WHATCOM COUNTY COUNCIL AGENDA BILL

CLEARANCES

<table>
<thead>
<tr>
<th>Originator:</th>
<th>Initial</th>
<th>Date</th>
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<tbody>
<tr>
<td>Cliff Strong</td>
<td></td>
<td>12/27/2016</td>
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<table>
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<tr>
<th>Division Head:</th>
<th>Date</th>
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<tr>
<td>Mark Personius</td>
<td>12/29/16</td>
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<th>Dept. Head:</th>
<th>Date</th>
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<tr>
<td>Sam Ryan</td>
<td>12/29/16</td>
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<th>Prosecutor:</th>
<th>Date</th>
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<tr>
<td>Royce Buckingham</td>
<td>12/29/16</td>
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<th>Purchasing/Budget:</th>
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<td>1/3/17</td>
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<tr>
<th>Executive:</th>
<th>Date</th>
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<tr>
<td>Jack Loues</td>
<td>1/3/17</td>
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TITLE OF DOCUMENT:
2016 Critical Areas Ordinance Update - Article 2 - Administrative Provisions

ATTACHMENTS: (all current and past materials provided to the Council can be found at http://www.whatcomcounty.us/2417/County-Council-Review)

A. Staff memo to Council dated 12/20/2016

SEPA review required? ( X ) Yes ( ) NO
SEPA review completed? ( X ) Yes ( ) NO

Should Clerk schedule a hearing? ( ) Yes ( X ) NO
Requested Date:

SUMMARY STATEMENT OR LEGAL NOTICE LANGUAGE: (If this item is an ordinance or requires a public hearing, you must provide the language for use in the required public notice. Be specific and cite RCW or WCC as appropriate. Be clear in explaining the intent of the action.)

This is another workshop (in a series of many) on the proposed ordinance to amend Whatcom County Critical Areas Ordinance (CAO) (WCC 16.16) pursuant to RCW 36.70A.130(1). The Growth Management Act (RCW 360.70A) defines critical areas as wetlands, frequently flooded areas, fish and wildlife habitat conservation areas (including streams), geologically hazardous areas, and critical aquifer recharge areas. The purpose of this periodic update is to ensure that the CAO meets the GMA requirements, including consistency with the Whatcom County Comprehensive Plan, best available science, and state agency guidance updates. Numerous amendments are being proposed, though most of them pertain to correcting grammar, updating references to other documents or laws, clarifying and updating administrative procedures, etc. The County is also required to integrate the CAO provisions with its Shoreline Master Program (SMP). Whatcom County has done so by adopting the CAO by reference within the SMP (WCC 23.10.060(A)). This reference is also proposed to be amended.

COMMITTEE ACTION: 

COUNCIL ACTION: 

Related County Contract #: Related File Numbers: Ordinance or Resolution Number:

Please Note: Once adopted and signed, ordinances and resolutions are available for viewing and printing on the County’s website at: www.co.whatcom.wa.us/council.
Memorandum

TO: The Honorable County Council
Jack Louws, County Executive
FROM: Cliff Strong, Senior Planner
THROUGH: Mark Personius, Asst. Director
DATE: December 20, 2016
SUBJECT: 2016 Critical Areas Ordinance Update
County Council Review, Workshop 2, 10 January 2017

On January 10th the Council will continue its review of the 2016 Critical Areas Ordinance Update. Topics to be covered include:

- Anticipated Schedule
- A note about changes proposed post-Planning Commission recommendation
- Overview of Certain Proposed Amendments to:
  - Global Changes
  - Article 1 – Purpose
  - Article 2 – Administrative Provisions
  - Article 5 – Critical Aquifer Recharge Areas
  - Article 5.5 – Lummi Island
  - Article 9 – Definitions

Anticipated Schedule

<table>
<thead>
<tr>
<th>Date</th>
<th>Topic(s)</th>
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<tbody>
<tr>
<td>9/20/16</td>
<td>Overview</td>
</tr>
<tr>
<td>10/25/16</td>
<td>Public Hearing</td>
</tr>
<tr>
<td>1/10</td>
<td>Article 1 – Purpose</td>
</tr>
<tr>
<td></td>
<td>Article 2 – Administrative Provisions</td>
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<tr>
<td>1/24</td>
<td>Article 4 – Frequently Flooded Areas</td>
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<tr>
<td>2/7</td>
<td>Article 6 – Wetlands</td>
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<td>Article 8 – Conservation Program on Agriculture Lands</td>
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<tr>
<td>2/21</td>
<td>Article 3 – Geologically Hazardous Areas</td>
</tr>
<tr>
<td>3/7</td>
<td>Review of Any Outstanding Issues</td>
</tr>
<tr>
<td>3/21</td>
<td>Introduction of Ordinance</td>
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<tr>
<td>4/11</td>
<td>Public Hearing</td>
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<td>Adoption</td>
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</table>
Changes Proposed Post-Planning Commission Recommendation

There have been a few issues brought to staff’s attention since the Planning Commission made their recommendation that we would like the Council to consider. Some are still being worked on so can’t all be listed now, but staff will point out these proposed amendments as we progress through the chapters.

Remember the Supporting Materials

Please remember that there is supporting documentation on the CAO Update webpage for your reference and consideration. These include:

- 2005 Best Available Science Report
- 2016 Best Available Science Supplemental Report
- Best Available Science studies
- Written comments provided prior to the Planning Commission action from the Citizens Advisory Committee, the Technical Advisory Committee, staff, and the public (public comments received since are found on the Council’s website)

All these are posted on the CAO Update website: [http://www.whatcomcounty.us/2417/County-Council-Review](http://www.whatcomcounty.us/2417/County-Council-Review) (or to navigate to it:

Proposed Amendments

Global Changes

Remember from the overview workshop that in general, many of the amendments pertain to:

- Correcting grammar
- Updating references to other documents or laws
- Clarifying procedures
- Moved a few subsections to sections they seemed to fit into better.
- Separated a few larger sections into distinct sections
- Many of the “mays” are proposed to be changed to “shall’s”

Article 1 – Purpose

- No proposed changes

Article 2 – Administrative Provisions

<table>
<thead>
<tr>
<th>WCC Section</th>
<th>Proposed Amendment</th>
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<tbody>
<tr>
<td>Throughout</td>
<td>Many of the “mays” are proposed to be changed to “shall’s,” as it is believed that, in instances where the language spoke to the Technical Administrator, less discretion should be afforded due to a perceived history of previous staff being too lenient.</td>
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<tr>
<td>WCC Section</td>
<td>Proposed Amendment</td>
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<tr>
<td>16.16.230</td>
<td>Exempt activities. Moved tree felling activities from Exempt Activities to 16.16.235(B)(4) Activities allowed with notification, as a tree risk assessment is a submittal requirement to determine if a tree meets the definition of Hazard Tree.</td>
</tr>
<tr>
<td>16.16.230(G)</td>
<td>Exempt activities. Moved restoration activities to Exempt Activities (from Activities allowed with notification), as these types of activities are exempt per RCW 77.55.181(4)).</td>
</tr>
<tr>
<td>16.16.235(B)(8)</td>
<td>Activities allowed with notification. Deleted the use of pesticides in buffers as an &quot;Activity allowed with notification&quot; since insects are important to the food chain. Also clarified that herbicides only be allowed for eradicating invasive species, not native plants.</td>
</tr>
<tr>
<td>16.16.240(A)(2) &amp; (C)(2)</td>
<td>Technical administrator and hearing examiner authority. Proposed amendment would give the Technical Administrator decision-making authority over all Reasonable Use Permits for single-family residential uses, including those in geohazard area, so as to minimize cost to the typical homeowner.</td>
</tr>
<tr>
<td>16.16.250</td>
<td>Submittal requirements and critical areas review process. Amended section to reflect process developed under Kaizen review procedures and now used.</td>
</tr>
<tr>
<td>16.16.260</td>
<td>General mitigation requirements. Though mitigation sequencing has always been a requirement, and that alternatives and cumulative impacts be analyzed, the code wasn't clear that these should be explicitly addressed. Amendments to this section make that more clear.</td>
</tr>
<tr>
<td>16.16.260(E)</td>
<td>General mitigation requirements. Added a paragraph explicitly stating that mitigation areas are to be permanently protected, though that if future development is proposed on the mitigation site, any restrictions can be removed as long as the final plan meets the requirements of this chapter for all cumulative impacts.</td>
</tr>
<tr>
<td>16.16.261, 262, and 263</td>
<td>Three different alternative mitigation strategies (Alternative or Innovative Mitigation Plans, Watershed-Based Management Plans, and Mitigation Banking) were contained in one section. These have been broken into three sections now, and a new section 263(D) (Use of Bank Credits) added based on DOE guidance.</td>
</tr>
<tr>
<td>16.16.264</td>
<td>In-Lieu Fees. Added a new section to allow an in-lieu fee program be set up. This language, which comes from DOE guidance documents, allows for such a program to be established.</td>
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<tr>
<td>16.16.265(B)</td>
<td>Critical areas protective measures. Added language that would allow the Technical Administrator to waive the notice on title requirement for certain, low risk geohazards.</td>
</tr>
<tr>
<td>16.16.265(E)</td>
<td>Critical areas protective measures. Added a requirement that applicants indemnify the County when a permit is granted for development or use within a geologic, flood, or other hazard area.</td>
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<tr>
<td>16.16.265(F)</td>
<td>Critical areas protective measures. Added a paragraph notifying applicants that temporary protection measures are required during construction.</td>
</tr>
<tr>
<td>WCC Section</td>
<td>Proposed Amendment</td>
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<tr>
<td>16.16.270 and 16.16.273</td>
<td>Reasonable use and Variances. In the existing code, the rules for reasonable use permits and variances are contained in the same section. However, these are very different mechanisms, and it was thought they each deserve their own section so were split. Most changes in these sections have to do with separating them out.</td>
</tr>
<tr>
<td>16.16.270(B)(2)(g &amp; h)</td>
<td>Reasonable use. Split g &amp; h into two sections. Amended (g) to state that any proposed activities won't cause damage to other properties, and (h) to state that the activities won't increase risk, as opposed to guarantee no threat, which is an impossibility (earthquakes and other geohazards may still happen; no one can guarantee they won't).</td>
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<tr>
<td>16.16.270(B)(2)(k)</td>
<td>Reasonable use. PDS Administrative Policy PL5-85-001A (CAO Reasonable Use/SMP Variance) has been incorporated into the code. This policy sets the Maximum Impact Area of 2,500 sf for CAO reasonable uses and Shoreline Management Program variances and has been in place since 4/17/08.</td>
</tr>
<tr>
<td>16.16.280</td>
<td>Appeals. Amended the language to require that any issues brought on appeal to the courts were raised and heard by the County's appeal body first. This is a standard legal practice for appeals these days.</td>
</tr>
<tr>
<td>16.16.285(I)</td>
<td>Penalties and enforcement. Added an &quot;After the Fact Permit Fee.&quot; Charging &quot;after the fact&quot; fees is consistent with how PDS handles &quot;aff&quot; building permits. It should be cheaper to ask for permission than forgiveness.</td>
</tr>
<tr>
<td>16.16.290</td>
<td>Conservation program on agricultural lands. The CPAL provisions (290 and Appendix A) have been combined and moved to a new Article 8.</td>
</tr>
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</table>

**Article 5 – Critical Aquifer Recharge Areas**
- No proposed changes other than a cross-reference

**Article 5.5 – Lummi Island**
- No proposed changes other than grammatical

**Article 9 – Definitions**
Adding definitions of:
- "Bankfull width"
- "Cumulative Impact"
- "Designated Species, Federal" "Designated Species, State"
- "Habitats of Local Importance" (from WAC 365-190-030)
- "Maximum Credible Event"
- "Practicable Alternative"
- "Species of Local Importance" (from WAC 365-190-030)
- "Stormwater Manual" (referred to throughout as a source for Best Management Practices)
- "Waters of the State" (from RCW 90.56.010(26))
Amending definitions of:

- “Critical Facilities” to keep maximum occupancy of uses under 500 and to exclude cell towers from the definition (needed if an emergency occurs)
- “Drainage Ditch” to try to clear up the public confusion between ditches and streams
- “Fish and wildlife habitat conservation areas” as the state definition has been amended (amended since the P/C recommendation)
- “Geologically Hazardous Areas” to make consistent with the GMA definition in RCW 36.70A.030(9)
- “High Intensity Land Use” to include Class IV Special forest practices (conversion of forest to development)
- “Hydric Soil” by changing the reference to that commonly used now
- “Moderate Intensity Land Use” to exclude nurseries and logging roads, both of which the TAC believe should be in the high intensity land use category
- “Planning Advisor,” rather than “Qualified Planning Advisor” (“qualified” is not used in the text so it was hard to find in the definitions.)
- “Qualified Professional” to increase the years of professional experience needed for wetland biologist from 3 to 5 years, and to exclude those consultants who’ve had their certification revoked
- “Reestablishment,” “Rehabilitation,” and “Restoration” to make consistent with USACE definitions
ARTICLE 2. ADMINISTRATIVE PROVISIONS

16.16.200 Authority.
This chapter is adopted under the authority of Chapters 36.70 and 36.70A RCW and Article 11 of the
Washington State Constitution.

16.16.205 Authorizations required.
A. Prior to issuing a permit, the County shall determine if the proposed activity or use is permitted pur-
suant to this chapter. No land use development permit, construction permit, or land division ap-
proval required by County ordinance shall be granted until the County decision-maker has deter-
mined that the applicant has complied with the applicable provisions of this chapter including the
B. Authorizations required under this chapter overlay other permit and approval requirements of the
Whatcom County Code. Critical areas review pursuant to this chapter shall be conducted as part of
the underlying permit or approval. Any proposed critical area alteration that does not require other
County project permits or approvals, such as variances and reasonable use exceptions, must comply
with the substantive and procedural requirements of this chapter and the procedural requirements
of Chapter 2.33 WCC.
C. The requirements of this chapter shall apply concurrently with review conducted under the State
Environmental Policy Act (SEPA) (Chapter 43.216 RCW), as locally adopted (Chapter 16.08 WCC). Any
conditions required pursuant to this chapter shall be coordinated with the SEPA review and thresh-
old determination.
D. Areas characterized by a particular critical area may also be subject to other regulations established
by this chapter due to the overlap or multiple functions of some critical areas. When one critical ar-
ea adjoins or overlaps another, the more restrictive standards shall apply.

16.16.210 Applicability and severability.
This chapter shall be consistently applied to any alteration or development within geographical areas of
unincorporated Whatcom County that meet the definition and criteria for critical areas and critical area
buffers as set forth in this chapter. No development shall be constructed, located, extended, modified,
converted, or altered, or land subdivided without full compliance with this chapter. Should any section
or provision of this chapter be declared invalid, such decision shall not affect the validity of this chapter
as a whole.

16.16.215 Relationship to other jurisdictions.
A. Permit applicants are responsible for complying with all federal, state, tribal, and local regulations
that 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,
B. In cases where other agencies have jurisdiction over critical areas and the technical administrator
determines that the permit conditions imposed by such agencies are no less protective and satisfy
the requirements of this chapter, those permit conditions may be substituted as the conditions of
approval for the requirements of this chapter. Such agencies may include, but are not limited to, the
Lummi Nation; the Nooksack Tribe; the United States Army Corps of Engineers; the United States
Environmental Protection Agency; the United States Fish and Wildlife Service; the National Marine
Fisheries Service or NOAA Fisheries; and the Washington State Departments of Ecology, Natural Re-
sources, and Fish and Wildlife.

http://www.whatcomcounty.us/documentcenter/view/39373
C. The County shall make findings required by Chapter WCC 2.33 and WCC 16.16.250 when adopting conditions of another jurisdiction's permit. Such requirements shall be a condition of critical area approval and enforceable by the County. In the event that there is a conflict between permit requirements and the standards of this chapter, the more restrictive standards shall apply.

D. The County shall notify the applicant in writing when adopting other agencies' conditions pursuant to this section provision applies.

16.16.220 Identification and mapping of critical areas.

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

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.

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.

A-D. Planning and Development Services has the authority and shall to update critical area maps and shall do so as new critical areas are identified and as new information becomes available.

16.16.225 Regulated activities.

A. The following provisions of this chapter when they occur within critical areas or their buffers:

1. Clearing, grading, dumping, excavating, discharging, or filling with any material. This includes creating impervious surfaces.

2. Constructing, reconstructing, demolishing or altering the size of any structure or infrastructure, subject to the provisions for a nonconforming structure pursuant to WCC 16.16.275, WCC Chapter 20.83, and WCC 23.50.070.

3. Any other activity for which a County permit is required, excluding permits for interior remodeling.

B. Alteration of critical areas and/or buffers is prohibited except when:

1. Alteration is approved pursuant to the reasonable use or variance provisions of WCC 16.16.270 and 16.16.273, respectively, or

2. Alteration is necessary to accommodate an essential public facility or public utility where no feasible alternative location will accommodate the facility and the facility is located, designed, and constructed to minimize and, where possible, avoid critical areas disturbance to the maximum extent feasible; or

3. Alteration is necessary to accommodate an approved water-oriented use and any associated development/activity and/or the development activities listed in WCC 23.90.130(8)(7)(a) when permitted in accordance with the Whatcom County Shoreline Management Program (SMP); provided, that such development is operated, located, designed and constructed to minimize and, where possible, avoid critical areas disturbance to the maximum extent feasible; or

4. Alteration is part of an essential element of an activity allowed by this chapter and all feasible measures to avoid and minimize impacts have been employed. Such feasible measures shall in-
clude, but not be limited to, clustering where permitted by zoning and as appropriate to protect
critical areas. The purposes of clustering shall be to minimize adverse effects of development on
critical area functions and values, minimize land clearing, maintain soil stability, preserve native
vegetation, provide for wildlife corridors, maintain hydrology, and mitigate risk to life and prop-

5. Alteration is associated with an exempt activity under WCC 16.16.230, or is allowed pursuant to
the notification provisions of WCC 16.16.235, or is allowed pursuant to the specific regulatory
standards for each designated critical area, as enumerated in the subsequent articles of this
chapter; or

6. Alteration is associated with an alternative mitigation plan or watershed-based management
plan approved pursuant to WCC 16.16.261(16) or 16.16.262, respectively; or,

6.7. Alteration is associated with a conservation farm plan pursuant to WCC 16.16 Article 8.

16.16.230 Exempt activities.

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

A. Class I, II, III, and IV special [not Class IV general] forest practices conducted in accordance with
the applicable standards of the Washington State Forest Practices Act rules, Chapter Title 222-16
WAC, except where either of the following applies:

B. the lands have been or are proposed to be converted to a use other than commercial forest prod-
uct production;
or

C. On lands which have been platted after January 1, 1960, as provided in RCW 76.09.060 and
76.09.240 (TAC).  

B. Maintenance of existing, [etc.] 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.

D-C. Maintenance activates necessary to implement approved mitigation plans.

E-D. Low impact activities that do not cause adverse impacts, [etc.] such as hiking, canoeing, viewing, nature
study, photography, hunting, fishing, education, or scientific research.

F-E. Activities undertaken to comply with a United States Environmental Protection Agency Superfund-
related Order, or a Washington Department of Ecology Order pursuant to the Model Toxics Control
Act, or a Department of Homeland Security Order that specifically preempts local regulations in the
findings of the Order.

F. Maintenance and/or repair of lawfully established single-family residences and appurtenant features;
provided, that the activity does not further alter, impact, or encroach upon critical areas or
buffers or further affect their functions. The maintenance activity shall not result in increased risk to
life or property. The landowner may cut hazard trees within critical areas and buffers.

G. Fish, wildlife, and/or wetland restoration or enhancement activities not required as project mitiga-
tion; provided, that the project is approved by the U.S. Fish and Wildlife Service, the Washington
State Department of Ecology, Washington State Department Fish and Wildlife, or other appropriate
local, state, federal, or tribal jurisdiction [etc.] and/or that meet the criteria of RCW 77.55.181(1) and
that are reviewed and approved according to the provisions of RCW 77.55.181(1).
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. 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. 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:

B. Activities allowed with notification:

1. Emergency construction or activity necessary for the immediate preservation of the public health, safety, and welfare as determined by the technical administrator; provided, that:

   a. Emergency construction is an unanticipated and imminent threat to public health, safety, or the environment that requires immediate action within a time period too short to allow full compliance with this chapter.

2. Emergency construction does not include development of new permanent protective structures where none previously existed. Where the technical administrator determines that new protective structures are the appropriate means to address an emergency situation, the project proponent shall either obtain any permits that would have been required absent an emergency, pursuant to Chapter 90.58 RCW, Chapter 173-27 WAC, or this chapter, or remove the structure upon abatement of the emergency situation.

3. Within the jurisdiction of the Whatcom County Shoreline Management Program (WCC Title 23), all emergency construction shall be consistent with the policies and procedural requirements of WCC Title 23 and this chapter.

4. The applicant shall make a reasonable attempt to contact the technical administrator prior to activity; provided, that when prior notice is not feasible, notification of the action shall be submitted to the technical administrator as soon as the emergency is addressed and no later than 14 days following such action.

B. Maintenance, operation, and/or repair of existing infrastructure improvements, including dikes and drainage ditches, rights-of-way, trails, roads, fences, and utilities; provided, that the activity does not further alter, impact, or encroach upon critical areas or buffers or further affect their functions. The maintenance activity shall not result in increased risk to life or property. Maintenance shall be allowed pursuant to the provisions set forth in this chapter; provided, that:

   a. The applicant shall submit to the technical administrator a written description of the maintenance activity with all of the following general information:

      i. Type, timing, frequency, and sequence of maintenance activity to be conducted;

      ii. Type of equipment to be used (hand or mechanical);

      iii. Manner in which the equipment will be used; and
d.4. Best management practices to be used.

2.b. The applicant's written description shall be valid for up to five years; provided, that there is no significant change in the type or extent of maintenance activity.

3. Select vegetation removal or pruning of vegetation subject to the following:
   a. Vegetation removal or pruning will be done in a manner that minimizes unnecessary disturbance and prevents adverse effects on soil stability, fish or wildlife habitat, water quality, or water quantity.
   b. Provided that except for lawn, pasture, ornamental vegetation, and similar introduced vegetation, no vegetation shall be removed from a wetland, habitat conservation area, coastal or riverine erosion hazard area, or landslide hazard area or their buffers unless otherwise authorized by the Technical Administrator for safety reasons, except for lawn, pasture, ornamental vegetation, and similar introduced vegetation, except that:
   c. Cut vegetation shall be left within the critical area or buffer where practical unless removal is warranted due to the presence of an established disease infestation or other hazard, or because of access or maintenance needs if the area is a utility or access right-of-way.

4. The landowner may cull falling of hazard trees within critical areas and buffers, with an approved tree risk assessment completed by a qualified professional, unless:

3.5. Clearing, pruning, and revegetation of buffer areas, except in landslide hazard areas and buffers and riverine and coastal erosion hazard areas and buffers, the clearing, pruning, and revegetation of buffer areas for view purposes, provided:
   a. This allowed activity shall not be conducted more than once every 10 years for any individual residential property.
   b. A window or view opening is limited to the minimum necessary for view purposes and shall not exceed 15% percent of buffer length, unless the applicant can demonstrate to the technical administrator's satisfaction that a larger dimension is warranted because of slope or other site considerations. Trees greater than 12 inches in diameter at breast height shall be preserved, but may be shaped, windowed/thinned or pruned.
   c. Clearing shall not take place where increased risks or adverse impacts, including cumulative impacts, to critical area functions and values are likely to occur.
   d. Low-growing native vegetation shall be retained and/or planted in the view corridor to provide habitat, stabilize the area, and achieve dense growth.
   e. This provision does not apply to open space set aside in a subdivision or other approval to which specific conditions are attached that prohibit clearing of vegetation without a written approval or permit.
   f. View areas established under this section shall be considered lawfully established and may be maintained as provided for in subsection B(3) of this section, WAC 173

C. The installation of navigation aids and boundary markers in accordance with applicable state and federal laws, or the

1.6. Installation of mooring buoys in accordance with the Department of Fish and Wildlife design guidelines and the Whatcom County Shoreline Management Program (WCC Title 23).

D.7. Routine site investigation work in wetlands, landslide hazard areas, and riverine and coastal erosion hazard areas. This includes geotechnical soil borings, groundwater monitoring wells, percolation tests, sediment sampling, and similar or related activities, necessary required for land use application submittals or permit compliance. Land survey and shallow soil test pits dug in conjunction with wetland delineation studies do not require notification.

E. Clearing, pruning, and revegetation of buffer areas, except landslide hazard areas and buffers and riverine and coastal erosion hazard areas and buffers, for view purposes, provided
1. This allowed activity shall not be conducted more than once every 10 years for any individual residential property.

2. A window or view opening is limited to the minimum necessary for view purposes and shall not exceed 50 percent of buffer length, unless the applicant can demonstrate to the technical administrator's satisfaction that a larger dimension is warranted because of slope or other site considerations. Trees greater than 12 inches in diameter at breast height shall be preserved, but may be shaped, windowed/shinned or pruned.

3. Clearing shall not take place where increased risks or adverse impacts, including cumulative impacts, to critical area functions and values are likely to occur.

4. Low growing native vegetation shall be retained and/or planted in the view corridor to provide habitat, stabilize the area, and achieve dense growth.

5. This provision does not apply to open space set aside in a subdivision or other approval to which specific conditions are attached that prohibit clearing of vegetation without a written approval or permit.

View areas established under this section shall be considered lawfully established and may be maintained as provided for in subsection 8 of this section.

6. Fish, wildlife, and/or wetland restoration or enhancement activities not required as project mitigation provided that the project is approved by the U.S. Fish and Wildlife Service, the Washington State Department of Ecology, Washington State Department Fish and Wildlife, or other appropriate local, state, federal, or tribal jurisdiction.

6.8. Household herbicides, pesticides, and fertilizers or household herbicides to address noxious weed infestation may be used in critical area buffers, but not in critical areas, when either must be applied at times and rates specified on the label in accordance with Washington State Department of Agriculture and other applicable regulations.

7. Routine maintenance of drainage channels-clitches on agricultural lands provided that all of the following are met:

1. The maintenance is necessary to support ongoing agricultural operations;
2. The maintenance activity does not expand the dimensions of the drainage channel beyond the original, lawfully established dimensions;
3. The agricultural activities are conducted pursuant to an approved conservation farm plan prepared pursuant to WCC 16.16.290;
4. 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
5. 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.

1.10. Alteration or removal of beaver-built structures two years old or less; provided, that:
1. There is no adverse impact to wetland or river or stream functions.
2. The property owner obtains an HPA from WDFW (if required) prior to the maintenance activity.
3. The property owner provides a copy of the HPA to the technical administrator as part of the written notification.

16.16.240 Technical administrator and hearing examiner authority.

The technical administrator is the Whatcom County director of planning and development services or his/her designee. The hearing examiner is appointed by the County Council. The technical administrator and the County Hearing Examiner shall administer and enforce the provisions of this chapter pursuant to the following:
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:

1. Authority to convene an interdisciplinary team to assist in reviewing development proposals or to solicit review from outside experts in accordance with WCC 16.16.245.

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 IR521.

3. Authority to grant, condition, or deny reasonable use permits for other development proposals that would affect critical area buffers, but not the critical areas themselves.

4. Authority to serve a cease and desist order pursuant to WCC 16.16.285 upon a person undertaking activity within a critical area or buffer in violation of this chapter.

5. Any additional responsibility and/or authority specifically provided for in the subsequent articles of this chapter.

B. The technical administrator’s authority shall transfer to another County decision-maker when another decision-maker is specified for a separate project permit. In such cases, the technical administrator shall ensure that all procedural requirements of this chapter are met and shall make a recommendation to the designated decision-maker as to how the provisions of this chapter apply to the permit action, including project permits.

C. The Whatcom County hearing examiner is hereby vested with responsibility and authority to hear appeals and perform the following duties:

1. Authority to grant or deny variances.

2. Authority to grant, condition, or deny reasonable use permits for all non-single-family developments, except single-family building permits, as affecting critical areas and for all developments in geologically hazardous areas.

3. Authority to decide on appeals of administrative decisions including, but not limited to, variance and reasonable use permits issued by the technical administrator.

4. Authority to hold public hearings pursuant to Chapters 20.84 and 20.92 WCC.

D. In granting, revising, or extending a permit, the technical administrator, or hearing examiner, as applicable, may attach such conditions, modifications, or restrictions thereto regarding the location, character, and other features of the proposed development deemed necessary to assure that the development is consistent with criteria set forth in this chapter. In cases involving unusual circumstances or uncertain effects, a condition may be imposed to allow for future review or reevaluation to assure conformance with this chapter. The technical administrator and/or hearing examiner shall render a final decision in accordance with the timelines established in WCC 2.33.090 and 20.92.430, as applicable. All decisions of the technical administrator and hearing examiner may be appealed pursuant to WCC 20.84.240 and 20.92.600.

16.16.245 Interdisciplinary team.

The technical administrator may call upon outside expertise including an interdisciplinary team if the technical administrator determines that additional technical assistance is required to assess a critical areas development proposal or ensure the application of best available science.

A. 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, and /or independent qualified professionals with expertise relating to the critical area issue.

B. The functions of the interdisciplinary team are to field check and verify critical area determinations/boundaries and assess species/habitat presence by providing written peer review of the in
formation included with an application, identify areas of concern in the application of best available science, provide professional opinions and recommendations relevant to the provisions of this chapter, and help focus the preparation of subsequent reports and environmental documentation on the most relevant issues.

C. The technical administrator will coordinate this effort and seek advice from the team.

D. In lieu of convening an interdisciplinary team, the County may require third party review by a qualified professional for any development proposal, mitigation plan, mitigation bank proposal, or other project for which additional technical expertise is needed. The cost of the third party review shall be the permit applicant’s responsibility.

16.16.250 Submittal requirements and critical areas review process.

A. All applicants shall complete a prescreening and/or meeting with the technical administrator prior to submitting an application subject to this chapter. The purpose of this meeting shall be to discuss the requirements for a complete application; the critical area standards and procedures; to review conceptual site plans prepared by the applicant; to discuss appropriate investigative techniques and methods; and to determine reporting requirements.

B. Review and approval of a proposed development within a critical area may be initiated through the application for any project permit in Whatcom County. If another authority does not require a project permit, application shall be made pursuant to Chapter 2.33 WCC.

C. The technical administrator shall be responsible, in a timely manner, to make one of the following determinations regarding critical areas review:

1. Initial Determination. Upon receipt of a permit application, the technical administrator shall use best available science, including but not limited to the County’s critical areas maps, his/her field investigation results, his/her own knowledge of the site, information from appropriate resource agencies, or documentation from a scientific or other credible source to determine if the project is more than likely to have a adverse impact a critical area or its buffer. The technical administrator may request that the applicant submit a critical area identification form provided by the County to assist in the initial determination.

2. Determination of Compliance. If the applicant demonstrates to the satisfaction of the technical administrator that the project meets the provisions of this chapter and is not likely to adversely affect critical areas or buffers, the technical administrator shall issue written verification that the proposal complies with this chapter. Written verification shall be included in the project review record for the underlying permit, or issued in accordance with Chapter 2.33 WCC, and no further critical areas review is required.

3. Need for Additional Critical Area Assessment. If the proposed activity does not meet the criteria of subsection (C)(2) of this section and would more or less than not affect a critical area or buffer, the technical administrator shall require confirmation of the presence or absence of critical areas through site inspection by a qualified professional or other appropriate means consistent with best available science, and shall notify the applicant in writing of the need to prepare a critical areas assessment report in accordance with WCC 16.16.225.

4. 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.

D. The technical administrator may waive the requirement for critical areas review under this chapter when he/she 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 past 5 years, site conditions have not changed, and the applica-
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;

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;

4. The prior permit has not expired;

5. The development activity involves a use that is equally or less intensive than the development activity that was subject to the prior permit. Land use intensity shall be based on factors including development density, critical areas impacts, impervious surface, noise, glare, dust, hours of operation, and traffic.

E. Upon the applicant's request, the technical administrator shall provide brief written findings of fact to support the decision made.

1. Complete Application
2. A detailed site map drawn to a common scale, or survey, showing at least the following:
   a. Vicinity Map
   b. Topographic, hydrologic, and vegetative features
   c. The location and description of known wildlife and habitat features and all known critical areas
   d. Proposed development activity with dimensions
3. Existing physical features of the site including buildings, fences, and other structures, roads, parking lots, utilities, water bodies, etc. Structures shall be dimensioned.

16.16.255 Critical areas assessment reports.

The intent of these provisions is to require a reasonable level of technical study and alternatives analysis pursuant to WCC 16.16.225 sufficient to assess potential project impacts and to protect critical areas.

A. When the technical administrator determines a need for additional critical area assessment pursuant to WCC 16.16.255(C)(3) proposed development is within, abutting, or is likely to adversely affect a critical area or buffer pursuant to the provisions of this chapter, he/she shall have the authority to require a critical areas assessment report, to be prepared by a qualified professional, as defined by this chapter, shall prepare the report and be consistent with best available science. The intent of these provisions is to require a reasonable level of technical study and analysis sufficient to protect critical areas. The analysis shall be commensurate with the value or sensitivity of a particular critical area and relative to the scale and potential impacts of the proposed activity.

B. The critical areas assessment report shall:
1. Demonstrate that the submitted proposal is consistent with the purposes and specific standards of this chapter;
2. Describe all relevant aspects of the development proposal and critical areas adversely affected by the proposal including any geological hazards and risks associated with the proposal, and assess impacts on the critical area from activities and uses proposed; and
3. Where impacts are unavoidable, demonstrate through an alternatives analysis that no other feasible alternative exists.
4. Consider the cumulative impacts of the proposed action that includes past, present, and reasonably foreseeable future actions to facilitate the goal of no net loss of critical areas. Such im-
pacts shall include those to wildlife, habitat, and migration corridors; water quality and quantity; and other watershed processes that relate to critical area condition, process, and/or services.

3. Identify proposed mitigation and protective measures as required by this chapter.

C. The technical administrator shall review the critical areas assessment report for completeness and accuracy and shall consider the recommendations and conclusions of the critical areas assessment report to assist in making administrative decisions concerning approval, conditional approval, or denial of the subject project and to resolve issues concerning critical areas jurisdiction and appropriate mitigation and protective measures.

D. Critical areas assessment reports shall generally be valid for a period of five years. From the date the assessment is approved by the technical administrator, the technical administrator may require preparation of new or supplemental critical area assessment reports unless it can be demonstrated to the satisfaction of the technical administrator that the previously prepared report is adequate for current analysis. The technical administrator may also require the preparation of a new critical area assessment report or a supplemental report when new information is found demonstrating that the initial assessment is in error. If the technical administrator requires more information in the report, s/he/she shall make the request in writing to the applicant stating what additional information is needed and why.

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

F. To avoid duplication, the reporting requirements of this chapter shall be coordinated if more than one critical area assessment report is required for a site or development proposal. Similarly, where other agencies assessments or reports are required pursuant to other state or federal laws, the applicant is encouraged to submit one report that satisfies all such agencies’ requirements.

G. In addition to a hard copy, applicants shall provide reports and maps to the County in an electronic format that allows site data to be incorporated into the County critical areas database; provided, however, that the County may waive this requirement for single-family development permits. Applicants shall follow Whatcom County’s electronic submittal guidelines. This requirement shall not be construed as a requirement to use specific computer software, though it must be in a format usable by the County.

H. At a minimum, a critical areas assessment report shall include the following information:

1. A site plan showing the proposed development footprint and clearing limits, all relevant critical areas and buffers within and abutting the site, a written description of the project, an examination of project on-site design alternatives, and an explanation of why the proposed activity requires a location on, or access across, a critical area and why alternatives are not feasible;

2. A written description of the critical areas and buffers on or abutting the site, including their size, type, classification or rating, condition, disturbance history, and functions and values. Projects in frequently flooded areas must comply with the reporting requirements of WCC Title 17. Projects on or adjacent to geologically hazardous areas shall identify the type of hazard and assess the associated risks posed by the development or that the development may be subject to;

3. An analysis of potential adverse critical area impacts associated with the proposed activity including, but not limited to, effects related to clearing, grading, noise, light/glare, drilling, damming, drainage, creating impervious surface, managing stormwater, releasing hazardous materials, and other alterations, and including an explanation of critical area processes and functions that may be affected.
4. An analysis of how critical area impacts or risks will be avoided and/or minimized, and/or an analysis of the proposed measures to prevent or minimize hazards. When impacts cannot be avoided, the report shall include a plan describing mitigation that will be provided to replace critical area functions and values altered as a result of the proposal. The mitigation plan shall be consistent with the provisions of WCC 16.16.260 and provide written documentation showing what the applicant considered for each step in the mitigation sequencing and the other applicable articles of this chapter;

5. The dates, names, signatures, and qualifications of the persons preparing the report and documentation of analysis methods including any fieldwork performed on the site; and

6. Additional reasonable information requested by the technical administrator for the assessment of critical areas impacts or otherwise required by the subsequent articles of this chapter.

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 is proposed, the applicant shall conduct an analysis and demonstrate that all reasonable efforts have been taken to mitigate impacts in the following prioritized order:

   a. Avoiding the adverse impact altogether by not taking a certain action or parts of an action, or moving the action.

   b. Minimizing adverse impacts by limiting the degree or magnitude of the action and its implementation by using appropriate technology and engineering, or by taking affirmative steps to avoid or reduce adverse impacts.

   c. Rectifying the adverse impact by repairing, rehabilitating, or restoring the affected environment.

   d. Reducing or eliminating the adverse impact over time by preservation and maintenance operations during the life of the action.

   e. Compensating for the adverse impact by replacing, enhancing, or providing similar substitute resources or environments and monitoring the adverse impact and the mitigation project and taking appropriate corrective measures.

2. Mitigation for individual projects may include a sequenced combination of the above measures as needed to achieve the most effective protection or compensatory mitigation for critical area functions.

B. Mitigation Plan.

1. Compensatory mitigation shall be provided for all unavoidable adverse alterations to a critical area or buffer. A mitigation plan shall be developed in accordance with an approved critical area 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. The mitigation plan shall provide for construction, maintenance, monitoring, and contingencies as required by conditions of approval and consistent with the requirements of this chapter.
3. The mitigation plan shall be prepared by a qualified professional; provided, that the technical administrator may waive the requirement to hire a qualified professional to prepare a mitigation plan when the required mitigation involves standard planting or enhancement practices. The waiver shall not be granted for mitigation practices involving wetland creation, rehabilitation and/or restoration.

4. The mitigation plan shall contain the following information:
   a. A description and scaled drawings of the activities proposed to reduce risks associated with geologic hazards and/or flooding, and/or to mitigate for impacts to critical area functions and values. This shall include all clearing, grading, excavation, drainage alterations, planting, invasive weed management, installation of habitat structures, construction sequencing, best management practices, site protection, irrigation, and other site treatments associated with the development activities.
   b. Specific information on construction or the proposed mitigation activity including timing, sequence, equipment needs, and best management practices, and responsible parties.
   c. A description of the functions and values that the proposed mitigation area(s) shall provide, and/or a description of the level of hazard mitigation provided.
   d. The goals, objectives, and performance standards that the proposed mitigation action(s) shall achieve or demonstrate consistency with.
   e. A description of how the mitigation area(s) will be evaluated and monitored to determine if the performance standards are being met.
   f. A program and schedule for construction and post-construction performance monitoring of the mitigation project.
   g. An evaluation of potential adverse impacts on adjacent property owners resulting from the proposed mitigation and measures to address such impacts. Mitigation projects shall not result in adverse impacts to adjacent property owners.
   h. Identification of potential courses of action or contingencies, and any corrective measures to be taken if monitoring or evaluation indicates that project performance standards are not being met.
   i. Plan sheets with scale identified, showing the edge of the critical area and buffer area. The affected critical area and buffer shall be clearly staked, flagged, and/or fenced prior to and during any site clearing and construction to ensure protection for the critical area and buffer during construction.
   j. A description of other permits and approvals being sought, including the need for permits from state and/or federal agencies.
   k. Additional information as required by the subsequent articles of this chapter.

C. Mitigation Monitoring and Maintenance.

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

2. The technical administrator shall have the authority to extend the monitoring period, require corrective measures, and/or require additional monitoring reports beyond the initial monitoring.
period for any project that does not meet the performance standards identified in the mitigation plan, or does not provide adequate replacement for the functions and values of the impacted critical area.

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

D. Mitigation Assurance.

1. The applicant and his/her representatives shall demonstrate sufficient scientific expertise and capability to implement the mitigation, monitor the site, and make corrections if the project fails to meet projected goals. The technical administrator may require the following to ensure that the mitigation is fully functional:

   a. The applicant shall post a mitigation surety in the amount of 125% percent of the estimated cost of the uncompleted actions or the estimated cost of restoring the functions and values of the critical area that are at risk, whichever is greater. The surety shall be based on an itemized cost estimate of the mitigation activity including clearing and grading, plant materials, plant installation, irrigation, weed management, monitoring, and other costs.

   b. The surety shall be in the form of an assignment of funds or other means approved by the technical administrator.

   c. Surety authorized by this section shall remain in effect until the technical administrator determines, in writing, that the standards bonded for have been met. Surety shall generally be held by the County for a period of five years to ensure that the required mitigation has been fully implemented and demonstrated to function, and may be held for longer periods when necessary. Surety for construction may be reduced after initial completion in an amount not to exceed the cost of monitoring plus not less than 25% percent of the construction cost.

   d. Depletion, failure, or collection of surety funds shall not discharge the obligation of an applicant or violator to complete required mitigation, maintenance, or monitoring.

   e. Public development proposals shall be relieved from having to comply with the bonding requirements of this section if public funds have previously been committed for mitigation, maintenance, or monitoring.

   f. Any failure to satisfy critical area requirements established by law or condition including, but not limited to, the failure to provide a monitoring report within 30 days after it is due or comply with other provisions of an approved mitigation plan shall constitute a default subject to the provisions of WCC 16.16.280, and the County may demand payment of any financial guarantee or require other action authorized by the County code or any other law.

   g. Any funds recovered pursuant to this section shall be used to complete the required mitigation.
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 16.16.285. 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.

6. 16.16.251 Alternative or Innovative Mitigation Approaches Plans and Watershed-Based Management Plans. [TAC35]

— The County shall consider shall facilitate review and may approve, or approval of:

A. An alternative or innovative mitigation plan, for a major development (as defined by this in Article 9 of this chapter), a planned unit developments (pursuant to Chapter 20.85 WCC), and/or a development agreements (pursuant to RCW 36.708.170 through 36.708.210). or,

— A watershed-based management plan sponsored by a watershed improvement district, other special purpose district, or other government agency.

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

1. The proponent(s) demonstrate the organizational and fiscal capability to carry out the purpose and intent of the plan;

2. The proponent(s) demonstrate that long-term management, maintenance, and monitoring of the watershed will be adequately funded and effectively implemented;

3. There is a clear likelihood for success of the proposed plan based on supporting scientific information and demonstrated experience in implementing similar plans;

4. In terms of functional value, the proposed project mitigation plan results in equal or greater protection and conservation of critical areas functions, services, and values than would be achieved using parcel-by-parcel regulations and/or traditional mitigation approaches;

5. The plan is consistent with the general purpose and intent of this chapter, the Shoreline Management Program (WCC Title 23), and the comprehensive plan;

6. The plan shall contain relevant management strategies considered effective in the scope of this chapter and shall document when, where, and how such strategies substitute for compliance with the specific standards herein; and

7. The plan shall contain clear and measurable standards for achieving compliance with the purposes of this chapter, a description of how such standards will be monitored and measured over the life of the plan, and a fully funded contingency plan if any element of the plan does not meet standards for compliance.

8. The County shall facilitate review and/or approval of a watershed-based management plan sponsored by a watershed improvement district or other special purpose district when it meets the general purpose and intent of this chapter. Such plans may be used to satisfy the requirements of this chapter and provide relief from the specific standards and requirements thereof when it is demonstrated that all of the following circumstances exist:

9. The proponent(s) demonstrate the organizational and fiscal capability to carry out the purpose and intent of the plan;

10. The proponent(s) demonstrate that long-term management, maintenance, and monitoring of the watershed will be adequately funded and effectively implemented;
11. There is a clear likelihood for success of the proposed plan based on demonstrated experience in implementing similar plans or supporting scientific information.

12. The proposed project results in equal or greater protection and conservation of critical areas than would be achieved using parcel-by-parcel regulations and/or traditional mitigation approaches.

13. The plan is consistent with an approved watershed plan prepared pursuant to Chapter 90.82 RCW (the State Watershed Management Act) or the plan is prepared under other local or state authority that is consistent with the goals and policies of an applicable and approved watershed plan prepared pursuant to Chapter 90.82 RCW.

14. The plan shall contain relevant management strategies considered effective and within the scope of this chapter and shall document when, where, and how such strategies substitute for compliance with the specific standards herein, and

15.7. The plan shall contain clear and measurable standards for achieving compliance with the purposes of this chapter, a description of how such standards will be monitored and measured over the life of the plan, and a fully funded contingency plan if any element of the plan does not meet standards for compliance.

B. Alternative mitigation plans shall be reviewed concurrently with the underlying land use permit(s) and decisions to approve or deny such plans shall be made in accordance with the underlying permit process. A watershed-based management plan and/or an alternative mitigation plan developed under this section for a major development, planned unit development or developer agreement shall be allowed to substitute for the standards and requirements of this chapter when approved by the designated decision-maker for the underlying development permit, as per County code. The process for approval shall be as follows:

C. The plan shall be reviewed by the technical administrator to ensure compliance with the general purpose and intent of the purposes of this chapter, the Whatcom County Shoreline Management Program (WCC Title 28), 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, and/or other local, state, federal, and/or tribal agencies or experts.

D.C. If the technical administrator finds the plan to be complete, accurate, and consistent with the purposes and intent of this chapter, the designated decision-maker shall solicit comment pursuant to the public notice provisions of Chapter 2.33 WCC prior to final approval/denial of permission of the plan to substitute for the requirements and standards of this chapter.

1. Alternative mitigation plans associated with major developments, planned unit developments, and/or developer agreements shall be reviewed concurrently with the underlying land use permit(s) and decisions to approve or deny such plans shall be made in accordance with the underlying permit process.

2. Watershed-based management plans approved by the Whatcom County council shall be adopted by ordinance and appended to this chapter.

3. The designated decision-maker shall not approve watershed-based management plans that conflict with Chapter 90.82 RCW.

16.16.262 Watershed-Based Management Plans.

A. The County may consider watershed-based management plans. A watershed-based management plan sponsored by a watershed improvement districts, other special purpose districts, or other government agency.
B. If approved, said plan may be used to satisfy the requirements of this chapter and provide relief and/or deviation as appropriate from the specific standards and requirements thereof, provided, that the standards of impact avoidance and minimization shall remain as guiding principles in the application of these provisions and when it is demonstrated that all of the following circumstances exist:
   1. The proponent(s) demonstrate the organizational and fiscal capability to carry out the purpose and intent of the plan;
   2. The proponent(s) demonstrate that long-term management, maintenance, and monitoring of the watershed will be adequately funded and effectively implemented;
   3. There is a clear likelihood for success of the proposed plan based on supporting scientific information or demonstrated experience in implementing similar plans;
   4. In terms of functional value, the proposed mitigation plan results in equal or greater restoration, protection, and conservation of the impacted critical areas than would be achieved using parcel-by-parcel regulations and/or traditional mitigation approaches;
   5. The plan is consistent with the general purpose and intent of this chapter, the comprehensive plan, and an approved watershed plan prepared pursuant to Chapter 90.82 RCW (the State Watershed Management Act) or the plan is prepared under other local or state authority that is consistent with the goals and policies of an applicable and approved watershed plan prepared pursuant to Chapter 90.82 RCW;
   6. The plan shall contain relevant management strategies considered effective and within the scope of this chapter and shall document where, where, and how such strategies substitute for compliance with the specific standards herein; and
   7. The plan shall contain clear and measurable standards for achieving compliance with the purposes of this chapter, a description of how such standards will be monitored and measured over the life of the plan, and a fully funded contingency plan if any element of the plan does not meet standards for compliance.

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, and/or other local, state, federal, and/or tribal agencies or experts.
   2. If the technical administrator finds the plan to be complete, accurate, and consistent with the purposes and intent of this chapter, the designated decision-maker shall solicit comment pursuant to the public notice provisions of Chapter 2.33 WCC prior to final approval/denial of permission of the plan to substitute for the requirements and standards of this chapter.
   3. The designated decision-maker shall not approve watershed-based management plans that conflict with Chapter 90.82 RCW.

F. 16.16.263 Mitigation Banking.
   A. The County may approve mitigation banking as a form of compensatory mitigation for wetland and habitat conservation area impacts when the provisions of this chapter require mitigation and when it is clearly demonstrated that the use of a bank will provide equivalent or greater replacement of critical area functions and values when compared to on-site mitigation; provided, that all of the following criteria are met:
1. Banks shall only be used when they provide significant ecological benefits including long-term conservation of critical areas, important species, habitats and/or habitat linkages, and when they are consistent with the County Comprehensive Plan and create a viable alternative to the piecemeal mitigation for individual project impacts to achieve ecosystem-based conservation goals.

2. The bank shall be established in accordance with the Washington State Draft Mitigation Banking Rule, Chapter 173-700 WAC or as revised, and Chapter 90.84 RCW and the federal mitigation banking guidelines as outlined in the Federal Register, Volume 60, No. 228, November 28, 1995. These guidelines establish the procedural and technical criteria that banks must meet to obtain state and federal certification.

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

4. 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:
   a. The bank sponsor shall submit a bank prospectus for County review. The prospectus shall identify the conceptual plan for the mitigation bank, including:
   b. The ecological goals and objectives of the bank;
   c. A narrative demonstrating compliance with the Whatcom County comprehensive plan, associated development standards and this chapter, shoreline restoration plan, watershed planning documents prepared and adopted pursuant to Chapter 90.82 RCW, and/or the salmonid recovery plan;
   d. A description of the existing site conditions and expected changes in site conditions as a result of the banking activity, including changes on neighboring lands;
   e. A conceptual site design;
   f. A description of the proposed protective mechanism such as a conservation easement; and
   g. Demonstration of adequate financial resources to plan, implement, maintain, and administer the project.

2. The technical administrator shall review the bank prospectus either by participating in the state's Mitigation Bank Review Team (MBRT) process and/or by hiring independent, third-party expertise to assist in the review.

3. If the technical administrator determines that the bank prospectus is complete, technically accurate, and consistent with the purpose and intent of this chapter, 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 be allowed. The Committee’s recommendation shall be nonbinding. The County Council may require mitigation for the loss of agricultural lands.

4. If the County Council determines, based on the initial review, that the prospectus is valid, it shall issue a notice to proceed to the bank sponsor. Following receipt of the notice to proceed, the bank sponsor may submit application for a major project permit in accordance with Chapter 20.88 WCC. The notice to proceed shall not be construed as final approval of the bank proposal, but shall indicate approval to proceed with the development of the mitigation bank instrument, which details all of the legal requirements for the bank.

http://www.whatcomcounty.us/documentscenter/view/35171
5. Upon receipt of a draft mitigation banking instrument from the bank sponsor and major project permit application, the technical administrator shall review the banking instrument and major project permit in consultation with the MBRT and/or other third-party expert. Following review of the mitigation banking instrument and major project permit, the technical administrator shall make a recommendation to certify and approve, conditionally certify and approve, or deny the bank proposal and major project permit in accordance with the procedures of Chapter 20.88 WCC.

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 to a wetland.

7. The bank sponsor shall be responsible for the cost of any third-party review.

C. The award of bank credits for an approved bank may be negotiated based on habitat acreage, habitat quality, and contribution to a regional conservation strategy that has been approved by the County and other appropriate regulatory agency(ies). Credit availability may vary in accordance with agreed upon performance criteria for the development of the resource value in question. Awarded bank credits, subject to the approval of the County and regulatory agency(ies), may be made transferable. Whether out-of-kind mitigation credit will be allowed at a particular bank will require a fact-specific inquiry on a case-by-case basis for the project creating the impacts.

D. Use of Bank Credits

1. Credits from a wetland mitigation bank may be approved for use as compensation for unavoidable impacts to wetlands when:
   a. The bank is certified under state rules;
   b. The Administrator determines that the wetland mitigation bank provides appropriate compensation for the authorized impacts; and
   c. The proposed use of credits is consistent with the terms and conditions of the certified bank instrument.

2. Replacement ratios for projects using bank credits shall be consistent with replacement ratios specified in the certified bank instrument.

3. Credits from a certified wetland mitigation bank may be used to compensate for impacts located within the service area specified in the certified bank instrument. In some cases, the service area of the bank may include portions of more than one adjacent drainage basin for specific wetland functions.

16.16.264 In-Lieu Fees

To aid in the implementation of off-site mitigation, the County may develop an in-lieu fee program. This program shall be developed and approved through a public process and be consistent with federal rules, state policy on in-lieu fee mitigation, and state water quality regulations. An approved in-lieu fee program sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the in-lieu program sponsor, a governmental or non-profit natural resource management entity. Credits from an approved in-lieu fee program may be used when paragraphs 1-6 below apply.

1. The approval authority determines that it would provide environmentally appropriate compensation for the proposed impacts.
2. The mitigation will occur on a site identified using the site selection and prioritization process in the approved in-lieu fee program instrument.
3. The proposed use of credits is consistent with the terms and conditions of the approved in-lieu fee program instrument.
4. Land acquisition and initial physical and biological improvements of the mitigation site must be completed within three years of the credit sale.
5. Projects using in-lieu-fee credits shall have debits associated with the proposed impacts calculated by the applicant's qualified wetland scientist using the method consistent with the credit assessment method specified in the approved instrument for the In-lieu-fee program.
6. Credits from an approved in-lieu-fee program may be used to compensate for impacts located within the service area specified in the approved in-lieu-fee instrument.

16.16.265 Critical areas protective measures.
When an impact to critical area or a buffer has been proposed, a standard buffer width has been altered, or mitigation is required, one or more of the following protective measures shall be applied:

A. Deterrent Devices/Signage. The technical administrator, as a condition of permit approval, may require that the outer boundary of a wetland or habitat conservation area critical area and its or buffer, a mitigation site, a designated open space, or a conservation easement (if) be identified with signs, or markers, and/or fencing when needed to minimize potentially harmful intrusions from adjacent land uses, to alert citizens to a potential public health or safety risk associated with a critical area, or to accomplish other objectives specifically provided for elsewhere in this chapter. The technical administrator shall provide specifications on the type, content, and size of the signs prior to permit approval. The signs shall be posted near primary access points and approximately every 200 feet along the critical area boundary unless the technical administrator determines that more or less frequent spacing is adequate considering the size and location of the site. (See also Appendix C of this chapter)

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 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 presence of the 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 be waived by the Technical Administrator for certain geologically hazardous areas if he finds that the risk is so low as to not warrant notification (e.g., old alluvial debris). [4AC]

C. Tracts and Easements. Prior to final approval of any development permits, subdivisions, short subdivisions, or binding site plans, the part of the critical area and required buffer that is located on the site shall be protected using one of the following mechanisms:
1. Placed in a separate tract or tracts owned in common by all lots within a subdivision, short subdivision, or binding site plan; [4AS]
2. Covered by a protective easement, or public or private land trust dedication; or
3. Preserved through an appropriate permanent protective mechanism that provides the same level of permanent protection as designation of a separate tract or tracts as determined by the County Technical Administrator or Hearing Examiner.

D. Building Setback. The County shall require buildings and other structures to be setback a minimum distance of 10 feet from the edge of a 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:
1. Landscaping;
2. Uncovered decks;
3. Building overhangs less than 18 inches (45.7 cm);
4. Impervious surfaces such as driveways, parking lots, roads, and patios; provided, that such surfaces conform to the applicable water quality standards and that construction equipment does not enter or damage the buffer or critical area;
5. Clearing and grading;
6. Wells.

E. Indemnification. At the technical administrator’s discretion, when a permit is granted for development or use within a geologic, flood, or other hazard area, the property owner shall sign an indemnification agreement acknowledging hazards posed to the development and absolving the County of all responsibility, to be recorded against the property prior to permit issuance.

E-F. Temporary protection measures to identify location of critical areas and buffers such as construction fencing, erosion and sediment control, or similar shall be required during construction of the proposed project/uses.

16.16.270 Reasonable use and variances.

A. Permit applicants for a property so encumbered by critical areas and/or buffers that application of this chapter—including buffer averaging, buffer reduction, or other mechanism—would deny all reasonable use who are unable to comply with the specific standards of this chapter may seek approval pursuant to the reasonable use or variance standards and procedures provided for in this section.

A-B. Reasonable Use Standards.

1. Nothing in this chapter is intended to preclude all reasonable economic use of property. If the application of this chapter would deny all reasonable economic use of the subject property, including agricultural use, use or development shall be allowed if it is consistent with the zoning code and the purposes of this chapter.

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;
   c. Activities will be located as far as possible from critical areas and the project employs all reasonable methods to avoid adverse effects on critical area functions and values, including maintaining existing vegetation, topography, and hydrology. Where both critical areas and buffer areas are located on a parcel, buffer areas shall be disturbed in preference to the critical area;
   d. The proposed activities will not result in adverse effects on endangered or threatened species as listed by the federal government or the state of Washington, or be inconsistent with an adopted recovery plan;
   e. Measures shall be taken to ensure the proposed activities will not cause degradation of groundwater or surface water quality, or adversely affect drinking water supply;
   f. The proposed activities comply with all state, local and federal laws, including those related to erosion and sediment control, pollution control, floodplain restrictions, and on-site wastewater disposal;
g. The proposed activities will not cause there will be no damage to nearby public or private other property properties.

h. The proposed activities will not increase risk to the health or safety of people on or off the site.

i. The inability to derive reasonable economic use of the property is not the result of segregating or dividing the property and/or creating the condition of lack of use after the effective date of the ordinance codified in this chapter September 30, 2005.

j. The project includes mitigation for unavoidable critical area and buffer impacts in accordance with the mitigation requirements of this chapter.

k. For single-family residences, the maximum impact area shall be no larger than 2,500 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 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.

b. On lots within 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, approval of those driveway portions shall be sought through a Shoreline Variance (WCC 23.60.030) and demonstrate that the size and location of the driveway is the minimum relief necessary to access the development site.

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 requirements in this chapter when the applicant proves by clear, cogent and convincing evidence of all of the following elements:

1. Because of special circumstances applicable to the subject property, including, but not limited to, size, shape, topography, location, surroundings, and other physical conditions, the application of this chapter precludes development of the property by the property owner as otherwise allowed in WCC Title 29 and

2. The granting of the variance will not be injurious to the health or safety of the community and every reasonable effort has been made to minimize adverse effects on critical areas and

3. The variance does not constitute a grant of special privilege, and is not based upon reasons of hardship caused by previous actions of the current property owner after July 18, 1992, and the proposed modification to a critical area will be the minimum necessary to allow reasonable and economically viable use of the property, and

4. The project includes mitigation for unavoidable critical area and buffer impacts.

C. Reasonable Use and Variance Procedures.

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

   a. Reasonable use permit applications shall be subject to an open record public hearing. This is provided, that reasonable use permit applications for single-family residential building permits, as proposed to be located outside of geologically hazardous areas, and for other development proposals that would affect critical area buffers, but not the critical areas themselves, shall be processed administratively by the technical administrator.
b. Variances and reasonable use permit applications that require an open record hearing shall be processed in accordance with Chapter 2.33 WCC and WCC 20.84.230.

c. Reasonable use permit applications that are subject to administrative approval by the technical administrator shall be processed in accordance with WCC 20.84.235.

d. The hearing examiner or technical administrator shall have the authority to set an expiration date for any or all variance and/or reasonable use approvals. The development proposal must be completed before the approval expires.

e. Any person aggrieved by the granting, denying, or rescinding of a reasonable use permit by the technical administrator or any party of record may appeal the Technical Administrator’s pursuant to WCC 16.16.280 or the hearing examiner decision pursuant to Chapter 29.92 WCC.

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.

g. Any application for a variance or reasonable use permit or approval which remains inactive for a period of 180 days shall expire and a new application and repayment of fees shall be required to reactivate the proposal; provided, that the technical administrator may grant a single 90-day extension for good cause. Delays such as those caused by public notice requirements, environmental (SEPA) review, litigation directly related to the proposal, or changes in government regulations shall not be considered as part of the inactive period.

2. All variance and reasonable use permit applications or other approvals shall be subject to the provisions of this chapter, which are in effect at the time of application.

3. Each application for a variance or reasonable use permit shall be accompanied by a fee as stated in the unified fee schedule.

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

16.16.273 Variances (cessation)

A. Where strict application of requirements of this chapter renders compliance with these provisions an undue hardship in cases where the reasonable use criteria of WCC 16.16.270 do not apply, permit applicants may seek a variance pursuant to the variance standards and procedures provided in this section.

A.8. 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 requirements in this chapter when the applicant proves by clear, cogent, and convincing evidence of all of the following elements:

1. Because of special circumstances applicable to the subject property, including but not limited to, size, shape, topography, location, surroundings, and other physical conditions, the application of this chapter precludes development of the property by the property owner as otherwise allowed in WCC Title 20, and,

2. The granting of the variance will not be injurious to the health or safety of the community and every reasonable effort has been made to minimize adverse effects on critical areas, and,

3. The variance does not constitute a grant of special privilege, and is not based upon reasons of hardship caused by previous actions of the current property owner after July 18, 1992, and the proposed modification to a critical area will be the minimum necessary to allow reasonable and economically viable use of the property, and,

4. The project includes mitigation for unavoidable critical area and buffer impacts.
5. No other feasible alternative exists.

C. Variance Procedures
   1. Procedural requirements for variances applications shall be as follows:
      a. Variance applications shall be subject to an open record public hearing, processed in
         accordance with Chapter 2.33 WCC and WCC 20.84.230
      b. The hearing examiner shall have the authority to set an expiration date for any or all
         variance approvals. The development proposal must be completed before the approval expires.
         The hearing examiner will render a decision pursuant to Chapter 20.82 WCC
      c. Any party of record may appeal the hearing examiner decision pursuant to Chapter 20.82
         WCC.
      d. Any application for a variance that remains inactive for a period of 180 days shall expire and
         a new application and repayment of fees shall be required to reactivate the proposal; provided,
         that the technical administrator may grant a single 90-day extension for good cause.
         Delays such as those caused by public notice requirements, environmental (SEPA) review,
         litigation directly related to the proposal, or changes in government regulations shall not be
         considered as part of the inactive period.
   2. All variance applications shall be subject to the provisions of this chapter that are in effect at the
      time of application.
   3. Each application for a variance shall be accompanied by a fee as stated in the unified fee schedule.
   4. In making variance decisions, the hearing examiner shall require submittal of technical reports in
      accordance with WCC 16.16.255 and/or 16.16.260(B).

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 that effective date of the adoption
   of 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 16.16.280 [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, is prohibited
   unless such use will produce 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 increased risk associated with geologically hazardous area.
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:
1. The reconstruction process is commenced within 18 months of the date of such damage; and
2. The reconstruction does not expand, enlarge, or otherwise increase the nonconformity, except
   as provided for in subsection B.C of this section.
D. Nonconforming uses in shoreline areas shall be governed by the shoreline management provisions of the WCC Title 23.

E. 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.

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.

B. Any person may appeal to the hearing examiner a final administrative order, final requirement, final permit decision, or final determination made; provided, that such appeal shall be filed in accordance with the appeal procedure for the underlying permit. If there is no appealable permit or if the appeal is for a reasonable use permit decision issued by the technical administrator, the appeal shall be filed in writing within 14 calendar days of the date the written decision, order, requirement, or determination is issued and public notice provided, unless the decision is issued as part of a SEPA determination of nonsignificance for which a public comment period is required, in which case a 21-day appeal period shall be provided.

C. The appeal will be upheld if the applicant proves that the decision appealed is clearly erroneous or based upon error of law.

D. The hearing examiner shall have the authority to set an expiration date for any or all appeal approvals. The hearing examiner will render a decision pursuant to Chapter 20.92 WCC.

E. Each application for an appeal of an administrative decision to the hearing examiner shall be accompanied by a fee as stated in the unified fee schedule.

F. Pursuant to WCC 20.92.610, the applicant, any party of record, or any County department may appeal any final decision of the hearing examiner to the County Council. The appellant shall file a written notice of appeal at the County Council office within 10 business days of the final decision of the Hearing Examiner.

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

16.16.285 Penalties and enforcement.

A. Any person who violates any of the provisions of this chapter shall be guilty of a civil offense and may be fined a sum not to exceed $1,000 for each offense. After a notice of violation has been given, each day of site work in conjunction with the notice of violation shall constitute a separate offense.

B. The penalty provided in subsection A of this section shall be assessed and may be imposed by a notice in writing either by certified mail with return receipt requested or by personal service to the person incurring the same. The notice shall include the amount of the penalty imposed and shall describe the violation with reasonable particularity. In appropriate cases, corrective action shall be taken within a specific and reasonable time.

C. Within 30 calendar days after the notice is received, the person incurring the penalty may apply in writing to the County for remission or mitigation of such penalty. Upon receipt of the application, the County may remit or mitigate the penalty upon whatever terms the County in its discretion deems proper. The County’s final decision on mitigation or revision shall be reviewed by

http://www.whatcomcounty.us/documentcenter/View/39171
the hearing examiner if the aggrieved party files a written appeal therewith of said decision
within 10 calendar days of its issuance.

D.B. If work activity has occurred on a site in violation of this chapter, prompt corrective action, restor-
tation, 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 property owner the cost 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.

E.C. In the event any person violates any of the provisions of this chapter, the County may issue a correc-
tion notice to be delivered to the owner or operator, or to be conspicuously posted at the site. In a
nonemergency situation, such notice may include notice of the intent to issue a stop work order no
less than 10 calendar days following the receipt of the correction notice, and provide for an adminis-
trative predeprivation hearing within 10 calendar days of the notice. In an emergency situation
where there is a significant threat to public safety or the environment, the County may issue a stop
work order. The stop work order shall include, in writing, the right to request an administrative pre-
deprivation hearing within 72 hours following receipt of the stop work order. Failure to comply with
the order to stop work shall be a gross misdemeanor punishable upon conviction by a minimum fine
of $500 up to a maximum fine of $1,000 or one year in jail, or both. Under no circumstance may the
court defer or suspend any portion of the minimum $500 fine for any conviction under this section.
Each day or part thereof of noncompliance with said order to stop work shall constitute a separate
offense.

F.D. The County may suspend or revoke a permit if the applicant violates the conditions or limitations set
forth in the permit or exceeds the scope of the work set forth in the permit.

G.E. The prosecuting attorney may enforce compliance with this chapter by such injunctive, declaratory,
or other actions as deemed necessary to ensure that violations are prevented, ceased, or abated.

F. Any person who, through an act of commission or omission, procures, aids, or abets in the violation
shall be considered to have committed a violation for the purposes of the civil penalty.

H.G. After the Fact Permit Fee, After the fact application fees shall be double the amount established
by the Unified fee schedule [NRSS01].

16.16.290 Conservation program on agriculture lands (CPAL) [C561]

16.16.295 Open space and conservation.

The following programs may be employed to achieve the purposes of this chapter and minimize the
burden to individual property owners from application of the provisions of this chapter:

A. Open Space. Any property owner whose property contains a critical area or buffer and who meets
the applicable qualifying criteria may apply for open space taxation assessment pursuant to Chapter
84.34 RCW.

B. Conservation Easement. Any person who owns an identified critical area or its associated buffer may
place a conservation easement over that portion of the property by naming the County or its quali-
fied designee under RCW 64.04.130 as beneficiary of the conservation. This conservation easement
may be in lieu of separate critical areas tracts that qualify for open space tax assessment described
in subsection A of this section. The purpose of the easement shall be to preserve, protect, maintain,
and limit use of the affected property. The terms of the conservation easement may include prohibi-
tions or restrictions on access and shall be approved by the property owner and the County.

C. Conservation Futures Fund. The County may consider using the conservation futures property tax
fund as authorized by RCW 84.34.230 for the acquisition of properties containing significant critical
areas and their associated buffers.
PROPOSED FINDINGS OF FACT

(AS ADOPTED BY THE PLANNING COMMISSION)
Proposed Findings of Fact (as adopted by the Planning Commission)

WHEREAS, the adopted Whatcom County Comprehensive Plan supports the protection of environmentally critical areas through the adoption of development regulations; and

WHEREAS, the State Growth Management Act (GMA) includes adopted goals and requirements to guide the development and adoption of comprehensive plans and development regulations including requirements to designate and protect environmentally critical areas; and

WHEREAS; the County has considered those adopted goals, policies, and requirements in development of the proposed Whatcom County Code Amendments related to critical areas, and, has considered other state requirements, law, rules, guidelines, and agency comments; and

WHEREAS, the County researched and assessed the experience of other jurisdictions in regard to standards and requirements for regulating critical areas, undertook a Best Available Science (BAS) review and public process in accordance with the requirements of the GMA, developed Whatcom County Code amendment drafts, prepared environmental documents in accordance with the requirements of the State Environmental Policy Act (SEPA), and held meetings and hearings throughout the code development process; and

WHEREAS, the County has been provided feedback on draft work products and guidance from members of the public, County staff, the Washington State Department of Fish and Wildlife, the Washington State Department of Ecology, the Washington State Department of Commerce, the Lummi Nation, the Nooksack Indian Tribe, other stakeholders and experts, the Whatcom Planning Commission, and elected and appointed officials during the development of the recommended code amendments; and

WHEREAS, in developing this ordinance, the County has followed the GMA's requirements, including to provide "early and continuous public involvement" through a variety of mechanisms described in the public record; and

WHEREAS, the County has followed the State guidelines for the BAS process required by RCW 36.70A.172 and WAC 365-195-900 through 925, employing a variety of mechanisms described in the public record; and

WHEREAS, a notice of intent to adopt the proposed code amendments was sent to the State of Washington Department of Commerce and to other State agencies on February 2, 2016, for a 60-day review and comment period in accordance with State law; and

WHEREAS, an environmental review has been conducted in accordance with the requirements of State Environmental Policy Act (SEPA), and a SEPA threshold determination was issued, and published on March 17, 2016, in the Bellingham Herald; and

WHEREAS, the Planning Commission held a total of 7 public meetings to consider the proposed amendments, which included two public hearings, one on May 12 and one on June 9, 2016, with deliberations throughout these meetings; and

WHEREAS, the Planning Commission has provided a recommendation to the County Council related to the proposed amendments; and
WHEREAS, the County Council held X study sessions on the proposed amendments on X, 2016, and a public hearing on X, 2016 and continued public hearing on X, 2016; and

WHEREAS, the County Council has considered the recommendation of the County Planning Commission and the public comments received; and

WHEREAS, the County Council has reviewed and considered a variety of information sources including Best Available Science materials, informational documents in the public record, and public testimony submitted verbally and in writing to the Planning Commission and to the County Council; and

WHEREAS, the County Council desires the proposed amendments to be effective throughout the County including within shoreline jurisdiction, a subsequent Shoreline Master Program amendment should be prepared for submittal to the State Department of Ecology for approval; and

WHEREAS, based upon the foregoing process, the County Council has made the following

Findings of Facts and Conclusions:

**General Critical Areas Findings**

1. The Growth Management Act requires critical areas to be designated and protected and to include and be informed by BAS when developing critical areas regulations. [RCW 36.70A]

2. Critical areas include wetlands, fish and wildlife habitat conservation areas, geologically hazardous areas, critical aquifer recharge areas, and frequently flooded areas.

3. The Whatcom County has within its borders a variety of environmentally sensitive areas that require protection of important functions and values.

4. Unregulated development may result in cumulative impacts to those functions and values of critical areas that contribute to and are necessary for a healthy natural environment and perceived quality of life.

5. The unregulated development of residences, businesses, shopping areas and other structures, and the clearing of land for accommodation of livestock and for such development all have the potential of adversely and significantly impacting the functions and values of critical areas.

6. The unregulated development of resource lands or areas susceptible to natural hazards may lead to inefficient use of limited public resources, jeopardize environmental resource functions and values, subject persons and property to unsafe conditions, and affect the perceived quality of life.

7. It is more costly to remedy the loss of critical area functions and values than to conserve and protect them from loss or degradation.

8. In determining what critical areas are to be afforded a particular degree of protection, Whatcom County has evaluated a wide range of the best science available with respect to the critical areas to make informed decisions that meet the intent of the Growth Management Act and that are also reflective of local needs.

9. The sources of this best available science that were evaluated and included in this ordinance are contained in Exhibit B: *Whatcom County Critical Areas Ordinance 2016 Update – Best Available Science Review: Addendum to the 2005 BAS Report.*
10. Protection standards for one critical area often provide protection for one or more other critical areas.

11. Critical areas may also be protected by other actions by the County, such as stormwater management standards, clearing and grading regulations, critical area restoration, and public education; and from other regulations, such as the Forest Practices Act, the Shoreline Management Act, the State Environmental Policy Act, and others.

12. The U.S. Constitution prohibits the taking of private property without just compensation.

13. The proposed regulations for critical areas are sufficient and appropriate to protect the functions and values of those areas consistent with the Whatcom Comprehensive Plan and Growth Management Act.

14. The amendments hereafter set forth address requirements related to development in and near environmentally critical areas including environmentally critical areas buffers, performance standards, mitigation requirements, exemptions and exceptions.

15. The amendments serve to further implement the Comprehensive Plan, and provide protection for critical areas that is consistent with BAS and with providing options and development flexibility, and are in the public interest.

16. The critical areas regulations continue to allow for reasonable use of property to ensure that such regulations do not infringe on constitutional private property rights.

17. The public record demonstrates that the amendments were developed through a review of the BAS literature available to the County for review and consideration.

18. The County has followed the GMA’s requirements for public involvement and for including and considering BAS in modification of the regulations for critical areas.

19. The public testimony provided to the County included both support for the proposed amendments and suggestions for modifications.

20. Based on the review of the testimony and public record, the amendments attached to this ordinance reflect the County’s requirement to protect critical areas and to consider the planning goals of the GMA, while recognizing public and private interests.

**Wetlands**

21. Wetlands and streams are environmentally sensitive and have numerous natural functions and values. These functions include: wildlife and fisheries habitat; water quality protection; flood protection; shoreline stabilization; stream flow; and ground water recharge and discharge. In many situations, these functions cannot be adequately replicated or replaced.

22. The scientific literature supports in the inclusion of protective buffers from wetlands to provide sediment control and nutrient inputs to wetlands, and to protect important wetland functions.

24. The scientific literature supports the inclusion of protective buffers of relatively intact native vegetation from wetlands to adequately protect wetland functions and values.


Critical Aquifer Recharge Areas

26. WAC 365-190-080 defines wellhead protection areas, sole source aquifers, special protection areas, and other areas that are susceptible or vulnerable to ground water contamination as areas with a critical recharging effect on aquifers used for potable water (also referred to as critical aquifer recharge areas).

27. Potable water is an essential life-sustaining element.

28. Much of the County’s drinking water in rural areas comes from groundwater supplies.

29. Once groundwater is contaminated it is difficult, costly, and sometimes impossible to clean up.

30. Preventing groundwater contamination is necessary to avoid exorbitant costs, hardships, and potential physical harm to people.


Frequently Flooded Areas

32. Flood hazard areas are subject to periodic inundation that results in loss of life and property, health, and safety hazards, disruption of commerce and governmental services, extraordinary public expenditures for flood protection and relief, and impairment of the tax base, all of which adversely affect the public health, safety, and general welfare.

33. These flood losses are caused by development in areas prone to inundation that increase flood heights and velocities, and when inadequately anchored, damage uses in other areas. Uses that are inadequately floodproofed, elevated, or otherwise protected from flood damage also contribute to flood loss.

34. Floodplain and stream connectivity are major elements in maintaining healthy riparian habitat and off-channel habitats for the survival of fish species and conveyance of floodwaters. If river, floodplains, and other systems are not viewed holistically as biological, geomorphological units, this can lead to serious degradation of habitat and increase flood hazards, which in turn can contribute to listing of various fish species as threatened or endangered and result in extraordinary public expenditures for flood protection and relief.

35. Frequently flooded areas, including the 100-year floodplain and the floodway, are commonly mapped on flood insurance maps, often known as Flood Insurance Rate Maps, or FIRM.
Geologically Hazardous Areas

36. Geologically hazardous areas are subject to periodic geological events that result in loss of life and property, health, and safety hazards, disruption of commerce and governmental services, extraordinary public expenditures, and impairment of the tax base, all of which adversely affect the public health, safety, and general welfare.

37. Geologic hazards may be exacerbated by development and human activity in sensitive areas, and impacts resulting from geologic hazards may be reduced by limiting development and human activity within or adjacent to the geologic hazard.

38. Some geologic hazards may be intensified during periods of consistent or heavy rainfall that results in ground saturation or surface water drainage flows.

Fish and Wildlife Habitat Conservation Areas

39. Fish and wildlife habitat conservation areas perform many important physical and biological functions that benefit Whatcom County and its residents, including but not limited to: maintaining species diversity and genetic diversity; providing opportunities for food, cover, nesting, breeding and movement for fish and wildlife; serving as areas for recreation, education and scientific study and aesthetic appreciation; helping to maintain air and water quality; controlling erosion; and providing neighborhood separation and visual diversity within urban areas.

40. Wetlands and streams are environmentally sensitive and have numerous natural functions and values. These functions include: wildlife and fisheries habitat; water quality protection; flood protection; shoreline stabilization; stream flow; and ground water recharge and discharge. In many situations these functions cannot be adequately replicated or replaced.

41. The scientific literature supports the inclusion of protective buffers from streams to provide sediment control, nutrient inputs to downstream waters, large woody debris, and other functions important to riparian areas.

42. The Washington Department of Fish and Wildlife (WDFW) has prepared management recommendations for the preservation of priority habitat and species, which are based on the best available science, and include, in some instances, recommended protective buffer distances.

43. Kelp and eelgrass beds have been identified and mapped by the Washington State Department of Natural Resources (DNR) in some areas. Herring and smelt spawning times and locations are outlined in WAC 220-110-240 through 220-110-260. Locations for both may be found by referring to Critical Spawning Habitat for Herring, Surf Smelt, Sand Lance and Rock Sole in Puget Sound, Washington: A Guide for Local Governments and Interested Citizens, 2002, and the Puget Sound Environmental Atlas, Volumes 1 and 2.

44. Salmonid and anadromous fish may be more impacted by development and human activity during some times than others. Such times are referred to as “fish windows," which have been documented by WDFW.

45. DNR has classified watercourses according to two stream-typing systems based on channel width, fish use, and perennial or intermittent status.
46. WAC 365-190-080(5) grants [the jurisdiction] the flexibility to make decisions in the context of local circumstances, and specifically excuses local jurisdictions from being required to protect "all individuals of all species at all time."