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

**Memorandum**

TO: The Honorable County Council  
Jack Louws, County Executive

FROM: Cliff Strong, Senior Planner *CS*

THROUGH: Mark Personius, Asst. Director *MP*

DATE: October 17, 2017

SUBJECT: 2017 Critical Areas Ordinance (CAO) Update  
Committee of the Whole Workshop on October 24, 2017

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At the request of Council, prior to the introduction of the CAO ordinance, another workshop on the 2017 Critical Areas Ordinance update will be held on October 24, 2017. The purpose of this workshop is to deal with a few issues that have recently arisen. Topics to be covered include:

- Review of the 2017 BAS Report Addendum
- Article 8, Conservation Program on Agriculture Lands
- Article 9, Definitions
- Nooksack-Abbotsford-Sumas Transboundary Nitrogen Study

To prepare for this meeting, please review this memo, the attached (revised) 2017 BAS Report Addendum, the draft code (provided in the last packet for your October 10<sup>th</sup> packet), and the reports comprising the County's BAS (found at <http://www.whatcomcounty.us/2417/County-Council-Review>).

Attachments:

- A. Revised 2017 BAS Report Addendum
- B. Type 1 CFP Application Checklist
- C. Policy PL1-85-004Z
- D. Email from Assistant Director Mark Personius, committing PDS to participate in the Nooksack-Abbotsford-Sumas Transboundary Nitrogen Study

## 2017 Best Available Science Report Addendum

### Why We're Here

If you will recall from your September 20, 2016 workshop, all cities and counties in Washington are required to adopt and conduct periodic updates of their critical areas regulations using the Best Available Science (BAS) in developing policies and development regulations to protect the functions and values of critical areas.

At that workshop staff presented to Council the rules regarding BAS found in WAC 365-195. These included the criteria for determining which information is the best available science (WAC 365-195-905); the criteria for obtaining the best available science (WAC 365-195-910); the criteria for including the best available science in developing policies and development regulations (WAC 365-195-915); the criteria for addressing inadequate scientific information (WAC 365-195-920); and the criteria for demonstrating "special consideration" has been given to conservation or protection measures necessary to preserve or enhance anadromous fisheries (WAC 365-195-925).

Staff also provided for your review a copy of the 2005 BAS Report, and the 2016 BAS Report Addendum as recommended by the Planning Commission. During your review of the draft code this past year Council has made additional changes to the draft code, and staff has been augmenting the BAS report based on your discussions, preliminary decisions, and materials provided. This revised (now referred to as the 2017) BAS Report Addendum was provided to you in your packet for your October 10, 2017 meeting (along with the draft ordinance, draft code, and the 2005 BAS Report), at which staff had anticipated the ordinance would be introduced. A public hearing was being scheduled for *all* these materials.

Since then you have received several public email comments requesting that the Council hold a workshop specifically on the BAS report. While there is no statutory nor policy requirement to do so, you have nonetheless requested one to review what has been added.

### What Has Changed in the 2017 BAS Report Addendum

As mentioned, staff has been augmenting the 2017 BAS Report addendum as Council has progressed through its review. Changes staff has made to the report since September 2016 include:

- Added section 1.2, which explains how the requirements for including the Best Available Science are met.
- Amended section 1.4 to explain Council's review process of the draft CAO (as it hadn't happened when the addendum was first provided to Council).
- Added the more substantive changes the Council has made to the various "synopses of amendments" tables, with explanations.
- Added some BAS report citations to the document based on your discussions, preliminary decisions, and materials provided, including:

- Document 76, Harris, W. CAO Exemptions for Passive Low Impact Activities, April 2015. (Not BAS per se, but references a dozen or so studies), including a reason why her proposal wasn't acted on.
- Document 81, the Central Puget Sound Growth Management Hearings Board. *Tahoma Audubon Society, People for Puget Sound, and Citizens for a Healthy Bay v. Pierce County, Park Junction Partners, and Snohomish County, Final Decision and Order* and the reason Council made their decision on the lahar regulations. (As well as documents 77, 78, 79, and 80, which the Council reviewed.)
- Document 82, the Department of Ecology EIM Well Data, 2016.
- Documents 83 – 89 having to do with the importance of small wetlands
- Corrected some of the document numbering and fixed some typos and formatting.

**Staff Recommendation:** Staff believes this report, and our process for producing it, meets the statutory requirements of using BAS in developing the CAO. As you will notice when reading the draft ordinance, it is to be adopted as the County's BAS report for this update.

## Definition of “Ongoing Ag”

In workshop, Council provided direction to amend the definition of “ongoing agriculture.”

The existing definition is:

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

Council's proposed definition reads:

“Ongoing agriculture” means agricultural uses and practices including, but not limited to: Producing, breeding, or increasing agricultural products; rotating and changing agricultural crops; allowing land used for agricultural activities to lie fallow in which it is plowed and tilled but left unseeded; allowing land used for agricultural activities to lie dormant as a result of adverse agricultural market conditions; allowing land used for agricultural activities to lie dormant because the land is enrolled in a local, state, or federal conservation program, or the land is subject to a conservation easement; conducting agricultural operations; maintaining, repairing, and replacing agricultural equipment; maintaining, repairing, and replacing agricultural facilities, provided that the replacement facilities are no closer to the critical area than the original facilities; and maintaining agricultural lands under production or cultivation. An

operation ceases to be ongoing when the area on which it was conducted has been converted to a nonagricultural use.

The primary differences between the two are that the Council version does not reference RCW [84.34.020\(2\)](#), nor does it have the provision that one loses this classification after a period of time (5 years). As you know, staff has recommended against amending this definition.

Our CPAL program has already been found to be GMA-compliant and is used as a model by the state for non-Voluntary Stewardship Program (VSP) counties. Even one of the remedies for a VSP county that doesn't complete their program is to:

Adopt development regulations previously adopted... by another local government for the purpose of protecting critical areas in areas used for agricultural activities. Regulations adopted under this subsection must be from a region with similar agricultural activities, geography, and geology and must: (i) Be from Clallam, Clark, King, or *Whatcom* counties." (RCW 36.70A.735)

**Staff Recommendation:** Do not amend the motion to amend the definition of ongoing agriculture, and leave our current definition in place.

## Exemptions from CPAL

There seems to be a lot of rumors circulating that the County is about to make it illegal to have more than one animal on one's property. We believe this has to do with the discussion Council has been having on whether to exempt folks from the CPAL program if they have less than 1 animal unit per 3 grazable acres and have no direct discharge into surface waters. This also seems to be the basis of comments to Council that the threshold for *having to prepare* a Conservation Farm Plan (CFP) should be 1 animal unit per acre of property, with some saying that it ought to be even higher. People seem to want all small/hobby farms to be exempt. But two different, though somewhat related issues seem to be at play here.

Let's try to explain and separate the two issues.

Currently, all farms with ongoing agriculture (i.e., ag that has been practiced in critical areas or their buffers since before the adoption of our first CAO in 1995, as discussed above) are supposed to prepare and abide by a CFP in order to continue farming in critical areas or their buffers. Farms without critical areas do not require a CFP. New farming does not require a CFP; those farmers are supposed to abide by the standard CAO requirements (i.e., farm outside of critical areas and their standard buffers). Thus, we're only talking about a subset of agriculture: the CPAL program does not apply to all farms.

Now, within that subset (i.e., ongoing ag as of 1995), there are three classes of CFPs: Type 1 (for small hobby farms having fewer than 1 au/ac), Type 3 (for dairies and CAFOs), and Type 2 (for all those in between, i.e., those having more than 1 animal unit/acre as well as berry farms, row crops, orchards, etc.). As you can see, the entire range of farm types is covered.

The 1 au/grazable acre standard found in 16.16.820 was chosen as a threshold between ongoing ag farms having to prepare a Type 1 vs. Type 2 CFP. A Type 1 CFP is a relatively simple checklist that can be prepared by farmers themselves, while Type 2 CFPs are “custom” plans that usually involve more complex protection alternatives and require preparation by a qualified professional. That professional would complete the assessment with a more knowledgeable eye and expertise in adopting pasture management and nutrient management practices that adequately protected groundwater.

Our CPAL program for dealing with existing farming in critical areas was found to be GMA-compliant and was used as a model by the state. But about 8-9 years ago PDS was swamped with processing farm plans and was having a hard time keeping up, so in 2010 the Director adopted Policy PL1-85-004Z (attached) to help with the backlog. This policy was intended to deprioritize resource allocation to ongoing ag activities that posed no discernable threat to critical areas. It basically states that PDS will not require farm plans from people:

- having no more than a certain number of animals (listed in the policy, but basically 1 animal unit);
- on at least 3 grazable acres (stating that the number of animals per grazable acres is not a ratio but rather a set number, for reasons provided in the policy); and,
- who manage their animals to avoid a direct discharge of sediment or fecal matter to surface waters (and the policy provides some indicators on how to judge that)

The policy was based on the Department’s experience of implementing CFPs, which showed that the impacts of such few animals under those specific conditions as so negligible that critical area functions and values were not impacted.

Now, during your recent CAO workshops, Council asked for language that would exempt participants in agricultural youth clubs (e.g., 4H, FFA, etc.) from the CPAL program. Staff suggested codifying Policy PL1-85-004Z as a way to accomplish that, given that most participants in agricultural youth clubs aren’t raising lots of animals. The first draft version read:

**16.16.814 Exemptions.**

The following are exempt from having to obtain a Conservation Farm Plan:

- A. Landowners that do not have critical areas on their property.
- B. Landowners that keep agricultural activities out of the standard critical area buffers.
- C. Landowners that do not exceed 1 animal unit per 3 acres, have at least three grazable acres, and manage their animals to avoid a direct discharge of sediment or fecal matter to surface waters.
  - (i) Indicators of direct discharge can include de-vegetated riparian area, unfenced access to a stream, or animal confinement areas adjacent to surface waters.
  - (ii) There is no multiplier for acreage; this is not an animal per acre threshold. Even if the animals are grazed on 100 acres, they are most often fed, sheltered, and cared for in one central location.
  - (iii) Grazable acres include both pasture and hayland, as described in the Whatcom County Standard Farm Conservation Planning Workbook.

That version didn't meet Council's objective, so staff provided a second version, which read:

**16.16.814 Exemptions.**

The following are exempt from having to obtain a Conservation Farm Plan:

- A. Landowners who do not have critical areas on their property.
- B. Landowners who keep agricultural activities out of the standard critical areas and their buffers.
- C. Landowners who do not exceed a ratio of 1 animal unit per 3 grazable acres and manage their animals to avoid a direct discharge of sediment or fecal matter to surface waters. Indicators of direct discharge can include de-vegetated riparian area, unfenced access to a stream, or animal confinement areas adjacent to surface waters. This is a ratio of animal units to grazable acres and may be used on parcels of any size.
- D. Youth agriculture education programs that promote the use of agriculture best management practices through the use of a checklist developed by the Whatcom County Conservation District in cooperation with Whatcom County.

This version added subsection (d), specifically addressing youth agriculture education programs by basically having them go through what amounts to getting a Type 1 CFP (both would rely on a similar self-completed checklist, with some education provided by the WCD). But additionally, it amended what the policy said, to say that the numbers of animal units to grazable acres *is* a ratio and may be used on parcels of any size, thus expanding the exemption (contrary to the reasons provided in the policy that it should not be a ratio). Council approved this language on 9/26/17.

**Staff Recommendation:** Staff recommends maintaining the existing exemption threshold for obtaining a CFP at 1 animal unit per 3 grazable acres. Nothing in the existing code prevents people from having more than 1 animal unit/3 acres; it's just that beyond that animal density an ongoing agricultural activity within a critical area would have to do a Type 1 farm plan (same as it's always been). If the animal density exceeds 1 au/ac then a Type 2 CFP would be required.

Graphically, this system can be represented as:

Animal Density			
≤ 1 AU/3 GAc	≤ 1 AU/Ac	> 1 AU/Ac	Dairy/CAFO
No CFP Required	Type 1 CFP Required	Type 2 CFP Required	Type 3 CFP (rely on Nutrient Management Plan)

*(Note: This graphic only shows differences based on animal density; other factors differentiate between Types 1 and 2 besides animal density.)*

**Additional Nitrogen Information**

During our discussions on the high concentrations of nitrogen found in the Nooksack-Abbotsford-Sumas aquifer, staff mentioned that one of the solutions might be to participate in the Nooksack-Abbotsford-Sumas Transboundary Nitrogen Study. Sponsored by the Dept. of Biology and College of Science and Engineering, Western Washington University, this is a group of U.S. and Canadian scientists, government agencies, farmers, and other stakeholders to deal with this issue. The approach models similar studies in

numerous places around the world where there are high concentrations of nitrogen in aquifers straddling international boundaries, and thus takes an international approach to address. Their goal is to assess the situation (data gathering) and to work with farmers and policy makers on developing strategies that reduce the amount of nitrogen percolating into the aquifer. Our Assistant Director, Mark Personius, has committed PDS to participating in this program (see attached email), and staff attended their Sept. 14-16, 2017, meeting.

**Staff Recommendation:** No action by Council is necessary; staff just wanted to provide you with this information.