

## 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 pursuant to this chapter. No land use development permit, construction permit, or land division approval required by County ordinance shall be granted until the County decision-maker has determined that the applicant has complied with the applicable provisions of this chapter including the mitigation standards set forth in WCC 16.16.260.
- 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 WCC 2.33.
- C. The requirements of this chapter shall apply concurrently with review conducted under the State Environmental Policy Act (SEPA) (RCW 43.21C), as locally adopted (WCC 16.08). Any conditions required pursuant to this chapter shall be coordinated with the SEPA review and threshold 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 area 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

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:

- A. In cases where other agencies have jurisdiction over critical areas and the Technical

Administrator determines that the permit conditions imposed by such agencies 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, and Fish and Wildlife.

- B. The County shall make findings required by 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.
- C. The County shall notify the applicant in writing when this provision applies.

**16.16.220 Identification and Mapping of Critical Areas**

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. 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 area 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. 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.

**16.16.225 Regulated Activities**

- A. The following activities shall be subject to the 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 non-conforming structure pursuant to WCC 20.83, SMP 23.50.07 and WCC 16.16.275.
  - 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; 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 area 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 SMP 23.90.13.B.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 area 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 include, but not be limited to, clustering where permitted by zoning and as appropriate to protect critical areas. The purposes of clustering shall be to minimize adverse effects of development on critical area functions and values, minimize land clearing, maintain soil stability, preserve native vegetation, maintain hydrology, and mitigate risk to life and property; or
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 16.16.260.E.

**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 forest practices conducted in accordance with the applicable standards of the Washington State Forest Practices Act, WAC 222-16, except where either of the following applies:
  1. The lands have been or are proposed to be converted to a use other than commercial forest product production; or
  2. On lands which have been platted after January 1, 1960, as provided in RCW 76.09.050 and RCW 76.09.240.
- B. Maintenance of existing, lawfully established vegetation, landscaping and gardens within a regulated critical area or its buffer, including but not limited to, cutting, mowing lawns, weeding, removal of noxious and invasive species, harvesting and replanting of garden crops, pruning and planting of non-invasive 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.

- C. Low impact activities such as hiking, canoeing, viewing, nature study, photography, hunting, fishing, education or scientific research.
- D. 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.
- E. 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.
- F. The landowner may cut hazard trees within critical areas and buffers.

**16.16.235 Activities Allowed With Notification**

The following activities as specified are authorized within critical areas and buffers provided that the applicant provides a written notification to the Technical Administrator (see Appendix B). The notification will provide specific information describing the activity and the mitigation to be implemented 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. Notification shall be submitted to the Technical Administrator at least ten (10) full business days prior to initiating work. 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. 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:

- A. Emergency construction or activity necessary for the immediate preservation of the public health, safety and welfare as determined by the Technical Administrator, provided that:
  - 1. An emergency 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 90.58 RCW, WAC 173-27 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 fourteen (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:
1. The applicant shall submit to the Technical Administrator a written description of the maintenance activity with all of the following general information:
    - a. Type, timing, frequency and sequence of maintenance activity to be conducted;
    - b. Type of equipment to be used (hand or mechanical);
    - c. Manner in which the equipment will be used; and
    - d. Best management practices to be used.
  2. 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.
- C. Select vegetation removal or pruning in a manner that minimizes unnecessary disturbance and prevents adverse effects on soil stability, fish or wildlife habitat, water quality, or water quantity provided that no vegetation shall be removed from a wetland, habitat conservation area, coastal or riverine erosion hazard area, or landslide hazard area or their buffers except for lawn, pasture, ornamental vegetation, and similar introduced vegetation.
- Cut vegetation shall be left within the critical area or buffer where practicable 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.
- D. Installation of navigation aids and boundary markers in accordance with applicable state and federal laws.
- E. 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).
- F. 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, and similar or related activities necessary for land use application submittals. Land survey and shallow soil test pits dug in conjunction with wetland delineation studies do not require notification.
- G. Clearing, pruning, and re-vegetation 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 fifteen percent (15%) 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.
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 16.16.230.B.

- H. 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.
- I. Household herbicides, pesticides, and fertilizers may be used in critical areas buffers, but not in critical areas, when applied at times and rates specified on the label in accordance with Washington State Department of Agriculture and other applicable regulations.
- J. Routine maintenance of drainage channels 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 farm conservation plan prepared pursuant to WCC 16.16.290;
  4. The farm operator obtains a Hydraulic Project Approval (HPA), if required from the Washington 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.

- K. 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 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 residences proposed to be located outside of geologically hazardous areas or for other development proposals that would affect critical area buffers, but not the critical areas themselves.
  3. Authority to serve a stop work order pursuant to WCC 16.16.285 upon a person undertaking activity within a critical area or buffer in violation of this chapter.
  4. 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 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 WCC 20.84 and 20.92.
- D. In granting, revising, or extending a permit, the Technical Administrator, or Hearing Examiner, as appropriate, 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 WCC 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 information 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 Area Review Process**

- A. All applicants are encouraged to contact and/or meet with the Technical Administrator prior to submitting an application subject to this chapter. The purpose of this meeting shall be to discuss 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 WCC 2.33.

- 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 probably than not located within 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 the chapter. Written verification shall be included in the project review record for the underlying permit, or issued in accordance with WCC 2.33, and no further critical areas review is required.
  3. **Need for Additional Assessment.** If the proposed activity does not meet the criteria of 16.16.250.C.2 and would more probably 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 area assessment report.
  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. 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 a previous critical areas review and appropriate County permits were issued;
  2. All critical areas on the parcel have been identified and delineated and the effects of the proposed development activity have been thoroughly considered in accordance with the regulations in effect at the time;
  3. The activity is in compliance with all permit conditions including mitigating measures, as applicable, that were imposed as part of the prior review and there are no outstanding violations of conditions that were imposed as part of the previous review;
  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.

**16.16.255 Critical Areas Assessment Reports**

- A. When the Technical Administrator determines a 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. A qualified professional, as defined by this chapter, shall prepare the report 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 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. 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 (5) years. Future land use applications 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, 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.
- G. 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 that the County may waive this requirement for single-family developments. Applicants are encouraged to coordinate with the Technical Administrator regarding electronic submittal guidelines. This requirement shall not be construed as a requirement to use specific computer software.
- 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, draining, creating impervious surface, managing storm water, releasing hazardous materials, other alterations;
  - 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 the other applicable articles of this chapter;
  - 5. The dates, names, 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 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, irrigation, and other site treatments associated with the development activities.
  - b. Specific information on construction of the proposed mitigation activity including timing, sequence, equipment needs, and best management practices.
  - 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.
  - 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 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, and any corrective measures to be taken if monitoring or evaluation indicates that project performance standards are not being met.
  - i. Plan sheets showing the edge of the critical area and buffer area. The affected area 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 (5) 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 (3) years for minor mitigation projects involving critical area or buffer re-vegetation 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 one hundred and twenty-five percent (125%) 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 (5) 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 thirty (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 guarantees 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. Alternative Mitigation Approaches and Watershed-based Management Plans**

- 1. The County shall facilitate review and/or approval of an alternative mitigation plan for a major development as defined by this chapter, a Planned Unit Development pursuant to WCC 20.85, and/or a development agreement pursuant to RCW 36.70B.170 - .210. The mitigation 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:
  - a. The proponent(s) demonstrate the organizational and fiscal capability to carry out the purpose and intent of the plan;
  - b. The proponent(s) demonstrate that long-term management, maintenance, and monitoring will be adequately funded and effectively implemented;
  - c. There is a clear likelihood for success of the proposed plan based on supporting scientific information and demonstrated experience in implementing similar plans;
  - d. 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;
  - e. The plan is consistent with the general purpose and intent of this chapter and the Comprehensive Plan;
  - f. 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
  - g. 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.

2. 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:
  - a. The proponent(s) demonstrate the organizational and fiscal capability to carry out the purpose and intent of the plan;
  - b. The proponent(s) demonstrate that long-term management, maintenance, and monitoring of the watershed will be adequately funded and effectively implemented;
  - c. There is a clear likelihood for success of the proposed plan based on demonstrated experience in implementing similar plans or supporting scientific information;
  - d. 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;
  - e. The plan is consistent with an approved watershed plan prepared pursuant to RCW 90.82 (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 RCW 90.82;
  - f. 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
  - g. 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.
3. A watershed-based management plan and/or an alternative mitigation plan 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 as per County Code. The process for approval shall be as follows:
  - a. 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.

- b. 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 WCC 2.33 prior to final approval/denial of permission of the plan to substitute for the requirements and standards of this chapter.
- c. 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.
- d. Watershed-based management plans approved by the Whatcom County Council shall be adopted by ordinance and appended to this chapter.
- e. The designated decision maker shall not approve watershed-based management plans that conflict with RCW 90.82.

**F. Mitigation Banking**

- 1. 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:
  - a. 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.
  - b. The bank shall be established in accordance with the Washington State Draft Mitigation Banking Rule WAC 173-700 or as revised, and RCW 90.84 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.
  - c. 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 RCW 90.82, a Salmonid Recovery Plan or project that has been identified on the Salmon Recovery Board Habitat Project List or by the Washington Department of Fish and Wildlife as essential for fish and wildlife habitat enhancement.

2. Mitigation banks shall require a major project permit in accordance with WCC 20.88 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:
    - i. The ecological goals and objectives of the bank;
    - ii. The rationale for site selection, including a site map and legal description of the prospective bank site;
    - iii. 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 RCW 90.82, and/or the Salmonid Recovery Plan;
    - iv. 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;
    - v. Conceptual site design;
    - vi. Description of the proposed protective mechanism such as a conservation easement; and
    - vii. Demonstration of adequate financial resources to plan, implement, maintain, and administer the project.
  - b. 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.
  - c. 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 non-agricultural 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 non-binding. The County Council may require mitigation for the loss of agricultural lands.
  - d. 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 WCC 20.88. 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.

- e. 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 WCC 20.88.
  - f. Following receipt of the recommendation, the County Council shall proceed with review in accordance with the procedures outlined in WCC 20.88. The County Council shall seek a final recommendation from the Agricultural Advisory Committee if the proposal involves conversion of agricultural land.
  - g. The bank sponsor shall be responsible for the cost of any third-party review.
3. 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(s), 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.

### **16.16.265 Critical Area Protective Measures**

#### **A. Signage**

The Technical Administrator as a condition of permit approval may require that the outer boundary of a critical area or buffer be identified with signs or markers 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 two hundred (200) feet along the critical area boundary unless the Technical Administrator determines that less frequent spacing is adequate considering the size and location of the site (see also Appendix C).

#### **B. Notice on Title**

The owner of any property containing a 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 the general 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.

**C. Tracts**

Prior to final approval of any 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;
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 ten (10) feet from the edge of 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;
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.

**16.16.270 Reasonable Use and Variances**

Permit applicants 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. 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 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 non-conforming 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 the effective date of 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 ground water 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. There will be no damage to nearby public or private property and no threat to the health or safety of people on or off the site;
  - h. 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 this chapter; and
  - i. The project includes mitigation for unavoidable critical area and buffer impacts in accordance with the mitigation requirements of this chapter.

**B. Variance Standards**

In cases where the reasonable use criteria of subsection A do not apply, or for 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 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.

**C. Reasonable Use and Variance Procedures**

1. Procedural requirements for variances and reasonable use permit applications shall be as follows:
  - a. Variance and reasonable use permit applications shall be subject to an open record public hearing provided that reasonable use permit applications for single-family residences proposed to be located outside of geologically hazardous areas or 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 WCC 2.33 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. The Hearing Examiner will render a decision pursuant to Chapter WCC 20.92.
  - e. Any party of record may appeal the Hearing Examiner decision pursuant to WCC 20.92.

- 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 or 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 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.

**16.16.275 Non-conforming Uses/Buildings**

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

- A. The lawful use of any building, structure, land, or premises existing on the effective date of adoption or amendment of this chapter or authorized under a permit or approval issued, or otherwise vested, prior to the effective date of adoption or amendment of this chapter may be continued, subject to the provisions for a non-conforming structure in WCC 20.83, provided that agricultural activities shall conform to section WCC 16.16.290. If a non-agricultural non-conforming use is intentionally abandoned for a period of 12 months or more, then any future use of the non-conforming building, land or premises shall be consistent with the provisions of this chapter.
- B. Expansion, alteration, and/or intensification of a non-conforming use, building or structure, excluding normal maintenance is prohibited if 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.
- C. Non-conforming 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 non-conformity, except as provided for in B above.
- D. Non-conforming uses in shoreline areas shall be governed by the shoreline management provisions of WCC Title 23.
- E. When a development permit is sought for a parcel containing a non-conforming building or structure that has been intentionally abandoned for a period of 12 months or more, the Technical Administrator may require removal of the non-conforming 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 WCC 2.33 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 non-significance 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 to Superior Court is 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

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constitute a separate offense.

- B. The penalty provided in subsection A 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 the Hearing Examiner if the aggrieved party files a written appeal therewith of said decision within 10 calendar days of its issuance.
- D. If work activity has occurred on a site in violation of this chapter, prompt corrective action, restoration or mitigation of the site will be required when appropriate. If this provision is not complied with, the County may restore or mitigate the site and charge the responsible person 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. In the event any person violates any of the provisions of this chapter, the County may issue a correction notice to be delivered to the owner or operator, or to be conspicuously posted at the site. In a non-emergency 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 administrative 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 predeprivation 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. 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. 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.
- H. 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.

#### **16.16.290 Conservation Program on Agriculture Lands (CPAL)**

Ongoing agriculture activities shall be permitted within critical areas, and/or their buffers in accordance with the standards of this chapter or pursuant to an approved conservation program

established by this section. This program shall be subject to continued monitoring and adaptive management to ensure that it meets the purpose and intent of this chapter:

- A. Agricultural activities that qualify for coverage under this section include:
  - 1. Low-impact farm or livestock operation where critical areas are protected against the potential negative impacts of agricultural activities through the implementation of an approved standard farm conservation plan prepared in accordance with Appendix A - Section 1; or
  - 2. Moderate or high-impact farm or livestock operation where critical areas are protected against the potential negative impacts of agricultural activities through the implementation of an approved custom farm conservation plan prepared in accordance with Appendix A - Section 2.
  
- B. The following additional requirements shall apply:
  - 1. A farm conservation plan shall not authorize filling, draining, grading or clearing activities within critical areas or buffers, except on existing agricultural land where such activities are an essential part of the ongoing agricultural use and do not expand the boundaries of the existing agricultural use provided that impacts are mitigated in accordance with an approved farm conservation plan.
  - 2. The farm conservation plan shall not authorize construction of structures. New structures shall be constructed in compliance with the applicable provisions of this chapter and the landowner shall ensure that all of the following are met:
    - a. Siting of structures shall not result in surface or ground water contamination.
    - b. Dust, odor and noise concerns attendant to use of the improvement shall be mitigated.
    - c. Impermeable surfaces such as building roofs, roads, and yards shall not change the flow, volume and/or direction of runoff, or cause erosion or downstream flooding.
  
- C. Farm conservation plans shall be subject to County review, approval, monitoring, adaptive management, and enforcement in accordance with the following:
  - 1. The Technical Administrator shall review and approve the farm conservation plan. The following entities may provide technical assistance and recommendations regarding a farm conservation plan:
    - a. The Whatcom Conservation District, or
    - b. A Watershed Improvement District for a farm or ranch that is within its boundaries, or
    - c. A qualified Planning Advisor as defined by this chapter.

2. The Technical Administrator and/or the farm operator shall monitor plan implementation and compliance. The monitoring may include periodic site inspections, self-assessment by the farm operator, or other appropriate actions. Prior to carrying out a site inspection, the Technical Administrator shall provide reasonable notice to the owner or manager of the property as to the purpose or need for the entry.
3. Where the Planning Advisor has reason to believe that there is an imminent threat to public health or significant pollution with major consequences occurring as a result of the agricultural operations, a Planning Advisor will advise the agricultural operator of his or her concerns in writing. While the Planning Advisor may provide suggestions for resolving the issue, the responsibility for compliance and resolution of issues rests solely with the farm operator. If compliance issues are not resolved, the Planning Advisor may report such situations to the Technical Administrator for subsequent action and enforcement in accordance with WCC 16.16.285.
4. Agricultural operations shall cease to be in compliance with this section when the Technical Administrator determines that any of the following have occurred:
  - a. A farm or ranch operator fails to properly and fully implement and maintain their farm conservation plan.
  - b. When implementation of the farm conservation plan fails to protect critical areas. If so, a new or revised conservation plan shall be required to protect the values and functions of critical areas at the benchmark condition.
  - c. When substantial changes in the agricultural activities of the farm or livestock operation have occurred that render the current farm conservation plan ineffective. In such cases a new or revised conservation plan will be required to meet the purpose and intent of this section.
  - d. When a new or revised farm conservation plan is required pursuant to either (b) or (c) above, the Technical Administrator has so advised the owner in writing, and a reasonable amount of time has passed without significant progress being made to develop said plan.

Refusal or inability to provide a new plan within a reasonable period of time shall be sufficient grounds to revoke the approved conservation plan and require compliance with the standard provisions of this ordinance.

- e. When an owner or manager denies the Technical Administrator reasonable access to the property for technical assistance, monitoring, or compliance purposes, then the Technical Administrator shall document such refusal of access and notify the owner of his/her findings. The owner shall be given an opportunity to respond in writing to the findings of the Technical Administrator, propose a prompt alternative access schedule, and to state any other issues that need to be addressed.

Refusal or inability to comply with an approved farm conservation plan within a reasonable period of time shall be sufficient grounds to revoke said plan and require compliance with the standard provisions of this ordinance.

5. Conservation plans prepared pursuant to this section will not be open to public inspection unless required by law, provided that the County will collect summary information related to the general location of a farming enterprise, the nature of the farming activity, and the specific best management practices to be implemented during the conservation plan review process. The summary information shall be provided by the farm operator or his/her designee and shall be used to document the basis for the County's approval of the plan. Plans shall also be subject to disclosure if required by a court of competent jurisdiction. Upon request, the County may provide a sample conservation plan, exclusive of site- or property-specific information, to give general guidance on the development of a conservation plan.

#### **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 RCW 84.34.
- 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 qualified 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) above. 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 prohibitions 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.