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66014-4

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No. 66014-4-I

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

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**LYLE AND SUE RADER,  
Appellants,**

v.

**WHATCOM COUNTY, WASHINGTON,  
Respondent.**

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**BRIEF OF RESPONDENT**

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**A. ASSIGNMENT OF ERROR**

There is no error for this Court of Appeal to correct. The Superior Court properly held that preexisting agricultural uses are not exempt from critical areas regulation.

**B. ISSUE**

**Question:** Are preexisting agricultural uses exempt from critical areas regulation?

**Brief Answer:** No. This question was settled in *Clallam County v. WWGMHB*, 130 Wash.App 127 (2005).

**C. STATEMENT OF THE CASE**

**1. Procedural Summary**

Whatcom County Planning and Development Services (PDS) made an administrative finding via an “Order to Correct” that the Raders had performed clearing and grading activity in a regulated wetland without the required County review or approval. CP 176. The County’s finding was upheld by the Whatcom County Hearing Examiner, CP 180, the Whatcom County Council, CP 116-117, 376, and the Superior Court. CP 10-12.

The Raders allege that those judicial and quasi-judicial entities all erred, and assert that these wetlands cannot be regulated by the County. Rader brief at 4, 14.

## 2. Summary of the Facts

Rader Farms is a large berry growing operation in Whatcom County, which was farming upwards of 700 acres of berries in 2005 and purchased another 250+ acre farm in March of that year. CP 297, 358. The subject site within that farm was approximately 10 acres of Category I forested wetlands (highest quality). CP 177.<sup>1</sup>

After the Raders purchased the property, they cut, cleared, and graded the ten-acre forested site, removing all trees and eliminating the wetland. CP 177. Access roads were developed and drainage ditches were excavated and/or moved. *Id.* Some drainage work occurred in waters of the state associated with Pangborn Lake. *Id.*

The Raders were then cited for altering the “critical area” (forested wetland) without review or approval. CP 176.

The Raders claimed that prior access to the area by cattle constituted prior agriculture, and that clearing to plant blueberries constituted “ongoing agriculture” that was not subject to any regulation.

Before the Hearing Examiner, George Boggs, the overseer of the County program regulating ongoing agriculture in critical areas (WCC

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<sup>1</sup> The Raders repeatedly use the word “pasture” to characterize this forested wetland, because cattle previously had access to it. However, the Hearing Examiner found that, under a previous owner, cattle did “minimal grazing” among the trees, the wetland was “marginal” for pasture purposes, and the agricultural activity was “limited.” *Id.* The site was not open field. *Id.*

16.16.290 - Conservation Program on Agricultural Lands), explained that:  
“Everyone engaging in agricultural activities within the buffer or the critical area has to comply with the Critical Area Ordinance.” CP 327.<sup>2</sup>  
“The alternative presented in the CPAL program...you have the opportunity to perhaps relax those standard specified buffers through the adoption of a farm plan.” *Id.*

The Raders did not seek review or approval under the Critical Areas Ordinance prior to clearing, nor did they submit a farm plan, and neither the Hearing Examiner, County Council, nor Superior Court found that the Raders had done so. CP 177, 375-376, 10-12.

The remaining facts found by the Hearing Examiner are adopted herein by reference. CP 173-178.

## **D. ARGUMENT**

### **1. SCOPE OF REVIEW**

Per RCW 36.70C.120, factual issues are confined to the record created by the quasi-judicial body that made the factual determinations. These determinations were made in this case by the Hearing Examiner and adopted by the County Council. CP 173, 375-376.

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<sup>2</sup> Consistent with state regulation of wetlands in agricultural areas, John Gillies, a Resource Conservationist for the Natural Resources Conservation Service of the U.S. Department of Agriculture, indicated that under a USDA program, a change from marginal pasture to blueberry crops would require a wetland inventory. CP 177.

## 2. STANDARD OF REVIEW

### BURDEN

The burden here is on the Raders. The Land Use Petition Act, RCW 36.70C.130, provides relief only if, “the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met.” *Schofield v. Spokane County*, 96 Wash.App. 581, 586 (1999). In this case, the Raders have raised issues under subsections (b) and (d).

- (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
- (d) The land use decision is a clearly erroneous application of the law to the facts.

RCW 36.70C.130(1). The standard of review under these subsections is as follows:

Issues raised under subsection (b) are questions of law, reviewed de novo. *City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 136 Wash.2d 38, 46, (1998)... The clearly erroneous test for (d) is whether the court is “left with the definite and firm conviction that a mistake has been committed.” *Anderson v. Pierce County*,

86 Wash.App. 290, 302, (1997). Our review is deferential.

We view the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact finding authority. *Davidson v. Kitsap County*, 86 Wash.App. 673, 680, 937 P.2d 1309 (1997).

*Schofield* at 586-587. Thus, all inferences in this case are viewed in the light most favorable to the County, as it prevailed before the highest forum exercising fact-finding authority. *Id.* at 588.<sup>3</sup>

Additionally, deference is given to the Hearing Examiner's/County Council's expertise in the area of land use. "Deference is given to the Board's expertise..." *Id.* at 587, 588.

### 3. STATE LEGISLATIVE INTENT

The Washington legislature and courts require counties to regulate ongoing agriculture when it occurs in a critical area. The case of *Clallam County v. Western Washington Growth Management Hearings Bd.*, 130 Wash.App. 127, 121 P.3d 764 (2005), is directly on point. In *Clallam Co.*, the court held that a County could not exempt ongoing agricultural uses from GMA regulation.

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<sup>3</sup> The Whatcom County Council finds facts under WCC 20.92.650, just as the Council in *Schofield* was required to make findings under RCW 58.17.110(2). The Council adopted the Hearing Examiner's findings. CP 375-376.

We conclude that the plain language of chapter 36.70A demonstrates the legislature's intent that GMA counties and cities exercise some measure of control over preexisting uses in critical areas. Reading a broad exemption into critical areas regulation for preexisting uses would frustrate, not further, the legislature's intent.

*Clallam County v. Western Washington Growth Management Hearings Bd.* at 137.

#### 4. LOCAL CRITICAL AREAS REGULATION

The Raders' mature forested wetland site was subject to regulation by multiple agencies, including Whatcom County.<sup>4</sup> At issue in this appeal is Whatcom County's regulation of critical areas under Whatcom County Code (WCC) chapter 16.16, the Critical Areas Ordinance (CAO).

The purpose of the CAO is to protect critical areas while allowing for appropriate use. 16.16.100(A). To protect critical areas, the chapter

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<sup>4</sup> Other agencies include the Department of Ecology, the Department of Natural Resources, the Washington Department of Fish and Wildlife, the Corps of Engineers, and the Environmental Protection Agency. Required permitting for the tree cutting, clearing, grading, road construction, and drainage ditch excavation activities include: DNR Forest Practices Act, WDFW Hydraulic Project Approval, County Land Disturbance, COE federal Clean Water Act Section 404, DOE federal Clean Water Act Sections 401 and 404, and Hydraulic Project Approval from WDFW – for ditch excavation.

regulates development to minimize critical area alterations—

16.16.100(B).

Critical areas activities are regulated under WCC 16.16.225.

Clearing and grading are the first explicitly listed activities subject to the regulations of the Critical Areas Ordinance.<sup>5 6</sup>

## 5. CRITICAL AREAS VIOLATIONS

Alteration of a critical area is prohibited except when all feasible measures to avoid and minimize impacts have been employed and alteration is essential to an activity allowed by WCC 16.16. WCC 16.16.225(B). Even if no permit is required, “Any proposed critical area alteration” must still be authorized and comply with regulations. WCC 16.16.205(B)(emphasis added).

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<sup>5</sup> ***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. (emphasis added)

<sup>6</sup> Clearing is also regulated under WCC 20.80.730, Land Clearing. Per WCC 20.80.731, the purpose of the Land Clearing regulations is:

“...to avoid or minimize impacts of clearing activity to adjacent and downstream public or private property and to protect receiving water bodies. The regulations contained in this section implement this goal by providing a reasonable standard for clearing land in Whatcom County. It is also the purpose of this section to establish a county review process for larger clearing projects to ensure these regulations are met.”

It is undisputed that the Raders did not seek critical areas review by the County before performing clearing and grading work. CP 176-180. No measures to avoid and minimize impacts of clearing and grading were reviewed or approved prior to the activity.

6. ONGOING AGRICULTURE IN CRITICAL AREAS IS REGULATED  
UNDER THE “CPAL” PROGRAM

“Under the GMA, counties must balance protecting the environment (including water quality) and maintaining natural resource industries including agriculture. *See* RCW 36.70A.020(8), (10).” *Clallam County* at 138. Thus, Whatcom County provides a special program for “ongoing agricultural” in critical areas when farmers wish to avoid permitting in accordance with the more stringent standards of the full Critical Areas Ordinance, Chapter WCC 16.16.

“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.”

WCC 16.16.290 (CPAL). *See also* the testimony of Goerge Boggs. CP 326-328.

Thus, “ongoing agriculture” could be permitted in critical areas pursuant to an approved conservation program for the current operation, which must be established under WCC 16.16.290 (CPAL). However, this CPAL program requires County review and approval.

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

*Id.*

The Raders did not seek review of their work in a critical area in accordance with the more restrictive standards of the Critical Areas Ordinance generally. Nor did the Raders seek review or approval via a conservation program under WCC 16.16.290 (CPAL).<sup>7</sup> The Raders sought no review.

The Raders’ position is that no review or approval is required for clearing and grading in a critical area for ongoing agriculture. In essence, they claim there is no regulation of critical areas for ongoing agriculture.

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<sup>7</sup> Petitioner submitted a “protection plan” post-clearing for their new use of the illegally cleared and graded subject site. Petitioner’s consultants did not evaluate any of the clearing and grading activity at issue or the functions of the critical area prior to the clearing and grading. This “protection plan” is not a conservation plan. Further, this plan was not reviewed and/or approved by the County prior to the clearing and grading (or afterward). Petitioner cannot, and does not, “qualify” for the CPAL program retroactively without obtaining a County approved conservation plan.

This is incorrect under the Clallam case, RCW 36.70A, and a plain reading of WCC 16.16.290.<sup>8</sup>

#### 7. CUTTING TREES IS NOT “ONGOING AGRICULTURE”

Note that cutting trees is not considered an ongoing agricultural activity.

The 10 acres at issue here previously supported timber, which meets the definition of forest land under WCC 20.97.157.<sup>9</sup>

“Forest land” means all land which is capable of supporting a merchantable stand of timber and is not being actively used for a use which is incompatible with timber growing.

WCC 20.97.157 (emphasis added).

The alleged use of the acreage was for cattle forage and shelter, which was not incompatible with timber growing. CP 177. Thus, this is forest land according to the definition.

Cutting and clearing trees falls under forest practices.<sup>10</sup>

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<sup>8</sup> Again, *see* testimony of CPAL overseer, Conservation District Manager George Boggs, CP 327.

<sup>9</sup> In fact, a permit for forest practices was issued previously. This permit expired in 2006, prior to the clearing by Petitioner, who then cleared without such a permit. Petitioner was also cited under WCC Chapter 20 for illegal clearing in violation of forest practices.

<sup>10</sup> Per WCC 20.97.158:

“Forest practice” means any activity conducted on or directly pertaining to forest land and related to growing, harvesting or processing timber (Chapter 222-16 WAC) including, but not limited to: (1) road and trail construction; (2) fertilization; (3)

Ongoing agriculture is defined in WCC 16.16.800, and it explicitly excludes forest practices (cutting and clearing trees) as ongoing agriculture.

“Ongoing agriculture” means those activities.... Forest practices are not included in this definition.

WCC 16.16.800 (emphasis added).

In addition to violation via critical areas alteration, tree cutting on forest land where agriculture previously was not incompatible with timber growing is explicitly not included in “ongoing agriculture.”

#### 8. ALLEGED PRIOR AGRICULTURAL ACTIVITY - CATTLE

Dairy cattle had previously been seen foraging on the subject site. Cattle operations are an agricultural activity. However, cutting all of the trees, clearing the site, and grading the land for conversion to berry farming is not an ongoing cattle operation. The impacts of completely clearing a forested wetland for planting are quite different than those resulting from having cattle walk through a forested wetland or feed upon scrub grasses between trees. In fact, clearing is incompatible with timber growing. Moreover, there is no evidence that any previous CPAL plan

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prevention and suppression of diseases and insects; or other activities which qualify as a use or development subject to the Forest Practices Act.

allowed cutting, clearing, and grading of the forested wetland for either cattle operations or conversion to berry farming.<sup>11</sup>

## 9. RADER ARGUMENTS

### **Regulatory scheme.**

The Raders claim that regulation of critical areas on farmland conflicts with several state statutes, identified below. Rader brief at 11-12.

### **79A.15.130**

The Raders claim the establishment of the “Farmlands preservation account” under RCW 79A.15.130 conflicts with regulation of critical areas on agricultural lands. It does not. Instead, the statute establishes an account to help preserve farmlands and the ecological functions on those lands.

(2)(a) Moneys appropriated for this chapter to the farmlands preservation account may be distributed for (i) the fee simple or less than fee simple acquisition of farmlands; (ii) the enhancement or restoration of ecological functions on those properties; or (iii) both.

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<sup>11</sup> Indeed, the prior cattle farm plan cited by the Raders recognized that the “wooded site” should remain as a filter area for ground water—ie. its natural ecological function. Rader brief at 5.

The establishment of this account certainly does not prohibit regulation of critical areas (such as wetlands) on agricultural lands. To the contrary, it endorses restoration of ecological functions as one of its goals.

**RCW 90.58.065**

RCW 90.58.065 is a Shoreline Management Act provision. It pertains only to promulgation of shoreline plans. The Critical Areas chapter and codes sections at issue in our case are not in the Shoreline chapter. The cited shorelines statute is not applicable here.

**RCW 7.48.310**

This section of state law defines agricultural activities. It does not prohibit regulation of critical areas on farmland. Note that agricultural activities are defined separately from, and do not include, tree cutting under forest practices. RCW 7.48.310(1), (5).

**RCW 7.48.315**

This is a damages statute that does not prohibit regulation of critical areas on farmland. It specifically does not apply to state and local agencies. RCW 7.48.315(5) (“A farmer may not recover...from a state or local agency...”).

**RCW 36.70A.560**

This statute cited by the Raders pertains to legislative limitations on critical areas ordinance amendments after May 1, 2007. The Raders do

not allege that the Critical Areas Ordinance applicable here was amended after 2007 or that this limitation applies to our case. This limitation is inapplicable.

**WCC 16.16.100**

The Raders cite the purpose and intent section of Whatcom County's critical areas ordinance to support their argument that agriculture is somehow exempt from critical areas regulation. Rader brief at 12. However, the stated intent of this section is, first and foremost, the preservation of critical areas. Indeed, even the agriculture provision referenced in subsection B(9), and quoted by the Raders, is subject to the introductory clause which states:

B. By regulating development and minimizing critical area alterations, this chapter seeks to:

...

(emphasis added). The intent clearly states that regulation by this chapter is an effort to balance protection of critical areas and agriculture. Nowhere does this intent statement indicate that regulation of critical areas is prohibited.

**Plain language of local code.**

*Review is required.*

The Raders argue that they were not subject to regulation because “planting blueberries in a cow pasture has no additional adverse effect on a wetland.” Rader brief, page 9. In essence, the Raders claim that, without any review, they somehow met the extensive standards required for working within critical areas.

First, the framing of the issue is misleading. The Raders were cited for clearing and grading a forested wetland, not for planting blueberries in an open pasture.

Second, no review was ever undertaken to determine whether reasonable measures were taken, adverse affects were avoided, or that alteration was minimized. Indeed, no court has found that any standards of the critical areas ordinance were analyzed or met. Without any review or analysis, conformance with the standards is impossible to find. It is incredible to claim that work within critical areas in accordance with the standards does not require any review of the work, or any application of the standards.

*Limited vegetation removal allowed only with permission.*

Alteration of critical areas is generally prohibited. WCC 16.16.225(B). However, under the very limited exceptions of WCC 16.16.235, the Critical Areas Ordinance permits certain enumerated

activities within critical areas, including the removal of some vegetation. However, there are stringent requirements for such removal, including ten days' notice to the County with a specific description of the activity, minimization of adverse impacts, and restoration. WCC 16.16.235.

The Raders note that "select vegetation removal" is allowed under subsection C, presumably in an effort to justify removal of all trees and grading of the entire wetland. However, the Raders fail to quote the remainder of subsection C, which goes on to say, "provided, that no vegetation shall be removed from a wetland..." The Raders did not provide notice, did not describe their activity prior to cutting and clearing, and removed vegetation from a wetland exactly in violation of this section.

Additionally, the Raders argue backward that because clearing and grading are absent from the list, they are somehow allowed. To the contrary, work in critical areas that is not included in this list of exceptions is prohibited under WCC 16.16.225(B).

**Settled area of law.**

The Raders also argue that "[n]o court has decided whether the GMA allows reasonable regulation of preexisting agricultural uses located in designated critical areas." Raders' brief at 12.

To the contrary, this question is settled by Washington case law. As mentioned above, the Court of Appeals addressed the issue of whether

critical areas may be regulated within preexisting agriculture in *Clallam County v. Western Washington Growth Management Hearings Board*, 130 Wash.App. 127 (2005).

In conclusion, we hold that the Board correctly ruled that preexisting agricultural uses are not exempt from all critical areas regulation.

*Clallam* at 140.

The *Clallam* case analyzes exactly the issue we address here. The *Clallam* Court did *not* find that Counties were prohibited from regulating critical areas within preexisting agriculture. Instead, Counties are required to balance any “exemption with corresponding restrictions that take into account the specific harms threatened....”<sup>12</sup> *Id.*

In short, the Raders’ assertion that ongoing agriculture allows unregulated alteration of a critical area is exactly contrary to clear County Code,<sup>13</sup> Washington statutes, and case law, and is without merit.

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<sup>12</sup> In Clallam, the Court found that the Growth Management Hearings Board failed to allow the County to balance preservation of ag land and preservation of the environment in striking down a County program that expanded certain exemptions for ag land. The Court explicitly required the County to consider amelioration of harm to the environment. Clallam at 140.

<sup>13</sup> 16.16.205 (B) - *Authorizations required.*

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

## E. CONCLUSION

Clearing and grading in a Category I wetland is regulated under WCC 16.16.205 and/or 16.16.225. Washington case law is in accord.

Petitioners do not have a conservation plan for ongoing agriculture approved under the WCC 16.16.290 CPAL program. Additionally, the act of cutting trees on timber land does not qualify as ongoing agriculture.

The cutting of trees, clearing, and grading by Petitioners without permits or an approved CPAL program violated 16.16.225.

Taking the facts in the light most favorable to the County and giving deference to the Council's interpretation of its own administrative program, the Council and Superior Court were correct to uphold the Hearing Examiner and Whatcom County's administrative determination.

### **ATTORNEY'S FEES**

The County requests reasonable attorney's fees and costs. Attorney's fees in land use decision cases are controlled by RCW 4.84.370.

*4.84.370. Appeal of land use decisions--Fees and costs*

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that does not require other county project permits or approvals, such as variances and reasonable use exceptions, must comply with the substantive and procedural requirements of this chapter and the procedural requirements of Chapter 2.33 WCC.

(1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and

(b) The prevailing party on appeal was the

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prevailing party or substantially prevailing party in all prior judicial proceedings.

(2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

This case involves the failure to obtain a development permit for clearing and grading (a denial of permission). The County has had its decision (that regulation is required) upheld in all prior judicial proceedings, as noted above. *See supra*, Procedural Summary, page 1.

The County requests that fees and costs be awarded in an amount to be determined post-decision by way of affidavit and commissioner or clerk determination under RAP 18.1(d).

#### F. RELIEF AND ORDER SOUGHT

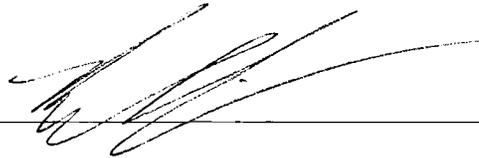
Whatcom County requests the following relief:

1. An order denying all of Plaintiff's claims with prejudice.
2. Denial of any award of costs or fees to the Plaintiff.
3. An award of reasonable costs and attorney's fees in favor of Defendant Whatcom County.

4. Such other relief to Whatcom County as the Court deems just and equitable.

DATED this 31<sup>st</sup> day of March, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Royce Buckingham', is written over a horizontal line.

ROYCE BUCKINGHAM, WSBA #22503

Civil Deputy Prosecuting Attorney

Whatcom County

16.16.800 Definitions.

## Appendices

Appendix A Conservation Program on Agriculture LandsAppendix B Notification ExampleAppendix C Native Growth Protection Easement Sign Installation GuidelinesAppendix D Special Status Fish and Wildlife Species Protected Pursuant to Article 7 of This ChapterAppendix E Locally Important Habitat Designations – Marine Shorelines and Chuckanut Wildlife Corridor

\*Prior legislation: Ords. 97-056 and 2004-050.

**Article 1. Purpose and Intent****16.16.100 Purpose and intent.**

A. The purposes of this chapter are to carry out the goals of the Whatcom County comprehensive plan and the State of Washington Growth Management Act (Chapter 36.70A RCW) and its implementing rules by designating and classifying critical areas, and by protecting the functions and values of critical areas and the ecological processes that sustain them, while allowing for appropriate economically beneficial or productive use of land and property. Critical areas regulated under this chapter include geologically hazardous areas, frequently flooded areas, critical aquifer recharge areas, wetlands, and fish and wildlife habitat conservation areas. This chapter seeks to maintain harmonious relationships between human activity and the natural environment.

B. By regulating development and minimizing critical area alterations, this chapter seeks to:

1. Protect the public from harm due to landslides, earthquakes, erosion, volcanic events, flooding, and other natural hazards.
2. Minimize unnecessary maintenance of public facilities, and costs associated with property damage, emergency rescue relief operations, and environmental degradation.
3. Ensure there are no adverse impacts to the quality and quantity of water resources.
4. Alert appraisers, assessors, real estate agents, owners, potential buyers or lessees, and other members of the public to natural conditions that pose a hazard or otherwise limit development.
5. Protect wetlands, floodplains, critical aquifer recharge areas, and habitat conservation areas by applying the best available science to ensure no net loss of ecological functions and values.
6. Protect species listed as threatened or endangered and their habitats.

7. Protect unique, fragile and/or valuable elements of the environment, including ground and surface waters, wetlands, anadromous fish species, shellfish, and other fish and wildlife and their habitats.
8. Provide county officials with information to approve, condition, or deny project proposals.
9. Protect property rights, while allowing for economic development, including agriculture, and allowing for the development and maintenance of adequate and appropriate public services and essential public facilities.
10. Prevent adverse and cumulative environmental impacts to critical areas and mitigate unavoidable impacts.
11. Coordinate Whatcom County's critical areas protection activities and programs with those of other jurisdictions.
12. Coordinate environmental reviews and permitting of proposals with other departments and agencies to avoid duplication and delay.
13. Allow for reasonable use of property in accordance with the provisions of WCC 16.16.270.
14. Establish critical areas protection standards and procedures that are consistent with state and federal regulations pertaining to critical areas.

C. The goals, policies and purposes set forth in this chapter serve as a basis for exercise of the county's substantive authority under the State Environmental Policy Act (SEPA) and the county's SEPA rules.

D. The county's enactment or enforcement of this chapter shall not be construed for the benefit of any individual person or group of persons other than the general public.

E. Nothing in this chapter is intended to preclude or discourage beneficial actions that protect, restore, and/or maintain critical areas or minimize risks associated with critical areas.

F. Consistent with Whatcom County's high standard of staff conduct, county staff observe all applicable federal and Washington laws regarding

entry onto privately owned property. (Ord. 2005-068 § 1).

## **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. (Ord. 2005-068 § 1).

### **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 Chapter 2.33 WCC.

C. The requirements of this chapter shall apply concurrently with review conducted under the State Environmental Policy Act (SEPA) (Chapter 43.21C RCW), as locally adopted (Chapter 16.08 WCC). 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. (Ord. 2005-068 § 1).

#### **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. (Ord. 2005-068 § 1).

#### **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 Chapter 2.33 WCC 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. (Ord. 2005-068 § 1).

**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 areas designation. Critical area locations and boundaries shown on the county's maps are approximate and do not include buffers that may be associated with critical areas. 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. (Ord. 2005-068 § 1).

**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 nonconforming structure pursuant to WCC 16.16.275, Chapter 20.83 WCC, and WCC 23.50.070.
3. Any other activity for which a county permit is required, excluding permits for interior remodeling.

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

1. Alteration is approved pursuant to the reasonable use or variance provisions of WCC 16.16.270; or
2. Alteration is necessary to accommodate an essential public facility or public utility where no feasible alternative location will accommodate the facility and the facility is located, designed, and constructed to minimize and, where possible, avoid critical areas disturbance to the maximum extent feasible; or
3. Alteration is necessary to accommodate an approved water-oriented use and any associated development/activity and/or the development activities listed in WCC 23.90.130(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 areas disturbance to the maximum extent feasible; or

4. Alteration is part of an essential element of an activity allowed by this chapter and all feasible measures to avoid and minimize impacts have been employed. Such feasible measures shall 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 WCC 16.16.260(E). (Ord. 2009-013 § 2 (Exh. 2); Ord. 2005-068 § 1).

#### **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, Chapter 222-16 WAC, 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 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 noninvasive ornamental vegetation or indigenous native species to maintain the general condition and extent of such areas; provided, that native growth protection areas, mitigation sites, or other areas protected via conservation easements or similar restrictive covenants are not covered by this exception.

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. (Ord. 2009-013 § 2 (Exh. 2); Ord. 2005-068 § 1).

**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 of this chapter). 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 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 Chapter 90.58 RCW, Chapter 173-27 WAC or this chapter, or remove the structure upon abatement of the emergency situation.
3. Within the jurisdiction of the Whatcom County Shoreline Management Program (WCC Title 23), all emergency construction shall be consistent with the policies and procedural requirements of WCC Title 23 and this chapter.
4. The applicant shall make a reasonable attempt to contact the technical administrator prior to activity; provided, that when prior notice is not feasible, notification of the action shall be submitted to the technical administrator as soon as the emergency is addressed and no later than 14 days following such action.

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

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, except that:

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, ground water 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 revegetation of buffer areas, except landslide hazard areas and buffers and riverine and coastal erosion hazard areas and buffers, for view purposes, provided:

1. This allowed activity shall not be conducted more than once every 10 years for any individual residential property.
2. A window or view opening is limited to the minimum necessary for view purposes and shall not exceed 15 percent of buffer length, unless the applicant can demonstrate to the technical administrator's satisfaction that a larger dimension is warranted because of slope or other site considerations. Trees greater than 12 inches in diameter at breast height shall be preserved, but may be shaped, windowed/thinned or pruned.
3. Clearing shall not take place where increased risks or adverse impacts, including cumulative impacts, to critical area functions and values are likely to occur.
4. Low-growing native vegetation shall be retained and/or planted in the view corridor to provide habitat, stabilize the area, and achieve dense growth.
5. This provision does not apply to open space set aside in a subdivision or other approval to which specific conditions are attached that prohibit clearing of vegetation without a written approval or permit.

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

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 area 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 State Department of Fish and Wildlife (WDFW), prior to the maintenance activity; and

5. The farm operator provides a copy of the HPA to the technical administrator as part of the written notification. No other written notification is needed.

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. (Ord. 2005-068 § 1).

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

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 nonemergency situation, such notice may include notice of the intent to issue a stop work order no less than 10 calendar days following the receipt of the correction notice, and provide for an 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 \$500.00 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 \$500.00 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. (Ord. 2009-013 § 2 (Exh. 2); Ord. 2005-068 § 1).

**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 operations 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, of this chapter; or
2. Moderate or high-impact farm or livestock operations 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, of this chapter.

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 has 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 subsection (C)(4)(b) or (c) of this section, 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 chapter.

- 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 chapter.

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. (Ord. 2005-068 § 1).

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

7. All mitigation areas shall be protected and managed to prevent degradation and ensure protection of critical area functions and values into perpetuity. Permanent protection shall be achieved through deed restriction or other protective covenant in accordance with WCC 16.16.265.

8. Mitigation projects involving in-stream work including, but not limited to, installation of large woody debris shall be designed to ensure there are no adverse hydraulic effects on upstream or downstream properties. The county river and flood division shall review any such mitigation projects for compliance with this provision. (Ord. 2005-068 § 1).

#### **Article 8. Definitions\***

\*Code reviser's note: Ord. 2005-068 does not provide a code section number under Article 8. Definitions. The section designation "WCC 16.16.800, Definitions" has been editorially added to preserve the chapter organization.

##### **16.16.800 Definitions.**

"Accessory structure" means a structure that is incidental and subordinate to a primary use. Barns, garages, storage sheds, and similar structures are examples.

"Active alluvial fan" means a portion or all of a fan that has experienced channel changes, erosion, or deposition. Active fans can be identified based on determination by field geomorphic and topographic evidence, and by historical accounts.

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

"Activity" means human activity associated with the use of land or resources.

"Adaptive management" means using scientific methods to evaluate how well regulatory and nonregulatory actions protect the critical area. An adaptive management program is a formal and deliberate scientific approach to taking action and obtaining information in the face of uncertainty. Management policy may be adapted based on a periodic review of new information.

"Adequate water supply" means a water supply that meets requirements specified in the Whatcom County drinking water ordinance (Chapter 24.11 WCC).

"Agricultural activities" means those activities directly pertaining to the production of crops or livestock including, but not limited to: cultivation; harvest; grazing; animal waste storage and disposal; fertilization; the operation and maintenance of farm and stock ponds or drainage ditches, irrigation systems, and canals; and normal

maintenance, repair, or operation of existing serviceable structures, facilities, or improved areas. Activities that bring an area into agricultural use are not agricultural activities.

“Agricultural land” is land primarily devoted to the commercial production of horticultural, viticultural, floricultural, dairy, apiary, or animal products, or of berries, grain, hay, straw, turf, seed, Christmas trees not subject to the excise tax imposed by RCW 84.33.100 through 84.33.140, or livestock, and/or lands that have been designated as capable of producing food and fiber, which have not been developed for urban density housing, business, or other uses incompatible with agricultural activity.

“Alluvial fan” means a fan-shaped deposit of sediment and organic debris formed where a stream flows or has flowed out of a mountainous upland onto a level plain or valley floor because of a sudden change in sediment transport capacity (e.g., significant change in slope or confinement).

“Alluvium” is a general term for clay, silt, sand, gravel, or similar other unconsolidated detrital materials, deposited during comparatively recent geologic time by a stream or other body of running water, as a sorted or semi-sorted sediment in the bed of the stream or on its floodplain or delta.

“Alteration” means any human-induced change in an existing condition of a critical area or its buffer. Alterations include, but are not limited to, grading, filling, channelizing, dredging, clearing (vegetation), draining, construction, compaction, excavation, or any other activity that changes the character of the critical area.

“Anadromous fish” means fish species that spend most of their lifecycle in salt water, but return to freshwater to reproduce.

“Animal unit” means 1,000 pounds of livestock live weight.

“Aquifer” means a geologic formation, group of formations, or part of a formation capable of yielding a significant amount of ground water to wells or springs (Chapter 173-160 WAC).

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

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

“Base flood” is a flood event having a one percent chance of being equaled or exceeded in any given year, also referred to as the 100-year flood. Designations of base flood areas on flood insurance map(s) always include the letters A (zone subject to flooding during a 100-year flood, but less so than V zones) or V (zone subject to the highest flows, wave action, and erosion during a 100-year flood).

“Bedrock” is a general term for rock, typically hard, consolidated geologic material that underlies soil or other unconsolidated, superficial material or is exposed at the surface.

“Best available science” means information from research, inventory, monitoring, surveys, modeling, synthesis, expert opinion, and assessment that is used to designate, protect, or restore critical areas. As defined by WAC 365-195-900 through 365-195-925, best available science is derived from a process that includes peer-reviewed literature, standard methods, logical conclusions and reasonable inferences, quantitative analysis, and documented references to produce reliable information.

“Best management practices” means conservation practices or systems of practices and management measures that:

1. Control soil loss and reduce water quality degradation caused by nutrients, animal waste, toxins, and sediment;
2. Minimize adverse impacts to surface water and ground water flow, circulation patterns, and to the chemical, physical, and biological characteristics of waters, wetlands, and other fish and wildlife habitat;
3. Control plant site runoff, spillage or leaks, sludge or water disposal, or drainage from raw material.

“Buffer (the buffer zone)” means the area adjacent to the outer boundaries of critical areas including wetlands; habitat conservation areas such as streams and marine shorelines; and/or landslide hazard areas that separates and protects critical areas from adverse impacts associated with adjacent land uses.

“Channel migration zone (CMZ)” means the area along a river or stream within which the channel can reasonably be expected to migrate over time as a result of normally occurring processes. It encompasses that area of current and historic lateral stream channel movement that is subject to erosion, bank destabilization, rapid stream incision, and/or channel shifting, as well as adjacent areas that are susceptible to channel erosion. There are three components of the channel migration zone: (1) the historical migration zone (HMZ) – the collective area the channel occupied in the historical record; (2) the avulsion hazard zone (AHZ) – the area not included in the HMZ that is at risk of avulsion over the timeline of the CMZ; and (3) the erosion hazard area (EHA) – the area not included in the HMZ or the AHZ that is at risk of bank erosion from stream flow or mass wasting over the timeline of the CMZ. The channel migration zone may not include the area behind a lawfully constructed flood protection device. Channel migration zones shall be identified in accordance with guidelines established by the Washington State Department of Ecology.

“Clearing” means the removal of vegetation or plant cover by manual, chemical, or mechanical means. Clearing includes, but is not limited to, actions such as cutting, felling, thinning, flooding, killing, poisoning, girdling, uprooting, or burning.

“Commercial fish” means those species of fish that are classified under the Washington State Department of Fish and Wildlife Food Fish Classification as commercial fish (WAC 220-12-010).

“Compensatory mitigation” means a project for the purpose of mitigating, at an equivalent or greater level, unavoidable critical area and buffer impacts that remain after all appropriate and practicable avoidance and minimization measures have been implemented. Compensatory mitigation includes, but is not limited to: wetland creation, restoration, enhancement, and preservation; stream restoration and relocation; rehabilitation; and buffer enhancement.

“Conservation” means the prudent management of rivers, streams, wetlands, wildlife and other environmental resources in order to preserve and protect them. This includes the careful utilization of natural resources in order to prevent depletion or harm to the environment.

“Conservation easement” means a legal agreement that the property owner enters into to restrict uses of the land for purposes of natural resources conservation. The easement is recorded on a property deed, runs with the land, and is legally binding on all present and future owners of the property.

“Contaminant” means any chemical, physical, biological, or radiological substance that does not occur naturally in ground water, air, or soil or that occurs at concentrations greater than those in the natural levels (Chapter 172-200 WAC).

“County” means Whatcom County, Washington.

“Critical aquifer recharge areas” means areas designated by WAC 365-190-080(2) that are determined to have a critical recharging effect on aquifers (i.e., maintain the quality and quantity of water) used for potable water as defined by WAC 365-190-030(2).

Critical Areas. The following areas as required in this chapter shall be regarded as critical areas:

1. Critical aquifer recharge areas;
2. Wetlands;
3. Geologically hazardous areas;
4. Frequently flooded areas;
5. Fish and wildlife habitat conservation areas.

“Critical areas report” means a report prepared by a qualified professional or qualified consultant based on best available science, and the specific methods and standards for technical study required for each applicable critical area. Geotechnical reports and hydrogeological reports are critical area reports specific to geologically hazardous areas and critical aquifer recharge areas, respectively.

“Critical area tract” means land held in private ownership and retained in an open undeveloped condition (native vegetation is preserved) in perpetuity for the protection of critical areas.

“Critical facilities (essential facilities)” means buildings and other structures that are intended to remain operational in the event of extreme environmental loading from flood, wind, snow or earthquakes pursuant to the International Building Code (IBC), 2003 Edition. These include, but are not limited to:

1. Buildings and other structures that represent a substantial hazard to human life in the event of failure including, but not limited to:

- a. Buildings and other structures where more than 300 people congregate in one area;
- b. Buildings and other structures with elementary school, secondary school or day care facilities with an occupant load greater than 250;
- c. Buildings and other structures with an occupant load greater than 500 for colleges or adult education facilities;
- d. Health care facilities with an occupant load of 50 or more resident patients but not having surgery or emergency treatment facilities;
- e. Jails and detention facilities;
- f. Any other occupancy with an occupant load greater than 5,000;
- g. Power-generating stations, water treatment for potable water, wastewater treatment facilities and other public utility facilities not included in subsection 2 of this definition;
- h. Buildings and structures not included in subsection 2 of this definition containing sufficient quantities of toxic or explosive substances to be dangerous to the public if released.

2. Buildings and other structures designed as essential facilities including, but not limited to:

- a. Hospitals and other health care facilities having surgery or emergency treatment facilities;
- b. Fire, rescue and police stations and emergency vehicle garages;
- c. Designated earthquake, hurricane or other emergency shelters;
- d. Designated emergency preparedness, communication, and operation centers and other facilities required for emergency response;

- e. Structures containing highly toxic materials as defined by IBC Section 307 where the quantity of the material exceeds the maximum allowable quantities of IBC Table 307.7(2);
- f. Aviation control towers, air traffic control centers and emergency aircraft hangars;
- g. Buildings and other structures having critical national defense functions;
- h. Water treatment facilities required to maintain water pressure for fire suppression;
- i. Power-generating stations and other public utility facilities required as emergency backup facilities for structures listed above.

“Critical habitat” means habitat areas with which endangered, threatened, sensitive or monitored plant, fish, or wildlife species have a primary association (e.g., feeding, breeding, rearing of young, migrating). Such areas are identified herein with reference to lists, categories, and definitions promulgated by the Washington State Department of Fish and Wildlife as identified in WAC 232-12-011 or 232-12-014; in the Priority Habitat and Species (PHS) Program of the Department of Fish and Wildlife; or by rules and regulations adopted by the U.S. Fish and Wildlife Service, National Marine Fisheries Service, or other agency with jurisdiction for such designations.

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

“Debris torrent” means a violent and rushing mass of water, logs, boulders and other debris.

“Deepwater habitats” means permanently flooded lands lying below the deepwater boundary of wetlands. Deepwater habitats include environments where surface water is permanent and often deep, so that water, rather than air, is the principal medium in which the dominant organisms live. The boundary between wetland and deepwater habitat in the marine and estuarine systems coincides with the elevation of the extreme low water of spring tide; permanently flooded areas are considered deepwater habitats in these systems. The boundary between wetland and deepwater habitat in the riverine and lacustrine systems lies at a depth of two meters (6.6 feet) below low water; however, if emergent vegetation, shrubs, or trees grow beyond this depth at any time, their deepwater edge is the boundary.

“Delineation” means the precise determination of wetland boundaries in the field according to the application of the specific method described in the 1997 Washington State Wetland Delineation Manual and/or the Corps of Engineers Wetlands Delineation Manual, 1987 Edition, as amended.

“Development” means any activity that requires federal, state, or local approval for the use or modification of land or its resources. These activities include, but are not limited to: subdivision and short subdivisions; binding site plans; planned unit developments;

variances; shoreline substantial development; clearing activity; fill and grade work; activity conditionally allowed; building or construction; revocable encroachment permits; and septic approval.

“Drainage ditch” means an artificially created watercourse constructed to drain surface or ground water. Ditches are graded (manmade) channels installed to collect and convey runoff from fields and roadways. Ditches may include irrigation ditches, waste ways, drains, outfalls, operational spillways, channels, storm water runoff facilities or other wholly artificial watercourses, except those that directly result from the modification to a natural watercourse. Ditched channels that support fish are considered to be streams.

“Emergency activities” means those activities which require immediate action within a time too short to allow full compliance with this chapter due to an unanticipated and imminent threat to public health, safety or the environment. Emergency construction does not include development of new permanent protective structures where none previously existed. All emergency construction shall be consistent with the policies of Chapter 90.58 RCW and this chapter. As a general matter, flooding or other seasonal events that can be anticipated and may occur but that are not imminent are not an emergency.

“Emergent wetland” means a wetland with at least 30 percent of the surface area covered by erect, rooted, herbaceous vegetation as the uppermost vegetative strata.

“Enhancement” means actions performed within an existing degraded critical area and/or buffer to intentionally increase or augment one or more functions or values of the existing critical area or buffer. Enhancement actions include, but are not limited to, increasing plant diversity and cover, increasing wildlife habitat and structural complexity (snags, woody debris), installing environmentally compatible erosion controls, or removing nonindigenous plant or animal species.

“Erosion” means a process whereby wind, rain, water and other natural agents mobilize, transport, and deposit soil particles.

“Erosion hazard areas” means lands or areas underlain by soils identified by the U.S. Department of Agriculture Natural Resource Conservation Service (NRCS) as having “severe” or “very severe” erosion hazards and areas subject to impacts from lateral erosion related to moving water such as river channel migration and shoreline retreat.

“Essential public facilities” means those facilities that are typically difficult to site, such as airports, state education facilities, state or regional transportation facilities, state and local correctional facilities, solid waste handling facilities, and inpatient facilities including substance abuse facilities, mental health facilities, and group homes.

“Estuarine wetland” means the zero-gradient sector of a stream where it flows into a standing body of water together with associated natural wetlands; tidal flows reverse flow in the wetland twice daily, determining its upstream limit. It is characterized by low bank channels (distributaries) branching off the main stream to form a broad, near-level delta; bank; bed and delta materials are silt and clay; banks are stable; vegetation

ranges from marsh to forest; and water is usually brackish due to daily mixing and layering of fresh and salt water.

“Exotic” means any species of plants or animals that is not indigenous to the area.

“Farm pond” means an open water depression created from a nonwetland site in connection with agricultural activities.

“Feasible alternative” means an action, such as development, mitigation, or restoration, that meets all of the following conditions: (1) the action can be accomplished with technologies and methods that have been used in the past in similar circumstances, or studies or tests have demonstrated in similar circumstances that such approaches are currently available and likely to achieve the intended results; (2) the action provides a reasonable likelihood of achieving its intended purpose; and (3) the action does not physically preclude achieving the project’s primary intended legal use. Feasibility shall take into account both short- and long-term monetary and nonmonetary costs and benefits.

“Fen” means a mineral-rich wetland formed in peat that has a neutral to alkaline pH. Fens are wholly or partly covered with water and dominated by grass-like plants, grasses, and sedges.

“Filling” means the act of transporting or placing by any manual or mechanical means fill material from, to, or on any soil surface, including temporary stockpiling of fill material.

“Fill material” means any solid or semi-solid material, including rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure that, when placed, changes the grade or elevation of the receiving site.

“Fish and wildlife habitat conservation areas” means areas important for maintaining species in suitable habitats within their natural geographic distribution so that isolated populations are not created.

“Fish habitat” means a complex of physical, chemical, and biological conditions that provide the life-supporting and reproductive needs of a species or life stage of fish. Although the habitat requirements of a species depend on its age and activity, the basic components of fish habitat in rivers, streams, ponds, lakes, estuaries, marine waters, and nearshore areas include, but are not limited to, the following:

1. Clean water and appropriate temperatures for spawning, rearing, and holding;
2. Adequate water depth and velocity for migrating, spawning, rearing, and holding, including off-channel habitat;
3. Abundance of bank and in-stream structures to provide hiding and resting areas and stabilize stream banks and beds;

4. Appropriate substrates for spawning and embryonic development. For stream- and lake-dwelling fishes, substrates range from sands and gravel to rooted vegetation or submerged rocks and logs. Generally, substrates must be relatively stable and free of silts or fine sand;
5. Presence of riparian vegetation as defined in this article. Riparian vegetation creates a transition zone, which provides shade and food sources of aquatic and terrestrial insects for fish;
6. Unimpeded passage (i.e., due to suitable gradient and lack of barriers) for upstream and downstream migrating juveniles and adults.

“Flood” or “flooding” means a general and temporary condition of partial or complete inundation of normally dry land areas from the overflow of inland waters and/or the unusual and rapid accumulation of runoff of surface waters from any source.

“Floodplain” means the total land area adjoining a river, stream, watercourse, or lake subject to inundation by the base flood.

“Floodway” means the channel of a river or other watercourse and the adjacent land area that must be reserved in order to discharge the base flood without cumulatively increasing the surface water elevation more than one foot. Also known as the “zero rise floodway.”

“Forested wetland” means a wetland with at least 30 percent of the surface area covered by woody vegetation greater than 20 feet in height, excluding monotypic stands of red alder or cottonwood that average eight inches in diameter at breast height or less.

“Frequently flooded areas” means lands in the floodplain subject to a one percent or greater chance of flooding in any given year and those lands that provide important flood storage, conveyance and attenuation functions, as determined by the county in accordance with WAC 365-190-080(3). Classifications of frequently flooded areas include, at a minimum, the 100-year floodplain designations of the Federal Emergency Management Agency and the National Flood Insurance Program.

“Function and value” means the beneficial roles served by critical areas and the values people derive from these roles including, but not limited to, water quality protection and enhancement, fish and wildlife habitat, food chain support, flood storage, conveyance and attenuation, ground water recharge and discharge, erosion control, wave attenuation, protection from hazards, providing historical and archaeological resources, noise and visual screening, open space, and recreation. These beneficial roles are not listed in order of priority.

“Function assessment” or “functions and values assessment” means a set of procedures, applied by a qualified consultant, to identify the ecological functions being performed in a wetland or other critical area, usually by determining the presence of certain characteristics, and determining how well the critical area is performing those functions. Function assessments can be qualitative or quantitative and may consider

social values potentially provided by the wetland or other critical area. Function assessment methods must be consistent with best available science.

“Functions” means the processes or attributes provided by areas of the landscape (e.g., wetlands, rivers, streams, and riparian areas) including, but not limited to, habitat diversity and food chain support for fish and wildlife, ground water recharge and discharge, high primary productivity, low flow stream water contribution, sediment stabilization and erosion control, storm and flood water attenuation and flood peak desynchronization, and water quality enhancement through biofiltration and retention of sediments, nutrients, and toxicants. These beneficial roles are not listed in order of priority.

“Game fish” means those species of fish that are classified by the Washington State Department of Wildlife as game fish (WAC 232-12-019).

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

“Gradient” means a degree of inclination, or a rate of ascent or descent, of an inclined part of the earth’s surface with respect to the horizontal; the steepness of a slope. It is expressed as a ratio (vertical to horizontal), a fraction (such as meters/kilometers or feet/miles), a percentage (of horizontal distance), or an angle (in degrees).

“Grading” means any excavating or filling of the earth’s surface or combination thereof.

“Ground water” means all water that exists beneath the land surface or beneath the bed of any stream, lake or reservoir, or other body of surface water within the boundaries of the state, whatever may be the geological formation or structure in which such water stands or flows, percolates or otherwise moves (Chapter 90.44 RCW).

“Ground water management area” means a specific geographic area or subarea designated pursuant to Chapter 173-100 WAC for which a ground water management program is required.

“Ground water management program” means a comprehensive program designed to protect ground water quality, to assure ground water quantity, and to provide for efficient management of water resources while recognizing existing ground water rights and meeting future needs consistent with local and state objectives, policies and authorities within a designated ground water management area or subarea and developed pursuant to Chapter 173-100 WAC.

“Growing season” means the portion of the year when soil temperatures are above biologic zero (41 degrees Fahrenheit).

“Growth Management Act” means Chapters 36.70A and 36.70B RCW, as amended.

“Hazard tree” means any tree that is susceptible to immediate fall due to its condition (damaged, diseased, or dead) or other factors, and which because of its location is at

risk of damaging permanent physical improvements to property or causing personal injury.

“Hazardous substance” means any liquid, solid, gas, or sludge, including any material, substance, product, commodity, or waste, regardless of quantity, that exhibits any of the physical, chemical or biological properties described in WAC 173-303-090 or 173-303-100.

“High intensity land use” means land use that includes the following uses or activities: commercial, urban, industrial, institutional, retail sales, residential (more than one unit/acre), high-intensity new agriculture (dairies, nurseries, greenhouses, raising and harvesting crops requiring annual tilling, raising and maintaining animals), high-intensity recreation (golf courses, ball fields), hobby farms.

“Hydraulic project approval (HPA)” means a permit issued by the State Department of Fish and Wildlife for modifications to waters of the state in accordance with Chapter 75.20 RCW.

“Hydric soil” means a soil that is saturated, flooded or ponded long enough during the growing season to develop anaerobic conditions in the upper part. The presence of hydric soil shall be determined following the methods described in the Washington State Wetland Identification and Delineation Manual (RCW 36.70A.175).

“Hydrologic soil groups” means soils grouped according to their runoff-producing characteristics under similar storm and cover conditions. Properties that influence runoff potential are depth to seasonally high water table, intake rate and permeability after prolonged wetting, and depth to a low permeable layer. Hydrologic soil groups are normally used in equations that estimate runoff from rainfall, but can be used to estimate a rate of water transmission in soil. There are four hydrologic soil groups:

1. Low runoff potential and a high rate of infiltration potential;
2. Moderate infiltration potential and a moderate rate of runoff potential;
3. Slow infiltration potential and a moderate to high rate of runoff potential; and
4. High runoff potential and very slow infiltration and water transmission rates.

“Hydrophytic vegetation” means macrophytic plant life growing in water or on a substrate that is at least periodically deficient in oxygen as a result of excessive water content.

“Hyporheic zone” means the saturated zone located beneath and adjacent to streams that contain some proportion of surface water from the surface channel. The hyporheic zone serves as a filter for nutrients, as a site for macroinvertebrate production important in fish nutrition and provides other functions related to maintaining water quality.

“Impervious surface” means a hard surface area that either prevents or retards the entry of water into the soil mantle as under natural conditions prior to development or

that causes water to run off the surface in greater quantities or at an increased rate of flow compared to natural conditions prior to development. Common impervious surfaces may include, but are not limited to, roof tops, walkways, patios, driveways, parking lots or storage areas, concrete or asphalt paving, gravel roads, packed earthen materials, and oiled macadam or other surfaces which similarly impede the natural infiltration of storm water. Impervious surfaces do not include surface created through proven low impact development techniques.

“Infiltration” means the downward entry of water into the immediate surface of soil.

“In-kind compensation” means to replace critical areas with substitute areas whose characteristics and functions mirror those destroyed or degraded by a regulated activity.

“Intertidal zone” means the substratum from extreme low water of spring tides to the upper limit of spray or influence from ocean-derived salts. It includes areas that are sometimes submerged and sometimes exposed to air, mud and sand flats, rocky shores, salt marshes, and some terrestrial areas where salt influences are present.

“Invasive species” means a species that is: (1) nonnative (or alien) to Whatcom County, and (2) whose introduction causes or is likely to cause economic or environmental harm or harm to human health. Invasive species can be plants, animals, and other organisms (e.g., microbes). Human actions are the primary means of invasive species introductions.

“Lahar” means a mudflow and debris flow originating from the slopes of a volcano.

“Lahar inundation zone” means areas that have been or potentially could be inundated by lahars or other types of debris flows, according to a map showing Volcano Hazards from Mount Baker, Washington.

“Lake” means a naturally or artificially created body of deep (generally greater than 6.6 feet) open water that persists throughout the year. A lake is larger than a pond, greater than one acre in size, equal to or greater than 6.6 feet in depth, and has less than 30 percent aerial coverage by trees, shrubs, or persistent emergent vegetation. A lake is bounded by the ordinary high water mark or the extension of the elevation of the lake’s ordinary high water mark with the stream where the stream enters the lake.

“Landfill” means a disposal facility or part of a facility at which solid waste is permanently placed in or on land including facilities that use solid waste as a component of fill.

“Landslide” means a general term covering a wide variety of mass movement landforms and processes involving the downslope transport, under gravitational influence of soil and rock material en masse; included are debris flows, debris avalanches, earthflows, mudflows, slumps, mudslides, rock slides, and rock falls.

“Landslide hazard areas” means areas that, due to a combination of site conditions like slope inclination and relative soil permeability, are susceptible to mass wasting.

“Low intensity land use” means land use that includes the following uses or activities: forestry (cutting of trees only), low-intensity open space (such as passive recreation and natural resources preservation), and unpaved trails.

“Maintenance or repair” means those usual activities required to prevent a decline, lapse or cessation from a lawfully established condition or to restore the character, scope, size, and design of a serviceable area, structure, or land use to a state comparable to its previously authorized and undamaged condition. This does not include any activities that change the character, scope, or size of the original structure, facility, utility or improved area beyond the original design.

“Major development” means any project for which a major project permit is required pursuant to Chapter 20.88 WCC. For the purposes of this chapter, “major development” shall also mean any project associated with an existing development for which a major development permit has been required or other existing legally nonconforming development for which a major development permit would otherwise be required if developed under the current land use regulations outlined in WCC Title 20.

“Mass wasting” means downslope movement of soil and rock material by gravity. This includes soil creep, erosion, and various types of landslides, not including bed load associated with natural stream sediment transport dynamics.

“Mature forested wetland” means a wetland with an overstory dominated by mature trees having a wetland indicator status of facultative (FAC), facultative-wet (FACW), or obligate (OBL). Mature trees are considered to be at least 21 inches in diameter at breast height.

“Mean annual flow” means the average flow of a river or stream (measured in cubic feet per second) from measurements taken throughout the year. If available, flow data for the previous 10 years should be used in determining mean annual flow.

“Mitigation” means individual actions that may include a combination of the following measures, listed in order of preference:

1. Avoiding an impact altogether by not taking a certain action or parts of actions;
2. Minimizing impacts by limiting the degree or magnitude of an action and its implementation;
3. Rectifying impacts by repairing, rehabilitating, or restoring the affected environment;
4. Reducing or eliminating an impact over time by preservation and maintenance operations during the life of the action;
5. Compensating for an impact by replacing or providing substitute resources or environments; and
6. Monitoring the mitigation and taking remedial action when necessary.

“Mitigation bank” means a site where wetlands or similar habitats are restored, created, enhanced, or in exceptional circumstances, preserved, expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to aquatic resources.

“Mitigation bank instrument” means the documentation of agency and bank sponsor concurrence on the objectives and administration of the bank. The “bank instrument” describes in detail the physical and legal characteristics of the bank, including the service area, and how the bank will be established and operated.

“Mitigation Bank Review Team” or “MBRT” means an interagency group of federal, state, tribal and local regulatory and resource agency representatives that are invited to participate in negotiations with the bank sponsor on the terms and conditions of the bank instrument.

“Mitigation Bank Review Team process” or “MBRT process” means a process in which the county and other agencies strives to reach consensus with the MBRT members on the terms, conditions, and procedural elements of the bank instrument.

“Mitigation bank sponsor” means any public or private entity responsible for establishing and, in most circumstances, operating a bank.

“Mitigation plan” means a detailed plan indicating actions necessary to mitigate adverse impacts to critical areas.

“Moderate intensity land use” means land use that includes the following uses or activities: residential (one unit/acre or less), moderate-intensity open space (parks), moderate-intensity new agriculture (orchards and hay fields), plant nurseries, paved trails, and building of logging roads.

“Monitoring” means evaluating the impacts of development proposals over time on the biological, hydrological, pedological, and geological elements of ecosystem functions and processes, and/or assessing the performance of required mitigation measures through the collection and analysis of data by various methods for the purpose of understanding and documenting changes in natural ecosystems and features compared to baseline or preproject conditions and/or reference sites.

“Native vegetation” means plant species that are indigenous to Whatcom County and the local area.

“Nearshore habitat” means the zone that extends seaward from the marine shoreline to a water depth of approximately 20 meters (66 feet). Nearshore habitat is rich biologically, providing important habitat for a diversity of plant and animal species.

“No net loss” means the maintenance of the aggregate total of the county’s critical area functions and values as achieved through a case-by-case review of development proposals. Each project shall be evaluated based on its ability to meet the no net loss goal.

“Off-site mitigation” means to replace critical areas away from the site on which a critical area has been adversely impacted by a regulated activity.

“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.

“Ordinary high water mark” means the mark or line on all lakes, rivers, streams and tidal water that will be found by examining the beds and banks and ascertaining where the presence and action of waters are so common and usual and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland in respect to vegetation (RCW [90.58.030\(2\)\(b\)](#)).

“Person” means an individual, partnership, corporation, association, organization, cooperative, public or municipal corporation, state agency or local governmental unit, however designated, or Indian nation or tribe.

“Planned unit development (PUD)” means one or a group of specified uses, such as residential, resort, commercial or industrial, to be planned and constructed as a unit. Zoning or subdivision regulations with respect to lot size, building bulk, etc., may be varied to allow design innovations and special features in exchange for additional and/or superior site amenities or community benefits.

“Pond” means an open body of water, generally equal to or greater than 6.6 feet deep, that persists throughout the year and occurs in a depression of land or expanded part of a stream and has less than 30 percent aerial coverage by trees, shrubs, or persistent emergent vegetation. Ponds are generally smaller than lakes. Farm ponds are excluded from this definition. Beaver ponds that are two years old or less are excluded from this definition.

“Potable” means water that is suitable for drinking by the public (Chapter [246-290 WAC](#)).

“Preservation” means actions taken to ensure the permanent protection of existing, ecologically important critical areas and/or buffers that the county has deemed worthy of long-term protection.

“Primary association” means the use of a habitat area by a listed or priority species for breeding/spawning, rearing young, resting, roosting, feeding, foraging, and/or migrating on a frequent and/or regular basis during the appropriate season(s) as well as habitats that are used less frequently/regularly but which provide for essential life cycle functions such as breeding/nesting/spawning.

“Priority habitat” means a habitat type with unique or significant value to one or more species. An area classified and mapped as priority habitat must have one or more of the following attributes: comparatively high fish or wildlife density; comparatively high fish or wildlife species diversity; fish spawning habitat; important wildlife habitat; important fish or wildlife seasonal range; important fish or wildlife movement corridor; rearing and foraging habitat; important marine mammal haulout; refuge; limited availability; high vulnerability to habitat alteration; unique or dependent species; or shellfish bed. A priority habitat may be described by a unique vegetation type or by a dominant plant species that is of primary importance to fish and wildlife (such as oak woodlands or eelgrass meadows). A priority habitat may also be described by a successional stage (such as old growth and mature forests). Alternatively, a priority habitat may consist of a specific habitat element (such as a consolidated marine/estuarine shoreline, talus slopes, caves, snags) of key value to fish and wildlife. A priority habitat may contain priority and/or nonpriority fish and wildlife (WAC 173-26-020(24)).

“Priority species” means wildlife species of concern due to their population status and their sensitivity to habitat alteration, as defined by the Washington State Department of Fish and Wildlife.

“Project” means any proposed or existing activity regulated by Whatcom County.

“Project permit” or “project permit application” means any land use or environmental permit or approval required by Whatcom County, including, but not limited to, building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, variances, lot consolidation relief, site plan review, permits or approvals authorized by a comprehensive plan or subarea plan.

“Qualified planning advisor” means those individuals who have technical experience and training necessary to prepare farm conservation plans for agricultural lands and who have:

1. Completed the two-week training course delivered by the technical administrator and achieved a minimum of 75 percent on the course exam and assignments and signed the practice and confidentiality agreement; or
2. Been certified a technical service provider by the USDA Natural Resources Conservation Service (see <http://techreg.usda.gov>) and signed the practice and confidentiality agreement.

“Qualified professional” or “qualified consultant” means a person with experience and training with expertise appropriate for the relevant critical area subject in accordance with WAC 365-195-905(4). A qualified professional must have obtained a B.S. or B.A. or equivalent degree in biology, soil science, engineering, environmental studies, fisheries, geology, geomorphology or a related field, and related work experience, and meet the following criteria:

1. A qualified professional for wetlands must have a degree in biology, ecology, soil science, botany, or a closely related field and a minimum of three years of

professional experience in wetland identification and assessment associated with wetland ecology in the Pacific Northwest or comparable systems.

2. A qualified professional for habitat conservation areas must have a degree in wildlife biology, ecology, fisheries, or a closely related field and a minimum of three years of professional experience related to the subject species/habitat type.

3. A qualified professional for geologically hazardous areas must be a professional engineering geologist or geotechnical engineer, licensed in the state of Washington.

4. A qualified professional for critical aquifer recharge areas means a Washington State licensed hydrogeologist, geologist, or engineer.

“Recharge” means the process involved in the absorption and addition of water from the unsaturated zone to ground water.

“Reestablishment” means measures taken to intentionally restore an altered or damaged natural feature or process including:

1. Active steps taken to restore damaged wetlands, streams, protected habitat, and/or their buffers to the functioning condition that existed prior to an unauthorized alteration;
2. Actions performed to reestablish structural and functional characteristics of the critical area that have been lost by alteration, past management activities, or other events; and
3. Restoration can include restoration of wetland functions and values on a site where wetlands previously existed but are no longer present due to lack of water or hydric soils.

“Rehabilitation” means a type of restoration action that restores a critical area to its original form or type such as restoring a wetland to its original hydrogeomorphic class.

“Resident fish” means a fish species that completes all stages of its life cycle within freshwater and frequently within a local area.

Restoration. See “reestablishment.”

“Rills” means steep-sided channels resulting from accelerated erosion. A rill is generally a few inches deep and not wide enough to be an obstacle to farm machinery. Rill erosion tends to occur on slopes, particularly steep slopes with poor vegetative cover.

“Riparian corridor” or “riparian zone” means the area adjacent to a water body (stream, lake or marine water) that contains vegetation that influences the aquatic ecosystem, nearshore area and/or fish and wildlife habitat by providing shade, fine or large woody material, nutrients, organic debris, sediment filtration, and terrestrial insects (prey production). Riparian areas include those portions of terrestrial ecosystems that

significantly influence exchanges of energy and matter with aquatic ecosystems (i.e., zone of influence). Riparian zones provide important wildlife habitat. They provide sites for foraging, breeding and nesting; cover to escape predators or weather; and corridors that connect different parts of a watershed for dispersal and migration.

“Riparian vegetation” means vegetation that tolerates and/or requires moist conditions and periodic free flowing water, thus creating a transitional zone between aquatic and terrestrial habitats which provides cover, shade and food sources for aquatic and terrestrial insects for fish species. Riparian vegetation and their root systems stabilize stream banks, attenuate high water flows, provide wildlife habitat and travel corridors, and provide a source of limbs and other woody debris to terrestrial and aquatic ecosystems, which, in turn, stabilize stream beds.

“Scrub-shrub wetland” means a wetland with at least 30 percent of its surface area covered by woody vegetation less than 20 feet in height as the uppermost strata.

“Seismic hazard areas” means areas that are subject to severe risk of damage as a result of earthquake-induced ground shaking, slope failure, settlement, or soil liquefaction.

“SEPA” is a commonly used acronym for the State Environmental Policy Act.

“Shellfish” means invertebrates of the phyla Arthropoda (class Crustacea), Mollusca (class Pelecypoda) and Echinodermata.

“Shellfish habitat conservation areas” means all public and private tidelands suitable for shellfish, as identified by the Washington State Department of Health classification of commercial growing areas, and those recreational harvest areas as identified by the Washington State Department of Ecology are designated as shellfish habitat conservation areas pursuant to WAC 365-190-80. Any area that is or has been designated as a shellfish protection district created under Chapter 90.72 RCW is also a shellfish habitat conservation area.

“Shellfish protection district” means the Drayton Harbor shellfish protection district (DHSPD) and the Portage Bay shellfish protection district (PBSPD) (Chapter 16.20 WCC), or other area formed by the county based on RCW Title 90, in response to State Department of Health (DOH) closures or downgrades of a commercial shellfish growing area due to a degradation of water quality as a result of pollution. These areas include the watershed draining to the shellfish beds as part of the shellfish habitat conservation area.

“Shorelands” or “shoreland areas” means those lands extending landward for 200 feet in all directions as measured on a horizontal plane from the ordinary high water mark; floodways and contiguous floodplain areas landward 200 feet from such floodways; and all wetlands and river deltas associated with the streams, lakes and tidal waters which are subject to the provisions of Chapter 90.58 RCW.

“Shoreline” (Shoreline Management Act) means all of the water areas of the state, including reservoirs and their associated wetlands, together with lands underlying them, except:

1. Shorelines on segments of streams upstream from a point where the mean annual flow is 20 cubic feet per second or less and the wetlands associated with such upstream segments; and
2. Shorelines on lakes less than 20 acres in size and wetlands associated with such small lakes.

“Shorelines” means all of the water areas of the state as defined in RCW 90.58.030, including reservoirs and their associated shorelands, together with the lands underlying them, except:

1. Shorelines of statewide significance;
2. Shorelines on segments of streams upstream of a point where the mean annual flow is 20 cubic feet per second (cfs) or less and the wetlands associated with such upstream segments; and
3. Shorelines on lakes less than 20 acres in size and wetlands associated with such small lakes.

“Shorelines of statewide significance” means those areas defined in RCW 90.58.030(2) (e).

“Shorelines of the state” means the total of all “shorelines,” as defined in RCW 90.58.030(2)(d), and “shorelines of statewide significance” within the state, as defined in RCW 90.58.030(2)(e).

“Single-family development” means the development of a single-family residence permanently installed and served with utilities on a lot of record.

“Site” means any parcel or combination of contiguous parcels, or right-of-way or combination of contiguous rights-of-way, under the applicant’s/proponent’s ownership or control that is the subject of a development proposal or change in use.

“Slope” means:

1. Gradient.
2. The inclined surface of any part of the earth’s surface, delineated by establishing its toe and top and measured by averaging the inclination over at least 10 feet of vertical relief.

“Soil” means all unconsolidated materials above bedrock described in the Soil Conservation Service Classification System or by the Unified Soils Classification System.

“Sphagnum bog” means a type of wetland dominated by mosses that form peat. Sphagnum bogs are very acidic, nutrient-poor systems, fed by precipitation rather than surface inflow, with specially adapted plant communities.

“Streams” means those areas where surface waters produce a defined channel or bed. A defined channel or bed is an area that demonstrates clear evidence of the annual passage of water and includes, but is not limited to, bedrock channels, gravel beds, sand and silt beds, and defined-channel swales. The channel or bed need not contain water year-round. This definition includes drainage ditches or other artificial water courses where natural streams existed prior to human alteration, and/or the waterway is used by anadromous or resident salmonid or other fish populations or flows directly into shellfish habitat conservation areas.

“Structure” means a permanent or temporary building or edifice of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner whether installed on, above, or below the surface of the ground or water, except for vessels.

“Technical administrator” means the director of the planning and development services department or staff member designated by the director to perform the review functions required in this chapter.

“Toe” means the lowest part of a slope or cliff; the downslope end of an alluvial fan, landslide, etc.

“Top” means the top of a slope; or in this chapter it may be used as the highest point of contact above a landslide hazard area.

“Unavoidable” means adverse impacts that remain after all appropriate avoidance and minimization measures have been implemented.

“Utilities” means all lines and facilities used to distribute, collect, transmit, or control electrical power, natural gas, petroleum products, information (telecommunications), water, and sewage.

“Volcanic hazard areas” means geologically hazardous areas that are subject to pyroclastic flows, lava flows, debris avalanche, or inundation by debris flows, mudflows, or related flooding resulting from volcanic activity.

“Watershed” means a geographic region within which water drains into a particular river, stream or body of water. There are approximately 122 watersheds (e.g., Bertrand, Ten Mile, Dakota, Canyon Creek, Lake Whatcom, Lake Samish) identified in WRIA 1 and 3. These are nested within approximately 14 sub-basins (e.g., North Fork Nooksack, Drayton Harbor, Sumas River, Friday Creek), which are nested within four basins (e.g., Nooksack River, Fraser River, Samish River, coastal).

“Watershed improvement district” means a special district established pursuant to Chapter 85.38 RCW citation.

“Wellhead protection area” means the area (surface and subsurface) managed to protect ground- water-based public water supplies.

“Wetland” means areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands do not include those artificial wetlands intentionally created from nonwetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, retention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street, or highway. However, wetlands include those artificial wetlands intentionally created to mitigate wetland impacts.

“Wetland buffer” means a designated area contiguous or adjacent to a wetland that is required for the continued maintenance, function, and ecological stability of the wetland.

“Wetland class” means the general appearance of the wetland based on the dominant vegetative life form or the physiography and composition of the substrate. The uppermost layer of vegetation that possesses an aerial coverage of 30 percent or greater of the wetland constitutes a wetland class. Multiple classes can exist in a single wetland. Types of wetland classes include forest, scrub/shrub, emergent, and open water.

“Wetland delineation” means the precise determination of wetland boundaries in the field according to the application of specific methodology as described in the 1997 Washington State Wetland Delineation Manual or 1987 Edition, as amended, Corps of Engineers Wetlands Delineation Manual and the mapping thereof.

“Wetland edge” means the boundary of a wetland as delineated based on the definitions contained in this chapter.

Wetland Enhancement. See “mitigation.”

“Wetland mitigation bank” means a site where wetlands and buffers are restored, created, enhanced or, in exceptional circumstances, preserved expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources.

Wetland Restoration. See “mitigation” and “reestablishment.”

“Wet meadow” means palustrine emergent wetlands, typically having disturbed soils, vegetation, or hydrology.

“Wet season” means the period generally between November 1st and March 30st of most years when soils are wet and prone to instability. The specific beginning and end of the wet season can vary from year to year depending on weather conditions.

“Windthrow” means a natural process by which trees are uprooted or sustain severe trunk damage by the wind.

“Wood waste” means solid waste consisting of wood pieces or particles generated as a byproduct or waste from the manufacturing of wood products, handling and storage of raw materials and trees and stumps. This includes, but is not limited to, sawdust, chips, shavings, bark, pulp, hog fuel, and log sort yard waste, but does not include wood pieces or particles containing chemical preservatives such as creosote, pentachlorophenol, or copper-chrome-arsenate.

<b>Acronyms</b>	
AASHTO	American Association of State Highway and Transportation Officials
AFO	Animal feeding operation
AHZ	Avulsion hazard zone
CAFO	Concentrated animal feeding operations
CFR	Code of Federal Regulations
CMZ	Channel migration zone
CPAL	Conservation program on agriculture lands
DHSPD	Drayton Harbor shellfish protection district
DOH	Washington State Department of Health
EHA	Erosion hazard area
ESU	Ecologically significant unit
FAC	Facultative
FACW	Facultative – Wet
FIMA	Federal Insurance and Mitigation Administration
FIRM	Flood Insurance Rate Maps
Fco	Federal species of concern
FE	Federal endangered
FT	Federal threatened
HGM	Hydrogeomorphic
HMP	Habitat management plan
HMZ	Historical migration zone

HPA	Hydraulic project approval
IBC	International Building Code
LWD	Large woody debris
MBRT	Mitigation Bank Review Team
MTBE	Methyl tertiary butyl ether
MRL	Mineral resource lands
NGPE	Native growth protection easement
NOAA	National Oceanic and Atmospheric Administration
NRCS	Natural Resource Conservation Service
OBL	Obligate
OSS	On-site sewage disposal system
PBSPD	Portage Bay shellfish protection district
PCE	Perchloroethylene
PHS	Priority habitat and species
PUD	Planned unit development
RCT	Recreational, commercial or tribal importance
RCW	Revised Code of Washington
SC	State candidate
SE	State endangered
SEPA	State Environmental Policy Act
SM	State monitor
SMA	Shoreline Management Act
SMP	Shoreline Management Program
SS	State sensitive
ST	State threatened
TMDL	Total maximum daily load
U	Unstable
UOS	Unstable old slides
URS	Unstable recent slides
USC	United States Code

USDA	United States Department of Agriculture
USEPA	United States Environmental Protection Agency
VA	Vulnerable aggregations
WAC	Washington Administrative Code
WCC	Whatcom County Code
WDFW	Washington State Department of Fish and Wildlife
WRIA	Water resource inventory area

(Ord. 2009-013 § 2 (Exh. 2); Ord. 2005-068 § 1).

## Appendix A

### CONSERVATION PROGRAM ON AGRICULTURE LANDS

#### Purpose Statement

The well-being of farms and ranches in Whatcom County depends in part on good quality soil, water, air and other natural resources. Agricultural operations that incorporate protection of the environment, including critical areas as defined by this chapter, are essential to achieving this goal.

#### Overview

A conservation farm plan identifies the farming or ranching activities and the practice(s) necessary to avoid their potential negative impacts (resource concerns). Practice selection depends upon the types of livestock raised and crops grown. Based upon the type and intensity of the operation, some generalizations can be made as to the resource concerns and remedies that apply.

Some operations present relatively low risks to critical areas because of their benign nature, timing, frequency, or location. For these operations, the resource concerns and remedies are relatively easy to identify and implement. These are described in more detail as low-impact agricultural operations subject to standardized farm conservation plans in Section 1 below.

Where the potential negative impacts to critical areas are moderate or high, solutions are more difficult to formulate and implement. In those circumstances, a more rigorous planning process is required. In such cases, a formal written plan shall provide the desired environmental protection. These types of operations are described as agricultural operations requiring custom farm conservation plans in Section 2 below.

Farm conservation plans prepared pursuant to Section 1 or 2 shall include all reasonable measures to maintain existing critical area functions and values.

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

LYLE AND SUE RADER, ) No. 66014-4-I  
)  
Appellants, )  
vs. )  
) DECLARATION OF SERVICE  
WHATCOM COUNTY, )  
WASHINGTON, )  
)  
Respondent. )  
\_\_\_\_\_)

I DECLARE THAT on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of Whatcom County's Brief of Respondent as follows:

Douglas Shepherd  
Shepherd Abbott Carter  
1616 Cornwall Avenue  
Bellingham, WA 98225

DATED this  /  day of April, 2011.

  
TERRI ZEMEL  
Paralegal

Declaration of Service

Whatcom County Prosecuting Attorney  
Whatcom County Courthouse  
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