

Critical Area Ordinance Regulatory Reform Task Force Meeting  
19 September 2019 5:30 - 7:30 PM  
Tri-Area Community Center Library Room  
Minutes

*5:31 Task Force convened by Facilitator Linda Herzog*

Participants Present: Kevin Coker, Stephen Mader, Robin Fitch, Donna Frosthalm, Al Cairns, Craig Durgan, John Bellow. A quorum (7 of 9 members) was present.

Absent: Teresa Michelsen, Jean Ball

Support: Patty Charnas, Greg Brotherton, Linda Herzog (Facilitator), Lisa Grueter (BERK Consulting, phone)

General Business

- 1. Update from Brotherton/ Charnas:** Greg and Patty summarized the County's commitment to the work of this Task Force, in the face of challenges by the Public Works Board to withhold State funding until the County's GMA update is completed. They told of the BoCC standing up for the Task Force, and confirmed that the work we are doing is a necessary and critical element for completing the Critical Area Ordinance Regulatory Reform, which is needed in order for the County to become GMA compliant. We need to stick with the original deadline of completing our work by December 2019 so that the County can meet its newly announced commitment to finalize its GMA update by June 30.
- 2. Meeting Agenda:** The Task Force approved the agenda with one modification: to switch the order of questions so that the question "Will the TF recommend two options... prescriptive and performance based?" is considered before "What is a 'Farm Plan'? Should TF recommend 'Critical Area Plan' instead?"
- 3. Minutes from 5 September 2019 meeting:** Approved as submitted.
- 4. Other Administrative Items:** Task Force members were asked to sign a "Thankyou" card to Cass Brotherton, who is turning the minutes duty over to Task Force member Robin Fitch. All Task Force members expressed gratitude and thanks for the work that Cass did in getting the Task Force minutes accomplished up to this point.

CAO RR Task Force Technical Discussion

**1. Continuing from the 5 September meeting discussion of Whatcom County CPAL questions**

Prior to going through the questions, a definition of "A Farm Plan" was requested by the TF. Linda provided the following temporary definition as a basis for continuing discussion of the

Qs / proposed Answers: “A Farm Plan is the document upon which the DCD approves a permit application of an agriculture operator.”

10a-d (Kevin Coker presented and facilitated the discussion)

10a What elements of the WCC 16.16.830 Farm Plan General Standards does the TF like or not like:

**Proposed Answer by TF member Coker:** Elements A - B2 look appropriate with reference to Whatcom replaced by Jefferson on B2.

TASK FORCE RESPONSE: General TF consensus with the answer provided by Kevin, with some further work required on the text.

Specifically:

16.16.830 A: General agreement. Both Teresa and Donna have reservations that need to be addressed.

16.16.830 B1: Filling, draining, or clearing activities within critical areas or buffers: some disagreement. Need to address Teresa’s concerns<sup>1</sup>.

16.16.830 B2: General agreement.

**Proposed Answer by TF member Coker:** Element B3 - reference to WA State Hydraulic Code seems appropriate but the Chimacum Drainage District needs more scrutiny and a decision on whether to restore its role and any best practices identified in the document that should be followed. It may be that a separate document needs to fill this role and no reference to the CDD is made.

16.16.830 B3: General agreement.

**Proposed Answer by TF member Coker:** Element B4 – I would be open to and encourage conversion of land to new agriculture under some instances. Eg. Al Cairns JCCD recent project conversion of a “dump site” that may have been in a critical area where large amounts of waste were removed. The goal was to repair the land and utilize some Ag. I am sure there are scenarios that could be allowed under the performance based system utilizing a low impact approach that repairs soils, hydrology, etc.

16.16.830 B4: General agreement, with caveat from Teresa which warned against using blanket language. Conversion might be allowed if it improves CAO values and functions and is in compliance with zoning.

**Proposed Answer by TF member Coker:** Element C – Yes other plans should be accepted including the USDA’s NRCS, WSDA, and others. Included in this section would also be the Organic Growers certification process.

*10b:* What elements of the WCC 16.16.840 for Farm Plan Requirements for Type 1 Ag operations does the TF like or not like:

**Proposed Answer by TF member Coker: Answer #10 b** – the description looks appropriate and the elements 1-7 appear thorough. I know that there is a state approved fertilizer and chemical list that may be listed here if the NCRS does not. Also the Certified Organic program will have an approved list of fert./chem. for reference. Should we identify animal species of greater or lesser impact? It came up in the last meeting and seems appropriate but needs more investigation.

General TF consensus with the answer provided by Kevin, but the wording needs refinement to fit Jefferson County realities. Teresa specifically asked to address concerns about (1) riparian habitat and warming streams, and (2) pesticide application in buffers.

*10c:* What elements of the WCC Farm Plan Requirements for Type 2 Ag does the TF like or not like:

**Proposed Answer by TF member Coker: Answer #10 c** – I like the cumulative nature of the type 2 description.

General TF consensus with the answer provided by Kevin, but wording needs refinement to suit TF's recommended categorization of JC agriculture into "types".

*10d:* What elements of the WCC Farm Plans for Type 3 Ag does the TF like or not like:

**Proposed Answer by TF member Coker: Answer #10 d** – Seems like an appropriate general description of state and federal requirements. I would expect some local conditions may be appropriate to incorporate on a more thorough review. A description of who would be qualified as a planner for this "High Risk" would also be appropriate.

General TF consensus with the answer provided by Kevin, but wording needs refinement.

The Task Force spent some time discussing what the typing elements might look like for Jefferson County. Al cautioned that the TF should avoid using "level-of-risk" descriptions as the basis for typing ag operations. He proposed a typing scenario where a Type 1 is defined as a farm with critical area resource concerns identified and BMPs implemented; Type 2 as a farm with critical area resource concerns identified and a list of possible BMPs to address those, but not yet implemented; and Type 3 as a farm with

no Critical Area resource evaluation or plan in place. For farms that have no critical areas or adjacency to a CA, Patty assured that JCC boilerplate / CAO preamble language is available to explain that the CAO is not applicable.

Lisa Grueter (BERK, phone) reminded the Task Force that these “typing criteria” are described in the BERK September 12, 2019 document titled “Agricultural Resource Concerns and Performance Standards”. This paper (page 5) also qualifies a farm as “Type 1” if it voluntarily follows the prescriptive regulations in the CAO. Although the TF did not formally affirm its consensus on these “type” definitions, members appeared willing to use this suggested typology in their continued discussion of the applicability of Whatcom’s CPAL to Jeff Co Ag/CA protection standards.

**2. At 6:10, the Facilitator moved the Task Force to consider the following question: *What is a “Farm Plan”? Should the TF recommend “Critical Area Plan” instead?***

Lengthy discussion; key points included:

- John: objection that the Farm Plan puts an unacceptable burden on farmers.
- Steve: Farm Plans should be holistic documents that are protective of critical areas.
- Donna: there is an absolute need to know the line of where critical areas are, and if criteria are being met.
- Patty: suggests we look at the ag activity and determine performance standards based on activity.
- Al: suggests that all ag practices exclusive of construction have applicable NRCS Best Management Practices. If a farm has and is implementing BMP(s) relevant to its operations, it would only require wetland delineation if a structure is proposed.

Final agreement: BERK will locate and present Case Studies and reports other than those prepared by a “qualified professional” (e.g. sub-area studies) that describe the kinds of performance standards applicable to Jeff Co farmlands. BERK will also look into what other counties are doing for determining wetland delineations.

**3. At 6:45 The Task Force returned to the discussion of Whatcom County CPAL questions**  
*Question #11* (Facilitated by Steve Mader) WCC 16.16.850 deals with who approves Farm Plans for the three types of ag operations, and if a DPD site visit is required if the Plan is prepared by an entity other than the Conservation District.

**Proposed Answer by TF member Mader:** “Trust but verify” comes to mind. The code does not explicitly explain the need or purpose of this section, but it infers quality assurance and efficient use of [DCD] resources. The code language would benefit from a better explanation of the purpose and intent.

It is counterintuitive that this code section sets minimum standards for plan preparers, but then lays out fairly strict [DCD] oversight responsibilities: “review, approval, monitoring, adaptive management, and enforcement.” If a conservation farm plan is in place, these oversight tasks could be relegated as specified in

the plan itself, which would relieve a potentially great technical burden on [DCD]. (If DCD maintains these oversight responsibilities, the performance measures, success criteria, and limits on potentially required adaptive management need to be articulated, not open-ended.)

Table 4 specifies qualifications for plan preparers, requiring more stringent qualifications for higher risk land uses. This quality assurance approach is well suited to implementing performance-based land use standards because it leverages known or accredited external systems that screen competencies without the need for [DCD] resources to review and assess the ability of a plan to manage the perceived risk to the CA. Presumably, the qualified persons have an interest in resource conservation or are held to a professional code of ethics. Whatcom attempted to define the categories of approved plan preparers; however, the categories would benefit from being better defined and referencing the required external credentials.

As much as I like the conservation farm plan's performance-based approach to CA risk management, it is inefficient for [DCD] to be regulating entire farming operations for CA conservation, likely to exceed [DCD] competencies, and may miss the point of the regulation. What if [DCD] simply requires a (mini) risk assessment to be included in the operation's conservation farm plan? The assessment would identify the sources of disturbance/contamination, release mechanisms and transport media, exposure routes, and potential receptors (i.e., Critical Areas). BMPs would be required to reduce risks acceptable levels.

A site visit should not be required if Table 4 is the basis for quality assurance, and [DCD] retains inspection/enforcement authority (in separate code section). Without specified performance/success criteria, how could [DCD] judge the operation's or plan's sufficiency and compliance?

The Task Force agreed, generally, with the answer provided by Steve, although John was not sure and reserved the right to revisit the question.

*Question #12* (Facilitated by Robin Fitch) WCC 16.16.860A describes Whatcom's monitoring and compliance process for Type 1 Ag operations or if the plan is approved by the Conservation District or Planning Advisor. The question is if the TF favors this approach or not, if not which elements are not right for Jefferson County?

**Proposed Answer by TF member Fitch:** I agree generally with paragraph A Monitoring and Compliance but recommend tightening the language slightly (note this answer assumes that the County has sufficient staff and resources to provide monitoring oversight and compliance enforcement. If the County does not have sufficient resources for these activities, then the Whatcom County process is insufficient and will not provide adequate CA protections).

-In the first sentence, require County oversight in addition to the farm operator to periodically monitor plan implementation. Deleting "/or" from the "and/or" would achieve this, so the sentence would read "The technical administrator and the farm operator shall periodically monitor plan implementation...". Justification: it is too easy for an Operator to forgo or forget to monitor a Plan every year, and knowing that the County is also looking would provide an added incentive to do the self-monitoring.

-In the 4th sentence, replace "may" with "will". Failure to submit a sufficient self-certification report upon receiving formal notice from the County should trigger a site visit. The process gives the operator an additional 30 days post request, which should be adequate time to respond to a letter.

Justification: Using the word “may” essentially takes the teeth out of a key tool for ensuring self-monitoring.

AI speculated that Jeff County Environmental Health and the Conservation District are likely to receive contracted authority from State Ecology to investigate the specifics of pollution brought to Ecology’s attention, but that no local agency will have consistent capability and expertise to pinpoint pollution sources. The Task Force did not agree with the suggestion to remove the “/or” from the text, and spoke at length about the advisability of “may” with “shall” or “will” in the text that describes the County’s monitoring and enforcement responsibility; this question was not fully resolved. Further, John objects to the five-year renewal timeframe specified in the text, arguing that there is in literal interpretation of this section no end to the permittee’s responsibility to continually demonstrate to the County that he/she is qualified for the permit. BERK was tasked with taking a look at the paragraph to address both the concern that the text does not adequately require the County to monitor, and that the five-year renewal is too arduous.

**The Task Force was asked to vote on this question: *Does the TF recommend two options... prescriptive and performance based?***

The Task Force members present (all except Teresa Michelsen and Jean Ball) agreed in general to proceed with the performance-based approach it has been designing, and will dispense with the “line-in-line-out” CAO update as it applies to Agriculture. (Note that heretofore DCD’s draft update had been referred to as “Option 1: Prescriptive CA Code for Agriculture”. The newly created “performance-based” approach has been termed “Option 2”. The group was essentially advising that **Article XIII: Agriculture** should contain only performance-based regulations.)

Extensive discussion followed, without a clear conclusion. The following were among the salient points:

- Other Articles of the Jeff County CAO, such as **III: Critical Aquifer Recharge Areas, IV: Frequently Flooded Areas**, etc., contain regulations that can be applied to agriculture as well as to residential, commercial and public infrastructure development. Some of those regulations may be defined as “prescriptive” and some may be “performance” oriented. The Task Force can examine those Articles one by one, judging their implications for ag as well as for other land uses.
- In anticipation of its support for the work of this Task Force, BERK Consulting has already identified other GMA-compliant Counties whose Critical Area Codes provide models and examples for the TF to consider. Those counties include Clark, Clallam, King, Kitsap and Whatcom, with the possible addition of Skagit and Snohomish. This method of examining other

counties' CA regulations is described in BERK's April 19 document titled *Jefferson County Critical Areas Ordinance Update*. Much of the comparative work has already been done by BERK.

- DCD's draft update of the CAO includes mandatory revisions that must be retained in order for the final CAO to meet newly codified State and Federal laws. County officials and BERK consultants will be able to identify revisions of that nature.
- Following completion of its recommendations regarding **Article XIII: Agriculture**, the TF wishes to move on to discussion of Jefferson Co's **Article VII: Wetlands**.
- The group did not reach a clear consensus on the manner in which the Jefferson County CAO and its draft update will be studied – either in comparison with the Whatcom County CAO excluding its CPAL program, or in comparison with multiple GMA-compliant example counties.

#### Final Administrative comments

1. **Next meeting date/ time/ place/ discussion topics.** Our plan for the next meeting will be to finish the Whatcom questions first. We will then review the material presented in the April 19, 2019 BERK document titled "Jefferson County Critical Areas Ordinance Update". The next Critical Area Article that we will consider is wetlands. The meeting will be held on 3 October 2019.

7:58 PM Meeting adjourned.

Minutes by Robin Fitch 19SEP2019

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<sup>i</sup> Teresa's comment on Element B1: "I disagree that filling, draining, grading, or clearing activities within buffers should be allowed for existing ag, without being subject to one of the permitting approaches we've discussed. I don't see how these could not expand the boundaries of existing activity. Even clearing should not be carried out within the buffer unless the habitat is to be replaced with something more functional (the reed canary grass issue)."