

Critical Area Ordinance Regulatory Reform Task Force Meeting

3 October 2019 5:30- 8:00 PM

Tri-Area Community Center Library Room

Minutes

5:34 Task Force convened by Facilitator Linda Herzog

Participants Present: Kevin Coker, Steve Mader, Robin Fitch, Donna Frosthalm, Al Cairns, Craig Durgan, John Bellow, Teresa Michelsen, and Jean Ball. A quorum (9 of 9 members) was present.

Absent: None

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 long-term goals of the Task Force, specifically noting that our work is assisting the County in its efforts to show demonstrable progress with the County's GMA update. While they would like to give us more time to consider all of the Critical Area Ordinance articles in depth, a time extension is not possible and we will need to complete the Task Force work by mid-November. Two options for covering the remaining CAO articles were offered: (1) to convene weekly meetings between now and November 14, and (2) to extend the meeting hours from two to three hours for the currently scheduled meeting dates of October 17, October 31, and November 14. The Task Force was canvased and it was determined that option (1) was not supportable for all. A modified option (2) was agreed to: our currently scheduled meetings will be extended to three hours and if necessary, we will hold an additional meeting on November 7, 2019.
- 2. Meeting Agenda:** The Task Force approved the agenda with one modification: to extend the meeting to 8:00 or possibly 8:30 in order to move through as much material tonight as possible.
- 3. Minutes from 17 September 2019 meeting:** Approved as submitted, with one modification. On page 6, the sentence "The Task Force voted uniformly in favor of the "performance-based approach it has been designing, and chose to dispense with the "line-in/line-out" draft CAO update as it applies to Agriculture" was contested by Teresa, who pointed out that she was not present to vote. We agreed to change the sentence to "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.”

CARR Task Force Technical Discussion

1. Continuing from the 17 September meeting discussion of Whatcom County CPAL questions

Question #12¹, but addressing the second half of the question: *Is the Whatcom requirement for continuous self-certification/monitoring/reporting appropriate for Jefferson County? If not is there a better approach that is both protective of Critical Areas and manageable for farmers whose permit applications are approved by the County?*

The Task Force spent some time discussing monitoring and reporting and how it should be conducted in Jefferson County. The Task Force members generally agreed that the County needs to do the monitoring, and that it is up to the County to determine the most practicable ways to accomplish this. All of the Task Force members weighed in on the subject. The following recommendation was proposed by Al Cairns, and agreed to by the Task Force: The County is responsible for ensuring that monitoring is conducted, and it should work with responsible farm agencies to develop and implement a monitoring program.

Question #13: *concerning the actions to be taken if there is an imminent threat to public health or significant pollution due to agriculture operations, does the Task Force agree with the changed role, responsibilities, and actions assigned by Whatcom County for the planning advisor and the technical advisor?*

Proposed Answer by TF member Teresa Michelsen:

I have mixed feelings about this provision. It does not refer to the farm operator’s duty to report imminent threats to public health or the environment that already exists under state and federal laws. Instead it seems to place most of the reporting burden on the planning advisor. I believe this should be modified to state that it is the farm operator’s responsibility to immediately report and seek to remedy any situation that is causing or has the potential to cause an imminent threat to public health or the environment. Applicable existing federal and state regulations could be cited. The farm operator should also notify the technical administrator and the planning advisor of the situation, along with the other reporting required depending on the nature of the incident or release. Of course he can seek guidance from the planning advisor as the situation is developing if he wishes, but it is still the farm operator’s basic responsibility to report and respond.

¹ This discussion finished the Task Force recommendation for question #12 which was partially completed at the 17 September 2019 Task Force meeting.

Essentially I think that this provision is duplicative of the duty to report that already exists under a variety of state and federal (and possibly local) laws, but that if the farm operator has a farm plan, the advisor and technical administrator should also be notified of such events as it may identify a need to modify the farm plan in some way – or at least that possibility should be reviewed. Some such events may be due to a simple accident or natural event that is impossible to foresee, but it could indicate where modifications to infrastructure or procedures are needed.

TASK FORCE RESPONSE: The Task Force uniformly agreed with Teresa’s suggestion to not accept the Whatcom process. Imminent threat to public health and significant pollution events are completely handled by state and federal law, and consequently do not need to be addressed in the County Ordinance. The Task Force recommends not including this paragraph from the Whatcom Code.

Note between Questions 13 and 14: *The Task Force was asked to affirm the definition of “compliance” as “implementing an approved Farm Plan”.*

Proposed Answer by TF member Donna Frostholm: Yes, assuming some standards, requirements, and monitoring provisions similar to what is in the WCC Conservation Program on Agricultural Lands (CPAL/Article 8) are included, such as those in WCC 16.16.830, 16.16.840, and 16.16.860, respectively.

TASK FORCE RESPONSE: The Task Force unanimously agreed with the definition of compliance as implementing an approved Farm Plan.

Question #14: *WCC 16.16.860D describes six situations where an approved Farm Plan can become non-compliant. The Task Force was asked to confirm that all six situations justify a non-compliant determination and that the provisions are appropriately protective of critical areas.*

Proposed Answer by TF member Al Cairns: Yes, these provisions are both reasonable and protect CA functions. The responsibilities of the farmer and Technical Administrator are well defined and there appears to be both an opportunity for dialogue and a reasonable timeline for correcting for operational deficiencies.

I would note that WCC mentions the Whatcom Conservation District as the exclusive developer of acceptable farm plans. This is in part because NRCS contracts with Whatcom CD to deliver a lot of the services they are unable to due to staffing shortages.

I would suggest that DCD would be best served to reference Jefferson County Conservation District or NRCS as an example of a DCD approved farm agency. So the JCC would read something akin to:

“Farm plans may be submitted to the Department by a farm agency approved by the Department.”

TASK FORCE RESPONSE: The Task Force agreed unanimously that the provisions are both reasonable and protective of Critical Area functions. The Task Force recommends including text similar to WCC 16.16.860D.

Question #15: *The Task Force was asked if the WDD 16.16.860E assurance that Farm Plan failure will not trigger other enforcement actions should be included in the Jefferson Code.*

Proposed Answer by TF member Steve Mader: This subsection is problematic and its legality should be reviewed by the County Attorney. A farm plan probably cannot be used as admission by the landowner that s/he has violated the CAO. The more pertinent issue is whether or not the farm plan is discoverable for enforcement/legal proceedings. I would be surprised if the farm plan could be legally protected from discovery, especially considering the poorly defined discovery exception for “life, health, environment, or safety.” It is hard to imagine a CAO violation that would not involve, at least, “environment.” The following code section, “16.16.870 Limited public disclosure,” seems to provide overlapping protection against discoverability/public disclosure, “unless required by law or a court of competent jurisdiction.”

Considering the ambiguity of the discoverability language, legal uncertainties, potential conflict with code section 16.16.870, and potential conflict with other sections of the JCC, this section should be dropped from the “alternative” code.

TASK FORCE RESPONSE: The Task Force agreed unanimously that text similar to WDD 16.16.860E should not be included in the alternative code.

Question #16: *The Task Force was asked to recommend whether or not the Whatcom public disclosure standards are appropriate for use in Jefferson County.*

Proposed Answer by TF member Craig Durgan:

- Farm Plans themselves will not be disclosed nor will be requested by Jefferson County.
- Jefferson County may collect publicly available info (but not a farm management plan or farm plan) to document BMP approval (but presumably not disclose to public).
- Jefferson County may post on its website which farms have implemented BMPs.
- Jefferson County may provide a list of BMPs as guidance to others.

TASK FORCE RESPONSE: The Task Force agreed unanimously that the public disclosure standards used by Whatcom are appropriate for Jefferson County, and that similar text should be included in the alternative code.

2. New vs Existing Agriculture. The Task Force was asked to consider the analysis provided by BERK in its paper dated September 11, 2019. Specifically, the Task Force was asked to vote on whether or not the Code should provide definitions of “new” and “existing” agriculture?

The Task Force discussed this question at length, and for the most part concluded that there is no need to make distinctions between new and existing agriculture because the definition of agriculture that appears in the Shoreline Management Act, now adopted in the rules that implement the GMA, and in the voluntary stewardship program does not make a distinction between new and existing agriculture. All members of the Task Force agreed that the main focus needs to be *no net loss of function* regardless of whether or not the activity is new or existing. Lisa explained that in the case of King County, which distinguishes between “existing” and “new” there are some additional performance standards they want to see to assure “no net loss”. For instance they don’t want to see tree loss in order to expand agriculture. In a vote as to whether or not the Code needs to include a definition of both new and existing agriculture, all of the TF members except for Frostholm and Bellow voted “no, there is no need to include definitions of new and existing agriculture in the code”.

Agriculture and Critical Areas Process and Case Studies. The Task Force was asked to review three questions about the Whatcom CPAL process and whether these processes and definitions should be used in the Jefferson alternative code.

- (1) The Task Force agreed in concept with Exhibit 1 in the BERK document dated 26 September 2019 (CPAL graphic of land-owner determination that a CA exists on his/her land), providing the actual wording is refined to fit the Task Force’s agreements on terms and conditions that fit Jefferson County.
- (2) The second question in this section, which was whether or not we agreed with the Whatcom rules for existing structure maintenance and appurtenant structure construction, was postponed so that it will be considered when we discuss wetland and buffer exemptions and allowances.
- (3) The Task Force considered whether or not case studies should be incorporated into the new proposed Agriculture Article. All members of the Task Force voted “no”, stating that it would be more appropriate for case studies to be provided in formats other than the County Ordinance.

4. Article VII: Wetlands. Discussions based on BERK paper titled “Wetlands Review”, dated 26 September 2019.

The Task Force considered four questions regarding the Wetlands Article:

Should Jefferson County offer a “standard” Hearing Examiner Variance as an additional option between the current options of administratively-approved variance and Hearing Examiner-determined “reasonable use exception” that avoids a “takings” challenge.

The Task Force generally recommends establishing a new intermediate mechanism such as that described in the BERK paper as a “standard variance” process with Hearing Examiner review.

-TF members Donna Frosthalm and Teresa Michelson both abstained from this vote. TF member Frosthalm does not see the value in adding another type of variance option based on her experience with the County, where it has been evident that landowners consistently choose to go with an administrative process rather than a HE review. TF member Michelson acknowledged that her abstention is based on a lesser understanding of the Hearing Examiner process and the professional qualifications of Hearing Examiners regarding wetlands protection.

[At this point the TF decided to continue on with the agenda for a half hour past the normal adjournment time.]

Should Jefferson County exempt (with mitigation) very small lower-functioning wetlands (e.g. Category III wetlands that are 1,000 square feet or less)?

The Task Force voted to add, as Donna suggested, “Category 4 and Category 3 wetlands of 1,000 sq. feet or less are exempt with criteria”, and that the criteria would need to be consistent with Ecology Guidance. TF Member Steve Mader took exception, noting that size does not equate with function.

Why was the buffer size in the High Impact land use area increased from 80-150 in the current CAO, to 80-300 in the draft CAO?

TF Member Donna Frosthalm stated that the change was a correction in the Code.

Should Jefferson County adopt rural-friendly buffer allowances with regards to wells, sewage facilities, and accessory agriculture structures?

Discussion in the group yielded multiple opinions and questions, especially in regard to septic systems in wetland buffers, given the potential of increased flooding as the climate changes and

well allowances in buffers

Lisa (BERK) and Patty were tasked to provide the Task Force with further work on buffer allowances for utilities and infrastructure that would support rural residential and agricultural development. The Task Force will resume discussions on this question at the next meeting.

Al noted that the Conservation District Board of Supervisors at its meeting the day prior strongly advised that agriculture activities be listed as exempt from Wetlands regulations, consistent with the federal Clean Water Act and Food Security Act. He pointed out that this is shown in the Whatcom regulations.

Final Administrative comments

- 1. Next meeting date/ time/ place/ discussion topics.** Our plan for the next meeting will be to finish the Wetlands questions and then move on to the Fish and Wildlife Habitat Conservation Areas Article and Geologically Hazardous Areas. The meeting will be held on 17 October 2019.

8:00 PM Meeting adjourned.

Minutes drafted by Robin Fitch 3OCT2019