

## LETTER OF TRANSMITTAL

**To:** Clallam County Board of Commissioners

**From:** Clallam County Planning Commission

**Subject:** Transmittal to BOCC: Findings and Conclusions regarding an update to the Critical Areas Code regarding existing on-going agriculture

Dear Commissioners:

The Clallam County Planning Commission has completed its review and public hearing process regarding an update to the Critical Areas Code regarding existing on-going agriculture. The Planning Commission completed its review and approved its final recommendations to forward to the BOCC at its meeting on September 21, 2016. As Chairman of the Clallam County Planning Commission, having first received the authorization of the Commission, I am transmitting herewith the findings and recommendations of the Commission on this proposed Ordinance:

### FINDINGS OF FACT:

1. Clallam County is updating the Critical Area Ordinance section on the exemption for existing & on-going Ag in Critical Areas. After the **interim** critical areas ordinance was adopted in 1992, Clallam County adopted the Critical Area Ordinance (CAO) in 2000. The initial CAO exempted all existing & on-going agriculture. This was challenged before the Growth Management Hearing Board (GMHB).

In 2001 new language was adopted in the CAO Exemption Section 27.12.035(7) CCC. This section states “Existing and ongoing agriculture that was conducted prior to the effective date of this chapter on lands designated as critical areas or their associated buffers; provided, that such lands are classified as farm and agricultural land pursuant to Chapter 84.34 RCW; provided further, that all activities occurring on such lands employ best management practices (BMPs). For the purposes of this exemption, acceptable BMPs shall include: (a) activities carried out consistent with farm plans issued and authorized by the Natural Resources Conservation Service (NRCS); (b) activities that demonstrate consistency with total maximum daily loads (TMDL) established by the Department of Ecology for specific operations; and/or (c) activities that demonstrate consistency with standard BMPs published by the NRCS, as now or hereafter amended. Written confirmation by the administering agency that applicable BMPs are being met will constitute evidence of eligibility for this exemption.”

This section is still in effect today. This section was challenged by Protect Peninsulas Future (PPF) before the Growth Management Hearing Board

(GMHB). Before this issue was resolved in 2006, the legislature placed a moratorium on updating the critical area regulations on agriculture. This lasted until 2011 when the legislature amended the Growth Management Act (GMA) to allow Voluntary Stewardship Plans (VSP). Clallam County did not adopt VSP.

In 2012 the GMHB initially found our Critical Areas exemption compliant with the GMA but this decision was challenged to the Court of Appeals that ultimately found our Critical Area exemption for Ag did not comply with GMA. In July 2015 the GMHB issued a 6 month compliance schedule and we have received four 90 day extension of time.

2. To address the GMHB case DCD started developing new Critical Area Codes to address existing on-going agriculture in critical areas. DCD worked closely with the Clallam Conservation District and also sought input from Protect Peninsulas Future (PPF).

The proposed update would only apply to agricultural operations that meet the following criteria:

- a) Have been in Ag since 1992;
  - b) Have not ceased in Ag use for 5 consecutive years;
  - c) Are located within Aquatic Habitat Conservation Areas (AHCA) – (i.e. DNR Type 1 to 5 waters), wetlands, or their associated buffers;
  - d) Are located within Agriculture Retention Zoning District or in the Agriculture taxing program.
3. The proposed update to the Critical Area Ordinance (CAO) is intended to make sure that the existing & on-going ag under this proposed section does not cause harm or degradation to the existing functions & values of the streams, wetlands, or their associated buffers. This proposed section does not require the streams, wetlands, or their associated buffers to be restored or enhanced.
  4. DCD has had workshops before the Planning Commission on March 16, 2016, June 15, 2016, and August 3, 2016 to address the Update to the Critical Area Code concerning critical area regulations for Existing and On-Going Agriculture.
  5. To ensure that the public has been aware of this update, DCD has done the following:
    - a) Established a website on the County Website on May 10, 2016 & continually updated it with relevant documents;
    - b) Sent mailers to approximately 800 landowners in the Agricultural Taxing & Agricultural Retention Zoning Districts.
    - c) Held a workshop in Sequim on May 24, 2016
    - d) Held a workshop in Forks on May 26, 2016
    - e) The Sequim Gazette wrote two articles on May 8, 2016 and June 8, 2016 about the Critical Areas Code Update for existing on-going agriculture.

6. DCD issued a SEPA Threshold Determination of a Determination of Non-Significance on August 19, 2019. The comment period on the DNS ended on September 6, 2016. This DNS was routed to the WA State Department of Ecology, Cities, and Tribes in Clallam County.
7. The Planning Commission held a Public Hearing on September 7, 2016 regarding the proposed amendments to the Critical Areas Code regarding existing and on-going agriculture. Comments were received from Protect Peninsula Future (PPF), the Jamestown Tribe, and the Makah Tribe.
8. PPF who challenge the existing critical area code section regarding existing on-going agriculture to the GMHB has indicated that they are in general approval of the proposed amendment to the critical areas code. The farmers, ranchers, and general public did not raise opposition to the proposed update to the Critical Areas Code as reflected by the workshops and public hearings.
9. The Jamestown and the Makah Tribes brought up the issues of whether the buffers proposed update to the critical areas code were based on Best Available Science during the 14 day SEPA comment period on this proposal.
10. The September 7, 2016 hearing was continued to September 21, 2016 to allow time to address the comments received from PPF and the Tribes. In the September 15, 2016 packet to the PC, DCD addressed the issue of BAS by citing the Jefferson County Critical Areas Ordinance Updated Best Available Science Report prepared by ESA dated December 15, 2015. Chapter 6 of this report addresses "Agricultural Activities in and near Critical Areas". This report states that narrow 5 and 15 foot dense buffers are just as effective as wide (35 foot and 180 foot) buffers in lowering water temperature and in generating effective shade on page 6-10.

Section 6.3 of this report provides additional recent scientific literature regarding agricultural uses in critical areas. These studies were utilized for the determination of buffers within the proposed updates to the critical areas code addressing existing on-going agriculture. This report cited (6.3.1) Washington Conservation Reserve Enhancement Program Monitoring Summary; (6.3.2) Washington Agricultural Caucus Riparian Buffer Review; 6.3.3 Chimacum Watershed Water Quality and Fishes Report; and (6.3.4) Working Buffers on Agricultural Lands Paper.

The DCD buffers are also consistent with Section 7.2 Overview of the Aquatic Habitat Functions and Value Section of the Whatcom County Critical Area Ordinance Best Available Science Review and Recommendations for Code Update (attached). This report was prepared by Parametrics, Adolphson Associates, Earth Systems, Coastal Geologic Services, and Jennifer Thomas and Associates, and is dated May 2005.

11. This program applies to existing and on-going agriculture that occurs within and adjacent to AHCA and wetland areas. For most of these areas the riparian areas have been previously degraded prior to June 16, 1992 for the establishment of the agricultural operations regulated under this proposal.

In addition, required Best Management Practices that specify 35 to 50 foot buffers from low intensity agricultural activities and over a 100 foot buffer from high intensity (heavy use and manure storage) areas should improve the water temperature, sediment filtration, and pollution removal of the degraded areas adjacent to existing on-going agriculture.

Clallam County has elected to subject open irrigation and drainage ditches and man-made ponds that are hydro-logically connected to AHCA and wetlands in the proposed amendment in order to enhance these critical areas. In this regard, Clallam County has elected to exceed the minimum requirements of solely not harming or degrading the existing functions and values of the AHCA and wetland areas.

12. DCD also cited three court cases that outlined how the proposed critical area code update was supported by case law.

A. The first case was *WEAN vs City of Seattle* that was cited by the Jamestown Tribe. The case focuses on the need to utilize Best Available Science in adopting critical areas regulation, but was not specifically dealing with existing and on-going agriculture in critical areas.

B. The next court case addressed was *WEAN vs Island County*. The court addressed updates to the critical area code for existing on-going agriculture. This decision found that the use of Farm Plans does not meet the requirement to use Best Available Science. They also determined that county's need to monitor the functions and values of critical areas. Clallam County current Critical Area Code exemption for existing and on-going agriculture is being challenged on by Protect Peninsula Future for the same reasons that Island County Critical Areas Code was challenged. The proposed amendments to the Critical Area Code include specific best management practices based on Best Available Science and includes monitoring of functions and values of critical areas to remedy the challenges to Island and Clallam County Critical Areas Code address existing on-going agriculture.

C. The Westlaw Case summary of *Swinomish Indian Tribal Community (SITC) and Washington Environmental Council (WEC) (petitioners) vs Western Washington Growth Management Hearing Board (Skagit County)* is attached. This case specifically addressed existing and on-going agriculture in critical areas.

In this case the Washington Supreme Court determined the following:

- i. "protection" of critical areas does not require enhancement or improvement of conditions in a critical area that is already in a degraded condition;
- ii. county's "no harm" standard for anadromous fish habitat in agricultural areas satisfied "protection" requirement;
- iii. county provided reasoned justification for its decision not to establish mandatory riparian buffers along streams and rivers on upland strip of land; and
- iv. county was required to establish benchmarks for its salmon habitat monitoring program.

In the September 15, 2016 Memo DCD outlined how the proposed update to the Critical Areas Code met the finding of the Washington Supreme Court Case that was exacting related to the update of Critical Area Codes for existing on-going agriculture in critical areas.

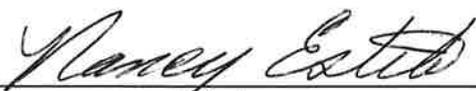
13. The final draft the update to the Critical Areas Code dated September 15, 2016 regarding existing on-going agriculture was presented at the September 21, 2016 Planning Commission Public Hearing. A vote was held; and in a 6 in favor, 1 opposed, and 2 absent the proposed update to the Critical Areas Code ordinance was passed to forward to the BOCC.

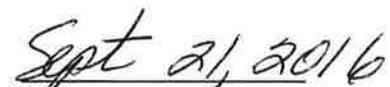
Based on the above facts and findings, and following attachments that include: the amendment to Section 27.12.035(7) CCC; proposed new Section 27.12.037 CCC; proposed amendments to definitions of agriculture found in Section 27.12.900(2) CCC; and a new definition in Section 27.12.900 for Existing, on-going agriculture; the Planning Commission adopts and transmits the following conclusion to the Clallam County Board of Commissioners.

**CONCLUSION:** The Clallam County Planning Commission concludes that the proposed update to the above referenced updates to the Critical Area Code:

- Support the continuation of existing, on-going agriculture while not cause harm or degregation to the existing conditions of AHCA and wetlands;
- Does not place undue burdens on agricultural operations, the Clallam Conservation District, or Clallam County;
- Has not been objected to by farmer, ranchers, and the public;
- Is consistent with the Growth Management Act;
- Is based by Best Available Science;
- And is consistent with case law regarding this issue.

The Planning Commission recommends approval by the BOCC and as Chair of the Commission, has directed me as its duly authorized agent to transmit this recommendation to the BOCC.

  
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Nancy Esteb, Chair

  
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Date

## MINUTES

### Clallam County Planning Commission

*Regular Meeting of September 21, 2016  
Clallam County Courthouse  
223 East Fourth Street, Suite 5  
Port Angeles, WA 98362-3015  
6:30 PM*

- A. CALL TO ORDER: The meeting was called to order at 6:30 p.m.
- B. PLEDGE OF ALLEGIANCE.
- C. ROLL CALL: Members present were Chair Nancy Esteb, Vice-Chair Beauvais, Robert Miller, Tom Montgomery, Jane Hielman and Steve Gale. Scott Clausen was excused. Mary Ellen Winborn, Director; Kevin LoPiccolo, Planning Manager; and Greg Ballard, Senior Planner, represented staff from the Department of Community Development. Also present was Rich James, Transportation Program Manager.
- D. WELCOME: Chair Esteb welcomed all in attendance.
- E. APPROVAL OF MINUTES: Draft September 7, 2016 meeting minutes.

A motion was made and seconded to approve the minutes.

Amendment:

Page 2, amend the fourth line in the first paragraph to read "...from the requirements of the Clallam County Critical Areas Code based on a petition from Protect the Peninsula's Future".

Following a vote, the motion carried 5-0 to approve the minutes as amended. Steve Gale abstained as he was excused from the September 7, 2016 meeting.

- F. ANNOUNCEMENTS:

Chair Esteb and Vice-Chair Beauvais will be excused from the October 5, 2016 meeting.

Commissioner Clausen will be excused from the October 5, 2016 meeting.

On October 11, 2016, staff will hold a community workshop at Greywolf Elementary School regarding the proposed Carlsborg urban growth amendments from the Carlsborg Community Advisory Council.

Commissioner Montgomery indicated that the third Presidential debate will be conducted on October 19, 2016, and suggested that the Planning Commission meeting be cancelled. Staff informed the Planning Commission that depending on the project calendar a determination would be made and the Planning Commission would be notified whether or not a meeting will occur.

Commissioner Gleason arrived.

Staff inquired as to whether the Commission would like to have their meetings video recorded. The Board of County Commissioners currently streams their meetings through the county website, and staff was requested input from the Planning Commission on this matter. The Commission was supportive.

Mary Ellen Winborn received an award from the Nature Conservancy and Dept. of Ecology for the Dungeness River Levee Setback Project, which is referred to as the floodplain luminary and recognizes the collaboration that it took to make this project successful.

G. PUBLIC COMMENT PERIOD:

Marcia Garrett, P.O. Box 2380, Sequim, WA

Ms. Garrett spoke in support of the proposed amendments to the Clallam County Critical Areas Code.

She indicated that she has a neighbor that is continuously polluting the critical areas with waste from her pig farm, and therefore, appreciates the standards and regulations within the Code to enforce such action.

Kelly Johnston, Owner of Johnston Farms

Mr. Johnston indicated that he was just made aware of the pollution to the critical areas by the landowner that Ms. Garrett referred to, and is very concerned. He indicated that he is very diligent about not adversely effecting critical areas since he is an organic farmer.

Jan Butler, 210 Bonita Lane, Port Angeles, WA

Ms. Butler spoke in support of the proposed amendments to the Clallam County Critical Areas Code, as she lives near the pig farm and has witnessed devastation to Agnew Creek, including livestock issues. Regulations are necessary to ensure compliance.

H. UNFINISHED BUSINESS:

**Proposed Amendments to Clallam County Critical Areas Code, Chapter 27.12**

Commissioner Montgomery spoke to importance of salmon, Dungeness Water Conservation Plan which was developed to maintain the critical flow of the Dungeness River for salmon, and dealing with Tribal treaty rights. The letter presented by the Jamestown S'Klallam Tribe is a very important document and he quoted the second paragraph of the letter that "the proposed amendments rely on risk assessment of agricultural practices that are not supported by scientific literature". Secondly, the letter raises two legal issues. In his opinion, the Commission has not yet been presented with adequate arguments by people with proper credentials regarding what the appropriate scientific study is for Clallam County with respect to the Critical Areas Code, nor has the Commission received an opinion by counsel stating their opinion of whether the proposed draft would survive a challenge in court.

Staff indicated that they specifically address the above referenced issued in the DCD Memo to the Planning Commission dated September 15, 2016. This included:

- Excerpts from the Jefferson County Best Available Science Report from 2015 prepared by ESA.
- Excerpts from the Whatcom County Critical Area Ordinance Best Available Science Review and Recommendations for Code Update from 2005 prepared by Parametrics and others.
- Three court cases that were provided by county legal counsel addressing the issues raised by the Jamestown Tribe. The Westlaw Case summary of Swinomish Indian Tribal Community (SITC) and Washington Environmental Council (WEC) (petitioners) vs. Western Washington Growth Management Hearing Board (Skagit County) is attached. This case specifically addressed existing and on-going agriculture in critical areas, and found that degraded critical areas do not have to be enhanced. This update is dealing with areas where farming that has continuously occurred since 1992 and is located within AHCA, wetlands and their associated buffers.

The Jefferson County BAS report also indicated that instead of a one size fit approach as outline in the table provided by the Jamestown Tribe, that National Oceanic and Atmospheric Administration (NOAA) supports a customized approach with an inter-zone area to control activities and an outer-zone that allows activities. This was the specific approach that staff used. Staff spoke to best management practices and supporting material included in the draft. Commissioner Montgomery reiterated that the Tribe indicates that the County the proposed draft was not supported by Best Available Science (BAS) and was not consistent with case law.

Commissioner Gale commented that the County would be in a better position if they sought to establish measurable criteria in which to match critical areas as to whether setbacks are being properly adhered to, rather than continuously involving best available science or best management perspectives, as the perception is a less liable position, and the County should adopt something more deliberate. Staff spoke to perimeters in place.

Commissioner Gleason spoke about Streamkeepers Program for stream monitoring and function, and indicated that if the number of macroinvertebrate is changing positively, the findings are that the stream is improving. If not, it's necessary to look upstream as to what is contributing to habitat degradation. Commissioner Gleason felt that the County has a fairly good data base, and observation by the public of their findings is very valuable.

Staff briefly reviewed comments received.

Eloise Kailin, Protect the Peninsula's Future,

Ms. Kailin spoke to the importance of protecting farmland and ongoing agriculture. Protect the Peninsula's Future, as well as their attorney Gerald Steel has provided input regarding the proposed amendments and has suggested further improvement so that the County achieves full compliance with the requirements of the Growth Management Act.

Vice-Chair Beauvais inquired regarding the extension deadline. Staff indicated that the County received a 3-month extension approximately 3 weeks ago, however, staff would prefer that the Commission not worry about the timeframe and be comfortable with its recommendation. She reiterated that she would like to see feedback from the Dept. of Commerce and Department of Ecology. Staff received notification from the Department of Commerce that they had no comment. Staff spoke with a representative from Department. of Ecology, who indicated that the County was on the right track in its proposal.

Commissioner Montgomery reiterated that he would like to see a written opinion by County counsel addressing the legal issues prior to voting on this, as well as a written scientific opinion or analysis from someone with a scientific background. Staff reiterated items that they relied on, as part of their analysis in moving forward.

The DCD Director indicated the difficulty in having to hire someone at this time to address the issue of BAS for this compliance issue, and that this may be more appropriate when we update our entire Critical Areas Code. Commission, Director, and staff had some closing comments with regard to the proposal.

Commissioner Gleason made a motion to approve the proposed amendments to the Critical Areas Code, 27.12 CCC, related to existing, and ongoing agriculture. Vice-Chair Beauvais seconded the motion. Following a roll-call vote, the motion carried 6-1. Commissioner Montgomery – No, Commissioner Miller – Yes, Chair Esteb – Yes, Commissioner Gleason – Yes, Commissioner Hielman – Yes, Vice-Chair Beauvais – Yes, and Commissioner Gale – Yes.

I. PUBLIC HEARING:

**Clallam County Six-Year Transportation Improvement Program (2017 – 2022)**

Rich James, Transportation Program Manager, indicated that current state statutes require each city and county to annually update its Transportation Improvement Program, and file a copy with

the Department of Transportation. The Program is an important programming and planning tool for local, state and federally funded projects.

Projects get on the local Six-Year Transportation Improvement Program based on safety needs, accident incidents, design issues and other engineering factors.

It is estimated that from 2017 through 2022, the County will do almost \$12.5 million dollars worth of work with the largest project being the replacement of the McDonald Creek Bridge on Old Olympic Highway, and repair to the Ward Bridge on Woodcock Road.

Mr. James reviewed some larger road projects in the Program.

Chair Esteb opened the public hearing.

Mr. James addressed questions of the Commission:

- Commissioner Miller inquired regarding the Olympic Discovery Trail project west of Lake Crescent to Forks
- Vice-Chair Beauvais inquired regarding funding totals
- Vice-Chair Beauvais inquired regarding Striped Peak Road (Private Road), and indicated that she is concerned that there are county trust lands in the area that log trucks travel on which create a safety hazard for the 35 residents on the road. She asked if there is a way to get the project on the unfunded list. Mr. James indicated that the Board would need to take action to have this added to the unfunded list.
- Commissioner Gale inquired regarding improvement to the intersection of U.S. 101 and Happy Valley Road. Mr. James indicated there is a Happy Valley Road project list in the funded list. The Road Dept. recognizes that there are issues with intersections of U.S. 101 and Happy Valley, and U.S. 101 and Palo Alto Rd., which have been subjects of studies done by the Jamestown S'Klallam Tribe. There is a long-range plan for those improvements with the State.
- Commissioner Miller inquired as to the necessity of the Kugel Creek Culvert project with regard to associated costs. Mr. James indicated that the culvert is impassable and too steep to accommodate fish. There is grant money available for the project.

Chair Esteb closed the public hearing.

Kelly Johnston inquired with regard to the McDonald Creek Bridge project on Old Olympic Highway, as to repair time and traffic detour. Mr. James indicated that the project will include widening the road to 40 feet with 8 foot shoulders, bringing up the elevation to match Old Olympic Highway, and that the road would need to be shut down for a significant period of time.

Eloise Kailin inquired whether soil in the west end road projects will be sterilized prior to laying pavement. Mr. James indicated that typically, the soil is treated or contained, but not sterilized.

Commissioner Montgomery made a motion to approve the Six-Year Transportation Improvement Program, as presented. Vice-Chair Beauvais seconded the motion. Following a roll-call vote, the motion carried 7-0. Commissioner Montgomery – Yes, Commissioner Miller – Yes, Chair Esteb – Yes, Commissioner Gleason – Yes, Commissioner Hielman – Yes, Vice-Chair Beauvais – Yes, and Commissioner Gale – Yes.

J. WORK SESSION ITEM: None.

K. PUBLIC COMMENT PERIOD:

Kelly Johnston indicated that there is a stream that runs through the middle of his property, and inquired regarding buffers that apply. Chair Esteb recommended that he discuss this with staff, and perhaps the Conservation District.

Jan Butler supports the proposal in order to ensure compliance so that degradation does not occur.

L. ADJOURNMENT: The meeting adjourned at 7:55 p.m.

Respectfully submitted,

Kevin LoPiccolo  
Principal Planner