Department of Commerce

Critical Areas Handbook

Chapter 3

Structuring Critical Areas Regulations

June 2018
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Code Applicability

Most communities have chosen to adopt stand-alone regulations to address critical areas to meet the Growth Management Act (GMA) requirement to ensure protection of critical areas. Often, such regulations are a critical areas chapter or section within the code's development regulations or environmental title.[1] This chapter focuses on critical areas regulations. However, critical areas may also be protected using other development regulations (Chapter 4) and non-regulatory programs (Chapter 6).

When to Require Critical Areas Review

The code needs to clearly specify when and where critical areas regulations are applicable, and when a permit is needed. If the critical areas regulations are integrated into existing development regulations, they may apply "automatically" to any new development similar to the manner that setbacks apply. However, if the critical areas regulations are located separately from the development regulations, such as in a critical areas chapter, the critical areas code needs to specify its applicability.

There are two basic options: (1) use code language that states that critical areas regulations are applicable to all development, or (2) specify the types of development and locations regulated by the critical areas code. In either case, critical areas regulations should always apply whenever necessary to protect critical areas from development activity. The first option, to have them always apply, cuts out the step (and relevant code language) of determining whether they apply or not. If the critical areas regulations always apply, then the review process needs to be simple enough that common permits are not unduly delayed. Limiting applicability to only specific uses or mapped locations eliminates the review process for many applicants, but depends on having sufficient information to precisely identify critical areas at the time the regulations are adopted.

The following is an example of code language that could be used to state applicability of the critical areas regulations:

> The [city/county] shall regulate all uses, activities, and developments within, adjacent to, or likely to affect, one or more critical areas, consistent with the best available science and the provisions [in the critical areas chapter].

[1] See Appendix 3.A for examples of local government code structures.

The example states applicability broadly, including all "uses, activities, and developments" and it specifies that it applies whenever such activity is "likely to affect" a critical area.

Which Activities Require Review?

While development regulations typically apply to new construction activities, the code language for critical areas needs to be broad enough that it protects critical areas from all development activities, including those that do not involve new structures, such as roads. Clearing, paving, new uses (such as outdoor stages), and even storage of equipment (such as those with hazardous chemicals) need to be regulated to ensure protection. New agricultural activities and conversions from forestry to another land use may also require regulation.

Depending on how performance measures are implemented, exemptions may need to be stated so that minor passive land use activities, such as passive recreational uses, are not subject to review.

Some existing and ongoing business practices that are nonconforming may also be regulated, requiring annual reporting to the jurisdiction about operational performance, storage of hazardous materials, etc. Annual inspection programs by the jurisdiction may be another function that should be considered, especially if the nonconforming use represents a potential risk to a critical area. An example of this would be those businesses that conduct activities that handle hazardous substances or waste and that are located within a critical aquifer recharge area.

When Is an Impact Likely?

The critical areas code should state that review is required whenever the proposed development is near a critical area or whenever an impact is likely. Some codes fail to fully protect critical areas by limiting review to the following scenarios:

- "When a critical area is located on site." – This ignores a potential critical area that might be located on the adjacent property or in the right-of-way that the proposed development may significantly impact.
- "When the development is located within a critical area." – This protects critical areas in the most extreme cases, but fails to protect when the development is within the buffer or immediately adjacent to the critical area. Some communities have partially addressed this issue by including the buffer in the language, "when the development is located within a critical area or its buffer." However, often the buffer distance is not known. Some critical areas do not have buffer set back requirements, and some developments will still result in significant impacts even when located beyond the buffer area. The

light, noise, and smoke from an industrial facility may have a significant impact on habitat even though it may be located beyond the buffer area.

To fully protect critical areas, the code language should include a statement that the community shall regulate development that is "likely to affect" a critical area. However, implementation of "likely to affect" can be difficult without knowing what typical impact distances are. To make the code more meaningful for both the staff and the public, it may be appropriate to include either a standard distance that includes all anticipated building activity set back distances or a list of variable buffer distances that apply depending on the type of critical areas identified.

The first "likely to affect" option can be implemented with the following language:

> The [city/county] shall regulate all uses within [___ feet] of, or that are likely to affect, one or more critical areas, consistent with the best available science and the provisions herein.

Alternatively, the community could specify a list of distances based on the critical areas known to exist in their environment:

> The [city/county] shall regulate all uses, activities, and developments within, adjacent to, or likely to affect, one or more critical areas, consistent with the best available science and the provisions herein. Adjacent shall mean any activity located:
>
> 1. On a site immediately adjoining a critical area;
> 2. A distance equal to or less than the required critical area buffer width and building setback;
> 3. A distance equal to or less than 2,620 feet from a peregrine falcon nest;[2]
> 4. A distance equal to or less than three hundred (300) feet upland from a stream, wetland, or water body;[3]
> 5. Within the floodway, floodplain or channel migration zone; or
> 6. A distance equal to or less than two hundred (200) feet from a critical aquifer recharge area.[4]

[2] The distance of 2,620 feet is based on the Washington Department of Fish and Wildlife *Management Recommendations for Washington's Priority Species, Volume IV: Birds, PHS Single Page Management Recommendations: Peregrine Falcon*.

[3] The distance of three hundred (300) feet is based on maximum recommended riparian habitat area width from the Washington Department of Fish and Wildlife *Management Recommendations for Washington's Priority Habitats: Riparian*., 1997. Riparian Ecosystems, Volume 1: Science Synthesis and Management Implications[3] is a partial update of the 1997 publication. Volume 2[3] of that document is WDFW's draft management recommendations to inform local government decisions related to riparian ecosystems and aquatic resources, and is expected to be finalized in the fall of 2018.

[4] The distance of two hundred (200) feet is a suggested distance to ensure that activities within the critical aquifer recharge area are included under this Chapter, even when the exact boundaries of the critical aquifer recharge area are not known at the time of application.

Using broad language here means that the critical areas regulations will apply in many situations, ensuring that potentially impactful development does not escape review. However, the applicability of regulations does not mean that developments must go through a complex or lengthy review process. First, minor activities should be listed as exempt (see section on exemptions below). Additionally, a two-tiered review process may be used where a low level of review is used for common proposals that are likely to have only minor impacts and a higher level of review for larger projects and those with more direct impacts.

Clear Criteria and Standards for Protection

Development regulations should provide clear and detailed criteria so that in wielding professional judgment, administrators have regulatory "sideboards" and policy direction. Providing sufficient guidance for decision-makers is an important element of development regulations.[5]

The Western Washington Growth Management Hearings Board found that, while RCW 36.70A.172(1) does not require a new best available science investigation at the time of permitting, discretion in issuing permit decisions should be guided by specific criteria. A city's requirements for an extensive critical areas report by a qualified biologist, coupled with the requirement that habitat alterations or mitigations must protect the quantitative and qualitative functions and values of habitat conservation areas when permits are issued, make the regulations compliant.[6]

In a challenged ordinance, the Central Puget Sound Growth Management Hearings Board found clear regulatory sideboards for approval of substitute mitigation measures were provided by the requirement of "equivalent mitigation for identified impacts."[7]

Exemptions, Exceptions, and Allowable Uses

As recommended above, a community's critical areas regulations should apply broadly to any development activity that might result in a detrimental impact to critical areas. However, there are several reasons why some activities should be exempt from critical areas regulations, or why they should be allowed with a lower level of review. Those reasons include:

[5] *RE Sources v City of Blaine*, 09-2-0015, Order on Reconsideration, April 27, 2010, at 6.
[6] *Evergreen Islands, Futurewise and Skagit County Audubon Society v. City of Anacortes*, 05-2-0016, FDO, 12/27/05.
[7] *Shoreline Preservation Society, et al. v. City of Shoreline*, Case No. 15-3-0002, Order on Motions, September 10, 2015, at 10-11.

- Regulations should not prevent emergency actions that reduce risks of natural hazards.
- Some activities are unlikely to result in an impact.
- Additional critical areas review may not be effective in some instances.
- Appropriate uses of land should be encouraged.
- Beneficial activities, such as restoration, should be encouraged.

Minor activities, such as bird watching, pose little threat to critical areas. Other activities may have already been reviewed for critical areas impacts, or their potential critical areas impact may be limited by other regulations, such as stormwater regulations. The time and expense to review such activities would likely be excessive compared to the resulting potential impact.

Local governments use a variety of approaches in applying their critical areas regulations to uses that may have no or minimal impact to critical areas. Some use an applicability section to determine which activities are exempt. Others provide a list of allowed uses in critical areas. The sections that follow illustrate how these approaches may be used, and when they are recommended.

Local government examples in Appendix 3.A include sections for exemptions, exceptions, and allowed uses. These three categories allow varying degrees of allowed activities or uses without review or provide an exception from the regulations of the critical areas chapter.

Exemptions

If an activity or use is "exempt" from the critical areas regulations, the regulations do not apply and no review is required. Proponents of the activity or use are usually required to submit a written request or permit for an exemption that must be approved by the local government. Approval or denial may be an administrative action. If the exemption is denied, the proponent may continue in the permit review process subject to the requirements of the critical area regulations.

Being an exempt activity does not give permission to degrade critical areas or ignore the risk of natural hazards. Also, approval as an exempt activity under the critical areas regulations does not exempt the activity from other applicable local, state, and federal laws and requirements. Typical exemptions include:

- **Emergencies.** Those activities necessary to prevent an immediate threat to public health, safety, or welfare, or that pose an immediate risk of damage to private property and that require remedial or preventive action in a timeframe too short to allow for compliance with the requirements of the critical areas regulations. Usually, emergency actions are required to use reasonable methods to address the emergency with the least possible impact to the critical area. The local government will require review of the

emergency action to determine if it was beyond the scope of the exemption, and may require necessary permits after the fact, including any restoration or mitigation.

- **Operation, maintenance, or repair.** Operation, maintenance, repair or improvements of existing structures or infrastructure, if the activity doesn't alter or increase impacts to critical areas and there is no increased risk to life or property.
- **Passive outdoor activities.** This usually includes recreation, education, and scientific research activities that do not degrade the critical area, including fishing, hiking, and bird watching. Trail construction may be allowed except within wetlands, fish and wildlife habitat conservation areas, and their respective buffers.
- **Forest practices regulated by the state.** Forest practices regulated and conducted in accordance with the provisions of Chapter 76.09 RCW and forest practices regulations, Title 222 WAC, are exempt, except for conversions to non-forestry uses.

Public Agency and Utility Exceptions

If the application of the critical areas regulations would prohibit a development proposal by a public agency or utility, the regulations may allow the agency or utility to apply for an exception. Criteria for review and approval may include:

- There is no other practical alternative to the proposed development with less impact on the critical areas;
- The application of the critical area regulations would unreasonably restrict the ability to provide utility services to the public;
- The proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the development proposal site;
- The proposal attempts to protect and mitigate impacts to the critical area functions and values consistent with the best available science; and
- The proposal is consistent with other applicable regulations and standards.

The Central Puget Sound Growth Management Hearings Board found that a city's record contained no scientific evidence to support an expansion of the public agency utility exception to include private utility projects. The Board concluded the city failed to demonstrate that it included best available science in violation of RCW 36.70A.172. The Board invalidated the ordinance and remanded to the City.[8][9]

[8] *John Hendrickson, et al. v. City of Kenmore*, Case No. 16-3-0002, Final Decision and Order, November 28, 2016, at 4.

[9] It should be noted that the 2006 version of the ordinance included some but not all of the criteria recommended above. These criteria were included in a Sample Critical Areas Ordinance that Commerce no longer publishes. The Board chose not to accept the City's assertion that the Commerce Sample Critical Areas Ordinance is best available science because the City had deviated from it in 2006. Thus, the Board did not decide whether adopting the Commerce Sample Critical Areas Ordinance suffices to show that best available science has been included. The Board stated that Commerce's technical assistance is aimed at developing GMA-compliant critical area policies, but

Allowed Uses or Activities

"Allowed uses or activities" are those uses or activities that are unlikely to result in a critical areas impact because of other regulations or previous reviews. These activities are subject to review by the city or county, but do not require a separate critical areas review or report. Since these activities are generally not "exempt," the critical areas standards continue to apply and the underlying permit could be conditioned to ensure that the activity complies with critical areas protection. Some jurisdictions use the term "partial exemptions" to note that these activities are exempt from the critical areas review process, but not the protection standards. Allowed uses or activities that may not need to complete a new critical review might include:

- **Projects previously reviewed for critical areas impacts.** Development permits and approvals that involve both discretionary land use approvals (such as subdivisions, rezones, or conditional use permits), and construction approvals (such as building permits), may not need to complete a new critical area review. Some jurisdictions place a time limit on how long a previous critical area review is good for, such as five years, to account for changes in codes, critical areas' boundaries, or other factors over time.
- **Modification of existing structures.** Structural modifications or replacement of an existing legally constructed structure that doesn't alter or increase impacts to a critical area or buffer and doesn't increase risk to life or property.
- **Activities within the improved right-of-way.** Replacement, modification, installation, or construction of utility facilities, lines, pipes, mains, equipment or appurtenances, not including substations, when such facilities are located within the improved portion of the public right-of-way or a county/city authorized private roadway. Provisions to address activities that alter a wetland or watercourse or result in the transport of sediment or increased stormwater runoff may include: (1) Increasing buffer widths equal to the width of the right-of-way improvement, including disturbed areas; and (2) Retention and replanting of native vegetation along the right-of-way and resulting disturbance.
- **Minor utility projects.** Utility projects with minor or short-duration impacts to critical areas and no significant impact on the function or values of a critical area, provided such projects are constructed with best management practices and additional restoration measures. Criteria for minor utility projects can include: (1) No practical alternative with less impact on the critical area; (2) The activity involves the placement of a small utility facility (e.g., pole, street sign, etc.); and (3) The activity involves disturbance of an area less than a certain number of square feet.
- **Public and private pedestrian trails.** Public and private pedestrian trails, except in wetlands, fish and wildlife habitat conservation areas, or their buffers. Conditions for approval can include: (1) The trail surface must meet all other requirements including stormwater regulations: (2) Critical area and/or buffer widths must be increased, where

WAC 365-195-910 does not say Commerce's model ordinances are the best and most current science available. *Id* at 15.

possible, equal to the width of the trail corridor, including disturbed areas; and (3) Trails proposed in landslide or erosion hazard areas must be constructed so as to not increase the risk of landslide or erosion in accordance with an approved geotechnical report.

- **Minor vegetation removal.** Selective removal of invasive, noxious and non-native vegetation with hand labor and light equipment. However, removal of vegetation from a critical area or its buffer may require approval.
- **Removal of hazard trees.** Removal of trees from critical areas and buffers that are hazardous, posing a threat to public safety, or posing an imminent risk of damage to private property may require a report from a certified arborist, registered landscape architect, or professional forester. The report documents the hazard and provides a replanting plan for replacement trees consistent with the jurisdiction's compensatory mitigation standards to provide for no net loss of ecosystem functions and values. Other tree pruning or cutting activities may be subject to requirements regarding tree replacement or provision for critical wildlife habitat. Measures to control a fire or halt the spread of disease or damaging insects should be consistent with the state Forest Practices Act (Chapter 76.09 RCW, and local forest regulations if adopted) with provisions for replacement.
- **Chemical applications.** The application of herbicides, pesticides, fertilizers, or other hazardous substances, as approved the city/county. Provided, their use should be restricted in accordance with state Department of Fish and Wildlife Management Recommendations and the regulations of the state Department of Agriculture and the U.S. Environmental Protection Agency.[10]
- **Minor site investigation work.** Work necessary for land use permit submittals, such as surveys, soil logs, percolation tests, and other related activities, can be an allowed use when they do not require construction of new roads or significant amounts of excavation. But, in every case, impacts to the critical area should be minimized and disturbed areas immediately restored.
- **Navigational aids and boundary markers.** Construction or modification of navigational aids and boundary markers.

Although exemptions are not prohibited under the GMA, the Eastern Washington Growth Management Hearings Board found that all development regulations, even those for exempt activities, must be based on best available science and tailored so as to reasonably ameliorate potential harm and address cumulative impacts. The county contended that their administrative review process would assure that functions and values of the critical area are protected. However, the Board found that it is not the review process but the inclusion of best available science that is imperative when it comes to critical areas.[11]

[10] More information on commercial and residential use of chemicals can be found in the Washington State Department of Ecology's Critical Aquifer Recharge Areas: Guidance Document, 2005, Publication #05-10-028; and from the Washington State Department of Agriculture, http://agr.wa.gov/.

[11] *Hazen, et al v. Yakima County*, 08-1-0008c, FDO at 29 (April 5, 2010), at 30.

An exception from the critical areas regulations for public agencies and public/private utilities when such an entity "has difficulty" meeting protection regulations resulting in preclusion of the proposal was challenged. The Western Washington Growth Management Hearings Board responded:

> The clause "would preclude a development proposal" does not include a qualifier that places the initial burden on the agency to show the location of the proposed development is necessary. . . the initial determination under the County's system, the location of the "development proposal", is left solely to the proponent, notwithstanding the possibility the proposal could be located in an area with fewer negative impacts to a critical area. The County has the obligation to protect critical areas and leaving the choice of location to the proponent is in effect a delegation of authority, would abrogate the duty to protect critical areas and fails to assure no net loss of ecological functions. Furthermore, there are no standards by which to determine that a project proponent would "have difficulty" meeting standard critical area regulations.[12]

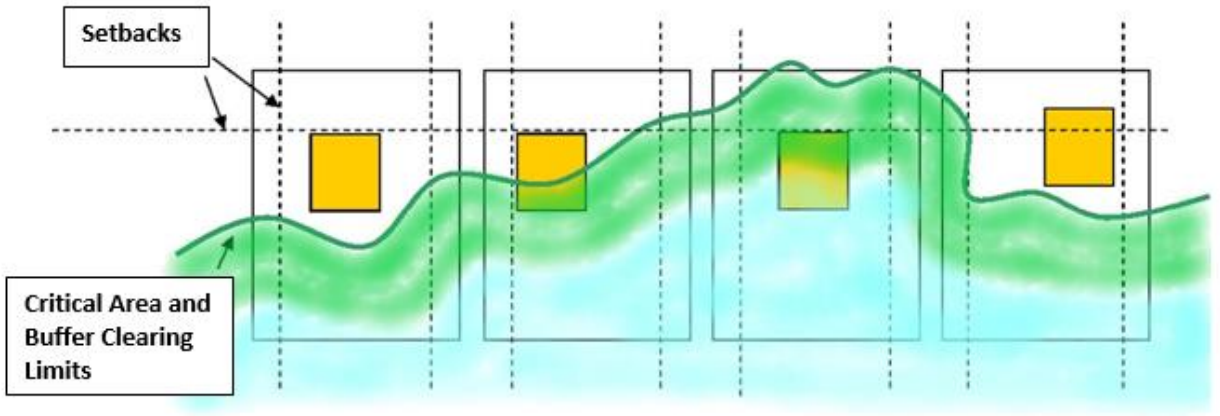
Reasonable Use Exception

In addition to exemptions and allowed uses, cities and counties must allow a minimal "reasonable use" of property even if such a use would otherwise be denied by the critical areas regulations. The Fifth Amendment and Fourteenth Amendment of the U.S. Constitution provide individuals with protection from being deprived of the use of one's property without due process or just compensation.

If critical areas regulations denied all use of a parcel, it would typically be considered a "taking" of the property. If legally challenged and unjustified, a court could throw out the regulations, thereby jeopardizing environmental protection. To avoid a taking, cities and counties typically include a reasonable use provision that allows only the minimal "reasonable" use of a property that would otherwise be prohibited.

Unlike variances, the purpose of a reasonable use exception permit is not to allow general development within critical areas, but to allow only the minimal "reasonable" use of the property so as to avoid a constitutional taking. Four scenarios are provided to illustrate situations where a reasonable use exception might or might not be applicable:

[12] *Friends of the San Juans, et al. v. San Juan County*, 13-2-0012c, FDO, September 6, 2013, at 33, 34.



Reasonable Use Scenarios in the Diagram

A – No reasonable use exception would be granted because there is sufficient space outside the critical area clearing limits.
B – A reasonable use exception might be granted since there is insufficient space for a reasonable use. The development area would need to be limited or scaled back in size and located where the impact is minimized. The jurisdiction might consider a variance to the required setback to minimize intrusion into the protection area.
C – A reasonable use exception would be granted for a minimal development if the property is completely encumbered and mitigation methods are applied.
D – The jurisdiction might consider modifications to the required setback to prevent intrusion into the protection area.

The criteria for reasonable use permits need to be consistent with case law to reduce the potential for appeals and overturned decisions. Key to being consistent with case law is careful use of the term "reasonable." Generally, the concept of "reasonable" has been left to the courts to decide, thereby making it difficult for cities to rule on whether or not a project qualifies. A reasonable use is often thought to be a modest single-family home, although some other structure might be "reasonable" depending on zoning, adjacent uses, and the size of the property.

The reasonable use permit criteria should allow for "reasonable" uses. If the criteria state that the applicant must demonstrate that no other use "is possible," or that there are "no feasible alternatives," it would conflict with the concept of a "reasonable" use as other "possible" alternatives may be so costly as to be unreasonable. "Possible" alternatives may also not meet the objectives of the property owner. For example, continued preservation of habitat is a "possible" use of property, but probably not a "reasonable" use for the owner.

Some jurisdictions have allowed a reasonable use exception in only those situations where all economic use of a property would be denied by the critical areas regulations. Criteria that might be used to allow approval of a reasonable use exception include:

- No other reasonable economic use of the property has less impact on the critical area;
- The proposed impact to the critical area is the minimum necessary to allow for reasonable economic use of the property;
- The inability of the applicant to derive reasonable economic use of the property is not the result of actions by the applicant after the effective date of this regulation, or its predecessor;
- The proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the development proposal site;
- The proposal will result in no net loss of critical area functions and values consistent with the best available science; or
- The proposal is consistent with other applicable regulations and standards.

The Western Washington Growth Management Hearings Board recognized that, although they may actually permit impacts to a critical area, reasonable use provisions are an indispensable component of critical area regulations because they address the issue of regulatory takings claims. Regulatory takings have been an element of American jurisprudence since the 1920s, and are founded on constitutional principles, seeking to provide a remedy when a regulation takes all reasonable use of a parcel of land. Given this grounding in constitutional law, the Board had no jurisdiction to determine the petitioners' claims as to whether the County's regulations exceed what is necessary to protect the County from a constitutionally-based takings claim as this is a question for the courts. However, although reasonable use provisions are necessary to prevent a constitutional takings claim, that does not mean such provisions should not prevent the protection of all the functions and values of wetlands and do not need to be supported by best available science.[13]

The Western Board found that a county failed to protect critical areas when it allowed grandfathered non-conforming uses that no longer comply with the more recently enacted, and presumably more protective land use laws, to be considered a "reasonable use" when determining whether a proposed use met the reasonable use criteria.[14]

[13] *WEAN/CARE v. Island County*, 08-2-0026c, FDO, November, 17, 2008, at 23.
[14] *Whidbey Environmental Action Network v. Island County*, Case No. 14-2-0009, Final Decision and Order, June 26, 2015, at 8.

Avoiding Unconstitutional Takings of Private Property

The Washington State Office of the Attorney General is directed under RCW 36.70A.370 to advise state agencies and local governments on an orderly, consistent process that better enables government to evaluate proposed regulatory or administrative actions to assure these actions do not result in unconstitutional takings of private property. The process must be used by state agencies and local governments that are required plan under the GMA. The Attorney General publishes an Advisory Memorandum to provide state agencies and local governments with a tool to help them evaluate whether proposed regulatory or administrative actions may result in an unconstitutional taking of private property or raise substantive due process concerns.

Critical Areas Review Process

Often, a determination about the likelihood of impacts to a critical area can be determined with some basic information. A critical areas identification form can ask a series of questions about the subject property. The questions can be designed to be completed by the property owner or applicant without the assistance of a technical professional. Combined with a site visit, GIS data, and aerial photography, the staff may be able to use the applicant's responses to determine whether critical areas are located nearby and whether the development is likely to result in an impact. This allows the staff to conduct a "low level" review without a lot of expense or delay. In locations where little existing information is available, the community may require the applicant to submit additional information about the site and proposal, such as site photographs.

Documenting Other Regulations

Regulations to protect critical areas often overlap with other environmental regulations, such as clearing and grading regulations and stormwater regulations. At times, regulations to protect critical areas may be superseded by more stringent zoning requirements. It is a good idea when reviewing and updating the critical areas regulations to ensure that they cross-reference these other regulations or permit requirements. When a local government is using its State Environmental Policy Act (SEPA) determination authority for programmatic or project environmental review, it should identify how these other regulations will be applied and conditioned to reflect the "protection of functions and values" requirement. For more information about critical areas and other regulations, see Chapter 4, Critical Areas Protection and Other Laws and Regulations.

Critical Areas Protection and SEPA

Cities and counties are encouraged to select certain categorized exemptions that do not apply in one or more critical areas pursuant to WAC 197-11-908. SEPA review procedures should require critical areas delineation and review prior to making a threshold determination. SEPA and critical area review procedures should be evaluated to ensure consistent project review procedures. For more discussion about SEPA and the GMA, see Chapter 4, Critical Areas Protection and Other Laws and Regulations.

Reviewing Multiple Critical Areas and Local Project Review

Where there are multiple critical areas that may be impacted by development, special efforts should be made to consider the cumulative effect of the permitting decision on the different critical areas. This information should be well documented during project review using either cumulative impacts reporting requirements in the critical areas regulations, or through the SEPA environmental review process. If project mitigation is being considered that is not required by the critical areas regulation, then the SEPA documentation should identify the impacts and the decision process for avoiding or mitigating environmental impacts to the critical area(s). (See the section on SEPA in Chapter 4).

Analyzing consistency of the proposed project with the applicable development regulations is a requirement under RCW 36.70B.040 for those jurisdictions fully planning under the GMA. All local jurisdictions routinely review projects for consistency with applicable regulations. GMA counties and cities must, at a minimum, consider the following four factors in their development regulations, or in the absence of applicable development regulations, the comprehensive plan policies.[15] The fourth factor is most relevant for critical areas that often have specific numerical standards, such as buffers or setbacks.

- The type of land use allowed, such as the land use designation;
- The level of development allowed, such as units per acre or other measures of density;
- Infrastructure, such as the adequacy of public facilities and services to serve the proposed project; and
- The characteristics of the proposed development, measured by the degree to which the project conforms to specific development regulations or standards.

This uniform approach is based upon existing project review practices and should not place an additional burden on applicants or local government. Consistency analysis is largely a matter of code checking for most projects that are simple or routine. More complex projects, such as those that would impact more than one critical area, may require more analysis of these

[15] See Commerce's Project Consistency Rules, Chapter 365-197 WAC, for more information on consistency criteria and analysis.

factors, including possible studies. If the project is not consistent with the development regulations and comprehensive plan, the project can be conditioned to make it consistent, or denied.[16]

Qualified Professionals

A jurisdiction is encouraged to consult with a qualified professional or a team of professionals at an early stage of critical area assessment and in the development of sound management approaches. Professionals can help the jurisdiction identify local critical areas, assemble and review the best science for understanding how the critical areas function, and help develop management recommendations.

In WAC 365-195-905(4), Commerce defines the role of a qualified professional and what qualifies him or her for this role. Determining whether a person is a qualified scientific expert with expertise appropriate to the relevant critical areas is determined by the person's professional credentials and/or certification. In addition, any advanced degrees earned in the pertinent scientific discipline from a recognized university, the number of years of experience in the pertinent scientific discipline, recognized leadership in the discipline of interest, formal training in the specific area of expertise, and field and/or laboratory experience with evidence of the ability to produce peer-reviewed publications or other professional literature. Where pertinent scientific information implicates multiple scientific disciplines, counties and cities are encouraged to consult a team of qualified scientific experts representing the various disciplines to ensure the identification and inclusion of the best available science.

The scientific expert or experts may rely on their professional judgment based on experience and training, but they should use the criteria set out in WAC 365-195-900 through 925 and any technical guidance provided by agencies with expertise.

[16] RCW 36.70B.030 and 040, and RCW 43.21C.240.

Appendix 3.A
Local Government Examples of Code Structures

City of Bellevue

City of Sumas

Yakima County

Jefferson County

City of Bellevue

Part 20.25H Critical Areas Overlay District

I. Scope and Purpose

20.25H.005 Scope

20.25H.010 Purpose

20.25H.015 Applicable procedure

20.25H.020 Submittal requirements

II. Designation of Critical Areas and Dimensional Standards

20.25H.025 Designation of critical areas

20.25H.030 Identification of critical area

20.25H.035 Critical area buffers and structure setbacks

20.25H.040 Standards for modifying non-critical area setbacks

20.25H.045 Development density/intensity

III. Use and Development in the Critical Areas Overlay District

20.25H.050 Uses and development in the Critical Areas Overlay District

20.25H.055 Uses and development allowed within critical areas – Performance standards

20.25H.065 Uses and development within critical area buffer or critical area structure setback not allowed pursuant to LUC 20.25H.055

IV. Streams

20.25H.075 Designation of critical area and buffers

20.25H.080 Performance standards

20.25H.085 Mitigation and monitoring – Additional provisions

20.25H.090 Critical areas report – Additional provisions

V. Wetlands

20.25H.095 Designation of critical area and buffers

20.25H.100 Performance standards

20.25H.105 Mitigation and monitoring – Additional provisions

20.25H.110 Critical areas report – Additional provisions

VI. Shorelines

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VII. Geologic Hazard Areas
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20.25H.135 Mitigation and monitoring – Additional provisions for landslide hazards and steep slopes
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20.25H.145 Critical areas report – Approval of modification

VIII. Habitat Associated with Species of Local Importance
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20.25H.155 Uses in habitat for species of local importance
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City of Sumas

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Yakima County

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Jefferson County

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