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## VOLUNTARY STEWARDSHIP PROGRAM

### STATEWIDE ADVISORY COMMITTEE AND CONSERVATION COMMISSION

#### POLICY ADVISORY #04-19

### *CRITICAL AREA ORDINANCES AND COUNTIES IN THE VOLUNTARY STEWARDSHIP PROGRAM*

**APRIL 2019**

#### *Summary*

The Conservation Commission (Commission) is empowered to establish policies and procedures for implementing the Voluntary Stewardship Program (VSP).<sup>1</sup> The Commission, after consultation with the VSP Statewide Advisory Committee (SAC), provides this advisory to the VSP county work groups to advise them on the roles and reporting obligations during VSP implementation.

This advisory is focused on guidance related to counties who have opted into the VSP and it explains how their Critical Area Ordinance (CAO) interacts with their work plan.

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<sup>1</sup> [RCW 36.70A.705\(2\)\(a\)](#)

The VSP was codified in RCW Chapter 36.70A. The Commission administers the VSP.<sup>2</sup> Under VSP, the Commission is charged with establishing the Statewide Advisory Committee.<sup>3</sup> “The role of the statewide advisory committee is to advise the commission and other agencies involved in development and operation of the program.”<sup>4</sup> The SAC is comprised of representatives of county, agricultural, and environmental organizations and invited tribal governments.<sup>5</sup>

The Commission has a number of other duties in the VSP that relate to the Statewide Advisory Committee, including:

- Provide administrative support for the program's statewide advisory committee in its work.”<sup>6</sup>
- Maintain a web site about the program that includes times, locations, and agenda information for meetings of the statewide advisory committee;<sup>7</sup>
- Conduct a review of the program beginning in 2017 in conjunction with the statewide advisory committee and every five years thereafter, and report its findings to the legislature by December 1st;<sup>8</sup>
- Consult with the Statewide Advisory Committee upon receipt of a report by a watershed group under RCW [36.70A.720](#)(2)(b);<sup>9</sup> and
- Consult with the statewide advisory committee and other state agencies, not later than August 31, 2015, and each August 31st every two years thereafter, and report to the legislature and each county that has elected under RCW [36.70A.710](#) to participate in the program on the participating watersheds that have received adequate funding to establish and implement the program.<sup>10</sup>

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<sup>2</sup> [RCW 36.70A.705\(1\)](#)

<sup>3</sup> [RCW 36.70A.745](#)

<sup>4</sup> [RCW 36.70A.745\(2\)](#)

<sup>5</sup> [RCW 36.70A.745\(1\)\(a\)](#)

<sup>6</sup> [RCW 36.70A.705\(2\)\(h\)](#)

<sup>7</sup> [RCW 36.70A.705\(2\)\(i\)](#)

<sup>8</sup> [RCW 36.70A.705\(2\)\(k\)](#)

<sup>9</sup> [RCW 36.70A.730](#)

<sup>10</sup> [RCW 36.70A.740\(4\)](#)

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*CRITICAL AREA ORDINANCES AND COUNTIES IN THE VOLUNTARY STEWARDSHIP PROGRAM*

Counties, county planners, and others are uncertain as to how existing, established, new, or old agriculture is to be treated under VSP. VSP applies to agricultural activities within the county. "Agricultural activities" is defined<sup>11</sup> as having the same definition as set out in the Shorelines Management Act (SMA):<sup>12</sup>

"Agricultural activities" means agricultural uses and practices including, but not limited to: Producing, breeding, or increasing agricultural products; rotating and changing agricultural crops; allowing land used for agricultural activities to lie fallow in which it is plowed and tilled but left unseeded; allowing land used for agricultural activities to lie dormant as a result of adverse agricultural market conditions; allowing land used for agricultural activities to lie dormant because the land is enrolled in a local, state, or federal conservation program, or the land is subject to a conservation easement; conducting agricultural operations; maintaining, repairing, and replacing agricultural equipment; maintaining, repairing, and replacing agricultural facilities, provided that the replacement facility is no closer to the shoreline than the original facility; and maintaining agricultural lands under production or cultivation;...

Certain terms in the definition of agricultural activities (agricultural products, agricultural equipment, and agricultural land) are further defined in the SMA:<sup>13</sup>

(b) "Agricultural products" includes but is not limited to horticultural, viticultural, floricultural, vegetable, fruit, berry, grain, hops, hay, straw, turf, sod, seed, and apiary products; feed or forage for livestock; Christmas trees; hybrid cottonwood and similar hardwood trees grown as crops and harvested within twenty years of planting; and livestock including both the animals themselves and animal products including but not limited to meat, upland finfish, poultry and poultry products, and dairy products;

(c) "Agricultural equipment" and "agricultural facilities" includes, but is not limited to: (i) The following used in agricultural operations: Equipment; machinery; constructed shelters, buildings, and ponds; fences; upland finfish rearing facilities; water diversion, withdrawal, conveyance, and use equipment and

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<sup>11</sup> [RCW 36.70A.703\(1\)](#)

<sup>12</sup> [RCW 90.58.065 \(2\) \(a\)](#)

<sup>13</sup> [RCW 90.58.065 \(2\) \(b\), \(c\) and \(d\)](#)

facilities including but not limited to pumps, pipes, tapes, canals, ditches, and drains; (ii) corridors and facilities for transporting personnel, livestock, and equipment to, from, and within agricultural lands; (iii) farm residences and associated equipment, lands, and facilities; and (iv) roadside stands and on-farm markets for marketing fruit or vegetables; and  
(d) "Agricultural land" means those specific land areas on which agriculture activities are conducted.

Anything not included in the above definition is subject to regulation under the county CAO and any other applicable regulation (e.g. developmental regulations, environmental regulations, etc).

For those counties that have opted-into VSP, agricultural activities, as defined in VSP and set out above, fall under the Voluntary Stewardship Program and the VSP work plan created by the watershed work group and approved by the VSP Technical Panel. Any applicable regulations (e.g. developmental regulations, environmental regulations, etc.) remain applicable to agricultural activities in VSP. Agricultural activities in counties that have opted-into VSP are still subject to local, state and federal laws and regulations that regulate these activities. However, for counties that have opted-into VSP, the county's CAO would not apply to agricultural activities in watersheds within VSP – the VSP work plan would.

#### *THE RELATIONSHIP BETWEEN VSP AND UPDATING A CAO*

Counties who have opted into the VSP may not amend or update a CAO with respect to agricultural activities in a participating watershed as identified in the county opt-in ordinance, unless certain statutory conditions have been met.<sup>14</sup> Any agricultural activities in watersheds not identified by the county ordinance as participating watersheds are covered by the CAOs, not VSP, and changes to the CAOs would apply.

VSP (as codified in RCW 36.70A) applies to all agricultural activities in opt-in counties within identified participating watersheds. These watersheds were identified by the county in their ordinance opting-in to VSP. Some of the VSP requirements apply to the county at the time the opt-in ordinance is passed; while other requirements apply at the time the county receives money to implement VSP.

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<sup>14</sup> [RCW 36.70A.130\(8\)\(b\)](#)

RCW 36.70A.130(8) covers when a VSP participating county may amend or update their critical areas ordinances for agricultural activities within participating watersheds and lists five specific instances when these amendments or updates may be made:

(b) A county that has made the election under RCW [36.70A.710](#)(1) may only adopt or amend development regulations to protect critical areas as they specifically apply to agricultural activities in a participating watershed if:

(i) A work plan has been approved for that watershed in accordance with RCW [36.70A.725](#);

(ii) The local watershed group for that watershed has requested the county to adopt or amend development regulations as part of a work plan developed under RCW [36.70A.720](#);

(iii) The adoption or amendment of the development regulations is necessary to enable the county to respond to an order of the growth management hearings board or court;

(iv) The adoption or amendment of development regulations is necessary to address a threat to human health or safety; or

(v) Three or more years have elapsed since the receipt of funding.

Therefore, absent one of these conditions being met, a VSP opt-in county may not amend or update a CAO with respect to agricultural activities in a participating watershed as identified in the county opt-in ordinance. Any agricultural activities in watersheds not identified by the county opt-in ordinance as participating watersheds are covered by the CAO, not VSP.

One additional exception to the prohibition against CAO amendments for opt-in counties is when an amendment is required to comply with federal requires. See *VSP and Federal Regulations* section below.

### *VSP and Federal Regulations*

If any provision of RCW 36.70A conflicts with certain federal requirements, that provision is inoperative to the extent of the conflict.<sup>15</sup> Although RCW 36.70A.130(8)(b) identifies only specific circumstances when a VSP county may amend or update a CAO, if a CAO must be amended to comply with federal funding requirements, RCW 36.70A.904 allows for the amendment. If the state is receiving funding from NOAA or FEMA (or any other federal agency) and compliance through updating a CAO to conform to new FEMA or NOAA (or other federal regulations) is required, then the county may amend the CAO to achieve this compliance. Such amendments would apply to all agricultural activities in the country.

### *PRACTICAL APPLICATION OF THE DEFINITION OF AGRICULTURAL ACTIVITIES IN VSP TO THE CAO*

- For counties that have opted into the VSP, the SMA definition of agricultural activities determines if agricultural activities are subject to the VSP or CAO.,
- County CAO's should reference participation in the VSP and that agricultural activities, as defined in the statute, are not regulated by the CAO, but are addressed in the approved work plans. VSP counties participating in VSP should reference and describe VSP in their CAO.
- Agricultural activities in shoreline areas are subject to local Shoreline Master Programs, whether existing and ongoing or new.
- For counties that have opted into VSP, modifying their existing CAO as it pertains to agriculture is prohibited until the VSP work plan is adopted.<sup>16</sup>
- Once a requirements in RCW 36.70A.130(8) have been met, counties should update their CAO to explain:
  - That the county has opted into VSP, and
  - That agricultural activities are covered under the VSP, and
  - Cite the definitions of agricultural activities and agricultural facilities, and
  - Further explain that if a proposed activity doesn't fit under the definition of agricultural activities, then VSP wouldn't apply to that activity. The CAO would cover those activities that are not agricultural activities, as defined in VSP. After a VSP work plan has been adopted, counties who have

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<sup>15</sup> [RCW 36.70A.904](#)

<sup>16</sup> [RCW 36.70A.130 \(8\)\(b\)\(i\)](#)

opted into VSP can rely on their existing CAO to apply to activities that do not fit under the definition of agricultural activities in VSP.

- If a producer chooses to not participate in VSP and declines an individual stewardship plan, that landowner isn't regulated under the CAO - they are still covered under VSP and other development regulations would still apply to them in addition to the regulatory backstops of CWA, ESA etc.
- Each VSP county and the county work groups should work to accommodate new agricultural activities in their work plan.
- In considering a conversion from non-agricultural use to agricultural use, we encourage a discussion at the county level with the VSP local work group and other relevant stakeholders.
- County planners should work with the county watershed work groups to address any issues that can't be addressed in the VSP work plan through the county code.
- Each county, watershed work group and VSP technical service provider should conduct outreach and education to existing and new agricultural producers on the applicability of VSP and the VSP work plan in their county, how voluntary practices can assist in protecting critical areas while maintaining agricultural viability, and how to participate in VSP.