

VOLUNTARY STEWARDSHIP PROGRAM

STATEWIDE ADVISORY COMMITTEE AND CONSERVATION COMMISSION

POLICY ADVISORY #04-19

CRITICAL AREA ORDINANCES AND COUNTIES IN THE VOLUNTARY STEWARDSHIP PROGRAM

REVISED FEBRUARY 2021

Summary

The Conservation Commission (Commission) is empowered to establish policies and procedures for implementing the Voluntary Stewardship Program (VSP).¹ 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.

¹ [RCW 36.70A.705\(2\)\(a\)](#)

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

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.”⁶
- Maintain a web site about the program that includes times, locations, and agenda information for meetings of the statewide advisory committee;⁷
- 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;⁸
- Consult with the Statewide Advisory Committee upon receipt of a report by a watershed group under RCW [36.70A.720](#)(2)(b);⁹ 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.¹⁰

² [RCW 36.70A.705\(1\)](#)

³ [RCW 36.70A.745](#)

⁴ [RCW 36.70A.745\(2\)](#)

⁵ [RCW 36.70A.745\(1\)\(a\)](#)

⁶ [RCW 36.70A.705\(2\)\(h\)](#)

⁷ [RCW 36.70A.705\(2\)\(i\)](#)

⁸ [RCW 36.70A.705\(2\)\(k\)](#)

⁹ [RCW 36.70A.730](#)

¹⁰ [RCW 36.70A.740\(4\)](#)

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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 defined¹¹ as having the same definition as set out in the Shorelines Management Act (SMA):¹²

"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:¹³

(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

¹¹ [RCW 36.70A.703\(1\)](#)

¹² [RCW 90.58.065 \(2\) \(a\)](#)

¹³ [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 apply.

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.¹⁴ 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.

¹⁴ [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 requirements. 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.¹⁵ 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.¹⁶
- 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

¹⁵ [RCW 36.70A.904](#)

¹⁶ [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.
- 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.

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PRINCIPLES OF DEFINITIONAL CONSTRUCTION

For purposes of the following principles of definitional construction, assume that:

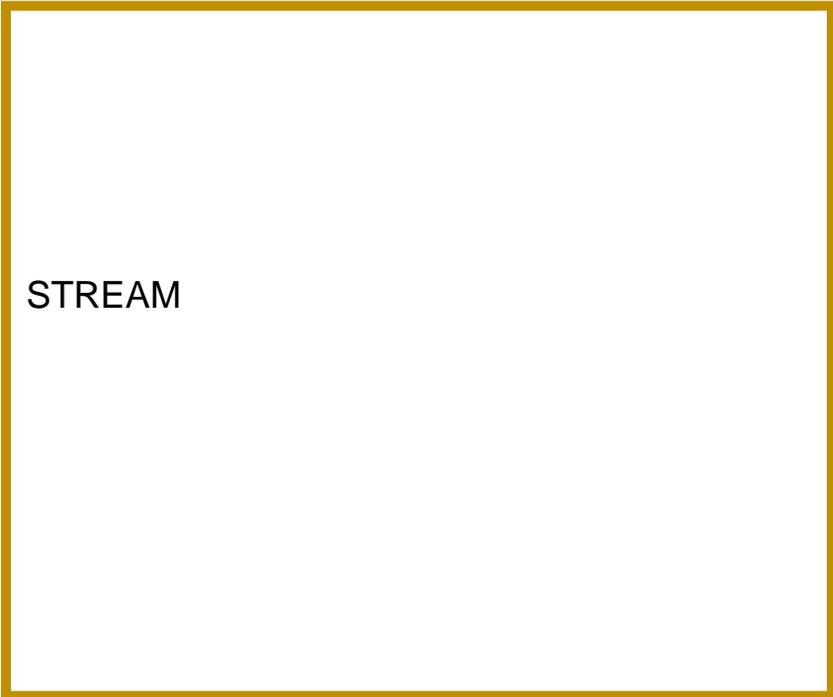
- The county has opted in-to VSP and the area depicted in the illustrations below falls within VSP in the county
- Agricultural activity is defined as per the VSP statute - RCW 36.70A.703 (1)
- An agricultural structure is a structure that is an agricultural activity as defined in the VSP statute
- Local planning considerations, conditions and circumstances may affect final determinations at the local level

1. New agricultural activity on existing agricultural land or land previously used for agriculture falls under VSP and the county CAO does not apply to that new agricultural activity.

Illustration: A landowner has land presently in agriculture and now wishes to engage in a new agricultural activity or construct an agricultural structure.

Result: The county CAO would not apply to the new agriculture activity or agricultural structure; the VSP county work plan would apply.

Example: If the county CAO required a 50' buffer, the landowner would not have to establish that buffer; they *could* put the agricultural structure anywhere on the portion of that parcel that already meets the definition of agricultural activity. Any other development regulation would still apply:



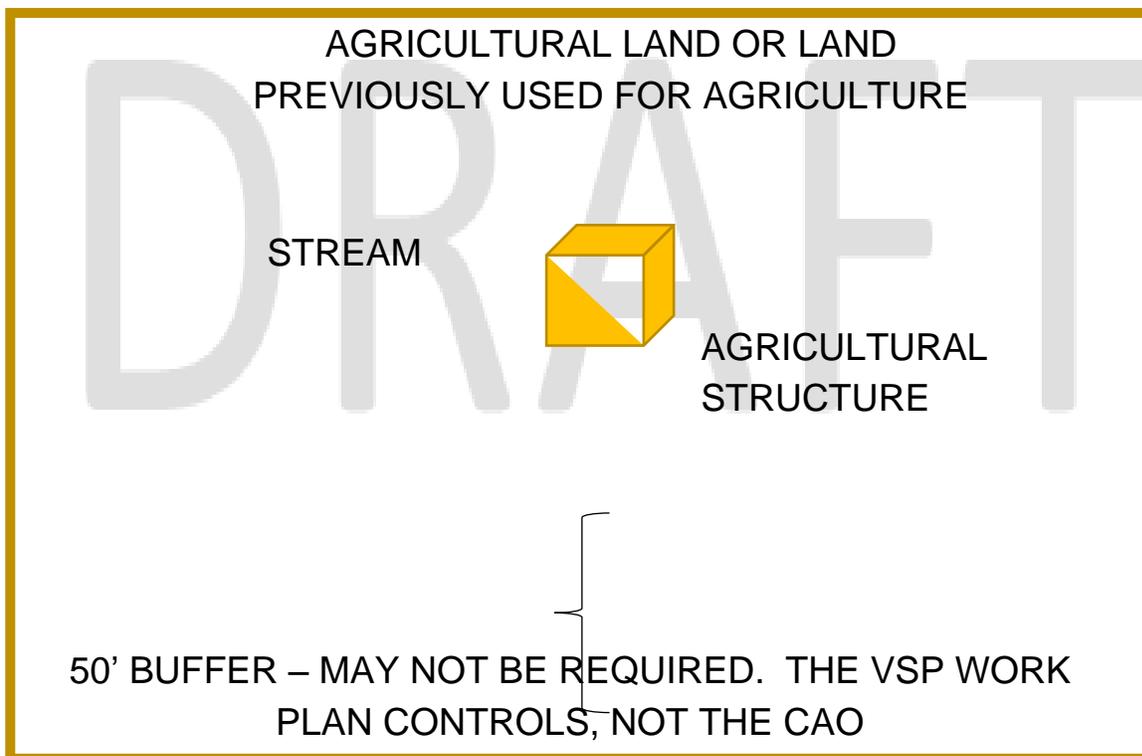
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2. A change in agricultural activity¹⁷ on existing agricultural land or land previously used for agriculture falls under VSP and the county CAO does not apply to the changed agricultural activity.

Illustration: A landowner wishes to change an agricultural activity on existing agricultural land or land previously used for agriculture. The change includes the conversion of a pre-existing structure to an agricultural structure. The existing structure is currently in the critical area.

Result: The activity would be considered an agricultural activity covered by the county VSP work plan, not the CAO.

Example: The activity and the structure would be considered agricultural activities covered by the county VSP work plan, not the CAO:



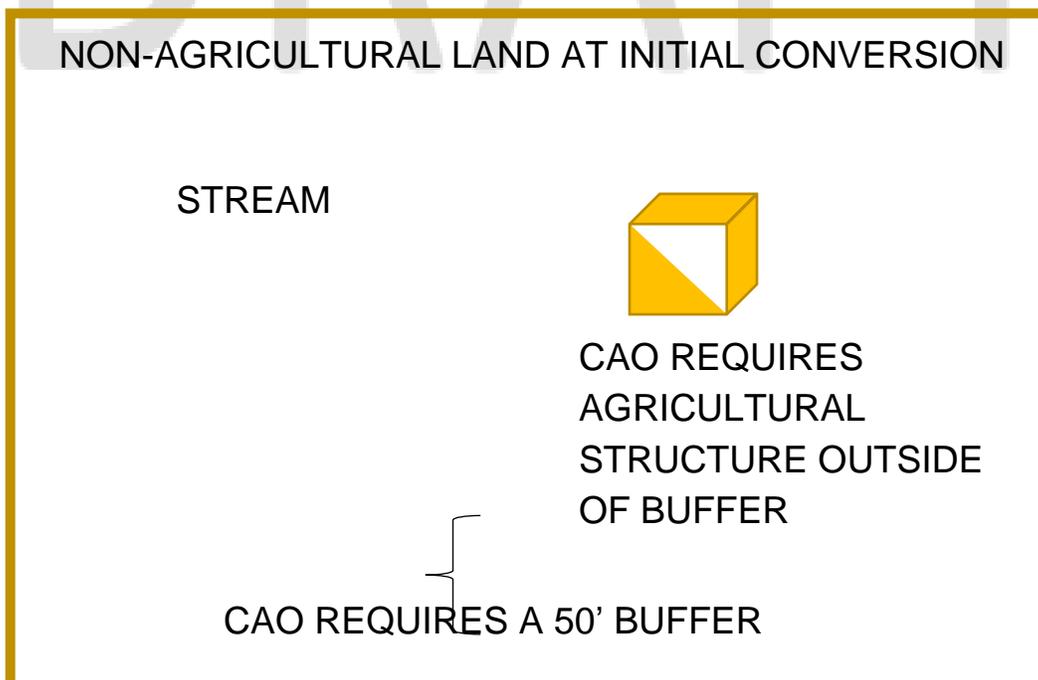
¹⁷ Ibid.

3. New agricultural activity that occurs on land not previously used for agriculture and not within the footprint of existing or on-going agricultural activity on that land is not governed by VSP and is subject to the county CAO. When new agricultural activity is proposed, such as the installation of an agricultural structure, it would initially invoke the CAO. Once that installation is complete, the agricultural structure or agricultural activity becomes an on-going and existing agricultural activity, subject to VSP and not the CAO.

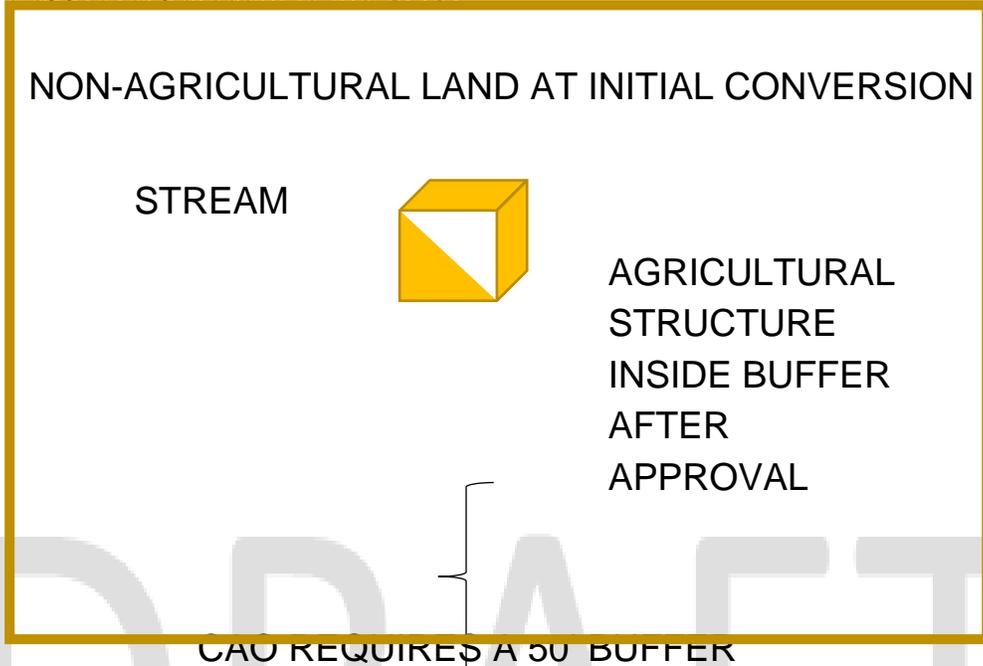
Illustration: A landowner wishes to convert non-agricultural land to a new agricultural activity or construct an agricultural structure.

Result: The county CAO would apply to the *initial* conversion, but after initial conversion, the VSP county work plan would apply, not the CAO. (The new agricultural structure or agricultural activity cannot be placed within a critical area or its buffer without approval pursuant to the CAO; an approval which is extremely unlikely.) Once that installation is complete, the agricultural structure or agricultural activity becomes an on-going and existing agricultural activity, and VSP would apply and not the CAO to agricultural activities that do not expand the area of the agricultural activity that was converted.

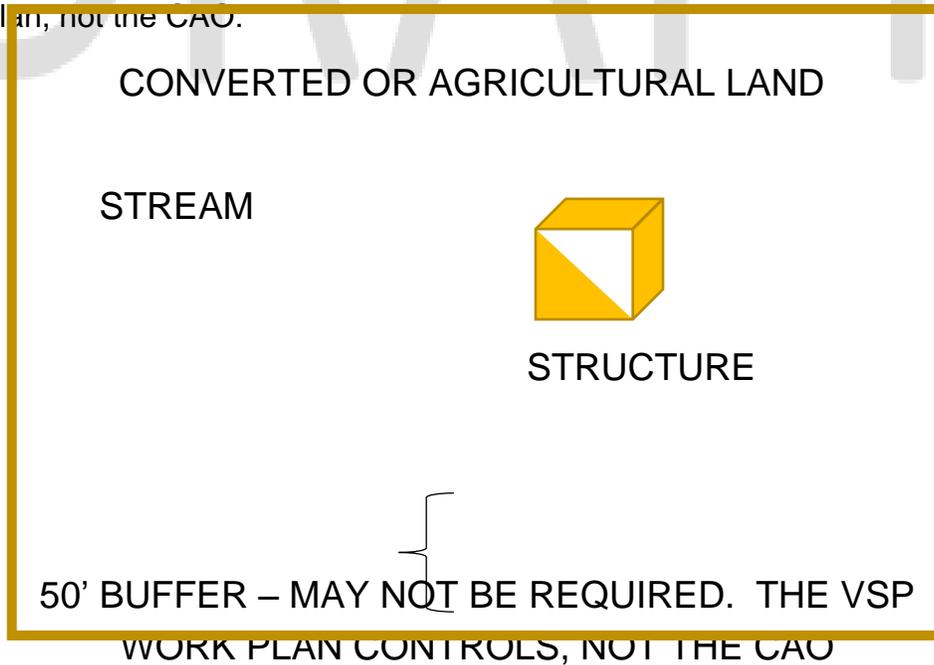
Example: If the county CAO required a 50' buffer, the landowner would have to establish that buffer. An agricultural structure built at the time of conversion would also have to abide by any other development regulations in effect.



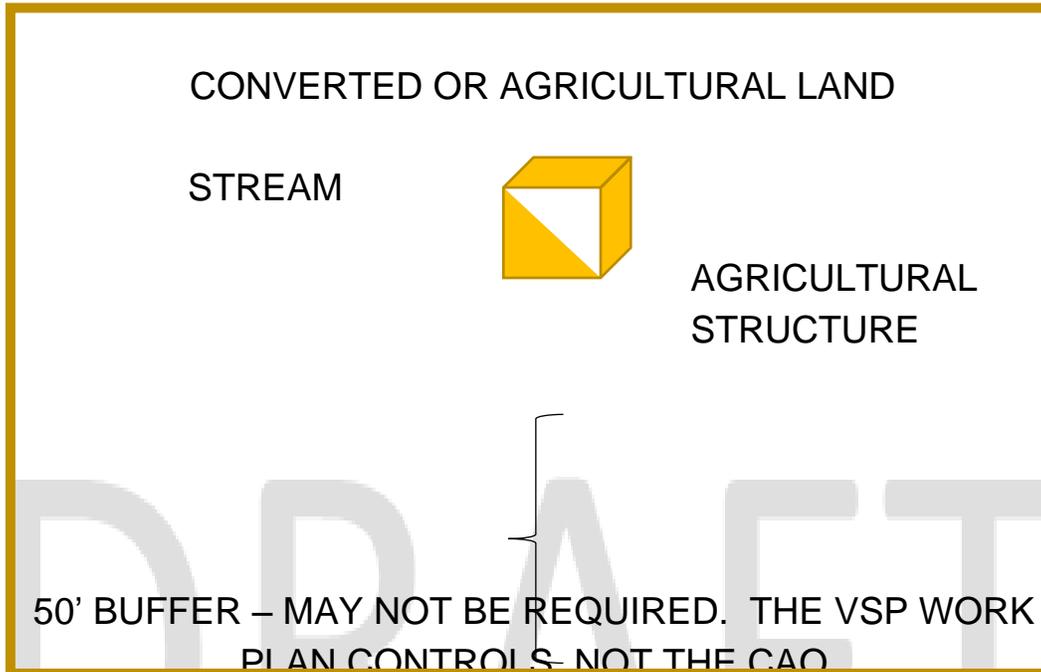
An agricultural structure or agricultural activity placed within the buffer must have approval pursuant to the CAO: structure or agricultural activity placed within the buffer must have approval pursuant to the CAO:



After compliance with the CAO, the agricultural structure or agricultural activity OUTSIDE the buffer would be considered an agricultural activity covered by the county VSP work plan, not the CAO.



After compliance with the CAO, the agricultural structure or agricultural activity **INSIDE** the buffer, **which had initial approval under the CAO**, would be considered an agricultural activity covered by the county VSP work plan, not the CAO:



FURTHER EXAMPLES

#1: Replacing a manure composting area with a manure control structure on lands already used for agriculture.

If the control structure is being built in the same footprint (does not expand the manure composting area), as the manure composting area, then this structure would be under the VSP work plan and the CAO would not apply. All other development and building regulations would apply. The county planning department, county work group, and / or the VSP technical service provider should have a conversation about this project to assess impact to the critical area and to possibly adaptively manage the county VSP work plan.

#2: Constructing a 10 acre cold storage facility on 12 acres of orchard (or lands already used for agriculture).

If the cold storage facility is being built in the same footprint (does not expand the area of land being used for agriculture activities), as the orchard, then this structure would be under the VSP work plan and the CAO would not apply. All other development and building regulations would apply. The county planning department, county work group, and / or the VSP technical service provider should have a conversation about this project to assess impact to the critical area and to possibly adaptively manage the county VSP work plan.

#3: Converting non-agricultural land to an agricultural activity (an activity that fits under the definition of agricultural activities in VSP).

The conversion of non-agricultural land to an agricultural activity under the VSP definition would initially invoke the CAO. Once that land becomes on-going and existing agricultural land, VSP would apply and not the CAO to agricultural activities that do not expand the area of the agricultural land. Visual depiction:

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