Concise Explanatory Statement and *Response to Comments* for the adoption of amendments to Growth Management Act Rules

Minimum Guidelines to Classify Agricultural, Forest and Mineral Lands and Critical Areas (WAC 365-190)

Best Available Science (WAC 365-195)

Procedural Criteria for Adopting Comprehensive Plans and Development Regulations (WAC 365-196)

Washington State Department of Commerce

March 22, 2023

Introduction to this document

The Washington State Department of Commerce (Commerce) prepared this *Concise Explanatory Statement and Response to Comments* summary to meet requirements of the Washington State Administrative Procedures Act, the law that guides agency rule-making (RCW 34.05.325).

Section I provides a general description of the process and the scope of work on the proposed rules and the agency's reasons for adopting the proposed rules.

Section II responds to the comments received regarding the proposed rules, indicating how the final rules reflect agency consideration of the comments, or why they fail to do so.

Section III summarizes differences between the proposed and adopted rules.

This document is available on the Commerce website at

https://www.commerce.wa.gov/about-us/rulemaking/

I: Concise Explanatory Statement

Introduction

Growth Management Services

Growth Management Services (GMS) assists and guides local governments, state agencies, and others to manage growth and development, consistent with the Growth Management Act (GMA). GMS initiated a comprehensive review of Chapter 365-190, 365-195, and 365-196 Washington Administrative Code (WAC) to ensure local governments have timely and accurate guidance as they undertake the periodic review and update of local comprehensive plans and development regulations pursuant to RCW 36.70A.130.

Statutory Authority

The GMA directs The Department of Commerce (Commerce) to establish a technical and financial assistance program for local governments to support GMA implementation. RCW 36.70A.050 directs Commerce to adopt guidelines for the classification of agricultural, forest, and mineral resource lands, and critical areas. These rules are codified in Washington Administrative Code (WAC), under Chapter 365-190 WAC.

RCW 36.70A.190 directs Commerce to adopt by rule "procedural criteria" to help counties and cities adopt comprehensive plans and development regulations that meet GMA goals and requirements. These rules are codified in Chapter 365-196 WAC.

How the Rules were Developed and the Scope of the Proposed Amendments

Commerce filed a Preproposal Statement of Inquiry (Form CR-101) with the Office of the Code Reviser on December 29, 2020 (WSR 21-02-032) to commence its rulemaking process. This document is linked below:

CR 101 - Washington State Register.pdf

Commerce announced the rulemaking efforts in an agency-wide announcement to the public on January 26, 2021. The announcement directed the public to the project website, and provided the project manger's contact information for those wanting project-specific email updates and additional information:

Project Website: Growth Management Act WAC Update

Project Contact: William Simpson, AICP
Senior Policy Analyst, Washington State Department of Commerce
william.simpson@commerce.wa.gov
509-280-3602

Scoping:

Commerce initiated a detailed scoping process after filing the CR-101. Commerce convened a state agency working group that consisted of eleven state agencies to develop a draft scope in the spring of 2021. Commerce considered potential changes to the rules to address new legislation, new case law, and to clarify existing guidance consistent with underlying GMA requirements. In a preliminary review of case law since the last comprehensive WAC update, the Attorney General's office did not identify any court cases that found our rules invalid or that required mandatory revisions.

Growth Management Services sent a newsletter announcement inviting local government planners to participate in a technical advisory group to provide feedback on the draft scope in May, 2021. The agency's Tribal Liaison sent letters to the federally recognized tribes in Washington in May, 2021 to inform them about the project and invite them to participate in a tribal technical advisory group.

Commerce hosted four listening sessions with representatives from local governments and tribal governments to discuss the draft scope and potential amendments to the administrative rules in June and July, 2021. Commerce released the draft scope for a 60

day public comment period on June 16, 2021. Commerce notified the project email list, invited comments on the draft scope in the Growth Management Services and American Planning Associations (Washington Chapter) July, 2021 newsletters.

Public comments and feedback from the listening sessions led Commerce to refine the project scope to ensure the amendments adequately considered areas of interest and concern to the public and local governments. Commerce decided to initiate a separate rulemaking process to address recent housing legislation to allow for more extensive outreach to affected communities, and more time to collect, synthesize and develop best practices and recommendations. The draft and final scopes are linked below:

Draft Scope - Growth Management Act 2022 WAC Update.pdf

Project Scope - Growth Management Act 2022 WAC Update .pdf

Developing the Proposed Amendments:

After finalizing the project scope, Commerce collaborated with other state agencies and GMS subject matter experts to develop draft language and proposed amendments to the three respective chapters. Commerce included an additional step in the rulemaking process to encourage early feedback from the public. Commerce released a preliminary draft of proposed changes on November 18, 2021 and encouraged public comments on potential changes through January 19, 2022. Commerce hosted two virtual public meetings on December 9, 2021 and December 13, 2021 to review the potential changes and answer questions about the proposed amendments.

The extended scoping process and preliminary draft allowed Commerce to work with stakeholders early in the rulemaking process to address concerns and incorporate feedback before filing the CR-102 and initiating the formal adoption process. The preliminary drafts, overviews of proposed changes to the preliminary drafts, and response to comments on the preliminary drafts are linked below:

Chapter 365-190

Preliminary Draft Overview - WAC 365-190.pdf

Preliminary Draft - WAC 365-190 - Complete Chapter.pdf

WAC 365-190 Comment Responses on Preliminary Draft.pdf

Chapter 365-195

Preliminary Draft Overview - WAC 365-195.pdf

Preliminary Draft - WAC 365-195 - Complete Chapter.pdf

WAC 365-195 Comment Responses on Prelminary Draft.pdf

Chapter 365-196

Preliminary Draft Overview - WAC 365-196.pdf

Preliminary Draft Overview - WAC 365-196.pdf

WAC 365-196 Comment Responses on Preliminary Draft.pdf

Proposed Rules:

The Department of Commerce filed Proposed Rulemaking (Form CR-102) with the Office of the Code Reviser on June 17, 2022 (WSR 22-13-125) with accompanying text for Chapters 365-190, 365-195, and 365-196 WAC:

CR 102 - GMA Rulemaking.pdf (wa.gov)

Draft Changes to WAC 365-190 - CR 102.pdf

Draft Changes to WAC 365-195 - CR 102.pdf

Draft Changes to WAC 365-196 - CR 102.pdf

Commerce requested public comments be emailed or submitted in writing by July 27, 2022 to gmarulemaking@commerce.wa.gov or to:

Dave Andersen
1011 Plum Street SE
P.O. Box 42525
Olympia, WA 98504-2525

Commerce filed a continuance of WSR 22-13-125 on December 15, 2022 (WSR 23-01-078) to allow for additional time to respond to comments, coordinate with state agencies, and consider proposed changes before final adoption.

CR 102 Continuance - GMA Rulemaking.pdf (wa.gov)

Public Hearings

Commerce held two virtual public hearings on the proposed amendments. The first on July 26, 2022 at 5:00 pm and the second on July 27, 2022 at 11:00 am. Commerce did not receive any public testimony at the first hearing and closed the public hearing at 5:12 pm. Commerce received public testimony from three stakeholders at the public hearing on July 27, 2022 and closed the public hearing at 11:27 am. All three

stakeholders also submitted more detailed, written comments and those are addressed in Section II: Responsiveness. Commerce received at total of thirteen written comment letters or emails during the formal comment period.

Adopted rules

Commerce filed the final rule in the Washington State Register on April 5, 2023. As required by the Washington State Administrative Procedures Act (RCW 34.05.325), Commerce prepared this Concise Explanatory Statement and Response to Comments Summary to identify the reasons for adopting the rules, describe differences between the proposed and adopted rule, and respond to all comments received regarding the proposed rule, indicating how each final rule reflects agency consideration of the comments, or why it failed to do so.

II: Responsiveness Summary

Chapter 365-190 WAC
MINIMUM GUIDELINES TO CLASSIFY AGRICULTURE, FOREST, MINERAL LANDS AND CRITICAL AREAS

WAC 365-190-040-070		
Stakeholder	**Comment**	**Response**
Richard Weinman	*365-190-040(10)(b)(ii) The major amendments from the existing guidelines is to change "should be deferred" to "must be deferred", i.e., to change discouraging and limiting site-specific de-designations to prohibiting them,* *I begin by saying that I appreciate the value and support the protection of natural resource lands and their place in the GMA scheme. As a lawyer and planner by background and profession, I have developed local government resource plans, policies and regulations, including several comprehensive mineral resource classification and designation programs for counties. While I agree that such programs should be based on a comprehensive/county-wide approach, I also recognize the following realities based on my professional experience: (1) comprehensive natural resource planning is expensive, time consuming and politically fraught, and it occurs at infrequent intervals; (2) it is typically based on generalized area-wide information; and (3) it seldom evaluates site-*	Thank you for the comment. Commerce revised the language to provide more flexibility in the timing of the resource lands review so that the items identified can be addressed through a countywide analysis. Commerce has amended WAC 365-190-040 and excluded specific references to the periodic update. WAC 365-190-040(10)(c)(iii) does allow for a review of designation in the case of a designation error. Commerce previously amended WAC 365-190-070 during this project to allow for de-designation when the mining activity has ceased and the site has been reclaimed.

	specific conditions (except to spot-check area-wide data). *In view of these limitations, I think that it is unduly burdensome to not provide a periodic opportunity to de-designate some limited categories of properties — for example, small sites located at the borders of large resource areas--that have been designated by mistake, using erroneous or outdated information, or that have experienced changed conditions. Cumulative impact analysis should be required to ensure that the overall functioning and integrity of the resource area is maintained. Local jurisdictions could establish a screening process to ensure that site-specific proposals meet these or similar criteria; this would avoid wide-spread de-designation and piece-meal compromise of natural resource lands. The result of the proposed draft, however, would require a property owner that has been incorrectly designated to wait for a decade or longer to propose de-designation or re-designation and without any recourse. It is an extremely blunt and unfair change; due process requires some safety valve.* *As an aside, I note that planning, classification and designation of mineral resource lands is, with few exceptions, typically site-specific; very few counties in the state have developed comprehensive programs that identify, classify and designate mineral lands without a site-specific amendment and/or in advance of a*	

	site-specific mining proposal. If Washington State is interested in protecting <u>all</u> natural resource lands, this failure to comply should be addressed. The proposed amendment would have an absurd result in relation to mineral resources.	
Futurewise, WA Environmental Council, WA Conservation Voters, Friends of the San Juans, RE Sources, Whidbey Environmental Action Network	*We support clarifying the parts of WAC 365-190-040, WAC 365-190-050, WAC 365-190-060, and WAC 365-190-070 that discourage dedesignation of agricultural, forest, and mineral resource lands on a parcel-by-parcel basis.* Agricultural, forest, and mineral resource lands are very sensitive to nearby uses and nearby conversions of natural resource lands. The "impermanence syndrome" is a "belief among farmers that agriculture in their area has limited or no future and that urbanization will absorb the farm in the not-too distant future."[1] "[F]or every acre of prime farmland that is urbanized, up to another acre becomes idled due to the impermanence syndrome (Plaut 1976)."[2] So when dedesignating agricultural land, it is necessary to consider the impacts on other nearby farmland. WAC 365-190-040(10)(b)'s requirement that "[i]n classifying and designating natural resource lands, counties must approach the effort as a county-wide or regional process. Counties and cities should not review natural resource lands designations solely on a parcel-by-parcel process" is well grounded in the science.	Thank you for the comment. No change requested.

	While some Growth Management Hearings Board decisions have correctly interpreted this and related provisions,[3] others have seemed confused focusing on whether the "process" considered amendments from throughout the county, not whether the dedesignation process considered agricultural lands designations on a countywide or regional basis.[4] It would be helpful to all to clarify that the dedesignation must consider the farmland on a countywide or regional basis and consider the impacts on any remaining farmland. Similar rules should be adopted for similar reasons for forest and mineral resource lands and we support these proposed amendments.	
Futurewise, WA Environmental Council, WA Conservation Voters, Friends of the San Juans, RE Sources, Whidbey Environmental Action Network	*We support that WAC 365-190-050(3)(c)(i) calls for the consideration of prime farmland, unique farmland, and farmland of statewide importance when determining long-term commercial significance. It should also call for considering good grazing land in designating agricultural lands of long-term commercial significance.* We support the proposed amendment to WAC 365-190-050(3)(c)(i) that now calls for considering prime farmland, unique farmland, and farmland of statewide importance when determining long-term commercial significance. According to the 2017 Census of Agriculture, Washington State has 14,679,857 acres of land in farms.[5]	Thank you for the comment. Soil type classifications are discrete criteria that a county can use in determining designation. Neither the law nor rule has specified the types of agriculture (other than what falls under the broad definition) to be considered and it would be inconsistent to introduce some types while being silent on others. This is intentional to give deference to local communities with expertise.

	Unfortunately this is down from 14,748,107 acres in 2012.[6] However, all areas of prime farmland in Washington State total 1,801,317 acres according to the U.S. Department of Agriculture. There are an additional 888,182 acres of farmland of unique importance in the state. So only requiring the conservation of prime and unique farmland soils will allow the conversion of 11,990,358 acres of land in farms. The conversion of almost 12,000,000 acres of existing farmland will not "[m]aintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries" as RCW 36.70A.020(8) requires. That is why WAC 365-190-050(3)(c)(i) should call for the consideration of prime farmland, unique farmland, and farmland of statewide importance when determining long-term commercial significance. Designating farmland of statewide importance as soils with long-term commercial significance has the potential to conserve much of 9,229,028 acres in that category. Farmland of statewide importance *is land, in addition to prime and unique farmlands, that is of statewide importance for the production of food, feed, fiber, forage, and oil seed crops. Criteria for defining and de-lineating this land are to be determined by the appropriate State agency or agencies. Generally, additional*	

	farmlands of statewide importance include those that are nearly prime farmland and that economically produce high yields of crops when treated and managed according to acceptable farming methods. Some may produce as high a yield as prime farmlands if conditions are favorable. In some States, addit[i]onal farmlands of statewide importance may include tracts of land that have been designated for agriculture by State law.[7] Farmland of statewide importance is highly productive and valuable farmland that for this reason has long-term commercial significance. Farmland of statewide importance should be conserved to comply with the RCW 36.70A.020(8) and the "legislative mandate for the conservation of agricultural land" in RCW 36.70A.020(8), .060(1), and .170.[8] Farmland of statewide importance also has a significant overlap with the American Farmland Trust's "Nationally Significant Agricultural Land."[9] The American Farmland Trust developed this rating system in consultation with experts.[10] The American Farmland Trust states that "[s]pecial effort should be made to protect Nationally Significant agricultural land, which is critical for long-term food security and environmental quality. Policy action is needed both to stop development on Nationally Significant land and to protect it in perpetuity."[11] Again, this underlines the need for WAC 365-190-050(3)(c)(i) to identify	

	prime farmland, unique farmland, and farmland of statewide importance as soils with long-term commercial significance. The regulations should also be updated to recognize that high quality range land is necessary to maintain the agricultural industry. WAC 365-190-050(3)(c)(i) or another regulation should be amended to reflect that high quality rangeland that is not prime farmland, unique farmland, or farmland of statewide importance soils still has long-term commercial significance.	
Futurewise, WA Environmental Council, WA Conservation Voters, Friends of the San Juans, RE Sources, Whidbey Environmental Action Network	*WAC 365-190-050(3)(c)(vi) should clarify the predominate parcel size criterion when determining long-term commercial significance.* WAC 365-190-050(3)(c)(vi) calls for considering the "[p]redominant parcel size" when determining if land has long-term commercial significance. We recommend that this criterion be clarified in two ways. First, a few jurisdictions have ignored "predominant" and set a hard minimum size for parcels designated as agricultural lands of long-term commercial significance. This has resulted in excluding from designation parts of multi-lot fields where some of the lots are lower than the minimum. It has also excluded farm dwellings on small lots from being designated as agricultural lands of long-term commercial significance. These holes the designation of agricultural lands can lead to incompatible uses	Change partially accepted. Commerce revised WAC 365-190-050(3)(iv) as follows: Predominant parcel size, <u>which may include smaller parcels if contiguous with other agricultural resource lands;</u> Commerce also changed WAC 365-190-060(4)(c) as follows: The size of the parcels: Forest lands consist of predominantly large parcels, <u>but may include smaller parcels if contiguous with other forest resource lands;</u> The language clarifies that smaller parcels may be considered for designation when contiguous with larger blocks or designated resource lands. Active

	locating with agricultural areas and interfering with agricultural uses. Second, the criterion should clarify that smaller lots can have long-term commercial significance. These smaller lots can be used to produce higher value agricultural products. They can also serve as a starter farm, helping beginning and socially disadvantaged farmers to get started in agriculture because smaller parcels are easier to buy or lease. Allowing the designation and conservation of these smaller lots improves access to land and can increase equity for beginning and socially disadvantaged farmers.	operations on smaller parcels should not necessarily be excluded solely on the basis of parcel size. The language is permissive and does not create a new requirement for local governments.

Chapter 365-195 WAC
GROWTH MANAGEMENT ACT—BEST AVAILABLE SCIENCE

WAC 365-195-905		
Stakeholder	**Comment**	**Response**
Futurewise, WA Environmental Council, WA Conservation Voters, Friends of the San Juans, RE Sources, Whidbey Environmental Action Network	We support the helpful clarifications in WAC 365-195-905. While we strongly support monitoring and adaptive management programs, we recommend that their purpose be clarified to ensuring that impacts to critical areas functions and values are avoided or fully mitigated.	Mitigation sequencing is discussed in WAC 365-196-830 - Protection of Critical Areas. Commerce added a definition of mitigation and mitigation sequencing in Chapter 365-196 as part of this update. Counties and cities must not allow a net loss of the functions and values of the ecosystem. Regulations that include Best Available Science are deemed to meet the minimum requirement to protect

		critical areas functions and values.

WAC 365-195-920		
Stakeholder	**Comment**	**Response**
Ann Aagaard	Page 7 Futurewise 1.19.2022 letter. Comments on WAC 365-195 page 5 of 5. (a) ….counties and cities should establish monitoring and adaptive management procedures that apply at both the project level and countywide. These procedures should ensure that individual projects do not result in impacts to critical area functions or values and that they fully replace impacted functions and values.	Mitigation sequencing is discussed in WAC 365-196-830 - Protection of Critical Areas. Commerce added a definition of mitigation and mitigation sequencing in Chapter 365-196 as part of this update. Counties and cities must not allow a net loss of the functions and values of the ecosystem. Regulations that include Best Available Science are deemed to meet the minimum requirement to protect critical areas functions and values.
Ann Aagaard	The recommendation to call for monitoring and adaptive management proposed in WAC 365-195-920(2) should ensure that individual projects do not result in cumulative impacts to critical area functions or values and that they fully replace impacted functions and values.	The GMA's no-net-loss standard does not allow cumulative impacts to critical areas functions and values. Individual projects must fully mitigate impacts. Commerce added a definition of mitigation and mitigation sequencing in Chapter 365-196 as part of this update.
Ian Munce	Page 5: I respectfully point out that after court rulings in *Swinomish 2007* and *WEAN 2020* the "precautionary or no risk approach" is controlling authority and "should" needs to be changed to "must" and "ongoing monitoring and adaptive management" is mandatory. See	Monitoring and adaptive management is only required when it is uncertain if regulations will protect critical areas. Our CAO guidebook, in reference to the Swinomish decision and the broader issue, states:

	my citations as to Page 70 of Draft WAC 365-196.	"No court decisions have held that local governments are required to adopt a monitoring and adaptive management program. However, the Supreme Court found that if Skagit County were to rely on monitoring and adaptive management to protect critical areas in agricultural lands, it needed to establish benchmarks for monitoring." In Swinomish, Skagit County adopted a monitoring and adaptive management process as part of their critical areas regulations specific to agricultural uses. The Supreme Court affirmed that the County must adopt benchmarks as part of the process. The Court notes that "under GMA regulations, local governments must either be certain that their critical areas regulations will prevent harm or be prepared to recognize and respond effectively to any unforeseen harm that arises. In this respect, adaptive management is the second part of the process initiated by adequate monitoring". If a local government adopts regulations consistent with the best available science,

		is certain its regulations will protect critical area and is properly implementing those regulations, then monitoring and adaptive management with established benchmarks is not required. In the *Anacortes* case[1], the GMHB ruled that adaptive management programs are not required if an agency follows Best Available Science (BAS). The adopted language recommends, but does not require, counties and cities to monitor and adaptively manage permit implementation. This is consistent with the critical areas guidebook. [1] *Ian Munce and Evergreen Islands v. City of Anacortes*, GMHB No. 21-2-0002c, (FDO March 21, 2022) at 5.
Futurewise, WA Environmental Council, WA Conservation Voters, Friends of the San Juans, RE Sources, Whidbey Environmental Action Network	*While we strongly support monitoring and adaptive management programs, we recommend that their purpose be clarified to ensuring that impacts to critical areas functions and values are avoided or fully mitigated.* As noted above, critical areas regulations must protect functions and values of critical areas. We	Monitoring and adaptive management language is focused on effective permit implementation. WAC 365-196-830 articulates that regulations must protect critical areas, resulting in no net loss of ecological functions. Cities and counties must require

	agree that monitoring and adaptive management can help achieve this requirement so we support the recommendations to call for monitoring and adaptive management in proposed WAC 365-195-920(2). We recommend that the purposes of this program be clarified to ensure that impacts to critical areas functions and values are avoided or fully mitigated. Our recommended additions are double underlined and our recommended deletions are double struck through. (a) In addition to the use of formal scientific approaches to monitoring and adaptive management program as an interim approach as described above, counties and cities should establish monitoring and adaptive management procedures that apply at both the project level and countywide. These procedures should ensure that individual projects do not result in cumulative impacts to critical area functions or values and that they fully replace impacted functions and values. ~~the department recommends counties and cities develop and maintain ongoing monitoring and adaptive management procedures to ensure implementation of critical area regulations is efficient andeffective.~~ Counties and cities should consult department guidance documents for information.	mitigation if development harms critical areas. This update includes a definition for "Mitigation" or "Mitigation sequencing" in WAC 365-196-210.

Chapter 365-196 WAC
GROWTH MANAGEMENT ACT (GMA) —PROCEDURAL CRITERIA FOR ADOPTING COMPREHENSIVE PLANS AND DEVELOPMENT REGULATIONS

WAC 365-196-060		
Stakeholder	**Comment**	**Response**
Futurewise, WA Environmental Council, WA Conservation Voters, Friends of the San Juans, RE Sources, Whidbey Environmental Action Network	We support the clarification to WAC 365-196-060 that balancing goals cannot be used to justify a violation of the GMA. Current law provides that goal balancing cannot undermine GMA goals and cannot be used to justify a violation of the GMA though sometime folks do try to do that. Therefore, this is a good clarification.	Thank you for the comment. No change requested.

WAC 365-196-210		
Stakeholder	**Comment**	**Response**
Ian Munce	*Page 5: I support the addition of the definition for "mitigation/mitigation sequencing" (taken from the SEPA WAC, 197-11-768) as currently drafted, noting that WAC 197-11-768(f) mandates "Monitoring the impact and taking appropriate corrective measures".*	Thank you for the comment. No change requested.

WAC 365-196-310		
Stakeholder	**Comment**	**Response**
Spokane County	***Subsection (c)(vi)*** *proposes to change the rule by adding in sections related to wildland or vegetative fuels.* *Spokane County is unable to find support for these provisions in the Growth Management Act, and more specifically under RCW 36.70A.110.*	The proposed language encouraging the consideration of wildland fires when expanding a UGA does not create a new requirement or expand the scope of the RCW.

	While the County lauds the consideration of wildfires in planning, a rule cannot impermissibly expand the scope of an RCW. State, Dept. of Ecology, 146 Wn.2d at 19 ("Administrative rules or regulations cannot amend or change legislative enactments."). Any desired change to consideration of wildfire planning being included in GMA planning, should be effected by a legislative change.	WAC 365-196-030 speaks to the applicability of Chapter 365-196 WAC. Subsection (2) states that compliance with the procedural criteria is not a prerequisite for compliance with the act. This chapter makes recommendations for meeting the requirements of the act, it does not set a minimum list of actions or criteria that a county or city must take. Counties and cities can achieve compliance with the goals and requirements of the act by adopting other approaches.
Spokane County	***Subsection (d)(i)*** *Discusses the identification of revenue sources and development of a reasonable financial plan to support operation and maintenance of existing facilities and services.* • *There is no requirement for a 20-year financial plan within the GMA itself.* • *Counties often do not control the urban public facilities provided by special districts, and the GMA contemplates that special districts will provide their own CFPs in conformance with (i.e., after as opposed to concurrently) the County's comprehensive plan.*	Counties and cities must consider the full twenty-year planning period when planning for capital facilities to ensure that the land use element, capital facilities element, and financing plan within the capital facilities element are coordinated and consistent in accordance with RCW 36.70A.070(3)(e). The proposed language is consistent with the requirements and recommendations provided in the existing rule on capital facilities elements: WAC 365-196-415. WAC 365-196-415(2)(b) recommends

	○ *Counties cannot compel special districts to comply with the GMA or CFP, including providing 20-year projected funding prospectus.* • *The reference to "operation and maintenance" is beyond the scope of the GMA which simply contemplates adequacy of facilities and a "capital facilities plan," "operation and maintenance" is a different budget, not mandated by the GMA.* *Recommendations on WAC 365-196-310(d)(i)* *1. The County would recommend striking the existing and proposed language related to a 20-year financial plan.* *2. In the alternative, the County would recommend striking the proposed language of the plan or changing the permissive "should" to the more permissive "may."* *3. The County would recommend striking all references to "operations and maintenance" in the proposed rule.* *4. To the extent a 20-year fiscal plan is considered/included in the final rule, the County would recommend language be inserted recognizing that Counties only have control over facilities it owns and operates, and that aspirational language for working with other public service*	that counties and cities should forecast needs for capital facilities during the planning period, based on the levels of service or planning assumptions selected and consistent with the growth, densities and distribution of growth anticipated in the land use element. The forecast should include reasonable assumptions about the effect of any identified system management or demand management approaches to preserve capacity or avoid the need for new facilities. Counties and cities should identify those improvements that are necessary to address existing deficiencies or to preserve the ability to maintain existing capacity, and should identify those improvements that are necessary for development. In cases where cities and counties rely on special purpose districts to support projected needs for facilities and growth, and those entities do not provide adequate information to demonstrate the ability to support those needs, cities and counties may need to reassess the land use element and other elements of the

	providers to provide 20 year financial plans are "encouraged."	comprehensive plan in accordance with RCW 36.70A.070(3)(e). WAC 365-196-415(d) provides recommendations if cities and counties believe necessary public facilities may be inadequate over the planning period. These include, reducing demand through demand management strategies, reducing level of service standards, increasing revenue, reducing the cost of needed facilities, redirecting or reallocating projected growth to better utilize existing facilities, phasing growth to adjust the timing of development, and revising the countywide population or employment forecasts.
Futurewise, WA Environmental Council, WA Conservation Voters, Friends of the San Juans, RE Sources, Whidbey Environmental Action Network	We support adding additional guidance and recommendations regarding the Wildland Urban Interface (WUI) to the procedural criteria in WAC 365-196- 310 and WAC 365-196-425. We strongly support adding additional guidance and recommendations regarding the Wildland Urban Interface (WUI) to the procedural criteria. Washington has experienced "immense" wildfires in recent years.[22] According to a recent peer-reviewed journal: *Large and severe fires in the Pacific Northwest are associated with warm and dry conditions, and such*	Thank you for the comment. No change requested.

	conditions will likely occur with increasing frequency in a warming climate. According to projections based on historical records, current trends, and simulation modeling, protracted warmer and drier conditions will drive lower fuel moisture and longer fire seasons in the future, likely increasing the frequency and extent of fires compared to the twentieth century.[23] Recent trends and future projections show a need to more effectively plan for wildfires especially in the WUI. WUI affects more than rural areas as recent wildfires threatening and damaging towns and cities has shown.[24] We strongly support guidance for urban growth area expansions, rural areas, and natural resource lands.	
Futurewise, WA Environmental Council, WA Conservation Voters, Friends of the San Juans, RE Sources, Whidbey Environmental Action Network	We support the recommendation that cities and counties should prepare 20- year revenue projections in WAC 365-196-310. Capital facility planning is one of the important innovations of the Growth Management Act to reduce costs for taxpayers and ratepayers. It also ensures that new development has the capital facilities and services needed to support growth. We strongly support adding the provision calling for 20-year cost and revenue estimates.	Thank you for the comment. No change requested.

WAC 365-196-320		
Stakeholder	**Comment**	**Response**
Spokane County	*Comments on WAC 365-196-320* *Subsection (e) recommends how jurisdictions should address potable water shortages projected within the 20-year planning horizon.* *The County would note, as it does above, that this provision suffers from the same defects as above related to special districts. The GMA contemplated that special districts would build and supply in accordance with Counties' comprehensive plans. In Counties where water is provided by a special district this new rule presents a problem. Counties cannot compel participation in the CFP process by special districts. This WAC does not directly apply to those special districts and instead compels a jurisdiction, potentially without authority over the special water district, to identify strategies or develop interties over which the jurisdiction has absolutely no control and can only request/recommend. The County lauds this planning provision, and sees the benefit behind it, however, the County would recommend that any such fix be done legislatively before adoption of this rule. Any such legislative fix would mandate the participation of special districts in the planning process as was originally contemplated by Laws of 1990, 1st Ex. Sess., ch. 17, § 18 (vetoed), and this WAC would then apply to water providers. Mandating jurisdictions that are not*	RCW 36.70A.030 includes domestic water systems in the definition of public facilities and urban governmental services. Sanitary sewer and public water from a Group A public water are necessary to support urban densities in urban growth areas and meet the requirements of RCW 36.70A.110. The capital facilities element and transportation element of a county or city comprehensive plan must show how adequate public facilities will be provided and by whom. If the county or city with land use authority over an area is not the provider of urban services, a process for maintaining consistency between the land use element and plans for infrastructure provision should be developed consistent with the county-wide planning policies. In cases where cities and counties cannot confirm there is legal water to support new growth and development, they should identify strategies to obtain the necessary water, or reconsider assumptions about where growth occurs in the land use element.

	water purveyors to compel special districts to provide planning fixes is an exercise in futility and does not necessarily reach the intended result WAC 365-190-130	
Futurewise, WA Environmental Council, WA Conservation Voters, Friends of the San Juans, RE Sources, Whidbey Environmental Action Network	We support the addition to 365-196-320 that public facilities and services must comply with state and federal law.	Thank you for the comment. No change requested.
Futurewise, WA Environmental Council, WA Conservation Voters, Friends of the San Juans, RE Sources, Whidbey Environmental Action Network	WAC 365-196-320 should provide that potable water demand for development within the service area of a public water system should not exceed the system's available water rights and water rights and conservation savings that can obtained in the future. We are concerned that proposed WAC 365-196-320(1)(e) no longer provides that potable water demand from the development the comprehensive plan and development regulations authorize should not exceed the water system's available water rights at the time of plan adoption and water rights and conservation savings that can obtained in the future. Given the limited availability of new water, the plan needs to reflect legal and physical water availability. This is important because it may not be possible to obtain additional water rights or meet the need through conservation as WAC 365-196-320(1)(e) now calls for. This requirement should apply to Group A and Group B systems to the	Commerce included new language as part of this update to recommend that cities and counties develop strategies to obtain sufficient water to meet projected demand. This strengthens the existing recommendations and reflects feedback Commerce received from local governments on the initial draft of the language. The proposed language states: <u>(e) If potable water demand is expected to exceed a public water system's available water rights within the 20-year planning horizon, cities and counties should develop strategies to obtain sufficient water to meet anticipated demand. Strategies may include, but are not limited to, decreasing water demand through conservation,</u>

	extent a plan relies on them for providing potable water. We also strongly recommend that WAC 365-196-320 not allow the use of agricultural water rights for rural residential development where their acquisition will lead to the conversion of agricultural lands of long-term commercial significance.	securing additional water rights and establishing an intertie agreement with another water purveyor to purchase the necessary water. Washington State Water law and implementing WACs will determine if agricultural water rights can be transferred to domestic uses.

WAC 365-196-325		
Stakeholder	**Comment**	**Response**
City of Vancouver	*The main thing that caught my eye after a quick review last week and today was that draft 365-196-325, providing land capacity sufficiency, has an outdated reference to the timelines for buildable lands reports, and contains language emphasizing basing capacity estimates on the allowed or zoned capacity of land which is inconsistent with the recent BLR statutes, and inconsistent with other portions of proposed subsection 325.*	Suggestion accepted. Thank you for the comment. Commerce made revisions to WAC 365-196-325(1)(c) to reflect new Buildable Lands Report timelines and for consistence with changes made to WAC 365-196-315.

WAC 365-196-450		
Stakeholder	**Comment**	**Response**
Joint Team of King County Rural Area Organizations	The last phrase in (1) Requirements should be changed to read: *"...that serves primarily rural area students from a rural area and an urban area..."* Such a change would be consistent with the wording and policies in the *King County Comprehensive Plan (KCCP)*—our highlighting below:	Thank you for the detailed review of the new section on extending public facilities and utilities to serve schools in rural areas. The proposed language WAC 365-196-450 (1)-(3) is based directly on the

	R-326 Except as provided in R-327: • New schools and institutions primarily serving rural residents shall be located in neighboring cities and rural towns; • New schools, institutions, and other community facilities primarily serving urban residents shall be located within the Urban Growth Area; and • New community facilities and services that primarily serve rural residents shall be located in neighboring cities and rural towns, with limited exceptions when their use is dependent on a rural location and their size and scale supports rural character. R-327 Consistent with the recommendations of the School Siting Task Force, included as Appendix Q, in the Rural Area: • Except as otherwise provided in subsections d. and e. of this policy, an existing elementary, middle, or junior high school may be modified or expanded but shall not be converted to a high school; • An existing high school may be modified or expanded or converted to an elementary, middle, or junior high school; • Snoqualmie Valley 1: parcel number 1823099046, as shown on the King County Department of	language in the underlying statute – RCW 36.70A.213. These guidelines apply to cities and counties throughout Washington. However, local governments may adopt more detailed or restrictive countywide planning policies, comprehensive plan policies, or development regulations if they are not in conflict with the underlying statute.

	Assessments map as of March 31, 2012, may develop as a new school; • Lake Washington 4: parcel numbers 0825069008 and 0825069056, as shown on the King County Department of Assessments map as of March 31, 2012, may develop as a new school and convert an existing school on the site to a high school use; • Tahoma 1: parcel number 2622069047, as shown on the King County Department of Assessments map as of March 31, 2012, may develop as a new school and convert an existing school on the site to a high school use only if no feasible alternative site can be located within the Urban Growth Area; • Lake Washington 2: parcel numbers 3326069010 and 3326069009, as shown on the King County Department of Assessments map as of March 31, 2012, may develop as a new school only if no feasible alternative site can be located within the Urban Growth Area, in which case it may be incorporated into the Urban Growth Area; and • Enumclaw A and D: the rural portions of parcel numbers 2321069064, 2321069063, and 2321069062, as shown on the King County Department of Assessments map as of March 31,	

	2012, may develop as ballfields or recreational playfields only, for a school located on the urban portions of the parcels. In fact, the *2021 King County Countywide Planning Policies (CPPs)*, which are approved by and cover King County and every King County city, have the following policies: DP-52 Except as provided in Appendix 5 (March 31, 2012 School Siting Task Force Report), limit new nonresidential uses located in the Rural Area to those that are demonstrated to serve the Rural Area, unless the use is dependent upon a rural location. Such uses shall be of a size, scale, and nature that is consistent with rural character. PF-13 Prohibit sewer service in the Rural Area and on Natural Resource Lands except: • Where needed to address specific health and safety problems threatening existing structures; or • As allowed by Countywide Planning Policy DP-49; or • As provided in Appendix 5 (March 31, 2012 School Siting Task Force Report). Sewer service authorized consistent with this policy shall be provided in a manner that does not increase development potential in the Rural Area. Locating Facilities and Services VISION 2050 calls for a full range of urban services in the Urban Growth	

	Area to support the Regional Growth Strategy, and for limiting the availability of services in the Rural Area. In the long term, there is increased efficiency and cost-effectiveness in siting and operating facilities and services that serve a primarily urban population within the Urban Growth Area. At the same time, those facilities and services that primarily benefit rural populations provide a greater benefit when they are located within neighboring cities and rural towns. PF-19 Locate schools, institutions, and other community facilities and services that primarily serve urban populations within the Urban Growth Area, where they are accessible to the communities they serve, except as provided in Appendix 5 (March 31, 2012 School Siting Task Force Report). If possible, locate these facilities in places that are well served by transit and pedestrian and bicycle networks. PF-20 Jurisdictions shall work collaboratively with school districts to ensure the availability of sufficient land and the provision of necessary educational facilities within the Urban Growth Area through compliance with PF-22 and PF-23 and through the land use element and capital facilities element of local comprehensive plans. PF-21 Locate new schools and institutions primarily serving rural residents in neighboring cities and rural towns, except as provided in Appendix 5 (March 31, 2012 School Siting Task Force Report). Locate new	

	community facilities and services that primarily serve rural residents in neighboring cities and rural towns, with the limited exceptions when their use is dependent upon a rural location and their size and scale supports rural character. PF-23 Coordinate and collaborate with school districts to build new and expand existing school facilities within the Urban Growth Area. Jurisdictions and school districts should work together to employ strategies such as: .... The four-county Puget Sound Regional Council's (PSRC's) *VISION 2050* sets out the following Multicounty Planning Policies (MPPs): MPP-PS-26 Work cooperatively with school districts to plan for school facilities to meet the existing and future community needs consistent with adopted comprehensive plans and growth forecasts, including siting and designing schools to support safe, walkable access and best serve their communities. MPP-PS-27 Site schools, institutions, and other community facilities that primarily serve urban populations within the urban growth area in locations where they will promote the local desired growth plans, except as provided for by RCW 36.70A.211. [NOTE: King County does not fit the description in this RCW because its population exceeds the maximum threshold of 1,500,000, therefore this *"exception"* does not apply.]	

	MPP-PS-28 Locate schools, institutions, and other community facilities serving rural residents in neighboring cities and towns and design these facilities in keeping with the size and scale of the local community, except as provided for by RCW 36.70A.211. [NOTE: King County does not fit the description in this RCW because its population exceeds the maximum threshold of 1,500,000, therefore this *"exception"* does not apply.] The four-county Puget Sound Regional Council's (PSRC's) *VISION 2050* sets out the following Multicounty Planning Policies (MPPs): MPP-PS-26 Work cooperatively with school districts to plan for school facilities to meet the existing and future community needs consistent with adopted comprehensive plans and growth forecasts, including siting and designing schools to support safe, walkable access and best serve their communities. MPP-PS-27 Site schools, institutions, and other community facilities that primarily serve urban populations within the urban growth area in locations where they will promote the local desired growth plans, except as provided for by RCW 36.70A.211. [NOTE: King County does not fit the description in this RCW because its population exceeds the maximum threshold of 1,500,000, therefore this *"exception"* does not apply.] MPP-PS-28 Locate schools, institutions, and other community	

	facilities serving rural residents in neighboring cities and towns and design these facilities in keeping with the size and scale of the local community, except as provided for by RCW 36.70A.211. [NOTE: King County does not fit the description in this RCW because its population exceeds the maximum threshold of 1,500,000, therefore this *"exception"* does not apply.] Finally, we cite the Growth Management Hearings Board (GMHB) on School Siting (found on the WA State Department of Commerce's *"Planning for Schools Siting"* webpage — https:// www.commerce.wa.gov/serving-communities/growth-management/growth-management-topics/ planning-for-school-siting/): Growth Management Hearings Board guidance related to siting schools The county has an obligation to work with school districts in the siting of schools. It also has an obligation to facilitate the siting of schools within urban areas while discouraging them outside of urban growth areas (UGAs). Hensley VI, 03-3-009c, FDO, at 22 School or church properties that are adjacent may be drawn into the UGA. Pilchuck VI, 06-3-0015c, FDO at 53 Any actual UGA extensions for churches and schools shall be limited and rare, for the following reasons: • RCW 36.70A.150 requires cities and counties to identify land for	

	public purposes, specifically schools. • School impact fees require coordination between school districts and jurisdictions so school needs should be known. • Accommodating school needs within existing UGAs should be a priority. CTED, 03-3-0017, FDO, at 28-29. Thank you for considering our comments from councils, associations, and organizations that serve most of the King County Rural Areas.	

WAC 365-196-425		
Stakeholder	**Comment**	**Response**
Futurewise, WA Environmental Council, WA Conservation Voters, Friends of the San Juans, RE Sources, Whidbey Environmental Action Network	We support adding additional guidance and recommendations regarding the Wildland Urban Interface (WUI) to the procedural criteria in WAC 365-196- 310 and WAC 365-196-425. We strongly support adding additional guidance and recommendations regarding the Wildland Urban Interface (WUI) to the procedural criteria. Washington has experienced "immense" wildfires in recent years.[22] According to a recent peer-reviewed journal: *Large and severe fires in the Pacific Northwest are associated with warm and dry conditions, and such conditions will likely occur with increasing frequency in a warming climate. According to projections based on historical records, current*	Thank you for the comment. No change requested.

	trends, and simulation modeling, protracted warmer and drier conditions will drive lower fuel moisture and longer fire seasons in the future, likely increasing the frequency and extent of fires compared to the twentieth century.[23] Recent trends and future projections show a need to more effectively plan for wildfires especially in the WUI. WUI affects more than rural areas as recent wildfires threatening and damaging towns and cities has shown.[24] We strongly support guidance for urban growth area expansions, rural areas, and natural resource lands.	

WAC 365-196-430		
Stakeholder	**Comment**	**Response**
Futurewise, WA Environmental Council, WA Conservation Voters, Friends of the San Juans, RE Sources, Whidbey Environmental Action Network	We support the proposals to amend WAC 365-196-430 to better address active transportation, sustainable transportation solutions, and the state vehicle miles traveled reduction goals. We support updating WAC 365-196-430 to call for including active transportation in transportation elements and to plan and implement sustainable transportation solutions. We also support guidance for meeting the state vehicle miles traveled reduction goals. These transportation solutions can help address mobility needs for all cost-effectively.	Thank you for the comment. No change requested.

WAC 365-196-475		
Stakeholder	**Comment**	**Response**
Futurewise, WA Environmental Council, WA Conservation Voters, Friends of the San Juans, RE Sources, Whidbey Environmental Action Network	We support amending WAC 365-196-475 to update recommendations on compatibility with military installations.	Thank you for the comment. No change requested.

WAC 365-196-480		
Stakeholder	**Comment**	**Response**
Futurewise, WA Environmental Council, WA Conservation Voters, Friends of the San Juans, RE Sources, Whidbey Environmental Action Network	We support clarifying the rule that discourages dedesignation of agricultural, forest, and mineral resource lands on a parcel-by-parcel basis in WAC 365- 196-480. Agricultural and forest land are very sensitive to nearby uses and nearby conversions of agricultural land. The "impermanence syndrome" is a "belief among farmers that agriculture in their area has limited or no future and that urbanization will absorb the farm in the not-too distant future."[26] "[F]or every acre of prime farmland that is urbanized, up to another acre becomes idled due to the impermanence syndrome (Plaut 1976)."[27] So when dedesignating agricultural land, it is necessary to consider the impacts on other nearby farmland. So, WAC 365-190-040(10)(b)'s requirement that "[i]n classifying and designating natural resource lands, counties must	Thank you for the comment. No change requested.

	approach the effort as a county-wide or regional process. Counties and cities should not review natural resource lands designations solely on a parcel-by-parcel process" is well grounded in the science. While some Growth Management Hearings Board decisions have correctly interpreted this and related provisions,[28] others have seemed confused focusing on whether the "process" considered amendments from throughout the county, not whether the dedesignation process considered agricultural lands designations on a countywide or regional basis.[29] It would be helpful to all to clarify that the dedesignation must consider the farmland on a countywide basis and consider the impacts on the remaining farmland.	
Futurewise, WA Environmental Council, WA Conservation Voters, Friends of the San Juans, RE Sources, Whidbey Environmental Action Network	We support the addition requiring counties and cities to consider the impacts of energy facilities on agricultural land and nearby agricultural operations in WAC 365-196-480. As the Washington Supreme Court held in the *Soccer Fields* decision counties and cities are "required *to assure the conservation of agricultural lands and to assure that the use of adjacent lands does not interfere with their continued use for the production of food or agricultural products.*"[30] We support adding the requirement that when siting energy facilities on or adjacent to natural resource lands, counties and cities must ensure that development does not	Thank you for the comment. No change requested.

	result in conversion to a use that removes the land from resource production, or interferes with the usual and accustomed operations of the natural resource lands. This is required by the Growth Management Act. We also support recommending that counties and cities adopt policies and regulations regarding the appropriate locations for siting energy facilities.	
Futurewise, WA Environmental Council, WA Conservation Voters, Friends of the San Juans, RE Sources, Whidbey Environmental Action Network	We support amending WAC 365-196-480 to better conserve agricultural, forest, and mineral resource lands natural resource lands. We also support amending WAC 365-196-480 to better conserve agricultural, forest, and mineral resource lands natural resource lands. In the *Soccer Fields* decision, the Washington State Supreme Court has held that [t]he County was required *to assure the conservation of agricultural lands and to assure that the use of adjacent lands does not interfere with their continued use for the production of food or agricultural products.*[31] Most agricultural and forest zones and even some mineral resource land zones allow residential uses albeit at low densities. This has led to estate development on agricultural, forest, and mineral resource lands, even resource lands for which the development rights have been purchased.[32] But even low-density residential uses and agricultural, forestry, and mineral uses are incompatible.[33]	WAC 365-196-815(1)(b)(i) states in part: "Development regulations must not allow a primary use of agricultural resource lands that would convert those lands to nonresource purposes." Nonagricultural uses on designated resource lands are limited, but not prohibited, by RCW 36.70A.177(3)(b)(ii). However, counties and cities are required to adopt development regulations assuring that the development on resource lands and on adjacent lands will not interfere with operation on the resource lands per RCW 36.70A.060. WAC 365-196-815(1)(b)(i) states in part: "Development regulations must not allow a primary use of agricultural resource lands that would convert those lands to nonresource purposes." This recommendation is

	Allowing residential uses in these zones also leads to poorly planned sprawl. Professor Nelson analyzed agricultural land preservation techniques and concluded that "[m]inimum lot sizing at up to forty-acre densities merely causes rural sprawl-a more insidious form of urban sprawl."[34] The American Farmland Trust concluded that to "make substantial progress protecting farmland in the Puget Sound region, minimum parcel size would be at least 40 acres and preferably larger."[35] Skagit County has directly addressed this problem by using siting criteria for residential uses in its agriculture of long-term commercial significance zone to residential uses that have an association to the agricultural use.[36] WAC 365-196-480 should limit residential uses allowed in agricultural zones to those occupied by those who own or work on the farm and their relatives. Whatcom County prohibits residential uses in its zone that applies to forest land of long-term commercial significance except for living quarters for those who are engaged in forest management activities on the property, such as fire crews and logging crews, and watchpersons. These uses are reviewed as conditional uses.[37] WAC 365-196-480 should include these requirements to conserve	addressed in WAC 365-196-815.

	forest lands of long-term commercial significance. Some agricultural zones also allow other incompatible uses. *Clark County Issue Paper 9*, prepared for the county's last update documents that the county's primary agricultural zone was <u>not</u> conserving agricultural land because it allowed "non-productive rural uses ...."[38] In the *Soccer Fields* decision the Washington Supreme Court held that "[i]n order to constitute an innovative zoning technique [authorized by RCW 36.70A.177] consistent with the overall meaning of the Act, a development regulation must satisfy the Act's mandate to conserve agricultural lands for the maintenance and enhancement of the agricultural industry."[39] Outdoor recreational facilities failed this test and cannot be allowed on agricultural lands because they will remove "designated agricultural land from its availability for agricultural production."[40] In the *Lewis County* decision, the State Supreme Court built on the *Soccer Fields* decision and again upheld a Board order that concluded the "County's ordinance allowing residential subdivisions and other non-farm uses within designated agricultural lands undermined the GMA conservation requirement."[41] In addition to residential subdivisions, the illegal uses were public facilities; public	

	and semipublic buildings, structures, and uses; and schools, shops, and airports.[42] In the *Kittitas County* decision, the state Supreme Court again upheld a Board decision finding that a variety of conditional uses allowed on agricultural lands of long-term commercial significance violated the GMA. The conditional uses violated the GMA because "the County has no protections in place to protect agricultural land from harmful conditional uses."[43] The conditional uses that violated the GMA included "kennels, day care centers, community clubhouses, governmental uses essential to residential neighborhoods, and schools with no limiting criteria or standards."[44] Consistent with these decisions, WAC 365-196-480 should clarify that nonagricultural uses that can increase the cost of agricultural lands by outspending farmers for the land or that interfere with agricultural uses cannot be allowed on agricultural lands of long-term commercial significance. Similar uses that outspend foresters and miners or are incompatible with these uses cannot be allowed on forest or mineral resource lands of long-term commercial significance.	
American Farmland Trust	In our previous comments, in regards to the development of energy projects, we suggested: "The WAC should identify factors to be considered in evaluating the risk of the conversion of farmland, such as the impacts to the regional	Thank you for the comment. WAC 365-196-480(2)(f) and WAC 365-196-815(1)(i) address the broader issues of conservation and conversion of natural

	agricultural economy, the implications for water rights, and the protection of valuable soils in design, construction, and decommissioning."	resource lands. The WAC does not allow for conversion of resource lands for the purpose of siting energy infrastructure. If energy facilities are sited on ag resource lands they must be complimentary to the agricultural operations. WAC 365-196-815(1)(i) says: *Development regulations must prevent conversion to a use that removes land from resource production. Development regulations must not allow a primary use of agricultural resource lands that would convert those lands to non-resource purposes.*

WAC 365-196-485		
Stakeholder	**Comment**	**Response**
Futurewise, WA Environmental Council, WA Conservation Voters, Friends of the San Juans, RE Sources, Whidbey Environmental Action Network	While we strongly support monitoring and adaptive management programs, we recommend that their purpose be clarified to ensuring that impacts to critical areas functions and values are avoided or fully mitigated in WAC 365- 196-485, WAC 365-196-610, and WAC 365-196-660. As noted above, critical areas regulations must protect functions and values of critical areas.[45] We agree that monitoring and adaptive management can help achieve this requirement, so we support the recommendations to call for monitoring and adaptive	Monitoring and adaptive management language in WAC 365-196-485(3)(e) is focused on effective and efficient permit implementation. WAC 365-196-830 articulates that regulations must protect critical areas, resulting in no net loss of ecological functions. Cities and counties must require mitigation if development harms critical areas. This update includes a definition for "Mitigation"

	management in proposed WAC 365-196485(3)(e), WAC 365-196-610(2)(b)(ii)(B), and WAC 365-196-660(2(b). We recommend that the purposes of this program be clarified to ensuring that impacts to critical areas functions and values are avoided or fully mitigated. This is necessary to contribute to the recovery of depleted salmon stocks. Our recommended additions are double underlined and our recommended deletions are double struck through. (b) The department recommends critical areas regulations be reviewed to ensure they are achieving no net loss of <u>functions and values, including</u> ecosystem functions and values. This review should include an analysis of monitoring plans, regulations and permits <u>to ensure that the regulations and individual projects do not result in cumulative impacts to critical area functions or values or that they fully replace impacted functions and values</u> ~~they are efficient and effective at achieving protection goals and implementation benchmarks.~~	or "Mitigation sequencing" in WAC 365-196-210.
Ann Aagaard	And related to monitoring and adaptive management as proposed in WAC 365-196-485(3)(e) , WAC 265-196-610(2)(b)(ii)(B) and WAC 365-196-660(2)(b) should be clarified to ensure that impacts to critical areas functions and values are avoided or fully mitigated.	Thank you for your comment. WAC 365-196-830 articulates that regulations must protect critical areas, resulting in no net loss of ecological functions. Cities and counties must require mitigation if development harms critical areas. This update includes a definition for "Mitigation"

		or "Mitigation sequencing" in WAC 365-196-210.
Ian Munce	Page 69: I recommend that WAC 365-196-485(b) ("Jurisdictions are required to include best available science in developing policies and development regulations to protect the functions and values of critical areas") be expanded with the addition of the following language: "Inclusion of best available science for permit review is not a substitute for implementing the WAC Minimum Guidelines".	WAC 365-196-485(b) reflects the statutory language and requirements in RCW 36.70A.172(1). WAC 365-190-080(1) addresses this recommendation: *Counties and cities required or opting to plan under the act must consider the definitions and guidelines in this chapter when designating critical areas and when preparing development regulations that protect the function and values of critical areas.*
Ian Munce	Page 69: I support the proposed change from "should" to "must" as follows: "critical areas must be designated and protected wherever the applicable environmental conditions exist …".	Thank you for the comment. No change requested.
Ian Munce	Page 70: I support the addition of language along the lines of that proposed: "The department recommends counties and cities review plan, regulation, and permit implementation monitoring results and, where applicable, incorporate adaptive management measures to ensure regulations are efficient and effective at protecting critical area functions and values". However, I respectfully assert that this proposed language falls far short of the standards set forth in in seminal Supreme Court case, *Swinomish 2007*. See e.g. "In short, under GMA Regulations must either be **certain** that their critical area regulations	Monitoring and adaptive management is only required when it is uncertain if regulations will protect critical areas. Our CAO guidebook, in reference to the Swinomish decision and the broader issue, states: "No court decisions have held that local governments are required to adopt a monitoring and adaptive management program. However, the Supreme Court found that if Skagit County were to rely on monitoring and

	will prevent harm or be prepared to recognize and respond effectively to any unforeseen harm that arises. In this respect, adaptive management is the second part of the process initiated by adequate monitoring". (Emphasis added). Reason: Supreme Court holding and Court of Appeals holding in *WEAN 2020* (that the precautionary approach set forth in WAC 365-195-920 as to adequate scientific information is a basic **requirement** and not simply a guideline). The citations are to *Swinomish Indian Tribal Community and Washington Environmental Council v. Western Washington GMHB et.al, 166 P.3d. 1198 (2007)* and *WEAN v. GMHB 471 P.3d 960 (2020)*	adaptive management to protect critical areas in agricultural lands, it needed to establish benchmarks for monitoring." In Swinomish, Skagit County adopted a monitoring and adaptive management process as part of their critical areas regulations specific to agricultural uses. The Supreme Court affirmed that the County must adopt benchmarks as part of the process. The Court notes that "under GMA regulations, local governments must either be certain that their critical areas regulations will prevent harm or be prepared to recognize and respond effectively to any unforeseen harm that arises. In this respect, adaptive management is the second part of the process initiated by adequate monitoring". If a local government adopts regulations consistent with the best available science, is certain its regulations will protect critical area and is properly implementing those regulations, then monitoring and adaptive management with established benchmarks is not required.

		The GMHB ruled that adaptive management programs are not required if an agency follows Best Available Science (BAS) in Ian Munce and Evergreen Islands v. City of Anacortes (No. 21-2-002c FDO March 21, 2022) The adopted language recommends, but does not require, counties and cities to monitor and adaptively manage permit implementation. This is consistent with the critical areas guidebook.

WAC 365-196-585		
Stakeholder	**Comment**	**Response**
King County Prosecuting Attorney's Office	Thank you for the opportunity to comment on the Washington Department of Commerce rule update for Chapter 365-196 WAC, pursuant to Notice WSR 22-13-125. This comment is with regard to the Department's proposed rule addressing the tracking and reporting GMA compliance for purposes of a local jurisdiction's eligibility for state grants and loan applications following a Growth Management Hearings Board Final Decision and Order. We note that the currently proposed draft rule would provide an avenue for local jurisdictions such as King County to avoid being determined ineligible or otherwise	The draft language in WAC 365-196-585(9) restates the two ways a county, city or town can remain eligible for certain grants and loans during the period of remand described in RCW 36.70A.300. RCW 36.70A.300(4)(b) states: *Unless the board makes a determination of invalidity, state agencies, commissions, and governing boards may not determine a county, city, or town to be ineligible or otherwise penalized in the acceptance of applications or the awarding of state*

	penalized in the award of grants or loans during a period of remand by taking certain actions, such as by delaying the effective date of the action, but that these solutions would not be available if the Board makes a determination of invalidity. The current proposal is silent on the effect of an agency or court order staying the effect of a Board Order finding noncompliance, whether or not the Board makes a determination of invalidity. By this letter King County requests that the Department consider an additional provision clarifying the status of a local jurisdiction's eligibility for grant and loan applications during the pendency of an Administrative Procedure Act appeal to a superior or appellate court. King County requests that such a provision clarify that if either a reviewing court or the Growth Board has ordered a stay of an order finding noncompliance or invalidity that the local jurisdiction's eligibility for grant and loan applications may not be penalized or otherwise affected upon provision of a copy of the signed order to Commerce. Local jurisdiction may seek a stay of a Final Order pursuant to either RCW 34.05.550 or WAC 242-03-860. Both avenues to obtain a stay require a formal motion process such that frivolous appeals or those not filed with a good faith basis for asserting Board error would be unlikely to receive a stay. Failure to provide such a rule effectively	*agency grants or loans during the period of remand. This subsection (4)(b) applies only to counties, cities, and towns that have: (i) Delayed the initial effective date of the action subject to the petition before the board until after the board issues a final determination; or (ii) within thirty days of receiving notice of a petition for review by the board, delayed or suspended the effective date of the action subject to the petition before the board until after the board issues a final determination.* The GMA does not provide eligibility exceptions for grants and loans if there is a determination of invalidity. Any additional eligibility exceptions would need to be established by the legislature in statute. Commerce does not have the authority to create eligibility exceptions through rule.

	renders a Board's Final Order unappealable in many circumstances for many jurisdictions. This lack of a viable appeal option introduces at minimum the perception of and in many circumstances actual unfairness into the GMA's otherwise sound public participation legislative system. The Department can and should take this opportunity to ensure that local jurisdictions' ability to appeal erroneous Board Orders is not impeded, and so that no jurisdiction is forced to forego a legitimate appeal. Thank you again for the opportunity to provide feedback regarding the Department's well-organized and thoughtful proposal.	

WAC 365-196-600		
Stakeholder	**Comment**	**Response**
Futurewise, WA Environmental Council, WA Conservation Voters, Friends of the San Juans, RE Sources, Whidbey Environmental Action Network	We support the addition providing that counties and cities should implement innovative techniques that support meaningful and inclusive engagement for people of color and low-income people in WAC 365-196-600. One of the hallmarks of the Growth Management Act is the requirements for effective public participation for all in the community. So, we support the requirement that counties and cities should implement innovative techniques that support meaningful and inclusive engagement for	Thank you for the comment. No change requested.

	people of color and low-income people and should consider potential barriers to participation that may arise due to race, color, ethnicity, religion, income, or education level and to address those barriers.	

WAC 365-196-610		
Stakeholder	**Comment**	**Response**
Futurewise, WA Environmental Council, WA Conservation Voters, Friends of the San Juans, RE Sources, Whidbey Environmental Action Network	While we strongly support monitoring and adaptive management programs, we recommend that their purpose be clarified to ensuring that impacts to critical areas functions and values are avoided or fully mitigated in WAC 365- 196-485, WAC 365-196-610, and WAC 365-196-660.	Thank you for your comment. Monitoring and adaptive management language in WAC 365-196-610(2)(b)(ii)(B) is focused on effective and efficient plan, regulation, and permit implementation relative to the periodic update. WAC 365-196-830 articulates that regulations must protect critical areas, resulting in no net loss of ecological functions. Cities and counties must require mitigation if development harms critical areas. This update includes a definition for “Mitigation” or “Mitigation sequencing” in WAC 365-196-210.
Ann Aagaard	And related to monitoring and adaptive management as proposed in WAC 365-196-485(3)(e) , WAC 265-196-610(2)(b)(ii)(B) and WAC 365-196-660(2)(b) should be clarified to ensure that impacts to critical areas functions and values are avoided or fully mitigated.	Thank you for your comment. WAC 365-196-830 articulates that regulations must protect critical areas, resulting in no net loss of ecological functions. Cities and counties must require

		mitigation if development harms critical areas. This update includes a definition for "Mitigation" or "Mitigation sequencing" in WAC 365-196-210.
Ian Munce	*Page 84: I support language along the lines that: "The department recommends evaluating the results of plan, regulation, and permit monitoring to determine if changes are needed to ensure efficient and effective implementation of critical area ordinances (See WAC 365-195-920)". However, I consider that this subsection should not be singled out from all of the other Minimum Guidelines with an undefined 'efficiency' standard. Further, as noted in my comments on the Page 70 issue, current, controlling case law requires not a recommendation but a "must" mandate.*	Thank you for your comment. While WAC 365-196-610(2)(b)(ii)(B) recommends plan, regulation and permit implementation monitoring and adaptive management as part of the periodic update, it is not a GMA requirement. Cities and counties will voluntarily design their programs and may rely on Commerce's guidance, which has been developed in collaboration with other state agencies and local government partners. The term "efficient" is used in its common meaning.

WAC 365-196-660		
Stakeholder	**Comment**	**Response**
Futurewise, WA Environmental Council, WA Conservation Voters, Friends of the San Juans, RE Sources, Whidbey Environmental Action Network	While we strongly support monitoring and adaptive management programs, we recommend that their purpose be clarified to ensuring that impacts to critical areas functions and values are avoided or fully mitigated in WAC 365- 196-485, WAC 365-196-610, and WAC 365-196-660.	Thank you for your comment. WAC 365-196-830 articulates that regulations must protect critical areas, resulting in no net loss of ecological functions. Cities and counties must require mitigation if development harms critical areas. This update includes a definition for "Mitigation" or "Mitigation sequencing" in WAC 365-196-210.

Ann Aagaard	And related to monitoring and adaptive management as proposed in WAC 365-196-485(3)(e) , WAC 265-196-610(2)(b)(ii)(B) and WAC 365-196-660(2)(b) should be clarified to ensure that impacts to critical areas functions and values are avoided or fully mitigated.	Thank you for your comment. WAC 365-196-830 articulates that regulations must protect critical areas, resulting in no net loss of ecological functions. Cities and counties must require mitigation if development harms critical areas. This update includes a definition for "Mitigation" or "Mitigation sequencing" in WAC 365-196-210.
Ian Munce	Page 89: I support language along the lines that: "The department recommends critical area regulations be reviewed to ensure that they are achieving no net loss of ecosystem functions and values. This review should include an analysis of monitoring plans, regulations, and permits to ensure they are efficient and effective at achieving protection goals and implementation benchmarks". However, I reiterate my comments from Page 84 and point out that the "benchmarks" need to be defined in some detail in the Minimum Guidelines.	Thank you for your comment. "Benchmark" is a common term meaning a standard or point by which you measure against. Local governments may establish benchmarks appropriate for their circumstances and programs.

WAC 365-196-735		
Stakeholder	**Comment**	**Response**
WSDOT	We recommend adding three RCW citations outside of the GMA to the "State and regional authorities" section of WAC 365-196-735 that are relevant to the Critical Areas Ordinance (CAO) element of the GMA. Including these changes in the	Commerce did not include changes to this section prior to the public hearing, and is unable to procedurally adopt changes to the section at this time. We are open to

	GMA rules will help increase the Local Agency Community Development staff's awareness of unique laws that may affect their CAO process. 1. Local permit exemptions for WDFW's Fish Habitat Enhancement Program under RCW 77.55.181. 2. WSDOT's statutory authority and duty to operate and maintain state highways and transportation facilities under RCW 47.01.260, and Transportation system policy goals under RCW 47.04.280. 3. WSDOT's 90-day permit issuing timeframe under RCW 47.01.485. Add to WAC 365-196-735 (1)(b) (i) Sponsored Fish Habitat Enhancement Projects under RCW 77.55.181 shall be exempt from critical areas regulatory review or approval by state or local governments except for floodplain development permits if applicable under the national flood insurance program (NFIP), in accordance with RCW 36.70A.460(2). Add to WAC 365-196-735 (2) (l) Statutory requirements and rules associated with statewide transportation, including duties and exemptions associated with operating and maintaining state highways and state transportation facilities and services: (i) RCW 47.01.260 Authority of department of transportation and	future amendments when we initiate rulemaking in 2023. Commerce would include the following language in a subsequent WAC update, which we discussed with your agency, to address your suggestions. An addition to subsection (2) Examples of statutes and regulations imposing statewide standards are: (l) Statutory requirements and rules associated with operating and maintaining state highways, transportation facilities and services under the Public Highways and Transportation Act. An addition to subsection (3) Examples of programs involving state issued permits or certifications are: Sponsored Fish Habitat Enhancement Projects permitted under RCW 77.55.181.

	RCW 47.04.280 Transportation system policy goals; (ii) RCW 47.01.485 Final determination by local governments on department of transportation permit application for state highway projects less than five hundred million dollars within 90 days, when due – Annual report;	

WAC 365-196-815		
Stakeholder	**Comment**	**Response**
Futurewise, WA Environmental Council, WA Conservation Voters, Friends of the San Juans, RE Sources, Whidbey Environmental Action Network	WAC 365-196-815(1)(b)(i) should explicitly exclude nonagricultural uses as a primary use of long-term commercially significant lands. Nonagricultural uses have inflated the cost of productive farmland to the point where the value of food production can no longer compete for the land. The American Farmland Trust's Farms Under Threat study found that agricultural land in Washington is largely being lost to low density residential development, which the Trust has defined as large-lot housing development on agricultural land. These areas in Washington are 70 times more likely to be converted to urban development over time. WAC 365-196-815(1)(b)(i) states "[d]evelopment regulations must not allow a primary use of agricultural resource lands that would convert those lands to nonresource purposes." This provision should be clarified to also exclude uses that will drive up the value of the land and erode the commercial viability of agriculture.	Thank you for your comment. WAC 365-196-815(1)(b)(i) states in part: "Development regulations must not allow a primary use of agricultural resource lands that would convert those lands to nonresource purposes." Nonagricultural uses on designated resource lands are limited, but not prohibited, by RCW 36.70A.177(3)(b)(ii). However, counties and cities are required to adopt development regulations assuring that the development on resource lands and on adjacent lands will not interfere with operation on the resource lands per RCW 36.70A.060. Both of these are covered by WAC 365-196-815. Commerce is not proposing any changes to this section of the WAC.

	These uses will impact the long-term commercial significance of agricultural lands, which will ultimately lead to conversion. Skagit County has directly addressed this problem by using siting criteria limiting residential uses in its agriculture of long-term commercial significance zone to residential uses that have an association to the agricultural use.[46] WAC 365-196-815 should also limit residential uses allowed in agricultural zones to those occupied by those who own or work on the farm and their relatives.	

WAC 365-196-830		
Stakeholder	**Comment**	**Response**
Futurewise, WA Environmental Council, WA Conservation Voters, Friends of the San Juans, RE Sources, Whidbey Environmental Action Network	We support the amendment to WAC 365-196-830 identifying avoidance as the most effective method of protecting critical areas. We support the amendment to WAC 365-196-830(4) providing that "[a]voidance is the most effective way to protect critical areas." This is well supported by the science.[47]	Thank you for the comment. No change requested.

General Comments

Commerce received one email with general comments, summarized below.

Summary of general comment:

There are concerns about fraud, forgery and embezzlement in regards to housing authorities and public funds intended to support public housing. A government agency such as Housing and Urban Development or the Department of Justice should be responsible for reviewing mismanagement, illegality or fraud. They should make sure no one endures any Civil Rights or Human Rights violations during the expansion, renovation and developmental process.

> **Commerce response:** The administrative rules under consideration provide guidance and recommendations to the adoption of comprehensive plans and development regulations for cities and counties. They do not address local housing authorities, or authorize the Department of Commerce to establish a regulatory review process regarding the distribution of funds or the construction of affordable housing.

I would be very interested in seeing the 1990 baseline date for enforcement and restoration highlighted in the new WAC. Especially if it can be tied to the court cases that you thought might be out there.

> **Commerce response:** WAC 365-190-040 identifies the specific dates for preliminary classification and designation of natural resource lands and critical areas. The court cases Commerce reviewed regarding historical requirements for baseline protections specifically referred to the dates in WAC 365-190-040(2).

III: Differences between proposed and adopted rule

This section summarizes differences between the proposed rules and the final adopted rules, pursuant to RCW 34.05.340(3). You can also find more about the comments and detail on changes in the relevant section under *II: Responsiveness Summary*.

Section	CR-102	Final	Explanation
WAC 365-190-050(3)(c)	(vi) Predominant parcel size;	(vi) Predominant parcel size, <u>which may include smaller parcels if contiguous with other agricultural resource lands;</u>	The language clarifies that smaller parcels may be considered for designation when contiguous with larger blocks of designated resource lands. Active operations on smaller parcels should not necessarily be excluded solely on the basis of parcel size. The language is permissive and does not create a new requirement for local governments.
WAC 365-190-060(4)	(c) The size of the parcels: Forest lands consist of predominantly large parcels;	(c) The size of the parcels: Forest lands consist of predominantly large parcels, <u>but may include smaller parcels if contiguous with other forest resource lands;</u>	The language clarifies that smaller parcels may be considered for designation when contiguous with larger blocks of designated resource lands. Active operations on smaller parcels should not necessarily be excluded solely on the basis of parcel size. The language is permissive and does not create a new requirement for local governments.
WAC 365-190-080	(1) Counties and cities must protect critical areas. Counties and cities required or opting to plan under the act must consider the definitions and	(1) Counties and cities must protect critical areas. Counties and cities required or opting to plan under the act must consider the definitions and	While the current language does not explicitly allow the

	guidelines in this chapter when designating critical areas and when preparing development regulations that protect the function and values and values of critical areas to ensure no net loss of ecological functions and values.	guidelines in this chapter when designating critical areas and when preparing development regulations that protect all~~the~~ functions and values and values of critical areas to ensure no net loss of ecological functions and values.	option to protect only some critical areas functions, court and Hearings Board cases, including *WEAN v. Island County* (2004) and the recent GMHB *Ian Munce and Evergreen Islands v. Anacortes* decision (2022), reinforce that all critical areas functions must be protected.
WAC 365-196-320(1)	(a) Urban services are defined by RCW 36.70A.030(18) as those public services and public facilities at an intensity historically and typically provided in cities. Urban services specifically include:	(a) Urban services are defined by RCW 36.70A.030~~(18)~~ as those public services and public facilities at an intensity historically and typically provided in cities. Urban services specifically include:	
WAC 365-196-320(1)	(b) RCW 36.70A.030 (12) and (13) define public facilities and public services, which in addition to those defined as urban services, also include streets, roads, highways, sidewalks, street and road lighting systems, traffic signals, parks and recreational facilities, and schools, public health and environmental protection, and other governmental services.	(b) RCW 36.70A.030~~ (12) and (13)~~ defines public facilities and public services, which in addition to those defined as urban services, also include streets, roads, highways, sidewalks, street and road lighting systems, traffic signals, parks and recreational facilities, and schools, public health and environmental protection, and other governmental services.	Commerce removed references to specific subsections of the statute as those have changed.
WAC 365-196-325(1)	(c) Counties and cities subject to RCW 36.70A.215 must determine land capacity sufficiency as part of the buildable lands reporting required no later than one year prior to the deadline for periodic review of comprehensive plans and development regulations required by RCW 36.70A.130, and adopt and implement measures that are reasonably likely to increase the consistency between land capacity and growth allocations. See WAC 365-196-315 for guidance.	(c) Counties and cities subject to RCW 36.70A.215 must determine land capacity sufficiency as part of the buildable lands reporting requirements~~d no later than one year prior~~ to the deadline for periodic review of comprehensive plans and development regulations required by RCW 36.70A.130, and adopt and implement measures that are reasonably likely to increase the consistency between land capacity and growth allocations. See WAC 365-196-315 for guidance.	Commerce made revisions to WAC 365-196-325(1)(c) to reflect new Buildable Lands Report timelines and for consistence with changes made to WAC 365-196-315.