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Memorandum

TO: The Honorable County Council
The Honorable Satpal Sidhu, County Executive

FROM: Cliff Strong, Senior Planner

THROUGH: Mark Personius, Director

DATE: April 15, 2021

SUBJECT: Off-Site Critical Area Buffer Mitigation Program Proposal

Goal

Whatcom County is exploring development of a program that would—under certain circumstances—facilitate mitigation for critical area (wetlands and Fish and Wildlife Habitat Conservation Areas (FWHCA)) buffer impacts to occur offsite, on properties where—when coordinated—such mitigation would provide greater ecological lift at a landscape scale over the small, fragmentary, on-site mitigation most commonly implemented.

An offsite buffer mitigation program would provide a clear path and ready-made venue for private property owners, developers, land use contractors, and public entities to offset wetland buffer impacts from development projects that would likely consist of the following options:

- Design and install buffer mitigation on a selected property (or properties) well suited for ecological enhancement or restoration in advance of an impact and then sell credits based on the cost (similar to a mitigation bank); or,
- Design a mitigation plan for the selected property (or properties), figure out the cost of implementing, collect mitigation fees to pay for it, and install the mitigation as monies come in (a.k.a., “in lieu fee” program); or,
- Design a mitigation plan for the property (or properties) and then allow developers to install mitigation on the property(ies) in a planned and coordinated fashion (a.k.a., “off the shelf” mitigation).

Current Practice

To "mitigate" means to make less harsh or hostile. Environmental mitigation is an action or activity intended to remedy, reduce, or offset known negative impacts to the environment.

Through our project permit review process, Whatcom County Planning and Development Services (PDS) applies the mitigation requirements of the Critical Areas Ordinance (CAO, WCC Chapter 16.16) and the Shoreline Master Program (WCC Title 23), using the mitigation sequencing of WCC 16.16.260. The

mitigation sequence consists of five measures, in preferential order, aimed at minimizing adverse impacts through project design, best management practices, and/or direct functional lift to maintain no loss of ecological function, values, and/or ecosystem-wide processes.

WCC 16.16.260 (General mitigation requirements)

1. When an alteration or impact to a critical area or buffer is proposed, the applicant shall conduct an alternatives/mitigation sequencing analysis and demonstrate that all reasonable efforts have been taken to mitigate adverse impacts in the following prioritized order:
 - a. *Avoiding the adverse impact* altogether by not taking a certain action or parts of an action, or moving the action.
 - b. *Minimizing adverse impacts by limiting the degree or magnitude of the action* and its implementation by using appropriate technology and engineering, or by taking affirmative steps to avoid or reduce adverse impacts.
 - c. *Rectifying the adverse impact* by repairing, rehabilitating, or restoring the affected environment.
 - d. *Reducing or eliminating the adverse impact over time* by preservation and maintenance operations during the life of the action.
 - e. *Compensating for the adverse impact* by replacing, enhancing, or providing similar substitute resources or environments and monitoring the adverse impact and the mitigation project and taking appropriate corrective measures.
2. Mitigation shall be provided for all unavoidable adverse alterations of a critical area or buffer. Mitigation for individual projects may include a sequenced combination of the above measures as needed to achieve the most effective protection, compensation for buffer functions and values, or mitigation for critical area functions and values.

For wetland buffer mitigation, additional rules apply regarding design and location of the mitigation. Buffers may be reduced (WCC 16.16.640 Wetland Buffer Reduction), averaged (WCC 16.16.650 Wetland Buffer Averaging), or, in certain circumstances, increased (WCC 16.16.660 Wetland Buffer Increases). Additionally, WCC 16.16.680 (Wetland Mitigation) subsection (f) requires that:

Compensatory mitigation shall be provided onsite or offsite in the location that will provide the greatest ecological benefit and have the greatest likelihood of success; provided, that mitigation occurs as close as possible to the impact area and within the same watershed as the permitted alteration. This provision may be waived upon demonstration through a watershed- or landscape-based analysis that mitigation within an alternative subbasin of the same basin would have the greatest ecological benefit and the greatest likelihood of success; provided, that limiting functions shall not be removed from sensitive watersheds identified in WCC Title 20. Mitigation shall occur within WRIA 1 or 3.

This section basically says that if one does offsite mitigation, it has to be as close as possible to the impact, so that the mitigation benefits the disturbed watershed. Note, however, that it does allow for offsite mitigation to occur within a different sub-basin if it can be shown to have “the greatest ecological benefit and the greatest likelihood of success.”

For Habitat Conservation Area buffer mitigation, similar rules apply: 16.16.740 Habitat conservation area buffers – Standards, subsection (D) allows reduction, subsection (E) allows averaging, and

subsection (F) allows for increases. Additionally, WCC 16.16.760 (Habitat conservation areas – Mitigation standards), subsection (B)(4) requires:

Mitigation shall be provided on site whenever feasible. Offsite mitigation in a location that will provide a greater ecological benefit to the species and/or habitats affected and have a greater likelihood of success may be accepted at the discretion of the technical administrator.

Mitigation shall occur as close to the impact site as possible. As mitigation is moved further away from the impacted habitat, the technical administrator may increase the amount of mitigation required. If offsite mitigation is proposed, the applicant must demonstrate through an alternatives/mitigation sequencing analysis (WCC 16.16.260) that the mitigation will have greater ecological benefit.

Current Outcome

Unincorporated Whatcom County contains many critical area constrained properties. The mitigation sequencing requirements of the CAO (required by state law) often result in protracted site plan and design review challenges during the permit review process—frustrating both property owners and staff. This is especially true:

- (1) when there's not enough room to put all required mitigation on-site;
- (2) where the mitigation area is so small or isolated it provides minimal ecological benefit; and/or,
- (3) where the mitigation area has a high likelihood of being re-disturbed after the 5-year monitoring has ended (e.g., someone's backyard).

In such cases, it would be better to concentrate such mitigation in areas where it could provide more significant ecosystem benefits and has a higher likelihood of persisting over time. Though the code currently allows offsite mitigation, it is infrequently used, as it is often deemed too expensive or too logistically challenging (or both) for most small builders and homeowners to do. PDS believes implementing a publically facilitated off-site buffer mitigation program would improve critical area permitting efficiencies, facilitate faster permit review timelines, and support greater countywide net ecological gain.

General Program Concept

At the request of the County Executive, Planning and Development Services is exploring development of an offsite critical area buffer mitigation program. Such a program would be designed to allow the County to facilitate ecosystem restoration and enhancement by obtaining (either by purchase or acceptance of) permanent conservation easements and/or obtaining and restoring fee title properties that contain wetlands, fish and wildlife habitat conservation areas, and/or streams with degraded buffers. An offsite mitigation program would provide a clear path and ready-made venue for private property owners, developers, land use contractors, and public entities to offset wetland buffer impacts from development that could consist of the following options:

- Design and install buffer mitigation on a selected property (or properties) well suited for ecological enhancement or restoration in advance of an impact and then sell credits based on the cost (similar to a mitigation bank); or,

- Design a mitigation plan for the selected property (or properties), figure out the cost of implementing, collect mitigation fees to pay for it, and install the mitigation as monies come in (a.k.a., “in lieu fee” program); or,
- Design a mitigation plan for the selected property and then allow developers to install mitigation on the property(ies) in a planned and coordinated fashion (a.k.a., “off the shelf” mitigation).

A “buffer only” mitigation program is a relatively new concept and we would need to explore implementing options through a feasibility study (see Proposed Action).

Please note that we are not proposing that the County develop a mitigation “bank” per se. A mitigation bank, as addressed in state law and our CAO, allows for offsite mitigation for impacts to both critical areas¹ and their buffers. Because mitigation banks can be used to offset impacts to the critical areas themselves (such as wetland fill to waters of the state or U.S.) there is a statute-prescribed process for developing one that requires coordination with and approval from the Department of Ecology, the U.S. Army Corps of Engineers, and other watershed managers (i.e., the Tribes). These mitigation banks typically take at least five years to establish and must go through a rigorous review and approval process. Furthermore, the Lummi Nation already has an operational bank (though temporarily closed until additional advanced mitigation is installed) and the City of Bellingham is developing one within its service area that includes the Ten Mile, Squalicum and Silver Creek sub-basins within unincorporated Whatcom County². Thus we are proposing to develop a mechanism that mitigates only for buffer impacts while restoring and enhancing environmental systems at landscape scale. According to the Department of Ecology such a mechanism would not be subject to the state and federal “mitigation bank” requirements for coordination and approval and would only need County Council approval.

Issues That Would Need to be Addressed

Please understand that this is just a conceptual proposal, and that there are many issues that would need to be evaluated as part of designing the program, as discussed below.

Potential Users

Because larger projects typically have enough room on their property to do onsite mitigation, we believe that the predominant users of such a program would be:

- Homeowners and small-scale builders building or expanding individual homes and accessory structures.
- Farmers not participating in CPAL
- Whatcom County Public Works has also expressed an interest, as they often need to mitigate for small impacts caused by road, bridge or stormwater projects, where there often isn’t enough room to do so onsite given the linear nature of such projects.

¹ Wetlands, streams, fish and wildlife habitat conservation areas, geologically hazardous areas, and critical aquifer recharge areas.

² The County has been in discussions with the City of Bellingham about potential partnering opportunities with their proposed bank but it would only apply to potential development impacts within their specific service area.

- Similarly, Puget Sound Energy, WSDOT, pipeline operators, school districts, diking districts, the Port of Bellingham, or other such entities might have such a need.

And there certainly may be other customer classes that would benefit from such a program. Who these folks are and what they're needs might be would need to be ascertained as part of the program's feasibility study. This could be accomplished by—among other things—analyzing past permit data and speaking with and gathering data from various interest groups.

Potential Demand

At this point, we only have anecdotal and experiential information about how much demand there might be for such a program. From processing permits we do know that there are many small, private projects approved wherein the applicant is required to mitigate for small amounts of buffer impacts but where there is little room to do so, it's small and isolated, or it's in a location that is not accessible for ensuring that it isn't disturbed after the required 5-year monitoring period. We also know there are critical area constrained lands within the Birch Bay UGA that present significant challenges to achieving full urban development buildout. Similarly, there are probably a substantial number of public projects, undertaken by Public Works, the various diking districts, the Port of Bellingham, WSDOT, etc. that have similar needs (i.e., small buffer mitigation requirements). However, we don't have empirical data to estimate the demand for such a system yet, and that would need to be developed. Knowing what the demand is, and where it's located would help us understand how much property would be needed, and where it should be located.

Ownership and Management

We would need to determine whether this would be a program owned and managed by the County, by a non-profit third party (such as the Whatcom Land Trust or Nooksack Salmon Enhancement Association (NSEA)), or by a for-profit third party (which is common for mitigation banks).

If owned and managed by the County, we would need to purchase the property, develop the property- specific mitigation plan for each property, purchase the equipment and materials, install the mitigation, and have staff dedicated to the project. If owned and managed by a third party, we would not. Furthermore, some of our local non-profit third parties may already have control over properties that could serve as the mitigation sites, which might reduce the final costs while furthering the interests of the third party by advancing their (which are also our) restoration goals.

If the advanced mitigation is achieved through enactment of a conservation easement, the County could be a co-benefactor of the easement in partnership with a local conservation organization, such as the Whatcom Land Trust, which could facilitate ongoing monitoring and enforcement, and the property itself could remain in private ownership. Enactment of a conservation easement under this effort could complement other existing County programs such as the Purchase of Development Rights Program, the River and Flood Program, and Lake Whatcom Management Program.

Anticipated Costs

At this time we do not have an estimate of the costs associated with implementing such a program. However, we anticipate expenditures could include:

- Property or easement purchase
- Developing property- specific mitigation plans for each property
- Equipment and materials to conduct mitigation actions

- Regulatory structure and amendments needed to implement the program
- Administration/Overhead/Staffing

Based on the answers to the questions posed above, a feasibility study should be able to estimate rough costs for these and provide estimates of what would need to be charged for the mitigation.

Proposed Action

PDS requests that Council approve a \$100,000 supplementary budget amendment through an additional service request (ASR) to hire a consultant to develop a feasibility study for creating an offsite buffer mitigation program, addressing the issues raised above. Developing a feasibility study should provide Council and staff the information needed to decide whether and how to move forward in creating such a program. We expect that this would take from 8-12 months to develop once a contract is initiated.

Depending on whether and how Council decides to proceed once the feasibility study is completed, we would expect to propose a future budget amendment for funds to create and implement the program.