



January 19, 2022

William Simpson, AICP
Senior Planner
Washington State Department of Commerce
Via Email - gmarulemaking@commerce.wa.gov

Subject: Comments on Preliminary Draft of 2022 Growth Management Washington Administrative Code Update

Dear Mr. Simpson,

Thank you for the opportunity to provide comment on the 2022 Growth Management WAC Update and thank you for the hard work that you and your agency have done do date on this project. We trust that the review process includes a review by state agencies with expertise in the relevant subject areas. The Washington Chapter of the American Planning Association (APA Washington) formed a subcommittee to follow the project and review the preliminary draft materials released November 19, 2021. We offer the following comments in support of clear, consistent, and effective agency rules.

Broadly, APA Washington recommends that the Department of Commerce review the subject WAC sections through the lens of two key appellate cases:

- [Swinomish Indian Tribal Community v. Western Washington GMHB, 161 Wn. 2d 415 2007, \(Swinomish\)](#), is a Washington Supreme Court Decision that requires benchmarks against which to compare critical area monitoring data.
- [Whidbey Environmental Action Network \(WEAN\) v. GMHB, 14 Wash. App. 2d 514 2020, \(WEAN\)](#), is a Court of Appeals Decision that affirms that counties and cities must take a precautionary or no-risk approach to critical areas protection.

APA Washington also has the following specific comments on the preliminary draft, which include examples of where the WAC can be revised to be consistent with *Swinomish* and *WEAN*; however, this is not an exhaustive list of all instances where the WAC should be updated. Other suggested clarification items are also included:

1. **WAC 365-196-210**: Add a new term and associated definition for wildfire prone areas. Commerce, in conjunction with other state agencies, should work on identifying and mapping these areas in each jurisdiction and develop guidance for significantly reducing risks in these areas.

Reason: Clarification

2. **WAC 365-196-310(4)(d)(i)**: Add after "... public services and open space" "and to prevent any net loss of critical areas functions and values".



Reason: Monitoring and adaptive management of critical areas is mandatory under the Washington Supreme Court’s rulings in *Swinomish* and is an expensive undertaking that should be properly budgeted and accounted for.

3. **WAC 365-196-310(4)(d)(i):** Change wording as follows: “Counties and cities should develop revenue funding projections for the twenty-year planning period to ensure consistency between the land use element and the capital facilities plan, and to demonstrate that probable funding does not fall short of the projected needs to maintain and operate public facilities, public services, and open space.

Reason: Clarification.

4. **WAC 365-196-315(5)(vii):** Change wording as follows: “Evaluation under RCW 36.70A.215(3)(e) should, based on the actual density, along with current trends and other relevant factors of development as determined under RCW 36.70A.215(3)(b), review commercial, industrial, and housing needs by type and density range, to determine the amount of land needed for commercial, industrial, and housing for the remaining portion of the twenty-year planning period used in the most recently adopted comprehensive plan.

Reason: Clarification. The existing language speaks only to density, but basing evaluation only on existing density implies that the only option for meeting land needs is to expand current land area without considering that more development may already be underway from recent zoning changes or other factors.

5. **WAC 365-196-430(I)(iii)(D)** (page 21): Add “this action cannot be used to either designate a new Local Area of More Intensive Rural Development (LAMIRD) or to expand the boundaries of an existing LAMIRDs”.

Reason: Clarification.

6. **WAC 365-196-485:** Expand the “Source of Change” with “and the rulings in *Swinomish* and in (e) change the “recommendation” to a “must”.

Reason: Case law; required by *Swinomish*.

7. **WAC 365-196-600:** Change “should” to “must”.

Reason: Clarification.

8. **WAC 365-196-610:** Expand the “Source of Change” with “and the rulings of *Swinomish*, and in (2)(b)(ii)(B) change the “recommendation” to a “must”.

Reason: Case law; required by *Swinomish*.

9. **WAC 365-196-630(2):** Remove the reference to PlanView, so that the subsection reads: “Notice to the department may be in digital format through a web-based portal provided by the department.

Reason: Clarification. Specific technologies and programs may change in the future.



10. **WAC 365-196-660:** Expand the “Source of Change” with “and the rulings of *Swinomish* and in 2(b) change the “recommendation” to a “must”.

Reason: Case law; required by *Swinomish*.

11. **Overview of WAC 365-195:** The changes actually water down clear, incisive decisions from the Washington Supreme Court in *Swinomish* and the Court of Appeals in *WEAN*. We recommend revising to be consistent with these two appellate decisions.

Reason: Case law; *Swinomish* and *WEAN*.

12. **WAC 365-195-900:** This section currently states that comprehensive plans and development regulations need to be updated “every five years”.

Reason: Legislation. The WAC should be updated to clarify that updates should occur every eight years to be consistent with RCW 36.70A.130(5). (This may change to a ten-year update cycle, depending on the outcome of the 2022 legislative session.)

13. **WAC 365-195-905(3):** Expand “Source of Change” with “and the rulings of *Swinomish*” and change “should” to “shall”.

Reason: Case law; required by *Swinomish*.

14. **WAC 365-195-915:** Change “should” to “shall”.

Reason: Case law; to comply with *Swinomish* and *WEAN*.

15. **WAC 365-195-920:** Expand the “Source of Change” consistent with the rulings in *Swinomish* and *WEAN* and change “should” and “recommendation” to mandatory language. Also, in (v) change “making recommendations” to “taking corrective action”.

Reason: Case law; required by *Swinomish* and *WEAN*.

16. **WAC 365-190-040(b):** Change “guidance” to “direction”.

Reason: Case law; to comply with appellate rulings in *Swinomish* and *WEAN*.

17. **WAC 365-190-090(4):** Current language reads, “Counties and cities may use the National Wetlands Inventory and a landscape-scale watershed characterization as information sources for determining the approximate distribution and extent of wetlands” and “Any potential locations of wetlands based on the National Wetlands Inventory or landscape-scale watershed characterization should be confirmed by field visits”. Suggest amending this section to be consistent with the guidance in WAC 365-190-080(4) (“[...] because maps may be too inexact for regulatory purposes, counties and cities should rely primarily on performance standards to protect critical areas. Counties and cities should apply performance standards to protect critical areas when a land use permit decision is made.”).



Reason: Case law. NWI maps may severely understate the presence of wetlands. If no site-specific study is triggered, this could lead to development within wetlands and be inconsistent with the precautionary approach required by *WEAN*.

18. **WAC 365-195:** Suggest including the following language within this section: “Any departure from the Critical Areas Ordinance WAC’s direction and recommendations shall be explained in a report that accompanies the CAO Update or Amendment”.

Lastly, APA Washington urges Commerce to incorporate updates to the WAC prompted by new legislation that may be passed in the 2022 legislative session.

Thank you again for this opportunity to provide input to this important piece of work. If you have any questions about our comments please contact Robin Proebsting at rcp3a@virginia.edu.

Best regards,

A handwritten signature in blue ink that reads 'Yorik Stevens-Wajda'.

Yorik Stevens-Wajda, AICP
President, Washington Chapter of the American Planning Association