



# The Voluntary Stewardship Program and Clean Water

The purpose of this document is to clarify the relationship between the Voluntary Stewardship Program (VSP) and the state's clean water programs, as well as highlight the potential opportunities for the two programs to be consistent and reinforce shared goals.

## The Voluntary Stewardship Program

The VSP was passed in 2011 as an amendment to the Growth Management Act (GMA). Its goals are to protect and enhance critical areas, maintain and improve the long-term viability of agriculture, and reduce the conversion of farmland to other uses. To accomplish these goals, the VSP relies primarily on incentives and voluntary stewardship practices. Counties that opt into the VSP are responsible for designating a local watershed group to develop a watershed plan that describes how critical areas on agricultural lands will be protected and enhanced.

**Statutory Language**—The VSP amended the Growth Management Act (GMA). It does not supersede or modify any state clean water law or regulation. The statute expressly states that it is not to be construed to:

(5) Limit the authority of a state agency, local government, or landowner to carry out its obligations under any other federal, state, or local law.

The VSP sets broad goals and requirements that the watershed group must follow. However, it intentionally provides a great deal of flexibility to the local watershed groups in developing their work plans. One question that has arisen, as people have thought more about the VSP and the watershed work plans, is how the VSP will intersect with the clean water laws and programs administered by the Washington State Department of Ecology (Ecology).

As a starting point, improved compliance with state and federal clean water law was a critical part of the Ruckelshaus agreement that led to the creation of the VSP. While this “regulatory backstop”—which was to take the form of better enforcement of clean water law *separate* from the VSP—was not included in the VSP statutory language, it was seen as a critical element by those involved with the Ruckelshaus process. The expectation that state and federal clean water laws will serve as a regulatory backstop is documented in correspondence to legislative leadership, the implementation budget for the law, and other sources.

Given these dynamics, it is important to understand the contents of the VSP statute, and how implementation of the VSP does and does not affect state and federal clean water laws.

# VSP and Clean Water Programs

Given the ecological relationship between critical areas and water quality, it is logical to assume that VSP and clean water programs have mutually reinforcing actions and outcomes. While this is largely true, they are not the same laws and may not necessarily achieve similar environmental outcomes. Compliance with state and federal clean water laws does not guarantee that landowners will also accomplish the relevant VSP protection and enhancement goals for their watershed. Likewise, landowners who implement actions in accordance with a county’s VSP may have to take additional actions to comply with state and federal clean water laws. Implementation and/or compliance with one does not mean compliance with the other.

## *Different purposes*

The purpose of the federal and state clean water laws is to prevent and control water pollution and protect water quality. The federal Clean Water Act (CWA) requires all states to restore their waters to be “fishable and swimmable.” The state Water Pollution Control Act’s policy statement sets the goal of maintaining “the highest possible standards to insure the purity of all waters of the state.”

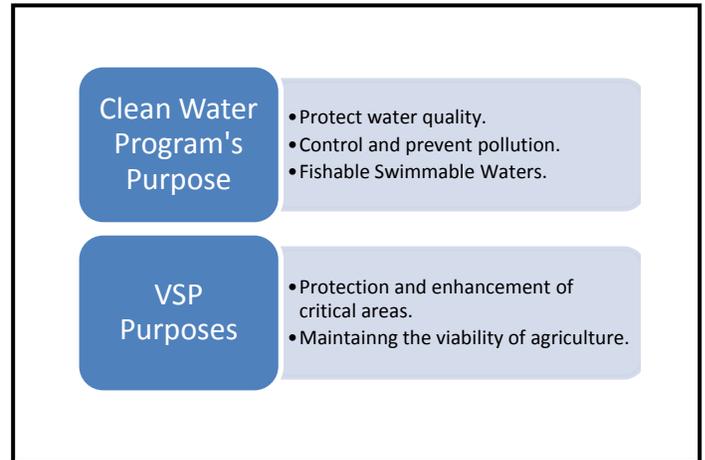
Water quality standards are a key tool for providing protection to state waters. The standards implement portions of the CWA by specifying the designated and potential uses of water bodies. They set water quality criteria to protect those uses. The standards also contain policies to protect high quality waters (antidegradation) and in many cases specify how criteria are to be implemented.

The VSP’s purpose is to protect and enhance critical areas while maintaining the viability of agriculture and reducing the conversion of farmland to other uses in the watershed. Critical areas targeted by the VSP include critical aquifer recharge areas (CARAs), wetlands, frequently flooded areas, geologically hazardous areas, and fish and wildlife habitat conservation areas.

Critical areas perform key functions that enhance our environment and protect us from hazards. The beneficial functions and values provided by critical areas include maintenance of water quality, fish and wildlife habitat, food chain support, flood storage, conveyance and attenuation (the slow release) of flood waters, groundwater recharge and discharge, erosion control, wave attenuation, protection from natural hazards, historical, archaeological and aesthetic value protection, and recreation.

## *Different standards*

Ecology is responsible for controlling and preventing the pollution of surface and underground waters of the state. State water pollution law prohibits the discharge of any polluting matter into the surface or groundwater of the state, and requires “the use of all known available and reasonable methods ... to prevent and control the pollution of the waters of the state of Washington.” Additionally, the water quality standards establish the basis for a water quality based approach to regulating waters that fail to



meet water quality standards despite the use of effluent limitations and other pollution control requirements.

Section 303(d) of the CWA establishes a process to identify and clean up polluted waters. Every two years, all states are required to perform a water quality assessment of the quality of surface waters in the state, including all the rivers, lakes, and marine waters.

The assessed waters are grouped into categories that describe the status of the water quality. The 303(d) list comprises those waters that are in the polluted water category, for which beneficial uses—such as drinking, recreation, aquatic habitat, and industrial use—are impaired by pollution.

The CWA requires that a water cleanup plan be developed for each of the water bodies on the 303(d) list. The technical name for a water cleanup plan is a Total Maximum Daily Load, or TMDL. A TMDL identifies how much pollution needs to be reduced or eliminated to achieve clean water. Further, the Washington State Water Pollution Control Act provides additional protection to state waters, as well as a basis for ensuring the implementation of nonpoint dominated TMDLs by prohibiting the discharge of nonpoint source pollution.

Under the CWA, a water body stays on the list until a TMDL has been developed for it, its pollution problem is addressed through some other pollution control process, or it meets water quality standards.

In comparison, the VSP sets the goal of protecting and enhancing critical areas. To “protect” critical areas generally means to preserve their functions and values. According to Washington State Department of Commerce guidance<sup>1</sup>, the required standard of protection should be to prevent adverse impacts or to mitigate adverse impacts. At a minimum, VSP work plans should be written to ensure there is no net loss of the structure, functions, and value of the critical areas being protected. VSP work plans can go beyond the minimum standard of “protection” and include measures to enhance these critical areas.

In pursuing its goals, the VSP relies on voluntary actions and financial incentives to promote agricultural and environmental stewardship. Participation by landowners is voluntary. Even after electing to participate, a landowner may withdraw from the program and is not required to implement any voluntary measures after the expiration of an applicable contract.

#### *Difference in enforcement*

The VSP relies on voluntary actions and financial incentives to promote protection and enhancement of critical areas. If a landowner knowingly or unknowingly degrades a critical area, the VSP does not require that local governments have an enforceable mechanism to stop harm from being done (although local governments may take actions to enforce other existing development regulations to address impacts to a wetland, CARA, floodplain, or fish and wildlife habitat conservation area). The VSP only provides options to address impacts voluntarily and by using incentives.

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<sup>1</sup> See the Department of Commerce’s *Critical Areas Assistance Handbook: Protecting Critical Areas Within the Framework of the Washington Growth Management Act* (<http://www.commerce.wa.gov/DesktopModules/CTEDPublications/CTEDPublicationsView.aspx?tabID=0&alias=CTED&language=en&ItemID=976&Mid=944&wversion=Staging>).

In comparison, the CWA and state Water Pollution Control Act provide enforcement authority to control and prevent discharges of pollutants from both point and nonpoint sources. If a landowner is discharging or creating a substantial potential to discharge, Ecology can use technical assistance, financial incentives, and enforcement to gain compliance. Wetlands are also protected under the CWA and the state Water Pollution Control Act. Both of these laws require that impacts to wetlands and their functions and values (beneficial uses) must be avoided and any unavoidable impacts must be mitigated through the restoration or creation of new wetland areas.

*TMDLs and watershed plans: similarities/differences*

TMDLs focus on meeting water quality standards. For impaired water bodies, Ecology must establish a TMDL that quantifies pollutant sources, establishes a margin of safety, and allocates allowable loads to the contributing point and nonpoint source discharges so that water quality standards are attained.

Some of the key elements of a TMDL include:

- *An assessment of the water quality problems.* This assessment includes a technical study identifying the pollutants causing the water quality problem and the sources of those pollutants, and a technical analysis to determine how much pollution must be reduced to protect the water.
- *Public involvement.* Public involvement, along with coordination with tribal governments and consideration of environmental justice issues (as appropriate).
- *An implementation plan.* Details how pollution will be prevented, reduced, and/or cleaned up to meet the water quality standards.
- *A follow-up monitoring plan.* Evaluates the success of pollution controls contained in the implementation plan or the need for additional actions.

<b>TMDLs and VSP Watershed Plans</b>	
Key Similarities	Key differences
<ul style="list-style-type: none"> <li>• Watershed based plans</li> <li>• Technical assistance &amp; financial incentives</li> <li>• Monitoring requirements</li> <li>• Public participation</li> <li>• Adaptive management</li> <li>• An implementation schedule and measurable milestones</li> </ul>	<ul style="list-style-type: none"> <li>• Water quality v. critical areas</li> <li>• Compliance requirements v. voluntary participation</li> <li>• All land uses v. agricultural lands</li> <li>• Water pollution reduction requirements v. no net loss requirement</li> </ul>

Ecology uses many tools, including but not limited to permit requirements, technical assistance, financial incentives, educational programs, and nonpoint enforcement authority to bring impaired waters into compliance with the water quality standards.

In comparison, VSP work plans target critical areas. The work plan must include goals and benchmarks for the protection and enhancement of critical areas. Watershed groups seek input from farmers, tribes, local environmental groups, agencies and other involved parties, and develop goals for participation of agricultural operators, as well as provide technical assistance to farmers. Conservation districts or other qualified technical assistance organizations provide technical assistance to agricultural landowners and operators in developing individual stewardship plans. Voluntary

incentives for landowners are emphasized for all program phases. There is no requirement that the work plan include enforceable regulatory standards.

*Can VSP watershed plans draw from TMDLs?*

Yes. TMDLs are considered best available science and can inform VSP watershed plans. TMDLs describe the type, amount, and sources of water pollution in a particular water body, and then analyze how much of the pollution needs to be reduced or eliminated to meet water quality standards.

Considering the nexus that critical areas have with water quality, TMDL implementation plans are a valuable resource to use when developing protection strategies for fish and wildlife habitat conservation areas. Specifically, TMDL implementation plans' strategies to control nonpoint pollution could be utilized by watershed groups to inform how they can protect and enhance critical areas.

*Wetland protection*

The VSP work plans must protect critical areas to the extent they would be protected under a critical areas ordinance. Under critical areas ordinances, damages and losses of wetlands and their functions must be avoided and any unavoidable adverse impacts must be mitigated.

In agricultural areas, there are two conditions of wetlands. They may be in active agricultural production or they may exist in their natural state. Many productive farms contain farmed wetlands that have been partially drained for crop production. While these areas may meet the criteria for wetlands, these wetlands and their functions have been significantly altered. For wetlands in agricultural production, impacts are minimized through the use of best management practices, such as the use of buffers and timing of farming activities outside of the wettest portion of the year. Farmlands also include well-functioning natural wetlands such as old river oxbows, scrub shrub wetlands, and forested wetland areas. Any adverse impacts to existing natural wetlands, such as conversion to farming activities or drainage of existing natural wetlands through expanded drainage systems, must be mitigated.

In addition to protections afforded under critical areas ordinances, wetlands are protected under the CWA and the state Water Pollution Control Act. Both of these laws require that impacts to wetlands and their functions and values (beneficial uses) must be avoided and any unavoidable impacts must be mitigated through the restoration or creation of new wetland areas. Ecology issues 401 water quality certifications under the CWA and administrative orders under the state Water Pollution Control Act for projects affecting wetlands. VSP only provides for reducing local permitting for wetlands on agricultural lands. It does not change state or federal law. For new wetland impacts, permits are required under the CWA and Water Pollution Control Act.

Proposals to convert wetlands to agricultural use must still secure state, and in many cases federal approvals to impact wetlands. Ecology implements the state Water Pollution Control Act for protecting wetlands and addressing enforcement of unauthorized impacts to wetlands.

## **Implementing the VSP regulatory backstop**

Under the VSP, there is no requirement that critical areas be protected through regulations in counties that opted-in unless the county is re-routed into the regular GMA critical areas process.

The VSP does not require counties to dedicate resources to encourage voluntary protection of existing critical areas until the VSP work plan is completed and approved by the executive director of the state Conservation Commission.

While the VSP does not include regulatory protection requirements, those involved in crafting the program decided to rely on enhanced enforcement of state and federal clean water laws to create a clear and immediate “regulatory backstop.” Improved compliance with state and federal law is needed because the VSP does not require county governments to have a local regulatory backstop that could ensure that needed protection of critical areas is provided in cases where a land owner rejects voluntary and incentive approaches. For wetlands, Ecology will continue to regulate conversions of wetlands in agricultural areas under the state Water Pollution Control Act to ensure that wetlands and their functions are protected and maintained. Additionally, continued and improved implementation of TMDLs and increased use of Ecology’s nonpoint enforcement authority under state law can provide protection to fish and wildlife habitat and CARAs.

#### *Enhanced enforcement*

Ecology currently dedicates staff in each region to compliance activities. Ecology staff engage in a variety of efforts including inspections, complaint response, technical assistance, and enforcement.

Ecology envisions implementing the regulatory backstop through additional enforcement and inspector staff. Their leads use water quality implementation plans—such as TMDL detailed implementation plans—along with ongoing complaint response to guide their compliance efforts. If a watershed does not have a completed TMDL, Ecology staff can use or develop a clean water compliance work plan to guide their efforts.

#### *Coordination*

While improved compliance with state and federal clean water laws is seen as a critical part of the Ruckelshaus agreement that led to the creation of the VSP, enhanced enforcement may create uncomfortable situations. The support of watershed groups is an important factor in the overall success of the program. Coordination between Ecology compliance staff, the watershed group (and the entity or entities designated to provide technical assistance) should be included in the VSP work plan.

#### *Resources*

Ecology currently does not have the resources available to adequately provide a regulatory backstop through enhanced enforcement. It is essential that proper levels of funding are provided to Ecology to be able to staff the compliance positions needed for on-the-ground compliance activities. The VSP draft budget calls for “6 FTE enforcement, phased in over 6 years.” Ecology supports those staffing levels as being the minimum necessary statewide to provide the regulatory backstop.

#### *Limits of the regulatory backstop*

Even if the clean water backstop is adequately funded, there are limits to having clean water laws serve as a regulatory backstop to a critical areas protection law. While there is a nexus between critical areas and clean water, enhanced enforcement of clean water laws does not guarantee that VSP requirements—no net loss of critical areas function and values—will be met, because the two types of laws have different goals and standards. For example, there may be a water resources or habitat function and value that a critical area provides that cannot be adequately protected through enforcement of clean water laws. Likewise, compliance with VSP requirements also does not

guarantee that the requirements of clean water laws will be met. The regulatory backstop does not enforce critical areas ordinances or the VSP work plan. Instead, the “regulatory backstop” relies on the imperfect nexus between clean water laws and critical areas.

Further, while the VSP includes the provision that the watershed group can request enhanced enforcement to facilitate progress toward watershed plan goals, the regulatory backstop should be considered as a stop-gap protection strategy that provides time for program implementation. If the incentive and voluntary approaches of the VSP are not resulting in landowner participation and critical areas protection goals being met, the law requires that modifications be made to the watershed plans.

Again, the keys to a successful implementation of the VSP regulatory backstop include:

- *Resources*—Ecology needs additional resources to implement the regulatory backstop. The VSP Draft budget calls for “6 FTE enforcement, phased in over 6 years.”
- *Compliance Staff*—If sufficient funding is provided, Ecology will dedicate compliance staff to implement the VSP regulatory backstop.
- *Coordination*—Support of Ecology’s enhanced enforcement activities from VSP watershed groups and technical assistance providers (CDs) is important if the regulatory backstop is to be successful.

## **Ecology’s enforcement philosophy**

Enforcement is not an end, but a means to achieve compliance and environmental protection. Most people and businesses subject to Washington’s environmental laws comply voluntarily. When they do not, it is usually because they do not understand what is required, and education and technical assistance remedy the problem. Unfortunately, there is a small percentage of people and businesses that require a more direct response to achieve compliance. In these cases, a spectrum of enforcement tools, ranging from relatively informal to significant, are available to be used by Ecology.

When enforcement actions are required, Ecology carefully matches the significance of the violation to the type of enforcement actions taken. Some compliance tools fall between cooperation-based and deterrent-based enforcement, such as compliance inspections. Ecology’s goal is to ensure that all enforcement actions are based in fact and law, well documented, appropriate to the violation, and issued in a professional, equitable, and effective manner.

### *Ecology’s current nonpoint compliance efforts*

Ecology uses its nonpoint enforcement authority judiciously. Following Ecology’s enforcement philosophy, Ecology staff provide technical assistance and financial incentives to correct nonpoint source pollution problems. Additionally, staff may refer landowners to the local conservation district. If nonpoint source pollution issues are not addressed, escalating enforcement may be used to gain compliance.

While there are some regional differences based on staff availability and regional priorities, Ecology continues to strive for clarity and consistency in its enforcement and technical assistance work. Recently, Ecology adopted inspection protocols to be used during livestock-related inspections and site visits. The inspection form and focus sheet outline what types of site conditions indicate past and continuing pollution, and/or future potential to pollute, as well as some best management practices that can help control and prevent pollution from happening.

## Summary

Even though they have different purposes and standards, both clean water laws and the VSP should provide protection to the riparian corridor. This provides an opportunity for the two programs to take advantage of each other to achieve shared goals and intended outcomes. An effective VSP program could complement the protection and pollution reduction goals of federal and state clean water laws by helping to implement the best management practices needed to meet the water quality standards and clean water laws.

## For more information

More information on Ecology's nonpoint pollution efforts can be accessed through Ecology's Web site. The address is:

[www.ecy.wa.gov/programs/wq/nonpoint/index.html](http://www.ecy.wa.gov/programs/wq/nonpoint/index.html).

More information on TMDLs can be accessed through Ecology's Web site. The address is:

[www.ecy.wa.gov/programs/wq/links/wq\\_assessments.html](http://www.ecy.wa.gov/programs/wq/links/wq_assessments.html).

More information on the VSP can be accessed through the Washington State Conservation Commission's Web site. The address is:

[www.scc.wa.gov/voluntary-stewardship/](http://www.scc.wa.gov/voluntary-stewardship/).

*For special accommodations or documents in alternate format, call the Water Quality Program at 360-407-6600, 711 (relay service), or 877-833-6341 (TTY).*