CRITICAL AREA COMMISSION
HB 233 IMPLEMENTATION GUIDE

HB 233 adds climate and equity considerations to state and local Critical Area programs. It also changes certain definitions, site development standards, and procedures to make administration of the law more adaptable and efficient.

All provisions of HB 233 became law on October 1, 2024 and the administrative changes are now fully in effect across the Critical Area. In addition, the Commission has begun considering climate and equity in its decision-making as of this date. Programmatic implementation of climate and equity provisions at the local level will follow as the Commission writes regulations to guide incorporation of these matters into local programs.

This document is intended as a guide for the public and local program managers. It is not legal advice and does not cover every potential scenario. Parties are urged to consult applicable law and regulations, and contact the Commission when clarification is needed.

Here's what's new:

SITE DESIGN

More options for permeable decking | Nat. Res. (NR) §8-1802(a)(20)
In the past, a deck attached to a house that included gaps allowing water to pass freely did not count toward a site's lot coverage. Now, any attached deck considered as permeable under the local jurisdiction's Critical Area program will not count as lot coverage.

When interpreting this provision, check to ensure the receiving area for stormwater under and around the decking achieves complete and lasting infiltration. Decks are still generally prohibited in buffers, regardless of design.

Additional lot coverage on small lots | NR §8-1808.3(f)(6)
At the option of a local jurisdiction, lots under one acre may construct or maintain an additional 500 square feet of lot coverage beyond baseline limits if using pervious materials that have been approved as part of a local Critical Area program.

This provision is intended to provide administrative relief in lieu of a variance process to accommodate reasonable site modifications on small parcels. It does not provide a new and larger 'floor' for further lot coverage sought under a variance. A jurisdiction interested in applying this provision must first submit a program amendment containing the proposed list of pervious materials to the Commission for approval.

DENSITY

Removed the term 'permanent' from the definition of a dwelling unit | NR §8-1802(a)(11)
A local jurisdiction no longer must determine whether the provisions for independent living are 'permanent' when identifying whether a structure counts as a dwelling unit.

Changes to facilitate accessory dwelling units in the RCA | NR §8-1808.1(e)(2)(i)
The Commission recognizes the role that accessory dwelling units (ADUs) can play in the state's housing supply. In the Critical Area, ADUs are referred to as "additional dwelling units" and are exempt from the RCA density calculation, but only if they meet certain standards.

The following changes facilitate the use of ADUs in the RCA while preserving the goals of the Critical Area program, in jurisdictions that allow them:

1. Primary dwelling units are now afforded an additional 900 square feet of lot coverage if an ADU is located in the primary structure.

2. An ADU may be served by its own separate sewage disposal system.

3. An ADU must not be larger than 900 square feet and must be able to meet all other Critical Area requirements without securing a variance to Critical Area development standards.

Private wetlands in the RCA may only generate density for a TDR program | NR §8-1808.1(e)(1)
The acreage of private wetlands on an RCA parcel may no longer be used to increase the effective density of a subdivision on the buildable portion of the parcel beyond 1 unit per 20 acres. However, a jurisdiction could incorporate provisions to allow for private wetlands to generate rights for transfer, if the wetlands are field delineated when the transferable development rights (TDRs) are certified. A TDR program must meet overall Critical Area goals and purposes.

An intra-family lot may be sold outside of the family if attached to the retirement of a development right from a TDR program | NR §8-1802(f)(1)
In a jurisdiction that permits bona fide intra-family transfers, such a lot may now be legally transferred outside of the immediate family if the action includes the retirement of a TDR. The development right used during the transfer must have been created under the jurisdiction's Critical Area program and retired in the land records of the sending parcel and the deed of conveyance of the intra-family lot.

LOCAL PROGRAM UPDATES, REFINEMENTS, AND AMENDMENTS

Four additional years to update local Critical Area programs | NR §8-1809(g)-(i)
Local jurisdictions had been required to complete a Critical Area Program update every six years. HB 233 changes this interval to every 10 years. A local jurisdiction may extend this period further by one year. The move to 10 years is intended to reduce the administrative load and provide an opportunity to align with the local Comprehensive Plan cycle.

Starting in 2028, a local jurisdiction will not be able to propose piecemeal amendments such as growth allocation or changes to zoning text for a program that is overdue. If a program remains out of date for five years, the CAC may update the local program. The Commission shall make a good faith effort to notify a jurisdiction of approaching deadlines.

Local jurisdictions may request extensions to the processing deadline for program changes | NR §8-1809(q)-(r)
The Commission is generally required to act on amendments within 130 days and refinements at the first meeting following the Chair's determination. A local jurisdiction may now request that the Commission delay action, providing time as needed to collaborate on modifications to the proposal for Commission approval without withdrawing the application and restarting the process. A local jurisdiction should contact the Chair or its Commission staff liaison to request an extension.

More timely updates to Critical Area maps
Once the initial round of mapping is complete, subsequent updates to the Critical Area boundary will be presented to local jurisdictions for approval about every eight years. Local jurisdictions will have one year from the date of receipt to adopt the updated map.

ADMINISTRATIVE PROCEDURES

Preliminary and final plats and site plans should be shared with Commission staff | NR §8-1802(a)(27)
The definition of "project approval" now includes both preliminary and final stages of review. The goal is to catch potential issues early, when any necessary changes are simpler and less costly.

Restrictions to issue approvals for violations have been clarified | NR §8-1808(d)(4)(20)
A local jurisdiction may not issue any permit, approval, variance or special exception for the violation, until all enforcement actions have been satisfied, including payment of fines.

CLIMATE AND EQUITY IN THE CRITICAL AREA

Growth allocation must be sited outside of areas vulnerable to climate change or incorporate approved measures that reduce vulnerability | NR §8-1808.1(c)(2)(vi)
HB 233 recognizes local context when determining how to site new development in a manner that is compatible with projected climate impacts. The law directs the Commission to help county and municipal programs identify vulnerable areas within their jurisdiction and describe locally effective measures that new or intensifying development can employ to avoid, minimize, and mitigate impacts. A jurisdiction is not required to take these steps, but growth allocation can only be located in vulnerable areas if such measures are included in a local program.

This effort will be most effective when undertaken as part of the jurisdiction's comprehensive program update. This will take some time to complete and is dependent upon future Commission rulemaking. In the interim, a site-specific vulnerability assessment and vulnerability reduction strategy may accompany the growth allocation application. In the next few months, the Commission will issue specific guidance to inform the review of growth allocation for climate vulnerability in cases where a local jurisdiction has not yet updated its local program.

The Commission must consider environmental impacts on underserved or overburdened communities when evaluating a request for growth allocation | NR §8-1808.1(c)(4)(viii)
The new law identifies underserved and overburdened communities using the definitions in §1-701 of the Environment Article. The Commission will issue guidance to help local jurisdictions and the Commission determine when an environmental impact is expected, how to quantify it, and whether there are measures that can be taken to avoid, minimize, or mitigate potential harm.

An impact under this provision does not necessarily disqualify a growth allocation request. The Commission will weigh the impact and any reasonable effort by the applicant to reduce it, along with the full list of growth allocation factors in the law.