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UNWRITTEN RULES AND UNFINISHED BUSINESS—THE LEGISLATURE NEEDS TO REVISIT THE GMA AND BEST AVAILABLE SCIENCE

The Growth Management Act, as written and interpreted considering "best available science" and the protection of critical areas, needs to be reexamined and clarified by the Legislature. The clarification is required because of the wide range of questions left unresolved by legislation, the mixed signals contained in the "minimum guidelines for critical areas,"[1] and "best available science" regulations[2] adopted by the Department of Community, Trade and Economic Development (CTED). Clarification is also required because of the questionable applicability and legality of big buffer programs, native growth protection area set asides, and restoration mandates included in the technical assistance offered in "Critical Areas Assistance Handbook: Protecting Critical Areas Within the Framework of the Washington Growth Management Act,"[3] (particularly in Appendix A: Example Code Provisions, for designating and protecting critical areas) ("Assistance Handbook").

The questions also arise from interpretations of the GMA and comments by state agencies, that "best available science" requires a "big buffer program" to protect critical areas under the GMA,[4] and the acceptance of such agency comments as "expert" opinion of science by the growth boards. This acceptance has led to a defacto unwritten rule that where local governments "depart" from the advice of the state agencies on the issue of buffers, and protection of critical areas the local governments are "departing from" best available science and that, without adequate

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[1] WAC 365-190-080 *et seq.*.

[2] WAC 365-195-900 *et. seq.*

[3] CTED, Nov. 2003.

[4] RCW 36.70A.170, .172(1), .060(2).

explanation of the "departure," the community is not in compliance with the state's Growth Management Act.[5]

As a result of the vague statute and conflicting advice, local governments are being required by the Legislature to update their local critical area ordinances to address major policy issues without adequate guidance as to what is required, and with guidance that, in many circumstances, will most certainly lead to significant municipal liability. The topics are controversial and a misstep in either direction can have devastating consequences, on the economy, the public acceptance of environmental programs, and the public purse as litigation will most certainly ensue.

At the very least, legislative oversight and clarification is required to put a reasonable degree of certainty into the requirements of the GMA in designating and protecting critical areas, and in implementing such a program in concert with the other goals of the GMA. Protection of critical areas is not a trump card to be achieved at the expense of the other goals of the GMA, but neither is it to be ignored. The problem at the moment is that there is not sufficient clarity in either the legislation or the regulations to clearly identify what the balance is intended to be. Fundamental to any proper legislative scheme is that those charged with complying with a law or regulation ought not have to guess at the legislative meaning, and that reviewing boards and courts have adequate guidelines by which to judge the performance. Sadly, such guidelines are wholly missing from the laws about protection of critical areas and guessing—at their peril—is all local governments are left with until the legislative guidance is provided.

The immediate issues under the GMA as written and interpreted through CTED's minimum guidelines, recommendations of state agencies, and growth board and court decisions to date are several. A legislative response to the following would be a good first step.

1. To what aim is the protection of critical areas under the Growth Management Act?

    a. To protect the *existing* functions and values of critical areas abutting both developed and natural areas; or

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[5] *See Friends of Skagit County v. Skagit County*, WWGMHB No. 96-2-0025, Compliance Hearing Order, August 9, 2000 (ag noncompliance cases); *Everett Shorelines Coalition v. City of Everett*, CPSGMHB No. 02-3-0009c; and most recently the Western Board decision reversed in *Whidbey Environmental Action Network v. Island County*, 122 Wn. App. 156 (2004) (*WEAN II*).

b. To protect existing natural areas abutting critical areas from development and *require* restoration of the existing built environment to some undefined prior state?

2.. Does the duty to protect critical areas under GMA arise:

a. At the point when land uses are changing and a new permit is sought for development; or

b. To any conduct or activity that causes harm to the local ecosystem?

3. What is the local responsibility to define and protect habitat?

a. For threatened and endangered species and identified species of local importance; or

b. For all species, threatened or common?

4. What is the local responsibility to define and protect habitat?

a. In all critical areas; or

b. In critical areas protected for their ecological values, and not those pertaining to public safety; and

c. Which critical areas fall within which category?

5. What is the local responsibility to define and protect habitat?

a. In critical area referred to as "fish and wildlife habitat";

b. In the built environment that may be used as habitat; and

c. By what measure is compliance defined?

6. Do the regulations stating that in the absence of best available science local governments must adopt a most protective approach until the scientific justification for action is known, run contrary to the Supreme Court decision in *Isla Verde v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002), that local governments have the burden of proof to demonstrate that regulations adopted requiring the set aside of land and precluding development of such land for the protection of wildlife must

be based upon an assessment that the requirement is reasonably necessary in that location?

Answers to these questions are needed because the protection of habitat functions has become the driving force in critical area regulation debate. The terms at issue are undefined and poorly understood. State agencies have become advocates for the use of big buffers, native growth protection areas on a community-wide basis, standard replacement ratios regardless of the functions to be replaced, and a maximum deference to habitat in the absence of local knowledge, as well as a host of other draconian "one size fits all" solutions, promoted as mandates in compliance with best available science. The state agencies advocate this position, both in written documents and workshop comments, but with little guidance to local communities as to the proper use and limitations on big buffer programs, or recognition that in fact the advocacy of BAS has shifted from an analysis of the consequence of possible actions to one of science driving both the policy and the end result.

The "unwritten rules" reference is the defacto rule making by state agencies claiming best available science (BAS) requires big buffers as the starting point for critical area protection, and the deference to agency technical assistance concerning BAS by the growth boards.

The "unfinished business" reference is the needed legislative clarification of the intended scope of the duty to protect critical areas, and particularly habitats. In the meantime, local governments updating their critical area programs are left in the untenable position of having to guess at legislative intent at their community's peril.

Presently, if local governments choose to apply an approach other than the "big buffer" approach advocated by the agencies, they risk appeal by local environmental coalitions. Such appeals risk growth board findings of noncompliance and potential invalidity due to failure to follow or properly explain "departure from" agency opinion of best available science. If such a finding results in a moratorium on local development,[6] which has a devastating impact on local activities and economies,[7] the pressure is to go with the agencies to avoid conflict.

But, following agency advice does not avoid conflicts. If local governments adopt the "big buffer" recommendations of the Assistance Handbook's Example Code Provisions, and the guidance of state agencies, they risk a finding of invalidity of

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[6] RCW 36.70A.302(1)(a)(b).

[7] *Diehl, Skagit County*, and *Everett* decisions noted previously.

another sort—invalidity by reason of unlawfully restricting the use and development of property without adequate justification, in violation of statutory and due process requirements of the constitution and statutorily imposed burdens of proof under decisions of the State and United States Supreme Courts concerning nexus, proportionality, and burden of proof.[8]

Ironically, it is the local governments and local taxpayers, not the state or state agencies which bear the ultimate liability and risk of damages for action leading to unlawful overregulation through excessive and unjustified requirements, or from the moratorium arising from a decision that the local program fails to properly protect the functions and values of critical areas, including "BAS."[9]

Science cannot answer the policy questions posed. The Legislature has made local governments resource managers within the context of the Growth Management Act, but without the management guidelines necessary to establish management priorities. Best available science is not a substitute for adequate management guidelines. Best available science can only predict consequences and results, on a limited scale. Without articulation of the values to be protected and the basis for balancing the values present, the rest is just a guessing game with significant consequences.

The Legislature must act so that local governments do not have to guess at the standards to which they will be judged and held accountable. The system as it presently exists is broken and needs to be fixed. Until such action is taken, local communities are being besieged with demands for large excessive buffers which, at the very least, create a very expensive habitat tax and unnecessary burden and constraint on the economy and overall goals of the GMA.

A. Protection or Restoration and Enhancement—Goals and Mandates Are Uncertain?

The first question is directed at the scope of the protection required under the critical areas mandate to "protect the functions and values of critical areas." As required by RCW 36.70A.060(2), 172(a).

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[8] *Isla Verde; Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907, cert. denied, 111 S. Ct. 284 (1990); and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994); and RCW 82.02.020. *See infra* at p. 40, Section F.

[9] In this regard, the situation is the polar opposite of the *Orion* series of cases in which the state, acting through the county with adopted rules, created a liability for overregulation that ultimately the state was the responsible party for defense and not the county.

1. To what aim is the protection of critical areas under the Growth Management Act?

   a. To protect the *existing* functions and values of critical areas abutting both developed and natural areas; or

   b. To protect existing natural areas abutting critical areas from development and *require* restoration of the existing built environment to some undefined prior state.

The questions arise because the Legislature first worded the duty of local governments to "preclude development" in critical areas. RCW 36.70A.060(2) (1990 1st ex.s. c 17 § 6). The language to "preclude development" is still found in the minimum guidelines adopted in 1991 by CTED. WAC 365-190-020. In 1991, however, the Legislature amended the legislation to state that the local duty was to "protect" critical areas, the current language of RCW 36.70A.060(2), (1991 sp.s. c 32 § 21); but the language of the rules has not been changed to reflect the difference. Either the minimum guidelines are long overdue for clarification and amendment, or the agency concluded that the change in language had no substantive meaning.

The legislative change to "protect" critical areas, rather than "preclude development" in critical areas, must have had some meaning,[10] but in the absence of any new or revised rule, local governments are left to guess the import of the change. Whichever the intent, clarification is in order.

A significant concern is the philosophical difference between "protection" and "restoration" of critical areas. A local government can protect a critical area by assuring that the existing functions and values of a local critical area are maintained. The functions and values of a given critical area are the product of the built and natural environment as they may exist in a given local and rarely reflect the functions and values present in a more natural or rural state. A fully developed river, lake, or marine shoreline will have given functions in the local ecosystem, depending upon its location, and the extent of development and activity on and near the given parcel and in the community.

The minimum guidelines regulations adopted by CTED state quite clearly that it was not the intent of the legislation to affect current land use through designation.

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[10] When the Legislature changes the terms of a statute and uses different language, a change of meaning is presumed. The problem here is that the nature and meaning of the change is poorly understood.

> Classifying, inventorying, and designating lands or areas *does not imply a change in a landowner's right to use his or her land under current law.* Land uses are regulated on a parcel basis and innovative land use management techniques should be applied when counties and cities adopt regulations to conserve and protect designated natural resource lands and critical areas. The department of community development will provide technical assistance to counties and cities on a wide array of regulatory options and alternative land use management techniques.

WAC 365-190-040, process.

Unfortunately, the technical assistance provided by the CTED makes no pretext in maintaining the status quo. It views the mandate of the GMA to be substantially more than "protecting" the functions and values of the existing situation. Limitations on current uses, prohibition of new uses, and restoration of some past natural condition of critical areas and buffer areas are the norm in the guidance.[11] The technical assistance and Example Code Provisions make no effort to even address best available science in conjunction with the built environment or management of developed and actively used shorelines, though such information is readily available. Instead, the technical guidance promotes a "restoration" model for the enhancement of critical areas with significant and detrimental consequences to existing development and future uses of shoreline and urban/rural environments.

The heart of the technical guidance is set forth in the Assistance Handbook's Example Code Provisions, which contain recommendations that critical areas, and particularly wetlands and streams, be governed by "big buffers" as a first line of defense, and that existing development within the buffers be tightly constrained and regulated—commonly as nonconforming uses with the result the (1) such uses may not be expanded or only nominally so, or (2) where damaged, destroyed, or proposed to be modified by any given degree the use and/or structure must be removed and rebuilt in compliance with the new buffer requirements.

The philosophy can be found in the section on wetlands that sets for "wetland buffers" ranging from 35 feet for low intensity uses on Category IV wetlands, to 300 feet for high intensity uses near Category I wetlands. As Category II and III wetlands are most predominant, particularly in or near developed areas, the 100-200 foot

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[11] *See e.g.* "Willamette Riverbank Design Notebook: Portland, Oregon" by Fishman Environmental Services, LLC, et al., adopted by Portland Development Commission, City of Portland, May 2001.

buffers suggested will have the most import. Significantly the recommended code provision states:

> *(F)(1) Standard Buffer Widths. The standard buffer width presume the existence of a* ***relatively intact native vegetation community*** *in the buffer zone adequate to protect the wetland functions and values at the time of the proposed activity. If the vegetation is inadequate, then the buffer width shall be increased or the buffer should be planted to maintain the standard width.*

Assistance Handbook Example Code Provisions at p. A-41.

Buffer widths are to be increased or a buffer planting plan is to be required if the buffer area has minimum vegetative cover:

> *Existing buffer vegetation is considered "inadequate" and will need to be enhanced through additional native plantings when (1) non native or invasive plant species provide the dominant cover (vegetation is lacking due to disturbance and wetland resources could be adversely affected or (3) enhancement plantings in the buffer could significantly improve buffer functions.*

Assistance Handbook Example Code Provisions at X.20.040(F)(3)(c), p. A-42-43.

Interestingly enough, and to thoroughly confuse the picture, the example code states that wetland buffers shall be measured from the wetland boundary as surveyed in the field but:

> *Only fully vegetated buffers will be considered. Lawns Walkways, driveways, and other mowed or paved areas will not be considered buffers.*

Assistance Handbook Example Code Provisions, (F)(2) at p. A-42.

The confusion is further promoted by the acknowledgment in the Example Code Provisions that the recommended buffer widths are derived from studies concerning fully developed natural area buffers on a state-wide basis not properly applicable to development urban areas.[12] A similar caution is found in "Management

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[12] Standard buffer widths have been developed by the state Department of Ecology as statewide standards for Category I, II, III, and IV wetlands. These buffer widths are

Recommendations for Washington's Priority Habitats—Riparian," by Knutson and Naef, Dec. 1997, that the models were based upon "natural conditions." The latter report is also suspect in that Appendix C, referring to "minimum buffer widths," more accurately reflects study widths and does not accurately reflect the content of the studies cited.[13]

The language in provision (F)(2) suggests that the built environment is not to be incorporated within local buffers, which is consistent with agency science that is based on evaluating fully developed natural buffers. Unfortunately, the concepts are contradicted by the following statement that where buffers are not fully vegetated (a common situation in local developed areas), enhancement and plantings are required, as noted above, "to significantly improve buffer functions."[14]

Local governments in practice are ignoring any effort to eliminate the built environment from buffers and effectively departing from any pretext of "protection" and instead adopting the "restoration" philosophy in the Example Code to instead enhance and significantly improve critical areas. Here the agency technical assistance goes well beyond the language of the GMA and significantly expands the stated legislative intent to promote a more restrictive philosophy and give priority to the policies of the resource agencies consulted over other GMA guidelines.

The limited number of buffer uses allowed under the Assistance Handbook's Example Code Provisions also reflects a "restoration," not "protection," model. Where in practice, the local government applies the buffer across elements of the built environment (including roads, structures, and existing farmed areas) limiting permitted uses to "conservation and restoration activities," "passive recreation," and "stormwater management facilities,"[15] all other existing facilities and activities are

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> based on the best available science to protect all wetlands in environmental settings that occur throughout the state of Washington. These standard wetland buffer widths may not be appropriate, either scientifically or in a practical sense, in areas where land use settings and buffer functions may be different than those found in rural areas or forestlands. Local governments should consider their specific natural resources and environmental setting in order to tailor these standard buffer widths to best protect and enhance wetlands in their jurisdiction.

Assistance Handbook Example Code Provisions, marginal note on p. A-41.

[13] *See* Dr. James Buell's "Best Scientific and Commercially Available Information, Getting Back to the Garden," pp. 7-9, prepared for presentation at Law Seminars International "Agricultural Lands in Transition" conference 3/11/02, copies of which are available through LSI.

[14] Assistance Handbook Example Code Provisions at (F)(3)(c), p. A-42-43.

[15] Assistance Handbook Example Code Provisions, p. A-42-43.

prohibited in the buffer. Any existing facilities, structures, and uses within the buffer not on the permitted use list are "nonconforming," and fall within the general rules that nonconforming uses may continue to exist, but are subject to further regulation to ameliorate the consequences of the nonconformity, *Rhod-A-Zalea v. Snohomish County*, 136 Wn.2d 1, 959 P.2d 1024 (1998), and are ultimately to be abated or removed. *Ibid.*

This restoration and enhancement philosophy from the Assistance Handbook and Example Code Provisions, evidenced by big buffers, limited uses, and severe restrictions on nonconforming uses, is built into the Assistance Handbook's Example Code sections on "riparian corridors" and "aquatic management recommendations"—as well as the wetlands sections—with the effect of creating a significant number of nonconforming structures and uses within the shorelines of the state, and on or near most ponds, wetlands, and streams of any size.

The "minimum guidelines" of Chapter 365-190 WAC and the "best available science" promoted by the state agencies and interpreted through the Critical Areas Assistance Handbook seem to reflect the agency view that the requirements of the GMA are really meant to "preclude" development in or near critical areas and to promote the restoration of the critical areas, at the expense of existing development. The unstated but evident aim of the guidance is to move the clock back to a time and era when the purported buffers were undisturbed and environmental conditions much better than they are today. While such an endeavor may be a noble goal in the abstract, the language supporting such a result is nowhere to be found in the GMA and a significant extension of the legislative intent ascertainable at the time of the 1991 change.

The impact of the "big buffer" approach, non conforming uses abatement, critical area restoration, and enhancement model is affecting a habitat tax on the entire economy and infrastructure of a local community; a habitat tax that must be paid in the form of setbacks, buffers, and restoration costs well out of proportion to any new development or change of use. Such a habitat tax that falls directly afoul of the legislative mandate of RCW 82.02.020 to assess no tax on the use and development of property except in specifically described terms.

Need for Legislative Review

The legislative clarification required is the reestablishment of the principle of "protection" evidenced in the 1991 amendments, and a rejection of the habitat tax imposed if most if not all properties near critical areas are required to set aside for wildlife protection or rendered nonconforming or significantly limited by the imposition of "big buffer programs." The original legislation for the GMA was

designed to protect the existing functions and values of critical areas, in context with the coordinated development of GMA plans and objectives articulated in RCW 36.70A.020. The Superior Court in *Skagit County v. WWGMHB* rejected the restoration model argued by the agencies and environmental groups.[16] Unfortunately, the decision was not appealed and no appellate clarification given in conjunction with agriculture—the point at issue in the case. In *Whidbey Environmental Action Network v. Island County*, 122 Wn. App. 156 (2004) (*WEAN II*) the Court of Appeals has stated as much, but with the unfortunate language that local governments must "depart from" best available science to achieve the objectives of the GMA. Such language suggests that the restoration model of the CTED code guidance has become *defacto* if not *de jure,* an unwritten rule, accepting agency interpretation of a mandate for specific action from the agency interpretation of best available science. Legislative clarification and correction is required.

B. The Timing of Regulation to Protect Critical Areas.

A second question for which local governments have little guidance is when to apply the requirements of critical area protection and include consideration of best available science. As noted above:

2. Does the duty to protect critical areas under the GMA arise:

    a. At the point when land uses are changing and a new permit is sought for development; or

    b. To any conduct or activity that causes harm to the local ecosystem?

The question is important because the regulations and court cases are at odds with the recommendations in the Critical Area Assistance Handbook, which, as noted above is becoming a "defacto" rule.

GMA legislation makes no specification as to when the duty to protect critical areas arises. Local governments are simply told to designate and protect critical areas and to include best available science when doing so. RCW 36.70A.170, .172(1), and .060(2).

The minimum guidelines state:

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[16] 12/31/02 letter opinion of Judge Christine A. Pomeroy, *Skagit County, et al. v. WWGMHB*, Thurston County Cause No. 01-2-01720-6.

> *Precluding incompatible uses and development does not mean a prohibition of all uses or development. Rather, it means* ***governing changes in land uses, new activities, or development that could adversely affect critical areas.*** *Thus for each critical area, counties and cities planning under the act should define classification schemes and prepare development regulations that govern changes in land uses and new activities by prohibiting clearly inappropriate actions and restricting, allowing, or conditioning other activities as appropriate.*

WAC 365-190-020.

The emphasized language of the WAC suggests that it is a "change in land use," "new activities, or development" adversely affecting critical areas that are the jurisdictional prerequisites for action and trigger the activation of rules prohibiting clearly inappropriate actions and restricting, allowing, or conditioning other activities as appropriate. The omission of any reference to existing and on-going activity or existing development must have some meaning and the clear import of the rule is that only new or changed activities are required to be addressed.

The quoted language also suggests that local governments may adopt a hierarchy of uses—"prohibiting clearly inappropriate actions and restricting, allowing, or conditioning other activities as appropriate." Notice the shift in language from "changes in uses" and "new activities" to "activities," but the language is clearly suggesting that a wide range of alternatives are available and that a simple-minded prohibition of activity or use simply due to proximity to a critical area was not intended.

The regulatory guidance to local governments is not at all clear, however, due to the shift from "new development" to "activity," and the Critical Areas Assistance Handbook does more to confuse than clarify the issue. The guidance states categorically:

> *. . . critical area regulations should always apply whenever necessary to protect the critical area from development activity.*

Critical Area Assistance Handbook at p. 34.

But, what development activity? The Western Growth Board clearly believe any existing and on-going activity, such as agriculture, must not be allowed to continue near critical areas if impacts to nearby critical areas are detectible. *Friends*

of Skagit v. Skagit County, supra.[17] But, a marina, boat launch, port, or airport facilities will necessarily have the same or greater impact on the functions and values of existing critical areas in the neighborhood and surrounding community. Does the fact of existing impact on habitat, long-standing from facilities built years ago, also require regulation by local government and rules requiring the modification of existing behavior to restore historical critical area functionality?[18] The guidance does not say.

Illustrating its intent, the CTED Assistance Handbook Example Code Provision states:

> *The purpose of this title is to designate and classify ecologically sensitive and hazardous areas and to protect these areas and their functions and values, while also allowing for the reasonable use of private property*

Assistance Handbook Example Code Provision at p. A-2.

The provisions are applicable to:

> *X.10.120 All lands, all land uses and development activity, and all structures and facilities in the [city/ county] whether or not a permit or authorization is required, and shall apply to every person. . . . or other entity that owns, leases or administers land within the [city/county]. No person shall alter a critical area or buffer except as consistent with the purposes and requirements of this title.*

Assistance Handbook Example Code Provisions at p. A-8.

What one reads into the sections, as written, is that the agencies believe that local governments must take steps—to the very limit of constitutional "reasonable

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[17] The growth board characterized allowing existing and ongoing activity of agriculture within a proposed buffer as "an exemption" and required regulation that was tantamount to prohibition.

[18] A lawn mower or street traffic makes noise. Does restoration mean eliminating or reducing lawn mowers or street traffic in developed areas near wetlands and within newly established buffers? The potential consequences of such a requirement, were it to exist, would bring commerce in the Puget Sound region to a standstill.

use" exceptions to draconian legislation—to promote the conservation, restoration and ultimate enhancement of the regions critical areas.

The current "unwritten rule" derived from the language of the technical assistance and the Skagit County case on existing agriculture, is that local governments must address existing activity that could adversely affect critical areas—even if the activity has been in place for years. But existing activity includes all of the direct and indirect consequences of existing development, with no guidance whatsoever as to the limits or extent of authority.

The Superior Court decision in *Skagit County v. WWGMHB , supra,* suggests that there is no duty to restore historic functions and values. But the suggested technical assistance and Example Codes clearly state a regulatory bias for restoration and enhancement. The technical assistance and minimum guidelines from CTED suggests that all properties on or near critical areas be regulated to the extent of the constitutional threshold to protect and enhance critical areas, allowing only a constitutionally limited "reasonable use" of property within the recommended buffers, and to prohibit all other as in conflict with the GMA goal to promote habitat as a priority function and value of critical areas.

Need for Legislative Review New legislative guidance is required to prevent the language of the guidance and code examples and supportive board decision from imposing a significant habitat tax on our local communities by making critical areas and habitat the GMA trump card that must restrict both new development and existing activities, to the limit of constitutional reasonable use requirements—for that is the clear import of the technical assistance provisions, the recommendations of the agencies, and the language of the few growth board cases on point.

C. The Scope of Protected Species and Habitats.

The third question goes to the purpose of the critical area protection intended by the Legislature in stating protection of "functions and values" as the defining concept of the GMA and in requiring protection of but not defining "fish and wildlife habitat conservation areas," or providing any boundaries on the notion or concept of "habitat" as it is to be used in local ordinances.

3. What is the local responsibility to define and protect habitat, both as a function of wetlands and within fish and wildlife habitat conservation areas:

    a. For threatened and endangered species and identified species of local importance; or

b. For all species, threatened and endangered or common?

The scope of protection to be given by local governments is a direct product of that which the Legislature directed to be protected. Unfortunately, the Legislature did not provide any guidance to some very vague concepts, and as a result a wide variety of opinions exist, and again local governments can only guess at the proper outcome.

The Legislature defined two of the critical areas, by statute (1) wetlands and (2) geologic hazard areas, the former as a place defined by hydrology, soils, and vegetation, and the latter as a place of potential public safety. The Legislature did not define frequently flooded areas, aquifer protection for potable water, or fish and wildlife habitat protection areas in Chapter 36.70A RCW.

The agency "minimum guidelines" provide additional definitions for "areas with a critical recharging effect on aquifers used for potable water" and "frequently flooded areas" (WAC 365-190-030(2) and (7), but provide no definition of "fish and wildlife habitat conservation areas."

Thus, the question of scope of require protection must be addressed first, by identifying the scope of the intended protection.

It is one thing to bring the full weight of the police power of the state to protect the spawning bed of the last run of dying salmon. It is quite another to having that same power used for the protection of common local small mammals, birds and reptiles with habitat throughout the community.

If the purpose of the critical area protection is to protect threatened and endangered species, and species of local importance, then the local codes may be structured to address the physical needs of the critical area (particularly wetlands, streams, lakes, ponds, and marine shorelines), including hydrology, structure, and safety, independent of the specific needs of all general or common species. The rules may then make special provision for threatened and endangered species and species of local importance by protecting that habitat in the community with which such species have a primary association. In this way, the habitat protection requirements are designed to protect existing functions and values of habitat essential to the protected species, but allows development in other areas without the specific habitat concerns. Thus, the significant regulations and limitations necessary to protect threatened and endangered species and identified species of local importance are imposed, but only where that "primary association" habitat exists and not speculatively throughout the community wherever such use might be reestablished. If, however, the purpose of the critical area rules is to protect all species' habitat, then the guidance as to how that must be achieved and how it is to be integrated into an overall GMA program is much less well defined, and much more complex.

The question arises, because all of the buffer recommendations in the Assistance Handbook Example Code Provisions come from wildlife surveys that address the needs of *all* species, not just needs of threatened and endangered species and species of local importance, but including common species. A list of reference materials existing or currently under development in response to the GMA best available science requirements show the focus on the habitat values for all species and the development of regulations to protect habitat for common species.

- "Management Recommendations for Washington's Priority Habitats—Riparian," by Knutson and Naef, Dec. 1997, and particularly Appendix C.

- "Guidance on Wetland Mitigation in Washington State, Part 1: Laws, Rules, Policies, and Guidance Related to Wetland Mitigation," publication #04-06-013A, April 2004 Draft, by WDOE, US Army Corps of Engineers and U.S. EPA.

- "Washington State Wetland Rating System for Western Washington," publication #04-06-025, by Thomas Hruby, August 2004.

- "Wetlands in Washington State, Vol. 2: Guidance for Protecting and Managing Wetlands," publication 04-06-024, by Thomas Hruby, Andy McMillan, Douglas Peters, Jane Rubey, Dyanne Sheldon, Stephen Stanley, and Erik Stockdale, August 2004 Draft, by WDOE and WDFW.

- "Critical Areas Assistance Handbook: Protecting Critical Areas Within the Framework of the Washington Growth Management Act," by CTED, November 2003.

Built into the buffer recommendations of the Assistance Handbook's Example Code Provisions, are buffers widths set to achieve the all encompassing purpose of protecting habitat values for all species, and even requiring connecting corridors for the benefits of all species. The "big buffer" approach recommended by the models and the agency workshops is clearly designed and based upon the assumption that the local duty is to protect habitat values for all species.

The problem is that the legislation and court cases do not clearly require such protection.[19] The consequences of such an all encompassing approach, particularly in the urban areas, would be devastating to the existing social and economic structure of

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[19] *HEAL v. CPSGMHB*, 96 Wn. App. 522, 979 P.2d. 864 (1999) speaks to the need to achieve balance with the other goals of the GMA. *Id* at 531-532.

our communities. Before such draconian rules are placed on localities (effectively regulating property near critical areas to only that development constitutionally necessary to prevent a taking), the Legislature must step in and provide a necessary degree of clarification. To describe the current situation as unclear is to state the proposition mildly—more clearly it is a mess.

The confusion arises from the lack of definition in the legislation. By protecting "functions and values" of critical areas, without defining functions and values, or the purpose for which critical areas are protected, the best available science shifts to the academic community the legislative function of defining management goals and priorities. Without necessary guidance local governments and property owners are left to guess at the legislative intent, and state agencies are free to push agency preferences or biases under the guise that best available science means local governments must protect everything that can be protected.[20]

On the issue of habitat, the rules suggest that limited coverage is required, because the specific admonition is to prevent the creation of isolated subpopulations. WAC 365-190-080(5). *See* detailed discussion of minimum guidelines on habitat below. The agency technical assistance is much broader in scope. Thus, a question for the Legislature is one of burden and scope:

> Is the local government free to act if no testimony is brought forward demonstrating that a particular population is at risk of impermissible isolation—thus acting within the litany of threatened and endangered species and species of local importance with the species of local importance being that which is at risk of being isolated?

Or,

> Is the burden on local government to presume that any physical change to the landscape in the community adversely affects habitat and that local governments must either adopt the big buffer and enhancement programs and require mitigation for all

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[20] *See McMillan* "The Science of Wetland Buffers and Its Implications for the Management of Wetlands, The Evergreen State College, Andy McMillan, 2000—a college thesis that has been elevated to the level of a defacto regulation by reference in support of the "code examples," p. A-41 footnote 14, and the assumption that the conclusions are per BAS and therefore dictate a specific result.

> habitat whether or not an affected species is at risk or not, or to prove the negative?

If all habitat is to be protected, even for common species, what is the purpose of identifying specific considerations for threatened and endangered species and species of local importance? Growth board cases have made it clear that the former must be covered and a process in place for the latter (species of local importance). The minimum guidelines further provide that in regulating critical areas local governments may take a variety of regulatory and nonregulatory approaches, prohibiting only those uses "clearly inappropriate."

> Precluding incompatible uses and development does not mean a prohibition of all uses or development. Rather, it means governing changes in land uses, new activities, or development that could adversely affect critical areas. Thus for each critical area, counties and cities planning under the act should define classification schemes and prepare development regulations that govern changes in land uses and new activities by prohibiting clearly inappropriate actions and restricting, allowing, or conditioning other activities as appropriate.

WAC 365-190-020.

Further, the rules discuss threatened and endangered species and species at risk of "isolation."

> Fish and wildlife habitat conservation means land management for maintaining species in suitable habitats within their natural geographic distribution so that isolated subpopulations are not created. This does not mean maintaining all individuals of all species at all times. . ..

WAC 365-190-080(5).

The quoted language suggests that the more limited coverage is required, and the local government need take no steps to protect the common species unless the local species of local importance process identifies specific local populations that are at risk of isolation identified for local protection. If such limited interpretation is not enforced, all activity in the built environment as well as any intrusion into undeveloped areas has some habitat impact on some common species. The entire community becomes "habitat" for some species and mitigation for any habitat loss for that species would be the norm.

The problem is that the guidance given in the agency models and assistance documents address the habitat potentials and needs of all species, and provides little if any legal rationale for the areas chosen to be regulated, other than "habitat" protection for all species is important.

The adoption of "riparian corridors" (a term not used in the GMA and undefined in the minimum guidelines), notions of connecting corridors, the requirement of enhancement and habitat mitigation in the absence of any demonstrated need by species at risk, all create a significant expansion of critical area protections well beyond the balancing of goals of RCW 36.70A.020 intended by the Legislature. Such an expansion of authority is prohibited.[21]

The expansive interpretation creates the potential for significant interference with the economy, and in the ability of communities to live and work and meet the combined goals of the GMA within the framework of RCW 36.70A.020.

And if, the legislative intent is to protect all species, including mice and rabbits; snakes, frogs, and salamanders; birds and plants, and all "habitat" is "critical," where does the listing end? WDFW still poisons noxious species, public and private weed control is still exercised in lakes and rivers and uplands, and steps are taken to eliminate predator fish in favor of favored species. All such steps necessarily "affect habitat" and are "detrimental" to certain species. Where is the rule identifying which species are to be protected and which may be safely eradicated? Best available science does not answer such policy questions.

In the absence of effective legislation, one can only guess.

The mandate for "native" species protection and use and the elimination of "nonnative" species also raises many questions. Most rhododendron and azaleas in the northwest are not "native." Without vigorous maintenance, many disturbed buffer areas would become blackberry and hardhack choked, weed infested strips abutting our critical areas—in itself a logical consequence of the "big buffer push," particularly in areas of degraded buffers. Such weed strips are not a "natural habitat" by any stretch of the imagination, and in many cases result in a decline in function and value from that existing or readily achievable in the developed world by structural and engineered means.

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[21] *HEAL, supra,* "We note the Legislature grants agencies authority, and takes a dim view of agencies granting themselves additional authority. *Id* at 536.

Need for Legislative Review

The Legislature must address the issue of scope of coverage. Minimum guidelines must be adopted with a proper public process and be clearly written and consistent. Such rules must eliminate any question of whether local governments are to protect threatened and endangered species and species of local importance, or whether common species are also entitled to the same protection. Proper rules must eliminate the guess work and whether the local governments have the duty to inventory all habitats within a locality and determine which populations may be isolated—and by what standard is the isolation to be measured before regulatory action is required. Or, will local governments be free to address local GMA goals and policies protecting threatened and endangered species and species of local importance, and isolated populations where identified and protected through the species of local importance process? Local governments should not have to guess at their peril.

D. How Far Does "Habitat" Extend?

The next question, related to the question of types of species protected, is the scope of habitat protection in critical areas.

4. What is the local responsibility to define and protect habitat:

    a. In all critical areas;

    b. In critical areas protected for their ecological values and not those pertaining to public safety; and

    c. Which critical areas fall within which category?

Here again, the lack of legislative definition and concise rules provide fertile fields within which to guess as to the applicability of the critical area requirements. Here, comments by agencies responding to questions about the critical area process have also helped to create confusion that only a legislative change can cure.

At the outset, the minimum guidelines recognize that some critical areas are protected for their environmental values and some for physical safety.

> There are qualitative differences between and among natural resource lands and critical areas. Not all areas and ecosystems are critical for the same reasons. Some are critical because of the hazard they present to public health and safety, some because of the values they represent to the public welfare.

WAC 365-190(2) Purpose.

Unfortunately the minimum guidelines also injected the notion of "ecosystem" into the equation as a consideration for all critical areas.

Critical areas include the following areas and ecosystems:

WAC 365-190-030(4).

The confusion becomes complete when the CTED Director of Critical Areas Programs inquires of King County about the County critical area program, including a question concerning the adequacy of the County's consideration of the habitat values of the geologic hazard protection.[22]

If local governments can be concerned only with physical safety in connection with steep slopes and flood plains, the scope of regulatory approach and control is at one level. If, however, as suggested by the minimum guidelines, all critical areas require examination of the space in context of some undefined "ecosystem," then protection of habitat and restoration of habitat potential within the area is an additional consideration. Under the latter circumstance, management of the physical safety critical areas take on a very different range of concerns.

A good case in point are "channel migration zones." Channel migration zones are areas where river channels have existed in the past, and may exist in the future. There is, however no accepted best available science on the appropriate time frame to be used for regulatory purposes—(really a management question, rather than one of "science"). In geologic time, the historic zones are likely from toe of the valley floor on either side of a river valley. In future geologic time, such zones may include intrusion into existing large banks that are subject to potential future erosion. Further, the question exists as to the extent local governments may take protective steps to avoid channel migration. Again, the question is one of policy and legislative intent, not science.

If channel migration zones are issues of public safety, then local governments may consider the likelihood and risk of migration, over both the short and long term, and the use of shoreline protective structures, as well as regulatory tools to protect public safety. Literally thousands of public roads, culverts, and river valley homes and businesses are covered in this consideration, as they may exist in or near local flood plains. Considered as such, channel migration zones fall within the overall

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[22] Chris Parson letter of 6/1/04 to Dow Constantine at King County Council.

consideration of flood hazard areas and raise concerns similar to tsunamis, lahars, earthquakes, and other future unpredictable events.

If, on the other hand, a channel migration zone could be perceived as a "future habitat," to be protected as part of a dynamic "ecosystem"; then local governments must identify a reasonable time frame in which to consider the potential for migration, and require mitigation for any development activity that could be affected by future migration, or impede future migration. Clearly, in such a program local governments are not protecting existing functions and values, but future habitat values. Yet, the arguments have been made that the habitat values of future channel migration are required. Local governments will certainly be appealed to test the issue if they do not take steps to designate and protect channel migration zones as part of protected "ecosystem."

A similar result is faced in connection with flood hazard areas. The current expectation is that flood hazard area regulations are intended to mirror federal flood plain regulations and some state agencies have stated as much.[23] Yet the case can also been made a flood plain is part of the larger "ecosystem." If flood plains are also part of this undefined "ecosystem," and since growth board cases clearly call for the evaluation of critical area impacts within an appropriate "ecosystem," an entire flood plain system must be regulated under local government critical area rules to protect existing and future habitat potential and avoid habitat consequences of development within the flood plain. A marked extension from the notion that the flood hazard rules need only conform to federal flood hazard guidelines. An interpretation permissible only because the legislation is so ambiguous, and the minimum guidelines introduce undefined terms not used in the legislation.

The term "ecosystem" is not used in the GMA, but injected into the debate by the minimum guidelines and correspondence suggesting an agency interpretation favoring an ecosystem (habitat) approach to all critical areas. In such circumstances, local governments are left to guess—at their peril—as to the scope of required regulation. Without adequate legislative direction as to the intended object of protection, local governments are without any basis to resolve the most fundamental questions of police power legislation.

A. Does the legislation and implementing regulation clearly identify the activity to be regulated in a manner that allows objective, rather than subjective

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[23] WDOE representative stated as much at Snohomish Count workshop on critical areas August 2003.

analysis, of the issues, *Anderson v. Issaquah*, 70 Wn. App. 64, 851 P.2d 744 (1993); and

B. Does the legislative mandate to local governments and resulting local regulations clearly demonstrate that the buffers, set asides, and other exactions to achieve the public purpose fall within the permissible scope of regulation, particularly where the consequence of local implementing regulations is to prevent or seriously limit development activity and use of property. *See e.g. Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907, cert. denied, 111 S. Ct. 284 (1990).

Thus, even though wetland buffers as small as 50 feet can provide 50% of the water quality protection necessary to protect the water quality of a wetland, and a properly designed stormwater system can achieve the remaining 50% and even better,[24] no provision in made in the Assistance Handbook for taking such an approach to wetland protection. (The argument is that habitat based on the needs of common species still requires the buffer so water quality is not the determinant factor.)[25]

Other jurisdictions have detailed elaborate programs that can be used at the water/public interface to recognize and accommodate public uses and activities involving waterfront use, while at the same time protecting and significantly enhancing the local habitat functions and values.[26] Sadly, none of the technical assistance efforts by the agencies have even begun to address such accommodative approaches. The fact that local guidelines begin with the admonition to "avoid" contact with critical areas where feasible harks back to the "preclude development" language of the 1990 statute referenced above. Such a program is not a program designed to integrate the GMA, and shoreline priorities in communities with a mandate to accommodate and serve a growing population. The agency approach is, unfortunately, a prescriptive prohibition designed to give "habitats" and ecosystems" the priority placement in the regulatory program, contrary to the language of *HEAL, supra.*.

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[24] An additional 200 feet of well established natural buffer is required to achieve 80% coverage.

[25] *See* Figures 1-4 attached.

[26] *See e.g.* "Willamette Riverbank Design Notebook: Portland, Oregon" by Fishman Environmental Services, LLC, et al., adopted by Portland Development Commission, City of Portland, May 2001)

Here again, the apparent divergence between the Legislature and the agencies is seen most clearly in the agency response to the legislative actions in 2002 to clarify that "shorelines of the state were not, *per se*, critical areas.

The Legislature spoke quite clearly in ESHB 1933 in the 2003 legislative session:

> (5) Shorelines of the state shall not be considered critical areas under this chapter except to the extent that specific areas located within shorelines of the state qualify for critical area designation based on the definition of critical areas provided by RCW 36.70A.030(5) and have been designated as such by a local government pursuant to RCW 36.70A.060(2)

RCW 36.70A.480(5).

The minimum guidelines have not caught up with the legislative change, since the guidelines still classify as fish and wildlife habitat "all waters of the state," WAC 365-190-080(5), which include Type I waters, which are defined as all waters regulated as shorelines of the state under Chapter 90.58 RCW. WAC 222-16-031. Thus, at the outset, the minimum guideline defining fish and wildlife habitat areas is now, on now on its face, contradictory with the amended legislation.

Even more confusing, given the express legislative intent to segregate shoreline areas into areas in which critical area protection is required, and areas outside the purview of critical area protection *per se*, is the position taken by the Department of Ecology on the meaning of the change. When asked by a county as to how to distinguish between shorelines to be regulated as critical areas until the new shoreline updates took place, the agency said:

> Good scientific information is the designated driver for these decisions whether in the SMP or the CAO. While it is certainly their right and obligation to look objectively at the available information, it seems to be highly unlikely that Snohomish County is going to find good scientific information indicating that any of the County's shoreline water bodies are not fish and wildlife habitat and therefore also not critical areas.

April 14, 2004 memorandum from Tom Mark (Senior Policy Analyst, Shorelands and Environmental Assistance Program, WDOE) to Erik Stockdale et al. regarding Snohomish County memorandum regarding shoreline integration.[27]

Too bad no one from Ecology informed the Legislature that all shorelines are fish and wildlife habitat, they could have saved the Legislature a great deal of time in debating ESHB 1933. Alternatively, it could be that the Legislature and the Department of Ecology have wildly divergent views on the intent of the term "habitat" in the protection of fish and wild life habitat and since ESHB 1933 was passed after RCW 36.70A.030(10) defining critical areas, the legislative intent expressed in ESHB 1933 reflected a clear legislative interpretation that all shorelines were indeed not "fish and wildlife habitat.

The fact the debate continues is reason enough for legislative action.

Need for Legislative Review

Where administrative guidance and technical assistance is so at odds with the language of the legislation, or permits such a wildly variable range of interpretations, the Legislature must step in to clarify and eliminate confusion. The statute and regulations must be modified to speak clearly and with one voice on the scope of coverage. Until that happens, local governments and affected property owners can only guess at the desired outcome. Legislative action is required.

E. Fish and Wildlife Habitat Conservation Areas.

The most controversial of the critical areas is the one which neither the Legislature nor the minimum guidelines chose to define—"fish and wildlife habitat conservation areas." This lack of definition then brings us to the next of the major questions the Legislature must face.

5. What is the local responsibility to define and protect fish and wildlife habitat?

    a. In critical areas referred to as "fish and wildlife habitat;" and/or,

    b. In the built environment that may be used as habitat; and

    c. By what measure is compliance defined?

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[27] *See* copy attached.

These questions raises the same issues addressed previously, what is to be protected and to what purpose? Here the utter lack of definition of terms combines with the restoration–protect all species model of the technical assistance to create a nightmare for local governments seeking to deal with this issue.

As noted above, the Legislature chose to define only two critical areas: wetlands and geologic hazard areas—though one was by area type (wetland) and the other was by potential physical consequence(geologic hazards).

The minimum guideline regulations add the term "ecosystem," an undefined term, to all critical areas: "Critical areas include the following areas and ecosystems,"[28] thereby raising the specter of habitat protection for all species in all habitat areas. WAC 365-190-030 (Definitions) states that critical areas also include "frequently flooded areas," tying the concept to the floodplain regulations, and "areas with a critical recharging effect on aquifers used for potable water," tying the concept to drinking water aquifers.[29]

Significantly, no definition was provided for "fish and wildlife habitat conservation areas." The lack of adequate definition results in a tremendous potential range of opinion as to the scope of coverage as discussed in the last section. A review of the minimum guidelines demonstrates the confusion as to scope and areas to be protected and the objective of the needed regulations. Not until WAC 365-190-080(5) do the minimum guidelines address fish and wildlife habitat conservation areas. And even here there is no definition one could use to objectively measure parameters for regulation. At the outset the introduction provides little guidance:

> (5) Fish and wildlife habitat conservation areas. Fish and wildlife habitat conservation means land management for maintaining species in suitable habitats within their natural geographic distribution so that isolated subpopulations are not created. This does not mean maintaining all individuals of all species at all times, but it does mean cooperative and coordinated land use planning is critically important among counties and cities in a region. In some cases, intergovernmental cooperation and coordination may show that it is sufficient to assure that a species will usually be found in certain regions across the state.

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[28] WAC 365-190-030 (4).

[29] *Id.*

WAC 365-190-080(5).

Notice the introductory section does not define a fish and wildlife habit conservation area. Rather, it describes a "means of land management." The range of personal subjective judgment that may be poured into the discussion (the language is certainly not a definition) is boundless and necessarily subjective. The language provides at least a glimpse into one purpose of the requirement, and that is to prevent the creation of isolated subpopulations. But this language has no context and makes no reference to threatened or endangered species or species of local importance as a guide to define the necessary range of expected action. The language is not helpful.

The question then follows, under these rules is a local ordinance to be measured by its protection of species at risk, or all species.

The focus of the "minimum guidelines" for fish and wildlife habitats seems to be on populations as a whole, in "suitable habitats" within "natural geographic distributions." Such an interpretation is supported by the next sentence in WAC 365-190-080(5), which then speaks to "cooperative and coordinated land use planning" among counties and cities within the region, and that "species will usually be found in certain regions across the state." But, the intent is vague since not all species need be protected at all times and the goal is to assure "a species" will "usually be found" "in certain regions." As a regulatory standard, without some indication of scope and range, the statement is meaningless.

The policy challenge faced by local governments is to establish the scope of protection granted. Here again, definitions are important and local governments would be well advised to adopt language specifically articulating the regulatory objective.

Choices would include (a) protecting habitat for threatened and endangered species, and species identified as locally significant, (b) protecting existing natural habitat to assure no net loss of habitat for all species, common as well as threatened or endangered, or (c) requiring restoration of habitat by limiting or prohibiting development in areas that could be restored to provide additional habitat for all species, common, as well as threatened or endangered.

The regulations provide that protecting habitat:

> *. . . does not mean maintaining all individuals of all species at all times . . .*

WAC 365-190-080(5).

This language suggests that where common species range freely throughout the region, and where the risk of isolated populations have not been identified as a need to create additional protections for species of local importance, local governments need not limit development activity that is otherwise on or near a critical area (whatever that may be) under the clarifications as to scope and coverage addressed above.

But, the suggestion is contradicted by the language of the example set forth in the Assistance Handbook, which call for the increase and restoration of buffers in any area where buffers within the suggested minimum buffer distances are not fully developed. Code Examples at p. A-41,42.

What is a local community to do, follow the minimum guidelines in Chapter 365-190 WAC , or the significantly more draconian examples in the Critical Area Assistance Handbook?

If the local community identifies its priority is to protect threatened and endangered species, and species of local importance, then the balance of the "minimum guideline" regulations seems to support such an approach, at least at the outset.

> *(a) Fish and wildlife habitat conservation areas include:*
> *(i) Areas with which endangered, threatened, and sensitive species have a primary association;*
> *(ii) Habitats and species of local importance;*
> *(iii) Commercial and recreational shellfish areas;*
> *(iv) Kelp and eelgrass beds; herring and smelt spawning areas;*

WAC 365-190-080(5).

Each of these limited habitat areas are specific geographic regions associated with species that are listed as threatened or endangered, or habitats of limited physical scope and particular importance to identified species of local importance, and particularly to anadromous fish—*e.g.* eel grass beds and herring and smelt spawning beds.[30] At this level, at least the regulations do not encompass the entire universe of "habitat." But such omission rapidly changes.

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[30] Communities are directed to pay particular attention to anadromous fish. RCW 36.70A.172(1).

The very next section greatly expands the potential scope. The required coverage shifts from the specific, to the generic—to a near blanket regulation of all waters and all habitats in the state.

> *Naturally occurring ponds under twenty acres and their submerged aquatic beds that provide fish or wildlife habitat;*

WAC 365-190-080(5)(a)(v).

The section is consistent, but duplicative with the first provisions, if the fish and wildlife to be protected under the section are limited to the threatened and endangered species, and identified species of local importance. If, however, as has been suggested by materials published by state agencies and the "technical assistance" from CTED, this provision makes all naturally occurring ponds critical areas if they have any fish and wildlife habitat capability (most ponds of 20 acres provide habitat to common species, including frogs, salamanders, local birds and small, but plentiful fish), then the section expanded the regulatory coverage significantly. The implication of the language is that the universe of all ponds under 20 acres, wherever found, and with whatever habitat included must be protected. But, for how much and what purpose? The Legislature delegates that responsibility to the resource agencies, which, without rule making, can suggest any possible combination of protections so long as they can point to a scholarly piece suggesting such regulation would be beneficial to some portion of the animal or plant population.

A parsing of the remainder of the fish and wildlife habitat minimum guidelines show the materials are a potpourri of thoughts and concepts with little, if any, objective standards to be followed by local governments and applied by growth boards and courts in reviewing local action.

WAC 365-190-080(5)(c)(vi), Waters of the state.

Here in particular the minimum guidelines move from a some notion of an area that is critical to a particular purpose to the universal concept that captures all waters of the state, wherever found, are "critical areas." As a "minimum guidelines," the section is so vague as to beg a variety of questions. First of all, "waters of the state" is a defined term, but not in the GMA. The rules refer the reader to the rules of the Department of Natural Resources, which identify the full universe of waters, including types I-IV.[31] Such waters include all shorelines of the state under Chapter 90.58 RCW, and likely all waters of the state under Chapter 90.48 RCW, though the

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[31] WAC 222-16-030.

latter may be found in both developed and undeveloped conditions from sizes of major streams to intermittent trickles and collections.

Again, questions abound. If the waters of the state are critical areas to the extent they are needed for threatened or endangered species and listed species of local importance, then the reference is a convenient reminder, but only applicable where one of the "waters of the state" has a primary association with a threatened or endangered species or a species of local importance. If, on the other hand, the physical "water of the state" becomes a critical area wherever found, protected to support all species that may be found near or benefit from waters of the state, then the section becomes a tremendous expansion of the local duty.

The Legislature must make it clear that local rules must be designed to protect fish and wildlife conservation areas that have a "primary association" with threatened or endangered species and listed species of local importance. Extension of the habitat rules to include all waters of the state, aside from being contrary to the stated intent of ESHB 1933 and RCW 36.70A.480(5), would hamstring all development in urban and rural areas that arguable affected some "habitat" and require that habitat to be "avoided" as a first priority or at least mitigated. The costs of such avoidance for all species and all habitats is the habitat tax referred to in this article that must be eliminated by legislative clarification.[32]

WAC 365-190-080(5)(c)(vii), Lakes, ponds, streams, and rivers planted with game fish.

This is another section that creates legal challenges for local governments. In the first place, if state agencies plant a local pond or stream with game fish, they are making the management decision that the habitat currently in place is suitable for the species. For the minimum guidelines to suggest that such areas must, by virtue of the resource agency decision to plant fish, be upgraded, enhanced, and local activities stopped or severely limited, raises real issues on enforcement and legality.

At the outset, the burden is on the local government to prove the reasonable need for the change at a location proposed for development (see section F below). Beyond that, as planting game fish is a public activity rather than a regulatory activity. Local governments are prohibited from taking or damaging private property for public purposes. Where a public agency plants fish for public recreational purposes, the

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[32] Without such clarity, the scope and purpose of the rule as applied, particularly in the built environment, poses an additional burden on the municipality and that is to meet the clarity and specificity requirements set forth in RCW 82.020.020 discussed in the section 6 below.

subsequent designation of abutting lands as buffers—rendering existing homes, businesses, roads, and public facilities unlawful or nonconforming and subject to significant restrictions on expansion or activity to protect the state-sponsored recreation activity—regulations to "protect" such activity would fall within a line of cases that suggest that the regulation is not to avoid a problem caused by the development of a property, but to protect a public recreation activity and thus subject to closer scrutiny.

Here again, the Legislature must make a clear distinction between the police power to protect habitat for a legitimate regulatory purpose and under standards consistent with police power regulation. At the very least, the Legislature must eliminate the direct mandate of the guidelines to enhance the habitat at the expense of personal use, to promote the government's game fishing program.

The Department of Fish and Wildlife has the ability to set forth fishing regulations to protect the harvest program. Fish and wildlife habitat conservation area minimum guidelines section ought not be a back door "rule" for recreational fishing enhancement.

WAC 365-190-080(5)(c)(viii), State natural area preserves and natural resource conservation areas.

This section raises issues similar to (vii) above. If the state is going to acquire lands for a park, preserve, or natural resource conservation area, they should acquire the necessary land, including the buffers. To require adjoining property owners to put up the buffers to protect a state project is again to cross the line between appropriate local regulation and unlawful promotion of a state park or preservation activity. Unless the area has habitat with which threatened or endangered species have a primary association, the local critical area rules should not apply.[33]

Here again, the Legislature must clarify that the local critical area fish and wildlife habitat program is designed to protect endangered species and species of local importance, and not all habitat or species found in a public park or natural area. This is particularly true where the scope of the regulation exposes the local government to significant municipal liability.

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[33] *See Orion I* and *Orion II* about problems arising from state efforts to force local governments to designate lands for state park or refuge purpose.

The minimum guidelines then shift to "considerations," which again provide little more than mixed signals, requiring local governments, boards, and courts to guess at the appropriate result.

> *Counties and cities may consider the following when classifying and designating these areas:*

WAC 365-190-080(5)(b).

Section (5)(b) lists a host of "considerations" that growth boards will generally consider as touchstones that the record must demonstrate were "considered" (*e.g.* evaluated and answered) by the municipality as part of the ordinance review process. Procedurally the question is one of consideration and articulation of a reason for action, not substantive result.

In practice, however, when state agencies weigh in with a particular policy recommendation, such as the all inclusive definition of habitat, the notion of "big buffers," preclusion and restoration as the first line of action, the question of "considerations" at the growth board has rapidly shifted to "prove the agency wrong."[34] In this context the choice between regulations directed to protecting threatened or endangered species and species of local importance, or protection all species looms large. It is one thing for a local community to make sure that species of local importance and local threatened and endangered species have adequate access, protection, and ability to move from critical habitat to critical habitat, it is another to do so for all species.

Unfortunately, the growth boards give the agency recommendations (based upon a "protect all species at all times" philosophy) the mantle of "best available science." As a result, the local responsibility is expanded to protection of all species everywhere, because that is the policy assumption imbedded in the recommendations of the state agencies, including CTED's Example Ordinance, WDOE, and WDFW technical guidelines cited above. The result is that the agency recommendations, embedded in the CTED technical assistance and vague minimum guidelines have become an unwritten, but very real, rules—substantially expanding the intent of the original legislative charge.

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[34] Skagit County "considered" the effect of agriculture on Type 4 and 5 streams and concluded the connection with real impact was too tenuous to require regulation. The growth board held failure to follow the agency recommendations for buffers, including Type 4 and 5 streams, is a "departure" from BAS and ruled the county failure "noncompliance." *Friends of Skagit County v. Skagit County, supra*——A classic case of "consideration" in the rule becoming a substantive mandate to follow the "priority" of the agencies.

The minimum guidelines clearly suggest that local governments must demonstrate that they "considered" each of the following items. Here again, the universe of areas is significantly different if a local is considering only threatened, endangered, or listed species of local importance, or is considering all species.[35]

> *(i) Creating a system of fish and wildlife habitat with connections between larger habitat blocks and open spaces;*
> *(ii) Level of human activity in such areas including presence of roads and level of recreation type (passive or active recreation may be appropriate for certain areas and habitats);*
> *(iii) Protecting riparian ecosystems;*

WAC 365-190-080(5)(b)(i-iii). It is here that the full extension of "habitat" to every conceivable habitat protection can be found.

This section is particularly significant in disclosing the conflict and mixed messages in the minimum guidelines.

The use of the references to riparian ecosystems, an undefined term of immensely wide potential scope, is but one of the sources of confusion.

Did the Legislature want local governments to use habitat protection as a bar to the uses considered priority uses in the Shoreline Management Act, RCW 90.58.020.

The language of RCW 36.70A.020 incorporating the policies of the Shoreline Management Act into the goals of the GMA and the language of ESHB 1933 would suggest clearly not:

> (1) For shorelines of the state, the goals and policies of the shoreline management act as set forth in RCW 90.58.020 are added as one of the goals of this chapter as set forth in RCW 36.70A.020 without creating an order of priority among the fourteen goals.

RCW 36.70A.480(1).

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[35] One need only consider the migratory and habitat needs of the lowly salamander, for which the WDOE habitat guide identifies a habitat range of 1800 feet from wet areas (salamanders are found in road side ditches, storm ponds, and a wide variety of small wet areas, some "wetlands, some not") to appreciate the magnitude of the problem.

Yet the tone and tenor of the regulations suggest that all riparian habitat—which includes all shorelines of the state—are to be regulated as critical areas with the policies of buffers, avoidance, and habitat restoration in lieu of use. Such a policy suggests an agency bias to protect riparian ecosystems at the expense of shoreline priority activities by restoring the riparian habitat to some pre-development natural state for the benefit of common species.

If a balance is to be achieved, how is a local government, growth board, or court to know what the Legislature intended? Under the minimum guidelines, we can only guess where the balance may be found and agency recommendations based on restoration for the benefit of all species in all locations is not helpful.[36]

The situation is made more confusing by the remainder of the "minimum guidelines," which move back and forth between requirements to designate and protect only areas of concern and requirements to designate and protect all areas. The WAC is in italics (WAC 365-190-080(5)(b)); the comments address the questions raised and not resolved by the "guidelines."

> *(iv) Evaluating land uses surrounding ponds and fish and wildlife habitat areas that may negatively impact these areas*;

What is the appropriate frame of reference? Any human development activity arguably "affected" the habitat and may negatively affect the area compared with the original undeveloped state. Is existing activity to be controlled to rehabilitate the historic functions and values of the habitat? Also, the reference is to "activity," not "new development, suggesting that the scope of the inquiry may be for local governments to move to address existing conditions affecting habitat, as opposed to the potential negative impact on existing conditions of new development.

> *(v) Establishing buffer zones around these areas to separate incompatible uses from the habitat areas; and*

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[36] The solution in some communities, allow some uses within the riparian corridor but not others, may be "legal" in the zoning context of deciding which uses are allowed in particular zones, but is a position hard to square with "science" if the "science-based" policy is to protect all species everywhere. None of the science relied upon distinguishes between public and private activity and uses and many of the uses allowed in public spaces are significantly more disruptive of habitat than private uses prohibited. (A boat launch, picnic area, or public dock may have much more use and be much more disruptive than a private yard and small private dock. Yet, some ordinances allow the public but not the private use within the critical area buffers on shorelines. It is policy, not science, that discriminates in favor of one and against the other.)

If the framework is the protection of threatened and endangered species and species of local importance and habitat essential to the protection of the life cycle of those present in the community, this section has a much different connotation than if it is a mandate to buffer and render nonconforming all human development that negatively affects the habitat as viewed from the original undisturbed condition. Here again, the agency recommendations as to which uses are "incompatible" and to what extent reflect an agency rulemaking and policy choice on how much is enough for which species—a call made by political science, not environmental science.

(vi) Restoring of lost salmonid habitat.

Restoration should be a product of any local program, but not as a mandate for every property owner. If "salmon habitat" is defined as all shoreline waters of the state, as suggested by the WDOE memorandum on shoreline coverage, and restoration means return habitat to a native state, the implications of the section include the removal of substantially all of the state's waterfront development and a significant amount of development that resulted in the channelization and culverting of small streams. Restoration looks to the recreation of past functions and values, but little if any of the science quoted by the agencies in support of their position suggests that restoration is achievable, let alone an appropriate goal, particularly in the urban areas. Why is it required here?

"Enhancement" of the existing situation is a more realistic goal than restoration in the developed urban environment, and may be a preferable model than the "restoration" model advocated here—particularly since the agency provides no guidance as to when and to what extent restoration is appropriate or how compliance is to be measured. Again, legislative clarification is required.

(c) Sources and methods[37]

(i) Counties and cities should classify seasonal ranges and habitat elements with which federal and state listed endangered, threatened and sensitive species have a primary association and which, if altered, may reduce the likelihood that the species will maintain and reproduce over the long term.

This section suggests that protection of threatened and endangered species is the objective of the fish and wildlife habitat conservation area requirements. If that is

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[37] WAC 365-190-080(5)(c).

so, why has the department issued other guidelines based not on such a limited sphere, but rather on the protection of all species everywhere?

> *(ii) Counties and cities should determine which habitats and species are of local importance. Habitats and species may be further classified in terms of their relative importance.*

This section identifies the duty to create a process to protect species of local importance, which has been upheld by the boards. But what purpose would such a procedure serve if the overall duty, is to protect all species, including common species?

> *Counties and cities may use information prepared by the Washington department of wildlife to classify and designate locally important habitats and species. Priority habitats and priority species are being identified by the department of wildlife for all lands in Washington state. While these priorities are those of the department, they and the data on which they are based may be considered by counties and cities.*

Priority species recommendations are based on the assumption that all species, not just threatened and endangered species, be protected. Local governments may use the guidelines to determine protections appropriate for a particular species, but should be careful about uncritical use of generalized recommendations.[38] Further, the courts have been sharply critical of ordinances with habitat set asides similar to native growth protection areas recommended in the agency technical assistance, where the mandate is region wide with no justification as to local impact or need. See section F below.

> *(iii) Shellfish areas. All public and private tidelands or bedlands suitable for shellfish harvest shall be classified as critical areas. Counties and cities should consider both commercial and recreational shellfish areas. Counties and cities should at least consider the Washington department of health classification of commercial and recreational shellfish*

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[38] For example, in WDFW's publication "Management Recommendations for Washington's Priority Habitats: Riparian," an evaluation of the habitat use and function of natural buffers is explored as applicable to all species, Appendix C of Priority Habitats: Riparian, and has been relied upon by many advocates in support of big buffer programs. Local governments should be cautioned that the accuracy of Appendix "C" and the appropriateness of use in urban areas has been seriously called into question by members of the environmental profession. See Buell, "Best Scientific and Commercially Available Information, Getting Back to the Garden," pp. 7-8, prepared for presentation at Law Seminars International "Agricultural Lands in Transition" conference 3/11/02.

growing areas to determine the existing condition of these areas. Further consideration should be given to the vulnerability of these areas to contamination. Shellfish protection districts established pursuant to chapter 90.72 RCW shall be included in the classification of critical shellfish areas.

(iv) Kelp and eelgrass beds; herring and smelt spawning areas. Counties and cities shall classify kelp and eelgrass beds, identified by department of natural resources aquatic lands division and the department of ecology. Though not an inclusive inventory, locations of kelp and eelgrass beds are compiled in the Puget Sound Environmental Atlas, Volumes 1 and 2. *Herring and smelt spawning times and locations are outlined in WAC 220-110-240 through 220-110-260 and the* Puget *Sound Environmental Atlas.*

These two sections suggest that marine shoreline areas may have within them "critical areas" worthy of designation, but not all shoreline areas are included, a position consistent with RCW 36.70A.480(5). WDOE's comment, , however, that all shorelines are fish and wildlife habitat unless proven otherwise by local governments, make the specific suggestions here only part of a perceived requirement to regulate the physical aspects of all of the shorelines as "habitat" for something, regardless of structure, use, or the likelihood of harm to an overall population.

(v) Naturally occurring ponds under twenty acres and their submerged aquatic beds that provide fish or wildlife habitat.

Naturally occurring ponds do not include ponds deliberately designed and created from dry sites, such as canals, detention facilities, wastewater treatment facilities, farmponds, temporary construction ponds (of less than three years duration) and landscape amenities. However, naturally occurring ponds may include those artificial ponds intentionally created from dry areas in order to mitigate conversion of ponds, if permitted by a regulatory authority.

This section implies the need to examine all fish habitat, local fish as well as anadromous fish. Often the habitat needs of anadromous and game fish are contradictory. An improvement for some game fish often merely increases the number of predators on juvenile salmon—which priority is to be pursued? The legislation does not say and the resulting confusion is simply an invitation for endless litigation.

(vi) Waters of the state. Waters of the state are defined in Title 222 WAC, the forest practices rules and regulations. Counties and cities should

use the classification system established in WAC 222-16-030 to classify waters of the state.

The section suggests that all waters of the state are critical areas requiring classification. Since the growth boards have said that all critical areas must be regulated (albeit with different standards), then by this guideline all waters of the state are critical areas, whether or not related to the needs of local endangered species or species of local importance. Here again, the absence of management guidelines from the Legislature on the scope and extent of protection required and the community ability to address competing values and uses, particularly on shorelines of the state, require some legislative clarification.

Counties and cities may consider the following factors when classifying waters of the state as fish and wildlife habitats:

(A) Species present which are endangered, threatened or sensitive, and other species of concern;

This section suggests the focus on threatened and endangered species and species of local importance.

(B) Species present which are sensitive to habitat manipulation;

It is hard to think of any species to which this section would not apply in some degree.

(C) Historic presence of species of local concern;

This section ties into the inventory necessary to identify and protect habitats of species of local concern.

(D) Existing surrounding land uses that are incompatible with salmonid habitat;

This section begs the question: Compared with what? Are local governments to dictate restoration to native conditions existing prior to any new development?. Are counties to address current activity that could have an impact on fish or fish habitat? Or only new development that needs mitigation to preserve the existing functions and values? The *Skagit County* case cited above suggests protection not restoration is the legal requirement, but as the minimum guidelines remain in place, local governments are left to guess and the growth boards have no rational basis for choosing any of the three alternatives, except their own personal preferences.

(E) Presence and size of riparian ecosystems;

Here, as with many of the guidelines, the agency injects terms not used in the legislation, "riparian," a term which has no generally established legal scope or meaning. This leaves local governments at the mercy of technical agencies with expressions of minimum standards to meet certain requirements, but with no way of knowing whether or to what extent such standards should be imposed.

Without any legislative definition of the scope of protection required, local governments are again forced to guess at the scope of this requirement, particularly when the agency best available science recommendations ignore the local built environment and suggest rules based on natural, not built, conditions.

(F) Existing water rights; and

This section plunges the local governments into the watershed water rights jurisdiction of the Pollution Control Hearings Board. Local governments have no basis in fact or law to measure the validity, use, or impact of existing water right certificates, which may or may not be valid or expired due to non use and may or may not be subordinate to (a) tribal treaty right, (b) minimum stream flow assessment, or (c) other priority uses and natural changes over which the local government has no control. What is the limit of the local duty to consider this item?

(G) The intermittent nature of some of the higher classes of waters of the state.

Here again, the rules create a duty but with no frame of reference. The Western Growth Board has clearly held all Type 4 5 streams are critical areas requiring protection, but with no reference as to why other than agency recommendation. Since many Type 4 and 5 waters are in artificial conveyance structures (ditches and culverts), the rules provide no guidance as to distinguishing between the built and natural environment. Such waters are often not involved directly in the habitat of threatened or endangered species, though effects of new activity need to be at least considered. But if all waters are to be protected for all habitat potential, the inclusion of Type 4 and 5 streams creates a criss cross of "off limit" and restoration areas, often 25-50 feet wide. Such areas will have a devastating impact on both agriculture and most urban development, with little if any basis for judging "how much is enough" or whether the local governments can meet the standards of particularity to meet the conditions discussed in section F below.

(vii) Lakes, ponds, streams, and rivers planted with game fish.

This includes game fish planted in these water bodies under the auspices of a federal, state, local, or tribal program or which supports priority fish species as identified by the department of wildlife.

Here again, the minimum guidelines make a "consideration," regulations to support public activity which could well be held to be outside the bounds of police power authority.

(viii) State natural area preserves and natural resource conservation areas. Natural area preserves and natural resource conservation areas are defined, established, and managed by department of natural resources.

Here again, the rules move beyond police power regulation of proposed development activity to the manipulation of private property to promote a state proprietary interest. The concern here is again to what purpose? If the state is suggesting that the counties downzone property to protect state park and natural areas, the regulation bumps up against the prohibitions in *Orion v. Washington—Orion Corp. v. Washington*, 103 Wn.2d 441, 693 P.2d 1369 (1985) (*Orion I*) and *Orion Corp. v. Washington*, 109 Wn.2d 621, 747 P.2d 1062 (1987), cert. denied, 486 U.S. 1022 (1988) (*Orion II*) concerning the devaluation and taking of property for public purposes.

Without legislative clarification, local governments are being called into another impossible situation. Protect private property from undue interference by public agencies in support of public programs, or protect such public lands as "critical area" fish and wildlife habitat. This is a no win situation for local governments, which again requires legislative clarification.

Only through legislative clarification will the local governments be given any certainty, and the growth boards and courts adequate criteria, by which to objectively measure compliance with the duty to "designate and protect" fish and wildlife habitat conservation areas. In the absence of such guidance, the Legislature has unlawfully designated the scope of compliance to any agency with a scientific base for a recommendation, regardless of the policy, political, or economic implications, or consequences on an overall GMA plan.

F. Police Power Limitations

The thesis of this paper has been that the prevailing technical assistance, combined with vague legislation, are pushing the limits of constitutional police power authority. The last question posed is:

6. Do the regulations stating that in the absence of best available science local governments must adopt a most protective approach until the scientific justification for action is known, run contrary to the Supreme Court decision in *Isla Verde v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002), that local governments have the burden of proof to demonstrate that regulations adopted requiring the set aside of land and precluding development of such land for the protection of wildlife must be based upon an assessment that the requirement is reasonably necessary in that location?

The final reason for clarification is the trap for local governments built into the procedural guidelines and Assistance Handbook that in the absence of best available science local governments are to proceed with the most cautious approach. The specification is contained in the best available science rules.

> *Where there is an absence of valid scientific information or incomplete scientific information relating to a county's or city's critical areas, leading to uncertainty about which development and land uses could lead to harm of critical areas or uncertainty about the risk to critical area function of permitting development, counties and cities should use the following approach:*
>
> *(1) A "precautionary or a no risk approach," in which development and land use activities are strictly limited until the uncertainty is sufficiently resolved; and*
>
> *(2) [adaptive management]* * * *
>
> *To effectively implement an adaptive management program, counties and cities should be willing to:*
>
> *(a) Address funding for the research component of the adaptive management program;*
>
> *(b) Change course based on the results and interpretation of new information that resolves uncertainties; and*
>
> *(c) Commit to the appropriate timeframe and scale necessary to reliably evaluate regulatory and nonregulatory actions affecting critical areas protection and anadromous fisheries.*

WAC 365-195-920

The import of the section is to severely limit use and development of property where the local government does not have enough information to make a specific determination as to potential impact on habitat. The admonition in section 2 suggests the intent of the rule is to impose a moratorium on development until new science is developed to resolve any questions. The admonition is repeated in the Example Code Provisions included with the Assistance Handbook.

The provision is extremely troubling for local governments on two levels.

At the practical level, there is very little science to demonstrate the adequacy or efficacy of buffers in the built environment and developed and/or actively used areas of the community. Thus, the program asks local governments to create a defacto moratorium over large areas of the community until necessary studies have been done and local government can prove BAS has been established for a given area. Recall that a local government may not rely on the Assistance Handbook, Example Code Provisions or Priority Habitats—Riparian, because the recommended buffers in those areas are taken from rural settings with natural buffers intact and may not be appropriate for urban settings (Assistance Handbook p. A-41).

Thus, at the outset, a local government faces adopting maximum recommended buffers whether or not they are truly required, until the local government can prove something less is consistent with BAS. At the very least a significant unfunded mandate.

More significantly, however, is the conflict between the admonition in the procedural guidelines to impose local moratoriums where BAS is not certain, and the requirement of due process for local governments to prove both the reasonableness and appropriateness of a set aside requirement as discussed in *Isla Verde, supra.*

In *Isla Verde*, the City of Camas required the set aside of 30% open space in all subdivisions as an element to protect wildlife. The provision is similar to the GMA recommendation in the Assistance Handbook and BAS regulation in WAC 365-195-920 that local governments require buffers in all locations to protect "fish and wildlife habitat," at least until someone can prove that the buffer is not required.

The State Supreme Court has consistently required local governments to demonstrate the reasonable necessity of a particular limitation of development of land in the context of the specific project.

> We have repeatedly held, as the statutes require, that development conditions must be tied to a specific identified impact of the development on a community.

146 Wn.2d 740 at 761.

Where the effect of a regulation is to deprive the owner of the use of land (and most of the buffer requirements are very limiting on uses allowed in buffers to private owners), the argument that the exaction may be shielded from scrutiny by incorporation in a City wide ordinance has likewise been specifically rejected.

> We reject the City's argument that it satisfies its burden under RCW 82.02.020 merely through a legislative determination "of the need for subdivision to provide for open space set asides. . . as a measure that will mitigate consequences of subdivision development.

146 Wn.2d at 761.

The Supreme Court thus reaffirmed that the presumption of validity attached to local legislative actions does not apply to actions which have the effect of requiring dedication or set aside of property in connection with a development or change of use on property.

> We conclude that the open space set aside condition is an in kind, indirect "tax, fee or charge on new development".

146 Wn.2d 759.

A municipality may not avoid the restriction by achieving the set aside by means of a setback rather than a dedication,[39] as the court looked to the affect of the requirement rather than the form. Without some demonstration of both nexus and proportionality to the property in question, the general requirement to meet a city wide set back requirement without some demonstration of need and proportionality was held to violate RCW 82.02.020. 146 Wn.2d at 765.

Isle Verde was decided on statutory grounds under RCW 82.02.020, as the Legislature codified many of the elements of substantive due process within the statute. But constitutional principles are closely behind and imbedded in the decision. As the court said, municipal authority does not extend to require a property owner to "shoulder an economic burden which in justice and fairness the public should rightfully bear." 146 Wn.2d at 766.

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[39] The open space in *Isla Verde* was a set aside tract in the subdivision to be maintained by the property owners, much as a native growth protection area in the recommended code provisions of the Critical Area Assistance Handbook.

Where the imposition of a police power limitation on the use of property has a significant and material affect on the utilization of that property, the courts will examine the "third factor" in the substantive due process analysis:

(a) The nature of the harm to be avoided,

(b) The availability and effectiveness of less drastic measures, and

(c) The economic loss suffered by the property owner.

146 Wn.2d at 768, citing *Presbytery v. City of Seattle*, 114 Wn.2d at 331.

Local governments must carefully weigh the admonitions of the court in *Isle Verde* and burdens imposed by RCW 82.02.020, before blindly imposing big buffers on wetlands, riparian corridors, shorelines, and developed lands as a blanket matter. Caution is due, particularly in the face of the warning from CTED that the recommended buffers "may not be applicable" to the local circumstance. Native growth protection areas would seem to be the precise prototype condition invalidated by *Isle Verde* and invalid on its face unless specifically justified. A county wide imposition of 65% open space natural area in all rural areas would also seem to fall before the prohibition of blanket conditions requiring the set aside of significant portions of private property without some identification of problem and indication of cause at the property level.

Of even greater concern would be a condition that a big buffer would be imposed under WAC 365-195-920 because local government does not know the potential consequence or affect of a project or activity. In such circumstances the government must be prepared to step up to the corollary responsibility of a moratorium that is to fund the necessary studies and commit to a specific resolution within a reasonable period of time. A commitment to get around to studies as funding might be available does not meet the test.

Lurking in the background is the provision that if a local government imposes a land use condition that it knows or should have known was unlawful, the municipality faces not only claims for damages for unlawful interference with property, but also liability to the property owner for costs and fees incurred in bringing and resolving the action. Chapter 64.40 RCW.

Why the CTED rules and guidelines continue to suggest big buffers and native growth protection areas in the face of *Isle Verde* (decided in 2002, nearly 10 years after the minimum guidelines, and a full year before the publication of the administrative assistance guidelines and examples) defies any logic. At the very least the Legislature must look at the questions and provide necessary direction and the rule

changes to reflect the realities of the court decisions and legislative intent in RCW 82.02.020.

Until such time, municipalities face a torrent of litigation and local expense—money much better spent on real environmental mitigation and enhancement.

F. An Interim Suggestion.

The thesis of this paper is that the best available science requirements and particularly those pertaining to undefined "functions and values" and "fish and wildlife habitat conservation areas" have become a regulatory waste basket in which resource agencies and the Department of Community Trade and Economic Development are pushing habitat restoration and recommending draconian measures to achieve the result—measures allegedly supported by best available science.

But the measures are supported by science, only if the Legislature in fact intended to protect common as well as threatened and endangered species and species of local importance; only if the Legislature intended local communities to mandate restoration models, regardless of the local property owner's contribution to a particular problem; and only if the Legislature intended the GMA to mandate the creation of large bands of nonconforming uses throughout the built and actively used areas of the community. Such intent was clearly not present at the time the GMA was created and such intent will not likely pass constitutional or statutory muster as local governments seek to enforce the requirements.

Until the Legislature acts, however, local governments still face the mandate to take action. What follows is a temporary suggestion that could be implemented.

I. Add to the LIST of questions to be asked on any SEPA checklist:

a. Identify any critical areas as defined in WAC 365-190-030(10) that may exist on or within 300 feet of the property.

b. Identify the existing functions and values served by the critical areas identified, including the habitat functions with which threatened and endangered species, and identified species may have primary association throughout any stage of a life cycle.

c. Identify any species not listed in "b" above that is dependent upon the critical area identified and is at risk of becoming an isolated subpopulation within the community and requires protection at this location to maintain an adequate presence within the community as a whole.

d. For each critical area function and value identified in "b" and "c" above, what steps will be taken consistent with best available science to assure that the existing functions and values to be protected will be maintained or enhanced as a result of your project. You may use regulatory and nonregulatory approaches, and may prohibit clearly inappropriate uses and use a combination of natural and constructed features to achieve your objective, but must demonstrate compliance with best available science as defined in WAC 365-195-900.

II. Make local provision to assure:

a. The checklist is applicable to all development projects, including those that would otherwise be "SEPA exempt" under the minimum thresholds.

b. The checklist is applicable to a new development or change of use if a permit is not required, but not to existing and ongoing activity.

c. The checklist is reviewed and approved by staff or hired consultants competent to measure the validity of the assessment and solutions offered.

d. The recommended conditions of approval to mitigate impact are installed in accordance with approved plans.

e. The recommended conditions of approval are maintained in a manner to assure survival and that the objective of the conditions are met over time.

f. Native growth protection areas, mitigation ratios, and large buffers or setbacks are reasonably necessary and appropriate on a project basis, rather than any formula, and designed to protect existing functions and values unless enhancement is required to effect overall mitigation for the project impacts.

g. Identify some minimum baseline of development well within the "safety" zone of recommended buffers for projects that may proceed without all necessary studies. But the safety zone is an option to develop without studies, not the imposition of a moratorium on development within such zones to the constitutional limits of reasonable use.

Implementing such a local program will take both time and money. Some communities may choose to fund such a program from local revenue sources. Others may choose a fee system. Most will likely require technical assistance from outside consultants until the local technology base is developed within the local governments. The costs of such projects in terms of time and expense will be large, both to the property owner and the community. But the costs are required by the vague legislative mandate, and much preferable to the inevitable litigation from many sides which will flow from the current proposals now pending.

In the meantime, Legislature—are you listening?

Alexander W. (Sandy) Mackie
Perkins Coie
Olympia, Washington

For presentation at LSI's "Growth Management in Washington" November 15, 2004.

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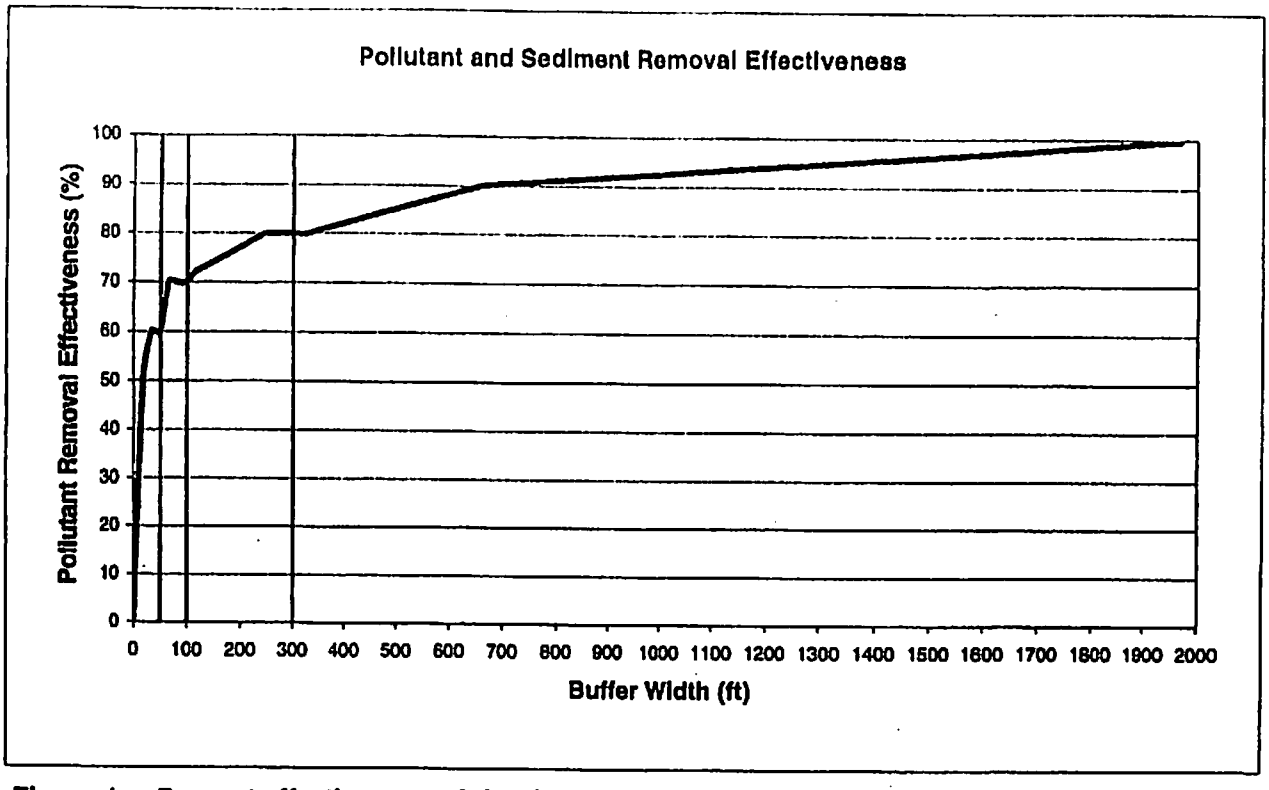

Figure 1 Percent effectiveness of riparian buffers at removing sediment and pollutants (adapted from Desbonnet et al. 1994).

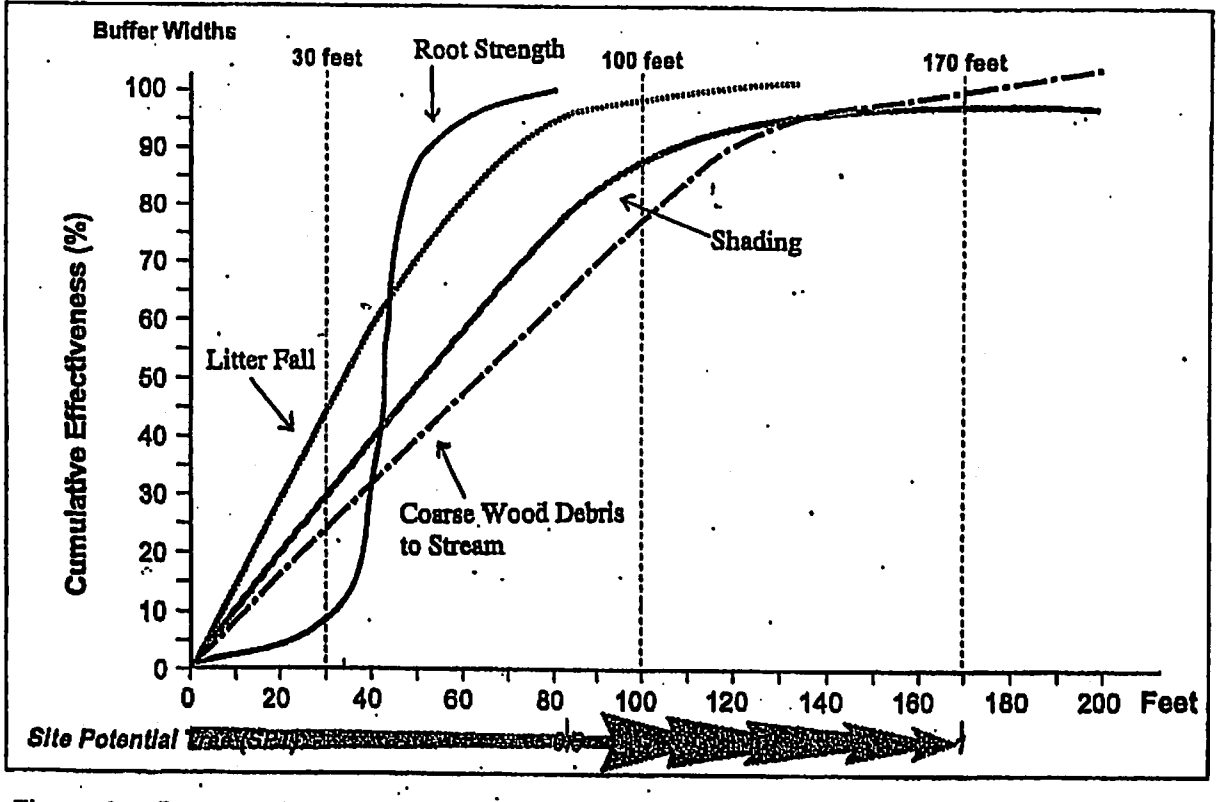

Figure 2 Percent effectiveness of several riparian functions in relation to buffer width (adapted from FEMAT 1993).

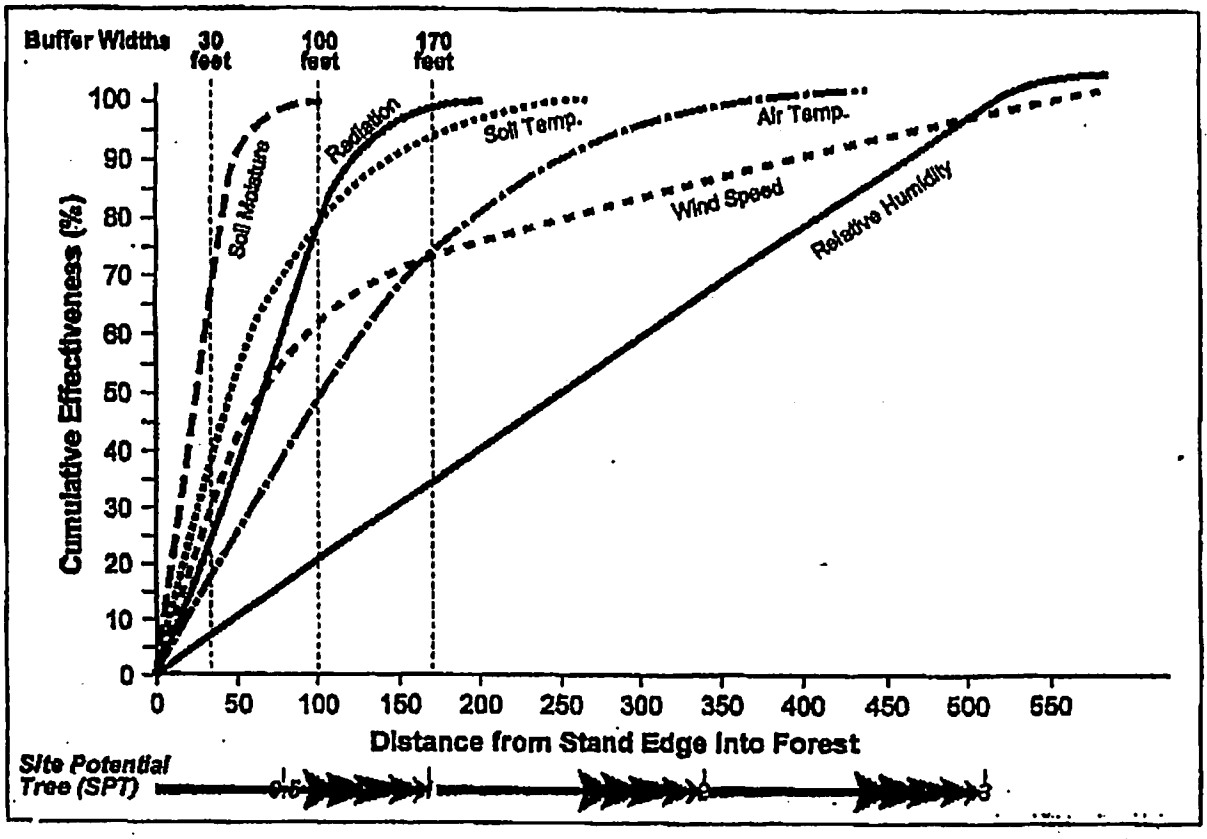

Figure 3 Effects of riparian buffer width on microclimate (adapted from FEMAT 1993).

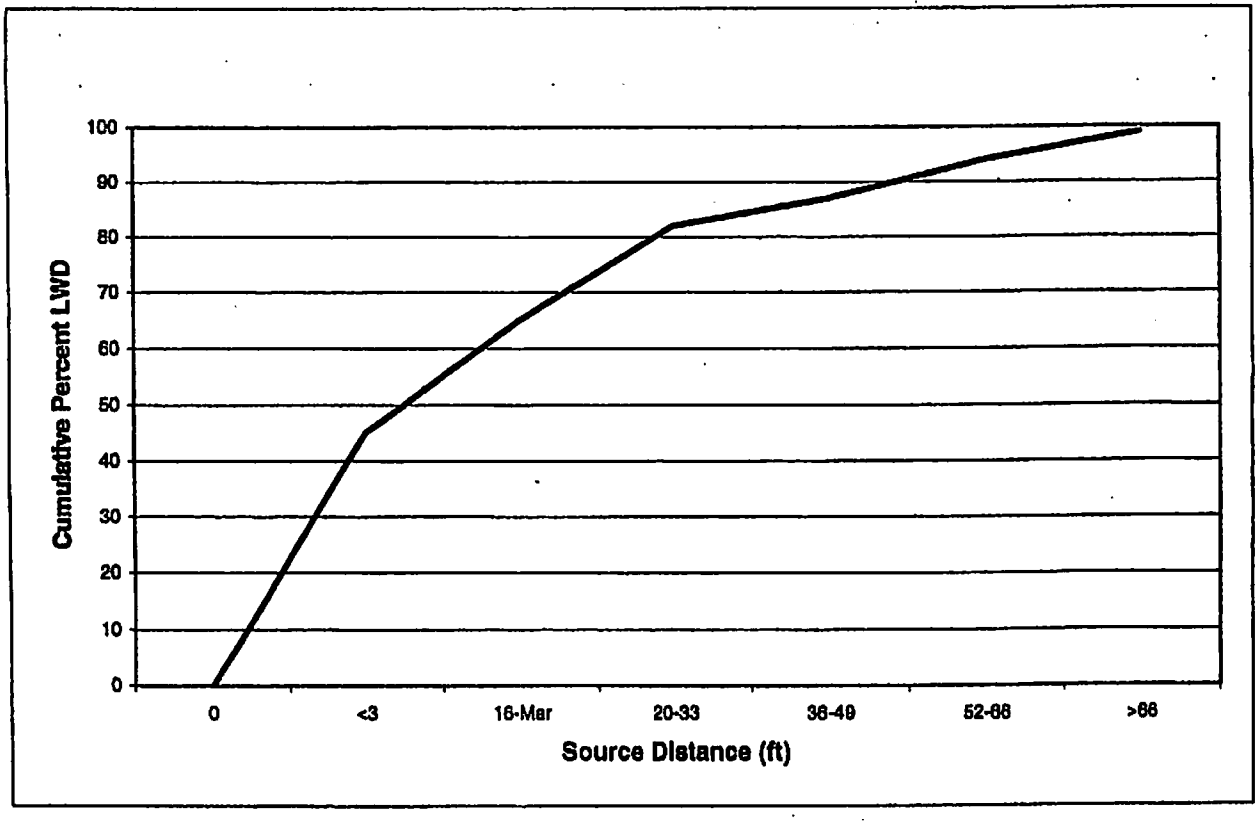

Figure 4 Percent of LWD contributed as a function of distance from shoreline (adapted from Murphy et al. 1987).

D. **Category II and III Wetlands.** With respect to activities proposed in Category II and III wetlands, the following standards shall apply:

1. Water-dependent activities may be allowed where there are no practicable alternatives that would have a less adverse impact on the wetland, its buffers and other critical areas.

2. Where nonwater-dependent activities are proposed, it shall be presumed that alternative locations are available, and activities and uses shall be prohibited, unless the applicant demonstrates that:

   a. The basic project purpose cannot reasonably be accomplished and successfully avoid, or result in less adverse impact on, a wetland on another site or sites in the general region; and

   b. All alternative designs of the project as proposed, that would avoid or result in less of an adverse impact on a wetland or its buffer, such as a reduction in the size, scope, configuration, or density of the project, are not feasible.

E. **Category IV Wetlands.** Activities and uses that result in unavoidable and necessary impacts may be permitted in Category IV wetlands and associated buffers in accordance with an approved critical area report and mitigation plan, and only if the proposed activity is the only reasonable alternative that will accomplish the applicant's objectives. Full compensation for the acreage and loss functions will be provided under the terms established under [Section X.20.050(F) and (G)].

F. **Wetland Buffers**

1. **Standard Buffer Widths.** The standard buffer widths presume the existence of a relatively intact native vegetation community in the buffer zone adequate to protect the wetland functions and values at the time of the proposed activity. If the vegetation is inadequate, then the buffer width shall be increased or the buffer should be planted to maintain the standard width. Required standard wetland buffers, based on wetland category and land use intensity, are as follows:[14]

   a. Category I

High intensity	300 feet
Moderate intensity	250 feet
Low intensity	200 feet

Standard buffer widths have been developed by the state Department of Ecology as statewide standards for Category I, II, III, and IV wetlands. These buffer widths are based on the best available science to protect all wetlands in environmental settings that occur throughout the state of Washington. These standard wetland buffer widths may not be appropriate, either scientifically or in a practical sense, in areas where land use settings and buffer functions may be different than those found in rural areas or forestlands. Local governments should consider their specific natural resources and environmental setting in order to tailor these standard buffer widths to best protect and enhance wetlands in their jurisdiction.

[14] Wetland buffer widths from *Vegetated Buffers in the Coastal Zone: A Summary Review and Bibliography*, University of Rhode Island Graduate School of Oceanography, 1994, Technical Report No. 2064; *The Science of Wetland Buffers and its Implications for the Management of Wetlands*, The Evergreen State College, Andy McMillan, 2000; and *Wetland Buffers: Use and Effectiveness*, Washington State Department of Ecology, 1992, Publication #92-10.

b. Category II

High intensity	200 feet
Moderate intensity	150 feet
Low intensity	100 feet

c. Category III

High intensity	100 feet
Moderate intensity	75 feet
Low intensity	50 feet

d. Category IV

High intensity	50 feet
Low and Moderate intensity	35 feet

2. **Measurement of Wetland Buffers.** All buffers shall be measured from the wetland boundary as surveyed in the field. The width of the wetland buffer shall be determined according to the wetland category and the proposed land use. The buffer for a wetland created, restored, or enhanced as compensation for approved wetland alterations shall be the same as the buffer required for the category of the created, restored, or enhanced wetland. Only fully vegetated buffers will be considered. Lawns, walkways, driveways, and other mowed or paved areas will not be considered buffers.

Existing buffer vegetation is considered "inadequate" when: (1) non-native or invasive plant species provide the dominant cover, (2) vegetation is lacking due to disturbance and wetland resources could be adversely affected, or (3) enhancement plantings in the buffer could significantly improve buffer functions.

3. **Increased Wetland Buffer Widths.** The [director] shall require increased buffer widths in accordance with the recommendations of an experienced, qualified professional wetland scientist, and the best available science on a case-by-case basis when a larger buffer is necessary to protect wetland functions and values based on site-specific characteristics. This determination shall be based on one or more of the following criteria:

   a. A larger buffer is needed to protect other critical areas;

   b. The buffer or adjacent uplands has a slope greater than fifteen percent (15%) or is susceptible to erosion and standard erosion-control measures will not prevent adverse impacts to the wetland; or

   c. The buffer area has minimal vegetative cover. In lieu of increasing the buffer width where existing buffer vegetation is inadequate to project the wetland functions and values, implementation of a buffer planting plan may substitute. Where a buffer planting plan is proposed, it shall include densities that are not less than three (3) feet on center for shrubs and eight (8) feet on center for trees and require monitoring and maintenance to ensure success. Existing buffer vegetation is considered "inadequate" and will need to be enhanced through additional native plantings and (if appropriate) removal of non-native plants when: (1) non-native or invasive plant species provide the dominant cover, (2) vegetation is lacking due to disturbance and wetland resources could be adversely

Middaugh, Randy

From: Stockdale, Erik [ESTO461@ECY.WA.GOV]
Sent: Wednesday, April 14, 2004 5:10 PM
To: Middaugh, Randy
Subject: FW: Sno Co Memo re: Shoreline GMA Integration

-----Original Message-----
From: Mark, Tom
Sent: Wednesday, April 14, 2004 3:39 PM
To: Stockdale, Erik; Skowlund, Peter
Subject: RE: Sno Co Memo re: Shoreline GMA Integration

Having looked at this again today, the memo is mostly technically accurate, however probably the most significant of several problems with it is an overly selective quoting of relevant sections of the law and wac that give the impression that broad choices are available when in fact they probably are not. Good scientific information is the designated driver for these decisions whether in the SMP or the CAO. While it is certainly their right and obligation to look objectively at the available information, It seems to me to be highly unlikely that Sno Co. is going to find good scientific information indicating that any of the County's shoreline water bodies are not fish and wildlife habitat and therefore also not critical areas.

While a local government can do whatever they conclude is adequate to comply with GMA in the CAO, when the SMP is submitted Ecology must find that it is consistent with the guidelines as well as that it is at least equal to the CAO. Thereby, the content of the CAO will only drive the outcome of an SMP where it exceeds the requirments of the guidelines.

As a further point I would note that the memo states that:

> "The stated purpose of RCW 36.70A.480 was to eliminate the blanket designation of all shorelines as critical areas and limit such designations to specifically designated areas."

1933 says in Section 1:

> "(2) This act is intended to affirm the legislature's intent that: ...
>
> (c) Shorelines of statewide significance may include critical areas as defined by RCW 36.70A.030(5), but that shorelines of statewide significance are not critical areas simply because they are shorelines of statewide significance.

I do not read these as saying the same thing though perhaps they could be read as such. I think that in this regard, the point of 1933 is that critical areas and shorelines are each defined separately in law or regulation and each definition must be applied independently but nothing in the law limits how much of the shoreline is also critical area.

Tom Mark, AICP

Senior Policy Analyst

Shorelands and Environmental Assistance Program