September 15, 2011

To: San Juan County Planning Commission
From: Citizens Alliance for Property Rights San Juan County Chapter
RE: Comments on the Wetlands Section of the proposed SJC Critical Areas Ordinance

Planning Commissioners:

Where is the local environmental problem that requires a new regulatory solution?

The observable facts regarding the environment in San Juan County indicate that current patterns of land use and development are sustainable and that our existing Growth Management Plan protects the environment. As yet there is no evidence that proves existing regulations or our extensive preservation programs are inadequate or have failed to protect critical areas. Consider the following statements from scientists and excerpts from San Juan County's own Best Available Science:

"Recent evaluations of the near shore and marine habitats of the San Juan region have determined these areas to be in relatively good condition." (PSAT2005; Shared Strategy 2005).

"Study site. I chose to work in the San Juan Islands, Washington State, USA, because this archipelago is known for its complex topography, strong tidal currents, and abundant marine life."(J.E. Zamon 10/17/03 Marine Ecology Progress Series*)*

"Most ecosystem processes in the site appear relatively intact "(Shared Strategy 2005),

"Marine waters in the county are classified as Class AA (Extraordinary) under the state's water quality standards, and one of the few Department of Ecology listings for the region includes San Juan Channel under "waters of concern" for fecal coliform and dissolved oxygen (Klingeretal.2006).

Compared with contributions from other counties, the contribution of San Juan County to pollution loads in Puget Sound as a whole has been suggested as being relatively small because of the county's low population density, low-intensity agriculture, and few commercial or industrial facilities. Indeed, several ecological studies have chosen areas in San Juan County as the least-altered benchmark or reference site when comparing with areas elsewhere. (SJC BAS Synthesis 2011)

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Citizens' Alliance for Property Rights was organized in 2003 as a non-partisan political action committee where individual citizens and existing organizations can work together defending property rights.

We will support equitable and scientifically sound land use regulations that do not force minority groups of private property owners to pay for public benefits enjoyed by all.

Please visit our web sites: http://www.capr-sanjuan.org/ , http://www.propriights.org/ , email: iwp@rockisland.com

We conclude that there is no evidence that home ownership, as it is currently allowed near wetlands, streams, or ponds, is doing harm or that more regulation of private property will help solve some undefined problem. Regulations should be based on a demonstrated need and not on the baseless assumption of a threat. The "precautionary principle" is not one of the GMA and SMA planning goals. (RCW 36.70A.020; RCW 90.58.020).

Moreover, the goals and policies adopted in the San Juan County Comprehensive Plan regarding protection of Critical Areas shows that there is a reasoned approach to critical areas regulation in county planning. The Comprehensive Plan cautions that regulation should "Allow for use of property to the greatest extent possible while protecting Critical Area functions and values" (Goal 2) and that the County should "Establish Critical Area requirements that are balanced and related to impacts" (Goal 3). Comprehensive Plan, Section B, § 2.5.B. How can regulations be consistent with these goals if the impacts or threats have not been specifically identified? How can the effects of humans on the functions and values of an ecosystem be judged without a baseline from which to measure?

The identification of a baseline and the existence of a problem or threat are fundamental to limiting regulation to no more than is required. Additional state and local rules mandate "evaluating the effectiveness of the current rules" (RCW 36.70A.130(1)(B)) and judging "the positive effect of State, Federal and local environmental protection programs" (SJC Comp. Plan 2.5.B., Policy 5). The numerous assessments of our local environment recounted above show "intact ecosystem processes" and that existing local rules and land conservations programs, in concert with state and federal laws and programs, are doing a good job protecting our waters and habitats. According to DOE, San Juan County has the most pristine waters in the State. No cause and effect for environmental degradation or decline of species has been convincingly linked to local land use.

Arbitrary land use regulation has federal and state constitution civil rights and property rights implications. Recently the Washington State Attorney General in an advisory memorandum stated, *"The public problem must be proven. In assessing whether a regulation has exceeded substantive due process limitations and should be invalidated, the court considers three questions. First, is the regulation aimed at achieving a legitimate public purpose? There must be a public problem or "evil" that needs to be remedied for there to be a legitimate public purpose. Second, is the method used in the regulation reasonably necessary to achieve the public purpose? The regulation must tend to solve the public problem. Third, is the regulation unduly oppressive on the landowner? Failing to consider and address each of these questions may lead to a substantive due process violation."*
(Advisory Memorandum and Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property, December 2006).

Claims of due process violations by local governments are becoming more prevalent as property restrictions increase. Recently, the Washington Court of Appeals in the case of *Dunlap v. City of Nooksack*, No. 66747-9-1(November 2010) found that the establishment of a no-touch buffer had resulted in a taking of property that required compensation by the local government, and that no examination of the public interest advanced by the regulation was necessary. Simply

put, when the government enacts regulations that destroy fundamental attributes of private property, it is liable for a total taking. The reason for the regulation is irrelevant; it must pay for the property.

In a case dealing with whether additional regulation was even necessary the Superior Court in the case of *Yakima County v. EWGMHB*, 10-2-02
3-9 (February 8, 2011) found that the paucity of science and a local review of buffer effectiveness showed that the existing buffer regulation was doing its job and, therefore, a decision not to increase buffer widths was not a violation of the GMA.

It is of legitimate concern that critical areas in SJC are being arbitrarily designated on maps using satellite LIDAR technology rather than on the ground examination. According to the latest maps, the amount of acreage now considered as wetlands (in need of protection) has doubled. This presumes that all these parcels are in need of the same level of protection. No evidence of an inventory was taken to identify what specific functions, values, or species need protection and what they need protection from. Areas such as streams, different classifications of wetlands, and shorelines may have different ecological functions and may not need the same level of protection.

> *"Therefore, before adopting critical area regulations, it is incumbent on the County to include science that actually identifies the existing functions and values of the critical area that will be threatened if use of the property is allowed. Swinomish, 161 Wn.2d at 430; Tracy v. City of Mercer Island, CPSGMHB No. 92-3-0001, at 25 (Final Decision and Order, Jan. 5, 1993) (The requirement to protect a critical area "presumes that the critical area presently exists.") (emphasis added)."*

The process to adopt "Best Available Science" lacks reasonable credibility.

The Department of Ecology has provided a large quantity of what they claim is BAS. However, there may be problems with some of their science. Several qualified scientists claim that DOE Best Available Science reports have a built-in anti-human bias, have methodological problems and have not been "peer reviewed." Therefore many of their conclusions should not be accepted as fact and used to leverage land use policy.

"Many of the studies cited in the Department of Ecology's review of the "best available science" (That is, Washington Wetlands, Vol 1 by Diane Sheldon et al.), are not scientifically valid because of methodological problems. Their most common weakness is that they failed to control the various environmental variables that affect buffer performance. Furthermore, many of them were government reports or other types of gray literature that were never peer reviewed." (Dr. Robert N. Crittenden report March 28, 2007)

Peer review is one of the requirements in WAC 360.195-905 and is defined:
" The information has been critically reviewed by other persons who are qualified scientific experts in that scientific discipline. The criticism of the peer reviewers has been addressed by the proponents of the information. Publication in a refereed scientific journal usually indicates that the information has been appropriately peer-reviewed."

DOE science is prejudicial because an expected outcome has been paid for.

"Another problem with their best available science is that the Department of Ecology funds studies on those issues which they know will be on their agenda in the near future and they tend to provide funding to scientists that generally agree with their viewpoint. Consequently, the studies that are available when the issues arise are a biased sample."
(Dr. Robert N. Crittenden report March 28, 2007)

The applicable laws concerning qualifications of the people who contribute science in the process are very specific. "*WAC 365-194 (4) Whether a person is a qualified scientific expert with expertise appropriate to the relevant critical areas is determined by the person's professional credentials and/or certification, any advanced degrees earned in the pertinent scientific discipline from a recognized university, the number of years of experience in the pertinent scientific discipline, recognized leadership in the discipline of interest, formal training in the specific area of expertise, and field and/or laboratory experience with evidence of the ability to produce peer-reviewed publications or other professional literature."*

One member of the San Juan County Council, Rich Peterson, has recently challenged a contributor to the BAS. This case may undercut the credibility of the BAS Synthesis the county will rely on for drafting CAO regulations. The contributor, Russel Barsh, may have made misrepresentations in a grant application. Barsh claimed to have the resources of San Juan County staff and management at his disposal in order to meet the criterion of the "matching funds" section of a DOE grant application. According to the County Administrator and others that was not true. "*None of them were involved in approving county participation in this grant application.*" (Pete Rose, Administrator, email 5/19/11)

This is just one part of the hundreds of contributors to BAS. There could be more challenges and controversy if the public had proper time to look at the material. When asked about the credentials of the various contributors of BAS to the Synthesis, Dr. Adamus replied that there was not sufficient time to second-guess all the studies that were included.

The time for citizen review of the massive quantity of BAS data was inadequate. There are 1,070 citations to literature in the revised BAS. Of those 1,070 there are 385 citations that are to information that the scientists identified as non-peer reviewed. There are 685 citations of peer-reviewed materials. As the process moves along and the BAS Synthesis is used to support CAO regulations these concerns will again surface.

The Planning Commission should be aware and concerned that an artificial deadline was imposed for BAS submissions. Staff has refused many submissions. By its very nature science is always in process. Everyday new studies are conducted, new theories and conclusions put forward, and new discoveries made. Studies that may apply to local issues may be uncovered. It is inconceivable that these studies will not be considered because staff has imposed some arbitrary deadline. This ridiculous and unscientific policy needs to change.

San Juan County Must Create a Record Showing That They Balanced All of the Planning Goals with Consideration Given to Local Circumstances.

Regulators must seek balance between the goals. For example, the GMA goal of environmental protection versus protection of property rights requires legislators to consider both goals equally and without prejudice. Some environmentalists and regulatory agencies share the belief that the goal of protecting the environment is accompanied by a requirement and therefore takes priority over all other GMA planning goals. The law does not support this idea.

> The GMA explicitly states that the planning goals "*are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations:*"[1] And the Supreme Court has confirmed this: "The [GMA's planning] goals are not listed in order of priority . . ." (RCW 36.70A.020. *Swinomish Indian Tribal Community v. Western Washington Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 424-25 (2007); *Viking Properties Inc. v. Holm*, 155 Wash. 2d 112 (2005)) ("We decline [the] invitation to create an inflexible hierarchy of the GMA goals where such a hierarchy was explicitly rejected by the legislature.").

Therefore, contrary to the proclamations of many loud voices in the land use debate, the GMA explicitly eschews establishing priorities amongst the goals.

Beginning with the Planning Commission, San Juan County must create a record showing that they deliberated on all of the planning goals and made determinations as to the weight to be afforded each, and the reasons therefore, with due consideration being given to local circumstances.

The state legislature, in adopting the provisions of the GMA, did not set out to impose statewide growth planning. The GMA is specifically designed to allow discretion at the local level, tempered by local circumstances. Note the use of the term "goal". A goal is a purpose toward which endeavor is directed. A goal is not a mandate, it is an aspiration. In order to satisfy the responsibilities that the GMA leaves to San Juan County, all of the planning goals of the GMA must be considered by the Planning Commission and the County Council in crafting comprehensive plan provisions and development regulations. The failure to do so is to exalt one goal or group of goals over the others in defiance of the explicit language of the GMA.

> "At the GMA's core is the requirement that local government develop their land use regulations by balancing a variety of planning goals. For example, the GMA requires that local government protect "critical areas" while at the same time "[m] aintain[ing] and enhanc[ing] natural resource-based industries, including productive timber, agricultural, and fishing industries" as well as "[e]ncourag[ing] the conservation of agricultural lands, and discourag[ing] incompatible uses." *See* RCW 36.70A.060(2), (8).
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> "Balancing the GMA's goals in accordance with local circumstances is precisely the type of decision that the legislature has entrusted to the discretion of local decision-making bodies. RCW 36.70A.3201"[2]

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[1] RCW 36.70A.020

[2] http://www.mrsc.org/mc/rcw/RCW%20%2036%20%20TITLE/RCW%20%2036%20.%2070A%20CHAPTER/RCW%20%2036%20.%2070A.3201.htm

"Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community."[3]

The challenge to our county is, therefore, to craft comprehensive plans and development regulations that:

- Provide for the fair use and development of private property.
- Encourage and reward voluntary enhancement and restoration efforts.
- Provide predictability in the permitting process.
- *Do not* designate existing uses as non-conforming.
- *Do not* drive up the cost of housing.
- *Do not* unnecessarily hinder economic opportunity.
- Protect the environment we all enjoy.

A local example of a way to protect critical areas without trampling on the rights of landowners is the number of voluntary programs that keep 47% of Island parcels free of development; protecting the environment while recognizing property rights. It is not whether we protect the people's rights, the economy and the environment; it is how we do it. The GMA provides the flexibility needed for local government to come up with local solutions.

Buffers are not the answer.

It is unfair and unlawful for one group to pay for the benefits enjoyed by all, or for one group to give while another takes.

SJC Comprehensive Plan, 2.2.1.B Land Use Concept
"The Land Use Element establishes a concept of how San Juan County should grow and develop while protecting its exceptional quality of life and natural environment and equitably sharing the public and private costs and benefits of growth."

Arbitrary buffers create a discriminatory "tax" on some parcels, not others. This kind of regulation is inconsistent with the intent of 2.21B and contrary to protections in GMA Goals. "The property rights of landowners shall be protected from arbitrary and discriminatory actions." RCW 36.70A.020(6)

"Goals of the GMA require Preserving and Protecting critical areas, not restoring them to a natural state. In CAPR v. King County, King County tried to argue that the GMA required them to set

[3] (RCW36.70A.3201)

aside large areas for watershed, open space and wildlife habitat. The court ruled GMA did not give the government the right to violate RCW 82.02 by placing uniform tax (buffer) on all property." (145 Wn. App. 649 (7/7/2008) [Does county's limitation on land clearing of rural property violate RCW 82.02.020?])

Protecting the environment is a public benefit. *"The preservation and fostering of wildlife is a general public benefit and the cost of providing that benefit should be born by the public in general not by one sub-group of them."* (Dr. Robert N. *Crittenden Report* March 28, 2007)

A major focus of the public agencies like DOE, Commerce, NOAA, FEMA etc. is establishing new buffers of 250-400 feet in width. This focus is designed to implement a strategy that buffers must be part of any critical area program and should be adopted wholesale as part of any CAO update. We have a great deal of local discretion in our land use regulation process and our citizens will demand that local control is not given up to these agencies.

Proponents of large buffers urge that the science of buffers is well suited to "built environments", is properly directed to existing conditions, and /or can prevent "future impacts". This approach ignores current GMA rural zoning requirements, impermissibly assumes unrestricted future development and does not consider the efficacy of existing regulatory systems.

The large buffer strategy is at the heart of a "de facto" restoration program designed to return the land to some pristine prior undeveloped state or condition, even though there is no authority under the SMA or the GMA to restore or rehabilitate wetland or other critical areas.

There is a civil rights aspect of land use regulation, which is protecting individuals from unwarranted and overreaching government actions.

There is a common question that has been frequently asked and has yet to be adequately answered. Is a single-family residence built to today's standards really a cause for environmental concern? What harm does a house cause?

The County must be very careful how they answer this question. There must be clear science that defines exactly what harm a house causes before they adopt laws that place burdensome restrictions upon certain landowners who must grant large portions of their land in order to solve a perceived problem that they did not cause.

The 5th Amendment to the Constitution "Takings Clause" is applicable when the government exercises its police power to enact regulations that interfere with private property. The concept relies upon establishing that the government has gone too far in regulation and judges the interference of government by looking at the impact on the property. The takings analysis looks to the entire parcel and is concerned only with the extent of the government's interference with property rights.

Factors to Consider in a Regulatory Takings Analysis. *Regulatory action that deprives property of all value constitutes a taking of that property. Where there is less than a complete deprivation of all value, a court will evaluate whether a taking has occurred by balancing the economic impact against two other factors: (1) the extent to which the government's action impacts legitimate and long-standing expectations about the use of the property; and (2) the character of the government's*

actions — is there an important interest at stake and has the government tended to use the least intrusive means to achieve that objective?" (Attorney General's Advisory Memorandum 2006)

CAO regulation may be invalid if it denies "due process" by allowing the government to arbitrarily and unreasonably interfere with individual property rights. A Substantive Due Process claim under the United States constitution asks a court to override the judgment of a political branch of government and invalidate an ordinance or statute because the action of that law is in some way illegitimate. Substantive due process requires two elements, (1) the existence of a protected interest or "right", and (2) proof that the government arbitrarily or capriciously (unreasonably) interfered with that right. The remedies for violation of due process include injunctive relief.

Washington law follows the federal law in stating that: *in order to demonstrate that the due process clause has been violated, one must demonstrate that the regulation is "irrational, arbitrary, or invidious".*
"Irrational" means that the regulation cannot reasonably be expected to achieve its intended legitimate government purpose. --- This is what "best available science" is about: Science is the strict standard of reason and the State, by defining BAS has attempted to define what is "reasonable" for the purposes of this law. Incidentally, their definition of "science" is flawed.
"Arbitrary" is to regulate without a rule or underlying principle (If they don't identify the BAS, the ordinance may be arbitrary.); and
"Invidious" is to be excessively harmful to the regulated party or out of proportion to what is necessary or would usually be expected.

Brian Hodges of the Pacific Legal Foundation's comments:
"In addition to constituting a taking, a land use regulation that too drastically curtails an owner's use of property may also effect a denial of substantive due process. Presbytery v. King County, 114 Wn.2d 320, 329 (1990); Orion Corp. v. State, 109 Wn.2d 621 (1987).

Substantive due process and takings claims are alternatives, representing separate sources of constitutional protection. Id. While the Takings Clause limits government power by requiring just compensation when the government takes private property, the Due Process Clause protects citizens from government actions that are "arbitrary, unreasonable, and capricious." Pruneyard Shopping Center v. Robbins, 447 U.S. 74, 84-85 (1980).

In Washington State, even if a regulation is insulated from a takings challenge, it still must withstand the due process test of reasonableness. Guimont v. Clarke, 121 Wn.2d at 608.

A three-fold inquiry is necessary to determine: "(1) whether the regulation is aimed at achieving a legitimate public purpose, (2) whether it uses means that are reasonably necessary to achieve that purpose, and (3) whether it is unduly oppressive on the landowner." Guimont, 121 Wn.2d at 609; see also, Orion Corp. v. State, 109 Wn.2d at 646-47; West Main Assocs. v. Bellevue, 106 Wn.2d 47, 52 (1986); Lawton v. Steele, 152 U.S. 133 (1894); Goldblatt v. Hempstead, 369 U.S. at 594-95."

Permanently encumbering a large percentage of the land in San Juan County with setbacks and buffers is a most intrusive way to accomplish environmental protection when less oppressive

solutions are feasible.
"Ultimately, the people of Washington State are best served when state and local governments aspire to adopt the fairest possible approaches for accomplishing important public purposes. We therefore encourage government decision-makers to seek effective regulatory approaches that fairly consider both the public interests and the interests of private property owners, while using these guidelines to avoid unconstitutional regulation." (Attorney General's Advisory Memorandum 2006)

It is the position of CAPR San Juan, that only minimum changes to our existing regulations (if any) are needed. The Planning Commission should proceed with caution and deliberate fairly considering the rights of all property owners. Overreaching regulations are not in the interest of the people. It is in this context that you should seek to balance the competing goals of GMA in an open and transparent way. The end result of the balancing process can be environmental protection without causing undue burden to the citizens, our community and the local economy.

CAPR San Juan