

## Symposium: GMA Critical Areas Ordinances

### Critical Areas Ordinance Updates: An Overview of What Is Required

*By Tim Trohimovich, Futurewise*

#### I. Introduction

A recent report that analyzed threats to wildlife habitat in the United States found that Washington's Growth Management Act provides one of the strongest state mandates for protecting critical areas in the nation.<sup>1</sup> Three concepts are at the core of this mandate: (1) critical areas must be designated and their functions and values protected, (2) best available science must be used in designating and protecting critical areas, and (3) critical areas policies and regulations must be periodically updated. This article summarizes the state of the law for these three concepts and gives the author's view on how the updates are going.

This article refers to many Growth Management Hearings Board ("GMHB" or "Board") decisions. Copies of the Boards' decisions are available at their website: <http://www.gmhb.wa.gov/index.html>. The Boards also have excellent digests that summarize their decisions. The digests are also available at their website.

#### II. What Are Critical Areas and What Is a CAO?

##### A. Definition of Critical Areas

The Growth Management Act ("GMA"), in RCW 36.70A.030(5), includes this definition of critical areas:

(5) "Critical areas" include the following areas and ecosystems: (a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas.

According to the Central Puget Sound Growth Management Hearings Board, "the GMA's definition of 'critical areas' constitutes a minimum — local jurisdictions must address the five categories described in the definition but are free to add other categories."<sup>2</sup> The GMA defines two of the five critical areas: geologically hazardous areas and wetlands.<sup>3</sup> Substantive changes to the GMA definitions are not allowed.<sup>4</sup> Cities and counties may adopt their own definitions for undefined terms as long as they comply with the GMA.<sup>5</sup>

The GMA, in RCW 36.70A.050, requires the Washington State Department of Community Trade and Economic Development ("CTED") to adopt minimum guidelines to guide the classification of critical areas. These minimum

guidelines define areas with a critical recharging effect on aquifers used for potable water and frequently flooded areas.<sup>6</sup> They also define some of the geological hazards and include criteria for designating critical areas.<sup>7</sup> The minimum guidelines direct cities and counties to use the GMA (and Shoreline Management Act) definition of wetlands.<sup>8</sup> The minimum guidelines are advisory, and cities and counties must consider them but are not required to follow them.<sup>9</sup> Consider means "[t]o give serious thought to something, to ponder it or carefully examine it ...."<sup>10</sup>

##### B. What is a CAO?

"CAO" stands for critical areas ordinance. RCW 36.70A.060(2) requires all counties and cities in Washington to adopt development regulations to protect critical areas. A critical areas ordinance is simply the development regulations that manage critical areas. Many of the first generation CAOs were adopted as freestanding ordinances. Now the trend is to integrate critical areas regulations into a comprehensive set of development regulations for a city or county. So development regulations for critical areas may be referred to as critical areas regulations ("CARs"), a CAO, a sensitive areas ordinance ("SAO"), or something altogether different.

Whatever they are called, the GMA requires that critical areas regulations designate and protect critical areas.<sup>11</sup> To meet these requirements, critical areas regulations typically include:

- criteria for the types of land and water that constitute a critical area—these criteria designate the critical areas;
- standards for protecting critical areas from development and activities, standards for protecting development from the critical areas that are hazardous to people and property, and standards for when alterations to critical areas will be allowed;
- buffers—undeveloped land vegetated with plants native to the environment—of various widths that surround critical areas to protect them from the adverse effects of nearby uses and activities (some buffers, such as those along wetlands and covering riparian areas adjacent to water bodies, have habitat value in their own right);<sup>12</sup>

- mitigation requirements for when the alternation of a critical area or buffer is allowed;
- a reasonable use process designed to allow a modification to the critical areas regulations when those regulations would result in no reasonable use of a property—this provision is intended to prevent regulatory takings from occurring; and
- administrative provisions, which may be shared with other city or county development regulations.

CTED has prepared a *Critical Areas Assistance Handbook: Protecting Critical Areas within the Framework of the Washington Growth Management Act (November 2003)* that includes example critical areas regulations prepared by CTED and examples adopted by some cities and counties. The CTED Handbook is available at: [http://www.cted.wa.gov/\\_CTED/documents/ID\\_976\\_Publications.pdf](http://www.cted.wa.gov/_CTED/documents/ID_976_Publications.pdf).<sup>13</sup>

### C. Designating Critical Areas

RCW 36.70A.170(1)(d) requires cities and counties to designate critical areas. For many critical areas, such as wetlands, performance standards are adopted to identify their location.<sup>14</sup> Others, such as frequently flooded areas and certain geological hazards are mapped.

The purpose of a performance standard is to have an objective standard against which to compare an as yet unclassified object. Such a concrete standard provides predictability... A project proponent, the public and county officials should be able to examine the condition of the area under review and observe whether the area is one listed in the definitions.<sup>15</sup>

The designation of critical areas is intended "to preclude land uses and developments which are incompatible with critical areas."<sup>16</sup> The GMA requirement to designate critical areas is not qualified or limited. "Therefore, any exemptions, exclusions, limitations on applicability or other regulatory provisions which result in not designating *all* critical areas, are prohibited."<sup>17</sup>

### D. Protecting Critical Areas

RCW 36.70A.060(2) provides that all counties and cities "shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170." In defining what "protect" requires, the Central Puget Sound Board wrote:

The Board holds that the Act's requirement to protect critical areas, particularly wetlands and fish and wildlife habitat conservation areas, means that the values and functions of such eco systems must be maintained. While local governments have the discretion to adopt development regulations that may result in localized impacts upon, or even the loss of, some critical areas, such flexibility must be wielded sparingly and carefully for good cause, and in no

case result in a net loss of the value and functions of such eco systems within a watershed or other functional catchment area.<sup>18</sup>

For those critical areas primarily intended to protect people and property from natural hazards, the standard is that cities and counties are required to "adopt development regulations that adequately protect development from" frequently flooded areas and geologically hazardous areas and assure that the allowed development "does not result in harm to other properties."<sup>19</sup>

A question that sometimes comes up is whether there is a separate standard for critical areas within designated urban growth areas. The Central Board has answered no.<sup>20</sup> "The GMA requires designation and protection of critical areas and makes no qualifying statement that, for example, urban wetlands are any less important or deserving of protection than rural ones."<sup>21</sup> The Central Board and Western Washington Board have upheld narrower buffers for urban areas than non-urban areas because the buffers met the no-net-loss of functions and values standard.<sup>22</sup> The Eastern Washington Board has not yet addressed this question.

As to whether critical areas regulations can include exemptions, the Boards differ. The Central Board has held:

Exemption, exclusion, limitation of applicability, or other drafting mechanisms that achieve the same effect, do not constitute designation and protection of critical areas. Local governments do have discretion as to how and even the degree to which they protect, but the inescapable conclusion from a plain reading of the Act is that critical areas must be protected.<sup>23</sup>

The Western Board held that "while all critical areas need not be protected, a detailed and reasoned justification for any critical areas not protected must be made." The exemptions must be written tightly enough to minimize negative impacts on critical areas and their buffers.<sup>24</sup> The Eastern Board has held that "[p]rotection of all critical areas is required by the Act."<sup>25</sup> Exceptions without review and possible mitigation determined by an appropriately trained individual are clearly erroneous because they fail to protect critical areas.<sup>26</sup>

RCW 36.70A.160 provides that "[e]ach county and city that is required or chooses to prepare a comprehensive land use plan under RCW 36.70A.040 shall identify open space corridors within and between urban growth areas. They shall include lands useful for recreation, wildlife habitat, trails, and connection of critical areas as defined in RCW 36.70A.030." Cities and counties also "have the authority to supplement the GMA's mandated regulatory protection of critical areas with non-regulatory programs."<sup>27</sup>

### III. The Periodic Update Requirement

#### A. Why Is There a Periodic Update Requirement?

The Legislature amended the GMA to require regular seven-year updates of comprehensive plans and development regulations, including those for critical areas, for many reasons. Consider three reasons:

- *The state and communities change.* Since 1992 (the latest deadline for adopting the first critical areas regulations) through 2004 (the first deadline for periodic updates), the population of Washington increased by over one million people, growing from 5,141,177 people to 6,167,800.<sup>28</sup>
- *We know more.* We have gained over a decade of experience with critical areas regulations and a large increase in scientific knowledge.<sup>29</sup> We need to benefit from this knowledge.
- *The Growth Management Act changes.* The Legislature has amended the Growth Management Act every year since it was adopted. An orderly and cost effective process is needed to incorporate these changes into city and county comprehensive plans and development regulations, including critical areas regulations.

#### B. What Is the Periodic Update Requirement?

The GMA, in RCW 36.70A.130(1)(a), requires each city and county in Washington to take legislative action to review and, if needed, revise its critical areas regulations to ensure that the regulations comply with the requirements of the GMA according to the time periods specified in RCW 36.70A.130(4).<sup>30</sup> The schedule in RCW 36.70A.130(4) for the first periodic updates can be found in a table presented in the endnotes.<sup>31</sup> The deadlines differ by counties but apply both to the county and the cities in those counties. RCW 36.70A.130(4) also requires counties and cities to conduct periodic reviews to update their critical areas regulations every seven years following the first update deadlines.

The Legislature adopted this requirement in 1997 and the original deadline was September 1, 2002, for all cities and counties.<sup>32</sup> The critical areas regulations were to be updated every five years.<sup>33</sup> In 2002, the deadline for the cities and counties to conduct their first periodic update was extended by between two to five years and the update interval increased to seven years.<sup>34</sup> The update intervals are measured from the first date for each category of counties and cities in the table presented in the endnotes.<sup>35</sup>

### IV. Best Available Science

This section first identifies the best available science requirement, breaks the requirement down into its four key components, and then discusses how courts and Growth Boards have applied the requirement. Finally, the section mentions the requirement to give special consideration to

conservation or protection measures necessary to preserve or enhance anadromous fisheries.

#### A. What Is Best Available Science?

In 1995, the Legislature adopted the best available science ("BAS") requirement in RCW 36.70A.172(1) as part of a compromise with the conservation community over the 1995 regulatory reform legislation.<sup>36</sup> RCW 36.70A.172(1) provides, in full, that:

(1) In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

Division I of the Court of Appeals has held that "the GMA requires that the regulations for critical areas must protect the 'functions and values' of those designated areas. RCW 36.70A.172(1). This means all functions and values."<sup>37</sup>

##### 1. Best, Really Valid

According to the Western Washington Board, "'Best' means that within the evidence contained in the record a local government must make choices based upon the scientific information presented to it[]" and the characteristics of a valid scientific process.<sup>38</sup> The Board has specifically rejected the "contention that 'best' under RCW 36.70A.172(1) includes one, and only one, scientific document."<sup>39</sup> The broader the range of valid science, "the broader the range of discretion allowed to a" city or county.<sup>40</sup> Where a city or county incorporates scientific conclusions of equal validity to the other science in the record into its policies or regulations, the city's or county's choice will not be disturbed.<sup>41</sup>

##### 2. Available

The Western Washington Board has held that: "'Available' means not only that the evidence must be contained in the record, but also that the science must be practically and economically feasible[]" to be implemented as shown by evidence in the record.<sup>42</sup> Because the science must be "available," if a local government is faced with the rare circumstance that there is no science, the city or county is not required to conduct original scientific research. WAC 365-195-920 recommends that a city or county in this circumstance adopt a precautionary or no risk approach and an adaptive management program.<sup>43</sup> However, WAC 365-195-920 only recommends this approach, and thus these regulations, as was documented above, only need to be considered. To some degree this makes sense since, while some local governments, such as King County and Snohomish County, have done important original scientific research, most local governments lack the capability to

do so. Fortunately, state agencies have worked hard to fill information gaps and compile scientific information for cities and counties to use.

### 3. Science

The Western Washington Board has stated that "science is a process involving methods used to understand the workings of the natural world. This process consists of four stages: 'making observations, forming hypotheses, making predictions from these hypotheses, and testing those predictions.'"<sup>44</sup> The characteristics of a valid scientific process include: (1) the findings have been critically reviewed by qualified scientific experts in the field, (2) the methods used are standard in the field or peer reviewed, (3) the conclusions are logical and the inferences reasonable given the data and methods, (4) the data have been analyzed using standard or peer reviewed quantitative or statistical methods, (5) the data and findings are placed in their proper context, and (6) the assumptions, analytical techniques, and conclusions are well referenced to the relevant, credible scientific literature.<sup>45</sup>

Not all forms of science have all of these characteristics of a valid method, but the more characteristics incorporated, the more reliable the science is likely to be.<sup>46</sup> WAC 365-195-905 Table 1 shows the types of scientific information and the characteristics of a valid method that are characteristic of that type of scientific information. The characteristics of science are useful for cities and counties to determine if offered evidence is science. As was documented under the analysis of "available" above, cities and counties are not required to do original scientific research.

### 4. Include

According to Division I of the Wahington Court of Appeals:

RCW 36.70A.172(1) requires that BAS shall be included "in developing policies and development regulations to protect the functions and values of critical areas." This court held "that evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations."<sup>47</sup>

Courts and Growth Boards have rejected the argument that including best available science is procedural; rather, as the above quotation shows, it is also a substantive requirement.<sup>48</sup> However, the scientific evidence alone does not require a particular policy outcome.<sup>49</sup> But best available science is essential to an accurate decision on critical areas policies and regulations. According to Division I:

The policies at issue here deal with critical areas, which are deemed "critical" because they may be more susceptible to damage from development. The nature and extent of this susceptibility is a uniquely scientific inquiry. It is one in which the best available

science is essential to an accurate decision about what policies and regulations are necessary to mitigate and will in fact mitigate the environmental effects of new development.<sup>50</sup>

The court also wrote that best available science would not only protect the environment, but also the rights of property owners. "If a local government fails to incorporate, or otherwise ignores the best available science, its policies and regulations may well serve as the basis for conditions and denials that are constitutionally prohibited."<sup>51</sup>

Given the procedural and substantive elements of the best available science requirement, Boards have analyzed best available science issues by considering the following questions: (1) the scientific evidence contained in the record, (2) whether the analysis by the local decision-maker of the scientific evidence and other factors involved a reasoned process; and (3) whether the decision made by the local government was within the parameters of the Act as directed by the provisions of RCW 36.70A.172(1).<sup>52</sup>

An issue related to best available science is whether the Legislature should define the term. In the 2004 legislative session, there was an unsuccessful attempt to pass a definition. This issue was recently addressed by a committee of the National Research Council of the National Academy of Sciences for the federal analogue to best available science. The Committee on Defining Best Scientific Information Available for Fisheries Management wrote: "A statutory definition of what constitutes 'best scientific information available' for fisheries management is inadvisable because it could impede the incorporation of new types of scientific information and would be difficult to amend if circumstances warranted change."<sup>53</sup>

### 5. Special Consideration to Conservation or Protection Measures for Anadromous Fisheries

RCW 36.70A.172(1) also provides that "counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries." Anadromous fish migrate up rivers and streams from the sea to breed in fresh water. Salmon, steelhead, and some trout, including some varieties of Bull trout, are anadromous fish. The Western Washington Board has addressed this provision and concluded:

This part of the statute directs measures for both preservation and enhancement. . . . In balancing the scientific evidence against issues of practicality and economics the result must be more heavily weighted towards science when dealing with anadromous fish. The "special consideration" language directs that local governments must go beyond what might otherwise be done in designating and protecting other kinds of critical areas.<sup>54</sup>

## B. How the Courts Apply the Best Available Science Requirement

In addition to many Growth Board decisions, we now have three reported appellate court cases addressing the GMA's best available science requirement. In *Honesty in Environmental Analysis and Legislation (HEAL) v. Central Puget Sound Growth Management Hearings Bd.*, 96 Wn. App. 522, 979 P.2d 864 (1999), Division I interpreted the best available science requirement in the context of policies to protect critical areas by looking to federal decisions interpreting the analogous requirement of federal law.

"[W]here ... the agency presents scientifically respectable conclusions which appellants are able to dispute with rival evidence of presumably equal dignity, we will not displace the administrative choice. Nor will we remand the matter to the agency in order that the discrepant conclusions be reconciled." *State of Louisiana v. Verity*, 853 F.2d 322, 329 (5th Cir.1988). The purpose of the ESA's best available science requirement is to ensure that regulations not be based on speculation and surmise. *Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154, 1168, 137 L.Ed.2d 281 (1997). We apply this view to RCW 36.70A.172(1).

The [Central Puget Sound Growth Management Hearings] Board properly applied *State of Louisiana v. Verity* to the record before it in this case. The Board found the City took scientific evidence and included it in the record. HEAL presented evidence contrary to the evidence relied upon by the City. The Board properly concluded it could not displace the City's judgment about which science the City would rely upon as the best available science.<sup>55</sup>

This holding means that if there is contrary evidence in the record of equal validity, the city or county gets to decide what scientific evidence to follow. That decision will not be overturned on appeal.

However, as Division I held in a later decision, *Whidbey Environmental Action Network (WEAN) v. Island County*, 122 Wn. App. 156, 93 P.3d 885, 894 (2004), *reconsideration denied* July 12, 2004, *review denied*, 153 Wn.2d 1025 (2005), the scientific information must be equal. One of the issues in *WEAN* was whether a 25-foot wide buffer provided adequate protection for Class 5 streams, which are narrow intermittent streams. The court reviewed the evidence in the record. The evidence that the County relied on focused primarily on "water quality functions, rather than looking at the entirety of functions attributed to stream buffers—including the protection of wildlife species other than fish."<sup>56</sup> Since the science that looked at this broader range of functions showed that wider buffers were needed, the court upheld the Western Board's decision that a 50-foot wide buffer was needed.<sup>57</sup>

In *Ferry County v. Concerned Friends of Ferry County*, 121 Wn. App. 850, 90 P.3d 698 (2004), *review granted in part*, 153

Wn.2d 1016 (2005), the approach and result were similar. The issue was what species of fish and wildlife the County should protect through its critical areas regulations. This is the issue of designation, and RCW 36.70A.172(1) requires that best available science be included in designating critical areas. On appeal to the Eastern Washington Board, the Board found:

The County has consulted with a credentialed biologist, but the process he undertook to develop his recommendations is inadequate. There is no evidence in the record that the consultant coordinated his recommendation with any other scientists with expertise in Ferry County, such as the Colville tribe, U.S. Forest Service, or the DFW [Washington State Department of Fish and Wildlife]. There is no evidence that any on-site field observations were conducted. With specific reference to the Peregrine Falcon, his recommendation seems to conflict with activities of the Colville Tribe. Regarding Bull Trout, a sensitive species documented to exist in Ferry County, he makes no mention at all.

Having said that, the Board finds no requirement for Ferry County to address species other than endangered, threatened, or sensitive in their Comprehensive Plan. While inclusion of other listed priority species may be desirable, not including them is within legislative authority of Ferry County. However, Ferry County has provided insufficient evidence that its limited listing of species that are endangered, threatened, or sensitive is based on best available science as required by RCW 36.70A.172.<sup>58</sup>

Division III upheld the Board's decision. The court first concluded that the Washington State Department of Fish and Wildlife ("DFW") Priority Habitats and Species Program includes comprehensive information about the location of fish and wildlife.<sup>59</sup> The court then wrote:

In opposing protection implementation based on DFW's list, the County called only one expert, Dr. McKnight. Dr. McKnight's four-page report cites two sources: a 1997 book based on breeding birds in Washington and conversations with a Washington State Game Department biologist. The Board found that Dr. McKnight's analysis and recommendations were inadequate.

Here, substantial evidence supports the Board's finding and conclusion that the County did not base its species listing on a reasoned process and that it erred in failing to do so. It provided only Dr. McKnight's limited report. And that report did not include field observations, consultation with other interested experts such as the Forest Service or the Colville Federated Tribes, or engage in other reasoned analysis. The County's argument fails.<sup>60</sup>

### C. Can Cities and Counties Balance Best Available Science with other GMA Goals and Requirements?

Both the *HEAL* and *WEAN* courts recognized that the GMA requires cities and counties to balance GMA goals and to take other GMA requirements into account.<sup>61</sup> The courts also concluded that best available science is not the only factor to be considered in decisions on policies and regulations to protect critical areas and that balancing other goals and requirements is allowed in these decisions.<sup>62</sup> However, the *HEAL* court wrote that scientific evidence would play a major role in critical areas policies and regulations.<sup>63</sup> Further, the *WEAN* court required evidence in the record showing that a departure from best available science was needed to achieve a GMA goal or requirement.<sup>64</sup>

Those considering balancing best available science with other GMA goals and requirements should also consider two other holdings. First, the Washington Supreme Court has held that some GMA goals mandate action to a greater degree than others. If there are conflicts between goals, the language of goals is to be considered to see which goal controls.<sup>65</sup> The GMA's environmental protection and natural resources industries goals, both of which direct the protection of critical areas, are among the strongest.<sup>66</sup> Second, the Court of Appeals has twice held that GMA goals cannot supersede "more stringent, specific requirements" found elsewhere in the GMA.<sup>67</sup> The *WEAN* requirement for evidence and the two holdings should reduce balancing best available science with other requirements to those situations that truly justify it.

### D. Sources of Best Available Science

State agencies, federal agencies, university scientists, and others have amassed an extensive scientific literature on how to protect the functions and values of critical areas. Much of this science is available free on the internet. For most planners and lawyers, the synthesis studies prepared by the Department of Ecology, Department of Fish and Wildlife, and the Puget Sound Action Team are likely to be most helpful.

With funding from the Puget Sound Action Team, Futurewise and the Washington Environmental Council have updated their CAO on CD. This data CD compiles public domain best available science. Copies of the CAO on a CD were mailed to public sector planning directors in 2004. Copies of the CAO on a CD are available from Futurewise. The table of contents, which includes live links to most of the studies, is also available on the Futurewise website. See *Read Me – Documents on the CAO on a CD at: [http://www.futurewise.org/resources/publications/index\\_html](http://www.futurewise.org/resources/publications/index_html)*. This CD makes gathering best available science very economical for cities and counties.

### V. How Are the Updates Going?

Slowly but surely. As of April 8, 2005, the Washington State Department of Community, Trade, and Economic

Development had received adopted critical areas updates from 62 cities and counties—this is 53 percent of the total number of cities and counties required to update their critical areas regulations in 2004. As a comparison, 74 percent of the cities and counties have updated their comprehensive plans, and 53 percent have updated their development regulations.<sup>68</sup>

Important progress is being made. The following is a brief status report for each of the 2004 update county governments.

- Clallam County has updated its critical areas regulations. The County had made a major update several years before and concluded it only needed to address some remands from an earlier appeal. No appeal has been filed of this update.
- Clark County is currently in the process of updating its critical areas regulations.
- Jefferson County updated its critical areas regulations. One narrow appeal has been filed.
- King County updated its critical areas regulations by the deadline. Only one Growth Board appeal has been filed by an individual acting *pro se*. The Central Board held that the King County CAO complied with the GMA.<sup>69</sup> The Pacific Legal Foundation has filed a lawsuit in Snohomish County Superior Court *Citizens Alliance for Property Rights v. Sims*, No. 04-2-13831-9, seeking to invalidate the critical areas regulations. The lawsuit alleges violations of RCW 82.02.020, which limits permit dedications and exactions, a facial substantive due process violation, unlawful delegations, and that certain provisions are unconstitutionally vague.<sup>70</sup>
- Kitsap County is in the process of updating its critical areas regulations.
- Pierce County updated its critical areas regulations by the deadline, adopting the update unanimously although it contains many of the provisions so hard fought in King County and has wildlife regulations superior to King County's. Two Growth Board appeals have been filed against the update, both narrow. One alleges that marine riparian buffers should have been adopted. The second appeal alleges that allowing large buildings that would be occupied by many people in lahar hazard areas, a geological hazard that consists of debris flows from mountains (in this case Mount Rainier) violates the GMA. The Central Board held that the County was required to adopt marine riparian buffers and that the failure to do so violated the GMA.<sup>71</sup> The Board also held that Pierce County's lahar hazard regulations compiled with the GMA.<sup>72</sup>

- Snohomish County is currently in the process of updating its critical areas regulations.
- Thurston County is currently in the process of updating its critical areas regulations.
- Whatcom County is currently in the process of updating its critical areas regulations. The proposal is currently before the County Council with a decision anticipated in September 2005.

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*This article is largely based on materials originally prepared for the 2005 Midyear Meeting and Seminar of the Environmental and Land Use Law Section of the Washington State Bar Association.*

- 1 R. Ewing, J. Kostyack, D. Chen, B. Stein, and M. Ernst, *Endangered by Sprawl: How Runaway Development Threatens America's Wildlife* (National Wildlife Federation, Smart Growth America, and NatureServe, Washington, D.C.: January 2005) at 30. Available as of July 28, 2005 from: <http://www.smartgrowthamerica.org/lebsreport/EndangeredBySprawl.pdf>.
- 2 *Tracy v. City of Mercer Island*, Central Puget Sound Growth Management Hearings Board ("CPSGMHB") Case No. 92-3-0001, Final Decision and Order (January 5, 1993) p.\*23, 1993 WL 839717 p.\*17.
- 3 RCW 36.70A.030(9); RCW 36.70A.030(20). The GMA and the Shoreline Management Act ("SMA") have the same definition of wetland. See RCW 90.58.030(2)(h) for the SMA definition.
- 4 *Gutschmidt v. City of Mercer Island*, CPSGMHB Case No. 92-3-0006 (March 16, 1993) p.\*17, 1993 WL 839725 p.\*23.
- 5 *Id.*
- 6 WAC 365-190-030(2), (7).
- 7 WAC 365-190-030 (definitions); WAC 365-190-080 (criteria for designating critical areas).
- 8 WAC 365-190-080(1).
- 9 RCW 36.70A.170(2); *Tracy v. City of Mercer Island*, CPSGMHB Case No. 92-3-0001, Final Decision and Order 1993 (January 5, 1993) WL 839717 p.\*17; *North Cascades Conservation Council et al. v. Chelan County Board of Adjustment*, Eastern Washington Growth Management Hearings Board ("EWGMHB") Case No. 93-1-0001, Order on Motion to Dismiss (May 21, 1993), 1993 WL 839716 p.\*4.
- 10 *Gutschmidt v. City of Mercer Island*, CPSGMHB Case No. 92-3-0006, Final Decision and Order (March 16, 1993) p.\*8, 1993 WL 839725 p.\*10.
- 11 RCW 36.70A.170(1)(d); RCW 36.70A.060(2).
- 12 See, for example, D. Sheldon, T. Hruby, P. Johnson, K. Harper, A. McMillan, T. Granger, S. Stanley, and E. Stockdale, *Wetlands in Washington State - Volume 1: A Synthesis of the Science* (Washington State Department of Ecology, Olympia, WA: Publication #05-06-006 March 2005) pp.5-39/40 (available as of July 28, 2005 from: <http://www.ecy.wa.gov/pubs/0506006.pdf>); K. L. Knutson and V. L. Naef, *Management Recommendations for Washington's Priority Habitats: Riparian* pp. 16 - 38 (Washington Department of Fish and Wildlife, Olympia: 1997) pp.16-38 (available as of July 28, 2005 from: <http://wdfw.wa.gov/hab/ripfinal.pdf>).
- 13 Appendix A of the Critical Areas Handbook—*Example Code Provisions for Designating and Protecting Critical Areas*—is available at [http://cted.wa.gov/\\_CTED/documents/ID\\_958\\_Publications.pdf](http://cted.wa.gov/_CTED/documents/ID_958_Publications.pdf).
- 14 WAC 365-190-040(2)(d); *Friends of Skagit County (FOSC), et al. v. Skagit County*, Western Washington Growth Management Hearings Board ("WWGMHB") Case No.: 96-2-0025, Final Decision and Order (January 3, 1997) p.\*2, 1997 WL 8935 p.\*1.
- 15 FOSC, Final Decision and Order, p.\*2, 1997 WL 8935 p.\*2.
- 16 *Pilchuck, et al. v. Snohomish County, et al. (Pilchuck II)*, CPSGMHB Case No. 95-3-0047c, Final Decision and Order (December 6, 1995) p.\*10, 1995 WL 903206 p.\*14.
- 17 *Pilchuck II*, Final Decision and Order, p.\*11, 1995 WL 903206 pp \*14-15 (italics in original), accord FOSC, Final Decision and Order, p.\*2, 1997 WL 8935 p.\*1.
- 18 *Tulalip Tribes of Washington (Tulalip I) v. Snohomish County*, CPSGMHB Case No. 96-3-0029, Final Decision and Order (January 8, 1997) p.\*7, 1997 WL 29145 p.\*8 (Jan. 8, 1997); *Swinomish Indian Tribal Community, et al. v. Skagit County, et al.*, WWGMHB Case No. 02-2-0012c, Compliance Order (December 8, 2003) pp. 23-24, 2003 WL 23305927 pp. \*14-15 (quoting *Tulalip I*).
- 19 *Pilchuck, et al. v. Snohomish County (Pilchuck II)*, WWGMHB Case No. 95-3-0047c, Order Partially Granting Motions for Reconsideration and Clarification (January 25, 1996) pp.\*5-6, 1996 WL 650336 p.\*5-7.
- 20 *Pilchuck II*. Final Decision and Order, p.\*13, 1995 WL 903206 p.\*18.
- 21 *Id.*
- 22 *Tulalip I*, Final Decision and Order, p.\*3, pp.\*9-10, 1997 WL 29145 p.\*3, p.\*9; *Protect the Peninsula's Future and Washington Environmental Council v. Clallam County*, WWGMHB Case No. 00-2-0008, 01-2-0020, Compliance Order & Final Decision and Order (October 26, 2001) p.\*4, 2001 WL 1671799 p.\*4.
- 23 *Pilchuck II*, Final Decision and Order, p.\*21, 1995 WL 903206, p.\*21.
- 24 FOSC, Final Decision and Order, pp.\*2, \*7, 1997 WL 8935 pp.\*1,\*6.
- 25 *Easy & Washington Environmental Council v. Spokane County*, EWGMHB Case No. 96-1-0016, Final Decision and Order (April 10, 1997) p.\*3, 1997 WL 191457 p.\*4.
- 26 *Larson Beach Neighbors and Wagenman v. Stevens County*, EWGMHB Case No. 03-1-0003, Final Decision and Order (February 10, 2004) p.\*22.
- 27 *Tulalip I*, Final Decision and Order, p.\*8, 1997 WL 29145 p.\*8.
- 28 RCW 36.70A.060(2); Office of Financial Management, State of Washington, *April 1 Intercensal and Postcensal Estimates of the Total Resident Population by Year for the State, Counties, Cities, the Unincorporated Areas, and Incorporated Areas: 1968 to 2004* (revised March 2005) (available as of July 28, 2005 from: <http://www.ofm.wa.gov/pop/cociseries/index.htm>).
- 29 For example, see the studies cited in Footnote 12 above.

- 30 RCW 36.70A.130(1)(a); *FEARN, et al. v. City of Bothell*, CPSGMHB Case No. 04-3-0006c, Order on Motions (May 20, 2004) p.\*9; *1000 Friends of Washington and Pro-Whatcom v. Whatcom County*, WWGMHB Case No. 04-2-0010, Order on Motion to Dismiss (August 2, 2004) pp.\*7,\*14.
- 31 Deadlines for the First Required Periodic Updates for Critical Areas

Counties & Cities	Update Deadlines	
Clallam, Clark, Jefferson, King, Kitsap, Pierce, Snohomish, Thurston, and Whatcom Counties and the cities in these counties	Comprehensive Plans & Development Regulations	December 1, 2004
	Comprehensive Plans & Development Regulations to Remain Eligible for Funding Bonuses under RCW 43.17.250	December 1, 2004
	Comprehensive Plans & Development Regulations to Remain Eligible for Public Works Trust Fund (RCW 43.155.050) & Centennial Clean Water Account (RCW 70.146.030) Funding	December 1, 2005
Cowlitz, Island, Lewis, Mason, San Juan, Skagit, and Skamania Counties and the cities in these counties	Comprehensive Plans & Development Regulations except Critical Areas Regulations	December 1, 2005
	Critical Areas Regulations to Remain Eligible for Bonuses under Public Works Trust Fund & Centennial Clean Water Account	December 1, 2005
	Critical Areas Regulations	December 1, 2006
Benton, Chelan, Douglas, Grant, Kittitas, Spokane, and Yakima Counties and the cities in these counties	Comprehensive Plans & Development Regulations except Critical Areas Regulations	December 1, 2006
	Critical Areas Regulations to Remain Eligible for Bonuses under Public Works Trust Fund & Centennial Clean Water Account	December 1, 2006
	Critical Areas Regulations	December 1, 2007
Adams, Asotin, Columbia, Ferry, Franklin, Garfield, Grays Harbor, Klickitat, Lincoln, Okanogan, Pacific, Pend Oreille, Stevens, Wahkiakum, Walla Walla, and Whitman Counties and the cities in these counties	Comprehensive Plans & Development Regulations except Critical Areas Regulations	December 1, 2007
	Critical Areas Regulations to Remain Eligible for Bonuses under Public Works Trust Fund & Centennial Clean Water Account	December 1, 2007
	Critical Areas Regulations	December 1, 2008

Source: RCW 36.70A.130 as amended by 2005 Session Laws, Chapter 294 §2 (ESI HB 2171).

- 32 1997 Session Laws, Chapter 429 § 10.
- 33 *Id.*
- 34 2002 Session Laws, Chapter 320 § 1 & *FEARN, et al. v. City of Bothell*, CPSGMHB Case No. 04-3-0006c Order on Motions p. \*8 of 12 (May 20, 2004).
- 35 RCW 36.70A.130(4) & RCW 36.70A.130(8)(c).
- 36 Personal Communication with Peter Hurley (April 15, 2005) & 1995 Session Laws, Chapter 347. The best available science requirement is in 1995 Session Laws, Chapter 347 § 105.
- 37 *Whidbey Environmental Action Network (WEAN) v. Island County*, 122 Wn. App. 156, 174-75, 93 P.3d 885, 894 (2004), *reconsideration denied* July 12, 2004, *review denied*, 153 Wn.2d 1025, 110 P.3d 756 (2005).
- 38 *Clark County Natural Resources Council (CCNRC), et al. v. Clark County, et al.*, WWGMHB Case No. 96-2-0017c, Final Decision and Order (December 6, 1996) p.\*7, 1996 WL 716195 p.\*5; WAC 365-195-905.
- 39 *Protect the Peninsula's Future and Washington Environmental Council v. Clallam County*, WWGMHB Case No. 00-2-0008, Corrected Final Decision and Order (December 19, 2000) p.\*3; Final Decision and Order 2000 WL 1869951 p.\*2.
- 40 CCNRC, Final Decision and Order, p.\*7, 1996 WL 716195 p.\*5.
- 41 *Honesty in Environmental Analysis and Legislation (HEAL) v. Central Puget Sound Growth Management Hearings Bd.*, 96 Wn. App. 522, 530-31, 979 P.2d 864, 869-70 (1999).
- 42 CCNRC, Final Decision and Order, p.\*7, 1996 WL 716195 p.\*5.
- 43 WAC 365-195-920(2) explains that adaptive management uses "scientific methods to evaluate how well regulatory and nonregulatory actions achieve their objectives. Management, policy, and regulatory actions are treated as experiments that are purposefully monitored and evaluated to determine whether they are effective and, if not, how they should be improved to increase their effectiveness. An adaptive management program is a formal and deliberate scientific approach to taking action and obtaining information in the face of uncertainty."
- 44 *Friends of Skagit County, et al. v. Skagit County*, WWGMHB Case No. 96-2-0025, Compliance Hearing Order and *Skagit Audubon Society, et al. v. Skagit County*, WWGMHB Case No. 00-2-0033c, Final Decision and Order August 9, 2000) p.\*10, 2000 WL 1175121 p.\*7 (citing Alan D. Copey, "Including Best Available Science in the Designation and Protection of Critical Areas Under the Growth Management Act," 23 *Seattle U. L. Rev.* 97, 107 (1999) (an excellent analysis of CTED's best available science regulations)), *partially affirmed and partially reversed in Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, Thurston County Superior Court Cause No. 01-2-00278-1, Letter Opinion (November 16, 2001), Final Order (March 28, 2002).
- 45 WAC 365-195-905.
- 46 WAC 365-195-905.
- 47 *WLAN*, 122 Wn. App. at 171, 93 P.3d at 893 (quoting *HEAL*, 96 Wn. App. at 531-32, 979 P.2d 869-70).
- 48 *HEAL*, 96 Wn. App. at 531-33, 979 P.2d at 870-71.
- 49 *Id.*
- 50 *HEAL*, 96 Wn. App. at 533, 979 P.2d at 870-71.
- 51 *HEAL*, 96 Wn. App. at 533, 979 P.2d at 871.

- 52 CCNRC, Final Decision and Order, p.\*7, 1996 WL 716195 p.\*5; *Easy & Washington Environmental Council v. Spokane County*, EWGMHB Case No. 96-1-0016, Final Decision and Order (April 10, 1997) p.\*5, 1997 WL 191457 p.\*6 (quoting the CCNRC Final Decision and Order).
- 53 Committee on Defining Best Scientific Information Available for Fisheries Management, Ocean Studies Board, Division on Earth and Life Studies, National Research Council of the National Academies, *Improving the Use of the "Best Scientific Information Available" Standard in Fisheries Management* (The National Academies Press, Washington D.C.: 2004) p.4 (emphasis in the original). You can read the book free online at: <http://www.nap.edu/books/0309092639/html/>.
- 54 CCNRC, Final Decision and Order, p.\*7, 1996 WL 716195 p.\*6.
- 55 HEAL, 96 Wn. App. at 530-31, 979 P.2d at 869-70.
- 56 WEAN, 122 Wn. App. at 174, 93 P.3d at 894.
- 57 WEAN, 122 Wn. App. at 171-72, 93 P.3d at 893.
- 58 Quoted in *Ferry County v. Concerned Friends of Ferry County*, 121 Wn. App. 850, 853-54, 90 P.3d 698, 700 (2004), review granted in part, 153 Wn.2d 1016, 106 P.3d 243 (2005).
- 59 *Ferry County*, 121 Wn. App. at 856, 90 P.3d at 702.
- 60 *Ferry County*, 121 Wn. App. at 856-57, 90 P.3d at 702.
- 61 HEAL, 96 Wn. App. at 531-32, 979 P.2d at 870; WEAN, 122 Wn. App. at 173, 93 P.3d at 893-94.
- 62 *Id.*
- 63 HEAL, 96 Wn. App. at 532-33, 90 P.3d at 870-71.
- 64 WEAN, 122 Wn. App. at 183-84, 93 P.3d at 899.
- 65 *King County v. Central Puget Sound Growth Management Hearings Bd.*, 142 Wn.2d 543, 558-59, 14 P.3d 133, 141 (2000) ("Although the planning goals are not listed in any priority order in the Act, the verbs of the agricultural provisions mandate specific, direct action.")
- 66 *Everett Shorelines Coalition, et al. v. City of Everett and Washington State Department of Ecology*, CPSGMHB Case No. 02-3-0009c, Corrected Final Decision and Order (January 9, 2003) p.\*12, 2003 WL 394132 p.\*13.
- 67 *Quadrant Corp. v. Central Puget Sound Growth Management Hearings Bd.*, 119 Wn. App. 562, 578, 81 P.3d 918, 927 (2003) affirmed in part and reversed in part, 154 Wn.2d 224, 110 P.3d 1132 (2005); *City of Bellevue v. East Bellevue Community Mun. Corp.*, 119 Wn. App. 405, 414, 81 P.3d 148, 153 (2003), review denied, 152 Wn.2d 1004, 101 P.3d 865 (2004).
- 68 Statistics from the State of Washington Department of Community, Trade, and Economic Development's Update Information Webpage: [http://www.cted.wa.gov/portal/falias\\_\\_CTED/lang\\_\\_en/tabID\\_\\_394/DesktopDefault.aspx?tabID=0&alias=cted.wa&lang=en-US&init](http://www.cted.wa.gov/portal/falias__CTED/lang__en/tabID__394/DesktopDefault.aspx?tabID=0&alias=cted.wa&lang=en-US&init) (accessed on July 28, 2005).
- 69 *Keesling v. King County (Keesling CAO)*, CPSGMHB Case No. 05-3-0001, Final Decision and Order (July 5, 2005).
- 70 The first amended petition can be found at: <http://www.pacificlegal.org/briefs/Citizens%20Alliance%20v%20Sims.pdf>.
- 71 *Tahoma Audubon Society, People For Puget Sound, & Citizens For A Healthy Bay v. Pierce County (Tahoma-Puget Sound)*, CPSGMHB Case No. 05-3-0004c, Final Decision and Order July 12, 2005 pp.\*37-44.
- 72 *Id.* at \*18, \*21-\*22, \*26-\*28, \*30-\*31.

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## King County's Critical Areas Ordinance Update: King County's Perspective

By Harry Reinert, King County Department of Development and Environmental Services

### I. Growth Management Act and Best Available Science

#### A. Critical Areas

The Growth Management Act ("GMA") requires all counties and cities in Washington, even those that are not otherwise planning under the GMA, to designate (RCW 36.70A.170) and protect (RCW 36.70A.060) critical areas. Critical areas are defined in the GMA to include: wetlands; critical aquifer recharge areas; fish and wildlife habitat conservation areas; frequently flooded areas; and geologically hazardous areas.

The requirement to designate and protect critical areas was identified by the CPSGMHB as one of the GMA's most powerful organizing concepts to combat sprawl. *City of Bremerton v. Kitsap County*, CPSGMHB Case No. 95-3-0039c, Final Decision and Order (Oct. 6, 1995). Local governments do not have a choice to protect only some critical areas, but they do have some flexibility in how they choose to protect critical areas.

While local governments have the discretion to adopt development regulations that may result in localized impacts upon, or even the loss of, some critical areas, such flexibility must be wielded sparingly and carefully for good cause, and in no case result in a net loss of the structure, value and functions of such natural systems within a watershed or other functional catchment area.

*Pilchuck Audubon Society v. Snohomish County*, CPSGMHB Case No. 95-3-0047c, Final Decision and Order (Dec. 6, 1995).

#### B. GMA Goals

For those local governments planning under the GMA, Goal 10 (the Environment goal) states that local government comprehensive plans and development regulations shall "protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water." RCW 36.70A.020(10).

Although the GMA goals are not listed in "any order of priority" in the statute, the Growth Management Hearings Boards ("Boards") have found that wording differences in the goals do have meaning. The Central Puget Sound