

This "Comment Summary" matrix provides a summary of each individual comment, by submittal, during the 3/1/17 -3/31/17 public review and comment period of the draft Critical Areas Ordinance, as well as the comment received during Planning Commission Hearings (record open 4/25-5/2/2017). The "Comment #" in the first column may be used to identify which submission has commented on a particular topic/section in the "Summary Comment and Response Matrix."

| Critical Areas Ordinance (Title 19) Public Comment on Draft (3/1/17-3/31/17) COMMENT SUMMARY | | | | |
|---|-----------------|------------------------|---------------|---|
| Comment # | Topic(s) | Method Received | Name | Summary |
| 1 | General | Email | Doug Lyons | Ordinance unnecessarily restricts development; suggests formation of citizens committee to review with the idea of reducing regulations; rather than applying regulations county-wide, select areas for development with lesser regulations; Private property owners should have more latitude to develop their property. |
| 2 | General | Web | Hank Anderson | Zooming in or out on the maps takes a very long time; no way to print just a portion |

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| 3 | 19.300 FWHCA | Web | Justin Morgan | Requesting that the section of Enetai Creek north of Helm St. in Bremerton be re-designated from Fish Habitat to Non-Fish Habitat; Request the no development buffer guidelines for a fish bearing stream be reduced from 150 ft. to 50 ft. |
| 4 | 19.200 Wetlands | Web | Tom Coleman | Trail building in KC parks should meet US Forest Service Guidelines; experienced and trained trails volunteers should be consulted in decisions regarding trail locations, type and restrictions. |
| 5 | General (Ag.) | Web | Jerry Darnall | County is proposing to require BMPs and an established farm plan.Cite the RCW's that give the County the authority to redefine beyond state statutes "existing and ongoing agriculture". |
| 6 | Definitions (19.150) | Web and PC Hearing | Ron Gillespie | Mitigation, specifically for wetlands, should not be allowed where "create" is the method. Cannot compensate for wetlands by creating where one doesn't exist; Delete "creation" from 19.150.465(A) and all of (B). ; Mitigation of wetlands by moving it somewhere else is not effective, an original wetland will function better than man made. Prohibit this type of mitigation(creation). if you can't build on the property, you cant' build on it. |

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| 7 | General- Buffers | Letter (3/15) | (KAPO?) | What is the CAO intending to protect? Disagree that buffers provide measurable protection; Replace "buffers" with "no-pesticide, vegetated hardscape setback of 25 feet" from critical areas; Add "all water falling on a parcel shall be percolated into the ground without leaving the parcel". <i>Swinomish</i> case: County may depart from BAS if it provides a reasoned justification for such departure; Maps of non-conforming parcels (not provided?)- no harm proven from existing structures inside what are now deemed critical areas/buffers. Failure to treat highway runoff as only "impactful study" showing fish mortality cause. |
| 7 | 19.100 Applicability | Letter (3/15) | (KAPO?) | .110 precludes gardening, etc; No benchmarks; Replace "existing native vegetation" with "functionally equivalent vegetation". |
| 7 | | | | .130(B) - Danger Trees, why would anyone say they have a danger tree if common practice is to just quietly but down? |
| 7 | | | | .155 Notice to Title- should be restricted to only the critical area, not buffer because this changes over time |
| 7 | 19.200 Wetlands; | Letter (3/15) | (KAPO?) | .205(A) - Enhancement and GMA policy of no net loss [do not] fit together; What is the BAS justification to reduce buffers; |
| 7 | | | | .225(A) in current CAO, regarding Docks, should be shown as strike-out, but should not be deleted because applies to lakes and wetlands |
| 7 | 19.300 FWHCA | | | (D) - credibility of wildlife corridors |
| 7 | 19.400 Geohazards | | | 19.400 - No way to track the markup. |

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| 8 | 19.200 Wetlands | Web | Frank Stricklin | Is habitat fragmentation addressed in the CAO? How many trails are enough in Kitsap open spaces? Forested wetlands often overlooked due to types of vegetation present. Hatchery vs. wild fish is a moot controversy is there is no habitat for either. |
| 9 | 19.100 Intro | Web | Tom Nevins | .130(A)(3)- 20% expansion statement could be misinterpreted, consider restatement |
| 9 | | | | .135(A)(1)- Variances, consider defining or rewording "in the vicinity" because open to interpretation |
| 9 | | | | .135(A)(3)- "variance will not result in substantial detrimental impacts...", consider removing word "substantial", which implies that the impact to the critical area is detrimental and creates a "net loss of function" |
| 9 | | | | .135(A)(4)- insert "minimum" before "permitted use", used by developers to get the maximum use of the lot, usually to the detriment of critical areas |
| 9 | | | | .140(A)(4)- insert "minimum" before "reasonable" |
| 9 | | | | .150- Appeals, who might be considered an "affected party"? Consider removing "by the applicant of affected party". |
| 9 | 19.150 Definitions | Web | Tom Nevins | .545 "Reasonable Alternative"- Replace "lower" with "minimal", or redefine as "an activity that could feasible attain or approximate a proposal's objectives with no net loss of critical areas quality, function and values." |
| 9 | 19.200 Wetlands | Web | Tom Nevins | .210 (B)(1)- Cat. 1 Wetlands, Remove "or unique" because "rare" is the larger category that includes all "unique wetland types". |
| 9 | 19.300 FWHCA | Web | Tom Nevins | .315 (A)(3)- Provisions for decreasing buffer, What is the format of the consultation with WDFW, other than the review of the HMP, that would lead to an admin. reduction in buffer width? |

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| 9 | | | | .315 (G) - Farm resource conservation plan, these agreements can result in major deductions in buffer protected areas as the conservation district often does not adhere to buffer guidelines and KCD is not a regulatory body. |
| 9 | 19.400 Geohazards | Web | Tom Nevins | .425(C) - word "seismic" should read "landslide" in intro sentence. |
| 10 | 19.150 Definitions | Email | P. Anderson | .170 Bog and .315 Fen- Use definitions in 2016 Wetland Guidance |
| 10 | | | | .325 Fish and wildlife habitat conservation areas-for clarity and consistency with WAC 220-660 and RCW 90.48.020 recommend revised definition |
| 10 | | | | .395 Grazed wet meadows- Recommend striking this definition, not a term used by Ecology or the Corps for wetland regulation |
| 10 | | | | .430 Hydric soils- For consistency with BAS and state and federal delineation standards, recommend replacing with definition from Field Indicators document |
| 10 | | | | .465 Mitigation- for consistency with WAC 197-11-768 recommend revision |
| 10 | | | | .480 Ordinary high water mark- recommend revision for consistency with RCW 90.58.030(2)(c) |
| 10 | | | | .495 Pond- for clarity and consistency with BAS, Kitsap County SMP and other state and federal statutes, recommend deleting |
| 10 | | | | .700 Wetlands, isolated- Replace with 2016 Wetland Guidance definition. |
| 10 | 19.200 Wetlands | Email | P. Anderson | .205(D) Prevent turbidity and pollution of wetlands and fish or shellfish bearing <u>other regulated waters of the state;</u> |

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| 10 | 19.200 Wetlands | Email / PC Hearing | P. Anderson | .210(B)(3)and(4)- Recommend adding the following conditions to the exemptions for small Cat.III and IV wetland: <u>Are not associated with riparian areas or their buffers;</u> <u>Are not associated with shorelines of the state or their associated buffers;</u> <u>Do not score 5 or more points for habitat function based on the 2014 update to the Washington State Wetland Rating System for Western Washington: 2014 Update (Ecology Publication #14-06-029, or as revised and approved by Ecology);</u> <u>Do not contain a Priority Habitat or a Priority Area1 for a Priority Species identified by the Washington Department of Fish and Wildlife, do not contain federally listed species or their critical habitat, or species of local importance identified in Chapter XX.XX; and</u> <u>Wetlands less than 1,000 square feet that meet the above criteria and do not contain federally listed species or their critical habitat are exempt from the buffer provisions contained in this Chapter.</u> |
| 10 | 19.200 Wetlands | Email / PC Hearing | P. Anderson | .220 C(1)(b)- Administrative Buffer Reductions- recommned striking this provision, not supported with BAS. Reductions in buffer width should only be allowed through buffer averaging. We support the proposed buffer averaging provisions in the current draft.; Most recent recommendations in 2016, based on 2013 science review- if anything, buffer widths should be increased for effectiveness, but made policy decision to not make that recommendation due to the impact to property owners; Beyond 25% reduction moves beyond a "moderate risk approach" |
| 10 | | PC Hearing | | Re: buffer reduction if degraded buffer is enhanced- if buffer is not fully funtional, it is better to have an increased buffer width even with enhancment efforts; state can assist with making this determination |
| 10 | 19.200 Wetlands | Email | P. Anderson | 19.200.225 (B) Agricultural Restrictions- Recommend striking second sentence provision that "restrictions shall not apply to those wetlands defined as grazed wet meadows, regardless of their classification, only where grazing has occurred within the last five years", because not consistent with resource protection; |
| 10 | | | | .225(F) Utilities and (G) Parks- Since work in wetlands or in-water will require state and federal approval, recommend adding the following: Before beginning work in-water or within wetlands, it shall be the utiliites responsibility to ensure all other required state and federal approvals have been obtained. |

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| 10 | 19.200 Wetlands | Email | P. Anderson | .250 C Wetland Replacement Ratios TABLE 19.200.250- Science has not sufficiently evolved to create or re-establish bogs or Wetlands of High Conservation Value, Recommended replacing "Case-by-case" to "Not considered possible". Also, change "6:1 Rehabilitation" to "Case-by-case" in the Rehabilitation column for these wetland types. |
| 11 | General | Email | Dean Jenniges (KAPO) | Historical context of 2005 CAO update; Recommends a total rewrite of the 2017 CAO. |
| 11 | | PC Hearing | | County responses are dismissive, planning commission not representing the public |
| 11 | | Email/PC Hearings | | Swinomish Indian v. Western Washington to be considered, including use of established baselines and no requirement to establish mandatory riparian buffers. |
| 11 | | PC Hearing | | CAO is arbitrary and discriminatory per case law |
| 11 | | PC Hearings | | Disagrees with interpretation of GMA; CAO not required by state law, not specifically in GMA |
| 11 | | | | Recommends DCD and Planning Commission read the document and consider the court case of Presbytery of Seattle v. King County and the "3 prong due process test" |
| 11 | | PC Hearing | | concern with streams and isolated wetlands, Clean Water Act only protects waters that influence other water locations |
| 11 | 19.100 Intro | Email | Dean Jenniges (KAPO) | .105 (A) - If critical areas so important, how does the County justify mitigation, and conflicts with policies 4 and 5 |
| 11 | | | | .110(D) only adds permitting requirements where there were none; |
| 11 | | | | .115 - relationship to other county regulations is without criteria and arbitrary |
| 11 | | | | .120 (D)(2)(c) - written request for extension, but no DCD required response time, section is arbitrary and no criteria |
| 11 | | | | .130 (A) Existing nonconforming structures section is too confusing |
| 11 | | | | .130 (B) Danger Tree Removal- criteria should be removed, provides no basis for allowing property owner to make determination of liability |

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| 11 | 19.200 Wetlands (general) | Email | Dean Jenniges (KAPO) | Entire section without a baseline of statistics which could be used to establish if a wetland was disturbed or not. Wetlands are only of value to wildlife which uses them for habitat. Does not take a specialist to figure out what and where a wetland is. This is an added cost to the developer and needs to be rewritten (see <i>Swinomish</i> case). |
| 11 | | PC Hearing | | How can wetland value supercede value of property owner rights and land value; how are they critical if they can be mitigated? |
| 11 | 19.200 Wetlands | Email | Dean Jenniges (KAPO) | .220(B)(1)(f) - tree protection rules, how did these come into existence? Entire section restricts property owners ability to determine landscape; why were all of the distance changes to buffers increased? |
| 11 | 19.400 Geohazards | Email | Dean Jenniges (KAPO) | 19.400.415 Does DCD have the expertise to add this entirely new paragraph? |
| 11 | | | | .435(A)(4) -why has native vegetation become such a priority over ornamental or other types of vegetation? |
| 11 | | | | .435(B) - What seismic maps are used and what is their accuracy as permitting is subject to that information? |
| 12 | 19.200 Wetlands | Web | Terry Fischer | Lives on property owned by family for over 40 years; was one of the main property owners next to the Shadowfax development in Silverdale, but was never notified of the plans or would have commented; personal knowlege of wetlands and seasonal stream in this area, but told by County that "no wetlands exist on that parcel", then that wetlands were only in on a small portion; the wetlands have been dimished to a small area, no buffer and is used for construction storage / filled. "Vehemently opposed to what is happening....and the destruction of wetlands crucial for the survival of many of our wildlife." |
| 13 | Genreal (maps) | Web | Pat Fuhrer | Why aren't eagle nests, aquifer recharge areas and critical drainage areas not shown on the Building Limitations Map; those overlays are also "building limitations" and one could get the wrong idea that there are no limitations on a parcel, when in fact there are others not referenced. |

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| 14 | General | Letter (3/27) | M. Gustavson (KAPO) | Requesting a one year delay; Table of contents needed |
| 14 | | | | No "science support document" found to support changes in buffers, as required and was provided in 2005 |
| 14 | | PC Hearing- Written | | Submit 2005 document with no changes and it won't be current with state law and decisions; Pass currently proposed draft and will be challenged |
| 14 | | Letter (3/27) / PC Hearing- Written | | "no identification of the creatures warranting protection", which means we have no baseline populations or way to measure progress in a Water Quality Monitoring Program or a Salmon Habitat Monitoring Program, required under Swinomish; no benchmarks provided; no local creatures listed as critical (WAC refernces in definitions are incorrect);What species are intended to be protected, they are not listed in the draft and the document needs to list them and benchmarks for each; 11 supreme course cases and at least 50 violations in draft |
| 14 | | Letter (3/27) / PC Hearing- Written | | homes are already located in critical areas with no apparent harm;Prior to 35 foot setback rule, nobody had ever reported a problem and building constructed up to edge of streams, still no proven harm; 95% of Kitsap are in mapped critical areas and therefore parcels/structures are nonconforming without any harm proven or measureable environmental benefit; \$30-40k added to permit costs for single family home, contrary to affordable housing |
| 14 | | | | the County is not required to follow BAS in the record if it provides a "reasoned justification for such departure"; supports the use of standard, vegetated setbacks of hardscape, but only to protect water quality and no further buffers |

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| 14 | | | | CAO effects more citizens than any other document, but is often not read by Commissioners and staff have little oversight; current draft is illogical, full of errors and violations of court decisions |
| 14 | | | | Problem intended to be solved is not stated; |
| 14 | | | | buffers do not provide measurable protection for these critical features, creates uncertainty for property owners, resulting in inaction (economic impact); the average parcel must provide five technical studies, significantly driving up the cost. |
| 14 | | | | Dept. of Ecology threatened the county would be "out of compliance" and ineligible for grants. The Swinomish decision removes this threat of non-compliance and Spromberg study shows us what is needed to clean water |
| 14 | | | | In 2005, there was a promise of annual reviews of CAO effectiveness, but this was not conducted and there is no Western Washington science supporting buffers are needed or effective |
| 14 | 19.100 Introduction | Letter (3/27) / PC Hearing-Written | M. Gustavson (KAPO) | .110 (A) and (F) Applicability- the wording of this section makes it illegal to move any dirt or plant material without first obtaining a permit and violates <i>Citizens Alliance for Property Rights v. Sims</i> and is vastly over-reaching. |
| 14 | | | | .110(G) Applicability Area of Review- "Largest potential buffer or setback" must be restricted to the parcel in question. Since virtually all rural parcels are developed, there can be no measurable positive effect of Title 19's requirements, but adds thousands to construction costs |
| 14 | | | | .120(B) Review Authority- Authority granted to DCD violates separation of powers and is an example of the dangers of administrative law; |
| 14 | | | | .120(C) - Second sentence grants DCD authority to revoke permits already granted, violates WA Supreme Court case in the Columbia River gorge where appeal unsuccessful when lodged during construction; |
| 14 | | | | .130(A)(4) - requires construction to begin within 24 months, no allowance given to time to obtain permit |
| 14 | | | | .135 - disallowing construction enjoyed by surrounding properties developed prior to date of the ordinance may violate Lucas, and "substantial detrimental impacts" fails to provide benchmarks to define "substantial" |

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| 14 | | | | .140 reasonable use exception- There is no minimum "reasonable use" defined in Title 19 and "picnic table" definition overturned in Lucas, previous planning commission voted to recommend including construction of a single-family residence as "reasonable use"; Precluding a development because it poses an "unreasonable threat" to the "welfare on(or off) the development proposal site has been used to object to increased traffic, etc., potentially contradicting court cases; "Hearing examiner shall make the final decision" in reasonable use cases violates decisions that grant access to courts. Need to list relevant court cases in 19.150.550 |
| 14 | | | | .150 Appeals- Administrative law proceedings are considered informal and no record is made of the appellant's testimony, therefore there is no record on which to base an appeal to superior court |
| 14 | | | | .155 Notice to Title- recommend notice to only describe boundaries of the critical area, as buffer requirements change; "runs with the land" and is a permanent restrictive document; |
| 14 | | | | In 2005, KAPO provided 3800 peer reviewed studies proving 9-16 foot grass buffers provide adequate water quality protection in western Washington, but County relied on an east coast study instead; What BAS is being used by DCD? No required "Science support document" has been provided; Attached study "Coho Salmon Spawner Mortality in Western US Urban Watershed: Bio-filtration Prevents Lethal Storm Water Impacts, Julian A. Spromberg, et al., Journal of Applied Ecology, 8 October 2015; |
| 14 | | | | .160 General application requirements- Requires the applicant "to confirm the nature and extent of any critical areas on or adjacent to the property", violating the privacy of the neighbor; |
| 14 | | | | .170 Enforcement- This section must state a warrant must first be obtained by the county employee and reference McCready. |
| 14 | 19.150 Definitions | Letter (3/27) | M. Gustavson (KAPO) | Add " Benchmarks " |
| 14 | | | | In " Best management practices " and " Buffer ", add "or functionally equivalent" after "native" |
| 14 | | | | " Danger tree "- WAC refers to logging and CAO expands this to include buildings, with regulations about arborists, permits, etc., none of which are mentioned in the WAC; |

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| 14 | | | | " Director "- clarify "authorized designee" and needs to be written with time and event specificity if representative is to inspect private land; |
| 14 | | | | " Erosion hazards "- delete coastal reference because this is in SMP |
| 14 | | | | " Fish and Wildlife Habitat Conservation Areas " and " Habitats of local importance "- no criteria or benchmarks to designate, violates Sims and Swinomish; |
| 14 | | | | " Functions and values "- requires specificity and benchmarks per Swinomish |
| 14 | | | | " Hazardous Substance "- only justification for buffers must require the same testing criteria in WAC |
| 14 | | | | " Impervious surface "- needs to allow for improved land to accomodate water runoff through infiltration techniques and should incorporate "Low impact activities" and "Retention facilities" into this defintion |
| 14 | | | | Add " Impervious Surface Wetland and Stream Setback " (see letter for details), implentation of this definition and the 25' setback therein, would eliminate the requirement for wetland and stream buffers from CAO. |
| 14 | | | | " Lot "- definition needs to be reinserted |
| 14 | | | | " Mitigation " and " Out of kind compensation "-definition violates decisions in Koontz, Nollan, Dolan, Hawkes Co., Sackett, and Lucas; |
| 14 | | | | " Non-conforming use or structure "- deletion of this definition violates US Constitution; |
| 14 | | | | " Performance-based development " and " Permit "- deletion is not understood |
| 14 | | | | " Practical alternative "- must be directly related to issue (nexus and proportionality) |
| 14 | | | | " Reasonable Use "- a true minimum reaasonable use needs to be defined |
| 14 | | | | " Re-establishment "- should be wetland re-establishment |
| 14 | | | | " Refuse "- delete, refuse is unacceptable in ALL cases and on all land per County code |
| 14 | | | | " Seismic areas "- add "two categories are mapped: 'Severe' and 'Moderate' seismic areas" |
| 14 | 19.200 Wetlands | Letter (3/27) | M. Gustavson (KAPO) | Dept. of Ecology places counties/cities in a difficult positon to defend prescriptive buffers, without defining, in measurable terms, chemical risk to wetlands or creative solutions |
| 14 | | | | There is a disparity of restrictions on stormwater placed on homeowners, when virtually no such restrictions apply to public facilities (roads, buildings, parking lots) |

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| 14 | | | | .205(A) - if wetlands so valuable for groundwater percolation, why are livestock ponds exempt?; In first sentence, replace "and increase" with "of", delete "and enhancing, when required,...", GMA does not require an increase of these features and functions; |
| 14 | | | | .205(D) - delete "...or shellfish..", as this is covered in the SMP |
| 14 | | | | .215(A) - delete "...or its largest potential width.." |
| 14 | | | | .215(C.1) - delete paragraph 1 |
| 14 | | | | .215(C.2) - delete "...or its standard buffer..." (see proposed impervious setback language) |
| 14 | | | | .215(C.2)(a.1 and 2) - Replace "250 feet" with "100 feet", which would be same as well and septic drain field requirements; Replace "standard buffer" with "...25 foot impervious Surface setback..." |
| 14 | | | | .215(C.2)(d) and (e) - delete in sentence 2, "...not.." and "...buffer width modifications..." and add "The 25 foot impervious surface wetland and stream setback shall remain in grass coverage and not be otherwise modified." |
| 14 | | | | .220 - replace with .150.422 recommendation |
| 14 | | | | Table (A) Land use impact, is redundant in light of .150.422 recommendation and because the only creature might be salmon and no benchmarks are set, the table is null; .220(B)(1)Wetland buffer requirements and (2) Buffer Averaging- delete entirely, buffer averaging is strictly a punishment and is of no benefit to the wetland and drives up housing costs |
| 14 | | | | .220(B)(3) Variance- replace text with "No variances shall be allowed to 19.150.442" |
| 14 | | | | .220(C) Fencing and signs- delete buffer references, place construction fences, etc. 10 feet from wetland during construction." |
| 14 | | | | .220(D) - use 19.150.442 recommendation to replace this section |
| 14 | | | | .220(E) -delete section because redundancy to (C) and (D) |
| 14 | 19.300 FWHCA | Letter (3/27) | M. Gustavson (KAPO) | Comments in this section reflect <i>Swinomish</i> and the <i>Sromberg</i> study; Replace "buffers" with "25 foot impervious surface setback" |
| 14 | | | | .305(D) Line D is added, without underline indication, and without proof there are wildlife forms in Kitsap County that migratory within the County. Need to identify species, requirements and benchmarks |

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| 14 | | | | .310(A.2)- should list species that qualify as Class I and Class II, no such wildlife are listed in WAC 232-012-011 or WAC 232-12-014; |
| 14 | | | | . 315- replace "buffer width and minimum building setback" column heading with "25 foot impervious surface setback in addition to requirements of Chapter 19.400 "Geological Hazardous Areas". |
| 14 | | | | .315 (A)(2)- incorporate infiltration or filters described in 19.150.442 recommendation |
| 14 | | | | .315(A)(3)- delete, already at minimum acceptable |
| 14 | | | | .315(A)(8)- delete, redundant with recommendation for .150.442 |
| 14 | | | | .315(D)- bio-filters described in .150.442 shall be installed to treat road runoff at all stream crossings |
| 14 | | | | .315(G)(2)- replace "encumbering the buffer" with "encumbering the stream and its impervious surface setback" |
| 14 | | | | .315(F)(4)- In second sentence, replace "buffer" with "habitat". |
| 14 | | | | .315(G)(3) Land use division- directly conflicts with Kitsap County Comprehensive Plan Reasonable Measures for maximum lot sizes in urban areas |
| 14 | 19.400 Geohazards | Letter (3/27) | M. Gustavson (KAPO) | Replace "buffer" with impervious surface setback" This does away with the 15 foot setback in addition otherwise found throughout Title 19. |
| 14 | 19.700 Special Reports | Letter (3/27) | M. Gustavson (KAPO) | .710(B)(2) Wetland Delineation Report- delete "or within two hundred fifty feet of", as this would require the applicant to enter and survey a neighbors property, same applies to .710(B)(6) |
| 14 | | | | .710(B)(8)- delete "including vegetative, fauna, habitat", as a thorough study of these characteristics could easily become a large study with limited value |
| 14 | | | | .710(B)(12)- delete "and buffers" , as they change over time and would be redundant with .150.442. |
| 14 | | | | .715 Wetland mitigation report- needs exhaustive simplification and is far too complex and costly |
| 14 | | | | .715(F)(9.c)- delete "buffer", word is redundant and implies a required 300 foot buiffer, which is often not the case |
| 14 | | | | .720 Habitat management plan- must display a list of critical habitat so applicants know what they are dealing with |
| 14 | | | | .720(D)(1)(a-c)- delete, redundant with .150.442 |

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| 14 | | | | .730(A)(2) Hydrogeological report- a report of well heads within 1000 feet of the project violates McCready and 4th Amendment. |
| 14 | 19.800 Appendices | Letter (3/27) | M. Gustavson (KAPO) | Appendix E- delete ..."and buffer"... from title and text as they are not a hard requirement; |
| 14 | | | | Appendix H- Alteration form- delete this form. |
| 15 | General | Letter (3/27) / PC Hearing | Jack Hamilton | Supports KAPO testimony; added cost to property owner and affordable housing goals |
| 15 | 19.100 Introduction | Letter (3/27) / PC Hearing | Jack Hamilton | 19.100.110 precludes gardening, etc; No benchmarks; 19.100.130(B)- Danger Trees - people will just remove the tree without providing notice; ; Notice to Title- should be restricted to only the critical area, not buffer because this changes over time; Replace "existing native vegetation" with "functionally equivalent vegetation". |
| 15 | | | | 19.100.130(A)(3) - 20% expansion statement could be misinterpreted, consider restatement; 19.100.135(A)(1)- Variances, consider defining or rewording "in the vicinity" because open to interpretation; (A)(3)- "variance will not result in substantial detrimental impacts...", consider removing word "substantial", which implies that the impact to the critical area is detrimental and creates a "net loss of function"; (A)(4)- insert "minimum" before "permitted use", used by developers to get the maximum use of the lot, usually to the detriment of critical areas; 19.100.140(A)(4)- insert "minimum" before "reasonable"; 19.100.150- Appeals, who might be considered an "affected party"? Consider removing "by the applicant of affected party". |
| 15 | | | | 19.100.105 (A) - If critical areas so important, how does the County justify mitigation, and conflicts with policies 4 and 5; (D) only adds permitting requirements where there were none; 19.100.115- relationship to other county regulations is without criteria and arbitrary; 19.100.120 (D)(2)(c)- written request for extension, but no DCD required response time, section is arbitrary and no criteria; 19.100.130 (A) Existing nonconforming structures section is too confusing; 19.100.130 (B) Danger Tree Removal- criteria should be removed, provides no basis for allowing property owner to make determination of liability. |

| Critical Areas Ordinance (Title 19) Public Comment on Draft (3/1/17-3/31/17) COMMENT SUMMARY | | | | |
|--|----------|-----------------|------|--|
| Comment # | Topic(s) | Method Received | Name | Summary |
| 15 | | | | .105 (A) Statement of purpose - State a clear intent and commitment to protect private property rights as required by the Constitution and GMA - Needs a clear intent and commitment to protect the rights of private property as required by GMA and Constitution, including in policies (what are the specific GMA/ other authority references to support the existing policies?) Who determines impact and course of action? Could result in mitigation on another's property. |
| 15 | | | | .105 (B) Include as Policy Goal number 1 a policy that adheres to the Constitution and GMA to protect individual property rights and hold those rights protected from administrative takings and other infringements under this title. |
| 15 | | | | .105 (B.1) - Where is the specific GMA reference that supports this policy? |
| 15 | | | | .105 (B.2) - Where is the specific GMA reference that supports this policy? |
| 15 | | | | .105 (B.4) - Exactly what are adjacent lands? Who determines that status? When is the determination made? If "adjacent" is not critical why would critical guideline apply? This is an abuse of property rights. |
| 15 | | | | .105 (B.6) - What activities cause detrimental affection and who determines that "When is it determined?" |
| 15 | | | | .105 (B.7) - What authority exists for this policy? This directly contradicts provisions of the Constitution . |
| 15 | | | | .105 (B.9) - Is "stormwater" any precipitation that falls to the ground in Kitsap County? If I catch the water from my roof in a rain barrel or cistern is it "stormwater" under this title? |
| 15 | | | | .105 (B.12) - How do we determine if an area was previously impacted and who gets to choose what course of action is to be followed? This could have property owner A trying to carry out mitigation on property B. Do you understand the concepts of private property? |
| 15 | | | | .105 (B)6- what activities cause detrimental affect and who decides? |
| 15 | | | | .105 (B)9- Is "stormwater" any precipitation falling to the ground in Kitsap County? Does this include water captured in a rain barrel? |

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| 15 | | | | .110 (A) Applicability - What happens when a permit is not required? Does the property owner proceed at his own risk because some third party may determine that some kind of critical area exists on the property? Definition requires tightening to remove potential abuse by authority. |
| 15 | | | | .110 (B) Applicability - Once again extension of the title to “adjacent” areas is not appropriate. The specific land is either critical and regulated or not regulated under this title. The ability for authority to extend applicability without constraint or legislative approval is not appropriate. |
| 15 | | | | .120 Review Authority - Elected commissioners are the original delegated authority in GMA, not the Director or employees; make the regulation clear or do not implement at all |
| 15 | | | | .120 Review Authority - Time limitations: Written request time limit on applicant, but no DCD required response time (arbitrary and no criteria); authority granted to DCD violates separation of powers; grants DCD authority to revoke permits already issued; extension should be granted unless there are exceptional conditions that would preclude such- appears to be a lack of understanding for the process and timelines associated with development |
| 15 | | | | .120 (A) - Delegating total responsibility to the “Department” or the director to act on what they perceive to be the intent of the legislative body or their interpretation of GMA is not consistent with the original delegation of authority to the elected Commissioners. The Commissioners, in their legislative actions, are responsible to the citizens of the county. Appointed Directors or general employees are not. |
| 15 | | | | .120 (B) - This is a clear example of why delegating authority to an appointed position is not appropriate. The title effectively places the burden of implementation, including a determination of both title intent and the legal basis for any action on the Department. A citizen has a specific right to know the actual meaning of a law or regulation that they are required to comply with. If ignorance of the law is appropriate then keeping the citizen ignorant is even more inappropriate. It is not up to a citizen to guess what the title intends. Either make the title clear or do not enact it. |

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| 15 | | | | .120 (C) - This provision states that previous permits and conditions are “grandfathered “except”. Either they are or they are not. This effectively leaves the property owner at risk for a later determination by “the department”. How does that protect property rights? |
| 15 | | | | .120 (D.2) - Why stress over a time extension? County doesn't understand the development process and associated timelines. Does permitting time include time required for studies, reports, and public hearings? If so, why is that time not granted to the requester so they actually have time to get the project underway? The county should recognize that until requirements are met and the permit actually issued, the developer will be at risk to obtain the necessary funding for the project. The extension should be granted lacking exceptional conditions that would preclude the extension. |
| 15 | | | | .125 (D) - Exemptions What is a new or adverse impact? Who determines it? Would it have to be a condition that did not exist at previous review? Who is responsible to authenticate the “newness”? |
| 15 | | | | .125 (E) - What are “best management practices”? Where are they documented? What title requires citizens of the county to implement these practices? Who determines if the practices are being followed? What if the practices are not effective? |
| 15 | | | | .125 (E) - What is a "new" or "adverse impact", who determines / authenticates "newness"? |
| 15 | | | | .125 (E) - What are the exact "best management practices" and where are they documented so citizens may implement? What if they are not effective? |
| 15 | | | | .130 (A) Existing Nonconforming Structures - Administrative taking because it allows redefining of conditions (critical area/buffer) after the fact |
| 15 | | | | .130 (A.2) Standards for existing development - This is an administrative taking via redefining a pre-existing condition that was previously acceptable. This is not an argument against properly defining a critical area but against the open ability to redefine such areas after the fact. |
| 15 | | | | .130 (B) Standards for existing development - If a tree poses a danger to people or property, the property owner has a duty and the right to correct that situation. Consulting with an approved arborist or getting County approval is not a part of that duty process. The concepts of replanting and restoration are inappropriate. Who is responsible if a tree falls as a consequence of natural events (windstorms)? |

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| 15 | | | | .135 (A.1) Variances - disallowing construction enjoyed by surrounding properties developed prior to ordinance may be violation of <i>Lucas</i> ; highest and best use should be determined by the property owner and that is the level the County taxes the property at expense of the owner |
| 15 | | | | .135 (A.2) Variances - Why is a "public hearing" required? What specific law(RCW) allows someone to comment on the use of another's property? |
| 15 | | | | .135 (A) Variances - "public utility" not necessarily the property owner? Has rights and priveleges superior to a/the property owner? |
| 15 | | | | .135 (A.1) Variances - Property rights are not based on "what we let the other guy do" but are based in highest and best use as determined by the property owner. As described in the ordinance this would be a takings issue. The County bases property taxes on the highest and best use so the property owner should be able to expect that level of use. |
| 15 | | | | .135 (A.2) Variances - How would a new owner have knowledge of actions taken by a previous owner? Language requires a current owner to know the history of parcel even if not provided at the time of purchase. What is the legal basis? |
| 15 | | | | .135 (A.6) Variances - Why is a mitigation plan required for use of private property? What mitigation requirements can be imposed and who determines the requirements? |
| 15 | | | | .135 (B) Variances - Why would a permit be needed?; critieria should be removed; homeowner should determine own liability |
| 15 | | | | .135 (B) Variances - Why is a "public hearing" required? How is a non-owner allowed to affect the use of another's private property? What RCW, not a WAC, is used as legal basis for this requirement? |
| 15 | | | | .135 (F) Variances - As proposed, a public utility has rights and privileges superior to the property owner? How does that work? |
| 15 | | | | .140 Reasonable use exception - Highest and best use is determined by individual property owners, not the County. Again see Constitution Article I sections 3 and 16. |
| 15 | | | | .140 Reasonable use exception and .145 - are administrative takings and violate the constitution; Federal court for civil rights and state District court for taking (Article 1, ion 3 section 3) |
| 15 | | | | .140 Reasonable use exception - Articles 140 through 145 are the classic definition of an administrative taking and a direct violation of the constitutional protections guaranteed by the State. |

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| 15 | | | | .140 Reasonable use exception - The property owner would more properly file suit in Federal District Court for a taking by the County and a violation of civil rights and a suit in state District Court for a taking contrary to the provisions of Article I,ion 3 section 3 (PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law) and for failure to comply with section 16 EMINENT DOMAIN.. I Section |
| 15 | | | | .150 (A.1) Appeals - This presumes that the Hearing Examiner has clear and documented evidence of the intent established by the Commissioners at the time of enactment of this Title. Since the Hearing Examiner is not a judicial entity they can neither establish case law or rule based on an opinion of intent. Would the appeal process not be more appropriate to include the Commissioners? That inclusion might also provide the opportunity for the Commissioners to recognize that the Title is not working as intended, that the department is not executing the program as intended, or that the basic assumptions on which the title was created are not correct. |
| 15 | | | | .150 (A.2) Appeals - This presumes that the Hearing Examiner has clear and documented evidence of the intent established by the Commissioners at the time of enactment of this Title. Since the Hearing Examiner is not a judicial entity they can neither establish case law or rule based on an opinion of intent. Would the appeal process not be more appropriate to include the Commissioners? That inclusion might also provide the opportunity for the Commissioners to recognize that the Title is not working as intended, that the department is not executing the program as intended, or that the basic assumptions on which the title was created are not correct. |
| 15 | | | | .150 (A.3) Appeals - This presumes that the Hearing Examiner has clear and documented evidence of the intent established by the Commissioners at the time of enactment of this Title. Since the Hearing Examiner is not a judicial entity they can neither establish case law or rule based on an opinion of intent. Would the appeal process not be more appropriate to include the Commissioners? That inclusion might also provide the opportunity for the Commissioners to recognize that the Title is not working as intended, that the department is not executing the program as intended, or that the basic assumptions on which the title was created are not correct. |
| 15 | | | | .150 Appeals - administrative law proceedings provide no record on which to base an appeal to superior court; the Commissioners, not the Hearing Examiner should hear appeals because of evidence of inent of the Title. |

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| 15 | | | | 19.100.155 Critical area and buffer notice to title - Under criminal law, this requirement would justify a charge of extortion. What authority does the County have to so encumber private property and use this kind of threat to force a property owner into compliance against his best interests and the provisions of the Constitutions? |
| 15 | 19.100 Introduction | Letter (3/27) | Jack Hamilton | In fair application of this section of the Title it would be incumbent on the county to identify every parcel for which title exists or could be issued on which a critical area exists so that proper notice could be recorded. To not do so places an unusual burden on those who the County would force into notice to title and would be a violation of the "equal protection under the law" criteria. |
| 15 | | Letter (3/27) and PC Hearing | | .155 Notice to Title - Restrict only to critical area, not buffer; land division approvals should not "encumber the buffer", but rather just the "stream and its impervious surface setback"; justifies a charge of extortion- what authority does the County have to do this? All parcels with critical areas need to be identified and recorded so as not to violate "equal protection under the law" |
| 15 | | | | .160 (A) General Application Requirements - This is either required or not. Making a "recommendation" that can later be used against an applicant is inappropriate. |
| 15 | | | | .160 (E) General Application Requirements - If all the blanks are filled in, what in the world are we doing? If the content is technically correct, will the County representative reviewing the document have the technical qualifications appropriate to the task and at least equal to those required of the individual completing the application? How will the County document those qualifications for their personnel? |
| 15 | | | | .160 (F) General Application Requirements - Since there are so many "at the discretion of the department" or "as determined by the Director", how does the applicant know what is required to comply with this provision? Please do not refer me back to the "recommended" initial conference. |
| 15 | | | | .160 (G) General Application Requirements - Contradicts previous statement that the County locates "critical areas" generally and not exactly. How can an applicant create a site plan with specific location data? Using the County or requiring the applicant hire a consultant is inappropriate. This language requires a property owner to declare portions of the land unusable and, no longer enterable, and then gives the County authority to expand that determination. |

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| 15 | | | | .160 (H) General Application Requirements - I approve the first three words of this paragraph because they clearly identify what this entire document is about. That said, an environmental review should be valid in perpetuity. A new review should not be required. |
| 15 | | | | .165 Inventory provisions - This demonstrates that the county is not sure of "critical area" locations. Confirmation of a critical area's existence requires a survey when a permit is requested. There are at least two problems with this approach. First, critical area protections should apply regardless of permit status since a permit request cannot and does not constitute the initial definition of a critical area (only the opportunity for the County to define a new critical area). Common restrictions should be applied, not restrictions to a particular parcel. Using discretion to apply regulations is incorrect and illegal. Second, why would a property owner apply for a permit to complete a minor renovation? The entire ordinance is an abuse of individual property rights. |
| 15 | | | | .170 Enforcement - Must state a warrant must first be obtained by the county employee What training, beyond knowing code, do employees have to investigate and issue orders? If an incorrect order is given, is the County willing to accept fiscal and legal liability?; Department determinations should not exist (what is "imminent and substantial " danger to the environment?) |
| 15 | | | | .170 (A) Enforcement - How are "employees" trained to be properly qualified to investigate and issue orders? If a fiscal and legal impact might be imposed on a property owner, a significant amount of training should be required for those making assessments and decisions. If an "employee" issues an incorrect order, is the County willing to accept fiscal and legal liability without litigation or will the property owner need to bring suit to have themselves fully restored? |
| 15 | | | | .170 (B) Enforcement - This paragraph could be reduced to –"County inspectors will not enter onto private property without prior permission of the property owner or under the provisions of a duly issued warrant. In the case of leased property the lessee, unless specifically delegated in writing, does not have the authority to grant permission to enter." |

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| 15 | | | | .170 (C) Enforcement - Exceptfor an immediate threat to personal safety, a stop work order must be delivered to the property owner or his designated agent. This clause should inculde protective language in the event that the county makes an error in assessment or decision in applying a stop work order,the county shall be liable for the loss suffered by the property owner or developer. |
| 15 | | | | .170 (D) Enforcement - What is the penalty to the County for an incorrect or wrong determination? |
| 15 | | | | .170 (E) Enforcement - What constitutes an “imminent and substantial” danger to the environment? The language is open ended and allows too much discretion for the department. If not specifically defined then it does not exist. |
| 15 | | | | .170 (F) Enforcement - It is imperative that the property owner have equal opportunity to seek legal resolution under this title. That should be specifically noted in this section. |
| 15 | 19.150 Definitions | Letter (3/27) | Jack Hamilton | use simple, common language for definitions ("detention facility", for example, has other meanings) |
| 15 | 19.150 Definitions | Letter (3/27) | Jack Hamilton | .100 Adjacent - Need to better define "adjacent" (and ensure it has the same meaning throughout each chapter and without referencing back to itself) |
| 15 | | | | .140 Aquifer recharge area (and .215 Critical...) - Aren't all areas in the county are "recharge areas"? If not, explain and provide scientific information to support the County position.; Where are critcal aquifer recharge areas documented? |
| 15 | | | | .140 Aquifer recharge area - Because all water in Kitsap County is, by County declaration< received from precipitation falling within the County, it follows that the entire surface area of the county is a “recharge area”. If that is not correct, please explain why it is not and provide some clear scientific information to support the County position. |
| 15 | | | | .150 Aquitard - How is the practically determined and what evidence is required to support the determination? |
| 15 | | | | .155 Bank Stabilization - sea walls and rock rip-rap would be appropriate under this defintion |
| 15 | | | | .160 Best Available Science - Just because WAC cannot get it right does not mean the County should be exempt from a proper defintion |
| 15 | | | | .165 Best Management Practices - new paragraph D is redundant to A, and should be deleted. |

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| 15 | | | | .165 Best Management Practices - How determined? Where documented for implementation? |
| 15 | | | | .200 Compensation - Compensation should refer to "just compensation", and another term should be used here |
| 15 | | | | .200 Compensation - Essentially includes entire surface area of Kitsap County; not well defined |
| 15 | | | | .235 Danger Tree - WAC listed refers to logging and CAO expands this to include buildings, arborists, permits, etc.; owner has right to remove |
| 15 | | | | .260 Director - "authorized designee" needs to be clarified and written with time/event specificity to access private land; What is the process and qualifications? |
| 15 | | | | .420 Hazardous Substance - Will this include CO2 since it is considered a hazard to our climate? |
| 15 | | | | .420 Hazardous Substance - Only justification for buffers must require the same testing criteria in the referenced WAC |
| 15 | | | | .440 / .442 Impervious Surface (Setback) - Definition includes every possible "development" to property. How is "pre-development" determined and documented? |
| 15 | | | | .440 / .442 Impervious Surface (Setback) - needs to allow for improvements to accommodate LID infiltration methods and add "retention facilities"; Add "Impervious Surface Wetland and Stream Setback", the 25' setback therein would eliminate the requirement for wetland and stream buffers from CAO |
| 15 | | | | .460 Low impact activities. - Please provide examples of "Low impact". |
| 15 | | | | .465 Mitigation - What is the scientific basis for the creation of a new "critical area" that has no geographic association with the one on the permitted property and making a "critical area" from essentially whole cloth? This seem to imply that man can create a "critical area" how does that works without impacting one of the other conditions set forth in the Title? |
| 15 | | | | .465 Mitigation (A) - Cannot "create" wetlands |
| 15 | | | | .470 Native vegetation - See the comments regarding Exotic. Why does the definition include the entire Puget Sound region and not just Kitsap? Is there some scientific evidence that the vegetation history of hood canal is the same as Bellingham bay or the Straits of Juan de Fuca? |

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| 15 | | | | .475 (A) Normal maintenance - A property owner on who unknowingly has a critical area on a parcel will be in violation if using fertilizer or pesticides. Is that the intent and if so, how will this be enforced? |
| 15 | | | | .485 Out-of-kind compensation - Improper use of “compensation” for property related issues. Please provide scientific support. |
| 15 | | | | .500 Practicable alternative - A person cannot build a home on an easement. Highest and best use is determined by individual property owners, not the County. This is another attempt at trying to replace individual rights with non-existent public good or public rights. Rights belong to individuals. Group rights do not exist. |
| 15 | | | | .535 Ravine - How about U-Shaped? Is there a generic definition from a dictionary that can be used? |
| 15 | | | | .550 Reasonable use - An individual who tries to avoid “taking” findings and other legal actions is effectively being abused by local government. |
| 15 | | | | .555 Reasonable use exception - The only provision for reasonable use is one that permits the property owner to exercise their rights to best and highest use and enjoyment of the property. Knowingly bypassing those rights is abusing the power of their elected offices. |
| 15 | | | | .565 Refuse - How about dead animals, wind blow tree limbs, fallen trees, and all those other things that seem to make up the real world? |
| 15 | | | | .610 Significant Tree - Breast height to who or what? Does it have to be “native” or is exotic also included? Are seedlings “significant”? Does location matter? How about who plants it and Why? |
| 15 | | | | .615 Single-family dwelling - Please define “family” since it is used to determine who is affected by this ordinance. Does it include a legal relationship and/or extended family? |
| 15 | | | | .635 Streams - Intermittent or Seasonal streams should not be considered fish habitat. Portions of my gravel driveway would meet the definition of a stream. |
| 15 | | | | .645 Threatened species (state listed) - Under a strict adherence to the provisions of this Title, the habitat available for humans in Kitsap County will be severely curtailed and diminished. Can humans be declared a “threatened” species? |
| 15 | | | | .660 Use or activity - So walking, hunting, fishing, “brushing” and such other non-developmental practices are not use or activity? |

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| 15 | | | | .665 Utilities - Does this include solar panels and windmills that might be installed on a property. Because they are impervious and or might endanger certain species or because they might be best located in a buffer, does the desire for green energy impact the need for protecting the environment? If so what has priority? |
| 15 | | | | .675 Wellhead protection area - To what specific distance or is this just open ended? What is the definition of a Public water system or utility? |
| 15 | | | | .680 Wetland delineation - What are is the federal wetlands delineation manual or regional supplements? How is a property owner to know if they are using correct guidance? |
| 15 | | | | .685 Wetland determination - How and when is this done? Who does it? How is access to Private property gained to complete the determination? The term defined is used is in the definition to define itself (Circular reference)? |
| 15 | | | | .695 Wetlands - OK, you certainly lost me on this one. Wetlands may not be artificially created (except before July 1990 - as if there was something magic about that date) and as provided by government mandate. I fail to follow the logic in this definition. I thought "wetland" was a technical and not a political definition. |
| 15 | | | | .700 Wetlands, isolated - What is the scientific rationale for the 100 foot separation and from where is the "radius" measured. Definition is confusing and will be abused. |
| 15 | | | | .705 Wetlands, mosaic - What are you trying to say and how will this be determined in the field? Limits to the amount of land included in a "mosaic" if "wetland" areas are found across a large spread of the landscape? Is it possible for a major parcel of property to be "consumed" by a "mosaic"? |
| 15 | | | | .710 Wetlands of regional significance - A site is either a wetland or not. How does allowing "the department" determine some level of protection priority fit in with the overall nature of this Title? Does that not permit discretion without specific guidance or limits? |
| 15 | | | | .715 Wetlands of statewide significance - A site is either a wetland or not. How does allowing "the department" determine some level of protection priority fit in with the overall nature of this Title? Does that not permit discretion without specific guidance or limits? |

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| 15 | | | | .725 (A, B, C) Wetlands specialist - The way this is written all three (A,B, C) are required. How are B and C determined and certified? There are in excess of 40 defined BS in biological sciences, most of which have absolutely nothing to do with environment or wet lands. Do degrees in any of those areas satisfy the requirement? |
| 15 | | | | .730 (c) Wildlife biologist - TWS with leadership involving numerous current state government employees, requires a BS and 5 years of experience. They also have a course preparing an individual for certification. The TWS mission more closely aligns with the nature conservancy and Sierra club instead of average citizens. Why is the County certification different from TWS? |
| 15 | 19.200 Wetlands | Letter (3/27) | Jack Hamilton | Trail building in KC parks should meet US Forest Service Guidelines; experienced and trained trails volunteers should be consulted in decisions regarding trail locations, type and restrictions. |
| 15 | | | | If a grass lawn is an impervious surface, what materials may be used adjacent (common meaning) to the edge of a buffer? |
| 15 | 19.200 Wetlands; 19.300 FWHCA; 19.400 Geohaz. | Letter (3/27) | Jack Hamilton | 19.200.205(A)- Enhancement and GMA policy of no net loss [do not] fit together; What is the BAS justification to reduce buffers; 19.200.225(A) in current CAO, regarding Docks, should be shown as strike-out, but should not be deleted because applies to lakes and wetlands; 19.300(D)- credibility of wildlife corridors; 19.400- No way to track the markup. |
| 15 | | | | Is habitat fragmentation addressed in the CAO? How many trails are enough in Kitsap open spaces? Forested wetlands often overlooked due to types of vegetation present. Hatchery vs. wild fish is a moot controversy is there is no habitat for either. |
| 15 | | | | Lives on property owned by family for over 40 years; was one of the main property owners next to the Shadowfax development in Silverdale, but was never notified of the plans or would have commented; personal knowledge of wetlands and seasonal stream in this area, but told by County that "no wetlands exist on that parcel", then that wetlands were only in on a small portion; the wetlands have been diminished to a small area, no buffer and is used for construction storage / filled. "Vehemently opposed to what is happening....and the destruction of wetlands crucial for the survival of many of our wildlife." |

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| 15 | | | | Entire section with without a baseline of statistics which could be used to establish if a wetland was disturbed or not. Wetlands are only of value to wildlife which uses them for habitat. Does not take a specialist to figure out what and where a wetland is. This is an added cost to the developer and needs to be rewritten (see <i>Swinomish</i> case). |
| 15 | | | | .210 (B)(1) - Cat. 1 Wetlands, Remove "or unique" because "rare" is the larger category that includes all "unique wetland types". |
| 15 | | | | .205(D) Prevent turbidity and pollution of wetlands and fish or shellfish bearing <u>other regulated waters of the state</u> ; |
| 15 | | | | .220(B)(1)(f) - how were tree protection rules established? Entire section restricts property owners ability to determine landscape; why were all of the distance changes to buffers increases? |

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| 15 | | | | <p>Dept. of Ecology places counties/cities in a difficult position to defend prescriptive buffers, without defining, in measurable terms, chemical risk to wetlands or creative solutions; There is a disparity of restrictions on stormwater placed on homeowners, when virtually no such restrictions apply to public facilities (roads, buildings, parking lots); .205(A)- if wetlands so valuable for groundwater percolation, why are livestock ponds exempt?; In first sentence, replace "and increase" with "of", delete "and enhancing, when required,...", GMA does not require an increase of these features and functions; .205(D)- delete "...or shellfish..", as this is covered in the SMP; .215(A)- delete "...or its largest potential width..", (C.1)- delete paragraph 1; (C.2)- delete "...or its standard buffer..." (see proposed impervious setback language); .215(C.2)(a.1 and 2)- Replace "250 feet" with "100 feet", which would be same as well and septic drain field requirements; Replace "standard buffer" with "...25 foot impervious Surface setback..."; .215(C.2)(d) and (e)- delete in sentence 2, "...not.." and "...buffer width modifications..." and add "The 25 foot impervious surface wetland and stream setback shall remain in grass coverage and not be otherwise modified."; .220- replace with .150.422 recommendation; Table (A) Land use impact, is redundant in light of .150.422 recommendation and because the only creature might be salmon and no benchmarks are set, the table is null; .220(B)(1)Wetland buffer requirements and (2) Buffer Averaging- delete entirely, buffer averaging is strictly a punishment and is of no benefit to the wetland and drives up housing costs; .220(B)(3) Variance- replace text with "No variances shall be allowed to 19.150.442". .220(C)Fencing and signs- delete buffer references, place construction fences, etc. 10 feet from wetland during construction."; .220(D)- use 19.150.442 recommendation to replace this section; .220(E)-delete section because redundancy to (C) and (D);</p> |
| 15 | | | | <p>19.200.220 C(1)(b) Wetlands buffer requirements - Administrative Buffer Reductions - recommended striking this provision, not supported with BAS. Reductions in buffer width should only be allowed through buffer averaging. We support the proposed buffer averaging provisions in the current draft.</p> |

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| 15 | | | | 19.200.225 (B) Wetlands additional standards - Agricultural Restrictions- Recommend striking second sentence provision that "restrictions shall not apply to those wetlands defined as grazed wet meadows, regardless of their classification, only where grazing has occurred within the last five years", because not consistent with resource protection; 19.200.225(F) Utilities and (G) Parks- Since work in wetlands or in-water will require state and federal approval, recommend adding the following: <u>Before beginning work in-water or within wetlands, it shall be the utilities responsibility to ensure all other required state and federal approvals have been obtained.</u> |
| 15 | | | | .205 (A) Purpose and Objectives - If the County does not have an accurate inventory of wet lands and other critical areas in the County how is 'no net loss' to be achieved" What is the bench mark against which loss will be measured and who is responsible to maintain the documentation? What happens if there is a net gain? |
| 15 | | | | .205 (B) Purpose and Objectives - What does "could arise" mean and how is it determined? Who is the authority for that determination? |
| 15 | | | | .205 (C) Purpose and Objectives - The ordinance gives the County the authority to "plan" the use of private property so the "holder" whatever that is, to benefit wherever possible. First the term is "private property owner" not "holder" which appears to imply that people somehow "hold" property for the use and benefit of others. Second, the responsibility and RIGHT to determine best and highest use of property lies with the owner, not government. |
| 15 | | | | .205 (D) Purpose and Objectives - You have not defined either turbidity or pollution for purposes of this Title. If common use is to be considered, it would appear that government itself is the major polluter of local waters and the primary cause of turbidity in those same waters. Does the Title apply to government or "public" actions and activities? |
| 15 | | | | .205 (E) Purpose and Objectives - By definition (an apparent intent) the entire land, water, and air space of the County is considered to be wildlife habitat. Unfortunately, most of that same area or space is also private property. Under the protections of the Constitutions, government has no role ,or authority to maintain anything on private property. |

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| 15 | | | | .210 (A.1) Wetland identification and functional rating - Unless the County has a specific inventory of “wetlands” with appropriate definitions of wetland boundaries, this section is nothing more than a declaration of intent to future action to identify and encumber property. Unfortunately, the County is not delegated the authority to carry out such actions as relate to private property. Either produce a complete inventory of “wetlands” so the citizens are fully aware of where and when this title applies or change the approach. |
| 15 | | | | .210 (B) Wetland identification and functional rating - If all of these descriptions are in the referenced manual why are they repeated here? Has the County modified any descriptions? Why are not wetlands on the County inventory already classified and so identified? Should this entire section be deleted? |
| 15 | | | | 19.200.210(B)(3)and(4) Wetland identification and functional rating - Recommend adding the following conditions to the exemptions for small Cat.III and IV wetland: <u>Are not associated with riparian areas or their buffers;</u> <u>Are not associated with shorelines of the state or their associated buffers;</u> <u>Do not score 5 or more points for habitat function based on the 2014 update to the Washington State Wetland Rating System for Western Washington: 2014 Update (Ecology Publication #14-06-029, or as revised and approved by Ecology);</u> <u>Do not contain a Priority Habitat or a Priority Area1 for a Priority Species identified by the Washington Department of Fish and Wildlife, do not contain federally listed species or their critical habitat, or species of local importance identified in Chapter XX.XX; and</u> <u>Wetlands less than 1,000 square feet that meet the above criteria and do not contain federally listed species or their critical habitat are exempt from the buffer provisions contained in this Chapter.</u> |
| 15 | | | | .215 (A) Wetland review procedures - If the County has not previously identified an existing wetland on a parcel, how will the applicant know to prepare and submit this report? If the county has properly defined the wet land, why is this report required? This section implies that the County is on a fishing expedition to find and define wetlands at the expense of the property owner and applicant. If that is not the case please explain exactly how this works. |

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| 15 | | | | .215 (A) Wetland review procedures - This certainly support the comment above and the transfer of responsibility from the County to the property owner to identify something the County needs to define so it can assign protections and deny use. This activity is covered in the Constitution, where? |
| 15 | | | | .215 (A) Wetland review procedures - Does this mean the County will complete the task at County expense or that the County will conduct the study an transfer the expense to the property owner? |
| 15 | | | | .215 (A) Wetland review procedures - First you require a licensed and certified consultant to perform a study, determine boundaries which may require a surveyor. The contract is between the applicant and cosultant, not the consultant and the county. The County reserves the "right" to check the work of that licensed consultant and require modifications of the consultant's report. This implies that the County reviewer will have qualifications at least equal to those required of the professional consultant (including license if one is involved), have completed and independent study of the area in question, and have provided scientific evidence documenting the errors in the original report. If that is not the case, what is it the County will do? Will the County accept liability for any suit raised by either the applicant or the consultant regarding the report? It would appear that if the County does not accept the report as presented they are challenging the professional competence of the consultant which could lead to civil suit (not the Hearing Examiner). |
| 15 | | | | .215 (A) Wetland review procedures - County is requiring property owners to follow its demands? To accept this provision, the property owner, under this title, freely gives their property to government. How is that proper? The county never misses an opportunity to have applicants pay more money. If granted an expedited review for a fee, it translates into other applications not paying this fee will take longer? |

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| 15 | | | | <p>.215 (A) Wetland review procedures - For the first time we are stating that the default (standard) wetland buffer is 250 feet surrounding the wet land. No discussion or scientific supporting the distance requirement. The 250 foot buffer will eliminate the development of significant properties in the County, drive the value of those properties down, and have immediate and lasting impact on the economic well-being of citizens. This is a takings according to the Constitution. If an acre is 4840 square yards (a square of 208 feet per side) the 250 foot buffer encompasses about 6900 square yards or 1.5 acres. In urban zoning which has a norm of 5-9 homes per acre this means that not fewer than 15 homes would be built because of a minimal wetland and the potential for no acceptable use of the property exists. How does this benefit of the property owner? Will the County refund all property taxes on the encumbered property that have been collected since 1990 to the date when critical areas are determined to exist?</p> |
| 15 | | | | <p>.215 (A) Wetland review procedures - This requires that the property owner not only permanently identify those portions of the property that are no longer subject to highest and best use but also implies that the property owner will have a continuing duty to maintain the signage to some acceptable level as determined by the County. Does this include a permanent authority for the County to enter into the property to make inspection to certify the wet land border is being maintained and properly identified? What are the penalties for non-compliance?</p> |
| 15 | | | | <p>.220 (A) TABLE DENSITY" BASED ON DEVELOPMENT TYPES - zoning definitions result in all urban area wetlands as High and virtually all other residential area (rural) will be moderate. Is this an upper limit with potential for reduction or a lower limit with potential for increase in restrictions? County should identify and delineate wetlands as a matter of record and not require definition in this ordinance?</p> |
| 15 | | | | <p>.220 (A) Wetland buffer requirements - Why include reference documents in table .220A? Impression is that the County is establishing the criteria? How will a property owner or applicant become aware of the revisions within referenced documents?</p> |
| 15 | | | | <p>.220 (B.1.a) Wetland buffer requirements - This means changing your highest and best use to satisfy County requirement. This appropriate under what authority?</p> |
| 15 | | | | <p>.220 (B.1.b) Wetland buffer requirements - Introduces a new series of buffer rationales without first identifying what those regulated limitations are. How does the property owner know when a "habitat assessment" report is required?</p> |

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| 15 | | | | .220 (B.1.c) Wetland buffer requirements - What is width averaging and how is "adverse impact" determined? Is this magic or is there a documented procedure that the applicant can consider before hand? |
| 15 | | | | .220 (B.1.d) Wetland buffer requirements - Regardless of what the considerations might be, the property owner must surrender highest and best use of a fixed area of their property, as determined by the County, in order to receive County permission to use what may remain? |
| 15 | | | | .220 (B.1.f.1) Wetland buffer requirements - Pacific Northwest most common presence on an undeveloped lot is trees. How and when did protecting trees (which belong to the property owner) have a higher priority than property rights? |
| 15 | | | | .220 (B.1.f.7) Wetland buffer requirements - After reading this section, it appears that it would be in the best interest of the property owner to pray for fire or windstorm to level the property. There does not appear to be any other reasonable assurance that the property might ever be used so long as the County assumes unconstitutional use jurisdiction. |
| 15 | | | | .220 (B.2) Wetland buffer requirements - If a buffer can be "administratively reduced" it would follow that the science underlying the creation of the buffer is subject to "administrative interpretation". This is an administrative decision based on some rationale other than science. If science is not the primary and only driver, why restrict the use of private property? |
| 15 | | | | .220 (B.2.a.6) Wetland buffer requirements - The "administrative process" is a different act of extortion, that requires an expensive yet ineffective alternate to a common septic system. Keeps "native" plants on the site instead of permitting appropriate landscaping. Science to support effectiveness or necessity of the alternatives is not provided. All decisions and/or protections should be based in "Best Available Science". |
| 15 | | | | .220 (B.2.a) Wetland buffer requirements - "administrative buffer reductions" and procedures to do it are illogical. How much does it cost the property owner? |
| 15 | | | | .220 (C.1) Wetland buffer requirements - What does "fully stabilized" and "per County approval" mean? What is the cost in money and time to a project? |

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| 15 | | | | .220 (C.2) Wetland buffer requirements - Previous tables identifies that the County is directing a disturbance to prevent a disturbance. How are the boundary fence and signs to be put in place in a semi-permanent or permanent manner without making noise, vibrating the ground and inviting human intrusion? |
| 15 | | | | .220 (D) Wetland buffer requirements - Ambiguous. Include clear definition of who determines protections and what they are. |
| 15 | | | | .220 (E) Wetland buffer requirements - Width of Buffers for Category I WetlandsIf the information in table is provided in the reference documents, why include it in this Title? Does that not lead to the impression that the County is establishing the criteria? Equally important, if the reference document is revised, how would an applicant using this Title be aware of the revisions? |
| 15 | | | | .220 (F) TABLE Examples of Measures to Minimize Impacts to Wetlands - <u>Lights:</u> Is a full moon a disturbance? <u>Noise:</u> How about overflight of helicopters? <u>Pets and human disturbance:</u> Is the County actually designating the very existence of human beings (also known as citizens and taxpayers) as a “disturbance”? |
| 15 | | | | .225 (B) Additional development standards for certain uses - How does a property owner demonstrate activity within the last 5 years? What specific level of activity meets the criteria? |
| 15 | | | | .225 (C.1) Additional development standards for certain uses - What does this mean? Too subjectiveand open to department determinations without recourse. |
| 15 | | | | .225 (C.2) Additional development standards for certain uses - This forces a property owner to abandon property because of a “critical area (wet lands) but that same land can be used for “pedestrian or bicycle easements, viewing points. What applies to one use should apply to the other. |
| 15 | | | | .225 (C.3) Additional development standards for certain uses - How about “as necessary to maintain roads and streets to the standards established for such” |
| 15 | | | | .225 (C.4) Additional development standards for certain uses - Does maintenance or repair of an existing road require a mitigation plan to proceed? What are the specific criteria and requirements of a mitigation plan and how does the property owner know of that requirement? |

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| 15 | | | | .225 (D.2) Additional development standards for certain uses - Requires a property owner to surrender portions of the property? Does this require County determination? Does the determination require access to the property? This requires the owner to willingly reduce the value of the property and opens the property to future additional restrictions as determined by the department. What constitutional reference provides this authority to the county or state? |
| 15 | | | | .225 (D.3) Additional development standards for certain uses - Shows a County bias towards increased density and attached dwelling units to minimize impacts to critical areas? How does this help a property owner who prefers a single family detached home? |
| 15 | | | | .225 (D.4) Additional development standards for certain uses - When does this determination occur? What constitutes permanent signs or fencing? Who is responsible for the maintenance of the "permanent" features? How is this to be enforced over time (permanence)? |
| 15 | | | | .225 (E) Additional development standards for certain uses - An "increase" in the rate of flow is vague. Clarification needed for a property owner to determine what this means and the implications without a "finding" by the department? |
| 15 | | | | .225 (F) Additional development standards for certain uses - This contradicts preceding rules and regulations which set wetlands aside as protect. The property owner has to sign away right to use property for a critical area and a buffer, give up an additional 15 feet outside the buffer , erect signs and fences, and be responsible for permanent maintenance of boundary markings and yet, we can turn the same wetland and buffer into essentially a public park. This entire exercise is a political statement and has little or nothing to do with environmental concerns. |
| 15 | | | | .225 (F.2) Additional development standards for certain uses - How does a utility corridor easement get approved that transverses through private property for which a notice to title has been imposed? Is the property owner or utility responsible for the maintenance of boundary marking and fencing? If the utility equipment in the corridor experiences a major failure, what permits and studies are associated with entry to make repairs and who is responsible for those permits and studies? |

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| 15 | | | | .225 (F.3) Additional development standards for certain uses - How is it acceptable to locate a septic system inside a buffer (with department approval) but no other activity (by the property owner) is allowed. Regulations are difficult to follow. Doing major excavation in a "buffer" to support either sewer lines or a septic system is permissible but planting a non-native bush is not? What is the reason and logic behind these regulations? |
| 15 | | | | .225 (F.4) Additional development standards for certain uses - What is "significant impact" Who determines that impact and what are the specific criteria used? |
| 15 | | | | .225 (F.5) Additional development standards for certain uses - "department may require" is open ended and does not consider cost to a property owner. What criteria are used to determine the need for additional mitigation? Language requires discover and define effort for every permit. Two significant issues. First, the land available for development cannot be determined until a request for permit including a site plan has been presented. The developer is already invested in the project, beyond land cost and has no assurance that that investment will result in a viable project. Second, the processes identified in this Title only come into play when a developer submit a request for a permit. This means that not all wetland or other critical areas within he county are receiving similar protections or that all property and property owners are being treated equally under the law. If that important, the rules and regulations should be issued at the state level and enforced universally throughout. |
| 15 | | | | .225 (F.5) Additional development standards for certain uses - This applies to public lands only and some specific authorization process involving Commissioner approval is required to make this possible? If not, this would exempt public lands from regulations that private property owners are required to follow?. |
| 15 | | | | 19.200.250 (C) Wetland Replacement Ratios TABLE 19.200.250- Science has not sufficiently evolved to create or re-establish bogs or Wetlands of High Conservation Value, Recommended replacing "Case-by-case" to "Not considered possible". Also, change "6:1 Rehabilitation" to "Case-by-case" in the Rehabilitation column for these wetland types. |
| 15 | | | | .250 (A.1) Wetland mitigation requirements - This seems just a bit unusual since the several above sections identify how wetlands and buffers can be violated. |

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| 15 | | | | .250 (A.2) Wetland mitigation requirements - What is appropriate technology and affirmative steps? Should the developer/property owner have knowledge of them beforehand? |
| 15 | | | | .250 (A.3.b) Wetland mitigation requirements - How can a man made wetland replace a natural wetland? and who determines the effectiveness of the replacement? Where are the plans and procedures to create the replacement documented so the developer/property owner can be advised beforehand and make a sound decision as to how to best proceed? |
| 15 | | | | .250 (A.4) Wetland mitigation requirements - Who is responsible for this and who determines when corrective measures are required? How long does this process continue? Will the newly created wetland have the same buffer, fencing and sign requirements as the original or can it be otherwise delineated? What happens if the created wetland fails? Will the property then be returned to unlimited use? |
| 15 | | | | .250 (C) Wetland mitigation requirements - What logic and science is behind this table? How was a 12 to 1 ratio or 16 to one ratio determined as opposed to a 5 to 1 or 22 to 1 ratio? |
| 15 | | | | .250 (D.2.d) Wetland mitigation requirements - All proposed mitigation adds cost to the developer, results in a loss of future property use, and does not significantly help protect the environment. Past development did not consider "critical areas", why should current developers be restricted or forced to pay more than those in the past? City of Seattle continues to exploit critical areas without restriction, why should Kitsap property owners be restricted. Forests have naturally regenerated even with past and current timber harvests. Have Kitsap history and the regenerative ability of natural resources been factored into this ordinance |
| 15 | | | | .250 (E) Wetland mitigation requirements - See the comments above about monitoring, determination of success and what happens if success is not achieved. Not appropriate to assign a ten year or longer authority to a department that has a significant turnover of personnel and an apparent 5 year horizon on revisions to this ordinance. |

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| 15 | | | | .260 Incentives for wetland mitigation - After the county has decreed a parcel of property as a wetland (or other critical area) and determined a buffer, there is a possibility that the County would purchase the land using tax dollars (that is the only source of County funds)? Two issues. First the County decides what land to designate and therefore determine what quality of land it would like to acquire. Second, the County would take the property off the tax rolls by purchase but leave it on the rolls if retained by the property owner. Establishes a conflict of interest and violates Constitutional protections? |
| 15 | 19.300 FWHCA | Letter (3/27) | Jack Hamilton | Requesting that the section of Enetai Creek north of Helm St. in Bremerton be re-designated from Fish Habitat to Non-Fish Habitat; Request the no development buffer guidelines for a fish bearing stream be reduced from 150 ft. to 50 ft. |
| 15 | | | | .315 (A)(3) - Provisions for decreasing buffer, What is the format of the consultation with WDFW, other than the review of the HMP, that would lead to an admin. reduction in buffer width?; 19.300.315 (G)- Farm resource conservation plan, these agreements can result in major deductions in buffer protected areas as the conservation district often does not adhere to buffer guidelines and KCD is not a regulatory body. |
| 15 | | | | .310 (B.1) Fish and wildlife habitat conservation area categories - The County needs to complete an On-site survey to make a final determination to confirm DNR stream types? The determination will not be accurate if completed in other than the "wet" months. The county already has a series of "maps" that identify the streams of the county and depicts the "buffers" established for each. Why is this chapter more specific to those maps and buffers? |
| 15 | | Letter (3/27)/ PC Hearing | | .310 (B.3.a.1) Fish and wildlife habitat conservation area categories - Where can the property owner find the maps or documentation that identifies these areas. If they do not currently exist, why not? This Title has been in effect for over ten years so there should be no "discovery" of habitat areas during site survey. If as new "specie" is added to this list, how does the County determine the specific land and water areas in the County which are impacted by the listing? Is this another application in which the rules are applicable only is a permit application is entered or does it actually apply equally throughout the County? If a "specie" is removed from the listing, how are impacted property owners notified and what process does the County use to document the reduction in restrictions on a property? |

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| 15 | | | | .315 (A.1) Development standards - What if the “buffer” is not natural vegetation area when the County defines it? Who is responsible to make it such? Who foots the bill? How does the County monitor the area to make sure that only “native” vegetation grows in the area” If an invasive plant, say Scotch Broom begins to grow in the area, who is responsible to remove it? What exactly can be done to “enhance” and area and how is that determined? Who decides if “enhancement” is appropriate? Who carries it out? Who pays for it? |
| 15 | | | | .315 (A.2) Development standards - How many staff members has the County dedicated to establishing and monitoring these buffers throughout the County? Does OHM apply to lakes at the 100,year rainfall level or just day to day measurements.? You do realize that a lake in Kitsap county, unless it is physically connected to a larger body of water, say Puget Sound) is little more than an isolated body of water. Any longer term sustained fish in such a lake are either hatchery or of a population that is self-sufficient to survive. What are we trying to accomplish? The only way the water so Eastern Kitsap a get included is by expanding the definition of what is being protected? |
| 15 | | | | .315 (A.3) Development standards - Permitting authority is overstepping and removing property rights. Under the auspices of “decreasing” a buffer, the department is extorting the land owner. Reference to multiple chapters and requiring production of one more plan is inappropriate. |
| 15 | | | | .315 (A.4) Development standards - If the provisions for buffer size are based on types of habitat and types of specie, and the buffers are based on “best available science” how is it possible that an expansion of a buffer will be necessary? Either the science is wrong or the County just wants authority to encumber any property it desires? |
| 15 | | | | .315 (A.5) Development standards - What science supports this determination? If the walls of the ravine are 250 feet deep why would an additional 25 feet at the top of the ravine (not considering geological hazards) be appropriate? How is the distance measured, actual land distance or vertical height from the OHM of the stream? Does this presume that the setback for a stream will vary on the land above the ravine on a foot by foot basis (or more frequently) to match the ravine depth or will an averaging method be used? |

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| 15 | | | | .315 (A.6) Development standards - How is a channel migration zone identified, and what is the historical limit for such a zone? If the current channel is not the same as it was 100 years ago, notwithstanding the development and other factors that might impact stream channels, will the pre-existing zone will become a "migration" zone in current use? |
| 15 | | | | .315 (A.7) Development standards - Why does the department get to identify how a buffer will be protected in this instance? Is there any limit to what may be required? How is boundary identification of this buffer different from any other? Why is it necessary to repeat the "Buffer" rules several times in this Title? Is it possible to use a standard set of rules for buffer identification, boundary marking, buffer reeducation or variation and buffer increase just once in the document? |
| 15 | | | | .315 (A.8) Development standards - Paragraph demonstrates the incorrect approach the County has taken with this ordinance. Removes property rights from the owner. Requires compliance with restrictions that are unidentified until after a permit is filed. The restrictions of the Title and the implementation of those restrictions are executed by unelected employees and are broad enough to allow those employees to "interpret" the intent of the Commissioners" without specific reference or consultation. The Title establishes a broad administrative process, using loosely defined guidelines to impose significant restriction of the use of private property with no consideration of the protections of the Constitution. |
| 15 | | | | .315 (B) Development standards - How does the property owner or the County determine a known" area? Does the habitat area for an eagle nesting area go away if the tree falls down or if the eagles cease to nest in the area? "Natural" vegetation inappropriate. How is compliance assured? (I have an example of a stream in my location that was over planted with "native" vegetation and is now virtually impassable. The over plant has also supported the appearance of a family of beavers, a new beaver dam and much more significant flooding of the area adjacent to the stream) How does that work out for creating and maintain a buffer? The stream "migration" is now considerably larger and the buffer must, by definition, be much greater but it was modified by action of the County. |

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| 15 | | | | .315 (C) Development standards - "All development permits... may require" is another example of lack of clarity. When and how would the expense and project time delay for a plan be required and who determines that requirement? |
| 15 | | | | .315 (D.1) Development standards - Major highways and roads throughout the state cross rivers and streams that the state has designated as "salmonid" yet this section would prohibit or seriously restrict the ability of a property owner to either access their property or fully use that property. Who determines feasibility of crossings and suitability of crossings? State process to replace culverts should not result in requiring private property owners to do the same. What science determines the "crossing" suitability for each individual location? Is the determination made by an independent professional, licensed to make the determination or by a County employee? |
| 15 | | | | .315 (D.2) Development standards - Is this for all natural salmonid habitat or does it include habitat created by introduction of hatchery fish to streams? That makes a difference because it could allow the state to significantly modify the use and access to property by undertaking a stocking action? For example, the salmon in Clear Creek are there because of a hatchery that was operated in the vicinity of half mile road some time ago. Is Clear Creek now a declared salmonid stream and if so what is the scientific basis for the determination? |
| 15 | | | | .315 (D.3) Development standards - How does protecting a single stream take priority over good engineering practices associated with construction of a bridge? The geology and mechanics associated with bridge construction, assuming safety of users, must take priority over some non-scientific concerns about placement of footings to protect salmon. |
| 15 | | | | .315 (D.5) Development standards - Is a single crossing required to be associated with easements to permit access to properties other than the one on which the crossing is located? How is this beneficial to the impacted property owner? Exactly what authority does the county use to make the determination of how many crossing is the correct number and when the requirement for easements might be excessive? |
| 15 | | | | .315 (E) Development standards - Does Gorst Creek come to mind? It appears that the only possible authority able to determine the need or scientific justification for "relocation" of a creek or stream resides in government. Is there a documented history of relocation success in the state? |

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| 15 | | | | .315 (E.1, E.2, E.3) Development standards - The preceding three paragraphs provide no sense of assurance that the governing authority has any notion of how to make this work properly. Something shall happen when required by a plan that is open to interpretation. A licensed engineer is going to certify that a projected occurrence based on ill defined assumption and loosely defined boundaries will be adequately covered by a proposed modification. And somehow ill- defined "functions and values" will be replicated or improved upon by a relocation? Where is the science and best engineering practices that support this effort? |
| 15 | | | | .315 (F) Development standards - If required, who applies a pesticide, herbicide, or fertilizer to properly maintain the Native vegetation within a buffer or to control or eradicate a noxious or invasive plant in those areas? Who pays the bill? Who is liable if the application has negative results on the buffer or habitat? |
| 15 | | | | .315 (G) Development standards - Is this not a zoning consideration? Why is it in this Title? or is the Title referenced in zoning Title? |
| 15 | | | | .315 (G.2) Development standards - This is a taking and/or extortion. |
| 15 | | | | .315 (G.3) Development standards - No matter how much property may be encumbered by this Title, an aggregation of land shall be required such that a building lot, as defined by the department, must be included? How does this support the Constitutional guarantees and make sure that the property owner realizes highest and best use of their property? It has become increasingly apparent that the state has determined that, by law it has the authority to impose burden and restrictions on property owners that are associated with conditions that have existed prior to creation of the state and certainly prior to the establishment of private property within the state. A basic question that needs to be addressed somewhere in this Title is where the constitutional authority, delegated to government by the people, exists for the implementation of the level of restrictions and conditions of use on private property. |
| 15 | | | | .315 (G.4) Development standards - Ill-defined authority being delegated to employees. Either a boundary needs to be positively identified or it does not. Why is this a department determination issue? |
| 15 | | | | .315 (G.5) Development standards - What is "performance based development"? Who created it? Where is it documented? How would a property owner/developer know about it? |

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| 15 | | | | .315 (H) Development standards - This receives the same comment as the previous guidance on the subject. Considering all of the rules and restrictions imposed on the property owner to protect critical areas and the associated buffers it is incongruous to now propose that that same property can be used as essentially a public park or playground. The land under consideration is to either be so inviolate that it must be protected from inappropriate use and damage by the property owner or not. If it is permissible to created trails and educational opportunities in the area, then mother is not realistic reason to preclude the property-owner for highest and best us of the property. There is no authority, other than eminent domain, that allows the state to take property for a greater public use. Creating a nature trail is not appropriate for eminent domain and certainly not without just compensation. |
| 15 | | | | .315 (H.2) Development standards - Minimize? Why should removal be authorized for important features? |
| 15 | | | | .315 (H.3) Development standards - This imposition can be authorized but a property owner who might require a minor incursion into a buffer area is subject to professional studies and mitigation. How does this work? |
| 15 | | | | .315 (H.4) Development standards - Again, a property owner who needs a stream crossing to access or fully use property is subject to lengthy study and restrictions but a wildlife viewing trail, created on his property within a buffer, is just appropriate. Please identity the logic in this approach. |
| 15 | | | | .315 (H.5) Development standards - An individual is forced (through administrative extortion) to surrender both use and value of property but a bike trail could be established on that same land area? |
| 15 | | | | .315 (I) Development standards - Comments similar to previous sections dealing with utilities. |
| 15 | | | | .315 (I.1) Development standards - Are best management practices fixed or dynamic? If practices change to allow less restriction on property use, are those changes back fit into existing applications and do property owners benefit from the changes? |
| 15 | | | | .315 (I.5.b) Development standards - How is this enforced? Who established the before construction and post construction baselines? The way this is written the County could bankrupt a utility. |

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| 15 | | | | .315 (I.6.a) Development standards - Where in the commercial market are lead based paints available? How about paints with cupric oxide use in wet areas? |
| 15 | | | | .315 (J) Development standards - The entirety of this section, although appearing to support "bank stabilization" actually presents a set of requirements and a process that makes it virtually impossible to create any kind of non-natural barrier or structure to restrict bank collapse or erosion. What the section does as does its counterpart in the Shoreline Master Plan, is present a situation for natural erosion and the loss of property as being preferable to a logical course of action to protect property. |
| 15 | | | | .315 (M) Development standards - See comments on previous section addressing this subject. |
| 15 | 19.400 Geologically Hazardous | Letter (3/27) | Jack Hamilton | .425(C) - word "seismic" should read "landslide" in intro sentence. |
| 15 | | | | .415 Does DCD have the expertise to add this entirely new paragraph?; 19.400.435(A)(4)-why has native vegetation become such a priority over ornamental or other types of vegetation? 19.400.435(B)- What seismic maps are used and what is their accuracy as permitting is subject to that information? |
| 15 | | | | .405 Purpose and applicability - Should not the protection of property also be included within the considerations? The intent below indicates that is part of the issue. |
| 15 | | | | .405 (B) Purpose and applicability - If road construction is required to gather data or complete the field study for the report, does that mean that a permit will not be considered? |
| 15 | | | | .410 (A.1) General requirements - Who determines when a report is required? Why is there an automatic determination of maximum buffer and set back before any reasonable engineering process to mitigate or stabilize is considered? |
| 15 | | | | .410 (A.1) General requirements - What does this mean? If good engineering practices include retaining walls or supporting piles to stabilize or safely use a site, as desired by the property owner, is that acceptable? |
| 15 | | | | .410 (A.1) General requirements - What if there is an alternative manner under best practices or is that not possible? |
| 15 | | | | .410 (A.1) General requirements - How is this determined and who makes that determination? Who has the liability if the determination is incorrect? |

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| 15 | | | | .410 (A.1) General requirements - Please see comments on previous section dealing with the same issues. |
| 15 | | | | .410 (A.1) General requirements - to limb a tree or cut a bush. What is the specific logic and authority for this requirement? Is there some underlying documented evidence that property owners are incapable of protecting their own property or that without government intervention a direct hazard to public safety is created? |
| 15 | | | | .410 (A.1) General requirements - See the previous discussion on "hazard" trees. What happens if a tree is felled by wind or other natural occurrence? |
| 15 | | | | .410 (A.1) General requirements - This either stops all development for 7 months of the year or adds cost to the development without adding value. This should not require government oversight, the county needs to trust property owners and developers. What happens if the County approves a control plan but the weather exceeds norms and some erosion occurs? Who has the burden for corrective action? When the County places a requirement and approved the proposal submitted to satisfy the requirement, who is responsible when the proposal does not work? Can the property owner/developer be assured that County approval has actual meaning? |
| 15 | | | | .410 (A.1) General requirements - So, regardless of the illogic of the underlying considerations or the added cost to the project. Is there any variance to this rule? |
| 15 | | | | .410 (A.1) General requirements - Does the County not know where all existing logging roads are and the geological condition associated with those roads? |
| 15 | | | | .410 (A.1) General requirements - What does this mean? How is it decided and imposed? What options (other than non-use) does the property owner have? |
| 15 | | | | .415 Designation of Geologically hazardous areas - If they are for informational purposes only where exactly are the specific criteria and guidelines located so the property owner may properly understand? Apparently, since the following paragraphs are for information only, have little or no actual value in determining the existence of a condition, and are subject to determination of both the intent of the section and the definition of conditions by the department, there is little use commenting on the materials. |

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| 15 | | | | .420 (C.3) Erosion hazard areas - The definitions above all seem to rely on some sort of study or survey which implies a physical field examination of the subject conditions and a detailed record of the findings. Is this correct? If not, how were the determinations made? When addressing features as historically evident exactly how was the history created and validated? For purposes of consistency, were owners of property that were “surveyed” or those that fall under one of the categories identified advised of the studies, requested to participate, or advised of the results? If not, why not? Are the properties identified in the results of the studies and the various maps subject to and currently under “notice to Title”? If not, why not? |
| 15 | | | | .425 Landslide hazard areas, .430 Seismic hazard areas - See comments above concerning erosion hazards area definition. |
| 15 | | | | .435 (A.2.a) Development Standards - This requirement could make a property with no 100-year history of ground movement unusable simply because of inherent features. Why is this criteria fixed? |
| 15 | | | | .435 (A.4) Development Standards - Why is additional buffer space or planting native vegetation acceptable but a properly engineered drainage flow system is not? |
| 15 | | | | .435 (B.1) Development Standards - How does a geotechnical report determine that construction in or near a seismic activity area is safe. Is the issue relative safety or absolute safety? The engineer who prepares the report and the individual who approves the report may have a fiduciary responsibility to the property owner and be liable if the report is proven wrong at some future date. |
| 15 | | | | .440 (A) Review Procedures - How frequently are these maps reviewed and updates? What are the qualifications of the individuals assigned responsibility to approve the information reflected on the maps? |
| 15 | | | | .445 Independent consultant review - County personnel that review a consultant report should have the same training or certification as the consultant. The applicant is paying twice for the same professional training, the consultant (hired) then the county (no contractual authority with applicant)? If the department does not have the technical expertise to conduct a proper review of a required report why are they insisting on that report? |

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| 15 | | | | .450 (C) Recording and disclosure - County deprives an owner of property rights, extorts an agreement from the property owner by requiring a technical report, makes final determinations that supercede the consultant used to create that report, and absolves itself of legal accountability with regard to its determinations. |
| 15 | 19.500 FFA | Letter (3/27) | Jack Hamilton | .505 Purpose - Please see the previous comments about how these special hazard areas were identified and defined and the active participation of property owners in the process. |
| 15 | 19.600 CARA | Letter (3/27) | Jack Hamilton | <p>.605 Purpose - As determined and documented in the WRIA studies, the entire surface of Kitsap County is an aquifer recharge area in that all water sources in the county are dependent on precipitation falling on county lands to maintain those sources. First priority is to retain all water that exists in the county and minimize outflow of those resources by first identifying those practices which most adequately support retention and infiltration. Because of the unique water resource situation for Kitsap (no mountain snowpack or mountain river flow) the realization that stream flows are a direct result of aquifer overcharge and stream flows should not be required to meet some minimum level. In essence, stream flows are determined by the annual levels of precipitation falling on the county (including the seasonal variations) and not some anecdotal prescribed flow level.</p> <p>Is this a Title requiring compliance or a general policy document upon which a title might be based? If this is a policy document, where and how has it be subjected to public review for purposes of establishment of policy? If it has not been reviewed, why not and how does the county now determine that rules and regulations can be established based on an unapproved policy?</p> |
| 15 | | | | .605 (A) Purpose - Based on WRIA this would include the entire surface area of the county. |
| 15 | | | | .610 (A.4) Critical aquifer recharge area categories - Please see the comments at erosion areas for concerns that apply to the designation of these recharge areas. If the “maps” or recharge area designations are maintained by utility districts, how does the department control the actual definition of area boundaries? If the department may revise areas and boundaries, what specific criteria are used and how are those determinations made and verified before that are included in the existing reports and maps? |

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| 15 | | | | .610 (B.2) Critical aquifer recharge area categories - This implies that a licensed hydrogeologist either uses GIS information or the results of their field studies imposed on GIS data. Which is the case? Is there any ongoing verification or validation of the information or is it locked in place once defined? |
| 15 | | | | .610 (C) Critical aquifer recharge area categories - Will produce or has produced? What is the status of the “maps” since they are heavily referenced in the paragraphs above? |
| 15 | | | | .615 (B.2) Development standards - Not fewer than three different jurisdictions get to decide what studies will be required and, have the authority to approve or disapprove the application. How does this work? |
| 15 | | | | .615 (C.1) Development standards - Where is the specific authority for the “tribes” to become involved with use of private property? The title to private property is conditional upon the agreement of the “tribes” as inferred by this section, is that what the county has in mind? |
| 15 | | | | .620 Activities with potential threat to groundwater quality - How was this list developed? What public review process was involved? How is the list maintained to make sure that uses no longer considered hazards are removed and newly identified hazards are added. For example, It is apparent that on-site septic systems are identified as a potential hazard while sewage treatment plants and public sewer systems are not. That is a bit concerning because of the most recent instances of pollution to creeks, streams and open water, public sewer systems have been the major offenders. |
| 15 | 19.700 Special reports | Letter (3/27) | Jack Hamilton | .705 - Licensed professionals that would prepare these report should review and comment on this draft. A mandatory part of that review and comment should include expected cost to the applicant for the study, survey, and reports. A specific effort needs to be made to minimize both effort and cost and still meet actual definition requirements. The county is attempting to clearly define and document the geophysical and habitat conditions of the county at the expense of the property owner. While most of the required studies refer to “maps” held by the county, they require a greater level of specificity of actual conditions on a site. How are the reports used? Why is the applicant paying for individual reports that are used to improve county documents and records? |
| 15 | | | | .710 (B.3.e) Wetland delineation report - Is this really necessary? Why not five feet or eight feet? The cost of determining and producing this contour map will be significant. |

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| 15 | | | | .715 (J.4.d) Wetland mitigation report - Does this include those invasive plants used by the state for erosion control and bank stability? |
| 15 | | | | .715 (K) Wetland mitigation report - It is of interest that the county would require a monitoring plan (with specific detail and reporting criteria) when the county has consistently failed to incorporate monitoring on the effectiveness of this Title in achieving the established goals. |
| 15 | | | | .715 (M.2.a) Wetland mitigation report - Once again the county requires a “contingency “ plan but has no idea of how this title is meeting objectives> Why should a n applicant have to meet criteria that the county is not willing or able to implement? |
| 15 | | | | .715 (R) Wetland mitigation report - If the county does not posses the technical expertise necessary are the consultants from this list the reviewing authority? Creating this list requires that an applicant accept the qualifications of a consultant without proper vetting. What happens when the department does not agree with the consultant’s report? Who is liable for any added expense? What cost to the applicant results from using this list of “qualified” consultants? |
| 15 | | | | .720 Habitat management plan (HMP) - The bald eagle has been removed from the list of threatened and endangered species in 2007. Why do we continue to treat them as threatened or endangered in Kitsap County? |
| 15 | | | | .720 (D.2) Habitat management plan (HMP) - Since we have learned that Spotted Owls are happy to reside in K-Mart signs and actually are more threatened by Barred Owls that anything else, just how exactly does one determine what plants are more conducive as habitat for each specie and how are the differences in requirements reconciled for this plan? |
| 16 | General | Letter/ BoCC RM (3/27) | Alan Beam | What is the problem we are trying to solve? How does the current plan fall short? How can we answer that since there is no monitoring plan to measure effectiveness? |
| 16 | | Letter/ BoCC RM (3/27) / PC Hearing- Written | | Plan is written to obscure it's purpose. By requiring specialists for reports, the County acknowledges that the landowner is incapable of interpreting the ordinance; If going to require a wetland specialist, as least have them determine the functions to protect and the appropriate buffer; reports are expensive and then the county sets the buffers anyway- let the experts set the buffers |

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| 16 | | | | Standard buffers make little sense; County says using BAS from Ecology, but Ecology science does not identify the problem to be addressed; each type of contaminant (people, livestock, turbidity, water pollution) has a different effective buffer width; Sedimentation- 16-66 feet; phosphorus- see sedimentation; nitrogen- 50% at 10 ft., 75% at 92 ft., and 90% at 367 ft.; erosion control- physicaly block livestock; habitat- other buffers expand vegetation and therefore habitat |
| 16 | | | | In all cases, you are talking about a regulatory taking and in most takings, the county is required to buy the property. Consider not taxing the portion of the property encumbered by buffers and setbacks. |
| 16 | | PC Hearing- Written | | Reference to Title 2 for inspections in every code, but violates RCW |
| 16 | 19.100 Introcution | Letter/ BoCC RM (3/27) | Alan Beam | .110 Applicability- [no comment, but bold emphasis added to portions of a copy of section] |
| 16 | 19.300 FWHCA | Letter/ BoCC RM (3/27)/ PC Hearing- Written | Alan Beam | There are no wildlife designated areas on the map, which is good because the definition fits the entire county (.325); defines wildlife areas and why we protect but not what the wildlife are and where category I wildlife areas are, none are shown on the maps; identify what we are trying to protect, by species |
| 16 | 19.200 Wetlands | Letter/ BoCC RM (3/27) | Alan Beam | By using the DOE Wetland Rating Sytem, allows the state to revise the state and county requirements without further review; downloads of Ecology publications are difficult to find |
| 16 | | PC Hearing- Written | | What monitoring system is used to determine "no net loss"? |
| 16 | | PC Hearing- Written | | There is no inventory of wetlands other than streams; buffers should be based on surveys |
| 17 | General | Web | Doug Lyons | The CAO seems to be to be a total overreach and violoation of private property rights both state and federal. |

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| 18 | 19.100 (Agriculture) | Web | Josh DeWitt | .125 agriculture exemption- requiring farm plans and BMPs for the last five years as a prerequisite to continued use exemption has significant implications. With adoption of new Ag code last August, these were voluntary. How many farms already had a plan/BMPs in place five years ago? What if they implemented then since the Ag Code was adopted? What if they are adopting them now? Spirit of exemption is to allow continued use without negative impacts, and would be better to encourage transition to farm plans/BMPs. Want to protect critical areas but protect existing farms. Proposed alternative language: "Pre-existing and ongoing agricultural activities on lands containing critical areas. For the purpose of this title, "existing and ongoing" means that the activity has been conducted and/or maintained within the past five years and is currently under a farm management plan or other best management practices not resulting in a net loss of critical area functions and values." |
| 19 | 19.100 (Agriculture) | Web | Scott Hall | .125 Exemptions- Pre-existing and ongoing agriculture- "bright line" of five years cannot be supported as the federal regulations (exemptions to 404f of Clean Water Act pre-empt local authority to establish regs that would interfere with federal exemptions) do not specify a time frame associated with "ongoing" use, nor do they specify that any particular activity must have been engaged in within a set time frame. Federal regulations refer to the operation being maintained such that extant hydrological regimes do not need to be altered to bring an area back into agricultural production (with no time frames on lying fallow); Proposed alternative language: "For the purpose of this title "existing and ongoing" means activities associated with farming operations conducted in accordance with the exemptions found in applicable federal regulations, and specifically including those federal regulations relating to wetlands. More specifically, exemption from this title is dependent on adhering to any requirements or conditions for exemptions found in federal regulations governing agricultural uses on lands that contain critical areas, including wetlands, as defined by this title." |
| 19 | 19.150 Definitions | Web | Scott Hall | .165 Best Management Practices- new paragraph D is redundant to A, and should be deleted; |
| 19 | | | | .265 Draining (related to wetland)- as used here, "draining" is not consistent with the meaning found in federal regulations |
| 19 | | | | .395 Grazed wet meadows- delete, cannot be recognized as separate from other recognized agricultural uses |

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| 19 | 19.200 Wetlands | Web | Scott Hall | .200.225(B) Agricultural restrictions- remove all mention of grazed wet meadows (see above); wording of section is generally confusing; current language states "wetlands shall be avoided by at least one of the following methods" rather than "loss of wetland functions and values shall be avoided by at least one of the following methods". |
| 20 | General | Web | Robert Dukes | How are the property owners to be compensated for the "taking" of our land//use of our land, for this ordinance? |
| 21 | General | Letter (4/3) | Brittany Gordon | Letter of support of Draft CAO- working group meetings provided a great opportunity for state agency representatives to discuss suggested updates; updates improve the consistency of the CAO with current state regulations, Best Available Science, and state guidance; Espeically support proposed updates to Wetlands (19.200), Fish and Wildlife Conservation Areas (19.300) and Special Reports (19.700). |
| 22 | 19.100 Introcution | Email (4/3) | Jon Brand | .125E- does this exemption for normal and routine maintenance or repair of exising structures in the right of way include bulkheads/rockeries associated with County Roads? |
| 22 | | | | .130A could routine repair and maintenance of County roadways constructed before intitial CAO be considered a nonconforming use? If so, consider saying it. |
| 22 | | | | .130B Danger Tree- Assuming if danger tree removed from right of way, no replanting is required. Correct?; What is a danger tree evaluation permit and who administers it? Does it apply ot trees in right of way or cases where trees on private property threatens roads? |
| 22 | | | | .135F Variances- Would it be appropriate to include County roads with public utilities? There are public service obligations and the need to reasonably accommodate roadway infrastrucure. |
| 22 | | | | .145 Special use review- When did the tribes achieve external authority status? When would review by a tribe be necessary? |
| 22 | | | | .160D Application requirements- Are there fees assessed against PW for review or geotechnical reports? |
| 22 | | | | .165 Inventory (map)- Is a site specific analysis performed by others subject to the same review and approval as those completed by project proponents? |
| 22 | | | | .170E- Imminent and substantial dangers- assuming this could relate to public roads |
| 22 | 19.150 Definitions | Email (4/3) | Jon Brand | .230 Critical Facilities- should include arterial roadways |
| 22 | | | | .235 Danger Tree- would a roadway qualify under this defintion? |

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| 22 | | | | .325 Fish and wildlife habitat conservation areas- what about drainage ditches located in the right of way? Are these not included in the definition? |
| 22 | | | | .350 Forest Practices- how do road and trail construction fit into the forest practices discussion? Please clarify. |
| 22 | | | | .365 Geologic Assessment- grammar issue |
| 22 | | | | .415 Habitats of local importance- have these been formally identified? |
| 22 | | | | .450 Landslide hazard areas- Is there an inventory of landslide hazard areas? Same as geohazard areas shown on parcel maps? |
| 22 | | | | .475 Normal maintenance- how about repair and routine maintenance of rockeries, buklheads and other roadway infrastructure? |
| 22 | | | | .505 Priority habitat- have these areas already been identified and mapped? |
| 22 | | | | .510 Priority species- thought it was the feds that did listings |
| 22 | | | | .520 Public project of significant importance- where is this referred to in CAO? |
| 22 | | | | .530 Public utility- transportation is listed as a public utility |
| 22 | | | | .635 Streams- include roadside ditches |
| 22 | | | | .665 Utilities- the definition of public utility includes transportation but this doesn't. Why? |
| 22 | | | | .710 Wetlands of regional significance- have these been identified and mapped? |
| 22 | 19.200 Wetlands | Email (4/3) | Jon Brand | .215B- Delineation of wetland boundaries- is DCD available for the delineation of minor wetlands located in the right of way?; verification by department requires a charge by DCD? |
| 22 | | | | .220E- Table- Other measures recommended for protection: no additional surface discharges to wetland or its tributaries- this may be the only option. |
| 22 | | | | .220B.2.a.5- Infiltration of stormwater where soils permit- assuming that on-site wastewater systems and stormwater infiltration in buffers is not allowed when wetland categories do not allow additional discharge? |
| 23 | General | PC Hearing- Letter | T.Oskinski (KBA) | Thanks to County staff for working with KBA in conversational way and productive dialogue; KBA is acting as the voice of the unsuspecting public, detailed comments submitted in writing; committed to each point in written submittal |
| 23 | | | | Don't go beyond what is absolutely necessary as indicated by Best Available Science and state mandates |

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| 23 | | | | Delay the implementation date by six months- technical code will need staff training and acclimation period |
| 23 | | | | Minimize 3rd party review whenever possible; they may not be aware of nuances of Kitsap County |
| 23 | | | | Incorporate Administrative Policy decision (Oct. 17th, 2006) that CAO to be applied to all uses, not just SFR, unless specified otherwise. |
| | | | | Make sure fault lines on map are labeled as "inferred" |
| 23 | Definitions (19.150) | | | Define "Habitable Structure" |
| 23 | | | | Define "qualified arborist" / "certified arborist"; pick one |
| 23 | Buffers | | | Keep buffer averaging, allow for administrative reduction of buffer without hearings; keep 50% minimum |
| 23 | | | | Admin. Buffer reduction: remove the phrase "as great or greater" and retain existing language "granting of a reduced buffer shall be the minimum necessary.." |
| 23 | | | | Wildlife corridor buffer reduction provision does not provide enough incentive (not much more than administrative buffer reduction); need to incentivize the applicant to utilize this option by reducing to buffers for low-impact uses |
| 23 | 19.200 Wetlands | | | Maintain the current mitigation thresholds (2,500 sq.ft. for category III and 7,500 for category IV) if the applicant adequately identifies the specific wetland function affected and mitigates; continue to allow these areas to be used for storm water features |
| 23 | 19.300 FWHCA | | | Continue to allow buffer reductions up to 50% through a type I permit providing a PWS has prepared a report requesting the reduction. |
| 23 | 19.400 Geohazards | | | Require only a geotechnical consultant to evaluate slope stability when removing and replanting in a geohazard area. |
| 23 | | | | Remove the "I" designation from the 300' requirement under geo hazard area. |
| 24 | Wetlands 19.200 | PC Hearing / Written | R. Myers | Consider retaining the tools for buffer reductions as is (size thresholds, 50%, etc.), with consideration or interpretation to protect and preserve corridors; sit-specific flexibility is critical especially with more redevelopment |
| 24 | | | | Ecology guidelines assume that buffers are "pristine" and there is not scientific evidence that current buffer reduction alternatives aren't meeting the GMA no net loss of function |

| Critical Areas Ordinance (Title 19) Public Comment on Draft (3/1/17-3/31/17) COMMENT SUMMARY | | | | |
|--|-------------------|-------------------|----------------|---|
| Comment # | Topic(s) | Method Received | Name | Summary |
| 25 | General | PC Hearing | Levi Holmes | Agrees with T. Osinski comments and KBA written submittal; more tools for site specific analysis makes projects more feasible and affordable; use local consultant knowledge to address critical areas; delayed implementation; addressing non-residential uses |
| 25 | | | | Draft has errors- some cross-outs not in original code; original code not in draft |
| 26 | General | PC Hearing | Shawn Williams | Suggests 6- month implementation delay to allow for acclimation within the County (staff and developers) |
| 26 | 19.400 Geohazards | | | Moderate hazard slope from 40' to 200' setbacks is a significant impact to homeowners (more site visits); increased buffers either can't build or higher costs |
| 26 | | | | natural encroachment can occur (3-4" year), so switching from 40' to 200' is questionable |
| 26 | | | | Letter from geotechnical consultant to the County is a good idea; however, multiple letters are likely needed from different professionals and this adds significant costs; cost implications to homeowner for added work (see average cost letter submitted by KBA). |
| 27 | General | PC Hearing-Letter | Judy Kriegsman | Supports CAO, believes it is a good document, if enforced; Letter submitted on behalf of the Illahee Preserver Stewardship Committee |
| 27 | | | | Mapping omissions: Steep slope designation for the Illhaee Creek corridor; Stream designation missing for Steele Creek headwaters in the Illahee Preserve; Wetland designation missing for the same area |
| 28 | Buffers | PC Hearing | Mark Kuhlman | Need to retain buffer averaging and buffer reduction tools for flexibility (finger of wetland can prevent use of the land); Avoidance and minimization area always the first option, averaging is never first choice |
| 28 | | | | Not much that evaluates the quality of buffers, only an assumption that all buffers are highly effective; enhancement of buffers should be appreciated and allowed for buffer reduction |
| 28 | | | | Applauds wildlife corridor concept, but won't be able to use it often- need to incentivize for smaller projects |
| 28 | | | | Protecting critical areas in UGA to the same degree as in rural areas reduces the available land in UGA, which ultimately leads to sprawl anyway |
| 29 | | PC Hearing | Thomas Frey | Full support of CAO, recommends draft as proposed; concern with current housing development proposal (Appletree Highline Estates) on a high landslide risk area; stormwater management is of great concern for Appletree Point community; largest wetland is filled already, additional runoff may overtake wetlands. |

| Critical Areas Ordinance (Title 19) Public Comment on Draft (3/1/17-3/31/17) COMMENT SUMMARY | | | | |
|--|----------|---------------------------------|-------------------------|---|
| Comment # | Topic(s) | Method Received | Name | Summary |
| 30 | | PC Hearings/ Email (4/27) | John Willet | CAO was not vetted by any Trails organization, nor was there any awareness by any of the trails organizations of the revisions to the CAO and the impacts; Works well with PW and Parks, needs DCD on board; hopes trails and critical areas can exist so public can get out and enjoy and learn about those areas; common sense needed about trail development |
| 30 | | | | Requests that the trails impact portion be set aside for adoption and comment period reopened until the trails community can be fully briefed |
| | | | | Response to 30' proposed to change to outside 25% setback- beaver habitat at Port Gamble trail efforts used as an example how proposed CAO would not allow what has been recently constructed and used often by the public. |
| 31 | | PC Hearing (email) | Rick Feeney | Response email to J. Willet; appears to have not been vetted by the county-sanctioned Non-Motorized Citizens Advisory Committee; had no idea changes were proposed; agrees with extending the due date |
| 31 | | | | Limits trails to pervious materials, preventing well-maintained dirt; seems like it can affect stormwater drain policy regarding paving shoulders in rural areas if classified as a wetland |
| 32 | | PC Hearing (email) | Joan Gorner | Must assure residents that DCD is protecting critical areas and the citizens who own property in the County. |
| 32 | | | | When defining buffers it is necessary that the document not presume species are present, but prove that a specific specie resides in a specific area BEFORE the county can restrict the use of private property |
| 32 | | | | WDFW's PHS list for Kitsap County includes 15 species of fish, 6 reptiles, 6 birds, 8 mammals, and 3 invertebrates. If the County is to create buffers for these species, must also use measures to protect private property owner from indiscriminate buffers which "takes" their property or restricts its use. |
| 33 | | PC Hearing (email) | Judy Mentor Eagleson | Fully supports the letter submitted for the record from Kitsap Builders Association (KBA). |
| 34 | | PC Hearing- Letter | T.Osinski (KBA)- | Letter from KBA in response to Planning Commission's questions about the likely fees applicants may be expected to pay; The proposed CAO will affect more applications and require more applicants to purchase professional services and most reports will verify that no critical area is affected |

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|--|----------|-------------------------|-----------------------|--|
| Comment # | Topic(s) | Method Received | Name | Summary |
| 34 | | | | \$750 stamped geological letter; \$1500 geological slope assessment; \$5000 geotechnical reports; \$3000 geotech infiltration report; \$600 letter from wetland biologist stating "no critical areas"; \$1500 certify wetland on neighboring property; \$5000 wetland delineation |
| 35 | | PC Hearing-Letter (5/1) | William Palmer (KAPO) | Written comments submitted, highlighting 10 issues |
| 35 | | | | 1) The WHY of the CAO: a) Specifically what are we trying to protect (specides or geophysical condition); b) if there has been a study of environmental conditions of Kitsap County not disclosed to the public...Exactly what protections are required to rectify the poblem. Such recommendations should have included "best management" solutions as well as demonstrate a need for regulatory measures.; c) Why was such a study not undertaken? And where is the treatise documenting public versus private responsibilities and solutions?; d) What is the minimum level of each protective measure appropriate to the species/condition for the specific site? |
| 35 | | | | 2) Exactly what guidance was provided for conduct of the update: a) Was the Department of Commerce Update Checklist followed?; b) What guidance did the BOCC provide?; c) What guidance did the Director of DCD provide?; d) What state level guidance or grant parameters were used for update?; e) How was Basic Available Science for Kitsap identified and validated?; f) Was BAS other than "State approved" considered or used? |
| 35 | | | | 3) How is CAO effeciveness determined: a) Where is the definitive inventory of specific Critical Areas covered by the ordinance; b) What are the specific metrics applicable to assessing the effectiveness of either the existing or proposed CAO?; c) Where is the baseline for those metrics established and documented?; d) What are the specifics of the monitoring and reporting program for each Critical Area? |
| 35 | | | | 4) Practical Basis for current revision is not evident: a) Not fewer than 12 court, GMHB cases and decisions not reflected in update; b) No evidence that provisions of 2005 edition were not effective; c) No edidence that 2005 provisions were not restrictive enough or even too restrictive; d) Update appears to be based solely on DOE revised "guidance" even though the Department of Ecology has no review authority of the ordinance and Kitsap County's experience with implementing the 2005 is not considered. |

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|--|----------|-----------------|------|---|
| Comment # | Topic(s) | Method Received | Name | Summary |
| | | | | <p>5) What is the economic impact of the CAO: a) Encumbrance of lands previously considered "available" for development that cannot be used and that restricts where population growth can be accommodated. This issues was/is not considered in the preparation of the Draft CAO Update.; b) Exceptional negative impact on value and desirability of land with Notice to Title redounds to the land owner and no consideration of this fact is acknowledged by either County DCD staff or elected officials; c) Increase in development cost (without value to end product) caused by various "studies" and extended permitting time. Such costs area passed to consumers without consideration of the impact on the County's responsibility to provide "affordable housing". No consideration of these associated costs is evident the Draft CAO Update.</p> |
| | | | | <p>6) The Takings considerations: a) CAO is discriminaory in that impacts only those applying for permits and does not extend to adjacent properties. Consequently there is discrimination against the land owner, land developer and ultimately against the in migration of people coming into Kitsap County or people relocation within its borders.; b) Critical Areas and their attendant buffers establish a priority of "highest and best use" public value for which the private property owner can derive no "highest and best use" personal value.; c) Notice to Title is not univeral on all properties in Kitsap County only on properties with some identified Critical Area and thus, there is an exceptional negative impact on both use and disposal of property; d) The Consitutional granted Rights of Property use and ownership area abridged by the proposed ordinance, which restricts the use of all or portions of their property. Such restrictions come without just compensation and therefore violate both the State of Washington's and our Federal Constitution.; e) Be it known that there is no Constitutional based protection for the environment but there is for people who own property.</p> |

| Critical Areas Ordinance (Title 19) Public Comment on Draft (3/1/17-3/31/17) COMMENT SUMMARY | | | | |
|--|----------|-----------------|------|--|
| Comment # | Topic(s) | Method Received | Name | Summary |
| 35 | | | | <p>7) Reasonable use is site specific and not universal. Application of CAO not consistent with other County Code Titles: a) CAO provisions much more restrictive than other titles; b) Plain reading of the proposed ordinance does not reflect intent offered by DCD in their explanations of the text; c) Language in used in CAO subverts common use and results in misinterpretation; d) Extensive discretion extended to "Department" for interpretation, application, and enforcement without oversight of elected officials; e) Specific comment on the provisions for "entry" onto private property-paragraph should clearly state the actual requirments and stop trying to create an "alternate world". Simply stated public officials may not enter private property unless permission is granted by the owner, a clear emergency situation exists such as a fire on premises or that public official has first obtained a warrant from a judge of a court of competent jurisdiction.</p> |
| 35 | | | | <p>8) Commissioner "intent" statement not specific and clear: a) Department delegated authority to interpret most provisions without clear intent- potential for misunderstanding and lacks reporting responsibilities to elected officials; b) Hearing examiner can only guess intent when hearing appeals; c) Commissioners are "out of the loop" in the appeals process; d) Commissioners adopt CAO but are held responsible at GMHB or in Court, but are out of the loop for what traspirees in DCD as the CAO is administered</p> |
| 35 | | | | <p>9) No effective "public participation" as required by GMA (and DOC Checklist): a) Committee formed but did little acutal work; b) CAO revision draft created by DCD without actual public input untl after text was set and then DCD staff has demonstrated unwillingness to make any changes to the text of the Draft CAO in response to public comments; c) Public comment period (considering length and detail of CAO) very short; d) Public comments edited and summarized by DCD for use by others (planning commission, commissioners, etc.)</p> |

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|--|------------------------|--------------------|-------------|---|
| Comment # | Topic(s) | Method Received | Name | Summary |
| 35 | | | | 10) Question of who is actually in charge: a) In 2005 Commissioners admitted that they had not ready CAO prior to adoption; b) In 2017 in meeting with DCD Director after close of public comment period, Director advised meeting participants that she was not well versed in CAO and was unable to answer any questions about the proposed revised ordinance. At that time the Draft CAO Update had already been presented to Planning Commission. ; c) In 2017 the same people who wrote the 2005 edition were rehired to create the 2017 update after having been away from the county for a number of years.; d) Public comments submitted to Commissioners and or DCD are not subject to open discussion of debate but are simply subject to a determination made by DCD and the Planning Commission. they who write the draft and then decide what comments and recommendations are worthy of consideration presents a situation where the citizens of Kitsap County are effectively excluded from an ordinance consideration/ approval process, an Ordinance that dramatically impacts their property and lives and not the lives of appointed or even elected officials. |
| 35 | | | | Have provided multiple submittals about these issues, but doesn't feel a satisfactory response to issues have been provided; Commetns from KAPO will likely be ignored or minimized |
| 35 | | | | Materials on back table didn't show responses to citizen concerns [Staff response: the summary of changes document provided on the back table were from February and only summarize the proposed changes in the preliminary draft for public comment.]; why can't citizen comment precipitate a change to the ordinance |
| 35 | | | | Resonse to question, "what specific items should change"?- comments refer to court cases that should influence the draft regulations. |
| 36 | 19.200 Wetlands | PC Hearing-Written | AJ Bredburg | Provided excerpt copies from Ecology Wetland Rating System (2014) and WAC 365-195-905 (Criteria for determining BAS); provided credentials (4000 wetland project approved) |
| 36 | | | | "Water always funs downhill", " collective judgement of regional experts" (quoting Ecology WRS, 2014) |
| 36 | | | | According to Ecology, we are using a system not supported by science (1-100 scoring), now it takes two people eight hours and 20 hours of work to determine wetland, costing property owner \$3000 |
| 36 | | | | BAS is peer review, WRS was not independently reviewed outside of DOE |

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| 36 | | | | Narrow wetland features become large swaths of land with increased buffer requirements |
| 36 | | | | Response to keeping 50% buffer averaging: agrees and refers to Snohomish County |
| 36 | | | | Resonse to reopir with DCD: good when Dave Greetham was here; new wetland rating forms would drive him out of business |
| 37 | Agriculture | PC Hearing | Jerry Darnall | Testifies to the agricultural side of things; procedurally inappropriate; Ag code affected 1000 parcels, CAO will affect every parcel in the county |
| 37 | | | | Working farm not a bad thing, the farmer is a good steward of the land |
| 37 | | | | pg.7 19.100: pre-existing ag activities definitins with BMP and farm management plans, doesn't qualify by definition because of free range birds in buffers zone of two pons and different answers from different authority |
| 37 | | | | Rough calculation 2 pigs with 5 pigles would take 30 years to create manure that was accidentally spilled from treatment plants in 2015 |
| 37 | | | | Kitsap County was supposed to assemble an agricultural commission via RCW 84.34.135 |
| 37 | General | | | Comment matrix: 18 comments included same response of review by prosecutor's office, attorney general document answers questions more specifically, page of AG document demonstrates procedural requirements |
| 38 | Trails | PC Hearing | Jay Spadee | Comments on trails, stormwater drainage criteria for trails was modified except in UGA; Trails in critical areas should be used as a form of mitigation to protect critical areas; more thoutful approach needed |
| 38 | | | | Need to relax standards to allow for trails in crtical areas, what does BAS say? Is there science that will support trails? |
| 39 | | PC Hearing | Jackie Rossworn | Lived in Kitsap For 40 years; asks to justify proposed buffers, eagle habitats, pond turtle?; CAO as proposed is a major obstacle; Killer whales are all over the world, our may be differenct but there needs to be justification for protection of these animals; How do we determined what we are protecting and for what reasons?; Regulations to account for potential of animal are not appropriate. |

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|---|-----------------|------------------------|------------------|--|
| Comment # | Topic(s) | Method Received | Name | Summary |
| 40 | | PC Hearing-Written | Linda Berry Mare | Provided excerpt of Clallam County Code on trails; key to low-budget trails, built capacity for trails into the codes, soft-surface and non-motorized trails have specific allowances- outright exemption from the buffer if no clearing or grading; specific allowances for public trails on public lands, certificate of compliance required; Encourage on existing roads, small width trails unless grant warrant wider trail widths, only non-motorized use, specific surfacing requirements |
| 40 | | | | long-term community volunteer, has worked through CAO in Poulsbo in past; involved in North Kitsap Trails Association and other committees with John Willet |
| 40 | | | | Trails area a high priority in comprehensive plan and communities |
| 40 | | | | 100-300' buffer is a large change, results of glacial scrapes area critical areas everywhere |
| 40 | | | | non-motorized trails are extremely difficult already with ADA accessibility issues, future projects will not be able to avoid CAO buffers as written |



May 1, 2017

Kitsap County Planning Commission
% Department of Community Development
619 Division Street, MS – 36
Port Orchard, Washington 98366

SUBJECT: Top 10 Issues Manifest in the Current Draft Critical Areas Ordinance

Honorable Planning Commission Members:

Kitsap Alliance of Property Owners has prepared a list of questions and issues that are not addressed either by the Department of Community Development Staff nor are they self-evidently resolved in the present draft version of the Critical Areas Ordinance update (CAO). Members of our organization have presented written testimony about the problems and unresolved issues in the Draft CAO in the comment period. Many of our comments have been summarized by DCD staff such that they have left the issues presented unsupported. We trust that the Commission members will read the entirety of our previously submitted testimony and not just the summary of our comments as prepared by staff.

As a means of providing a key to the points we have made in our testimony we are herein submitting the "Top Ten" issues and problems our members have identified in prior testimony and those that arise out of our meetings with DCD staff and individual members of the Board of County Commissioners.

1. The WHY of the CAO

- a. Specifically what are we trying to protect (species or geophysical condition)
- b. If there has been a study of environmental conditions of Kitsap County not disclosed to the public,....Exactly what protections are required to rectify the problem. Such recommendations should have included "best management" solutions as well as demonstrate a need for regulatory measures.
- c. Why was such a study not undertaken? And where is the treatise documenting public verses private responsibilities and solutions?
- d. What is the minimum level of each protective measure appropriate to the species/condition for the specific site?

2. Exactly what guidance was provided for conduct of the update

"The small, thoughtful details are the heart of our work and our care." Thomas Jefferson

- a. Was the Department of Commerce Update Checklist followed?
- b. What guidance did the BOCC provide?
- c. What guidance did the Director of DCD provide?
- d. What state level guidance or grant parameters were used for update?
- e. How was Basic Available Science for Kitsap identified and validated?
- f. Was BAS other than “State approved” considered or used?

3. How is CAO effectiveness determined

- a. Where is the definitive inventory of specific Critical Areas covered by the ordinance?
- b. What are the specific metrics applicable to assessing the effectiveness of either the existing or proposed CAO?
- c. Where is the baseline for those metrics established and documented?
- d. What are the specifics of the monitoring and reporting program for each Critical Area?

4. Practical Basis for current revision not evident

- a. Not fewer than 12 court. GMHB cases and decisions not reflected in update
- b. No evidence that provisions of 2005 edition were not effective
- c. No evidence that 2005 provisions were not restrictive enough or even too restrictive.
- d. Update appears to be based solely on DOE revised “guidance” even though the Department of Ecology has no review authority of the ordinance and Kitsap County’s experience with implementing the 2005 CAO is not considered.

5. What is the economic impact of the CAO

- a. Encumbrance of lands previously considered “available” for development that cannot be used and that restricts where population growth can be accommodated. This issue was/is not considered in the preparation of the Draft CAO Update.
- b. Exceptional negative impact on value and desirability of land with Notice to Title redounds to the land owner and no consideration of this fact is acknowledged by either County DCD staff or elected officials.
- c. Increase in development cost (without value to end product) caused by various “studies” and extended permitting time. Such costs are passed to consumers without consideration of the impact on the County’s responsibility to provide “affordable housing.” No consideration of these associated costs is evident the Draft CAO Update.

6. The Takings considerations

- a. CAO is discriminatory in that it impacts only those applying for permits and does not extend to adjacent properties. Consequently there is discrimination against the land owner, land developer and ultimately against the in migration of people coming into Kitsap County or people relocation within its borders.

- b. Critical Areas and their attendant Buffers establish a priority of “highest and best use” public value for which the private property owner can derive no “highest and best use” personal value.
 - c. Notice to Title is not universal on all properties in Kitsap County only on properties with some identified Critical Area and thus, there is an exceptional negative impact on both use and disposal of property.
 - d. The Constitutional granted Rights of Property use and ownership are abridged by the proposed ordinance, which restricts the use of all or portions of their property. Such restrictions come without just compensation and therefore violate both the State of Washington’s and our Federal Constitution.
 - e. Be it known that there is no Constitutional based protection for the environment but there is for people who own property.
- 7. Reasonable use is site specific and not universal. Application of CAO not consistent with other County Code Titles**
- a. CAO provisions much more restrictive than other titles
 - b. Plain reading of the proposed ordinance does not reflect intent offered by DCD in their explanations of the text
 - c. Language in used in CAO subverts common use and results in misinterpretation
 - d. Extensive discretion extended to “Department” for interpretation, application, and enforcement without oversight of elected officials.
 - e. Specific comment on the provisions for “entry” onto private property – paragraph should clearly state the actual requirements and stop trying to create a “alternate world.” Simply stated public officials may not enter private property unless permission is granted by the owner, a clear emergency situation exists such as a fire on the premises or that public official has first obtained a warrant from a judge of a court of competent jurisdiction.
- 8. Commissioner “intent” statement not specific and clear**
- a. Department delegated authority to interpret most provisions without clear intent - potential for misunderstanding and lacks reporting responsibilities to elected officials
 - b. Hearing examiner can only guess intent when hearing appeals
 - c. Commissioners are “out of the loop” in the appeals process
 - d. Commissioners adopt CAO but are held responsible at GMHB or in Court, but are out of the loop for what transpires in DCD as the CAO is administered
- 9. No effective “public participation” as required by GMA (and DOC Checklist)**
- a. Committee formed but did little actual work
 - b. CAO revision draft created by DCD without actual public input until after text was set and then DCD staff has demonstrated an unwillingness to make any changes to the text of the Draft CAO in response to public comments.
 - c. Public comment period (considering length and detail of CAO) very short
 - d. Public comments edited and summarized by DCD for use by others (planning Commission, Commissioners, etc.)

10. Question of who is actually in charge

- a. In 2005 Commissioners admitted that they had not read CAO prior to adoption
- b. In 2017 in meeting with DCD Director after close of public comment period, Director advised meeting participants that she was not well versed in CAO and was unable to answer any questions about the proposed revised ordinance. At that time the Draft CAO Update had already been presented to Planning Commission.
- c. In 2017 the same people who wrote the 2005 edition were rehired to create the 2017 update after having been away from the county for a number of years.
- d. Public comments submitted to Commissioners and or DCD are not subject to open discussion of debate but are simply subject to a determination made by DCD and the Planning Commission. They who write the draft and then decide what comments and recommendations are worthy of consideration presents a situation where the citizens of Kitsap County are effectively excluded from an ordinance consideration / approval process, an Ordinance that dramatically impacts their property and lives and not the lives of appointed or even elected officials.

Should there be any confusion about any of the ten main points or sub-points presented herein, members of the Kitsap Alliance of Property Owners will be more than pleased to submit answers to those questions in writing. Many of our above listed comments require more explanation or at the very least dialog. However, it is our experience that for the most part, whatever we present is most likely to be ignored or minimized. That has been our experience to date with DCD staff and we wonder what kind of a response there will be from those making decisions. If ignored or minimized as our testimony was in 2005, our organization must necessarily take the next step. Unlike the environment in 2005, both the Growth Management Hearings Board, the Washington State Supreme Court and the US Supreme Court have made decisions that have a direct bearing on the kind of provisions that are now included in Draft CAO. Even though KAPO has provided clear and certain reference to those Hearings Board and Court decisions, there is no evidence our testimony has been cause for even discussion of the issues.

Our testimony should be influential in what is included in an updated CAO, if any changes in the 2005 adopted Ordinance are to be made, but so far there is no indication it has or will. Thus, KAPO concludes the ordinance as presently drafted is vulnerable in an appeal. If our assessment is correct, Kitsap County will be spending the public's money to rectify issues after the fact that could have been addressed in the drafting process or at the very least in the public hearing consideration process.

Based on appearances, the Draft CAO Update is nothing more than proposed legislation for the sake of adopting more restrictive rules. So far, no justification has been presented by DCD staff for a.) what the values and functions are of so-called

Critical Areas, b.) what measures, if any, are necessary to protect those values and functions, c.) what consequences redound to the County's citizens if those undefined values and functions are somehow compromised, d.) what data has been collected to demonstrate a problem exists that justifies regulatory measures and finally e.) what is the minimum necessary to address the issues presented in the analysis that documents or documented a problem. Clearly the "problem" has not been defined and yet draconian rules (even more so than found in the 2005 Cao) are being proposed to supposedly solve a problem that may not in fact exist. KAPO remains unalterably opposed to this proposed Draft CAO Update or any and all other regulations proposed for regulation sake.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "William M. Palmer", with a long horizontal flourish extending to the right.

William M. Palmer, President

KITSAP ALLIANCE OF PROPERTY OWNERS

Attention Commissioners

Charlotte Garrido, Rob Gelder, and Ed Wolfe

I am asking the commissioners to justify the proposed buffers that will be placed on private property in Kitsap County. I can't find any critically endangered species in our area. Bald Eagles have been removed from the endangered list and no-longer require a buffer. You can't impose a buffer on animals that don't live here. The Pacific Pond Turtle does not live here and has not been listed for Kitsap County using evidence based science nor has one been produced that lives here. Killer Whales are found in great numbers in all most every one of our oceans and are not missing from anywhere they should be. They live almost everywhere.

We cannot control the movements of Whales. Humpbacks and Sperms would be hard to put a buffer around and very seldom ever come into Puget Sound. I have never see either Whale adjacent to my property. I would like to have the history that validates the statement made by the County. My great grand- parents are buried in the Naval Ave. Cemetery and my grand- parents started their family here so I have a long history in this County. Never one word of whales living here was ever shared.

You cannot regulate if an animal doesn't live here, might live here someday, might become threatened. Precautionary Principles have been prohibited in many land use decisions and will be again.

Jackie Rossworn 5/01/2017

Robert Rossworn

From: Joan Gorner <jwgorner@outlook.com>
Sent: Sunday, April 30, 2017 3:55 PM
To: rosswornjr@wavecable.com
Subject: Critical Areas Ordinance

I am sorry that I cannot attend the meeting. I would like my statement to be read into the record as this ordinance update is very important to us, the citizens of Kitsap County.

The Washington State Growth Management Act requires local governments to protect five types of critical areas, among which are wildlife habitat areas.

The Critical Areas Ordinance (CAO) update affects all of Kitsap County so it must assure the residents of our county that due diligence has been applied by the Department of Community Development (DCD), not only for protecting the critical areas and sensitive, endangered and threatened species, but also to protect the citizens who own property in the county. Therefore, when DCD defines buffers, it is necessary that the document NOT presume that sensitive, endangered and threatened species presently exist in the area defined. In other words, the DCD needs to prove that a specific named specie resides in a specific area BEFORE the county can restrict the use of private property.

The Washington Department of Fish and Wildlife (WDFW) has created a Priority Habitat and Species list (PHS) wherein it lists endangered and sensitive species. The PHS lists 20 habitat types, 152 vertebrate species, 41 invertebrate species and 10 specie groups. When the list is broken into counties, Kitsap County lists 15 species of fish, 6 species of reptiles, 6 species of birds, 8 species of mammals, and 3 species of invertebrates. If Kitsap County is to create buffers for these species, in order to protect them from extinction, the county MUST also use all measures to protect the owners of private property from indiscriminate buffers which "takes" their property or restricts its use.

Thank you.
Joan W. Gorner

Question 4: Slope Wetlands

Slope wetlands occur on hill or valley slopes where groundwater surfaces and begins running along the surface, or immediately below the surface. Water in these wetlands flows only in one direction (down the slope) and the gradient is steep enough that the water is not impounded. The downhill side of the wetland is always the point of lowest elevation in the wetland. Figure 14 shows a Slope wetland that formed where the slope of the hillside changed and caused groundwater to come to the surface.

Slope wetlands with surface flows can be distinguished from Riverine wetlands by the lack of a defined stream bed with banks. Slope wetlands may develop small rivulets along the surface, but they serve only to convey water away from the wetland. There is no surface flow coming into the wetland through channels. Also, Slope wetlands do not impound water except in very small depressions that may form on the surface. These are only a few inches in diameter and a few inches deep.

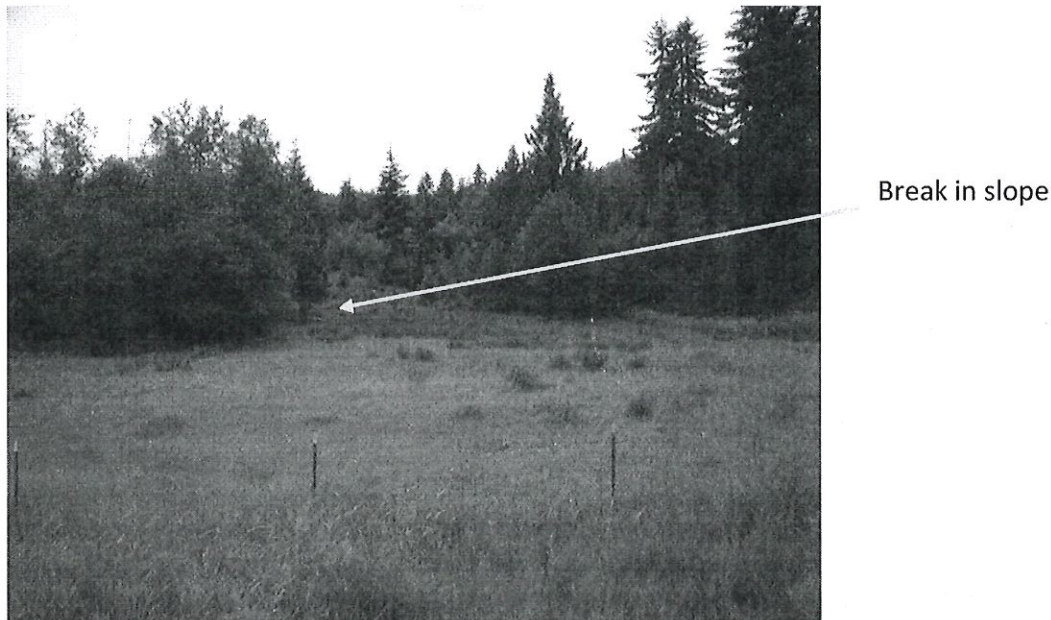


Figure 14. Slope wetland in Lewis County identified by the presence of wetland plants (*Carex* spp. *Juncus* spp.) and hydric soils. Wetland occurs where there is a major break in the slope of the hillside.

Question 5: Riverine Wetlands

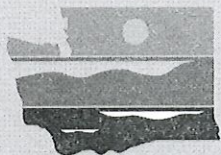
Riverine wetlands occur in valleys associated with stream or river channels. They lie in the active floodplain, and have important hydrologic links to the flows in the river or stream. Their proximity to the river facilitates both the rapid transfer of floodwaters in and out of the wetland, and the import and export of sediments. The distinguishing characteristic of Riverine wetlands in western Washington is that they are flooded by overbank flow from the river at least once every 2 years on average over a 10-year period. Riverine wetlands,



Washington State Wetland Rating System

For Western Washington

2014 Update



DEPARTMENT OF
ECOLOGY
State of Washington

October 2014 - Effective January 2015
Publication no. 14-06-029

Preface

This document is an update of the *Washington State Wetland Rating System for Western Washington*, published by the Department of Ecology in 2004 (Hruby, 2004b). This is the fourth edition of the rating system since the Department of Ecology published the first one in 1991. The original document was published with the understanding that modifications would be incorporated as we increase our understanding of wetland systems, and as many different people use the rating system.

The need to update the previous version became apparent as we have learned more in the last decade about how wetlands function and what is needed to protect them. Furthermore, statistical analyses of the data collected during the use of the previous version indicated that scoring functions from 0-100 could not be supported by the science. The method can accurately document the levels at which wetlands function only to three qualitative ratings of High, Medium, or Low.

We are calling this version an update of the 2004 edition rather than a revision because the changes made are not as significant as those made between the 1993 and the 2004 versions. Much of the information and text remain the same and changes were made only if new scientific information indicated that changes were needed.

This update was initially published online as Publication # 14-06-019 in June 2014. It was removed from the website to allow time for local jurisdictions to update relevant code language and to correct typographical and formatting errors. Because typographical changes were made to the Rating Form, we replaced the published version with a new publication number, rather than issuing a notice of errata.

Acknowledgements

This document would not have been possible without the participation and help of many people. The document is an update of existing tools, and thus represents the culmination of two decades of development, review, and field testing. Special thanks go to the technical committee of wetland experts and planners from local governments and Ecology's Wetlands Technical Advisory Group who helped develop the objectives for the rating system in 2004, reviewed and field tested the Credit Debit Method in 2010 (Ecology publication #10-06-011), and provided feedback on these tools. Special thanks to Joe Rocchio of the Natural Heritage Program for refining our list of bog species and those found in calcareous fens. We have also received valuable comments from 19 individuals and organizations who took the time to review the draft sent out for public comment, and we wish to acknowledge their efforts. These include: Suzanne Anderson, Confluence Environmental Services, Kathy Curry, Geoff Gray, Grette Associates, Patricia Johnson, Kennewick Irrigation District, Mike Laves, Torrey Luiting, Jeff Meyer, David Moore, Hugh Mortensen, Brad Murphy, NW Ecological Services, Scott Rozenbaum, Rebecca Schroeder, Lee Stragis, Doug Swanson, and Patrick Togher. Amy Yahnke edited the final draft. Thank you all.

1. Introduction

The wetlands in Washington State differ widely in their functions and values. Some wetland types are common, while others are rare. Some are heavily disturbed, while others are still relatively undisturbed. All, however, provide some functions and resources that are valued. These may be ecological, economic, recreational, or aesthetic. Managers, planners, and citizens need tools to understand the resource value of individual wetlands in order to protect them effectively.

Many tools have been developed to understand the functions and values of wetlands. The methods range from detailed scientific analyses that may require many years to complete, to the judgments of individual resource experts done during one visit to the wetland. Managers of our wetland resources, however, are faced with a dilemma. Scientific rigor is often time consuming and costly. Tools are needed to provide information on the functions and values of wetlands in a time- and cost-effective way. One way to accomplish this is to categorize wetlands by their important attributes or characteristics based on the collective judgment of regional experts. Such methods are relatively rapid but still provide some scientific rigor (Hruby, 1999).

The Washington State Wetland Rating System categorizes wetlands based on specific attributes such as rarity, sensitivity to disturbance, and the functions they provide. These attributes are not comparable, and thus cannot be rated on the same scale. Only the functions are actually rated on a qualitative scale. The term “rating”, however, is being kept in the title to maintain consistency with the previous editions.

This rating system was designed to differentiate among wetlands based on their sensitivity to disturbance, their significance, their rarity, our ability to replace them, and the functions they provide. The rating system, however, does not replace a full assessment of wetland functions that may be necessary to plan and monitor a project of compensatory mitigation.

The intent of the rating categories is to provide a basis for developing standards for protecting and managing the wetlands. Some decisions that can be made based on the rating include the width of buffers needed to protect the wetland from adjacent development and permitted uses in, and around, the wetland. Many local jurisdictions have included language on buffers in their critical areas ordinances based on the 2005 guidance on wetland buffers (found in *Wetlands in Washington State – Volume 2: Guidance for Protecting and Managing Wetlands*, Publication #05-06-008). The update of the rating systems will provide a more accurate rating of the functions and values of a wetland but keeps the same four wetland categories used in the 2005 guidance. For the 2015-2019 critical areas ordinance update cycle, we are not proposing any changes to the buffer widths recommended in the 2005 guidance, however any buffer strategy that uses function scores to determine buffer widths will need to be adjusted to use the new scores in the 2014 update.

Peer and public review of this update

The 2004 version of the rating system went through a thorough peer and public review process as did the Credit/Debit Method. The new sections on Landscape Potential and Value were field tested for one year prior to publication in 2012. Over 40 individuals and groups provided comments on the Credit/Debit Method. These comments and our responses can be found at <https://fortress.wa.gov/ecy/publications/SummaryPages/1206005.html>. In addition to the 40 reviewers of the Credit/Debit Method, we received comments from 19 reviewers of a draft of this update.

The rating system is based on the best information available at this time and meets the needs of “best available science” under the Growth Management Act.

We anticipate that the method will be further modified over time as we keep increasing our understanding of our wetland resources.

(1) This section provides assessment criteria to assist counties and cities in determining whether information obtained during development of critical areas policies and regulations constitutes the "best available science."

Criteria for determining which information is the "best available science."

(2) Counties and cities may use information that local, state or federal natural resource agencies have determined represents the best available science consistent with criteria set out in WAC 365-195-900 through 365-195-925. The department will make available a list of resources that state agencies have identified as meeting the criteria for best available science pursuant to this chapter. Such information should be reviewed for local applicability.

(3) The responsibility for including the best available science in the development and implementation of critical areas policies or regulations rests with the legislative authority of the county or city. However, when feasible, counties and cities should consult with a qualified scientific expert or team of qualified scientific experts to identify scientific information, determine the best available science, and assess its applicability to the relevant critical areas. The scientific expert or experts may rely on their professional judgment based on experience and training, but they should use the criteria set out in WAC 365-195-900 through 365-195-925 and any technical guidance provided by the department. Use of these criteria also should guide counties and cities that lack the assistance of a qualified expert or experts, but these criteria are not intended to be a substitute for an assessment and recommendation by a qualified scientific expert or team of experts.

(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. No one factor is determinative in deciding whether a person is a qualified scientific expert. Where pertinent scientific information implicates multiple scientific disciplines, counties and cities are encouraged to consult a team of qualified scientific experts representing the various disciplines to ensure the identification and inclusion of the best available science.

(5) Scientific information can be produced only through a valid scientific process. To ensure that the best available science is being included, a county or city should consider the following:

(a) **Characteristics of a valid scientific process.** In the context of critical areas protection, a valid scientific process is one that produces reliable information useful in understanding the consequences of a local government's regulatory decisions and in developing critical areas policies and development regulations that will be effective in protecting the functions and values of critical areas. To determine whether information received during the public participation process is reliable scientific information, a county or city should determine whether the source of the information displays the characteristics of a valid scientific process. The characteristics generally to be expected in a valid scientific process are as follows:

1. **Peer review.** 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.

2. **Methods.** The methods that were used to obtain the information are clearly stated and able to be replicated. The methods are standardized in the pertinent scientific discipline or, if not, the methods have been appropriately peer-reviewed to assure their reliability and validity.

3. **Logical conclusions and reasonable inferences.** The conclusions presented are based on reasonable assumptions supported by other studies and consistent with the general theory underlying the assumptions. The conclusions are logically and reasonably derived from the assumptions and supported by the data presented. Any gaps in information and inconsistencies with other pertinent scientific information are adequately explained.

4. **Quantitative analysis.** The data have been analyzed using appropriate statistical or quantitative methods.

5. **Context.** The information is placed in proper context. The assumptions, analytical techniques, data, and conclusions are appropriately framed with respect to the prevailing body of pertinent scientific knowledge.

6. **References.** The assumptions, analytical techniques, and conclusions are well referenced with citations to relevant, credible literature and other pertinent existing information.

(b) **Common sources of scientific information.** Some sources of information routinely exhibit all or some of the characteristics listed in (a) of this subsection. Information derived from one of the following sources may be considered scientific information if the source possesses the characteristics in Table 1. A county or city may consider information to be scientifically valid if the source possesses the characteristics listed in (a) of this subsection. The information found in Table 1 provides a general indication of the characteristics of a valid scientific process typically associated with common sources of scientific information.

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Items 1 - 10 of 11 Next 10
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| Score | Document |
|-------|---|
| 100% | Chapter 27.12 CRITICAL AREAS ...and routine maintenance and operation of residences, landscaping, utilities, roads, trails, irrigation and drainage ditches, and fish ponds which were lawfully ... |
| 96% | Chapter 31.03 SEQUIM-DUNGENESS REGIONAL PLAN ...Management Act defines "public facilities" as streets, roads, highways, sidewalks, trails, street and road lighting systems, traffic signals, domestic water systems ... |
| 71% | Chapter 31.04 PORT ANGELES REGIONAL PLAN ...are linked to the Olympic Discovery Trail via multiple feeder trails and paths for efficient nonmotorized transportation options for reaching work ... |
| 46% | Chapter 31.02 COUNTY-WIDE COMPREHENSIVE PLAN ...require a forested setting, such as primitive campgrounds, picnic areas, trails, boat launches, and other dispersed outdoor recreational developments currently enjoyed ... |
| 43% | Chapter 31.05 STRAITS REGIONAL PLAN ...and directed to connections to many hiker, bicyclist, and equestrian trails in the nearby area. Local trails will be identified and ... |
| 28% | Chapter 31.07 CITY OF FORKS URBAN GROWTH AREA COMPREHENSIVE PLAN ...making transit usage somewhat unfavorable for tourists. (f) Pedestrian/Bicycle Trails. The current roadway development in the City is not conducive ... |
| 25% | Chapter 23.03 GENERAL PARK AND FAIRGROUNDS RULES AND REGULATIONS ...may prohibit smoking on any park lands, including roads and trails, by the posting of appropriate signs. (6) Smoking is not ... |

one inch. Field markers shall be spaced at a minimum of every fifty (50) feet, unless alternative placement or spacing is authorized by the Administrator. The location of field stakes must be shown on all site plans and final plats associated with the development proposal. Field stakes shall remain in place until any required, final inspections are completed and approved. Field markers may be waived by the review authority if an alternative to field staking achieves the same objective and is proposed and approved, or if the development activity is located at a sufficient distance so that impacts to the critical area are unlikely to occur.

(15) Trails and Trail-Related Facilities. Construction of publicly owned trails on public lands, or privately owned trails for private or public use, and trail-related facilities, such as picnic tables, benches, interpretive centers and signs, pedestrian bridges and viewing platforms, may be allowed in regulated wetlands and associated buffers through the issuance of a certificate of compliance pursuant to this chapter, subject to the following standards:

- Trails and related facilities shall, to the extent feasible, be placed on existing road grades, utility corridors, or any other previously disturbed areas;
- Trails, pedestrian bridges and related facilities within a critical area or buffer shall be planned and aligned to minimize removal of trees, shrubs, snags and important wildlife habitat and critical area functions such that the disturbed area, including that private trail surfaces for private use are a maximum of three (3) foot in width and other trails, either privately or publicly owned that allow public use (with or without fees), the trail surfaces shall be a maximum of ten (10) feet in width; except for regional public trails which shall be a maximum of fourteen (14) feet whereby design considerations are made to minimize impacts to critical areas and buffers;
- Viewing platforms, interpretive centers, picnic areas, benches and their associated access shall be designed and located to minimize disturbance of wildlife habitat and/or critical characteristics of the affected critical area;
- Trails shall be limited to nonmotorized use;
- Trail surfacing shall be comprised of natural materials (e.g., gravel, rock, bark) and that permanent surfacing materials (e.g., bituminous asphalt or concrete) require a variance approval pursuant to Part Seven of this chapter; except for regional public trails may have up to ten (10) feet of permanent surfacing materials. Any construction materials shall not significantly alter the existing drainage or negatively affect the critical area;
- All proposals shall also submit a mitigation plan pursuant to Part Eight of this chapter.

(16) Utilities. Placement of utilities within regulated wetlands and associated buffers may be allowed through a variance approval in accordance with Part Seven of this chapter, subject to the following standards:

- New utility transmission facilities which carry oil, gas or any other hazardous substances are prohibited within a regulated wetland and associated buffer.
- The following performance standards shall apply to any allowed private or public utility expansion or construction authorized under this chapter within a wetland or buffer:
 - New utilities shall use existing utility corridors whenever possible.
 - New utility corridors shall be aligned when possible to avoid cutting trees greater than twelve (12) inches in diameter at four and one-half (4.5) feet measured on the uphill side.

125%

*Clallam county code***27.12.030 Regulated uses and development activities.**

(1) Permitted Uses. Those land uses and development activities described in CCC Title 33, Zoning Code, and the Clallam County Shoreline Master Program as permitted or conditional uses are also recognized under this chapter, and are subject to the performance standards and other requirements of this chapter. Compliance with this chapter is demonstrated by the issuance of a certificate of compliance, variance or reasonable use exception, as specified in this chapter.

(2) The following types of permit and/or actions are required by the County Code. In review of these land uses and activities, Clallam County shall assure compliance with this chapter. Approval by Clallam County of the following permit or actions shall also be considered a certificate of compliance, as required by this chapter. Proposed land use or development activities not requiring one of the permit types that are listed below, and not listed as exempt in CCC 27.12.035 shall also comply with this chapter.

- Building permit
- Public water system permit
- Zoning conditional use or variance
- Shoreline permit (variance, conditional use, substantial development, exemption)
- Comprehensive Plan and zoning map amendment
- On-site sewage disposal permit
- Land Divisions and related actions under CCC Title 29
- Road approach permit
- Storm water and/or clearing and grading, if applicable

(3) Clallam County shall not grant any permit, license or other development approval that is inconsistent with the provisions of this chapter.

27.12.035 Activities not regulated by this chapter – Exemptions.

The following developments are exempt from the requirements of this chapter and do not require a certificate of compliance; provided, that best management practices are incorporated where practicable and necessary in order to avoid impacts to critical areas:

- (1) Outdoor recreation such as bird watching, boating, bicycling, canoeing, fishing, hiking, horseback riding, hunting, jogging, photography, swimming, and similar activities not requiring clearing or grading.
- (2) Emergency work when done to protect life or property and authorized by the County Board of Commissioners. An "emergency" is an unanticipated and imminent threat to public health, safety, or the environment which requires immediate action within a time too short to allow full compliance with this chapter.
- (3) Construction of wildlife nesting structures not involving clearing or grading.
- (4) Education and scientific research projects which will have no damaging effect upon the environment.
- (5) Site investigation work (e.g., soil surveys, soil logs) or other related activities necessary for designating critical areas.



Kitsap County Planning Commission
Kitsap County Department of Community Development
614 Division Street
Port Orchard, Washington 98366

May 1, 2017

VIA Email to Jim Bolger

Dear Chairman Baglio,

Thank you for the opportunity to provide testimony regarding the Kitsap County 2017 Critical Areas Ordinance update. The KBA previously provided written and verbal testimony to the Planning Commission regarding the current draft.

During the first public hearing on April 25, 2017, testimony about cost was provided and some members of the Planning Commission asked for more information about those estimated fees. Below please find a list of likely fees a property owner/applicant may be expected to pay as they seek permission to build their home. Please keep in mind that a critical area is not necessarily a wet land, but may be a steep slope, and the area may not even be on the applicant’s property. The proposed updated CAO will affect more applications and as a result require more applicants to purchase the services listed below. Most reports will verify that no critical area is affected, and yet the applicant will spend hundreds or thousands of dollars to prove that.

Estimated Costs for Technical Experts and Reports:

- \$750 – stamped letter stating “no geological concerns”
- \$1500 – geological slope assessment
- \$5,000 – Geotechnical report
- \$3,000 – Geotech infiltration report
- \$600 – letter from wetland biologist stating “no critical areas”
- \$1500 – wetland biologist to certify a wetland on neighboring property
- \$5,000 – wetland delineation

The cost of housing is ever increasing. The divide between appraised value and construction costs continue to be a challenge, and the cost of materials and labor continue to climb as well. It is easy to look at issues like the one before you, as if it stands alone, but the reality is that these regulations are a part of a much more complex and expensive regulatory system. To the extent you can use your discretion, recognizing the local condition, and craft language that will avoid forcing more applications into these expensive technical reports, the better. We hope the estimated cost data provided above is helpful to the Planning Commission. We urge you to use the greatest care in balancing the needs of the entire community in your deliberations.

Sincerely,

Teresa C Osinski
Executive Vice President



Tasha Santos

From: Jim Bolger
Sent: Tuesday, May 02, 2017 5:47 PM
To: Tasha Santos
Subject: FW: CAO - Hearing tomorrow 6pm
Attachments: Final CAO Comments for Planning Commission.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

And the other

From: Judy Mentor Eagleson [mailto:Judy@mentorcompany.com]
Sent: Monday, May 1, 2017 11:08 AM
To: Jim Bolger <jbolger@co.kitsap.wa.us>
Cc: Teresa Osinski, Kitsap Building Association <tosinski@kitsaphba.com>
Subject: FW: CAO - Hearing tomorrow 6pm

Jim –

Please accept this email as my formal comments regarding the Critical Area Ordinance Update. I understand the KBA has submitted the attached letter of which I am in full support.
Thanks,
Judy

From: Teresa Osinski [mailto:TOsinski@kitsapbuilds.com]
Sent: Monday, April 24, 2017 3:20 PM
To: Judy Mentor Eagleson <Judy@mentorcompany.com>
Subject: CAO - Hearing tomorrow 6pm

Hi Judy,

Attached are the comments the KBA has put together for the CAO hearing before the KC Planning Commission. I hope you will make it to the meeting and you will agree to speak. You can simply say that you understand the KBA has already submitted written remarks and you would like the Planning Commission to know you speak in support of the KBA's comments. That's it. You needed feel you need to say anything more.

If you want to look at the current draft you can follow this link:
https://spf.kitsapgov.com/dcd/Pages/Critical_Areas_Update.aspx

The hearing is at 6pm at the Kitsap County Fairgrounds in the Presidents' Hall.

See you there!

THANKS!!!

Teresa

Guidelines calibrate buffer standards to the new wetland category rating methods.

The Ecology recommendation on buffer widths and mitigation ratios are general, and there may be some wetlands for which these recommendations are either too restrictive or not protective enough. The recommendations assume that a wetland will be protected only at the scale of the site itself. [They do not reflect buffers and ratios that might result from regulations that are developed based on a larger landscape-scale approach.] A8-C PG 2

Ecology's buffer recommendations are also based on the assumption that the buffer is well vegetated with native species..... If the buffer does not consist of vegetation adequate to provide the necessary protection, then either the buffer area should be planted or the buffer width should be increased (Guidance PG 13)

THREE POINTS TO OFFER BASED ON REVIEW OF SCIENCE

REDUCTION of size thresholds for Category III and Category IV wetlands.

2,500 to 1,000 sq ft for Category III

7,500 to 4,000 sq ft for Category IV

There is an increasing demand for stormwater compliance which associates itself to wetland areas. Typically stormwater mitigation can be constructed in these wetland areas to replace function. Reducing the size thresholds could create a number of outcomes;

BUFFER AVERAGING:

Currently we may reduce/replace buffers down to 50% of the standard width. Proposed CAO is reduced to 25% of the standard.

Ecology clearly states "there is no scientific information available to determine if averaging the widths of buffers actually protects functions of wetlands"

Said another way : "there is no scientific information available to determine if averaging the widths of buffers DOES not adequately protect function of wetlands"

I ask, where is the science? Buffer averaging results in a net zero impact replacing buffer sq ft per sq ft. Lowering the amount restricts and limits proper land use development AND protection of our wetlands, streams and corridors.

RECONSIDER THE CHANGE TO BUFFER AVERAGING LIMIT

TECHNICAL FLAWS IN BUFFER REDUCTION AND LOW HABITAT IMPACT ALTERNATIVE

Basically, the same thing although the reduction is based on the habitat value of the wetland. The concept is to apply conservation measures to relevant or priority upland corridors as compensation

to reduce a wetland buffer by 25%. This can be problematic for any development where the corridors extend off to adjacent properties.

MITIGATION RATIOS

Higher. Studies indicate that compliance and poorly structured mitigation plans are the leading cause to failure of or unsatisfactory mitigation.

Compliance absent/non-priority at County level

Developers don't follow through. You should fully embrace the mitigation requirements. Failure to do so today results in higher ratios tomorrow.

SUMMARY

Consider retaining the vehicles for buffer reductions as is with consideration or interpretation to protect and preserve corridors. Site specific flexibility is critical to our wetlands, streams and watersheds. We're getting into the hard stuff, meaning redevelopment and renewal. Existing non-conforming uses have both the opportunity to improve and degrade our resources.

Without site specific alternatives, degraded wetland and stream corridors may become static.

Staff resources may be stressed with higher level approvals (variances) and a cost burden to the land owner. You end up with the same mitigation (SFR).

Use your local professionals... we know what is out there.

Consider the alternative that site specific alternatives may better address the needs of resources and accommodate the proposed use. Ecology guidelines assume that buffers are "pristine" and there is no scientific evidence that current buffer reduction alternatives aren't meeting the GMA no net loss of function.

Wildlife Issues:

1. The state delegates wildlife regulation to the county
2. The County does not designate or map Class I or Class II Wild Life Habitat Conservation Areas.
3. The County does not identify or map Wildlife locations (there are approximately 48 candidate species that may be in Kitsap County)
 - a. Species specific maps cost the requestor in \$52/map
 - b. At least 15 species maps are legally restricted
 - c. http://wdfw.wa.gov/conservation/phs/maps_data/orderinformationform.pdf
4. The county does not publish species restrictions/buffers
5. All Wildlife species are designated by reference. Any change to and species automatically is placed into effect in our CAO.
6. Who determines what reports are required
 - a. How are the trained
 - b. What criteria do they use
 - c. Which species do they designate

Wildlife

The CAO defines a requirement to designate Critical Wildlife Habitat Conservation Areas Class 1 Wild Life habitat require habitat Management Plans for Federal and State Species designated Endangered, Threatened and Sensitive.

Priority Habitats and Species List 2008 (Updated 2016)

<http://wdfw.wa.gov/publications/00165/wdfw00165.pdf>

For Kitsap County that boils down to:

Pacific Pond Turtle State Status: Endangered

The western pond turtle (*Clemmys marmorata*) is listed by Washington State as an endangered species. The species is not listed under the federal Endangered Species Act. It was petitioned in 1992 for federal listing, but the Fish and Wildlife Service found that listing was not warranted in 1993.

The western pond turtle is declining throughout most of its range and is highly vulnerable to extirpation in Washington. They are still abundant in northern California and southern Oregon wherever there are relatively few people. The species requires a continued recovery program to ensure its survival in the state until sources of excessive mortality can be reduced or eliminated.

The range of the western pond turtle extends from the Puget Sound lowlands in Washington south to Baja California. Western pond turtles were essentially extirpated in the Puget lowlands by the 1980's. **Their present range in Washington is thought to be composed of two small populations in Skamania and Klickitat counties, and a small**

pond complex in Pierce County where they were recently reintroduced from captive bred stock. <http://wdfw.wa.gov/publications/00398/wptdraft.pdf>

Marbled Murrelet Threatened, Habitat old growth forests

Common Loon Sensitive, 490 foot construction buffer from Nesting Site

Common Murre Sensitive Habitat Pacific Ocean Cliffs, elevated Marine Terraces on Islands and rocky headlands, Lays single egg directly on Substrate or bare rock.

Recommended Restrictions on fishing and gill netting

Bald Eagle Sensitive Landowners should consult the USFWS to determine if a permit is required when proposing land use activities within 660 feet of an eagle nest.

<https://www.fws.gov/pacific/eagle/>

Peregrine Falcon Sensitive

[Recommended Buffer 1310 feet any nest year-round](#)

Nests occurring within non-forested lands, and those nests not subjected to forest practices or forest practice rules, should be similarly considered through the development of a site-specific peregrine management plan when activities near nests are considered.

http://wdfw.wa.gov/publications/00026/Abbreviated_Peregrine_Falcon.pdf

Class II Wildlife Habitat Conservation Areas. Habitats for state listed candidate and monitored species documented in maps or databases available to Kitsap County and its citizens, and which, if altered, may reduce the likelihood that the species will maintain a viable population and reproduce over the long term.

Class II Wildlife Habitat Conservation Area Development Standards. All development permits within known Class II wildlife conservation areas may require the submittal of a habitat management plan (HMP), as determined during the SEPA/critical areas review on the project. The HMP shall consider measures to retain and protect the wildlife habitat and shall consider effects of land use intensity, buffers, setbacks, impervious surfaces, erosion control and retention of natural vegetation.

Approximately 46 species

Wetlands Issues

1. There is no inventory of wetlands other than streams
2. The required wetland surveys should be used to determine the required buffers vice maximum general buffers.
3. There is no monitoring program for effectiveness

19.150.680705 Wetland delineation.

“Wetland delineation” means the identification of the wetland boundary as determined by using the Washington State Wetlands Identification and Delineation Manual, March 1997, as now or hereafter amended. the identification of wetlands and their boundaries pursuant to this title, which shall be done in accordance with the approved federal wetlands delineation manual and applicable regional supplements.

No Reference?

19.200.205 Purpose and Objectives.

A. **Achieve no net loss and increase the quality, and function and** values of wetland acreage within Kitsap County by and maintaining and enhancing, when required, the biological and physical functions and values of wetlands with respect to water quality maintenance, stormwater and floodwater storage and conveyance, fish and wildlife habitat, primary productivity, recreation, and education;

What monitoring system is used to determine “no net Loss”?

19.200.220 Wetland buffer requirements.

Determining Buffer Widths. The following buffer widths are based on three factors: the wetland category, the intensity of the impacts, and the functions or special characteristics of the wetland that need to be protected as established through the rating system. These factors must be **determined by a qualified wetland professional** using the Washington State Wetland Rating System for Western Washington: 2014 Update (Ecology Publication #14-06-029, or as revised and approved by Ecology).

- 1. There is no way for a person to know how their wetland is classified without a professional survey**

19.200.215 Wetland review procedures. A. Application Requirements. Except as otherwise provided herein, all applications for development within a wetland or its largest potential buffer width shall include the following special reports at the time of application. This shall not prohibit the department from requesting reports or other information.

Wetland delineation report (Section 19.700.710)

Wetland mitigation report (Section 19.700.715)

General issues

1. Supreme court cases have not been incorporated (e.g. Swinomish)
2. The real problem for fish is stormwater runoff from roads and parking lots without filtering (Suquamish study). What is being done to solve the problem.
3. **19.100.17065 Enforcement. Right of entry violates state law RCW 59.18.150**
Searches by code enforcement officials for inspection purposes
4. Notices to Title requirements are particularly onerous to property owners (Constitutes a permanent taking of property)

Alan Beam
arbeam@aol.com
360-440-2812

April 25th 2017

Comments to the Planning Commission regarding the CAO

Community Dev.

The CAO is philosophically very good, if it is enforced.

I once heard an old native proverb which goes something like this, "The frog does eat up the pond in which he lives." In other words, we must protect nature, our vital asset which everyone in Kitsap County enjoys.

Tonight we will hear the pros and cons of the CAO, but at the end of the evening, "science will not be silenced" and the CAO will be approved with certain changes. With regard to those changes, and to reflect a more accurate mapping description of the critical areas of Illahee, the Illahee Preserve Stewardship Committee has passed a motion which was approved at their stewardship meeting on April 18th, 2017. The motion which was approved is as follows:

"The Illahee Preserve Stewardship Committee finds omissions and mistakes in the current draft of the CAO mapping regarding:

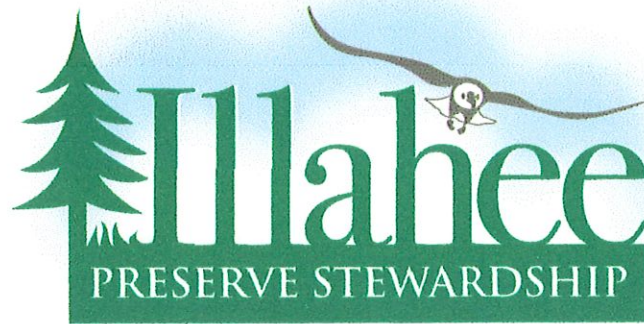
1. Steep slope designation for the Illahee Creek corridor.
2. Stream designation missing for Steele Creek headwaters in the Illahee Preserve
3. Wetland designation missing for the same area.

The stewardship group requests that the Department of Community Development address the omissions and accuracy of their mapping regarding the above issues."

The minutes of the stewardship committee are attached.

Thank you for all you do to continue to help the residents of Kitsap County.

Judith Kringsman, Secretary
Illahee Preserve Stewardship Committee



Minutes

Illahee Preserve Stewardship Committee

Tuesday, April 18, 2017

6:30 – 8:00 PM in Kitsap Pavilion Building at Fairgrounds

1. Welcome & Introductions:

Attendees: Jim Aho, Judith Krigsman, Jon Buesch, Don Jahaske, Irwin Krigsman, Dale Boyle. Note: Jim Aho chaired the meeting in place of Vic Ulsh.

2. Minutes from last Meeting: Minutes of the 3/21/17 meeting were approved as read.

3. Business:

- Almira Shelter Progress Review: Michael Kipp, Frontier Log Homes, Shelton WA. The shelter contractor will begin construction Wednesday 4/19 /17 with the digging of the foundation holes. Framing and pouring of concrete should commence on Friday, 4/21/17. Judith raised the question of the possibility of RCO accepting the shelter project for matching funds. Jim Aho will check with RCO.
- Comcast Care work party 4/22/17: Saturday, 4/22/17, 8:00 – 3:30 PM approximately 50 Comcast volunteers will spread structural crushed rock in the shelter area and help with moving the kiosk. Comcast is donating \$1,000 to include the cost of porta-potty rental.
- Brownsville Elementary tour of Illahee Preserve 4/18/17: 2nd and 3rd graders toured the Illahee Preserve Tuesday morning. They carried fill bags and collected interesting specimens, and even enjoyed talking about the 500 year old tree. Jim Aho led the tour. Ken Hegbedt's wife is a teacher at Brownsville Elementary School and helped conduct the tour.
- Critical Areas Ordinance (CAO) Update Comment Period:
 - Steep slopes designation
 - Stream designation missing for Steele Creek headwaters
 - Wetland designation missing for same area.

A motion was made and approved that Judith should present comments regarding the above concerns relating to omissions and errors in Kitsap County CAO mapping and ensuring that they are entered into the record with Illahee Preserve Stewardship Committee minutes attached.

The approved motion is as follows:

"The Illahee Preserve Stewardship Committee finds omissions and mistakes in the current draft of the CAO mapping regarding:

- 1. Steep slope designation for the Illahee Creek corridor.*
- 2. Stream designation missing for Steele Creek headwaters in the Illahee Preserve.*
- 3. Wetland designation missing for the same area.*

The stewardship group requests that the Department of Community Development address the omissions and accuracy of their mapping regarding the above issues."

- County's proposal to acquire Lost Continent/Timber's Edge Phase 2: No new information. Currently waiting for legislative action.
- Kitsap County Park's Report - Lori Raymaker: Not available at this time. A discussion ensued regarding status of the All-Secure project. A motion was made and approved that Judith would arrange a meeting with Parks Director Jim Dunwiddie to discuss various issues of concern to stewardship members.
- Brush picker alert: No activity.
- Homeless watch - Almira corridor & car camping: Volunteers are keeping a close watch on the Almira parking lot.
- Belden Property Update: Dale Boyle will continue to observe for issues.
- Anyone need a *Thank You?* Jim Aho will send Judith contact information for the Comcast volunteers.
- Wildlife & Nature reports: Two barred owls were observed during the Brownsville Elementary School tour. Jon Buesch observed an eagle at ground level while walking west on Fuson.

5. Adjourn: Meeting adjourned at 8:00PM

The Illahee Preserve Stewardship Committee meets on the third Tuesday of the month to discuss issues associated with the Illahee Preserve. The next regularly scheduled meeting of Illahee Preserve Stewardship Committee is **June 20, 2017**.

NOTE: Illahee Forest Preserve, the non profit 501(c)(3) corporation which supports the Illahee Preserve, meets the middle month of each quarter on the 3rd Tuesday of that month.

Judith Kringsman, Secretary



Kitsap County Planning Commission
Critical Areas Ordinance Hearing
April 2017

The Kitsap Building Association is pleased to have had the opportunity to bring together a team to review the technical matters associated to our County's critical areas ordinance. The KBA has a long history of promoting environmentally sensitive land development and construction; having lead the way in the creation of Built Green® and coordinating the effort to make the use of low impact development techniques acceptable throughout Kitsap County. We are happy to work in collaboration on this important code update as well. To that end, the KBA hired Robbyn Meyers of BGE Environmental and Shawn Williams of EnviroSound Consulting to help us fully understand the content of the draft and, where necessary, help the KBA to offer practical alternatives.

The KBA is not only the largest trade association in Kitsap County, representing almost 300 companies it is also often the voice for the unsuspecting public. Codes, like the CAO, are highly technical and most citizens have no idea the code is under review or how it may affect them. The KBA has some of our County's best engineering firms within its membership and those companies are the ones that deal directly with the property owner when the land is being considered for development/construction. Between our technically informed members to our hired consultants, referenced above, the KBA has fully reviewed the draft and offers the following recommendations to the Kitsap County Planning Commission. We continue to stand ready to assist the County through this process and we hope that we can conclude with an ordinance that continues to protect our water while recognizing the rights of property owners, the importance of affordable housing, and the need to encourage economic development in our community.

Summary of Recommendations

After an excellent collaborative review of the Critical Area Ordinance Update, it is suggested that the following changes be incorporated in the updated:

1. Wetland/Habitat Buffers and Categorization

a. Wetland Categorization 19.200.210 B 3-4

Summary: it is unclear where specifically DOE documents evidence that wetland mitigation does not increase functionality of small isolated wetlands. The new mitigation thresholds are so minimal that they may effectively eliminate the function replacement mitigation option all together. It is a great asset to development to be able to use small isolated wetlands for storm water while maintaining and/or improving the function through mitigation and/or enhancement at the same time.

Recommendation:

Maintain the current mitigation thresholds (2,500 sqft for category III and 7,500 for category IV) if the applicant adequately identifies the specific wetland function affected

or at risk, and proposes mitigation to replace the wetland function. Continue to allow these areas to be used for storm water features for functional replacement as well.

b. Wetland Buffer Averaging 19.200.220 B 1

Summary: Ecology's buffer recommendations are based on the assumption that the buffer is well vegetated with native plant communities appropriate for the ecoregion or with one that performs similar functions.

Ecology further states that there may be some wetlands for which the recommended buffer widths and mitigation ratios are either too restrictive or not protective enough. Ecology's guidance documents are based on site specific protection, not large landscape-scaled approaches. As every wetland is different, discretion should be given to a Professional Wetland Scientist (PWS) to recommend the best way to develop around a wetland including the proper buffer, mitigation, and/or enhancement. There are many challenges to establishing building sites including but not limited to storm management, groundwater, septic drain fields, topography, etc. Because every property is unique, the buffer averaging requirements should not be further restricted.

Recommendation:

Continue to allow the 50% buffer averaging as cited in the code "...the minimum buffer width at any point will not be less than 50 percent of the widths established after the categorization.... is done and any adjustments applied..." – 19.200.220 B-1-e

c. Wetland Administrative Buffer Reduction 19.200.220 B 2

Summary: it is unclear where specifically DOE documents evidence that buffer reductions with enhancement are not equal or superior to regular buffers. It also appears to be a mistake to include the phrase "as great or greater" in the buffer reductions section.

Recommendation:

Remove the phrase "as great or greater" from the buffer reduction section. Retain existing language "Granting of a reduced buffer shall be the minimum necessary..." 19.200.220 C 1 b

d. Fish and Wildlife Habitat Buffer Reductions 19.300.315 A 3

Summary: As every Habitat is different, discretion should be given to a PWS to recommend the best way to develop around a habitat including the proper buffer, mitigation, and/or enhancement. There are many challenges to establishing building sites including but not limited to storm management, groundwater, septic drain fields, topography, etc. Because every property is unique, the buffer reduction requirements should not be further restricted.

Recommendation:

Continue to allow fish and wildlife habitat buffer reductions up to 50% through a type I permit providing a PWS has prepared a report requesting the reduction.

e. Wetland Buffer Reduction through Wildlife Corridors 19.200.220 B 2 c

Summary: the code allows for properties with a high intensity use to get a buffer reduction to that of moderate intensity providing a wildlife corridor is established. This

type of reduction requires the corridor to connect to an adjacent habitat with a minimum of 100' width and a legal protection such as a conservation easement. The problem with this type of reduction is that it is too onerous for the applicant. It is very rare that a property will have the ability to create this type of connectivity within one parcel. This means the applicant will also need cooperation with adjacent properties to create the corridor. In addition, the majority of the reductions would only give the applicant a few more feet of reduction than if they went through an administrative buffer reduction. See table below.

| Wetland Category | Required Buffer | Reduction through corridor | Administrative Reduction |
|------------------|-----------------|----------------------------|--------------------------|
| CIV | 50 | 40 | 37.5 |
| CIII | 150 | 110 | 112.5 |
| CII | 300 | 225 | 225 |

Recommendation:

Incentivize the applicant to utilize this option by reducing the buffer to those recommended for low-intensity impacts providing the applicant can create the wildlife corridor as described in this section.

2. Non-Single Family Residential Uses:

Summary: The current Critical Area ordinance does not specifically address how it applies to non-Single Family residential uses. Because of this issue, Kitsap County has a policy to apply the Critical Area Ordinance Code to all uses not just Single Family Residential. This policy was formalized through an Administrative Decision on October 17th 2006.

Recommendation:

Specifically incorporate this policy into the Critical Area Ordinance Update.

3. Adoption versus Effective Date:

Summary: It is understood that the County is under a lot of pressure to update the CAO by June of this year. It is also understood that the natural process of the update and incorporating comments causes many rewrites, additions, and deletions. The code will continue to evolve until it is finally adopted. Once it is adopted it takes a great deal of time for the County staff, professional consultants, property owners, and other interested parties to review, understand and implement the newly adopted code. For this reason a delayed effective date can be very beneficial to all parties involved. Two examples of how this worked well are the 2016 Stormwater Update and the 2016 Energy Code Update. Both codes had a delayed implementation date that allowed all parties to finish previously started projects and adapt new projects to the newly adopted code. Although this can cause a backlog of projects right before the adoption date it is a far better outcome than the backlog created by projects reviewed without understanding or correct implementation of the new codes.

Recommendation:

Delay the “effective date” of the updated Critical Area Ordinance by six months.

4. Third Party Review

Summary: In the past there has been concern over the costs associated with third party review. Often times the reviewer does not share the same culture as the county, and will send comments back without reviewing the entire project. When the applicant responds to the comments, the reviewer has new comments from the first submittal. The County has done a great job minimizing this type of “back reaching” within the department but it still happens with third party review. The back and forth with the third party reviewer can become very costly for the applicant.

Recommendation:

Minimize third party review wherever possible. When it is necessary, be sure to extend the departments policy regarding “back reaching”. It would also be helpful to require a not to exceed budget from third party reviewers so the applicant can anticipate the total cost.

5. Definitions and Clarifications

a. Habitable Structure 19.11.130 B

Summary: Habitable structure is not defined within the CAO Update. It appears the intent of allowing danger tree removal is to protect human life. A definition should be created to further describe “Habitable Structure”.

Recommendation:

Define “Habitable Structure” in the definitions section.

b. Vegetation Removal in a Geo-Hazard Area 19.400.410 D 2

Summary: The removal of vegetation from a geohazard area and the replanting plan should be dependent on a geotechnical consultant with regards to slope stability. Although a qualified arborist has expertise to evaluate the health of the vegetation, they are not qualified to evaluate the stability of the slope.

Recommendation:

Require only a geotechnical consultant to evaluate slope stability when removing and replanting in a geohazard area. Define “qualified arborist” for other sections that require an arborist.

- c. Qualified Arborist 19.100.130 B and 19.400.410 D 2
Summary: Throughout the code there are references to a "qualified arborist" or a "certified arborist" in regards to a risk assessments for danger trees. There are no definitions for "qualified" and "certified arborists".

Recommendation:

If "qualified" and "certified" arborist are the same term then consolidate to one term and define it in the definitions section.

- d. Fault Line Map
Summary: The map showing fault lines does not say "inferred fault line". The concern is that home owners may think they are precisely on top of a fault line and not realize the lines are inferred.

Recommendation:

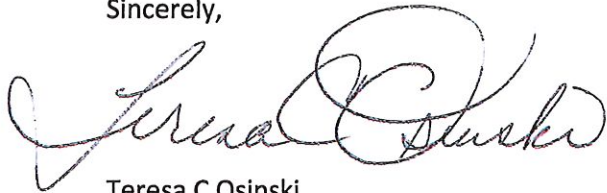
Label lines on map as "inferred".

- e. "I" Designation for geohazard areas 19.400.425 C 14
Summary: It appears that a full geotechnical report will be required for properties within 300' of an "I" designation. This requirement is excessive for the "I" designation.

Recommendation:

Remove the "I" designation from the 300' requirement under geo hazard areas.

Sincerely,

A handwritten signature in cursive script, appearing to read "Teresa C Osinski".

Teresa C Osinski
Executive Vice President

April 4, 2017

From: Kitsap Alliance of Property Owners
To: Kitsap County Planning Commission

Subj: Critical Areas Ordinance Review and Update

The attached material is submitted for review by the Kitsap County Planning Commission. This material was submitted for the public record at the County Commissioners public hearing March 27, 2017. Copies have been presented to all three County Commissioners.

Since Kitsap County's Department of Community Development website now shows the Planning Commission schedule includes a public hearing and acceptance of further testimony and comment is scheduled for April 27, 2017, the period of public comment obviously remains open at this time.

We appreciate your attention to the attached comments, which discuss violations of U.S. and State Supreme Court decisions and a number of items that challenge logic.

Sincerely,



Michael A. Gustavson

Member, KAPO Board of Directors

March 27, 2017

**KITSAP COUNTY TITLE 19
CRITICAL AREAS ORDINANCE UPDATE
KITSAP ALLIANCE OF PROPERTY OWNERS COMMENTS**

Author: Michael Gustavson

We recommend Kitsap County request a one year delay in submittal of the Critical areas Ordinance from Washington State Department of Commerce to allow for corrections described in this paper. It seems there's never time to "do it right", but always plenty of time to "do it over".

The document requires a table of contents.

We have not discovered a required current "Science Support Document" as accompanied the Critical Areas Ordinance Second Draft of May 17, 2005, yet several buffer widths have been adjusted, apparently without justification.

The following comments reflect in major portion, U.S. and Washington State Supreme Court decisions not reflected in the proposed version of Kitsap County's Title 19. Significantly, there is no identification of creatures warranting protection of the ordinance, nor are benchmarks provided. In the case of endangered and threatened species, there is neither measure of baseline populations, nor objective population goals. Thus, there is no way to measure harm or progress in either a Water Quality Monitoring Program (WQMP) or a Salmon Habitat Monitoring Program (SHMP). All of these issues are required to be included in the CAO under *Swinomish Indian Tribal Community v. Western*

Washington Growth management hearings Board (2007).

Of even greater curiosity, of the Washington State threatened and endangered species creatures listed in the reference WAC 232-12-011 and 232-12-014, none are issues in Kitsap County. This begs a very significant question: With the exception of slide prone areas, just exactly what are excessively wide buffers intending to protect, when there are no local creatures listed as "Critical"? Additionally, when one looks at Kitsap County maps for critical area from 2005, homes are located throughout critical areas, with no apparent harm.

Regarding buffers: In *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board (2007)*, paragraph 22: "The Board held that BAS (Best Available Science), and by extension GMA, does not require the county to establish mandatory riparian buffers. Again, we (Washington State Supreme Court) agree with the board". Paragraph 23 further states: "Moreover, the GMA does not require the county to follow BAS; rather it is required to 'include' BAS in its record. RCW 36.70A.172(1). **Thus the county may depart from BAS if it provides a reasoned justification for such departure.**"

KAPO favors protection of critical features, but objects to regulation which adds no measured critical area protection, but merely restricts citizens from making reasonable, non-harmful use of their property. To draft a CAO whose principal purpose is to restrict use of rural property is simply wrong, and must be addressed. Our biggest objection is to imposition of large buffers, which *Swinomish* deems are not mandated.

We support the use of standard, vegetated setbacks of hardscape (which includes buildings) from critical areas, in lieu of buffers, but only to protect water quality. The use of standard building setbacks vastly reduces the application of arbitrary, changing buffer widths and will provide consistency and predictability to the citizenry while protecting streams and wetlands areas from water contamination. Simplification and transparency are significant attributes, which these proposed changes propone.

The draft flies in the face of numerous court decisions, which are highlighted in the attached text.

As will be shown, there is much work to be done to bring this draft into compliance and it certainly far from being "ready for prime time". It certainly is not of adequate quality to be presented to the Planning Commission for their review.

CHAPTER 19.100 INTRODUCTION AND APPEALS PROCEDURES

19.100.110 Applicability: The definition below is a grand over-reach on the part of the county, far exceeding the bounds of *Citizens Alliance for Property Rights v. Sims (2008)*. In the *Sims* case, King County Executive Sims had sponsored a resolution that would have required 65% of the land in rural King County to revert to "natural (pre-European settlement) conditions". In the wording below, the reader will discover it would be illegal to move any dirt or plant material without first

obtaining a permit. Section 19.100.110, a written, precludes even gardening or weeding.

19.100.110 Applicability

"A. Kitsap County shall not grant any permit, license or other development approval to alter the condition of any land, water or vegetation, or to construct or alter any structure or improvement, nor shall any person alter the condition of any land, water or vegetation, or construct or alter any structure or improvement for any development proposal regulated by this title, except in compliance with the provisions of this title. Failure to comply with the provisions of this title shall be considered a violation and subject to enforcement procedures as provided for in this title."

F. Uses and activities in critical areas or their buffers for which no permit or approval is required by any other county ordinance remain subject to the development standards and other requirements of this title. While this title does not require a review or approval process for such uses and activities, they remain subject to the title."

Paragraph 19.100.110 precludes gardening, or even pulling a weed and violates *Citizens Alliance for Property Rights v. Sims (2008)* as it is vastly over-reaching.

19.100.110.G Applicability Area of

Review: "Largest potential buffer or setback" must be restricted to the parcel in question. Otherwise it runs afoul of *Nollan v. California /Coastal Commission (1987)*, *Dolan v. City of Tigard (1994)*, *McCready v. City of Seattle (1994)* and *Citizens Alliance for Property Rights v. Sims (2008)*

These concerns also apply to 150.100 "Adjacent", below.

Since virtually all rural parcels in Kitsap County are already developed and Title 19 only applies to those requesting a building permit, There can be virtually no measurable positive effect of its requirements, yet it adds many thousands of dollars to construction costs.

19.100.120.B "Review Authority". While it is convenient to grant the department (DCD) authority to make determinations in land use, this authority violates separation of powers and is a grand example of the dangers of administrative law, where all legislative, executive and judicial powers of government are held in a single body.

19.100.120.C "Review Authority". The second sentence grants DCD the authority to revoke permits already granted, this flies in the face of a Washington State Supreme Court case in the Columbia River gorge in which a building permit had been issued and during construction, an appeal was unsuccessfully lodged. The second sentence must be deleted.

19.100.130.B.4. Standards for existing development: While this section requires reconstruction to begin within 24 months of a casualty, no allowance is given for time to obtain approval from DCD.

19.100.135.1. Variances Disallowing construction enjoyed by surrounding properties developed prior to the date of the ordinance may violate *Lucas v. South Carolina Coastal Commission (1992)* (takings via regulation prohibited).

19.100.135.3. Variances: "substantial detrimental impacts to the critical area" fails to provide benchmarks to define the term "substantial".

19.100.140 Reasonable use exception, third sentence: "The property owner and/or applicant for a reasonable use exception has the burden of proving that the property is deprived of all reasonable uses". There is no minimum "reasonable use" defined in Title 19 and in the past County Commissioner Tim Botkin declared that siting a picnic table would satisfy the test of "reasonable use". The "picnic table" definition of reasonable use was overturned in *Lucas*. **During the 2005 review, the Planning Commission voted to recommend including construction of a single family dwelling to constitute a "reasonable use"**. Obviously, approval by the health department prior to issuance of a building permit would still apply, so a home couldn't be constructed in a wetland. The proposed draft before you reduces some buffers, bringing into question their justification in the 2005 draft, which could have impacted the application of "reasonable use".

19.100.140.3. Reasonable use exception: Precluding a development because it poses an "unreasonable threat" to the "welfare on (or off) the development proposal site" has been used in Kitsap County to object to increased traffic, etc. This may well violate *Lucas v. South Carolina Coastal Commission (1992)* (takings via regulation prohibited) and *Nollan v. California /Coastal Commission (1987)* (mitigation cannot result in property extortion and must reflect nexus and proportionality).

19.100.140 Reasonable use exception: states the

Hearing "Examiner shall make a final decision" in reasonable use cases. This directly violates decisions that grant access to courts, where Kitsap County is acting as an agency under administrative law. See:

* *City of Monterey, CA. v. Del Monte Dunes at Monterey, LTD* (1999)

* *U.S. Army Corps of Engineers v. Hawkes Co. et al.* (2016)

* *Sackett v. U.S. EPA* (2012)

"The property owner and/or applicant for a reasonable use exception has the burden of proving that the property is deprived of all reasonable uses". Section 19.150.550 states "'Reasonable Use' is a legal concept articulated by federal and state courts in regulatory taking cases." Rather than list a set of court cases that would apply at the time of this writing, the citizen is left to wander the swamp of all federal and state case law. It would be very helpful if Section 19.150.550 listed at least the following significant decisions as a place for both DCD and the applicant to begin their research:

Swinomish Indian Tribal Community v. Western Washington Growth management hearings Board (2007) (buffers not required if justification is provided).

Lucas v. South Carolina Coastal Commission (1992) (takings via regulation prohibited, and equal enjoyment as the neighbors) (See also 19.200.220(E), 300 foot septic setback from wetlands, which may exceed the parcel boundary, while allowing pre-existing manure lagoons and stock watering ponds in 19.100.125.C)

Koontz v. St. Johns River Water Management District (2013) (precludes off-site and practical alternative mitigation and mitigation banks and

buffer averaging.) (See 19.200.250.C.2. and 19.200.260.)

Nollan v. California /Coastal Commission (1987) (mitigation cannot result in property extortion and must reflect nexus and proportionality. Precludes out-of-category mitigation. Precludes buffer averaging, see 19.200.220.B.)

Dolan v. City of Tigard (1994) (requires mitigation nexus and precludes out-of-category mitigation)

Administrative law judge not allowed to make "final decision" and guarantee of direct access to Superior Court (See 19.100.140.A.):

* *City of Monterey, CA v. Del Monte Dunes at Monterey, LTD (1999)*

* *U.S. Army Corps of Engineers v. Hawkes Co., et. al. (2016)*

* *Sackett v. U.S. EPA (2012)*

McCready v. City of Seattle (1994) (right of entry requires warrant) (See 19.100.170)

Citizens Alliance for Property Rights v. Sims (2008) mitigation must not be over-reaching)

U.S. Army Corps of Engineers v. Hawkes Co. et.al. (2016) (precludes off-site compensatory mitigation requirement)

19.100.150 Appeals: Appeals are available only through the same hearing examiner who first heard the case. Under appellate rules, only material brought forward in the original hearing is subject to review. Often, administrative law proceedings are considered "informal" and no record is made of the appellant's testimony. Thus at appeal to

superior court, there is no record on which to base a case. The only avenue for appeal is to show the government failed to follow correct procedures. In addition, due process is not available, nor is access to jury trial.

19.100.155 Critical area and buffer notice to title:

We recommend Notice to Title describe only the boundaries of the critical area.

Requiring Notice to Title to include a buffer is ludicrous, given that stream and wetland buffer widths in the current draft are reduced from the 2005 CAO. Additionally, the requirement for buffers is eliminated in *Swinomish Indian Tribal Community v. Western Washington Growth management hearings Board (2007)*, if justification is provided. Buffers for the sole purpose of providing clean water is over turned by "*Coho Salmon Spawner Mortality in Western US Urban Watershed: Bio-filtration Prevents Lethal Storm Water Impacts*", Julian A. Spromberg, et.al. *Journal of Applied Ecology* 8 October 2015, which we are hereby providing.

During testimony for the 2005 draft, KAPO provided 3800 peer reviewed studies proving in Western Washington that 9-16 foot grass buffers provide very adequate protection to water quality. Unfortunately, in the 2005 CAO draft, DCD relied on a study based on conditions on industrial farming communities on the Eastern shore of Maryland as its "best available science". They relied on *Chevron v. Environmental Defense Council (1984)*, giving agency decisions maximum deference to agency decisions. Imposing huge buffers on

Kitsap County was a sad day for rural property owners.

A question now becomes, on what "best available science" is DCD relying on to arbitrarily reduce certain stream and wetland buffer widths in the current draft? To our knowledge, DCD has yet to provide the required "Science Support Document" for this CAO draft, as was required in 2005.

The most impactful **scientific study** we have encountered regarding water quality and buffers is "*Coho Salmon Spawner Mortality in Western US Urban Watershed: Bio-filtration Prevents Lethal Storm Water Impacts*", Julian A. Spromberg, et.al. *Journal of Applied Ecology* 8 October 2015, attached. The study, done in coordination with the Suquamish Tribe, shows an average of 50% of returning adult coho salmon die in urban streams before spawning due to highway runoff. The study showed 100% mortality in 2 to 24 hours when exposed to runoff materials. When the runoff was cleaned with an inexpensive bio-filter, the mortality dropped to 0%. Continuing to fail to treat highway runoff assures extinction of these fish.

Notice to title includes buffers and "runs with the land" and is a permanent restrictive document. There is no allowance to change the notice to title restrictions if later DCD reduces buffer requirements as is the case in the current draft. This permanently damages the property owner, without compensation, as required by the Washington State Constitution.

19.100.160.H. General application requirements: The first sentence requires the

applicant or property owner "to confirm the nature and extent of any critical areas on or adjacent to the property. This certainly violates the privacy of the neighbor and would be in direct violation of *McCready v. City of Seattle (1994) (right of entry requires warrant)* if entry onto the neighbor's property is required and a warrant is not first obtained.

19.100.170.B Enforcement, Right of Entry: This section must state a warrant must first be obtained by the county employee and reference *McCready v. City of Seattle (1994) (right of entry requires a warrant)*.

DEFINITIONS

19.150.157 Add a definition of "Benchmarks", as required by *Swinomish*. Recall WAC 232-12-011 and 232-12-104 identify no Kitsap County creatures that are listed as threatened or endangered.

150.165.C. Best Management practices: After "native", add: "or functionally equivalent" plant species. There's no measurable difference in protection offered by a native vs. a hybrid rhododendrum. "Or functionally equivalent" plant species needs to be added in all other locations where native plants are required.

19.150.175 Buffer: after "native", add: "or functionally equivalent" plant species. See above.

19.150.235 Danger Trees: The referenced WAC 296-54-505 "Danger Trees" refers to logging, and states: "Any tree of any height, dead or alive, **that presents a hazard to workers** because of rot, root, stem or limb damage, lean, or any other observable

condition created by natural process or man-made activity".

Using WAC 296-54-505 as the reference, the CAO expands danger trees to include buildings and requires an arborist, permits, a standing stump, etc. None of these are not mentioned in the WAC. It is inappropriate to re-define this term, using the WAC reference as justification, as is the case in the CAO.

From the perspective of pure logic, why would any sane person would ever declare they have a danger tree, when a non-danger tree is easily just quietly cut down, as is common practice. This section only provides fodder for a disconsolate neighbor to anonymously create havoc. Homeowners insurance covers tree damage, whether the tree was grown on one's neighbor's property or one's own property. "Danger tree" should be deleted from the CAO. Use of the term "danger tree" in this context is is inappropriate and superfluous.

19.150.260 Director "Duly authorized representative": requires clarification. Who has authority to authorize? The authorization needs to be written, with time and event specificity if the "representative" is to inspect a parcel of privately owned land. (See 19.100.170.B., Right of entry)

19.150.270 Endangered species: the referenced WAC fails to list endangered species in Kitsap County. **19.150.645 "Threatened species"** references WAC 232-12-011, again, with no specific species listed. **19.150.620 "Species of Concern",** doesn't even show a WAC reference, much less, which species are of concern. **19.150.505 "Priority habitat", 19.150.510 "Priority species" and 19.150.600**

"Species of concern" must list which fish or for which habitats, who decides, the quantified criteria and benchmarks. **Lists of species and benchmarks are required per *Swinomish*.** Ludicrously, as written, it is possible this section could state Kitsap has an insufficient rat population.

19.150.285 Erosion hazard areas: Delete "coastal erosion-prone areas", as this topic is covered in the Shoreline Master Plan.

19.150.325 Fish and wildlife habitat conservation area: This definition allows the county to designate "conservation areas" with no criteria or benchmarks. This violates both *Sims* and *Swinomish*. This comment applies also to **19.150.415 "Habitats of local importance"**.

19.150.360 Functions and Values: The definition requires specificity and benchmarks per *Swinomish*.

19.150.420 Hazardous substance, This definition refers to WACs 173-303-090 and 173-303-100. These two WACs list compounds and measures of dangerous or hazardous levels. We know, from NOAA Fisheries study (see 19.100.155, above),_returning adult pre-spawn salmon die in urban creeks at a rate of 50% to 90%. Where in the CAO is the laboratory testing program to ensure our highway runoff characteristics are below WAC toxic levels, especially in post-summer storm events when salmon return to spawn?

The only justification for buffers must require the same WAC testing criteria.

19.150.440 Impervious Surface: As defined, "impervious surfaces" would include all earth surfaces after removal of any plant material. It needs to allow for improved land to accommodate water runoff through infiltration techniques adjacent to hardscape, such as heavily amended soils, dry wells and infiltration ponds. Without these options, we, as well as all indigenous people would need to be removed from Kitsap County to be compliant. **19.150.460 "Low impact activities"** and **19.150.580 "Retention facilities"** allow more reasoned approaches and should be incorporated into the definition of "impervious surfaces".

Insert "19.150.442 Impervious Surface wetland and stream setback:" Impervious surfaces may be located with a mandated minimum setback distance of 25 feet from wetlands and/or streams (hereafter referred to as "critical areas"), under the following conditions, if all the hardscape water is collected and treated as follows:

1. The water table between the impervious surface and the critical area allows percolation to a depth of four feet using a "drywell" or heavily amended landscaping soils. The conditions of 19.150.460 "Low impact activities" and 19.150.580 "Retention facilities" shall be observed.

2. In the event percolation cannot be proven, either:

a. Install and maintain a strip of grass at least 16 feet wide to act as a surface water filter. The grass must be graded to ensure uniform, sheet runoff, or,

b. runoff shall be collected and directed to a pair of filters (one active and one in reserve), three feet deep, and measuring forty square feet

per every 3,000 square feet of hardscape. Contents shall consist of a 12 inch drainage layer of gravel aggregate overlain by 24 inches of bio-retention soil media (60% sand: 40% compost) and topped with 2 inches of mulched bark. Drainage water from the impervious surface shall enter uniformly at the top and discharge from the base, prior to entering the critical area. Annually, in early November, the property owner shall hire a qualified water quality specialist to test rain water discharging from the filter in accordance with WACs 173-303-090 and 173-303-100 and provide a report of his/her findings to DCD in accordance with Kitsap County's Water Quality Monitoring Program.

3. In the case of steams and wetlands, drywells shall be located at least 15 feet from the stream channel migration boundary or the wetland boundary. In the case of the described filters, they are allowed to discharge into both streams and wetlands.

4. In cases where percolation and/or installation of the described filter are impractical, surface drainage must be collected and piped to a location where it can be satisfactorily percolated or filtered.

5. During building construction, a layer of straw shall cover the Impervious Surface wetland and stream setback.

(Note: With implementation of "19.150.442 **Impervious Surface wetland and stream setback:**", the requirement for wetland and stream buffers is no longer required and needs to be expunged from the entirety of Title 19 and replaced with "25 foot Impervious surface wetland and stream setback". We will not go to the effort of identifying locations of all 123+ references to "buffers", which can be easily replaced using software word search).

"19.150.455 Lot" definition needs to be re-inserted.

19.150.464 Mitigation: The provided mitigation definitions violate the following decisions:

Koontz v. St. Johns River Water Management District (2013) (precludes off-site and practical alternative mitigation and mitigation banks and buffer averaging.) (See also **19.200.250.C.2.** and **19.200.260.**)

Nollan v. California /Coastal Commission (1987) (mitigation cannot result in property extortion and must reflect nexus and proportionality. Precludes out-of-category mitigation. Precludes buffer averaging, see **19.200.220.B.**)

Dolan v. City of Tigard (1994) (requires mitigation nexus and precludes out-of-category mitigation)

U.S. Army Corps of Engineers v. Hawkes Co. et.al. (2016) (precludes off-site compensatory mitigation requirement)

Sackett v. U.S. EPA (2012)

Lucas v. South Carolina Coastal Commission (1992) (takings via regulation prohibited)

19.150.485 Out of Kind compensation: This definition also violates decisions cited in "**19.150.464 Mitigation**", above.

19.150.475 Deleting definition of "**Non-conforming use or structure**" violates ex-post facto requirement of the US Constitution 5th Amendment by not allowing a use or structure constructed under laws to which it conformed at the time, then under

new law, to become now illegal.

19.150.500 Deletion of definition "**Performance based development**" is not understood. This definition was well received when included in the 2005 CAO.

19.150.510 Deletion of definition "**Permit**" is not understood.

19.150.500 Practical alternative: The "practical alternative" must be directly related to environmental issue in question, else it violates decisions illustrated in "**19.150.464 Mitigation**", above. Nexus and proportionality must be demonstrated.

19.150.550 Reasonable use: A true "minimum reasonable use" needs to be defined. This definition needs to list significant court cases up to the time of this CAO update, or DCD staff and the citizens have nothing on which to base decisions. (See **19.100.140 Reasonable use exception**, above).

19.150.560 Re-establishment: The title should read "Wetland re-establishment"

19.150.565 Refuse: Delete ..."in a critical area or its buffer"... Refuse is unacceptable in ALL cases and on all land per County health codes.

19.150.595 Seismic areas: Add "Two categories are mapped: 'Severe' and 'Moderate' seismic areas".

CHAPTER 19.200 Wetlands

Washington State Department of Ecology has taken a very conservative position on protecting wetlands. Unfortunately, it places counties and cities in the difficult position of dealing with legal decisions that will require jurisdictions to reimburse property owners for regulatory loss of use of their properties because of overly large prescriptive buffers. Ecology has failed to define in measurable terms, chemical risk to wetlands and to provide creative solutions. The reader's attention is invited to the decisions discussed in **19.100.140**.

These solutions conform to Section 19.200.225.E. The disparity of restrictions on storm water placed on home owners, when virtually none of such restrictions apply to public facility storm water discharge must be resolved. Also to be recognized are the millions of gallons of untreated raw sewage routinely discharged from public facilities during major storm events, with impunity and even little recognition. This is especially poignant when one considers 60% to 80% of hardscape consists of roads and the remainder is buildings and parking lots. As is shown in the discussion in **19.100.155**, above, 50% to 90% of returning adult pre-spawn salmon die in urban streams due to toxic highway runoff. Solution to the real problem appears to be lack of inexpensive bio-filtering of highway runoff.

Before proceeding further, your attention is invited to "**19.150.442 Impervious Surface wetland and stream setback:**", above.

19.200.205 Purpose and Objectives: It's curious that wetlands can be held in high regard as sources of groundwater percolation and yet in **19.100.125 Exceptions**, manure lagoons and livestock water ponds are exempt from these regulations.

First sentence, insert instead of "Section":
"...Sections 19.150.685 and 19.150.705,..."

19.200.205.A. Purpose and Objectives: In the first sentence, replace "and increase", with "of". Delete "...and enhancing, when required,..." The only requirement of the Growth Management Act is to create "no net loss of functions and values". There is no requirement to increase these features or functions.

19.200.205.D. Purpose and Objectives: Delete "...or shellfish...", as this is covered in the SMP.

19.200.215.A Wetland review procedures: Delete "...or its largest potential width"... See "19.150.442 Impervious Surface wetland and stream setback".

19.200.215.C.1. Wetland review procedures: Delete paragraph 1. See "19.150.442 Impervious Surface wetland and stream setback".

19.200.215.C.2. Wetland review procedures: Delete "...or its standard buffer"...

19.200.215.C.2.a.(1) and(2) Wetland review procedures: Replace "250 feet" with "100

feet". Surely, if a well and septic require 100 feet of separation, the same should apply to wetlands and septic drain fields. This is particularly logical, in view of the exemption for far more grievous manure ponds and stock water ponds in 19.100.125.C.

19.200.215.C.2.a. (2) Wetland review

procedures: Replace "standard buffer" with "...25 foot Impervious Surface setback"...

19.200.215.C.2.d. Wetland review

procedures: Delete in sentence 2, ..."not"... and ..."buffer width modifications".... Add "The 25 foot impervious Surface wetland and stream setback shall remain in grass coverage and not be otherwise modified".

19.200.215.C.2.e. Wetland review

procedures: Replace "buffer" with "...the 25 foot impervious Surface wetland and stream setback"....

19.200.220 Wetland buffer requirements: Replace with "19.200.220 Wetland Impervious surface setback: The wetland impervious surface setback shall conform to section 19.150.442."

Delete **Table 219.200.220 (A) Land use impact "intensity" based on development types.** This table is redundant in light of 19.150.442. Since the only potential creature, but not discussed in 19.150.270 might be salmon and since no benchmarks (per *Swinomish*) have been identified for salmon or other creatures the table is null. Applying 19.150.442 alleviates Kitsap County from liability under the court decisions listed in 19.100.140, above.

19.200.220.B.1. Wetland buffer requirements, Buffer averaging: The following discussion is inserted in the event the BoCC does not opt to incorporate **19.150.442.**

Buffer averaging requires placing buffers at distances where no potential impact on the wetland exists. The statement that the entire buffer must encompass an area equal to 100% of the prescribed buffer area is problematic. Administratively reducing a buffer by 25% will result in "buffer averaging" driving restricted land out to 125% of that required, strictly as punishment. (It is noted that wetland buffer averaging allows up to 50% buffer reduction). The added buffer width is of no benefit to the wetland. This serves only to drive up the cost and reduce the availability of housing and is a purely punitive taking. It also violates *Nollan v. California Coastal Commission (1987)*, *Dolan v. City of Tigard (1994)* and likely *Koontz v. St. Johns River Water Management District (2013)*.

We recommend deleting sections **19.200.220.B.1.** and **19.200.220.B.2.** in their entirety.

19.200.220.B.3. Variance: Replace text with "No variances shall be allowed to **19.150.442.**

19.200.220.C. Wetland buffer requirements, Fencing and Signs: Delete references to buffers. Place construction fences, etc. 10 feet from the wetland during construction.

19.200.220.D. Wetland buffer requirements
Protection of buffers: Replace "Protection of buffers. Wetlands shall be protected as required by the department, especially applying **19.150.442.** The wetland shall be identified on the

site plan and filed as an attachment to the notice to title as required in Section 19.100.155 (Critical Area Notice to Title). Refuse shall not be placed in Impervious Surface wetland and stream setback areas."

19.200.220.E. Wetland buffer requirements, Building or impervious surface setback lines: Delete this section, as it is redundant with Section 19.200.220.C. and D., above.

19.200.225.B.1. Additional development standards for certain uses, fencing: Delete, as redundant with B.2.

19.200.225.C. Additional development standards for certain uses, road, street repair and construction: Replace "buffer" with ..."Section 19.150.442 Wetland impervious surface setback"...

19.200.225.C. Additional development standards for certain uses, Land division approvals...: add 19.200.225.C."5." The requirements of Section 19.150.442 shall be applied."

19.200.225.D.2. Additional development standards for certain uses, Land divisions and Land Use Permits: Delete ..."and wetland buffers"...(twice) from the first sentence. The wetland is critical, but prescriptive buffer widths change with time, as is now the case in this version of the CAO.

19.200.225.D.4. Additional development standards for certain uses, Land divisions and Land Use Permits: Delete ..."or associated buffer"... in the

first sentence. Delete ..."and buffer"... (twice) in the second sentence.

In the remainder of Section 19.200, replace "wetland buffer" with "25 foot impervious surface setback".

19.200.225.E. Additional development standards for certain uses, Land divisions and Land Use

Permits: With the aggressive regulations on private property owners on water quality, it seem ludicrous to allow public storm water facilities to discharge into wetlands.

Table 19.200.250.C. Wetland mitigation

requirements: The term "Enhancement" flies in the face of the "No net loss" requirement of GMA. Enhancement becomes a violation of *Sims*, *Nollan* and *Dolan*, etc.

Table 19.200.250 Wetland mitigation replacement

ratios table: The term "Enhancement" flies in the face of the "No net loss" requirement of GMA. Enhancement becomes a violation of *Sims*, *Nollan* and *Dolan*, etc.

Criteria must be stated in lieu of "Case by case".

"Coastal lagoon" is likely covered by the SMA and should not appear in Title 19.

Table 19.200.250.C.2. Wetland mitigation

requirements: Delete "or enhancement". Replace

"improvement" with "rehabilitation".

19.200.250.D.2. Wetland mitigation requirements Off site mitigation: Care must be taken in applying off site mitigation, not to violate the following decisions:

Koontz v. St. Johns River Water Management District (2013)

(precludes off-site and practical alternative mitigation and mitigation banks and buffer averaging.)

Nollan v. California /Coastal Commission (1987)
(mitigation cannot result in property extortion and must reflect nexus and proportionality. Precludes out-of-category mitigation. Precludes buffer averaging, see 19.200.220.B.)

Dolan v. City of Tigard (1994) (requires mitigation nexus and precludes out-of-category mitigation)

U.S. Army Corps of Engineers v. Hawkes Co. et.al. (2016) (precludes off-site compensatory mitigation requirement)

19.200.260 Incentives for wetland mitigation: Third sentence may run afoul of GMA by creating non-conforming parcels due to size or to making non-conforming parcels even smaller.

Chapter 19.300 FISH AND WILDLIFE HABITAT CONSERVATION AREAS

Chapter 19.300: Comments in this section reflect particularly the *Swinomish* decision and the NOAA Fisheries (*Spromberg, 2015*) study described in

comments in 19.100.155, above. The court decisions listed in 19.100.140 apply as well.

Throughout this chapter, replace "buffers" with "25 foot impervious surface setback". See Section 19.150.442. Again, the disparity of restrictions on storm water placed on home owners, when virtually none of such restrictions apply to public facility storm water discharge must be resolved.

19.300.305.D. Purpose: Line D is added, without underline indication. Wildlife corridors are an interesting concept, with no proof there are wildlife forms in Kitsap County that are migratory within the county. If this term is to be used, species identification, their specific requirements and benchmarks are required.

19.300.310.A.2. Fish and wildlife habitat conservation area categories, wildlife conservation areas: In light of the ten year review cycle for the CAO display, species that qualify as Class I and Class II wildlife in this section at the time of drafting should be listed in Title 19. Note: No such wildlife are currently listed in WAC 232-012-011 and WAC 232-12-014. If a change occurs during the interceding review cycle, DCD staff can make the applicant aware of it at the time of application.

Table 19.300.315: Replace "Buffer Width and Minimum Building Setback" column headings with "25 foot Impervious Surface Setback in addition to requirements of Chapter 19.400 "Geological Hazardous Areas".

19.300.315.A.2. Development Standards, Buffer

Measurement: One of the principal features of stream protection is the quality of water entering the stream. It needs to be addressed by incorporating the infiltration or filters described in 19.150.442.

19.300.315.A.4. Development Standards, Provisions for Decreasing Buffer: Delete this section, as impervious surface setback is already at the minimum acceptable.

19.300.315.A.8. Development Standards, Building or impervious surface setback lines: Delete this section, as redundant with "19.150.442 Impervious Surface wetland and stream setback:"

19.300.315.D. Development Standards, Stream Crossings: Bio-filters described in Section 19.150.442 shall be installed to treat road runoff at all stream crossings.

19.300.315.F.2. Development Standards: In sentence 1, replace "encumbering the buffer" with "encumbering the stream and its impervious surface setback".

19.300.315.F.4. Development Standards: In the second sentence, replace "buffer" with "habitat".

19.300.315.G.3. Development Standards, Land Divisions and Land Use Permits: This section conflicts directly with Kitsap County's Comprehensive Plan Reasonable measures for maximum lot sizes in urban areas.

**CHAPTER 19.400
GEOLOGICAL HAZARDOUS AREAS**

In this chapter, replace "buffer" with impervious surface setback". This does away with the 15 foot setback addition otherwise found throughout Title 19. See 19.400.435 A.2.

**CHAPTER 19.500
FREQUENTLY FLOODED AREAS**

No changes offered to this section.

**CHAPTER 19.600
CRITICAL AQUIFER RECHARGE AREAS**

No changes offered to this section.

**CHAPTER 19.700
SPECIAL REPORTS**

19.700.710.B.2. Wetland delineation report: Delete "or within two hundred fifty feet of". This phrase may require the applicant to enter and survey a neighbor's property, which demands a warrant, per *McCready v. City of Seattle (1994)*. This would be a violation of the neighbor's right to privacy and he/she may object to the finding of wetland determination on his property. The county has no right or authority to demand this information of a neighbor. It is also a violation of the 4th Amendment to the U.S. Constitution.

19.700.710.B.6. Wetland delineation report, General site conditions: Requiring information beyond the applicant's site in question is an over-reach,

violating *Sims*. See 19.700.710.B.2., above.

19.700.710.B.8. Wetland delineation report: Delete "including vegetative, fauna, habitat,". A thorough study of these characteristics could easily become a PhD dissertation and are of very limited value. Again, could this easily be viewed as a violation of *Sims*.

19.700.710.B.12. Wetland delineation report: Delete "and buffers", as they change over time and would be redundant with the fixed "impervious surface setback" of 19.150.442.

19.700.715 Wetland mitigation Report: This report requirement needs exhaustive simplification. It is far too complex and costly. In its current form nearly every square inch of South Kitsap County is impacted. Most of the parcels in rural Kitsap are already built, so the marginal benefit of bringing one new applicant into compliance is not measurable. The cost of this report is added to the cost of construction and when used as used a price comparative, it drives up the sale prices of all existing homes. This impacts general affordability, leaving less discretionary money. Poorer people are poorer stewards of the land and more homelessness is created.

19.700.715.F.9.c. Wetland mitigation Report: Delete "buffer". The word is redundant and implies a required 300 foot buffer, which often is not the case.

19.700.720 Habitat management plan: This section must display a list of critical habitat, so

applicants know what they are dealing with. Since WAC 232-12-011 and 232-12-014 do not list that threatened or endangered species are found in Kitsap County, it baffles the reader that a habitat management plan is required. HMP for what species?

19.700.720.D.1.a., b. and c. Habitat management plan: Delete these paragraph as redundant with inclusion of 19.150.442.

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19.700.730.A.2. Hydrogeological Report: "A report of well heads within 1000 feet of the project" violates *McCready v. City of Seattle (1994) (right of entry requires warrant)* and the neighbor's right to privacy and protection from search (U.S. 4th Amendment).

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APPENDIX E

KITSAP COUNTY CRITICAL AREA AND BUFFER NOTICE:

Delete ..."and buffer"... in title.
Delete ..."and/or its buffer"... in the text.
Buffers are not a hard requirement, per *Swinomish*.

APPENDIX H

WETLAND BUFFER ALTERATION GENERAL AUTHORIZATION FORM:

Delete this form, because under 19.150.442 "Impervious Surface wetland and stream setback:", the 25 foot impervious setback from wetlands and streams is already the minimum allowed.

KAPO SUMMARY COMMENTS

Title 19, the Critical Area Ordinance effects more citizens of Kitsap County than any other document our County Commissioners will approve. In the past, some or all County Commissioners relied only on staff briefings of the CAO, but failed to critically read it themselves.

My experience with County Staff has been there is rarely oversight or critical review of the authorship.

The current draft is loaded with illogic, errors and violations of court decisions.

Nowhere is stated the problem this document is intended to solve. Where is the measurement this document solves any stated problem?

What is the CAO intending to protect? Which exact species are to be protected by the CAO? They are not listed in the draft. The document needs to display a list of critical species and features and the criteria and benchmarks that would provide protection for each.

Kitsap Alliance of Property Owners (KAPO) agrees that certain geographical features are critical to the functioning environment and there is a need to protect threatened and endangered species, if any are listed. We disagree that buffers provide measurable protection for these critical features.

Buffers provide a large workload for County DCD employees and create a tremendous burden of

uncertainty for property owners. For individual property owners, this often results in inaction due to fear of local government or high cost of permitting. People tend not to embark on property improvements. Workers are not hired and our economy languishes.

At this point, let's review recent history. At the first discussion of the CAO by the BoCC in 2004, Commissioner Chris Endresen wondered aloud, why were large buffers being proposed, since for many decades, Kitsap had required a 35 foot building setback for streams, shorelines and wetlands. No one had ever reported a problem. Prior to the 35 foot rule, **no setback** was required.

Prior to the 35 foot setback rule, buildings were routinely constructed right at the edge of streams. To this day, there has been no proven harm. An example is the property that now hosts the Swim Step Restaurant in Port Orchard. Except for earlier septic problems, now relieved by a sewer hookup, that building causes no provable harm to salmonoids.

During the 2005 CAO update, we took a keen interest. More than any other Kitsap resident or County employee, I attended every meeting and hearing, including those of the Growth Management Hearings Board.

During the 2005 CAO review, Department of Ecology (DOE) informed Kitsap that the county would be deemed "out of compliance" and ineligible for grant money if large buffers were not included in the CAO. The threat of loss of grant money motivated Commissioners Chris Endresen and Patty Lent to vote for the large buffers in the 2005 version of the

CAO. Next, we will show the 2005 DOE threat is mute.

Thanks to the *Swinomish* decision, the Department of Ecology 2005 treat of non-compliance is now gone, so we are free to use common sense in drafting our CAO. Clean water entering steams and wetlands poses no environmental threat and we now know how to clean the water per the NOAA Fisheries study (*Spromberg, 2015*).

Your attention is drawn to the Kitsap County maps. The upper ones display in yellow, the 95% of Kitsap deemed inside a critical area and thus these parcels become non-conforming. Please note the black dots showing buildings exist on the vast majority of these "critical area" parcels. To date, no measured science has been provided that prove harm to the environment on these non-conforming parcels.

Citizens in 2005 were promised annual reviews of effectiveness of the CAO, but non were conducted. There is no supporting relevant Western Washington science showing buffers are needed or effective.

Rural Kitsap is almost entirely built out. Virtually all structures are built inside what are now deemed "critical areas" or buffers.

What harm has been proven?

Where is this documented?

What measurable benefit to the environment is there of placing huge restrictions on the remaining vacant lots?

The second set of maps, in yellow, display the area

covers by buffers. The average parcel must provide five technical studies, the expense of which drives up the cost of house construction significantly.

The maps display Kitsap's critical areas and their buffers that are restricted by the current CAO. While a few stream and wetland buffer width reductions are proposed, updated maps will change but a little.

So, we have the scientific justification and the Supreme Court authority to delete buffers. Now we need only the will.

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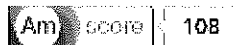
Standard Paper

Coho salmon spawner mortality in western US urban watersheds: bioinfiltration prevents lethal storm water impacts

Julann A. Spromberg, David H. Baldwin, Steven E. Damm, Jenifer K. McIntyre, Michael Huff, Catherine A. Sloan, Bernadita F. Anulacion, Jay W. Davis, Nathaniel L. Scholz

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Summary

1. Adult coho salmon *Oncorhynchus kisutch* return each autumn to freshwater spawning habitats throughout western North America. The migration coincides with increasing seasonal rainfall, which in turn increases storm water run-off, particularly in urban watersheds with extensive impervious land cover. Previous field assessments in urban stream networks have shown that adult coho are dying prematurely at high rates (>50%). Despite significant management concerns for the long-term conservation of threatened wild coho populations, a causal role for toxic run-off in the mortality syndrome has not been demonstrated.

2. We exposed otherwise healthy coho spawners to: (i) artificial storm water containing mixtures of metals and petroleum hydrocarbons, at or above concentrations previously measured in urban run-off; (ii) undiluted storm water collected from a high traffic volume urban arterial road (i.e. highway run-off); and (iii) highway run-off that was first pre-treated via bioinfiltration through experimental soil columns to remove pollutants.
3. We find that mixtures of metals and petroleum hydrocarbons – conventional toxic constituents in urban storm water – are not sufficient to cause the spawner mortality syndrome. By contrast, untreated highway run-off collected during nine distinct storm events was universally lethal to adult coho relative to unexposed controls. Lastly, the mortality syndrome was prevented when highway run-off was pretreated by soil infiltration, a conventional green storm water infrastructure technology.
4. Our results are the first direct evidence that: (i) toxic run-off is killing adult coho in urban watersheds, and (ii) inexpensive mitigation measures can improve water quality and promote salmon survival.
5. *Synthesis and applications.* Coho salmon, an iconic species with exceptional economic and cultural significance, are an ecological sentinel for the harmful effects of untreated urban run-off. Wild coho populations cannot withstand the high rates of mortality that are now regularly occurring in urban spawning habitats. Green storm water infrastructure or similar pollution prevention methods should be incorporated to the maximal extent practicable, at the watershed scale, for all future development and redevelopment projects, particularly those involving transportation infrastructure.

Introduction

In recent decades, non-point source run-off has become the leading pollution threat to aquatic habitats in the USA and similarly developed countries. In highly built watersheds, the transport of toxic chemical contaminants via storm water contributes to the well documented 'urban stream syndrome', as evidenced by various indicators of biological and ecological degradation (Walsh *et al.* 2005). These include declines in species abundance, species diversity and the proliferation of non-native, pollution-tolerant taxa.

Nevertheless, field assessments in urban watersheds rarely report fish kills or similar acute mortality events for aquatic life. A notable exception is the recurring die-off of adult coho salmon that return from the ocean to spawn each year in large metropolitan areas of northern California, western Oregon and Washington in the USA, and southern British Columbia in Canada. The coho mortality phenomenon has been studied most extensively in lowland streams of the greater Seattle area of Puget Sound. Coho begin the freshwater phase of their spawning migration with the onset of autumn rainfall. Typically within days of arriving at stream reaches suitable for spawning, affected fish become stricken with symptoms that progress from a loss of orientation (surface swimming) to a loss of equilibrium and death on a time-scale of a few hours (Videos S1 and S2, Supporting information; Scholz *et al.* 2011). Year-to-year mortality rates within and across urban watersheds are typically high (~50–90%), as measured by the proportion of unspawned females for an entire annual run (Scholz *et al.* 2011).

As might be expected, initial modelling indicates that such high mortality rates at the critical spawner life stages pose a significant extinction risk for wild coho populations (Spromberg & Scholz 2011). Coho distinct population segments, or evolutionarily significant units (ESUs; Waples 1991), are comprised of metapopulations that span large river basins with varying degrees of urban and suburban land use (e.g. Pess *et al.* 2002; Bilby & Mollet 2008). This population structure and the highly migratory life histories of salmonids have generally constrained ecotoxicological studies (Ross *et al.* 2013). Nevertheless, if urban run-off is killing adult coho, ongoing regional development pressures may present an important obstacle to the recovery of coho ESUs, including those designated as threatened (Lower Columbia River) or a species of concern (Puget Sound) under the US Endangered Species Act.

To date, the evidence linking urban storm water run-off and coho spawner mortality has been indirect. The uniform nature of the symptoms, over many years and across many streams, is consistent with a common and prevalent form of toxicity. A forensic investigation spanning nearly a decade ruled out several other potential causes, including conventional water quality parameters (e.g. dissolved oxygen, temperature), habitat availability, poor spawner condition and disease (Scholz *et al.* 2011). Moreover, an initial geospatial land cover analysis found a significant positive association between the severity of the coho die-off phenomenon and the extent of impervious surface within a watershed (Feist *et al.* 2011).

The aim of the present study was to explore the connection between water quality and coho mortality more directly by experimentally exposing freshwater-phase spawners to both artificial and actual highway run-off. Although urban storm water is chemically complex, field collected samples consistently contain motor vehicle-derived mixtures of metals and polycyclic aromatic hydrocarbons (PAHs), many of which are toxic to salmon at other life stages (e.g. copper, McIntyre *et al.* 2012; Sandahl *et al.* 2007; PAHs, Meador *et al.* 2006; Heintz *et al.* 2000). If the mortality syndrome could be reproduced with an environmentally realistic mixture of metals and PAHs, it would then be possible to identify the causal agents by removing different components of the mixture. To account for the possibility that some other contaminant(s) may be causal, we also exposed adult coho to storm water collected from a dense urban arterial road (i.e. highway run-off). Lastly, we exposed adult coho to highway run-off which was pre-treated with a conventional green storm water infrastructure (GSI) technology (bioinfiltration through soil columns) to remove pollutants, with the aim of lessening or eliminating any overtly harmful impacts of unmitigated storm water.

Materials and methods

Animals

Adult coho salmon were collected at the Suquamish Tribe's Grovers Creek Hatchery near Poulsbo, Washington. Hatchery coho are an appropriate surrogate for wild coho given that field observations have documented the mortality syndrome in spawners of both wild and hatchery origins (Scholz *et al.* 2011). At Grovers Creek, returning coho migrate <4 km in freshwater from Miller Bay in Puget Sound to a hatchery pond via a fish ladder. The pond was seined on Monday, Wednesday and Friday of each week, and thus the fish were in the pond for a maximum of 72 h prior to capture. The coho were strays from a net-pen operation designed to provide a terminal fishery to the south of Miller Bay. When available, females were used for the

controlled storm water exposures. For trials with an insufficient number of females, males were also included, as the urban mortality syndrome affects males and females alike (Scholz *et al.* 2011). Only fish exhibiting normal behaviour and with no obvious signs of trauma, disease or poor condition were included. One set of exposures was conducted on a given day.

Each individual coho spawner was placed in a holding tube constructed of PVC, of either 15.2 × 76.2 cm (diameter × length) or 20.3 × 106.7 cm with 1.1-cm-thick polyethylene gates fitted into slots at either end. Ventilation was provided by six 2.5-cm-diameter holes on either side of the anterior (head) end of each tube and five 1.75-cm-diameter holes in each gate. A ventilation hose attached to a pump (for 2011–12, a Flotec Tempest 1/6 HP, 4.5 m³ h⁻¹ (Flotec Water, Delavan, WI, USA); for 2013–14, a Lifeguard Aquatics Quiet One 3000, 3.1 m³ h⁻¹ (Lifeguard Aquatics, Cerritos, CA, USA)) submerged in the polyethylene tank supplied a minimum of 4 L min⁻¹ flow through the forward gate and over each fish in an anterior–posterior direction.

For each trial, four separate coho holding tubes were placed in a large polyethylene tank containing 440 L of clean well water, artificial storm water, highway run-off, or run-off pretreated with soil infiltration. Adult coho were exposed for 4–48 h depending on the treatment (see below). Aeration was provided with air stones attached to an air pump (Coralife 05146 Model SL-38 Super Luft Air Pump, Central Aquatics-Coralife, Franklin, WI, USA). Exposure waters were maintained at temperatures below 14 °C by flow-through (2011) and Aqua Logic® Cyclone® Drop-In Titanium Chillers (2012). Smaller ventilation pumps that produced less heat were used in 2013–14, and thus, chillers were not needed.

Exposures to Artificial Storm Water

In the autumn of 2011, returning adult coho were exposed to artificial storm water containing mixtures of PAHs and metals. The mixtures were comprised of individual compounds at concentrations at or above those measured during autumn storm events in Seattle-area urban streams (Seattle Public Utilities 2007), or at levels representative of urban storm water run-off more generally (Stein, Tiefenthaler & Schiff 2006; Gobel, Dierkes & Coldewey 2007; Tiefenthaler, Stein & Schiff 2008). The PAH profile of urban run-off is compositionally similar to that of crude oil, particularly for toxic three- and four-ring compounds (McIntyre *et al.* 2014). The exception is a lack of dissolved pyrene and fluoranthene in crude oil (Incardona *et al.* 2009). Thus, the PAH portion of the mixture was generated from a water-accommodated fraction (WAF) of Alaska North Slope crude oil, to which pyrogenic pyrene and fluoranthene were added (Table S1). The WAFs were prepared in a 3-speed commercial blender with a 3.8-L stainless steel container (Waring CB15; Waring Commercial, Torrington, CT, USA), following a protocol developed to yield fine oil droplets and bioavailable PAHs in the dissolved phase (Incardona *et al.* 2013). In brief, the stainless steel container was cleaned with acetone and dichloromethane, the rubber lid was lined with dichloromethane-rinsed heavy-duty aluminium foil, and the container was filled with 1 L of deionized water. The volume of crude oil added to the WAF (1 mL) was intended to produce a final maximum phenanthrene exposure concentration of 0.384 µg L⁻¹ (Stein, Tiefenthaler & Schiff 2006). Pyrene and fluoranthene were then added to coequal final target exposure concentrations of 0.584 µg L⁻¹. Water and oil were blended for 30 s on the lowest speed four times. The oil–water mixture was then poured into a 1-L separatory funnel and allowed to sit for 1 h. With care to leave the surface slick undisturbed, 789.3 mL at the bottom were then drawn off and added to the exposure chamber.

The metals fraction of the PAHs/metals mixture consisted of cadmium, nickel, lead, copper and zinc (anhydrous CdCl_2 , NiCl_2 , PbCl_2 , CuCl_2 and ZnCl_2 ; Sigma-Aldrich, St. Louis, MO, USA, > 98% purity) added to clean well water at nominal concentrations (Table S1) that were in the upper range of metal detections in urban streams (Stein, Tiefenthaler & Schiff 2006; Gobel, Dierkes & Coldewey 2007; Seattle Public Utilities 2007; Tiefenthaler, Stein & Schiff 2008). Moreover, the concentrations of metals in urban run-off are transiently elevated during the first flush interval (Kayhanian *et al.* 2012). To capture this exposure scenario, experiments in the autumn of 2012 used relatively higher nominal concentrations of metals only (Table S1). Temperature and dissolved oxygen were monitored and maintained at physiological ranges for adult salmon, and water samples were collected for analytical verification of exposure concentrations.

Exposures to Highway Run-Off

Storm water was collected from the downspouts of an elevated urban principal arterial road in Seattle, WA. The downspouts receive run-off from the on-ramp to a four-lane (70 m wide) highway over which approximately 60 000 motor vehicles travel each day (WA DOT 2013a). The highway, paved with Portland cement concrete (WA DOT 2013b), is a conventional urban impervious surface. All of the flow to the downspouts originated from precipitation falling on the active arterial road.

The captured run-off was transported to the hatchery facility in either covered glass carboys or in a stainless steel tank. The holding interval prior to exposures varied with the timing and intensity of autumn storm events, but did not exceed 72 h. While some collections took place after an extended antecedent dry interval and therefore included the first flush for a given storm, others spanned periods of intermittent rainfall. Daily and cumulative rainfall for each autumn season is shown in Fig. 1, with each storm water collection interval superimposed (solid rectangular boxes). Collected run-off was used for one exposure only. Temperature, pH and dissolved oxygen were measured at the outset of each exposure, and water samples were collected for chemical analyses to quantify concentrations of metals and PAHs (2012–13 but not 2014 storms). After exposures, the run-off was transported to a Kitsap County Wastewater Pump Station for disposal.

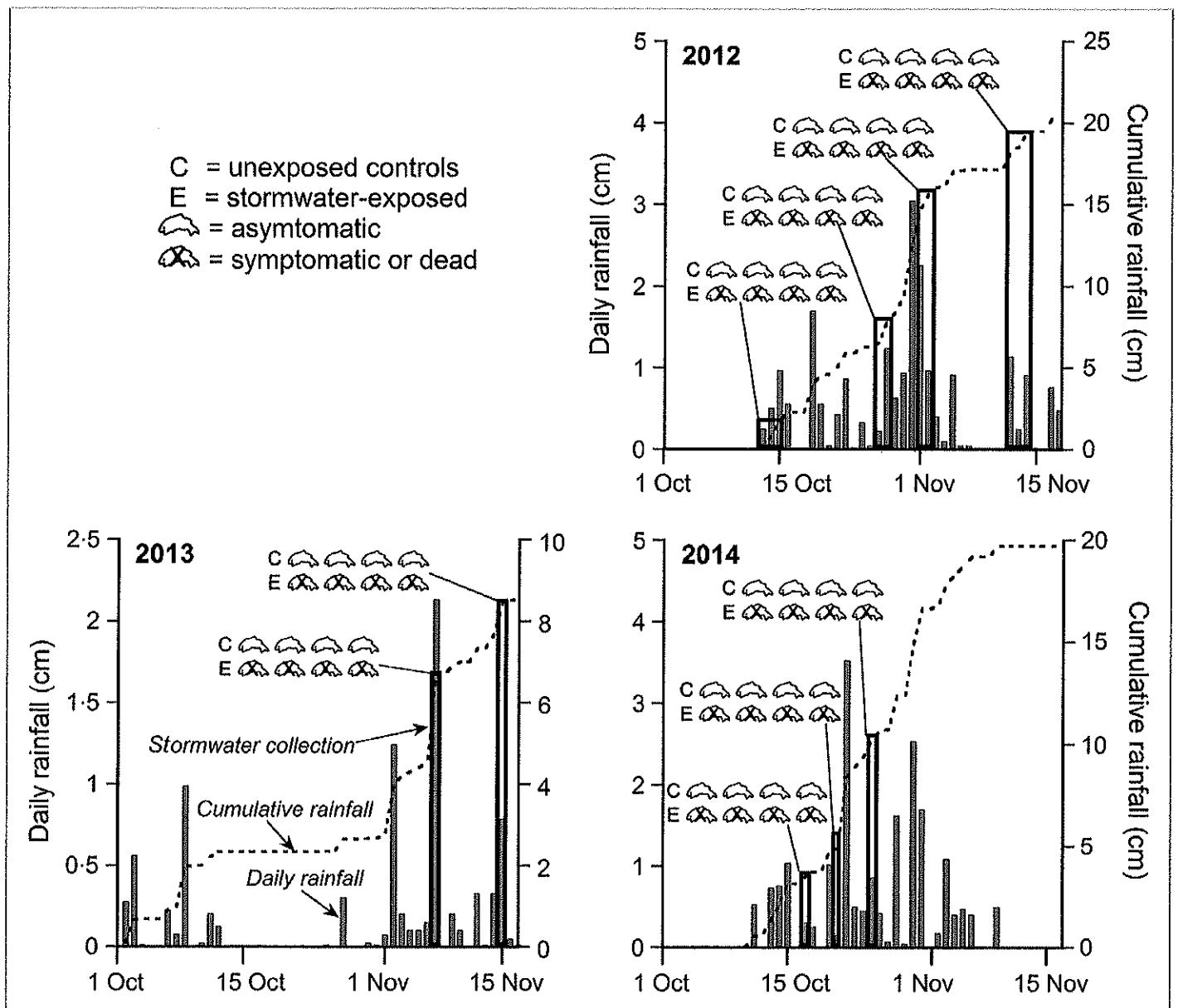


Figure 1.

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The presence or absence of the pre-spawn mortality syndrome in adult coho salmon exposed to unfiltered highway run-off (E) or clean well water (C). Paired exposures spanned three consecutive autumn spawning seasons, 2012–14. Shown in each panel are daily rainfall (shaded bars), cumulative rainfall (dotted lines), highway run-off collection intervals for each separate exposure event (black rectangles) and the presence or absence of symptomatic (or dead) fish in each individual treatment (4–24 h duration; see 'Materials and methods'). Symptoms included lethargy, loss of orientation or loss of equilibrium.

Exposures to Filtered Run-Off

In the autumn of 2013, four 200-L bioretention columns were constructed and plumbed with outflow drains following conventional guidelines for green storm water infrastructure (WA DOE 2012). The filtration columns were composed of a 30.5-cm drainage layer of gravel aggregate overlain by 61 cm of bioretention soil media (60% sand: 40% compost) and topped with 5 cm of mulched bark. In the autumn of 2014, the bioretention columns were emptied and fresh media installed. In each year, the bioretention media were conditioned by passing seven pore volumes (660 L) of clean well water from the hatchery facility through each column at a rate of 2 L min⁻¹: equivalent to 2 months of summer rainfall on a contributing area 20 times the size of the treatment area. Urban highway run-off was collected as described above, and the homogenized volume was evenly divided to flow through one of the four bioretention columns at a rate of 2 L min⁻¹, with the outflows from the four columns recombined into a single post-treatment exposure volume. Adult coho spawners were exposed to either untreated urban storm water or the same run-off post-filtration for 4–24 h. Water quality was measured, and samples were collected for chemical analyses as described above.

Observations of Symptomatic Fish

Hallmark characteristics of the adult coho spawner mortality syndrome include a progression from lethargy to a loss of orientation, a loss of equilibrium, followed by death (Scholz *et al.* 2011). Individual fish were examined for these symptoms during and after each exposure. Fish were moved from the large exposure tank and released from their holding tubes into an observation tank containing clean well water at a minimum depth of 50 cm. Swimming ability and evasiveness (responses to light and gentle prodding) were recorded over a 1- to 3-min observation interval. For the trials using artificial storm water, symptomology was assessed at 24 h and then again at the end of the exposure. Coho exposed to highway run-off were visually examined at 2, 4 and 24 h. Live fish at 2 and 4 h were returned to their holding tubes and exposure chambers for the remainder of the trial.

Water Quality Analyses

Conventional water quality parameters, including pH, dissolved oxygen, alkalinity, total suspended solids, N-ammonia, nutrients and organic carbon, were measured for selected trails using standard instrumentation or by outside laboratories using US EPA-approved methods (Analytical Resources Inc., Tukwila, WA, USA or Am Test Inc., Kirkland, WA, USA). Total and dissolved concentrations of cadmium, copper, nickel, lead and zinc were determined by inductively coupled plasma mass spectrometry (ICP-MS) by Frontier Global Sciences (Bothell, WA, USA; EPA method 1638) or Am Test Inc. (EPA method 200.8). Briefly, samples were preserved in 1% (v/v) nitric acid (total metals) or passed through a 0.45- μ m filter (dissolved metals) and then oven-digested prior to analysis by ICP-MS. Duplicate samples and laboratory blanks were included to ensure quality control. Selected water samples for PAH determinations were preserved with 10% dichloromethane and stored at 4 °C in amber glass bottles until analysis at the NOAA Northwest Fisheries Science Center by gas chromatography/mass spectrometry (GC-MS) with additional selected ion monitoring for alkyl-PAHs (Sloan *et al.* 2014).

Tissue Sampling and Analyses

At the conclusion of each exposure, fish length, weight, reproductive status and origin (i.e. hatchery or wild spawned) were assessed. To confirm the bioavailability of PAHs in exposure waters, bile was screened for PAH metabolites in a subset of 2011 and 2012 trials with both artificial storm water and highway run-off. Fish were killed, and bile was collected from the gall bladder and stored in amber glass vials at $-20\text{ }^{\circ}\text{C}$ until analysis for PAH metabolites using high-performance liquid chromatography with fluorescence detection (Krahn *et al.* 1986; da Silva *et al.* 2006). The concentrations of fluorescent PAH metabolites in bile are determined using naphthalene (NPH), phenanthrene (PHN) and benzo[a]pyrene (BaP) as external standards and converting the relative fluorescence response of bile to NPH, PHN and BaP equivalents, and reported as ng g^{-1} bile or ng mg^{-1} biliary protein.

Coho gills were sampled to confirm uptake of metals in selected 2011 and 2012 artificial and collected storm water exposures. Tissues were excised with Teflon or titanium scissors and plastic forceps, placed in plastic Whirl-paks, and stored at $-80\text{ }^{\circ}\text{C}$. Metals analyses were determined by inductively coupled mass spectroscopy (ICP-MS) at the Trace Elements Research Laboratory (TERL; College Station, TX, USA) using standard methods (TERL Method Codes 001, 006). Briefly, gill tissues were wet digested with nitric acid, freeze-dried, and homogenized by ball-milling in plastic containers. Samples were ionized in high-temperature argon plasma, and positively charged ions were separated on the basis of their mass : charge ratios by a quadrupole mass spectrometer. Student's *t*-tests assessed differences in the tissue concentrations between exposures and their respective paired control.

Results

Adult Coho Responses Across Treatments

Coho spawners exposed for 24 h to mixtures of PAHs and metals at concentrations slightly higher than those previously measured in urban run-off were asymptomatic – that is behaviourally indistinguishable from controls exposed to clean well water (Table 1). Although there was some mortality across the four independent trials ($n = 4$ of 30 fish total), this was not significantly different by treatment (Fisher exact tests, two-tailed, $P \geq 0.21$) and was therefore apparently attributable to handling stress. Extending the exposures to 48 h did not increase the incidence of mortality or symptomology ($n = 4$ of 22 fish total, two control and two exposed). Increasing the concentrations of metals fivefold or 10-fold in metal-only mixtures was also insufficient to elicit the symptoms of the pre-spawn mortality syndrome (Table 2). As with the PAHs/metals mixture, there was a small but insignificant amount of mortality across treatments ($n = 2$ of 38 fish; Fisher exact tests, two-tailed, $P = 1$).

Table 1. Adult coho salmon spawner mortality following a 24-h exposure to either clean well water (unexposed) or a mixture of polycyclic aromatic hydrocarbons (PAHs) and metals. Shown in parentheses are the numbers of symptomatic or dead fish as a proportion of the total numbers of spawners in each exposure. The PAH/metal exposures were based on measured

levels in urban creeks during storm events (see 'Materials and methods'). Relative to environmental samples, the artificial mixture contained higher concentrations of both total PAHs and metals. Each exposure was conducted on a separate day

| Exposure (h) | Mortality | |
|--------------|-----------|---------------------|
| | Unexposed | PAHs/Metals mixture |
| 24 | 25% (1/4) | 0% (0/4) |
| 24 | 33% (1/3) | 0% (0/3) |
| 24 | 0% (0/4) | 50% (2/4) |
| 24 | 0% (0/4) | 0% (0/4) |

Table 2. Exposures to relatively high levels of metals in artificial mixtures are not sufficient to elicit the coho spawner mortality syndrome. Similar to unexposed controls, nearly all of the adults survived exposures to mixtures of metals (Cd, Cu, Pb, Ni, Zn) that were fivefold (Low) or 10-fold (High) higher than measured concentrations in urban creeks where coho mortality syndrome was observed. Shown in parentheses are the numbers of symptomatic or dead fish as a proportion of the total numbers of spawners in each exposure. Each exposure was conducted on a separate day

| Exposure (h) | Mortality | | |
|--------------|-----------|------------|-------------|
| | Unexposed | Low metals | High metals |
| 24 | 0% (0/4) | 0% (0/4) | |
| 24 | 0% (0/4) | 0% (0/3) | |
| 24 | 0% (0/4) | | 0% (0/4) |
| 24 | 25% (1/4) | | 25% (1/4) |
| 24 | 0% (0/3) | | 0% (0/4) |

Although the artificial storm water preparations were designed to have a similar composition to highway runoff for many PAHs and metals, the effects on coho spawners were very different. Whereas the artificial

mixtures did not elicit the distress characteristic of the mortality syndrome, coho exposed to the unfiltered highway run-off rapidly became symptomatic. For every discrete rainfall collection interval ($n = 9$; 2012–2014), all of the exposed fish were either symptomatic or dead within 4 h (Fig. 1, Table 3). Those that survived the initial 4-h exposure were dead by 24 h. All of the paired control coho in clean well water survived, showing no behavioural symptoms at 4 or 24 h (Fig. 1, Table 3). Each exposure showed a statistically significant difference in mortality (Fisher exact tests, two-tailed, $P = 0.006$). Examples of asymptomatic control fish and symptomatic, run-off-exposed spawners are shown in Video S3. For the purpose of comparing symptoms, digital movies of affected coho in Seattle-area urban watersheds are shown in Videos S1 and S2. Thus, despite the event-to-event variation in rainfall duration and intensity, and a corresponding variation in water chemistry (conventionals, metals and PAHs, Tables S2, S3 and S5), urban run-off was 100% lethal to otherwise healthy adult coho salmon. The contribution of handling stress was evidently minimal, as the survival rate for controls across treatments in 2012–2014 was 100%.

Table 3. Proportion of adult coho displaying the spawner mortality syndrome after placement in clean well water (unexposed) or highway run-off that was either unfiltered or filtered through an experimental soil bioretention system (during 2013 and 2014). Shown in parentheses are the numbers of symptomatic or dead fish as a fraction of the total number of coho in each treatment. Each exposure was conducted on a separate day

| Exposure (h) | Mortality | | |
|--------------|-----------|------------|----------|
| | Unexposed | Unfiltered | Filtered |
| 4 | 0% (0/4) | 100% (4/4) | 0% (0/4) |
| 24 | 0% (0/4) | 100% (4/4) | 0% (0/4) |
| 24 | 0% (0/4) | 100% (4/4) | 0% (0/4) |
| 24 | 0% (0/4) | 100% (4/4) | 0% (0/4) |
| 24 | 0% (0/4) | 100% (4/4) | 0% (0/4) |

The constructed bioretention columns effectively treated the highway run-off in terms of both toxic chemical exposure and salmon spawner survival. Although the focal (measured) contaminants were not completely removed by infiltration, the overall improvement in water quality was sufficient to completely prevent the lethal effects and sublethal symptomology caused by untreated storm water. All of the adult coho exposed to filtered run-off survived and showed no behavioural symptoms at either 4 or 24 h (100% survival, $n = 20$; Table 3; Video S3). Thus, urban storm water contains an as-yet unidentified chemical component(s) that, while lethal to salmon spawners, can be removed using inexpensive bioinfiltration.

Measured Levels of Metals, PAHs and Conventional Water Quality Parameters Across Treatments

The chemical properties of highway run-off were evaluated for the six distinct collection events in the autumn of 2012 and 2013. As expected, conventional water quality parameters varied across storm water collections, as did concentrations of PAHs and metals. The analytical results are shown in Tables S2, S3 and S5. As expected, suspended solids (TSS: 23–220 mg L⁻¹) and organic matter (DOC: 8–92 mg L⁻¹) were elevated in urban run-off relative to control water (TSS < 1.1 mg L⁻¹, DOC < 1.8 mg L⁻¹). In contrast, run-off had lower Mg ($t(8) = 6.072$, $P < 0.001$), alkalinity ($t(8) = 6.201$, $P < 0.001$) and phosphate ($t(8) = 3.547$, $P = 0.008$). The pH values for run-off were circumneutral (6.12–7.47) and consistently lower than those for control water ($t(8) = 2.691$, $P = 0.027$). Other conventional chemistry parameters were not significantly different among treatments, including Ca ($t(8) = -0.121$, $P = 0.907$) and hardness ($t(8) = 1.159$, $P = 0.280$). At the outset of exposures, dissolved oxygen levels ranged from 8.1 to 10.7 mg O₂ L⁻¹ and were maintained above 6.5 mg L⁻¹ with additional aeration as needed.

Collected highway run-off had a more pyrogenic (or combustion-driven) PAH profile relative to the artificial storm water mixtures, as evidenced by a relative enrichment of higher molecular weight (5- and 6-ring) compounds and fewer low molecular weight (2- and 3-ring) compounds (Fig. 2). Bile PAH metabolites were not significantly different between fish exposed to control well water or storm water run-off after a 4-h exposure (Fig. 3). Although the measured concentrations of PAH metabolites in the bile of fish exposed for 24 h to the PAHs/metals mixture were elevated relative to paired controls, the difference was not significant (Student's t -test; $P = 0.1$, 0.14, 0.11 for phenanthrene, benzo-a-pyrene and naphthalene metabolites, respectively). This indicates that low-level PAH exposures typical of urban run-off do not produce large increases in measurable bile metabolites, consistent with bile PAH metabolite measurements from symptomatic coho previously collected during field surveys of urban spawning habitats (Scholz *et al.* 2011).

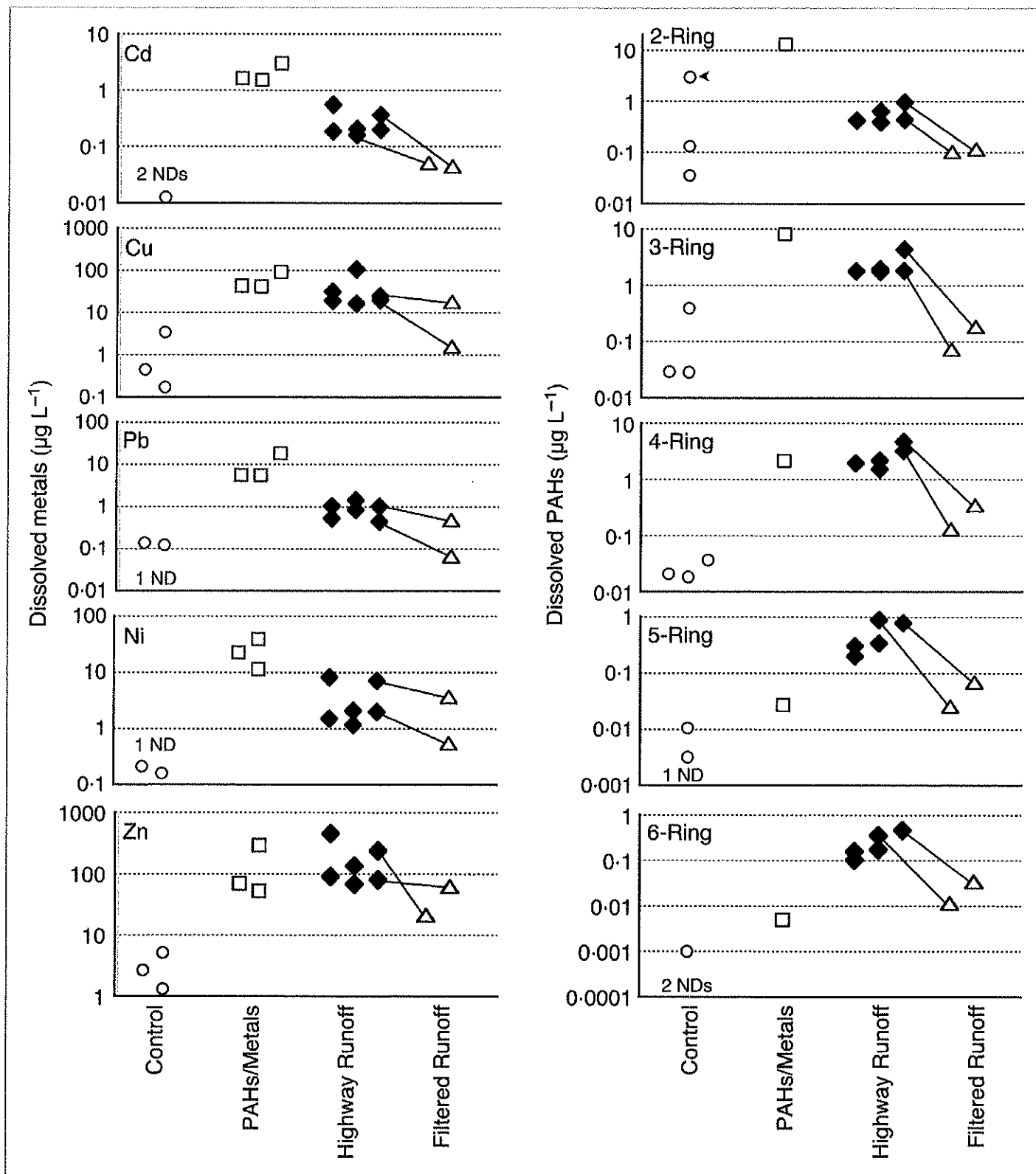


Figure 2.

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Dissolved metal (left column) and dissolved polycyclic aromatic hydrocarbon (right column) concentrations summarized by ring number for adult exposures to well water controls, polycyclic aromatic hydrocarbons (PAHs)/metal mixtures, highway run-off and filtered run-off. Closed symbols indicate dead or symptomatic individuals were observed in the exposure. Lines connect paired highway run-off and filtered run-off from the same collection. Control points are the mean of samples collected each year. The number of mean values below the reporting limits (i.e. non-detects) is indicated by # ND.

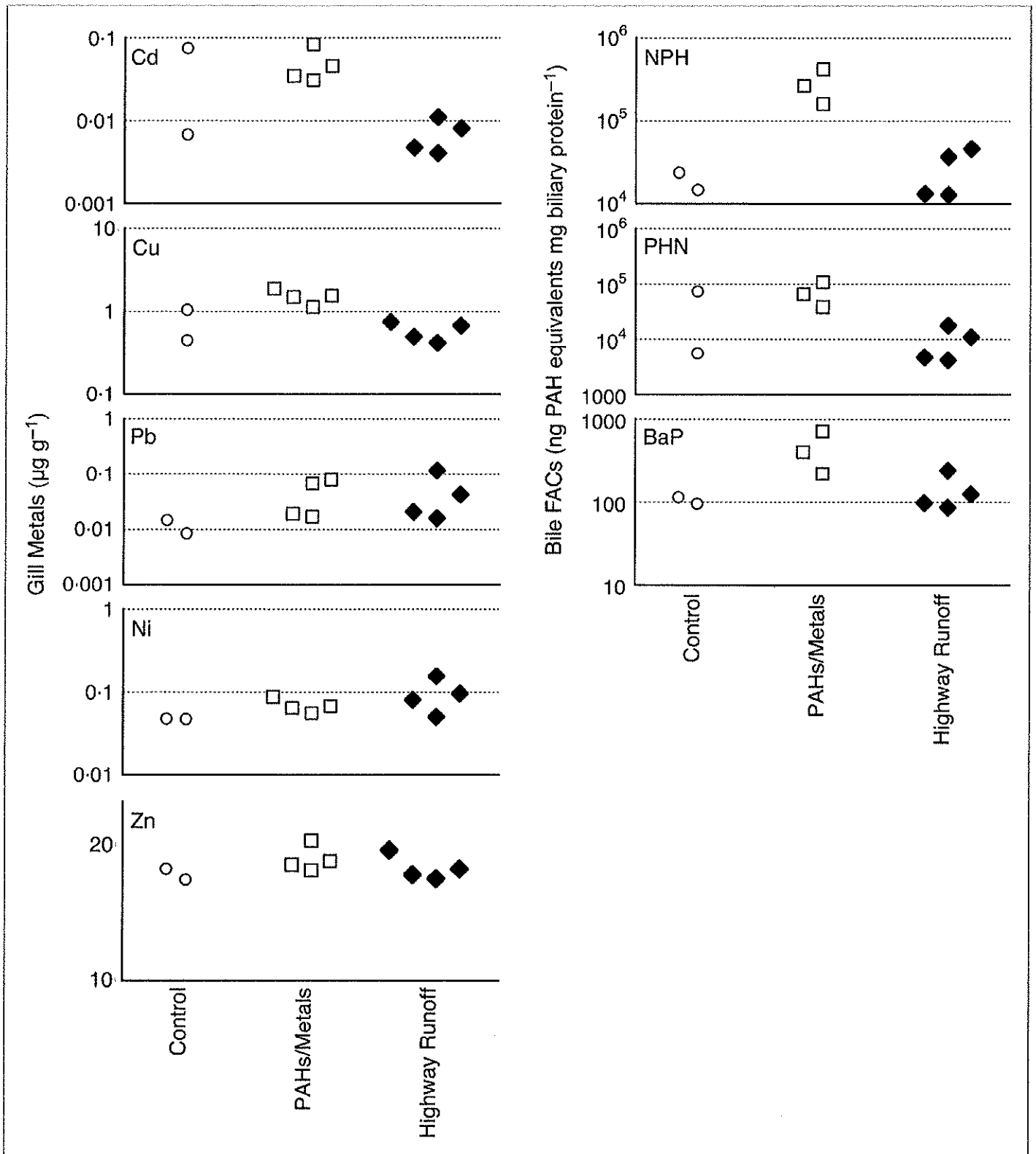


Figure 3.

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Left column shows the relative measured concentrations of metals in adult coho salmon gill tissue for Cd, Cu, Pb, Ni and Zn ($\mu\text{g g}^{-1}$). Control values are means of control tests run in 2011 and 2012. Closed symbols indicate dead or symptomatic individuals observed in the exposure. The right column shows bile fluorescent aromatic compounds (FACs) detected at naphthalene (NPH), phenanthrene (PHN), benzo-a-pyrene (BAP) wavelengths shown as protein corrected polycyclic aromatic hydrocarbons (PAH) equivalents (ng mg^{-1}).

Notably, in 2012, the levels of 2- and 3-ring PAHs in the control exposure water were unexpectedly elevated relative to all other control treatments (Fig. 2, arrow). This was attributed to the recent drilling of a new well at the Suquamish hatchery facility. Measured PAH levels in the well water declined sharply over a time span of 2 weeks (Fig. 2), and adult coho controls that were exposed during the interval did not exhibit behavioural symptoms (Fig. 1).

Whereas the levels of dissolved-phase Cd and Pb were generally lower in collected run-off relative to all of the artificial storm water mixtures (Fig. 2), Cu and Ni in run-off spanned the range of these two metals in the environmentally relevant mixture. Zinc levels in run-off were higher, and within the range of corresponding Zn levels in the high-metal mixture. The concentrations of metals in the gills of storm water-exposed and unexposed coho (4 h) were not significantly different (Student's *t*-tests, $P > 0.05$; Fig. 3) and, in both cases, were lower than gill metal levels measured from symptomatic spawners collected from the field (Scholz *et al.* 2011). Similarly, exposures to the environmentally relevant artificial storm water mixture of PAHs/metals did not produce a significant accumulation of metals in the gills, with the exception of Ni (Student's *t*-test, $P = 0.017$). For the high metals mixture, only gill Cd, Cu and Pb levels were significantly elevated relative to controls (Student's *t*-test; $P = 0.002, 0.018, 0.003$ for Cd, Cu and Pb, respectively).

Filtering collected highway run-off through the bioretention columns reduced total PAHs by 94% and total metals by 58%. As expected, removal efficiency varied for different contaminants. For example, the soil columns removed lower molecular weight PAHs less efficiently than higher molecular weight PAHs (e.g. 81–89% for 2–3 ring PAHs vs. 93% removal of 4- to 5-ring PAHs; Table S5). Notably, the medium in the bioretention columns was a source (i.e. an exporter) of total Ni to the treated run-off, resulting in a 57% increase over the pre-filtration input (Table S3). All other total metals decreased by an average of 48–88% across the two events in the order of Cd < Pb < Cu < Zn. For each of the metals, concentrations in the dissolved phase also declined after soil column infiltration (Table S3). In addition to exporting Ni, the bioretention columns were also a source of DOC (post-/pre-filtration increase of 164%), alkalinity (+29%), Ca (+60%), Mg (+372%), ortho-P (+4000%) and increasing hardness (+107%). By contrast, column infiltration reduced the ammonia content of storm water by 92% (Table S2).

Discussion

We have confirmed that controlled exposures to untreated urban run-off are sufficient to reproduce the coho spawner mortality syndrome. Adult coho became symptomatic and died within a few hours of immersion in collected storm water. Mortality rates were 100% for exposed fish vs. 0% in control fish held in clean well

water, and these results were consistent across nine distinct rainfall intervals that spanned three consecutive autumn spawning runs. As evidence that one or more toxic chemical contaminants are causal, pre-treating the highway run-off with soil bioinfiltration completely prevented the acutely lethal impacts on coho spawners. Surprisingly, coho did not develop symptoms in response to artificial mixtures of PAHs and metals, even at concentrations that were higher than those typically measured in storm water, including the first flush. Urban run-off is chemically complex, with many chemical constituents that are very poorly characterized in terms of toxicity to fish. While it may take years of additional assessment to identify precisely which of these agents is killing coho, our initial results suggest that simple GSI technologies hold promise as a means to improve water quality and effectively prevent coho mortality in urban spawning habitats.

Our finding that road run-off alone is sufficient to induce the spawner mortality syndrome aligns with previous evidence for a positive association between the amount of impervious surface within an urban watershed and the year-to-year severity of coho die-offs (Feist *et al.* 2011). It appears that other forms of water quality degradation are not necessary to produce the phenomenon. Consistent with this, symptomatic spawners do not show evidence of neurotoxic pesticide exposure (Scholz *et al.* 2011), and adult coho are not unusually vulnerable to low-level mixtures of currently used pesticides (King *et al.* 2013). The link to impervious run-off also discounts a role for personal care products, pharmaceuticals, and other classes of compounds that are transported to some urban streams via combined sewer overflows in heavy rains.

As noted above, urban road run-off contains a complex mixture of chemicals, many of which originate from motor vehicles in the form of exhaust, leaking crankcase oil and the wearing of friction materials (i.e. brake pads) and tyres. We assessed the toxicity of PAH and metal mixtures because these compounds are ubiquitous in storm water and are known to be disruptive to the fish cardiovascular system (PAHs: Brette *et al.* 2014), as well as the respiratory and osmoregulatory functions of the gill (metals: Niyogi & Wood 2004). Although bile and gill tissue results suggest that PAHs and some metals are bioavailable to the coho spawners (this study; Scholz *et al.* 2011), artificial mixtures of PAHs and metals did not produce the symptoms of the mortality syndrome. Our results appear to rule out many of the PAHs that are common to urban run-off and crude oil spills (e.g. phenanthrenes). However, there may be a role for the higher molecular weight pyrogenic PAHs found in particulate vehicle exhaust (i.e. soot), other than pyrene or fluoranthene. The remaining list of potential causal chemicals is long and includes other organic hydrocarbons such as methylphenols, quinones, thiazoles, thiophenes, furans and quinolines. Given the logistical challenges associated with adult coho exposures – seasonal availability of animals, large volume assays, limited number of fish, etc. – it may be years before the causal agent(s) is identified. Notably from a water resource management perspective, this will likely be a chemical or chemicals for which there are no existing water quality criteria.

Biological indicators play an important role in field assessments to document the urban stream syndrome in affected watersheds world-wide. Common examples are benthic indices of biological integrity (B-IBIs), which are used to characterize the health of streams based on the diversity and abundance of macroinvertebrates (Karr 1999). Although poor B-IBI scores are diagnostic of aquatic habitat degradation, they do not necessarily differentiate between drivers that may be chemical (i.e. pollution) vs. physical or biological. Conversely, biological indicators that are specific to toxic run-off may not have directly meaningful implications for individual survival, as a basis for guiding species conservation at the population and

community scales. This includes, for example, the upregulation of sensitive and responsive cytochrome p450 enzymes in the livers of fish exposed *in situ* to certain PAHs and other contaminants that act via the aryl hydrocarbon receptor (van der Oost, Beyer & Vermeulen 2003).

Coho spawners, by contrast, appear to be very sensitive ecological indicators, with a response metric that is directly attributable to toxic storm water. Moreover, the implications of widespread and recurring mortality are relatively clear at higher scales (e.g. Spromberg & Scholz 2011). Although the highway run-off used in this study (at the point of discharge) presumably contained higher concentrations of chemical contaminants than surface water conditions in urban spawning habitats, it is evident that run-off in urban waterways is not sufficiently diluted to protect many or most coho from premature death (Scholz *et al.* 2011). By establishing a direct link between non-point source pollution and the mortality syndrome, our findings set the stage for future indicator studies in western North America. This includes, for example, more refined predictive mapping of vulnerable habitats as a function of impervious land cover, at present and with future urban growth scenarios (Feist *et al.* 2011). Coho survival in urban streams can also indicate the success of pollution control programmes, via GSI or other strategies. Intensive control measures will almost certainly be necessary, across large spatial scales, to: (i) recover viable coho populations in the built environment, and (ii) prevent the rapid future loss of coho as a consequence of expanding impervious cover in watersheds that are currently productive but primarily non-urban.

In the future, it may be possible to narrow the focal list of chemicals by determining more precisely why storm water-exposed coho are dying. The gaping, surface swimming and disequilibrium of affected spawners suggest adverse physiological impacts on the gill, the heart, the nervous system or some combination of these. An earlier forensic study found no evidence of physical injury to the gills or other tissues (Scholz *et al.* 2011). An alternative approach would be to screen the target organs of symptomatic fish for changes in gene expression, and specifically gene sets that are diagnostic for specific categories of physiological stress (e.g. respiratory uncoupling). If the cause of death is ultimately found to be heart failure, for example, the candidate chemicals could be screened for cardiotoxic potential. It may also be possible to develop alternative exposure methods that reflect different sources of contaminants on roadways. This includes, for example, large-volume suspensions of particulate soot from motor vehicle exhaust, dust from brake pad wear or fine particles from tyre wear.

Lastly, toxic run-off is likely to represent an increasingly important conservation challenge for west coast coho populations in the coming years. Extant population segments are generally at historically low abundances, as evidenced by current US Endangered Species Act threatened designations in central and northern California, as well as north-western Oregon and south-western Washington. Land cover change has been extensive in some lowland watersheds where coho spawn, as a consequence of sprawl in recent decades (e.g. Robinson, Newell & Marzluff 2005). Over a similar period of time, coho habitat use in areas affected by urbanization has declined sharply (Bilby & Mollot 2008). Resource managers have been aware of the urban pre-spawn mortality syndrome among adult coho since at least the 1980s (Kendra & Willms 1990). However, the extent to which recurring adult die-offs have driven down wild coho numbers in urbanizing watersheds is not presently known. Initial modelling has shown that local populations in urbanizing watersheds cannot withstand the rates of mortality observed in Puget Sound urban stream surveys since 2000 (Spromberg & Scholz 2011). However, in terms of recovery planning, this storm water-related threat has yet to be mapped

out for actual coho conservation units at the sub-basin scale.

In conclusion, a core objective of GSI is to slow, spread and infiltrate storm water. As anticipated from recent studies (e.g. McIntyre *et al.* 2015), the experimental soil columns used here effectively prevented the acutely lethal toxicity of run-off from a dense urban arterial road. This extends the range of aquatic species and life stages that demonstrably benefit from storm water bioinfiltration. These include the early life stages of zebrafish (McIntyre *et al.* 2014), juvenile coho salmon and their macroinvertebrate prey (McIntyre *et al.* 2015), and adult coho spawners (this study). Bioretention is therefore a promising clean water technology from the standpoint of installation cost, reliability, reproducibility and scalability. However, the science of GSI effectiveness is still relatively young (Ahiablame, Engel & Chaubey 2012), and fundamental questions remain as-yet unanswered, for example how much treatment will be needed, over what spatial scales, to ensure coho salmon survival? Whereas bioretention may work well for small-footprint sites that receive modest inputs of storm water, they are but one of many evolving non-point source pollution control and prevention methods that are currently under development (Hughes *et al.* 2014). For the urban watersheds of the future, the coexistence of humans and wild coho will likely hinge on the success of these innovations.

Acknowledgements

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Data accessibility

Data generated from this study are included in the text, tables, figures and uploaded online supporting information.

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**Supreme Court of Washington, En Banc.
SWINOMISH INDIAN TRIBAL COMMUNITY and
Washington Environmental Council, Petitioners, v.
WESTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD; Skagit County, a municipal
corporation of the State of Washington; Skagit County
Farm Bureau; Skagitonians to Preserve Farmland;
Western Washington Agricultural Association; Skagit
County Diking District No. 3; Skagit County Diking
District No. 12; Skagit County Drainage District No. 17;
and Skagit County Consolidated Diking District No. 22,
Respondents.**

**Skagit County, a municipal corporation of the State of
Washington; Skagit County Farm Bureau;
Skagitonians to Preserve Farmland; Western
Washington Agricultural Association; Skagit County
Diking District No. 3; Skagit County Diking District No.
12; Skagit County Drainage District No. 17; and Skagit
County Consolidated Diking District No. 22, Petitioners,
v. Western Washington Growth Management Hearings**

**Board, Swinomish Indian Tribal Community, and
Washington Environmental Council, Respondents.**

No. 76339-9.

Decided: September 13, 2007

Alix Foster, Ofc. of Tribal Atty., La Conner, WA, David Alan Bricklin, Bricklin Newman Dold LLP, Seattle, WA, Hilary S. Franz, Hilary S. Franz Attorney at Law, Bainbridge Island, WA, for Petitioners. Sheila Deirdre Lynch, Ofc. of Attorney General, Martha Patricia Lantz, Offc. of Atty. Gen. Lic. & Admin. Law Div., Larry Dean Stout, Attorney at Law, Olympia, WA, Russell Clayton Brooks, Brian Trevor Hodges, Pacific Legal Foundation, Bellevue, WA, Amanda Jones Johnson, Attorney at Law, La Conner, WA, Gary T. Jones, Jones & Smith, Don Le Roy Anderson, Skagit County Pros. Atty. Office, Mount Vernon, WA, Peter L. Buck, The Buck Law Group, Jay Palmer Derr, Tadas A. Kisielius, Samuel Wilmore Plauche, GordonDerr LLP, Seattle, WA, for Respondents. Clare Melissa Gilbert, Snohomish County Public Defender's Assoc., Everett, WA, John D. Echeverria, Robert Dreher, Georgetown University Law Center, Washington, DC, for Amicus Curiae on behalf of Washington Trout, Amicus Curiae on behalf of Pacific Coast Federation of Fishermen's Associations, Amicus Curiae on behalf of Institute for Fisheries Resources. Jason Jerome Cummings, Civil Div. Snohomish County Prosecutor's, Everett, WA, for Amicus Curiae on behalf of Snohomish County. Toby Thaler, Attorney at Law, Seattle, WA, for Amicus Curiae on behalf of James Karr Ray White Dave Montgomery Kai Lee Stephen Ralph. Richard Jameson Langabeer, Robert Michael Tull, Langabeer & Tull PS, Bellingham, WA, for Amicus Curiae on behalf of Fish and Farms. main body

¶ 1 In this consolidated appeal, we review two separate decisions by the Western Washington Growth Management Hearings Board (Board). Both decisions concern Skagit County's efforts to comply with the critical areas provisions of the Growth Management Act (GMA). In the first decision, *Swinomish Indian Tribal Community v. Skagit County*, No. 02-2-0012c, 2003 GMHB LEXIS 73 (W. Wash. Growth Mgmt. Hr'gs Bd. (WWGMHB) Dec. 8, 2003) (hereinafter 2003 Compliance Order), the Board largely upheld Skagit County's 2003 effort to comply with the GMA. Approval, however, was subject to two exceptions, "the enforcement of watercourse protection measures and the need for more specificity in [the county's] monitoring program and adaptive management process." *Id.* at *3. Although the Board's 2003 Compliance Order directed the county to correct the deficiencies within 180 days, it concluded in a 2005 order that the county had failed to do so completely. *Swinomish Indian Tribal Cmty. v. Skagit County*, No. 02-2-0012 c, 2005 GMHB LEXIS 2, at *2-3 (WWGMHB Jan. 13, 2005) (hereinafter 2005 Compliance Order). After

review, we uphold both of the Board's decisions.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 In 1990, the legislature adopted the GMA, chapter 36.70A RCW. One section of that act, RCW 36.70A.060(2), required local governments to enact development regulations protecting so called “critical areas” by September 1, 1991. “Critical areas” are defined as “(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.” RCW 36.70A.030(5). The requirement to “protect” critical areas is a part of the GMA's larger purpose of requiring comprehensive land use planning within the state of Washington. See RCW 36.70A.020(10) (providing that local governments will “[p]rotect the environment”); RCW 36.70A.010 (describing the legislature's intent in adopting the GMA to provide for “comprehensive land use planning”).

¶ 3 The legislature created three regional boards to review compliance with the GMA by the cities and counties that are located within each board's jurisdictional boundaries. See RCW 36.70A.250-.350. One of the boards, the Western Washington Growth Management Hearings Board, is responsible for reviewing Skagit County's compliance with the GMA.

¶ 4 Since 1996, Skagit County has made several efforts to comply with the GMA's critical areas mandate.¹ In 2002, the Board held that the county's then-current critical areas ordinance did not comply with the GMA because there was “no mandatory, fallback approach in place to ensure the protection of CAs [critical areas] and anadromous fish.” *Swinomish Indian Tribal Cmty. v. Skagit County*, No. 02-2-0012c, 2002 GMHB LEXIS 67, at *13 (WWGMHB Dec. 30, 2002). Consequently, the Board ordered the county to “adopt an alternative that . must include the adoption of mandatory development regulations for agriculture as necessary to comply with RCW 36.70A.060(2) and .172(1).” *Id.* Whether Skagit County complied with this directive is the primary issue in this consolidated appeal.

¶ 5 In 2003, following the Board's 2002 finding of noncompliance, Skagit County adopted Ordinance 020030020, which contained a “no harm” standard for protecting anadromous fish habitat in agricultural areas. The Swinomish Indian Tribal Community (Tribe) and the Washington Environmental Council (WEC) challenged the ordinance's “no harm” standard, alleging that it failed to protect critical areas, as required by RCW 36.70A.060(2). After reviewing the challenge, the Board upheld the ordinance, concluding that the county was “in compliance with the [GMA] except for the enforcement of watercourse protection measures and the need for more specificity in its monitoring program and adaptive management process.” 2003 Compliance Order, 2003 GMHB LEXIS 73, at *3.

¶ 6 The Tribe and the WEC each petitioned the Thurston County Superior Court to review the Board's decision. The petitions were consolidated by the superior court. Thereafter, all three parties (Skagit County, the Tribe, and the WEC) requested, pursuant to the provisions of chapter 34.05 RCW, that the Board certify its decision for direct review by Division Two of the Court of Appeals. The Board agreed that the standard for direct review had been met and, consequently, it granted the motion. Division Two of the Court of Appeals then granted direct review.

¶ 7 In 2004, while appellate review was pending, Skagit County adopted Ordinance 020040011. It responded to the Board's directions regarding the need for enforcement of watercourse protection measures and greater specificity in its monitoring and adaptive management program. The Tribe and WEC argued to the Board that the 2004 ordinance did not bring the county into full compliance with the GMA. The Board agreed. See 2005 Compliance Order, 2005 GMHB LEXIS 2. The county then petitioned Division Two of the Court of Appeals to directly review the Board's decision, alleging that the Board failed to give proper deference to its interpretation of adaptive management and that the Board used improper procedures in reaching its decision. The Court of Appeals accepted direct review and consolidated the appeal with the pending appeal of the 2003 Compliance Order. We subsequently accepted the Tribe's motion to transfer the consolidated appeal from the Court of Appeals to this court. We now review the decisions of the Board that Skagit County's 2003 Ordinance, with two exceptions, complied with the GMA and its decision that the county's 2004 ordinance did not fully comply with the GMA.

II. STANDARD OF REVIEW

¶ 8 The Board is charged with determining compliance with the GMA and, when necessary, invalidating noncomplying comprehensive plans and development regulations. *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 142 Wash.2d 543, 552, 14 P.3d 133 (2000) (citing RCW 36.70A.280, .302). The Board "shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." RCW 36.70A.320(3). An action is " 'clearly erroneous' " if the Board is " 'left with the firm and definite conviction that a mistake has been committed.' " *Cent. Puget Sound Hr'gs Bd.*, 142 Wash.2d at 552, 14 P.3d 133 (quoting *Dep't of Ecology v. Pub. Util. Dist. No. 1*, 121 Wash.2d 179, 201, 849 P.2d 646 (1993)). "[C]omprehensive plans and development regulations [under the GMA] are presumed valid upon adoption." RCW 36.70A.320(1). Although RCW 36.70A.3201 requires the Board to give deference to a county, the county's actions must be consistent with the goals and requirements of the

GMA. Cent. Puget Sound Hr'gs Bd., 142 Wash.2d at 561, 14 P.3d 133.

¶ 9 This court, in turn, reviews the Board's decisions pursuant to the Administrative Procedure Act (APA), chapter 34.05 RCW. RCW 34.05.570(3). The Board's legal conclusions are reviewed “de novo, giving substantial weight to the Board's interpretation of the statute it administers.” Cent. Puget Sound Hr'gs Bd., 142 Wash.2d at 553, 14 P.3d 133. If the Board's findings of fact are reviewed, the substantial evidence test is used. Id.

III. ANALYSIS

A. Background to the 2003 and 2005 Board Decisions

¶ 10 The GMA was enacted largely “in response to public concerns about rapid population growth and increasing development pressures in the state.” Quadrant Corp. v. Growth Mgmt. Hr'gs Bd., 154 Wash.2d 224, 232, 110 P.3d 1132 (2005) (internal quotation marks omitted) (quoting Cent. Puget Sound Hr'gs Bd., 142 Wash.2d at 546, 14 P.3d 133). As we have already noted, one of the central requirements of the GMA is that counties and cities, which plan under it, must protect “critical areas.” RCW 36.70A.060(2). But the GMA places additional, and sometimes competing, obligations on local governments. For example, it lists as “planning goals” to both “[m]aintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries” and “[e]ncourage the conservation of . productive agricultural lands, and discourage incompatible uses.” RCW 36.70A.020(8). Local governments are not, however, given much direction by that statute as to whether protection of critical areas or the maintaining of agricultural lands is a priority. In fact, the GMA explicitly eschews establishing priorities: “The [GMA's 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.” RCW 36.70A.020.

¶ 11 The lack of priority in the planning goals becomes especially problematic when local governments are faced with land that qualifies as both agricultural land and as a critical area (for example, a parcel of agricultural land that abuts a water source). Skagit County, in particular, had to confront this tension between maintaining agricultural land and protecting critical areas. This was necessary because the county contains approximately 115,000 acres of agricultural land that have been designated under the GMA as agricultural lands of long-term commercial significance. Furthermore, a significant portion of these lands are located in areas that, although historically part of the Skagit and Samish River deltas and/or floodplains, have been cleared, diked, and drained to make them suitable for agricultural production. Some of this activity occurred as long ago as 100 years. Thus, present day agricultural production in the area depends, in part, upon this network of well established drains and dikes.

¶ 12 At the same time, the State has identified the Skagit and Samish Rivers watershed as the “most significant watershed in Puget Sound” in terms of salmon recovery. Admin. R. (AR) at 4074. It is home to at least six species of salmon and two fish species that are listed under the Endangered Species Act.² As the county acknowledges, “[t]he anadromous fish stocks in the Skagit and Samish River systems are another valuable Skagit County natural resource.” Resp’t Skagit County’s Resp. Br. at 9. The resource is also of economic significance because just as farmers depend on agricultural land for their livelihood, persons involved in the fishing industry and belonging to the Tribe depend upon healthy rivers for theirs.

¶ 13 Despite the explicit lack of a prioritization in the planning goals section of the GMA, the legislature has provided some guidance for determining GMA priorities. Specifically, in 1995, the legislature amended the GMA to strengthen protection of critical areas:

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.

RCW 36.70A.172(1) (emphasis added). The GMA was amended again in 1997 to provide that growth management hearings boards should “grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter” and that “[l]ocal comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances.” RCW 36.70A.3201. But these amendments add little in the way of guidance. For example, the requirements to be guided by the “best available science” (BAS) in developing critical areas regulations and to “give special consideration” to protecting anadromous fisheries arguably conflict with the legislature’s directive that growth management hearings boards defer to local balancing of “local circumstances,” if that local balancing is not in favor of critical areas. Id. It is with these numerous tensions in mind that we must decide whether Skagit County’s critical areas ordinance complies with the GMA.

B. The 2003 Board Decision

1. The “no harm” standard

¶ 14 Riparian farm land in Skagit County qualifies as both “agricultural land” and “critical areas” under the GMA. See RCW 36.70A.030(2), (5). In an effort to “protect” both, consistent with what the GMA requires in RCW 36.70A.020(10), the county’s 2003 ordinance established a “no harm” standard that ongoing agricultural operators must meet. AR at 988 (Skagit County Ordinance 020030020, at 78) (hereinafter 2003

Ordinance). Under the 2003 Ordinance, farmers are to conduct ongoing agricultural activities “so as not to cause harm or degradation to the existing Functional Values” of critical areas. *Id.* In effect, the county's no harm standard sets the “existing” condition of local critical areas as the baseline for measuring harm. *Id.* The county contended before the Board that the no harm standard protects critical areas in a manner consistent with the GMA. The Board largely agreed with the county.

¶ 15 At the core of the Board's decision was its interpretation of the word “protect,” as it appears in RCW 36.70A.172(1). The Board held that the requirement under the GMA to “protect” critical areas is met when local governments prevent new harm to critical areas. See 2003 Compliance Order, 2003 GMHB LEXIS 73, at *7-9. Accordingly, it held that the county protects these areas by adopting the no harm standard because it does not allow existing conditions to further degrade. See *id.*

¶ 16 The Tribe asserts here, as it did before the Board, that where an area is already in a degraded condition, it is not being protected unless that condition is improved or enhanced.³ It contends that the Board's “construction of ‘protect’ to allow maintenance of degraded, status quo conditions nullifies the legislature's direction to ‘protect the functions and values of critical areas.’” *Am. Br. of Swinomish Indian Tribal Cmty.* at 38.

¶ 17 The Board's refusal to conflate “protect” and “enhance,” the Tribe asserts, “is based on a false premise—that ‘protect’ and ‘enhance’ are mutually exclusive.” *Am. Br. of Swinomish Indian Tribal Cmty.* at 39. The Tribe argues that because the terms are not mutually exclusive, the Board cannot “exclude from the ‘protect’ mandate measures which both ‘protect’ and ‘enhance.’” *Am. Br. of Swinomish Indian Tribal Cmty.* at 42.

¶ 18 In our effort to determine if the Board erred, we have endeavored to ascertain the meaning of the word “protect.” The legislature, unfortunately, has not defined “protect” within the GMA. We therefore accord the word its common meaning, and where necessary, consult a dictionary. See *Quadrant Corp.*, 154 Wash.2d at 239, 110 P.3d 1132 (citing *Dahl-Smyth, Inc. v. City of Walla Walla*, 148 Wash.2d 835, 842-43, 64 P.3d 15 (2003)). The Tribe cites Webster's New World Dictionary of the American Language (College Ed.1966) in support of its contention that “‘protect’” means “‘to shield from injury, danger, or loss’” and that to protect “‘can result in [an object's] enhancement.’” *Am. Br. of Swinomish Indian Tribal Cmty.* at 39 (emphasis added). The Tribe, however, fails to recognize that even under the definition it offers, “can” is used to describe an option of enhancement, rather than a requirement of enhancement, when defining “protect.”

¶ 19 That difference is significant. We say that because it illustrates that something can be protected without it being enhanced. For example, an individual charged with protecting his friend's dilapidated automobile

discharges that duty despite not refurbishing it. If the car is returned in its same condition, it was protected, but not enhanced.⁴

¶ 20 The legislature has also recognized that “protect” has a different meaning than “enhance.” In several sections of the GMA, the legislature allows enhancement of natural conditions under the GMA without requiring enhancement. For example, RCW 36.70A.172(1) requires counties to “give special consideration to . protection measures necessary to preserve or enhance anadromous fisheries.” (Emphasis added.) This statute clearly gives counties a choice between preserving “or” enhancing. Furthermore, the requirement is to give “special consideration to” such measures, not necessarily to adopt them. See WAC 365-195-925(2) (a county must include “in the record” evidence of special consideration to comply with RCW 36.70A.172(1)). Another statute, RCW 36.70A.020(10), lists as a goal of the GMA to “enhance the state's high quality of life, including air and water quality.” However, the GMA allows counties to decide how to achieve the goal of enhancing water quality without specifically requiring enhancement of a damaged fish habitat. In our judgment, water quality and fish habitat are related, but they are not the same. A duty to enhance the quality of water is not a duty to enhance fish habitat. A third example is RCW 36.70A.460. It recognizes that under chapter 77.55 RCW, fish habitat enhancement projects that meet certain criteria are entitled to a streamlined permitting process. Nothing in that chapter, however, requires a county to undertake such projects. See RCW 77.55.181.

¶ 21 As the foregoing illustrates, the legislature has not imposed a duty on local governments to enhance critical areas, although it does permit it. Without firm instruction from the legislature to require enhancement of critical areas, we will not impose such a duty. Therefore, to the extent that the Tribe argues that the GMA places a higher burden upon the county than the duty to prevent new harm to critical areas, we disagree. The “no harm” standard, in short, protects critical areas by maintaining existing conditions.

2. Mandatory Buffers

¶ 22 We next consider whether, as the Tribe contends, the GMA requires the county to establish mandatory buffers along streams and rivers on the upland strip of land. Buffers are strips of land contiguous to a watercourse, usually containing indigenous shrubs and trees. They are generally not used for agricultural purposes. See, e.g., *Am. Br. of Swinomish Indian Tribal Cmty.* at 5-6. The Tribe argued to the Board that because a provision of the GMA, RCW 36.70A. 172(1), requires the county to use BAS in developing protections for critical areas and because BAS supports requiring mandatory riparian buffers, then the GMA requires the county to establish such buffers. The Board held that BAS,

and by extension the GMA, does not require the county to establish mandatory riparian buffers. Again, we agree with the Board.

¶ 23 In reaching this determination, we began by reviewing how the GMA instructs local governments to employ BAS. The legislature has expressly delegated to counties and cities the function of developing the specific means for protecting critical areas. See RCW 36.70A.3201. Under the GMA, counties and cities “have broad discretion in developing [development regulations] tailored to local circumstances.” King County, 142 Wash.2d at 561, 14 P.3d 133 (alteration in original) (quoting Diehl v. Mason County, 94 Wash.App. 645, 651, 972 P.2d 543 (1999)). Moreover, the GMA does not require the county to follow BAS; rather, it is required to “include” BAS in its record. RCW 36.70A.172(1). Thus, the county may depart from BAS if it provides a reasoned justification for such a departure. See *Ferry County v. Concerned Friends*, 155 Wash.2d 824, 837-38, 123 P.3d 102 (2005); WAC 365-195-915(1)(c)(i)-(iii). Here, the county justified its decision to not require mandatory riparian buffers on the basis that doing so would “impos[e] requirements to restore habitat functions and values that no longer exist.” Resp’t Skagit County’s Resp. Br. at 44. This was based on a recognition of the fact that the vegetation that had made up the riparian buffers along streams and rivers was cleared long before there was a legal impediment to doing so.

¶ 24 If the omission of mandatory buffers from the county’s critical areas ordinance is a departure from BAS, it is a justified departure of the kind that is tolerated by the GMA. As we have noted above, the GMA’s requirement to protect does not impose a corresponding requirement to enhance. That holding guides us here. A requirement to develop buffers would impose an obligation on farmers to replant areas that were lawfully cleared in the past, which is the equivalent of enhancement. Without a duty to enhance being imposed by the GMA, however, we cannot require farmers within Skagit County to replant what was long ago plucked up. The county need not impose a requirement that farmers establish riparian buffers.

C. The 2005 Board Decision

¶ 25 As we observed above, the Board did not fully approve the 2003 Ordinance. It withheld its approval of two parts of the ordinance: “the enforcement of watercourse protection measures and the need for more specificity in its monitoring program and adaptive management process.” 2003 Compliance Order, 2003 GMHB LEXIS 73, at *3. Furthermore, the Board ordered the county to address these issues in accord with RCW 26.70A.300(1). Consequently, as we have already noted, the county revised its critical areas ordinance in 2004 (Ordinance 020040011) (hereinafter 2004 Ordinance). The Tribe again challenged the county’s compliance with the GMA. After reviewing the county’s effort, the Board

held in early 2005 that the watercourse protection measures were now compliant with the GMA.2005 Compliance Order, 2005 GMHB LEXIS 2. It withheld approval, however, of the monitoring program and adaptive management sections of the 2004 Ordinance. The county appealed that decision, arguing that the Board followed improper procedure in reaching its decision and that, in any case, the Board should have approved the revised ordinance.

1. Alleged Procedural Errors

¶ 26 The county argues, first, that the Board committed procedural error by consulting an outside expert and consulting factual materials that were not a part of the record that was submitted to the Board. Specifically, it asserts that the Board erred in using a technical adviser, Dr. Oscar Soule,⁵ without giving the parties an opportunity to rebut or object to the technical advice provided by Dr. Soule. This argument overlooks the fact that the Board is expressly authorized to consult experts “[i]f it determines that advice from scientific or other experts is necessary or will be of substantial assistance in reaching its decision.” RCW 36.70A.172(2).⁶ While the GMA provides no specific procedure for the utilization of an expert under RCW 36.70A.172(2), the practices and procedures of the growth management hearings board are governed by the APA, chapter 34.05 RCW. RCW 36.70A.270(7). A provision in the APA permits the Board to engage in ex parte communications with persons “who have not participated in the proceeding in any manner, and who are not engaged in any investigative or prosecutorial functions in the same or a factually related case.” RCW 34.05.455(1)(c). Accordingly, we conclude that the Board did not err in consulting Dr. Soule.

¶ 27 The county claims, additionally, that the Board erred in using nonrecord materials to define the concept of “adaptive management.”⁷ The county argues that the Board is prohibited from consulting nonrecord materials because “[f]indings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding.” Skagit County's Opening Br. at 38 (emphasis added) (quoting RCW 34.05.461(4)). In our view, the Board did not err in considering these nonrecord materials because the materials were not evidence. Rather, the Board used the publications to assist in interpreting the term “adaptive management” as used in WAC 365-195-920(2). See 2005 Compliance Order, 2005 GMHB LEXIS 2, at *21-22. Such use of scholarly materials does not, in our view, transform these materials into “evidence.” In sum, the Board's use of the nonrecord materials to aid it in defining the term “adaptive management” did not violate the APA or the GMA.

2. Alleged Substantive Errors

¶ 28 We next address the county's substantive challenges to the Board's

2005 decision. The Board determined that the county's revised ordinance failed to bring its monitoring and adaptive management processes into compliance with the GMA. It concluded that the monitoring process provided for in the 2004 Ordinance lacked the necessary benchmarks for comparing the data it gathered. 2005 Compliance Order, 2005 GMHB LEXIS 2, at *25-26. The Board concluded, additionally, that even if the monitoring process was adequate in detecting degradation of critical areas, the ordinance did not have an effective adaptive management process that was capable of responding to the detected harm. Id. at *32-33.

¶ 29 The monitoring program set forth in the 2004 Ordinance consists of two components: a water quality monitoring program and a salmon habitat monitoring program. The county contends that both programs “describe in great detail the schedule for monitoring, methods for selecting sites, monitoring parameters and protocols (how and what will be measured), quality control procedures, and data assessment procedures.” Skagit County's Opening Br. at 13. This contention overlooks the fact that the Board took issue with how the county proposed to use the data it collected. More specifically, the Board held that the county could not sufficiently analyze the data because its monitoring program lacked appropriate benchmarks to compare data as it was collected. See 2005 Compliance Order, 2005 GMHB LEXIS 2, at *25-26.

¶ 30 We agree with the Board that the county has not established appropriate benchmarks. In fact, the county is unable to produce a description of any such benchmarks, despite its statement that “the County's program does include sufficient benchmarks.” Skagit County's Opening Br. at 50. That same brief contains an assertion by the county that it cannot adopt benchmarks because salmon habitat monitoring program “science has not established[,] and the state has not adopted[,] specific numbers or quantities” to use as benchmarks. Id. at 54. Any deficiencies in the State's monitoring process do not, however, excuse the deficiencies of the county's monitoring process. A benchmark is needed to compare data as it is recorded. Data that cannot be analyzed, via comparison to the benchmark, is essentially meaningless because a harm cannot be detected unless there is a benchmark by which to define a harm in the first place.

¶ 31 We are also unpersuaded by the county's argument that in the absence of an adequate benchmark, it does the “next best thing” by proposing to monitor current conditions in an effort to develop a benchmark in the future. Skagit County's Opening Br. at 56. No indication is given as to when this process will be complete. Instead, the county merely notes that it will take at least three years to complete the initial monitoring of current conditions before a benchmark is established.

Id. At best, then, the county can provide full compliance with the GMA three years after it went before the Board and argued that it was compliant. We find no reason to reverse the Board's holding that such an assurance by the county is insufficient.⁸

¶ 32 The issue of the benchmarks in the monitoring program dovetails into what the role of adaptive management is in the protection of critical areas. When a monitoring system detects newly discovered risks to critical areas from land use or development, adaptive management is a process used to confront the scientific uncertainty surrounding them. WAC 365-195-920. As part of the GMA's regulations describe it, critical areas regulations 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.” WAC 365-195-920(2). An effective adaptive management program thus “relies on scientific methods to evaluate how well regulatory and nonregulatory actions achieve their objectives.” Id. In short, under GMA regulations, local governments must either be certain that their critical areas regulations will prevent harm or be prepared to recognize and respond effectively to any unforeseen harm that arises. In this respect, adaptive management is the second part of the process initiated by adequate monitoring.

¶ 33 In its 2005 Compliance Order, the Board did not approve the county's adaptive management program.⁹ It noted that “clear goals, objectives, performance standards, and a well-defined monitoring program” are essential to a successful adaptive management program and that the county did not demonstrate them. AR at 1312-13. Because we agree with the Board that the monitoring system set forth in the 2005 Ordinance by the county is fatally flawed, we need not reach the question of whether its adaptive management system complies with the GMA. Without a compliant monitoring system, the adaptive management program cannot be compliant as the county cannot adequately adapt its management of critical areas if it is unable to adequately detect changes to them.

IV. CONCLUSION

¶ 34 In sum, we affirm the Board's 2003 and 2005 Compliance Orders.

¶ 35 I join the majority to affirm the Western Washington Growth Management Hearings Board (Board) 2003 order upholding Skagit County's (County) comprehensive plan under the Growth Management Act (GMA). However, I write separately because I would reverse the inconsistent 2005 Board order that determined that the County's adaptive management processes under the affirmed comprehensive plan failed to comply with the GMA.

¶ 36 The majority's decision that the legislature did not intend “protection” to further mandate enhancement is a correct reading of the statute and properly deferential to the County's plan as also required by the statute.

In dissent, I assert the same deference should apply to the County's adaptive management program. In addition, the 2005 Board decision was flawed by consultation with an ex parte technical adviser, and improperly relied on nonrecord materials.

¶ 37 While I concur with the chief justice's affirmation of the 2003 Board order and the county plan, I address the important legal defects in the Board's 2005 order.

Growth Management Hearings Boards Have Limited Discretion

¶ 38 The GMA provides for the creation of three regional growth management hearings boards to resolve some planning disputes under the statute. RCW 36.70A.250. The growth management hearings board members are not elected but are appointed by the governor for six-year terms (without legislative confirmation). RCW 36.70A.260. They do not have, indeed cannot have, legislative power over land use. It follows that they surely have no power to engage in the "adaptive management" of county lands.

¶ 39 The legislature has expressly required each growth management hearings board "to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of" the GMA. RCW 36.70A.3201. Growth management hearings boards are limited in jurisdiction, possessing no policy-making authority. See *Viking Props., Inc. v. Holm*, 155 Wash.2d 112, 129, 118 P.3d 322 (2005).¹ The GMA does not require a single approach to growth management or to adaptive growth management. See *id.* at 125-26, 118 P.3d 322 (alteration in original) ("the ultimate burden and responsibility for planning, harmonizing the planning goals of [the GMA], and implementing a county's or city's future rests with that community" (quoting RCW 36.70A.3201)).

¶ 40 Under the GMA, the legislature requires that when a growth management hearings board considers challenges to the decisions of local government it "shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of this chapter." RCW 36.70A.320(3) (emphasis added). Accordingly, "a board's ruling that fails to apply this 'more deferential standard of review' to a county's action is not entitled to deference from this court."

Quadrant Corp. v. Hearings Bd., 154 Wash.2d 224, 238, 110 P.3d 1132 (2005). As the analysis provided below demonstrates, the Board's 2005 order fails to accord the County the statutorily required deference.

Accordingly, I would not defer to the Board's 2005 order.

The County's Adaptive Enforcement Mechanism Satisfies the GMA

¶ 41 The County's program consists of two adaptive mechanisms: a water quality monitoring program (WQMP) and a salmon habitat monitoring program (SHMP). The WQMP measures water quality

parameters and their importance to fish habitat. The methods and protocols are derived from guidelines created by state and federal agencies, including the United States Environmental Protection Agency (EPA), the Washington State Department of Ecology (Ecology), and the U.S. Geological Survey. Admin. R. (AR) at 0109-110. The SHMP is based on EPA standards and was developed with the assistance of scientists from the EPA. See, e.g., AR at 0082-83; AR at 0532-602; AR at 0604-877; AR at 0891-904; AR at 0897-98.

¶ 42 Likewise, the County's adaptive management program specifies statistical methods for reporting and analyzing data collected, requiring publication of an annual report and the raw data. See, e.g., AR at 0071; AR at 0094; AR at 0105-108. The program even includes a minimum three-year cycle legislative process for the County to consult with agencies and then consider proposals to amend a county ordinance (if the County decides that the desired protection level has not been achieved). AR at 0105-106. It is notable that the County's three-year cycle is significantly shorter than the seven-year time period specified by the GMA. See RCW 36.70A.130(4)(b).

¶ 43 The majority argues that the County's plan lacks evidence of sufficient benchmarks. Majority at 1208. This is an inconsistent position, given the majority's decision that "protection" does not require enhancement over and beyond the current fish run status. Here, the County's monitoring and adaptive management programs were created in consultation with both state and federal agencies with expertise, including the Washington Department of Fish and Wildlife, Ecology, and the EPA. See AR at 0891-905; AR at 0527-30; AR at 0959-60; AR at 0931-58; AR at 0906-30. Strikingly, the County's final decisions were supported by Ecology and the EPA. AR at 0525; AR at 0970. Thus, the County's program is consistent with state and federal programs and has been tailored-with the assistance of those respective agencies-to the County's local circumstances. *Id.* Due diligence has been satisfied, as has RCW 36.70A.172(1)'s requirement that the County include the "best available science in developing policies and development regulations to protect the functions and values of critical areas."

¶ 44 This court's recent decision in *Ferry County v. Concerned Friends*, 155 Wash.2d 824, 123 P.3d 102 (2005), did not determine whether the best available science (BAS) requirement is procedural or substantive in character. I pointed out as much in my dissent. *Id.* at 855, 123 P.3d 102 (Johnson, J.M., J. dissenting). In my view, the BAS requirement is best understood as a procedural mandate requiring consideration of "best available science" by local government, but continuing the deference to local decisions made after such consideration. As a procedural matter, the County's determination in this matter clearly satisfied the BAS

requirement. This conclusion is confirmed by the participation in and approval of the county plan by federal and state environmental agencies. ¶ 45 The majority asserts that the three-year window set aside for data collection is insufficient, precisely because the data has not yet been collected. Majority at 1208. However, the County should not be penalized for adopting this three-year practice that is actually more protective than the GMA mandated seven-year review cycle. See RCW 36.70A.130(4)(b).

¶ 46 Additionally, the criticized three-year period for the collection of benchmark data is now moot. By the time this opinion issues, the benchmark data promised by the County will be available since this case concerns 2003-04 events. Yet, the majority argues that the Board should not approve the County's plan without sufficient data collection measures in place. Majority at 1208. This argument does not give the statutorily required deference to the County; indeed, it casts aspersions on the County's assurances. *Id.* (“We find no reason to reverse the Board's holding that such an assurance is insufficient.”). The County had a plan to generate benchmark numbers but needed time to establish the comparative values. See Skagit County's Opening Br. at 56. The Board should not overturn the County's plan because it had not yet yielded results. Ironically, the results were not complete, precisely because the Board refused to allow implementation of the County's plan.

¶ 47 In sum, if there is a plausible argument that some other enforcement mechanism might further the goals of the GMA, such as revised benchmarks, the County is free to consider any such proposal.² The Board or a court may not make that decision for the County because neither possesses legislative powers. The county standards satisfy statutory requirements and common sense, and this court should do “no harm” to the GMA's hallmark of local decision making. See *Quadrant*, 154 Wash.2d at 238, 110 P.3d 1132.

¶ 48 Here, the County's actions must be implemented by ordinances that utilize an open, deliberative process involving notice and public discussion. See RCW 36.70A.035; see also RCW 42.30.030 (“All meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency.”). This process protects the interests of all stakeholders by encouraging a fully developed public record. The various interested parties should be required to submit their recommendations and then allow the County to revise its management program through the appropriate deliberative and local legislative process.

Defects of the Board's 2005 Order

¶ 49 The Board's 2005 order is the product of procedural defects that separately require reversal. The Board's reliance upon nonrecord

materials constitutes a denial of proper procedures. Likewise, its reliance upon a secret “expert” to support the 2005 order did not adhere to common law principles of notice and verification. I recognize that a governmental entity does not have actual due process rights, as those rights are properly reserved for private parties. See *City of Mountlake Terrace v. Wilson*, 15 Wash.App. 392, 394, 549 P.2d 497 (1976). However, the Board's conduct in this matter violates the same core common law principles that support the due process doctrine: openness and fair play. The rationale for open and balanced proceedings is spelled out in the Administrative Procedure Act (APA), chapter 34.05 RCW, the GMA, and growth management hearings boards procedures. These sources of authority embody fundamental principles of fairness that entitle parties to notice and the opportunity to respond to materials used against them in Board proceedings and decisions. Improper procedures are also grounds for reversal. See RCW 36.70A.290(4); WAC 242-02-540. See also RCW 36.70A.270(7); RCW 34.05.449(2), 452(3).

¶ 50 First, this Board based its analysis and conclusion largely upon four nonrecord documents. None of those publications were presented to the County or were part of the record. The Board did not notify the County before or during the hearing that it intended to rely on those publications. Nor did the Board afford the County opportunity to respond to the facts and assertions upon which it ultimately based its decision.

¶ 51 The majority contends that these distinctions are not dispositive because the mere use of such materials is not sufficient to transform the publications into evidence. Majority at 1208. I disagree. The Board relied on the publications to inform its working definition of “adaptive management”; a key term used in the Board's final decision. These secondary sources should have been available for scrutiny because a successful challenge to their credibility or relevance would have seriously undermined the Board's final determination.³ One could reasonably assume that the sources analyses of conditions in other states (and counties) were much less relevant than the state and local experts who participated on behalf of the County.⁴ Second, the Board engaged an ex parte scientific consultant to review its draft decision and opine on the nonrecord sources it cited. Without notifying the parties, the Board procured the opinion of a retired environmental science professor, Oscar H. Soule, Ph.D.⁵ It belatedly issued a “Notice of Consultation” when it was too late to object or qualify the professor as a “consultant.” AR at 1328-46; see also supra note 4. The Board rejected all parties' requests that it refrain from consulting this expert without appropriate notice.

¶ 52 RCW 36.70A.172(2) does authorize growth management hearings boards to retain scientific advice or experts to assist in reviewing petitions involving critical areas. The GMA does not, however, specify procedures

for the Board to do so. Here, APA provisions govern the Board's conduct except where they conflict with specific GMA provisions. RCW 36.70A.270(7). The majority notes that RCW 34.05.455(1)(c) allows for ex parte communication with other employees or consultants of the agency “‘who have not participated in the proceeding in any manner.’” Majority at 1207 (quoting RCW 34.05.455(1)(c)). However, a Board cannot arbitrarily rely on undisclosed and unqualified opinions. Here, the record does not establish that Dr. Soule met any statutory exception. Instead, the County and the tribe were denied the ability to review Dr. Soule's “consultant” qualifications (or lack thereof) and cross-examine him concerning background, publications, and experience.⁶

¶ 53 In sum, Dr. Soule's conclusion that the nonrecord sources contradicting the county plan “represent sound science,” does not equate to the GMA's more stringent BAS standard. The Board is clearly trying to bootstrap the “sound science” used by Dr. Soule into the BAS standard, a category that is properly limited to the best of all available “sound science” and by definition is an exclusive, rather than inclusive term. In view of the Board's failure to engage in an open process, its reliance upon this nonrecord “sound science” also requires reversal. Equally important, these several improper bases for the Board's second order, especially its reliance on extra record materials, hamper meaningful judicial review.

Conclusion

¶ 54 In accord with the majority, I agree to affirm the Board's 2003 order upholding the County's comprehensive plan. Thus, I concur. However, I would reverse the Board's 2005 order concerning Skagit County's adaptive management regulations. I would remand this case to the Board and instruct the Board to remand immediately back to Skagit County. More than three years has transpired since the commencement of this action, and I would accept the County's assurances that it will apply its process, including the benchmark provision, in good faith. The statutorily required deference should allow the County to implement its adaptive management while considering input from all interested parties.

¶ 55 The majority affirms the Western Washington Growth Management Hearings Board's (Board) finding that Skagit County's “no harm” standard establishes an appropriate baseline for protecting critical areas within agricultural areas of long-term commercial significance. Under this standard, farmers must ensure that their agricultural practices do not cause further substantial harm to the present degraded conditions of the riparian fish and wildlife habitat. Because I read the Growth Management Act (GMA), chapter 36.70A RCW, as requiring enhancement under certain circumstances where existing conditions are degraded and cannot adequately support anadromous fisheries, I would hold the “no harm” standard fails to satisfy the GMA's mandate to “adopt development

regulations that protect critical areas.” RCW 36.70A.060(2). Thus, I respectfully dissent.

¶ 56 The legislature adopted the GMA after finding that “uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state.” RCW 36.70A.010. Among others, the legislature listed the following planning goals: “[m]aintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries,” “[e]ncourage the conservation of . productive agricultural lands,” “conserve fish and wildlife habitat,” and “[p]rotect the environment and enhance the state's high quality of life, including air and water quality.” RCW 36.70A.020(8), (9), (10). To accomplish these goals, the GMA specifically requires local jurisdictions to “adopt development regulations that protect critical areas.” RCW 36.70A.060(2). “‘Critical areas’” include “fish and wildlife habitat conservation areas.” RCW 36.70A.030(5)(c). In designating and protecting critical areas, the GMA directs local jurisdictions to “include the best available science” and “give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.” RCW 36.70A.172(1).

¶ 57 Pursuant to the GMA's mandate to protect critical areas, Skagit County adopted an ordinance governing the protection of anadromous fish habitat within agricultural areas of long-term commercial significance. This ordinance includes minimal protective regulations and an adaptive management program aimed at protecting the existing functions and values of the fish and wildlife habitat. In particular, this ordinance requires “no evidence of significant degradation to the existing fish habitat characteristics of the watercourse” and mandates compliance with state water quality standards, total maximum daily load requirements, the state hydraulics code, and specified watercourse protection measures. Skagit County Ordinance 020030020(3)(a)(v), (i)-(iv) (codified at Skagit County Mun.Code 14.24.120(3)(a)(v), (i)-(iv)). In reviewing whether this ordinance complies with the GMA, the Board deemed that the combination of minimal protective regulations, namely the “no harm” standard, and the adaptive management program, which detects habitat deterioration, in theory, provides adequate protection for the critical areas. However, the Board found that Skagit County failed to establish benchmarks and implement triggers for corrective action, which are necessary for identifying deterioration and responding effectively with protective measures.

¶ 58 The majority affirms the Board's decision, holding the “no harm” standard adequate if combined with a functional program for adaptive

management. The majority's interpretation, however, conflicts with the legislature's broad protection mandate for critical areas, particularly with respect to fish and wildlife habitat supporting anadromous fisheries. The legislature specifically directed local jurisdictions to "give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries." RCW 36.70A.172(1) (emphasis added).

¶ 59 In implementing this legislation, the Department of Community, Trade, and Economic Development (CTED) promulgated rules to explain the criteria for determining whether local jurisdictions gave adequate "special consideration" to conservation or protection measures under RCW 36.70A.172(1). In this regulation, CTED clarifies that conservation or protection measures "include measures that protect habitat important for all life stages of anadromous fish, including, but not limited to, spawning and incubation, juvenile rearing and adult residence, juvenile migration downstream to the sea, and adult migration upstream to spawning areas." WAC 365-195-925(3). CTED further explains that local jurisdictions must consider "the best available science relevant to stream flows, water quality and temperature, spawning substrates, instream structural diversity, migratory access, estuary and nearshore marine habitat quality, and the maintenance of salmon prey species." *Id.* These measures "can include the adoption of interim actions and long-term strategies to protect and enhance fisheries resources." *Id.*

¶ 60 Nothing in the critical areas statute or its implementing regulations indicates that the legislature deemed the existing degraded conditions adequate to protect salmon habitat. To the contrary, the regulations demonstrate that preserving and enhancing fish and wildlife habitat to support salmon fisheries requires the implementation of complicated measures. Moreover, the legislature anticipated that protecting these critical areas may entail development regulations that change, modify, or stop existing legal practices. For example, the legislature specifically qualified its mandate to protect agricultural, forest, and mineral resource lands with a prohibition on regulations that interfere with preexisting legal uses. RCW 36.70A.060(1)(a). The legislature specifically did not include a similar provision in its mandate to protect critical areas, RCW 36.70A.060(2); in fact, the legislature removed the provision from the bill before enacting it. See H.B. Final Rep. on Engrossed Substitute H.B. 1025, at 3, 52d Leg., 1st Spec. Sess. (Wash.1991). By omitting language that would prohibit regulations that restrict preexisting legal uses in critical areas under RCW 36.70A.060(2), the legislature demonstrated its intent for local jurisdictions to enact robust protection measures as necessary to ensure the continued viability of critical areas.

¶ 61 In addition to undermining the legislature's intent to provide broad

protection for fish and wildlife habitat, the majority's holding relies on flawed reasoning. The majority observes that the legislature did not explicitly define "protect" in the GMA. After examining the dictionary, and the legislature's use of the term "protect" in other statutory provisions, the majority reasons that "something can be protected without it being enhanced." Majority at 1205. Thus, according to the majority, enhancement is never a necessary component of protection. From this logic, the majority deduces that maintenance of the existing conditions always protects the fish and wildlife habitat, even where the conditions are presently degraded. Id. at 1205-06. I disagree. The fact that protection does not always require enhancement does not mean that protection never requires enhancement. Whether protection requires enhancement depends on the condition of the object to be protected. Where the conditions of the fish and wildlife habitat are degraded and thereby unable to support the anadromous fisheries, protection may require some level of enhancement.

¶ 62 The majority's analogy to a dilapidated automobile is similarly unavailing. The majority explains that "an individual charged with protecting his friend's dilapidated automobile discharges that duty despite not refurbishing it. If the car is returned in its same condition, it was protected, but not enhanced." Id. at 1205. Contrary to the majority's implication, the individual's failure to enhance the car does not necessarily mean that he fulfilled his duty to protect the car. The majority provides no support to show how the car "was protected," except that it "[was] not enhanced." This analogy fails to recognize that depending on the circumstances, the individual would have had to do something in order to protect the car; in an unsafe neighborhood, this may have involved locking the doors or parking in a garage, and in flooded conditions, this may have involved moving the car to another street. Simply returning it in the same condition does not demonstrate how the individual protected it; rather, it shows only that the individual returned it without refurbishing it. In a similar fashion, the majority provides no support for its determination that Skagit County's "no harm" standard "protects" the fish and wildlife habitat, except by showing that the standard does not enhance the habitat.¹

¶ 63 Although the majority recognizes that protection may result in enhancement, it holds that enhancement is an option, never a requirement. This conclusion ignores the legislature's intent to provide genuine protection for fish and wildlife habitat critical areas supporting anadromous fisheries. Rather than assuming that existing conditions provide adequate protection, I would hold that the conditions of the salmon habitat dictate whether the local jurisdiction should employ preservation or enhancement measures. While I agree with the majority's ultimate conclusion that Skagit County failed to establish

baselines and implement an adequate monitoring system to protect the salmon habitat, I also believe that Skagit County failed to show that the “no harm” approach of maintaining existing conditions meets the GMA’s directive. Contrary to the majority’s position, I read the GMA to require that local jurisdictions take action to protect salmon fisheries; depending on the existing conditions, protection may entail preservation or enhancement. If the conditions are “dilapidated,” then merely maintaining them does not provide the protection the GMA requires.

FOOTNOTES

1. See, e.g., *Friends of Skagit County v. Skagit County*, Nos. 96-2-0025 & 00-2-0033c, 2001 GMHB LEXIS 53 (WWGMHB Feb. 9, 2001); *Friends of Skagit County v. Skagit County*, Nos. 96-2-0025 & 00-2-0033c, 2000 GMHB LEXIS 323 (WWGMHB Aug. 9, 2000); *Friends of Skagit County v. Skagit County*, No. 96-2-0025, 1998 GMHB LEXIS 283 (WWGMHB Sept. 16, 1998); *Friends of Skagit County v. Skagit County*, No. 96-2-0025, 1997 GMHB LEXIS 344 (WWGMHB Jan. 3, 1997).
2. *Endangered and Threatened Wildlife and Plants*, 64 Fed.Reg. 58,910 (Nov. 1, 1999) (Coastal-Puget Sound Bull Trout); *Endangered and Threatened Species*, 64 Fed.Reg. 14,308 (Mar. 24, 1999) (Puget Sound Chinook).
3. For purposes of simplicity, we discuss similar positions and arguments that are put forward separately by the Tribe and the WEC by referring only to the first party, the Tribe. For example, both the Tribe and the WEC challenge the no harm standard in the 2003 Ordinance, but we refer to it as the Tribe’s position.
4. The dissent attempts to buttress its position that “protect” entails “enhance” by asserting that the automobile analogy is “unavailing.” Dissent at 1211. It concludes, “[s]imply returning [the automobile] in the same condition does not demonstrate how the individual protected it; rather, it shows only that the individual returned it.” *Id.* The dissent, in our view, confuses the question of how an object is protected with the question of whether it was protected. Because this case turns upon what “protect” means, it is the latter question that is determinative. Asking how the object was protected is secondary. To answer the relevant question of whether an object has been protected: If it is returned in the same condition it was given, surely no new harm has befallen it and it was protected. This is true by definition.
5. Dr. Soule is a retired professor of environmental studies at The Evergreen State College.
6. The concurrence/dissent cites various statutes and a regulation in support of its conclusion that “[i]mproper procedures [i.e., reliance on Dr. Soule] are also grounds for reversal.” Concurrence/dissent at 1212 (citing RCW 36.70A.290(4), .270(7); RCW 34.05.449(2), .452(3); WAC

242-02-540). None of the cited statutes or the regulation provides justification for reversing the Board's decision. Furthermore, they do not override the clear authorization for ex parte consultation with experts that RCW 36.70A.172(2) and 34.05.455(1)(c) provide. For example, RCW 36.70A.270(7) directs the Board to comply with the APA and WAC provisions for using evidence in its decisions. Those provisions, including the two cited by Justice J.M. Johnson, WAC 242-02-540 and RCW 36.70A.290(4), provide the Board with the discretion to supplement the record with additional evidence. Additionally, RCW 34.05.449(2) provides for a response to introduced evidence only "[t]o the extent necessary" as determined by the Board. Finally, RCW 34.05.452(3) merely provides that "[a]ll testimony of parties and witnesses . be made under oath." Thus, if there is any tension between these provisions and the Board's use of Dr. Soule, and it appears that there is not, it does not justify reversing the Board's decision.

7. The amount of nonrecord materials is very slight in comparison to the entirety of the administrative record. The materials in question consisted of four publications: "(1) Hymanson, Kingma-Rymek, Fishbain, Zedler and Hansch, California Coastal Commission: 'Procedure Guidance for Evaluating Wetland Mitigation Projects in California's Coastal Zone'; (2) 'Use of Monitoring and Adaptive Management to Promote Regeneration in the Allegheny National Forest,' Lois DeMarco, USFS [United States Forest Service] National Silvicultural Workshop, Kalispell, Montana; (3) Salafsky, Margoluis and Redford, 'Adaptive Management: A Tool for Conservation Practitioners,' World Wildlife Fund, Inc. (2001); and (4) The British Columbia Forest Practices Code." Skagit County's Opening Br. at 17. A reference to any of these four documents occurs only on three pages of the Board's 2005 order.

8. The concurrence/dissent asserts that we should reverse the Board's 2005 decision because the Board failed to give the proper "deference" to the county's "assurance[]" of future compliance under the "clearly erroneous" standard. Concurrence/dissent at 1211. Without question, the "clearly erroneous" standard requires that the Board give deference to the county, but all standards of review require as much in the context of administrative action. The relevant question is the degree of deference to be granted under the "clearly erroneous" standard. The amount is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the county's actions a "critical review" and is a "more intense standard of review" than the arbitrary and capricious standard. See, e.g., *Cougar Mountain Assocs. v. King County*, 111 Wash.2d 742, 749, 765 P.2d 264 (1988). And even the more deferential "arbitrary and capricious" standard must not be used as a "rubber stamp" of administrative actions. See *Ocean Advocates v. United States Army*

Corps of Eng'rs, 361 F.3d 1108, 1118, 1119 (9th Cir.2004).

9. The Board specifically held, “The question is what will work to protect fish habitat in the same environment where ongoing agriculture is well-functioning and being conserved. Adaptive management is a creative tool to explore possible solutions, but it requires rigor, commitment, and prompt change in response to indications of problems in order to ensure that the county's less-than-precautionary protections of fish habitat in ongoing agricultural lands comply with RCW 36.70A.040, .060, and .172.

The monitoring and adaptive management system . still does not establish an overall protection strategy for fish and wildlife habitat in ongoing agricultural lands that complies with these provisions of the GMA.” AR at 1304-05. has befallen it and it was protected. This is true by definition.

1. “[T]he growth management hearings boards do not have authority to make ‘public policy’ even within the limited scope of their jurisdictions, let alone to make statewide public policy.” Viking Props., Inc., 155 Wash.2d at 129, 118 P.3d 322. This opinion does not reach the broader constitutional question of whether these sui generis unelected boards, appointed by the governor, may overrule county legislators and micromanage land use plans for counties.

2. The parties involved in this litigation, as well as the agencies listed above, are encouraged to provide relevant scientific input to the County (as mandated by the GMA).

3. The four nonrecord publications did not even address the unique circumstances of Skagit County, and it seems unlikely that they were relevant to hearings to the Board. The studies did not address any geographic area inside Washington, but instead analyzed environmental conditions in California, Oregon, and British Columbia. See majority at 1207, n. 5. Even if the studies were held to be relevant, the County was deprived of any opportunity to rebut the issues addressed in the four nonrecord publications.

4. Moreover, none of the four nonrecord publications were admitted through a motion to supplement the record pursuant to WAC 242-02-540. The Board thereby failed to comply with APA requirements and its own rules for supplementing the record

5. The Board did not qualify the “expert” as is normally required to ensure material testimony. See Wash. R. Evid. 702. Here, there was no adversarial process to determine the professor's expertise or competency.

6. The County and the tribe had no chance to cross-examine Dr. Soule as his testimony was presented in a letter, not under oath. See *Weyerhaeuser v. Pierce County*, 124 Wash.2d 26, 33, 873 P.2d 498 (1994). Furthermore, the Board apparently failed to supply him the EPA protocols or any other materials upon which the County based its decision. AR at

1344. The Board apparently provided Dr. Soule only selected materials- all were exhibits presented by the Swinomish Indian Tribal Community. Id.

1. The majority contends that my approach “confuses the question of how an object is protected with the question of whether it was protected.” Majority at 1205 n. 4. However, in order to determine whether Skagit County's ordinance adequately protected the riparian fish and wildlife habitat under RCW 36.70A.060(2), we must first establish what procedures are necessary-i.e., how-to protect the critical areas. After that initial inquiry, we then examine whether Skagit County's protection measures satisfied the “protect” requirement.

ALEXANDER, C.J.

WE CONCUR: CHARLES W. JOHNSON, TOM CHAMBERS, BARBARA A. MADSEN, MARY E. FAIRHURST, and BOBBE J. BRIDGE, Justices.



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16 U.S. Code § 668 - Bald and golden eagles

Current through Pub. L. 114-38 (<http://www.gpo.gov/fdsys/pkg/PLAW-114publ38/html/PLAW-114publ38.htm>). (See Public Laws for the current Congress (<http://thomas.loc.gov/home/LegislativeData.php?n=PublicLaws>).

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(a) PROHIBITED ACTS; CRIMINAL PENALTIES

Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined not more than \$5,000 or imprisoned not more than one year or both: *Provided*, That in the case of a second or subsequent conviction for a violation of this section committed after October 23, 1972, such person shall be fined not more than \$10,000 or imprisoned not more than two years, or both: *Provided further*, That the commission of each taking or other act prohibited by this section with respect to a bald or golden eagle shall constitute a separate violation of this section: *Provided further*, That one-half of any such fine, but not to exceed \$2,500, shall be paid to the person or persons giving information which leads to conviction: *Provided further*, That nothing herein shall be construed to prohibit possession or transportation of any bald eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to June 8, 1940, and that nothing herein shall be construed to prohibit possession or transportation of any golden eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to the addition to this subchapter of the provisions relating to preservation of the golden eagle.

(b) CIVIL PENALTIES

Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle, commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, may be assessed a civil penalty by the Secretary of not more than \$5,000 for each such violation. Each violation shall be a separate offense. No penalty shall be assessed unless such person is given notice and opportunity for a hearing with respect to such violation. In determining the amount of the penalty, the gravity of the violation, and the demonstrated good faith of the person charged shall be considered by the Secretary. For good cause shown, the Secretary may remit or mitigate any such penalty. Upon any failure to pay the penalty assessed under this section, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found or resides or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action. In hearing any such action, the court must sustain the Secretary's action if supported by substantial evidence.

(c) CANCELLATION OF GRAZING AGREEMENTS

The head of any Federal agency who has issued a lease, license, permit, or other agreement authorizing the grazing of domestic livestock on Federal lands to any person who is convicted of a violation of this subchapter or of any permit or regulation issued hereunder may immediately cancel each such lease, license, permit, or other agreement. The United States shall not be liable for the payment of any compensation, reimbursement, or damages in connection with the cancellation of any lease, license, permit, or other agreement pursuant to this section.

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(June 8, 1940, ch. 278, § 1, 54 Stat. 250 (<http://uscode.house.gov/statviewer.htm?volume=54&page=250>); Pub. L. 86-70 (<http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=PLAW>), § 14, June 25, 1959, 73 Stat. 143 (<http://uscode.house.gov/statviewer.htm?volume=73&page=143>); Pub. L. 87-884 (<http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=PLAW>), Oct. 24, 1962, 76 Stat. 1246 (<http://uscode.house.gov/statviewer.htm?volume=76&page=1246>); Pub. L. 92-535 (<http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=PLAW>), § 1, Oct. 23, 1972, 86 Stat. 1064 (<http://uscode.house.gov/statviewer.htm?volume=86&page=1064>).

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WAC 296-54-505

Definitions.

DANGER TREE (OVER)

A-frame - A structure made of two independent columns fastened together at the top and separated by a reasonable width at the bottom to stabilize the unit from tipping sideways.

An operation - Any place where logging or log related activities are taking place.

Approved - Approved by the department of labor and industries.

Arch - Any device attached to the back of a vehicle and used for raising one end of logs to facilitate movement.

Authorized person - A person approved or assigned by the employer to perform a specific type of duty(s) or to be at a specific location at a certain time(s).

Backcut (felling cut) - The cut in a felling operation made on the opposite side from the undercut.

Backline - The portion of the haulback that runs between the spar/spar tree and the corner block.

Ballistic nylon - A nylon fabric of high tensile properties designed to provide protection from lacerations.

Barrier - A fence, wall or railing to prevent passage or approach.

Base of tree - That portion of a natural tree not more than three feet above ground level.

Bight of the line - A hazardous zone created by running lines under tension. Any section of a line between the ends.

Binder - A hinged lever assembly for connecting the ends of a wrapper to tighten the wrapper around the load of logs or materials.

Boomboat - Any boat used to push or pull logs, booms, bundles, or bags, in booming ground operations.

Boomscooter - A small boat, usually less than fourteen feet in length, equipped with an outboard motor, having directional pushing capabilities of 360 degrees.

Brailing - When tiers of logs, poles, or piles are fastened together with a type of dogline and the ends of the side members are then fastened together for towing.

Brow log - A log or a suitable substitute placed parallel to any roadway at a landing or dump to protect the carrier and facilitate the safe loading or unloading of logs, timber products, or materials.

Buck - Means the process of severing a tree into sections (logs or bolts).

Butt - The bottom of the felled part of a tree.

Butt welding - The practice of welding something end to end.

Cable tree thinning - The selective thinning of a timber stand using mobile yarding equipment specifically designed or adapted for the purpose. Cable tree thinning includes skyline, slackline, or modified slackline, overhead cable systems.

Cable yarding - The movement of felled trees or logs from the area where they are felled to the landing on a system composed of a cable suspended from spars and/or towers. The trees or logs may be either dragged across the ground on the cable or carried while suspended from the cable.

Chock - A block, often wedge shaped, which is used to prevent movement; e.g., a log from

rolling, a wheel from turning.

Choker - A length of wire rope with attachments for encircling the end of a log to be yarded.

Chunking - To clear nonusable material from a specified area.

Cold deck - A pile of yarded logs left for future removal.

Competent person - One who is capable of identifying hazards in the surroundings or working conditions which are unsanitary, hazardous or dangerous.

Corner block - The first block the haulback passes through on its way to the tail block.

Crotch line - Two short lines attached to the same ring or shackle, used for loading or unloading.

Cutter - An employee whose primary job is to fall, buck, or limb trees before they are moved to the landing area.

Danger trees - Any tree of any height, dead or alive, that presents a hazard to workers because of rot, root, stem or limb damage, lean, or any other observable condition created by natural process or man-made activity.

Dapped - A notch in a timber for receiving part of another timber.

DBH - Diameter at breast height.

Deadman - Buried log or other object used as an anchor.

Debark - To remove bark from trees or logs. Debark generally denotes mechanical means as opposed to manual peeling.

Deck - A stack of trees or logs.

Designated person - An employee who has the requisite knowledge, training, and experience to perform specific duties.

Directional falling - A mechanical means to control the direction of falling timber.

Dog line - Type of line used to fasten logs or timber products together by the use of dogs.

Domino felling - The partial cutting of multiple trees which are left standing and then pushed over with a pusher tree.

Donkey - Any machine with a series of drums used to yard logs.

Double ended logs - Two logs end to end on the same lay.

Drop zone - The area where the helicopter delivers logs from the logging site.

Droplines - A short line attached to the carriage or carriage block which is used as an extension to the main line.

Drum - A mechanical device on which line is spooled or unspooled.

Dry land storage - Decks of logs stored for future removal or use.

Dutchman -

- A block used to change direction of line lead (sideblocking).

- A method used to pull a tree against its lean by leaving a section of the undercut on one corner of the face. The portion left consists of a single saw kerf in one side of the face, with the face completely removed on the opposite side of the face cut. A single saw kerf must never extend completely across the stump.

Experienced person - A person who has been trained and has participated in the subject process for a period of time long enough to thoroughly acquaint the person with all facets of the process.

F.O.P.S. - Falling object protective structure.

Fair lead - Sheaves, rolls, or a combination thereof arranged to receive a line coming from any direction for proper line spooling on to a drum.

Subject: Trails and Critical Areas ordinance

All,

It has come to my attention, as a concerned citizen and supporter of trails, that the new Kitsap County Critical Areas Ordinance was not vetted by any, to my knowledge, Trails Organization in its drafting or was there any awareness by any of the trails organizations, whether County sanctioned or Public, of the revision of the KC Critical Areas Ordinance and the impacts outlined in the ordinance to trails in the ordinance.

I believe that this important Ordinance should be fully vetted by the Trails Community with appropriate Kitsap County staff before being passed into law.

I have become aware that the comment period on this ordinance was over on March 31st 2017 and the only available way to comment on impact to trails by ordinance as it is drafted today is at the three public meetings this Month?

My hopes are that trails and critical areas can coexist, as my mind set is that I want the public to get outside and experience all of Natures habitats, so the public will learn and want to treasure them. I don't feel that we can teach, if the pupils can't see it or experience it. Trails are the way to get the public there and to learn, in my mind. We can be very thoughtful about this, but to just pretty much band trails in critical areas does not serve the purpose of having trails or learning about our critical areas.

Consequently, I would like to request that the trails impact portion of the ordinance that I have supplied for review here be set aside for adoption and the comment period be reopened until the trails community can be fully briefed and has the chance to comment as a community or as separate organizations to this very important ordinance and its workability with trails.

Trails advocates; please contact your members and alert them to this issue and have them contact the Commissioners, Public Works and Parks staff of your desire to have trails impacts in this ordinance fully vetted and transparently by the trails community. I have pasted in an attachment that you should read and so you can start becoming aware or the impacts of this ordinance on trails and then comment on the impact to trails and the CAO.

Comments, thoughts?

John Willett

Disclosure:

Member of, but comments here not fully vetted by;

KC Non Motorized Facilities Citizens Advisory Committee, member

Kitsap Forest and Bay Coalition, member

KC Parks Forest Management Board, member

NKTA, past President