

## **MEMORANDUM**

### **PROPOSED "BEST AVAILABLE SCIENCE" RULE UNDER WASHINGTON GROWTH MANAGEMENT ACT**

**SEPTEMBER 2, 1999**

**CONFIDENTIAL:** The Information and analysis contained in this memorandum was developed and provided to NAR by Robinson & Cole LLP pursuant to the NAR Land Use Initiative program. Users of this information and analysis are specifically reminded that the One Realtor Place license agreement, to which all users agree as a condition of gaining access to One Realtor Place, limits the use of content provided by others, including that contained here, as follows: Users may download only one copy of such content for their own personal, non-commercial use, and such content may not be copied, reproduced, republished, updated, posted, transmitted, or distributed in any way with out expressed permission of NAR. Users who have any legal questions concerning the information or analysis in this database should consult with their attorneys before relying or acting upon any such information or analysis.

## **SUMMARY OF REQUEST**

NAR has requested review and comment on a proposed agency rule which would define the term “Best Available Science” as used in the Washington Growth Management Act. We have reviewed what we understand to be the most recent version of the rule, which appears as a “Discussion Draft” dated July 23, 1999 (“Proposed Rule”). NAR has asked for analysis and comments that the Washington Association of Realtors (WAR) can use in critiquing the proposal during the public comment period. In particular, WAR has expressed the concern that the Proposed Rule will have the effect of forcing land use agencies in Washington to adopt state standards in local decision-making by deferring to state agency determinations of what constitutes “best available science.”

## **BACKGROUND**

Various Washington land use laws use the term “best available science” but it appears that no statute defines the term. For example, Washington’s Growth Management Act requires that a city or county include “best available science” (“BAS”) in the record when developing critical areas policies and regulations. Regional Growth Management Boards, and most recently, the state Court of Appeals in *Honesty in Environmental Analysis v. Central Puget Sound Growth Management Hearings Board*, 979 P.2d 864 (Ct. App. Wash. 1999) have considered the extent to which BAS must form the basis of land use regulatory decisions under the applicable statutes. The Regional Growth Management Boards have also made an effort to define the term BAS, however there is not one consistent definition that has been universally adopted. The Proposed Rule attempts to address this fact by creating a regulatory interpretation of the term that will then be used in implementing the statutes.

## **ANALYSIS AND COMMENTS**

### **A. THE PROPOSED RULE APPEARS TO HAVE THE EFFECT OF ALLOWING THE USE OF INFORMATION FROM STATE AND FEDERAL AGENCIES AS “BEST AVAILABLE SCIENCE” EVEN IF THAT INFORMATION IN FACT LACKS SCIENTIFIC BASIS OR VALIDITY, AND OF PROTECTING THE USE OF SUCH INFORMATION FROM JUDICIAL SCRUTINY**

**The Proposed Rule.** Section WAC-365-195-910(2) of the Proposed Rule indicates that “Local governments may use information that state or federal natural resource agencies have indicated to represent best available science or consult with a qualified scientific expert or team of qualified scientific experts, when feasible, to identify scientific information, determine the best available science, and assess its applicability to the critical areas at issue. . . .” (emphasis provided). The apparent meaning of this language is that information generated by state or federal agencies and designated by them as BAS may be adopted by local governments as BAS without further inquiry as to whether the state or federal agency information is, in fact, scientifically valid. By contrast, under the Proposed Regulations, other types of information must be specifically assessed by the local government to determine, among other matters, “whether the source of the information displays the characteristics of a valid scientific process.” Section 365-195-910(3).

**Effect of the Proposed Rule.** As a result of this proposed language, where a local agency policy, regulation or decision is premised on a study that a state agency has identified as BAS, a property owner or other aggrieved party may be unable to challenge the use of that study by the local agency. This is because the Proposed Rule specifically defers to the state agency for the BAS determination, apparently putting the underlying validity of the state determination beyond review on appeal from the local action. The Proposed Rule at WAC 365-195-920 indicates that "State natural resource agencies provide numerous guidance documents and model ordinances that incorporate the agencies' assessments of the best available science." It is not clear that there would be any requirement of a public rulemaking or administrative proceeding before a state agency can designate a study as BAS or adopt "guidance documents" and "model" provisions purporting to incorporate BAS. If not, there may be no opportunity whatsoever to challenge whether the study, guidance or model ordinance does in fact have scientific basis or reasonably resolve competing scientific information. By contrast, a local agency's determination that an expert's testimony or some other type of evidence does or does not constitute BAS would presumably be subject to review on appeal to the same extent as any other type of mixed question of law and fact.

Furthermore, by creating a category of information that is deemed to be BAS simply by virtue of a state agency declaring it to be such, the Proposed Rule effectively discourages local agencies from developing scientific information specific to their individual situations, or fairly evaluating information developed by an applicant or third party. It would be in the local agency's interest to avoid the time and expenditure necessary to conduct its own consultation with qualified experts where it already has "canned" BAS to which it can refer. Indeed, at section WAC 365-195-920, the Proposed Rule indicates that "consultation with state natural resources agencies can provide a quick and cost-effective way to develop scientific information and recommendations based on that information." A local agency likewise might be inclined to discount any information developed by an applicant or other interested party. If the state information is *deemed* BAS, why would a local agency be inclined to inquire into the comparative validity of that information and independently produced information from an applicant or third party? By contrast, if no presumption or automatic status attached to such information, all testimony and information in front of the local board would be on equal footing and more likely subject to a comparable degree of evaluation and consideration.

**Recommendation:** WAR should urge that there be no special regulatory deference to state or federal agency pronouncements as to what constitutes "best available science" for purposes of local decision-making and that any local use of information from these sources be subject to the same type and extent of scrutiny as the use of information from other sources. At a minimum, WAR should insist that any state agency designation of a study or other information source as "best available science" take place as a formal Rule with the opportunity for public notice and comment and judicial review.

Regardless of whether the Proposed Rule is adopted or other formulations of "best available science" become law, in light of the *HEAL* case and growth management board decisions, WAR should advise its constituents to identify now, and be prepared to retain, objectively qualified scientific experts for the purpose of testifying at applicable local hearings so that there can be a balanced presentation of scientific testimony.

In light of the mandate to include BAS in its decisions, and, in particular, given the commentary in *HEAL* to the effect that critical areas policies present “a uniquely scientific inquiry,” a local government is limited by the record in its ability to accommodate realtors’ interests, even if it wants to do so. A local government can only accommodate the views of the realtors (or any interest group) to the extent that there is reliable scientific testimony and evidence pertinent to the issues at hand that supports the groups’ cause and is credible to the local government.

**Suggested Revision to Proposed Rule.** We have attached at the end of this memorandum proposed language that WAR might suggest for a revision to WAC 365-195-910(1) and (2), subject to review by its local counsel.

**B. THE PROPOSED RULE REQUIRES THAT ADMINISTRATIVE VARIANCES AND EXCEPTIONS BE PREMISED ON BEST AVAILABLE SCIENCE EVEN THOUGH THERE APPEARS TO BE NO SUCH SUBSTANTIVE REQUIREMENT IN THE GROWTH MANAGEMENT ACT**

Section WAC 365-195-920(3) of the Proposed Rule states that “a local government shall include best available science in determining whether to grant applications for administrative variances and exceptions from generally applicable provisions in policies and development regulations adopted to protect the function and values of critical areas. . . . The local government should be able to ensure that best available science was included in determining whether to grant each application for a variance or exception. The inclusion of best available science should be accomplished by adopting science-based criteria for evaluating such applications.” This appears to be a substantive requirement that would be added to applicable land use law by this Rule. The addition of the BAS factor by regulation would presumably allow arguments on appeal from individual variance or exception decisions based on the failure to include BAS.

Furthermore, by singling out BAS, the Proposed Rule implies that a heightened level of importance should be attached to the BAS factor above other factors used in deciding variances and exceptions.

Finally, this portion of the Rule equates the “inclusion” of BAS with the adoption of criteria that are “science based.” This appears to go beyond what the *HEAL* court has concluded is the meaning of the requirement that BAS be “included.” In its substantive effect, it also appears to exceed the statutory authority of RCW 36.70A.190(4)(b) cited by the agency in WAC 365-195-900(4) which gives the agency authority only to adopt procedural regulations.

**Recommendation:** WAR should question the statutory basis for requiring that BAS be included in making administrative decisions on variances and exceptions. WAR should assert that the agency lacks the authority to determine the factors to be considered in issuing variances and exceptions, which are set forth by statute.

**C. THE “ADAPTIVE MANAGEMENT” AND “PRECAUTIONARY” APPROACHES TO INCORPORATING BEST AVAILABLE SCIENCE IN CRITICAL AREAS**

## **PROTECTION ARE LIKELY TO RESULT IN OVERLY RESTRICTIVE REGULATIONS AND TO CREATE UNCERTAINTY FOR PROPERTY OWNERS**

**Adaptive Management Approach.** The Proposed Rule at WAC 365-195-931 encourages local governments to undertake an adaptive management approach to regulating critical areas in which “scientific methods” are used to “test the results of action taken so that the management and related policy can be changed promptly and appropriately.” Under such an approach, “[a]ctions are treated as experiments and are therefore subject to rigorous experimental guidelines and decision criteria.” Such an approach contemplates a “willingness by decision-makers to change course based on the results and interpretation of new information.”

It is not possible in the abstract to determine how such an approach will affect real estate interests in any particular case. And although the Proposed Rule does not detail how the adaptive management approach would be implemented, it is reasonable to expect that a jurisdiction following such an approach would use one of two strategies: (i) impose a conservative (strict) set of regulations and then assess over time to see whether experience with these regulations warrants making the regulations more lenient towards development or (ii) impose a more balanced set of regulations with the possibility that upon further assessment it will make the regulations more stringent.

**Potential Problems.** As a practical matter, either approach is potentially problematic from the standpoint of a property owner. The first approach would result in regulations that may be unnecessarily onerous — excessive setback and buffer requirements, for example, or designating a critical area that is over-inclusive — with a resulting decrease in the value of affected property. It is also doubtful that a jurisdiction inclined to adopt strict regulations from the outset will ever be persuaded to make them more lenient. The second approach will reduce certainty because of the understanding that the land use regulations applicable to the property are “experimental” in nature and subject to change at any time depending upon whether the experiment is determined to be successful.

**Precautionary Approach.** The Proposed Rule also suggests, as an alternative to adaptive management, “the use of the ‘precautionary approach’ which implies that actions should not be taken if they can lead to significant irreparable harm of critical area resources.” This would appear to be an even more extreme approach than either of the adaptive management approaches, with greater implications for property owners and development interests.

**No Statutory Requirement.** There appears to be no statutory requirement that local governments employ an adaptive management approach to critical areas designation and regulation. The Proposed Rule recognizes this at WAC 365-195-910(c)(5) which states that “where there is an absence of valid scientific information or incomplete scientific information relating to a local government’s critical area, they *are encouraged* to develop an effective adaptive management program in order to obtain additional information and to test the results of actions taken so that the management and related policy can be changed promptly and appropriately.”(emphasis supplied). While we urge you to confirm this observation with local counsel, the adaptive management approach appears to be contemplated elsewhere in the Washington Code only in connection with a small number of programs that either pertain to the

management of state owned-lands (RCW 79.01.2955) or are voluntary on the part of private landowners (RCW 75.46.070; 76.09.350). What the Proposed Rule encourages is the extension of this approach to public regulation of private property rights more generally.

**Recommendation: WAR should be skeptical of the adaptive management approach in the designation and regulation of critical areas, as such an approach may foster instability in expectations as to a property's development value, and may tend to encourage the adoption of more restrictive regulations than may be necessary to accomplish legislative goals with respect to critical areas management.**

**SUGGESTED REDRAFT: WAC 365-195-910 (1) and (2)**

(1) This section provides assessment criteria to assist local governments in determining whether information obtained during development of critical areas policies and regulations constitutes the “best available science” ~~Use of these criteria should guide a local legislative authority in the absence of the assistance of a qualified expert, but is not intended to be a substitute for an assessment and recommendation by a qualified scientific expert.~~

(2) In identifying scientific information relevant to critical areas protection within its jurisdiction, determining the best available science, and assessing its applicability to the critical areas at issue, local governments may consider any use information in the record that has the characteristics of a valid scientific process, including the opinions of qualified scientific experts, regardless of whether such information has been identified as best available science by another level or branch of government or whether it was introduced by a public agency or a private party ~~that state or federal natural resource agencies have indicated to represent best available science or~~ Such local governments may consult with a qualified scientific expert or team of qualified scientific experts, ~~when feasible,~~ for assistance in identifying to identify scientific information, determine determining the best available science, and assess assessing its applicability to the critical areas at issue. [No change in balance of section]