

A WHITE PAPER

CRITICAL AREA REVIEW 2002
and
BEST AVAILABLE SCIENCE:
GUIDE TO EFFECTIVE PARTICIPATION

presented by
WASHINGTON ASSOCIATION OF REALTORS®

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January 22, 2002

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Re: Critical Area Reviews-2002

Dear Bryan:

Critical areas are environmentally sensitive areas the state requires local governments to “designate” and protect. Critical areas requiring protection are wetlands, aquifers, geologic hazard areas, frequently flooded areas, and fish and wildlife habitat conservation areas. Most jurisdictions have existing local rules dealing with the topics listed under local flood hazard regulations, critical area regulations, and shoreline regulations. Such rules typically address limitations on use within such areas and buffers or setbacks that further restrict or limit land uses near the listed areas.

The WAR membership will face one of its biggest GMA challenges this year as cities and counties around the state begin to consider changes to local critical area regulations. The local actions are in response to a state statutory requirement to review development regulations for GMA compliance by September 2002. The requirement for a periodic review applies to all cities and counties, not just those with GMA comprehensive plans, because GMA requires that all cities and counties have critical area regulations. The periodic review will be important, because most jurisdictions adopted rules and regulations affecting critical areas before the Legislature adopted the requirements to consider “best available science” as part of the critical area process.

Your local associations need to understand that the impact to communities of the critical area process may well rival the challenges faced by communities considering the recent shoreline amendments or ESA regulations. And the end product is the loss or significant devaluation of many presently buildable lands. The reason the change may affect members is that state agencies have been promoting

buffers and designations, under the name of “best available science,” which are often substantially in excess of regulations presently in place. The nature of the concern can be identified with just a few examples:

Wetland Category	WDOE Recommendation*	Skagit County	King County	Bellevue
I	300 feet	150 feet	Class 1 100 feet	Class A 50
II	200 feet	75 feet	Class 2 50 feet	Class B 25
III	100 feet	50 feet	Class 3 25 feet	
IV	50 feet	35 feet		

*WDOE Model Ordinance

Similar disparities exist statewide. See generally 1998 OCD (Office of Community Development) Critical Areas Ordinance Review Project (attached) for a survey of rules in your area.

The WDOE Model Ordinance has been identified as reflecting best available science and has been recommended to some counties by the OCD as the starting point for a local wetland review process. As you can see, the effect of many of the WDOE Model Ordinance recommendations will be to double or triple buffers. Recommendations for reductions in allowed uses can also be expected.

Guidelines for participation are technical, but a brief summary will aid in both understanding and participating in your local programs.

While local rules and regulations are generally presumed to be valid, Boards and Courts have been quick to hold that, when addressing critical area regulations, municipalities must show their work, and must be able to demonstrate that the regulations chosen are within the range of “best available science” for the topic at hand. Such rulings have effectively shifted the burden of proof to local governments to demonstrate that the local agency “actually considered” best available science for the critical area in question and that the regulations chosen fall within a scientifically defensible range of suitable alternatives.

The case for local concern is made even more compelling in that Growth Boards have tended to accept the state agency recommendations as “best available science,” leaving to local governments the burden of proving both the suitability and effectiveness of alternatives where local regulations depart from agency recommendations. Regulations adopted by local governments that provide the appropriate record will be upheld. However, where the local government fails to

specifically respond to a specific agency recommendation or fails to adequately document reasons for departing from state agency recommendations, the consequences can be severe, including both findings of non compliance, and potentially findings of substantial interference, with the resulting risk of moratoria on or near locally noncompliant critical areas.

The materials which follow are designed to aid your local association's participation in a critical area review process. To facilitate participation, however, I have also set forth several key points below that your members should consider when participating in the local programs. Remember, you cannot emphasize too strongly the need for active participation. Local action is important to achieve a program that works for your members and the local community. Failure to act may result in the doubling or tripling of local buffer requirements, which may well be unnecessary under local circumstances and would certainly lead to hardship and loss of buildable lands.

Active participation can also facilitate the creation of a good record, and aid in the defense of local actions where communities endeavor to make real scientific inquiry the basis of protection of local critical areas and defending against efforts to promote excessive regulation under the guise of best available science.

1. Participation is key

Local organizations should encourage their local cities and counties to participate in the critical area review program. This is particularly true when budgets are tight and other priorities seem more important. If a local community does not participate and the local critical area program was not developed with a best available science record (most were not), the local community is at risk of a challenge to local ordinances based upon a "failure to act." Where such failure is demonstrated, the Growth Boards can most certainly find noncompliance, and with respect to certain critical areas, including wetlands and fishery habitat, may well find "substantial interference" with the goals of GMA. Such a finding, if made, precludes vesting of any project in or near the affected area and for all intents and purposes creates the risk of a moratorium on related new development.

Participation should also include direct action by your membership. Local planners and elected officials should be contacted to find out how and when the local community will address these questions. Often communities will create "citizen advisory committees" to aid the local process. Participation on such committees is an invaluable way to become familiar with and influence the local outcome.

2. Joint action should be encouraged

The critical area regulations look to protect the “functions and values” of a critical area. Many of the critical areas, including wetlands, flood hazard, fish habitat, and critical aquifer cross jurisdictional boundaries. The costs of securing local expertise to both identify proper standards for designation and the range of real alternatives available in differing urban and rural settings will be expensive and time consuming. Local governments would be well advised to pool their resources to identify, through experts, the real range of alternatives properly available in given circumstances. Local communities may then choose alternatives from among the appropriate protective actions to meet specific local needs and circumstances. Joint effort will eliminate duplication or overlapping efforts, which will be important. There are neither time nor funds for each jurisdiction to conduct all of the required inquiries individually.

3. Build a good record

The Growth Management Act requires plans and regulations to be adopted by local governments—County Commissions for unincorporated lands; City Councils for incorporated lands. Proceedings typically involve a staff presentation and report or a consultant’s report, a public hearing before the Planning Commission, and a public hearing before the City Council or Board of County Commissioners. The end product of the process will be a resolution adopting amendments to the comprehensive plan and/or an ordinance amending the development regulations (typically the community’s critical area regulations or shoreline master program).

Participation by the public may be through a combination of written comments and public testimony. The sum total of all reports, written comments, and public testimony combine to create the “record” supporting the city or county action. In all subsequent proceedings, whether reviewed by a Growth Board or in Court, the principal legal issue is whether the “record” created by the city or county supports the action taken.

Because a good record is key to defending local action, local associations should also consider networking with other groups to make coordinated presentations. Affected groups in your community might include Master Builders, Building Industry Association of Washington, Economic Development Councils, granges, farm bureaus, and a variety of business and property interests.

Local agencies must be encouraged to build a scientific record in support of critical area rules. Critical area protection is recognized as a uniquely scientific inquiry, then overlain with political considerations once the scientifically available

range of alternatives have been identified. Expressions of local opinion are demonstrably inadequate to defend a local critical area choice which differs from specific agency recommendations.

Participation is also important if local associations desire to challenge local action. “Standing” to litigate local action is achieved through “participation.” “Participation” means a representative of the group has commented during the local public process, either in writing or orally, and identified the nature of the concern the group would like to have addressed. Legal precision is not required, but failure to take part in local hearings or failure to raise topics of concern may result in an order that the local association waived its rights and has no “standing” to take part in later legal proceedings.

4. Address local issues

Your local associations can be helpful in identifying experts to put local concerns and needs into context.

All too often local governments are going to be looking for a “quick fix” or a simple textbook answer to address local needs. Unfortunately no such simple answers exist. As detailed in greater length in the paper attached, many agency recommendations, particularly those which stem from boilerplate application of agency policies and studies, result in a “one size fits all” recommendation. Such a limited approach is usually not based on best available science and will certainly subject local jurisdictions to challenges of over regulation and unlawful conduct. The “best” available science in protecting the functions and values of local critical areas will necessarily depend upon a variety of local circumstances. Urban wetlands and those surrounded by development certainly pose different considerations than a similar wetland in a more rural setting. The regulatory approach to the protection of fishery streams is quite likely to be different in urban and heavily developed settings than solutions available and more suitable to undisturbed or more natural settings.

The risk in accepting a textbook or boilerplate recommendation may be a significant, and unnecessary, increase in local buffers. Identification of the different functions and values for each critical area in your local jurisdiction will be key to identifying meaningful alternatives to protection, while maintaining reasonable flexibility for use and development in your local communities.

To achieve this goal, your association should encourage local planners and elected officials to consult with experts knowledgeable with your local critical areas to help identify realistic choices and build the record supporting those choices.

5. Promote consideration of a functions/values approach to critical area protection

The statutory requirement is to protect the “functions and values” of the critical area system and to consider “best available science” in making the local choices. Courts and Boards have made it clear that a protection system may look to the functions and values of the overall critical area system. Thus, not every critical area must be given the same protection or be maintained and protected in place. Many agency recommendations rely solely upon physical buffers and use restrictions for critical area protection. Often, particularly in more urbanized settings, a wide variety of uses and priorities occur on or near critical area edges, calling for a more complex method of protection. Local jurisdictions should be encouraged to consider viable alternatives to single factor recommendations that (1) measure the “functions and values” of the critical area system in question and not just in the given location, and (2) permit modification of a given critical area so long as the overall system functions and values are protected. While such programs require expert testimony on the nature of the critical areas functions and values in different local settings (a wetland in an urban industrial setting may serve an entirely different function than one in a more rural, undeveloped state), ultimately programs which allow proper consideration of system-wide functions and values may well be less intrusive on overall building patterns in a local community than regulations that adopt the “one size fits all” programs most often recommended by some resource agencies.

6. Preserve UGA capability to accommodate growth

Your local associations should impress upon the local jurisdictions that the urban growth boundaries were set to meet identified industrial, commercial, and residential needs in the community. If local governments adopt recommendations which significantly increase critical areas or buffers, particularly wetland and fishery buffers within the UGA, the immediate effect is to reduce land available for development. You need to insist that cities and counties take this loss seriously and take steps to increase capacity within the UGAs to make up for the loss. Local government must be held accountable to provide replacement acreage “like for like,” including both acreage and ability to achieve given intensities by increasing planned intensity within cities and adding land to an expanded UGA. Replacing apartment land with single-family acreage does not achieve the balance of housing opportunities in the original UGA and does not protect the integrity of the preexisting balance. The loss of significant industrial lands for expansion or new development, or making existing lands and uses “nonconforming,” will significantly affect values of industrial lands and the marketability of both existing and new properties. A white paper

entitled “The WA Growth Management Act After Ten Years: The Duty to Accommodate Growth” by Perkins Coie is available to assist you in making this point.

Your local associations should make a point of requiring a full accounting of available lands and capability, both before and after critical area designation, buffer and use changes. The accounting will assure the overall economic balance of the community is not lost through the proposed increase in critical area lands and buffers.

7. Preserve buildable land opportunities in rural areas

Your associations in more rural areas may be looking to unincorporated small towns and other “limited areas of more intense development” to provide residential and employment opportunities. Increases in flood hazard, wetland, or stream buffers may well affect significant portions of property within local LAMIRDs (“local areas of more intensive rural development”). LAMIRDs include unincorporated small towns, rural commercial lands, rural plats, and rural industrial areas outside urban growth areas.

Where such changes occur, your associations should argue that the LAMIRD boundary must be increased and a like capability added to the LAMIRD to preserve the historic availability of lands for uses at comparable rural intensity. Fostering the ability to live and work in rural lands at rural intensities and densities is just as much a part of “rural character” as preserving the environment. Statutory provisions for LAMIRDs provide for limited new lands and new development, consistent with rural character. Where local critical area regulations necessarily infringe or eliminate lands historically used or available for commercial, industrial, or residential uses, local governments have every right and justification to increase the boundaries of the small towns, cross road commercial areas, and rural plats to replace the lost capacity.

In many local markets, if such substitutions are not done, the economic viability of a local community may be directly and adversely affected in ways that cannot be undone or replaced. This is particularly true if new critical area regulations significantly affect existing rural commercial or industrial lands and/or make existing rural commercial and industrial uses nonconforming. In such case providing a new conforming location may be the only alternative to losing the capability all together—an occurrence all too common in many of our local rural small towns already.

Our rural areas are often economically depressed and can ill afford to lose or adversely affect existing uses.

8. Resource land considerations

While specific legislation concerning resource lands is beyond the scope of this paper, several short comments are appropriate:

a. Forest resource lands

Long-term timber resource lands are covered by forest practice rules worked out after detailed consideration of both science and policy issues. Counties should consider adopting such regulations for long-term commercially significant forest lands and for local timber tracts that are maintained under timber tax and managed as forest product resource lands, even though not designated as commercially significant timber lands.

b. Mineral resource lands

Designated mineral resource lands may be adversely affected by new regulations. Local jurisdictions should identify mines in existing designated mineral resource lands of long-term significance. Such mines must be required to assure that off-site impacts are properly mitigated, but must not be subject to standard provisions that could significantly hinder mining activities. Steep slope limitations, shore side buffers, and flood plain regulations designated for general applicability may seriously interfere with approved mine operations. Unnecessary conflict should be avoided.

c. Agricultural resource lands

The Skagit County cases discussed in the attached materials identify the difficulty addressing agricultural lands and critical areas. While details of an agricultural ordinance are beyond the scope of this paper, your associations should certainly encourage local counties to provide special consideration to the needs of farmers and heed the risk of impact to agricultural lands due to excessive regulation. One of the consequences of regulating agricultural lands to the point of non productivity is the inevitable shift from agriculture to development. Growth Boards have recognized the “special status” of agricultural resource lands due to other limitations, and your associations should support efforts of the local agricultural community to recognize the need for special consideration.

9. Conflicting regulations

Local shoreline master programs regulate uses on shorelands of the state, typically larger streams (20 cfs) and lakes (20 acres), as well as all salt water frontage. Shoreline regulations presently in place identify permitted uses, buffers, and a number of bulk, density, and use constraints the local community has identified and relied

upon to achieve the goals of shoreline management set forth in the Shoreline Management Act.

Critical area regulations, adopted under GMA, pose a very real risk of conflict with shoreline regulations that may preempt locally adopted rules and cause significant disruption to local shoreline activities. Under WDOE guidelines, “wetland” critical areas may extend beyond a shoreline edge where certain vegetation types are present below the line of ordinary high water (typically up to 2 meters or about 6’6” deep). Such underwater “wetland areas” may be found along shorelines of lakes, streams, and certain tidal embayments. Where such situations are found, a 100- or 200-foot wetland setback may preempt local shoreline rules that permit more intense uses than the critical area rules. The risk of conflict is particularly great in urban settings where urban shoreline rules typically have much smaller setback requirements than recommended wetland buffers. In such cases, new uses, authorized by the shoreline master program, but not authorized by the critical area ordinance, would be prohibited (the more restrictive ordinance prevails). Further, a real risk arises that existing uses on the shoreline and within the critical area buffer become “nonconforming.” Such status typically limits the ability to expand an existing use and may preclude reconstruction where an existing nonconforming structure is destroyed or substantially damaged.

Where local governments seek to give the shoreline rules precedence over the critical area rules, the local government must document a “best available science” rationale for the modification of buffer rules in the shoreline setting. Economic hardship and local political sentiment, without more, will not be sufficient. Simply compare your local shoreline setbacks with the wetland or fish habitat setback and then inventory your urban industrial waterfronts or shoreline lots and homes to identify those rendered unbuildable or non conforming by a 100-200 foot wetland or fishery buffer on an existing “urban” or “rural” shoreline. In most jurisdictions a significant swath of shoreline property will be rendered “non conforming” by the application of the new rules. Given that in many jurisdictions nonconforming uses cannot be expanded, and in some jurisdictions not rebuilt if damaged or destroyed, you can see the risk and magnitude of the potential problem.

Your local associations should call this potential for conflict to the attention of their local governments and insist that such conflicts among regulations be resolved.

10. Constitutional issues

A tendency exists to claim an unconstitutional “taking” when regulations affect the use or value of property. Certainly critical area regulations will affect certain

properties more than others and no one will deny that property values may be affected.

But, courts at all levels have approved the exercise of police power to protect public health and safety, including the environment and no one can argue today that the objects of critical area regulation are beyond the purview of local governmental concern. Further, courts have routinely ruled that zoning regulations *per se* do not violate the constitution nor constitute a taking, even if such rules result in a significant reduction in property values. Recent “taking” cases that make the headlines are few and far between, often involve extreme or unusual facts, and are the exceptions that prove the rule.

The more fruitful areas of inquiry for your members participating in local hearings involve claims pertaining to substantive due process. Under current cases, a governmental action must not only reflect an activity that is appropriate for government concern, but the regulation adopted must be “reasonably related” to the concern being addressed, and “not unduly burdensome” on private owners relative to the benefit to be achieved.

Cases in point may include both wetland and fishery regulations currently pushed as “best available science” by the state agencies involved. WDOE guidelines recommend 200-foot buffers on Category 2 wetlands. In urban settings I have been involved in cases where expert testimony identifies that protection of much if not all of the wetland functions and values can be achieved with 50-foot buffers and adequate mechanical means of protecting water quality (such as storm sewers) or habitat shields to reduce the impact of intrusion. Where such alternatives are reasonably available and shown on the record to be generally effective, a 200-foot buffer may well be challenged as unnecessary to achieve the purpose and therefore unlawful as excessive.

A requirement for 50-foot buffers on non fish bearing streams (an issue in the Skagit County case) may be challenged by demonstrating on the record that less intrusive alternatives are both available and equally effective to meet the particular local function and value needs. Particularly where a small “stream” functions more as a local stormwater channel; ponds, biofiltration systems, fencing and relocation may prove to be equally effective and significantly less intrusive than a boilerplate 25-foot setback on either side of a channel.

The key in any such case is to make the point that the legitimate objectives of the municipality may often be achieved through regulations significantly less intrusive than “one size fits all” general guidelines proposed by some regulatory agencies. Where such case is made, on the record, by qualified personnel (a) the stage is set for local governments to adopt the less intrusive alternate approach as “within the range

of acceptable and appropriate alternatives to achieve the local need,” and (b) where the municipality adopts the excessive regulation, the record is set for a challenge that the rule is unreasonable and unnecessarily intrusive.

Another fact pattern that may be subject to challenge as “unreasonable” is where municipality rules allow certain “public” activities but prohibit the same activity when done by private means. Regulations dealing with utilities, roads, and storm water facilities often fall into this category. Where issues of maintenance and long-term responsibility can be addressed, the rationale for a double standard between public and private uses is very small and may well provide grounds for a successful challenge.

A taking claim may be heard where (a) regulations leave property with no reasonable use, or (b) regulations appropriate private property to accommodate a public need. The former situation may occur where the municipality zones property for a given use in a context where that use cannot reasonably be achieved. Examples of this zoning may be shoreline industrial zoning which limits the development of a unique property to shoreline dependent uses when such uses are not present or likely to be accommodated in that location. Another fact pattern is the designation of property as agricultural, when no current agricultural use can provide a return to land, labor, and capital, or other regulations make use of the property for commercial agriculture unfeasible. The point is to question local action that regulates property in a way that effectively precludes any commercially reasonable use of property.

The requirement by a municipality for private owners to collect and dispose of stormwater running from municipal facilities, or to take steps to enhance property to protect a public commercial enterprise are fact patterns where a takings claim may well be appropriate. (Far be it for counsel to suggest that a government action requiring private owners to improve their riparian lands so that the abutting streams will grow more fish, which the state can then allocate to harvest by tribal, commercial, sport, and international interests, would constitute such an appropriation to promote a public activity, but the analogy comes close.)

Conclusion

The magnitude of local undertakings to come under this year's critical area review are huge. Critical areas encompass wetlands; flood hazard areas; aquifer protection; geologic hazard areas, including steep slopes, mine area, tsunami and volcanic hazard areas; and fish and wildlife habitat areas, with particular focus on anadromous fish and endangered species listings. The combinations and permutations in each local area defy simplistic responses and require detailed local efforts.

Your local associations are important to the process. Someone must bring to the local government's attention the economic dislocation and disruption that may result from excessive buffers or other limiting regulation. Local governments must be encouraged to identify and seek viable alternatives to state-wide recommendations that may well at least double current rules when suitable alternatives are appropriate and reasonably available to a given locality.

Your associations should support local efforts to provide real options and alternatives to support good planning that provides real critical area protection. Your associations should be equally critical of proposals that use the guise of "best available science" to impose unnecessary or excessive burdens on the local community and property owners.

The materials which follow provide a detailed background and guideline for action.

Very truly yours,

Alexander W. Mackie

AWM:kr

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CRITICAL AREA REVIEW 2002 and BEST AVAILABLE SCIENCE: GUIDE TO EFFECTIVE PARTICIPATION

The Washington State Legislature adopted the state's Growth Management Act, Chapter 36.70A RCW, in 1990. Among the provisions of GMA is that every county and city will designate and protect critical areas, RCW 36.70A.060, and such regulations will be reviewed "by September 1, 2002" to assure compliance with GMA.¹

The purpose of this paper is to provide people participating in local GMA review programs with a handbook to guide them through the process and to provide information that can be used to make a difference in local community planning. Local communities have adopted critical area requirements, particularly for wetlands, streams, and wildlife protection, which often vary from agency recommendations. A brief review of local ordinances will show that potential changes could increase local buffers substantially and may have significant impacts on local properties. For example: many cities in the Puget Sound region use 100-foot buffers on Category 2 wetlands, when the WDOE model ordinance suggests 200 feet. Similarly, many communities have adopted 50-foot streamside buffers on salmon-bearing streams, when agency recommendations range from 150-250 feet on salmon-bearing streams; and no buffers on Type 4 and 5 streams, and at least one Growth Board case has required 50-foot buffers where they may drain into salmon-bearing waters.²

By learning the requirements of GMA, the presence of viable alternatives, and by being aware of the position taken by certain agencies in other jurisdictions, you can better prepare yourself and your local jurisdiction for this upcoming program review.

Attached to this article are six documents that are directly applicable to the GMA process:

1. Technical Bulletin 1.1. "GMA Updates in 2002: Counties and Cities "Not Fully Planning" under the Growth Management Act" (Appendix A)

¹ "Each comprehensive plan land use and development regulation shall be subject to continuing review and evaluation by the county or city that adopted them. Not later than September 1, 2002 ... a county or city shall take action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure that the plan and regulations are complying with the requirements of this chapter." RCW 36.70A.130(1). See also WAC 365-195-900(1), as amended by WSR 01-03-166, eliminating a confusing reference to a section RCW 36.70A.215, which only applied to a few counties in the state.

² Details of each community's regulations are set forth in the 1998 Critical Areas Ordinance Review Project report which is attached.

2. Technical Bulletin 1.2. “GMA Updates in 2002: Level of Review and Revision for Counties and Cities “Fully Planning” under the Growth Management Act,” prepared Washington State Office of Community Development (Appendix B)

3. “Critical Areas Ordinance Review Project,” Final Report, December 1998, Department of Community, Trade and Economic Development (Appendix C)

4. “Citations of the Best Available Science for Designating and Protecting Critical Areas,” Preliminary Draft Report for Public Review and Comment, July 2001 (Appendix D)

5. Excerpt of comment letter from DCTED (now known as OCD) to Lewis County (Hon. Dennis Haddler), dated June 8, 2000, p. 3 (Appendix E)

6. Pertinent Regulations (Appendix F):
- a. WAC 365-195-040, General method (mandatory provisions)
 - b. WAC 365-195-410, Critical areas (1) requirements and (2) recommendations for meeting requirements
 - c. WAC-365-190-080, Critical Areas (defined)
 - d. WAC 222-16-030, Water typing system
 - e. WAC 222-16-031, Interim water typing system

I. Critical Area Protection—A historical overview

It is helpful to begin with a brief history of the critical area regulation program. Understanding critical areas and some changes in early legislation will help you understand the scope of the coming program review requirements.

The legislative mandate is for all local governments to “designate” critical areas “where appropriate,” RCW 36.70A.170(1). “Critical Areas” are defined as including five physical areas:

- (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).

Guidelines for designation are found in Chapter 365-190 WAC, Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands and Critical Areas. For reference, copies of the applicable regulations are attached.

Protection of critical areas evolved from the original language of the GMA, which provided that local governments were required to adopt regulations

... precluding land uses or development that is incompatible with the critical areas that are required to be designated under RCW 36.70A.170.

RCW 36.70A.060(2), adopted Laws 1990, 1st Ex. Sess., Ch. 17, §6.

The following year the Legislature, in response to criticism that “precluding” development was too strong a term, amended the language of section .060 to provide that the duty on local governments was not to “preclude” incompatible land uses, but to “protect” the critical areas. RCW 36.70A.060(2), as amended, 1991 Sp.S, Ch 32, §21. (This legislative change is important to point out to those who make the argument that the only way to protect critical areas is to preclude development.)

The evolution of critical area protection at the legislative level was completed in 1995, when the Legislature amended the sections again to clarify that the duty of local governments was to protect the “functions and values” of the critical area in question, and that such determinations were to be made by consideration of the “best available science.”

As now written the section provides local governments:

... 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), Laws 1995, Ch. 347, §105.³

In outlining the guidelines for designating and protecting critical areas, the Department of Community Trade and Economic Development (now Office of Community Development and hereafter referred to as “OCD” or the “Department”) regulations provided that the key consideration in compliance was the identification and adoption of,

³ Note that the statutory requirement is for conservation or protection measures. Requirements for property owners to engage in enhancement activities absent a specific project or development, is without statutory authority.

... measures designed to preserve the structure, values and functions of the natural environment or to safeguard the public from hazards to health and safety.

WAC 365-195-825(2)(b).

II. Critical Area Planning—The Best Available Science Regulations⁴

The Office of Community Development has published a series of regulations dealing with the designation and protection of critical areas and resource lands, WAC 365-190-010 *et. sec.*, Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands and Critical Areas; and Chapter 365-195 WAC, GMA—Procedural Criteria for Adopting Comprehensive Plans and Development Regulations. The new “Part Nine, Best Available Science” regulations are the latest in this effort. The Best Available Science regulations are found at Part Nine, WAC 365-195-900 *et sec.* and were published at WSR 00-16-064. The effective date is August 27, 2000.

Any critical area plans or policies adopted prior to that date are by definition not in compliance with the new requirements and must be reviewed to assure both technical and procedural compliance.

The rules provide guidance and criteria to be considered on a variety of topics:

- 905—determining which information qualifies as “best available science”
- 910—obtaining the best available science
- 915—including the best available science in developing policies and development regulations
- 920—addressing inadequate scientific information
- 925—demonstrating “special consideration” has been given to conservation or protection measures necessary to preserve or enhance anadromous fisheries

This paper will focus on the issues by topic, as each raises as many questions as it answers.

⁴ From a paper presented by Mackie entitled “Best Available Science—The Five Year Annual Review, December 2001 Status Report,” at Law Centers International, “Wetlands in Washington” December 3 and 4, 2001, and a paper presented by Castelle and Mackie at Law Centers International, “Wetlands in Washington” September 28 and 29, 2000, “Developing a Best Available Science Program for Wetland Management.” Copies may be obtained from LSI at 800 Fifth Ave. Suite 101, Seattle, Washington 98104. The program book for the Castelle article contains more than a dozen focused articles on the topic and is a useful guide for anyone interested in a more detailed discussion of the topic.

A. 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 [the BAS guidelines] (WAC 365-195-905(2))

The Department is going to make available a list of resources that state agencies have identified as meeting the criteria for the best available science pursuant to this chapter, but local agencies are cautioned to review the information for local applicability, as “responsibility” rests with the local legislative authority.

The Department has published a draft guideline: “Citations of the Best Available Science for Designating and Protecting Critical Areas,” Preliminary Draft Report for Public Review and Comment, July 2001. A copy is attached. As of the date of this paper, final recommendations have not been published.⁵

The introduction to the citations outlines the agency’s purpose.

...the GMA does not set specific state or regional development standards for critical areas protection, the statute is clear that local governments must include the “best available science” when designating and protecting them.

The best available science or valid science can be described as research conducted by qualified individuals using documented methodologies that lead to verifiable results and conclusion. It is important for elected officials to understand how to identify valid science and how best to integrate it in policy-making.

The responsibility for including the best available science in GMA policies and development 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 experts to help identify and determine the best available scientific information and assess its applicability to the relevant critical areas. State agencies can also assist local governments with guidance and identifying additional resources.

“Citations of the Best Available Science for Designating and Protecting Critical Areas,” Preliminary Draft Report for Public Review and Comment, July 2001, p. 1.

⁵ In discussing the draft with the author, Ms. Chris Parsons at OCD, she noted the name will be changed to “considerations” to avoid the appearance that OCD is designating specific documents as “best available science” in all cases. She also noted a number of additions and deletions were contemplated. Reference should be made to the final document when published.

In guiding local jurisdictions, the guideline provides:

Scientific information can be produced only through a valid scientific process. To ensure that the best available science is being included in policies and regulations, a county or city should consider the “characteristics” of a valid scientific process and common sources of scientific information (see Chapter 365-195-905(5) WAC). 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.

“Citations of the Best Available Science for Designating and Protecting Critical Areas,” Preliminary Draft Report for Public Review and Comment, July 2001, p. 1.

The publication of any such list creates both opportunities and challenges for local government. The citations provide practical guidelines addressing the various topics of critical area management. The list is not exclusive, however, and does not come with any automatic indicators as to applicability or appropriateness of recommendations to local circumstances. Nor does the publication of the list identify the full range of alternatives available to accomplish the necessary protection. For these latter tasks, local expert opinion will be necessary.

A note of caution must be raised because in past cases state agencies would simply just send a letter or comment during the public process making a particular recommendation. The mere presence of such a letter, if not specifically addressed by the local community, has been sufficient to find noncompliance with critical area requirements. *See e.g. WEC, et al. v. Whatcom County*, WWGMHB Case No. 95-2-0071 (1995) (WDOE letter concerning wetland buffers) and *Diehl v. Mason County*, WWGMHB 95-2-0073, Aquatic Management Areas, March 22, 2000 (OCD letter concerning streamside buffers). In neither case did the local jurisdiction present an adequate record demonstrating the reasons for departing from the agency recommendation. In both cases, the simple failure to adequately respond and explain why the agency recommendations were not being used was sufficient to warrant a ruling of noncompliance.

In a more recent case, *Friends of Skagit County v. Skagit County*, WWGMHB No. 96-2-0025, Compliance Hearing Order, August 9, 2000, the Board identified five agency letters and four agency reports on streamside habitat, which the agencies had declared to be “their” best available science. Since the actions of the County were outside of the ranges of the reports cited, though made with technical assistance, the Board concluded that the regulation was outside the range of “best available science.” In so ruling, the Board specifically held that the report, Management Recommendations for Priority Habitats: Riparian, includes a section on agriculture and “is BAS.”

The Legislature provided that local governments are to use best available science when making critical area determinations or developing policy and regulatory actions. The section in question, stating that OCD will publish a list of documents that regulatory agencies claim to

be best available science, when combined with some Growth Board's deference to positions self proclaimed as "best" by resource agencies, creates the potential for serious problems for local governments, and fertile grounds for litigation.

Two cautionary notes must be raised in using the OCD guidelines in the context of local action. Many of the papers or monographs identified provide useful information. The question is whether the information provided is applicable to the circumstances present in a local community. When considering recommendations from agencies or other sources, two questions should be asked:

- First, do all of the publications listed meet the criteria for "best available science" as imposed upon the local governments in Section 905? Nothing in RCW 36.70A.060, .170, or .172(1) gives the state agencies the right to dictate a particular result merely by labeling their opinion "best." One needs to engage in the further inquiry: "Best for whom?" and "Under what circumstances are the recommendations either available or appropriate?" Further, many communities will want to ask the question: "What viable alternatives are available?"

Recommendations in a cited publication may be "best" from the point of view of a resource agency desiring a maximum buffer to protect a critical area. But, if other approaches permit the protection of the pertinent functions and values of the critical area without the maximum buffer, RCW 36.70A.172(1) gives the local jurisdiction the discretion to make that choice and to adopt alternative recommendations. Under the circumstances, the published information may be useful, but ultimately not applicable, and therefore not "best." In this context, care must be taken in reviewing the recommendations in materials from the citation list, to avoid labeling agency work as "best" in any given context, in advance of determinations of applicability, propriety, and alternatives. Any such designation which seeks to prejudge the end result before such inquiry is made would not meet the requirements for agency action under RCW 36.70A.170; and would be misleading.

- Second. Caution must be taken in that the publication of a list of documents as "best available science" tends to give the listed reports and recommendations the force of law or regulation to which they are not entitled. Local communities have the duty to use "best available science." If agency recommendations on the OCD list were given the *de facto* force of regulations, such action would be unlawful in violation of the procedural requirement of the State Administrative Procedure Act, Chapter 34.05 RCW. RCW 34.05.010(16)⁶ provides that any agency direction "which establishes,

⁶ A "rule" is "any agency order, directive, or regulation of general applicability."

alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law” and “the violation of which subjects a person to a penalty or administrative sanction” must be adopted as a rule before it may be put into effect. Local governments must be cautioned that publication of a document in the list of citations cannot elevate a monograph to the status of a *defacto* rule. The agency’s expressed intent to change the title to “considerations” may alleviate the problem to some degree. Those participating in local programs should make the point that other alternatives are available. Even better is to provide evidence of such alternatives where such alternatives provide reasonable protection to critical area functions and values without unnecessarily affecting the ability to achieve other regional goals, including economic development.

B. BAS has the following characteristics:

- Peer review publication
- Methods standardized and capable of replication
- Logical conclusions and reasonable inferences adequately documented
- Quantitative analysis using appropriate techniques
- Context—the conclusions are limited to the appropriate context
- Reference—The information is tied to credible literature and pertinent information

See WAC 365-195-905(5)(a).

The characteristics of best available science listed provide a sound basis for evaluating a given recommendation or request pertaining to the protection of critical areas. Care must be exercised, however, in looking for a quick fix. Communities must refrain from a “one size fits all” approach to critical area regulations, as such an approach is rarely “science,” let alone “best available science.”

The BAS inquiry will necessarily require consultation with experts trained in the appropriate fields to address how scientific studies, doctrines, and approaches address each of the critical area issues raised in a given community. Issues of applicability, propriety, alternatives, and consequences all enter into the discussion of appropriate regulatory choices from which local discretion may be exercised. All such considerations require a degree of expert review and guidance.

Caution must also be exercised in application of the “peer review” criteria. It is one thing to require that principles used to guide regulations flow from scientifically accepted sources; such would necessarily be a consideration of best available science. It is quite another task, however, if application of such generally accepted principles to a given circumstance had to be “peer reviewed” and “proven effective” before the application would be accepted as protective of the critical area. Since each location is likely to have unique features or local considerations, which have not specifically been subjected to “peer review”

process, this latter interpretation would turn the entire critical area review process into a massive research and development program with no certainty. The concern is raised because the trend in some decisions seems to support this latter view.

The current legal debate revolves around how one defines “science” applicable to a field situation. The Growth Board addressed that issue in the *Friends of Skagit* case, noting that the terms “best” and “available” had been defined, but not science. The Board then took a page from an article written by Mr. Alan Copsey, Assistant Attorney General and attorney for the Office of Community Development. In his article Mr. Copsey made the following observation:

... science is a process involving methods used to understand the workings of the natural world. This process consists of four stages: making observations, forming hypotheses, making predictions from these hypotheses, and testing those predictions.

Copsey, 23 Seattle U.L Rev. 97, (1999).

One of the major principles of scientific inquiry is the concept of replication. A scientific hypothesis is accepted or rejected only after it is replicated by additional tests or validated by further predictions and testing. The most general process used in the scientific community to review the principal of replication is peer review, which is most generally accomplished after publication of the hypotheses.

Friends of Skagit v. Skagit County, August 9, 2000 Compliance Order at p. 14.

The problem with this definition is that it can be used to limit the application of generally accepted principles to a field condition where the results have not been subject to specific study and approval. This was the result in the *Friends of Skagit* case, where experts applied generally accepted principles to a given situation, but acknowledged that the precise circumstances had not been previously tested.

In the *Friends of Skagit* case, the Western Board concluded that the application of scientific principles to a new situation could not be “science.”

As stated by the Board:

Since “science” must be pre-tested, the adopted [Skagit County] plan could not qualify as science even though ASC and the County hired excellent scientists to develop the plan.

* * *

... the County's untested, 25-foot RBZ-managed buffer plan does not represent the BAS in the record. It is more a county-wide demonstration project outside of established BAS which could create "new science" as the plan is implemented and monitored. While the approach might provide valuable scientific information, it does not meet the requirements of RCW 36.70A.172 and therefore does not comply with GMA.⁷

Friends of Skagit v. Skagit County, August 9, 2000 Compliance Order at p. 22.

The Growth Board's use of Mr. Copsy's definition of science and the requirement that any application of general principles must be "pretested" before it may be considered science is an example of a very "narrow view" of the application of scientific principles in natural resource settings. This narrow view would accept only information obtained by using the scientific method, i.e. rigorous experimental testing of hypotheses. An alternate approach does exist in the application of "best" available science to field situations. In a given situation, this broad view would bring to bear all relevant and credible information, including experiments, reasoned extrapolations (both conceptual and credible mathematical models), estimations, and consensus judgment among scientists, both published and unpublished.⁸ The broad view supported in the referenced materials allows communities to bring scientific principles of streamside, wetland, or other critical area management principals to bear on local situations.

A requirement that application of generally accepted principles to local situations will not be effective unless tested and peer reviewed appears to the author to be an overly narrow approach and not required by generally accepted principles of resource management. If "peer review" publication was an indispensable requisite of best available science at a given location, then application of such guidelines in most urban and Puget Sound lowland areas would be considered "experimental," defaulting to the most extreme recommendations.⁹ As will be

⁷ A telling defect in the Skagit County case was the apparent failure of the consultants to even claim their work was consistent with the best available science

⁸ Personal conversation with Michael G. Dosskey, PhD, Research Riparian Ecologist, National Agroforestry Center, University of Nebraska. He notes a broad view is implicit in the following articles published in scientific journals.

a. Ludwig (and 2 others). *Science* Vol. 260, 2 April 1993, p. 17, 36. *Uncertainty, Resource Exploitation, and Conservation: Lessons from History*.

b. Naiman (and 4 others). *Science* Vol. 270, 27 October 1995, p. 584-585. *Freshwater Ecosystems and Their Management: A National Initiative*.

c. Hilborn. *North American Journal of Fisheries Management* Vol. 7, No. 1, Winter 1987. p. 1-5. *Living with Uncertainty in Resource Management*.

⁹ Local governments are constantly caught in the crossfire of conflicting claims as to the quality of "science" necessary to reach an acceptable solution. At the very least, local governments

demonstrated later, such extreme recommendations may well provide fertile grounds for claims of unlawful overregulation.

An abstract of a recent article summarizing the art and science of buffer management notes: A great deal of professional judgment is still required to extrapolate current knowledge of buffer functions into broadly accurate estimates of water pollution abatement in response to buffer installation on crop land.¹⁰

C. Local communities must document BAS (WAC 365-195-915)

... counties and cities should address each of the following on the record:

- (a) The specific policies and development regulations adopted to protect the functions and values of the critical areas at issue.
- (b) The relevant sources of best available scientific information ...
- (c) Any nonscientific information—including legal, social, cultural, economic, and political information—used as a basis for critical area policies and regulations that depart from recommendations derived from the best available science State Environmental Policy Act (SEPA) review often provides an opportunity to establish and publish the record of this assessment.

WAC 365-195-915(1).

Documentation of the factors recited in the section will be the hallmark of a successful case. Under requirements to “show your work,” Boards will look to see whether the community properly documented the reasons for a given decision. Where a decision is properly documented and demonstrated to be within the range of appropriate considerations, plans and regulations have and will be upheld. See discussion in *CCNRC v. Clark County*, WWGMHB No. 96-2-0017, *infra* at p. 19.

Documentation is the essential element of any successful critical area review if a local agency is to “show its work” and demonstrate that it “actually considered” the available scientific opinion.

must elicit direct expert testimony on the necessity, suitability, and applicability of particular recommendations.

¹⁰ Dr. Michael G. Dosskey, PhD, “Toward Quantifying Water Pollution Abatement in Response to Installing Buffers on Crop Land,” *Environmental Management* (An International Journal for Decision Makers, Scientists and Environmental Auditors) Volume 28, No. 5, 28:577-598 (2001), DOI: 10.1007/s002670010245. Abstract available at <http://link.springer.de/link/service/journals/00267/bibs/1028005/10280577.html>

For each critical area addressed, it is suggested that local governments build a record on a number of issues:

1. *The functions and values of the critical area system that are important to protect at a given location.* Not all functions of a critical area require the same protection in all areas. The key point is the statutory recognition that it is not the critical area *per se* that requires protection, but the functions and values of the critical area system. RCW 36.70A.172(1). Local governments must document the basis for action and demonstrate consideration of appropriate scientific principles or recommendations in choosing different approaches to critical area protection.
2. Given the dearth of published and peer reviewed articles on the bulk of situations encountered in most local jurisdictions, the “broad view” described above becomes important if a local community desires to move away from the boilerplate agency recommendations and adopt a specific program to fit local needs. The key to success in such cases, as identified in *CCNY v. Clark County, supra*, is that the management guidelines adopted by local government fit within the matrix of “appropriate” and “applicable” alternatives identified through an appropriate inquiry of “available” scientific information and that choices were made after “consideration” of the scientific information. Only a detailed record will document that a decision will pass the required tests.

D. Criteria for addressing inadequate scientific information (WAC 365-195-920)

The most controversial and contentious issues will arise in circumstances where published information provides no direct guidelines to aid a community in its inquiry. In such cases, the distinction between the narrow view and the broad view of science described above will be important in identifying the real range of alternatives available to local communities. OCD’s rules provide that where science is not available, the most conservative assumptions are recommended.

Where there is an absence of valid scientific information ... leading to uncertainty about which development and land uses could lead to harm of critical areas or uncertainty about the risk to critical area function of permitting development, counties and cities should use the following approach:

- (1) A “precautionary or a no risk approach,” in which development and land use activities are strictly limited until the uncertainty is sufficiently resolved; and
- (2) As an interim approach, an effective adaptive management program that relies on scientific methods to evaluate how well regulatory and nonregulatory actions achieve their objectives. ... An adaptive management program is a formal and deliberate scientific approach to taking action and

obtaining information in the face of uncertainty. ... [C]ounties and cities should be willing to:

- (a) Address funding for the research component ...
- (b) Change course based on the results ...; and
- (c) Commit to the ... timeframe and scale ... to reliably evaluate regulatory and nonregulatory actions affecting critical areas protection and anadromous fisheries.

WAC 365-195-920.

Section 920 is the most troubling from a regulatory point of view. The Legislature required the use of best available science when making policy and regulatory determinations concerning critical areas. RCW 36.70A.170(2), emphasis supplied. The Legislature provided no guidance for situations when the inquiry provides little or no pertinent information.

The Office of Community Development has sought to fill this gap with the “precautionary” recommendation of this section, but in so doing risks advising local communities to move well beyond the statutory requirements and risk the consequences of attempting to implement and enforce potentially invalid regulations. The language in the regulation is in the discretionary “should.” The decision in the Skagit County case, discussed below, however, must be a cause of concern for local governments. The import of the Skagit decisions, and particularly Judge Pomeroy’s reversal of the Board decisions, is to create a threshold that the absence of scientifically documented success for any recommendation automatically defaults to an adaptive management program that is necessarily experimental. If carried too far, the regulation goes beyond the legislative mandate to act within accepted and identified guidelines and shifts the burden to prohibit action until local governments can demonstrate the effectiveness of a particular regulation at a particular location. As noted above, uncertainty is an inherent element in local action. The Legislature did not turn critical areas into research and development projects and the OCD rules should not be interpreted to reach that result.

A simple example should suffice to illustrate the problem. The “best available science” concerning a lahar (a sudden discharge of dirt and water down a volcanic mountainside) is that such events are not survivable. As such, development of large concentrations of population should not be permitted in areas of known risk. In Puget Sound, historic flows from Mt. Rainier have affected both the Puyallup and Duwamish valleys to Puget Sound. In known lahar areas there is no known device to prevent a lahar flow. Thus local governments are developing warning systems to provide advance notice of a volcanic event in an effort to give time to get people evacuated to high ground. As evidenced by the eruption of Mt. St. Helens, the timing of a volcanic event is not a scientifically ascertainable event, and the effectiveness of a given evacuation plan cannot be known until an event occurs. The same can

be said for catastrophic tsunami events, which could cause 50+ foot waves to traverse Puget Sound and inundate the abutting lowlands.

Under the OCD guideline listed, no one in the Puget Sound area should be permitted to live or work below 50-100 feet mean sea level until warning systems and evacuation plans are tested and peer reviewed, since occupancy of such lands risks death by tsunami or lahar. While such a result is the logical extension of the “prove it or lose it” approach in the *Skagit County* decision, it is difficult to find a legislator or author who will suggest such a result was either the conscious or intended result of the best available science amendments in 1995.

The Legislature focused on the “best available” science in the 1995 amendments. The absence of such science does not mean that development cannot occur within the areas in question, only that communities must recognize the limitations created by the absence of data. Precluding development merely because data is unavailable, the approach recommended by the OCD regulation, is not mandated by the legislation and cannot be grounds for excessive regulation.¹¹

As will be discussed below, this “absence of science” problem is a double-edged sword. OCD and the Growth Boards are telling local jurisdictions they must err on the side of caution, effectively creating a moratorium on development until regulations pass the “science” test, being at risk of having plans invalidated if they do not.¹²

At another level, however, it is the local governments that must apply the adopted standards through regulations. Court cases have made it very clear that local governments may apply development regulations only when the restriction bears some logical connection to the problem at hand, and that the imposition bears some relationship to the benefit to be gained. This topic is discussed at greater detail at pp. 25 et. sec.

The purpose of making this point now is that the regulations dealing with environmental uncertainties and the legal requirements for imposing only reasonable conditions or restrictions on property based on identified problems are logically at odds. Local governments should look carefully at the potential consequences if they choose to follow the “maximum caution” path, since by definition the government is seeking to impose conditions to regulate development where it admits it has little or no information about scope

¹¹ The OCD approach seems to revert back to the original language of the critical area statute, which called for communities to “preclude” impact. As noted above, the next year the Legislature changed the language from “preclude” to “protect.” OCD cannot by regulation nullify the legislative change.

¹² The issue of a moratorium is itself a delicate legal issue. While courts accept “reasonable restrictions” while decisions are being made, the length of time in which absolute or nearly absolute restrictions are imposed is necessarily limited. See discussion *infra* at p. 30.

or consequences of a particular action. Where the local government takes a precautionary approach, the question is raised, “How can the government defend a requirement in the face of requirements, that at the very least, governments are accountable to explain the relationship between the rule imposed and the benefit to the community, particularly when the imposition on a given property is significant?”

E. Special consideration for anadromous fisheries (WAC 365-195-925)

The special consideration for anadromous fisheries is an independent requirement of RCW 36.70A.172(1) and must be documented independently from the overall BAS deliberations. In accomplishing this objective, communities are charged with

1. Developing a record demonstrating the special consideration and
2. Dealing with the entire life cycle of anadromous fish, including:
 - Spawning and incubation
 - Juvenile rearing and adult residence
 - Juvenile downstream migration to the sea
 - Adult migration upstream to spawning areas
3. Best available science should address:
 - Stream flows
 - Water quality and temperature
 - Spawning substrates
 - Instream structural diversity
 - Migratory access
 - Estuary and near shore marine habitat quality
 - Maintenance of salmon prey species.

Section 925 provides a portion of the checklist for a best available science inquiry for protecting anadromous fish. The first point to note is that the issue is “all” anadromous fish, not merely the ESA listings. Second, the list begins to provide an idea of the magnitude of the undertaking in store for local governments if they undertake a best available science review. To complete the chart, local governments should also assess both the scientific range of alternatives and the economic and environmental consequences and tradeoffs for a full range of varying areas including:

- Urban shoreline areas that are already developed for port, industrial, water enjoyment, and recreational uses, and waterfront residential uses that are priority uses of urban and developed shorelines under the state Shoreline Management Act, RCW 90.58.020.

- Rural, agricultural, and timber resource areas specifically addressed under RCW 36.70A.060, .070.
- The status of the ecosystem or watershed as to each anadromous species concerning issues of the health of the species, the strength of the run, and local needs or impediments to determine that which is merely useful or helpful, and therefore susceptible to a wider variety of options and alternatives, and that which is critical to the protection of the fish, and which may permit few if any alternatives.

Cases have made it clear that fish are entitled to “special” protection, *see Friends of Skagit County, supra*, and the variety of opinions, applicability of studies and recommendations, and complexity of the topic, all of which will substantially challenge local government resources. State agencies, including WDFW and OCD, are quick to recommend maximum buffers for fish protection. See excerpt of OCD letter (Attachment 7) where 150-250 foot buffers are recommended.

The BAS requirements as written and as interpreted in *Friends, supra.*, come very close to requiring a local jurisdiction to prove a negative—that development activity will have no effect on anadromous fish. Communities may not need to meet all of the requirements for fish at all locations. Applicability, proportionality, and need are all relevant issues, but the local jurisdiction must clearly document the science in support of their decision.

III. Best Available Science and the Courts and Boards

As communities prepare for participation in local critical area updates, it is useful to keep in mind several key points that have been made by the Growth Boards and the Courts in development of critical area regulations.

A. Courts and Boards have affirmatively upheld that the duty to protect critical areas flows to the “functions and values” of the critical area system and not each component of the system

The Central Puget Sound Growth Management Hearings Board has noted that the duty to the critical area is not the physical area, but rather the

... structure, values and functions of the critical area, ... not the critical area itself.

Pilchuck v. Snohomish County, CPSGMHB No. 95-3-0047, citing WAC 365-195-825(2)(b).

The *Pilchuck* case was modified on remand from Superior Court, and the amended language on remand contains the most concise statement of the wetland critical area protection requirements of RCW 36.70A.060.

... the Act's requirement to protect critical areas, particularly wetlands and fish and wildlife habitat conservation areas, means that the ~~structure~~, values and functions of such ~~natural ecosystems are inviolate~~ must be maintained. While local governments have the discretion to adopt development regulations that may result in localized impacts upon, or even the loss of, some critical areas, such flexibility must be wielded sparingly and carefully for good cause, and in no case result in the net loss of the ~~structure~~, value and functions of such ~~natural ecosystem~~ within a watershed or other functional catchment area.

Tulalip Tribes of Washington v. Snohomish County, CPSGMHB Case No. 96-3-0029, Final Decision and Order, January 1997, at p. 8.

The *Tulalip* case now provides one of the best summaries of local government responsibility and focuses the “protection” duty under GMA on an ecosystem or system-wide, rather than localized, approach.

Thus, local governments have the flexibility to adopt critical area development regulations that would permit the reduction of the geographic extent of, for example, a wetland. See *Pilchuck II*, at 20 [herein 1422]. This could result in the loss of all or a portion of an individual site-specific critical area, so long as the values and functions of the ecosystem in which the critical area is located are not diminished. The nature of ecosystems necessitates that such site-specific judgments, *e.g.*, whether to allow filling in a small wetland, be made in the context of the likely impact on the function and values of the larger system. This means that, in the circumstance that a local government permits elimination of a wetland, for example, it has a duty to assure that the net values and functions of the ecosystem are not diminished. How far afield it must look to make this determination is dependent on the specific circumstances, whether it is at the level of an entire watershed ecosystem, a sub-basin, or other functional catchment area.

Tulalip at p. 8.

Tulalip, then at least stands for the proposition that not all critical areas have equal weight, and that, taking the broader view, a community may choose to be more protective in some areas and less protective in others, so long as, on balance, the functions and values of the overall system are maintained.

The functions and values approach to mitigation and regulation is particularly appropriate to wetland mitigation where many jurisdictions adopted variations of a WDOE model wetland ordinance, which tends to protect all wetlands wherever found, with few exceptions.

A more detailed functions and values approach would allow certain wetland areas to be modified and even moved or eliminated where the mitigation protects functions and values of the overall system.

B. The Growth Boards will give deference to local governments which choose to follow a proper approach to critical area regulations

The key to success in a critical area program is to document the work. The Western Washington Growth Management Hearings Board has set forth the key elements. As stated in *CCNRC v. Clark County*, WWGMHB No. 96-2-0017, compliance with RCW 36.70A.172(1) is based upon the following factors:

- (1) The scientific evidence contained in the record;
- (2) Whether the analysis by the local decision-maker of the scientific evidence and other factors involved a reasoned process; and
- (3) Whether the decision made by local governments was within the parameters of the [GMA]

As quoted in *Friends of Skagit County, supra*, at p. 7.

The *CCNRC v Clark County* case also provides a good starting point for the determination of “best available.”

Available means not only that the evidence must be contained in the record, but also that the science must be practical and economically feasible. “Best” means that within the evidence contained in the record a local government must make choices based on the information presented to it. The wider the dispute of the scientific evidence, the broader the range of discretion allowed to local governments. Ultimately, a local government must take into account the practical and economic application of the science to determine if it is the “best available.”

Clark, supra, at p. 10, emphasis supplied.

Only through adequate documentation can a local government meet the applicable tests.

C. Courts and Boards will not substitute their judgment for that of the local agency if the record supports a true scientific approach to the protection of critical areas

The leading case on point is *HEAL v. Hearings Bd.*, 96 Wn. App. 522, 979 P.2d. 864 (1999). In *HEAL*, the Court was faced with a challenge to the City of Seattle critical area

regulations after the 1995 effective date of the best available science requirements. RCW 36.70A.172.

The first point raised is whether there was a requirement in the Growth Management Act to adopt critical area policies, as opposed to regulations, to achieve compliance with GMA. The Court ruled:

... the Board is correct that the GMA does not require local governments to adopt critical area policies

... if a city or county chooses to adopt critical area policies ... the city or county [must comply] with the requirements of RCW 36.70A.171-.172(1).

96 Wn. App at 528.

In short, a community has no duty to adopt BAS policies in its comprehensive plan, but if it does, it must use best available science in the process.

The second question was to look at the role the Legislature intended science to play in the decision-making process. The City argued and the Board found that the legislative requirement was directed to process, and not any particular outcome. The trial court had reversed the Board, finding that the legislation required the inclusion of best available science in a “substantive way.” The question on appeal is: “Which approach was required during the review of a city or county decision?”

In deciding the case, the Court looked to the Endangered Species Act, where best available science is also a regulatory requirement, and followed the federal approach:

[W]here ... the agency presents scientifically respectable conclusions which appellants are able to dispute with rival evidence of presumably equal dignity, we will not displace the administrative choice. Nor will we remand the matter to the agency in order that the discrepant conclusions be reconciled. [citation omitted]

96 Wn. App. at pp. 530-31.

In ruling that the Board’s approach was correct, the Court found:

... the City took scientific evidence and included it in the record. HEAL presented evidence contrary to the evidence relied upon by the City. The Board properly concluded that it could not displace the City’s judgment about which science the City would rely upon as the best available science.

96 Wn. App. at 531.

The Court made it clear that “mere inclusion” of scientific evidence in the record is not sufficient to satisfy the best available science requirement. The language of the Court is particularly instructive in developing a record in critical area cases and balancing the critical area requirements against the other goals of GMA.

The Legislature passed RCW 36.70A.172(1) five years after GMA was adopted. It knew of the other factors, but neither made the best available science the sole factor, the factor above all other factors nor made it purely procedural. Instead, the Legislature left the cities and counties with the authority and obligation to take scientific evidence and to balance that evidence among the many goals and factors to fashion locally appropriate regulations based on evidence not on speculation and surmise.

96 Wn. App at pp. 531-32.

The Court held:

... evidence of the best available science must be included in the record and must be considered substantively in the development of critical area policies and regulations.

96 Wn. App. at 532.

Certainly with respect to the impact of potential development, the need for an appropriate nature of mitigation is a “uniquely scientific inquiry ... in which the best available science is essential to an accurate decision.” *Id.* at 533. Once a city engages in the appropriate inquiry, however, the Court made it clear that it will not inquire into whether some other science is “better” and that the Legislature has granted great deference to the actions of the local community. *Id.* at 532-33.

The Court also issued a cautionary note about the need for an appropriate scientific basis for imposing environmental limitations. As noted by the Court, when developing regulations to limit use of property,

... policies and regulations adopted under GMA must comply with the nexus and rough proportionality limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications. [citations omitted].

Simply put, the nexus rule permits only those conditions necessary to mitigate a specific adverse impact of a proposal. The rough proportionality requirement limits the extent of the mitigation measures, including denial, to those which

are roughly proportional to the impact they are designed to mitigate. [citations omitted]

96 Wn. App. at pp. 533-34.

It should also be noted that under *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed.2d 304 (1994) the local community has the burden of proof on both reasonableness and rough proportionality.

D. *Friends of Skagit County v. Skagit County*, WWGMHB No. 96-2-0025—a case study

No paper on best available science in Washington would be complete without a discussion of the Skagit County experience in developing an appropriate riparian buffer for agricultural lands.

Skagit County developed a riparian buffer zone to protect streams in agricultural areas. The County in such cases has the twin challenge of protecting the use of agricultural resource lands and protecting the critical areas, with special attention to anadromous fish. In Skagit County the challenge was even more pressing because the principal fish runs were species listed under the Endangered Species Act.

Skagit County retained a technical consultant to provide a management plan and the recommendation was for a riparian buffer zone (RBZ) of 25 feet and an agricultural management zone (AMZ) of 25 feet along salmon-bearing streams, Type 1, 2, or 3 under the DNR stream typing regulations. No specific buffers were identified for the Type 4 and 5 streams.

The County's consultants reviewed literature on the subject of riparian protection and questioned the applicability of many of the references submitted by state agencies, but noted that in their opinion the program designed for Skagit County was in itself "experimental" and as a result no final conclusions could be drawn until the studies were complete.

On appeal the Growth Board held the plan to be noncompliant with the best available science requirements. The petitioners in the case provided a checklist of complaints that any local government agency must address if it is going to challenge agency assertions of best available science:

(7) BAS is in the record. All the agencies showed the 25-foot RBZ to be well below their range of BAS. Just a few of the examples given were the following exhibits:

1617 National Marine Fisheries (NMFS) letter

1619 Department of Ecology letter

1620	WDFW letter
1704B	WDFW letter
1622	NMFS letter to USDA/FSA regarding CREP program
0018	Management Recommendations for Washington's Priority Habitat: Riparian (PHS) – WDFW
1588	WSP WDFW/Tribes
1706A	Man Tech Report (Broad Study – Federal counterpart to PHS and WSP)
1704A	CREP Program – U.S. Department of Ag and Washington State

(8) PHS table 4 at 89 is a summary of 1500 independently-done studies. This includes a section on impact of agriculture and provides BAS.

(9) The FEMAT curve (included in Appendix F of ordinance) describes the impact of Agriculture. It also shows that in addition to fish being impacted, most forms of wildlife are dependent on riparian buffers.

Friends of Skagit Co. v. Skagit Co., WWGMHB No. 96-2-0025, August 9, 2000 Compliance Order at 16-17.

In its decision, the Growth Board looked to the weight of the evidence rather than the County selection and said:

The County adopted this agriculture buffer program even though the overwhelming scientific evidence in the record failed to support having only a 25-foot RBZ buffer. PHS, WSP, Man Tech Report, CREP Program and agencies with expertise showed 25 feet to be below the range of BAS. Also, the BAS in the record was of reasonable relevance to low gradient agricultural lands. For example, PHS (a summary of 1500 independently-done studies) included a section on the application to agriculture, and the CREP program dealt directly with agriculture lands.

Friends of Skagit Co. v. Skagit Co., WWGMHB No. 96-2-0025, August 9, 2000 Compliance Order at 21.

The Growth Board also noted the admission that the program “had not been tested” and was “‘new science’ that would be refined and tested by implementing the plan.” *Id* at p. 21.

In a final note, the Board began to give its stamp of approval to the notion that the only “science” acceptable in a best available science context is that which has been subject to laboratory-like testing and replication. As stated by the Board:

Since “science” must be pre-tested, the adopted plan could not qualify as science even though the [agricultural community] and the County hired excellent scientists to develop the plan. Further, the [consultants] never claimed their work constituted BAS.

Friends of Skagit Co. v. Skagit Co., WWGMHB No. 96-2-0025, August 9, 2000 Compliance Order at 22.

The Board also struck down an exemption based upon an approved farm plan, though they left the door open if more details were provided identifying the features necessary in a farm plan to achieve compliance. August 9, 2000 Compliance Order, p. 40.

Finally the Board held as non compliant, the County’s exemption of Type 4 and 5 streams.¹³

The County applied its managed riparian zone to “salmon bearing streams,” which means that non salmon bearing streams, Type 4 and 5 streams on the DNR chart, were exempt. The Growth Board found:

The record is replete with evidence that the temperature and quality of downstream fish-bearing waters is highly dependent on the temperature and quality of the upstream non-salmon bearing waters. Therefore, it is critical to provide protection for waters that flow into salmon-bearing waters. Neither the County nor [the agriculture community] denied the importance of that protection, nor have they claimed that zero buffers for the Type IV and V streams is in the range of BAS. At a minimum this ordinance must require some protection of Type IV and V waters that feed into salmon-bearing waters.

August 9, 2000 Compliance Order at p. 42.

The Growth Board not only held the County noncompliant, they held that inadequate buffers substantially interfere with critical area protection and therefore the County plan was invalid. Such finding of invalidity creates a defacto moratorium in the areas affected, since no development permit may vest in any area under an order of invalidity. RCW 36.70A.302(3).

¹³ Stream typing is based on the size and function of the streams. Current regulations are found at WAC 222-16-030 (water typing system) and WAC 222-16-031 (interim water typing system).

The invalidity order placed significant pressure on the County to respond, as they had secured a \$1,500,000 grant to aid in the cost of securing the buffers—significant restoration work would be required, and under an invalidity order state agencies were not going to release the funds.

The County took immediate steps to follow the Growth Board’s decision and in so doing:

1. Adopted a 50-foot riparian buffer zone on all salmon-bearing waters, instead of a 25-foot zone, thereby increasing the natural zone by 100%.
2. Maintained the 25-foot agricultural management zone, but increased the limitations to assure proper function.
3. Adopted a 25-foot buffer on either side of Type 4 and Type 5 streams and called for an additional prohibition against mowing along the last 400 feet of Type 4 and 5 streams leading to salmon-bearing waters to encourage the growth of a 75% canopy cover over the streams, or alternatively, a planted canopy to accomplish the same result. Monitoring was put in place to measure the effectiveness.

The Growth Board held the management plan in compliance, thus eliminating the barrier to grant funds, but held the details of the program noncompliant, but not invalid, to encourage future program development. The Type 4 and 5 stream limitation was also approved with the caveat that should monitoring prove the need for additional protection, protection would be provided.

Friends of Skagit County v. Skagit County, WWGMHB No 96-2-0025. *Skagit County Audubon Society v. Skagit County*, WWGMHB No. 00-2-0033c, Compliance Order February 9, 2001.

Unfortunately for Skagit County, the matter did not end there. Judge Christine Pomeroy, Thurston County Superior Court overruled the Western Washington Growth Management Hearings Board in the Skagit County managed buffer case, ruling that the County "failed in its burden to prove the effectiveness of its proposed buffers" *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, Thurston County Superior Court No. 01-2-00278-1; Letter Opinion dated November 16, 2001, at p.2. The matter continues, with the range of acceptable alternatives in Skagit County upwards of 200 feet apart, with no clear or prompt answer in sight. Notice the specific language of the court that the burden was on the County to “prove” the effectiveness of a proposed regulation, even though the Legislature provided that community legislators are to be given due deference. RCW 36.70A.3201, and the burden of proof is on the challenger to prove the municipality action “clearly erroneous,” RCW 36.70A.320(3). In practice, the requirements for counties to (1) show their work, (2) show they actually considered best available science, and (3) demonstrate the choices made were within the accepted range have

turned the presumption on its head. The city or county in fact has the burden in critical area cases.

In the mean time, the case continues and identifies the wide divergence of opinion on how best available science programs should be implemented.

E. Courts impose requirements for local governments to explain and defend limitations imposed through development regulations

Courts have long held that local municipalities are limited by rules concerning nexus and proportionality when imposing limits in a development context. While the federal cases of *Nollan v. California Coastal Comm.*, 483 U.S. 825, 97 L. Ed.2d. 677, 107 S. Ct. 3141 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed.2d 304 (1994) are familiar to most, Washington courts have been particularly attentive to the principles at issue. Two recent cases reinforce the municipal duty to prove both nexus and proportionality in a development context.

1. *Isla Verde Int'l. v. City of Camas*

Isla Verde Int'l v. City of Camas,¹⁴ is not a best available science case, but does provide insight into the issue of rough proportionality and the notion that individual property owners should not bear a disproportionate burden in protecting a municipal interest. In *Isla Verde*, a city imposed a 30% open space requirement on a plat development. The city code clearly called for the set aside of 30% of the platted property as open space. The *Isla Verde* decision is a succinct straight forward analysis of the regulatory limits on governmental action in Washington. In ruling the 30% set aside for open space unconstitutional the Court simply said:

Because there is no evidence that the set-aside ordinance is roughly proportional to the impact of the proposed development, we agree that it is constitutionally defective.

99 Wn. App. at 129.

Analytically, the Court made a number of significant points:

1. It makes no difference whether open space is dedicated to the community or merely set aside to serve a public purpose or interest

¹⁴ *Isla Verde Int'l v. City of Camas*, 99 Wn. App. 127, 990 P.2d 429 (1999) (as clarified on denial of reconsideration Feb. 2000), review granted 141 Wn.2d 1011, 10 P.3d 1071 (Sept. 2000).

... alienation of title [(sale or transfer)]is not a necessary predicate to a taking; the essence of the harm is the government’s unconstitutional interference with one’s right to use and enjoy property.

99 Wn. App. at 138.

2. The inquiry is into whether an “essential nexus” exists between the exaction or limitation proposed and the problem identified.

In looking for an “essential nexus,” we examine the record for evidence of a reasonable relationship between the project and the identified public problem.

99 Wn. App. at 139.

Wildlife protection and open space requirements meet the test of a proper public interest and thus an open space requirement was justifiable. The question then was: “How much is enough?”

3. The government must also show that rough proportionality exists between the required exaction and the impact of the proposed development.

No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development, ... [or] that an ordinance ... imposes requirements reasonably related to the projected impact of the proposed development.

99 Wn. App. at 140 (emphasis added).

Since the City had no record that the 30% open space was reasonably required to mitigate the impacts of the specific project, the city ordinance did not pass the test.

2. *Benchmark v. City of Battle Ground*¹⁵

Benchmark is an important case because it stands for the proposition that a community may not hide behind mere proximity to development to impose conditions that are otherwise

¹⁵ *Benchmark v. City of Battle Ground* 94 Wn. App. 537, 972 P.2d 944 (1999), (*Benchmark I*), as modified by *Benchmark v. City of Battle Ground*, 103 Wn. App. 721, 14 P.3d 172 (2000), (*Benchmark II*).

excessive. In *Benchmark*, the City of Battleground sought to enforce an ordinance which required developers to improve frontages, including the construction of fronting streets, even on side streets that were to receive little or no traffic from the project in question. The community relied upon its ordinance, which required all fronting properties to make such improvements regardless of need. The City argued such a regulation, adopted as part of a general code requirement and not imposed as part of a development requirement, was a “police power” regulation and therefore not subject to nexus and proportionality.

The court disagreed. The court said mere proximity was not a sufficient criteria to impose burdens on citizens that were not directly attributable to a proposed development and that were not roughly proportional to the impact on society from the given project.

The fact the requirement for frontage improvements was contained in an ordinance and not imposed through the development review process was irrelevant.

The court reiterated that the purpose of the Fifth Amendment is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” [citations omitted]

103 Wn. App. at 724.

In fact, imposing excessive requirements through the development ordinance, rather than a development review process, places the local community in a significant bind since often the community relies upon the ordinance and makes no effort to demonstrate either nexus or rough proportionality on the record, which makes defeat of the proposed condition almost a given. See discussion of *Isle Verde*, *supra*.

The two cases suggest, in the strongest possible terms, that land use restrictions imposed on property as a result of adopted regulations will be subject to specific inquiry on the reasonableness of the application. Where no inquiry was made or where inquiry demonstrated no basis for asserting both nexus and rough proportionality between the buffers or limitations required in a given context and specific protection or benefit to the local critical area functions and values cannot be identified due to an absence of information, such application would almost certainly fail the nexus and rough proportionality tests described. Further, the government’s case is complicated by the fact that the burden of proof is on the governmental agency seeking to enforce regulatory restrictions. See *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed.2d 304 (1994).¹⁶

¹⁶ Readers interested in following this issue should watch for a new Court of Appeals decision in the case of *Benchmark v. City of Battle Ground*, 94 Wn. App. 537, 972 P.2d 944 (1999), appealed, and reargued after remand, decision due anytime.

The local government quandary is even more difficult because state agencies get a pass on this one. OCD's regulations are merely advisory, suggesting how a local agency should comply. The state agencies have no direct regulatory authority, unlike the Shoreline Management Act, where state agencies may incur liability for excessive regulations when the county, as an agent of the state, imposes regulations that are later determined to be unlawful, See *Orion Corp. v. Washington*, 109 Wn.2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022 (1988) (*Orion II*).

Where local governments simply opt to accept maximum buffers with little or no testimony on the suitability, necessity, or propriety for such regulations on a local context, local programs will certainly be at significant risk of challenge. Given the direct conflict between maximum caution in the absence of scientific proof under OCD guidelines and the need for governments to demonstrate both need and rough proportionality under state and federal constitutional mandates, local regulations adopted under the suggested "precautionary" approach will most certainly be challenged as "unlawful as applied," if not for "facial" constitutional invalidity.

Isla Verle and *Benchmark* are "development regulation" cases, not "police power" cases *per se*, in that the requirement for property to be set aside arises only in the context of a specific development.

The considerations are telling, however, in that courts clearly will not give local governments a free ride where restrictions result in a partial taking or to the loss of the use of property in cases in which local governments are unable to identify the reasons why the requirements were chosen or how they relate to the problem to be solved.

F. Limitations on Police Power—The Test of Reasonableness

The temptation is to argue that land use regulations that limit use of particular portions of an owners property are a "taking: under the state and U.S. constitutions. Such broad-based arguments are typically met with skepticism by local officials and shrugged off by local courts as inapplicable—and with good reason.

The U.S. Supreme Court has upheld regulations that limit use of property to protect public health and safety, even where the effect of the rule was to require that valuable minerals be left in the ground (*Pennsylvania Coal Ass'n v. Mahon*, 269 U.S. 393 (1922)). The Washington State Supreme Court has held that changes in zoning (including downzones) are not unlawful or a taking (*Carlson v. Bellevue*, 73 Wn.2d 41, 435 P.2d 957 (1968)), and that where a critical area regulation, including buffers, precludes or significantly reduces use of a portion of the property, a "taking" has not occurred if a "reasonable use" is left for the remaining property (*Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907, *cert. denied*, 111 S. Ct. 284 (1990)).

As you approach your local regulations, a "taking" case may arise, but typically much less often than most people believe.

A more compelling argument can be made under the “due process” limitations of the State and U.S. constitutions, and the recognized limits of the “police power,” which is the legal basis for land use regulations.¹⁷

Under both state and federal constitutional principles a local regulation must meet the twin tests set out for legislation to be lawful under the substantive due process limitations on the exercise of the police power:

1. That the public interest requires action to limit use of property to achieve a recognized legitimate governmental purpose—protecting public health, safety, or general welfare; and
2. That the means are reasonably necessary for the accomplishment of that valid purpose.

See generally *Presbytery of Seattle, supra*.

While courts have been expansive in upholding a wide range of actions on behalf of the public weal, they have been much more focused in considering the means chosen to achieve the public good. See generally *Brutsche v. Kent*, 78 Wn. App. 370, 898 P.2d 319 (1995) (a three-part test) and *Woodcrest Investments v. Skagit County*, 39 Wn. App 622, 694 P.2d 705 (1985).

It is this latter area, “overregulation,” “unnecessary regulation,” and “arbitrary and capricious regulation” that provides the most fertile field for judicial inquiry when local jurisdictions default to “overregulation” and fail to properly inquire into local needs and circumstances.

To set the stage for such challenges, local groups should push several questions upon agencies or personnel who are suggesting material changes, and particularly increases in local buffers or land use restrictions.

1. What purpose does the regulation serve?
2. Why is it necessary at this location?
3. Are less intrusive regulations available to achieve a similar purpose?

¹⁷ Cities and counties typically plan under Chapters 35.14, 35A.14, 36.70 RCW or locally adopted charters. The referenced provisions are typically procedural, however, dealing with issues on how to adopt, record, and enforce development regulations. The underlying due process/police power constraints still remain.

Forcing local communities to articulate the reason for going beyond minimum necessary buffers will set the stage for building a good record of the need and suitability and ultimately the legitimacy of buffers under consideration.

Another troubling aspect of the “maximum buffer solution” in the absence of information, is the risk of a temporary taking when a moratorium becomes “unreasonable.” This issue is presently before the United States Supreme Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764, 30 Env’t. L. Rep. 20638 (9th Cir. 2000), reh’g and reh’g *en banc* denied, 228 F.3d 998 (9th Cir. 2000) and cert. granted in part, 121 S. Ct. 2589, 150 L. Ed.2d 749 (U.S. 2001), which is to be resolved in the 2002 term.¹⁸ In this case a planning moratorium has been in place for years, while planning agencies study the problem of development in the Lake Tahoe area. The intensity and duration of the development limitations are at issue.

IV. Three Principal Lessons in Critical Area Planning

As local communities confront the reality of the need to complete a critical area program review by September 1, 2002, three principal lessons should be kept in mind:

- a. The duty is to protect the functions and values of the critical area system, not each element of every critical area.
- b. The duty is to assemble and identify science applicable to your local area and to work within the framework of applicable and appropriate science to your local situations.
- c. The burden is on the local jurisdiction to demonstrate that the burdens imposed are reasonably related to the problems to be solved.

By understanding the three principal lessons in critical area planning, a community is equipped to address the legislative mandate and adopt regulations consistent with “protecting” the critical areas and harmonizing with local implementation of the 13 GMA goals. RCW 36.70A.020.

Lesson 1. Protect the functions and values, not the place

The language of the 1995 amendment, focusing on using best available science to protect the functions and values of the critical areas, provides the first principal lesson in GMA critical area planning. The lesson is that not every wetland, stream, or other “critical area” is essential in place. While agency recommendations (from the WDOE “model

¹⁸ A good discussion of the topic is found in “Moratoria as Categorical Regulatory Takings: What *First English* and *Lucas* Say and Don’t Say,” *Zoning and Planning Law Report*, Vol. 24, No. 10, November 2001.

ordinance” for wetland protection to the characteristic letters from the Washington State Dept. of Fish & Wildlife and OCD recommending 100-250 foot buffers on all streams in the state) look to universal protection of all critical areas everywhere, the Legislature has made it very clear that the protections due are to the “functions and values” of the habitat system.¹⁹

The implications of the ruling include several options that may be very important to critical area management in local areas:

1. Urban area wetlands, which may be degraded and highly impacted by their urban setting, may have very low functions and may be altered, replaced, or even removed under appropriate guidelines where overall system-wide functions and values are retained.
2. By adopting an ordinance which speaks in terms of functions and values, the local community sets the stage for modification or even relocation of wetlands, and the adoption of differing wetland or stream side buffer standards in different locations to achieve community GMA goals, including critical area protection. Such goals may include intensification of development in urban areas, or protection of agriculture, timber resource, or even shoreline recreational activities in rural areas. So long as the functions and values approach is supported by competent evidence in the record, local governments indeed have a great deal of flexibility in addressing the protection of critical areas in the context of local needs.

Lesson 2: Assemble, identify, and document “best available science” in your locality

Lesson 2 begins with the requirement that science must come from the experts. The statement may sound simplistic, but all too often local communities will approach the critical area process with a “property rights” or “will of the people” record, which will be doomed to failure in light of the new requirements.

In addressing the best approach to Lesson 2, it is useful to consider the recent guidelines for best available science put out by OCD and discussed above. The record in a local jurisdiction must, at the very least, document the following considerations for each local critical area review and action:

¹⁹ See (1) *Pilchuck v. Snohomish County*, CPSGMHB No. 95-3-0047, citing WAC 365-195-825(2)(b), and (2) *Tulalip Tribes of Washington v. Snohomish County*, CPSGMHB No. 96-3-0029, FDO January 1997 at p. 8, discussed above at page 16 above.

1. Identifying which information is “best available science” applicable and appropriate to the local situation.
2. Obtaining the best available science, through consultation with experts knowledgeable in the field, including both public and private sources.
3. Demonstrating how “best available science” was used in developing policies and development regulations.
4. Addressing the situation where scientific information may be limited and establishing a process to provide protection without unduly or unlawfully imposing limits on property that fail requirements of reasonableness or nexus and proportionality.
5. Demonstrating that “special consideration” has been given to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

At the outset, local jurisdictions should also elicit a discussion on the applicability of available scientific principles to local situations and the merits of considering the broad view or narrow view of “science” discussed in connection with the Copey article, discussed at p. 30 above. At the very least, jurisdictions should address the issue and identify reasons for the approach chosen locally.

Lesson 3: The burden is on local governments

What is important to understand is that local governments have the duty to:

- a. Review their critical area regulations;
- b. Make any adjustments required to assure consistency with best available science;
- c. Operate within a range of acceptable alternatives;
- d. Document the decisions;
- e. Assure that local impacts of their decisions comply with the legal duties of reasonableness in light of purpose, nexus, proportionality, and burden of proof, as well as best available science.

If the current round of court cases says anything at all, it is that the local government must provide a rationale and justification for any imposition on property under the critical area regulations, and the fairness or proportionality of imposing a given burden on the current property owner.

The cases provide the rationale for concluding that:

1. Local governments should not rely on the boiler plate statements of state agencies and must develop local BAS on their own if they are to meet objections from property owners who may challenge the imposition of a requirement on constitutional grounds.
2. Local government will have a particularly hard time explaining or justifying remediation requirements now sought by state agencies where the property, project, or development charged with the requirement is not the source of the problem under the “nexus” requirements, nor proportional or reasonably related to the problem at hand where the property is located. Due process analysis of local development regulations will focus on the applicable questions.

V. Preparing for a Critical Area Review

Given the range and scope of critical areas in the state and the wide differences of opinion on management objectives, as well as viable alternatives, September 2002 is a challenging deadline.

To deal with those challenges, local governments must be prepared to take several steps:

With respect to critical areas, and particularly wetlands and streamside regulations, move to a functions and values approach to regulation.

This approach eliminates the problems caused by the “one size fits all” scheme in most state agency recommendations.

At the very least, local agencies must:

- a. Affirmatively review critical area regulations with an eye to conformance with best available science recommendations.
- b. Take action to affirm current programs or make necessary changes to bring local programs within the scientifically acceptable range of alternatives.
- c. Document the source and applicability of recommendations adopted, and where at odds with an agency recommendation, the reason for the departure.

Local jurisdictions should also be encouraged to act in concert, to both share the cost of expert evaluation and better address regulation on a system-wide basis, which will permit use of the functions and values approach where appropriate.

Local jurisdictions should be encouraged to hold common technical hearings where systems can be identified and ranges of appropriate alternatives discussed. With such regional

information gathered collectively, local governments may save significant sums by avoiding duplication of effort. Further, local governments may be able, jointly, to secure experts to provide a depth of discussion on appropriate needs and alternative management tools, which local governments acting alone could not afford to secure. Once such a common record of systems and management options is created, each of the local jurisdictions may take the additional step of revising or affirming local ordinances as appropriate.

Meeting the September 1, 2002 will be a challenge, but that is no reason not to proceed.²⁰ However, where communities fail to act, fail to justify their actions, or fail to demonstrate compliance, there is no doubt local plans will be subject to challenge, with the resulting findings of noncompliance and invalidity and substantial disruption of local community development.

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January, 2002

²⁰ A similar effort was unsuccessful last year and given the short session and focus on budget and transportation, a legislative reprieve cannot be assured this year.