

A Citizen's Guide to Critical Areas Ordinances

How to Understand and Influence the Adoption of Critical Areas Ordinances under Washington State's Growth Management Act

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Executive Summary

Critical Areas Ordinances - The Growth Management Act (GMA) requires all local governments, regardless of whether they are required or choose to plan under the GMA, to adopt Development Regulations, commonly referred to as Critical Areas Ordinances (CAOs), to protect critical areas. Critical areas are defined by statute to include wetlands and fish and wildlife habitat conservation areas. (RCW 36.70A.030(5)). In addition, the Department of Community Trade & Economic Development (CTED) has adopted procedural rules to assist with the classification of critical areas.

Best Available Science - Local governments must “include the best available science” (BAS) when designating critical areas, developing policies and development regulations. (RCW 36.70A.172) However, just what constitutes the “inclusion” of BAS has been the topic of much debate. However, there are few judicial and administrative decisions that have addressed the GMA’s BAS requirement, i.e., what constitutes BAS, how much local discretion exists, how to develop a record for review, and who bears the burden of proof when attempting to justify use of non-science considerations. In addition, a recurring problem is that there is often an absence of BAS to guide local governments. Where there is an absence of BAS, local governments should use an adaptive management program to evaluate whether regulatory actions are achieving their objectives, and amend those regulations as necessary based the monitoring program.

Policy Goals & Objectives - Adopted policy goals and objectives can provide guidance for implementation of a local government’s CAO program, and therefore a statement of policy goals and objectives for critical areas management should be included in a local government's Comprehensive Plan (CP). CAOs should include clearly defined terms and concepts to prevent ambiguity in application of regulations, mitigation requirements and performance standards. CAOs should include maps showing the approximate location and extent of identified resources within a jurisdiction's boundaries. A CAO should clearly explain how these maps are to be used and what information they do, and do not, include.

Non-conforming Uses - The adoption of CAOs may create numerous “non-conforming uses.” Non-conforming uses are those that were legal when initially established, but which no longer comply with local land use regulations. An ordinance may apply to the use or activity itself, to the manner in which the activity is conducted, or to buffer or setback requirements. The creation of numerous non-conforming uses is often politically unpopular. Nonconformity is unpopular with property owners because it may reduce the value of their property; it may also make bank loans and insurance coverage more difficult or costly to obtain. These more practical considerations must be weighed against the purpose of GMA’s mandate to protect critical areas.

Exemptions - Certain activities are exempt from the operation of CAOs because of environmental, practical or policy reasons. These activities may be those that are minor and do not commonly adversely affect critical; those that it is simply not practical to police or administer through the ordinance; or those that for policy reasons local government's try to encourage, such as affordable housing. Existing land uses, or proposed land uses that have been permitted or legally "vested" before adoption of a new CAO are "grandfathered" and specifically exempted from new critical area restrictions. Vested uses are often specifically spelled out.

Buffers - Buffers are typically required for many types of critical areas to provide an additional measure of protection of the resource. Disturbance of the buffer is also typically restricted. As reflected in the information below, required buffer widths can vary widely. While buffers are a local decision, any buffer should be reasonable and should be defensible in terms of actually protecting the resource. Many jurisdictions desire to permit some flexibility in implementing their CAOs. In general, they recognize that a single set of prescriptive regulations or a single approach may not always be the most desirable way to accomplish an environmental goal.

"Buffer averaging" is the reduction of buffer width in one location with a corresponding enlargement of buffer width in another location, while maintaining the required buffer area. The purpose is to allow land use flexibility and to recognize that resources -- particularly linear resources like streams -- are not always of uniform sensitivity. Averaging may be allowed where an applicant demonstrates that the protected area contains variations in sensitivity due to existing physical characteristics. Some disturbance (generally lower intensity land uses) may be allowed adjacent to areas where the buffer width is reduced.

Density Transfers - Density transfer programs allow landowners to utilize development potential that would otherwise be lost due to the presence of critical areas on a site. The transfer of lost development potential to another portion of the same property (within the development proposal site) or to an unconstrained, off-site 'receiving area' are options that are sometimes considered. In addition to protecting sensitive areas, such programs permit property owners to realize the development potential of their lands and allow the City to simultaneously accomplish other objectives (e.g., accommodating growth at higher densities). The mechanism should be supported by Comprehensive Plan policies and development regulations.

Variances - Variance provisions, commonly but not always applicable to buffer requirements, are intended to provide some degree of relief to property owners where strict application of the standards would have an unreasonable result. A variance will allow uses on property that would not otherwise be allowed by a strict adherence to zoning regulations applicable to that area. But they are allowed because based upon all the circumstances it makes good public policy to allow a varied use of the property.

CRITICAL AREAS ORDINANCES

I. Introduction

The purpose of this paper is to provide information to interested citizens about Critical Area Ordinance (CAO) requirements, to highlight regulatory options, and to provide some general information about the various elements of critical area programs.

II. Growth Management Act (GMA)

The GMA requires all Washington cities and counties to adopt Development Regulations (DRs) to protect critical areas (RCW 36.70A.060). Critical areas are defined to include the following areas and ecosystems: (a) wetlands; (b) areas with 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).

The Washington State Department of Community Trade & Economic Development (CTED), in consultation with the Department of Ecology (DOE) has adopted procedural rules to guide the classification of critical areas (WAC 365-190). The rules include suggestions for designating, classifying and managing critical areas (365-190-040, 365-190-080). The fish and wildlife habitat conservation section of the guidelines specify the types of land and water resources to be included as fish and wildlife habitat and provides sources for information on each type and methods for classifying them.

A. Best Available Science (BAS)

1. Statute and Rules.

In 1995, the legislature amended the critical areas provisions of the GMA to require that all cities and counties “*include* the best available science” when designating critical areas and developing policies and development regulations to protect them (RCW 36.70A.172, emphasis added). All jurisdictions are also directed to give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

In 2001, CTED adopted rules (codified in WAC 365-195-900), to assist local jurisdictions to identify and include best available science in policies and regulations. The rule outlines a series of criteria for determining which information is the best available science; what types of information constitute best available science; and where best available science can be found. Sources of best available science are expected to be peer reviewed, include methods, establish logical conclusions and reasonable inferences, contain quantitative analysis, provide context, and provide references. The section also provides common sources for best available science,

including the CTED's published *Citations of Recommended Sources of Best Available Science For Designating and Protecting Critical Areas, 2002*.

The citations include various agencies' recommended standards and guidelines, such as DOE's wetland buffer standards and mitigation replacement ratios. The guidelines suggest a three-step process to document inclusion of best available science (WAC 365-195-915). Documentation should include:

- (1) specific policies and development regulations adopted to protect the functions and values of the city's critical areas;
- (2) relevant sources of best available scientific information included in the decision-making; and
- (3) all non-scientific information used (e.g., legal, social, cultural, economic and political) to depart from science-based recommendations.

The record must support any decision to depart from available scientific information, include the rationale for the departure, and must identify potential risks to the functions and values of critical areas, as well as methods to reduce such risks. The record must also demonstrate evidence that the jurisdiction has given special consideration to conservation or protection of anadromous fish.

When faced with an absence of BAS, local governments are encouraged to use an adaptive management program to evaluate how well regulatory actions are achieving their objectives, and to amend those regulations as necessary based the monitoring program.

2. Hearings Board and Court Decisions.

There are few judicial and administrative decisions interpreting the GMA's BAS requirement and providing guidance to implementation of BAS requirements, i.e., what constitutes BAS, how much local discretion exists, how to build a record, and the burden of proof required to justify use of non-science considerations. The recent *City of Everett* decision by the Central Puget Sound Growth Management Hearings Board (CPSGMHB), has also added to the uncertainty about BAS. This body of opinion is briefly summarized below.

HEAL v. GMHB. *HEAL v. Growth Management Hearings Board* (96 Wn. App 522, 979 P.2d 864, 1999) was focused on the scope of GMHB review of critical area policies (as distinct from regulations), and the meaning of the language in the GMA requiring cities "to include" BAS in their policies and regulations. Does that mean that BAS must be included in the process or that it must be reflected in the outcome?

The ***HEAL*** Court noted that the GMA does not require that jurisdictions adopt critical area policies in its Comprehensive Plan. If it chooses to do so, then the GMHB has jurisdiction to review those policies. The policies also become subject to GMA's BAS, along with CAO's. The court read the legislative history to indicate that the BAS requirement was neither the only factor nor the preeminent factor to be considered, but also not purely procedural - "Local jurisdictions have the authority and obligation to take scientific evidence and balance it among the many

GMA goals and factors to fashion locally appropriate regulations based on the evidence not on speculation and surmise” (HEAL at 532).

Evidence of BAS must be included in the record and must be considered substantively in the development of critical area policies and regulations.

Despite balancing of numerous factors, the Court found it hard imagine a situation where scientific evidence did not play a “major role” in the context of critical areas. In the first instance, it is for the local jurisdiction to determine whether scientific evidence is authoritative, controlling or of no consequence.

Relying on U.S. Supreme Court decisions regarding the “nexus” and “rough proportionality” required to pass constitutional muster, the Court emphasized that failing to incorporate BAS could result in regulations that go beyond constitutional boundaries.

City of Everett. The CPSGMHB decision in *Everett Shorelines Coalition v. City of Everett* (No. 02-3-0009c, January 2003) interpreted the relationship of the Shorelines Management Act (SMA) to the GMA, and suggested how to identify the best available science for critical areas. It should be noted that this decision has generated considerable controversy and is being appealed. As of this writing, however, and unless modified or reversed on appeal, it suggests how the Central Puget Sound Board views GMA’s BAS requirements. The decision is long and complex, and readers may reach different conclusions about its holdings.

The Board’s decision was made in the context of GMA provisions that require an integration of the SMA and GMA. Shoreline Master Program (SMP) goals and policies must be incorporated into GMA comprehensive plans, and SMPs incorporated into GMA development regulations (RCW 36.70A.480). Based on this integration requirement, the Board concluded that SMA shorelines of statewide significance are also GMA critical areas and are subject to the GMA’s BAS requirements. (The court also interpreted the SMA to contain its own equivalent of a BAS requirement.) The Board also interpreted the order of preference of shoreline uses contained in the SMA to require that the paramount policy of the SMA is to preserve, protect, enhance and restore shorelines (Note that while the Board’s holding on this issue is specific to shorelines of statewide significance – which were at issue in the Everett appeal – its reasoning, as well as language in the decision – suggest that it could also apply to other regulated shorelines). This appears to be a fundamental change in interpretation and direction away from the notion of accommodating and balancing shoreline uses.

The portions of the holding concerning best available science suggest the factors the Board is likely to consider in reviewing a jurisdiction’s critical area program. Defects that the Board identified regarding Everett’s science included: lack of consensus on certain elements of a mitigation program among members of an inter-agency technical committee; contrary scientific testimony and opinions by appellants and resource agencies; a self-justifying tone in a consultants report; data gaps; and, ultimately, the Board’s lack of conviction that the consultant’s report constituted BAS.

The Board noted that local implementation programs must assure that Everett's goal of halting future shoreline degradation (i.e., no net loss) and local governments must take affirmative steps to show actual improvement on an ecosystem-wide basis.

A compliant restoration program must include, the Board found, specific timetables and benchmarks to measure improvements, land use policies that assure shoreline development results in no net loss of ecosystem functions, and "credible commitments" of public resources to restoration purposes.

ESHB 1933 was enacted by the 2003 legislature in response to the Everett decision. It "clarified" that shorelines and GMA-designated critical areas are distinct. GMA's planning goals are not listed in any priority order and do not give precedence to one or another goal (e.g., environment versus managing growth). Shorelines are governed by the shoreline management act and not GMA's critical area requirements.

B. Shoreline Management Act

The Shoreline Management Act (RCW 90.58) was enacted in 1971 to protect the shorelines of the State while balancing multiple uses of the shorelines. Its jurisdiction includes the Pacific Ocean shoreline and the shorelines of Puget Sound, the Strait of Juan de Fuca, rivers, streams, and lakes above a certain size. It also regulates "wetlands" associated with these shorelines.

Local governments must develop master programs for shorelines subject to the SMA. Shoreline Master Programs establish goals and policies that are implemented through use regulations. No "substantial development", i.e., construction or repair of less than \$5,000 in value, is permitted on the state's shoreline unless a permit is obtained from the local jurisdiction.

New rules for developing local shoreline master programs were adopted by the Department of Ecology in December 2003. Please also refer to the discussion of the January, 2003 *City of Everett* decision in sub-section B above.

III. Regulatory Issues and Alternatives

Introduction

The following section presents a range of alternatives for managing and regulating critical areas. Alternatives include both procedural and substantive elements of critical areas programs, and a number of possible regulatory and non-regulatory approaches to critical area management. Major discussion items (which also correspond to sections of a typical critical areas ordinance) include:

- Purpose and intent;
- Definitions of key terms;
- Sensitive area maps;
- Activities regulated by the CAO;

- Exempt activities;
- Resource classifications and ratings;
- Protection techniques (e.g., buffer requirements);
- Flexibility techniques;
- Mitigation standards;
- Permit process and application requirements; and
- Relief mechanisms (reasonable use provisions and variances).

A. Purpose and Intent

Goals and Objectives for Managing Critical Areas

Why are local governments protecting their critical areas? What are they trying to accomplish? These issues are typically articulated in the initial section of a CAO that articulates a local government's goals and objectives.

Goals and objectives provide general guidance for implementation of the critical areas program. The statement of goals and objectives for critical areas management should reflect the intent of the GMA, a local government's Comprehensive Plan (CP), the SMP, surface water management requirements, and other relevant regulations and programs. The requirements for species listed under the Endangered Species Act (ESA) should also be taken into consideration.

There are a number of options for defining the purpose of critical areas management. Sample goals from some jurisdictions in the region and GMA are provided below.

- *To designate the resources and development activities regulated by the ordinance.*
- *To provide clear procedures for review of applications; coordination of environmental review and permitting of proposals to avoid duplication and delay.*
- *To provide greater predictability for property owners and interested citizens.*
- *To identify the important functions and values of critical areas that will be protected by regulations.*
- *To comply with the requirements of the Growth Management Act and other provisions of state and federal law.*

The objective of protecting individual resources, and their important functions and values, can also be articulated. This can provide notice of the CAO's reach, a checklist of the ordinance's major topics, and the basis for regulatory standards. Similarly, accomplishing other important goals and objectives -- such as accommodating growth pursuant to the GMA, respecting private property rights, protecting the public health, safety and general welfare reducing -- can also be articulated as part of the context for sensitive areas regulations.

Sample objectives for individual resources are provided below:

Wetlands

- Ensure ‘no net loss’ of wetlands wetland function and value (or alternatively, function, value and acreage).
- Ensure that compensatory mitigation is improving the performance of wetlands functions.
- Provide (and/or enhance) fish and wildlife habitat.
- Manage wetlands and buffers to help control surface water, stormwater, flood water; groundwater quality and quantity.
- Provide areas for recreation, education and scientific study.
- Enhance and restore wetlands where possible.

Streams

- Ensure *appropriate* stream buffers are provided (by stream class) in new developments.
- Improve (or maintain) water quality.
- Provide for long-term maintenance and management of aquatic resources.
- Convey and store storm and flood waters.
- Recharge groundwater.
- Provide areas for recreation, education and scientific study.

Fish And Wildlife Conservation Areas

- Ensure that the performance of aquatic resource functions and the values they represent remain at current levels or increase to ensure greater long-term protection of fish and wildlife populations and their habitat, and meet federal regulations (e.g. Section 404(b)(1))
- Ensure that new culverts, bridges, and other structures provide for fish passage.
- Ensure that flood hazard reduction measures do not adversely affect fish habitat.
- Provide opportunity for food, cover, nesting, breeding and movement.
- Maintain and coordinate protection of species and habitat diversity.
- Maintain air and water quality.
- Provide neighborhood separation.
- Provide areas for recreation, education and scientific study.

Frequently Flooded Areas

- Ensure runoff from future buildout conditions does not cause an increase peak flow rates and duration over 1995 conditions.
- Protect or improved existing flood storage capacity to protect public health, safety, and welfare while protecting the aquatic resources.
- Prevent damage to public & private property by controlling development within floodplains.

Aquifer Recharge Areas

- Identify areas susceptible to contamination.
- Conduct appropriate levels of study and analysis, apply sound engineering principles.

- Regulate and/or restrict land uses where necessary.
- Maintain groundwater quality.

Significant Vegetation Resources

- Maintain or replace existing vegetation.
- Maintain and protect property values.
- Enhance the City's character.
- Reduce erosion and stormwater runoff.
- Promote appropriate landscape plan selection
- Reduce visual impacts of new development through screening.

Geological Hazard Areas

- Avoid and minimize potential impacts to life and property from geologic hazards
- Conduct appropriate levels of study and analysis, apply sound engineering principles
- Regulate and/or limit land uses where necessary

B. Definitions

1. Definition of Regulated Resources

CAOs should clearly define the resources they regulate, as well as the key concepts used. Clear definitions will prevent ambiguity in application of regulations, mitigation requirements and performance standards. Wherever applicable, to ensure legal defensibility, regulated resources should be defined consistent with any definitions in the GMA statute (RCW 36.70A.030) and regulations (WAC Chapter 365-190).

The definitions should be technically accurate (in scientific or engineering terms) descriptions of the characteristics of the subject resource. While using clear, simple language is often a goal of ordinance drafting, achieving technical accuracy often requires use of technical terms.

Defining sub-categories of resources (e.g. habitat and critical habitat) may provide better focus for regulatory controls and allow the local government to be more precise.

Definitions are also frequently used to identify the resources subject to the ordinance. Since the occurrence of all critical areas are not mapped or known, the definition will often function as a primary means for identifying whether a particular resource is or is not within the CAO's reach.

Selected key GMA resource definitions are provided below.

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

Erosion Hazard Areas: Those areas containing soils which, according to the U.S. Department of Agriculture Soil Conservation Service Soil Classification System, may experience severe to very severe erosion.

Fish and Wildlife Conservation Areas: Areas for maintaining species in suitable habitats within their natural geographic distribution so that isolated subpopulations are not created. This does not mean maintaining all individuals of all species at all times; cooperative and coordinated land use planning is emphasized. Conservation Areas may include:

- Areas with which endangered, threatened, and sensitive species have a primary association;
- Habitats and species of local importance;
- Commercial and recreational shellfish areas;
- Kelp and eelgrass beds; herring and smelt spawning areas;
- Naturally occurring ponds under twenty acres and their submerged aquatic beds that provide fish or wildlife habitat;
- Waters of the state;
- Lakes, ponds, streams planted with game fish by a governmental or tribal entity; or
- State natural area preserves and natural resource conservation areas.

Geologically Hazardous Areas: Areas that because of their susceptibility to erosion, sliding, earthquake, or other geological events, are not suited to siting commercial, residential, or industrial development consistent with public health or safety concerns.

Landslide Hazard Areas: Areas potentially subject to risk of mass movement due to a combination of geologic, topographic, and hydrologic factors.

Seismic Hazard Areas: Areas subject to severe risk of damage as a result of earthquake induced ground shaking, slope failure, settlement, or soil liquefaction.

Streams: Streams are not defined under GMA; jurisdictions generally rely on existing Washington DNR stream information and general stream characteristics. Riparian corridors could be defined as including all areas within 100 feet of the stream or river (measured horizontally from the top of the bank, or if that cannot be determined, from the ordinary high water mark of the watercourse and water body, or from the 100-year floodplain boundary, whichever is greater). Streams can be further defined by whether they flow year round (perennial or intermittent streams) and whether they are natural or man-made. Grass-lined swales, ditches, canals, detention facilities, wastewater treatment facilities and landscape amenities could be excluded from the definition.

Frequently Flooded Areas: Areas in the floodplain subject to a one percent or greater chance of flooding in any given year. These areas include, but are not limited to, streams, rivers, lakes, coastal areas, wetlands, and the like.

Aquifer Recharge Areas: Areas with a critical recharging effect on aquifers used for potable water are areas where an aquifer that is a source of drinking water is vulnerable to contamination that would affect the certifiable potability of the water.

Wetlands: Areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

Wetlands do not include those artificial wetlands intentionally created from nonwetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those wetland created after July 1, 1990, that were intentionally created as a result of the construction of a road, street or highway. Wetlands may include those artificial wetlands intentionally created from non-wetland areas created to mitigate conversion of wetlands (RCW 36.70A.030). Wetlands are to be delineated in accordance with the Washington State Wetlands Identification and Delineation Manual, adopted by the Department of Ecology (DOE) in 1997 (RCW 90.58.380).

C. Critical Areas Maps

A CAO will typically include maps showing the approximate location and extent of identified resources within the jurisdiction's boundaries. The ordinance should clearly define how the maps are intended to be used and what they do and do not include.

However, few if any local governments have conducted inventories of critical areas that are detailed or comprehensive enough to serve as the sole basis for identifying all resources. Achieving such a level of detail and completeness would be prohibitively expensive. While maps based on existing inventories are a good starting point for identification, and are valuable for providing notice to property owners, they should be supplemented with other forms of identification. This will usually involve case-by-case determination based on a site evaluation. Typically, CAO maps include a "disclaimer" or notice that they are not complete and are not the sole determinant of where sensitive areas are located. Ultimately, the narrative definition of the resource, as determined in the field by a qualified scientist or engineer, should determine whether or not a particular resource is subject to the CAO. Some critics argue, however, that this should be responsibility of and cost borne by local government.

D. Applicability -- Activities Regulated by the Ordinance; Non-Conforming Uses

Applicability

GMA requires that jurisdictions adopt development regulations for activities/land uses that are adjacent to or within sensitive areas. In this section, jurisdictions identify what type of action or activity will trigger the standards and requirements of the ordinance, subjecting a property owner

or applicant to its standards. Typically, regulated activities are specifically listed and defined. Alternatively, they may be defined very broadly and generally. A list of exemptions may qualify the regulated activities or may define them by default.

The major issue is how inclusive a local government wants to be, and what will invoke the ordinance's provisions and make it apply to a property or proposal. For example, going from most general and inclusive and to the more specific, the ordinance could apply to:

- All lands under a local government's (applies to existing and proposed land uses regardless of any pending/proposed activity); or
- Any "activity" (regardless of whether a development permit is required); or
- Any "alteration" (regardless of whether a development permit is required); or
- Activities (other than those exempt) that "potentially" or "probably" could affect or cause an "impact" to a critical area or its established buffer. "Impacts" may be further defined to mean *any* impact, or could be limited to *adverse* or *significant adverse* impacts); or
- Specified types of proposed activities (e.g. clearing, filling).

Activities that have the potential to impact critical areas generally involve a change in topography, removal of vegetation, change in drainage pattern or flood storage capacity, discharge to surface or groundwater, and/or construction activity. Examples of regulated activities drawn from representative ordinances include:

- Removing, excavating, disturbing or dredging soil, sand, gravel, minerals, organic matter or materials of any kind;
- Dumping, discharging, or filling with any material;
- Draining, flooding or disturbing the water level or water table;
- Driving pilings or placing obstructions;
- Constructing, reconstructing, demolishing or altering the size of any structure or infrastructure that results in disturbance of a sensitive area or the addition of any impervious surface coverage to a site;
- Destroying or altering vegetation through clearing, grading, harvesting, shading or planting vegetation that would alter the character of a sensitive area;
- Activities that result in significant changes in water temperature, physical or chemical characteristics of water sources, including quantity and pollutants;
- Any other activity that has a potential to significantly adversely impact a sensitive area or established buffer not otherwise exempt for the provisions of this chapter; and/or
- With regard to flood hazard areas, provisions apply to any activity that would result in change to the flood storage capacity of a floodplain or flood fringe area, or cause an increase in the base flood elevation unless otherwise exempted (see *Exemptions* below).

In general, the more inclusive approaches to applicability will provide more protection for critical resources. At the same time, a more inclusive approach may also be more intrusive; many activities engaged in by private property owners would become subject to the CAO.

Non-Conforming Uses

Adoption of new critical area regulations also raises the potential for creation of “non-conforming uses.” Non-conforming uses are those which were legal when initially established but which at a later date no longer fully comply with local land use or environmental requirements because of changes in development standards or mitigation requirements. The non-conformity may apply to the use or activity itself, to the manner in which the activity is conducted, or to bulk, dimensional or setback requirements.

Depending on what uses and activities are subject to and/or exempt from the CAO, some currently permitted land uses are likely to become nonconforming. Established, historical stream setbacks, for example, may be less than what is considered optimal from the perspective of today’s best available science. It may be necessary to consider the option of prohibiting certain currently permitted activities within the setbacks.

If a new larger setback were established for all land uses, many current uses and properties would become nonconforming as to those new regulations. Thus a local government might determine that as matter of public policy it is undesirable to render all existing uses nonconforming, due to the burden this places on property owners and the impracticability of achieving larger setbacks for existing uses. Alternatively, a different mitigation approach (e.g., enhancement within existing setbacks) could be proposed for properties which would otherwise be nonconforming as new setback regulations. The option of grandfathering is discussed above.

Non-conforming uses often have an unusual place in the local regulatory regime, due to a combination of legal, economic and political factors. Some jurisdictions take a tough position and actively seek to abate the nonconforming use or its nonconformity. Most, however, take a less aggressive approach and permit them to continue indefinitely, and even to expand or modify, so long as they do not increase their non-conformity and usually subject to limits or thresholds for rebuilding in the event of partial destruction. Some jurisdictions establish amortization periods (i.e., a period in which the economic value of the use will be considered to have been captured by the owner), after which the non-conforming use loses its non-conforming status and may be abated.

Numerous judicial decisions establish that non-conforming uses are not favored by the law and that local policies and actions may limit or eliminate them over time (e.g., see cases cited in *Rhode-A-Zalea v. Snohomish County*, 136 Wn.2d.1, 1998). The *Rhoed-A-Zalea* decision (Id.) held that non-conforming uses are not exempt from later enacted regulations.

From a local government’s perspective, however, creation of many non-conforming uses from adoption of new standards is often politically unpopular. Nonconformity aggravates property owners because it may reduce the value of their property; it may also make bank loans and insurance coverage more difficult or costly to obtain. These more practical considerations must be weighed against the purpose of GMA’s requirement to protect critical areas.

E. Exemptions

1. Exempt Activities

Some activities may be exempt, in whole or in part, from the operation of the ordinance because of environmental, practical or policy reasons. These activities may be those that are minor and do not usually (when executed properly) adversely affect sensitive areas; those that it is simply not practical to police or administer through the ordinance; or those which as a matter of policy a local government desires to encourage, like affordable housing.

Exempted activities can be identified in general or for each type of critical area (and its buffer). Generally speaking, ordinances which identify relatively few, narrowly defined exemptions, apply critical area protection mechanisms more strictly. Conversely, ordinances containing numerous, broadly defined exemptions, tend to be more flexible and less restrictive. A balanced approach is desirable, so that exemptions do not detract from protection of critical areas, and so that the exceptions do not swallow the rules.

The most commonly exempted activities include some existing uses, maintenance activities, research and educational activities, conservation work, public service and utilities facilities, mitigation measures and Best Management Practices (BMPs). A typical list of exemptions might include:

- existing and ongoing agricultural activities, forestry, and gardening;
- maintenance, operation and reconstruction of existing roads, pedestrian facilities, ditches and utilities;
- reconstruction or remodeling of residential, commercial or damaged structures;
- new single-family or duplex structures, accessory structures;
- educational activities, research and outdoor recreation;
- conservation or enhancement activities;
- mitigation or best management activities;
- emergency activities; and/or
- "minor" activities (as defined in the ordinance).

Some ordinances further identify a category of exempt activities that may be allowed (or sometimes conditionally allowed) in buffers. These can apply across the board or may differ depending on the type of critical area. These can include the following:

- public and private roadways and pedestrian trails;
- wildlife management and viewing;
- fishing access;
- outdoor interpretive and scientific facilities;
- utilities;
- drainage facilities;
- golf courses (with 60 percent buffer protected); and/or
- development activities allowed within the SMP.

2. Exempt Critical Areas

Critical areas that provide minimal ecological, fish and wildlife, or public value are also sometimes exempted from restrictions. This type of exemption can soften the impact of regulation to property owners and allow local governments to prioritize their regulatory efforts.

Note that these exemptions are sometimes created by defining specified critical areas to exclude certain sub-types or sub-categories. Examples of sensitive areas exempted by some jurisdictions include:

- Activities involving artificially created wetlands or streams intentionally created from nonwetland sites, including but not limited to grass-lined swales, irrigation and drainage ditches, detention facilities, and landscape features, except wetlands, streams or swales created as mitigation or that provide critical habitat for salmonid fishes; and
- Activities affecting the lowest quality wetlands (i.e., Type IV, Category 3-4), subject to a size threshold (individually smaller than 2,500 square feet and/or cumulatively smaller than 10,000 square feet in size), and/or non-riparian wetlands.

3. Grandfathered Uses

Existing land uses, or proposed land uses that have been permitted or legally "vested" before adoption of the new critical areas ordinance, are sometimes considered to be "grandfathered" and specifically exempted from new critical area restrictions. Vested uses are often specifically called out. Some jurisdictions, however, feel that mentioning vesting encourages a rush of development applications attempting to vest under the old rules. Retroactive application of an ordinance is touchy and, in the case of vested or previously permitted uses, is likely to lead to legal action. Grandfathering is generally suspect, and it should not be used as a loophole to undermine applicability of a CAO.

Examples of grandfathered uses exempted in some ordinances include:

- Previously legally filled wetlands or wetlands created before a given date that were unintentionally created as a result of the construction of a road, street or highway, or wetlands accidentally created by other human actions within [20] years of the date the development application is filed, are exempt. The latter is required to be documented by the applicant through photographs, statements, and/or other evidence; and
- Public contracts signed before a given date.

F. Resource Classification and Rating

Classification and rating of sensitive areas facilitate regulation of sensitive areas according to their distinct sensitivity to disturbance, overall ecological value and importance to the community. Classification of resources, as defined by GMA, includes defining categories and

assigning classifications to individual critical areas. Rating refers to prioritizing resources according to their value or sensitivity.

Representative classification and rating systems used by Washington jurisdictions are summarized below.

Wetlands: Wetlands are typically classified according to:

- DOE's Wetlands Rating System (Categories I-IV; based on the 1997 Manual), incorporating quality of habitat, plant communities, soils, ecological functions, local significance, source and relationship to surface/groundwater and size. Some jurisdictions have added an 'artificial wetlands' category to the DOE system.
- Locally developed classification criteria (i.e., City of Bellevue system (Type A-C)), based on US Army Corps of Engineers definitions, adjacency to riparian corridor and size.

Streams: Streams are commonly classified by type (Type 1-5) according to state criteria (WAC 222-16-030). The State stream classifications generally depend on whether the water body is perennial or intermittent, whether fish are present or not, and stream flows.

Fish and Wildlife Habitat Conservation Areas: Habitat Conservation Areas are generally designated according to listings of critical species by the federal and state government. The Washington Department of Fish and Wildlife Priority Habitats and Species (PHS) database, a catalog of habitats and species considered to be priorities for conservation and management, provides information on habitat location.

Federally protected species are classified as threatened, endangered, sensitive or candidate species. The State also identifies threatened, endangered and sensitive species; candidate species (species of concern); vulnerable species aggregations; species of recreational, commercial and/or Tribal importance that are vulnerable; and priority habitat areas. Species or habitat areas of particular local significance may also be identified.

Some jurisdictions have focused their critical area regulations on some or all categories of listed species (e.g., threatened and endangered) and their habitat. These may be classified as "critical" while other types of habitat/species (priority and non-priority, for example) are placed in a different category. Regulations may distinguish between the categories.

Frequently Flooded Areas: Areas are usually classified according to FEMA floodplain delineations and by use of FEMA Flood Insurance Rate Maps. Regulations tend to focus on the 100-year floodplain, although some also address problem drainage areas outside the floodplain. U.S. Army Corps of Engineers modeling and surveys are used when available. The City has identified floodplain and flood hazard areas according to FEMA delineations in its Comprehensive Plan.

Aquifer Recharge Areas: Sole Source Aquifer, Wellhead Protection Areas, and Sensitive Aquifer Areas are classified according to WAC 246-290 and 36.70A.030 and U.S.

Environmental Protection Agency standards. U.S. Department of Agriculture - Soil Conservation Service (USDA-SCS) soil surveys are used to determine susceptibility to contaminants.

Significant Vegetation Resources: Vegetation resources can be classified on a case-by-case basis according to tree density per acre, percent of property retained in vegetative cover/percent of trees to be removed, tree diameter at breast height, tree type, number of tree units (determined by height and width), and/or caliper measure. Classification and retention of vegetative cover can also facilitate additional protection of other sensitive area types. The overall level of benefit achieved by protecting vegetation depends on the amount, type and location of the resources retained or replaced.

Regulations often focus on protection of on-site vegetation resources. Innovative mitigation programs can also, however, allow replacement or enhancement off site, to create larger contiguous vegetated/habitat areas. Some type of master planning is generally required to achieve this result.

Geological Hazard Areas: Geologic hazard areas include coal mine hazard areas, erosion hazard areas, seismic hazard areas, volcanic hazard areas, and steep slope hazard areas (40 percent or greater). Classification and protection advance local interest in ensuring public safety and reducing threats to life and property by promoting good development practices and by controlling the location and/or type of development. Hazard areas may be identified and/or mapped based on area-wide studies, or maybe determined on a case-by-case basis (when a development permit application is submitted).

Efforts to classify geological hazard areas on an area-wide basis are intended to prevent public hazards by controlling the location and type of development. Approaches to classification frequently identify a category of each resource that it designates as "critical." Distinctions are generally based on the sensitivity of the resource (based on localized conditions) and sometimes on the type and/or density of proposed land use. A "critical aquifer recharge area", for example, might be one that is particularly susceptible to contamination because of soil conditions, aquifer movement and/or reliance on the aquifer for drinking water.

G. Approaches to Critical Area Protection

This section identifies the range of protection mechanisms that can be applied to individual sensitive areas. In addition to regulating activities that can directly affect the resource (such as filling or clearing), critical area programs typically require a buffer area of a specified width to protect the functions and values of the particular resource. Activities within buffers are also usually regulated. Mechanisms are tailored to each specific sensitive area and to the type of proposed land use activity (if applicable).

1. Buffer Requirements

Buffers are typically required for many types of critical areas to provide an additional measure of protection of the resource. Disturbance of the buffer is also typically restricted.

As reflected in the information below, required buffer widths can vary widely. While buffers are a local decision, any buffer should be reasonable and should be defensible in terms of actually protecting the resource.

Wetlands: Required buffer widths usually vary with the wetland's classification or rating, sometimes in combination with the type of proposed land use. The range recommended by the Washington Department of Ecology is the most restrictive. The range of buffers currently being implemented by jurisdictions in the region (before BAS updates) varies widely but is significantly smaller than DOE's recommendation.

Ranges of Wetland Buffers

Category	Dept. of Ecology ¹ (linear feet)	Survey of Local Jurisdictions (linear feet) ²
Category 1	200 to 300	20 to 300
Category 2	100 to 200	15 to 200
Category 3	50 to 100	15 to 100
Category 4	25 to 50	5 to 50

Notes:

1. Department of Ecology, 1998.

2. Based on an informal survey conducted by Huckell/Weinman Associates in 1999.

Streams: The range of minimum buffers currently being implemented by local jurisdictions in the Puget Sound region are as follows:

Type 1 50 to 150 feet

Type 2 10 to 100 feet

Type 3 5 to 50 feet

Type 4 0 to 10 feet

Most jurisdictions are seeking ways to identify a scientific basis for reasonable buffer widths which will also allow them to accomplish other GMA goals and to perform governmental responsibilities.

2. Elements That Provide CAO Flexibility

Many jurisdictions desire to permit some flexibility in implementing their CAOs. In general, they recognize that a single set of prescriptive regulations or a single approach may not always

be the most desirable way to accomplish an environmental goal. In some cases, allowing a degree of flexibility may provide equal or better protection of resources and result in better development projects. These flexible techniques generally require case-by-case administration, appropriate exercise of discretion, and possibly the involvement or advice of technical specialists. While potentially producing a satisfactory result, these techniques are more demanding of staff time for review and decision making.

a. Activities Within Buffers

Some ordinances treat the buffer similarly to the resource itself, and prohibit any or most activities. However, many permit some limited types and extent of land uses that are considered to be compatible with overall maintenance of the buffer and protection of its functions. This may be based on the lack of impact of the activity (when conducted properly), and/or on the importance or value of the activity from a policy perspective. Land uses that are considered to involve low or inconsequential impacts or to be a high priority, and which are consistent with the purpose of the buffer, may be permitted outright or conditionally.

Permitted and conditional uses may also vary with the resource and classification of the resource (i.e., more sensitive resources can generally tolerate less buffer disturbance). Uses and/or activities that are considered to be compatible with buffers include pedestrian trails, passive park facilities, stormwater retention facilities, and some types of utilities.

b. Buffer Width Averaging

“Buffer averaging” is the reduction of buffer width in one location with a corresponding enlargement of buffer width in another location, while maintaining the required buffer area. The purpose is to allow land use flexibility and to recognize that resources -- particularly linear resources like streams -- are not always of uniform sensitivity. Averaging may be allowed where an applicant demonstrates that the protected area contains variations in sensitivity due to existing physical characteristics. Some disturbance (generally lower intensity land uses) may be allowed adjacent to areas where the buffer width is reduced.

Typically, buffers are not allowed to be reduced beyond 25 to 50 percent of the required width. This restriction on averaging prevents unintended use of the buffer averaging provision and adverse impacts to the protected areas. Activities may also be limited to a portion of the buffer (i.e., the outer edge). In general, when activities are permitted, conditions are appropriate to ensure the integrity of the buffer is maintained.

c. On-Site and Off-Site Density Transfer

Density transfer programs allow landowners to utilize development potential that would otherwise be lost due to the presence of critical areas on a site. The transfer of lost development potential to another portion of the same property (within the development proposal site) or to an unconstrained, off-site ‘receiving area’ are options that are sometimes considered. In addition to

protecting sensitive areas, such programs permit property owners to realize the development potential of their lands and allow the City to simultaneously accomplish other objectives (e.g., accommodating growth at higher densities). The mechanism should be supported by Comprehensive Plan policies and development regulations.

Typically, in on-site transfer programs, a formula is used to calculate the amount of development potential that can be transferred. The formula is usually based on the size of the resource/buffer area present on the site and determines the amount of development that can be transferred. The amount of density that can be transferred is inversely related to the total amount of the site constrained by critical areas.

As a practical matter, the smaller the unconstrained area the more difficult it will be to develop the transferred density. A maximum amount of transferable density may also be defined, to avoid having to squeeze an excessive amount of development onto the site. A simple approach to encouraging on-site transfers is to include the land constrained by a sensitive area, and therefore the density associated with it, in the calculation of gross density.

Many jurisdictions that permit on-site density transfers require a Planned Unit Development (PUD) or similar site planning procedure to effect the transfer. The rationale is that creativity and additional review are necessary to ensure that the site is planned in a manner that reasonably accommodates the density transfer, without impacting other resources or adjacent land uses.

An off-site transfer of development rights (TDR) program is more complex but offers considerable flexibility. It requires the identification and designation of “sending” and “receiving” parcels or areas; calculation of the value (or "currency") of development rights; regulatory authorization of transfers of development rights between parcels; and a mechanism for tracking and recording transfers. Development rights are usually calculated in terms of a number of dwelling units or square feet of floor area. They could also be defined in terms of traffic generation, or using some other measure that reflects value. Limits are sometimes placed on the amount of density that may be transferred between sites. Receiving parcels are generally considered able to accommodate the additional density without causing significant impacts to infrastructure, neighborhood character and other community facilities.

TDR programs can be complex to devise and administer. A successful program must consider the need for public education, potential effects on the local market, the feasibility and attractiveness of receiving sites, administration and planning issues.

d. Mitigation Banking

Mitigation banking (most often applied in wetland system management) involves the off-site creation, restoration, and/or enhancement of wetlands (or other resources) to compensate for unavoidable impacts associated with development. Establishment of the bank, and mitigation for impacts, generally occurs before impacts occur. The newly created wetland or restored site acts as a “bank” that can issue credits to compensate for anticipated impacts on other sites (usually within the same drainage basin). State law authorizes the use of mitigation banks.

Drawbacks to the program include high upfront costs, potentially more planning time, lack of required scientific expertise, and less in-kind/on-site compensation.

H. Mitigation Standards and Programs

Mitigation of adverse impacts to resources is an integral part of federal, state and local critical areas programs. Mitigation is usually defined as actions (such as modifications to a proposal) that avoid, reduce, minimize, or compensate for impacts. Under certain circumstances, property owners may be permitted to fill or otherwise disturb a sensitive area or its buffer if they agree to mitigate or compensate for impacts caused by a proposal. This approach to mitigation is intended to offset the loss in biological and other functional values that occurs when resources are altered.

1. Mitigation Standards

Based on definitions in SEPA, NEPA and agency regulations, mitigation is generally understood to mean:

- Avoiding impact altogether by not taking/allowing a certain action or parts of actions;
- Minimizing impacts by limiting the degree or magnitude of the action and its implementation;
- Rectifying the impact by repairing, rehabilitating or restoring the affected environment;
- Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and/or
- Compensating for the impact by replacing or providing substitute resource or environments.

The Environmental Protection Agency (EPA) and the Army Corps of Engineers require that mitigation actions be “sequenced,” as follows: avoidance, minimization, and compensation. Sequencing encourages impact avoidance before the use of compensatory actions. An applicant must demonstrate that impacts are unavoidable before undertaking another approach to mitigation (e.g., compensation). Mitigation actions may be required to occur on-site or may be permitted off-site (e.g., within a drainage basin), and usually within a certain time period. Most often, jurisdictions require that a mitigation plan be prepared and approved before a development permit is issued. Performance standards can be used to specify the actions required actions for different types of sensitive areas.

In practice, local jurisdictions do not always follow a strict approach to mitigation sequencing when reviewing projects. Most ordinances require that significant adverse impacts to critical area functions and values be mitigated. In some cases, avoidance is required for certain classes of resources (e.g., Class I wetlands), while compensatory mitigation may be permitted for lower value resources.

To encourage avoidance, and establish local priorities, project-specific mitigation programs could be required to demonstrate that:

- All “feasible and reasonable” measures have been taken to reduce impacts and losses to the sensitive areas, or to avoid impacts where avoidance is required; or
- Demonstration that “no practicable alternative” is available;
- The restored, created or enhanced sensitive area or buffer will be as viable and persistent as the sensitive area or buffer it replaces; and/or
- In the case of wetlands and streams, no overall net loss will occur in wetland or stream functions and values.

2. Replacement/Enhancement Ratios

Enhancement and replacement ratios apply in cases where compensation is proposed to mitigate an impact. They identify how much area of a resource must be replaced or enhanced to compensate for an impact. The ratios are typically set higher than one-to-one to provide a margin of safety in case the replacement or enhancement is not successful and/or to account for any period of time between occurrence of the impact and mitigation. While many ordinances permit concurrent impact and replacement, some require that the mitigation occur before the impact is permitted. Examples of compensation ratios are provided below.

Wetlands: Wetland replacement ratios typically depend on the classification of the affected resource. In general, the more valuable the resource the higher the mitigation ratio. Ranges of wetland replacement ratios required by the jurisdictions in the Puget Sound region are as follows:

Category 1	2:1 to 6:1
Category 2	1.5 to 2.1
Category 3	1:1 to 11.5:1
Category 4	0.45 to 1.25:1

Ratios recommended by Ecology are shown below:

Wetland Category	Replacement Ratio	Enhancement Ratio (Acres)
	(Acres Created or Enhanced: Acres Impacted)	
Category I	6:1	12:1
Category II	Forested 3:1	6:1
	Scrub/Shrub 2:1	4:1
	Emergent 2:1	4:1
Category III	Forested 3:1	6:1
	Scrub/Shrub 2:1	4:1
	Emergent 2:1	4:1
Category IV	1.25:1	2.5:1

Source: Wetland Mitigation Replacement Ratios: Defining Equivalency, Department of Ecology, 1992

Vegetation: Some vegetation management programs include requirements for tree replacement or enhancement of disturbed or cleared areas. Replacement requirements could be applied according to the number and size of trees removed, and/or according to the total area of the site disturbed. For example, 1 existing tree of 6 dbh must be replaced with 2 new trees on-site, or no more than 20 percent of the site (or 12 trees per acre) may be cleared.

Flood Storage: Flood storage capacity could be reduced if development is permitted within the floodplain or floodway. Flood storage compensation, equal to the lost storage capacity, is sometimes required to avoid potential public hazards and property damage. Compensation may be required either on- or off-site.

Wildlife Habitat: Establishment of compensation ratios may also be considered for wildlife habitat.

I. Permit Process and Application Requirements

Critical areas permits and approvals are generally coordinated with other local regulations to avoid duplication. Examples include clearing and grading regulations, site plan review, general development permits, special development permits, subdivisions or short subdivisions, building permits; shoreline substantial development permits, variances, master plan approval, and other permits leading to the development or alteration of land. Rezones may also be included if they are not combined with another development permit. While a separate critical area permit may be required, it should be integrated with other review processes.

Ordinances should clearly identify the types of information regarding critical areas that is required to be submitted with an application. Technical studies or reports may be used to determine the presence and location of sensitive areas, and the potential for and extent of impacts to those areas and their buffers. The following issues should be addressed in defining information requirements:

- Use of internal or external studies and staffing;
- If external studies are permitted, a listing of required consultant qualifications;
- Timing of studies to be conducted; and
- Specific elements of analysis to be included in studies and reports.

J. Reasonable Use Provision and Variances

1. Reasonable Use

Based on established legal principles and case law, regulations that deprive a property owner of all reasonable economic use of property can violate the federal and/or state constitutions and be determined to result in a regulatory taking. One or more provisions included in most critical area

ordinances is intended to ensure that some use of property is permitted and that a taking does not result.

Takings questions are a complex area of the law. At minimum, a CAO should ensure that some use of the property is permitted; there should be a process that can serve as a relief valve for harsh regulatory effects in particular cases. The use ultimately permitted by this process need not be the use proposed by an applicant or the most profitable or intensive use of the property.

Criteria should be stated to determine when reasonable use allowances are appropriate. Examples of potential criteria are provided below:

- The proposed project is water-dependent or requires access to the sensitive area;
- No reasonable use with less impact on the sensitive area and its buffer is possible;
- There is no feasible on-site alternative to the proposed activities, including reduction in density, phasing of project implementation, change in timing of activities;
- Proposed activities will result in minimum feasible alteration or impairment to the area's functional characteristics;
- Disturbance of the sensitive area has been minimized by relocating any necessary alteration in buffers to the extent possible;
- Proposed activities will not cause significant degradation of groundwater or surface water quality;
- Proposed activities comply with all state, local and federal laws;
- Any and all alterations to sensitive areas and their buffers will be mitigated;
- There will be not damage to nearby public or private property and no threat to the health or safety or people on or off the property; and
- Inability to derive reasonable economic use of the property is not the result of actions by the applicant in segregating or dividing the property and creating the undevelopable condition.

Typically, an applicant must demonstrate conformance with all the relevant criteria.

2. Variances

Variance provisions, usually applicable to buffer requirements, are intended to provide some degree of relief where strict application of the standards would have an unreasonable result. These are analogous to the variance criteria for land use actions. Typical criteria could include the following:

- There are special circumstances applicable to the subject property or to the intended use such as shape, topography, location or surroundings that do not apply generally to other properties and which support the granting of a variance from the buffer width requirements;
- Such buffer width variance is necessary for the preservation and enjoyment of a substantial property right or use possessed by other similarly situated property but which because of special circumstances is denied to the property in question;
- The granting of such buffer width variance will not be materially detrimental to the public welfare or injurious to the property or improvement.

IV. In Closing

Critical area ordinances are intended to protect critical areas. Yet due to the setbacks and buffers imposed upon these areas, they can often restrict property use and reduce the supply of buildable land. But note that not every critical area must be protected to the same level. The statutory scheme requires only that there is no net loss of environmental functions and values associated with development.

Since the Act's adoption in 1990, the GMA and the rules promulgated to give the act guidance, have encouraged flexibility and innovation in local land use planning¹, so don't be shy about pressing your local decision-makers to "think outside-the-box." Get them thinking in terms of mitigation, setback averaging, density averaging and transfers, and other creative solutions.

As previously discussed, an integral part of developing, or challenging CAOs involves addressing Best Available Science. While there have been attempts to define this term, its role in the development of CAOs is the subject of ongoing debate. Part of the reason for this is that the development of BAS applicable to a particular physical setting takes time and money. To date, much of the empirical work in this area has been carried out by or on behalf of government entities that tend to have their own agenda. Moreover, the bulk of the work that has been done has been conducted in steep-sloped, forestland areas, where the environmental needs are entirely different than those found in lowland or valley contexts, or an urban environment that has been substantially built-out.

Therefore, make sure that the BAS your local planners are relying on as justification for a proposed ordinance actually applies to your often unique local physical environment. If we are dealing with an urban setting, has the BAS offered in support of a particular designation been tested in an urban, as opposed to rural or sloped area?

Even though you may not be a scientist, you can still have an impact on the development of CAOs. Keep in mind that the goal is to protect the functions and values of a particular critical area. Your local government is under no obligation to restore or enhance that environment. If it appears that they are headed down that path, call them on it. But also recognize that opposing protection puts you in direct conflict with existing law. So support policies that protect the functions and values of a particular ecosystem while at the same time protecting property owners against unnecessary impacts.

¹ RCW 36.70A.090 - **Comprehensive Plans - Innovative Techniques**; WAC 365-195-020 - **Purpose** - "Within the structure established by the act, a wide diversity of local visions of the future can be accommodated. Moreover, *there is no exclusive method* for accomplishing the planning and development regulation requirements of the act." [Emphasis added]; See also, WAC 365-195-030 **Applicability**. "(1) This chapter makes recommendations for meeting the requirements of the act. The recommendations set forth are intended as a listing of possible choices, but compliance with the requirements of the act can be achieved without using all of the suggestions made here or by adopting other approaches."

Also, as noted previously, your local government is to take an innovative approach to protecting environmentally sensitive areas. The simple fact is that a one-size-fits-all approach is usually defective. This is perhaps best demonstrated in the area of setbacks.

Often there will be a recommendation that a certain sized setback be maintained along the entire length of a critical area. However, there will rarely be sound scientific support for such a position. Challenge your local government to use a common sense, practical approach to conservation of natural resources that takes into consideration existing political, economic and human conditions.

Rather than asking how large a particular setback should be, the better inquiry is, what are the consequences of using this or that size setback? If a fifty-foot buffer will adequately protect the functions and values of a particular area, set the buffer at fifty feet. If a hundred-foot setback is needed in other areas, fine. Just don't let your local government fall victim to the idea that more is always better. It isn't.

Finally, understand that local governments must show their work, i.e., that they have "included" BAS in their deliberations. If they haven't shown their work, or haven't justified the restrictions they impose, you stand a much better chance of getting an ordinance overturned on appeal².

² See CAO/BAS Policy Guides published by W.A.R. and C.T.E.D for more information in this area.