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September 13, 2004

Bryan Wahl
Washington Association of Realtors, Inc.
504 14th Avenue SE, Ste 200
Olympia, WA 98501

Re: Critical Areas—Best Available Science and the Mythology of Buffers

Dear Brian:

I am enclosing the first portion of an article I am preparing for a CLE program to be held October 25-26, 2004 in Seattle. The topic of the article is Best Available Science and the Mythology of Buffers.

The focus of the article is to point out that the “buffer science” promoted to support critical area programs with significant buffers suffers from two critical defects:

1. The studies used to support big buffers are studies looking at natural habitats and are not generally applicable to the “built environment,” which consists of the developed portions of our communities, including roads, homes, and businesses that may boarder or abut lake, marine, or stream shorelines and/or wetlands. As such, the “science” behind the recommended buffers is often not applicable to the management of developed shorelines.
2. The “big buffer” drafts are based on the premise that the goal of the GMA is to restore functions and values by making large bands of developed lands bordering shorelines and wetlands nonconforming. Redevelopment and expansion of nonconforming structures and uses within the big buffers is seriously restricted. The common objective of creating nonconforming uses or structures within the buffer is to encourage the abatement of the structure or use over time and force a reversion to some predeveloped state. The GMA does not dictate such a result as a prerequisite for protecting critical areas.

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The developed shorelines of the state and developed area wetlands can be managed to accomplish the protection required by the GMA without creating large bands of nonconforming uses through big buffers. Such approvals are given every day by cities and counties, acting in concert with WDOE, the Washington Department of Fish & Wildlife, and a variety of federal agencies—all charged with protecting the environment. There is a better way to manage the developed (or “built environment”) and over use of big buffers is not the universal starting point.

Your members may wish to share a copy of the article with local elected officials as part of their testimony on proposed critical area ordinances. Local governments need to be held accountable for ordinances that reflect the “protection” of critical areas without needlessly rendering large portions of their local shoreline communities nonconforming.

I trust you will find the attached materials useful.

Very truly yours,



Alexander W. Mackie

AWM:kr
Enclosure

Prepared for:
"Wetlands in Washington" CLE
Presented by Law Seminar International
Seattle, Washington
October 25-26, 2004

Protection of Critical Areas and the Mythology of Buffers

By: Alexander W. (Sandy) Mackie

Over the next 90 days cities and counties throughout the Puget Sound Region will be rushing to meet legislatively-imposed deadlines to update their critical area ordinances. Guided by twin mandates to "protect" critical areas and to "include" best available science, drafts of new regulations are under review and moving slowly through the approval process.

The use of the "buffer" as the principal tool of protection is the centerpiece for most of these programs. In many communities suggested buffers range from 50 to 300 feet from the edge of critical areas. Critical areas are defined to include "wetlands" and "fish and wildlife habitat" and cover rivers and wetlands, and may further include lakes and ponds, marine shorelines, and a host of natural and artificial waterways, as well as slopes and other identified areas of concern.

A "buffer" is nothing more than a designated distance from a critical area edge. Once the buffer is imposed, new development within the buffer is generally prohibited. Existing development within buffer areas is tightly constrained due to the change of status of the developed portion of the property to "nonconforming structure" or "nonconforming use." Typically nonconforming buildings cannot be expanded or expansion is strictly limited within the buffer. Activity or new development deemed "harmful" to the environment may be severely curtailed or prohibited. And structures, once damaged or removed due to obsolescence, often may not be replaced, except outside the identified buffer. Such programs are designed to result in the ultimate removal of "nonconforming" uses and structures and to replace them with more "natural," "native," or "habitat friendly" vegetation. Big buffers are at heart a "restoration program" going far beyond the mandate to "protect" existing functions and values. Restoration programs are designed to return the land to some prior state or condition.

Those pushing the "big buffer" approach support their claims by pointing to work by the Washington State Departments of Ecology and Community, Trade and Economic Development. The Department of Community, Trade and Economic Development has published a compilation of research in its regulations that it labels "best available science." DCTED has also published a "model ordinance" (now called a "guideline")

suggesting the need for the universal use of large buffers as the first line of protection, even where such buffers cross or include developed lands.

Others supporting the big buffer approach also point to publications from the Washington State Department of Ecology on the ecology of wetlands, and the Department of Fish and Wildlife regarding priority habitats to support their claims. Similar publications have been sponsored by larger county planning departments, bent on providing their own justification of “best available science” for the imposition of big buffers as the primary tool to “protect” critical areas.

But claims that these documents justify large buffers under all conditions are simply not true. The Department of Community, Trade and Economic Development specifically cautions against uncritical acceptance of the compilations or published lists, and strongly suggests that local governments critically examine the applicability of the published materials to make sure recommendations are appropriate for local use and conditions.

Careful analysis of the studies cited in the various compilations of “best available science” in support of big buffer programs in urban or developed areas suggests most of these efforts miss the mark—widely. The reams of compilations cited in support of big buffers share common threads. They principally include studies that focus on the habitat needs of a wide variety of species (common, as well as endangered) and the water retention, clarification, and purification capabilities of “natural” or “undisturbed” buffers. Editors and advocates then make the value judgment that the published works prove buffers are required to protect all critical areas and nudge local governments to uncritically accept the work and adopt the mass buffer programs to comply with the Growth Management Act.

The common problem with the studies and compilations cited as supportive of mass buffer programs is that uniformly they do not apply to the urban or built environment. The studies cited typically deal with natural habitat use—what could be accomplished if natural buffers were restored. Few, if any, of the compilations can point to studies of urban environments where “best available science” in the management of our developed lands and shorelines is reversion to the undeveloped norms studied in the habitat compilations. Certainly the urban areas surrounding streams or wetlands are not going to revert to undeveloped habitat.

Current ordinance proposals, citing the natural area compilations, promote big buffers to include existing homes and businesses, docks, lawns, dikes, farmed fields, and roadways, as well as other developed urban, suburban, and rural landscapes. Yet, the habitat studies themselves acknowledge that within the developed areas, even native vegetation less than 50 feet in width from the critical area edge, provides very poor habitat or buffer function. Further, the developed landscapes within the proposed big buffers are areas in which the native vegetation and natural conditions common to the

best available science studies no longer exist and often has not existed for years—if at all. Yet, under big buffer codes natural vegetated buffers are still being identified as the norm.

Most of the studies cited to support big buffers address the benefit of natural conditions to promote habitat needs of common species, including a wide range of amphibians, reptiles, and birds, as well as small mammals. The push for large buffers is a push to restore natural habitats for all species throughout our urban and rural regions. Few, if any, of the studies cited address the ability of common species to inhabit the developed areas, as they do under current conditions. More significantly, unlike earlier programs, communities are no longer attempting to protect just threatened or endangered species, or identified species of local importance, but *all* species regardless of local need or desirability; or the social and economic disruption created by the imposition of large bands of nonconforming uses along our marine, lake, and river shorelines and wetland edges.

Buffers are a poor tool for the protection and management of the developed portions of our communities, or “built environment” as it is referred to under our State Environmental Policy Act. Natural buffers provide most of their water quality functions in the first 50 feet, and require another 200 feet to gain an additional 10-20% efficiency. Modern stormwater manuals require that stormwater be treated for quality and discharged at safe rates. In urban and rural areas, studies are showing stormwater systems achieve good results. In such circumstances, buffers are not depended upon to treat or detain stormwater and in some circumstances such manuals prohibit reliance on natural buffers as an alternative to treatment.

The big buffer programs seek to reimpose natural conditions on the developed landscape. Such a task results in significant localized hardship and disruption without the short-term benefits promised. Nonconforming structures and activities may continue to be used in most cases without change. It is only new or expanded activity that is immediately at risk.

The imposition of big buffers across built environments can even be counterproductive to efforts to improve existing conditions. When new buffers are imposed, the extraordinary conditions on new development or redevelopment become a significant disincentive to upgrade existing degraded conditions. The big buffers have the perverse reverse incentive, to forgo new development within the buffers and the significant site improvements that may be included as a result. Likewise, big bands of nonconforming structures and uses can also result in reductions in the community tax base if waterfront property values drop due to the constraints on current uses, and stringent limitations on change or new development.

Big buffers need not be the only solution to protecting critical areas, particularly in the areas of the built environment. Everyday state and local governments, the

Department of Ecology, the Department of Fish and Wildlife, the U.S. Fish and Wildlife, and the U.S. Army Corps of Engineers, agencies all charged with protecting our waterways and environment, issue permits for use and development of our marine, river, and lake shorelines and wetland-influenced areas. These permits allow development to proceed with a wide variety of constructed mitigation and enhancement approaches in or near the affected critical area. The managed approach is a marked contrast to the “big buffer-revert to nature” philosophy of the big buffer advocates. Yet, such active management approaches are to be preferred and indeed are essential if the vitality of shoreline-related uses are to continue and not be locked away in an effort to restore some ideal shoreline habitat. The permits for shoreline-related work are based on best available science, but science directed to managing the built environment and not prohibiting use or restoring native habitat at the expense of economic use.

The “mythology of buffers” is grounded in the belief that buffers must be the foundation and universal underpinning of all critical area ordinances. This is not the case. Local governments need not make entire regions of the community into nonconforming uses, restricting use of developed properties within the buffers to the limits of constitutional authority. Other tools are much better designed to deal with the protection of critical areas in the built environment.

Artificial buffers across shoreline ports, homes, and businesses are simply a habitat tax, unreasonably and unnecessarily imposed on local homeowners and businesses. Local governments need not spend up to 30% of their transportation budgets providing 2-1, 6-1, or 12-1 habitat restorations for new projects, when in truth, the habitat values of small areas affected by a transportation facility upgrade can readily be replaced with targeted enhancement projects with improved benefit to the affected habitat system and at much less expense than the one-size-fits-all buffer programs.

Local governments should aim for critical area protection ordinances that reflect existing conditions and the more complex nature of our built environment, as well as protecting the natural environment. Buffers certainly have a role to play, where appropriate, but not as a centerpiece of a local program. Critical area ordinances should be designed to optimize use and upgrade our existing developed shoreline and wetland areas, as well as continue protection of “natural” or undeveloped areas. Critical area code updates should provide incentives to more effectively manage the areas already put to use, without artificially denying access to our lakes, rivers, and other shorelines, or to artificially limit changes of use and new development in areas already built up and affected by development.

The mythology of buffers seeks to find a simple answer to the protection of critical areas. The truth is much more complex, and the “science” promoted to support the universal buffer approach cannot withstand tight scrutiny across the built

environment. As local governments face a draft ordinance based on “big buffers” as a first line of defense, with buffers designed to render large portions of the developed community nonconforming, proponents must be put to the test that effective alternatives are not available and that the recommended programs are required for protection of existing conditions, not restoration. Proponents should not be permitted to rely on published lists of natural habitat studies, but must be forced to provide proof that the studies cited support the buffers proposed in the locations recommended. Local governments owe it to their constituents to demand nothing less.

Environmental protection and preservation of the functions and values of critical areas are important considerations. Achieving the goals will not be easy, and the cost of programs designed to manage, rather than prohibit, development on or near our waterways and wetlands will necessarily be more complex and expensive than it is today. But, such approaches are preferred to the “big buffer” and resulting “nonconforming use” consequences of proposals currently under review.

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For presentation at LSI’s Wetlands in Washington panel to be presented October 26, 2004.

Sandy Mackie has been speaking and writing on Growth Management and Best Available Science issues since 1999.

- *“GMA and Best Available Science, Unwritten Rules and Evolving Guidelines in Designating and Protecting Critical Areas,” presented at the Washington Land Use Law conference sponsored by Law Seminars International (April 2004)*
- *“Revising Critical Area Ordinances, Practice Tips and Considerations,” 12th annual GMA conference, Law Seminars International (November 2003)*
- *“Critical Areas and Choices, Understanding the Role of Best Available Science,” Wetlands in Washington 2003 conference, Law Seminars International (October 2003)*
- *“Managing a Critical Area Review, The Snohomish County Critical Area Review 2003,” presented at the Land Use Law conference, Law Seminars International (April 2003)*

- *“Critical Areas and Best Available Science,” presented at the Washington Association of Prosecuting Attorneys’ Spring Training Program (April 2003)*
- *“Common Sense and Critical Areas: Facing the Coming Challenge,” GMA—Challenges & Solutions 2002, Law Seminars International (November 2002)*
- *“Best Available Science—A New Beginning,” Washington Land Use Law Conference, Law Seminars International (April 2002)*
- *“Best Available Science-The Five Year Annual Review, December 2001 Status Report,” Wetlands in Washington Conference, Law Seminars International (December 2001)*
- *“Critical Areas and ‘Best Available Science’-Where Do We Go From Here,” Washington Land Use Law Conference, Law Seminars International (April 2001)*
- *“Developing a Best Science Program for Wetland Management” (with Andrew Castelle), Wetlands in Washington 2000 seminar, Law Seminars International (September 2000)*
- *“Best Available Science in Critical Areas – Update and Practical Tips, “ Ninth Annual GMA Conference, Law Seminars International (September 2000)*
- *“GMA and Current Issues in Resource and Critical Area Protection: ‘Best Available Science’, Exemptions, Diminimus Impacts II,” Washington Land Use Law Seminar, Law Seminars International (April 2000)*
- *“Wetland Regulation Under GMA,” Wetlands in Washington 1999 Seminar, Law Seminars International (November 1999)*

*Copies of prior articles may be obtained through Kate Johnson at LSI
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