



By Hand

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San Juan County Planning Commission
c/o Lynda Guernsey
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RE: Public Comment – San Juan County’s August 30, 2011 Draft Amendments to SJCC 18.20 “Definitions,” 18.10.040 “Establishment of Land Use Districts and Official Maps,” SJCC 18.30.150 “Wetland Critical Areas”; and Repealing Appendices A-C of SJCC 18.3-.150

Dear Planning Commissioners:

Friends of the San Juans (“Friends”) respectfully submits the following comments to address the August 30, 2011 draft amendments to San Juan County’s (“County”) proposed Critical Areas Ordinance (“CAO”) provisions for wetlands. Friends appreciates the efforts that County staff have made to bring the wetlands provisions closer to compliance with the Growth Management Act (“GMA”), and offers these comments to address both minor edits and additional substantive changes necessary to protect the functions and values of wetlands. Some of these proposals are rooted in the Best Available Science (“BAS”); to better understand the role that BAS plays in a CAO update, we have attached as Appendix A to this comment letter a white paper that analyzes the GMA mandate to include BAS. This comment letter incorporates herein by reference the comments that Friends submitted on both July 14, 2011 and August 5, 2011.

The comments below examine the sections of the proposed ordinance in the order drafted and address: (1) revisions for the definition section; (2) the omission of a monitoring and adaptive management program to respond to impacts caused by the moderate risk approach; (3) exemptions for wetland sizes and several activities; (4) the buffer sizing procedure; and (5) at the risk of being overly pedantic, the proper usage of “that” and “which.” A global concern that is reflected below, but not discussed in detail, is that the proposed ordinance foregoes the opportunity to establish a wetlands regime consistent with those implemented by the U.S. Army Corps of Engineers and the Washington Department of Ecology. While Friends appreciates the desire to forge a unique

and separate path, departing from the classification system established by those agencies will increase the administrative burden on the County, and thus the costs both for County review and applicant compliance with the CAO. Consequently, Friends continues to urge the County to adopt a tailored classification system similar to that offered by the Department of Ecology.

For over 30 years, Friends has been protecting and promoting the health and future of the San Juan Islands' land, water, natural and human communities through education, citizen involvement, science, and advocacy. Friends is a 501(c)(3) non-profit organization representing approximately 2,000 members. Friends works with diverse stakeholders including citizens, businesses, scientists, and land managers, and collaborates with public agencies and non-profit organizations, utilizing innovative tools to conserve the County's resources to achieve the greatest benefit for people and nature.

A. Proposed Revisions to Section 1, Chapter 18.20 SJCC.

Friends proposes revisions to the definition section as follows:

- **Development**—the words “permanent” and “saleable” should be removed from this definition because they are undefined, ambiguous terms that could prevent the protection of critical areas, do not have any basis in BAS, and are inconsistent with other jurisdictions. In the absence of definitions, attempting to determine whether an activity is permanent, or leads to a saleable parcel, could be administratively onerous at a later date. In addition, because short term activities on a property could have significant impacts on critical areas, such as placing materials in a wetland for short-term purposes, applying the term permanent could impact critical area functions and values. Furthermore, the BAS in the record does not support allowing temporary activities in wetlands. Lastly, a brief survey reveals that none of Island, Skagit, Whatcom, Jefferson, or Snohomish counties limit their definition for development to only those activities that satisfy an undefined threshold for permanency, even though several of them apply substantially similar language for “development.
- **Development area**—the word “permanent” should be removed from this definition for the reasons stated above. Although the ambiguity in the term is diminished by its definition as a change exceeding 24 months, the BAS does not support limiting the development area to only those areas that will be changed for 24 months because significant impacts can occur to wetlands within 24 months. In addition, the impacting activities could be extended for an unspecified period at the planning department director's discretion.

B. Proposed Revisions to Section 3, SJCC 18.30.150.

1. Medium risk alternative requires adaptive management.

To spare the County and its residents the expense of later adjusting new development where it has been found to impact wetlands, Friends recommends that the County apply the minimal risk recommendations offered by the Analysis of Existing San

Juan County Regulations Pertaining to Wetlands.¹ In addition, this approach is consistent with the BAS regulations' direction to employ a precautionary approach where incomplete scientific information casts uncertainty about the impacts of proposed development.² The County's initial proposal to pursue either of two different options, a minimal risk option and a moderate risk option indicates the existence of some scientific uncertainty that warrants application of the precautionary principle to achieve minimal risk.

In the alternative, even to the extent that the County chooses to pursue a moderate risk approach, application of BAS requires the implementation of an adaptive management program. The BAS regulations call for an adaptive management approach even where a precautionary approach is employed.³ A proper adaptive management plan would provide funding to evaluate the effectiveness of the chosen regulations, identify the means for adapting the approach to address any subsequent impacts, and implement those changes.⁴ Because the moderate risk option assumes a moderate possibility of impacts to wetland functions worse than those anticipated for that option, it demands an adaptive management approach.

2. Minimum size thresholds are not supported by Best Available Science.

The proposed ordinance offers two options for establishing a minimum threshold size, below which wetlands would not be subject to the CAO. The Planning Commission should reject both of these exemptions from the CAO because they are inconsistent with BAS and fail to protect wetland functions and values. In addition, because State and Federal regulations protect wetlands of all sizes, local provisions that exempt some wetlands would continue to create confusion for landowners seeking to determine whether their property was subject to wetland protections.

Both of the proposed wetland threshold exemption options are inconsistent with the BAS and fail to protect wetlands.⁵ Option 1 proposes to exempt medium importance wetlands up to 2,500 square feet in size and low importance wetlands up to 5,000 square feet. Option 2 proposes a generic exemption for all wetlands smaller than 1,000 square feet. Both of these proposals conflict with the BAS Synthesis document and the BAS in the record. Chapter 2 of the BAS Synthesis recites the Washington Department of Ecology ("Ecology") position that "we do not believe it is appropriate to recommend a general threshold for exempting small wetlands in Washington because the scientific literature does not provide support for such a general exemption."⁶ In addition, as noted by the BAS Synthesis, "[a]lthough some wetlands are too small to encompass the entire daily home range of many animals, they may nonetheless support rare wetland plants, as well as serve as corridors or hospitable resting stops for animals moving between larger but more distant wetlands."⁷ Thus, the BAS does not support an exemption based on wetland size.

¹ Paul R. Adamus, Analysis of Existing San Juan County Regulations Pertaining to Wetlands (May 31, 2011).

² WAC 365-195-920(1).

³ WAC 365-195-920(2).

⁴ *Id.*

⁵ Ordinance, at 11-12.

⁶ BAS Synthesis, Chapter 2, Wetlands, 42 (undated Final draft).

⁷ *Id.*

Moreover, a recent Central Puget Sound Growth Management Hearings Board (“CPSGMHB”) decision held that nearly identical exemptions adopted by Kitsap County failed to comply with the GMA.⁸ There, Kitsap County adopted a CAO that exempted isolated Category III wetlands under 2,500 square feet and isolated Category IV wetlands under 7,500 square feet.⁹ The CPSGMHB rejected these exemptions, holding that “there is no evidence in the record of the likely number of exempt wetlands, no cumulative impacts assessment or adaptive management, and no monitoring program to assure no net loss.”¹⁰ The CPSGMHB relied upon the same BAS for that position that can be found in the County’s record here, the Department of Ecology’s *Wetlands Volume 2*.¹¹ Consequently, the County’s proposed exemptions for wetlands of a certain size do not comply with the GMA.

In addition, County exemptions based on size would increase confusion and complexity for landowners who seek to develop property with wetlands. As confirmed by the BAS Synthesis, the U.S. Army Corps of Engineers protects wetlands regardless of their size.¹² To simplify the process for identifying applicable regulations, the threshold for triggering the County’s regulations should be consistent with that at the federal and state levels.

3. Exempt activities (proposed SJCC 18.30.150.C.).

Friends appreciates the County staff’s work to decrease the scope of exempt activities in a manner consistent with the BAS. It should be revised slightly, though, to clarify some ambiguity for two of the activities that would be exempt from the CAO. First, due to the comma after “and” in paragraph 2, it is unclear whether the CAO would allow the planting of new crops. If that is not the intent, the comma should be removed. Second, the exemption for existing and ongoing agricultural activities should be removed from the ordinance in favor of the County’s parallel process pursuant to the Ruckelshaus Center recommendations for harmonizing critical area and agricultural resource land protections.

⁸ *Hood Canal, et al., v. Kitsap County*, CPSGMHB No. 06-3-0012c, Final Decision and Order, (Aug. 28, 2006).

⁹ *Id.* at 17.

¹⁰ *Id.* at 19.

¹¹ The CPSGMHB quoted the following from Volume 2 of the Department of Ecology’s Wetlands manual:

Volume 1 (chapter 5) documents the relationship between the lower levels of protections afforded to small wetlands and the resulting fragmentation and increase in distance between wetlands on the landscape as well as the important functions provided by small wetlands. The loss of small wetlands is one of the most common cumulative impacts on wetlands and wildlife in Washington.

- As with exempting a certain wetland size, there is no scientific basis for exempting wetland impacts under any particular size without an analysis of the cumulative effects of the exemption. A study of the management area is needed in order to measure the net result of the exemption as applied over time. If a local government chooses to move forward with an exemption for small area impacts, a restoration program and/or in lieu fees program should be created to offset the impacts. Given the potential for cumulative impacts from exempting small wetlands and small impacts to wetlands, local governments should monitor and report the effectiveness of their wetland provisions or critical areas ordinance to achieve “no net loss.”

Id. at 19 (quoting *Wetlands Vol. 2* [Index 590], at 8-13 and 8-14).

¹² *Id.*

That process will address the proper relationship between critical areas and farmlands, and the CAO should thus defer to it.

4. Conditionally Allowed Activities.

While Friends understands the County's desire to allow some activity within wetland buffers, several of the proposed activities are not supported by BAS in the record, particularly given the smaller buffers chosen through the moderate risk approach. For example, the BAS does not support the creation of new lawns, landscaping, orchards, gardens, and fences up to 1,000 square feet or 10% of the buffer (if the latter is larger than 1000 square feet).¹³ In addition, the BAS does not support tree removal that could lead to a 25%-50% reduction in the tree canopy.

5. Buffer sizing procedure.

Friends supports a wetland classification system that closely ties the likely impacts of a development to the scope of the protections made necessary by that development. Friends is concerned, however, that the complexity of the proposed scheme may limit its implementability. To address that concern, Friends recommends that the County incorporate into its scheme a cost recovery mechanism for outside consulting on wetland issues, and that it establish a countywide monitoring program to determine whether activities permitted by the new CAO impact wetlands.

a. Development intensity.

The development intensity rating system does not comport with either common sense or BAS. As an initial matter, the science does not support a determination that developing over one acre of a three acre parcel is low intensity development, particularly if that development surrounds the wetland area. In addition, the proposed regulations do not take into account the location of the development area on the parcel, other than to determine whether development there generally triggers application of the CAO; however, the location of the development could easily have as great an impact as the overall amount of development of a parcel. Thus, the buffer sizing scheme's primary reliance on development area for determining land use intensity is severely flawed. Moreover, the scheme does not attempt to incorporate the physical proximity of the more impacting activities within that development area into the buffer size calculation. Thus, a parking lot could be located only 80 feet from a highly important wetland if it consumed up to 35% of a 3-5 acre lot while a cabin would be located 300 feet from that wetland if a lawn also existed somewhere on the property up to 50% of its size. The BAS does not support this sort of scheme. The County should revise the proposed ordinance so that it addresses the impacts of proposed development that accurately focuses on the source of the impacts, and includes overall parcel development as it contributes to those impacts.

b. Potentially regulated area.

The potentially regulated area in Table 3.4 should be increased to ensure that development that may impact a critical area is accurately identified. Notwithstanding that

¹³ Proposed SJCC 18.30.150.E.1.a.

the initial threshold inquiry likely will not benefit from the expertise of a qualified wetland professional, the proposed ordinance establishes threshold numbers that are identical to the buffer sizes. Consequently, an erroneous determination of either the type of wetland or its edge could lead to an underestimation of the distance needed between the wetland and proposed development. Because the accurate determination of the applicability of the CAO is essential to the protection of wetland functions and values, the next draft of the ordinance should include increased threshold numbers.

c. Buffer reductions.

The proposed ordinance's allowance of buffer reductions for downslope buffers and omission of discussion of lateral buffers fails to meet BAS. The record does not contain science that supports the discontinuation of a wetland buffer from the point that the land begins to slope away from the wetland, or a 15 or 50-foot habitat buffer for low and medium-high importance wetlands. Indeed, the BAS Synthesis expressly states that decreased downslope buffers would be appropriate only where the sole purpose of the wetland buffer is to protect water quality.¹⁴ In addition, the BAS Synthesis notes that development such as roads and herbicides and fertilizers commonly used on gardens and lawns can negatively affect amphibians, and that amphibians may travel well in excess of 50 feet from a wetland, much less 15 feet.¹⁵ Consequently, allowing those activities within 15 or 50 feet downslope of a wetland could fail to protect the functions and values of wetlands. To protect the habitat function that wetlands provide, the buffer must meet the size necessary for local species.

d. Building setbacks.

The proposed CAO properly acknowledges that structural setbacks from the buffer are necessary to accommodate fire protection activities, but the current draft does not likewise address hazard tree removal. The combination of low proposed buffer sizes for low intensity development and the proposed hazard tree exemption could allow the removal of a substantial number of trees in both a buffer and a wetland. The County should address this concern by ensuring that homes are set back sufficiently from the wetlands to accommodate hazard trees, in addition to fire protection.

e. Decreased urban buffers.

Neither the GMA regulations nor the BAS support smaller urban buffers for wetlands similar to those in the rural setting. The proposed ordinance establishes wetland buffers for urban areas that are approximately half the size of buffers in rural areas for low development intensity. However, the CAO guidelines state that "[i]f critical areas are included in urban growth areas, they still must be designated and protected."¹⁶ Therefore, the wetland buffers for low intensity development in urban areas should be the same as that for rural areas.

¹⁴ BAS Synthesis, Ch. 2, at 54.

¹⁵ BAS Synthesis, Chapter 2, at 60-63.

¹⁶ WAC 365-195-485(4)(c). In addition, "[c]ritical areas should be designated and protected wherever the applicable environmental conditions exist, whether within or outside of urban growth areas.

6. Invasive species in soil applications.

The proposed ordinance should be augmented with protections to ensure that allowed activities in wetlands, including noncompensatory enhancement and compensatory mitigation, do not introduce invasive species to wetlands. Friends recommends that addition of a criterion such as “**the activity will not result in the introduction of an invasive species within a wetland or its buffer,**” for those areas.

7. Confirming accuracy of applicant materials.

To confirm that development will not impact wetlands, the County must implement a procedure to contract for the review of submitted materials by a qualified professional, and to recover the cost of that review.

C. General Editorial Note—that vs. which.

The proposed ordinance applies the term “which” in numerous locations that call for use of the term “that.” For example, the proposed definition for “salmonid watershed wetland” is “a wetland that is in or within 300 feet of, and in the same watershed as, marine or fresh waters **which** are known or reasonably assumed to be physically accessible for any length of time during most years to coastal cutthroat trout or other salmonid species native to the Pacific Northwest.” This use of the term which is grammatically incorrect. A useful rule for determining whether that or which is appropriate is to determine whether the clause following that word can be removed without changing the meaning of the sentence. If not, then “that” is appropriate. In the sentence above, the clause following “which” provides a description of the type of marine or fresh waters that is essential to the definition, and thus “that” should replace “which.” Friends urges the Planning Commission to make similar revisions throughout the ordinance.

D. Conclusion.

Friends appreciates the Planning Commission’s efforts to recommend a CAO that complies with the GMA. The recommendations offered above would assist in achieving that task.

Respectfully submitted,

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