

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  |  | |  |  |
| **To:** | Montesano CAC Members | | **Date:** | March 15, 2015 |
| **from:** | Brad Medrud | | **Project No.:** | 2130554.30 |
|  | **Project Name:** | Montesano SMP Update |
|  |  | | | |
| **Subject:** | CAC Meeting #4 – March 16, 2015 | | | |
|  | |  | |  |

Items to address at tonight’s meeting.

* Mike Wincewicz prepared a public notice for property owners in the shoreline jurisdiction, inviting them to attend tonight’s meeting.
* Ecology provided their comments on the initial draft SMP. I have copies of their review memo, their marked-up initial draft SMP, and a table we have prepared that summarizes all of their comments. Copies have also been posted on the website.
* At our last CAC meeting, the question was asked about how critical area regulations are to be addressed in the SMP update. I have attached some background information regarding the connection between critical areas under GMA and the SMA.
* Suggested Policies and Regulations from our last CAC meeting:
  + SMP Section 4.04 Ecological Protection and Critical Areas
    - Add policy to SMP Section 4.04.01 stating: “Work with state and federal regulators to ensure that funding exists to mitigate fully the impacts of accidents involving hazardous materials.
    - Add regulation to SMP Section 4.04.02 stating: “Public or private parties that are responsible for accidents involving hazardous materials shall be responsible for the entire cost of required cleanup activities.
* On March 10, 2015, we sent out a copy of the draft Restoration Plan for review by staff and the CAC. I have copies of the draft Restoration Plan as well.
* On March 11, 2105, Ken asked for more examples of riparian vegetative planting. Erik Schwartz with Herrera provided the following: “Native vegetation should include a mix of shrub and tree species; spruce, cottonwood, willows, and perhaps some emergent sedges and rushes in wetter areas; and Douglas fir, cedar, vine maple, snowberry, salmonberry for example, in drier areas. We can give it some additional thought and add examples to the final plan.”

BM/bm

**Ecology FAQs regarding critical areas regulations in the shoreline jurisdiction**

* **Q: Why are critical areas ordinances often incorporated into local shoreline program updates?**  
  **A:** A recent state Supreme Court decision (Futurewise v. Anacortes) decided that the shoreline master program solely regulates the shorelines and critical areas covered by the program, once Ecology approves it. Many existing master programs contain buffer requirements but are based on outdated conditions and science. Rather than repeat the work local governments have already done developing their critical areas ordinances under the state Growth Management Act, relevant portions of existing critical areas ordinances may be placed in updated shoreline master programs under the Shoreline Management Act.
* **Q: What are differences between critical areas ordinances and shoreline master programs?**  
  **A:** Local governments and Ecology implement the Shoreline Management Act using locally-tailored Shoreline Master Programs. Local governments implement critical areas ordinances under the authority of the state Growth Management Act. The two laws have many similar requirements for environmental protection but they are administered with different kinds of regulatory procedures. The two laws also have many similar and some different objectives for dealing with future land use and development. Integrating Growth Management and Shoreline Management Act goals, policies, and regulations is required but often difficult to accomplish.
* **Q: Do the rules surrounding “best available science” apply to shoreline master programs?**  
  **A:** No. Current science is the basis for shoreline master programs while “best available science” is a term from the state Growth Management Act, and does not apply to shoreline master programs. Shoreline management requires use of the “most current, accurate and complete scientific and technical information” as the basis for decision making.
* **Q: What is Ecology’s role in developing and providing wetlands guidance to local governments?**  
  **A:** Local governments and the state Department of Commerce implement the GMA. Ecology, however, has expertise in managing and protecting wetlands. We knew most local governments didn’t have the resources to develop a science-based standard for protecting wetlands. To help local governments meet GMA requirements without reinventing the wheel, Ecology got a federal grant in 2002 and spent three years crafting wetlands guidance. We scanned over 15,000 scientific articles and summarized another 1,000 related to protecting and managing wetlands. Ecology continues to provide this guidance and technical assistance, as applicable wetland regulations are updated all across the state.

**Case Law regarding critical areas under GMA and the SMA**

* [*Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*](http://courts.mrsc.org/mc/courts/zsupreme/164wn2d/164wn2d0242.htm), 164 Wn.2d 242 (2008) - critical areas in shorelines

The Growth Management Act (GMA) does not apply to those critical areas inside shoreline management areas managed through shoreline master plans properly adopted, amended, and approved by Department of Ecology under the Shoreline Management Act (SMA). Critical areas within the jurisdiction of the SMA are governed only by the SMA. However, what is left unanswered by the court's plurality decision (a fifth justice concurring in the result only) is when the 2003 law at issue transfers protection of shoreline critical areas to a shoreline master program. Two subsequent court of appeals decisions from different divisions ([Kitsap Alliance of Property Owners v. Growth Mgmt. Hrgs. Bd](http://courts.mrsc.org/mc/courts/zappellate/152wnapp/152wnapp0190.htm)., 152 Wn. App. 190 (2009), and [Kailin v. Clallam County](http://courts.mrsc.org/mc/courts/zappellate/152wnapp/152wnapp0974.htm), 152 Wn. App. 974 (2009)) reached differing conclusions as to the effect of the Futurewise decision. The 2010 legislature resolved the matter with the passage of [ESHB 1653 (Ch. 107, Laws of 2010).](http://app.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Session%20Law%202010/1653.SL.pdf)

* [*KAPO v. Central Puget Sound Growth Mgmnt. Hearings Board*](http://courts.mrsc.org/mc/courts/zappellate/160wnapp/160wnapp0250.htm), 159 Wn. App. 270 (2011) - GMA/Shorelines Management

Following 2010 legislation (Chapter 107, Laws of 2010) that applied retroactively, the court held that the Growth Management Act was to regulate critical areas in shoreline areas until such time as Shoreline Management Act plans were updated. Retroactive application of the new legislation does not violate the separation of powers doctrine, does not infringe vested rights, does not constitute a prohibited ex post facto law, and does not render existing local plans noncompliant with the Growth Management Act.

**RCW applicable to critical areas under GMA and the SMA**

|  |  |
| --- | --- |
| RCW 36.70A.480Shorelines of the state. |  |

(1) For shorelines of the state, the goals and policies of the shoreline management act as set forth in RCW [90.58.020](http://app.leg.wa.gov/rcw/default.aspx?cite=90.58.020) are added as one of the goals of this chapter as set forth in RCW [36.70A.020](http://app.leg.wa.gov/rcw/default.aspx?cite=36.70A.020) without creating an order of priority among the fourteen goals. The goals and policies of a shoreline master program for a county or city approved under chapter [90.58](http://app.leg.wa.gov/rcw/default.aspx?cite=90.58) RCW shall be considered an element of the county or city's comprehensive plan. All other portions of the shoreline master program for a county or city adopted under chapter [90.58](http://app.leg.wa.gov/rcw/default.aspx?cite=90.58) RCW, including use regulations, shall be considered a part of the county or city's development regulations.  
  
     (2) The shoreline master program shall be adopted pursuant to the procedures of chapter [90.58](http://app.leg.wa.gov/rcw/default.aspx?cite=90.58) RCW rather than the goals, policies, and procedures set forth in this chapter for the adoption of a comprehensive plan or development regulations.  
  
     (3)(a) The policies, goals, and provisions of chapter [90.58](http://app.leg.wa.gov/rcw/default.aspx?cite=90.58) RCW and applicable guidelines shall be the sole basis for determining compliance of a shoreline master program with this chapter except as the shoreline master program is required to comply with the internal consistency provisions of RCW [36.70A.070](http://app.leg.wa.gov/rcw/default.aspx?cite=36.70A.070), [36.70A.040](http://app.leg.wa.gov/rcw/default.aspx?cite=36.70A.040)(4), [35.63.125](http://app.leg.wa.gov/rcw/default.aspx?cite=35.63.125), and [35A.63.105](http://app.leg.wa.gov/rcw/default.aspx?cite=35A.63.105).  
  
     (b) Except as otherwise provided in (c) of this subsection, development regulations adopted under this chapter to protect critical areas within shorelines of the state apply within shorelines of the state until the department of ecology approves one of the following: A comprehensive master program update, as defined in RCW [90.58.030](http://app.leg.wa.gov/rcw/default.aspx?cite=90.58.030); a segment of a master program relating to critical areas, as provided in RCW [90.58.090](http://app.leg.wa.gov/rcw/default.aspx?cite=90.58.090); or a new or amended master program approved by the department of ecology on or after March 1, 2002, as provided in RCW [90.58.080](http://app.leg.wa.gov/rcw/default.aspx?cite=90.58.080). The adoption or update of development regulations to protect critical areas under this chapter prior to department of ecology approval of a master program update as provided in this subsection is not a comprehensive or segment update to the master program.  
  
     (c)(i) Until the department of ecology approves a master program or segment of a master program as provided in (b) of this subsection, a use or structure legally located within shorelines of the state that was established or vested on or before the effective date of the local government's development regulations to protect critical areas may continue as a conforming use and may be redeveloped or modified if: (A) The redevelopment or modification is consistent with the local government's master program; and (B) the local government determines that the proposed redevelopment or modification will result in no net loss of shoreline ecological functions. The local government may waive this requirement if the redevelopment or modification is consistent with the master program and the local government's development regulations to protect critical areas.  
  
     (ii) For purposes of this subsection (3)(c), an agricultural activity that does not expand the area being used for the agricultural activity is not a redevelopment or modification. "Agricultural activity," as used in this subsection (3)(c), has the same meaning as defined in RCW [90.58.065](http://app.leg.wa.gov/rcw/default.aspx?cite=90.58.065).  
  
     (d) Upon department of ecology approval of a shoreline master program or critical area segment of a shoreline master program, critical areas within shorelines of the state are protected under chapter [90.58](http://app.leg.wa.gov/rcw/default.aspx?cite=90.58) RCW and are not subject to the procedural and substantive requirements of this chapter, except as provided in subsection (6) of this section. Nothing in chapter 321, Laws of 2003 or chapter 107, Laws of 2010 is intended to affect whether or to what extent agricultural activities, as defined in RCW [90.58.065](http://app.leg.wa.gov/rcw/default.aspx?cite=90.58.065), are subject to chapter [36.70A](http://app.leg.wa.gov/rcw/default.aspx?cite=36.70A) RCW.  
  
     (e) The provisions of RCW [36.70A.172](http://app.leg.wa.gov/rcw/default.aspx?cite=36.70A.172) shall not apply to the adoption or subsequent amendment of a local government's shoreline master program and shall not be used to determine compliance of a local government's shoreline master program with chapter [90.58](http://app.leg.wa.gov/rcw/default.aspx?cite=90.58) RCW and applicable guidelines. Nothing in this section, however, is intended to limit or change the quality of information to be applied in protecting critical areas within shorelines of the state, as required by chapter [90.58](http://app.leg.wa.gov/rcw/default.aspx?cite=90.58) RCW and applicable guidelines.  
  
     (4) Shoreline master programs shall provide a level of protection to critical areas located within shorelines of the state that assures no net loss of shoreline ecological functions necessary to sustain shoreline natural resources as defined by department of ecology guidelines adopted pursuant to RCW [90.58.060](http://app.leg.wa.gov/rcw/default.aspx?cite=90.58.060).  
  
     (5) Shorelines of the state shall not be considered critical areas under this chapter except to the extent that specific areas located within shorelines of the state qualify for critical area designation based on the definition of critical areas provided by RCW [36.70A.030](http://app.leg.wa.gov/rcw/default.aspx?cite=36.70A.030)(5) and have been designated as such by a local government pursuant to RCW [36.70A.060](http://app.leg.wa.gov/rcw/default.aspx?cite=36.70A.060)(2).  
  
     (6) If a local jurisdiction's master program does not include land necessary for buffers for critical areas that occur within shorelines of the state, as authorized by \*RCW [90.58.030](http://app.leg.wa.gov/rcw/default.aspx?cite=90.58.030)(2)(f), then the local jurisdiction shall continue to regulate those critical areas and their required buffers pursuant to RCW [36.70A.060](http://app.leg.wa.gov/rcw/default.aspx?cite=36.70A.060)(2).

[2010 c 107 § 2; 2003 c 321 § 5; 1995 c 347 § 104.]