

GMA, Minimum Guidelines, and Criteria for Best Available Science

A. The basics: Critical Area rules and laws overview

1. Definition:

Critical areas include the following areas and ecosystems: (a) Wetlands; (b) areas with the critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas, and geologically hazardous areas. RCW 36.70A.030(5). The GMA defines geologically hazardous areas, and wetlands. RCW 36.70A.030(9), (21).

The Legislature amended the definition of wetlands in 1995 to exclude wetlands “created after July 1, 1990 that were unintentionally created as a result of the construction of a road, street or highway.”

The Legislature amended the definition of critical areas in 2012 to make clear that fish and wildlife habitat conservation areas do not include “such artificial features or constructs as irrigation delivery systems, irrigation infrastructure, irrigation canals, or drainage ditches that lie within the boundaries of and are maintained by a port district or an irrigation district or company.”

The Minimum Guidelines add definitions of fish and wildlife habitat conservation areas (FWHCAs), habitats of local importance, frequently flooded areas, landslide hazard areas, and species of local importance. *See* WAC 365-190-030(6), (8) , (10), and (19).

WAC 365–190–130(2) provides an expansive definition of FWHCAs advising that the following “must” be considered for classification and designation: areas where endangered, threatened, and sensitive species (ETS) have a primary association; habitats and species of local importance, as determined locally; commercial and recreational shellfish areas; kelp and eelgrass beds; herring, smelt, and other forage fish spawning areas; naturally occurring ponds under 20 acres and their submerged aquatic beds that provide fish or wildlife habitat; waters of the state; lakes, ponds, streams and rivers planted with game fish by a government or tribal entity; and state natural area preserves, natural resource conservation areas, and state wildlife areas.

2. Designation:

(a) On or before September 1, 1991, each county, and each city, shall designate where appropriate:... (d) Critical areas. RCW 36.70A.170.

(b) In making the designations required by this section, counties and cities shall consider the guidelines established pursuant to RCW 36.70A.050 (the Minimum Guidelines - Chapter 365 – 190 WAC).

3. Protection:

Each county and city shall adopt development regulations that **protect** critical areas that are required to be designated under RCW 36.70A.170. RCW 36.70A.060(2).

4. Best Available Science:

In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the **functions and values** of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries. RCW 36.70A.172(1).

Chapter 365 – 195 WAC contains criteria for determining which information is the “best available science” (BAS) and criteria for obtaining BAS, including BAS in developing policies and regulations, addressing inadequate scientific information, and demonstrating “special consideration” has been given to consideration or protection measures necessary to preserve or enhance anadromous fisheries.

A few key provisions are cited below.

WAC 365–196– 830(4)

Development regulations may not allow a net loss of the functions and values of the ecosystem that includes the impacted or lost critical areas.

WAC 365–195– 915(1):

To demonstrate that the best available science has been included in the development of critical areas policies and regulations, counties and cities should address each of the following **on the record**:

- (a) The specific policies and development regulations adopted to protect the functions and values of the critical areas at issue.
- (b) The relevant sources of best available scientific information included in the decision–making.
- (c) Any nonscientific information - including legal, social, cultural, economic, and political information - used as a basis for critical area policies and regulations that depart from recommendations derived from the best available science. A county or city departing from science – based recommendations should:
 - (i) Identify the information in the record that supports its decision to depart from science – based recommendations;
 - (ii) Explain its rationale for departing from science – based recommendations; and
 - (iii) Identify potential risks to the functions and values of the critical area or areas at issue in any additional measures chosen to limit such risks. State Environmental Policy Act (SEPA) review often provides an opportunity to establish and publish the record of this assessment.

a. Inclusion of Best Available Science:

- Evidence of the Best Available Science must be included in the record and must be considered substantively in the development of critical areas policies and regulations. *Honesty in Environmental Analysis & Legislation*

v. Central Puget Sound Growth Management Hearings Board, 96 Wn. App. 522, 532 (1999).

- A county must rely on scientific information and must analyze that information especially if disregarding scientific recommendations provided by agencies and tribes. *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 836 – 837 (2005).
- Although BAS does not require the use of a particular methodology, at a minimum BAS requires the use of a scientific methodology. *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 836 – 837 (2005).
- Analysis of BAS requires a reasoned process: “Furthermore, the steps taken in analyzing the information do not constitute a reasoned process. The county directs us to no evidence of its evaluating the science produced by Dr. McKnight. Nor is there sufficient evidence of the county’s comparing science provided by Doctor McKnight to any other resources, such as science available from state or federal agencies or the Colville Tribe.” *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 836 – 837 (2005).

b. Departure from Best Available Science:

- A county need not follow Best Available Science if it includes sufficient reasoned justification. *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 430-31 (2007); *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 837–38 (2005); WAC 365–195– 915(1)(c)(i) – (iii).
- Departure from BAS is not reasoned without explanation and justification of another priority. *Whidbey Envtl. Action v. Island Cty.*, 122 Wn. App. 156, 173, 93 P.3d 885, 894 (2004) (“If a local government elects to adopt a critical area requirement that is outside the range that BAS alone would support, the local agency must provide findings explaining the reasons for its departure from BAS and identifying the other goals of GMA which it is implementing by making such a choice”); *See also Yakima County v. E. Washington Growth Management Hearings Board*, 168 Wn. App. 680, 693, 279 P.3d 434 (2012) (“[S]ince the County did not believe it was deviating from [best available science, it made knows specific findings]’ to explain his departure from the scientific studies or to identify other goals of the GMA it was implementing by making such a choice.”)

B. Recent Cases

1. Protection of Critical Areas—A new emphasis on ecosystems

In 2010, the Department of Commerce added the following definition of Fish and Wildlife Habitation Conservation Areas (“FWHCAs”) to WAC 395-190-030(6):

“Fish and wildlife habitat conservation areas” are areas that serve a critical role in sustaining needed habitats and species for **the functional integrity of the ecosystem**, and which, if altered, may reduce the likelihood that the species will persist over the long term. These areas may include, but are not limited to, rare or vulnerable ecological systems, communities, and

habitat or habitat elements including seasonal ranges, breeding habitat, winter range, and movement corridors; and areas with high relative population density or species richness. Counties and cities may also designate locally important habitats and species.

This emphasis on ecosystems has been picked up in the Growth Management Board cases and in court cases since 2010, as can be found in the most recent critical area cases. In the first case we learn that a county must designate and protect habitat areas and ecosystems regardless of whether other entities or regulations protect them too.

- *Whidbey Environmental Action Network v. Island County*, 14-2-0009 (Final Decision and Order June 24, 2015)

WAC 365–190–130(2) enumerates the areas that a local government should consider for classification and designation as FWHCAs. WAC 365–190–130(2)(h) identifies state natural area preserves (NAPs). NAPs are selected, acquired, managed and protected by the Department of Natural Resources. RCW 79.70.030. Island County designated the one NAP in the County as an FWHCA. It did not require buffers adjacent to NAPs as “[t]hese were assumed to encompass the land required for species preservation.”

In *Whidbey Environmental Action Network v. Island County*, WEAN asserted that the County failed to protect the NAP and failed to include BAS, arguing the purpose of an NAP is much broader than species protection and use of controlled fire as a management tool will require that adjacent development provide a buffer from the NAP. Emphasizing the use of the term “ecosystems” in the definition of critical areas, the Board ruled that the GMA requires the County to protect the functions and values of Critical Area ecosystems. It turned to scholarly publications to define “ecosystems” and found that the County failed to protect the NAP’s habitat or the functional integrity of the ecosystem.

WEAN also challenged the County’s decision not to designate Westside Prairie, Oak Woodland and Herbaceous Bald habitats as FWHCAs. The County apparently responded that plants are not wildlife and that the GMA requires protection of flora only if there are endangered, threatened, or sensitive fish or wildlife species in the County with a primary association with those flora. Again emphasizing the importance of ecosystems, the Board made short shrift of these arguments:

Plants provide essential ecosystem services and functions. If plants are not protected then there will be a net loss of ecosystem functions and values.

PRACTICE TIP: Ecosystems are not limited to the area’s fauna and include all of the interconnected organisms in a particular area.

Island County chose not to designate prairies as habitats and species of local importance, finding that such a designation was not warranted at that time because large areas of Island County’s remaining native prairies are owned by public entities or other private organizations and managed for conservation purposes and are therefore not in any immediate risk of being lost or destroyed. The Board held that:

It is the County’s obligation to designate and protect habitat areas and ecosystems; the protection afforded by other entities or regulations is irrelevant.

Another recent, albeit long-running dispute informs us that a City must protect the water within its critical ecosystems regardless if the water quality has degraded before it

reaches the City's borders and that any ordinance that significantly weakens ecosystem protections may be treated as a critical area ordinance.

- *Aagard v. City of Bothell*, 15-3-0001 (Final Decision and Order July 21, 2015):

The debate in *Aagard* over the land use policies affecting 220 acres within Bothell's City limits has involved, thus far, eight Growth Board decisions. The property, part of the North Creek Basin, has significant hydrologic function and fish habitat. The debate has served as an illustration of the tension between development to meet forecast growth and preservation of critical areas and ecosystems. Although 98% of the North Creek basin is within the UGA of Snohomish and King County, Bothell's BAS Report noted that protection of its streams, tributaries, reaches, and wetlands "should be a high priority for Bothell's critical area relations."

The City's 2004 Comp Plan Update designated the North Creek Protection Area. The planning commission recommended a special low impact development overlay (LID Overlay) designation to apply to all parcels containing a critical area or associated buffer. The council chose to assign low-density residential zoning instead; approximately one home per acre to over 350 acres. Development interests challenged this Comp Plan Amendment, arguing that the net buildable area was inadequate to meet the City's urban density requirements. The parties debated whether urban residential density should be calculated on a gross acreage or a net acreage, but the Board noted that the Act does not require a particular methodology and the City could deduct unbuildable acres from the gross land area, equate net acreage with buildable acreage, and arrive at a net density of 4 dwelling units per acre (du/acre). The Board decided that it was not clearly erroneous for the City to instead choose minimum lot sizes to protect the unique natural resource of the North Creek system. I

In 2006, a new study (the Parametrix Study) found that creeks within the North Creek Projection Area were likely important in supporting spawning runs of coho salmon and steelhead. The city enacted new ordinances that allowed smaller minimum lot sizes but set ratios for minimum forest cover and maximum effective impervious surface area (Effective Impervious Area) and committed the City to develop Low Impact Development polices and designate wildlife corridors..

In 2008, developers still wanted higher density. The city chose to implement LID regulations to limit development likely to injure the North Creek Protection Area, but concerned activists launched a challenge of its enactment over a lot modification provisions that allowed the Community Development Director to reduce minimum lot size by up to 50% for low impact development. The Board upheld the City's plan.

Developers complained that the LID overlay was too complicated and complex, and that in conjunction to the recession had severely limited development. In 2014, Bothell passed Ordinance 2163, amending its Comp Plan and simplifying its regulations. *Aagard* challenged the ordinance, arguing that the City had gutted the essential regulations necessary to ensure preservation of the North Creek Protection Area. This Growth Board panel was particularly troubled by the City's contention that the amendments to the LID Overlay do not amend or lessen the City's critical area regulations in any manner and are not required to consider best available science. The Board found that regardless of whether the CAO itself was being amended, where the amendments significantly weakened ecosystem protections for actual critical areas they are considered part of the CAO (and, thus, require inclusion of BAS).

The Growth Board also noted that City has the obligation to protect the critical ecosystems within its borders even if water quality degradations exists before the water reaches the City limits. The Growth Board decision appeared to shift the burden of proof; noting that there was no evidence that the special hydrology of the subarea would be protected or that the conditions necessary for salmon spawning will be preserved, rather than placing the burden on the petitioners to prove that the Effective Impervious Areas development restriction removal would cause issues.

The Board noted that both the Bothell BAS Report and the Parametrix Study indicated that the Fitzgerald and Canyon Creek Subareas required additional measures to protect the hydrologic cycle and to ensure no net loss of ecosystems functions and values. The Board found that the petitioners demonstrated that Ordinance 2163 reduced or eliminated protections of Critical Areas, resulting in a net loss of ecosystem function and values, contravened Bothell's CAO, and frustrated the CAO purposes and polices.

PRACTICE TIP: Be aware that any plan, code amendment, or ordinance that weakens ecosystem protections in Critical Areas may be treated as a Critical Area Ordinance and subject to the requirement to include BAS.

Note that the job of the Growth Board is not to determine if there is a better way to comply with the GMA, but instead whether the challenge regulations comply. RCW 36.70A.280(1)(a) (the legislature defined and limited the jurisdiction of the Growth Board to those questions of a state agency, county, or city planning under this chapter is not in compliance with the GMA); RCW 36.70A.320(2) (the burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter); *see also Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 430, 166 P.3d 1198 (2007) (refusing to require enhancement of damaged riparian area and holding “Without firm instruction from the legislature to require enhancement of critical areas, we will not impose such a duty. Therefore, to the extent that the Tribe argues that the GMA places a higher burden upon the county than the duty to prevent new harm to critical areas, we disagree. The “no harm” standard, in short, protects critical areas by maintaining existing conditions.”)

- *Concerned Friends of Ferry County v. Ferry County*, Case No. 97-1-00018c, Order Finding Continuing Noncompliance [Fish and Wildlife Habitat Conservation Areas]¹

Petitioners asserted that Ferry County's regulations did not protect habitat for Common Loon. The County prohibited new structures within 500 feet of Loon breeding sites and nursery pools. But it did not enact timing restrictions for disturbance of nest sites and for buffers around brood – rearing areas (nursery pools) as recommended by WDFW's management recommendations. The Board found that the county erred in failing to consider these recommendations to protect Common Loon habitat.

2. Inclusion of BAS

- *Concerned Friends of Ferry County v. Ferry County*, 97-1-0018c (Order Finding Continuing Noncompliance [Fish and Wildlife Habitat Conservation Areas] February 5, 2014).

¹ Ferry County is a long-running dispute since 1997, with over 14 Growth Board Orders find Ferry County Non-Complaint with the GMA for failure to designate, protect, and include BAS in its FWHCAs; these orders were upheld and affirmed by the Superior Court, the Court of Appeals, and the Washington Supreme Court.

Under WAC 365–190–130(2), the County must classify and designate those areas where Endangered, Threatened, Sensitive (ETS) species have a primary association. The Board cited Court of Appeals and Supreme Court decisions holding that the GMA directs counties to determine what lands are primarily associated with listed species, and then to adopt regulations protecting those lands. *Stevens County v. Futurewise*, 146 Wn. App. 512 (2008), *rev. denied*, *Stevens County Futurewise*, 165 Wn.2d 1038 (2009); *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 837 – 839 (2005).

In the 2014 Growth Board case, Petitioners challenged the County’s election not to designate habitat for Bull Trout in part because there is no federally – designated “critical habitat” for the species in the County. The Board held that federal Endangered Species Act has different standards for designating habitat than the GMA. Thus, the absence of federally – designated critical habitat is not a determinative fact for purposes of a County’s GMA designation of areas where endangered, threatened, or sensitive species have a “primary association.” It went on to find substantial evidence in the record demonstrating that Bull Trout is present in Ferry County and has a primary association with certain areas of the County. Accordingly, the County’s failure to designate any Bull Trout habitat was not supported by substantial evidence in the record and represented a departure from BAS without any reasoned justification.

The Board found that Petitioners failed to come forward with evidence that the County failed to include BAS in designating habitat for the Bald Eagle, Peregrine Falcon, and Fisher.

- *Friends of the San Juans et al v. San Juan County*, 13-2-0012 (Order Finding Compliance and Continuing Non-Compliance August 20, 2014)

This case also addressed the requirement to “include” BAS. It found that the County’s wetlands regulations failed to consider science showing that wetland impacts from soil disturbance and vegetation removal when digging, trenching, and compacting the soil when constructing or maintaining utility lines are significant and difficult to mitigate. It further found that the county had not required adequate compensatory mitigation for long – term harm to wetlands from ground – disturbing utility line construction.²

- In several cases the Board declined to find noncompliance based on poorly crafted and/or confusing language. *Whidbey Environmental Action Network v. Island County*, 14-2-0009 (Final Decision and Order June 24, 2015); *Friends of the San Juans et al v. San Juan County*, 13-2-0012 (Order Finding Compliance and Continuing Non-Compliance August 20, 2014).
- *Lake Burien Neighborhood v. City of Burien*, 13-3-0012 (Final Decision and order June 16, 2014).

The requirement to include BAS does not apply to the incorporation of a critical areas ordinance into a Shoreline Master Program (SMP) or reopen the critical areas ordinance to review. The SMP is reviewed for compliance with the Shorelines Management Act and Guidelines. In *dicta* the Board observed:

[E]ven if BAS was at issue, more would be required for Petitioners to prevail than merely questioning the validity of the Department’s or City’s use of science. It is not enough to merely assert that one expert disagreed with another or that

² In response, the County required mitigation of any adverse impacts. *See*, May 14, 2015 Order Finding Compliance.

petitioners believed the science to be somehow flawed. To meet the “clearly erroneous standard” a petitioner must show that the best available science was not included in developing policies and development regulations to protect the functions and values of critical areas, e. g. by showing that scientific information was not used or by showing that better scientific information was available to the agency and disregarded. (Emphasis in original).

3. Departure from BAS

- *Friends of the San Juans et al v. San Juan County* 13-2-0012 (Order Finding Compliance and Continuing Non-Compliance August 20, 2014).³

This case considered San Juan County’s departure from BAS on 3 topics: allowance of some on-site sewage system components in wetlands and FWHCAs and their buffers; water quality buffer averaging in 2, small non-municipal UGAs (Lopez Village and Eastsound); and modification of land-use tables regarding agriculture. Noting that no appellate court has defined the term “reasoned justification,” the Growth Board ruled:

[A] “reasoned justification” should include a consideration of the science and the record together with predominantly scientific, technical, or legal factors that support a departure from Best Available Science recommendations. Social, cultural, or political factors should not predominate over the scientific, technical, and legal factors as a rationale for departing from science – based recommendations.

In a footnote, the Board noted that WAC 365–195– 915(1)(c) suggests the possibility of non-scientific factors being used as a basis for critical area policies and regulations that depart from science-based recommendations:

[H]owever, this regulation does not indicate how nonscientific factors should be weighed and balanced with legal and technical factors. It must be borne in mind that the fundamental standard is the statutory requirement to include Best Available Science and developing regulations that “protect” Critical Areas. If non—scientific, social, or political factors could be used as the predominant rationale for departing from science, then the Legislature’s policy objective to promote science – based land-use decisions would be substantially undermined or unrealized. (Emphasis in original).

The County provided 11 findings explaining its rationale for allowing certain sewage lines (sleeved and water-tight lines) in wetlands and wetland buffers, including:

- 75% of the county’s population relies on on – site septic systems.
- Sometimes there is no practicable alternative deciding it on – site sewage system line in a wetland [or its] buffer.
- Soil disturbance and vegetation removal associated with the installation are usually of short duration and limited to small areas that can be quickly revegetated.
- On-site sewage systems are regulated by San Juan County Health & Community Services under statewide standards adopted in WAC 246 – 272 A. These

³ This case was the consolidation of 11 petitions challenging a series of ordinances San Juan County adopted in response to a 2013 FDO finding noncompliance.

regulations protect public health by minimizing both the potential for exposure to sewage from on-site sewage systems and the adverse effects of discharges from on-site sewage systems on ground and surface waters.

The Board (with Member Roehl dissenting) found none of these bases to be reasoned. The Board found that the County's reliance on the State Board of Health regulations was not reasoned because those health regulations do not seek to broadly protect wetland functions and values but rather focus more narrowly on human health. With regard to the latter justification it held "there is no science – based reasoning supporting the 'no practicable alternative' provision." It found the rationale that construction impacts and soil disturbance are usually of short duration can be mitigated to be contrary to the science which indicates that degradation of ecological functions can be "longer lasting" and soil disturbance/trenching can significantly alter the water regime and native vegetation by introducing invasive species.⁴

The Board then noted:

This analysis should not be misinterpreted as absolutely precluding any activity that BAS indicates would negatively impact any critical area – the GMA does not prescribe such an absolute outcome. Rather, the GMA prescribes the inclusion of Best Available Science in protecting against the degradation of ecological functions and values. A county could potentially allow activities with negative impacts in critical areas if science – based mitigation adequately protects against the loss of ecological functions and values, or if there is a reasoned justification for departing from BAS while still protecting the critical area or if a reasonable use exception is required to prevent a constitutional taking of property.

In his dissent, Board member Roehl cited detailed findings the County made regarding the potential risks to the functions and values of critical areas and the requirements that limit potential risk to critical area functions and values. He found that the rationale for departure from BAS and the risks and limitations to the critical area could all be found regarding the sewage disposal systems in wetlands, and disagreed that the sole rationale for BAS departure relied upon Department of Health regulations. He concluded that the majority opinion ignored the allowance of departure from BAS.

A similar challenge failed because the challenger was not able to come forward with scientific evidence of harm to FWHCA functions and values. San Juan County's regulations allowed wetland and FWHCA buffer averaging in Lopez Village and Eastsound. The County offered the following rationales for departure from BAS :

- Public opinion regarding the negative impact of large buffers on the community character of these 2 areas;
- Buffer averaging would accommodate growth within these 2 areas, contributing to the achievement of other GMA goals
- County and individual utility service providers have and are continuing to expand water, wastewater and stormwater infrastructure in those areas.

⁴ In response, the County amended the pertinent code provision to prohibit sleeved and watertight sewer lines within wetlands. *See*, May 14, 2015 Order Finding Compliance.

The Board held:

San Juan County is made up entirely of islands, has a very small population, only one incorporated municipality and only 2, small non-municipal UGAs. In this particular instance, based on the unique nature of the County and having both explained his departure and desire to further the GMA urban growth and sprawl reduction goals, the Board finds San Juan County has provided a reasoned justification for departure from BAS.

The Board upheld the County's departure from BAS in classifying moderate – intensity agriculture as a low intensity use and hobby farms as a moderate intensity use rather than the moderate and high intensity uses, respectively, assigned in the Department of Ecology's Land Use Intensity tables from *Wetlands Volume 2*. The county pointed to the scale and significance of agriculture:

Agriculture in San Juan County is a vital part of our heritage and an integral part of the county's landscape, culture and economy. The county's quality of life depends on the successful integration of sustainable agriculture and ecological health. Ecology's land use intensity table was modified because the scale of agriculture, especially hobby farms, orchards, and hay fields on the Islands are generally small family farm operations....

The Board took notice of the statement in *Wetlands Volume 2* that:

Local governments should consider the types of agriculture being practiced in their watersheds and craft their critical areas protection programs to address impacts from agriculture accordingly.

4. Illustration of Administrative Discretion

- *WEAN v. Island County*, 14-2-0009 (Final Decision and Order)

Island County's regulations provided an exemption for existing and ongoing agricultural activities which provided, in pertinent part:

And operation ceases to be on – going when the area on which it is conducted is converted to a nonagricultural use or has lain idle for more than five (5) years... *The five-year period ... may be extended by an appropriately limited and reasonable amount of time in order to account for unavoidable and unintentional events which make active agricultural use impossible.* Such events may include the death of an agricultural operator, difficulty in selling the agricultural property, or securing a lease with an agricultural operator.

WEAN challenged ordinance, arguing that it is vague and potentially unlimited, thus failing to protect critical areas and ignoring BAS. The County argued that the provision balanced its duty to maintain the agricultural industry and conserve agricultural lands with its obligation to protect critical areas.

The Board found a violation of RCW 36.70A.060 due to the County's failure to establish clear standards for the exercise of administrative discretion regarding the extension of time for continuing an exemption:

The Board's concern is the lack of adequate standards to guide a County administrator in determining what constitutes an "*appropriately limited and*

reasonable amount of time.” The County has the obligation to protect critical areas and the absence of clear standards could lead to the resumption of agricultural activities, with potential negative impacts on the functions and values of FWHCAs, following a decade or more of no agricultural activity. The Board has on numerous occasions stressed the need to provide administrative guidance.

PRACTICE TIP: Regulations should provide specific administrative guidance if allowing for administrative discretion.

5. Miscellaneous

- *Common Sense Alliance v. Growth Mgmt. Hrgs Bd*, 2015 Wash App. LEXIS 1908 (2015).

This case involves San Juan County’s 2012 critical areas ordinance updates. Friends of the San Juans raised 52 issues for review, contending the four ordinances at issue did not go far enough to protect critical areas, and those with an opposing view raised 27 issues, contending the ordinances went too far to protect critical areas. In San Juan Superior Court, the Alliance brought six issues and Friends brought seven. The Court upheld the Board on each issue. The arguments on appeal focused mainly on San Juan’s habitat conservation ordinance. In this unpublished case, Division One reaffirmed the propriety of identify critical areas during the permitting process rather than specifically identifying them on a map. *Id.* at *23-*24 (noting that all shorelines are not per se critical areas). In addition, all potential critical habitat areas need not be specifically evaluated and mapped out in advance of development activity. “The Act does not require that a critical area ordinance take a parcel-by-parcel approach.”

- *Protect the Peninsula’s Future v. Growth Mgmt. Hrgs Bd*, 185 Wn. App. 959 (2015)

This case addressed the voluntary stewardship program (VSP) statutes. PPF brought a compliance action against Clallam County for failure to adopt new critical areas regulations that comply with the GMA. Part of Clallam County’s critical area regulations exempted preexisting agricultural operations from the critical areas protection requirements.

PPF challenged the exemption, and the Board found that the agricultural exception did not comply with the GMA. Clallam County amended its regulation in 2001, limiting the agricultural exemption to preexisting agricultural uses on land classified as farm and agricultural land and required exempt agricultural operations to utilize best management practices. PPF again petitioned the Board for review. The Board held that the amended exemption was invalid. On appeal, the Court agreed that Clallam County could not exempt all preexisting agricultural uses from critical areas regulations and also clarified that the exemption need not be limited to designated agricultural resource lands, remanding to the Board for further proceedings.

The 2007 moratorium on alteration of GMA critical area regulations was then enacted, and stayed in effect until 2011, when the legislature amended the GMA to add the VSP. RCW 36.70A.735(1)(b) allows counties that have elected to participate in the VSP but are unable to implement a VSP work plan to adopt the critical areas regulations of one of four counties, one of which is Clallam, to achieve compliance with VSP. Clallam argued that the legislature implicitly validated Clallam’s critical areas regulations by incorporating them into the 2011 GMA amendments that establish the VSP.

The Court found that there were two pathways to comply with GMA's critical areas protection requirements: "(1) voluntary stewardship practices governed by the VSP and (2) traditional critical areas regulations adopted under RCW 36.70A.060."

The Court reversed the Board and remanded for a determination of whether Clallam County's critical areas regulations complied with the GMA: "The statutory scheme makes it clear that counties that opt in to the VSP can lawfully adopt Clallam's critical areas regulations, but counties electing not to participate in the VSP—including Clallam itself—cannot."