

Critical Areas Case Law

Review of Recent Growth Management
Hearings Board Decisions



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OVERVIEW

- The Basics
- BAS as a reasoned process
- Departure from BAS
- Indirect Amendment of CAO
- Reliance on other regulations
- Balancing GMA goals
- Focus on Ecosystems
- Exercise of administrative discretion
- Voluntary Stewardship Programs

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THE BASICS

- Wetlands, critical aquifer recharge areas, FWHCAs, frequently flooded areas and GHAs
- All cities and counties must adopt regulations that protect critical areas
- Include BAS
- Continuing review

BAS REQUIREMENTS AND GUIDANCE

- RCW 36.70A.172
- WAC 365-195-900 through -925

BAS INTERPRETATION—A “REASONED PROCESS”

- Reliance on scientific information
- Use of a scientific methodology
- Analysis of that information
- Considered substantively
- Included in the record



DEPARTURE FROM BAS

- Provide a reasoned justification for departure
- If a local government disagree with/ignores scientific recommendations/resources provided by state agencies or Indian tribes, it must develop and obtain valid scientific information.



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DEPARTURE FROM BAS

WEAN v. Island County

- County chose not to designate Western Toad as a species of local importance
- *Rationale 1: Only a candidate for listing by WDFW*
 - **Finding: Priory habitats and species include candidate species.**
- *Rationale 2: Not common to Island County*
 - **Finding: That fact only underscores the need to designate and protect**
- Outcome: Not reasoned



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DEPARTURE FROM BAS

Friends of the San Juans v. San Juan County

Issue: Allowance of sleeved and water-tight sewage lines

- Findings:
 - 75% of the county's population relies on septic systems
 - OSS are regulated by County Health and Community Services (HCS)
 - OSS are inspected, system upgrades are often required prior to building permits or property transfer
 - 100' separation of drainfields from surface waters; 50' Separation of tanks must from surface waters.
 - HCS designates sensitive areas that are subject to increased requirements and which require annual inspections
 - HCS helps to protect critical areas through regulation, notification, education and financial assistance
- Outcome:

The forgoing are not reasoned justifications for departure from BAS because they rely on human health standards which do not protect ecological functions and values of wetlands as required by the GMA

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DEPARTURE FROM BAS

Friends of the San Juans v. San Juan County

- Finding:
 - Sometimes there is no practicable alternative to siting an onsite sewage system line in a wetland FWHCA, or their buffer
- Outcome:

Not reasoned because there is no science-based reasoning supporting “no practicable alternative” and no standards for ascertaining this standard



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DEPARTURE FROM BAS

Friends of the San Juans v. San Juan County

- Findings:
 - Mitigation requirements are designed and required to protect critical areas from potential adverse impacts
 - Soil disturbance and vegetation removal during installation are usually of short duration and limited to small areas
 - State law requires HCS to propose Marine Recovery Areas where existing OSS are a significant factor contributing to concerns associated with threatened or downgraded shellfish growing areas

- Outcome:

Not reasoned justification when science 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

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DEPARTURE FROM BAS

Friends of the San Juans v. San Juan County

- Holding:

The Board finds the wetlands mitigation provision to be incoherent and internally inconsistent because the BAS already establishes that construction, operation, and maintenance of sewer lines in wetlands will degrade wetland functions and values. The science-based approach to preventing a loss of functions and values is to disallow sewer lines in wetlands
- Dissent:

“Contrary to its assertion, the result of the majority’s analysis would be to preclude any action that BAS indicates would negatively impact any critical area. It ignores the allowance of departure from BAS . . .”



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DEPARTURE FROM BAS



Concerned Friends v. Ferry County

Issue: Designation and Protection of Bull Trout

- *Rationale: County is not part of the federally designated Bull Trout Recovery area; Bull Trout have no areas of primary association*
- Findings:
 - Federal Endangered Species Act has different standards for designating habitat than GMA; lack of federally-designated critical habitat not a determinative fact for GMA designation of areas where ETS species have a primary association
 - There is substantial evidence that Bull Trout are present in Ferry County and a primary association with certain areas of the County
- Outcome:

County's failure to designate any Bull Trout habitat was not supported by substantial evidence and thus is a departure from BAS without any reasoned justification.

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DEPARTURE FROM BAS



Concerned Friends v. Ferry County

Issue: Failure to Consider all WDFW Recommendations

- Findings:
 - County designated active Common Loon breeding sites and nursery pools as FWHCAs and provided a 500' buffer
 - County followed WDFW's scientific management recommendations for protecting known nest and nursery sites and requiring buffer
- Outcome
 - Board held it did not consider all WDFW's scientific recommendations when it did not restrict disturbance of nest sites (April to July) and brood-rearing pools (July to September)

The Superior Court affirmed, ruling that the County must "show its work" by including the BAS in the record and considered substantively in the development of critical area regulations. Lack of analysis is not a reasoned justification.

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INDIRECT AMENDMENT OF CAO

Aagard v. City of Bothell

- Issue: Ordinance amended low impact development provisions for
 - Impervious surface coverage
 - Retained forest cover

- Outcome: **Ordinance 2163 eliminates or reduces pre-existing protective standards and therefore fails to protect the functions and values of Critical Area Ecosystem, contrary to Best Available Science in the record. No reasoned justification is provided for departure from Best Available Science**



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INDIRECT AMENDMENT OF CAO

Aagard v. City of Bothell



Trap for the unwary:

Regulations are considered part of a Critical Area Ordinance whether or not they explicitly amend a critical area ordinance if they significantly weaken ecosystem protection for critical areas. Such amendments require application of BAS.



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RELIANCE ON OTHER REGULATIONS

WEAN v. Island County

- **Western Toad**
 - "It is the County's obligation to designate and protect habitat areas and ecosystems; the protection afforded by other entities or regulations is irrelevant."
- Beaver Dams
- Natural Area Preserve (NAP)

Concerned Friends v. Ferry County

- Bull Trout



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RELIANCE ON OTHER REGULATIONS

WEAN v. Island County

- Western Toad
- **Beaver Dams**
 - Exemption for removal of beaver dams required Hydraulic Project Approval (HPA) from WDFW
 - Board found that dam removal is a problematic exempt activity
 - An exemption provides no notification, review, or permitting
- Natural Area Preserve (NAP)

Concerned Friends v. Ferry County

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

Concerned Friends v. Ferry County

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RELIANCE ON OTHER REGULATIONS

WEAN v. Island County

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Concerned Friends v. Ferry County

- Bull Trout
 - ***Absence of federally-designated critical habitat is not determinative***



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BALANCING GMA GOALS



Aagard v. City of Bothell

No Balancing:

- **“The Board is aware of no statutory authority to support the City’s theory that “balancing” protection of critical areas with the City’s achievement of anticipated development is within its discretion.”**
- **“The GMA prescribes a consideration of multiple goals and directs cities and counties to simultaneously accommodate growth and protect critical areas.”**

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BALANCING GMA GOALS

Friends of the San Juans v. San Juan County

Balancing of goals approved:

- Water quality buffer averaging in UGAs upheld as a reasoned departure
- Board: 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 its 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.

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FOCUS ON ECOSYSTEMS MINIMUM GUIDELINES

The Guidelines were modified in 2010 to add an expanded definition of "Fish and wildlife habitat conservation areas" (FWHCA) that includes "ecosystem"

:

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

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FOCUS ON ECOSYSTEMS

WEAN v. Island County

- GMA requires the County to protect the functions and values of Critical Area ecosystems
- Protection of species found in FWHCAs is not the sole purpose of FWHCAs.
- Not requiring buffers for NAPs based assumption that the NAP included land required for species protection fails to protect the functional integrity of the NAP's ecosystem

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FOCUS ON ECOSYSTEMS

WEAN v. Island County

Ecosystems include flora

- County did not designate Westside Prairie, Oak Woodlands, and Herbaceous bald habitats as FWHCAs
- Argued that plants are not “wildlife”
- Board: Argument misses the larger context of ecosystem protection requirements prescribed by the GMA
- Ecosystems include all of the interconnected organisms in a particular area; ecosystem is not limited to the area's fauna

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ADMINISTRATIVE DISCRETION

WEAN v. Island County

- Exemption for existing and ongoing agricultural activities
- Operation ceases to be on – going when it is conducted is converted to a nonagricultural use or has lain idle for more than 5 years
- The 5 period ... may be extended by an appropriately limited and reasonable amount of time in order to account for events which make active agricultural use impossible.
- **The Board's concern was lack of adequate standards to guide a County administrator in determining what constitutes an appropriately limited and reasonable amount of time.**

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VOLUNTARY STEWARDSHIP PROGRAM

Protect the Peninsula's Future v. Growth Mgmt. Hrgs. Bd (2015)

- 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."**

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Alison Moss helps private residential and commercial developers, contractors, local governments, ports and individuals navigate complex land use and dispute resolution issues throughout the Pacific Northwest. With more than 34 years of experience in land use, she is an active force in advocating for clients in environmental and planning issues throughout the region. Alison's clients appreciate her creative, collaborative solutions fueled by her in-depth industry knowledge, dispute resolution skills, and sense of humor and adventure.

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Virginia was raised on a cattle ranch near Crater Lake National Park and understands both the challenges facing agriculture ventures, and the value of common sense in addressing them. She works with property owners facing regulatory roadblocks in attempts to use their land for recreation or business purposes. From obtaining a dock permit to providing advice on complex land use and environmental regulations, Virginia finds workable solutions by listening to clients and applying her diverse experience in agriculture, technology and litigation.

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