

SAN JUAN COUNTY COUNCIL CAO and SMP WORKSHOP
August 25th 2009

Answers to Questions from the Public (that did not get addressed at the workshop):

Janet Alderton: Since Rocky shorelines are close to an impervious surface, shouldn't setbacks on rocky shores be the greatest?

S. Hale: The amount of setback needed depends on a number of factors including the type of Critical Area present and the type of shoreline. If infiltration of upland runoff and removal of contaminants is to occur in the buffer/ setback area, steep, rocky areas are less effective than areas with a gentle slope, permeable soil and dense vegetation, so additional space may be required. In areas subject to erosion however, additional space may be required to allow for natural erosive processes over the life of the structure.

Dr. Kenneth Brooks: Depends on how you manage the stormwater.

Ecology: That depends. There are a number of variables that come into play. For example, if upland development caused sediment, chemical or other type of potential contaminate that would be carried by run-off, then yes, a rocky surface may require a greater buffer in hopes of removing at least some adverse impacts. The degree of slope may also be a factor. However, if because of the landscape and building design run-off contaminates are not an issue, then a lesser buffer may be needed.

Janet Alderton: Is Dr. Kenneth Brooks' salary partly from oil companies?

Dr. Kenneth Brooks: Dr. Brooks has never received money from any oil company or any company affiliated with oil companies.

Amanda Azous: Given the history of enforcement in SJC and the current projected and future budget shortfalls, how will the Council ensure critical areas and shorelines are adequately protected under any regulatory scenario but especially if a flexible or adaptive management approach to protection is used with performance standards? As a scientist I prefer performance standards but the reality of the costs of such a program make it, in my view, a taxpayers nightmare, and unenforceable in SJC.

Dr. Kenneth Brooks: The county can initiate a watershed monitoring program to provide a "first alert" of exceedances in water quality criteria (see WAC 173-201). When exceedances occur, they are violations of state law and Ecology should then initiate a site-specific study to identify the source of the contaminants. I suspect that a watershed monitoring

project for San Juan County could be initiated through the Conservation District for less than \$100,000.00. Could the county seek grant funds for a pilot program to demonstrate the efficacy of this approach?

The Army Corps of Engineers has advised me on several occasions that 90% of the wetland violations they investigate are reported by neighbors. A performance standard based CAO won't prevent the report of violations by citizens, which appears to be the primary route leading to enforcement.

The US EPA has initiated numerous Stream Keeper, Watershed Watch and Beach Watch programs. There is significant literature available to support these efforts by citizen monitoring groups. This would provide citizens with something positive to do in protecting the environment – rather than demanding that someone else do something (i.e. give up use of their property). As chair of many meetings and efforts to achieve sustainable use of our environment, I often cautioned participants that, “we aren't going to make progress until each of you turn those pointing, accusing, fingers around and ask, what can I do to help, instead of demanding that someone else do something.”

Mike Carlson: (Directed at the San Juan County Council, and hopefully you won't answer as "We have to do what the agencies tell us to be protected in the courts":) Ecology agreed (at the 8-25-09 workshop) with the "Pizzemente" (sp?) study which in essence implies water quality can be protected with much smaller buffers than the suggested present buffer matrix AND coupled with the fact our county is so rural in nature with a lot of reserve habitat in wooded areas that will likely never be totally cleared especially in a large way. How then can we, SAN JUAN COUNTY, justify the suggested buffer regime?

S. Hale: We are not required to protect all habitats and unless it is next to a stream, the shoreline, a wetland or an area with endangered/ threatened/ sensitive species, protection of upland forest would not be required. One habitat type can't be exchanged for another. i.e. you can't protect the functions and values of wetlands or eelgrass beds (where protection is required) by protecting non-wetland forest in another area.

We will need to assess this by taking a comprehensive look (inventory) at the amount of land we have in our "Reserve Bank" as well (i.e. Land Bank, Preservation Trust, Parks, Watersheds (Town of Friday Harbor, Roche Harbor, etc.)) as well as public properties, designated farm land, open space timber plans as well as DFL. An honest assessment of the protected habitat we now have and more accurately that we have expanded just in the last few years will certainly show there is a lot of land that should be credited as a type of "BUFFER CREDIT".

I have another very large concern and I am want to want to know the legality of the following issue: Since we are so strapped for money now I feel we are very

vulnerable to accepting money from state government that has "strings attached" tied to an outcome not welcome here at home. Also studies from special interest groups that have an agenda. More specifically my concern is large about our county receiving its shoreline inventory data from the FOSJ. Do you really think FOSJ would be comfortable with a comprehensive dock impact study from a (hypothetical) "Marine Constructors Association"? If you take money or turn legitimate planning processes that you consider for legislation, i.e. Puget Sound Partnership information, is it morally right and are you sure that you won't create additional liability toward legal expenses?

Friends of the San Juans: Friends of the San Juans performs rigorous, verifiable scientific assessments of the health and extent of species and habitats in the San Juans. Below, you will find an explanation of several of Friends' projects and partners.

Friends of the San Juans Nearshore Habitat Assessments: Since 2000, FSJ has collaborated with relevant state agencies, local governments and citizens to complete multiple shoreline habitat inventories using standard, accepted scientific protocols. Project reports, including detailed methodology discussions, are available for each project on the FSJ website www.sanjuans.org or upon request. Projects document the presence of priority nearshore habitats, including photographs and GPS locations. In addition, the spatial data products (GIS Layers) have been provided to over 175 coastal scientists, planners and managers from local, state, tribal, federal and nongovernmental organizations and are available at no charge upon request. San Juan County, Washington State agencies, Federal agencies and multiple Tribal and conservation organizations all use the nearshore habitat maps produced by FSJ (in collaboration with multiple partners) as best available science and have been doing so for multiple years. FSJ's current Science Director has an interdisciplinary Master's of Science degree (biology, geography and landscape architecture) and 18 years experience in applied conservation, including positions with a wildlife refuge, watershed council's in eastern and western Oregon and a University natural history museum, prior to joining FSJ in 2002. A quick summary of the primary habitat assessments, key partners and research approach are provided below. As noted above, more detailed information on methods is available on the web or upon request.

Forage Fish Spawning Habitat Assessments: In response to the listing of Chinook salmon under the federal endangered species act, state budget cuts and the need for improved information on the location of forage fish spawning activity on San Juan County beaches, Friends of the San Juans, the San Juan County Marine Resources Committee, Friday Harbor Marine Laboratories and the Washington Department of Fish and Wildlife partnered to complete habitat surveys locally. At the start of the project in 2001, then San Juan County Commissioner's directed all County

Department heads to acknowledge the San Juan County Forage Fish Spawning Habitat Assessment Project results as best available science and to apply results in their management decisions. In addition, the Town of Friday Harbor provided monetary support to include town beaches into the county-wide survey. State Department of Fish and Wildlife protocol (field gravel sample collection; GPS point, photo, and field form recording; and lab analysis) were used and WDFW fisheries biologist and forage fish expert Dan Penttila (30 years experience on this topic in Washington State) trained FSJ biologists, conducted quality assurance protocols (e.g. all positive samples were analyzed by WDFW, 25% of negative samples also analyzed by WDFW) throughout the project and reviewed final reports and maps prior to distribution. Field data was collected 2001-2003; final report and maps were distributed in February 2004.

Outer-line of Eelgrass Beds: Georeferenced underwater video of the deep water edge of San Juan County eelgrass beds was collected in the summer of 2003 using Washington Department of Natural Resources (DNR) protocol. Field data was collected by Marine Resource Consultants (MRC) of Port Townsend Washington, the firm that DNR uses for their annual eelgrass surveys around Puget Sound as part of the Puget Sound Ambient Monitoring Program. Oversight of the project, including field work and the uploading of the field data into GIS maps was overseen by a technical team of MRC, DNR, University of Washington and FSJ partners.

Bull Kelp Beds: FSJ partnered with the Washington Department of Natural Resources to map bull kelp beds within the county. Washington State Department of Transportation completed the aerial photography, using DNR flight protocols. Kelp researchers from Friday Harbor Marine Laboratories conducted related shore based studies the same days/times of the aerial flights in accordance with project protocol. Nearshore habitat and photo interpretation experts from the DNR analyzed photo results and developed a digital bull kelp layer. Potential problem areas from the aerial photo interpretation were documented and addressed through boat based follow-up field surveys, conducted by DNR and FSJ researchers.

John Evans: What local data or studies demonstrate that salmon, traveling through County waters between their mainland spawning streams and the open seas, are suffering from islander-caused environmental damage?

S. Hale: If WDFW conducts ongoing studies they may show how populations are reacting to continued growth and development. San Juan County is not involved in tracking forage fish populations.

Dr. Kenneth Brooks: Dr. Brooks strongly recommends that San Juan County residents not accept significant increases in restrictions on the use

of their property in the *absence of a showing of harm*. To that end, it is recommended that the County Council base future changes to the SMP on scientifically rigorous demonstrations of harm by agencies (NMFS, DOE, WDFW) demanding further restrictions.

John Evans: How has the current population level of surf smelt and sand lance been tabulated?

John Evans: What is the current San Juan County population of the forage fish species?

John Evans: What tracking will be done to see if the proposed regulations for bulkheads and development setbacks make any difference to forage fish populations?

John Evans: Why are fishing licenses available from Washington State Fish and Wildlife to net surf smelt as they spawn on beaches?

John Evans: What are the specific biological and chemical profiles of the streams that will be subject to the new buffer widths proposed under the critical area designations?

John Evans: How will we know if the proposed regulations for stream buffers are making any difference to the targeted species of concern listed in the new regulations?

John Evans: Please list the scientific studies and results which prove insect populations, eaten by fish, are more plentiful in a natural "native" plants landscape vs. a landscape that includes non-native plants.

S. Hale: This is a question for the fish and bug experts. Insects often eat a specific plant or plants, and while you might be able to find non-native plants that would be an acceptable alternative, you would have to figure out which insects you have, what they eat and what the alternatives might be for each one. If a property owner wanted to do this they could present a site specific plan with the supporting science.

Dr. Kenneth Brooks: I have several detailed studies describing the prey of juvenile salmon using the *Index of Relative Importance (IRI)*. In the many samples collected, terrestrial insects represented << 1% of the IRI. In one sample, by one author, terrestrials represented 20+ percent of the IRI. Salmon are opportunistic feeders and it is certainly possible that in some instances they will focus on a hatch of terrestrial insects associated with a hatch or an unusual habitat. However, the vast majority of the samples showed that for juvenile salmon, copepods (specifically Harpacticoid copepods) are the primary food source. As the fish grow larger (perhaps 6

to 10 cm total length) they increasingly focus on larger prey including Gammarid amphipods, larvaceans, etc., etc. The bottom line is that, taken as whole, terrestrial insects are a minor food source for salmon in the marine environment.

John Evans: What local science can you reference that clearly demonstrates local species populations birds, fish, animals and plants are unsustainable under the County's existing Critical Area Ordinance.

John Evans: What is the scientific basis for the opinion that "natural" sediment from the mainland rivers and shoreline feeder bluffs is not an environmental concern, but miniscule sedimentation that could originate from a residential home site is?

S. Hale: I am not an expert in this area and hopefully those who are will provide a response. We have several scientific documents (on our CD and the web site) that discuss the effects of fine sediment and changes in the size and quantity of sediment. As I understand it, the natural systems that make up our aquatic Fish and Wildlife Habitat Conservation Areas (shell fish beds, eelgrass beds, forage fish spawning areas) evolved in conjunction with a particular size and amount of sediment. For example, different types of shellfish need different sizes of sand/ gravel. Changes to the size and amount of sediment (either more or less) can have a negative impact on species relying on that habitat. The sediment coming off residential development (including runoff from gravel driveways, parking areas etc.) tends to be fine textured and can have chemical pollutants attached to it. Both the pollutants and the fine particles can cause problems for fish, shellfish, eelgrass, kelp etc.

Dr. Kenneth Brooks: I am unaware of **any study** quantifying the transport of sediment, nutrients, or pesticides (including zinc and copper from gutters and flashings) to aquatic environments associated with low density rural residential development.

John Evans: How have the Federal, State and County buffer width recommendations balanced the diminishing environmental benefit vs. the increased economic or social costs to landowners, of ever-wider buffers?

S. Hale: The State legislature mandated that we "protect" the "functions and values" of Critical Areas. Case law further clarified protection to mean "no net loss" of these areas. Unless and until the State legislature changes this requirement, balancing can only occur after basic protection measures are established.

Ecology: The wetland buffer widths recommended by Ecology are consistent with the legal mandate in RCW 36.70A.172(1) to protect the

functions and values of critical areas based on best available science. The buffer recommendations in *Wetlands in Washington State - Volume 2: Guidance for Protecting and Managing Wetlands* (Publication # 05-06-008, April 2005) represent the middle range of what wetland science shows is necessary to protect functions depending on the quality of the wetland and surrounding land use. While it is true some landowner's use of property will be restricted, it is also true that property values may also increase by protecting wetlands. This is demonstrated by property owners who have chosen to create ponds and wetlands in order to enhance their property. Likewise, the cost of removing contamination from water is often greater than protecting it.

John Evans: What are the water quality standards we are trying to achieve under the draft Critical Area Ordinance?

S. Hale: We are trying to achieve a "no net loss" standard. So for water quality that means developing in a way that does not result in more sediment, pollution, warmer temperatures or more runoff than what currently exists.

Dr. Kenneth Brooks: Washington State defines water quality standards in WAC 173-201 and sediment quality standards in WAC 173-204. These standards include turbidity, fecal coliform bacteria, temperature, dissolved oxygen, metals, many organic contaminants, and nutrients. These are standards that citizens must abide by as they are codified in the Washington Administrative Code. San Juan County does not need to develop its own standards – they already exist.

Ecology: Most of our native fish species, including our native salmonids, are dependent on clean water within a relatively narrow temperature and oxygen range. Buffers are necessary to protect water quality, which they do by removing sediment, nutrients, toxins and pathogens from surface water flowing through the buffer and in many cases by ameliorating microclimate (i.e., shade). The purpose of the CAO is to protect the functions and values of critical areas, which includes the protection of water quality.

John Evans: What are the future specific water quality measurement tracking reports that will be recorded for each of the County's critical area streams and wetlands?

S. Hale: The County does not have the financial resources to monitor all streams and wetlands. Some monitoring is already occurring through other organizations, and some monitoring will be conducted through the Stormwater Utility. The organizations involved in monitoring are currently meeting and working out the details.

Dr. Kenneth Brooks: As part of Jefferson County's CAO deliberations, I worked with our Conservation District to develop a watershed monitoring program. If you are interested, I will send you a copy of that plan.

Ecology: While it is desirable to have water quality data for all of the streams, wetlands, and marine waters in San Juan County, this would be a very costly undertaking; an undertaking not required by the Growth Management Act. It is a better use of the County's limited resources to pass a Critical Areas Ordinance that adequately protects critical areas. That protection should be based on the best available science.

John Evans: What studies have been done and considered, by the State or County, to measure the anticipated economic and social impact to island property owners when the government takes control (and largely eliminates the owners use) of thousands of acres of private property under the Critical Areas Ordinance?

Ecology: The purpose of a CAO is not for the government to take control and eliminate uses, but rather to ensure that as property is developed, critical areas are also protected.

John Evans: Has a "dry run" been done to measure and project the direct cost to the county budget (taxpayers) to administer the complexities of the draft CAO?

John Evans: Why hasn't County draft CAO "considered" the best available science and "balanced" critical area protections with the rest of the Growth Management Act as the law requires.

S. Hale: Staff and the CAO Committee listened to presentations by scientists and reviewed an array of scientific reports on the various species and habitats that must be protected. Balancing with other GMA goals can't occur until we meet the basic legislative mandate to protect Critical Areas.

Kyle Loring: This question does not provide any support for its assertion that critical area protections must be balanced with the rest of the Growth Management Act, or indicate what the author thinks that means. The GMA itself, though, does not propose a balancing of critical area protections. Instead, it mandates that "[e]ach county and city shall adopt development regulations that protect critical areas...." RCW 36.70A.060(2). Likewise, GMA regulations state that "[c]ritical areas should be designated and protected wherever the applicable natural conditions exist, whether within or outside of urban growth areas." WAC 365-195-410(2)(b).

John Evans: Why hasn't the County taken a more holistic planning view toward

“no net loss of habitat functions and values” that would include the value of the Land Bank and Preservation Trust programs?

S. Hale: The existence of other protected lands does not provide a legal basis to allow impacts on natural resources that would not otherwise be allowed. We won't be able to achieve the “no net loss” of habitat standard unless property owners control the impacts of their development site by site and project by project.

Kyle Loring: This question may misunderstand the nature of CAO protections and the no net loss standard. As an initial matter, the no-net-loss standard does not apply to CAO designation or protection pursuant to the Growth Management Act. Chapter 36.70A RCW. Instead, the GMA mandates that cities and counties “protect” critical areas. In addition, although Shoreline Management Act regulations require Shoreline Master Programs to meet the no net loss standard for shorelines of the state, critical areas within the shorelines must receive a level of protection at least equal to those adopted under the GMA. RCW 36.70A.480(4).

To the extent that the no net loss standard applies to non-shoreline CAO protections, it is intended to prevent further degradation of natural resources within the state, including those located on both public and private lands. While San Juan County Land Bank and San Juan Preservation Trust properties that host critical areas may aid that goal directly by limiting degradation on those lands, they do not compensate for lands that continue to be degraded in other critical areas of the state. Thus, as state regulations note, conservation areas are a valuable component of CAO protection. See WAC 365-190-080(5)(c)(viii).

John Evans: Why hasn't the County measured and reported on how much additional cost will fall on the property owner to build a home on land encumbered by a Critical Area designation?

John Evans: Why hasn't the County studied and considered the affect of the CAO on the County's chronic affordable housing problem and the already designated urban growth areas?

John Evans: Why hasn't the County studied and reported for public discussion, the affect on the value of a legally permitted home that becomes a “non-conforming use” when encumbered by a critical area designation or critical area buffer?

John Evans: Are Federal and State agency bureaucrats in charge of County planning as a top down process, or are our elected officials and the law under GMA the planning authority?

Denny Holm: What will the financial impact be in assessment value and real estate excise tax income if setbacks are increased?

Paul LeBaron: How many counties have 200' setbacks? What is the minimum setback? Why should we have to go more?

S. Hale: There is no “minimum” setback. Whatever setbacks are adopted must be adequate to protect the functions and values of Critical Areas, based on the existing body of science. Among other counties that have gone through this process, those that adopted shoreline buffers of at least 100 feet in rural areas were found to comply with the law. Kitsap County first adopted a 35 foot shoreline buffer, lost on appeal because it wasn't consistent with the body of science, and then adopted a 100 foot buffer for rural areas. That was however before the FEMA bio op.

If we want to tailor our buffers for specific site conditions, I think there is adequate scientific support for buffers as small as 75 feet in some areas. In other areas larger buffers will likely be necessary to protect their functions and values.

Ecology: “Setbacks” are typically just a distance required between a structure and some feature, other structure or property line. “Buffers” are usually intended to provide protection and function (i.e. shading, filtration, food source, habitat) for a critical area such as a wetland, stream or the nearshore. Even areas not considered a “critical area” under the Growth Management Act may need a buffer in order to protect the environment under the Shoreline Management Act.

A number of jurisdictions have wetland buffers of 200-feet or greater. At least two Pacific Coast counties (Pacific and Grays Harbor) have 200-foot marine buffers.

Assuming your reference is to the National Marine Fisheries Service's suggested restriction of development 200-feet from marine shorelines, we are not aware of any jurisdictions that have implemented such a buffer based on that recommendation. However, there are jurisdictions that have utilized a 200-foot marine buffer in special cases such as a Natural shoreline designation through their shoreline master program (Yakima County for one).

Edward A LeCocq, Jr.: GMA requires concentrating development and CAO requires setbacks. What happens to Eastsound, the commercial center of our biggest island?

S. Hale: We have the option of smaller buffers in UGAs - but the associated impacts to the functions and values of wetlands and other

Critical Areas must then be offset with improvements so as to achieve the “no net loss” standard.

Carol McCoy: Have you been able to prove San Juan County is the problem for marine life versus Canada’s disposal of sewage?

Ecology: The “problem” for marine life is at different intensities in various locations which are generally all interconnected.

Carol McCoy: Why are we, I believe, the only county in the state to issue 2 deer hunting permits per person? They are overly protected and now are showing signs of illness.

Michael Nachlinger: Per the U.S. Constitution and more specifically the State of Washington's Constitution, you are required to justly compensate individuals for property you take or make unusable.

1) How will the County fund lawsuits and compensate property owners when the “Best Available Science” the DOE and other bureaucrats from governmental agencies (as opposed to elected officials) are promoting as BAS is proven to not be so?

Kyle Loring: This question does not appear to be related to the takings introduction above (whether the County relies upon BAS in enacting regulations and whether the County has enacted a regulation that constitutes a taking are distinct questions).

With regard to an alleged taking, it is important to understand what the law defines as an uncompensated taking. A legal claim that the government has taken property without just compensation asserts either: (1) that governmental regulations unconstitutionally deprive a landowner of all economically beneficial use of a property; or (2) that factors such as the regulation’s economic effect on the landowner, interference with reasonable investment-backed expectations, and character of the government action combine to cause a taking. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18, 121 S. Ct. 2448, 150 L. Ed.2d 592 (2001). The enactment of an ordinance to protect critical areas may not by itself constitute a taking requiring just compensation. In addition, where an ordinance offers several options that allow use of the property, such as the proposed ordinance’s variance and reasonable use provisions, it likely would withstand a challenge that it effects an unconstitutional taking.

2) As the County is short of funds to pay for existing programs and is asking the voters to support a "Levy Lift," what is your contingency plan for where that money is coming from? Will DOE and the other agencies that are forcing these

“requirements” on the County be required to pony up costs, penalties, etc.?

Kyle Loring: It is not clear what costs and penalties the author believes would apply.

3) When the CAO documentation clearly states "The CAO must be reviewed" and does not say "is required to increase restrictions on property owners," why are you not reviewing claims from DOE, DFW, etc. to find out if there is any basis in fact of the claims that it is necessary to increase restrictions on property owners? Where is the locally obtained BAS?

4) How many people in the governmental agencies (percentage) that are pushing these onerous restrictions on property owners are actually property owners themselves? What is the real agenda?

5) Can you explain the claim of why it is necessary to include 200 foot setbacks of waterfront properties to prevent the runoff of copper and zinc from building sites, presumably in the form of pipe, flashing, and galvanized nails, when almost every boat in the area has a copper bottom paint to kill marine life, and sacrificial zincs fitted to their hulls to prevent erosion of their metallic parts, and are able to put those same boats right at the shoreline?

Dr. Kenneth Brooks: Copper based antifouling paints and sacrificial anodes are significant sources of these metals. Several years ago, I studied sediments at 15 Hubbs Sea World white sea bass delayed release netpens. Most of these small facilities were located in marinas in Southern California. Sediments in these marinas often exceeded Washington State Sediment Quality Criteria for copper and/or zinc. Metal ions are divalent cations, which bind to anionic moieties. In the environment, clay particles typically carry a negative charge (i.e. they are anions because they migrate to a positive electrode). Soil containing at least 5 - 10% clay will bind metals from residential homes within a few feet of the gutters downspout. In sandy soils, the metals migrate further. This is a site specific issue. However, unless the gutter stormwater is piped to an aquatic environment, buffers of 20 to 30 feet are generally sufficient to sequester the metals – at least on relatively low slopes (i.e. <2 to 4%). I do like San Juan County’s discussion of the 200-second residence time to adequately sequester contaminants). A meandering filter swale that has dense grass is ideal for processing stormwater. They are easy to design in most cases and easy to maintain. In general, the peer reviewed literature does not support San Juan County’s current view that forests (woody vegetation) provides better filtering of contaminants in stormwater than grass. A healthy residential lawn underlain by loam soils is the very best form of vegetation for VFS.

6) Can you explain why it is important to have overhanging trees on the shoreline

to protect the salmon, smelt, orcas, etc., when some of the most prolific spawning grounds in the world are void of vegetation?

Dr. Kenneth Brooks: Good question. For most fish, hatching occurs following an accumulation of some specific number of *degree days*. If it is too cold, the eggs take longer to hatch and are therefore subject to increased predation and the potential for natural disturbance. Too much heat and the eggs die of desiccation and/or thermal stress. Overhanging trees on a good spawning beach that faces south may help cool the substrate and increase survival of surf smelt. However, on a north-facing beach, the shade may cool the substrate too much resulting in an extended period for hatching – leading to a loss of reproductive potential. These are all site specific issues that cannot be addressed with a one size fits all solution. There are many factors, including pore water infiltration and loss (i.e. how fast does the beach dry out on low tides), which is dependent on the extent, depth and grain size of the sediments. This is a good example of basing the need for a restriction on effects in one specific environment and ignoring alternative conditions (i.e. other environments).

Michael Nachlinger: Ultimately, it is the taxpayers that once again are required to pony up for bureaucratic nonsense. As elected officials the Council was elected to represent the people of San Juan County, not the bureaucracies of the State. You took an oath to uphold the Constitution. Do you intend to honor that oath?

Frank Penwell: Directed to the County Council:

- It is not fair to place burdensome regulations on a group of individuals, property owners, for public benefits that are being considered as necessary for the community as a whole. The actions being considered are really a civil rights taking issue, because it is the taking of the use of property from property owners, for the benefit of all, and without the individual property owner's approval, and without any compensation to the individual property owners.

With these facts in mind, will the County Council find ways to reimburse the property owners who will be affected by any proposed regulations and buffers? If any Council member chooses to vote for the proposed regulations, will that Council member consider options such as: instituting a Victim's Compensation Fund, use of the Land Bank's assets to purchase buffers, Open Space tax reductions or some other ways to compensate individual property owners who are going to be severely and adversely affected, as well as financially burdened, by these regulations?

- As a Council, each of you have heard, or had a chance to review, what was said at the CSA FORUM. The Institute of Justice explained in great detail how our State's Constitution is written to protect private property

rights, and how it even provides more protections than the Federal Constitution. You have also had a chance to review the recent Washington Supreme Court rulings on recent private property cases in the Pacific Legal Foundation's summaries. It is clear that DOE is forcing you to make a decision between following our State Constitution, in regards to protection of Private Property rights, or following an ambiguous, expensive, complicated, and unproven plan that will lead to litigation. Will each Council member make a written comment on your willingness to put the County Citizens' Constitutional Rights above the desires and will of the DOE? If you are unwilling to do that, please provide a written explanation as to why not.

- The City of Blaine chose to send their CAO plan back for revisions that takes into consideration the people and their private property rights. Will this County Council please consider making a similar motion?

Are the CAO revisions that you are considering enacting actually going to be making a difference for the orca, the surf smelt, and the bugs? Why not use this opportunity to find ways to actually make a difference: Ask the Friday Harbor Labs to conduct a study of the toxicity of our island waters and lands, talk to senior salmon scientists, like Dr. Crittenden, to find ways to increase the salmon population, direct the Dept of Fish and Wildlife to stop the sale of licenses to net smelt; and be the leaders who actually direct positive change: find ways to promote boots on the ground conservation and stewardship of the natural resources that we all love.

Gordy Petersen: Addressed to the Departments of Ecology and Commerce: There is clear evidence that just the threat of large (yet to be determined) no-development buffers has caused sales of undeveloped shoreline property to completely stop in San Juan County.

There is no question that CAO regulations with large prescriptive buffers will diminish the use and value of private property.

Large buffers will increase the cost of housing due to an expensive permitting process and increased cost of compliance with regulations.

San Juan County economy is heavily dependant upon real estate and the residential construction industry. Both of these industries will be impacted negatively by imposition of the proposed large buffers.

These impacts are real and quantifiable.

In your answer to question #6 and in other answers you have stated that

protection of critical areas is not a goal of GMA but a legislative “requirement” and as such overrides all other GMA goals. You use as support for this position a GMHB ruling. You have also stated that the courts have ruled, “goals do not override requirements.” (Gates CTED).

Where have the courts stated this? Please cite the case law.

Ecology: The Central Puget Sound Growth Management Hearings Board (Central Board) decision in *Ecology and CTED v. City of Kent* (Case No. 05-3-0034) that CTED and Ecology referenced above includes the decisions of the Washington State Supreme Court and Appeals Courts. In the Kent decision, the Central Board cites language from the Supreme and Appeals Courts when stating that goals are not to be balanced against requirements (i.e., requirements take precedence). Here is the language from the Kent decision, including the Central Board’s citations to case law:

“The Board notes that the GMA mandate to designate critical areas and protect their functions and values using BAS is **a requirement, not a goal**; pursuant to the admonition of the Supreme Court in *Quadrant*, goals do not override requirements.” 05334 *DOE/CTED v. City of Kent* p. 3

“As this Board stated in *Bremerton, et al., v Kitsap County*, CPSGMHB Case No. 95-3-0039c, Final Decision and Order (Oct. 6, 1995):

It is significant that the Act required cities and counties to identify and conserve resource lands and to identify and protect critical areas before the date that IUGAs [Interim Urban Growth Areas] had to be adopted. This sequence illustrates a fundamental axiom of growth management: “**the land speaks first.**” Only after a county’s agricultural, forestry and mineral resource lands have been identified and actions taken to conserve them, and its critical areas, including aquifers, are identified and protected, is it then possible and appropriate to determine where, on the remaining land, urban growth would be directed pursuant to RCW 36.70A.110.

Id. at 31-32, (emphasis supplied). Therefore, designation and protection of critical areas *precedes* the development of comprehensive plans and the designation of urban growth areas.” 05334 *DOE/CTED v. City of Kent* pp. 10-11

“The *Quadrant* Court stated that GMA requirements provide substance to GMA goals, *citing Skagit Surveyors & Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 548, 958 P.2d 962 (1998). The Supreme Court explained that a city or county’s discretion to balance GMA goals is not a license to ignore the GMA’s explicit requirements. Thus “balancing” and “deference” come into play when GMA mandates have been satisfied.” *Quadrant*, 154 Wn.2d at 246-247.

The Board reads these decisions of the Supreme Court and Court of

Appeals as establishing the rule that a jurisdiction may not assert the need to balance competing GMA goals as a reason to disregard specific GMA requirements. 05334 DOE/CTED v. City of Kent pp. 12-13

How could the courts refusal to hear the city of Kent case create a new law or elevate a growth board decision above the Supreme Court or Legislature?

Ecology: The Washington State Supreme Court's refusal to hear the Kent case does not create a new law or elevate Growth Management Hearings Board decision above the Supreme Court or legislature. The holdings from Supreme Court decisions cited in the Kent case are still good guideposts for understanding the distinction between the overarching GMA goals and the more explicit requirements.

You have stated that protection of critical areas is mandated by the use of the word "shall" yet GMA goal 6 also contains "shall" two times. "(6) *Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.*" (RCW 36.70A.020(6)) Is this merely a goal of GMA, not a requirement? Does the mandate to protect critical areas have more weight than this goal?

Ecology: As discussed above, designating and protecting critical areas is a requirement of the Growth Management Act. Local governments are also required to protect property rights under the state and federal Constitution. It is important to ensure critical areas ordinances contain appropriate safety valves to allow reasonable use.

In light of the following relevant information why do you feel that the protection of critical areas does not require balance with other GMA goals? Why does protection of critical areas not fall under the goal 10, Environment? How are goals and requirements different under the law and why should they not be balanced in local land use plans? Please be specific.

"The GMA imposes a general obligation to adopt comprehensive land use regulations, including critical areas ordinances, by balancing various non-prioritized planning goals and requirements, including, in relevant part, designating and protecting critical areas while protecting private property rights. Swinomish Indian Tribal Cmnty v. W. Wash. Growth Mgmt. Hearings Bd., 161 Wn.2d 415, 424-25 (2007); RCW 36.70A.020(6), (10)."

(Brian Hodges PLF Sammamish legal analysis 2009)

also,

"Balancing the GMA's goals in accordance with local circumstances is precisely the type of decision that the legislature has entrusted to the discretion of local decision-making bodies. RCW 36.70A.3201"

<http://www.mrsc.org/mc/rcw/RCW%20%2036%20%20TITLE/RCW%20%2036%20.%2070A%20CHAPTER/RCW%20%2036%20.%2070A.3201.htm>

“Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.” (RCW 36.70A.3201)

Dr. Kenneth Brooks: It is important to understand that the Central GMHB, which hears appeals of critical area issues for the highly urbanized counties (King, Pierce, Kitsap and Snohomish) has ruled somewhat differently than the Western GMHB. San Juan County appeals will be heard by the Western GMHB – not the Central Board. The Western Board in the Skagit County appeal repeatedly cautioned local legislative bodies to *not exceed their Constitutional Authority* when imposing restrictions on private property. The constitutionality of requiring private property owners to set aside portions of their property for the general benefit of wildlife has not been tested in either the State or Federal Appeals Courts. At the recent workshop, Ecology Staff asserted that the courts have consistently upheld Ecology's position and their BAS. I am unaware of any court decision validating Ecology's BAS and the fact of the matter is that Ecology wins some and they lose some. In my experience, Ecology rarely references the Western Board and frequently references the Central Board. That is less than honest.

What authority do State agencies cite to advise counties that the goals and requirements of GMA have different weight, one over another, when the Supreme Court and the Legislature have refused to do so?

Ecology: Please see responses above.

How can State agencies suggest that the goals of affordable housing, economic development, and protection of private property, are lesser goals subject to the imposition of prescriptive buffers to protect critical areas at the cost of diminishing property rights and property values, limiting the local economy, and driving up the cost of housing? Please explain.

Ecology: Please see responses above.

Janice Peterson: What is the purpose of designating a properly permitted residence and/or out-building as non-conforming? Isn't this a taking?

S. Hale: Property would not be designated non-conforming - that is the term used to describe the situation that occurs when regulations change and existing development no longer conforms. Our existing code has provisions for this situation and the proposed shoreline amendments

include adoption of the same approach that is currently used for upland areas.

Janice Peterson: The unintelligibility of the discussion in terms of providing clear information for the public is astounding. It should not be this hard to understand what bureaucracies plan to inflict on us in the name of “Best Available Science.” Your “Best Available Science” sounds like a very imprecise weapon used to inflict harm on property owners. It sounds highly unscientific. How can you propose these buffers when you have no data to demonstrate harm in the present system (which is fundamental to making changes in the way we do things)?

Ecology: For wetland buffers, the scientific literature reviewed and cited in *Wetlands in Washington State - Volume 1: A Synthesis of the Science* (Publication #05-06-006, March 2005) is very clear on the important role that buffers play in protecting water quality, water quantity and habitat.

Vern Vander Weide: We own two lots on Golf Course Road (San Juan Island), which, in the Puget Sound Playground Plat is 128 – 292 feet from the shoreline (not “top of bank”). This plat was approved by the County decades ago. What assurance can we have that the undeveloped lot will be buildable? Are we entitled to ask for such assurance? Given their inherent subjectivity, “Reasonable Use Exemptions” don’t provide such assurance.

Amy Windrope: To the SJC Council: What issues do you want more science on? On what issues do you want to hear more from the community?

Dr. Kenneth Brooks: This is a really good question. I strongly recommend that the County Council frame a list of specific questions that must be answered by peer reviewed studies using anonymous reviewers who have a history of publication in the peer reviewed literature and an independent referee. I wonder what would happen if the county refused to increase restrictions on private property in the absence of answers to those questions. As legislators, you should have the authority to demand a reasonable level of rigorous support from state and federal agencies that are advising you.