

## Chapter 2

# The Growth Management Act and Protection of Critical Areas

## 2.1 Introduction

This chapter provides background on the Washington State Growth Management Act (GMA) and its directives to local governments to protect critical areas such as wetlands. It also clarifies issues regarding the protection of critical areas and incorporation of best available science into critical areas regulations.

As defined in Chapter 36.70A.030(5) Revised Code of Washington (RCW), “critical areas” include: wetlands; areas with a critical recharging effect on aquifers used for potable water; fish and wildlife habitat conservation areas; frequently flooded areas; and geologically hazardous areas.

## 2.2 An Overview of the GMA

In 1990, the Washington State Legislature passed the GMA (RCW 36.70A) to guide local jurisdictions in their decisions regarding land use. The GMA dictates that counties and cities with certain characteristics must plan for future growth (RCW 36.70A.040). The GMA (RCW 36.70A.020 and RCW 90.58.020) identifies 14 goals that are to be used by local governments to “guide” the development of comprehensive plans and development regulations, including critical areas ordinances, to meet its intent and requirements. The goals consist of a range of actions, including concentrating urban development to reduce sprawl, providing a range of affordable housing, ensuring that transportation infrastructure is coordinated between jurisdictions, and assuring property rights.

In addition, the GMA includes goals that address maintaining the extraction of natural resources, such as timber and mining, and agricultural land uses while avoiding incompatible uses; providing for open space and recreation, including conserving fish and wildlife habitats; and protecting the environment and the quality of life in the state. Cities and counties have responded to these mandates by developing or updating their comprehensive plans and development regulations.

The GMA requires jurisdictions to develop regulations that implement their comprehensive plan provisions (RCW 36.70A.040). Comprehensive plans and development regulations, including critical areas regulations, are subject to continuing review and evaluation by the county or city that adopted them. In 2002, the Legislature

amended the GMA to require counties and cities to take legislative action to review and, if needed, revise their comprehensive land-use plans and regulations on a seven-year cycle to ensure the plans and regulations comply with the requirements of GMA (RCW 36.70A.130). (The review cycle had previously been five years.)

The GMA also requires local jurisdictions to include the best available science in the development of policies and development regulations used to both designate and protect the functions and values of critical areas (RCW 36.70A.172). The Legislature considered the requirement for best available science an important step toward regulatory reform and timely permitting of projects.

The GMA contains a variety of provisions that are directly related to landscape-based planning and developing regulations based on science. For example, there is a requirement to identify open space corridors within and between urban growth areas (RCW 36.70A.160). In addition, the GMA states that the corridors are to provide lands that are "... useful for recreation, wildlife habitat, trails, and connection of critical areas as defined in RCW 36.70A.030." This provision relates to one of the key findings of the synthesis of the science in Chapter 3 of Volume 1, which identifies habitat fragmentation (elimination of habitat links between wetlands) as one of the significant, adverse effects of urbanization on biodiversity. Other examples include provisions under the land use element (RCW 36.70A.070(1)) which requires the "protection of the quality and quantity of groundwater used for public water supplies" and, where applicable, the review of "drainage, flooding, and storm water run-off in the area and nearby jurisdictions and provide for guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state, including Puget Sound, or waters entering Puget Sound."

In passing the GMA, the Legislature also required that local governments coordinate their comprehensive plans with jurisdictions that share either common borders or regional issues, to be consistent across political boundaries. Variations in zoning regulations, density of housing, for example, as well as the infrastructure built for transportation, water service, sewage, and other necessary public utilities, had been resulting in inconsistent and incompatible uses and expectations across jurisdictional boundaries.

## **2.3 A Review of Hearings Board Cases and Court Cases**

The following sections present a review of court cases and Growth Management Hearings Board cases prepared by Alan Copsey, Washington State Attorney General's Office, and Chris Parsons, Washington State Department of Community, Trade and Economic Development. The text in these sections is from a memorandum (dated April 2004) to state agencies developed by Chris Parsons, summarizing Alan Copsey's information about GMA and critical areas protection. Minor edits have been made to the formatting of this text, such as the addition of subheadings, and to punctuation to make it consistent with the format of other chapters in this volume.

## 2.3.1 Designating Critical Areas and Adopting Regulations to Protect Them

The GMA recognizes that the first formal step required in implementing the GMA is the designation and protection of critical areas. This is important for two reasons: 1) to exclude critical areas from urban growth designations and impacts, and 2) to prevent irreversible environmental harm while comprehensive plans and implementing development regulations are prepared.

All three Growth Management Hearings Boards in Washington State (Central Puget Sound, Eastern Washington, and Western Washington) have recognized and given effect to the required priority of critical areas designation and protection.<sup>1</sup> The phrase *given effect to* implies a legal review and decision conferring status. In an oft-quoted passage, the Central Board explained:

*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 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 should be directed pursuant to RCW 36.70A.110.<sup>2</sup>*

RCW 36.70A.170(1) requires that all critical areas in all counties and cities must be designated where appropriate. The GMA permits no exemptions, exclusions, or limitations on applicability that would result in some critical areas not being designated. The requirement to designate may be met by designating or mapping known critical areas at the time the critical areas ordinance is adopted or by adopting a process to designate or map critical areas as information becomes available.

RCW 36.70A.060(2) requires all counties and cities in Washington to adopt development regulations to protect designated critical areas.<sup>3</sup> The Western Board has described RCW 36.70A.060(2) as imposing a *duty* on local governments to adopt development

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<sup>1</sup> See *Bremerton v. Kitsap Cy.*, CPSGMHB No. 95-3-0039c (Final Decision & Order, Oct. 6, 1995); *Association to Protect Anderson Creek v. City of Bremerton*, CPSGMHB No. 95-3-0053 (Final Decision & Order, Dec. 26, 1995); *City of Port Townsend v. Jefferson Cy.*, WWGMHB No. 94-2-0006 (Final Decision & Order, Aug. 10, 1994); *C.U.S.T.E.R. Ass’n v. Whatcom Cy.*, WWGMHB No. 96-2-0008 (Final Decision & Order, Sept. 12, 1996); *Knapp v. Spokane Cy.*, EWGMHB No. 97-1-0015c (Final Decision & Order, Dec. 24, 1997).

<sup>2</sup> *Bremerton v. Kitsap Cy.*, CPSGMHB No. 95-3-0039c (Final Decision & Order, Oct. 6, 1995).

<sup>3</sup> RCW 36.70A.060(2).

regulations that protect critical areas; inherent in that duty is the requirement that the regulation contain appropriate and specific criteria and standards to ensure protection.<sup>4</sup>

All designated critical areas must be protected but not all critical areas must be protected in the same manner or to the same degree.<sup>5</sup> To “protect” critical areas means to maintain their values and functions, this requires no net loss of critical areas values and functions.<sup>6</sup> The required standard of protection should be to prevent adverse impacts or, at the very minimum, to mitigate adverse impacts.<sup>7</sup>

While local governments have discretion to adopt critical areas regulations that may result in local impacts upon some critical areas, or even the loss of some critical areas, there must be no net loss of the structure, value, and functions of the natural systems constituting the protected critical areas.<sup>8</sup> A county or city must provide a detailed and reasoned justification for any designated critical area not protected.<sup>9</sup> All such decisions and justifications must be based on a substantive consideration of the best available science.<sup>10</sup>

Development in critical areas is not absolutely prohibited under the GMA, so long as the structure, functions, and values of the critical areas are protected.<sup>11</sup>

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<sup>4</sup> See *Whatcom Env'tl. Coun. v. Whatcom Cy.*, WWGMHB No. 95-2-0071 (Final Decision & Order, Dec. 20, 1995); *Willapa Grays Harbor Oyster Growers Ass'n v. Pacific Cy.*, WWGMHB No. 99-2-0019 (Final Decision & Order, Oct. 28, 1999).

<sup>5</sup> *Tulalip Tribes of Wash. v. Snohomish Cy.*, CPSGMHB No. 96-3-0029 (Final Decision & Order, Jan. 8, 1997); *Pilchuck Audubon Soc'y v. Snohomish Cy.*, CPSGMHB No. 95-3-0047 (Final Decision & Order, Dec. 6, 1995); *Easy v. Spokane Cy.*, EWGMHB No. 96-1-0016 (Final Decision & Order, Apr. 10, 1997); *Confederated Tribes & Bands of the Yakama Indian Nation v. Yakima Cy.*, EWGMHB No. 94-1-0021 (Final Decision & Order, Mar. 10, 1995); *Save Our Butte Save Our Basin Soc'y v. Chelan Cy.*, EWGMHB No. 94-1-0015 (Final Decision & Order, Aug. 8, 1994); *Clark Cy. Natural Res. Coun. v. Clark Cy.*, WWGMHB No. 92-2-0001 (Final Order, Nov. 10, 1992).

<sup>6</sup> RCW 36.70A.172(1); WAC 365-195-825(2)(b); *Tulalip Tribes of Wash. v. Snohomish Cy.*, CPSGMHB No. 96-3-0029 (Final Decision & Order, Jan. 8, 1997); *Pilchuck Audubon Soc'y v. Snohomish Cy.*, CPSGMHB No. 95-3-0047 (Final Decision & Order, Dec. 6, 1995).

<sup>7</sup> *Save Our Butte Save Our Basin Soc'y*, EWGMHB No. 94-1-0015 (Compliance Hearing Order, Apr. 8, 1999, and Final Decision & Order, Aug. 8, 1994); *English v. Bd. of Cy. Comm'rs of Columbia Cy.*, EWGMHB No. 93-1-0002 (Final Decision & Order, Nov. 12, 1993).

<sup>8</sup> *Tulalip Tribes of Wash. v. Snohomish Cy.*, CPSGMHB No. 96-3-0029 (Final Decision & Order, Jan. 8, 1997); *Pilchuck Audubon Soc'y v. Snohomish Cy.*, CPSGMHB No. 95-3-0047 (Final Decision & Order, Dec. 6, 1995). These decisions address wetlands and fish and wildlife habitat conservation areas, but their rationale applies also to frequently flooded areas and critical aquifer recharge areas insofar as they are protected for their ecological or hydrological function and value.

<sup>9</sup> *Friends of Skagit Cy. v. Skagit Cy.*, WWGMHB No. 96-2-0025 (Final Decision & Order, Jan. 3, 1997); *Whatcom Env'tl. Coun. v. Whatcom Cy.*, WWGMHB No. 95-2-0071 (Final Decision & Order, Dec. 20, 1995).

<sup>10</sup> RCW 36.70A.172(1); *Honesty in Env'tl. Analysis. & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 96 Wn. App. 522 (1999).

<sup>11</sup> *Knapp v. Spokane Cy.*, EWGMHB No. 97-1-0015 (Final Decision & Order, Dec. 24, 1997); *Association to Protect Anderson Creek v. Kitsap Cy.*, CPSGMHB No. 95-3-0053 (Final Decision & Order, Dec. 26,

The GMA does not categorically exempt pre-existing land uses from the requirement to protect critical areas. A city or county may need to regulate pre-existing uses in order to fulfill its statutory duty to “protect critical areas” under RCW 36.70A.060(2).<sup>12</sup> Any exemptions for pre-existing use must be limited and carefully crafted.<sup>13</sup>

Some critical areas, such as wetlands and fish and wildlife habitat conservation areas, may transcend the boundaries of individual parcels and jurisdictions, so that it is necessary to address the protection of their structure, function, and values on a larger scale (such as a watershed).<sup>14</sup>

### 2.3.2 Relationship of Critical Areas Regulations to Other Land Uses

Critical areas regulations are to overlay all other land uses, including designated natural resource lands and designated urban growth areas, and are to preclude land uses and developments that are incompatible with the protection of critical areas.<sup>15</sup> This overlay requirement makes sense in the overall scheme of the GMA, under which all lands are designated in one of three categories:

- Urban land (i.e., within a designated urban growth area)
- Natural resource land (i.e., designated as agricultural, forest, or mineral resource land)

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1995); *Pilchuck Audubon Soc’y v. Snohomish Cy.*, CPSGMHB No. 95-3-0047 (Final Decision & Order, Dec. 6, 1995).

<sup>12</sup> *Protect the Peninsula’s Future v. Clallam Cy.*, WWGMHB No. 00-2-0008 (Final Decision & Order, Dec. 19, 2000).

<sup>13</sup> *Id.*; *Friends of Skagit Cy. v. Skagit Cy.*, WWGMHB No. 96-2-0025 (Final Decision & Order, Jan. 3, 1997).

<sup>14</sup> *Tulalip Tribes of Wash. v. Snohomish Cy.*, CPSGMHB No. 96-3-0029 (Final Decision & Order, Jan. 8, 1997).

<sup>15</sup> WAC 365-190-020. Critical areas overlaying designated urban growth areas, see *Advocates for Responsible Dev. v. City of Shelton*, CPSGMHB 98-2-0005 (Final Decision & Order, Aug. 10, 1998); *Litowitz v. City of Federal Way*, CPSGMHB No. 96-3-0005 (Final Decision & Order, July 22, 1996); *Pilchuck Audubon Soc’y v. Snohomish Cy.*, CPSGMHB No. 95-3-0047 (Final Decision & Order, Dec. 6, 1995); *Association of Rural Residents v. Kitsap Cy.*, CPSGMHB No. 93-3-0010 (Final Decision & Order, June 3, 1994). Critical areas overlaying designated natural resource lands, see *Protect the Peninsula’s Future v. Clallam Cy.*, WWGMHB Nos. 00-2-0008/ 01-2-0020 (Compliance Order/Final Decision & Order, Oct. 26, 2001); *Mitchell v. Skagit Cy.*, WWGMHB No. 01-2-0004 (Final Decision & Order, Aug. 6, 2001); *Saddle Mtn. Minerals v. City of Richland*, EWGMHB No. 99-1-0005 (Order Finding Partial Compliance, Apr. 18, 2001); *Friends of Skagit Cy. v. Skagit Cy./Skagit Audubon Soc’y v. Skagit Cy.*, WWGMHB Nos. 96-2-0025/ 00-2-0033c (Compliance Hearing/Final Decision & Order, Aug. 9, 2000); *Saddle Mtn. Minerals v. Grant Cy.*, EWGMHB No. 99-1-0015 (Final Decision & Order, May 24, 2000); *Island Cy. Citizens’ Growth Mgmt. Coalition*, WWGMHB No. 98-2-0023 (Final Decision & Order, June 2, 1999); *Friends of Skagit Cy. v. Skagit Cy.*, WWGMHB No. 96-2-0025 (Final Decision & Order, Jan. 3, 1997). Critical areas overlaying rural lands, see *City of Anacortes v. Skagit Cy.*, WWGMHB No. 00-2-0049c (Final Decision & Order, Feb. 6, 2001).

- Rural land (which may include limited areas of more intense rural development and a variety of land uses)

These three designations have been called the “fundamental building blocks of land-use planning under the GMA;”<sup>16</sup> other land-use designations and restrictions overlay these three primary designations. As long as critical areas are protected, “other, non-critical portions of land can be developed as appropriate under the applicable land-use designation and zoning requirements.”<sup>17</sup>

### 2.3.3 Including Best Available Science in Critical Areas Regulations

RCW 36.70A.172(1) requires all local governments to include the best available science when adopting development regulations to designate and protect critical areas. In addition, they “shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.” This language actually imposes three inter-related requirements:

- The requirement to include the best available science when designating and protecting critical areas
- The requirement to give special consideration to the preservation or enhancement of anadromous fisheries
- The requirement to adopt development regulations that protect the functions and values of critical areas

There are two reported appellate court decisions interpreting RCW 36.70A.172, focused primarily on what it means to *include* the best available science.<sup>18</sup> In the HEAL case, the Court did not attempt to explain what constitutes best available science, although it suggested in passing that the Board could not displace a local government’s judgment as to which science in the record is the “best.”<sup>19</sup> On the other hand, the Court strongly stated that a local government “cannot ignore the best available science in favor of the science it prefers simply because the latter supports the decision it wants to make.”<sup>20</sup> This language suggests the Board in fact may review whether a local government has

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<sup>16</sup> See *Forster Woods’ Homeowners Ass’n v. King Cy.*, CPSGMHB No. 01-3-0008 (Final Decision & Order, Nov. 6, 2001)

<sup>17</sup> See *Association to Protect Anderson Creek v. City of Bremerton*, CPSGMHB No. 95-3-0053 (Final Decision & Order, Dec. 26, 1995); *Knapp v. Spokane Cy.*, EWGMHB No. 97-1-0015c (Final Decision & Order, Dec. 24, 1997).

<sup>18</sup> *Honesty in Envtl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 96 Wn. App. 522 (1999). *Whidbey Environmental Action Network [WEAN] v. Island County*, \_\_\_ Wn. App. \_\_\_, 93 P.3d 885, 893 (2004)

<sup>19</sup> *Id.*, 96 Wn. App. at 530.

<sup>20</sup> *Id.*, 96 Wn. App. at 534.

identified and relied on the best available science and remand to the local government to achieve compliance with RCW 36.70A.172(1).

In the WEAN case (see footnote 18 on the previous page), the Central Board concluded that some of the stream buffers in Island County that were adopted to protect fish and wildlife habitat conservation areas were not supported by the scientific information in the record before the County. The Court of Appeals affirmed, rejecting the County's argument that the Board must defer to the local government's discretionary balancing of the best available science with other factors. The Court explained that RCW 36.70A.172(1) requires the best available science to be included in the record and considered substantively in the development of critical areas policies and regulations.<sup>21</sup> The Court briefly reviewed the science in the record and held that the Board's disapproval of the stream buffers was supported by sufficient evidence.

If a local government chooses to depart from best available science, then it is recommended that the jurisdiction follow the criteria provided in Chapter 365-195-915 WAC for demonstrating that the best available science has been "included" in the development of critical areas policies and regulations. The local government's record supporting adoption of those policies and regulations should include the following:

- The specific policies and regulations adopted to protect the functions and values of critical areas
- Copies of (or references to) the best available science used in the decision making
- The nonscientific information used as a basis for departing from science-based recommendations
- The rationale supporting the local government's reliance on the identified nonscientific information
- Actions taken to address potential risks to the functions and values of the critical areas the policies and regulations are intended to protect

Implicit in the rule is the presumption that the Growth Management Hearings Boards and the courts review both the local government's assessment of what constitutes the best available science and the substantive relationship between the best available science and the adopted critical areas regulations. Local governments must substantively consider the best available science when adopting development regulations to designate or protect critical areas. The adopted regulations must protect the functions and values of the critical areas. If the local government determines this protection can be assured using an approach different from that derived from the best available science, the local government must demonstrate on the record how the alternative approach will protect the functions and values of the critical areas.

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<sup>21</sup> 76 Wn.2d at 1222-23, citing *Honesty in Environmental Analysis & Legislation (HEAL) v. Central Puget Sound Growth Management Hearings Board*, 96 Wn. App. 522, 532, 979 P.2d 864 (1999).

## 2.3.4 Protecting the Functions and Values of Critical Areas

Local governments must adopt development regulations that protect the functions and values of critical areas. This reference to functions and values has been interpreted to mean the functions and values of the resources of which a given critical area is a part. Accordingly, while a local government is not prohibited from allowing localized impacts on some critical areas, or even the loss of some critical areas, it may not allow a net loss of the functions and values of the resources including the impacted or lost critical areas. Moreover, any loss or adverse impact should be allowed only for good cause and evaluated using the best available science.

The Central Board has explained that RCW 36.70A.172(1), read together with RCW 36.70A.060 and RCW 36.70A.020(8), requires local governments to protect critical areas, maintain and enhance anadromous fisheries, and conserve fish and wildlife habitat.<sup>22</sup> RCW 36.70A.172(1) thus conveys a legislative intent to protect the functions and values of critical areas, recognizing that wetlands and fish and wildlife habitat conservation areas, in particular, are interrelated ecosystems important to the preservation and enhancement of anadromous fisheries:

*[T]he Act's requirement to protect critical areas, particularly wetlands and fish and wildlife habitat conservation areas, means that the values and functions of such ecosystems must be maintained. While local governments have the discretion to adopt development regulations that may result in localized impacts upon, or even the loss of, some critical areas, such flexibility must be wielded sparingly and carefully for good cause, and in no case result in a net loss of the value and functions of such ecosystems within a watershed or other functional catchment area.*<sup>23</sup>

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<sup>22</sup> *Tulalip Tribes of Wash. v. Snohomish Cy.*, CPSGMHB No. 96-3-0029 (Order on Motions, Oct. 6, 1996).

<sup>23</sup> *Id.*