

**Key Questions for Discussion:
Implementing “Critical Areas Segment” SMP amendments per the *Anacortes* case**

Request

The Department of Ecology Shorelands Program is soliciting comments on a new process that local governments and Ecology may soon need to implement. The recent *Anacortes* decision of the state Supreme Court creates a new linkage between Critical Area and Shoreline Program updates. The decision leaves many significant details unresolved. As of the date of this document, Supreme Court action on a request for reconsideration is pending; thus, the *Anacortes* decision is not final. However, if the Court rejects the request for reconsideration, the *Anacortes* process requirements will take effect shortly after Court action.

Ecology may need to amend rules or adopt guidance to effectively implement the *Anacortes* decision. The Supreme Court may provide clarity on some aspects. However, we are requesting assistance from local governments and other interested parties in examining the best options to implement the *Anacortes* process if this becomes necessary.

Background

The 2005 Western Washington Growth Management Hearings Board decision in *Evergreen Islands, Futurewise and Skagit Audubon Society v. City Of Anacortes* creates a new final step in the Critical Area Ordinance adoption process – after local adoption, cities and counties would be required to submit their Critical Area Ordinance update to Ecology; the agency would then review and approve this as a “critical area segment” update to the local government’s Shoreline Master Program. (Prior to this decision, local government adoption of CAOs was subject only to appeal to the Growth Management Hearings Board.)

Upon approval of this “critical area segment” update, sole regulatory jurisdiction would shift to the Shoreline Master Program: The Critical Area regulations adopted under the Growth Management Act would no longer apply within the Shoreline area. The Board decision focused on the intent section of HB 1933 (2003), which adopted new policies regarding shifting from dual GMA/SMA coverage to sole jurisdiction under updated Shoreline regulations. The *Anacortes* decision is not consistent with state agency interpretation of HB 1933.

Ecology and CTED appealed the Hearings Board’s *Anacortes* decision in 2006, due to significant legal and procedural concerns with the Hearings Board decision. On July 31, 2008 the Supreme Court issued their decision which appears to uphold the *Anacortes* decision. A request for reconsideration was filed by state agencies and other parties. As of the date of this document, Supreme Court action on this request is pending; thus, the decision is not final. However, if the Court rejects the request, the *Anacortes* Hearings Board decision will take effect shortly after Court action. For status updates on this case, see

<http://www.ecy.wa.gov/programs/sea/sma/news/reconsider.html>

The decision interprets and gives special weight to the following provision in the Shoreline Management Act regarding “critical area segments” of local SMPs:

RCW 90.58.090(4) The department shall approve the segment of a master program relating to critical areas as defined by RCW 36.70A.030(5) provided the master program segment is consistent with RCW 90.58.020 and applicable shoreline guidelines, and if

the segment provides a level of protection of critical areas at least equal to that provided by the local government's critical areas ordinances adopted and thereafter amended pursuant to RCW 36.70A.060(2).

These three statutory criteria, including consistency with SMA Policy (RCW 90.58.020) and the guidelines (WAC 173-26, Part III) and protection equal to the CAO, must be satisfied before Ecology can approve the critical areas segment of a SMP.

The following questions are intended to solicit comments on key procedural issues facing Ecology and local governments regarding the *Anacortes* decision.

Questions for discussion and comment

1. Should all local governments submit their existing Critical Area Ordinances to Ecology for adoption into their Shoreline Master Programs?

The perspective of the Department of Ecology is that the *Anacortes* case does not require submittal of already-approved CAOs to Ecology for approval as Shoreline updates. This perspective supports the concept of finality in land use decisions. We do not believe it is reasonable or workable to require already locally-adopted CAOs to be re-adopted as SMP amendments. Please note that these positions could change based on Court clarification.

Ecology also supports the perspective that, at this time, adopted Critical Area Ordinances continue to apply within the Shoreline area (“dual coverage.”) The Hearings Board decision dealt with this issue specifically: they found that dual coverage continues until Ecology approves a CAO as an amendment to the local Shoreline Master Program. The Supreme Court opinion contains language that implies potential retroactivity. However, this is not in harmony with the apparent bottom-line decision of the Court to support the Hearings Board decision. Retroactivity is one of the issues where we requested clarification from the Court.

Other parties suggest that the *Anacortes* decisions can be read to imply retroactivity – to July 2003 (effective date of HB 1933) or even before. If the decision applies beginning in July 2003, retroactive actions to adopt CAOs into SMPs could apply to 139 cities and counties. From this perspective, it may be prudent for cities and counties to file their existing CAOs with Ecology for approval as SMP critical areas “segments”. The purpose of such filings would be to reduce confusion and avoid gaps in environmental protection created by possible retroactivity.

A counter-balancing perspective on filing existing locally adopted CAOs for SMP adoption: Filing existing CAOs for Ecology approval as SMP segments also must not trigger requirements for a comprehensive SMP update, per WAC 173-201-201(1). In addition, under existing Ecology procedural rules, this approach could require a new public process including holding a local public hearing and providing an opportunity for public comment on the proposed limited SMP (CAO segment) amendment (WAC 173-26-100 through 120). This

also would require a local and state response to comments received. Furthermore, this process could re-open opportunities for appeal, under the SMA and possibly GMA as well. This risk of appeal could be highly disruptive, time consuming and expensive for local governments.

Comments on the above perspectives and other approaches to this important question are solicited. Our desire is for clear, prudent guidance based on the current status of the *Anacortes* case.

2. What process should local governments follow when they intend to submit future CAOs to Ecology as SMP amendments?

The *Anacortes* GMHB decision creates a new final step in adopting a CAO – submittal to Ecology as an amendment to the local Shoreline program. But the decision does not provide details on implementing this new process linking Growth Management Act and Shoreline Management Act requirements.

- One potential approach is to simply rely on the CAO public review process. The CAO process includes public hearings, Planning Commission review and often recommendation from other committees, followed by elected official hearings and action. From this perspective, there is plenty of public involvement in the CAO process to justify submittal of the document to Ecology for a Shoreline program update.
- But what about basic principles regarding public notice of proposed government actions? Shouldn't property owners and other parties be notified about the proposed SMP amendment, so they can comment on these proposed amendments prior to local government action? One option might be to include notice of intended submittal to Ecology in the final action of the local officials. But is this sufficient to meet the intent of public notification?
- The Hearings Board decision is very unclear on how we move from a GMA-based presumed valid CAO approval by local government, to Ecology approval of a Shoreline Master Program amendment. The Hearings Board directed Ecology to review the locally-adopted CAO against the Shoreline Act and Shoreline guidelines adopted by the agency. These Guidelines include specific requirements for critical areas policies that are not included under the Growth Management Act - including inventory and assessment, analysis of cumulative impacts and achievement of no net loss. Should local governments be required to follow both GMA and SMA requirements in developing Critical Area regulations within Shoreline areas? What would this mean for local governments in costs and timelines?

3. How do we balance “presumptive validity” under GMA with formal approval by Ecology under SMA?

Presumed validity of local government CAO approval is a fundamental part of the Growth Management Act. If an adopted CAO is not challenged to the Growth Management

Hearings Board, it is considered valid. Each local government must consider comments from state agencies and other parties – but they can decide to reject these comments and adopt CAO regulations of their own choosing (with the potential for challenge to the Growth Management Hearings Board.)

In contrast, a fundamental feature of the Shoreline Management Act is that city and county shoreline regulations receive formal review and approval by the Department of Ecology before they can take effect. If the adoption is challenged, both the local government and Ecology provide legal defense of the SMP.

Ecology comments on CAO wetlands regulations provide a clear example of our problem. Ecology staff provide detailed comments on most proposed CAOs regarding wetlands protection. The city or county can accept or reject each of these comments – that is the authority of the local government under the GMA. But when the CAO is provided to Ecology for a Shoreline amendment, how can we approve regulations that our staff found were deficient in adequately protecting wetlands? What does Ecology do with comments from CTED, WDFW or other parties that were not fully addressed in the local CAO? Ecology must require changes to locally submitted SMP amendments where they are necessary to determine the amendments are consistent with statutory and guidelines requirements.

4. **How should the critical area update be integrated into the SMP? How does a “critical area segment” fit into the broader objectives of Shoreline management?**

One option would be to require that the updated CAO standards be fully integrated into the existing SMP document. However, this would require a significant amount of work and seems to go beyond the Board’s intent.

Another approach is to append the updated CAO onto the existing SMP. This seems consistent with the Hearings Board decision, which views this as the final action in a CAO update process. The general legal principle would be that where there are different standards in the two documents (for buffer widths, for example), the more restrictive generally applies. But leaving these as two separate documents could create significant confusion. Issues include:

- How do we ensure that the habitat protection standards in the critical area “segment” do not contradict or undo other objectives of the local SMP? The CAO is a single-topic document (environmental protection.) In contrast, the SMP also includes environment designations (use zoning), priority for water dependent uses, and provisions for public access – and meeting the broad policy intent of an SMP may not be consistent with CAO requirements.

To illustrate this potential problem: How should we handle new or expanded buffers for critical areas that are adjacent to water-dependent port activities? Might these existing port uses – which are priority uses under the local Shoreline program – be technically

made “non-conforming” by the updated CAO regulations? How should this be handled to avoid unraveling existing Shoreline policies when the updated CAO standards are incorporated into SMPs? In this case, a more restrictive standard applies approach (see above) may create a policy conflict.

- What about land use review procedures in the CAO that contradict Shoreline permit procedures? For example, in Shoreline areas the sole process for deviating from adopted standards is through a Shoreline variance permit. But CAOs often include “reasonable use exceptions” that follow a different process. How would applicants and staff understand which processes apply if we simply append the CAO to the existing SMP? Is it unreasonable to require that conflicting procedures and other provisions in the CAO be removed from the version adopted as a “segment” of the Shoreline program? Would this not require a new “action” on the part of local government to make such changes to the CAO?

5. How do these critical area segment SMP amendments fit with the upcoming comprehensive SMP updates required by statute?

Critical area segment SMP amendments do not take the place of the comprehensive SMP updates required by statute. Comprehensive SMP updates are based on the collection of data and technical assessments regarding shoreline conditions, future development, restoration opportunities, etc. SMP updates include a basic demonstration of how no net loss of ecological function will be achieved. The result: Habitat protection standards and approaches adopted through a subsequent comprehensive SMP update may need to differ from standards adopted in the original CAO.

One option might be that Ecology approves critical area segments as “interim” actions, to function as “overlays” expressly intended to be superseded by the future comprehensive SMP updates. But is this feasible from a policy and legal standpoint? Does Ecology approval of standards in a critical area segment create legal precedent binding future approvals? How does Ecology retain the ability to adopt standards during a comprehensive SMP update that differ from the original CAO standards, where this is needed to meet SMP guidelines requirements? In addition, new scientific and technical information may well emerge in the subsequent comprehensive SMP update process that may necessitate changes in existing CAO standards.

Comments and suggestions should be sent to Tom Clingman, Ecology Shorelands & Environmental Assistance Program, at tcli461@ecy.wa.gov or 360 407-7448. Written comments can be sent to:

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Or provide comments to any of our regional Shorelands staff.