

NO. 66014-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

(Whatcom County Court Case No. 08-2-02663-5)

Lyle and Sue Rader, husband and wife,

Petitioners/Appellants,

vs.

Whatcom County,

Respondent.

APPELLANTS' REPLY BRIEF

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I – INTRODUCTION

The Raders appeal the trial court conclusion of law that the Raders planting preparation was “first . . . subject to county action.” CP8. In 2006, the Raders began clearing a cow pasture for the planting of blueberries. CP 966; CP 445; CP 53; CP 606. Blueberry farming is an ecological improvement over dairy farming. CP 287. Blueberry farming is the farming practice that is the very least disruptive to wetlands. CP 287.

In November of 2006, Whatcom County ordered the Raders to stop and mitigate or face thousands of dollars of fines. CP 465 – 466. The Raders explained how their actions were allowed without a permit the Critical Areas Ordinance. CP 475, 480. Whatcom County did not agree.

The Raders appealed to the judicial branch to review Whatcom County’s decision. The trial court found that the site had agricultural activity ongoing “for more than 20 years. . . primarily being used for pasture. . . ” CP 7. The trial court determined that “no permit is required for Raders to plant blueberries on the disputed parcel.” CP 8. Whatcom County argues the trial court

made no errors in its findings of fact or conclusions of law. Brief of Respondent, 1.

Neither the facts nor the law support Whatcom County's exercise of power. So, Whatcom County continues to smear the Raders and portray them as villains. Brief of Respondent, Pages 2 – 3. Whatcom County suggests the Raders should have known that Whatcom County was going to "interpret" the Critical Areas Ordinance to require County action. *Id.*

The Raders are the first farmers to be subject to Whatcom County's interpretation of the Critical Areas Ordinance. Appendix "C" to Raders' Appeal Brief. The drafters of the ordinance did not anticipate Whatcom County would require permits for ongoing agriculture. CP 888; 4/18/07 RP 84. The County action is not described in the Critical Areas Ordinance or identified in Whatcom County's Brief. If County action is required, the Critical Areas Ordinance is void for vagueness.

II – RESPONSIVE STATEMENT OF FACTS

Whatcom County tells this Court, “After the Raders purchased the property, they cut, cleared and graded the ten-acre forested site, removing all trees and eliminating the wetland.” Brief of Appellants, 2. Not true.

When the Raders purchased the 10 acre site, there were few trees. CP 438, 503, 520, and 530 – 531; 4/18/07 RP 99. The Raders cut no more than 25 trees on the site. CP 530 – 531. Some trees remain on the property. CP 438, 520.

The Raders did not drain the pasture. 4/18/07 RP, 101 – 102. The ditches were already there. *Id.*, at 102. The pasture was likely drained before 1950. *See* CP 564.

III – ARGUMENT

A. Whatcom County’s Arguments are Circuitous.

Whatcom County, in its brief, repeatedly cites the Critical Areas Ordinance as if to ask the Court, “You see it right?” But it is just not there: the Critical Areas Ordinance does not require County permitting or approval of ongoing agriculture. Each argument circles back to this same flaw.

1. Section 5.

Whatcom County argues:

- Ongoing agriculture is “alteration.”
- Alterations “must comply with the substantive and procedural requirements of this chapter.”
- Therefore, ongoing agriculture must be “authorized” by Whatcom County personnel. Whatcom County’s Brief, p. 7. Citing WCC 16.16.205(B).

Nothing in the Critical Areas Ordinance, however, requires authorization before a farmer plants blueberries on farmland. As enacted, the section relied upon the Whatcom County simply reads: “Any proposed critical area alteration . . . must comply with the substantive and procedural requirements of this chapter. . .” WCC 16.16.205.

2. Section 6.

Whatcom County continues,

- “Ongoing agriculture in critical areas is regulated under the ‘CPAL’ Program.” Brief, 9.
- The CPAL program requires county “approval.” Brief, 10 (citing WCC 16.16.290).
- Therefore, ongoing agriculture must be approved by Whatcom County Personnel.

Conduct in accordance with the provisions of the Chapter does not need to be approved through the WCC 16.16.290 CPAL program. WCC 16.16.290; WCC 16.16.620; CP 549.

3. Section 7.

Whatcom County goes on,

- Forest Practices are activities “related to growing, harvesting or processing timber.” Brief, 10, citing WCC 2.97.158.
- Forest practices are not agriculture. Brief, 11, citing WCC 16.16.800.
- “Cutting trees is not ‘ongoing agriculture.’” Brief, 10.

However, no timber was grown, processed, or harvested by the Raders. CP 531. Whatcom County has not claimed error in findings of fact Number 7: “The parcel in dispute, for more than 20 years, has had agricultural activity ongoing, primarily being used as a pasture. . .” CP 7. Unchallenged findings of fact “are verities on appeal. . .” *Harris v. Urell*, 133 Wn.App. 130, 137, 135 P.3d 530 (2006), *review denied*, 160 Wn.2d 1012 (2007).

4. Section 8.

Whatcom County adds, "Cutting all of the trees, clearing the site, and grading the land for conversion to berry farming is not an ongoing cattle operation." Brief, 11. Ongoing agricultural is defined as "those activities involved in the production of crops and livestock including but not limited to. . . changes between agricultural activities." WCC 16.16.800; CP 551.

5. "County Action" is not required.

The trial court correctly determined that no permit was required. However, the trial court incorrectly determined that "clearing and grading shall not be done without first being subject to county action under the Critical Areas Ordinance." The action the trial court was referring to cannot be a permitting action. County "action" is used only in conjunction with permitting. WCC 16.16.240(B).¹ There is no county action allowed by WCC 16.16 in this case.

¹ "The Technical Administrator's authority shall transfer to another County decision-maker when another decision-maker is specified for a separate project permit. In such cases, the Technical Administrator shall ensure that all procedural requirements of this chapter are met and shall make a recommendation to the designated decision maker as to how the provisions of

B. Whatcom County's Arguments are Inconsistent with Case Law.

Our Supreme Court has affirmed critical areas ordinances maintaining agricultural lands as being consistent with the purposes and requirements of the Growth Management Act (GMA).

Swinomish Indian Tribal Community v. Western Washington Growth, 161 Wn.2d 415, 166 P.3d 1198 (2007). Contrary to Whatcom County's assertions, the Growth Management Act does not require Whatcom County to prioritize critical areas over agriculture. *Id.*, at 425. In fact, 34 of the 39 Washington Counties' Critical Areas Ordinances "either exempt or conditionally exempt existing and ongoing agriculture from the critical areas ordinance provisions." April 30, 2008, University of Washington, William D. Ruckelshaus Center Analysis of Language of Selected Elements of the Critical Areas Ordinances of Washington Counties, Page 2. Attached as Appendix 1.

In *Swinomish*, Skagit County's "no harm" standard allegedly failed to adequately protect critical areas as required by the GMA because it favored agriculture over critical areas. *Id.*, at 422.

this chapter apply to the **permit action**, including project permits." WCC 16.16.240(B). (Emphasis added.)

Local governments are not, however, given much direction by that statute as to whether protection of critical areas or the maintaining of agricultural lands is a priority. In fact, the GMA explicitly eschews establishing priorities: "The [GMA's planning] goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations." RCW 36.70A.020.

The lack of priority in the planning goals becomes especially problematic when local governments are faced with land that qualifies as both agricultural land *and* as a critical area (for example, a parcel of agricultural land that abuts a water source). Skagit County, in particular, had to confront this tension between maintaining agricultural land and protecting critical areas. This was necessary because the county contains approximately 115,000 acres of agricultural land that have been designated under the GMA as agricultural lands of long-term commercial significance.

Id., at 425.

Whatcom County's critical areas ordinance is clearly favorable to agriculture. Similar to the ordinance in *Swinomish*, Whatcom County's Ordinance allows ongoing agricultural activities where they are "conducted in accordance with all applicable provisions of the chapter." WCC 16.16.620(K).

C. Even if the Ordinance Were Intended to Require "County Action", It would be Unconstitutionally Vague.

Ongoing agriculture is clearly allowed in Whatcom County critical areas. WCC 16.16.290. Permitting is not required. *Id.* If there is a "county action" requirement hiding somewhere between the lines of Chapter 16.16, that requirement is void for vagueness. *Colautti v. Franklin*, 439 U.S. 379, 401, 99 S.Ct. 675 (1979). Due Process requires fair notice of the prohibited conduct, and prohibits language that is so indefinite it encourages arbitrary enforcement. *Colautti v. Franklin*, 439 U.S. at 390.

In *Colautti*, doctors in Pennsylvania sued to enjoin enforcement of a statute prohibiting abortions. *Colautti v. Franklin*, 439 U.S. at 381. The Court reasoned that Pennsylvania could not clarify ambiguities by resorting to statutory constructions that would make statutory language "redundant or largely superfluous." *Id.*, at 393.

In this case, the critical areas ordinance does not require permitting or action by Whatcom County. If the Court, however, were to determine that this was the drafters intent, that intent is

far too vague to meet the Due Process requirements of fair notice and prevention of arbitrary enforcement. The County "action" requirement is void for vagueness.

IV - CONCLUSION

The Raders are farmers who removed 20 to 25 trees (2.5 trees per acre) because they were preparing the pasture to plant blueberries. The Raders undertook no activity to "eliminate" a wetland. The Raders' intended actions would have improved the farm's ecology by planting blueberries in a pasture. The drafters of the ordinance did not anticipate it would be applied the way Whatcom County would have it applied. This Court should reverse the trial court and hold that no county action is required in this case to clear and grade a pasture for the planting of blueberries.

Respectfully submitted this 4th day of May 2011.

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APPENDIX A

THE WILLIAM D. RUCKELSHAUS CENTER

UNIVERSITY OF WASHINGTON

Analysis of Language of Selected Elements of the Critical Areas Ordinances of Washington Counties

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April 30, 2008

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Fact-Finding Reports

Substitute Senate Bill 5248 directed the William D. Ruckelshaus Center to conduct fact-finding related to critical areas and agricultural activities in seven topic areas. The attached paper is a discussion document distributed for review and consideration by the SSB 5248 Committee.

Information in this report was assembled by the Ruckelshaus Center based on sources and data that were accessible and assumed to be reliable during the fact-finding process in 2007-2008. The results were summarized for use by the Committee. This paper is not intended to express judgment about adequacy of policies or programs discussed, but to summarize the facts and highlight items that would appear to be of interest and relevance to the SSB 5248 Committee.

This document should not be assumed to represent the views of the SSB 5248 Committee members, the Ruckelshaus Center and its Board of Directors, or those who were interviewed during its development.

Analysis of Language of Selected Elements of the Critical Areas Ordinances of Washington Counties

Overview

What follows is a review of selected sections of the critical area ordinance language of Washington counties identified by the SSB 5248 caucuses. In each of these ordinances there is considerable variability in the language used. This is not unexpected.

Of significant interest to the SSB 5248 caucuses will be the section of the matrix that addresses the exemption of agricultural activities from critical areas regulations. In sum the language contained within the critical areas ordinances of 34 of the 39 counties either exempts or conditionally exempts existing and on-going agriculture from the critical areas ordinance provisions.

Analysis of Language of Selected Elements of the Critical Areas Ordinances of Washington Counties

The outline of this document begins with a discussion of the section of the matrix that addresses the exemption of existing and ongoing agricultural activities from critical areas regulation. This is of particular importance to the SSB 5248 process because other selected sections of the critical areas ordinances (e.g., wetland and habitat conservation buffer widths requirements) as they related to agriculture are dependent upon the exemption status (i.e., if existing and on-going agriculture is exempt none of the following regulations will apply). An analysis of the wetland buffer and habitat conservation areas regulations was prepared based on those counties grouped into: 1. Existing and on-going agriculture exempt; 2. Existing and on-going agriculture exempt with conditions; and 3. Existing and on-going agriculture not exempt. Following this section is a summary of the remaining sections and a discussion of the limitations associated with each section. Finally, the document summarizes the other columns of the matrix.

Agricultural Exemption Language

Summary of Section:

This column or section of the matrix presents the varying ways in which Washington counties incorporate agriculture under the critical areas ordinance regulations. An overwhelming proportion of counties (33/39) either exempts or conditionally exempts existing and on-going agriculture from the critical areas ordinance provisions. Seven of the counties do not exempt agriculture from critical areas ordinance provisions and one county has no critical areas regulations. Three of the counties, Clark, Clallam and Pierce, all cross over into two categories.

Existing and On-going Agriculture Exempt

There are a large number (24) of counties where *existing and on-going* agriculture is considered exempt from critical areas regulations. These counties include:

Adams, Asotin, Benton, Chelan, Clark¹, Cowlitz, Ferry, Garfield, Kitsap, Kittitas, Klickitat, Lewis, Lincoln, Pend Oreille, Pierce², San Juan, Skagit, Skamania, Spokane, Thurston, Wahkiakum, Walla Walla, Whitman, and Yakima.

These counties explicitly state that “existing or (and) on-going agriculture” is exempt from the critical areas ordinance provisions. Language similar to that which appears in the Garfield county ordinance is typical.

¹ Clark: Existing Agriculture within non-riparian habitat areas is exempt from Habitat Areas Regulations, and exempt from Wetland Regulations (if established prior to wetland ordinance) as long as further damage is not done.

² Pierce: Existing agricultural activities established prior to February 2, 1992 are exempt. After that date exempt with conditions.

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"This ordinance applies to lands within unincorporated Garfield County...Existing and ongoing agricultural and irrigation systems are exempt." Resource Lands and Critical Areas Development Ordinance for Garfield County § 3.1

Although existing and ongoing agriculture is exempt from any critical areas regulations within these counties, a brief analysis was conducted to see if there are any patterns reflected in these regulations. A brief analysis of the matrix sections on regulatory/ non-regulatory language, wetland buffer widths language, and habitat conservation widths language follows.

Regulatory/ Non-regulatory language: Regulations are provided for twelve (12) of the counties; two counties provide "guidelines" and ten (10) counties provide regulations and incentives. The large number of regulatory with incentive-based programs is an interesting development when considering that agriculture is exempt from regulations.

Wetland Setbacks: There are five different variants that are used to determine wetland setbacks. Two of the counties provided guidelines (with no specific setbacks). Eight of the counties utilize the type or category of the wetland to determine the buffer; setbacks in this category varied from a high of 200' to a low of 25'. Eight of the counties base wetland buffers off of the type or category of the wetland and the intensity of the development; setbacks in this category had a range of 300' to 25'. One county based buffers off of type of wetland and shoreline classification, with a range of 200' to no setback (0'). The remaining five counties base wetland buffers off of category of wetland, intensity of wetland and the function level of the wetland habitat (sometime referred to as "performance-based" buffers); setbacks in this category also range from 300' to 25'.

Fish and Wildlife Habitat Setbacks: There are several different variants that are used to determine fish and wildlife habitat setbacks (sometime referred to as habitat conservation areas). Three variants encompass a majority of the counties; setbacks based on water type and specific habitat plan (4 counties), setbacks based on water type, intensity and development and specific habitat plan (5 counties), and setbacks based on water type and a deferral to WDFW for specific habitat (4 counties). Three counties use water type and a performance based process to determine buffers; two counties use water type and intensity and three counties provide "guidelines." The remaining counties differ slightly in their approach, one county uses a "steering committee" for recommendations, one county uses a habitat plan only, and one county defers to WDFW for setbacks. The setback ranges differ slightly as well, 7 counties use a high of 100', 2 counties use a high of 150', 4 counties have a high of 200' and 4 counties have a high of 250'. As for the buffer "lows": 2 counties have a low of 0', one county has a low of 10', 6 counties have a low of 25', one county a low of 35', 5 counties a low of 50', one county a low of 75' and one county with a low of 150'.

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Existing and On-going Agriculture Exempt with Conditions

The critical areas regulations in eleven (11) Washington counties indicate that *existing and on-going* Agriculture is exempt with conditions. These counties include:

Clallam³, Douglas, Grant, Island, Jefferson, King, Mason, Okanogan, Pacific, and Pierce (after 2/92), Stevens (See Attachment “A” for specific conditions).

Ordinance language varies substantially by jurisdiction, but several counties tie the term ‘conditions’ to use and adoption of best management practices. Island County’s language is a good illustration.

"Existing and on-going agricultural activities when undertaken pursuant to best management practices to minimize impacts to critical areas" are exempt.

“Best management practices (BMPs) are approved by the county: ‘The Department shall maintain a selection of best management practices which have been approved by the Board for those uses which are subject to best management practices.’” ICC § 17.02.040(E)(1)

Other conditions of note include the adoption of a farm management plan; the significance of the impact of any new agricultural activity; exemptions in selected areas of the jurisdiction; or specified links to other county ordinances. This provision does not include expansions of existing and on-going agriculture or new agriculture.

Although the regulatory buffers typically do not impact the existing and on-going agriculture in these areas; a brief analysis was conducted to establish whether there were any patterns in the matrix sections of regulatory/ non-regulatory language, wetland buffer widths language, and habitat conservation widths language.

Regulatory/ Non-regulatory language: Regulations are provided for nine of the counties; two of the counties provide regulations and incentives.

Wetland Setbacks: There are three different variants that are used to determine wetland setbacks. Five of the counties utilize the type or category of the wetland to determine the buffer; setbacks in this category varied from a high of 150’ to a low of 25’. Three of the counties base wetland buffers off of the type or category of the wetland and the intensity of the development; setbacks in this category had a range of 300’ to 25’. The remaining three counties base wetland buffers off of category of wetland, intensity of wetland and the function level of the wetland habitat (sometime referred to as “performance-based” buffers); setbacks in this category also range from 300’ to 25’.

Fish and Wildlife Habitat Setbacks: There is quite a range in the different variants that are used to determine fish and wildlife habitat setbacks (sometime referred to as habitat conservation areas). The

³ Clallam: Agricultural activities established prior to 6/92 are exempt with conditions; all agriculture established after 6/92 not exempt.

Analysis of Language of Selected Elements of the Critical Areas Ordinances of Washington Counties

most significant variant used is buffers based on the specific water type and a habitat plan (4 counties). Two counties only use a habitat plan to determine setbacks. The remainder of the counties differ; one county uses water type, intensity of development and a habitat plan; one uses water type and defers to WDFW for habitat; one county has specific development standards and bases setbacks for water on the location inside/outside of the Urban Growth Area and type of water; another uses habitat standards and water type; and finally, one county uses the water type and staff investigation to determine setbacks for habitat. The most significant habitat setback (associated with water type) range from a high of 150' and a low of 50'; however, among all counties the high is 200' and the low is 25'.

Existing and On-going Agriculture Not Exempt

Six of the counties do not provide absolute exemptions for existing and on-going agriculture. This is of particular importance to the SSB 5248 committee because agriculture is in whole or in part regulated in these counties. Within each of these six county ordinances there is, however, considerable variation. Consequently, a summary of each individual county is provided below. The summary includes an analysis of four sections of the matrix: regulatory/ non-regulatory language, wetland buffer widths language, habitat conservation widths language and notes of any alternative regulations that may apply to agriculture. Also, the wetland and habitat conservation buffer widths information provided below does not necessarily reveal the buffers that may be actually approved and implemented. Provisions in most of these county codes allow for buffer reductions (through enhancement or mitigation). These buffer reduction sections typically will allow a maximum of a 50 percent reduction in total buffer (i.e. a 100-foot buffer could be reduced to 50 feet).

The six counties in which existing and on-going agriculture is not exempt include: Clallam (after 6/92), Clark⁴, Columbia, Franklin, Snohomish⁵, and Whatcom.

Clallam County

Regulatory: Regulations are provided.

Wetland: The wetland ratings are based on the class of wetland and the type of development (major vs. minor development). Buffers associated with major development include: Class I (200'), Class II (150'), Class III (75') and Class IV (50'). Buffers associated with minor development include: Class I (100'), Class II (75'), Class III (50') and Class IV (25'). CCC § 27.12.215(1)(a).

⁴ Clark: Existing Agriculture within riparian habitat areas (or wetlands) is regulated and agriculture established after the adoption of the habitat conservation and wetland ordinances are not exempt.

⁵ As of Oct. 1, 2007 Snohomish County has two CAOs – one for ag subject to the “timeout” in SSB 5248 (old CAO – SCC 30.62) and another for ag not subject to the “timeout” as well as all other development activities; for ag subject to the “timeout” the CAO does not apply to existing and on-going agriculture until a permit or approval is required (building permit, flood hazard permit, shoreline permit, etc., or a project goes beyond the “right to farm” threshold requiring a grading permit or drainage approval. Note that permits or approvals are not typically required for what is considered “existing or on-going” agriculture but are more often associated with new or modified ag activities).

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Fish and Wildlife Habitat: Habitat conservation areas buffers are based on the “Type of Water” (ranging from 1-5) and the type of development (major vs. minor development). Buffers associated with major development range from 150' (Type 1 Water) to 50' (Type 5 Water); minor development buffers range from setback determined by Shoreline Management Act to 50' (Type 5 Water) CCC § 27.12.315.

Alternative Regulations Agriculture: No alternative agricultural regulations, however the all agriculture established prior to 6/92 is exempt.

Clark County

Regulatory: Regulations are provided; non-regulatory incentives also provided.

Wetland: Buffers could be considered “performance based”; they are based on wetland rating category, associated habitat functions and the intensity of land uses (low, moderate & high). Buffers associated with a low intensity of land use vary from 150' (high wetland function rating) to 25' (low wetland rating and category). Moderate land use intensity buffers range from 225' (high wetland function rating) to 40' (low wetland rating and category), and high land use intensity buffers range from 300' (high wetland function rating) to 50' (low wetland rating and category) CCC § 40.450.30(E)(2).

Fish and Wildlife Habitat: Habitat Conservation buffers are based on the Type of Water; buffers are: Type S= 250', Type F= 200', Type Np= 100' and Type Ns= 75'. For the purposes of an agricultural/habitat protection plan, the regulated riparian area is reduced: ranging from 100' (Type S and F streams) to 75' (Type Np and Ns streams). The County defers to the Washington Department of Fish and Wildlife (WDFW) for other priority habitats and species CCC § 40.440.010(C)(1)(a) and (b).

Alternative Regulations Agriculture: Existing Agriculture within non-riparian habitat areas is exempt from Habitat Areas Regulations, and exempt from Wetland Regulations (if established prior to wetland ordinance) as long as further damage is not done. Existing Agriculture within riparian habitat areas (or wetlands) is regulated and agriculture established after the adoption of the habitat conservation and wetland ordinances is also regulated. In some cases an agricultural/habitat protection plan may be required for conducting agricultural activities in riparian areas. Plan must be approved by an agricultural-habitat technician certified by the county CCC § 40.440.040(B)(2)(a). There is also opportunity for a non-regulatory "Stewardship Plan" and the county is responsible for providing examples of Best Management Practice's. CCC § Table 40.440.010-1 and § 40.440.40 and § 40.450.010(C)(1).

Columbia County

Regulatory: Regulations are provided.

Wetland: Wetland buffers are based on the Category of wetland and the intensity of use (high, moderate and low); buffers are as follows: Category I (High: 300'; Moderate: 250'; Low: 200'), Category II (High: 200'; Moderate: 150'; Low 100'), Category III (High: 100'; Moderate 75'; Low 50'), and Category IV (High: 50'; Moderate: 35'; Low: 25'). Columbia Critical Areas and Resource Lands

Analysis of Language of Selected Elements of the Critical Areas Ordinances of Washington Counties

Ordinance Chapter 7, Section 4(E)

Fish and Wildlife Habitat: Habitat Conservation Area setbacks are determined by a habitat assessment in combination with WDFW management recommendations and performance standards are provided for specific habitats. (Critical Areas and Resource Lands Ordinance Chapter 4, Section 2(C)). Riparian habitats have specific setbacks based on the Type of Stream: Type 1 & 2 Streams (250'); Type 3 (200'); Type 4 and 5 with low mass wasting potential (150') and Type 4 & 5 with high mass wasting potential (200') Columbia Critical Areas and Resource Lands Ordinance Chapter 4, Section 3(B)(3)(a).

Alternative Regulations Agriculture: No alternative agricultural regulations.

Franklin County

Regulatory: Regulations are provided.

Wetland: No buffer widths provided.

Fish and Wildlife Habitat: No buffer widths provided.

Alternative Regulations Agriculture: No alternative agricultural regulations.

Snohomish County

Regulatory: As of Oct. 1, 2007 Snohomish County has two CAOs – one for ag subject to the “timeout” in SSB 5248 (old CAO – SCC 30.62) (this includes land located within agriculture or rural designations) and another for ag not subject to the “timeout” as well as all other development activities (this includes land located outside of agriculture or rural designations) (SCC 30.62A, B and C).

Snohomish County Agriculture NOT SUBJECT to the “Timeout”

Wetland: Buffers could be considered “performance based”; they are based on the category of wetland, characteristics and functions of wetland, land use intensity and the proposed mitigation. There is a large range in the buffers: Category I and II range from 300'-50', Category III buffers range from 150' to 40' and Category IV range from 50' to 25' (note: buffers will not be applied to agricultural activities unless they are required by BMP's or farm plan, or farmer opts to be regulated under full provisions of new CAO) SCC § 30.62A.320(1)(a) Table 2b.

Fish and Wildlife Habitat: Buffers are provided for streams, lakes and marine waters; they are based on type and range from: Type S (150') to Type Ns (50'), buffers for all marine waters (150') SCC § 30.62A.320(1)(a)-Table 2a. Habitat corridor buffer widths are based on wetland category, description and intensity, they range from 75' to 40'. There is also a requirement for a habitat management plan for the presence of critical species note: buffers will not be applied to agricultural activities unless they are required by BMP's or farm plan, or farmer opts to be regulated under full provisions of new CAO) SCC § 30.62A.460.

Alternative Regulations Agriculture: Agriculture has its own regulations, which include Best Management Plan's (BMP's) and a farm conservation plan. Agriculture may not be subject to buffer requirements unless the BMP's or farm plan require them SCC § 30.62A.010(2)(b).

Analysis of Language of Selected Elements of the Critical Areas Ordinances of Washington Counties

Snohomish County Agriculture SUBJECT to the “Timeout”⁶

Wetland: Buffer widths are based on type of wetland and an urban or rural classification; buffer widths are as follows: Urban classification: Category 1 (75'), Category 2 (50'), Category 3 & 4 (25'); Rural classification: Category 1 (100'), Category 2 (75'), Category 3 (50'), and Category 4 (25').

Fish and Wildlife Habitat: Buffer widths are based on stream type and urban or rural classification; buffer widths are as follows: Urban classification: Type 1 to Type 3 (100'), Type 4 (25'), and Type 5 (10'); Rural classification: Type 1 to Type 3 (100'), Type 4 (50'), and Type 5 (25'). Habitat Management Plans are required when the presence of a priority habitat is indicated (Note: the County has an adopted ESA rule for Chinook and Bull Trout which requires a 150-foot buffer for waters containing these fish species).

Alternative Regulations Agriculture: No alternative agricultural regulations.

Whatcom County

Regulatory: Regulations are provided.

Wetland: Buffers could be considered “performance based”; they are based on the level of function, wetland category and intensity of land use. Wetlands buffers with a high level of function range from 300' to 25'; those with a moderate level of function range from 150' to 25'; and buffers associated with a low level of function range from 100' to 25'. WCC § 16.16.630

Fish and Wildlife Habitat: Stream Buffers are as follows: Shoreline streams: 150 feet; Fish-bearing streams: 100 feet; Non-fish-bearing streams: 50 feet; and other habitat areas (i.e. ponds, locally important habitat) range from 150' to 50'. WCC § 16.16.740(B) and (C)

Alternative Regulations Agriculture: Existing ongoing agricultural activities are subject to the following:

1. The activities are conducted in accordance with all applicable provisions of the critical areas chapter and Whatcom County Code Title 17 (Flooding); or
2. The agricultural activity is in compliance with the Conservation Program on Agricultural Lands (CPAL) as described in WCC 16.16.290, and Appendix A WCC § 16.16.290 and Appendix A. The CPAL requires that agriculture have a conservation plan (the actual plan required varies in complexity depending on farming operation).

Existing and On-going Agriculture No Regulations

One county does not provide critical areas regulations: Grays Harbor. Therefore existing and ongoing agriculture is not regulated. No analysis is required for this group.

⁶ Ag subject to the “timeout” in SSB 5248 (old CAO – SCC 30.62): The CAO does not apply to existing and on-going agriculture until a permit or approval is required (building permit, flood hazard permit, shoreline permit, etc., or a project goes beyond the “right to farm” threshold requiring a grading permit or drainage approval. Note that permits or approvals are not typically required for what is considered “existing or on-going” agriculture but are more often associated with new or modified ag activities

Analysis of Language of Selected Elements of the Critical Areas Ordinances of Washington Counties

Summaries and Limitations of Sections

Regulatory vs. Non-Regulatory Language

Summary of Section: This section offers an overview of the county critical areas ordinances and indicates whether they are regulatory or non-regulatory (or if the county provides for both). Regulatory ordinances are those that require compliance, while those that are non-regulatory are voluntary or incentive based. The 1990 Washington State Growth Management Act (GMA) required local governments to provide for the designation and protection of critical areas throughout the state. The GMA requires all counties to have a regulatory critical areas ordinance; this section of the matrix goes beyond the regulatory ordinances to include those counties that also make available non-regulatory or voluntary means for protection of critical areas. Included in the directives of SSB 5248 was the need for innovative solutions to the balance of agricultural activities and environmental regulations; in identifying those counties that are currently using voluntary (or innovative) programs this matrix can assist with fact-finding aimed at that directive.

Limitations: The information provided for in the matrix was primarily internet research (except when unavailable and a hard copy of the critical areas ordinance was obtained), followed-up by a brief verbal confirmation with county staff. One of the most significant limitations with this matrix is the “ground truth” element. Although many counties do have regulatory critical areas ordinances, it is difficult to determine if they are implemented as they are presented in the ordinance. Also, with regard to the non-regulatory programs, the information provided on the internet does not qualify the popularity of the programs, or availability of any funding required, or the difficulty in obtaining the incentives.

Definition of Agriculture

Summary of Section: This column or section of the matrix presents the varying definitions that the counties provide for agriculture. The counties do not consistently define the term agriculture; many instead define agricultural activities, agricultural land or existing and on-going agriculture. The intent of this section is to highlight any of the significant similarities or differences found in the counties definitions regarding agriculture. Something additional to note is that the definitions can also be found in different chapters or sections of the code; some counties have a separate definition section, while others provide definitions within the critical areas chapter.

Limitations: This section is fairly straight forward in the fact that definitions are stated directly in the text. The primary limitation comes again with implementation; if the definition provided for is, in fact, used by county staff when considering agricultural applications. It appears that many counties have become more specific in the types of agriculture (i.e. horticulture, viticulture, etc.) and this specificity may assist in the implementation.

Analysis of Language of Selected Elements of the Critical Areas Ordinances of Washington Counties

Compliance Requirement Language

Summary of Section: The compliance requirement language indicates to ‘what’ and ‘where’ the critical areas ordinance applies. While the language used by counties varies, the jurisdictions are focused on development activities within designated county critical areas.

Limitations: The language used in this section is quite variable and broad. How a particular county chooses to interpret this language is something that cannot be assessed in this analysis.

Wetland Buffer Widths Language

Summary of Section: This column of the matrix presents the county setback requirements (or buffer widths) associated with development in and around wetlands. Section 3(3)(a) of Substitute Senate Bill 5248 directed the fact finding of existing regulatory critical areas specifics related to critical areas ordinances adopted under 36.70 RCW and buffer widths. The most common determinate for wetland buffers is the category (or type) of wetland; from this base, buffers vary based on intensity of use, or more site-specific habitat functions. It is important to note that this section only represents the buffers represented in the specific county code. It is very common that county codes provide a means for buffer reduction based on some form of mitigation, or enhancement and many development proposals utilize these buffer reductions.

Limitations: The most significant limitation to the information in this section is the difficulty in determining how the wetland buffer sections are implemented on the ground, including how often the buffer reduction provisions are used (and to what extent). The provisions in most county codes allow for wetland buffer reductions (through enhancement or mitigation). These buffer reduction sections typically will allow a maximum of a 50 percent reduction in total buffer (i.e. a 100-foot buffer could be reduced to 50 feet). Also, gathering of the wetland buffer information was determined through internet research (except when unavailable and a hard copy of the critical areas ordinance was obtained), followed-up by a brief verbal confirmation with county staff; there may be programs that have inadvertently been overlooked.

Habitat Conservation Buffer Widths Language

Summary of Section: The determination of fish and wildlife habitat buffer widths in counties follows a fairly standardized process. Most jurisdictions use one of two different Department of Natural Resources (DNR) designations for water bodies in combination with the requirement for a site specific habitat management plan to specify buffer widths associated with priority species or wildlife. Buffer widths for water bodies (lakes, rivers, streams, etc.) within these jurisdictions are

Analysis of Language of Selected Elements of the Critical Areas Ordinances of Washington Counties

typically specified in this section of the code. There is considerable variation in the buffer widths specified by counties for each water body classification. Another group of counties do not specify setbacks but rely on a site specific habitat management planning process to identify appropriate buffer widths.

Limitations: Similar to the wetland buffer section, the most significant limitation to the information in this section is the difficulty in determining how setbacks are implemented on the ground. Also, the use of specific habitat management plans does not provide information on the typical setbacks that are required.

Other Columns of the Matrix

The other columns provided for in the matrix include general, straight-forward information: the name of the county, "County"; if the county is required to fully plan under the Growth Management Action (GMA), "Fully Planning Under the GMA"; the county contact information and county website, "Contact/Website"; the date that an amended critical areas ordinance is required through the GMA, "Date Amended CAO Due"; if there is any spatial data provided by the county (website location for information) "Spatial Data"; the most recent date for a critical areas ordinance update "Date of Last Update"; and finally a column for additional information on the counties regulation of critical areas "Notes".

Analysis of Language of Selected Elements of the Critical Areas Ordinances of Washington Counties

Attachment “A”

Counties *existing and on-going* Agriculture Exempt with Conditions (10 counties):

Clallam: Agricultural Activities established prior to 6/92 are exempt from critical areas regulations if following BMP's. "Acceptable BMP's shall include: (a) activities carried out consistent with farm plans issued and authorized by the NRCS; (b) activities that demonstrate consistency with (TMDL) established by the Department of Ecology; (c) activities that demonstrate consistency with standard BMPs published by the NRCS CCC § 27.12.035.

Douglas: Agricultural activities normal or necessary to general farming conducted according to industry-recognized best management practices are exempt.

Grant: Existing and ongoing agricultural activities that result in significant adverse impacts to a critical area or its buffer shall not be exempt from the provisions of this Chapter. New agricultural development and expansion of existing is also regulated. GCC § 24.08.60

Island: "Existing and on-going agricultural activities when undertaken pursuant to best management practices to minimize impacts to critical areas" are exempt. BMP's are approved by the county: "The Department shall maintain a selection of best management practices which have been approved by the Board for those uses which are subject to best management practices." ICC § 17.02.040(E)(1)

Jefferson: Existing and ongoing agricultural activities on lands enrolled in the open space tax program for agriculture or on lands designated as agricultural lands of long-term commercial significance on the official map of Comprehensive Plan land use designations are exempt. JCC § 18.15.300(3) and 18.15.335(1)(e)

King: Existing and on-going Agriculture is generally exempt (although need a farm management plan to cover agricultural ditches that are used by salmonids). New and expanded agriculture requires a farm management plan with the King County Conservation District. KCC § 21A.24.020 and 21A.24.051.

Mason: Existing and Ongoing Agriculture exempt "provided they are conducted using best management practices, except where such activities result in the conversion of a regulated wetland or wetland buffer to a use to which it was not previously subjected." BMP's defined through the Stormwater Program Guidance Manual for the Puget Sound Basin, Volumes I and 2, #92-32 and 92-33, WDOE, 1992). MCC § 17.01.070(2)(d) and 17.01.110(F)(3)

Okanogan: Existing and ongoing agricultural activities are not exempt in all cases; only exempt in the wetlands and fish and wildlife sections. OCC § 14.12.570(D); OCC § 14.12.260(D). OCC § 14.12.260(D) exempts “[s]tructures and activities that currently and legally exist within fish and wildlife habitat conservation areas at the time of adoption of this chapter” which includes existing and ongoing agriculture. Riparian areas are classified as a fish and wildlife conservation area. OCC § 14.12.270(B)(11).

Analysis of Language of Selected Elements of the Critical Areas Ordinances of Washington Counties

Pacific: Existing and ongoing agricultural operations are exempt provided that they do not result in expansion into a critical area and that they comply with BMP's contained within any conservation plan between the owner and the Department of Ecology. Pacific County Critical Areas and Resource Lands Ordinance Section 3(E)(2).

Pierce (after 2/92): Agriculture established after 2/2/92 must not cause permanent conversion of a critical area through actions such as filling, ditching, draining, clearing, grading, etc. PCC § 18E.20.030(A) Agricultural activities must be in compliance with the USDA, NRCS Conservation Reserve Program farm Management Standards if they are to be permitted within critical areas and buffers. PCC § 18E.40.040(B)(14) and § 18E.30.040(C).

Stevens: Existing and ongoing Ag are treated as an allowed use and must meet requirements of code-SCC § 13.20.052 must be in conducted in accordance with BMP's. BMP's are developed through: Stevens County Conservation District, the Natural Resource Conservation Service (NRCS), NRCS technical service providers, the Washington State University Extension Service, or other qualified professionals. SCC § 13.20.054 and 13.20.056.

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

Lyle and Sue Rader, Husband and
Wife,

Petitioners/Appellants,

vs.

Whatcom County,

Respondent/Respondent.

Case No. 66014-4-I

**Whatcom County
Superior Court
Case No. 08-2-02663-5**

Certificate of Service

CERTIFICATE OF SERVICE
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I, Heather Shepherd, certify that on May 4th, 2011, I caused to be served copies of the following documents: **Appellant's Reply Brief**; and this **Certificate of Service** in the above matter, on the following person, at the following address, in the manner described:

Royce Buckingham, Esq.
Whatcom County Prosecutor's Office
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U.S. Mail
 Express Mail
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 Messenger Service
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DATED this 4th day of May 2011.


Heather Shepherd