



City of Bainbridge Island
PLANNING & COMMUNITY DEVELOPMENT
MEMORANDUM

TO: Mayor and City Council

FROM: Greg Byrne, Director
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DATE: March 28, 2007

RE: Options for revising CAO to comply with BAS on Shorelines

Background:

Bainbridge Island's Critical Areas Ordinance (CAO) was revised by Ordinance No. 2005-03 on December 14, 2005. On February 16, 2006, the Suquamish Tribe filed a petition with the Central Puget Sound Growth Management Hearings Board (Board) challenging the legality of the revised CAO.

The original hearing on the merits before the Board was scheduled for June 16, 2006. However, the City and Tribe have entered a number of stays of the litigation in order to explore possible settlement of the litigation, and to allow the City an opportunity to have an outside consultant review the City's revised CAO and whether utilization of the City's Shoreline Management Master Program as the document for managing Marine Critical Areas was consistent with the Best Available Science (BAS) requirement. A hearing on the merits before the Board is currently scheduled for June 14, 2007.

The primary question posed by the Suquamish appeal of the revision to the City's Critical Areas Ordinance is whether the protections afforded by the CAO and the Shoreline Management Master Program provide adequate protection to the marine critical areas. The City utilized Battelle Marine Science Laboratory for this study since they have the necessary expertise and extensive knowledge of the Island shorelines from work in the past.

The Battelle Marine Science Laboratory review of the City's Critical Areas Ordinance (CAO) and Shoreline Management Master Program concludes that utilizing the Shoreline Master Program as the document for managing marine critical areas is not consistent with the Best Available Science (BAS) requirement (WAC 365-195-900 though 365-195-925). On the basis of the report and recent Board decisions addressing similar shoreline/CAO issues, the staff respectfully recommends that the City should strongly consider proceeding with revisions to the Critical Areas Ordinance to address the identified deficiencies regarding the marine critical areas.

The Washington Administration Code (WAC 365-190-080(5)) specifically lists the following marine critical areas:

- Commercial and recreational shellfish areas;
- Kelp and eelgrass beds; herring and smelt spawning areas;
- Waters of the state

The WAC also requires the inclusion of the areas with which endangered, threatened, and sensitive species have a primary association. Since National Marine Fisheries Service (NMFS) has designated all of the nearshore in Puget Sound as critical habitat for Puget Sound Chinook, all of the shorelines of Bainbridge Island are considered a Class I Fish and Wildlife Habitat Conservation Areas (FWHCA). Attached is a map showing marine critical areas other than the Chinook habitat. The data used to develop this map has not been field verified and may not be reliable, but it gives a general idea of marine critical areas that are specifically identified in the WAC, other than FWHCA.

Proposed Options:

Staff has developed three options to amend the ordinance to comply with the best available science and address the necessary regulation of marine critical areas. Staff recommends Option B. Each option will require a review of the best available science to determine if it adequately provides protection of the critical areas.

Option A – Site Specific Habitat Management Plans (HMPs)

As currently provided in the CAO regulations, a Habitat Management Plan (HMP) is required for all activities within 200 feet of a Class I FWHCA (except for marine critical areas). HMPs evaluate the impact of the proposed activities on the functions and values of the critical areas using best available science. It also includes mitigation for those impacts.

To meet the requirements for protection of marine critical areas, Option A would remove the exception currently provided for marine critical areas, resulting in the requirement of an HMP for all activities within 200 feet of the marine shoreline. This option would not include prescriptive regulations, but would require the development of administrative guidelines after Council adoption. Administrative guidelines set the standards for the HMPs and what would be included in the plan.

Pros – Positive Aspects of this Option

- Code revision would be relatively simple.
- Standards are being developed for HMPs (which may need modification for marine issues).
- BAS consistency would be provided in each site-specific analysis.
- Applicant would have the greatest amount of flexibility.

Cons – Negative Aspects of this Option

- Use of HMP is untested before the Growth Hearing Boards for inconsistency with State law.
- Additional staff or consultant resources would be required to review HMPs (Environmental Technical Advisory Committee could provide some assistance but number of applications could be excessive for volunteer group.)
- Increased costs for the applicant.
- Unpredictable process - Impossible to determine what would be allowed without first doing the analysis.
- Longer review time required for applications.
- Administrative permit decisions subject to dueling expert opinions.
- Very difficult to maintain consistency in decisions.
- Would not address cumulative impacts.
- The City would still need to do a BAS review as the basis for HMP review and to direct applicants to acceptable scientific documents.

Option B – Establish prescriptive buffers and development standards for marine critical areas with optional Habitat Management Plans

This option would be a similar approach to the buffers and development standards currently established for streams and wetland critical areas, and would be developed through a process based on best available science. Buffer reduction and modification (reduction, averaging, variance and reasonable use exceptions), as well as use exceptions would be based on science.

Habitat Management Plans: Site-specific HMPs that are based on BAS could still be allowed. The buffer could be divided into a habitat buffer and a water quality buffer similar to the current wetland and stream buffer requirements. A habitat management plan option could be provided, allowing development within the habitat buffer if impacts were sufficiently addressed and the quality of habitat was not diminished. These HMPs would need to demonstrate no net loss in the function and value of the critical areas buffers.

Recent Growth Hearings Boards decisions have indicated that the BAS for buffers, including shoreline buffers, need to be greater than 100 feet in width. (Examples of other jurisdictions' buffer requirements are attached for information.) Specific buffer widths would have to be determined based on a review of the best available science and would likely require recommendations from a consultant and a peer review by the City's Environmental Technical Advisory Committee (ETAC.) One buffer width may be established for the entire Island that would be of sufficient width to protect all of the marine critical areas, or buffers could be established based on each type of critical area.

Pros – Positive Aspects of this Option

- Provides a high level of certainty for the applicant.

- Could be administered with less increase in administrative costs than Option A.
- BAS documentation would improve future updates.
- Regulations could be migrated into SMP during comprehensive update and not have to be rewritten.
- Still provides HMPs as an option and maintains flexibility in the management of the habitat buffer.

Cons – Negative Aspects to this Option

- Increased staff time and consultant resources necessary for up front legislative process and BAS review (Option A would shift cost and staff resource increases until after adoption of the CAO amendment).
- Would result in significant number of current residential structures being non-conforming
- Regulations for marine critical areas waterward of ordinary high water would require significant development and will take more time than Option A.

Option C – Established Buffer

This option would establish buffers to protect marine critical areas, but would not divide these buffers into water quality and habitat buffers. Development on undeveloped legal lots within the newly designated buffer area would only be permitted through a reasonable use exemption. Any redevelopment that expands a structure would not be allowed.

Pros – Positive Aspects of this Option

- Could be administered with less increase in administrative costs than Option A.
- BAS documentation would improve future updates.
- Regulation would be simpler to develop as they would be based on current regulations for reasonable use exemptions.
- Decisions would be made by the Hearing Examiner and would be based on legal precedents.
- Would allow for more flexibility to be developed in the update of the Shoreline Management Master Plan since management standards would not be predetermined in this update process and could be part of a more holistic management plan.

Cons – Negative Aspects to this Option

- May increase likelihood of legal challenges as some may view it as too restrictive.
- Increase number of Reasonable Use Exception that would require Hearing Examiner review.
- Would result in a significant number of current residential structures being non-conforming.
- Vegetation removal regulations would be difficult to enforce.

Additional Costs and Timelines:

Each of these proposed revision options will require additional scientific review and support from a consulting firm in the development of the standards. It will also be very important that we keep the public informed of what is being proposed. To accomplish these goals it is anticipated that the following additional funding will be necessary:

Best Available Science Review and Consultation	\$35,000
Mailings, printing and other supplies	\$10,000
Support from a communication specialist	\$15,000
Total	\$60,000

Time required to complete the necessary reviews and amendments would vary depending on which option is selected. Option A would require the least amount of time to enact, but the CAO challenge before the Board would continue if the Suquamish Tribe does not accept this approach. Continued litigation could involve both the continued challenge to the current CAO and a subsequent challenge to the CAO amendment. One of the attached timelines would be for Option B or C, which would provide for the most thorough revision of the CAO in relationship to the marine critical areas. A continued stay on the appeal would be required from the Growth Hearing Board in order for the City to complete the amendment process and include the community in a full public involvement process. The Timeline for Option A would still require a stay from the Growth Hearings Board but would not be as long.

Public Involvement Opportunities

Any of the options will allow the public with a number of opportunities to provide comments on the developed option, which exceeds the requirements for public involvement pursuant to the Growth Management Act. The opportunities are in the attached timeline and include:

- All Island Mailing on issue
- Webpage updates
- Email notification on request
- Legislative Scoping Workshop and comment period
- SEPA comment period
- Committee work sessions
- Two public hearings

Staff Recommendation: The staff recommends the development of Option B. This option provides a minimum protective area on the shoreline while providing flexibility in the management of the site. It is very consistent with the management strategy development by the City Council for the protection of wetlands and streams. Depending on the buffer identified in the BAS review, the management area may be less than for option A. If the prescribed buffers are left, development would not incur the cost of an HMP.

Marine Area Critical Area Buffers in Recent or Draft CAOs

Jurisdiction	Marine Areas	Buffers
Snohomish County (2006 Draft)	All marine water	150 feet
King County	Type S (Marine waters and large streams)	115 feet 165 feet in shoreline designated as high (more natural) on Basin and shoreline Map
Kitsap County	Urban, Semi-Rural, Rural Shoreline	100 Feet
Whatcom County (Draft)	Eelgrass and Kelp bed	150 Feet
	Commercial and Recreation Shellfish beds	150 Feet
	Forage Fish Spawning Beaches	150 Feet
Pierce County (After remand by CPSGHB)	Marine waters designated as Marine Shoreline Critical Salmon Habitat	100 Feet
Seattle (Upheld by CPSGHB)	Shoreline	100 Feet
City of Shoreline	Puget Sound	Site-by-Site