

## "Minority" commentary on:

### MEMORANDUM

**To:** Jefferson County Planning Commission **From:** Critical Area Ordinance Committee (CARC)

**Date:** May 1, 2007

**Subject:** Fundamental/Foundational Principles and Values –

The endorsing members of the Critical Areas Ordinance Committee (CARC) herewith transmit to the Jefferson County Planning Commission these statements of Fundamental/Foundational Principles and Values:

1. In recognition of the full spectrum of the goals of the Growth Management Act (i.e. adequate infrastructure, control of sprawl, transportation, housing, economic development, property rights, timely and predictable permitting, natural resource industries, open space, environment, citizen participation, public services, historic preservation and shoreline management), the fundamental constitutional civil rights that are implicated, and the need to assure that each goal of the Act is fully balanced against the other goals of the Act, considered, and incorporated into any recommendation for regulation under its authority, the CAO Sub-Committee recommends that any regulation adopted by the Jefferson County BOCC, pursuant to the Growth Management Act including the required update of the Critical Area Ordinance currently being prepared, be based on a stated principle of doing the least harm to the rights and privileges of the citizens/property owners possible while furthering the goals and achieving all of the objectives required by the act.

The requirement to protect critical areas is separate from, and takes precedence over, the balancing of the 14 goals of the Growth Management Act listed above. Thus it is not appropriate to base regulations for development in critical areas on doing the least harm to property rights.

2. Regulations adopted by Jefferson County should be clear, concise, and written in “plain English” so that the citizens of the County can know what is expected of them. The use of jargon, unexplained references to other portions of the code or other external documents not readily available to the public should be avoided. Where possible, as in the case of the Critical Areas Ordinance, regulations should exist as “stand alone” documents that contain all of the information that a citizen would need to understand how to comply with the regulation.”
3. Regulations adopted by Jefferson County should be based upon clear statements of the rationale/reason for the regulation (i.e. a clear legislative statement of the legitimate public purpose to be addressed by the regulation), the expected effectiveness of the regulation to address the identified legitimate public purpose, the means to be utilized to ascertain and assure that the regulation has its intended effect (i.e. for monitoring and evaluation), and for timely modifying or rescinding the regulation if it fails to achieve the intended result (i.e. adaptive management and a “sunset clause”).

Jefferson County does not have the ability to conduct the scientific investigations necessary to prove the effectiveness of regulations for the protection of all critical areas in all locations. WAC 365-195-920 "Criteria for addressing inadequate scientific information." states in part:

"Where there is an absence of valid scientific information or incomplete scientific information relating to a county's or city's critical areas, leading to uncertainty about which development and land-uses could lead to harm of critical areas or uncertainty about the risk to critical area function of permitting development, counties and cities should use the following approach:

(1) A "precautionary or a no risk approach," in which development and land-use activities are strictly limited until the uncertainty is sufficiently resolved;...

4. Regulations adopted by Jefferson County should state the projected direct and indirect costs of their implementation, by whom these costs are borne (i.e. the cost to the general public and the cost to the landowner applicant), and contain a process to ascertain whether projected costs are experienced in practice. Where regulations advantage the public good and disadvantage individual citizens, the financial burden of the regulation should be largely borne by the public. Regulations adopted by Jefferson County should not duplicate existing regulatory programs by any state or federal agency.
5. Regulations adopted by Jefferson County should be limited to regulatory (i.e. mandatory) language only, and avoiding language which involves encouragement, equivocation, vagueness, the appearance of coercion, or educational rhetoric or phrasing inappropriate to a regulatory enactment.
6. Regulations adopted by Jefferson County should clearly indicate which portions of the regulation are mandatory (i.e. required by law) and which are discretionary (a voluntary choice by Jefferson County to exceed the minimum requirements of state or federal law).
7. Regulations adopted by Jefferson County should be accompanied by a clear statement of the BOCC's analysis and consideration of the impacts of the regulation on the property owners affected, and their reasoning as to why the regulation is the least onerous alternative method for protecting watershed functions and values. Regulations adopted should assure they will be equally applied to landowners involved in substantially the same activities and possessing substantially the same type of landscape. When this is not done the regulation should clearly and specifically state why one category of landowner is treated differently or advantaged over another.
8. Regulations adopted by Jefferson County should, whenever possible, be supported by and based upon "best available science" that is site specific, based on local facts and circumstances and local scientific expertise where and when available. Applicable locally derived "science" (i.e. locally developed, locally applicable Best Available Science) should always take precedence over Best Available Science supplied by non-local, non-governmental entities and state agencies.

Detailed standards for assessing what information qualifies as "best available science" are laid out in WAC 365-195-900 through 365-195-925. Locally derived science that has not been subjected to peer review should not take precedence over non-local science that has.

9. Regulations adopted by Jefferson County should provide and/or describe a specific mechanism by which a Jefferson County citizen can petition for modification and/or relief from any portion

of the regulation which can be demonstrated to be ineffective, inappropriate or inapplicable to their specific factual circumstances. Provision should be made for such a petition to be initially processed and decided administratively, in an expeditious manner, and subject to appeal to the Hearing Examiner in the method currently provided in the Jefferson County Unified Development Code.

10. Regulations adopted by Jefferson County should contain a specific definition of “reasonable economic use” in each land use and zoning designation. Further, a “reasonable economic use exception” should be provided which is available to an affected property owner who can demonstrate to the satisfaction of the Administrator that the application of the ordinance prevents the use of the property for the defined “reasonable economic use” (i.e. without requirement to exhaust any other administrative remedy before seeking a “reasonable use exception”). The fee for a “reasonable use exception” application should be minimal, and once the applicant demonstrates that such an exception is necessary, additional processing and/or hearing costs should be borne by the public. The citizens of Jefferson County should not have to pay for the privilege or be financially penalized if they successfully demonstrate (in an application for a “reasonable use exception” or in a final judicial decision) that regulations cause them undue harm or violate their constitutional rights.

(NOTE: The above ten principles were adopted earlier in the committee process by unanimous vote.

Actually, the vote was not unanimous as there were abstentions. Please note the comments that have been added to Principles 1 and 3 above.

The following principles have been adopted by majority votes of the committee.)

11. Jefferson County’s Critical Area Ordinance must be viewed as legitimate by affected landowners to achieve voluntary compliance. If restrictions included in the ordinance are not considered necessary and legitimate, the result will likely be increasing levels of defiance resulting in the ordinance being ignored to the detriment of water quality and wildlife. In this vein, the protection of critical areas should be accomplished in the least onerous way possible.

What we have heard through months of listening to the Group's discussion and public testimony, is that the greater part of the dissatisfaction expressed by those affected by the existing CAO is not that the actual restrictions are overly onerous but that the process of compliance needs to be changed. It is very difficult to ascertain what rules apply and how; there is insufficient reliable information about where critical areas are and are not; the code language is confusing; delineations and special reports are expensive and unreliable; and the outcome of the process of determination of how to appropriately develop or manage land-use is highly uncertain.

12. Property ownership is a foundation of the American system. The sense of pride in one’s property and the sense of responsibility for that property can only be realized when there is clear ownership and control of the land.

People have many different reasons for owning land. Many people use, and manage responsibly, land that they do not own. The reality is that, in the absence of regulation,

individual financial gain will often trump land use and management decisions responsible for protection of the public interest.

13. Citizens and their government share responsibility for managing critical areas. In practice, this "shared onus" means that government has a responsibility to clearly document why restrictions are being imposed on private property. In return, citizens have a responsibility to manage their property such that they do not harm the environment.

The first sentence above should be: "All citizens share the responsibility to manage critical areas through effective local representative government." The term "shared onus" reflects a viewpoint that regulation of land-use in critical areas is necessarily a burden. This statement should include the other reasons for our government to be involved in the protection of critical areas which are:

Avoiding harm to each other by inappropriate land-use in flood areas (including wetlands), geologically hazardous areas, and critical aquifer recharge areas; and

Avoiding the adverse effects of habitat degradation on the cultural, recreational, and economic opportunities provided by our common resources of clean and plentiful water, fish, shellfish, and wildlife.

14. All citizens should share the costs of protecting critical areas. Those costs can be reduced by minimizing the number of special reports and consultations required of landowners.

This statement supports the "minority" position that, particularly for wetlands, fish and wildlife habitat conservation areas, as well as for critical aquifer recharge areas, prescriptive standards based on BAS-supported assumptions of low to moderate risk are less expensive to land owners, and to the public, than land-use regulations based on case-by-case site-specific analysis designed to establish absolute minimum, high risk performance standards requiring rigorous monitoring and adaptive management.

15. Management of critical areas is most effectively achieved through development of site-specific management plans that consider the specific functions and values of the wetland and the goals of the landowner. Unfortunately, the resources necessary to develop site-specific management plans are not available to every property owner. Therefore, the committee believes there is a need for minimum buffer widths coupled with the practice of monitoring and adaptive management when there is a showing of harm. The committee also believes that landowners should be allowed the option of developing site-specific management plans that will protect the watershed's functions and values while allowing maximum enjoyment of critical areas and their buffers by landowners.

The "majority" approach to regulation of all land-uses, other than existing and ongoing agricultural activity, in the vicinity of wetlands is based on prescriptive "minimum buffer widths" that are significantly smaller than those recommended by DOE, "coupled with the practice of monitoring and adaptive management when there is a showing of harm." In our opinion, there are several significant problems with this approach:

1. The County does not have the resources to satisfy the guidelines established in section (2) of WAC 365-195-920 "Criteria for addressing inadequate scientific information." Of particular note in the guidelines:

"An adaptive management program is a formal and deliberative scientific approach to taking action and obtaining information in the face of uncertainty. To effectively implement an adaptive management program, counties and cities should be willing to:

- (a) Address funding for the research component of the adaptive management program;
- (b) Change course based on the results and interpretation of new information that resolves uncertainties; and
- (c) Commit to the appropriate time frame and scale necessary to reliably evaluate regulatory and non-regulatory actions affecting critical areas protection and anadromous fisheries."

2. The BAS that has been presented to support the proposed prescriptive "minimum buffer widths" is primarily based on agricultural activity, not on other land-uses.

3. While the choice to use adaptive management as the means of allowing agricultural activities to continue may be justified due to the importance of agriculture to the community, it is not practical to undertake the same approach for all other land-uses.

4. A CAO based on prescriptive standards that are so clearly insufficient as to require site-specific monitoring and adaptive management places an unfair burden on the private land owner. The reason to have prescriptive standards, based on a reasonable level of risk and clearly supported by the BAS, is to relieve the land owner, and the public, of the financial and legal burden of constant monitoring and adaptive management, or corrective action as a consequence of demonstrated harm.

5. After there has been a demonstration of harm, for numerous ecological and economic reasons, neither adaptive management nor corrective action is always possible.

This is an issue that is currently before the Washington Supreme Court. We certainly agree that the site-specific management approach to protection of critical areas can be effective, but it must be accompanied by meaningful baseline data, monitoring, and swift and certain corrective action. However, because there is no science demonstrating that narrow buffers suffice for wildlife or aquatic habitat, we believe that the application of this approach should be limited to agricultural land-uses, and only in watersheds where monitoring programs are formally established, and only as long as these programs remain fully funded and implemented.

16. The American jurisprudence system is based on the belief that all parties are innocent until proven guilty. This basic principle should also be applied to the protection of critical areas.

There are two systems in American jurisprudence, criminal and civil, with different standards of proof. The statements above are not relevant to the legal aspects of critical areas regulation.

17. Minimum buffer widths have not been defined for wildlife. The committee believes there is no GMA/ regulatory requirement for private property owners to manage their property for the general benefit of wildlife unless a species is listed as threatened or endangered by State or Federal authorities pursuant to a formal listing process, or is within a designated Fish and Wildlife Habitat Conservation area as specified in the Critical Area Ordinance. However, in view of the high value that Jefferson County residents typically have for wildlife, the committee recommends the establishment of small wildlife buffers for wetlands and fish and wildlife habitat conservation areas, based on the habitat scores defined in the Washington State Wetland Rating System (WDOE, 2004). Any further enhancement of wildlife habitats in all landscapes, including those associated with critical areas is best accomplished through a voluntary program supported by education and incentives.

The buffers established in the "majority" reports for wetlands and fish and wildlife habitat conservation areas are not based on BAS that adequately addresses land-uses other than agriculture. The concept of combining mandatory "small wildlife buffers" with "further enhancement...through a voluntary program" is not supported by BAS from the agency with the most expertise, the Department of Fish and Wildlife, nor has such a system been adopted in any other CAO.

The DOE Wetland Rating System was not designed to be used for determination of buffers on the features of the landscape defined as "fish and wildlife habitat conservation areas": streams, lakes, marine shorelines, kelp beds, etc.

While laudable, voluntary programs cannot be the sole means of providing the GMA mandated protection of wildlife habitat. A legitimate exception may be made for existing and ongoing agriculture, but not without rigorous monitoring and adaptive management.

WAC 365-190-080 provides detailed guidance against which to test the distinction being made above between protection of habitat for "the general benefit of wildlife" versus the protection of [from WAC 365-190-080 (5) (c)] "seasonal ranges and habitat elements with which federal and state listed endangered, threatened and sensitive species have a primary association" and protection of "habitats and species of local importance."

18. Agriculture is both a central and historically important component of the rural character of Jefferson County. A small area comprising less than 2% (approx.) of the landscape of Jefferson County is used for agriculture. The county's citizens are determined to protect this agricultural heritage and to provide future generations with the opportunity to participate in this most basic of human activities.
19. Agriculture occurs in wetlands in Jefferson County. The relatively recent glacial history of Jefferson County leaves much of our county with immature soils not suited for Agriculture. Consequently, much of our historic and ongoing agriculture is conducted in organic soils located in wetlands. The committee believes that the best use of these areas is for continued food production.



For further clarification, it should be stated that wetlands not previously converted to agricultural use must not be used for agricultural activities. It should also be stated that previously converted wetlands abandoned for so long that the predominant vegetation is now native scrub/shrub or forest cannot be returned to agricultural use.

20. Agriculture is an evolving activity. Commercial agriculture requires long-term investments in land, machinery and personal commitment. Like any business, farmers in Jefferson County must be allowed flexibility in selecting the crops they grow and when they grow them. Farmers should be allowed maximum flexibility to include long-term fallowing of farmland to practice forestry and/or a change from low intensity farming to moderate or high intensity production without having to apply for permits from county government. This flexibility is considered *a right to farm* that should not be interfered with in the absence of an empirical demonstration of harm. In the long-term, agriculture cannot survive in Jefferson County without the flexibility to respond to current food and fiber needs.

The "long-term fallowing of farmland to practice forestry" is not a change in agricultural activity. It is a change in land-use, and should not be included in any new definition of "agricultural activity" to accommodate the full spectrum of present and future farming practices.

21. The functions and values of Class IV and some Class III wetlands (regardless of size) having low habitat scores (<20 points in the WDOE system) can be protected while the wetlands and their buffers could likely be used at least seasonally for certain uses.

Many wetlands are rated as Class III or Class IV because they (and/or their buffers) are being used for some form of agricultural activity. The "certain uses" which might be allowed in these wetlands must be clearly specified and limited to agricultural or forest resource uses.

22. The Critical Area Ordinance should not be used as a tool to control growth. Protection of critical areas and management of growth are separate issues. Blurring the line between these two issues leads to a loss of legitimacy of the Critical Areas Ordinance.

Protection of critical areas is a fundamental requirement of the Growth Management Act. The purpose of protecting critical areas with development regulations is to ensure that "growth" will happen on the lands that are best suited for it, and not in areas where there is a significant risk of harm to health, safety, and public and privately-owned natural resources.

23. WDOE (1993) allowed for multiple ratings in wetlands. WDOE (2004) does not include that provision. The committee believes that Jefferson County should allow the multiple rating of wetlands. This will allow identification and increased protection of those portions of large wetland landscapes with high functions and values. It would also allow reduced protection of those portions having low functions and values. Allowing for multiple ratings in large wetland systems is a win-win approach that will increase the protection of truly valuable wetland areas and provide for more flexibility by landowners in managing areas with low functions and values, increasing the perceived legitimacy of the ordinance.

It is doubtful that there is a need for this departure from the 2004 DOE Wetland Rating System. The ratings form excludes from consideration vegetation classes and seasonal ponds covering less than 1/4 acre or 1/10 of the area of the wetland unit (whichever is greater). The Special

Characteristics section of the form allows for dual ratings of some estuarine wetlands. The Rating System manual provides detailed guidance on separating large contiguous wetlands located in valleys into distinct units for the purposes of rating. Similar detail, and compatible criteria, would have to be provided in our CAO to justify the departure.

**Conclusion** These principles and value statements by the Critical Area Ordinance Review Committee are not intended to avoid protection of critical areas. Rather, they are intended to recognize the demonstrated value of voluntary approaches to natural resource stewardship here and in other parts of America. Further, these statements and values are intended to facilitate the understanding of the Planning Commission and the Board of County Commissioners of the reasoning which led to the specific recommendations of the CARC, and to assist in the balancing of competing goals and objectives in this CAO Update process.