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Protecting the land

September 23, 2010

Okanogan County Planning Commission
Okanogan County Office of Planning and Development
123 5th Ave N Ste 130
Okanogan, Washington 98840

Dear Members of the Planning Commission:

Subject: **Comments on the Okanogan County Critical Areas Ordinance (attached to the Okanogan County Office of Planning and Development January 12, 2009 memo) and the Okanogan County Regional Shoreline Master Program Complied Draft (August 26, 2010)**

Thank you for the opportunity to comment on the Okanogan County Critical Areas Ordinance update and the Okanogan County Regional Shoreline Master Program. Our mission at Futurewise is to promote healthy communities and cities while protecting working farms, working forests, and shorelines for this and future generations. Futurewise has members across Washington State, including Okanogan County.

Summary of Our Recommendations

In short, we recommend the Planning Commission recommend adoption of the updated Regional Shoreline Master Program with the recommendations in this letter. We recommend that the critical areas regulations, Chapter 14.12 Okanogan County Code (OCC), be comprehensively updated to incorporate the current scientific data and the amendments to the Growth Management Act. Our more detailed comments follow.

Recommendations on the updated Regional Shoreline Master Program

Overall, we support the updated Regional Shoreline Master Program. We believe it will better protect the county's shoreline resources while providing for an appropriate level of development. We also commend Okanogan County's Interlocal Agreement with the Confederated Tribes of the Colville Reservation. Okanogan County and the Confederated Tribes of the Colville Reservation should be proud of their cooperative approach to land use planning and management. We also commend the county and cities for working together on the update. This can help reduce costs and increase quality since the county and cities work together. We do recommend the following improvements.

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Please clarify that activities must comply with the Shoreline Management Act and the Shoreline Master Program

The Shoreline Management Act regulates activities, such as land clearing, in addition uses and development. So we recommend that proposed 14.15.030 on page 6 be modified to include "activities." Our addition is double underlined:

14.15.030 Applicability

All proposed uses, activities, and development occurring within the shoreline jurisdiction must conform to Chapter 90.58 RCW, the Shoreline Management Act and this Program whether or not a permit is required.

Please correct the inadvertent typo in "Critical Areas" on page 13

Our suggested additions are double underline below.

8. "Critical Areas" Critical Areas include the following areas and ecosystems, as designated by the County, city, town or Tribe with jurisdiction: Wetlands; Areas with a critical recharging effect on aquifers used for potable water; Fish and wildlife habitat conservation areas; Frequently flooded areas; and Geologically hazardous areas.

Please clarify the definition of Fish and Wildlife Habitat Conservation Areas and adopt policies and regulations providing for their protection

We are concerned that definition of "Fish and Wildlife Habitat Conservation Areas," on page 17 will be read to only include "areas of local importance" that meet the qualifications in that definition. The shoreline master program guidelines require the protection of priority species and habitats.[1] In addition to meeting other requirements, updated SMPs must be consistent with the Shoreline Master Program Guidelines.[2] So we recommend that fish and wildlife habitat conservation areas be defined as the habitats of priority species, priority habitats, and fish and wildlife habitats of local importance.

While in two situations, geological hazards, and mining, there are provisions providing some protection for priority species and habitats, there are no regulations generally protecting these habitats. We recommend that the proposed regional shoreline master program include generally applicable regulations protecting priority species and habitats.

Please clarify the definition of "Forest Lands"

On page 18 lines 420 and 421, the definition of "forest lands" states that they are regulated under RCW 76.09. However, shoreline master programs apply to forest

[1] WAC 173-26-221(2)(c)(iii)(A); WAC 173-26-221(2)(c)(iv)(B).
[2] RCW 90.58.090.

practices within shoreline jurisdiction and we are concerned that this definition may be confusing. We recommend that the definition be amended to read as follows to address this ambiguity with our deletions double struck through:

11. "Forest Lands" means lands designated as forest lands, as required by the Growth Management Act, RCW 36.70A.170~~ and as regulated under RCW 76.09~~.

Please clarify whether the SMP will regulate critical areas in shoreline jurisdiction and if it will, please clarify the definition of "Shoreline Jurisdiction" and "Shoreline Area"

The Shoreline Master Program should clarify whether the updated Shoreline Master Program will manage critical areas within shoreline jurisdiction. If the proposed SMP is to regulate critical areas within shoreline jurisdiction, shoreline jurisdiction must be expanded to include the buffers necessary to protect those critical areas.[3] If the county and cities will rely on their critical areas regulations, then it is not necessary to expand shoreline jurisdiction to include the necessary buffers. Either way, the SMP update should be clear.

If the proposed SMP update is to manage critical areas within shoreline jurisdiction, we recommend the following amendments to the definition of Shoreline Jurisdiction on pages 27 and 28 with our additions double underlined.

7. "Shoreline Jurisdiction or "Shoreline Area" means:
   - A. Where the floodway has been delineated the "Shoreline Jurisdiction" will include the floodway and adjacent land extending landward two hundred feet therefrom.
   - B. All Other Waters were the floodway has not been delineated: shoreline jurisdiction or shoreline area shall be defined as those lands lying 200 feet in all directions as measured on a horizontal plane from the ordinary high water mark of all water bodies subject to this SMP and the one-hundred year floodplain and any wetlands associated therewith, which are subject to the provisions of this SMP.
   - C. <u>All lands and waters necessary to included the buffers required by this chapter shall also be included within "Shoreline Jurisdiction."</u>

Clarify the definition of "vegetation conservation areas"

Futurewise appreciates that the proposed SMP recognizes the need to conserve native vegetation and that this sometimes requires the active management of the vegetation. The conservation of native vegetation is required by the Shoreline Master Program

[3] RCW 36.70A.480(6).

Guidelines.[4] The definition of "vegetation conservation areas" on page 33 of the proposed SMP would be clearer if it recognized that it includes areas where the vegetation is maintained in addition to "activities." We suggest the following clarification with our additions double underlined:

2. "Vegetation conservation areas" includes land areas where native vegetation shall be maintained or reestablished and activities to prevent the loss of plant communities that contribute to the ecological functioning of shoreline areas. Vegetation conservation deals with the protection of existing diverse plant communities along the shorelines, aquatic weed control, and the restoration of altered shorelines by reestablishing natural plant communities as a dynamic system that stabilizes the land from the effects of erosion.

Delete "[s]ubstantially degrade" and adopt the legally required no net loss of ecological functions standard

The policy of the Shoreline Management Act, in RCW 97.58.020, provides that "[p]ermitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water." The Shoreline Master Program Guidelines implement this policy by requiring that "local master programs shall include policies and regulations designed to achieve no net loss of those ecological functions."[5] In addition to meeting other requirements, SMPs and amendments to SMPs must be consistent with the policy of the Shoreline Management Act and the Shoreline Master Program Guidelines.[6]

Unfortunately, the proposed shoreline master program does not meet this standard. The proposed definition of substantially degrade, on page 32, provides that "'[s]ubstantially degrade' means cause significant ecological impact." In several provisions of the proposed SMP, development or activities are required not to substantially degrade some aspect of the shoreline environment. For example, on page 109 the proposed SMP provides that "[a]ctivities that substantially degrade priority habitats should not be allowed." "Significant ecological impact" is a much greater level of environmental destruction than allowed under either "minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area" or the "no net loss standard." Further, the "substantially degrade" standard would allow uses and activities that will cause an ecological impact that may not be significant alone, but that will be on a cumulative basis to occur. Consequently, the definition of substantially degrade and its use as a standard for environmental protection in the proposed SMP violates the Shoreline Management Act and the Shoreline Master Program Guidelines. We urge the county to delete this

[4] WAC 173-26-221(5).
[5] WAC 173-26-186(8)(b).
[6] RCW 90.58.090.

definition and change all references to "substantially degrade" to no net loss of ecological functions, which is the legally required standard. For example, proposed 14.15.170(F)(16) on page 62 should read, with our additions double underlined and our deletions double struck through, that:

16. Aquaculture facilities shall not introduce incompatible visual elements or result in a net loss of ~~substantially degrade~~ the aesthetic qualities of the shoreline. Aquaculture structures and equipment, except navigation aids, shall be designed, operated and maintained to blend into their surroundings through the use of appropriate colors and materials.

Any other policy or regulation that uses substantially degrade must be corrected as well.

Update the list of backup definitions

On page 35, the proposed SMP includes two dictionaries as back-up sources of definitions. The third edition of *Black's Law Dictionary* is quite ancient, although we recognize that it now also references later editions too. The Washington State courts refer to dictionaries of American English to define words (as opposed to legal concepts), rather than law dictionaries.[7] So we recommend that the reference to Black's law dictionary be deleted and current edition of *Webster's Third New International Dictionary*, the most common dictionary used by the courts, be substituted for the other dictionary.

Clarify that the buffers required by proposed 14.15.110(D) apply to riparian areas, but not other wildlife habitats, see pages 42 and 43, and adopt adequate regulations to protect wildlife habitats

Proposed 14.15.110 provides that "[r]iparian and fish and wildlife habitat buffers in shoreline areas shall be comprised of Zone 1 and Zone 2 buffers." These are the buffers in Proposed Section 14.15.120(E) which provides buffers and setbacks that range in width from ten feet to 200 feet. The no touch buffers vary between five and a 100 feet in width. While these buffers, with the modifications recommended below, maybe adequate for riparian buffers they are much too narrow for wildlife habitat buffers.

For example, parts of Okanogan County are the habitat of the Western Gray Squirrel which is designated as a threatened species by Washington State.[8] The Department of

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[7] *Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 239, 110 P.3d 1132, 1140 (2005).

[8] Jeff Azerrad, John Carleton, Jennifer Davis, Timothy Quinn, Chris Sato, Michelle Tirhi, George Wilhere (WDFW), and Suzanne Tomassi (The Watershed Company), *Landscape Planning for Washington's Wildlife: Managing for Biodiversity in Developing Areas (A Priority Habitats and Species Guidance Document)* (Washington State Department of Fish and Wildlife: December 2009) Appendix B: Species and Development Database species list extract for Okanogan County p. *8. Accessed on September 23,

Fish and Wildlife recommends "a clearly-marked, permanent year-round buffer" of 50 feet around each nest tree, along with other protective measures.[9] The department also recommends a seasonal buffer of 400 feet around a nest.[10] The county's widest Zone 1 buffer, the buffer that limits most development, is only 100 feet wide and some are five feet wide. Clearly these buffers are not even close to wide enough to protect the Western Gray Squirrel and many other species. The solution, as we recommended above, is to have separate regulations that adopt protection measures, including adequate buffers for priority species and habitats other than riparian areas.

Include a adequate buffers in Table 1 on pages 52 and 53

The important shoreline functions of lakes, rivers, streams and the functions of riparian vegetation are detailed in the Washington State Department of Fish and Wildlife's *Management Recommendations for Washington's Priority Habitats: Riparian* and *Crafting a Lake Protection Ordinance*. The maintenance of large woody debris requires 100 to 150 foot wide buffers.[11] This is needed to maintain the structure of lakes, rivers, and streams especially pools which are necessary to maintain fish populations.[12] This applies to Type 1, 2, and 3 waters all of which have fish living in them. Sediment removal requires 100 feet.[13] Wildlife habitat generally requires buffers of 100 to 200 feet wide, with wider buffers needed for some wildlife.[14]

Given these widths, we are concerned that the Riverine/Lacustrine Zone 1 buffer for non-water related uses and activities was reduced from 100 to 75 feet. That buffer will no longer effectively filter sediments, especially given that residences are allowed in the Zone 2 Use Buffer. We recommend that the Riverine/Lacustrine Zone 1 buffer

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2010 at: http://wdfw.wa.gov/publications/pub.php?id=00023 and enclosed with this letter. The filename is "app_b_species_development_database Okanogan WA.pdf."

[9] M. J. Linders, W. M. Vander Haegen, J. M. Azerrad, R. Dobson, and T. Labbe, *Management Recommendations for Washington's Priority Species: Western Gray Squirrel* p. 9 (Washington Department of Fish and Wildlife, Olympia, Washington: 2010). Accessed on September 23, 2010 at: http://wdfw.wa.gov/publications/pub.php?id=00027 and enclosed with this letter with the filename "western_gray_squirrel_final.pdf."

[10] *Id.*

[11] K. L. Knutson & V. L. Naef, *Management Recommendations for Washington's Priority Habitats: Riparian* p. 164 (Wash. Dept. Fish and Wildlife, Olympia WA: 1997) accessed on November 5, 2009 at: http://wdfw.wa.gov/hab/ripfinal.pdf and included in the CAO on CD enclosed with the paper original of our January 22, 2010 letter to the Planning Commission in the "Fish & Wildlife Habitat\PSH Management Recs" directory with the filename: "ripfinal.pdf". For buffers and other measures necessary to protect lakes, please Karen Cappiella and Tom Schueler, *Crafting a Lake Protection Ordinance* Urban Lake Management, Watershed Protection Techniques 3(4) p. 756 (2001) accessed on November 24, 2009 at: http://www.cwp.org/Resource_Library/Center_Docs/special/lakes/ulm_lakeprotectionord.pdf and included in the CAO on CD enclosed with the paper original of our January 22, 2010 letter to the Planning Commission in the "Fish & Wildlife Habitat\Lake Habitats" directory with the filename: "ulm_lakeprotectionord.pdf."

[12] K. L. Knutson & V. L. Naef, *Management Recommendations for Washington's Priority Habitats: Riparian* p. XI (Wash. Dept. Fish and Wildlife, Olympia WA: 1997).

[13] *Id.* at p. 164.

[14] *Id.* at pp. 165 – 67.

be restored to 100 feet for non-water related uses and activities. The Zone 1 plus 2 buffers for non-water related uses and activities the Rural Resource, Rural Residential, Shoreline Recreation should all be 100 feet wide for the non-water related uses and the Zone 1 buffers at least 50 feet wide for the non-water related uses and activities. These widths are needed to protect these important resources.

Clarify that preexisting agriculture continues to be regulated by the county's and cities' critical areas regulations

While proposed 14.15. 160, Agriculture, on pages 58 and 59, correctly provides that proposed Section 14.15. 160 only applies to new agricultural activities and the conversion of agricultural lands to other uses it does not recognize that existing agriculture will continue to be regulated by the county's and cities' existing critical areas regulations.[15] While there is currently a moratorium on new development regulations related to agriculture in critical areas regulations, but not shoreline master programs, when that moratorium is over counties and cities will need to update the critical areas regulations as they apply to agriculture to comply with the Growth Management Act.[16] So we recommend that the following language be added to clarify that critical areas regulations will continue to manage existing agriculture.

H. Existing agricultural activities or lands that had agricultural activities in place at the time of adoption of this Master Program shall be continue to be managed by the applicable critical areas regulations.

Clarify Proposed Section 14.15.360, Table 11: Use and Activity Table, and Article IV to better protect shoreline resources. See pages 95 – 98 and 99 to 118

The Shoreline Management Act and the shoreline guidelines require limitations on the uses allowed in shoreline jurisdiction to protect shoreline resources and the public safety. Proposed Section 14.15.360, Table 11: Use and Activity Table, allows a wide variety of use including many uses that are inconsistent with these requirements.

WAC 173-26-211(5)(a)(ii)(B) provides that new industrial uses and nonwater-oriented recreation should not be allowed in the Natural Environment. But Table 11 allows water-oriented industrial uses and high-intensity recreational uses without requiring that it be water dependent. The industrial uses should not be allowed and recreational uses should be limited to only water-oriented recreation. Shoreline stabilization should also not be allowed in the Natural Environment, except to protect structures that existing before the adoption of the updated SMP.

WAC 173-26-211(5)(b)(i) provides in part that "[e]xamples of uses that are appropriate in a "rural conservancy" environment include low-impact outdoor recreation uses, timber harvesting on a sustained-yield basis, agricultural uses, aquaculture, low-

[15] RCW 36.70A.480(3)(b).
[16] RCW 36.70A.560.

intensity residential development and other natural resource-based low-intensity uses." WAC 173-26-211(5)(b)(ii) provides in part that for the Rural Conservancy Environment:

> Except as noted, commercial and industrial uses should not be allowed. Agriculture, commercial forestry, and aquaculture when consistent with provisions of this chapter may be allowed. Low-intensity, water-oriented commercial and industrial uses may be permitted in the limited instances where those uses have located in the past or at unique sites in rural communities that possess shoreline conditions and services to support the development.
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> Water-dependent and water-enjoyment recreation facilities that do not deplete the resource over time, such as boating facilities, angling, hunting, wildlife viewing trails, and swimming beaches, are preferred uses, provided significant adverse impacts to the shoreline are mitigated.
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> ....
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> (C) Construction of new structural shoreline stabilization and flood control works should only be allowed where there is a documented need to protect an existing structure or ecological functions and mitigation is applied, consistent with WAC 173-26-231. New development should be designed and located to preclude the need for such work.

In the Conservancy Environment the allowed commercial and industrial uses are not limited low-intensity water related uses where they have located in the past or in unique communities. The allowed shoreline stabilization and flood control facilities are not "allowed where there is a documented need to protect an existing structure or ecological functions and mitigation is applied." Proposed 14.15.350(E) allows new structures to have shoreline stabilization even in the Conservancy Environment. As does proposed 14.15.380(C)(22) and (D)(11). High intensity recreational uses of all kinds are allowed. Multi-family housing is allowed in the Conservancy Environment, which is not low-intensity residential development. Multi-family dwelling are inconsistent with all of the rural shoreline environments. So we recommend that multi-family dwellings be prohibited in the Rural Resource, Rural Residential, Conservancy, and Riverine/Lacustrine shorelines environments outside urban areas. Overall, the allowed uses in both the table and Article IV should be modified so they are consistent with the requirements of the Shoreline Master Program Guidelines.

We are also concerned because listing uses in the use table and then listing uses in Article IV creates the potential for confusion and inconsistency. We suggest either just using the table or just listing the uses in Article IV, but not both.

Critical Areas Reports and Mitigation Management Plans should be required to be prepared by a Qualified Professional

We appreciate the improvements to critical areas reports and mitigation management plans in proposed 14.15.460 Minimum Application Requirements. Both of these documents should be required to be prepared by a "Qualified Professional" to ensure these reports are adequate.

Please amendment Proposed 14.15.490, Application Vesting, to comply with state law

Proposed 14.15.490, Application Vesting, implies that applications for shoreline environment amendments and other legislative approvals vest when a complete application is filed. However, like rezones, shoreline environment amendments and other legislative actions do not vest under Washington law. So Proposed 14.15.490 should exclude applications for legislative actions.

Require public access for all uses for which public access is required by the Shoreline Master Program Guidelines

One of the policies of Washington's Shoreline Management Act is to increase public access to publicly owned rivers, streams, and lakes.[17] As our population increases, we need more public access. The development needed to accommodate this growth can also interfere with the traditional public accesses that people have used for years to boat, swim, hunt, and fish. The Shoreline Master Program Guidelines implement the Shoreline Management Act policies by including more specific requirements for public access. These provisions include WAC 173-26-221(4)(d)(i) which provides in part that:

> The master program should seek to increase the amount and diversity of public access to the state's shorelines consistent with the natural shoreline character, property rights, public rights under the Public Trust Doctrine, and public safety.

Further, WAC 173-26-221(4)(d) requires in part that:

> (iii) Provide standards for the dedication and improvement of public access in developments for water-enjoyment, water-related, and nonwater-dependent uses and for the subdivision of land into more than four parcels. In these cases, public access should be required except:
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> (A) Where the local government provides more effective public access through a public access planning process described in WAC 173-26-221(4)(c).

[17] RCW 90.58.020.

(B) Where it is demonstrated to be infeasible due to reasons of incompatible uses, safety, security, or impact to the shoreline environment or due to constitutional or other legal limitations that may be applicable.

In determining the infeasibility, undesirability, or incompatibility of public access in a given situation, local governments shall consider alternate methods of providing public access, such as off-site improvements, viewing platforms, separation of uses through site planning and design, and restricting hours of public access.

(C) For individual single-family residences not part of a development planned for more than four parcels.

(iv) Adopt provisions, such as maximum height limits, setbacks, and view corridors, to minimize the impacts to existing views from public property or substantial numbers of residences. Where there is an irreconcilable conflict between water-dependent shoreline uses or physical public access and maintenance of views from adjacent properties, the water-dependent uses and physical public access shall have priority, unless there is a compelling reason to the contrary.

Shoreline master programs must comply with the policy of the Shoreline Management Act and the Shoreline Master Program Guidelines.[18] Unfortunately, the proposed SMP does not meet these requirements. The proposed Regional Shoreline Master Program, in proposed 14.15.290, Public Access, and elsewhere, only requires physical public access for public developments and primary utility developments. This violates the requirements of the guidelines. We recommend the following revisions to the use regulations in proposed 14.15.290. Our recommended additions are double underlined and our deletions are double struck through.

10. Dedication and improvement of public physical access shall be required in all shoreline areas as follows:
    a. As part of all non-water-dependent commercial and industrial developments.
    c. As part of multi-unit residential development with more than four dwelling units and land divisions creating more than four lots.
    d. As part of recreational uses and developments.

The other references to public access in the proposed policies and regulations should be modified to reflect these requirements.

[18] RCW 90.58.090.

Update the Geologically Hazardous Areas provisions to incorporate the Washington State Department of Natural Resources' Liquefaction Susceptibility and Site Class Maps.

The geological hazards provisions should be updated to incorporate the Washington State Department of Natural Resources' Liquefaction Susceptibility and Site Class Maps. In 2004, the Washington State Department of Natural Resources completed a set of liquefaction maps and maps identifying where the geology is likely to amplify ground shaking, referred to as "Site Class" maps. These maps represent available scientific data on the occurrence of these hazards which the Shoreline Management Act requires to the county to incorporate in the shoreline master program.

Adopting these maps and protective provisions for these areas will protect people and property from hazards resulting from earthquakes. Liquefaction occurs when earthquake shaking causes a soil to rapidly loose its strength and behave like quicksand. The soils most likely to liquefy are artificial fills and areas of loose sandy soils saturated with water. The movement of liquefied soils can rupture pipelines, move bridge abutments and roads, and damage buildings. Liquefaction has damaged many buildings during earthquakes including Alaska's Good Friday earthquake, California's Loma Prieta earthquake, and the Kobe, Japan earthquake.[19] We recommend that areas classified as having a liquefaction susceptibility of "moderate," "moderate to high," "high," and "peat deposit" be identified as geological hazards.

The Site Class Map identifies areas where the underlying geology is likely to amplify shaking on the ground surface. This is the most damaging effect of an earthquake. So buildings constructed on areas more susceptible to strong shaking area are more likely to be damaged or destroyed in an earthquake.[20] By identifying these areas and engineering and constructing buildings to withstand this shaking, people and property will be better protected from earthquake damage. We recommend that areas classified as having a site class of "D," "D to E," "E," and "F" be designated as geological hazards.

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[19] Stephen P. Palmer, Sammantha L. Magsino, James L. Poelstra, Eric L. Bilderback, Derek S. Folger, and Rebecca A. Niggemann, *Liquefaction Susceptibility Map of Okanogan County, Washington* (Washington State Department of Natural Resources, Sept. 2004). In the CAO on a CD enclosed with the paper original of our January 22, 2010 letter to the Planning Commission in the directory: "Geo Hazards\Earthquake Hazards\Liquefaction Maps by County\okanogan." Filename: "Okanogan Liquefaction Susceptibility.pdf"

[20] Stephen P. Palmer, Sammantha L. Magsino, Eric L. Bilderback, James L. Poelstra, Derek S. Folger, and Rebecca A. Niggemann, *Site Class Map of Okanogan County, Washington* (Washington State Department of Natural Resources, Sept. 2004). In the CAO on a CD enclosed with the paper original of our January 22, 2010 letter to the Planning Commission in the following directory: "Geo Hazards\Earthquake Hazards\Liquefaction Maps by County\okanogan." Filename: "Okanogan Site Class.pdf"

Include regulations to prohibit new development in channel migration zones and buffer them to protect people and property from harm.

The Okanogan County Office of Planning and Development January 12, 2009 memo accompanying the critical areas regulations on page 1 notes that channel migration studies have been done for both the Methow and Okanogan Rivers. Channel migration zones are a type of geologically hazardous area and the Shoreline Master Program Guidelines provides that they must be protected from new development. We urge Okanogan County to adopt regulations meeting the Shoreline Master Program Guideline requirements to protect people and property from damage in these hazardous areas.

Recommendations for the Critical Areas Regulations

Okanogan County must review and revise the Critical Areas Regulations to comply with the Growth Management Act.

The existing and apparently proposed critical areas regulations, with a few proposed changes outlined in the cover memo, date from 1994. Since then, the Growth Management Act has been amended to require that counties and cities include best available science in developing policies and regulations to protect the functions and values of critical areas.[21] The amount of scientific information has also increased substantially. For example, in 2004 (ten years after the adoption of the current critical areas regulations), the Washington State Department of Fish and Wildlife issued *Management Recommendations for Washington's priority species, Volume IV: Birds* which includes updated management recommendations for the sharp-tailed grouse, a state threatened species that lives in Okanogan County, along with other species.[22] The Growth Management Act requires Okanogan County to review, and if necessary, revise the critical areas ordnance to comply with the Growth Management Act by December 1, 2013.[23] The 1994 Critical Areas regulations, Chapter 14.12 Okanogan County Code (OCC), are out of date. For example the sharp-tailed grouse is not listed as a threatened species.[24] Chapter 14.12 OCC must be comprehensively updated. While totally rewriting Chapter 14.12 is beyond the scope of this letter, we do highlight a few of the areas where amendments are required. We recommend reviewing the Washington State Department of Community, Trade, and Economic Development's, now Commerce's, example critical areas ordinance in the "CTED CA

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[21] RCW 36.70A.172 adopted by 1995 Washington Laws Chapter 347 § 105.
[22] E. Larsen, J. M. Azerrad, N. Nordstrom, editors, *Management Recommendations for Washington's Priority Species, Volume IV: Birds* p. 16-1 (Washington Department of Fish and Wildlife, Olympia, Washington, USA: 2004). Enclosed on the CAO on CD included with the paper original of our January 22, 2010 letter to the Planning Commission in the "Fish & Wildlife Habitat\PSH Management Recs" directory with the filename: "phs_vol4_birds.pdf" and accessed on January 21, 2010 at: http://wdfw.wa.gov/hab/phs/vol4/birdrecs.htm
[23] RCW 36.70A.130.
[24] OCC 14.12.270A.

Handbook" directory of the CAO on CD enclosed with the paper original of our January 22, 2010 letter to the Planning Commission for proposed language for the county to use to update the critical areas regulations.

Critical Areas Maps are helpful, but actual conditions should control.

The Okanogan County Office of Planning and Development January 12, 2009 memo discusses using agency data to prepare maps that will be adopted as critical areas maps. We agree that this can be helpful and support. However, the actual conditions on the ground should control over the maps. For example, if any area meets the criteria for a wetland but it not shown on the map, then it must be regulated as a wetland.

The best data sources for wildlife habitats are the Washington State Department of Fish and Wildlife's (WDFW) Priority Habitats and Species (PHS) Database. This data is based on actual field research and is updated frequently.[25] So we recommend that the latest version of these maps be used. Local governments obtain new maps every six months or so to keep them up to date.

We support including channel migration zones as a geologically hazardous area and adopting regulations to protect people and property from harm.

The Okanogan County Office of Planning and Development January 12, 2009 memo on page 1 notes that channel migration studies have been done for both the Methow and Okanogan Rivers. Channel migration zones are a type of geologically hazardous area. We support designating them as geologically hazards areas and requiring setbacks to the channel migration zone for residences and other non-agricultural buildings to reduce the potential that property will be damaged.

We support the recommendation to use the Washington State Department of Natural Resources S, F, and Np and Ns water body classification system.

The Okanogan County Office of Planning and Development January 12, 2009 memo on pages 1 and 2 recommends that the Washington State Department of Natural Resources S, F, and Np and Ns water body classification system be used. We support this recommendation as this is the mapping system that includes the best information on rivers and streams and using this system will save time and money for the county, developers, and property owners since they will not have to translate the stream type from one system to another.

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[25] Washington Department of Fish and Wildlife, *Descriptions of Standard Maps and Digital Data Products* p. 6 (March 2005). Included in the CAO on CD enclosed with the paper original of our January 22, 2010 letter to the Planning Commission in the "Fish & Wildlife Habitat\PSH Management Recs" directory with the filename: "datasrc_jan1005.pdf."

The county must designate and protect fish and wildlife habitats.

The Okanogan County Office of Planning and Development January 12, 2009 memo on pages 3 and 4 indicates that deleting the specific species for fish and wildlife habitats is recommended and that Level I, II, and III habitats be designated. We recommend that Okanogan County designate and protect priority species and habitats identified by the Washington State Department of Fish and Wildlife. This will help protect the full range of species that Okanogan County residents appreciate and the help support the county's economically important tourism industry.

If the county chooses not to designate and protect priority species and habitats, it must at a minimum designate and protect endangered, threatened, and sensitive species and habitats and species of local importance. As the Washington State Supreme Court has written:

> ¶ 14 The [Growth Management Act] GMA directs counties and cities to designate critical areas. RCW 36.70A.170. RCW 36.70A.030(5) lists types of critical areas: (1) fish and wildlife habitat conservation areas, (2) wetlands, (3) frequently flooded areas, (4) critical aquifer recharge areas, and (5) geologically hazardous areas. Fish and wildlife habitat conservation areas are at issue here.
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> ¶ 15 Fish and wildlife habitat conservation areas include areas where ETS [endangered, threatened, and sensitive] species have a primary association, habitats and species of local importance, and waters of the state that provide fish and wildlife habitat.[FN7] WAC 365-190-080(5). Counties and cities should "classify seasonal ranges and habitat elements with which federal and state listed endangered, threatened and sensitive species have a primary association and which, if altered, may reduce the likelihood that the species will maintain and reproduce over the long term." WAC 365-190-080(5)(c)(i). Counties and cities must also determine which habitats and species are of local importance:
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> > Counties and cities may use information prepared by the Washington department of wildlife to classify and designate locally important habitats and species. Priority habitats and priority species are being identified by the department of wildlife for all lands in Washington state. While these priorities are those of the department, they and the data on which they are based may be considered by counties and cities.
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> WAC 365-190-080(5)(c)(ii).

> ¶ 16 Counties and cities are further required to adopt development regulations that protect designated critical areas. RCW 36.70A.060. "In designating and protecting critical areas ... counties and cities shall include best available science in developing policies and development regulations to protect the functions and values of critical areas." RCW 36.70A.172(1).
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> FN7. This list does not include all of the fish and wildlife habitat conservation areas mentioned in WAC 365-190-080(5).[26]

The county's proposed criteria in the memo do not include sensitive species and do not seem to designate species and habitats of local importance. We recommend that they explicitly do so.

The county's critical areas regulations do not protect the functions and values of fish and wildlife habitats as the Supreme Court held the GMA requires. The critical areas regulations violate the GMA in two ways. First OCC 14.12.290 excludes uses, activities, and developments that are not subdivisions or do not require permits. But many activities, such as clearing vegetation, grading, and filling, all adversely impact fish and wildlife habitat and sometimes do not require permits. All developments, structures, uses and activities that adversely impact critical areas must be regulated by the critical areas regulations. The Washington State Department of Community, Trade, and Economic Development's, now Commerce's, example critical areas ordinance in the "CTED CA Handbook" directory in the CAO on CD enclosed with the paper original of our January 22, 2010 letter to the Planning Commission has some good example language.

Second, even when the regulations apply they are unclear. For example, OCC 14.12.340(B)(2) includes riparian setbacks and requires vegetation retention, but it is unclear if that is required in all of the setback outside the view/access corridors. The riparian setbacks should be converted to buffers and vegetation removal prohibited. They also need to be wider to protect wildlife habitats as we documented in our above comments on the Shoreline Master Program update. Again, the example critical areas ordinance contains helpful language.

Designate and protect type 5 waters and adopt buffers for these streams.

OCC 14.12.340(B)(2) does not include any measures to protect Type 5 waters. However, these waters perform important functions. In the shrub-steepe areas of Eastern Washington:

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[26] *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 832 – 33, 123 P.3d 102, 106 (2005).

> Small, intermittent streams and draws may naturally have little or no characteristic riparian vegetation. Instead, they consist of largely upland plant species, including big sagebrush, bitterbrush, rabbitbrush, and spiny hopsage. The presence of woody and herbaceous vegetation assists in moderating stream temperature, sedimentation, water quality and quantity, and debris flows downstream.[27]

So failing to protect these streams and buffer them will result in higher water temperatures, increased sedimentation in streams and rivers, degraded water quality and quantity, and more debris in the stream and river system. Small intermittent streams play an important role in forested areas as well:

> Because of the interconnected nature of stream systems, the habitat quality of most streams is important to fish production. Even small headwater streams (DNR Water Types 4 and 5) that have no fish influence the habitat quality downstream in fish-bearing waters. For example, small streams recruit large organic debris that may later be transported to fish habitats (Bisson et al. 1987). Small streams can also provide storage and the slow release of sediments, thereby regulating the flow of sediments downstream (Sullivan et al. 1987, Benda 1988). Many damaging landslides begin in small headwater streams as a result of logging roads, timber harvest, or other activities in the upper watershed. Retaining intact riparian habitat along small headwater streams is essential to protecting downstream fish habitat, particularly in areas with unstable soils (Cederholm 1994).[28]

Riparian areas in general help clean drinking water:

> Riparian areas are important to people because they help provide clean water. Much of our drinking water either flows or percolates through riparian areas (Freeze and Cherry 1979). Intact riparian vegetation and soils filter and biodegrade 40-99% of the organic debris and environmental pollutants carried in surface flows before they can reach main stream channels (Lowrance et al. 1984, Rhodes et al. 1985).[29]

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[27] K. L. Knutson & V. L. Naef, *Management Recommendations for Washington's Priority Habitats: Riparian* p. 19 (Wash. Dept. Fish and Wildlife, Olympia WA: 1997). On the CAO on a CD included with the paper original of our January 22, 2010 letter to the Planning Commission this letter in the directory "\Fish & Wildlife Habitat\PSH Management Recs" filename: "ripfinal.pdf."
[28] *Id.* at 20.
[29] *Id.* at p. 9.

For these reasons all waters should be protected and buffers required for them[30] with allowances for bridges, crossings, and similar types of development. We urge you to protect Type 5 waters and provide them with a 50 foot wide buffer.

The county must update and improve its protections for wetlands.

The Okanogan County Office of Planning and Development January 12, 2009 memo on page 4 recommends updating the wetland rating system from the 1991 system to the current system. We agree. This will actually save applicants time and money as this system is wildly used and so most wetland biologists are familiar with it, reducing costs for those that require consultants.

The Okanogan County Office of Planning and Development January 12, 2009 memo on page 4 recommends that a mechanism be adopted to protect wetlands whether or not another development permit is required. We agree.

The Eastern Washington Growth Management Hearings Board has held that "[p]rotection of all critical areas is required by the [Growth Management] Act."[31] The Court of Appeals has held that "the GMA requires that the regulations for critical areas must protect the 'functions and values' of those designated areas. RCW 36.70A.172(1). This means all functions and values."[32] By only requiring protections for wetlands for developments that require permits other than category I wetlands, the current critical areas regulations do not protect all functions and values.

The Washington State Department of Ecology has prepared some excellent recommended wetlands regulations in *Wetlands in Washington State - Volume 2: Guidance for Protecting and Managing Wetlands* Appendix 8-B: Recommendations for Wetland Language in a Critical Areas Ordinance. This report is included on the CAO on CD enclosed with the paper original of our January 22, 2010 letter to the Planning Commission in the "wetlands" directory with the filename: "0506008.pdf." We also recommend that the wetland buffers and wetland mitigation replacement ratios in the critical areas regulations be updated to reflect the recommendations in Appendix 8-D, Guidance on Widths of Buffers and Ratios for Compensatory Mitigation for Use with the Eastern Washington Wetland Rating System, in the same report. The scientific basis for these recommended regulations can be found in Sheldon, D., T. Hruby, P. Johnson, K. Harper, A. McMillan, T. Granger, S. Stanley, and E. Stockdale, *Wetlands in Washington State - Volume 1: A Synthesis of the Science* (Washington State Department of Ecology Publication #05-06-006 Olympia, WA: March 2005). This report is enclosed on the CAO on CD provided with the paper original of our January

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[30] *Id.* at p. 88.
[31] *Easy & Washington Environmental Council v. Spokane County*, EWGMHB Case No. 96-1-0016 Final Decision and Order p. *3, 1997 WL 191457 p. *4 (April 10, 1997).
[32] *Whidbey Environmental Action Network [WEAN] v. Island County*, 122 Wn. App. 156, 174 – 175, 93 P.3d 885, 894 (2004) *reconsideration denied* July 12, 2004, *review denied Whidbey Environmental Action Network v. Island County*, 153 Wn.2d 1025, 110 P.3d 756 (2005).

22, 2010 letter to the Planning Commission in the "Wetlands" directory with the filename "0506006.pdf."

Clarify that developments must avoid and minimize critical area impacts.

Wetland mitigation has been famously unsuccessful. For example, the Washington State Department of Ecology conducted a study assessing the success of wetland mitigation. This report found that:

> Overall, 13 projects (29%) were in full compliance with all three [criteria analyzed in the study]. Forty-two projects (93%) were implemented, and of those, 23 projects (55%) were implemented to plan. Thirty-four projects had performance standards that could be evaluated, and of those, 12 projects (35%) were meeting all performance standards assessable by this study.[33]

Given this record, the critical areas regulations should clarify that all development should seek to avoid impacts to critical areas and minimize these impacts as much as possible. This will better protect critical areas. It will also reduce costs to developers since replacement mitigation is very expensive.

The aquifer recharge areas in Article II should designate and protect wellhead protection areas in addition to permeable soils.

The aquifer recharge provisions say that no mapping is available to identify aquifer and so relies on permeable soils in designating aquifer recharge areas. We agree this is a reasonable approach until studies are available. We also recommend that the well head protection areas around community water system wells also be designated as aquifer protection areas. These areas are relatively small, but if they are contaminated their adverse effects on wells can be rapid and significant. Protecting these areas is important to maintaining the water supplies for homes and business. This approach is recommended by the *Critical Aquifer Recharge Areas Guidance Document* and maps of the wellhead protection areas are available from the state agencies.[34]

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[33] Patricia A. Johnson, Dana L. Mock, Emily J. Teachout, and Andy McMillan; *Washington State Wetland Mitigation Evaluation Study Phase 1: Compliance* p. v (Washington State Department of Ecology, Publication No. 00-06-016: June 2000). Included in the "wetlands" directory of the CAO on CD included with the paper original of our January 22, 2010 letter to the Planning Commission with the filename: "0006016.pdf."

[34] Laurie Morgan, *Critical Aquifer Recharge Areas Guidance Document* p. 22 – 23 (Washington State Department of Ecology, Water Quality Program: January 2005 Publication Number 05-10-028). Enclosed on the CAO on CD provided with the paper original of our January 22, 2010 letter to the Planning Commission in the "CARAs" directory with the filename "0510028.pdf."

Update the Geologically Hazardous Areas provisions to incorporate the Washington State Department of Natural Resources' Liquefaction Susceptibility and Site Class Maps.

For the reasons set out in our comments on the proposed Shoreline Master Program, we recommend that Okanogan County update its geological hazards provisions to incorporate the Washington State Department of Natural Resources' Liquefaction Susceptibility and Site Class Maps. We also recommend you adopt our recommendations on regulations to manage these dangerous critical areas. This will reduce the damage to property and the harm to people that would otherwise occur during major earthquakes.

Recommendations on the Designation of Agricultural Lands

The Growth Management Act, in RCW 36.70A.170(1)(a), required Okanogan County to designate agricultural lands of long-term commercial significance by September 1, 1991. The Washington State Supreme Court has held that there is a three part test for agricultural land of long-term commercial significance:

> ¶ 17 In sum, based on the plain language of the GMA and its interpretation in *Benaroya I*, we hold that agricultural land is land: (a) not already characterized by urban growth (b) that is primarily devoted to the commercial production of agricultural products enumerated in RCW 36.70A.030(2), including land in areas used or capable of being used for production based on land characteristics, *and* (c) that has long-term commercial significance for agricultural production, as indicated by soil, growing capacity, productivity, and whether it is near population areas or vulnerable to more intense uses.[35]

The Growth Management Act requires the designation of agricultural lands for many reasons. One of them is the economic benefit of agriculture to Okanogan County and Washington State. The Washington State Department of Agriculture's *Washington Agriculture Strategic Plan 2020 and Beyond* documents to need to conserve agricultural lands to maintain the agricultural industry and the jobs and incomes the industry provides.[36] Given our current economic problems, protecting such an important part of the state and Okanogan County economies is a good idea.

Allowing the conversion of Okanogan County's farmland is also a bad idea for the county budget. As the *Washington Agriculture Strategic Plan 2020 and Beyond* documents:

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[35] *Lewis County v. Western Washington Growth Management Hearings Bd.*, 157 Wn.2d 488, 502, 139 P.3d 1096, 1103 (2006).

[36] Washington State Department of Agriculture, *Washington Agriculture Strategic Plan 2020 and Beyond* pp. 50 -- 52 (2009). Accessed on August 10, 2009 at: http://agr.wa.gov/FoF/ and enclosed with the paper original of this letter.

> For each $1 paid in taxes by farm and forest lands in that [Skagit] county, those lands received back about 51 cents in services, contributing a 49 cent subsidy for the rest of the taxpayers in the county. For every $1 paid in taxes by residential properties, those properties received $1.25 in public services.[37]

The 2007 Census of Agriculture found that Okanogan County had 1,205,229 acres of land in farms.[38] This includes farm and ranch land, but does not include federal grazing allotments. As the Census of Agriculture explains: "All grazing land, except land used under government permits on a per-head basis, was included as ''land in farms'' provided it was part of a farm or ranch."[39] We recommend that the county designate all of its land in farms that has long-term commercial significance as agricultural lands of long-term commercial significance.

Irrigated farm land, which is included in the land in farms, should also be designated as agricultural lands of long-term commercial significance. Okanogan County has long recognized the economic value of these lands.[40] In the Methow basin alone, as of 2001 irrigated lands totaled 16,729 acres. Of this total, 77% was planted in alfalfa and the remainder in orchards and pasture and turf.[41]

Again, we support the proposed update to the regional shoreline master program with our recommended improvements. And we recommend a comprehensive updating of the critical areas regulations. We also recommend that the county properly designate its agricultural lands of long-term commercial significance.

Thank you for considering our comments. If you require additional information please contact me at telephone 206-343-0681 or email tim@futurewise.org

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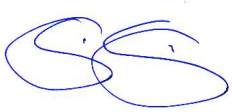
[37] *Id.* at p. 53.
[38] United States Department of Agriculture, National Agricultural Statistics Service, *2007 Census of Agriculture, Washington State and County Data Volume 1 Geographic Area Series • Part 47* Chapter 2: County Level Data, Table 8. Farms, Land in Farms, Value of Land and Buildings, and Land Use: 2007 and 2002 p. 293 (February 2009). Accessed September 23, 2010 at: http://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_2_County_Level/Washington/index.asp and enclosed with the paper original of this letter.
[39] United States Department of Agriculture, National Agricultural Statistics Service, *2007 Census of Agriculture Washington State and County Data Volume 1 • Geographic Area Series • Part 47* Appendix B pp. B-14 – B-15 (February 2009). See also the definition of "woodland pastured" in Appendix B on p. B-25.
[40] *Methow Basin (WRIA 48) Watershed Plan* p. 6 (Approved by the Okanogan County Board of County Commissioners June 20, 2005). Accessed on September 22, 2010 at: http://okanogancounty.org/water/Documents%20on%20Site/Methow%20Basin%20plan%20text.pdf and enclosed with the paper original of this letter.
[41] *Id.* at p. 12 & p. 45.

Also, please notify me of any upcoming public involvement opportunities for the county's critical areas regulations, the shoreline master program update, or the designation of agricultural lands of long-term commercial significance.

Sincerely,



Tim Trohimovich, AICP
Co-Director of Planning & Law

Enclosures