

From: [WENDY](#)
To: [PDS Planning Commission](#)
Cc: [PDS](#); [Boscolo, Anthony](#); [Douglas R. Allen](#)
Subject: Partial comments on the amendments to Art 7 on Habitat Conservation Areas
Date: Thursday, April 14, 2016 7:35:17 AM
Attachments: [comment on Art 7 to PC.docx](#)

Dear Planning Commission:

Attached please find my line by line comments on the Habitat Conservation Area provisions in Art 7 of the amended CAO. Because of the recent agenda change, I was unable to complete comments on each statutory subsection and will have to submit my remaining comments at a later date. I know that some of my concerns were previously forwarded to you in the form of email comments or attachments.

Frankly, I was quite surprised by how many changes had been made to the HCA since the citizen advisory committee last reviewed it. I found that troubling, because that means the real work was done after the CAC was no longer functioning and provided the appearance, but not the reality of citizen input.

I think it is important to make one thing perfectly clear. At no point did the CAC ever review the best available science before commenting on the provisions in the CAO. I believe that I was the only member who regularly sent in BAS, much of which was not accepted, without any explanation. Because the CAO process must be based on BAS, this is an important fact. Being provided with a list of BAS that was never reviewed or discussed as a committee does not satisfy the requirements of the GMA.

Sincerely,
Wendy Harris.

16.16.710.B *“The approximate location and extent of identified fish, and wildlife, and sensitive plant habitat areas are shown on the County’s critical area maps as well as state and federal maps.”*

The county has not made a good faith effort to reflect the terrestrial HCA’s on its maps. While the HCA map on fish is quite extensive, the map regarding all other wildlife is largely blank and filled with wide generalities. The county is not even trying. There are number of databases available that the county can use, for free, to supplement its HCA map. It simply has not put in the effort. At a minimum, ESA species should be identified. There is no reason that state priority species and habitat are not reflected on this map. In addition, the WDFW database identified areas of high biodiversity. That would be important to note as these would be areas that are not suitable for development.

The importance of properly mapping these HCA areas is underscored in the provisions of WAC 365-196-485 (4), Avoiding impacts through appropriate land use designations.

(a) Many existing data sources can identify, in advance of the development review process, the likely presence of critical areas. When developing and reviewing the comprehensive plan and future land use designations, counties and cities should use available information to avoid directing new growth to areas with a high probability of conflicts between new development and protecting critical areas. Identifying areas with a high probability of critical areas conflicts can help identify lands that are likely to be unsuitable for development and help a county or city better provide sufficient capacity of land that is suitable for development as required by RCW **36.70A.115**. Impacts to these areas could be minimized through measures such as green infrastructure planning, open space acquisition, open space zoning, and the purchase or transfer of development rights.

(b) When considering expanding the urban growth area, counties and cities should avoid including lands that contain large amounts of mapped critical areas. Counties and cities should not designate new urban areas within the one hundred-year flood plain unless no other alternatives exist, and if included, impacts on the flood plain must be mitigated.

RCW **36.70.110**(8) prohibits expansion of the urban growth area into the one hundred-year flood plain in some cases. See WAC **365-196-310**.

Please note by not properly denoting the nature and extent of non-fish HCA, the county is failing to put property owners on notice of potential property development constraints and is not ensuring that future growth will be directed away from biodiversity hotspots, migration corridors, and areas of high conservation value.

16.16.710.B *“Each applicant is responsible for having a property-specific determination made pursuant to Article 2.” **This site specific requirement is not compliant with the GMA.** The purpose of the Critical Area Ordinance is to protect the functions and values of critical area. In*

many cases, a determination of whether a development will result in proper protection of the critical area requires review that extends beyond the development site. However, the county absolutely refuses to require anything beyond a site specific review, limited to the land being developed. I spent a great deal of time arguing about this as part of the EIS scoping, to no avail.

The county's position directly contradicts WAC 365-196-830(6), which states that *"Functions and values must be evaluated at a scale appropriate to the function being evaluated. Functions are the conditions and processes that support the ecosystem. Conditions and processes operate on varying geographic scales ranging from site-specific to watershed and even regional scales. Some critical areas, such as wetlands and fish and wildlife habitat conservation areas, may constitute ecosystems or parts of ecosystems that transcend the boundaries of individual parcels and jurisdictions, so that protection of their function, and values should be considered on a larger scale."*

See that word, "must"? That means that it is not optional. I also attempted to raise the matter on several occasions on the citizen advisory committee and was always rebuffed by the agricultural stakeholders. Whatcom County citizen will not be pleased if the county requires unnecessary expenditure of public funds to litigate issues before the Growth Management Hearing Board on a matter where the law is clear.

This should be revised to read, *"Each applicant is responsible for having a property determination evaluated at the scale appropriate to the function being evaluated. In almost every case, evaluation of wetlands and habitat conservation areas will require consideration of the larger ecosystem of which that critical area is a part."*

16.16.710.C.1.b. I am pointing out this provision because it reflects a situation where the Planning Department is authorized to use its discretion, and parameters and guidelines for use have been proscribed. This is appropriate, and is in contrast to a number of other situations in the this Article where the staff is provide unrestricted discretion, which is not appropriate.

16.16.710.C.2 and 3. As drafted, these provisions appear to leave out certain categories of species that should be protected under the GMA. Protected federal species should include species that are endangered, threatened, vulnerable or species of concern. State priority species include species that are endangered, threatened, sensitive, candidate species or state monitor species. However, these statutes refer only to "LISTED SPECIES." That would seem to exclude species of concern, candidate species and monitor species from protection. This must be clarified, particularly because the definitions in Article 9, which refer to "designated species,

federal” and “designated species, state” only reference federal endangered and threatened species and only state endangered, threatened and sensitive species.

“Designated Species, Federal.” Federally designated endangered and threatened species are those fish and wildlife species identified by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service that are in danger of extinction or threatened to become endangered. The U.S. Fish and Wildlife Service and the National Marine Fisheries Service should be consulted for current listing status.” Page 85 of Art 9

“Designated Species, State.” State designated endangered, threatened, and sensitive species are those fish and wildlife species native to the state of Washington identified by the Washington Department of Fish and Wildlife, that are in danger of extinction, threatened to become endangered, vulnerable, or declining and are likely to become endangered or threatened in a significant portion of their range within the state without cooperative management or removal of threats. State designated endangered, 32 threatened, and sensitive species are periodically recorded in WAC 232-12-014 (state endangered species) and WAC 232-12-011 (state threatened and sensitive species). The State Department of Fish and Wildlife maintains the most current listing and should be consulted for current listing status.” Page 85 of Art 9.

In contrast WDFW states about priority species and habitat:

The PHS List is a catalog of habitats and species considered to be priorities for conservation and management. Priority species require protective measures for their survival due to their population status, sensitivity to habitat alteration, and/or recreational, commercial, or tribal importance. Priority species include State Endangered, Threatened, Sensitive, and Candidate species; animal aggregations (e.g., heron colonies, bat colonies) considered vulnerable; and species of recreational, commercial, or tribal importance that are vulnerable. Priority habitats are habitat types or elements with unique or significant value to a diverse assemblage of species. A priority habitat may consist of a unique vegetation type (e.g., shrub-steppe) or dominant plant species (e.g., juniper savannah), a described successional stage (e.g., old-growth forest), or a specific habitat feature (e.g., cliffs).

ESA species include threatened and endangered species as well as candidate species waiting for a determination. Nowadays, species can remain in candidate status for a number of years. Clearly, the county is not adopting protections for all federal and state priority species.

16.16.710.C.3 and 4. This is confusing as these two provisions appear to overlap each other, with one provision being less protective than the other. Did the staff go through the CAO, after

the committees had completed their work, and then attempt to revise and reduce the protections provided for habitat and species? I do not understand why these conflicts appear.

16.16.710.C. 11. It would be very helpful if this statute listed out all the examples of Natural Area Preserves, Aquatic Reserves, and Natural Resource Conservation Area.

16.16. 710.C???? Habitat Corridors Are Missing From The List of Protected Species and

Habitat: It is important to note the county code does not include reference to habitat corridors as recommended in the WAC 365-190-130 with regard to waters and streams of the state. This has particular importance because the county is noncompliant with RCW 36.70A.160, which requires counties and cities to identify open space corridors within and between urban growth areas for multiple purposes, including those areas needed as critical habitat by wildlife. RCW 36.70A.160; WAC 365-196-335; WAC 365-196-485. This is generally referenced along with matters pertaining to the CAO.

This problem has been on-going for some time and has not been challenged, but the legal requirement is quite clear. This remains a compliance issue. You should be aware that the administrative staff made no effort to address this problem, although this is the very purpose of a CAO and comp. plan update. I suggest that the Planning Commission raise this issue independently of staff or it will otherwise be completely neglected.

Please note that the large areas with arrows that I have seen shown on a map are not adequate to satisfy this requirement. The Hearings Board requires that open space corridors be identified with sufficient specificity to identify the location of land within the corridor. While a habitat corridor committee was formed, (misnamed the habitat advisory committee), it is in only the earliest stages of its work regarding an inventory. Thus, the staff provides no solution to this compliance issue for purposes of the 2016 comp. plan update.

I suggest that the county at least start with the work that was completed in the Birch Bay Characterization and Pilot Project.

<http://www.ecy.wa.gov/mitigation/docs/BirchBayCharacterization.pdf>. It identified the Terrill Creek area as an important hub of connectivity for various unidentified habitat migration routes throughout the county. This project continues to be referenced in many other documents that I come across. I attempted to submit the Birch Bay Characterization and Pilot Project as BAS. I reviewed the 2005 BAS Report, and this is not the case. Therefore, please include this important study in the BAS for the 2016 update.

While the 2005 BAS Report did not list the Birch Bay project, it certainly did reflect the importance and value of establishing habitat corridors, stating that this is *“Land essential for preserving connections between habitat blocks and open space. Maintaining habitat connectivity for fish and wildlife species is necessary to sustain population viability. Habitat connectivity enables individuals to move between habitat patches in obtaining requisite resources, the dispersal of individuals, and genetic exchange between populations. Isolated populations are at greater risk of extinction due to natural population fluctuations, random events, and inbreeding (Morrison et al. 1998; Lemkuhl et al. 2001).”*

The 2005 BAS Report also stated, at 6.1.1.10, that, *“Whatcom County has not identified or designated any lands essential for habitat connectivity as recommended in the Critical Areas Assistance Handbook (Ousley et al. 2003). However, the existing wetlands along the Nooksack River (identified on the draft 2004 priority species map) provide potential wildlife habitat connectivity between the eastern and western portions of the County. Similarly, the riparian corridors of the North and South Forks of the Nooksack River provide a potential north-south wildlife corridor in the central County. There is good connectivity of habitats along the County’s marine shoreline with Bellingham and Blaine and scattered residential developments being the principal barriers to wildlife movement and migration. There are still extensive areas of the County’s marine shoreline along Birch Point, between Point Whitehorn and Neptune Beach, the Nooksack Delta, Chuckanut Bay and Drive, and Lummi Island that remain relatively undisturbed and continue to provide habitat for wildlife.”* These areas should be reviewed to determine whether these potential habitat corridors are still viable, or whether they have already been too developed.

The county should be required to list habitat corridors as a critical area to encourage and ensure that it will finally take this responsibility seriously. The county is facing serious pressure from both the building industry and the agricultural community, both of whom strongly oppose habitat corridors. Such provisions will give the county the backbone it needs to stand strong and comply with the law in the face of great local pressure.

16.16.710.C.14: Species and Habitat of Local Importance. Incredibly, the county has removed every single species of local importance without any basis in science, deliberately ignoring information clearly set out in the 2005 BAS Report, and information that I provided as part of the review process. This appears to be solely agenda driven and as a result, this is likely a GMA compliance problem.

Also disturbing is a new statement that was added after the two committees were sent home, stating that, *“The Department of Planning and Development Services is authorized to maintain a current list of Species of Local Importance as designated by the County Council.”* What was the purpose of the citizen and technical advisory boards when so much of the CAO was revised through the unilateral actions of the staff? The County Council lacks the expertise to designate species of local importance and no guidelines or standards are proposed to assist them. This provides appearance lacking any substance.

The basis for removing these species was stated by Cliff Strong as follows. *“This section is odd, as some of the species listed here are already on the WDFW priority species list, and thus are protected anyways, and others aren’t. Yet no one seems to know where this list came from, and the TAC questions the inclusion of osprey and turkey vulture. Staff has reached out to local wildlife agencies and groups for input, but had only one response, from The Wildlife Society to add red-tailed hawks. However, they weren’t able to pull all the information together to meet the criteria for listing a species of local importance (section D). Thus, we’re proposing to delete*

all the species currently listed, keep the listing criteria, and let staff have the ability to keep a list were the Council to add any to it.”

I assume that Mr. Strong read the 2005 BAS Report as he provided a copy of it to both committees. I also assume he read the several emails that I provided on this issue. Two of the fish species, the Nooksack dace and the Salish Sucker were included because they are found only in Bertrand and Fishtrap creeks. The 2005 BAS Report recommended the osprey and turkey vulture due to rarity. There were also other recommended species and habitats that were recommended, some of which were so obviously appropriate that I had recommended them before I reviewed the 2005 BAS Report materials.

Mr. Strong also appears confused about the basis and legal standards regarding species of local importance. Because they reflect different criteria than those for ESA and priority species, it should not be a concern if they are double listed. State and federal species change all the time, and the county might want to implement a different, more protective standard for some local species and this will make its legal authority for doing so clearer.

Table 6-4, pages 6-8, 6-9 of the 2005 BAS Report refers to designated species and habitat of local importance on 1998 Critical Area Maps. It is not clear why these species were removed. However, it is clear that rather than deleting all local species, the county should be adding additional species, habitat and plants. The GMA requires the county to consider, through use of BAS, the designation of local species and habitat of local importance. More specifically, the 2005 BAS Report states:

“The 1998 Critical Areas map for Whatcom County identified habitats and species of local importance at Point Roberts, Birch Bay State Park, Lake Terrell, and along portions of the Nooksack River upstream of Everson (WCPD 1998). However, many species of fish are associated with protected habitats such as wetlands and streams. Several species of resident fish, such as the Nooksack Dace and the Salish Sucker are only known to inhabit Fishtrap and Bertrand Creeks in the United States. Kokanee, the landlocked sockeye salmon of Lake Whatcom, are also a good candidate for a species of local importance. Habitats of local importance are defined in the WCC as habitats supporting vulnerable and recreationally important species listed in Appendix C of Chapter 16.16 (Table 6-4). The WCC does not identify particular habitat types or locations of habitats of local importance. Although not specifically designated as such by Whatcom County, Drayton Harbor has been identified as an Important Bird Area by Washington Audubon because of the high numbers of wintering water birds and raptors found there (Cullinan 2001). Brant are specifically designated as a locally important species, and a Washington Brant Festival, held in Blaine and Birch Bay, was established in 2003 to foster public awareness of brant and to support the local area economy (Washington Brant Foundation 2004). In recent years, wildlife watching has grown in popularity and can be an important source of income to local communities. In 2001, wildlife watching expenditures in the U.S. exceeded \$38 billion, or an average of \$738 per individual (USFWS and U.S. Department of Commerce, U.S. Census Bureau 2002).”

I recommend that Whatcom County re-adopt the species and habitat that were reflected in its 1998 critical area maps, set out in Table 6-4, unless BAS establishes that these species no longer need protection. In addition, because of their value and importance to our agricultural crops, I recommend that all native bee and bat species be designated as local species of importance. Given the devastating die-off of our local sea star species, I also recommend designating sea stars as a local species of importance. I would like to see old growth forest designated as a habitat of local importance. With climate change, the old growth forest best sequesters carbon while cooling the climate, creating more oxygen and high quality habitat. Because of their great value to the local ecosystem, I recommend that beavers be designated as local species of importance.

16.16.710.D. Related to the above, this provision creates the criterion for designating species of local importance. However, the standards are so burdensome that it is extremely unlikely that someone would be able to qualify in designating a local species. As Cliff Strong indicated, a organization wanted to designate red tail hawks as a local species as part of this update process, but could not meet the stiff standards being imposed. In essence, the county is relying upon impractical performance standards to prevent the creation of species of local importance, rather than relying upon BAS.

This is similar to a recent state appellate case, where Ferry County, using a designation statute similar to Whatcom County, including the creation of a management plan, was found to be noncompliant with the GMA because it failed to include a number of species without the benefit of BAS or a reasonable alternative approach. *Ferry County v. Growth Management Hearings Board*, Court of Appeals of Washington, Division 3, No.31331-0-111 (Dec. 9.24.14). <http://caselaw.findlaw.com/wa-court-of-appeals/1686658.html>. It is noteworthy that two of the species discussed by the court, the peregrine falcon and the Oregon spotted frog are both found in Whatcom County.

This decision provides specific guidance to Washington counties when evaluating the habitats and species of local importance within their boundaries by identifying the specific factors a court takes into consideration when evaluating whether a county is compliant with the Growth Management Act. Paying special attention to the potential adverse effects of development on a listed species or priority habitat will ensure compliance with the GMA and further the protection of these priority habitats in concurrence with local development strategies.

16.16.730 Standards – Locally important habitats and species – Standards. *Alterations that occur within a locally important habitat area or that may affect a locally important species as defined herein shall be subject to review on a case-by-case basis. The technical administrator shall have the authority to require an assessment of the effects of the alteration on species or habitats and may require mitigation to ensure that unmitigated adverse effects do not occur. This standard is intended to allow for flexibility and responsiveness with regard to locally important species and habitats.*

I am just now reviewing this provision for the very first time and it undermines any attempt to designate locally important habitats and species by providing unrestricted discretion by the

planning staff as to whether and how there will be mitigation for impacts to local species. All decisions are made on a case by case basis and there is no process for public review. At a minimum, this should be conditional use type process requiring some oversight. The Growth Management Hearings Board upholds administrative discretion, but not when it is unrestricted and unbounded. There must be standards and parameters and goal posts and a process to ensure that things are on the right track.

Here, the entire alteration and mitigation process for local species has been separated from the normal mitigation provisions and is left to the sole discretion of the planning department. This is an appearance of legal compliance without any assurance of the reality of legal compliance. Where is the transparency and accountability of this subsection? How will the handling of each case, and each year be tracked and by whom will it be reviewed to ensure that the staff stays on track and meets no net loss standards? What justification is there for treating local species differently than other critical area impacts? How will we ensure that the staff is not subjected to excessive pressure from the agricultural or building industry?

It was already a concern that was noted in the 2005 BAS Report that the existing regulations are very short on objective performance standards and rely too heavily on the individual discretion of the staff planner. Yet this provision goes quite a bit further than anything we have previously seen. I think this provision should just be deleted and the normal mitigation provisions used.

