



## ADMINISTRATIVE CODE INTERPRETATION RELATING TO THE IMPLEMENTATION OF CHAPTER 14.88 LSMC WHEN A PROPERTY IS SEPARATED FROM A CRITICAL AREA BY PREEXISTING IMPROVEMENTS AND FUNCTIONALLY DISCONNECTED BUFFER AREAS

### **1. Authority**

Lake Stevens Municipal Code (LSMC) 14.04.120(a) allows city departments to administratively adopt guidelines, standards, reference materials, forms or other documents that aid the public, applicant, staff or decision-maker in interpreting the municipal code. LSMC 14.16C.035 outlines the process for administrative interpretations to clarify the provisions of this title. The Planning and Community Development Director (Director) is authorized to issue this interpretation, pursuant to LSMC 14.16C.035(a) to:

- (1) Clarify ambiguous provisions of the code applied to a specific project;
- (2) Determine nonconforming rights;
- (3) Determine whether a use is allowed in a particular zone; and
- (4) Interpret the meaning of terms.

### **2. Intent**

This interpretation clarifies ambiguous provisions, determines nonconforming rights and interprets the meaning of terms to harmonize sections of Chapter 14.88 LSMC Critical Areas; otherwise known as the city of Lake Stevens Critical Areas Ordinance (CAO). Specifically, this policy provides guidance on how to determine:

- (1) What does *no net loss* mean and how does this apply to regulated and allowed activities;
- (2) When preexisting site improvements create a functional disconnect to, and affect the administration of, critical areas buffers for new development; and
- (3) Do the definitions found in Chapter 14.08 LSMC and other regulatory sources provide guidance on the technical terms used in the code sections as cited to determine intent; and
- (4) A related issue emerging from a review of Issue 2, relates to determining what classifies as a minor or major development.

Publications from the Department of Ecology (DOE) and Department of Commerce (Commerce) are also evaluated to understand the legal and scientific contexts of CAOs. *Italicized sections* emphasize key elements related to the municipal code, Comprehensive Plan, findings of fact and conclusions. Headers, imbedded notes and select findings and conclusions **are bolded for contrast and additional weight**.

### **3. Policy Framework**

The Comprehensive Plan provides a framework for evaluating the land use goals and policies of the city related to the administration of development regulations. Relevant sections follow.

Land Use Goal 2.3 – Apply the comprehensive plan as a guide for community development implemented through the city's development regulations to ensure preferred community growth patterns are achieved.

*LU Policy 2.3.1 Review development standards and regulations to ensure that they possess an appropriate level of flexibility to promote efficient use of buildable land, balanced with the need for predictable decision-making.*

Land Use Goal 2.10 – Ensure that land uses optimize economic benefit and the enjoyment and protection of natural resources while minimizing the threat to health, safety and welfare.

LU Policy 2.10.6 Encourage growth that is responsive to environmental concerns and that enhances the natural environment of the lake drainage basin and the area watersheds.

Environmental and Natural Resources Goal 4.1 – Sustain environmental quality through the preservation and conservation of the natural environment and resources, and *require development to be sensitive to site characteristics and protect natural and cultural resources.*

*Policy 4.1.1 The city will continue to prioritize the protection of wetlands, streams and creeks, lakes and ponds, aquifer recharge areas, geologically hazardous areas (e.g., steep slopes and erosion areas), significant trees, fish and wildlife habitat areas and corridors, cultural resources, and frequently flooded areas through land use policies, regulations and decisions based on best available information and in coordination with state and regional priorities.*

*Policy 4.1.3 Preserve existing vegetation as much as possible due to its vital role in maintaining wildlife habitat and preventing additional storm water runoff or soil erosion from new developments.*

Environmental and Natural Resources Goal 4.3 – Protect the natural environment, surface water and ground water and aquifer recharge areas, conserve all critical areas including wetlands, shorelines, creeks/streams, geological hazard areas and wildlife habitats by locating development within geographically suitable and geologically stable areas, and coordinate local development regulations with state and federal policies.

*Policy 4.3.1 Review critical areas regulations which reflect the Best Available Science (BAS) pursuant to the GMA. These regulations must protect the functions and values of these areas and not unduly reduce property rights by requiring greater protection measures which offer diminishing beneficial returns.*

### **Policy Findings and Conclusions**

- The selected goals and policies from the Land Use and Environmental and Natural Resources elements of the Lake Stevens Comprehensive Plan require city development regulations protecting critical areas to be based on best available information and science, allow flexible administration and recognize private property rights. *Policy 4.3.1 provides the most succinct guidance on how to apply the city's CAO during the development review process.*
- The city's CAO, as adopted and based on best available science, follows the Comprehensive Plan goals and policies to protect the functions and values of critical areas.
- The city administers its CAO to protect critical areas functions and values under the codified framework. The city also recognizes decisions must contain some degree of flexibility to

evaluate real world impacts on sites with functionally disconnected buffers by prioritizing beneficial returns, and giving consideration to private property rights, especially when preexisting conditions exist on a property that may not align with current regulations.

#### **4. Applicable Code Sections and Issues**

**Issue 1** – Chapter 14.88 LSMC regulates activities that may affect critical areas and requires the city to evaluate land uses and development activity in a manner that is consistent with the purposes, objectives, and goals of this chapter. *The first issue to consider is what does no net loss mean and how does this apply to regulated and allowed activities.*

**LSMC 14.88.010 Purpose and Intent** describes the purpose of this chapter is to designate and protect critical areas by establishing regulations and development standards to protect public health, safety and welfare and to ensure *no net loss of acreage, functions and values of critical areas.*

**LSMC 14.88.210 Regulated Activities**, states:

- “(a) For any regulated activity, a critical areas report is required to support the requested activity. *All land use and/or development activities on lands containing critical areas are subject to this chapter and are prohibited unless:*
  - (1) *The use or activity is found to be exempt by the Planning and Community Development Director or designee per the “allowed activities” sections of this chapter...*

#### **Findings and Conclusions Issue 1**

- Development activities must be consistent with the city's CAO including exempted and allowed activities.
- *If there are no alterations or modifications to the physical limits of an existing critical area or its buffer and no new impacts occur that would affect the existing functions and values of the critical area or its buffer, there is no net loss.*

**Issue 2** – Several LSMC sections are entitled *Allowed Activities* as referenced in LSMC 14.88.210: LSMC 14.88.220 (General Provisions), LSMC 14.88.420 (Fish and Wildlife Areas), LSMC 14.88.520 (Frequently Flooded Areas), LSMC 14.88.620 (Geologically Hazardous Areas) and LSMC 14.88.820 (Wetlands).

The sections listed above all reference LSMC 14.88.220 – *this code section creates the principal guidance for administering preexisting improvements with new development.* Individual sections concerning different critical area types provide directions for modifying critical areas or buffers as applicable. The language found in 14.88.220(n) for administering preexisting conditions is duplicated in 14.88.430(e) for fish and wildlife areas such as streams and 14.88.830(f)(5) for wetlands.

**14.88.220 Allowed Activities (General Provision).** Unless specifically prohibited elsewhere in this chapter, *the following uses are allowed in any critical area or buffer;* provided, that a site/resource-specific report prepared when the activity may result in a loss of functions and values, that describes the environmental limitations of and proposed mitigation for the site, shall be submitted, reviewed, and approved by the City prior to permit issuance or land use approval:

- (n) *Development when the subject property is separated from a critical area by preexisting, intervening, and lawfully created structures, public roads, or other substantial improvements.*  
*The preexisting improvements must be found to separate the subject property from the critical area or impair the delivery of buffer functions.*

**14.88.430 Requirements (e) (Provision for Fish and Wildlife Conservation Areas).** The Director may modify the buffer widths in the above table in accordance with the following:

(5) *Buffer widths may be modified if the subject property is separated from the stream channel by preexisting, intervening, and lawfully created structures, public roads, or other substantial preexisting intervening improvements. The intervening structures, public roads, or other substantial improvements must separate the subject upland property from the stream channel by height or width, preventing or impairing the delivery of buffer functions to the stream channel. In such cases, the reduced buffer width shall reflect the buffer functions that can be delivered to the stream channel.*

**14.88.830(f) Buffer Reductions (Provision for Wetlands).** Buffer reductions may be allowed for Category III or IV wetlands, provided the applicant demonstrates the proposal meets the criteria in subsections (f)(1) through (4) of this section and either subsection (f)(5) or (6) of this section. Buffer width reduction proposals that meet the criteria as determined by the Director or designee shall be reduced by no more than 25 percent of the required buffer.

(5) *The subject property is separated from the wetland by preexisting, intervening, and lawfully created structures, public roads, or other substantial improvements. The preexisting improvements must be found to separate the subject upland property from the wetland by height or width that prevents or impairs the delivery of buffer functions to the wetland. In such cases, the reduced buffer width shall reflect the buffer functions that can be delivered to the wetland.*

Other related LSCM sections provide context when considering the application of LSCM 14.88.220 and its subordinate sections.

- LSCM 14.88.295 requires the permanent protection of critical areas and associated buffers unless existing legally (ongoing) established structures and landscaping are present.
- LSCM 14.88.330 allows regulated nonconforming activities, approved prior to the passage of this chapter, to continue with some limitations.

**14.88.295 Permanent Protection for Streams, Wetlands and Buffers.** All streams and wetlands under this chapter and their required buffers shall be permanently protected by designating them as native growth protection areas (NGPAs) in accordance with Section 14.88.290. NGPAs are to be left permanently undisturbed in a substantially or environmentally enhanced natural state. No clearing, grading, filling, building construction or placement, or road construction is allowed except the following:

(c) *Existing legally (ongoing) established structures, and nonnative or ornamental landscaping, including, but not necessarily limited to, gardens, yards, pastures, and orchards, are not required to be designated as NGPAs.*

#### **14.88.330 Nonconforming Activities.**

*A regulated activity that was approved prior to the passage of this chapter and to which significant economic resources have been committed pursuant to such approval but which is not in conformity with the provisions of this chapter may be continued subject to the following:*

- (a) *No such activity shall be expanded, modified, or substituted in any way that increases the extent of its nonconformity without a permit issued pursuant to the provisions of this chapter;*
- (b) *Except for cases of discontinuance as part of normal agricultural practices, if a nonconforming activity is discontinued for 180 days, any resumption of the activity shall conform to this chapter;*

- (c) *If a nonconforming use or activity is destroyed by human activities or a natural occurrence, it shall not be resumed except in conformity with the provisions of this chapter;*
- (d) Activities or adjuncts thereof that are or become *nuisances shall not be entitled to continue as nonconforming activities.*

## **Findings and Conclusions Issue 2**

- The city's CAO identifies allowed and exempt uses; provides distinct guidance on how to regulate critical areas and critical areas buffers with legal, preexisting improvements and nonconforming activities; and identifies appropriate protection measures.
- *LSMC 14.88.220(n) establishes the universal requirement across all critical area types allowing the continuation of preexisting, intervening, and lawfully created activities or improvements when the existing buffer function is impaired.* Other related sections of the municipal code are subordinate and should be read as standalone elements, even when there is an apparent contradiction such as in 14.88.830(f).
  - The 25% buffer reduction, described at the end of LSMC 14.88.830(f), only applies to Category III and IV wetlands meeting the criteria of subsection (1 through 4).
  - Other reductions are considered separately. As noted, subsection (5) implements LSMC 14.88.220(n) related to pre-existing impacts to determine a functional buffer.
  - Subsection (6) deals with potential modifications of wetlands or wetland buffers receiving a lower habitat score and is tied directly to the mitigation strategies described in LSMC 14.88.840, which vary from prescriptive to innovative. It also relates to the general municipal code requirement for mitigation found in LSMC 14.88.275, which provides the technical requirements for mitigation plans; and 14.88.276, which provides an allowance for site-specific, alternative mitigation strategies.
- LSMC 14.88.295 identifies additional situations that may be exempt from native growth protection areas protections, such as on-going nonnative or ornamental landscaping.
- LSMC 14.88.330 plainly states nonconforming regulated activities may continue when they meet certain criteria.
- *The referenced sections of Chapter 14.88 LSMC, as read together, exempt sites with lawful, pre-existing and non-conforming situations from some or all buffer requirements when the buffer function is already impaired and there is no new impact subject to a site-specific review and analysis of associated criteria.*

**Issue 3** – Do the definitions found in Chapter 14.08 LSMC and other regulatory sources provide guidance on the technical terms used in the code sections as cited to determine intent?

*Agricultural activities, existing and ongoing:* Those activities conducted on lands defined in RCW 84-34-020(2), and *those activities involved in the production of crops and livestock*, including but not limited to operation, maintenance and conservation measures of farm and stock ponds or drainage ditches, irrigation systems, changes between agricultural activities, and normal operation, maintenance or repair of existing serviceable structures, facilities or improved areas. Activities that bring an area into agricultural use are not part of an ongoing activity. *An operation ceases to be ongoing when the area in which it was conducted is proposed for conversion to a nonagricultural use or has lain idle for a period of longer than five years*, unless the idle land is registered in a federal or state soils conservation program (DOE Model Ordinance, 2022-page B-1).

*Alteration. Any human-induced action which impacts the existing condition of a critical area.* Alterations include but are not limited to grading; filling; dredging; draining; channelizing; cutting, pruning, limbing or topping, clearing, relocating or removing vegetation; applying herbicides or pesticides or any hazardous or toxic substance; discharging pollutants; grazing domestic animals; paving, construction, application of gravel; modifying for surface water management purposes; or any other *human activity that impacts the existing vegetation, hydrology, wildlife or wildlife habitat.* Alteration does not include walking, passive recreation, fishing or other similar activities (Chapter 14.08 LSMC).

**Note: this definition of alteration expands upon the one found in the DOE Model Ordinance publications (2016-page 53) and (2022-page B-1).**

*Developable (e.g., land, acres).* Land on which development can occur per the regulations of this and other titles of the Lake Stevens Municipal Code. Specifically, *lands that are considered critical areas per Chapter 14.88 (Critical Areas) are not considered developable* (Chapter 14.08 LSMC).

*Developable Area.* Land outside of critical areas, their setback, and buffers (Chapter 14.08 LSMC).

*Development* (definition related to shoreline permits only). A use consisting of the construction or exterior alteration of structures; dredging, drilling, dumping, filling, removal of sand, gravel or minerals, bulkheading, driving of pilings, placing of obstructions, or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters of the State subject to Chapter 90.58 RCW at any stage of water level (Chapter 14.08 LSMC).

**Note: The definition of development found in the DOE Model Ordinances (2016-page 54 and 2022 page B-3) are similar to the city's shoreline specific definition – *A land use consisting of the construction or exterior alteration of structures; grading, dredging, drilling, or dumping; filling; removal of sand, gravel, or minerals; bulk heading; driving of pilings; or any project of a temporary or permanent nature which modifies structures, land, wetlands, or shorelines and which does not fall within the allowable exemptions contained in the City Code.* The key difference between the city's definition and the model ordinances is *the last clause in the city's definition explicitly references allowable exemptions.***

*Development Activity.* Any construction or expansion of a building, structure or use; any change in use of a building or structure; or any changes in the use of land (Chapter 14.08 LSMC).

*Existing Site Conditions.* The current site features, natural features, cultural features and infrastructure of a specific location (Chapter 14.08 LSMC).

*Functions and Values.* The beneficial roles served by critical areas including, but not limited to, water quality protection and enhancement, fish and wildlife habitat, food chain support, flood storage, conveyance and attenuation, groundwater recharge and discharge, erosion control, wave attenuation, aesthetic value protection, and recreation. These roles are not listed in order of priority (Chapter 14.08 LSMC).

*Functions and Values:* The ecosystem services provided by critical areas to society, including, but not limited to, improving and maintaining water quality, providing fish and wildlife habitat, supporting terrestrial and aquatic food chains, reducing flooding and erosive flows, wave attenuation, carbon sequestration, thermal refugia, historical or archaeological importance, cultural uses and significance, educational opportunities, and recreation (DOE Model Ordinance, 2022-page B-4).

**Note: the city's and the DOE's definitions cover the same topics, but are stated differently. Both include a combination of natural elements e.g., water quality, fish and**

**wildlife habitat, flood control and other cultural elements e.g., aesthetics and recreation with an emphasis on different natural and cultural elements.**

*Impervious Surface.* A type of *hard surface* area, which either *prevents or retards the entry of water into the soil mantle as it entered under natural conditions prior to development*, and/or a hard surface area, which causes water to run off the surface in greater quantities or at an increased rate of flow from the flow present under natural conditions prior to development. *Common impervious surfaces include, but are not limited to, roofs, walkways, patios, driveways, parking lots, storage areas, areas that are paved, graveled or made of packed or oiled earthen materials, or other surfaces which similarly impede the natural infiltration of surface and stormwater.* Open, uncovered retention/detention facilities shall not be considered as impervious surfaces for the purpose of this chapter (Chapter 14.08 LSMC).

*Infiltration:* The downward entry of water into the soil (Chapter 14.08 LSMC).

**Note: the city's definition of impervious surface is nearly identical to the DOE's (2016-page 55 and 2022-page B-4). The key characteristic to consider is whether the hard surface prevents or impedes infiltration. The city's definition expands the list of common impervious surfaces. The definition of "infiltration" is included for context. If there is impeded infiltration, this may impact hydrology, water quality and would rely on other stormwater regulations to mitigate potential impacts.**

*Nonconforming Development.* A lot or *site improvement*, such as an off-street parking facility, landscaping, or access *that does not conform to the City's current development ordinances either because it was established prior to the enactment of City ordinances governing the structure or improvement or because the structure or improvement conformed at the time it was established but applicable City ordinances have since changed* (Chapter 14.08 LSMC).

### **Finding and Conclusions Issue 3: The definitions from the municipal code and DOE model ordinances provide context to the code citations described in Issue 2.**

- Neither the city nor the DOE define “regulated or allowed activity.” The LSMC defines “development activity.” Broadly applied this is any action that alters or modifies the natural or built environment. This definition should be read in concert with the definitions of “alteration” and “development” that provide clear examples of specific activities and reviewed against LSMC 14.88.210 Regulated Activities and LSMC 14.88.220 Allowed Activities and its subordinate sections.
- Neither the city nor DOE define “pre-existing improvements” as a distinct term. The most applicable definitions are “existing site conditions” and “nonconforming development.”
  - Existing site conditions are simply the current built and natural features occurring on a development site.
  - *Nonconforming development is the key term to consider*, as this definition establishes when a site improvement was established prior to the enactment of a city ordinance governing the issue or was legal when it was initially established. When the municipal code references preexisting, intervening, and lawfully created or other substantial preexisting improvements in LSMC 14.88.220, 14.88.430 or 14.88.830 this can only be evaluated as nonconforming development.
  - By extension, if the nonconformity or existing site condition is not expanded, any previous impact(s) are considered to have occurred with the original development and been mitigated, if required, at the time of the initial impact.

- The definitions also provide guidance on other preexisting conditions such as agriculture.
  - DOE's definition provides clear and prescriptive language for when an "on-going activity" ceases when the agricultural land has lain idle *for a period of longer than five years*. LSMC 14.88.330 establishes a threshold of 180 days for a non-conforming activity (the physical alteration or use) to be abandoned.
- Reviewing DOE's definitions and city definitions together helps assess if an impact to "functions and values" is permanent or temporary.
  - The definition of "alteration" provides the best description of an impact to functions and values, stating "Any human-induced action which impacts the existing condition of a critical area ... human activity that impacts the existing vegetation, hydrology, wildlife or wildlife habitat."
  - Using the presence of impervious areas as an example of when an existing condition may impede the delivery of buffer functions – if a site has existing, significant disturbances consisting of impervious surfaces, such as pavement, compacted gravel, etc., over all or part of the current adopted buffer, a project reviewer can infer there is likely a functional disconnect because the buffer cannot provide natural water infiltration and the hydrological connectivity to the wetland may be reduced or eliminated across the disturbed area.
  - In cases where there is an existing impact or disconnect, the buffer would extend to the area outside of the prior disturbed area based on a site-specific report that establishes an impediment to the critical area and the disconnect of one or more functions or values.
  - If the site-specific report such as a biological, engineering or geotechnical analysis does not empirically identify a functional disconnect, associated with existing conditions, and other exemptions do not apply, the project would need to meet current regulations, including buffer widths and mitigation criteria.

## 5. **Other Guidance and Factors Considered**

**Department of Ecology** – DOE publishes *Wetland Guidance for Critical Areas Ordinance (CAO) Updates* for cities including a model ordinance. The city used the 2016 Wetland Guidance to develop its last major CAO update. *The 2022 DOE model ordinance is referenced in this interpretation to consider regulatory changes* since 2016 and following the city's CAO adoption in 2018.

The 2016 Wetland Guidance states,

"Your wetlands section should identify those activities in or near wetlands that are regulated and those that are exempt from regulation. *Exemptions include activities that will have little or no environmental effect* or are an emergency that threatens public health or safety" (DOE Model Ordinance, 2016-page 7).

The 2016 model ordinance recommends limiting exempt activities to those that will not have a significant impact on a wetland's structure and function (including its water, soil, or vegetation) and those that are expected to be very short term (2016, page 8). It also contemplates the on-going repair and maintenance of non-conforming uses or structures, legally established within the buffer, *provided they do not increase the degree of nonconformity* (2016, page 34).

The updated 2022 document recommends local codes identify regulated, allowed and exempt activities (2022, page 13) as well as exceptions for activities such as utilities (2022, page 15). The

criteria for determining impacts does not change from 2016. However, *the 2022 document provides improved guidance on functionally disconnected buffer areas.*

*“In some cases, A local CAO should anticipate these situations and provide clear direction on how to address them.”*

*“You should exercise care to differentiate minor developments from significant developments that completely block wetland buffer functions. Examples of minor developments that do not fully block buffer functions include trails, minor accessory structures, paths, and driveways serving a single residence. Significant developments that are unquestionably a complete barrier to the functions of the buffer area include built public infrastructure such as paved roads and railroads, and private developments such as houses or commercial structures. In addition, you should evaluate whether the interruption will affect the entirety of the buffer (2022, page 24).”*

The 2022 guidance has also added a new section dealing specifically with functionally disconnected buffers as part of its revised model ordinance. The discussion of functionally disconnected buffers is the key to interpreting the sections described thus far.

*“Buffers may exclude areas that are functionally and effectively disconnected from the wetland by an existing public or private road or legally established development, as determined by the [Administrator]. Functionally and effectively disconnected means that the road or other significant development blocks the protective measures provided by a buffer.*

Significant developments shall include built public infrastructure such as roads and railroads, and private developments such as homes or commercial structures. The [Administrator] shall evaluate whether the interruption will affect the entirety of the buffer. Individual structures may not fully interrupt buffer function. In such cases, the allowable buffer exclusion should be limited in scope to just the portion of the buffer that is affected. Where questions exist regarding whether a development functionally disconnects the buffer, or the extent of that impact, the [Administrator] may require a critical area report to analyze and document the buffer functionality. (Page A-11 and A-12 2022).”

### **Findings and Conclusions from the DOE Wetland Guidance for Critical Areas Ordinance (CAO) Updates.**

- The city's CAO provides clear definitions for critical areas administration that are comparable to DOE's definitions. The city ordinance describes regulated activities and exemptions, including those for pre-existing improvements, through various sections as detailed in Section 4 of this code interpretation. The city's CAO anticipates nonstandard situations and includes guidance for administering legally existing or nonconforming situations within critical areas and associated buffers when they do not increase the degree of nonconformity.
- The 2022 DOE model ordinance provides improved guidance for administering exceptions for functionally disconnected buffer areas and recognizes functionally and effectively disconnected buffers may be excluded from buffer requirements when the protective measures provided by a buffer is negated by the pre-existing condition.
  - As discussed in Sections 3, 4 and 5 of this interpretation, the city's comprehensive plan, municipal code and the definitions reviewed align with the DOE guidance on how to evaluate non-conforming and existing conditions to determine if buffer functions are

already impeded with site-specific development proposals and when functionally disconnected buffers would be excluded.

- The 2022 guidance cautions cities to distinguish minor developments from significant developments that may completely block wetland buffer functions, with examples such as a commercial development or public road versus a narrow private drive or trail.
  - With the former, it is expected all, or a substantial portion of a buffer's functions are compromised or impeded.
  - With the latter, it is expected there is only a partial disruption of function that can be excluded or mitigated.

**Department of Commerce** – Commerce has produced a *Critical Areas Handbook* as a resource for local governments reviewing and updating its CAO. The handbook also assesses Court and Growth Hearing Board Decisions related to the implementation of a CAO.

The *Critical Areas Handbook* suggests local governments must do two things to comply with the Growth Management Act (GMA): *designate critical areas and protect their functions and values* (Section 1.6, page 10).

- The minimum guidelines to designate and protect critical areas were established in 1990 through the Washington Administrative Code (WAC) 365-190-020(6) (Section 1.7, page 10-11).
- The handbook implies the role of designating critical areas is to protect critical areas and preclude incompatible land uses (Section 1.7, page 11).
- It does not prohibit all uses or development but recommends having a regulatory framework to govern development or activities that could adversely affect critical areas (Section 1.7, page 12).

The conclusion of Section 1.7 references applicable Court and Growth Hearing Board Decisions related to application of minimum guidelines to be compliant with the GMA.

In Section 1.8 of the handbook, Commerce states, “There are two primary forms of critical areas protection – protection of functions and values, and protection of health and safety” (page 13).

- RCW 36.70A.172(1) provides the statutory authority to protect “functions and values” or the primary ecological processes performed by a particular critical area. The handbook emphasizes this point by referring to cases that have found *jurisdictions are responsible to protect functions and values of critical areas, but not enhance or restore habitats where functions no longer exist* to meet GMA standards (Section 1.8, 13)<sup>1</sup>. Protection of function and values would be based on an evaluation of best available science.
- Protecting health and safety is outside of this interpretation but broadly applies to shielding the public from potential impacts from critical areas, such as geologically hazardous areas as discussed in WAC 365-196-830(3).

Section 1.9 of the *Critical Areas Handbook* describes the concept of “no net loss” from a statutory and legal standpoint<sup>2</sup> and states, “*No net loss is measured relative to the baseline of existing conditions; the GMA only requires the prevention of further harm* to critical areas, not the

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<sup>1</sup> Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board, Yakima County v. Eastern Washington Growth Management Hearings Board, and Whidbey Environmental Action Network v. Island Count

<sup>2</sup> RCW 36.70A.172; Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board

enhancement of critical areas that were previously damaged (page 16). For reference, the handbook points to WAC 365-196-830(4), which states

*"Although counties and cities may protect critical areas in different ways or may allow some localized impacts to critical areas, or even the potential loss of some critical areas, development regulations must preserve the existing functions and values of critical areas. If development regulations allow harm to critical areas, they must require compensatory mitigation of the harm. Development regulations may not allow a net loss of the functions and values of the ecosystem that includes the impacted or lost critical areas."*

Section 1.10 (pages 17-18) clearly defines what is meant by best available science in reference to RCW 36.70A.172 and related to developing a CAO.

- Commerce claims, "Science plays a central role in delineating critical areas, identifying functions and values, and recommending strategies to protect their functions and values."
- Citing a growth hearing board case<sup>3</sup>, the handbook goes on to state, "With respect to the availability of science, the Western Washington GMHB found that the best available science is *science that is presently available as well as practically and economically feasible*" with an emphasis on available.
- The handbook describes what best available science means as defined by WAC 365-190, stating, "...in the development of critical areas policies and regulations, a local government's record should *provide a rationale connecting the criteria in the ordinance used for designation and protection to the documented functions and values of critical areas known or potentially existing within the jurisdiction.*"
- This section concludes with guidance based on case law that even when using "best available science" there must be a constitutional nexus and proportionality observed as determined by the United States Supreme Court<sup>4</sup> which has placed limits on governmental authority to impose development conditions (Section 1.0, page 23-24).

### **Findings and Conclusion from the Commerce Critical Areas Handbook**

- The Commerce guidance references the authority to impose a CAO from statute and state rules, namely the GMA and it specifically the minimum guidelines to designate and protect critical areas.
- Like DOE, Commerce provides specific direction for developing CAO regulations. It recommends local regulations include exemptions, exceptions and allowable uses and meet the minimum guidelines to comply with GMA.
- The Commerce guidance helps to define the legal framework for adopting and administering a CAO with its inclusion of case law from the Growth Hearings Board and applicable court decisions. This guidance is invaluable as it directly considers broad regulatory and administrative topics:
  - Prioritizing existing functions over enhancing those that no longer exist;
  - Seeing "no net loss" as relative to existing conditions and preventing further harm;
  - Defining best available as science that is presently available as well as practically and economically feasible; and

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<sup>3</sup> WEAN/CARE v. Island County and Hood Canal Environmental Council, et al v. Kitsap County

<sup>4</sup> Honesty in Environmental Analysis & Legislation (HEAL) v. Central Puget Sound Growth Management Hearings Board

- Acknowledging regulations must consider constitutional nexus and proportionality.
- As described in sections 3 and 4, the city has adopted goals and polices into its comprehensive plan related to the protection of critical areas as implemented through Chapter 14.88 LSMC. The city's CAO is based on state law, best available science and it follows DOE and Commerce guidance and has been approved by both agencies as compliant.
- The city of Lake Stevens has demonstrated in sections 3, 4 and 5 that its code as implemented protects critical areas functions and values; defines allowed and exempt activities; recognizes decisions must evaluate impacts on sites with functionally disconnected buffers; prioritizes protecting functional buffers; and considers property rights, especially those sites with nonconforming or pre-existing conditions that may not align with current regulations.

## 6. Interpretation

This interpretation considers various sections of the Lake Stevens Municipal Code and related definitions to harmonize potentially ambiguous sections, determines non-conforming rights and interprets the meanings of specific terms related to preexisting improvements that may create a functional disconnect and/or affect the enactment of critical areas buffers.

**Policy 1** – The Lake Stevens Municipal Code, based on best available science and an application of constitutional principles, coupled with a review of agency guidance clearly identifies what “no net loss” means in its practical application of protecting functions and values during development review and addresses Issue 1.

- DOE opines, “*Buffers may exclude areas that are functionally and effectively disconnected from the wetland by an existing public or private road or legally established development.*”
- Commerce finds, “*the GMA only requires the prevention of further harm to critical areas, not the enhancement of critical areas that were previously damaged,*” as a standard to assess “no net loss.”
- **Plainly stated, if there are no alterations or modifications to the physical limits of an existing critical area or its buffer and no new impacts occur that would affect the existing functions and values of the critical area or its buffer, there is no net loss.** This position is supported by the GMA and has been decided by case law.

**Policy 2** – The LSMC and definitions provide clear guidance on how to regulate critical areas and critical areas buffers and protect the important functions and values including those sites with legal, pre-existing conditions and nonconformities and addresses Issues 2 and 3.

- Pre-existing intervening conditions means those elements of a property where legal, nonconformities or current site features exist from prior development activity or alterations, including but not limited to roads, structures, utilities, extended impervious areas that impede the effective delivery of values and functions to critical areas or associated buffers as described in LSMC 14.88.220(n) and associated subordinate sections.
- **Those sites with legal, pre-existing or non-conforming conditions are allowed activities and are only required to provide buffers to the remaining portion of the critical area buffer that is not functionally disconnected or where there is no impairment to the delivery of buffer functions and values, subject to a site-specific review of onsite conditions and an analysis of associated code-specific criteria related to the critical area type.**
- If the nonconformity is an activity or use it is subject to the requirements of LSMC 14.88.330 to determine continuation or cessation.

- Remaining functional critical area buffers are subject to any mitigation requirements or code standards applicable to the specific critical area type and must be permanently protected per LSMC 14.88.295 and set aside in a Native Growth Protection Easement or a Critical Areas tract per LSMC 14.88.290.

**Policy 3** – A new issue to resolve, not individually discussed in Section 4, but in direct response to the updated 2022 DOE guidance is determining what constitutes a minor development from a major development that may affect the application of critical areas buffers or permanent protection measures as discussed in Policy 2.

- **Simply stated, a minor development includes those elements or uses on a property where legal nonconformities or current site features exist from prior development activity that only partially disrupt critical areas and/or buffer functions and values and can be mitigated effectively.** Minor disturbances are limited in scale and do not fully impair the delivery of buffer functions.
  - Examples of minor developments include trails, minor accessory structures, paths, and narrow drives serving a single residence or other type of development. Minor disturbances may include site features like houses or septic drain fields when they have been abandoned and can no longer serve the intended use. It also means activities such as agricultural or ornamental landscaping and pastures when the on-going activities and the direct maintenance have ceased or have been abandoned.
  - Ongoing means the nonconforming use or activity has not ceased. Maintenance means the site has been mowed, pruned or otherwise cared for to preserve the activity in a functional state.
  - Derelict houses, septic drain fields and similar site features are considered abandoned when the structure is not habitable and the related site features have not been maintained for five or more years and the site has started to naturalize.
  - Agricultural, pastoral or ornamental landscaping within critical areas or buffers are considered abandoned for five or more years when they cease to be maintained, are laid fallow or start to naturalize.
  - Nonconforming uses and activities are considered abandoned when the use or activity ceases for 180 days or more subject to LSMC 14.88.330.
- **Conversely, a major development includes those elements or uses on a property where legal nonconformities or current site features exist from prior development activity or when nonconforming activities and uses have not ceased that markedly impede the delivery of protective functions due to the size or intensity of the existing condition.**
  - Examples may include on-going agricultural uses or nonconforming uses, private developments such as homes or /industrial commercial structures, parking lots, public infrastructure such as roads and railroads or other utilities that create a barriers to the protective functions and values of a critical area or buffer.
  - When major developments exist that are legal, pre-existing features or uses, they do not create a net loss of critical area function and value as the impact occurred at the time of the original impact and may continue if the use or condition is not expanded per LSMC 14.88.220(n) and associated subordinate sections.

## **7. Implementation**

When, the city updates its CAO in the future it should consolidate its current exceptions into a single section and add specific language distinguishing major and minor developments.

## **8. Resources**

*Wetland Guidance for CAO Updates, Western Washington Version*  
Shorelands and Environmental Assistance Program  
Washington State Department of Ecology  
Olympia, Washington  
June 2016, Publication No. 16-06-001

*Wetland Guidance for Critical Areas Ordinance (CAO) Updates, Western and Eastern Washington*  
Shorelands and Environmental Assistance Program  
Washington State Department of Ecology  
Olympia, Washington  
October 2022, Publication #22-06-014

Critical Areas Handbook Volume 3.0, Department of Commerce Growth Management Services.



April 1, 2024

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Russell Wright, MA, MES  
*Community Development Director*

Date

This code interpretation is a Type I Review and is issued pursuant to LSMC 14.16C.035 and may be appealed to the Hearing Examiner pursuant to LSMC 14.16A.210(b)(1). Appeals must be filed within 14 days after the date of this interpretation and must be filed with a written description of the specific aspect being appealed, any supporting evidence and filing fee pursuant to LSMC 14.16B.115.