

**COMMENTS ON PROTECTING PUGET SOUND THROUGH SHORELINE MASTER PROGRAMS:
OPPORTUNITIES TO IMPROVE PROTECTION (March 4, 2010)**

Summary: The following are comments submitted by Common Sense Alliance on the “Draft White Paper” dated March 4, 2010, that purports to address “common challenges” encountered in protecting the Puget Sound through the shoreline master program process. It is the intent of the Common Sense Alliance to be helpful in our response to the Draft White Paper. The first step in gaining public support for a program such as the shoreline master program update—which our County has been told will cost \$1 million in planning costs alone—is to communicate clearly and convincingly (1) the problem that has been identified; (2) the actions required to resolve it; and (3) how and why the burden of resolving that problem is assigned.

However, the Draft White Paper is woefully lacking in logical process and devoid of supporting facts and data. It makes numerous assumptions that lack substantiation. The overarching theme of the paper seems to be that people, especially property owners, are the problem, and the “environment” is the only value. There is no effort to balance protection of the environment, human activity, and the impact of regulations upon the local economy. If the Paper’s intent was to gain the public’s confidence in the shoreline master program update process, it sadly misses the mark.

We present the following specific comments:

Specify Functions to be Protected (Pages 3-5): Perhaps the most fundamental flaw in the Paper is its failure even to recognize the need to identify specifically the “shoreline ecological functions” to which the no-net-loss standard is to be applied. Until the “functions and values” to be protected are identified, until the “functions and values” are benchmarked, it is impossible to determine whether there is a loss of function or values.

Cumulative Impact (Page 4-5): It is difficult to understand the basis for the assumption that the burden of addressing “cumulative impacts,” especially on a Puget Sound-basis, should be allocated only to new “development opportunities.” Asking how to “fairly allocate the burden of addressing cumulative impacts among development opportunities” is like asking how to allocate the burden of the cumulative impact of past and existing reckless drivers only to new drivers. Assuming that “new development” should be burdened with responsibility for past bad actors, and that all new development will inevitably damage the environment, is fundamentally unfair and, accordingly, are destined to fail the “essential nexus” and/or “rough proportionality” tests applied to regulations and regulatory takings. We suggest that the reason there is “minimal guidance on how this standard should be implemented,” is that it should not be.

The clear bias against all development is apparent in the praise as a “major improvement” for “policies and regulations that prohibit developments if they are determined to contribute to cumulative impacts,” because—as set forth at pages 11-12—“there are often unavoidable impacts” regardless of the care with which a development is undertaken, even with single family residences.

Hard Armoring (Page 5): We agree that the current environment encourages home owners to favor traditional hard armoring; the Paper offers little reason for that to change. Owners have the right under the SMA to use and protect their property.

Condescension Toward Property Owners (Page 7-8): We agree that many land owners are concerned about the impact on their lives of new “nonconforming use” designations for their homes and associated property. We continue to believe that there are good reasons for that concern. We object to the pervasive attitude exemplified by the assertion that “Some property rights interests have taken advantage of these concerns to generate opposition to shoreline regulations such as buffer standards.” We would remind the authors that the law whose implementation they are discussing protects property rights. Property rights are not an unfortunate constraint on unbridled regulation. The Paper treats citizens interested in their property—usually the largest investment a family has—as somehow due lesser regard than “environmental” groups. The paternalistic tone (the need to help property owners “on nonconforming lands . . . understand the ecological impact of their actions”) is also disturbing.

Special Treatment of Agriculture (Page 8): The Paper cites the “perception” that agricultural uses are provided special treatment. Why not admit that agricultural uses are provided special treatment, and allow this critical policy discussion to proceed? There is no question that agriculture contributes to the “cumulative impacts” upon the Puget Sound, but it is not currently subject to the constraints of the SMA.

“Common Strategies for Common Challenges” (Page 9-10): The Paper proposes increased “inter-jurisdictional” and “cross-Sound” technical studies to “improve the efficiency” of the SMP process, yet concedes that technical studies would have to be “tailored by local governments to their individual situations.” One size fits all probably fits none. One of the most troublesome aspects of CAO and SMP updates is the “one-size-fits-all” technical guidance being imposed upon planning jurisdictions. San Juan County often finds itself subjected to the same assumptions and analysis applied to urban jurisdictions. This county has a remarkable historical commitment to conservation, unique geographic features and geology, and a fragile economy. The law recognizes the importance of local solutions to local problems. Moreover, the fact that other jurisdictions may have chosen to adopt certain overly-restrictive approaches does not mean that San Juan County should not fully investigate its options and perhaps proceed more thoughtfully.

Public Involvement as a Challenge (Pages 9-10): Listing “public involvement” as one of three “challenges experienced by local governments and Ecology” speak volumes about the overall tenor of the Paper. This section associates “organized property rights groups” with “fear” and inaccurate information. Rather than casting vague aspersions, the Paper should seek to engender constructive dialogue by identifying the purportedly inaccurate information, and setting forth why it is inaccurate. In our experience to date, the principal misinformation has come from government-financed sources, who repeatedly underplayed the scope and effect of proposed restrictions. Finally, rather than searching for a euphemism for the term “nonconforming use,” we believe that regulators should clarify, and explore how to limit, the negative effects of the nonconforming designation – and seek to minimize the extent to which it is necessary to impose it in the first place.

Public Trust (Page 11): We agree that public trust in government is fragile, and that “the public expects high quality and scientifically certain deliverables and dependability from government programs and efforts.” It is the absence of science and transparency that undermines public trust. The Paper concedes that the government has no metrics for “no net loss;” the fact is that the “shoreline ecological functions” to be measured and protected are not even identified. Yet the Paper assumes, without providing evidence, that every single family home is an environmental threat and contributes almost unavoidably to the “cumulative impact” and deterioration of (unspecified) ecological functions.

Conclusion: In conclusion, we appreciate the opportunity to comment on this draft. We believe that effective public participation is the most important element of this process. The Common Sense Alliance is committed to advocating for common sense in land use regulation and making sure that land owners and others in our community are aware of the implications of proposed regulations, alternative conclusions, and additional factors that should be considered by counties in updating and implementing SMPs and other land use regulations.

Thank you again for this opportunity to comment.