



R. GERARD LUTZ  
Direct Phone: 425.635.1403  
Direct Fax: 425.635.2403  
email: JI.utz@perkinscoie.com

The PSE Building  
10885 N.E. Fourth Street, Suite 700  
Bellevue, WA 98004-5579  
PHONE: 425.635.1400  
FAX: 425.635.2400  
www.perkinscoie.com

October 9, 2008

The Hon. George Malina  
The Hon. Chuck Parrish  
The Hon. Bill Arthur  
The Hon. Lynn Peterson  
The Hon. Margaret Bratcher  
The Hon. Allan Ekberg

EXHIBIT 39 DATE 10/9/08  
PROJECT NAME  
SMP Update  
FILE NO LOG-088

Tukwila Planning Commission  
6300 Southcenter Blvd., #100  
Tukwila, WA 98188

**Re: Comment to Draft Tukwila Shoreline Master Program, dated July 24, 2008**

Dear Commissioners:

This firm represents Harnish Group Inc., and its subsidiaries, N C Machinery Co. and N C Power Systems Co. (collectively, "HGI"). In August, HGI learned of the City of Tukwila's ("City") proposed amendment its Shoreline Master Program in 2008 ("SMP Amendment"), and its anticipated schedule to adopt an amendment. HGI has substantial property interests that will be materially and adversely impacted by the SMP Amendment as drafted. HGI's property interests include (i) approximately 21 acres on West Valley Highway;<sup>1</sup> and (ii) approximately 7 acres located at the corner of 180<sup>th</sup> and West Valley Highway, immediately across the highway from the Green River.<sup>2</sup> HGI's properties include several buildings and other structures, along with other property, in the Green River shoreline area. HGI's site is a flat site out of the

<sup>1</sup> This bell-shaped property comprises three tax parcels (nos. 2523049010, 2523049046, and 2523049047) with addresses running from 16711 to 17035.

<sup>2</sup> Parcel no. 3623049011.

LEGAL14622016.1

ANCHORAGE · BEIJING · BELLEVUE · BOISE · CHICAGO · DENVER · HONG KONG · LOS ANGELES  
MENLO PARK · OLYMPIA · PHOENIX · PORTLAND · SAN FRANCISCO · SEATTLE · WASHINGTON, D.C.

Perkins Cole LLP and Affiliates

Tukwila Planning Commissioners

October 9, 2008

Page 2

flood plain high above the inside (eastern) corner of the river between, at the south, a West Valley Highway retaining wall, and, at the north, another retaining wall and again West Valley Highway. There is no dike. No one (to HGI's knowledge) is proposing to excavate the existing river bank on HGI's property to straighten out or broaden the river, nor does any governmental entity have property rights to undertake such a project.

We were surprised to learn that the current draft SMP Amendment (the "Staff/Ecology Draft Amendment") represents a major revision of the City staff's first draft in response to Department of Ecology ("Ecology") staff input. The Staff/Ecology Draft Amendment evolved without any meaningful input from the regulated community. However, in the brief time the City's staff has scheduled for public input, we have identified a number of issues that cause us serious concern. For the reasons set forth below, HGI believes that the Tukwila Planning Commission ("Commission") should recommend that the Staff/Ecology Draft Amendment be rejected in its current form. The Commission should send the draft back to staff with instructions to develop an open public process that permits meaningful public input. The Shoreline Management Act, Ch. 90.58 RCW ("SMA") requires meaningful public participation and HGI looks forward to the opportunity to be involved. However, staff's planned process, while structured to appear as having included such participation, does not meet the SMA's legal requirements.

HGI is confident that if HGI and other representatives of the local community are allowed fair input, the City's final product will be a workable, legally compliant and defensible plan that will serve the City well for years to come. Please do not waste this opportunity to do things right the first time. Pursuant to RCW 90.58.080(2)(a)(ii), the City has until December 1, 2009 to finalize SMP Amendment. Please use the available time wisely to allow us a fair opportunity for input.

**A. The Community has not had Sufficient Opportunity to Participate in the Current Staff/Ecology Draft Amendment**

The City staff's process has provided Ecology a year to review staff's first draft. Inexplicably, the City's process would allow affected citizens only a few weeks to review, analyze and comment on the drastically revised staff/Ecology draft. This is backwards. The City's first duty is to its constituents. In the past few weeks, the City's staff has made itself available to answer HGI's questions about Staff/Ecology Draft Amendment and the SMP Amendment Process. The City's website has been a

Tukwila Planning Commissioners

October 9, 2008

Page 3

helpful resource as well. However, it is obvious the affected community has not had an adequate opportunity to participate in the preparation of the current Staff/Ecology Draft Amendment.

**1. Last-Minute Changes to the Amendment Negate Prior Public Participation**

The Staff/Ecology Draft Amendment reports extensive citizen involvement in SMP Amendment process during the 1990s. However, community involvement in the production of the current Staff/Ecology Draft Amendment is perfunctory at best. The SMA envisions significantly more robust public involvement that provides a real opportunity to affect the outcome of the process. The Staff/Ecology Draft Amendment notes that a Shoreline Advisory Panel (which included a representative from HGI) was appointed by the Mayor's Office in 1999 to work on the SMP Amendment. However, that panel has not met since 2000 following the panel's recommendation that the SMP Amendment be no more intrusive than necessary to meet requirements of law.

Approximately seven years later, the City sent its 2007 Staff Draft Shoreline Management Program ("2007 Draft") to Ecology for comment. Thereafter, without any meaningful public review or input, the City incorporated the majority of Ecology's comments and concepts into the current Staff/Ecology Draft Amendment. Contrary to the Shoreline Advisory Panel's recommendation, the current Staff/Ecology Draft Amendment now would impose restrictions on shoreline uses far in excess of applicable legal requirements. Moreover, it would do so disregarding the current environment and site specific information available to both the City and Ecology. The current draft ignores the year 2000 recommendations of the Shoreline Advisory Panel. That process 8 years ago was not citizen participation in the development of the current Staff/Ecology Draft Amendment. On the contrary, the plan should note its deviation from the recommendations of the prior Shoreline Advisory Panel.

**2. The Shoreline Management Act Requires that the City Consider All of the Best Available Science and Provide the Public a Full Opportunity to Participate**

RCW 90.58.130 requires that the City insure that all parties with an interest in the Shoreline Master Program have a full opportunity for involvement in both the

development and implementation in the SMP Amendment. While the Planning Commission has delayed consideration of the Staff/Ecology Draft Amendment from August 28<sup>th</sup> 2008 to October 9, 2008, five weeks is simply not enough time for the community to review, let alone provide meaningful input regarding, these substantial changes proposed in the final days of a project the City began almost 10 years ago. Staff have made themselves available to try to explain the provisions of the current draft. Staff have also expressed a willingness to consider minor modifications. However, in general, they have (mistakenly) asserted that their hands are effectively tied. On balance, staff seems intent on pushing forward with the bulk of the draft as is, rather than meaningfully considering the types of revisions we believe are needed. In that regard, we do not intend to advocate changes that would deviate from the SMA Amendment processes' procedural or substantive requirements. However, we do intend to vigorously advocate appropriate provisions that will consider and respect our legal rights, and help keep the commercial and industrial areas of Tukwila vibrant and strong.

As one example only, the Staff/Ecology draft adopts unnecessary, and illegal, one size fits all buffers that far exceed those needed to assure "no net loss" of, and protect against loss of, shoreline function. WAC 173-26-186(10) provides that the City must, to the extent feasible, consider all studies and other similar information submitted by private individuals interested in the SMP Amendment. We have attached an October 8, 2008 report from Lyndon C. Lee, Ph.D., PWS, former Senior Wetlands Ecologist for the U.S. Environmental Protection. After a site specific assessment, Dr. Lee has concluded that that the existing 40 foot buffer will sufficiently maintain the existing functions and values of the shoreline ecosystem of HGI's property with no net loss against impacts from our ongoing operations.

On a related subject, it is our understanding that the City is considering adopting the following definition of "no net loss" prepared by ESA-Adolfson and derived from a Washington Department of Ecology Report ("ESA Definition"):

**No Net Loss:** means a standard intended to ensure that shoreline development or uses, whether permitted or exempt, are located and designed to avoid loss or degradation of shoreline ecological functions that are necessary to sustain shoreline natural resources. *The standard is met when proposed uses or developments are in compliance with the provisions of this master program (emphasis added).*

This is an unnecessary mistake for three reasons. First, Ecology guidance not subject to formal rulemaking procedures does not have the force of law. *Simpson Tacoma Kraft Co. v. Department of Ecology*, 119 Wn.2d 640, 650, 835 P.2d 1030, (1992). Second, the ESA Definition is totally circular, as it defines an SMP standard - the "no net loss" standard - in terms of compliance with SMP standards, and the SMP standards as assuring "no net loss." Finally, and perhaps most importantly, under applicable Washington law, the "no net loss" concept is simple: the City's SMA amendments must be designed to assure the *maintenance* of shoreline functions and values. *Everett Shorelines Coalition v. City of Everett*, CPSGMHB Case No. 02-3-0009c, FDO, January 9, 2003, at 30. Cite the Applying that simple, legal concept, Dr. Lee's report states that preserving the current buffer will assure maintenance of shoreline functions and values on HGI's properties against impacts from our current uses. The SMA requires that the City's process accept and consider this input in developing its SMA Amendment.

We suspect a site specific study of other commercial and industrial properties adjacent to the Green River would reach the same conclusion with respect to other properties. The Planning Commission should instruct staff to take full advantage of the time available to work with the community to develop an SMP Amendment backed by the Best Available Science. The fact that the City still has more than a year in which to complete the SMP Amendment forecloses any argument that it is not feasible to implement the scientific process required by RCW 36.70A.172. *Id.* at 11 (holding that the SMA and the Growth Management Act, Ch. 36.70A RCW, are to be integrated into a unified and coordinated land use decision-making regime).

The City must engage the public in a meaningful way before moving forward with the SMP Amendment. It is not sufficient for City staff to take comments, develop a matrix of those comments, but not incorporate the changes in any meaningful or scientific way.

#### **B. HGI's Properties are Improperly Designated**

The 2007 Draft properly acknowledged that the shoreline environment designations and associated land use restrictions should be based on, among other things, existing land uses and site-specific characteristics of the individual properties designated. In the 2007 draft, HGI's property and much of the commercial and industrial shoreline area of Tukwila was designated for "High Intensity Use." However, following receipt of Ecology's comments to the 2007 Draft ("Ecology Comments"), City staff made an

abrupt about-face and adopted Ecology's suggestion that the City impose the Urban Conservancy Shoreline Environment designation along most of the river, including HGI's properties. This is manifest error.

**1. Ecology's Suggested Designations are Based on a Misinterpretation of the Shoreline Master Program Guidelines**

Ecology staff justifies its suggested environment designations on the grounds that the Urban Conservancy Shoreline Environment "is more consistent with the circumstances." See Letter from Ecology to Jack Pace, dated February 1, 2008, at 5. However, that assertion is completely contrary to the facts. The purpose of the Urban Conservancy Shoreline Environment "is to protect and restore ecological functions of open space, flood plain and other sensitive lands *where they exist* in urban and developed settings, while allowing a variety of compatible uses" (emphasis added). WAC 173-26-211(5)(e). In other words, that designation was intended to *conserve existing* sensitive lands in urban and developed areas. *There are no open spaces, flood plains, or other sensitive lands anywhere on HGI's properties outside the existing 40 foot buffer.* On the contrary, the areas the draft Staff/Ecology Plan Amendment designates as "Urban Conservancy" include the footprints of office and industrial buildings, parking areas, and areas actively and continuously used for storage and maintenance of heavy equipment. Applying the Urban Conservancy designation to HGI properties outside the existing 40 foot buffer is inconsistent with reality and defies the plain language of the SMP Guidelines. The City must consider the high-intensity character of HGI's properties and (at least outside the existing 40 foot buffer) properly designate them as within the High Intensity Shoreline Environment.

The fundamental mistake behind Ecology's suggestions is that Ecology mistakenly equates the SMA's stated preference for water oriented use in the High Intensity Shoreline Environment with a prohibition on non-water uses. See WAC 173-26-211(5)(d). In other words, Ecology appears to believe that the High Intensity Shoreline Environment only permits water-oriented uses and, therefore, concludes that non-water uses must be designated Urban Conservancy. To the contrary, the SMA Guidelines instruct planners to

***Assign a "high-intensity" environment designation to shoreline areas within incorporated municipalities, urban growth areas, and industrial or commercial "rural areas of more intense development," as described by RCW***

**36.70A.070, if they currently support high-intensity uses related to commerce, transportation or navigation; or are suitable and planned for high-intensity water-oriented uses (emphasis added).**

(WAC 173-26-211(5)(d)(iii). Ecology seems to focus only on the language following "or." The guidelines require HGI's property to be designated "high-intensity use."

**2. Ecology's Suggested Designations are Inconsistent with the City's Comprehensive Plan**

To make matters worse, the designations suggested by Ecology are inconsistent with the City's Comprehensive Plan ("Comp Plan") in violation of WAC 173-26-191(1)(e), and would significantly reduce the inventory of usable commercial and industrial land in Tukwila. In general, the Comp Plan refers to the underlying zoning to implement its land use designations. HGI's property is designated and zoned at Commercial/Light Industrial. That designation/zone "is intended to provide for areas characterized by a mix of commercial, office, or light industrial uses." Tukwila Municipal Code Ch. 18.30.010. These intended uses are in stark contrast to the uses permitted in the Urban Conservancy Shoreline Environment, which, as a practical matter, prohibit commercial, office and light industrial uses.

The HGI properties currently support high-intensity uses relating to commerce and transportation, are located within the incorporated municipality of the City of Tukwila, and deserve to be designated within the High Intensity Shoreline Environment of the SMP Amendment.

**C. The Proposed Buffers are Excessive and Unnecessarily Inflexible**

As noted above, Dr. Lynden Lee, a recognized expert on shoreline and wetlands protection, has concluded that the current 40 foot buffers are sufficient to protect the existing shoreline functions and values on HGI's properties. Without any attempt site specific information, the Staff/Ecology Draft Amendment would impose a 125 foot buffer on HGI's properties. Apparently, this 125 foot buffer proposal is a staff/Ecology compromise from Ecology's even more radical suggestion of uniform 200 foot buffers, and is based on a comparable levee design the City anticipates using for levee reconstruction. Regardless, even a 125 foot buffer would be a radical departure from the current 40 foot buffers, and at least on HGI's property, is not justified by any site specific conditions.

**1. The Proposed Buffers are Far Larger than Necessary**

The Staff/Ecology Draft Amendment notes that the 125 foot buffer width is "the *maximum* needed to reconfigure the river bank to achieve . . . a stable slope" (emphasis added). Apart from the fact that staff and Ecology are wrong on the facts, it is stunning that City staff would invite the City to impose a *maximum* buffer rather than striking some reasonable balance between protecting the environment and protecting private property. Certainly, that deviates from the citizens' year 2000 recommendations. As demonstrated by Dr. Lyndon C. Lee, maintaining the existing 40 foot buffer on HGI's property will result in no net loss of the function and values of the shoreline ecosystem from HGI's current operations.

Further, even the City's own engineering demonstrates that the buffer need not exceed 70 feet on HGI's property. To illustrate, we have attached a marked copy of an exhibit prepared by the City of Tukwila titled *Typical Section of Proposed Levee* ("Diagram"). First, the Diagram calls for a 106 foot buffer on the levee side of the river. Second, the green circle on the Diagram marks an additional 6 foot buffer necessary to stabilize riprap on the levee side of the river. Because there is no levee on HGI's property, that 6 foot buffer is not needed. Third, the blue diamond on the Diagram marks the City's proposed 20 foot public pathway. Per HGI's discussions with City staff, we understand that the City agrees that public access is not workable on HGI's property; thus, that 20 foot buffer is not needed. Finally, the red triangle on the Diagram marks the inland bank of the levee. Again, since there is no levee on HGI's property, that 10 foot buffer is not needed. In summary, if the City's engineers recommended resloping the back of HGI's property to match a reconstructed levee on the opposite shoreline of the levee side of the river, then one would expect the City to calculate the necessary buffer on HGI's property as follows:  $106 - 6 - 20 - 10 = 70$  feet.

**2. Buffers Imposed under the SMP Must be Based on Site-Specific Circumstances and Consistent with Constitutional Law**

The Shoreline Management Program buffer requirements must include built-in flexibility to respond to site-specific circumstances. Washington law requires that restrictions imposed by development regulations be reasonably necessary as a direct result of proposed development. See *Citizens' Alliance for Property Rights v. Sims*, \_\_\_ Wn.App. \_\_\_, \_\_\_, 187 P.3d 786, 795 (2008). Courts have made clear that

The government must show that the development . . . will create or exacerbate the identified public problem. This is the same as to say that there must be a relationship ("nexus") between the development and the identified public problem; that the necessary relationship will exist if the development will create or exacerbate the identified problem; but that the necessary relationship will not exist if the development will not adversely impact the identified public problem.

*Id.* at 796 (citing *Burton v. Clark County*, 91 Wn.App. 505, 521-22, 958 P.2d 343 (1998)). Here, the City has not even attempted to sufficiently demonstrate why a 125 foot buffer is necessary on any of HGI's properties. For example, the City has provided no reasonable explanation as to why properties on the side of the river with no levee (and not within any flood plain) should be burdened with the same buffer as properties on the levee side (where HGI understands the buffer width to be based on a levee design compromise between the US Army Corps of Engineers and King County, rather than protection of shoreline functions and values). According to City staff, the reason for the "maximum needed" one-size-fits-all buffer is that "Ecology is looking for consistency, and Ecology will require at least a 100 foot buffer unless facts demonstrate a smaller buffer is sufficient." These justifications are flawed for several reasons. First, this approach is in direct conflict with the nexus requirements of law (e.g. *Citizens' Alliance*). Moreover, (a) as to HGI's property, at least, Dr. Lee's report demonstrates that 40 feet is sufficient, and (b), for the residential properties to the south, the City has proposed only a 50 foot buffer (which we understand to be based on staff's political, as opposed to scientific, judgment). Finally, even if HGI's shoreline were resloped, only 70 feet is needed.

WAC 173-26-191(2)(a)(i)(D) requires the City to implement the SMA consistent with all relevant constitutional and other legal limitations on the regulation of private property. . See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994) (holding that city failed to meet its burden of demonstrating that development conditions were reasonably related to impacts of proposed development); *Nollan v. California Coastal Com'n*, 483 U.S. 825, 107 S.Ct. 3141 (1987) (holding that that the Coastal Commission could not condition development on property owners' transfer to public of easement across beachfront property without paying compensation). If the City oversteps its limits in this SMP Amendment process and a lawsuit arises, it will be the City, not Ecology, who will be primarily liable. If the Staff/Ecology Draft Amendment were adopted by the Planning Commission as is, HGI estimates that

approximately 30% of its property (over 6 acres of commercial/industrial land) would be impacted resulting in potential losses in multiple millions of dollars. The Planning Commission should not simply rubber stamp staff's acquiescence to Ecology staff's overreaching "recommendations". The current Staff/Ecology draft is seriously flawed and requires significant revision.

In summary, rather than imposing a one-size-fits-all buffer, the SMA Amendment should provide for buffers that are (i) based on site-specific circumstances, (ii) flexible enough to help achieve some reasonable level of stability on the river bank, and (iii) accommodate existing and future development consistent with the underlying zoning for the property to which they are applied. All of this can be achieved with no net loss of shoreline ecosystem function and values by providing for buffers consistent with current regulations and restoration and enhancement mechanisms triggered by redevelopment.

**D. The Staff/Ecology Draft Amendment Should Not Render Existing Development Non-Conforming**

HGI understands that the SMA also envisions restoration and enhancement of shorelines over time. Other property owners have suggested that the City liberalize its non-conforming use statute to help ameliorate the burdens the Staff/Ecology Draft Amendment would otherwise impose. That could be beneficial. However, HGI believes that a more straightforward approach would be to impose any otherwise legal restoration and enhancement requirements only upon substantial redevelopment (and then on a site-specific basis). Particularly if the City also considers modern zoning and development mechanisms such as density credits, implementation of larger river setbacks and other restoration and enhancement requirements can be done much more efficiently at the time of redevelopment, with far less effect on the City's inventory of usable land, while still providing significant opportunity for shoreline functions and values to be restored and enhanced.

As long as the SMA Amendment meets a no net loss standard, the City need not declare existing uses within the broader Green River shoreline area in Tukwila to be non-conforming. The Staff/Ecology Draft Amendment adopts Ecology's misguided strategy to shift manufacturing, industrial, and commercial uses out of the shoreline jurisdiction by transforming valuable existing development within the expanded buffer into legal non-conforming uses. See Letter from Ecology to Jack Pace, dated February 1, 2008, at 4. This strategy would affect the usability, value and insurability

of developments within the shoreline area and likely lead to inefficiency and blight. Without the freedom to make the kinds of property improvements that will allow businesses to remain competitive in the future, landowners simply will not be able to invest in their properties. But, landowners will not sell either, as non-conforming status will instantly and substantially diminish the value of those properties affected. Rather than sell at a loss, landowners will continue to operate their properties at the least possible cost. Eventually, the shoreline area could be overcome with blight. This approach is bad for the community and inconsistent with the goals of the SMA. Also, it unfairly requires certain property owners to bear the cost of society's pursuit of perceived environmental benefits intended to accrue to the community as a whole.

**E. Development Standards regarding Archaeological, Cultural and Historical Resources are Unnecessary and Confusing**

Section 9.7 of the Staff/Ecology Draft Amendment provides a set of development standards regarding archaeological, cultural, and historical resources. These issues are already fully regulated by other applicable state and federal laws. The SMP Amendment would impose additional, duplicative, and conflicting obligations that are unnecessary to the protection of the resources at issue. HGI's concern is that such standards create yet another regulatory layer that will complicate, extend, and increase the cost associated with, the development process without offering any protection beyond that provided under existing local, state, and federal law. Section 9.7 of the Staff/Ecology Draft Amendment should be deleted in its entirety.

**F. Public Access**

City staff has acknowledged, public access through HGI's property would be unworkable from a practical standpoint (given the configuration of West Valley Highway) and would be incompatible with public and worker safety policies and standards. Given the lack of sidewalks along West Valley Highway, it would be a trail from and to nowhere.

However, HGI sharply objects to the Staff/Ecology Draft Amendment providing for (i) the granting of public access rights to and along the shoreline without compensation to private property owners, and (ii) the exaction of any fees or taxes in lieu thereof. As stated above, the SMP Guidelines provide that the SMP Amendment observe constitutional and other legal limitations on the regulation of private property. Specifically, in *Nollan*, 483 U.S. 825, the Supreme Court of the United States held

Tukwila Planning Commissioners

October 9, 2008

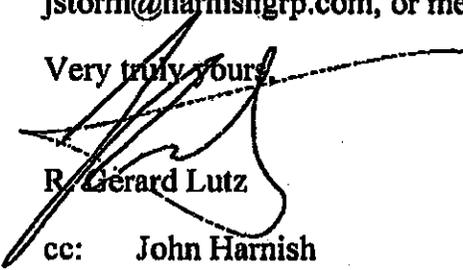
Page 12

that the California Coastal Commission could not condition development on property owners' transfer to public of easement across beachfront property without paying compensation. HGI believes that *Nollan* and its progeny will prohibit the City from taking a public access easement on HGI's property without just compensation. Additionally, here in Washington, RCW 82.02.020, as extensively interpreted by Washington courts, prohibits local jurisdictions from exacting taxes or fees from property owners as a condition to development unless there is a nexus between the development and an identified public impact mitigated by the tax or fee.

#### **G. Conclusions**

We appreciate the chance to comment, but hope to be provided the opportunity for broader, more collaborative input to the SMA Amendment process. The City and Commission should not approve this Staff/Ecology Draft Amendment without further input from the community impacted thereby. Pushing through an overreaching, one-size-fits-all buffer regime, downsizing large areas of commercial and industrial land, and declaring a large segment of the City's commercial and industrial property to be unusable or non-conforming will have drastic and lasting effects on property owners and the economic vitality of the City. We look forward to the opportunity to provide further, more precise comments in the more open public process we hope you will recommend. If you have questions, please contact John Storm at (425) 251-9806 or at [jstorm@harnishgrp.com](mailto:jstorm@harnishgrp.com), or me at (425) 635-1403 or [jlutz@perkinscoie.com](mailto:jlutz@perkinscoie.com).

Very truly yours,

  
R. Gerard Lutz

cc: John Harnish  
Rick Bellin  
John Storm  
Lyndon Lee, Ph.D



## MEMORANDUM

October 8, 2008

To: John Storm; Harnish Group

From: Lyndon C. Lee, Ph.D., PWS  
Donald B. Lagen, AICP

Subject: Assessment of On-site Shoreline Buffer Functions -- Harnish Group Campus

On October 6, 2008 we visited the Harnish Group Industrial Campus located at 17035 West Valley Highway in the City of Tukwila. The purpose of the visit was to make a preliminary assessment of site conditions and the environmental functions currently provided by the 40 foot shoreline buffer specified under TMC 18.44. It is our understanding that Harnish may decide to submit this preliminary review to the City.

### SITE CONDITIONS

The Harnish Campus is located on a bend of the Green River. The campus encompasses three lots situated between the West Valley Highway on the east side of the property and the Green River shoreline on the north, west and south. In all there is approximately 2,700 feet of river frontage. The north third of the property is separated from the south by a rail right-of-way that crosses to the west side of the river.

The property was developed in the early 1960's as an industrial site and has been used for the sale, rental, maintenance and storage of heavy equipment (i.e. tractors, back-hoes, graders, etc.) With the exception of a vegetated slope immediately adjacent to the river, the site is completely developed with structures, and paved and compacted surfaces. The structures and paved surfaces account for approximately three-quarters of the site's area. The other quarter consists of compacted dirt surfaces that are used for heavy equipment storage and is located adjacent to the vegetated slope south of the rail right-of-way.

### EXISTING BUFFER

TMC 18.44 currently requires a 40 foot shoreline buffer for this property. The vegetated slope adjacent to the river varies in width from approximately 40 feet at the north and south ends of the site to a maximum width of about 75 feet at the site's mid-point. With the exception of some landscaping along the West Valley Highway, the only on-site vegetation occurs on the slope adjacent to the river, which includes the existing buffer area.

Overall the existing buffer is highly degraded due to a dominance of non-native invasive plant species, lack of tree canopy, the developed nature of the site and on-going uses of the three properties. Consequently, the environmental functions provided by this buffer are minimal.

## **CONCLUSION**

The question you have asked us to answer is: given the current condition of the shoreline buffer, will a 40 foot buffer width, as currently required under TMC 18.44, maintain the existing level of buffer functions.

If the type and intensity of uses on the site does not change, and site maintenance activities continue at their current levels, then it is our opinion that a 40 foot buffer will maintain the existing degraded level of ecological functions of the buffer area.



WSP Environment & Energy  
2324 Eastlake Avenue East, Suite 505  
Seattle, WA 98102

Tel: 206.294.7402  
Email: [lyndon.lee@wspgroup.com](mailto:lyndon.lee@wspgroup.com)  
<http://www.wspenvironmental.com>

**Lyndon C. Lee, Ph.D., PWS**  
**Principal Ecologist & Vice President**  
**Ecosystem Science & Natural Resources**  
**Management Services**

**Professional Experience**

Lyndon C. Lee is Principal Ecologist/Vice President with WSP Environment & Energy (WSP). In his current capacity, Lyndon co-leads the Ecosystem Science & Natural Resources Management group (ESNRM) for WSP. ESNRM includes several senior scientists who have a great deal of applied national and international experience. ESNRM specializes in wetland and river science, conservation biology, design/build approaches to ecosystem restoration, regulatory assistance, and training. In addition to waters/wetlands, ESNRM focuses its operations in many different types of ecosystems including forests, grasslands, riparian areas, urban landscapes, brownfields, and other contaminated sites.

Prior to joining WSP (February, 2007), Lyndon worked as the Senior Ecosystem Ecologist for Entrixx, Inc. (2006) and as Principal Ecologist & Vice President for BBL/Arcadis (2005-2006). During the period 1989 - 2004, he served as Principal Ecologist and President of L.C. Lee & Associates, Inc. (LCLA) and Director of the National Wetland Science Training Cooperative. LCLA was a small environmental consulting firm that specialized in river and wetland science, regulatory assistance, and training throughout the U.S.

From 1986 to 1989, Lyndon served as the Senior Wetland Ecologist for the U.S. Environmental Protection Agency (EPA) Headquarters Office of Wetlands Protection, Washington, D.C. During this time, he was involved directly with the formulation and application of national waters/wetlands policy, applied research, and regulatory/enforcement procedures. At EPA, Dr. Lee directed a national team of EPA technical and regulatory experts who dealt with top priority waters/wetland issues throughout the U.S. He also served as the liaison from the Office of Wetlands Protection to the EPA Superfund and RCRA programs. During his tenure at EPA,

*Dr. Lyndon C. Lee came to WSP after working in wetland, river, and forested ecosystems, soil science, and wildlife ecology for 30 years. Currently, his interests are focused on responses of wetland, river, and forested ecosystems to perturbation; assessment of site-specific and cumulative impacts to waters/wetland ecosystem functions; design and construction of waters/wetlands ecosystem restorations; and management of the movement and fate of contaminants in waters/wetlands ecosystems.*

**Education**

- Ph.D. - Ecosystem Ecology with a focus on River & Wetland Science, 1983, University of Washington
- M.S. - Forest Ecology/Silviculture, 1979, University of Montana
- B.S. - Forest Ecology/Botany, 1974, Tufts University and the University of Montana

**Registrations**

- Society of Wetland Scientists - Professional Wetland Scientist (#000385 - Since 1995)
- Certified Sediment And Erosion Control Lead
- Certified Hazwoper

---

Lyndon led the team that produced a landmark study of cumulative impacts to bottomland hardwood forests of the southeastern U.S. He also founded the National Wetland Science Training Cooperative, which he has continued to run since leaving EPA.

Lyndon came to EPA from the University of Georgia Institute of Ecology, Savannah River Ecology Laboratory (SREL), Aiken, South Carolina. During the interval 1984 - 1986, he was the Research Manager of the SREL Division of Wetlands Ecology where he managed SREL's wetland research programs at the U.S. Department of Energy's Savannah River Nuclear Facility and National Environmental Research Park. Savannah River is a principal production site for weapons-grade plutonium and many other radionuclides. SREL's research focused on (a) assessment and monitoring of the effects of radionuclide production on riverine wetland ecosystems, (b) management of the movement and fate of radionuclide, heavy metal and organic contaminants in waters/wetlands, and (c) restoration of wetland and river ecosystems degraded by chronic thermal and/or contaminant inputs.

While pursuing his graduate degrees, Lyndon spent six years researching the structure and functioning of riverine waters/wetlands and riparian forested ecosystems throughout the Pacific Northwest and Northern Rocky Mountain regions. He focused on interactions among physical and geochemical processes and development of the structure and functioning of floodplain and riparian plant communities. Between his Master's and Ph.D. programs, (1977 - 1980) he worked as one of two Senior Habitat Ecologists for the Interagency Grizzly Team's Border Grizzly Project, Montana Forest and Range Conservation Experiment Station, Missoula, Montana. There he developed, conducted, and supervised research dealing with the definition, description, classification, protection, and restoration of grizzly bear and grey wolf habitat throughout the northern Rocky Mountains, southeastern British Columbia, and in northern Chihuahua, Mexico. Lyndon placed particular emphasis on waters/wetlands ecosystems as essential components of critical habitat for endangered bears and other wide-ranging carnivores.

The scope of Lyndon's consulting experience over the last 18 years has taken him to all areas of the U.S., Canada, Europe, Japan, and many Pacific and Caribbean islands. He has completed more than 125 contracts with federal, state, and local government agencies, private industry, research and conservation organizations, and private landowners. Dr. Lee has focused most of his efforts on the (a) application of science to the design and construction of large and small wetland and river restoration projects, and the (b) development and implementation of practical silvicultural and land-use management programs for wetlands and riverine ecosystems. Currently Lyndon's technical and applied interests are focused on responses of wetland, river, and forested ecosystems to perturbation, assessment of site-specific and cumulative impacts to waters/wetland ecosystems, design and construction of waters/wetlands ecosystem restorations, and management of the movement and fate of contaminants in waters/wetlands ecosystems.

In addition to his technical and applied work, Lyndon continues to work as a national expert on the federal Clean Water Act jurisdictional and functional assessment issues as they relate to management of waters/wetlands. In this capacity, his emphasis always has been on the application of science to federal, state, and local programs that focus on protection of aquatic ecosystems. He has a great deal of experience in U.S. federal regulatory and enforcement procedures, assessment of impacts to waters/wetlands ecosystems, and training of others in all of

---

---

the above. For example, since 1993, Lyndon has been one of the principal architects responsible for development and implementation of the "Hydrogeomorphic Approach" (HGM) for assessment of waters/wetlands ecosystem functions. In this regard, he has extensive practical knowledge of ecological modelling, and application of science to regulatory, enforcement, and restoration programs. Further, since 1989, Lyndon has served as a lead expert and technical team leader for the National Resources Conservation Service, and the U.S. Department of Justice (DOJ) - Environment and Natural Resources Division. Working with DOJ, Lee has helped win or settle eight major Clean Water Act cases that have been argued in three Districts of U.S. federal court, two circuit courts of appeal, and the U.S. Supreme Court.

Lyndon has been active in teaching and training throughout his career. He held the position of Assistant Research Professor at the University of Georgia's Institute of Ecology while working at the Savannah River Ecology Laboratory and at EPA Headquarters. He has also served as an Adjunct Assistant Professor at both the University of South Carolina and George Mason University. While at the universities of Washington and Montana, Dr. Lee taught or assisted in teaching a variety of forestry and natural resource management courses. He also served as a principal instructor for the Montana Forest Habitat Type Short Courses, sponsored by the U.S. Forest Service Rocky Mountain Forest and Range Experiment Station. Since 1987, Dr. Lee has led over 100 training courses for EPA and several other federal, state, and local agencies and organizations through the National Wetland Science Training Cooperative.

Lyndon is an active member of the scientific community. He has published two books, more than 30 refereed professional papers, and over 150 technical reports. He has presented more than 50 oral papers and seminars at professional meetings and conferences. He edited the *Bulletin* and served on the National Board of Directors of the Society of Wetland Scientists (SWS) for seven years. Lyndon co-founded the "SWS Student Awards Program" and endowment, and served as the Program Chairman for two national SWS meetings (Seattle, 1987 and Washington, D.C., 1988). In 1992, Dr. Lee was awarded Life Membership in the Society of Wetland Scientists. In 1995, he earned certification as a Professional Wetlands Scientist (#385). In addition to SWS, Lyndon is member of standing in the Society For Ecological Restoration (SER) and American Association for the Advancement of Science (AAAS).

---



WSP Environment & Energy  
2324 Eastlake Avenue East, Suite 505  
Seattle, WA 98102

Tel: 206.284.7402  
Email: don.largen@wspgroup.com  
<http://www.wspenvironmental.com>

**Donald B. Largen, AICP**  
**Senior Planner & Senior Director**  
**Ecosystem Science & Natural Resources**  
**Management Services**

**Professional Experience**

Donald B. Largen is a Senior Planner and Senior Director in the Ecosystem Science & Natural Resources Management Services (ESNRM) group of WSP Environment & Energy (WSP). ESNRM focuses on the assessment, management, and restoration of natural ecosystems, specializing in wetlands, rivers, and watersheds. ESNRM includes internationally recognized scientists with direct and applied national and international experience with restoration of many types of terrestrial and aquatic ecosystems including forests, grasslands, waters/wetlands, rivers and streams, riparian ecosystems, urban landscapes, and brownfields.

Don joined WSP ESNRM in February of 2008 with over 22 years of consulting experience in environmental assessment, comprehensive land use planning, project permitting and regulatory development. From 1989 to 1999 he worked as a senior planner for McConnell/Burke, Inc., a premier Washington State consulting firm, where he functioned as the firm's specialist on the State Environmental Policy Act (SEPA), NEPA, Critical Areas Ordinances (CAO), Shoreline Management Act (SMA), and their integration with the Growth Management Act (GMA); as well as acting as project manager and providing technical expertise on a wide range of comprehensive plans, regulatory updates and research projects.

In anticipation of the closure of McConnell/Burke, Inc., he began independent contracting in 1999. Since that time he has specialized in the coordination and preparation of environmental impact statements under SEPA/NEPA, GMA and their integration; regulatory review and updates with an emphasis on critical areas protection and management; incorporating natural systems in project planning; and research for specific land use issues.

Don has been responsible for the preparation, review and/or oversight of a variety of environmental assessments for both public and private clients. Below is a representative sample:

**Lewis County: July 2002 to present.** On-going SEPA Consultant responsible for oversight, establishing process and scope, and reviewing the adequacy of environmental analysis and documents prepared in support of both private and County initiated projects. Projects since 2002 include the following:

**Phillipsville Master Planned Resort. Current.** A recent application for development of a 270 acre Master Planned Resort that would include a Regional Equestrian Center.

**Birchfield Master Planned Community. 2005 to 2007.** The Birchfield MPC is a fully contained community pursuant to RCW 36.70A.350, to be developed in several phases

---

that will include a mix of urban uses, both residential and non-residential on approximately 1,290 acres.

**Cardinal Glass. 2004.** A Master Planned Development under the provisions of RCW 36.70A.367 to develop a float glass manufacturing facility on a 139 acre site.

**SOVREN Master Planned Industrial Development. 2002 to 2004.** The application was to designate a 925-acre area as an Industrial Land Bank (ILB)/Major Industrial Development – Master Planned Industrial Park; pursuant to the guidelines of RCW 36.70A.365. The environmental review for this project is to resume in late 2008.

**Keeneland Park PRRD, Thurston County: August 2006 through January 2008.** Coordinated the preparation of the Final EIS for a 99 lot Planned Rural Residential Development. Included compiling and providing responses to comments for the FEIS. Significant issues included preservation and mitigation of significant wetland habitats, protective mitigations for heron rookeries, groundwater and surface water impacts, stormwater management and transfer of water rights.

**City of Mt. Vernon: March 2006 to January 2007.** Coordinating Author responsible for the preparation of the Draft and Final EIS in support of the City's recently updated CAO in conformance with GMA amendments requiring incorporation of Best Available Science. Adopted in March, 2007, the City's CAO is an innovative, landscape scale approach that bases protective measures on the prevailing conditions of individual stream/drainage basins, and is aimed at significant restoration of City controlled waters/wetlands habitats. This approach has been supported by Department of Ecology, local tribes and the development community.

**Pleasant Harbor Resort: January 2006 to November 2006.** Coordinating Author in the preparation of a Preliminary Draft EIS for the Statesman Company in support of a Plan Amendment for a proposed Master Planned Resort under GMA guidelines. Particular emphasis on the protection of archeological resources, innovative on-site water/wastewater planning and management strategies and techniques, aquatic habitats of Hood Canal.

**Lewis County: March 2001 through June 2002.** Coordinating Author responsible for the preparation of a Draft and Final EIS as part of the County's GMA compliance process relative to their Comprehensive Plan and development regulations. Partially funded by Washington State, the EIS was intended to provide a more streamlined model for future programmatic environmental reviews conducted within the state. Significant issues included water resources, critical areas and flood management.

**Island County: 1997-1998.** Coordinating Author responsible for the prepared two Supplemental Draft EIS's and a Final EIS for the County's comprehensive plan and development regulations. Significant issues included critical areas, saltwater shorelines and water resources.

---

Critical Areas Ordinances (CAO) are a statutory requirement for cities and counties in Washington State. CAO are intended to provide for on-going protection and management of sensitive environments such as wetlands, streams, lakes and specific

---

---

wildlife habitats. In association with Dr. Lyndon C. Lee, Don assisted in the development of an innovative CAO for the City of Mount Vernon that is based on an assessment of the landscape conditions of specific drainage basins, encourages active restoration over passive management, and that provides an alternative to traditional mitigation banking. Below is a sample of the jurisdictions for which he has developed environmental regulations.

*City of Mount Vernon: 2006 – 2007*  
*City of Black Diamond: 2004 – 2005*  
*City of Federal Way: 1998 – 1999*  
*San Juan County: 1997 - 1998*  
*City of Medina: 1995 -1996*  
*Town of Hunts Point: 1994 – 1995*

Since 1998 he has also been a Hearings Examiner in nine Washington jurisdictions, a quasi-judicial position empowered with conducting public hearings and rendering the final decision on land development applications. Don currently provides Hearing Examiner services to the Cities of Burien and Mount Vernon, Washington. Previous clients have included the following:

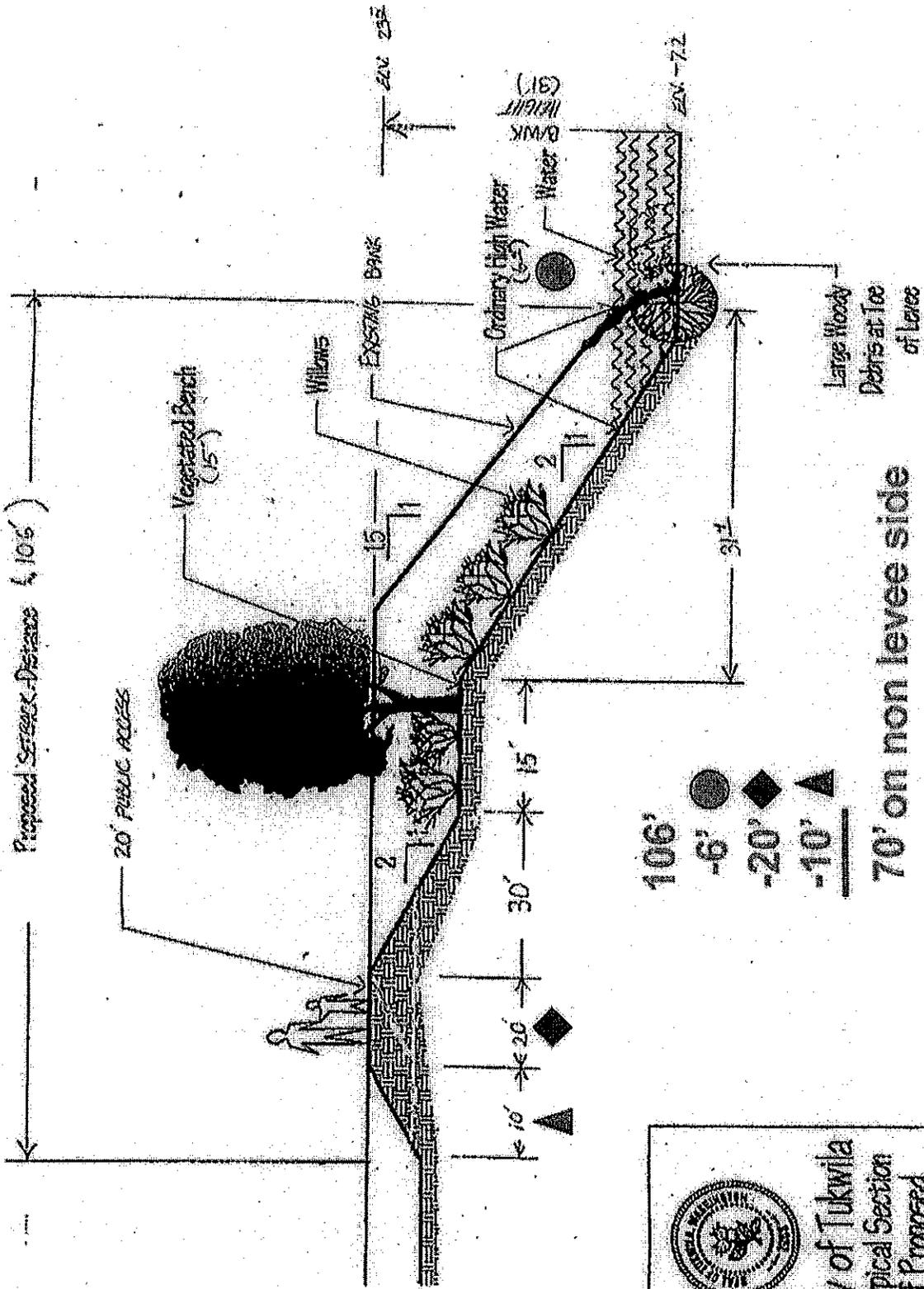
*City of Edmonds*  
*City of Kirkland*  
*City of Marysville*

*City of Newcastle*  
*City of Puyallup*

*City of Carnation*  
*City of Snoqualmie*

---

Page 7 of October 8, 2008 Work Session Packet




City of Tukwila  
 Typical Section  
 of Proposed  
 Levee

- 106'
- 6' ●
- 20' ◆
- 10' ▲

70' on non levee side