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WHATCOM COUNTY  
WASHINGTON  
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**IN THE SUPERIOR COURT OF WASHINGTON FOR WHATCOM COUNTY**

Lyle and Sue Rader, Husband and Wife,

**CAUSE NO: 08-2-02663-5** 2

Petitioners,

**LAND USE PETITION, COMPLAINT  
FOR DECLARATORY JUDGMENT  
AND INJUNCTIVE RELIEF**

vs.

Whatcom County,  
Respondent.

*\$200*

**STEVEN J. MURA**

1 For its Land Use Petition,/Complaint for Declaratory Judgment and other  
2 relief, petitioners Lyle and Sue Rader allege as follows:  
3

4 The land use decision at issue was made by Whatcom County,  
5 Washington regarding land owned by Lyle and Sue Rader (Rader), husband and  
6 wife, petitioners herein.  
7

8 **Identification of Parties**

9 Petitioners: Lyle and Sue Rader  
10 1270 East Badger Road  
11 Lynden, WA 98264

12 Attorney Douglas R. Shepherd, Esq.  
13 for Shepherd Abbott Carter  
14 Petitioner: 1616 Cornwall Avenue, Suite 100  
15 Bellingham, WA 98225

16 Local Whatcom County Hearing Examiner  
17 Jurisdictions 311 Grand Avenue  
18 for Decisions Bellingham, WA 98225  
19 at Issue:

20 Whatcom County Council  
21 311 Grand Avenue, Suite 105  
22 Bellingham, WA 98225

23 **Decision**

24 The land use decision at issue was made by the Whatcom County Hearing  
25 Examiner. The decision issued June 26, 2008 is attached hereto as Exhibit A.  
26 The June 2008 decision was upheld on appeal by the Whatcom County Council.  
27 The Council decision issued September 26, 2008 is attached hereto as Exhibit B.  
28 The matter was commenced by Whatcom County's Order to Correct, dated  
29 November 3, 2006. See Exhibit C attached hereto.  
30

1 **Facts Demonstrating that the Petitioner has Standing to Seek Judicial**  
2 **Review Under RCW 36.70C.060**

3 Petitioner is the owner of real property situated in Whatcom County  
4 Washington and as such was ordered to correct certain farming practices, which  
5 were alleged to be in violation of Whatcom County's Critical Areas Ordinance.

6 Petitioner appealed that Order to Correct. On July 2, 2008, Rader, as  
7 Appellants, received the attached erroneous decision of the Whatcom County  
8 Hearing Officer. That decision was appealed and on September 29, 2008, Rader,  
9 received the attached erroneous decision of the Whatcom County Council. Rader  
10 was not given notice of that hearing or an opportunity to be heard on that date.

11 Rader is aggrieved by Whatcom County's actions, including its arbitrary  
12 and capricious decision to enforce its Critical Areas Ordinance against ongoing  
13 farming activities of Rader. A judgment/decision in favor of petitioner Rader  
14 would eliminate the prejudice to Rader by the actions of Whatcom County  
15 because such a decision would enable Rader to proceed with the intended  
16 planting and harvesting of blueberries on the ten acres.

17 Petitioner Rader has exhausted its administrative remedies to the extent  
18 required by law. There are no further administrative appeals available to  
19 Petitioner.

20 **Concise Allegation of Errors**

21 Whatcom County has erred in the following respects:

- 22 1. In issuing its Order to Correct.  
23 2. In alleging and apparently concluding that the 10 acres, when  
24 purchased by Rader, was a forested wetland.  
25 3. In determining that Petitioner's proposed use of their land required a  
26 permit under the Critical Areas Ordinance.  
27 4. In applying terms and provisions of its Critical Areas Ordinance to  
28 petitioner's actions which are vague and unconstitutional.  
29 5. In applying terms and provisions of its Critical Areas Ordinance to  
30 petitioner's actions in an arbitrary and capricious manner.



1 the west in blueberries. Those activities were conducted without seeking any  
2 permit and without any Order to Correct being issued by Whatcom County.  
3 Further, the activities were conducted by Rader similar to the manner in which  
4 many other pastures were converted by Rader into blueberry farmland, around  
5 the same time.

6 Rader takes the position that the activity done and proposed does not  
7 require a permit.

8 In 1956 Lyle Rader graduated from high school and began farming 40  
9 acres of raspberries. In 1959 he received the first of his many awards for berry  
10 farming when he was voted "Star Farmer of America."

11 In 1978, Rader first harvested with machines. In 1981, they built their  
12 first harvesting plant. In 1986, Rader purchased farmland in Whatcom County,  
13 Washington and moved their family to Lynden, Washington. In 1996, Rader  
14 invested millions of dollars into Whatcom County farming by building a large  
15 state of the art processing plant, which plant included an IQF tunnel. Ex. 9, p. 7.  
16 (Exhibit numbered citations are to record gathered by Hearing Officer, Exhibit  
17 Numbers used by Hearing Officer, and part of the record forwarded to the  
18 Council.) In 2000, Rader expanded their farming activities from raspberries to  
19 include 40 acres of blueberries. They harvested their first blueberries in 2003.  
20 Id.

21 In 2005, they again expanded their farming operation by purchasing the  
22 VandeHoef dairy farm. They paid more than \$3,000,000.00 for the farm and  
23 spent more than \$300,000.00 cleaning up environmental problems caused by the  
24 dairy operation, including two large manure lagoons, silage bunkers, and  
25 buildings.<sup>1</sup> Their intentions were to plant raspberry and blueberry plants on the  
26 land. Id; 04/18/2007 RP 97-98.

27  
28  
29 <sup>1</sup> An earlier study by Whatcom County, related to Pangborn Lake, disclosed the following  
30 information: "Pangborn Lake is ringed by large dairy farms. 80% of the wetland boundary is  
pasture/grazing land . . . . Nutrient and chemical inputs from the large dairy farm to the north  
(VandeHoef) are serious concerns." Ex. 13 to Ex. 9.

1 Gillies testified regarding an earlier farm plan, approved for the  
2 VandeHoef dairy, which plan allowed the VandeHoef's to use the 20 acres of  
3 wooded pasture as part of a waterway designed and constructed by Gillies'  
4 agency so that the "20 acres that's in question so it was – the idea was this was  
5 a wooded site that could serve as a filter area for this (dairy) discharge that was  
6 not very onerous." 06/11-2008 RP 8.

7 Prior to purchasing the VandeHoef's property, Rader's had purchased well  
8 over 100 acres of Whatcom County pasture land and planted blueberries and  
9 raspberries on that pasture land without obtaining any permits from Whatcom  
10 County. *Id.*, 100; Ex. 11.

11 At of the end of 2005, Lyle and Sue Rader, as owners of Rader Farms,  
12 Inc., a Washington corporation, farmed and processed 568 acres of raspberries  
13 and 164 acres of blueberries in Whatcom County, Washington. Rader Farms has  
14 88 full time and 456 seasonal employees. Ex. 9, "Brief of Rader", p. 7.

15 In 2006, consistent with their intentions when they purchased the  
16 VandeHoef farm, Rader began preparing 10 acres of "scrub pasture" for planting  
17 of blueberries. Rader Farms had previously planted approximately 50 acres of  
18 pasture to the west with blueberries and 10 acres to the east with blueberries.  
19 *Id.*; 04/18/07 RP, 99-100. No permit was obtained from Whatcom County by  
20 Rader before they planted the 50 acres of pasture land, immediately to the west  
21 of the disputed 10 acres, into blueberries in 2005. *Id.* Rader used the services  
22 of the Soil Conservation Service (John Gillies) to help design the drainage system  
23 for that 50 acres. *Id.* No permit was obtained from Whatcom County by Rader  
24 before they planted the 10 acres immediately to the east to blueberries in 2005.  
25 Again, Rader used the services of the Soil Conservation Service (John Gillies) to  
26 help design the drainage system for that 10 acres. *Id.*

27 Prior to planting the blueberry bushes on the VandeHoef property, Rader  
28 had purchased more than 100 acres of pasture land from other farmers and  
29 "converted" that pasture land to berry farms without any permit and while using  
30

1 the Soil Conservation Service to help design the drainage. 04/18/07 RP, 100-  
2 101.

3 When Rader purchased the dairy farm, the 10 acres at issue in this matter  
4 had man made drainage ditches on three sides. Ex. 9 and 16 to Ex. 9. 04/18/07  
5 RP 102. The land was fenced. Id. There were cow ear tags, animal bones, a  
6 road and drainage tile on the 10 acres. Id; Ex. 12. Rader understood and  
7 believed that the 10 acres had been used by VanderHoef as pasture for dry  
8 cattle.<sup>2</sup> 04/18/07 RP 99.

9 Ed Kooi, a prior owner of the land, testified by way of a declaration that  
10 from 1960 to 1974 the Kooi family used the 10 acres as a pasture for cows in the  
11 summer months. Ex. 10 to Ex. 9. Mr. Kooi, a neighbor, also testified that from  
12 1974 until at least 2004 he personally observed the VandeHoef's use the 10  
13 acres for the pasturing of dairy cows.<sup>3</sup> Id.

14 Another neighbor Robert Van Dyken, by way of a declaration, testified as  
15 follows:

16 "From 1988 to 2005, I was familiar with the dairy farming practices of the  
17 VandeHoefs. I personally observed VandeHoefs pasture dairy cows in the  
18 20 acres immediately to the west and south of their home which 20 acres  
19 had trees on it. At least every summer the VandeHoefs ran dairy cows,  
20 primarily bulls, in the pasture which is presently cleared of most all trees  
21 and which I understand to be the subject matter of Rader's dispute with  
Whatcom County."

22 Ex. 10 to Ex. 9.

23  
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28 <sup>2</sup> "Most of the dairy cows were stored in a barn or feedlot. The only place that I observed  
29 where there was any on the ground was in the area in question and in some of the peat ground  
to the west of it." RP 99.

30 <sup>3</sup> "Again, at all times the property was fenced and used by VandeHoef's to pasture dairy cows."  
Ex. 10 to Ex. 9.

1 The 10 acres of wetlands, at issue in this appeal, were drier than the  
2 other 120 acres that Rader had planted into blueberries between 2003 and 2006,  
3 including the 60 adjacent acres.<sup>4</sup> 04/18/07 RP 110-111. In 2005, Rader began  
4 preparing the 10 acres for the planting of blueberries. They believed that no  
5 permit was required to plant blueberries on farmland.<sup>5</sup>

6 David Haggith, of N# Consulting, testified that he was employed by the  
7 Dairy Federation to sit on the citizen's advisory committee on the rewrite of the  
8 Critical Areas Ordinance. 04/18/07 RP 83. He stated the obvious, that farmers  
9 were a strong lobbying group. He believed that the final draft, approved by the  
10 County Council, did not require farmers to obtain permits for ongoing farming  
11 activities in wetlands. Id., 84. Haggith testified that Rader used "best  
12 management practices." Id., 86-87.<sup>6</sup>

13 Blueberry bushes, managed and farmed appropriately, have a productive  
14 life of over 50 years. 04/18/07 RP 87. Further, as regards the potential  
15 environmental impact upon the wetland, blueberry farming would be much less  
16 disruptive or harmful than dairy farming or annual crop farming. Id., 88-91.

17 It is Rader's position in this matter that the planting of blueberries on the  
18 10 acre parcel is allowed under the Whatcom County Critical Areas Ordinance  
19 without first obtaining any permit.

20 The issue in this appeal is what is intended by the following language:  
21 "Ongoing agriculture activities shall be permitted within critical areas (wet lands),  
22 and/or their buffers in accordance with the standards of this chapter or pursuant  
23

24 <sup>4</sup> "There's no standing water and we had probably one of the wettest winters, as you all know,  
25 since November up till now or seasons that we've ever had, and there was no water that ran off  
26 of this. Everything that Mother Nature gave us went down into the soil, so there was absolutely  
no runoff at all." 04/18/07 RP 111.

27 <sup>5</sup> "I've never dreamt that a permit would ever be required to farm. That's a new one on me.  
28 I've been farming, like I said, since I was in high school. And to think that one's required makes  
me think about changing occupations." 04/18/07 RP 104.

29 <sup>6</sup> "[T]he practices that were being involved or were being used (by Rader) were very good, and  
30 the best management practices was – it was an easier plan to write, because a lot of the  
practices that were being conducted were already either at or above the standard practices for  
the industry and the best management practices in the industry." 04/18/07 RP 87.

1 to an approved conservation program." WCC 16.16.290. Does "permitted" as  
2 used in this section mean allowed or does "permitted" mean the farmer has to  
3 obtain a permit in order to continue to farm in wetlands? Clearly, the Council  
4 intended the language to mean allowed.

5 Whatcom County began drafting and discussing Critical Areas Ordinance  
6 (CAO) in 1992, after direction from the state for local governments to conform to  
7 the Growth Management Act (GMA). During 1992, the County Council held over  
8 200 public meetings in which it discussed and listened to comments on the  
9 proposed CAO. In 2005, the final CAO was adopted with well over a decade of  
10 contemplation and concern for how the CAO would affect all land owners,  
11 including Whatcom County farmers.

12 Numerous public hearings attempted to listen to and address concerns of  
13 farmers. Relevant legislative history is incorporated into the January 15, 2008  
14 Declaration of Shepherd. Ex. 19. On April 1, 1992, John Gillies argued that  
15 "sometimes agriculture is a good buffer all by itself." *Id.*, p. 2. At that same  
16 meeting, Warner assured those in attendance that "people will not be prohibited  
17 from farming." *Id.*, p 3. And, on April 1, 2002, Galvin stated that for farming  
18 activities "a permit is not required." *Id.* Fred Beirlink noted that "one of the  
19 goals of the Growth Management Act was to protect private property rights and  
20 agricultural land." *Id.* 3-4. On June 29, 1999, discussing an earlier draft, Hoag  
21 stated that Whatcom County "is not interested in 'whacking' anyone. She (it)  
22 fights very hard for the farmers and wants them to be able to prosper and not  
23 have to pay fines." *Id.*, p. 5.

24 What are the "standards" of the CAO? "[T]his chapter seeks to . . . .  
25 Protect property rights, while allowing for economic development including  
26 agriculture . . . . (and) Allow for reasonable use of property in accordance with  
27 the provisions of WCC 16.16.270." WCC 16.16.100. The purposes of this  
28 chapter are to protect "the functions and values of critical areas and the  
29 ecological processes that sustain them while allowing for appropriate  
30 economically beneficial or productive use of land and property. . . . This chapter

1 seeks to maintain harmonious relationships between human activity and the  
2 natural environment." WCC 16.16.100. "Nothing in this chapter is intended to  
3 preclude all reasonable economic use of property. If the application of this  
4 chapter would deny all reasonable economic use of the subject property,  
5 including agricultural use, use or development shall be allowed it if is consistent  
6 with the purposes of this chapter." WCC 16.16.270. Existing ongoing  
7 agricultural activities are allowed in wetlands if "conducted in accordance with  
8 applicable provisions of this chapter . . ." WCC 16.16.670(K).

9 The Hearing Officer's determination that WCC 16.16.225(A) was intended  
10 by the council to apply to all farming activities in wetlands is not consistent with  
11 the legislative history cited above, relevant sections and definitions contained in  
12 the Critical Areas Ordinance, or with other applicable state statutes.  
13

14 "Agricultural activities" means those activities directly pertaining to the  
15 production of crops or livestock including, but not limited to, cultivation,  
16 harvest, grazing, animal waste storage and disposal, fertilization, the  
17 operation and maintenance of farm and stock ponds or drainage ditches  
18 irrigation systems, canals, and normal maintenance, repair, or operation  
19 of existing serviceable structures, facilities, or improved areas. Activities  
20 that bring an area into agricultural use are not agricultural activities.

21 . . . .

22 "Agricultural land" is land primarily devoted to the commercial production  
23 of horticultural, viticultural, floricultural, dairy, apiary, or animal products,  
24 or of berries, grain, hay, straw, turf, seed, Christmas trees not subject to  
25 the excise tax imposed by RCW 84.33.100 through 84.33.140, or  
26 livestock, and/ or lands that have been designated as capable of  
27 producing food and fiber, which have not been developed for urban  
28 density housing, business, or other uses incompatible with agricultural  
29 activity.

30 . . . .

"Ongoing agriculture" means 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 and

1 maintenance of existing farm and stock ponds or drainage ditches,  
2 irrigation systems, changes between agricultural activities, and  
3 maintenance or repair of existing serviceable structures and facilities.  
4 Activities that bring an area into agricultural use are not part of an  
5 ongoing activity. An operation ceases to be ongoing when the area on  
6 which it was conducted has been converted to a non-agricultural use, or  
7 has lain idle for more than five consecutive years unless that idle land is  
8 registered in a federal or state soils conservation program. Forest  
practices are not included in this definition.

9 WCC, Critical Areas Ordinance, Article 8 Definitions.

10 Numerous state statutes require the Court conclude that Whatcom  
11 County's Critical Areas Ordinance was not intended to require permits for  
12 ongoing farming activities. The Critical Areas Ordinance, as interpreted by  
13 Whatcom County, and as analyzed by the Hearing Examiner is in conflict with  
14 many Washington statutes, including:

- 15 1. The farmland preservation act. RCW 79A.15.130. See Ex. 15 to Ex. 9.
- 16 2. Guidelines and Programs Regarding Agricultural Activities. RCW  
17 90.58.065. Id.
- 18 3. Definitions of Agricultural activities. RCW 7.48.310. Id.
- 19 4. Farmers right to recover lawsuit costs. RCW 7.48.315. Id.
- 20 5. Guidelines for critical area Ordinances. RCW 36.70A.060. Id.

21 It appears other counties have attempted to regulate all farming activities  
22 in critical areas under their Critical Areas Ordinances and this caused the  
23 legislature recently, in attempting to avoid the results felt by Rader, passed RCW  
24 36.70A.560 which, in part reads:

25  
26 For the period beginning May 1, 2007, and concluding July 1, 2010,  
27 counties and cities many not amend or adopt critical area ordinances  
28 under RCW 36.70A.060(2) as they specifically apply to agricultural  
29 activities. Nothing in this section: . . . (c) limits the ability of a county or  
30 city to adopts or employ voluntary measures or programs to protect or  
enhance critical areas associated with agricultural activities. . . .

1 (2) Counties and cities subject to deferral requirements under subsection  
2 (1) of this section: (a) Should implement voluntary programs to enhance  
3 public resources and the viability of agriculture.

4 In enacting RCW 36.70A.560, the legislature made certain findings that  
5 are instructive:  
6

7 [2007 c 353 § 2, eff. May 8, 2007.]

8 HISTORICAL AND STATUTORY NOTES

9 **Finding--Intent--2007 c 353:** "(1) The legislature finds that the goal of  
10 preserving Washington's agricultural lands is shared by citizens  
11 throughout the state. The legislature recognizes that efforts to achieve a  
12 balance between the productive use of these resource lands and  
13 associated regulatory requirements have proven difficult, but that good  
14 faith efforts to seek solutions have yielded successes. The legislature  
15 believes that this willingness to find and pursue common ground **will**  
16 **enable Washingtonians to enjoy the benefits of a successful**  
17 **agricultural economy and a healthy environment, while also**  
18 **preventing the unnecessary conversion of valuable agricultural**  
19 **lands.** (Emphasis added.)

20 WCC 16.16.100 permits ongoing agriculture activities within critical areas,  
21 including wetlands.

22 It is not disputed in this matter that blueberry farming is a vast  
23 environmental improvement over dairy farming. It is not disputed in this matter  
24 that blueberry farming is a substantial environmental improvement over the prior  
25 use of the 10 acres by VandeHoef, which was for cow pasture and dairy waste  
26 discharge. It is not disputed that the 10 acres was used by prior owners, until  
27 2005, directly for the production of livestock, including grazing, animal waste  
28 storage and disposal, the operation of farm ponds and drainage ditches.

29 The Rader's intended use of the 10 acres, for the growing of blueberries,  
30 is consistent with the purposes of the CAO. Whatcom County's argument that  
the planting of blueberry bushes or the harvest of blueberries is a regulated  
activity under WCC 16.16.225 because it is a conversion, alteration and

1 development activity of concern is a far broader interpretation of the CAO than  
2 intended by this Council in 2005.

3 **Request for Relief**

4 Petitioner Rader requests the following relief:

5 1. A determination and declaration by the Court that the 10 acres at issue  
6 in this matter was prior converted wet land to farm land and that no permit is  
7 required to plant blueberry bushes on the ten acres.

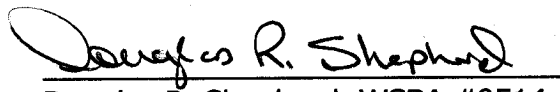
8 2. Declaratory judgment pursuant to Chapter 7.24 RCW that the  
9 Whatcom County Critical Areas Ordinance, including sections listed above, are  
10 unconstitutional on their face and as applied to petitioner Rader.

11 3. For an award of petitioner Rader's costs and disbursements, including  
12 reasonable attorneys' fees and expenses, to the fullest extent authorized by law.

13 4. For such other relief as the Court deems just, appropriate and  
14 necessary.

15  
16 DATED this 17<sup>th</sup> day of October 2008.

17  
18 SHEPHERD ABBOTT CARTER

19   
20 Douglas R. Shepherd, WSBA #9514  
21 Of Attorneys for Petitioner Rader  
22  
23  
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**EXHIBIT A**

**TO RADERS' LAND USE  
PETITION AND COMPLAINT FOR  
DECLARATORY JUDGMENT**

SCANNED  
RECEIVED  
JUL 02 2008  
SHEPHERD ABBOTT CARTER

WHATCOM COUNTY HEARING EXAMINER

RE: Administrative Appeal ) APL06-0035  
)  
)  
Lyle and Sue Rader, Appellants ) FINDINGS OF FACT,  
) CONCLUSIONS OF LAW,  
) AND DECISION

**SUMMARY OF APPEAL AND DECISION**

**Application:** The Appellants, Lyle and Sue Rader, have appealed an Order to Correct, ENF2006-00153, issued by Whatcom County Planning and Development Services on November 3, 2006, alleging a violation of the Whatcom County Critical Areas Ordinance.

**Decision:** The Whatcom County Hearing Examiner has concluded that the Appellants did violate the Whatcom County Critical Areas Ordinance by the clearing and grading of land within a Regulated Wetland and the conversion of a wetland to a blueberry field without Critical Areas Review and without required permits.

**FINDINGS OF FACT**

I.

Property Owner/Appellant: Lyle and Sue Rader

Property Address: Haverstick Road, Whatcom County, Washington

Legal Description: S ½ Section 1, Township 40 North, Range 3 East, Willamette Meridian  
Whatcom County, Washington.

Assessor Parcel Number (APN) 400301 363356

S ½ SW NE-EXC S 200 FT THEREOF-NE SW NE-SE NW NE-SUBJ TO  
COVENANT TO BIND PROPERTIES, WI 235460 AF 970416026.

Zoning: Agricultural (AG) District

Comprehensive Plan: Agricultural (AG)

Subarea: Lynden/Nooksack Valley Subarea

Authorizing Ordinances:                   WCC 20.92                   Hearing Examiner  
  WCC 20.84.220               Appeals

Applicable Whatcom County Codes

Critical Areas:           WCC 16.16.225           Regulated Activities  
                              WCC 16.16.230           Exempt Activities  
                              WCC 16.16.235           Activities Allowed with Notification  
                              WCC 16.16.250           Submittal Requirements and Critical Area Review  
                              WCC 16.16.255           Critical Areas Assessment Reports  
                              WCC 16.16.260           General Mitigation Requirements  
                              WCC 16.16.290           Conservation Program on Agricultural Lands

Wetlands:           WCC 16.16.610           Designation, Rating, and Mapping – Wetlands  
                              WCC 16.16.620           Wetlands – General Standards: not applicable  
                              WCC 16.16.630           Standards – Wetlands Buffer Widths  
                              WCC 16.16.670           Review and Reporting Requirements  
                              WCC 16.16.680           Standards – Wetland Mitigation  
                              WCC 16.16.690           Compensatory Wetland Mitigation Plan

Habitat Conservation Areas:

                  WCC 16.16.710           Designation, Mapping and Classification – Habitat Conservation Areas  
                  WCC 16.16.720           Habitat Conservation Areas – General Standards  
                  WCC 16.16.720           Standards - Habitat Conservation Area – Buffers  
                  WCC 16.16.750           Review and Reporting Requirements  
                  WCC 16.16.760           Mitigation Standards for Habitat Conservation Areas

Land Clearing:       WCC 20.80.731           Land Clearing  
                              WCC 20.80.732           Applicability  
                              WCC 20.80.733           Exemptions  
                              WCC 20.80.734           General Review Thresholds

Parties of Record

Lyle and Sue Rader  
1270 East Badger Road  
Lynden, WA 98264

Douglas Shepherd  
114 W. Magnolia Street, Suite 300  
Bellingham, WA 98225

John Gillies  
208 South Garden Drive  
Lynden, Washington 98264

George Boggs  
Whatcom Conservation District  
6975 Hannegan Road  
Lynden, WA 98264

Royce Buckingham  
Civil Deputy Prosecutor

Suzanne Bosman and Oliver Grah  
Planning and Development Services

Hearing Dates: April 18, 2007, February 27, and June 11, 2008

Exhibits

- 1 Appeal Application with attached letter dated November 15, 2006, from Douglas Shepherd
- 2 Order to Correct, letter dated November 3, 2006, from Suzanne Bosman
- 3 Critical Areas Protection Plan, dated October 9, 2006
- 4 Certificate of Posting, dated January 23, 2007
- 5 Legal Notice, dated January 25, 2007
- 6 Staff Report, dated January 31, 2007
- 7 Email Correspondence with Staff and Appellant's Attorney
- 8 Request for Continuance dated March 19, 2007
- 9 Notebook from Appellant's Attorney: Brief and Attached Exhibits
- 10 Forest Practice Application Checklist and Summary
- 11 Excise Tax Affidavit

- 12 Photo of drainage tile placed on site by prior owner
- 13 Digests, Bill History, Senate Bill 5248 and House Bill 1167

*Exhibits received since April 2007 hearing*

- 14 Email from Buckingham to Magner, dated May 16, 2007
- 15 Agreed Request for Continuance, dated May 16, 2007
- 16 Email from Buckingham to Magner, dated 10/05/07
- 17 Memo from Hearing Examiner to Parties, dated 10/09/07
- 18 Proposed Findings and Conclusions, from Royce Buckingham, dated November 30, 2007, with attachments:
  - 18-1 Whatcom County Council Minutes regarding agriculture and the Critical Areas Ordinance
  - 18-2 Technical Advisory Committee records re: CPAL program development & revisions
  - 18-3 Proceedings of Whatcom County Planning Commission
- 19 Letter, dated January 15, 2008, from Heather Shepherd with proposed findings and conclusions from Douglas Shepherd attached
- 20 Letter dated January 17, 2008, from Carole Magner to Douglas Shepherd
- 21 Letter dated January 28, 2008 from Douglas Shepherd to Magner
- 22 Notice of Hearing, dated January 30, 2008

**II.**

On November 3, 2006, Whatcom County Planning and Development Services issued an Order to Correct to Lyle and Sue Rader. The Order to Correct alleged violation of the Whatcom County Critical Areas Ordinance on a parcel owned by the Rader's and zoned Agriculture. The Order directed the Rader's to retain a qualified wetland professional to generate a mitigation plan in accordance with WCC 16.16.260.

The Rader's filed a timely Appeal of the Order to Correct on November 17, 2006.

### III.

The Rader's have stipulated that they conducted clearing and grading activities in a Regulated Wetland on Assessor's Parcel No. 400301 363356, without seeking County review from Planning and Development Services, without permits, and without an existing Critical Areas Protection Plan, which might have allowed deviations from the Critical Areas Ordinance.

The record indicates that Rader Farms removed trees, shrubs, and grass-like vegetation from approximately ten acres of an approximately thirty-four acre parcel, within a larger contiguous farm site in the Agriculture zone, on Haverstick Road, owned by the Rader's. The area was cleared in preparation for blueberry production. The area contained Regulated Wetlands. Planning and Development Services determined that the wetland in question was regulated as a Category I Wetland, and included both forested wetland and peat bog wetland areas associated with Pangborn Lake. As pointed out in the Staff Report, Whatcom County regulates wetlands in categories that reflect the functions and values of the wetland in question and that the wetland in question in this matter is afforded the highest level regulatory protection by the Whatcom County Critical Areas Ordinance, WCC 16.16.

The Appellants have stipulated that in fact the area is a Regulated Wetland and have not contested the characterization of the wetland as set forth in the Staff Report.

### IV.

The Appellants undertook clearing and grading on the approximately ten acre area without a Clearing and Grading Permit from Whatcom County, and without notification to and review by the Whatcom County Critical Areas Specialist.

At the time of the wetland alteration, the property in question was not covered by a Critical Areas Protection Plan. Since that time, Rader Farms has obtained a Critical Areas Protection Plan, which covers the subject property. It is not clear from the record as to whether or not Whatcom County has approved the submitted plan.

### V.

The record does establish that there were limited agricultural activities going on within the wetland area prior to the clearing and grading activities. It is not clear from the record as to whether or not these agricultural activities pre-dated the adoption of Whatcom County's first Critical Areas Ordinance. The agricultural activities pre-dating this clearing activity were described by John Gillies, Resource Conservationist for the Natural Resources Conservation Service of the United States Department of Agriculture, as "shelter belt" or marginal pastureland. He indicated the use was not intensive, but that it contained trails and shade areas, as well as minimal grazing areas, generally utilized by young cattle stock and dry cows. Mr. Gillies did indicate that if the property were in a USDA program, the change from marginal pasture to blueberry crops would have required a wetland inventory. George Boggs, Conservation District Manager, testified that he administers the Critical

Areas Protection Plan Program for Whatcom County. He indicated that agricultural operators must observe buffers and critical area requirements of the Whatcom County Critical Areas Ordinance unless alternatives have been approved by a Critical Areas Protection Plan. He testified that if the Rader's have had such a plan in effect prior to the conversion of the wetland areas to blueberry farming, they would have needed to develop a new CPAL Plan and have it approved prior to the work in the wetland undertaken by the Appellants.

## VI.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following

### CONCLUSIONS OF LAW

#### I.

Whatcom County regulates activities within wetlands pursuant to the Critical Areas Ordinance, WCC 16.16. WCC 16.16.205, Paragraph A of the Critical Areas Ordinance, reads as follows:

#### **16.16.205 Authorizations Required**

- A. Prior to issuing a permit, the County shall determine if the proposed activity or use is permitted pursuant to this chapter. No land use development permit, construction permit, or land division approval required by County ordinance shall be granted until the County decision-maker has determined that the applicant has complied with the applicable provisions of this chapter including the mitigation standards set forth in WCC 16.16.260.**

WCC 16.16.205 requires that prior to the issuance of any Permit, Whatcom County is to determine if the proposed use or activity is permitted, pursuant to the Critical Areas Ordinance. Where other permits or approvals are required for work within wetlands, the work must also be authorized pursuant to the Critical Areas Ordinance. Any critical area alteration that does not require other County permits or approvals still must comply with the substantive and procedural requirements of the Critical Areas Ordinance, as well as the procedural requirements of WCC 2.33, pursuant to WCC 16.16.205 (B), which reads as follows:

16.16.205

- B. Authorizations required under this chapter overlay other permit and approval requirements of the Whatcom County Code. Critical areas review pursuant to this chapter shall be conducted as part of the underlying permit or approval. Any proposed critical area alteration that does not require other County project permits or approvals, such as variances and reasonable use exceptions, must comply with the substantive and procedural requirements of this chapter and the procedural requirements of WCC 2.33.**

In this case, the Appellants undertook activities, including clearing and grading, within a Regulated Wetland without the authorization required by WCC 16.16.205.

The Appellants were required to obtain a Clearing and Grading Permit for the activity undertaken and if they had applied for this permit, the County would have performed a Critical Areas Review and would have informed the Appellants that the proposed work had to comply with the Critical Areas Ordinance.

Even if a permit was not required for the clearing and grading, the Appellants were still required to submit the proposed critical area alteration to the County for review. The Appellants' failure to do so was a violation of the Critical Areas Ordinance and justifies the Order to Correct issued by Whatcom County on November 3, 2006, regarding the clearing and grading activity which took place on this site in April 2006.

WCC 16.16.250(B), specifically, requires an application for work within a critical area (pursuant to the procedural requirements of WCC 2.33) if the work does not require any other Whatcom County project permit. The Appellants violated the Critical Areas Ordinance by undertaking the work without applying for a Clearing and Grading Permit or a Critical Areas authorization.

**II.**

WCC 16.16.620(K) allows "on-going agricultural activities" in wetlands when they are conducted in accordance with all of the applicable provisions of the Critical Areas Ordinance or when they are conducted in accordance with an approved Conservation Program on Agricultural Lands. Pursuant to this section, blueberry farming could be allowed within a critical area only if it is conducted in accordance with the applicable provisions of the Critical Areas Ordinance.

WCC 16.16.620 allows on-going agricultural activities in wetlands only "... when all reasonable measures have been taken to avoid adverse affects on wetland functions and values, compensatory mitigation is provided for all adverse impacts to wetlands that cannot be

**avoided, and the amount and degree of alteration are limited to the minimum needed to accomplish the project purpose ...”.**

The Order to Correct requires critical areas review and compensatory mitigation consistent with WCC 16.16.620. As pointed out by the Appellant, the definition of on-going activity in the Critical Areas Ordinance includes “...changes between agricultural activities ...” It may be possible for Rader Farms to change the marginal pasture activity taking place within the wetland area to a blueberry field, but only after review and authorization by the Critical Areas Technical Administrator and subject to conditions imposed by the Administrator to ensure that all reasonable measures have been taken to avoid adverse impacts to wetland functions and values, that appropriate compensatory mitigation has been provided for, and that the amount and degree of alteration is limited to the minimum to accomplish the project purpose, as required by WCC 16.16.620.

### **III.**

Whatcom County Planning and Development Services appropriately issued an Order to Correct to Lyle and Sue Rader, on November 3, 2006. The Order appropriately required the Rader’s to retain a qualified wetland professional, to generate a mitigation plan that meets the requirements of WCC 16.16.620 and WCC 16.16.680. The Order to Correct should be upheld and the Appeal should be denied.

### **VI.**

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following

### **DECISION**

The Appellants violated the Whatcom County Critical Areas Ordinance by altering a Regulated Wetland without a Critical Areas Review and Approval by the Critical Areas Technical Administrator. The Order to Correct in ENF2006-00153 is upheld. The Appeal is Denied. This matter is remanded to Whatcom County Planning and Development Services for further action consistent with this Decision.

### **NOTICE OF APPEAL PROCEDURES FROM FINAL DECISIONS OF THE WHATCOM COUNTY HEARING EXAMINER**

This action of the Hearing Examiner is final. The following review procedure is available from this decision and may be taken by the applicant, any party of record, or any County department.

Appeal to County Council. Within ten business days of the date of the decision a written notice of appeal may be filed with, and all required filing fees paid to, the Whatcom County Council, Courthouse - 1st Floor, 311 Grand Avenue, Bellingham, WA 98225. The appeal notice must state either:

- 1) The specific error of law which is alleged, or
- 2) How the decision is clearly erroneous on the entire record.

More detailed information about appeal procedures is contained in the Official Zoning Ordinance at Section 20.92.600-.830. A copy of this document is available for review at the County Council Office.

After an appeal has been filed and the Council office has received the hearing record and transcript of the public hearing, the parties will be notified of the time and date to file written arguments.

DATED this 26<sup>th</sup> day of June 2008.

  
\_\_\_\_\_  
Michael Bobbink, Hearing Examiner

**EXHIBIT B**

SCANNED  
RECEIVED  
SEP 29 2008  
SHEPHERD ABBOTT CARTER

BEFORE THE COUNTY COUNCIL  
WHATCOM COUNTY, WASHINGTON

IN RE:

The Appeal of LYLE AND SUE  
RADER, Appellants, from the Hearing  
Examiner's Decision on File No.  
APL06-0035

File No. AB2008-268

FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND  
DECISION

This matter having come on before the Whatcom County Council at its regularly scheduled meeting on September 23, 2008, on the appeal of Lyle and Sue Rader, Appellants herein, from the decision of the Hearing Examiner made on June 26, 2008, upholding an order to correct issued on November 3, 2006, by Whatcom County Planning and Development Services alleging a violation of the Whatcom County Critical Areas Ordinance. Said meeting was duly convened and took place in all respects in accordance with law, and to the extent required by law, due and proper notice of such meeting was given, and a legal quorum of the Whatcom County Council was present throughout the meeting. The Council having been fully advised in the premises through consideration of the record, including the memoranda submitted by the parties, now hereby makes, enters, and renders the following:

FINDINGS OF FACT

1. On June 26, 2008, Whatcom County Hearing Examiner Michael Bobbink issued a decision, accompanied by findings of fact and conclusions of law, upholding an order to correct issued on November 3, 2006, by Whatcom County Planning and Development Services alleging a violation of the Whatcom County Critical Areas Ordinance.
2. On July 7, 2008, a notice of appeal of the Examiner's decision was by filed by Doug Shepherd, on behalf of Lyle and Sue Rader.
3. The Hearing Examiner's Findings of Fact as expressed in his June 26, 2008, decision are hereby adopted and incorporated by this reference.

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following:

CONCLUSIONS OF LAW

1. The appeal in this matter was timely filed and this matter is properly before the County Council.
2. The conclusions of law drawn by the Examiner were proper and are hereby incorporated by this reference.
3. The Examiner's decision was neither clearly erroneous based upon the entire record nor was an error of law made.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following:

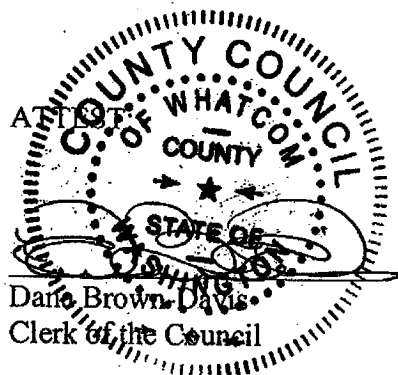
DECISION

The decision of the Whatcom County Hearing Examiner is affirmed.

DATED this 26 day of September, 2008.

WHATCOM COUNTY COUNCIL  
WHATCOM COUNTY, WASHINGTON

  
\_\_\_\_\_  
Carl Weimer  
Council Chair



**IN RE THE APPEAL OF RADER, WHATCOM COUNTY, WASHINGTON  
ADMINISTRATIVE APPEAL  
WHATCOM COUNTY HEARING EXAMINER**

**IN RE THE APPLICATION OF**

**APL 2006-00035**

**LYLE AND SUE RADER,  
HUSBAND AND WIFE**

**EXHIBIT B**

**TO RADERS' LAND USE  
PETITION AND COMPLAINT FOR  
DECLARATORY JUDGMENT**

SCANNED  
RECEIVED  
SEP 29 2008  
SHEPHERD ABBOTT CARTER

BEFORE THE COUNTY COUNCIL  
WHATCOM COUNTY, WASHINGTON

IN RE:

The Appeal of LYLE AND SUE  
RADER, Appellants, from the Hearing  
Examiner's Decision on File No.  
APL06-0035

File No. AB2008-268

FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND  
DECISION

This matter having come on before the Whatcom County Council at its regularly scheduled meeting on September 23, 2008, on the appeal of Lyle and Sue Rader, Appellants herein, from the decision of the Hearing Examiner made on June 26, 2008, upholding an order to correct issued on November 3, 2006, by Whatcom County Planning and Development Services alleging a violation of the Whatcom County Critical Areas Ordinance. Said meeting was duly convened and took place in all respects in accordance with law, and to the extent required by law, due and proper notice of such meeting was given, and a legal quorum of the Whatcom County Council was present throughout the meeting. The Council having been fully advised in the premises through consideration of the record, including the memoranda submitted by the parties, now hereby makes, enters, and renders the following:

FINDINGS OF FACT

1. On June 26, 2008, Whatcom County Hearing Examiner Michael Bobbink issued a decision, accompanied by findings of fact and conclusions of law, upholding an order to correct issued on November 3, 2006, by Whatcom County Planning and Development Services alleging a violation of the Whatcom County Critical Areas Ordinance.
2. On July 7, 2008, a notice of appeal of the Examiner's decision was by filed by Doug Shepherd, on behalf of Lyle and Sue Rader.
3. The Hearing Examiner's Findings of Fact as expressed in his June 26, 2008, decision are hereby adopted and incorporated by this reference.

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following:

CONCLUSIONS OF LAW

1. The appeal in this matter was timely filed and this matter is properly before the County Council.
2. The conclusions of law drawn by the Examiner were proper and are hereby incorporated by this reference.
3. The Examiner's decision was neither clearly erroneous based upon the entire record nor was an error of law made.


Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following:

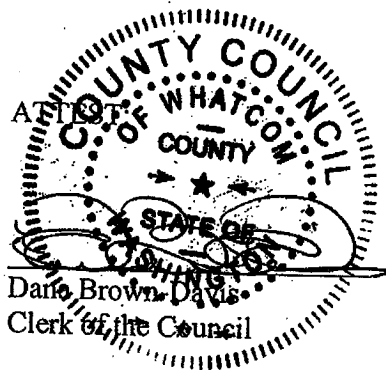
DECISION

The decision of the Whatcom County Hearing Examiner is affirmed.

DATED this 26 day of September, 2008.

WHATCOM COUNTY COUNCIL  
WHATCOM COUNTY, WASHINGTON

  
\_\_\_\_\_  
Carl Weimer  
Council Chair



**EXHIBIT C**

**TO RADERS' LAND USE  
PETITION AND COMPLAINT FOR  
DECLARATORY JUDGMENT**

Whatcom County  
PLANNING & DEVELOPMENT SERVICES  
5280 Northwest Drive  
Bellingham, WA 98226



Hal H. Hart, A.I.C.P.  
Director

Robert C. Martin, A.I.C.P.  
Land Use & Natural Resource Division  
Manager

November 3, 2006

Lyle & Sue Rader  
1436 E. Badger Road  
Lynden, WA 98264-9504

RECEIVED  
NOV 06 2006  
SHEPHERD ABBOTT CARTER

**Subject: Order to Correct - ENF2006-00153  
Violation of Whatcom County Critical Areas Ordinance  
APN 400301 363356**

Dear Mr. & Mrs. Rader:

Whatcom County Planning and Development Services, Land Use & Natural Resources Division is issuing you this Order to Correct for violation of the Whatcom County Critical Areas Ordinance, **(WCC 16.16.225(A)(1) – Regulated Activities)**.

On April 13, 2006, an interagency site inspection was conducted with the Washington State Department of Natural Resources, (DNR), the Washington State Department of Ecology, (DOE) and with Whatcom County Planning & Development Services. During this site inspection it was documented that approximately one-third of the subject parcel had been cleared and graded in preparation for blueberry production. Regulated wetlands were observed in the cleared and graded areas by DOE, DNR, and PDS staff. The U.S. Army corps of Engineers conducted a site visit on May 9, 2006 and determined that regulated wetlands existed in the areas that were cleared and graded. The County's critical areas maps concur that the forested area that was logged/cleared on parcel number 400301363356 were wetlands. In addition, sea-run cutthroat are presumed to utilize a watercourse located along the western portion of the property.

Our research indicates that on November 14, 2003, the Washington State Department of Natural Resources, (DNR) approved a Class III timber harvest permit, (Application No. 2806380). Since the permit expired on November 14, 2005, the logging that recently occurred on the site was done without a valid DNR permit. In addition, the DNR permit required a buffer to be maintained next to the surface waters located within and/or adjacent to the cleared area. These buffers were not maintained and resulted in impacts to a regulated wetland and its protective buffers.

On May 2, 2006, DNR issued a Notice to Comply requiring the landowner to submit a mitigation plan to them that had been approved by Whatcom County and the Department of Ecology. The mitigation plan was to be submitted within 60-calendar days. To date, six months have passed and none of the agencies have received a mitigation plan.

This letter serves as an Order to Correct. Whatcom County will be requiring you to retain a qualified wetland professional to generate a mitigation plan in accordance with WCC 16.16.260 and WCC 16.16.680. Attached is a list of Whatcom County approved wetland specialists that can assist you with the above referenced requirements. We feel you have had ample time to comply with the DNR mitigation requirements. Therefore, Whatcom County will be requiring you to submit a mitigation plan to the attention of Oliver Grah at Whatcom County, on or before December 1, 2006.

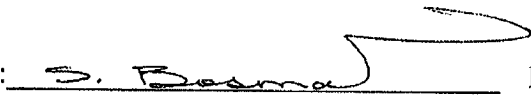
**Failure to comply with the above referenced corrective actions by the date specified above shall result in penalties up to \$1,000 per day, per violation per WCC 16.16.285.**

**APPEAL RIGHTS:**

Any person aggrieved by a ruling made pursuant to the administration of the Whatcom County Critical Areas Ordinance – Title 16 may file an appeal **within 14 days** of the date of the administrative decision per WCC 16.16.280. To file a valid appeal, a completed application must be accompanied with the appeal fee as specified in the 2006 Unified Fee Schedule.

Please contact me immediately if you have any questions regarding this matter.

Issuing Party/Title: Suzanne Bosman, Senior Planner – Compliance

Signature:  Phone: (360) 676-6907  
E-mail: [Sbosman@co.whatcom.wa.us](mailto:Sbosman@co.whatcom.wa.us)

Attachment:

Whatcom County Approved Wetland/Stream Specialists

Cc Andrew Craig, Department of Ecology  
Susan Meyer, Department of Ecology  
Scott Hanna, Department of Natural Resources  
Oliver Grah, Whatcom County  
Douglas R. Shepherd, Attorney At Law

**DELIVERY METHOD:**  Posted on Site  Certified Mail  Hand Delivered  Regular Mail

## WHATCOM COUNTY APPROVED WETLAND/STREAM SPECIALISTS

### **ADVANCED ENVIRONMENTAL SOLUTIONS**

Tina Marie Mirabile  
Bellingham, WA

360-201-2313

[tmirabile5@hotmail.com](mailto:tmirabile5@hotmail.com)

### **AQUA-TERR SYSTEMS (ATSI)**

Jim Wiggins

Sedro Woolley, WA

360-856-2139

FAX 360-856-5238

### **BILL WATTS**

Bellingham, WA

360-671-9159

[wmsbwatts@aol.com](mailto:wmsbwatts@aol.com)

### **BINDA COLEBROOK**

Everson, WA

360-966-5805

[binda@seanet.com](mailto:binda@seanet.com)

### **BREDBERG & ASSOC.**

Anthony Jay Bredberg

Richard Herriman

Gig Harbor, WA

253-858-7055

[ajb@wa.net](mailto:ajb@wa.net)

### **CANTRELL & ASSOC. INC.**

Bill Cantrell

Bellingham, WA

360-738-4725

FAX 360-671-5168

[bill@cantrellassociates.com](mailto:bill@cantrellassociates.com)

[www.cantrellassociates.com](http://www.cantrellassociates.com)

### **COMMON GROUND ENVIRONMENTAL CONSULTING, LLC**

Analiese Burns

Bellingham, WA 98229

360-647-8021

[www.cgenvironmental.com](http://www.cgenvironmental.com)

### **COOKE SCIENTIFIC SERVICES**

Sarah Cooke

Seattle, WA

206-525-5105

### **DAVID EVANS & ASSOC.**

Sara Young

Bellingham, WA

360-647-7151

[acbu@deainc.com](mailto:acbu@deainc.com)

### **D.B. GREEN ENVIRONMENTAL CONSULTING, LLC**

(Stream Specialist only)

Brady Green

Bellingham, WA

360-738-6496

[bgreen5645@aol.com](mailto:bgreen5645@aol.com)

### **EARTH SYSTEMS SCIENCE**

Robert Knable

Mount Vernon, WA

360-336-3774

### **FISHER CONSULTING SERVICES**

Mariann Brown & Ken Carrasco

Ferndale, WA

360-366-1466

### **FOSTER-WHEELER ENVIRONMENTAL SERVICES**

Bellevue, WA

425-482-7600

Joe Arnett

[jarnett@ttfwi.com](mailto:jarnett@ttfwi.com)

### **HAARD LANDSCAPING**

(For enhancement only)

Bellingham, WA

360-734-5903

[kkhaard@nas.com](mailto:kkhaard@nas.com)

### **J.S. JONES & ASSOC.**

Jeffery S. Jones

Federal Way, WA

253-874-9588

[www.jsjonesassociates.com](http://www.jsjonesassociates.com)

### **NORTHWEST ECOLOGICAL SERVICES**

Vikki Jackson

Michele Bodtke

Bellingham, WA

360-734-9484

[ledum2@comcast.net](mailto:ledum2@comcast.net)

### **NORTHWEST WETLANDS**

Katrina Jackson

Bellingham, WA

360-647-2839

[nwckatrina@comcast.net](mailto:nwckatrina@comcast.net)

### **PEGASUS WETLAND MANAGEMENT SERVICES**

Elaine Gold

Bellingham, WA

360-647-8552

[egold@palmergold.us](mailto:egold@palmergold.us)

### **PUGET LAND CONSULTANTS**

Wes Jennings

Tacoma, WA

253-474-5432

[wes@affconet.org](mailto:wes@affconet.org)

### **SHAPIRO & ASSOC.**

Marc Boule

Seattle, WA

206-624-9190

[mboule@shap.com](mailto:mboule@shap.com)

### **SHELDON & ASSOC.**

Seattle, WA

206-726-1549

### **WETLAND RESOURCES INC.**

Everett, WA

425-337-3174

[mailbox@wetlandresources.com](mailto:mailbox@wetlandresources.com)