



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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March 25, 2016

(See Distribution List)

Re: March 4th Letter to Director Bellon about Edmonds Marsh

Dear Interested Parties:

Thank you for taking time to write to Director Bellon about your concerns with Edmonds Marsh and a December 11, 2015 memorandum (Memo) from Washington State Department of Ecology (Ecology) staff. We value your input and commitment to protecting the environment. Based on your March 4, 2016 letter, it is apparent that Edmonds Marsh is an environmental asset that you care deeply about. As the Shorelands and Environmental Assistance Program Manager, I am writing on behalf of Director Bellon in response to several points raised in your recent letter. In that letter you also ask that Ecology retract our December 11, 2015 memorandum and provide an "official" response to the Edmonds City Council.

Your letter indicates that you believe Ecology's Memo lacks scientific merit; that Ecology suggested the wetland category of Edmonds Marsh be downgraded to a Category II wetland; and that the associated buffers be reduced below the standard buffer widths. As a state agency, Ecology takes its responsibility to protect our shorelines and aquatic resources very seriously and we strive to base our decisions on the best available information. We are always interested in learning how we can do a better job of explaining how we do our work and clarifying any misconceptions on how we reached a particular decision. Let me explain our rationale for the major concerns you raise in your letter.

1. Ecology's December 11, 2015 memorandum to Shane Hope lacks scientific merit and is not BAS

As indicated in Ecology's December 11, 2015 memo, the intent and purpose of Ecology staff collecting data in the Marsh in late 2010 was to establish that tidal inundation is a current and ongoing phenomenon. As part of Ecology's review of the City of Edmonds (City) comprehensive Shoreline Master Program (SMP) update, Ecology staff wanted to ensure that the Marsh, and apparent tidal exchange, was accurately characterized. The

2007 shoreline characterization classified all of Edmonds Marsh as an associated wetland. Contemporary aerial photographs show that tidal channels and mudflats are found in the western portion of the Marsh to the east of the railroad tracks, indicating periodic tidal inundation from Puget Sound. In late 2010, Ecology staff expressed concern that this tidal inundation had established an ordinary high water mark (OHWM) in the western Marsh and that this portion of the Marsh was not simply an associated wetland. The OHWM definition in the Shoreline Management Act implementing rules (Section 173-22-030(a)(ii) of the Washington Administrative Code [WAC]) states, in part:

In low energy environments where the action of waves and currents is not sufficient to prevent vegetation establishment below mean higher high tide, the ordinary high water mark is coincident with the landward limit of salt tolerant vegetation.

Therefore, the Puget Sound OHWM was extended into the western portion of the Marsh based on the landward limit of salt tolerant vegetation as seen in the field by Ecology staff and as documented in aerial photographs and earlier studies by Fisher et al. (1998) and O'Connell et al. (2009). An additional purpose of measuring water levels was to document how far into the Marsh tidal influence extended. Did the salt tolerant community within the Marsh accurately reflect the extent of tidal inundation? Water level measurements confirmed that tidal influence in December 2010 and January 2011 did not extend beyond the salt tolerant community. Ecology's data collection at this time was simply meant to document tidal influence, and the OHWM, and was never intended to be a rigorous scientific investigation.

The Growth Management Act (GMA) requires that local jurisdictions periodically update their land use ordinances to protect critical areas, including wetlands and fish and wildlife habitat, and those updates shall include best available science (BAS) in developing those regulations (see RCW 36.70A.172(1)). Ecology's concerns with the proper classification of Edmonds Marsh (the Puget Sound OHWM extends into the western Marsh) was for the update to the City's SMP, not for the critical areas ordinance update required under the GMA. While we agree that these updates should be based on the best available information, the BAS requirement only applies to local jurisdictions in their development of critical areas regulations. The landward limit of salt tolerant vegetation within the Marsh was used to establish the OHWM and that was the only purpose for collecting data (water levels, salinity and plant distribution) by Ecology staff in the winter of 2010.

2. Memo suggests Edmonds Marsh be downgraded to Cat. II wetland

It was never the intention of Ecology (or City staff) to downgrade the category of Edmonds Marsh. The City's current critical areas ordinance references both the 1993 and 2004 wetland rating systems for Western Washington (see EMC 23.50.010.B). The 1993 wetland rating system (Ecology 1993) was replaced by the 2004 rating system (Hruby 2004) and is no longer considered BAS (the 2004 rating system was updated in 2014 and is also no longer considered BAS). In the 2004 rating system, estuarine wetlands are classified as Category I if they are at least 1 acre in size and meet two of the three following conditions:

- are relatively undisturbed;
- at least $\frac{3}{4}$ of the landward edge has a 100-foot buffer of shrub, forest or unmowed/un-grazed grassland; and
- has at least two of these features: tidal channels, depressions with open water or contiguous freshwater wetland.

Edmonds Marsh is larger than 1 acre, but it is not relatively undisturbed as much of the marsh has been filled, the remaining marsh is separated from the marine waters by several hundred feet of high-intensity development and the only hydrologic connection to Puget Sound is through a culvert with a tide gate. Nor does $\frac{3}{4}$ of landward edge of the Marsh have an intact 100-foot buffer. For approximately 70 percent of its length, intact buffer on the Marsh is absent or limited to a narrow strip of trees and shrubs less than 100 feet wide. The standard buffer width for a Category II estuarine wetland adjacent to a high-intensity land use is 150 feet (see Appendix 8C.2.3, Granger et al. 2005). The only remaining patch of intact 150-foot buffer on Edmonds Marsh is limited to the southeast corner of the Marsh (Figure 1).

Therefore, under the 2004 and 2014 wetland rating systems (Hruby 2004 and 2014, respectively), as well as the Edmonds Municipal Code (EMC 23.50.010.B), Edmonds Marsh is a Category II wetland, as stated in Ecology's Memo. The shoreline inventory and characterization prepared for the comprehensive SMP update (Sea-Run Consulting et al. 2007) states that the City has designated Edmonds Marsh as a Category I wetland but does not provide the rationale for this rating. Reviewing the wetland rating categories listed in the current critical areas ordinance (EMC 23.50.010.B), Edmonds Marsh should have been rated as a Category II wetland (Estuarine wetlands smaller than one acre, or disturbed estuarine wetlands larger than one acre). It is not Ecology's intent to change the rating of Edmonds Marsh; we were simply providing our interpretation of the state and City rating categories in our Memo.

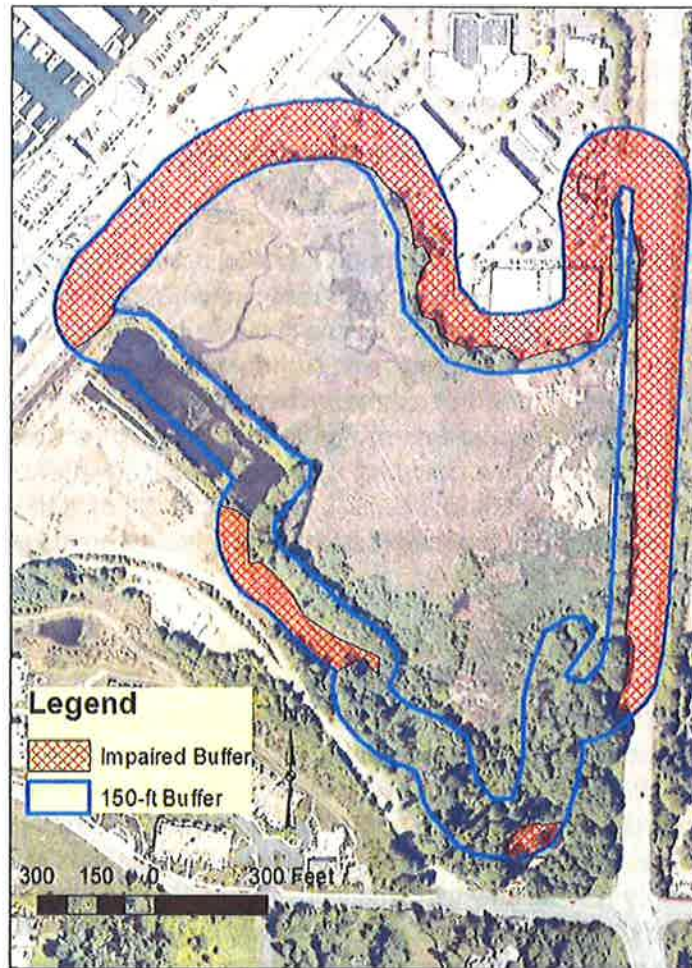


Figure 1. 150-foot buffer (blue lines) on Edmonds Marsh showing areas where the buffer has been impaired (red cross-hatch) due to previously authorized development. The largest remaining patch of buffer is found along the southeast portion of the Marsh.

3. The Edmonds Marsh buffer should be reduced below state prescribed standard buffer

Buffers are well-vegetated areas adjacent to wetlands and other aquatic areas that provide habitat, moderate climatic affects and help protect water quality through interception of runoff. It is the intact vegetation that provides the habitat and water quality functions necessary to protect and support the critical area through various physical, chemical, and/or processes (Sheldon et al. 2005 pp. 5-23 and 5-39 – 5-55 and Glossary; Buntun et al. 2012, p. 11; Hruby 2013). Setbacks are a related land use concept that prescribe distances for building and development footprints. Buffer functions are discussed at some length in Ecology's *Wetlands in Washington State - Volume 1: A Synthesis of the Science* (Sheldon et al. 2005) as well as a more recent literature review by Hruby (2013). The importance of

intact vegetation within wetland buffers is emphasized in *Wetlands & CAO Updates: Guidance for Small Cities Western Washington Version, 2nd Revision October 2012*:

Ecology's buffer recommendations are also based on the assumption that the buffer is well vegetated with native species appropriate to the ecoregion (emphasis in original).

Buffers, and their associated functions, only encompass intact vegetation and do not extend into areas of high-intensity land uses such as paved roads, parking areas, commercial/industrial development or intensive agricultural practices, such as row crops. Setbacks typically do extend across developed areas.

The Washington Supreme Court (Court) addressed the question of whether the GMA requires that impaired buffers (no longer well-vegetated) be restored adjacent to salmon-bearing streams in its decision in *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board* (No. 76339-9). Although this case dealt with agricultural land use adjacent to fish habitat, the central tenet of the decision relative to buffer functions is applicable to other critical areas and land uses, such as Edmonds Marsh. Regarding buffers, the Court ruled that:

As we have noted above, the GMA's requirement to protect does not impose a corresponding requirement to enhance. That holding guides us here. A requirement to develop buffers would impose an obligation on farmers to replant areas that were lawfully cleared in the past, which is the equivalent of enhancement. Without a duty to enhance being imposed by the GMA, however, we cannot require farmers within Skagit County to replant what was long ago plucked up.

This is precisely the situation we find for most of the buffer adjacent to Edmonds Marsh; the buffer was lawfully converted ("plucked up") to developed uses many years ago and there is no regulatory requirement to restore those altered areas. Voluntary restoration of degraded buffers is beneficial and should be encouraged, but there is no requirement to do so. Protection of the remaining intact buffer on the Marsh, or compensation for any unavoidable impacts to intact buffer, would be a requirement for any future development impacts. As shown in Figure 1, very little of the 150-foot buffer remains on Edmonds Marsh and as a matter of practice and legal interpretation, it is inappropriate to apply the 150-foot buffer to areas that have been lawfully converted to other uses.

Also, regarding the City's SMP update, Ecology has been working closely with City Development Services staff on the remaining SMP issues including Edmonds Marsh. Ecology's Memo is a part of the overall Ecology SMP Findings and Conclusion report, which will provide the factual basis for Ecology's decision on the City's SMP. City staff have also indicated a preference for finalizing the updates to the critical areas ordinance with the City Council before Council addresses any remaining SMP issues. Ecology agrees with this approach because this will improve the overall effectiveness of the critical areas regulations within Edmonds shoreline jurisdiction. This has added a number of months to

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the final SMP process, but in the end, will result in a more effective SMP. We look forward to continuing to work with Council and City staff in getting the SMP completed.

Thank you again for contacting us with your concerns. If you have any additional questions on this issue, please contact Paul Anderson, Ecology's regional wetland/401 Unit Supervisor, at (425) 649-7148 or send an email to Paul.S.Anderson@ecy.wa.gov.

Sincerely,



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