

Staff response and other submittals
received from
July 27, 2010 to August 2, 2010



Memorandum

Date: August 2, 2010

To: Chris Jordan, City Manager

From: Peter Spir, Associate Planner

Subject: This staff report responds to new material submitted after the July 19, 2010 City Council hearing during a week long written comment period that ended July 26, 2010. The hearing was to consider Troy and Gina Bundy's appeal of the Planning Director's decision to deny their application for a Water Resource Area (WRA) Protection permit to construct a swimming pool and patio area etc.

File: AP-10-01 (original file: WAP-09-03)

Purpose

During the week long open period to submit written evidence and arguments, staff received a considerable volume of material. Most of the submittals did not address the criteria relevant to the application; they merely said that the Bundy's should be allowed to keep their pool. However, of significance to staff were two memorandums from the appellant's wetland specialist, Jason Clinch of Terra Science, which addressed at length the location of the wetlands on Mr. and Mrs. Bundy's property. Staff will discuss these two memoranda at this time. It is staff's opinion that they provide compelling grounds for denial of the WRA permit. Staff will also address elements of attorney Michael Robinson's letter dated July 26, 2010.

Background

City Council held a public hearing on July 19, 2010 to consider Troy and Gina Bundy's appeal of the Planning Director's decision to deny their application for a Water Resource Area (WRA) Protection permit to construct a swimming pool, patio area and other associated work in an area protected by WRA regulations and a conservation easement. At the close of the hearing, City Council approved a request by Michael Robinson, attorney for the appellant, that the record be left open for public comments through

July 26, 2010 followed by rebuttals and a staff report by August 2, 2010 and the appellant's final statements by August 9, 2010.

The hearing is scheduled to reconvene on September 13, 2010.

The 120-day permit processing period was extended to September 30, 2010.

Discussion

Staff has long held that the AKS wetland delineation conducted in 2000 provides sufficient evidence that wetlands extend about five feet onto the appellant's property. Based on the memorandums of appellant's wetland consultant, Jason Clinch of Terra Science, findings can be made that the wetlands extend much further onto the property into the area of the pool, patio and associated improvements (including landscaping) in contravention of the approval criteria for CDC Chapter 32. This has further implications for the 50-foot wide transition areas. If the wetlands extend further onto the appellants property then the transition zones would cover even more of the site.

Evidence of Wetland

1. The AKS Engineering study delineated the wetlands in 2000. The City accepted that delineation. Associate Planner Kristi Crowell reviewed the AKS study, which was site specific for property which includes the parcel upon which the Bundy residence sits today. Ms. Crowell's credentials included a bachelor's degree in Biology and Environmental Science and a Masters degree in Geography with an emphasis on Natural Resource Conservation. She studied wetland delineation. Her thesis was on wetlands. The City hired her in 1996 to handle code enforcement of wetlands and natural drainage ways because of her expertise in this area. Ms. Crowell analyzed the AKS study and determined that the property contained enough indicia to be determined to be a wetland within the meaning of ORS 196.800(14). Ms. Crowell's determination formed the basis of the City's conclusion that the property is a wetland. Per the AKS delineation, the wetlands extend about five feet onto the appellant's property from the north property line. That would include the northern edge of the patio. While it is not necessary that the City's delineation is acknowledged by DSL, DSL does concur that the area is a wetland, see the revised Consent Agreement dated July 9, 2010, referred to in section 10, below.
2. The 2005 Local Wetland Inventory (LWI) identified wetlands extending about 29 feet onto the appellant's property. This inventory was adopted by City Council and approved by DSL. For specific sites, DSL notes that additional wetland delineation is needed.

3. Jason Clinch, a wetland consultant from Terra Science Inc. prepared two letters regarding the wetlands for the appellants. In a June 7, 2010 letter he states on page 1 paragraph 2 that: ***“Site visits have revealed that a swimming pool, patio and landscaping features have been constructed in wetlands in the back (north) part of your property.”***
4. In that same letter, Jason Clinch of Terra Science states (page 2, paragraph 3): ***“It has already been acknowledged during a recent site visit by DSL, the Corps and Terra Science Inc. (TSI, Jason Clinch) that areas impacted by the swimming pool, patio, landscaped areas, and drainage ditch qualified (and still qualify where not effectively filled, see above) as jurisdictional wetlands prior to impacts.”***
5. In that same letter, Jason Clinch of Terra Science states (page 4 paragraph 3) that: ***“In summary, it appears that the wetlands on the properties identified have been impacted through construction of the swimming pool, patio, landscaping and improvement of the drainage ditch.”***
6. In a July 23, 2010 letter, Jason Clinch of Terra Science states on page 2 paragraph 2: ***“Contemporary conditions clearly indicate a greater portion of the property would likely qualify as wetland under current wetland delineation methodology....”***
7. Jason Clinch of Terra Science states on page 4 paragraph 1: ***“...during the field visit with Mr. Spir, Ms. Anita Huffman (DSL-Clackamas County Permit coordinator), Ms. Kristen Hafer (Corps-Biologist/Permit Coordinator), and myself on May 5, 2010, all parties involved (with the possible exception of Mr. Spir) agreed that the wetlands continue to persist on the PGE property and the Bundy property.”***
8. Jason Clinch of Terra Science states on page 6 paragraph 8: ***“DSL rejected the wetland report by AKS and contends that much more of the property is likely to qualify as wetland than what the City identified when they accepted the faulty and incorrect AKS report....”*** In other words, the true extent of the wetland is greater than initially reported by AKS.
9. In that same letter, Jason Clinch of Terra Science states on page 8 paragraph 2 the following: ***“...the subject property still qualifies as a wetland and functions much the same as it did before.”***
10. Yet another piece of evidence regarding wetlands is the DSL Revised Consent Agreement signed by Mr. and Mrs. Bundy and dated July 9, 2010. In that legal agreement, the appellants acknowledge the facts of the case, as laid out by DSL, and agree to pay fines and mitigate as required. Under the ‘Stipulated Facts’ heading is the following entry:

"2. The properties contain a wetland, a 'water of the state' within the meaning of ORS 196.800(14).

By recognizing the fact that there are wetlands on their property the appellant's join a group of others including Terra Science (statement 7 above), DSL, AKS, Winterbrook Planning, authors of the DSL acknowledged 2005 Local Wetland Inventory and City staff who agree that wetlands are on the appellant's property. USACE also offered a reserved assessment in Terra Sciences memo that:

"the site visit revealed that a pool, patio, and landscaping may have been placed within wetlands in the backyard of your residence."

These findings run counter to and should, given the volume of professional findings, invalidate Michael Robinson's principal argument stated on page 3 of his July 26, 2010 letter when he wrote:

"The resource (wetlands) that the transition and buffer requirements in CDC Chapter 32 seek to protect is not located in the Bundy backyard."

Michael Robinson's subsequent statement on page 4 paragraph 6 that:

"None of the protected water features and vegetated corridors are affected by the pool and patio." is similarly wrong given statement 4 above; "It has already been acknowledged during a recent site visit by DSL, the Corps and Terra Science Inc. (TSI, Jason Clinch) that areas impacted by the swimming pool, patio, landscaped areas, and drainage ditch qualified (and still qualify where not effectively filled, see above) as jurisdictional wetlands prior to impacts."

Michael Robinson's reference to slide 5 of staff's July 19, 2010 power point as proof that there are no wetlands is incorrect. That slide, was based on the AKS delineation, and shows the wetland boundary in yellow dashed lines extending five feet onto the Bundy property.

Evidence of Fill

11. Jason Clinch of Terra Science in the June 7, 2010 letter states on page 1 paragraph 2: ***"Several soil samples taken near the patio and in the PGE Right-Of-Way indicated varying depths of fill (2 to 6 inches) over the native soil."***
12. Also in the DSL Revised Consent Agreement signed by Mr. and Mrs. Bundy and dated July 9, 2010, the appellants acknowledge the 'Stipulated Facts' including:

“3. Troy and Gina Bundy removed and/or filled more than 50 cubic yards of material within waters of the state without a permit or authorization from the Department.”

From these statements it is evident that there is 2 to 6 inches of fill near the patio and that the appellant’s acknowledge that there is fill on their property. Thus, CDC 32.050 (C) is not met in that grading the majority of the rear yard then constructing hardscapes (pool, patio) does not reflect any attempt to minimize the adverse effect on the water resource area.

Other Issues raised by Michael Robinson, Attorney for Appellants

Defining a Structure

Additional points raised by Michael Robinson included the contention that the concrete and steel pool is not a structure. Staff takes issue with that. CDC Chapter 2 Defines “Structure” as follows:

“Structure. Something constructed or built and having a fixed base on, or fixed connection to, the ground or another structure, and platforms, walks, and driveways more than 30 inches above grade and not over any basement or story below.”

Michael Robinson, states that since the 15 X 30 foot concrete pool is not over 30 inches high it is not a structure.

Staff finds that the CDC definition should be interpreted to define two separate types of structures given the use of the conjunction “and”.

“Something constructed or built and having a fixed base on, or fixed connection to, the ground or another structure and...”

“platforms, walks, and driveways more than 30 inches above grade and not over any basement or story below.”

Staff finds that the pool meets the first part of the definition, the pool is a structure and therefore the structural setback would apply.

Additional support for this comes from the Oregon Residential Specialties Code as adopted by the West Linn Municipal Code. It defines a swimming pool as:

“Any STRUCTURE intended for swimming or recreational bathing that contains water over 24 inches (610 mm) deep. This includes in-ground, aboveground and on-ground swimming pools, hot tubs and spas.”

Also there is ORSC §R202 Definitions: Structure: *“That which is built or constructed.”*

Defining Passive Recreation Facilities

Michael Robinson also contends that a swimming pool and patio is a “passive recreation facility” and therefore permitted in the Water Resource Area transition and structural setback area per CDC 32.050(F). That code section was written to accommodate needed public facilities in WRA when there is no practical alternative. For example, to traverse a WRA with a necessary road or water transmission pipeline with a minimum of disturbance. The legislative intent was that “Passive recreation facilities” should be limited to narrow trails in parks traversing drainageways as contemplated in the Parks and Natural Area Design Review definition for “passive-oriented parks” (CDC 56.015). It does not seem reasonable to consider a private 30 X 15 foot pool, patio, rockery and water fountain as a passive recreation facility in this context.

Staff finds that CDC Chapter 56.015: Design Review for Active and Passive Recreation-Oriented Parks applies. It defines passive oriented parks as follows: *“Passive-oriented parks focus is upon unstructured play, relaxation, family picnics and similar activities.... Support facilities, such as covered picnic or play areas, etc. are discouraged unless the facilities of a more community wide nature are included at the park.”*

Metro’s Greenspaces Master Plan (Adopted 1992) Definitions p. 131 & 133 offers the following definition:

*“Active recreation – recreation that uses specifically built facilities or that occurs in such density or from that it requires or results in a modification o the area or resource (i.e. campgrounds, golf courses)(sometimes called high intensity recreation)
Passive recreation – recreation not requiring developed facilities that can be accommodated without change to the area or resource (sometimes called low-density recreation).”*

Department of State Lands, Division 120, Wetland Conservation Plan Wetland Resource Designations and Analysis of Alternatives. In “141-120-0080 Uses Allowed in the Protection Category” it includes:

“(2)(a) Passive recreation activities that require no structures, such as bird watching, canoeing or nature walks;”

Staff finds the swimming pool is not a “passive recreation facility”. Therefore staff finds that the criterion is not met.

Eligibility for Hardship

The hardship provisions allow the development of lots that, because of the Water Resource Area restrictions, would otherwise be deprived of all economically viable use of the land. If that hardship is proven then the code allows up to 5,000 square

feet of the site to be disturbed (including any grading and excavation).

It would be difficult for the appellants to argue that they are being denied all economically viable uses of the property, since the house and property at 1215 Ninth Street has been assessed by Clackamas County at 640,370 dollars which demonstrates that the site has already achieved economic viability.

The existing driveways, front sidewalk and the house footprint total approximately 7,175 square feet (not counting the pool, patio, associated hardscapes and graded areas) so even if hardship were proven, the maximum 5,000 square foot allowance has already been exceeded. Discussion of "hardship" procedures is also addressed by staff on page CC-19.

Value of Transitions

There is a pervasive message being sent that only the wetlands are important and that the transition zone is not relevant or has no value. In terms of the CDC it is relevant in that development is excluded from these areas. And as far as value, staff would defer to an excerpt from Freshwater Wetlands in Washington State Chapter 5, Volume 1 – A Synthesis of the Science, August 2003, regarding buffers (transitions).

5.5.2 Functions Provided by Buffers, states:

"The literature is broadly consistent on the ways in which buffers can provide for the protection and maintenance of wetland functions. These include:

- *Removing sediment*
- *Removing excess nutrients (phosphorous and nitrogen)*
- *Removing toxics (bacteria, metals, pesticides)*
- *Influencing the microclimate*
- *Maintaining adjacent habitat critical for the life needs of many species that use wetlands*
- *Screening adjacent disturbances (noise, light, etc.)*
- *Maintaining habitat connectivity".*

(Staff is submitting into the record "The Science and Effectiveness of Wetland Management Tools" dated March 2005.)

Relevance of the Open Space Conservation Easement

And although the appellant's attorney contends that the Open Space Conservation Easement (page 35-38/ (105-108)) is not relevant to this WRA application, staff contends that a decision to approve this WRA permit could not take place with the knowledge that the appellant is in violation of the terms of the easement.

Response of other Agencies

Whether DSL or USACE pursue enforcement is irrelevant to the City of West Linn's obligation to enforce its own regulations. That having been said much of this discussion is semantics, DSL is not pursuing "enforcement" but is requiring payment of penalty plus mitigation. USACE has their "After the Fact" permit process. City staff respects both agencies permitting and compliance procedures. It is staff's opinion that their varied positions speaks to the culture or priorities of each agency.

Portland General Electric may not be pursuing action against the appellants but they have not sanctioned or approved any fill or activity either. In a June 2, 2010 e-mail on page CC-23, Tina Tippin of PGE stated,
"PGE has not granted the Bundy's any right to access the PGE property interest, or to remove any trees, re-grade or landscape PGE's property in any fashion and our records do not reflect any request by the Bundy's to do so. Were such a request made and granted it would be conditioned upon strict compliance with all applicable laws and property rights."

The subsequent July 27, 2010 e-mail from Tina Tippin to Troy Bundy only outlined a procedure for the appellant to follow and did not promise approval:
"PGE needs to review the mitigation plan prior to giving any type of approval."

Conclusion

To date, the City has relied on the AKS wetland delineation done in 2000 which showed wetland extending just five feet onto the Appellant's property. But based on Mr. Clinch of Terra Science, the wetland may extend much further onto the appellant's property. According to Mr. Clinch, DSL contends, in item 8 above, that **"...much more of the appellant's property is likely to qualify as wetland...."**

The appellant's wetland consultant continues to make the City's case with the finding that **"It has already been acknowledged during a recent site visit by DSL, the Corps and Terra Science Inc. (TSI, Jason Clinch) that areas impacted by the swimming pool, patio, landscaped areas, and drainage ditch qualified (and still qualify, where not effectively filled, see above) as jurisdictional wetlands prior to impacts."**

Finally, the most definitive statement (3 above) from the June 7, 2010 letter from Terra Science:
Site visits have revealed that a swimming pool, patio and landscaping features have been constructed in wetlands in the back (north) part of your property."

Those statements, plus statement numbers 5, 6, 7, 8 and 9 (above) from Terra Science, (including those attributed to DSL and the Corps (USACE) by Terra Science), means that

the pool, patio, plus associated fill/landscaping etc. are not just in a transition or setback area, as staff contended originally, but that they are located on the actual wetlands. This violates CDC 32.050 (B), (C), (D), (E) and (L). The signed DSL consent agreement also makes it abundantly clear that the appellants acknowledge the presence of wetlands and fill on their property. Terra Science's discovery of 2-6 inches of fill near the patio (statement 12 above) also means that the appellant violates CDC 32.050(C).

Options

1. City Council could agree with staff and adopt the findings listed above from Terra Science that the wetlands extend beyond the delineation provided by AKS and that the swimming pool and patio are on the wetlands.
2. City Council could disregard the Terra Science findings and rely instead on the AKS wetland delineation which would mean that only some of the patio is in wetlands but all of the swimming pool, patio and associated modifications are in the transition and setback area.

Recommendation

Staff recommends option 1. The appeal should be denied based on the findings by Terra Science listed above plus the findings contained in the memorandum to the City Manager dated June 14, 2010 (pages CC-2 through CC-21) and the findings contained in the Planning Director's decision (pages 70-116).

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Chapter 5

The Science and Effectiveness of Wetland Management Tools

5.1 Reader's Guide to this Chapter

This chapter builds on the previous discussion of how wetlands function (Chapter 2), how human activities and changes in land use cause disturbances (across the landscape and at specific sites) that influence the factors that control wetland functions (Chapter 3), and how wetland functions are impacted by these disturbances (Chapter 4).

Chapter 5 presents a synthesis of what the current literature reports on four tools currently used to identify wetlands and to address impacts to wetlands and their functions: wetland definitions, wetland delineation methods, wetland ratings, and buffers. This chapter does not provide language or recommendations for regulatory or policy language—those will be provided in a separate volume on management options and recommendations (Volume 2).

5.1.1 Chapter Contents

Major sections of this chapter and the topics they cover include:

Section 5.2, Introduction and Background on Regulatory Tools introduces the key wetland management tools that are discussed in this chapter.

Section 5.3, How Wetlands Are Defined and Delineated describes similarities and differences in the way various agencies define *wetland*. It explains the critical difference between “biological wetlands” and “regulated wetlands.” It also discusses certain types of wetlands that are frequently exempted from regulation, such as isolated wetlands, small wetlands, or those designated as Prior Converted Croplands. The various manuals that have been developed to guide the delineation of wetland boundaries are also briefly discussed.

Section 5.4, Wetland Rating Systems discusses how rating systems have been developed to rapidly assess wetland characteristics in the field. These characterizations allow wetlands to be rated for regulatory or management purposes. This section introduces the reader to the Washington State wetland rating systems, which were briefly mentioned previously in a number of places in the document. It also includes discussion of certain wetland types that require particular attention under the Washington State wetland rating systems.

Section 5.5, Buffers comprises the bulk of this chapter. This section provides a synthesis of the literature on how buffers protect and maintain wetland functions. The section concludes by summarizing recommendations from the literature for establishing effective buffer widths.

Section 5.6, Chapter Summary and Conclusions ties together the major concepts presented in the chapter.

5.1.2 Where to Find Summary Information and Conclusions

Each major section of this chapter concludes with a brief summary of the major points resulting from the literature review on that topic in a bulleted list. The reader is encouraged to remember that a review of the entire section preceding the summary is necessary for an in-depth understanding of the topic.

For summaries of the information presented in this chapter, see the following sections:

- Section 5.3.6
- Section 5.4.2
- Section 5.5.3.5
- Section 5.5.4.4
- Section 5.5.5.4
- Section 5.5.6.1

In addition, Section 5.6 provides a summary and conclusions about the overarching themes gleaned from the literature and presented in this chapter.

5.1.3 Data Sources and Data Gaps

No literature review was conducted for the section on wetland definitions or delineations. Both of these management tools are currently established by state and federal statutes. It was determined that review of the previous discourse on these topics was not relevant to the current state of the science for Washington State.

Considerable research was published prior to 2000 on the role of small wetlands relative to wildlife in a landscape context. Since then, several synthesis documents on small and isolated wetlands have been published.

Papers on the adequacy or effectiveness of wetland rating systems were not found; instead, the literature concentrates on function assessment methods. This chapter does not attempt to assess the science on wetland function assessment because the Washington State Department of Ecology (Ecology) has evaluated and described different function assessment methods previously (see Volume 2, Appendix 5-B for more information). Additionally, Ecology completed function assessment methods for several different

wetland hydrogeomorphic types on both sides of the state within the last five years (see Chapter 2 for further information).

The subject of buffers is well documented in the scientific literature. Numerous studies from across the U.S. have been conducted for wetland and stream buffers. The results of buffer studies, completed here in the Pacific Northwest as well as other areas of the country, provide remarkably consistent findings related to the factors that are important in determining appropriate buffer widths. This consistency is particularly striking in the numerous buffer synthesis documents. Additionally, the results of many studies conducted in other parts of the U.S. have been replicated in studies in the Pacific Northwest.

Determining relevance to Washington, however, can be challenging, since the physical settings of the studies vary widely. Some, however, obviously do relate to Washington; for example, literature related to agricultural practices and vegetated filter strips from the north-central United States and south-central Canada is relevant to some agricultural practices in Washington, especially in areas east of the Cascades.

The majority of research on buffers tends to focus on how buffers influence water quality. Far fewer studies examine the influence of a buffer's physical characteristics on attenuating rates of surface water flow.

Most studies on buffers related to wildlife document the needs of a particular species or guild related to how far they travel from aquatic habitats to fulfill their life-needs. While there is substantial literature on the implications of habitat fragmentation, this literature does not specifically address the role of buffers in reducing fragmentation between wetlands and other parts of the landscape.

Numerous compilations and syntheses of the literature concerning buffers have been completed since 1990. These synthesis documents are used in this document as direct sources when no more recent research was found. This chapter also cites literature related to stream buffers and riparian areas when the findings are relevant to the functions or processes these areas provide to the adjacent aquatic resource.

A more detailed description of the types of literature used and any recognized gaps in the scientific literature are provided within each section on buffers as appropriate.

5.2 Introduction and Background on Regulatory Tools

The regulatory tools discussed in this chapter are components of “typical” wetland protection programs. The intent is not to analyze all elements of protection programs and their regulations but to focus on the key science-based elements relating directly to wetland protection and management. Therefore, this chapter focuses on the following four elements:

- Wetland definitions
- Wetland delineation methods
- Wetland ratings
- Buffers

The topic of compensatory mitigation, another key regulatory tool, is discussed separately in Chapter 6 because of the volume of information and literature available on this subject.

5.3 How Wetlands are Defined and Delineated

5.3.1 How Agencies Define Wetlands

Several definitions of wetlands have been developed and used by various federal, state, and local agencies and jurisdictions. The effectiveness of current federal or state wetland definitions was not evaluated as part of this synthesis. However, definitions are included here because how a wetland is defined is critical to determining what areas are subject to the provisions of a law or regulation.

For the purposes of most laws and regulations, wetlands are usually defined using one of the following two definitions:

Those areas that are saturated or inundated by surface or groundwater at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. (U.S. Army Corps of Engineers 1987);

or

“Wetlands” or “wetland areas” means areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas. Wetlands do not include those artificial wetlands intentionally created from non-wetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street, or highway. Wetlands may include those artificial wetlands intentionally created from nonwetland areas to mitigate the conversion of wetlands. (Washington Administrative Code 173-22-030.)

The Washington State definition is derived from the U.S. Army Corps of Engineers (Corps) definition, but it also includes clarifying language that identifies which common human-made or -induced features are not meant to be defined as wetland. The state definition is required by the Growth Management Act (RCW 36.70A.030 (20)) to be used in all local critical area regulations.

In addition, for the National Wetland Inventory, the U.S. Fish and Wildlife Service (USFWS) defined wetlands as follows:

Wetlands are lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For the purpose of this classification wetlands must have one or more of the following three attributes: (1) at least periodically, the land supports predominantly hydrophytes, (2) the substrate is predominantly undrained hydric soil, and (3) the substrate is nonsoil and is saturated with water or covered by shallow water at some time during the growing season of each year. (Cowardin et al. 1979)

Note that the definition used by the USFWS allows the use of a single parameter to determine if an area is a wetland. The definition also includes areas that may not be vegetated, such as gravel bars and mudflats. In most cases, the Corps and Ecology definitions require the presence of all three parameters (vegetation, soil, and hydrology) for an area to be considered a wetland, and they both assume that wetlands generally are vegetated.

5.3.2 Biological vs. Regulated Wetlands

In some jurisdictions, all lands that meet the definition of *wetland* are regulated. However, it is not unusual for a jurisdiction to differentiate within its regulations between “wetlands” (i.e., biological wetlands) and “regulated wetlands” (i.e., wetlands that they intend to regulate). The definition of what constitutes a regulated wetland may vary from jurisdiction to jurisdiction.

In reviewing regulatory language from local wetland regulations, the three primary criteria used to differentiate between “wetland” and “regulated wetland” were:

- The category or rating of the wetland
- The size of the wetland
- The type of wetland (such as isolated wetlands and those designated as Prior Converted Croplands)

In general, a category or rating system has been used historically in regulatory language to differentiate between wetlands that need different degrees of protection. Rating systems are used by local jurisdictions to group wetlands based on physical characteristics and/or functions that the wetlands may provide and how those characteristics or functions are valued. Section 5.4 of this document describes the current

state of the science on wetland ratings and the wetland rating systems developed for eastern and western Washington.

The criterion of wetland size is usually a minimum below which the jurisdiction will not regulate a wetland. For example, the jurisdiction may allow no fill in wetlands larger than 10,000 square feet, or they may include language such as “Category 2 wetlands larger than 0.25 acre cannot be altered.” The historical rationale for the use of size as a regulatory criterion was the perception that “bigger is better,” and the belief that small wetlands were less important and did not provide significant functions. The scientific literature of the last 10 years has made it clear that size does matter but not in the way previously believed. In multiple studies, small wetlands have been shown to contain a significant diversity of plant and animal species (See Section 5.3.3 for more information).

Additionally, two other wetland types may be exempted from regulation: isolated wetlands and wetlands designated as Prior Converted Croplands.

In 2001, the U.S. Supreme Court determined that isolated wetlands are not subject to regulation under Section 404 of the federal Clean Water Act if the only basis for their regulation is their use by migratory birds. However, the Court did not define “isolated,” and the federal government has not issued any new guidance or regulations to clarify the situation. In general practice, the U.S. Army Corps of Engineers (Corps), the federal agency that administers the Clean Water Act, considers isolated wetlands to be those of any size that are not adjacent to or have no direct surface water connection to any navigable waters. However, recent lower court decisions have interpreted Corps jurisdiction over isolated waters differently, and the situation is in flux.

Washington State has determined that isolated wetlands are regulated by the Department of Ecology under the state Water Pollution Control Act (RCW 90.48). Since some local jurisdictions in Washington fashion their wetland regulations on the federal or state standards, it is important to consider the implications of not regulating isolated wetlands. Thus, scientific information on isolated wetlands is discussed in Section 5.3.4.

Wetlands that are designated as Prior Converted Croplands (PCC) are another type of wetland that are exempt from regulation by the federal government. PCC are those wetlands that were drained or otherwise manipulated prior to December 23, 1985, for the production of commodity crops. They are wetlands in which inundation (ponding) does not occur for more than 14 consecutive days during the growing season. These sites must produce an agricultural commodity that requires planting a crop that needs annual tilling. These areas are considered waters of the U.S. if they are abandoned (i.e., tilling and planting has not occurred for five consecutive years), and hydrophytic vegetation and wetland hydrology returns. However, even if they are not abandoned, many of the PCCs in Washington still meet the three criteria required for biological wetlands. As with isolated wetlands, the Department of Ecology regulates PCCs that are wetlands under state law.

No information on wetland areas meeting the definition of PCC was found in the scientific literature. However, many wetlands meeting the criteria for PCC would still be expected to provide important functions, given that the criteria for being designated "Prior Converted" require only that the wetland has been manipulated for production of commodity crops since 1985 and does not pond for more than 14 consecutive days during the growing season. The authors of Volume I have observed widespread flooding in PCC areas during the winter and have observed use of these areas by several species of overwintering waterfowl. One published study of waterfowl in Puget Sound documented significant use of farmlands by several duck species for feeding during the winter (Lovvorn and Baldwin 1996). This study found greater use by waterfowl of farm fields that were flooded in winter, but made no distinction between upland farm fields, farmed wetlands, and Prior Converted Croplands. In addition, the authors of Volume I have documented significant water quality and quantity functions provided by PCCs in projects reviewed and permitted by the Department of Ecology (This data has not been published).

If the agricultural activities were abandoned, PCCs could revert to a plant community characteristic of wetland; and, without maintenance of the hydrologic modifications, the wetland's water regime may revert to a condition more like that which existed prior to the alteration. Further analysis of the functions of wetland areas designated as PCC is needed.

No literature was found that discussed the ecological consequences of the legal bifurcation between biological wetlands and regulated wetlands. However, literature was found that discusses the functions and values provided by small wetlands and isolated wetlands, as discussed below.

5.3.3 Small Wetlands

The elimination of small wetlands is an issue that has gained attention over the past 10 years. Many regulations have preferentially allowed filling of small wetlands. Many regulations completely exempt wetlands under a certain threshold. Also, size is one of the most common characteristics used in determining wetland ratings at the local level, and smaller wetlands typically receive lower levels of protection. Yet, the loss of small wetlands is one of the most common cumulative impacts on wetlands and wildlife (Weller 1988, Tiner et al. 2002).

No definition of *small* is provided here because what constitutes "small" varies between jurisdictions and scientific studies (see also Section 5.3.2). In some contexts, small is determined exclusively by size. Small may mean less than 0.10 acre; in others, it may mean less than 10 acres.

Some jurisdictions, however, also differentiate small wetlands using criteria that reflect function and values. Small wetlands can have outlets, be in a floodplain, or be otherwise associated with a larger aquatic system. These characteristics are often used in rating systems and, combined with size, determine what is considered a small wetland. For

example, a jurisdiction may include language in their regulations such as “Category 2 wetlands larger than 0.25 acre cannot be altered.” For each of the studies below, we have included the authors' definition of small.

In addition to the obvious loss of habitat for wildlife, fragmentation of habitat increases as small wetlands are eliminated, resulting in greater distances between wetland patches in the landscape. Semlitsch and Bodie (1998) found that creating greater distances between wetlands of 0.5 to 10 acres in size can have a significant effect on the ability of a landscape to support viable populations of amphibians, as juveniles dispersing from a source wetland may not be able to travel far enough to recolonize other surrounding (now distant) wetlands. Management priorities have focused on larger, semi-permanent wetlands, with the least emphasis on protecting the smaller, seasonal wetlands (< 1.2 acres) that are critical components of wetland complexes (Naugle et al. 2001).

The following sections describe studies of the use of small wetlands by wildlife, and the role that small wetlands play in maintaining connections between habitats. For each of these studies, the authors' definition of small is described.

Studies of the relationship between wetland size and wildlife distribution have mostly focused on amphibians and birds. Few studies have examined how use of wetlands by mammals relates to wetland size, and no studies of this relationship were found for macroinvertebrates or reptiles. No studies were found that documented the role that small wetlands play in providing water quality or hydrologic functions. However, the degree to which small wetlands perform water quality or hydrologic functions is likely to be determined by site-specific characteristics (see Chapter 2) and can be estimated on a per-acre basis using some of the available function assessment methods.

5.3.3.1 Amphibians and Small Wetlands

Snodgrass et al. (2000) undertook a study of amphibian use of wetlands to address three commonly held beliefs about small wetlands (0.7 acres - 3 acres):

- They have short hydroperiods
- They support few species
- They support species that are also found in larger wetlands

Snodgrass et al. (2000) determined that amphibian species richness increases with length of hydroperiod. They also concluded that short-hydroperiod wetlands (smaller temporarily ponded wetlands) are also important in maintaining biological diversity in that they support species not found in larger wetlands with longer hydroperiods. The species they found in small wetlands were not a subset of those in larger wetlands but rather a unique group of species.

Similarly, amphibian richness in Puget Sound wetlands was found to have no correlation with wetland size (1 - 30 acres). High richness occurred in some of the smallest wetlands (Richter and Azous 1995). The study indicates that small wetlands that are vegetatively

simple can serve adequately as breeding habitats as long as favorable nonbreeding habitat is present nearby. Species richness also was not related to persistence of ponding.

Gibbs (1993) conducted a simulation model in Maine from which he theorized that small wetlands may be most important for wetland organisms with low population growth rates and low densities. The model demonstrated that the loss of small freshwater wetlands (less than approximately 5 acres [2 ha]) would result in a decline of total wetland area by 19% and total wetland number by 62%, while the average distance between wetlands would increase by 67% (Gibbs 1993). The model showed that the loss of small wetlands would result in a change (from 90% to 54%) of the area that would lie within the maximum migration distance of terrestrial-dwelling and aquatic-breeding amphibians. The risk of extinction would significantly increase for local populations of turtles, small birds, and small mammals that are currently stable even though the model showed no change in the risk of metapopulation extinction for salamanders or frogs. Amphibian populations in the study were buffered from the risk of extinction due to high rates of population increase. The model demonstrated that dispersal ability for amphibians is a predictor of population growth rate and density, not sensitivity of a population to loss of small wetlands.

5.3.3.2 Birds and Small Wetlands

Bird use of wetlands appears to have a stronger relationship to wetland size than that of amphibians. Bird richness was positively correlated with larger wetland size in a Puget Sound study of palustrine wetlands (Richter and Azous 2001b). This is attributed to the fact that larger wetlands in the study generally had greater structural complexity and a greater number of habitat types.

Martin-Yanny (1992) also found that bird species richness and abundance in wetlands of the Pacific Northwest are positively correlated with wetland size. However, Martin-Yanny noted that habitat heterogeneity was a more important determining factor than wetland area in influencing bird species richness. Wetlands in highly urbanized watersheds had fewer neotropical migrant species, fewer ground-nesting birds, and more edge-tolerant (habitat generalist) species. This is because urbanizing watersheds tend to have smaller wetlands (less than 10 acres [4 ha]) with more edge habitat, making birds more susceptible to competition, predation, and nest parasitism. The author recommends preserving large wetlands or complexes of smaller wetlands that are connected by extensive upland buffers.

In northern prairie marshes, bird species richness was also seen to increase with marsh size and to decrease as the wetland became more isolated (Brown and Dinsmore 1986). Marshes that were part of wetland complexes showed higher species richness than isolated wetlands. Certain bird species used smaller marshes only when the marshes were part of a wetland complex. Large isolated marshes in the study often had lower species richness than smaller marshes that were part of wetland complexes. While bird species richness increased, the rate of increase slowed as the marshes became larger. In other words, they concluded that prairie marshes in the size range of 49 to 74 acres (20 to 30 ha) were more efficient in preserving bird species than larger marshes.

A study of agriculturally disturbed wetlands in western Oregon reached similar conclusions in finding that larger wetlands support more bird species (Budeau and Snow 1992). These authors also showed that wetlands of all sizes were important to water-birds.

However, in eastern Washington, Foster et al. (1984) found that waterfowl breeding use of wetlands in the Columbia Basin was greatest in smaller wetlands (less than 1 acre [0.4 ha]).

5.3.3.3 Mammals and Small Wetlands

The study that modeled the effects of the loss of small wetlands in Maine showed that local populations of small mammals faced a significant risk of extinction following the loss of small wetlands (<5 acres) (Gibbs 1993). However, in a study of Puget Sound wetlands, Richter and Azous (2001c) concluded that wetland size alone was not a significant factor in determining mammal richness or abundance. They noted that small-mammal richness was most closely affected by the combined factors of:

- Wetland size
- Extent of retention of forest adjacent to the wetland
- Quantity of large woody debris within wetland buffers

In conclusion, the literature suggests that size is not a significant factor in contributing to most wetland habitat functions. Rather, habitat structure, connectivity, and wetland hydroperiod are much more significant factors in determining habitat functions than size alone. The literature emphasizes that small wetlands are critically important to amphibians, particularly when connectivity between wetlands and with adjacent uplands is maintained. However, none of the studies evaluated the role of wetlands less than 0.5 acre, so the implications of exempting wetlands less than 0.25 acre, as is commonly done in local wetland regulations, are unknown.

The next section deals specifically with isolated wetlands. The following excerpt from Moler and Franz (1987) describes small, isolated wetlands and sheds some light on the attributes of both size and isolation.

To a great extent, the unique values and functions of small, isolated wetlands have been overlooked. This oversight derives from several factors, perhaps foremost being the general tendency to think of small wetlands as being little more than subsets of larger wetlands. So long as the uniqueness of small wetlands is unrecognized, then it is intuitive to think of wetlands as declining in value directly as function of size. Similarly, so long as the unique values of isolated wetlands are unrecognized, it is understandable that connected wetlands might be considered of greater value. In reality, small isolated wetlands are biologically unique systems. Because of their isolation and small size, they support a very different assemblage of species than that found in

larger, more permanently wet situations. The ephemeral nature of many small wetlands makes them unsuitable for species which require permanent water.

5.3.4 Isolated Wetlands

Isolated wetlands are being addressed in this document because of the recent Supreme Court decision to exclude many isolated wetlands from federal regulation. The Supreme Court decision regarding isolated wetlands was made based on a legal interpretation of jurisdiction under the federal Clean Water Act (*Solid Waste of Northern Cook County v. United States Army Corps of Engineers*). The key factor was the language in the Act that relates to navigable waters. The Court did not rule that isolated wetlands are less important than non-isolated wetlands, only that the intent of Congress in passing the Clean Water Act was to relate the protection of waters of the United States to navigability. The Court also did not provide any definition of what constitutes “isolation” for purposes of jurisdiction.

The Seattle District of the U.S. Army Corps of Engineers (Corps) does not have any national or regional guidance for making isolated wetland determinations. As of November 2004, if a wetland meets the test of "adjacency" (neighboring, bordering or contiguous) with any navigable water, or if the wetland has a surface outlet that drains to a navigable water, then the Corps does not consider it isolated (T.J. Stetz, U.S. Army Corps of Engineers, Seattle, personal communication 2004). Future court or administrative decisions may change how isolated wetlands are determined.

Much confusion has resulted from this decision, and some in the public have assumed that isolated wetlands are less important or less worthy of protection. Therefore, it is important to summarize some of the basic science on isolated wetlands, which is presented in the paragraphs that follow.

Much of the information comes from the work of Tiner et al. (2002) and a recent issue of *Wetlands* (Volume 23, #3, 2003) that includes numerous articles on isolated wetlands. Readers are directed to this work for more detailed information. Additionally, the work of Hruby et al. (1999, 2000) in developing assessment methods for wetland functions in Washington provides important scientific information on depression wetlands in Washington, a wetland type that contains the majority of isolated wetlands in Washington.

Wetlands can be defined as isolated based on their geographic isolation, ecological isolation, or hydrologic isolation (Tiner et al. 2002). For this discussion, isolated wetlands are defined by a very specific type of hydrologic isolation—they do not have a surface outlet by which water leaves the wetland, even seasonally, to another water body. Although frequently described as closed depressions (Tiner et al. 2002, Winter and LaBaugh 2003), isolated wetlands can also be sloped wetlands where surface water, if present, re-enters the shallow groundwater zone at the base of the wetland and is not linked via surface flows to a downstream water body. Isolated wetlands are not

necessarily small. They can be large systems with substantial heterogeneity and diverse habitat types (Tiner et al. 2002, Leibowitz 2003).

Generally, isolated wetlands provide most of the same functions as non-isolated wetlands and do so for the same reasons: position in the landscape, hydrologic regime, and type of soils and vegetation present (Leibowitz 2003, Whigam and Jordan 2003, Leibowitz and Nadeau 2003). Basic functions of isolated wetlands as described by Hruby et al. (1999), Tiner et al. (2002), Leibowitz (2003), and Whigam and Jordan (2003) are presented below.

- **Water quantity (hydrologic functions).** Isolated wetlands have no surface outlet. Precipitation and local runoff entering the wetland must either return to the atmosphere by evapotranspiration or infiltrate into groundwater (Leibowitz 2003). As a result, their ability to retain surface water may be significant, depending upon the surrounding topography. This provides potential flood storage because no surface water leaves the wetland to cause potential flooding or erosion downgradient.
- **Water quality.** Because they lack an outlet, isolated wetlands function as sediment traps for contaminants that move into them. Isolated wetlands function as sinks for most dissolved and all sediment-associated nutrients and toxics because they have no outlets that allow materials to be transported downgradient (Hruby et al. 1999). A review of the literature by Whigam and Jordan (2003) concludes that isolated, depression wetlands have been shown to improve water quality and to efficiently retain nutrients.
- **Wildlife habitat.** Isolated wetlands provide wildlife habitat functions similar to those of non-isolated wetlands (Leibowitz 2003), except in regard to habitat for migrating fish in Washington (Hruby et al. 1999). The habitat value of isolated wetlands is governed by the same factors as non-isolated wetlands (hydrologic regime, vegetation, habitat structure, connectivity to other habitats, etc.) (Leibowitz 2003, Gibbons 2003). Tiner et al. (2002) found that isolated wetlands provide essential habitat for a wide range of guilds and may be vital to maintaining viable, genetically diverse metapopulations. They state:

From an ecological standpoint, isolated wetlands are among the country's most significant biological resources. In some areas, isolation has led to the evolution of endemic species vital for the conservation of biodiversity. In other cases, their isolation and sheer numbers in a given locality have made these wetlands crucial habitats for amphibian breeding and survival (e.g., woodland vernal pools and cypress domes) or for waterfowl and waterbird breeding (e.g., potholes). In arid and semi-arid regions, many isolated wetlands are veritable oases – watering places and habitats vital to many wildlife that use them for breeding, feeding, and resting, or for their primary residence.

5.3.5 Delineation Methods

In addition to the definition of what constitutes a wetland, the U.S. Army Corps of Engineers (Corps) and Washington State Department of Ecology (Ecology) have provided guidance on how to determine the edge of a wetland (i.e., how to delineate the wetland boundary). Delineating a wetland's boundary is a necessary step in the regulatory process because it factors into calculations of potential wetland impacts and determines the starting point for buffers and setbacks.

The Corps published a federal manual to delineate wetlands in 1987 and another manual in 1989, jointly with the U.S. Environmental Protection Agency (EPA), Soil Conservation Service, and U.S. Fish and Wildlife Service. In subsequent years (1991, 1992, and with EPA in 1994) the Corps released updates to clarify questions and provide regional guidance.

In the early 1990s, there was substantial controversy over proposals to change the 1987 and 1989 federal delineation manuals. A substantial amount of literature was produced analyzing the effectiveness of the various delineation manuals for determining a wetland edge. In subsequent years, the use of the 1987 Federal Manual for Delineation of Wetland Areas became the required legal standard for the Corps.

As required by state legislation, Ecology issued the *Washington State Wetlands Identification and Delineation Manual* in 1996 (WAC 173-22-080, Ecology publication #96-94). Ecology's manual uses the original 1987 Corps of Engineers manual and incorporates changes in the manual made by the federal government since 1987. The state manual includes national guidance issued by the Corps in 1991 and 1992 (which is not present in the 1987 Corps manual), as well as regional guidance issued by the Corps and EPA in 1994. In addition, the state manual eliminated references and examples that were not relevant to Washington State and added examples and situations relevant to Washington. The 1996 state manual is required by statute (RCW 36.70A.175) to be used by local jurisdictions in implementing the Growth Management Act. Since the two manuals rely upon the same criteria and indicators for hydrology, soils, and vegetation, proper use of either manual should result in the same boundary.

5.3.6 Summary of Key Points

- Regulatory agencies define the term *wetland* in slightly different ways.
- Local jurisdictions often differentiate between “biological wetlands” and “regulated wetlands”. The distinction is often based on the wetland rating and/or wetland size.
- The studies of the correlation of wetland size to wildlife use conflict somewhat in their findings, but most generally conclude that small wetlands are important habitats (particularly where adjacent buffer habitats are available) and that elimination of small wetlands can negatively impact local populations.

- Small wetlands provide habitat for a range of species that are not a subset of the species found in larger, more permanently inundated wetlands. Small wetlands do not just provide a smaller area for the same array of amphibian species found in larger wetlands.
- Small wetlands are very important in reducing isolation among wetland habitat patches. Smaller wetlands provide significant habitat for wildlife and affect the habitat suitability of larger wetlands by reducing isolation on the landscape.
- The presence of small wetlands reduces the distance between wetlands and thus increases the probability of successful dispersal of organisms. This, in turn, likely increases the number of individuals dispersing among patches in a wetland mosaic, thereby reducing the chance of population extinction.
- Isolated wetlands provide the same range of wetland functions as non-isolated wetlands. Isolated wetlands provide important water quantity, water quality, and habitat functions.
- The U.S. Army Corps of Engineers 1987 wetland delineation manual and the 1996 *Washington State Wetlands Identification and Delineation Manual* are the current standards to be used in determining the boundary of a wetland. Correct use of these two manuals should result in the same wetland boundary.

5.4 Wetland Rating Systems

Wetland rating systems (or categorizations) are one of the numerous procedures that have been developed to analyze wetlands, providing ways to identify, characterize, or rate wetland characteristics, functions, and social benefits (values). Categorizations, as well as other procedures such as function assessment, are used by natural resource managers and regulators in a variety of contexts for regulating, planning, and managing the wetland resource (Bartoldus 1999). In the context of local regulations, rating systems are used to categorize wetlands based on different needs for protection. However, rating systems can often be used as one means to analyze wetlands.

Many different procedures to analyze wetlands have been developed in the last three decades. These range from detailed scientific evaluations that may require many years to complete, to the judgments of individual experts during one visit to a wetland. For example, Bartoldus (1999) summarized 40 different tools that were developed up to 1998, and that are used to meet the needs of regulating and managing wetlands.

Although many different rating-type tools have been developed, the literature search for this document did not uncover any analyses of the effectiveness of rating systems at protecting the wetland resource. It is assumed that better protection for wetlands is provided with improved understanding of wetland functions and values (e.g., Roth et al. 1993, National Research Council 1995).

Scientific rigor is often time consuming and costly. For regulatory use, tools are needed that provide some information on the functions and values of wetlands in a time- and cost-effective way. One way to accomplish this is with an analytical tool that categorizes wetlands by their important attributes or characteristics based on the collective judgment of regional experts. Categorization methods, such as rating systems, are relatively rapid but can still provide some scientific rigor (Hruby 1999).

The rapid method most commonly used for analyzing wetlands in eastern and western Washington has been Ecology's wetland rating systems (Ecology 1991, 1993, Hruby 2004a,b). This rating system or some modification of it has been incorporated in the wetland regulations of at least 20 counties in the state and many cities and towns as well (Chris Parsons, Washington State Department of Community, Trade and Economic Development (CTED), personal communications and survey 1999, data are available on request from CTED).

In the first editions of the Washington State wetland rating systems, the term *rating* was not used in a manner that is consistent with its definition in the dictionary, and this has caused some confusion. The method does not rate the wetland and generate a relative estimate of value (e.g., high, medium, low). Rather, it is a categorization of wetlands based on specific criteria, such as sensitivity to disturbance and rarity in the landscape.

The rating systems were designed to differentiate between wetlands based on their sensitivity to disturbance, their significance, their rarity, our ability to replace them, and the functions they provide. However, the rating systems were not intended to replace a full assessment that may be necessary to determine the levels of performance for numerous functions or to plan and monitor a compensatory mitigation project. As noted in the wetland rating system for eastern Washington:

The rating categories are intended to be used as the basis for developing standards for protecting and managing the wetlands to minimize further loss of their resource value. The management decisions that can be made based on the rating include the width of buffers necessary to protect the wetland from adjacent development, the ratios needed to compensate for impacts to the wetland, and permitted uses in the wetland. (Hruby 2004a)

The rating systems for both eastern and western Washington have been revised by Ecology in conjunction with teams of wetland experts and local planners in each region who provided technical input and field testing. The goal of the revisions is to reflect the best and most current science on wetlands and how they function (using three broad groups of functions—hydrologic, water quality, and habitat) while maintaining rapidity and ease of use. You can access the rating systems for eastern and western Washington at the following web site: <http://www.ecy.wa.gov/programs/sea/wetlan.html>.

Wetland rating systems used in other parts of the nation

Categorization systems have also been used in other parts of the United States to manage wetlands. Other states have wetland categorizations as part of their wetland laws and rules, and other jurisdictions have used them to help manage wetlands for specific projects. For example:

Vermont adopted a law (10 VSA Chapter 37, Section (a) (7-9)) mandating that rules be adopted to identify Vermont's significant wetlands. The rules categorize wetlands into three classes of which the first two are considered "significant" (Vermont Department of Environmental Conservation 1999).

New Jersey has a wetland categorization included directly in its law (NJAC 7:7A). Criteria are provided for categorizing wetlands into (1) freshwater wetlands of exceptional resource value, (2) wetlands of ordinary resource value, and (3) wetlands of intermediate resource value.

New York has adopted rules that categorize wetlands into four categories based on ecological associations, hydrologic features, pollution control features, cover types, and distribution and location (6 NYCRR Part 664.5).

West Eugene, Oregon developed a method for a plan based on "needs for protection" (City of Eugene 2002).

North Carolina created a GIS-based system that characterizes the "significance" of wetlands based on several landscape and function-based criteria (Gainey and Roise 1998).

5.4.1 Other Characteristics Used for Rating

Some wetlands in Washington are categorized in the Washington State wetland rating systems based on important characteristics that are not specifically related to functions. These characteristics include rarity on the landscape, sensitivity to disturbance, and difficulty in restoring or creating such wetlands through mitigation efforts (Ecology 1991, Hruby 2004a,b). The wetland types that have been defined for eastern and western Washington are listed below. Some of the types are unique to either eastern or western Washington (e.g., Wetlands in coastal lagoons are unique to western Washington):

- Bogs
- Alkali wetlands
- Mature and old-growth forested wetlands
- Vernal pools
- Wetlands identified by the Washington State Department of Natural Resources as "Natural Heritage" wetlands"

- Wetlands in coastal lagoons
- Interdunal wetlands
- Estuarine wetlands

Each of these types is described in more detail below.

5.4.1.1 Bogs

Many of the scientific studies of bogs have been published in Europe and the northern parts of the United States, such as Minnesota and Maine. There has not been extensive research on bogs in Washington State. This summary of the literature is not intended to be a thorough synthesis but provides basic background information regarding characteristics of bogs requiring special consideration for management.

Predominance of Organic Soils

Bogs are peatlands (wetlands with organic soils) that have been classified according to their shape, chemistry, plant species, and vegetation structure (Gore 1983). The common factor in bogs is the presence of organic soils or peat, which result from the accumulation of poorly decomposed plant material. The optimum conditions for peat formation occur in cool, humid climates in a location with poorly drained soil.

The rate of peat accumulation is generally quite low, although it can vary with site-specific factors. Heathwaite and Gottlich (1993) report rates of accumulation ranging from 2 to 4 inches (5 to 10 cm) every 100 years. Durno (1961) lists a range of 0.5 to 4.3 inches (1.2 to 11 cm) accumulation every 100 years. In Washington, Rigg (1958) reports peat accumulation of 1 inch (2.5 cm) in 40 years for the west side of the Cascades and 1 inch in 50 years on the east side. Peat can be as little as 8 inches (20 cm) deep to over 45 feet (15 m) deep (Heathwaite and Gottlich 1993).

The three ways that peat is formed, described below, illustrate the lengthy process of peat and bog formation and help explain why bogs are almost impossible to recreate through compensatory mitigation (see below and in Chapter 6).

- In a **filled-lake sequence**, open water progresses to a sedge or moss community that gradually builds a mat over the water, evolving into a bog, bog forest, and then climax community (Conway 1949).
- **Paludification** occurs when bogs invade the surrounding forest. Sphagnum species cause a rise in the water table as peat layers compress and impede drainage (Heathwaite and Gottlich 1993).
- A **flow-through succession** occurs when surface flows are modified. Organic matter builds up to the point where surface flows are diverted around the peat mound. As it builds, the mound becomes isolated from groundwater, relying solely on precipitation as its water source (Klinger 1996).

Studies have shown, on the other hand, that many bogs remain very stable for thousands of years as a sphagnum moss/shrub community, even though succession to a forested community can occur (Klinger 1996).

Acidity and Poor Nutrients

Bogs have unusual hydrodynamics and chemistry for wetlands. They typically only receive precipitation and very localized surface runoff as their sources of water. As a result, many essential nutrients, such as nitrogen, occur in low concentrations. The upper layers of peat, formed by slowly decomposing sphagnum, are often strongly acidic, usually with a pH of 4 or less.

Bogs typically support plant species that are specially adapted to these harsh growing conditions. Sphagnum moss, as well as other mosses, usually dominate the vegetation near the ground. Ericaceous shrubs, such as Labrador tea (*Ledum gladulosum*), are also common in bogs.

Trees can grow in bogs but at a very slow rate due to the poor growing conditions. In studies in the Pacific Northwest, Rigg (1918) found tree growth in sphagnum peat soils was slow. Rigg determined that hemlock (*Tsuga heterophylla*) grew in sphagnum soils at a rate that was only 27% of its growth rate in productive upland soils, and that Douglas-fir (*Pseudotsuga menziesii*) grew in sphagnum at only 16% of its growth rate in upland soils. He measured the annual growth of western red cedar (*Thuja plicata*) as only 0.02 inches (0.6 mm).

Although persistent wet conditions, low soil oxygen, and high acidity are important factors, it is actually the lack of available nutrients, or the inability of plants to absorb nutrients because of acidity (Moore and Bellamy 1974), that most influences the flora of bogs. Most bog species have developed special adaptations to these conditions and out-compete more common wetland plants (Mitsch and Gosselink 2000). Therefore, this makes bog species susceptible to nutrient loading and changes in acidity (as well as alterations in water source that can precipitate these changes) that would enable other species to establish and dominate.

Bogs in Western and Eastern Washington

In western Washington, Kunze (1994) characterized numerous types of peatlands, including bogs and fens. She identified 10 types of sphagnum bog communities in the Puget Trough region and 14 in the Olympic Peninsula/southwest Washington. They occur in the lowlands of the Puget Trough in depressions, oxbows, and old lake beds. These typically have a raised center with a moat around the edge. Bogs and fens also occur on the Olympic Peninsula and in southwest Washington where they can occupy basins, slopes, and flat to rolling ground, as well as forming along low-gradient streams. Bogs in the foothills of the Cascades include sloping bogs, which are influenced by both mineral soil water and precipitation.

Peatlands in eastern Washington have not been classified to the extent of those in western Washington. However, 50 peatlands were identified by Rigg (1958). Forty-four of those

identified were located in the northeastern corner of the state. They included fens associated with flowing water, and bogs formed in depressions or along lake margins. Six peat systems were found in scabland channels and depressions on the Columbia Plateau.

Difficulty in Restoring Bogs

Researchers in Northern Europe and Canada have found that restoring bogs is difficult, specifically in regard to plant communities (Bolscher 1995, Grosvermier et al. 1995, Schouwenaars 1995, Schrautzer et al. 1996), water regime (Grootjans and van Diggelen 1995, Schouwenaars 1995), and/or water chemistry (Wind-Mulder and Vitt 2000). In fact, restoration may be impossible because of changes to the biotic and abiotic properties (Schouwenaars 1995, Schrautzer et al. 1996).

It is apparent that true restoration of a raised bog ecosystem is a long-term process. In *Restoration of Temperate Wetlands*, Joosten (1995) states:

Long term studies in bog regeneration indicate that restoration of bogs as self-regulating landscapes after severe anthropogenic damage is impossible within human time perspective, because the necessary massive re-establishment of bog key species and renewed accumulation of peat require centuries.

Refer to Chapter 6 for more information on the challenges in restoring bogs.

5.4.1.2 Alkali Wetlands

Alkali wetlands are characterized by the occurrence of non-tidal, shallow saline water. In eastern Washington, these wetlands contain surface water with specific conductance (a measure of salinity) that exceeds 3,000 micromhos per centimeter. These wetlands provide the primary habitat for several species of migratory shorebirds and are also heavily used by migrating waterfowl. They also have unique plants and animals that are not found anywhere else in eastern Washington. For example, the small alkali bee that is used to pollinate alfalfa and onion for seed production lives in alkali systems. This bee is a valuable natural resource for agriculture in the western United States and especially in eastern Washington (Delaplane and Mayer 2000). The “regular” bees which pollinate fruits and vegetables are generally too large to pollinate the small flowers of these commercially important plants.

The salt concentrations in alkali wetlands have resulted from a relatively long-term process of groundwater surfacing and evaporating. These conditions cannot be easily reproduced through compensatory mitigation because the balance of salts, evaporation, and water inflows is hard to reproduce, and no references were found suggesting this has ever been attempted. Alkali wetlands are also rare in the landscape of eastern Washington. Of several hundred wetlands that were surveyed and visited by wetland scientists during field work for the state’s function assessment methods and the rating system for eastern Washington (Hruby et al. 2000, Hruby 2004a), only nine could be classified as alkali.

5.4.1.3 Mature and Old-Growth Forested Wetlands

No mature or old-growth forested wetlands have ever been successfully created or restored through compensatory mitigation. A mature forested wetland may require 80 years or more to develop, and the full range of functions performed by these wetlands may take even longer (Stanturf et al. 2001). The actual time required to reconstruct old-growth forests and their soil properties (in contrast to mature forests) is unknown (Zedler and Callaway 1999). These forested wetlands provide important functions associated with wetlands as well as habitat functions associated with mature and old-growth forests. (Washington State Department of Fish and Wildlife 1999a).

5.4.1.4 Vernal Pools

Vernal pool wetlands occur in eastern Washington and are formed when small depressions in bedrock or in shallow soils fill with snowmelt or spring rains. They retain water until the late spring when reduced precipitation and increased evapotranspiration lead to a complete drying out. The wetlands hold water long enough throughout the year to allow some strictly aquatic organisms to flourish but not long enough for the development of a typical wetland environment (Zedler 1987). Vernal pools often contain upland species during the summer after they dry out and may be difficult to identify as jurisdictional wetlands during part of the year.

Vernal pools in the scablands are the first to melt in the early spring. This open water provides areas where migrating waterfowl can find food while other, larger bodies of water are still frozen. Furthermore, the open water provides areas for pair bonding of waterfowl (R. Friesz, Washington State Department of Fish and Wildlife, personal communications 2000-2004). Thus, vernal pools in a landscape with other wetlands provide a critical habitat function for waterfowl (Hruby 2004a).

5.4.1.5 “Natural Heritage” Wetlands

“Natural Heritage” wetlands are those that have been identified by scientists of the Washington State Natural Heritage Program as high-quality, relatively undisturbed wetlands, and wetlands that support state threatened, endangered, or sensitive plant species.

The Natural Heritage Program has identified important natural plant communities and species that are very sensitive to disturbance or threatened by human activities and maintains a database of these sites. The program’s web site states:

Some natural systems and species will survive in Washington only if we give them special attention. By focusing on species at risk and maintaining the diversity of natural ecosystems and native species, we can help assure our state's continued environmental and economic health.

(Washington State Department of Natural Resources No Date,
<http://www.dnr.wa.gov/nhp/about.html>)

5.4.1.6 Estuarine Wetlands

Estuaries, the areas where freshwater and salt water mix, are among the most highly productive and complex ecosystems. Here, tremendous quantities of sediments, nutrients, and organic matter are exchanged between terrestrial, freshwater, and marine communities. A large number of plants and animals benefit from estuarine wetlands. Fish, shellfish, birds, and plants are the most visible organisms that live in estuarine wetlands. However, a huge variety of other life forms also live in an estuarine wetland, including many kinds of diatoms, algae and invertebrates.

Estuaries, of which estuarine wetlands are a part, are a “priority habitat” as defined by the state Department of Fish and Wildlife. Estuaries have a high fish and wildlife density and species richness, important breeding habitat, important fish and wildlife seasonal ranges and movement corridors, limited availability, and high vulnerability to alteration of their habitat (Washington State Department of Fish and Wildlife, <http://www.wa.gov/wdfw/hab/phslist.htm> , accessed October 15, 2003).

Estuarine wetlands are not freshwater wetlands, and therefore, information about them was not reviewed in Volume 1. They are included in this compilation of wetlands with special characteristics because they are included in the wetland rating System for western Washington (Hruby 2004b). They are often found adjacent to freshwater wetlands and should be managed in conjunction with freshwater wetlands. The methods for identifying estuarine wetlands and the rationale for protecting them are described in more detail in the rating system (Hruby 2004b).

5.4.1.7 Wetlands in Coastal Lagoons

Coastal lagoons are shallow bodies of water, like a pond, partly or completely separated from the sea by a barrier beach. They may, or may not, be connected to the sea by an inlet, but they all receive periodic influxes of salt water. This can be either through storm surges overtopping the barrier beach or by flow through the porous sediments of the beach. Coastal lagoons often contain vegetated areas that are jurisdictional wetlands. The wetlands associated with coastal lagoons are, therefore, included in the rating system as wetlands with special characteristics.

Wetlands in coastal lagoons probably cannot be reproduced through compensatory mitigation, and they are relatively rare in the landscape. No information was found on any attempts to create or restore wetlands in coastal lagoons in Washington that would suggest this type of compensatory mitigation is possible. Any impacts to lagoons will, therefore, probably result in a net loss of their functions and values.

In addition, coastal lagoons and their associated wetlands are proving to be very important habitat for salmonids. Unpublished reports of ongoing research in the Puget Sound (Hirschi et al. 2003, Beamer et al. 2003) suggest coastal lagoons are heavily used by juvenile salmonids.

5.4.1.8 Interdunal Wetlands

As defined in the western Washington rating system (Hruby 2004b), any wetlands that are located to the west of the Boundary Line of Upland Ownership as determined in 1889 are considered interdunal. The boundary line is a legally defined line along the Pacific Coast. Interdunal wetlands form in the “deflation plains” and “swales” that are geomorphic features in areas of coastal dunes. These dunes are the result of the interaction between sand, wind, water, and plants. The dune system immediately behind the ocean beach (the primary dune system) and its associated wetlands is very dynamic and can change from storm to storm (Wiedemann 1984). This means that the location of the wetlands is not fixed and may change from year to year.

Interdunal wetlands provide critical habitat for many species in this ecosystem (Wiedemann 1984). Although important, these wetlands constitute only a small part of the total dune system (Wiedemann 1984). No methods have been developed to characterize how well interdunal wetlands function so these wetlands cannot be rated by a score for their functions. In the absence of direct methods for characterizing their functions, the rating of interdunal wetlands is based on their documented importance as habitat in the coastal dune ecosystem.

5.4.2 Summary of Key Points

- Wetland rating systems provide a rapid method to identify, characterize, categorize, or estimate relative wetland functions and values. This information is used in regulating and managing wetlands.
- The rapid method most commonly used for analyzing wetlands in eastern and western Washington has been the Washington State wetland rating systems. The rating system was designed to differentiate between wetlands based on a broad grouping of functions that they provide (hydrologic, water quality, and habitat), as well as other characteristics (listed in the next bullet). However, this rating system does not replace the more robust function assessment methods developed for Washington State. The latter may be necessary to determine the level of performance for specific functions (such as the potential to remove sediment) or to plan and monitor a compensatory mitigation project.
- In the rating system, some wetlands are categorized because of their rarity on the landscape, sensitivity to disturbance, or difficulty in restoration or creation through mitigation efforts, and not because of the functions these wetlands perform. The wetland types in Washington that are included in the rating system because they have these other characteristics include bogs, alkali wetlands, mature and old-growth forested wetlands, vernal pools, estuarine wetlands, wetlands in coastal lagoons, interdunal wetlands, and “Natural Heritage” wetlands.

5.5 Buffers

Buffers are another common element of wetland regulations. Buffers are vegetated areas adjacent to an aquatic resource that can, through various physical, chemical, and/or biological processes, reduce impacts from adjacent land uses. Buffers also provide the terrestrial habitats necessary for wildlife that use wetlands to meet their life-history needs. In this document, we collectively call these processes that buffers provide the *functions* of buffers. Buffers and other adjacent upland areas provide habitat for other wildlife species that do not commonly use wetlands. This document does not address those functions of upland habitats.

The primary purpose of buffers is to protect and maintain the wide variety of functions and values provided by wetlands (or other aquatic areas). The physical characteristics of buffers—slope, soils, vegetation, and width—determine how well buffers reduce the adverse impacts of human development and provide the habitat needed by wildlife species that use wetlands. These characteristics are discussed in detail in this section.

The subject of buffers is well documented in the scientific literature. The research on buffers has occurred worldwide, and this section includes literature from a variety of regions when it was found to be relevant. In particular, a variety of literature related to agricultural practices and vegetated filter strips from the north-central United States and south-central Canada is directly relevant to some agricultural practices in Washington State, especially east of the Cascades. In addition, studies on buffers in urban and suburban settings conducted in the Pacific Northwest region are clearly relevant. However, many of the buffer studies conducted elsewhere in the U.S. and the world, as well as the many buffer synthesis documents, provide information relevant to the state of Washington.

The majority of research on buffers tends to focus on the processes that buffers provide to filter sediment or take up nutrients (i.e., their influence on water quality). Far fewer studies look at the influence of a buffer's physical characteristics on attenuating surface water flow rates, except as it relates to water quality. The long-term effectiveness of buffers in providing such mechanical and biological processes is not well documented in the literature and may represent a critical need for future research.

The literature on buffers related to wildlife is, in general, less focused. Most studies document the needs of a particular species or guild relative to distances for breeding or other life-history needs within a radius from aquatic habitats. There is substantial literature on the implications of habitat fragmentation and connectivity, some of it related specifically to agricultural practices, forestry practices, or the impacts of urbanization. This literature does not specifically address the role of buffers in providing connectivity between wetlands and other parts of the landscape. It does, however, unequivocally support maintaining connectivity between wetlands in order to maintain viable populations of species that are closely associated with wetlands. The reader is referred to Section 4.11 in Chapter 4, which discussed the effects of habitat loss and fragmentation as well as Section 5.5.4.3.

Older research studied the tolerance limits of wetland wildlife for disturbance—how closely a disturbance can approach animals before they are flushed from wetlands—with particular emphasis on waterfowl. These studies tend to be older than 1990 and focus on the prairie pothole region of North America. Where the findings are germane and where they have not been superceded by more recent work, they are included.

In addition to papers on specific research studies, multiple compilations and syntheses of literature on buffers have been completed since 1990. Synthesis papers were compiled by Castelle and other authors (1992b, 1994, and 2000) and another was compiled by McMillan (2000) as a master's thesis. These compilations include literature that was published prior to 1990, but much of the work they rely on is considered seminal to the effectiveness of buffers in protecting wetlands and contributing to habitat. Therefore these synthesis documents are used in this document as direct sources when no more recent research was found to supercede the earlier findings.

This section also cites literature related to stream buffers and riparian areas when the findings are relevant to the influence these areas have on the adjacent aquatic resource. The literature on stream buffers related to microclimate, water quality influences, and some habitat characteristics is particularly relevant because the ways buffers protect and maintain these functions is similar whether they are adjacent to streams or wetlands.

5.5.1 Terms Used to Describe Buffers

The scientific literature varies widely on the terms used to denote the area that serves to reduce impacts to wetlands from adjacent land uses and provide habitat for parts of the life-cycle of many species. Common terms include:

- Buffer
- Wetland setback
- Vegetated filter strip
- Buffer strip
- Riparian area
- Riparian zone
- Riparian corridor

These terms can be differentiated as those that are a product of regulations or policy language and those that define or describe an ecological condition or location (Castelle et al. 1994). Terms such as *buffer*, *wetland setback*, or *vegetated filter strip* are most commonly applied in an administrative context to denote the landscape immediately adjacent to an aquatic resource, the dimensions of which are legally determined. The terms *buffer strip* or *vegetated filter strip* may imply a relatively undisturbed, vegetated

area that helps attenuate the adverse effects of land uses adjacent to a wetland. For example, Norman (1996) provides this definition:

Buffer strips are strips of vegetated land composed in many cases of natural ecotonal and upland plant communities which separate development from environmentally sensitive areas and lessen these adverse impacts of human disturbance.

The terms *riparian areas* or *riparian zones* are defined by many to denote ecologically discernable ecotones (transition zones) along aquatic resources where the presence or action of surface waters, or the presence and duration of shallow groundwater, influences the structure and composition of the vegetation community (Lowrance et al. 1995, Harper and MacDonald 2001). The term *riparian corridor* is defined by Naiman et al. (1993) as “encompass(ing) the stream channel and that portion of the terrestrial landscape from the high water mark towards the uplands where vegetation may be influenced by elevated water tables or flooding, and by the ability of the soils to hold water.”

5.5.2 Functions Provided by Buffers

The literature is broadly consistent on the ways in which buffers can provide for the protection and maintenance of wetland functions. These include:

- Removing sediment
- Removing excess nutrients (phosphorous and nitrogen)
- Removing toxics (bacteria, metals, pesticides)
- Influencing the microclimate
- Maintaining adjacent habitat critical for the life needs of many species that use wetlands
- Screening adjacent disturbances (noise, light, etc.)
- Maintaining habitat connectivity

As noted by Castelle and Johnson (2000), buffers can be both ecological sources and sinks. They can control or limit the effects of land uses upslope of the aquatic resource (act as a sink), and they can contribute biological benefits to the aquatic resource (act as a source). Naimen et al. (1992) summarize the range of functions provided by buffers along streams as follows:

It is well known that riparian vegetation regulates light and temperature regimes, provides nourishment to aquatic as well as terrestrial biota, acts as a source of large woody debris, ...regulates the flow of water and nutrients from uplands to the stream, and maintains biodiversity by providing an unusually diverse array of habitat and ecological services.

These same functions can be attributed to wetland buffers (Castelle et al. 1992b, Desbonnet et al. 1994, McMillan 2000).

The literature also describes the physical, chemical, and/or biological characteristics of a buffer that determine the functions it provides. The most frequently cited physical characteristics that influence the effectiveness of a buffer are:

- Vegetation characteristics (composition, density, and roughness—for example, downed material)
- Percent slope
- Soils
- Buffer width and length (adjacent to the source of impacts)

Only two of the physical characteristics noted above can be easily managed (vegetation characteristics and buffer width/length), while the others are characteristics that do not lend themselves to manipulation.

By far the issue of greatest interest with respect to buffers is the question of how wide a buffer needs to be in order to be effective in protecting a wetland (or other aquatic resource). While the literature is unanimous that buffers provide important functions that protect wetlands and provide essential habitat for many species, there is wide-ranging discussion about how much buffer is necessary to be effective in providing a particular level of function (Young et al. 1980, Booth 1991, Castelle et al. 1994, Norman 1996, Dosskey 2000, McMillan 2000, Rickerl et al. 2000).

For ease of discussion as to the effective widths of buffers, the functions of buffers listed above are grouped into two major categories:

- Water quality (discussed in Section 5.5.3)
- Wildlife habitat (discussed in Section 5.5.4)

Buffers and their influence on wetland hydroperiod, as described in the few studies found on this subject, are summarized in the shaded box on the next page.

The following literature sources are generally consistent in describing what functions buffers provide to aquatic resources as well as the physical parameters that influence a buffer's ability to provide these functions: Budd et al. (1987), Phillips (1989), Castelle et al. (1992, 1994), Naiman et al. (1992), Belt and O'Laughlin (1994), Desbonnet et al. (1994), Norman (1996), Dillaha and Inamdhar (1997), Dosskey (2000), Van der Kamp and Hayashi (1998), Liquori (2000), McMillan (2000), Todd (2000), Townsend and Robinson (2001), Dosskey (2001).

Buffers alone have limited influence on wetland hydroperiod

As described in detail in Chapter 3, human land uses, such as agricultural practices, clearing, and land development, alter the movement and storage of surface water and groundwater within a wetland's contributing basin. These changes can significantly affect the hydroperiod of wetlands and other aquatic resources, causing an adverse effect on many wetland functions (Azous and Horner 2001). There is little published literature on the effectiveness of buffers in ameliorating the effect of changes in land use within the contributing basin on wetland hydroperiod. Some of the literature indicates that wetland buffers are far less effective at maintaining wetland hydroperiod than other mechanisms, such as controlling impervious surfaces and utilizing effective stormwater management practices (Herson-Jones et al. 1995).

Research in the Puget Sound Basin has agreed that changes in the land cover type in the contributing basin have a stronger influence on the resulting hydroperiod of the wetland than the buffer does (Booth 1991, Azous and Horner 2001). An exception may be for wetlands that have a very small contributing basin. However, the rate and manner in which stormwater enters the wetland following land-use changes in the contributing basin will most often shift from sheet flow and interflow to one or more point sources, resulting in a potential change in hydroperiod. Based on hydroperiod models using the U.S. Environmental Protection Agency's Hydrologic Simulation Program Fortran (HSPF model) for areas west of the Cascades, the wetland will tend to receive more water more quickly in the fall and will receive less water for a shorter period in the spring, resulting in a shift in the seasonal hydroperiod.

Buffer width is usually not sufficient to counteract the influence of land-use changes and stormwater management facilities within the wetland's contributing basin.

5.5.3 Buffers and Protection of Water Quality

Buffers protect the water quality of wetlands through four basic mechanisms:

- They remove sediment (and attached pollutants) from surface water flowing across the buffer
- They biologically "treat" surface and shallow groundwater through plant uptake or by biological conversion of nutrients and bacteria into less harmful forms
- They bind dissolved pollutants by adsorption onto clay and humus particles in the soil
- They help maintain the water temperatures in the wetland through shading and blocking wind

Literature describing the different ways that buffers maintain and improve water quality in wetlands and other aquatic areas is abundant. There is also considerable research on the effective widths that provide a relative percentage of removal of sediments, nutrients, and some toxics emanating from various sources. Four categories of water quality improvement are discussed below:

- Removing sediment
- Removing nutrients
- Removing toxics and pathogens
- Maintaining microclimate

For each of these categories, a summary is provided on what the literature says about the relationship between buffer width (or other characteristics) and the buffer's effectiveness in providing that type of water quality improvement. A summary table is included that lists the range of buffer widths for each category and the literature references that substantiate those findings. However, the literature does not address the issue of "how much pollutant removal is acceptable." For each pollutant, there may be a maximum amount that a buffer can process before its ability to do so is overwhelmed. The literature does not provide any specific thresholds (See section 5.5.5.3 for more on this issue).

5.5.3.1 Removing Sediment

Characteristics that Influence a Buffer's Ability to Remove Sediment

A buffer's ability to remove sediment from surface water flows depends upon several physical characteristics of the buffer. Sediment removal occurs when (Castelle et al. 1992b, Dillaha and Inamdar 1997, Phillips 1989):

- Flows are slowed sufficiently to allow particles to settle out
- Physical filtering by vegetation and roots mechanically removes sediments from the water column
- The slope of the buffer is of a low enough gradient to preclude formation of rills and scouring
- There is large woody debris on the ground to create roughness
- The infiltration rate of the soils allows water to move through the soils rather than on the surface

The way sediment-laden water enters a buffer influences the ability of the buffer to slow the flows sufficiently to allow sediment deposition. Several studies noted that vegetated buffers are only effective at removing sediments if sediment-laden waters enter the buffer as sheet flow, rather than in channels or rivulets (Phillips 1989, Booth 1991, Castelle et

al. 1992b, Desbonnet et al. 1994, Belt and O'Laughlin 1994, Sheridan et al. 1999). Norman (1996) cites work conducted by Schueler in 1987 that found buffers in urban settings were most effective at removing sediments where slopes were less than 5%, and waters entered the buffer in shallow, dispersed sheet flow. Norman surmised that, "The rate of removal of pollutants appears to be a function of the width, slope, and soil permeability of the (buffer) strip, the size of the contributing runoff area, and the runoff velocity."

In other research, Sheridan et al. (1999) found that the greatest reduction in sediment loading occurs in the initial "treatment" stages using a vegetated filter strip that is managed and mowed. Their research found the greatest removal of sediments (56 to 72%) and reduction in flow rates occurs in the outer portion of a vegetated filter strip (the strip closest to the source of sediment). Grass filter strips provided removal ranging from 78 to 83% of suspended sediments.

The ability of a buffer to provide physical filtering of sediments also depends on the condition of the vegetation and the surface roughness. Belt and O'Laughlin (1994) noted that when vegetation, rocks, or other obstructions were eliminated from the buffer surface, sediment-laden waters flowed further into (or through) a buffer. Buffers were found to be effective in removing sediments only if flows were shallow and broad, not narrow and incised. The presence of woody debris and vegetative obstructions on the ground surface (roughness) was found to slow flows, inhibit the formation of rills, and facilitate sediment deposition.

In contrast, hydrologic models created by Phillips (1989) estimated that surface roughness would be of minor concern, and buffer width was not critical, as long as a minimum 49-foot (15 m) buffer was maintained. This study was based on estimated models, whereas Belt and O'Laughlin's work was based on field measurements.

Phillips (1989) also emphasized the importance of slope. He states, "Results show that where solid-phase pollutants transported as suspended or bed-load in overland flow are the major concern, slope gradient is the most critical factor, followed by soil hydraulic conductivity." Slope gradient is critical because, on slopes greater than 5%, sheet flow can start to become channelized. Channelized flows have faster rates, more erosive powers, and less contact with vegetation (Norman 1996). Faster moving water has the capacity to carry fine sediment particles farther than slower flows, even moving through dense vegetation.

In his research in urbanizing settings, Booth (1991) notes that buffers adjacent to aquatic resources may have limited ability to filter and slow flows caused by stormwater. He found that (1) in some instances the buffers no longer existed in a natural vegetated condition, (2) once development occurred, and the buffer was subdivided into multiple private ownerships, maintaining an intact buffer was not possible, or (3) the increased volumes and rates of flows were too significant to be controlled by conditions within a vegetated buffer.

Buffers were found to facilitate reduction of sediment from active agricultural fields in several studies:

- Welsch (1991) found that a three-tiered buffer system on a shallow slope, with the first tier (closest to the source of sediment) composed of dense herbaceous vegetation, maximized sediment removal (See Section 5.5.6 for a discussion of the three-tiered system).
- Dosskey (2001) noted in agricultural settings that vegetated buffers retain pollutants by reducing the flow rates and filtering surface runoff from fields.
- Assessing management options to control non-point-source pollution (sediment, nitrogen, and phosphorus) in agricultural settings, Yocom et al. (1989) recommended the use of vegetated filter strips between actively cropped land and adjacent wetlands.

Buffer Width and Effectiveness in Removing Sediment

As noted above, the ability of a buffer to remove sediment is based on the condition of the buffer and its slope, as well as the characteristics of the incoming sediment. The following variables all contribute to the sediment removal effectiveness of a buffer:

- The velocity of sediment transport (in surface water)
- The size of sediment particles from the source materials
- The density of the vegetation present
- The presence and extent of large woody debris
- Surface roughness within the buffer

However, the relationship between the width of the buffer and its effectiveness is non-linear. The largest particles and the greatest percentage of particles are dropped in the outer portions of the buffer (closest to the source of sediment). In these outer areas, the rate of surface flow begins to diminish as the water is slowed by vegetation and woody debris. Slower water movement allows particles to drop out of the water column.

This is graphically illustrated in the graph below (Figure 5-1). This table is included here for illustrative purposes only, to depict the non-linear nature of buffers in removing sediments. This graph is based on data from the buffer synthesis by Desbonnet et al. (1994).

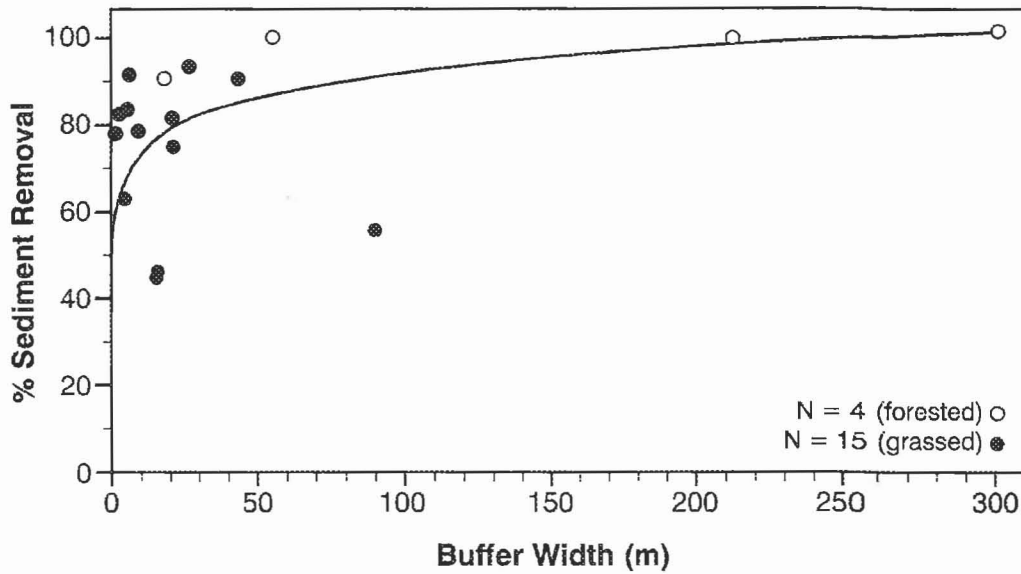


Figure 5-1. Relationship of percent removal to buffer width for the treatment of sediments contained in surface water runoff (Desbonnet et al. 1994).

In 1982, Wong and McCuen derived a formula to model a buffer’s ability to remove sediments based on sediment particle size, the slope within the buffer, the rate of surface runoff, and the amount of vegetation and woody debris (roughness) in the buffer (Castelle et al. 1994). The model predicted that there would be a point of relative diminishing returns for function vs. width. For example, “If the sediment removal design criteria were increased from 90 to 95% on a 2% slope, then the buffer widths would have to be doubled from 30.5 to 61 m (100 to 200 ft).” In other words, the model predicted that the width of the buffer would have to double to achieve an additional 5% removal of sediment after 90% of it had already been removed from the water column. Desbonnet et al. (1994) determined that a small buffer (7 feet [2 m]) could effectively remove up to 60% of suspended sediment, while a buffer of up to 82 feet (25 m) would be needed to remove 80%.

These findings are consistent with others who have found that progressively larger buffer dimensions are required to filter out finer particles (Norman 1996). These and other studies are summarized in Table 5-1.

See Section 5.5.5 for discussion of the ability of buffers to continue providing sediment removal over the long term.

Table 5-1. Summary of studies on sediment control provided by buffers of various widths.

Author(s)	Date	Buffer Width	Comments
Broderson	1973	200 feet (61 m)	Effective sediment control “even on steep slopes”
Desbonnet et al.	1994	6.6 – 82 feet (2 – 25 m)	60% removal in 6.6 feet (2 m); 80% removal required 80 feet (25 m)
Desbonnet et al.	1994	16 – 49 feet (5 – 15 m)	On grassy buffers on slopes with less than 5% slope, removed all but the finest particles
Ghaffarzadeh et al.	1992	16 – 49 feet (5 – 15 m)	Found 85% removal in 30-foot (9.1 m) buffers
Horner and Mar	1982	200 feet (61 m)	80% of sediments. As cited by Castelle and Johnson (2000)
Lynch et al.	1985	98 feet (30 m)	75 to 80% removal of sediment from logging activities into wetlands
Norman	1996	9.8 feet (3 m): sands 49.9 feet (15.2 m): silts 400 feet (122 m): clays	Distances required for effective removal of progressively smaller particle sizes
Wong and McCuen	1982	100 – 200 feet (30.5 – 61 m)	90% at 100 feet (30 m), need 200 feet (61 m) to obtain 95% removal effectiveness
Young et al.	1980	80 feet (24.4 m)	92% sediment removal rate from feedlot through vegetated buffer strip

5.5.3.2 Removing Nutrients

Characteristics that Influence a Buffer’s Ability to Remove Nutrients

Nutrients are transported into wetlands via sediment-laden water or dissolved in surface or shallow subsurface flows. The primary nutrients of concern are nitrogen and phosphorous. Buffers remove nitrogen and phosphorous through a variety of mechanisms that are similar to the mechanisms present within the wetland itself, as described in Chapter 2.

As much as 85% of phosphorous in surface waters is bound to sediments (Karr and Schlosser 1977) and thus can be removed via sediment removal in buffers. Phosphorus and other nutrients may be effectively reduced in surface waters by filtering and uptake; however, dissolved forms of nitrogen are not affected by surface processes and can be more effectively removed in the buffer through subsurface contact with fine roots (Muscutt et al. 1993, Townsend and Robinson 2001). Lowrance et al. (1995) confirm that the areas where improvements in water quality are the most effective are where precipitation moves across, through, or near the rooting zone of a forested buffer. These

findings are similar to those of Phillips (1989), who found that longer contact of dissolved pollutants through wider vegetated buffers was the most important factor for effective removal.

Buffer Width and Effectiveness in Removing Nutrients

It is difficult to compare studies of buffer width and effectiveness at removing nutrients because the basic parameters of the studies differ greatly. Some studies were conducted in field settings while others occurred in experimentally designed plots. There were differences in the loading rate of nutrients, the types of soils, and the vegetation in the buffers. Some studies examined only nitrogen or phosphorous removal, whereas others combined different nutrients. The result is that reported effectiveness of buffer widths for removing nutrients ranges from a few meters to hundreds of meters. Studies are listed in Table 5-2.

In a synthesis of research on nitrogen removal, McMillan (2000) found nitrogen can be effectively removed in buffer strips ranging from 20 to 98 feet (6 to 30 m) wide. He cites work by two research groups (Patty et al. 1997, Daniels and Gilliam 1996) that 47 to 99% removal of nitrogen can be achieved in buffers ranging from 20 to 66 feet (6 to 20 m) wide. This is not totally consistent with synthesis results presented by Desbonnet et al. (1994) that “well configured” buffers (with ideal slope, soils, and vegetation) as small as 30 feet (9 m) could reduce as much as 60% of nitrogen, while 197-foot (60 m) buffers would be necessary for 80% nitrogen removal.

A recent study from Oregon documented the role of red alder forests in exporting nitrogen to streams (Compton et al. 2003). They found that the percent of alder forest in a watershed was positively correlated with nitrate concentrations in surface water. This has implications for assuming that buffers with alder forests will help reduce the input of nitrogen from adjacent land uses into wetlands and other surface water.

The literature also describes a range of buffer widths necessary for phosphorus removal. Studies of buffer widths as small as 13 feet (4 m) and as large as 279 feet (85 m) found phosphorus removal rates of 50% to over 90% (see Table 5-2).

Overall, a consistent pattern emerges from the literature. The largest relative percent removal of phosphorus occurs within the outer portions of the buffer (closest to the source), while larger buffers are required to remove increasingly more of the nutrients. This consistency substantiates the conclusions of many that initial contact causes sediment-associated nutrients to be deposited, while dissolved nutrients require longer residence time and prolonged contact with vegetation for effective uptake (removal from the water column) to occur.

Castelle and Johnson (2000) surmised in their literature review that nutrient removal may have a similar non-linear relationship to buffer width as sediment removal. However, Phillips (1989) found that buffer width was a more critical element for dissolved nutrients (especially nitrogen), because wider buffers provided more prolonged contact with the rooting zone and time for uptake and conversion. Phillips did not report widths of buffers related to a certain percent of removal or effectiveness.

Limited research has been done on the long-term effectiveness of buffers for nutrient removal when there is an ongoing nutrient source present on the outside edge of the buffer. See Section 5.5.5.3 for a discussion.

Table 5-2. Summary of studies on nutrient removal provided by buffers of various widths.

Author(s)	Date	Width	Comments
Daniels and Gilliam	1996	20 – 66 feet (6 – 20 m)	47-99% removal of nitrogen
Desbonnet et al.	1994	30 feet (9 m): 60% removal 197 feet (60 m): 80% removal	Small buffers could have effective removal rates for nitrogen; much larger buffers are necessary for a significant increase in effectiveness
Desbonnet et al.	1994	Averages: 39 feet (12 m): 60% 279 feet (85 m): 80%	When all the findings from the literature synthesis were averaged, the average removal efficiencies were non-linear: larger buffers were needed for increases in effectiveness
Dillaha	1993	15 feet (4.6 m): 70% 30 feet (9.1 m): 84 %	Percent removal of suspended solids and their associated nutrients with vegetated filter strips. As cited in Todd (2000)
Dillaha	1993	15 feet (4.6 m): 61 % 30 feet (9.1 m): 79 %	Removal of phosphorus with vegetated filter strips. As cited by Todd (2000)
Dillaha	1993	15 feet (4.6 m): 54% 30 feet (9.1 m): 73%	Removal of nitrogen with vegetated filter strips. As cited by Todd (2000)
Doyle et al.	1977	12.5 feet (3.8 m) forested 13.1 feet (4 m) grass	Reduced nitrogen, phosphorus, and potassium levels
Edwards et al.	1983	98 feet (30 m)	50% removal rate of phosphorus
Lowrance	1992	23 feet (7 m)	Forested buffer zones were effective at removing nitrate through plant uptake and microbial denitrification
Lynch et al.	1985	98 feet (30 m)	Forested buffers reduced soluble nutrient levels from logging activities to “appropriate” levels
Patty et al.	1997	20 – 66 feet (6 – 20 m)	47 - 99% removal of nitrogen
Shisler et al.	1987	62 feet (19 m)	Forested riparian buffers effectively removed up to 80% and 89% of phosphorus and nitrogen, respectively
Thompson et al.	1978	39 – 118 feet (12 – 36 m)	Found a range of removal effectiveness of 44 to 70%

Author(s)	Date	Width	Comments
Vanderholm and Dickey	1978	> 853 feet (260 m)	Removal of 80% of nutrients, solids, and BOD from feedlot runoff with shallow (<0.5%) buffer slopes. Cited in Castelle et al. (1992b)
Young et al.	1980	69 feet (21 m): 67% removal 89 feet (27 m): 88% removal	Removal of phosphorus
Xu et al.	1992	33 feet (10 m)	Significant reductions in nitrate through a mixed herbaceous and forested buffer strip (as cited by Castelle and Johnson 2000)

5.5.3.3 Removing Toxics and Pathogens

Characteristics that Influence a Buffer's Ability to Remove Toxics and Pathogens

A buffer's ability to remove toxicants and pathogens is one of the least thoroughly studied. At this time, it represents a significant data gap. Castelle and Johnson (2000) note the lack of research on pathogens, toxicants and fecal coliform bacteria (an indicator of the possible presence of pathogens). Many of the studies they examined are quite old, but little recent research was found to supplement these older studies. Therefore, the conclusions presented from the synthesis of the previous work are provided here.

Gilliam (1994) also confirms in his work that little to no research is available on the effective removal of fecal coliforms or various pesticides. Much of the work assessed the effectiveness of removal of nutrients and toxics, without identifying a dimension of width necessary to provide that removal.

Toxics (pesticides and metals) can be removed by buffers through sedimentation, biological uptake by vegetation, adsorption onto clay or humus particles in the soil of the buffer, or degradation of the toxics through biochemical processes (McMillan 2000, Patty et al. 1997).

As mentioned in the discussion of sediment removal, Welsch (1991) described the use of a three-tier buffering system for the most effective removal of sediments and their associated toxics. The outermost tier (closest to the source of impacts) was a densely vegetated filter strip, managed to ensure no erosion or rill formation. He found the most effective removal of sediments and the toxics adhered to sediment particles was through surface sheet flows through the vegetated filter strip. The middle tier was subject to some management activities (limited agriculture or limited tree harvest), while the innermost tier was undisturbed natural vegetation. Dissolved nutrients and some toxics were not affected by physical filtering unless there was prolonged contact with the rooting zone through the shallow groundwater table. See Section 5.5.6 for further discussion.

Castelle and Johnson (2000) note that the apparent effectiveness of small buffers in removing toxics is due to the adsorption of many toxics to sediment particles. When vegetated buffers are effective at filtering sediments, they will also be effective at filtering those toxics and nutrients adhered to the sediments.

One study in Saskatchewan (Donald et al. 1999) found that the concentrations of agricultural pesticides and herbicides in wetlands were influenced by the timing of precipitation relative to the applications of the chemicals. They noted that buffer width may influence exposure of the wetland to these chemicals, but they did not quantify what buffer widths related to the effectiveness of removing chemicals.

Neary et al. (1993) reviewed studies in the Southeastern U.S. on the use of buffers in reducing contamination of water by pesticides. They found that cases of high concentrations of pesticides in water only occurred when no buffer was present or when pesticides were applied within the buffer. Regular use of buffer strips kept concentrations of pesticide residue within water-quality standards. Neary concluded that, generally speaking, buffer strips of 15 m (49 ft) or larger are effective in minimizing contamination of streams by pesticide residue.

Table 5-3 summarizes studies on the effectiveness of toxicant and pathogen removal provided by buffers of various widths.

Table 5-3. Summary of studies on pathogen control provided by buffers of various widths.

Author(s)	Date	Width	Comments
Doyle et al.	1977	12.5-foot (3.8 m) forested buffers 13.1-foot (4 m) grass buffers	Reduction in fecal coliform bacteria levels.
Grismer	1981	98-foot (30 m) grass filter strip	Removal of 60% of fecal coliform bacteria.
Young et al.	1980	115-foot (35 m) grass buffer	Reduced microorganisms to acceptable levels.

5.5.3.4 Maintaining Microclimate

The influence of buffers on microclimate is most often thought of in the context of shading for maintaining water temperature. This is well documented in the literature in relation to the effects on streams (Lynch et al. 1985, Johnson and Stypula 1993, Belt and O’Laughlin 1994, Castelle and Johnson 2000,). In those documents, literature focused on streams and their buffers is almost exclusively relied upon to discuss the influences of buffers on water temperature. No literature was found that specifically examined the influence of buffers on the water temperatures and microclimates within wetlands.

It may be tempting to deduce that the benefit of forested shade in moderating water temperatures is the same in wetlands as in streams. However, it is not reasonable to

apply to wetlands the findings on the widths used for stream buffers for the purpose of shading. As with streams, there are many variables that can influence how shading affects the water temperature in a wetland. These variables relate to differences in water budgets (e.g., the relative influence of groundwater on a seasonal basis, whether the wetland has an inlet/outlet, etc.). In addition, the physical configurations of a large open-water wetland, a small fully vegetated wetland, and a linear stream corridor may not provide reasonable parallels. With these limitations in mind, some relevant findings are provided below.

Forests can create shade and also block the wind, which can help moderate temperatures in adjacent aquatic systems (Oke 1987). Stable water temperature helps maintain water quality because cooler water can carry higher loads of dissolved oxygen, which is important for many aquatic biota. Warmer water can also result in a looser bond between sediment particles and nutrients, which could result in an increase in nutrient loading in warmer aquatic systems (Karr and Schlosser 1977).

Microclimate influences can also extend from large wetlands into the adjacent forests. Harper and MacDonald (2001) conducted research on boreal forests near lakes and found a “distinct lake edge community” of about 131 feet (40 m) width. The lake edge community tended to have greater structural diversity, less canopy cover, fewer snags, greater amounts of coarse woody debris, and greater number of saplings and mid-canopy trees than the interior forest. Changes in the distribution of vegetation species were along a shade tolerance gradient, but the authors postulated that moisture gradient or water table depth also had an influence. Their research was conducted within forests adjacent to open water lakes, but it would be valid to extrapolate their findings to forested communities adjacent to permanent, large open wetlands that would create the same “light and shade” effect. The findings imply that large open aquatic systems influence the adjoining upland community for approximately 131 feet (40 m) distance into the interior of the forested buffer. Thus, buffers not only influence temperatures and wind effects in a wetland, but research identifies that large aquatic systems may have a reverse positive influence on the vegetation structure and species diversity of the buffer. This can thereby affect some of the habitat discussed later in this chapter.

Table 5-4. Summary of a study on the influence of microclimate provided by buffers of various widths.

Author(s)	Date	Width	Comments
Harper and MacDonald	2001	Approx. 131 feet (40 m)	Influence of large aquatic systems on adjacent upland forest composition and structural complexity

5.5.3.5 Summary of Key Points

- The use of buffers to protect and maintain water quality in wetlands (removing sediments, nutrients, and toxicants) is best accomplished by ensuring sheet flow across a well vegetated buffer with a flat slope (less than 5%).
- Significant reductions in some pollutants, especially coarse sediments and the pollutants adhered to them, can be accomplished in a relatively narrow buffer of 16 to 66 feet (5 to 20 m), but removal of fine sediments requires substantially wider buffers of 66 to 328 feet (20 to 100 m).
- Removal of dissolved nutrients requires long retention times (dense vegetation and/or very low slope) and, more importantly, contact with fine roots in the upper soil profile (i.e., soils that are permeable and not compacted). Distances for dissolved nutrient removal are quite variable, ranging in the literature from approximately 16 to 131 feet (5 to 40 m).
- The literature is consistent in finding that it takes a proportionally larger buffer to remove significantly more pollutants because coarse sediments and the pollutants associated with them drop out in the initial (outer) portions of a buffer. It takes a longer time for settling, filtering, and contact with biologically active root zones to remove fine particles and dissolved nutrients.
- The role of buffers in protecting the microclimate of streams is well documented and may be applicable to wetlands, but no specific data on buffers and wetland microclimate maintenance were found.

5.5.4 Buffers and Wildlife Habitat

Wetland buffers are essential to maintaining viable wildlife habitat because they perform three overlapping functions:

- Buffers can provide an ecologically rich and diverse transition zone between aquatic and terrestrial habitats. This includes necessary terrestrial habitats for many wildlife species that use and/or need wetlands but also need terrestrial habitats to meet critical life requirements.
- Buffers can screen wetland habitat from the disturbances of adjacent human development
- Buffers may provide connectivity between otherwise isolated habitat areas

In regard to wildlife, most of the scientific research is not directly focused on the effectiveness of buffers for maintaining individuals or populations of species that use wetlands. Some of the research simply documents use of upland habitats adjacent to wetlands by wildlife to meet their life-history needs. For example, a substantial body of

research identifies the distances that amphibians may be found away from a wetland edge. However, the implications to amphibian populations of providing buffers that are smaller than those identified ranges are not well documented.

The following discussion summarizes the literature on buffers related to wildlife that use wetlands for the three essential functions listed above. Several documents are cited that represent a synthesis of scientific literature on the effectiveness of buffers for protecting wildlife-related functions of wetlands. Even though these documents include some research conducted prior to 1990, they have been included where relevant.

There is substantial literature on the implications to wildlife populations from fragmenting habitats as a result of human activities. However, this research was not necessarily conducted to address the effectiveness of various buffer widths. The literature on this topic is mentioned because of the management implications for the long-term viability of species that are closely associated with wetlands. The reader is referred to Section 4.11 in Chapter 4 and Section 5.5.4.3 for a detailed discussion of habitat fragmentation.

5.5.4.1 Maintaining Terrestrial Habitat Adjacent to Wetlands

Buffers provide a transition between aquatic and terrestrial environments and are a critical component of the habitat of wildlife that use wetlands. The specific habitat functions provided by wetland buffers include:

- Sites for wildlife for foraging, breeding, and nesting
- Cover for escape from predators or adverse weather
- Source of woody debris and organic matter that provides habitat structure and food, as well as moderation of water temperatures within adjacent wetlands to support species that are sensitive to temperature (e.g., fish, amphibians).
- Areas for dispersal and migration related to both individuals and populations; buffers may connect or be part of corridors

As defined previously, buffers are predominantly upland habitat communities that lie adjacent to aquatic habitats. They are a different habitat type than the wetland and their presence increases habitat heterogeneity by providing niches for more species. First described by Leopold (1933) as the “edge effect,” and later by Odum (1959) as an “ecotone,” this phenomenon features higher use of transition zones by wildlife, particularly between aquatic and terrestrial habitats. It has been demonstrated in studies of birds (Beecher 1942, McElveen 1977), mammals (Bider 1968), and amphibians (Bury 1988). The same pattern has been demonstrated in the Pacific Northwest in studies by Oakley et al. (1985), Knight (1988), and Cross (1988). Recent research conducted in the Puget Sound lowlands found that the greatest species richness of birds and small mammals in 50 foot wetland buffers was found when an additional 1,640 feet (500 m) of relatively undisturbed habitat was adjacent to the wetland buffer (Richter and Azous 2001b, 2001c).

Protection of upland areas adjacent to wetlands is critical to helping ensure that wildlife populations that are closely associated with wetlands have access to the habitat features necessary to meet their survival requirements. Species that are closely associated with wetlands, such as many amphibians, aquatic invertebrates, waterfowl, and some mammals, require access to wetlands for critical stages of their life-history. Many more species use wetlands, as well as other aquatic systems such as streams, lakes, or rivers, to meet various life-history needs. Research shows that species that were assumed to be dependent upon wetlands also depend upon adequate and appropriate upland habitats to maintain viable populations (Foster et al. 1984, Bury 1988, Washington Department of Wildlife in Castelle et al. 1992b, Semlitsch 1998, Semlitsch 2000).

In addition, vegetated buffers protect habitat in wetlands by maintaining the microclimate (through temperature moderation), as discussed previously, and by providing a source of organic matter to aquatic systems. This includes both large organic debris (e.g., logs, root wads, limbs), which provides habitat structure in aquatic environments, and particulate and dissolved organic matter, which provides a source of food for invertebrates (Brown 1985, Groffman et al. 1991a).

In coastal wetlands in South Carolina, Braccia and Batzer (2001) found that large woody debris within wetlands was critical for both aquatic and terrestrial invertebrate populations. They identified that the source of the large woody debris within the wetlands was from the adjacent uplands. The forest conditions in adjacent uplands, therefore, can have a significant influence on wetland biota because the aquatic invertebrates form the foundation of many food chains in aquatic settings (Castelle et al. 1994).

Buffer Width and Effectiveness in Protecting Wetland Habitat and Providing Habitat in Adjacent Uplands

This section summarizes the literature that identified ranges of widths of uplands that protect wetland habitat and/or that provide adjacent upland habitat for wildlife species that use wetlands. The literature presents findings in a variety of ways. Some studies identify the distance that target species range from a wetland source, while other researchers identified the distances that species travel between wetlands. Synthesis documents outlined recommendations for buffer widths based on a review of research findings. Some of the literature identified use of habitats by broad categories of wildlife guilds, while other studies focused on limited guilds or even individual species.

It is important to understand that the range of buffer widths identified and discussed in the literature is a reflection of many variables including the objectives of the research, the species/guilds studied and their varied life-history needs, and the methods of the research. Thus, it is not appropriate to choose a single study or buffer dimension to justify a buffer dimension, whether large or small. It is critical to incorporate the life-history requirements of the range of targeted species when considering buffer dimensions. Synthesis documents clarify that a range of upland habitat buffer dimensions may be appropriate depending upon site considerations, landscape context, and targeted species.

For example, in summarizing the literature he reviewed on buffer effectiveness, McMillan (2000) concluded, “An appropriate buffer to maintain wildlife habitat functions for all but the most highly degraded wetlands would be comprised of native tree and/or shrub vegetation and range from 30 to 100 meters [98 to 328 feet].” Other authors have reached similar conclusions, with their buffer recommendations varying depending on the type of wildlife, life-history stage, intensity of adjacent land use, and surrounding landscape (Groffman et al. 1991a, Castelle et al. 1992b, Desbonnet et al. 1994, Semlitsch 1998). Because there is often substantial information on the needs for some specific wildlife groups, the research findings that are relevant for birds, amphibians, reptiles, and mammals are provided below. Following this discussion, Table 5-5 provides a summary of literature on general habitat needs in relation to buffer sizes.

One consideration not found for this synthesis was the implication of the condition of the upland buffer relative to its provision of wildlife habitat. In several studies on the use of upland buffers by native species, the study identified that the buffer was upland forest. However, no studies were reviewed for this synthesis that compared wildlife use of mature forested buffers with buffers composed of meadow, shrubland, harvest forest, or younger forests. Some research has identified the importance of intact forest habitat to wetland-related species (Azous and Horner 2001, Richter 1997), but a comparison study was not found for this synthesis.

Generally, wildlife-species have varying needs for different types of adjacent habitat for different life needs, such as breeding, foraging, and resting (Brown 1985). This makes it difficult to prescribe one particular type of habitat as best for wildlife. Habitat is very species specific. However, as a general rule, most researchers have recommended that buffers be maintained or restored to a forested condition if only for the screening function they provide. (Obviously, this has little relevance to the shrub-steppe ecoregion in Eastern Washington, where trees are rarely found.)

Birds

The research on birds ranges from studies in individual species to summaries on bird species richness. A tremendous amount of research on waterfowl exists, with the majority being conducted in the prairie pothole region of the United States. This section focuses on studies or syntheses that are relevant to the Pacific Northwest.

The Puget Sound Stormwater Management Research Program found that a distance of 1,640 feet (500 m) from a wetland edge was necessary to account for total species richness of birds (Richter and Azous 2001b). In a study of bird use of freshwater wetlands in urban King County, Washington, Milligan (1985) determined that bird species diversity was strongly correlated with the percentage of the wetland boundary that was buffered by at least 49 feet (15 m) of trees and shrubs.

In eastern Washington, Foster et al. (1984) determined that 68% of waterfowl nests were in upland areas within 98 feet (30 m) of the wetland edge, whereas it would take a 312-foot (95 m) buffer to encompass 95% of the nesting sites.

Temple and Cary (1988) created a computer model whose results may relate to the breeding success of forest birds using wetland buffers. Estimating the effects of habitat fragmentation on birds breeding in the interior of forests in Wisconsin, their model predicted that nesting success was strongly correlated to distance to the edge of a forest. The computer model predicted a success rate of 70% for nests greater than 656 feet (200 m) from the forest edge, 58% for a distance of 328 to 656 feet (100 to 200 m), and only 18% for nests less than 328 feet (100 m) from the forest edge. Applying these findings to wetland buffers, those less than 100 feet (30 m) in width might not be expected to support bird species that nest in forest interiors. The authors concluded that, without “recruits” (birds moving into appropriate habitat niches from farther afield), the continued fragmentation of forest habitats could lead to local extinction of populations of birds that use the interior of forests.

Amphibians

The research on amphibians and buffers in relation to their habitat needs comes both from studies in the Pacific Northwest and literature summaries from around the United States. Findings are rather consistent in that amphibians range substantial distances from breeding locations in a wetland to fulfill their life-history needs. On the west side of the Cascades, there appears to be a preference for forested habitats adjacent to breeding sites. Urban land uses near breeding sites seem to have a negative influence on amphibian abundance.

Detailed findings include:

- A study in the Puget Sound lowlands documented a decline in amphibian richness in wetlands where forest in the contributing watershed was diminishing. Results were not linked to buffer dimensions (Richter and Azous 2001a).
- In a study in King County by Ostergaard (2000), the greatest use of stormwater ponds by native breeding amphibians was found when 3,280 feet (1,000 m) of forested habitat was available adjacent to the pond.
- A study of pond-breeding salamanders in the eastern U.S. found that a buffer of 534 feet (164 m) would be needed to encompass 95% of adult and juvenile salamanders. This buffer range may apply to other similarly mobile species (Semlitsch 1998). Buffers of 98 to 328 feet (30 to 100 m) were recommended along riparian zones, depending upon slope, stream width, and adjacent use (Semlitsch 1998).
- Salamanders use upland habitats over 1,969 feet (600 m) from the edge of wetlands for non-breeding life-history stages. Sustaining viable amphibian species closely associated with wetlands requires maintaining the connection between wetlands and terrestrial habitats (Semlitsch 1998).

See Table 5-5 for further information on these studies.

In addition, in the Midwestern U.S., Knutson et al. (1999) found a positive correlation between the presence of forest around the perimeter of the wetland and amphibian abundance, and a negative correlation to urban land uses on the perimeter.

Reptiles

Western pond turtles are associated with a variety of aquatic habitats, including wetlands, streams, and rivers. In a California study, western pond turtles were found to overwinter as far as 1,650 feet (500m) from water (Reese and Welsh 1997). An unpublished study done in Washington for the Washington Department of Wildlife found nest sites as far as 615 feet (187m) from water, usually in open areas with good sun exposure (Holland 1991).

Research on freshwater turtles in North Carolina found that turtles used a wide area for nesting and terrestrial hibernation in uplands surrounding the ponds where breeding occurred (Burke and Gibbons 1995). They found that a 902-foot (275 m) buffer was required to protect 100% of the nest and hibernation sites. Protecting 90% of the sites required a 240-foot (73 m) buffer. The authors concluded that most buffer requirements are inadequate to protect turtle habitat for all stages of their life-history.

Mammals

Use of wetlands by mammals depends upon adjacent uplands. The literature indicates that even a mammal that is closely associated with wetlands, such as a beaver, uses upland habitats an average of 100 feet (30 m) from the wetland edge in eastern Washington and over 300 feet (100 m) distant in western Washington (Castelle et al. 1992b). Research on small mammals found the greatest concentration of species near riparian corridors, with some species found within that riparian corridor that were not found farther away in upland habitats (Cross 1985).

Dimensions of effective buffers for mammals are more difficult to discern from the literature because they depend upon the species' life-history. Also, as discussed in Section 4.11 of Chapter 4, habitat linkages and fragmentation may be more critical for the sustainability of some populations.

As part of the Puget Sound Stormwater Management Research Program, Richter and Azous (2001c) found that the highest richness of small mammals was in wetlands with at least 60% of the first 1,640 feet (500 m) of buffer in forest cover. Other findings of this program include:

- The preservation of large woody debris within the wetland and adjacent upland forest is important for maintaining small-mammal habitat.
- Small-mammal richness was best associated with the combined factors of wetland size, adjacent forest, and the quantity of large, coarse woody debris within the wetland and its buffer.

- In southwestern Oregon, Cross (1985) conducted research on small mammals in “leave-strips” adjacent to streams within zones of forest that had been harvested. He found that the richness of small-mammal species was highest in the riparian zone closest to the stream, intermediate in the transition zone, and lowest in the upland zone. (The zones were defined by vegetation composition, not by dimension.) Because riparian habitats provide more niches for species, it is expected that such habitats would maintain greater species richness (Cross 1985).

Cross also found no species in the upland zone that were not found in the riparian zone, but he found five species present in the riparian zone that were not present in the upland or transition zones. A strip averaging 220 feet (67 m) wide supports mammal communities at similar numbers and richness to the nearby undisturbed riparian corridor. This study focused on small mammals which, relative to large mammals, have small home ranges. Therefore, the study is not broadly applicable to appropriate leave-strip dimensions for larger species.

Table 5-5 presents a summary of literature on wildlife and buffer/upland habitat use that was relevant to this synthesis. As noted previously, some of the research is specific to individual species, some is focused on a particular guild or group of similar species, some looks at life-history patterns (nesting distances), and some sources represent synthesis documents of buffer effectiveness. These distances do not necessarily reflect the literature relative to human disturbance and/or habitat fragmentation, which are discussed in the next sections.

It is difficult to synthesize the findings of the research on wildlife and the width of buffers into simple generalizations that can be readily applied. When looking at life-history needs (e.g., nesting sites, foraging ranges, etc.), the distances presented in the literature range from 98 feet (30 m) (Foster et al. 1984, Castelle et al. 1992b) to 3,280 feet (1,000 m) (Richter 1997). These distances, measured in the field, represent the distance that species ranged, nested, or foraged from a wetland edge.

Other authors have presented their own synthesis or recommendations of effective buffer ranges based on review of the literature. These range from 49 feet (15 m) (Desbonnet et al. 1994) to 328 feet (100 m) (Groffman et al. 1991a, Castelle et al. 1992b, Desbonnet et al. 1994, McMillan 2000). Note that Desbonnet et al. (1994) recommends a range of buffer dimensions based on site conditions, species of interest, and proposed adjacent land uses; hence, their studies are cited at both ends of the distance spectrum.

Table 5-5. Summary of studies on wildlife habitat provided by buffers.

Author(s)	Date	Width	Comments
Allen	1982	328 – 590 feet (100 – 180 m)	Mink use: generally concentrated within 330 feet (100 m) of water but will use upland habitats up to 590 feet (180 m) distant
Burke and Gibbons	1995	240 feet (73 m): 90% 902 feet (275 m): 100%	Buffer to encompass % nesting and hibernation of turtles in North Carolina

Author(s)	Date	Width	Comments
Castelle et al.	1992b	197 – 295 feet (60 – 90 m): Western Washington 98 – 197 feet (30 – 60 m): Eastern Washington	Range for all species they noted Range for all species they noted
Castelle et al.	1992b	263 feet (80 m) avg. - 590 feet (180 m)	Wood duck nesting locations from wetland edge (non-Washington data)
Castelle et al.	1992b	98 feet (30 m): Eastern Washington 328 feet (100 m): Western Washington	Distance of beaver use of upland habitats from water edge
Chase et al.	1995	98 feet (30 m) or more	100 feet (30 m) would be “adequate”; buffers larger than 100 feet needed to meet habitat needs, including breeding for birds and some mammals
Cross	1985	220 feet (67 m)	Forested “leave-strips” for small mammal richness adjacent to streams in SW Oregon
Desbonnet et al.	1994	49 – 98 feet (15 – 30 m): low intensity 98 – 328 feet (30 – 100 m): high intensity	Variable buffer widths using adjacent land uses as decision-making criteria
Fischer et al.	2000	98 feet (30 m) minimum	Literature review; majority of literature cited recommends buffer widths of 330 feet (100 m) for reptiles, amphibians, birds, and mammals
Foster et al.	1984	98 feet (30 m): 68% of nests) 312 feet (95 m): 95% of nests	Waterfowl breeding use of wetlands in the Columbia Basin greatest in smaller (<1 acre [0.4 ha]) wetlands; 68% of waterfowl nests within 100 feet (30 m) of wetland edge; to encompass 95% of waterfowl nests would require 310 feet (95 m) of buffer
Groffman et al.	1991a	197 - 328 feet (60 - 100 m)	For most wildlife needs
Groffman et al.	1991a	328 feet (100 m)	Neotropical migratory bird species
Howard and Allen	1989	197 feet (60 m)	For most wildlife needs
McMillan	2000	98 – 328 feet (30 – 100 m)	Based on a synthesis of literature
Milligan	1985	49 feet (15 m)	Bird species diversity strongly correlated with the percentage of the wetland boundary buffered by at least 50 feet (15 m) of tree and shrub vegetation
Norman	1996	164 feet (50 m)	To protect wetland functions; more buffer may be required for “sensitive wildlife species”

Author(s)	Date	Width	Comments
Ostergaard	2001	3,280 feet (1,000 m)	Forested habitat surrounding stormwater ponds, related to native amphibian richness
Richter	1996	3,280 feet (1,000 m)	Literature review and synthesis
Richter	1996	3,280 feet (1,000 m)	Native amphibian use
Richter and Azous	2001b	1,680 feet (512 m)	Distance from wetland edge necessary to include all bird richness in Puget Sound lowland wetlands
Richter and Azous	2001c	1,640 feet (500 m): 60%	Highest small-mammal richness when 60% of first 1,640 feet (500 m) of buffer was forest habitat
Semlitsch	1998	1,969 feet (600 m)	Salamanders
Semlitsch	1998	228 – 411 feet (69.6 - 125.3 m) 539 feet (164.3 m) for 95% of all species	Six species of adult salamanders and two species of juveniles; mean distance from wetland edge was 228 feet (juveniles) – 411 feet (adults). To incorporate 95% of all species, buffer mean would have to be 539 feet
Short and Cooper	1985	164 – 328 feet (50 – 100 m)	164 feet (50 m) for foraging
Temple and Cary	1988	> 656 feet (200 m): 70% success 328 – 656 feet (100 – 200 m): 58% success < 328 feet (100 m): 18% success	Nesting success rates for interior-dwelling forest birds related to distance into the interior of a forest from the forest edge

5.5.4.2 Screening Adjacent Disturbances

Wetland buffers screen wildlife from human activities. Disturbance from humans can come in the form of noise and light (indirect effects) or from human presence/movement (direct effects). Noise and light can disrupt feeding, breeding, and sleeping habits of wildlife. Many wildlife species in wetlands are disturbed by unscreened human activity within 200 feet (61 m) (Washington Department of Wildlife in Castelle et al. 1992b). Dense shrubs and trees in a wetland buffer can limit intrusion and screen out noise, light, and movement from adjacent human development (Castelle et al. 1992b).

In addition, domestic pets such as dogs and cats can adversely affect wetland wildlife by preying on some wildlife species and are particularly damaging to ground-nesting species (Churcher 1989). See Section 4.12.5 in Chapter 4 for further discussion.

The effect of noise on wildlife is a topic of growing concern. Little research exists on the effective buffer widths required to filter sounds for wildlife. See Section 4.12.3 in Chapter 4 for a discussion of current literature on the effects of noise on wildlife.

Groffman et al. (1991a) determined that 105 feet (32 m) of dense, forested buffer was necessary to reduce noise from commercial areas to background noise levels. Shisler et al. (1987) differentiated between the impacts of low-intensity land uses (agricultural, recreational, low-density housing) and high-intensity land uses (high-density residential, commercial/industrial). They found that low-intensity land uses could be effectively screened with vegetated buffers of 49 to 98 feet (15 to 30 m), while high-intensity land uses required buffers of 98 to 164 feet (30 to 50 m).

Direct sighting of humans approaching was found to disrupt birds (i.e., change their behavior or cause flushing) between 46 and 164 feet (14 to 50 m) (Shisler et al. 1987, Josselyn et al. 1989, Rodgers and Smith 1997). Looking specifically at great blue herons, Short and Cooper (1985) documented that they would flush from their nests if humans approached within 328 feet (100 m). Buffers between 46 and 164 feet (14 to 50 m) may be required to screen wildlife from direct observation of humans, while larger buffers (328 feet or 100 m) were documented as necessary to screen nesting herons.

Other researchers differentiated between the types of activities humans are engaged in and their effects on wildlife. Humans walking toward birds were studied to see how closely they could approach before birds flushed from perches or stopped foraging. In Florida, Rodgers and Smith (1997) found that humans could approach 46 to 112 feet (14 to 34 m) before flushing, but automobiles flushed birds at 61 to 78 feet (18.5 to 24 m). Interestingly, they found that bird-watching (as opposed to humans who were simply walking) had the greatest adverse impacts on birds. They surmised this was due to the human behavior of stopping and standing with binoculars at one point for a prolonged time.

Cooke (in Castelle et al. 1992b) analyzed 21 wetland sites in western Washington and concluded that buffers smaller than 50 feet (15 m) were generally ineffective in screening human disturbance from alterations such as noise, debris, and altered use of the buffer.

Table 5-6 summarizes the findings of the literature related to the disturbance limits or screening effects of a buffer for various wildlife species.

Table 5-6. Summary of studies on screening provided by buffers.

Author(s)	Date	Width	Comments
Castelle et al.	1992b	200 feet (61 m)	General wildlife considerations
Cooke	1992	50 feet (15 m)	Analyzed 21 sites in King County. Buffers less than 50 feet were often disturbed by human activities and were not effective at screening "human effects." Found in Castelle et al. (1992b)
Groffman et al.	1991a	105 feet (32 m)	Dense forest to filter sound from commercial land uses to natural background levels
Josselyn et al.	1989	49 – 164 feet (15 – 50 m)	Unscreened human activity within 50 – 164 feet was disruptive to waterbirds in San Francisco Bay area

Author(s)	Date	Width	Comments
Rodgers and Smith	1997	46 to 112 feet (14 – 34 m) 61 to 78 feet (18.5 – 24 m)	Waterbirds in Florida: flushing distance from walkers 46 – 112 feet; flushing distance from autos 61 – 78 feet. Nature observation had greatest impact if involving walking activities. Nesting birds tolerated closer human approach than birds that were perching/foraging
Shisler et al.	1987	50 - 100 feet (15 – 30 m) 100 – 164 feet (30 – 50 m)	Low-intensity land uses (agriculture, recreation, and low density residential): 50 - 100 feet High-density residential housing and commercial/industrial: 100 - 164 feet Most effective buffers had steep slopes, dense shrubs
Short and Cooper	1985	328 feet (100 m)	328 feet to buffer nesting great blue herons from human disturbance

5.5.4.3 Maintaining Habitat Connections

Converting habitats to other uses directly increases the isolation of wetlands and the fragmentation of habitats (See Section 4.11 in Chapter 4 for further discussion of the impacts of fragmentation). Buffers can play a role in reducing habitat fragmentation by serving as upland habitat directly adjacent to a wetland. They can also provide an area that can connect, or be part of a corridor that connects, wetlands with upland habitats or other water bodies (National Research Council 2001). However, buffers, as applied in a regulatory context, are rarely designed to provide these connections. Typical buffer widths generally are insufficient to link wetlands to other habitats. In addition, maintaining linkages from one habitat type to another on individual parcels is often not a consideration when properties are reviewed case by case. The authors of Volume I believe that maintaining habitat connectivity is best accomplished through landscape-scale planning and protection measures.

In general, the literature states that for terrestrial species with wide-ranging habits, it is important to maintain connections between sites used for breeding, feeding, and refuge. This is critical for maintaining population viability (Bedford and Preston 1988, Gibbs 1993, Semlitsch and Bodie 1998, National Research Council 2001). One may assume that this applies only to large terrestrial mammals. However, research has shown that many native amphibians on the west side of the Cascades can range 3,280 feet (1,000 m) from source wetlands into other wetlands or surrounding upland habitats (Richter 1997). Ostergaard (2001) found the greatest amphibian richness in sites that had upland forest habitat surrounding the site by 3,280 feet (1,000 m). Richter and Azous (2001b) found that a radius of 1,680 feet (512 m) surrounding a wetland was necessary to include all the bird richness of species utilizing the source wetland.

5.5.4.4 Summary of Key Points

- There is no simple, general answer for what constitutes an effective buffer width for wildlife considerations. The width of the buffer is dependent upon the species in question and its life-history needs, whether the goal is to maintain connectivity of habitats across a landscape, or whether one is simply trying to screen wildlife from human interactions.
- The majority of wildlife species in Washington use wetland habitats for some portion of their life-history needs. Many species that are closely associated with wetlands (those that depend upon wetlands for breeding, brood-raising, or feeding) depend upon surrounding upland habitats as well for some life-history stages.
- Many terrestrial species that are dependent upon wetlands have broad-ranging habits, some over 3,280 feet (1,000 m) from the source wetland. Although this might be expected for large mammals such as deer or black bears, it is also true for smaller species, such as salamanders and other amphibians.
- Human access and land uses adjacent to wetlands influence the use and habits of wildlife through noise and light intrusions, as well as elimination or degradation of appropriate upland habitats. Even “passive” activities, such as bird/nature-watching, have been shown to have effects on roosting and foraging birds.
- Synthesis documents that evaluated many studies discussing the protection of habitat provided by wetland buffers generally recommend buffer widths between 50 and 300 feet (15 to 100 m), depending on specific factors. These factors include the quality of the wetland habitat, the species needing protection, the quality of the buffer, and the surrounding land uses.

5.5.5 Buffer Maintenance and Effectiveness over Time

Buffers can help to protect wetlands for as long as the buffers themselves remain intact. Buffer areas can be altered over time by human disturbance and natural events, such as windstorms. In addition, some researchers have raised the issue of whether buffers have a long-term, carrying capacity with regard to filtration and binding of pollutants. In other words, is there a maximum amount that can be processed before the buffer’s ability is overwhelmed?

5.5.5.1 Human Alteration to Buffers

Human activities are the most common mechanism for altering buffers over time. Buffer functions can be reduced if vegetation is cut or trampled, soils are compacted, sediment loading surpasses the filtering capability of the vegetation, or surface-water flows create channels and subsequent erosion.

Cooke (in Castelle et al. 1992b) analyzed 21 wetland sites in western Washington and concluded that buffers less than 50 feet (15 m) wide were more susceptible to being reduced over time by human disturbance. Nearly all of the buffers they studied that were less than 50 feet (15 m) in width were significantly reduced in the few years the buffers had been present on the back of private lots. Some of the buffers were found to have been eliminated through complete clearing of native vegetation. Of the buffers wider than 50 feet (15 m), most still had some portion intact and, overall, showed fewer signs of human disturbance. Cooke also found that fencing buffers (without a gate allowing access) was effective at reducing the alteration of buffers by humans.

In a study in the Monterey Bay area of California, Dyste (1995) examined 15 wetlands with buffers. All of the buffers suffered from human alteration including cutting of vegetation, soil compaction, and dumping of garbage.

5.5.5.2 Loss of Trees to Blowdown

In the Pacific Northwest, forested buffers are often leave-strips around wetlands or along streams when the surrounding forest is cleared for land development. These forested strips are then exposed to winter windstorms, which are common, often resulting in substantial loss of large trees due to blowdown.

Pollock and Kennard (1998) concluded that trees in narrow forested buffers (less than 76 feet [23 m] wide) have a much higher probability of suffering significant mortality from windthrow and blowdown than trees in wider buffers. They conclude that buffers in the range of 76 to 115 feet (23 to 35 m), created when the surrounding forest is cut, are the minimum width that can be expected to withstand the effects of wind in the long term.

5.5.5.3 Reduced Capacity for Sediment/Nutrient Removal

Many of the studies described earlier assessed the effectiveness of buffers in removing sediments and nutrients for short durations (on the order of one to two years, if the time period was discernable in the methods sections of the literature). One study that assessed water quality improvement over longer periods found that effectiveness diminished as the outer margins of the buffers became saturated with sediment (Dillaha and Inamdar 1997). Their findings suggest that buffers have a limited carrying capacity for sediment removal (a maximum amount of sediment that can be removed) and that larger buffers and other methods may be required to ensure long-term control of sediment.

Similarly, Todd (2000) cites work by Dillaha in 1993 that found less than 10% of grass filter strips were effective after three to five years. The grass filter strips became channelized and surface flows were no longer passing through as sheet flow that would allow contact with vegetation to remove sediments and nutrients. Todd emphasizes that, for buffers to be effective, they have to be sustainable over time, and this must be a factor when determining buffer widths.

5.5.5.4 Summary of Key Points

- Human actions can reduce the effectiveness of buffers in the long term through removal of buffer vegetation, soil compaction, sediment loading, and dumping of garbage.
- Buffers may lose their effectiveness to disperse surface flows over time as flows create rills and channels, causing erosion within the buffer.
- Leaving narrow strips of trees can result in tree loss due to blowdown.
- Buffers may become saturated with sediment over time and become less effective at removing pollutants. The literature indicates that this should be considered when determining buffer widths.

5.5.6 Summary of Buffer Ranges and Characteristics from the Literature

The following discussion summarizes the many suggestions and recommendations in the literature for how buffer widths can be established. Many of these were found in synthesis documents that summarize scientific literature on buffers and then draw general conclusions. The recommendations in most of these syntheses are remarkably consistent. Taken together with the great number of site-specific studies cited in the syntheses, they present what should be considered "fundamental principles" for buffers.

At its most basic level, the science on wetland buffers identifies four criteria that should be considered in determining the width of a buffer (Castelle et al. 1992b, Desbonnet et al. 1994, Norman 1996, McMillan 2000, Todd 2000):

- The functions and values of the aquatic resource to be protected by the buffer
- The characteristics of the buffer itself and of the watershed contributing to the aquatic resource
- The intensity of the adjacent land use (or proposed land use) and the expected impacts that result from that land use
- The specific functions that the buffer is supposed to provide; for habitat functions this includes the targeted species to be managed and an understanding of its habitat requirements

The feasibility or possibility of incorporating those four considerations into determining buffer dimensions is dependent upon the jurisdiction in question. Ideally, buffer widths should be tailored to these four factors. However, the authors that recommend considering these factors also acknowledge that the scientific basis for determining the width of a buffer is often superseded by political expediency. Buffers are more often

determined administratively as standard or fixed dimensions that may, or may not, be correlated with the criteria listed above.

Table 5-7 presents a summary of the buffer ranges recommended by the authors who conducted literature reviews or syntheses on buffer effectiveness. Minimums ranged from 25 feet (8 m) to 197 feet (60 m). Maximums ranged from 98 feet (30 m) for some land uses to 350 feet (107 m).

Table 5-7. Summary of recommendations for buffer dimensions from the literature.

Author(s)	Date	Minimum Buffer	Maximum Buffer	Comments
Castelle et al.	1994	50 to 100 feet (15 - 30m)		"Minimum buffers necessary to protect wetlands and streams under most circumstances"
Fischer et al.	2000	98 feet (30 m)	328 feet (100 m)	Larger buffer for reptiles, amphibians, birds and mammals
Groffman et al.	1991a	197 feet (60 m)	328 feet (100 m)	For most wildlife needs
Howard and Allen	1989	197 feet (60 m)		For most wildlife needs
McMillan	2000	25 feet (8 m)	350 feet (107 m)	Case by case, using a rating system and the intensity of proposed or existing land use for protecting most wetland functions
Norman	1996	164 feet (50 m)		To protect wetland functions; more may be required to protect more "sensitive wildlife species"

Table 5-8 is taken from one of the most comprehensive buffer syntheses published (Desbonnet et al. 1994). The authors of the synthesis looked at several hundred articles and reports on buffers. This table presents the information in a format that outlines the general effectiveness of different buffer widths at removing pollutants and providing habitat.

Table 5-8. A summary of the effectiveness of pollutant removal and the value of the wildlife habitat of vegetated buffers according to buffer width (Desbonnet et al. 1994).

Buffer Width in Feet (Meters)	Pollutant Removal Effectiveness	Wildlife Habitat Value
16 feet (5 m)	Approximately 50% or greater sediment and pollutant removal	Poor habitat value; useful for temporary activities of wildlife
32 feet (10 m)	Approximately 60% or greater sediment and pollutant removal	Minimally protects stream habitat; poor habitat value; useful for temporary activities of wildlife
49 feet (15 m)	Greater than 60% sediment and pollutant removal	Minimal general wildlife and avian habitat value
66 feet (20 m)	Greater than 70% sediment and pollutant removal	Minimal wildlife habitat value; some value as avian habitat
98 feet (30 m)	Approximately 70% or greater sediment and pollutant removal	May have use as a wildlife travel corridor as well as general avian habitat
164 feet (50 m)	Approximately 75% or greater sediment and pollutant removal	Minimal general wildlife habitat value
246 feet (75 m)	Approximately 80% or greater sediment and pollutant removal	Fair to good general wildlife and avian habitat value
328 feet (100 m)	Approximately 80% or greater sediment and pollutant removal	Good general wildlife habitat value; may protect significant wildlife habitat
656 feet (200 m)	Approximately 90% or greater sediment and pollutant removal	Excellent general wildlife value; likely to support a diverse community
1,968 feet (600 m)	Approximately 99% or greater sediment and pollutant removal	Excellent general wildlife value; supports a diverse community; protection of significant species

Castelle et al. (1994), summarizing research conducted primarily before 1990, concluded “buffers necessary to protect wetlands and streams should be a minimum of 49 to 98 feet (15 to 30 m) in width under most circumstances.” They note that the lower end of the spectrum is the minimum necessary to maintain physical and chemical processes, while the upper end of the spectrum may be the minimum necessary to maintain biological processes. The Castelle et al. report of 1994 does not identify appropriate maximums. McMillan (2000) recommends an approach to determining buffers that attempts to balance predictability with flexibility by setting standard buffer widths that can be altered on a case-by-case basis to adapt to site-specific factors. This approach for determining buffer width incorporates a rating system for wetlands, plus an assessment of the intensity of proposed or existing adjacent land use, to establish buffer widths ranging from 25 to 350 feet (8 to 107 m). It is perhaps the method that is closest to fitting the four bulleted criteria outlined at the beginning of this section. It incorporates an understanding of the condition of the wetland, the buffer, and the proposed adjacent land use.

Several other authors also suggest that considering site-specific factors enhances the effectiveness of buffer strips over using fixed-width buffers (Steinblums et al. 1984,

Norman 1996, Todd 2000). Belt and O’Laughlin (1994) note that, “The fixed minimum-width approach enjoys the virtue of simplicity in application, but has the potential for providing either not enough or too much protection.”

Liquori (2000) also cautions against using fixed buffer widths to protect long-term ecological functioning of buffers and their associated aquatic resources. He notes that many of the functions that buffers provide are directly related to physical characteristics and biological processes within the buffers. Informed with site-specific information, a case-by-case argument could be made for establishing buffer widths. “The nature of the [functions a buffer provides] may significantly depend upon riparian structure both locally and as a mosaic over the watershed scale.”

In urban settings, larger buffer widths are often prescribed in anticipation of future impacts from adjacent land use and activity upstream in the watershed. The most important criterion for determining buffer width is identification of the various functions the buffer is expected to provide (Todd 2000).

In agricultural lands, Welsch (1991) identifies a three-zone approach for establishing buffers:

- **Zone 1** consists of riparian-type trees and shrubs immediately adjacent to the stream, water body, or wetland. It should be a minimum 13 feet (4 m) wide, or adjusted to include the entire riparian area (the area with year-long or seasonal soil-moisture regime influenced by the stream or water body). Minimum length should be the length of the proposed disturbance outside the riparian management zones, or “the longest distance possible.”
- **Zone 2** extends upslope from Zone 1 and consists of vegetation that may be periodically harvested as it matures. A minimum distance of 20 feet (6 m) should be allowed for this zone for small streams or water bodies; for larger streams or water bodies the total of Zones 1 and 2 can be increased up to 98 feet (30 m) or 30% of the geomorphic floodplain (whichever is less). Minimum length should match that of Zone 1. Zone 2 can be an active harvest zone, but trees and vegetation need to be left to provide soil holding and filtering capacity.
- **Zone 3** is added upslope of Zone 2 if adjacent land (away from the aquatic resource) is cultivated cropland or another land use with the potential for erosion or sediment production. Zone 3 is a vegetated filter strip and should be wide enough to control “concentrated flow erosion from cultivated cropland.” Zone 3 vegetation should be established prior to the establishment of Zones 1 and 2.

This zonal approach is recommended for active agricultural activities, which implies the regular creation of conditions with high erosion potential (grazing or tilling). It also allows more active use of the central portion of the buffer and active management of the outer area of the buffer.

Townsend and Robinson (2001) build on this zonal approach and recommend guidance on maintenance of canopy coverage and closure. They suggest using species that readily

resprout from stumps or roots in the areas nearest the stream channels (to allow the vegetation to respond to flood damage and/or beaver activity). They stress the need for ongoing maintenance, especially in Zone 3, to ensure that erosive flows are not causing rills or channelized flows into Zone 2. They also note that, while most of these buffers will be applied on an ownership basis, greater benefit would be realized if the concept of zoned buffers were applied on a watershed basis.

Other recommendations are based on wildlife species of particular interest. Based on their study of waterbirds in Florida, Rodgers and Smith (1997) recommend a buffer width of 328 feet (100 m) to ensure that birds will not be triggered into an “approach” response, a state which occurs prior to actual flushing. They derived this figure by analyzing the flushing distance from human approach for 16 species, then adding 131 feet (40 m) to that distance. The 131-foot (40 m) distance was derived from previous work which found that birds became alert (stopped their ongoing behavior and focused on the approaching human) in a range of 82 to 131 feet (25 to 40 m).

5.5.6.1 Summary of Key Points

- Many researchers have recommended using four basic criteria to determine the width of a buffer:
 - the functions and values of the aquatic resource to be protected by the buffer
 - the characteristics of the buffer itself and of the watershed contributing to the aquatic resource
 - the intensity of the adjacent land use (or proposed land use) and the expected impacts that result from that land use
 - the specific functions that the buffer is supposed to provide including the targeted species to be managed and an understanding of their habitat needs
- Protecting wildlife habitat functions of wetlands generally requires larger buffers than protecting water quality functions of wetlands
- Effective buffer widths should be based on the above factors. They generally should range from:
 - 25 to 75 feet (8 to 23 m) for wetlands with minimal habitat functions and low-intensity land uses adjacent to the wetland
 - 75 to 150 feet (15 to 46 m) for wetlands with moderate habitat functions and moderate or high-intensity land uses adjacent to the wetland
 - 150 to 300+ feet (46 to 92+ m) for wetlands with high habitat functions, regardless of the intensity of the land uses adjacent to the wetland
- Fixed-width buffers may not adequately address the issues of habitat fragmentation and population dynamics. Several researchers have recommended

a more flexible approach that allows buffer widths to be varied depending on site-specific conditions.

5.6 Chapter Summary and Conclusions

Wetlands are defined using well established language that is generally consistent between federal and state laws. However, certain wetland types are sometimes excluded from regulation. These include small wetlands, isolated wetlands, and wetlands that are designated as Prior Converted Croplands (PCC). The scientific literature makes clear that small wetlands and isolated wetlands provide important functions and does not provide any rationale for excluding these wetlands from regulation. Little scientific information is available on PCC, but there is no evidence to suggest that they are unimportant in providing wetland functions. They retain many of the characteristics necessary to provide multiple wetland functions.

Wetland delineation is conducted according to either the federal or state delineation manual. These manuals are consistent and, when applied correctly, will result in the same wetland boundary. Wetland rating systems are a useful tool for grouping wetlands based on their needs for protection. The most widely used method in Washington is the state's rating system which places wetlands in categories based on their rarity, sensitivity, irreplaceability, and functions.

Wetland buffers are a critical tool for protecting wetland functions. Findings regarding buffer functions and effectiveness are consistent in recommending that the width of a buffer should be related to the wetland functions that need protection, the land-use activities from which the wetland is being buffered, and the characteristics of the buffer itself. These factors, derived from the many studies of wetland buffers and other aquatic resources, can be thought of as the "fundamental principles" that are recommended to determine the widths and characteristics of buffers.

The literature confirms that for water quality improvement (e.g., sediment removal and nutrient uptake) there is a non-linear relationship between buffer width and increased effectiveness. Sediment removal and nutrient uptake are provided at the greatest rates within the immediate outer portions of a buffer (nearest the source of sediment/nutrient), with increasingly larger widths of buffers required to obtain measurable increases in those functions. Additionally, the long-term effectiveness of buffers in providing such mechanical and biological processes is not well documented in the literature. However, the literature suggests that buffers may have a carrying capacity or limit to their ability to remove pollutants. Future research on this topic is needed.

Compared to the widths needed for sediment removal and nutrient uptake, the literature has documented the need for significantly wider buffers to protect or maintain habitat functions for wildlife species that are closely associated with wetlands, as well as for populations that use wetlands. Research confirms that many wildlife species and guilds are dependent upon wetlands for only portions of their life cycles, and that they require upland habitats adjacent to the wetland to meet all their life needs. Without adequate

upland habitat adjacent to wetlands, these habitat functions are lost. Some species use upland habitats that are far from the source wetland. The literature documents that, without access to appropriate upland habitat and the opportunity to move between wetlands and other habitats across a landscape, it is not possible to maintain viable populations of many species. Beyond simply providing adequate upland habitat adjacent to a single wetland, the literature on the maintenance of wildlife populations finds that it is necessary to link habitat types, including wetlands and uplands, across a landscape in order to maintain genetically viable populations.

Several authors who suggested recommendations for buffer widths based on their own synthesis of the literature have recommended variable widths based on the conditions of the wetland, the conditions of the buffer, the proposed land uses adjacent to the buffer, and what functions are intended to be managed. For protection and maintenance of wildlife habitat functions of wetlands, these studies suggest that effective buffer widths should be based on the above factors and generally should range from: 25 to 75 feet (8 to 23 m) for wetlands with minimal habitat functions and low-intensity land uses adjacent to wetlands; 50 to 150 feet (15 to 46 m) for wetlands with moderate habitat functions and moderate or high-intensity land use that is adjacent; and 150 to 300+ feet (46 to 92+ m) for wetlands with high habitat functions depending on the intensity of the adjacent land use. However, several authors noted that protection and maintenance of viable wildlife populations for many species requires habitat connections via corridors and large habitat patches.

Chapter 6 continues the discussion of regulatory tools used to manage wetlands by discussing wetland compensatory mitigation and its effectiveness.

Spir, Peter

From: Spir, Peter
Sent: Wednesday, August 04, 2010 12:12 PM
To: 'Robinson, Michael C. (Perkins Coie)'; 'Troy S. Bundy'
Subject: FW: Staff Report for AP 1-01 Bundy appeal

These amended versions of my memo to City Manager were submitted at 4:50 on August 2, 2010. The City Attorney has advised me that they must be entered into the record of material submitted by the City by the August 2, 2010 5pm deadline.

From: Cindy Phillips [mailto:Cindy.Phillips@jordanschrader.com]
Sent: Monday, August 02, 2010 4:48 PM
To: Spir, Peter; Sonnen, John
Cc: Jenny De Gregorio; Bill Monahan; Tim Ramis
Subject: Staff Report for AP 1-01 Bundy appeal

Peter and John: Attached are a clean version and a track changes version of the staff report in the above entitled matter. Thanks. Cindy

<<AP-10-01 Bundy August 2 memo of rebuttal.trkchg.doc>> <<AP-10-01 Bundy August 2 memo of rebuttal.clean.doc>>

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Spir, Peter

From: Cindy Phillips [Cindy.Phillips@jordanschrader.com]
Sent: Monday, August 02, 2010 4:48 PM
To: Spir, Peter; Sonnen, John
Cc: Jenny De Gregorio; Bill Monahan; Tim Ramis
Subject: Staff Report for AP 1-01 Bundy appeal

Peter and John: Attached are a clean version and a track changes version of the staff report in the above entitled matter. Thanks. Cindy

<<AP-10-01 Bundy August 2 memo of rebuttal.trkchg.doc>> <<AP-10-01 Bundy August 2 memo of rebuttal.clean.doc>>

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Memorandum

Date: August 2, 2010

To: Chris Jordan, City Manager

From: Peter Spir, Associate Planner

Subject: This staff report responds to new material submitted after the July 19, 2010 City Council hearing during a week long written comment period that ended July 26, 2010. The hearing was to consider Troy and Gina Bundy's appeal of the Planning Director's decision to deny their application for a Water Resource Area (WRA) Protection permit to construct a swimming pool and patio area etc.

File: AP-10-01 (original file: WAP-09-03)

Purpose

During the week long open period to submit written evidence and arguments, staff received a considerable volume of material. Most of the submittals did not address the criteria relevant to the application; they merely expressed the opinion that the Bundy's should be allowed to keep their pool. However, of significance to staff were two memorandums from the appellant's wetland specialist, Jason Clinch of Terra Science, which addressed at length the location of the wetlands on Mr. and Mrs. Bundy's property. Staff will discuss these two memoranda at this time. It is staff's opinion that they provide compelling grounds for denial of the WRA permit. Staff will also address elements of attorney Michael Robinson's letter dated July 26, 2010.

Background

City Council held a public hearing on July 19, 2010 to consider Troy and Gina Bundy's appeal of the Planning Director's decision to deny their application for a Water Resource Area (WRA) Protection permit to construct a swimming pool, patio area and other associated work in an area protected by WRA regulations and a conservation easement. At the close of the hearing, City Council approved a request by Michael Robinson, attorney for the appellant, that the record be left open for public comments through

July 26, 2010 followed by rebuttals and a staff report by August 2, 2010 and the appellant's final statements by August 9, 2010.

The hearing is scheduled to reconvene on September 13, 2010.

The 120-day permit processing period was extended to September 30, 2010.

Discussion

Staff has long held that the AKS wetland delineation conducted in 2000 provides sufficient evidence that wetlands extend about five feet onto the appellant's property. Based on the memorandums of appellant's wetland consultant, Jason Clinch of Terra Science, findings can be made that the wetlands extend much further onto the property into the area of the pool, patio and associated improvements (including landscaping) in contravention of the approval criteria for CDC Chapter 32. This has further implications for the 50-foot wide transition areas. If the wetlands extend further onto the appellants property then the transition zones would cover even more of the site.

Evidence of Wetland

1. The AKS Engineering study delineated the wetlands in 2000. The City accepted that delineation. Associate Planner Kristi Crowell reviewed the AKS study, which was site specific for property which includes the parcel upon which the Bundy residence sits today. Ms. Crowell's credentials include a bachelor's degree in Biology and Environmental Science and a Masters degree in Geography with an emphasis on Natural Resource Conservation. She studied wetland delineation. Her thesis was on wetlands. The City hired her in 1996 to handle code enforcement of wetlands and natural drainage ways because of her expertise in this area. Ms. Crowell analyzed the AKS study and determined that the property contained enough indicia to be determined to be a wetland within the meaning of ORS 196.800(14). Ms. Crowell's determination formed the basis of the City's conclusion that the property is a wetland. Per the AKS delineation, the wetlands extend about five feet onto the appellant's property from the north property line. That would include the northern edge of the patio. While it is not necessary that the City's delineation is acknowledged by DSL, DSL does concur that the area is a wetland, see the revised Consent Agreement dated July 9, 2010, referred to in section 10, below.
2. The 2005 Local Wetland Inventory (LWI) identified wetlands extending about 29 feet onto the appellant's property. This inventory was adopted by City Council and approved by DSL. For specific sites, DSL notes that additional wetland delineation is needed.

3. Jason Clinch, a wetland consultant from Terra Science Inc. prepared two letters regarding the wetlands for the appellants. In a June 7, 2010 letter he states on page 1 paragraph 2 that: ***"Site visits have revealed that a swimming pool, patio and landscaping features have been constructed in wetlands in the back (north) part of your property."***
4. In that same letter, Jason Clinch of Terra Science states (page 2, paragraph 3): ***"It has already been acknowledged during a recent site visit by DSL, the Corps and Terra Science Inc. (TSI, Jason Clinch) that areas impacted by the swimming pool, patio, landscaped areas, and drainage ditch qualified (and still qualify where not effectively filled, see above) as jurisdictional wetlands prior to impacts."***
5. In that same letter, Jason Clinch of Terra Science states (page 4 paragraph 3) that: ***"In summary, it appears that the wetlands on the properties identified have been impacted through construction of the swimming pool, patio, landscaping and improvement of the drainage ditch."***
6. In a July 23, 2010 letter, Jason Clinch of Terra Science states on page 2 paragraph 2: ***"Contemporary conditions clearly indicate a greater portion of the property would likely qualify as wetland under current wetland delineation methodology...."***
7. Jason Clinch of Terra Science states on page 4 paragraph 1: ***"...during the field visit with Mr. Spir, Ms. Anita Huffman (DSL-Clackamas County Permit coordinator), Ms. Kristen Hafer (Corps-Biologist/Permit Coordinator), and myself on May 5, 2010, all parties involved (with the possible exception of Mr. Spir) agreed that the wetlands continue to persist on the PGE property and the Bundy property."***
8. Jason Clinch of Terra Science states on page 6 paragraph 8: ***"DSL rejected the wetland report by AKS and contends that much more of the property is likely to qualify as wetland than what the City identified when they accepted the faulty and incorrect AKS report...."*** In other words, the true extent of the wetland is greater than initially reported by AKS.
9. In that same letter, Jason Clinch of Terra Science states on page 8 paragraph 2 the following: ***"...the subject property still qualifies as a wetland and functions much the same as it did before."***
10. Yet another piece of evidence regarding wetlands is the DSL Revised Consent Agreement signed by Mr. and Mrs. Bundy and dated July 9, 2010. In that legal agreement, the appellants acknowledge the facts of the case, as laid out by DSL, and agree to pay fines and mitigate as required. Under the 'Stipulated Facts' heading is the following entry:

"2. The properties contain a wetland, a 'water of the state' within the meaning of ORS 196.800(14).

By recognizing the fact that there are wetlands on their property the appellant's join a group of others, including Terra Science (statement 7 above), DSL, AKS, Winterbrook Planning, authors of the DSL acknowledged 2005 Local Wetland Inventory and City staff, who agree that wetlands are on the appellant's property. USACE also offered a reserved assessment in Terra Sciences memo that:

"the site visit revealed that a pool, patio, and landscaping may have been placed within wetlands in the backyard of your residence."

These findings run counter to and should, given the volume of professional findings, invalidate Michael Robinson's principal argument stated on page 3 of his July 26, 2010 letter when he wrote:

"The resource (wetlands) that the transition and buffer requirements in CDC Chapter 32 seek to protect is not located in the Bundy backyard."

Robinson's subsequent statement on page 4 paragraph 6 that:

"None of the protected water features and vegetated corridors are affected by the pool and patio." is similarly wrong given statement 4 above; "It has already been acknowledged during a recent site visit by DSL, the Corps and Terra Science Inc. (TSI, Jason Clinch) that areas impacted by the swimming pool, patio, landscaped areas, and drainage ditch qualified (and still qualify where not effectively filled, see above) as jurisdictional wetlands prior to impacts."

Robinson's reference to slide 5 of staff's July 19, 2010 power point as proof that there are no wetlands is incorrect. That slide was based on the AKS delineation and shows the wetland boundary in yellow dashed lines extending five feet onto the Bundy property.

Evidence of Fill

1. Jason Clinch of Terra Science in the June 7, 2010 letter states on page 1 paragraph 2: **"Several soil samples taken near the patio and in the PGE Right-Of-Way indicated varying depths of fill (2 to 6 inches) over the native soil."**
2. Also in the DSL Revised Consent Agreement signed by Mr. and Mrs. Bundy and dated July 9, 2010, the appellants acknowledge the 'Stipulated Facts' including:

"3. Troy and Gina Bundy removed and/or filled more than 50 cubic yards of material within waters of the state without a permit or authorization from the Department."

From these statements it is evident that there is 2 to 6 inches of fill near the patio and that the appellants acknowledge that there is fill on their property. The grading of the majority of the rear yard and then constructing hardscapes (pool, patio) does not reflect any attempt to minimize the adverse effect of this activity on the water resource area, as required by CDC 32.050(C).

Other Issues raised by Michael Robinson, Attorney for Appellants

Defining "Structure"

Additional points raised by Michael Robinson included the contention that the concrete and steel pool is not a structure. Staff takes issue with that. CDC Chapter 2 Defines "Structure" as follows:

"Structure. Something constructed or built and having a fixed base on, or fixed connection to, the ground or another structure, and platforms, walks, and driveways more than 30 inches above grade and not over any basement or story below."

Robinson opines that since the 15 X 30 foot concrete pool is not over 30 inches high it is not a structure.

Staff finds that the CDC definition should be interpreted to define two separate types of structures given the use of the conjunction "and".

"Something constructed or built and having a fixed base on, or fixed connection to, the ground or another structure and..."

"platforms, walks, and driveways more than 30 inches above grade and not over any basement or story below."

Staff finds that the pool meets the first part of the definition, the pool is a structure and therefore the structural setback would apply.

Additional support for this comes from the Oregon Residential Specialties Code as adopted by the West Linn Municipal Code. It defines a swimming pool as:

"Any STRUCTURE intended for swimming or recreational bathing that contains water over 24 inches (610 mm) deep. This includes in-ground, aboveground and on-ground swimming pools, hot tubs and spas."

Also there is ORSC §R202 Definitions: *Structure: "That which is built or constructed."*

Defining "Passive Recreation Facilities"

Robinson also contends that a swimming pool and patio is a "passive recreation facility" and therefore permitted in the Water Resource Area transition and structural setback

area pursuant to CDC 32.050(F). However, that code section was written to accommodate needed public facilities in WRA when there is no practical alternative. For example, it is sometimes necessary to traverse a WRA with a road or water transmission pipeline. This code section would allow a road or a water transmission pipeline to traverse the WRA, so long as it can be done with a minimum of disturbance. The legislative intent was that "Passive recreation facilities" be limited to narrow trails in parks traversing drainageways as contemplated in the Parks and Natural Area Design Review definition for "passive-oriented parks" (CDC 56.015). It is neither reasonable nor consistent with legislative history to consider a private 30 X 15 foot pool, patio, rockery and water fountain as a passive recreation facility in this context.

See CDC Chapter 56.015: Design Review for Active and Passive Recreation-Oriented Parks, as an example of what is meant by the term "passive recreation." It defines passive oriented parks as follows: *"Passive-oriented parks focus is upon unstructured play, relaxation, family picnics and similar activities.... Support facilities, such as covered picnic or play areas, etc. are discouraged unless the facilities of a more community wide nature are included at the park."* Using this code section as an analogy, if a covered picnic area and play area is discouraged in a passive area park, a swimming pool would also be discouraged as a passive use.

Metro's Greenspaces Master Plan (Adopted 1992) Definitions p. 131 & 133 offers the following definition:

"Active recreation – recreation that uses specifically built facilities or that occurs in such density or form that it requires or results in a modification to the area or resource (i.e. campgrounds, golf courses)(sometimes called high intensity recreation)

Passive recreation – recreation not requiring developed facilities that can be accommodated without change to the area or resource (sometimes called low-density recreation)."

Department of State Lands, Division 120, Wetland Conservation Plan Wetland Resource Designations and Analysis of Alternatives. In "141-120-0080 Uses Allowed in the Protection Category" it includes:

"(2)(a) Passive recreation activities that require no structures, such as bird watching, canoeing or nature walks;"

Staff finds the swimming pool is not a "passive recreation facility". Therefore staff finds that the criterion is not met.

Eligibility for Hardship

The City's hardship provisions allow the development of lots that, because of the Water Resource Area restrictions, would otherwise be deprived of all economically viable use of the land. If that hardship is proven then the code allows up to 5,000 square feet of the site to be disturbed (including any grading and excavation).

It would be difficult for the appellants to argue that they are being denied all economically viable uses of the property, since the house and property at 1215 Ninth Street has been assessed by Clackamas County at \$640,370.00 which demonstrates that the site has already achieved economic viability.

The existing driveways, front sidewalk and the house footprint total approximately 7,175 square feet (not counting the pool, patio, associated hardscapes and graded areas) so even if hardship were proven, the maximum 5,000 square foot allowance has already been exceeded. Discussion of "hardship" procedures is also addressed by staff on page CC-19.

Value of Transitions

The tone of the Robinson arguments is that only the wetlands are important; the transition zone is not relevant or has no value. In terms of the CDC, transition zones are relevant in that development is excluded from these areas. Transition zones have value which the City has sought to protect. Buffers can protect and maintain important wetland functions, including the removing of sediment, excess nutrients (phosphorous and nitrogen, toxics (bacteria, metals, pesticides), influencing the microclimate, maintaining adjacent habitat critical for the life needs of many species that use wetlands, screening adjacent disturbances (noise, light, etc.) and maintaining habitat connectivity. To ignore the transition zones and allow disturbances therein is not consistent with wetland protection.

Relevance of the Open Space Conservation Easement

Although the appellant's attorney contends that the Open Space Conservation Easement (page 35-38/ (105-108)) is not relevant to this WRA application, staff contends that a decision to approve this WRA permit could not take place with the knowledge that the appellant is in violation of the terms of the easement.

Response of other Agencies

Whether DSL or USACE pursue enforcement is irrelevant to the City of West Linn's obligation to enforce its own regulations. That having been said much of this discussion is semantics, DSL is not pursuing "enforcement" but is requiring payment of penalty plus mitigation. USACE has their "After the Fact" permit process. City staff respects both agencies permitting and compliance procedures. It is staff's opinion that their varied positions speaks to the culture or priorities of each agency.

Portland General Electric may or may not be contemplating action against the appellants. There is simply no evidence of what PGE is doing or not doing. They have

repeatedly said that they are waiting for the Bundys to make the first move to repair the site. In a June 2, 2010 e-mail on page CC-23, Tina Tippin of PGE stated, "*PGE has not granted the Bundy's any right to access the PGE property interest, or to remove any trees, re-grade or landscape PGE's property in any fashion and our records do not reflect any request by the Bundy's to do so. Were such a request made and granted it would be conditioned upon strict compliance with all applicable laws and property rights.*"

The subsequent July 27, 2010 e-mail from Tina Tippin to Troy Bundy only outlined a procedure for the appellant to follow and did not promise approval: "*PGE needs to review the mitigation plan prior to giving any type of approval.*"

Conclusion

To date, the City has relied on the AKS wetland delineation done in 2000 which showed wetland extending just five feet onto the Appellant's property. But based on Mr. Clinch of Terra Science, the wetland may extend much further onto the appellant's property. According to Mr. Clinch, DSL contends, in item 8 above, that "*...much more of the appellant's property is likely to qualify as wetland....*"

The appellant's wetland consultant continues to make the City's case with the finding that "*It has already been acknowledged during a recent site visit by DSL, the Corps and Terra Science Inc. (TSI, Jason Clinch) that areas impacted by the swimming pool, patio, landscaped areas, and drainage ditch qualified (and still qualify, where not effectively filled, see above) as jurisdictional wetlands prior to impacts.*"

Finally, the most definitive statement (3 above) from the June 7, 2010 letter from Terra Science:

Site visits have revealed that a swimming pool, patio and landscaping features have been constructed in wetlands in the back (north) part of your property.

Those statements, plus statement numbers 5, 6, 7, 8 and 9 (above) from Terra Science, (including those attributed to DSL and the Corps (USACE) by Terra Science), means that the pool, patio, plus associated fill/landscaping etc. are not just in a transition or setback area, as staff contended originally, but that they are located on the actual wetlands. This violates CDC 32.050 (B), (C), (D), (E) and (L). The signed DSL consent agreement also makes it abundantly clear that the appellants acknowledge the presence of wetlands and fill on their property. Terra Science's discovery of 2-6 inches of fill near the patio (statement 12 above) also means that the appellant violates CDC 32.050(C).

Conclusion

For the reasons stated above, as well as the reasons stated in the memorandum to the City Manager dated June 14, 2010 (pages CC-2 through CC-21) and the findings

contained in the Planning Director's decision (pages 70-116), the appeal should be denied.

Memo-2010-AP-10-01-Bundy August 2-memo to City Manager



Memorandum

Date: August 2, 2010

To: Chris Jordan, City Manager

From: Peter Spir, Associate Planner

Subject: This staff report responds to new material submitted after the July 19, 2010 City Council hearing during a week long written comment period that ended July 26, 2010. The hearing was to consider Troy and Gina Bundy's appeal of the Planning Director's decision to deny their application for a Water Resource Area (WRA) Protection permit to construct a swimming pool and patio area etc.

File: AP-10-01 (original file: WAP-09-03)

Purpose

During the week long open period to submit written evidence and arguments, staff received a considerable volume of material. Most of the submittals did not address the criteria relevant to the application; they merely expressed the opinions that the Bundy's should be allowed to keep their pool. However, of significance to staff were two memorandums from the appellant's wetland specialist, Jason Clinch of Terra Science, which addressed at length the location of the wetlands on Mr. and Mrs. Bundy's property. Staff will discuss these two memoranda at this time. It is staff's opinion that they provide compelling grounds for denial of the WRA permit. Staff will also address elements of attorney Michael Robinson's letter dated July 26, 2010.

Background

City Council held a public hearing on July 19, 2010 to consider Troy and Gina Bundy's appeal of the Planning Director's decision to deny their application for a Water Resource Area (WRA) Protection permit to construct a swimming pool, patio area and other associated work in an area protected by WRA regulations and a conservation easement. At the close of the hearing, City Council approved a request by Michael Robinson, attorney for the appellant, that the record be left open for public comments through

July 26, 2010 followed by rebuttals and a staff report by August 2, 2010 and the appellant's final statements by August 9, 2010.

The hearing is scheduled to reconvene on September 13, 2010.

The 120-day permit processing period was extended to September 30, 2010.

Discussion

Staff has long held that the AKS wetland delineation conducted in 2000 provides sufficient evidence that wetlands extend about five feet onto the appellant's property. Based on the memorandums of appellant's wetland consultant, Jason Clinch of Terra Science, findings can be made that the wetlands extend much further onto the property into the area of the pool, patio and associated improvements (including landscaping) in contravention of the approval criteria for CDC Chapter 32. This has further implications for the 50-foot wide transition areas. If the wetlands extend further onto the appellants property then the transition zones would cover even more of the site.

Evidence of Wetland

1. The AKS Engineering study delineated the wetlands in 2000. The City accepted that delineation. Associate Planner Kristi Crowell reviewed the AKS study, which was site specific for property which includes the parcel upon which the Bundy residence sits today. Ms. Crowell's credentials included a bachelor's degree in Biology and Environmental Science and a Masters degree in Geography with an emphasis on Natural Resource Conservation. She studied wetland delineation. Her thesis was on wetlands. The City hired her in 1996 to handle code enforcement of wetlands and natural drainage ways because of her expertise in this area. Ms. Crowell analyzed the AKS study and determined that the property contained enough indicia to be determined to be a wetland within the meaning of ORS 196.800(14). Ms. Crowell's determination formed the basis of the City's conclusion that the property is a wetland. Per the AKS delineation, the wetlands extend about five feet onto the appellant's property from the north property line. That would include the northern edge of the patio. While it is not necessary that the City's delineation is acknowledged by DSL, DSL does concur that the area is a wetland, see the revised Consent Agreement dated July 9, 2010, referred to in section 10, below.
2. The 2005 Local Wetland Inventory (LWI) identified wetlands extending about 29 feet onto the appellant's property. This inventory was adopted by City Council and approved by DSL. For specific sites, DSL notes that additional wetland delineation is needed.

3. Jason Clinch, a wetland consultant from Terra Science Inc. prepared two letters regarding the wetlands for the appellants. In a June 7, 2010 letter he states on page 1 paragraph 2 that: ***“Site visits have revealed that a swimming pool, patio and landscaping features have been constructed in wetlands in the back (north) part of your property.”***
4. In that same letter, Jason Clinch of Terra Science states (page 2, paragraph 3): ***“It has already been acknowledged during a recent site visit by DSL, the Corps and Terra Science Inc. (TSI, Jason Clinch) that areas impacted by the swimming pool, patio, landscaped areas, and drainage ditch qualified (and still qualify where not effectively filled, see above) as jurisdictional wetlands prior to impacts.”***
5. In that same letter, Jason Clinch of Terra Science states (page 4 paragraph 3) that: ***“In summary, it appears that the wetlands on the properties identified have been impacted through construction of the swimming pool, patio, landscaping and improvement of the drainage ditch.”***
6. In a July 23, 2010 letter, Jason Clinch of Terra Science states on page 2 paragraph 2: ***“Contemporary conditions clearly indicate a greater portion of the property would likely qualify as wetland under current wetland delineation methodology...”***
7. Jason Clinch of Terra Science states on page 4 paragraph 1: ***“...during the field visit with Mr. Spir, Ms. Anita Huffman (DSL-Clackamas County Permit coordinator), Ms. Kristen Hafer (Corps-Biologist/Permit Coordinator), and myself on May 5, 2010, all parties involved (with the possible exception of Mr. Spir) agreed that the wetlands continue to persist on the PGE property and the Bundy property.”***
8. Jason Clinch of Terra Science states on page 6 paragraph 8: ***“DSL rejected the wetland report by AKS and contends that much more of the property is likely to qualify as wetland than what the City identified when they accepted the faulty and incorrect AKS report....”*** In other words, the true extent of the wetland is greater than initially reported by AKS.
9. In that same letter, Jason Clinch of Terra Science states on page 8 paragraph 2 the following: ***“...the subject property still qualifies as a wetland and functions much the same as it did before.”***
10. Yet another piece of evidence regarding wetlands is the DSL Revised Consent Agreement signed by Mr. and Mrs. Bundy and dated July 9, 2010. In that legal agreement, the appellants acknowledge the facts of the case, as laid out by DSL, and agree to pay fines and mitigate as required. Under the ‘Stipulated Facts’ heading is the following entry:

"2. The properties contain a wetland, a 'water of the state' within the meaning of ORS 196.800(14).

By recognizing the fact that there are wetlands on their property the appellant's join a group of others, including Terra Science (statement 7 above), DSL, AKS, Winterbrook Planning, authors of the DSL acknowledged 2005 Local Wetland Inventory and City staff, who agree that wetlands are on the appellant's property. USACE also offered a reserved assessment in Terra Sciences memo that:

"the site visit revealed that a pool, patio, and landscaping may have been placed within wetlands in the backyard of your residence."

These findings run counter to and should, given the volume of professional findings, invalidate Michael Robinson's principal argument stated on page 3 of his July 26, 2010 letter when he wrote:

"The resource (wetlands) that the transition and buffer requirements in CDC Chapter 32 seek to protect is not located in the Bundy backyard."

~~Michael~~ Robinson's subsequent statement on page 4 paragraph 6 that:

"None of the protected water features and vegetated corridors are affected by the pool and patio." is similarly wrong given statement 4 above; "It has already been acknowledged during a recent site visit by DSL, the Corps and Terra Science Inc. (TSI, Jason Clinch) that areas impacted by the swimming pool, patio, landscaped areas, and drainage ditch qualified (and still qualify where not effectively filled, see above) as jurisdictional wetlands prior to impacts."

~~Michael~~ Robinson's reference to slide 5 of staff's July 19, 2010 power point as proof that there are no wetlands is incorrect. That slide₇ was based on the AKS delineation₇ and shows the wetland boundary in yellow dashed lines extending five feet onto the Bundy property.

Evidence of Fill

~~11-Ja~~

1. Jason Clinch of Terra Science in the June 7, 2010 letter states on page 1 paragraph 2: **"Several soil samples taken near the patio and in the PGE Right-Of-Way indicated varying depths of fill (2 to 6 inches) over the native soil."**

2. "

~~12.~~ Also in the DSL Revised Consent Agreement signed by Mr. and Mrs. Bundy and dated July 9, 2010, the appellants acknowledge the 'Stipulated Facts' including:

"3. Troy and Gina Bundy removed and/or filled more than 50 cubic yards of material within waters of the state without a permit or authorization from the Department."

From these statements it is evident that there is 2 to 6 inches of fill near the patio and that the appellant's acknowledge that there is fill on their property. ~~Thus, CDC 32.050 (C) is not met in that~~ The grading of the majority of the rear yard and then constructing hardscapes (pool, patio) does not reflect any attempt to minimize the adverse effect of this activity on the water resource area, as required by CDC 32.050(C).

Other Issues raised by Michael Robinson, Attorney for Appellants

Defining "ng-a-Structure"

Additional points raised by Michael Robinson included the contention that the concrete and steel pool is not a structure. Staff takes issue with that. CDC Chapter 2 Defines "Structure" as follows:

"Structure. Something constructed or built and having a fixed base on, or fixed connection to, the ground or another structure, and platforms, walks, and driveways more than 30 inches above grade and not over any basement or story below."

~~Michael~~ Robinson, states-opines that since the 15 X 30 foot concrete pool is not over 30 inches high it is not a structure.

Staff finds that the CDC definition should be interpreted to define two separate types of structures given the use of the conjunction "and".

"Something constructed or built and having a fixed base on, or fixed connection to, the ground or another structure and..."

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Staff finds that the pool meets the first part of the definition, the pool is a structure and therefore the structural setback would apply.

Additional support for this comes from the Oregon Residential Specialties Code as adopted by the West Linn Municipal Code. It defines a swimming pool as:

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~~Michael~~ Robinson also contends that a swimming pool and patio is a "passive recreation facility" and therefore permitted in the Water Resource Area transition and structural setback area pursuant to ~~per~~ CDC 32.050(F). ~~However, T~~ that code section was written to accommodate needed public facilities in WRA when there is no practical alternative. For example, it is sometimes necessary to traverse a WRA with a ~~necessary~~ road or water transmission pipeline. This code section would allow a road or a water transmission pipeline to traverse the WRA, so long as it can be done with a minimum of disturbance. The legislative intent was that "Passive recreation facilities" ~~should~~ be limited to narrow trails in parks traversing drainageways as contemplated in the Parks and Natural Area Design Review definition for "passive-oriented parks" (CDC 56.015). It ~~does is neither not seem~~ reasonable nor consistent with legislative history to consider a private 30 X 15 foot pool, patio, rockery and water fountain as a passive recreation facility in this context.

~~See Staff finds that~~ CDC Chapter 56.015: Design Review for Active and Passive Recreation-Oriented Parks ~~applies, as an example of what is meant by the term "passive recreation."~~ - It defines passive oriented parks as follows: "*Passive-oriented parks focus is upon unstructured play, relaxation, family picnics and similar activities.... Support facilities, such as covered picnic or play areas, etc. are discouraged unless the facilities of a more community wide nature are included at the park.*" Using this code section as an analogy, if a covered picnic area and play area is discouraged in a passive area park, a swimming pool would also be discouraged as a passive use.

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Staff finds the swimming pool is not a “passive recreation facility”. Therefore staff finds that the criterion is not met.

Eligibility for Hardship

The City's hardship provisions allow the development of lots that, because of the Water Resource Area restrictions, would otherwise be deprived of all economically viable use of the land. If that hardship is proven then the code allows up to 5,000 square feet of the site to be disturbed (including any grading and excavation).

It would be difficult for the appellants to argue that they are being denied all economically viable uses of the property, since the house and property at 1215 Ninth Street has been assessed by Clackamas County at \$640,370.00-dollars which demonstrates that the site has already achieved economic viability.

The existing driveways, front sidewalk and the house footprint total approximately 7,175 square feet (not counting the pool, patio, associated hardscapes and graded areas) so even if hardship were proven, the maximum 5,000 square foot allowance has already been exceeded. Discussion of “hardship” procedures is also addressed by staff on page CC-19.

Value of Transitions

The tone of the Robinson arguments is re-is a pervasive message being sent that only the wetlands are important; and that the transition zone is not relevant or has no value. In terms of the CDC, transition zones are it is relevant in that development is excluded from these areas. Transition zones have value which the City has sought to protect. And as far as value, staff would defer to an excerpt from Freshwater Wetlands in Washington State Chapter 5, Volume 1—A Synthesis of the Science, August 2003, regarding buffers (transitions).

5.5.2 Functions Provided by Buffers, states:

“The literature is broadly consistent on the ways in which B-buffers can provide for the protection and maintenance of important wetland functions, including the s. These in removing of lude:

- Removing sediment,
- Removing excess nutrients (phosphorous and nitrogen),
- Removing toxics (bacteria, metals, pesticides),
- Influencing the microclimate,
- Maintaining adjacent habitat critical for the life needs of many species that use wetlands,
- Screening adjacent disturbances (noise, light, etc.) and
——• Maintaining habitat connectivity”. To ignore the transition zones and allow disturbances therein is not consistent with wetland protection.

~~(Staff is submitting into the record "The Science and Effectiveness of Wetland Management Tools" dated March 2005.)~~

Relevance of the Open Space Conservation Easement

~~And a~~ Although the appellant's attorney contends that the Open Space Conservation Easement (page 35-38/ (105-108)) is not relevant to this WRA application, staff contends that a decision to approve this WRA permit could not take place with the knowledge that the appellant is in violation of the terms of the easement.

Response of other Agencies

Whether DSL or USACE pursue enforcement is irrelevant to the City of West Linn's obligation to enforce its own regulations. That having been said much of this discussion is semantics, DSL is not pursuing "enforcement" but is requiring payment of penalty plus mitigation. USACE has their "After the Fact" permit process. City staff respects both agencies permitting and compliance procedures. It is staff's opinion that their varied positions speaks to the culture or priorities of each agency.

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The subsequent July 27, 2010 e-mail from Tina Tippin to Troy Bundy only outlined a procedure for the appellant to follow and did not promise approval: *"PGE needs to review the mitigation plan prior to giving any type of approval."*

Conclusion

To date, the City has relied on the AKS wetland delineation done in 2000 which showed wetland extending just five feet onto the Appellant's property. But based on Mr. Clinch of Terra Science, the wetland may extend much further onto the appellant's property. According to Mr. Clinch, DSL contends, in item 8 above, that **"...much more of the appellant's property is likely to qualify as wetland..."**

The appellant's wetland consultant continues to make the City's case with the finding that ***"It has already been acknowledged during a recent site visit by DSL, the Corps and Terra Science Inc. (TSI, Jason Clinch) that areas impacted by the swimming pool, patio, landscaped areas, and drainage ditch qualified (and still qualify, where not effectively filled, see above) as jurisdictional wetlands prior to impacts."***

Finally, the most definitive statement (3 above) from the June 7, 2010 letter from Terra Science:

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Those statements, plus statement numbers 5, 6, 7, 8 and 9 (above) from Terra Science, (including those attributed to DSL and the Corps (USACE) by Terra Science), means that the pool, patio, plus associated fill/landscaping etc. are not just in a transition or setback area, as staff contended originally, but that they are located on the actual wetlands. This violates CDC 32.050 (B), (C), (D), (E) and (L). The signed DSL consent agreement also makes it abundantly clear that the appellants acknowledge the presence of wetlands and fill on their property. Terra Science's discovery of 2-6 inches of fill near the patio (statement 12 above) also means that the appellant violates CDC 32.050(C).

Options Conclusion

~~For the reasons stated above, as well as the reasons stated in the memorandum to the City Manager dated June 14, 2010 (pages CC-2 through CC-21) and the findings contained in the Planning Director's decision (pages 70-116), the~~
~~1. City Council could agree with staff and adopt the findings listed above from Terra Science that the wetlands extend beyond the delineation provided by AKS and that the swimming pool and patio are on the wetlands.~~

~~2. City Council could disregard the Terra Science findings and rely instead on the AKS wetland delineation which would mean that only some of the patio is in wetlands but all of the swimming pool, patio and associated modifications are in the transition and setback area.~~

Recommendation

~~Staff recommends option 1. The appeal should be denied, based on the findings by Terra Science listed above plus the findings contained in the memorandum to the City Manager dated June 14, 2010 (pages CC-2 through CC-21) and the findings contained in the Planning Director's decision (pages 70-116).~~

Memo-2010-AP-10-DI-Bundy August 2-memo to City Manager

Dear Mr. Spir:

Per Mike Robinson's request, attached is a copy of his letter and enclosure addressed to Mayor Kovash and Members of the City Council regarding the above-referenced. Please place a copy before the City Council and in the official Planning Department file for this application.

Please contact Mike at (503-727-2264) if you have any questions.

<<kovash ltr.PDF>> <<Exh. 1.PDF>>

Michael C. Robinson | Perkins Coie LLP

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Tenth Floor

Portland, OR 97209-4128

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sent by Corinne F. Ryan | Perkins Coie LLP

LEGAL SECRETARY TO:

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July 30, 2010

VIA E-MAIL

Mayor John Kovash
City of West Linn
22500 Salamo Road, #100
West Linn, OR 97068

Re: City of West Linn File No. AP-10-01; Second Open Record Submittal by Troy and Gina Bundy

Dear Mayor Kovash and Members of the City Council:

1. Introduction.

This office represents Troy and Gina Bundy (the "Applicants"). This letter constitutes the Bundys' submittal prior to the close of the second open record on Monday, August 2, 2010 at 5:00 p.m. This letter contains argument and evidence responding to those written documents received by the City prior to 5:00 p.m. on July 26, 2010. Mr. Peter Spir provided the following documents to me on July 27 indicating that these were the only documents received by the City prior to the close of the first open record period:

- A. One (1) page email dated July 26, 2010 from Jane Hickman.
- B. One (1) page email dated July 26, 2010 from Bethany McClain.
- C. One (1) page email dated July 23, 2010 from John Stowell.
- D. City-prepared summary of telephone call from unidentified female caller on July 26, 2010.
- E. City-prepared summary of telephone conversation with Luella Hunt received by City on July 23, 2010.

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Perkins Coie LLP and Affiliates
Agenda Packet os of August 31, 2010; Page 562

2. The two (2) City prepared summaries of telephone conversations must be removed from the record and not placed before the West Linn City Council prior to deliberation.

The summary of telephone conversations with the unidentified female caller and Luella Hunt are not eligible to be placed in the record or before the City Council. The City Council's motion at the conclusion of the public hearing on July 19, 2010 provided for submittal of *written* documents from parties prior to 5:00 p.m. on July 26, 2010. Telephone calls with summaries prepared by staff do not constitute written documents from parties. Accordingly, the Applicants respectfully request that the City Council remove these two (2) documents from the official Planning Department file and that they not be placed before the City Council prior to deliberation.

3. Response to substantive issues raised by Jane Hickman.

Ms. Hickman argues that the Applicants should be required to "remove all improvements they made to both protected wetlands and to publicly owned rights-of-way." The City Council can reject this argument for two (2) reasons.

First, the only protected wetlands are the ditch and the wetlands on the Portland General Electric property. The Bundys have agreed pursuant to a Revised Consent Agreement with the Oregon Department of State Lands to restore these wetlands. Second, no publicly owned rights-of-ways are involved. The right-of-way referred to by Ms. Hickman is the Portland General Electric property. Further, the "bridge" that Ms. Hickman refers to is a moveable bridge. Please note one of the photographic exhibits submitted by the Bundys in their initial evidentiary submittal on July 26, 2010 that shows Mr. Bundy holding the bridge up above the small drainageway. Further, had Ms. Hickman reviewed the record, she would have discovered that the Oregon Department of State Lands ("DSL") has reached an agreement with the Bundys. This is not a criminal matter, so the Oregon State Police need not be involved.

In response to the argument submitted by Ms. Hickman, the Bundys are entitled, pursuant to the City Council's motion, to rebut the argument and evidence. **Exhibit 1** is a July 27, 2010 email from Tina Tippin of Portland General Electric, a July 26, 2010 email from Troy S. Bundy and two (2) attachments to his email. The email from Ms. Tippin states that "Portland General Electric must review the mitigation plan prior to giving any type of approval for installation of landscaping on their property" and also states that a "permit of entry" will be required prior to entering the property for planting the materials. Mr. Bundy's preceding email to Ms. Tippin describes the consent agreement entered into with DSL and includes the two (2) proposed mitigation planting plans. This evidence demonstrates, contrary to Ms. Hickman's argument and the argument from the unidentified female telephone caller, that the Bundys are proceeding to

Mayor John Kovash
July 30, 2010
Page 3

implement the Revised Consent Agreement and will restore the wetlands located on the Portland General Electric property.

4. Conclusion.

For the reasons contained in this submittal, the July 26, 2010 submittal and argument and evidence submitted on behalf of the Bundys at the public hearing on July 19, 2010, the Applicants respectfully request that the City Council grant their appeal, reject the Planning Director's decision and approve their application with reasonable conditions of approval.

Very truly yours,



Michael C. Robinson

MCR/cfr

Enclosures

cc: Mr. and Mrs. Troy Bundy (w/encls.) (via email)
Mr. Jason Clinch (w/encls.) (via email)
Mr. John Sonnen (w/encls.) (via email)
Mr. Peter Spir (w/encls.) (via email)

Robinson, Michael C. (Perkins Coie)

From: Troy S. Bundy [TSB@hbw.com]
Sent: Tuesday, July 27, 2010 1:29 PM
To: Robinson, Michael C. (Perkins Coie)
Subject: FW: 1215 9th St

From: Tina Tippin [mailto:Tina.Tippin@pgn.com]
Sent: Tuesday, July 27, 2010 7:25 AM
To: Troy S. Bundy
Cc: Mike Livingston
Subject: RE: 1215 9th St

Hello Mr. Bundy,

PGE needs to review the mitigation plan prior to giving any type of approval. PGE has an approved plant list we need to use when planting on our property and around power lines. We will also need to issue a Permit of Entry for the work prior to planting.

Please sent me the plan(s) and I will circulate it for review on our end and get back to you as soon as possible.

Thank you,
Tina Tippin



Portland General Electric

Real Property Services
Property Agent
P: 503.464.7672
F: 503.464.2863

From: Troy S. Bundy [mailto:TSB@hbw.com]
Sent: Monday, July 26, 2010 10:14 AM
To: Tina Tippin
Subject: 1215 9th St

Ms. Tippin:

Good morning. I own a home at 1215 9th Street, West Linn. A portion of PGE land lies behind my home. The City of West Linn contacted you about this earlier. Last year, that property was cleared of construction debris and "native vegetation." We met with the DSL about this and they would like it restored, (without the construction debris) as it sits on a wetland. We have agreed to do this at our expense, but would like your permission to do the necessary plantings and such. Machinery will not be utilized. I will forward a copy of the proposed plan, which we can modify as PGE feels appropriate.

EXHIBIT 1

7/27/2010

There will be no trees planted. Low lying bushes and grasses will be planted as directed by the DSL. Thank you for your attention to this. If I could get some confirmation that the plan is either acceptable or you will allow me access to plant on this property to the extent both PGE and the DSL agree on a revised plan, that would be fantastic. My submittal to the City in this respect is due today, and hearing from PGE today would be advisable so the City Council can understand your position for the record. Thanks so much,

Troy Bundy

General Planting Notes

All plantings will be installed at locations appropriate to their hydrologic tolerance prior to December 31, 2010 (locations to be determined by a wetland mitigation or restoration specialist). All plant material will be installed during the dormant season to insure good plant establishment prior to the next dormant season. The anticipated planting dates would occur between November 2010 and December 2010.

All plant material will be arranged to create a diverse environment that perpetuates natural colonization of native species and matures in a naturalistic pattern. Purchased shrubs and select grasses will be of one- to two-year old stock (1 gallon pots for shrubs, 4 inch pots for grasses). Plugs for emergent species would be acquired just prior to installation. Purchased plugs will be high quality living material with healthy roots. A qualified landscaper or suitable equivalent will install all plantings. According to nursery specifications, careful planting and fertilization procedures would be employed to promote healthy root growth and plant survival. In addition, all container stock would be planted by digging oversized holes and adding organic fertilizer according to nursery specifications to promote good plant establishment. A qualified wetland mitigation or restoration specialist will supervise the planting effort.

Specific Planting Notes

Planting Area A: PGE Wetland Restoration Area

Tufted hairgrass (*Deschampsia cespitosa*): 4 inch pots should be arranged in clumps of five (5) at the locations indicated on the planting plan (Figure 1) unless otherwise indicated by the wetland mitigation or restoration specialist.

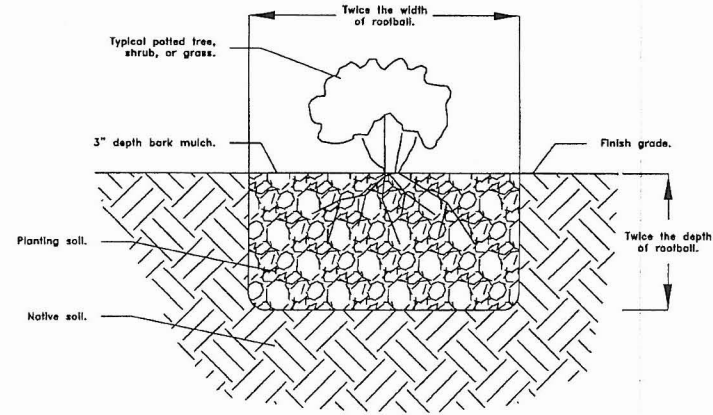
Soft rush (*Juncus patens*), spreading rush (*Juncus effusus*), and slough sedge (*Carex obnupta*): Plugs should be arranged in clumps of twenty (20) at the locations indicated on the planting plan (Figure 1) unless otherwise indicated by the wetland mitigation or restoration specialist.

Planting Area C: Drainage Ditch Water Quality Improvement Area - Ditch Bottom

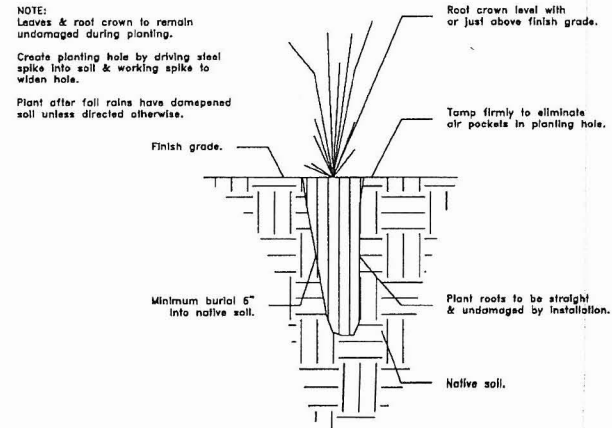
Soft rush (*Juncus patens*), spreading rush (*Juncus effusus*), daggerleaf rush (*Juncus ensifolius*), taper-tip rush (*Juncus acuminatus*), and slough sedge (*Carex obnupta*): Plugs should be arranged in clumps of five to ten (5-10) in a variable pattern throughout the length of the ditch bottom indicated on the planting plan (Figure 1) unless otherwise indicated by the wetland mitigation or restoration specialist.

Planting Area C: Drainage Ditch Water Quality Improvement Area - Ditch Slopes

Western fescue (*Festuca occidentalis*): 4 inch pots should be arranged in clumps of three (3) in a variable pattern throughout the length of the ditch slopes indicated on the planting plan (Figure 1) unless otherwise indicated by the wetland mitigation or restoration specialist.

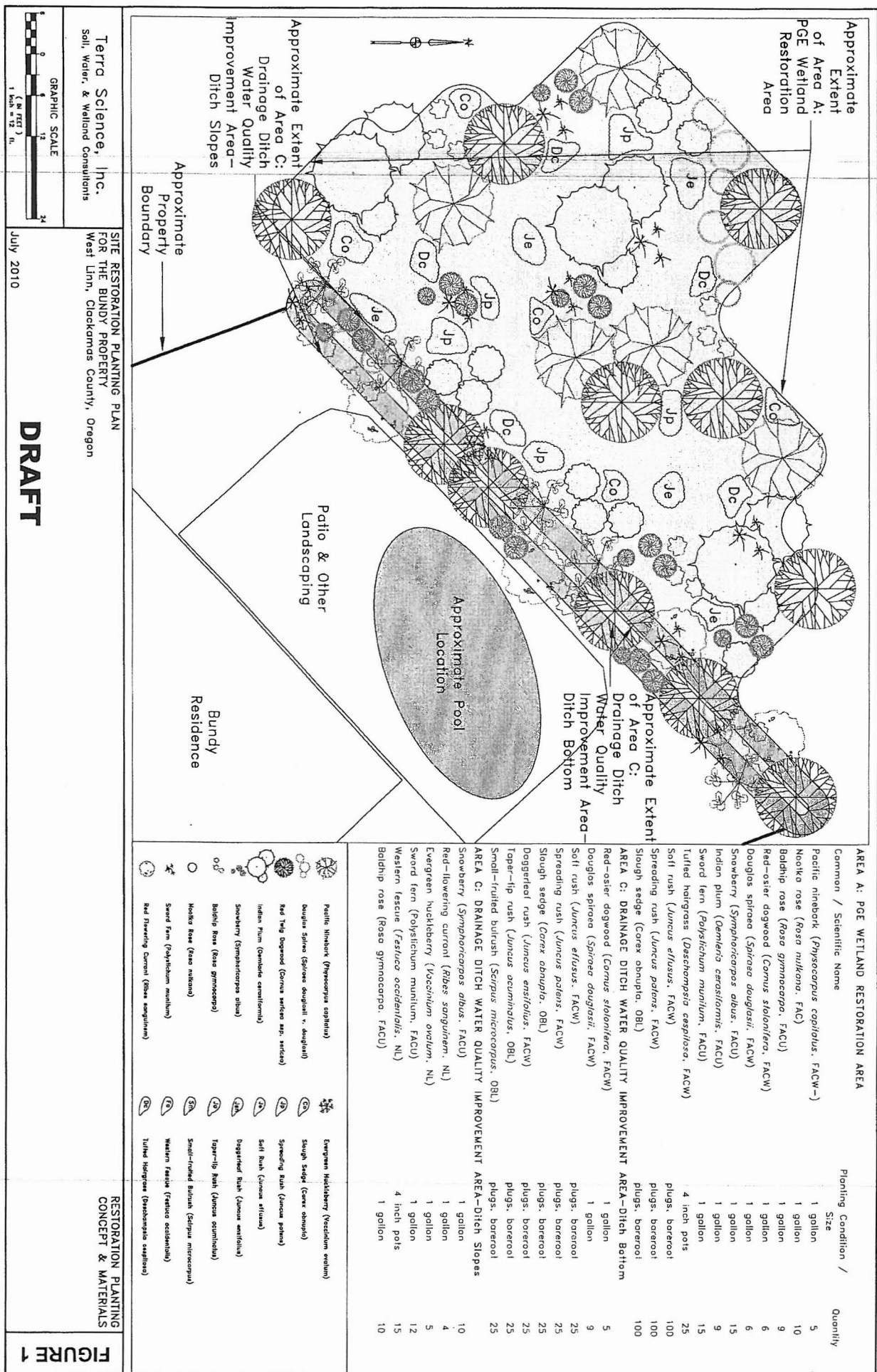


DETAIL: Shrub Planting



DETAIL: Plug Planting

<p>Terra Science, Inc. Soil, Water, & Wetland Consultants</p>	<p>SITE RESTORATION PLANTING PLAN FOR THE BUNDY PROPERTY West Linn, Clackamas County, Oregon</p>	<p>RESTORATION PLANTING DETAILS</p>
<p>NO SCALE</p>	<p>July 2010</p> <p style="text-align: center;">DRAFT</p>	<p style="writing-mode: vertical-rl; transform: rotate(180deg);">FIGURE 2</p>



AREA A: PGE WETLAND RESTORATION AREA

Common / Scientific Name	Planting Condition / Size	Quantity
Pacific ninebark (<i>Physocarpus opulifolius</i> , FACW-)	1 gallon	5
Noochka rose (<i>Rosa milkana</i> , FAC)	1 gallon	10
Baldhip rose (<i>Rosa gymnocarpa</i> , FACU)	1 gallon	9
Red-osier dogwood (<i>Cornus stolonifera</i> , FACW)	1 gallon	6
Douglas spiraea (<i>Spiraea douglasii</i> , FACW)	1 gallon	6
Snowberry (<i>Symphoricarpos albus</i> , FACU)	1 gallon	15
Indian plum (<i>Oemleria caeriflora</i> , FACU)	1 gallon	9
Sword fern (<i>Polystichum munulum</i> , FACU)	1 gallon	15
Tufted hallograss (<i>Deschampsia cespitosa</i> , FACW)	4 inch pots	25
Soft rush (<i>Juncus effusus</i> , FACW)	plugs, bareroot	100
Spreading rush (<i>Juncus patens</i> , FACW)	plugs, bareroot	100
Slough sedge (<i>Carex obnupta</i> , OBL)	plugs, bareroot	100
AREA C: DRAINAGE DITCH WATER QUALITY IMPROVEMENT AREA-Ditch Bottom		
Red-osier dogwood (<i>Cornus stolonifera</i> , FACW)	1 gallon	5
Douglas spiraea (<i>Spiraea douglasii</i> , FACW)	1 gallon	9
Soft rush (<i>Juncus effusus</i> , FACW)	plugs, bareroot	25
Spreading rush (<i>Juncus patens</i> , FACW)	plugs, bareroot	25
Slough sedge (<i>Carex obnupta</i> , OBL)	plugs, bareroot	25
Dogwater rush (<i>Juncus ensifolius</i> , FACW)	plugs, bareroot	25
Taper-tip rush (<i>Juncus acuminatus</i> , OBL)	plugs, bareroot	25
Small-fruited bulrush (<i>Scirpus microcarpus</i> , OBL)	plugs, bareroot	25
AREA C: DRAINAGE DITCH WATER QUALITY IMPROVEMENT AREA-Ditch Slopes		
Snowberry (<i>Symphoricarpos albus</i> , FACU)	1 gallon	10
Red-flowering current (<i>Ribes sanguinum</i> , NL)	1 gallon	4
Emergreen huckleberry (<i>Vaccinium oxycum</i> , NL)	1 gallon	5
Sword fern (<i>Polystichum munulum</i> , FACU)	1 gallon	12
Western tescue (<i>Festuca occidentalis</i> , NL)	4 inch pots	15
Baldhip rose (<i>Rosa gymnocarpa</i> , FACU)	1 gallon	10

	Pacific Ninebark (<i>Physocarpus opulifolius</i>)		Emergreen Huckleberry (<i>Vaccinium oxycum</i>)
	Douglas Spiraea (<i>Spiraea douglasii</i> s. douglasii)		Slough Sedge (<i>Carex obnupta</i>)
	Red Osier Dogwood (<i>Cornus stolonifera</i> ssp. stolonifera)		Spreading Rush (<i>Juncus patens</i>)
	Indian Plum (<i>Oemleria caeriflora</i>)		Soft Rush (<i>Juncus effusus</i>)
	Snowberry (<i>Symphoricarpos albus</i>)		Dogwater Rush (<i>Juncus ensifolius</i>)
	Baldhip Rose (<i>Rosa gymnocarpa</i>)		Taper-tip Rush (<i>Juncus acuminatus</i>)
	Hooker Rose (<i>Rosa nutkana</i>)		Small-fruited Bulrush (<i>Scirpus microcarpus</i>)
	Sword Fern (<i>Polystichum munulum</i>)		Western Tescue (<i>Festuca occidentalis</i>)
	Red Flowering Current (<i>Ribes sanguinum</i>)		Tufted Hallograss (<i>Deschampsia cespitosa</i>)

Terra Science, Inc.
Soil, Water, & Wetland Consultants

GRAPHIC SCALE
0 1 2 4
1 inch = 16'

July 2010

SITE RESTORATION PLANTING PLAN
FOR THE BUNDY PROPERTY
West Linn, Clackamas County, Oregon

DRAFT

RESTORATION PLANTING
CONCEPT & MATERIALS

FIGURE 1

Appellant's rebuttal and final arguments
received from
August 3, 2010 to August 9, 2010



1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
PHONE: 503.727.2000
FAX: 503.727.2222
www.perkinscoie.com

Michael C. Robinson
PHONE: (503) 727-2264
FAX: (503) 346-2264
EMAIL: MRobinson@perkinscoie.com

August 9, 2010

VIA E-MAIL

Mayor John Kovash
City of West Linn
22500 Salamo Road, #100
West Linn, OR 97068

Re: City of West Linn File No. AP 10-01

Dear Mayor Kovash and Members of the West Linn City Council:

This office represents the Applicants, Troy and Gina Bundy. This letter constitutes the Applicants' final written argument and consists of argument only, with the exception of **Exhibit 1**, which is submitted as a rebuttal to new evidence submitted by the City.

1. Introduction.

Troy and Gina respectfully request that the City Council assist in a resolution of this matter by approving their application with reasonable conditions of approval.

Notwithstanding the disagreement between the Bundys and staff, it is clear that the City Council can find that the relevant criteria of West Linn Community Development Code ("CDC") Chapter 32 have been satisfied. Contrary to the staff assertion that the Applicants have not addressed the relevant approval criteria, the Applicants explained in both their appeal and their submittal on July 26, 2010 why the relevant CDC Chapter 32 approval criteria are satisfied and how the City Council can approve the application and appropriately condition the decision to protect the public interest.

The overriding issue is whether the City wishes to be punitive or encourage compliance with the relevant and important provisions of CDC Chapter 32. These provisions are intended to protect delineated and mapped wetland resources. While the Bundys readily acknowledge that the improvements in their backyard for their family's passive recreation purposes are within transition areas and in an ORS Chapter 271 Conservation Easement (discussed below), and while the Bundys agree that the transition areas serve a purpose, the issue before the City Council is

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whether the resources intended to be protected by the transition area have either not been affected or, if they have, can they be mitigated with the permission of the United States Army Corps of Engineers ("USACE"), the Oregon Department of State Lands ("DSL"), and the property owner, Portland General Electric ("PGE").

A punitive approach to enforcement of CDC Chapter 32 would result in a denial of this application. A conciliatory approach regarding compliance with the most important provisions of CDC Chapter 32 (an acknowledgement that the transition requirements, while important, are secondary to the actual protection of the resources, especially in a case like this where the entire Bundy property is covered by one sort of transition or the other) will result in a reasonable decision allowing the Bundys to maintain their swimming pool and patio but requiring them to apply for and receive necessary permits and pay an appropriate penalty to the City. The Bundys have consistently offered that position to staff since beginning discussion with staff about this matter in March, 2010.

2. The pool and the patio area do not encroach upon or affect a delineated resource.

The City Council should review the Director's decision (found in the record at Tab "PD Decision w/Staff Report") page 1(70). The Director stated: "Wetlands designated on the City of West Linn's adopted West Linn Wetland, Riparian and Wildlife Inventory, 2003 (WI02) *lie to the north of the applicant's rear property line. The wetlands are located on property owned by Portland General Electric ("PGE").*" (Emphasis added).

Thus, notwithstanding staff's attempt in the August 2, 2010 staff report to now assert that the wetlands extend five (5) feet into the Bundy's property line (no map accompanies this statement and neither the 2000 delineation nor the 2005 adopted wetland inventory support this statement and, in fact, staff contradicts itself when the staff report is compared to the Director's decision), it is clear that the primary issue in this case involves the wetlands on the PGE property. However, the Bundys have entered into an agreement with DSL whereby they are required to mitigate and restore the wetlands on PGE. PGE will approve the Bundy's entry into the property and has approved the Bundy's landscaping plan. (**Exhibit 1**).

The Applicants are entitled to request an opportunity to submit **Exhibit 1** pursuant to ORS 197.763(6)(c) and (7) as a response to new evidence submitted with the August 2, 2010 staff report. The City's new evidence consists of two (2) parts. First, the 57-page attachment to the staff report concerning Washington State wetlands and, second, the staff report assertion at page 8 that PGE has "repeatedly said they are waiting for the Bundys to make the first move to repair the site." The Bundys are entitled to rebut the 57-page wetland report and the new assertion that PGE has "repeatedly" said they are waiting for the Bundys to make the first move. **Exhibit 1** shows that PGE has approved the mitigation plan, which is attached as part of **Exhibit 1**. This is an appropriate rebuttal to the City's unfounded evidentiary assertion that PGE has repeatedly said they are waiting for the Bundys to make the first move and, because the 57-page Washington

State wetlands guide is used to point out the importance of the PGE wetland, the proposed mitigation plan approved by PGE is a relevant evidentiary rebuttal to that evidence.

Staff's assertion at page 7 of the new staff report that the "tone of the Robinson arguments" is that the transition areas are not relevant or have no value is simply wrong. It appears that neither staff nor their lawyer have read the submittals. The Bundys agree that the transition areas are important but also believe it is important for the City Council to understand that the only resources that have been affected are not those where the pool and patio are located. It is also reasonable to take into account a situation where property such as this is 100% encumbered by various transition area requirements. Is it not consistent with the spirit of Chapter 32 and the City's desire to allow families to have an outdoor, passive recreational area for the City to approve this Chapter 32 application where only transition areas are affected?

3. The only mapped resources are north of the Bundy property.

Notwithstanding the staff's apparent desire to amend the 2005 Goal 5 adoption and the 2000 delineation, it may not do so in this process. The reality is that, based on the City's acknowledged wetland inventory, the pool and patio area in the backyard are not within a protected wetland (Note Planning Director staff report statement quoted on page 2, above). Neither the 2001 delineation, the 2005 Goal 5 adoption, DSL nor USACE have made that determination. Notwithstanding that the Applicants' wetland biologist might have opined on that issue, the City is bound by the adopted maps implementing CDC Chapter 32 and none of them cover this area. Moreover, that is precisely the point that the Director acknowledged in his original decision.

The ditch at the rear of the Bundy's property was changed before the Bundys purchased their property. Staff acknowledged that point in the last public hearing. The "bridge" that the City has raised as a concern is a moveable bridge and that is shown by the photograph in the record of Mr. Bundy holding the bridge. Since Mr. Bundy is not Superman, we can all conclude that the bridge is moveable. The DSL Final Consent Agreement requires restoration of this area and the PGE wetlands. CDC Chapter 32 is satisfied by this requirement.

The PGE wetland is the wetland that has been at issue since the very beginning of this matter. The DSL Final Consent Agreement requires that the area be restored by the end of this year. PGE has approved the mitigation plan and will allow the Bundys entry into the property. Mr. Clinch, because he is the *only* witness in this matter that is a credible wetland biologist, has provided substantial evidence that the change to the ditch (which will be restored) has had no impact on the function or value of the ditch.

Exhibit 2 is Mr. Clinch's response to the August 2, 2010 staff report. It is fully incorporated as part of the Applicants' final written argument.

4. The ORS Chapter 271 conservation easement is ineffective and the 2001 partition decision's condition of approval are irrelevant to this application.

It is undisputed that the City failed to follow the requirements of ORS Chapter 271 when it imposed the conservation easement in 2001. Therefore, the City Council should find that the easement is ineffective. In any event, the easement is irrelevant to this application. CDC 32.020.A provides: "[Chapter 32] applies to properties upon which a natural drainageway, wetland, riparian corridor and/or associated transition and setback area, is located." CDC Chapter 32 does *not* apply to areas based upon a conservation easement established (or purported to have been established) under ORS Chapter 271.

Additionally, the Applicants disagree with the City that conditions of approval from the 2001 partition plat are relevant. The Planning Director did not raise that issue in either his original decision nor in any subsequent staff report and CDC Chapter 32 does not require that prior partition decisions be relevant to a CDC Chapter 32 application.

5. The City fails to acknowledge the impacts to the Bundy's property if they do not approve this application with reasonable conditions of approval.

First, since the Bundys landscaped their yard upon their purchase in 2003, there were no native plants at that time. The evidence in the record demonstrates that the area had already been approved with non-native plants and had a pre-existing concrete patio.

Second, even though tax valuation is irrelevant because it is relevant only to CDC 32.090.B and the Applicants assert that CDC 32.090.A applies, it is helpful for the City Council to consider the fact that prohibiting any reasonable passive recreational development on the rear or front yard of the Bundy's property, renders their property worthless. Moreover, it is poor public policy to so regulate a property that a family cannot do the same thing that any other family in the City could do in their backyard.

Additionally, the City Council should remember that the regulations now asserted to have been violated were *not in effect* when the Bundys purchased their property in 2003. To approve this application, the City Council should be sensitive to situations like this where the regulations are so burdensome that ordinary approval such as patios and swimming pools cannot be allowed.

6. The City Council should reject the arguments raised by staff concerning passive recreation and whether the swimming pool and patio are structures.

The simple answer to the new staff report asserting that the swimming pool is a structure is that this determination must be based on the CDC and not on other documents. Additionally, if the City Council makes this determination, it should be prepared to enforce the setbacks for all of the patios and swimming pools that are within setbacks and there are undoubtedly hundreds of them in the City. Second, the City Council can easily find that the swimming pool is a passive

Mayor John Kovash
August 9, 2010
Page 5

recreational facility. Nothing mandates that they determine that it is not and it is good public policy to determine in this case and, indeed, City-wide that swimming pools are passive recreations areas.

The City Council should not fall into the trap of taking extreme policy positions because that would satisfy the result of this case. Instead, they should carefully evaluate the approval criteria in CDC Chapter 32 and come to the conclusion that this is the right policy decision City-wide.

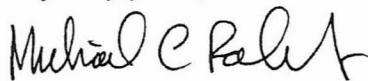
7. Conclusion.

The City Council should find a way to resolve this notwithstanding the failure of staff to even investigate a resolution of this matter.

This is about a family trying to correct a mistake – it is relevant as to whether they believed they were entitled to construct the pool but they now understand that they were not. The City can find based on substantial evidence in the whole record that the only affected resource is on the PGE property and the ditch, both of which will be restored by the Bundys.

As noted above and as explained in the July 26, 2010 letter at page 8, the City Council can find that substantial evidence supports a determination that the relevant approval criteria in CDC Chapter 32 have been satisfied. In the event the City Council so determines, the Applicants respectfully request that the City Council impose reasonable conditions of approval requiring that the Bundys apply for and receive "after the fact" building permits, mitigation plans and erosion control plans as required by CDC Chapter 32. Additionally, the Bundys will agree to have a mitigation plan required by CDC 32.070, a revegetation plan required by CDC 32.080 and a site plan required by CDC 32.060 for the PGE property reviewed and approved by the City.

Very truly yours,



Michael C. Robinson

MCR/cfr

Enclosure

cc: Mr. Jon Sonnen (w/encl.) (via email)
Mr. Peter Spir (w/encl.) (via email)
Mr. Tim Ramis (w/encl.) (via email)
Mr. and Mrs. Troy Bundy (w/encl.) (via email)
Mr. Jason Clinch (w/encl.) (via email)

Robinson, Michael C. (Perkins Coie)

From: Troy S. Bundy [TSB@hhw.com]
Sent: Friday, July 30, 2010 11:23 AM
To: Robinson, Michael C. (Perkins Coie)
Subject: FW: Planting Plan

Attachments: Bundy_Planting_Plan.pdf



Bundy_Planting_Plan.pdf (302 K...

-----Original Message-----

From: Tina Tippin [mailto:Tina.Tippin@pgn.com]
Sent: Friday, July 30, 2010 11:18 AM
To: Troy S. Bundy
Cc: jason@terrascience.com; Mike Livingston; Tina Tippin
Subject: RE: Planting Plan

Troy,

The proposed planting plan is acceptable to PGE.

I also wanted to clarify my last email regarding the permit of entry. It is not a permit of entry PGE will issue but a License for Use. The License must be agreed upon and in place prior to any work being done on PGE property. I will send you a draft as soon as possible.

Tina

-----Original Message-----

From: Troy S. Bundy [mailto:TSB@hhw.com]
Sent: Tuesday, July 27, 2010 1:29 PM
To: Tina Tippin
Cc: Robinson, Michael C. (Perkins Coie)
Subject: FW: Planting Plan

Tina:

Attached please find the planting plan our wetland biologist prepared. Let me know if PGE needs to change some of the plants. If you have a list of plants, I can give those to Jason and he can modify based upon that too, if that is easier. Troy Bundy

-----Original Message-----

From: Jason Clinch [mailto:jason@terrascience.com]
Sent: Friday, July 23, 2010 4:01 PM
To: Troy S. Bundy
Subject: Planting Plan

Hey Troy,

Here is the draft planting plan. Let me know if this works for you. I don't have cost estimates at this time for plant material and installation but can get some estimates from several of our preferred landscapers if you like. I can also just get the cost of materials if you think you might plant it yourself or use your landscaper.

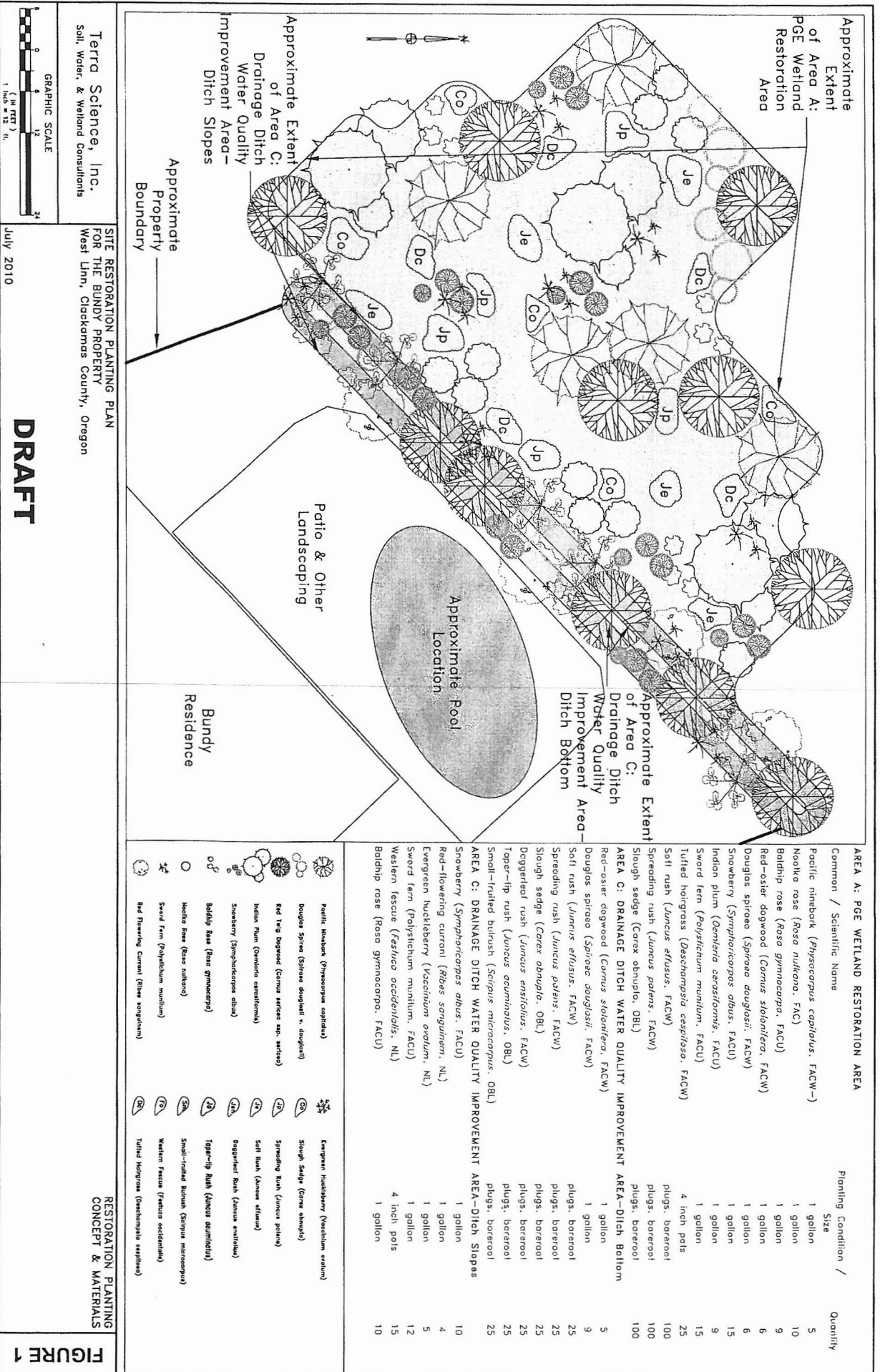
Thanks

Jason

Jason Clinch
Wetland Biologist / Project Manager

-----Terra Science, Inc.-----
Soil, Water & Wetland Consultants
4710 S.W. Kelly Ave., Suite 100
Portland, OR 97239

Ph: 503-274-2100 Fax: 503-274-2101
Email: jason@terrascience.com



Approximate Extent of Area A: PGE Wetland Restoration Area

Approximate Extent of Area C: Drainage Ditch Water Quality Improvement Area - Ditch Slopes

Approximate Extent of Area C: Drainage Ditch Water Quality Improvement Area - Ditch Bottom

Approximate Pool Location

Patio & Other Landscaping

Bundy Residence

Approximate Property Boundary

Terra Science, Inc.
Soil, Water, & Wetland Consultants

SITE RESTORATION PLANTING PLAN
FOR THE BUNDY PROPERTY
West Linn, Clackamas County, Oregon

RESTORATION PLANTING
CONCEPT & MATERIALS

GRAPHIC SCALE
1" = 10' (10 FEET)
1" = 20' (20 FEET)

July 2010

DRAFT

FIGURE 1

AREA A: PGE WETLAND RESTORATION AREA

Common / Scientific Name	Planting Condition / Size	Quantity
Pacific ninebark (<i>Physocarpus opulifolius</i> , FACW-)		
Nootka rose (<i>Rosa nutkana</i> , FAC)	1 gallon	5
Baldhip rose (<i>Rosa gymnocarpa</i> , FACU)	1 gallon	10
Red-osier dogwood (<i>Cornus stolonifera</i> , FACW)	1 gallon	9
Douglas spiraea (<i>Spiraea douglasii</i> , FACW)	1 gallon	6
Snowberry (<i>Symphoricarpos albus</i> , FACU)	1 gallon	6
Indian plum (<i>Oenothera cerastiformis</i> , FACU)	1 gallon	15
Sword fern (<i>Polystichum munifolium</i> , FACU)	1 gallon	9
Tufted hairgrass (<i>Deschampsia cespitosa</i> , FACW)	4 inch pots	15
Soft rush (<i>Juncus effusus</i> , FACW)	plugs, bareroot	100
Spreading rush (<i>Juncus patens</i> , FACW)	plugs, bareroot	100
Slough sedge (<i>Carex obnupta</i> , OBL)	plugs, bareroot	100
AREA C: DRAINAGE DITCH WATER QUALITY IMPROVEMENT AREA-Ditch Bottom		
Red-osier dogwood (<i>Cornus stolonifera</i> , FACW)	1 gallon	5
Douglas spiraea (<i>Spiraea douglasii</i> , FACW)	1 gallon	9
Soft rush (<i>Juncus effusus</i> , FACW)	plugs, bareroot	25
Spreading rush (<i>Juncus patens</i> , FACW)	plugs, bareroot	25
Slough sedge (<i>Carex obnupta</i> , OBL)	plugs, bareroot	25
Doggett's rush (<i>Juncus ensifolius</i> , FACW)	plugs, bareroot	25
Tapar-tip rush (<i>Juncus acuminatus</i> , OBL)	plugs, bareroot	25
Small-fruited bulrush (<i>Scirpus microcarpus</i> , OBL)	plugs, bareroot	25
AREA C: DRAINAGE DITCH WATER QUALITY IMPROVEMENT AREA-Ditch Slopes		
Snowberry (<i>Symphoricarpos albus</i> , FACU)	1 gallon	10
Red-flowering currant (<i>Ribes sanguinum</i> , NL)	1 gallon	4
Evergreen huckleberry (<i>Vaccinium ovatum</i> , NL)	1 gallon	5
Sword fern (<i>Polystichum munifolium</i> , FACU)	1 gallon	12
Western tescue (<i>Festuca occidentalis</i> , NL)	4 inch pots	15
Baldhip rose (<i>Rosa gymnocarpa</i> , FACU)	1 gallon	10

	Pacific Ninebark (<i>Physocarpus opulifolius</i>)		Evergreen huckleberry (<i>Vaccinium ovatum</i>)
	Douglas Spiraea (<i>Spiraea douglasii</i> v. <i>douglasii</i>)		Slough Sedge (<i>Carex obnupta</i>)
	Red Twp Dogwood (<i>Cornus sericea</i> ssp. <i>sericea</i>)		Spreading Rush (<i>Juncus patens</i>)
	Indian Plum (<i>Oenothera cerastiformis</i>)		Soft Rush (<i>Juncus effusus</i>)
	Snowberry (<i>Symphoricarpos albus</i>)		Doggett's Rush (<i>Juncus ensifolius</i>)
	Baldhip Rose (<i>Rosa gymnocarpa</i>)		Tapar-tip Rush (<i>Juncus acuminatus</i>)
	Nootka Rose (<i>Rosa nutkana</i>)		Small-fruited Bulrush (<i>Scirpus microcarpus</i>)
	Sword Fern (<i>Polystichum munifolium</i>)		Western Tescue (<i>Festuca occidentalis</i>)
	Red Flowering Currant (<i>Ribes sanguinum</i>)		Tufted Hairgrass (<i>Deschampsia cespitosa</i>)

General Planting Notes

All plantings will be installed at locations appropriate to their hydrologic tolerance prior to December 31, 2010 (locations to be determined by a wetland mitigation or restoration specialist). All plant material will be installed during the dormant season to insure good plant establishment prior to the next dormant season. The anticipated planting dates would occur between November 2010 and December 2010.

All plant material will be arranged to create a diverse environment that perpetuates natural colonization of native species and natives in a naturalistic pattern. Purchased shrubs and select grasses will be of one- to two-year old stock (1 gallon pots for shrubs, 4 inch pots for grasses). Plugs for emergent species would be acquired just prior to installation. Purchased plugs will be high quality living material with healthy roots. A qualified landscaper or suitable equivalent will install all plantings. According to nursery specifications, careful planting and fertilization procedures would be employed to promote healthy root growth and plant survival. In addition, all container stock would be planted by digging oversized holes and adding organic fertilizer according to nursery specifications to promote good plant establishment. A qualified wetland mitigation or restoration specialist will supervise the planting effort.

Specific Planting Notes

Planting Area A: PGE Wetland Restoration Area

Tufted hairgrass (*Deschampsia cespitosa*): 4 inch pots should be arranged in clumps of five (5) at the locations indicated on the planting plan (Figure 1) unless otherwise indicated by the wetland mitigation or restoration specialist.

Soft rush (*Juncus patens*), spreading rush (*Juncus effusus*), and slough sedge (*Carex obnupta*): Plugs should be arranged in clumps of twenty (20) at the locations indicated on the planting plan (Figure 1) unless otherwise indicated by the wetland mitigation or restoration specialist.

Planting Area C: Drainage Ditch Water Quality Improvement Area - Ditch Bottom

Soft rush (*Juncus patens*), spreading rush (*Juncus effusus*), doggerleaf rush (*Juncus ensifolius*), loper-tip rush (*Juncus acuminatus*), and slough sedge (*Carex obnupta*): Plugs should be arranged in clumps of five to ten (5-10) in a variable pattern throughout the length of the ditch bottom indicated on the planting plan (Figure 1) unless otherwise indicated by the wetland mitigation or restoration specialist.

Planting Area C: Drainage Ditch Water Quality Improvement Area - Ditch Slopes

Western fescue (*Festuca occidentalis*): 4 inch pots should be arranged in clumps of three (3) in a variable pattern throughout the length of the ditch slopes indicated on the planting plan (Figure 1) unless otherwise indicated by the wetland mitigation or restoration specialist.

Terra Science, Inc.
Soil, Water, & Wetland Consultants

SITE RESTORATION PLANTING PLAN
FOR THE BUNDY PROPERTY
West Linn, Clackamas County, Oregon

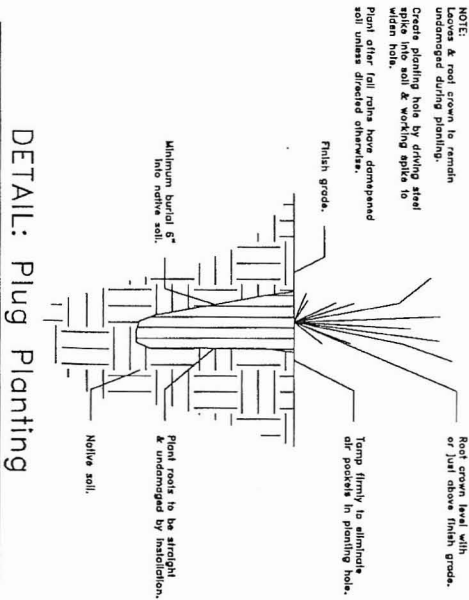
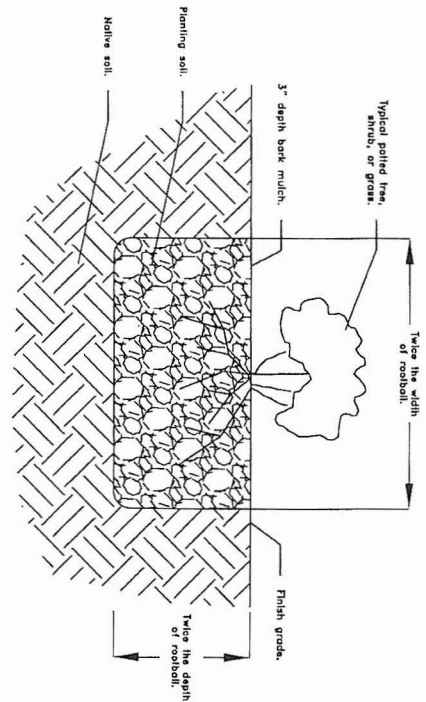
NO SCALE

July 2010

DRAFT

RESTORATION PLANTING
DETAILS

FIGURE 2





Memorandum

Date: August 2, 2010

To: Chris Jordan, City Manager

From: Peter Spir, Associate Planner

Subject: This staff report responds to new material submitted after the July 19, 2010 City Council hearing during a week long written comment period that ended July 26, 2010. The hearing was to consider Troy and Gina Bundy's appeal of the Planning Director's decision to deny their application for a Water Resource Area (WRA) Protection permit to construct a swimming pool and patio area etc.

File: AP-10-01 (original file: WAP-09-03)

Purpose

During the week long open period to submit written evidence and arguments, staff received a considerable volume of material. Most of the submittals did not address the criteria relevant to the application; they merely expressed the opinion that the Bundy's should be allowed to keep their pool. However, of significance to staff were two memorandums from the appellant's wetland specialist, Jason Clinch of Terra Science, which addressed at length the location of the wetlands on Mr. and Mrs. Bundy's property. Staff will discuss these two memoranda at this time. It is staff's opinion that they provide compelling grounds for denial of the WRA permit. Staff will also address elements of attorney Michael Robinson's letter dated July 26, 2010.

Background

City Council held a public hearing on July 19, 2010 to consider Troy and Gina Bundy's appeal of the Planning Director's decision to deny their application for a Water Resource Area (WRA) Protection permit to construct a swimming pool, patio area and other associated work in an area protected by WRA regulations and a conservation easement. At the close of the hearing, City Council approved a request by Michael Robinson, attorney for the appellant, that the record be left open for public comments through

July 26, 2010 followed by rebuttals and a staff report by August 2, 2010 and the appellant's final statements by August 9, 2010.

The hearing is scheduled to reconvene on September 13, 2010.

The 120-day permit processing period was extended to September 30, 2010.

Discussion

Staff has long held that the AKS wetland delineation conducted in 2000 provides sufficient evidence that wetlands extend about five feet onto the appellant's property. Based on the memorandums of appellant's wetland consultant, Jason Clinch of Terra Science, findings can be made that the wetlands may extend much further onto the property into the area of the pool, patio and associated improvements (including landscaping) in contravention of the approval criteria for CDC Chapter 32. This has further implications for the 50-foot wide transition areas. If the wetlands extend further onto the appellants property then the transition zones would cover even more of the site.

Evidence of Wetland

1. The AKS Engineering study delineated the wetlands in 2000. The City accepted that delineation. Associate Planner Kristi Crowell reviewed the AKS study, which was site specific for property which includes the parcel upon which the Bundy residence sits today. Ms. Crowell's credentials include a bachelor's degree in Biology and Environmental Science and a Masters degree in Geography with an emphasis on Natural Resource Conservation. She studied wetland delineation. But can Ms. Crowell conduct a wetland delineation? Why did her findings differ from the wetland staff at DSL who we know are trained in wetland delineation methodology (refer to my July 8, 2010 letter regarding the AKS report) ? Her thesis was on wetlands. The City hired her in 1996 to handle code enforcement of wetlands and natural drainage ways because of her expertise in this area. Ms. Crowell analyzed the AKS study and determined that a portion of the property contained enough indicia to be determined to be a wetland within the meaning of ORS 196.800(14). Ms. Crowell's determination formed the basis of the City's conclusion that a portion of the property is a wetland. Per the AKS delineation, the wetland boundary in 2000s extended ed about five feet onto the appellant's property from the north property line. That would include the northern edge of the patio. While it is not necessary that the City's delineation is acknowledged by DSL, DSL does concur that the area isis the properties contain a wetland, see the revised Consent Agreement dated July 9, 2010, referred to in section 10, below.

2. The 2005 Local Wetland Inventory (LWI) identified wetlands extending about 29 feet onto the appellant's property. This inventory was adopted by City Council and approved by DSL. For specific sites, DSL notes that additional wetland delineation is needed. If this supercedes the AKS boundary, then why did the City not require modifications to the Conservation Easement?
3. Jason Clinch, a wetland consultant from Terra Science Inc. prepared two letters regarding the wetlands for the appellants. In a June 7, 2010 letter he states on page 1 paragraph 2 that: ***"Site visits have revealed that a swimming pool, patio and landscaping features have been constructed in wetlands in the back (north) part of your property."*** This is inaccurate. The letter states: "Site visits have revealed that a swimming pool, patio, and landscaping features have been constructed in the back (north) part of your property, a drainage ditch was improved along the north property line, and landscaping was conducted within the PGE Right-Of-Way. At least some portions of the aforementioned improvements appear to occur in contemporary wetlands. However, the actual extent to which these features occur in what was historical wetlands is debatable."
4. In that same letter, Jason Clinch of Terra Science states (page 2, paragraph 3): ***"It has already been acknowledged during a recent site visit by DSL, the Corps and Terra Science Inc. (TSI, Jason Clinch) that areas impacted by the swimming pool, patio, landscaped areas, and drainage ditch qualified (and still qualify where not effectively filled, see above) as jurisdictional wetlands prior to impacts."*** This is inaccurate. The letter states: "It has already been acknowledged during a recent site visit by DSL, the Corps, and Terra Science, Inc. (TSI, Jason Clinch) that areas impacted by the swimming pool, patio, landscaped areas, and drainage ditch would qualify as wetland under existing delineation methodology. Forensic analysis of the historic wetland boundary would be quite difficult given the amount of development and alterations to the landscape since initial home construction occurred in 2002 and the lack of an appropriate reference site due to adjacent development."
5. In that same letter, Jason Clinch of Terra Science states (page 4 paragraph 3) that: ***"In summary, it appears that the wetlands on the properties identified have been impacted through construction of the swimming pool, patio, landscaping and improvement of the drainage ditch."*** This is inaccurate. The letter state: "In summary, it appears that at least some wetlands on the properties identified have been impacted through construction of the swimming pool, patio, landscaping, and improvements to a drainage ditch."
6. In a July 23, 2010 letter, Jason Clinch of Terra Science states on page 2 paragraph 2: ***"Contemporary conditions clearly indicate a greater portion of the property would likely qualify as wetland under current wetland delineation methodology..."*** This ignores the latter part of that sentence which reads: "...but it is hard to say what the effect construction of the homes in 2002 may have had on the original extent of the

wetlands.” Mr. Spir is refusing to acknowledge the original mistake by the City in allowing the homes to be constructed in the first place without having an accurate wetland boundary and also the effect said construction had on the extent of those wetlands.

7. Jason Clinch of Terra Science states on page 4 paragraph 1: “*...during the field visit with Mr. Spir, Ms. Anita Huffman (DSL-Clackamas County Permit coordinator), Ms. Kristen Hafer (Corps-Biologist/Permit Coordinator), and myself on May 5, 2010, all parties involved (with the possible exception of Mr. Spir) agreed that the wetlands continue to persist on the PGE property and the Bundy property.*” However, the extent of said wetlands was never agreed upon or determined by any party.
8. Jason Clinch of Terra Science states on page 6 paragraph 8: “*DSL rejected the wetland report by AKS and contends that much more of the property is likely to qualify as wetland than what the City identified when they accepted the faulty and incorrect AKS report....*” In other words, the true extent of the wetland is greater than initially reported by AKS. Likely to qualify as wetland should not be interpreted as fact. Only an updated delineation report can tell the true extent of wetlands at this time which doesn’t reflect what they were in 2000, 2003, or 2009 nor can we determine the effect initial scalping of the property had on the extent of wetlands between 2000 and 2003.
9. In that same letter, Jason Clinch of Terra Science states on page 8 paragraph 2 the following: “*...the subject property still qualifies as a wetland and functions much the same as it did before.*” This should not be interpreted as the entire property but only that portion which qualifies as wetland.
10. Yet another piece of evidence regarding wetlands is the DSL Revised Consent Agreement signed by Mr. and Mrs. Bundy and dated July 9, 2010. In that legal agreement, the appellants acknowledge the facts of the case, as laid out by DSL, and agree to pay fines and mitigate as required. Under the ‘Stipulated Facts’ heading is the following entry:

“2. The properties contain a wetland, a ‘water of the state’ within the meaning of ORS 196.800(14). The properties do contain a wetland however, the extent of the wetland boundary was not determined by DSL

By recognizing the fact that there are wetlands on their property the appellant’s join a group of others, including Terra Science (statement 7 above), DSL, AKS, Winterbrook Planning, authors of the DSL acknowledged 2005 Local Wetland Inventory and City staff, who agree that wetlands are on the appellant’s property. USACE also offered a reserved assessment in Terra Sciences memo that:

"the site visit revealed that a pool, patio, and landscaping may have been placed within wetlands in the backyard of your residence."

These findings run counter to and should, given the volume of professional findings, invalidate Michael Robinson's principal argument stated on page 3 of his July 26, 2010 letter when he wrote:

"The resource (wetlands) that the transition and buffer requirements in CDC Chapter 32 seek to protect is not located in the Bundy backyard."

Robinson's subsequent statement on page 4 paragraph 6 that:

"None of the protected water features and vegetated corridors are affected by the pool and patio." is similarly wrong given statement 4 above; *"It has already been acknowledged during a recent site visit by DSL, the Corps and Terra Science Inc. (TSI, Jason Clinch) that areas impacted by the swimming pool, patio, landscaped areas, and drainage ditch qualified (and still qualify where not effectively filled, see above) as jurisdictional wetlands prior to impacts."* Which is incorrectly quoted in the first place (see above).

Robinson's reference to slide 5 of staff's July 19, 2010 power point as proof that there are no wetlands is incorrect. That slide was based on the AKS delineation and shows the wetland boundary in yellow dashed lines extending five feet onto the Bundy property.

Evidence of Fill

1. Jason Clinch of Terra Science in the June 7, 2010 letter states on page 1 paragraph 2: *"Several soil samples taken near the patio and in the PGE Right-Of-Way indicated varying depths of fill (2 to 6 inches) over the native soil."*
2. Also in the DSL Revised Consent Agreement signed by Mr. and Mrs. Bundy and dated July 9, 2010, the appellants acknowledge the 'Stipulated Facts' including:
 - "3. Troy and Gina Bundy removed and/or filled more than 50 cubic yards of material within waters of the state without a permit or authorization from the Department."*

From these statements it is evident that there is 2 to 6 inches of fill near the patio and that the appellant's acknowledge that there is fill on their property. The grading of the majority of the rear yard and then constructing hardscapes (pool, patio) does not reflect any attempt to minimize the adverse effect of this activity on the water resource area, as required by CDC 32.050(C). How can the City not acknowledge DSL's rejection of the AKS report yet go on to acknowledge the findings of consent agreement? DSL never defined the exact extent of fill in wetland, only that it occurred. In effect, the Bundy's are taking on the responsibility of past transgressions by previous landowners (those

that scalped the property and dumped fill on the PGE property prior to the Bundy's ownership) through this consent agreement since it is when those transgressions occurred that the most significant wetland impacts occurred.

Other Issues raised by Michael Robinson, Attorney for Appellants

Defining "Structure"

Additional points raised by Michael Robinson included the contention that the concrete and steel pool is not a structure. Staff takes issue with that. CDC Chapter 2 Defines "Structure" as follows:

"Structure. Something constructed or built and having a fixed base on, or fixed connection to, the ground or another structure, and platforms, walks, and driveways more than 30 inches above grade and not over any basement or story below."

Robinson opines that since the 15 X 30 foot concrete pool is not over 30 inches high it is not a structure.

Staff finds that the CDC definition should be interpreted to define two separate types of structures given the use of the conjunction "and".

"Something constructed or built and having a fixed base on, or fixed connection to, the ground or another structure and..."

"platforms, walks, and driveways more than 30 inches above grade and not over any basement or story below."

Staff finds that the pool meets the first part of the definition, the pool is a structure and therefore the structural setback would apply.

Additional support for this comes from the Oregon Residential Specialties Code as adopted by the West Linn Municipal Code. It defines a swimming pool as:

"Any STRUCTURE intended for swimming or recreational bathing that contains water over 24 inches (610 mm) deep. This includes in-ground, aboveground and on-ground swimming pools, hot tubs and spas."

Also there is ORSC §R202 Definitions: Structure: *"That which is built or constructed."*

Defining "Passive Recreation Facilities"

Robinson also contends that a swimming pool and patio is a "passive recreation facility" and therefore permitted in the Water Resource Area transition and structural setback area pursuant to CDC 32.050(F). However, that code section was written to accommodate needed public facilities in WRA when there is no practical alternative.

For example, it is sometimes necessary to traverse a WRA with a road or water transmission pipeline. This code section would allow a road or a water transmission pipeline to traverse the WRA, so long as it can be done with a minimum of disturbance. The legislative intent was that "Passive recreation facilities" be limited to narrow trails in parks traversing drainageways as contemplated in the Parks and Natural Area Design Review definition for "passive-oriented parks" (CDC 56.015). It is neither reasonable nor consistent with legislative history to consider a private 30 X 15 foot pool, patio, rockery and water fountain as a passive recreation facility in this context.

See CDC Chapter 56.015: Design Review for Active and Passive Recreation-Oriented Parks, as an example of what is meant by the term "passive recreation." It defines passive oriented parks as follows: "*Passive-oriented parks focus is upon unstructured play, relaxation, family picnics and similar activities.... Support facilities, such as covered picnic or play areas, etc. are discouraged unless the facilities of a more community wide nature are included at the park.*" Using this code section as an analogy, if a covered picnic area and play area is discouraged in a passive area park, a swimming pool would also be discouraged as a passive use.

Metro's Greenspaces Master Plan (Adopted 1992) Definitions p. 131 & 133 offers the following definition:

"Active recreation – recreation that uses specifically built facilities or that occurs in such density or form that it requires or results in a modification to the area or resource (i.e. campgrounds, golf courses)(sometimes called high intensity recreation)
Passive recreation – recreation not requiring developed facilities that can be accommodated without change to the area or resource (sometimes called low-density recreation)."

Department of State Lands, Division 120, Wetland Conservation Plan Wetland Resource Designations and Analysis of Alternatives. In "*141-120-0080 Uses Allowed in the Protection Category*" it includes:

"(2)(a) Passive recreation activities that require no structures, such as bird watching, canoeing or nature walks;"

Staff finds the swimming pool is not a "passive recreation facility". Therefore staff finds that the criterion is not met.

Eligibility for Hardship

The City's hardship provisions allow the development of lots that, because of the Water Resource Area restrictions, would otherwise be deprived of all economically viable use of the land. If that hardship is proven then the code allows up to 5,000 square feet of the site to be disturbed (including any grading and excavation).

It would be difficult for the appellants to argue that they are being denied all economically viable uses of the property, since the house and property at 1215 Ninth Street has been assessed by Clackamas County at \$640,370.00 which demonstrates that the site has already achieved economic viability.

The existing driveways, front sidewalk and the house footprint total approximately 7,175 square feet (not counting the pool, patio, associated hardscapes and graded areas) so even if hardship were proven, the maximum 5,000 square foot allowance has already been exceeded. Discussion of "hardship" procedures is also addressed by staff on page CC-19.

Value of Transitions

The tone of the Robinson arguments is that only the wetlands are important; the transition zone is not relevant or has no value. In terms of the CDC, transition zones are relevant in that development is excluded from these areas. Transition zones have value which the City has sought to protect. Buffers can protect and maintain important wetland functions, including the removing of sediment, excess nutrients (phosphorous and nitrogen, toxics (bacteria, metals, pesticides), influencing the microclimate, maintaining adjacent habitat critical for the life needs of many species that use wetlands, screening adjacent disturbances (noise, light, etc.) and maintaining habitat connectivity. To ignore the transition zones and allow disturbances therein is not consistent with wetland protection.

Relevance of the Open Space Conservation Easement

Although the appellant's attorney contends that the Open Space Conservation Easement (page 35-38/ (105-108)) is not relevant to this WRA application, staff contends that a decision to approve this WRA permit could not take place with the knowledge that the appellant is in violation of the terms of the easement.

Response of other Agencies

Whether DSL or USACE pursue enforcement is irrelevant to the City of West Linn's obligation to enforce its own regulations. That having been said much of this discussion is semantics, DSL is not pursuing "enforcement" but is requiring payment of penalty plus mitigation That is how DSL's enforcement policy works. USACE has their "After the Fact" permit process. City staff respects both agencies permitting and compliance procedures. It is staff's opinion that their varied positions speaks to the culture or priorities of each agency.

Portland General Electric may or may not be is not contemplating action against the appellants. There is simply no evidence of what PGE is doing or not doing. They have

repeatedly said that they are waiting for the Bundys to make the first move to repair the site. In a June 2, 2010 e-mail on page CC-23, Tina Tippin of PGE stated, "PGE has not granted the Bundy's any right to access the PGE property interest, or to remove any trees, re-grade or landscape PGE's property in any fashion and our records do not reflect any request by the Bundy's to do so. Were such a request made and granted it would be conditioned upon strict compliance with all applicable laws and property rights."

The subsequent July 27, 2010 e-mail from Tina Tippin to Troy Bundy only outlined a procedure for the appellant to follow and did not promise approval:

"PGE needs to review the mitigation plan prior to giving any type of approval." PGE has agreed to the restoration plan per Tina Tippin's July 30, 2010 email but still requires a Licence of Use to conduct the restoration.

Conclusion

To date, the City has relied on the AKS wetland delineation done in 2000 which showed wetland extending just five feet onto the Appellant's property. This is inaccurate. If this was the case then they would not be concerned with and trying to make the case that the pool and patio are in wetland! But based on Mr. Clinch of Terra Science, the wetland may extend much further onto the appellant's property. According to Mr. Clinch, DSL contends, in item 8 above, that "...much more of the appellant's property is likely to qualify as wetland..." Again, "likely to qualify as wetland" should not be interpreted as fact.

The appellant's wetland consultant continues to make the City's case with the finding that "It has already been acknowledged during a recent site visit by DSL, the Corps and Terra Science Inc. (TSI, Jason Clinch) that areas impacted by the swimming pool, patio, landscaped areas, and drainage ditch qualified (and still qualify, where not effectively filled, see above) as jurisdictional wetlands prior to impacts." Which is incorrectly quoted in the first place (see above).

Finally, the most definitive statement (3 above) from the June 7, 2010 letter from Terra Science:

Site visits have revealed that a swimming pool, patio and landscaping features have been constructed in wetlands in the back (north) part of your property." Mr. Spir's most definitive statement is an inaccurate quotation from the letter. The letter states: "Site visits have revealed that a swimming pool, patio, and landscaping features have been constructed in the back (north) part of your property, a drainage ditch was improved along the north property line, and landscaping was conducted within the PGE Right-Of-Way. At least some portions of the aforementioned improvements appear to occur in contemporary wetlands. However, the actual extent to which these features occur in what was historical wetlands is debatable."

Those statements, plus statement numbers 5, 6, 7, 8 and 9 (above) from Terra Science, (including those attributed to DSL and the Corps (USACE) by Terra Science), means that the pool, patio, plus associated fill/landscaping etc. are not just in a transition or setback area, as staff contended originally, but that they are located on the actual wetlands. This violates CDC 32.050 (B), (C), (D), (E) and (L). The signed DSL consent agreement also makes it abundantly clear that the appellants acknowledge the presence of wetlands and fill on their property. Terra Science's discovery of 2-6 inches of fill near the patio (statement 12 above) also means that the appellant violates CDC 32.050(C). The contemporary extent of wetlands (as in 2009 wetland boundary, when alleged impacts occurred) has never been determined. The City has failed to acknowledge that any significant impacts that occurred to wetlands (wherever they may be), occurred during scalping of the property and illegal dumping of material on the PGE property. Lastly, most of the statements Mr. Spir quotes from the Terra Science letters are inaccurate from what was actually stated in those letters.

Conclusion

For the reasons stated above, as well as the reasons stated in the memorandum to the City Manager dated June 14, 2010 (pages CC-2 through CC-21) and the findings contained in the Planning Director's decision (pages 70-116), the appeal should be denied.

Memo-2010-AP-10-DI-Bundy August 2-memo to City Manager