

**BEFORE THE HEARING EXAMINER  
FOR SKAGIT COUNTY**

In the Matter of the Application of	)	No. PL22-0600
	)	
	)	
<b>Hyden McKown, on behalf of the</b>	)	
<b>Washington State Dep't of Nat. Res.</b>	)	McKown DNR Critical Areas Variance
	)	
	)	FINDINGS, CONCLUSIONS, AND
<u>For a Critical Areas Variance</u>	)	DECISION

**SUMMARY OF DECISION**

The request by Hyden McKown on behalf of the Washington State Department of Natural Resources (DNR) for a Critical Areas Variance to reduce a Category II wetland buffer from the standard 150 feet down to 60 feet in the vicinity of Lizard Lake; to reduce a second Category II wetland buffer from the standard 150 feet down to 75 feet in the vicinity of Lily Lake; and to reduce the fish and wildlife habitat conservation riparian buffer surrounding these lakes' outlet streams from the standard 150 feet down to 60 feet and 75 feet, respectively, all on DNR-owned forestland within the Blanchard State Forest, is **APPROVED**. Conditions are necessary to address specific impacts of the proposed project.

**SUMMARY OF RECORD**

Hearing Date:

The Hearing Examiner held an open record hearing on the request on October 11, 2023, using remote access technology. After the hearing, the Hearing Examiner held open the record pending additional exhibits, which he received October 13, 2023.

Testimony:

The following individuals presented testimony under oath at the open record hearing:

Betsy Stevenson, Skagit County Senior Planner  
Hyden McKown, DNR Applicant Representative  
Perry Welch, Wetland Biologist  
Mark Buehrer, 2020 Engineering, Engineer

Exhibits:

The following exhibits were admitted into the record:

1. Staff Report, dated October 3, 2023
2. Critical Areas Variance Application, dated December 18, 2022

*Findings, Conclusions, and Decision  
Skagit County Hearing Examiner  
McKown DNR Critical Areas Variance  
No. PL22-0600*

3. Site Plans
4. Blanchard Trail System Map
5. Critical Areas Assessment, prepared by Welch Ecological Services, LLC, dated October 27, 2022, updated May 31, 2023
6. Notice of Development Application, dated April 6, 2023
7. Notice of Public Hearing, dated September 21, 2023
8. Email from County to WDFW and Ecology, dated April 4, 2023
9. Letters of Support, various dates
10. Department of Archaeology and Historic Preservation Concurrent, dated February 15, 2023
11. Post-Hearing Memo from County, dated October 12, 2023

The Hearing Examiner enters the following findings and conclusions based upon the testimony at the open record hearing and on the admitted exhibits:

### **FINDINGS**

#### Application and Notice

1. Hyden McKown, on behalf of the Washington State Department of Natural Resources (Applicant) requests approval of a critical areas variance to allow the construction of two vault toilets in the Blanchard State Forest. The first proposed vault toilet would be 60 feet from Lake Lizard, within the 150-foot buffer of a Category II wetland associated with that lake. The second proposed vault toilet would be 75 feet from Lily Lake, within the 150-foot buffer of a second Category II wetland associated with that lake.<sup>1</sup> The vault toilets are intended to serve hikers. Currently, due to the absence of toilets at the lake, hikers deposit human waste within the buffers of the wetlands. *Exhibit 1, Staff Report, pages 1 through 3; Exhibit 2; Exhibit 3.*
2. The Applicant submitted its critical areas variance application on December 18, 2022. On April 16, 2023, the County issued public notice of the application by publishing it in the *Skagit Valley Herald* newspaper, mailing it to property owners within 300 feet of the subject property, and emailing it to local tribes and agencies with possible jurisdiction, including the Washington State Department of Fish and Wildlife (WDFW) and the Washington State Department of Ecology (Ecology). Senior Planner Betsy Stevenson testified that the tribes who received notification included the Upper Skagit, Sauk-Suiattle, Swinomish, and Samish Tribes, as well as the Skagit River System Cooperative. The notice development application set a deadline for public comment of April 21, 2023. On September 20, 2023 the County caused a notice of public hearing to be posted on the subject property, published in the newspaper, and mailed to property owners. No public comments were received in response to these notices. *Exhibit 1, Staff Report, page 2; Exhibit 6; Exhibit 8; Testimony of Betsy Stevenson.*

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<sup>1</sup> Following the hearing, the County and Applicant argued, and the Hearing Examiner agreed, that there was also a separate buffer around the lakes' outlet streams. This issue is discussed in greater detail below.

3. Although there were no public comments in response to the County’s notices, there had been public discussion of the proposal at an earlier phase. Applicant Representative Hyden McKown testified that the Blanchard Forest Advisory Committee and other stakeholders had reviewed the proposal during the grant phase and had provided letters of support. Following the public hearing, he submitted these letters, which the Hearing Examiner admitted as Exhibits 9 and 10. In summary, the letters commented as follows:
- The Washington Trails Association expressed “strong support” for the proposal, which it felt would lead to “improved recreational user experience and reduced environmental impacts associated with increases in public use to the Blanchard State Forest. This project will help effectively manage human sanitation in an environmentally sustainable manner.”
  - Skagit County Parks and Recreation (an agency of the County) commented that it “enthusiastically supports” the proposal, again on the grounds that the proposed toilets will “help to effectively manage human sanitation in an environmentally sustainable manner, which will benefit the overall user experience.”
  - The Greater Bellingham Running Club commented that “[t]he project will help bring expanded facilities to the increasingly visited state forest and decrease the overall impact of unmanaged waste out on the trails. Even though most people follow the Leave No Trace principles, providing toilets should help reduce the formation of social trails and decrease the amount of pollution and trash associated with improperly disposed of toilet paper and human waste, especially near campgrounds and trailheads.”
  - The Back Country Horsemen of Whatcom County commented that, under existing conditions, “[t]he only pit toilets are at the lower trailhead and at the Overlook parking area. All the rest of the mountain as well as the camping areas at Lily and Lizard Lakes have no facilities for human waste disposal. The need for the toilets that this grant is requesting is very great.”
  - The Whatcom Mountain Bike Coalition commented that the proposed toilets “will be fantastic improvements to the trail network. The primary recreation opportunity provided by the project will be improved recreational user experience and reduce environmental impacts associated with the increase in public use to the Blanchard State Forest. This project will help effectively manage human sanitation in an environmentally sustainable manner.”
  - The Washington State Department of Archaeology and Historic Preservation issued a letter of concurrence in which it agreed that there would likely be “no adverse cultural resources impacts with the stipulation for an unanticipated discovery plan.”

*Exhibit 9; Exhibit 10; Testimony of Hyden McKown.*

#### State Environmental Policy Act

4. The County Planning and Development Services Department determined that the

proposal is categorically exempt from review under the State Environmental Policy Act (SEPA), chapter 43.21C Revised Code of Washington (RCW), as provided in Washington Administrative Code (WAC) 197-11-800(6)(e). That provision of the statewide SEPA rules exempts from SEPA review the granting of a variance not related to economic hardship. *Exhibit 1, Staff Report, page 2.*

#### Comprehensive Plan, Zoning, and Surrounding Uses

5. The subject property lies in the “Industrial Forest—Natural Resource Lands” designation of the Skagit County Comprehensive Plan. According to the Comprehensive Plan:  
The principal uses of Industrial Forest and Secondary Forest lands are the practice of commercial forestry, forestry support services, and forest-based businesses. Secondary Forest lands are intended to provide a transitional density between Rural- designated lands and Industrial Forest lands. Secondary Forest lands also offer the potential for smaller-scale commercial timber operations, supporting natural resource industries, and limited residential uses. Secondary Forest lands may include low-density residential use if consistent with the goals and policies of this chapter. Mining is also allowed in Industrial Forest and Secondary Forest on parcels located within a Mineral Resource Overlay designation.

...

Recreational opportunities on Forest Resource land shall be permitted uses where they will not conflict with forest practice activities on these lands or when such impacts can be fully mitigated. Proposed acquisitions of forest land for public recreational, scenic and park purposes shall be evaluated to determine the potential impacts on the economic viability and sustainability of forestry. Lands removed from forestry production for recreation and park uses shall be included in the Converted Natural Resource Lands Database.

*Comprehensive Plan, Goal 4B-5, et seq.*

6. The subject property is zoned “Industrial Forest—Natural Resources Lands,” as well. Within the zone, nonmotorized trails are a use permitted outright. *Skagit County Code (SCC) 15.16.410(3)(s).*

#### Existing Conditions and Proposal

7. The subject property (Parcel Nos. P47616, P47735, and P47732), comprising approximately 160 acres, is part of the larger Blanchard State Forest, a 4,500-acre forest managed by DNR east of Bellingham Bay. The forest provides habitat for wildlife, water retention and water quality benefits, timber production, and recreation opportunities. A network of trails runs through the subject property, connecting to public trailhead parking lots at Samish Overlook, Blanchard Lower, and Blanchard Upper. Toilet facilities are located at the Samish Overlook and Blanchard Lower parking lots but nowhere else in the

Blanchard State Forest. From the trailheads, it is a hike of approximately two to four miles to Lily Lake and Lizard Lake, depending on the route the hiker selects. There are existing primitive campsites at both lakes. *Exhibit 1, Staff Report, page 2; Exhibit 4; Exhibit 5.*

8. The proposal is to build two vault toilets, one near Lizard Lake, the other near Lily Lake. The Lily Lake toilet would be located at the southwest end of the lake about 20 feet west and upslope of the Lily Lake Trail and approximately 75 feet from the delineated critical area boundary, which consists of lake fringe/depressional emergent aquatic wetlands. The selected location is approximately 100 to 200 feet from the designated campsites and about 100 feet from the junction of Max's Shortcut and Oyster Lily Trails. The toilet location site occurs on a flat area, with the surroundings having a 20 to 30 percent slope, descending toward the lake. *Exhibit 2; Exhibit 5.*
9. The Lizard Lake toilet would be located at the southeast end of Lizard Lake, about five feet south of the trail, about 20 feet east of the Lizard-Lily Connector Trail, and about 60 feet from the nearest wetland critical area that is formed by an emergent wetland at the east end of Lizard Lake. This location is approximately 80 to 100 feet from the campground, which is located along the southeast shore of Lizard Lake. The specific toilet location occurs in a sparsely vegetated hollow formed by some snags and rotting downed wood. Several smaller snags will have to be removed and existing downed large woody debris can be re-purposed near the building area. Vegetation such as sword fern that may be present can be salvaged and transplanted around the toilet. *Exhibit 2; Exhibit 3.*
10. Each vault will require an approximately 15- by 25-foot clearing area. The final footprint for each toilet may be less, depending on final design. Each toilet building will be supported by a concrete slab supported by pin piles, precast concrete footings, or sonotubes. Minimal if any excavation will be required. The toilet units will not involve development of a drainfield or infiltration trench. All waste products are intended to be composted in place through a process of separation and drying and periodically hauled off-site and disposed of properly. Toilet buildings will pre-manufactured and assembled on-site. Materials will be transported to each site using back county horses using DNR service trails that are accessed from a DNR service road. Each unit will feature a solid waste composting chamber and a urine tank. The toilet system separates urine from feces. Solids and liquids can be managed separately to optimize evaporation and volume reduction potential. The intent of the design is to significantly reduce or eliminate the volume and weight of waste hauled off-site. The waste would be retained in plastic vaults and periodically hauled off-site and/or disposed of in accordance with the Department of Ecology's biosolids management program. Final site plans will provide more specific detail. *Exhibit 5.*

### Critical Areas

11. Each lake is surrounded by a Category II wetland. In addition, each lake is also a fish and wildlife habitat conservation area, being under 20 acres in size with submerged aquatic beds that provide fish or wildlife habitat. As noted above, the Applicant proposes non-discharging vault toilets within 60 feet and 75 feet of the two lakes and their associated wetlands. *Exhibit 5*.
  
12. The Applicant submitted a critical areas assessment for the wetlands and the fish and wildlife habitat conservation areas. The assessment, prepared by Welch Ecological Services, LLC, noted that existing recreational uses around the lakes:  
include horses, backpackers, day hikers and mountain bikers. These would be considered low-impact uses. There are established passive recreation campsites around both lakes. All of these land-uses occur within the protection standards for wetlands and Fish and Wildlife Habitat Conservation Areas. None of the campgrounds—which can accommodate several tents and small groups—provide toilet locations. There are signs posted encouraging campers to pack in and out. However, there is human waste left around the area. The current situation poses a risk to water quality.

Development of remote site toilets will contain human waste and reduce water quality hazards to the critical areas. The activity will not significantly degrade surface or groundwater. There will be no drainfield or infiltration of waste product.

Placement of remote campsite toilets at this project site would be considered Low Impact use. According to SCC 14.24.240 (6)(b), low impact uses and activities are associated with low levels of human disturbance or low habitat impacts, including, but not limited to, passive recreation, open space, or forest management land uses.

Low-impact uses and activities which are consistent with the purpose and function of the buffer and do not detract from its integrity may be permitted within the buffer depending on the sensitivity of the habitat involved; provided, that such activity shall not result in a decrease in riparian functions and values and shall not prevent or inhibit the buffer's recovery to at least pre-altered condition or function.

Each toilet will require will require a 375 square foot area. Minimal brush is present in the planned clearing areas. Groundcover is sparse or absent. At Lily Lake, approximately two to three eight-inch Douglas Fir or Western red cedars will be removed. At Lizard Lake, clearing will

involve removal of several snags, rotten woody debris and about a half dozen sword ferns. Any removed vegetation will be salvaged and re-purposed.

Minimal trail construction is required. Access points will consist of unimproved earthen paths. An approximately 15-foot-long natural access or unimproved trail about three feet wide will provide access to the toilet from the Lily Lake Trail. At Lizard Lake, the planned toilet location is very close to the main trail, so only about a five-foot long earthen access is required.

Each toilet will occupy approximately 375 square feet of undisturbed forest. Each toilet is located under thick canopy cover and interception of precipitation is anticipated to moderate stormwater run-off, which is anticipated to infiltrate within the well-drained soils at each site.

No critical wildlife habitat will be directly affected by placement of the remote toilets.

*Exhibit 5.*

13. The critical areas assessment described the toilets as “self-mitigating,” in that the toilets would create essentially no new impact while reducing the existing impacts of human waste. The assessment recommended three proposed conditions of approval:
- Salvage existing ground cover, such as sword fern and salal, and replant around periphery of toilets.
  - Re-purpose salvageable downed woody debris cleared from toilet locations and place around toilets to enhance natural appearance.
  - Install various best management practices (BMPs) around construction area to cover exposed soils and minimize erosion potential. BMPs for construction will be straw, jute, and plastic cover.

*Exhibit 5.*

#### Critical Areas Variance

14. County staff analyzed the proposal against the County’s critical areas variance approval criteria in SCC 14.24.140 and determined the following:
- The proposed vault toilet locations were chosen to best mitigate the ongoing accumulation of untreated human waste within the critical area buffer. This requires a location proximal to the frequently used trails and campgrounds. A reduction in the zoning setback would not provide sufficient relief to avoid the need for the requested critical areas variance.
  - A site assessment with mitigation plan, utilizing best available science, was prepared by Welch Ecological Services, LLC. Mitigation standards are outlined

in the critical areas assessment updated May 31, 2023. The project is considered self-mitigating. The vault toilet locations will be landward of existing trails, and a functional well-vegetated buffer will be retained between the toilets and the wetlands. The proposed toilets will provide for improved water quality.

- The site assessment, updated May 31, 2023, prepared by Welch Ecological Services, LLC, utilized best available science to support the modification to the standard wetland buffer.
- The site assessment with mitigation plan provides for reasonable development of the property and demonstrates that the proposed project will have the least possible impact on the nearby wetlands. The proposed vault toilet locations were chosen to best mitigate the ongoing accumulation of untreated human waste within the critical area wetland buffers. This requires a location proximal to the frequently used campgrounds and trails.
- The reasons set forth in the application justify the granting of the requested variance, and it is the minimum variance that will make possible the reasonable use of the land for passive recreation. For this project the location of the Lily and Lizard Lake toilets is above slope and on the landward side of existing low impact trails and recreational uses. Functional buffer consisting of thick forest will remain between the toilets and the critical area. Functional and valuable buffer will remain well beyond the protection standard buffers with the exception of the toilets, which will improve water quality for the critical areas.
- The granting of this variance is consistent with the intent of chapter 14.24 SCC. Property value is conserved, public welfare is safeguarded, and the on-site wetlands are further protected through the adequate storage of human waste at or near the site.
- No boundary line adjustments or subdivisions are on record for these parcels.
- The location of the toilets was chosen to best mitigate the occurrence of untreated human waste within the critical area buffers.

*Exhibit 1, Staff Report, pages 2 through 4.*

15. In addition to the critical areas variance criteria, County staff also considered the rules for mitigation set forth in SCC 14.24.080 and determined the following:
- Impacts to the critical areas are occurring via deposition of human waste within the critical area buffers. The proposed vault toilets will help avoid the impacts for such occurrences.
  - Measures taken to minimize the impact of the placement of the toilets are as follows:
    - Salvage existing ground cover such as sword fern and salal and replant around periphery of toilets.
    - Re-purpose salvageable downed woody debris cleared from toilet locations and place around toilets to enhance natural appearance.



- Install various BMPs around construction area to cover exposed soils and minimize erosion potential. BMPs for construction will be straw, jute, and plastic cover.
- The nature of buffer impacts associated with construction of the restrooms will be permanent and cannot be completely repaired, rehabilitated, or restored. Some of the disturbed buffer area will be restored once construction is complete. The Applicant or their contractor will:
  - Salvage existing ground cover such as sword fern and salal and replant around periphery of toilets.
  - Re-purpose salvageable downed woody debris cleared from toilet locations and place around toilets to enhance natural appearance.
- Impacts are reduced over time through the proper containment of human waste through use of the restrooms within the critical area buffer.
- The environment is enhanced through this project, via the proper containment of human waste through the use of the restrooms within the critical area buffer.
- A substantial portion of the buffers are not degraded as a result of this project. Rather, the proposal is intended to rectify an issue resulting from the current use of the property. As such, mitigation plantings are not required for this proposal.
- The proposal was reviewed by the Skagit County Health Department for compliance with chapter 12.05 SCC, the On-Site Sewage Code. Septic permits must be obtained prior to installation of the vault toilets.

*Exhibit 1, Staff Report, pages 5 and 6.*

#### Testimony

16. Betsy Stevenson, Senior Planner, testified generally about the application and its relation to the critical areas variance criteria. She described the public notice procedures for both the development application and the public hearing. She affirmed that the County had not received any public comments. She testified that the Upper Skagit, Sauk-Suiattle, Swinomish, and Samish Tribes, as well as the Skagit River System Cooperative, had all been notified of the application, although she, herself, had not been the person to send those emails.

Ms. Stevenson testified that the Welch Ecological Services, LLC, critical areas site assessment had used best available science to assess the wetlands and lakes, and the proposal's potential impacts thereto. She did not believe the vault toilets would have any adverse impact and would, on the contrary, improve these critical areas and their buffers by reducing the amount of human waste entering the wetlands and waters. She testified that there would be no septic system, but the toilets would still require a permit, just as a porta-potty would.

Ms. Stevenson testified that the two lakes are not regulated under the County's Shoreline Master Program (SMP) because they are under 20 acres in size. But she still believed

that the lakes met the criteria to be fish and wildlife habitat conservation areas because they have fish habitat. Ms. Stevenson identified a potential irregularity in the code, SCC 14.24.530, in which the buffers for lakes are based on the lakes' designation in the SMP, but lakes that are not regulated under the SMP may lack buffers under SCC 14.24.530. She testified that the lakes are not streams and are not shorelines, so they do not appear to have a buffer designated under SCC 14.24.530. *Testimony of Betsy Stevenson.*

17. Applicant Representative Hyden McKown, Baker District Recreation Manager at DNR, testified that the proposed locations for the toilets were the best ones, even though they are inside the wetland buffers associated with the two lakes. Steep slopes farther landward from the lakes would make landward locations less feasible. There is the also the issue that, if the toilets are too far away from the lakes, hikers and campers may choose not to use the toilets.

Mr. McKown testified that the Blanchard Forest Advisory Committee had been informed of the proposal at the earlier grant stage. Some of the stakeholder members of the committee had provided statements in support, which Mr. McKown proffered after the hearing.<sup>2</sup> The Washington State Department of Archaeology and Historic Preservation had provided a concurrence, which Mr. McKown also proffered after the hearing.<sup>3</sup> He testified that DNR had done its own outreach to the tribes, including the Lummi, the Nooksack, the Samish, the Sauk-Suiattle, the Stillaguamish, the Swinomish, and the Upper Skagit Tribes, and had kept the Tribes informed as the project moved forward. *Testimony of Hyden McKown.*

18. Perry Welch, of Welch Ecological Services, LLC, is the wetland biologist who prepared the critical areas assessment. Mr. Welch testified that he thought that not only the wetlands, but also the lakes, would have a critical areas buffer. He believed the lakes would have a buffer of 200 feet, which he had pulled from SCC 14.24.530. Mr. Welch did not think of the variance as a buffer reduction so much as a buffer mitigation because the trails are already inside the buffer. He did not think the vault toilets would pose any threat to the wetlands or lakes. Even a tree falling on the vault toilets would not likely cause harm, given the toilets' distance to the wetlands and lakes. Like Mr. McKown, Mr. Welch thought it would be a mistake to site the toilets farther away from the waters, both because it would require additional trail-building and because of steep slopes farther landward. He based his assessment on his own observations during his site visits. *Testimony of Perry Welch.*

19. Mark Buehrer, of 2020 Engineering, testified that he was one of the designers of the toilet system. He testified that the toilets were lightweight so they could be transported by horses. Despite being lightweight, they could withstand 100 feet of snow load. The

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<sup>2</sup> Exhibit 9.

<sup>3</sup> Exhibit 10.

tanks themselves, beneath the buildings, would likely survive a treefall, unless it was a truly substantial tree.

Solids and liquids are separated in the toilet and are stored separately. Liquids evaporate, while solids would dry out. Solid waste is actually mostly water, so very little waste would be left to haul out following drying. Mr. Buehrer estimated that haul-out would only have to occur once every 10 to 15 years. *Testimony of Mark Buehrer.*

#### Staff Recommendation

20. Ms. Stevenson testified that the County staff recommends approval of the variance, with conditions. The Applicant Representative did not object to the County's proposed conditions. *Testimony of Betsy Stevenson; Testimony of Mark Buehrer.*

#### Post-Hearing Memo

21. Following the hearing, Ms. Stevenson submitted a memo on the subject of whether the lakes themselves had their own critical areas buffer, independent of the buffer for the wetlands around the lakes. In her memo, Ms. Stevenson quoted Perry Welch, who cited SCC 14.24.530(1)(c) (the standard riparian buffer widths table) to argue that the lakes were fish and wildlife habitat conservation areas with their own buffers. Mr. Welch seemed to cite the lakes' outlet streams, rather than the lakes themselves, as the source of a potential riparian buffer. Although the outlet streams are typed by DNR as Type N (non-fish bearing), the lakes are typed as Type F (fish-bearing). Therefore, Mr. Welch felt it appropriate for the outlet streams to have 150-foot riparian buffers. Ms. Stevenson concurred with Mr. Welch's assessment and recommended that the stream buffer be added to the variance request. This addition would have no practical effect because the standard buffer for a Type F water is 150 feet, same as the Category II wetland buffer. *Exhibit 11.*

### **CONCLUSIONS**

#### Jurisdiction

The Hearing Examiner has jurisdiction to hear and decide requests for a critical areas variance when a variance seeks to reduce a required buffer by more than 50 percent. Here, the requested reduction in the buffer is from the standard 150 feet down to 75 feet in one instance and 60 feet in the other, placing the variance application within the jurisdiction of the Hearing Examiner. *SCC 14.06.050(1)(b)(i); SCC 14.06.120; SCC 14.10.020(3); SCC 14.24.140(1)(b).*

#### Criteria for Review

The Hearing Examiner may approve a request for a variance from the setback and buffer requirements of the County's Critical Areas Ordinance, chapter 14.24 SCC, if the Hearing Examiner determines that each of the following requirements would be met:

- (a) The issuance of a zoning variance by itself will not provide sufficient relief to avoid the need for a variance to the dimensional setback and other requirements for the critical areas regulated by this Chapter; and
- (b) Preparation of a site assessment and mitigation plan by a qualified professional pursuant to the requirements of SCC 14.24.080 and all other applicable sections of this Chapter. The site assessment and mitigation plan shall be prepared utilizing best available science; and
- (c) The conclusions of the site assessment must utilize best available science to support a modification of the dimensional requirements of this Chapter; and
- (d) The site assessment and mitigation plan demonstrate that the proposed project allows for development of the subject parcel with the least impact on critical areas while providing a reasonable use of the property; and
- (e) The reasons set forth in the application justify the granting of the variance, and the variance is the minimum variance that will make possible the reasonable use of the land, building or structure; and
- (f) The granting of the variance will be consistent with the general purpose and intent of this Chapter, and will not create significant adverse impacts to the associated critical areas or otherwise be detrimental to the public welfare; provided, that if the proposal is within the special flood hazard area (SFHA), the applicant must demonstrate that the proposal is not likely to adversely affect species protected under the Endangered Species Act, or their habitat; and
- (g) The inability of the applicant to meet the dimensional standards is not the result of actions by the current or previous owner in subdividing the property or adjusting a boundary line after the effective date of the ordinance codified in this Chapter; and
- (h) The granting of the variance is justified to cure a special circumstance and not simply for the economic convenience of the applicant.

*SCC 14.24.140(3).*

In granting any variance, the Approving Authority shall prescribe such conditions and safeguards as are necessary to secure adequate protection of critical areas from adverse impacts and to ensure that impacts to critical areas or their buffers are mitigated to the extent feasible utilizing best available science. The Approving Authority shall consider and incorporate, as appropriate, recommendations from Federal, State and Tribal resource agencies.

*SCC 14.24.140(4).*

Where a variance involves the reduction of a critical areas buffer, the mitigation sequence shall be applied. *SCC 14.24.240(3).* The mitigation sequence requires the proposal to select the least

harmful feasible alternative from the sequence of possible mitigation measures, which are, in order of least harmful to most harmful:

- (i) Avoid the impact altogether by not taking a certain action or parts of an action;
- (ii) Minimize the impacts by limiting the degree or magnitude of the action and its implementation by using appropriate technology, or by taking affirmative steps to avoid or reduce impacts;
- (iii) Rectify the impact by repairing, rehabilitating or restoring the affected environment to the conditions existing at the time of the initiation of the project or activity;
- (iv) Reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action;
- (v) Compensate for the impact by replacing, enhancing, or providing substitute resources or environments.

*SCC 14.24.080(5)(b).*

The criteria for review adopted by the Skagit County Board of County Commissioners are designed to implement the requirement of chapter 36.70B RCW to enact the Growth Management Act. In particular, RCW 36.70B.040 mandates that local jurisdictions review proposed development to ensure consistency with their own development regulations, considering the type of land use, the level of development, infrastructure, and the characteristics of development. *RCW 36.70B.040.*

#### Conclusions Based on Findings

**With conditions, the proposed use would comply with the criteria for a critical areas variance.** The County provided reasonable notice of the application and public hearing. No SEPA review was required because the variance is categorically exempt. No public comments were received by the County. In addition, DNR gave the tribes and the stakeholders in the Blanchard Forest Advisory Committee an opportunity to comment on the proposal during an earlier, pre-permitting phase. The Tribes asked only to be kept informed, while the stakeholders who commented were universally supportive of the project due to its environmental and recreational benefits.

The Hearing Examiner agrees with County staff that the project will result in a substantial benefit to the environment. Although the project has not formally been called a “buffer enhancement project,” that is functionally what the project involves: improving an existing condition that is environmentally harmful due to the accumulation of human waste. The Hearing Examiner is satisfied that the toilets will improve the water quality and the recreational experience for the hikers and campers at Lizard Lake and Lily Lake. The absence of any septic field, and the toilets’ sophisticated system of separating, evaporating, and drying waste, will result in no risk to the environment. The only damage to the environment will come from the footprints of the toilets themselves, which can be mitigated by following the suggestions of the

Welch Ecological Services, LLC, critical areas assessment. The Hearing Examiner will incorporate those suggestions as conditions of approval, just as recommended by County staff. The Hearing Examiner will also incorporate the suggestion from the Department of Archaeology and Historic Preservation that the Applicant prepare an inadvertent discovery plan. All other critical areas variance criteria and mitigation sequencing requirements are met.

The Hearing Examiner agrees with the post-hearing memo of Ms. Stevenson. The lakes are fish and wildlife habitat conservation areas under SCC 14.24.500(1)(e) because they are naturally occurring ponds under 20 acres in size, with submerged aquatic beds that provide fish habitat. Under SCC 14.24.530, however, the only buffers provided in the critical areas ordinance are for “riparian areas,” under SCC 14.24.530(1)(c), and “lake and marine shoreline buffers ... based on the shoreline designations defined in the [SMP],” under SCC 14.24.530(2). Because the lakes are not streams, the riparian buffer rules do not apply to the lakes. *SCC 14.24.530(1)* (“Riparian buffers apply only to streams and rivers.”). Because the lakes do not have shoreline designations in the SMP, being lakes under 20 acres in size, the lake and marine shoreline buffers also do not apply. The lakes themselves are left without a buffer, even though they are fish and wildlife habitat conservation areas. As Ms. Stevenson testified, this is a potential inconsistency in the code.

The Hearing Examiner accepts the workaround suggested by Ms. Stevenson and Mr. Welch in Ms. Stevenson’s post-hearing memo, which is to consider not the lakes themselves but rather the lakes’ outlet streams. These streams, unlike the lakes, are subject to the riparian buffer rules. The Hearing Examiner agrees with Ms. Stevenson and Mr. Welch’s conclusions that the outlet streams should be subject to 150-foot riparian buffers as fish-bearing streams. The designation of the outlet streams as critical areas will have no practical impact on the proposal, however, because variances for buffer reductions are treated the same regardless of whether the buffer is for a wetland or a stream. *SCC 14.24.140*.

The Hearing Examiner agrees with the critical areas assessment that the wetlands associated with the lakes are Category II wetlands and that the standard buffer for such wetlands is 150 feet when the proposed use is a low-impact use like hiking and camping. *SCC 14.24.230*. The Hearing Examiner also agrees that the outlet streams are subject to 150-foot riparian buffers for fish-bearing streams. *SCC 14.24.530(1)(c)*. The criteria for the reduction of these buffers down to 75 feet and 60 feet at Lizard Lake and Lily Lake have been satisfied. *Findings 1–21*.

## DECISION

Based on the preceding findings and conclusions, the request for a Critical Areas Variance to reduce the 150-foot wetland buffer and 150-foot riparian buffer in the vicinity of Lizard Lake and its outflow stream down to 60 feet, and to reduce the 150-foot wetland buffer and 150-foot riparian buffer in the vicinity of Lily Lake and its outflow stream down to 75 feet, to

accommodate the installation of two vault toilets, is **APPROVED**, with the following conditions:<sup>4</sup>

1. The recommendations of the Critical Areas Assessment prepared by Welch Environmental Services, LLC, updated May 31, 2023 are considered conditions of approval.
2. The Applicant will request and obtain a septic permit for each proposed vault toilet.
3. The Applicant will salvage existing ground cover, such as sword fern and salal, and replant around the periphery of the toilets within the critical area buffer.
4. The Applicant will repurpose salvageable downed woody debris cleared from the toilet locations and place around toilets to enhance a natural appearance within the critical area buffer.
5. The Applicant will install various BMPs around the construction area to cover exposed soils and minimize erosion potential. BMPs for construction will be straw, jute, and plastic cover.
6. Prior to conducting any ground-disturbing activities, the Applicant shall submit, for County review and approval, a standard inadvertent discovery plan for any human remains or archaeological material.
7. This variance shall expire if the use or activity for which it is granted is not commenced within three years of final approval. Knowledge of the expiration date is the responsibility of the Applicant.

**DECIDED** this 20th day of October 2023.



ALEX SIDLES  
Hearing Examiner

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<sup>4</sup> This decision includes conditions designed to mitigate impacts of this proposed project as well as conditions required by the County code.