

## Merrill, Hannah

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**From:** Robert Crittenden  
**Sent:** Thursday, June 02, 2011 11:34 PM  
**To:** zSMP  
**Subject:** Consistency Review  
**Attachments:** commentsSMPConsistencyReview.pdf

Please find my coments on the SMP consistency review attached.  
They are a pdf file.

Robert Crittenden

# Comments on the Clallam County Shoreline Master Plan Update Consistency Review

**By Dr. Robert N. Crittenden**

██████████ Carlsborg WA 98324 Phone: ██████████

1. The salmonid stocks in Clallam County are not limited by freshwater habitat, except possibly in a few special circumstances. As to why they have low abundances, according to statements made by senior officials from the National Oceanic and Atmospheric Administration (NOAA) and the Washington Department of Fish and Wildlife (WDFW) at the Environmental Impact Hearings for WDFW's Hatchery Management Program, WDFW is deliberately holding many salmonid stocks in Washington State at artificially low abundances. They also said, specifically, that they were doing that with the Dungeness River stocks.

Nevertheless, they are doing this for scientifically valid reasons. These are that they need more data from years with low abundance in order to achieve statistical significance in fitting the Ricker Spawner-Recruit Curve. That is something they will need, if, they are ever to manage salmon scientifically. (See, for example, Crittenden, R.N. 1994 "Optimum escapement computed using Ricker's spawner-recruit curve." Fish. Res. 2.)

However, the low abundance of these stocks is also being used, to perpetrate the deception that it is caused by habitat loss. --- Obviously, if their low abundance is not caused by habitat loss, then, regulations that aim at protecting and/or restoring their habitat, in order to protect or restore the stocks, can not reasonably be expected to achieve their intended purpose. For that reason, the Clallam County's current regulations for buffers, setbacks, and so on ... to the extent that they are intended to protect salmonid habitat, are probably often in violation of due-process. Also, any increase in the severity of those regulations or any new regulations serving that same purpose, will probably be, too. Furthermore, there is no loss of ecological function, when the species in question are not limited by those factors.

I also have a large amount of additional evidence supporting this item, as I wrote two books on the salmon crisis, (*Salmon at Risk* and *Elite Planners*) which went through multiple editions.

There are also indirect ramifications of artificially depressing the salmon stocks: In particular, the Orrick Decision, better known as the "Boldt II Decision," is based upon the assumption that salmon are limited by freshwater habitat. That decision created treaty rights to water and habitat. However, as that decision's central assumption appears to be generally invalid, that decision is in error, and much of what rests upon it is, too. Consequently, it would be wise to recognize that those decisions and treaty rights, may be overturned, and avoid basing County ordinances upon them, so far as that is possible.

2. The regulation of meander zones is susceptible to serious abuse. There are three underlying problems: The first is that a conflict of interest is created by programs such as the "Wild and Scenic Rivers Act" or "Wild Olympics;" the second is, that few members of either the public or private sectors have an adequate understanding of open-channel dynamics to properly control a meandering river, except, when it is relatively small; and the third is that the licensing requirements for some classes of geologists appear to be inadequate to insure that the individuals licensed are competent to conduct their professions. --- As unlicensed individuals

are prohibited from being paid for providing those services, the State's having too low a standard, virtually guarantees that many of those who are licensed will be incompetent while competent individuals who are unlicensed will be prevented from correcting their errors. --- The seriousness of this problem, only becomes fully apparent when you consider the Federal standard (from case law) for due process. That is that a scientific fact is considered debatable, rather than being established, if two professionals can discuss it and take different sides on it.

This provides a way to circumvent the due-process protection against irrational regulations. For example, if two licensed hydrogeologists don't know what is wrong with making a groundwater model that has more parameters than data, and at least one of them thinks that that is a valid thing to do, then, basing regulations on such a model is not a due-process violation, even though it has been known, for many decades, that such a model is not scientifically valid.

The same applies to hydrologists managing channel migration: If the standards for their profession are too low, case law provides a loophole that will allow the implementation of irrational regulations and irrational programs that violate the civil rights of the public.

For these reasons, more than a little care needs to be taken to guard against the abuse of the regulations governing of channel migration. In particular, there needs to be oversight by better qualified individuals; homeowners need to be allowed to protect their homes from meandering stream and rivers; and the County needs to be vigilant in preventing government agencies or their employees from misusing these regulations to clear the land.

3. In addition, the coastal plains in Clallam County were predominately created by glaciation, rather of by the action of streams or rivers. Consequently, some of the usual assumptions about meandering streams or rivers may be inappropriate. In particular, there may be few, if any, natural barriers limiting their movement, as these coastal plains are just a vast expanse of relatively easily erodible glacial deposits. Therefore, item 3c on page 14 of the *Draft Consistency Review* needs to be reconsidered to allow artificial restrictions to natural channel migration to prevent their movement beyond a reasonable meander zone that would be sufficient to serve the hydraulic functions of bed load movement, erosion and deposition.
4. Furthermore, due to their glacial origin, these coastal plains may be unusually steep. Consequently, these rivers are fast and may carry large rocks or even small boulders in their bed-loads. In these types of rivers, soft structures are often inadequate to protect banks or homes or to limit channel migration. --- Clallam County's Code needs to reflect these conditions wherever they exist in the County.
5. In writing the draft ordinance, I hope that the purpose or purposes that each part of it serve, will be stated explicitly enough that scientific evidence and logical arguments can be used to support or refute it, whether that be in general or for a particular application. For example, is the purpose of a buffer to provide shade, the filtration of dissolved or particular contaminates, wildlife habitat, to reduce runoff peaks, and so on... or is it primarily aesthetic? Only then, when its purpose is known, can one determine what width of buffer might be appropriate or whether it is needed at all. --- That is, explicit statements of purpose, are essential to avoiding arbitrary regulation.
6. Item 4 on page 10 of the *Consistency Review* appears to be advocating the legalization of trespass. --- The right to exclude is a fundamental right of property ownership. I object very strongly to this item.

Some of the navigable waters in this County became private property before Statehood. For that reason, some of the riverbeds are owned by individuals. Thus, this item clearly does not reflect

the history and circumstances of Clallam County. Neither the public nor government employees have any right to trespass on these lands, unless, of course, they have a warrant.

What is contemplated in this item, appears to be a confiscation of private property in order to make a park of these lands. That imposes a financial burden on one segment of the public (the owners of these properties) to provide a benefit to the general public. That is an illegal tax. If the County or DOE wants make a park of these lands, it needs to buy them or buy easement rights to them.

7. Rather than write a detailed criticism of the remainder of Section 4 and Section 5 of the *Consistency Review*, I will give one general criticism that covers it all: It goes too far.

There is a name for what it suggests: That is “slavery,” in the Classical sense of the word, that is, in the sense that Aristotle used it. He said that, a slave is a man who must live by rules set down by others.

More recently, John Locke (1632-1704) described the opposite condition, in his *Second Treatise on Government*. He said that, “Freedom of man under government is to have a standing rule to live by, common to everyone of that society, and made by the legislative power erected in it; at liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man.”

These ideas continue to be relevant, today, because the individuals who drafted the *US Constitution* cited John Locke the most, after the *Bible*, during the early period when they were considering fundamental principles; John Locke's work only slightly modified Thomas Aquinas's *Summa Theologia*, which had served as the constitution of the governments of Medieval Europe; Thomas Aquinas, in turn, had based his work upon Aristotle's, as well as upon Marcus Cicero's *On the Commonwealth*; and Aristotle had not invented his ideas but is believed to have mostly been describing the structure of society that he found around him. Thus, these concepts of freedom and slavery are as old as the history of Western man. They probably are part of our nature.

The problem with the *Consistency Review* is that it provides an exhaustive list of the things that we may do, while prohibiting everything else. That is a fundamentally flawed approach, as it is slavery in the Classical sense. What it should do, instead, is to carefully identify the nuisance-like threats that the regulations seek to prevent and, then, provide regulations or restrictions that can reasonably be expected to achieve those legitimate government purposes and which are in proportion to what is needed or might usually be expected. However, they leave one is free to do anything else, that is not prohibited.

That difference may seem subtle but it is all the difference between freedom and slavery; and the reception that ordinances written according to these two different approaches will get from the public can be expected to be correspondingly different, too.

Sincerely

Dr. Robert N. Crittenden,

June 3, 2011