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The Honorable Shelly Short
State Representative, District 7
PO Box 40600
Olympia, WA 98504-0600

Dear Representative Short:

By letter previously received, you have requested an opinion on several questions that I have consolidated and paraphrased as follows:

Does the practice of wetland identification or delineation, or wetland functions assessment, constitute the practice of geology for others?

I understand your questions to ask whether, in all cases, identification, delineation, and assessment of functions of wetlands must be performed by a licensed geologist or hydrogeologist.

BRIEF ANSWER

In light of the categorical nature of your questions, I conclude that the answer is no. My conclusion is based primarily upon the general nature of the activities you ask about, statutes governing the licensing of geologists and hydrogeologists, and a related policy of the Washington State Geologist Licensing Board.

BACKGROUND

The Growth Management Act (GMA) and the Shoreline Management Act (SMA) both impose limitations on the development and use of wetlands. RCW 36.70A; RCW 90.58. Under state law, a "wetland" is an area that is "inundated or saturated by surface water or groundwater 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." RCW 36.70A.030(21); RCW 90.58.030(2)(h). This definition is taken verbatim from 33 C.F.R. § 328.3(b) and 40 C.F.R. § 230.3(t), the U.S. Army Corps of Engineers and the Environmental Protection Agency regulations implementing the federal Clean Water Act, 33 U.S.C. §§ 1251-1387.

Given the key part wetlands play in Washington's comprehensive planning statutes, their identification and delineation—and the assessment of wetland functions—are necessary to help landowners, developers, and regulators understand what activities are legally permissible—and what are not—on property that may be subject to these statutes. Your questions ask whether the individuals performing these tasks are required to be licensed as geologists or hydrogeologists under state law.

Wetland identification and delineation establish the location and size of a wetland for purposes of local, state, and federal regulation. At bottom, it is an exercise in identifying, and determining the boundaries of, wetlands for the purpose of determining permissible uses for real property. The method of conducting this exercise is established by administrative rule of the Department of Ecology. "Identification of wetlands and delineation of their boundaries . . . shall be done in accordance with the approved federal wetland delineation manual and applicable regional supplements." WAC 173-22-035.

"A wetland is a transitional land that lies between terrestrial and aquatic systems where the water table is at or near the surface or where water covers the land." *Pacific Topsoils, Inc. v. State*, 157 Wn. App. 629, 636, 238 P.3d 1201 (2010). The federal manual referenced in the rule establishes three environmental characteristics that are to be used to identify and delineate wetlands: hydrophytic vegetation (an assemblage of plant species dominated by species that can tolerate prolonged inundation or soil saturation during the growing season[1]), hydric soils (soils that formed under conditions of saturation, flooding, or ponding long enough during the growing season to develop anaerobic conditions in the upper part[2]), and wetland hydrology indicators (direct observation of surface water or groundwater; evidence that the site is subject to flooding or ponding; other evidence of current or recently saturated soil; and landscape, vegetation, and soil features indicating contemporary rather than historical wet conditions[3]); *see also Pacific Topsoils*, 157 Wn. App. at 636.

Once a wetland has been identified and delineated, it frequently becomes necessary to categorize and assess the functions of the wetland in order to determine how (or whether) it can be developed, whether and how alterations to the wetland can be mitigated, and for a host of

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[1] *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Version 2.0)* at 13 (2008) ("*Arid West Region Supplement*"), *available at* http://el.erdc.usace.army.mil/elpubs/pdf/trel08-28.pdf (last visited June 26, 2012); *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Western Mountains, Valleys, and Coast Region (Version 2.0)* at 17 (2010), ("*Western Mountains, Valleys, and Coast Region Supplement*") *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_supp/west_mt_finalsupp.pdf (last visited June 26, 2012).

[2] *Arid West Region Supplement* at 17; *Western Mountains, Valleys, and Coast Region Supplement* at 35.

[3] *Arid West Region Supplement* at 61-62; *Western Mountains, Valleys, and Coast Region Supplement* at 69.

other reasons to facilitate wetland management under local, state, and federal environmental regulations. The Department of Ecology has developed a set of assessment methods, one for Western Washington and one for the Columbia Basin. In both areas, assessing wetland function requires evaluating the potential effects of a particular wetland on water quality improvement, hydrology (maintenance of water flow and recharge), and functions related to habitat suitability. These include assessing wetlands for their potential to remove certain materials, such as sediments, from the water, as well as the potential for wetlands to control erosion or recharge groundwater. They also include assessing wetlands biologically for their suitability as habitat for both plants and animals. Washington State Department of Ecology, *Methods for Assessing Wetland Functions, Volume I: Riverine and Depressional Wetlands in the Lowlands of Western Washington* at 37 (1999)[4]; and Washington State Department of Ecology, *Methods for Assessing Wetland Functions, Volume II: Depressional Wetlands in the Columbia Basin of Eastern Washington* at 36-37 (2000)[5] *See Yakima Cy. v. Eastern Washington Growth Management Hearings Bd*, ___ Wn. App. ___, 279 P.3d 434, 442 (2012) (describing categories of wetland functions).

ANALYSIS

The crux of your question is whether the identification and delineation of wetlands, or the assessment of wetlands functions, are tasks that can only be legally performed by licensed geologists or hydrogeologists. The answer to this question derives from an examination of the statutes governing the licensing of geologists, and upon a related policy of the Washington State Geologists Licensing Board (the Geologist Board), in light of the general nature of the activities you ask about. That examination leads to the conclusion that wetland identification, delineation and function assessment are not categorically within the scope of practice for geologists, even if geologists might be among those qualified to perform some tasks involved in these functions. The answer to your question is, therefore, "no."

A "geologist" must be licensed by the Board. RCW 18.220.020(1). A "hydrogeologist" must have a Geologist Board-issued geology license and a hydrogeology specialist license. RCW 18.220.020(1); WAC 308-15-53(2). It is against the law "for any person to practice, or offer to practice, geology for others in this state . . . unless the person has been licensed under the provisions of this chapter." RCW 18.220.020(1).

RCW 18.220.010(7) provides that "geology" under the law is "the science that includes: Treatment of the earth and its origin and history, in general; the investigation of the earth's constituent rocks, minerals, solids, fluids, including surface and underground waters, gases, and

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[4] Volume I, Part 1 is available at https://fortress.wa.gov/ecy/publications/summarypages/99115.html; Volume I, Part 2 is available at https://fortress.wa.gov/ecy/publications/summarypages/99116.html.

[5] Volume II, Part 1 is available at https://fortress.wa.gov/ecy/publications/summarypages/0006047.html; Volume II, Part 2 is available at https://fortress.wa.gov/ecy/publications/summarypages/0006048.html.

other materials; and the study of the natural agents, forces, and processes that cause changes in the earth." "Hydrogeology" is the

> science that involves the study of the waters of the earth, including the study of the occurrence, circulation, distribution, chemistry, remediation, or quality of water or its role as a natural agent that causes changes in the earth, and the investigation and collection of data concerning waters in the atmosphere or on the surface or in the interior of the earth, including data regarding the interaction of water with other gases, solids, or fluids.

RCW 18.220.010(8).

The '[p]ractice of geology for others' includes, but is not limited to:

> (a) The preparation of geologic reports, documents, or exhibits by any commission, board, department, district, or division of the state or any political subdivision thereof or of any county, city, or other public body, or by the employees or staff members of the commission, board, department, district, or division of the state or any political subdivision thereof or of any county, city, or other public body when the reports, documents, or exhibits are disseminated or made available to the public in such a manner that the public may reasonably be expected to rely thereon or be affected thereby; and
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> (b) The performance of geological services by any individual, firm, partnership, corporation, or other association or by the employees or staff members thereof, whether or not the principal business of the organization is the practice of geology, which the geological reports, documents, or exhibits constituting the practice of geology are disseminated or made available to the public or any individual or organization in such a manner that the public or individual or combination of individuals may reasonably be expected to rely thereon or be affected thereby.
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> However, geological reports, documents, or exhibits that are prepared by the employees or staff members of any individual, firm, partnership, corporation, or other association or commission, board, department, district, or division of the state or any political subdivision thereof or any county, city, or other public body that are for use solely within such organizations are considered in-house reports, documents, or exhibits and are not the practice of geology for others unless or until the reports are disseminated or made available as set forth in (a) or (b) of this subsection.

RCW 18.220.010(12).[6]

The statute also offers a lengthy list of activities that do not require a license under RCW 18.220. Among other activities, no license is required for:

> General scientific work customarily performed by such physical or natural scientists as chemists, archaeologists, geographers, hydrologists, oceanographers, pedologists, and soil scientists, providing such work does not include the design and execution of geological investigations, being in responsible charge of geological or specialty geological work, or the drawing of geological conclusions and recommendations in a way that affects the public health, safety, or welfare.

RCW 18.220.190(7).

In light of this statutory safe harbor, the Geologist Board adopted a Board Policy in 2009 that provides as follows:

> RCW 18.220.190: Permitted activities – Certificate of licensing not required.
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> The Washington State Geologist Licensing Board will not pursue complaints of unlicensed practice for the following activities:
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> . . .
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> - Collection of groundwater level data for the sole purpose of wetland delineation. . . .

Geologist Licensing Board Policy 190-1 (June 2009), *available at* www.dol.wa.gov/business/geologist/geoboardpolicies.html.

The statutes defining "geology," "hydrogeology," and the "practice of geology for others," do so quite broadly. Standing alone, the statutes might suggest an equally broad

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[6] More generally, the "practice of geology" is separately defined as the "performance of geological service or work including but not limited to collection of geological data, consultation, investigation, evaluation, interpreting, planning, geological mapping, or inspection relating to a service or work that applies to geology, and the responsible supervision thereof, the performance of which is related to public welfare or the safeguarding of life, health, property, and the environment, except as otherwise specifically provided by . . . chapter [18.220 RCW]." RCW 18.220.010(11). Similarly, the "practice of hydrogeology" is defined as "the performance of or offer to perform any hydrogeologic service or work in which the public welfare or the safeguarding of life, health, environment, or property is concerned or involved. This includes the collection of geological data, and consultation, investigation, evaluation, interpretation, planning, or inspection relating to a service or work that applies hydrogeology."

requirement for a license as a geologist or hydrogeologist. Those terms do not, however, stand alone. The task of construing a statute entails discerning its plain meaning "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002).

The general language of RCW 18.220.010(7), (8), and (12), defining "geology," "hydrogeology," and the "practice of geology for others," therefore must be read together with the language of RCW 18.220.190(7). *See Hallauer v. Spectrum Properties, Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001) (statutes relating to the same subject are read together to constitute a unified whole). The latter statute excludes from the geologist licensing requirement "general scientific work" customarily performed by other disciplines, including "hydrologists" and "soil scientists," among others. RCW 18.220.190(7).

As we have seen, the characteristics used in identifying and delineating wetlands relate, in part, to the identification of hydrophytic vegetation, consisting of species that can tolerate prolonged inundation or soil saturation. *Arid West Region Supplement* at 13; *Western Mountains, Valleys, and Coast Region Supplement* at 17. This task does not obviously entail the practice of geology or hydrogeology, as defined in RCW 18.220.010, but rather describes a function that a biologist might undertake. Next, the identification and delineation of wetlands also relates to the identification of hydric soils. *Arid West Region Supplement* at 17; *Western Mountains, Valleys, and Coast Region Supplement* at 35. While geologists might undertake this task, it is excluded from the geologist licensing requirement as general scientific work performed by soil scientists. Finally, the identification and delineation of wetlands also includes looking for wetland hydrology indicators, which entails direct observation of surface water or groundwater or of evidence of current or past flooding such as landscape, vegetation, and soil features. *Arid West Region Supplement* at 61-62; *Western Mountains, Valleys, and Coast Region Supplement* at 69. Again, this task is excluded from the geologist licensing requirement as general work that might be performed by biologists, hydrologists, or soil scientists.

A similar analysis applies to the assessment of wetland function. As noted, this task includes assessing wetlands for their potential to remove certain materials, such as sediments, from the water, as well as the potential for wetlands to control erosion or recharge groundwater. They also include assessing wetlands biologically for their suitability as habitat for both plants and animals. Washington State Department of Ecology, *Methods for Assessing Wetland Functions, Volume I: Riverine and Depressional Wetlands in the Lowlands of Western Washington* at 37; and Washington State Department of Ecology, *Methods for Assessing Wetland Functions, Volume II: Depressional Wetlands in the Columbia Basin of Eastern Washington* at 36-37. While, to be sure, it appears that aspects of this work could entail the use of geological principles and interpretation, this at most would be a component of a broader and more inter-disciplinary practice. In particular, the emphasis that is placed on assessing wetlands for their suitability as habitat for plants and animals belies any claim that this task falls

exclusively within the scope of practice for geologists and hydrogeologists. As with the identification and delineation of wetlands, this task is excluded from the geologist licensing requirement as general work that might be performed by biologists, hydrologists, or soil scientists. RCW 18.220.190(7).

The Geologist Board's policy provides further support for these conclusions. "[A]n agency's interpretation of an ambiguous statute is entitled to great weight where the statute is one which the agency is charged with implementing and concerns matters within the agency's expertise." *State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 140 Wn.2d 615, 645, 999 P.2d 602 (2000) (Madsen, J., concurring and dissenting) (citing *City of Seattle v. Department of Labor & Indus.,* 136 Wn.2d 693, 704, 965 P.2d 619 (1998); *Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council,* 129 Wn.2d 787, 799, 920 P.2d 581 (1996); *City of Pasco v. Public Employment Relations Comm'n*, 119 Wn.2d 504, 509, 833 P.2d 381 (1992)).[7] The Geologist Board is charged with administering and enforcing the geologist licensing statutes. RCW 18.220.050 (describing the authority of the Geologist Board). Analysis of the scope of practice for which a geologist license is required is uniquely within the expertise of the Geologist Board. RCW 18.220.030 (requiring five of the seven members of the Geologist Board to be licensed geologists).

As noted, the Geologist Board has adopted a policy, construing the "[c]ollection of groundwater level data for the sole purpose of wetland delineation" as falling within the exclusion from the geologist licensing requirement under RCW 18.220.190(7). Geologist Board Policy 190-1. Whether or not that policy covers the full scope of all functions related to the identification and delineation of wetlands or the assessment of wetland function, it strongly indicates that the administrative body granted authority to administer and enforce the geologist licensing statutes does not construe those functions as falling categorically within the scope of the geologist licensing requirement.

I trust that the foregoing information will prove useful. This is an informal opinion and will not be published as an official Attorney General Opinion.

Sincerely

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[7] This is not to suggest that any of the statutes under consideration are ambiguous. I reach my conclusions based upon the plain language of RCW 18.220.010 and RCW 18.220.190, and cite the Geologist Board policy as confirmation of this plain language construction.