

1 BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
2 WESTERN WASHINGTON REGION
3 STATE OF WASHINGTON

4 WHIDBEY ENVIRONMENTAL ACTION
5 NETWORK,

Case No. 14-2-0009

6
7 Petitioner,

FINAL DECISION AND ORDER

8 v.

9
10 ISLAND COUNTY,

11 Respondent.
12

13
14 **SYNOPSIS**

15 On September 22, 2014, Island County adopted Ordinance C-75-14, an update of its
16 comprehensive plan and development regulations for fish and wildlife habitat conservation
17 areas (FWHCAs). Whidbey Environmental Action Network (WEAN) timely filed a Petition for
18 Review challenging various provisions of the ordinance. The Board concluded the County
19 failed to include Best Available Science (BAS) in designating and protecting the functions
20 and values of critical area ecosystems, including the habitat of certain flora and fauna. It
21 failed to protect specific types of FWHCAs: a Natural Area Preserve, as well as Westside
22 Prairies, Oak Woodlands, and Herbaceous Balds. In addition, the Board concluded
23 regulations regarding application of the term “reasonable use,” and the removal of beaver
24 and beaver dams failed to protect critical areas and include BAS. Finally, the County failed
25 to establish clear standards for the exercise of administrative discretion in extending critical
26 area exemptions to certain agricultural practices.
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29 The Hearing on the Merits was convened on May 21, 2015, at the Island County Law
30 & Justice Building. Present for the hearing were Board Members Nina Carter, Raymond
31 Paolella, and William Roehl, presiding officer. WEAN was represented by one of its
32 members, Steve Erickson. Deputy Prosecuting Attorney Adam R. Long represented Island

1 County, and Cynthia Sullivan-Brown appeared on behalf of *Amicus Curiae* Washington
2 Native Plant Society.

3 4 I. BOARD JURISDICTION

5 The Board finds the Petitions for Review were timely filed pursuant to RCW 36.70A
6 .290(2). The Board finds the Petitioner has standing to appear before the Board pursuant to
7 RCW 36.70A.280(2). The Board finds it has jurisdiction over the subject matter of the
8 petition pursuant to RCW 36.70A.280(1)(a).
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10 II. BURDEN OF PROOF

11 Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations
12 and amendments to them are presumed valid upon adoption.¹ This presumption creates a
13 high threshold for challengers as the burden is on the petitioner to demonstrate action taken
14 by the local jurisdiction is not in compliance with the Growth Management Act (GMA).²

15 The Board is charged with adjudicating GMA compliance and, when necessary,
16 invalidating noncompliant plans and development regulations.³ The scope of the Board's
17 review is limited to determining whether a local jurisdiction has achieved compliance with
18 the GMA only with respect to those issues presented in a timely petition for review.⁴ The
19 GMA directs that the Board, after full consideration of the petition, shall determine whether
20 there is compliance with the requirements of the GMA.⁵ The Board shall find compliance
21 unless it determines the local jurisdiction's action is clearly erroneous in view of the entire
22 record before the Board and in light of the goals and requirements of the GMA.⁶ In order to
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27 ¹ RCW 36.70A.320(1) provides: "[Except for the shoreline element of a comprehensive plan and applicable
28 development regulations] comprehensive plans and development regulations, and amendments thereto,
29 adopted under this chapter are presumed valid upon adoption."

30 ² RCW 36.70A.320(2) provides: "[Except when city or county is subject to a Determination of Invalidity] the
31 burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this
32 chapter is not in compliance with the requirements of this chapter."

³ RCW 36.70A.280, RCW 36.70A.302.

⁴ RCW 36.70A.290(1).

⁵ RCW 36.70A.320(3).

⁶ RCW 36.70A.320(3).

1 find the local jurisdiction’s action clearly erroneous, the Board must be “left with the firm and
2 definite conviction that a mistake has been committed.”⁷

3 Thus, the burden is on WEAN to overcome the presumption of validity and
4 demonstrate the challenged actions taken by Island County are clearly erroneous in light of
5 the goals and requirements of the GMA.
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7 III. PRELIMINARY MATTERS AND ABANDONED ISSUES

8 A. Prior to and at the commencement of the Hearing on the Merits the Board issued
9 orders or, at the HOM, announced it would take official notice of numerous proposed
10 exhibits. Those included the following: the Board’s Order Finding Continuing
11 Noncompliance (Case No. 98-2-0023c) and Order of Dismissal (Case No. 06-2-0012c) and
12 Island County’s Ordinance No. C-16-15;⁸ Exhibit 437-1, Federal Register, Vol. 62, No. 112,
13 June 11, 1997, 50 CFR Part 17, listing the Golden Paintbrush as a threatened plant and
14 referencing its existence in Island County, and Exhibit 438-1, a USFW Golden Paintbrush
15 Fact Sheet, Exhibit 442-1, USFWS Federal Register, Volume 75, No. 124 , June 29, 2010;
16 Notice of document availability, Endangered and Threatened Wildlife and Plants; Recovery
17 Plan for the Prairie Species of Western Oregon and Southwestern Washington,⁹ Exhibit
18 443-1, USFWS, Federal Register I, Vol. 79, No. 68, April 9, 2014; Final rule: Endangered
19 and Threatened Wildlife and Plants; Threatened Species Status for the Olympia Pocket
20 Gopher, Roy Prairie Pocket Gopher, Tenino Pocket Gopher, and Yelm Pocket Gopher;¹⁰
21 Exhibit 435-1, Recovery Plan for the Prairie Species of Western Oregon and Southwestern
22 Washington, a report on “endangered species act listings by the U. S. Fish and Wildlife
23 Service” (USFW); Exhibit 439-1, Endangered and Threatened Wildlife and Plants; Critical
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29 ⁷ *City of Arlington v. CPSGMHB*, 162 Wn.2d 768, 778, 193 P.3d 1077 (2008) (Citing *Dept. of Ecology v. PUD*
30 *District No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 1993); See also *Swinomish Tribe v.*
31 *WWGMHB*, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007); *Lewis County v. WWGMHB*, 157 Wn.2d 488, 497-
32 98, 139 P.3d 1096 (2006).

⁸ Order on Motions, March 26, 2015.

⁹ Order on Petitioner’s Second Motion to Supplement, April 22, 2015.

¹⁰ *Id.*

1 Habitat Designation for Nine Puget Trough Mazama Pocket Gopher Species;¹¹ and, finally,
2 ICC 17.02A.070 and ICC 17.02A.030.¹²

3 In addition, at the beginning of the HOM, the Board heard argument regarding taking
4 official notice of, or allowing supplementation of the record with, a number of exhibits.¹³ The
5 Board will supplement the record with or, as appropriate, take official notice of: Exhibit 440-
6 1, a DNR, Island County Public Works Forest Practice, Application/Notification - Forest
7 Practices Clearing Permit;¹⁴ and Exhibit 441-1, a Washington Natural Heritage Program
8 description of the status and ranking systems used by the Natural Heritage Network; Exhibit
9 442-1, Federal Register, Vol. 79, No. 124 (recovery plans for three prairies species); and
10 Exhibit 443-1, Federal Register, Vol. 79, No. 68 (determination of threatened status of four
11 subspecies of the Mazama pocket gopher).
12

13 **B.** The Board acknowledged receipt from the County of requested copies of the
14 County's final BAS report: The Watershed Company and Parametrix Best Available Science
15 and Existing Conditions Report for Island County, Fish and Wildlife Habitat Conservation
16 Areas.
17

18 **C.** WAC 242-03-590(1) provides in part "[f]ailure to brief an issue shall constitute
19 abandonment of the unbrieffed issue."¹⁵ The following issues are found to have been
20 abandoned, either as a result of WEAN's acknowledgement of abandonment or as a result
21 of the Board's determination that WEAN failed to adequately brief same: Issues 4 and 13.¹⁶
22 Beyond that, numerous statutory and rule violations were alleged by WEAN in its issue
23 statements. Many of those were not argued, let alone even referenced in its opening brief,
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27 ¹¹ HOM transcript, pp. 4-7.

28 ¹² *Id.*, p. 7.

29 ¹³ *Id.* pp. 7-18.

30 ¹⁴ Order on Petitioner's Second Motion to Supplement, April 22, 2015.

31 ¹⁵ An issue is briefed when legal argument is provided. It is not enough to simply cite the statutory provision in
32 the statement of the legal issue. *North Clover Creek II v. Pierce County*, Case No. 10-3-0015, FDO (May 18,
2011), at 11; An issue not addressed in petitioner's brief is considered abandoned. *WEC v. Whatcom County*,
Case No. 95-2-0071, FDO (December 20, 1995).

¹⁶ WEAN stated during the HOM it had abandoned Issues 4 and 13. HOM transcript, pp. 29 and 55. It also
failed to address Issue 13 in its opening brief.

1 which also incorporated its argument in support of its Dispositive Motion.¹⁷ In some cases,
2 violations were alleged of non-existent sections of the WAC.¹⁸ The Board has attempted to
3 discern the correct, intended reference wherever possible.¹⁹

4 **D.** The County previously filed a motion to dismiss WEAN's Issue 10 (referenced as
5 Issue 3.4 in WEAN's 2nd Amended Petition for Review).²⁰ The County addressed the
6 question during the HOM, observing the February 17, 2015 adoption by the County of
7 Ordinance C-16-15 dealt with the Issue 10 concerns.²¹ While that may be true, Ordinance
8 No. C-16-15 is an interim ordinance which will only remain in effect for a period of one year
9 commencing on its date of adoption.²² The adoption of an interim ordinance cannot cure
10 non-compliance; the Board cannot determine compliance until the adoption of a permanent
11 amendment.²³

12 While acknowledging that legal impediment to a compliance determination, the
13 County requested the Board defer ruling as Island County is commencing its RCW
14 36.70A.130 update, scheduled for completion by June 30, 2016, in which the issue will be
15 addressed permanently.
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17 RCW 36.70A.300(2)(a) requires the Board to issue its final order within one hundred
18 eighty days of receipt of the petition for review. Thus deferral is not an option.
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20 21 **IV. LEGAL ISSUES, DISCUSSION AND ANALYSIS**

22 The action challenged by WEAN was the decision of the Island County Board of
23 County Commissioners to adopt Ordinance No. C-75-14, an update of the County's
24 Comprehensive Plan and development regulations pertaining to Fish and Wildlife Habitat
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26 ¹⁷ See WEAN's Pre-Hearing Brief, p. 2, referencing WEAN's Dispositive Motion of March 6, 2015.

27 ¹⁸ See, e.g., Issue 5's reference to RCW 36.70A.105.

28 ¹⁹ As an example, there are numerous references to WAC 365-190-830 (Issues 1-3 and 6-12). There is no
29 such code section. The Board has assumed WEAN was referring to WAC 365-196-830 or, depending on
30 context, WAC 365-190-130.

31 ²⁰ Island County's Motion for Official Notice and for Dismissal of Issue 3.4 as Moot, filed March 6, 2015. By
32 order dated March 26, 2015, the Board deferred ruling on the motion.

²¹ HOM transcript, p. 65.

²² See p. 5 of Ordinance C-16-15, attached to the County's March 6, 2015 motion

²³ *Friends of the San Juans v. San Juan County*, Case No. 03-2-0003c, Compliance Order, July 21, 2005,
p. 10.

1 Conservation Areas. WEAN's specific challenges assert the County adopted development
2 regulations that fail to protect FWHCAs and that, in many instances, it failed to include BAS.
3 In addition to alleged violations of various sections of chapters 365-190, 365-195, and 365-
4 196 WAC, most of WEAN's issues allege statutory violations of both RCW 36.70A.060 and
5 RCW 36.70A.172, which are set out below:

6
7 **RCW 36.70A.060(2):** Each county and city shall adopt development
8 regulations that protect critical areas that are required to be designated under
9 RCW 36.70A.170. For counties and cities that are required or choose to plan
10 under RCW 36.70A.040, such development regulations shall be adopted on
11 or before September 1, 1991.

12 **RCW 36.70A.172(1):** In designating and protecting critical areas under this
13 chapter, counties and cities shall include the best available science in
14 developing policies and development regulations to protect the functions and
15 values of critical areas. In addition, counties and cities shall give special
16 consideration to conservation or protection measures necessary to preserve
17 or enhance anadromous fisheries.

18 V. LEGAL ISSUES AND ANALYSIS

19 **Issue 1. Do the definitions of Reasonable Use (17.02B.060HH) and**
20 **Permitted Alterations (§310C.6.d) fail to protect critical areas as required by**
21 **RCW 36.70A.060 and WAC 365-190-080(1), 365-196-830(1)(3)(4) or do they**
22 **fail to include the Best Available Science as required by RCW 36.70A.172**
23 **and WAC 365-190-080(2), §130(5)²⁴ because they allow determination of**
24 **what constitutes reasonable use to be based on uses which are non-**
25 **conforming with current critical area standards? (WEAN's Issue 3.1.1)**

26 "Reasonable use" is a concept grounded in constitutional law. Many local land use
27 codes provide that if strict application of a particular body of land use law precludes all
28 "reasonable use" of property, the local government may issue certain types of conditional
29 use permits or variances to allow some reasonable use.²⁵

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31 ²⁴ There is no Sec. 130(5) in chapters 365-190, 365-195, or 365-196 WAC.

32 ²⁵ Article: *Washington's Vested Rights Doctrine: How We Have Muddled a Simple Concept and How We Can Reclaim It*, Roger D. Wynne, Vol. 24, No. 3, Seattle U. L. Rev. 851, 929 (Winter, 2001).

1 WEAN argues the definition of “reasonable use” included in the challenged ordinance
2 would allow “grandfathered non-conforming uses to be considered in determining whether a
3 proposed ‘reasonable use’ would be allowed.”²⁶ A nonconforming use or structure is one
4 that was legal when established, but that no longer conforms to later-enacted land use
5 laws.²⁷

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7 The definition provides:

8 **17.02B.060HH:** Reasonable Use: The minimum logical or rational use of a
9 specific parcel of land which a person can be expected to conduct or
10 maintain fairly and appropriately taking into account specific site
11 characteristics.

12 Island County observes that its CAO includes a more restrictive definition of “reasonable
13 use” and that this more restrictive definition would apply:

14 **17.02A.020:** Reasonable Use: The logical or rational use of a specific Parcel
15 of land which a person can be expected to conduct or maintain fairly and
16 appropriately under the specific circumstances, considering the size of the
17 Lot, the type of Use or Structure proposed and similar Uses and Structures in
18 the general vicinity of the Lot, that are Permitted Uses consistent with and
19 conforming to current regulations.

20 The County essentially concedes a GMA violation if the definition of reasonable use
21 included at 17.02B.060HH were the only one to apply.²⁸ However, it is the County’s position
22 other ICC sections insure the stricter definition of 17.02A.020 would control.²⁹ If the
23 County’s position were accurate, reasonable use determinations would necessarily be
24 based on, among other considerations, only uses that are “consistent with and conforming
25 to current regulations.” However, WEAN points to a separate code section, ICC 17.02B
26 .050D, which states, in part:

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28 ²⁶ WEAN’s Dispositive Motion of March 6, 2015, pp. 4, 5.

29 ²⁷ *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 6-12, 959 P.2d 1024, 1027-30 (1998).

30 ²⁸ Island County’s Response to WEAN’s Dispositive Motion, 2-4.

31 ²⁹ 17.02B.040: “Conflicts: If any provision of this chapter conflicts with a provision of another chapter of Island
32 County Code, or the Island County Comprehensive Plan, the more restrictive or protective provision shall
apply.” ICC 17.02B.050(B): “Conflicts: If any provision of this chapter conflicts with a provision of another
chapter of Island County Code, or the Island County Comprehensive Plan, the more restrictive or protective
provision shall apply.”

1 General Definitions: Unless modified by 17.02B.060 et seq. definitions in ICC
2 17.02A.030 Definitions shall apply.

3 It is clear the definition included at 17.02B.060HH differs from that in 17.02A.020.
4 That is, the former has modified the latter. Consequently, it is the 17.02B.060HH definition
5 that would be applied in determining whether a proposed use within a FWHCA or its buffer
6 is a “reasonable use.” By applying that definition, “grandfathered non-conforming uses”
7 which no longer comply with more recently enacted and, presumably, more protective land
8 use laws, could be considered a “reasonable use” when determining whether a proposed
9 use met the reasonable use criteria.³⁰ The County’s argument that the more protective
10 definition in ICC 17.02A applies in effect concedes the fact that consideration of non-
11 conforming uses in this context fails to protect FWHCAs.³¹

12 As to Issue 1, the Board concludes WEAN has met its burden of proof to establish
13 violations of RCW 36.70A.060 and RCW 36.70A.172.
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16 **Issue 2. Does the definition of "Clearing" (17.02B.060F), in concert with**
17 **other regulations, fail to protect critical areas as required by RCW**
18 **36.70A.060 and WAC 365-190- 080(1), 365-196-830(1)(2)(4), or fail to include**
19 **the Best Available Science as required by RCW 36.70A.172 and 365-190-**
20 **080(2), 365-196-830(3)(5) because it allows cutting, killing, grubbing or**
21 **removing herbaceous (non-woody) vegetation and wholesale pruning of**
22 **woody vegetation in critical areas and their buffers? (WEAN’s Issue 3.1.2)**

23 The “Clearing” definition at 17.02B.060F reads as follows:

24 Cutting, killing, grubbing or removing vegetation or other organic plant
25 material by physical, mechanical, chemical, or any other similar means. For
26 the purpose of this definition of “clearing”, “Cutting” means the severing of
27 the main trunk or stem of woody vegetation at any point.

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30 ³⁰ The Board acknowledges ICC Chapter 17.02B contains additional criteria regarding reasonable use
31 allowance. See e.g. 17.02B.310.6 and 17.02B.320.

32 ³¹ Island County’s Response to WEAN’s Dispositive Motion, p. 2: “. . . the County adopted a definition of
‘Reasonable Use’ in 2008 [referring to ICC 17.02A.020] to make clear that only uses which are consistent with
current code requirements may be considered in making ‘reasonable use’ determinations.”

1 WEAN argues “the detailed definition of what constitutes *cutting* necessarily excludes
2 any other *cutting*. And with that omission the language allows cutting, killing, grubbing or
3 removing herbaceous (non-woody) vegetation without limit and wholesale cutting of woody
4 vegetation as long as one stem per plant remains”.³²

5 The County responds by first stating WEAN provided no BAS in support of its
6 argument and then suggests that the issue can be resolved by simply reading the
7 regulation. The County argued:
8

9 First, the additional cutting" definition simply adds clarification as to how the
10 definition of "clearing" applies to specific vegetation such as trees and other
11 woody vegetation. It prevents severing of the main trunks of trees and the
12 cutting of the stem of woody vegetation, and it prevents such cutting at any
13 point on the stem of woody vegetation. So, in reality, the only permitted
14 "cutting is that of tree branches. Because the "cutting" clarification only
15 applies to: trees and woody vegetation, cutting of other, herbaceous
16 vegetation or organic material is simply not permitted.³³

17 WEAN’s argument that the definition allows “wholesale clearing of herbaceous
18 vegetation and stems of woody plants” or that “nettles or grasses on a stream bank could be
19 regularly mowed” does not appear to be a logical interpretation of the definition. The
20 meaning of one action, “cutting,” is specifically defined in 17.02B.060F. In addition to
21 “cutting,” clearing also includes “killing, grubbing or removing vegetation or other organic
22 plant material.” Thus, the suggestion that “nettles or grasses on a stream bank could be
23 regularly mowed” does not follow.

24 Definitions in and of themselves rarely, if ever, arise to a GMA violation; rather, it is
25 how those definitions relate to the regulations themselves that may constitute a GMA
26 violation.³⁴ Here, WEAN suggests the definition of “clearing” would allow the trimming of
27 nearly all branches of trees within a FWHCA or its buffer so long as the trimming does not
28 result in killing the trees. While the Board might agree widespread trimming of trees could
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31 ³² WEAN’s Dispositive Motion of March 6, 2015, p. 6.

32 ³³ Response to WEAN’s Dispositive Motion, p. 3.

³⁴ *Friends of the San Juans v. San Juan County*, Case No. 13-2-0012c, FDO, p. 94.

1 result in negative impacts to a FWHCA, the BAS referenced by WEAN relates to “clearing”
2 in general, as opposed to tree-trimming.³⁵ It cites no BAS from the record regarding
3 potential deleterious effects of limbing trees.

4 Furthermore, WEAN’s argument is based on the use of the word “clearing” in five
5 specific sections of the challenged ordinance. As described by WEAN, clearing is used in
6 five instances: “whether an action is considered development, exempt site investigative
7 work, considered in a biological site assessment, disclosed in a site plan or description of a
8 proposed development, or trigger protective measures for Bald Eagles.”³⁶
9

10 The definition of “development” in the challenged ordinance is: “Any activity that
11 results in a use or modification of land, or its resources. Development activities include, but
12 are not limited to: dredging, drilling, dumping, filling, Earth movement, Grading, *Clearing* or
13 removal of vegetation. . . .”³⁷ Although in this instance WEAN only relates the definition of
14 “clearing” to its use in another definition, that of “development,” the Board observes its
15 inclusion in that definition precedes the clause “removal of vegetation.” The latter clause
16 would encompass all vegetation removal, including the branches of trees. Clearing or
17 removal of vegetation, among other activities, constitutes development.

18 WEAN also suggests use of the word in the following exemption fails to protect
19 critical areas and include BAS:
20

21 Site investigative work necessary for permit submittals, or County-authorized
22 monitoring activities, such as surveys, soil logs, and percolation tests
23 provided there is no *Clearing*, fill or use of heavy equipment in a Critical Area
24 or impacts to its buffer.”³⁸ (emphasis added)

25 However, such site investigative work is exempt, if, and only if, “there is *no Clearing*. That is,
26 if there is no “[c]utting, killing, grubbing or removing vegetation or other organic plant
27 material by physical, mechanical, chemical, or any other similar means.” WEAN’s argument
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30 ³⁵ See n. 25, WEAN’s Dispositive Motion of March 6, 2015, p. 6: Issue No. 2 – 115, p. 9-10; Issue No. 2-177 p.
31 10; Issue No. 2–42, pp. 3-4.

32 ³⁶ WEAN’s Dispositive Motion of March 6, 2015, p. 5.

³⁷ Ordinance C-75-14, p. 19.

³⁸ Ordinance C-75-14, p. 31.

1 that using the term “clearing” in relation to the site investigation exemption does not
2 constitute a violation of the GMA.

3 WEAN also refers to the use of the word “Clearing” in regards to Biological Site
4 Assessment [BSA] Contents:

5 A BSA shall be prepared by a Qualified Professional at the expense of the
6 applicant... Unless modified by the, director, a BSA shall include: 1. A site
7 plan showing Critical Areas and associated Critical Area buffers falling on or
8 within 1000 feet of the portion of the subject property proposed for
9 Development. The site plan shall also clearly show the location and extent of
10 all proposed *Clearing*, earthwork, Grading...; 2. Description of the proposed
11 Development, including, but not limited to, quantity and spatial extent (area)
12 of any proposed Development, *Clearing*, earthwork, Grading. . . .³⁹
(emphasis added)

13 If the site plan requirement includes the depiction of the location of any clearing, and even
14 assuming WEAN's interpretation is correct, there would be clear disclosure of any
15 potentially harmful clearing. Furthermore, the definition of “development not only includes
16 clearing but also the *removal of vegetation*. WEAN's argument that using the term “clearing”
17 in the BSA exemption does not constitute a violation of the GMA.

18 Finally, WEAN cites the regulations related to Bald Eagles, which include the
19 following direction:

20 If the Planning Director determines that the scope or timing of the proposal
21 may create an adverse impact or adversely affect the Eagle nest territory,
22 he/she shall require the preparation of a Habitat Management Plan prior to
23 any *Clearing*, Grading, or construction....⁴⁰ (emphasis added)

24 Again, even if WEAN's interpretation is correct, a BSA would be required if there was a
25 proposal to conduct “wholesale cutting of woody vegetation” and/or “removal of all
26 “herbaceous” (non-woody) vegetation.”⁴¹ Use of the term “clearing” in regards to
27 requirements applicable to Bald Eagle protection does not constitute a violation of the GMA.
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31 ³⁹ Ordinance C-75-14, pp. 39, 40.

32 ⁴⁰ Ordinance C-75-14, pp. 42, 43.

⁴¹ The quoted clauses are from WEAN's Dispositive Motion of March 6, 2015, p. 6.

1 As to Issue 2, the Board concludes WEAN has failed to meet its burden of proof to
2 establish violations of RCW 36.70A.060, WAC 365-190-080(1), WAC 365-196-830(1)(2)(4),
3 or RCW 36.70A.172, WAC 365-190-080(2), or WAC 365-196-830(3)(5).⁴²
4

5 **Issue 3. Does the exemption for removal of Beaver and Beaver dams**
6 **(17.02B.300A, Exemption Table, exemption #15) fail to protect critical areas**
7 **as required by RCW 36.70A.060, WAC 365-190-080(1), 365-196-830(1)(3)(4),**
8 **or fail to include the Best Available Science as required by RCW 36.70A.172**
9 **and WAC 365-190-080(2), §130(3)(5) because it relies entirely on Hydraulic**
10 **Permit Approval by the Washington Dept. of Fish and Wildlife pursuant to**
11 **RCW 77.55? (WEAN's Issue 3.1.3)**

12 ICC 17.02B.300A.15 provides the following exemption from the FWHCA regulations:

13 Removal of beaver. The control, trapping, and removal of beaver from critical
14 areas or critical area buffers provided no alteration occurs except the
15 removal of the beaver dam and the control, trapping, or removal is authorized
16 by the Washington State Department of Fish and Wildlife (WDFW) through
17 the issuance of a hydraulic project approval (HPA).

18 The County's definition of "alteration" states:

19 Alteration of a wetland, a deepwater habitat or a fish and wildlife habitat
20 conservation area means in any wetland, deepwater habitat, or a fish and
21 wildlife habitat conservation area or required buffer, the placement, erection
22 or expansion of any solid material or structure; the discharge or disposal of
23 any dredged material or waste, including filling, grading, channelization,
24 removing, dredging, draining, mining or extraction of any materials; the
25 removal or harvesting of trees or other vegetation; and modification for use
26 as a storm water retention/detention facility.⁴³

27 The challenged section of the code allows the removal of a Beaver dam within a
28 critical area or its buffer based only on the issuance of an HPA (Hydraulic Project Approval)
29 from the Washington Department of Fish and Wildlife. WEAN argues reliance on WDFW's
30 HPAs fails to protect critical areas and include BAS.⁴⁴ RCW 77.55.021(7)(a) provides that

31 ⁴² While the County's definition of "clearing" does not violate the GMA, it is poorly written and will result in
32 confusion. To assist the public, the County may want to consider rewriting the 17.02B.060F definition.

⁴³ ICC 17.02A.030.

⁴⁴ WEAN's Dispositive Motion of March 6, 2015, p. 7.

1 the only consideration WDFW may rely on in determining whether to issue an HPA is
2 protection of fish life.⁴⁵ WDFW has no authority to consider any of the other functions and
3 values of FWHCAs, let alone protect them.

4 The County initially contended the issue was moot as WDFW recently adopted new
5 rules regulating the management and removal of beaver dams.⁴⁶ While the County dropped
6 that argument at the HOM,⁴⁷ it continued to assert the additional protections included in the
7 Island County Code were sufficient, referencing the following clause: "provided no alteration
8 occurs except the removal of the beaver dam."
9

10 In its Response to Wean's Dispositive Motion, the County cited a WDFW Fact Sheet,
11 *Living With Wildlife-Beavers*,⁴⁸ which includes the following paragraph:

12 Beavers dams create habitat for many other animals and plants of
13 Washington. In winter, deer and elk frequent beaver ponds to forage on
14 shrubby plants that grow where beavers cut down trees for food or use to
15 make their dams and lodges. Weasels, raccoons, and herons hunt frogs and
16 other prey along the marshy edges of beaver ponds. Migratory waterbirds
17 use beaver ponds as nesting areas and resting stops during migration.
18 Ducks and geese often nest on top of beaver lodges since they offer warmth
19 and protection, especially when lodges are formed in the middle of a pond.
20 The trees that die as a result of rising water levels attract insects, which in
21 turn feed woodpeckers, whose holes later provide homes for other wildlife.

22 The Board also takes official notice⁴⁹ of WAC 220-660-230(2)(a), a sub-section of the
23 WDFW HPA beaver dam management rule referenced by the County. The sub-section
24 states:

25 Beavers play an important ecological role in creating and maintaining ponds
26 and wetlands for fish and wildlife habitat. Ponds also provide surface water
27 storage that improves summer flows, as well as improving water quality
28 through retaining sediment.

29
30 ⁴⁵ RCW 77.55.021(7)(a): "Protection of fish life is the only ground upon which approval of a permit may be
denied or conditioned. Approval of a permit may not be unreasonably withheld or unreasonably conditioned."

31 ⁴⁶ Island County's Response to WEAN's Dispositive Motion, p. 5.

32 ⁴⁷ HOM transcript, p. 72, line 24; p. 73, line 22.

⁴⁸ Island County's Response to WEAN's Dispositive Motion, p. 5: <http://wdfw.wa.gov/living/beavers.html>.

⁴⁹ WAC 242-03-630(2).

1 Beyond that, the record includes the following:

2 The songbird has a friend in the beaver. According to a study by the Wildlife
3 Conservation Society, the busy beaver's signature dams provide critical
4 habitat for a variety of migratory songbirds . . .

5 Beavers help repair degraded stream habitats and their dams and associated
6 ponds recharge local water tables and create wetlands. With our changing
7 climate likely to mean increasing droughts in the West, managing ways to
8 allow watersheds to act more like sponges will be a challenge. Beaver are a
9 powerful tool to be considered for that, and the associated benefits to other
wildlife add to their value.⁵⁰

10 Similar to large wood, beaver dams slow water, retain sediment, and create
11 pools and off channel ponds used by rearing coho salmon (Naiman et al.
12 1988, Pollock et al. 2004). Beavers are native to Island County, as evidenced
13 by Whidbey native peoples trading beaver skins to the early fur traders and
14 beaver bones found in middens (R. Milner, personal communication with K.
15 Swanson November 18, 2013).⁵¹

16 As the above quotes indicate, the record establishes that Beaver dams within a
17 FWHCA or its buffers provide functions and values beyond habitat for fish life. Sole reliance
18 on the issuance of an HPA from WDFW, an agency which is precluded from considering
19 any functions and values beyond fish life, fails to protect critical area functions and values
20 and fails to include BAS.

21 It is the County's contention the proviso regarding "no further alterations" provides
22 sufficient critical area protection. However, the record establishes there will be "alterations"
23 beyond mere removal of the beaver dam. Water flows will increase and retained sediment
24 will be released.⁵² Some animal and plant habitat will be negatively affected.⁵³ Water tables
25 may well be lowered and wetlands altered.⁵⁴

26
27
28
29 _____
30 ⁵⁰ IR 222. <http://www.sciencedaily.com/releases/2007/01/070110180828.htm>.

31 ⁵¹ IR 70, *Best Available Science and Existing Conditions Report for Island County's Fish and Wildlife Habitat
Conservation Areas*, p. 77.

32 ⁵² *Id.*

⁵³ IR 222.

⁵⁴ *Id.*

1 That is not to say removal of beaver dams should be prohibited. It is the fact that dam
2 removal is an exempt activity under ICC 17.02B.300A.15 that is problematic. An exemption
3 provides no notification, no County review, and no County permitting. The protection of all of
4 the functions and values of such a critical area require more than issuance of a permit
5 addressing fish habitat combined with a proviso that no “further alterations” occur.
6

7 The Board enters the following findings of fact and conclusions of law:
8

9 1. As to Issue 3, WEAN has met its burden of proof to establish violations of RCW
10 36.70A.060 and RCW 36.70A.172;

11 2. Beavers play an important ecological role in creating and maintaining ponds and
12 wetland ecosystems for fish and wildlife habitat;

13 3. Sole reliance on the issuance of an HPA from WDFW to support the exemption for
14 removal of Beaver and Beaver dams fails to protect critical area functions and values;

15 4. Island County failed to include BAS in protecting the functions and values of critical
16 area ecosystems;

17 5. The Board is left with a firm and definite conviction that a mistake has been made;
18 and
19

20 6. Ordinance C-75-14 is clearly erroneous in view of the entire record before the
21 Board and in light of the goals and requirements of the GMA.
22

23 **Issue 5. Are “standard habitat management plans” (17.02B.430E, F, H)**
24 **development regulations as defined in RCW 36.70A.030(7) and if so do they**
25 **contravene the requirements and goals of RCW 36.70A.020(11), §035, §105,**
26 **§106, §130(2), §140, WAC 365-196-030, §200(7), §600, §640, §660, and §800**
27 **because they may be created, adopted, modified, or deleted without**
28 **compliance with requirements for public notification or participation,**
29 **notification of state agencies, or procedural requirements for adoption or**
30 **amendment of development regulations? (WEAN’s Issue 3.1.5)**

31 ICC 17.02B.430 E, F, and H include references to the use of both standard and site-
32 specific habitat management plans (HMPs) to protect species or habitat. ICC 17.02B.430H
includes the following sentence: “From time to time as the lists of protected species and

1 species of local importance are amended, the county may develop additional standard
2 HMPs, modify adopted standards; and/or delete HMP requirements.”

3 WEAN states that standard HMPs are development regulations,⁵⁵ akin to standard
4 stream buffers, sub-area plans or watershed plans. It argues the County’s adoption or
5 modification of standard HMPs can be done administratively and thus would not be subject
6 to GMA public notice, participation, and legislative action requirements. The County
7 specifically disagrees with the assertion standard HMPs can be adopted administratively.
8

9 During the HOM, the County stated the adoption or modification of standard HMPs
10 would be subject to GMA required notice, public review, public comment, and adoption. At
11 the HOM it agreed standard HMP’s are GMA development regulations and clearly stated
12 their adoption or modification are subject to all GMA requirements.⁵⁶

13 PRESIDING OFFICER ROEHL: Are you suggesting or are you
14 acknowledging that a standard HMP constitutes a development regulation?

15 MR. LONG: I think it does, yeah.

16 PRESIDING OFFICER ROEHL: You think it does; either it does or it doesn't.
17 In your opinion is it a development regulation?

18 MR. LONG: Yes.

19 PRESIDING OFFICER ROEHL: It being a development regulation, is it not
20 required to be a GMA adopted document complying with public notice, public
21 participation and notice requirements?

22 MR. LONG: Yes.

23 The Board assumes the County will act in accordance with counsel’s statements.

24 WEAN provides no support for its assertion that standard HMPs can be adopted
25 administratively, thus circumventing GMA requirements. Apparently, WEAN insists on
26
27
28
29

30 ⁵⁵ RCW 36.70A.030(7): "Development regulations' or 'regulation' means the controls placed on development
31 or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas
32 ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision
ordinances, and binding site plan ordinances together with any amendments thereto.”

⁵⁶ HOM transcript, p. 80, line, 25; p. 81, line. 12.

1 inclusion of a clear statement in the Code that the County will comply with the applicable
2 GMA requirements.⁵⁷

3 As to Issue 5, the Board concludes WEAN has failed to meet its burden of proof to
4 establish violations of RCW 36.70A.020(11), 36.70A.035, 36.70A.105, 36.70A.106,
5 36.70A.130(2), 36.70A.140, WAC 365-196-030, WAC 365-196-200(7), WAC 365-196-600,
6 WAC 365-196-640, WAC 365-196-660, and WAC 365-196-800.
7

8 **Issue 6. Do the buffer requirements for Natural Area Preserves**
9 **(17.02B.430E) fail to protect critical areas as required by RCW 36.70A.060**
10 **and WAC 365-190-080(1), 365-196-830(1)(3)(4)(6) or to include the Best**
11 **Available Science as required by RCW 36.70A.172 and WAC 365-190-080(2),**
12 **§130(3), 365-196-830(5)(6) because they fail to protect all critical area**
13 **functions, fail to protect this critical area from adjacent development, or fail**
14 **to provide any buffers or setbacks from adjacent development? (WEAN's**
15 **Issue 3.2.1)**

16 WEAN asserts the County's regulations regarding Natural Area Preserves (NAPs)
17 fail to protect these critical areas and fail to include BAS. NAPs are defined by RCW
18 79.70.020(2):

19 "Natural areas" and "natural area preserves" include such public or private
20 areas of land or water which have retained their natural character, although
21 not necessarily completely natural and undisturbed, or which are important in
22 preserving rare or vanishing flora, fauna, geological, natural historical or
23 similar features of scientific or educational value and which are acquired or
24 voluntarily registered or dedicated by the owner under this chapter.

25 The purpose of Chapter 79.70 RCW and a state policy are included in RCW
26 79.70.010:

27 The purpose of this chapter is to establish a state system of natural area
28 preserves and a means whereby the preservation of these aquatic and land
29 areas can be accomplished.
30

31

32 ⁵⁷ WEAN's Pre-Hearing Brief, p. 4: "The plain language of the provisions for 'standard habitat management plans' does not state that the 'develop[ment] of additional standard HMPs' must ultimately be subjected to legislative adoption as the County asserts."

1 All areas within the state, except those which are expressly dedicated by law
2 for preservation and protection in their natural condition, are subject to
3 alteration by human activity. Natural lands, together with the plants and
4 animals living thereon in natural ecological systems, are valuable for the
5 purposes of scientific research, teaching, as habitats of rare and vanishing
6 species, as places of natural historic and natural interest and scenic beauty,
7 and as living museums of the original heritage of the state.

8 It is, therefore, the public policy of the state of Washington to secure for the
9 people of present and future generations the benefit of an enduring resource
10 of natural areas by establishing a system of natural area preserves, and to
11 provide for the protection of these natural areas.

12 NAPs are selected, acquired, managed, and protected by the Washington State
13 Department of Natural Resources.⁵⁸ Island County has a single NAP.

14 WAC 365-190-130, one of the Minimum Guidelines adopted by the Department of
15 Commerce to assist local governments in the classification of critical areas and resource
16 lands, includes the following directive:

17 (2) Fish and wildlife habitat conservation areas that must be considered
18 for classification and designation include:

19 (h) State *natural area preserves*, natural resource conservation areas,
20 and state wildlife areas. (emphasis added)

21 Island County has included its natural area preserves, natural resource
22 conservation areas, and state wildlife areas as designated FWHCAs in ICC 17.02B.

23 ICC17.02B.430E⁵⁹ provides:

24 The director shall determine the appropriate buffer for FWHCA other than
25 streams based on best available science and the following guidance:
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27
28
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31

32 ⁵⁸ RCW 79.70.030.

⁵⁹ Ordinance C-75-14, p. 44.

Fish and Wildlife Conservation Area	Buffer Requirement
State natural area preserves, natural resource conservation areas, and state wildlife areas	Buffers shall not be required adjacent to these areas. These areas are assumed to encompass the land required for species preservation. The director may impose a new buffer or increase the applicable buffer if it is determined that a proposed development would infringe on or inhibit use of the entire property for species preservation.

However, while the County’s NAP has been designated,⁶⁰ WEAN asserts the County has failed to protect it and failed to include BAS. WEAN first refers to the reference to “species preservation” in ICC17.02B.430E, observing the purpose of NAPs is much broader than species protection. Rather, they are intended to: “. . . protect the best remaining examples of many ecological communities including rare plant and animal habitat.”⁶¹ Secondly, WEAN questions the specific assumption included in ICC17.02B.430E: “These areas are *assumed* to encompass the land required for species preservation.” It argues there is no basis in the record for support of this assumption. Next, WEAN states the regulation would allow adjacent development to reduce “‘use of the entire property’ until the point where ‘it is determined that a proposed Development would infringe on or inhibit use of the entire property’.”⁶² Finally, WEAN states much of the County’s NAP is devoted to conserving a rare plant community and species. It asserts BAS in the record establishes that one of the standard management tools for preservation of the prairies containing the rare plant community and species is the use of controlled fire. It argues use of controlled fire as a management tool will require that adjacent development be sufficiently set back from the NAP. Rather than protecting the FWHCA, the regulation protects adjacent properties from the FWHCAs.⁶³

⁶⁰ The only NAP in Island County is the Admiralty Inlet NAP, located within Ebey’s Landing National Historical Reserve. IR 70, p. 40.
⁶¹ WEAN’s Dispositive Motion of March 6, 2015, p. 11.
⁶² *Id.*, p. 12.
⁶³ *Id.*

1 The County contends WEAN fails to cite any BAS establishing a particular buffer
2 standard and points to the language allowing the director to impose a new or increased
3 buffer “. . . if it is determined that a proposed development would infringe on or inhibit use of
4 the entire property for species preservation.” It interprets that clause in the opposite manner
5 from WEAN, that is, that *any reduction* in the use of the NAP would authorize an increased
6 buffer determination. Significantly, it argues that species preservation is the only relevant
7 consideration in establishing FWHCAs.⁶⁴ It concludes by contending there was no scientific
8 evidence before the County establishing that burning was required for species preservation.
9

10 **BUFFERS**

11 The Board finds that the underlined portion of the following sentence is subject to two
12 diametrically opposite interpretations: “The director may impose a new buffer or increase the
13 applicable buffer if it is determined that a proposed development would infringe on or inhibit
14 use of the entire property for species preservation.” Does only a small portion of the NAP
15 need to be impacted, or does the Director’s authority to impose a wider buffer arise if and
16 only if the proposed development would infringe upon all of the NAP’s acreage? While the
17 sentence is poorly crafted and may be confusing to the public, the County is entitled to
18 interpret its regulations.⁶⁵ The Board will not base a violation finding on this inartfully crafted
19 clause.
20
21

22 **PROTECTION OF SPECIES, or AREAS and ECOSYSTEMS**

23 The County’s assumption that the NAP⁶⁶ “encompass[es] all the land required for
24 *species preservation*” and that there was no science in the record regarding fire for *species*
25 *protection* are related.
26
27
28
29

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31 ⁶⁴ Response to WEAN’s Dispositive Motion, p. 8.

⁶⁵ Island County would be well advised to clarify that particular clause.

32 ⁶⁶ Island County does not presently have any lands designated as Natural Resource Conservation Areas. IR
70, p. 41

1 The Washington Growth Management Act requires all cities and counties to:(1)
2 designate Critical Areas,⁶⁷ and (2) adopt development regulations that protect the “functions
3 and values” of Critical Areas,⁶⁸ and, in doing so, to include the Best Available Science.
4 Under the statutory definition, “Critical Areas” include “areas and ecosystems,” and *it is the*
5 *functions and values of those areas and ecosystems that counties and cities are required to*
6 *protect.*⁶⁹ Development regulations may not allow a net loss of the functions and values of
7 the ecosystem that includes the impacted or lost critical areas.⁷⁰ Some critical areas may
8 constitute ecosystems or parts of ecosystems that transcend the boundaries of individual
9 parcels and jurisdictions, so that protection of their function and values should be
10 considered on a larger scale.⁷¹

12 Fish and Wildlife Habitat Conservation Areas are one of five categories of Critical
13 Area ecosystems that must be designated and protected.⁷² FWHCAs are “areas that serve
14 a critical role in sustaining needed habitats and species for the *functional integrity of the*
15 *ecosystem.*”⁷³

17 In sum, the GMA requires the County to protect the functions and values of Critical
18 Area Ecosystems. The key statutory term “*ecosystems*” was not defined by the Legislature
19 or by the Department of Commerce. Therefore, the Board looks to scholarly publications to
20 assist in defining and interpreting the term “*ecosystems*”⁷⁴:

22 An *ecosystem* consists of all the organisms that live in a particular area along
23 with physical components of the environment with which those organisms
24 interact. There must be an appropriate mixture of plants, animals, and
25 microbes if the ecosystem is to function. Organisms and their physical

26 ⁶⁷ RCW 36.70A.170.

27 ⁶⁸ RCW 36.70A.060(2); RCW 36.70A.172(1).

28 ⁶⁹ RCW 36.70A.030(5).

29 ⁷⁰ WAC 365-196-830(4).

30 ⁷¹ WAC 365-196-830(6).

31 ⁷² RCW 36.70A.030(5)(c).

32 ⁷³ WAC 365-190-030(6)(a) [WAC Chapter 365-190 contains the “minimum guidelines that apply to all jurisdictions,” promulgated pursuant to RCW 36.70A.050(3)].

⁷⁴ The Supreme Court has held that the Growth Management Hearings Board may consider and use scholarly publications to assist in interpreting undefined legal terms – such interpretive materials are not considered by the Supreme Court to be “evidence.” *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 433-434 (Wash. 2007).

1 environment are interconnected by an ongoing flow of energy and nutrient
2 cycling. So complete is the interconnectedness of the various living and
3 nonliving components of the ecosystem that a change in any one will result in
4 a subsequent change in almost all the others. Green plants provide
5 ecosystem services because they enhance the life-supporting attributes of
6 the atmosphere, surface water, soil, and other physical components of an
7 ecosystem. As primary producers, plants benefit many other organisms by
8 producing oxygen, reducing atmospheric carbon, building soil, holding water,
9 moderating climate, and converting energy in sunlight into chemical energy
10 through photosynthesis. Plants provide human societies with food, fibers,
11 building materials, and medicines. Biodiversity is important for maintaining
12 ecosystem functions.⁷⁵

13 With that understanding of the GMA's critical area protection requirements, the Board
14 cannot agree with the County's narrow view that the sole purpose of FWHCAs, including
15 NAPs, is the protection of the species found therein.⁷⁶

16 In its Response to WEAN's Dispositive Motion, the County cites RCW 79.70.010 and
17 79.70.020(2) in support of its view that GMA protection requirements are focused on
18 species. However, those statutes clearly state the protection goal is broader than simply
19 species protection, including preservation of areas of geological, natural historical, or similar
20 features of scientific or educational value, and as places of natural historic and natural
21 interest and scenic beauty, and as living museums of the original heritage of the state:
(emphasis added)

22 The purpose of this chapter is to *establish a state system of natural area*
23 *preserves and a means whereby the preservation of these aquatic and land*
24 *areas can be accomplished.*

25 All areas within the state, except those which are expressly dedicated by law
26 for preservation and protection in their natural condition, are subject to
27

28 ⁷⁵ Freeman, Scott, *Biological Science*, 4th Edition, Pearson 2011, pp.547-549 and 1117-1120; Molles, Manuel,
29 *Ecology – Concepts and Applications*, 5th Edition, McGraw Hill 2008, p.8; Kimmins, J.P., *Forest Ecology: A*
30 *Foundation for Sustainable Forest Management and Environmental Ethics in Forestry*, 3rd Edition, Prentice
31 Hall 2004, pp. 28-29; Starr, Cecie and Taggart, Ralph, *Biology – The Unity and Diversity of Life*, 10th Edition,
Thomson 2004, pp. 868-873.

32 ⁷⁶ Response to WEAN's Dispositive Motion, p. 8: "So while the purpose of natural area preserves may include
other considerations such as 'natural historic and natural interest and scenic beauty,' *species preservation is*
the only consideration relevant to fish and wildlife habit conservation areas."

1 alteration by human activity. *Natural lands*, together with the plants and
2 animals living thereon in natural ecological systems, *are valuable for the*
3 *purposes of scientific research, teaching*, as habitats of rare and vanishing
4 species, *as places of natural historic and natural interest and scenic beauty,*
5 *and as living museums of the original heritage of the state.*

6 It is, therefore, the public policy of the state of Washington to secure for the
7 people of present and future generations the benefit of an enduring resource
8 of natural areas by establishing a system of natural area preserves, and to
9 provide for the protection of these natural areas. RCW 79.70.010

10 "Natural areas" and "natural area preserves" include *such public or private*
11 *areas of land or water which have retained their natural character*, although
12 not necessarily completely natural and undisturbed, or *which are important in*
13 *preserving rare or vanishing flora, fauna, geological, natural historical or*
14 *similar features of scientific or educational value* and which are acquired or
15 voluntarily registered or dedicated by the owner under this chapter. RCW
16 79.70.020(2)

17 The BAS in the record describes the County's NAP:

18 The area includes a 36-acre old growth forest, as well as shoreline
19 bluffs. PHS⁷⁷ data show the presence of bald eagles nests within the
20 Reserve, and eBird records include sightings of common loon, great blue
21 heron, marbled murrelet, and osprey. The cliffs, also documented by WDFW
22 as a Priority Habitat, may be suitable for peregrine falcon nesting, and the
23 species has been reported there on several occasions by eBird users.

24 The NAP protects one of only 10 remaining populations of golden paintbrush
25 in Washington State (a federally threatened plant species).⁷⁸

26 As stated above, the GMA requires jurisdictions to protect "areas and ecosystems."⁷⁹
27 FWHCAs "serve a critical role in sustaining needed habitats and species for the functional
28 integrity of the ecosystem."⁸⁰ By failing to establish buffers for the NAP based on an

29 _____
30 ⁷⁷ WDFW's *Priority Habitats and Species*; PHS is a source of BAS. "Generally the DFW's priority habitat maps
31 are the BAS on the county's critical areas for listed species." *Ferry County v. Growth Mgmt. Hr'gs Bd.*, 184 Wn.
32 App. 685, 734 (Wash. Ct. App. 2014), citing *Stevens County v. Futurewise*, 146 Wn. App. 493 at 512.

⁷⁸ IR 70, pp. 40-41.

⁷⁹ RCW 36.70A.030(5).

⁸⁰ WAC 365-190-030(6)(a).

1 assumption that it encompasses “the land required for species preservation”, the County
2 has failed to protect the NAP’s habitat or the functional integrity of its ecosystem. Not only
3 has the County focused solely on species protection but it has done so while making an
4 assumption that is nowhere supported by the record.

5 Contrary to the County’s assertion of a lack of scientific evidence in the record
6 regarding the use of fire as a standard management tool for prairie habitat, WEAN cites the
7 following:
8

9 Prairie vegetation in the Pacific Northwest was historically maintained by
10 anthropogenic fire. Golden paintbrush appears to respond favorably to fire
11 management.⁸¹

12 Prairie habitat throughout Western Washington is one of the most imperiled
13 habitat types, and a number of rare plant species are associated with this
14 habitat type. Formed in glacial outwash soils, grassland- dominated ‘prairies’
15 (so called by the first European settlers), scattered with oak trees, were
16 maintained through fire by the native American tribes prior to European
17 settlement. The Tribes maintained the prairies with fire management for food
18 production (cultivating a variety of roots, including camas, chocolate lily,
19 bracken fern, acorns), as well as to maintain the open grasslands, which in
20 turn provided habitat for deer and other species.⁸²

21 Also included in the record assembled by the County was the publication *Indians,
22 Fire, and the Land in the Pacific Northwest* in which it is stated:

23 Through the use of fire and a simple technology, the Indians over many
24 generations had encouraged the growth of three dominant plants on the
25 islands-Bracken, Camas, and nettles-to supplement their regular diet of fish
26 and small game, and also had created the conditions that fostered immense
27 forests of Douglas-fir. . . . The Salish not only burned nettle patches but also
28 regularly burned entire prairies in mid-summer or early fall when the rains
29 had stopped and grass was tall and tinder dry.⁸³

30 ⁸¹ IR 70, p. 29.

31 ⁸² IR 70, p. 47.

32 ⁸³ IR 432-1, *Indian Land Use and Environmental Change*, Richard White, editor, pp. 37, 40. The specific article
is also listed in the BAS and Existing Conditions Report references at p. 124, IR 70, Boyd, R. 1999. *Indians,
Fire, and the Land in the Pacific Northwest*, Oregon State University Press, Corvallis, Oregon. 1999.

1 While the County is correct that the record includes no information regarding buffer
2 width recommendations for NAP/prairie protection, the Board notes the directive included in
3 WAC 365-190-130(3)(a):

4 (3) When classifying and designating these areas, counties and cities must
5 include the best available science, as described in chapter 365-195 WAC.

6 (a) Counties and cities should consider the following:

7 (iv) Evaluating land uses surrounding ponds and fish and wildlife habitat
8 conservation areas that may negatively impact these areas, or conversely,
9 that may contribute positively to their function;

10 (v) Establishing buffer zones around these areas to separate
11 incompatible uses from habitat areas;

12 As to Issue 6, the Board enters the following findings of fact and conclusions of law:

13 1. WEAN has met its burden of proof to establish a violation of RCW 36.70A.060,
14 and RCW 36.70A.172;

15 2. Island County failed to protect a specific type of FWHCA, the Natural Area
16 Preserve;

17 3. Island County failed to include BAS in designating and protecting the functions and
18 values of critical area ecosystems;

19 4. The Board is left with a firm and definite conviction that a mistake has been made;
20 and
21

22 5. Ordinance C-75-14 is clearly erroneous in view of the entire record before the
23 Board and in light of the goals and requirements of the GMA.
24

25 **Issue 7. In not designating and protecting the habitat of flora listed by the**
26 **federal or state government as areas where endangered, threatened, or**
27 **sensitive species have a primary association has Island County, in**
28 **reviewing and updating its critical area policies and regulations failed to**
29 **comply with GMA's requirements for designation and protection of critical**
30 **areas and inclusion of the Best Available Science, as required by RCW**
31 **36.70A.060, §172 and WAC 365-190-§030(6), §080(1)(2), §130(1)(2)(3)(4), 365-**
32 **196-830(1)(2)(3)(4)(5)(6)(8)(9)? (WEAN's Issue 3.3.1)**

1 **Issue 8. In not designating and protecting the rare, threatened, and**
2 **biodiverse habitats of Westside Prairie, Oak Woodland, and Herbaceous**
3 **Balds, has Island County, in reviewing and updating its critical area**
4 **policies and regulations failed to comply with GMA's requirements for**
5 **designation and protection of critical areas and inclusion of the Best**
6 **Available Science, as required by RCW 36.70A.060, §172 and WAC 365-190-**
7 **§030(6), §080(1)(2), §130(1)(2)(3)(4), 365-196-830(1)(2)(3)(4)(5)(6)(7)(8)(9)?**
8 **(WEAN's Issue 3.3.2)**

9 **Issue 9. In not designating and protecting the habitat of species listed by**
10 **the Washington Department of Fish and Wildlife as candidates for listing as**
11 **endangered or threatened or by the U.S. Fish and Wildlife Service as**
12 **species of concern, particularly Western Toad, has Island County failed to**
13 **comply with GMA's requirements for designation and protection of critical**
14 **areas and inclusion of the Best Available Science, as required by RCW**
15 **36.70A.060, §172 and WAC 365-190-§030(6)(19), §080(1)(2), §130(1)(2)(3)(4),**
16 **365-196-830(1)(2)(3)(4)(5)(6)(8)(9)? (WEAN's Issue 3.3.3)**

17 Issues 7, 8, and 9 present challenges comparable in some ways to that of Issue 6. As
18 alleged by WEAN, the County:

19 . . . refused to designate in their proper category rare plants listed by the
20 federal and state governments, . . . [Issue 7: rare plants]; refused to
21 designate and protect globally, regionally, and locally rare native prairie
22 ecosystems [Issue 8: prairies]; and it refused to designate and protect
23 Western Toad, a declining and Candidate species recognized as of "greatest
24 conservation need" [Issue 9: Candidate species – Western Toad].⁸⁴

25 In its adoption of Ordinance C-75-14, the County designated some endangered,
26 threatened, and sensitive (ETS) plants as species of local importance.⁸⁵ It did not designate
27 Westside Prairie, Oak Woodland, and Herbaceous Bald habitats as FWHCAs. Nor did it
28 designate the Western Toad, a federal species of concern and state candidate species.⁸⁶

29 Both WEAN and the County devoted extensive argument in the briefs and at the
30 HOM to the question of whether plants are "wildlife" as that word is used by the GMA in
31 reference to FWHCAs. WEAN asserted they constitute wildlife while the County disputed

32 ⁸⁴ WEAN's Pre-Hearing Brief, p. 6.

⁸⁵ ICC 17.02B.510.

⁸⁶ IR-12, p. 11; IR 70, p. A-5.

1 the assertion. The County's response to Issues 7 and 8, in fact, relies almost exclusively on
2 the argument that plants are not wildlife. Thus, argues the County, as there are no ETS
3 animals in Island County with a primary association with its prairies, no action was
4 required.⁸⁷ Protection of fauna is a statewide policy, it contends, while protection of flora is
5 to be determined at the local level.⁸⁸ The County's positions on these questions are
6 reflected in Findings of Fact adopted by the Island County Board of County
7 Commissioners.⁸⁹

9
10 **Ordinance Findings 38 and 39 – Protection Standards for Prairies and Rare Plants**

11 Ordinance C-75-14 "Findings" 38 and 39 are predominantly interpretations of the
12 laws and regulations related to the designation and protection of FWHCAs. Those
13 interpretations formed the foundation for the County's decisions in designating and
14 protecting habitat areas.⁹⁰

15 By way of example, based on Finding 39, paragraphs f and g, the County determined
16 it had no legal duty to protect plants unless an animal has a primary association with a plant
17 or plant community:

18
19 Paragraph f.: Pursuant to WAC 232-12-297, *the phrase "endangered,*
20 *threatened, and sensitive species" includes only animals* classified as a
21 species or subspecies as commonly accepted by the scientific community.⁹¹

22 Paragraph g: While the GMA does not define the term "wildlife", the
23 Department of Fish and Wildlife, an agency with expertise, defines wildlife as
24 "*all species of the animal kingdom whose members exist in Washington in a*
25 *wild state. This includes but is not limited to mammals, birds, reptiles,*
26 *amphibians, fish, and invertebrates...*"(RCW 77.08.010(78)). Because *the*
27 *phrase "endangered, threatened, or sensitive species" includes only animals,*
28 and because *the term wildlife includes only animals,* the Board of Island
29 County Commissioners finds that *plants and plant communities must only be*

30 ⁸⁷ Island County's Prehearing Brief, p. 10.

31 ⁸⁸ Island County's Prehearing Brief, p. 9.

32 ⁸⁹ Ex. G to Ordinance C-75-14.

⁹⁰ See, in particular, Ex. G, pp. 89 - 94, Findings 38, and 39.

⁹¹ Ex. G to Ordinance C-75-14, p. 91 [emphasis added].

1 *protected when it can be shown that a species of fish or wildlife has a*
2 *primary association with a plant or plant community.*⁹²

3 The County’s legal conclusion that “plants and plant communities must only be
4 protected when it can be shown that a species of fish or wildlife has a primary association
5 with a plant or plant community” is erroneous for several reasons:

6 First, the County mistakenly relied on WAC 232-12-297, a rule unrelated to the GMA,
7 [pertaining to a different statutory scheme governing WDFW’s wildlife management] rather
8 than relying on GMA Minimum Guideline WAC 365-190-030(6)(a). The GMA Minimum
9 Guidelines define FWHCAs as including “rare and vulnerable ecological systems.” The GMA
10 guidelines focus on the “functional integrity of the ecosystem” and make no distinction
11 between plant and animal species. Plants and animals are interconnected components of all
12 terrestrial ecosystems.
13

14 Second, the GMA statutes make no distinction between plant and animal species;
15 rather the GMA statutes require protection of the integrated habitat area and ecosystem.
16

17 Third, the County’s erroneous legal interpretation is contradicted by another part of
18 Ord. C-75-14 (ICC 17.02B.510A, Ordinance, page 48) that designates seven ETS plant
19 species as “habitats and species of local importance” without showing a plant/animal
20 association.
21

22 Fourth, by first concluding plants must only be protected when it can be shown that a
23 species of fish or wildlife has a primary association with a plant or plant community, the
24 County eliminates consideration of WAC 365-190-130(1)(a)’s guideline to consider for
25 classification and designation, among other things, “areas where endangered, threatened,
26 and sensitive species have a primary association.”
27

28 Many of the ultimate decisions made by the County were based on these faulty
29 conclusions. For compliance with the GMA, jurisdictions must first look to the wording of the
30 GMA statutes. Other than the Minimum Guidelines included within chapter 365-190 WAC,
31 administrative code sections adopted to assist jurisdictions in compliance are extremely
32

⁹² *Id.* [emphasis added].

1 helpful but are secondary. Resort to statutes or rules unrelated to the GMA for interpretation
2 of its provisions is rarely appropriate. In this instance, the County's reliance on non-GMA
3 definitions used by the Department of Fish and Wildlife led to faulty interpretations and
4 regulations.

5 Contrary to the County's assertion in "finding/conclusion" 39, paragraphs f and g, the
6 GMA does *not* require protection of plant communities *only* when it can be shown that a
7 species of fish or wildlife has a primary association with a plant or plant community. Rather,
8 the GMA requires protection of the functions and values of habitat areas and ecosystems,
9 based on included Best Available Science. Plants provide essential ecosystem services and
10 functions. If plants are not protected then there will be a net loss of ecosystem functions and
11 values.
12

13 Another example of the County's findings is also included within Section 39 of Exhibit
14 G:
15

16 The Board of Island County Commissioners finds that this list [referencing
17 WAC 365-190-130(1)(a-h)] makes it clear that prairies and rare plants need
18 not be protected unless it is either: (a) determined that a threatened,
19 endangered, or sensitive species of fish or wildlife present in Island County
20 has a primary association with prairies or rare plants; or, (b) it is locally
21 determined that prairies and rare plants should be designated as habitats
and species of local importance.⁹³

22 WAC 365-190-130(1)(a-h) does not state "that prairies and rare plants need not be
23 protected" except under the circumstances this finding references. That code section
24 provides that the areas listed "must be considered for classification and designation." The
25 County reads the regulation very narrowly and in doing so has failed to consider the
26 directives of GMA statutes to designate Critical Areas and adopt development regulations
27 that protect the "functions and values" of those habitat areas and ecosystems, again as
28 discussed specifically below.
29

30 The County's findings also include the following:
31

32 _____
⁹³ *Id.*, p. 90.

1 a. The GMA requires local governments to identify, classify, and designate,
2 locally important habitats and species, but allows the local government to
3 exercise discretion in determining which habitats and species should be
4 designated as habitats and species of local importance.⁹⁴

5 Paragraph "a." is another example of focusing too narrowly on a particular
6 administrative rule while failing to look first to the GMA's statutory requirements and also to
7 the entirety of the administrative rule itself. The GMA makes no mention of "locally important
8 habitats and species." That term appears in the Department of Commerce Guidelines [WAC
9 365-190-030(6)(b)] and there it refers specifically to "locally important" habitats.⁹⁵ As
10 discussed below in regards to prairies, there are habitat areas (as well as species) which
11 have broader regional or ecological significance as opposed to merely being locally
12 important. And, it is true local government has discretion in determining which habitats are
13 of local importance, but that discretion is bounded by the parameters of the GMA.
14

15 The next "finding" follows on page 92 of Ordinance C-75-14's Exhibit G:

16 c. It has been suggested that Island County should designate prairies as
17 habitats and species of local importance at this time. The Board of Island
18 County Commissioners finds that such a designation is not warranted at this
19 time because: (1) large areas of Island County's remaining native prairies are
20 owned by public entities or by private organizations and managed for
21 conservation purposes, and are therefore not in any immediate risk of being
22 lost or destroyed, (2) several large prairie remnants are protected by existing
23 or proposed programs, policies and regulations, (3) this topic was discussed
24 at a Technical Advisory Group (TAG) meeting and most members were not
25 in favor of developing specific protection standards for prairies at this time,
26 and (4) Island County is currently in the process of updating its
27 comprehensive plan and development regulations, this will provide an
28 opportunity to address concerns about prairies in a more comprehensive
29 fashion by considering a full range of potential programs, policies, and
30 regulations.⁹⁶

31 ⁹⁴ *Id.*, p. 92.

32 ⁹⁵ WAC 365-190-030(6)(b) "Habitats of local importance" designated as fish and wildlife habitat conservation areas include those areas found to be locally important by counties and cities.

⁹⁶ Ex. G to Ordinance C-75-14, p. 92.

1 The Board notes the County's rationale for not designating prairies as FWHCAs
2 includes two assumptions not supported by the record: that some prairie areas are owned
3 and/or managed for conservation purposes *and not in any "immediate risk" of loss* and
4 some are *protected by "existing or proposed programs."* It is the County's obligation to
5 designate and protect habitat areas and ecosystems; the protection afforded by other
6 entities or regulations is irrelevant.⁹⁷ Finally, whether "most members [of the TAG] were not
7 in favor of protecting prairies at this time' and the County's ongoing RCW 36.70A.130
8 update process providing "an opportunity to address concerns about prairies" are
9 insufficient justification for not complying with the duty to designate and protect fish and
10 wildlife habitats and ecosystems.
11

12 While the question of "whether plants are wildlife" is an interesting discussion,⁹⁸ the
13 Board finds this semantic disagreement among the parties misses the larger context of
14 ecosystem protection requirements prescribed by the GMA. As stated above, the GMA
15 requires the County to protect the functions and values of "areas and ecosystems."
16 FWHCAs constitute one of the "areas and ecosystems" which must be designated and
17 protected. FWHCAs "serve a critical role in sustaining needed habitats and species for the
18 functional integrity of the ecosystem."⁹⁹ Finally, ecosystems include all of the interconnected
19 organisms in a particular area;¹⁰⁰ the ecosystem is not limited to the area's fauna.
20
21

22 ⁹⁷ *Ferry County v. Growth Mgmt. Hr'gs Bd.*, 184 Wn. App. 685 (Wash. Ct. App. 2014) p. 741: "Ferry County
23 next argues it departed from science because wetland and riparian regulations and buffers already protect 11
24 species on the DFW list. But as Futurewise argues, protection by other regulations is irrelevant. Otherwise the
25 GMA's critical habitat provisions are superfluous since state and federal rules already seek to protect ETS
26 species. More importantly, nothing in the record supports the county's assertion. There is no evidence that the
27 county analyzed regulations and determined existing regulations were sufficient to protect these 11 species."

28 ⁹⁸ Interestingly, the County's argument that plants do not constitute "wildlife" in the context of a GMA FWHCA
29 is undercut by the fact it lists plants as species of local importance and, in its prior ordinance included them as
30 protected species. Ordinance C-75-14, p. 48.

31 ⁹⁹ WAC 365-190-030 (6)(a) "*Fish and wildlife habitat conservation areas' are areas that serve a critical role in*
32 *sustaining needed habitats and species for the functional integrity of the ecosystem, and which, if altered, may*
reduce the likelihood that the species will persist over the long term. These areas may include, but are not
limited to, rare or vulnerable ecological systems, communities, and habitat or habitat elements including
seasonal ranges, breeding habitat, winter range, and movement corridors; and areas with high relative
population density or species richness. Counties and cities may also designate locally important habitats and
species.'

¹⁰⁰ See the definition of ecosystem above, p. 21.

1 Island County Findings of Fact 38 and 39 (Ord. C-75-14, Exhibit G, pp. 89-92) are
2 predominantly comprised of legal interpretations that are clearly erroneous and are also
3 unsupported by facts and scientific evidence in the record.

4 **Rare Plants**

5 With Issue 7, WEAN asserts the County failed to designate and protect the “habitat of
6 flora listed by the federal or state government” and failed to include BAS. Issue 8 similarly
7 alleges violations related to the County’s failure to designate and protect Westside Prairies,
8 Oak Woodlands, and Herbaceous Balds.
9

10 RCW 36.70A.170(2) requires jurisdictions to “designate” critical areas. WAC
11 365-190-040(4) provides in part:

12 Classification is the first step in implementing RCW 36.70A.170 and requires
13 defining categories to which natural resource lands and critical areas will be
14 assigned.

15 (a) Counties and cities are encouraged to adopt classification schemes
16 that are consistent with federal and state classification schemes and those of
17 adjacent jurisdictions to ensure regional consistency. Specific classification
18 schemes for natural resource lands and critical areas are described in WAC
19 365-190-050 through 365-190-130.

20 (b) *State agency classification schemes are available for specific critical
21 area types, including the wetlands rating systems for eastern and western
22 Washington from the Washington state department of ecology, the priority
23 habitats and species categories and recommendations from the Washington
24 state department of fish and wildlife, and the high quality ecosystem and rare
25 plant categories and listings from the department of natural resources,
26 natural heritage program. (emphasis added)*

27 Designation is the second step in implementing RCW 36.70A.170. Critical areas must be
28 designated based on their defined classifications and designation establishes “the general
29 distribution, location, and extent of critical areas”. WAC 365-190-040(5).

30 WAC 365-190-130(2):

31 Fish and wildlife habitat conservation areas that must be considered for
32 classification and designation include:

(a) Areas where endangered, threatened, and sensitive species have a
primary association. . .

1 (h) State natural area preserves, natural resource conservation areas, and
2 state wildlife areas.

3 *Natural area preserves include “such public or private areas of land or water which have*
4 *retained their natural character, although not necessarily completely natural and*
5 *undisturbed, or which are important in preserving rare or vanishing flora.* RCW 79.70.020(2)

6 WAC 365-190-130 (4):

7 Sources and methods.

8
9 (a) Endangered, threatened and sensitive species. Counties and cities
10 should identify and classify seasonal ranges and habitat elements where
11 federal and state listed endangered, threatened and sensitive species have a
12 primary association and which, if altered, may reduce the likelihood that the
13 species will persist over the long term. Counties and cities should consult
14 current information on priority habitats and species identified by the
15 Washington state department of fish and wildlife. Recovery plans and
16 management recommendations for many of these species are available from
17 the Unites States Fish and Wildlife Service, the National Marine Fisheries
18 Service and the Washington state department of fish and wildlife. *Additional*
19 *information is also available from the Washington state department of natural*
resources, *natural heritage program*, and aquatic resources program.
(emphasis added)

20 The record establishes one particular plant, the Golden Paintbrush (*Castilleja*
21 *levisecta*), is listed by the Department of the Interior’s USFWS as threatened and by the
22 State of Washington as endangered.¹⁰¹ Five other plants located in the County are
23 classified as either threatened or sensitive by the State of Washington: White Meconella
24 (scientific name – *Meconella oregano*) listed as Threatened; White-top Aster (*Sericocarpus*
25 *rigidus*) listed as Sensitive; Bulb-bearing Water-Hemlock (*Circuta bulbifera*) listed as
26 Sensitive;¹⁰² Black Lily (*Fritillaria camschatcensis*) listed as Sensitive;¹⁰³ and Tall Agoseris

30
31 ¹⁰¹ IR 115-3, IR 437-1, IR 442-1, IR 70-1 at p. 18, IR 438-1.

¹⁰² The most recent sightings of this species were prior to 1977. IR 70-1, p. 18.

32 ¹⁰³ *Id.* The Washington Natural Heritage Program indicates the White Meconella and the Golden Paintbrush
are both endangered. <http://www1.dnr.wa.gov/nhp/refdesk/lists/plantsxco/island.html>.

1 (*Agoseris elata*) listed as Sensitive.¹⁰⁴

2 According to the BAS Report, the Golden Paintbrush, White Meconella, and White-
3 top Aster “. . . occur in prairie habitats, [and] where the term prairie in this document is used
4 as a general descriptor for wet and dry prairies, herbaceous balds,¹⁰⁵ and herbaceous
5 communities atop coastal bluffs.”¹⁰⁶ The record thus establishes these three ETS species
6 have a primary association with the County’s prairies and herbaceous balds. WAC 365-190-
7 130(2) directs jurisdictions to consider and designate areas where endangered, threatened,
8 and sensitive species have a primary association. The County’s prairies have such an
9 association with the three referenced plant species.¹⁰⁷

10
11 As the Washington State Court of Appeals stated (in regards to GMA plans and
12 regulations):

13 As part of those plans and regulations, local governments by ordinance must
14 designate and protect the *habitat of endangered, threatened, and sensitive*
15 *(ETS) species* of fish and wildlife and species of local importance. RCW
16 36.70A.020(9), (10), .060(2), .170(1)(d); WAC 365-190-130(2). When
17 designating and protecting these environmentally critical areas, a local
18 government entity must “include the best available science.” RCW
19 36.70A.172.¹⁰⁸ (emphasis added)

20 The Washington Supreme Court observed in a 2005 Ferry County decision that:

21
22 ¹⁰⁴ *Id.*

23 ¹⁰⁵ IR 70-1, Table A2: Herbaceous Balds are variable-sized patches of grass and forb vegetation located on
shallow soils over bedrock that commonly is fringed by forest or woodland.

24 ¹⁰⁶ *Id.* Also see IR 70-1, pp. 26-27: [Golden Paintbrush]: Historically, golden paintbrush ranged from the
Willamette Valley in Oregon, through the Puget trough, and up to the south end of Vancouver Island in
25 association with prairies.

26 [White-top aster]: There is only one known occurrence of the species on Whidbey Island in an area known
locally as Schoolhouse prairie. This occurrence is the only documented population between the prairies of
27 south Puget Sound and the Vancouver Island, British Columbia.

28 [White meconella]: The species was likely aided by historical fire disturbance, and may now be impacted by
29 competition from weedy species. Documented occurrences on Whidbey Island occurred in 1897 and 1936,
and more recently plants have consistently been located in the vicinity of Goose Rock in Deception Pass State
30 Park.

31 ¹⁰⁷ See also http://www1.dnr.wa.gov/nhp/refdesk/plan/plan07_entire.pdf: Grassland habitats, often associated
with open oak woodlands, were historically maintained with frequent fires; they support rare species such as
32 the federally threatened golden paintbrush and a number of butterfly species. Rare grassland species are
declining due to development and lack of historic fire regimes.

¹⁰⁸ *Ferry County v. Growth Mgmt. Hr'gs Bd.*, 184 Wn. App. 685, 694.

1 The fact that the county's listing omits both the peregrine falcon and the bull
2 trout, both of which are ETS species known to be present in Ferry County,
3 further supports that the listing was not generated using BAS.¹⁰⁹

4
5 Here the County listings omit three ETS flora species the presence of which in the County
6 has been documented in the scientific record.

7 As to Issue 7, WEAN has met its burden of proof to establish violations of RCW
8 36.70A.060 and RCW 36.70A.172 due to the County's failure to designate and protect
9 habitat of flora listed by the federal or state government as areas where endangered,
10 threatened, or sensitive species have a primary association.

11 12 **Prairies, Oak Woodlands, and Herbaceous Balds**

13 In regards to Issue 8, WAC 365-190-130 includes the following direction:

14
15 (2) Fish and wildlife habitat conservation areas that must be considered
16 for classification and designation include:

17 (b) *Habitats and species of local importance*, as determined locally;
18 (emphasis added)

19 The record establishes Western Washington's prairie ecosystems have been
20 severely reduced and the associated prairie vegetation dramatically impacted.¹¹⁰ Westside
21 prairies, Oak woodlands and herbaceous balds have also been designated as Priority
22 Habitats by the Washington Department of Fish and Wildlife.¹¹¹ The County's assembled
23 BAS clearly establishes that prairie habitat¹¹² in the County has been significantly reduced
24
25
26

27
28 ¹⁰⁹ *Ferry County v. Concerned Friends*, 155 Wn.2d 824, 837 (Wash. 2005).

29 ¹¹⁰ IR 115-12, p. ix, referencing Western Washington: "Only about 8% of the original prairie still supports
30 grassland vegetation and perhaps 2-3% is still dominated by native prairie vegetation." IR 70, p. 47: "Prairie
31 habitat throughout Western Washington is one of the most imperiled habitat types, and a number of rare plant
32 species are associated with this habitat type."

¹¹¹ Washington Department of Fish and Wildlife, 2008, *Priority Habitats and Species List*, Olympia, Washington.
<http://wdfw.wa.gov/publications/00165/wdfw00165.pdf>. pp. 155, 160 and 163.

¹¹² The BAS Report uses the term "prairie habitat" to include wet and dry prairies, herbaceous balds, and
herbaceous communities atop coastal bluffs. IR 70, p. 28.

1 over time.¹¹³ The BAS Report documents seven prairie or oak woodland sites: (1) Naas
2 [Admiralty Inlet] Natural Area Preserve, (2) West Beach, (3) NAS Whidbey Island -
3 Seaplane Base - Forbes Point, (4) Fort Casey State Park, (5) Smith Prairie, (6) Grasser's
4 Hill and Schoolhouse Prairie, and (7) Ebey's Bluff.¹¹⁴

5 The GMA's definition of FWHCAs bears repeating:

6 RCW 36.70A.030(6)(a) "Fish and wildlife habitat conservation areas" are
7 areas that *serve a critical role in sustaining needed habitats and species for*
8 *the functional integrity of the ecosystem, and which, if altered, may reduce*
9 *the likelihood that the species will persist over the long term. These areas*
10 *may include, but are not limited to, rare or vulnerable ecological systems,*
11 *communities, and habitat or habitat elements* including seasonal ranges,
12 breeding habitat, winter range, and movement corridors; and areas with high
13 relative population density or species richness. Counties and cities may also
14 designate locally important habitats and species. (emphasis added)

15 The BAS Report addresses concerns regarding "patch size and isolation effects":

16 The pattern of habitat loss and resulting fragmentation may exert a greater
17 influence on declines in wildlife populations, including birds, mammals, and
18 insects, than habitat loss alone. *Biodiversity as a whole, however, may be*
19 *impacted less by fragmentation than habitat loss.*¹¹⁵ (emphasis added)

20 In specific reference to prairie habitat, the BAS Report makes a significant
21 observation regarding Island County's prairie habitat:

22 In some cases, such as prairie habitats, because extinctions and biodiversity
23 often lag behind habitat loss and fragmentation, even if all existing habitat
24 area is conserved, it is not sufficient to sustain the remaining prairie
25 biodiversity. This finding indicates that habitat restoration may be needed in
26 some cases, such as prairies, in order to conserve existing biodiversity. The
27 authors also note that where conservation of habitat area is supplemented by

28 ¹¹³ IR-127, p.1: "While historically, over 7,600 acres of prairie soils once existed in Island County, most prairies
29 were lost as land was converted to other uses . . . Currently, only approximately 100 acres of prairie soils
30 remain undeveloped and only a small fraction of this area is managed for prairie habitat restoration."

31 IR 70, p. 47: "Most prairies and oak woodlands in Island County were lost as land was converted to other
32 uses, including agriculture, military operations, and residential and urban development. Today on Whidbey
Island, only small patches of prairies and oak woodlands persist. . . . There are, however, additional areas of
remnant prairie vegetation within Island County."

¹¹⁴ *Id.* at pp. 47-48 [high quality wetland ecosystems and terrestrial ecosystems are shown on Map 3].

¹¹⁵ IR 70, p. 88.

1 directed conservation of vulnerable species, species biodiversity will also be
2 enhanced as those vulnerable species act as umbrella species for species
3 not specifically targeted for conservation.¹¹⁶

4 WAC 365-190-130(2)(b) *directs jurisdictions to consider habitats and species of local*
5 *importance for classification and designation.* Although the record establishes these areas
6 constitute *rare*¹¹⁷ *or vulnerable ecological systems and habitat or habitat elements* (RCW
7 36.70A.030(6)(a)), the County did not designate Westside prairies, Oak woodlands and
8 herbaceous balds as habitats of local importance.¹¹⁸

9
10 As to Issue 8, WEAN has met its burden of proof to establish violations of RCW
11 36.70A.060 and RCW 36.70A.172 due to the County's failure to designate and protect
12 Westside Prairies, Oak Woodlands, and Herbaceous Balds as habitats of local importance
13 and failure to include the Best Available Science in protecting critical area ecosystems.
14

15 **Western Toad**

16 As with Issue 8, WAC 365-190-130(2)(b) applies to Issue 9. It directs jurisdictions to
17 consider habitats and species of local importance for classification and designation. WAC
18 365-190-130(4)(b):
19

20 Habitats and species areas of local importance. Counties and cities should
21 identify, classify and designate locally important habitats and species.
22 *Counties and cities should consult current information on priority habitats and*
23 *species identified by the Washington state department of fish and wildlife.*
24 *Priority habitat and species information includes endangered, threatened and*
25 *sensitive species, but also includes candidate species and other vulnerable*
26 *and unique species and habitats. While these priorities are those of the*
27 *Washington state department of fish and wildlife, they should be considered*

28 ¹¹⁶ *Id.*, p. 90.

29 ¹¹⁷ IR 70, p. 47: "Most prairies and oak woodlands in Island County were lost as land was converted to other
30 uses, including agriculture, military operations, and residential and urban development. Today on Whidbey
31 Island, only small patches of prairies and oak woodlands persist. . . . There are, however, additional areas of
32 remnant prairie vegetation within Island County."

¹¹⁸ The Board observes that Island County has established a "nomination" process for the designation of
habitats and species of local importance (ICC 17.02B.500). In light of that the County may wish to consider the
decision in *Ferry County v. Growth Mgmt. Hr'gs Bd.*, 184 Wn. App. 685, (Wash. Ct. App. 2014) where the
Court expressed concern regarding Ferry County's nomination process for habitats and species of local
concern. pp. 705 and 721-723.

1 by counties and cities as they include the best available science. The
2 Washington state department of fish and wildlife can also provide assistance
3 with identifying and mapping important habitat areas at various landscape
4 scales. Similarly, the Washington state department of natural resources'
5 natural heritage program can provide a list of high quality ecological
6 communities and systems and rare plants. (emphasis added)

6 The Western Toad is a state candidate species.¹¹⁹ As the Court of Appeals stated in
7 regards to the failure of Ferry County to designate any habitat or species of local
8 importance:
9

10 The GMHB faulted Ferry County for failing to designate any habitat or
11 species of local importance. Ferry County argues it has no obligation to
12 designate any habitat or species of local importance. . . . Assuming Ferry
13 County did not have to designate any species, it passed a critical areas
14 ordinance. That ordinance must comply with the GMA, which requires it to
15 include BAS when it decides whether to designate species and habitats of
16 local importance. *Honesty in Env'tl. Analysis & Legislation (HEAL) v. Cent.*
17 *Puget Sound Growth Mgmt. Hr'gs Bd.*, 96 Wn. App. 522, 527, 979 P.2d 864
18 (1999). "RCW 36.70A.172(1) provides that counties and cities 'shall include'
19 the best available science in developing both policies and regulations
20 regarding critical areas. Inclusion of the best available science in the
21 development of critical areas policies and regulations is therefore a
22 mandate of the GMA." *HEAL*, 96 Wn. App. at 528.

20 The GMHB did not require the county to designate any species or habitat of
21 local importance. The GMHB found the county enacted a critical areas
22 ordinance. Therefore, the GMHB initially ruled that Ferry County must
23 include BAS in the adoption of that regulation. In the alternative, the county
24 must provide a reasoned justification for departing from BAS.¹²⁰

25 Generally, the WDFW's priority habitat maps are the BAS for a county's critical areas
26 for listed species.¹²¹ WDFW's PHS indicates "any occurrence" of the Western Toad should
27 be a "priority area."¹²² At the HOM, the County agreed it departed from BAS in its failure to
28

29
30 ¹¹⁹ IR 70, Appendix A, p. 5.

¹²⁰ *Ferry County v. Growth Mgmt. Hr'gs Bd.*, 184 Wn. App. 685, 731 (Wash. Ct. App. 2014), p. 731.

¹²¹ *Stevens County v. Futurewise*, 146 Wn. App. 493, 511.

¹²² Washington Department of Fish and Wildlife, 2008, *Priority Habitat and Species List*. Olympia, Washington., p. 6: Any Occurrence: Applies to a priority species with limiting habitat that is not known or to a species that is so rare that any occurrence is important in a land use decision.

1 designate the Western Toad, but states it had a “reasoned justification.”¹²³ Jurisdictions may
2 depart from BAS but, in doing so, must provide a reasoned justification.¹²⁴ The County did
3 not address that justification in the Findings for Ordinance C-75-14 although it did in its
4 brief.¹²⁵

5
6 Island County chose not to provide additional protection for the Western
7 Toad for two justified reasons. First, during the development process, the
8 Western Toad was federally listed as a Species of Concern and was only a
9 candidate for listing by the Washington Department of Fish and Wildlife. It
10 was also determined that the Western Toad was not common to Island
11 County and that there had been only one documented occurrence in Island
12 County by Fish and Wildlife. The County ultimately determined that because
13 the Western Toad’s breeding and egg development habitat was already
14 protected by the County’s existing wetland and wetland buffer protections,
15 the lack of documented occurrences suggested that additional regulations for
16 Western Toad habitat protection was not warranted.¹²⁶

17 WAC 365-190-130(4)(b) provides that priority habitats and species include candidate
18 species. The Western Toad is a candidate species. Island County’s statement that the Toad
19 is not common to the County does not represent a reasoned justification for its departure
20 from BAS; that fact only underscores the need to designate and protect. Furthermore, the
21 County’s statement that the Toad’s breeding and egg development habitat was already
22 protected by other regulations does not constitute a reasoned justification for BAS
23 departure. The County provided no evidence that it had analyzed the existing wetland and
24 wetland buffer protections to determine their sufficiency.¹²⁷ Beyond that, the record
25

26 ¹²³ HOM transcript, p. 95, lines 8-18.

27 ¹²⁴ *Swinomish Indian Tribal Cmty.*, 161 Wn.2d at 431-32.

28 ¹²⁵ HOM transcript, p. 95, lines 15-19: “PRESIDING OFFICER ROEHL: Is that reasoned justification set out in
29 the findings? MR. LONG: I don't believe it's in the findings; it is in the record in a memo.”

30 ¹²⁶ Island County’s Prehearing Brief, p. 10.

31 ¹²⁷ *Ferry County v. Growth Mgmt. Hr'gs Bd.*, 184 Wn. App. 685, 741 (Wash. Ct. App. 2014): “Ferry County next
32 argues it departed from science because wetland and riparian regulations and buffers already protect 11
species on the DFW list. But as Futurewise argues, protection by other regulations is irrelevant. Otherwise the
MA's critical habitat provisions are superfluous since state and federal rules already seek to protect ETS
species. More importantly, nothing in the record supports the county's assertion. There is no evidence that the
county analyzed regulations and determined existing regulations were sufficient to protect these 11 species.”

1 establishes the Toad's habitat extends beyond wetlands and their buffers, including prairies
2 and forests.¹²⁸

3 WEAN has met its burden of proof to establish violations of RCW 36.70A.060 and
4 RCW 36.70A.172 due to the County's failure to designate and protect the Western Toad as
5 a species of local importance (Issue 9).

6 As to Issues 7, 8, and 9, the Board makes the following Findings of Fact and
7 Conclusions of Law:

8 1. WEAN has met its burden of proof to establish violations of RCW 36.70A.060 and
9 RCW 36.70A.172;

10 2. Best Available Science shows that flora are an integral component of critical area
11 ecosystems;

12 3. Island County failed to designate and protect habitat of flora listed by the federal or
13 state government as areas where endangered, threatened, or sensitive species have a
14 primary association;

15 4. Best Available Science shows that prairie habitats are rare and vulnerable
16 ecological systems that serve a critical role in sustaining needed habitats and species for
17 the functional integrity of the ecosystem;

18 5. Island County failed to designate and protect Westside Prairies, Oak Woodlands,
19 and Herbaceous Balds as habitats of local importance and failed to include the Best
20 Available Science;

21 6. Best Available Science shows that any occurrence of the Western Toad should be
22 a priority area for protection;

23 7. Island County failed to designate and protect the Western Toad as a habitat and
24 species of local importance;

25 8. Island County failed to include BAS in designating and protecting the functions and
26 values of critical area ecosystems;

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32 ¹²⁸ IR 70, Appendix A, p. 5. The County did not address the extent of this species' habitat in Ordinance C-75-14 nor in its brief.

1 9. The Board is left with a firm and definite conviction that a mistake has been made;
2 and

3 10. Ordinance C-75-14 is clearly erroneous in view of the entire record before the
4 Board and in light of the goals and requirements of the GMA.
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6 **Issue 10. Do the definitions of Agricultural Activities, Existing and On-**
7 **Going (17.02B.060B) and Exempt Activities (§300A, Exemption Table,**
8 **exemption #1) fail to protect critical areas as required by RCW 36.70A.060**
9 **and WAC 365-190-080(1), 365-196-830(1)(4)(9) because they allow indefinite**
10 **abandonment of "existing and ongoing agricultural activities or**
11 **operations" in critical areas and their buffers without protecting critical**
12 **area functions that have been re-established following abandonment?**
13 **(WEAN's Issue 3.4.1)**

14 The challenged definition provides as follows:

15 **17.02B.060 - Definitions—Fish and wildlife habitat conservation areas.**
16 **B. Agricultural activities, existing and on-going** means those activities
17 conducted on lands defined in RCW 84.34.020(2), and those activities
18 involved in the production of crops or livestock. These activities include the
19 operation and normal maintenance of legally existing farm and stock ponds
20 or drainage ditches, operation and normal maintenance of legally existing
21 unregulated streams, changes between agricultural activities, and normal
22 maintenance, repair, or operation of legally existing serviceable structures,
23 facilities, or improved areas. Activities which bring an area into agricultural
24 use are not part of an on-going operation. *An operation ceases to be on-*
25 *going when the area on which it is conducted is converted to a*
26 *nonagricultural use or has lain idle for more than five (5) years, unless the*
27 *idle land is registered in a federal or state soils conservation program other*
28 *than conservation reserve enhancement program (CREP) and other riparian*
29 *buffer enhancements. Forest practices and maintenance of legally existing*
30 *vegetation, landscaping and gardens are not included in this definition. This*
31 *definition is limited to legally existing uses and activities. The five-year period*
32 *specified above may be extended by an appropriately limited and reasonable*
amount of time in order to account for unavoidable and unintentional events
which make active agricultural use impossible. Such events may include the
death of an agricultural operator, difficulty selling the agricultural property, or
*securing a lease with an agricultural operator.*¹²⁹ (emphasis added)

¹²⁹ Ordinance C-75-14, p. 17.

1 ICC 17.02B.300 is a list of activities which are exempt from compliance with the
2 FWHCA regulations, including existing and on-going agricultural activities.

3 With this issue WEAN challenges the language in ICC 17.02B.060B and ICC
4 17.02B.300 allowing for an extension of the period of time within which agricultural property
5 can remain exempt from the critical areas ordinance:

6 *An operation ceases to be on-going when the area on which it is conducted*
7 *is converted to a nonagricultural use or has lain idle for more than five (5)*
8 *years, unless the idle land is registered in a federal or state soils*
9 *conservation program other than conservation reserve enhancement*
10 *program (CREP) and other riparian buffer enhancements. . . . The five-year*
11 *period specified above may be extended by an appropriately limited and*
12 *reasonable amount of time in order to account for unavoidable and*
13 *unintentional events which make active agricultural use impossible. Such*
14 *events may include the death of an agricultural operator, difficulty selling the*
15 *agricultural property, or securing a lease with an agricultural operator.*
16 (emphasis added)

17 WEAN argues the extension standard requiring it to be for “an appropriately limited
18 and reasonable amount of time” is vague and potentially unlimited, thus failing to protect
19 critical areas and ignoring BAS. WEAN cites numerous references in the BAS Report
20 regarding potential impacts of agricultural practices, but fails to relate the science
21 specifically to this regulation.¹³⁰

22 The County states it “determined that the goal of preserving existing and ongoing
23 agricultural activity in Island County would be supported by a flexible extension rather than a
24 hardline.” It argues this is a balancing of its duty to maintain the agricultural industry and
25 conserve agricultural lands with its obligation to protect critical areas.”

26 The Board’s concern is the lack of adequate standards to guide a County
27 administrator in determining what constitutes an “*appropriately limited and reasonable*
28 *amount of time.*” The County has the obligation to protect critical areas and the absence of
29 clear standards could lead to the resumption of agricultural activities, with potential negative
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31 ¹³⁰ IR 70-1, p. 87 (water quality); pp. 101-103 (*Water quality- Sediment, Nutrients, Freshwater Habitat*); pp.
32 107-108 (Recommendations to Maintain Water Quality); p. 111 (*9 General Terrestrial Habitat Management*
Recommendations); IR 88-1 pp. 6-8 (*Water Quality - Sediment, Nutrients, Freshwater Habitat*).

1 impacts on the functions and values of FWHCAs, following a decade or more of no
2 agricultural activity. The Board has on numerous occasions stressed the need to provide
3 administrative guidance.¹³¹

4 As to Issue 10, the Board enters the following findings of fact and conclusions of law:

5 1. WEAN has met its burden of proof to establish violations of RCW 36.70A.060 due
6 to the County's failure to establish clear standards for the exercise of administrative
7 discretion regarding the extension of time for continuing an exemption for existing and on-
8 going agricultural practices from the FWHCA regulations.

9 2. The Board is left with a firm and definite conviction that a mistake has been made;
10 and

11 3. Ordinance C-75-14 is clearly erroneous in view of the entire record before the
12 Board and in light of the goals and requirements of the GMA.
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15 **Issue 11. Do the definitions of Agricultural Activities, Existing and On-**
16 **Going and Best Management Practices (17.02B.060 B, D); Exempt Activities**
17 **(§300A, Exemption Table, exemption #1; §300B 1, 2), and Protection**
18 **Standards - Streams and other Aquatic Habitats (§420B) fail to protect**
19 **critical areas as required by RCW 36.70A.060, WAC 365-190-080(1), § 365-**
20 **196-830(1)(3)(4)(6), or fail to include the best available science as required**
21 **by RCW 36.70A.172, WAC 365-190- 080(2), §130(3), § 365-196-830(5)(6)**
22 **because they do not safeguard critical areas from a net loss of function?**
23 **(WEAN's Issue 3.4.2)**

24 ¹³¹ *Friends v. San Juan County*, Case No. 13-2-0012c, FDO, p. 34: Furthermore, there are no standards by
25 which to determine that a project proponent would "have difficulty" meeting standard critical area regulations;
26 *Pilchuck v. Snohomish County*, Case No. 95-3-0047, p. 30: Failure to provide such parameters does not just
27 place an administrator in an uncomfortable position — it would undermine, perhaps fatally, the duty of the
28 legislative body to articulate in its adopted development regulations its expectations and requirements with
29 regard to critical areas protection.”;

30 *RE Sources v City of Blaine*, Case No. 09-2-0015, Order on Reconsideration, p. 6: “As the Board noted in the
31 FDO in its discussion pertaining to administrator discretion, providing sufficient guidance for decision-makers
32 is an important element of development regulations.”

A zoning ordinance does not have to meet impossible standards of specificity, but it must set forth uniform
guidelines so that its interpretation is not left solely to the discretion of administrative bodies or officials. See
Burien Bark Supply v. King Cy., 106 Wn.2d 868, 725 P.2d 994 (1986); *Anderson v. Issaquah*, 70 Wn. App. 64,
79, 851 P.2d 744 (1993).

Indian Trail Prop. Ass'n v. Spokane, 76 Wn. App. 430, 437 (Wash. Ct. App. 1994).

1 **Issue 12. Do the definitions of Regulated and Unregulated Streams**
2 **(17.02B.060 MM, §060NN); and Exempt Activities (§300A, Exemption Table,**
3 **exemption #1) fail to protect critical areas as required by RCW 36.70A.060,**
4 **WAC 365-190-080(1), 365-196-830(1)(2)(3)(4)(6) and fail to include the best**
5 **available science as required by RCW 36.70A.172, WAC 365-190-080(2),**
6 **§130(3), 365-196-830(5)(6) because they fail to safeguard streams and other**
7 **watercourses, downstream wetlands, and marine waters from the impacts**
8 **of stream dredging and fail to require a demonstration of previous**
9 **dredging? (WEAN’s Issue 3.4.3)**

10 WEAN argues Issues 11 and 12 together. In first addressing Issue 12 it states the
11 definition of streams, in concert with the existing agriculture exemption, fails to prevent a net
12 loss of function from “stream” dredging. The issue relates to the definition of regulated and
13 unregulated streams. Regulated streams include Artificial Stream Channels which are
14 defined as “artificial channels either used by salmonids of any life stage, or *that directly*
15 *convey water from or through an existing regulated wetland.*” Unregulated streams are then
16 defined as “Ditches and other water conveyance systems, which are artificially constructed
17 and actively maintained for irrigation and/or drainage and which are not otherwise classified
18 as a Regulated Stream.” WEAN contends that for a channel to be regulated it must “*directly*
19 *convey water from or through an existing regulated wetland.*” If it does not do so, it is
20 unregulated, dredging is then an exempt activity, and WEAN states it will result in a failure
21 to protect critical areas and does not meet BAS standards.¹³²

22 The County contends WEAN has cited no BAS and suggests WEAN has attempted
23 to place the burden of proof upon the County.¹³³

24 The definitions of regulated and unregulated streams are related to the exemption
25 tables of ICC 17.02B.300 which list those activities which are exempt from application of the
26 ICC 17.02B critical areas ordinance. Included at page 30 of Ordinance C-75-14 are
27 “Existing and on-going agricultural activities.” The exemption table specifically states: “This
28 exemption includes normal Maintenance or Repair of existing drainage facilities and
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32 ¹³² WEAN’s Pre-Hearing Brief, p. 30.

¹³³ Island County’s Prehearing Brief, p. 13.

1 Unregulated Streams, when such features are related to a Legally Existing and On-Going
2 Agricultural Activity.”

3 So, dredging is exempt if the following are met:

- 4 1. It is an “artificially constructed and actively maintained [ditch or other water
5 conveyance system] for irrigation and/or drainage;”
6
- 7 2. Which is “related to a Legally Existing and On-Going Agricultural Activity;”
8
- 9 3. It does not “directly convey water from or through an existing regulated
10 wetland;” and
- 11 4. Dredging is limited to normal maintenance and repair.

12 The Board has struggled to understand WEAN’s limited Issue 12 argument regarding
13 the phrase “directly convey water from or through an existing regulated wetland”.

14 Furthermore, its references to BAS in the record are, at best, generalized references to
15 agricultural impacts. Its remaining arguments are merely assertions, unsupported by legal
16 argument.¹³⁴

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18 WEAN’s Issue 11 challenge relates to ICC 17.02B.300.B.2.¹³⁵ The entire argument
19 follows:

20 9.1.2. The expanded exemption scheme for streams and agriculture also
21 allows net loss by failing to require buffer restoration. The functions of
22 naturally vegetated buffers are well known. While GMA does not require
23 enhancement or creation of new buffers, the presumption that critical areas
24 on farms always lack natural buffers is neither realistic nor supported by the
25 record. Failing to require restoration of existing natural buffers with similar
26 vegetation fails GMA’s “do no harm / no net loss” protection standard and

27
28 ¹³⁴ See for example p. 30, lines 8, 9: “Additionally, no demonstration is required that the particular stream was
29 previously dredged . . .”; lines 11, 12: “The presumption that dredging truly is an *existing and ongoing activity*
30 should be confirmed . . .”

31 *Panesko v. Lewis County*, Case No. 08-2-0007, Order on Reconsideration, pp. 7-9 (Sept 15, 2008): “In order
32 to overcome the presumption [of validity], a petitioner must persuade the Board that the jurisdiction’s action
was clearly erroneous and to do so it must present clear, well-reasoned legal argument supported by
appropriate reference to the relevant facts, statutory provisions, and case law which establishes that the
GMA’s requirements have not been met.”

¹³⁵ Ordinance C-75-14, p. 32.

1 ignores the BAS as to the damage that clearing and disturbance of critical
2 areas and buffers create.¹³⁶ (footnotes omitted)

3 The County states ICC 17.02B.060 B and D merely require restoration of a disturbed
4 critical area or its buffer while recognizing the lack of a requirement for establishing a natural
5 buffer.

6 WEAN has failed to provide sufficient argument to meet its burden of proof to
7 establish violations as alleged in Issues 11 and 12.
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10 **Issue 14. Have Comprehensive Plan Fish and Wildlife Habitat Conservation**
11 **Areas Overlay policies A, B, F, and N not been implemented as required by**
12 **RCW 36.70A.040(5) and WAC 365-196-800(1)? (WEAN's Issue 3.4.4)**

13 WEAN alleges a violation of RCW 36.70A.040(5).¹³⁷ That statute applies to counties
14 not originally required to plan under chapter 36.70A RCW but which, due to population
15 increases, are subsequently required to do so. Island County is not one of those counties; it
16 was initially required to plan in 1990. WEAN is unable to establish a violation of RCW
17 36.70A.040(5). Nor is it able to establish a violation of WAC 365-196-800, one of the
18 "procedural criteria" for adopting comprehensive plans and development regulations. See
19 WAC 365-196-030(3).¹³⁸
20

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22 ¹³⁶ WEAN's Pre-Hearing Brief, pp. 30, 31.

23 ¹³⁷ RCW 36.70A.040(5): "If the office of financial management certifies that the population of a county that
24 previously had not been required to plan under subsection (1) or (2) of this section has changed sufficiently to
25 meet either of the sets of criteria specified under subsection (1) of this section, and where applicable, the
26 county legislative authority has not adopted a resolution removing the county from these requirements as
27 provided in subsection (1) of this section, the county and each city within such county shall take actions under
28 this chapter as follows: (a) The county legislative authority shall adopt a countywide planning policy under
29 RCW 36.70A.210; (b) the county and each city located within the county shall adopt development regulations
30 under RCW 36.70A.060 conserving agricultural lands, forest lands, and mineral resource lands it designated
31 within one year of the certification by the office of financial management; (c) the county shall designate and
32 take other actions related to urban growth areas under RCW 36.70A.110; and (d) the county and each city
located within the county shall adopt a comprehensive land use plan and development regulations that are
consistent with and implement the comprehensive plan within four years of the certification by the office of
financial management, but a county or city may obtain an additional six months before it is required to have
adopted its development regulations by submitting a letter notifying the department of its need prior to the
deadline for adopting both a comprehensive plan and development regulations."

¹³⁸ "How the growth management hearings board use these guidelines. The growth management hearings
board must determine, in cases brought before them, whether comprehensive plans or development

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V. ORDER

Based upon review of the Second Amended Petition for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board orders and case law, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

1. Island County's definition of reasonable use (17.02B.060HH) fails to protect critical areas in violation of RCW 36.70A.060 and fails to include the Best Available Science in violation of RCW 36.70A.172. (WEAN's Issue 1).

2. Island County's exemption for removal of Beaver and Beaver dams (17.02B.300A, Exemption Table, exemption #15) fails to protect critical areas in violation of RCW 36.70A.060 and fails to include the Best Available Science in violation of RCW 36.70A.172. (WEAN's Issue 3).

3. Island County's buffer requirements for Natural Area Preserves (17.02B.430E) fails to protect critical areas in violation of RCW 36.70A.060 and fails to include the Best Available Science in protecting critical area ecosystems in violation of RCW 36.70A.172. (WEAN's Issue 6).

4. Island County's failure to designate and protect habitat of flora listed by the federal or state governments as areas where endangered, threatened, or sensitive species have a primary association fails to protect critical areas in violation of RCW 36.70A.060 and fails to include the Best Available Science in protecting critical area ecosystems in violation of RCW 36.70A.172. (WEAN's Issue 7).

5. Island County's failure to designate and protect Westside Prairies, Oak Woodlands, and Herbaceous Balds as habitats of local importance fails to protect critical areas in violation of RCW 36.70A.060 and fails to include the Best Available Science in protecting critical area ecosystems in violation of RCW 36.70A.172. (WEAN's Issue 8).

regulations are in compliance with the goals and requirements of the act. When doing so, board must consider the procedural criteria contained in this chapter, but *determination of compliance must be based on the act itself.* (emphasis added)

1 6. Island County’s failure to designate and protect the Western Toad as a species of
2 local importance fails to protect critical areas in violation of RCW 36.70A.060 and fails to
3 include the Best Available Science in protecting critical area ecosystems in violation of RCW
4 36.70A.172. (WEAN’s Issue 9).

5 7. Island County’s failure to establish clear standards for the exercise of
6 administrative discretion regarding the extension of time for continuing an exemption for
7 existing and on-going agricultural practices from the FWHCA regulations fails to protect
8 critical areas in violation of RCW 36.70A.060. (WEAN’s Issue 10).

9 8. In regard to all other issues, WEAN either abandoned the same or the Board
10 found and concluded WEAN had failed to meet its burden of proof. All such issues are
11 dismissed;
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13 9. The Board remands Island County Ordinance C-75-14 for the County to take
14 legislative action to comply with the requirements of the GMA as set forth in this order. RCW
15 36.70A.300(3)(b) requires the Board to set a time for compliance “not in excess of one
16 hundred eighty days, or such longer period as determined by the board in cases of unusual
17 scope or complexity.” The Board finds the present case presents unusual scope and
18 complexity as compliance is inextricably linked to the County’s required RCW 36.70A.130
19 review and update of its comprehensive plan and development regulations. The Board
20 therefore sets a one-year compliance schedule but will require the filing of a status report
21 addressing progress on compliance. In addition, the Board will require the County to provide
22 a report regarding its actions regarding the expiration, extension, or amendment of interim
23 Ordinance C-16-15.
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27 The Board sets the following schedule for the County’s compliance:
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Item	Date Due
Status Report on Compliance Due	December 18, 2015
Report Re: Action on Ordinance C-16-15	February 15, 2016
Compliance Due on identified areas of noncompliance	June 25, 2016
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	July 9, 2016
Objections to a Finding of Compliance	July 23, 2016
Response to Objections	August 3, 2016
Compliance Hearing Location to be determined	August 18, 2016 10:00 a.m.

DATED this 24th day of June, 2015.

William Roehl, Board Member

Nina Carter, Board Member

Raymond Paolella, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.¹³⁹

¹³⁹ Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1); WAC 242-03-840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.