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**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

TAHOMA AUDUBON SOCIETY,)
PEOPLE FOR PUGET SOUND, and) **CPSGMHB Consolidated**
CITIZENS FOR A HEALTHY BAY,) **Case No. 05-3-0004c**
)
Petitioners,) **(Tahoma-Puget Sound)**
)
v.)
) **FINAL DECISION AND ORDER**
PIERCE COUNTY,)
)
Respondent,)
)
and)
)
PARK JUNCTION PARTNERS,)
)
Intervenors.)
)
and)
)
SNOHOMISH COUNTY,)
)
Amicus Curiae)
)

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SYNOPSIS

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Pierce County reviewed and revised its critical areas regulations after an extended process which it called "Directions." Two of the resulting three ordinances were challenged in petitions for review to the Growth Management Hearings Board.

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Tahoma Audubon Society challenged the provisions of Ordinance 2004-57s concerning "covered assemblies" in certain volcanic hazard zones. Park Junction Partners intervened on behalf of the County. Petitioner Tahoma Audubon argued that Pierce County failed to use the best available science in allowing 400-person occupancy in a lahar inundation zone that would be inundated within one hour of a lahar event, in a valley where no early warning system was feasible. Pierce County responded that risk assessment is a public policy choice which must be left to elected officials. Park Junction Partners asserted that Mount Rainier visitors "voluntarily choose to assume volcano-related risks" and that Pierce County was entitled to weigh the lahar risk against the economic goals of the County in encouraging tourism.

1 The Board found that the County had used best available science in mapping the lahar
2 inundation zones and in calculating the time for lahars to reach locations within the inundation
3 zones. The Board found that the GMA mandate to use best available science to protect the
4 “functions and values” of critical areas – RCW 36.70A.172 - has no apparent application to
5 volcanic hazard areas and that no other GMA provision appears to require the County to make
6 human life and safety its paramount concern when adopting critical areas regulations.
7

8 The Board determined that Petitioner Tahoma Audubon did not carry its burden of proving
9 Pierce County’s action was non-compliant with the GMA. The Board agreed with the County
10 that life-safety risk assessment is a public policy determination that rests with the moral
11 conscience of elected officials, not with the Board. The Tahoma Audubon petition was **dismissed**.
12

13 People for Puget Sound and Citizens for a Healthy Bay challenged the provisions of Ordinance
14 2004-56s concerning fish and wildlife habitat conservation areas. Petitioners asserted that
15 Pierce County’s failure to designate marine shorelines as Critical Fish and Wildlife Habitat
16 Conservation Areas and failure to require a 150-foot vegetated buffer on marine shorelines does
17 not comply with RCW 36.70A.172(1) and other GMA requirements.
18

19 Pierce County countered that a number of its critical areas designations protect areas of the
20 marine shore and that in sum, these overlapping designations, determined on a site-by-site
21 review, provide protection for anadromous fish. Pierce County also argued that the science of
22 marine buffer widths is immature. Both Pierce County and Amicus Curiae Snohomish County
23 point the Board to ESHB 1933, establishing the legislature’s determination that shorelines of the
24 state are not critical areas per se and should not be subject to “blanket” designation.
25

26 The Board found that the science in the Pierce County record uniformly documents the
27 importance of Puget Sound marine shorelines in the lifecycle of anadromous fish. The Board
28 found that a recent nearshore assessment identifies the specific reaches of Pierce County’s
29 marine shores that provide, or can be restored to provide, high quality salmon habitat. The
30 Board also found ample science in the record concerning the role of marine riparian vegetation
31 in protecting the “functions and values” of marine shorelines as salmonid habitat. The Board
32 was persuaded that the action of Pierce County was clearly erroneous.
33

34 The Board concluded that Pierce County **failed to comply** with RCW 36.70A.172(1) in failing to
35 use best available science to designate and protect fish and wildlife habitat conservation areas,
36 in failing to “protect the functions and values” of marine shorelines as critical salmon habitat,
37 and in failing to “give special consideration to conservation or protection measures necessary to
38 preserve or enhance anadromous fisheries.” The Board entered an **order of non-compliance**
39 and **remanded** Ordinance 2004-56s to Pierce County to amend the Ordinance consistent with
40 this opinion.
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3 **I. BACKGROUND**¹

4 Pursuant to RCW 36.70A.130(1), Pierce County (**County** or **Respondent**) updated its
5 Comprehensive Plan and reviewed and revised its development regulations, including its
6 designations and protections for critical areas, prior to December 1, 2004. Revisions to the
7 County's critical areas regulations were enacted in a set of ordinances adopted on October 19,
8 2004.

9 Petitions for review were timely filed by Tahoma Audubon Society (**Tahoma** or **Petitioner**),
10 challenging the Volcanic Hazard Area regulations of Ordinance No. 2004-57s, and by People for
11 Puget Sound and Citizens for a Healthy Bay (together **Puget Sound** or **Petitioners**), challenging
12 deletion of protections for marine shorelines in Ordinance No. 2004-56s. The two petitions for
13 review were consolidated as CPSGMHB Case No. 05-3-0004c.

14
15 At the Prehearing Conference, the Board granted intervention to Park Junction Partners
16 (**Intervenor** or **Park Junction**) on behalf of Pierce County in the Tahoma Audubon matter.
17 Subsequently, the Board granted *amicus curiae* status to Snohomish County (**Amicus** or
18 **Snohomish**) in the Puget Sound matter. Both motions were without objection.

19
20 The Board received Pierce County's Index to the record. Exhibits are cited herein by County
21 **Index** numbers. Additional exhibits admitted at or after the hearing on the merits are identified in
22 Section III.B, *infra*, and cited herein by **HOM** exhibit numbers.

23
24 All prehearing briefs were timely filed and are referred to herein as follows:

- 25 Opening Brief of Tahoma Audubon Society (**Tahoma PHB**)
- 26 Petitioners People for Puget Sound and Citizens for a Healthy Bay's Prehearing Brief
- 27 (**Puget Sound PHB**)
- 28 Respondent Pierce County's Prehearing Brief (**County Response**)
- 29 *Amicus Curiae* Brief of Snohomish County (**Snohomish**)
- 30 Park Junction Partners' Response to Opening Brief of Tahoma Audubon Society (**Park**
- 31 **Junction**)
- 32 Reply Brief of Petitioner Tahoma Audubon Society (**Tahoma Reply**)
- 33 Petitioners People for Puget Sound and Citizens for a Healthy Bay's Prehearing Reply
- 34 Brief (**Puget Sound Reply**)
- 35

36 The Hearing on the Merits was convened on May 11, 2005, at 10:00 a.m., in the Pierce County
37 Environmental Services Building, 9850 64th Street West, University Place. Present for the Board
38 were Margaret A. Pageler, presiding, and Board members Edward G. McGuire and Bruce C.
39 Laing. Reporting services were provided by Katie Askew of Byers & Anderson, Inc. Petitioner
40 Tahoma Audubon Society was represented by Robert E. Mack of Smith, Alling, Lane.
41 Petitioners People for Puget Sound and Citizens for a Healthy Bay were represented by Amy
42 Williams-Derry and co-counsel Patty Goldman of Earthjustice. Respondent Pierce County was
43 represented by Deputy Prosecuting Attorney Pete Philley. Intervenor Park Junction Partners was
44 represented by Margaret A. Archer. *Amicus* Snohomish County was represented by Laura
45 Keselius of the Snohomish County Prosecutor's Office.

46
47 ¹ See Appendix A for the complete procedural history of this case.

1
2 At the outset of the Hearing on the Merits, the Board heard various motions of the parties. The
3 Board's rulings are set forth below at Section III.B. The Hearing adjourned at approximately
4 3:00 p.m. The Board ordered a transcript of the hearing which was received on May 26, 2005
5 and is cited herein as **HOM**.

6
7 The Board received a Motion to Submit Post-Hearing Brief from Petitioners Puget Sound on
8 May 20, 2005, and a Response in Opposition from Pierce County on May 26, 2005. The Board
9 rules on the motion below, at Section III.B.

10
11 **II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF**
12 **REVIEW**

13
14 Petitioners challenge Pierce County's adoption of Ordinance Nos. 2004-57s and 2004-56s,
15 development regulations dealing with critical areas. Pursuant to RCW 36.70A.320(1), County
16 Ordinance Nos. 2004-57s and 2004-56s are presumed valid upon adoption.

17
18 The burden is on Petitioners to demonstrate that the actions taken by the County are not in
19 compliance with the requirements of the GMA. RCW 36.70A.320(2).

20
21 Pursuant to RCW 36.70A.320(3), the Board "shall find compliance unless it determines that the
22 action taken by the county is clearly erroneous in view of the entire record before the board and
23 in light of the goals and requirements of [the GMA]." For the Board to find Pierce County's
24 actions clearly erroneous, the Board must be "left with the firm and definite conviction that a
25 mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

26
27 Pursuant to RCW 36.70A.3201 the Board will grant deference to Pierce County in how it plans
28 for growth, consistent with the goals and requirements of the GMA. The State Supreme Court's
29 most recent delineation of this required deference states: "We hold that deference to county
30 planning actions that are consistent with the goals and requirements of the GMA ... cedes only
31 when it is shown that a county's planning action is in fact a 'clearly erroneous' application of the
32 GMA." *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings*
33 *Board*, 154 Wn.2d 224, 248, 110 P.3d 1132 (2005). The *Quadrant* decision affirms prior State
34 Supreme Court rulings that "[L]ocal discretion is bounded, however, by the goals and
35 requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearings*
36 *Board*, 142 Wn.2d 543, 561, 14 P.3d 133 (2000). Division II of the Court of Appeals further
37 clarified, "Consistent with *King County*, and notwithstanding the 'deference' language of RCW
38 36.70A.3201, the Board acts properly when it foregoes deference to a county's plan that is not
39 'consistent with the requirements and goals of the GMA.'" *Cooper Point Association v.*
40 *Thurston County*, 108 Wn.App. 429, 444, 31 P.3d 28 (2001); *affirmed Thurston County v.*
41 *Western Washington Growth Management Hearings Board*, 148 Wn.2d 1, 15, 57 P.3d1156
42 (2002) and cited with approval in *Quadrant, supra*, at fn. 7.

43
44 The scope of the Board's review is limited to determining whether a jurisdiction has achieved
45 compliance with the GMA with respect to those issues presented in a timely petition for review.
46 RCW 36.70A.290. The Board's decision does not extend to unchallenged elements of a County's
47 plan or regulations, which are presumed valid as a matter of law.

1
2 **III. BOARD JURISDICTION, PRELIMINARY MATTERS AND PREFATORY NOTE**

3
4 **A. BOARD JURISDICTION**

5
6 The Board finds that the Petitioners' PFRs were timely filed, pursuant to RCW 36.70A.290;
7 Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the
8 Board has subject matter jurisdiction over the challenged ordinances, which amend King
9 County's development regulations, pursuant to RCW 36.70A.280(1)(a).

10
11 **B. PRELIMINARY MATTERS**

12
13 The Board heard several motions at the outset of the hearing on the merits and subsequently
14 received a post-hearing motion and response. In addition, several exhibits were offered at the
15 hearing on the merits. The Board rules on these matters as follows.

16
17 *County Motions to Strike and/or Dismiss.*

18
19 The County moved to dismiss both petitions, on the grounds that the petitioners failed to set forth
20 in their prehearing briefs the Legal Issues being addressed, as required by the Prehearing Order.
21 The County's objection was raised in the County Response, and both petitioners cured the fault
22 by providing, in reply briefs, an outline of their Prehearing Briefs indicating the pages dealing
23 with each numbered issue. The Board finds that the error was not fatally prejudicial, and the
24 motion to dismiss is **denied**.

25
26 At the Hearing on the Merits the Board stated again the importance of identifying *in a*
27 *petitioner's opening brief* each legal issue being addressed. While legal issues may be regrouped
28 or re-ordered by a petitioner for purposes of argument, failure to indicate the issue being
29 addressed creates an undue burden for the respondent, in setting forth its response, as well as for
30 the Board, in entering its decision.

31
32 The County moved to dismiss the petitioners' briefs in their entirety and also to dismiss
33 individual legal issues as abandoned. The Board agrees that, in the absence of indication of
34 which issues were being argued, certain legal issues appeared to have been abandoned. The
35 Board addresses abandoned issues in the more detailed decision which follows. See Section
36 IV.C.3.

37
38 Pierce County also moved to dismiss Puget Sound's Petition based on a change in wording from
39 "any" to "all." Petitioners People for Puget Sound drafted the legal issues in their PFR as
40 follows: "Whether the failure of Ordinance 2004-56s to classify *any* marine shorelines as critical
41 areas and to apply a 150-foot landward vegetative buffer to them violates ..." The issue
42 statements were *based on the County Council memorandum* preceding the vote on Ordinance
43 2004-56s, which systematically deleted from the proposed legislation all the references to
44 "marine shorelines" as critical areas, as well as the requirements for a marine shoreline
45 vegetative buffer. Index 124.

1 Petitioners' Prehearing Brief argued that Ordinance 2004-56s failed to designate and protect
2 "all" Pierce County's marine shorelines, acknowledging that there remained in Ordinance 2004-
3 56s protections for eelgrass beds, shellfish beds, and other discrete features of marine shorelines.
4 Puget Sound PHB, at 28-29.

5
6 When a jurisdiction's regulatory action is opaque or excessively complex, the Board is not
7 compelled to dismiss a petition summarily if issues are misworded simply because the *effect* of
8 the regulations is misunderstood, so long as the Board's ruling is within the issues presented.
9 RCW 36.70A.290(1). In *Maxine Keesling v. King County (Keesling)*, CPSGMHB No. 05-3-
10 0001, Final Decision and Order (July 5, 2005), another critical areas ordinance challenge, the
11 Board reviewed the *substance* of several regulatory provisions challenged by the petitioner,
12 despite the petitioner's mistakes of fact, expressed in issue statements, concerning the *effect* of
13 the regulations.

14
15 In the present case, Petitioners Puget Sound put Pierce County's action squarely at issue with
16 respect to designation of marine shorelines as critical salmon habitat and the requirement of
17 vegetative buffers to protect the functions and values of that habitat. Pierce County's motion to
18 dismiss is **denied**.

19
20 *Tahoma Audubon Motion to Supplement the Record.*

21
22 A number of exhibits not in the County's record were offered by Petitioner Tahoma Audubon as
23 exhibits to its briefs or by motion to supplement brought beyond the time set for motions practice
24 in the Board's prehearing order. Pierce County objected to these exhibits, arguing that they were
25 not offered in accordance with the Board's rules, were untimely, and were prejudicial to the
26 County's preparation of its response. HOM, at 11-12. Tahoma responded that courts routinely
27 take cognizance of scholarly and technical articles. *Id.* at 13.

28
29 The Board noted two competing interests. First, the Board must review the County's action
30 based on the record before the County at the time it acted and must give deference to the
31 County's decision. The GMA contemplates a public process that will bring key facts to the
32 attention of the decision makers *before* the decision is made. A citizen may not wait in the wings
33 and surprise the local jurisdiction with new and significant information after the jurisdiction
34 takes action. The Board's rules reinforce this perspective by allowing for early determination of
35 the appropriate items from the totality of the County's record that will be introduced as exhibits
36 to aid the Board's deliberation. The Board's rules also establish an early opportunity for
37 petitioners, by motion, to seek to introduce new evidence into the hearing.

38
39 A countervailing issue is the affirmative duty imposed on the jurisdiction by the GMA at RCW
40 36.70A.172 to use best available science to designate and protect critical areas. *Whidbey*
41 *Environmental Action Network (WEAN) v. Island County*, 122 Wn.App. 156, 171, 93 P.3d 885
42 (2004). While the jurisdiction need not commission its own scientific research, it may not ignore
43 readily-available and relevant studies and then, when challenged, hide behind the deficiency of
44 its own record. *Ferry County v. Concerned Friends of Ferry County (Ferry County)*, 121
45 Wn.App. 850, 90 P.2d 698 (2004).

1 The statute contemplates that the Board may need to look beyond the science in the jurisdiction's
2 own record, even allowing the Board to retain an expert of its own. RCW 36.70A.172(2).
3 However, a petitioner bringing a challenge to the science relied on by a county or city has a
4 heavy burden of supplementing the record with cogent and credible evidence. *See Keesling,*
5 *supra*, at 32, 36.

6
7 Tahoma Audubon here argues that Pierce County ignored current studies and scientific reports
8 on lahar travel time and inundation risk, relying on outdated studies and on the oral input of just
9 one scientist. Tahoma PHB, at 16.

10
11 The Board heard argument at the Hearing on the Merits and enters the following rulings
12 concerning the Tahoma Audubon supplemental exhibits:

- 13
- 14 • **Admitted – HOM Ex. 1** – Partial transcript of Pierce County Council Community
15 Development Committee Meeting, August 6, 2003.
- 16 • **Admitted – HOM Ex. 2** – USGS *Volcano Hazards from Mount Rainier, Washington*.
17 Revised 1998. (*See* partial copies in County record, Index 23 and 180).
- 18 • **Admitted – HOM Ex. 3** – *WSSPC Awards in Excellence 2003 Award Recipients*.
- 19 • **Admitted – HOM Ex. 4** – USGS *Pilot Project Mount Rainier Volcano Lahar Warning*
20 *System* (1999)
- 21 • **Admitted – HOM Ex. 5** – Former County Code – Chapter 18E.40.
- 22 • **Denied** – Vallance, et al., *Debris-Flow Hazards Caused by Hydrological Events at*
23 *Mount Rainier, Washington* (2003)
- 24 • **Denied** – USGS *Volcano Warning Schemes in the United States* (2001)
- 25 • **Denied** – *About WSSPC and WSSPC Members/Partners*
- 26 • **Denied** - Iverson, et al., *Objective delineation of lahar-inundation hazard zones* (1998)
- 27 • **Denied** - "Report urges more eyes on volcanoes," *News Tribune*, 29 April 05.
- 28 • **Denied** - "US volcanoes need closer scrutiny," *News Tribune*, 3 May 05.
- 29

30
31 The Board's long-standing procedure which establishes a motions calendar for supplementation
32 of the record is of particular importance in "best available science" challenges. A timely motion
33 to supplement the record, indicating to the Board and the parties why the petitioner believes the
34 additional evidence is relevant to a proper decision of the case, allows responding parties to file
35 any objections and gives the Board an opportunity for thoughtful analysis. In this case, the Board
36 judged that the extra-record scientific articles offered by Tahoma were primarily refinements of
37 lahar travel-time zone calculations and other elements of the Case II lahar travel time and
38 inundation zone analysis. Given that the occupancies at issue are *already* within a one-hour lahar
39 inundation zone, in an area where an early warning system is not feasible, the Board concluded
40 that this information was not "necessary or of substantial assistance" to the Board's decision.
41 WAC 242-02-540.

42
43 The Board recognizes that difficult questions may arise in establishing the evidentiary record in a
44 "best available science" challenge which must be decided primarily on the basis of the record
45 before the challenged city or county. The Board notes that the County's record here [and in other
46 "best available science" challenges] is replete with studies that contain bibliographical references
47 to other works by the same authors or on related topics, which County staff may or may not have

1 reviewed. The Board also notes that much science in the County's record consists of print-outs
2 from web sites of other governmental agencies, and that these web sites are updated from time to
3 time. Pierce County states that it also receives CD's from citizens and participants in its public
4 process which purport to present relevant science. HOM, at 32. The Board is likely to be
5 presented with some difficult questions of proof as to whether city or county officials are aware
6 of, or are required by RCW 36.70A.172(1) to be aware of, updated scientific findings. In the
7 present challenges, however, the Board determined it was able to make its decisions without
8 considering the proffered extra-record studies.

9
10 *County's Objection to People for Puget Sound Exhibits.*

11
12 The County objected to exhibits appended to the Prehearing Brief and Reply Brief of People for
13 Puget Sound, specifically Exhibit 1, a news article dated February 23, 2005; Exhibit 4, a
14 December 30, 2004 letter from WDFW to the City of Anacortes; Exhibit 5, the Whatcom County
15 Draft CAO, dated 2005; and Exhibit 6, executive summary of a National Research Council 2003
16 report on riparian areas. HOM, at 30-32. Petitioners state that Exhibit 6 goes to the question of
17 the definition of "riparian," and establishes that the word is used to denote marine as well as
18 freshwater environments, a definition challenged by Pierce County. HOM, at 33-34.

19
20 The Board finds that proposed Exhibits 1, 4, and 5 post-date Pierce County's action and are not
21 of assistance in determining the legal issues before the Board. As to proposed Exhibit 6, the
22 Board finds that the County's record contains multiple examples of scholarly articles and of
23 County staff using "riparian" or "marine riparian" to denote a saltwater shore;² thus the exhibit is
24 superfluous. The Board can distinguish when the word "riparian" is used in a marine, as opposed
25 to a freshwater, context.

26
27 Puget Sound's proposed Exhibits 1, 4, 5, and 6 are **denied**.

28
29 *County Supplemental Exhibits and Puget Sound Post-Hearing Motion.*

30
31 The County submitted three supplemental exhibits: a complete copy of Index 1187, which was
32 incomplete in the form attached to County Response; the set of maps of critical areas Attachment
33 E to Ordinance 2004-56s; and a copy of the County's prior Critical Areas Ordinance. Without
34 objection, these exhibits were **admitted**.

35
36 Pierce County also offered a print-out of a power point presentation which formed part of the
37 County's argument at hearing. As an alternative to the power point, the County offered a real-
38 time GIS demonstration that would show the "layered protections" for various categories of land
39 on or near the marine shorelines. The Board declined the GIS presentation but allowed the power
40 point as illustrative of the County's shorelines regulations.

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42
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44 ² For scientific use of the term "marine riparian," see, e.g., Index 802, [Working Draft, Marine Riparian: An
45 Assessment of Riparian Functions in Marine Ecosystems], at 1; Index 783 [University of British Columbia study], at
46 2; Index 846 [Williams and Thom, Battelle Marine Sciences Laboratory, Pacific Northwest Laboratory], at 6; Index
47 1174 [Habitat Protection Toolkit, Washington Environmental Council], at 22; Index 797 [Puget Sound Action Team
email to Debby Hyde]; Index 1287 [Pentec Report], throughout.

1 Petitioners Puget Sound filed a post-hearing motion objecting to Pierce County’s power point.
2 Petitioners argued that (1) the County provided no advance notice of its intent to present these
3 maps; (2) Puget Sound had never seen the maps prior to minutes before the hearing; and (3)
4 Puget Sound lacked an advance opportunity to discover the maps’ inherent limitations and
5 convey this information to the Board. Puget Sound Post-hearing Motion, at 2. Further,
6 Petitioners contend, the Board may not rely on the GIS maps in its decision because the maps are
7 not part of the record and are merely a post-hoc rationalization of the County’s action. *Id.* at 3.
8

9 Petitioners contend that the GIS maps have systematic data gaps in that they neither depict nor
10 designate salmon presence along marine shorelines. As a result, even if the maps were properly
11 and consistently utilized by County staff during permit review, they would not trigger a need for
12 a marine shoreline buffer adjacent to key salmon habitat. *Id.* at 4-5. Indeed, Pierce County
13 admits that it cannot guarantee its GIS mapping system will be applied or utilized in any
14 consistent fashion during permit review. *Id.* at 4.
15

16 Pierce County responds that no additional briefing is needed because the Presiding Officer ruled
17 at the hearing that the County may display the maps for illustrative purposes, and the display was
18 not admitted as evidence into the record. County Response to Post-Hearing Motion, at 1-3.
19

20 The Board accepts the Pierce County power point presentation as illustrative of Ordinance 2004-
21 56s, noting, as Petitioners Puget Sound point out, the “systematic data gaps” with respect to
22 salmonid presence along saltwater shores. The Board admits Pierce County’s HOM exhibits as
23 follows:
24

- 25 • **HOM Ex. 6** – WDFW “*Management recommendations for Washington’s priority*
26 *habitats*” (1997) - Index 1187.
- 27 • **HOM Ex.7** – Critical Areas Atlas Maps – Exhibit E to Ordinance No. 2004-56s.
- 28 • **HOM Ex. 8** – Title 18E – Critical Areas - Pierce County’s 1998 critical areas ordinance
- 29 • **HOM Ex. 9** – **for illustrative purposes** – Overview of Critical Areas Protections
30 Affecting Marine Shorelines in Pierce County – power point printout.
31

32 C. PREFATORY NOTE AND ABANDONED ISSUES

33

34 The Board addresses Tahoma Audubon Society’s Issues first, Legal Issues No. 1-9, addressing
35 them in the order presented. Tahoma Audubon **withdrew** Legal Issue No. 8 and acknowledged
36 that Legal Issue No. 9 is a constitutional issue which was included in the Petition in order to
37 reserve the question for other proceedings.³ HOM, at 100. **Legal Issues 8 and 9 are dismissed.**
38

39 ³ Legal Issue No. 8: Whether Ordinance 2004-57s is inconsistent with provisions of the Upper Nisqually Valley
40 Community Plan, incorporated into the Pierce County Comprehensive Plan, which provides that County land use
41 policies should protect property, residents, and visitors from threats of natural disasters in volcanic hazard areas?
42 More particularly, whether the ordinance is inconsistent with the Community Plan’s “desired condition”, which
43 requires that Case II volcanic hazard areas be zoned as Rural 40, so that only one residential unit per 40 acres would
44 be allowed in Case II volcanic hazard areas?

45 Legal Issue No. 9: Whether Ordinance 2004-57s is unconstitutionally void for vagueness, insofar as it relies on
46 “Travel Time Zones” not identified or mapped in the ordinance itself, and for delegating a legislative decision to an
47 administrative official?

1
2 The Board enters Findings of Fact with respect to the Tahoma Audubon PFR in Appendix – B.
3

4 The Board then addresses issues raised by People for Puget Sound and Citizens for a Healthy
5 Bay, Legal Issues 11-15, in the order presented. For the reasons set forth below, at Section
6 IV.C.3, the Board determines that Puget Sound **Legal Issue No. 12 is abandoned.**
7

8 The Board enters Findings of Fact with respect to the Puget Sound PFR in Appendix –C.
9

10 **IV. LEGAL ISSUES AND DISCUSSION**

11 **A. CRITICAL AREAS AND BEST AVAILABLE SCIENCE**

12 **1. Pierce County’s Critical Areas Ordinances**

13
14
15
16 Pierce County amended its critical areas ordinances in 2004 as the culmination of a multi-year
17 process of evaluating critical area designations and development regulations, identifying and in
18 some cases commissioning studies to determine best available science, conducting public
19 hearings and workshops, debating and deliberating. The process was given the name
20 “Directions” and the set of regulations is sometimes referred to as the “Directions Package.”
21

22 Early in 2002, Pierce County retained a consultant, URS Greiner Woodward Clyde (**URS**) to
23 conduct a “best available science review” of the draft critical areas regulations. URS released its
24 report April 24, 2002. Pierce County also communicated with appropriate state and federal
25 agencies concerning its proposals, and was provided with advice and recommendations.
26

27 The Ordinances at issue here – Ordinance No. 2004-56s and Ordinance No. 2004-57s - are two
28 of the three ordinances that made up the Directions Package.
29

30 **2. Applicable Law**

31
32 Under RCW 36.70A.060(2) and (3), the County is required to adopt development regulations
33 that designate and protect environmentally critical areas. Critical areas include: (a) wetlands; (b)
34 areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife
35 habitat areas; (d) frequently flooded areas; and (e) geologically hazardous areas.
36

37 RCW 36.70A.130(1) requires local governments to ensure ongoing compliance with the GMA
38 by “tak[ing] legislative action to review and, if needed, revise comprehensive plans and
39 development regulations” under a statutory schedule which, for Pierce County, imposed a
40 December 1, 2004 deadline. The compliance review “shall include ... consideration of critical
41 areas ordinances.” *Id.*
42

43 RCW 36.70A.172(1) requires that “best available science” (**BAS**) shall be included “in
44 developing policies and development regulations to protect the functions and values of critical
45 areas.” The Division I Court of Appeals has held that “evidence of best available science must be
46
47

1 included in the record and must be substantively considered in the development of critical areas
2 policies and regulations.” *Honesty in Environmental Analysis & Legislation v. Central Puget*
3 *Sound Growth Management Hearings Board (HEAL)*, 96 Wash. App. 522, 532, 979 P.2d 864
4 (1999). *See also Whidbey Environmental Action Network v. Island County (WEAN)*, 122
5 Wn.App 156, 93 P.3d 885 (2004).

6
7 **RCW 36.70A.172 - Critical areas -- Designation and protection -- Best available science to**
8 **be used - states:**

9
10 (1) In designating and protecting critical areas under this chapter, counties and cities shall
11 include the best available science in developing policies and development regulations to
12 protect the functions and values of critical areas. In addition, counties and cities shall give
13 special consideration to conservation or protection measures necessary to preserve or
14 enhance anadromous fisheries.

15
16 **3. CTED Guidelines**

17
18 The Washington State Department of Community, Trade and Economic Development (**CTED**)
19 has adopted guidelines to assist jurisdictions in the designation and protection of critical areas
20 and guidelines for use of best available science. Each of the petitioners here states legal issues
21 challenging Pierce County’s violation of CTED guidelines.

22
23 There are several legislative mandates in the Growth Management Act which require CTED to
24 adopt rules or guidelines for jurisdictions planning under the Act.

25
26 Minimum Guidelines. RCW 36.70A.050(1) requires CTED, upon consultation with other
27 appropriate state agencies, to adopt guidelines “to guide the classification” of resource lands and
28 critical areas. These guidelines “shall be *minimum guidelines* that apply to all jurisdictions,” and
29 shall assist jurisdictions in designating and classifying resource land and critical areas. Chapter
30 365-190 WAC contains guidelines developed in response to this directive, including minimum
31 guidelines for critical areas.

32
33 This Board has held that the “minimum guidelines” are not mandatory. Most recently, in *Orton*
34 *Farms, et al., v. Pierce County (Orton Farms)*, CPSGMHB No. 04-3-0007c, Final Decision and
35 Order (Aug. 2, 2004), at 26, the Board said:

36
37 In one of its earliest cases, the Board stated, “The minimum guidelines (Chapter
38 365-190 WAC) remain advisory – the legislature has not given [CTED] the
39 authority to adopt mandatory regulations.” *See Twin Falls Inc., et al., v.*
40 *Snohomish County*, CPSGMHB Case No. 93-3-0003, Order on Dispositive
41 Motions (June 11, 1993), at 7. The Board notes that over the ensuing decade the
42 legislature still has not seen fit to authorize CTED to adopt the “minimum
43 guidelines” as mandatory regulations.

1 The Board concluded, “If the county does not use [the minimum guidelines] ... it must explicitly
2 identify those indicators it does use to satisfy the statutory analysis requirements.” *Orton Farms*,
3 at 26.

4
5 Procedural Criteria. RCW 36.70A.190(4)(b) requires CTED to adopt “... by rule *procedural*
6 *criteria* to assist counties and cities in adopting comprehensive plans and development
7 regulations that meet the goals and requirements” of the GMA. The procedural criteria are
8 required to reflect “regional and local variations and the diversity that exists among different
9 counties and cities...” Chapter 365-195 WAC contains guidelines developed by CTED in
10 response to this directive.

11 The procedural criteria adopted by CTED pursuant to RCW 36.70A.190 are advisory, not
12 obligatory. WAC 365-195-030 states that "this chapter makes recommendations . . . but
13 compliance with the requirements of the [GMA] can be achieved without using all of the
14 suggestions made here or by adopting other approaches."

15
16 The Board has stated that the GMA does not *require* that local governments comply with the
17 recommendations set forth in CTED procedural criteria. “[T]he GMA imposes no duty that local
18 governments comply with the recommendations set forth in those guidelines.” *Master Builders*
19 *Association of King and Snohomish Counties v. City of Arlington*, CPSGMHB Case No. 04-3-
20 0001, Final Decision and Order (2004), at 25.⁴ As a result, the Board has summarily dismissed
21 legal issues that claim that a local government has an independent duty to be consistent with
22 CTED’s procedural criteria. *See Bennett et al., v. Bellevue*, CPSGMHB Consolidated Case No.
23 01-3-0022c, Final Decision and Order (2002), at 27-28.

24
25 CTED developed a set of procedural guidelines, “... to assist counties and cities in identifying
26 and including the best available science in newly adopted policies and regulations ... and
27 demonstrating they have met their statutory obligations under RCW 36.70A.172(1).” WAC 365-
28 195-900. These procedural criteria provide valuable assistance to cities and counties in planning
29 under the GMA and may be informative to the Board, but the Board has no jurisdiction to
30 compel a city or county to comply with CTED procedural criteria.

31 **B. TAHOMA AUDUBON LEGAL ISSUES**

32 **1. The Challenged Action**

33
34
35
36 Pierce County Ordinance No. 2004-57s is the portion of its updated critical areas regulations that
37 contains its revised rules on volcanic hazard zones. PCC 18E.60. The Volcanic Hazard Area
38 regulations establish development allowances based on a calculus of risks associated with
39 proximity to Mount Rainier.

40
41 Tahoma Audubon challenges Ordinance No. 2004-57s, specifically provisions of Exhibit “A” at

42
43 ⁴ See also *King County and City of Renton v. Snohomish County*, CPSGMHB Case No.03-3-0011, Order on
44 Reconsideration and Clarification (2003), at 7; *Master Builders Association, et al. v. Snohomish County*,
45 CPSGMHB Case No. 01-3-0016, Final Decision and Order, (2001), at 7; *Children’s Alliance and Low Income*
46 *Housing Institute v. City of Bellevue*, CPSGMHB Case No. 95-3-0011, Order on Dispositive Motions (1995); and
47 *Twin Falls Inc. et al., v. Snohomish County*, CPSGMHB Case No. 93-3-0003c, Final Decision and Order, (1993) at
21.

1 pages 9-11 which are to be codified as sections 18E.60.040 and 18E.60.050 of the Pierce County
2 code. Petitioner challenges the regulations allowing development of "covered assemblies" to
3 accommodate up to 400 people in Case II, Travel Time Zone A, Lahar Inundation Zones.
4

5 Pierce County's Volcanic Hazard Area regulations begin with a statement of purpose:
6

7 PCC 18E.60.010 Purpose.
8

9 At over 14,411 feet high, Mount Rainier dominates the skyline of the southern
10 Puget Sound region. This glacier-clad potentially active volcano is capable of
11 spewing ash from pyroclastic eruptions, and generating large volumes of lahars
12 and floods which have, in the recent geologic past, inundated various watersheds
13 and reached the shores of Puget Sound significantly altering pre-flood conditions.
14 The purpose of this Chapter is to promote the public health, safety, and general
15 welfare of the citizens of Pierce County by providing standards that minimize the
16 loss of life that may occur as a result of volcanic events emanating from Mount
17 Rainier.

18 PCC 18E.60.010; Exhibit A to Ordinance No. 2004-57s (emphasis added).
19

20 The hazards are identified, in layman's language, in the Upper Nisqually Valley Community
21 Plan, which was adopted as part of the Pierce County Comprehensive Plan.
22

23 Volcanic Hazard Areas

24 Portions of the plan area are subject to potentially catastrophic impacts from activities
25 originating on the Mount Rainier volcano. Due to its height, frequent earthquakes, active
26 system of steam vents, and extensive glacial system mantle, Mount Rainier is potentially
27 the most dangerous volcano in the Cascade Range. There are several types of hazards
28 associated with volcanoes such as Mount Rainier. These include ash eruptions, lava
29 flows, pyroclastic flows, and lahars (also known as mudflows or debris flows). In
30 addition, glacier caused mudflows and traditional mountain flooding are relatively
31 common within the plan area.
32

33 Lahars and mudflows can occur without any volcanic activity and with little or no
34 warning. Lahar and mudflow hazards present the greatest risk to the inhabitants and
35 visitors of the Upper Nisqually. Mount Rainier and the Nisqually River Valley have
36 experienced numerous debris flows in postglacial times (over the past 10,000 years).
37 Mount Rainier poses the most severe debris flow risks of any volcano in the United
38 States. The Upper Nisqually Valley has historically experienced a number of debris
39 flows. Debris flows can be defined as slurries of sediment and water that look and behave
40 much like flowing concrete. A debris flow contains 60 percent or more sediment, with the
41 remaining volume composed of water. There are two types of volcanic debris flows
42 (lahars): (1) "cohesive," relatively high clay flows originating as debris avalanches; and
43 (2) "noncohesive" flows with less clay that begin most commonly as meltwater surges.
44

45 Cohesive (Case I) Debris Flows

46 The largest debris flows to occur on Mount Rainier have been cohesive flows that began
47 as debris avalanches formed from huge volcanic landslides. The potential suddenness of

1 these debris flows means little or no warning to those downstream. It would take less than
2 two hours for one of these large debris flows to reach Ashford and Elbe. These lahars
3 have occurred at Mount Rainier at a frequency of once every 500-1,000 years. The
4 Electron Mudflow inundated the Puyallup River Valley, downstream to Sumner, to a
5 depth of over 20 feet approximately 550 years ago. A similar event has a 10-18 percent
6 probability of occurring within the next 100 years in the river valleys leading from Mount
7 Rainier, including the Nisqually. The U.S. Geological Survey, in analyzing the risk and
8 impacts of debris flows on the river valleys surrounding Mount Rainier, has determined
9 that a flow the size of the Electron Mudflow is a reasonable event to assume. In the case
10 of the Nisqually River Valley, scientists estimate a debris flow the size of the Electron
11 would inundate the valley floor and lower hillsides of the upper stretches of the valley,
12 east of Elbe. The depth of the flow would range from approximately 50 feet at the base of
13 the volcano to 22 feet at the lowland end of the debris flow. An Electron-size debris flow
14 is estimated to have speeds of 11-49 miles per hour with an estimated arrival time at
15 Alder Lake of between 0.6 and 2.5 hours.

16 Noncohesive (Case II) Debris Flows

17 Noncohesive debris flows have occurred much more frequently at Mount Rainier than the
18 cohesive debris flows, i.e., at a frequency of once every 100-500 years. A noncohesive
19 debris flow has a 64 percent probability of occurring at least once in the next 100 years.
20 Noncohesive debris flows most commonly originate as water surges from the melting of
21 snow and ice by volcanic heat, lava, or pyroclastic flows. These [noncohesive debris]
22 flows begin as streamflow and gradually increase in bulk as sediments accumulate along
23 the path of the flow until the flow contains a significant amount of sediment. The
24 Nisqually River Valley has experienced several noncohesive debris flows in post-glacial
25 times. The largest noncohesive debris flow in the Mount Rainier area, the National Lahar,
26 inundated the lower river valley all the way to Puget Sound. The U.S. Geological Survey,
27 in analyzing the risk and impacts of debris flows has determined that a noncohesive
28 debris flow the size of the National Lahar is a reasonable event to assume. In the case of
29 the Nisqually River Valley, another debris flow the size of the National is estimated to
30 inundate a portion of the valley floor, east of Elbe. The valley portion of the plan area,
31 east of Copper Creek, and within approximately 0.25-0.50 miles of the river, east of Elbe,
32 would be the most susceptible area. The depth of flow would range from 15 feet at the
33 base of the volcano to 8 feet at the lowland end of the debris flow. Debris flows are
34 estimated to have speeds of 7-18 miles per hour with an estimated arrival time at Alder
35 Lake of between 1.6 and 4.2 hours.

36
37
38 Community Plan, at 70-72; Park Junction PHB, Tab 1, at 70.

39
40 Pierce County's regulations for volcanic hazard areas establish three sets of Lahar Inundation
41 Zones based on the size of lahars – Case I, largest and least frequent, Case II, and Case III, most
42 frequent but less destructive. Lahar travel times zones A, B, C, and D⁵ are based on the *estimated*
43

44
45 ⁵ Pierce County Director of Emergency Management describes these zones for the Nisqually Valley: "Time zone A
46 on the Nisqually [is] an area within one hour of travel distance from the source, the source of the event. Travel time
47 zone B on the Nisqually is one and one-half hours, Time zone C on the Nisqually is one and a half to two hours. ..."
HOM Ex. 1, at 8-9.

time for a lahar flow to reach a specific area, adjusted for the availability of warning systems in the Puyallup River and Carbon River basins. No warning systems are practicable in the Upper Nisqually Valley because the likely source of lahars is too close to the population. HOM Ex. 1, at 3.

Table 18E.60.040 illustrates the standards established by PCC 18E.60.040.

Table 18E.60.040 Volcanic Hazard Area Standards				
Facility/ Occupancy List	Case I Lahar Inundation Zone	Case II Lahar Inundation Zone	Case III Lahar Inundation Zone	Pyroclastic Flow Hazard Zone
Bonus Densities ⁽¹⁾	Not Allowed	Not Allowed	Not Allowed	Not Allowed
Essential Facilities ⁽²⁾	Not Allowed	Not Allowed	Not Allowed	Not Allowed
Hazardous Facilities ⁽³⁾	Not Allowed	Not Allowed	Not Allowed	Not Allowed
Special Occupancies ⁽⁴⁾	In Travel Time Zone A - Limited to 100 person occupant load. In Travel Time Zone B - Limited to 500 person occupant load. In Travel Time Zone C - Limited to 1,000 person occupant load. In Travel Time Zone D - Limited to 5,000 person occupant load.	In Travel Time Zone A - Limited to 100 person occupant load. In Travel Time Zone B - Limited to 500 person occupant load. In Travel Time Zone C - Limited to 1,000 person occupant load. In Travel Time Zone D - Limited to 5,000 person occupant load.	Not Allowed	Not Allowed
Covered Assemblies ⁽⁵⁾	In Travel Time Zone A - Limited to 400 person occupant load. In Travel Time Zone B - Limited to 700 person occupant load. In Travel Time Zone C - Limited to 1,000 person occupant load. In Travel Time Zone D - Limited to 5,000 person occupant load.	In Travel Time Zone A - Limited to 100 person occupant load. ⁽⁶⁾ In Travel Time Zone B - Limited to 500 person occupant load. In Travel Time Zone C - Limited to 1,000 person occupant load. In Travel Time Zone D - Limited to 5,000 person occupant load.	Not Allowed	Not Allowed
Other Occupancies	No Limitation	No Limitation	No Limitation	No Limitation

(1) Bonus Density as set forth in Chapter 18A.35 Development Regulations-Zoning.

(2) Essential Facility as defined in Section 18E.60.040 B.

(3) Hazardous Facility as defined in Section 18E.60.040 B.

(4) Special Occupancy structures as defined in Section 18E.60.040 C.

(5) Covered Assemblies as defined in Section 18E.60.040 D.

(6) Occupancy may be increased pursuant to the requirements of 18E.60.050

1
2 The County prohibits bonus densities in any of the volcano hazard areas. PCC 18E.60.040.A.
3 “Essential facilities” and “hazardous facilities” are prohibited.⁶ PCC 18E.60.040.B. “Special
4 occupancies” – schools, nursing homes, and the like – are limited to 100 persons.⁷ PCC
5 18E.60.040.
6

7 The challenged provision of the ordinance is the exception for “covered assemblies” in Case II
8 Lahar Inundation Zones, Travel Time A. Covered assemblies include “any structure that has the
9 potential to provide capacity for large numbers of people or assemblies such as, but not limited
10 to, convention centers, churches, theaters, etc.” *Id.*
11

12 In a Case II Lahar Inundation Zone, Travel Time Zone A, the occupancy of a “covered
13 assembly” is limited to 100 persons unless the project proponent satisfies certain requirements, in
14 which case the occupancy may be increased to 400. The special conditions involve providing for
15 evacuation of all occupants to a safe height out of the lahar inundation zone in the time
16 appropriate to the lahar travel time zone.⁸
17
18

19 ⁶ “Essential facilities” are necessary to maintain life and safety functions, such as police and fire stations, emergency
20 medical facilities. PCC 18.25.030. “Hazardous facilities” house or support toxic or explosive chemicals. *Id.*

21 ⁷ “Special Occupancy Structures” include schools, day care centers, nursing homes. PCC 18.25.030.

22 ⁸ PCC 18E.60.050, entitled “Increased Occupancy for Covered Assembly,” lists the requirements that must be met
23 before the Pierce County Hearing Examiner can approve a reasonable use exception:

24 The occupancy limits for covered assembly structures within the Case II Lahar Inundation Zone, Travel
25 Time Zone A, may be increased by the Director to a maximum of 400 persons when the following criteria
26 have been met:

27 A. The applicant has demonstrated through submittal of a travel time analysis the amount of time that is
28 anticipated for a lahar to reach the proposed project and evacuation route.

29 B. The applicant has demonstrated through submittal of a volcanic hazard emergency evacuation plan that:

30 1. The proposed project is located directly adjacent to a safety zone (area completely located outside the
31 limits of a Case I lahar) that is within walking distance in an amount of time less than the anticipated time
32 that it takes a lahar to reach a given point (refer to Section 18E.60.020.C). (Note: The time that it takes a
33 lahar to reach a given point is calculated from either the source of the event to the given point, or from the
34 source of the lahar warning signal to the given point, i.e., only the Puyallup and Carbon River drainages at
35 this time have the Acoustic Flow Monitoring System. Other drainages, such as the Nisqually and White
36 Rivers, have no warning systems. Persons in those areas would be reliant on other emergency notification
37 systems, such as the National Weather Radio. At this time, no other warning system is planned for the
38 Nisqually or White River drainages.) The time of walking distance shall be calculated based upon the
39 amount of time necessary for physically or mentally challenged individuals to get from the proposed
40 project to the safety zone.

41 2. The estimated travel time analysis for the lahar to reach the evacuation route is less than the estimated
42 travel time for physically or mentally challenged individuals to have cleared the evacuation route and
43 reached the safety zone.

44 3. The evacuation route must be at a slope and surface to be considered handicapped accessible (e.g., slopes
45 may not exceed 1' in 12' rise and surface must be an all weather, hard material) as determined by the
46 County Building Official.

47 4. The evacuation route has been determined not to contain any other potential natural hazards, such as
landslide or flood hazards, to cause a blockage or destruction of the evacuation route during an event (i.e.,
seismic event triggers a landslide that results in the evacuation route becoming impassible).

5. The evacuation route is not located adjacent to any highways or arterial road networks that may cause a
life safety threat to evacuating pedestrians.

1 **2. Legal Issue No. 1 – RCW 36.70A.010**

2
3 Legal Issue No. 1:

4
5 *Whether the Ordinance’s [specifically, Ordinance No. 2004-57s, Exhibit “A”,*
6 *pages 9-11, to be codified as sections 18E.60.040 and .050 of the Pierce County*
7 *Code] allowance of places of covered assembly within Case I Lahar and Case II*
8 *Lahar Inundation Zones (“the Zones”) violates the requirements of RCW*
9 *36.70A.010 that comprehensive plans and development regulations provide*
10 *adequately for the health and safety of residents of the state by jeopardizing the*
11 *health and safety of persons who will work in, and occupy, such places?*

12
13 Positions of the Parties.

14
15 Petitioner Tahoma Audubon argues that the GMA “requires that comprehensive plans and
16 development regulations provide adequately for the health and safety of residents of the state.”
17 Tahoma PHB, at 18. By authorizing increased risk through allowance for “covered assemblies,”
18 Tahoma contends, Pierce County violates a core principle of growth management. *Id.*

19
20 Intervenor Park Junction,⁹ on the side of the County, responds that the County’s policy merely
21 “allows citizens to accept risks associated with natural disasters.” Park Junction, at 14. “Covered
22 assemblies,” according to Park Junction, are “used by individuals who voluntarily chose to
23 assume volcano related risks,” and therefore are entitled to less governmental protection. *Id.* at 2.

24
25 Pierce County responds that RCW 36.70A.010 is a statement of legislative findings that has no
26 independent obligatory effect; therefore Petitioner’s legal issue must be dismissed. From a legal
27 perspective, the County argues, it cannot violate RCW 36.70A.010 – the statute contains no
28 explicit requirements. County Response, at 12, 13. The County cites the Board’s ruling in
29 *Wildlife Habitat Injustice Prevention et al. v. City of Covington (WHIP II)*, CPSGMHB Case No.
30 01-3-0026, Final Decision and Order (July 2003), at 61:

31
32 In one of its prior decisions, the Board has stated, "RCW 36.70A.010 is not a
33 substantive or even procedural requirement of the Act, and it creates no specific
34 local government duty for compliance apart from the subsequent goals and
35 requirements of the Act." *See Litowitz, et al., v. City of Federal Way*, CPSGMHB
36 Case No. 96-3-0005, Final Decision and Order, (Jul. 22, 1996), at 14. The Board

37
38
39 6. The safety zone is an area with adequate ingress/egress (i.e., a direct exit once individuals reach this
40 location).

41 ⁹ The Mt. Rainer Park Junction Resort “will be located on a portion of a 440-acre site located on State Highway 706,
42 eleven miles from the entrance to Mt. Rainer National Park. Park Junction Partners have received Pierce County
43 approval to construct Park Junction Resort, a large destination resort that will include a 270 room lodge with a 500
44 person conference center, an 18-hole championship golf course, 300 units of vacation home and condominium sites,
45 120 units of employee housing, several restaurants, 50 cabins, 50,000 square feet for a retail center and a train
46 station.” Park Junction, at 8, fn.10.

47 Two other possible “covered assemblies” referenced by a citizen in the record are the Ashford Community
Performing Arts Center and the Rainier Discovery and Mountaineering Center. Index 140, at 3.

1 continues to subscribe to this holding, and will not review compliance with the
2 legislative findings of .010.
3

4 Tahoma replies that Pierce County’s position essentially deprives RCW 36.70A.010 of all
5 significance and urges the Board not to read this section out of the statute. Tahoma cites *King*
6 *County v. Central Puget Sound Growth Management Hearings Board*, 91 Wn.App. 1, 16, 951
7 P.2d 1151 (1998) (the appellate body is “required to read legislation as a whole, and to determine
8 intent from more than a single sentence”), and (“Effect should be given to all of the language
9 used, and the provisions must be considered in relation to each other, and harmonized to ensure
10 proper construction.”) *Id.*
11

12 Board Discussion

13
14 The Board concurs with the County. RCW 36.70A.010 – Legislative findings – indicates general
15 legislative intent but does not create specific duties enforceable by this Board.
16

17 RCW 36.70A.010 provides:

18 The legislature finds that uncoordinated and unplanned growth, together with a lack of
19 common goals expressing the public's interest in the conservation and the wise use of our
20 lands, pose a threat to the environment, sustainable economic development, and the
21 health, safety, and high quality of life enjoyed by residents of this state. It is in the public
22 interest that citizens, communities, local governments, and the private sector cooperate
23 and coordinate with one another in comprehensive land use planning. Further, the
24 legislature finds that it is in the public interest that economic development programs be
25 shared with communities experiencing insufficient economic growth.
26

27 Tahoma Audubon claims that the County’s “covered assembly” occupancy allowance in Lahar
28 Inundation Zones violates RCW 36.70A.010 because the “safety” of the state’s residents is not
29 protected. However, the Board must look to sections of the statute that impose specific
30 requirements because the Board’s jurisdiction is limited to “the *requirements* of this chapter....”
31 RCW 36.70A.300(1). See *HEAL*, 96 Wn.App. at 527.
32

33 Accordingly, Legal Issue No. 1 must be **dismissed**.
34

35 **3. Legal Issue No. 2 – RCW 36.70A.172**

36
37 Legal Issue No. 2:
38

39 *Whether Pierce County used best available science, as required by RCW*
40 *36.70A.172, in allowing places of covered assembly of 400 or more persons to be*
41 *located in a Case II Lahar Inundation Zone, Travel Time Zone A (“Zone A”)*
42 *when the immediately previous development regulations prohibited places of*
43 *public assembly greater than 300 persons from being located in the same area,*
44 *and when the evidence before the Council showed that placement of such places*
45 *in such zones presents hazards to both structures and human lives?*
46
47

1 Positions of the Parties
2

3 Tahoma contends that the County’s best available science declined to address any issues
4 regarding the location of covered assembly places in volcanic hazard areas. Tahoma PHB, at 14.
5 Further, Tahoma argues that whatever information the County had on travel time zones applied
6 only to the Puyallup River Valley and the Carbon River Valley, and numerous documents in the
7 record highlighted the danger of allowing structures in Case I and II Lahar Travel Time Zone A.
8 *Id.* at 15. Tahoma highlights USGS and other studies which emphasize the destructiveness of
9 Case II lahars and the potential for such events to occur without preceding seismic activity. *Id.* at
10 4-9. Tahoma argues that there is simply no explanation of the County’s rationale for allowing
11 places of human habitation and covered assembly buildings in the Upper Nisqually Valley, nor
12 for liberalizing the past rule which restricted such occupancies to 300 persons. Tahoma PHB, at
13 2-3, 16.
14

15 Pierce County responds that it conducted a “best available science” review which concluded that
16 occupancy limits could not be scientifically decided. URS, the consultant retained by the County,
17 provided a report in April 2002 comparing the Pierce County proposed critical areas regulations
18 with BAS and highlighting some areas for further revision. With respect to geologically
19 hazardous areas, URS took the position that BAS could be used to designate such areas, but that
20 “protecting the functions and values” of such areas was irrelevant and that the County must look
21 to “policy, safety, and engineering” to make the necessary judgments about land use.
22

23 The URS report states:
24

25 **V. HAZARD AREA, PCC 18E.60**
26

27 This section addresses the proposed revisions to Pierce County Code (PCC)
28 related to Volcanic Hazards (Chapter 18E.60) in light of the best available and
29 applicable science (BAS) guidelines expressed in the WAC. Science-based
30 elements are identified and compared with the BAS.
31

32 **V.1 BAS Evaluation**
33

34 This chapter contains few elements that may affect the functions and values of
35 critical areas. Other elements are *policy, safety or engineering driven* and are not
36 covered in the Best Available Science review as they would not affect the
37 functions and values of critical areas.
38

39 Part of the proposed Volcanic Hazard Code that establishes different classes of
40 hazard and travel zones can be directly or indirectly traced to the references listed
41 below.¹⁰ There is *no BAS for special occupancy limitations* within specific hazard
42 travel time zones. It is assumed that the occupancy number allowed is based on
43 an expected time to evacuate a structure of stated occupancy.
44
45
46

47 ¹⁰ See bibliography, *infra*, at 23.

1 Since volcanic hazards are limited to a few areas of the U.S. there is currently no
2 known BAS reference for mitigation/land use policies. *Land use restrictions are*
3 *based on policy and what is deemed an acceptable risk by policy makers.*
4

5 Index 150, at p. V-1 (emphasis supplied).
6

7 Pierce County insists that its occupancy allowances are not science decisions but policy choices
8 – a “public policy risk management decision” which the County made after obtaining and
9 applying the best available science. County Response, at 17. From the County’s perspective, it is
10 crucial to point out that the statute requires counties and cities to “include” BAS in developing
11 policies and development regulations. It does not require that these policies and regulations be
12 based solely upon BAS.
13

14 BAS plays an important part in the entire regulatory package. “However, BAS is not the
15 only component of critical area development regulations. “Science” – even the very best
16 of it and its most available level – does not address fundamental public policy decisions
17 ultimately left to local legislative officials. In this case, the Pierce County Council made
18 the policy decision - a risk analysis - to limit the number of occupants in certain limited
19 facilities to the prescribed number, rather than absolutely prohibit them.”
20

21 County Response, at 18.
22

23 The County “urges the Board to keep this issue in perspective.” *Id.* at 17. Case III Lahars, the
24 most frequent and least devastating, occur almost entirely within the boundaries of Mount
25 Rainier National Park, over which Pierce County has no jurisdiction. *Id.* Case II Lahars do
26 extend into the lowlands, but they occur “at the lower end of the 100-500 year range,” and “the
27 most common origin for this class of flows is from a volcanic eruption, which would be presaged
28 by seismic activity.” *Id.* Mount Rainier is closely monitored by vulcanologists who would
29 provide ample warning were the mountain to rumble to life. *Id.* at 16.
30

31 The County concludes: “The odds of the events occurring [Case I and Case II Lahars] are fairly
32 low. Moreover, much of the risk for these categories of lahars is reduced because they are the
33 result of actual volcanic activity, which is highly monitored and which provides ample advance
34 warning.” *Id.* at 17. The County’s regulations are essentially based on this risk analysis.
35

36 The County argues that science, even the best and the most available, can only go so far – it
37 cannot make public policy decisions for the County’s elected public officials. Here, the scientists
38 told the County the state of lahar science; but they also admitted that science could not evaluate
39 the amount of risk that was acceptable. *Id.* at 36.
40

41 Intervenor Park Junction argues that occupancy is not a matter for scientific determination.
42 “Scientific analysis informs policy makers of risks associated with certain volcanic hazards.
43 Whether the risks should be accepted for certain development, however, is not a question of
44 science, but is a question of policy.” Park Junction, at 10. Park Junction states that each of the
45 scientists who made presentation to the Planning Commission and County Council agreed that
46 occupancy limits were a policy question, not a science question. *Id.* at 11.
47

1 Park Junction notes that at the April 14, 2004, Planning Commission meeting, Pierce County
2 staff stated: “Science tells us that in the likely event of size that it will travel this far and this fast
3 but science does not tell us what [occupancy] number to pick.” Index 164, at 2. [Park Junction’s
4 brief omits the remainder of this quote: “You anticipate that you will have warning but you
5 cannot be sure.”]
6

7 In Park Junction’s brief,¹¹ the two million people who visit Mount Rainier each year “voluntarily
8 opt to assume the risk of volcanic activity.” *Id.* at 15. The County should “allow citizens to
9 accept risks associated with natural disasters.” *Id.* at 14. “Mount Rainier is a significant draw to
10 visitors who voluntarily choose to accept volcano related hazards.” *Id.* at 12. “Mount Rainier is a
11 tremendous tourist attraction that brings more than 2 million persons to the national park each
12 year (despite the known risks associated with a live volcano).” *Id.* at 2.
13

14 Further, according to Park Junction, the County appropriately balanced economic goals against
15 the lahar inundation risk. “The Council needed to consider economic goals set forth in the Upper
16 Nisqually Valley Community Plan to expand and grow tourist activity in the area.” *Id.* at 12-13.
17 “The County clearly considered the available science which advised it of the risks, and weighed
18 it in the context of the facts surrounding Mount Rainier and competing economic goals of the
19 Upper Nisqually Valley.” *Id.*
20

21 Board Discussion

22

23 Under the Growth Management Act, Pierce County is required to include the best available
24 science “in developing policies and development regulations to protect the functions and values
25 of critical areas.” RCW 36.70A.172(1). “Critical areas” include “geologically hazardous areas.”
26 RCW 36.70A.030(5). Geologically hazardous areas are “areas that because of their susceptibility
27 to erosion, sliding, earthquake, or other geological events, are not suited to the siting of
28 commercial, residential, or industrial development consistent with public health or safety
29 concerns.” RCW 36.70A.030(9). CTED’s minimum guidelines for critical areas provide:
30 “Volcanic hazard areas shall include areas subject to pyroclastic flows, lava flows, and
31 inundation by debris flows, mudflows, or related flooding resulting from volcanic activity.”
32 WAC 365-190-030(21).
33

34 The Board is persuaded that Pierce County used best available science to **designate** its volcanic
35 hazard areas. The County also incorporated best scientific analysis in its regulations by
36 **differentiating** land use allowances based on current mapping of lahar inundation zones and, in
37 particular, the lahar travel times from likely sources high on the flanks of Mount Rainier to
38 populated areas in the lowlands. In addition, new lahar early warning systems were designed and
39 installed in two drainages – Puyallup River and Carbon River -- through close collaboration
40

41
42 ¹¹ The Board finds nothing in the County record to support Park Junction’s assertions on this matter. While the
43 Board may assume that some knowledgeable individuals who visit Mount Rainier - trained mountain climbers, for
44 example, - understand and accept volcanic risks, it is equally plausible to assume that the majority of Mount Rainier
45 tourists know little about volcanoes and less about lahars. They might reasonably believe that if government allows
46 them to drive into the area or permits an inn or other overnight accommodation, “it must be safe.” Pierce County’s
47 aggressive citizen education campaign (*infra*, at Section IV.B.6) suggests that even residents of the area may lack
essential understanding of lahar risks.

1 between Pierce County staff and USGS vulcanologists.¹²

2
3 CTED's "best available science" guidelines advise jurisdictions to start with the national and
4 state agencies with relevant scientific expertise. WAC 365-195-910. The United States
5 Geological Survey (USGS) is the agency with expertise in vulcanology, operating the Cascade
6 Volcano Observatory in Vancouver, WA. Dr. Thomas C. Pierson, associate scientist in charge
7 of the USGS Cascade Volcano Observatory [and presumably the supervisor of the team of CVO
8 experts who produced most of the scientific papers cited by various parties here], has also
9 personally researched Mount Rainier lahar hazards.¹³ Dr. Pierson is in a unique position to
10 convey to Pierce County staff and decision makers the most current scientific understanding of
11 the lahar risks at Mount Rainier.

12
13 Dr. Pierson worked with Steve Bailey, the Pierce County Director of Emergency Management,
14 to deploy the award-winning lahar early warning system. HOM Ex. 3, Ex. 4. He was interviewed
15 by URS in the development of the BAS Report. Index 150. Dr. Pierson testified at a Planning
16 Commission meeting on April 16, 2003 [Index 1080], before the Pierce County Council
17 Community Development Committee on August 5, 2003 [HOM Ex. 1, at 10] and again before
18 the Planning Commission on April 14, 2004 [Index 164]. At the latter meeting he "clarified the
19 USGS position on advance warning on lahars and the west side of the mountain versus the south
20 side." Index 164, at 2. The Board is persuaded that Pierce County was provided with the best
21 available scientific advice concerning the lahar threats posed in the vicinity of Mount Rainier.

22
23 The State office with relevant expertise is the Washington State Department of Natural
24 Resources (**DNR**), Geology Division. Steve Palmer and Pat Pringle¹⁴ of DNR also participated in
25 the discussion at the April 16, 2003 Planning Commission meeting. Index 1080.

26
27 The County published a bibliography of its various BAS documents that was attached to an April
28 10, 2002, Staff Report. Index 877. For volcanic hazard areas, the bibliography listed:

29
30 Volcanic Hazard Areas

31 "An Empirical Method for Estimating Travel Times for Wet Volcanic Mass
32 Flows," Thomas C. Pierson, U.S. Geological Survey, Cascades Volcano
33 Observatory, Bulletin 60:98-109, 1998

34
35 "Estimated Lahar Travel Times for Lahars 10⁷to10⁸ Cubic Meters in Volume
36 (Approaching a Case I Lahar in Magnitude) in the Puyallup River Valley, Mount
37 Rainier," Personal correspondence from Thomas C. Pierson, U.S. Geological
38 Survey, Cascades Volcano Observatory, October 11, 2001 and accompanying
39 Estimated Lahar Travel Time Map

40
41
42 ¹² The parties agree that lahar warning systems are impracticable in the Upper Nisqually Valley. The emergency
43 services have provided residents with weather alert radios that can be used to transmit information when an event is
44 detected. County Response, at 26.

45 ¹³ See, e.g., "An Empirical Method for Estimating Travel Times for Wet Volcanic Mass Flows," Thomas C. Pierson,
46 USGS Cascades Volcano Observatory, Bulletin 60:98-109, 1998. Index 889, at 8.

47 ¹⁴ Pat Pringle is co-author of one of the studies referenced in the BAS Report: Volcano Hazards from Mount
Rainier, Washington, USGS Open File Report, 1995. Index 150, at V-1.

1 "Map Showing Debris Flows and Debris Avalanches at Mount Rainier,
2 Washington—Historical and Potential Future Inundation Areas," Hydrogeologic
3 Investigations Atlas HA-729, U. S. Dept. of Interior, Geologic Survey, 1995 as
4 amended by Kevin Scott, USGS, on November 10, 1997, to be consistent with
5 the reports listed as 1. and 2. Below:
6

7 1. Volcano Hazards from Mount Rainier, Washington by Hoblitt, Walder,
8 Driedger, Scott, Pringle, and Valance, U.S. Geological Survey Open File Report
9 95-273, 1995;

10
11 2. Sedimentology, Behavior, and Hazards of Debris Flows at Mount Rainier,
12 Washington, U.S. Geological Survey Professional Paper 1547, 1995.
13

14 Personal communication with Kevin Scott and Tom Pierson, U.S. Geological
15 Survey, Cascades Volcano Observatory staff.
16

17 Index 889, at 8.
18

19 The Board finds that “best available science” was included in the designation of Lahar
20 Inundation Zones and Lahar Time Travel Zones. To the extent the new regulations were built
21 around that mapping exercise, they reflect best available science as required by RCW
22 36.70A.172(1).
23

24 The more troubling question is what land use regulations are required, once the hazard is
25 acknowledged. RCW 36.70A.172(1) requires “best available science” to be included in
26 protection of “the *functions and values* of critical areas,” with special reference to “preservation
27 and enhancement of anadromous fisheries.” The County’s position is that the “function and
28 values” language is inapplicable. The County reasons that the only remaining question –
29 reasonable occupancy limits -- is a policy choice based on weighing risks. In the County’s
30 calculus, the low frequency of lahar events, the likelihood of early warning,¹⁵ and the
31 opportunity for evacuation must be weighed against the economic opportunity presented by new
32 tourist facilities. County Response, at 31.
33

34 The USGS volcanologists and Pierce County’s Director of Emergency Management clearly
35 favor land use restrictions in lahar inundation zones. The USGS bulletin, Volcano Hazards from
36 Mount Rainier, 1998, states:
37

38 Communities, businesses, and citizens can undertake several actions to mitigate
39 the effects of future eruptions, debris avalanches, and lahars. Decisions about
40 land use and siting of critical facilities can incorporate information about volcano
41 hazards. *Areas judged to have an unacceptably high risk can be left*
42 *undeveloped.* Alternatively, development can be planned to reduce the level of
43

44
45 ¹⁵ Early warning through seismic activity is likely. “However, as with Case I flows, non-eruptive origins are
46 possible, and there may be no precursory signals. For example, the most recent Case II flow, in 1947, was triggered
47 by heavy rain and also involved release of water stored within a glacier.” Volcano Hazards from Mount Rainier,
1998; HOM Ex. 2, at 9.

1 risk, or even include engineering measures to mitigate the risk. For example,
2 areas along the channels and flood plains of lahar-prone rivers could be set aside
3 for open space or recreation, and *valley walls or high terraces could be used for*
4 *houses, schools, and businesses.*¹⁶

5
6 HOM Ex. 2, at 8.

7
8 Pierce County staff initially proposed changing volcanic hazard regulations to limit “covered
9 assemblies” to 100 persons. A 2003 Pierce County staff report to the Planning Commission
10 indicated the new 100-person limit “closes the public assembly loophole.” Index 877, at 9.
11 Testifying before the Planning Commission on April 16, 2003, Richard Schroedel, from Pierce
12 County’s Department of Emergency Management, explained that “it is impossible to install a
13 warning system close enough to Mt. Rainier to allow any warning in the Upper Nisqually area.
14 Due to potential threats, it was determined that the best rationale was to limit the amount of
15 people allowed in the hazard area.” Index 1080, at 2.

16
17 Dr. Tom Pierson, USGS, and Pat Pringle, DNR, told the Planning Commission that the lahar
18 threat presents “significant risk” in the Nisqually Valley. Commission members “asked whether
19 limiting occupancy to 100 people in the Upper Nisqually area is not cautious enough. Dr. Pierson
20 responded that he has attempted to provide the information necessary to address the public
21 safety, but the decision is up to Pierce County.” *Id.*

22
23 The Planning Commission, however, recommended increasing the occupancy limit in “covered
24 assemblies” to 400.¹⁷

25
26 Several months later, Steve Bailey, Pierce County Director of Emergency Management, made a
27 power point presentation to the County Council Community Development Committee on August
28 5, 2003, that referred graphically to Mount Vesuvius. Index 826; HOM Ex. 1, at 4-5. Bailey
29 explained that over the past two millennia, development has pushed up the flanks of Mount
30 Vesuvius so that now two million people live too close to the mountain. The Italian government
31 at first tried to devise an evacuation plan, but soon learned that timely evacuating of the
32 population was not feasible. Now they have launched a buy-out program to buy out the people
33 who live closest to the mountain. “That’s an example of how land use plays into this kind of
34 process and decision making,” said Bailey. “So the only effective mitigation for Mount Rainier is
35 effective land use planning. The only, the real solution is to control development closest to the
36 mountain.” HOM Ex. 1, at 4-5.

37
38 Bailey explained to the County Council that the new scientific delineation of lahar travel time
39 zones – that is, the time it would take the flow of a Mount Rainier lahar to reach a given area –
40 allowed land use regulations to be recalibrated. “[The] previous ordinance treated the whole
41 valley the same way. Now with these travel times, we’re allowing more development ... farther
42

43
44 ¹⁶ Tahoma Audubon, in letters to the County officials, repeatedly urged that the County require Park Junction to
45 build its “covered assemblies” on the high ground of its 400-acre site and build its golf course in the inundation
46 zone. Index 103, 175, 176.

47 ¹⁷ Steve Bailey: “The covered assemblies, time travel zone A, we have recommended originally one hundred person
occupant load. ... planning commission change[d] that to four hundred.” HOM Ex. 1, at 7.

1 away from the mountain.... We've recommended to tighten up the areas closer to the mountain.
2 And the planning commission disagreed, and came up with this, their own recommendations."
3 *Id.* at 7.
4

5 The Board finds no direct requirement in the GMA that would allow it to substitute its judgment
6 for that of the Pierce County elected officials on this matter. The GMA *defines* geologically
7 hazardous areas as areas that "are not suited to siting of ... development consistent with public
8 health or safety concerns," [RCW 36.70A.030(9)], but there is *no affirmative mandate* associated
9 with this definition¹⁸ except "protect the functions and values." Petitioners have not persuaded
10 the Board that the requirement to protect the functions and values of critical areas has any
11 meaning with respect to volcanic hazard areas or that the GMA contains any independent life-
12 safety mandate.
13

14 At the August 5, 2003, meeting of the County Council Community Development Committee,
15 after hearing Steve Bailey's presentation about lahar risks, Councilmember Wimsett put the issue
16 in stark perspective:
17

18 ... [L]et's face it, if there's a major incident on Mt. Rainier, the casualties are going
19 to be high. I mean very high. And you know I guess it boils down to what is okay.
20 Is it okay to sacrifice two hundred and fifty people, but not three hundred or . . . I
21 mean, where do you draw that line?
22

23 HOM Ex. 1, at 16.
24

25 The Board agrees with Pierce County that land use policy and responsibility with respect to
26 Mount Rainier Case II lahars -- "low probability, high consequence" events -- is within the
27 discretion of the elected officials; they bear the burden of deciding "How many people is it okay
28 to sacrifice?"
29

30 Conclusion

31
32 The Board finds and concludes that Petitioner has **failed to carry its burden of proof** in
33 demonstrating that Pierce County violated RCW 36.70A.172(1) in establishing "covered
34 assembly" occupancy limits in Volcanic Hazard Areas. **Legal Issue No. 2. is dismissed.**
35

36 **4. Legal Issue No. 3 – Consistency with Flood Zone Regulations**

37 Legal Issue No. 3:

38
39
40 *Whether the failure of Ordinance 2004-57s to locate places of human habitation*
41 *and places of general public assembly above and beyond lahar inundation zones,*
42 *and in contradiction to development regulation provisions for flood control zones,*
43 *violates the provisions of RCW 36.70A.010 regarding protection of the health and*
44

45 ¹⁸ The Board does not enforce GMA definitions. *Hanson v. King County*, CPSGMHB No. 98-3-0015c, Final
46 Decision and Order (Dec. 16, 1998), at 7-8; "RCW 36.70A.030 defines the terms used in the GMA. Definitions, by
47 themselves, do not create GMA duties."

1 *safety of residents of the state and RCW 36.70A.172 regarding the use of best*
2 *available science in adopting regulations dealing with critical areas?*
3

4 Petitioner Tahoma Audubon contends that Pierce County’s lahar regulations fail to harmonize
5 with analogous flood control zone regulations. Tahoma PHB, at 17. Noting the statement in the
6 County’s science that “for planning purposes Case II flows are analogous to the 100-year flood
7 commonly considered in engineering practice,” [HOM Ex. 2, at 9], Petitioner argues that zoning
8 for analogous risks should be consistent.
9

10 Tahoma points out that Pierce County’s regulations regarding flood hazard areas prohibit any
11 development, encroachment, filling, etc., within a floodway. PCC 18E.70.040.B. Residential or
12 commercial structures, including “covered assemblies,” must be located at least two feet above
13 base flood elevation. PCC 18E.70.040.C.4. Tahoma urges the Board to consider that under
14 Pierce County Code no special occupancy or covered assembly structure is allowed within a
15 floodway or even within flood fringe areas. PCC 18E.70.040.B and C. Tahoma Reply, at 27.
16 “Under what rationale,” asks Tahoma, “can Pierce County prohibit structures from a 100-year
17 flood zone and allow them within a Case II flow zone?”
18

19 Pierce County responds by pointing to the statutory provisions cited by Tahoma in Legal Issue
20 No. 3: RCW 36.70A.010 – Legislative findings – and RCW 36.70A.172 – Critical areas – Best
21 available science to be used. The County asserts that Section .010 provides no independent basis
22 for a GMA challenge [see Legal Issue No. 1, *supra*] and that it has clearly demonstrated its use
23 of best available science [see Legal Issue No. 2, *supra*]. County Response, at 30.
24

25 Board Discussion.
26

27 The Board has held that a jurisdiction’s development regulations must be consistent with its
28 comprehensive plan and that such regulations must be internally consistent. *West Seattle Defense*
29 *Fund v. City of Seattle*, CPSGMHB No. 95-3-0040, Final Decision and Order (Sep. 11, 1995), at
30 7. Regulatory provisions must be compatible, and one provision may not thwart another. The
31 Board bases this rule on RCW 36A.70.130(1)(b). *Corrine R. Hensley and Jody L. McVittie v.*
32 *Snohomish County*, CPSGMHB No. 01-3-0004c, Final Decision and Order (Aug. 15, 2001), at
33 20; *Olson, et al., v. City of Kent*, CPSGMHB No. 03-3-0003, Final Decision and Order (June 30,
34 2003), at 7. RCW 36A.70.130(1)(b) is not cited by Tahoma as a basis for its challenge here.
35

36 Moreover, in the present case, the analogy between floods and lahars is limited. The scientific
37 references linking 100-year floods and Case II Lahars refer only to periodicity, not to depth or
38 viscosity or rate of flow or even predictability: “For planning purposes, Case II flows are
39 analogous to the 100-year flood commonly considered in engineering practice.” HOM Ex. 2, at
40 9. The County might well choose to be much *more* restrictive in the Case II Lahar inundation
41 zone, given the mass of the flow,¹⁹ or *less* restrictive, reasoning that there is some likelihood of
42 advance warning because of seismic activity. The GMA imposes no duty on the County to treat
43 both hazards alike in its development regulations just because their frequency may be analogous.
44
45

46 ¹⁹ For example, Steve Bailey testified to the County Council: “There’s been discussion about how you could harden
47 facilities. And that’s not [an] option because of the power of these lahars.” HOM Ex. 1, at 11.

1 Conclusion

2
3 The Board finds and concludes that Petitioner Tahoma **has not carried its burden of proof** in
4 demonstrating that Pierce County’s Volcanic Hazard Areas regulations violate RCW 36.70A.010
5 or RCW 36.70A.172 or are inconsistent with Pierce County’s flood hazard areas regulations.
6 **Legal Issue No. 3 is dismissed.**

7
8 **5. Legal Issues 4, 5, and 6 – CTED Guidelines**

9
10 Legal Issue No. 4:

11
12 *Whether Pierce County was required to consult a qualified expert or experts on*
13 *volcanic hazards, the likelihood of mud flows and lahars resulting from volcanic*
14 *hazards and other hazards, the steps and provisions necessary to protect people*
15 *as a result of such hazards, and related issues, and whether this failure violated*
16 *the provisions of WAC 365-195-905 which require consultation of qualified*
17 *experts?*

18
19 Legal Issue No 5:

20
21 *Whether Ordinance 2004-57s violates provisions of WAC 365-195-915 by not*
22 *adequately identifying the information the County relied on, or adequately*
23 *explaining the County’s rationale, for allowing places of human habitation and*
24 *places of general public assembly to be located within lahar inundation zones in*
25 *general, and Zone A in particular, and in areas where such location was*
26 *prohibited under the immediately previous development regulations?*

27
28 Legal Issue No. 6:

29
30 *Whether the County was required to adopt a cautionary or “no risk” approach in*
31 *adopting regulations dealing with the location of places of human habitation and*
32 *places of general public covered assembly within volcanic hazard areas, and in*
33 *not adopting adequate plans for the evacuations of persons from such places at*
34 *hazardous times, as required by WAC 365-195-920, and whether Ordinance*
35 *2004-57s violates provisions of that regulation?*

36
37 Positions of the Parties

38
39 Tahoma argues that there is simply no explanation of the County’s rationale for allowing places
40 of human habitation and covered assembly buildings in the Upper Nisqually Valley, nor for
41 liberalizing the past rule. Tahoma PHB, at 16. Further, Tahoma states that Pierce County
42 violated the BAS requirements when it failed to consult experts, did not consult all available
43 published literature regarding the issue, and ignored the advice of experts as to the known
44 dangers of the area. Tahoma Reply, at 9. Tahoma concludes that given the lack of adequate
45 information, the County should have utilized a precautionary approach in determining the
46 number of people to allow, until adequate information becomes available. Tahoma PHB, at 18.

1
2 Pierce County responds that Tahoma’s legal issues based on compliance with CTED guidelines
3 should be summarily dismissed because the guidelines are merely advisory and create no
4 enforceable requirements for local jurisdictions. County Response, at 33.

5
6 Pierce County states that it consulted with qualified experts, reviewed the applicable literature,
7 ascertained the best available science for volcanic hazard areas, and included that science in its
8 regulations. *Id.* at 34. Pierce County listed its scientific sources in the record and informed the
9 public of the proposed regulatory response. *Id.* at 36; Index 877, 889.

10
11 Pierce County denies that the “precautionary” approach of WAC 365-195-920 applies, even if it
12 were mandatory. The County asserts:

13
14 In the case of hazards stemming from lahars, there is an abundance of scientific
15 information that the County relied upon in developing its volcanic hazard area
16 regulations. Moreover, that scientific information is complete.

17
18 *Id.* at 37.

19
20 Board Discussion

21
22 The Board concurs with the County. As set forth in Section IV.A.3, *supra*, Petitioner cannot base
23 a challenge to the County’s action on CTED’s advisory guidelines. In any event, the record in
24 this case persuades the Board that Pierce County consulted qualified volcano experts [Legal
25 Issue 4 – WAC 365-195-905] and adequately identified the scientific information it relied on
26 [Legal Issue 5 – WAC 365-195-915].

27
28 The Board reads the cautionary approach recommended in the CTED guidelines [Legal Issue 6 –
29 WAC 365-195-920] to refer to situations where incomplete science may result in inadequate
30 protection for the “functions and values” of critical areas. In this case, we are not concerned with
31 protecting “the functions and values” of volcanic debris flows. Here, the science of lahar
32 inundation hazards on Mount Rainier is sufficiently detailed; the question dealt with in the
33 County occupancy regulations is the feasibility of rapid evacuation from sites very close to the
34 mountain – identified by the URS report as an engineering and life-safety question rather than an
35 issue of vulcanology.

36
37 Conclusion

38
39 The Board finds and concludes that Petitioner Tahoma **has not carried its burden of proof** in
40 demonstrating that Pierce County’s Volcanic Hazard Areas regulations violate the GMA through
41 failure to comply with WAC 365-195-905, -915, or -920. **Legal Issue Nos. 4, 5, and 6 are**
42 **dismissed.**

1 **6. Legal Issue No. 7 – Consistency with Comprehensive Plan**

2
3 Legal Issue No. 7:

4
5 *Whether Ordinance 2004-57s violates provisions of the County’s comprehensive*
6 *plan directly applicable to the area covered by the ordinance, and specifically*
7 *whether the ordinance violates provisions of the following code sections:*

8 *a. Pierce County Code section 19A.60.080, which requires that Pierce*
9 *County “[a]void the endangerment of lives, property, and resources in hazardous*
10 *areas, including areas subject to geologic and flood hazards” [Environmental*
11 *Objective 9];*

12 *b. Code section 19A.60.080 which requires that the County establish*
13 *“land use practices in hazardous areas so that development does not cause or*
14 *exacerbate natural processes which endanger the lives, property, and resources*
15 *of the citizens of Pierce County”;*

16 *c. Code section 19A.60.080.B.2, which requires incentives for the use of*
17 *hazardous areas as open space; and*

18 *d. Code section 19A.60.080.D.1, which requires that Pierce County*
19 *“[d]iscourage high-intensity land use activities in volcanic hazardous areas, and*
20 *[e]stablish lower densities and low-intensity land uses in volcanic hazard areas*
21 *which discourage conversion of land to urban uses,... ”*
22

23 Positions of the Parties

24
25 Tahoma Audubon argues that the Volcanic Hazard Areas regulations are inconsistent with Pierce
26 County Comprehensive Plan policies in PCC 19A.60. Tahoma PHB, at 19. Tahoma asserts that
27 rather than avoiding the endangerment of lives and property, as called for in PCC 19A.60.080,
28 Environmental Objective A, the County allows human assembly that puts more people at risk. *Id.*
29 The new regulations *exacerbate danger to lives and property*, contrary to PCC 19A.60.080.D,
30 according to Tahoma. The County’s own policies, cited by Tahoma, require it to “discourage
31 high intensity land use” in hazard areas and “consider incentives for maintaining hazardous areas
32 as open space by allowing increased densities on less-sensitive areas of the site.” *Id.* “By
33 allowing special occupancies and covered assemblies in the Travel Time Zone A within the Case
34 I and Case II flow zone areas, the subject ordinance endangers lives and property in hazardous
35 areas.” Tahoma Reply, at 22.

36
37 Intervenor Park Junction responds that the standard for an inconsistency is whether one provision
38 of the plan or regulations “thwarts” another. Park Junction, at 15. According to Park Junction, no
39 goal or policy is thwarted by the “minor increase in authorized capacity” for covered assemblies
40 in Case II, Travel Time A, Lahar Inundation Zones. *Id.* Indeed, Park Junction urges, the
41 comprehensive plan goal of promoting tourism to strengthen the economy is furthered, because
42 the new regulation “authorizes facilities that may be used by tourists.” *Id.* at 16.
43

44 Pierce County responds that its Volcanic Hazard Areas regulations, taken as a whole, reduce or
45 minimize risks. County Response, at 40.
46
47

1 Pierce County has prohibited all bonus densities in the area. The regulations
2 prohibit all essential public facilities and hazardous facilities. Residential housing
3 is limited to one dwelling unit per forty acres. Although covered assemblies and
4 special occupancy structures are permitted, they are only done so under very
5 limited conditions. The regulations (*see* PCC 18E.60.050 and PCC
6 18E.20.050.C.5) authorize the Director of PALS to make a discretionary decision
7 or the Pierce County Hearing Examiner to permit a reasonable use exception. The
8 process involves submitting a travel time analysis, a volcanic hazard emergency
9 evacuation plan that includes escape to a safety zone outside a Lahar Inundation
10 Zone. The evacuation plan must use the time it takes for a physically or mentally
11 challenged person to walk to safety. The evacuation route must be handicapped
12 accessible and cannot contain other potential natural hazards such as flood or
13 landslide hazards, and it cannot be located adjacent to a highway or arterial road.
14 *Id.* at 40.

15
16 The County argues that its policies, far from “causing or exacerbating” natural volcanic
17 processes, attempt to reduce the likelihood of impact of lahars on human lives or property.
18 “Restrictive development regulations have been adopted, a public education system has been
19 created, a system of notifying the public of the potential dangers has been established, and in the
20 most high-risk areas with the highest population concentrations, a sophisticated lahar warning
21 system has been established.” *Id.* at 41.

22
23 Board Discussion.

24
25 The Board looks at the whole of the Comprehensive Plan policy cited by Petitioner, to the extent
26 applicable to Volcanic Hazard Areas.

27
28 **ENV Objective 9.** Avoid the endangerment of lives, property, and resources in
29 hazardous areas, including areas subject to geologic and flood hazards.

30 A. Identify and map all hazardous areas including geologic and flood hazards.

31 B. Establish land use practices in hazardous areas so that development does not cause or
32 exacerbate natural processes which endanger the lives, property, and resources of the
33 citizens of Pierce County.

34 1. Ensure that property owners in hazardous areas are educated and notified about the
35 presence of hazardous areas and the threat which they pose.

36 a. Require notification statements to be placed on the face of all title documents and plats
37 of properties containing hazardous areas.

38 b. Develop public outreach programs which educate the citizenry about the threats posed
39 by hazardous areas and about measures which they can take to avoid the hazards.

40 c. Provide the public with on-line access to County mapping of hazardous areas. Take
41 steps to ensure that the mapping information is readily understandable to the public.

42 d. On a Pierce County Planning and Land Services web site, include detailed information
43 on the location of and dangers of hazardous areas, and measures that could be used to
44 avoid hazards.

1 2. Hazardous areas should be utilized as open space whenever possible. Consider
2 incentives for maintaining hazardous areas as open space by allowing increased densities
3 on less-sensitive areas of the site. . . .

4 C. Develop and adopt in cooperation with the Federal Emergency Management Agency
5 an evacuation plan and lahar warning system for volcanic hazard areas. D. Establish land
6 use practices in geologically hazardous areas so that development does not cause or
7 exacerbate natural processes which endanger the lives, property, and resources of the
8 citizens of Pierce County.

9 1. Discourage high-intensity land use activities in volcanic hazard areas.

10 a. Establish lower densities and low-intensity land uses in volcanic hazard areas which
11 discourage conversion of land to urban uses. . . .

12 6. Community facilities (except parks and recreational facilities) should be located on
13 level or gradable land and avoid geologically hazardous areas.

14 7. Create regulations which prohibit the utilization of bonus density provisions on
15 properties or portions of properties located in Case II volcanic hazard areas.

16 E. Utilize the best available data and methodologies to identify, evaluate, and delineate
17 hazardous areas.

18 F. Direct critical facility development away from areas subject to catastrophic, life-
19 threatening geologic hazards where the hazards cannot be mitigated.

20 1. Prohibit the construction of critical facilities (e.g., hospitals, toxic material storage
21 sites) in volcanic hazard areas.

22 G. Where the effects of hazards can be mitigated, require appropriate standards for site
23 development and for the design of structures in areas subject to geologic hazards. . . .

24 5. Require independent review of geotechnical reports for projects in seismic, mine, and
25 volcanic hazard areas, rather than in-house technical review.

26
27
28
29 The Board notes that the County has prohibited density bonuses in lahar hazard zones, provided
30 maps of flow zones which are available on line, launched significant public and landowner
31 information and outreach, created and installed warning systems where feasible, prohibited
32 critical facilities, and limited special occupancies and covered assemblies. The Board finds that
33 the Pierce County Comprehensive Plan land use policies that might apply to the occupancies at
34 issue here are equivocal and do not provide a basis for overturning the covered assembly
35 occupancies in Case II, Travel Time Zone A, Lahar Inundation Zones..

36
37 Conclusion

38
39 The Board finds and concludes that Petitioner **has not carried its burden of proof** in
40 demonstrating that Pierce County's development regulations are inconsistent with the County's
41 comprehensive plan. **Legal Issue No. 7 is dismissed.**

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C. PEOPLE FOR PUGET SOUND LEGAL ISSUES

1. The Challenged Action

Pierce County Ordinance No. 2004-56s adopts new or revised critical areas regulations concerning stormwater, shorelines, wetlands, and fish and wildlife. Pierce County began work on updating its critical areas ordinances in 2000, in the light of best available science and the legislative requirement to give special consideration to the protection of anadromous fish. RCW 36.70A.130(1) and .172(1).

Pierce County retained a consultant to provide a “best available science” review. Index 150. County staff consulted with experts from Washington State Department of Fish and Wildlife (WDFW) concerning best measures for protection of the functions and values of marine shorelines. Index 982. The County commissioned its own studies, including a detailed marine shoreline inventory conducted by Pentec Environmental [July 3, 2003] which identified and ranked nearshore [i.e., marine] salmon habitat. Index 1287. The County participated in salmon-recovery planning conducted through the Tri-County process, which gave the County access to other scientific studies of the functions and values of Puget Sound marine shorelines as salmon habitat. See, e.g., Index 812 [Vashon and Maury Islands Nearshore Assessment]; Index 1283.

Pierce County developed its proposed critical areas ordinance amendments, called the “Directions” package, under the expectation that all marine shorelines must be classified as habitat essential to salmon recovery, relying on this Board’s decision in *Everett Shorelines Coalition v. City of Everett*, CPSGMHB No. 02-3-0009c, Corrected Final Decision and Order (Jan. 2003) and guidance from CTED and WDFW. Index 1297; Index 104. The Directions proposal which was evaluated in the BAS review and critiqued by WDFW and others identified all marine shorelines as critical fish and wildlife conservation areas with a required vegetative buffer. Index 887.

In the 2003 legislative session, the state legislature amended the Growth Management Act to state that marine shorelines are not *per se* critical areas. RCW 36.70A.480(5). Throughout 2003, Pierce County continued to debate and refine its marine shorelines critical areas and the proposed vegetative buffers. The marine buffer widths proposed and debated ranged from 50 feet to 150 feet. After much debate about the size of the required buffer, the Planning Commission forwarded to the County Council a recommendation for a 100-foot marine shoreline buffer. Index 4, at 13 (Council staff memo, July 12, 2004).

In September, 2004, the Pierce County Council Community Development Committee amended the proposed critical areas regulations by deleting all reference to marine shorelines and eliminating mandatory vegetated buffers. The Council action retained some designations related to marine shorelines, notably eelgrass beds, shellfish areas, and herring, sandlance and smelt spawning areas, but did not update the salmonid habitat areas to include marine nearshore habitat or define an appropriate buffer for such areas.

The amendment was described by its proponent, Councilmember Terry Lee, as follows:

1 I am recommending that marine shorelines be removed from the list of regulated
2 critical areas within Proposal No. 2004-56 and all associated buffer requirements
3 and other standards be deleted. This recommendation is based upon the provisions
4 of Engrossed Substitute House Bill (ESHB) 1993 and subsequent statutory
5 changes to the Growth Management Act that have occurred within the last year,
6 and my belief that existing county code coupled with other changes to Pierce
7 County's critical areas regulations proposed within the Directions package
8 provide adequate and appropriate protection of Pierce County's unincorporated
9 shoreline areas.

10
11 Index 124, at 1.

12
13 People for Puget Sound and Citizens for a Healthy Bay filed a timely petition for review,
14 challenging the deletion of marine shoreline designation and buffer requirements from the
15 directions package as contrary to the Growth Management Act.

16 17 **2. Legal Issues 10 and 11 – RCW 36.70A.172(1)**

18 19 Legal Issue No. 10:

20
21 *Whether the failure of Ordinance 2004-56s to classify any marine shorelines as*
22 *critical areas and to apply a 150-foot landward vegetative buffer to them violates*
23 *the Growth Management Act's requirement that counties use the "best available*
24 *science" in designating and protecting critical areas pursuant to RCW*
25 *36.70A.172(1) and WAC 365-195-900 et seq., given that marine shoreline habitat*
26 *is directly related to the survival of fish and wildlife species and a healthy,*
27 *functioning marine ecosystem?*

28 29 Legal Issue No. 11:

30
31 *Whether the failure of Ordinance 2004-56s to classify any marine shorelines as*
32 *critical areas and to apply a 150-foot landward vegetative buffer to them violates*
33 *the Growth Management Act's requirement that counties give "special*
34 *consideration to conservation or protection measures necessary to preserve or*
35 *enhance anadromous fisheries" as required by RCW 36.70A.172(1) and WAC*
36 *365-195-925, given that marine shoreline vegetative buffers provide vital life*
37 *functions for threatened and endangered salmonids that inhabit Pierce County*
38 *marine waters?*

39 40 Positions of the Parties

41
42 Petitioners contend that, taken together, the goals of the GMA and SMA outline a priority for
43 protecting fish and wildlife habitat and for protecting valuable and fragile shoreline ecosystems
44 in their natural state. Puget Sound PHB, at 9. They point out that the GMA requires Pierce
45 County to designate and protect critical areas by following the best available science and giving
46 special consideration to anadromous fisheries. *Id.* Petitioners assert that local governments must
47

1 substantively consider BAS when adopting development regulations to protect critical areas.
2 RCW 36.70A.060(2). Further, a local jurisdiction cannot ignore the BAS in favor of the science
3 it prefers simply because the latter supports the decision it wants to make. *HEAL*, 96 Wn.App. at
4 533. If the jurisdiction elects to adopt a critical area requirement that is outside the range
5 supported by BAS, Petitioners state, it must provide findings explaining the reasons for its
6 departure and identify the other goals of the GMA it is implementing by such a choice. *WEAN*,
7 122 Wn.App. at 173.

8
9 Petitioners state that the county violated the GMA by failing to explain its deviation from the
10 BAS, and by basing its decision not to protect marine shorelines on nonscientific factors. Puget
11 Sound PHB, at 14. Petitioners contend that Pierce County has cited no scientific support for its
12 argument that setbacks protect the functions and values of marine shoreline critical areas. As a
13 result, the County's reliance on setbacks as a protective measure fails to comply with the GMA.
14 *Id.* at 16; *Lewis v. City of Edgewood*, CPSGMHB No. 01-3-0020, Final Decision and Order,
15 (Feb. 7, 2002).

16
17 Petitioners also contend that when Washington Department of Fish and Wildlife (**WDFW**) has
18 endorsed a particular recommendation for designating and protecting fish and wildlife habitat
19 conservation areas, the County must grant substantial deference to that recommendation. Puget
20 Sound PHB, at 16. Petitioners cite *Diehl v. Mason County*, WWGMHB No. 95-2-0073,
21 Compliance Order, (Aug. 23, 2002) (Board invalidated the 75-foot marine shoreline buffers,
22 finding that they do not reach WDFW's minimum and so are not justifiable as within the range
23 of BAS) and *Ferry County*, 121 Wn.App. at 853 (If a County chooses to deviate from a WDFW
24 recommendation, it must set forth a sound reasoning process based on BAS). Puget Sound PHB,
25 at 16-17.

26
27 Petitioners acknowledge that marine shorelines are not automatically critical areas just because
28 they are shorelines, rather, in order to qualify as critical areas, the land must fit the definition of
29 critical areas provided by the Act. Puget Sound Reply, at 4; RCW 36.70A.030(5); RCW
30 36.70A.480(5). However, in this case they point to numerous studies in Pierce County's record
31 that compel the finding that the vast majority of Pierce County marine shorelines qualify as
32 critical areas because they are fish and wildlife habitat conservation areas. *See e.g.* Index 104
33 (literature review and synthesis by WDFW describing the fish and wildlife habitat functions
34 provided by Pierce County marine shorelines); Index 1192 (Pierce County ESA report finding
35 that Pierce County marine shorelines are "Critical Fish and Wildlife Habitats" because they are
36 waters with which listed salmon have a primary association); Index 150 (Pierce County BAS
37 assessment concluding that designating marine shorelines as fish and wildlife habitat
38 conservation areas and protecting them with a 150-foot buffer is consistent with the BAS).

39
40 Petitioners point out that the requirements of the Act call for "special consideration" of
41 anadromous fisheries when developing critical areas ordinances, which means protecting the
42 shoreline and nearshore habitats that provide vital habitat requirements for salmon. RCW
43 36.70A.172(1). In order to comply with this requirement, Petitioners assert, jurisdictions must
44 protect habitat important for all life stages of anadromous fish. Puget Sound PHB, at 12; WAC
45 365-195-925(3). Marine shorelines provide a vital ecological function for anadromous fish;
46 therefore, Petitioners argue, under the BAS and special consideration standard, the County was
47

1 required to protect the functions and values of marine shorelines by applying an appropriate
2 marine shoreline buffer. Puget Sound PHB, at 15-16; *Friends of Skagit Co. v. Skagit Co.*,
3 WWGMHB No. 96-2-0025, Compliance Hearing Order, (Aug. 9, 2000); and *Skagit Audubon*
4 *Soc’y v. Skagit County*, WWGMHB No. 00-2-0033c, Final Decision and Order, (Aug. 9, 2000).
5 The Petitioners point to BAS in the County record indicating that habitat functions and values
6 are optimized by vegetative buffers of at least 150 feet. Puget Sound PHB, at 14.

7
8 Petitioners assert that Pierce County’s ordinance does not protect the functions and values of
9 riparian ecosystems because: (1) it improperly defers buffer determinations, if any, to a future
10 permitting process, notwithstanding the narrow range of discretion already provided by the BAS;
11 and (2) even if the County may properly defer buffer determinations, if any, to a future
12 permitting process, the ordinance as drafted creates loopholes and exemptions that do not
13 guarantee the protection of fish and wildlife habitat conservation areas within marine shorelines.
14 Puget Sound Reply, at 11-12; *see WEAN*, 122 Wn.App. at 175.

15
16 Petitioners conclude that the County failed to act within the range of the BAS and to apply
17 special consideration to the needs of anadromous fisheries when it removed marine shorelines
18 from its list of designated critical areas and omitted buffer protections for them. Puget Sound
19 PHB, at 26-27; RCW 36.70A.172(1)]

20
21 The County responds that as a matter of law, it was not required to impose an automatic,
22 mandatory, 150-foot buffer on all of its marine shorelines. The County states that it reviewed,
23 considered, included, and applied BAS in its implementation of the development regulations.
24 County Response, at 60.

25
26 The County explains:

27
28 However, with the passage of ESHB 1933, it became absolutely clear that not all
29 marine shorelines are critical areas. Partially as a result of that legislation and in
30 recognition that the County was otherwise protecting its designated critical areas,
31 Pierce County eliminated the all-inclusive proposed 150-foot buffer. This action
32 was not rash; it was thoughtfully considered and thoroughly justified. It was first
33 passed by the Council’s Community Development Committee on September 13,
34 2004 {*see* Index 1290, at 17.

35
36 The detailed rationale for the removal is found in a September 10, 2004,
37 memorandum from Councilmember Terry Lee to the members of the Pierce
38 County Council’s Community Development Committee {Index 124 (attached to
39 People’s Prehearing Brief)}. The memo explained that the County already had
40 effective protective measures in place that protected critical areas on marine
41 shorelines.

42
43 County Response, at 107-108.

44
45 The County relies on amendments to the GMA (ESHB 1933) to support its argument that
46 shorelines are not critical areas *per se*, and that shorelines only become critical areas if some
47

1 other critical area is located on them. County Response, at 63-64; RCW 36.70A.480. The County
2 also argues that the distinction between marine shorelines and freshwater shorelines is important.
3 *Id.* at 72-73. The County notes that several of the studies cited by Petitioners refer only to
4 freshwater areas, not to marine shorelines, when they analyze “riparian” areas. *Id.*
5

6 The County further states that there are very few empirical studies within Puget Sound which
7 relate directly to the question of varying marine riparian zone widths and their associated
8 functions for supporting fish and wildlife. *Citing*, Index 797. While the Puget Sound Action
9 Team (**PSAT**) suggested that the County impose marine buffers in salmon-bearing areas, it did
10 not require the County to impose a marine shoreline buffer along *all* of the County’s shorelines.
11 County Response, at 76. The County states that its decision to impose case by case standards of
12 buffer size, rather than employing a “one size fits all” buffer, is a policy choice that is within the
13 discretion of the County Council. *Id.* at 77.
14

15 The County cites its various protections for marine shorelines, including bulk regulations, critical
16 areas protective measures, additional 15-foot setback from all critical area buffers, use and
17 activity regulations, and fish and wildlife habitat buffers.²⁰ The County argues that these
18 regulations, coupled with the County’s SMA-required regulations, protect the necessary
19 functions of fish and wildlife habitat areas. County Response, at 107.
20

21 The County concludes that it more than adequately explained its reasons for departing from the
22 BAS. *Id.* at 109. In any event, the County asserts, under *WEAN*, it was not required to adopt
23 regulations that are consistent with the BAS because such a rule would interfere with the
24 County’s ability to consider the other goals of the GMA and to adopt an appropriate balance
25 between all GMA goals. *Id.* at 108.
26

27
28 ²⁰ The list included in the Lee Memorandum [Index 124] contained the following items:

- 29 • 50 foot shoreline setback (Title 20)
- 30 • Impervious surface limitations for residential shoreline development (Title 20)
- 31 • Prohibition or significant limitations on intensive development types (marinas, commercial and light
32 industrial uses, and similar uses) along approximately 51 percent of Pierce County’s unincorporated
33 shoreline (areas designated as Conservancy or Natural Shoreline Environment) (Title 20)
- 34 • Prohibition on residential development and most other types of development within the most
35 environmentally and culturally important marine shoreline areas (areas designated as Natural
36 Shoreline Environment (Title 20)
- 37 • Requirement that lots within new residential subdivisions be separated from the shoreline by a
38 commonly owned natural open space tract (Title 20)
- 39 • Requirement along approximately 97 percent of the marine shoreline that new residential lots be at
40 least 1 acre or larger in size (Title 18A)
- 41 • Preservation and buffering requirements for steep slopes along approximately 79 percent of the marine
42 shorelines (existing and proposed critical area regulations)
- 43 • Protection of eelgrass beds (existing and proposed critical area regulations)
- 44 • Protection of herring, sandlance, and smelt spawning areas (existing and proposed critical area
45 regulations)
- 46 • Preservation and buffering requirements for estuaries and other wetland areas (existing and proposed
47 critical area requirements)
- Limitations on the construction of bulkheads (proposed critical area regulations)
- Stormwater and erosion control requirements (existing and proposed Title 17A and accompanying
manual)

1 Board Discussion and Analysis

2
3 Pierce County’s dilemma is reflective of the difficulty of developing complex regulatory systems
4 in the face of changes in the applicable legal parameters as well as advances in the relevant
5 science. Pierce County began its critical areas ordinance (CAO) review process under the
6 assumption that all its Puget Sound marine shorelines are salmon habitat conservation areas,
7 pursuant to *Everett Shorelines Coalition* and guidance from CTED [Index 1297, at A-98]. Pierce
8 County enacted its CAO update – Ordinance 2004-56s - after the legislature decreed that
9 shorelines of the state are not *per se* critical areas but must be assessed, first, under GMA
10 criteria, and subsequently, under SMA criteria, to determine the appropriate level of protection.
11 ESHB 1993; RCW 36.70A.480.

12
13 The Board agrees with Pierce County that marine shorelines are not *per se* fish and wildlife
14 habitat conservation areas. The Board then asks (1) whether Pierce County used best available
15 science to protect critical fish and wildlife habitat conservation areas on its marine shorelines; (2)
16 whether Pierce County’s regulations gave priority to anadromous fish; (3) whether Pierce
17 County’s regulations protect the functions and values of marine shorelines as salmon habitat, and
18 (4) whether a vegetative buffer is required.

19
20 Pierce County’s Ordinance No. 2004-56s identifies a number of critical fish and wildlife habitat
21 conservation areas on its marine shorelines. These include eelgrass beds, shellfish beds, surf
22 smelt spawning areas and the like. However, Ordinance No. 2004-56s as enacted fails to
23 properly identify critical salmon habitat along marine shorelines, presumably because the
24 Ordinance was drafted to designate and protect *all* Pierce County marine shorelines. When the
25 County Council voted to remove marine shorelines from critical areas, it did so (a) without
26 ascertaining whether the remaining protected salt-water areas included all the areas important for
27 protection and enhancement of anadromous fisheries and (b) without assessing whether the
28 overlay of elements remaining in the CAO [i.e., steep slopes, erosion areas, eelgrass beds, etc.]
29 would protect the “values and functions” necessary for salmon habitat.

30
31 Critical areas ordinances – The GMA Standard. The Board first looks at the applicable law and
32 then at the County’s scientific record. In *Pilchuk Audubon Society v. Snohomish County (Pilchuk*
33 *II)*, CPSGMHB Case No. 95-3-0047, Final Decision and Order (Dec. 6, 1995), at 12, the Board
34 held that *all* lands meeting the definition of critical areas must be so designated. Because RCW
35 36.70A.060(2) requires counties to “adopt development regulations that protect critical areas that
36 are required to be designated,” the Board went on to hold that *all* designated lands must be
37 protected. *Id.* at 13. Protection was defined as measures “to preserve the structure, value and
38 functions,” that is, “the structural integrity of the whole critical areas system and its ability to
39 continue serving the values and functions” that are at stake. *Id.*²¹

40
41 The requirement to protect fish and wildlife habitats means that the functions and values of such
42 ecosystems must be maintained. CAOs cannot allow a net loss of the value and function of such
43 ecosystems. *Tulalip Tribes v. Snohomish County*, CPSGMHB Case No. 96-3-0029, Final
44 Decision and Order (Jan. 8, 1997), at 11. The Courts have affirmed this analysis. “The GMA
45

46 ²¹ At issue in *Pilchuk II* were wetlands and wetland buffers. The consultant’s report stated: “The data on buffer
47 effectiveness are still relatively sparse, with studies scattered in sites all over the U.S.” *Id.* at 14.

1 requires that the regulations for critical areas must protect the ‘functions and values’ of those
2 designated areas. RCW 36.70A.172(1). This means *all* functions and values.” *WEAN*, 122
3 Wn.App. at 174-75.

4
5 Inclusion of best available science is a substantive requirement:

6
7 RCW 36.70A.172(1) requires that BAS shall be included ‘in developing policies
8 and development regulations to protect the functions and values of critical areas.’
9 This court held ‘that evidence of the best available science must be included in the
10 record and must be considered substantively in the development of critical areas
11 policies and regulations.’

12
13 *WEAN*, citing *HEAL*, 96 Wn.App. at 532.

14
15 In *WEAN*, the Court of Appeals upheld the Western Washington Growth Management Hearings
16 Board’s determination that Island County’s stream buffer regulations did not include best
17 available science. In *WEAN*, the County’s record included several stream buffer studies and
18 specific recommendations from WDFW and DOE; however, the County chose to rely on its own
19 consultant for a much narrower buffer width. *Id.* The court pointed out that the consultant’s
20 wildlife habitat study “was limited to the [marine] shoreline environment of Island County and
21 has questionable application to interior stream buffer issues.” *Id.* The court further noted that the
22 consultant’s stream recommendations were formulated based on water quality functions, rather
23 than looking at “the entirety of functions attributed to stream buffers – including the protection
24 of wildlife species other than fish.” *Id.* The court rejected Island County’s argument that its
25 existing regulations were effective, agreeing with the Board that “other regulations provided by
26 the County ... and the County’s ‘holistic’ approach, failed to provide assurances of “minimal
27 effective protection.” *Id.*

28
29 *Marine Shorelines as Critical Salmon Habitat*. The second sentence of RCW 36.70A.172(1)
30 requires local jurisdictions to give “special consideration” to the preservation and enhancement
31 of anadromous fish. There is a strong record in this case demonstrating that some or all of Pierce
32 County’s marine shorelines are critical habitat for salmon.

33
34 Pierce County’s Endangered Species Act Response Plan: Evaluation of County Policies,
35 Regulations and Programs, issued in 2000 by consultant URS, identified the County’s marine
36 shorelines as critical habitat with ‘*primary association*’ for *federally listed salmon* species. Index
37 1192, at 5-3. The report identified several “gaps” in the County’s regulations for salmon
38 protection. First, the regulations “do not directly address mitigation of impacts on salmon
39 habitat.” *Id.* at 9-1. Second, construction of single family homes and accessory uses do not
40 require a shoreline permit, and compliance with County shoreline regulations is not actively
41 monitored. *Id.* at 9-3. Third, shoreline inventories should be updated to incorporate “new
42 information about salmonid habitat distribution, quality, and importance.” *Id.* The report
43 recommended protecting the functions of this habitat with 150-foot vegetated buffers. *Id.* at 5-7.

44
45 Two years later the URS Best Available Science Review, April 2002, found Pierce County’s
46 then-proposed 150-foot marine shorelines buffers to be consistent with best available science and
47

1 noted: “Virtually the entire unmodified marine and estuarine shoreline and parts of the modified
2 shoreline in Pierce County can potentially be *used by salmonid species for feeding* and migration
3 corridors.” Index 150, at III-4, 5.
4

5 As the multi-year Directions process reached its conclusion in 2004, Pierce County’s Final EIS
6 for its CAO revisions, issued before the amendments deleting marine shorelines, noted: “Today’s
7 regulations ... only require construction to be set back from the ordinary high water mark and do
8 not require vegetation to be in place. The current proposal [100 foot buffer] would be *more*
9 *effective in protecting fish* and wildlife species and providing habitat along marine shorelines.”
10 Index 134, at 61. The County’s notice of CAO hearings in the summer of 2004 states, “Scientific
11 study has shown that the nearshore habitat found along Puget Sound’s marine shorelines is
12 *essential in the lifecycle of salmon* and other fish species.” Index 145, at 1.
13

14 As part of its Endangered Species Act response, Pierce County commissioned a “Nearshore
15 Salmon Habitat Assessment” of the Kitsap Peninsula, Gig Harbor, and Islands Watershed by
16 Pentec Associates and Batelle Institutes [**Pentec Report**]. The Pentec Report, issued July 3,
17 2003, [Index 1287], used a tidal habitat model to assess marine shoreline habitat quality and
18 function for juvenile salmonids. The Pentec Report surveyed 179 miles of shoreline divided into
19 413 smaller reaches. The goal was to determine “the best and poorest salmon habitat” and areas
20 with “high potential for habitat restoration.” *Id.* at 2. Pentec assessed shoreline conditions and
21 salmonid habitat quality through review of aerial shoreline photographs²² and existing habitat
22 data, and through field surveys in 2002 using the indicators of the Tidal Habitat Model as a
23 guide. *Id.* at 5. On-the-water field surveys by skiff, followed by underwater video surveys,
24 completed the data base. *Id.* at 7.
25

26 The Tidal Habitat Model is “focused *only* on indicators that are of direct or indirect relevance to
27 anadromous salmonids, particularly juveniles.” *Id.* at 6. Ecological functions addressed by the
28 model include feeding, migration, predator avoidance and saltwater adaptation. Index 1287,
29 Appendix B, at 1. This model “provides an indicator of relative shoreline habitat quality for
30 salmonids, especially juvenile Chinook and chum salmon, that has been used to identify highest
31 quality shoreline areas that should be considered for protections. Specifically, [highest scoring
32 areas] should be examined closely to ensure that existing land-use regulations provide a level of
33 protection needed to maintain present functional habitat values.” *Id.* at 34. The result of the
34 Pentec Nearshore Assessment was a ranking of Pierce County marine shoreline reaches based on
35 their relative habitat value for salmonids, plus a preliminary identification of areas capable of
36 restoration.
37

38 Despite this detailed information about the functions and values of salmonid habitat specific to
39 each shoreline reach, Pierce County eliminated “marine shorelines” from the fish and wildlife
40 habitat conservation areas listed in its critical areas ordinance without determining whether the
41 remaining designated critical areas adequately meet the needs of salmon. Undoubtedly some of
42 Pierce County’s remaining designated and mapped salt-water critical areas, such as eelgrass
43 beds, surf smelt beaches, salt marshes and steep bluffs, overlap with habitats critical to the
44 survival of anadromous fish. But there is nothing in the record to indicate that the high-value
45

46 ²² These aerial video surveys, June 1997 and June 1999, have been identified by CTED as best available science for
47 designating and protecting critical areas. *Id.* at 4.

1 shoreline reaches identified by the Pentec Report for salmonid habitat [much less the restorable
2 habitat stretches] are designated and protected in the Pierce County critical areas regulations.
3

4 The Board finds that Pierce County’s deletion from the proposed CAO of marine shorelines as
5 fish and wildlife habitat conservation areas fails to comply with the second clause of RCW
6 36.70A.172(1) – the requirement to “give special consideration to ... measures necessary to
7 preserve or enhance anadromous fisheries.”
8

9 Protecting marine shoreline salmon habitat functions and values. Pierce County based its
10 deletion of marine shorelines from the proposed CAO in part on the assertion that other existing
11 and revised CAO provisions (as amended in Ordinance No. 2004-56s) together with site-by-site
12 assessments, are adequate to protect salmon habitat. The Ordinance 2004-56s Findings state:
13

14 Additionally, certain critical fish and wildlife habitat areas which occur along
15 marine shorelines (such as eelgrass beds, surf smelt and sandlance spawning
16 areas, and commercial and recreational shellfish areas) are regulated pursuant to
17 18E.40 Regulated Fish and Wildlife Species and Habitat Conservation Areas.
18 Using Pierce County's geographic information system; it is estimated that 50
19 percent or more of the marine shoreline falls within one or more regulated critical
20 areas. The application of these chapters results in substantial benefits to fish and
21 wildlife habitat while protecting life and property.
22

23 Index 124, at 6.
24

25 Deferring salmon habitat protection to a site-by-site analysis based on disaggregated factors is
26 inconsistent with Pierce County’s best available science. The County’s record documents the
27 interactive functions of marine shorelines [e.g., Index 829] and demonstrates that “near shore
28 areas, beaches and bluffs form a dynamic system” that is essential to shore birds, forage fish, and
29 salmonids. Index 756, at 9-17. Nothing in the science amassed by the County supports
30 disaggregating the values and functions of marine shorelines. “The highest quality shorelines ...
31 [featured] multiple process-related indicators (feeder bluffs, salt marsh, eelgrass beds) that
32 greatly increase their habitat function.” Pentec Report, Index 1287, at 10.
33

34 Another study in Pierce County’s file – Reconnaissance Assessment of the State of the
35 Nearshore Ecosystem, prepared for King County by Pentec Environmental in May, 2001, is even
36 more directive:
37

38 The nearshore must be addressed from an ecosystem perspective. ... This will
39 require a shift from our approach of single-species or single-habitat management
40 to an integrated ecosystem approach.... It is important to emphasize that most
41 Pacific salmon are marine fishes that are dependent upon good estuarine and
42 marine habitat conditions and prey resources. This dependency requires us to pay
43 particular attention to other elements in the ecosystem.
44

45 Index 812, at 30. The author goes on to reference forage fish such as surf smelt and sand lance,
46 and the need to protect their spawning habitat; eelgrass and macroalgae, which provide critical
47

1 habitat for multiple species; natural erosion of banks and bluffs, a critical habitat forming
2 process; and crab, clam and other invertebrates of the nearshore ecosystem. *Id.* at 31.

3
4 The habitat functions and values include soil and slope stability, sediment control, wildlife,
5 microclimate, nutrient input, fish prey production, habitat structure, large woody debris
6 recruitment, and shade; the multiple functions must be protected “as a whole” to “maintain all
7 natural processes and functions.” Index 802, at 5.²³ “Nearshore habitats span a continuum from
8 uplands, through riparian and intertidal zones, to subtidal areas. . . . [and nearshores] are critical
9 to the life histories of . . . perhaps most significantly, salmonids.” Index 1287, at 1.

10
11 The Puget Sound Action Team²⁴ summarizes the salmon habitat analysis: “Nearshore marine
12 habitat may serve as migration corridors, feeding areas, physiological transition zones, refugia
13 from predators, or refuge from high energy wave dynamics [citing five studies].. . . Emergent
14 vegetation and riparian trees and shrubs have been identified as vital components that provide
15 detritus and habitat for chinook food organisms [two studies].” Index 707.

16
17 Petitioners argue that the holistic value of marine shorelines as fish and wildlife habitat
18 conservation areas is not adequately recognized by Pierce County’s piecemeal protection
19 scheme. Protecting an eelgrass bed by prohibiting protruding docks, for example, addresses only
20 one threat. An eelgrass bed will not thrive or serve its purpose as a fishery nursery if the beach
21 and bluff above are degraded. The Board agrees.

22
23 Best available science laid out by the County also specified that “a *continuum* of suitable habitat”
24 is essential for salmon survival. Pentec Report, Index 1287, at 35. Pierce County’s piecemeal
25 scheme doesn’t address the need for continuity.

26
27 The Board finds that Pierce County’s site-by-site assessment of marine shorelines during the
28 permit application process, as established in Ordinance 2004-56s, does not meet the requirement
29 of using best available science to devise regulations protective of the integrated functions and
30 values of marine shorelines as critical salmon habitat. *See WEAN*, 122 Wn.App. at 174-175.

31
32 *Marine riparian vegetation.* A final issue is whether vegetative buffers are required. Pierce
33 County declined to establish a regulatory requirement for vegetative buffers on marine
34 shorelines, except to the extent they might be required in connection with a narrower protective
35 regime (eelgrass beds, for example, or bald eagle nesting sites), and has substituted a 50-foot
36 setback from ordinary high water mark.

37
38 There is a *wealth of scientific opinion* in the County’s record supporting vegetative buffers to
39 protect multiple functions and values of marine shoreline salmon habitat. Pierce County’s July,
40 2004, FEIS notes that vegetated marine buffers “would be more effective in protecting fish and
41 wildlife species and providing habitat along marine shorelines” than the 50-foot construction
42

43
44 ²³ J. Brennan and H. Culverwell, *Marine Riparian: An Assessment of Riparian Functions in Marine Eco-systems*,
45 (working draft, April, 2003). The Board notes that this study has a nine-page bibliography with many studies
46 specific to Puget Sound marine shorelines.

47 ²⁴ The Puget Sound Action Team is a partnership of state agencies and local, federal, and tribal governments that is
charged by the legislature with responsibility for implementing an environmental agenda for Puget Sound.

1 setback. Index 134, at 31. The Puget Sound Action Team’s issue papers [Index 707] identify
2 overhanging vegetation as a positive component of beaches that support key forage fish species
3 [citing Robbards, 1999 and Pentilla, 2001].
4

5 Terrestrial insects that drop from overhanging shrubs and trees are an important component of
6 the diet of juvenile salmon in Puget Sound. Index 104, at 3. In a March 2004 “Technical
7 memorandum summarizing regional threats to nearshore and marine habitats and landscapes and
8 the possible effects on juvenile salmon functions,” the Puget Sound Action Team lists “removal
9 of riparian vegetation decreasing shading and delivery of organic matter” as a significant threat.
10 Index 796, at 7.
11

12 Pierce County’s record includes a set of printouts from the Department of Ecology’s website for
13 Puget Sound Shorelines. Index 804-808. The Salmon page [Index 804] identifies five
14 components of marine shoreline salmon habitat loss; one is “Loss of shoreline vegetation.” The
15 web page explains: “Loss of vegetation is of particular importance to juvenile salmon. Shoreline
16 vegetation stabilizes the shoreline, provides shade, protective cover, organic input, and food
17 (insects) to young salmon moving in close to shore.” Index 804. Under “What you can do,” the
18 web page includes “Keep or install a buffer of native plants along the beach or bluff.” *Id.*²⁵
19

20 Some of the science supporting DOE’s advice is summarized in “Marine and Estuarine Shoreline
21 Modification Issues,” G. D. Williams and R. M. Thom, Batelle Marine Sciences Laboratory,
22 April 17, 2001. Index 846.
23

24 Riparian vegetation affects the quality of aquatic habitats by increasing slope
25 stability, providing erosion protection, and buffering against pollution and
26 sediment runoff. Marine riparian vegetation also performs a number of
27 increasingly recognized habitat functions at the interface of aquatic and terrestrial
28 zones. For example, overhanging riparian vegetation provides shading that
29 regulates microclimates important to intertidal invertebrate distribution and surf
30 smelt spawning. Vegetated riparian zones deliver organic matter and invertebrate
31 prey to the nearshore and create complex structure that is important for fish (e.g.,
32 refuge and spawning) and wildlife (e.g., bird nesting and roosting).
33

34 Index 846, at 9, citations to nine studies omitted.
35

36 [Marine riparian vegetation] is a key element of shoreline ecological function and
37 has a significant impact on habitat value, both in the riparian zone itself, and in
38 adjacent aquatic and terrestrial areas. Riparian vegetation contributes to
39 maintenance of fisheries habitat and water quality, functioning as shade, cover for
40 fish and wildlife, organic matter input, and source of insect prey. It may have
41 particularly high value in Puget Sound because of its contributions to marine
42 forage fish that utilize the upper intertidal for spawning and to juvenile salmonids
43 for cover and foraging.
44

45
46 ²⁵ The importance of trees and a vegetative buffer on Puget Sound shorelines is repeated in the DOE web pages for
47 bald eagle [Index 805], surf smelt [Index 807], great blue heron [Index 808], and pigeon guillemot [Index 809].

1 *Id.* at 62, citations to five studies omitted.

2
3 In the County's record is a Canadian research paper, Marine and Estuarine Riparian Habitats and
4 Their Role in Coastal Ecosystems, Pacific Region,²⁶ which cites marine riparian buffer zones and
5 guidelines in southeast Alaska, Chesapeake Bay, and Washington's WDFW. Index 783, at 5.

6
7 The Board finds the County's "immature science" argument unpersuasive.²⁷ A decade ago the
8 science of wetland buffers was uncertain [*see Pilchuk II*, where the consultant's report stated:
9 "The data on (wetland) buffer effectiveness are still relatively sparse, with studies scattered in
10 sites all over the U.S."] but the Board and the Court of Appeals in WEAN required Island
11 County to use the best science available. *WEAN*, 122 Wn.App. at 173.

12
13 In *Ferry County, supra*, Ferry County rejected WDFW's list of "Priority Habitats and Species,"
14 relying instead on a single consulting expert. The Board found Ferry County had not used best
15 available science and the Court upheld the Board's finding of noncompliance. *Id.* "The County
16 may decline to follow a DFW recommendation, but only if the County based its decision on a
17 sound, reasoned process known as the best available science." 121 Wn.App. at 853. Pierce
18 County here has rejected the recommendations of WDFW, and of the other state agencies with
19 recognized expertise, without any "sound, reasoned process."

20
21 Pierce County bases its last-minute deletion of marine shorelines and vegetated marine shoreline
22 buffers from its critical areas ordinance on a June 17, 2004, email from a Puget Sound Action
23 Team scientist. The email acknowledges that there is no single authoritative formula for
24 establishing marine riparian buffers. Index 797. Pierce County cites this email in the Findings
25 for Ordinance 2004-56s.

26
27 According to an email received from a Puget Sound Action Team scientist, the
28 "science on marine riparian functions lags considerably from that of the function
29 of similar buffers on freshwater streams and wetlands. ... Very few empirical
30 studies exist within Puget Sound directly on the questions of varying riparian
31 zone widths and their associated functions for supporting fish and wildlife water
32 quality and hazard risk reductions. ... It is important to remember that shoreline
33 elevation, slope, underlying geology, presence of invasive species, bulkheads or
34 other armoring and general level of shoreline and adjacent upland development
35 have bearing on all of these functions."

36
37 Index 124, at 6.

38
39 Pierce County rejected the recommendation of the subsequent July 9, 2004, letter from the *chair*
40 of the Puget Sound Action Team, Brad Ack, which advises: "Buffer widths set for marine
41

42
43 ²⁶ C. Levings and G. Jamieson, Fisheries and Oceans Canada, 2001.

44 ²⁷ The Board takes official notice that nearshore salmon habitat assessments are being or have been conducted in
45 many Puget Sound locations since the federal ESA listing of Puget Sound Chinook salmon in 1999. A number of
46 these reports, in Pierce County's record here, begin with the observation that there is more science on interior
47 wetlands and stream riparian buffers than on marine shorelines, but cumulatively the studies appear to the non-
scientist to have built a wealth of information.

1 shorelines should be at least as protective as the 150 foot buffer widths Pierce County has
2 designated for freshwater shorelines in salmon-bearing areas.” Index 190, at 2. [See also PSAT
3 recommendations for marine vegetative buffers for salmon survival, Index 707.]
4

5 Pierce County rejected the advice of Washington’s Department of Ecology, recommending
6 vegetated marine riparian buffers to protect juvenile salmon. Index 804.
7

8 Pierce County also rejected the August 6, 2004, letter from WDFW to the Pierce County
9 Council, which discusses each of the functions and values of marine riparian areas as salmon
10 habitat, referencing current studies, and expresses concern that Pierce County is proposing only a
11 100-foot marine buffer. Index 104. WDFW indicates that the marine and shoreline riparian
12 buffer functions “are directly related to the survival and life history of several fish and wildlife
13 species found in and around Pierce County waters.” *Id.* at 2. WDFW concludes: “WDFW ...
14 cannot support buffers of less than 100 feet [on marine shorelines] because of the lack of science
15 to support reduction of buffers and the related significant impacts to public fish and wildlife
16 resources.” *Id.* at 5.
17

18 The Board is persuaded that Pierce County’s action was **clearly erroneous**. The Board finds and
19 concludes that Pierce County failed to include best available science in its policies and
20 regulations concerning fish and wildlife habitat conservation areas and failed to give special
21 consideration to the preservation and enhancement of anadromous fish.
22

23 Finally, the Board rejects Pierce County’s assertion that it used allowable discretion in balancing
24 other GMA goals. The *WEAN* court addressed the parameters of this discretion. In *WEAN*, Island
25 County sought to exempt agriculture from buffer requirements. The court upheld the Board’s
26 approval of the County’s exemption for designated agricultural resource lands, noting the GMA
27 parallel requirements to designate and protect *both* natural resource lands and critical areas.
28 *WEAN*, 122 Wn.App. at 173. However, the court held that the Board properly invalidated Island
29 County’s exemption for farms in the rural area, as the GMA contains no comparable mandate to
30 protect rural farming. The County’s attempted “balancing” was outside the requirements of the
31 GMA. *Id.*
32

33 Pierce County does not identify other goals of the GMA it purportedly “balanced,” and there are
34 none in its stated reasons for deletion of marine shorelines designation [Index 124], in the
35 County Council minutes on this matter [Index 1290, at 10-16] nor in the Ordinance 2004-56s
36 Findings.
37

38 Conclusion

39
40 The Board finds and concludes that Ordinance No. 2004-56s **does not comply** with RCW
41 36.70A.172(1). In adopting Ordinance No. 2004-56s, Pierce County failed to use best available
42 science to designate fish and wildlife habitat conservation areas, failed to use best available
43 science to “protect the functions and values” of marine shorelines as critical salmon habitat, and
44 failed to “give special consideration to conservation or protection measures necessary to preserve
45 or enhance anadromous fisheries.” The Board enters an **order finding noncompliance** and
46 **remands** Ordinance 2004-56s to Pierce County to take action consistent with this decision.
47

1
2 **3. Legal Issue No. 12 – RCW 36.70A.060(2)**
3

4 Legal Issue No. 12:
5

6 *Whether the failure of Ordinance 2004-56s to classify any marine shorelines as*
7 *critical areas and to apply a 150-foot landward vegetative buffer to them violates*
8 *the Growth Management Act’s substantive requirement to protect critical areas*
9 *pursuant to RCW 36.70A.060(2), given that marine shoreline habitat is rapidly*
10 *disappearing in Pierce County, where more than half of the native shoreline has*
11 *already been degraded due to development?*
12

13 Board Discussion.
14

15 The Board’s Rules of Practice and Procedure provide:
16

17 A petitioner . . . shall submit a brief on each legal issue it expects a board to
18 determine. *Failure by such a party to brief an issue shall constitute abandonment*
19 *of the unbriefed issues.* Briefs shall enumerate and set forth the legal issue(s) as
20 specified in the prehearing order if one has been entered.
21

22 WAC 242-02-570(1), (emphasis supplied).
23

24 Additionally, the Board’s February 18, 2005 Prehearing Order in this matter states, “Legal
25 issues, or portions of legal issues, *not briefed in the Prehearing Brief* will be deemed to have
26 been abandoned and cannot be resurrected in Reply Briefs or in oral argument at the Hearing on
27 the Merits.” PHO, at 8 (emphasis supplied).
28

29 Also, the Board has stated, “Inadequately briefed issues would be considered in a manner similar
30 to consideration of unbriefed issues and, therefore, should be deemed abandoned.” *City of*
31 *Bremerton, et al., v. Kitsap County*, CPSGMHB Case No. 04-3-0039c, Final Decision and Order
32 (Aug. 9, 2004), at 5; *citing Sky Valley, et al., v. Snohomish County*, CPSGMHB Case No. 95-3-
33 0068c, Order on Motions to Reconsider and Correct (Apr. 15, 1996), at 3.
34

35 Legal Issue No. 12 addresses the County’s alleged failure to comply with RCW 36.70A.060(c).
36 Respondent alleges that Petitioners have abandoned Legal Issue 12 [and other issues] due to
37 inadequate briefing. County Response, at 58-59.
38

39 In review of the Puget Sound PHB, the Board found only conclusory statements and two
40 citations to RCW 36.70A.060(2). Puget Sound PHB, at 9, 37. Therefore, the Board deems Legal
41 Issue No. 12 **abandoned**.
42

43 Conclusion
44

45 The Board concludes that Legal Issue No. 12 is abandoned. **Legal Issue 12 is dismissed.**
46
47

1 **4. Legal Issue No. 13 – ESHB 1933 and GMA Planning Goals**

2
3 Legal Issue No. 13:

4
5 *Whether the failure of Ordinance 2004-56s to classify any marine shorelines as*
6 *critical areas and to apply a 150-foot landward vegetative buffer to them violates*
7 *the Growth Management Act’s planning goals pursuant to RCW 36.70A.020(8)*
8 *(to protect fisheries industries), RCW 36.70A.020(9) (to conserve fish and wildlife*
9 *habitat); RCW 36.70A.020(10) (to protect the environment and enhance water*
10 *quality), and RCW 36.70A.480(1) (to protect and preserve shorelines, including*
11 *their natural character, resources, and ecology), given that marine shoreline*
12 *habitat is directly related to the survival of fish and wildlife species and a healthy,*
13 *functioning marine ecosystem?*

14
15 **RCW 36.70A.480 - Shorelines of the state.**

16
17 (1) For shorelines of the state, the goals and policies of the shoreline management
18 act as set forth in RCW 90.58.020 are added as one of the goals of this chapter as
19 set forth in RCW 36.70A.020 without creating an order of priority among the
20 fourteen goals. . . .

21

22
23 (5) Shorelines of the state shall not be considered critical areas under this chapter
24 except to the extent that specific areas located within shorelines of the state
25 qualify for critical area designation based on the definition of critical areas
26 provided by RCW 36.70A.030(5) and have been designated as such by a local
27 government pursuant to RCW 36.70A.060(2).

28
29 (6) If a local jurisdiction's master program does not include land necessary for
30 buffers for critical areas that occur within shorelines of the state, as authorized by
31 RCW 90.58.030(2)(f), then the local jurisdiction shall continue to regulate those
32 critical areas and their required buffers pursuant to RCW 36.70A.060(2).

33 Positions of the Parties

34
35 Puget Sound argues that, taken together, the goals of the GMA (RCW 36.70A.020(8)-(10)) and
36 of the Shoreline Management Act (SMA) (RCW 90.58.020) express a substantive commitment
37 to protection of the environment and conservation of fish and wildlife habitat. Puget Sound PHB,
38 at 7-9. Puget Sound reasons that RCW 36.70A.480(1) requires the goals of GMA and SMA to be
39 read together, and together, the goals include maintaining and enhancing fisheries, conserving
40 fish and wildlife habitat, protecting the environment, enhancing water quality, and preserving the
41 natural character, resources, and ecology of the shoreline. *Id.* at 27. Petitioners state that the
42 GMA’s goals have substantive authority and must be considered and incorporated into all GMA
43 actions. *Id.* citing *King County v. Central Puget Sound Growth Management Hearings Board*,
44 142 Wn.2d 543, 556, 14 P.3d 133 (2000) (where language of goal mandates “specific, direct
45 action,” county has duty to implement goal).
46
47

1 Petitioners contend that ESHB 1933 requires Pierce County to designate and protect its shoreline
2 critical areas pending completion of its shoreline master program. Puget Sound PHB, at 17.
3 Because ESHB 1933 did not alter the BAS requirement or the heightened protections for
4 anadromous fish in RCW 36.70A.172(1), it reinforces the Legislature's clear intent that local
5 jurisdictions are to protect marine shorelines consistent with these mandates. *Id.* The legislature
6 is deemed to have knowledge that the vast majority of marine shorelines constitute vital fish and
7 wildlife habitat conservation areas, Petitioners reason; thus, the language of RCW
8 36.70A.480(5), together with the Act's strong mandate for designating and protecting critical
9 areas, compels the conclusion that a local jurisdiction must designate these shoreline critical
10 areas and protect them until it completes its SMP. *Id.* Upon completion of the SMP, final
11 jurisdiction for the protection of shoreline critical areas transfers to the SMA. *Id.*

12
13 Petitioners assert that although ESHB 1933 declared that shorelines are not critical areas simply
14 because they are shorelines of statewide significance, RCW 36.70A.480(5), it clarified that: (1)
15 shorelines meeting the GMA's definition of critical areas, including fish and wildlife habitat
16 ecosystems, are still eligible for critical area designation, and are to be designated under the
17 GMA, *see id.*; (2) shorelines are to be protected under the GMA on an interim basis until
18 protections are transferred to the SMA, RCW 36.70A.480(4);²⁸ (3) and substantial buffers are a
19 contemplated mechanism for protecting shorelines, *see* RCW 36.70A.480(6). Petitioners argue
20 that Pierce County marine shorelines meet the GMA definition of critical areas as fish and
21
22

23 ²⁸ RCW 36.70A.480 describes this transition to the updated Shoreline Master Program regime as follows:

24 (3) The policies, goals, and provisions of chapter 90.58 RCW and applicable guidelines shall be
25 the sole basis for determining compliance of a shoreline master program with this chapter except
26 as the shoreline master program is required to comply with the internal consistency provisions of
27 RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105.

28
29 (a) As of the date the department of ecology approves a local government's shoreline master
30 program adopted under applicable shoreline guidelines, the protection of critical areas as defined
31 by RCW 36.70A.030(5) within shorelines of the state shall be accomplished only through the local
32 government's shoreline master program and shall not be subject to the procedural and substantive
33 requirements of this chapter, except as provided in subsection (6) of this section.

34 (b) Critical areas within shorelines of the state that have been identified as meeting the definition
35 of critical areas as defined by RCW 36.70A.030(5), and that are subject to a shoreline master
36 program adopted under applicable shoreline guidelines shall not be subject to the procedural and
37 substantive requirements of this chapter, except as provided in subsection (6) of this section. . . .

38 (c) The provisions of RCW 36.70A.172 shall not apply to the adoption or subsequent amendment
39 of a local government's shoreline master program and shall not be used to determine compliance
40 of a local government's shoreline master program with chapter 90.58 RCW and applicable
41 guidelines. Nothing in this section, however, is intended to limit or change the quality of
42 information to be applied in protecting critical areas within shorelines of the state, as required by
43 chapter 90.58 RCW and applicable guidelines.

44 (4) Shoreline master programs shall provide a level of protection to critical areas located within
45 shorelines of the state that is at least equal to the level of protection provided to critical areas by
46 the local government's critical area ordinances adopted and thereafter amended pursuant to RCW
47 36.70A.060(2).

1 wildlife habitat ecosystems, RCW 36.70A.030(5), so that Pierce County is required to designate
2 its marine shorelines as critical areas. Puget Sound PHB, at 35-37.

3
4 Pierce County responds that Puget Sound did not brief this issue, and so it should be dismissed,
5 and that Puget Sound has not met its burden of showing how the County's Directions Package
6 fails to comply with the three planning goals. County Response, at 112.

7
8 Snohomish County provides an *amicus* brief as a county with extensive Puget Sound marine
9 shorelines that is currently updating its own critical areas regulations. Snohomish contends that
10 Petitioners' argument that all marine shorelines in Pierce County should be designated as critical
11 areas ignores the differences in ecological functions and values provided by distinct segments of
12 marine shorelines. Snohomish, at 2. Not all marine shorelines are critical areas, Snohomish
13 asserts. In fact, ESHB 1933 prohibits the categorical designation of shorelines as critical areas
14 unless they qualify as critical areas under the specific definitions in the GMA. *Id.* at 5. Although
15 some shorelines, evaluated individually, may meet the criteria of critical area designation, local
16 governments are not required to designate all shorelines of the state as critical areas. *Id.* at 6.
17 Indeed, Snohomish suggests, a wholesale exclusion of shorelines from critical areas may be
18 appropriate based on existing conditions. *Id.* at 7.

19
20 Thus Snohomish opines that Pierce County's method of designating critical areas gives effect to
21 the legislative intent of ESHB 1933; rather than automatically designating the entirety of Pierce
22 County's marine shorelines as critical areas, specific areas of shorelines are evaluated to
23 determine whether they meet the definition of critical areas under the GMA. *Id.* at 8. Neither
24 Pierce County's Comprehensive Plan nor its critical areas regulations automatically designate the
25 entirety of Pierce County's marine shorelines as critical areas, because that approach would be
26 inconsistent with the legislative intent of ESHB 1933 and RCW 36.70A.480(5). *Id.* at 9.

27
28 Snohomish concludes that Pierce County's designation of some, but not all, marine shorelines as
29 critical areas reflects the actual conditions of marine shorelines in Pierce County. *Id.* at 10. Just
30 because some marine shorelines are not regulated under Pierce County's critical area regulations
31 does not mean that they are unregulated, Snohomish adds, noting that Pierce County's shoreline
32 master program will be updated in a few years. *Id.* According to Snohomish, that is the
33 appropriate regulatory vehicle to provide the comprehensive oversight of all of Pierce County's
34 marine shorelines. *Id.*

35
36 Board Discussion.

37
38 ESHB 1933, codified as amendments to RCW 36.70A.480, was a legislative correction to this
39 Board's ruling, in *Everett Shorelines Coalition* that the state's "shorelines of statewide
40 significance" under RCW 90.58.020 by definition are "critical areas" to be protected by
41 appropriate development regulations under the Growth Management Act. The legislative
42 correction was unequivocal:

43 (5) Shorelines of the state shall not be considered critical areas under this chapter
44 except to the extent that specific areas located within shorelines of the state
45 qualify for critical area designation based on the definition of critical areas
46
47

1 provided by RCW 36.70A.030(5) and have been designated as such by a local
2 government pursuant to RCW 36.70A.060(2).

3 “Shorelines of the state” include rivers and lakes, as well as marine shorelines. RCW
4 90.58.030(c)-(e).

5
6 While the 2003 GMA amendments [ESHB 1933] prohibit blanket designation of all marine
7 shorelines (or indeed, all freshwater shores) as critical fish and wildlife habitat areas, the GMA
8 requires application of best available science to designate critical areas, explicitly recognizing
9 that some of these will be in the shorelines.

10
11 The legislature sought to ensure that this correction did not create loopholes. “Critical areas
12 within shorelines” must be protected, with buffers as appropriate, if they meet the definition of
13 critical areas under RCW 36.70A.030(5). RCW 36.70A.480(5), (6).

14
15 Pierce County officials, acting in good faith on the pre-ESHB 1933 presumption that all marine
16 shorelines are critical fish and wildlife habitat conservation areas, prepared the Directions
17 proposal on that basis. The Pentec Report [Index 1287], based on a detailed nearshore
18 assessment, identified reaches of Pierce County shoreline that provide high quality salmon
19 habitat and other reaches that are degraded or otherwise less suited for salmon. One cannot read
20 the Pentec Report without concluding that, at a minimum, the nearshore areas identified by
21 Pentec as high-value habitat for salmon are “fish and wildlife habitat conservation areas”
22 required to be identified and protected as critical areas, particularly in a system that “gives
23 special consideration” to anadromous fish. At the same time, the Pentec Report may provide a
24 basis for designating less than all of Pierce County’s marine shorelines as critical habitat for
25 salmon.

26
27 ESHB 1933 does not justify Pierce County’s blanket deletion of marine shorelines and marine
28 shoreline vegetative buffer requirements from its Directions package. Pierce County’s failure to
29 identify and protect critical salmon habitat along marine shorelines in its adoption of Ordinance
30 2004-56s does not comply with RCW 36.70A.480. The Board is persuaded that the County’s
31 action is clearly erroneous.

32
33 Conclusion

34
35 The Board finds and concludes that Ordinance 2004-56s **does not comply** with RCW
36 36.70A.480 because it fails to identify and protect critical fish and wildlife habitat conservation
37 areas in marine shorelines, specifically, areas of high value for salmon habitat.

38
39 **5. Legal Issue No. 14 – CTED Guidelines**

40
41 Legal Issue No. 14:

42
43 *Whether the failure of Ordinance 2004-56s to classify any marine shorelines as*
44 *critical areas and to apply a 150-foot landward vegetative buffer to them violates*
45 *the Growth Management Act’s requirement to consider the guidelines developed*
46 *by the Department of Community, Trade, and Economic Development at WAC*
47

1 365-190-010 *et seq.* and 365-195-010 *et seq.*, as specified in RCW 36.70A.170(2)
2 and RCW 36.70A.050, given the Department's findings that "the unwise
3 development of natural resource lands . . . may lead to inefficient use of limited
4 public resources," and that "[i]t is more costly to remedy the loss of natural
5 resource lands or critical areas than to conserve and protect them from loss or
6 degradation," WAC 365-190-010?
7

8 Positions of the Parties
9

10 Puget Sound alleges that CTED's criteria are due deference by the County, the Board, and the
11 courts, notwithstanding the criteria's indication that they are only advisory. Petitioners rely on
12 *City of Des Moines v. Puget Sound Regional Council*, 98 Wn.App. 23, 31-32, 988 P.2d 27
13 (1999), where the court looked to CTED guidelines concerning "Essential Public Facilities" to
14 inform its decision in a case concerning SeaTac Airport and neighboring municipalities.
15

16 Petitioners assert that the CTED guidelines urge counties to consider protecting riparian
17 ecosystems, establishing buffer zones, and restoring lost salmonid habitat in their critical areas
18 ordinances. WAC 365-190-080(5)(b)(iii), (v), (vi). Further, where a county lacks or has
19 incomplete scientific information, petitioners claim that CTED's guidelines direct it to take a
20 precautionary or no risk approach, in which development and land use activities are strictly
21 limited until the uncertainty is sufficiently resolved, and to adopt an adaptive management
22 approach, on an interim basis, to evaluate effects. WAC 365-195-905(c).
23

24 Petitioners state that CTED regulations provide guidance to local jurisdictions "in determining
25 whether information...constitutes best available science." WAC 365-195-905(1). Petitioners
26 state that CTED recognizes WDFW's 250-foot buffer for marine riparian areas as BAS, and has
27 included it in its example code provisions for designating and protecting critical areas. Index
28 1297, at Appendix A, A-107 (Critical Areas Assistance Handbook, Nov. 2003); *see also* RCW
29 36.70A.190(4)(a), (authorizing CTED to develop model land use ordinances). Petitioners argue
30 that Pierce County violated the GMA by failing to give heightened deference to CTED's
31 guidance to protect riparian ecosystems and estuary and nearshore marine habitat quality with
32 buffer zones. Puget Sound Reply, at 18; WAC 365-195-925(3), 365-190-080(5)(b)(iii), (v).
33

34 Pierce County responds that counties and cities are only required to *consider* CTED's "minimum
35 guidelines" in making critical areas designations; the guidelines are not binding. County
36 Response, at 112, *citing Orton Farms v. Pierce County*, CPSGMHB Consolidated Case No. 04-
37 3-0007c, Final Decision and Order (Aug. 2, 2004), at 61. As to CTED's "procedural criteria" for
38 best available science, these guidelines are advisory only. *Id.* at 114.
39

40 Board Discussion
41

42 The Board concurs with the County. CTED guidelines provide valuable assistance to cities and
43 counties in meeting the requirements of the Growth Management Act. The guidelines also may
44 be helpful to the Board and to the courts in evaluating and resolving cases under the GMA.
45 However, the Board has no jurisdiction to require a city or county to comply with CTED
46
47

1 guidelines. *See* discussion *supra*, at Section IV.A.3. The Board is not persuaded that the
2 County’s action in relation to the CTED guidelines was clearly erroneous.

3
4 Conclusion

5
6 The Board finds and concludes that Puget Sound has **not carried its burden of proof** in
7 demonstrating that Pierce County failed to comply with the GMA by not considering the CTED
8 guidelines. **Legal Issue No. 14 is dismissed.**

9
10 **6. Legal Issue No. 15 – Consistency with Comprehensive Plan**

11
12 Legal Issue No. 15:

13
14 *Whether the failure of Ordinance 2004-56s to classify any marine shorelines as*
15 *critical areas and to apply a 150-foot landward vegetative buffer to them violates*
16 *the Growth Management Act’s requirement, in RCW 36.70A.040, 36.70A.060(3),*
17 *36.70A.120, and WAC 365-195-800 et seq., that the County’s development*
18 *regulations be consistent with the County’s Comprehensive Plan, Pierce County*
19 *Code 19A.60.070, given that vegetative marine shoreline buffers are a critical*
20 *part of the nearshore environment that provides required habitat elements for*
21 *Puget Sound fish and wildlife, including threatened and endangered anadromous*
22 *fish?*

23
24 Positions of the Parties

25
26 Petitioners state that the GMA requires counties to “insure consistency” between their
27 comprehensive plans and development regulations. RCW 36.70A.060(3); *see also* RCW
28 36.70A.040(4)(d) In requiring consistency between the comprehensive plan and development
29 regulations, the legislature intended that the policy framework of comprehensive plans would
30 provide context for the operation of detailed development decisions. *Tulalip Tribes of*
31 *Washington v. Snohomish County, supra*, at 39. Petitioners argue that Ordinance 2004-56s
32 should be invalidated because it violates the GMA due to its lack of consistency with the
33 County’s Comprehensive Plan. Puget Sound PHB, at 35.

34
35 The Pierce County Comprehensive Plan establishes the County’s objective to “provide for the
36 maintenance and protection of habitat conservation areas for fish and wildlife.” PCC
37 19A.60.070. To meet this objective, Petitioners assert, the Comprehensive Plan requires the
38 County to identify and map fish and wildlife habitat conservation areas and to take affirmative
39 steps to conserve those areas. PCC 19A.60.070(A)-(E). Puget Sound PHB, at 33.

40
41 Petitioners state that the Comprehensive Plan also establishes a protective scheme for fish and
42 wildlife habitat conservation areas by requiring “that buffers of undisturbed vegetation be
43 retained for all new development activities along...Puget Sound.” PCC 19A.60.070(C)(1). In
44 sum, according to Petitioners, the Comprehensive Plan prioritizes the protection of fish and
45 wildlife habitat conservation areas, including marine shorelines, through buffers and other
46 protective measures. Puget Sound PHB, at 34.

1
2 The County responds:
3

4 People contends that because the County removed the automatic 150-foot buffer
5 protection from all marine shorelines, that it has violated the GMA’s consistency
6 requirement. . . . [I]t is the County’s position that it does require protections for all critical
7 areas, whether they involve marine shorelines or not. Some critical areas, such as
8 wetlands and streams, have explicit, pre-determined buffer widths. Others, such as those
9 involving fish and wildlife habitat conservation areas, will be determined on a case by
10 case basis by the County and WDF&W. However, the County will require buffers.
11 Therefore, the County’s implementing development regulations are consistent with its
12 comprehensive plan.
13

14 County Response, at 118.
15

16 Board Discussion
17

18 The Pierce County Comprehensive Plan policy at issue here is PCC 19A.60.070 – Fish and
19 Wildlife.²⁹ It begins: “ENV Objective 8. Provide for the maintenance and protection of habitat
20 areas for fish and wildlife.” The policies that follow provide considerable regulatory flexibility.
21 For example, “Require that buffers of undisturbed vegetation be retained along ... Puget Sound
22 ...*where appropriate.*” PCC 19A.60.070.C.1 (emphasis added).
23

24 The Board is not persuaded that Ordinance 2004-56s is fatally at odds with Pierce County’s
25 Comprehensive Plan.
26

27 Conclusion
28

29 The Board finds and concludes that Petitioners People for Puget Sound have **not carried their**
30 **burden of proof** in demonstrating that Ordinance 2004-56s is inconsistent with Pierce County’s
31 Comprehensive Plan and thus non-compliant with the GMA. **Legal Issue No. 15 is dismissed.**
32

33 **V. ORDER**
34

35 Based upon review of the Petitions for Review, the GMA, prior orders of this Board and the
36 other Growth Management Hearings Boards, case law, the briefs and exhibits submitted by the
37 parties, having considered the arguments of the parties, and having deliberated on the matter, the
38 Board ORDERS:
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47 ²⁹ The policy is set out in full in County Response, at 116-118.

- 1 • Petitioner Tahoma Audubon Society has **failed to carry its burden of proof** in
2 demonstrating that the challenged portion of Ordinance 2004-57s does not comply with
3 RCW 36.70A.172 (best available science) or other provisions of the Growth Management
4 Act relied on by Petitioners. The Board was not persuaded that Pierce County’s action in
5 adopting the challenged portion of Ordinance No. 2004-57s was clearly erroneous with
6 respect to the requirements of the Growth Management Act.
7
8 • **Legal Issue Nos. 1 through 9 are dismissed.** Tahoma Audubon Society’s Petition for
9 Review, CPSGMHB Case No. 05-3-0003 is **dismissed**.
10
11 • Petitioners People for Puget Sound and Citizens for a Healthy Bay **have failed to carry**
12 **their burden of proof** with respect to Legal Issues 14 and 15 and have **abandoned** Legal
13 Issue No. 12. **Legal Issues 12, 14, and 15 are dismissed.**
14
15 • Pierce County’s adoption of Ordinance 2004-56s was **clearly erroneous** and **does not**
16 **comply** with the requirements of RCW 36.70A.172(1) in that Pierce County failed to use
17 best available science to designate and protect fish and wildlife habitat conservation areas
18 in marine shorelines, failed to “protect the functions and values” of marine shorelines as
19 critical salmon habitat, and failed to “give special consideration to conservation or
20 protection measures necessary to preserve or enhance anadromous fisheries” in its
21 regulation of marine shorelines. Pierce County’s adoption of Ordinance 2004-56s also
22 was **clearly erroneous** and **does not comply** with RCW 36.70A.480.
23
24 • Therefore, the Board **remands** Ordinance 2004-56s to Pierce County with directions to
25 take the necessary legislative action to comply with the requirements of RCW
26 36.70A.172(1) and RCW 36.70A.480 with respect to fish and wildlife habitat
27 conservation areas, including salmonid habitat in marine shorelines, pursuant to the
28 following schedule:
29
30 1. By no later than **January 12, 2006**, Pierce County shall take appropriate legislative
31 action to bring its critical areas ordinance into compliance with the requirements of
32 RCW 36.70A.172(1) and RCW 36.70A.480 as set forth in this Order.
33
34 2. By no late than **January 26, 2006**, Pierce County shall file with the Board an original
35 and four copies of the legislative enactment(s) adopted by Pierce County to comply
36 with this Order along with a statement of how the enactments comply with RCW
37 36.70A.172(1) and RCW 36.70A.480 (**compliance statement**). The County shall
38 simultaneously serve a copy of the legislative enactment(s) and compliance statement
39 on Petitioners People for Puget Sound and Citizens for a Healthy Bay.
40
41 3. By no later than **February 9, 2006**, Petitioners People for Puget Sound and Citizens
42 for a Healthy Bay *may* file with the Board a Petitioners’ Response to the County’s
43 compliance statement and the legislative enactments. Petitioners shall simultaneously
44 serve a copy of such comment on the County.
45
46
47

1 4. Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance
2 Hearing in this matter for **10:00 a.m. February 17, 2006** at the Board's offices. [The
3 only matter at issue at this compliance proceeding will be whether Pierce County has
4 brought its critical areas regulations into compliance with RCW 36.70A.172(1) and
5 RCW 36.70A.480 with respect to the designation and protection of critical salmon
6 habitat in marine shorelines.]
7

8 If Pierce County takes the required legislative action prior to the January 12, 2006 deadline set
9 forth in this Order, the County may file a motion with the Board requesting an adjustment to this
10 compliance schedule.
11

12 So ORDERED this 12th day of July, 2005.
13

14 CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD
15

16 _____
17 Bruce C. Laing, FAICP
18 Board Member
19

20 _____
21 Edward G. McGuire, AICP
22 Board Member
23

24 _____
25 Margaret A. Pageler
26 Board Member
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31 Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a
32 motion for reconsideration pursuant to WAC 242-02-832.
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APPENDIX – A

Chronological Procedural History of CPSGMHB Case No. 05-3-0004c

On January 12, 2005, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Tahoma Audubon Society (**Tahoma Audubon** or **Petitioner**). The matter was assigned Case No. 05-3-0002, and is hereafter referred to as *Tahoma Audubon v. Pierce County*. Board member Margaret Pageler is the Presiding Officer for this matter. Petitioner challenges Pierce County’s (**Respondent** or the **County**) adoption of Ordinance No. 2004-57s, which amends the County’s development regulations dealing with critical areas. The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or the **Act**).

On January 13, 2004, the Board received a PFR from People for Puget Sound and Citizens for a Healthy Bay (together **Petitioners** or **Puget Sound**). The matter was assigned Case No. 05-3-0004, and is hereafter referred to as *Puget Sound v. Pierce County*. Board member Margaret Pageler is the Presiding Officer in this matter. Petitioners challenge Pierce County’s adoption of Ordinance No. 2004-56s, which amends the County development regulations dealing with critical areas. The basis for the challenge is noncompliance with various provisions of the GMA.

On January 18, 2005, the Board received a Notice of Appearance on behalf of Pierce County from Gerald A. Horne and M. Peter Philley, Pierce County Prosecuting Attorneys.

On January 20, 2005, the Board issued its Notice of Hearing and Possible Consolidation in Cases No. 05-3-0003 and 05-3-0004.

On January 31, 2005, the Board received an Amended Petition for Review from People for Puget Sound and Citizens for a Healthy Bay.

On February 4, 2005, the Board received Park Junction Partners’ Motion to Intervene. The Board’s Administrative Officer provided Park Junction an electronic copy of the Notice of Hearing and conveyed the Presiding Officer’s intent to rule on intervention at the Prehearing Conference

On February 10, 2005, the Board conducted the Prehearing Conference (**PHC**) in the Fifth Floor Conference Room, Union Bank of California Building, 900 Fourth Avenue, Seattle. Board member Margaret Pageler, Presiding Officer in this matter, conducted the conference, with Board members Ed McGuire and Bruce Laing in attendance. Robert Mack of Smith Alling Lane represented Petitioner Tahoma, Amy Williams-Derry of Earthjustice represented Petitioners Puget Sound, Deputy Prosecuting Attorney Al Rose represented Pierce County, and Margaret Archer of Gordon Thomas Honeywell represented Intervenor Park Junction Partners.

Without objection, the Board orally ruled that CPSGMHB Cases 05-3-0002 and 05-3-0004, both challenging the adoption of Pierce County’s critical areas regulations, would be consolidated. The consolidated cases are **CPSGMHB Case No. 05-3-0004c** and are referred to as *Tahoma-Puget Sound v. Pierce County*. Without objection, the Board orally granted intervention by Park

1 Junction Partners on the side of Pierce County with respect to the Tahoma Audubon issues.
2 Petitioner Puget Sound requested and was granted leave to file restated Legal Issues to correct
3 mis-citations and clarify ordinance references.

4
5 On February 15, 2005, the Board received Petitioner Tahoma Audubon's Amended Petition for
6 Review, as requested at the PHC.

7
8 On February 16, 2005, the Board received Pierce County's GMA Index.

9
10 On February 18, 2005, the Board issued its Prehearing Order and Orders on Consolidation and
11 Intervention (**PHO**).

12
13 On March 29 the Board received two copies of the Upper Nisqually Valley Community Plan
14 adopted September 28, 1999, by Pierce County Ordinance No. 99-67.

15
16 On March 17, 2005, the Board received Pierce County's Amended Directions Index.

17
18 On April 5, 2005, the Board received Pierce County's Modified Directions Index –
19 Supplemental.

20
21 On April 7, 2005, the Board received the Motion of Snohomish County to File *Amicus Curiae*
22 Brief. The Board received no objection to the motion. On April 12, 2005, the Board issued its
23 Order Granting *Amicus*.

24
25 On April 8, 2005, the Board received the "Opening Brief of Petitioner Tahoma Audubon
26 Society" and "Petitioners People for Puget Sound and Citizens for a Healthy Bay's Prehearing
27 Brief."

28
29 On April 8, 2005, the Board received a letter from Smith Alling Lane regarding a Community
30 Development Committee Meeting of August 6, 2003. On April 15, 2005 [electronically] and
31 April 18 [hard copy] the Board received Tahoma Audubon Society's Motion to Supplement the
32 Record with attached transcript of an excerpt from Community Development Committee
33 meeting of August 6, 2003. The Board received no response to the motion to supplement.

34
35 On April 8, 2005, the Board received the Opening Brief of Tahoma Audubon Society (**Tahoma**
36 **PHB**) with 8 exhibits and the Prehearing Brief of People for Puget Sound and Citizens for a
37 Healthy Bay (**Puget Sound PHB**) with 50 exhibits.

38
39 On April 22, 2005, the Board received Respondent Pierce County's Prehearing Brief (**County**
40 **Response**) with 24 exhibits and *Amicus Curiae* Brief of Snohomish County (**Amicus Brief**). The
41 Index to Respondent Pierce County's Prehearing Brief was received electronically and by
42 messenger delivery on April 25.

43
44 On April 22, 2005, [electronically] and April 25 [hard copy] the Board received [Intervenor]
45 Park Junction Partners Response to Opening Brief of Tahoma Audubon Society (**Park Junction**
46 **Response**), with 21 exhibits.

1 On May 2, 2005, the Board issued its Order Changing Location of Hearing on the Merits.
2

3 On May 6, 2005, the Board received Petitioner People for Puget Sound and Citizens for a
4 Healthy Bay Prehearing Reply Brief (**Puget Sound Reply**) with 8 exhibits. The Reply Brief of
5 Tahoma Audubon Society (**Tahoma Reply**) with 15 exhibits and a Motion to Take Notice of
6 Material Facts and to Supplement the Record, with 9 exhibits, were received electronically May
7 6, 2005, and in hard copy May 9, 2005.
8

9 The Hearing on the Merits was convened on May 11, 2005, at 10:00 a.m., in the Pierce County
10 Environmental Services Building, 9850 64th Street West, University Place. Present for the Board
11 were Margaret A. Pageler, presiding, and Board members Edward G. McGuire and Bruce C.
12 Laing. Reporting services were provided by Katie Askew of Byers & Anderson, Inc. Petitioner
13 Tahoma Audubon Society was represented by Robert E. Mack of Smith, Alling, Lane.
14 Petitioners People for Puget Sound and Citizens for a Healthy Bay were represented by Amy
15 Williams-Derry and co-counsel Patty Goldman of Earthjustice. Also in attendance were Naki
16 Stevens for People for Puget Sound and Leslie Ann Rose for Citizens for a Healthy Bay.
17

18 Respondent Pierce County was represented by Deputy Prosecuting Attorney Pete Philley.
19 Intervenor Park Junction Partners was represented by Margaret A. Archer. *Amicus* Snohomish
20 County was represented by Laura Keselius of the Snohomish County Prosecutor's office. Also in
21 attendance were Debby Hyde from the Pierce County Executive's Office, Hugh Taylor from the
22 County Council office, Kim Freeman with Pierce County Planning and Land Services, Richard
23 Schroedel with Pierce County Emergency Management, and Steve Morrison from Thurston
24 County Regional Planning.
25

26 At the outset of the Hearing on the Merits, the Board heard various motions of the parties. The
27 Board also admitted some additional exhibits and denied others. The Board's rulings on these
28 matters are set forth in the FDO, at Section III.B. The Hearing adjourned at approximately 3:00
29 p.m. The Board ordered a transcript of the hearing which was received on May 26, 2005.
30

31 The Board received a Motion to Submit Post-Hearing Brief from Petitioners Puget Sound on
32 May 20, 2005, and a Response in Opposition from Pierce County on May 26, 2005. The Board
33 ruled on the motion in the FDO, at Section III.B.
34

35 The Final Decision and Order was issued July 12, 2005.
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APPENDIX – B

Tahoma Audubon Society v. Pierce County

Findings of Fact

1. Mount Rainier is the largest active volcano in the Cascade Range. It is potentially the most dangerous because of the volume of water stored in its glaciers. Index 180, at 1; Index 601, at 1-2.
2. The USGS is the federal agency with recognized expertise in vulcanology. A number of USGS scientists, based at the Cascade Volcano Observatory in Vancouver, Washington, study and monitor Mount Rainier. HOM Ex. 2, at 6.
3. Scientists have identified four types of lahars likely to occur on Mount Rainier, Case I, Case II, Case III and pyroclastic flow. They have mapped inundation zones, determined travel times, and estimated recurrence intervals for the different lahar types. Lahar types also differ in whether they are likely to be presaged by seismic activity, giving additional warning of imminent danger. Index 656, at 1-2.
4. Scientists with special expertise in vulcanology and Mount Rainier volcanic hazards in particular worked directly with Pierce County staff in mapping lahar inundation zones, calculating lahar travel times, and developing and installing lahar warning systems. Index 601, at 4; HOM Ex. 1; HOM Ex. 3, 4.
5. Pierce County staff work closely with USGS and other vulcanologists. Steve Bailey, emergency manager for the county, recently received a prestigious award for development of a lahar warning system through sensors on the Puyallup River and Carbon River drainages. HOM Ex. 3, 4; Index 14.
6. The Nisqually Valley cannot be served by early-warning sensors, because there is not enough distance from the start of a lahar to where it would trip the alarm system before it caused damage to humans and structures. Index 656, at 1. However, there is some research suggesting that Case II lahars on the Nisqually side of Mount Rainier are more likely to be preceded by seismic activity which would alert vulcanologists to the increased risk. Index 703.
7. The Upper Nisqually Valley is subject to frequent Case III lahars [several per century] which seldom flow beyond the National Park boundaries. Index 140, at 2.
8. Lahar travel time zones measure the reach of a lahar in a given time interval. Lahar travel time zone A is an area likely to be inundated by lahar flow within the first hour of a Case I or Case II event. PCC 18E.60.020(c)(1)(A).
9. The Upper Nisqually Valley is in the inundation zone for Case II lahars, travel time zone A.
10. Case II lahars occur every 100 to 500 years and were characterized in a 1998 USGS study as similar in frequency to the 100-year flood that forms the basis for engineering design in a floodplain. HOM Ex. 2, at 8.
11. Case I lahars may occur without advance seismic activity. Case II lahars are more likely to be preceded by seismic activity but may also occur without warning. Index 601, at 2.
12. A Case II lahar is a slurry of sediment and water with the consistency of flowing concrete. There is no construction method that can make a building strong enough to withstand a Case II lahar. Index 164, at 2; HOM Ex. 1, at 11.

- 1 13. In reviewing and revising its critical areas regulations, Pierce County reviewed its
2 delineations and regulations for volcanic hazard areas. Pierce County's lengthy critical
3 areas review process was give the name "Directions."
- 4 14. Pierce County's prior CAO allowed "special occupancies" (defined as any structure
5 holding many people) of 300 [outright] in the Upper Nisqually. The prior CAO did not
6 specify inundation zones by lahar type or lahar travel times. Index 176, at 1.
- 7 15. In developing the Directions package, County staff recommended that covered
8 assemblies in Case II Lahar Inundation Areas, travel time zone A, be limited to 100
9 persons. HOM Ex. 1, at 4-5.
- 10 16. Pierce County retained URS Greiner Woodward Clyde to conduct a "best available
11 science review" of the Directions package. With respect to Volcanic Hazard Areas, URS
12 reported that the proposed regulations establishing different classes of hazard and travel
13 zones have a science basis: "Other elements are policy, safety, or engineering driven."
14 The URS Best Available Science Review stated: "There is no BAS for special occupancy
15 limitations within specific hazard travel time zones. . . . Land use restrictions are based
16 on policy and what is deemed an acceptable risk by policymakers." Index 150, at V-1.
- 17 17. The County's BAS report issued in April 2002 cited only a few studies on Mount Rainier
18 lahar risks, and none more recent than 2001. Index 150, at V-1. The same scientists cited
19 in the BAS report have written further articles and updated earlier reports. E.g., HOM Ex.
20 2.
- 21 18. Dr. Thomas C. Pierson is a USGS scientist with special expertise in Mount Rainier
22 vulcanology. Dr. Pierson is the associate scientist in charge of the USGS Cascade
23 Volcano Observatory and works closely with or may be presumed to be familiar with the
24 work of the vulcanologists named in the County's BAS bibliography and listed in
25 bibliographies appended to the cited studies. Dr. Pierson provided oral input to the
26 County staff, to the URS team providing BAS review, and to the County Planning
27 Commission on at least two occasions – April 15, 2003 and April 14, 2004 - during its
28 review of the CAO. Index 150, at V-1; Index 1080; Index 175; HOM Ex. 4.
- 29 19. Dr. Pierson and Pierce County planners and emergency managers advised the County
30 Planning Commission and County Council that occupancy limits in lahar hazard areas are
31 not a matter that can be determined scientifically. Index 175; Index 1080; HOM Ex. 1.
- 32 20. The Pierce County Planning Commission amended the covered assembly occupancy
33 limits to allow up to 400 people in Case II Lahar Inundation Zones, travel time zone A,
34 under certain conditions. Index 166, at 5.
- 35 21. Ordinance 2004-57s allows occupancy of up to 400 persons in a covered assembly in a
36 Case II Lahar hazard area in Travel Zone A if certain evacuation routes are in place.
37 Evacuation means not merely exiting the building but getting beyond the inundation zone
38 by moving to high ground. PCC 18E.60.050.
- 39 22. Ordinance 2004-57s modifies previous regulations by applying best available science to
40 calculate lahar travel times from source of event to populated areas. Development
41 regulations are also calibrated based on notice and time to evacuate. HOM Ex. 1, at 3;
42 Index 648, at 8; PCC 18E.60.050.
- 43 23. Ordinance 2004-57s differentiates uses and occupancies allowed in volcanic hazard
44 areas. Bonus densities, essential public facilities, and hazardous facilities are prohibited
45 in all Lahar Inundation Zones. Special Occupancies [eg schools, day cares, nursing
46 homes] are allowed in Case I and II Lahar Inundation Areas, and are limited to 100
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persons in Lahar Travel Time Zone A, with increasing occupancies in Zones B, C, and D. Covered Assemblies [churches, cinemas, convention centers] are also allowed in Case I and II Lahar Inundation Areas, with a 400-person limit in Case I Lahar Travel Time Zone A and up to 400 persons, with approved evacuation routes, in Case II Lahar Travel Time Zone A. PCC 18E.60.050.

- 24. Pierce County included “best available science” in mapping lahar inundaton zones and lahar travel time zones in the Ordinance 2004-57s regulations for Volcanic Hazard Areas.
- 25. Pierce County based its allowance for 400-person occupancy in “covered assemblies” in Case II Lahar Inundation Zones, Lahar Travel Time Zone A, on a risk assessment, balancing the lahar risks against the economic development goals of Pierce County and the Upper Nisqually Valley community plan. County Response, at 18, 31.

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APPENDIX – C

People for Puget Sound and Citizens for a Healthy Bay v. Pierce County

Findings of Fact

1. Marine shorelines in unincorporated Pierce County are primarily located west of the Narrows, on the Peninsula around Gig Harbor, and on Fox, Anderson, and McNiel Islands. There are approximately 179 miles of marine shoreline in western Pierce County. Index 1287, at v.
2. Pierce County began its review of its critical areas ordinances in 2000. Pierce County named its process “Directions.”
3. Pierce County’s Directions package developed analysis and regulatory response around the concept that all marine shorelines are fish and wildlife habitat conservation areas to be designated and protected. Index 1287.
4. Pierce County reviewed the multiple functions and values of marine shorelines as Fish and Wildlife Habitat Conservation Areas. The County consulted with WDFW as to designation and protection of marine shorelines. Index 982; Index 1287, at v.
5. The County determined that nearshore habitat along Puget Sound marine shorelines is essential to the lifecycle of salmonids, especially juveniles. Index 145. Ecological functions include feeding, migration, predator avoidance and saltwater adaptation.
6. The County determined that marine riparian vegetation in Puget Sound has a high value to juvenile salmonids for cover and foraging. Terrestrial insects that drop from overhanging shrubs and trees are an important component of the diet of juvenile salmon in Puget Sound. Index 104, at 3; Index 846, at 62.
7. The County determined that marine riparian vegetation provides the following functions and values: salmonid habitat protection, sediment removal and erosion control, pollutant removal, large woody debris, and control of water temperature and shading. Index 756; Index 1192, at A-1; Index 846, at 9, 62.
8. The science concerning optimum width of marine shoreline vegetative buffers to protect salmon habitat is not as well-established as the science concerning freshwater riparian buffers. Index 797.
9. The County identified the range of buffer widths that might serve to protect each marine shoreline function and value. Staff, in consultation with WDFW, proposed a 150 foot vegetative buffer. Index 756; Index 885, at 76.
10. Pierce County retained URS Greiner Woodward Clyde to conduct a “best available science review” of the Directions package.
11. The County’s BAS review affirmed that best available science identifies Puget Sound marine shorelines as fish and wildlife habitat conservation areas and supports a 150 foot buffer of native vegetation. Index 150, at III-2 and III-9.
12. Pierce County retained Pentec Environmental to conduct a Nearshore Salmon Habitat Assessment. Pentec surveyed the Pierce County marine shoreline in order to identify the best and the poorest salmon habitat. Index 1287.
13. Pentec ranked each reach of Pierce County marine shoreline, using a tidal habitat model, to determine the “values and functions” of the shoreline as salmon habitat. With a focus

- 1 on juvenile salmonids, Pentec identified high-value shorelines, shorelines with high
2 potential for habitat restoration, and low-value shorelines. Index 1287.
- 3 14. WDFW objected when, during the planning process, Pierce County reduced its proposed
4 vegetated buffer width for marine shorelines to 100 feet. Index 104, at 3.
- 5 15. In September, 2004, the County Council amended its Directions legislation to delete
6 references to marine shorelines as fish and wildlife habitat conservation areas and to
7 delete requirements for vegetated buffers on such shorelines. The reasons were stated in a
8 memorandum from County Councilmember Terry Lee [Index 124], in the Council
9 committee minutes [Index 1290], and in the Ordinance 2004-56s Findings.
- 10 16. Pierce County's stated reasons for the amendment were (1) ESHB 1933 forbids the
11 blanket designation of shorelines as critical areas and (2) Pierce County's other
12 regulatory provisions adequately protect marine shorelines. Index 124.
- 13 17. Pierce County cited no countervailing policy, goal or requirement of the GMA against
14 which it balanced its decision not to protect marine shorelines as salmon habitat. Index
15 124; Index 1290, at 10-16.
- 16 18. Pierce County based its amendment on an email from a Puget Sound Action Team
17 scientist stating that the science of optimum marine riparian buffers is not yet as certain
18 as the science of freshwater buffers, and that establishing a vegetative buffer width
19 requires some inferences from freshwater studies. Index 797.
- 20 19. WDFW and Puget Sound Action Team, two state agencies with direct responsibility and
21 expertise in Puget Sound salmon protection, both sent letters to the Pierce County
22 Council opposing the amendment. Index 104, 190. WDFW does not support any buffer
23 that is less than 100 feet.
- 24 20. Pierce County's existing regulations provide protection for several functions and values
25 of the marine shoreline. These are steep slopes, caves, eelgrass beds, shellfish beds, smelt
26 and sandlance spawning beaches, etc. A majority of Pierce County's marine shorelines
27 and some nearshore waters have some level of protection under one or more of these
28 provisions. County Response, at 83, 91-93, 106.
- 29 21. The County's science record indicates that the functions and values of marine shorelines
30 as salmon habitat require protection as an "ecosystem," not as disaggregated elements.
31 See, e.g., Index 1287, at 10; Index 104; Index 684, Index 783; Index 802.
- 32 22. There is no evidence in the record that the shoreline reaches identified as high-value
33 salmon habitat in the Pentec Nearshore Assessment, or otherwise identified as having a
34 primary association with salmon, will be protected under the County's case-by-case
35 program. Except for estuaries and salt marshes, the areas of salmon presence on the
36 Pierce County marine shoreline have not been mapped or designated as critical fish and
37 wildlife conservation areas.
- 38 23. Pierce County failed to include best available science when it deleted marine shorelines
39 from its designation of fish and wildlife habitat conservation areas without mapping and
40 protecting nearshore salmon habitat areas.
- 41 24. Pierce County's Ordinance 2004-56s does not protect the functions and values of marine
42 shorelines as salmon habitat.
- 43 25. Pierce County's Ordinance 2004-56s does not give special consideration to the
44 preservation and enhancement of anadromous fisheries.
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