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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NO. 51903-8-II

WHIDBEY ENVIRONMENTAL ACTION NETWORK,

Appellant,

v.

GROWTH MANAGEMENT HEARINGS BOARD; ISLAND COUNTY,

Respondents.

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

This appeal is about respondent Island County’s continuing failure to protect environmentally critical areas as required by Washington’s Growth Management Act (“GMA”), chapter 36.70A RCW. Under the GMA, these areas, such as wetlands, wildlife habitat, and rare ecological systems and communities, “are deemed ‘critical’ because they may be more susceptible to damage from development.” *Honesty in Env’tl. Analysis and Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App 522, 534, 979 P.2d 864 (1999). Protection of critical areas is an important part of the GMA’s broader goal of preventing “uncoordinated and unplanned growth,” which may “pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state.” RCW 36.70A.010.

The GMA required Island County to update its critical areas rules in 2005—more than a decade ago—to ensure these critical areas are protected. Now, after missing its statutory deadline and two attempts to adopt rules that pass muster under the GMA, the county has still failed to do so. Critical wildlife habitat still lacks the protection it needs, including Island County’s only state-designated Natural Area Preserve near Camp Casey on Whidbey Island, habitat for endangered, threatened, and sensitive-status plant species

that are in danger throughout Washington, and imperiled prairie habitat unique to the island's landscape.

In September of 2016, Washington's Growth Management Hearings Board ("Growth Board" or "Board") issued an order finding the county had finally come into compliance with the GMA through adoption of Ordinance C-71-16, but the decision betrays a misunderstanding of Island County's critical area rules and a misapplication of the GMA and its implementing regulations. The superior court similarly erred when it upheld the Board's orders. For the reasons below, petitioner Whidbey Environmental Action Network ("WEAN")—a Washington nonprofit organization dedicated to restoring and preserving the native biodiversity of Whidbey Island—requests reversal of the Board's orders and an order directing Island County to finally adopt rules to protect these imperiled environmental resources.

II. ASSIGNMENTS OF ERROR

The Growth Board erred when it approved provisions of Island County Ordinance C-71-16 relating to protection of Island County's only Natural Area Preserve near Camp Casey, habitat for endangered, threatened, and sensitive plant species, and the county's imperiled prairie habitat. The erroneous findings and conclusions are addressed in the discussion of the issues below.

The Superior Court similarly erred when it affirmed the Board and held that the Board's orders were supported by substantial evidence. The superior court's erroneous findings and conclusions are addressed in the discussion of the issues below.

The issues pertaining to the Assignments of Error are:

1. Whether the county's new buffer provision for the Natural Area Preserve at Island County Code ("ICC") 17.02B.430.E fails to protect all habitat functions and values?

2. Whether the county's new buffer provision for the Natural Area Preserve at ICC 17.02B.430.E deviates from best available science by failing to impose a 100-foot minimum buffer width?

3. Whether the county's new plant habitat designations fail to protect endangered, threatened, and sensitive plant species that are not associated with the county's prairie habitat?

4. Whether the county's new plant habitat designations fail to protect endangered, threatened, and sensitive plant species and misclassify that habitat as being only of "local importance," resulting in reduced protection?

5. Whether the county's new plant habitat designations fail to protect historically reported endangered, threatened, and sensitive plant species that may still exist?

6. Whether the county's new designations for westside prairies, oak woodlands, and herbaceous balds violate the GMA by failing to clearly define which habitat types are protected and where they are located?"

7. Whether the county's new designations for westside prairies, oak woodlands, and herbaceous balds violate the GMA by failing to protect smaller examples of those habitat types?

III. LEGAL AND FACTUAL BACKGROUND

A. Overview of the Growth Management Act

Under the GMA, cities and counties are required to designate, and to adopt regulations to protect, environmentally critical areas. *See* RCW 36.70A.170; RCW 36.70A.060(2). Under the statute, these critical areas include "fish and wildlife habitat conservation areas" ("FWHCA"), which are defined as "areas that serve a critical role in sustaining needed habitats and species for the functional integrity of the ecosystem, and which, if altered, may reduce the likelihood that the species will persist over the long term." WAC 365-190-030(6)(a). "These areas may include, but are not limited to, rare or vulnerable ecological systems, communities, and habitat or habitat elements including seasonal ranges, breeding habitat, winter range, and movement corridors; and areas with high relative population density or species richness." *Id.* *See also* RCW 36.70A.030(5).

To protect these fragile environmental resources, jurisdictions must consider designating as FWHCAs areas where threatened, endangered, or sensitive (“ETS”)¹ species have a “primary association”; habitats “of local importance”; and Natural Area Preserves (“NAP”). WAC 365-190-130(2).² State law requires that local regulations protecting these areas must “preserve the existing functions and values” of this habitat, and “may not allow a net loss of the functions and values of the ecosystem.” WAC 365-196-830(4). Island County’s critical areas ordinance is located at Title XVII of the Island County Code (“ICC”).³

To ensure a county’s critical areas rules are scientifically valid and remain so over time as science evolves, the GMA first requires a county to

¹ The terms “endangered,” “threatened,” and “sensitive” are defined in a number of state and federal laws. Representative definitions applicable to rare plant species in Washington may be found in the record at AR 3630. An “endangered” species is one that is “[i]n danger of becoming extinct or extirpated from Washington within the foreseeable future if factors contributing to its decline continue. Populations of this taxon are at critically low levels or its habitats have been degraded or depleted to a significant degree.” *Id.* A “threatened” species is “[i]ikely to become endangered in Washington within the foreseeable future if factors contributing to its population decline or habitat degradation or loss continues.” *Id.* Finally, a “sensitive” species is “[v]ulnerable or declining and could become Endangered or Threatened in the state without active management or removal of threats.” *Id.*

² Pursuant to RCW 79.70.020(2), Natural Area Preserves are “public or private areas of land or water which have retained their natural character, although not necessarily completely natural and undisturbed, or which are important in preserving rare or vanishing flora, fauna, geological, natural historical or similar features of scientific or educational value and which are acquired or voluntarily registered or dedicated by the owner under this chapter.”

³ The Island County Code is online at https://library.municode.com/wa/island_county/codes/code_of_ordinances.

include “best available science” (“BAS”) in designating critical areas and adopting protective regulations. RCW 36.70A.172; WAC 365-195-900(2). “[B]est available science is essential to an accurate decision about what policies and regulations are necessary to mitigate and will in fact mitigate the environmental effects of new development.” *HEAL, supra*, 96 Wn. App. at 534. Second, counties must periodically review and update their regulations to ensure they continue to meet GMA standards, including the best available science requirement. RCW 36.70A.130(1)(a), (c). The deadline for Island County to review and update its critical area rules was December 1, 2005. RCW 36.70A.130(4)(b).

B. Island County’s First Attempt at Updating Its Critical Areas Rules — Ordinance C-75-14

Island county failed to meet the December 2005 deadline established by the GMA. *See* AR 2439.⁴ Later, in 2013, when WEAN challenged the county’s failure to timely update its rules, WEAN obtained a compliance schedule from the Growth Board directing the county to complete the periodic review process by July 24, 2014. *Id.* The county finally updated its critical areas rules in September of 2014, nine years after the statutory deadline, with passage of Island County Ordinance C-75-14. Ordinance C-75-14 may be found in the administrative record at AR 9–84.

⁴ References to the administrative record (“AR”) refer to the Bates numbering, leading zeros omitted.

On November 13, 2014, WEAN challenged Ordinance C-75-14 before the Board, alleging, *inter alia*, that it failed to protect Island County’s only Natural Area Preserve (known locally as the Naas Preserve and formally as the Admiralty Inlet NAP) adjacent to Camp Casey. *See* AR 3–8. This area contains rare prairie habitat, “features one of only seven known Washington occurrences of a specific Douglas-fir/western hemlock forested plant community,” and is characterized by old-growth forest, shoreline bluffs, bald eagle nests, and habitat for sensitive bird species. AR 2225, 3508. In essence, the Naas Preserve contains a unique ecological community that transcends any one species or component of the greater whole—it is a rare collection of environmental attributes found nowhere else on Whidbey Island.

WEAN also challenged the county’s failure to designate habitats of ETS plant species and three specific habitat types—westside prairies, oak woodlands, and herbaceous balds (collectively, “prairies”)—as protected FWHCAs. AR 5–6. State regulatory definitions of these habitat types may be found at AR 1427–1431, and their conservation status at AR 661–64. They are “among the most endangered ecological communities in North America.” AR 1051. “Since settlement by Euro-Americans, the extent of these prairies has steadily declined with their use for agriculture and the cessation of burning that has allowed succession to Douglas-fir forest. Only

about 8% of the original prairie still supports grassland vegetation and perhaps 2-3% is still dominated by native prairie vegetation.” *Id.* In short, Whidbey Island’s prairie habitats are quickly vanishing and require protection if they are to continue to exist in the future.

On June 24, 2015, the Board ruled that Ordinance C-75-14 failed to comply with the GMA because it contained inadequate protections for these areas. AR 2372–2420 (“2015 Order”). That ruling is relevant to this appeal of the county’s subsequent attempt in 2016 to comply with the Board’s order (discussed below) because it shows the original errors that the county attempted, but failed, to cure.

1. Ordinance C-75-14’s inadequate protection of the Naas Preserve.

With respect to the Naas Preserve, the controversy over Ordinance C-75-14 centered on the county’s new buffer requirement at ICC 17.02B.430.E. Under the Island County Code, the term “buffer” is defined as “the area adjacent to the outer boundary of a critical area, measured in feet, which protects the critical area from alterations caused by a development proposal.” ICC 17.02.030. As the name implies, the purpose of a buffer is to provide a space between the critical area and uses and activities outside the critical area that may damage it. “Regulatory buffers

are common management tools to protect sensitive features from adjacent development.” AR 3477.

In Ordinance C-75-14, the new buffer provision for the Naas Preserve expressed the county’s view that “species preservation” (*i.e.*, preventing local extinction—“extirpation”—of a species) is the Naas Preserve’s only habitat function or value, and, therefore, the only attribute of the preserve that might require a protective buffer. The new buffer provision for the Naas Preserve provided, in relevant part:

Buffers shall not be required adjacent to [Natural Area Preserves]. These areas are assumed to encompass the land required for species preservation. The director may impose a new buffer or increase the applicable buffer if it is determined that a proposed development would infringe on or inhibit use of the entire property for species preservation.

AR 2390 (codified at ICC 17.02B.430.E). As can be seen from the language above, a buffer would *only* be required around the Naas Preserve if and when development threatened the preserve’s ability to serve the singular goal of “species preservation”—the only value recognized by the county. Conversely, no buffer would be required even if other values and functions of the preserve were threatened, such as a particular admixture of species and aesthetic qualities at a particular location.

On June 24, 2015, the Board ruled that the provision quoted above violated the GMA because the Naas Preserve has many other functions and

values—*aside* from bare species preservation—that may also require a protective buffer. For example, the Board observed in its 2015 Order that lands within the preserve’s unique ecological mixture are “‘valuable for the purposes of scientific research, teaching, . . . as places of natural historic and natural interest and scenic beauty, and as living museums of the original heritage of the state’”—all of which are values that go beyond merely preserving a particular species from extinction. AR 2394 (quoting RCW 79.70.010). Accordingly, the Board held that the county violated the GMA by focusing exclusively on species preservation, ignoring these other habitat functions and values, which may also require a protective buffer. The Board wrote:

By failing to establish buffers for the NAP based on an assumption that it encompasses ‘the land required for species preservation,’ the County has failed to protect the NAP’s habitat or the functional integrity of its ecosystem. Not only has the County focused solely on species protection but it has done so while making an assumption that is nowhere supported by the record.

See AR 2394–95. The Board further observed that

the protection goal [under the GMA] is broader than simply species protection, including preservation of areas of geological, natural historical, or similar features of scientific or educational value, and as places of natural historic and natural interest and scenic beauty, and as living museums of the original heritage of the state.

AR 2393.

As can be seen from the quotes above, the county's buffer provision for the Naas Preserve had two distinct flaws: First, it focused solely on species preservation as the sole trigger for a protective buffer. Second, it was based on an unsupported assumption that the area within the preserve is sufficient for that limited purpose.

In turn, the Board's holding on this issue was a clear reflection of the GMA's requirements. As this Court has held, "the GMA requires that the regulations for critical areas must protect the 'functions and values' of those designated areas. This means *all* functions and values." *Whidbey Env'tl. Action Network v. Island County*, 122 Wn. App. 156, 93 P.3d 885 (2004)) (emphasis added; internal footnote omitted). *See also Yakima County v. E. Wash. Growth Mgmt. Hearings Bd.*, 168 Wn. App. 680, 692, 279 P.3d 434 (2012) ("The GMA requires regulations for critical areas to protect *all* functions and values of the designated areas, not just some of the values") (emphasis added). By focusing exclusively on species preservation as the sole trigger for a protective buffer, the county's buffer provision for the Naas Preserve violated the GMA by ignoring other, equally important functions and values.

2. Ordinance C-75-14's inadequate protection of ETS Plant and Prairie Habitat.

With respect to the county's treatment of ETS plant habitat, the county's position was that only fauna (not flora) are protected under the GMA. *See* AR 2397–98. Based on this view, the county declined to designate *any* habitats associated with ETS plant species as habitat to be protected under the GMA. *See* AR 2403–06. It also declined to designate and protect Whidbey Island's imperiled prairie habitats. AR 2406–08.

The Board rejected this narrow view of critical areas under the GMA. The Board explained that “GMA Minimum Guidelines define FWHCAs [habitat requiring protection] as including ‘rare and vulnerable ecological systems,’” without limit to flora or fauna. AR 2399. The Board also explained that GMA regulations adopted by the Washington Department of Commerce “focus on the ‘functional integrity of the ecosystem’ and make no distinction between plant and animal species.” *Id.* (quoting WAC 365-190-030(6)(a)). In Island County, at least three ETS plant species have a primary association with Whidbey Island's prairies. *See* AR 2405. By failing to designate this and other habitat with which these ETS species have a “primary association,” WAC 365-190-130(2)(a), the Board held Island County violated the GMA. The Board concluded:

Island County's failure to designate and protect habitat of flora listed by the federal or state governments as areas

where endangered, threatened, or sensitive species have a primary association fails to protect critical areas in violation of RCW 36.70A.060 and fails to include the Best Available Science in protecting critical area ecosystems in violation of RCW 36.70A.172.

AR 2418. *See also* AR 2411 (“Island County failed to designate and protect habitat of flora listed by the federal or state government as areas where endangered, threatened, or sensitive species have a primary association.”).

On the narrower issue of whether the county should have designated prairies for protection as FWHCAs, the Board similarly ruled that omitting them violated the GMA. These habitats are listed by the Washington Department of Fish & Wildlife (“WDFW”) as “priority habitats”—a designation that is, by definition, “best available science” under the GMA. *See* AR 3297; WAC 365-190-130(4)(b). Prairie habitats “have been severely reduced and the associated prairie vegetation dramatically impacted,” and are among “the most imperiled habitat types.” AR 2406. At the very least, the Board held that these areas qualified as habitats of local importance under WAC 365-190-130(2)(b). Again, the Board concluded:

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

AR 2418

Finally, the Board acknowledged that even if Island County were to protect *all* remaining prairie habitat, that may not be sufficient for these “rare or vulnerable ecological systems” to survive in the future. AR 2407-08; WAC 365-190-030(6)(a). According to the county’s own BAS report:

In some cases, such as prairie habitats, because extinctions and biodiversity often lag behind habitat loss and fragmentation, even if *all* existing habitat area is conserved, it is not sufficient to sustain the remaining prairie biodiversity.

AR 2407 (emphasis added). The Board described this as a “significant observation.” *Id.*

The need to protect all remaining prairie habitat is also clear from the WDFW’s Science Advisory Committee, which rejected minimum size thresholds when westside prairie was first designated as a priority habitat in 2008. WDFW’s Science Advisory Committee found specifically that “[s]ince *all* prairie is imperiled, *all* prairie is important and should be conserved no matter what size.” AR 1569 (emphasis added).⁵ In short, if these rare habitats are to be preserved, the county must protect all of them—not just some.

⁵ The quote from AR 1569 comes from an oversized document containing remarks of the state’s science advisory committee. The document has been shrunk for the administrative record, rendering the text nearly unreadable unless enlarged on one’s computer screen. The quoted language is from the penultimate paragraph on the lower right side.

C. Island County’s Second Bite at the Apple: Ordinance C-71-16

A year later, on June 23, 2016, Island County adopted a new critical areas ordinance—Ordinance C-71-16—to remedy the problems identified in the Board’s order on Ordinance C-75-14. *See* AR 2611–27. The County then requested the Growth Board hold a “compliance hearing” to determine if the new ordinance complied with the GMA.

1. Ordinance C-71-16’s updated buffer provision for the Naas Preserve, with the same critical problem as before.

With respect to the issue of protective buffers around the Naas Preserve, the County amended the text of ICC 17.02B.430.E to read as follows:

Buffers shall not be required adjacent to [Natural Area Preserves] as long as these areas encompass the land required for species preservation. The Planning Department shall confirm the public agency establishing and managing the area has included sufficient land within these areas to ensure no net loss of habitat function and values. If buffers are required, they shall reflect the habitat sensitivity and the type and intensity of activity proposed to be conducted nearby.

AR 2625. As can be seen, this amended rule retained the county’s myopic focus on “species preservation” as the sole trigger for a protective buffer. As such, it failed to address the main problem that the Board identified in its 2015 Order: So long as the singular value of species preservation is achieved, the first sentence of ICC 17.02B.430.E prohibits the county

(“shall not”) from requiring any buffer to protect other ecosystem functions and values. *See* AR 2394–95. As before, no consideration is given to other functions and values that may also require a protective buffer.

Nonetheless, on September 29, 2016, the Board upheld the county’s revised buffer provision for the Naas Preserve. *See* AR 4199–4200 (“2016 Order”). In its 2016 Order, the Board recognized that it would be a violation of the GMA to limit buffers for the exclusive protection of a single ecological value (species preservation) but found that the second sentence of the revised provision would force the county to consider other values and functions, and to potentially impose a buffer for their protection. The Board wrote, in part:

WEAN’s current argument that the County’s compliance action narrowly focuses on “species preservation” to the detriment of the forest community is not well taken. WEAN quotes only the first sentence of ICC 17.02B.430. The language of that section (set forth above) also requires the County to ensure “no net loss of habitat functions and values” and, if not, a development proposal is required to include buffers reflecting the sensitivity of the habitat to the proposed development.

AR 4199 (footnote omitted).

We will have more to say about the Board’s reasoning below. Suffice it here that the Board’s reliance on the second sentence of the revised buffer provision is misplaced. That sentence does *not* allow the county to impose a buffer for the protection of anything other than the

limited value of species preservation. This can be seen in the first sentence of the revised buffer provision, which states unequivocally that “Buffers *shall not* be required adjacent to [Natural Area Preserves] as long as these areas encompass the land required for species preservation.” AR 2625.

2. Ordinance C-71-16’s limited protections for ETS Plant and Prairie Habitat.

With respect to ETS plant species habitat and prairies, Ordinance C-71-16 attempted to remedy the problems identified in the Board’s 2015 order by designating twelve areas known to contain prairies, herbaceous balds, oak woodlands, and habitat for three sensitive plant species (golden paintbrush, white maconella, and white-top aster). These areas are listed at ICC 17.02B.510 as “habitats . . . of local importance,” *see* AR 2627, and are depicted in a map attached to Ordinance C-71-16. *See* AR 2636. An excerpt from the adopted map is depicted below, together with the map legend⁶:

⁶ The excerpt of the map below was obtained from the county’s website because the copy in the administrative record is a low-quality scan. Aside from image quality, the image below is otherwise identical to map contained in the record at AR 2636 and formally adopted as part of Ordinance C-71-16.

The specific URL from which the excerpt below was taken is:
<https://www.islandcountywa.gov/Planning/Planning%20Commission%20Documents/PC%20MATERIALS%205-9-16%206.%20Prairies%20BAS.pdf>

Fig. 1: Island County Critical Areas Map (see AR 2636)



LEGEND

- Natural Area Preserves²
 - WNHP High-quality terrestrial ecosystem²
 - Other WNHP grassland^A
 - Other grassland^A
 - Other oak woodland^A
- Species of Local Importance**
- Vascular plants**
- Golden paintbrush (S1)^A
 - White meconella (S1)²
 - White-top aster (S3)²
 - City Limits¹

As explained below, however, the county has still not complied with the GMA. For example, the new designations ignore habitat for many ETS plant species and do not protect all imperiled prairie habitat, contrary to the GMA's best available science mandate. Despite these many problems, the Board approved the county's limited designations in its 2016 Order. *See AR 4192–4208*. The Board subsequently denied WEAN's motion for reconsideration. *See AR 4275–4280*.

D. The Present Action

WEAN timely challenged the Growth Board's finding of compliance for Island County Ordinance C-71-16 and order on reconsideration. *See AR 1–37* (Petition for Review). WEAN's petition raised several issues relating to the county's regulations for the Naas Preserve, ETS plant species habitats, and prairies. On April 19, 2018, the superior court entered a letter opinion affirming the Board's 2016 Order and Order on Reconsideration, as well as Island County Ordinance C-71-16. *See CP 494–97*. The court's letter opinion was followed by a final order of dismissal. *AR 510–16*. The issues addressed in this appeal, and dismissed by the superior court, are discussed and challenged below.

IV. STANDARD OF REVIEW

The GMA provides a private cause of action for appealing final orders of the Growth Board. RCW 36.70A.300(5). Such appeals are

governed by the judicial review procedures of Washington’s Administrative Procedure Act. *Id.* Under the APA, an agency action may be set aside, *inter alia*, if it represents an erroneous interpretation or mis-application of the law⁷, is not supported by substantial evidence in the record⁸, and/or is arbitrary and capricious. RCW 34.05.570(3)(a)–(i).

Under this last standard, it is well-established that “agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts and circumstances.” *Wash. Indep. Tele. Ass’n v. WUTC*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003); *D.W. Close Co., Inc. v. Wash. Dept. of Labor and Ind.*, 143 Wn. App. 118, 130, 177 P.3d 143 (2008). When is room for two opinions, a reviewing court will not substitute its own judgment for the agency, but the agency action must be taken after “due consideration” of the facts and circumstances. *Hillis v. State, Dept. of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997). The arbitrary and capricious standard “must not be used as a rubber stamp of administrative

⁷ Under this test, a court reviews the Growth Board’s legal conclusions *de novo*, giving substantial weight to Board’s interpretation of GMA. *See, e.g., King v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000).

⁸ “[T]he test of substantial evidence is ‘a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.’ *King, supra*, 142 Wn.2d at 553 (quoting *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510 (1997)).

actions.” *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 435 n.8, 166 P.3d 1198 (2007).

V. ARGUMENT

A. Ordinance C-71-16 Fails to Protect Whidbey Island’s Only Natural Area Preserve.

The county’s revised buffer provision for the Naas Preserve at ICC 17.02B.430.E (quoted *infra*, page 15 and found at AR 2625) still does not protect all functions and values of the preserve—one of the specific shortfalls that the Board found in its original 2015 Order on Ordinance C-75-14. *See* AR 2393–95. For this and other reasons discussed below, the Board erred in upholding that provision and the superior court erred in doing the same.

1. The county’s revised buffer provision for the Naas Preserve fails to protect all functions and values.

First the Board erred when it determined that the second sentence of ICC 17.02B.430.E allows the county to impose a buffer between the Naas Preserve and adjacent development based on impacts to functions and values other than species preservation. *See* AR 4199. The superior court similarly erred when it upheld the Board’s ruling on that issue, describing it as “properly appl[ying] the principles of statutory construction.” CP 496, 512. To see this, the plain language of the county’s revised buffer provision at ICC 17.02B.430.E is dispositive.

The first sentence of the county’s revised buffer provision at ICC 17.02B.430.E provides: “Buffers shall not be required adjacent to [Natural Area Preserves] as long as these areas encompass the land required for species preservation.” AR 2625. This sentence clearly prohibits the imposition of any buffer outside the preserve if lands within the preserve are sufficient for the limited purpose “species preservation”—only one of the known functions and values of the Naas Preserve. *See* AR 2394 (discussing other functions and values).

The second sentence of the county’s revised buffer provision at ICC 17.02B.430.E provides: “The Planning Department shall confirm the public agency establishing and managing the area has included sufficient land within these areas to ensure no net loss of habitat function and values.” The Board cited this in its 2016 Order as authority to require buffers whenever they are needed to prevent a loss of habitat function and values, of any sort. *See* AR 4199. But this sentence does something different; it requires the county to verify that lands *inside* the preserve (*i.e.*, “these areas”) are sufficient for that purpose. Obviously, it is good that the county will confirm that lands inside the preserve have positive environmental qualities. But it is still necessary to prevent those lands from being damaged by activities outside the preserve, which is the purpose of a buffer. The second sentence does not speak to that issue.

The third sentence of the revised buffer requirement does not modify the first sentence's prohibition either. It provides: "If buffers are required, they shall reflect the habitat sensitivity and the type and intensity of activity proposed to be conducted nearby." Here, the word "if" refers to the possibility that a buffer may be required if necessary for species preservation. It does not override the prohibition in the first sentence that precludes buffers in all other circumstances.

Contrast this with the Board's conclusion that the second sentence of ICC 17.02B.430.E "requires the County to ensure 'no net loss of habitat functions and values' *and, if not*, a development proposal is required to include buffers reflecting the sensitivity of the habitat to the proposed development." AR 4199 (emphasis added). The first part of this conclusion is true—the second sentence of the revised buffer provision does require the county to ensure that areas within the preserve are sufficient to ensure no net loss of habitat functions and values. But the second half of this conclusion (everything after the word "and") is taken out of thin air. There is nothing within the revised buffer provision that would allow the county to impose a buffer to protect the Naas Preserve unless the county finds, specifically, that it is needed for the sole purpose of species preservation—as stated unequivocally in the first sentence of the revised rule: "Buffers *shall not* be required adjacent to [Natural Area Preserves] as long as these

areas encompass the land required for *species preservation*.” AR 2625 (emphasis added). It does not get much clearer than that.

Because the Board’s interpretation of the revised buffer provision at ICC 17.02B.430.E is based on a misinterpretation of the plain language of that rule, its 2016 Order should be reversed on this issue and Island County should be directed to adopt a new buffer provision that will protect *all* functions and values found at the Naas Preserve, as required by the GMA. *See Yakima County*, 168 Wn. App. at 692 (“The GMA requires regulations for critical areas to protect *all* functions and values of the designated areas, not just some of the values”) (emphasis added).

2. The county’s revised buffer provision for the Naas Preserve departs from Best Available Science, which recommends a minimum buffer of 100 feet.

Next, the county’s revised buffer provision at ICC 17.02B.430.E conflicts with best available science supporting a 100-foot minimum buffer along the Naas Preserve’s southern boundary. In that area, the preserve’s rare forest community extends onto the Camp Casey property, with the forested area outside the preserve protecting the forest in the preserve from strong southerly winds. Without this natural buffer on the Camp Casey property, trees in the preserve would be at risk of being blown down. This

was acknowledged by the county’s own consultants, who observed in their technical memorandum that buffers in this area “are warranted”:

Where the rare forest community extends south beyond the boundaries of the NAP onto the Camp Casey property, buffer management provisions are warranted to ensure that the forest community within the NAP is adequately protected from edge effects, in particular blowdown susceptibility.

AR 2754. *See also* AR 3478 (same).

The county’s technical memorandum went on to describe particular buffer widths to protect the forest community at the southern area of the Naas Preserve. The memorandum provided, in relevant part:

The forested area on the Camp Casey parcel likely provides buffer functions for the forest community within the NAP, and given the exposed location of the NAP to southwest winds, these functions include limiting blowdown risk to trees within the NAP (Knutson and Naef 1997). *Knutson and Naef (1997) identify 100 feet as generally sufficient to protect habitats from blowdown risk. Alternatively, Kelsey and West (2001) note that wind velocities remain elevated up to 600 feet into a buffer, and that wider buffers up to that distance that allow for selective thinning may be appropriate for areas subject to blowdown.*

AR 2754 (emphasis added); AR 3478 (same).

The purpose of the technical memorandum quoted above was to “provide best available science (BAS) related to the need for buffers to protect fish and wildlife NAPs in Island County,” where the Naas Preserve is the only NAP within the county so far. AR 3475. And it is clear from the block-quote directly above that BAS supports a *minimum* buffer width of

100 feet along the Naas Preserve’s southern boundary, although even that may not be sufficient. The Board recognized this in its 2016 Order upholding the revised buffer provision, observing “100 feet was the recommended minimum of a 100–600 foot range.” AR 4200. This range also is consistent with scientific studies cited by WEAN, further confirming its status as best available science. *See* AR 3337–75.

Below, WEAN challenged the county’s revised buffer provision at ICC 17.02B.430.E on the partial basis that it gives complete discretion to the county to decide the width of the buffer at the Naas Preserve’s southern boundary, to approve a buffer of less than 100 feet, or even to decline to impose a buffer altogether. In response, the Board held that the county acted reasonably in failing to impose a minimum, 100-foot buffer requirement—its so-called “tailored approach”—stating “[w]hile WEAN might prefer a specific standard for protecting the NAP’s southern boundary, it is unable to meet its burden to establish that the County’s action is clearly erroneous in light of the entire record” AR 4200. The superior court similarly held that “[t]here is no requirement in the GMA or in the prior Board order that a firm buffer be adopted.” CP 496, 513.

But the GMA—and judicial precedent interpreting the GMA—does make clear that if a city or county wishes to depart from best available science, it must provide a reasoned justification for that departure:

[I]f a local government elects to adopt a critical area requirement that is outside the range that BAS alone would support, the local agency must provide findings explaining the reasons for its departure from BAS and identifying the other goals of GMA which it is implementing by making such a choice.

Whidbey Env'tl. Action Network, supra, 122 Wn. App. at 173. *See also Yakima County, supra*, 168 Wn. App. at 692 (county must provide “reasoned justification” for departure from buffers supported by best available science); RCW 36.70A.172; WAC 365-195-900(2).

Here, the Court will search in vain for any evidence in the record supporting a buffer requirement of less than 100 feet—*i.e.*, the minimum recommended by the county’s own technical memo documenting best available science on that issue. Nor did the county, the Board, or the superior court identify any such evidence that would support a narrower minimum buffer.⁹

By failing to provide a reasoned justification for its rejection of a minimum 100-foot buffer, the county violated the GMA. The Board’s 2016 Order and superior court order upholding that departure are not supported

⁹ To clarify, the Board did make findings rebutting what the Board viewed as WEAN’s argument for a “firm buffer width”—*i.e.*, an inflexible, absolute buffer width that would apply in all circumstances. *See* AR 4200. But that was a strawman. WEAN never advocated for a “firm” buffer width, only a minimum buffer width that could be adjusted upwards. That is the same approach the county has taken for stream buffers, where the minimum buffer may be enlarged in individual cases. *See* ICC 17.02B.420.

by substantial evidence, are arbitrary and capricious, and should be reversed. The county should be directed to adopt a minimum buffer requirement consistent with best available science, as described by its own technical consultants.

B. Ordinance C-71-16 Fails to Protect Endangered, Threatened, and Sensitive Plant Species Habitat as Required by the GMA and the Growth Board’s 2015 Order.

In its 2015 order, the Growth Board held that Island County was required under the GMA to designate habitat for endangered, threatened, and sensitive plant species. *See* AR 2418 (quoted *supra*, pages 12–13). Several of these species are listed at ICC 17.02B.510.A.¹⁰ Others have been listed by the Department of Natural Resources as part of the Washington Natural Heritage Program (herein, the “NHP List”). AR 3775.¹¹ As discussed above, following the Board’s disapproval of Ordinance C-75-14 in 2015, the county designated 12 locations associated with only three of these species as habitats of “local importance.” *See* AR 2627, 2636. But it did not designate habitat for any of the other ETS species on these lists. As

¹⁰ ETS species listed by the county are tall agoseris (sensitive), golden paintbrush (endangered), bulb bearing water hemlock (sensitive), black lily (sensitive), and white meconella (threatened). *See* ICC 17.02B.510.A.

¹¹ Species listed by the Department of Natural Resources (but not listed by the county) are pink fawn-lilly (sensitive), California buttercup (threatened), Scouler’s catchfly (sensitive), and Texas toadflax (sensitive). *See* AR 3775.

discussed below, the Board’s approval of that decision in its 2016 Order should be reversed for three independent reasons.

1. Ordinance C-71-16 fails to protect habitat of non-prairie ETS plant species.

First, in its 2015 Order disapproving Ordinance C-75-14, the Board held broadly that the GMA requires the county to designate habitat for ETS plant species, without limitation to any particular subset of that threatened class. *See* AR 2418 (observing the county’s “failure to designate and protect habitat of flora listed by the federal or state governments as areas where endangered, threatened, or sensitive species have a primary association fails to protect critical areas in violation of RCW 36.70A.060 . . .”). The Board noted that at least three such species do have habitat in Island County—namely, prairie habitat. *See* AR 2406. But as the county has observed, the Board’s 2015 order did *not* contain findings as to whether any other ETS plant species also have habitat in the county, including those that rely on *non-prairie* habitat for survival. *See* CP 136 (“The GMHB made no finding regarding whether other ETS species had a primary association with other habitats in Island County.”). That issue was left open for the county to resolve on remand.

Ultimately, the county chose only to protect the three specific prairie species listed in the Board’s 2015 order—golden paintbrush, white-topped

aster, and white meconella. *See* AR 2636. And the Board upheld that decision. *See* AR 2405. But there is no evidence in the record that the county also considered designating other, non-prairie listed ETS species that may also have habitat in Island County. For non-prairie ETS species—such as the black lily—their habitat has yet to be designated and there is no evidence in the record supporting the county’s decision to not protect them, too. *See, e.g.*, AR 2216 (observing: “There is a historic occurrence of black lily, (*Fritillaria camschatcensis*) to the east of Crockett Lake, at Admiralty Lagoon (1975)”).¹²

This is a fundamental problem with the Board’s 2016 Order on Ordinance C-71-16 that requires reversal (and also reversal of the superior court’s order and findings upholding the Board, *see* CP 496, 513). The GMA does not allow the county to consider protecting only ETS species that occur in prairies or any other particular habitat type. Instead, it must consider protecting *all* ETS species. *See* WAC 365-190-130(2)(a) (“Fish and wildlife conservation areas that must be considered for classification and designation include,” without limitation, “[a]reas where endangered,

¹² Below, the county asserted that WEAN did not raise the issue of protecting non-prairie plant species. *See* CP 117:17–19. But since the beginning (even before the Board issued its first order), it has been WEAN’s position that habitat of all ETS species should be protected, without limit. *See* AR 660–61 (arguing that habitat for all ETS species should be protected, and observing “[t]hese plants are listed because they are either globally rare (federal listing) or rare in Washington as a whole (WNHP listing), not merely because of local rarity and importance”).

threatened, and sensitive species have a primary association[.]”). By completely ignoring non-prairie ETS plant species, Ordinance C-71-16 does not comply with the GMA or the Board’s 2015 order. The Board’s holding to the contrary is arbitrary and capricious and is not supported by substantial evidence.

2. In adopting Ordinance C-71-16, the county failed to consider designating “primary association” habitat for ETS plant species.

In addition to this fundamental problem with the Board’s 2016 ruling on Ordinance C-71-16, habitat for the three ETS plant species chosen by the county for protection were misclassified as only of “local” importance—not, as the Board required in 2015, as areas where those species have a “primary association.” *See* AR 2418 (county failed to “designate and protect . . . areas where endangered, threatened, or sensitive species *have a primary association* fails to protect critical areas in violation of RCW 36.70A.060”) (emphasis added).

The GMA’s implementing regulations require counties to consider protecting habitat for two different classes of sensitive species. The first is described as “[a]reas where endangered, threatened, and sensitive species have a primary association.” The second is “habitat . . . of local importance.” WAC 365-190-130(2)(a), (b). In Island County, the difference has real-world implications. Primary association habitat is defined functionally, so

that it is protected wherever the species is found in the actual world. *See* ICC 17.02B.060 (defining “primary association” habitat as “the immediate area where the species occurs and the contiguous habitat necessary for its long term persistence.”). But habitat for species “of local importance” is only protected if and when the county chooses to depict that habitat on the county’s critical areas map (which is static and does not change over time as new habitat is found, or when ETS species are found to occur at new locations). *See* AR 2636. Buffer requirements also differ, with greater protections given to primary association habitat than to habitat deemed only to be of “local” importance.¹³ Thus, the county’s decision to classify ETS plant habitat solely under the rubric of “local importance,” *see* AR 2626-27, necessarily results in reduced protection for the three species the county chose to designate.

When WEAN raised the county’s failure to designate primary association habitat for ETS plant species, the county argued the difference was immaterial and that the two categories are equivalent from a

¹³ The Island County Code provides that wherever primary association habitat is found, buffers “*shall* be based on management recommendations provided by the Washington State Department of Fish and Wildlife PHS Program and *shall* consider site-specific conditions and recommendation of qualified professional.” ICC 17.02B.430.E (emphasis added). In contrast, protection measures for habitats of local importance are effectively discretionary. *See* AR 3226 (“the implication of areas being habitats of local importance is that it provides discretion for the director, when reviewing a development application, to determine if a site-specific management plan needs to be developed”).

regulatory perspective. *See* AR 3734. That is false. Moreover, the Growth Board determined in its 2015 Order that the county’s specific error was its failure to designate “primary association” habitat, thereby “fail[ing] to protect critical areas in violation of RCW 36.70A.060.” AR 2418. At the very least, the county should have considered treating these habitats under the more protective rubric of “primary association” under the plain language of WAC 365-190-130(2)(a). And, we submit, it must do so rationally and based on a real-world understanding of the different levels of protection provided by the different categories under the Island County Code.

For this reason, too, the Board’s 2016 order (and the superior court) should be reversed. There is not substantial evidence in the record supporting the Board’s 2016 Order affirming the county’s false equivocation. It also was arbitrary and capricious for the Board to ignore its prior ruling, in 2015, that the county should have designated primary association habitat for these species. *See Rios v. Washington Dept. of Labor and Industries*, 145 Wn.2d 483, 39 P.3d 961 (2002) (agency action arbitrary and capricious where agency ignored its own prior findings); *Probst v. State Dept. of Retirement Systems*, 167 Wn. App. 180, 191, 271 P.3d 966 (2012) (same).

3. Ordinance C-71-16 fails to designate habitat for historic ETS plant species, which the county wrongly assumed have been locally extirpated.

Finally, the Board erred when it upheld the county's decision to ignore four ETS plant species on the false basis that they are "presumed extirpated," a status the county inferred from the fact that they are listed as "Historic" on the NHP List. *See, e.g.,* AR 3771. The four species are pink fawn lily, Texas toadflax, California buttercup, and Scouler's catchfly. AR 3771. *See also* AR 4013. In its 2016 Order on Ordinance C-71-16, the Board effectively approved the county's determination that these species no longer exist, finding instead that there are only three extant ETS species that have habitat in Island County. *See* AR 4202 ("The BAS in the record establishes that three listed species . . . have a primary association with prairies located on Whidbey Island: the Golden paintbrush, White-topped aster, and White meconella.").

The Board erred when it upheld the county's determination that these historic species and their habitat do not require protection.

First and foremost, the county's position that these species are "presumed extirpated" was premised on a misreading of the NHP List. Designating a species as "Historic" on the NHP List—denoted by the letter "H," *see* AR 3775—does not mean that it is "extirpated." Instead, it means that species "may exist but has not been verified recently." AR 3634. In

contrast, extirpated species are denoted by the letter “X.” *Id.* By regulation, these designations by the Washington Department of Natural Resources constitute best available science.¹⁴ Thus, the best available science under the GMA is that these species may exist, not that they are extirpated, as the county asserted below. In turn, for a species on the brink, that difference can have real consequences—especially when it means official protection to ensure continued survival, versus falling off the county’s radar and lacking any and all protection from the harm of future development.

In short, the only support for the county’s decision to not protect these species (and by extension, for the Board’s 2016 ruling on this issue) is premised on a simple misunderstanding of the NHP List. And that misunderstanding could have dire consequences for the rarest species in Island County, contrary to the GMA’s stated goal to protect “rare or vulnerable ecological systems.” WAC 365-190-030(6)(a).

Second, it is common scientific knowledge that species clinging to survival may go unobserved for many years, even when they have not been

¹⁴ See WAC 365-190-040(4)(b), -130(4)(a). See also *Stevens County v. Futurewise*, 146 Wn. App. 493, 513, 192 P.3d 1 (2008) (“Use of the best available science in the development of critical area regulations is especially important to decision-making that affects threatened or endangered species”).

extirpated. The WDFW has observed with respect to “very rare” or “presumed extirpated” faunal species:

Given their extreme rarity, these species are often under-surveyed or are difficult to survey. Consequently, it will *often* be the case that these species will not be documented in a county even if they are present.

AR 1424 (emphasis added). Here too, the extreme rarity of these ETS at-risk plant species does not mean they are gone. In fact, one of these species was rediscovered after 20 years, and WEAN is aware of another species—Scouler’s catchfly—that was only recently re-discovered on Whidbey Island, leading to an update to the NHP List. *See* AR 3377, n.5; AR 3524, n.15; AR 3872. It is precisely this extreme rarity that makes these species so valuable and so important to protect.

Finally, the GMA contains specific guidance for what to do when information is lacking, as it is here with respect to the current status of “Historic” species on the NHP List and their sensitivity to future development impacts. In such instances, the GMA requires local jurisdictions to take a “‘precautionary or no risk approach,’ in which development and land use activities are strictly limited until the uncertainty is sufficiently resolved[.]” WAC 365-195-920(1). *See also Ferry County v. Growth Mgmt. Hearings Bd.*, 184 Wn. App. 685, 742, 339 P.3d 478 (2014) (“In the absence of scientific evidence, a county should

adopt a precautionary or no risk approach.”). Here, by allowing the county to ignore habitat for four ETS plant species on the false (or at the very least, unsupported) basis that they are extirpated, the Board effectively sanctioned a violation of this core GMA requirement. Far from “no risk,” the county chose the one option—ignoring these species—that puts them at *most* risk. By affirming the county, the Board acted arbitrarily and capriciously and its 2016 Order affirming Ordinance C-71-16 on this issue is not supported by substantial evidence.

Finally, in its final order, the superior court stated that the Board did not reach the issue of whether certain historic species require protection under the GMA, and therefore declined to reach the issue. *See* CP 513. Yet, this issue was clearly part of the record below. Following the Board’s first order in 2015, the county acknowledged WEAN’s concerns about historic species being wrongly classified as “extirpated” as part of the county’s self-described “remand issues.” *See* AR 2632–33, 3377, 3471. The county raised this issue in its compliance report to the Board following remand after the Board’s 2015 order. *See* AR 2601. WEAN addressed this issue in its response brief before the Board on Ordinance C-71-16. *See* AR 3086. The county addressed this issue in its reply. *See* AR 3743. And the Board held that only three ETS species require protection, none of which are the

“historic” species addressed by WEAN’s arguments. WEAN properly raised this issue and the Board wrongly decided it in its 2016 Order.

Ultimately, the Board erred by authorizing the county to ignore habitat for non-prairie ETS plant species; by ignoring its own prior ruling requiring the county to designate “primary association” habitat for ETS species; and by approving the county’s erroneous view that all “historic” ETS species are “presumed extirpated.” The Board’s rulings on these issues were arbitrary and capricious, were not supported by substantial evidence, and represent an erroneous interpretation or application of the GMA. The Board’s order should be reversed, and so should the superior court’s order affirming the Board. *See* CP 513.

C. Ordinance C-71-16 Fails to Protect Prairies, Oak Woodlands, and Herbaceous Balds.

Finally, the Board erred in 2016 when it approved the county’s new map designating westside prairie habitat, oak woodlands, and herbaceous balds. *See* AR 4201–03, AR 4277–79. As discussed above, the map may be found at AR 2636. Representative excerpts from the map may be found above at page 18.

For several reasons, use of this map as the sole means of designating these habits violates the GMA. First, there is the issue of accuracy. In June

of 2016, the county's interim long-range planning director described the map, and its role in the Island County permit process, this way:

In this case, the map would provide generally an area where you *might* have prairie, prairie habitat, you *might* have herbaceous bald habitat, you *might* have oak woodland habitat. And if the director, through the application, the review of that development application, determines that additional information is needed as to the specific location of *features*, the property has to develop a habitat management plan.

AR 2665 (emphasis added). Elsewhere, the accuracy of the map data is described in more technical language. *See* AR 3638 (“Site-specific protection or management will require additional field mapping or ground truthing of the product in order [sic] accuracy on a particular site”). But the result is the same. Like the county's other critical area maps, this map is “a reference and d[oes] not provide a final critical areas designation.” ICC 17.02B.200.C.

That, in turn, could lead to problems down the road when the question arises as to exactly what habitat areas need to be protected. The map itself will not answer that question. And indeed, it is not even clear what “features” the county would use, on an *ad hoc* basis, to determine whether a mapped area requires protection from a specific development proposal.

Of course, mapping rare and vanishing habitat is a tall order. One hundred-percent accuracy may not be possible. And it is true, as the superior court observed, that mapping is “an accepted tool for the County to utilize and is consistent with best available science.” CP 514. But the GMA also recognizes the inherent shortfalls in trying to use a map as the exclusive mechanism for designating critical areas, and provides a solution that the county ignored—namely, to adopt a list of definitional criteria defining what features must be protected, to be used in conjunction with the map:

Inventories and maps should indicate designations of natural resource lands. In circumstances where critical areas cannot be readily identified, *these areas should be designated by performance standards or definitions*, so they can be specifically identified during the processing of a permit or development authorization.

WAC 365-190-040(5)(b) (emphasis added). *See also* AR 4207 (“Under WAC 365-190-080(4), critical areas can be designated by maps or by performance standards, although performance standards are preferred over maps.”)

Here, the WDFW provides detailed definitions of westside prairies, oak woodlands, and herbaceous balds, including characteristic species, soil types, and habitat descriptions. *See* AR 1427–1431. The county could have protected all of these habitat types simply by incorporating these definitions in the Island County Code, together with the map. Indeed, the code itself

contemplates that approach.¹⁵ By simply approving a map that does not fully protect these critical areas, the Board's decision was arbitrary and capricious and is not supported by substantial evidence in the record. Without definitional criteria to supplement the maps, there is no guarantee that when development is proposed, these critical areas will be correctly identified in the field within the broad, generalized areas that are loosely defined by the county's critical areas map.

Next, in creating the map, the county excluded smaller examples of prairie habitat. *See* AR 3084, 2601-02. The county's omission of these areas may put all of the county's prairies at risk, and the rare plants that depend on them for their continued survival. *See* AR 1569 (“[s]ince *all* prairie is imperiled, *all* prairie is important and should be conserved *no matter what size.*”) (emphasis added). *See also* AR 1769 (recommending

¹⁵ *See* ICC 17.02B.200.C (“In the event of a conflict between FWHCA mapping and the designation criteria outlined above, the designation criteria shall control”). Similarly, Guidance from the Department of Commerce cautions that “When critical areas are not precisely designated, they may go unprotected even if the protection measures are otherwise very strong.” It then goes on to state “Critical areas may be designated by adopting specific performance standards, delineating specific geographic areas, or both. *Generally, performance standards are preferred, as any attempt to comprehensively map wetlands, for example, throughout a jurisdiction would likely be too inexact for regulatory purposes.*” Washington State Department of Community, Trade and Economic Development, Critical Areas Assistance Handbook: Protecting Critical Areas Within the Framework of Washington Growth Management Act, p.18 (Updated Jan. 2007), available at <http://www.commerce.wa.gov/wp-content/uploads/2016/08/gms-ca-handbook-critareas-2007.pdf>

genetic conservation of small prairie patches). Omitting them also violates the GMA’s requirement that local regulations “may not allow a net loss of the functions and values of the ecosystem.” WAC 365-196-830(4).¹⁶

When WEAN raised this issue below, the Growth Board described it as “disingenuous” because it ignored “other statements” from the Board’s 2015 order. *See* AR 4279. Yet, the Board did not indicate what those “other statements” were.¹⁷

Ultimately, the real rationale for the county’s decision to exclude smaller examples of prairie habitat, and its decision to not adopt definitional criteria for determining prairie habitat in the field, is found in the technical memorandum from the county’s consultant:

¹⁶ We also note that the county’s only outside peer reviewer assumed (wrongly) that all known examples of prairie habitat would be protected, consistent with GMA requirements. *See* AR 2681-2. (describing county’s intent to “*designate all known* Island County prairie, herbaceous bald, and oak woodland areas.” AR 2681 (emphasis added). In other words, the county’s only outside peer review was premised on a demonstrably false assumption about the scope of the county’s critical areas designations.

¹⁷ The Board also stated that WEAN failed to timely raise this issue. *See* AR 4278. But that is false. In the original proceedings, WEAN argued that Island County should designate and protect all remaining prairie habitat. *See* AR 663–64 (“The BAS is that all remaining prairie should be conserved regardless of their size”). In its first order, the Board directed the county to designate prairie habitat, and to follow best available science in doing so. *See* AR 2411, 2418. Thereafter, WEAN argued repeatedly that to fully protect these resources, the county must adopt definitional criteria so that these habitats can be identified in the field, and so that all remaining examples of these vanishing habitats can be protected. *See, e.g.,* AR 3525, 2633. WEAN continued to make these arguments throughout the adjudicative proceedings leading to the Board’s second order on compliance. *See* AR 3084–85, 3095–97, 3099–3101.

It is our understanding that the map . . . would be used by applicants and County planners to identify the approximate locations of prairie, herbaceous bald, and oak woodland habitats. In theory, simple use of the Washington Department of Fish and Wildlife (WDFW) definitions to designate habitats would be wholly protective of all habitat areas; however, in practice, the screening of all potential areas for such habitats would be difficult to administer. The list of protected habitats may omit some small areas of remnant prairie, but due to their size, such small remnant prairies are likely to support limited habitat functions. On the other hand, the list of protected habitats, accompanied by the reference map, would facilitate permit review, ensuring that the high-functioning areas, larger areas, and areas known to support rare plant species are recognized and protected.

AR 2691. *See also* AR 4279 (Board order on reconsideration, lines 1–8).

Notwithstanding this explanation, the county has still failed to justify its exclusion of smaller areas of these critically imperiled habitats, and the Board’s decision upholding the map was made in error.

First, the consultant’s determination (endorsed by the Board) that smaller areas “are likely to support limited habitat function” ignores the record, which supports the opposite conclusion that “[s]ince all prairie is imperiled, all prairie is important and should be conserved no matter what size.” AR 1569. *See also* AR 2407-08 (even if *all* prairie habitat is protected, that may not be enough to prevent additional loss of biodiversity).¹⁸ Without

¹⁸ *See also* AR 3611 (explaining that the county’s exclusion of smaller habitat patches would adversely affect one locally rare species—the fawn lily—which occurs at only four sites on Whidbey Island: “Not all important prairie sites are designated. . . . Fawn Lily (*Erythronium oregonum*) is currently known to occur at

explanation, the county also improperly excluded a National Park Service GIS data layer for plant (including prairie) species location reports, and a spreadsheet of some of that data. *See* AR 903, 907, 1571–75.¹⁹ The county did not explain its rejection of this science or provide a “reasoned justification” for doing so. *Ferry County, supra*, 184 Wn. App. at 736.²⁰ This is especially troubling because even smaller, fragmented, and degraded prairie patches meet WDFW’s priority habitat criteria under best available science. *See* AR 3891 (observing that “[s]maller remnant and/or disturbed prairies are not recognized under this WNHP classification, but may still be mapped by the WNHP program and meet the WDFW PHS definition”).

Second, the issue in the quote above is posed as an “either/or”—*i.e.*, to designate these habitats exclusively by map (excluding smaller

only four sites on Whidbey Island. Two of these are small sites, but have populations of seed producing plants that fluctuate between ~10 and ~300 plants at each site. Not protecting these sites risks losing 1/2 of the occurrences of this species in Island County and drastically increases the risks of losing the species from all of Whidbey Island”).

¹⁹ More information about the National Park Service data may be found at AR 3898–3901.

²⁰ With respect to the National Park Service data, the county’s sole rationale for rejecting this data appears in a declaration drafted after the county adopted its new rules. *See* AR 3831–32. The declaration takes issue with the sources and “spatial aggregation methodology” of the dataset. *Id.*, ¶ 5. But under the GMA, scientific uncertainty is not a reason to reject data that could prevent the destruction of a threatened species. Quite the opposite, it is a reason to take a “‘precautionary or a no risk approach,’ in which development and land use activities are strictly limited until the uncertainty is sufficiently resolved.” WAC 365-195-920(1). Here, rather than take a no-risk approach until the uncertainty is resolved, the county ignored the data in violation of the GMA.

areas) or by adopting definitional criteria to cover all of these habitat types. But the dilemma is false; the two methods may be used in conjunction, exactly as the Island County Code contemplates. *See* ICC 17.02B.200.C.²¹ This removes the touted benefits of the map as a reason to reject definitional criteria. “[R]easoned means rational and supported by evidence.” *Ferry County, supra*. False logic does not count. The Board’s endorsement of this false dilemma is similarly arbitrary and capricious. *See* AR 4279 (falsely ascribing to WEAN a desire for an “ad hoc” approach based only on definitional criteria, rather than a combined approach with both mapping *and* criteria—an approach endorsed by the GMA but never considered by the county).

Third, the only other factor offered for rejecting definitional criteria is that “the screening of all potential areas for such habitats would be difficult to administer.” AR 2691. *See also* AR 4279 (same). But administrative burden does not justify diverging from best available science. The Growth Board has explained that “a ‘reasoned justification’ [for departing from best available science] should include a consideration of the science in the record together with predominantly scientific,

²¹ Indeed, on the very page containing the quote above, the county’s consultant recommended that the county use definitional criteria. *See* AR 2691 (“We would recommend that the WDFW ‘westside prairie’ criteria be used to confirm *and delineate* prairie areas”) (emphasis added).

technical, or legal factors Social, cultural, or political factors should not predominate over the scientific, technical, and legal factors as a rationale for departing from science-based recommendations.” *Friends of the San Juans v. San Juan County*, WWGMHB No. 13-2-0012c, 2014 WL 4809406 *22 (Aug. 20, 2014) (quoted at AR 659). Because this last justification has no relation to science, the county effectively offered no valid justification for declining to designate smaller instances of the county’s imperiled prairie habitat. Again, the Board’s affirmance on this issue was arbitrary and capricious and not supported by substantial evidence.

Finally, the areas marked with stars on the map fail even the most basic designation requirement. WAC 365-190-040(5)(a)(ii) requires designations to establish “the general distribution, location, and extent of critical areas.” Each star shows a point location, but not the “extent” of the habitat. *See* 3643 (county admitting that the three locations marked with stars—Penn Cove Road, San de Fuca Schoolhouse, and South Smith Prairie—have no associated geospatial data; *i.e.*, the stars depict point locations, but not the area of any associated habitat). To show the true “extent” of this habitat, multiple points would be needed to depict the habitat’s area. In turn, this is more than a technicality. With no definitional criteria provided for determining what part of the surrounding area actually constitutes prairie, and no indication of how far from the mapped points

such habitat might extend, these points do not designate anything. They suggest where to begin looking, but not what to look for.

Because Island County's vague designations for imperiled prairie habitat lack definitional criteria (or other mechanisms that would enable such habitats to be identified in the field); because the county ignored the biological significance of smaller patches of prairie in derogation of best available science; and because the county failed to offer a "reasoned justification" for its decision to depart from best available science, the Board's orders approving Ordinance C-71-16 are arbitrary and capricious, are not supported by substantial evidence in the record, and represent an erroneous interpretation or application of the GMA. Likewise, the superior court's conclusion that the Board's decision was supported by substantial evidence (CP 514) was made in error.

V. CONCLUSION

For the reasons above, the Growth Board's orders affirming Island County Ordinance C-71-16 under the GMA are not supported by substantial evidence; in the many ways discussed above the order reflects erroneous interpretations of the law; and the order is arbitrary and capricious as applied to the County's treatment of the Naas Preserve, ETS plant species habitat, and prairie habitat. The court should reverse those orders, find that

Island County has not complied with the GMA, and remand the matter to
Island County to come into compliance on the issues above.

Dated this 5th day of October, 2018.

Respectfully submitted,

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

WHIDBEY ENVIRONMENTAL
ACTION NETWORK (WEAN),

Appellant,

v.

GROWTH MANAGEMENT
HEARINGS BOARD,

Respondent,

ISLAND COUNTY,

Additional Party.

NO. 51903-8-II

(Thurston County Superior
Court Cause No. 16-2-04747-2)

DECLARATION OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, PEGGY S. CAHILL, under penalty of perjury under the laws of the
State of Washington, declare as follows:

I am the legal assistant for Bricklin & Newman, LLP, attorneys for appellant herein. On the date and in the manner indicated below, I caused the Opening Brief of Appellants to be served on:

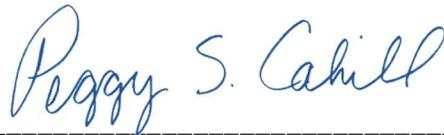
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