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

NO. 52923-8-II

WHIDBEY ENVIRONMENTAL ACTION NETWORK,

Appellant,

v.

GROWTH MANAGEMENT HEARINGS BOARD; ISLAND COUNTY,

Respondents.

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

This case involves Island County's failure to designate and protect habitat for the Western toad as required under the Growth Management Act ("GMA"), Chapter 36.70A RCW. The Western toad is a state candidate species for listing as threatened or endangered, as well as a Washington Department of Fish and Wildlife ("WDFW") designated priority species. Like many amphibians, the Western toad faces threats from habitat loss and fragmentation. The species is also rare in Island County; to date, only six occurrences have been mapped. Based on its rarity and threats to its continued survival, the WDFW has determined that "any occurrence" of the species should be protected.

The appellant is Whidbey Environmental Action Network ("WEAN"), a Washington nonprofit organization dedicated to restoring and preserving the native biological diversity of Whidbey Island. WEAN has brought several lawsuits since 1992 to force Island County to comply with the GMA, including the lawsuit at issue in this appeal challenging the county's most recent attempt to adopt GMA-complaint regulations for the protection of Western toad habitat.

The issues in this appeal are three-fold. First, WEAN challenges the county's decision to not protect "any occurrence" of the Western toad, in violation of WDFW's recommendation and best available science. The toad

spends much of its life-cycle in upland habitat, and upland habitat currently represents five of the six known occurrences in Island County. In turn, the number of documented occurrences within the county have increased dramatically in recent years, suggesting that more upland occurrences may be discovered in the near future. Yet, the county's new regulation only protects the five upland occurrences that were discovered on or before January 24, 2017, ignoring any other upland occurrences that may be discovered in the future. This is a clear violation of best available science and WDFW's admonition that "any occurrence" should be a priority for protection — not just those that happen to have been discovered by an arbitrary point in time.

Second, the county's new regulation fails to implement the "precautionary approach" mandated by the GMA, which requires the county to strictly limit future development when critical information is lacking about potential environmental impacts. Here, the county professes to know very little about current population levels, stressors, and habitat needs of the species in Island County. Yet, its new regulation fails to take a conservative approach to protecting the species' habitat. Among other things, the new regulation fails to protect upland occurrences discovered after an arbitrary point in time, fails to include an adaptive management program for monitoring impacts, and fails to provide any protection for

Western toad habitat more than 1,000 feet from a documented occurrence — an arbitrary distance that bears no relation to the actual behavior or needs of the species.

Last, the county has failed to protect Western toad habitat insofar as the specific enforcement mechanisms that the new regulation relies upon are discretionary. As such, the county has not demonstrated that they will, in fact, comply with the GMA’s mandate to protect critical areas.

Below, the Growth Management Hearings Board (“Growth Board” or “Board) upheld Island County’s new Western toad regulation under the GMA. For the reasons discussed below, that ruling was not supported by substantial evidence and was arbitrary and capricious. Island County’s new regulation fails to comply with the GMA, and the Growth Board should be reversed.

II. ASSIGNMENTS OF ERROR

The Growth Board erred when it approved provisions of Island County Ordinance C-02-17 relating to protection of Western toad habitat. The erroneous findings and conclusions are addressed in the discussion of the issues below. Similarly, the superior court erred when it affirmed the Growth Board under the Administrative Procedures Act (“APA”), chapter 34.05 RCW.

The issues pertaining to the Assignments of Error are:

1. Whether the county's new critical area designations for Western toad upland habitat fail to satisfy the GMA's "best available science" requirement, specifically by omitting documented occurrences that may be discovered in the future?

2. Whether, in adopting its new critical area rules for Western toad habitat, the county failed to comply with the GMA's precautionary principle?

3. Whether the county's discretionary system for protecting Western toad habitat, which may be waived on a case-by-case basis, complies with the GMA?

III. LEGAL AND FACTUAL BACKGROUND

A. Overview of the Growth Management Act

Under the Growth Management Act, cities and counties are required to designate and adopt regulations to protect environmentally critical areas. *See* RCW 36.70A.170; RCW 36.70A.060(2). These areas include Fish and Wildlife Habitat Conservation Areas ("FWHCAs"), 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 “habitats and species of local importance” as protected FWHCAs. WAC 365-190-130(2)(b). Under the GMA, habitats and species of local importance include species identified by the WDFW as endangered, threatened, or sensitive, as well as candidate species and “other vulnerable and unique species and habitats.” WAC 365-190.130(4)(b). “Once designated, local regulations protecting these areas must “preserve the existing functions and values” of the 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, Chapter 17.02B of the Island County Code (“ICC”).¹

To ensure a county’s critical areas rules are scientifically valid and remain so over time as science evolves, the GMA requires a county to include best available science (“BAS”) in designating critical areas and adopting protective regulations. RCW 36.70A.172; WAC 365-195-900(2).

¹ The Island County Code is online at https://library.municode.com/wa/island_county/codes/code_of_ordinances

“[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.” *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). As applied to species of local importance, information provided by the WDFW priority habitats and species program is deemed to be best available science. WAC 365-190-140(4)(b).

However, the GMA also recognizes that even the best “available” science may not be sufficient to answer all questions relating to how a particular species or its habitat should be protected. In that case — *i.e.*, when there is not adequate scientific information to determine what habitats should be protected, or what protective mechanisms should be put in place — the GMA mandates use of a “precautionary” or “no risk” approach. This principle is codified at WAC 365-195-920, which provides:

Where there is an absence of valid scientific information or incomplete scientific information relating to a county’s or city’s critical areas, leading to uncertainty about which development and land uses could lead to harm of critical areas or uncertainty about the risk to critical area function of permitting development, counties and cities should use the following approach:

- (1) 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). In other words, when faced with scientific uncertainty about potential environmental impacts, a city or county must “strictly limit[] land use activities until the uncertainty is sufficiently resolved.” *Yakima County v. Eastern Washington Growth Mgmt. Hearings Bd.*, 168 Wn. App. 680, 693, 279 P.3d 434 (2012).

Like other counties planning under the GMA, Island County must review and update its critical area regulations every eight years to ensure they continue to meet GMA standards, including the best available science requirement. RCW 36.70A.130(1)(a), (c). The first deadline for Island County to review and update its critical area rules was December 1, 2005, which it missed. RCW 36.70A.130(4)(b). The county began a process to finally update its rules in 2014, culminating, in relevant part, in the 2017 ordinance at issue in this case (Ordinance C-02-17). It did so in response to a Growth Board order finding the county had failed to timely review and update its rules in accordance with the schedule set by the GMA. *See* AR 9–84. The next deadline for the county to review and update its critical area rules is not until 2024. *See* CP 111.

B. Western Toad Conservation Status and Decline

The Western toad is a candidate for state listing as threatened or endangered, and designated as a Species of Greatest Conservation Need in the State Wildlife Action Plan. AR 4073–78. As documented throughout the record, Western toad populations in western Washington have undergone precipitous decline. *See, e.g.*, AR 1044–45, 3399–3401, 3403, 3406, 3411, 4464, 4782-83 4953, & 4984. This is reflective of a much larger pattern of global amphibian decline, caused largely by habitat loss and fragmentation. *See* AR 4464.

To maintain species viability, the Western toad, like most amphibians, generally requires “cool temperatures, high moisture, litter, and woody cover, along with corridors among foraging sites and hibernacula.” AR 5012. The Western toad breeds in aquatic areas, but is “largely” or “primarily terrestrial,” dispersing long distances into uplands. *See, e.g.*, AR 5011 (observing that aquatic breeding sites “are only used in spring and early summer, with juveniles and adults dispersing throughout the landscape . . . the rest of the year.”).² Accordingly, “it is vital that movement corridors and upland habitat be connected for all essential life phases.” AR

² *See also* AR 4461-62; AR 1043; AR 3422; AR 4762; AR 4784, fn. 11; AR 4806; AR 4952; AR 4984; AR 5046; AR 5057-58; AR 5198-99; AR 5236; AR 5240; AR 5246-47; AR 5270; AR 5302; AR 5410-11; AR 5424; AR 5456; AR 5467-68; AR 5497; AR 5532.

5012. Absent such protections, “[s]ome minimal upland [*i.e.*, non-breeding] habitat threshold appears to exist below which Western Toads cannot sustain a population, as appears to be the case with many temperate zone amphibians.” AR 5011.

Not surprisingly, the primary threats to the continued existence of the Western toad are habitat loss, fragmentation, and degradation. AR 4462-63; AR 4112; AR 5199; AR 5525. Island County has the highest rate in Washington of conversion of natural lands to development. AR 5959.³ But there are ways to limit these stressors and reduce their impacts.

For example, BAS in the record suggests, *inter alia*, that the county should conserve certain percentages of upland forest and open spaces adjacent to aquatic breed sites, up to 1,000 meters away (*i.e.*, 3,000 feet). Specifically, the county should “[p]rotect upland forest and open space habitat encompassing wetlands used by breeding Western Toads of 40, 50 and 60% upland protection within 100, 500 and 1,000 meters respectively around aquatic areas used for breeding.” AR 5014.

³ See also AR 3578 (explaining “[i]n 2011, human development covered 42.6% of all lands in Island County, or a total of 55,891 acres of land. Between 2001 and 2011 the county lost 5,463 acres of natural areas to development. The proportion of natural areas lost each year in Island County is 374.8% higher than the annual rate of loss in Washington and 850.6% higher than the annual rate of loss across the west.”).

In turn, within these areas (*i.e.*, upland habitat within 3,000 meters of breeding sites), there are indicators of quality toad habitat that should be protected. These include “[m]ixed undeveloped upland habitat . . . , preferably some open area and prairie habitat, mixed with forest (or if riparian — open sand bars mixed with forest).” AR 5014. Other indicators include “[g]ood overwintering habitat, meaning large hollow log refuges, rocky talus slopes or areas with substantial burrows created by another animal that are large enough to use by overwintering Western Toads,” and “[h]abitat that is not bisected by roads or other development between aquatic and non-breeding or overwintering upland habitat” *Id.* The county’s own wildlife consultant has identified recommendations to protect these habitat characteristics as “best available science.” AR 3499.

The Washington Department of Fish and Wildlife designates the Western toad as a “Priority Species” with “any occurrence” in Washington deemed to be a priority for protection. AR 4073-78. In turn, an “occurrence” includes any location where there is (a) evidence of historical presence, or (b) credible evidence of “current and likely recurring presence.” AR 4196. This “any occurrence” designation is reserved for “priority species with limiting habitat that is not known” or where a species “is so rare that any occurrence is important in a land use decision.” AR 5001. Under the GMA,

WDFW's admonition that *any* occurrence should be protected represents best available science. *See* WAC 365-190-140(4)(b).

C. History of Island County's Efforts to Protect the Western Toad under the Growth Management Act

After nine years of failing to update its critical areas rules as required by the GMA, Island County issued Ordinance C-75-14 in September of 2014 in response to a Growth Board order finding that the county had not met its statutory obligations for timely periodic updates. AR 9–84. A major issue at that time was whether the county must protect Western toad habitat under the GMA. The county declined to protect any such habitat.

WEAN challenged that decision before the Growth Board and won. *See* AR 2422–23. Based on the past and current recommendations of WDFW, the Board concluded that “Best Available Science shows that *any* occurrence of the Western Toad should be a priority area for protection.” *Id.* at 2423. (emphasis added). *See also* 2421 (same). In other words, every occurrence should be protected. The county violated the GMA by not protecting any.

In response to the Growth Board's ruling, the County adopted Ordinance C-71-16, which attempted to protect Western toad aquatic breeding sites, but fell short of fully implementing WDFW's admonition that “any occurrence” should be protected. First, the new rule was vague

and did not clearly protect breeding sites. *See* AR 4195. More substantively, the new rule was invalid because it ignored upland, non-breeding habitat which was left entirely unprotected. *See* AR 4196. On these bases, the Board struck down the county’s second attempt to comply with the GMA. *Id.* at 4197.

Following the Board’s second order, on January 24, 2017, Island County made a third attempt at compliance by adopting Ordinance C-02-17. *See* AR 4370–82 (copy of ordinance). The operative language in that ordinance — now codified at ICC 17.02B.210 — is quoted below:

Western Toad breeding sites, as documented by scientifically verifiable data from WDFW, or a qualified professional, shall be protected through the county’s wetland and stream critical areas regulations, presently codified in title 17 [of the Island County Code]. Such breeding sites, as they are presently known and documented as provided above, or may later be identified through the processing of site-specific land use and development permits or other scientifically verifiable data, are designated as Fish and Wildlife Habitat Conservation Areas. Also designated as Fish and Wildlife Habitat Conservation Areas are the occurrences identified by Priority Habitat Species data from WDFW as it existed on January 24, 2017.

AR 4310.

This new and current iteration of the county’s rule designates as protected FWHCAs “all currently known site ‘occurrences’” of the Western toad, which the new rule defines as any occurrence documented by WDFW on or before January 24, 2017 — *i.e.*, the day the ordinance was passed. *See*

CP 107. In practice, this resulted in the designation of six individual occurrences — one associated with an aquatic breeding site, and five associated with upland, non-breeding sites. *See* AR 4310. A map of the designated occurrences may be found at AR 4366. *See* CP 107, n.7.

In addition to protecting the six known occurrences, the rule also provides for automatic designation of any newly-discovered occurrences associated with aquatic breeding sites, so long as they are “documented by scientifically verifiable data from WDFW, or a qualified professional.” AR 4310. In practical terms, this means “if a citizen saw a Western Toad in a wetland on their property and had an official from WDFW verify the breeding site through a site visit which reflects the presence of an egg mass, then the County will add that breeding site to its map of known occurrences.” CP 4310–11. Obviously, breeding sites are important and their protection should not hinge on whether they were documented on or before January 24, 2017. Consistent with best available science, “any occurrence” should be protected, regardless of when it is first discovered.

But the same is not true of upland habitat under the new rule. Unlike aquatic breeding sites where newly discovered occurrences will automatically be designated as protected FWHCAs, upland habitats in active use will not be protected unless they were documented on or before January 24, 2017. *See* AR 4310–11. In other words, while the number of

protected breeding sites is dynamic under the county's new rule — and will grow as new sites are discovered — the number of protected upland occurrences is fixed in time. This is flatly contrary to WDFW's admonition that "any occurrence" is a priority and should be protected.

As for why the county chose not to automatically designate newly-discovered upland occurrences, the county says it is because "upland habitat characteristics associated with the Western Toad are not well understood." AR 4310. *See also* AR 4697. In other words, the county chose not to protect any additional upland habitat, including occurrences newly discovered after January 24, 2017, "because it is not understood with which upland areas or habitat conditions the species has a primary association." AR 4353. Oddly, that is the exact same factor cited by WDFW as a reason why *any* occurrence should be protected, without regard to when it is first documented. *See* AR 5001 ("any occurrence" should be protected when "limiting habitat . . . is not known"). This lack of information also points to the GMA's precautionary principle, referenced above, requiring new development to be strictly limited until the uncertainty is resolved.

As a second rationale for not automatically designating newly-discovered upland occurrences, the county observed that while toads display "some level of breeding site fidelity" — meaning they may return to the same breeding site in subsequent years — a documented upland

occurrence “does not provide assurance that the species will occur in the same area in the future.” AR 4311. In this way, the county argued that protecting all upland occurrences (including ones discovered later) might be overkill. But obviously, that argument misunderstands the meaning of the word “occurrence,” which denotes “evidence of historical presence, *or current and likely recurring presence*, at a given location.” AR 5718 (internal quotations omitted; emphasis added). And the WDFW — the source of the best available science — recommends that *all* occurrences be conserved.

In turn, there is significant reason to suspect that even under this more rigorous standard of what counts as an “occurrence,” more occurrences will be discovered, potentially in the very near future. As of 2014, only one occurrence had been documented in Island County. *See* AR 1119. By 2016, there were three documented occurrences. *See* AR 5720. And by early 2017, that number had doubled to six — *five of which are upland sites. Id. See also* AR 4353 (the species “may be more common than currently documented occurrences”).

Finally, it is important to understand how the county envisions that these sites will actually be protected. The county relies on the Biological Site Assessment (“BSA”) requirement at ICC 17.02B.400 (formally codified at ICC 17.02B.410). A BSA is generally required whenever a

development project is proposed within 1,000 feet of a designated FWHCA, as depicted at AR 4366. The general purpose of a BSA is to collect information on the proposal's potential environmental impacts — in this case, on potential Western toad habitat. *See* ICC 17.02B.400. If the BSA discloses that there will be impacts, the county may then require the development of a Habitat Management Plan, which would document measures to mitigate, reduce, or eliminate those impacts. AR 4310.

As applied to the county's new rule for Western toad habitat, no BSA would ever be required for development projects proposed for areas more than 1,000 feet from a designated occurrence. This is notwithstanding that the Western toad is known to inhabit upland habitat well beyond 1,000 feet from aquatic breeding sites, with reported maximum dispersal distances for adult females ranging from 1.5 to 2.44 kilometers —roughly 5,000 to 8,000 feet. *See* AR 4462; AR 5057. The county's Planning Director may also waive the BSA requirement altogether, whenever he finds that impacts will be "minor" — a term left conspicuously undefined in the county code. *See* ICC 17.02B.400.A.1. The Director may make that determination, and waive the BSA requirement entirely, even before any information is gathered about the proposal's potential environmental impacts on Western toad habitat. *See id.*

As for why the county opted not to require a BSA for projects further away from designated occurrences, the county's Planning Director explained, "I'm pretty convinced that the Board of County Commissioners is not willing to draw a two kilometer circle around a breeding site and say whoever owns property here you can't touch it." AR 4472; AR 5854. In other words, there was political opposition to requiring even an investigation (in the form of a BSA) into potential Western toad habitat further away from breeding sites, or any analysis of whether protective measures might be prudent or scientifically necessary for the toad's continued survival. Even gathering facts and asking whether potentially critical habitat needs to be protected was rejected.

As well, the county's rationale ignores that there are other potential ways of protecting Western toad habitat that do not amount to a complete prohibition on development. These include, *inter alia*, careful location of development within a single development site, retaining corridors of native vegetation, and providing amphibian tunnels under roads. *See* AR 5014–15.

D. The Growth Board's Ruling

Over WEAN's objection, the Growth Board ultimately held on April 10, 2017 that the county had finally come into compliance with the GMA and included the best available science for protection of Western toad habitat. *See* AR 5712–25 (Order Finding Compliance and Closing Case).

The Board later affirmed that ruling on reconsideration. *See* AR 5965–80. In doing so, the Board rejected several of WEAN’s arguments challenging the county’s newest and current Western toad rule in Ordinance C-02-17.

Among other things, WEAN argued that the County had acted arbitrarily and capriciously, and failed to include BAS, by treating future upland occurrences differently from future breeding site occurrences. In particular, WEAN argued that the county lacked a valid scientific rationale for automatically including new aquatic breeding site occurrences as protected FHWCA’s, but limiting protection of upland, non-breeding sites to only those occurrences documented prior to January 24, 2017 — a scientifically arbitrary deadline. *See* AR 4476–77. WDFW’s recommendation for conservation of “any” means any. Upland occurrences discovered after that date also should be automatically designated as protected FWHCA’s, consistent with BAS.

In response, the Growth Board acknowledged that “BAS in the record supports the designation of ‘priority areas’ with *any* reliably documented ‘occurrence’ of Western toad, whether breeding or non breeding.” AR 5972 (emphasis added). *See also id.* (observing “[s]cience in the record also shows the importance of upland, non-breeding dispersal areas for the Western Toad.”). But the Board rejected WEAN’s argument on the basis that the GMA only requires use of best “available” science; and

here, the “available” science had only documented five upland occurrences by the time the county adopted its new ordinance. *See id.* (“Consistent with BAS, the County has designated all known occurrences of the Western toad.”). *See also* AR 5721. The Board reasoned that any additional upland occurrences could be protected later, in 2024, the next time the county is scheduled to review and update its critical area rules (assuming it does so, having failed to timely review its rules in the past). *Id.* *See also* 5971; CP 111.

Relatedly, WEAN argued that it was arbitrary and not supported by best available science for the county to limit protection of Western toad habitat to 1,000 feet of documented occurrences (*i.e.*, the distance within which a BSA would need to be prepared for any new development proposal). AR 4472–73. In particular, that distance bears no relation to the actual behavior and habitat needs of the species, which regularly disperses several kilometers from breeding sites. *See* AR 4462; AR 5057. WEAN also explained that the 1,000-foot BSA requirement had been adopted years earlier, specifically for the protection of heron rookeries, not for amphibians generally or the Western toad in particular. *See* AR 4473; AR 5083. Finally, WEAN argued that the 1,000-foot limitation is not consistent with the precautionary principle mandated by the GMA at WAC 365-195-920. *See* AR 4476.

The Growth Board rejected this argument on the theory that it had previously decided, in its September 2016 order, that upland habitat need not be protected — and thus, that it was equally acceptable to limit its gratuitous protection for upland habitat to areas within 1,000 feet of an aquatic breeding site (or presumably, to provide no protection at all). *See* AR 5721. But that rationale was false. In its prior ruling, the Board rejected the county’s earlier attempt to comply with the GMA precisely because it omitted protection of any upland habitat, without any indication that such protections could justifiably be limited to 1,000 feet of a known occurrence. AR 4196.

WEAN also challenged the county’s reliance on the BSA requirement for Western toad protection on the basis that it is discretionary and may be waived whenever the county determines that impacts will be “minor” — a vague and undefined term.⁴ The Board rejected this argument, reasoning it “will not presume that the County will abuse its discretion in making such a determination.” AR 5722.

⁴ *See* AR 4472 (“By relying on an entirely discretionary system for protection with no definitions, standard, or criteria to put sideboards on that discretion, the County has failed to protect the Western Toad habitat or include the BAS in doing so.”).

E. The Current Appeal

WEAN timely challenged the Growth Board's finding of compliance for Island County Ordinance C-02-17 and its new rule codified at ICC 17.02B.210. *See* CP 1–12 (Petition for Review). WEAN's petition raised the same arguments discussed above in Section III.E. On December 6, 2018, the superior court issued a letter opinion affirming the Board's ruling. *See* CP 139–42. The court's letter opinion was followed by a final order of dismissal. CP 143–50. This appeal followed.

IV. STANDARD OF REVIEW

The GMA provides a private cause of action for appealing final orders of the Growth Management Hearings Board. RCW 36.70A.300(5). Such appeals are governed by the judicial review procedures of APA, *see id.*, under which an agency action may be set aside, *inter alia*, if it represents an erroneous interpretation or misapplication of the law, is not supported by substantial evidence in the record, 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 there 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 actions.” *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 435 n.8, 166 P.3d 1198 (2007).

“Substantial evidence is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 596, 13 P.3d 1076 (2000).

Because this appeal arises from judicial review of an administrative decision, this Court applies these standards of review directly to the administrative record. *See, e.g., Yakima County*, 168 Wn. App. at 687 (“We review the GMHB’s decision under the Administrative Procedures Act, applying chapter 34.05 RCW standards directly to the record before the GMHB.”) (citing *Kittitas County v. Eastern Washington Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 155, 256 P.3d 1193 (2011)).

V. ARGUMENT

A. Ordinance C-02-17 Fails to Designate and Protect “Any Occurrence” of Upland Toad Habitat

One of the core issues in the underlying proceedings was the county’s decision to not automatically designate newly-discovered occurrences of upland toad habitat as protected FWHCAs, in contrast to the way it treats newly discovered breeding sites which *are* automatically designated. As WEAN observed, the best available science provided by the WDFW is that “any occurrence” is a priority and should be protected. *See* AR 4073-78. In other words, whenever there is credible evidence that a site is used by the Western toad, and that the toad is likely to use that area again, it should be designated as a protected FWHCA.

This scientific directive is indisputable and has been confirmed by the Growth Board itself. *See, e.g.,* AR 5972 (“BAS in the record supports the designation of ‘priority areas’ with *any* reliably documented ‘occurrence’ of Western toad, whether breeding or non breeding.”) (emphasis added); AR 2423 (“Best Available Science shows that *any* occurrence of the Western Toad should be a priority area for protection.”) (emphasis added).

Notwithstanding the rule that “any occurrence” should be protected, the Board upheld the county’s decision to limit its protection of upland

habitat to only five occurrences documented prior to January 24, 2017, reasoning that those five occurrences — *and only those five occurrences* — represent BAS.⁵ In this regard, the Board misunderstood the BAS. In essence, it conflated the current state of knowledge relating to where Western toad occurrences are located on the landscape with scientific knowledge of what should be done when occurrences are discovered.

Admittedly, the former type of knowledge was limited when the county adopted its rule; only six occurrences had been discovered. But scientific knowledge was *not* limited about what should be done if and when more occurrences are discovered in the future. The best available science is that “any occurrence” should be protected, with no stated qualification. *See* AR 2423 (“Best Available Science shows that *any* occurrence of the Western Toad should be a priority area for protection.”). That includes future occurrences, too.

In turn, there is every reason to believe that future upland occurrences could, in fact, be discovered and that they may be discovered in the near future — well before the county is scheduled to review and

⁵ *See* AR 5722 (“It is apparent that the County did include BAS in designating the known toad occurrences.”); AR 5972 (ruling that the county complied with BAS simply by designating the six occurrences known as of the date of rule adoption, and opining that the county’s decision to automatically designate later-discovered breeding site occurrences was a gratuitous “extra step”).

update its rules again in 2024. As noted above, the number of known occurrences is dynamic and has increased substantially in just the past few years. *See* AR 1119; AR 5720. “Any” means any — there is no scientific basis for not protecting new occurrences simply because they are discovered later.

Nor is this situation unique. In the case of wetlands, cities and counties routinely recognize that best available science requires protection. Yet, it is not possible at the time of rule adoption to say exactly where every wetland is located, because some have not been documented and confirmed. To get around that common problem, cities and counties routinely adopt criteria for determining what constitutes a wetland and what protective measures should be imposed for all wetlands, including those that may be discovered later. *See, e.g.*, ICC 17.02B.460 (defining categories of protected wetlands and their buffers). That is science, but it is also common sense. It is also why the GMA generally recommends the adoption of definitional criteria to locate protected critical areas on the landscape, instead of relying on static maps which necessarily depict only a snapshot of knowledge about where those critical areas are located at a given point in time.⁶ That way,

⁶ *See* WAC 365-190-040(5)(b) (“In circumstances where critical areas cannot be readily identified, these areas should be designated by performance standards or definitions, so they can be specifically

new areas are automatically protected if and when they are discovered, instead of limiting protections arbitrarily to only those areas discovered to date.

The same is true here. The current state of knowledge is incomplete with respect to the actual location of all Western toad “occurrences” — *i.e.*, sites that toads have used in the past, and where there is a likelihood of recurring presence. *See* AR 4195. But the *principle* expressed by best available science is that “any occurrence” should be protected. Like wetlands, we may not know where every occurrence is located. But we do know that all occurrences should be designated as protected FWHCAs. By upholding the county’s decision to ignore future documented occurrences, the Board ignored best available science.

The Court will search the record in vain for any evidence that WDFW intended its “any occurrence” rule to apply only to presently known occurrences; indeed, that is why the list grows. Because the Growth Board conflated the BAS that “any occurrence” should be protected, on the one hand, with the state of knowledge concerning where those occurrences are located, on the other, its ruling was arbitrary and capricious and not supported by substantial evidence. When new Western toad occurrences are

identified during the processing of a permit or development authorization.”).

discovered, they should automatically be designated and protected, regardless of whether they are breeding sites or upland, non-breeding sites. *See, e.g.*, AR 5972 (“BAS in the record supports the designation of ‘priority areas’ with *any* reliably documented ‘occurrence’ of Western toad, whether breeding or non breeding.”) (emphasis added). By not automatically designating future documented occurrences of upland toad habitat, the county violated the GMA and best available science. The Board erred in holding otherwise.

B. Island County Failed to Adopt a Precautionary Approach for Western Toad Habitat

Another way to approach this issue is through the precautionary principle at WAC 365-195-920 and discussed above in Section III.A. Under that provision, “[w]hen there is an absence of valid scientific information or incomplete scientific information” relating to potential impacts on critical areas, a city or county must “strictly limit[] land use activities until the uncertainty is sufficiently resolved.” *Yakima County*, 168 Wn. App. at 693. In other words, when the risk of impacts is not known, a city or county must take a “precautionary or no risk approach.” WAC 365-195-920(1).

Applied to Island County’s decision about how and whether to protect Western toad habitat, the precautionary principle is clearly applicable. For example, the county asserts that it does not know current

population levels. *See* AR 432; AR 4758. If local populations are in decline, the county does not know what “causal factors” are responsible. AR 4349. *See also* AR 4675 (“There is much that is not understood regarding local/regional populations trends, stressors, and significant upland habitat features for the Western toad.”). Indeed, according to the county, “there is incomplete scientific information on 1) the status of the Western toad in Island County, 2) the extent of the role of habitat destruction or degradation in influencing population trends, and 3) the upland habitat features important to Western toad.” AR 4358. *See also* AR 2785 (same). In part, this dearth of information is due to the county’s own failure to investigate. *See* AR 5957–59 (discussing the county’s failure to investigate upland habitat usage and population trends).

Ultimately, the county has explained that “[w]ithout additional information related to these population trends, upland habitat use, and stressors, *it is not possible* to determine what additional regulatory management measures would effectively conserve the Western toad.” AR 4119 (emphasis added). Significantly, that is the exact trigger for the precautionary approach mandated by the GMA. *See* WAC 365-195-920 (precautionary principle applies when there is “uncertainty about which development and land uses could lead to harm of critical areas or

uncertainty about the risk to critical area function of permitting development.”).

Applied here, a precautionary approach would mandate that the county at least enact automatic designation of any newly discovered upland toad occurrences, consistent with WDFW’s admonition that “any occurrence” is a protection priority. In other words, if the county truly does not know whether the species is in local decline, what type of habitat it needs to survive, or what additional regulatory measures are needed to conserve the species, then the very least the county can do is to automatically designate newly-discovered upland occurrences instead of dismissing them on the arbitrary basis that they were not discovered on or before January 24, 2017. This is yet another reason why the Growth Board erred in upholding the county’s decision to ignore new upland occurrences that may be discovered in the future. That decision was arbitrary and capricious by ignoring the GMA-mandated precautionary approach.

But there are also other ways in which the Board ignored the precautionary principle when it upheld the county’s newest Western toad rule. When the precautionary principle applies, the county is supposed to “*strictly limit[]* land use activities until the uncertainty is sufficiently resolved.” *Yakima County*, 168 Wn. App. at 693 (emphasis added). Here, not only could the county have provided for automatic designation of

newly-discovered upland occurrences, it could have proactively mapped and protected areas that exhibit features known to provide high-quality toad habitat. The county claims that upland habitat features are not well understood, which the Board reiterated in its ruling. *See, e.g.*, AR 5973. But in fact, there are recognizable landscape features that should be conserved, including, *inter alia*, “prairie habitat mixed with forest” and areas connecting these habitat types to potential aquatic breeding sites. *See* AR 5014; AR 3499. These areas should have been proactively designated as protected FWHCAs, consistent with the GMA’s precautionary, no-risk approach, which requires the county to “strictly limit” development until the uncertainty is resolved.

Relatedly, if the county truly does not know what stressors are affecting the Western toad, the causal factors in its decline, or the types of habitat it uses, then it must at least adopt an adaptive management program to evaluate these issues as required by the precautionary approach. Under WAC 365-195-920, the precautionary principle requires not only that development be strictly limited until the uncertainty is resolved, but also that the county adopt “an effective adaptive management program that relies on scientific methods to evaluate how well regulatory and nonregulatory actions achieve their objectives.” WAC 365-195-920(2). *See also* AR 3612; AR 4473–76.

The purpose of an adaptive management program is to monitor the effectiveness of current land use regulations and to determine if they actually comply with the GMA's mandate to protect critical areas over time. *Id.* Such a program must address funding, contain a plan for changing course depending on the observed efficacy of the rules, and must exhibit a commitment to timely change course if it is determined that the adopted rules fail to achieve their objective. *See* WAC 365-195-920(2)(a)–(c). In this case, the county's most recent rule for Western toad habitat contains none of these features of an effective adaptive management program, despite the precautionary principle clearly applying.

Last, the county's decision to require a Biological Site Assessment only within 1,000 feet of Western toad occurrences violates the precautionary approach mandated by the GMA. As noted above, this distance was borrowed from a rule designed to protect heron rookeries and bears no scientific relation to the actual distance that toads disperse from their breeding sites, which can range anywhere from 3,000 feet to several kilometers. *See* AR 4472–72; AR 4476. *See also supra*, Section III.B. When WEAN challenged this arbitrary limitation on the BSA requirement, the Board rejected WEAN's argument on the theory that it had already determined (in a prior order) that “upland habitat in the County was not known to be a limiting factor.” AR 5721.

But that was actually the *county's* rationale (not the Board's) for not designating *any* upland habitat in 2016, which the Board rejected. *See* AR 4194 (reporting county's rationale for not designating any upland habitat); AR 4196 (ruling that the county must designate documented upland occurrences). As for the Board, it clearly believed the county must protect documented upland habitat, which is why it rejected the last iteration of the county's rule. *See* AR 4196.

Putting aside that false basis for upholding the county's 1,000-foot limitation, there is no scientific support in the record for not requiring an evaluation of potential Western toad habitat in areas further away from known occurrences. No habitat may be found or only minor changes to proposed development may be needed, but there is no justification for not even preparing a biological site assessment. If the precautionary approach requires the county to "strictly limit" development until the uncertainty is resolved, surely it requires a BSA for projects within the known range of the Western toad. If valuable habitat exists, it should be found and evaluated, even if it happens to be located more than 1,000 feet from a documented occurrence.

In all of these ways, the county's new rule for Western toad habitat in Ordinance C-02-17 violates the precautionary approach mandated by the GMA at WAC 365-195-920. In affirming that rule notwithstanding this core

deficiency, the Growth Board's ruling was arbitrary and capricious and not supported by substantial evidence. The Growth Board should be reversed.

C. The County's New Rule Arbitrarily Allows Protective Measures to be Waived

Finally, there is the problem that the sole mechanism for protecting Western toad habitat — the Biological Site Assessment requirement — may be waived whenever the county determines, before any information is collected about a proposed development project, that impacts will be “minor.” *See* ICC 17.02B.400.A.1. In essence, despite the county's reliance on the BSA requirement to protect Western toad habitat, even that modicum of protection may be waived in any particular case.

Critically, the word “minor” is not defined in the Island County Code and there is no information in the record about how it might be applied on a case-by-case basis with respect to Western toad habitat. Nor is there any guarantee that the county would be capable of applying it in a consistent or predictable manner given the extreme paucity of information the county claims to possess about the Western toad and its habitat needs. As WEAN observed below, “[w]ith no investigation and the County insisting that it does not know what habitat the species needs, the ordinance allows the planning director to decide if any investigation will occur at all and therefore whether there will be any protection.” AR 4472. This is especially

troubling in light of the county's statements that it will not necessarily seek to protect upland habitat more than 1,000 feet from a documented breeding site, notwithstanding the plain demand of best available science that "any occurrence" is a priority for protection. *See* AR 4119.

The Board upheld the county's new rule despite this vague, discretionary enforcement mechanism, reasoning it "will not presume that the County will abuse its discretion in making such a determination." AR 5722. But the problem is not that the county will "abuse" its discretion. The problem is that there is no information in the record about the standard the county will use to exercise its discretion, even if it attempts to do so in good faith. Without knowing that standard, it is impossible to determine whether the new rule will, in fact, protect Western toad habitat as required by the GMA.

Our Supreme Court has held that "[a]n ordinance must be clear, precise, definite and certain in its terms, and an ordinance vague to the extent that its precise meaning cannot be ascertained, is invalid." *State ex rel. Welks v. Town of Tumwater*, 66 Wn.2d 33, 35, 400 P.2d 789 (1965). Likewise, when an ordinance is so vague that "persons of common intelligence" must necessarily guess at its meaning, it is unconstitutionally vague. *See Burien Park Supply v. King County*, 106 Wn.2d 868, 871, 725 P.2d 994 (1986) (holding the phrase "limited degree" was

unconstitutionally vague in local land use ordinance) (citing *Grant County v. Bohne*, 89 Wn.2d 953, 577 P.2d 138 (1978)). See also *Myrick v. Bd. of Pierce Cy. Comm'rs*, 102 Wn.2d 698, 677 P.2d 140 (1984). Here, there is simply no standard articulated in the record regarding what constitutes a “minor” impact, or how that term will be applied on a case-by-case basis to Western toad habitat. As a result, there is not substantial evidence for the Board’s determination that it will actually protect that habitat. See, e.g., WAC 365-196-830(4) (local rules “*may not* allow a net loss of the functions and values of the ecosystem”) (emphasis added).

Ultimately, the Growth Board erred in relying on the vague, discretionary BSA requirement as the sole mechanism for protecting Western toad habitat. For this reason, too, its affirmance of Ordinance C-02-17 should be reversed. The county should at least be required to articulate a meaningful standard for when it will and will not require a BSA, the very purpose of which is to identify and evaluate potential impacts on the Western toad.

VI. CONCLUSION

For the reasons above, the Growth Board’s affirmance of Island County Ordinance C-02-17 under the GMA is not supported by substantial evidence and is arbitrary and capricious. In the many ways discussed above, the county’s new rule for Western toad habitat fails to comply with the

GMA's best available science standard, fails to comply with the precautionary principle, and rests on an arbitrary enforcement scheme which can be waived on the basis of unknown and unarticulated standards.

The court should reverse the Board and find that Island County has not complied with the GMA. The County's most recent rule for Western toad habitat should be remanded so that the county may finally come into compliance with the GMA.

Dated this 24th day of April, 2019.

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.

ISLAND COUNTY,

Respondent.

NO. 52923-8-II

(Thurston County Superior
Court Cause No. 17-2-04695-4)

DECLARATION OF SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KING) ss.

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
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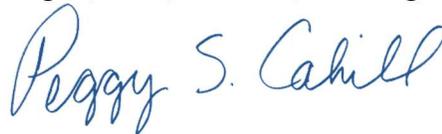
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DATED this 24th day of April, 2019, at Seattle, Washington.



PEGGY S. CAHILL

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