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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON:  
DIVISION TWO

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WHIDBEY ENVIRONMENTAL ACTION NETWORK,  
Appellant,

v.

W. WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD,  
Respondent;

ISLAND COUNTY,  
Other Respondent

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge  
Superior Court Cause No. 17-2-04695-34  
W. Wash. GMHB No. 14-2-0009

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BRIEF OF RESPONDENT ISLAND COUNTY

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF THE CASE AND SUMMARY OF THE ADMINISTRATIVE RECORD.....2

    A. WEAN’s Original 2014 Petition and the 2015 GMHB Order of Non-Compliance .....3

    B. The County’s Attempt to Comply with the 2015 Order. ....5

    C. The County’s 2017 Amendments Bringing the County into GMA Compliance.....10

    D. WEAN’s Motion for Reconsideration .....12

    E. Summary of the Appeal .....16

    F. Status of the Western Toad. ....17

III. RESTATEMENT OF ISSUES.....18

IV. ARGUMENT .....19

    A. Standard of Review .....19

        1. *Procedurally*. ....19

        2. *Substantively*. ....20

    B. The Board did not err in finding that Island County has protected every “occurrence” of the Western Toad, in a manner consistent with the Best Available Science. ....23

        1. *It is a fundamental principle of the GMA that science informs action and agencies take informed action.* .....23

2.	<i>Best Available Science is an essential tool for crafting good policy, but it is not the function of science to tell us what that policy should be.</i>	24
3.	<i>The Board agreed that Best Available Science did not support designating upland areas not yet mapped by WDFW, as a verified “occurrence” requires evidence of historical presence or likely recurring presence.</i>	27
4.	<i>Conclusion</i>	33
C.	The GMA mandates a “no harm” approach to critical areas management, not the “no risk” approach WEAN would prefer.	34
1.	<i>The Board recognized that this case does not present application of the “precautionary approach” guidelines, and did not apply them.</i>	34
2.	<i>WEAN mistakes the requirement of a BSA report within 1,000 feet of a W. Toad occurrence for a maximum buffer threshold.</i>	39
D.	The constitutional “void for vagueness” rule has no application in this context.	41
V.	CONCLUSION	46

TABLE OF AUTHORITIES

**WASHINGTON SUPREME COURT CASES**

*Burien Bark Supply v. King Cty.*, 106 Wn.2d 868, 725 P.2d 994 (1986) 43, 44

*City of Spokane v. Douglass*, 115 Wn.2d 171, 795 P.2d 693 (1990).. 42, 43

*King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 14 P.3d 133 (2000)..... 20

*Norway Hill Preservation & Protection Ass’n v. King Cty. Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976)..... 21

*Rios v. Wash. Dep’t of Labor and Indus.*, 145 Wn.2d 483, 39 P.3d 961 (2002)..... 20

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

*Town of Clyde Hill v. Roisen*, 111 Wn.2d 912, 767 P.2d 1375 (1989).... 44

**WASHINGTON COURT OF APPEALS CASES**

*Conner v. City of Seattle*, 153 Wn. App. 673, 223 P.3d 1201 (Div. 1, 2009) ..... 41, 44, 45

*Ferry Cty. v. Growth Mgmt. Hearings Bd.*, 184 Wn. App. 685, 339 P.3d 478 (Div. 3, 2014)..... 19

*Honesty in Evtl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 979 P.2d 864 (Div. 1, 1999) ..... 16, 25, 34

*Matter of Troupe*, 4 Wn.App.2d 715, 423 P.3d 878 (Div. 2, 2018) ..... 42

*Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hearings Bd.*, 166 Wn. App. 172, 274 P.3d 1040 (Div. 2, 2012)..... 19

*Somers v. Snohomish Co.*, 105 Wn. App. 937, 21 P.3d 1165 (Div. 1, 2001) ..... 35

*Spokane Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 173 Wn. App. 310, 321, 293 P.3d 1248 (Div. 3, 2013)..... 21

*Stevens Cty. v. Futurewise*, 146 Wn. App. 493, 192 P.3d 1 (Div. 3, 2008) ..... 30

*Whidbey Evtl. Action Network (WEAN) v. Island Cty.*, 122 Wn. App. 156, 93 P.3d 885 (Div. 1, 2004)..... 19, 23

**FEDERAL CASES**

*Sessions v. Dimaya*, \_\_ U.S. \_\_, 138 S. Ct. 1204, 1242 *et seq.*, 200 L.Ed.2d 549 (2018)..... 41

*State of La. v. Verity*, 853 F.2d 322 (5th Cir. 1988)..... 16

**WASHINGTON STATUTES**

RCW 34.05.570 ..... 19, 20  
 RCW 34.05.574 ..... 22  
 RCW 36.70A.030..... 22  
 RCW 36.70A.030(23)..... 1  
 RCW 36.70A.060..... 1  
 RCW 36.70A.280..... 1  
 RCW 36.70A.300(3)..... 21  
 RCW 36.70A.320..... 21, 22

**ADMINISTRATIVE CODE**

WAC 242-03-940..... 11, 22, 37  
 WAC 365-190-090..... 1  
 WAC 365-190-130..... 8, 26  
 WAC 365-195-920..... 34, 35, 39  
 WAC 365-196-830..... 22

**COUNTY CODE**

ICC 17.02B.040 ..... 38  
 ICC 17.02B.210 ..... passim  
 ICC 17.02B.400 ..... passim  
 ICC 17.02B.410 ..... 6, 7, 9, 12  
 ICC 17.02B.430 ..... passim

**COURT RULES**

RAP 10.3 ..... 2  
 RAP 3.3 ..... 4

**LIST OF APPENDICES**

Appendix A	Island County Code 17.02B.400
Appendix B	Island County Code 17.02B.430

## **I. INTRODUCTION**

Island County plans in accordance with the Planning Enabling Act (Ch. 36.70 RCW) and the Growth Management Act (Ch. 36.70A RCW, “GMA”). Counties and cities planning under RCW 36.70 and 36.70A must protect “critical areas” of the environment, including wetlands<sup>1</sup> and fish and wildlife habitat conservation areas (“FWHCA”).<sup>2</sup> See RCW 36.70A.060(2). The GMA provides a private cause of action to certain persons who participate in the public planning process to challenge regulations adopted pursuant to the GMA. RCW 36.70A.280.

On April 10, 2017, the Western Washington Growth Management Hearings Board (“Board” or “GMHB”) found Island County in compliance with the GMA on the last remaining issue raised in a 2014 challenge by Appellant Whidbey Environmental Action Network (“WEAN”) to then newly-enacted FWHCA regulations. On July 21, 2017, the Board again rejected largely the same arguments renewed by WEAN on reconsideration, confirming county compliance. WEAN appeals these orders of the Board closing the longstanding case.

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<sup>1</sup> See RCW 36.70A.030(23) and WAC 365-190-090 for overview and discussion.

<sup>2</sup> See WAC 365-190-130 for overview and discussion.

The issue before the court is whether or not the GMHB erred in finding that land use controls adopted by the county to protect *Anaxyrus* (or *Bufo*) *boreas* (“Western Toad”)<sup>3</sup> were informed by Best Available Science (Chapter 365-195 WAC, “BAS”) and consistent with the GMA and the Board’s prior orders in the case.

Below, Petitioner failed to meet its burden of showing that the County’s chosen course of regulatory action, which is presumed valid, was “clearly erroneous.” Here, Petitioner fails to meet its burden of showing that the GMHB’s orders under review are arbitrary and capricious, or contrary to the law of the case and the evidence in the record.

## **II. STATEMENT OF THE CASE AND SUMMARY OF THE ADMINISTRATIVE RECORD**

RAP 10.3(5) mandates that the Brief of Appellant or Petitioner contain “a fair statement of the facts and procedure relevant to the issues presented for review, *without argument*. Reference to the record must be included for each factual statement.” (emphasis added). WEAN’s Opening Brief lacks a concise or objective statement regarding the background of this litigation or any navigational aid to the court for the 6,000 pages of documents that constitute the record in this case. Rather, WEAN’s “Legal

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<sup>3</sup> “The Western Toad...is a large, stocky toad. It ranges in colour from greenish to tan, brown or black with a light line along its mid-back and a pronounced cheek gland... The Western Toad has a wide distribution in western North America, from Baja California to Alaska, and from the Pacific Coast to Colorado and Alberta.” AR 5456.

and Factual Background” makes up more than half of Appellant’s Brief and consists largely of legal argument and conclusion.

As well as confusing the issues and leaving the court to untangle the administrative record, it shifts the burden on Respondent to give a neutral account of these proceedings. For the convenience of the court, an attempt to do that succinctly is made here.

**A. WEAN’s Original 2014 Petition and the 2015 GMHB Order of Non-Compliance**

This controversy stems from *WEAN v. Island County*, WWGMHB Case No. 14-2-0009, a petition challenging a 2014 Island County ordinance. AR 3, *et seq.* Among other things, Ordinance C-75-14 served to update the Island County Comprehensive Plan and amend the Island County Code to add more robust Fish and Wildlife Habitat Conservation Area protection regulations. AR 9 *et seq.*

After a Prehearing Conference on WEAN’s 2014 petition, the Board identified and condensed 14 issues raised by the complaint for future decision on the merits. AR 115–118, 208–210. In a Final Decision and Order issued on June 24, 2015 (“2015 Order”), the Board agreed with WEAN that seven of those 14 issues required remand to the County for correction and GMA compliance. AR 2418–2420.

Through the adoption of several ordinances amending its critical areas regulations over the course of the next three years, the Board has found Island County in compliance as to all seven issues cited for correction in the 2015 Order. WEAN, however, continues to litigate four of them. Three of those issues are on appeal to this court under Cause No. 51903-8-II,<sup>4</sup> and the fourth—“Issue 9” identified in the original petition—is before the court here:

In not designating and protecting the habitat of species listed by the Washington Department of Fish and Wildlife as candidates for listing as endangered or threatened or by the U.S. Fish and Wildlife Service as species of concern, particularly Western Toad, has Island County failed to comply with GMA’s requirements for designation and protection of critical areas and inclusion of the Best Available Science...?  
AR 209 (citations omitted).

Throughout the entirety of this litigation, the Board has consistently framed all of its decisions and orders in this case in terms of the issues as it framed them in the 2014 Prehearing Conference order. *Compare, e.g.*, AR 2389 *et seq.*, AR 4189, AR 5714. The County likewise framed its planning on remand in terms of these issues, to the extent consistent with updated

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<sup>4</sup> For unclear reasons, an agreed motion to consolidate that litigation with the case at bar was denied below at a previous posture. It may nonetheless be appropriate to consolidate these cases on appeal. *See* RAP 3.3. The administrative record in this case appears to contain the complete administrative record before the court in No. 51903-8-II. However, the latter has been transferred to Division I on the court’s own motion.

Best Available Science and local policy-making goals. *See, e.g.*, AR 2724–2730. WEAN did not appeal the Board’s 2015 Order, or otherwise object to the Board’s framing or analysis of the issues.

In its adoption of Ordinance C-75-14 with accompanying FWHCA regulations, Island County did not designate the Western Toad or its habitat explicitly for local conservation status. AR 1119–120. While the county believed its existing wetland and stream regulations would be sufficient to protect the toad’s breeding habitat, it also acknowledged that Best Available Science supporting this assumption was not submitted for the record. (“The Western Toad is not a federal or state listed endangered, threatened, or sensitive species,<sup>5</sup> and thus was not included in the Best Available Science and Existing Conditions Report.” AR 1119). *See also* AR 2421–2422, *cf.* 2780 *et seq.* The Board therefore found Island County noncompliant with the GMA in its 2015 Order as to Issue 9 raised by WEAN’s Petition and rehearsed above. AR 2423.

**B. The County’s Attempt to Comply with the 2015 Order.**

To comply with the 2015 Order, the County reevaluated Best Available Science and adopted Ordinance C-71-16 with accompanying regulations which, *inter alia*, explicitly recognized Western Toad breeding

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<sup>5</sup> To be clear, the W. Toad has never actually been listed as endangered, threatened, or sensitive, either federally or statewide, at any time during the course of this litigation.

sites as critical areas. AR 2629, 2636. The County accomplished this through former ICC 17.02B.210, which is found in the record at AR 2636: “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.” In adopting former ICC 17.02B.210, “the County’s consideration of the Western Toad included an assessment of its regulatory status, retention of biologists to prepare and review BAS, and a review of its previously adopted criteria for local importance designations.” AR 2604 *et seq. and citations therein.*

BAS assembled by the county revealed that the W. Toad has a “primary association”<sup>6</sup> with wetlands, which support breeding and tadpole development, a critical role in sustaining the toad. *See* AR 4193. In combination with former ICC 17.02B.410,<sup>7</sup> the regulations required a Biological Site Assessment (“BSA”) prepared by a qualified scientist when

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<sup>6</sup> “Fish and wildlife habitat conservation areas that must be considered for classification and designation include: (a) Areas where endangered, threatened, and sensitive species have a *primary association*.” WAC 365-190-130(2) (emphasis added). Again, the toad has never been deemed endangered, threatened, or sensitive.

<sup>7</sup> ICC 17.02B.410 is now codified at ICC 17.02B.400. This regulation, particularly the language contained in current subsection (A), was cited frequently by the Board in its 2016 and 2017 Order(s). It is important to an understanding of how the Western Toad and its habitat is protected by the County. A copy is provided as Appendix A to this Brief. Additional sections of the Island County Code may be accessed at [https://library.municode.com/wa/island\\_county/codes/code\\_of\\_ordinances](https://library.municode.com/wa/island_county/codes/code_of_ordinances).

“a development proposal is located within 1,000 feet of a habitat for a protected species or an identified fish and wildlife habitat conservation area or its buffer.” *See* Appx. A, ICC 17.02B.400 [former ICC 17.02B.410].

Unfortunately, to quote the Board, former ICC 17.02B.210 was “less than clear.” AR 4195. This stand-alone section in the critical areas ordinance did not by its terms actually designate any habitat element as an FWHCA. By its terms, it directed the reader to the wetland and stream critical area regulations, which make no reference to the toad. In this circumstance, it was not clear how the requirement of a Biological Site Assessment would be enforced for a development proposal near toad breeding habitat.<sup>8</sup> Additionally, the wetland and stream regulations would offer no protection for two non-breeding terrestrial sites on Whidbey Island which had been verified by the Washington Department of Fish and Wildlife (“WDFW”) in the interim since the 2015 Order; the new ordinance was silent as to whether and how these sites were protected.

At the time of the 2015 Order, the Western Toad was listed as a federal “species of concern” on the U.S. Fish and Wildlife Service Endangered Species Act list for Washington State. *See* AR 5969, AR 1119.

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<sup>8</sup> A BSA is required for development “within 1,000 feet of a habitat for *a protected species or an identified fish and wildlife habitat conservation area or its buffer.*” Appx. A, ICC 17.02B.400 (emphasis added). Under the original iteration of ICC 17.02B.210, was the toad’s habitat classified as one or both or neither?

When the county revisited BAS in response to the Board’s remand, it was no longer on the federal watch list, but remained a “priority” or “candidate species” with a “vulnerable” classification under WDFW guidelines. *See* WAC 365-190-130(4); *passim* AR 2422, 2780–81, 5969. On the other hand, two additional, unprotected “occurrences”<sup>9</sup> had been mapped by WDFW and placed in the record as part of the county’s own Best Available Science and Compliance Report. *See* AR 2789.

“Island County purported to protect the one WDFW-documented breeding site for the Western toad in Ordinance C-71-16 by referencing previously adopted regulations for wetland and stream critical areas regulations. But the County failed to designate the Western toad known ‘occurrences’ as FWHCAs.” AR 4196. The protected status of the toad’s known habitat in the critical areas ordinance was ambiguous, if not illusory. Therefore, while the Board found Island County in compliance as to the other six issues remanded for correction in the 2015 Order,<sup>10</sup> it found the County in continuing noncompliance as to original Issue 9. *See* AR 4181–4198 (“2016 Order”).

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<sup>9</sup> This scientific term is discussed *infra* at length.

<sup>10</sup> WEAN objected to the Board’s finding of compliance on three of the other six issues. That portion of the 2016 Order is the subject of the pending appeal discussed at footnote 4, *supra* (the “parallel litigation”).

In the 2016 Order, the Board instructed the county that GMA-compliant “protection could begin with designation of the Western toad itself or, based on the BAS in the record, with designation of the toad’s known habitat... If the County’s Code were to be clarified, protection of the Western toad could then be addressed through preparation of a Biological Site Assessment pursuant to [former] ICC 17.02B.410 [current ICC 17.02B.400].” AR 5717 (emphasis in original, quoting AR 4195–96).

In emphasizing this need for clarification, the Board would later confirm that its “finding of continuing non-compliance was based primarily on the fact that the County’s prior attempt to designate and protect Western toad habitat failed as a result of poorly crafted regulations.” AR 5968. In the Board’s view, if the County had actually designated the toad’s known habitat for protection, as it apparently intended to do,<sup>11</sup> then ICC 17.02B.400’s Biological Site Assessment procedure would have served as adequate protection for the toad under the GMA. *Id.* WEAN did not object to this posturing of the Western toad issue by the Board in the 2016 Order.

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<sup>11</sup> AR 4195 (emphasis in original): “While counsel for the County stressed that it was *the intent* to designate known Western toad breeding sites as FWHCAs; that intent does not appear to have been realized.”

**C. The County’s 2017 Amendments Bringing the County into GMA Compliance.**

On compliance, the County resolved any ambiguity in the text by enacting Ordinance C-02-17 amending it. AR 5698–5710. Wetland “primary association” toad habitat remained protected through the wetland and stream regulations in the Critical Areas Ordinance, while *all* known “occurrences” of the toad (both wetland and terrestrial upland occurrences), as mapped by WDFW (see AR 4366), were additionally designated as FWHCAs.

A mechanism for the automatic designation of yet-to-be discovered breeding sites as FWHCAs is also established, and as before, a BSA is required prior to all proposed development within a 1,000 foot radius of every FWHCA, or all six occurrences. Island County’s action on compliance was consistent with the Board’s prior orders, the GMA, and the BAS in the record. (“Island County’s adoption of Ordinance No. C-02-17 achieved compliance with the GMA and the Board’s [2016 Order].” AR 5723; “It is apparent that the County did include BAS in designating the known toad occurrences.” AR 5722).

Specifically, ICC 17.02B.210 now reads, with pertinent amendments underlined:

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. 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 4375.

WEAN again objected to a finding of compliance. It argued (for the first time) that the county had failed to regulate logging, which the Board rejected based on the GMHB rules of procedure. *See* AR 5720–21; WAC 242-03-940.

WEAN also argued that “the County’s regulations will only address protection of the toad inside the 1000 foot buffers surrounding designated occurrences, arguing from another angle that upland toad habitat is left unprotected and contrary to BAS.” AR 5721. The Board noted that WEAN was rearguing an issue it had already ruled on, and that the BAS in the record indicated “upland habitat in the County was not known to be a limiting factor given the broad range of habitat used by the toad and the predominantly rural, undeveloped nature of the County.” AR 5721. WEAN takes this rejected argument up again here before the Court.

Finally, WEAN argued that ICC 17.02B.400 [former ICC 17.02B.410] is invalid because it gives the Planning Director discretion to waive the requirement of a Biological Site Assessment if he determines that a proposed development would result in only minor impacts. The Board rejected this argument, refusing to presume that the Planning Director would abuse this discretion. AR 5722. Having dispensed with all of WEAN's arguments, the Board dismissed Island County from the longstanding litigation and closed Case No. 14-2-0009. AR 5712–5724 (“First 2017 Order”).

**D. WEAN's Motion for Reconsideration**

WEAN moved for reconsideration, arguing that the Board erred in denying a previous request to supplement the record with certain transcripts. It also asked the Board to reconsider its substantive findings and conclusions. The Board accepted that it should have permitted WEAN to supplement the record, and granted reconsideration on that basis. It deferred a decision on the substantive merits of WEAN's motion pending an opportunity to review the supplemented record. AR 5752–5754.

After another round of briefing on the substantive issues, the Board issued a final “Order Denying Motion for Reconsideration and Reconfirming Finding of Compliance.” AR 5965–5975 (“Second 2017 Order”). On reconsideration, the Board considered whether or not it had

misunderstood or misinterpreted the BAS in the record “as it relates to Western toad non-breeding habitat, including its range or dispersal distance;” and whether it had erred in its “conclusions regarding regular updating of Western toad ‘occurrences.’” AR 5966.

The Board affirmed that the presumption of validity still applied, and it was incumbent upon WEAN to prove the county’s action was clearly erroneous and the First 2017 Order contained misinterpretations of fact or law. As to upland, non-breeding habitat, the Board reiterated that the “priority area” for the toad is any “occurrence,” and that “occurrences are based on evidence of historical presence, or current and likely recurring presence, at a given location.” AR 5968.

The BAS in the record supported designating the six known occurrences, individualized assessment of areas in a 1,000 feet radius of these locations, and ensuring the future automatic designation of wetland occurrences (where the toad has a primary association) as FWHCAs. AR 5967–70. There was no evidence supporting WEAN’s contention that additional upland habitat was “essential” to the toad, and the allegation was not sufficient to satisfy its burden to overcome the presumption of validity. AR 5969.

Rather, the BAS had shown that while every “occurrence” is a “priority area,” not every “occurrence” required automatic designation as a

FWHCA. *See* AR 5968. To quote BAS, “different management priorities may be appropriate for different priority areas based on site-specific considerations and species habitat needs... A documented occurrence provides an indication of the vicinity in which an individual Western toad may occur, but it does not provide assurance that the species will occur in the same area in the future. Western toads are known to exhibit some level of breeding site fidelity, meaning that they will return to the same wetland site in subsequent years. Therefore, a documented breeding area could be expected to support Western toads in years subsequent to the observation.” AR 5973. *See also* AR 4078.

Therefore, The Board of Island County Commissioners, as is its prerogative, determined the best policy to be designation of all toad breeding sites, known or unknown, and designation of the five known upland occurrences as FWHCAs; and 1,000 foot “buffers”<sup>12</sup> for each through the operation of ICC 17.02B.400. The Growth Board did not find itself obliged to set aside these findings which were based on BAS, recognizing that the toad was not endangered, threatened, or sensitive and

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<sup>12</sup> This is not to say that the 1,000 foot “trigger language” of the BSA requirement correlates with any buffer that would be established around a toad occurrence. Rather, buffers “shall be established adjacent to FWHCA as necessary to protect the ecological integrity, structure and functions of the resource... Buffer widths shall reflect the sensitivity of the species or habitat present and the type and intensity of the proposed adjacent human use or activity.” ICC 17.02B.430.D. As ICC 17.02B.430 will be discussed *infra*, it is attached as Appendix B for the court’s convenience.

that Island County would need to reassess upland Western toad habitat for future designation, if more “occurrences” were discovered or the toad’s status changed before Island County’s next scheduled review of its critical areas ordinance. “Science is not static, it evolves...If BAS at that time indicates a need to designate and/or regulate activity in additional areas for protection of the toad, the County will need to include consideration of that BAS.” AR 5971.

While WEAN argued it was legally obligated to do more, the Board found no such requirement in the GMA. “Petitioners failed to satisfy their burden of proof to demonstrate that future FWHCA designations cannot be done in the manner that the County has chosen in adopting Ordinance C-02-17. WEAN has failed to show that the Board’s decision was based on a misinterpretation of fact or law as it relates to the updating of Western toad occurrences as designated FWHCAs.” AR 5974. The Board therefore refused to modify the First 2017 Order, reaffirmed its finding of compliance, and declined to reopen the case.

In the Board’s expert view, the County’s chosen protections for the Western toad were informed by BAS and consistent with its prior orders and the GMA. While there was some information presented by WEAN which would support additional regulations for the purpose of protecting the toad, it was not entitled to greater weight than the county’s BAS-

informed evidence, and it was not sufficient to meet WEAN's burden of proof to establish clear error. *See* AR 5969, 5970 *citing Honesty in Evntl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 530–31, 979 P.2d 864 (Div. 1, 1999) (quoting *State of La. v. Verity*, 853 F.2d 322, 329 (5th Cir. 1988)).

**E. Summary of the Appeal**

WEAN appealed to the Thurston County Superior Court under the Administrative Procedures Act. The court concluded that WEAN “failed in its burden to show the Board erroneously interpreted the law and failed to show that the Board’s most recent orders relating to the Western Toad were arbitrary and capricious. Rather... the Board’s orders at issue here regarding Ordinance C-02-17 are supported by evidence that is substantial when viewed in light of the whole record.” CP 140; 146. Therefore, the superior court affirmed the GMHB’s Order Finding Compliance and Closing Case and the Order Denying Motion for Reconsideration and Reconfirming Finding of Compliance. Island County was dismissed. CR 148–149.

WEAN appeals to this court.

To summarize this case, as the Board framed and understood it in a preamble to the First 2017 Order:

*The Petitioner initially challenged numerous provisions of Island County’s Ordinance C-75-14, an update of the County’s comprehensive plan and*

*development regulations for fish and wildlife habitat conservation areas. In its June 24, 2015, Final Decision and Order [2015 Order], the Board concluded the County failed to include Best Available Science in designating and protecting the functions and values of critical area ecosystems, including the habitat of certain flora. In response to the FDO, Island County then adopted Ordinance C-44-16 and C-71-16. The Board found the County had achieved compliance on all but one issue. That issue was remanded following a finding of continuing non-compliance in regards to the designation and protection of the Western Toad. The Board now concludes the County has achieved compliance.*

AR 5712 (parenthetical acronyms omitted, italics in original).

**F. Status of the Western Toad.**

The Western toad is widely distributed in the western United States and Canada, ranging from southern Alaska to northern Mexico and east to Utah, including throughout Washington. AR 2780. While there has been a recent national decline in verifiable occurrences of the species, the International Union for Conservation of Nature (“IUCN”) Red List of Threatened Species “assigns the Western toad a... category of ‘least concern’ due to ‘the large extent of occurrence, large number of subpopulations and localities, large population size, and use of a wide range of habitats.” AR 4352.

As of 2015, the toad was on Washington’s Species of Greatest Conservation Need list. To be included on this list means the species has

“some form of official protection status... but [is] not yet listed as part of either the Federal or State Endangered Species program... Presence on this list does not necessarily mean that conservation attention will be directed towards these species; rather that conservation actions for the species are *eligible* for State Wildlife Grants funding, and may be more competitive for other grant programs.” AR 4077 (emphasis in original).

The Western toad is native to Island County but has not been documented as a staple of local ecology. AR 2781. Again, there are six scientifically verified occurrences of the Western toad on Whidbey Island. AR 4366. All are now explicitly designated and protected by the Island County Code.

### **III. RESTATEMENT OF ISSUES**

1. Did the Growth Management Hearings Board err in recognizing that the code amendments at issue protect every “occurrence” of the Western Toad in Island County, are consistent with BAS, and brought the County into compliance with the GMA and the Board’s prior orders?

2. Are Island County’s regulations consistent with the “no harm” standard articulated by the Court in interpreting the GMA?

3. Is the “void for vagueness” doctrine inappropriate in the context of a facial challenge to sections of a Critical Areas Ordinance under the GMA?

#### IV. ARGUMENT

##### A. Standard of Review

###### 1. Procedurally.

This court sits in the same position as the Superior Court and applies the Administrative Procedure Act (“APA”) standards<sup>13</sup> directly to the administrative record before the Board. *Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hearings Bd.*, 166 Wn. App. 172, 187, 274 P.3d 1040 (Div. 2, 2012). “The burden of demonstrating the invalidity of agency action is on the party asserting the invalidity.” *Whidbey Envtl. Action Network (WEAN) v. Island Cty.*, 122 Wn. App. 156, 165, 93 P.3d 885 (Div. 1, 2004). “Under the APA, judicial relief is appropriate only if the person seeking judicial relief has been substantially prejudiced by the action complained of.” *Ferry Cty. v. Growth Mgmt. Hearings Bd.*, 184 Wn. App. 685, 733, 339 P.3d 478 (Div. 3, 2014) (citations omitted). A correct judgment will not be reversed when it can be sustained on any theory, even though different from the one relied upon by the finder of fact. *WEAN*, 122 Wn. App. at 168.

WEAN gives lip service to the APA, stating variously that the Board erroneously interpreted or applied the law, that its factual findings are not supported by substantial evidence in the record, and/or that it acted arbitrarily and capriciously. RCW 34.05.570(3)(d),(e),(i). But it has not

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<sup>13</sup> RCW 34.05.570(3).

actually framed its arguments on appeal in terms of the APA or the Board's order(s). Rather, it mounts a new attack against the county.

As pointed out to the superior court,<sup>14</sup> it is the GMHB's orders under direct review, not Island County's actions. *See* CP 101. This court reviews the Board's legal conclusions *de novo*, giving substantial weight to the Board's interpretation of the statute it administers. *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 424, 166 P.3d 1198 (2007). Where the Board's findings of fact are reviewed under RCW 34.05.570(3)(e), the substantial evidence test is used. *Id.* "The 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 Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000) (citation omitted). When there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous. *Rios v. Wash. Dep't of Labor and Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002).

## 2. *Substantively.*

Like so many appeals of local government planning decisions, this case requires the Court to harmonize competing powers delegated to the

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<sup>14</sup> And "this court reviews the *Board's* decision, not the decision of the superior court." *King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000) (emphasis in original).

growth board and to local governments under the GMA. In doing so, the Court applies a unique standard of review that requires that the growth board defer to the decisions of local governments on matters governed by the GMA, except where the local government has clearly erred. *Spokane Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 173 Wn. App. 310, 321, 293 P.3d 1248 (Div. 3, 2013).

In reviewing comprehensive plans and development regulations adopted by local governments in response to a noncompliance finding, the presumption of validity applies and the burden is on the challenger to establish that the new adoption is clearly erroneous in view of the entire record and in light of the GMA. *See* CP 15; RCW 36.70A.320(1), (2), (3).

After the Board has entered a finding of non-compliance, the local jurisdiction is given a period of time to adopt legislation to achieve compliance. *See* CP 14; RCW 36.70A.300(3)(b). In order to find the County's legislative action on compliance clearly erroneous, the Board must have been "left with the definite and firm conviction that a mistake has been committed." *See* CP 14–15; *Norway Hill Preservation & Protection Ass'n v. King Cty. Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976). "Issues not within the nature, scope, and statutory basis of the conclusions of noncompliance in the prior order will not be addressed in the

compliance hearing but require the filing of a new petition for review.”  
WAC 242-03-940.

In sum, the burden remains on WEAN to overcome the presumption that the challenged provisions of Ordinance C-02-17 were compliant with the GMA and the Board’s prior order(s), and demonstrate that the County’s process or result was clearly erroneous in light of the goals and requirements of the act.<sup>15</sup> RCW 36.70A.320 (1), (2).

The GMA requires cities and counties to protect the functions and values of critical area ecosystems. Development regulations must preserve the existing functions and values of critical areas and may not allow a net loss of the functions and values of the ecosystem containing the impacted critical areas. AR 4184, *citing* RCW 36.70A.030(5); WAC 365-196-830(4); *Swinomish*, 161 Wn.2d at 430. However, the GMA does not impose a duty to “enhance” critical areas; it imposes a duty to do “no harm.” *Swinomish*, at 429–430. In deciding how best to preserve existing functions, local jurisdictions must consider the Best Available Science. *Id.* at 430–431. The GMA does not require BAS be followed if there is a reasoned justification for the departure.<sup>16</sup> *Id.* GMHBs may choose from equally compelling but

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<sup>15</sup> If WEAN is able to carry this burden, the court may take any action consistent with RCW 34.05.574(1).

<sup>16</sup> While that is the rule, Island County does not believe it has strayed from BAS in this case. As shown throughout, the Board agreed.

competing evidence, and doing so is not arbitrary or capricious. *WEAN*, 122 Wn. App. at 173.

**B. The Board did not err in finding that Island County has protected every “occurrence” of the Western Toad, in a manner consistent with the Best Available Science.**

*1. It is a fundamental principle of the GMA that science informs action and agencies take informed action.*

In this case, due deference is owed both to the Board’s interpretation of the statute it administers, and the presumption of validity that attaches to the county’s local policy making. The Court is obliged not to disturb the Board’s order unless *WEAN* successfully proves one of the bases for reversal under the APA is met. Because *WEAN* chooses to focus its appellate attack on the County’s decision making, rather than the Board’s, its appeal necessarily fails.

Moreover, the voluminous evidence submitted into the record by *WEAN* is not in conflict with the County’s. *WEAN* simply uses it to advocate for alternative policies.<sup>17</sup> But the Board of Island County Commissioners is granted the constitutional authority to make policy for

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<sup>17</sup> See AR 4460 (“Three of the sources cited here are earlier BAS reports previously commissioned and produced for Island County, including one by the same consultants.”); AR 4474–75 (“There is no disagreement that there are very few known occurrences of Western Toad in Island County.”); AR 5731 (“The science in the record is overwhelming that Western Toad spends most of its life cycle in uplands away from aquatic breeding habitat and the County’s consultants never disputed this science.”).

Island County, not WEAN. The policy adopted by the County is consistent with the BAS offered by both parties, the Board’s prior orders, and the Growth Management Act.

2. *Best Available Science is an essential tool for crafting good policy, but it is not the function of science to tell us what that policy should be.*

“Any occurrence” is a term of art created by the WDFW to aid stakeholders in interpreting its Priority Habitat and Species (“PHS”) List. Neither the word “occurrence” nor the term “any occurrence” is present in the GMA, or in the guidelines<sup>18</sup> established in the WAC by the Department of Commerce. The term has no independent legal significance. By downplaying its actual meaning, which is dependent on context, WEAN tries to create a GMA rule that does not exist; in fact it would be a rule that is clean contrary to the GMA.

WEAN argues that “the best available science is that ‘any occurrence’ [of the toad] should be protected, with no stated qualification,” including, namely, yet-to-be discovered upland terrestrial occurrences. *See* Appellant’s Opening Brief (“Brief”), at 24. First, to be clear, Island County *is* protecting every known occurrence of the toad, with no stated qualification. *Compare* 2016 Order, AR 4196 (“The County failed to

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<sup>18</sup> GMA guidance promulgated by the Department of Commerce does not set out requirements with which counties and cities must comply. *See* AR 2591, *citing* *Evergreen Islands v. City of Anacortes*, WWGMHB No. 05-2-0016 (December 27, 2005), pp. 53-54.

designate the Western toad known ‘occurrences’ as FWHCAs”), *with* First 2017 Order, AR 5720 (“All six BAS verified occurrences of the Western toad have been designated as FWHCAs”).

Second, these yet-to-be discovered upland occurrences are speculative at best, making no part of the scientific record. “The BAS in the record regarding Western toad ‘seasonal ranges’ and ‘movement corridors’ habitat is thin. It is much more extensive in regards to ‘breeding habitat’... The County’s BAS has established that the Western toad has a ‘primary association’ with wetlands, which support breeding and tadpole development, a critical role in sustaining the toad. It does not support the designation of other habitat areas.” First 2017 Order, AR 5723.

However, even if Appellant’s position was supported by BAS, WEAN fundamentally mischaracterizes the requirements imposed on agencies that plan under the Growth Management Act. Best Available Science does not *mandate* the county designate anything—Best Available Science is “a factor to be considered along with all other factors mandated to be considered by the Growth Management Act.” *HEAL*, 96 Wn. App. at 525; *Ferry Cty. v. Growth Mgmt. Hearings Bd.*, 184 Wn. App. 685, 717, 339 P.3d 478 (Div. 3, 2014) (“The GMA does not require a county to follow BAS; rather it is required to ‘include’ BAS in the record.”).

Nor did the Board “conflate[] 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.” Brief, at 24 (emphasis added). Rather, WEAN conflates the role of science with the role of the Island County Planning Commission. Science is silent “about what should be done if and when more occurrences are discovered in the future.” *Id.* Science cannot provide the answer to questions like this. “Science helps us describe how the world *is*, and then *we* have to decide how to use that knowledge.”<sup>19</sup>

Island County is not charged with the impossible task of “maintaining all individuals of all species at all times.” WAC 365-190-130. Nor is it legally “compelled to perform proactive conservation planning,” as WEAN rightly concedes. *See* AR 4478. Rather, its principal duty in protecting FWHCAs is to manage land in such a way as to “maintain[] populations of species in suitable habitats within their natural geographic distribution so that the habitat available is sufficient to support viable populations over the long term and isolated subpopulations are not created.” WAC 365-190-130.

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<sup>19</sup> “What Is Science?,” 12. *Understanding Science*. University of California Museum of Paleontology. <[https://undsci.berkeley.edu/article/%3C?%20echo%20\\$baseURL;%20?%3E\\_0\\_0/whatscience\\_12](https://undsci.berkeley.edu/article/%3C?%20echo%20$baseURL;%20?%3E_0_0/whatscience_12)> (accessed June 5, 2019). Emphasis in original.

In other words, the county must manage land so as not to “degrad[e] or reduc[e] populations or habitats so that they are no longer viable over the long term.” *Id.* This is the GMA rule, which scientists, land use planners, and county commissioners must apply in a manner informed by the best available science of the day. As the Board reiterated over and over in the 2017 orders under review, the County used BAS to fashion a valid regulation that would protect the toad population and habitat on Whidbey Island consistent with the GMA and the Board’s prior orders.

3. *The Board agreed that Best Available Science did not support designating upland areas not yet mapped by WDFW, as a verified “occurrence” requires evidence of historical presence or likely recurring presence.*

There are six known “occurrences” of the Western Toad on Whidbey Island. One is a breeding site; five are non-breeding sites. The County did more than required by BAS or the GMA when it provided for automatic designation of any breeding areas that might be discovered in the future. This decision was supported by the knowledge gleaned from science that toads breed and maintain a certain lifelong fidelity to wetlands, a critical area. AR 4078. Island County did not have scientific information that would support proactively “spot designating” potential future “upland” or “terrestrial” locations. However, as explained below, protecting current and

future wetland occurrences will likely lead to scientific information about future upland occurrences as well.

“Upland” and “terrestrial” features are not terms that can be translated into a single critical area regulation, as the toad ranges in adult lifetime habitat from desert springs and “prairie habitat mixed with forest,”<sup>20</sup> to woodlands and mud puddles under urban streetlights. *See* AR 2782. As the Board explained in the Second 2017 Order:

The County designated all known ‘occurrences’ of the Western toad. The BAS in the record does not support further designation of areas beyond those known occurrences, together with protections for areas within 1,000 feet of the six current Western Toad occurrences and future Western toad breeding sites. While WEAN may describe upland habitat beyond 1,000 feet from a breeding site as ‘essential’ and argues that the County failed to provide a ‘reasoned justification’ from BAS deviation, the BAS does not support WEAN’s contention. The Board has not been provided with BAS evidence supporting WEAN’s argument that additional upland habitat must be designated in order ‘to protect the functions and values of the Western toad.’

AR 5968.

As a matter of BAS, the term “occurrence” was accurately explained by the Board in the First 2017 Order, with references made to directives given to the county in both the 2015 and 2016 Orders. *See* AR 5716–5720.

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<sup>20</sup> Brief, at 30. As discussed in Island County’s briefing in the parallel litigation, the County already protects its prairie systems as “habitats of local importance.”

WDFW's list of Priority Habitats and Species is considered Best Available Science for counties to utilize in fashioning critical areas regulations.<sup>21</sup> "PHS in turn references the NatureServ Species Report which then states under Minimum Criteria for an Occurrence: 'Occurrences are based on evidence of historical presence, or current and likely recurring presence, at a given location.'" AR 5718. A documented "occurrence" is an observation of fish and wildlife from a "source deemed reliable by WDFW biologists." AR 1424.

Where the PHS describes "any occurrence" of a species as a "priority area," it is either because the species' "limiting habitat is not known" or because the species is "so rare that any occurrence is important in a land use decision." *Id.* In this case, "any occurrence" of the Western Toad is categorized as a priority area because the limiting features of its habitat are unknown, not because of its rarity. The Western Toad is "not known to be particularly rare in Washington State" and inhabits all but our

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<sup>21</sup> "The PHS List is a catalog of habitats and species considered to be priorities for conservation and management... Priority species include State Endangered, Threatened, Sensitive, and Candidate species... There are 20 habitat types, 152 vertebrate species, 41 invertebrate species, and 10 species groups currently in the PHS List... Numerous individuals and groups use the PHS List... Typical users include cities and counties that use PHS to fulfill planning requirements under the Growth Management Act." AR 1034. The Western Toad is a state "Candidate Species" on this list, and has been for the entirety of this litigation. AR 5969 fn. 24. The current PHS list may be found at <https://wdfw.wa.gov/species-habitats/at-risk/phs>.

most arid counties. *See* AR 1427; 2780–81.<sup>22</sup> “Local stressors remain unidentified.” AR 2785.

WEAN complains that Island County relied only on WDFW’s mapped occurrences in designated toad habitat for protection. *See* Brief, at 25 and fn. 6. But in the context of the PHS list, maps represent the BAS promulgated by WDFW. “Generally, the WDFW’s priority habitat *maps* are the BAS for a county’s critical areas for listed species.” AR 5716, fn. 10 (emphasis added); *see also* *Stevens Cty. v. Futurewise*, 146 Wn. App. 493, 512, 192 P.3d 1 (Div. 3, 2008) (“Habitat maps are the best available science on the county’s critical areas for listed species”).

At the time of the 2014 petition, WDFW had mapped only one occurrence of the W. Toad in Island County. AR 1119. When the county reviewed BAS for revisions on compliance in 2016, there were three mapped occurrences, one of which was a breeding site. *See* AR 2781–82, 2789. But in its first attempt at compliance, the county did not explicitly protect these three occurrences. It simply noted in a standalone section that Western toad breeding sites would be protected through its wetland and stream critical areas regulations. It did not explicitly protect every priority

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<sup>22</sup> Recall that the W. Toad is no longer a federal species of concern. AR 5969.

area, every mapped “occurrence” of the toad.<sup>23</sup> To not do so, it needed to provide a reasoned justification for departing from BAS.

When Island County adopted the latest iteration of ICC 17.02B.210 in 2017, the PHS map had been updated to include three more terrestrial occurrences, and the code now explicitly protects all six DFW mapped occurrences, as the Board all but ordered. *See* AR 4366. A 1,000 foot review area is established for each occurrence through operation of ICC 17.02B.400, though the actual buffer areas may be larger or smaller as appropriate, depending on the results of scientific investigation. *See* Appx. B, ICC 17.02B.430.D (quoted *infra*).

Because the toad has a certain fidelity to its breeding sites and all breeding sites are protected, mandated Biological Site Assessments should reveal the upland terrestrial corridors, if any, which WEAN claimed to the Board without citation are “essential” to the toad. *See* AR 5969. The County automatically protects the toad’s actual “essential” habitat—that is, its

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<sup>23</sup> The BAS consultants for the 2016 compliance revisions suggested that protecting aquatic areas used for breeding could be achieved through implementation of existing CAO regulations for wetlands, streams, and buffers, which led the county to adopt former ICC 17.02B.210. However, there was no nexus between the former provision and “occurrences” identified and mapped by WDFW, which prompted the Board to remand to the county for correction. “Protection could begin with designation of the Western toad itself or, based on the BAS in the record, with designation of the toad’s known habitat.” AR 4195–96. “The record before the Board...indicates there are possibly three locations evidencing current or likely recurring presence.” AR 4196.

“primary association” habitat—and further research on the ground will reveal if additional habitat elements require additional protection.

As the Board explained in the Second 2017 Order, quoting BAS in part:

A biological site assessment (BSA)<sup>24</sup>... would determine appropriate management measures to conserve the species within 1,000 feet of verifiable breeding sites. This BSA would include a description of potential corridors, analysis of potential impacts, and proposed best management practices to protect Fish and Wildlife Habitat Conservation Areas.

Western toads can occupy a variety of upland habitats, but rely on open water for breeding and egg development... Following metamorphosis, thousands of toadlets disperse from the aquatic habitat into the adjacent upland terrestrial habitat. They generally remain close to aquatic areas during the day, but may range more widely at night... For shelter, juveniles and adults dig their own burrows in loose soil, use the burrows of small mammals, or shelter under logs or rocks.

Consistent with BAS, the County has designated all known occurrences of the Western toad.

AR 5972.

In fact, Island County has done more than designate all known occurrences for protection. It has provided for automatic designation of all future breeding sites as well. In doing so, Island County has taken a precautionary approach, though none is required.

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<sup>24</sup> As required by ICC 17.02B.400.

#### 4. Conclusion

To conclude this section, WEAN has noted that all of Whidbey and Camano islands are suitable habitat for the Western toad. AR 4461. This proposition was stated a different way by the County's BAS consultants: "Given the broad range of upland habitats known to be used by Western toad, and the predominantly rural and undeveloped nature of unincorporated Island County,<sup>25</sup> upland habitat for Western toad is not known to be limiting in the County." AR 2785.

The county cannot designate the entirety of its jurisdiction as protected Western toad habitat. What it has done instead "is consistent with the GMA approach to designating habitat conservation areas for threatened and endangered species and therefore, should be sufficient to address candidate species" like the Western Toad. AR 5969.

The County was required to consider BAS and the BAS identified six scientifically verifiable occurrences, including a breeding site associated with wetlands (the habitat with which the toad is "primarily associated"). The County designated them all for protection. In the Board's expert view, this was the GMA-mandated threshold, and "the County then took the *extra step* to automatically designate subsequently identified breeding sites. Non-

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<sup>25</sup> It is not clear where WEAN obtained the numbers for Island County alleged in fn. 3 (p. 9) of its brief. The figures do not appear to be in the cited materials submitted into the record.

breeding occurrences will be subject to BAS when the County conducts its next RCW 36.70A.130 review and update of its critical area regulations.” AR 5972 (emphasis added).

To be sure, WEAN argues for a policy that some would support—one that the County reviewed and found to be unworkable and unaffordable. But the GMHB is not charged with adjudicating between equally legitimate policy choices. “Where the agency presents scientifically respectable conclusions which appellants are able to dispute with rival evidence of presumably equal dignity, we will not displace the administrative choice. Nor will we remand the matter to the agency in order that the discrepant conclusions be reconciled.” AR 5970 *quoting HEAL*, 96 Wn. App. at 530–31 (citation omitted).

**C. The GMA mandates a “no harm” approach to critical areas management, not the “no risk” approach WEAN would prefer.**

*1. The Board recognized that this case does not present application of the “precautionary approach” guidelines, and did not apply them.*

Failing to show that its proposal is the only one afforded by BAS, WEAN argues in the alternative that its preferred policy for protection of toad habitat is mandated by the “precautionary approach” guidelines. *See* WAC 365-195-920. WEAN is perhaps correct that this is “another way to

approach this issue,” but it is not correct that the county “must” take this approach. Brief, at 27.

First, the GMHB has never ruled on this argument, and it is therefore not properly before the court. “The question of whether a county is in compliance with the GMA is an issue over which the GMHB has exclusive subject matter jurisdiction.” *Somers v. Snohomish Co.*, 105 Wn. App. 937, 945, 21 P.3d 1165 (Div. 1, 2001) (vacating trial court decision regarding GMA challenge for want of subject matter jurisdiction).

Secondly, WEAN fails to recognize that ICC 17.02B.400 codifies the “precautionary approach” by requiring Biological Site Assessments within 1,000 feet of all occurrences, where impacts on toad habitat are not well understood. These assessments reveal the need for scientific habitat management plans under ICC 17.02B.430.F, like the adaptive management plans contemplated by WAC-365-920, as shown below.<sup>26</sup>

Moreover, WEAN again mischaracterizes the extent of the GMA mandate to counties planning under the act. The “precautionary or no *risk* approach” of WAC 365-195-920 is urged where there “is uncertainty about which development and land uses could lead to harm of critical areas or

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<sup>26</sup> “Adaptive management plan” is an open-ended concept. *See Swinomish*, 161 Wn.2d at 433–34 (holding that the Board did not err in considering “nonrecord materials” to aid it in defining the ambiguous term “adaptive management”).

uncertainty about the risk to critical area function.” It is a standard higher than the usual “no *harm*” standard of the GMA, a standard above and beyond the bar set by our Supreme Court’s interpretation of the GMA. *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 427–430, 166 P.3d 1198 (2007) (disagreeing that the GMA places a higher burden upon the county than the duty to prevent new harm and articulating the ‘no harm’ standard, which “protects critical areas by maintaining existing conditions”).

Island County is required by the GMA to protect known toad habitat from net loss. This can be achieved through the county’s currently enacted land use controls, which include the adaptive management element discussed below. “Under GMA regulations, local governments must either be certain that their critical areas regulations will prevent harm or be prepared to recognize and respond effectively to any unforeseen harm that arises.” *Swinomish*, 161 Wn.2d at 436. The GMHB correctly applied the “no harm” *Swinomish* standard throughout this case and the parallel litigation, finding that designation and protection of all known occurrences, coupled with the requirement of a BSA for proposed development in areas around them, would prevent harm to priority habitat.

Let us look at what ICC 17.02B.210 and ICC 17.02B.400 specifically accomplish. First, “Western Toad breeding sites...shall be

protected through the County's wetland and stream critical areas regulations." ICC 17.02B.210. These regulations are beyond the scope of this appeal, and it does not appear that WEAN has ever targeted their sufficiency. "Issues not within the nature, scope, and statutory basis of the conclusions of noncompliance in the prior order will not be addressed in the compliance hearing but require the filing of a new petition for review." WAC 242-03-940.

Secondly, breeding sites "as they are presently known... 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 [along with] occurrences identified by Priority Habitat Species data from WDFW as it existed on January 24, 2017." ICC 17.02B.210. In the Board's expert view, this was an "extra step" than that required by the "no harm" standard of the GMA. AR 5972.

ICC 17.02B.400's requirements (including potential triggering of a habitat management plan under ICC 17.02B.430) work in tandem with the county's wetland regulations to provide two layers of defense to breeding habitat, with the stricter of any conflicting provision applying. *See* ICC 17.02B.040.G ("In the event provisions of this chapter conflict with provisions of applicable federal, tribal, state, County or other applicable

regulations, the provision that is most protective of critical areas shall prevail.”). *Accord* ICC 17.02B.040.A (“If a conflict exists between this chapter and another chapter or planning policy, the more restrictive shall apply.”).

When a development proposal is located within 1,000 feet of a FWHCA or its buffer,<sup>27</sup> a biological site assessment is required with a description of all critical areas shown on the site plan, including “areas which may act as wildlife corridors... and analysis of impacts to the protected species or habitats. A discussion of impacts to all critical areas and critical area buffers must be included... if monitoring is required, this section shall include a description of proposed monitoring criteria, methods, and schedule.” ICC 17.02B.400.

A Habitat Management Plan may then be required if the County determines “that impacts to a protected species or habitat may occur as a result of a proposal.” The purpose of the HMP is “*to better determine the impact to habitat* and to determine the appropriate buffer width for the proposed development.” ICC 17.02B.430.F (emphasis added). These requirements are consistent with the “precautionary approach,” which

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<sup>27</sup> Since the *buffer* of a critical area already extends *beyond* the borders of the critical area, clearly, a BSA could be required at a radius greater than 1,000 feet from the edges of a toad occurrence FWHCA. *Cf.* Brief, at 31–32.

contemplates “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.

Ultimately however, the Board did not analyze this case under the “precautionary approach” principle. It agreed with the County that the BAS in this record indicated that an appropriate method and “rationale for designating a species is to identify areas which 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.’” AR 5723. In the Board’s expert view, the county’s decision to focus future conservation efforts on wetlands<sup>28</sup> (for now), while also protecting existing known terrestrial occurrences, was consistent with the applicable “no harm” rule articulated in *Swinomish*.

2. *WEAN mistakes the requirement of a BSA report within 1,000 feet of a W. Toad occurrence for a maximum buffer threshold.*

WEAN argues that “there is no scientific support in the record for not requiring an evaluation of potential Western toad habitat in areas further away [than 1,000 feet] from known occurrences.” Brief, at 32. First, it is not the county’s burden to disprove this confusing double negative. Rather, it

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<sup>28</sup> According to BAS, wetlands support breeding and tadpole development and have a critical, primary role in sustaining the toad. *See* AR 4193.

was WEAN's burden to prove, with scientific evidence, that an evaluation of toad habitat farther than 1,000 feet from known occurrences *is* required under the GMA. Secondly, the 1,000 foot trigger for the BSA requirement is not a "limitation" establishing a maximum buffer for toad occurrences, as implied by WEAN. *Id.* Rather, 1,000 feet is the *minimum* threshold within which further scientific research will be required before development will be approved.

ICC 17.02B.430 governs how buffers are calculated for FWHCAs, and also serves to place parameters around the unfettered discretion WEAN argues is vested in the Planning Director to waive BSAs and other requirements of ICC 17.02B:

(C) All other FWHCA shall be protected on a case-by-case basis<sup>29</sup> depending on the vulnerable resource and proposed activity or development...

(D) Buffers shall be established adjacent to FWHCA as necessary to protect the ecological integrity, structure and functions of the resource from development induced impacts. Buffer widths shall reflect the sensitivity of the species or habitat present and the type and intensity of the proposed adjacent human use or activity...

(E) The Planning Director shall determine the appropriate buffer for FWHCA other than streams based on best available science...

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<sup>29</sup> If WEAN believes a "case-by-case" approach creates uncertainty, it should not have joined in recommending it during advisory meetings prior to Island County's 2014 FWHCA updates. *See* AR 4478.

But WEAN has stated no claim for relief for which a remedy could be granted on this last and most creative of its arguments.

**D. The constitutional “void for vagueness” rule has no application in this context.**

There is no constitutional impediment to regulations with standards that “derive meaning from the unique conditions and characteristics of the subject to which they are applied.” *Conner v. City of Seattle*, 153 Wn. App. 673, 690, 223 P.3d 1201 (Div. 1, 2009). Petitioner’s advancement of its “void for vagueness” argument implies the dubious proposition that WEAN’s due process rights have somehow been violated under the Fourteenth Amendment, from which the doctrine emanates.<sup>30</sup>

Washington courts have limited the application of the constitutional “void for vagueness” doctrine. *City of Spokane v. Douglass*, 115 Wn.2d 171, 795 P.2d 693 (1990) directs how the argument may be advanced, and Appellant has not made a *prima facie* claim under this theory. A duly enacted ordinance is presumed to be constitutional and will be declared unconstitutionally vague only if the ordinance is unconstitutional beyond a

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<sup>30</sup> Justice Thomas recently called into question the value and historical precedent of current “void for vagueness” jurisprudence. He argues convincingly that the judiciary need not attempt to interpret a vague statute under constitutional principles, as a truly unintelligible statute is void *ab initio*. See *Sessions v. Dimaya*, \_\_ U.S. \_\_, 138 S. Ct. 1204, 1242 *et seq.*, 200 L.Ed.2d 549 (2018) (Thomas, J., dissenting).

reasonable doubt. *Id.* at 177. The party challenging the ordinance under this theory must carry this “heavy burden.” *Id.*

The due process clause of the Fifth Amendment, incorporated into the Fourteenth Amendment, requires that citizens be afforded fair warning of what conduct may result in criminal liability or deprivation of life, liberty, or property. *See Matter of Troupe*, 4 Wn.App.2d 715, 724–725, 423 P.3d 878 (Div. 2, 2018).<sup>31</sup> While the courts have occasionally applied it in the land use context to “as applied” restrictions on a landowner’s use of property, it has no application in the growth management context. Such a claim necessarily presents a facial challenge, which is not permitted.

The doctrine:

is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct is prohibited. Additionally, vagueness challenges to enactments which do not involve First Amendment rights are to be evaluated in light of the particular facts of each case. *When a challenged ordinance does not involve First Amendment interests, the ordinance is not properly evaluated for facial vagueness.* Rather, the ordinance must be judged as applied.

*Douglass*, at 179 (emphasis added).

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<sup>31</sup> “Void-for-vagueness challenges may be brought against statutes that deprive one of a protected liberty or property interest within the meaning of procedural due process [under *Mathews v. Eldridge*].”

Here, WEAN cannot challenge the ordinance as applied, because there are no facts in the record about how the critical areas ordinance is being applied, or has ever been applied, to WEAN or anyone else. Nor can a circumstance be envisioned where WEAN's members would suffer deprivation of life, liberty, or property from application of this ordinance. The nature of a GMA claim is a facial challenge, and the void for vagueness doctrine has no place in a petition challenging an environmental regulation's compliance with the Growth Management Act.

WEAN's citation to *Burien Bark Supply v. King Cty.*, 106 Wn.2d 868, 871, 725 P.2d 994 (1986) is inapposite. While that case involved analysis of the vagueness doctrine in the land use context, it also involved a government "deprivation of liberty" implicating the 14th Amendment. The court found the challenged county ordinance void *as applied* to prohibit a retail and wholesale business from using certain nuisance-creating equipment throughout the 1980s, first through a notice and order to correct code violations, and then through a quasi-judicial decision of its Hearing Examiner. *Burien Bark Supply*, at 870. *See also Town of Clyde Hill v. Roisen*, 111 Wn.2d 912, 917–919, 767 P.2d 1375 (1989).

Analogous to this case is *Conner v. City of Seattle*,<sup>32</sup> where the court declined to void as unconstitutionally vague a Landmark Preservation Ordinance. While the purpose of a critical areas ordinance is to designate and protect vulnerable natural resources, the purpose of an LPO is to “designate, preserve, protect, enhance and perpetuate those sites, improvements and objects which reflect significant elements of the City’s cultural, aesthetic, social, economic, political, architectural, engineering, historic or other heritage.” *Id.* at 687 (emphasis removed).

The court noted that the

result of this emphasis on individual ‘sites, improvements and objects’ is a highly varied list of landmarks peppered throughout Seattle... includ[ing] objects as small as the Seattle, Chief of the Suquamish statue, and as large as the entire Montlake Cut between Lake Washington and Lake Union. It includes individual residences, apartment buildings, department stores, office towers, churches, schools, firehouses and bridges, as well as tugboats, gardens, parks, and breweries.

*Id.*

The court reasoned that because each landmark had “unique features and occupies a unique environment, it is impracticable for a single ordinance to set forth development criteria or standards that could apply to every landmark. Rather, because that which may be appropriate adjacent to

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<sup>32</sup> 153 Wn. App. 673, 223 P.3d 1201 (Div. 1, 2009)

the Red Hook Ale Brewery may not be suitable next to the Smith Tower, the LPO requires each landmark designation to provide for specific controls and incentives, thus requiring individual consideration of development proposals.” *Id.* This analysis resonates in the context of a critical areas ordinance. “The specification of standards is not always appropriate in administrative actions... Only rarely will the environmental factors affecting different special use applications be the same.” *Id.* at 689.

As the *Conner* court did, The Board understood that “different management priorities may be appropriate for different priority areas based on site-specific considerations and species habitat needs... A documented occurrence provides an indication of the vicinity in which an individual Western toad may occur, but it does not provide assurance that the species will occur in the same area in the future.” AR 5973. *See also* AR 4078. The Island County Code anticipates and allows for the flexibility needed to adequately manage and protect Western toad.

At any rate, attached ICC 17.02B.400, in describing the contents of a BSA, establishes guidelines for the Planning Director’s discretion, as does the Habitat Management Plan guidelines of ICC 17.02B.430. (“The level of detail in a BSA should be proportionate to the location, size and impacts of the project proposal. Unless modified by the Planning Director, a BSA shall include... [listing eight requirements].” *See* Appx. A, B). The Board refused

to presume that the Planning Director will abuse his discretion, instead applying the correct rule that critical area regulations are presumed valid on adoption. *See* AR 5722.

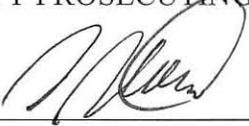
**V. CONCLUSION**

WEAN has failed to carry the burden of proving that the Board's ruling in the County's favor on these issues was arbitrary and capricious, or contrary to law or fact. WEAN has failed to establish that Island County's actions "on compliance" were inconsistent with Best Available Science, the GMHB's 2015 and 2016 Orders, or the goals and requirements of the Growth Management Act.

Therefore, the Superior Court's Order dismissing the above cause number and the GMHB's Orders bringing this longstanding litigation to a close must be affirmed.

Respectfully submitted this 14<sup>th</sup> day of June, 2019.

GREGORY M. BANKS  
ISLAND COUNTY PROSECUTING ATTORNEY

By:   
\_\_\_\_\_  
Jesse J. Eldred  
DEPUTY PROSECUTING ATTORNEY  
WSBA # 48496

# **Appendix A**

## 17.02B.400 - Evaluation requirements.

- A. **Site assessment and submittal requirements.** When a development proposal is located within 1,000 feet of a habitat for a protected species or an identified fish and wildlife habitat conservation area or its buffer, based upon maps and other information available to or maintained by the County, as described in section 17.02B.200.C., or when the applicant proposes to alter, decrease or average a standard stream buffer, a biological site assessment (BSA) shall be required.
1. The requirement for a BSA may be waived by the Planning Director, if the Planning Director determines that the proposed development would result in only minor impacts.
  2. For activities authorized pursuant to section 17.02B.310.B.7., no BSA shall be required provided that:
    - a. The activity does not involve a type "F" or type "S" stream; and
    - b. The activity is associated with an existing and on-going agricultural activity; and
    - c. The Planning Director verifies, prior to permit approval, that the area where the proposed activity will take place has been actively used for, and continuously maintained as, an agricultural drainage facility; and
    - d. The proposed activity is limited to maintenance or repair; and
    - e. Critical area functions and values can be protected through the application of clear, and easily understood mitigation measures and BMPs; and
    - f. Upon completion of the proposed work the Planning Director verifies that required BMPs have been properly implemented and that all conditions of permit approval have been adhered to.
- B. **Biological site assessment contents.** A BSA shall be prepared by a qualified professional at the expense of the applicant. The level of detail in a BSA should be proportionate to the location, size and impacts of the project proposal. Unless modified by the Planning Director, a BSA shall include:
1. A site plan showing all critical areas and associated critical area buffers falling on or within 1,000 feet of the portion of the subject property proposed for development. The site plan shall also clearly show the location and extent of

all proposed clearing, earthwork, grading, excavation, filling, structures, utilities, septic system components, wells, roads, parking areas, driveways and other development; and

2. Descriptions of all critical areas shown on the site plan, including areas which may act as wildlife corridors, ravines or steep slopes, etc.; and
  3. Description of the proposed development, including, but not limited to, quantity and spatial extent (area) of any proposed development, clearing, earthwork, grading, excavation, and filling, the location and dimensions of all proposed structures, utilities, septic system components, and wells; and
  4. Analysis of impacts to the protected species or habitats. A discussion of impacts to all critical areas and critical area buffers must be included; and
  5. The spatial extent of impact to critical areas and their buffers shall be quantified; and
  6. Regulatory summary, identifying other agencies with jurisdiction; and
  7. Best management practices, including a discussion of on-going maintenance practices that will assure protection of all critical areas on-site after the project has been completed. If monitoring is required, this section shall include a description of proposed monitoring criteria, methods, and schedule.
  8. The recommendations of the BSA, once approved, shall be included as conditions of approval of the underlying permit.
- C. **Wetland report.** A wetland report shall be submitted for all development proposals when the development proposal is located on a lot that contains or is affected by a wetland or wetland buffer. A wetland report will also be required for any request to modify a required wetland buffer. Wetland reports shall be prepared by a wetland professional and may be consistent with a BSA. A wetland report shall at a minimum include:
1. A brief detailed description of the development proposal;
  2. A description of assumptions and methodologies used to complete the analysis and appropriate documentation of all fieldwork;
  3. A description of the wetland type, its specific location and the buffer that is appropriate for the wetland;
  - 4.

If an alteration is proposed for the wetland or wetland buffer, the wetland report shall describe actions that have been considered to avoid or reduce any alteration;

5. If an alteration is proposed, a wetland mitigation plan; and
6. If a buffer modification is proposed, an explanation of why the modification will not adversely affect wetland functions.

( Ord. No. C-75-14 [PLG-006-14], Exh. B, 9-22-2014; Ord. No. C-86-17 [PLG-009-17], Exh. A, 8-15-2017)

**Editor's note—** Ord. No. C-86-17 [PLG-009-17], Exh. A, adopted Aug. 15, 2017, repealed former § 17.02B.400 which pertained to general standards and derived from Ord. No. C-75-14 [PLG-006-14], Exh. B, adopted Sept. 22, 2014. Ord. No. C-86-17 subsequently amended and renumbered former § 17.02B.410, "Evaluation requirements—Fish and wildlife habitat conservation areas" as § 17.02B.400 to read as herein set out.

## **Appendix B**

## 17.02B.430 - Other fish and wildlife habitat conservation areas.

- A. **Bald Eagle.** When the Bald Eagle is listed under Washington State Law as threatened or endangered, Bald Eagle habitats shall be protected pursuant to the Washington State Bald Eagle Protection Rules, WAC 232-12-292. When the Bald Eagle is not so listed, federal laws such as the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act still apply. If the Planning Director determines that the scope or timing of the proposal may create an adverse impact or adversely affect the eagle nest territory, he/she shall require the preparation of a habitat management plan prior to any clearing, grading, or construction whenever activities that alter habitat are proposed near a verified nest territory.
- B. **Washington Natural Heritage Program areas.**
1. **South Camano and Keystone.** South Camano is inventoried as a significant plant community dominated by Big Leaf Maple (*Acer macrophyllum*). Keystone is inventoried as a significant plant community dominated by Douglas Fir, Western Hemlock and Swordfern. Natural vegetation between the ordinary high water mark and the top of banks and bluffs ten (10) feet or higher shall be retained, except for removal of hazard trees and to allow for pedestrian waterfront access. Removal of invasive non-native species is authorized. Trimming but not removal for view enhancement is authorized.
  2. **Grasser's Hill.** Grasser's Hill is inventoried as a significant plant community including white-top aster (*Sericocarpus rigidus*), a protected species. A biological site assessment and a habitat management plan (HMP) shall be prepared pursuant to this chapter in order to ensure protection of the white-top aster.
  3. **West Beach and Ebey's Landing.** West Beach and Ebey's Landing are inventoried as a significant plant community including golden indian paintbrush (*Castilleja levisecta*), a protected species. A biological site assessment and a habitat management plan (HMP) shall be prepared pursuant to this chapter in order to ensure protection of the golden indian paintbrush.
  4. **All other high quality terrestrial ecosystems per Washington Natural Heritage Program.** Projects affecting these areas will require mitigation sequencing, as demonstrated through the preparation of a biological site assessment in consultation with the Washington Natural Heritage Program.

- C. All other FWHCA shall be protected on a case-by-case basis depending on the vulnerable resource and proposed activity or development.
- D. Buffers shall be established adjacent to FWHCA as necessary to protect the ecological integrity, structure and functions of the resource from development induced impacts. Buffer widths shall reflect the sensitivity of the species or habitat present and the type and intensity of the proposed adjacent human use or activity.
- E. The Planning Director shall determine the appropriate buffer for FWHCA other than streams based on best available science and the following guidance:

Fish and Wildlife Habitat Conservation Area	Buffer Requirement
Areas with a primary association with endangered, threatened, and sensitive species	Buffer 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.
State natural area preserves, natural resource conservation areas, and state wildlife areas	Buffers shall not be required adjacent to these areas 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 functions and values. If buffers are required, they shall reflect the habitat sensitivity and the type and intensity of activity proposed to be conducted nearby.

Species and habitats of local importance	The need for and dimensions of buffers for approved species and habitats of local importance shall be determined on a case-by-case basis by the Planning Director according to an adopted or approved habitat management plan for the specific resource.
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- F. If in reviewing the BSA and proposal, the County determines that impacts to a protected species or habitat may occur as a result of a proposal, a habitat management plan (HMP) may be required. An applicant may either use a standard HMP maintained by the County (if available) or may choose to complete an HMP for a site-specific analysis to better determine the impact to habitat and to determine the appropriate buffer width for the proposed development based on the site-specific analysis. The preparation and submission of this report is the responsibility of the applicant and subject to approval by the County. The report shall rely on best available science and shall be prepared by a qualified professional.
- G. The HMP may be combined with the BSA. The HMP must be consistent with the management recommendations adopted by the Washington Department of Fish and Wildlife, and the specific attributes of the affected properties, such as, but not limited to, property size and configuration, surrounding land use, and the practicability of implementing the HMP, and the adaptation of the species to human activity.
- H. Standard habitat management plan. Where the County has developed a standard HMP, the applicant may either accept and sign the standard HMP or prepare his or her own HMP pursuant to subsections D. and E. From time to time as the lists of protected species and species of local importance are amended, the County may develop additional standard HMPs, modify adopted standards; and/or delete HMP requirements.

( Ord. No. C-75-14 [PLG-006-14], Exh. B, 9-22-2014; Ord. No. C-71-16 [PLG-008-16], § II(Exh. A), 6-23-2016; Ord. No. C-86-17 [PLG-009-17], Exh. A, 8-15-2017)

**Editor's note**— Ord. No. C-86-17 [PLG-009-17], Exh. A, adopted Aug. 15, 2017, changed the title of § 17.02B.430 from "Protection standards—Other fish and wildlife habitat conservation areas" to read as herein set out.

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State of Washington  
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COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

WHIDBEY ENVIRONMENTAL ) NO. 52923-8-II  
ACTION NETWORK (WEAN), )  
 ) (Thurston County Superior Court  
Appellant, ) Cause No. 17-2-04695-4)  
 )  
vs. )  
 )  
ISLAND COUNTY, ) **DECLARATION OF SERVICE**  
 )  
Respondent. )  
\_\_\_\_\_ )

I, Cassandra S. Cosby, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the 14<sup>th</sup> day of June, 2019, Respondent Island County's Brief and this Declaration of Service was served on the parties designated below as indicated:

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Signed this 14<sup>th</sup> day of June, 2019, in Coupeville, Washington.

  
CASSANDRA S. COSBY

**ISLAND COUNTY PROSECUTING ATTORNEY'S OFFICE**

**June 14, 2019 - 8:28 AM**

**Transmittal Information**

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