

FILED  
Court of Appeals  
Division II  
State of Washington  
8/5/2019 1:42 PM

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

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NO. 52923-8-II

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WHIDBEY ENVIRONMENTAL ACTION NETWORK,

Appellant,

v.

GROWTH MANAGEMENT HEARINGS BOARD; ISLAND COUNTY,

Respondents.

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REPLY BRIEF OF APPELLANT

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Bryan Telegin, WSBA No. 46686  
BRICKLIN & NEWMAN, LLP  
1424 Fourth Avenue, Suite 500  
Seattle, WA 98101  
(206) 264-8600  
Attorneys for Appellant

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## I. INTRODUCTION

In the opening brief of Whidbey Environmental Action Network (“WEAN”), we argued that the Growth Management Hearings Board (“Growth Board” or “Board”) erred in its approval of Island County’s most recent critical areas rule under the Growth Management Act (“GMA”) for the protection of Western toad habitat. We showed that the Western toad is rare in Island County and needs protection, as shown by best available science (“BAS”). *See* Op. Br. at 8–11. We demonstrated that BAS supports protecting not only aquatic breeding sites, but also upland habitat where the toad spends the majority of its life. *See id.* at 9–10. We also demonstrated that when the Board upheld the county’s new rule, it misconstrued BAS provided by the Washington Department of Fish & Wildlife (“WDFW”), which states that “any occurrence” of Western toad habitat should be protected. Without evidence of WDFW’s intent, the Board read that admonition narrowly to include upland occurrences only if they were discovered before January 24, 2017. *Id.* at 13, 26–27.

WEAN’s opening brief asked the Court to reverse and remand the Board’s orders upholding the county’s new rule under the GMA. Consistent with the WDFW’s admonition that *any* occurrence is a priority and should be protected, the county should not be permitted to limit its protection of upland habitat to only those occurrences that were discovered by an arbitrary point in time. *Id.* at 27. Just as the county’s new rule automatically

protects later-discovered aquatic habitat, BAS also requires automatic protection of later-discovered occurrences of upland habitat.

In response, Island County downplays the conservation status of the Western toad and argues, falsely, that protecting new upland occurrences would be “unworkable” and “unaffordable.” In turn, while the county argues that it complied with BAS by designating all *currently known* upland occurrences, it provides no evidence that WDFW had such a narrow intent when it wrote that “any occurrence” should be protected.

The county violated the GMA and BAS by failing to protect “any occurrence” of Western toad habitat. The Board erred in upholding the county’s new rule and should be reversed. We may not know where new upland occurrences of Western toad habitat will be found. But we still know today — based on BAS provided by WDFW — that they should be protected if and when they are discovered.

## **II. ARGUMENT IN REPLY**

### **A. The County Failed to Protect “Any Occurrence” of Upland Toad Habitat, as Required by Best Available Science.**

#### **1. The Western toad needs protection in Island County.**

Before addressing the merits of the dispute, it is important to understand the facts. Throughout its brief, the county downplays the need to protect Western toad habitat in Island County. It does so by emphasizing

that the toad is not listed under the federal Endangered Species Act, a statute designed to protect the most imperiled species in the world. *See* County Br. at 18. The County emphasizes that the Western toad “has not been documented as a staple of local ecology,” though the source it cites, AR 2781, provides no such statement. *See id.* And it notes that the Western toad has been assigned the status of “least concern” by the International Union for Conservation of Nature. *Id.* at 17. For the county, the apparent purpose of these observations is to leave the Court with the impression that full protection of Western toad habitat is not important.

But the question is not whether the Western toad is in danger of extinction across all or even a significant portion of its historic range, the standard under the federal Endangered Species Act. *See* 16 U.S.C. § 1532(6, 20). Nor is the issue whether the toad is rare or threatened internationally, across the United States, or even all of Washington. Instead, the issue under the GMA is whether the toad is in need of protection in Island County. Indeed, it is for this reason that the GMA requires cities and counties to not only protect species of statewide or national significance, but also “[h]abitats and species of local importance.” WAC 365-190-130(2)(b).

So, what can we say with certainty about the health of Western toad populations in Island County? The answer is very little. As the county’s technical consultant opined, “[p]opulation trends of Western toad in Island County are unknown.” AR 4352. *See also* AR 4357 (same). In other words,

the county does not know whether local populations are healthy, if they are in decline, or if they are at risk of local extirpation. The only thing that may be said with confidence is that currently documented occurrences are not a reliable indicator of the species' real presence in the county. *See* AR 4353 (“the species may be more common than currently documented occurrences”).

The county is also right that BAS does not reveal all of the habitat that the Western toad currently inhabits in Island county. Collectively, we know the 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.”). We know the general characteristics of what upland toad habitat looks like, including mixed prairie/forest habitat and large hollow log refuges. AR 5014. We also know “it is vital that movement corridors and upland habitat be connected for all essential life phases,” AR 5012; Op. Br. at 9. But it is true, as the county repeatedly implies, that we do not know exactly what areas the species currently inhabits, or how much habitat the species needs to survive in Island County. All we know is that “[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.

But none of this negates the need for protecting Western toad habitat under the GMA. Instead, it enhances and expands that need.

As we noted in our opening brief, the GMA requires a “precautionary” or “no risk” approach to development regulations when there is uncertainty about environmental impacts. In particular, such an approach must be taken when “there is an absence of valid scientific information or incomplete scientific information . . . 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.” Op. Br. at 6 (quoting WAC 365-195-920(1)). Applied here, where the county has no knowledge of local population trends, and professes complete ignorance about where the toad spends the majority of its life cycle, the GMA requires the county to “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). In other words, it is precisely because so little is known that the GMA requires a conservative, no-risk approach to protecting Western toad habitat. Under the GMA, unknown risks must be avoided.

This principle is also expressed by the WDFW in its priority habitats and species program, which is deemed to be best available science under the GMA. *See* WAC 365-190-130(4)(b). As discussed throughout our opening brief, WDFW’s expert scientific opinion is that “any occurrence”

of Western toad habitat should be protected. *See, e.g.*, Op. Br. at 10 (quoting AR 4073). Below, the Growth Board repeatedly acknowledged this directive as BAS under the GMA. *See, e.g.*, AR 2423 (“Best Available Science shows that *any* occurrence of the Western Toad should be a priority area for protection.”) (emphasis added); AR 2421 (same); AR 5972 (lines 9–10, same). The county admits as much in its response brief, and claims to have followed WDFW’s direction. *See* County Resp. at 22 n.16. Yet, WDFW’s directive to protect “any occurrence” is itself an expression of the precautionary principle, reserved specifically 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. In other words, WDFW recommends protection of “any occurrence” precisely because we know so little about the species and what it needs to survive.

In turn, Island County is facing the effects of habitat loss at a much higher rate than much of Washington. “In 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.” AR 3578. *See also* Op. Br. at 9 n.3 (same). The county claims ignorance of these figures.

But they are clearly disclosed in the record. *Compare* County Resp. at 33 n.25 with AR 3578 (citing figures, study, and methodology).

The rapid expansion of development, coupled with near complete ignorance about the actual status and needs of local toad populations, presents a compelling need for protection. This is especially true under the GMA, the very purpose of which is to avoid the impacts of uncoordinated and unplanned growth on environmentally sensitive areas and species, including those that are important locally. *See* RCW 36.70A.010.

**2. It would not be unworkable or unaffordable to protect all occurrences of upland toad habitat.**

In addition to downplaying the need for conservation, the county argues that protecting *any* occurrence — including ones that might be discovered in the future — would be “unworkable and unaffordable.” County Resp. at 34. To do so, the county alleges, it would have to “designate the entirety of its jurisdiction as protected Western toad habitat.” *Id.* at 33. This argument should be rejected.

First, the county is wrong when it suggests that Western toads are so common that they have been documented in “mud puddles under urban streetlights.” *Id.* at 28. The county’s reference for that statement (AR 2782) contains no such allegation. Indeed, there have been only six documented occurrences across the entire county, five of which were discovered after 2014. *See* Op. Br. at 15. There is not a plague of toads in Island County.

The species is very rare and has experienced precipitous declines throughout the Puget Lowlands. “Once one of the most common amphibian species in the region, sightings of western toads in the lowlands are now rare.” AR 4812. *See also* AR 4783 n.6 (same).

Second, the county is wrong when it asserts that “[a] documented occurrence provides an indication of the vicinity in which an individual Western toad may occur, but it does not provide that the species will occur in the same area in the future.” County Br. at 4 (quoting AR 5973) As we explained in our brief, this is part of the county’s argument — accepted by the Board — that protecting all upland “occurrences” (including ones discovered later) would lead to needless protection of areas that toads are not likely to use in the future. *See* AR 5973 (lines 22–28). But obviously, that argument misunderstands the meaning of “occurrence,” a term that denotes “evidence of historical presence, or current and likely recurring presence, at a given location.” AR 5718 (internal quotations omitted). Not every spot of land a toad ever crossed, or will cross, would meet this standard. Instead, WDFW’s admonition to protect “any occurrence” is limited to areas where there is scientific evidence of historic presence, or current “and likely recurring” future presence.

Nor is there evidence that it would be unworkable or unaffordable for the county to automatically protect newly-discovered upland occurrences, as it does for newly-discovered aquatic occurrences. *See* Op.

Br. at 13; AR 4310 (ICC 17.02B.210). Administratively, the county could simply incorporate by reference the WDFW's priority habitat and species list, such that if and when WDFW adds a new documented upland occurrence, it would be automatically protected. Indeed, the county already takes this approach for other protected habitats and species.<sup>1</sup>

Substantively, the only impact of this approach would be that *after* such newly-documented occurrences are added, land developers would have to do a Biological Site Assessment ("BSA") before developing those areas. *See* Op. Br. at 15–16. In other words, they would have to show the county that they looked for potential toad habitat and, if found, make recommendations as to whether and how it should be protected. *Id.* at 16. *See also* ICC 17.02B.400; AR 4310 (explaining purpose of BSA). With only six occurrences documented to date, there is no evidence that this would cause hardship or result in designating the whole county as protected toad habitat.

Finally, the county argues not only that it would be unworkable and unaffordable to require a BSA before developing areas known in the future to be at or near documented toad habitat, but also that this would somehow impose a one-size-fits-all strategy for protecting that habitat. County Br. at

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<sup>1</sup> *See* ICC 17.02B.200.4 (protecting all areas designated by the Washington Department Natural Resources as high-quality terrestrial ecosystems in that agency's "most recent maps and data"); ICC 17.02B.230.B (protecting nests, nesting sites, and foraging sites for several species of fauna, even though the specific locations of these habitat features are not mapped and may change over time).

14 (arguing that each site might require “different management priorities.”). But as the county explains at length, the very purpose of a BSA is to identify such habitat, if it exists, and to describe desired management strategies on an *ad hoc*, tailored basis. *See* County Br. at 36–39. In other words, by not protecting future documented upland occurrences, the county has eliminated the one tool designed to address the very problem it identifies — that different upland toad sites may need to be managed differently.

Nor is this tool alien to the county. The BSA requirement already applies to any development near the five currently known upland occurrences in Island County. *Id.* The county just does not want to apply it to any new occurrences documented with scientific rigor in the future.

To the extent the Board accepted the county’s claim of hardship, it erred. There is no evidence that protecting later-discovered upland occurrences would be onerous, unworkable, or unaffordable.

### **3. The Growth Board and Island County misconstrue best available science.**

Ultimately, the county’s position is that it complied with WDFW’s BAS directive that “any occurrence” is a priority that should be protected, and that the Growth Board’s orders should be upheld on that basis. We disagree with that conclusion, but we agree with the county’s framing of the issue.

Echoing the words of WDFW, the Board has held that “Best Available Science shows that *any* occurrence of the Western Toad should be a priority area for protection.” AR 2423(emphasis added) *See also* AR 2421 (same). The county has consistently argued that it complied with that directive when it designated all *currently known* occurrences (albeit on a narrow reading of the word “any”). *See* Resp. Br. at 33 n.25. And the Growth Board upheld the county’s new rule on the basis that it followed WDFW’s direction. *See* AR 5972 (“BAS in the record supports designation of ‘priority areas’ with *any* reliably documented ‘occurrence’ of Western toad . . . Consistent with BAS, the County has designated all *known* occurrences of the Western toad.”). So, that is the basis on which the Growth Board’s orders must stand or fall — namely, whether Island County complied with BAS as articulated by WDFW that “any occurrence” should be protected.

The issue, then, is this: What did WDFW mean when it said that “any occurrence” is a priority and should be protected? *See* AR 4073. Did it mean, as the county alleges and the Board found, only that all currently known occurrences should be protected, but that future documented upland occurrences are of lesser importance? Or did it mean, as we contend, that “any” means “any” — *all* occurrences should be protected, even if some have not been documented yet? That is the fundamental question in this case. And it is a question of WDFW’s intent.

For its part, the county did not cite any evidence below — in the form of other statements or writings by WDFW, or otherwise — to shed light on WDFW’s true intent. Instead, like the county’s response brief, the county and Growth Board simply assumed that WDFW intended to limit its recommendation to occurrences known at the time of rulemaking, and to exclude future occurrences that might not be documented until later. But that assumption is not grounded in the record. In our opening brief, we argued that 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.” Op. Br. at 26. The county does not dispute or attempt to refute that statement. It simply acts as though the issue does not exist.<sup>2</sup>

Yet, if WDFW’s recommendation was to protect any “shrub-steppe” habitat, or any “old-growth forest,” *see* AR 4996, would anyone wonder if it intended to exclude examples of those habitat types just because they were not discovered by a particular point in time? We think not, and the same interpretative principle should be applied here. While the definition of an “occurrence” includes that it must be documented by a “source deemed

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<sup>2</sup> For example, in its order on reconsideration, the Board wrote that “BAS in the record does not support further designation of areas beyond those *known* occurrences.” AR 5968 (emphasis added). Coupled with the Board’s earlier statements that WDFW’s admonition to protect “any occurrence” is BAS, this assertion could only be supported by an *assumption* that WDFW itself intended a narrow view of its own words — namely, that when WDFW said “any occurrence,” it really meant “any *presently known* occurrence” or “any occurrence *known by the local jurisdiction at the time of rulemaking.*” But that assumption about WDFW’s intent is not confirmed or supported anywhere in the record.

reliable by WDFW biologists,” AR 5001, a natural reading of WDFW’s statement is still that *any* such occurrences should be protected, without limit. In other words, while WDFW’s inventory of documented occurrences may grow over time, the management directive expressed in WDFW’s priority habitat and species program remains the same — when the inventory grows, the newly discovered areas should be protected. We know that today, even if other occurrences might not be discovered until tomorrow. “Best Available Science shows that *any* occurrence of the Western Toad should be a priority area for protection,” AR 2423 (emphasis added), not just the occurrences discovered to date.

The Growth Board itself has recognized the true import of WDFW’s admonition to protect “any occurrence.” As noted above, between 2014 and 2016, the number of documented occurrences in Island County jumped from one to three. *See* Op. Br. at 15. When that happened, the Board did not question whether those new occurrences should be included in WDFW’s direction to protect “any occurrence.” Nor did the Board question whether upland habitat is “essential,” as it did, without rational explanation, in its order on reconsideration. *See* AR 5969 (lines 17–19).<sup>3</sup> Instead, the Board

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<sup>3</sup> The Board’s statement that upland habitat is not “essential” (*see* AR 5969, lines 17–19) also clearly conflicts with its later statements that “BAS in the record supports the designation of ‘priority areas’ with any reliably documented ‘occurrence’ of Western toad, whether breeding or non-breeding” and that “[s]cience in the record also shows the importance of upland, non-breeding dispersal areas for the Western toad.” AR 5972 (lines 12–16).

struck down a prior version of the county’s rule for failing to include new upland occurrences. *See* AR 4196 (lines 7–20). For this same reason, there should be no question that future-documented upland occurrences should be protected as well. As above, the list of known occurrences might grow over time, but the principle is still the same — “any occurrence” is a priority and should be protected. This natural, plain-language reading of BAS provided by WDFW should not be jettisoned without evidence that WDFW actually intended a narrower interpretation of its words. No such evidence exists, and none has been cited to this Court.

Finally, the county offers three more arguments for its decision to not extend automatic protection to upland toad occurrences discovered in the future. All three should be rejected.

First, the county argues that BAS is just one “factor” to be considered under the GMA, not a binding requirement. *See* County Resp. at 25 (quoting *Honesty in Env’tl. Analysis and Legislation (HEAL) v. Growth Mgmt. Hearings Bd.*, 184 Wn. App. 685, 717, 339 P.2d 478 (2014) and *Ferry County v. Growth Mgmt. Hearings Bd.*, 184 Wn. App. 685, 717, 339 P.3d 478 (Div. 3, 2014)). But in *Ferry County*, the Court held that BAS is binding unless the local jurisdiction provides a “reasoned justification” for its departure. *See Ferry County.*, 184 Wn. App. at 723. And in *HEAL*, the Court held that BAS “must be considered substantively.” *HEAL*, 184 Wn. App. at 533. Here, the county does not purport to be departing from BAS,

but to be following WDFW's admonition to protect "any occurrence" (even if it has adopted an overly narrow interpretation of WDFW's intent) *See* Resp. Br. at 33 n.25.<sup>4</sup> Nor has the county considered WDFW's BAS substantively. Instead, it assumed, without evidence, that when WDFW wrote that "any occurrence" is a priority, it intended to include only those occurrences known at a particular point in time. The Board agreed based on an equally vacuous evidentiary basis, without evidence that WDFW intended such a limited interpretation of its words.

Second, the county argues that only the maps produced by WDFW count as BAS under the GMA, not the normative statement that "any occurrence" should be protected. County Resp. at 30. *See also id.* at 26 (arguing that "science" is limited to describing the world as it is, not how it should be managed). But this belies the plain language of the law: Among the types of "science" that cities and counties must consider under the GMA are "[r]ecovery plans *and management recommendations*" made by WDFW. WAC 365-190-130 (emphasis added). In other words, under the GMA, "science" includes more than data and maps — it also includes management recommendations, such as WDFW's view that "any

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<sup>4</sup> *See also* AR 261 (observing that "if a local government elects to adopt a critical area requirement that is outside the range that BAS alone would support, the local agency must provide findings explaining the reasons for its departure from BAS and identifying the other goals of the GMA which it is implementing by making such a choice"; but that "The county has not done so") (quoting *Whidbey Envtl. Action Network v. Island County*, 122 Wn. App. 156, 173, 93 P.3d 885 (2004)).

occurrence” of Western toad habitat should be protected. And indeed, this is exactly how the Growth Board described it: “Best Available Science shows that *any* occurrence of the Western Toad *should be* a priority area for protection.” AR 2423 (emphasis added); AR 2421 (same).

Third, like the Growth Board, the county asserts that science changes over time and that if new occurrences are discovered later, it may consider protecting them in 2024, the next time it is scheduled to review the adequacy of its rules under the GMA. *See* County Resp. at 34; AR 5971; CP 111. But the county already has a track record of missing its periodic review dates under the GMA. *See* Op. Br. at 7 (noting that Island County did not even begin its periodic review scheduled for 2005 until 2014, and even then, not until it was challenged by WEAN). More importantly, if today’s BAS is that “any occurrence” should be protected, then there is no basis under the GMA for not implementing that very directive by ensuring that even future documented occurrences are automatically protected. As we noted, that is the approach favored by the GMA and adopted by Island County for other critical areas. *See* Op. Br. at 25–26 (discussing Island County’s approach to wetlands and the GMA’s preference for definitional criteria instead of static maps). The same principles apply here, too.

In *HEAL*, the Court observed that “best available science is essential to an accurate decision about what policies and regulations are necessary to mitigate and will in fact mitigate the environmental effects of new

development.” *HEAL*, 96 Wn. App. at 533. Here, the county’s sole justification for its new Western toad rule is that it complies with BAS, not that it has presented a reasoned departure. Yet, both the county and the Board misunderstood the BAS provided by WDFW. Specifically, they misunderstood WDFW’s intent when it wrote that “any occurrence” should be protected. Because there is no evidence in the record that WDFW intended that statement to apply only to occurrences known at the time of rulemaking, the Board’s orders are not supported by substantial evidence and they are arbitrary and capricious.

To comply with WDFW’s BAS statement that “any occurrence” is a priority and should be protected, the county must extend automatic protection to *all* Western toad upland occurrences that might be discovered in the future, not just to those occurrences that happened to have been discovered by June 24, 2017. Because the Growth Board purported to apply BAS while simultaneously taking an artificially narrow view of WDFW’s intent (supported nowhere in the record), the Board’s orders upholding the county’s new rule should be reversed. At the very least, the Court should remand the matter to the Growth Board to determine whether the county has presented a “reasoned justification” for *departing* from WDFW’s BAS, not whether it *complied* with WDFW’s BAS as the issue was framed in its orders.

**B. The County Failed to Adopt a Precautionary Approach to Protecting Western Toad Habitat.**

As an alternative way of addressing this issue, we argued that automatic protection of later-discovered upland occurrences is required by the GMA's precautionary approach to critical areas protection at WAC 365-195-920. *See* Op. Br. at 6–7, 27–33. As discussed above, that regulation requires cities and counties to adopt a conservative, “no-risk” approach when there is scientific uncertainty about potential impacts on sensitive environmental resources. *Id.* When such uncertainty exists, a city or county must “strictly limit[] land use activities until the uncertainty is sufficiently resolved.” *Yakima*, 168 Wn. App. at 693. Applied here, the GMA's precautionary or no-risk mandate applies precisely because the county admittedly knows so little about the health of local Western toad populations, their habitat, and what must be done to conserve them. *See* Op. Br. at 27–30. This is yet another reason, in addition to WDFW's BAS in the record, to extend automatic protection to “any occurrence” — including occurrences documented in the future, not just those occurrences discovered by June 24, 2017.

In response, the county, argues that the Growth Board did not reach this issue, and so the Court should not resolve it in the first instance. *See* County Resp. at 35. The county also argues that the GMA's precautionary or “no risk” approach to scientific uncertainty is at odds with the general

“no harm” standard approved by the Supreme Court in *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 166 P.3d 1198 (2007). *See id.* at 36.

With respect to the county’s second argument — that the precautionary approach conflicts with the GMA’s general “no harm” standard — the county misreads the *Swinomish* case. In *Swinomish*, the issue was whether the GMA requires cities and counties to protect critical areas from new harm; or, alternatively, whether it also requires them to restore damage that has already been done. Ultimately, the Court held that the GMA only requires cities and counties to protect against further damage. *See Swinomish*, 161 Wn.2d at 427–30. In doing so, the Court did not purport to abolish the GMA’s precautionary approach to critical area protection, as codified at WAC 365-195-920.

Indeed, the *Swinomish* Court specifically upheld the Growth Board’s order which applied the precautionary principle in striking down Skagit County’s critical area rules for fish habitat. *See id.* at 436, n.9. Applying the precautionary principle, the *Swinomish* Court held that “[w]ithout a compliant monitoring system, the [county’s] adaptive management program cannot be compliant as the county cannot adequately adapt its management of critical areas if it is unable to adequately detect changes to them.” *Id.* at 436–37. As noted in our brief, “adaptive

management” is a core element of the GMA’s precautionary approach at WAC 365-195-920. *See* Op. Br. at 30–31.

As for the county’s first argument — that the Growth Board did not rule on WEAN’s arguments concerning the precautionary principle — the county adopts an unnaturally myopic view of what the Board held. As the county observes, the general requirement under the GMA is that cities and counties ““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.”” County Resp. at 36 (quoting *Swinomish*, 161 Wn.2d at 436). This is the GMA’s “no harm” standard, but it is also an expression of the precautionary principle, which simply defines how to attain that standard of performance when there is scientific uncertainty about potential impacts.

Here, WEAN argued that the county had failed to comply with the GMA’s precautionary approach in its briefing to the Growth Board. *See* AR 4476. The Board rejected those arguments, holding instead that the county’s new rule was fully protective of Western toad habitat. *See, e.g.*, AR 5969. Obviously, the Board could not have viewed the rule as being fully protective if it did not also think it complied with the precautionary approach mandated by the GMA.

On the merits of our argument, the need for a precautionary approach may be best exemplified in the following statement by the county’s technical consultant, the Watershed Company:

There is much that is not understood regarding local/regional population trends, stressors, and significant upland habitat features for the Western toad. Additional research would help to understand Western toad population dynamics and to identify potential stressors and key upland habitat features. This understanding is important to inform the management of the Western toad in Island County, as it assesses 1) the vulnerability of the Western toad population in the County, and 2) potential anthropogenic stressors and remedies. *Because the population and population trends are unknown, and local stressors remain unidentified, it is difficult to link regulatory actions to recovery objectives.*

AR 2785 (emphasis added).<sup>5</sup> Here, where the county has no knowledge of local population trends or upland habitat needs, and where it admittedly cannot “link regulatory actions to recovery objectives,” the precautionary approach clearly applies — the county must “strictly limit[] land use activities until the uncertainty is sufficiently resolved.” *Yakima*, 168 Wn. App. at 693. In turn, it is inconsistent with the precautionary principle to not automatically protect new upland occurrences that may be discovered later, especially when BAS establishes today that “any occurrence” should be a

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<sup>5</sup> *See also* AR 4358 (county’s technical consultant observing “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.”).

priority for protection, and where the Board itself has ruled that BAS requires protection of upland habitat. *See* AR 4196 (lines 7–20).

Next, we argued that Island County violated the GMA’s precautionary approach by limiting the BSA requirement to development proposals within 1,000 feet of documented Western toad occurrences. *See* Op. Br. at 31–32. In response, the county provides a detailed explanation of how the BSA requirement is intended to function as a way to identify and protect toad habitat on an *ad hoc* basis. *See* County Resp. at 36–39. But the fact remains that the 1,000-foot limit, however it is measured (*e.g.*, from the occurrence itself or from an applicable buffer, if one applies) was designed to protect heron rookeries, not amphibians or the Western toad in particular. *See* Op. Br. at 19, 31; AR 4473; AR 5083. The record contains abundant evidence that Western toads routinely disperse much more than 1,000 feet from their breeding sites, anywhere from 3,000 feet to several kilometers. *See* AR 4472–72; AR 4476. There is no evidence in the record that the county’s 1,000-foot limit on the BSA requirement is related to the actual, biological needs of the Western toad in any way, shape, or form — let alone that it responds to the conservative, “no-risk” approach mandated by the GMA’s precautionary principle at WAC 365-195-920. Nor does the county argue otherwise in its brief.

In our opening brief, we noted that the Board’s rationale for upholding the 1,000-foot BSA limit was premised on a misunderstanding

of its prior orders, which the Board mistakenly viewed as adopting the county's prior rationale for not protecting any upland habitat (an approach the Board actually rejected). *See* Op. Br. at 32. The Board also held that WEAN failed to prove that the 1,000-foot limit was "clearly erroneous." *See* AR 5970. But even the clearly erroneous standard of review assumes there is at least *some* evidence to support the decision. *See, e.g., Ancheta v. Daly*, 77 Wn.2d 255, 259–60, 461 P.2d 531 (1969) ("A finding is clearly erroneous when *although there is evidence to support it*, the reviewing court is left with the definite and firm conviction that a mistake has been committed.") (emphasis added; quoting *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)). Here, in contrast, the county's 1,000-foot limit was designed for heron rookeries. There is no evidence in the record that it is adequate for Western toad habitat under the GMA.

For the reasons above, the Board's orders affirming the county's new western toad rule are not supported by substantial evidence and are arbitrary and capricious. The county violated the GMA's precautionary principle and the Board's orders should be reversed.

**C. The County Failed to Comply with the GMA By Relying on a BSA Requirement that May Be Waived at the County's Discretion.**

Last, we argued that the county's BSA requirement fundamentally fails to satisfy the GMA's requirement to actually protect critical areas, and to ensure against a "net loss of the functions and values of the ecosystem."

Op. Br. at 35 (quoting WAC 365-196-830(4)). In particular, the county allows the BSA requirement to be waived whenever it determines, in its sole discretion, that development impacts will be “minor” — a term that is not defined anywhere in the Island County Code. *See id.* at 33; ICC 17.02B.400.A.1.

In its response, the county harps on our reference to the standard of review under the constitutional void for vagueness doctrine, under which a regulation is void when it is so vague that “persons of common intelligence” must necessarily guess at its meaning. *See County Resp.* at 41–46. But we borrowed that standard by analogy. The idea is that if the conditions under which a BSA will be required are so vague as to require persons of common intelligence to guess at their meaning, then the BSA requirement cannot be relied upon to ensure no net loss of habitat functions and values as required by the GMA. *See Op. Br.* at 35.

This can perhaps best be seen now that the county has described the BSA requirement as fulfilling the GMA’s adaptive management requirement at WAC 365-195-920. *See County Resp.* at 35. Speaking to the latter, the Supreme Court held in *Swinomish* that such plans fail to satisfy the GMA when they do not contain “clear goals, objectives, performance standards, and a well-defined monitoring program.” *Swinomish*, 161 Wn.2d at 436 (internal quotes omitted). Under that standard, Skagit County’s plan was deficient because it did not contain clear benchmarks for determining

what is and is not an acceptable level of harm. *See id.* at 435 (observing “harm cannot be detected unless there is a benchmark by which to define a harm in the first place”).

Here, the county goes on at length about the value of a BSA when one is required. *See County Resp.* at 36–39. But on the fundamental question of when the county may or may not waive that requirement in its entirety, the county is silent. To date, the county has not offered even a cursory explanation of what is meant by the word “minor,” leaving the BSA requirement devoid of any reliable benchmarks for determining whether it will or will not actually protect critical areas, or what constitutes an unacceptable (*i.e.*, non-minor) level of harm in the first place. This is particularly so given the county’s admitted ignorance of the Western toad and its habitat needs. Because the Growth Board relied upon the BSA requirement as the sole mechanism for protecting Western toad occurrences, its decision was not supported by substantial evidence, was arbitrary and capricious, and should be reversed.

### **III. CONCLUSION**

For the reasons above and in WEAN’s opening brief, 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. The court should reverse the Board and find that Island County has not complied with the GMA.

Dated this 5th day of August, 2019.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: s/ Bryan Telegin  
Bryan Telegin, WSBA No. 46686  
Attorney for Petitioner Whidbey  
Environmental Action Network

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 WHATCOM         )       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  
Whidbey Environmental Action Network (WEAN) herein. On the date and

in the manner indicated below, I caused Reply Brief of Appellant to be served

on:

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Jesse J. Eldred  
Deputy Prosecuting Attorneys  
Island County  
Law and Justice Center  
101 N.E. 6<sup>th</sup> Street  
P.O. Box 5000  
Coupeville, WA 98239-5000  
(Attorneys for Island County)

By United States Mail  
 By Legal Messenger  
 By Facsimile  
 By Federal Express/Express Mail  
 By E-Mail to [l.pence@co.island.wa.us](mailto:l.pence@co.island.wa.us); [j.eldred@co.island.wa.us](mailto:j.eldred@co.island.wa.us);  
[C.Simpliciano@co.island.wa.us](mailto:C.Simpliciano@co.island.wa.us); [c.cosby@co.island.wa.us](mailto:c.cosby@co.island.wa.us)

Dionne Padilla-Huddleston  
Assistant Attorney General  
Licensing & Administrative Law Division  
800 5<sup>th</sup> Avenue  
Seattle, WA 98104  
(Attorneys for Growth Management Hearings Board)

By United States Mail  
 By Legal Messenger  
 By Facsimile  
 By Federal Express/Express Mail  
 By E-Mail to [dionnep@atg.wa.gov](mailto:dionnep@atg.wa.gov); [lalseaef@atg.wa.gov](mailto:lalseaef@atg.wa.gov)

DATED this 5<sup>th</sup> day of August, 2019, at Bellingham, Washington.



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PEGGY S. CAHILL

**BRICKLIN & NEWMAN, LLP**

**August 05, 2019 - 1:42 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52923-8  
**Appellate Court Case Title:** Whidbey Environ. Action Network, App v. Island County, Respondent  
**Superior Court Case Number:** 17-2-04695-4

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