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DIVISION II

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

CLALLAM COUNTY BOARD OF COUNTY COMMISSIONERS, a
political subdivision of the State of Washington; and WASHINGTON
STATE DEPARTMENT OF ECOLOGY,

Appellants,

v.

ELOISE KAILIN; HARVEY KAILIN TRUST; AND ELOISE KAILIN,
AUTHORIZED DESIGNEE OF NANCY SCOTT, TRUSTEE OF
HARVEY KAILIN TRUST,

Respondents.

**OPENING BRIEF OF APPELLANT WASHINGTON STATE
DEPARTMENT OF ECOLOGY**

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR2

 A. Assignments of Error2

 B. Issues Related to Assignments of Error3

III. STATEMENT OF THE CASE.....3

 A. Overview of the Relevant Statutes: Shoreline
 Management Act and Growth Management Act3

 B. Procedural and Factual Background of Dr. Kailin’s
 Development Proposal7

IV. SUMMARY OF ARGUMENT.....11

V. ARGUMENT13

 A. Standard of Review13

 B. The Superior Court Erroneously Interpreted the Supreme
 Court’s Split Decision in *Futurewise v. WWGMHB*.....14

 C. The Board Properly Declined Jurisdiction Over the
 Critical Areas Permit Because the Board’s Jurisdiction is
 Limited to the Authority Granted in Statute19

 D. The Passage of ESHB 1933, Which Transferred
 Regulation of Certain Critical Areas to Shoreline Master
 Programs, Does Not Confer Jurisdiction on the Board to
 Review a Critical Areas Permit Decision Under the
 Growth Management Act.....21

VI. CONCLUSION24

TABLE OF AUTHORITIES

Cases

<i>Buechel v. Dep't of Ecology</i> , 125 Wn.2d 196, 884 P.2d 910 (1994).....	4, 5
<i>Futurewise v. Western Wash. Growth Mgmt. Hearings Bd.</i> , 164 Wn.2d 242, 189 P.3d 161 (2008).....	<i>passim</i>
<i>Green v. City of Seattle</i> , 146 Wash. 27, 261 P. 643 (1927)	18
<i>Human Rights Comm'n ex rel. Spangenberg v. Cheney School Dist.</i> 30, 97 Wn.2d 118, 641 P.2d 163 (1982).....	19
<i>In re Isadore</i> , 151 Wn.2d 294, 88 P.3d 390 (2004).....	18
<i>Nisqually Delta Ass'n v. City of DuPont</i> , 103 Wn.2d 720, 696 P.2d 1222 (1985).....	4
<i>Oscar's, Inc. v. Liquor Control Bd.</i> , 101 Wn. App. 498, 3 P.3d 813 (2000).....	14
<i>Postema v. Pollution Control Hearings Bd.</i> , 142 Wn.2d 68, 11 P.3d 726 (2000).....	13, 14
<i>Tapper v. Employment Sec. Dep't</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	7, 14
<i>W.R. Grace & Co. v. Dep't of Rev.</i> , 137 Wn.2d 580, 973 P.2d 1011 (1999).....	18
<i>Wolfe v. Legg</i> , 60 Wn. App. 245, 803 P.2d 804 (1991).....	18

Statutes

RCW 34.05.030(5).....	13
RCW 34.05.526	13, 14
RCW 34.05.570(3).....	14
RCW 34.05.570(3)(d)	14
RCW 36.70A.....	1
RCW 36.70A.030(5).....	5
RCW 36.70A.060(2).....	5
RCW 36.70A.130(1)(a)	5
RCW 36.70A.170(1)(d)	5
RCW 36.70A.172.....	5
RCW 36.70A.480(3)(a)	6
RCW 36.70A.480(4).....	7, 17
RCW 36.70A.480(6).....	7
RCW 36.70C.....	1
RCW 36.70C.030.....	21
RCW 90.58	1, 15
RCW 90.58.020	3
RCW 90.58.030(2)(f).....	4
RCW 90.58.030(3)(e)	4
RCW 90.58.090	4

RCW 90.58.140	4, 20
RCW 90.58.140(10).....	5, 20
RCW 90.58.170	19
RCW 90.58.175	19
RCW 90.58.180	5
RCW 90.58.180(1).....	19, 20
RCW 90.58.180(3).....	13
RCW 90.58.180(4).....	19
RCW 90.58.190(3).....	19

Other Authorities

Clallam County Code Ch. 27.12	22
Engrossed Substitute H.B. 1933, 58th Leg., Reg. Sess. (Wash. 2003)	<i>passim</i>
Substitute S.B. 6012, 58th Leg., Reg. Sess. (Wash. 2003)	15

Rules

RAP 10.3(g)	7
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I. INTRODUCTION

This case involves the intersection of development regulations under the Shoreline Management Act and the Growth Management Act, Chapters 90.58 and 36.70A RCW. Dr. Eloise Kailin wants to build a house on her shoreline property nine and one-half feet from the edge of a wetland. Because the property is located on the shoreline, Clallam County's shoreline master program adopted under the Shoreline Management Act applies to the development. Because the development would impact a wetland (a "critical area" under the Growth Management Act), the County's critical areas ordinance adopted under the Growth Management Act applies to the development. Dr. Kailin must get two permits under the two different (but intersecting) regulations in order to build her proposed home.

Because the two permits are issued under two different statutes, two different appeals processes apply. The permit under the Shoreline Management Act can be appealed to the Shorelines Hearings Board. The permit under the Growth Management Act can be appealed to superior court under the Land Use Petition Act, Chapter 36.70C RCW. Dr. Kailin tried to appeal both permit decisions to the Shorelines Hearings Board. The Board properly declined to review the Growth Management Act permit decision.

On appeal, the superior court wrongly concluded that the Shorelines Hearings Board should have reviewed the Growth Management Act permit decision. In reaching this conclusion, the court erroneously interpreted the Supreme Court's 4-1-4 decision in *Futurewise v. Western Wash. Growth Mgmt. Hearings Bd. (WWGMHB)*, 164 Wn.2d 242, 189 P.3d 161 (2008). The superior court treated the plurality opinion as the decision of the Court even though the plurality opinion did not earn the vote of five justices. The superior court's erroneous interpretation led to an improper remand to the Shorelines Hearings Board to review the Growth Management Act permit. The Department of Ecology (Ecology) respectfully asks the Court to reverse the superior court's decision and affirm the decision of the Shorelines Hearings Board.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The superior court erred in determining that the Shorelines Hearings Board has jurisdiction to review Clallam County's permit decision under a critical areas ordinance when the critical areas ordinance has not been incorporated into the County's shoreline master program and approved by Ecology.

2. In determining that the Board has jurisdiction to review the critical areas permit decision, the superior court erroneously interpreted

Engrossed Substitute House Bill 1933 and the Supreme Court's decision in *Futurewise*, 164 Wn.2d 242.

B. Issues Related to Assignments of Error

1. Does the Shorelines Hearings Board have statutory jurisdiction to review a permit decision under a critical areas ordinance when the ordinance has not been incorporated into a local jurisdiction's shoreline master program and approved by Ecology?

2. Does Engrossed Substitute House Bill 1933 confer jurisdiction on the Shorelines Hearings Board to review a permit decision under a critical areas ordinance even if the ordinance has not been incorporated into a shoreline master program and approved by Ecology?

III. STATEMENT OF THE CASE

A. Overview of the Relevant Statutes: Shoreline Management Act and Growth Management Act

Since 1971, shoreline development has been regulated under the Shoreline Management Act, which was enacted in response to public concern regarding the "utilization, protection, restoration, and preservation" of state shorelines. RCW 90.58.020. The Shoreline Management Act applies to all development within shoreline jurisdiction.¹

¹ Shoreline jurisdiction includes "those lands extending landward for two hundred feet in all directions as measured on a horizontal plane from the ordinary high water mark; floodways and contiguous floodplain areas landward two hundred feet from such floodways; and all wetlands and river deltas associated with the streams, lakes, and

RCW 90.58.030(2)(f); *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 204, 884 P.2d 910 (1994).

The Shoreline Management Act establishes a cooperative scheme of state and local regulation. All local governments must develop “shoreline master programs” that regulate shoreline development consistent with the goals and policies of the Act. *See Buechel*, 125 Wn.2d at 203. Ecology must then approve local shoreline master programs before they become effective. RCW 90.58.090; *Buechel*, 125 Wn.2d at 203.

A person who wants to develop property within shoreline jurisdiction must obtain a shoreline permit from local government. RCW 90.58.140; *Buechel*, 125 Wn.2d at 204. A local government may only grant a permit for substantial development² within shoreline jurisdiction if the proposed development is consistent with the shoreline master program and the Shoreline Management Act. RCW 90.58.140; *Buechel*, 125 Wn.2d at 204, citing to *Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 724, 696 P.2d 1222 (1985). Furthermore, before a permit for a shoreline variance or conditional use permit can be granted, Ecology

tidal waters which are subject to the provisions of this chapter; the same to be designated as to location by the department of ecology.” RCW 90.58.030(2)(f).

² “Substantial development” is defined generally as “any development of which the total cost or fair market value exceeds five thousand dollars, or any development which materially interferes with the normal public use of the water or shorelines of the state.” RCW 90.58.030(3)(e).

must review and approve the permit. RCW 90.58.140(10). Shoreline permit decisions may be appealed to the Shorelines Hearings Board, a “quasi-judicial administrative body with specialized skills in hearing shoreline cases.” *Buechel*, 125 Wn.2d at 204; RCW 90.58.180.

Although shoreline development is primarily regulated under the Shoreline Management Act, the Growth Management Act has, since 1994, required local governments to regulate critical areas, including critical areas located within shoreline jurisdiction. RCW 36.70A.172. Therefore, if a person wants to develop property within shoreline jurisdiction and the development is likely to impact critical areas, then both the Shoreline Management Act and the Growth Management Act apply to the development.

Under the Growth Management Act, local governments must adopt development regulations to designate and protect five types of critical areas, including: (1) fish and wildlife habitat conservation areas; (2) wetlands; (3) frequently flooded areas; (4) critical aquifer recharge areas; and (5) geologically hazardous areas. RCW 36.70A.030(5), .060(2), .170(1)(d). At least every seven years, local governments must review their critical areas regulations and revise them through legislative action, if needed, to ensure compliance with the Growth Management Act. RCW 36.70A.130(1)(a).

Most local governments have protected critical areas by passing critical areas ordinances enacted under the authority of the Growth Management Act. However, this practice is in the process of changing as a result of ESHB 1933,³ which passed the legislature in 2003. Engrossed Substitute H.B. 1933, 58th Leg., Reg. Sess. (Wash. 2003).

ESHB 1933 amends both the Shoreline Management Act and the Growth Management Act. Under ESHB 1933, protection of critical areas located within the shorelines is supposed to occur under the Shoreline Management Act and shoreline master programs instead of the Growth Management Act:

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

RCW 36.70A.480(3)(a).

In order for critical areas protections to transfer to the shoreline master program, the master program must provide "a level of protection to critical areas located within shorelines of the state that is at least equal to the level of protection provided to critical areas by the local government's

³ A full copy of the bill is attached as Appendix A and also in the Clerk's Papers at 180-94.

critical area ordinances” RCW 36.70A.480(4). If the shoreline master program does not provide adequate protection for critical areas, then the critical areas ordinance adopted under the Growth Management Act continues to apply, at least until the master program is updated to include the required protections. RCW 36.70A.480(6).

B. Procedural and Factual Background of Dr. Kailin’s Development Proposal

Dr. Eloise Kailin wants to build a single family residence on the shoreline of Sequim Bay, in Clallam County. Clerk’s Papers (CP) at 64.⁴ In 2004, Clallam County reviewed Dr. Kailin’s proposal under its critical areas ordinance, enacted in 1999 under the Growth Management Act. The County denied a reasonable use exception under its critical areas ordinance, which was necessary to build the house as proposed. CP at 65. Dr. Kailin appealed the denial simultaneously to Clallam County Superior Court under the Land Use Petition Act (LUPA) and to the Shorelines Hearings Board (hereafter Shorelines Board or Board). Those appeals are still pending. CP at 65.

After her first proposal was denied, Dr. Kailin submitted a second, revised proposal to the County. This time, the County granted a shoreline

⁴ Many of the citations in this section are to the unchallenged findings of fact contained in the decision of the Shorelines Board. Because they are unchallenged, they are verities in this appeal. RAP 10.3(g); *Tapper v. Employment Sec. Dep’t*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993) (unchallenged agency findings are verities on appeal). A copy of the Shorelines Hearings Board’s decision is attached as Appendix B to this brief.

substantial development permit under its shoreline master program for the revised proposal. CP at 66. However, the County again denied Dr. Kailin's proposed reasonable use exception under its critical areas ordinance. *Id.*

Dr. Kailin needs both permits to build her proposed house. She needs the shoreline substantial development permit because the construction will occur within 200 feet of the shoreline. CP at 64. She needs the permit under the County's critical areas ordinance because she wants to build only nine and one-half feet from the edge of a wetland, but the County's critical areas ordinance requires a 50 foot buffer around the wetland. CP at 66, 68. The County was unwilling to authorize such an intrusion into the wetland buffer, but the County's decision does give guidance to Dr. Kailin on how to modify her application so that a reasonable use exception can be granted. Certified Appeal Board Record at 917-19.

Dr. Kailin simultaneously appealed the County's decision to the Shorelines Board under the Shoreline Management Act and to superior court under LUPA. The Shorelines Board upheld the substantial development permit as written. CP at 70-71. The Board declined to review the County's denial of the proposed reasonable use exception under its critical areas ordinance because the Board concluded that it lacks

jurisdiction over that decision. CP at 71-75. Specifically, the Board determined that it only has jurisdiction over critical areas regulations that have been incorporated into a shoreline master program and reviewed and approved by Ecology. CP at 151-52.

Dr. Kailin appealed the Shorelines Board's decision to Clallam County Superior Court, where her LUPA appeals are still pending. CP at 58-77. Before turning to the merits of the County's decision, the superior court asked for briefing and argument on the question of whether the Shorelines Board had properly declined jurisdiction over the critical areas permit. In response, Dr. Kailin argued that the Board had improperly declined jurisdiction, but that the court need not remand to the Board because the court could decide on its own that the County should have granted the proposed reasonable use exception under the critical areas ordinance. CP at 272-97. Ecology and the County argued that the Board properly declined jurisdiction and that decisions under a critical areas ordinance are reviewable under LUPA, not the Shoreline Management Act. CP at 130-40, 169-79.

Before the superior court could rule on the jurisdictional question, the Supreme Court issued a decision in the case of *Futurewise*, 164 Wn.2d 242. It was a 4-1-4 decision addressing the question of when regulation of

shoreline critical areas transfers to shoreline master programs under ESHB 1933.

A four justice plurality stated that ESHB 1933 is retroactive, but then reinstated a decision of the Western Washington Growth Management Hearings Board that held that ESHB 1933 is prospective and, therefore, applies only to critical areas regulations that are adopted or updated after the 2003 passage of ESHB 1933. *Futurewise*, 164 Wn.2d at 243-48. A four justice dissent would have held that ESHB 1933 is prospective and transfers regulation to the shoreline master program only after the local jurisdiction incorporates critical areas protections into its master program through a comprehensive update to that program. *Id.* at 248-51. Justice Madsen concurred with the plurality in result only, the result being the reinstatement of the Growth Management Hearings Board (hereafter Growth Board) decision. *Id.* at 248.

Ecology, *Futurewise*, and the Department of Community, Trade, and Economic Development (CTED) moved for reconsideration of the Supreme Court's decision.⁵ Ecology then moved the superior court for a stay of the *Kailin* matter until the Supreme Court rules on reconsideration. CP at 106-27. The County joined Ecology's request for a stay. Each party

⁵ The motion for reconsideration is still pending.

also submitted supplemental briefing on the issue of how the *Futurewise* case should be applied to Dr. Kailin's case. CP at 90-127.

The superior court denied Ecology's and the County's request for a stay. The court acknowledged that the *Futurewise* case may be of questionable precedent, but concluded that the plurality opinion was the more persuasive opinion in the case. CP at 27-28. The court concluded that the order of the Shorelines Board "that the Board was without jurisdiction to determine compliance with Clallam County's Critical Areas Ordinance was in error." CP at 28. The court thus remanded the case to the Shorelines Board "for further hearings." *Id.* This appeal followed.

IV. SUMMARY OF ARGUMENT

The Shorelines Board is a creature of statute and has only those authorities that have been granted to it by the legislature. The Shorelines Board has authority to review permits that are issued under the Shoreline Management Act and a shoreline master program. The Board does not have authority to review permits issued under critical areas regulations adopted under the Growth Management Act unless the regulations have been incorporated into a shoreline master program and approved by Ecology.

Clallam County has not incorporated its critical areas ordinance into its shoreline master program. Therefore, the Board lacks jurisdiction

to review a permit issued under the County's critical areas ordinance. Instead, a permit issued under the ordinance must be challenged under LUPA, which is the exclusive means of review for most land use decisions.

ESHB 1933 does not change this result. ESHB 1933 requires critical areas within shorelines to be regulated by a shoreline master program as of the date the Department of Ecology approves a shoreline master program under applicable guidelines. Under ESHB 1933, a critical areas ordinance continues to govern critical areas within the shoreline until Ecology approves a master program that provides sufficient protection for these critical areas.

Ecology has neither reviewed nor approved a shoreline master program amendment for Clallam County that provides protection to critical areas within the shorelines. Clallam County has not comprehensively updated its critical areas ordinance since 1999, four years before the passage of ESHB 1933. Therefore, Clallam County's critical areas ordinance continues to govern critical areas within the shoreline.

This position is consistent with the decision of the Western Washington Growth Management Hearings Board that was reinstated by the Supreme Court in the *Futurewise* case. The superior court's order

remanding Dr. Kailin's case to the Shorelines Board conflicts with the Growth Board decision, thereby conflicting with the Supreme Court's ruling. The superior court erred by relying on dicta in the plurality opinion that did not earn the vote of five justices. The court should have based its decision on the only portion of the *Futurewise* decision that garnered five votes, i.e., reinstatement of the Growth Board decision. By relying on the plurality opinion rather than the majority ruling, the superior court has directed the Shorelines Board to review a permit decision that it lacks jurisdiction to review. Therefore, the superior court should be reversed and the decision of the Shorelines Board affirmed.

V. ARGUMENT

A. Standard of Review

Judicial review of Shorelines Board decisions is governed by the Administrative Procedure Act. RCW 34.05.030(5); RCW 90.58.180(3). The Court of Appeals can review any final order of superior court under the Administrative Procedure Act. RCW 34.05.526. When doing so, the Court sits in the same position as the superior court, applying the applicable standards of review directly to the agency record. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000).

An order of remand constitutes a final order of superior court on the issues that were resolved in the court's order. *See Postema*, 142

Wn.2d at 119 (authorizing appeal of remand order where superior court ruled against appellant on the legal issues but remanded on factual issues); *Oscar's, Inc. v. Liquor Control Bd.*, 101 Wn. App. 498, 502, 3 P.3d 813 (2000) (superior court order final except for the one issue that was remanded to the administrative tribunal). Here, the superior court's decision that the Shorelines Board improperly declined jurisdiction is final for the purpose of appeal under RCW 34.05.526.

The standards for judicial review of agency orders are set forth in RCW 34.05.570(3). The issue in this case is a purely legal issue involving the scope of the Shorelines Board's jurisdiction. Thus, the "error of law" standard under RCW 34.05.570(3)(d) applies to this appeal. Pure questions of law are to be reviewed de novo by this Court. *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993).

B. The Superior Court Erroneously Interpreted the Supreme Court's Split Decision in *Futurewise v. WWGMHB*

The question before the Supreme Court in the *Futurewise* case was a question of timing: Under ESHB 1933, when does regulation of shoreline critical areas transfer from critical areas ordinances adopted under the Growth Management Act to shoreline master programs adopted under the Shoreline Management Act? Ecology argued to the Supreme Court that this transfer takes place prospectively because in the same year

that it passed ESHB 1933, the legislature passed Substitute Senate Bill 6012,⁶ which sets forth a schedule for local governments to comprehensively update their shoreline master programs. Substitute S.B. 6012, 58th Leg., Reg. Sess. (Wash. 2003). Ecology interpreted the two bills in conjunction and concluded that local governments are required to incorporate critical areas protections into their shoreline master programs as they complete their comprehensive updates under the schedule established by the legislature. Until then, the critical areas ordinances continue to apply.⁷

The Supreme Court rejected that interpretation, instead voting to reinstate a Western Washington Growth Management Hearings Board decision.⁸ The Growth Board decision is important because it essentially constitutes the decision of the Supreme Court since it is the only portion of the Supreme Court's decision that earned the votes of five justices.

In the Growth Board case, the City of Anacortes took the position that its shoreline master program is the sole regulatory authority that applies to critical areas within shoreline jurisdiction. The state agencies and Futurewise argued that the City's critical areas ordinance, adopted in

⁶ SSB 6012 is codified in Chapter 90.58 RCW. It is also contained in Appendix C to this brief and in the Clerk's Paper's at 220-25.

⁷ Ecology and CTED publicized this interpretation through guidance that the two agencies jointly issued. CP at 166.

⁸ Attached as Appendix D to this brief is the Growth Board's decision in *Futurewise v. City of Anacortes*, WWGMHB No. 05-2-0016.

2005, applies to all critical areas, including those within shoreline jurisdiction, until the City updates its shoreline master program to incorporate critical areas protections.

The Growth Board rejected both positions. It ruled that any update to a critical areas ordinance after the effective date of ESHB 1933 is a *de facto* shoreline master program amendment that needs to be reviewed and approved by Ecology before it becomes effective. CP at 250-256; App. D at 25-31. Because Anacortes updated its critical areas ordinance in 2005, after ESHB 1933 was passed, the ordinance needs to be approved by Ecology as part of the City's shoreline master program. CP at 256; App. D at 31.

The Growth Board was clear that its interpretation of ESHB 1933 in no way “lessens protections of critical areas.” CP at 255; App. D at 30; *see also* App. D at 27 (“critical areas within the shorelines of the state are not stripped by ESHB 1933 of protections given to them by existing critical areas regulations.”). The Growth Board expressly rejected a retroactive application of ESHB 1933 to shoreline master programs adopted prior to 2003 because a retroactive interpretation would diminish protection of shoreline critical areas. CP at 252-53; App. D at 27-28. The Growth Board reasoned that retroactive application would contradict the requirement in ESHB 1933 that shoreline master programs provide a level

of protection that is “at least equal to the level of protection provided to critical areas by the local government’s critical area ordinance” CP at 253; App. D at 28, citing to RCW 36.70A.480(4).

The state agencies and Futurewise appealed the Growth Board’s decision to superior court, which reversed the Board. The case was appealed and transferred to the Supreme Court upon motion of Anacortes. In a 4-1-4 decision, the Supreme Court reinstated the Growth Board’s decision. *Futurewise*, 164 Wn.2d 242.

In the decision, four plurality justices stated that ESHB 1933 is retroactive so that only shoreline master programs, not critical areas ordinances, apply to critical areas within shoreline jurisdiction. *Id.* at 245-46. Four dissenting justices determined that ESHB 1933 is prospective and that a shoreline master program only applies to critical areas after the program has been updated in accordance with the schedule established by the legislature in SSB 6012. *Id.* at 249-51.

Justice Madsen concurred with the plurality opinion “in result only.” *Id.* at 248. The result is set forth in the last sentence of the plurality opinion: “The decision of the trial court is reversed, and the decision of the Western Washington Growth Management Hearings Board upholding Anacortes is reinstated.” *Id.* However, the Growth Board decision directly conflicts with the remainder of the plurality opinion since

the Growth Board held that ESHB 1933 is prospective and the plurality opinion states that it is intended to be retroactive. This conflict has created considerable confusion over the question of when critical areas protections transfer to a shoreline master program.

To compound the confusion, it is not clear whether the decision has any precedential effect. As a general rule, a “plurality opinion has limited precedential value and is not binding on the courts.” *In re Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004). When four justices sign a plurality opinion, and one justice concurs in the result only without writing a separate opinion, it is not possible to identify any “holding” of the court. *Wolfe v. Legg*, 60 Wn. App. 245, 249 n.2, 803 P.2d 804 (1991). In effect, the reasoning of the plurality never becomes the law because there is no majority concurrence on the reasoning. *See Green v. City of Seattle*, 146 Wash. 27, 30-31, 261 P. 643 (1927) (opinion signed by three members of the court and later affirmed *en banc* on result only never becomes the law and “is nothing more than the then views” of a plurality of the court).

Given this uncertainty, the most reasonable conclusion is that the Growth Board decision constitutes the decision of the Supreme Court since five justices voted to reinstate that decision. *See W.R. Grace & Co. v. Dep't of Rev.*, 137 Wn.2d 580, 593, 973 P.2d 1011 (1999) (holding of court is position taken by those justices concurring on narrowest possible

grounds). However, the superior court did not apply the Growth Board decision to Dr. Kailin's case. Instead, the court determined that the plurality opinion is the more persuasive opinion in the case. CP at 27. As a result, the court issued an order that conflicts with the Growth Board decision, thereby conflicting with the majority ruling in *Futurewise*. For this reason, the court's decision is erroneous and should be reversed.

C. The Board Properly Declined Jurisdiction Over the Critical Areas Permit Because the Board's Jurisdiction is Limited to the Authority Granted in Statute

The Shorelines Board is a quasi-judicial agency created by RCW 90.58.170. As an administrative agency, its authority is limited to the authorities granted by statute or necessarily implied. *Human Rights Comm'n ex rel. Spangenberg v. Cheney School Dist.* 30, 97 Wn.2d 118, 127, 641 P.2d 163 (1982). The Shorelines Board's statutorily granted authority includes authority to adopt rules governing practice before it; to hear and decide cases involving the grant, denial, or rescission of a shoreline permit; to hear and decide challenges to rules or guidelines adopted by Ecology; and to hear cases involving the approval, rejection, or modification of a shoreline master program by a local government that is not required to plan under the Growth Management Act. RCW 90.58.175, .180(1), .180(4), .190(3).

The Shorelines Board only has jurisdiction to decide cases that the legislature has authorized it to decide, i.e., cases involving shoreline permits, Ecology rules or guidelines, or certain shoreline master programs. The legislature has not given the Board authority to decide cases involving permits issued under a critical areas ordinance passed under the Growth Management Act. Thus, the Board properly determined that it lacks authority to rule on the validity of a permit decision made by Clallam County under its critical areas ordinance.

Ecology anticipates that Dr. Kailin may argue that the Board does have jurisdiction over the County's decision because the Board has jurisdiction over permits "on shorelines of the state pursuant to RCW 90.58.140" and the critical area on Dr. Kailin's property is on a shoreline of the state. However, the Board's jurisdiction extends only to those permits issued "pursuant to RCW 90.58.140." RCW 90.58.180(1). RCW 90.58.140 applies only to substantial development permits or to permits for variances or conditional uses "under approved [shoreline] master programs." RCW 90.58.140(10). A permit under a critical areas ordinance that has not been incorporated into a shoreline master program does not fit into any of these categories. Thus, the Board lacks jurisdiction over such permits.

A party that wants to challenge a critical areas permit decision has adequate recourse under LUPA, which is the exclusive means of review for most land use decisions. RCW 36.70C.030. Dr. Kailin simultaneously filed a LUPA appeal with her Shorelines Board appeal. She should pursue her LUPA appeal rather than insist that the Board exert jurisdiction over a permit that the Board is not authorized to review. The superior court's order of remand to the Board was erroneous.

D. The Passage of ESHB 1933, Which Transferred Regulation of Certain Critical Areas to Shoreline Master Programs, Does Not Confer Jurisdiction on the Board to Review a Critical Areas Permit Decision Under the Growth Management Act

Neither ESHB 1933 nor the Supreme Court's decision interpreting ESHB 1933 alters the historical split of regulatory authority between the Shoreline Management Act and the Growth Management Act. The Shoreline Management Act, and shoreline master programs adopted under that Act, regulate development on shorelines of the state. The Growth Management Act, and critical areas ordinances adopted under that Act, regulate development that impacts critical areas.

The fundamental change that occurred as a result of ESHB 1933 is that critical areas protections must now be incorporated into shoreline master programs and reviewed and approved by Ecology. Once that occurs, critical areas protections become part of the shoreline master

program and are then governed by the Shoreline Management Act. According to the Growth Board decision, this shift in regulatory authority occurs when a critical areas ordinance is updated after the effective date of ESHB 1933.

Two key aspects of the Growth Board's decision underscore the superior court's error in Dr. Kailin's case. First, the Board determined that ESHB 1933 applies prospectively to critical areas ordinances that are updated after ESHB 1933 passed. Clallam County updated its critical areas ordinance in 1999 and has not comprehensively amended the ordinance since that time. Clallam County Code Ch. 27.12; CP at 114. Therefore, ESHB 1933 should not have influenced the superior court's decision at all because the County's ordinance was adopted prior to passage of ESHB 1933.

Second, the Growth Board held that a critical areas ordinance becomes a valid shoreline regulation only after Ecology has reviewed and approved the ordinance. CP at 253-54, 256; App. D at 28-29, 31. Ecology has not reviewed or approved Clallam County's critical areas ordinance. Therefore, the superior court has erroneously directed the Shorelines Board to review a permit decision under a critical areas ordinance that has never been incorporated into the County's shoreline

master program because it has never been reviewed or approved by Ecology. The Board lacks jurisdiction to do this.

The superior court's order of remand places the Shorelines Board in a conundrum. The Board is bound by the superior court's decision unless the decision is reversed on appeal. However, the Board is also bound by decisions of the Supreme Court. Here, the Board has been handed a superior court order that conflicts with a Supreme Court decision. It is not clear how the Board should proceed.

The superior court has exacerbated the confusion stemming from the *Futurewise* decision by applying the plurality opinion to Dr. Kailin's case even though the plurality did not earn five justices' votes. This Court should alleviate the confusion and undo the error by reversing the superior court's decision and affirming the Shorelines Board's decision. Dr. Kailin can pursue her remedies under her LUPA appeal.

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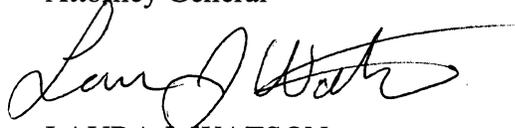
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VI. CONCLUSION

The Department of Ecology respectfully asks this Court to reverse the superior court's decision and affirm the decision of the Shorelines Hearings Board.

RESPECTFULLY SUBMITTED this 26 day of March, 2009.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "Laura J. Watson", written in a cursive style.

LAURA J. WATSON
Assistant Attorney General
(360) 586-4614

CERTIFICATION OF ENROLLMENT
ENGROSSED SUBSTITUTE HOUSE BILL 1933

Chapter 321, Laws of 2003

58th Legislature
2003 Regular Session

SHORELINE MANAGEMENT

EFFECTIVE DATE: 7/27/03

Passed by the House April 25, 2003
Yeas 98 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate April 9, 2003
Yeas 45 Nays 0

BRAD OWEN

President of the Senate

Approved May 15, 2003.

GARY F. LOCKE

Governor of the State of Washington

CERTIFICATE

I, Cynthia Zehnder, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE HOUSE BILL 1933** as passed by the House of Representatives and the Senate on the dates hereon set forth.

CYNTHIA ZEHNDER

Chief Clerk

FILED

May 15, 2003 - 3:53 p.m.

Secretary of State
State of Washington

ENGROSSED SUBSTITUTE HOUSE BILL 1933

AS AMENDED BY THE SENATE

Passed Legislature - 2003 Regular Session

State of Washington

58th Legislature

2003 Regular Session

By House Committee on Local Government (originally sponsored by Representatives Berkey, Kessler, Cairnes, Buck, Sullivan, Orcutt, Hatfield, Jarrett, Miloscia, Gombosky, Grant, DeBolt, Quall, Woods, Schoesler, Conway, Lovick, Clibborn, Edwards, Schindler, McCoy, Eickmeyer and Alexander)

READ FIRST TIME 03/05/03.

1 AN ACT Relating to the integration of shoreline management policies
2 with the growth management act; amending RCW 90.58.030, 90.58.090,
3 90.58.190, and 36.70A.480; and creating a new section.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** (1) The legislature finds that the final
6 decision and order in *Everett Shorelines Coalition v. City of Everett*
7 and *Washington State Department Of Ecology*, Case No. 02-3-0009c, issued
8 on January 9, 2003, by the central Puget Sound growth management
9 hearings board was a case of first impression interpreting the addition
10 of the shoreline management act into the growth management act, and
11 that the board considered the appeal and issued its final order and
12 decision without the benefit of shorelines guidelines to provide
13 guidance on the implementation of the shoreline management act and the
14 adoption of shoreline master programs.

15 (2) This act is intended to affirm the legislature's intent that:

16 (a) The shoreline management act be read, interpreted, applied, and
17 implemented as a whole consistent with decisions of the shoreline
18 hearings board and Washington courts prior to the decision of the

1 central Puget Sound growth management hearings board in *Everett*
2 *Shorelines Coalition v. City of Everett and Washington State Department*
3 *of Ecology*;

4 (b) The goals of the growth management act, including the goals and
5 policies of the shoreline management act, set forth in RCW 36.70A.020
6 and included in RCW 36.70A.020 by RCW 36.70A.480, continue to be listed
7 without an order of priority; and

8 (c) Shorelines of statewide significance may include critical areas
9 as defined by RCW 36.70A.030(5), but that shorelines of statewide
10 significance are not critical areas simply because they are shorelines
11 of statewide significance.

12 (3) The legislature intends that critical areas within the
13 jurisdiction of the shoreline management act shall be governed by the
14 shoreline management act and that critical areas outside the
15 jurisdiction of the shoreline management act shall be governed by the
16 growth management act. The legislature further intends that the
17 quality of information currently required by the shoreline management
18 act to be applied to the protection of critical areas within shorelines
19 of the state shall not be limited or changed by the provisions of the
20 growth management act.

21 **Sec. 2.** RCW 90.58.030 and 2002 c 230 s 2 are each amended to read
22 as follows:

23 As used in this chapter, unless the context otherwise requires, the
24 following definitions and concepts apply:

25 (1) Administration:

26 (a) "Department" means the department of ecology;

27 (b) "Director" means the director of the department of ecology;

28 (c) "Local government" means any county, incorporated city, or town
29 which contains within its boundaries any lands or waters subject to
30 this chapter;

31 (d) "Person" means an individual, partnership, corporation,
32 association, organization, cooperative, public or municipal
33 corporation, or agency of the state or local governmental unit however
34 designated;

35 (e) "Hearing board" means the shoreline hearings board established
36 by this chapter.

37 (2) Geographical:

1 (a) "Extreme low tide" means the lowest line on the land reached by
2 a receding tide;

3 (b) "Ordinary high water mark" on all lakes, streams, and tidal
4 water is that mark that will be found by examining the bed and banks
5 and ascertaining where the presence and action of waters are so common
6 and usual, and so long continued in all ordinary years, as to mark upon
7 the soil a character distinct from that of the abutting upland, in
8 respect to vegetation as that condition exists on June 1, 1971, as it
9 may naturally change thereafter, or as it may change thereafter in
10 accordance with permits issued by a local government or the department:
11 PROVIDED, That in any area where the ordinary high water mark cannot be
12 found, the ordinary high water mark adjoining salt water shall be the
13 line of mean higher high tide and the ordinary high water mark
14 adjoining fresh water shall be the line of mean high water;

15 (c) "Shorelines of the state" are the total of all "shorelines" and
16 "shorelines of statewide significance" within the state;

17 (d) "Shorelines" means all of the water areas of the state,
18 including reservoirs, and their associated shorelands, together with
19 the lands underlying them; except (i) shorelines of statewide
20 significance; (ii) shorelines on segments of streams upstream of a
21 point where the mean annual flow is twenty cubic feet per second or
22 less and the wetlands associated with such upstream segments; and (iii)
23 shorelines on lakes less than twenty acres in size and wetlands
24 associated with such small lakes;

25 (e) "Shorelines of statewide significance" means the following
26 shorelines of the state:

27 (i) The area between the ordinary high water mark and the western
28 boundary of the state from Cape Disappointment on the south to Cape
29 Flattery on the north, including harbors, bays, estuaries, and inlets;

30 (ii) Those areas of Puget Sound and adjacent salt waters and the
31 Strait of Juan de Fuca between the ordinary high water mark and the
32 line of extreme low tide as follows:

33 (A) Nisqually Delta--from DeWolf Bight to Tatsolo Point,

34 (B) Birch Bay--from Point Whitehorn to Birch Point,

35 (C) Hood Canal--from Tala Point to Foulweather Bluff,

36 (D) Skagit Bay and adjacent area--from Brown Point to Yokeko Point,
37 and

38 (E) Padilla Bay--from March Point to William Point;

1 (iii) Those areas of Puget Sound and the Strait of Juan de Fuca and
2 adjacent salt waters north to the Canadian line and lying seaward from
3 the line of extreme low tide;

4 (iv) Those lakes, whether natural, artificial, or a combination
5 thereof, with a surface acreage of one thousand acres or more measured
6 at the ordinary high water mark;

7 (v) Those natural rivers or segments thereof as follows:

8 (A) Any west of the crest of the Cascade range downstream of a
9 point where the mean annual flow is measured at one thousand cubic feet
10 per second or more,

11 (B) Any east of the crest of the Cascade range downstream of a
12 point where the annual flow is measured at two hundred cubic feet per
13 second or more, or those portions of rivers east of the crest of the
14 Cascade range downstream from the first three hundred square miles of
15 drainage area, whichever is longer;

16 (vi) Those shorelands associated with (i), (ii), (iv), and (v) of
17 this subsection (2)(e);

18 (f) "Shorelands" or "shoreland areas" means those lands extending
19 landward for two hundred feet in all directions as measured on a
20 horizontal plane from the ordinary high water mark; floodways and
21 contiguous floodplain areas landward two hundred feet from such
22 floodways; and all wetlands and river deltas associated with the
23 streams, lakes, and tidal waters which are subject to the provisions of
24 this chapter; the same to be designated as to location by the
25 department of ecology.

26 (i) Any county or city may determine that portion of a one-hundred-
27 year-flood plain to be included in its master program as long as such
28 portion includes, as a minimum, the floodway and the adjacent land
29 extending landward two hundred feet therefrom.

30 (ii) Any city or county may also include in its master program land
31 necessary for buffers for critical areas, as defined in chapter 36.70A
32 RCW, that occur within shorelines of the state, provided that forest
33 practices regulated under chapter 76.09 RCW, except conversions to
34 nonforest land use, on lands subject to the provisions of this
35 subsection (2)(f)(ii) are not subject to additional regulations under
36 this chapter;

37 (g) "Floodway" means those portions of the area of a river valley
38 lying streamward from the outer limits of a watercourse upon which

1 flood waters are carried during periods of flooding that occur with
2 reasonable regularity, although not necessarily annually, said floodway
3 being identified, under normal condition, by changes in surface soil
4 conditions or changes in types or quality of vegetative ground cover
5 condition. The floodway shall not include those lands that can
6 reasonably be expected to be protected from flood waters by flood
7 control devices maintained by or maintained under license from the
8 federal government, the state, or a political subdivision of the state;

9 (h) "Wetlands" means areas that are inundated or saturated by
10 surface water or ground water at a frequency and duration sufficient to
11 support, and that under normal circumstances do support, a prevalence
12 of vegetation typically adapted for life in saturated soil conditions.
13 Wetlands generally include swamps, marshes, bogs, and similar areas.
14 Wetlands do not include those artificial wetlands intentionally created
15 from nonwetland sites, including, but not limited to, irrigation and
16 drainage ditches, grass-lined swales, canals, detention facilities,
17 wastewater treatment facilities, farm ponds, and landscape amenities,
18 or those wetlands created after July 1, 1990, that were unintentionally
19 created as a result of the construction of a road, street, or highway.
20 Wetlands may include those artificial wetlands intentionally created
21 from nonwetland areas to mitigate the conversion of wetlands.

22 (3) Procedural terms:

23 (a) "Guidelines" means those standards adopted to implement the
24 policy of this chapter for regulation of use of the shorelines of the
25 state prior to adoption of master programs. Such standards shall also
26 provide criteria to local governments and the department in developing
27 master programs;

28 (b) "Master program" shall mean the comprehensive use plan for a
29 described area, and the use regulations together with maps, diagrams,
30 charts, or other descriptive material and text, a statement of desired
31 goals, and standards developed in accordance with the policies
32 enunciated in RCW 90.58.020;

33 (c) "State master program" is the cumulative total of all master
34 programs approved or adopted by the department of ecology;

35 (d) "Development" means a use consisting of the construction or
36 exterior alteration of structures; dredging; drilling; dumping;
37 filling; removal of any sand, gravel, or minerals; bulkheading; driving
38 of piling; placing of obstructions; or any project of a permanent or

1 temporary nature which interferes with the normal public use of the
2 surface of the waters overlying lands subject to this chapter at any
3 state of water level;

4 (e) "Substantial development" shall mean any development of which
5 the total cost or fair market value exceeds five thousand dollars, or
6 any development which materially interferes with the normal public use
7 of the water or shorelines of the state. The dollar threshold
8 established in this subsection (3)(e) must be adjusted for inflation by
9 the office of financial management every five years, beginning July 1,
10 2007, based upon changes in the consumer price index during that time
11 period. "Consumer price index" means, for any calendar year, that
12 year's annual average consumer price index, Seattle, Washington area,
13 for urban wage earners and clerical workers, all items, compiled by the
14 bureau of labor and statistics, United States department of labor. The
15 office of financial management must calculate the new dollar threshold
16 and transmit it to the office of the code reviser for publication in
17 the Washington State Register at least one month before the new dollar
18 threshold is to take effect. The following shall not be considered
19 substantial developments for the purpose of this chapter:

20 (i) Normal maintenance or repair of existing structures or
21 developments, including damage by accident, fire, or elements;

22 (ii) Construction of the normal protective bulkhead common to
23 single family residences;

24 (iii) Emergency construction necessary to protect property from
25 damage by the elements;

26 (iv) Construction and practices normal or necessary for farming,
27 irrigation, and ranching activities, including agricultural service
28 roads and utilities on shorelands, and the construction and maintenance
29 of irrigation structures including but not limited to head gates,
30 pumping facilities, and irrigation channels. A feedlot of any size,
31 all processing plants, other activities of a commercial nature,
32 alteration of the contour of the shorelands by leveling or filling
33 other than that which results from normal cultivation, shall not be
34 considered normal or necessary farming or ranching activities. A
35 feedlot shall be an enclosure or facility used or capable of being used
36 for feeding livestock hay, grain, silage, or other livestock feed, but
37 shall not include land for growing crops or vegetation for livestock

1 feeding and/or grazing, nor shall it include normal livestock wintering
2 operations;

3 (v) Construction or modification of navigational aids such as
4 channel markers and anchor buoys;

5 (vi) Construction on shorelands by an owner, lessee, or contract
6 purchaser of a single family residence for his own use or for the use
7 of his or her family, which residence does not exceed a height of
8 thirty-five feet above average grade level and which meets all
9 requirements of the state agency or local government having
10 jurisdiction thereof, other than requirements imposed pursuant to this
11 chapter;

12 (vii) Construction of a dock, including a community dock, designed
13 for pleasure craft only, for the private noncommercial use of the
14 owner, lessee, or contract purchaser of single and multiple family
15 residences. This exception applies if either: (A) In salt waters, the
16 fair market value of the dock does not exceed two thousand five hundred
17 dollars; or (B) in fresh waters, the fair market value of the dock does
18 not exceed ten thousand dollars, but if subsequent construction having
19 a fair market value exceeding two thousand five hundred dollars occurs
20 within five years of completion of the prior construction, the
21 subsequent construction shall be considered a substantial development
22 for the purpose of this chapter;

23 (viii) Operation, maintenance, or construction of canals,
24 waterways, drains, reservoirs, or other facilities that now exist or
25 are hereafter created or developed as a part of an irrigation system
26 for the primary purpose of making use of system waters, including
27 return flow and artificially stored ground water for the irrigation of
28 lands;

29 (ix) The marking of property lines or corners on state owned lands,
30 when such marking does not significantly interfere with normal public
31 use of the surface of the water;

32 (x) Operation and maintenance of any system of dikes, ditches,
33 drains, or other facilities existing on September 8, 1975, which were
34 created, developed, or utilized primarily as a part of an agricultural
35 drainage or diking system;

36 (xi) Site exploration and investigation activities that are
37 prerequisite to preparation of an application for development
38 authorization under this chapter, if:

1 (A) The activity does not interfere with the normal public use of
2 the surface waters;

3 (B) The activity will have no significant adverse impact on the
4 environment including, but not limited to, fish, wildlife, fish or
5 wildlife habitat, water quality, and aesthetic values;

6 (C) The activity does not involve the installation of a structure,
7 and upon completion of the activity the vegetation and land
8 configuration of the site are restored to conditions existing before
9 the activity;

10 (D) A private entity seeking development authorization under this
11 section first posts a performance bond or provides other evidence of
12 financial responsibility to the local jurisdiction to ensure that the
13 site is restored to preexisting conditions; and

14 (E) The activity is not subject to the permit requirements of RCW
15 90.58.550;

16 (xii) The process of removing or controlling an aquatic noxious
17 weed, as defined in RCW 17.26.020, through the use of an herbicide or
18 other treatment methods applicable to weed control that are recommended
19 by a final environmental impact statement published by the department
20 of agriculture or the department jointly with other state agencies
21 under chapter 43.21C RCW.

22 **Sec. 3.** RCW 90.58.090 and 1997 c 429 s 50 are each amended to read
23 as follows:

24 (1) A master program, segment of a master program, or an amendment
25 to a master program shall become effective when approved by the
26 department. Within the time period provided in RCW 90.58.080, each
27 local government shall have submitted a master program, either totally
28 or by segments, for all shorelines of the state within its jurisdiction
29 to the department for review and approval.

30 (2) Upon receipt of a proposed master program or amendment, the
31 department shall:

32 (a) Provide notice to and opportunity for written comment by all
33 interested parties of record as a part of the local government review
34 process for the proposal and to all persons, groups, and agencies that
35 have requested in writing notice of proposed master programs or
36 amendments generally or for a specific area, subject matter, or issue.

1 The comment period shall be at least thirty days, unless the department
2 determines that the level of complexity or controversy involved
3 supports a shorter period;

4 (b) In the department's discretion, conduct a public hearing during
5 the thirty-day comment period in the jurisdiction proposing the master
6 program or amendment;

7 (c) Within fifteen days after the close of public comment, request
8 the local government to review the issues identified by the public,
9 interested parties, groups, and agencies and provide a written response
10 as to how the proposal addresses the identified issues;

11 (d) Within thirty days after receipt of the local government
12 response pursuant to (c) of this subsection, make written findings and
13 conclusions regarding the consistency of the proposal with the policy
14 of RCW 90.58.020 and the applicable guidelines, provide a response to
15 the issues identified in (c) of this subsection, and either approve the
16 proposal as submitted, recommend specific changes necessary to make the
17 proposal approvable, or deny approval of the proposal in those
18 instances where no alteration of the proposal appears likely to be
19 consistent with the policy of RCW 90.58.020 and the applicable
20 guidelines. The written findings and conclusions shall be provided to
21 the local government, all interested persons, parties, groups, and
22 agencies of record on the proposal;

23 (e) If the department recommends changes to the proposed master
24 program or amendment, within thirty days after the department mails the
25 written findings and conclusions to the local government, the local
26 government may:

27 (i) Agree to the proposed changes. The receipt by the department
28 of the written notice of agreement constitutes final action by the
29 department approving the amendment; or

30 (ii) Submit an alternative proposal. If, in the opinion of the
31 department, the alternative is consistent with the purpose and intent
32 of the changes originally submitted by the department and with this
33 chapter it shall approve the changes and provide written notice to all
34 recipients of the written findings and conclusions. If the department
35 determines the proposal is not consistent with the purpose and intent
36 of the changes proposed by the department, the department may resubmit
37 the proposal for public and agency review pursuant to this section or
38 reject the proposal.

1 (3) The department shall approve the segment of a master program
2 relating to shorelines unless it determines that the submitted segments
3 are not consistent with the policy of RCW 90.58.020 and the applicable
4 guidelines.

5 (4) The department shall approve the segment of a master program
6 relating to critical areas as defined by RCW 36.70A.030(5) provided the
7 master program segment is consistent with RCW 90.58.020 and applicable
8 shoreline guidelines, and if the segment provides a level of protection
9 of critical areas at least equal to that provided by the local
10 government's critical areas ordinances adopted and thereafter amended
11 pursuant to RCW 36.70A.060(2).

12 (5) The department shall approve those segments of the master
13 program relating to shorelines of statewide significance only after
14 determining the program provides the optimum implementation of the
15 policy of this chapter to satisfy the statewide interest. If the
16 department does not approve a segment of a local government master
17 program relating to a shoreline of statewide significance, the
18 department may develop and by rule adopt an alternative to the local
19 government's proposal.

20 (~~(5)~~) (6) In the event a local government has not complied with
21 the requirements of RCW 90.58.070 it may thereafter upon written notice
22 to the department elect to adopt a master program for the shorelines
23 within its jurisdiction, in which event it shall comply with the
24 provisions established by this chapter for the adoption of a master
25 program for such shorelines.

26 Upon approval of such master program by the department it shall
27 supersede such master program as may have been adopted by the
28 department for such shorelines.

29 (~~(6)~~) (7) A master program or amendment to a master program takes
30 effect when and in such form as approved or adopted by the department.
31 Shoreline master programs that were adopted by the department prior to
32 July 22, 1995, in accordance with the provisions of this section then
33 in effect, shall be deemed approved by the department in accordance
34 with the provisions of this section that became effective on that date.
35 The department shall maintain a record of each master program, the
36 action taken on any proposal for adoption or amendment of the master
37 program, and any appeal of the department's action. The department's
38 approved document of record constitutes the official master program.

1 **Sec. 4.** RCW 90.58.190 and 1995 c 347 s 311 are each amended to
2 read as follows:

3 (1) The appeal of the department's decision to adopt a master
4 program or amendment pursuant to RCW 90.58.070(2) or 90.58.090(~~(+4)~~)
5 (5) is governed by RCW 34.05.510 through 34.05.598.

6 (2)(a) The department's decision to approve, reject, or modify a
7 proposed master program or amendment adopted by a local government
8 planning under RCW 36.70A.040 shall be appealed to the growth
9 management hearings board with jurisdiction over the local government.
10 The appeal shall be initiated by filing a petition as provided in RCW
11 36.70A.250 through 36.70A.320.

12 (b) If the appeal to the growth management hearings board concerns
13 shorelines, the growth management hearings board shall review the
14 proposed master program or amendment solely for compliance with the
15 requirements of this chapter (~~and chapter 36.70A RCW~~), the policy of
16 RCW 90.58.020 and the applicable guidelines, the internal consistency
17 provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105,
18 and chapter 43.21C RCW as it relates to the adoption of master programs
19 and amendments under chapter 90.58 RCW.

20 (c) If the appeal to the growth management hearings board concerns
21 a shoreline of statewide significance, the board shall uphold the
22 decision by the department unless the board, by clear and convincing
23 evidence, determines that the decision of the department is
24 inconsistent with the policy of RCW 90.58.020 and the applicable
25 guidelines.

26 (d) The appellant has the burden of proof in all appeals to the
27 growth management hearings board under this subsection.

28 (e) Any party aggrieved by a final decision of a growth management
29 hearings board under this subsection may appeal the decision to
30 superior court as provided in RCW 36.70A.300.

31 (3)(a) The department's decision to approve, reject, or modify a
32 proposed master program or master program amendment by a local
33 government not planning under RCW 36.70A.040 shall be appealed to the
34 shorelines hearings board by filing a petition within thirty days of
35 the date of the department's written notice to the local government of
36 the department's decision to approve, reject, or modify a proposed
37 master program or master program amendment as provided in RCW
38 90.58.090(2).

1 (b) In an appeal relating to shorelines, the shorelines hearings
2 board shall review the proposed master program or master program
3 amendment and, after full consideration of the presentations of the
4 local government and the department, shall determine the validity of
5 the local government's master program or amendment in light of the
6 policy of RCW 90.58.020 and the applicable guidelines.

7 (c) In an appeal relating to shorelines of statewide significance,
8 the shorelines hearings board shall uphold the decision by the
9 department unless the board determines, by clear and convincing
10 evidence that the decision of the department is inconsistent with the
11 policy of RCW 90.58.020 and the applicable guidelines.

12 (d) Review by the shorelines hearings board shall be considered an
13 adjudicative proceeding under chapter 34.05 RCW, the Administrative
14 Procedure Act. The aggrieved local government shall have the burden of
15 proof in all such reviews.

16 (e) Whenever possible, the review by the shorelines hearings board
17 shall be heard within the county where the land subject to the proposed
18 master program or master program amendment is primarily located. The
19 department and any local government aggrieved by a final decision of
20 the hearings board may appeal the decision to superior court as
21 provided in chapter 34.05 RCW.

22 (4) A master program amendment shall become effective after the
23 approval of the department or after the decision of the shorelines
24 hearings board to uphold the master program or master program
25 amendment, provided that the board may remand the master program or
26 master program adjustment to the local government or the department for
27 modification prior to the final adoption of the master program or
28 master program amendment.

29 **Sec. 5.** RCW 36.70A.480 and 1995 c 347 s 104 are each amended to
30 read as follows:

31 (1) For shorelines of the state, the goals and policies of the
32 shoreline management act as set forth in RCW 90.58.020 are added as one
33 of the goals of this chapter as set forth in RCW 36.70A.020 without
34 creating an order of priority among the fourteen goals. The goals and
35 policies of a shoreline master program for a county or city approved
36 under chapter 90.58 RCW shall be considered an element of the county or
37 city's comprehensive plan. All other portions of the shoreline master

1 program for a county or city adopted under chapter 90.58 RCW, including
2 use regulations, shall be considered a part of the county or city's
3 development regulations.

4 (2) The shoreline master program shall be adopted pursuant to the
5 procedures of chapter 90.58 RCW rather than the goals, policies, and
6 procedures set forth in this chapter for the adoption of a
7 comprehensive plan or development regulations.

8 (3) The policies, goals, and provisions of chapter 90.58 RCW and
9 applicable guidelines shall be the sole basis for determining
10 compliance of a shoreline master program with this chapter except as
11 the shoreline master program is required to comply with the internal
12 consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and
13 35A.63.105.

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

21 (b) Critical areas within shorelines of the state that have been
22 identified as meeting the definition of critical areas as defined by
23 RCW 36.70A.030(5), and that are subject to a shoreline master program
24 adopted under applicable shoreline guidelines shall not be subject to
25 the procedural and substantive requirements of this chapter, except as
26 provided in subsection (6) of this section. Nothing in this act is
27 intended to affect whether or to what extent agricultural activities,
28 as defined in RCW 90.58.065, are subject to chapter 36.70A RCW.

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

37 (4) Shoreline master programs shall provide a level of protection
38 to critical areas located within shorelines of the state that is at

1 least equal to the level of protection provided to critical areas by
2 the local government's critical area ordinances adopted and thereafter
3 amended pursuant to RCW 36.70A.060(2).

4 (5) Shorelines of the state shall not be considered critical areas
5 under this chapter except to the extent that specific areas located
6 within shorelines of the state qualify for critical area designation
7 based on the definition of critical areas provided by RCW 36.70A.030(5)
8 and have been designated as such by a local government pursuant to RCW
9 36.70A.060(2).

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

Passed by the House April 25, 2003.

Passed by the Senate April 9, 2003.

Approved by the Governor May 15, 2003.

Filed in Office of Secretary of State May 15, 2003.

1 **SHORELINES HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 ELOISE KAILIN; HARVEY KAILIN
4 TRUST; and ELOISE KAILIN,
5 AUTHORIZED DESIGNEE OF NANCY
6 SCOTT, TRUSTEE OF HARVEY KAILIN
7 TRUST,

Petitioner,

v.

8 CLALLAM COUNTY, A Political
9 Subdivision of the State of Washington; and
10 STATE OF WASHINGTON
11 DEPARTMENT OF ECOLOGY,

Respondent.

SHB NO. 07-025

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

12
13 Petitioners Eloise Kailin and Harvey Kailin Trust, Eloise Kailin, Authorized Designee of
14 Trustee Nancy Scott, filed a petition with the Shorelines Hearings Board (Board) for review of
15 an August 14, 2007 Clallam County decision on Shoreline Substantial Development Permit
16 (SSDP) No. SHR2006-00034, which authorized construction of a single-family residence on
17 Sequim Bay, Clallam County, Washington. The Board held a hearing on January 7 and 8, 2008
18 in Sequim, Washington. Administrative Appeals Judge, Cassandra Noble, presided for the
19 Board, which was comprised of Kathleen D. Mix, Chair, Judy Wilson, Mary-Alyce Burleigh and
20 Tim Farrell, members. Attorney Craig A. Ritchie represented the petitioners. Chief Deputy
21 Prosecuting Attorney Mark Nichols represented Clallam County, and Assistant Attorney General

FINDINGS AND CONCLUSIONS
AND ORDER
SHB NO. 07-025

1 Joan Marchioro represented the Department of Ecology (Ecology). The proceedings were
2 recorded by Randi R. Hamilton, Olympia Court Reporters, Olympia, Washington. Witnesses
3 were sworn and heard, exhibits were introduced, the parties presented arguments to the Board,
4 and the Board conducted a site visit. Based upon the evidence presented, the Board makes the
5 following

6
7 **FINDINGS OF FACT**

8 [1]

9 The Harvey Kailin Irrevocable Trust, Eloise Kailin, Agent, (Dr. Kailin) propose to build
10 a single family dwelling within 200 feet of the shoreline of Sequim Bay, in Clallam County,
11 Washington. Dr. Kailin intends to build a two story, five bedroom residence on the property
12 with a 1,235 square foot foundation footprint. The house is proposed on the eastern portion of the
13 approximately 20,000 square foot lot, at the highest possible elevation. *Exhibits R-3C, R-13.*
14 The Kailin property is located on the north side of Old Blyn Highway, approximately 350 feet
15 northeast of the intersection of Old Blyn Highway and Blyn Crossing Road, southwest of the
16 Jamestown S'Klallam Tribal Center. *Exhibit R-2.*

17 [2]

18 Sequim Bay is located within marine waters of the Strait of Juan de Fuca, from the
19 eastern Clallam County line to the western head of Freshwater Bay. This area is designated as a
20 Class I Wildlife Habitat Conservation Area by the Clallam County Code. CCC 27.12.320(1)(b).

21
FINDINGS AND CONCLUSIONS
AND ORDER
SHB NO. 07-025

1 The Kailin property contains a Class III regulated wetland and a Class I Aquatic Habitat
2 Conservation Area (Sequim Bay). The property is zoned Rural Center, and is within the Clallam
3 County Shoreline Master Program (CCSMP) Rural Shoreline Environment. *Exhibit R-2.*

4 [3]

5 A mobile home placed on the property in 1972 was present on the property when Dr.
6 Kailin purchased it in 1985. It has since been removed. A 576 square foot garage (24 feet by 24
7 feet), was constructed in 1975. Dr. Kailin intends to retain the garage structure on the property.
8 A well, intended for single-family residential use, is located approximately 10 feet from the
9 garage. *Exhibit R-3C, R-3D.*

10 [4]

11 On the adjoining lot to the west of the property is an approximately 3,300 square foot
12 residence that Dr. Kailin previously built, lived in, and sold. She intends to build her new house
13 to be of a size and configuration that would accommodate two bedrooms and bathrooms on one
14 floor, with two more bedrooms and baths and a large area of additional living space on the
15 second floor. *Exhibit 3f, 3g; Testimony of Kailin.*

16 [5]

17 Clallam County first reviewed the Kailin proposal under the County's Critical Areas
18 Ordinance Reasonable Use Exception procedure in 2004. The County denied the requested
19 exception. *Exhibits 21 – 24.* That decision has been appealed to Clallam County Superior Court
20 and is pending, as is a previous appeal to this Board based on the first proposal. The County and
21

1 Dr. Kailin agreed to adjust the proposal and start another permit process, which is the subject of
2 this appeal. *Testimony of Gray; Pre-Hearing Brief of Clallam County.*

3 [6]

4 The County approved Dr. Kailin's SSDP, subject to modifications and conditions,
5 including a reduction in the size of the footprint of the house. *Testimony of Kailin.* The County
6 determined that the proposal was in compliance with the fifty foot shoreline setback provisions
7 of the CCSMP based on a determination of the Ordinary High Water Mark (OHWM) as located
8 by Ecology. *Testimony of Lund, Lux, & Gray.* Although the proposed Kailin residence would be
9 built outside the CCSMP shoreline setback for a single family residence, it would be 40.5 feet
10 within the County's 50-foot protective wetland buffer requirement. This buffer is set out in the
11 County's Critical Areas Ordinance, not the Shoreline Master Program. CCC 27.12.315(1);
12 *Exhibit R-2.*

13 [7]

14 Gretchen Lux is Wetland Banking Lead/Environmental Scientist for Ecology. *Exhibit R-*
15 *9.* She holds a Bachelor of Science as well as a Master of Science in biology from Western
16 Washington University. Since 2000, Ms. Lux's professional experience has related to
17 environmental and wetland regulatory matters. At Ecology, Ms. Lux has been responsible for
18 administering the provisions of the Shoreline Management Act (SMA), including determinations
19 of the OHWM at various locations on the state's shorelines. *Exhibit R-36; Testimony of Lux.*
20 The Board finds Ms. Lux qualified to determine the OHWM on the Kailin property. On July 23,

1 2004, Ms. Lux set the location of the OHWM for the entire length of the property. She based her
2 determination on an identification of the plants and the dominant plant associations on the site,
3 distinguishing between salt-tolerant and non-salt-tolerant vegetation as indications of the normal
4 intrusion of saltwater onto the land. Based on her observations, she identified a series of
5 vegetative bands that related to the dominant plants. Ms. Lux concluded that the OHWM was
6 located where plant community structures differed with respect to the presence or absence of one
7 particular plant called “giant horsetail” (*Equisetum telmateia*) that serves as an indicator species.

8 *Exhibit R-15.*

9 [8]

10 Dr. Kailin’s expert, Kenneth Brooks, Ph.D., also examined the Kailin property to
11 determine the OHWM. Dr. Brooks based his opinion on the existence of a distinct sandy berm
12 running the length of the property. Dr. Brooks differed with Ms. Lux as to the location of the
13 OHWM on the westerly portion of the site, but not the easterly portion where the house is
14 proposed. *Exhibit P-8, Site visit, Testimony of Brooks.* The Board finds that Ecology correctly
15 and accurately determined the OHWM at all locations relevant to the proposed Kailin residence.

16 [9]

17 It is undisputed that, at the location proposed for the Kailin residence, the proposed
18 foundation would be at least 50 feet from the OHWM of Sequim Bay as determined by Ecology.

19 *Exhibit R-2.*

1 [10]

2 Dr. Kailin's Environmental Checklist describes the existence of a wetland on the property
3 as a "4050 square foot Class III palustrine emergent wetland." *Exhibit P-2*. In a letter written on
4 April 20, 2007, Dr. Brooks described the plan's "...incursion into the Class III wetland buffer
5 associated with the construction of a single family residence." Dr. Kailin's Wetland Buffer
6 Mitigation Plan described a "...small Class III palustrine emergent wetland ...identified behind
7 the fore-dune, which separates intertidal habitats of Sequim Bay from property lying south."
8 However, Dr. Brooks concluded the wetland had "little value" and that where a home is placed
9 in the wetland buffer would not make any difference to the environment. *Exhibit P-6B*.

10 [11]

11 Based on Ecology's determination of the OHWM, and her drawings of the site showing
12 the planned footprint for the residence, Dr. Kailin would be able to construct her home at the
13 square footage she prefers and would not intrude into the 50-foot shoreline setback as provided
14 in the CCSMP. The structure would, however, intrude about 40.5 feet into the wetland buffer
15 area required under the County's Critical Areas Ordinance (CAO), and could not be built without
16 a reasonable use exception from the CAO buffer requirement and a zoning variance for a
17 reduction in the road setback. *Testimony of Gray*.

18 [12]

19 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

20 Based upon the foregoing Findings of Fact, the Board enters the following

21
FINDINGS AND CONCLUSIONS
AND ORDER
SHB NO. 07-025

1 **CONCLUSIONS OF LAW**

2 [1]

3 The Board has jurisdiction over the parties and the subject matter of this case pursuant to
4 RCW 90.58.180.¹ The Board considers the case *de novo*. As the appealing parties, the
5 Petitioners have the burden of proving Clallam County’s permit decisions and conditions were
6 inconsistent with the requirements of the Shoreline Management Act (SMA) and the Clallam
7 County Shoreline Master Program (CCSMP).

8 [2]

9 The following legal issues as set forth in the Pre-Hearing Order remain:

- 10 1. Was the ordinary high water mark properly identified?
- 11 2. Is the Clallam County Critical Areas Ordinance, adopted pursuant to RCW
12 36.70A applicable to shorelines defined in RCW 90.58.030(2)(f), and is the
13 Critical Areas Ordinance part of the County Shoreline Master Program approved
14 by the Department of Ecology? (Chapter 321, Laws of 2003, Section 1(3))?
- 15 3. Do the Shoreline Management Act reasonable use provisions in the variance
16 criteria of the applicable regulations apply to Petitioners’ substantial
17 development permit?
- 18 4. Did the County wrongfully deny a reasonable use proposed by Petitioners?
- 19 5. Was the County’s imposition of off-site mitigation supported by sufficient
20 study establishing a need for such mitigation?
- 21 6. What mitigation do the identified environmental impacts of the project
require?

¹ Although the Board’s jurisdiction over all issues was originally questioned, the parties have now agreed that the Board has jurisdiction to address the remaining issues.

1 [3]

2 In Clallam County, residential development is allowed in the Rural Shoreline
3 Environment, so long as it is located, designed, constructed, and maintained to preserve, enhance
4 and wisely use the natural features and resources of Clallam County's shorelines. CCSMP Sec.
5 5.08.B. The CCSMP provides a minimum shore setback of fifty feet within the Rural shoreline
6 environment for dwellings, accessory buildings and structures and other improvements
7 substantially altering the natural topography or vegetation as measured from the OHWM.
8 CCSMP Sec. 5.08.C.4.

9 [4]

10 All development of shorelines of the state must comply with the Shoreline Management
11 Act (SMA) through implementation of local master programs approved by Ecology. RCW
12 90.58.090. The SMA should be broadly construed in order to protect the state shorelines as fully
13 as possible. *Buechel v. Dep't. of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994).

14 Ordinary High Water Mark Determination

15 [5]

16 The SMA defines the OHWM as follows:

17 ...that mark that will be found by examining the bed and banks and ascertaining
18 here the presence and action of waters are so common and usual, and so long
19 continued in all ordinary years, as to mark upon the soil a character distinct from
20 that of the abutting upland, in respect to vegetation as that condition exists on
21 June 1, 1971, as it may naturally change thereafter, or as it may change thereafter
in accordance with permits issued by a local government or the department.

RCW 90.58.030(2)(b).

1 This statute has been interpreted to mean that an OHWM is wherever the presence of
2 water is reflected in the vegetation on the land. *Thompson v. Ecology*, 136 Wn.Appl 580, 584,
3 150 P.3d 1144 (2007). The Board concludes that the OHWM on the Kailin property was
4 properly identified by Ecology. The parties do not significantly differ on this point. At the
5 location of the proposed residence, there was no dispute as to the location of the OHWM in
6 relation to the location and front foundation of the proposed house. Even for a building
7 footprint of approximately 1,200 square feet, as was proposed by the Petitioners, the structure
8 would be at least 50 feet from the OHWM.

9 [6]

10 The Board concludes that the proposed building is further than 50 feet from the OHWM
11 of Sequim Bay, as delineated by Ecology, and therefore, the location of the house complies with
12 the setback provisions of the CCSMP.² CCSMP 5.08 C.4. Table R-1.

13
14 Critical Areas and Shoreline Management

15 [7]

16 All of the remaining issues concern the interaction between the Clallam County Critical
17 Areas Ordinance (CAO) and the CCSMP. The County argues that the fact that the Clallam CAO
18 was adopted pursuant to RCW 36.70A, and not as part of the CCSMP, deprives the Board of
19

20 ² There is no requirement that a jurisdiction provide applicants with any particular size house. In any event, the
21 Board need not address the size of the proposed house because, even as proposed by Dr. Kailin, the house is not
proposed to be located within the shoreline setback required in the CCSMP.

1 subject matter jurisdiction over the remaining issues, all of which involve the County's County
2 Critical Areas Ordinance (CAO) wetland setback requirements.

3 [8]

4 The CCSMP does not include critical area buffers for wetlands or other habitat
5 conservation areas. The Washington Growth Management Act provides as follows:

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

10 RCW 36.70A.480(6).

11 [9]

12 The Clallam County CAO requires a 50-foot protective buffer from the OHWM of an
13 aquatic habitat conservation area with a Rural Shoreline designation. The CAO also requires a
14 50-foot protective buffer from the delineated edge of a class III regulated wetland. CCC
15 27.12.215(1). A regulated wetland buffer may not be reduced to less than 50 feet without
16 buffer averaging or a reasonable use exception under the CAO. CCC 27.12.215(1)(d). While
17 the proposed Kailin building site is located outside of the required 50-foot shoreline setback from
18 the OHWM of Sequim Bay, the building site is proposed 9.5 feet from the delineated edge of the
19 regulated wetland. This would necessitate the County granting a reasonable use exception under
20 its CAO to allow a 40.5-foot reduction in the 50-foot protective buffer required under the CAO.
21

1 [10]

2 Local SMPs and critical areas regulations work together as separate, but complementary,
3 bodies of law. Shoreline master programs must assure consistency of the master program with
4 the local government's comprehensive plan, including the critical areas ordinances adopted
5 pursuant to the Growth Management Act, Chapter 36.70A RCW. RCW 90.58.080(4). But the
6 consistency requirement does not mean that critical or sensitive areas ordinances supplant SMA-
7 based regulation of shoreline development in a master program. Reference to critical areas
8 regulations in a shoreline master program simply reinforces the requirement that development
9 comply with *both* sets of laws.

10 [11]

11 A SMP can specifically incorporate other laws by reference and thus make them a part of
12 the SMP. However, this Board has consistently held that such incorporation by reference must
13 be specifically articulated. *Laccinole et al. v. City of Bellevue*, SHB No. 03-025 (Order Granting
14 Summary Judgment and Order of Remand) (March 10, 2004). Mere reference to a CAO in an
15 SMP is not sufficient to expand the Board's jurisdiction to interpret and apply critical area
16 ordinance regulations within the shorelines of the state. For example, the Board recently held
17 that it does not have jurisdiction over local zoning code provisions unless they are incorporated
18 by specific reference into an SMP *and* Ecology approves such provisions as part of an SMP.
19 *Breakwater Condominium Assoc. v. City of Kirkland et al.*, Order on Motions, SHB No. 06-034.
20 p.5. (2007). In *Breakwater*, the Board considered whether it should apply non-conforming use

1 provisions of a city zoning code in the context of a challenge to a shoreline permit, and declined
2 to do so, reaffirming its prior decisions on this point:

3 Since 1999, it has been well settled that the Board does not have jurisdiction over
4 local zoning codes unless: (1) the local government's SMP has specifically
5 incorporated the zoning provisions in questions [*sic*]; and (2) the zoning
6 provisions have been reviewed and approved by Ecology in its approval of the
7 SMP as required by RCW 90.58.090(1).

8 *Breakwater Condominium Assoc. v. City of Kirkland et al.*, Order on Motions, SHB No. 06-034.
9 P. 5, (2007).

10 As expressed in the *Breakwater* case, this Board has no jurisdiction over local land use
11 regulations, including critical areas ordinances, unless they have been specifically and clearly
12 incorporated into an SMP and Ecology has approved the incorporated provisions as part of the
13 jurisdiction's SMP. The Board concludes that there is no such incorporation of the Clallam
14 County CAO by reference in the CCSMP, nor have the parties cited any incorporation articulated
15 in County regulations to the Board. Accordingly, the Board concludes that, in Clallam County,
16 critical area buffers are not regulated by the CCSMP, but rather by the County's Critical Areas
17 Ordinance (CAO). Thus, this Board is without jurisdiction to determine compliance with the
18 CAO.

19 [12]

20 Issue 5 asks whether the County wrongfully denied Dr. Kailin's proposed Reasonable
21 Use Exception application. Because this Board lacks jurisdiction to determine compliance with
local code provisions not specifically incorporated into the shoreline master program, we are
without jurisdiction to consider this issue. *Breakwater*, SHB No. 06-034, p. 6. As this Board has

1 previously held, references to other regulations reflect “the simultaneous governance of one
2 project by several bodies of law and not the incorporation of one body of law into another.”
3 *Faben Point Neighbors et al. v. City of Mercer Island, et al.*, SHB No. 98-63, CL IV (Summary
4 Judgment of Dismissal for Lack of Jurisdiction) (May 5, 1999). While other laws in addition to
5 the CCSMP may apply to the location and construction of a house on the Kailin property, this
6 Board has jurisdiction only over decisions made pursuant to the SMA and the CCSMP. The
7 Reasonable Use Exception sought by Dr. Kailin is relief that is based upon the County’s critical
8 areas wetland regulation, and the proper avenue for relief is through the Land Use Petition Act,
9 Ch 36.70C RCW, the exclusive means of judicial review for land use decisions not covered by
10 the SMA.

11 [13]

12 Dr. Kailin also argues that, because Ecology has not specifically identified a wetland
13 associated with the shoreline on her property, the County cannot treat the property as containing
14 a wetland under its CAO. As authority for this assertion, she cites the SMA definition of
15 “shorelands” or “shoreland areas,” which is as follows:

16 ...those lands extending landward for two hundred feet in all directions as
17 measured on a horizontal plane from the ordinary high water mark; floodways and
18 contiguous floodplain areas landward two hundred feet from such floodways; and
19 all wetlands and river deltas associated with the streams, lakes, and tidal waters
20 which are subject to the provisions of this chapter; the same to be designated as to
21 location by the department of ecology.

RCW 90.58.030(f).

1 The Board is not persuaded by this argument, nor does it interpret the SMA as suggested
2 by the Petitioners. RCW 90.58.030 is a definitional statute. It designates Ecology as the agency
3 with authority to make such determinations as may be necessary to implement and enforce the
4 provisions of the SMA. Petitioners present no authority to support their contention that Ecology
5 is statutorily *required* to identify every wetland in the state. Indeed, such an obligation would be
6 unrealistic and impractical. It would be extremely burdensome and, ultimately, a fruitless
7 exercise. Both upland and shoreline wetland areas constantly evolve and change over time, a
8 fact amply demonstrated by the physical conditions on the Kailin site. Finding no authority for
9 such a requirement, the Board rejects the suggestion that, because it has not previously been
10 delineated on a map by Ecology, the wetland that is obviously present on the Kailin property
11 does not exist.

12 [14]

13 With regard to the remaining issues, the only shoreline permit involved in this case is a
14 shoreline substantial development permit. The critical areas reasonable use exception, zoning
15 variance application, and appropriateness of off-site wetland mitigation, are all based upon
16 regulations that are not within the Board's jurisdiction, given the particular facts of this case.
17 The wetland mitigation required by the County was related to the intrusion into the wetland
18 buffer under the CAO. The Board lacks jurisdiction to address, grant, or deny a reasonable use
19 exception for intrusion into a wetland buffer requirement of the County CAO.

1 [15]

2 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

3 Based upon the foregoing Findings of Fact and Conclusions of Law, the Board enters the
4 following

5 **ORDER**

6 Clallam County's decision approving Shoreline Substantial Development Permit (SSDP)
7 No. SHR2006-00034 is AFFIRMED, and this appeal is DENIED.

8 SO ORDERED this 15th day of February 2008.

9 **SHORELINES HEARINGS BOARD**

10 KATHLEEN D. MIX, Chair

11 MARY-ALYCE BURLEIGH, Member

12 TIM FARRELL, Member

13 JUDY WILSON, Member

14 CASSANDRA NOBLE, Presiding
15 Administrative Appeals Judge

CERTIFICATION OF ENROLLMENT

SUBSTITUTE SENATE BILL 6012

Chapter 262, Laws of 2003

58th Legislature
2003 Regular Session

SHORELINE MANAGEMENT

EFFECTIVE DATE: 7/27/03

Passed by the Senate April 26, 2003
YEAS 44 NAYS 5

BRAD OWEN

President of the Senate

Passed by the House April 17, 2003
YEAS 61 NAYS 37

FRANK CHOPP

Speaker of the House of Representatives

Approved May 14, 2003.

GARY F. LOCKE

Governor of the State of Washington

CERTIFICATE

I, Milton H. Doumit, Jr.,
Secretary of the Senate of the
State of Washington, do hereby
certify that the attached is
SUBSTITUTE SENATE BILL 6012 as
passed by the Senate and the House
of Representatives on the dates
hereon set forth.

MILTON H. DOUMIT JR.

Secretary

FILED

May 14, 2003 - 10:16 a.m.

**Secretary of State
State of Washington**

SUBSTITUTE SENATE BILL 6012

AS AMENDED BY THE HOUSE

Passed Legislature - 2003 Regular Session

State of Washington

58th Legislature

2003 Regular Session

By Senate Committee on Land Use & Planning (originally sponsored by Senators Mulliken, T. Sheldon and Morton)

READ FIRST TIME 03/05/03.

1 AN ACT Relating to shoreline management; and amending RCW
2 90.58.060, 90.58.080, and 90.58.250.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 90.58.060 and 1995 c 347 s 304 are each amended to
5 read as follows:

6 (1) The department shall periodically review and adopt guidelines
7 consistent with RCW 90.58.020, containing the elements specified in RCW
8 90.58.100 for:

9 (a) Development of master programs for regulation of the uses of
10 shorelines; and

11 (b) Development of master programs for regulation of the uses of
12 shorelines of statewide significance.

13 (2) Before adopting or amending guidelines under this section, the
14 department shall provide an opportunity for public review and comment
15 as follows:

16 (a) The department shall mail copies of the proposal to all cities,
17 counties, and federally recognized Indian tribes, and to any other
18 person who has requested a copy, and shall publish the proposed

1 guidelines in the Washington state register. Comments shall be
2 submitted in writing to the department within sixty days from the date
3 the proposal has been published in the register.

4 (b) The department shall hold at least four public hearings on the
5 proposal in different locations throughout the state to provide a
6 reasonable opportunity for residents in all parts of the state to
7 present statements and views on the proposed guidelines. Notice of the
8 hearings shall be published at least once in each of the three weeks
9 immediately preceding the hearing in one or more newspapers of general
10 circulation in each county of the state. If an amendment to the
11 guidelines addresses an issue limited to one geographic area, the
12 number and location of hearings may be adjusted consistent with the
13 intent of this subsection to assure all parties a reasonable
14 opportunity to comment on the proposed amendment. The department shall
15 accept written comments on the proposal during the sixty-day public
16 comment period and for seven days after the final public hearing.

17 (c) At the conclusion of the public comment period, the department
18 shall review the comments received and modify the proposal consistent
19 with the provisions of this chapter. The proposal shall then be
20 published for adoption pursuant to the provisions of chapter 34.05 RCW.

21 (3) The department may (~~propose~~) adopt amendments to the
22 guidelines not more than once each year. (~~At least once every five~~
23 ~~years the department shall conduct a review of the guidelines pursuant~~
24 ~~to the procedures outlined in subsection (2) of this section)~~ Such
25 amendments shall be limited to: (a) Addressing technical or procedural
26 issues that result from the review and adoption of master programs
27 under the guidelines; or (b) issues of guideline compliance with
28 statutory provisions.

29 **Sec. 2.** RCW 90.58.080 and 1995 c 347 s 305 are each amended to
30 read as follows:

31 (1) Local governments shall develop or amend(~~, within twenty-four~~
32 ~~months after the adoption of guidelines as provided in RCW 90.58.060,~~)
33 a master program for regulation of uses of the shorelines of the state
34 consistent with the required elements of the guidelines adopted by the
35 department in accordance with the schedule established by this section.

36 (2)(a) Subject to the provisions of subsections (5) and (6) of this

1 section, each local government subject to this chapter shall develop or
2 amend its master program for the regulation of uses of shorelines
3 within its jurisdiction according to the following schedule:

4 (i) On or before December 1, 2005, for the city of Port Townsend,
5 the city of Bellingham, the city of Everett, Snohomish county, and
6 Whatcom county;

7 (ii) On or before December 1, 2009, for King county and the cities
8 within King county greater in population than ten thousand;

9 (iii) Except as provided by (a)(i) and (ii) of this subsection, on
10 or before December 1, 2011, for Clallam, Clark, Jefferson, King,
11 Kitsap, Pierce, Snohomish, Thurston, and Whatcom counties and the
12 cities within those counties;

13 (iv) On or before December 1, 2012, for Cowlitz, Island, Lewis,
14 Mason, San Juan, Skagit, and Skamania counties and the cities within
15 those counties;

16 (v) On or before December 1, 2013, for Benton, Chelan, Douglas,
17 Grant, Kittitas, Spokane, and Yakima counties and the cities within
18 those counties; and

19 (vi) On or before December 1, 2014, for Adams, Asotin, Columbia,
20 Ferry, Franklin, Garfield, Grays Harbor, Klickitat, Lincoln, Okanogan,
21 Pacific, Pend Oreille, Stevens, Wahkiakum, Walla Walla, and Whitman
22 counties and the cities within those counties.

23 (b) Nothing in this subsection (2) shall preclude a local
24 government from developing or amending its master program prior to the
25 dates established by this subsection (2).

26 (3)(a) Following approval by the department of a new or amended
27 master program, local governments required to develop or amend master
28 programs on or before December 1, 2009, as provided by subsection
29 (2)(a)(i) and (ii) of this section, shall be deemed to have complied
30 with the schedule established by subsection (2)(a)(iii) of this section
31 and shall not be required to complete master program amendments until
32 seven years after the applicable dates established by subsection
33 (2)(a)(iii) of this section. Any jurisdiction listed in subsection
34 (2)(a)(i) of this section that has a new or amended master program
35 approved by the department on or after March 1, 2002, but before the
36 effective date of this section, shall not be required to complete
37 master program amendments until seven years after the applicable date
38 provided by subsection (2)(a)(iii) of this section.

1 (b) Following approval by the department of a new or amended master
2 program, local governments choosing to develop or amend master programs
3 on or before December 1, 2009, shall be deemed to have complied with
4 the schedule established by subsection (2)(a)(iii) through (vi) of this
5 section and shall not be required to complete master program amendments
6 until seven years after the applicable dates established by subsection
7 (2)(a)(iii) through (vi) of this section.

8 (4) Local governments shall conduct a review of their master
9 programs at least once every seven years after the applicable dates
10 established by subsection (2)(a)(iii) through (vi) of this section.
11 Following the review required by this subsection (4), local governments
12 shall, if necessary, revise their master programs. The purpose of the
13 review is:

14 (a) To assure that the master program complies with applicable law
15 and guidelines in effect at the time of the review; and

16 (b) To assure consistency of the master program with the local
17 government's comprehensive plan and development regulations adopted
18 under chapter 36.70A RCW, if applicable, and other local requirements.

19 (5) Local governments are encouraged to begin the process of
20 developing or amending their master programs early and are eligible for
21 grants from the department as provided by RCW 90.58.250, subject to
22 available funding. Except for those local governments listed in
23 subsection (2)(a)(i) and (ii) of this section, the deadline for
24 completion of the new or amended master programs shall be two years
25 after the date the grant is approved by the department. Subsequent
26 master program review dates shall not be altered by the provisions of
27 this subsection.

28 (6)(a) Grants to local governments for developing and amending
29 master programs pursuant to the schedule established by this section
30 shall be provided at least two years before the adoption dates
31 specified in subsection (2) of this section. To the extent possible,
32 the department shall allocate grants within the amount appropriated for
33 such purposes to provide reasonable and adequate funding to local
34 governments that have indicated their intent to develop or amend master
35 programs during the biennium according to the schedule established by
36 subsection (2) of this section. Any local government that applies for
37 but does not receive funding to comply with the provisions of

1 subsection (2) of this section may delay the development or amendment
2 of its master program until the following biennium.

3 (b) Local governments with delayed compliance dates as provided in
4 (a) of this subsection shall be the first priority for funding in
5 subsequent biennia, and the development or amendment compliance
6 deadline for those local governments shall be two years after the date
7 of grant approval.

8 (c) Failure of the local government to apply in a timely manner for
9 a master program development or amendment grant in accordance with the
10 requirements of the department shall not be considered a delay
11 resulting from the provisions of (a) of this subsection.

12 (7) Notwithstanding the provisions of this section, all local
13 governments subject to the requirements of this chapter that have not
14 developed or amended master programs on or after March 1, 2002, shall,
15 no later than December 1, 2014, develop or amend their master programs
16 to comply with guidelines adopted by the department after January 1,
17 2003.

18 **Sec. 3.** RCW 90.58.250 and 1971 ex.s. c 286 s 25 are each amended
19 to read as follows:

20 (1) The legislature intends to eliminate the limits on state
21 funding of shoreline master program development and amendment costs.
22 The legislature further intends that the state will provide funding to
23 local governments that is reasonable and adequate to accomplish the
24 costs of developing and amending shoreline master programs consistent
25 with the schedule established by RCW 90.58.080. Except as specifically
26 described herein, nothing in this act is intended to alter the existing
27 obligation, duties, and benefits provided by this act to local
28 governments and the department.

29 (2) The department is directed to cooperate fully with local
30 governments in discharging their responsibilities under this chapter.
31 Funds shall be available for distribution to local governments on the
32 basis of applications for preparation of master programs and the
33 provisions of RCW 90.58.080(7). Such applications shall be submitted
34 in accordance with regulations developed by the department. The
35 department is authorized to make and administer grants within
36 appropriations authorized by the legislature to any local government

1 within the state for the purpose of developing a master shorelines
2 program.

3 ~~((No grant shall be made in an amount in excess of the recipient's
4 contribution to the estimated cost of such program.))~~

Passed by the Senate April 26, 2003.

Passed by the House April 17, 2003.

Approved by the Governor May 14, 2003.

Filed in Office of Secretary of State May 14, 2003.

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2

3 EVERGREEN ISLANDS, FUTUREWISE and
4 SKAGIT AUDUBON SOCIETY,

5

Petitioners,

6

7 v.

8

9 CITY OF ANACORTES,

10

11 Respondent.

12

13

I. SYNOPSIS OF DECISION

14

15 Anacortes is a city located on Fidalgo Bay in Puget Sound with many assets. These assets
16 include miles of shorelines shared by critical habitat and industrial uses, preserved forest
17 lands that cover almost half of the city, and a historic downtown. This case arises out of the
18 City's efforts to protect the City's considerable environmental resources while managing
19 future growth and maintaining and enhancing its shoreline industrial resources.

20

21 This matter comes to the Board as an appeal of the City of Anacortes Ordinance 2702
22 (Ordinance), an ordinance that repealed the City's previous critical areas regulations and
23 enacted a new stand-alone critical areas ordinance (CAO). Petitioners are Evergreen
24 Islands, Futurewise, and the Skagit Audubon Society. Petitioners challenge the
25 Ordinance's wetland buffer widths and exemptions, the adequacy of wetland buffer widths
26 for shoreline habitat areas, the alleged lack of standards for buffers in forest habitat areas,
27 and the use of the term "professional scientific analysis" rather than "best available science"
28 in the City's development regulations.

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1 The City has kept its commitment to the Board made during a previous case¹ involving the
2 same Petitioners to replace its original critical areas regulations as early as possible. The
3 City has responsibly enacted new, more protective regulations ahead of its December 1,
4 2006, update deadline. Previously, with commendable foresight, the City had set aside
5 nearly half of the City's land by permanently protecting over 2600 acres through its
6 Community Forest Lands program.
7

8
9 The City argues that the Board does not have jurisdiction over its wetland buffer widths or its
10 wetland exemptions because it plans to review and possibly revise these regulations before
11 its December 1, 2006, update deadline. The Board finds that it does have jurisdiction over
12 these regulations because they are a new enactment of development regulations, over
13 which the Board has jurisdiction pursuant to RCW 36.70A.280(1).
14

15
16 Understanding that the City acknowledges that its work on these regulations is not yet done,
17 the Board must still find that the wetland buffers and exemptions do not comport with best
18 available science (BAS). They do not comport with the only BAS included in the record,
19 provided by the Petitioners and the Washington State Department of Ecology (Ecology).
20 The City has neither provided a reasoned discussion of why it has departed from the BAS
21 offered by an agency with expertise nor provided an alternative source of BAS.
22

23
24 The City argues that the adaptive management program enacted by the Ordinance will
25 monitor and measure the impact of the adopted buffer widths and exemptions. The Board
26 agrees that for a small city which issues relatively few building permits, a workable adaptive
27 management program is a real possibility. However, we cannot find this approach
28 compliant without a description of how the monitoring and adaptive management program
29
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32

¹ *Evergreen Islands, Futurewise, and Skagit Audubon Society v. the City of Anacortes*, Case No. 03-2-0017.

1 will be conducted, what scientific methods would be used, and how the effectiveness will be
2 measured and monitored.

3
4 The City also argues that the Board does not have jurisdiction over the challenges to the
5 critical areas regulations applicable in the City's shorelines because such critical areas
6 regulations are now governed by the Shoreline Management Act. The Board received two
7 amicus briefs on this subject, as well as briefs from the City and the Petitioners. In light of
8 the express legislative intent in adopting ESHB 1933, we find that the repeal of the prior
9 critical areas regulations governing critical areas in the shorelines and the adoption of new
10 critical areas regulations (some of which apply to critical areas in the shorelines) amend the
11 City's shoreline master program. As a result, those amendments must be submitted to
12 Ecology by the City for review and approval.
13
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15
16 As for Petitioners' challenge to the lack of standards for buffers, we find that in forest lands,
17 determination of buffer widths for habitat areas on a case-by-case basis is consistent with
18 the best available science in the record - the advice given by the Washington Department of
19 Community, Trade and Economic Development (CTED) Critical Areas Assistance
20 Handbook. While a more specific standard for these habitat areas would be preferable, we
21 find that the City's requirements that an extensive critical area report must be prepared by a
22 biologist with experience in the type of habitat being regulated and the general standard that
23 the review will be based upon protecting the functions and values of habitat make this
24 regulation compliant.
25
26

27 Petitioners challenge the use of the term "professional scientific analysis" rather than "best
28 available science" in sections of the new CAO that deal with (1) procedures in the City's
29 comprehensive plan for nominating for designation habitat areas and species when
30 management strategies are included for these local nominations, (2) specifications for
31 issuing conditional use permits allowing development in habitat conservation areas or their
32

1 buffers, and (3) reductions in riparian buffers. RCW 36.70A.172(1) requires that BAS must
2 be substantively included in the formulation of development regulations. We do not read
3 RCW 36.70A.172(1) to require another BAS investigation for issuing permits.
4

5
6 The regulation that codifies procedures located in the City's comprehensive plan for the
7 nomination process for habitat areas and species of local importance establishes a
8 procedure for making an addition to the City's development regulations. Because this
9 process will establish a new development regulation(s), it must include BAS. Since it does
10 not, this section of the new CAO does not comply with the Growth Management Act (GMA).
11

12 On the other hand, the sections of the new CAO that establish permitting processes are not
13 required to incorporate BAS in the permitting process. The regulations for issuing
14 conditional use permits which allow development in habitat conservation areas or their
15 buffers and establish conditions for reductions in riparian buffers detail the requirements for
16 conditions imposed on development at the time that permits are issued. While we find that
17 RCW 36.70A.172(1) does not require a new BAS investigation at the time of permitting, we
18 find, as we have in previous cases, that discretion in issuing permit decisions should be
19 guided by specific criteria. The City's requirements for an extensive critical areas report by
20 a qualified biologist, coupled with the requirement that habitat alterations or mitigations must
21 protect the quantitative and qualitative functions and values of habitat conservation areas
22 when permits are issued, make these regulations compliant.
23
24

25
26 We find that the Petitioners' request for invalidity is not justified in this case. Invalidity here
27 would have the effect of suspending the newly adopted and more protective critical areas
28 regulations. The Board sees no reason to question the City's good faith in pursuing the
29 adoption of critical areas regulations that fully protect the functions and values of critical
30 areas. The Board encourages the City to keep the provisions of Ordinance 2702 in place
31 while it completes its update work.
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II. PROCEDURAL HISTORY

On April 18, 2005, the City of Anacortes adopted Ordinance 2702 (Ordinance) that enacted a new stand-alone chapter of the Anacortes City Code for protecting critical areas, and published a notice of adoption on April 27, 2005. On June 27, 2005, Evergreen Islands, Futurewise, and Skagit Audubon Society filed a petition for review challenging Ordinance 2702. The City filed an answer to the petition for review on July 18, 2005.

The Board issued a Notice of Hearing and Preliminary Schedule on July 6, 2005.

A prehearing conference was held telephonically on July 19, 2005. Charles Cottrell represented Petitioners, Ian Munce represented the City, and Board member Holly Gadbow presided.

On July 27, 2005, Petitioners filed an amended petition for review that included in the issue statement the sections of the challenged ordinance that Petitioners alleged violated the Growth Management Act (GMA).

A prehearing order was issued on August 1, 2005.

The City filed Motion to Dismiss or Alternatively, Summary Judgment (Substantive Motion) on August 15, 2005. On August 23, 2005, the Board issued an order deciding not to consider the City's motion due to the Board's schedule of cases.

On October 10, 2003, Petitioners filed their prehearing brief. The City submitted its opposition brief on October 24, 2005. Petitioners submitted a Reply Brief on October 21, 2005.

1 The Washington State Departments of Community, Trade and Economic Development
2 (CTED), Ecology, and Fish and Wildlife (WDFW) moved for permission to file an Amicus
3 Brief on October 24, 2005. On that same day, the Washington Public Ports Association also
4 moved for permission to file an Amicus Brief and submitted an Amicus Brief. The City filed
5 a response to the motions to file amicus briefs on November 1, 2005, and offered no
6 objection to allowing either brief, if the City's response was allowed.
7

8
9 The Board held a hearing on the merits on November 3, 2005, at the Anacortes City Hall.
10 Charles Cottrell represented Petitioners. Ian Munce represented the City. All three Board
11 members attended.
12

13 At the hearing on the merits, the Presiding Officer made the following rulings:
14

- 15 a. CTED, Ecology, and WDFW were granted leave to submit an Amicus Brief.
- 16 b. The Washington Public Ports Association was granted leave to submit an
17 Amicus Brief.
- 18 c. The City was granted leave to submit a response to the amicus briefs.
- 19 d. The Board admitted the following as exhibits:
 - 20 i. Ordinance 2706 with attached oversized maps - Exhibit 176
 - 21 ii. Document titled: Plan for Habitat Protection, Restoration, and
22 Enhancement Fidalgo Bay and Guemes Channel – Exhibit 177
 - 23 iii. Shoreline Master Plan for City of Anacortes – Exhibit 178
 - 24 iv. Revised Final Integrated Fidalgo Bay-Wide Plan and
25 (January 18, 2000) – Exhibit 179.
26
27

28 III. ISSUES PRESENTED

- 29
30 **1. Do provisions ACC 17.65.051 (D) (2) and (E) (1), ACC 17.65.210, ACC 17.65.053 (F)**
31 **(1), ACC 17.41.00, and ACC X.60.040 adopted by Ordinance No. 2702 violate RCW**
32 **36.70A.020(10), RCW 36.70A.040, RCW 36.70A.050, RCW 36.70A.060, RCW**

1 **36.70A.130, RCW 36.70A.130, RCW 36.70A.172 and RCW 36.70A.175 when the**
2 **ordinance fails to protect critical areas functions and values and fails to consider**
3 **best available science by allowing buffers on all categories of wetlands, Type 3**
4 **streams, and marine shorelines that are unsupported by best available science, by**
5 **allowing Class II sized-buffers on a Class I Wetland and Class III sized-buffers on a**
6 **Class II Wetland, and by exempting certain category II and III Wetlands from buffer**
7 **requirements altogether?**

8 **2. Does ACC X.60.020G adopted by Anacortes Ordinance No. 2702 violate RCW**
9 **36.70A.020(9), RCW 36.70A.020(10), RCW 36.70A.040, RCW 36.70A.050, RCW**
10 **36.70A.060, RCW 36.70A.130 and RCW 36.70A.172 by failing to tie buffer width for**
11 **development adjacent to fish and wildlife habitat conservation areas to any**
12 **standards and by precluding consistent and assured protections of the functions**
13 **and values of the habitat conservation areas?**

14 **3. Does Appendix F to Anacortes Ordinance No. 2702 on pages 85, 90, and 94**
15 **adopted by Ordinance No. 2702 to the extent that it substitutes the term**
16 **professional scientific analysis for best available science violate RCW**
17 **36.70A.020(9), RCW 36.70A.020(10), RCW 36.70A.040, RCW 36.70A.050, RCW**
18 **36.70A.060, RCW 36.70A.130 and RCW 36.70A.172 when the substituted term has**
19 **no definition or standard under the GMA and therefore cannot protect critical area**
20 **functions and values?**

21 **4. Considering the failure to comply with the above-noted sections of Chapter 36.70A**
22 **RCW, should this board issue a finding of invalidity pursuant to RCW 36.70A.302**
23 **when Anacortes' City Ordinance No. 2702 substantially interferes with the**
24 **fulfillment of the goals of the Growth Management Act?**

25 **IV. BURDEN OF PROOF**

26 For purposes of board review of the comprehensive plans and development regulations
27 adopted by local government, the GMA establishes three major precepts: a presumption of
28 validity; a "clearly erroneous" standard of review; and a requirement of deference to the
29 decisions of local government.

30 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations, and
31 amendments to them are presumed valid upon adoption:

32 Except as provided in subsection (5) of this section, comprehensive plans and
development regulations, and amendments thereto, adopted under this chapter are
presumed valid upon adoption.

RCW 36.70A.320(1).

1 The statute further provides that the standard of review shall be whether the challenged
2 enactments are clearly erroneous:

3 The board shall find compliance unless it determines that the action by the state
4 agency, county, or city is clearly erroneous in view of the entire record before the
5 board and in light of the goals and requirements of this chapter.
6 RCW 36.70A.320(3).

7 In order to find the City's action clearly erroneous, the Board must be "left with the firm and
8 definite conviction that a mistake has been made." *Department of Ecology v. PUD1*, 121
9 Wn.2d 179, 201, 849 P.2d 646 (1993).

10
11
12 Within the framework of state goals and requirements, the boards must grant deference to
13 local government in how they plan for growth:

14 In recognition of the broad range of discretion that may be exercised by counties and
15 cities in how they plan for growth, consistent with the requirements and goals of this
16 chapter, the legislature intends for the boards to grant deference to the counties and
17 cities in how they plan for growth, consistent with the requirements and goals of this
18 chapter. Local comprehensive plans and development regulations require counties and
19 cities to balance priorities and options for action in full consideration of local
20 circumstances. The legislature finds that while this chapter requires local planning to
21 take place within a framework of state goals and requirements, the ultimate burden and
22 responsibility for planning, harmonizing the planning goals of this chapter, and
23 implementing a county's or city's future rests with that community.
24 RCW 36.70A.3201 (in part).

25 In sum, the burden is on the Petitioners to overcome the presumption of validity and
26 demonstrate that any action taken by the City is clearly erroneous in light of the goals and
27 requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).

28 Where not clearly erroneous and thus within the framework of state goals and requirements,
29 the planning choices of local government must be granted deference.

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V. DISCUSSION

Jurisdiction

Positions of the Parties

As a threshold issue, the City challenges the Board's jurisdiction to determine the compliance of portions of its newly adopted critical area ordinance (CAO) with the GMA. The City argues that its work is not done on its wetland buffers and exemptions. City of Anacortes Opposition Brief (October 24, 2005) at 1. Because it has until the GMA update deadline to complete its work, the City asserts, the Board does not have jurisdiction to consider the "interim" regulations it adopted here. *Id.*

Petitioners contend that when the City enacted its CAO, it subjected these regulations to the Board's jurisdiction and a review for GMA compliance. Petitioners argue that a municipality cannot adopt critical areas protections and then evade Board scrutiny with the condition that "further review" will be conducted by the next GMA update deadline. Petitioner points out building permits continue to vest under these adopted regulations. Petitioner's Reply (October 31, 2005) at 2.

Board Discussion

The Board's review of the record shows conflicting evidence on whether Ordinance 2702 updated the City's critical area ordinance pursuant to RCW 36.70A.130(1), (2), and (4). The City argues in its brief that it adopted a new stand-alone CAO and the City Council minutes show that the City considered its CAO an "update," except for the regulations related to wetland buffers and wetland exemptions which will be subject to further review before the City's December 1, 2006, deadline. Exhibit 163 at 2. The City says failure to do this will constitute an opportunity for an appeal to the Growth Board. City of Anacortes Opposition Brief at 7. At argument the City stated that the critical areas ordinance adopted by the Ordinance was an annual revision pursuant to RCW 36.70A.130(1) and (2), but not a seven year "update" pursuant to RCW 36.70A.130(1), (2), and (4).

1 To help us determine whether or not Ordinance 2702 is an update, we look to our decision
2 in a case that presented a similar situation, *1000 Friends of Washington and Pro-Whatcom*
3 *v. Whatcom County*, WWGMHB Case No. 04-2-0010. In that case, this Board said:

4 The threshold question that we must answer is whether Ordinance 2004-017 is an
5 update of the County's comprehensive plan (or part of it) pursuant to RCW
6 36.70A.130(1)(a) and (2)(a). We look to RCW 36.70.130 to determine what is
7 required for an update. This provision of the GMA (RCW 36.70.130) contains two
8 major kinds of revision requirements for comprehensive plans and development
9 regulations. First, comprehensive plans and development regulations adopted
10 pursuant to Ch. 36.70A RCW are subject to "continuing review and evaluation."
11 While there is no express requirement that this be done every year, this type of
12 review is usually done in an annual comprehensive amendment cycle, RCW
13 36.70A.130(2)(a). The amendments adopted under this process may be appealed to
14 the boards to determine whether the adopted amendments comply with the GMA; but
15 these types of amendments are not required to ensure that the local jurisdiction's
16 entire comprehensive plan and development regulations comply with all the
17 provisions of the GMA.

18 "Updates" on the other hand, require a review and revision, if needed, of both the
19 comprehensive plan and the development regulations to ensure their compliance
20 with the GMA, according to a staggered schedule set out in RCW 36.70A.130(4):
21 "Updates" means to review and revise, if needed, according to subsection (1) of this
22 section, and the time periods specified in subsection (4) of this section. RCW
23 36.70A.130(2)(a)(in part).

24 An update requires that counties and cities review and revise, as needed, their plans
25 and regulations, to ensure compliance with the GMA. RCW 36.70A.130(1)(a) and
26 (2)(a).

27 *1000 Friends of Washington and Pro-Whatcom v. Whatcom County*, WWGMHB Case No.
28 04-2-0010, Order on Motions to Dismiss (August 2, 2004) at 7 and 8.

29 Also in *1000 Friends of Washington and Pro-Whatcom v. Whatcom County*, the Board said
30 this about the necessary components of legislative actions taken by cities and counties
31 completing updates according to RCW 36.70A.130(1):

32 The statute specifies that a local jurisdiction must take "legislative action" in adopting
its update. RCW 36.70A.130(1)(a). Legislative action is defined as "the adoption of
a resolution or ordinance following notice and a public hearing indicating *at a*
minimum, a finding that a review and evaluation has occurred and identifying the
revisions made, or that a revision was not needed and the reasons therefore." RCW

1 36.70A.130(1)(a) (emphasis added). Until the County takes legislative action
2 indicating what it has revised, what it has not revised, and the reasons for its
3 decision, it has not undertaken an update. RCW 36.70A.130(1)(a). Because
4 Ordinance 2004-017 does not include such findings, it is not an update within the
5 meaning of RCW 36.70A.130.

6 *1000 Friends of Washington and Pro-Whatcom v. Whatcom County*, WWGMHB Case No.
7 04-2-0010, Motion on Order to Dismiss (August 2, 2004) at 8, 9, and 11.

8 In light of conflicting views in the record on what type of review was adopted in the
9 Ordinance, the Board will look to the actual language of Ordinance 2702. The Board's
10 examination of the Ordinance shows that the City has not made "a finding that a review and
11 evaluation has occurred and identifying the revisions made, or that a revision was not
12 needed and the reasons therefore." Ordinance 2702, Opening Recitals and Findings. The
13 Board concludes that, without such a finding, no update pursuant to RCW 36.70A.130(1),
14 (2)(a), and (4) has occurred. Therefore, to the extent the City has not acted to update its
15 CAO, any challenges to the sufficiency of that update under RCW 36.70A.130 are not ripe.
16

17 Nevertheless, the City has enacted new regulations. Ordinance 2702, Section 3.
18 Ordinance 2702 repeals the City's prior critical areas regulations and enacts a new, stand-
19 alone critical areas ordinance (CAO). This puts the issue of the sufficiency of the new CAO
20 to protect critical areas squarely before the Board. Thus, the challenges to the adequacy of
21 the protections adopted arise under RCW 36.70A.060 and RCW 36.70A.172(1).
22

23
24
25 Cities and counties amend their comprehensive plans from time to time according to RCW
26 36.70A.130(2)(a). They may also amend or adopt development regulations. According to
27 RCW 36.70A.280(1), these amendments are subject to the jurisdiction of a growth
28 management hearings board if they are "permanent." While the City says that some parts of
29 this ordinance are interim, no words in the adopting language of the Ordinance describe
30 these regulations as interim or temporary. Section 17.65.01 states that Section
31 17.65.053(F)(1) (Standard Buffer Widths) and Section 17.65.210 (Isolated Wetland
32

1 Exemptions) will be revised before the City's update deadline of December 1, 2006, and
2 that failure to do so will create an appeal opportunity but the Ordinance itself does not make
3 these regulations temporary and has no sunset clause.
4

5 **Conclusion:** The City's newly enacted regulations governing development in critical areas,
6 even those considered "interim," must comply with the goals and requirements of the GMA.
7 The City has enacted new regulations in regard to wetland buffers and exemptions, buffers
8 for fish and wildlife habitat areas, and its habitat conservation area protections where it uses
9 the term "professional scientific analysis." Therefore, the Board has jurisdiction over these
10 new enactments pursuant to RCW 36.70A.280(1).
11
12

13 **Wetland Buffers and Exemptions (Issue 1)**

14 Positions of the Parties

15
16 Having found that the Board has jurisdiction over the City's protection measures for wetland
17 buffers and exemptions, the Board will examine whether these provisions comply with the
18 Growth Management Act (GMA).
19

20 **Petitioners' Position**

21 Petitioners argue that the protections for wetlands adopted by the Ordinance fail to protect
22 the functions and values of wetlands because the Ordinance establishes buffers for all
23 categories of wetlands that are less than those recommended by a state agency that used
24 BAS. Likewise, Petitioners contend that the Ordinance's exemption from wetland
25 protections for certain isolated wetlands, specifically Category II and III wetlands of less than
26 2,500 square feet and Category IV wetlands of less than 10,000 square feet, is not
27 supported by BAS. Petitioners' Prehearing Brief (October 3, 2005) at 6.
28
29

30 Petitioners point out that the Ordinance establishes the following buffer widths for wetlands:
31 Category I – 200 feet, Category II – 150 feet, Category III – 50 feet, and Category IV – 35
32

1 feet. Petitioners contrast this to Department of Ecology's (Ecology) advice for wetland
2 buffer widths, which are tied to intensity of surrounding uses: Category I High Intensity – 300
3 feet, Moderate Intensity – 250 feet, Low Intensity – 150 feet; Category II High Intensity –
4 200 feet; Moderate Intensity – 150; Low Intensity – 100 feet; Category III High Intensity –
5 100 feet, Moderate Intensity – 75 feet, Low Intensity – 50 feet; and Category IV High
6 Intensity – 50 feet, and Moderate and Low Intensity - 35 feet. *Id.* at 7. Petitioners also
7 include for comparison Ecology's recommendations for wetland buffer widths based on
8 wetland category alone: Categories I and II – 300 feet, Category III – 150 feet, and
9 Category IV – 50 feet. *Id.* at 7.

10
11
12 Petitioners point out that the City has adopted buffer sizes recommended by Ecology for the
13 lowest land use intensity. These are not recommended for all intensities of use, Petitioners
14 argue. Citing *Whidbey Environmental Action Network v. Island County*,² Petitioners further
15 contend that “deviations from recognized BAS standards nevertheless must be justified on
16 the record and the other GMA goals for supporting such a decision must be identified.” *Id.*
17 at 8. Petitioners allege that no justification exists in the record for the City's choice of buffer
18 widths recommended for areas of low intensity uses, when Ecology recommends larger
19 buffers for wetlands in busy cities like Anacortes. *Id.* at 8 and 9.

20
21
22 As for the exemption for Category III and IV wetlands of certain sizes, Petitioners cite
23 Ecology's letter to the City which indicates the lack of scientific support for blanket
24 exemptions from critical areas protection without an examination of cumulative effects.
25 Exhibit 154 at 2. Petitioners contend that Ecology's advice is the only BAS in the record on
26 the issue of these exemptions and the City's record does not contain any explanation of
27 reasons for the exemptions or the BAS support for this decision. They rely upon the Board's
28
29
30

31
32 ² *Whidbey Environmental Action Council (WEAN) v. Island County*, 122 Wn. App. 93 P.3d 885(2004), review
denied, 153 Wn.2d 1025 (2005).

1 December 20, 1995, decision in *Whatcom Environmental Council v. Whatcom County*,
2 WWGMHB Case No. 95-2-0071 to support their argument. *Id.* at 9.

3
4 Petitioners anticipate the City's argument that its adaptive management program will
5 mitigate any deficiencies in its buffer requirements. Petitioners assert that a vague adaptive
6 management plan without specific criteria for assessing the ecological functions and values
7 on a citywide basis cannot be relied upon to ensure protection of wetlands when buffers are
8 below BAS recommendations. *Id.* at 10 and 11.

9
10
11 **City's Position**

12 The City argues that the wetland buffers adopted by the Ordinance comply with the GMA
13 because the selected buffer widths fall within the range supported by BAS, and those widths
14 are supplemented by other complementary measures including an adaptive management
15 strategy and mandatory width increases. City of Anacortes' Opposition Brief at 9. The City
16 argues that while the buffer widths are set at the minimum threshold, the Ordinance's
17 adaptive management program mitigates this by requiring an increase in buffer widths
18 where necessary to protect wetland functions and values and a commitment to reviewing
19 buffers annually. *Id.* at 5. The City notes that Ecology called its wetlands protection
20 approach "innovative." The City also contends that Ecology's "example" guidelines are
21 general, and not directed specifically to the circumstances in the City. Nevertheless, the
22 City asserts its adopted buffer widths fall within the "example's" range. *Id.* at 9.

23
24
25
26 Further, the City declares that these exemptions are within the City's discretion. The City
27 cites the Board's November 6, 1996, Final Decision and Order in *Clark County Natural*
28 *Resources Council v. Clark County*, WWGMHB Case No. 92-2-0001 as support for this
29 argument. *Id.* at 10.

30
31
32 ///

1 Board Discussion

2 **Wetland Buffers (ACC 17.65.051 (D)(2) and E(1)), (Issue 1)**

3 The Board will examine Petitioners' challenge that the wetland buffers adopted by the
4 Ordinance do not comport with BAS, and for that reason, do not protect wetlands. While
5 Anacortes maintains that the wetland buffers it adopted are within Ecology's guidance
6 parameters, Petitioners contend that they are not. Since Ecology's guidance is the only
7 BAS in the record, Petitioners argue, when the City departed from this guidance it should
8 have provided other sources of BAS to justify its departure.
9

10
11 RCW 36.70A.060 requires the City to adopt development regulations to protect critical
12 areas. RCW 36.70A.172(1) requires the city to include BAS in developing policies and
13 development regulations to protect the functions and values of critical areas. WAC 365-
14 195-900 through WAC 365-195-925 are guidelines "intended to assist counties and cities in
15 identifying and including the best available science in newly adopted policies and
16 regulations and in this periodic review and evaluation and in demonstrating they have met
17 their statutory obligations under RCW 36.70A.172(1)." Also, previous decisions of this
18 Board, the other growth management hearings boards, and Washington's court of appeals
19 have laid the foundation for evaluating challenges to critical area ordinances.
20
21

22
23 In *Clark County Natural Resources Council v. Clark County*, Case No. 96-2-0017, this Board
24 said:

25 ...The adoption of section .172 by the Legislature shrinks the discretion parameters
26 available to local governments but does not eliminate them. Because of that local
27 discretion, it is not possible for us to establish a "bright-line" definition of BAS for
28 critical areas. Rather, in keeping with one of the basic tenants of the Act, regional
29 and local diversity, we will decide each case individually, based upon the record. We
30 will base our decision upon the following factors:
31 (1) The scientific evidence contained in the record;
32 (2) Whether the analysis by the local decision-maker of the scientific evidence and
other factors involved a reasoned process; and

1 (3) Whether the decision made by the local government was within the parameters of
2 the Act as directed by the provisions of RCW 36.70A.172(1).
3 *Clark County Natural Resources Council v. Clark County*, Case No. 96-2-0017, Final
4 Decision and Order, (December 12, 1996) at 9.

5
6 The Washington Court of Appeals, Division I, said this about including BAS in critical areas
ordinances:

7 We hold that evidence of the best available science must be included in the record
8 and must be considered substantively in the development of critical areas policies
9 and regulations... The policies at issue here deal with critical areas, which are
10 deemed "critical" because they may be more susceptible to damage from
11 development. The nature and extent of this susceptibility is a uniquely scientific
12 inquiry. It is one in which the 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.

13 *Honesty in Environmental Analysis and Legislation v. CPSGMHB*, 96 Wn. App. 522, 979,
14 P.2d 864 (1999) at 532 and 533.

15 The Board's examination of the record here shows that Ecology's guidance is the only BAS
16 on wetlands protection in the record. Importantly, the record also shows that Ecology was
17 concerned about the City's adoption of buffer widths for high intensity urban uses that were
18 recommended by Ecology for low intensity uses. A February 22, 2004, letter states how
19 Ecology viewed the City's actions:
20

21 In particular we support the innovative proposal to monitor future changes in wetland
22 functions and values that may result from development...and would allow for
23 adaptive management of regulations based on an evaluation of their effectiveness
24 after implementation. Ecology can accept the proposal for buffer averaging for
25 Category III and IV wetlands with this additional regulatory monitoring.

26 We are encouraged that the City is considering incorporating requirements for best
27 management practices (BMP) and best operating procedures (BOP) into proposed
28 wetland buffer width regulations, to enable smaller buffer widths than those
29 recommended for high intensity land uses to those recommended for moderate
30 intensity land uses, but not to low intensity buffers. Ecology considers urban
development as a high intensity land use, primarily for its impacts on adjacent wildlife
31 habitat.

32 Exhibit 154 at 1.

1 The Amicus Brief of the Washington State Department of Community, Trade and Economic
2 Development, Washington State Department of Ecology, and Washington State Department
3 of Fish and Wildlife (October 24, 2005) (the Amicus Brief of State Agencies) explains how
4 state agencies' guidance should be regarded: "Each state agency prepares these
5 [guidance] documents in reliance on science that, in the agency's assessment, satisfy the
6 criteria set forth in CTED's best available science rules, WAC 365-195-900 through -925."
7 State Agencies' Brief at 6. However, the Amicus Brief of State Agencies also points out this
8 "technical and scientific information constitutes assistance, not a mandate." *Id.* at 3.
9

10
11 Ecology's comment letter related to its guidance³ states that its guidance is general, and
12 there may be instances where its recommendations are too restrictive, and others where
13 they are not restrictive enough. The guidance goes on to say that its recommendations are
14 based on the assumptions that a wetland will be protected only at the scale of the site itself,
15 and do not reflect buffers and ratios that might result from a larger scale, landscape
16 approach. Exhibit 139(m) at 1.
17

18
19 Based on the documentation provided by the state agencies demonstrating that their
20 recommendations are based on BAS, the Board considers the recommendations offered by
21 Ecology as BAS, but also notes that this is not the only BAS the City could have considered.
22 The Board also sees flexibility in Ecology's recommendations based on local circumstances,
23 data, and approach. Therefore, the Board looks to whether the analysis by the local
24 decision-maker of the scientific evidence and other factors involved a reasoned process in
25 order to determine whether the City's wetland buffer widths and exemptions comply with the
26 GMA. The Board's examination of the evidence before us shows no scientific information
27 except that provided by Petitioners and Ecology on the issue of appropriate buffer widths for
28
29
30

31
32 ³ Appendix 8 – C, Guidance on Widths of Buffers and Ratios for compensatory Mitigation to be Used with the
Western Washington Wetland Ratings System (July, 2004).

1 wetlands. There is also no reasoned discussion of scientific evidence or other factors
2 causing the City to depart from the BAS submitted from Ecology.

3
4 The City did not rest with the buffer widths it adopted, however. The City also committed to
5 an adaptive management program to monitor the impact of development on wetlands over
6 time, to assess the impacts on an annual basis, and to make changes in its wetland
7 protection measures based on this assessment. ACC 17.65.320. Adaptive management
8 has been advised for use when the science is uncertain or incomplete, in WAC 365-195-
9 920.

10
11
12 Under certain circumstances, this Board has accepted the use of adaptive management
13 where the city or county adopts a less-than-precautionary approach to protecting certain
14 critical areas. See *OEC v. Jefferson County*, WWGMHB Case No. 01-2-0015, Compliance
15 Order, (October 31, 2003). However, "this approach calls for an effective adaptive
16 management program that relies on scientific methods to evaluate how well regulatory and
17 non regulatory actions adopted by the County achieve their objectives." *Swinomish Tribal*
18 *Community, v. Skagit County*. WWGMHB Case No. 02-2-0012c, Compliance Order,
19 (December 8, 2003) at 47.

20
21
22 The City recognizes that its protective measures require an adaptive management program
23 and includes it in the ordinance. ACC 17.65.220. Ecology also is supportive of requiring an
24 adaptive management program if the City intends to retain greater flexibility than imposing
25 Ecology's recommended buffers. Exhibit 154 at 1.

26
27
28 The necessary components of an adaptive management program are: (1) Collection and
29 evaluation of meaningful data concerning the effectiveness of the less-than-precautionary
30 measures; and (2) Provision for swift and certain corrective action in response to any
31 indications that the protective measures are not sufficient to protect the critical areas at
32

1 issue. See *Swinomish Tribal Community v. Skagit County*, WWGMHB Case No. 02-2-
2 0012c, Compliance Order – Adaptive Management (January 13, 2005) at 17 – 22.

3
4 Our evaluation of the Ordinance shows that the City's adaptive management program
5 contains a commitment to provide for swift and certain corrective action in response to any
6 indications that the protective measures are not sufficient to protect the critical areas at
7 issue. Ordinance 2702, Section 17.65.220. However, the evidence before the Board and in
8 the language of the ordinance itself does not include a description of how the monitoring
9 and adaptive management program will be conducted, what scientific methods would be
10 used, and how the effectiveness will be measured and monitored. The City candidly
11 admitted at the hearing that it is currently working on these important details.
12

13
14 **Conclusion:** Anacortes' wetland protection measures are clearly a work in progress. The
15 City has responsibly enacted new measures that are more protective while it finishes its
16 update work. Nevertheless, the City has adopted measures that have been appealed and
17 over which the Board has jurisdiction. The Board finds it unfortunate that the relationship
18 between the City and these Petitioners is such that each step in the process must be
19 challenged and resources end up being devoted to these challenges rather than developing
20 protection measures. However, this being the case, the Board has no choice but to find the
21 City wetland protection measures do not comply with RCW 36.70A.060 and RCW
22 36.70A.172(1) due to lack of information in the record concerning the City's choice in
23 adopting less than the precautionary measures than the science in the record recommends,
24 and lack of detail on the City's adaptive management program's implementation. Given the
25 City's commitment to providing this detail, this noncompliance is already scheduled for
26 correction.
27
28

29
30 **Wetland exemptions (ACC 17.65.210) (Issue 1)**

31 Petitioners argue the Ordinance's exemptions for Category II and Category III wetlands of
32 2,500 square feet and Category IV wetlands of 10,000 square feet are not supported by

1 BAS, and that Ecology expressed its concern to the City about allowing these exemptions
2 without examining the exemptions' cumulative effects. Exhibit 154 at 2. Petitioners argue
3 that although this Board previously ruled that all wetlands do not need to be protected,⁴ it
4 has ruled that before exemptions are allowed, the cumulative impacts of the exemptions
5 should be examined.⁵ Petitioners' Prehearing Brief at 8 and 9.
6

7
8 The City of Anacortes contends that exemptions on the scale the Ordinance allows are
9 consistent with what Clark County allowed when similar exemptions were found compliant in
10 *Clark County Natural Resources Council v. Clark County*, WWGMHB 92-02-0001, Final
11 Decision and Order (November 6, 1992). City of Anacortes' Opposition Brief at 9 and 10.
12

13
14 In the Final Decision and Order, December 20, 1995, in *Whatcom County Natural*
15 *Resources Council v. Whatcom County*, WWGMHB Case No. 95-2-0071, this Board said:

16 We have previously held that all critical areas must be designated, and, while all
17 critical areas need not be protected, a detailed and reasoned justification for any
18 critical areas not protected must be made. *Clark County Natural Resources Council,*
et al., v. Clark County, WWGMHB 92-2-0001.

19 *Whatcom County Natural Resources Council v. Whatcom County*, WWGMHB Case No. 95-
20 2-0071, Final Decision and Order (December 20, 1995).
21

22 The record in this current case shows that Ecology has concerns about the adoption of
23 wetland exemptions without an examination in the record of the cumulative impacts of these
24 exemptions. See Exhibit 154 at 2. Just as in the discussion of wetland buffers, the Board's
25 examination of the evidence here shows no scientific information except that provided by
26 Ecology and no reasoned discussion as the basis for the City's departure from the only
27 science in the record.
28

29
30 ⁴ *Clark County Natural Resources Council v. Clark County*, WWGMHB Case No. 92-02-0001, Final Decision
and Order (November 6, 1992).

31 ⁵ *Whatcom County Natural Resources Council v. Whatcom County*, WWGMHB 95-2-0071, Final Decision and
32 Order (December 20, 1995).

1 At argument, the City maintained that its adaptive management program will cause it to
2 reconsider these exemptions if information produced by the adaptive management program
3 shows detrimental cumulative impacts. As well, Anacortes offers that an adaptive
4 management program for a small city like Anacortes which issues relatively few permits is
5 feasible both in terms of affordability and manageability of data.
6

7
8 **Conclusion:** The City's proposed adaptive management program has the potential to
9 monitor the City's less than precautionary approach to wetlands protection and includes a
10 commitment to change course if wetland exemptions prove to be detrimental. Still, the
11 City's adaptive management lacks detail about how a monitoring and adaptive management
12 program will be conducted, what scientific methods would be used, and how the
13 effectiveness will be monitored. The Board finds that the lack of reasoned and detailed
14 discussion about why the levels of protection supported by BAS should not be imposed here
15 and the absence of the detail listed above in the City's adaptive management program,
16 cause the Ordinance's wetland exemptions to be noncompliant with RCW 36.70A.060 and
17 RCW 36.70A.172(1).
18

19
20 **Type 3 Stream Buffers (Issue 1)**

21 In their Reply Brief and at argument, Petitioners stated that they had abandoned their
22 challenge concerning the Ordinance's Type 3 Steam Buffers. Petitioner's Reply at 7.
23
24

25 **Conclusion:** With the abandonment of the challenge to the Ordinance Type 3 Stream
26 Buffers, the City's Type 3 Steam Buffers comply with RCW 36.70A.060.
27

28 **Marine Shorelines Critical Areas Challenges (Issue 1)**

29 Petitioners also challenge the sufficiency of the marine shorelines critical areas protections
30 in the City's new, stand-alone critical areas ordinance. Ordinance 2702. This challenge
31 raises the question of the effect of ESHB 1933, Laws of 2003, on the Board's review. We
32

1 find this issue to be dispositive of the extent of the Board's review in this case and therefore
2 begin with it.

3
4 **Positions of the Parties**

5
6 Petitioners allege that "ACC 17.41.100 and other city regulations do not adequately protect
7 marine shorelines." Petitioners' Prehearing Brief at 15. Petitioners' claims are brought
8 pursuant to the Growth Management Act, RCW 36.70A.020(9) and (10), .040, .050, .060,
9 .130, .172, and .175.

10
11
12 The City responds with three major arguments challenging the Board's jurisdiction over this
13 issue. First, the City states that it has not designated its urban shorelines as fish and wildlife
14 critical areas. City of Anacortes' Opposition Brief at 17. Because they are not designated,
15 the City argues, they are not subject to critical areas requirements. *Id.* Second, the City
16 points out that its Shoreline Master Program was updated in 2000 and that update was not
17 appealed. For this reason, the City urges that the Petitioners' challenge is untimely. *Id.* at
18 20. Third, the City argues that ESHB 1933 transferred protection of critical areas of
19 shorelines of the state to local shoreline master programs. The City asserts that the
20 Legislature rejected a proposed provision that the jurisdiction of protection of critical areas
21 within the shorelines of the state be transferred only to master programs adopted after 2003
22 and instead transferred jurisdiction to those programs generally; according to the City, this
23 means that the City's present shoreline master program should govern. *Id.* at 20-1.

24
25
26
27 Petitioners respond to the City's three arguments as follows: First, Petitioners argue that
28 the City did designate its urban shorelines as fish and wildlife habitat conservation areas.
29 The City designated its fish and wildlife habitat conservation areas in Chapter X.60, the
30 portion of the critical areas regulations adopted by Ordinance 2702 pertaining to fish and
31 wildlife conservation areas. Petitioners' Prehearing Brief at 12 -13. Petitioners point out
32 that ACC X.60.010(A)(1) designates "Areas With Which State or Federally Designated

1 Endangered, Threatened, and Sensitive Species Have a Primary Association" as fish and
2 wildlife habitat conservation areas. *Id.* Petitioners point to exhibits which demonstrate that
3 these species extensively use near shore marine and estuarine areas for juvenile rearing,
4 adult and juvenile migration, and residence for adult Chinook salmon. *Id.* at 13. Petitioners
5 also point out that ACC X.60.010(A)(3)(b)(5) designates herring and smelt spawning areas
6 as fish and wildlife habitat areas and that these, too, are located in Anacortes' marine
7 shorelines. *Id.* at 14.
8

9
10 Petitioners argue that Anacortes' existing shoreline master program does not protect critical
11 areas within its shorelines and that the Legislature did not intend to transfer jurisdiction over
12 critical areas in the shorelines to shoreline master programs until the master programs were
13 updated. Petitioners' Prehearing Brief at 24. Petitioners assert that the rejected language
14 considered in ESHB 1933 that applied the transfer to future master programs "adopted
15 under revised shoreline guidelines effective after January 1, 2003" was only changed
16 because ESHB 1933 was not adopted until May 15, 2003. *Id.* at 23. Petitioners assert that
17 a reading of ESHB 1933 as a whole shows "that the only way the shift in jurisdiction works
18 is after an update of the SMP that addresses all of the requirements of SHB[sic] 1933." *Id.*
19 at 24.
20
21

22
23 Two amicus briefs were filed on this issue. The Washington State Department of
24 Community, Trade and Economic Development (CTED), the Washington State Department
25 of Ecology (Ecology), and the Washington State Department of Fish and Wildlife (WDFW),
26 collectively the "state agencies," argue that the transfer of authority for protection of critical
27 areas protections to the shoreline master programs occurs only when the local government
28 adopts a critical areas segment in its shoreline master program and it is approved by
29 Ecology. Amicus Brief of Washington State Department of Community, Trade and
30 Economic Development, the Washington State Department of Ecology, and the Washington
31 State Department of Fish and Wildlife (Amicus Brief of State Agencies) at 9. The state
32

1 agencies argue that Ecology did not review the critical areas protections in shorelines
2 before the adoption of ESHB 1933 - "the vast majority of counties and cities left the
3 protection of critical areas along shorelines to their critical areas regulations adopted under
4 the GMA" - and therefore existing shoreline master programs do not address protections for
5 critical areas. *Id.* at 11-12. For this reason, the state agencies argue that critical areas
6 within the shorelines of the state are not governed by shoreline master programs until
7 Ecology approves the critical areas protections in those SMPs.
8

9
10 The Washington Public Ports Association (WPPA) also filed an Amicus Brief on this issue.
11 WPPA expresses concern that the Board's decision in this case "maintain the integrity of the
12 overall framework [of the relationship between the applicability of the GMA and the SMA]
13 that has resulted from such intense and often rancorous debate." Amicus Curiae Brief of
14 the WPPA at 2. WPPA proposes that the Board find that the amendment to ACC 17.41.100
15 applies exclusively within shorelines jurisdiction and addresses a topic that is inherently
16 shorelines limited. *Id.* at 14. On its face, WPPA argues, the regulation is a shoreline
17 regulation. Therefore, WPPA urges the Board should find that the amendment effectively
18 seeks to amend the City's shoreline master program which should be remanded for
19 conformance with the requirements for such an amendment under Ch. 90.58 RCW. *Id.* at
20 15.
21
22

23 24 **Board Discussion**

25 As to the City's first argument, we find that the City did designate critical areas in the
26 shorelines. The designation of "Areas With Which State or Federally Designated
27 Endangered, Threatened, and Sensitive Species Have a Primary Association" and the
28 designation of herring and smelt spawning areas as fish and wildlife habitat areas in
29 Ordinance 2702 makes those areas in the shorelines "critical areas." RCW 36.70A.060.
30

31 ///

32 ///

1 The other two arguments concerning the Board's jurisdiction to decide the issues relating to
2 the marine shorelines critical areas regulation arise out of the interpretation of ESHB 1933.
3 The Board must therefore consider the meaning of ESHB 1933 in this regard in order to
4 decide this issue.
5

6
7 All parties and amicus curiae agree that ESHB 1933 transfers authority for governing critical
8 areas in the shorelines of the state from the Growth Management Act to the Shoreline
9 Management Act. The dispute is over timing. The City argues that this change in authority
10 made its shoreline master program (updated in 2000) the sole source of its critical areas
11 regulations in the shorelines. City of Anacortes' Opposition Brief at 20. Petitioners argue
12 that if such a change happened automatically upon the effective date of ESHB 1933, there
13 would be a ten year gap between the date when shoreline master programs were the sole
14 means of regulating critical areas and when Ecology reviewed those plans for sufficiency of
15 critical areas regulations. Petitioners' Prehearing Brief at 22. The state agencies are
16 similarly concerned that such an "automatic" and retroactive transfer of authority would
17 result in an unintended gap in critical areas protections. Amicus Brief of State Agencies at
18 12-13.
19
20

21
22 The first principle in construing legislation is to give effect to legislative intent. *Sheehan v.*
23 *Transit Authority*, 155 Wn.2d 740, 747, 2005 Wash. LEXIS 917 (2005). Here, the
24 Legislature has made its intention in adopting ESHB 1933 very clear. In the first section of
25 ESHB 1933, the Legislature expressly stated its intention that critical areas within the
26 shorelines of the state be governed by the Shoreline Management Act, while all other critical
27 areas are governed by the Growth Management Act:
28

29 The legislature intends that critical areas within the jurisdiction of the shoreline
30 management act shall be governed by the shoreline management act and that critical
31 areas outside the jurisdiction of the shoreline management act shall be governed by
32 the growth management act.

Section 1, Paragraph 3, ESHB 1933.

1 Both the City and the Petitioners point to the amendment in RCW 36.70A.480 to support
2 their positions regarding the time at which shoreline master programs will govern critical
3 areas regulations in the shorelines. ESHB 1933 amends RCW 36.70A.480 in a variety of
4 ways, including a provision regarding the date upon which the shoreline master programs of
5 local jurisdictions become the sole source of critical areas regulations in the shorelines:
6

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

13 RCW 36.70A.480(3)(a).

14 The purport of this provision relative to when master programs shall govern the protection of
15 critical areas is ambiguous at best. The City claims it means that the City's existing
16 shoreline master program governs critical areas in the shorelines and because it was last
17 amended in 2000, it cannot be challenged here. Petitioners and the state agencies argue
18 that this amendment means that critical areas in the shorelines will not be governed by the
19 SMA until new master programs are enacted and approved according to the schedule
20 adopted in RCW 90.58.080.
21

22 Because this provision is ambiguous, the Board must construe it to give effect to legislative
23 intent. As cited above, the express legislative intent in enacting ESHB 1933 is to provide
24 that critical areas within the jurisdiction of the Shoreline Management Act be governed by
25 the Shoreline Management Act, while all other critical areas are governed by the Growth
26 Management Act. Section 1, Paragraph 3, ESHB 1933.
27

28
29 CTED reads RCW 36.70A.480(3)(a) to mean that until such time as Ecology approves a
30 new shoreline master program, protection of critical areas within the shorelines is governed
31 by the GMA requirements for critical areas generally, including best available science
32

1 (BAS). CTED has issued guidance on this issue, advising that:

2 During the period of time between the effective date of ESHB 1933 and a local
3 government's update of its SMP, the local government's GMA critical areas
4 regulations continue to apply to designated critical areas throughout the jurisdiction.
5 If the local government updates its critical areas ordinance under the GMA before it
6 updates its Shoreline Mast Program then the GMA's BAS requirements will apply to
7 the critical area update in the shoreline jurisdiction until the SMP is updated.

8 Appendix B to Amicus Brief of State Agencies.

9 While we agree that critical areas within the shorelines of the state are not stripped by
10 ESHB 1933 of protections given to them by existing critical areas regulations, we do not
11 agree that ESHB 1933 allows amendments to those regulations to continue to be governed
12 by the GMA. We find it impossible to square such a result with the plain legislative intent
13 expressed in ESHB 1933. As Petitioners point out, because of the statutory deadlines for
14 adopting new shoreline master programs, such a gap would result in a delay of 10 years.
15 Petitioners' Prehearing Brief at 22. By continuing to apply the GMA to critical areas
16 regulations enacted between the time of the adoption of ESHB 1933 and the time Ecology
17 approves new shoreline master programs under the schedule adopted in RCW 90.58.080,
18 this Board would be declining to conform its review of newly adopted critical areas
19 regulations with the express legislative intent for that review until 2011 (at the earliest).
20 Because the Legislature could not have been plainer in indicating that it wants the boards to
21 apply the SMA rather than the GMA and BAS in reviewing challenges to critical areas
22 regulations in the shorelines, we cannot adopt this construction of ESHB 1933.

23
24
25
26 The City argues that this means that its shoreline master program, adopted in 2000,
27 governs critical areas regulations in the shorelines. To accept the City's position, the Board
28 would have to determine that ESHB 1933 was meant to apply retroactively to master
29 programs adopted prior to its enactment. A legislative amendment is presumed to apply
30 prospectively unless there is clear legislative intention to apply it retroactively. "A legislative
31 enactment is resumed to apply prospectively only and will not be held to apply
32

1 retrospectively unless such legislative intent is clearly expressed." *Puyallup v. Pac.*
2 *Northwest Bell Tel. Co.*, 98 Wn.2d 443, 450, 656 P.2d 1035, 1982 Wash. LEXIS 1727
3 (1982). See also *Margula v. Benton Franklin Title*, 131 Wn.2d 171, 930 P.2d 307, 1997
4 Wash. LEXIS 85 (1997); *Barstad v. Stewart Title Guaranty Co.*, 145 Wn.2d 528, 39 P.2d
5 934, (2002) Wash. LEXIS 109 (2001) (setting out conditions for retroactive application).
6 Such a clear expression of retroactive application is not apparent in ESHB 1933.
7

8
9 In fact, retroactive application would contradict another expression of legislative intent found
10 in RCW 36.70A.480(4):

11 Shoreline master programs shall provide a level of protection to critical areas located
12 within shorelines of the state that is at least equal to the level of protection provided
13 to critical areas by the local government's critical area ordinances adopted and
14 thereafter amended pursuant to RCW 36.70A.060(2).
15 RCW 36.70A.480(4).

16
17 Before they can be assured of providing a level of protection "at least equal to the level of
18 protection provided to critical areas by the local government's critical areas ordinance,"
19 shoreline master programs must be reviewed by Ecology for that purpose. According to the
20 Amicus Brief of the State Agencies, Ecology did not review those critical areas protections
21 before ESHB 1933 was adopted. This is evidently the case for the Anacortes Shoreline
22 Master Program. Under the terms of Anacortes' master program, critical areas regulations
23 adopted for the City's critical areas generally govern critical areas in the shorelines:
24

25 The policies and regulations of this Master Program shall apply to all shorelines
26 within the corporate limits of the City of Anacortes. Development within the
27 shorelines must also comply with the City Comprehensive Plan, the Fidalgo Bay Sub-
28 Area Plan, and the City Development Regulations (including critical areas
29 ordinances).
30 City of Anacortes Shoreline Management Master Program, Section 3: Scope.

31 When the City repealed its existing critical areas regulations and enacted its new CAO
32 through Ordinance 2702, it changed the regulations governing critical areas in its

1 shorelines. This change is an amendment to its master program and must be reviewed by
2 Ecology.

3
4 We note that the Legislature anticipated that critical areas regulations in the shorelines may
5 be adopted and reviewed prior to adoption of the entire shoreline master program under
6 revised shoreline guidelines. ESHB 1933 amends the SMA to provide that Ecology may
7 approve the segment of a master program relating to critical areas:
8

9 The department shall approve the segment of a master program relating to critical
10 areas as defined by RCW 36.70A.030(5) provided the master program segment is
11 consistent with RCW 90.58.020 and applicable shoreline guidelines, and if the
12 segment provides a level of protection of critical areas at least equal to that provided
13 by the local government's critical areas ordinances adopted and thereafter amended
14 pursuant to RCW 36.70A.060(2).
15 RCW 90.58.090(4).

16 By applying the procedural and substantive terms of the SMA to critical areas regulations
17 adopted and/or updated after the effective date of ESHB 1933, the SMA applies
18 prospectively to ensure appropriate review by Ecology but does not delay application of the
19 SMA to those critical areas when they are amended. Accordingly, we find that Anacortes'
20 repeal of prior critical areas regulations applicable in its shoreline and its adoption of a new
21 CAO in Ordinance 2702 must meet the requirements for a segment of a master program
22 relating to critical areas in the shorelines. RCW 90.58.090(4). Further, the segment of the
23 Anacortes' master program that relates to shoreline critical areas must be submitted to
24 Ecology for review and approval before appeal to the Board may be had.
25
26

27 In this case, Ordinance 2702 also makes a finding that its shoreline master program
28 includes land necessary for buffers for critical areas that occur within the shorelines of the
29 state. This tracks RCW 36.70A.480(6) (adopted in ESHB 1933), which provides:

30 If a local jurisdiction's master program does not include land necessary for buffers for
31 critical areas that occur within shorelines of the state, as authorized by RCW
32

1 90.58.030(2)(f), then the local jurisdiction shall continue to regulate those critical
2 areas and their required buffers pursuant to RCW 36.70A.060(2).

3
4 Such a determination should also be reviewed by Ecology.

5
6 In sum, we find that, in Ordinance 2702, Anacortes repealed the critical areas regulations
7 applicable in the shorelines under its master program and that its new CAO (to the extent it
8 applies in the shorelines) constitutes the segment of its master program which governs
9 protection of critical areas in the shorelines. Review of the critical areas segment of
10 Anacortes' master program is governed by the SMA and those new regulations become
11 effective only after they have been presented to and approved by Ecology under the
12 direction provided in ESHB 1933, that is, as containing regulations that protect the functions
13 and values of critical areas in the shorelines.
14

15
16 As we have said, the foremost consideration in construing legislation is to give effect to
17 legislative intent. At the same time, we cannot help but be concerned with the impact of any
18 construction of the statute we make. In this case, though, we find that the impact on
19 protections for critical areas in the shorelines is positive. First, we note that there is nothing
20 in this transfer of authority that in any way lessens protections for critical areas. ESHB 1933
21 expressly provides that "[S]horeline master programs shall provide a level of protection to
22 critical areas located within shorelines of the state that is at least equal to the level of
23 protection provided to critical areas by the local government's critical area ordinances
24 adopted and thereafter amended pursuant to RCW 36.70A.060(2)." Second, the addition of
25 Ecology's review and approval process can only benefit all parties, including the boards, in
26 assuring appropriate protections are in place. The expertise that Ecology offers in reviewing
27 master programs and amendments, together with the inclusive process that it brings to
28 bear, will be of major assistance to the boards in applying sound scientific principles to the
29 review of critical areas protections.
30
31
32

1 **Conclusion:** Those critical areas regulations governing critical areas in the shorelines of
2 Anacortes adopted by Ordinance 2702 must be reviewed by Ecology to ensure that they
3 provide “a level of protection to critical areas located within shorelines of the state that is at
4 least equal to the level of protection provided to critical areas by the local government's
5 critical area ordinances adopted and thereafter amended pursuant to RCW 36.70A.060(2).”
6 RCW 90.58.090(4). Until those regulations have been reviewed by Ecology, the changes to
7 critical areas regulations in the shorelines are not compliant and not ripe for Board review.
8

9
10 **Forest Buffers (Issue 2)**

11 Positions of the Parties

12
13 With regard to the buffer requirements applicable to forest habitat (as distinct from buffers
14 on wetlands, streams and shorelines), Petitioners argue that RCW 36.70A.050 and WAC
15 365-190-080(b)(5) require that cities and counties designating critical areas must create
16 buffer zones to separate incompatible uses from habitat areas. Petitioners state that
17 although that ACC X.60.30(G)⁶ recommends that the City establish buffers on a case-by-
18 case basis as shown in CTED's “example code,”⁷ it differs from CTED's recommendations
19 because it does not require buffer widths to be consistent with recommendations of WDFW.
20 Petitioners contend that the Ordinance lacks standards to determine appropriate buffer
21 widths. Petitioners' Prehearing Brief at 25.
22
23
24
25
26

27 ⁶ Both the Amended Prehearing Order (July 27, 2005) and the Prehearing Order (August 1, 2005) list this
28 provision as ACC X.60.020(G). No such provision exists in Ordinance 2702. The Petitioners' Prehearing Brief
29 states the provision as ACC X. 60.030(G), the provision related to buffers for habitat areas. The City did not
30 object to the change in code number in the issue statement, and responded to Petitioners' arguments
31 regarding this code provision, so the Board will address this issue.

32 ⁷ Critical Areas Assistance Handbook, Protecting Critical Areas within the Framework of the Growth
Management Act (November 2003)

1 The City argues that half of its upland acreage is classified as a habitat area that protects
2 species' richness and prevents habitat fragmentation. City of Anacortes' Opposition Brief at
3 22. Further, the City maintains it requires additional buffers adjacent to habitat areas based
4 on the nature of existing vegetation, sensitivity of habitat, and intensity of human activity
5 nearby. *Id.* at 22. The City also points out that WDFW had the opportunity to comment on
6 this provision of the Ordinance and has not requested additions or changes to this
7 requirement. *Id.* at 22.
8

9
10
11 Board Discussion

12 Petitioners continue to allege, as they did in Case No. 03-2-0017 in which they and the City
13 of Anacortes were also parties, that Chapter 365-190 WAC (the Minimum Guidelines) sets
14 out requirements with which counties and cities must comply. See *1000 Friends of*
15 *Washington, Evergreen Islands, and Skagit Audubon Society v. City of Anacortes*,
16 WWGMHB Case No. 03-2-0017 at 14. It does not. In fact, RCW 36.70A.050, which
17 Petitioners contend the City violated, only directs CTED to adopt guidelines to assist cities
18 and counties in the designation and classification of natural resource lands and critical
19 areas. RCW 36.70A.170(1) directs cities and counties to *consider* the Minimum Guidelines,
20 but does not require that the cities and counties follow the "requirements" of WAC 365-190-
21 080(5)(b) to buffer habitat areas from incompatible uses.⁸
22
23

24
25 The Board determines that the buffers challenged in this part of Petitioners' brief are the
26 buffers for habitat areas that occur in or near forest habitat, as other parts of this issue
27 challenge the buffers for wetlands, riparian areas, and shorelines. CTED's Critical
28

29
30
31 ⁸ While the issue statement asserts that ACC X.60.030(G) violates RCW 36.70A.060, .130, and .172 because
32 it does not require buffers to be consistent with the recommendations from the WDFW, as recommended by
CTED's "example code," Petitioners' brief offers no argument concerning why CTED's "example code" must
be followed in this regard.

1 Assistance Handbook language suggests that such buffers should be considered on a case-
2 by-case basis:

3 The (director) shall require establishment of buffer areas *when needed* to protect
4 habitat conservation areas. [Emphasis added.]
5 Critical Areas Assistance Handbook, Protecting Critical Areas within the Framework of the
6 Growth Management Act (November 2003) at A-102.

7
8 CTED's advice is the only science in the record concerning forest buffers cited by any party
9 in this case. It is therefore consistent with the BAS that the determination of appropriate
10 buffers on forest habitat be made on a case-by-case basis.

11
12
13 Petitioners argue that the Ordinance lacks standards for establishing such buffers.
14 Petitioners' Prehearing Brief at 25. The Board agrees that buffers for habitat protection
15 need to be judged by standards. However, we disagree that the Ordinance lacks sufficient
16 standards. Section 17.65.030 G requires:

17
18 Buffers shall consist of an undisturbed area of native vegetation or areas identified
19 for restoration established to protect the integrity, functions, and values of the
20 affected habitat. Required buffers shall reflect the nature of the existing vegetation,
21 sensitivity of the habitat, and type and intensity of human activity proposed to be
22 conducted nearby.

23 Section 17.65.030 G.

24 The standard is therefore that the buffers "protect the integrity, functions and values of the
25 affected habitat."
26

27
28 Furthermore, Section X.60.020 requires an extensive critical area report that must be
29 prepared by a qualified professional who is a biologist with experience with the relevant
30 habitat. The critical area report must contain a discussion of any federal, state, or local
31 special management recommendations, including those of WDFW for the species or
32 habitats located on or adjacent to the project site.

1 The Board disagrees that WAC 365-190-080(5)(b) mandates that counties and cities create
2 buffer zones in every case to separate incompatible uses from habitat areas. We do not
3 read the science in Chapter 365-190 WAC or CTED's guidance to mandate buffers for all
4 habitat areas.
5

6
7 **Conclusion:** The record before the Board contains no evidence that standard buffer widths
8 are required for all habitat conservation areas. The City has relied upon best available
9 science in determining that buffer requirements for forest areas should be determined on a
10 case-by-case basis. The standard for determining what buffers are needed (those which
11 "protect the integrity, functions and values of the affected habitat") could be more rigorous
12 but falls short of noncompliance. In addition, the City requires extensive information on
13 which to base its decision for permitting conditions for forest habitat buffers, including
14 relevant information from WDFW, and also requires that these habitats must protect the
15 functions and values of forest habitat. For these reasons, in the case of forest habitat, we
16 find that Petitioners have not sustained their burden of proof pursuant to RCW 36.70A.320
17 that ACC X.60.30(G) does not comply with RCW 36.70A.020(9), RCW 36.70A.020(10),
18 RCW 36.70A.040, RCW 36.70A.050, RCW 36.70A.060, RCW 36.70A.130 and RCW
19 36.70A.172.
20
21

22
23 **Best Available Science (Issue 3)**

24 Positions of the Parties

25
26 Petitioners challenge various provisions of Appendix F to Ordinance 2702 that uses a new
27 and undefined term - "professional scientific analysis" - as the basis upon which decisions
28 about buffers in forest lands will be made. The term is used in the following situations: (1)
29 as a standard to judge management strategies for newly nominated species or habitats; (2)
30 as criteria for development of a habitat conservation area or its buffer; and (3) in reductions
31 in buffer sizes. Petitioners further contend that the Ordinance's use of "professional
32

1 scientific analysis” to establish conditions for development differs from CTED’s “example
2 code” that recommends the use of BAS in these situations. Petitioners conclude that all
3 these situations are policy decisions and require substantive determinations regarding
4 appropriate critical area protections that require BAS. Petitioners’ Prehearing Brief at 27
5 and 28.
6

7
8 The City responds that the GMA requires consideration of BAS in creating development
9 regulations for protection of critical areas, but the GMA does not require including the term
10 BAS in the critical areas regulations themselves. The City cites *Honesty in Environmental*
11 *Analysis and Legislation v. CPSGMHB*, 96 Wn. App. 522, 979, P.2d 864(1999) to support
12 its position. Additionally, Anacortes contends that the City is not required to follow CTED’s
13 example ordinance recommending the use of the term BAS in the actual ordinance. City of
14 Anacortes’ Opposition Brief at 21 and 22.
15

16
17 Board Discussion

18 Based on RCW 36.70.172(1), all three growth management hearings boards, as well as
19 Division I of the Court of Appeals,⁹ have clearly decided that best available science must be
20 included in developing both policies and regulations for protecting critical areas. RCW
21 36.70A.172(1) provides “In designating and protecting critical areas under this chapter,
22 counties and cities shall include the best available science in developing policies and
23 development regulations to protect the functions and values of critical areas.”
24
25
26
27
28

29 ⁹ *FOSC v. Skagit County*, WWGMHB Case No. 96-2-0025c (Compliance Order, August 9, 2000) and *FOSC*
30 *Skagit County*, WWGMHB 00-2-0033c, Final Decision and Order (August 9, 2000), *Honesty in Environmental*
31 *Analysis (HEAL) v. City of Seattle*, CPSGMHB 96-3-0012, Final Decision and Order (August 21, 1996) *Saddle*
32 *Mountain Minerals v. City of Richland*, EWGMHB 99-1-0005, Order Finding Partial Compliance (April 18,
2005), and *Honesty in Environmental Analysis and Legislation (HEAL) v. CPSGMHB*, 96 Wn. App. 522, 979,
P2d 864(Div. I, 1999).

1 Petitioners do not challenge the science that was used to develop these challenged policies
2 and regulations, but challenge the lack of application of best available science in the actual
3 permitting of development in or near habitat conservation areas. Petitioners object to the
4 use of “professional scientific analysis” instead of “best available science” in the following
5 provisions of Ordinance 2702:
6

- 7 (1) ACC X.60.010 A(3)(a)(v) - part of the codification of Appendix A, procedures in
8 the City’s comprehensive plan for nominating for designation habitat areas and
9 species if management strategies are included for these local nominations;
10 (2) ACC X. 60.30 D – specifications for issuing conditional use permits allowing
11 development in habitat conservation areas or their buffers; and
12 (3) ACC X.60.040 C(4)(f.) – reductions in riparian buffers.

Petitioners’ Prehearing Brief at 27.

13 Division I of the Court of Appeals has said this about the meaning of RCW 36.70A.172(1):
14

15 The key portion of the section in dispute in this issue is “in developing.” By using this
16 language the Legislature clearly has not mandated any substantive outcome, or
17 product, when counties and cities take actions that are subject to the provisions of
18 this section. Rather, the Legislature has required counties and cities to make the
19 best available science part of their process of “developing policies and development
20 regulations to protect the functions and values of critical areas.”

21 *Honesty in Environmental Analysis and Legislation (HEAL) v. CPSGMHB*, 96 Wn. App. 522,
22 979, P.2d 864(1999) at 529.

23 The plain language of the statute does not require that “best available science” be included
24 in the language or the application of the regulation itself, just in the development of the
25 regulations. Requiring the substantive use of best available science in developing policies
26 and development regulations is not the same as requiring best available science to be
27 referenced in the regulations themselves and applied again during the permit process.

28
29 RCW 36.70A.172(1) requires that BAS must be substantively included in the formulation of
30 development regulations. We do not read RCW 36.70A.172 to require another BAS
31 investigation for issuing permits. Even though CTED’s “example code” recommends the
32 use of BAS in permitting decisions, the Board cannot require its use for these decisions if

1 the GMA does not. While the definite use of best available science in application of policies
2 and regulations to permits might produce better results on the ground, as CTED's "example
3 code" recommends, the Board only judges the compliance of development regulations
4 within the parameters of the goals and requirements of the Act.
5

6
7 Only ACC X.60.010 A(3)(a)(v) is on its face both a policy and a development regulation.
8 Appendix D of Anacortes' City Code says this about nominations of habitats and species of
9 local importance:

10 Additions, corrections, and deletions for these lists may be proposed at any time by
11 submitting a suggestion to the Planning Director. Proposed changes will be
12 considered through the annual cycle of amending the City Comprehensive Plan and
13 Development Regulations.

14 Anacortes City Code, Chapter 17.70, Appendix D.

15
16 ACC X.60.010 A(3)(a)(v) is a development regulation that guides the city council in making
17 a legislative decision that will become an addition to the City's development regulations.
18 Therefore, although this provision is part of the City's development code, it is also a policy
19 guiding the creation of a new development regulation. RCW 36.70A.172 requires that BAS
20 should be used in the development of management strategies that are adopted as a
21 development regulation. For this reason, ACC X.60.010 A(3)(a)(v) must include a
22 requirement that BAS be included in the process of nominating for designation habitat areas
23 and species.
24

25
26 The other challenged provisions, ACC X. 60.30 D and ACC X.60.040 C(4)(f) are
27 development regulations that detail the requirements for conditions imposed on
28 development at the time that permits are issued. ACC X.60.020 requires a critical areas
29 report for habitat conservation areas that meet the requirements of ACCX.60.010. This
30 report requires extensive information with detailed specifications, including the requirement
31 that the preparation of the report be done by a biologist with experience preparing reports
32

1 for that type of habitat. Section X.60.030 establishes performance standards, including the
2 standard that a habitat conservation area may be altered only if the proposed alteration of
3 the habitat or the mitigation does not degrade the quantitative and qualitative functions and
4 values of the habitat.
5

6
7 This Board has held that discretion in guiding permit decisions should be limited by specific
8 criteria. See *Whatcom Environmental Council v. Whatcom County*, WWGMHB Case No.
9 95-2-0071, Final Decision and Order, (December 21, 1995). In this case, the solid
10 information the City requires and the requirement that habitat alterations or mitigations must
11 protect the quantitative and qualitative functions and values of habitat conservation areas
12 set a standard by which conditions for the issuance of permits may be measured.
13

14
15 **Conclusion:** RCW 36.70A.172(1) requires the City to include BAS *in developing* policies
16 and regulations to protect the functions and values of critical areas. It does not require that
17 BAS must be applied again in implementing those development regulations. ACC X.60.010
18 A(3)(a)(v) is a development regulation that defines a process for crafting a management
19 strategy that will, in turn, become (part of) a development regulation. Therefore, RCW
20 36.70A.172(1) requires that BAS be incorporated into the creation of this regulation.
21 Because the language of ACC X.60.010 A(3)(a) uses “professional scientific analysis”
22 without defining it as BAS in this process, ACC X.60/010 A.3(a)(v) does not comply with
23 RCW 36.70A.172(1).
24

25
26 On the other hand, ACC X. 60.30 D and ACC X.60.040 C(4)(f) are regulations that apply to
27 permitting decisions. Because RCW 36.70A.172(1) does not require the inclusion of BAS in
28 making permitting decisions and because the City requires solid information and parameters
29 to guide its permitting decisions, the Board finds that Petitioners have not sustained their
30 burden of proof that ACC X. 60.30 D and ACC X.60.040 C(4)(f) are clearly erroneous and
31 do not comply with RCW 36.70A.060, RCW 36.70A.172 and RCW 36.70A.060.
32

1 **Invalidity (Issue 4)**

2 **Positions of the parties**

3
4 Petitioners argue that the Ordinance's failures to meet BAS standards for wetlands, to tie
5 buffer widths for habitat areas to BAS, to adopt appropriate buffers for shoreline critical
6 areas, and to substitute standards mandated by BAS for making substantive and policy
7 decisions do not protect the environment, maintain or enhance natural resource-based
8 industries, or conserve fish and wildlife habitat. For this reason, Petitioners allege the
9 certain challenged provisions, except for the provisions dealing with stream buffers,
10 substantially interfere with Goals 8, 9, and 10 of the GMA. Petitioners' Prehearing Brief at
11 28.
12

13
14 Anacortes responds that if the Board invalidates its interim critical area protections, the
15 GMA would give the City the option of rescinding all of its increased protections until its
16 December 1, 2006, update deadline, which would leave its less protective regulations in
17 place until the deadline. The City contends invalidity would produce an absurd result. City
18 of Anacortes' Opposition Brief at 7 and 8.
19

20
21 **Board Discussion**

22 To find invalidity, the Board must first find noncompliance. Having found that only the
23 provisions that apply to wetland buffer widths and exemptions and ACC X.60.010 A.3 and
24 the critical areas segment of the City's shoreline master program do not comply with the
25 GMA, the Board could only find invalidity in regard to these provisions.
26

27
28 In recent cases, the Board has said this about invalidity:
29

30 We have held that invalidity should be imposed if continued validity of the
31 noncompliant comprehensive plan provisions or development regulations would
32 substantially interfere with the local jurisdiction's ability to engage in GMA-compliant

1 planning. See *Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c, Order
2 Finding Noncompliance and Imposing Invalidity (February 13, 2004).
3 *1000 Friends v. Thurston County*, WWGMHB Case No. 05-2-0002, Final Decision and
4 Order (July 20, 2005) at 30.

5 **Conclusion:** In this case, it is obvious that invalidity is not necessary to ensure that proper
6 compliant planning can be accomplished during the period of remand. The City is already
7 committed to incorporating needed detail into its adaptive management program and
8 making its wetland protections compliant with the GMA. At argument, the City made it plain
9 that it is willing to make adjustments to its CAO as needed to comply with GMA
10 requirements.

11
12
13 Further, here, invalidity would have the effect of making the newly enacted more protective
14 critical areas protections unenforceable. The Board sees no need to impose invalidity and
15 encourages the City to keep the provisions of Ordinance 2702 in place while it completes its
16 update work. The Board finds that the provisions for wetland buffer widths and exemptions
17 and ACC X.60.010 A.3 do not substantially interfere with RCW 36.70A.020(8), (9), and (10)
18 and declines to impose invalidity.
19
20

21 VI. FINDINGS OF FACT

- 22
- 23 1. The City of Anacortes is a city in Skagit County, which is located west of the crest of
24 the Cascade Mountains. The cities of Skagit County are required to plan pursuant to
25 RCW 36.70A.040.
 - 26 2. Petitioners Evergreen Islands, Futurewise, and Skagit Audubon Society are nonprofit
27 organizations that participated in the adoption of Ordinance 2702 in writing and
28 orally. These Petitioners addressed the issues raised in their Petitions for Review in
29 its participation below.
 - 30 3. On April 18, 2005, the City of Anacortes adopted Ordinance 2702, repealing an
31 existing critical areas regulation and enacting a new critical areas ordinance (CAO) –
32 a stand-alone chapter of the Anacortes' City Code for protecting critical areas.
 4. The City published a notice of adoption of Ordinance 2702 on April 27, 2005.

- 1 5. On June 19, 2005, Evergreen Islands, Futurewise, and Skagit Audubon Society filed
2 a petition for review challenging Ordinance 2702. On July 27, 2005, Petitioners filed
3 an amended petition for review.
- 4 6. In Ordinance 2702, the City did not make an express finding that a review and
5 evaluation of its comprehensive plan policies and development regulations had
6 occurred, identifying the revisions made, or that revisions were not made, and the
7 reasons therefore. Ordinance 2702, Opening Recitals and Findings.
- 8 7. While the City says that some parts of this ordinance are interim, no words in the
9 adopted language of the Ordinance describe these regulations as interim or
10 temporary.
- 11 8. Ecology's guidance is the only science on wetlands protection in the record.
- 12 9. The record also shows that Ecology was concerned about the City's adoption of
13 buffer widths for high intensity urban uses that were recommended by Ecology for
14 low intensity uses.
- 15 10. Ecology relies on science that, in the agency's assessment, satisfies the criteria set
16 forth in CTED's best available science rules, WAC 365-195-900 through -925 in its
17 guidance and comment letters.
- 18 11. Ordinance 2702 adopts the following buffer widths for wetlands in the City of
19 Anacortes: Category I wetlands – 200 feet, Category II – 150 feet, Category III – 50
20 feet, and Category IV – 35 feet.
- 21 12. Using best available science, Ecology recommends the following buffer widths for
22 wetlands, based on category of wetland and intensity of surrounding land use:
23 Category I High Intensity – 300 feet, Moderate Intensity – 250 feet, Low Intensity –
24 150 feet; Category II High Intensity – 200 feet, Moderate Intensity – 150 feet, Low
25 Intensity – 100 feet; Category III High Intensity – 100 feet, Moderate Intensity – 75
26 feet, Low Intensity – 50 feet; and Category IV High Intensity – 50 feet, and Moderate
27 and Low Intensity 35 feet.
- 28 13. Using best available science and based on wetlands category alone, Ecology
29 recommends the following wetland buffers: Categories I and II – 300 feet, Category
30 III – 150 feet, and Category IV – 50 feet.
- 31 14. The wetland buffer widths adopted by the City do not comport with the
32 recommendations of Ecology, based on best available science.

- 1 15. The City adopted buffer widths for wetlands that were narrower than those
2 recommended by Ecology without a discussion of why the BAS in the record was not
3 followed or how another source of BAS supports the adopted approach.
- 4 16. Ordinance 2702 also commits to an adaptive management program to monitor the
5 impact of development on wetlands over time, to assess the impacts on an annual
6 basis, and to make changes in its wetland protection measures based on this
7 assessment.
- 8 17. The key components of an adaptive management program are: (1) Collection and
9 evaluation of meaningful data concerning the effectiveness of the less-than-
10 precautionary measures, and (2) Provision for swift and certain corrective action in
11 response to any indications that the protective measures are not sufficient to protect
12 the critical areas at issue.
- 13 18. The City has committed to an adaptive management program for its wetlands buffers
14 program, but the Ordinance does not specify how the monitoring and adaptive
15 management program will be conducted, what scientific methods would be used, and
16 how the effectiveness will be measured and monitored.
- 17 19. Ordinance 2702 adopts exemptions for Category II and Category III wetlands of
18 2,500 square feet and Category IV wetlands of 10,000 square feet.
- 19 20. Ecology expressed concern about exempting Category II and Category III wetlands
20 of 2,500 square feet and Category IV wetlands of 10,000 square feet without
21 examining the cumulative effects of these exemptions.
- 22 21. The City did not examine the cumulative effects of exempting from buffer
23 requirements Category II and Category III wetlands of 2,500 square feet and
24 Category IV wetlands of 10,000 square feet. The City also did not include in the
25 record a discussion about why it failed to incorporate the only BAS in the record or
26 adopt another source of BAS to support its approach to exempting certain wetlands
27 from buffer requirements.
- 28 22. The City designated "Areas With Which State or Federally Designated Endangered,
29 Threatened, and Sensitive Species Have a Primary Association" and herring and
30 smelt spawning areas as fish and wildlife habitat areas in Ordinance 2702. Some of
31 these designations are within the shorelines.
- 32 23. Under the terms of Anacortes' master program, critical areas regulations adopted for
the City's critical areas generally govern critical areas in the shorelines.

- 1 24. When the City repealed its existing critical areas regulations and enacted its new
2 CAO through Ordinance 2702, it changed the regulations governing critical areas in
3 its shorelines.
- 4 25. The City failed to submit the amendments to its shoreline master program adopted in
5 Ordinance 2702 to Ecology for review and approval.
- 6 26. Petitioners abandoned their challenge to the City's buffer widths for Type 3 streams.
7
- 8 27. Ordinance 2702 provides that buffers for habitat areas that occur in or near forest
9 habitat will be considered on a case-by-case basis.
- 10 28. The best available science in the record, CTED's Critical Assistance Handbook
11 recommends that such buffers should be established on a case-by-case basis.
- 12 29. Section X.60.020, requires an extensive critical area report that must be prepared by
13 a qualified professional who is a biologist with experience with the relevant habitat
14 and must include specific information that includes a discussion of any federal, state,
15 or local special management recommendations, including those of WDFW for the
16 species or habitats located on or adjacent to the project site.
- 17 30. Section 17.65.030 G requires that buffers for habitat conservation areas shall consist
18 of an undisturbed area of native vegetation or areas identified for restoration
19 established to protect the integrity, functions, and values of the affected habitat.
20 Required buffers shall reflect the nature of the existing vegetation, sensitivity of the
21 habitat, and type and intensity of human activity proposed to be conducted nearby.
- 22 31. ACC X.60.010 A.3.(a)(v) establishes a process for nominating and designating
23 species of local importance for habitat conservation. It is a development regulation
24 that guides the city council in making a legislative decision that will become an
25 addition to the City's development regulations.
- 26 32. ACC X.60.010 A.3.(a)(v) fails to incorporate best available science in the legislative
27 decision concerning nomination and acceptance of species of local importance for
28 habitat conservation.
- 29 33. ACC X. 60.30 D and ACC X.60.040 C(4)(f) are regulations that apply to permitting
30 decisions. Petitioners do not challenge the science that was used to develop these
31 regulations, but challenge the lack of application of best available science in the
32 actual permitting development in or near habitat conservation areas.

- 1 34. Section X.60.030 includes performance standards including the standard that a
2 habitat conservation area may be altered only if the proposed alteration of the habitat
3 or the mitigation proposed does not degrade the quantitative and qualitative functions
4 and values of the habitat.
- 5 35. The scientific analysis and information required for permitting decisions under ACC
6 X. 60.30 D and ACC X.60.040 C(4)(f) provide a basis for sufficient protection of the
7 functions and values of critical areas in or near forest lands.
- 8 36. Any Finding of Fact hereafter deemed to be a Conclusion of Law is hereby adopted
9 as such.

10 VII. CONCLUSIONS OF LAW

- 11 A. The Board has jurisdiction over the parties and subject matter of this consolidated
12 petition.
- 13 B. The petition was timely brought and the petitioners have standing to raise the issues
14 in their petition for review.
- 15 C. The petition and the amended petition challenge the City's adoption of Ordinance
16 2702, which repeals prior critical areas regulations and enacts a new stand-alone
17 critical areas ordinance.
- 18 D. ACC 17.65.051 D(2) and E(1)), regulations establishing wetland buffers and (ACC
19 17.65.210) regulations exempting certain size wetlands from protection, are clearly
20 erroneous and do not comply with RCW 36.70A.060 or RCW 36.70A.172(1).
- 21 E. ACC X.60.30 G complies with RCW 36.70A.060 and RCW 36.70A.172(1).
- 22 F. ACC X.60.010 A.3.a is clearly erroneous and does not comply with RCW 36.70A.060
23 or RC 36.70A.172(1).
- 24 G. ACC X. 60.30 D and ACC X.60.040 C(4)(f) comply with RCW 36.70A.060 and RCW
25 36.70A.172(1).
- 26 H. The repeal of existing critical areas regulations and the adoption of critical areas
27 regulations adopted by Ordinance 2702 that apply to critical areas in the shoreline
28 including ACC 17.41.00 constitute amendments to Anacortes' shoreline master
29 program. Amendments to the shoreline master program must be submitted by the
30 City to Ecology for review. RCW 90.58.090 and 36.70A.290(2)(c).
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VIII. ORDER

Based on the foregoing, the City is required to bring Ordinance 2702 into compliance with the GMA no later than **December 1, 2006**. The Board finds that developing critical areas protections and an adaptive management program are of sufficient scope and complexity and provide sufficient reason for the Board to provide more than 180 days for compliance, pursuant to RCW 36.70A.300. RCW 36.70A.130(4) sets the deadline for the city's update of its comprehensive plan and development regulations as December 1, 2006, to complete the requirements of RCW 36.70A.130(1), including an update of its critical areas regulations. For these reasons the Board sets **December 1, 2006**, as the date by which the City must bring its regulations for wetland buffers and exemptions and ACC X.60.010 A(3)(a)(v) into compliance with RCW 36.70A.060 and RCW 36.70A.172. Because a finding of noncompliance could make the City ineligible for certain state grants and loans pursuant to RCW 43.17.250, the Board stands ready to consider an earlier compliance date at the City's request.

Item	Date Due
Compliance	December 1, 2006
Compliance Report	December 21, 2006
Objections to a Finding of Compliance, if any	January 11, 2007
Response to Objections, if needed	February 1, 2007
Compliance Hearing	February 13, 2007

Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a petition for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy to all other parties of record. **Filing means actual receipt of the document at the Board office.** RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

1 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
2 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
3 judicial review may be instituted by filing a petition in superior court according to the
4 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
5 Enforcement. The petition for judicial review of this Order shall be filed with the
6 appropriate court and served on the Board, the Office of the Attorney General, and all
7 parties within thirty days after service of the final order, as provided in RCW
8 34.05.542. Service on the Board means actual receipt of the document at the Board office within
9 thirty days after service of the final order. A petition for judicial review may not be
served on the Board by fax or by electronic mail.

10 **Service.** This Order was served on you the day it was deposited in the United States
11 mail. RCW 34.05.010(19)

12 Entered this 27th day of December 2005.

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16 _____
17 Holly Gadbow, Board Member

18
19
20 _____
21 Margery Hite, Board Member

22
23
24 _____
25 Gayle Rothrock, Board Member

FILED
COURT OF APPEALS
DIVISION II

09 MAR 27 PM 1:45

STATE OF WASHINGTON

BY
DEPUTY

NO. 38727-1

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

CLALLAM COUNTY BOARD OF
COMMISSIONERS, a political
subdivision of the State of Washington;
and WASHINGTON STATE
DEPARTMENT OF ECOLOGY,

Appellants,

v.

ELOISE KAILIN; HARVEY KAILIN
TRUST; AND ELOISE KAILIN,
AUTHORIZED DESIGNEE OF
NANCY SCOTT, TRUSTEE OF
HARVEY KAILIN TRUST,

Respondents.

CERTIFICATE OF
SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 26th day of
March, 2009, I caused to be served the Opening Brief of Appellant
Washington State Department of Ecology in the above-captioned matter
upon the parties herein as indicated below:

Craig A. Ritchie
Ritchie Law Firm, P.S.
P.O. Box 2085
Port Angeles, WA 98362

U.S. Mail
 State Campus Mail
 Hand Delivered
 Overnight Express
 By Fax

Douglas E. Jensen
Senior Deputy Prosecuting Attorney
Clallam County Prosecutor's Office
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Bruce L. Turcott
Attorney General's Office
P.O. Box 40110
Olympia, WA 98504-0110

U.S. Mail
 State Campus Mail
 Hand Delivered
 Overnight Express
 By Fax

the foregoing being the last known address.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 26th day of March, 2009, in Olympia, Washington.


TANYA M. ROSE-JOHNSTON
Legal Assistant