

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

SEATTLE AUDUBON SOCIETY, YES)	
FOR SEATTLE, HERON HABITAT)	CPSGMHB Case No. 06-3-0024
HELPERS and EUGENE D. HOGLUND,)	<i>(Seattle Audubon)</i>
)	
Petitioners,)	
)	
v.)	
)	
CITY OF SEATTLE,)	FINAL DECISION AND ORDER
)	
Respondent.)	
)	

SYNOPSIS

The City of Seattle first adopted critical areas designations and regulations under the Growth Management Act (GMA) in 1992. On March 27, 2006, the City adopted an updated Critical Areas Ordinance (CAO) – Ordinance No, 122050, codified as Seattle Municipal Code (SMC) 25.09. Certain elements of the CAO were challenged by a group of citizens and citizen organizations that had participated actively in the City’s adoption process – Seattle Audubon Society, Yes for Seattle, Heron Habitat Helpers, and Eugene D. Hoglund (Petitioners or Seattle Audubon).

Seattle’s CAO designated as geologically hazardous areas only landslide-prone areas, steep slopes, and liquefaction zones, despite the fact that Seattle’s record includes competent and current science concerning other seismic hazards impinging on the City, in particular, the recently-identified Seattle fault, tsunami and seiche inundation areas, and lahar inundation areas. SMC 25.09.020(1). The Board agrees with Petitioners that the City’s restricted designation of geologically hazardous areas does not comply with RCW 36.70A.170(2) and .172(1).

Seattle’s CAO exempts from regulation wetlands that are smaller than 100 square feet and that are not associated with Type 1-5 waters or with other wetlands or part of a priority habitat area. SMC 25.09.160. In developing its CAO, Seattle undertook an inventory of wetlands with the assistance of the U.S. Fish and Wildlife Service to provide a survey of wetland resources in the City. The Board finds that the limited exemption, in the context of the inventory and other science in the City’s record, meets the criteria for limited wetlands exemptions laid out by the Court of Appeals in Clallam County v. Western Washington Growth Management Hearings Board, 130 Wash. App. 127, 140, 121 P.3d 764 (2005).

Petitioners also challenge Seattle’s buffer provisions for fish and wildlife habitat conservation areas (FWHCA) along marine shorelines and riparian corridors. SMC 25.09.200. The Board finds that the 100 foot buffers adopted by the City for marine and Type 1 waters are within the scope of the best available science in the City’s record. Petitioners further object to regulatory provisions which allow development within buffer areas subject to various restrictions. The Board concludes that Petitioners fail to carry their burden of demonstrating that the City’s allowances, which generally require full mitigation for any impaired ecological functions, fail to protect the functions and values of the shoreline and riparian critical areas.

The Board dismisses Petitioners’ challenge to the City’s provisions concerning redevelopment in critical areas – SMC 25.09.200(A), read with 25.09.045 – and the provisions for protection of priority species habitat (for example, bald eagle nesting sites and heron rookeries) - SMC 25.09.020(D) – where Petitioners have misread or misunderstood the regulations.

The Board remands Ordinance 122050, SMC 25.09.020, to the City of Seattle for designation of geologically hazardous areas in compliance with RCW 36.70A.170(2) and .172(1).¹

I. PROCEDURAL BACKGROUND²

The City of Seattle adopted its updated development regulations for critical areas on March 27, 2006, in Ordinance No. 122050 (**Critical Area Ordinance** or **CAO**).

On June 12, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from the Seattle Audubon Society, Yes for Seattle, Heron Habitat Helpers and Eugene D. Hoglund. The matter was assigned Case No. 06-3-0024, hereafter referred to as *Seattle Audubon v. City of Seattle*, and Board member Edward G. McGuire was initially designated as the Presiding Officer (**PO**). Petitioners challenge the City of Seattle’s (**Seattle** or the **City**) adoption of Ordinance No. 122050, contending that certain CAO provisions pertaining to geologically hazardous areas, wetlands, shorelines and fish and wildlife conservation areas are noncompliant with various provisions of the GMA.

The Prehearing Conference (PHC) was conducted on July 17, 2006, at the Board’s offices in Seattle, Board member Edward G. McGuire presiding. Knoll Lowney represented Petitioners Seattle Audubon Society, Yes for Seattle, Heron Habitat Helpers and Eugene D. Hoglund. Eugene D. Hoglund was also present. Eleanore Baxendale represented Respondent City of Seattle. Board member McGuire informed the parties that a change of presiding officer would likely occur when a third member to the Board is appointed by the Governor. Mr. Lowney indicated that Petitioners were seeking an

¹ The text of this Final Decision and Order also includes suggestions to clarify or complete SMC 25.09.160 and 25.09.200(a)/25.09.045.

² The chronology of procedures is set forth in full in Appendix – A.

alternate attorney to represent them in this matter and would inform the Board, filing a notice of appearance, when such a representative was retained.

The Parties and the Board discussed the six Legal Issues as set forth in the PFR in light of “Respondent the City of Seattle’s Motion to Clarify Issues and Memorandum on Matters Set for Prehearing Conference,” filed July 6, 2006. At the PHC, the City provided the Board and Petitioners with the City’s “Index to Record” in this matter.³ On July 18, 2006, the Board issued its Prehearing Order, setting the Case Schedule and the Legal Issues for decision.

On August 3, 2006, the Board received a Notice of Appearance of Roger M. Leed as attorney for Petitioners. On the same day the Board received the City of Seattle’s Motion to Amend Index [**City Motion to Amend Index**] and Notice of Filing Amended Index of Record. There were no objections to the City’s additional documents, which were taken from websites of Department of Ecology (**DOE**) and United States Geological Survey (**USGS**) upon which the City relied in developing its CAO.

No further motions were filed during the time established for motions on the case calendar.

On September 27, 2006, the Board issued a Notice of Change of Board Offices and Presiding Officer, substituting Board member Margaret Pageler as the Presiding Officer.

Briefing and Hearing on the Merits

The parties filed the following briefs and supplemental materials:

- September 14, 2006 - Petitioners’ Prehearing Brief with exhibits [**Audubon PHB**]
- September 18, 2006 - Petitioner Eugene Hoglund’s Supplemental Prehearing Brief with 6 exhibits [**Supp. PHB**]
- October 5, 2006 - The City of Seattle’s Second Motion to Supplement the Record, with 7 exhibits [**City Second Motion to Supplement**]
- October 5, 2006 - The City of Seattle Response and Motions Objecting to Standing, with 20 exhibits [**City Response**]
- October 11, 2006 - Petitioner Eugene D. Hoglund’s Reply Brief to City of Seattle’s Second Motion to Supplement the Record [**Hoglund Reply re Supp**]
- October 12, 2006 - Petitioners’ Prehearing Reply Brief with 4 exhibits [**Audubon Reply**]

³ Documents cited herein are referenced by Document numbers from the City’s Index. The Index is 16 pages long, listing Council Documents – 1 to 10f, Written Public Comments Submitted to Council Generally – 200 to 273, Comments Sent to Individual Council Members – 600-659, and Public Comments Posted on DPD Website – 800-803. More than one item or document is typically listed under each Index Number.

The Hearing on the Merits was convened on October 19, 2006, at 10:00 a.m in the Palouse Conference Room, 20th Floor, 800 Fifth Avenue, Seattle, and adjourned at approximately 12:45 p.m. Board member Margaret Pageler presided. Board Members Ed McGuire and Dave Earling attended, along with Board law clerk Julie Taylor. Petitioners were represented by Roger Leed, with Eugene Hogle also present. Eleanor Baxendale represented the City of Seattle, and was accompanied by City planners Miles Mayhew and Maggie Glowacki. City attorney Sandy Watson also attended. Court reporting services were provided by Eva Jankovits of Byers & Anderson. The Board ordered a transcript of the proceedings.

On October 23, 2006, the Board received Petitioners' Adoption of Briefing. On October 24, 2006, the Board received City of Seattle Opposition to Petitioners' Notice of Adoption, and a letter from the City of Seattle with clarification of the City's wetland survey in response to a question raised by the Board at the HOM.

On October 30, 2006, the Board received the transcript of the Hearing on the Merits [HOM Transcript].

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, STANDARD OF REVIEW, AND DEFERENCE TO LOCAL JURISDICTIONS

Upon receipt of a petition challenging a local jurisdiction's GMA actions, the legislature directed the Boards to hear and determine whether the challenged actions were in compliance with the requirements and goals of the Act. *See* RCW 36.70A.280. The legislature directed that the Boards "after full consideration of the petition, shall determine whether there is compliance with the requirements of [the GMA]." RCW 36.70A.320(3); *see also*, RCW 36.70A.300(1). *Ferry County v. Concerned Friends of Ferry County, et al. (Ferry County)*, 155 Wn.2d 824, 833, 123 P.3d 102 (2005): "The Board adjudicates compliance with the GMA and must find compliance unless a county's or city's action is clearly erroneous."

Petitioners challenge the City's adoption of the CAO Update, adopting updated critical areas regulations. Comprehensive plans and development regulations, and amendments thereto, adopted by the City of Seattle pursuant to the Act, are presumed valid upon adoption. RCW 36.70A.320(1).

The burden is on the Petitioners to demonstrate that the actions taken by the City are not in compliance with the Act. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board “shall find compliance unless it determines that the actions taken by [the City of Seattle] are clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” For the Board to find the action of the City of Seattle clearly erroneous, the Board must be “left with the firm and definite conviction that a mistake has been made.” *Dep’t of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

The GMA affirms that local jurisdictions have discretion in adapting the requirements of the GMA to local circumstances and that the Board shall grant deference to local decisions that comply with the goals and requirements of the Act. RCW 36.70A.3201. Pursuant to RCW 36.70A.3201, the Board will grant deference to the City of Seattle in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. The Supreme Court has stated: “We hold that deference to county planning actions that are consistent with the goals and requirements of the GMA . . . cedes only when it is shown that a county’s planning action is in fact a ‘clearly erroneous’ application of the GMA.” *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board*, 154 Wn.2d 224, 248, 110 P.3d 1132 (2005).

The *Quadrant* decision is in accord with prior rulings that “Local discretion is bounded . . . by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board (King County)*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). As the Court of Appeals explained, “Consistent with *King County*, and notwithstanding the ‘deference’ language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not ‘consistent’ with the requirements and goals of the GMA.” *Cooper Point Association v. Thurston County*, 108 Wash. App. 429, 444, 31 P.3d 28 (2001); *affirmed Thurston County v. Western Washington Growth Management Hearings Board*, 148 Wn.2d 1, 15, 57 P.3rd 1156 (2002); *Quadrant*, 154 Wn.2d 224, 240 (2005).

The scope of the Board’s review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to those issues presented in a timely petition for review.

III. BOARD JURISDICTION AND PRELIMINARY MATTERS

A. Board Jurisdiction

The Board finds that the Petitioners’ PFR was timely filed, pursuant to RCW 36.70A.290(2); that Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2);⁴ and that the Board has subject matter jurisdiction over the challenged ordinance, which amends the City’s critical areas regulations, pursuant to RCW 36.70A.280(1)(a).

⁴ The City’s challenge to Petitioners’ standing to raise two issues is addressed *infra*.

B. Preliminary Matters

Presiding Officer Disclosures

At the outset of the Hearing on the Merits, Presiding Officer Pageler disclosed that she was a Seattle City Councilmember until December 31, 2003. Upon review of the City's Index of the Record, Ms. Pageler determined that the City's process for revision and update of its Critical Areas Ordinances began with scoping activities in January, 2004, after she had left the City Council. Thus, nothing precludes her participation as Board member and PO in this matter.

Evidentiary Matters

Motion to Amend Index. The City's Motion to Amend Index provided printouts from agency websites relied on by the City in developing its CAO. The City provided numeration for these materials in its Amended Index. There was no objection to the City's Motion. The Board finds that the documents are necessary or of substantial assistance to the Board in its determination and that they reflect the actual record in this matter. The Motion to Amend Index is **granted**.

Second Motion to Supplement. The City's Second Motion to Supplement provides seven documents which the City states were referred to and relied on in adoption of the CAO but not provided at the outset because of uncertainty about the precise content of Petitioners' challenge. The City provided enumeration of these materials in an Amended Index.

Mr. Hoglund filed a "Reply" to the City's motion which provided an additional document already in the City's Index. The attorney for Petitioners raised no objection to the City's motion. The Board finds that the documents are necessary or may be of substantial assistance to the Board in its determination and that they reflect the actual record in this matter. The Second Motion to Supplement is **granted**.

Separate Participation of Eugene Hoglund

The Petitioners in this challenge are Seattle Audubon Society, Yes for Seattle, Heron Habitat Helpers and Eugene D. Hoglund. The attorney appearing as counsel of record for Petitioners is Roger M. Leed. Notice of Appearance, August 3, 2006. Mr. Leed filed Petitioners' Prehearing Brief on September 14, 2006, the date required in the Prehearing Order. On September 18, 2006, the Board received "Petitioner Eugene D. Hoglund's Supplemental Prehearing Brief" adding arguments and exhibits concerning tsunami hazard areas. The City did not object or move to strike. The City's only objection was in footnote 7 of its Response, where it noted that Mr. Hoglund's brief was untimely.⁵ The City responded to Mr. Hoglund's arguments on the merits.

⁵ The parties here have been uniformly courteous and professional.

Subsequently, Mr. Hoglund submitted a “Reply Brief to City of Seattle’s Second Motion to Supplement the Record,” adding an exhibit from the City’s Index.

The Board has determined that the potential for prejudice and confusion is too high to allow any exception to the rule that only the attorney speaks for the parties he or she represents. The Board’s cases frequently involve groups of loosely-affiliated individuals or organizations. Cities and counties are entitled to know who is the designated spokesperson and to what arguments they must respond. When a brief has been filed, clients are not entitled to second-guess their attorney and file their own arguments. Allowing additional filings from represented parties would be unfair to the attorney, to opposing parties, and to the Board.⁶

Accordingly, Mr. Hoglund’s Supplemental Prehearing Brief and his reply brief to the City’s Second Motion to Supplement the Record will not be allowed. However, the Board notes that both the City and Petitioners’ attorney have relied on and incorporated Mr. Hoglund’s materials to some extent in their briefs. Therefore, at the Hearing on the Merits the Board stated that it would allow Mr. Leed to indicate any materials, briefing, or sections of briefs submitted by Mr. Hoglund which he wished to adopt on behalf of Petitioners, and then would allow the City to respond. Mr. Leed subsequently filed “Petitioners’ Adoption of Briefing,” adopting both of Mr. Hoglund’s submissions, and the attached exhibits. The City then filed “City of Seattle Opposition to Petitioners’ Notice of Adoption,” objecting to Petitioners’ adoption of Mr. Hoglund’s second pleading: “Reply Brief to City of Seattle’s Second Motion to Supplement the Record.” The City contends that, while there may have been extenuating circumstances for Mr. Hoglund’s first supplemental brief and materials, there were none for the second.

Having considered the materials submitted and the arguments of the parties, the Board rules as follows:

- The Board **allows** Petitioners’ adoption of Mr. Hoglund’s Supplemental Prehearing Brief [hereafter, **Audubon Supp PHB**].
- The Board **strikes** Mr. Hoglund’s Reply Brief to City’s Second Motion to Supplement the Record and denies adoption by Petitioners.
- The document attached to Mr. Hoglund’s reply brief – Doc. 204g – is from the City’s indexed record and is **admitted as part of the record**.

Motions to Dismiss for Lack of Standing

The City’s Response includes motions to dismiss two of Petitioners’ arguments on the grounds that the matters were not expressly raised in the public process and Petitioners therefore lack participation standing under RCW 36.70A.280(2), (4).

Green Lake designation and protection. The City moved to dismiss the portion of the Petitioner’s brief on Legal Issue 3 alleging failure to designate and provide buffer protection for Green Lake. The City contends that during the public process no questions

⁶ A Petitioner wishing to appear *pro se*, may so indicate at the Prehearing Conference, or by motion prior to briefing on the merits.

were raised by these Petitioners concerning the regulations for Type 1 waters that do not contain anadromous fish. Green Lake is the only non-salmon-bearing Type 1 waterbody in the City of Seattle.

Petitioners contend that the Ordinance fails to designate and does not provide buffers for Type 1 waters that are not migratory corridors for salmon and thus these important shoreline habitats are not protected. Audubon PHB at 32; Audubon Reply, at 18. The City points out that the Ordinance designates Green Lake as a fish and wildlife habitat conservation area under Sec. 25.09.020.D.1: “areas mapped by the Washington State Department of Fish and Wildlife [WDFD] as urban natural open space habitat areas.” City Response, at 21. The City supplies a WDFW Habitat and Species Map, Doc. 810, and states that the protective measures are found in Sec. 25.09.200.C, where consultation with WDFW and compliance with species habitat management plans is required. *Id.* at 21-22. The City states that the adequacy of these provisions for Green Lake was never questioned by Petitioners during the public process and Petitioners therefore lack standing to raise the challenge here.

In response to the City’s motion to dismiss, Petitioners fail to point to any document in the City’s record indicating that protections for Green Lake (or Type 1 non-salmon waters) were ever raised by Petitioners or others in the City’s public process. Rather, Petitioners cite to a “Summary of Conservation Community Recommendations for the Seattle Environmentally Critical Areas Update” submitted to City Council. The Summary, however, specifically focuses on details of those sections of the City’s proposed ordinance which protect salmon-migration corridors – Sec. 25.09.020.D(6) and 25.09.200.B.⁷

The Board notes that Petitioners here represent a broad coalition of active citizens [PFR at 3-4] who have been involved in the public process for developing Seattle’s regulations since at least February/March 2005 [see e.g., Index, Doc. 801c, 801i, 801p, 801t]. Their failure to come forward with any evidence within the record which expressed concern for the inadequacy of protections for the Green Lake shoreline confirms the City’s assertion that the question was simply never raised. Further, the provisions of the Ordinance which in fact designate and protect Green Lake shorelines and habitat could have been readily addressed had Petitioners raised their questions during public participation.

⁷ The document cited by Petitioners as their basis for standing contains this paragraph:

SHORELINES: Amend the Executive Proposal to allow construction within 100 feet of the ordinary high water mark only if the size, configuration, dimensions, or location of the lot prevent development outside the buffer and strengthen the Environmental Policy Committee’s decision that mitigation be located on or near the waterline (required, if feasible). The science shows that these shorelines are important fish and wildlife habitats. While the Executive proposal sets a 100 foot buffer which we support, building is allowed within 25 feet of the ordinary high water mark or as close to the water as neighboring properties. This is too close to protect these important habitats and should only be allowed for maritime uses and for lots that are otherwise too small or too narrow for development. We support the Environmental Policy committee recommended [sic] that mitigation for construction within the buffer should be located along the shoreline to establish a vegetative buffer and restore habitat if possible.

The Board finds that Petitioners lack GMA participation standing to challenge Ordinance 122050 with respect to designation and protection of non-salmon bearing Type 1 waters. The City's motion to dismiss Petitioners' argument concerning Green Lake is **granted**.

Critical areas "values." The City contends that during the public process the Petitioners did not raise the issue of protection for the "values" of critical areas but only sought stronger regulations to protect critical area "functions." City Response, at 29. The City moves to dismiss Petitioners' argument alleging the failure to protect "values." See Audubon PHB, at 32.

The City and Petitioners each provide discussion on the distinction between critical area "functions" and "values." City Response, at 15-16; Audubon Reply, at 16. Petitioners contend that the issue of protecting critical area "values" is reasonably related to the matters they raised in the public process and therefore they have standing to argue the question here. Petitioners state:

Petitioners clearly put the City on notice that we objected to the buffer provisions as they were proposed and adopted. ... Although all of our comments did not cite the specific language of the GMA, the comments that buffers did not adequately protect shorelines habitats conveyed to the City that their buffers did not comply with the GMA, and failing to protect the functions and values is reasonably related to these comments.

Audubon Reply at 15.

The Board concurs with Petitioners; their participation reasonably put the City on notice of their concern for the protection of functions and values of shoreline habitats. The City's motion to dismiss Petitioners' argument concerning protection of critical area "values" is **denied**.

IV. LEGAL ISSUES

A. Applicable Law

Each of Petitioners' Legal Issues alleges non-compliance with the following GMA provisions: RCW 36.70A.040(3); RCW 36.70A.060; RCW 36.70A.170; RCW 36.70A.172; RCW 36.70A.130; RCW 36.70A.020 (8), (9), and (10). These provisions set forth the GMA requirements concerning local designation and protection of critical areas.

The GMA requires all counties and cities, whether or not planning under the Act, to designate critical areas. RCW 36.70A.040(3) provides:

(3) Any county or city that is initially required to conform with all of the requirements of this chapter under subsection (1) of this section shall take actions under this chapter as follows: ... (b) the county and each city

located within the county shall designate critical areas ... and adopt development regulations ... protecting these designated critical areas, under RCW 36.70A.170 and 36.70A.060;

RCW 36.70A.170 requires:

- (1) On or before September 1, 1991, each county, and each city, *shall designate* where appropriate: ... (d) Critical areas.
- (2) In making the designations required by this section, counties and cities *shall consider the guidelines* established pursuant to RCW 36.70A.050.

(Emphasis supplied).

Critical areas are defined in RCW 36.70A.030(5):

“Critical areas” included the following areas and ecosystems: (a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas.

Wetlands are specifically defined in the Act at RCW 36.70A.030(21). CTED has promulgated minimum guidelines for designation of fish and wildlife habitat conservation areas [WAC 365-190-080(5)] and geologically hazardous areas [WAC 365-190-080(4)]. In designating critical areas, cities and counties “shall consider” the minimum guidelines promulgated by the Department of Community Trade and Economic Development (CTED) in consultation with appropriate resource agencies pursuant to RCW 36.70A.050(1) and (3). RCW 36.70A.170(2).

Having designated critical areas, counties and cities must enact development regulations to protect them. RCW 36.70A.040(3)(b). “Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170.” RCW 36.70A.060(2). The requirement to designate and protect critical areas applies to every city and county in the state of Washington, not just those required to fully plan under the GMA, and applies to all categories of land, whether urban, rural, or natural resource lands.

In sum, the Legislature listed mandatory categories of critical areas to be protected [RCW 36.70A.030(5)], directed CTED to adopt guidelines to assist local governments [RCW 36.70A.050, .190; see WAC Chapter 365-190], and required local governments to adopt regulations to protect the designated critical areas [RCW 36.70A.060(2)].

In 1995 the GMA was amended to add a new requirement for critical areas regulations: “best available science” (BAS). RCW 36.70A.172(1):

In designating and protecting critical areas under this chapter, counties and cities *shall include the best available science* in developing policies and development regulations *to protect the functions and values* of critical

areas. In addition, counties and cities *shall give special consideration* to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

(Emphasis supplied).

In 2002, Section .130 of the Act was amended to require review and update of plans, including critical areas regulations, on a regular cycle “to ensure these policies and regulations comply with the requirements of this chapter.” RCW 36.70A.130(1)(a), (c).⁸ These updates must include best available science.

The requirement to “include best available science” was interpreted by the Washington Supreme Court in *Ferry County v. Concerned Friends of Ferry County (Ferry County)*, 155 Wash.2d 824, 834, 123 P.2d 102 (2005). In *Ferry County*, the Court cited with approval the Western Board’s case-by-case review of BAS challenges under the following framework:

- (1) The scientific evidence contained in the record;
- (2) Whether the analysis by the local decision-maker of the scientific evidence and other factors involved a reasoned process; and
- (3) Whether the decision made by the local government was within the parameters of the Act as directed by the provisions of RCW 36.70A.172(1).

Ferry County, 155 Wn.2d at 834. The Central Board adds a fourth consideration based on *WEAN* and on the CTED guidelines at WAC 395-195-915(c):

- (4) Whether there is justification for departure from BAS.

See, e.g., *DOE/CTED v. City of Kent (DOE/CTED)*, CPSGMHB Case No. 05-3-0034, Final Decision and Order (Apr. 19, 2006), at 42.

Three of the thirteen GMA planning goals have particular relevance to the designation and protection of critical areas - RCW 36.70A.020(8), (9), and (10):

- (8) Natural resource industries. *Maintain and enhance* natural resource-based industries, including *productive* timber, agricultural and *fisheries industries*....

⁸ RCW 36.70A.130(1):

(a) Each comprehensive land use plan and development regulations shall be subject to continuing review and evaluation by the county or city that adopted them. A county or city shall take legislative action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter according to the time periods specified in subsection (4) of this section.... (c) ...The review and evaluation required by this subsection *shall include*, but is not limited to, *consideration of critical area ordinances*....

(9) Open space and recreation. Retain open space, enhance recreational opportunities, *conserve fish and wildlife habitat*, increase access to natural resource lands and water, and develop parks and recreation facilities.

(10) Environment. *Protect the environment* and enhance the state's high quality of life, including air and *water quality*, and the availability of water.

(Emphasis supplied.)

B. Legal Issue No. 1

The PHO states Legal Issue No. 1 as follows:

1. Whether Ordinance No. 122050's failure, in SMC § 25.09.020 and elsewhere to designate and protect earthquake hazard areas including ground faults, lahar hazard areas, or tsunami event hazard areas complies with RCW 36.70A.020(8), (9) and (10), RCW 36.70A.040(3), RCW 36.70A.060, RCW 36.70A.170, RCW 36.70A.172 and RCW 36.70A.130?

Ordinance Provisions

Ordinance No. 122050 regulates liquefaction-prone areas, landslide areas, and steep slope areas as environmentally critical areas. The risks associated with seismic hazards are referenced as regulated by the Building Code.

25.09.020(A) Geologic Hazards and Steep Slope Areas

(1) Geologic hazard areas are liquefaction-prone areas and landslide-prone areas described in subsections 2 and 3. Landslide-prone areas include steep slope areas. Steep slope areas that are regulated for additional erosion hazards are described in subsection 4. Seismic hazards are addressed in Subsection 5.

.....

(5) There is a known risk from seismic events in Seattle and the surrounding region. Subsections 1-4 identify areas that constitute a particularly high risk to safety and welfare from such events and are therefore regulated as environmentally critical areas. The risks associated with seismic hazards in the remainder of the city are regulated by the Building code (SMC Title 22) and not by this chapter.

Discussion and Analysis

Geological Context:

The movement of the earth's tectonic plates is a source of seismic activity. The Puget Sound region is an active seismic area, and part of the larger area known as the Cascadia subduction zone. In the Northwest, the Juan de Fuca plate's movement under the North American plate is a significant source of the region's volcanoes and earthquake activity. Doc. 243b – *Washington State Hazard Mitigation Plan*, Tab 7.1.3, at 1 (2004). There is no dispute that the Seattle Fault is evidence of this seismic activity.

Recent studies have uncovered a number of active surface faults in the Puget Sound lowland capable of generating shallow crustal earthquakes, including the Seattle Fault. *Id.* at 4. The Seattle Fault is now understood to extend across the City of Seattle from east to west, but the fault line has not yet been precisely mapped. The City of Seattle is engaged with the US Geological Survey (USGS), University of Washington, and others in mapping the location of the Seattle Fault [current maps show a broad "Fault Zone"]. While there is much still to be learned, "evidence points to a magnitude 7 or greater earthquake on the Seattle fault about 900 A.D. Such evidence includes a tsunami deposit in Puget Sound Scientists currently estimate the approximate recurrence rate of a magnitude 6.5 or greater earthquake on the Seattle fault at about once every 1,000 years." *Id.* at 5.

The parties do not dispute that the Seattle area has experienced tsunamis. Earthquakes on the Seattle Fault [900 years ago] and the Cascadia Subduction Zone [300 years ago] have caused tsunamis impacting areas now within the City of Seattle. *Id.* at 6.

Mount Rainier is the volcanic peak in the Cascades that has generated volcanic debris flows (lahars) reaching toward the present city of Seattle. The largest Mount Rainier lahar in the past 10,000 years was the Osceola Mudflow some 5,600 years ago, which "extended at least as far as the Seattle suburb of Kent." Doc. 243b Lahars – *Volcano Hazards from Mount Rainier, Washington*, USGS 1998, at 6. The parties dispute whether Mount Rainier lahar flows have reached or are reasonably likely to reach areas of the Duwamish Valley within the City.

Positions of the Parties

Petitioners assert that "Seattle is exposed to threats of geological and seismic hazards, including active faults and tsunamis, and volcanic events such as lahars. Yet the Ordinance ignores these hazards." Audubon PHB at 12. Petitioners contend that the GMA requires the City to designate seismic, volcanic and tsunami hazard areas within the City and to adopt development regulations to protect lives and property. Petitioners contend that simply designating liquefaction zones, landslide-prone areas and steep slopes doesn't encompass the known seismic hazards in the City. *Id.* at 17.

As to earthquake hazards, Petitioners cite studies in the City's record describing recently-identified surface faults in Central Puget Sound and point to maps indicating the Seattle Fault zone through the City. *Id.* at 14-15. Petitioners quote the reference to the Seattle Fault in the City's BAS:

Shallow earthquakes have the potential to be quite devastating, especially if shallow enough to cause ground rupture. Current seismic research has identified surface faults in the Puget Sound lowland associated with shallow earthquake events, including the Seattle Fault zone.

Id. at 16, citing Doc. 3g, *Best Available Science Review*, at 5-2 (August 2005). In fact, Petitioners assert, there is a wealth of data about the Seattle Fault in the City's record. "Numerous geologic maps currently exist, the record shows, documenting the location of the Seattle Fault based on observed displacement of surficial formations, displacement inferred from the observed elevation of shoreline terraces, and interpretations of subsurface geophysical data. There is so much data in fact that it is taking a large task force to correlate and interpret it all." Audubon Reply, at 5.

As to volcanic hazards, Petitioners state that areas of the city are at risk of lahars (volcanic debris flows) from Mount Rainier. They cite studies indicating that the Duwamish Valley is at some risk of inundation from a Case I lahar (recurrence interval 500-1000 years) and contingent risk⁹ from Case II lahars (recurrence interval 100-500 years). *Id.* at 20, citing Doc. 243b Lahars, at 2. Petitioners note that the USGS has recently extended the zone of lahar risk into the Duwamish Valley:

Extension of the Case II inundation zone ... reflects the recent discovery of lahar-related deposits from Mount Rainier that apparently filled the lower Duwamish River valley from wall to wall as far as Elliott Bay in Puget Sound.

Audubon Reply, at 8, citing Doc. 243b, at 2. By failing to designate these geologic hazards, Petitioners claim, Seattle violates the GMA.

Petitioners contend that there is also substantial evidence that earthquakes on the Seattle Fault can generate tsunamis and seiches.¹⁰ Audubon Supp. PHB at 2; Audubon Reply, at 7-8. Petitioners point to mapping prepared by the NOAA TIME Center¹¹ and Washington Department of Natural Resources Division of Geology and Earth Resources based on modeling of a tsunami likely to be generated by a major rupture along the Seattle Fault. *Id.* at 3. While the relevant science is in the City's record, according to Petitioners, the City has failed "to designate and effectively manage" the areas at risk. *Id.*

⁹ Contingencies include Mud Mountain Reservoir failure or sedimentation, or aggradation of the lower White River causing the White and Puyallup to drain northward into the Green River Valley.

¹⁰ A seiche is a wave that oscillates in a partially or fully-enclosed body of water, such as a lake or landlocked bay, caused by seismic or atmospheric disturbance. Doc. 243b – *Designing for Tsunamis*, at 2.

¹¹ National Oceanic and Atmospheric Administration (NOAA) Center for Tsunami Inundation Mapping Efforts (TIME)

The City responds that Seattle’s susceptibility to earthquakes is not disputed; in fact, the BAS included information on seismic activity and existing maps. City Response at 6. However, the City argues that scientific information about the Seattle Fault, including the precise location of the fault line, is still very preliminary. *Id.* at 10-11. Because “the only available mapping ... is over four decades old,” the City and the USGS are preparing new geological maps to include the Seattle Fault and other updated information. *Id.* Until this mapping is completed, the City argues, “the location of a fault or ground rupture, which triggers tsunamis, is not currently scientifically supported.” *Id.* at 7. The City points out that the text of the map presented by Petitioners warns: “The map does not provide information for engineering purposes, nor does it provide useful site specific information.” Doc. 204c. “Thus [the map] cannot be used as science for designating a fault line.” *Id.*

With respect to tsunami hazards, the City points out that the tsunami models for the Puget Sound area are based on assumptions about the precise location of a triggering earthquake. According to the City, without updated fault maps the models are essentially guesswork and cannot be used to require setbacks or prohibit development. *Id.* at 13-14.

With respect to lahars, the City states that the largest known Mount Rainier lahar, the Osceola Mudflow, which occurred approximately 6,500 years ago, reached only to the suburb of Kent, and not as far as the Duwamish Valley within Seattle’s present city limits. *Id.* at 15. The City reasons that the distance from Mount Rainier and the reduced velocity of any lahar flow in the long runout through the flat Green River Valley¹² “make it reasonable to assume that time would be available to issue lahar warnings to areas in the City of Seattle.” *Id.* at 15.

The City’s theory is that geologic hazards need not be designated unless the hazards are so great that development must be precluded. “The City did not designate areas susceptible to ground motion because it found that these areas are suitable for development [through compliance with the Building Code].” *Id.* at 9. Similarly, the City did not designate tsunami or lahar inundation zones because it concluded that these areas are suitable for development, as the very remote risks can be effectively mitigated through emergency management systems. *Id.* at 14-16.

Even if the Board were to determine that the GMA requires designation of areas subject to such remote geologic risks, the City argues, there is no duty to “protect the functions and values” of such areas. *Id.* at 16. “Moreover, if the City were required to designate areas of seismic shaking, and then to protect them under the GMA, it is not clearly erroneous to protect that area through the International Building Code ... and through

¹² A countervailing perspective, cited by Petitioners (Audubon Reply, at 8), is found in Doc. 243b Lahars – Volcano Hazards from Mount Rainier, at 2:

A modern flow of the same size [Case I] would spread farther and faster across flood plains that are now deforested and thus hydraulically smoother; indeed, one estimate is that such a modern flow might inundate 40 percent more area. ... The revised Case I inundation zone reflects our concern about the greater mobility of a modern Case I flow.

additional regulations for landslide-prone and liquefaction-prone areas. The City may also rely on emergency management systems to provide protection from lahars and tsunamis.” *Id.* at 17.

Board Discussion

The GMA requires that cities and counties designate geologically hazardous areas as critical areas. RCW 36.70A.030(5). The statute defines “geologically hazardous areas” as “areas that because of their susceptibility to erosion, sliding, earthquake, or other geological events, are not suited to the siting of commercial, residential, or industrial development consistent with public health or safety concerns.” RCW 36.70A.030(9). The Legislature instructed CTED, in consultation with resource agencies, to develop minimum guidelines for designating critical areas, and the GMA requires cities and counties to consider these guidelines in making their critical area designations. RCW 36.70A.050(1) and (3); RCW 36.70A.170(2).

The minimum guidelines developed by CTED for designation of geologically hazardous areas are at WAC 365-190-080(4). The guidelines include a broad range of hazards, from ordinary sloughing of steep bluffs to events that might occur once in several millennia. CTED guidelines reference surficial faulting, subsurface zones of weakness, volcanic hazards including lahars, seismic hazards, and “other geological events.” CTED guidelines suggest review of any evidence of earth movement within a 10,000 year horizon. .080(4)(d)(iii). With respect to lahars, CTED guidelines provide: “Volcanic hazard areas shall include areas subject to pyroclastic flows, lava flows and inundation by debris flows, mudflows or related flooding resulting from volcanic activity.”¹³ WAC 365-190-030(21); .080(4)(f)(i). CTED points out that some hazards can be reduced by engineering or design practices, so that development can be permitted with reasonable safety. .080(4)(a). Further, the degree of risk in a designated hazard area may vary; thus, CTED advises cities to classify geologically hazardous areas as “known or suspected risk; no risk; or risk unknown.” .080(4)(b). CTED recommends that cities consult the designations on maps published by the USGS or Department of Natural Resources Division of Geology and Earth Resources. .080(4)(d)(i)(c).

Rather than deal with the broad range of geologic hazards as the CTED guidelines indicate, Seattle’s Ordinance 122050 designates only liquefaction-prone areas, landslide-prone areas, and steep slope areas. These are hazards with a recurrence interval of decades, in Seattle. SMC 25.09.020(A)(1). By contrast, areas of the City at risk of surface-fault earthquakes, or tsunami or lahar inundation involve time horizons of 1,000 to 10,000 years. The City has not designated these areas, arguing that the risks are too remote to justify special land-use regulation and are more appropriately mitigated through building codes and emergency management measures. SMC 25.09.020(A)(5).

¹³ For a perspective on periodicity, Mt. Saint Helens, which began its current eruptive cycle in 1980, had a prior eruptive cycle in the period 1800 and 1857, and before that in 1480-1647. The City’s BAS contains the relevant information about Mount Rainier. Doc. 243b Lahars.

However, CTED's minimum guidelines construe the GMA duty to designate geologic hazard areas as extending to low-probability, high-consequence geological events such as surface-fault earthquakes, lahars, and tsunamis. *See generally* WAC 365-190-080(4); and see, *Seaview Coast Conservation Coalition v. Pacific County*, WWGMHB Case No. 96-2-0010, Final Decision and Order (Oct. 22, 1996), at 3 (tsunami inundation zones as geologically hazardous areas).

The City of Seattle has in its record ample scientific support for *designation* of geologic hazards areas associated with the Seattle Fault, tsunami and seiche inundation areas, and lahar inundation areas. See, e.g.,

- Doc. 204b - Frank I. Gonzalez et al, *Puget Sound Tsunami Sources – 2002 Workshop Report*, NOAA/Pacific Marine Environmental Laboratory (June 2003)
- Doc. 204c – S.Y.Johnson, et al, “Active Tectonics of the Seattle fault and central Puget Sound, Washington – Implications for earthquake hazards” 1999 GSA Bulletin, v. 111, 1042-1053 (modified, March 29, 2001)
- Doc. 204c - U.S.Conference on Lifeline Earthquake Engineering, “How vulnerable are Seattle area lifelines?”
- Doc. 243b Earthquakes - Washington Military Department Emergency Management Division, *Washington State Hazard Mitigation Plan: Hazard Profile – Earthquake*
- Doc 243b Lahars - P.Hoblitt, et al, *Volcano Hazards from Mount Rainier, Washington* (Revised 1998: USGS Open-File Report 98-428)
- Doc. 600g - T.J.Walsh, et al, *Tsunami hazard map of the Elliott Bay area, Seattle, Washington – Modeled tsunami inundation from a Seattle fault earthquake*, Washington Division of Geology and Earth Resources Open File Report 2003-14 (2003)

The Board has dealt with seismic and volcano hazard areas in two recent decisions: *Tahoma Audubon Society v. Pierce County (Tahoma Audubon)*, CPSGMHB Case No. 05-3-0004c, Final Decision and Order (July 12, 2005), at 21-25, concerning lahar hazards, and *Sno-King Environmental Alliance v. Snohomish County (Sno-King)*, CPSGMHB Case No. 06-3-0005, Final Decision and Order (July 24, 2006), at 12-16, concerning earthquake hazards. In each case, the County had designated the hazard areas and the petitioners challenged the stringency of particular development regulations.

In *Tahoma Audubon*, petitioners challenged Pierce County's regulations which allowed covered assemblies for up to 400 people in a mapped lahar inundation zone where a lahar warning system was impracticable. The County's regulation required special evacuation considerations in the design of the project. The Board found the regulation to be within the County's discretion.

In *Sno-King*, the challenged seismic ordinance was enacted by Snohomish County to provide specific regulations associated with recently identified surface faults. Most jurisdictions rely on the International Building Code (**IBC**) for design and engineering standards related to seismic risks; however, the IBC standards are tied to official maps

produced by the USGS. The USGS maps for Central Puget Sound do not yet incorporate current understanding of the fault line at issue in that case (a lineament of the South Whidbey Island Fault - SWIF), so heightened IBC standards are not yet applied to projects along these faults. To fill this regulatory gap, Snohomish County's seismic ordinance imposed additional project requirements in the vicinity of "known or inferred seismic faults." The Board noted: "[T]he County is currently in the process of updating its critical areas regulations and the Board trusts that, upon completion of that process, the County will have included within its designations of Geologically Hazardous Areas the SWIF and other recently discovered faults or lineaments." *Id.* at 15, fn. 10.

Significantly, the best available science concerning tsunami threats to Seattle was developed by a team of experts with the express intent of assisting cities to meet their GMA obligation to designate geologically hazardous areas.¹⁴ In 2002, NOAA's Tsunami Inundation Mapping Effort (**TIME**) convened a panel of geoscientists and oceanographers from the University of Washington, USGS, NOAA, Washington State Department of Natural Resources and Washington State Military Department Emergency Management Division to develop tsunami inundation maps. The Workshop Report states its purpose - to provide best available science to local jurisdictions tasked under the GMA with designating critical areas.¹⁵ Doc. 204b - *Puget Sound Tsunami Sources – 2002 Workshop Report*, NOAA/Pacific Marine Environmental Laboratory (June 2003), at 3. In the face of this detailed report, Seattle's failure to make any *designations* at all related to tsunami hazards leaves the Board with a definite and firm conviction that a mistake has been made.

Seattle argues that the Seattle fault line has not yet been definitively mapped, so that critical area designation is premature with respect to both earthquake and tsunami hazards. For example, concerning tsunamis, Seattle notes that Doc. 600g describes the limitation of the tsunami inundation mapping: "This means that while modeling can be a useful tool to guide evacuation planning, it is not of sufficient resolution to be useful for land use planning." City Response at 13. Seattle says the model is based on assumptions about motion on the Seattle fault and so must await more precise mapping of the fault line. *Id.*

The Petitioners make two responses to the City's argument of insufficient data. First, Petitioners point out, "The GMA designation requirement is satisfied, when insufficient

¹⁴ "A workshop dedicated to the systematic assessment of current scientific information by a group of experts is a traditional way of establishing the best available science for a particular topic and judging the adequacy of that science to contribute meaningfully to issues of concern." Doc. 204b – *Puget Sound Tsunami Sources*, at 26.

¹⁵ The Report states:

In Washington, this effort provides the basis for ... compliance with the Washington State Growth Management Act, under which coastal areas threatened by tsunamis are designated as critical areas. In 1995, a section was added to the Growth Management Act that requires counties and cities to include the "best available science" ... and encourages state officials to "...consult with a qualified scientific expert or team of qualified scientific experts to identify scientific information ...and assess its applicability to the relevant critical areas." *Id.* at 3 (internal citations omitted).

data exists to precisely define critical areas, by the adoption of performance standards to guide designation as data becomes available.” Audubon Reply at 6, citing WAC 365-190-040(2)(d). Second, at the HOM, Petitioners argued, “[I]f you actually cannot reach a conclusion as to whether there’s a risk for surficial faulting today, ... stick in the ordinance a provision that says that you are compiling the information, and that when the information allows the designation of the faults with accuracy, that the following development standards will apply.” HOM Transcript at 70.

The Board agrees – the City, however, has a range of options in designating areas at risk of low-probability, high-consequence hazards. It may choose to adopt maps or modeling provided by other agencies or academic scientists. E.g., Doc. 600g, *Tsunami Hazard Map of the Elliot Bay Area, Seattle, Washington* (2003).¹⁶ It may commit to making designations and corresponding regulatory changes as soon as updated science is available. See *Sno-King, supra*, at 15, fn. 10. It may rate hazards as “known or suspected risk,” “no risk,” or “unknown-risk.” WAC 365-190-080(4)(b). It may designate based on criteria such as recurrence interval or other likelihood or damage potential assessment.

Nonetheless, the GMA clearly mandates that cities *designate* environmentally critical areas, including geologically hazardous areas. RCW 36.70A.060(2), .030(5) and (8). In making these designations they “shall consider” the minimum guidelines promulgated by CTED. RCW 36.70A.170(2), .050. Here, it does not appear that the City of Seattle considered CTED’s guidelines which call for designation of areas subject to more remote but potentially-catastrophic geologic hazards. For example, there is no mention of these hazards in the Director’s Report. Doc. 3h.

Further, the GMA requires that critical areas regulations be updated periodically, RCW 36.70A.130(3), and that cities “shall include” best available science in designating critical areas, RCW 36.70A.172(1). Here, the City of Seattle is aware of a great deal of new science concerning the existence and location of surficial faults and concerning the past occurrence and future risks of tsunamis and lahars. But the City has not included this new science, even provisionally, in its designations of geological hazard areas.

Petitioners have met their burden in demonstrating that the City of Seattle’s restricted designation of geologic hazard areas is **clearly erroneous**. The Board is persuaded that the City’s designation of geologically hazardous areas **does not comply** with RCW 36.70A.040 and 170, in that the City has failed to apply best available science to designate areas at risk from surficial faults, tsunami and lahar inundation.

The Board concurs with the City that additional “protection” of critical area functions and values is not yet relevant to these more remote but potentially catastrophic geological hazards. In *Sno-King*, the Board explained: “This is not to say that the use of BAS is not

¹⁶ Certainly, reliance on maps and models provided by scientific experts and resource agencies is an appropriate application of best available science for critical area designation. See, e.g., WAC 365-190-080(3) (FEMA and National Flood Insurance Program), .080(4)(c) (USDA Soil Conservation Service), and .080(4)(d) (USGS).

important in “identifying” and “designating” geologically hazardous areas; but rather its significance in “protecting” such critical areas verges on meaningless in the context of seismic areas.” *Id.* at 15. The City of Seattle properly relies on provisions of its Building Code (SMC Title 22) and its emergency management system to protect people and property in the face of extreme but highly infrequent geological events.

In *Sno-King*, the Board pointed out that the IBC, which is adopted by the State of Washington as RCW 19.27, governs construction of buildings and structures in all local jurisdictions. The IBC includes provisions for design and construction in seismic hazard areas where documented active faults exist. *Sno-King*, at 12. Mapping of these active faults by the USGS is required in order to have the IBC’s provisions apply. *Id.* The Board stated:

The County’s duty and obligation to protect the public from potential injury or damage that may occur if development is permitted in geologically hazardous areas is not rooted in the challenged GMA critical areas provisions. Rather, providing for the life safety of occupants and the control of damage to structures and buildings is within the province of building codes. In Washington, the State Building Code [Chapter 19.27 RCW] applies and is enforced by all jurisdictions throughout the state – including Snohomish County. The State Building Code, in turn, has adopted the IBC (2003 version), including its performance standards and construction requirements. *See* RCW 19.27.020. The IBC, as well as the County’s Building Code, include provisions and requirements for earthquake resistant design and construction. Ex. B-39.

Id. at 15. Here the parties acknowledge that, as USGS maps are updated to delineate the Seattle fault, more stringent construction requirements may apply. However, the City’s critical areas ordinance should indicate, at a minimum, that when information allows more specific designation of fault lines, the City will reassess and update its development standards.

The Board also notes the substantial overlap of the City’s designated liquefaction-prone zones (and, in some cases, landslide-prone areas) with areas at risk for lahar and tsunami inundation.¹⁷ However, without *designation* of lahar and tsunami inundation zones, even provisionally, appropriate analysis of emergency management measures cannot be assured.

Conclusion

Petitioners have carried their burden in demonstrating the City’s non-compliance with the Act in that the City has failed to designate – either by mapping or by performance criteria

¹⁷ These areas in Seattle in some places also overlap with areas that may be designated as “frequently flooded areas.” CTED advises cities, in designating frequently flooded areas, to consider “the potential effects of tsunami, high tides with strong winds, sea level rise resulting from global climate change ...” WAC 365-190-080(3)(d).

- areas of seismic hazard, tsunami and seiche inundation zones, and lahar inundation zones. The Board finds and concludes that the City of Seattle’s adoption of Ordinance 122050, Section 25.09.020(A) **was clearly erroneous** in failing to designate geologically hazardous areas using best available science. The Board is left with a definite and firm conviction that a mistake has been made.

The Board concludes that Ordinance 122050, Section 25.09.020(A), **does not comply** with RCW 36.70A.040(3), .170(2), .172(1), and .130(1). The Board will **remand** Ordinance 122050, Section 25.09.020(A) to the City of Seattle to take legislative action to comply with the GMA as set forth in this Order.

C. Legal Issue No. 2

The PHO states Legal Issue No. 2 as follows:

2. *Whether the exemptions for and failures to protect certain category I, II, III and IV wetlands in Ordinance No. 122050, SMC§ 25.09.160, comply with RCW 36.70A.020(8), (9) and (10), RCW 36.70A.040(3), RCW 36.70A.060, RCW 36.70A.170, RCW 36.70A.172 and RCW 36.70A.130?*

Ordinance Provisions

Seattle’s Ordinance No. 122050 – at Section 25.09.160 – exempts certain small wetlands from buffer requirements. The exempted wetlands are Category I, II and III wetlands under 100 square feet and Category IV wetlands under 1000 square feet, except where the wetlands are a part of a larger wetland or abut Type 1-5 waters. Category IV wetlands under 1000 square feet may be developed if there is an equal-size on-site constructed wetland, vegetation replacement, bioengineered infiltration facility or eco-roof or roof garden replicating the hydrologic and/or water quality benefits of the developed wetlands. The challenged portions of SMC 25.09.160 provide:

(B) Impacts to Wetlands

- (1) Development, including but not limited to grading, filling, or draining, is prohibited within or over:
 - (a) Category I, II, or III wetlands greater than one hundred (100) square feet;
 - (b) Category IV wetlands one thousand (1,000) square feet or greater;
 - (c) Any wetland of any category or size that is part of a larger wetland system or abuts any Type 1-5 water.
- (2) Development may occur within or over Category IV wetlands less than one thousand (1,000) square feet, other than those wetlands described in subsection B1c, in accordance with subsection C3.

- (3) When development is authorized on a parcel containing a wetland:
 - (a) All on or offsite runoff shall be routed away from the wetland and wetland buffer; and
 - (b) Direct lighting shall be directed away from the wetland and its buffer.

(4) Removal of, clearing, or any action detrimental to habitat, trees or vegetation in wetlands is prohibited, except as provided in Section 25.09.320.

(C) Wetland Buffers and Mitigation.

(3) The Director may authorize development in a Category IV wetland under one thousand (1,000) square feet that does not have the characteristics described in subsection B1c above, when the Director finds that one of the following measures, which must occur on site, will mitigate wetland function lost by development:

- (a) Construct a wetland of equal function to the lost wetland function.
- (b) Plant an area of native vegetation equal or greater in size to the area of the developed wetland, and remove invasive species in the area to be planted.
- (c) Construct a bioengineered/infiltration facility, such as a bioswale, stormwater planter or infiltration planter, that replicates the hydrologic and/or water quality benefit of the developed wetland. [designed pursuant to Title 22, Subtitle VII – Stormwater, Grading, and Drainage Control Code].
- (d) Construct an eco-roof or roof garden that replicates the hydrologic and/or water quality benefit of the developed wetland. [designed pursuant to Title 22, Subtitle VII – Stormwater, Grading, and Drainage Control Code].

Discussion and Analysis

Positions of the Parties

Petitioners contend that the City’s blanket exemption for Category I, II and III wetlands smaller than 100 square feet is contrary to the BAS in the City’s record. Audubon PHB at 21. Petitioners point to the Washington State Department of Ecology’s (DOE) 2005 synthesis of the best available science related to wetlands¹⁸ [*Wetlands I*], which both parties agree is the best authority. *Id.* Petitioners read the study to require that “All wetlands, including even small, isolated wetlands, deserve protection.” *Id.* Petitioners cite passages from *Wetlands I* concerning the habitat value of small, isolated wetlands, which “serve wildlife populations not served by large wetlands.” *Id.* at 23.

¹⁸ Washing State Department of Ecology, *Wetlands in Washington State – Volume 1: A Synthesis of the Science (Wetlands I)* [Doc. 243b, CAO on a CD].

Petitioners point out that the City's exemption not only allows development on small wetlands but deprives them of the protection of buffers, which are critical for preserving wetlands functions and values. *Id.* at 23. Petitioners rely on the language in *Clallam County v. Western Washington Growth Management Hearings Board (Clallam County)*, 130 Wash. App. 127, 140, 121 P.3d 764 (2005). The *Clallam County* decision requires exemptions to be "tailored ... to reasonably ameliorate potential harm to the environment and fish and wildlife. And the regulations must specifically address any threatened harm peculiar to the number and size of [properties] exempted." *Id.* 130 Wash.App. at 140. Petitioners also cite to the Board's recent holding in *Hood Canal, et al. v. Kitsap County (Hood Canal)*, CPSGMHB Case No. 06-3-0012c, Final Decision and Order (Aug. 28, 2006), at 20, where the Board said: "The Board reads the [*Clallam County*] opinion to require CAO exemptions to be supported by some analysis of cumulative impacts and corresponding mitigation or adaptive management." Petitioners argue that the City's record lacks any inventory, cumulative impacts assessment, or monitoring and adaptive management to ensure no net loss of wetlands functions and values. *Id.* at 24.

The City responds that its exemptions for very small wetlands are indeed narrowly tailored, using BAS, to ameliorate harm to the environment and to fish and wildlife. City Response, at 17. The City distinguishes its regulations from those challenged in the *Hood Canal* case: first, because the exempted wetlands, at less than 100 square feet, are significantly smaller than those exempted in the Kitsap County regulation, where the exemption thresholds were 7,500 square feet for Category IV and 2,500 square feet for Category III wetlands, and, second, because the City's exemptions follow DOE advice rather than disregarding it. The City points to a comment letter from DOE proposing a "strategy for regulating small wetlands that are less than 3,000 square feet in size" and allowing limited exemptions for wetlands less than 1000 square feet implemented through "a fee-in-lieu compensatory mitigation system." Doc. 801v.

Board Discussion

Seattle has adopted DOE's rating system for wetlands, which rates wetlands on how well they function to protect water quality, water quantity, and fish and wildlife habitat.¹⁹ See generally, *DOE/CTED v. City of Kent (DOE/CTED)*, CPSGMHB Case No. 05-3-0034, Final Decision and Order (Apr. 19, 2006), at 31-35. The DOE rating scale falls into four categories with Category I wetlands having the highest functionality and Category IV the least. In general, size is not a primary determinant of function, and *Wetlands I* discourages ratings or exemptions based on size. See, *Hood Canal*, at 18-19.

¹⁹ In *DOE/CTED* the Board explained: "Wetland rating or ranking systems classify wetlands based on their ecological functions. Rating systems are used to match protective regulations (usually buffers) to the set of functions at issue under particular circumstances. Wetlands serve a number of *functions* in the urban landscape. These functions may generally be grouped into three categories:

- hydrologic [reduce flooding, water retention, detention, erosion control and aquifer recharge],
- improving water quality [sediment retention, nutrient and toxic removal], and
- habitat [fish and wildlife habitat and migration corridors].

Wetlands and their buffers may also provide urban *values* such as open space, noise barriers, recreation and educational opportunities." *Id.* at 31.

The parties agree that Seattle's Ordinance designates small wetlands, but Petitioners contend that the regulations fail to protect small wetland functions and values. Seattle's Ordinance designates all wetlands and protects wetlands of any size, including those under 100 square feet, if they (A) are part of a larger wetland system or (B) abut Type 1-5 water. SMC 25.09.160.B.1.c and chart .160.C.1, Ordinance pp. 40-42. The Ordinance also protects very small wetlands that (C) fall under the priority habitat provisions of SMC 25.09.020.D.2 and 25.09.200C.

In Category IV wetlands (the most degraded) of less than 1000 square feet, the City allows development impacts if they are mitigated by on-site replacement, bioswales, revegetation, or roof gardens. SMC 25.09.160.C.3. However, no buffers are required. In *Hood Canal*, the Board acknowledged the potential disproportionality of requiring buffers as the means of protecting functions of the smallest, most degraded wetlands. *Hood Canal*, at 19, fn. 23. The Board noted that other mitigating strategies, such as best management practices or compensatory on-site or off-site mitigation might be scientifically supported. *Id.* Here, Seattle has opted for alternative protection mechanisms for these limited cases of small, isolated, low-functioning wetlands. In light of Seattle's alternative approach, the Board concludes that the Petitioners have **not carried their burden of proving** that the City's regulations for Category IV wetlands of less than 1,000 square feet are clearly erroneous.

For certain Category I, II, and III wetlands of less than 100 square feet, Seattle's ordinance provides a narrowly-tailored exemption. As Petitioners point out, the scientific literature "does not support a general exemption based on size." Audubon Reply at 9. In *Clallam County*, the Court of Appeals held that the GMA does not permit a County to exempt wetlands from critical areas protection unless it can "show that by using best available science it has tailored the exemption to reasonably ameliorate potential harm to the environment and fish and wildlife." *Clallam County*, 130 Wash. App. at 140. In addition, the Court required some quantification to "specifically address any threatened harm peculiar to the number and size of [properties] exempted." *Id.*

In *Hood Canal*, assessing Kitsap County's exemption for Category III wetlands less than 2500 square feet and Category IV wetlands less than 7500 square feet, the Board found no science in the County's record supporting the exemption and no strategy by the County – e.g., inventory or cumulative assessment or adaptive management – to assure no net loss of wetland functions over time. Indeed, the resource agencies commenting on Kitsap's proposal expressed concern over the exemptions. *Hood Canal*, at 19-20. The Board found itself compelled by the *Clallam County* holding and by the record before it to remand that portion of Kitsap's CAO.

In contrast, Seattle's record contains some credible science concerning very small wetlands – science indicating that their functions cannot be accurately rated, but it is possible to identify habitat value for amphibians in wetlands as small as 200 square feet. Seattle cites to advice from Thomas Hruby, DOE's wetlands expert and author of DOE's 2004 *Washington State Wetland Rating System for Western Washington*, based on field

testing and review of research. Doc. 805. Hruby comments on the difficulty of identifying the functions of very small wetlands.

My experience, however, is that indicators of function used to identify whether a wetland functions or not become difficult to determine in very small wetlands. On the other hand, wetlands that are larger than 1/10 acre [4300 square feet] are adequately characterized. This is based on the consensus of the different teams (function assessment and rating) that went out into the field.

We do not have any methods to adequately characterize functions in very small wetlands because no research has been done on their functions (with the exception of some studies about amphibians showing that wetlands as small as 200 square feet are good habitat.)

Doc. 806, p. 2. Without a way to “adequately characterize functions,” Seattle says, it has no scientific basis for regulating to protect those functions. City Response, at 20.

Applying the *Clallam County* holding here, the Board finds that Seattle has shown “that by using best available science it has tailored the exemption to reasonably ameliorate potential harm to the *environment* and *fish* and *wildlife*.”

- The Seattle exemption is tailored to reasonably ameliorate harm to *wildlife*, in that all priority habitats are protected and wetlands as small as 200 square feet, which studies indicate may provide good habitat for amphibians, are protected.
- The Seattle exemption is tailored to reasonably ameliorate harm to *fish*, in that wetlands associated with Type 1-5 waters are protected.
- The Seattle exemption is tailored to ameliorate loss of *hydrological functions*, in that mosaic wetlands and wetlands associated with Type 1-5 waters are protected and the only wetlands exempted are those that are far too small for their hydrological functions to be effectively rated.

In addition to requiring that any exemption be narrowly tailored using BAS, the *Clallam County* decision required some quantification to “specifically address any threatened harm peculiar to the number and size of [properties] exempted.” 130 Wash. App. at 140. In the Board’s *Hood Canal* decision, the Board read *Clallam County* “to require CAO exemptions to be supported by some analysis of cumulative impacts and corresponding mitigation or adaptive management.” *Hood Canal*, at 20.

At issue in the *Clallam County* case was the County’s expansion of an exemption for wetlands in agricultural resource lands to extend to wetlands on all farmed lands in rural areas. The court required the County to determine the number and size of farms involved, and “specifically address any threatened harm” related to the extent of the exemption. Applying this guidance in the *Hood Canal* case, in light of exemption of isolated small

wetlands throughout the whole of Kitsap County, the Board similarly noted that Kitsap County lacked cumulative impact analysis or a monitoring program.

Seattle’s limited small-wetland exemption is on a completely different scale than the exemptions sought in *Clallam County* or in the *Hood Canal* case. Nevertheless, Seattle has undertaken a study to map wetlands in Seattle, in collaboration with the U.S. Fish and Wildlife Service. Doc. 3h, at 7. Preliminary findings of the survey identified 733 possible wetlands in the City, of which 197 were estimated to be smaller than 1,000 square feet. *Id.* at 9. Wetlands smaller than 100 square feet – and hydrologically isolated - would necessarily be a smaller subset of the 197. To require the City to address specific harm from the possible loss of this subset of very small isolated wetlands, when best available science cannot viably assess their ecological functions, would stretch the Board’s authority.²⁰ A fee-in-lieu compensatory mitigation program would of course be preferable, as it would enable the City to mitigate any cumulative impacts that future scientific understandings might bring to light. However, in the context of a narrowly-tailored exemption based on the current science, the Board is not persuaded that the GMA requires more. Petitioners have not carried their burden of demonstrating that the City’s regulations are clearly erroneous or that they fail to comply with the GMA.

Conclusion

Petitioners **have not carried their burden** of proving that the wetlands exemptions in Ordinance 122050, Sec. 25.09.160(B)(1), do not comply with RCW 36.70A.040(3), .172(1), .060(2), and other cited portions of the Act. The Board is not persuaded that the action of the City challenged in Legal Issue No. 2 is clearly erroneous. Legal Issue No. 2 is **dismissed**.

D. Legal Issue No. 3

The PHO states Legal Issue No. 3 as follows:

3. Whether the buffers, riparian management areas and limited development areas adopted for shoreline habitats and/or type 1, 2 and 3 water bodies in Ordinance No. 122050, SMC§ 25.09.200, comply with RCW 36.70A.020(8), (9) and (10), RCW 36.70A.040(3), RCW 36.70A.060, RCW 36.70A.170, RCW 36.70A.172 and RCW 36.70A.130?

Ordinance Provisions

Seattle’s Ordinance No. 122050 – at Section 25.09.200 – enacts development standards for fish and wildlife habitat conservation areas (**FWHCA**). “Riparian corridors,” or areas along Type 2-5 waters, are governed by SMC 25.09.200(A). “Shoreline habitat,” which includes marine shores and Type 1 waterbodies used as fish migration corridors, is governed by SMC 25.09.200(B).

²⁰ Future research specifically directed to small wetlands may require a re-evaluation.

SMC 25.09.200 Development standards for fish and wildlife habitat conservation areas.

A. Development standards for parcels with riparian corridors.

3. Riparian Management Area.

...

d. In addition to subsections A3b(2) and A3c, *development is allowed in the riparian management area on lots existing at the time Ordinance 1220501 takes effect* if the applicant demonstrates that:

(1) the *development is in the limited riparian development area*, which is the area in the riparian corridor but outside of the watercourse and *more than seventy-five feet (75')* from the top of the watercourse bank for Type 2 and 3 waters with anadromous fish present for any part of the year, *fifty feet (50')* from the top of the watercourse bank for Type 2 and 3 waters where anadromous fish are not present for any part of the year and *more than fifty feet (50')* from the top of the watercourse bank for Type 4 and 5 waters;

(2) the development *complies with Section 22.802.016*, regardless of the area of land disturbing activity or the size of the addition or replacement of impervious surface, except as provided in subsection 3e; and

(3) any *development*, including but not limited to coverage by impervious surface, *does not exceed 35% of the total area of the limited riparian development area*, provided that the maximum lot coverage does not exceed that allowed under Title 23, and except as provided in subsection 3e.

...

e. When compliance with Section 22.802.016 is required solely based on subsection 3d(2) above, the *Director may approve a restoration plan* in lieu of requiring compliance with subsections 3d(2) and (3) if the applicant demonstrates that the plan meets the following criteria:

(1) The watercourse or riparian management area function will be restored so that it *prevents erosion, protects water quality, and provides diverse habitat*; and

(2) The *restoration results in greater protection* of the watercourse and riparian management area than compliance with subsections 3d(2) and (3).

B. Development Standards for Shoreline Habitat.

...

4. Buffers.

a. Shoreline habitat has a *one hundred foot (100') buffer* from the ordinary high water mark [**OHWM**].

...

c. Other development for *water dependent and water related* uses is prohibited in the buffer, except when:

- (1) The development is allowed under Title 23, including chapter 23.60, the Shoreline Master Program [SMP]; and
- (2) *no vegetation is removed, the amount of impervious surface is not increased, and no surface that is permeable by water at the time of the application will be covered with an impervious surface so that impervious surface will be closer to the ordinary high water mark; or*
- (3) if any of the actions described in subsection c(2) above occur and that action impacts the ecologic function of the shoreline, those *impacts are mitigated* as set out in subsection (e) below.

...

d. Other development for *non-water dependent and non-water related* uses is prohibited in the buffer, except when:

...

- (2) for *non-residential* uses
 - (a) the lot was in existence before the effective date of Ordinance 1220501; and
 - (b) *the development is twenty five feet (25') or more from the ordinary high water mark* unless the development is allowed in the shoreline habitat under Title 23, including chapter 23.60, the Shoreline Master Program; and
 - (c) (i) no vegetation is removed, impervious surface is not increased and *no net loss of ecological function of the critical area or buffer* from other actions occurs; or
(ii) if any of the actions described in subsection d(2)(c)(i) above occur, *all impacts on the ecological function are mitigated* as set out in subsection (e) below; or

...

- (3) for *residential* uses *the residence is twenty five feet (25') or more from the ordinary high water mark*
 - (a) and no vegetation is removed, impervious surface is not increased and *no net loss of ecological function of the critical area or buffer* from other actions occurs; or
 - (b) if any of the actions described in subsection d(3)(a) above occur, *all impacts on the ecological function are mitigated* as set out in subsection (e) below.

e. Mitigation.

- (1) *Mitigation must prevent net loss of ecological function.* Mitigation must achieve the equivalent ecologic functions as the conditions existing in the shoreline habitat buffer at the time of development. ...
- (2) For the purpose of this section, mitigation is action that replaces ecological functions lost as a result of a project impact. Depending on the type of lost ecological function these include:
 - (a) providing habitat, or

- (b) creating new pervious ground or
- (c) replicates the function of the pervious ground through methods that are engineered and designed according to the requirements of Title 22, Subtitle VIII, Stormwater, Grading and Drainage Control Code.

...

SMC 25.09.200 (emphasis added)

Discussion and Analysis

Local Circumstances.

Seattle is the primary urban center in Washington State. It houses a population of 575,000, at a density of 6,717 persons per square mile, and provides more than 536,000 jobs.²¹ The City is largely built out; much of the saltwater shoreline is already developed for marine and industrial uses, and freshwater shorelines are built up residentially or preserved as parks and public spaces. Doc. 3h, at 23. Single family parcels in the City are small, with a median size of 5,716 square feet. Where parcels of 60'x100' are arrayed along a creek or lake shore, many structures are already built within fifty feet of the water, and there may be little or no buildable land beyond the 100 foot riparian corridor. *Id.* at 22. In this intensely developed environment, Seattle's shorelines and aquatic systems have been altered not only by urbanization but by major rerouting of waterways in the first half of the twentieth century. Doc. 3g, at 3-2.

The City states that its regulations acknowledge existing conditions and seek to provide the full range of uses along Seattle's waterfronts. *Id.* at 23. Even in this built-out urban center, the City references its intent to continue to absorb a fair share of the region's growth, with a commitment to add 47,000 new households and 84,000 new jobs in the next 20 years. *Id.* at 19. Nevertheless, Seattle's saltwater shores (30 miles along Puget Sound) and estuaries, lake fronts, waterways and creeks continue to provide essential habitat for salmon and other fish and wildlife and are highly valued by Seattle's citizens. *Id.* at 3-4, Doc. 3g.

Positions of the Parties

With Legal Issue 3, the Petitioners assert three deficiencies:

- A. The marine buffers are too narrow to protect habitat functions along Puget Sound and Type 1 water bodies that provide migration corridors for WDFW priority species fish;
- B. No protection is provided for Type 1 waters that do not contain migration corridors for WDFW priority species fish [this sub-issue was dismissed, *supra*]; and
- C. The buffers, management areas, and limited development areas adopted for Type 2 and 3 water bodies are inadequate to protect habitat functions and values.

²¹ Seattle data sheet at www.seattle.gov/oir/datasheet.

Issue 3(A) - Marine Buffers and Type 1 Waters: Shoreline habitat, in Seattle’s scheme, includes marine waters along Puget Sound and Type 1 waters (Seattle’s major lakes and waterways) that provide migratory corridors for salmon.²²

Petitioners point out that the City’s Record in this matter demonstrates that Puget Sound shorelines, including the marine riparian zone, are important habitats for wildlife and fish, including two federally threatened salmon species - Fall Chinook and Summer Chum. Audubon PHB at 25-27. Petitioners assert that Type 1 waters have important habitat values necessitating adequate buffers, especially given the fact that almost all of the aquatic food web originates in adjacent riparian and terrestrial components of the stream ecosystem. *Id.* at 29.

Petitioners argue that marine buffers are needed to reduce shoreline erosion and protect the marine environment and that buffers supported by the City’s BAS ranged from 100 to 450 feet along saltwater shorelines. *Id.* at 28 (citing King County’s summary of BAS, Doc. 243b). Petitioners further point out that the City’s BAS review denoted buffers of 65-200 feet along Type 1 waters for protection of salmon habitat and 100-400 feet for sediment removal. *Id.* at 29 (citing Doc. 3g at 3-16, 3-19). According to the Petitioners, the City, contrary to its own review, adopted a 100 foot buffer for shoreline habitats (marine and Type 1), much narrower than those indicated by the science; furthermore, the various development allowances in the City regulations result in a mere 25 foot buffer for both non-residential and residential uses along shorelines. *Id.* at 30 (see SMC 25.09.200(B)(4)(a), .200(B)(4)(d)).

Petitioners critique the City’s mitigation provisions. They assert that the mitigation plan required by the City to prevent the net loss of ecological *functions* neglects the critical areas’ *values*; further, that there is no scientific evident that shows it is possible to mitigate all of the functions and values of a 100-foot buffer in 25 feet, most notably, protection of the benthic community.²³ *Id.* at 30-32. The Petitioners are concerned that the City’s requirement that “mitigation must achieve the equivalent ecological functions as existing conditions” does not serve to restore the City’s highly degraded habitats. *Id.* at 31. In addition, the reduction of buffer area requires no justification or showing of hardship, rather it is a blanket authorization to build within the buffer area. *Id.*

In response, the City states that the Petitioners misunderstand the City’s buffer requirements for the shoreline environment. City Response at 23. The City’s position is that all shoreline habitats have a 100 foot buffer. The City asserts that the Petitioners’ claim that the City’s buffers are not supported by BAS is without merit since “even skimming the chart ... it is apparent that 100 feet is supported by the science.” *Id.* at 23-24. The City states that any buffer incursions permitted under this section of the Ordinance may only occur if impacts to the ecological function of the shoreline are fully

²² SMC 25.09.020(D)(6) - Shoreline habitat, which is Type 1 waters, as defined in WAC 222-16-031, that provide migration corridors for fish listed by WDFW as a priority species waterward of the ordinary high water mark, include Lake Washington, Lake Union, the Duwamish River, Elliott Bay and other saltwater shorelines. Doc 3h at 3.

²³ Benthic communities are those organisms living on the bottom of a body of water.

mitigated. SMC 25.09.200(B)(4)(c). In general, no vegetation may be removed, impervious surface may not increase, and impervious surface may not be closer to the OHWM. In addition, the City argues that the existing ecological functions of the critical areas will be preserved (i.e. protected) by mitigation; improvement and/or restoration of the habitat is not required by the GMA. *Id.* at 24, 26. The City states that if the impact cannot be mitigated, then the development or incursion will not be allowed. *Id.* at 25.

Issue 3(C) - Type 2 and 3 Waters: Seattle's freshwater creeks, streams, and small lakes (Haller Lake and Bitter Lake) are classified as Types 2, 3, 4, or 5 depending on rate of flow and whether it is perennial or intermittent. Since Type 2 and Type 3 waters have fish and wildlife use, Petitioners allege that the riparian management area (RMA) standards and buffers adopted in SMC 25.09.200(A)(3)(d)(1) do not adequately protect the habitat functions of the riparian corridor. Audubon PHB at 32-33.

Petitioners argue that the City's own cited studies conclude that buffers smaller than 100 feet are inadequate for Type 2 and 3 streams, especially in relationship to the maintenance of benthic communities, and therefore, the City failed to use BAS in setting the required buffers. *Id.* at 35, 37. Petitioners assert that the City permits development within 75 or 50 feet of a stream (the limited riparian development area (LRDA)) and does not require the maintenance of all functions and values of the riparian corridor. *Id.* at 33-34.

In essence, the Petitioners argue, the City does not have 100 foot wide buffers; it has 100 foot wide management areas with inadequate buffers that can be as narrow as 50-75 feet. Audubon Reply at 19. The Petitioners allege that the City is not protecting all of the functions and values of the critical area, as required by the GMA, but only three – erosion, water quality, and habitat diversity - without considering others such as maintenance of the benthic community. *Id.* at 19-20.

In response, the City asserts that the Petitioners once again misrepresent how the City's riparian corridor regulations work. City Response at 33. The City explains that the RMA is a designated critical area extending 100 feet on either wide of the watercourse. *Id.*; SMC 25.09.020(D)(5)(a). Development within this area is not allowed (i.e. new lots created after adoption of Ordinance 122050) except under strictly limited circumstances. *Id.* Pursuant to 25.09.200(A)(3)(d)(1), no development is permitted within the LRDA, defined as an area of the riparian corridor outside of the watercourse and more than 75 feet from the top of the watercourse bank for Type 2 and 3 waters with anadromous fish present for any part of the year or more than 50 feet for Type 2 and 3 waters where anadromous fish are not present for any part of the year. *Id.* at 33-34. Generally, development is permitted within the 25 feet farthest from the water of Type 2/3 anadromous streams and within the 50 feet farthest from the water of Type 2/3 non-anadromous streams, subject to compliance with stormwater regulations and limitation on imperious surface coverage. *Id.* In addition, the applicant must demonstrate that the riparian corridor function will be restored (fully mitigated) so as to prevent erosion, protect water quality, and provide a diverse habitat. *Id.* 36.

Board Discussion

The crux of Petitioners’ argument for Legal Issues 3(A) and 3(C) is that the City did not conform to best available science (**BAS**) when it established its buffers for shoreline habitat and riparian corridors, creating buffers which are too narrow, permitting development within the buffer, and therefore not adequately protecting critical area functions and values. The GMA requires that critical areas, once designated, be protected. RCW 36.70A.040(3)(b). In particular, the *functions and values* of these areas must be protected. RCW 36.70A.172(1). Buffers are a proven strategy for protecting many functions and values of shorelines and riparian corridors. See generally, Doc. 3g, Table 1.

Shoreline Habitat Development Standards. SMC 25.09.200(B)(4)(a) requires a 100 foot shoreline habitat buffer from the OHWM. SMC 25.09.200(B) sets forth the development standards for shoreline habitat.

SMC 25.09.200(B): Development Standards for Shoreline Habitat

	Allowed under SMC Title 23 – Shoreline Master Program	If impacts occur, mitigation provided for all impacts to ecological functions	No vegetation removed	Imperious surface not increased or placed closer to OHWM	Lot in existence prior to May 2006	Development is >25 feet from OHWM unless allowed under SMP	No net loss of ecological function of critical area or buffer
Shoreline Habitat	✓	✓					
Shoreline Buffer Water dependent Water related	✓	✓	✓	✓			
Shoreline Buffer Non-water dependent Non-water related <i>Non-residential uses</i>	✓	✓	✓	✓	✓	✓	
Shoreline Buffer Non-water dependent Non-water related <i>Residential uses</i>	✓	✓	✓	✓		✓	✓

SMC 25.09.200(B)(3) states that development is prohibited within the shoreline habitat unless it is permitted under the City’s SMP and *mitigation is provided for all impacts to*

the ecological functions. For water dependent and water related uses, development may occur to the water’s edge with full mitigation for impacts within the buffer. There is a 25-foot no-build restriction for non-water dependent uses, and in general, no vegetation may be removed and impervious surface may not be increased or placed closer to the OHWM. SMC 25.09.200(B)(4)(e) requires that “mitigation must prevent net loss of ecological function. Mitigation must achieve the equivalent ecological functions as the conditions existing ... at the time of development ... mitigation is action that replaces ecological functions lost as a result of a project impact.” Mitigation measures include: providing habitat, creating new pervious ground, or replicating the function of pervious ground through engineered methods. SMC 25.09.200(B)(4)(e)(2).

Riparian Area Development Standards. Seattle’s protection of creeks, streams, and small lakes also begins with a 100 foot buffer.²⁴ The riparian management area (RMA) is the area within one hundred feet (100’) measured horizontally landward from the top of each bank of the watercourse or from the ordinary high water mark of the watercourse as surveyed in the field if the top of the bank cannot be determined. SMC 25.09.020(D)(5)(a). SMC 25.09.200(A)(3)(b) generally prohibits development within the RMA. Petitioners challenge exceptions found in .200(A)(3)(d), which provides that development is permitted within the RMA on lots existing at the time Ordinance 122050 takes effect if the applicant can demonstrate: (1) the proposed development is within the Limited Riparian Development Area (LRDA); (2) the proposed development complies with SMC 22.802.016 (Stormwater, Drainage, and Erosion Control); and (3) the proposed development does not exceed 35 percent of the total area of the LRDA in impervious surface coverage. The City defines a LRDA:

SMC 25.09.200(A)(3)(d)(1): Limited Riparian Development Area

	Type 2 or 3 waters with anadromous fish present any time of year	Type 2 or 3 waters where anadromous fish are not present any time of year	Type 4 or 5 waters
LRDA	<ul style="list-style-type: none"> • Area outside of watercourse • Area > 75 feet from top of watercourse • Impervious surface coverage no > 35 % of total area of LRDA 	<ul style="list-style-type: none"> • Area outside of watercourse • Area > 50 feet from top of watercourse • Impervious surface coverage no > 35 % of total area of LRDA 	<ul style="list-style-type: none"> • Area outside of watercourse • Area > 50 feet from top of watercourse • Impervious surface coverage no > 35 % of total area of LRDA

The Petitioners argue that the City has failed to protect the functions and values of both critical areas – shoreline and riparian - because a 100 foot buffer is too narrow and because the City permits development within the buffer. Audubon PHB at 33-34. Petitioners present three questions:

²⁴ Freshwater creeks, streams, and small lakes (Haller Lake and Bitter Lake) are classified as Types 2, 3, 4, or 5 depending on rate of flow and whether it is perennial or intermittent. Seattle’s regulations also differentiate streams with anadromous fish present at any time of the year.

(1) Is a 100 foot buffer within the range of best available science in the City's record?

(2) Does the GMA require critical areas and/or critical area buffers to be "no build" zones?

(3) Do the City's development regulations, which permit development within critical areas, including shoreline habitats, shoreline, buffers, and the LRDA, protect the functions and values of the critical area?

Shoreline and Riparian Buffer Width. RCW 36.70A.172 requires that the City include best available science (BAS) when developing regulations which are intended to protect the function and values of critical areas. *See DOE/CTED*, at 40. The City's BAS review incorporates much recent science developed in the Central Puget Sound region and many studies specific to the City's streams, lakes, and shorelines. Over the past ten years, in response to the threatened status of Puget Sound Chinook and low numbers of other anadromous species, scientists have undertaken extensive research focused on salmon use of Seattle waterways and on the ecological health of shorelines and streams in a highly altered urban environment. Doc. 3g, at 3-24 to 3-37.

For shoreline habitats and buffers, the Ordinance sets a buffer width of 100 feet from the OHWM. SMC 25.09.200(B)(4)(a). For riparian areas, the City's RMA or "riparian buffer" is 100 feet. SMC 25.09.020.

The nearshore environment (the approximately 30 miles of Seattle's Puget Sound shoreline) and anadromous fish migratory corridors along Type 1 waters are addressed as Fish and Wildlife Habitat Conservation Areas in Section 3-1 of the City's BAS review document. Doc. 3g, at 3-31 to 3-48. Although there is scientific literature advising that, depending on shoreline classification, marine buffers should range between 100-450 feet (Doc. 243b, King County BAS Review, Volume 1, at 7-24), the SMA guidelines (RCW 90.58; WAC 173-26) set a buffer zone of one-half of SPTH (Site Potential Tree Height) or 100 feet, whichever is greater. Doc. 243d, Page 7-24.

Riparian corridor widths and functions are addressed in Table 1 of the City's BAS review, which provides a listing of science that was reviewed in regard to sediment removal, pollutant removal, large woody debris recruitment, stream temperature, benthic communities, salmon and wildlife habitat. Doc. 3g, at 3-16 to 3-19. Riparian corridor widths shown on Table 1 vary in width from as little as 13 feet (Pollutant Removal – Doyle et al; Knutson & Naef; May) to as large as 984 feet (Wildlife habitat – Knutson & Naef) with generally recommended riparian area widths ranging from 50 to 200 feet. *Id.* For the "Lotic Environment" (running water, rivers and streams), the City's BAS review determined that the protection and restoration of natural functions is tied to maintenance or restoration of the riparian area, including natural channel forming processes with a riparian buffer of 50-100 feet in width desirable to provide natural functions for fish and wildlife. *Id.* at 3-23.

As the Board reads SMC 25.09.200, the City has established buffer areas, both for marine shorelines and riparian corridors, which, although not the high-end of the spectrum, correlate with recommended buffer widths in the scientific literature and are based on BAS. The Board notes that on January 12, 2006, the “Conservation Community” submitted recommended revisions for marine buffers and did not request a change to the proposed 100 foot buffer. Doc. 641. The Petitioners have failed to carry their burden of proving that the City’s action in setting 100 foot buffers for shorelines and riparian corridors was not within BAS and was clearly erroneous.

Allowing Mitigated Development within Buffers. The Board notes that cities and counties, as well as state agencies, have developed a range of mechanisms for protecting critical areas with buffers while providing flexibility for access and human use. Examples include reasonable use exceptions, buffer reduction and buffer averaging provisions, farm plans incorporating best management practices, and the like. See eg., *Pilchuck Audubon v. City of Mukilteo*, CPSGMHB Case No. 05-3-0029, Final Decision and Order (Oct. 10, 2005) (buffer reduction regulations). RCW 36.70A.172(1) specifically demonstrates a legislative intent that protection is to be afforded to the *functions* and *values* of critical areas.²⁵ This Board has previously held that the GMA’s requirement to protect critical areas means that:

“... the values and functions of the ecosystem must be maintained [and that while] local governments have the discretion to adopt development regulations that may result in localized impacts upon, or even the loss of, some critical areas, such flexibility must be wielded sparingly and carefully for good cause, and in no case result in a net loss of the value and functions of such ecosystems within a watershed or other functional catchment area.”

Tulalip Tribes v. Snohomish County, CPSGMHB Case No. 96-3-0029, Final Decision and Order (Jan. 8, 1997). See also, *Pilchuck, et al. v. Snohomish County*, CPSGMHB Case No. 95-3-0047, Final Decision and Order (Dec. 6, 1995). The GMA mandates that local governments must protect the functions and values of critical areas, and buffers around certain critical areas are scientifically supported as a preferred protection strategy. The GMA does not mandate that critical area buffers must be “no build” or “no touch” areas. The Board reviews the BAS in the City’s record to determine whether the particular buffer regulations adopted – whether “no build” or fully mitigated – provide protections for functions and values within the scope of the science.

Seattle’s Regulations - Limited Development with Full Mitigation. Within marine shoreline buffer areas, the City permits development, distinguishing between water dependent/related and non-water dependent/related uses, subject to several limitations

²⁵ RCW 36.70A.172 provides: In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.(Emphasis added.)

including compliance with the SMP, mitigation of impacts to ecological functions, and limitations on vegetation removal and impervious surfaces. For the Riparian Management Area (RMA), development is permitted on lots which existed at the time Ordinance 122050 took affect but only in the 25 or 50 feet farthest from the top of the watercourse (maintaining a 50-75 foot no-build area), depending on the type of waterway.

Petitioners contend that these allowances for mitigated incursions result in narrow buffers unsupported by BAS. Petitioners point to the Board's *Hood Canal* decision, where Kitsap County's 35 foot marine shoreline buffer was ruled non-compliant. Audubon PHB, at 37. However, the problem the Board identified in the Kitsap case was not merely that the buffers were narrow but that this narrow buffer was applied without differentiation along all marine shorelines classified as Urban, Semi-Rural, or Rural under Kitsap's SMP. *Hood Canal*, at 42-46.²⁶ The Board found that the Kitsap buffers did not include BAS, as the designations were linked to SMP land use categories, rather than to the particular shoreline resources to be protected.²⁷

The issue in the present case, as the Board sees it, isn't the width of the buffers, since the City's selections are within the range of BAS, but whether the limitations set forth by the City and the required mitigation ensure protection of the critical area's functions and values. As the Petitioners asked at the HOM: "... if you allow people to build in the buffer, have you assessed the impact of that [development] on the resources that you're required to protect... [so that the action] can be justified." HOM Transcript at 28.

Seattle's Ordinance deals with the built-out environment by forbidding any additional intrusion into the 100 foot riparian or shoreline zone unless impacts to critical area functions and values are fully mitigated. HOM Transcript at 36. At the outset, the allowance for development in buffers generally is conditioned on no removal of vegetation, no increase of impervious surface, and no new impervious surface. Secondly, all impacts of development within the buffer must be mitigated so there is no net loss of ecological functions.

The Board is not persuaded that the City's program fails to protect the indicated functions of shorelines and riparian corridors. The City has undertaken a review of Best Available Science with a focus on altered urban environments. Doc. 3g. Strategies to protect riparian corridors noted within the City's BAS review and the Director's Report include control of stormwater discharge and restoration of natural functions for fish and wildlife,

²⁶ Kitsap argued that the narrow buffer, augmented by a 50 foot setback from the top of the bluff, was adequate to protect habitat at the base of the bluff, but provided no record of the extent to which the designated shores were characterized by bluffs. *Id.* at 39-40. Kitsap Association of Property Owners, one of the petitioners in that case, argued that *any* buffer along densely built-out shores was environmentally ineffective and unfairly made existing uses non-conforming, but again, the record connection between build-out and buffer requirements was lacking. *Id.* at 40, fn. 50.

²⁷ The Board did not decide whether there might be particular stretches of Kitsap's marine shoreline where a 35-foot buffer or a 35-foot buffer enhanced by a 65-foot "full mitigation" zone might meet the BAS standard, but remanded for "designations linked to shoreline resources to be protected, rather than to SMP land use categories." *Id.* at 42.

to improve hydrology, fish access, habitat connections, and floodplain reconnection. *Id.* at 3-23 to 3-24. In the riparian corridor, where the required undisturbed buffer is never less than 50 feet, modification to the LRDA must adhere to accepted mitigation strategies – stormwater control, impervious coverage, and landscape design – to offset impacts and to provide mitigation of ecological impacts resulting from the development.

In its BAS review and Director’s Report, Seattle evaluated its stormwater controls - SMC 22.802.016 – Stormwater, Drainage, and Erosion Control (Stormwater Ordinance)²⁸- especially the heightened requirements in the vicinity of shorelines and water courses. Doc. 3g, at 3-20; Doc. 3h, at 10-13. The Director’s Report noted that the proposed shoreline and riparian development standards, including requiring stormwater control, were intended, in part, to replicate the protection of ecological functions and create a larger effective riparian area by providing higher water quality, flow control, and habitat protection. Doc. 3h at 10. Although the City recognized that buffers play an important role in critical areas protection, the analysis concluded that buffers are only part of the solution to addressing impacts of stormwater runoff from broader urban impervious surfaces so as to reduce the influx of water and pollutants into the riparian system. *Id.* at 11. Under the Stormwater Ordinance, there are “additional stormwater and drainage requirements for projects within critical areas, as well as stricter grading thresholds for sites within shoreline areas.” *Id.* at 13.

The question of reliance on stormwater regulations for protection of critical areas functions and values has come before the Board in several recent decisions. The Court of Appeals set the standard in *WEAN v. Island County (WEAN)*, 122 Wn.App. 156, 180, 93 P.3d 885 (2004), stating that if a local government is relying substantially on pre-existing regulations to satisfy its obligations under RCW 36.70A.172, then “those regulations must be subject to the applicable critical areas analysis to ensure compliance with the GMA.”

In *DOE/CTED*, the City of Kent attempted to justify its decision to depart from BAS recommendations in regard to wetland protections, relying, in part, on the City’s stormwater management regulations. *DOE/CTED* at 48. Kent’s record included staff recommendations that the city would need to adopt a series of new, more stringent stormwater requirements to mitigate risks to wetlands if the proposed buffers were readopted. Without changes to the stormwater regulations, they could not be relied on to meet the GMA critical areas protection mandate. *Id.* at 48. As the Board subsequently explained:

[T]he Board’s ruling regarding Kent’s decision to rely on other regulations and programs besides buffers to protect wetlands was based on the specific facts of the case; viz, the absence of BAS in Kent’s record ensuring that wetland functions and values would be protected by these

²⁸ Last amended in 2001, this provision of the SMC sets forth flow control and stormwater treatment requirements. SMC 22.802.016(B) specially addresses the protection of streams including peak drainage water discharge rates, streambank erosion, and water quality. SMC 22.802.015 also comes into play because conformance with this section of the SMC is required in 22.801.016.

other regulations and programs. A similar question arose in *Keesling IV*, the King County CAO challenge, where the record was very different. Keesling objected to King County's action that incorporated updated protections for critical areas in revised provisions of its Surface Water Management Ordinance and its Clearing and Grading Ordinance, as well as in its Critical Areas Ordinance. The Board upheld King County's use of multiple regulations, where the County could point to (a) thorough scientific analysis that identified the specific wetlands protections that could be provided through means other than buffers and (b) corresponding revisions to its clearing and grading regulations and its stormwater regulations, as well as to its critical areas ordinance. *Keesling IV*, at 20-21, 26, 31-32.

DOE/CTED, Certificate of Appealability (July 11, 2006), at 6-7.

Although the provisions of the City's Stormwater Ordinance did not specifically undergo new scientific studies in conjunction with Ordinance 122050,²⁹ the City's BAS review for riparian areas (RMA) analyzed the role stormwater management (both quantity and quality) plays in maintaining riparian areas and considered the control of stormwater discharge as a strategy for protecting the lotic (running water, river and stream) environment. Doc. 3g, at 3-13 to 3-14, 3-23. The City determined that the application of higher stormwater flow control and treatment, as required by the Stormwater Ordinance, is consistent with BAS as it will reduce peak flows entering creeks, streams and lakes while helping to maintain good water quality. *Id.* at 22.

Like the City's program for riparian corridors, the City's regulations for shorelines also call for additional mitigation where development is conditionally permitted. SMC 25.09.200(B) states that development is permitted within the 100 foot shoreline buffer only when no vegetation is removed and impervious surface is not increased or located closer to the OHWM.³⁰ If vegetation is removed or impervious surface is increased, any impacts to the ecologic function of the shoreline must be mitigated so as to prevent a net loss of ecological function. Mitigation includes providing habitat, creating pervious ground, or replicating pervious ground functions. As with the riparian management areas, the City's BAS review and Director's Report for shorelines included an analysis of a suite of strategies to protect the nearshore environment: habitat protection to maintain existing intertidal and shallow subtidal resources, the reduction of shoreline armoring, the prevention of over-water structures, native plantings, and the application of stricter stormwater, grading, and drainage control within the shoreline area. Doc. 3g at 3-37; Doc. 3h at 12-13, 24.

²⁹ The Board notes that the City is scheduled to update its stormwater regulations in 2007 and the Board assumes the City will consider BAS and the impact of any modification to these regulations on critical areas as part of its update process. "Update of the City's Stormwater Grading and Drainage Code will identify options to increase flow and water quality related controls ..." Doc. 3h at 29; "Other measures to protect and enhance aquatic habitat in the shoreline environment will be considered as part of upcoming updates to the City's Stormwater, Grading, and Drainage Code and Shoreline Master Plan." *Id.* at 24.

³⁰ For residential uses, fully-mitigated development may be located as close as 25 of the OHWM. SMC 25.09.200(4)(B)

The Petitioners fail to demonstrate that the City's science is insufficient or that the mitigations in its regulations are ineffective. The Board must assume good faith on the part of the City and its officials in implementing the regulations in such a way that essential ecological functions are maintained.

The Petitioners **have not carried their burden** of demonstrating that the City's action, in adopting shoreline and riparian protections that allow limited, fully-mitigated incursions in buffer areas, is clearly erroneous. The City of Seattle has established buffer areas that conform to recommendations provided within their BAS review. The City has adopted development regulations intended to protect the functions and values of critical areas if intrusion into buffer areas is permitted, through the application of heightened stormwater and other standards, through requirements for full mitigation to ensure that the ecological functions of critical areas are maintained, and through replacement formulas that favor on-site restoration. The Board is not persuaded that a mistake has been made.

Conclusion

The Board finds that the Petitioners **did not carry their burden of proof** in demonstrating that the City's adoption of Ordinance 122050, SMC 25.09.200, was clearly erroneous. The City has adopted buffer areas to protect critical areas and although the City permits limited intrusion into the buffer it does so only upon a showing that the ecological functions of the critical area will be maintained. Legal Issue 3 is **dismissed**.

E. Legal Issue No. 4

The PHO states Legal Issue No. 4 as follows:

4. *Whether Ordinance No. 122050 in SMC§ 25.09.200(A)(1)(b) complies with RCW 36.70A.020(8), (9) and (10), RCW 36.70A.040(3), RCW 36.70A.060, RCW 36.70A.170, RCW 36.70A.172 and RCW 36.70A.130?*

Ordinance Provisions

Petitioners challenge the City's development standards applied to redevelopment in riparian corridors.

SMC 25.09.200(A)(1b) provides:

It is the long term goal of the City to restore the City's riparian corridors and to protect salmon passage in such corridors where scientifically justified. The City has determined that best available science supports protecting these riparian corridors as described in this chapter. *Where past development has encroached into riparian corridors, redevelopment shall be regulated subject to Section 25.09.045.*

Emphasis supplied.

SMC 25.09.045 is titled “Exemptions,” and provides, in relevant part:

A.3.a. ... The applicant for an exemption shall provide all information requested by the Director and demonstrate that the work qualifies for the exemption. The Director shall determine whether work is exempt and may impose conditions on the work to protect environmentally critical areas and buffers or other property.

D. ...[I]f existing development that encroaches within or impacts the environmentally critical area or buffer is removed, then new development that encroaches within, alters or impacts the environmentally critical area or buffer is not exempt.

F. Maintenance, repair, renovation, or structural alteration of an existing structure that does not increase the impact to, or encroach further within, or further alter an environmentally critical area or buffer is exempt from the provisions of this chapter.

G. Rebuilding or replacing structures that are destroyed by an act of nature is exempt from the provisions of this chapter, provided that action toward the rebuilding or replacement is commenced within one year of the act of nature, that the rebuilding or replacement is diligently pursued, and that the new construction or related activity does not further encroach into, or increase the impact to, or further alter an environmentally critical area or buffer and complies with restrictions on flood hazard areas reconstruction.

Discussion and Analysis

Positions of the Parties

Petitioners assert that the “last sentence in SMC 25.09.200(A)(1)(b) creates a blanket exemption for redevelopment in riparian habitats” because past development which has encroached into riparian corridors is regulated by the provisions of SMC 25.09.045 – the “Exemptions” section - effectively exempting riparian redevelopment entirely from the CAO. Audubon PHB at 38. Because of this “blanket exemption,” the Petitioners assert the City has not designated and protected critical areas as required by the GMA because “exemption, exclusions, limitations of applicability, or other drafting mechanisms” do not constitute designation and protection. *Id.* In addition, Petitioners argue that “redevelopment” is not defined, leaving the City and/or the developer free to determine the scope of any exemption. *Id.*

In response, the City alleges that redevelopment is regulated under the standard riparian corridor regulations as well as the limited exceptions found in SMC 25.09.045. City

Response at 37; HOM Transcript at 54-56.³¹ According to the City, redevelopment is regulated and SMC 25.09.045 permits applicants for redevelopment to obtain exemptions in limited situations from some, but not all, critical areas regulations. *Id.* The City notes that the provisions of SMC 25.09.045 limit redevelopment (including maintenance, repair, renovation, or structural alternation) to those actions which do not increase the impact to or encroach further within the buffer area. City Response at 39. In addition, the City points out that an exemption must be authorized by the Director who may impose conditions to protect the critical area and its associated buffer. *Id.*

In reply, Petitioners renew their argument that under the plain wording of the City's regulations a redevelopment project is not regulated by SMC 25.09.200 (Development standards for fish and wildlife habitat conservation areas) but SMC 25.09.045 (Exemptions - Regulations for Environmentally Critical Areas). Audubon Reply at 20. According to Petitioners, the term "redevelopment" is not mentioned in SMC 25.09.045 and, therefore, "redevelopment which encroaches on a riparian corridor is not regulated by the CAO unless it falls within one of the specific exemptions." *Id.*

Board Analysis

SMC 25.09.200(A) sets forth the development standards for parcels within riparian corridors and includes a provision in which applicants who desire to redevelop property that has previously encroached into a riparian corridor are redirected to the provisions of SMC 25.09.045.

Although Petitioners assert that the word "redevelopment" is not defined, SMC 25.09.520 defines "development" as all components and activities related to construction or disturbance of a site, including but not limited to land-disturbing activities.³² Applying basic principles of statutory construction, the Board will give a word that is not defined in the ordinance its ordinary meaning. *Washington State Coalition for the Homeless v. Department of Soc. & Health Servs.*, 133 Wn.2d 894, 949 P.2d 1291 (1997); *see also Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 815 P.2d 781 (1991) (plain words do not require construction). The dictionary defines the prefix *re-* as "again, for a second time, anew." *Miriam Webster Dictionary* 1998. 'Redevelopment' thus encompasses all activities related to construction or disturbance of a site that has been previously built on or disturbed. Although the City may want to clarify the statutory language, the Board reads the City's definition as providing the parameters for a definition of any subsequent *re-development*.

Addressing Petitioners' substantive concern, the Board reads the Ordinance as specifying that only those activities which the Director has determined meet the criteria set forth in

³¹ The City concedes that some of Petitioners' confusion in regard to their reading of §25.09.200(A) could have been avoided by additional punctuation after the word "regulated." *Id.* at 37. The Petitioners state that, even with the inclusion of the City's omitted punctuation, the Petitioners' concerns are not alleviated. HOM Transcript at 31.

³² "Land disturbing activity" means any activity that results in a movement of earth, or a change in the existing soil cover (both vegetative and nonvegetative) or the existing topography and includes clearing, grubbing, grading, filling, excavation, or addition or replacement of impervious surface. SMC 25.09.520.

SMC 25.09.045 (D) to (J) are exempt from the provisions of SMC 25.09 – the City’s CAO. In any event, no proposed development – including maintenance, repair, renovation, structural alteration, or rebuilding or replacement of structures destroyed by an act of nature (all essentially forms of ‘redevelopment’) – will be exempted unless the Director has determined that the proposed action *does not increase the impact to, or encroach further within, or further alter an environmentally critical area or buffer*. SMC 25.09.045(F)-(G) (Emphasis added). If the Director has determined that the proposed action will increase impacts, then the proposed action is not exempt from the provisions of SMC 25.09 and would be subject to the provisions of SMC 25.09.

Here the City has complied with the GMA’s mandate to designate critical areas. Under SMC 25.09.020(D), the City has designated Fish and Wildlife Habitat Conservation Areas, which include riparian corridors. Once critical areas have been designated, the GMA requires that these areas be protected. RCW 36.70A.040, .060, .172. As written, SMC 25.09.200 in combination with 25.09.045 protects riparian areas by ensuring that when an applicant proposes to *redevelop* property which has previously encroached into a riparian corridor, any proposed activity will not increase the impact to, encroach further within, or further alter the riparian corridor or buffer. Contrary to the Petitioners’ assertion, the only redevelopment proposals which are exempt from the development standards of SMC 25.09 are those proposals which will *not* adversely impact the designated critical area or buffer – as determined by the Director in a project-specific review. SMC 25.09.045(A).

Conclusion

The City of Seattle’s CAO regulations concerning redevelopment in riparian areas are not a model of clarity. However, Petitioners have **failed to carry the burden of proof** in demonstrating non-compliance with RCW 36.70A.020(8), (9), and (10), 36.70A.040(3), 36.70A.060, 36.70A.170, 36.70A.172, and 36.70A.130. Petitioners’ Legal Issue 4 is **dismissed**.

F. Legal Issue No. 5

The PHO states Legal Issue No. 5 as follows:

5. *Whether the measures for protecting fish and wildlife habitat conservation areas in Ordinance No. 122050, SMC§ 25.09.200, comply with RCW 36.70A.020(8), (9) and (10), RCW 36.70A.040(3), RCW 36.70A.060, RCW 36.70A.170, RCW 36.70A.172 and RCW 36.70A.130?*

Ordinance Provisions

SMC 25.09.020(D) defines a fish and wildlife habitat conservation area (**FWHCA**) as, among other things, an area designated by WDFW as priority habitat and species area or an area which provides habitat for species of local importance. SMC 25.09.200(C) sets forth development standards for FWHCA:

(1) Development on parcels containing fish and wildlife habitat conservation areas shall comply with any species habitat management plan set out in a Director's Rule. The Director may establish by rule a species habitat management plan to protect any priority species identified by the Washington State Department of Fish and Wildlife or to protect species of local importance.

(2) Any person proposing development on a parcel containing fish and wildlife habitat conservation areas shall consult with the Washington State Department of Fish and Wildlife and comply with any requirements of that agency, except as limited in subsections A and B above [SMC 25.09.200(A) and .200(B)].

Discussion and Analysis

Positions of the Parties

Petitioners concede that the City did an excellent job in designating fish and wildlife habitat conservation areas (FWHCA). Audubon PHB at 39. Despite this concession, Petitioners assert that the City has failed to adequately protect these FWHCAs by fashioning necessary measures, such as buffers, to protect the habitat from human intrusion, noise, and glare. *Id.* Petitioners point out that within the City's BAS review it was noted that buffers ranging between 400 and 800 feet for Bald Eagles and up to 3,200 feet for Great Blue Heron nesting colonies are needed to protect the birds and their habitats. *Id.* at 39-40, citing Doc. 3g, Section 4, Pages 4-1 to 4-9. Despite this fact, Petitioners allege that even though SMC 25.09.200(C) requires compliance with a species habitat management plan (SHMP), protection of the habitat is on the property being developed and that the SHMP is limited to the development parcel, thereby failing to address areas located on neighboring parcels. *Id.* 40-41.

In response, the City asserts that the Petitioners are "seeking a buffer on a buffer" and that the Petitioners do not understand the area which is included in the FWHCA. City Response at 39. The City explains that its BAS review identified WDFW's management system for eagle habitat and that its regulations require property owners within the FWHCA, whether the nest is on their property or not, to comply with a Standard Bald Eagle Management Plan (BEMP) that protects more than just the nesting site. *Id.* at 40. The City did not address the Petitioners' assertions as to Great Blue Herons.

Board's Analysis

The Board agrees with the City's reasoning, that the Petitioners misunderstand the area encompassed by a FWHCA. The habitat area includes a management zone (which may include a primary and secondary zone) around the nesting or roosting site; a development proposal on any parcel in the management zone or part of it would trigger application of the critical areas regulations.

Bald eagles are protected by both state and federal law.³³ Pursuant to WAC 232-12-011(1), the Bald Eagle is classified as ‘threatened’ in Washington State. Washington’s law, the Bald Eagle Protection Act, RCW 77.12.655, focuses on the protection of nesting and roosting habitat and requires the establishment of rules defining buffer zones around bald eagle nest and roost sites. The Bald Eagle Protection Rules are found in WAC 232-12-292, with the primary focus of the rules being to protect habitat via Bald Eagle Management Plans (BEMPs). Documents 810 and 813 are maps produced by WDFW that designate habitats for species, including the Bald Eagle and Great Blue Heron, within the Seattle area. Document 243b – *Management Recommendations for Washington’s Priority Species*, authored by WDFW - indicates that the management zone (the HCA) for a bald eagle is the first 400 feet from the nest tree (the protected or primary zone) and an additional 330 to 800 feet extending beyond the edge of the protected zone (termed the conditioned or secondary zone) which serves to further screen and protect nest sites and generally includes alternate nest locations, perch trees, and feeding sites. Doc. 243b, at 9-7 (Figure 3), 9-9, 9-10.

The Great Blue Heron is considered a “monitored species” in Washington and WDFW does not formally require protection.³⁴ Although not mandated under state law, the City included analysis of this species within its BAS review due to its status as a Species of Local Importance, as provided in SMC 25.09.200(E). Doc.3g, Section 4, at 4-6 to 4-9. Current scientific information for the Great Blue Heron recommends a 300 foot habitat protection buffer around the periphery of a colony and an undisturbed buffer of at least 328 feet around foraging areas, especially wetlands. *Id.* at 4-8 to 4-9. Intense activities, such as construction or logging that should not occur within 3,200 feet of a colony during the nesting season. *Id.* at 4-9.

In Seattle, SMC 25.09.020(D) defines a FWHCA as, among other things, an area designated by WDFW as priority habitat and species area or an area which provides habitat for species of local importance. SMC 25.09.200(C) sets forth development standards for FWHCA. Subpart C states that development on parcels containing FWHCA “shall comply with any species habitat management plan (to protect any priority species identified by (WDFW) or to protect species of local importance) set out in a Director’s Rule.” SMC 25.09.200(C)(1) (Emphasis added).

Two Director’s Rules have been adopted by the Director of Seattle Department of Planning and Development (DPD) with respect to bald eagle FWHCAs: a “Standard Bald

³³ The federal laws are the Bald and Golden Eagle Protection Act, the Migratory Bird Treaty Act, and the Endangered Species Act. These laws primarily address nest tree protection and protection from harassment. The Bald Eagle is currently listed as “threatened” under federal law.

³⁴ State “monitored species” are not considered Species of Concern, but are monitored for status and distribution. They are managed by the WDFW, as needed, to prevent them from becoming endangered, threatened, or sensitive.

Eagle Management Plan” (Standard BEMP) and a “Site-Specific Bald Eagle Management Plan” (Specific BEMP).³⁵ Doc. 815.

With a Standard BEMP, for activities which are proposed within 800 feet of an eagle nest, but not within 400 feet of the nest, or activities that are proposed within 250 feet of the shoreline and within one-half mile of an eagle nest, but not within 400 feet of the nest, the applicant/developer must retain all known perch trees and all conifers greater than or equal to 24 inches diameter at breast height (DBH); all cottonwoods greater than or equal to 20 inches DBH; at least 50 percent of pre-clearing/construction conifer stands with diameter distribution representative of the original stand; and no more than 30 percent of the live crown of any tree may be removed although windowing and low-limbing is acceptable. Doc. 815. A Specific BEMP, requested through WDFW, is required for activities proposed within 400 feet of an eagle nest or within one-quarter mile of a communal roost, or, if the property owner feels that the conditions of the Standard BEMP cannot be met. *Id.* In addition, SMC 25.09.200(C)(2) requires that any person proposing development on a parcel containing FWHCA must consult with the WDFW and comply with any requirements of that agency.

Given the language of SMC 25.09.200 and the BEMPs, both standard and specific, the Board finds that more than just the nesting site is protected. In fact, the 330 to 800 feet conditioned zone serves as a buffer to the protected ‘nesting’ zone, essentially creating a 700 to 1200 feet circle of protection around the eagle’s nest. This entire area is the FWHCA. Based on the size of properties within the City, it is reasonable to assume that these buffer areas will extend beyond the parcel on which the nest is located, so that any development proposed on neighboring and/or adjacent parcels which would occur within the FWHCA that overlays the parcel would be required to comply with SMC 25.09.200 and any applicable SHMP. Since the City has yet to adopt a SHMP for the Great Blue Heron, the Board can only assume that it will act, as it did with the Bald Eagle, in conformance with the scientific information provided to it in its BAS review.

Conclusion

The Board finds and concludes that Petitioners have **failed to carry their burden** of demonstrating noncompliance with the Act. The Board finds that the City’s measures to protect fish and wildlife habitat conservation areas, through regulating development on any parcel within the management zone for priority species habitat, are not clearly erroneous. Legal Issue No. 5 is **dismissed**.

G. Legal Issue No. 6 – Invalidity

The Board has previously held that a request for invalidity is a prayer for relief and, as such, does not need to be framed in the PFR as a legal issue. *See King County v. Snohomish County*, CPSGMHB Case No. 03-3-0011, Final Decision and Order, (Oct. 13,

³⁵ The City is in the process of developing a specific management plan for the Great Blue Heron. See recommendations provided in the City’s BAS Review (Doc. 3g at 4-6 to 4-9) and Director’s Report (Doc. 3h at 13.

2003) at 18. Nevertheless, Petitioner has framed the request for an order of invalidity as a Legal Issue, set forth in the PHO as Legal Issue No. 6:

6. *Does the continued validity of the violations of the GMA, as described above, substantially interfere with the fulfillment of the goals of the GMA such that the enactments at issue should be held invalid pursuant to RCW 36.70A.302?*

Pursuant to RCW 36.70A.302,³⁶ the Board may issue an order of invalidity only following a finding of noncompliance, a remand to the city or county, and a determination that the continued validity of the challenged ordinance would substantially interfere with the goals of the GMA.

In the present proceeding, the Board has found Ordinance 122050, Section 25.09.020 noncompliant with RCW36.70A.040(3), .170(2), .172(1) and .130 and is remanding the Ordinance to the City for more complete designation of geologically hazardous areas (whether by mapping or by criteria).³⁷ Petitioners have made no persuasive argument that continued validity of this section of the Ordinance interferes with the goals of the GMA. In fact, an order of invalidity would remove important protections for steep slopes and other hazard zones. The Board finds and concludes that the provisions of the Ordinance, though not fully in compliance with critical areas designation requirements, do not substantially interfere with fulfillment of the goals of the GMA. Petitioners' request for an order of invalidity is **denied**. Legal Issue No. 6 is **dismissed**.

V. ORDER

Based upon review of the Petition for Review, the Board's Rules of Practice and Procedure, the briefs and exhibits submitted by the parties, having considered the arguments of the parties, prior orders by this Board and the other Growth Boards, case law, and having deliberated on the matter, the Board ORDERS:

1. Petitioners failed to carry their burden of proof with respect to Legal Issue Nos. 2, 3, 4, 5, and 6, challenging the City of Seattle's adoption of various provisions of Ordinance No. 122050 for failure to comply with RCW 36.70A.040(3); RCW

³⁶ RCW 36.70A.302 provides:

- (1) A board may determine that part or all of a comprehensive plan or development regulation are invalid if the board:
 - (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
 - (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
 - (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

³⁷ The Board acknowledges that, upon designation of these hazard zones, the safety issues will in all likelihood be addressed through the City's Building Code and/or emergency management system.

36.70A.060; RCW 36.70A.170; RCW 36.70A.172; RCW 36.70A.130; RCW 36.70A.020 (8), (9), and (10). Legal Issue Nos. 2, 3, 4, 5, and 6 are **dismissed**.

2. The City of Seattle's adoption of Ordinance No. 122050, the Critical Areas Ordinance, was **clearly erroneous** with respect to failure to designate certain geologically hazardous areas, as set forth in this order. The Ordinance provision challenged in Legal Issue No. 1 [Section 25.09.020(A)] **does not comply** with the requirements of RCW 36.70A.040(3), .170(2), .172(1), and .130(1).
3. Therefore the Board **remands** Ordinance No. 122050 [Section 25.09.020(A)] to the City of Seattle with direction to the City to take legislative action to comply with the requirements of the GMA as set forth in this Order.
4. The Board sets the following schedule for the City's compliance:
 - The Board establishes **April 11, 2007**, as the deadline for the City of Seattle to take appropriate legislative action.
 - By no later than **April 25, 2007**, the City of Seattle shall file with the Board an original and four copies of the legislative enactment described above, along with a statement of how the enactment complies with this Order (**Statement of Actions Taken to Comply - SATC**). By this same date, the City shall also file a **Compliance Index**, listing the procedures (meetings, hearings etc.) occurring during the compliance period and materials (documents, reports, analysis, testimony, etc.) considered during the compliance period in taking the compliance action.
 - By no later than **May 9, 2007**,³⁸ the Petitioners may file with the Board an original and four copies of Response to the City's SATC.
 - By no later than **May 16, 2007**, the City may file with the Board a Reply to Petitioners' Response.
 - Each of the pleadings listed above shall be simultaneously served on the other party to this proceeding.
 - Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance Hearing in this matter for **May 24, 2007, at 10:00 a.m.** The hearing will be held at the Board's offices. If the parties so stipulate, the Board will consider conducting the Compliance Hearing telephonically. If the City of Seattle takes the required legislative action prior to the April 11, 2007, deadline set forth in this Order, the City may file a motion with the Board requesting an adjustment to this compliance schedule.

³⁸ May 9, 2007, is also the deadline for a person to file a request to participate as a "participant" in the compliance proceeding. See RCW 36.70A.330(2). The Compliance Hearing is limited to determining whether the City's remand actions comply with the Legal Issues addressed and remanded in this FDO.

So ORDERED this 11th day of December, 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

David O. Earling
Board Member

Edward G. McGuire, AICP
Board Member

Margaret A. Pageler
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.³⁹

³⁹ 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 motion 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 served on 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, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within 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.

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

APPENDIX A
Chronology of Proceedings of CPSGMHB Case No. 06-3-0024

On June 12, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from the Seattle Audubon Society, Yes for Seattle, Heron Habitat Helpers and Eugene D. Hoglund (**Petitioners** or **Seattle Audubon**). The matter was assigned Case No. 06-3-0024, and is hereafter referred to as *Seattle Audubon v. City of Seattle*. Board member Edward G. McGuire will serve as the Presiding Officer (**PO**) for this matter. Petitioners challenge the City of Seattle's (**Respondent** or the **City**) adoption of Ordinance No. 122050 updating and amending the City's Environmentally Critical Areas regulations (**Critical Area Ordinance** or **CAO**). Petitioners contend that certain CAO provisions pertaining to geologically hazardous areas, wetlands, shorelines and fish and wildlife conservation areas are noncompliant with various provisions of the Growth Management Act (**GMA** or **Act**).

On June 15, 2006, the Board received a "Notice of Appearance and Notice of Unavailability of Counsel" from the City of Seattle indicating that Eleanore S. Baxendale would be representing the City.

On June 19, 2006, the Board issued a "Notice of Hearing" in the above-captioned case. The Order set a date for a prehearing conference (**PHC**) and established a tentative schedule for the case.

On July 6, 2006, the Board received "Respondent the City of Seattle's Motion to Clarify Issues and Memorandum on Matters Set for Prehearing Conference."

On July 17, 2006, the Board conducted the PHC at the Board's offices, Seattle. Board member Edward G. McGuire, Presiding Officer (**PO**) in this matter, conducted the conference. Knoll Lowney represented Petitioners Seattle Audubon Society, Yes for Seattle, Heron Habitat Helpers and Eugene D. Hoglund. Eugene D. Hoglund was also present. Eleanore Baxendale represented Respondent City of Seattle. Board law clerk Julie Taylor and Board externs Kris Hollingshead and Brian Payne also attended.

Presiding Officer McGuire informed the parties that when a third member to the Board is appointed by the Governor, the new member will likely become the Presiding Officer in this matter. The parties will be informed when the transfer occurs.

The City provided the Board, and Petitioners with the City's "Index to Record" (**Index**) in this matter. The Index is 16 pages, listing Council Documents – 1 to 10f, Written Public Comments Submitted to Council Generally – 200 to 273, Comments Sent to Individual Council Members – 600-659, and Public Comments Posted on DPD Website – 800-803. More than one item or document is typically listed under each Index Number.

The Board discussed with the parties the possibility of settling or mediating their dispute to eliminate or narrow the issues. The Board encourages such efforts and can arrange for mediation or settlement assistance by members or the Eastern or Western Growth

Management Hearings Boards. If the parties are pursuing settlement, with or without Board assistance, they may so stipulate in a request for a settlement extension. The Board is now empowered to grant settlement extensions for up to ninety days.

The Board then reviewed its procedures for the Hearing, including the composition and filing of the Index to the Record Below; Supplemental Exhibits; Dispositive Motions; the Legal Issues to be decided; and a Final Schedule of deadlines.

Mr. Lowney indicated that Petitioners were seeking another attorney to represent them in this matter and would inform the Board, filing a notice of appearance, when such a representative was retained. Until that event occurs, Mr. Lowney is representing Petitioners.

The Parties and the Board discussed the six Legal Issues as set forth in the PFR in light of the City's "Motion to Clarify." Each issue was discussed, explained and clarified with only minor revisions being required. Petitioners were given until 12:00 p.m. [noon] on July 18, 2006 to provide clarification and possible additional citations pertaining to "exemptions" as referenced in Legal Issue 2. Any other modifications made at the PHC are reflected in the Statement of Legal Issues, *infra*.

On July 18, 2006, the Board received an e-mail from Petitioners' attorney indicating no additional citations would be provided for Legal Issue 2.

On July 18, 2006, the Board issued its Prehearing Order.

On August 3, 2006, the Board received a Notice of Appearance of Roger Leed as attorney for Petitioners. On the same day the Board received the City of Seattle's Motion to Amend Index and Notice of Filing Amended Index of Record. There were no objections to the City's additional documents, which were taken from websites of DOE and USGS upon which the City relied in developing its CAO.

No further motions were filed during the time established for motions on the case calendar.

On September 14, 2006, the Board received Petitioners' Prehearing Brief with exhibits.

On September 18, 2006, the Board received Petitioner Eugene Hogle's Supplemental Prehearing Brief with 6 exhibits.

On September 27, 2006, the Board issued a Notice of Change of Board Offices and Presiding Officer, notifying the parties that Board member Margaret Pageler is assigned as the Presiding Officer in the place of Edward McGuire. The Notice also indicated the Board's new address and change of location for the Hearing on the Merits.

On October 5, 2006, the Board received the City of Seattle's Second Motion to Supplement the Record, with seven exhibits, and the City of Seattle Response and

Motions Objecting to Standing, with 20 exhibits. A Table of Exhibits was filed separately on October 10.

On October 11, 2006, the Board received Petitioner Eugene D. Hoglund's Reply Brief to City of Seattle's Second Motion to Supplement the Record.

On October 12, 2006, the Board received Petitioners' Prehearing Reply Brief with 4 exhibits.

The Hearing on the Merits was convened on October 19, 2006, at 10:00 a.m in the Palouse Conference Room, 20th Floor, 800 Fifth Avenue, Seattle, and adjourned at approximately 12:45. Board member Margaret Pageler presided. Board Members Ed McGuire and Dave Earling attended, along with Board law clerk Julie Taylor. Petitioners were represented by Roger Leed, with Eugene Hoglund also present. Eleanor Baxendale represented the City of Seattle, and was accompanied by City planners Miles Mayhew and Maggie Glowacki. City attorney Sandy Watson also attended. Court reporting services were provided by Eva Jankovits of Byers and Anderson. The Board ordered a transcript of the proceedings.

On October 23, 2006, the Board received Petitioners' Adoption of Briefing.

On October 24, 2006, the Board received City of Seattle Opposition to Petitioners' Notice of Adoption, and a letter from the City of Seattle with clarification of wetland square footage in response to a question raised by the Board at the HOM.

On October 30, 2006, the Board received the transcript of the Hearing on the Merits.