

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

TAHOMA AUDUBON SOCIETY,)	
CITIZENS FOR A HEALTHY BAY,)	Case No. 06-3-0001
PEOPLE FOR PUGET SOUND, and)	
FUTUREWISE,)	<i>(Citizens for a Healthy Bay)</i>
)	
Petitioners,)	
)	FINAL DECISION AND ORDER
v.)	
)	
THE CITY OF TACOMA,)	
)	
Respondent.)	
)	

SYNOPSIS

The Board takes official notice of the intense and costly state and regional efforts to protect endangered salmon and restore Puget Sound. One key component of the regional strategy is the expectation that each Central Puget Sound jurisdiction has enacted science-based development regulations that protect marine shoreline habitats, in compliance with RCW 36.70A.130(1)(c) and RCW 36.70A.172(1). The City of Tacoma has not done so.

The City of Tacoma adopted Substitute Ordinance No. 27341, its updated Critical Areas Preservation Ordinance, in November, 2005. Tahoma Audubon Society, Citizens for a Healthy Bay, People for Puget Sound, and Futurewise challenged the provisions in the Ordinance concerning marine shorelines. The Ordinance designates all the marine shores of the City as Fish and Wildlife Habitat Conservation Areas for salmon habitat. TMC 13.11.510. Petitioners argue that there must also be specific designations for forage fish spawning areas, aquatic vegetation, and other marine species. However, the Board found that the science in the record cited by Petitioners appeared to indicate that the vegetated shoreline buffers requested by Petitioners would protect the full range of functions and values which would be called for by a more varied designation scheme. The Board determined that Petitioners did not meet their burden of proving that the designation was clearly erroneous.

However, the Board determined that the City of Tacoma did not comply with the requirement to protect the designated marine shoreline critical areas. While the evidence of best available science presented by Petitioners was minimal, the City provided none at all. Instead, the City relies on a site-by-site project-specific process which has no apparent basis in science. TMC

13.11.520. The Board found the Ordinance non-compliant with RCW 36.70A.130(1)(c) and RCW 36.70A.172. In light of the City's extended delay in protecting marine critical areas, the Board remanded the Ordinance and set a compliance schedule.

I. BACKGROUND¹

On January 13, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Tahoma Audubon Society, Citizens for a Healthy Bay, People for Puget Sound, and Futurewise (**Petitioners** or **Citizens**). The matter was assigned Case No. 06-3-0001, and is hereafter referred to as *Citizens for a Healthy Bay et. al. v. City of Tacoma*. Board member Margaret Pageler is the Presiding Officer (**PO**) for this matter. Petitioners challenge the City of Tacoma's (**City** or **Tacoma**) adoption of Substitute Ordinance No. 27431 updating its critical areas regulations, in particular the regulations concerning Tacoma's marine shorelines at TMC 13.11.510 and .520, as noncompliant with provisions of the Growth Management Act (**GMA** or **Act**).

In February, 2006, prior to the scheduled Prehearing Conference, the Board received a Joint Motion for Extension of Case Schedule from Petitioners and Respondent requesting a ninety day settlement extension. Five additional requests for settlement extension were filed, and the Board issued six consecutive settlement extension orders, amending the case schedule with each order. In August, 2007, the Prehearing Conference was convened and the Board issued its Prehearing Order. The Board did not calendar a motions practice, and no motions were filed by either party prior to the Hearing on the Merits.

Prehearing briefs were timely submitted, as follows:

- Petitioners' Prehearing Brief, with 7 attachments – **Petitioners' PHB**
- Respondent's Prehearing Brief – **City Response**
- Petitioners' Reply, with 2 attachments – **Petitioners' Reply**

The Hearing on the Merits was convened on October 18, 2007, at 10:25 a.m. in the conference room of the Board's offices, 800 Fifth Avenue, Seattle, and adjourned at 11:15 a.m. Board members Margaret Pageler, Ed McGuire and Dave Earling attended. Keith Scully appeared for Petitioners. The City of Tacoma was represented by Steven Victor, with City planners Steve Atkinson and Molly Harris also in attendance. Petitioners provided a power point, which was also provided as a set of printed slides and was **admitted** as **Hearing on the Merits Exhibit 1**.

The Hearing on the Merits afforded the Board the opportunity to ask a number of questions and develop a clear understanding of the City's plan and policies and the Petitioners' challenge. Court reporting services were provided by Shelley Hoyt of Byers and Anderson, Inc. The Board did not order a transcript of the Hearing.

On October 22, 2007, the Board received Petitioners' Supplemental Citation to Evidence in the Record and Motion, with three attachments.² Petitioners moved the Board to consider the post-

¹ A complete chronology of proceedings in this matter is attached as Appendix A.

² Documents submitted were from the City's Index VIII (I):

1. Glasoe and Beale, *New Approaches to Shellfish Protection in Puget Sound*. Proceedings of 2005 Puget Sound Georgia Basin Research Conference (2005).

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hearing submission of evidence from the City's record. The City filed no objection. Accordingly, the Board **grants** Petitioners' motion.

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 are 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). As articulated recently by the Supreme Court, "the Board is empowered to determine whether [city] decisions comply with GMA requirements, to remand noncompliant ordinances to [cities], and even to invalidate part or all of a comprehensive plan or development regulation until it is brought into compliance." *Lewis County v. Western Washington Growth Management Hearings Board (Lewis County)*, 157 Wn.2d 488 at 498, fn. 7, 139 P.3d 1096 (2006).

Legislative enactments adopted by the City of Tacoma 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] 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 clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dept of Ecology v. PUD 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).³

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 Tacoma in how it plans for growth,

2. Brennan, et al., *Juvenile Salmon Composition, Timing, Distribution and Diet in Marine Nearshore Waters of Puget Sound in 2001-2002*. King County Department of Parks and Natural Resources (2004).

3. Lemieux, et al., *Current Marine Riparian Setback Standards Used by DFO in BC*. Proceedings of DFO/PSAT Workshop, Tsawassen, BC (2004).

³ The State Supreme Court's most recent delineation of the "clearly erroneous" standard is found in *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, Docket Number 76339-9 (Sept. 13, 2007), at 20, fn. 8:

Without question, the "clearly erroneous" standard requires that the Board give deference to the county, but all standards of review require as much in the context of administrative action. The relevant question is the degree of deference to be granted under the "clearly erroneous" standard. The amount is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the county's actions a "critical review" and is a "more intense standard of review" than the arbitrary and capricious standard. *See, e.g., Cougar Mountain Assocs. V. King County*, 111 Wn.2d 742, 749, 765 P.2d 264 (1988). And even the more deferential "arbitrary and capricious" standard must not be used as a "rubber stamp" of administrative actions. *See Ocean Advocates v. United States Army Corps of Eng'rs*, 361 F.3d 1108, 1118, 1119 (9th Cir. 2004).

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provided that its policy choices are consistent with the goals and requirements of the GMA. The Supreme Court has made clear: “Local discretion is bounded . . . by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). In *Lewis County*, the Court reaffirmed this ruling, stating: “[T]he GMA says that Board deference to [city] decisions extends only as far as such decisions comply with GMA goals and requirements. In other words, there are bounds.” 157 Wn. 2d at 506, fn. 16.

The scope of the Board’s review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to only those issues presented in a timely petition for review. RCW 36.70A.290(1).

II. BOARD JURISDICTION AND THE CHALLENGED ACTION

A. Board Jurisdiction

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

B. The Challenged Action

RCW 36.70A.130(1)(c) requires GMA cities and counties to review and revise their critical areas ordinances to ensure compliance with the requirements of the Act. For the City of Tacoma, the statutory deadline was December 1, 2004, legislatively extended to December 1, 2005. RCW 36.70A.130 (4)(a) and (8)(a). The extension gave cities and counties an additional year to assemble and review best available science, complete their own studies and inventories, and conduct a robust public process, prior to adoption of the required regulations.

On November 15, 2005, the City of Tacoma adopted Substitute Ordinance No. 27431, the City’s updated Critical Areas Preservation Ordinance (**CAPO**). The Ordinance designates all of Tacoma’s marine shorelines as critical areas, identifying the shorelines as Fish and Wildlife Habitat Conservation Areas (**FWHCA**) based on the presence of Chinook salmon, a federally-listed endangered species. TMC 13.11.510. The Ordinance indicates that habitat areas *may* be designated based on shellfish beds, kelp and eel grass beds, herring and smelt spawning areas, and other priority habitats and species. TMC 13.11.510(A)(1). However, the areas that *will* be designated are habitats for endangered species (TMC 13.11.510(A)(2)), and on this basis, all Tacoma’s marine shorelines are designated FWHCA.

The Ordinance contains no buffer requirements for marine shorelines. Instead, activities in the Fish and Wildlife Habitat Conservation Area are managed through site-specific permitting which is required to be “consistent with the species located there and all applicable state and federal regulations.” TCC 13.11.520. Activities landward of the ordinary high water mark (**OHWM**) are

regulated under the City's development regulations, and activities waterward of the OHWM are regulated under the City's Shoreline Master Program (SMP).

The Petitioners are four environmental advocacy organizations – Tahoma Audubon Society, Citizens for a Healthy Bay, People for Puget Sound, and Futurewise. Petitioners generally credit the City of Tacoma with enacting effective, science-based critical areas protections, except with respect to marine shorelines. Petitioners contend that the GMA requires, first, that Tacoma designate marine shorelines for additional habitat values, not just salmon, and second, that protective regulations must include vegetative buffers.

IV. LEGAL ISSUES AND DISCUSSION

The PHO sets forth Legal Issue No. 1 as follows:

Legal Issue No. 1: Does the adoption of Substitute Ordinance 27431, adopting an updated and revised critical area ordinance, fail to comply with RCW 36.70A.130, RCW 36.70A.020(9), RCW 36.70A.020(10), RCW 36.70A.060, RCW 36.70A.170 and RCW 36.70A.172 when it adopts a critical areas ordinance that doesn't designate any marine shorelines as critical areas and doesn't adopt development regulations based on best available science to protect the functions and values of marine shoreline habitats as required by the GMA?

Applicable Law

RCW 36.70A.040(3):

(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:

(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.

RCW 36.70A.060(2):

(2) Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170. For counties and cities that are required or choose to plan under RCW 36.70A.040, such development regulations shall be adopted on or before September 1, 1991. For the remainder of the counties and cities, such development regulations shall be adopted on or before March 1, 1992.

RCW 36.70A.020:

(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 recreational 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.

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.

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....

Discussion and Analysis Failure to Designate

Positions of the Parties

Petitioners first contend that Tacoma has failed to comply with the GMA requirement to *designate* critical areas. Petitioners acknowledge that the Ordinance designated *all* Tacoma marine shores as FWHCA, but argue that more specific delineation is needed. Petitioners state that merely protecting the shores as salmon habitat ignores the importance of other resources such as habitat for forage fish and aquatic vegetation (i.e. eel grass and kelp). Petitioners point out that the Ordinance allows, but does not require, designation of “tidelands and bedlands suitable for shellfish harvest” and “kelp and eelgrass beds and herring and smelt spawning areas.” TMC 13.11.510(A)(1) “Potential Fish and Wildlife Habitat Conservation Areas.”

Petitioners' argument is that without specific designation of areas related to these resources, in addition to salmon, Tacoma cannot provide regulatory protection for all the relevant functions and values of the critical areas.

The City of Tacoma responds by underscoring that all of Tacoma's marine waters and shorelines are habitat for Chinook salmon and thus TMC 13.11.510A designates all marine shores as FWHCA. City Response, at 5-6. The City states that "there is no question that a substantial portion of the City's shoreline areas would be affected by Petitioners' desire for the City to designate and protect specific marine habitats of local importance and adopt corresponding regulations that would protect those locations." *Id.* at 11-12. The City argues, however, that the indicated review is properly deferred to the comprehensive updating of its SMP which is currently underway and scheduled for December 2008 completion. *Id.* at 10-12.

Petitioners reply that Tacoma's marine shores "have more functions and values than merely providing salmon habitat." Petitioners' Reply, at 2. "The city's shorelines provide for forage fish, including surf smelt spawning areas, and aquatic vegetation, including eel grass and kelp." *Id.* Petitioners assert that Tacoma's designation of marine critical areas cannot be linked to just one species. *Id.* at 3.

Board Discussion

CTED's regulations provide the following guidance concerning fish and wildlife habitat conservation areas:

Fish and wildlife habitat conservation means land management for maintaining species in suitable habitat within their natural geographic distribution....

(a) Fish and wildlife habitat conservation areas include:

- (i) Areas with which endangered, threatened, and sensitive species have a primary association;
- (ii) Habitats and species of local importance;
- (iii) Commercial and recreational shellfish areas;
- (iv) Kelp and eelgrass beds; herring and smelt spawning areas;
- (v) Naturally occurring ponds under twenty acres and their submerged aquatic beds that provide fish or wildlife habitat;
- (vi) Waters of the state;
- (vii) Lakes, ponds, streams, and rivers planted with game fish by a governmental or tribal entity;
- (viii) State natural area preserves and natural resource conservation areas.

WAC 365-190-080(a).

In *Tahoma Audubon Society v. Pierce County*, CPSGMHB Case No. 05-3-0004c, Final Decision and Order (July 12, 2005), this Board reviewed Pierce County's critical areas regulations for marine shorelines. Pierce County had designated kelp and eel grass beds, eagle nesting areas, forage fish spawning areas, salt marches, shellfish beds, steep slopes, and other critical areas along its marine shores, but had not designated marine shoreline salmon habitat, despite a *specific inventory of high-value salmon habitat* in the County's record. The County argued that the identified designations covered a significant percentage of its marine shores and would provide sufficient protection for migrating salmon. The Board disagreed, and ruled that the County's failure to designate known salmon habitat did not comply with the "best available

science” requirement of RCW 36.70A.172(1). On remand, the County identified and designated an additional 20 miles of marine shorelines as priority habitat for salmon. Order Finding Compliance (Jan. 12, 2006).

In the present case, by contrast, the City of Tacoma has designated *all* of its marine shorelines as FWHCA because of the presence of Chinook salmon. Petitioners argue that the City is required, in addition, to specifically identify and designate habitat for other fish or aquatic resources, even though it will already be within the FWHCA identified for salmon.

Petitioners’ arguments fall short in two respects. First, with two exceptions, Petitioners have failed to document these other types of resources. Second, Petitioners do not indicate that protecting these other resources would require a different strategy than the strategy for protecting salmon habitat. Indeed, Petitioners spend considerable effort arguing that vegetated buffers are essential for protecting *all* the functions and values at issue.

The GMA makes clear that Petitioners bear the burden of demonstrating non-compliance with the GMA. Throughout their pleadings here, Petitioners argue generally that Tacoma’s shorelines are habitat for significant resources in addition to salmon, based primarily on generalized surveys of Puget Sound shores. The sparse record provided to the Board on this question is contained in Petitioners’ Tab 7. In this material, the Board finds surf smelt spawning beaches identified and indicated by a smudge on the map along Tacoma’s northeast marine shorelines. At the Hearing on the Merits, Petitioners also pointed out in Tab 7 a mapping of sargassum, a non-indigenous brown algae, along Tacoma’s shores. Petitioners have failed to provide the science identifying the other alleged resources in Tacoma’s marine shorelines. This failure is all the more surprising because several of these petitioning organizations hold themselves out as stewards of Puget Sound and of Commencement Bay, yet they apparently failed to put into the City’s record the necessary documentation of the marine resources they now claim should be designated.

Secondly, the Petitioners have not shown that failure to designate these other habitat resources would make a practical difference in the protection of the functions and values at issue. In fact, Petitioners argue, citing to science in the record, that vegetated shoreline buffers will serve to protect the habitat of not only salmon, but also forage fish, kelp and eel grass, and other target species.⁴ On this record, the Petitioners have **not carried their burden** of demonstrating that designating all the shorelines for salmon habitat is clearly erroneous.

While the Board recognizes that a differentiation of resources to be protected by buffering may be relevant to the appropriate width of a marine buffer, that is not the question here. In *Hood Canal v. Kitsap County*, CPSGMHB Case No. 06-3-0012c, Final Decision and Order (Aug. 12, 2006), at 40-41, the Board stated:

In the matter before us, Kitsap County chose a buffer-based regulatory scheme to protect the functions and values associated with marine shorelines designated as fish and wildlife habitat conservation areas. However, the County has not differentiated among the functions and values that may need to be protected on

⁴ Petitioners’ supplemental submission includes a study indicating marine buffers are protective of shellfish beds. Glasoe and Beale, *New Approaches to Shellfish Protection in Puget Sound*. Proceedings of 2005 Puget Sound Georgia Basin Research Conference (2005).

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shorelines that serve, for example, as herring and smelt spawning areas, juvenile chum rearing areas, Chinook migratory passages, shellfish beds or have other values. Rather, they have chosen an undifferentiated buffer width [35 feet] that is at or below the bottom of the effective range for pollutant and sediment removal cited in *May*. And they have applied that buffer to SMP land use classifications, not to the location of specific fish and wildlife habitat.

In the public process leading up to adoption of these provisions of the CAO, state resource agencies urged the County to *differentiate* ecological resources on the shoreline and also to differentiate protection levels for urban and rural areas. WDFW urged Kitsap to specifically identify the most important shoreline reaches to be protected and to adopt significantly larger [150-250 feet] marine shoreline buffers. “WDFW requests that the County have kelp and eelgrass beds, shellfish areas, forage fish spawning areas, feeder bluffs, riparian areas, and juvenile salmon migration corridors as separate listed categories. *This will allow specific protection to be applied to these critical areas....*” Index 1293 (WDFW letter Aug. 6, 2004), at 7 (emphasis supplied).

... Protection for critical areas *functions and values* should be based first on the needs of the resource as determined by BAS....

Here Kitsap County has opted to designate its whole shoreline as critical area but then has not followed through with the protection of *all* the applicable functions and values.

On remand, Kitsap County increased its marine buffers within the range of best available science contained in the County’s record for protecting a broad range of habitat functions and values, and the Board found compliance because protections were adequate for a variety of specific resources. Order Finding Compliance (Apr. 30, 2007).

Like Kitsap County, the City of Tacoma has designated all its marine shoreline as salmon habitat but has failed to provide protection based on best available science. But Petitioners have *put nothing in the record* here suggesting that, if science-based regulations are adopted to protect salmon habitat, such regulations will not be sufficient to protect the other marine resources which they argue should be identified.

Failure to Protect

Positions of the Parties

Petitioners allege two flaws in the protection scheme in the Ordinance. First, the Ordinance does not require buffers to protect shorelines or the water from activities on shore. Petitioners’ PHB, at 17. Petitioners point to Board cases recognizing the importance of saltwater buffers. *Seattle Audubon Society v. City of Seattle*, CPSGMHB Case No. 06-3-0024, Final Decision and Order (Dec. 11, 2006), at 34-35; *Hood Canal v. Kitsap County*, *supra*, FDO, at 44. Petitioners state that Tacoma’s record includes the science supporting marine buffers as “the best means of protecting

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its critical areas.” Petitioners PHB, at 19, referencing Tab 6, Index No. VIII(H), Brown, *et al.*, *Best Available Science: Volume I: A Review of Science Literature*, p. 7-24 (King County Executive Report, Seattle, 2004).

Second, Petitioners object to Tacoma’s reliance on “all applicable state and federal regulations,” rather than enacting its own protective regulations. Petitioners PHB, at 19-21. Petitioners point out that the state regulates hunting and fishing but does not regulate habitat; federal regulation of habitat is limited to “critical habitat” for endangered or threatened species. *Id.* Thus, Petitioners contend, the requirement of the GMA to consider BAS in adopting development regulations that protect all functions and values of critical areas is not satisfied by reliance on state and federal regulations. *Id.*

The City of Tacoma responds by detailing the process it uses for consideration of applications for shoreline substantial development permits or substantial development/conditional use/variance permits. City Response, at 6-9. The City points out that the permit review requires detailed evaluations and mitigation of potential impacts to anadromous fish, aquatic habitat, and adjacent critical areas. *Id.* at 7-8. Where projects trigger review under SEPA, review by Washington Department of Fish and Wildlife through the Hydraulics Code, review by the U.S. Army Corps of Engineers through Section 404, review by Washington Department of Ecology for water quality certification, or review by the Puyallup Tribe for development impinging on Tribal trust interests in Commencement Bay, the GMA requirements for protection of FWHCA along Tacoma’s marine shorelines are fully satisfied, the City asserts. *Id.* at 9.

Finally, Tacoma argues that its current process for updating its SMP, with final review and adoption by Tacoma City Council planned for December 2008, is the “only lawful and practical manner” in which the City can comply with Petitioners’ concerns and requests. *Id.* at 12.

Petitioners’ Reply reiterates the role of vegetated marine buffers in protecting not only salmon habitat but also sand lance and surf smelt spawning areas and eel grass beds. Petitioners’ Reply, at 2-3, citing Tab 1, Index No. VIII(H), Williams and Thom, *White Paper: Marine and Estuarine Shoreline Modification Issues*, pp. 40-41 (Pacific Northwest National Laboratory, Battelle, Sequim, 2001). Petitioners point out that Tacoma’s permit process decision criteria do not contain “any regulation that protects the existing riparian vegetation that the salmon, surf smelt and aquatic vegetation depend upon.” *Id.* at 3. The Petitioners contend that neither SEPA, nor the City’s current SMP, nor other state or federal agency systems meet the GMA requirement that BAS be used to protect all functions and values of fish and wildlife habitat along marine shorelines. *Id.* at 4.

Board Discussion

The Board takes **official notice** of the state and federal focus on Puget Sound and on local salmon species. In the last eight years, the federal government has listed several species of Puget Sound anadromous fish under the Endangered Species Act, 16 U.S.C. 1531, et seq. In response, communities around the Sound, through collaborative watershed planning and other efforts, have sponsored studies and nearshore inventories to learn how best to protect salmon and other

aquatic resources. The Governor has launched an initiative to restore Puget Sound, supported by the Legislature with the creation and funding of the Puget Sound Partnership. One key component of the Puget Sound strategy is the expectation that each city and county has enacted science-based development regulations that protect marine shoreline habitats, as required by the Growth Management Act. RCW 36.70A.480(4), .172(1).

Recognizing the key role of proper land use management to protect salmon and other resources, the GMA requires, at 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.

The Legislature set December 1, 2004 (extended to December 1, 2005), as the deadline for Central Puget Sound cities and counties to update their critical areas ordinances in the light of best available science. The Hearing on the Merits in this case was held on October 18, 2007, and Tacoma acknowledged it has not yet complied with the statutory mandate with respect to regulations for marine shorelines. Thus habitat for endangered salmon, and presumably other marine resources, is not being protected along Tacoma shorelines, although protective regimes have been adopted for marine shores in adjacent and cross-Sound jurisdictions.

Petitioners contend that “best available science” requires the maintenance of continuous vegetated buffers in order to protect the functions and values of the full range of marine shoreline habitats. Petitioners provide just three scientific references⁵ from Tacoma’s record in support of the marine buffer requirement:

- Jim Brennan, “Riparian Functions and the Development of Management Actions in Marine Nearshore Ecosystems,” in Lemieux, *et al.*, *Proceedings of the DFO/PSAT Marine Riparian Experts Workshop, 2004*. Petitioners’ PHB, Tab 3, from Index VIII(H).
- One-page excerpt from Brown, *et al.*, *Best Available Science: Volume I: A Review of Science Literature*, p. 7-24 (King County Executive Report, Seattle, 2004). Petitioners’ PHB, Tab 6, from Index VIII(H).
- Two-page excerpt from Williams and Thom, *White Paper: Marine and Estuarine Shoreline Modification Issues*, pp. 40-41 (Pacific Northwest National Laboratory, Battelle, Sequim, 2001). Petitioners’ Reply, Tab 1, from Index VIII(H).

Petitioners’ post-hearing submissions provide some additional support; see, *supra*, fn. 2.

While this scant evidence is only narrowly sufficient to make a *prima facie* case for Petitioners, the City does not attempt any rebuttal at all. At the HOM, the City’s attorney suggested that the

⁵ Petitioners also submit two letters from Futurewise attorney Tim Trahimovich citing various scientific studies. Petitioners’ PHB, Tab. 4. The Board has previously pointed out that attorney presentations and advocacy materials do not qualify as “best available science.” *Hood Canal, supra*, FDO, at 35.

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City might undertake its own BAS review for its marine shorelines⁶ but did not elaborate in response to Board questioning. Neither the City's briefing nor its argument at the HOM provides any scientific support for its project-specific approach to shoreline habitat protection.

In *Tahoma Audubon Society v. Pierce County*, CPSGMHB Case No. 05-3-0004c, Final Decision and Order (July 12, 2005), the Board addressed Pierce County's argument that salmon habitat protection along shorelines could be achieved on a project-specific basis. In that case, Pierce County contended that site-by-site assessments, in the context of a variety of overlapping regulations, would protect salmon habitat without the need for a CAO regulation. The Petitioners in that case pointed the Board to a wealth of scientific literature in the County's record that indicated the importance of protecting the "holistic value of marine shorelines as fish and wildlife habitat conservation areas," arguing against the efficacy of the County's piecemeal approach. *Id.* at 41. Based on the science in the record, the Board rejected the County's permit-based protection scheme:

The Board finds that Pierce County's site-by-site assessment of marine shorelines during the permit application process, as established in Ordinance 2004-56s, does not meet the requirement of using best available science to devise regulations protective of the integrated functions and values as marine shorelines as critical salmon habitat.

Id. at 41. On remand, Pierce County adopted compliant buffer regulations which petitioners characterized as "an ecosystem approach towards protecting marine shoreline ecological functions and values, including salmon migration corridors and rearing areas." Order Finding Compliance, at 8.

In the present case, the GMA has clear requirements for local jurisdictions to adopt development regulations based on best available science to protect the functions and values of critical areas, with special consideration for the preservation of anadromous fisheries. RCW 36.70A.172(1). The City has proffered no scientific basis at all to rebut the Petitioners' citations to the science in the record supporting continuous vegetated buffers. Plainly, the City has not complied with the GMA critical areas mandate.

Tacoma states that it is currently working on updating its Shoreline Master Program, with a target date of December, 2008, and that this update will incorporate the necessary protections of marine resources. The City asserts that revising its critical areas regulations in the next several months for marine shorelines would be duplicative, confusing for citizens, and a diversion of City planning resources. The Board disagrees.

The Legislature's amendments to RCW 36.70A.480(4) specify:

Shoreline master programs shall provide a level of protection to critical areas located within shorelines of the state that is at least equal to the level of protection provided to critical areas by the local government's critical area ordinances adopted and thereafter amended pursuant to RCW 36.790A.060(2).

⁶ As previously stated, any such studies should have been completed several years ago.
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Thus the marine shoreline critical areas protections adopted by the City under the GMA should be readily incorporated into the SMP update, subject to Department of Ecology review, without duplication or confusion.

The Board finds and concludes that the City of Tacoma, in adopting Substitute Ordinance 27431, **failed to comply** with the GMA mandate to adopt development regulations that protect critical areas, specifically, the Fish and Wildlife Habitat Conservation Areas designated along Tacoma's marine shorelines. The City's action is **clearly erroneous**: the Board is left with a definite and firm conviction that a mistake has been made.

The City's action **does not comply** with RCW 36.70A.130, which requires a timely update and revision of critical areas regulations [.130(4)(a) and (8)(a)]; **does not comply** with RCW 36.70A.020(9) and (10), which articulate planning goals protective of fish and wildlife habitat and of the environment; **does not comply** with RCW 36.70A.060, which requires enactment of development regulations to protect critical areas; and **does not comply** with RCW 36.70A.172, which mandates the application of best available science in enacting critical areas protections, and calls for special consideration to the measures necessary to preserve salmon. The Board **remands** the Ordinance to the City to take legislative action to comply with the GMA.

Conclusion

The Board finds and concludes that the City of Tacoma's adoption of Substitute Ordinance 27431, adopting an updated and revised critical area ordinance – specifically TMC 13.11.510 and 13.11.520 - **failed to comply** with RCW 36.70A.130, RCW 36.70A.020(9), RCW 36.70A.020(10), RCW 36.70A.060 and RCW 36.70A.172 with respect to Tacoma's marine shorelines. The Board **remands** the Ordinance to the City to take legislative action to bring its critical areas regulations into compliance with the GMA as set forth in this order.

V. INVALIDITY

The Board has previously held that a request for an order of 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, 2003) at 18. Petitioners here have requested the Board to find certain provisions of the challenged Ordinances invalid. The PHO sets forth Legal Issue No. 2 as follows.

Legal Issue No. 2: Does adoption of the challenged provisions of Substitute Ordinance 27431 substantially interfere with the goals of the Growth Management Act, thereby warranting invalidity?

However, in their briefing and orally at the Hearing on the Merits, Petitioners withdrew their request for an invalidity order at this time. Petitioners' PHB, at 21-22.

The GMA's invalidity provision, RCW 36.70A.302, provides that a Board may enter an order invalidating a non-compliant ordinance based on a determination "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.” The Board has concluded that Ordinance 27431, specifically sections 13.11.510 and .520 do not comply with the GMA and has remanded the Ordinance to the City of Tacoma to bring the regulations into compliance with the requirements of the GMA. The Board sets a compliance schedule but **does not enter** an invalidity order at this time.

VI. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board Orders and case law, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

1. The City of Tacoma’s adoption of Substitute Ordinance No. 27431, the City’s critical areas ordinance – specifically the provision concerning marine shorelines in TMC 13.11.510 and .520 - was **clearly erroneous** and **does not comply** with the requirements of RCW 36.70A.130, .060, and .172, and **is not guided** by GMA Goals RCW 36.70A.020(9), and (10).
2. Therefore the Board **remands** Ordinance No. 27431 to the City of Tacoma with direction to the City to take legislative action to comply with the requirements of the GMA as set forth in this Order.
3. The Board sets the following schedule for the City’s compliance:
 - The Board establishes **May 1, 2008**, as the deadline for the City to take appropriate legislative action.
 - By no later than **May 13, 2008**, the City 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 23, 2008**,⁷ the Petitioners may file with the Board an original and four copies of Response to the City’s SATC.
 - By no later than **May 30, 2008**, the City may file with the Board a Reply to Petitioners’ Response.
 - Each of the pleadings listed above shall be simultaneously served on each of the other parties to this proceeding.
 - Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance Hearing in this matter for **June 5, 2008, at 10:00 a.m.** The hearing will be held at the Board’s offices.⁸ If the parties so stipulate, the Board will consider conducting the

⁷ May 23, 2008, 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.

⁸ The Board’s office is located at Suite 2356, Bank of America Fifth Avenue Plaza, 800 Fifth Avenue in Seattle. *06301 Citizens for a Healthy Bay v. City of Tacoma (Nov. 1, 2007)*

Compliance Hearing telephonically. If the City of Tacoma takes the required legislative action prior to the May 1, 2008, deadline set forth in this Order, the City may file a motion with the Board requesting an adjustment to this compliance schedule.

So ORDERED this 1st day of November, 2007.

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 242-02-832.⁹

⁹ 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)

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APPENDIX A

CHRONOLOGY OF PROCEDURES CPSGMHB Case No. 06-3-0001

On January 13, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Tahoma Audubon Society, Citizens for a Healthy Bay, People for Puget Sound, and Futurewise (**Petitioners** or **Citizens**). The matter was assigned Case No. 06-3-0001, and is hereafter referred to as *Citizens for a Healthy Bay et. al. v. City of Tacoma*. Board member Margaret Pageler is the Presiding Officer (**PO**) for this matter¹⁰. Petitioners challenge the City of Tacoma's (**Respondent** or **Tacoma**) adoption of Substitute Ordinance No. 27431 updating its critical areas regulations. The basis for the challenge is noncompliance with provisions of the Growth Management Act (**GMA** or **Act**).

On January 17, 2006, the Board issued a Notice of Hearing (**NOH**) which scheduled a Prehearing Conference (**PHC**) for February 13, 2006, identified July 13, 2006 as the deadline for a Final Decision and Order (**FDO**), and proposed a tentative schedule for the conduct of the case that included a Hearing on the Merits of the Petition (**HOM**) on May 18, 2006.

On February 9, 2006, the Board received City's Index of Record (**Index**).

On February 9, 2006, the Board received a Joint Motion for Extension of Case Schedule from Petitioners and Respondent requesting a ninety day settlement extension, a rescheduling of the PHC, and a revised tentative case schedule. On February 10, 2006, the Board granted the Request for Settlement Extension and revised the case schedule.

On April 26, 2006, the Board received a Second Joint Motion for Extension of Case Schedule from Petitioners and Respondent requesting a ninety-day settlement extension, a rescheduling of the PHC, and a revised tentative case schedule. On May 2, 2006, the Board granted the Second Request for Settlement Extension and revised the case schedule.

On July 14, 2006, the Board received Petitioners' Settlement Status Report. On July 24, 2006, the Board received a Third Joint Motion for Extension of Case Schedule from Petitioners and Respondent requesting a ninety day settlement extension, a rescheduling of the PHC, and a revised tentative case schedule. On July 25, 2006, the Board issued its "Order Granting Third Settlement Extension and Amending Case Schedule and Notice of Presiding Officer Change."

On October 18, 2006, Petitioners filed a Settlement Status Report indicating continued progress on resolving the matters at issue. On October 19, 2006, the Board received a Fourth Joint Motion for Extension of Case Schedule, from Petitioners and Respondent, requesting a ninety day settlement extension and rescheduling of the October 26, 2006, Prehearing Conference. On October 27, 2006, the Board issued its "Order Granting Fourth Settlement Extension and Amending Case Schedule."

¹⁰Upon the retirement of former Board member Bruce Laing, Board member Margaret Pageler was appointed as the Presiding Officer for this matter.

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On January 19, 2007, the Board received electronically Petitioners' "Settlement Status Report" and "Notice of Substitution of Council and Change of Address for Petitioners." The status report stated that the City has drafted legislation that may address Petitioners' issues and that the legislation is still under review. On January 22, 2007, the Board received "Fifth Joint Motion for Extension of Case Schedule" on behalf of both parties. The Fifth Joint Motion requests a ninety day settlement extension, a rescheduling of the PHC, and an amended case schedule. On January 22, 2007, the Board issued its "Order Granting Fifth Settlement Extension and Amending Case Schedule."

On May 1, 2007, the Board received a "Sixth Joint Motion for Extension of Case Schedule" from Petitioners and Respondent requesting a ninety day settlement extension, a rescheduling of the PHC, and a revised tentative case schedule. On May 3, 2007, the Board issued its Order Granting Sixth Settlement Extension and Amending Case Schedule. The Order noted: "No schedule for the City's action on the proposed legislation has been provided. The Settlement Status Report provides no indication that any of the Petitioners have provided comment or input on the draft legislation in the interest of settlement of the pending dispute." Order, at 3. The Order set August 2, 2007, as the rescheduled date of the Prehearing Conference.

The Prehearing Conference was convened at 10:30 a.m. on August 2, 2007, in the Board's offices, Margaret Pageler presiding. Board member David Earling, law clerk Julie Taylor, and legal extern Linda Jenkins attended for the Board. Petitioners were represented by Jeremy Anderson. City of Tacoma was represented by Assistant City Attorney Steve Victor, who attended telephonically.

The Board first discussed with the parties their reason for discontinuing the settlement process. The City stated that it acknowledges the merits of the petition, but that it has been advised by the Department of Ecology to defer revising its marine shoreline regulations until its Shoreline Management Program update in 2010. Petitioners stated that the case should go forward and be decided on the merits.

The Board then reviewed its procedures for the hearing, including the composition of the Index to the Record below; filing of core documents, exhibit lists, and supplemental exhibits; possible dispositive motions; the Legal Issue to be decided; and a Final Schedule. Petitioner indicated the likelihood that the record in this matter could be established without motions to supplement, and Respondent stated that the City will not bring any dispositive motions. The City indicated that it would stipulate to non-compliance if the matter could be resolved without a hearing. Petitioner, however, stated that the issue of invalidity would require briefing and argument.

Accordingly, the Presiding Officer determined that the Board would not calendar a motions practice but would set a schedule for briefing and hearing on the merits. The Presiding Officer requested that, should the parties agree to stipulate to all or part of the issues, they should notify the Presiding Officer no later than a week before the date for filing Petitioner's Prehearing Brief. Subsequent to the Prehearing Conference, on August 7, 2007, the Presiding Officer informed the parties of a scheduling conflict requiring a change in the date tentatively set for the Hearing on the Merits. Neither party indicated an objection to the changed date. On August 9, 2007, the Board issued its Prehearing Order.

No motions were filed by either party prior to the Hearing on the Merits.

Prehearing briefs were timely submitted, as follows:

- Petitioners' Prehearing Brief, with 7 attachments – **Petitioners' PHB**
- Respondent's Prehearing Brief – **City Response**
- Petitioners' Reply – **Petitioners' Reply**

The Hearing on the Merits was convened on October 18, 2007, at 10:25 a.m. in the conference room of the Board's offices, 800 Fifth Avenue, Seattle, and adjourned at 11:15 a.m. Board members Margaret Pageler, Ed McGuire and Dave Earling attended. Keith Scully appeared for Petitioners. The City of Tacoma was represented by Steven Victor, with City planners Steve Atkinson and Molly Harris also in attendance. Petitioners provided a power point outlining their argument, which was also provided as a set of printed slides and was **admitted as Hearing on the Merits Exhibit 1.**

The Hearing on the Merits afforded the Board the opportunity to ask a number of questions and develop a clear understanding of the City's plan and policies and the Petitioners' challenge. Court reporting services were provided by Shelley Hoyt of Byers and Anderson, Inc. The Board did not order a transcript of the Hearing.

On October 22, 2007, the Board received Petitioners' Supplemental Citation to Evidence in the Record and Motion, with three attachments. Petitioners moved the Board to consider the post-hearing submission of evidence from the City's record. The City filed no objection. The Board **granted** Petitioners' motion.