

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

HOOD CANAL ENVIRONMENTAL)	
COUNCIL, <i>et al</i> ,)	
)	Case No. 06-3-0012c
Petitioners,)	
and)	(Hood Canal)
)	
SUQUAMISH TRIBE)	
)	
Intervenors,)	
and)	
)	
PACIFIC LEGAL FOUNDATION, <i>et al</i> ,)	
)	
<i>Amicus Curiae</i> ,)	
)	
v.)	
)	
KITSAP COUNTY,)	ORDER FINDING
)	COMPLIANCE
Respondent.)	
)	

I. BACKGROUND

On August 28, 2006, the Board issued its Final Decision and Order (**FDO**) in CPSGMHB Case No. 06-3-0012c. The FDO provided in relevant part:

Based upon review of both Petitions 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. Petitioner KAPO abandoned Legal Issue No. 3. Alternatively, KAPO did not carry its burden of proof with respect to Legal Issue No. 3, and the Board found that the County complied with RCW 36.70A.020(11), .035, and .140. Legal Issue No. 3 is **dismissed**.

2. Petitioner KAPO failed to carry its burden of proof with respect to Legal Issue Nos. 4, 5, 6, and 8, challenging Kitsap County’s adoption of various provisions of Ordinance No. 351-2005 for failure to comply with RCW 36.70A.480(5), .172, .050, .060(2), and .020(6). Legal Issue Nos. 4, 5, 6, and 8 are **dismissed**.

3. Kitsap County's adoption of Ordinance No. 351-2005, the Critical Areas Ordinance, was **clearly erroneous** with respect to certain wetlands exemptions and certain marine buffers provisions, as set forth in this order. The Ordinance provisions challenged in Legal Issue Nos. 1 and 2 [KCC 19.200.210 and KCC Table 19.300.315] **do not comply** with the requirements of RCW 36.70A.060, .130, .170, and .172 and **are not guided** by GMA goals RCW 36.70A.020(9) and (10).
4. Therefore the Board **remands** Ordinance No. 351-2005 to Kitsap County with direction to the County to take legislative action to comply with the requirements of the GMA as set forth in this Order.
5. The Board sets the following schedule for the County's compliance:
 - The Board establishes **February 23, 2007**, as the deadline for Kitsap County to take appropriate legislative action.
 - By no later than **March 9, 2007**, Kitsap County 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 County 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 **March 19, 2007**, the Petitioners may file with the Board an original and four copies of Response to the County's SATC.
 - By no later than **March 26, 2007**, the County 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, including interveners, and upon *amici*, at their request.
 - Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance Hearing in this matter for **April 2, 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 Kitsap County takes the required legislative action prior to the February 23, 2007, deadline set forth in this Order, the County may file a motion with the Board requesting an adjustment to this compliance schedule.

FDO, at 53-54.

On March 12, 2007 the Board received "Respondent Kitsap County's Statement of Actions Taken to Comply" (**Kitsap SATC**), and the County's "Compliance Index" (**Compliance Index**). The Compliance Index lists approximately 220 items. *See* Attachment A to SATC. Also attached to the SATC were 19 Exhibits from the Compliance Index. To achieve compliance, the County adopted Ordinance No. 376-2007

during its remand period. *See* Attachment B to SATC. Consequently, Ordinance No. 376-2007 is the subject of the Board’s compliance review.

On March 21, 2007, the Board received “Suquamish Tribe’s Response to the County’s Statement of Actions Taken to Comply” (**Suquamish Response**). Attached to the submittal was a copy of an unidentified exhibit, eventually determined to be Compliance Index Ex. 1460.

On March 21, 2007, the Board also received “Response of Petitioner Hood Canal Environmental Council, et al. To Kitsap County’s Statement of Actions Taken to Comply” (**Hood Canal Response**). Attached to the submittal were copies of Compliance Index Exs. 1436 and 1492.

Finally, on March 21, 2007, the Board received “KAPO’s Response to Kitsap County’s Statement of Actions Taken to Comply” (**KAPO Response**). KAPO attached three exhibits¹ that were not identified as part of the compliance record.

On March 27, 2007, the Board received “Respondent Kitsap County’s Reply RE: Statement of Actions Taken to Comply” (**Kitsap Reply**).

All filings were timely.

The Board conducted the Compliance Hearing on April 2, 2007, at 10:00 a.m. at the Board’s offices Suite 2356, 800 Fifth Avenue, Seattle, Washington. Board Member Edward G. McGuire convened the compliance hearing.² Board Member David O. Earling, Law Clerk, Julie Taylor, and Board Extern, Moani Russell were also present for the Board. Petitioner Suquamish Tribe was represented by Mark Bubenick; Petitioner Hood Canal was represented by Alexandria Doolittle and Keith Scully; Petitioner KAPO was represented by Brian Hodges. Lisa Nickel and Jim Bolger represented Respondent Kitsap County. Also in attendance were: Melody Allen and Planning Commissioner Mike Gustavson. Court Reporting services were provided by Barbara E. Hayden of Byers and Anderson. The Compliance Hearing was adjourned at approximately 11:00 a.m. The Board ordered a transcript of the compliance hearing (**CH Transcript**).

On April 9, 2007, the Board received the CH Transcript.

¹ Exhibit 1 is a website printout of a Kitsap Sun article dated 2/27/07, entitled “Commissioners Vote in Favor of Larger Buffers” Having been produced after the remand action, this exhibit **will not be considered** as part of the compliance record. Exhibit 2 is entitled “Advisory Memorandum: Avoiding Unconstitutional Takings of Private Property, dated December 2006, prepared by Attorney General Rob McKenna [Michael S. Grossman, Alan D. Copsey and Katharine G. Shirley, principal authors]. The Board **takes official notice** of this offering [**Compliance Hearing Ex. 1**]. Exhibit 3 is a summary table of an insurance company survey entitled “The Impact of Nonconforming Status on a Homeowner’s Ability to Purchase Insurance Coverage: A Telephone Survey of Insurance Companies.” This item is already in the Compliance Index and is identified as **Compliance Index Ex. 1408**.

² Board Member Margaret A. Pageler, the initial Presiding Officer in this case, was unable to attend the compliance hearing due to illness. Ms. Pageler did not participate in reaching this decision.

On April 16, 2007, the Board received “Notice of Withdrawal and Substitution of Counsel” from the Suquamish Tribe, indicating that Mark Bubenik was withdrawing his appearance on behalf of the Tribe and Melody Allen is now representing the Suquamish Tribe.

II. DISCUSSION

FDO Context:

The Board’s August 28, 2006 FDO found that Kitsap County’s adoption of Ordinance No. 351-2005 was clearly erroneous with respect to *certain wetland exemptions* [Remand Issue 1] and *certain marine buffer provisions*. [Remand Issue 2]. These provisions were found to be noncompliant with the requirements of RCW 36.70A.060, .130, .170, and .172 and not guided by GMA Goals 9 and 10 [RCW 36.70A.020(9) and (10)]. *See* 8/28/06 FDO, at 53. The Board’s FDO directed Kitsap County to take appropriate legislative action to comply with the requirements of GMA. The County’s adoption of Ordinance No. 376-2007 was their response to the Board’s FDO.

A. Remand Legal Issue 1 – Exemption of Small Wetlands from Regulation

On remand, Kitsap County adopted Ordinance No. 376-2007, amending its Critical Areas Regulations. Regarding the Small Wetlands Exemption, the County removed the prior exemption, and “chose to regulate the previously unregulated wetlands through the same standards and enforcement mechanism as applied to other wetlands.” SATC, at 4-5; *see also* Ordinance No. 376-2007, Section 4, at 3-5. The County contends that now all wetlands, regardless of size or isolation are now regulated. *Id.* at 5. Additionally, the County instituted a “compensatory mitigation” program for the previously un-regulated wetlands. *Id.* The County notes that Petitioners Futurewise, People for Puget Sound Hood Canal and KCRP, agreed and supported this approach. *Id.* at 6.

In response to the SATC, Petitioners Hood Canal concurred that the County’s removal of the small wetland exemption and its chosen path of regulation would comply with the GMA. Hood Canal Response, at 3. The Suquamish Tribe also concurred that the removal of the small wetland exemption satisfied the concerns of the Tribe and would comply with the GMA. Suquamish Response, at 1. Kitsap Alliance of Property Owners (KAPO) did not respond to this issue in their Response to SATC. KAPO Response, at 1-17.

In the County’s reply, the County noted the concurrence, or lack of objection, to the County’s remand action regarding small wetlands, and urged the Board to enter a finding of compliance on this issue. Kitsap Reply, at 3.

At the April 2, 2007 Compliance Hearing, Petitioners Hood Canal and Suquamish Tribe affirmed their support of the County’s action on this issue. Petitioner KAPO, again, took no position or offered no comment on the removal of the small wetlands exemption. CH Transcript, at 7-8 and 18.

The Board agrees that the County's adoption of Ordinance No. 376-2007, specifically the removal of the small wetland exemption and subsequent regulation of these wetlands under the regular wetland standards, including the wetland report requirement and compensatory mitigation procedure [Ordinance 376-2007, Section 4, at 3-4], complies with the requirements of RCW 36.70A.060, .130, .170, and .172 and is guided by GMA Goals 9 and 10 [RCW 36.70A.020(9) and (10)]. The Board will enter a **Finding of Compliance** in regards to Legal Issue 1.

B. Remand Legal Issue 2 – Marine Shoreline Buffers

On adopting the remand Ordinance No. 376-2007, the County also addressed Marine Shoreline Buffers. *See* Ordinance No. 376-2007, Section 5, at 5-9. The County contends that it modified its noncompliant 35 foot marine shoreline buffers after reviewing the best available science (**BAS**) pertaining to the function and values of the adjacent critical areas, and considering how shorelines are already protected by other means. SATC, at 6-7. As a result of the County's remand review, the County "chose to differentiate between its urban designated shorelines and its rural and semi-rural shorelines. The County then modified its rural and semi-rural shoreline to a buffer width of 100 feet, and its urban shorelines to a buffer width of 50 feet." *Id.* at 8.

Each of the Petitioners asserted that the County's increase in its marine buffer widths was based upon upland Shoreline Management Program (**SMP**) designations, and not related to the function and values of the critical areas that were to be protected. Suquamish Response, at 3-4; Hood Canal Response, at 3-8;³ and KAPO Response, at 6-15. Additionally, the Suquamish Tribe and Hood Canal Petitioners questioned the County's proposed buffer reduction procedures. *Id.* at 5-6; and *Id.* at 3 and 8, respectively.

The County replied that it had based its designation upon review of the function and values of marine habitats since the buffer widths were derived from the amount of protection to various critical area functions and values could be achieved through various buffer widths. SATC, at 8-16 [rural and semi-rural], 16-22 [urban]; and County Reply, at 3-12. The County detailed its evaluation process based upon the same BAS used in the prior proceeding, namely the May and Knutsen and Naef reports.⁴ *Id.* To support its regulatory distinction between urban and rural environments, the County relied upon Pentec Environmental, Key Peninsula, Gig Harbor, and Islands Watershed Nearshore Salmon Habitat Assessment, 2003 – Ex. 1596. Additionally, the County noted that it is embarking upon a shoreline habitat inventory program as part of its required update to its Shoreline Management Program. *Id.*

At the CH, each party reasserted the claims and arguments made in prior briefing.

³ The Board notes that the primary exhibit Hood Canal relies upon for urging larger buffers (150'), Ex. 1436 (1/19/07 Charnas memo), also turns to the SMP designations. *See* Ex. 1436; CH Transcript, at 34..

⁴ Christopher May, Stream-Riparian Ecosystem in the Puget Sound Lowland Eco-Region: A Review of Best Available Science, 2003 – Ex. 91; and K. L. Knutsen and V.L. Naef, Management Recommendations for Washington's Priority Habitats: Riparian, 1997 – Ex. 1363.

Kitsap County has designated all its marine shorelines as Fish and Wildlife Habitat Conservation Areas (**FWHCA**). In the FDO, the Board found that the County's designation was supported by competent science in the record. However, the Board found that the County's marine shoreline regulations were flawed because, when tested against science in the record: 1) the 35' buffer widths were too narrow to protect the range of habitat functions and values; and 2) the buffers were assigned based upon shoreline master program (SMP) land use designations.

In adopting Ordinance No. 376-2007 the County increased all the marine buffer widths and has identified from science in its record that the chosen widths are within the buffer ranges to protect marine shoreline habitat functions and values.

The Petitioners focus on the Board's discussion of the County's marine buffers being keyed to SMP land use designations, not the function and values of the critical areas. *See* FDO, at 39-41. Petitioners are correct that the Board was critical of the County's approach to regulating its marine shorelines simply based upon SMP designations. However, as the County correctly points out in its reply, "The Board's basis for discussing the use of Shoreline Management Program designations was the lack of evidence of a link between the upland designations and the nearshore environment. The new BAS in the County's record establishes this evidence [as discussed in the SATC.]" County Reply, at 12. The Board agrees.

As described and discussed in the County's SATC, the County has linked its increased buffer widths for semi-rural, rural and urban⁵ SMP designations, to the function and value of critical fish and wildlife conservation areas. The County showed that the chosen buffer widths provide increased protections to marine habitat by controlling water temperature, sediment, erosion and providing large woody debris, each of which is a contributing factor to habitat protection and conservation. This linkage demonstrates a basis for protection and limiting the amount of pollution and sediment that could cause further degradation to these habitats. This was the missing link in the County's prior effort. *See Seattle Audubon Society v. City of Seattle*, CPSGMHB Case No. 06-3-0024, Final Decision and Order, (Dec. 11, 2006), at 34-35. [Finding that 100' marine shoreline buffer requirement was supported by science in Seattle's record.]

As to the buffer reduction procedures, the County clarified, and Petitioners Suquamish Tribe and Hood Canal acknowledged that the buffer reduction process has limited application, as it is only available for the 50' buffer in the urban areas; it is not available for the semi-rural and rural areas. CH Transcript, at 16-17. Additionally, the County clarified that such buffer reductions could not be granted unless the critical area function and value could be protected. This would typically occur through a habitat management plan. CH Transcript, at 25-26. The Board finds that the County's buffer reduction procedures, which include provisions for habitat management plans and the preservation

⁵ Specific characteristics of the County's 8.5 miles of unincorporated urban marine shoreline are identified in Index 1577 and described in the SATC, at 16-18.

of the function and values of the critical areas, is not clearly erroneous. *See*, analogously, *Seattle Audubon*, FDO, at 39. [Allowing limited buffer incursions where fully mitigated.]

The Board notes that, as part of its SMP update, the County is embarking upon an inventory of its shoreline habitats. *See* CH Transcript, at 15, 21, and 28 through 31. The Board agrees that completion of this inventory may enable the County to refine its protections of its marine shorelines. The GMA scheme of protecting critical areas based upon best available science, contemplates that new information will lead to more effective regulation over time. Future marine shoreline designations (or de-designations) will undoubtedly be more fine-grained, and buffers or other protections more directly keyed to site-specific functions and values. However, the present buffers are in place and should not be viewed as “interim.”

The Board finds and concludes that the County’s actions on remand were not clearly erroneous and the Board will enter a Finding of Compliance on Remand Legal Issue 2.

Conclusions – Remand Legal Issue 1 and 2

Regarding the small wetland exemption question, Remand Legal Issue 1, the Board finds and concludes that the County’s adoption of Ordinance No. 376-2007, amending Chapter 19.200 KCC, **complies** with the requirements of RCW 36.70A.060, .130, .170, and .172 and **is guided by** GMA Goals 9 and 10 [RCW 36.70A.020(9) and (10)].

Regarding the marine shoreline buffers question, Remand Legal Issue 2, the Board finds and concludes that the County’s adoption of Ordinance No. 376-2007, amending Chapter 19.300 KCC, **complies** with the requirements of RCW 36.70A.060, .130, .170, and .172 and **is guided by** GMA Goals 9 and 10 [RCW 36.70A.020(9) and (10)].

III. FINDING OF COMPLIANCE

Based upon review of the August 28, 2006 FDO, the SATC, the written Responses and Reply to the SATC, Ordinance No. 376-2007, the oral arguments of the parties, and having deliberated on the matter as reflected, *supra*, the Board enters a **Finding of Compliance** for Kitsap County.

IV. ORDER

Based upon review of the GMA, the Board’s August 28, 2006 Final Decision and Order, the Statement of Actions Taken to Comply, Ordinance No. 376-2007, the briefs and exhibits, and presentations made by the parties at the Compliance Hearing, and having deliberated on the matter, the Board ORDERS:

- Kitsap County’s adoption of Ordinance No. 376-2007 corrected the compliance deficiencies found by the Board and required by the GMA. The adoption of Ordinance No. 376-2007, amending Kitsap County’s Critical Areas regulations [Chapters 19.200 and 19.300 Kitsap County Code], now

complies with the goals and requirements of the GMA [RCW 36.70A.060, .130, .170, .172, .020(9) and (10)] as discussed in the Board's August 28, 2006 Final Decision and Order. The Board therefore enters a **Finding of Compliance** for Kitsap County.

- The matter of Hood Canal, et al., v. Kitsap County, CPSGMHB Consolidated Case No. 06-3-0012c, is **closed**.

So ORDERED this 30th day of April, 2007.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

David O. Earling
Board Member

Edward G. McGuire, AICP
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.