

1 **I. PROCEDURAL BACKGROUND**¹

2
3 **A. General**

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5 On October 5, 2007, the Central Puget Sound Growth Management Hearings Board (**the Board**)
6 received a Petition for Review (**PFR**) from the Pilchuck Audubon Society and Futurewise
7 (**Petitioners**). The matter was assigned CPSGMHB Case No. 07-3-0033. Dave Earling is
8 Presiding Officer. Petitioners challenge Snohomish County's (**Respondent or the County**)
9 adoption of Ordinance No. 06-061, amending the County's Critical Areas regulations.

10
11 Subsequent to the filing of the PFR, the Board received a "Motion to Intervene" from the Master
12 Builders of King and Snohomish Counties (**MBA**) and from Snohomish County Camano
13 Association of Realtors (**SCCAR**) (collectively, **Intervenors**). MBA and SCCAR were granted
14 intervention on behalf of the County.

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17 **B. Motion to Supplement the Record**

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19 Petitioners filed a Motion to Supplement the Record and Leave to File a Motion Out of Time
20 (**Motion to Supplement**). The County objected to the Motion to Supplement. The Board
21 considered the Motion to Supplement at the Hearing on the Merits and its disposition is
22 addressed below. *See* Section III(B) – Preliminary Matters.

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25 **C. Briefings**

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27 All Prehearing briefs were received in a timely manner. The following references are used
28 throughout this Final Decision and Order:

- 29
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- 31 • Petitioners' Pilchuck Audubon & Futurewise Opening Brief: **Petitioners' HOM Brief**
 - 32 • Snohomish County's Prehearing Brief: **County Response**
 - 33 • Intervenors' Prehearing Brief: **Intervenors' Response**
 - 34 • Petitioners' Reply Brief: **Petitioners' Reply**

35 On February 21, 2008, the Board held a hearing on the merits (HOM) at the Board's office at
36 800 Fifth Avenue, Suite 2356, Seattle, Washington. Board members David Earling, Presiding
37 Officer, Edward McGuire, and Margaret Pageler were present. The Board's Staff Attorney, Julie
38 Ainsworth-Taylor, was also present for the Board. Petitioners Pilchuck Audubon and Futurewise
39 were represented by Keith Scully of Futurewise. Petitioner Snohomish County was represented
40 by Laura Kisielius. Intervenors' MBA and SCCAR were represented by Robert Johns. Court
41 reporting services were provided by Barbara Hayden of Byers and Anderson, Inc. The following
42 persons also attended the HOM to observe: Tim Trohimovich and Ryan Espesgard of Futurewise;
43 John Moffat, Terri Strandberg, and Matt Otten of Snohomish County; and Jennifer Jerabek of
44 MBA. The Hearing on the Merits afforded the Board the opportunity to ask a number of
45 questions, and to clarify matters in order to develop a clear understanding of the County's actions
46 and Petitioners' challenge.

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48 On February 25, 2008 the Board received a Transcript of the Hearing on the Merits [**HOM**
49 **Transcript**].

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¹ A complete chronology of procedures in this case is attached as Appendix A.

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3 **II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, STANDARD OF REVIEW,**
4 **AND DEFERENCE TO LOCAL JURISDICTIONS**
5

6 Upon receipt of a petition challenging a local jurisdiction’s GMA actions, the Legislature
7 directed the Boards to hear and determine whether the challenged actions are in compliance with
8 the requirements and goals of the Act. *See* RCW 36.70A.280. The legislature directed that the
9 Boards “after full consideration of the petition, shall determine whether there is compliance with
10 the requirements of [the GMA].” RCW 36.70A.320(3); *see also*, RCW 36.70A.300(1). “[T]he
11 Board is empowered to determine whether [a jurisdiction’s] decisions comply with GMA
12 requirements, to remand noncompliant ordinances to [jurisdictions], and even to invalidate part
13 or all of a comprehensive plan or development regulation until it is brought into compliance.”
14 *Lewis County v. Western Washington Growth Management Hearings Board (Lewis County)*,
15 157 Wn.2d 488 at 498, fn. 7, 139 P.3d 1096 (2006).
16

17 Legislative enactments adopted by Snohomish County pursuant to the Act are presumed valid
18 upon adoption. RCW 36.70A.320(1). The burden is on the Petitioners to demonstrate that the
19 actions taken by the County are not in compliance with the Act. RCW 36.70A.320(2).
20

21 Pursuant to RCW 36.70A.320(3), the Board “shall find compliance unless it determines that the
22 actions taken by [the jurisdiction] are clearly erroneous in view of the entire record before the
23 board and in light of the goals and requirements of [the GMA].” For the Board to find the
24 action of Snohomish County clearly erroneous, the Board must be “left with the firm and
25 definite conviction that a mistake has been made.” *Dep’t of Ecology v. PUD 1*, 121 Wn.2d 179,
26 201, 849 P.2d 646 (1993).
27

28 The GMA affirms that local jurisdictions have discretion in adapting the requirements of the
29 GMA to local circumstances and that the Board shall grant deference to local decisions that
30 comply with the goals and requirements of the Act. RCW 36.70A.3201. Pursuant to RCW
31 36.70A.3201, the Board will grant deference to Snohomish County in how it plans for growth,
32 provided that its policy choices are consistent with the goals and requirements of the GMA. The
33 Supreme Court has stated: “We hold that deference to [a jurisdiction’s] planning actions that are
34 consistent with the goals and requirements of the GMA . . . cedes only when it is shown that a
35 [jurisdiction’s] planning action is in fact a ‘clearly erroneous’ application of the GMA.”
36 *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board*, 154
37 Wn.2d 224, 248, 110 P.3d 1132 (2005). In *Lewis County*, the Court reaffirmed and clarified its
38 holding in *Quadrant*, stating that: “. . . the GMA says that Board deference to [local government]
39 decisions extends only as far as such decisions comply with GMA goals and requirements. In
40 other words, there are bounds.” 157 Wn. 2d at 506, fn. 16.²
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42
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44

45 ² The *Lewis County* majority is in accord with prior rulings that “Local discretion is bounded . . . by the goals and
46 requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board*, 142 Wn.2d
47 543, 561, 14 P.3d 133, 142 (2000). *See also*, *Cooper Point Association v. Thurston County*, 108 Wash. App. 429,
48 444, 31 P.3d 28 (2001) (“notwithstanding the ‘deference’ language of RCW 36.70A.3201, the Board acts properly
49 when it foregoes deference to a . . . plan that is not ‘consistent’ with the requirements and goals of the GMA”);
50 *affirmed Thurston County v. Western Washington Growth Management Hearings Board*, 148 Wn.2d 1, 15, 57 P.3rd
1156 (2002).

1 The scope of the Board's review is limited to determining whether a jurisdiction has achieved
2 compliance with the GMA with respect to only those issues presented in a timely petition for
3 review. RCW 36.70A.290(1).
4

5 **III. BOARD JURISDICTION and PRELIMINARY MATTERS**

6 **A. Board Jurisdiction**

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8
9 The Board finds that Petitioners' PFR was timely filed, pursuant to RCW 36.70A.290(2); that
10 Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and that
11 the Board has subject matter jurisdiction over the challenged Ordinance, which amends
12 Snohomish County's development regulations, pursuant to RCW 36.70A.280(1)(a).
13

14 **B. Preliminary Matters**

15
16 Petitioners filed a Motion to Supplement seeking inclusion in the Record of an e-mail from the
17 Washington State Department of Ecology, dated February 6, 2008, which pertained to Ecology's
18 wetlands classification process for residential density. The County objected to the Motion to
19 Supplement, asserting that the document with which Petitioners wished to supplement the
20 Record did not exist at the time the Snohomish County Council adopted the challenged
21 ordinance nor does it provide substantial assistance to the Board.
22

23 At the HOM, the Board denied the motion finding that the document was created after the
24 Record was established. HOM Transcript, at 5.
25

26 Several documents were submitted at the HOM by Snohomish County and were admitted to the
27 Record as follows:
28

29 HOM Exhibit No. 1: Range of Effective Buffer Widths by Function
30 HOM Exhibit No. 2: Comparison of Snohomish County Buffer Widths and Range of
31 Effective Buffer Widths by Function
32 HOM Exhibit No. 3: Wetlands and Fish & Wildlife Habitat Conservation Area Chapter
33 30.62A, Page 17
34 HOM Exhibit No. 4: Table 8C-7 Widths of buffers needed to protect Category I
35 wetlands in Western Washington, Department of Ecology's
36 *Wetlands in Washington*, Vol. 2 (April 2005)
37 HOM Exhibit No. 5: Excerpt of Petitioner's HOM Reply Brief, Page 13
38
39

40 **IV. THE CHALLENGED ACTION**

41 Petitioners challenge Snohomish County's adoption of Ordinance No. 06-061. With this
42 Ordinance, the County amended its Critical Areas Ordinance (CAO), set forth in Snohomish
43 County Code (SCC) 30.62A. Petitioners contend that the amendments violated the GMA by
44 deviating from Best Available Science in establishing buffer widths and reductions; in failing to
45 protect the functions and values of habitat for state-listed endangered, threatened, and sensitive
46 species; and in failing to regulate all activities which may adversely impact critical areas.
47

48 **V. LEGAL ISSUES**

49
50 In the Board's November 14, 2007 PHO, three legal issues were set forth for review. Legal
Issue 1 pertained to wetlands and buffers and buffer standards; Legal Issue 2 pertained to the
07333 Pilchuck VII v. Snohomish County (April 1, 2008)

1 designation and protection of wildlife habitat and species, specifically priority habitats and
2 species; and Legal Issue 3 pertained to the regulation of activities that may impact critical areas.
3

4 After submittal of their HOM Brief, Petitioners e-mailed the Board, the County, and the
5 Intervenors and stated that they have abandoned Legal Issue 2. Futurewise, E-mail of January 4,
6 2008; *see also* HOM Transcript, at 5-6. In addition, a subset of Legal Issue 1 pertained to the
7 County's buffer-averaging provisions set forth in SCC 30.62A.320(1)(f). Although the
8 Petitioners briefed this issue, within their Reply Brief they conceded that the buffer-averaging
9 provisions meet the GMA, and they abandoned this portion of Legal Issue 1. Petitioners' Reply,
10 at 7; *see also* HOM Transcript, at 6.
11

12 Therefore, the Board finds that Petitioners have **abandoned Legal Issue 2 in its entirety** and
13 **Legal Issue 1 as it pertains to the buffer-averaging provisions** of SCC 30.62.320(1)(f).
14

15 Except for RCW 36.70A.130, for both Legal Issues 1 and 3, Petitioners alleged violations of the
16 same provisions of the GMA which are: RCW 36.70A.020(8), 36.70A.020(9), 36.70A.020(10),
17 36.70A.040, 36.70A.060, 36.70A.070, 36.70A.170, and 36.70A.172. However, within their
18 briefing, Petitioners do not cite to or brief any of these provisions except for RCW 36.70A.060
19 and 36.70A.172 – the GMA's requirement to adopt development regulations that protect critical
20 areas and the requirement that BAS be included in developing those regulations so as to protect
21 the functions and values of critical areas.
22

23
24 In this regard, the Board finds that Petitioners have **abandoned their assertion that Ordinance**
25 **06-061 violates the GMA provisions provided for in their Legal Issues *except for* RCW**
26 **36.70A.060 and 36.70A.172.**
27

28 With respect to protections for forested wetlands, the parties first debated Petitioners' standing.
29 The County first asserted that Petitioners have no standing since the topic of forested wetlands
30 was not raised during the legislative process in "sufficient detail" to allow the County to respond.
31 County Response, at 26 (*citing* the Court of Appeals in *Wells v. WWGMHB*, 100 Wn. App. 657,
32 974; 997 P. 2d 405 (2000), and *Alpine/Bremerton v. Kitsap County*, CPSGMHB Case No. 95-3-
33 0039c/95-3-0032, Order on Motions, at 7-8 (Oct. 8, 1998)). As to standing, Petitioners assert
34 that during the adoption process, they urged the County to adopt Buffer Alternative 3, which
35 includes forested wetland protections. So, pursuant to *Wells*, they sufficiently commented on a
36 "matter" at issue in the case. *Id.* at 4.
37

38
39 During the Hearing on the Merits, the County explained its methodology to achieve compliance
40 for forested buffers to the Petitioners' satisfaction. The Petitioners withdrew the issue on
41 forested buffers from their Petition. HOM Transcript 70-72 and 91.
42

43 Therefore, the Board finds that Petitioners have **abandoned Legal Issue 1 as it pertains to the**
44 **protections for forested wetlands.**
45

46 The Board notes that it is significant that Snohomish County's *identification* of wetlands,
47 *designation* of wetlands and the *buffers it has adopted to protect* wetlands are not the focus of
48 this challenge. Rather, the challenge is to two aspects of the County's critical areas regulatory
49 scheme, namely, several buffer reduction provisions and a generic challenge to the scope of
50

1 activities that are regulated by the County. This is a far cry from the critical area challenges this
2 Board has entertained in the past.

3
4 It is also instructive to the Board that Petitioners abandoned so much of their challenge as this
5 case evolved.³ First, Petitioners abandoned an entire Legal Issue [No. 2 from the PHO] after the
6 initial briefing began. Second, in Legal Issue 1, after filing their opening brief and reviewing
7 the County's Response, Petitioners abandoned their challenge to "buffer averaging" in their
8 Reply Brief. Third, at the hearing on the merits after hearing the County's explanation on
9 "forested wetlands" Petitioners withdrew their challenge on this portion of Legal Issue 1. This
10 tells the Board two things: 1) Petitioners' challenge was not well thought out from its inception;
11 and 2) the County's regulations are not a model of clarity.

12
13 Applicable Law:

14
15 RCW 36.70A.060, in relevant part, emphasis added:

16
17 (2) Each county and city *shall adopt development regulations that protect critical*
18 *areas that are required to be designated under RCW 36.70A.170.* For counties
19 and cities that are required or choose to plan under RCW 36.70A.040, such
20 development regulations shall be adopted on or before September 1, 1991...

21
22 RCW 36.70A.172, in relevant part, emphasis added:

23
24 (1) In designating and protecting critical areas under this chapter, counties and
25 cities *shall include the best available science in developing policies and*
26 *development regulations to protect the functions and values of critical areas.* In
27 addition, counties and cities shall give special consideration to conservation or
28 protection measures necessary to preserve or enhance anadromous fisheries.

29
30
31 **Legal Issue 1 – Wetland and Riparian Buffers and Buffer Standards**

32
33 Legal Issue 1, as set forth in the Board's PHO, is:

34
35 *Do the wetland and riparian buffers and buffer standards and requirements in*
36 *section 30.62A.320 fail to incorporate Best Available Science and fail to*
37 *adequately protect riparian areas, fish, and wildlife habitats, and wetlands,*
38 *thereby violating RCW ~~36.70A.020 (8-10), 36.70A.040, 36.70A.060, 36.70A.070,~~*
39 *~~36.70A.130, 36.70A.170~~ and 36.70A.172?⁴*

40
41
42 Position of the Parties:

43
44 The core of Petitioners' argument is that the County's buffer widths do not correlate with those
45 required by Best Available Science (BAS) to protect all functions and values of a wetland.
46 Petitioners' HOM Brief, at 8-9. Petitioners do not assert that the County has failed to correctly

47
48 ³ Clarification of the scope of Petitioners' challenge was specifically requested at the outset by the County and
49 Intervenor, was discussed at the Prehearing Conference, and a restatement of issues was required. See Appendix A,
50 *infra*.

⁴ The struck sections of the RCW were abandoned by Petitioners.

1 designate its wetlands. Rather, it is the buffer system, specifically the ability to reduce or vary
2 the buffer widths which is a function of land usage intensity and wetland type, adopted by the
3 County to protect the functions and values of the wetlands, that is insufficient. *Id.* at 20.
4 Petitioners assert that the Department of Ecology's (DOE) *Wetlands in Washington* Manual is
5 the BAS in the County's record.
6

7 Petitioners argue that although the County has adopted *Wetlands Vol. 1* as BAS, it has modified
8 the buffers so as to bring them out of the range of BAS for high-intensity uses. *Id.* at 11. In
9 particular, Petitioners address forested wetlands and buffer reductions permitted subject to a
10 separate tract, fencing, enhancement, or mitigation (directional lighting, habitat corridor, etc.).
11 *Id.* at 13-14. According to the Petitioners, the buffer reductions create "significant deviations
12 from DOE's BAS" and do not assure "no net loss of critical areas functions and values" as the
13 "GMA commands." *Id.* at 20-22. In addition, Petitioners contend that the County's classification
14 of high intensity and low intensity land uses (in regard to residential density) is not in accord
15 with DOE's classification and does not provide clear guidance as to the application of "standard
16 buffer widths." *Id.* at 22-23.
17
18

19 Petitioners argue that Snohomish County's reduction and use classifications that allow for a
20 variance in the standards established by DOE are "without scientific justification;" and, since the
21 County recognized DOE's recommendations as BAS, then it must provide a "reasoned basis for
22 deviating from Ecology's recommendations." *Id.* at 24-25 (*citing to Ferry County v. Concerned*
23 *Friends of Ferry County*, 155 Wn.2d 824, 837-38; 123 P.3d 102 (2005) which found that
24 deviation from BAS is allowed but only upon a reasoned showing for such a departure).
25 Petitioners assert that this cannot be done without a reasoned scientific justification which the
26 County did not provide nor, according to Petitioners, could the County provide, given the
27 GMA's mandate to protect the functions and values of the critical area in .060(2). *Id.* at 25-26.
28
29

30 In response, the County states that Petitioners have raised three arguments – 1) buffers for
31 forested wetlands (objection subsequently withdrawn), 2) buffer reductions, and 3) land use
32 intensity classification. The County also notes that, with the exception of .060 and .172, the
33 Petitioners have failed to brief on the other provisions of the GMA and they have abandoned
34 these provisions. County Response, at 16-17.
35

36 The County responds to Petitioners' objection to the ability of a property owner to reduce buffer
37 widths based on the provision of fencing or placing the critical area in a separate tract by arguing
38 that the issue was inadequately briefed and should be dismissed. *Id.* at 34. The County asserts
39 that the use of these techniques serves to protect the area from adjacent property owner
40 encroachment and will allow no more than a 25% reduction in width. *Id.* at 35. In addition, the
41 County points to DOE support for the use of such techniques to protect wetlands from
42 encroachment, thereby maintaining functions. *Id.* at 35-37. The County asserts that deference
43 to their choice as to buffer widths is mandated by the GMA, but acknowledges that deference is
44 tempered. *Id.* at 36.
45
46

47 The County addresses Petitioners' assertion in regard to a reduction being permitted subject to
48 enhancement (vegetation). Contrary to Petitioners' position, the GMA does not require
49 enhancement of an already-degraded buffer, only maintenance of the existing function of the
50 area (*citing to Swinomish Indian Tribal Community v. WWGMHB*, 161 Wn. 2d 415, 530; 166 P.

1 3d 1198 (2007)). *Id.* at 38-41. The County further points out that protection of critical areas can
2 be achieved by smaller, well-vegetated buffers as opposed to larger, barren buffers, and that this
3 is supported by BAS. *Id.* at 41. The County notes that the SCC permits no more than a 30
4 percent reduction which requires fencing or a separate tract in addition to vegetated
5 enhancement. *Id.* at 42.
6

7 A second argument concerns intensity of land use in connection with buffer widths. The County
8 has established 4 du/acre as “high intensity land use” while DOE has defined it as 1+ du/acre.
9 *Id.* at 43. The County asserts its figure is in accord with its comprehensive plan as well as with
10 the GMA’s requirement on urban density. *Id.* at 44.
11

12 Intervenor points out that Petitioners concede that the County’s “standard buffer widths” are
13 within BAS but then argue that reductions regulations “may” create buffers that are outside of
14 BAS. Intervenor Brief, at 3-4. Intervenor sees the Petitioners’ argument as based upon two
15 claims: (1) DOE’s standard buffer widths are BAS and (2) modifications permitted under the
16 adopted regulations on a case by case basis may not fully protect the functions and values of
17 every wetland all of the time. *Id.* at 4.
18
19

20 As to the first argument, Intervenor asserts that Ecology’s standards *are not* BAS but rather
21 guidelines or recommendations. *Id.* Intervenor contends that Vol. 1, “*A Synthesis of the*
22 *Science*,” was adopted by the County as its BAS but that Vol. 2, “*Guidance for Protecting and*
23 *Managing Wetlands*,” was not adopted as BAS and DOE does not recognize it as such and,
24 according to Intervenor, Petitioners rely on Vol. 2’s guidance for their argument that the County
25 failed to include BAS. *Id.* at 6-7 (*citing* excerpt from Vol. 2 that it’s a recommendation).
26 Intervenor also asserts that Vol. 2 does not distinguish between Eastern and Western
27 Washington. *Id.* at 7-8. Intervenor points out that the County did select one of DOE’s buffer
28 alternatives – Alternative #3 – and then tailored the guidance/recommendations provided to the
29 specific circumstances and issues faced by the County. *Id.* at 8.
30
31

32 Second, Intervenor asserts that the County is not required to protect the function and value of
33 *every* wetland. *Id.* at 9 (*citing* to *Pilchuck Audubon Society v. Snohomish County*, CPSGMHB
34 Case No. 95-3-0047, Final Decision and Order, at 21 (Dec. 6, 1995), establishing a “no net loss”
35 standard). Intervenor goes on to assert that the requirement for a critical areas study assures that
36 there will be no diminution in the functions and values of the area nor would there be a “net
37 loss.” *Id.* at 10. According to Intervenor, for reductions that do not require a critical areas study
38 – fencing and separate tract – DOE has recognized these as effective mitigation measures and the
39 County’s experience supports this as well. *Id.* at 10-11.
40
41

42 In regard to the ability for a property owner to reduce buffer width by buffer enhancement,
43 Intervenor points to the recent Supreme Court decision in *Swinomish* which found that the
44 GMA’s “protection” language does not equate to a mandate that degraded buffers must be
45 restored or enhanced. *Id.* at 11. In addition, for the code to be satisfied, Intervenor notes the
46 proponent must both enhance the degraded buffer and show that the resulting buffers provide
47 “equal or better protection of function and value.” *Id.* at 12.
48

49 In reply, Petitioners concede that the GMA does not require *every* wetland to be protected but it
50 does “command that all functions and values” receive protection with “no net loss,” which

1 amounts to a quantitative and qualitative analysis. Petitioners' Reply, at 2. Petitioners point out
2 that although the GMA may permit a wetland to be destroyed, the "no net loss" standard does not
3 equate to "limit the loss." *Id.* at 3.
4

5 Petitioners argue that there is no support in the record for reducing buffers simply by placing
6 them in a separate tract or fencing them. *Id.* at 8. Although Petitioners recognize that these
7 incentives assist in maintaining the integrity of a buffer, they do not necessarily protect the
8 functions and values, especially if the buffer is too narrow. *Id.* The crux of Petitioners' argument
9 appears to be that fencing/tracts are acceptable so long as the buffer is sized in conformance with
10 BAS and protects functions/values.
11

12 Lastly, Petitioners argue that the County's CAO permits development up to the edge of a
13 completely degraded buffer so long as the width is that provided for in DOE's Alternative 3, but
14 that the buffer could then be replanted (*i.e.* restored) and reduced in width. *Id.* at 8-9.
15 Petitioners contend that DOE's buffer widths are dependent on a fully-vegetated buffer and that
16 inappropriately-vegetated buffers should be widened, not reduced, or they should be enhanced.
17 *Id.* In response to the County and Intervenor's argument that a requirement for buffer
18 enhancement cannot be a mandate within the CAO, Petitioners state that they are not arguing that
19 enhancement be required but that a reduction reward for enhancement is inappropriate. *Id.* at 10.
20 Petitioners point to *Swinomish* to assert that the GMA authorizes counties to require
21 enhancement.
22
23

24 Board Discussion

25
26 The County's CAO provides an incentive for additional protection of designated buffers. If the
27 property owner fences the critical area and buffer, or places the parcel in a separate tract, and
28 enhances by re-vegetating the buffer, the County allows up to a 30 percent reduction in buffer
29 width. SCC 30.62A.320(1) (e) and (f). The County's plan recognizes that, over time, human
30 activities are likely to encroach on an area designated as a buffer and to degrade its functions and
31 values, so that strategies to promote long-term protection should be encouraged. SCC 30.62.A.
32
33

34 Buffer Reductions

35
36 All parties agree that the County has adopted the Department of Ecology's *Wetlands in*
37 *Washington, Volume 1* as the Best Available Science for protecting and managing wetlands.
38

39 Petitioners assert: "Although Snohomish County's buffers start within the range of best available
40 science, the County's system of reductions create significant deviations from Ecology's BAS."
41 Petitioners HOM Brief, at 20. Petitioners note that SCC 30.62A.320(1)(a) Table 2b is
42 comparable to Ecology's Alternative 3 Table 8C-7, 6, 5 and 4, but Petitioners claim they are not
43 equivalent. *Id.* at 20, *compare* tables at 11-12 and tables at 15-18. One would assume that
44 Petitioners would then demonstrate that by applying the buffer reduction provisions for a given
45 category of wetland with its assigned buffer widths the result would be a buffer width outside the
46 range of BAS as established in *Wetlands I*. However, Petitioners never did this.
47
48

49 At the HOM the County provided a demonstrative exhibit, HOM Ex. 2, entitled "Comparison of
50 Snohomish County Buffer Widths and Range of Effective Buffer Widths by Function" that
illustrated the *range* of buffer widths by different function and intensity of land uses and

1 different sources of BAS from the County's record. As the Board understands it, this exhibit
2 illustrates that the County's BAS supports a wide range of buffers and that even applying
3 reductions to the buffers established by the County the resulting buffers would fall within the
4 range of BAS in the record.
5

6 Given the Petitioners' failure to demonstrate that the County's buffer reductions fall outside the
7 range of BAS and the County's rebuttal of this assertion with HOM Ex. 2, the Board finds that
8 Petitioners have failed to carry the burden of proof in challenging buffer reductions. The Board's
9 inquiry could stop here. However, if the Board is misinterpreting HOM Ex. 2, the Board
10 proceeds to discuss the fenced, separate tract and enhancement provisions of the County's
11 Ordinance.
12

13 Petitioners argue that the reductions of buffer size allowed by the County, when a critical area is
14 fenced or placed in a separate tract, potentially modify the size of buffers to significantly deviate
15 from the BAS provided in *Wetlands Vol. 1*. By doing so, Petitioners contend there is no
16 guarantee that there will be no net loss of critical areas' functions and values as required by the
17 GMA.
18

19 As to the fencing and separate tract provisions (SCC 30.62A.320(1)(e)),⁵ the County asserts that
20 allowing property owners the option of adding fencing and/or placing a critical area in a separate
21 tract will provide additional protection for the critical area. The County contends the critical area
22 will not be compromised because a land owner's combined use of these reductions is limited to a
23 maximum of 25 percent reduction of buffer width.
24
25

26 The Board finds that Ecology's Volume I *Suggestions from the Literature for Improving the Site*
27 *Selection and Design*, Table 6-12, at 6-67, states, "Minimize human encroachment by planting
28 dense vegetation around the site and installing fences." Additionally, the Board finds that
29 Ecology's Volume II (*Guidance for Protecting and Managing Wetlands*), which provides
30 guidance based upon the BAS in Volume I, contains Table 8C8, at 10, notes the merits of the
31 fencing and separate tract mechanisms for protecting the integrity of buffers and the critical areas
32 they protect. Consequently, the Board finds no error in the County's selection of these
33 mechanisms as part of their regulatory scheme for protecting the function and value of wetlands.
34
35

36 As to the County's enhancement provisions (SCC 30.62A.320(1)(f)),⁶ the Board notes that a
37 critical areas study is required prior to using this provision. The critical areas study speaks to
38 protecting the function and value of the critical area and its related buffers. It would appear to
39 the Board that a critical area study would provide the necessary information to the County to
40

41
42 ⁵ Buffer reductions:

43 Separate Tracts: SCC 30.62.320(1)(e)(i) – allows up to a 15% reduction

44 Fencing: SCC 30.62A.320(1)(e)(ii) - allows up to a 15% reduction

45 Separate Tract combined with Fencing: SCC 30.62A.320(1)(e)(iii) allows up to a 25% reduction

46 ⁶ Buffer reductions:

47 Enhancement: SCC 30.62A.320(1)(f)(ii) – allows up to a 25% reduction

48 Enhancement combined with Fencing: SCC 30.62A.320(1)(f)(iii)(A) – allows up to a 30%
49 reduction

50 Enhancement combined with Separate Tract: SCC 30.62A.320(1)(f)(iii)(B) – allows up to a 30%
reduction

1 determine whether the function and value of the wetland and its buffer are being protected
2 adequately enough through enhancement to merit a reduction in the buffer and ensure no net loss
3 of the wetland. Further, the Board notes that the County should be commended for addressing
4 *enhancement* of buffers given that *protection* of existing critical areas, regardless of their quality,
5 is all that is required. *Swinomish Indian Tribal Community v. WWGMHB*, 161 Wn. 2d 415, 530;
6 166 P. 3d 1198 (2007)
7

8
9 While the Board would not suggest that the County’s approach to establishing buffer widths and
10 reductions is the easiest to follow, the Board finds and concludes that the Petitioners have failed
11 to carry their burden of proof in demonstrating that the County’s action, in adopting Ordinance
12 06-061, was clearly erroneous. The Petitioners did not demonstrate, through best available
13 science, that the County’s allowance for buffer reductions based on fencing, separate tracts and
14 enhancements failed to protect the function and values of the critical areas or yielded buffer
15 widths which were not supported by the science contained in the County’s record.
16

17 Land Use Intensity
18

19 Petitioners assert that, by setting high intensity uses based on 4 du/acre, Snohomish County has
20 effectively changed Ecology’s definitions of land intensity uses and failed to apply BAS. In
21 addition, missing from the CAO is a definition of moderate intensity uses, which leaves
22 Petitioners questioning which buffer width applies – the standard buffer or the low intensity
23 buffer. Petitioners point to Ecology’s numerical definitions set forth in Appendix C, Table 8C-3
24 of *Wetlands in Washington, Vol. 2*. This table states that high intensity land uses include
25 residential uses of more than one dwelling unit per acre; moderate intensity uses include
26 residential uses of one dwelling unit per acre or less; low intensity uses do not reference
27 residential uses at all. Snohomish County establishes its own numerical definitions in footnotes
28 to SCC 30.62A.320 Table 2b, which sets forth wetland buffer width standards. Footnotes 1 and
29 2 of Table 2b state that high intensity land uses include residential use of four or more dwelling
30 units per acre (4du/acre) and, like Ecology, low intensity uses have no provision for residential
31 use.
32
33

34 Comparison of the County’s and Ecology’s tables and footnotes show a clear difference in the
35 definition of high intensity uses, but Petitioners never establish that Ecology’s was based upon
36 BAS or that the County’s was not.⁷ The Board could end its inquiry here since Petitioners failed
37 to carry their burden of proof.
38
39

40 But, the question remains whether Snohomish County deviated from BAS by defining residential
41 high intensity use at a level different than Ecology. Both *Wetlands Vol. 1* and *Wetlands Vol. 2*
42 speak to the science behind buffer widths as they relate to the intensity of adjacent land use.
43 Although no specific numerical definition of land intensity is provided in *Wetlands Vol. 1*, a
44 study conducted by Shisler, et al (1987) differentiated between land use impacts, classifying low
45 intensity land use as agricultural, recreational, and low-density housing and high intensity land
46
47

48 ⁷ Along with their Reply Brief, Petitioner offered to supplement the record with an e-mail from Ecology wherein
49 Ecology attempted to explain its rationale, but since the “explanation” was a *post hoc* offering that did not cite to the
50 existing record and was not presented to the County at the time the decision was made, the Board denied the
proposed exhibits inclusion in the record. Petitioners are therefore left with an unsupported allegation.

1 use as high density residential, commercial, and industrial. *Wetlands Vol. 1*, at 5-47 – 5-48.
2 These findings are reflected later in *Wetlands Vol. 1* when buffer widths are recommended based
3 on habitat value and land intensity, with minimal habitat and low-intensity use requiring 25 to 75
4 feet buffers, moderate habitat and moderate/high intensity use requiring 75 to 150 feet buffers,
5 and high habitat and any intensity use requiring 150 to 300 feet buffers. *Wetland Vol. 1*, at 5-55,
6 5-57 (see also *Wetlands Vol. 2*, at 3-10).
7

8
9 With the exception of Table 8C-3 of *Wetlands Vol. 1*, Petitioners point to no other numerical
10 definition as to intensity, nor could the Board find any reference in either volume of Ecology’s
11 documents, including the Glossary. The County noted that its Comprehensive Plan has
12 established 4 to 6 du/acre as the minimum net urban density, which is in accord with densities
13 considered compact urban development – or high intensity - by this Board. Therefore, the
14 Board concludes that the County’s CAO definition for high intensity land use is consistent with
15 its minimum urban density. And, the Board further concludes that the Petitioners have failed to
16 demonstrate how the County’s definition is not supported by BAS or, in the contrast, Ecology’s
17 definition is numerically supported by BAS.
18

19
20 As to the omission of moderate intensity within SCC 30.62A.320 Table 2b creating ambiguity,
21 the Board disagrees with Petitioners because the definitions provided in Footnotes 1 and 2 set
22 limitations as to the application of the given buffer widths. The buffer widths for low intensity
23 would not be applicable to any residential use which does not meet the definition provided in
24 Footnote 2. A similar result is found for high intensity uses; if the proposed residential use is
25 not 4 du/acre or greater, then it does not meet the definition and therefore is not eligible for
26 widths and/or reductions applicable to that intensity. As the County explains in its Response
27 Brief,
28

29
30 Uses that do not fall within the categories of high intensity land use or low
31 intensity land use are considered moderate intensity land uses and are assigned a
32 “standard buffer width.” A residential use that is less than four units per acre does
33 not fall in either the high intensity land use or low intensity land use categories
34 and is therefore, a moderate intensity land use.
35

36 County Response, Footnote 22, at 42. Although the County’s regulations in this regard are not a
37 model of clarity, simply adding another footnote, as explained in the County’s briefing would
38 clarify how the County defines moderate intensity uses.
39

40 The Board finds and concludes that the Petitioners have failed to carry their burden in
41 demonstrating that the County’s action, in adopting Ordinance 06-061, was clearly erroneous.
42 The Petitioners did not demonstrate, through best available science, that the County’s definition
43 of land intensity failed to protect the functions and values of the critical area or created buffer
44 widths which were not supported by the science contained in the County’s record.
45

46 Conclusion

47
48 The Board finds and concludes that Petitioners have failed to carry their burden of proving that
49 the County’s provisions for buffer widths and reductions, adopted in Ordinance 06-061, were
50 clearly erroneous. Legal Issue No. 1 is **dismissed**.

1
2
3 **Legal Issue 3 – Regulated Activities**

4 Legal Issue 3, as set forth in the Board’s PHO, is:

5
6 *Does Snohomish County’s failure to regulate all activities that may impact*
7 *critical areas in SCC 30.62A.010 fail to protect critical areas and fail to*
8 *incorporate Best Available Science in violation of RCW ~~36.70.020(8-10),~~*
9 *~~36.70A.040, 36.70A.060, 36,70A.070, 36.70A.170~~and 36.70A.172?*⁸

10
11 **Position of the Parties:**

12
13 The crux of Petitioners’ argument is that the County only regulates *certain types* of activities
14 within critical areas, instead of *all* activities – thereby failing to protect *all of the functions and*
15 *values of the critical area*. Petitioners’ HOM brief, at 30 (citing SCC 30.62A.010(2)(a) at PFR,
16 Attachment 1, SCC 30.62A). Petitioners assert that the County’s definitions for “development
17 activity” and “project permit” do not include “function-destroying activities like draining,
18 flooding, and shading of wetlands” – these are the only activities that are targeted. *Id.* at 30.

19
20
21 Petitioners point to RCW 36.70A.172, which requires Snohomish County to utilize BAS when
22 developing policies and regulations for protecting the function and values of critical areas. *Id.* at
23 31. Petitioners state that the GMA requires *all functions and values of a critical area to be*
24 *protected*⁹ and conclude that the failure to regulate all activities that could affect a critical area
25 correlates to a failure to use BAS to protect the area. *Id.* at 31-32. According to Petitioners,
26 *shading* may impact aquatic and terrestrial vegetation, thereby affecting filtration, shelter, and
27 forage for wildlife; *draining* would impact the physical structure of a wetland so as to make it
28 unable to support vegetation and soils; and *flooding* (resulting in an increase of water to the
29 wetland) although having the potential for improving water quality, may also impact the
30 residence time, distribution of aerobic/anaerobic environments, and microbial and non-microbial
31 chemical processes. *Id.* at 32 (citing to *Wetlands of Washington*, Vol. 1).

32
33
34 Petitioners rely on a 1996 Central Board decision holding that *protect* means that the values of
35 functions must be *maintained, with no net loss* (citing to *Tulalip Tribes v. Snohomish County*,
36 CPSGMHB Case No. 96-3-0029, FDO (Jan. 8, 1997)) and the *HEAL* case in which the Court of
37 Appeals held BAS was essential to the decision-making process and the County cannot just
38 choose the science it prefers, simply because the BAS doesn’t support its decision (citing *HEAL*
39 *v. CPSGMHB*, 96 Wn. App. 522, 533 (1999)). *Id.* at 32-33. From these two cases, Petitioners
40 conclude the science in the County’s record supports regulations of all activities and not
41 exemptions of activities. *Id.* at 33.

42
43
44 In response, the County asserts the complained-of activities – shading, flooding, and draining –
45 are not independent activities but are *caused by* activities that are captured within the definitions
46

47
48 ⁸ The struck sections of the RCW were abandoned by Petitioners.

49 ⁹ See *Whidbey Environmental Action Network (WEAN) v. Island County*, 122 Wn. App. 156, 174-175 (2004)
50 (holding that the GMA requires that the regulations for critical areas must protect the "functions and values" of those
designated areas. *This means all functions and values*) (Emphasis added).

1 of “development activities,” “project permit,” and “clearing.” County Response, at 45. The
2 County goes on to provide examples of how each of the complained-of activities is an “effect of
3 an activity” and those activities are subject to critical areas regulations. *Id.* at 45-47. In addition,
4 specific to shading and flooding, the County notes these occur naturally and can actually be
5 beneficial to the critical area and therefore, are not “function-destroying” as Petitioners assert.
6 *Id.* at 47 (citing to Core Document 2, Draft Summary of BAS).
7

8
9 In regard to *shading*, the Intervenor assert Petitioners do not have standing to raise this issue
10 because it was never raised in the six years during which the CAO was being reviewed; they rely
11 on the County’s briefing for dismissal of Petitioners’ claim based on standing. Intervenor’s
12 Response, at 12-13. Intervenor note, citing from *Wetlands Volume 1*, that there is no evidence
13 in the record that demonstrates shading, in and of itself, should be regulated or is harmful to a
14 wetland. *Id.* at 13. Intervenor point out shading has been shown to be beneficial, especially
15 when adjacent to streams, but there is no scientific analysis studying shade’s effect on wetlands.
16 *Id.* at 13-14. Intervenor also note there is no logical and workable remedy for Petitioners’ claim
17 that shade adversely impacts the wetland. *Id.* at 14.
18

19
20 As to *flooding and drainage*, Intervenor note Petitioners have failed to provide an example of
21 any activity that would cause such problems that is not already covered under the CAO or other
22 regulations and that one of the benefits of a wetland is flood storage. *Id.* at 15. Specifically,
23 Intervenor find almost any flooding or draining activity would require a grading permit and any
24 exemptions from grading permit requirements, including certain small projects, do not apply if
25 the activity would occur within a critical area. *Id.* at 16.
26

27
28 In reply, Petitioners argue that they have standing to raise claims in regard to shading because
29 their comments, based on BAS which included shading, provided for “All actions, uses, and
30 activities” – therefore shading is encompassed by “all actions.” *Id.* at 5.
31

32
33 On the merits, Petitioners argue that not all “relevant activities require a project permit or
34 otherwise fall within the County’s Ordinance” so as to protect critical areas functions and values.
35 Petitioners’ Reply, at 12. With regard to shade, Petitioners specifically point to SCC 30.52A.148
36 (the County’s Building Code) which provides exemptions from permits for small structures (less
37 than 200 sq ft), fences, oil derricks, pre-fabricated swimming pools, playground equipment, job
38 shacks, shade cloth, agricultural structures, etc. - many of which, according to Petitioner, would
39 create shade. *Id.* at 13-14. Petitioners also point out that vegetation planting, such as that
40 required by cluster subdivisions, may create shade with no regulation governing and there are no
41 provisions governing vegetation alteration unless clearing is involved. *Id.* at 15.
42

43
44 Petitioners next address draining and state this can be accomplished through pipes and pumps or
45 a garden hose, not just earth movement as the County asserts, and therefore a property owner can
46 drain a wetland without ever getting a permit. *Id.* at 15. Petitioners go on to argue that SCC
47 30.63A (the County’s Drainage code) applies only to development activities with those asserted
48 above not defined as such. *Id.* at 16.
49

50
The same argument is submitted for flooding, i.e., not all activities that could result in flooding
require permits – such as those exempted in SCC 30.52A.148 – or a “temporary structure” in a
stream. *Id.* at 16. In response to the County’s statement that “special flood hazard area”

1 regulations provide protection, Petitioners contend that such regulations are only applicable
2 when the activity causing flooding occurs within the flood hazard area. *Id.*
3

4 Lastly, Petitioners assert that the County's claims that flooding and shading could be beneficial
5 to a wetland cite to scientific literature based on "naturally-occurring" shading and flooding and
6 not man-made events. *Id.* at 17. According to Petitioners, for wetlands that have not historically
7 been impacted by these occurrences, the result could be damaging. *Id.*
8

9
10 Board Discussion:

11 As a preliminary matter, the Intervenors question Petitioners' standing to argue about shading.
12 Intervenor's objection is well taken. During the County deliberations on the critical areas
13 ordinance, the Petitioners submitted a letter to the County Council that discussed, as the first of
14 several "Recommended Improvements," the applicability provisions of the ordinance.
15 Petitioner's letter stated:
16

17
18 The Critical Areas provisions must apply to *all activities and uses* that adversely
19 affect critical areas and that the County has authority to regulate.
20

21 Index 259, at 6, (emphasis supplied).
22

23 The activities specifically discussed in Petitioners' letter are draining, clearing, filling and
24 grading at levels that do not require a permit. *Id.* at 7. From this discussion, the County could
25 hardly have understood that "shading" is an "activity" or "use" that Petitioners believe should be
26 regulated. Because Petitioners failed to put either science or salient facts or arguments on
27 "shading" into the record during the County process, they lack standing to raise the matter before
28 the Board on this appeal. *Suquamish II v. Kitsap County*, CPSGMHB Case No. 07-3-0019c,
29 Order on Motions, at 5 (May 3, 2007); *Sno-King v. Snohomish County*, CPSGMHB Case No. 06-
30 3-0005, Final Decision and Order, at 17-19 (July 24, 2006).
31

32
33 The GMA requires local jurisdictions to adopt development regulations that protect the functions
34 and values of critical areas. RCW 36.70A.172. "Development regulations" are defined in the
35 statute:
36

37 Development regulation or regulations means the controls placed on development
38 or land use activity by a county or city
39

40 RCW 36.70A.030(7).
41

42 Snohomish County has adopted critical areas regulations that apply to (1) all land-disturbing
43 activities that require a County permit, approval or authorization, (2) all land use or
44 environmental permits, approvals or licenses, and (3) all clearing activities. SCC 30.62A.010(2).
45 As the County explains, its wetlands regulations apply to "development activities," which are
46 defined in the Code as:
47

48 Any construction, development, earth movement, clearing or other site
49 disturbance which either requires a permit, approval or authorization from the
50 county or is proposed by a public agency.

1 SCC 30.91D.240. “Clearing” is broadly defined as:
2

3 The surface removal of vegetation by cutting, pruning, limbing, topping,
4 relocating, application of herbicides or pesticides, or any application of hazardous
5 or toxic substance that has the effect of destroying or removing vegetation.
6

7 SCC 30.91C.112.
8

9 This comprehensive approach is consistent with one of the regulatory schemes proposed by
10 Ecology in *Wetlands Vol. 1*, at 8-9: “Measures to protect wetlands or other critical areas can be
11 initiated when any development permit (e.g., grading, rezone, building, subdivision, and short-
12 plat permit) is required by the local jurisdiction.... Thus, the law can be written such that the
13 submittal of each development permit allows staff to review and condition the application based
14 on regulatory standards for wetlands from this code.” Ecology’s comment letter supported the
15 County’s applicability approach when clearing was added to the list of covered activities. Index
16 222 at 6.
17

18
19 The crux of this issue comes down to a difference in approach to solving the problem of
20 protecting critical areas. Petitioners assert that only certain types of activities in critical areas are
21 regulated by the County’s ordinance, but not all - specifically, draining and flooding of wetlands
22 are not regulated. By not expressly regulating these activities within critical areas, Petitioners
23 contend the County fails to protect all functions and values of critical areas.
24

25 The County argues that protecting critical areas regarding the issues of draining and flooding is
26 accomplished through development requirements in SCC 30.91 (The definitions pertaining to the
27 Unified Development Code – Title 30; specifically 30.91D.240 [Development Activities];
28 30.91P.350 [Project Permit]; 30.91C.112 [Clearing]; and 30.91W.060 [Wetlands].¹⁰ Protection
29 of the critical areas would be assured by required permits and by the critical area analysis that
30 would be performed prior to approval of such permits.
31

32
33 The Board is not convinced the County has failed to address the protection of critical areas in
34 regard to draining and flooding. Petitioners argue mischief can be done by a property owner
35 who chooses to drain a wetland with a garden hose or alter the flow of a stream by diverting it
36 with rocks. The Board believes these mischievous actions are at best hypothetical and
37 speculative situations;¹¹ at least, no factual supporting information has been provided. In
38 general, the Board agrees with the County that the normal activities that are likely to result in
39 flooding or draining of wetlands are captured by the definitions of “development activities,”
40 “project permit,” and “clearing.”
41

42 The GMA places the burden of proof on Petitioners who challenge a city or county GMA action.
43 That burden would require the Petitioners to have placed in the record in the County’s process
44 persuasive science and/or factual data documenting their concerns. Instead, they have based their
45

46
47 ¹⁰ Also there are citations to various aspects of Title 30: 30.52A - Building Code, 30.41A – Subdivisions; 30.41B –
48 Short Subdivisions; 30.41C – Rural Cluster, 30.41D – Binding Site Plans, 30.41F – Accessory Dwelling Units;
49 30.42B – Planned Residential Development; 30.63A – Draining; 30.63B – Grading; and 30.43C – Flood Hazards.

50 ¹¹ Further, federal and state codes prohibit blocking streams and draining wetlands, require permits, and impose
sanctions.

1 argument before the Board largely on hypothetical scenarios. These hypotheticals do not
2 overcome the presumption of validity in favor of the County.
3

4 The Board finds that the County's permit application requirements reasonably encompass the
5 kinds of land development activities and uses likely to impact critical areas and buffers.
6 Petitioners have failed to carry their burden of proof on this point.
7

8 Conclusion
9

10 The Board finds and concludes that the Petitioners have failed to carry their burden of proof in
11 demonstrating that the County's regulation of development activities failed to protect critical
12 areas or was not based on best available science as required by RCW 36.70A.172. Legal Issue
13 No. 3 is **dismissed**.
14

15 **VII. ORDER**
16

17 Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties,
18 the GMA, prior Board Orders and case law, having considered the arguments of the parties, and
19 having deliberated on the matter, the Board ORDERS:
20

- 21
- 22 1. **Petitioners failed to carry their burden of proof with respect to Legal Issue 1 and 3,**
23 **challenging Snohomish County's adoption of various provisions of Ordinance No. 06-**
24 **061. The challenged provisions are **not clearly erroneous** and **comply** with RCW**
25 **36.70A.060, and 36.70A.172. Legal Issue Nos. 1 and 3 are **dismissed**.**
26
 - 27 2. The matter of *Pilchuck Audubon Society, et al v. Snohomish County*, CPSGMHB Case
28 No. 07-3-0003 is **closed**.
29

30 So ORDERED this 1st day of April, 2008.
31

32
33 CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD
34
35

36
37 _____
38 David O. Earling
39 Board Member
40

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42 _____
43 Edward G. McGuire, AICP
44 Board Member
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48 Margaret A. Pageler
49 Board Member
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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 242-02-832.¹²

¹² 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. 07-3-0033

On October 5, 2007, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Pilchuck Audubon Society and Futurewise (**Petitioners**). The matter was assigned CPSGMHB Case No. 07-3-0033, and is hereafter referred to as *Pilchuck VII v. Snohomish County*. Board member David O. Earling is the Presiding Officer (**PO**) for this matter. Petitioners challenge Snohomish County's (**Respondent** or the **County**) adoption of Ordinance No. 06-061. The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**).

On October 9th, 2007, the Board issued a Notice of Hearing (**NOH**) in the above-captioned case. The NOH set a date for a Prehearing Conference (**PHC**) and established a tentative schedule for the case.

On October 16, 2007, the Board received a Motion to Intervene of the Master Builders of King and Snohomish Counties. (**MBA**) On October 25, 2007, the Board received a Motion to Intervene of the Snohomish County Camano Association of Realtors. (**SCCAR**)

On November 8, 2007, the Board conducted the PHC at Seattle City Hall. Presiding Officer David O. Earling conducted the conference. Board members Margaret Pageler and Edward McGuire, as well as Board Attorney Julie Ainsworth-Taylor, were also present. Keith M. Scully represented the Petitioners. Laura C. Kisielius represented the Respondent. Robert D. Johns represented the potential interveners. Also in attendance were Tim Trohimovich from Futurewise and David Hall and John Moffat from Snohomish County. Former Board Extern, Linda Jenkins was in attendance. The Board granted the motions to intervene on behalf of Snohomish County by MBA and SCCAR.

At the PHC, the Board received the County's Index to the Administrative Record and the Best Available Science for Critical Areas document utilized by the County in formation of Ordinance No. 06-061.

The Board acknowledged the receipt of a letter on November 5, 2007, from Snohomish County requesting clarification of the issues raised by the Petitioner in the PFR. A discussion was held by the Board and participants regarding the framing of the Petitioner's issues in the PFR. The County and Intervenors requested clarification and refinement of the issues. The Petitioner agreed to redraft issues for Board consideration by November 13, 2007. In addition the Intervenors requested an expanded briefing schedule.

On November 9, 2007, the Board received Petitioners' Amended Statement of the Issues for Review.

On November 13, 2007, Presiding Officer Earling received, via fax, a letter from Respondent Snohomish County, In Re: the Amended Issues Statement filed by Petitioners.

On November 14, 2007, the Board issued its Prehearing Order, Order on Intervention, and Order of Restatement of Issues and Schedule Adjustment.

1 Petitioners' filed Petitioners' Pilchuck Audubon and Futurewise Opening Brief on January 3,
2 2008, with seven exhibits (followed by the additional submittal of Tab 660 on January 9, this
3 having been inadvertently omitted at time of brief filing).
4

5 Prehearing Brief of Intervenors SCCAR and MBA of King and Snohomish Counties was filed
6 on January 23, 2008.
7

8 Respondent filed its Snohomish County's Response Brief, along with its Amended Index to the
9 Administrative Record, on January 24, 2008, with thirty exhibits.
10

11 Petitioners' Hearing on the Merits Reply Brief was received by the Board on February 6, 2008,
12 with one exhibit.
13

14 On February 11, 2008, Petitioners filed their Motion to Supplement the Record and Leave to
15 File a Motion Out of Time, with one exhibit.
16

17 Respondent Snohomish County filed its Response to Petitioners' Motion to Supplement the
18 Record and Leave to File a Motion Out of Time on February 13, 2008.
19

20 The Hearing on the Merits was convened on February 21, 2008, at 10:00 a.m. in the Palouse
21 Room, 20th Floor, Bank of America 5th Avenue Plaza, and adjourned at 11:57 a.m. Board
22 members Dave Earling, Presiding Officer, Margaret Pageler and Ed McGuire attended, as did
23 Julie Ainsworth-Taylor, GMHB Staff Attorney. Parties to the case in attendance were Keith
24 Scully, Tim Trohimovich and Ryan Espeguard for petitioners, Laura Kisielius, John Moffat, Terri
25 Strandberg, Matt Otten for Respondent Snohomish County, and Bob Johns and Jennifer Jeraben
26 for Intervenors MBA of King/Snohomish County and SCCAR. Court Reporting Services were
27 provided by Barbara Hayden of Byers and Anderson, Inc.
28

29 The Hearing on the Merits afforded the Board the opportunity to ask a number of questions, and
30 to clarify matters in order to develop a clear understanding of the County's actions and
31 Petitioners' challenge. At the HOM, Respondent Snohomish County submitted, and the Board
32 accepted, the following Hearing on the Merits exhibits:
33

- 34 • Exhibit 1: Range of Effective Buffer Widths by Function
- 35 • Exhibit 2: Comparison of Snohomish County Buffer Widths and Range of Effective
36 Buffer Widths by Function
- 37 • Exhibit 3: Wetlands and Fish & Wildlife Habitat Conservation Areas, Chapter 30.62A
- 38 • Exhibit 4: Table 8C-7. Width of buffers needed to protect Category I wetlands in western
39 Washington
40

41 On February 25, 2008, the Board received the E-Transcript of the Hearing on the Merits from
42 Byers and Anderson, followed by the sealed original on February 27, 2008.
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