BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

WHIDBEY ENVIRONMENTAL ACTION NETWORK, Petitioner, v. ISLAND COUNTY, Respondent	Case No. 98-2-0023c **2006 ORDER FINDING COMPLIANCE ON CRITICAL AREAS PROTECTIONS IN RURAL LANDS**

I. SYNOPSIS

THIS Matter comes before the Board upon the motion of Island County for a finding of compliance in the last remaining compliance issue in a case filed in 1998. That issue is whether the best management practices program adopted by Island County meets the Growth Management Act's (GMA) requirements for protection of the functions and values of critical areas in noncommercial agricultural zones. We find that it does.

The program adopted by the County allows a landowner to qualify for exemption from the County's standard buffer requirements for an existing and ongoing agricultural use with a standard or customized farm plan that incorporates the Natural Resources Conservation Service (NCRS) best management practices (BMPs) for agricultural activities. Implementation of the BMPs in the farm plan is mandatory or the landowner will be required to comply with the standard buffer requirements in the County's critical areas ordinance. The County reviewed the NCRS BMPs with the aid of three state agencies – Department of Ecology (Ecology), Department of Fish and Wildlife (WDFW) and the Department of Community, Trade and Economic Development (CTED) – and determined that NCRS BMPs, together with its monitoring and adaptive management program, incorporate the best available science to protect the functions and values of critical areas.

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The County's program commits to monitoring and adaptive management of those BMPs to ensure that they in fact protect the functions and values of critical areas. Island County has enlisted the support of the Conservation Districts and the Washington State University Extension Service to help prepare and monitor the adoption and implementation of farm plans. In addition, the County provides for swift corrective action in the event that BMPs are found to be insufficient protection, and keeps the public apprised of those actions through annual reporting,[1]

Island County laid the basis for its adoption of BMPs for noncommercial agricultural activities with a survey of agriculture in its rural zones. This survey found that there is as much acreage in agricultural use in rural designations as there is in commercial agricultural zones. It also found that the majority of this agriculture activity occurs on property with critical areas and that the standard buffer requirements of the critical areas ordinance would threaten the ability of property owners to continue agricultural practices that enhance the rural character of Island County.

Island County has done a thorough analysis of its local circumstances and come up with an admirable commitment to preserving its rural character while protecting the functions and values of critical areas in the rural areas. There should be no doubt about the amount of work that will go into the County's program by every participant in it. However, the involvement of landowners is one of the many strengths of the County's program, since it makes the consideration of the protection of critical areas an everyday part of agricultural practices. The County's involvement in every step of the process – from gathering questionnaires to working with the Conservation District on farm plans, to investigation of complaints, to monitoring of water quality, to prompt adaptive management of ineffective BMPs – represents an active engagement in the protection of critical areas tailored to the

[1] Ordinance C-22-06, ICC 17.02.040L.6 and 7.

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local circumstances of Island County. We believe this comports with the letter and the spirit of the GMA.

II. PROCEDURAL HISTORY

This case has had a long history, beginning when the Petition for Review was filed in 1998. Multiple issues were raised in the original petition and various decisions of the Board have been issued, some of them regarding all the issues and some tracking specific issues. The sole remaining issue is the compliance of the County's critical areas regulations of agricultural activities occurring in rural zones with RCW 36.70A.060(2), 36.70A.170, and 36.70A.172. (FDO Remand Issue 10).

The Board first found noncompliance on this issue in its Final Decision and Order, dated June 2, 1999. Thereafter, the Board referred to the issue as FDO Remand Issue 10 (the agricultural exemption).

The Board's decision on this, and other, issues was appealed by the County to the Island County Superior Court. The Superior Court, among other things, reversed the Board's finding of noncompliance on FDO Remand Issues 10 and 15.[2] WEAN and the County appealed the superior court decision to the Court of Appeals, Division I, which reversed the Superior Court on FDO Remand Issue 10 and affirmed the Board on that issue.[3]

Petitioner WEAN requested that the Board promptly schedule a compliance hearing.[4] To determine the status of the case, the Board ordered a progress report and the County filed its progress report on April 15, 2005. At that time, the County asserted that there had

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[2] Decision, *Island County and WEAN v. Western Washington Growth Management Hearings Board*, Island County Superior Court Cause No. 99-2-00334-3, June 12, 2002.
[3] *WEAN v. Island County*, 122 Wn. App. 156, 93 P. 2d 885 (2004).
[4] Memorandum from Steve Erickson to the Western Washington Growth Management Hearings Board dated March 4, 2005.

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not yet been a remand of the case from the courts.[5] The case was remanded from the Court of Appeals to the Island County Superior Court on July 19, 2005.[6] The parties then agreed to move the case from Island County Superior Court to this Board. The County filed its compliance report and request for a finding of compliance on one subject on August 23, 2005.[7] Petitioner filed its motion for invalidity and sanctions on September 26, 2005.[8]

A hearing on the motions was held on October 25, 2005. The Board declined to enter a determination of invalidity at that time.[9] Thereafter, the County filed a motion for a finding of compliance on Remand Issue 10 based on the Court of Appeals' decision in *Protect the Peninsula's Future v. Clallam County,* Division II Doc. No. 31283-2-II and the County's Report on Ag Uses in Rural Zones.[10] The Board deferred ruling on this motion, finding that the issue of compliance should be decided after Island County had taken action on its update of its regulations on agricultural best management practices (BMPs), in accordance with the schedule adopted by the County Commissioners on August 1, 2005.[11]

The County filed a progress report and motion for an extension of time on January 24, 2006.[12] At that time, the County requested additional time since there was a SEPA appeal pending regarding the adoption of Ordinance C-150-05 and Ordinance C-22-06. The Board found that the County Commissioners could not adopt legislation under County rules until the SEPA determination was resolved and therefore extended the compliance date 90 days

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[5] Respondent Island County's Compliance Progress Report.
[6] Mandate Island County Superior Court No. 99-2-00334-3.
[7] Respondent Island County's Compliance Progress Report and Request for a Compliance Determination Re: Type 5 Stream Buffers.
[8] WEAN's Motion of September 26, 2005 for Invalidity and Sanctions.
[9] Order Finding Compliance as to Type 5 Stream Buffers and Denying Determination of Invalidity as to Agricultural Activities in Rural Areas , November 14, 2005.
[10] Island County's Compliance Motion Regarding Existing Rural Agriculture, November 7, 2005.
[11] Order Deferring Ruling on County Motion for Compliance and Setting Compliance Schedule, December 2, 2005.
[12] Island County's Progress Report and Motion Regarding Existing Rural Agriculture.

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to allow the SEPA appeal before the Hearings Examiner. [13] The Hearings Examiner dismissed the SEPA appeal on March 24, 2006.[14]

On May 15, 2006, the Island County Board of Commissioners took final action to update the County's critical areas regulations relating to existing and ongoing agriculture.[15] The County therefore moved the Board to determine that the new regulations applicable to existing and ongoing agricultural lands located in the R, RR and RF zones comply with the GMA and that the County had achieved compliance on FDO Remand Issue 10.[16] WEAN filed its objections to a finding of compliance on May 29, 2006.[17]

The compliance hearing was held on June 22, 2006, in Coupeville, Washington. Mr. Steve Erickson represented WEAN. The County was represented by attorney Keith Dearborn and deputy prosecutor Joshua Choate. Board members Holly Gadbaw, Margery Hite (presiding officer) and Gayle Rothrock attended.

At the hearing, motions to strike were made with respect to three briefs: WEAN moved to strike the brief of ICPRA as containing prejudicial material and personal attacks. That brief was not stricken but any attacks or personal issues with respect to WEAN members were disregarded as not relevant to issues of compliance. WEAN also moved to strike the brief of the Frei Family on the grounds that it relies upon a letter from State Senator Mary Margaret Haugen concerning the meaning of the GMA. The Board agreed that the interpretation of the senator, however respected and well-regarded, is not admissible as evidence in the case. The Board allowed the Frei Family to resubmit their brief as argument without reference to Sen. Haugen's letter and they did so. The County moved to strike the WEAN

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[13] Order Granting Motion for Extension of Compliance Period, February 10, 2006.
[14] Order Dismissing Whidbey Environmental Action Network's Appeal of a SEPA Threshold Determination of Non-Significance for Ordinance PLG-021-05, File No. APP 023/06.
[15] Island County's Compliance Motion Regarding Existing Rural Agriculture, May 16, 2006.
[16] *Ibid* at 2.
[17] WEAN's Response of May 20, 2006.

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Reply brief because there was no provision for such a reply in the established schedule and no ability to respond. The Board agreed and struck the WEAN Reply.

III. OFFICIAL NOTICE

At the hearing on the merits, the County requested the Board to take official notice of the Natural Resource Conservation Service (NRSC) best management practices (BMPs) found on the NRSC web-site and at R8799 of the County's record. The Board agrees to take official notice of the NRSC BMPs pursuant to WAC 242-02-670.

IV. BURDEN OF PROOF

In a compliance proceeding, the Petitioner has the burden of proving that the legislative enactments adopted to achieve compliance are clearly erroneous:

> Except as otherwise provided in subsection (4) of this section, the burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter.

RCW 36.70A.320(2)

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

RCW 36.70A.320(1)

> In any petition under this chapter, the board, after full consideration of the petition, shall determine whether there is compliance with the requirements of this chapter. In making its determination, the board shall consider the criteria adopted by the department under RCW 36.70A.190(4). The board shall find compliance unless it determines that the action taken by the state agency, county, or city is clearly erroneous in light of the goals and requirements of this chapter.

RCW 36.70A.320(3)

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

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

> In recognition of the broad range of discretion that may be exercised by counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter, the legislature intends for the boards to grant deference to the counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

RCW 36.70A.3201 (in part).

Overall, the burden is on the Petitioner to overcome the presumption of validity and demonstrate that any action taken by the County is clearly erroneous in light of the goals and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2). Where not clearly erroneous and thus within the framework of state goals and requirements, the planning choices of local government must be granted deference.

V. ISSUE PRESENTED

Does the adoption of Ordinances C-150-05 and C-22-06 the County's critical areas regulations applicable to existing and ongoing agricultural activities in rural zones comply with RCW 36.70A.060(2), 36.70A.170, and 36.70A.172.

VI. DISCUSSION

Positions of the Parties

WEAN argues that Ordinances C-150-05 and C-22-06 do not provide adequate protection to critical areas.[18] WEAN argues that existing and ongoing agriculture is degrading critical areas throughout Island County, and that the damage is itself both existing and ongoing.[19]

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[18] WEAN's Response of May 29, 2006 at 4 and 28.
[19] *Ibid* at 14.

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WEAN further argues that the compliance scheme is focused entirely on water quality instead of protecting all the functions and values of those critical areas.[20] In addition, in its claims, WEAN faults the County's regulations for: grandfathering existing grazing and animal confinement areas within 100 feet of wells; providing inadequate or no stream and wetland buffers; creating a new wetland designation and classification scheme with no scientific basis; "allowing reduction in critical area protections based on the lack of current violation of state water quality standards"; and using a protection scheme that is "ultimately prohibitively expensive". [21]

The County responds that the question is whether the County may regulate existing agriculture in the same way, regardless of zoning.[22] The County notes that the Board has already found that existing and ongoing agriculture uses in the Commercial Agriculture (CA) and Rural Agriculture (RA) zones may utilize best management practices instead of the County's Critical Areas Ordinance.[23] In Ordinance C-150-05, the County has adopted a system for the administration of agricultural best management practices (BMPs), the County asserts, and in Ordinance C-22-06, it has adopted a monitoring program and framework for adaptive management.[24] The County denies that there is evidence to show that agricultural activities in the rural areas are degrading critical areas and argues that its management system will protect critical areas.[25]

Board Discussion

This case comes to the Board as a compliance matter based on the Board's 2000 ruling that the County must provide a basis establishing the need for the exemption of noncommercial rural agriculture from the buffer requirements of the County's critical areas ordinance. The

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[20] *Ibid* at 15.
[21] *Ibid* at 24.
[22] Island County's Response to WEAN's Objections at 9.
[23] *Ibid.*
[24] *Ibid* at 12.
[25] *Ibid* at 20-24.

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Board had found that BMPs were appropriate for critical areas protections in designated commercial agricultural lands but that there was no showing that such a variation from buffer requirements of the County's critical areas ordinance was needed for noncommercial agriculture in rural lands.[26]

The Study of Noncommercial Agricultural Uses

On remand, the County conducted a study of noncommercial agriculture in rural lands.[27] It found approximately 14,000 acres in noncommercial agricultural use in rural zones (RA, RR and RF), compared with 10,000 acres in commercial agricultural zones (CA and RA). The study further estimates that 40% of the agricultural land in the rural zones is being used for livestock production; 35% for horticulture; 14% for both livestock and horticulture; and 6% listed for unidentified agriculture on the Assessor's property database.[28] Of the lands being used for livestock, the majority have less than one animal per acre.[29] The average size of the rural noncommercial farms surveyed was less than ten but more than five acres.[30] The study further shows that approximately 72% of the noncommercial agricultural activity is occurring in areas in or near critical areas.[31]

In Ordinance C-150-05, the County Commissioners found that both commercial and noncommercial farming are important to the rural character of Island County.[32] Rural character, they found, is part of the economy and culture of the County.[33] They determined that noncommercial farming activities in rural designations contribute to the rural character of Island County and preserve the County's agricultural heritage.[34] Therefore, the

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[26] Compliance Hearing Order on FDO Remand Issues 10, 14 and 15, November 17, 2000.
[27] R-8414
[28] R-8327
[29] *Report and Recommendations of the Agricultural Review Committee* at 2.
[30] R-8327, Exhibit B.
[31] R-8445
[32] Ordinance C-150-05, Exhibit A-2
[33] *Ibid.*
[34] Ordinance C-150-05, Exhibit A -2.

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Commissioners found that the contributions of both noncommercial farming and commercial farming should be recognized and protected..[35] Because of the number of critical areas located on parcels in rural noncommercial agricultural use, the Commissioners found that the standard buffer requirements would threaten the ability of rural agriculture to continue and that BMPs would assist rural agriculture to coexist in conformity with GMA requirements for the protection of critical areas.[36]

We find that, with its survey of agricultural activity on Island County and the Commissioners' findings, the County has established a sufficient rationale, based on its local circumstances, for the need to adopt special measures to protect critical areas that also preserve existing and ongoing agricultural activities in its noncommercial rural zones. This rationale led to the adoption of two ordinances – Ordinance C-150-05 and Ordinance C-22-06.

Best Available Science

The County argues that best management practices (BMPs) developed by the Natural Resources Conservation Service (NCRS) incorporate the best available science for protecting critical areas and in fact do protect critical areas as required by RCW 36.70A.060(2), 36.70A.170 and 36.70A.172. The County Commissioners determined that NCRS BMPs constitute best available science for the protection of critical areas in farmed lands.[37] For this reason, the Commissioners decided to apply site specific measures, tailored to the level and intensity of agricultural practices, to protect critical areas in all farmed lands.[38]

Based on its survey of agricultural uses in the rural zones, the County established BMP requirements for existing and ongoing noncommercial agricultural activity at three levels of

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[35] *Ibid,* Exhibit A-2.
[36] *Ibid.*
[37] Ordinance C-150-05, Exhibit C-3
[38] *Ibid* Exhibit A-2

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intensity – low, medium and high.[39] Ordinance C-150-05 provides that agricultural activities of low intensity may protect critical areas through standard farm management plans. Medium and high intensity agricultural activities require a custom farm management plan. Property owners who wish to exercise the option for farm plans in lieu of the buffer requirements otherwise imposed by the County's critical areas ordinance must submit a questionnaire to the County within six months of the effective date of the ordinance and follow with a completed farm plan. These requirements are codified at ICC 17.02.040(K) and ICC 17.02.050(D).[40]

The standard farm plan (low intensity uses) uses a standard set of NCRS BMPs to protect critical areas generally and more specifically for those activities occurring in the drainage basins of salmon-bearing streams.[41] The custom farm management plans are developed for each farm and address the specific issues pertinent to the higher intensity activities on that property.[42] The custom farm management plans also implement NCRS BMPs.[43] WEAN challenges the County's conclusion that NCRS BMPs constitute best available science for protecting critical areas for farming practices. Fundamentally, WEAN argues that minimum buffer sizes have been legally established and that the County's BMP program does not include best available science because it does not adhere to those buffer requirements.[44]

The County performed a review of the NCRS BMPs to determine whether they incorporate the best available science.[45] Jeff Tate, the assistant planning director, conducted the review. Because there are 145 different practices within the Natural Resources

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[39] *Ibid.*
[40] *Ibid,* Exhibit B 3-5.
[41] Ordinance C-105-05, Exhibit B 1-2.
[42] *Ibid,* Exhibit B-1.
[43] *Ibid.*
[44] WEAN's Reply of June 16, 2006 Re: Island County's Brief at 10.
[45] R 8511

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Conservation Service Field Office Technical Guide, Mr. Tate did not attempt to review each practice independently.[46] Instead, he reviewed the scientific reliability of the methods used by NCRS to adopt the BMPs. Following the principles for determining best available science in WAC 365-195-905(5), Mr. Tate considered whether the BMPs were adopted through a valid scientific process; whether peer review was conducted; whether the peer reviewers were qualified scientific experts; whether the methods used to obtain information were clearly stated and able to be replicated; whether the methods used were standard scientific methods; whether the conclusions were based on reasonable assumptions supported by other studies; whether the data was analyzed using appropriate statistical or quantitative methods; whether the information was placed in the proper scientific context; and whether it included references to relevant references and credible literature.[47] He found:

> There is no standardized protocol for BMP review, both in terms of the frequency in which they are reviewed (save for the fact that all BMPs are reviewed at least every 5 years) and method in which review and update occurs. Some BMPs are assigned a single individual, some are reviewed more frequent [sic] than others, each BMP will vary in the amount of peer review – but all receive peer review; some involve review by NRCS staff only, others include researches from universities. A file for all practices is maintained in Washington, D.C. that contains all of the supporting scientific literature.[48]

Mr. Tate concluded that BMPs are developed using scientific methods and through a valid scientific process; they are peer reviewed; the scientific methods are clearly stated and can be replicated; the BMPs are developed using logical conclusions based on reasonable assumptions; the data used that were properly analyzed and placed in appropriate context; and the BMPs were developed using techniques, assumptions and conclusions that reference relevant, credible literature.[49] WEAN did not address any of these conclusions.

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[46] *Ibid* at 27 and 31
[47] *Ibid* at 32.
[48] *Ibid* at 33.
[49] *Ibid*.

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WEAN states that all agencies with expertise agree that buffers are necessary.[50] WEAN further argues that buffer requirements have been eliminated in Ordinance C-150-05. However, our review of the Conservation Practice Standards finds this is not wholly accurate. The Conservation Practices Standards require vegetated buffer strips but allow for haying of the buffer strips and grazing in "farmed wet meadows" from June 1 to October 1.[51] These uses in buffers are part of the NCRS BMPs and are addressed in the farm management plans for each farm.

For agricultural practices, the state agencies recommend BMPs rather than buffers. In the 2005 publication *Wetlands in Washington State: Vol 2: Guidance for Protecting and Managing Wetlands* (R-8769-12c), the state Departments of Ecology and Fish and Wildlife clearly express this view: BMPs should be used to regulate ongoing agricultural activities:

> The departments of Ecology and Fish and Wildlife recommend the use of best management practices (BMPs) and/or conservation plans for ongoing agricultural activities in wetlands.

At p. 8-18.

Where the agencies with expertise and responsibility for addressing protection of critical areas unequivocally recommend the use of BMPs instead of standard buffers, Petitioner has a heavy burden to show that the BMPs are not adequate protection under RCW 36.70A.170 and 36.70A.060.

In addition, the County submitted its proposed BMP program to three state agencies for review: the Department of Community, Trade and Economic Development (CTED), the Department of Fish and Wildlife (WDFW) and the Department of Ecology (Ecology). All three approved of the County's program.

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[50] WEAN's Reply of June 16, 2006: Re: Island County's Brief at 12 citing R-8769.
[51] Ordinance 150-05, Exhibit D-11

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CTED:

> We have consulted with the Department of Agriculture, Ecology and Fish and Wildlife, as well as the Puget Sound Action Team and State Conservation Commission, and each agency concurs with Mr. Tate's conclusion that the BMPs included in the NRCS Field Office Technical Guides exhibit the characteristics of a valid scientific process and, therefore, can constitute part of the BAS [best available science].[52]

WDFW:

> Overall, Island County has done an excellent job in helping to better protect fish and wildlife resources because of the proposed requirements contained in the Existing and On-going Agricultural activities section of the Critical Areas Ordinance (CAO).[53]

Ecology:

> Given the historic and on-going disturbance to wetlands by agricultural activities, we believe that the Standard Farm Plan, coupled with compliance monitoring and enforcement, is a reasonable approach to protecting wetlands from further degradation.[54]

The Board has reviewed the farm plans that have been submitted as exhibits in this case with great interest. It is evident that the use of farm plans has the advantage of making the protection of critical areas an interactive process that involves and educates the landowner in the effect of agricultural practices on critical areas. See also the Education and Outreach involvement of Washington State University and the Conservation Districts found in Exhibit C-11-12 of Ordinance C-150-05. Farm plans are also geared to the particular agricultural activities that are occurring on the property – whether a single horse for the landowner and her granddaughter (Plan 17), or an alpaca farm with a projected total of 100 animals (Plan 6). Where standard buffers widths respond to a variety of possible circumstances, BMPs and farm plans are able to target more specifically the practices that are actually in use on each farm.

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[52] Letter of November 14, 2005, R-8468.
[53] Comments from WDFW attached to R-8468.
[54] Final comments on Island County's Standard Farm Plan, May 1, 2006. R-8736.

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Enforcement of the best management practices program is tiered, beginning with education efforts but then utilizing standard County enforcement actions under ICC 17.02.050(D) and 17.03.260. The Island County program includes a default to buffers in the event that BMPs are not being fully implemented.[55] This is a key aspect of the program since it provides an ongoing incentive to the landowner to meet his or her commitments in the farm plan.

Based on the County's reasoned review of the factors in WAC 365-195-905(5) for determining if the NCRS BMPs constitute best available science; and the assessment of the state agencies with expertise in this area – Ecology, Fish and Wildlife, and CTED – we find that the NCRS BMPs constitute best available science for the regulation of ongoing noncommercial agricultural practices in Island County, so long as they are accompanied by monitoring and an adaptive management program.

Monitoring and Adaptive Management

Because of limited data on implementation of NCRS BMPs, CTED also advised that the monitoring and adaptive management components of the County's proposed strategy were very important.[56] Ordinance C-22-06 establishes the County's monitoring and adaptive management program in relation to the use of BMPs for agricultural activities.

The County will monitor water quality standards established by Chapter 173-201A WAC as part of its program of BMPs.[57] There are three components to the program: baseline monitoring, source identification, and adaptive management.[58] If the established water quality standards are exceeded, the County is responsible for addressing adaptive management actions that may be required to ensure that the BMPs are effective.[59]

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[55] *Ibid*
[56] R-8468
[57] Exhibit A, Ordinance C-22-06, ICC 17.02.030.
[58] ICC 17.02.040L.
[59] ICC 17.02.040L(2)(d)

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WEAN argues that this plan monitors water quality only but that description fails to consider all the aspects of water quality that are monitored. The monitoring parameters include dissolved oxygen, fecal coliform, nitrate, pH, phosphorus, temperature, turbidity, conductive, hardness, and vegetation.[60] These parameters follow the recommendations in a study led by Dr. Paul Adamus.[61] Many of these parameters are indicators of conditions of fish and wildlife habitat that are not directly monitored – temperature relates to shade, for example, and turbidity (cloudiness of water) indicates disruptive activity, such as animal access to streams, in the vicinity of habitat.[62]

The County monitoring and adaptive management program then will use any data showing that water quality standards have been exceeded to identify the source of the contamination.[63] From that information, the County will determine whether the BMPs must be changed or whether the problem can be addressed through education or other means. With recommendations from the Conservation Districts, NRCS or a certified farm planner, the Planning Director has been delegated the authority to impose site specific modifications.[64] The public is advised of the County's actions in response to monitoring information through the reporting requirements of the program. The annual report includes information about the monitoring program, any compliance assessments and source identification actions, education and/or BMP modifications, and future monitoring priorities.[65]

We find that the County's monitoring and adaptive management program for the NCRS BMPs it has adopted to regulate farming activities in critical areas meet the scientific

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[60] ICC 17.02.040L(3)(a)
[61] *Draft Water Quality Data Synthesis and Recommendations for a Surface Freshwater Monitoring Program,* January 18, 2006. Authored by Dr. Paul Adamus, Island County Department of Planning and Community Development, and Joe Eilers, Max Depth Aquatics.
[62] *Ibid* at 48.
[63] ICC 17.02.040L.(4)
[64] ICC 17.02.040L(6)
[65] *Ibid* at ICC 17.02.040 L.7

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standards for such programs.[66] The County's program sets monitoring parameters that are reasonably related to the protection of the functions and values of critical areas affected by agricultural activities. The program will establish baseline conditions, monitor water quality according to State standards, tie any contamination to the source, and refer this information to the Planning Director for action. The Planning Director is directed to make changes to the BMPs to address any contamination issues that are not cured through education and enforcement. Island County has achieved compliance in an impressive way that could be a model for other jurisdictions.

VII. FINDINGS OF FACT

1. Island County is located west of the crest of the Cascade Mountains and is required to plan according to RCW 36.70A.040.
2. WEAN is an original petitioner in this case. WEAN has also participated orally and in writing in the process to adopt legislation to achieve compliance in this case - Ordinance C-150-05 and Ordinance C-22-06.
3. On May 15, 2006, the Island County Board of Commissioners took final action to update the County's critical areas regulations relating to existing and ongoing agriculture and adopted Ordinance C-150-05 and Ordinance C-22-06.
4. The remaining issue for compliance in this case is whether the best management practices program adopted by Island County in Ordinance C-150-05 and Ordinance C-22-06 meets the Growth Management Act's (GMA) requirements for protection of the functions and values of critical areas in noncommercial agricultural zones.
5. The County's study of noncommercial agriculture in rural lands found approximately 14,000 acres in noncommercial agricultural use in rural zones (RA, RR and RF), compared with 10,000 acres in commercial agricultural zones (CA and RA).

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[66] See discussion in *Swinomish Tribal Community v Skagit County,* WWGMHB Case No. 02-2-0012c (Compliance Order – Adaptive Management, January 13, 2006)

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6. The study further estimates that 40% of the agricultural land in the rural zones is being used for livestock production; 35% for horticulture; 14% for both livestock and horticulture; and 6% listed for unidentified agriculture on the Assessor's property database.
7. Of the lands being used for livestock, the County's study found that the majority have less than one animal per acre.
8. The County's study further found that the average size of the rural noncommercial farms surveyed was less than ten but more than five acres.
9. It also showed that approximately 72% of the noncommercial agricultural activity in Island County is occurring in areas in or near critical areas.
10. The County Commissioners found that both commercial and noncommercial farming are important to the rural character of Island County. Rural character, they found, is part of the economy and culture of the County. They determined that noncommercial farming activities in rural designations contribute to the rural character of Island County and preserve the County's agricultural heritage. Therefore, the Commissioners found that the contributions of both noncommercial farming and commercial farming should be recognized and protected.
11. Because of the number of critical areas located on parcels in rural noncommercial agricultural use, the Commissioners found that the standard buffer requirements would threaten the ability of rural agriculture to continue and that best management practices (BMPs) would assist rural agriculture to coexist in conformity with GMA requirements for the protection of critical areas.
12. Based on its local circumstances, the County has established a sufficient basis for the need to adopt special measures to protect critical areas that also preserve existing and ongoing agricultural activities in its noncommercial rural zones.
13. The County's program for protection of critical areas in farmed lands utilizes the best management practices (BMPs) developed by the Natural Resources Conservation Service (NCRS).

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14. The County established BMP requirements for existing and ongoing noncommercial agricultural activity at three levels of intensity – low, medium and high. Landowners conducting agricultural activities of low intensity may protect critical areas through standard farm management plans. Medium and high intensity agricultural activities require a custom farm management plan.
15. Property owners who wish to exercise the option for farm plans in lieu of the buffer requirements otherwise imposed by the County's critical areas ordinance must submit a questionnaire to the County within six months of the effective date of the ordinance and follow with a completed farm plan.
16. The standard farm plan (low intensity uses) uses a standard set of NCRS BMPs to protect critical areas generally and more specifically for those activities occurring in the drainage basins of salmon-bearing streams. The custom farm management plans are developed for each farm and address the specific issues pertinent to the higher intensity activities on that property. The custom farm management plans also implement NCRS BMPs.
17. The County performed a review of the NCRS BMPs to determine whether they incorporate the best available science following the principles for determining best available science in WAC 365-195-905(5).
18. The County concluded that BMPs are developed using scientific methods and through a valid scientific process; they are peer reviewed; the scientific methods are clearly stated and can be replicated; the BMPs are developed using logical conclusions based on reasonable assumptions; the data used that were properly analyzed and placed in appropriate context; and the BMPs were developed using techniques, assumptions and conclusions that reference relevant, credible literature.
19. The State Departments of Ecology and Fish and Wildlife, for agricultural practices, recommend BMPs rather than buffers as protection for the functions and values of critical areas.

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20. The County submitted its proposed BMP program to three state agencies for review: the Department of Community, Trade and Economic Development (CTED), the Department of Fish and Wildlife (WDFW) and the Department of Ecology (Ecology). All three approved of the County's program.
21. The use of farm plans has the advantage of making the protection of critical areas an interactive process that involves and educates the landowner in the effect of agricultural practices on critical areas.
22. Farm plans are geared to the particular agricultural activities that are occurring on farmed property. BMPs and farm plans are able to target the practices that are actually in use on each farm.
23. Enforcement of the best management practices program is tiered, beginning with education efforts but then utilizing standard County enforcement actions.
24. The Island County program includes a default to buffers in the event that BMPs are not being fully implemented. This is a key aspect of the program since it provides an ongoing incentive to the landowner to meet his or her commitments in the farm plan.
25. Because of limited data on implementation of NCRS BMPs, CTED also advised that the monitoring and adaptive management components of the County's proposed strategy were very important.
26. Based on local circumstances, the NCRS BMPs constitute best available science for the regulation of ongoing noncommercial agricultural practices in Island County, so long as they are accompanied by monitoring and an adaptive management program.
27. Ordinance C-22-06 establishes the County's monitoring and adaptive management program in relation to the use of BMPs for agricultural activities.
28. The County will monitor water quality standards established by Chapter 173-201A WAC as part of its program for implementing BMPs.
29. There are three components to the program: baseline monitoring, source identification, and adaptive management. If the established water quality standards

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are exceeded, the County is responsible for addressing adaptive management actions that may be required to ensure that the BMPs are effective.

30. The monitoring parameters include dissolved oxygen, fecal coliform, nitrate, pH, phosphorus, temperature, turbidity, conductive, hardness, and vegetation.
31. Many of the water quality parameters are indicators of conditions of fish and wildlife habitat that are not directly monitored – temperature relates to shade, for example, and turbidity (cloudiness of water) indicates disruptive activity, such as animal access to streams, in the vicinity of habitat.
32. The County monitoring and adaptive management program then will use any data showing that water quality standards have been exceeded to identify the source of the contamination.
33. From the monitoring data, the County will determine whether the BMPs must be changed or whether the problem can be addressed through education or other means. With recommendations from the Conservation Districts, NRCS or a certified farm planner, the Planning Director has been delegated the authority to impose site specific modifications of the BMPs.
34. The public is advised of the County's actions in response to monitoring information through the reporting requirements of the program. The annual report includes information about the monitoring program, any compliance assessments and source identification actions, education and/or BMP modifications, and future monitoring priorities.
35. The County's program sets monitoring parameters that are reasonably related to the protection of the functions and values of critical areas affected by agricultural activities.
36. The program will establish baseline conditions, monitor water quality according to State standards, tie any contamination to the source, and refer this information to the Planning Director for action.

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37. The Planning Director is directed to make changes to the BMPs to address any contamination issues that are not cured through education and enforcement.

38. Any Finding of Fact hereafter determined to be a Conclusion of Law is hereby adopted as such.

VIII. CONCLUSIONS OF LAW

A. The Board has jurisdiction over the parties and subject-matter of this action.

B. WEAN has standing to bring its challenges to whether Ordinance 150-05 and C-22-06 achieve compliance as directed by the Board in its previous orders.

C. With the adoption of Ordinance 150-05 and C-22-06, the County has achieved compliance with RCW 36.70A.060, 36.70A.170 and 36.70A.172 through a program of best management practices, monitoring and adaptive management of agricultural activities in noncommercial agricultural lands. This program protects the functions and values of critical areas.

IX. ORDER

The County having **ACHIEVED COMPLIANCE** on all issues in this case, this case is hereby **CLOSED**.

Entered this 30th day of August 2006.

_____
Margery Hite, Board Member

_____
Holly Gadbaw, Board Member

_____
Gayle Rothrock, Board Member

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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 mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and three copies of the petition for reconsideration, together with any argument in support thereof, should be filed by mailing, faxing or delivering the document directly to the Board, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-330. The filing of a petition 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, by fax 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.

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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