

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 WHIDBEY ENVIRONMENTAL ACTION
4 NETWORK,

5 Petitioner,

6 v.

7 ISLAND COUNTY,

8 Respondent

Case No. 06-2-0012c

9
10
11 **FINAL DECISION AND ORDER**

12 **I. SYNOPSIS**

13 This case appeals Ordinances C-150-05 and C-22-06, ordinances adopted to achieve
14 compliance in WWGMHB Case No. 98-2-0023c. In the compliance case, the Board recently
15 found that the program of Natural Resource Conservation Service (NRCS) best
16 management practices (BMPs) adopted in Ordinance C-150-05, and the monitoring and
17 adaptive management program established in Ordinance C-22-06, comply with the Growth
18 Management Act's requirements for the protection of critical areas as to agricultural
19 practices in rural lands. RCW 36.70A.060(2) and 36.70A.172(1).¹

20
21 This appeal was brought by WEAN to ensure that all the challenges it wished to raise with
22 respect to Ordinances C-150-05 and C-22-06 would be decided by the Board, even if those
23 challenges were to exceed the scope of the issues for compliance. Therefore, there is
24 some duplication of issues. We find that the challenge to whether Ordinances C-150-05
25 and C-22-06 protect critical areas and include best available science is the same challenge
26 that was decided in WWGMHB Case No. 98-2-0023c. As we did in the compliance case,
27 we find that the County's program of NRCS BMPs, together with its monitoring and adaptive
28 management program, protect the functions and values of critical areas by regulating
29 agricultural practices in rural lands. Although the benefits of standard buffers along
30
31

32 ¹ *WEAN v. Island County*, WWGMHB Case No. 98-2-0023c (2006 Order Finding Compliance on Critical Areas
Protections in Rural Lands, August 30, 2006)

1 streams and wetlands are well-established, the evidence shows that the use of BMPs to
2 regulate agricultural activities near critical areas (BMPs that also include vegetated buffers)
3 can also protect the functions and values of those critical areas. For that reason, both the
4 Department of Ecology and the Department of Fish and Wildlife recommend BMPs to
5 protect critical areas where agricultural practices are in operation. By coupling a system of
6 mandatory BMPs with an annual monitoring and adaptive management program, the
7 County has developed a strategy that targets agricultural practices that may impact critical
8 areas, timely assesses the effectiveness of the BMPs required, and provides for prompt
9 corrective action where needed. The annual report on data collected and actions taken
10 provides the public with current information on the status of the BMP program.
11
12

13 Originally, WEAN challenged the elimination of the requirement in the Island County Code
14 that critical areas that have been illegally altered be restored. However, the County has
15 stipulated that it did not intend to eliminate this requirement and will revise its code to make
16 that clear in the near future. On the basis of that stipulation, WEAN has agreed to dismiss
17 that challenge.
18

19
20 This case also raises a challenge to the SEPA review conducted of the challenged
21 ordinances. However, we find that WEAN has not met its burden of proof on this issue by
22 failing to provide a sufficient factual record for the Board to review, and by failing to
23 adequately address the environmental determination that the County performed.
24
25

26 **II. PROCEDURAL HISTORY**

27 On July 12, 2006, the Board received two petitions for review from Whidbey Environmental
28 Action Network (WEAN). WEAN is also the petitioner in WWGMHB Case No. 98-2-0023c
29 and filed these petitions for review regarding two ordinances that were adopted to achieve
30 compliance in WWGMHB Case No. 98-2-0023c. These new petitions challenge Island
31 County Ordinance C-150-05 and Ordinance C-22-06. WEAN expressly filed the new
32

1 petitions (consolidated in the instant case) to ensure that it could raise all its challenges to
2 the compliance of Ordinance C-150-05 and Ordinance C-22-06 with the requirements of the
3 Growth Management Act (GMA) and the State Environmental Policy Act (SEPA).
4

5
6 By letter dated July 13, 2006, the Presiding Officer proposed coordinating the decision on
7 the two new petitions with the compliance decision in WWGMHB Case No. 98-2-0023c
8 through an expedited schedule. This proposal was made because the issues in the
9 consolidated case are closely related to the compliance issue in WWGMHB Case No. 98-2-
10 0023c. The County responded that it objected to consolidating the new case with the
11 compliance case and requested the Board to decide the compliance case independently of
12 the two new petitions.² WEAN responded that it concurred in an expeditious resolution of
13 the new petitions but would like more time than originally proposed.³ The County also
14 requested a modified schedule for briefing on the two new petitions. To ensure that all
15 arguments had been heard on the challenged ordinances before a decision in the
16 compliance case (WWGMHB Case No. 98-2-0023c) was issued, the Board set an expedited
17 briefing and hearing schedule.⁴
18
19

20
21 The hearing on the merits was held on August 28, 2006. Steve Erickson appeared for
22 WEAN. Island County was represented by attorney Keith Dearborn and deputy prosecuting
23 attorney Joshua Choate. All three board members attended.
24

25 III. RECORD

26 Because the issues set forth in the consolidated petitions for review had already been
27 briefed in large part in WWGMHB Case No. 98-2-0023c, and because the record had
28 already been developed for those challenges in WWGMHB Case No. 98-2-0023c, the
29
30

31
32 ² Letter of Keith Dearborn to Presiding Officer, July 14, 2006.

³ Letter of Steve Erickson to Presiding Officer, July 14, 2006.

⁴ Prehearing Order, August 16, 2006.

1 parties were allowed to submit any exhibits to support the arguments of the parties in this
2 case from the record in WWGMHB Case No. 98-2-0023c.

3
4 The County brought two motions to supplement the record of the County below in this
5 case.⁵ Petitioners had no objection to either motion. Therefore, the record below is
6 supplemented with R8799, 8839, 8844, 8845, 8847, 8850, 8851, 8853, 8854, 8857.
7

8
9 WEAN also brought a motion to supplement the record below.⁶ The County filed no
10 objection. Although the County noted an objection on grounds of relevance at the hearing
11 on the merits, the Board supplemented the record with P-38, P-40, P-41, P-43, P-44, P-45,
12 P-46, P-47, P-48, R3367, R4042, R8309, R8392 and R8704, to be given appropriate
13 weight.
14

15 16 **IV. BURDEN OF PROOF**

17 For purposes of board review of the comprehensive plans and development regulations
18 adopted by local government, the GMA establishes three major precepts: a presumption of
19 validity; a “clearly erroneous” standard of review; and a requirement of deference to the
20 decisions of local government.
21

22 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and
23 amendments to them are presumed valid upon adoption:
24

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

28 RCW 36.70A.320(1).
29

30 ⁵ Island County's Motion to Supplement the Record and Memorandum in Support, August 21, 2006; Island
31 County's Second Motion to Supplement the Record and Memorandum in Support, August 22, 2006. Island
32 County's first motion was dated August 17, 2006 but inexplicably did not arrive in the Board offices until
August 28, 2006.

⁶ WEAN's Motion of August 17, 2006 to Supplement the Record.

1 The statute further provides that the standard of review shall be whether the challenged
2 enactments are clearly erroneous:

3 The board shall find compliance unless it determines that the action by the state
4 agency, county, or city is clearly erroneous in view of the entire record before the
5 board and in light of the goals and requirements of this chapter.

6 RCW 36.70A.320(3)

7 In order to find the County's action clearly erroneous, the Board must be "left with the firm
8 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,
9 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

10
11
12 Within the framework of state goals and requirements, the boards must grant deference to
13 local government in how they plan for growth:

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

24 RCW 36.70A.3201 (in part).

25 In sum, the burden is on the Petitioners to overcome the presumption of validity and
26 demonstrate that any action taken by the County is clearly erroneous in light of the goals
27 and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).
28 Where not clearly erroneous and thus within the framework of state goals and requirements,
29 the planning choices of local government must be granted deference.
30
31
32

1 **V. ISSUES PRESENTED**

2 Issues raised in the petition for review in WWGMHB Case No. 06-2-0011 were incorporated
3 into this consolidated case as Issues 1-4. Upon stipulation of the County⁷, WEAN agreed to
4 dismiss Issues 1-4. Therefore, Issues 1-4 will be dismissed.
5

6
7 The remaining issues, raised in the petition for review filed in WWGMHB Case No. 06-2-
8 0012, are as follows:

- 9 5. Does the adoption of Ordinance C-150-05 and C-22-06 fail to protect critical areas
10 and include best available science (RCW 36.70A.060, 36.70A.130, and 36.70A.172).
11 6. Do Ordinance C-150-05 and C-22-06 substantially interfere with GMA's goals and
12 requirements for the protection of critical areas (RCW 36.70A.020(9)(10), and
13 36.70A.130).
14 7. Did Island County fail to comply with the State Environmental Policy Act (RCW
15 43.21C) in adopting C-150-05 and C-22-06.
16
17

18 **VI. DISCUSSION**

19
20 ***Issue No. 5: Does the adoption of Ordinance C-150-05 and C-22-06 fail to protect***
21 ***critical areas and include best available science (RCW 36.70A.060, 36.70A.130, and***
22 ***36.70A.172).***

23 **Positions of the Parties**

24 WEAN includes by reference all the arguments it made in its brief in WWGMHB Case No.
25 98-2-0023c, WEAN's Response of May 29, 2006.⁸ WEAN argues that the NRCS BMPs "fall
26

27
28 ⁷ The County stipulated as follows:

29 Island County stipulates C-150-05 makes no substantive change in the restoration requirements
30 contained in ICC 17.03.250.I related to the issues raised in WWGMHB Case No. 06-2-0011. During
31 the current update of the wetland regulations, the County will take legislative action to make this intent
32 clear in the Island County Code. That update is scheduled to be finished by Feb. 28, 2007. The
County agrees that if it does not take this action it will not object or raise any legal argument in
opposition to Whidbey Environmental Action Network bringing this issue back before the Western
Washington Growth Management Hearings Board.

August 22, 2006 stipulation signed on behalf of Island County by attorney Keith Dearborn.

1 below the GMA's minimum standards even with goal balancing."⁹ WEAN argues that the
2 adopted BMPs reduce the buffer standards for protection of critical areas below acceptable
3 levels.¹⁰ WEAN asserts that undisturbed buffers are necessary for a variety of reasons:
4 without them, the cumulative impact is wildlife habitat fragmentation; only buffers can
5 stabilize wetland functioning; buffers provide shade which in turn affects water temperature;
6 and buffers provide water quality filtration functions only if they are left undisturbed.¹¹
7

8
9 As to the County's adaptive management program (C-22-06), WEAN claims that only
10 failures to implement BMPs can trigger enforcement action.¹² WEAN also asserts that the
11 use of "adversely affecting critical areas" is not a standard for enforcement and the period
12 during which educational efforts may be used for enforcement is open-ended.¹³ Lastly,
13 WEAN argues that the County's adaptive management program will only respond after
14 damage has occurred and thus is not protective.¹⁴
15

16
17 The County also incorporates its prior pleadings and arguments (from WWGMHB Case No.
18 98-2-0023c) by reference.¹⁵ The County further responds that the local circumstances in
19 Island County justify the extension of its BMP program to noncommercial agricultural
20 practices.¹⁶ Buffers are not eliminated in the revised BMP program, the County asserts;
21 buffers are increased in size for low intensity agriculture but haying is allowed.¹⁷ Livestock
22 are not allowed in the buffers, the County maintains, and manure cannot be applied unless
23 a custom farm plan has been prepared.¹⁸ Overall, the County argues that its revised BMP
24
25

26
27 ⁸ WEAN's Hearing Brief at 3.

⁹ *Ibid* at 13.

28 ¹⁰ *Ibid* at 13-14.

¹¹ *Ibid* at 14-17.

29 ¹² WEAN's Hearing Brief at 18.

30 ¹³ *Ibid* at 18-19.

¹⁴ *Ibid*.

31 ¹⁵ Island County's Response Brief at 1

¹⁶ *Ibid* at 2-3.

32 ¹⁷ *Ibid* at 5.

¹⁸ *Ibid* at 6.

1 program does not weaken BMP protection.¹⁹ Further, the County maintains that NRCS
2 BMPs conform to the best available science and allowing buffers to be managed is
3 consistent with best available science.²⁰
4

5 As to the adaptive management program, the County points to its enforcement procedures,
6 which place critical areas violations ahead of every other code complaint except those
7 involving “life safety and health”.²¹ The County also notes that, in the event that a person is
8 dissatisfied with the County’s enforcement action, County code allows any aggrieved person
9 to initiate and prosecute a complaint.²² The County further contends that WEAN has
10 overlooked the role of the Conservation Districts in monitoring and enforcement of BMPs.²³
11
12

13 **Board Discussion**

14 The Board has addressed the arguments of the parties on this issue in its September 1,
15 2006 compliance decision in WWGMHB Case No. 98-2-0023c.²⁴ The Board adopts the
16 same reasoning here and incorporates it by reference to the attached decision. With
17 respect to buffers in particular, the Board finds that standard buffer widths respond to a
18 variety of possible circumstances, but that BMPs and farm plans are able to target more
19 specifically the practices that are actually in use on each farm. In light of the fact that the
20 state agencies with expertise in the protection of critical areas – Department of Ecology and
21 the Washington Department of Fish and Wildlife – expressly recommend BMPs for
22 agricultural practices, the Board finds that the use of BMPs for agricultural practices as
23 adopted in Island County complies with the GMA requirements to protect the functions and
24 values of critical areas. We note that the Conservation Practice Standards adopted by
25
26
27

28 _____
29 ¹⁹ *Ibid.*

30 ²⁰ *Ibid* at 7-8.

31 ²¹ *Ibid* at 10.

32 ²² *Ibid.*

²³ *Ibid* at 11.

²⁴ *WEAN v. Island County*, WWGMHB Case No. 98-2-0023c (2006 Order Finding Compliance of Critical Areas Protections in Rural Lands, September 1, 2006).

1 Island County include vegetated buffers as part of the regulatory package for farms with
2 streams and wetlands. As in the compliance case, the Board finds that the County's
3 program incorporates best available science and protects critical areas:

4 Based on the County's reasoned review of the factors in WAC 365-195-905(5) for
5 determining if the NRCS BMPs constitute best available science; and the
6 assessment of the state agencies with expertise in this area – Ecology, Fish and
7 Wildlife, and CTED – we find that the NRCS BMPs constitute best available science
8 for the regulation of ongoing noncommercial agricultural practices in Island County,
9 so long as they are accompanied by monitoring and an adaptive management
10 program.²⁵

11 As to the monitoring and adaptive management part of the County's program, the Board
12 finds that this is key to the success of the BMPs. The County will monitor nine parameters
13 of water quality - dissolved oxygen, fecal coliform, nitrate, pH, phosphorus, temperature,
14 turbidity, conductive, hardness, and vegetation. In addition to identifying potential
15 contamination, these water quality monitoring parameters are indicative of functions and
16 values of fish and wildlife habitat such as shade and woody debris.²⁶ The County monitoring
17 and adaptive management program then will use any data showing that water quality
18 standards have been exceeded to identify the source of the contamination.²⁷ From that
19 information, the County will determine whether the BMPs must be changed or whether the
20 problem can be addressed through education or other means. With recommendations from
21 the Conservation Districts, NRCS or a certified farm planner, the Planning Director has been
22 delegated the authority to impose site specific modifications.²⁸

23
24
25 In addition, the County will report annually on the data collected in the monitoring program,
26 any compliance assessments and source identification actions, education and/or BMP
27

28
29
30 ²⁵ *Ibid* at 15.

31 ²⁶ *Draft Water Quality Data Synthesis and Recommendations for a Surface Freshwater Monitoring Program*,
32 January 18, 2006. Authored by Dr. Paul Adamus, Island County Department of Planning and Community
Development, and Joe Eilers, Max Depth Aquatics.

²⁷ ICC 17.02.040L(4)

²⁸ ICC 17.02.040L(6)

1 modifications, and future monitoring priorities.²⁹ This annual report is made public and
2 allows for public review of the effectiveness of the BMP program. As we found in the
3 compliance case, the Board finds here that:

4 ...the County's monitoring and adaptive management program for the NRCS BMPs it
5 has adopted to regulate farming activities in critical areas meet the scientific
6 standards for such programs.³⁰ The County's program sets monitoring parameters
7 that are reasonably related to the protection of the functions and values of critical
8 areas affected by agricultural activities. The program will establish baseline
9 conditions, monitor water quality according to State standards, tie any contamination
10 to the source, and refer this information to the Planning Director for action. The
11 Planning Director is directed to make changes to the BMPs to address any
12 contamination issues that are not cured through education and enforcement.³¹

12 **Conclusion:** Under the local circumstances in Island County, Ordinance C-150-05 and C-
13 22-06 establish regulations that protect critical areas for rural noncommercial agricultural
14 practices and incorporate best available science. Since the impacts of BMPs are not well-
15 established, the County's annual monitoring and adaptive management program is a
16 necessary component of the protections so that any failings in the BMPs may be detected
17 and corrected promptly.

18
19
20 **Issue No. 6: Do Ordinance C-150-05 and C-22-06 substantially interfere with**
21 **GMA's goals and requirement for the protection of critical areas (RCW**
22 **36.70A.020(9)(10), and 36.70A.130).**

23
24 Because the Board does not find that Ordinance C-150-05 and C-22-06 are noncompliant,
25 the question of invalidity may not be reached. RCW 36.70A.302(1)(a).

26
27 **Issue No. 7: Did Island County fail to comply with the State Environmental Policy**
28 **Act (RCW 43.21C) in adopting C-150-05 and C-22-06.**

29
30 ²⁹ *Ibid* at ICC 17.02.040 L.7

31 ³⁰ See discussion in *Swinomish Tribal Community v Skagit County*, WWGMHB Case No. 02-2-0012c
(Compliance Order – Adaptive Management, January 13, 2006)

32 ³¹ *WEAN v. Island County*, WWGMHB Case No. 98-2-0023c (2006 Order Finding Compliance of Critical Areas
Protections in Rural Lands, September 1, 2006).

1 **Positions of the Parties**

2 WEAN argues that Ordinances C-150-05 and C-22-06 “will have probable significant
3 adverse environmental impacts”.³² This argument, in turn, comes from WEAN’s Hearing
4 Brief before the Island County Hearing Examiner in APP 023/06.³³ There, WEAN argues
5 that an environmental impact statement must be prepared for these ordinances because the
6 activities to be allowed under the ordinances have “previously caused significant adverse
7 environmental impacts”.³⁴ WEAN alleges that the impacts of existing and ongoing
8 agriculture are: polluted surface waters throughout Island County, polluted groundwater,
9 degraded aquatic ecosystem function, degraded riparian habitat function, recreation, and
10 public health.³⁵ For these, and other reasons³⁶, WEAN argues that an environmental impact
11 statement must be prepared.
12

13
14
15 The County responds that the new BMP and adaptive management program does not
16 reduce protections for critical areas below those currently in effect.³⁷ The County asserts
17 that the definitions are the same in both programs but that the revised program regulates
18 agricultural activities by intensity of use.³⁸ Both the existing and the revised programs use
19 NRCS Conservation Practices, the County maintains, and the revised program expands
20 monitoring and adaptive management to require reporting by Conservation Districts and
21 action by the Planning Director in the event that water quality standards have been
22 exceeded.³⁹ The County further argues that buffer widths have been increased in the
23 revised program and the only restriction that has been altered is to allow haying within
24

25
26
27 ³² WEAN's Response of May 29, 2006 at 30-31 in WWGMHB Case No. 98-2-0023c, incorporated by reference
in WEAN’s Hearing Brief at 3.

28 ³³ R-8769

29 ³⁴ *Ibid* at 16.

30 ³⁵ *Ibid* at 16-19.

31 ³⁶ WEAN argues extensively about the elimination of the “restoration requirement” for illegal alteration of critical
areas. However, issues related to the restoration requirement have been settled and dismissed from this
appeal.

32 ³⁷ Island County’s Response Brief at 3.

³⁸ *Ibid* at 3-4.

³⁹ *Ibid*.

1 buffers.⁴⁰ The County also disputes WEAN's assertion that agricultural practices have
2 caused shellfish closures and that nitrate pollution results from those practices as well.⁴¹
3

4 **Board Discussion**

5 WEAN has offered only its prior briefing on this issue, which are its submissions before the
6 hearings examiner. This makes it difficult to discern what aspects of the SEPA
7 determination are at issue here. WEAN failed to show at the hearing on the merits in this
8 case that the County's environmental determination was flawed because WEAN did not
9 discuss the County's determination at all. WEAN did argue that an environmental impact
10 statement should have been prepared because the challenged ordinances change prior
11 BMPs but WEAN did not address previous environmental reviews of the BMPs or show how
12 the prior environmental review did not encompass the impacts argued to occur as a result of
13 the changes to the BMPs. WEAN also failed to include a request for a remand for a SEPA
14 review in the relief requested in its hearing brief.⁴²
15
16

17
18 Any allegation must be supported by the relevant evidence. Here, WEAN has not provided
19 the Board with enough evidence to enable the Board to assess the County's determination.
20 In fact, WEAN never mentions the County's determination other than to say that an
21 environmental impact statement should have been prepared. Since all of WEAN's
22 arguments on this point were submitted in prior hearings, it is not clear whether the County's
23 determination itself is part of the evidence in this case, and to what extent (if any) the DNS
24 relied upon prior environmental reviews.
25
26

27 Under these circumstances, the Board finds that WEAN has not met its burden of proof on
28 this issue.
29

30
31 ⁴⁰ *Ibid* at 5.

32 ⁴¹ *Ibid* at 12-13.

⁴² WEAN's Hearing Brief at 25.

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 has participated orally and in writing in the process to adopt 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 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).
5. 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.
6. Of the lands being used for livestock, the County's study found that the majority have less than one animal per acre.
7. 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.
8. It also showed that approximately 72% of the noncommercial agricultural activity in Island County is occurring in areas in or near critical areas.
9. 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.

- 1 10. Because of the number of critical areas located on parcels in rural noncommercial
2 agricultural use, the Commissioners found that the standard buffer requirements
3 would threaten the ability of rural agriculture to continue and that best management
4 practices (BMPs) would assist rural agriculture to coexist in conformity with GMA
5 requirements for the protection of critical areas.
6
- 7 11. Based on its local circumstances, the County has established a sufficient basis for
8 the need to adopt special measures to protect critical areas that also preserve
9 existing and ongoing agricultural activities in its noncommercial rural zones.
- 10 12. The County's program for protection of critical areas in farmed lands utilizes the best
11 management practices (BMPs) developed by the Natural Resources Conservation
12 Service (NRCS).
- 13 13. The County established BMP requirements for existing and ongoing noncommercial
14 agricultural activity at three levels of intensity – low, medium and high. Landowners
15 conducting agricultural activities of low intensity may protect critical areas through
16 standard farm management plans. Medium and high intensity agricultural activities
17 require a custom farm management plan.
- 18 14. Property owners who wish to exercise the option for farm plans in lieu of the buffer
19 requirements otherwise imposed by the County's critical areas ordinance must
20 submit a questionnaire to the County within six months of the effective date of the
21 ordinance and follow with a completed farm plan.
- 22 15. The standard farm plan (low intensity uses) uses a standard set of NRCS BMPs to
23 protect critical areas generally and more specifically for those activities occurring in
24 the drainage basins of salmon-bearing streams. The custom farm management
25 plans are developed for each farm and address the specific issues pertinent to the
26 higher intensity activities on that property. The custom farm management plans also
27 implement NRCS BMPs.
- 28 16. A vegetated buffer strip for streams and wetlands is required by the Conservation
29 Practice Standards.
30
31
32

- 1 17. The County performed a review of the NRCS BMPs to determine whether they
2 incorporate the best available science following the principles for determining best
3 available science in WAC 365-195-905(5).
4
5 18. The County concluded that BMPs are developed using scientific methods and
6 through a valid scientific process; they are peer reviewed; the scientific methods are
7 clearly stated and can be replicated; the BMPs are developed using logical
8 conclusions based on reasonable assumptions; the data used that were properly
9 analyzed and placed in appropriate context; and the BMPs were developed using
10 techniques, assumptions and conclusions that reference relevant, credible literature.
11
12 19. The State Departments of Ecology and Fish and Wildlife, for agricultural practices,
13 recommend BMPs rather than buffers as protection for the functions and values of
14 critical areas.
15
16 20. The County submitted its proposed BMP program to three state agencies for review:
17 the Department of Community, Trade and Economic Development (CTED), the
18 Department of Fish and Wildlife (WDFW) and the Department of Ecology (Ecology).
19 All three approved of the County's program.
20
21 21. The use of farm plans has the advantage of making the protection of critical areas an
22 interactive process that involves and educates the landowner in the effect of
23 agricultural practices on critical areas.
24
25 22. Farm plans are geared to the particular agricultural activities that are occurring on
26 farmed property. BMPs and farm plans are able to target the practices that are
27 actually in use on each farm.
28
29 23. Enforcement of the best management practices program is tiered, beginning with
30 education efforts but then utilizing standard County enforcement actions.
31
32 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.

- 1 25. Because of limited data on implementation of NRCS BMPs, CTED also advised that
2 the monitoring and adaptive management components of the County's proposed
3 strategy were very important.
- 4 26. Based on local circumstances, the NRCS BMPs constitute best available science for
5 the regulation of ongoing noncommercial agricultural practices in Island County, so
6 long as they are accompanied by monitoring and an adaptive management program.
- 7 27. Ordinance C-22-06 establishes the County's monitoring and adaptive management
8 program in relation to the use of BMPs for agricultural activities.
- 9 28. The County will monitor water quality standards established by Chapter 173-201A
10 WAC as part of its program for implementing BMPs.
- 11 29. There are three components to the program: baseline monitoring, source
12 identification, and adaptive management. If the established water quality standards
13 are exceeded, the County is responsible for addressing adaptive management
14 actions that may be required to ensure that the BMPs are effective.
- 15 30. The monitoring parameters include dissolved oxygen, fecal coliform, nitrate, pH,
16 phosphorus, temperature, turbidity, conductive, hardness, and vegetation.
- 17 31. Many of the water quality parameters are indicators of conditions of fish and wildlife
18 habitat that are not directly monitored – temperature relates to shade, for example,
19 and turbidity (cloudiness of water) indicates disruptive activity, such as animal access
20 to streams, in the vicinity of habitat.
- 21 32. The County monitoring and adaptive management program then will use any data
22 showing that water quality standards have been exceeded to identify the source of
23 the contamination.
- 24 33. From the monitoring data, the County will determine whether the BMPs must be
25 changed or whether the problem can be addressed through education or other
26 means. With recommendations from the Conservation Districts, NRCS or a certified
27 farm planner, the Planning Director has been delegated the authority to impose site
28 specific modifications of the BMPs.
- 29
30
31
32

- 1 34. The public is advised of the County's actions in response to monitoring information
2 through the reporting requirements of the program. The annual report includes
3 information about the monitoring program, any compliance assessments and source
4 identification actions, education and/or BMP modifications, and future monitoring
5 priorities.
6
7 35. The County's program sets monitoring parameters that are reasonably related to the
8 protection of the functions and values of critical areas affected by agricultural
9 activities.
10
11 36. The program will establish baseline conditions, monitor water quality according to
12 State standards, tie any contamination to the source, and refer this information to the
13 Planning Director for action.
14
15 37. The Planning Director is directed to make changes to the BMPs to address any
16 contamination issues that are not cured through education and enforcement.
17
18 38. WEAN has failed to introduce a sufficient evidentiary record for the Board to
19 determine whether the County's SEPA determination for the adoption of Ordinances
20 C-150-05 and C-22-06 was clearly erroneous.
21
22 39. Any Finding of Fact hereafter determined to be a Conclusion of Law is hereby
23 adopted as such.

24 VIII. CONCLUSIONS OF LAW

- 25 A. The Board has jurisdiction over the parties and subject-matter of this action.
26 B. WEAN has standing to bring its challenges to Island County Ordinances C-150-05 and
27 C-22-06.
28 C. Ordinances C-150-05 and C-22-06 protect the functions and values of critical areas and
29 include best available science in compliance with RCW 36.70A.060(2) and 36.70A.172(1).
30 D. Island County complied with the State Environmental Policy Act (RCW 43.21C) when it
31 adopted Ordinances C-150-05 and C-22-06.
32

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

IX. ORDER

Based upon the agreement of the parties, Issues 1-4 of the Prehearing Order are hereby DISMISSED. Ordinances C-150-05 and C-22-06 COMPLY with the Growth Management Act and this case is hereby CLOSED.

Entered this 14th day of September 2006.

Margery Hite, Board Member

Holly Gadbow, Board Member

Gayle Rothrock, Board Member

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

1 parties within thirty days after service of the final order, as provided in RCW
2 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
3 but service on the Board means actual receipt of the document at the Board office
4 within thirty days after service of the final order.

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

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32