

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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3 CAMANO ACTION FOR A RURAL ENVIRONMENT  
4 (CARE) AND WHIDBEY ENVIRONMENTAL  
5 ACTION NETWORK (WEAN),

Case No. 08-2-0026c

**COMPLIANCE ORDER**

6 Petitioners,

7 v.

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9 ISLAND COUNTY,

10 Respondent.  
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14 This matter came before the Board at a compliance hearing held on June 29, 2009  
15 following the submittal of Island County's Compliance Report.<sup>1</sup> The Compliance Report  
16 describes the actions Island County (County) took in response to the Board's November  
17 17, 2008 Final Decision and Order (FDO) and subsequent December 22, 2008 Order on  
18 Motion for Reconsideration.<sup>2</sup> In the FDO, the Board found that the County's new wetland  
19 protection measures failed to comply with Chapter 36.70A RCW (Growth Management Act  
20 or GMA) in regards to its reasonable use provisions, Rural Stewardship Plans (RSPs), and  
21 a twenty five percent limitation on buffer expansion, all as described in greater detail  
22 below. Whidbey Environmental Action Network (WEAN) filed a response to the  
23 Compliance Report on May 26, 2009 in which it stated it had no objections to a finding of  
24 compliance. Camano Action for a Rural Environment (CARE) did not file a response by  
25 June 8, 2009, the date set for filing objections to compliance. Board members James  
26 McNamara, Nina Carter and William Roehl took part in the compliance hearing with Mr.  
27 Roehl presiding. Daniel Mitchell represented the County. Steve Erickson appeared on  
28 behalf of WEAN. A representative of CARE did not attend the hearing.  
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<sup>1</sup> Island County's Statement of Actions Taken dated May 12, 2009.

<sup>2</sup> The Order On Motion For Reconsideration denied all requests for reconsideration except for the correction of some clerical errors.

1 **I. SYNOPSIS OF DECISION**

2 The Board finds that the County has appropriately addressed the three areas of  
3 noncompliance.

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5 **II. PERTINENT PROCEDURAL HISTORY**

6 On March 17, 2008 the County adopted Ordinance C-63-08 (Ordinance) which amended its  
7 wetland protection measures as a result of the review required by RCW 36.70A.130. The  
8 Ordinance was codified as ICC 17.02A. WEAN filed a Petition for Review (PFR) on May 20,  
9 2008 and that case was assigned Case No. 08-2-0025. CARE filed a PFR on May 21, 2008  
10 and that case was assigned Case No. 08-2-0026. On May 30, 2008, the Board consolidated  
11 the cases.<sup>3</sup> The Board issued its FDO on November 17, 2008.

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14 **III. BURDEN OF PROOF**

15 After a board has entered a finding of non-compliance, the local jurisdiction is given a period  
16 of time to enact legislation to achieve compliance. RCW 36.70A.300(3)(b).

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18 After the period for compliance has expired, the board is required to hold a hearing to  
19 determine whether the local jurisdiction has achieved compliance. RCW 36.70A.330(1) and  
20 (2).

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22 For purposes of board review of the comprehensive plans and development regulations  
23 adopted by local governments in response to a non-compliance finding, the presumption of  
24 validity applies and the burden is on the challenger to establish that the new adoption is  
25 clearly erroneous. RCW 36.70A.320(1),(2) and (3).

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27 In order to find the County's action clearly erroneous, the Board must be "left with the firm  
28 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,  
29 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

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<sup>3</sup> Notice of Consolidation and Notice of Hearing and Preliminary Schedule (May 30, 2008).

1 In recognition of the broad range of discretion that may be exercised by counties  
2 and cities consistent with the requirements of this chapter, the legislature intends  
3 for the boards to grant deference to the counties and cities in how they plan for  
4 growth, consistent with the requirements and goals of this chapter. Local  
5 comprehensive plans and development regulations require counties and cities to  
6 balance priorities and options for action in full consideration of local  
7 circumstances. The legislature finds that while this chapter requires local planning  
8 to take place within a framework of state goals and requirements, the ultimate  
9 burden and responsibility for planning, harmonizing the planning goals of this  
10 chapter, and implementing a county's or city's future rests with that community.  
11 RCW 36.70A.3201 (in part).

12 In sum, the burden is on the Petitioner to overcome the presumption of validity and  
13 demonstrate that any action taken by the County is clearly erroneous in light of the goals  
14 and requirements of the GMA. Where not clearly erroneous and thus within the framework  
15 of state goals and requirements, the planning choices of the local government must be  
16 granted deference.

#### 17 **IV. DISCUSSION**

##### 18 **Definition of Reasonable Use**

19 In its FDO the Board found that the County's permitting process improperly used existing  
20 uses that were no longer consistent with the County zoning code as one of the benchmarks  
21 for new uses in the vicinity of critical areas thus perpetuating the establishment of potentially  
22 incompatible uses in a manner contrary to best available science (BAS). More specifically,  
23 the language of ICC 17.02A.030 defining "reasonable use" permitted a determination of  
24 reasonable use to be based on an existing, legally established use, but one which was no  
25 longer consistent with the current zoning code. The Board concluded that failed to comply  
26 with RCW 36.70A.172 and RCW 36.70A.060(2).  
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29 The County states that the Board of Island County Commissioners adopted Ordinance C-  
30 53-09 on May 4, 2009 (2009 Ordinance). The 2009 Ordinance included a revised definition  
31 of "Reasonable Use":  
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1 The logical or rational use of a specific Parcel of land which a person can be  
2 expected to conduct or maintain fairly and appropriately under the specific  
3 circumstances, considering the size of the Lot, the type of Use or Structure  
4 proposed and similar Uses and Structures in the general vicinity of the Lot *that*  
5 *are Permitted Uses consistent with and conforming to current regulations.*<sup>4</sup>  
(amendatory language italicized)

6 The County argues that, with the new definition, similar uses or structures in the vicinity of a  
7 parcel may be considered to determine reasonable use, but only when those uses and  
8 structures are consistent with and conform to current regulations. They state this will  
9 prevent the consideration of nonconforming uses in the vicinity of critical areas as one of the  
10 benchmarks for the establishment of new uses.<sup>5</sup>

11  
12 The County's revised definition of "reasonable use" clearly addresses the Board's concern.  
13 With the amendment only uses and structures consistent with then current regulation may  
14 be considered when determining "reasonable use". The new definition of reasonable use  
15 complies with RCW 36.70A.172 and 36.70A.060 (2).  
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### 18 **Rural Stewardship Plans**

19 The Ordinance provided for RSPs, a program that allows property owners to reduce the  
20 intensity rating of their land use and thus the required wetland buffer. RSPs establish a  
21 collaborative agreement between property owners and the County to tailor management  
22 specific to the owner's property. However, the program as originally proposed did not  
23 require monitoring. While the Board approved the use of RSPs, it concluded that the lack of  
24 required monitoring failed to ensure continued maintenance and was inconsistent with the  
25 Department of Ecology's BAS-based recommendation. The Board held the lack of  
26 monitoring resulted in ICC 17.02A.090D.5 and the Rural Stewardship Application's failure to  
27 comply with RCW 36.70A.060(2) and RCW 36.70A.172(1).  
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<sup>4</sup> Ordinance C-53-09, Exhibit A, ICC 17.02A.030.

<sup>5</sup> Island County's Statement of Actions Taken at pg. 3.

1 The County states that ICC 17.02A.040C.6 and ICC 17.02A.090D.5 were amended to  
2 require a monitoring program and that the RSP worksheet requirements were also modified  
3 to include clear notification that a monitoring program would be required.<sup>6</sup>  
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5 As amended, those sections of the Island County Code read as follows:

6 When a reduction in Land-Use Intensity is allowed based on a Rural Stewardship  
7 Plan, the Plan shall include a monitoring program that:

8 a) Specifies standards and time periods that will be used to judge the  
9 implementation and effectiveness of approved rural stewardship practices in  
10 achieving the goals of the Plan and preventing degradation of Critical Area  
11 functions; and.

12 b) Allows the County reasonable access to the Parcel to determine that the  
13 Rural Stewardship Plan is being followed and Critical Areas functions are not  
14 being degraded.

15 The frequency of monitoring reports and the monitoring time period shall be  
16 established by the Director based on the type of Use for which a reduction in  
17 Land Use Intensity is requested and the type of Critical Area subject to the Rural  
18 Stewardship Plan.

19 Monitoring plans shall be prepared by the applicant and submitted at the  
20 frequency described in the preceding paragraph.<sup>7</sup> ICC 17.02A.040C.6

21 Any new Use or Structure classified as medium or high intensity may be lowered  
22 by one intensity classification by the Planning Director if the use or structure is  
23 modified to reduce potential adverse impacts to wetland functions through the  
24 approval of a rural stewardship plan, provided the approved plan contains a  
25 monitoring program as required by ICC 17.02A. 040C.6. ICC 17.02A.090D.5<sup>8</sup>

26 The Board's finding of noncompliance was based on a lack of RSP monitoring. That defect  
27 has now been corrected. Addition of the monitoring program achieves compliance with  
28 RCW 36.70A.060(2) and 36.70A.172(1).  
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32 <sup>6</sup> Id. at pg. 3.

<sup>7</sup> Ordinance C-53-09 at Exhibit A-5.

<sup>8</sup> Ordinance C-53-09 at Exhibit A-6.

1 **Buffer Expansion**

2 The Ordinance provided the Planning Director with the discretion to require enhancement or  
3 compensation if a wetland buffer was inadequately vegetated so as to protect wetland  
4 functions and values. However, that discretion was limited to a 25% buffer width increase.

5 The Board found that the 25% limitation was arbitrary, not based on BAS, and concluded  
6 that ICC17.02A.090G.5 failed to comply with RCW 36.70A.060(2) and RCW 36.70A.172(1).  
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8 The County states that it has cured this area of noncompliance by removing the 25%  
9 enhancement limit imposed on the Planning Director. See ICC 17.02A.090<sup>9</sup>  
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11 The arbitrary limitation on the extent of enhancement or compensation which could be  
12 required by the Planning Director was the basis for the Board's finding of noncompliance.  
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14 The County has now removed that arbitrary limitation, thus achieving compliance.  
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16 **V. ORDER**

17 The Board, having found Island County has achieved compliance with the GMA, this case is  
18 closed.  
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20 Dated this 30th day of June, 2009  
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William Roehl, Board Member

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James McNamara, Board Member

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Nina Carter, Board Member  
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31 **Pursuant to RCW 36.70A.300 this is a final order of the Board.**  
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<sup>9</sup> Ordinance C-53-09 at Exhibit A-6.  
COMPLIANCE ORDER  
Case No. 08-2-0026c  
June 30, 2009  
Page 6 of 6

1 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the  
2 mailing of this Order to file a petition for reconsideration. Petitions for  
3 reconsideration shall follow the format set out in WAC 242-02-832. The original and  
4 three copies of the petition for reconsideration, together with any argument in  
5 support thereof, should be filed by mailing, faxing or delivering the document directly  
6 to the Board, with a copy to all other parties of record and their representatives.  
7 **Filing means actual receipt of the document at the Board office.** RCW 34.05.010(6),  
8 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for  
9 filing a petition for judicial review.

10 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the  
11 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for  
12 judicial review may be instituted by filing a petition in superior court according to the  
13 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil

14 **Enforcement.** The petition for judicial review of this Order shall be filed with the  
15 appropriate court and served on the Board, the Office of the Attorney General, and all  
16 parties within thirty days after service of the final order, as provided in RCW  
17 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,  
18 but service on the Board means **actual receipt of the document at the Board office**  
19 within thirty days after service of the final order.

20 **Service.** This Order was served on you the day it was deposited in the United States  
21 mail. RCW 34.05.010(19).  
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Western Washington  
Growth Management Hearings Board  
905 24th Way SW, Suite B-2  
Olympia, WA 98502  
P.O. Box 40953  
Olympia, Washington 98504-0953  
Phone: 360-664-8966  
Fax: 360-664-8975