BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

CITIZENS FOR RATIONAL SHORELINE PLANNING and RONALD T. JEPSON, Petitioners, v. WHATCOM COUNTY AND WASHINGTON STATE DEPARTMENT OF ECOLOGY, Respondents, And BUILDING INDUSTRY ASSOCIATION OF WHATCOM COUNTY, Intervenor.	Case No. 08-2-0031 **FINAL DECISION AND ORDER**

I. SYNOPSIS

In this order the Board finds the public participation process afforded by Whatcom County was not a violation of the Shoreline Management Act. While the Act requires early and continuous public participation, the County and Ecology clearly engaged the public in the Shoreline Management Program[1] (SMP) amendment process. Although it might have been appropriate for the public participation process to continue until final adoption by the County, Petitioners and Intervenors have not shown that the public was denied involvement in the consideration of Ecology's required amendments, nor that the public was excluded from consideration of substantive changes to the plan.

[1] Petitioners refer to the County's enactment as a Shoreline Master Plan, while the County refers to it as a Shoreline Management Program. Assuming the County is most familiar with their local terminology, the Board shall refer to it as the latter.

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The Board also finds that the challenge to the County's designation of shorelines as critical areas was timely. While that designation was originally made in 2005 as part of the County's obligation under the GMA to designate critical areas, those designations were not incorporated into the County SMP, and that SMP was not reviewed by Ecology, until 2008.

However, while timely filed, the Petitioners' and Intervenor's challenge to the County SMP fails. The challengers have failed to show that the SMP's adoption of the critical areas ordinance by reference violates RCW 36.70A.480(5). The allegation that the County failed to support the shoreline critical area designations with site specific analysis is rebutted by the County's evidence that the designations were based on the presence of special status fish, wildlife and/or plant species.

II. PROCEDURAL HISTORY

The Petition for Review (PFR) in this case was filed on October 20, 2008, and was amended on November 19, 2008. On December 1, 2008, the Board granted intervention to the Building Industry Association of Whatcom County (BIAWC). On January 16, 2009, in response to substantive motions brought by Respondents, the Board dismissed Issues 2, 3, 5, and 7.[2]

Briefs were filed by Petitioners and Intervenor on February 3, 2009; by Ecology on February 24, 2009; and by the County on February 25, 2009.[3]

The Hearing on the Merits was conducted on March 4, 2009, in Bellingham, Washington. Citizens for Rational Shoreline Planning and Ronald T. Jepson (collectively "CRSP") were represented by Matthew Stock. Intervenor Building Industry Association of Whatcom

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[2] January 16, 2009, Order on Motions.

[3] The Board notes that the County's Hearing on the Merits Brief was received by mail at the Board's office on February 25, 2009. Pursuant to the Board's January 23, 2009 Order on Motion to Extend Briefing Deadline, the County's brief was due on February 24, 2009 and thus this filing was one day late. The County is reminded that deadlines are established for a reason and late filings are generally not tolerated by the Board. The County should take heed as the next time a brief is delinquently filed, the Board may deny acceptance and the County will be left to rely solely on the GMA's presumption of validity.

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County (BIAW) was represented by Sam Rodabough. Whatcom County was represented by Karen Frakes. The Washington State Department of Ecology (Ecology) was represented by Katherine Shirey. Board members Nina Carter, William Roehl and James McNamara were present, with Mr. McNamara presiding.

III. BURDEN OF PROOF

Pursuant to RCW 36.70A.280(1)(a), the Legislature has granted the Board authority to hear and determine petitions alleging that a county is not in compliance with the requirements of the Shoreline Management Act, RCW 90.58 (SMA), as it relates to the adoption of Shoreline Master Programs (SMP) or amendments thereto. RCW 36.70A.480(3) states that the policies, goals, and provisions of RCW 90.58 shall be the sole basis for determining compliance of a SMP. RCW 90.58.190(2) addresses the burden and standard of proof in an appeal of a shoreline master program to the Board:

> (2)(a) The department's decision to approve, reject, or modify a proposed master program or amendment adopted by a local government planning under RCW 36.70A.040 shall be appealed to the growth management hearings board with jurisdiction over the local government. The appeal shall be initiated by filing a petition as provided in RCW 36.70A.250 through 36.70A.320.
>
> (b) If the appeal to the growth management hearings board concerns shorelines, **the growth management hearings board shall review the proposed master program or amendment solely for compliance with the requirements of this chapter, the policy of RCW 90.58.020 and the applicable guidelines**, the internal consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105, and chapter 43.21C RCW as it relates to the adoption of master programs and amendments under chapter 90.58 RCW.
>
> (c) If the appeal to the growth management hearings board concerns a shoreline of statewide significance, **the board shall uphold the decision by the department unless the board, by clear and convincing evidence, determines that the decision of the department is inconsistent with the policy of RCW 90.58.020 and the applicable guidelines.**
>
> (d) **The appellant has the burden of proof** in all appeals to the growth management hearings board under this subsection.

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> (e) Any party aggrieved by a final decision of a growth management hearings board under this subsection may appeal the decision.
> (emphasis added)

Thus, the burden is on the Petitioners/Intervenors in this appeal to prove that Ecology's decision to approve the SMP is inconsistent with the policy of RCW 90.58.020 and the applicable guidelines, that the County's adoption of Ecology's SMP revisions violated the SMA's public participation requirements and that the County's designation of all County shorelines as critical areas violated RCW 36.70A.480. The SMP is presumed valid upon approval/adoption by Ecology pursuant to RCW 90.58.090(7) and will be found out of compliance with the statute only if the action by Ecology is found to be inconsistent with the policy of RCW 90.58.020 by clear and convincing evidence. RCW 90.58.190(2)(c). Pursuant to RCW 36.70A.320(1) development regulations and amendments to them are presumed valid upon adoption. The statute further provides that the standard of review shall be whether the challenged enactments are clearly erroneous.

IV. DISCUSSION

Petitioners and Intervenor challenge the adoption and approval of the Whatcom County Shoreline Managment Program (SMP) which became effective upon approval by Ecology on August 8, 2008. The approval of the SMP was the final step, following almost four years of work, with the initial process of updating the SMP starting in August 2004. The Draft SMP was adopted by the County in February 2007 with Ordinance 2007-17 and submitted to Ecology for its review/approval. Ecology provided for public comment from September to November of 2007 and held a public hearing on the SMP in October 2007. Ecology completed their review, made suggested and recommended amendments, and returned the Revised SMP to the County in July 2008. On August 5, 2008, the County Council passed Resolution 2008-56 which approved the Revised SMP as presented by Ecology but with some changes. The challenge currently before the Board is founded on two things: public participation and critical areas within shorelines.

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Public Participation

Issue 1: *Was the County's and the Department's adoption of the Shoreline Management Program inconsistent with the public participation requirements of the Shoreline Management Act, including RCW 90.58.130, and the Shoreline Management Act Guidelines, including WAC 173-26-090 to -120?*

Petitioners and Intervenor argue the County's adoption of Ecology's SMP revisions violated the SMA's public participation requirements.[4] Petitioners note RCW 90.58.130 requires local governments to "[m]ake reasonable efforts to inform the people of the state" and to "not only invite but actively encourage participation by all persons and private groups and entities showing an interest in shoreline management programs of this chapter." Petitioners and Intervenor also note the SMA guidelines require that counties planning under RCW 36.70A implement public involvement strategies "that ensure early and continuous public participation".[5] Further, Petitioners point to WAC 173-26-090 which provides: (Emphasis added)

> Counties and cities planning under chapter 36.70A RCW, shall establish and broadly disseminate to the public a public participation program identifying procedures whereby proposed amendments of the comprehensive plan and development regulations relating to shorelines of the state will be considered by the local governing body consistent with RCW 36.70A.130. Such procedures shall provide for <u>early and continuous public participation</u> through broad dissemination of informative materials, proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, and consideration of and response to public comments. (emphasis added)

Finally, Petitioners argue that pursuant to RCW 90.58.090(2), when Ecology requires or recommends changes to a county's proposed shoreline master plan amendments, the County's written notice of agreement to such changes constitutes final action by Ecology in approving the amendment.

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[4] Although Intervenor provides argument in regards to Issue 1, it also adopts and incorporates Petitioners' arguments relating to this issue. Intervenor's Brief, at 4.
[5] WAC 173-26-100.

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Petitioners note that although SMA public involvement provisions have not been previously interpreted by the Boards, the Boards have interpreted the GMA's public participation requirements – which are fundamentally similar – on numerous occasions.[6] For example, they cite *Friends of Skagit County v. Skagit County*[7] where the Board struck down a local ordinance when the public was not provided a reasonable opportunity to comment on the version of the ordinance ultimately adopted. Likewise, they argue this case is similar to *1000 Friends of Washington et al. v. Spokane County*,[8] in which the Eastern Washington Growth Management Hearings Board found a lack of adequate public participation where the County made 72 amendments to the County Planning Commission recommended plan without additional public involvement.

Petitioners and Intervenor argue the County failed to adhere to the SMA public participation requirements because it adopted Ecology's revisions to the Draft SMP without any public participation.[9] In addition, they argue that the County may not rely on past public participation relating to a particular enactment to satisfy its public participation obligations with regard to subsequent amendments to that enactment.[10] Petitioners allege that Ecology's revisions to the Draft SMP nullified the public participation relating to the County's adoption of that draft SMP, requiring the County to subject the revisions to public review.

In response, the County argues there is no legal requirement for additional public process prior to agreeing to the changes required by Ecology.[11] The County notes there is a specific process for the adoption of SMPs set forth in the Act and the guidelines, and that it adhered to that process.

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[6] Petitioners' Breif at 11.
[7] WWGMHB No. 95-2-0065, Second Order Re: Invalidity and Compliance, (8/28/96).
[8] EWGMHB No. 01-1-0018 (FDO, 6/4/02).
[9] Petitioners' Brief at 6.
[10] Id. at 14.
[11] County Brief at 9.

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Board Discussion

At the outset the Board notes that its analysis begins with the law, as found in the RCW, and only then does the Board turn to agency rules set forth in the Washington Administrative Code. Here, RCW 36.70A.480(2) provides:

> The shoreline master program shall be adopted pursuant to the procedures of chapter 90.58 RCW rather than the goals, policies, and procedures set forth in this chapter for the adoption of a comprehensive plan or development regulations.

Although Petitioners cite GMA-based public participation cases, this statute specifically states that it is the procedures of RCW 90.58 which guide the adoption of SMPs, not those of the GMA. Thus, the interpretation of GMA-based public participation requirements, although potentially helpful, is not controlling.

Therefore, the Board looks to RCW 90.58.090 for the procedures to be followed in the approval or amendment of a shoreline master program. In particular, RCW 90.58.090(2) provides: (Emphasis added)

> Upon receipt of a proposed master program or amendment, the department shall:
>
> (a) Provide notice to and opportunity for written comment by all interested parties of record as a part of the local government review process for the proposal and to all persons, groups, and agencies that have requested in writing notice of proposed master programs or amendments generally or for a specific area, subject matter, or issue. The comment period shall be at least thirty days, unless the department determines that the level of complexity or controversy involved supports a shorter period;
> (b) In the department's discretion, conduct a public hearing during the thirty-day comment period in the jurisdiction proposing the master program or amendment;
> (c) Within fifteen days after the close of public comment, request the local government to review the issues identified by the public, interested parties, groups, and agencies and provide a written response as to how the proposal addresses the identified issues;
> (d) Within thirty days after receipt of the local government response pursuant to (c) of this subsection, make written findings and conclusions regarding the consistency of the proposal with the policy of RCW 90.58.020 and the applicable

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guidelines, provide a response to the issues identified in (c) of this subsection, and either approve the proposal as submitted, recommend specific changes necessary to make the proposal approvable, or deny approval of the proposal in those instances where no alteration of the proposal appears likely to be consistent with the policy of RCW 90.58.020 and the applicable guidelines. The written findings and conclusions shall be provided to the local government, all interested persons, parties, groups, and agencies of record on the proposal;

(e) **If the department recommends changes to the proposed master program or amendment**, within thirty days after the department mails the written findings and conclusions to the local government, **the local government may**:

(i) **Agree to the proposed changes**. The receipt by the department of the written notice of agreement constitutes final action by the department approving the amendment; or

(ii) **Submit an alternative proposal**. If, in the opinion of the department, the alternative is consistent with the purpose and intent of the changes originally submitted by the department and with this chapter it shall approve the changes and provide written notice to all recipients of the written findings and conclusions. If the department determines the proposal is not consistent with the purpose and intent of the changes proposed by the department, the department may resubmit the proposal for public and agency review pursuant to this section or reject the proposal.

Petitioners and Intervenor do not challenge the public participation afforded by the County *before* the Draft SMP was submitted to Ecology in 2007.[12] Nor do they challenge any failure of Ecology *before* it returned the Revised SMP to the County. As noted, below, Ecology conducted its own public comment period on the proposed amended SMP, which has not been challenged. Petitioners and Intervenor similarly do not raise any contentions as to the County's or Ecology's process during these stages of the SMP amendment process. Rather the challenge is grounded in the activity that occurred *after* the Revised SMP was returned to the County from Ecology in the summer of 2008, with the assertion being that the public was denied any opportunity to review/comment on Ecology's requested "substantive" changes.

[12]In their Prehearing Brief, Petitioners specifically state that the County satisfied its public participation obligations with respect to the Draft SMP. Petitioner's Brief at 13.

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The Board notes that neither the RCW nor the WAC[13] sets forth any requirements for public input on a Revised SMP returned by Ecology to the originating jurisdiction. In accordance with RCW 90.58.090, after Ecology has conducted its review of a submitted SMP, it may do one of three things:[14]

1. Approve the SMP as presented by the jurisdiction,
2. Deny approval of the SMP, OR
3. Recommend specific changes necessary to make the proposal approvable.

Option 3 was exercised in this case. Upon receipt of Ecology's revised SMP, the jurisdiction has two choices:[15]

1. Agree to the proposed changes, OR
2. Submit an alternative proposal.

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[13] Unlike RCW 90.58.090, which sets forth the process Ecology is required to follow for SMP approval, the SMA itself establishes no process for local governments to follow. Rather, the process for local governments is established via agency rule – in WAC 173-26-100. This WAC provision lists the minimum steps needed, including at least one public hearing, public notice, consultation with interested/responsible persons, parties, agencies, solicitation of comments from Ecology, and compliance with SEPA – all followed by approval of the draft proposal. RCW 90.58.090(2)(a) establishes the process for Ecology when reviewing a proposed SMP or amendments to a SMP. WAC 173-26-120 largely mirrors these requirements and denotes a two-part approach: Formal Review and Approval. During its review, Ecology is to provide reasonable notice and opportunity for at least a 30-day comment period, a discretionary public hearing, and response opportunity for the submitting jurisdiction to any public comment. RCW 90.58.090(2)(a)-(d) The statute and rule goes on to set forth the approval process which requires Ecology to make written findings and conclusions and to either approve the SMP outright, deny the SMP outright, or recommend changes to the SMP. RCW 90.58.090(2(e); WAC 173-26-120(7). If Ecology recommends changes, the local government may either agree to the changes with written notice or submit an alternative proposal. RCW 90.58.090(2)(e)(ii); WAC 173-26-120(7)(ii). If the local government submits an alternative proposal, Ecology is to review the changes suggested for consistency with the SMA and, if Ecology agrees with the changes, it shall approve them and provide written notice. RCW 90.58.090(2)(e)(ii); WAC 173-26-120(7)(ii). If Ecology determines the alternative proposal is not consistent with the SMA, it may either resubmit the proposal for public and agency review or reject it. RCW 90.58.090(2)(e)(ii). If the local government simply accepts the recommended changes and responds in writing, Ecology's receipt of that notice is deemed to be final action in approving the SMP. RCW 90.58.090(2)(e)(i); WAC 173026-120(7)(i). Regardless of the process taken to reach approval, a SMP or amendment to a SMP takes effect when and in such form as approved/adopted by Ecology. RCW 90.58.090(7).

[14] RCW 90.58.090(2)(d).

[15] RCW 90.58.090(2)(e)(i)-(ii).

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Here, Option 2 was used. Although Resolution 2008-056 states that the County "acknowledges and agrees to" Ecology's required changes, the County actually modified the recommendations, deleting some and modifying others (See Exhibit 1.16).

If a jurisdiction submits an alternative proposal, Ecology has three options (1, 2a and 2b):[16]

1. If, in the opinion of Ecology the alternative is consistent with the purpose and intent of Ecology's original changes and the SMA, Ecology shall approve the changes, OR
2. If Ecology determines the alternative is not consistent, Ecology may:
    a. Resubmit the alternative proposal for public and agency review, or
    b. Reject the alternative proposal.

Ecology exercised Option 1 by approving the SMP with "the County's Alternative Attachment B and [Ecology's] Attachment C, Recommended Revisions."[17]

The language of RCW 90.58.090(2)(e)(ii) is instructive here. If an alternative proposal is returned to Ecology, there is <u>no</u> language in the statute requiring Ecology to undergo additional public participation; it is free to approve the alternative SMP if it finds consistency. However, it is specifically noted that if Ecology deems the alternative inconsistent, it may return an alternative for *public and agency review.* Similar language is not present in RCW 90.58.090(e)(i) – which simply permits a local government to agree to Ecology's proposed changes. In addition, the Board notes that RCW 90.58.090 has no provision requiring the local government to subject a Revised SMP that has been returned from Ecology for additional public scrutiny and comment as to those revisions made by Ecology. Similarly, WAC 173-26-120 only addresses the local government's obligations up and until submittal of a proposed SMP to Ecology. Based on a plain reading of the SMA, there is nothing that requires additional public review of a Revised SMP that has been returned to the originating jurisdiction by Ecology if a jurisdiction decides to agree to Ecology's recommendations.

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[16] RCW 90.58.090(2)(e)(ii).
[17] Exhibit 1.20.

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The Board is also mindful of the provision in RCW 90.58.130 that requires Ecology and the County to provide the public with "a full opportunity for involvement in both [the] development and implementation" of master programs, and to "not only invite but actively encourage participation". In addition, the Board interprets the language in WAC 173-26-090 to provide for "early and continuous public participation" as applying throughout the adoption process. Of concern to the Board is that after Ecology recommended specific changes necessary to make the proposed Draft SMP consistent with the SMA and applicable guidelines, the County modified some of those recommended changes. Yet, it is not the County's modifications that Petitioners and Intervenor assert were substantive. In fact, they state the the County's modifications were minor. [18] Rather, it is Ecology's revisions to the Draft SMP which Petitioners assert were "substantive in nature" and "significantly" affected development in the shoreline area, thereby requiring additional public participation.[19] However, throughout the process required by the RCW and WAC, Ecology opened a public comment period to seek input on the proposed amended SMP, including within its notice of the hearing a description of the proposed amendment and the authority under which the action was proposed, the time and location of the hearing, and the manner in which interested persons could obtain copies and present their view.[20] Petitioners and Intervenor do not assert this process was flawed.

The Board notes in passing that Petitioners have alleged the County violated its own charter and code by adopting Ecology's revision by resolution rather than by ordinance.[21] Petitioners also recognize that questions involving compliance with charter and code are beyond this Board's jurisdiction.[22] Petitioners are correct in their assessment of the Board's jurisdiction. Such a question is outside the matters subject to Board review as set forth in RCW 36.70A.280 and will not be addressed in this FDO.

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[18] Petitioners' Brief, at 4.
[19] Id. at 2.
[20] County Brief at 5.
[21] Id. at 16.
[22] Id.

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***Conclusion*:** Nothing in the RCW or the WAC required Whatcom County to allow for public comment/involvement on the changes recommended by Ecology once Ecology completed its review process, which was subject to public participation. The revisions/ recommendations developed by Ecology were subject to the public participation required by RCW 90.58.090 and WAC 173-26-120. The changes made by the County subsequent to that review were not substantive to the extent that they would require a new public review process. Therefore, the Board does not conclude that the County's public participation process was clearly erroneous.

Shorelines Setbacks

Issue 4: *Was the County's adoption of the Shoreline Management Program inconsistent with the requirements of the Shoreline Management Act, including RCW 90.58.020, and the Shoreline Management Act Guidelines, including WAC 173-26-186, 173-26-201, and 173-26-241, where the shoreline setbacks imposed by SMP 23.90.13, which are based on the County's critical area regulations, far exceed the Guidelines' no net loss standard?*

The Board reviewed the briefing and found no reference to Issue 4 or briefing on that issue. This Board has been consistent in its treatment of non-briefed issues; holding that an issue that is not briefed by a petitioner is deemed abandoned. *WEC v. Whatcom County*, WWGMHB Case No. 95-2-0071 (Final Decision and Order, December 20, 1995); *OEC v. Jefferson County*, WWGMHB Case No. 94-2-0017, (Final Decision and Order, February 16, 1995). Fairness requires that an issue be addressed in the petitioner's opening brief to provide the respondent with an opportunity to respond.

Conclusion: Petitioners and Intervenors presented no argument regarding Issue 4 and therefore that issue is deemed abandoned and dismissed in its entirety.

Designation of Shorelines as Critical Areas

Issue 6: *Was the County's and the Department's adoption of the Shoreline Management Program inconsistent with the requirements of RCW 36.70A.480 where the County has designated all shorelines as critical areas?*

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1. Timeliness of Appeal

Ecology argues the challenge raised in Issue 6 is untimely. It asserts this Issue is a challenge to the County's *designation* of shorelines as criticial areas, a process that occurred in 2005 with the adoption of Ordinance 2005-068. Since critical areas are designated under the GMA, pursuant to RCW 36.70A.170, Ecology argues that any challenge to this designation should have been brought within 60 days of the September 17, 2005 notice of adoption.[23] In response, Intervenor argues that the County did more than merely adopt a critical areas ordinance in 2005, but took new action in 2008 that incorporated the 2005 ordinance into the SMP.[24] Therefore, they argue that an appeal following Ecology's approval of the County's SMP represents the first time the shoreline critical areas were ripe for the Board's review.[25]

Board Discussion

Had the County taken no other action with regard to its critical area designations, its arguments regarding the timlienss of this appeal would have merit. However, as Intervenors note, the County incorporated its critical areas ordinance into its Shoreline Management Plan in 2008,[26] and it is the Shoreline Management Plan that is under appeal. In *Evergreen Islands v. City of Anacortes*, [27] this Board held that "[r]eview of the critical areas segment of Anacortes' master program is governed by the SMA and those regulations become effective only after they have been presented to and approved by Ecology". The Board further stated: "[u]ntil those regulations have been reviewed by Ecology, the changes to critical areas regulations in the shorelines . . . are not ripe for Board review"[28].

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[23] Ecology Brief at 3-4.
[24] Intervenor's ReplyBreif at 2.
[25] Id. at 3.
[26] Purusant to WAC 173-26-191(2)(b) a jurisdicion may incorporate by reference other documents into a SMP, such a zoning code or CAO.
[27] Evergreen Islands v. City of Anacortes, WWGMHB No, 05-2-0016 FDO at 30 (12/27/05).
[28] Id at 31.

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The Board is not persuaded by Ecology's argument that, while it is required to review the County's shoreline regulations, it is not required to review its designation of critical areas in shoreline jurisdiction. Ecology argues that "[A]lthough Ecology must approve the regulations governing development of critical areas within shoreline jurisdiction, Ecology does not oversee the designation of critical areas."[29] This is incorrect. WAC 173-26-191((2)(b) quoted in full below, provides, in part "[I]n the approval process the department will review the referenced development regulation sections as part of the master program." Ecology's argument that the designation of critical areas are not development regulations is undercut by the definition of "development regulations" as "controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, . . . "[30]

That these designations, which are incorporated by reference, are to be subject to public review at the time of their incorporation is demonstrated by WAC 173-26-191(2)(b): (Emphasis added)

> (b) *Including other documents in a master program by reference.* Shoreline master program provisions sometimes address similar issues as other comprehensive plan elements and development regulations, such as the zoning code and critical area ordinance. For the purposes of completeness and consistency, local governments may include other locally adopted policies and regulations within their master programs. **For example, a local government may include its critical area ordinance in the master program** to provide for compliance with the requirements of RCW 90.58.090(4), provided the critical area ordinance is also consistent with this chapter. This can ensure that local master programs are consistent with other regulations.
>
> Shoreline master programs may include other policies and regulations by referencing a specific, dated edition. When including referenced regulations within a master program, local governments shall ensure that the public has **an opportunity to participate in the formulation of the regulations** or in their incorporation into the master program, as called for in WAC 173-26-201

[29] Ecology Brief at 4.
[30] RCW 36.70A.030(7).

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> (3)(b)(i). In the approval process the department will review the referenced development regulation sections as part of the master program. A copy of the referenced regulations shall be submitted to the department with the proposed master program or amendment. If the development regulation is amended, the edition referenced within the master program will still be the operative regulation in the master program. Changing the referenced regulations in the master program to the new edition will require a master program amendment.

Thus, Petitioners/Intervenor were entitled to "an opportunity to participate in the formulation of the regulations" including "their incorporation into the master program". To suggest that the public has no right to appeal the regulations as they are incorporated into the master program would render them passive participants and the SMA's provisions related to public participation meaningless, as discussed *supra* with Issue 1.

WAC 173-26-191(2)(b) provides in part that "In the approval process the department will review the referenced development regulation sections as part of the master program." There is no evidence that the County sent Ordinance 2005-068 to Ecology for its review. This reinforces the conclusion that Ecology did not review the shoreline designations and the appeal deadline did not begin to run until the County adopted Resolution 2008-056 in 2008.

Conclusion: Thus, the Board concludes that the challenge to the designation of shorelines as critical areas is timely. The Board will next consider whether the County erred in designating all shorelines in the County as critical areas.

2. Designation of Shorelines as Critical Areas

The basis of the challenge to the County's designation of shorelines as critical areas is that the County made a "blanket designation" of all shorelines as critical areas, rather than conducting a site-specific analysis as required by RCW 36.70A.480(5). That statute provides as follows: (Emphasis added)

> (5) Shorelines of the state shall not be considered critical areas under this chapter except to the extent that **specific areas located within shorelines** of

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> the state qualify for critical area **designation based on the definition of critical areas provided by RCW 36.70A.030(5)** and have been designated as such by a local government pursuant to RCW 36.70A.060(2).

Petitioners and Intervenor argue that based on this language, it is clear that not all shorelines of the state are automatically critical areas, and that the County must determine which specific areas should be so designated.[31] They further argue that the County's blanket designation without any consideration of whether only certain areas qualified runs counter to this requirement. Petitioners and Intervenor also argue that the record, specifically the County Staff Report,[32] is devoid of any analysis of the areas that qualify for designation. In addition, they argue that the County failed to incorporate the findings of the Shoreline Inventory and Characterization with respect to shoreline critical areas and that a blanket designation is inconsistent with the Shoreline Inventory.[33] By way of example, Petitioners and Intervenor point out that while the Shoreline Inventory states that only two of the fifteen reaches of Lake Whatcom contain habitat conservation areas, the CAO defines the entire shoreline of the lake as habitat conservation area critical areas.[34] They cite additional examples on Bellingham Bay, Lummi Bay, and Birch Bay in support of their argument that the CAO was not adopted in consideration of all of the data in the Shoreline Inventory.[35]

Board Discussion

The parties are in agreement that shorelines of the state are not automatically critical areas and the Board concurs. Had the County merely designated its shorelines as critical areas without consideration of whether those shorelines qualified as critical areas, the County would have run afoul of RCW 36.70A.480(5)'s requirement to designate those "specific"

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[31] Intervenor's Brief at 9.
[32] Index 9.13.
[33] Index 7.2 Whatcom County SMP Update – Shoreline Inventory and Characterization.
[34] Intervenor's Brief at 13.
[35] Id., at 13-14.

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shorelines of the state that "qualify for critical area designation". However, the record supports the County's actions.

RCW 36.70A.480(5) permits Shorelines of the State to be considered critical areas when specific areas located within these shorelines qualify for critical area designation based on the definition of critical areas set forth in RCW 36.70A.030(5) and they have been designated as such by the local government." Critical areas include wetlands, critical aquifer recharge areas, fish and wildlife habitat conservation areas, frequently flooded areas, or geologically hazardous areas, each of which occurs in shoreline areas of Whatcom County.[36] The County CAO designates as critical areas all areas that are of critical importance to the maintenance of special status fish, wildlife and/or plant species.[37] For example, the County designates the habitat of priority fish species such as Chinook, Coho, Chum, Pink, and Sockeye salmon as critical areas. [38] These species occur throughout the shoreline rivers and streams of Whatcom County.[39] In addition, the South, Middle and North Fork of the Nooksack River, and their tributaries, all contain several priority salmonid species.[40] As Ecology points out, virtually all of the shoreline streams and rivers in the County contain or are presumed to contain a current population of salmonids or are areas with a historic population of salmonids which the County seeks to restore.[41]

Turning to the specific bodies of water highlighted by Intervenor, Ecology points out:

Lake Whatcom[42] – The Shoreline Inventory states that all of Lake Whatcom is home to Kokanee salmon, a fish species listed in Appendix D of Whatcom County's CAO whose habitat is protected as critical area. Ecology contends that because of the presence of this

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[36] IR 8.1, attached to Ecology Brief at Exhibits B – G.
[37] WCC 16.16.710.
[38] Ecology Brief at 8, citing Ex. A at Appendix D, Table D-3.
[39] IR 7.3, Scientific Literature Review at 7-6 and Table 7-1.
[40] Id.
[41] Id.
[42] Ecology's Brief, at 10; Citing to Index 7.2 Shoreline Inventory at 13-10 and Index 8.1, Table D-3, Pg. D-5.

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priority species, all of Lake Whatcom meets the criteria for FWHCA and is properly designated as such in the CAO.

Bellingham Bay[43] – The Shoreline Inventory states that the area in question supports surf smelt and Pacific sand lance spawning. East of Fort Bellingham, the Wildlife Habitat Conservation map demonstrates that this area contains smelt and sand lance spawning. Ecology points out that CTED guidelines require areas of smelt spawning to be designated as critical areas. Further, Ecology notes that Pacific sand lance is a priority species whose habitat is protected as a critical area in Whatcom County.

Lummi Bay[44] – Ecology points out that the entire Lummi Bay shoreline provides habitat for a number of priority species. According to Ecology, the western and southern portion of Lummi Bay support herring spawning; the interior of the bay supports eelgrass beds and shellfish; and the northernmost portion of the bay supports state priority species as well as state and federal listed species.

Birch Bay[45] – While Intervenor states that the Shoreline Inventory demonstrates that there are only two habitat conservation areas in the marine shoreline area that runs from north of Birch Point to south of Cherry Point,[46] Ecology notes that the Shoreline Inventory states that the entire Birch Point reach supports eelgrass and is a spawning area for herring and surf smelt; the Birch Bay reach supports recreational and commercial shellfish, waterfowl, herring spawning, Pacific sand lance and surf smelt; the Birch Bay State Park reach supports shellfish, eelgrass, Pacific sand lance spawning, and herring spawning; and the Cherry Point reach supports kelp beds, eelgrass, herring spawning, surf smelt, and Pacific sand lance.

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[43] Id., at 10-11; Citing to Index 7.2 Shoreline Inventory at 14-9, 14-11 and Index 8.1, Table D-3, Pg. D-7.
[44] Id., at 11; Citing to Index Record 8.1 and Index 7.2 at 15-15 – 15-18.
[45] Id., at 11-12; Citing to Index 7.2 at 16-14 – 16-19 and Index 8.1, Appendix D.
[46] Intervenor's Brief at 14.

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In short, the County developed a record in its CAO, CAO maps, and Shoreline Inventory which supports the designation of Whatcom County's shorelines as a type of critical area – specifically, fish habitat. While the Board might well wonder whether some areas of the shoreline are so developed or isolated from protected species as to afford little habitat, Intervenors have not carried their burden of proof by showing that these designations were clearly erroneous. Instead, the thrust of Intervenor's argument was that these "blanket designations" were not supported by the record and were unsupported by the County's own Shoreline Inventory. That has not been proven. RCW 36.70A.480(5) provides that areas within the shoreline may qualify for designation based on the definition of critical areas provided by RCW 36.70A.030(5). That section provides that critical areas include "fish and wildlife habitat conservation areas". The record in this case shows that these shorelines were designated as critical areas because of their role as fish and wildlife habitat conservation areas. Therefore, the Board does not find this designation to be clearly erroneous.

Conclusion: Petitioners' and Intervenor's challenge to the County's designation of all shorelines as critical areas was timely. However, they have failed to carry their burden of proving that the County's designation of critical areas was clearly erroneous and in violation of RCW 36.70A.480(5).

V. FINDINGS OF FACT

1. Whatcom County is a county located west of the crest of the Cascade Mountains that is required to plan pursuant to RCW 36.76A.040.
2. The Petitioners timely filed a Petition for Review.
3. Intervenor filed a motion requesting intervention on behalf of Petitioners and the Board granted that motion.
4. Pursuant to RCW 36.70A.280, the Board has jurisdiction over the parties and subject matter of this appeal.

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5. In August of 2004, Whatcom County began the process of updating its Shoreline Master Program (SMP) as required by RCW 90.58.080. Between 2004 and 2007, the County conducted various public meetings, workshops, and hearings.
6. On February 27, 2007, the Whatcom County Council passed Ordinance No. 2007-17 adopting an updated, amended Draft SMP as recommended by the County's Planning Commission. As required by the SMA, this Draft SMP was forwarded to the Department of Ecology for its review and approval.
7. In the fall of 2007, Ecology provided for public comment and a public hearing on the Draft SMP.
8. On July 30, 2008, Ecology approved the County's Draft SMP subject to several required and/or recommended changes, creating a Revised SMP.
9. On August 5, 2008, the Whatcom County Council adopted Resolution No. 2008-56 approving Ecology's approval of the Revised SMP and subsequently notified Ecology of its approval. The County did make several modifications to the Revised SMP which were subject to Ecology's further review and approval.
10. On August 8, 2008, Ecology notified Whatcom County that it had approved the SMP, incorporating all of the County's recommended modifications. Pursuant to RCW 90.58, the SMP became effective on this date.
11. RCW 36.70A.480(2) requires the Board to utilize the goals, policies, and procedures of the Shoreline Management Act, RCW 90.58 (SMA), when reviewing a challenge based on the adoption of a SMP.
12. The SMA requires Ecology and Whatcom County to provide the public with a full opportunity for early and continuous participation in both the development and implementation of SMP as well as to actively encourage such involvement.
13. RCW 90.58.090 sets forth the process Ecology is required to follow for SMP approval. WAC 173-26-120 delineates this process into two approaches: Formal Review and Approval.

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14. The SMA itself does not establish a SMP approval process for local governments. The process for local governments to adopt a Draft SMP is established via agency rule – WAC 173-26-100.
15. Petitioners and Intervernor do not allege the public participation process afforded by either Whatcom County prior to submittal of the Draft SMP to Ecology in 2007 or Ecology's action prior to returning the Revised SMP to the County in 2008 was inadequate.
16. Neither the RCW nor the WAC set forth any requirements for additional public review/comment if the local government elects to return an Alternative SMP to Ecology, unless Ecology deems the alternative is inconsistent with the SMA.
17. Petitioners and Intervenor state the modifications proposed by the County to Ecology's Revised SMP were minor.
18. Ecology determined the Alternative SMP was consistent with the SMA.
19. Petitioners and Intervenor did not submit briefing on Issue 4.
20. In 2005, Whatcom County adopted Ordinance No. 2005-068, the County's Critical Areas Ordinance (CAO). The CAO designated shorelines as critical areas. The County did not submit the CAO to Ecology for its review.
21. Whatcom County incorporated its CAO by reference into its SMP in 2008.
22. WAC 173-26-191(2)(b) requires Ecology to review development regulations which have been incorporated by reference into a SMP.
23. Incorporation of development regulations entitles the public to an opportunity to not only participate in the formulation of regulations but also their incorporation in the SMP.
24. The appeal period for challenging the County's decision in regards to the CAO's designations as they relate to the SMP did not begin to run until the County adopted Resolution No. 2008-56.
25. RCW 36.70A.480(5) permits Shorelines of the State to be considered critical areas when specific areas located within these shorelines qualify for critical area

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designation based on the definition of critical areas set forth in RCW 36.70A.030(5) and have been designated as such by the local government.

26. Critical areas include fish and wildlife habitat conservation areas. The County's CAO designates as critical areas all areas that are of critical importance to the maintenance of special status fish, wildlife, and/or plant species.

27. The Record contains evidence to support the designation of Whatcom County's shorelines as a type of critical area – specifically fish and wildlife habitat. Evidence, including the CAO, CAO maps, and a Shoreline Inventory supports the County's conclusion that the shoreline areas of the County provide habitat for various state priority species as well as state and federally-listed species, including salmonids, smelt, Pacific sand lance, herring, and also provide areas of kelp and eelgrass as well as shellfish beds.

VI. CONCLUSIONS OF LAW

A. Pursuant to RCW 36.70A.250(c), the Board has jurisdiction over the parties to this action.

B. Pursuant to RCW 36.70A.280(1)(a), the Board has jurisdiction over the subject matter of this action.

C. Pursuant to RCW 36.70A.280(2)(b), Petitioners have standing to raise the issues in this case.

D. Pursuant to RCW 36.70A.480(3), the Board is required to use the policies, goals, and provisions of the Shoreline Management Act, RCW 90.58, and applicable guidelines, WAC 173-26, when determining compliance of a SMP.

E. Whatcom County complied with the public participation process set forth in WAC 173-26-100 when adopting the Draft SMP.

F. The Department of Ecology complied with the public participation process set forth in RCW 90.58.090 and WAC 173-26-120 when formulating the Revised SMP.

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G. Neither RCW 90.58 nor WAC 173-26 requires Whatcom County or Ecology to allow for additional public participation after a Revised SMP has been returned to a local government by Ecology.

H. As provided in RCW 90.58.090, Whatcom County submitted an Alternative SMP to Ecology and Ecology determined this Alternative SMP was consistent with the purpose and intent of Ecology's original recommendations and the SMA.

I. Neither RCW 90.58 nor WAC 173-26 requires Whatcom County or Ecology to allow for additional public participation after an Alternative SMP has been returned to Ecology by a local government.

J. The Petitioners and Intervenor failed to meet their burden of proof in demonstrating the public participation process afforded by Whatcom County and Ecology violated the SMA, specifically RCW 90.58.130, and the applicable guidelines, specifically WAC 173-26-090 to 173-26-120.

K. WAC 173-26-191(2)(b) permits the incorporation by reference of other documents into a SMP. The County incorporated its CAO by reference within its SMP.

L. WAC 173-26-191(2)(b) requires Ecology to review the referenced development regulations during the approval process of the SMP.

M. WAC 173-26-191(2)(b) required the County to allow for public participation.

N. The appeal deadline for challenging the decision to incorporate critical areas begins to run when the County adopts the SMP.

O. RCW 36.70A.480(5) permits Shorelines of the State to be considered critical areas to the extent specific areas located within the shoreline qualify for critical area designation based on the GMA's definition and process for critical area designation.

P. Pursuant to RCW 36.70A.030(5), Fish and Wildlife Habitat Conservation Areas are a type of critical area. The Record of these proceedings supports a finding that the County's shorelines are Fish and Habitat Conservation Areas and were designated as such.

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Q. Any Conclusion the Law later determined to be a Finding of Fact is adopted as such.

VII. ORDER

Based on the foregoing, the Board finds that that the County has not violated the public participation requirements of the Shoreline Management Act, nor has the County or Ecology violated the requirements of RCW 36.70A.480. Therefore, this case is CLOSED.

Entered this 20th day of April 2009.

_____
James McNamara, Board Member

_____
Nina Carter, Board Member

I agree with my colleagues' opinion in all regards other than their analysis of Issue 1. In the matter before us, I cannot find the failure of the County to hold an additional hearing to be clearly erroneous.

The County urged a rather strained interpretation of the process upon the Board; one which clearly divided the "local" process from the "state" process. The County initially argued that once a draft Shoreline Management Program (SMP) is sent to the Department of Ecology (DOE) by the County, the "local" process terminates. I disagree. The local process does not cease until the County agrees to any DOE required changes and notifies DOE of that agreement. DOE required extensive changes and recommended others.
In the matter before us, Whatcom County adopted a draft SMP in February, 2007 and submitted it to DOE. On July 30, 2008, seventeen months thereafter, DOE forwarded thirteen pages of required revisions and two pages of recommended revisions to the County. Six days later, without any public opportunity to review those changes and

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apparently without even the opportunity for council members to review them, the County agreed to the changes by resolution.

RCW 36.70A.480, as amended in 2003, makes it abundantly clear that shoreline master programs are to be adopted pursuant to the procedures of Chapter 90.58 RCW. RCW 90.58.130 addresses the public process to be used in the development of shoreline master programs and states that interested persons are to be provided ". . . with a full opportunity for involvement in . . . their development . . ." and directs local government (as well as the DOE) to make reasonable efforts to not only inform the public about the shoreline management program but to also " . . . actively encourage participation by all persons . . . showing an interest . . ."

WAC 173-26-201 appears to be the only rule addressing the shoreline management program development public involvement process filed subsequent to the amendments to RCW 36.70A.480. The referenced WAC quotes portions of RCW 90.58.130 including the "full opportunity" and "actively encourage" language. WAC 173-26-201(3)(b)(i) also specifically refers to WAC 173-26-100 and RCW 36.70A.140 under a heading entitled "Participation requirements". One of the stated purposes of the WAC 173-26-201 amended rules was to provide guidance on the limitations of regulatory authority and *guidance on shoreline and growth management act integration*.[47]

WAC 173-26-100 instructs local jurisdictions to "ensure early and <u>continuous</u> public participation" and also refers to WAC 365-195-600, which again uses the "early and continuous public participation" language. As stated, the 2003 amended WAC also refers to RCW 36.70A.140. While I realize the referenced rules (other than WAC 173- 26-201) predate the amendments to RCW 36.70A.480, it cannot be presumed that the drafters of the rule in 2003 were unaware of the public participation guidelines set forth in the pre-2003 rules which they referenced in the new rule.

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[47] Washington State Register 04-01-117.

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"Continuous" as used in "early and continuous" surely cannot be interpreted to necessarily mean all public participation at the local level should cease once a local jurisdiction submits its recommended draft SMP to DOE. In the case before us, Whatcom County submitted its draft SMP and approximately seventeen months later it received numerous pages of recommended and required changes. Those changes were approved within a few days of receipt and without any opportunity for the public to review, let alone comment on, the changes.

As counsel for the Petitioners stated at the Hearing on the Merits, the "best legislative decisions are made in the open". I concur. In the case before us, a legislative decision was made by the Whatcom County Council without opportunity for additional public review and input, a decision that was not one “made in the open”. It was also made seventeen months after adoption of the draft SMP on February 27, 2007. I do not find that the process included “continuous”[48] participation.

Having said that, if in fact the Petitioner in this case had clearly established that the changes required and recommended by DOE were of a significant, substantive nature, I would remand the matter to the County on the basis of the lack of adequate public participation opportunity. However, the Petitioners failed in my opinion to establish the substantive nature of those changes. When asked at hearing to provide examples of a substantive change, they were hard-pressed to do so. The one example provided, while appearing on its face to be of a substantive nature, proved on closer examination to be but an amendment made to achieve consistency between regulations.

_____
William P. Roehl, Board Member

[48] WAC 193-26-100.

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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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