CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

PILCHUCK AUDUBON SOCIETY Petitioner, v. THE CITY OF MUKILTEO, Respondent.	)	**CPSGMHB Case No. 05-3-0029** ***(Pilchuck V v. Mukilteo)*** **ORDER FINDING COMPLIANCE**

I. BACKGROUND

On October 10, 2005, the Board issued its Final Decision and Order (**FDO)** in CPSGMHB Case No. 05-3-0029. The FDO provided in relevant part:

> The City of Mukilteo's last-minute adoption of the 40% reduction to wetland buffers, with a minimum of 35 feet, in Ordinance 1112 was **clearly erroneous**, and **did not comply** with RCW 36.70A.172(1). Therefore, the Board will **remand** the Ordinance, directing the City of Mukilteo to take legislative action to bring its wetlands regulations into compliance with RCW 36.70A.172(1) as set forth in this Order.

FDO, at 12.

> The Board finds that Petitioners have **failed to carry their burden of proving** non-compliance in the City of Mukilteo's public notice for its adoption of Ordinance 1112. The notices provided were **not clearly erroneous.**
>
> However, the Board was persuaded by Petitioners that the City of Mukilteo's adoption of Ordinance 1112, specifically the wetland buffer reduction amendment, without providing an opportunity for citizen review and comment, was **clearly erroneous**, and **did not comply** with RCW 36.70A.035(2) and RCW 36.70A.020(11). Therefore, the Board will **remand** the Ordinance, directing the City of Mukilteo to provide the opportunity for public review and comment required by RCW 36.70A.035(2).

Id, at 19.

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

1. The City of Mukilteo's adoption of Ordinance 1112 was **clearly erroneous** and **does not comply** with the requirements of RCW 36.70A.172(1) and RCW 36.70A.035(2).

2. Therefore the Board **remands** Ordinance 1112 to the City of Mukilteo with direction to the City to take legislative action to comply with the requirements of the GMA as set forth in this Order.

3. The Board sets the following schedule for the City's compliance**:**

- The Board establishes **January 10, 2006,** as the deadline for the City of Mukilteo to take appropriate legislative action.

- By no later than **January 24, 2006**, the City of Mukilteo shall file with the Board an original and four copies of the legislative enactment described above, along with a statement of how the enactment complies with this Order (**Statement of Actions Taken to Comply - SATC**). The City shall simultaneously serve a copy of the legislative enactment(s) and compliance statement, with attachments, on Petitioners. By this same date, the City shall also file a "**Compliance Index**," listing the procedures (meetings, hearings etc.) occurring during the compliance period and materials (documents, reports, analysis, testimony, etc.) considered during the compliance period in taking the compliance action.

- By no later than **January 31, 2006**,[1] the Petitioners may file with the Board an original and four copies of Response to the City's SATC. Petitioners shall simultaneously serve a copy of their Response to the City's SATC on the City.

- Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance Hearing in this matter for **10:00 a.m. February 9, 2006,** at the Board's offices. If the parties so stipulate, the Board will consider conducting the Compliance Hearing telephonically. If the City of Mukilteo takes the required legislative action prior to the January 10, 2006, deadline

[1] January 31, 2006, is also the deadline for a person to file a request to participate as a "participant" in the compliance proceeding. *See* RCW 36.70A.330(2). The Compliance Hearing is limited to determining whether the City's remand actions comply with the Legal Issues addressed and remanded in this FDO.

> set forth in this Order, the City may file a motion with the Board requesting an adjustment to this compliance schedule.

Id, at 21 – 22.

On January 24, 2006, the Board received Mukilteo's Statement of Actions Taken to Comply with Final Decision and Order (**SATC),** together with copies of Ordinance 1147 and the City's Compliance Index (**Compliance Index**).

No response to the SATC was filed with the Board.

For the convenience of the parties, the Compliance Hearing was convened by telephone conference call at 10:05 a.m. February 9, 2006, pursuant to the Board's October 10, 2005, FDO . Board member Bruce Laing convened the hearing, with Board member Margaret Pageler and Board extern Justin Titus in attendance[2]. Respondent City of Mukilteo was represented by James E. Haney. Petitioner Pilchuck Audubon Society was represented by Dan Mitchell. The proceedings were recorded by audio tape (**Compliance Hearing tape**). The Compliance Hearing was closed at 10:20 a.m., February 9, 2006.

II. DISCUSSION

Ordinance 1112 Remand

The Board remanded Mukilteo Ordinance 1112 and directed the City to take legislative action to comply with the RCW 36.70A.172(1), i.e. include best available science in developing its wetlands regulations. FDO, at 12, 21. The Board also directed the City to provide the opportunity for public review and comment required by RCW 36.70A.035. FDO, at 19, 21.

Mukilteo's Action Taken to Comply

Best Available Science

At the time the Mukilteo City Council enacted Ordinance 1112, the ordinance found non-compliant in this case, the Department of Ecology had promulgated three buffer alternatives for use by local governments in complying with the best available science requirements of RCW 36.70A.172: Buffer Alternative 1, which recommended buffer widths based solely on wetland category; Buffer Alternative 2, which recommended buffer widths based on wetland category and intensity of impacts from proposed changes in surrounding land uses; and Buffer Alternative 3, which recommended three specific buffer widths based on wetland category, intensity of impacts, and habitat scores. Index Exhibit 264, Washington State Department of Ecology, *Wetlands in Washington State, Volume 2: Guidance for Protecting and Managing Wetlands* (April 2005), Appendix 8-C, §8C.2 at p. 3. Ordinance 1112 adopted Buffer Alternative 3, except that the ordinance

[2] Board member Edward McGuire was not able to attend the Compliance Hearing.

adopted a buffer reduction methodology that allowed for a buffer reduction of up to 40% but to no less than 35 feet upon seven specific conditions, whereas Buffer Alternative 3 capped the buffer reduction at 25% but not less than 75 feet for moderate value wetlands such as those in Mukilteo.

Subsequent to the City's enactment of Ordinance 1112, DOE promulgated an additional buffer alternative known as Buffer Alternative 3A. As explained by DOE, the difference between Buffer Alternative 3 and Buffer Alternative 3A is as follows:

> Alternative 3 contains recommendations for protecting the habitat functions of wetlands using only three groupings of scores (0-19, 20-28, 29-36). As a result, a one-point difference between 28 and 29 points can result in a 150-foot increase in the width of a buffer around a wetland. The habitat scores were divided into three groups to simplify the regulations based on this guidance. This division is not based on a characterization of risk since the scientific information indicates that the decrease in risk with increasing buffers is relatively continuous for habitat functions.
>
> Such a large increase in width with a one-point increase in the habitat score may be contentious. A jurisdiction may wish to reduce the increments in the widths for buffers by developing a more graduated (but inherently more complicated) scale based on the scores for habitat. Table 8C-9 [Buffer Alternative 3A] provides one example of a graduated scale for widths of buffers where the width increases by 20 feet for every one-point increase in the habitat score (Figure 8C-1 shows the buffer widths graphically).

Index Ex. 264, DOE Publication #05-06-08, *Wetlands in Washington State, Volume 2: Guidance for Protecting and Managing Wetlands* (April 2005), Appendix 8-C, §8C.2.7 at p. 13.

On December 5, 2005, Mukilteo adopted Ordinance 1147 amending the City's wetland regulations and adopting in full the Department of Ecology's Buffer Alternative 3A as set forth in Index Ex. 264, DOE Publication #05-06-08, *Wetlands in Washington State, Volume 2: Guidance for Protecting and Managing Wetlands* (April 2005), Appendix 8-C, §8C.2.7 at p. 13, *et seq.*

<u>Public Participation</u>

On December 5, 2005, prior to adopting Ordinance 1147, the Mukilteo City Council conducted a public hearing on buffer alternatives for the City's wetland regulations. Compliance Index No. 6. Notice of the public hearing was mailed to 39 parties of interest, including Petitioner Pilchuck Audubon Society, on November 23, 2005. Compliance Index No. 2. The notice was published in the City's official newspaper on

November 25, 2005. Compliance Index No. 6. The notice of public hearing stated that the following two alternatives would be considered by the City Council:

> Alternative 1: Readopt the provisions of Ordinance 1112, establishing wetland buffers using the Department of Ecology's (DOE's) "Buffer Alternative 3" methodology as described in DOE's publication titled "*Freshwater Wetlands in Washington State, Volume 2: Managing and Protecting Wetlands*" and modifying the buffer reduction provisions of that methodology by adopting a new Subsection 17.52B.100(H) of the Mukilteo Municipal Code authorizing reductions of up to 40% of the high intensity buffer but to not less than 35 feet where the applicant demonstrates through a mitigation report relying on best available science that the smaller buffer would provide equal or greater protection than the larger buffer and where seven specific mitigation measures are employed. DOE's "Buffer Alternative 3" methodology divides wetlands into four categories, and establishes buffer widths within those categories based on high, medium, and low habitat value ranges.
>
> Alternative 2: Adopt a new ordinance establishing wetland buffers using DOE's "Buffer Alternative 3A" methodology as described in DOE's publication titled "*Freshwater Wetlands in Washington State, Volume 2: Managing and Protecting Wetlands*" including the buffer reduction provisions of that methodology, which authorize buffer reductions of up to 25% but not less than 40 feet where seven specific mitigation measures are employed. DOE's "Buffer Alternative 3A" methodology also divides wetlands into four categories, but establishes buffer width based on actual habitat value point scores rather than on high, medium and low habitat value ranges.

Compliance Index No. 6.

Positions of the Parties

Respondent Mukilteo asserts that by adopting DOE's Buffer Alternative 3A methodology unchanged, including the buffer reduction provisions therein, the City has complied with RCW 36.70A.172(1) and with the FDO. SATC, at 6. Mukilteo argues that by providing the notice of public hearing and conducting the public hearing prior to adoption of Ordinance 1147 the City has complied with the public participation requirements of RCW 36.70A.035 and with the FDO. *Id*

Petitioner Pilchuck Audubon Society supports the City's adoption of Ordinance 1147. Compliance Hearing tape, at #123 - 136. At the City's public hearing, Petitioner testified in support of Alternative 2 – DOE's Buffer Alternative 3A – on the basis that it is consistent with best available science. Compliance Index No. 16, at 1. Petitioner asserted that the City had complied with the FDO requirement regarding public

participation and that adoption of DOE's Buffer Alternative 3A would comply with the FDO requirement regarding best available science. *Id*, at 2.

Conclusions

Mukilteo's adoption of Ordinance 1147, which incorporates DOE's Buffer Alternative 3A methodology, complies with the provisions of RCW 36.70A.172(1) and with the provisions of the FDO requiring such compliance. The City's public participation process in adopting Ordinance 1147 complies with the provisions of RCW 36.70A.035 and with the related directive of the FDO.

III. FINDING OF COMPLIANCE

Based upon review of the October 10, 2005 Final Decision and Order, the City of Mukilteo SATC, the Board's review of Ordinance 1147 and other documents in the record, the arguments and comments offered in the briefing and at the compliance hearing, the Board finds:

- By adopting Ordinance 1147 [Amending the City's Wetland Regulations] Mukilteo has complied with the goals and requirements of the GMA as set forth in the aforementioned Board FDO and the GMA. The Board therefore enters a **Finding of Compliance** for Mukilteo Re: Ordinance 1147.

V. ORDER

Based upon review of the October 10, 2005 Final Decision and Order, the City of Mukilteo SATC, the Board's review of Ordinance 1147 and other documents in the record, the arguments and comments offered in the briefing and at the compliance hearing, and having deliberated on the matter, the Board ORDERS:

> CPSGMHB Case No. 05-3-0029, *Pilchuck V v. Mukilteo,* is **closed**. Mukilteo's adoption of Ordinance 1147 corrects the deficiencies found in Ordinance 1112 and **complies** with the goals and requirements of the GMA as set forth in the Board's October 10, 2005 FDO. The Board therefore enters a **Finding of Compliance** for the City of Mukilteo Re: Ordinance 1147 [Amending the City's Wetland Regulations].

So ORDERED this 14th day of February, 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Bruce C. Laing, FAICP
Board Member

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Margaret A. Pageler
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.