

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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

Case No. 08-2-0026c

**FINAL DECISION AND ORDER**

5 Petitioner,

6 v.

7  
8 ISLAND COUNTY,

9 Respondent.  
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12 **I. SYNOPSIS**

13 The Whidbey Environmental Action Network (WEAN) and Camano Action for a Rural  
14 Environment (CARE) challenge various aspects of Island County's new wetland protection  
15 measures adopted by Ordinance C-63-08 and which are codified at ICC17.02A. The  
16 County's new wetland protection measures include provisions for determining wetland  
17 buffers based on wetland type, intensity of adjacent use, and function of the wetlands to be  
18 protected. Both WEAN and CARE argue that the buffers established under these  
19 provisions will not protect all wetland functions, particularly water quality and habitat. For  
20 this reason, among others, CARE and WEAN contend that this system violates RCW  
21 36.70A.060(2), the requirement to adopt regulations to protect all the functions and values  
22 of wetlands, and RCW 36.70A.172(1), the requirement to include best available science  
23 (BAS) in the formulation of these regulations.  
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26 CARE and WEAN are especially concerned that once a buffer, especially for low intensity  
27 uses, has been established, if increased development occurs on the property in the future,  
28 the buffer will not be able to be increased. The Washington State Departments of Ecology  
29 (Ecology) and Community, Trade and Economic Development (CTED) - agencies charged  
30 with providing cities and counties recommendations based on BAS for developing critical  
31 area regulations - filed an amicus brief that supports the County's buffer determination  
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1 system and maintain that it is consistent with their state agencies' recommendations. The  
2 Board finds that CARE and WEAN's concern is mitigated by the County's provisions for  
3 buffer averaging, permits are required for road building that require the functions and values  
4 of wetlands be protected, and the County's past history of relatively little clearing and  
5 grading in and near wetlands. Also, a comparison of the County's buffers to Ecology's  
6 recommended buffer widths, which are based on BAS, show in a very few instances that the  
7 County's buffers are smaller than the Ecology's recommendations, and the majority of  
8 buffers would be the same or larger. The buffer system's favorable comparison with  
9 Ecology's also diminish CARE and WEAN's arguments that Island County's buffer system  
10 does not protect terrestrial wildlife and water quality.  
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12  
13 Another major concern for CARE and WEAN are the Ordinance's reasonable use  
14 provisions. Here, the County's definition of existing use includes both legally established  
15 uses, which conform to the current zoning code and those which now do not. This definition  
16 causes the reasonable use provision not to include BAS considerations or protect the  
17 functions and values of wetlands. However, the Board finds the other portions of the  
18 County's reasonable use provisions are based on mitigation sequencing supported by BAS.  
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20  
21 The Board also finds CARE has not carried its burden of proof that the science that Island  
22 County prepared for analyzing what changes its protection measures needed, known as the  
23 *Phase 1 and 2 Reports* are not BAS. The Board finds these reports are consistent with the  
24 criteria for BAS included in WAC 365-195-905. CARE also failed to carry its burden that  
25 several of the County's wetland policies did not include BAS. The Board also finds that we  
26 do not have jurisdiction over CARE's challenge to the County's Wetland Guide because it  
27 was not adopted by the County as a development regulation.  
28

29  
30 WEAN also challenged the County's failure to adopt a landscape-based approach to  
31 protecting wetlands. Here, the Board concludes that due to lack of information available on  
32 wildlife corridors and the amount of effort it would take to institute such an approach by the  
deadline imposed by RCW 36.70A.130, the failure of not adopting a landscape approach is

1 not clearly erroneous. Additionally, the Board finds that WEAN has not carried its burden to  
2 prove that the County's wetland protection measures are noncompliant because they do not  
3 allow for adequate vegetated buffers, lack appropriate criteria for making buffer  
4 determinations based on spatial considerations, failed to include adequate provisions to  
5 protect wetlands and their buffers from the impacts of pesticides, herbicides, and pets, and  
6 do not include requirements for permanent fencing.  
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8 Further, WEAN's allegations that the County's definition of mature forested wetlands do not  
9 comport with BAS is not supported by the science in the record. Because the science in the  
10 record is conflicting, the County's system for determining buffers for mature forested  
11 wetlands is not clearly erroneous.  
12

13 The Board rejects WEAN's claims that the Ordinance's monitoring and adaptive  
14 management program does not comply with the GMA. The Board finds that the County's  
15 adaptive management system is consistent with Ecology's advice, provides for transparency  
16 for its regulatory decisions, and will assist the County in evaluating the effectiveness of its  
17 regulations.  
18

19 There are two other areas besides the County's reasonable use definition where the Board  
20 finds noncompliance. One is in regard to the County's Rural Stewardship Plans (RSP).  
21 The County's program allows property owners to reduce their intensity rating with the  
22 adoption of an approved RSP without requiring monitoring of these plans. The other is the  
23 County's arbitrary limit of 25 percent on buffer expansion. The Board finds these provisions  
24 are not based on BAS and potentially will not protect the functions and values over the long-  
25 term.  
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1 **II. PROCEDURAL HISTORY**

2 On March 17, 2008 the County adopted Ordinance C-63-08 (Ordinance)<sup>1</sup> that amended its  
3 wetland protection measures as a result of its review required by RCW 36.70A.130. WEAN  
4 filed a Petition for Review (PFR) on May 20, 2008 and that case was assigned Case No. 08-  
5 2-0025. CARE filed a PFR on May 21, 2008 and that case was assigned Case No. 08-2-  
6 026. On May 30, 2008, the Board consolidated these cases.<sup>2</sup> WEAN filed an amended PFR  
7 on June 6, 2008.  
8

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10 A prehearing conference was held June 20, 2008 and a Prehearing Order was issued on  
11 June 26, 2008.

12  
13 On August 8, 2008 the Board issued Order on Petitioners' Motions to Supplement the  
14 Record.

15  
16 On September 9, 2008, the Board issued an Order on Motion that for the most part denied  
17 the County's motion denying standing to WEAN and CARE on several issues. The County's  
18 motion to deny standing to CARE on its Issue 5 regarding standards for wetland guidance  
19 and to WEAN on violations of the County's wetland policies was granted.  
20

21 All parties filed the prehearing briefs in a timely manner. The State Agencies filed a Motion  
22 for Permission to File Brief of Amici Curiae with its brief on September 16, 2008. This order  
23 grants that permission.  
24

25 A Hearing on the Merits was held in Coupeville, Washington on October 1, 2008. Keith  
26 Dearborn represented the County. Keith Scully represented CARE, and Steve Erickson  
27 represented WEAN. All three Board Members attended. Holly Gadbow presided.  
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<sup>1</sup> Exhibit 1 attached to the County's brief titles the Ordinance C-63-08 PLG 09-08. The Ordinance attached to WEAN's Petition for Review show the number of the Ordinance is C-02-08.

<sup>2</sup> Notice of Consolidation and Notice of Hearing and Preliminary Schedule (May 30, 2008).

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### III. PRELIMINARY ISSUES

A. Amicus Brief

On September 17, 2008, the Washington Departments of Ecology (Ecology) and Community Trade and Economic Development (CTED) (collectively the State Agencies) submitted a Motion for Permission to File Brief of Amici Curiae. CTED states that it has adopted guidance and criteria that local governments must consider when adopting GMA comprehensive plans and development regulations. CTED maintains that it has an interest in assisting local governments in their efforts to comply with the GMA. Ecology states it is the state agency with expertise in wetland science, has published extensive guidance for use by local governments as best available science (BAS) and has an interest in the proper interpretation of the Growth Management Act (GMA) as it relates to wetlands. Both parties participated in the proceedings below by commenting on the Ordinance at issue.

Neither party objected to the State Agencies' Brief.

WAC 242-02-280 allows persons whose interests are substantially affected by a case before the Board to request, by motion, *amicus* status. This WAC provision also sets forth the needed components for such a motion including the applicant's interest, applicant's familiarity with the issues and scope of the argument presented, specific issues to which the brief will be directed, and the applicant's reason for believing additional argument is necessary. The applicant's brief can be filed no later than the deadline for the brief of the party it supports.<sup>3</sup>

**Conclusion:** The State Agencies' Brief of Amicus Curiae meets all the conditions of WAC 242-02-280 except it was filed with the Board one day after the brief was due.

Nevertheless, neither CARE nor WEAN filed an objection to the admission of this brief nor stated one when queried about it at the Hearing on the Merits. Therefore, based on the lack

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<sup>3</sup> Breif of Amicus Curiae at 3.

1 of objection from Petitioners and the fulfillment of all the other conditions in WAC 242-02-  
2 280, the State Agencies' Brief of Amicus Curiae is admitted.

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4 B. Standing

5 In its Order on Motion, the Board left its decision on the County's challenge to WEAN's  
6 standing on its Issue 10 to this decision. At the Hearing on the Merits, the County  
7 abandoned its challenge to WEAN's standing on Issue 10.

8 **Conclusion:** Based on the County's statement abandoning its challenge to WEAN's  
9 standing on its Issue 10, the Board finds WEAN has standing to argue Issue 10.  
10

11 C. Addition to the record

12 At the HOM, the County asked to add Island County/Model Program Buffers to the Record  
13 (all data from R-9789). No party objected.  
14

15 **Conclusion:** Because the data is compiled from information in the record and just  
16 presented in a different format and no party objected to the information being included in the  
17 record, this exhibit will be admitted and given the Record number R 9827.  
18  
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20 **IV. BURDEN OF PROOF**

21 For the purposes of board review of the comprehensive plans and development regulations  
22 adopted by local government, the GMA establishes three major precepts: a presumption of  
23 validity; a "clearly erroneous" standard of review; and a requirement of deference to the  
24 decisions of local government.  
25

26 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and  
27 amendments to them are presumed valid upon adoption:  
28

29 Except as provided in subsection (5) of this section, comprehensive plans and  
30 development regulations, and amendments thereto, adopted under this chapter  
31 are presumed valid upon adoption. RCW 36.70A.320(1).

32 The statute further provides that the standard of review is whether the challenged  
enactments are clearly erroneous:

1 The board shall find compliance unless it determines that the action by the state  
2 agency, county, or city is clearly erroneous in view of the entire record before the  
3 board and in light of the goals and requirements of this chapter. RCW  
4 36.70A.320(3)

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

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

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

RCW 36.70A.3201 (in part).

20 In challenging the sufficiency of compliance efforts as well as in an initial petition for review,  
21 the burden is on Petitioners to overcome the presumption of validity and demonstrate that  
22 any action taken by the County is clearly erroneous in light of the goals and requirements of  
23 Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2). Where not clearly  
24 erroneous, and thus within the framework of state goals and requirements, the planning  
25 choices of local government must be granted deference.  
26

## 27 **V. ISSUES TO BE DISCUSSED**

28 CARE raises seven issues and WEAN raises 13 issues challenging the Ordinance.

29 Both CARE and WEAN challenge the compliance of the Ordinance's Reasonable Use  
30 provisions and allege that the Ordinance fails to account for future increases in impervious  
31 surfaces, and to include BAS in establishing inadequate buffers for wetlands to protect  
32

1 water quality, wetland habitat, and Mature Forested Wetlands. Both Petitioners CARE and  
2 WEAN ask for a finding of invalidity.

3  
4 CARE also claims that the County's Wetland Guide that assists property owners in  
5 identifying wetland type is inadequate and several of the County's policies for protecting  
6 wetlands do not include BAS.

7  
8 Other WEAN challenges to the Ordinance's compliance include the failure to protect  
9 wetlands through a landscape-based approach; incorrect definition of Mature Forested  
10 Wetlands, inadequate or lack of measures for spatial considerations in determining wetland  
11 buffers, vegetation enhancement and permanent fencing; the limit on buffer enhancement;  
12 and insufficient requirements for Rural Stewardship Plans and the Monitoring and Adaptive  
13 Management Program.  
14

15 The Issue Statements will be set out in their entirety in the discussion below.  
16

## 17 **VI. DISCUSSION OF THE ISSUES**

18  
19 WEAN and CARE challenge various parts of the County's wetland protection regulations,  
20 Chapter 17.02A of the Island County Code, adopted by Ordinance C-63-08. Most of  
21 CARE's and WEAN's challenges involve claims that the Ordinance violates RCW  
22 36.70A.060 (2), the requirement that critical areas must be protected by development  
23 regulations, and RCW 36.70A.172(1), the requirement that policies and regulations  
24 designed to protect critical areas must include best available science (BAS).  
25

26 Several documents in the record have been relied on by the parties in this case to a greater  
27 or lesser extent as BAS. These documents will be referred to by their abbreviations in the  
28 discussion below:  
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- 30 • Washington State Department of Ecology and Washington Department of Fish  
31 and Wildlife, *Wetlands in Washington State: Volume 1: A Synthesis of the  
32 Science (Volume 1)*, April, 2005.

- 1 • Washington State Department of Ecology and Washington Department of Fish  
2 and Wildlife, *Wetlands in Washington State: Volume 2: Guidance for*  
3 *Protecting and Managing Wetlands (Volume 2)*, April, 2005.
- 4 • Paul R. Adamus, *Wetlands of Island County, Washington, Profile of*  
5 *Characteristics, Functions, and Health (Phase 2 Report)*, August, 2006.
- 6 • Paul R. Adamus, *Best Available Science for Island County, Washington:*  
7 *Review of Published Literature, A Report Prepared in Response to the Critical*  
8 *Areas Updating Requirements for Wetlands (Phase 2 Report)*, November  
9 2007.

10 All parties agree that *Volumes 1 and 2* are BAS. CARE claims that the *Phase 1 and 2*  
11 *Reports* are not BAS. That issue is discussed under IV.H *infra*.

12 Both the County and the State Agencies identify the CTED's *Critical Areas Assistance*  
13 *Handbook, Protecting Critical Areas within the Framework of the Growth Management Act*  
14 (November, 2003) as a reference for recommendations for critical areas protection based on  
15 BAS. The Board therefore takes official notice pursuant to WAC 242-02-660(2) of this  
16 publication.

17  
18 Also, strikeouts indicated in the Issue Statements reflect issues where either CARE or  
19 WEAN was denied standing.<sup>4</sup>

#### 20 21 A. Failure to Use a Landscape Approach

22 *Issue One (WEAN):* Does Ordinance C-02-08 fail to comply with RCW 36.70A.040(3),  
23 RCW 36.70A.060(2), and RCW 36.70A.172(1), ~~and fail to implement Comprehensive Plan~~  
24 ~~Wetland Overlay policy A~~ because it fails to include a landscape approach and thereby fails  
25 to include the best available science or to protect critical areas?

### 26 **Positions of the Parties**

#### 27 WEAN's Position

28 WEAN argues that the science is clear that Island County's reliance primarily on buffers and  
29 protection of individual wetlands will not prevent degradation of numerous wetland functions  
30 in the face of widespread changes in Island County's landscape, especially deforestation  
31  
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<sup>4</sup>-See Order on Motion to Dismiss.  
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1 and the addition of impervious surfaces.<sup>5</sup> WEAN points to the County's own study and the  
2 study's peer reviewers for support for its conclusions. <sup>6</sup> WEAN maintains the County has  
3 time if it acts now to prevent widespread degradation of habitat and water quality.<sup>7</sup>  
4

5 CARE, in its arguments in regard to Issue 6 discussed *infra* contends that BAS requires the  
6 County to analyze a broader landscape approach and consider adjacent areas in food webs  
7 associated with wetlands. We will address that argument here.<sup>8</sup>  
8

9 County's Position

10 Island County agrees that looking at the contextual geographic setting of a wetland is  
11 important. The County acknowledges Ecology's *Wetlands in Washington, Volume 1*<sup>9</sup>,  
12 identifies the need to plan on a larger geographic scale and *Volume 2* discusses landscape-  
13 based land use plans. However, the County maintains these publications offer no guidance  
14 on how to incorporate a landscape approach into development regulations. The County  
15 contends WEAN ignores the legal implications of taking such an approach. Further, the  
16 County says WEAN does not recognize the many ways the County's wetland protection  
17 program takes a landscape-based approach and points to various places in its code that  
18 does this.<sup>10</sup>  
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21 State Agencies' Position

22 The State Agencies agree with WEAN that the overall development in a watershed may  
23 negatively impact wetlands, but disagrees with WEAN that the County's wetland ordinance  
24 must immediately address these factors. The State Agencies point out that Ecology's  
25 guidance indicates that protection at a landscape scale is a broad endeavor that must be  
26 undertaken over time through a variety of regulatory and non-regulatory measures, of which  
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30 <sup>5</sup> WEAN's Hearing Brief at 7.

31 <sup>6</sup> Id. At 5 and 6.

32 <sup>7</sup> Id. At 6.

<sup>8</sup> CARE's Hearing on the Merits Brief at 29 and 30.

<sup>9</sup> No party disputes this document is BAS.

<sup>10</sup> Island County's Response Brief at 27 and 28.

1 a scientifically-based wetlands ordinance is only one key part.<sup>11</sup> The reasons for this, these  
2 agencies assert, are the costs, limited resources of local governments, and the fact that  
3 analytical approaches are still being tested.<sup>12</sup>  
4

5 Ecology and CTED state that they have worked to provide numerous documents including  
6 Ecology's *Volumes 1 and 2* and CTED's *Critical Areas Assistance Handbook*. CTED and  
7 Ecology maintain these and similar documents represent their agencies' efforts to identify  
8 BAS to assist counties and cities in meeting their obligations for protecting critical areas and  
9 including BAS in these protections and that these documents are consistent with CTED's  
10 BAS rules. Ecology and CTED conclude that counties and cities that adopt regulations that  
11 comport with this advice comply with GMA's requirements for protecting critical areas and  
12 include BAS.<sup>13</sup>  
13

14  
15 However, these State Agencies acknowledge that their guidance is not the only source of  
16 BAS and that WEAN identifies a number of scientific studies that indicate the ecological  
17 functioning of a water body is directly related to the level of urbanization in a watershed.  
18 Nevertheless, the State Agencies indicate that the County's wetland protection ordinance is  
19 just one part of the County's critical areas protections, and a more specific landscape scale  
20 analysis is needed to determine how landscape processes will affect wetland functions, to  
21 identify the causes and effects and the measures to address them.<sup>14</sup> The State Agencies  
22 assert that the science on which WEAN relies for the needed percentages of native  
23 vegetation and limitations on impervious surface is addressed at preventing degradation of  
24 streams rather than wetlands.<sup>15</sup>  
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27 WEAN's Reply  
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31 <sup>11</sup> Brief of Amici Curiae at 3 and 4.

32 <sup>12</sup> Id at 8.

<sup>13</sup> Id. at 6.

<sup>14</sup> Id. at 7.

<sup>15</sup> Id. at 7 and 8.

1 WEAN replies that GMA requires that protection include the best available science (WEAN's  
2 emphasis) not some science that will be available in the future. WEAN declares Ecology's  
3 guidance states that aquatic system degradation results when 65% of the watershed is  
4 deforested or developed with 10 percent impervious surface.<sup>16</sup> WEAN disputes the State  
5 Agencies' assertion that the County's protection measures contain some degree of  
6 landscape scale factors, because they do not address cumulative impacts and address only  
7 development of properties with wetlands or near wetlands.<sup>17</sup> To counter the State  
8 Agencies' claim that protection may be delayed because the County will address other  
9 measures in the future, including Fish and Wildlife Habitat critical area (FWHCA)  
10 regulations, WEAN argues the GMA does not allow this, unless the County stipulates that  
11 it will address landscape scale mechanisms during review of its FWHCA regulations.<sup>18</sup>  
12 WEAN claims that if the County is going to rely on non-regulatory programs such as Rural  
13 Stewardship Plans, it needs additional monitoring and adaptive management programs to  
14 ensure corrective measures are taken.<sup>19</sup>  
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16

### 17 **Board Discussion**

18 WEAN claims that Island County's failure to adopt a landscape-based approach to  
19 protecting wetlands violates RCW 36.70A.040(3), RCW 36.70A.060, and RCW  
20 36.70A.172(1).  
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23 All the parties agree that a landscape approach in the long run is important to protecting the  
24 functions and values of wetlands. Ecology's *Volume 2* states that the best available  
25 scientific information makes it clear that the most effective way to protect wetland functions  
26 and values is a comprehensive, landscape-based approach.<sup>20</sup> Even so, this guidance  
27 document acknowledges that local governments are not in a position to implement the  
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30 <sup>16</sup> WEAN's Reply to State Agencies and Island County at 4.

31 <sup>17</sup> Id. at 5.

32 <sup>18</sup> Id.

<sup>19</sup> Id. at 6.

<sup>20</sup> This publication according to Ecology represents the recommendations as to how a local government could include BAS in policies, plans and regulations to protect wetlands. See Vol. 2 at 1-2.

1 diversified, comprehensive approach that it describes and many jurisdictions will have  
2 difficulty meeting the GMA deadline for updates, even without incorporating a landscape  
3 perspective. Additionally, this guidance also recognizes transforming the approach of  
4 managing wetlands from a site specific basis to a view of the broader landscape will take a  
5 change in the practice of local governments. Ecology's publication projects this change will  
6 most likely occur incrementally as local governments collect and analyze landscape data  
7 and incorporate it into their various plans, policies, and regulatory and non-regulatory  
8 approaches. Based on these observations, Ecology recommends local governments  
9 should at a minimum adopt strong wetland regulations until they can incorporate landscape-  
10 based plans, policies, and non-regulatory elements.<sup>21</sup> This recommendation is confirmed  
11 in the State Agencies' Amicus brief.<sup>22</sup>

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14 Additionally, Ecology's guidance document points out methods for landscape analysis are  
15 currently lacking an analysis of wildlife habitat and corridors.<sup>23</sup> As mentioned *supra*, CTED  
16 and Ecology maintain this document represents the agencies' efforts to identify BAS to  
17 assist counties and cities in meeting their obligations for including BAS in critical areas'  
18 protection and these documents are consistent with CTED's BAS rules.

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20  
21 This Board has also recognized the following, in regard to protecting critical areas:

22 The goals of the Act, the practicality of the "science" and the fiscal impact,  
23 relating to the availability of information and to the ultimate decision, must be  
24 balanced by a local government in determining how to designate and how to  
25 protect critical areas. "Available" means not only that the evidence must be  
26 contained within the record, but also that the science must be practically and  
27 economically feasible.<sup>24</sup>

28 RCW 36.70A.130(1) and (4) required Island County to update its critical areas regulations  
29 by December 1, 2005. *Volume 1* notes that data is currently lacking an analysis of wildlife

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32 <sup>21</sup> R 9343B *Wetlands in Washington State, Volume 2, Protecting and Managing Wetlands* at 1-4.

<sup>22</sup> Brief of Amici Curiae at 3 and 4.

<sup>23</sup> *Id.*

<sup>24</sup> *Clark County Natural Resources Council v. Clark County*, WWGMHB Case No. 96-2-0017(Final Decision and Order, December 6, 1996).

1 habitat and corridors. Given the amount of data, information, and resources needed for  
2 counties and cities to develop a landscaped-based approach, the Board concludes that it is  
3 not practical for counties and cities to develop a landscaped based approach in time to meet  
4 the deadlines established by RCW 36.70A.130(1) and (4).

5  
6 **Conclusion:** The guidance offered in *Volume 2*, that was based on the BAS synthesized  
7 in *Volume 1*, and was considered by the County, recognizes that viable data was not yet  
8 available on wildlife habitat or wildlife corridors. Without the needed scientific data, it is  
9 impractical for the County to develop regulations based on a landscape approach. For this  
10 reason, the Board finds and concludes that the County's decision to use a site-based  
11 approach to protect wetlands rather than a landscape-based approach is not a clearly  
12 erroneous violation of RCW 36.70A.040(3), RCW 36.70A.060, and RCW 36.70A.170(1).  
13  
14

#### 15 B. Definition of Impervious Service

16 *Issue Two (WEAN):* Does 17.03.040 Definitions: Impervious Surface fail to comply with  
17 RCW 36.70A.060(2) and RCW 36.70A.172(1) because it fails to include the best available  
18 science or to protect critical areas by not including gravel roads and parking areas as  
19 impervious surfaces?

#### 20 **Positions of the Parties**

##### 21 WEAN's Position

22 WEAN argues that the definition the County uses to define impervious surface for the  
23 purpose of determining land use intensity, and thereby the required width of wetland  
24 buffers, does not include gravel roads or parking areas. WEAN points out that the County  
25 Code contains two definitions of impervious surface – one in the general zoning code, ICC  
26 17.03, and another in the stormwater drainage regulations, ICC 15.02. According to  
27 WEAN, the latter code provisions are more expansive, appropriately address all types of  
28 impervious surface, and should be utilized by the County because they are consistent with  
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1 the definition Ecology uses to define impervious surface, as well as other cities around the  
2 country, and constitutes BAS.<sup>25</sup>

3  
4 County's Position

5 The County responds that it adopted the definition referenced within its wetland regulations  
6 in 1998 and this was not modified by the challenged enactments. Therefore, according to  
7 the County, based on *Thurston County v. Western Washington Growth Management*  
8 *Hearings Board (Thurston County)*<sup>26</sup>, because there were no modifications to the GMA  
9 since 1998 which directly affect how the County defines impervious surfaces the Board does  
10 not have jurisdiction to consider WEAN's challenge.<sup>27</sup>

11  
12 The County argues that in managing stormwater, it is important to consider all surfaces that  
13 create stormwater runoff. In contrast, in determining land use intensity, the County asserts  
14 the purpose is to determine the potential risks to wetlands which are dependent on the  
15 location of a surface and not whether the surface is impervious. The County asserts BAS  
16 and the State Agencies support site specific determinations rather than general standards in  
17 this regard.<sup>28</sup>

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20 WEAN's Reply

21 WEAN replies that *Thurston County* does not apply to County's adoption of its wetland  
22 regulations. WEAN supports this contention by asserting that the County's wetland  
23 regulations were first adopted in 1984 and then readopted in 1992, while the GMA's  
24 requirements regarding BAS were adopted in 1995. WEAN argues that the County's  
25 reliance on impervious surface in determining buffers is an entirely new regulation.  
26 According to WEAN, just as the Board would have jurisdiction over any comprehensive plan  
27 changes caused by the use of new Office of Financial Management 20-year forecasts, so  
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31  
32 <sup>25</sup> WEAN's Hearing Brief at 8 and 9.

<sup>26</sup> *Thurston County v. WWGMHB*, 164 Wn.2d 329 (2008).

<sup>27</sup> County Response Brief, at 30.

<sup>28</sup> County Response Brief, at 30-31.

1 too would changes in BAS give the Board jurisdiction to consider claims of failures to  
2 include BAS in the adoption of amended critical areas regulations.<sup>29</sup>

3  
4 WEAN further argues that the County's treatment of gravel surfaces should be no different  
5 from other existing or proposed existing impervious surfaces. WEAN points out that the  
6 County's regulations for determining buffers calculate the amount of existing and proposed  
7 impervious surfaces and this is not a spatial relationship to wetlands.<sup>30</sup>

### 9 **Board Discussion**

10 As the Supreme Court recently articulated in *Thurston County*, when a jurisdiction is  
11 conducting a GMA required review and update pursuant to RCW 36.70A.130, a party may  
12 challenge a county's failure to revise a comprehensive plan only with respect to those  
13 provisions that are directly affected by new or recently amended GMA provisions.<sup>31</sup> The  
14 Court provided its rationale for this holding, stating that the mandatory RCW 36.70A.130  
15 update was not intended to create an "open season" for challenges previously decided or  
16 time-barred and that limiting the scope of challenges recognizes that the original  
17 comprehensive plan was legally deemed GMA compliant.<sup>32</sup> The Board further notes that  
18 given the language of RCW 36.70A.130(1)(a), the reasoning and rationale set forth by the  
19 Supreme Court in *Thurston County* applies equally to development regulations.<sup>33</sup>

22 ICC 17.03.040 was not amended by the challenged enactment and, since its adoption in  
23 1998, RCW 36.70A.172(1), has not been subject to an amendment which would require  
24 Island County to update its zoning code. Thus, although on initial review it would appear  
25 WEAN's challenge to the definition set forth in ICC 17.03.040 is untimely, WEAN is not  
26 challenging ICC 17.03.040 in isolation but the incorporation of this provision into the critical  
27  
28

29  
30 \_\_\_\_\_  
31 <sup>29</sup> WEAN's Reply at 7 and 8.

32 <sup>30</sup> WEAN's Reply at 8 and 9.

<sup>31</sup> *Thurston County*, 164 Wn.2d at 344.

<sup>32</sup> *Thurston County*, 164 Wn.2d at 344-45.

<sup>33</sup> RCW 36.70A.130(1)(a) references the need to update both comprehensive plans and development regulations.

1 areas ordinance (CAO) which is required to include BAS. The use of BAS would  
2 necessarily correlate to the most current science.

3  
4 Island County's CAO itself does not set forth a definition of Impervious Surface. Rather, in  
5 relationship to Land Use Intensity and Wetland Buffers, the County incorporates the  
6 definition provided for within its zoning code at ICC 17.03.040. Therefore, since the County  
7 has elected to rely on this provision in relationship to wetland protection, this definitional  
8 provision is part and parcel of the CAO and must be based on BAS.  
9

10 The County's CAO, at ICC 17.02A.030, provides: (Emphasis Added)

11  
12 **C. Land Use Intensity:** A determination by the Director for every  
13 Development Proposal regulated by this Chapter. *Intensity shall be*  
14 *based on the type, character, density and location of the proposed Use or*  
15 *Structure, Cleared Area and Impervious Surfaces (as defined in Chapter*  
16 *17.03 ICC) proposed by the Development Proposal and potential adverse*  
17 *impact that may be caused by the Development Proposal. Land Use*  
18 *Intensity is used to determine the size of a Wetland Buffer.*

19  
20 ICC 17.03.040 provides:

21  
22 **Impervious Surface:** Surfaces that do not absorb water. Examples of  
23 such surfaces include Buildings and concrete or asphalt parking areas,  
24 paved roads, sidewalks or driveways.

25  
26 The Board notes that the County's cited definition is not exclusive; rather, it sets forth  
27 examples of types of surfaces which are to be considered impervious. Thus, the County's  
28 definition is open to interpretation as to whether or not a gravel road, gravel driveway, or  
29 gravel parking area would fall under the definition of impervious surface. However, in  
30 regards to land use intensity calculations, the County does not consider gravel roads as  
31 impervious.<sup>34</sup>  
32

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<sup>34</sup> County Response Brief at 30. See *also*, WEAN Prehearing Brief, at 8.  
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1 WEAN points to the County's definition set forth in ICC 15.02.020(A), the Storm and Surface  
2 Water Utility Ordinance, which WEAN contends is more expansive and is not defective.<sup>35</sup>  
3 However, the County does not rely on ICC 15.02.020(A) to define impervious surfaces  
4 within its CAO, it relies on ICC 17.03.040 and as such, the Board's review is limited to  
5 whether WEAN has provided the Board with sufficient evidence to demonstrate that this  
6 definition is not supported by BAS. Thus, the question before the Board is whether WEAN  
7 has demonstrated that the BAS for wetlands supports a definition of impervious surface  
8 which includes gravel roads and parking areas.  
9

10  
11 WEAN references several jurisdictions from around the country which treat graveled driving  
12 and parking surfaces as impervious as well as Washington's own Department of Ecology.<sup>36</sup>  
13 The problem with all of these documents is that they relate to the management of  
14 stormwater and not the protection of a critical area.<sup>37</sup> The management of stormwater  
15 addresses both water quality and water quantity and although it may have science behind  
16 certain elements, other aspects of stormwater management are engineer driven.<sup>38</sup> In  
17 addition, simply citing to code provisions from out-of-state jurisdictions does not necessarily  
18 correlate to a finding that these provisions were adopted based on a standard of BAS.  
19  
20  
21  
22

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23 <sup>35</sup> WEAN Prehearing Brief, at 9. ICC 15.02.020(A) provides: (Emphasis added)

24 "Impervious Surface" shall mean any area that either prevents or retards water from entering into the  
25 soil mantle as it did under natural conditions before development, and/or any surface area that  
26 causes water to run off the surface in greater quantities or at an increased rate of flow than existed  
27 under natural conditions before development. *Common Impervious Surfaces include, but are not*  
28 *limited to, roofs, concrete or asphalt paving, walkways, patios, driveways, parking lots or storage*  
*areas, and oiled, macadam or other surfaces that similarly impede the natural entry of surface water*  
*into the soil.*

29 <sup>36</sup> WEAN Prehearing Brief, at 9 (Citing Exhibits R-10004 Ann Arbor, MI; R-10005 Hamilton County, OH; R-  
30 10006 New York State; R-10007 North Carolina; R-10008 Chapel Hill, NC; R-10009 DOE's Stormwater  
Manual).

31 <sup>37</sup> Ann Arbor's definition was established in order to support a rate system based on total impervious surface in  
32 order to fund maintenance and system updates. R-10004. *See also*, R-10005 Hamilton County's Stormwater  
Service Fee, R-10008 Chapel Hill Stormwater Management Fee Appeal Form.

<sup>38</sup> What WEAN needed to provide were citations to BAS concluding gravel roads and gravel parking areas  
should be deemed impervious surface in order to protect the functions and values of Island County's wetlands.  
This WEAN failed to do.

1 **Conclusion:** The Board finds and concludes that WEAN has failed to demonstrate that the  
2 County's CAO's definition for impervious surface as it relates to land use intensity for  
3 wetland protections violates RCW 36.70A.172, as alleged in Issue 2.

4  
5 D. Avoidance of Impacts

6 1. Reasonable Use

7 *CARE Issue Two:* Do Island County's reasonable use exceptions in ICC 17.02A, as  
8 amended by Ordinance No. C-02-08-PLG-011-07, create unlawful exemptions from critical  
9 areas regulation and thereby violate Island County Comprehensive Plan Policies Critical  
10 Areas 1, 3-4, 11, RCW 36.70A.020(9-10), 36.70A.040, 36.70A.060, 36.70A.070,  
11 36.70A.130, 36.70A.170, and 36.70A.172?

12 *WEAN Issue Three:* Does C-02-08 generally, including 17.02A.010 and 17.02A.050, fail to  
13 comply with RCW 36.70A.060(2) and RCW 36.70A.172(1), and fail to implement  
14 Comprehensive Plan Wetland Overlay policy A because it fails to protect critical areas and  
15 include the best available science by mandating development approval regardless of  
16 impacts to Critical Areas?

17 *WEAN's Issue Four:* Does C-02-08 generally, including 17.02A.010, 17.02A.050, and  
18 Comprehensive Plan Critical Areas policy #4, fail to comply with RCW 36.70A.060(2) and  
19 RCW 36.70A.172(1), and fail to implement Comprehensive Plan Wetland Overlay policy A  
20 because they fail to protect critical areas and include the best available science by creating  
21 unlawful exemptions from critical area regulations?

22 *WEAN's Issue Five:* Do C-02-08 generally, including 17.02A.010, 17.02A.050, and  
23 Comprehensive Plan Critical Areas policy #4, fail to comply with RCW 36.70A.060(2) and  
24 RCW 36.70A.172(1), and fail to implement Comprehensive Plan Wetland Overlay policy A  
25 because they fail to protect critical areas and include the best available science by fail to  
26 require avoidance of impacts to critical areas?

27 *WEAN's Issue Six:* Do 17.02A.030 Definitions: Reasonable Use and 17.02.050 fail to  
28 comply with RCW 36.70A.060(2) and RCW 36.70A.172(1) because they fail to include the  
29 best available science or to protect critical areas by defining reasonable use based on non-  
30 conforming uses in the same area?

31 The Board will discuss these issues together since they all relate to the County's regulation  
32 of "reasonable uses". The Board addresses Comprehensive Plan Policy #4 within the  
context of Issue 3 *infra*.

1 **Positions of the Parties**

2 CARE's Position

3 CARE states that "reasonable use" is a constitutionally-based prohibition on government  
4 taking of private property and prevents the government from removing the economically  
5 viable use of a parcel by means of regulation. CARE maintains that with its reasonable use  
6 provisions the County is allowing virtually all permitted uses in a zone to be considered  
7 "reasonable use" and this not only creates an overly broad regulation but blatantly violates  
8 the GMA's mandate to protect all critical areas.<sup>39</sup>  
9

10 WEAN's Position

11 Like CARE, WEAN contends Island County's overly broad interpretation of "reasonable use"  
12 guts the GMA's requirement to protect critical areas (CAs) by allowing any use permitted by  
13 the zoning code. WEAN claims that no development proposal will ever be denied based on  
14 impacts to CAs, including situations where approval is not necessary to prevent an  
15 uncompensated taking. According to WEAN, the County's is also required to approve a  
16 development proposal if mitigation is not "practical and reasonable." WEAN cites ICC  
17 17.02A.010B use of the word "shall," which it says demonstrates that regardless of impacts  
18 to wetlands, no permit may ever be denied when protection would make a parcel unusable,  
19 would deny "reasonable use", or would provide for planned public facilities and services.  
20  
21

22 WEAN asserts that by expanding the effective definition of what constitutes a "reasonable  
23 use" to all uses allowed under Chapter 17.03 ICC the County has defined reasonable use  
24 as any use allowed by the zoning code.<sup>40</sup>  
25  
26

27 WEAN further contends that another area where the County has not included BAS and  
28 protected CAs is demonstrated by the County's failure to require avoidance before allowing  
29 impacts. WEAN asserts that the County has renounced its authority to prevent impacts and  
30 relies on compensatory mitigation despite the poor track record of mitigation in preventing a  
31

32 \_\_\_\_\_  
<sup>39</sup> CARE Prehearing Brief, at 8-10.

<sup>40</sup> WEAN Prehearing Brief, at 9-11.

1 net loss of wetland functions and values. WEAN declares that the County doesn't even  
2 require full and successful replacement and uncompensated net loss.<sup>41</sup>

3  
4 WEAN also objects to including existing uses in the County's definition of "reasonable use,"  
5 arguing that existing non-conforming uses should not be used as a baseline to determine  
6 what constitutes a "reasonable use". WEAN reasons that the effect of using existing uses  
7 as a baseline will allow impacts in excess of that required to avoid constitutional strictures  
8 and will result in a net loss of wetlands.<sup>42</sup>  
9

10 County's Position

11 The County states that ICC 17.02A.010(B) simply provides for the application of the  
12 County's wetland regulations in a manner intended to ensure no lot is unusable in order to  
13 prevent a takings claim. The County explains that a "reasonable use" determination is  
14 made when the County's regulations deny a landowner use of a parcel and a review of the  
15 size, use requested, and neighboring uses is considered by the County to be "fair", "logical",  
16 "rational", and "appropriate". As for WEAN and CARE's arguments that the County's  
17 threshold for reasonable use is broader than what "takings" law may require, the County  
18 contends an objective reading of its regulations does not support their conclusion.  
19 According to the County not all allowed uses will be approved but rather uses will be revised  
20 subject to the standards of ICC17.02A.050 which include review of the proposal in a  
21 prioritized order based on avoidance, reduction, restoration, and compensation  
22 requirements.  
23  
24  
25

26 The County disagrees that avoidance is not required in reasonable use determinations  
27 according to ICC 17.02A.050(B). The County maintains that the County's mitigation  
28 requirements are consistent with the State's Model Program and, as adopted, were  
29  
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32

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<sup>41</sup> WEAN Prehearing Brief, at 11-14.

<sup>42</sup> WEAN Prehearing Brief, at 17.

1 supported by state agencies.<sup>43</sup> Further, the County disagrees with CARE's and WEAN's  
2 characterization of the County's reasonable use provision as an exemption.<sup>44</sup>

3  
4 In response to WEAN's contention that the definition of reasonable use will allow the County  
5 to consider nonconforming uses as justification for allowing a new use, the County argues  
6 that it does not use the term non-conforming use in its zoning code. The County explains  
7 the term it uses is "existing use" and that they are regulated under ICC17.03.230.

8 According to the County, the reference to "existing" or allowed uses in the context of  
9 reasonable uses is to ensure that the proposal will fit into the community in which it is  
10 located.<sup>45</sup>

### 11 12 WEAN and CARE's Reply

13  
14 CARE replies that although Island County requires a report and mitigation plan as part of  
15 the review process before a reasonable use exception is granted, the County's mitigation  
16 plans do not guarantee replacement of all functions and values of a lost wetland.<sup>46</sup>

17  
18 WEAN asserts that the County has not disputed that: (1) the ordinance potentially mandates  
19 no development proposal will be denied due to impacts to wetlands, (2) "reasonable use"  
20 has been defined so broadly that no development proposal contemplated under the zoning  
21 ordinance will be denied based on impacts to wetlands, and (3) in order to avoid facially a  
22 net loss to wetlands, there is an extreme reliance on mitigation.<sup>47</sup> WEAN contends that the  
23 problem with allowing an existing use to determine what constitutes "reasonable use" is that  
24 uses which are not permitted under current County regulations should not be used to  
25 determine "reasonable use".<sup>48</sup> According to WEAN, if non-conforming uses are defined as  
26 reasonable, then ordinary prohibitions as to CA impacts no longer apply.<sup>49</sup>

27  
28  
29  
30 <sup>43</sup> County Response Brief, at 20-21, 31-33.

31 <sup>44</sup> County Response Brief, at 21.

32 <sup>45</sup> County Response Brief at 34 and 35.

<sup>46</sup> CARE's Hearing on the Merits Reply Brief (CARE's Reply Brief) at 9 and 10.

<sup>47</sup> WEAN's Reply at 10 and 11.

<sup>48</sup> WEAN's Reply at 13.

<sup>49</sup> WEAN Reply, at 13.

1 **Board Discussion**

2  
3 With the above-noted issues, Petitioners essentially allege Island County has created  
4 “unlawful exemptions” to the County’s CAO. CARE’s allegations are focused on the  
5 County’s reasonable use provisions while WEAN’s broaden the argument by contending the  
6 Island County Code (ICC) mandates approval regardless of impacts to critical areas and  
7 fails to adhere to the County’s policies that the avoidance of impacts is the highest priority.  
8

9 CARE and WEAN both argue Island County has provided an overly broad definition of  
10 “reasonable use” by effectively permitting it to encompass any use permitted on a parcel of  
11 land by the zoning code regardless of impact. Petitioners contend this overly broad  
12 language goes beyond what is constitutionally required to protect the County from a takings  
13 claim. The Board recognizes that although they may actually permit impacts to a critical  
14 area, reasonable use provisions are an indispensable component of critical area regulations  
15 because they address the issue of regulatory takings claims. Regulatory takings have  
16 been an element of American jurisprudence since the 1920s<sup>50</sup> and are founded on  
17 constitutional principles, seeking to provide a remedy when a regulation takes *all*  
18 *reasonable use* of a parcel of land.<sup>51</sup> Given this grounding in constitutional law, the Board  
19 has no jurisdiction to determine Petitioners’ claims as to whether the County’s regulations  
20 exceed what is necessary to protect the County from a constitutionally-based takings claim  
21 as this is a question for the courts.<sup>52</sup> However, although reasonable use provisions are  
22 necessary to prevent a constitutional takings claim, that does not mean such provisions  
23 should not prevent the protection of all the functions and values of wetlands and do not  
24 need to be supported by BAS. The question of whether Island County’s development  
25  
26  
27

28  
29 <sup>50</sup> *Pennsylvania Coal Co. v. Mahon*, , 260 U.S. 393 (1922), is generally recognized as the first case addressing  
30 regulatory takings in relationship to land.

31 <sup>51</sup> *Presbytery of Seattle v. King County*, 114 Wn. 2d 320 (1990).

32 <sup>52</sup> See e.g., *Panesko v. Lewis County*, Case No. 00-2-0031c and *Hadaller v. Lewis County*, Case No. 08-2-0004c, Combined Compliance Order/FDO (July 2, 2008). See also decisions of our colleagues: *Dudek/Bagely v. Douglas County*, EWGMHB Case No. 07-1-0009, Order on Motions (Sept. 26, 2007)(Board does not have jurisdiction over constitutional issues); *Skills v. City of Auburn*, CPSGMHB Case No. 07-3-0008c, FDO (July 18, 2007) (Allegations based on constitutional issues are beyond the Board’s jurisdiction).

1 regulations protect all the functions and values of wetlands and are supported by BAS is a  
2 GMA-based question which the Board has jurisdiction to address.

3  
4 ICC 17.02A.030 provides the definition of “Reasonable Use” for Island County:

5 The logical or rationale use of a specific Parcel of land which a person can be  
6 expected to conduct or maintain fairly and appropriate under the specific  
7 circumstances, considering the size of the Lot, the type of Use or Structure  
8 proposed and similar Existing or allowed Uses and Structures in the general  
9 vicinity of the Lot.

10 This same provision also provides a definition for “Reasonable”:

11 As used herein, rational; logical; realistic; in accord with common sense; or not  
12 expecting more than possible or achievable.

13 Approval of a Reasonable Use is mandated when the applicant has satisfied three criteria:

14 (1) prepared a Reasonable Use Report, (2) the development proposal is a reasonable use  
15 of the lot *and* the alteration has been reduced as required by ICC 17.02A.040.A.5, and (3)  
16 the Development Proposal includes mitigation, if avoidance, reduction, or restoration are not  
17 possible.<sup>53</sup> A Reasonable Use Report has five required elements including a description of  
18 the function or condition of the critical area or buffer that would be altered, an analysis of the  
19 effect of the proposal on the critical area and/or buffer, actions that can be taken to modify  
20 the proposal to avoid or reduce impacts, if the actions cannot be reduced, a comparison of  
21 the proposal to other uses within the vicinity, and a mitigation plan if the alteration cannot be  
22 restored.<sup>54</sup> This is consistent with Ecology’s and CTED’s recommendations that are based  
23 on BAS.<sup>55</sup>

24  
25  
26 In Issue 6, WEAN argues that the County is determining the reasonableness of a use to be  
27 measured by the uses within the vicinity of the proposal. WEAN contends this would  
28 effectively permit both existing uses that currently conform with the zoning in the area and  
29 non-conforming uses to serve as the basis for approval. The County contends that its  
30

31  
32 <sup>53</sup> ICC 17.02A.050(B).

<sup>54</sup> ICC 17.02A.050(B)(1).

<sup>55</sup> R9343B *Volume 2* at 8-6, Appendix B at 13,14, Critical Areas Assistance Handbook at A-12.

1 zoning code does not use the term “non-conforming use” but rather the ICC utilizes the term  
2 “existing use.” Whether a use is termed existing or non-conforming is not of importance, as  
3 the end result is the same - the referenced use currently does not conform to the code  
4 provisions in effect at the time of the application.

5  
6 Under the Island County CAO, to be “existing”, a building, lot, or use must have been  
7 “legally established, created, or erected.”<sup>56</sup> Therefore, under the County’s regulations an  
8 existing use can be either a legally established use currently authorized by the zoning code  
9 or a legally-established use that does not currently conform to the zoning code due to  
10 amendments that have occurred since the use was established.

11  
12  
13 The County contends its reference to existing uses is intended to ensure the compatibility of  
14 the proposal with the surrounding community. But, consideration of established, existing  
15 uses that are not now consistent with the current zoning code is not an appropriate basis for  
16 a determination of “reasonable.” Permitting uses based upon uses that were established,  
17 albeit legally, prior to the adoption of ordinances that required the protection of critical areas  
18 cannot be considered a regulation that includes BAS. Instead such a regulation improperly  
19 employs existing uses as the benchmark of what is appropriate in the vicinity of critical  
20 areas and merely perpetuates the establishment of uses that are incompatible with BAS.  
21 For that reason, the County’s definition of “reasonable use”, in its references to similar  
22 existing uses, violates RCW 36.70A.060’s and RCW 36.70A.172’s mandate to “protect the  
23 functions and values of critical areas” and include BAS.  
24  
25

26 With Issues 3 and 5, WEAN contends that the County mandates approval of a reasonable  
27 use regardless of impacts, fails to require avoidance of impacts, and has expanded the  
28 meaning of reasonable to include all uses contemplated by the zoning code. This concept  
29 is built on by WEAN in Issue 4 where WEAN similarly contends the County is creating  
30 “unlawful exemptions” to the CAO by mandating approval and by CARE in Issue 2. As  
31  
32

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<sup>56</sup> ICC 17.02A.030. Similar language is contained in the County’s Zoning Code – ICC 17.03.040.

1 noted above, whether or not the County has acted beyond what is needed for constitutional  
2 protection against a regulatory taking claim is not before the Board. Instead it is the  
3 protection of critical areas that the GMA requires the Board to focus.

4  
5 The “no denial” language relied on by WEAN is contained within ICC 17.02A.010(B) and  
6 .050(B). The CAO’s Authority provision, at ICC 17.02A.010(B), provides: (Emphasis added)

7  
8       The New CAO is to be administered flexibly with attention to site-specific  
9 characteristics of Critical Areas. The New CAO *shall not make any parcel or*  
10 *lot unusable; or deny an Owner Reasonable Use; or prevent the provision of*  
11 *needed public transportation and utility projects.*

12  
13 ICC 17.02.050(B) provides: (In relevant part, Emphasis added)

14       Nothing in this Chapter is intended *to preclude Reasonable Use of property.*  
15 *Strict application of the Critical Area regulations contained in this Chapter shall*  
16 *not cause the denial of Uses allowed under Chapter 17.03 ICC ...*

17  
18 These policy and regulatory provisions address the reasonable use of property encumbered  
19 with critical areas. The first regulatory provision seeks flexible application so as to preclude  
20 the complete denial of use of property or the denial of a reasonable use. The second  
21 regulatory provision similarly provides for the reasonable use of property along with noting  
22 that strict application shall not result in the denial of an allowed use – undoubtedly because  
23 an allowed use would generally be seen as reasonable within its given zoning district. The  
24 Board does not read these provisions as a mandate for approval of any and all development  
25 proposals regardless of impact as WEAN asserts. The Board also does not read these  
26 provisions as authorizing “every possible use contemplated” by the zoning code as, in  
27 actuality, only those uses permitted within a given zoning district would be considered. In  
28 addition, the Board disagrees with WEAN’s contention that these provisions would  
29 encompass Conditional Uses since such uses are not allowed outright. Rather Conditional  
30  
31  
32

1 Uses are subject to discretionary review because of the potential for significant impacts to  
2 the area where they are located.<sup>57</sup>

3  
4 Thus, the Board reads the cited provisions, ICC 17.02A.010(B), and 17.02A.050(B), as  
5 requiring only the approval of *allowed, reasonable* uses subject to the critical areas priority  
6 goals of avoidance, reduction, restoration, and mitigation and the preparation of a  
7 Reasonable Use Report, all of which are intended to ensure that the function and values of  
8 a critical area are maintained.<sup>58</sup>

9  
10 **Conclusion:** The Board concludes that it has no jurisdiction to address CARE and WEAN's  
11 assertions that Island County's reasonable use provisions exceed the language necessary  
12 to protect the County against a regulatory takings claim as these assertions are of  
13 constitutional latitude. Therefore, as to arguments presented by CARE in Issue 2 and  
14 WEAN in Issues 3, 4, 5, and 6 which are grounded in constitutional protections, the Board  
15 has no jurisdiction.

16  
17  
18 The Board finds and concludes that the language of ICC 17.02A.030 which permits a  
19 determination of "reasonable use" to be based on an existing use within the general vicinity  
20 is not supported by BAS because the County's definition of "existing" potentially allows a  
21 legally established use that is not consistent with the current zoning code and had not been  
22 subject to critical areas regulations based on current BAS to determine a reasonable use.

23  
24 The Board finds and concludes that the language of ICC 17.02A.010 and 17.02A.050(B)  
25 does not mandate development approval for all proposals regardless of impacts nor does it  
26 distort the County's avoidance of impacts goal. The Board reads these provisions as  
27 permitting only allowed reasonable uses subject to the County's critical area review process  
28 which sets forth a priority scheme in which avoidance is dominant.

29  
30  
31 \_\_\_\_\_  
32 <sup>57</sup> ICC 17.03.040.

<sup>58</sup> Approval of a development proposal based on a reasonable use request is subject to review as a Type II decision with administrative approval by the Planning Director subject to an open record appeal to the County Hearing Examiner. ICC 16.19, Table A.

1 Therefore, the Board finds that WEAN, with Issue 6, has demonstrated that ICC 17.02A.030  
2 and 17.02A.050(B), by allowing for compatibility of uses within the vicinity of a proposal to  
3 determine whether a use is reasonable, is not supported by BAS. Without such support, the  
4 County's development regulations fail to comply with RCW 36.70A.060 and 36.70A.172.

5  
6 The Board further finds CARE, Issue 2, and WEAN, Issues 3, 4, and 5, failed to  
7 demonstrate that Island County is mandating the approval of every allowed use and that the  
8 County is failing to comply with its policy of avoidance of impacts as set forth in ICC  
9 17.02A.010 and 17.02A.050(B).  
10

11  
12 2. Use of "Should" v. "Shall"

13 *CARE Issue Three*: Does Island County's failure to mandate avoidance of impacts to critical  
14 areas in its General Land Use Policies Goals for Critical Areas Policies #1, 3-4, 11, as  
15 amended by Ordinance No. C-02-08-PLG-011-07, violate RCW 36.70A.020 (9-10),  
36.70A.070, 36.70A.130, and 36.70A.172?

16 **Positions of the Parties**

17 CARE argues that the replacement of the mandatory term "shall" with the more permissive  
18 "should" in several of its comprehensive plan policies, particularly Comprehensive Plan  
19 policies 1,3, 4, and 11 violates the GMA requirements to include BAS in its development  
20 regulations and to protect all the functions and values of wetlands. The Board will discuss  
21 CARE's arguments directed at individual policies below.  
22

23  
24 For all the policies challenged by CARE, the County relies on the argument that based on  
25 the Supreme Court's decision in *Citizens v. Mount Vernon (Mount Vernon)*<sup>59</sup> the  
26 comprehensive plan serves as a guide and the development regulations control  
27 development proposals. Therefore, the use of "should" or "shall" matters in development  
28 regulations, but not in comprehensive plans. The County maintains that CARE has made  
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30  
31  
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<sup>59</sup> *Citizens v. Mount Vernon*, 133 Wn.2d 861(1997).

1 no claim that the County's development regulations do not require avoidance of impacts to  
2 wetlands.<sup>60</sup>

3  
4 **Board Discussion**

5 While CARE's Issue Statement alleges that the County's Policies 1, 3, 4, and 11 for  
6 protecting wetlands violate various GMA sections, only RCW 36.70A.172(1) is cited in its  
7 brief. Therefore, the Board concludes that CARE has abandoned alleged violations of RCW  
8 36.70A.020 (9-10), 36.70A.070, and 36.70A.130.  
9

10 *Policy 1*

11 CARE alleges that the use of "should" versus "shall" makes Policy 1 noncompliant because  
12 the GMA mandates the use of BAS in policies.  
13

14 RCW 36.70A.172(1) states,

15 In designating and protecting critical areas under this chapter, counties and cities  
16 **shall include the best available science in developing policies and**  
17 **development regulations** to protect the functions and values of critical areas.  
18 (emphasis added).

19 Island County's Policy 1 states:

20 Development regulations to protect critical areas should be adopted after considering  
21 scientific information judged by the County to be the best available at the time of  
22 enactment.<sup>61</sup>

23 RCW 36.70A.172 requires the inclusion of BAS in policies and development regulations  
24 designed to protect critical areas as required by RCW 36.70A.060(2). The use of "should" in  
25 Policy 1 does not negate the RCW 36.70A.060(2) requirement that the County adopt  
26 development regulations to protect critical areas. Here the policy requires the consideration  
27 of BAS and therefore Policy One complies with RCW 36.70A.172(1).  
28

29 *Policy 3*

30 Policy 3 states,  
31  
32

<sup>60</sup> Island County's Response Brief at 21.

<sup>61</sup> County's Exhibit 1, Ordinance C-6308, Exhibit A.

1 To the fullest extent possible, any regulation adopted to protect critical areas  
2 should be based on and adapted to the local circumstances unique to Island  
3 County.<sup>62</sup>

4 CARE contends if local circumstances are different from other parts of the state, BAS will  
5 dictate measures “based and adapted” to local circumstances. However, CARE argues that  
6 deviating from BAS applicable to other parts of the state simply to identify something unique  
7 to Island County violates RCW 36.70A.172.<sup>63</sup>

8  
9 The Board does not read Policy 3 the same way CARE does. The policy assumes the  
10 protection of critical areas and does not state the County will depart from BAS just to adapt  
11 to local circumstances. In this policy, the use of “should” gives the County the flexibility to  
12 employ measures based on BAS when the only BAS available is BAS that has not been  
13 adapted to local circumstances. On its face, the Board does not find that Policy 3 violates  
14 RCW 36.70A.172(1).  
15

16  
17 *Policy 4*

18 Policy 4 states,

19 When reasonable and practical, except when critical areas deny any  
20 reasonable use of property, impacts from new uses or activities and critical  
21 areas buffers should be avoided.<sup>64</sup>

22 CARE also alleges that Policy 4 is too permissive in that in addition to stating that impacts to  
23 wetlands “should” be avoided, it includes “when reasonable and practical”. This violates  
24 RCW 36.70A.060, CARE claims, because impacts to all wetlands’ functions and values  
25 must be avoided, not only when it’s convenient.<sup>65</sup>  
26

27  
28 In the discussion of the County’s “reasonable use provisions” *supra*, the Board addresses  
29 whether the words “reasonable and practical” need standards to determine whether a  
30

31 \_\_\_\_\_  
32 <sup>62</sup> County’s Exhibit 1, Ordinance C-63-08, Exhibit One.

<sup>63</sup> CARE’s Hearing on the Merits Brief at 11.

<sup>64</sup> County’s Exhibit 1, Ordinance C-63-08, Exhibit One.

<sup>65</sup> CARE’s Hearing on the Merits Brief at 12.

1 “reasonable use” complies with RCW 36.70A.060. However, the appropriate place to  
2 incorporate standards that apply to reasonable use is in the development regulations. The  
3 use of the words “reasonable and practical” in Policy 4 does not fail to comply with GMA  
4 requirements. While BAS in the record recognizes that impacts to wetlands cannot always  
5 be avoided in providing for “reasonable use”, it does recommend that avoidance is the first  
6 option that counties and cities should consider when determining whether to grant a permit  
7 necessitated by “reasonable use.”<sup>66</sup> ICC 17.02A.040(5) institutes this concept by requiring  
8 that “alteration of a critical area or buffer shall be avoided, if practical and reasonable.”<sup>67</sup>  
9 The Board does not find Policy 4 inconsistent with the concept of mitigation sequencing by  
10 first seeking avoidance, but recognizes that other options may have to be employed. As  
11 discussed *supra*, this policy is based on BAS. For this reason, the Board finds that CARE  
12 has not carried its burden of proof that Policy 4 does not comply with RCW 36.70A.172.  
13  
14

15 *Policy 11*

16 Policy 11 says,

17  
18       Development proposals that affect wetlands should incorporate measures and  
19       practices that reduce the quantity and improve the quality of stormwater runoff by  
20       controlling pollutants at their sources and retain natural vegetation, soils, and  
21       drainage patterns.<sup>68</sup>

22 CARE maintains that this Policy merely suggests consideration of measures that should in  
23 fact be mandatory so as to prevent pollution, destruction of vegetation, soils, and drainage  
24 patterns that affect the functions and values of wetlands. CARE suggests that this kind of  
25 language may allow a property owner to argue that these protections do not apply to their  
26 land.<sup>69</sup> As we discussed *supra*, in order for the County to avoid a taking, it may have to  
27 allow temporary or permanent impacts to a wetland if it follows BAS recommendations for  
28 mitigation sequencing. The Board rejects CARE’s argument that avoidance of impacts to  
29 wetlands is mandatory in all situations. The Board does not doubt that these measures are  
30

31  
32 <sup>66</sup> *Wetlands in Washington, Volume 1*, at 7. Also see WAC 197.11.768.

<sup>67</sup> ICC 17.02.040 A.(5).

<sup>68</sup> County’s Exhibit 1, Ordinance C-63-08, Exhibit One.

<sup>69</sup> CARE’s Hearing on the Merits Brief at 12 and 13.

1 important in protecting the functions and values of wetlands. However, the GMA  
2 requirements under which the Board must consider CARE's challenge is whether this policy  
3 is supported by BAS or fails to protect all the functions and values of wetlands. In criticizing  
4 Policy 11, CARE does not point to the science on which this policy should be based or  
5 whether, in all situations, failure to employ these measures fails to protect all wetland  
6 functions and values. Therefore, the Board finds that CARE has not carried its burden of  
7 proof that Policy 11 is a clearly erroneous violation of RCW 36.70A.172.  
8

9  
10 **Conclusion:** CARE has not carried its burden of proof that Policies 1,3,4, and 11 do not  
11 comply with RCW 36.70A.172.  
12

#### 13 E. Failure to Protect All Wetland Functions

14 *WEAN Issue Seven:* Do C-02-08 generally and 17.02A.030 Definitions: Wetland Functions,  
15 17.02A.090, and Comprehensive Plan Wetland Overlay policies A and B, fail to comply with  
16 RCW 36.70A.060(2), RCW 36.70A.172(1), and RCW 36.70A.175, and fail to implement  
17 ~~Comprehensive Plan Wetland Overlay policy A~~ because they fail to protect critical areas and  
18 include the best available science by failing to identify and protect all functions and values of  
19 critical areas?

20 *CARE Issue Four.* Does Island County's failure to identify and protect all functions and  
21 values of wetlands by limiting the protected functions to water quality protection and habitat  
22 for wetland dependent species in ICC 17.02A, as amended by Ordinance No. C-02-08-PLG-  
23 011-7 and Exhibit H to Ordinance No. C-02-08-PLG-011-07, fail to protect all functions and  
24 values of critical areas and thus violate Island County Comprehensive Plan Policies Critical  
25 Areas 1, 3-4, 11, WAC 365-190-080, RCW 36.70A.020(9-10), 36.70A.040, 36.70A.060,  
26 36.70A.070, 36.70A.130, 36.70A.170, 36.70A.172, and 36.70A.175?

#### 27 **Positions of the Parties**

28 WEAN contends that the County's definition of wetland functions has been changed from  
29 the previous ordinance and is not a definition but a statement that limits the functions that  
30 the ordinance was designed to protect. Both CARE and WEAN say that Dr. Adamus, the  
31 County's science consultant, stated that failing to protect the non-wetland dependent wildlife  
32 function of wetland buffers... " is a policy decision, not a science decision" and contrasts

1 with an Appeals Court decision<sup>70</sup> that disallowed Island County's attempt to protect only  
2 water quality functions of streams, and held that all functions and values needed to be  
3 protected. Additionally, both these Petitioners say that the definition is not consistent with  
4 Ecology's definition which is BAS.<sup>71</sup> CARE further asserts Ecology's guidance points out,  
5 and Dr. Adamus acknowledges, that supplying water and habitat to terrestrial species is a  
6 wetland function.<sup>72</sup>  
7

8 WEAN alleges that if, despite this definition, the Ordinance actually protected all the  
9 functions and values, compliance would be achieved, but it does not because the system  
10 used to establish buffer widths may be solely designed to protect water quality. WEAN uses  
11 as an example of the Ordinance's lack of protection for all wetland functions, in that the  
12 buffers used to protect native plant wetlands that can be as narrow as 20 to 25 feet. WEAN  
13 contrasts these to the Ordinance findings which state that a study suggested a buffer of 50  
14 to 100 feet might be sufficient to limit the spread of non-native plants.<sup>73</sup>  
15  
16

### 17 County's Position

18 The County replies WEAN ignores its Field Data Comparison that shows field data for over  
19 100 wetlands. The County explains the selected wetlands establish a statistically  
20 representative sample and that over 50 percent of the sample's non-estuarine wetlands  
21 under the new ordinance are native plant wetlands. According to the County, five of these  
22 wetlands receive a water quality buffer because the habitat score falls below 22. All of the  
23 wetlands receive a water quality buffer because the habitat score falls below 22. All of the  
24 rest would receive habitat buffers that range from 75 to 300 feet. The County says this  
25 approach is supported by state agencies.<sup>74</sup>  
26

### 27 State Agencies' Position

28  
29  
30

31 <sup>70</sup> Whidbey Environmental Network v. Island County, 585 118 Wn.App.567.

32 <sup>71</sup> WEAN's Hearing Brief at 19 and 20; CARE's Hearing on the Merits Brief at 14 and 15.

<sup>72</sup> CARE's Hearing on the Merits Brief at 14 and 15.

<sup>73</sup> WEAN's Hearing on the Merits at 20.

<sup>74</sup> Island County's Response Brief at 35.

1 Ecology and CTED declare that the Ordinance is consistent with Ecology's guidance that a  
2 wetland protection can be determined by type of wetland, intensity of adjacent land use, and  
3 the functions the wetland provides. These state agencies assert that because a specific  
4 function is not mentioned in a definition does not mean that the Ordinance fails to protect  
5 habitats for all species.<sup>75</sup>  
6

7 Ecology and CTED agree with WEAN and CARE that all wetland functions must be  
8 protected, including habitat for non-wetland dependent species, but disagree that the  
9 challenged Ordinance does not do this. By requiring a buffer adjacent to wetland to protect  
10 the wetland's suitability for wetland dependent species, in most cases, buffers necessary for  
11 wetland dependent species are in the same range as those needed for non-wetland  
12 dependent species. The State Agencies state to the extent the non-wetland species  
13 habitat needs further protection then this protection is more appropriately provided by the  
14 fish and wildlife conservation ordinance.<sup>76</sup>  
15  
16

17 WEAN and CARE's Reply

18 CARE replies that the County's failure to provide habitat for terrestrial species on its list of  
19 specifically-protected functions means that a wetland which provides vital drinking water for  
20 terrestrial species, such as deer, but does not offer other habitat value, will be scored for  
21 water quality and will have a much smaller buffer to protect only that function. CARE  
22 argues that the Ordinance's scoring system ignores the needs of terrestrial wildlife. CARE  
23 gives an example of the Ordinance's deficiency by demonstrating how a small isolated pond  
24 would receive a low score for habitat and be scored only for water quality, but this smaller  
25 buffer would not protect the pond as drinking water for terrestrial animals.<sup>77</sup> To counter the  
26 state agencies assertion that the County's fish and wildlife protection ordinance would  
27 provide buffer protection for terrestrial animals, CARE points out that the County's fish and  
28  
29  
30  
31

32 <sup>75</sup> Brief of Amici Curiae at 8 and 9.

<sup>76</sup> Id. at 9 and 10.

<sup>77</sup> CARE's Reply Brief at 14 and 15.

1 wildlife regulations omit virtually every non-stream wetland unless a citizen has gone  
2 through the time-consuming process to establish it as a habitat of local importance.<sup>78</sup>

3  
4 WEAN replies that the state agencies do not deny that the Ordinance's definition of wetland  
5 functions does not comply facially with BAS.<sup>79</sup>

### 6 7 **Board Discussion**

8 CARE alleges that the County's failure to protect all the functions and values of wetlands  
9 violates Island County Comprehensive Plan Policies Critical Areas 1, 3-4, 11, WAC 365-  
10 190-080, RCW 36.70A.020(9-10), 36.70A.040, 36.70A.060, 36.70A.070, 36.70A.130,  
11 36.70A.170, 36.70A.172, and 36.70A.175. However, CARE's brief only discusses violations  
12 of RCW 36.70A.060(2); therefore, the Board finds that CARE has abandoned challenges  
13 that involve other sections of the GMA except for RCW 36.70A.060(2).  
14

15 WEAN points out that the definition of wetland functions leaves out habitat for terrestrial  
16 species, a function provided by wetlands, and therefore limits the functions that the  
17 Ordinance is designed to protect. WEAN concedes and the Stage Agencies agree that if  
18 the Ordinance does in fact protect this habitat function, it would be compliant. However,  
19 both CARE and WEAN say that it does not.  
20

21  
22 As stated *supra*, the State Agencies which developed sources of BAS and  
23 recommendations based on that BAS assert that buffers provided to protect wetland  
24 species also protect most terrestrial species.<sup>80</sup> Additionally, Ecology, in addressing buffer  
25 widths in a protection system similar to the County's, recommends that in determining the  
26 appropriate buffer for a wetland, the function of the wetland that produces the highest score  
27 should determine the buffer.<sup>81</sup> For instance, if a wetland scores higher for habitat than for  
28 water quality, then the buffer should be designed for habitat. The Ordinance follows this  
29  
30

31  
32 <sup>78</sup> *Id.* at 16.

<sup>79</sup> WEAN's Reply at 13.

<sup>80</sup> See *Exhibit 9343B*, Volume 2 at Appendix 8-A, p. 2.

<sup>81</sup> *Exhibit 9343 B*, Volume 2 at Appendix 8-C, p. 6.

1 recommendation. See ICC 17.02A.090. F. What concerns CARE most is that wetlands  
2 receiving less than 40 points for all habitat functions will be given a buffer as small as 20  
3 and 25 feet in the County's Category D and Category E, the County's less important and  
4 sensitive wetlands near low intensity use. CARE is concerned that these sized buffers are  
5 not enough to protect these wetlands as drinking water sources for terrestrial animals like  
6 deer. However, these buffer sizes are in line with Ecology's recommendation of 25 feet for  
7 Category IV wetlands, Ecology's recommended buffer size for less sensitive or important  
8 wetlands with low habitat scores.<sup>82</sup> Additionally, the County's comparison of application of  
9 its wetland protection system to statistically selected wetlands with Ecology's  
10 recommendations show that only in relatively few instances were buffers imposed under the  
11 County's system less than Ecology's recommended buffer widths for Category D and E  
12 wetlands, and most are more, in line with buffers to protect habitat.<sup>83</sup>  
13  
14

15 **Conclusion:** Ecology's recommendations for buffers that protect habitat for wetland  
16 species also in most cases protect non-wetland species. The County's buffer determination  
17 includes habitat considerations. The County's comparison of application of its wetland  
18 protection system to statistically selected wetlands compares favorably with Ecology's  
19 recommendations. For these reasons, the Board finds that although the county's definition  
20 of wetland functions does not include habitat for terrestrial species, Petitioners have not  
21 carried their burden of proof that the County's wetland buffers do not protect non-wetland  
22 terrestrial species and do not comply with RCW 36.70A.060(2) and RCW 36.70A.172(1).  
23  
24

#### 25 F. Failure to Prevent Increase in Intensity after Buffer Determination

26 *WEAN's Issue Eight:* Does C-02-08 generally, including 17.02A.080 and 17.02A.090, fail to  
27 comply with RCW 36.70A.060(2) and RCW 36.70A.172(1), and fail to implement  
28 ~~Comprehensive Plan Wetland Overlay policy A~~ because it fails to protect critical areas and  
29 include the best available science by failing to prevent a subsequent increase in intensity of  
30 land use after a buffer is established based on a lower intensity of land use?  
31  
32

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<sup>82</sup> Id. and ICC 17.02A.090 F(5).

<sup>83</sup> R-9827.

1 CARE's Issue One: Does Island County's failure in ICC 17.02A, as amended by Ordinance  
2 No. C-02-08-PLG-011-07, and Exhibit H to Ordinance No.C-02-08-PLG-011-07, to ensure  
3 that all functions and values of wetlands are protected by failing to prevent a subsequent  
4 increase in intensity of use after a buffer is established for a lower intensity of use violate  
5 Island County Comprehensive Plan Policies Critical Areas 1, 3-4, 11, WAC 365-190-080,  
6 RCW 36.70A.020(9-10), 36.70A.040, 36.70A.060, 36.70A.070, 36.70A.130, 36.70A.170,  
7 and 36.70A.172?

## 8 **Positions of the Parties**

### 9 WEAN and CARE's Position

10 WEAN and CARE contend that the Ordinance, particularly Sections 17.02A.080 and  
11 17.02A.090, does not include a mechanism to assure that future intensification will not be  
12 permitted in those situations where the buffer has already been based on earlier land use  
13 intensity and the buffer can no longer be increased due to permanent alteration. WEAN  
14 also alleges that the County's wetland protection system has the following deficiencies: (1)  
15 the notice on the title provides no notice of future intensification and is not a perpetual  
16 easement; (2) buffer enlargement with future intensification is only required if the planning  
17 director determines it is "reasonable and practical" and the triggering mechanism for  
18 enlargement is inadequate buffer vegetation; (3) the Ordinance's provisions do not take into  
19 consideration roads, structures, and long lasting effects of clearing that could make a buffer  
20 increase impractical or politically impossible; (4) some changes in impervious surface do not  
21 require review by the County such as clearing and grading permits; and (5) the County's  
22 practice of no denial of proposals mandates approval for any new land use intensification.<sup>84</sup>  
23  
24  
25

### 26 County's Position

27 The County responds that Ecology's guidance suggests three alternative ways to establish  
28 wetland buffers; two of these rely on land use intensity, but are silent on details involving  
29 land use intensity determinations. The County declares that State Agencies reviewed the  
30 County's land use intensity system and made suggestions on how to improve it, which the  
31  
32

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<sup>84</sup> WEAN's Hearing Brief at 21 – 23.

1 County included in its system.<sup>85</sup> The County states it makes its land use intensity  
2 determinations on a case by case basis, every applicant is made aware that changes may  
3 not be possible, and notice of approval conditions are recorded. The County points out  
4 buffers can be established for new uses irrespective of the location of the original single-  
5 family residence. The County asserts if a required buffer cannot be established, the County  
6 will not be able to make the change<sup>86</sup> Additionally, the County stresses the Ordinance  
7 requires a review of land use intensity determinations, allowing for continuing oversight.<sup>87</sup>  
8

### 9 State Agencies' Position

10 The State Agencies support the County's approach to wetland protection citing similar  
11 reasons why changes in intensity do not mean that buffers cannot be correspondingly  
12 enhanced. Further, State Agencies assert that WEAN's contentions are based on  
13 speculation, and although it is possible to postulate future scenarios in which the County  
14 could violate the GMA, it does not show that the County's Ordinance is clearly erroneous.<sup>88</sup>  
15  
16

### 17 WEAN and CARE's Reply

18 In reply to the State Agencies contention that the scenarios presented by CARE that would  
19 prevent a larger buffer are speculative, CARE asserts any challenge to a new regulation  
20 must be speculative, and the Ordinance must stand up to reasonable factual hypothetical  
21 situations.<sup>89</sup> WEAN, in a similar vein, says its argument is the County's Ordinance fails to  
22 address the readily predictable future intensification when existing development does not  
23 make buffer enlargement or enhancement possible.<sup>90</sup>  
24  
25

26 CARE says that, contrary to the County's statement, the County will not deny a permit if a  
27 buffer for a new use cannot be created. WEAN says the County has no mechanism to deny  
28 a permit for a new use that will change the intensity of the land.  
29

30 <sup>85</sup> Island County's Response Brief at 18 and 19.

31 <sup>86</sup> Id. at 19.

32 <sup>87</sup> Id. at 19 and 20.

<sup>88</sup> Brief of Amici Curiae at 10 and 11.

<sup>89</sup> CARE's Reply Brief at 4.

<sup>90</sup> WEAN's Reply Brief at 14.

1 WEAN rebuts the State Agencies' statement that future activities require a permit, noting  
2 that substantial clearing and grading and logging with non-conversion forest permits,  
3 including associated road building, are exempt. Therefore, the lack of regulation of activities  
4 that change the land use intensity makes the Ordinance noncompliant.<sup>91</sup> WEAN finds the  
5 County's reliance on its notice requirement objectionable for the following reasons: 1) the  
6 language describing the conditions are not reviewed by the County prior to recording; (2)  
7 the "activities" on which the land use intensity determination are based are not described;  
8 and (3) the notice does not explicitly state that future approval is required for additional  
9 clearing and grading.<sup>92</sup> WEAN also objects that the monitoring system is deficient because  
10 it does not include intensification that is exempt or incremental.<sup>93</sup>  
11  
12

### 13 **Board Discussion**

14 WEAN and CARE contend that the Ordinance does not include a mechanism to assure that  
15 future intensification will not be permitted in those situations where the buffer has already  
16 been based on earlier land use intensity and the buffer can no longer be increased due to  
17 permanent alteration. CARE's Issue Statement One alleges that these provisions violate  
18 Island County Comprehensive Plan Policies Critical Areas 1, 3-4, 11, WAC 365-190-080,  
19 RCW 36.70A.020(9-10), 36.70A.040, 36.70A.060, 36.70A.070, 36.70A.130, 36.70A.170,  
20 and 36.70A.172, but only claim violations of RCW 36.70A.060(2) in its brief. Therefore, the  
21 Board considers CARE's challenges that ICC 17.02.090 D violates Island County  
22 Comprehensive Plan Policies Critical Areas 1, 3-4, 11, WAC 365-190-080, RCW  
23 36.70A.020(9-10), 36.70A.040, 36.70A.070, 36.70A.130, 36.70A.170, and 36.70A.172  
24 abandoned.  
25  
26

27 Both CARE and WEAN present hypothetical situations where they contend the County's  
28 provisions for determining buffers based in part on land use intensity will fail to protect  
29 wetlands and therefore violate RCW 36.70A.060(2). WEAN and CARE both suggest that a  
30  
31

32 <sup>91</sup> WEAN's Reply at 14-16.

<sup>92</sup> Id. at 16.

<sup>93</sup> Id.

1 low intensity approved use can locate roads and structures up to the edge of a narrow  
2 buffer. Later, when a more intense use is proposed, the permanent structures or  
3 improvements will make it impossible to provide a larger buffer.<sup>94</sup> However, the State  
4 Agencies indicate the Ordinance provides remedies for this scenario including (1) changes  
5 in intensity would require a new buffer calculation, and (2) if a buffer for a new use cannot  
6 provide a uniformly wider buffer because of existing use, buffers adjacent to the existing  
7 structures on the same property may be increased resulting in the same area for overall  
8 buffer, which they characterize as a common approach. The Board's review of the  
9 Ordinance confirm that ICC 17.02.090 D provides for buffer determination for each new  
10 development proposal based on the intensity on a lot and that ICC17.02A.040 A.1, 5, 6, and  
11 ICC 17.02A.090 G. 2 together provide for increasing buffers adjacent to and existing  
12 structures to achieve an appropriate overall buffer.  
13  
14

15 Petitioners also express a concern that intensity on a lot can be increased after an  
16 appropriate buffer has been established by activities such as forest practices permits over  
17 which the County has no authority and a certain amount of clearing and grading that the  
18 County allows without a permit. The County's *Phase 2 Report* raised this concern and the  
19 Board acknowledges that this is problematic under the County's wetland protection system.  
20 Several factors mitigate this concern. One is the County's comparison of buffers that would  
21 be established under its approach for certain wetland categories with various intensities  
22 compared favorably to Ecology's buffers. This comparison showed that although 10 percent  
23 of the County's selected wetlands had smaller buffers than Ecology's recommended buffers,  
24 36 percent had larger buffers, with the rest being the same.<sup>95</sup>  
25  
26

27 Another factor is the County's adopted monitoring and adaptive management system (ICC  
28 17.02.080). While the monitoring and adaptive management program will not require  
29 appropriate mitigation actions as a result of these exempt permitted activities, the  
30  
31  
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<sup>94</sup> WEAN's Hearing Brief at 21; CARE's Hearing on the Merits Brief at 6-8.

<sup>95</sup> County's Response Brief at 17 and 18 and R 9827.

1 requirement that the County annually will review its land intensity determinations and  
2 describe buffer alterations, the actions taken, and the reasons for the alteration and will  
3 publish them will assist the County and the public in determining whether its wetland  
4 protection program needs adjustment.<sup>96</sup> Finally, the County's *Phase I Report* shows that  
5 relatively little clearing, filling, and grading in or near the County's wetlands is occurring and  
6 that these activities are declining based on the County's visits of 103 wetlands and an  
7 analysis of these wetlands through maps, Geographic Information System (GIS) data, aerial  
8 photographs, and permit files.<sup>97</sup>

10  
11 As for WEAN's contention that road building is exempt, our review of the Ordinance shows  
12 that road building requires a permit and the Ordinance sets out conditions requiring that  
13 mitigation sequencing be applied to an application to build a road and the application must  
14 show that any reduction in the wetland buffer will not adversely affect wetland functions and  
15 values as documented in a wetland report.<sup>98</sup> Also, we can find nothing in the Ordinance that  
16 exempts this kind of impervious surface from not being counted as impervious surface when  
17 a new development proposal on the property is proposed.

19  
20 The State Agencies recognize that although it is possible to present scenarios where the  
21 County's approach might fail to protect wetlands, it does not prove that this approach is  
22 clearly erroneous. No party points to BAS in the record that requires this.

23  
24 WEAN also objects that the County's required notice on permits fails to inform future  
25 property owners that further intensification might not be possible and the County has no way  
26 to deny further intensification. CTED's *Critical Areas Assistance Handbook's* model  
27 ordinance provisions, based on BAS, suggests notices on titles such as the kind required by  
28 ICC 17.02A.040 B.6. The Board notes that ICC17.02A.040 B.6 requires a notice be  
29 attached to the property's title for development near a critical area that identifies the type of  
30

31  
32 \_\_\_\_\_  
<sup>96</sup>-ICC 17.02A.080 G. 7 and 10.

<sup>97</sup>R9565 *Phase 2 Report* at 54 and 92. County's Exhibit E, R9566, Technical Appendix F.

<sup>98</sup> ICC 17.02A.090 G.1.

1 critical area associated with the permitted development and any restrictions imposed by the  
2 County. While the County does not require the language in the notice that the conditions on  
3 the development may limit future actions, the County requires each property owner to which  
4 a development permit is granted on land containing a critical area to file an affidavit with the  
5 County that contains the information for the notice. This affidavit also includes language that  
6 the land use intensity rating could restrict current and future land use activities on the  
7 property. This affidavit is filed with the auditor with a copy to the Planning Department for  
8 inclusion in the permit file.<sup>99</sup> These provisions are sufficiently consistent with CTED's  
9 advice; therefore, the Board finds WEAN has not carried its burden of proof that the  
10 County's notice provisions on permits in regard to presence of wetlands and development  
11 restrictions fails to protect the functions and values of wetlands, or violates RCW  
12 36.70A.060(2) and RCW 36.70A.172(1).  
13  
14

15 WEAN also contends that this approach fails to include BAS so does not comply with RCW  
16 36.70A.172. In fact Ecology' *Volume 2*, based on a synthesis of BAS, recommended this  
17 approach, and as also noted *supra*, a representative sample of the County's buffer widths  
18 compared favorably with Ecology's recommended buffers. Ecology does not provide any  
19 advice on how to account for future increases in intensity. The State Agencies supported  
20 the County's wetland protection approach and stated that the County had adequate  
21 mechanisms to mitigate for this.  
22  
23

24 **Conclusion:** The Board finds and concludes the following factors sufficiently mitigate  
25 against the risk that buffers for future development on a site cannot be adequately provided  
26 by the County's approach: (1) County code provisions ICC 17.02.090 D, ICC 17.02A.040  
27 A.1, 5, 6, and B.6, ICC 17.02A.090 G. 2, (2) the County's buffer determination system  
28 compares favorably to Ecology's model program, (3) the County's monitoring and adaptive  
29 management system, (4) permits are required for road building that require the functions  
30 and values of wetlands be protected, and (5) the County's past history of relatively little  
31  
32

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<sup>99</sup> Island County's Wetland Implementation Strategy, Attachment 9.  
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1 clearing and grading near wetlands in the County. Based on these factors, the Board  
2 concludes that this approach is not a clearly erroneous violation of RCW 36.70A.060(2) and  
3 RCW 36.70A.172(1).

4  
5 G. Deficiency in Definition of Mature Forested Wetland

6 *WEAN's Issue Nine:* Does 17.02A.030 Definitions: Mature Forested Wetland fail to comply  
7 with RCW 36.70A.060(2), RCW 36.70A.170(1), and RCW 36.70A.172(1), and fail to  
8 implement Comprehensive Plan Wetland Overlay policy A because it fails to properly  
9 designate critical areas, include the best available science, or protect critical areas?

10  
11 **Position of the Parties**

12 WEAN contends Island County has failed to designate a significant portion of Mature  
13 Forested Wetlands (MF Wetlands) and has failed to provide adequate protection for those  
14 MF Wetlands that it has designated.<sup>100</sup> According to WEAN, the County has adopted  
15 designation criteria which are too restrictive and therefore omit a significant portion of the  
16 County's MF Wetlands. WEAN points out that the County relies on Ecology's Wetland  
17 Rating System definition for Upland Forests, not Wetland Forests, and therefore does not  
18 include BAS which demonstrates the slower growth rate of trees within wetlands from which  
19 WEAN sets forth a 15 inch tree diameter standard.<sup>101</sup>

20  
21  
22 Island County agrees with WEAN's statement as to the rarity of MF Wetlands. But, the  
23 County contends its statistical sampling revealed no MF Wetlands nor is it aware of any  
24 such wetlands which would satisfy Ecology's rating system.<sup>102</sup> The County argues it  
25 reviewed BAS and selected a tree diameter of 18 inches, three inches less than Ecology's  
26 recommendation of 21 inches.<sup>103</sup> Amici note that ICC 17.02A.030 is not solely based on the  
27  
28  
29  
30

31 <sup>100</sup> WEAN Prehearing Brief, at 23-24. Issue 10 discusses development regulations to protect these critical  
32 areas.

<sup>101</sup> WEAN Prehearing Brief, at 24-26.

<sup>102</sup> County Response Brief, at 36.

<sup>103</sup> County Response Brief, at 36.

1 size of a tree but also allows for classification considering the age of trees, providing for a  
2 range of 80 to 200 years.<sup>104</sup>

3  
4 In reply, WEAN contends classifying trees by age, as noted by Amici, requires either cutting  
5 down the tree or using an increment borer, neither of which are generally used when  
6 making wetland determinations and delineations.<sup>105</sup> WEAN argues that under Amici's  
7 interpretation, any time a tree within a forested wetland is less than 18 inches it would need  
8 to be dated and the ICC has no provisions requiring this. WEAN further asserts that the  
9 County has not argued its chosen diameter is within the range of BAS.<sup>106</sup>

#### 11 **Board Discussion**

12  
13 ICC 17.02A.030 defines MF Wetlands within Island County:

14 **Mature Forested Wetland:** A Wetland one (1) acre or larger in size in which  
15 the tree canopy within the vegetated part of the Wetland is comprised  
16 predominantly of trees having diameters of eighteen (18) inches or larger  
17 measured at 4.5 feet above the ground level or the oldest trees are 80-200  
18 years old; cross cover may be less than 100%; and, decay, decadence,  
19 number of snags and quantity of downed material is generally less than found  
20 in old-growth forests County maps will identify Mature Forested Wetlands as  
they are located through review of Development Proposals.

21 Within Ecology's *Wetland Rating System*, references to mature forests are in several  
22 locations:

23 **Mature Forests:** Stands with average diameters exceeding 21 in (53 cm)  
24 dbh; crown cover may be less than 100%; decay, decadence, number of  
25 snags, and quantity of large downed material is generally less than that found  
26 in old-growth; Oldest trees 80-200 years old west of the Cascade crest.<sup>107</sup>

27 **Mature Forests:** (west of the Cascade Crest) Stands where the largest trees  
28 are 80-200 years old **or** have average diameters (dbh) exceeding 21 inches  
29 (53 cm); canopy cover may be less than 100%; decay, decadence, number of  
30

31  
32 <sup>104</sup> Brief of Amicus Curiae, at 11-12.

<sup>105</sup> WEAN Reply Brief, at 17.

<sup>106</sup> WEAN Reply Brief, at 17-18.

<sup>107</sup> Ecology's R9343C *Wetland Rating System*, at 83.

1 snags, and quantity of large downed material is generally less than that found  
2 in old growth. NOTE: The criterion for dbh is based on measurements for  
3 upland forests. Eighty to 200 year-old trees in wetlands will often have a  
4 smaller dbh because their growth rates are often slower. The DFW criterion is  
5 an "OR" so mature forests do not necessarily have to have trees of this  
6 diameter.<sup>108</sup>

6 Within Ecology's *Wetlands in Washington Volume 1 - A Synthesis of Science*, the  
7 importance of MF Wetlands is noted for both wetland and wildlife habitat functions along  
8 with the fact that these types of wetlands cannot be successfully reproduced.<sup>109</sup> However,  
9 a definition is not set forth in that volume. Ecology's *Volume 2 – Recommendations for*  
10 *Protecting and Managing Wetlands* does set forth a definition:

11 **Mature forests:** Stands with average diameters exceeding 53 cm (21 in) dbh;  
12 crown cover may be less than 100%; decay, decadence, numbers of snags,  
13 and quantity of large downed material is generally less than that found in old-  
14 growth; 80 - 200 years old west ... of the Cascade crest.<sup>110</sup>

15  
16 Thus, in reviewing Ecology's wetland guidance, mature forests are forests with an average  
17 dbh exceeding 21 inches or trees of 80 to 200 years old. As WEAN points out, these  
18 definitions are based on *upland* forests and not *wetland* forests. But, these definitions are  
19 contained within Ecology's wetland guidance documents and are based on the Washington  
20 Department of Fish and Wildlife's definition for priority habitat. In addition, Ecology  
21 recognizes that mature trees within wetlands are smaller and reflect this in the rating  
22 system's emphasis as to the importance of age, rather than size.  
23  
24

25 WEAN directs the Board to a recently published study on wetlands within the Puget Sound  
26 Lowlands to support its assertion that the County's definition is not supported by BAS. The  
27 document relied on, a 2007 paper entitled *Growth Rates and the Definition of Old-Growth in*  
28 *Forests Wetlands of the Puget Sound Region*, is a thesis paper prepared by a graduate  
29  
30

31  
32 <sup>108</sup> R 9343C *Ecology's Wetland Rating System*, at 90; see also *Wetland Rating Form – Part H.2.3 and SC 4.0*.

<sup>109</sup> R9343C *Ecology's Wetlands in Washington – Volume 1*, Sec. 6.9.4 at 6-63.

<sup>110</sup> R 9343C *Ecology's Wetlands in Washington – Volume 2*, Glossary at 12.

1 student at Evergreen College in relationship to a Master in Environmental Studies.<sup>111</sup> From  
2 this document WEAN focuses in on a single statement – the paper’s notation that the  
3 estimated average diameter of a mature forest in the Snohomish River estuary is 15 inches  
4 with trees even smaller within sphagnum bogs. However, this is only one piece of Mr.  
5 Pantier’s thesis which stated: (Emphasis added – italics and bold)<sup>112</sup>

6  
7 As part of a program to protect rare habitats in Washington State, state  
8 agencies have adopted definitions of mature and old-growth forest, with  
9 minimum size and age criteria for the largest trees. State wetland rating and  
10 functional assessment guidelines use these criteria to identify mature and old-  
11 growth forested wetlands; however, these forest definitions are based on the  
12 characteristics of Douglas-fir forests in upland habitats, and are not applicable  
13 to forested wetlands. *In this study, **data from forested wetlands in the Puget***  
14 ***Lowlands were analyzed with linear regression to estimate growth rates***  
15 ***for five tree species: western red cedar, Sitka spruce, western hemlock, red***  
16 ***alder and coast pine. For these species, estimated diameter is significantly***  
17 ***smaller than the mature and old-growth size criteria. **Estimated average*****  
18 ***diameter for mature forest is 18 inches (46 cm), and for old-growth 27***  
19 ***inches (69 cm). **Trees in some wetland types average significantly smaller*****  
20 ***than these mean values. The estimated average diameter for mature forest***  
21 ***in the Snohomish River estuary is 15 inches (38 cm). Coast pine and other***  
22 ***trees in sphagnum bogs are typically smaller than even this low estimate, and***  
23 ***require a separate criterion if they are to be identified as mature or old-growth***  
24 ***based on size.***

25 Thus from WEAN’s own documentation, the average diameter for trees within MF Wetlands  
26 is 18 inches, with this average being reduced for some types of wetland such as estuaries  
27 or sphagnum bogs. Island County, despite Ecology’s wetland guidance documents  
28 provision of 21 inches, deviated and selected the very same number WEAN’s

29  
30 <sup>111</sup> WEAN would like the Board to accept this document as BAS and to apply its definitional recommendations  
31 in regards to mature forested wetlands. WAC 365-195-906 sets the criteria for whether or not something may  
32 be classified as BAS and includes the need for a valid scientific process including such things as peer review,  
study methods, quantitative analysis, logical conclusions and reasonable inferences, appropriate context, and  
references. For research documents, such as the one presented by WEAN, all elements are needed and what  
appears to be missing from WEAN's document is peer review.

<sup>112</sup> Exhibit 9756-F.

1 documentation sets forth, thus establishing a more restrictive definition than the Ecology  
2 proposes. As such, the Board finds no error as alleged by WEAN in Issue 9.

3  
4 **Conclusion:** WEAN has failed to demonstrate that Island County's definition of mature  
5 forested wetlands, as set forth in ICC 17.02A.030, fails to comply with the GMA's  
6 requirement for BAS as provided in RCW 36.70A.172(1). The County has selected an  
7 average tree diameter of 18 inches as one of the criteria for identifying mature forested  
8 wetlands. The adoption of a more restrictive measurement is not clearly erroneous and  
9 provides for the potential inclusion of more forested wetlands within this category.  
10

#### 11 H. Failure to Base Ordinance on BAS

12  
13 *CARE's Issue Six:* Does Island County's failure to include Best Available Science, including  
14 a failure to use science applicable to Island County's unique local circumstances, in ICC  
15 17.02A, as amended by Ordinance No. C-02-08-PLG-011-07, and Exhibit H to Ordinance  
16 No. C-02-08-PLG-011-07, fail to protect all functions and values of critical areas and thus  
17 violate Island County Comprehensive Plan Policies Critical Areas 1, 3-4, 11, WAC 365-190-  
18 080, RCW 36.70A.020(9-10), 36.70A.040, 36.70A.060, 36.70A.070, 36.70A.130,  
19 36.70A.170, 36.70A.172, and 36.70A.175?

20 CARE's arguments in this Issue pertain to the inadequacy of the *Phase 1 and 2 Reports*  
21 and reasons why they should not be considered BAS for determining wetland buffers. In  
22 this section the Board will consider CARE's claims about the adequacy of the *Phase 1 and*  
23 *2 Reports* as BAS. In the next section entitled Inadequacy of Buffers, we will discuss  
24 CARE's contentions on why the BAS in the record does not support the County's  
25 methodology for determining buffers.  
26

#### 27 **Positions of the Parties**

##### 28 *Phase 1 Report*

##### 29 CARE's Position

30 CARE argues the *Phase 1 Report* is a study of the current health of Island County's  
31 wetlands, not a study of what measures best protect wetlands, and therefore is not BAS for  
32

1 determining wetland buffer widths and other protection measures.<sup>113</sup> According to CARE,  
2 the Phase 1 Report has many deficiencies including the following:

- 3 1) No consideration of numerous factors unique to Island County including soil  
4 chemistry, sedimentation and water quality, long-term water table, flashiness  
5 of water levels in response to stormwater runoff, sedimentation rates, and  
6 reproduction rates and usage of fish and wildlife wetlands.
- 7 2) Lack of site visits and the use of aerial photographs. This differed from  
8 Ecology's BAS.
- 9 3) Lack of comment on the quantity of buffer needed for specific wetland.
- 10 4) Study of only buffers of 100 feet.
- 11 5) No analysis provided for deviating from Ecology's recommended buffers.

### 12 County's Position

13 The County does not disagree that the Ecology's guidance is BAS, and maintains that it  
14 used it as a reference point and repeatedly compared its program to Ecology's. The County  
15 says that CARE cannot justify its attacks on the *Phase 1 and 2 Reports*. The County points  
16 out the State Agencies considered both Reports of the highest quality, and that the County's  
17 peer reviewers' consensus was that *Phase 2* was a thorough compilation of relevant  
18 BAS.<sup>114</sup>

19 The County points out that the only GMA violation that CARE cites is RCW 36.70A.172 and  
20 therefore has abandoned claims of violations of other statutes.

### 21 State Agencies Position

22 The State Agencies disagree that the *Phase 1 and Phase 2 Reports* are not BAS. They  
23 declare that *Volumes 1 and 2* are necessarily general and provide general options and  
24 strategies for Washington's local governments and recognize that GMA does not require  
25 local governments to follow Ecology's advice. These agencies advise that local  
26 governments should tailor Ecology's recommendations to local circumstances and that is  
27 what Island County has done.<sup>115</sup>

31 \_\_\_\_\_  
32 <sup>113</sup> Id. at 20.

<sup>114</sup> Island County's Response Brief at 24 and 25.

<sup>115</sup> Brief of Amicus Curiae at 12.

1 They also support *the Phase 1 Report's* finding that Island County differs from other  
2 jurisdictions in that its wetlands are generally not associated with larger streams or rivers,  
3 and have a more limited range of functions.<sup>116</sup>  
4

5 The State Agencies did not find the County's methods of gathering and analyzing  
6 information for the Phase 1 Report inadequate.<sup>117</sup>  
7

### 8 **Board Discussion**

9 CARE's Issue Statement asserts that the County's failure to include BAS in its wetland  
10 protection program violates Island County Comprehensive Plan Policies Critical Areas 1, 3-  
11 4, 11, WAC 365-190-080, RCW 36.70A.020(9-10), 36.70A.040, 36.70A.060, 36.70A.070,  
12 36.70A.130, 36.70A.170, 36.70A.172, and 36.70A.175. However, as with other issues,  
13 CARE limits its argument to a violation of RCW 36.70A.172. Therefore, the Board finds that  
14 CARE has abandoned its challenges to all other statutes mentioned in its Issue Statement.  
15  
16

17 The County declares that the BAS it considered for the amendments to its wetland  
18 protection measures are the scientific information contained in the *Phase 1 and Phase 2*  
19 *Reports*.<sup>118</sup> The County also stresses that it consulted Ecology's *Volumes 1 and 2* and  
20 worked with Ecology and CTED throughout the process of developing these measures.  
21 CARE disagrees with the County and the State Agencies that the *Phase 1 and Phase 2*  
22 *Reports* are BAS, or even if they are BAS, the County should not have relied on their  
23 conclusions because better BAS is contained in the record, including Ecology's *Volumes 1*  
24 *and 2*. All parties agree that *Volume 1 and 2* constitute BAS.  
25  
26

27 The *Phase 1 Report* is an assessment of the health of Island County's wetlands, which the  
28 County says it used to consider whether and what kind of changes should be made to its  
29 current regulations during the review of its regulations required by RCW 36.70A.130(1) and  
30 (4). The assessment was a year-long project that compiled and statistically correlated data  
31

32 <sup>116</sup> Id at 13.

<sup>117</sup> Id at 13.

<sup>118</sup> R9565 at 3.

1 for over 1000 characteristics of the County's known 958 wetlands by overlaying maps from  
2 many existing sources and analyzed that data using computerized tools at four scales:  
3 wetland, contributing area (area where surface water drains into the wetland), surrounding  
4 area (various distances up to 300 feet from the wetland), and watershed basin.

5  
6 Additionally, data on plant species composition, water regime, and alterations was collected  
7 from site visits to 103 wetlands chosen according to rigorous statistical design by a  
8 professional statistician. Aerial photographs and satellite imagery was used from various  
9 time periods to identify wetland alterations and then compared to the field visits and permit  
10 files.<sup>119</sup>

11  
12 WAC 365-195-905 sets out the following criteria to evaluate whether scientific information is  
13 BAS. The *Phase I Report* is described as both an Assessment and a Survey<sup>120</sup>. To be  
14 considered BAS, this type of scientific information needs to meet certain criteria listed in  
15 WAC 365-195-905 (5)(b). According WAC 365-195-905(5)(b), both a survey and an  
16 assessment must obtain the scientific information using methods that are clearly stated and  
17 able to be replicated. The methods are to be standardized in the pertinent scientific  
18 discipline or, if not, the methods must be appropriately peer-reviewed to assure their  
19 reliability and validity. CARE argues that the *Phase I Report* is not BAS because of its  
20 method of using aerial photographs and lack of site visits. The State Agencies refute this  
21 claim by explaining the county-wide scale of the survey and assessment make it  
22 unreasonable for the County to visit every wetland, this protocol is routine wetlands science  
23 and was used by Ecology in developing its rating system.<sup>121</sup> As described above, the  
24 *Phase 1 Report* also used site visits and permit files to corroborate information obtained  
25 from aerial photographs. *Washington State Wetland Rating System for Western*

26  
27  
28  
29  
30  
31  
32  

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<sup>119</sup>R8899 *Phase 1 Report* at 7.

<sup>120</sup> R 9565 *Phase 2 Report* at 3.

<sup>121</sup> *Amicus Curiae Brief* at 13.

1 *Washington* confirms that Ecology used the same methods to develop its information and  
2 recommendations.<sup>122</sup>

3  
4 CARE contends that the *Phase 1 Report* was deficient because it analyzed only wetlands  
5 with buffers of 100 feet and deviated from Ecology's recommendations. The Board notes  
6 that the *Phase 1 Report* was an assessment of the health of the County's wetlands, and the  
7 largest buffer under the County's previous wetland protection measures was 100 feet.  
8 Likewise, CARE's criticism of the *Phase I Report* for deviating from Ecology's  
9 recommendation and the lack of discussion on the quantity of wetland buffers is not relevant  
10 for the same reason that this report assessed the County's wetlands' health and did not  
11 make recommendations.  
12

13  
14 **Conclusion:** The Board concludes, based on our review of the *Phase I Report* and State  
15 Agencies' confirmation, that the methods used for the assessment and survey included in  
16 *Phase I Report* are valid scientific methods. CARE's other arguments are not relevant to the  
17 kind of scientific information produced by this report or its purpose. Therefore, the Board  
18 concludes it is an appropriate document for the County to consider as BAS as it developed  
19 its wetland regulations. Its use complies with RCW 36.70A.172.  
20

21 *Phase 2 Report*

22 CARE's Position

23  
24 CARE disputes *Phase 2 Report's* finding that the selected studies that were analyzed were  
25 not sufficiently tailored to Island County's situation. CARE declares that until there are  
26 different studies, the studies are BAS. CARE rejects the *Phase 2 Report's* criticism that the  
27 studies it analyzed were opinions not data, and were not peer reviewed. CARE contends  
28 that these criticisms are unfounded because the data that was missing was not identified,  
29 only one study criticized by the County's science consultant was not peer reviewed the rest  
30 of the studies recommended larger buffers, the nutrient loading on the large number of  
31  
32

---

<sup>122</sup> R9343C at 2.  
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1 Island County hobby farms is similar to the nutrient loading in feed lots, and the County's  
2 data on stream sediment loading is limited.<sup>123</sup>

3  
4 CARE criticizes several aspects of the *Phase 2 Report*. It challenges conclusions that the  
5 buffers suggested to protect from high nutrient loadings from uses like feed lots do not apply  
6 to Island County; that a focus on stormwater pollutants was not necessary because of the  
7 low level of sediment; and that studies setting larger buffers are based on lack of clay soils  
8 in the County.<sup>124</sup> CARE says that the only two reports, NCRS recommendations on filter  
9 strips and the Timber Harvest Rules, which the County selects to support its  
10 recommendations, are not BAS.<sup>125</sup> Additionally CARE argues that the County ignores that  
11 the County's sole source aquifers are important to their recharge.<sup>126</sup>

#### 12 13 14 County's and State Agencies' Position

15 These agencies dispute CARE's claim that wetlands are a significant source of recharge  
16 based on several studies.<sup>127</sup>

#### 17 18 **Board Discussion**

19 The *Phase 2 Report* depicts its work as a synthesis of pertinent scientific knowledge done  
20 since the publication of *Volumes 1 and 2* regarding wetlands, as well as expert opinion of its  
21 author, Dr. Paul Adamus, a wetland scientist and wildlife biologist,<sup>128</sup> that has been peer  
22 reviewed.<sup>129</sup> The Report demonstrates how it meets the criteria for BAS as delineated in  
23 WAC 365-195-905 (5)(b).<sup>130</sup> The State Agencies charged with developing BAS to assist  
24 cities and counties in developing critical areas regulations also support the *Phase 2 Report*  
25 as BAS.  
26  
27  
28

29 <sup>123</sup> Id. at 26 and 27.

30 <sup>124</sup> CARE's Hearing Brief at 26-27.

31 <sup>125</sup> Id. at 28.

32 <sup>126</sup> Id. at 29 and 30.

<sup>127</sup> Brief of Amici Curiae at 14.

<sup>128</sup> Dr. Adamus is also a contributor to the synthesis of the science contained in *Volume 1*.

<sup>129</sup> R 9565, *Phase 2 Report* at 3.

<sup>130</sup> Id.

1 The *Phase 2 Report* describes factors that are important to consider when determining  
2 wetland classifications and determining wetland buffers. It draws conclusions about the  
3 local circumstances for the County to consider when categorizing wetlands and designing  
4 buffers. It also opines on the quality of the science in recent studies related to wetlands  
5 protection and their applicability to Island County. The *Phase 2 Report* recognizes the  
6 limitations of information included in the *Phase 1 and Phase 2 Reports* including the lack of  
7 areas where studies have been done that exactly match Island County's wetlands in terms  
8 of types, species, and settings, the infeasibility of sampling water quality or conducting  
9 comprehensive surveys of wildlife and plant species that reproduce in or use the County's  
10 wetlands, and inability to compare the County's most common 100 foot buffers with lesser  
11 buffers. The *Phase 2 Report* also does not make any specific recommendations for  
12 changing Island County's wetland measures.  
13  
14

15  
16 CARE does not cite any of the factors delineated in WAC 365-195-905 that would cause the  
17 Phase 2 Report not to be considered BAS. However, CARE contends that even if the  
18 Phase 2 Study is considered BAS, it can't be considered for wetland protections because it  
19 makes no recommendations. However, the Board finds the lack of recommendations is not  
20 fatal, because the Board views the *Phase 2 Report* as somewhat analogous to *Volume 1*  
21 which is a synthesis of the science and which Ecology used to make its recommendations in  
22 *Volume 2*.  
23

24  
25 CARE's criticizes the County's findings on the nutrient loading on the large number of Island  
26 County hobby farms, and the County's data on stream sediment loading as limited.  
27 However, while CARE's November 30, 2008 comment letter<sup>131</sup> cites several studies that it  
28 says refute this information, it is not clear that these studies are included in the Record nor  
29 does CARE provide them to the Board to evaluate. Likewise, CARE does not provide any  
30 science that shows that Island County's farms produce similar impacts as livestock feedlots  
31  
32

1 or that, contrary to the State Agencies' opinion<sup>132</sup>, the wetlands are important sources of  
2 recharge for the County's aquifers.

3  
4 Further, Ecology and CTED, agencies with expertise, charged with providing  
5 recommendations based on BAS to assist counties and cities in to developing critical areas  
6 protections, asserted that *Phase 2 Report* could be considered BAS for purpose of  
7 informing Island County's process for developing its wetland protection measures.<sup>133</sup>  
8

9 **Conclusion:** Based on the foregoing, the Board finds that CARE has not carried its burden  
10 of proof to demonstrate why the *Phase 2 Report* cannot be included as BAS in the County's  
11 process for developing its wetland protection measures. Also, it is apparent from the record  
12 that while the County considered *Phase 2 Report*, it was not the only source of science on  
13 which it relied. Throughout the process of these development regulations the County  
14 consulted with Ecology and CTED and consulted *Volumes 1 and 2* as sources of BAS<sup>134</sup>.  
15  
16

#### 17 I. Inadequate Buffers

18 *WEAN's Issue Ten:* Does C-02-08 generally, including 17.02A.030 Definitions: Buffers,  
19 17.02A.030 Definitions: Highly Erodible Soils, 17.02A.040, 17.02A.080, 17.02A.090, and  
20 Rural Stewardship Guide (Exhibit-I), fail to comply with RCW 36.70A.060(2) and RCW  
21 36.70A.172(1), and fail to implement Comprehensive Plan Wetland Overlay policies A and B  
22 because it fails to establish buffers adequate to protect critical areas and include the best  
23 available science?

24 *CARE's Issue Seven:* Do Island County's criteria for designating, classifying, and protecting  
25 critical areas and establishing buffers and other protections in ICC 17.02A, as amended by  
26 Ordinance No. C-02-08-PLG-011-07, and Exhibit H to C-02-08-PLG-011-07, fail to protect  
27 all functions and values of these critical areas by inappropriately classifying or not  
28 classifying areas, and/or establishing insufficient buffers and other protections, and thus  
29 violate Island County Comprehensive Plan Policies Critical Areas 1, 3-4, 11, WAC 365-190-  
30 080, RCW 36.70A.020(9-10), 36.70A.040, 36.70A.060, 36.70A.070, 36.70A.130,  
31 36.70A.170, and 36.70A.172?

32 <sup>132</sup> See R343 B *Volume 1* at 2-50 -2-51.

<sup>133</sup> Brief of Amicus Curiae at 12.

<sup>134</sup> County's Exhibit H: R 9596, 9766 and 9806,

1 **Positions of the Parties**

2 CARE's Position

3  
4 CARE argues that until the County has a monitoring system in place that can monitor key  
5 parameters, it cannot rely on its own science and deviate from Ecology's  
6 recommendations.<sup>135</sup> CARE claims the *Phase 1 and Phase 2 Reports* are not BAS. CARE  
7 asserts that even if they are, it does not support the buffer widths chosen by the County.<sup>136</sup>  
8 CARE contends that studies analyzed in the *Phase 2 Report* recommended larger buffers  
9 than the County's regulations would provide. CARE also asserts that almost all the studies  
10 selected by the consultant showed that buffers of more than 25 feet were needed to protect  
11 for water quality functions, and some of the County's buffers are smaller than this so do not  
12 provide for adequate water quality protection.

13  
14  
15 CARE asserts that Ecology's *Volumes 1 and 2*, constitute BAS and significant differences  
16 exist between the buffer widths recommended by Ecology and adopted by the County.  
17 According to CARE, the County has deviated from the BAS in the record, and has not  
18 shown its reasons for doing so, as the Boards have required.<sup>137</sup>

19  
20 CARE argues that Island County violated BAS by incorrectly categorizing mature forested  
21 wetlands, mosaic wetlands, native plant wetlands, and fish-bearing stream riparian  
22 wetlands leading to buffers that are too small at any land use intensity. CARE says that the  
23 *Phase 1 Report* identifies numerous wetland dependent species and rare wetland plants that  
24 rely on mature forested wetlands for habitat. CARE says Ecology's *Volume 1* indicates  
25 buffers between 100 and 300 feet are needed to adequately protect species closely  
26 associated with Washington wetlands.  
27  
28  
29  
30  
31

32 <sup>135</sup> Id. at 22.

<sup>136</sup> CARE's Hearing on the Merits Brief at 18.

<sup>137</sup> Id. at 19 and 22.

1 According to CARE, the *Phase 2 Report* cites no studies providing for habitat functions with  
2 buffers of less than 50 feet, but does cite numerous studies that indicate buffers of greater  
3 than 50 feet are required to protect wetlands from windthrow, the spread of non-native  
4 invasive plants, trampling and vandalism. CARE asserts that placing forested, shrub “native  
5 plant” wetlands, and mature forested wetlands in a water quality-only table provides buffers  
6 that are detrimental to wetland-dependent and other species and therefore does not protect  
7 the functions and values of wetlands related to these species.<sup>138</sup>  
8

9  
10 CARE also contends areas where there are loamy soils with steep slopes need larger  
11 buffers.<sup>139</sup> Finally, CARE alleges the County ignores a key reason why the lack of fish  
12 bearing streams and stream associated wetlands are important, because they provide a  
13 drinking water source for terrestrial wildlife, so need larger buffers.<sup>140</sup>  
14

#### 15 WEAN’s Position

16 WEAN attacks the County’s system of establishing buffers for several reasons. First, as  
17 discussed *supra* is WEAN’s argument the Ordinance does not assure protection over time  
18 when land use is intensified. Second, spatial configuration of the development is not  
19 considered in determining land use intensity because it does not contain criteria or  
20 standards for determining when a buffer is needed due to the proximity of the increased  
21 land use to the wetland. Third, buffers for all forested wetlands fail to include or provide for  
22 protection from windthrow or blowdown, which need at least 76 feet, that would not be  
23 provided by the smaller buffers needed for water quality or habitat protection. Fourth,  
24 increases in buffer width are not required for inadequate vegetation and increases in buffer  
25 widths are limited to 25 percent, which is both arbitrary and discretionary, when it is  
26 mandatory to protect all wetland functions. Fifth, low intensity land buffers are inadequate  
27  
28  
29  
30  
31

32 <sup>138</sup> CARE’s Hearing on the Merits Brief at 30 – 33.

<sup>139</sup> *Id.* at 26 and 27.

<sup>140</sup> *Id.* at 28.

1 to protect from the impacts of pesticides and herbicides, stormwater, and household pets.  
2 Sixth, not allowing needed buffers on adjacent property does not protect wetlands.<sup>141</sup>

3  
4 WEAN also objects to allowing buffer reductions based on Rural Stewardship Plans (RSPs).  
5 WEAN contends RSPs do not protect wetlands because they do not need County  
6 verification, and contends RSPs do not require public review because they are Type One  
7 decisions. Further, WEAN contends that the criteria for RSPs do not justify buffer  
8 reductions.<sup>142</sup>

9  
10 County's Position

11 The County agrees the spatial arrangement of uses and activities was a concern expressed  
12 by peer reviewers and the County addressed that concern by adding ICC 17.02A.090 D. 4.

13 The County answers WEAN's claim that it should have adopted specific standards and  
14 made these provisions mandatory, by saying ICC 17.02A.090 does make these  
15 considerations mandatory.<sup>143</sup>

16  
17  
18 As for WEAN's argument that all forested buffers should be increased, the County's claims  
19 that WEAN uses a theoretical argument of how small buffers might be instead of addressing  
20 the Field Data Comparison. The County says that WEAN has not explained how windthrow  
21 alters wetland functions, and windthrow can be beneficial to wetland-functions. The County  
22 contends WEAN uses a water quality buffer in its argument when it knows that forested  
23 wetlands receive a higher habitat score.<sup>144</sup>

24  
25 The County states that its buffer sizes were suggested without regard to the use or non-use  
26 of fertilizers or control of pets, and contend that WEAN does not offer any explanation on  
27 how a larger buffer would prevent pets from finding and entering a wetland.<sup>145</sup>

28  
29  
30  
31 <sup>141</sup> WEAN's Hearing Brief at 26-34.

32 <sup>142</sup> Id. at 34-36.

<sup>143</sup> Island County's Response Brief at 38.

<sup>144</sup> Id.

<sup>145</sup> Id. at 40.

1 The County answers WEAN's argument that buffer increases should be mandatory by  
2 stating ICC 17.02 090 G.5 allows for buffer increases that go beyond Ecology's Model  
3 Program and the changes requested by Ecology. The County replies that WEAN's  
4 contention that the County's Ordinance is deficient because it cannot impose buffer  
5 requirements on adjacent property owners ignores rudimentary due process.<sup>146</sup>  
6  
7

8 The County concedes that the 25 percent limit objected to by WEAN on buffer expansion is  
9 arbitrary but decided a limit on administrative discretion was necessary and state agencies  
10 did not express a concern about the limit.<sup>147</sup>  
11

12 The County states that CARE's arguments are basically those it used in arguing Issue  
13 Seven, that is, the County should have used Ecology's Model Program. The County says  
14 that CARE ignores the County's Correlation and Field Data Comparison. The County  
15 points out that the State Agencies did not find any deficiency in the County's BAS and that  
16 CARE has abandoned claims to other violations of the GMA, except RCW 36.70A.172(1).  
17 The County asserts that its buffers are larger than Ecology's 25 percent of the time and on  
18 balance correlate with Ecology's guidance.  
19  
20

21 As for WEAN's allegations that use of RSPs to reduce buffer sizes is noncompliant, the  
22 County explains that a one-step reduction in intensity (high to medium, medium to low) may  
23 be made, but only if the RSP reduces impacts on wetland functions. An intensity reduction  
24 can be requested, but only reduction of potential impacts will determine if one is granted.  
25 The County also declares that an RSP is recoded and enforced just like any other permit,  
26 and ICC 17.02.080 requires monitoring and source identification to maintain additional  
27 oversight.<sup>148</sup>  
28  
29

### 30 State Agencies' Position

31 \_\_\_\_\_

32 <sup>146</sup> Island County's Response Brief at 38.

<sup>147</sup> Id.

<sup>148</sup> Id. at 40.

1 The State Agencies maintain that the County's wetland protection system is consistent with  
2 Ecology's advice because it assigns buffers based on characteristics of the wetland,  
3 intensity of the use, and functions the wetland provides. Again, these agencies point out that  
4 CARE focuses on the smallest buffers and ignores the large buffers the Ordinance requires  
5 for higher intensity uses.<sup>149</sup> The State Agencies find that the deviations noted by CARE  
6 from Ecology's recommendations are not significant. They report that Ecology reviewed  
7 100 wetlands in the County and found that they would have received a buffer of 135 feet  
8 using Ecology's rating system and 139 feet using the County's system.<sup>150</sup>  
9

10  
11 The State Agencies answer CARE's criticism of the Ordinance's focus on water quality and  
12 habitat functions by saying those are the functions which most of the literature regarding  
13 buffers is based. The largest buffers are needed to protect habitat functions and the  
14 County's Ordinance provides them consistent with Ecology's and Washington Department  
15 of Fish and Wildlife's recommendations. Also, the County provides buffers for water quality  
16 protection consistent with Ecology's recommendations, when a larger habitat buffer is not  
17 needed based on habitat scores.<sup>151</sup> These agencies also refute CARE's argument that the  
18 buffers established by the Ordinance are insufficient to protect water quality. They point  
19 out that CARE only cited the buffers that apply to low intensity uses and that these uses do  
20 not generate significant pollutants to require big buffers.<sup>152</sup>  
21  
22

23 The State Agencies note CARE's concern that buffers of at least 50 feet are needed for  
24 forested wetlands to protect from blow down, invasive species, trampling, and other effects.  
25 Here, these agencies note that in most cases buffers for these wetlands are in excess of 50  
26 feet.<sup>153</sup>  
27

28 WEAN's Reply  
29  
30

31 <sup>149</sup> Brief of Amici Curiae at 14.

32 <sup>150</sup> Id. at 13.

<sup>151</sup> Id. at 15.

<sup>152</sup> Brief of Amici Curiae at 14.

<sup>153</sup> Id.

1 WEAN asserts the County does not dispute that no criteria in its code exist for determining  
2 when buffers should be increased due to spatial considerations and that buffer increases  
3 due to spatial considerations only apply to low intensity uses.

4  
5 WEAN disputes the County's claim that its regulations allow buffers for mature forested  
6 wetlands to be increased by referencing Exhibit R-9789, and argues it is impossible to tell  
7 from this exhibit which wetlands are mature forested wetlands. WEAN maintains the  
8 science in the record shows that 76 to 115 feet is the minimum buffer that can be expected  
9 to protect such a wetland. Therefore, a 75 foot buffer is the minimum buffer that should be  
10 considered, and is inadequate most of the time to protect forested wetlands. WEAN  
11 analyzed the 39 wetlands cited by the County, and says that 10 of those buffers fall beneath  
12 the bare 75 foot buffer needed.<sup>154</sup> WEAN asserts that the most important factor to be  
13 considered in protecting a forested wetland is how much of the forest around the wetland  
14 has been cleared, not the particular land use intensity. While WEAN notes the County's  
15 statement that blowdown is a natural phenomenon, still forested wetlands provide important  
16 habitat and lack of protection can cause rapid or catastrophic loss of this wetland  
17 function.<sup>155</sup>

18  
19  
20  
21 WEAN notes that the County concedes that the 25 percent limit on buffer increase is  
22 arbitrary, and cannot be compliant when more buffer width is necessary to provide  
23 protection.<sup>156</sup>

24  
25 WEAN also argues against any buffer reduction unless stormwater is treated, control of pets  
26 is enforced, and the applications of fertilizers and biocides is prohibited. Since enforcement  
27 of these conditions are impossible, no buffer reduction should be allowed.<sup>157</sup>

## 28 29 **Board Discussion**

30  
31  
32 <sup>154</sup> WEAN's Reply at 20

<sup>155</sup> Id. at 21 and 22.

<sup>156</sup> Id. at 24.

<sup>157</sup> Id. at 25.

1 CARE's argument that the County's wetland categories are not categorized correctly is  
2 disputed by the State Agencies which assert that they correspond with the only science in  
3 the record on this subject, *Washington State Wetland Rating System for Western*  
4 *Washington*.<sup>158</sup>

5  
6 CARE contends the County should not have developed its wetland protection program until  
7 it had developed benchmarks for monitoring the buffer widths' impacts on wetlands and  
8 instead should have adopted Ecology's program that is based on BAS. The State Agencies  
9 disagree and declare that the County did follow Ecology's recommendations in *Volume 2*,  
10 and adopted a version of *Volume 2's* Option Three for a wetland protection program.<sup>159</sup>  
11 Our review of Option Three confirms this.<sup>160</sup> The State Agencies also assert that they  
12 calculated buffers for 100 referenced wetlands using both the County's Ordinance and  
13 Ecology's guidance and on average the County's buffers were four feet wider.<sup>161</sup> The  
14 record confirms this.<sup>162</sup> Further, *Volume 2's* Option Three does not include any direction that  
15 monitoring like the kind CARE asserts the County must adopt before pursuing the wetland  
16 protection program which it adopted.  
17  
18

19 CARE also argues the buffer widths adopted by the County do not correspond to the larger  
20 buffer widths recommended in the studies analyzed by the County's science consultant  
21 pertaining to a wetland's function of protecting water quality. According to the *Phase 2*  
22 *Report*, the effectiveness of buffers depended on the conditions surrounding the wetland,  
23 the function the wetland performs (removing nitrate, sediment, controlling stormwater runoff)  
24 and the level of protection the buffer needs to provide. Buffers ranged from over 500 feet for  
25 wetlands with coarse soils (Polyakov 2005)<sup>163</sup> to as little as three feet for sediment and 13  
26 feet for nutrients (Desbonnet, 1994), with many studies having shown that for sediment and  
27  
28

29  
30 <sup>158</sup> Brief of Amici Curiae at 6.

31 <sup>159</sup> Id.

32 <sup>160</sup> R 9343B Volume 2 at Appendix 8-C at 6 and 7.

<sup>161</sup> Brief of Amicus Curiae at 6.

<sup>162</sup> R9827.

<sup>163</sup> *Phase 2 Report* at 32.

1 nutrient retention the first 20 to 30 feet of a buffer shows greatest retention for these  
2 factors.(Bedard –Haughn,2004).<sup>164</sup> This observation led Dr. Adamus, the County’s science  
3 consultant, to conclude that given the dozens of buffer studies that can be considered BAS,  
4 they may fall short of yielding the types of specifications needed to be effective under all  
5 circumstances. To address this uncertainty, Dr. Adamus suggested an adaptive  
6 management program, which the County has adopted, and is discussed *infra*.  
7

8 CARE also cites several studies in its November 30, 2007 comment letter that show that  
9 sediment and nitrate levels are rising.<sup>165</sup> However, CARE does not provide these studies in  
10 the record for the Board to evaluate.  
11

12 Ecology explains in *Volume 2* the importance of local governments understanding the risk to  
13 wetland resources resulting from their decisions. Ecology says that it has addressed risk in  
14 its recommendations by tailoring the degree of protection to several factors that the scientific  
15 literature says are important. It goes on to clarify that its buffer recommendations were  
16 selected from the middle of the range of buffers suggested in the literature, therefore  
17 representing a moderate risk approach to determining buffer width.<sup>166</sup> Ecology has made  
18 recommendations after assessing this risk. The County has adopted a version of *Volume*  
19 *2*’s recommendations and its buffers have been shown to compare favorably with *Volume*  
20 *2*’s recommendations for Ecology’s recommended wetland categories.<sup>167</sup>  
21  
22

23  
24 **Conclusion:** The Board concludes that, except for the instance cited below, the County  
25 has appropriately considered the risk of its approach and its approach comports with  
26 Ecology’s BAS for a system for determining buffers, that relies on type of wetland, land use  
27 intensity, and the function to be protected is within the range of BAS in the record and for  
28 the most part, complies with RCW 36.70A.060(2) and RCW 36.70A.172(1). Below we will  
29 discuss specific challenges which WEAN says undermine this system.  
30

31  
32 <sup>164</sup> R9565 *Phase 2* Report at 33.

<sup>165</sup> R9752

<sup>166</sup> 9343 B *Volume 2* at 1-11 and 1-12.

<sup>167</sup> 9343B, *Volume 2*, Appendix C, pp. 6 - 8; ICC 17.02.090 F; R9827.

1 WEAN's challenge to the County's buffers based on future increases in intensity are  
2 addressed *supra*.

3  
4  
5 Lack of requirements to compensate for inadequate vegetation

6 WEAN alleges that the County does not require adequate vegetation in buffers to protect all  
7 functions and values of wetlands because it assumes buffers are adequately vegetated.  
8 However, the Board finds that ICC 17.02A.090 that during the development review process  
9 described in ICC 17.02A.040 A.6 (b) and (d) and through the application of ICC 17.02A.090  
10 G.2, the Planning Director has discretion, when there is inadequate vegetation, to require  
11 the buffer be enhanced or compensated for so that the functions and values of the wetland  
12 are protected. However, the Board agrees with WEAN that the 25 percent limitation on  
13 buffer increases is arbitrary, and could limit the County's ability to protect all functions and  
14 values of wetlands. The County's reason that the Planning Commission felt the need to limit  
15 the Planning Director's discretion is not supported by evidence in the record. Therefore the  
16 Board finds ICC 17.020A.090 G.5 does not comply with RCW 36.70A.060(2) and RCW  
17 36.70A.172(1).  
18  
19

20 As for WEAN's allegation that the County's refusal to allow buffer increases on adjoining  
21 property does not protect wetland functions and values, the Board knows of no provision in  
22 state law that would allow the County to regulate another property owner's land as result of  
23 a neighboring property owner's permit application.  
24

25 **Conclusion:** The Board finds that the Ordinance's provisions require and include methods  
26 for ensuring protection of all functions and values of wetlands when there is inadequate  
27 vegetation of wetlands and therefore the Ordinance complies, with one exception, with RCW  
28 36.70A.060(2) and RCW 36.70A.172(1). That exception is ICC 17.020A.090 G.5 that  
29 imposes a 25 percent limit on buffer increases does not comply with RCW 36.70A.060(2)  
30 and RCW 36.70A.172(1).  
31  
32

1 Inadequate Buffers to Mitigate for Pets, Herbicides and Pesticides

2 WEAN and CARE both argue that low intensity land buffers are inadequate to protect from  
3 the impacts of pesticides and herbicides, stormwater, and household pets. The State  
4 Agencies, which includes Ecology which created the recommendations based on BAS, on  
5 which these Petitioners would like the County to rely, assert that the County provides buffers  
6 for water quality protection consistent with Ecology's recommendations, when a larger  
7 habitat buffer is not needed.<sup>168</sup> These agencies support the buffers in the Ordinance as  
8 sufficient to protect for water quality. They point out that CARE only cited the buffers that  
9 apply to low intensity uses as being insufficient and that these uses do not generate  
10 significant pollutants to require larger buffers.<sup>169</sup>

11  
12  
13 Ecology's *Volume 1* states that no specific information on impacts of domestic pets on  
14 wetlands has been found, but goes on to say some studies have found that housecats in  
15 residential developments near wetlands have a significant impact on birds, small mammals,  
16 and even some amphibians.<sup>170</sup> Ecology's *Volume 2* suggests that fencing or dense  
17 vegetation be used to mitigate against the impacts of pets.<sup>171</sup> The County's Ordinance  
18 allows for increases in vegetation when it is inadequate to protect the functions and values  
19 of the wetland. As noted *supra*, science must be practical. While the County's Ordinance  
20 as discussed *infra* does not provide for fencing, the Board finds that not providing buffers  
21 and fencing to assure the protection of the wetland habitat from household cats is not  
22 practical and not a clearly erroneous violation of RCW 36.70A.172.  
23  
24

25 Further, as noted *supra*, the record shows that a comparison of the County's buffers to  
26 Ecology's, the recommendations on which Petitioners want the County to rely, show that  
27  
28  
29  
30

31  
32  

---

<sup>168</sup> Brief of Amicus Curiae at 15.

<sup>169</sup> *Id.* at 14.

<sup>170</sup> R9343 B Volume 1 at 4-69.

<sup>171</sup> R9343B *Volume 2* at Table 8C-8.

1 the County's buffers compare favorably the great majority of the time to protect wetland  
2 habitat.<sup>172</sup>

3  
4 **Conclusion:** Based on Ecology's recommendations in the record based on BAS, the  
5 comparison of the County's buffers to Ecology's, Ecology's statement that the County's  
6 buffer widths are adequate to protect for impacts of water quality from stormwater and  
7 herbicides and pesticides, and the impracticality of providing buffers that assure wetlands  
8 will be protected from pets, the Board finds that WEAN and CARE have not carried their  
9 burden of proof that Ecology's buffers do not comply with RCW 36.70A.060(2) or RCW  
10 36.70A.172(1) in regard to this allegation.  
11

#### 12 Spatial Considerations in Determining Buffers

13  
14 WEAN argues that the Ordinance does not provide criteria to determine spatial  
15 considerations of the development when determining buffers. As the County points out ICC  
16 17.02.090 4.D. does require the County to consider potential adverse impacts to wetland  
17 functions expected to be caused by site-specific characteristics and the orientation or  
18 location of the proposed use or structure in relation to the wetland. This provision allows the  
19 County to re-classify the intensity of use if the proposal is not modified by the applicant. The  
20 Board does not read this requirement to apply to only low intensity uses. WEAN makes no  
21 suggestions for these criteria and points to no BAS or recommendations based on BAS as  
22 to what these criteria should be.  
23

24  
25 **Conclusion:** Based on the foregoing, the Board finds that WEAN has not carried its burden  
26 of proof that County's lack of criteria for considering spatial considerations for determining  
27 wetland buffers or ICC 17.02.90 4 D is a clearly erroneous violation of RCW 36.70A.060(2)  
28 and RCW 36.70A.172(1).  
29

#### 30 Buffers for Forested Wetlands

31  
32  

---

<sup>172</sup> 9343B, Volume 2, Appendix C, pp. 6 - 8; ICC 17.02.090 F; R9827.

1 WEAN and CARE contend that not all forested wetlands would receive adequate buffers,  
2 particularly if they received a low intensity water quality buffer. Evidence in the record  
3 provides the explanation that forested wetlands provide important habitat functions. The  
4 *Phase 2 Report* attributes the importance of forested wetlands to the persistence of wildlife  
5 (especially amphibians) and native plants because they function to maintain natural patterns  
6 of temperature, humidity, wind, and soil.<sup>173</sup> The *Phase 2 Report* says, “For forested  
7 wetlands, another consideration related to microclimate is the long-term reduction of the  
8 wooded buffer effectiveness as a result of tree blowdown.”<sup>174</sup> Additionally, the *Phase 2*  
9 *Report* and *Volume 2* both recount the results of several studies by Pollock and Kennard,  
10 also referenced in *Volume 1*, that recommend buffers of 76 to 115 feet for forested wetlands  
11 to prevent blowdown.<sup>175</sup>

12  
13  
14 WEAN puts forth the assumption that forested wetlands are native plant wetlands, a  
15 Category D wetland. WEAN says that the comparison of the buffer a Category D wetland  
16 would receive under the County’s rating system to the a wetland buffer rated by Ecology’s  
17 system shows that the habitat ratings would not produce large enough buffers for forested  
18 wetlands.

19  
20  
21 The Board notes *Volume 2*’s recommendations do not include other forested wetlands as a  
22 specific wetland type nor does the County’s approach.<sup>176</sup> Both systems’ rating sheets used  
23 to determine wetland buffers show points given for their habitat characteristics, including  
24 those related to forested wetlands.<sup>177</sup> However, from the comparison of buffers rated  
25 under the County’s system and Ecology’s, there is no way of discerning what wetlands in  
26 this comparison are actually forested.<sup>178</sup> If the primary function of a forested wetland is to  
27 provide habitat, as the *Phase 2 Report* explains, then it follows that in both Ecology’s and  
28

29  
30 <sup>173</sup> 9565-The Phase 2 Report at 45

31 <sup>174</sup> Id.

32 <sup>175</sup> Id.

<sup>176</sup> R9343 B *Volume 2* at Appendix 8C at 6 – 8; ICC 17.02A.090 F.

<sup>177</sup> R 9343C Washington State Wetland Rating System for Western Washington, Appendix A, Wetland Rating Form-Western Washington; County’s Exhibit 1, Attachment H, Wetland Buffer Worksheet.

<sup>178</sup> R 9789,90.

1 the County's systems forested wetlands would receive appropriate buffers based on their  
2 habitat quality. In the County's rating system, all buffers that receive scores requiring a  
3 buffer to protect habitat receive a buffer of at least 75 feet or as much as 300 feet, in line  
4 with *Volume 2's* observation that studies have shown buffers of at least 76 feet are needed  
5 to protect forested wetlands from blowdowns.  
6

7 For buffers for Mature Forested (MF) Wetlands, the science can be interpreted in two ways.  
8 First, as described above, Ecology recommends that Category I, analogous to Category A in  
9 the County's system, buffers should be determined by their habitat rating. As noted *supra* it  
10 also advises that forested wetlands should receive at least a 76 foot buffer, and all the  
11 County's wetlands that require habitat buffers require at least a buffer of 75 feet and as  
12 much as 300 feet.<sup>179</sup> In one instance it is possible that an old growth or MF Wetland with  
13 an outlet and low habitat score would receive a 45 foot buffer which is not consistent with  
14 the BAS in the record that a minimum buffer of 76 feet is needed to protect forested  
15 wetlands from blowdown. The County asserted that the statistical sampling performed by  
16 Dr. Adamus did not reveal any MF wetlands within Island County. The Board's review of Dr.  
17 Adamus's work presented in both the *Phase 1 Report* and the *Phase 2 Report* appear to  
18 support this statement. However, it is unclear whether this conclusion was based on  
19 Ecology's definition of MF wetlands or the County's new definition which establishes a  
20 criterion of 18 inches dbh as opposed to Ecology's 21 inch measurement. As such, there  
21 may be MF wetlands in need of protection within Island County.<sup>180</sup>  
22  
23  
24

25 **Conclusion:** Nevertheless, given the conflicting evidence in the record and the deference  
26 that needs to be given to County decisions in light of local circumstances, the Board does  
27 not find the buffers for forested wetlands, including MF wetlands fail to comply with RCW  
28 36.70A.060(2) or RCW 36.70A.172(1).  
29

### 30 Rural Stewardship Plans (RSP)

31 \_\_\_\_\_  
32

<sup>179</sup> ICC 17.02A.090 F.

<sup>180</sup> R8899 *Phase 1 Report* at Appendix D.

1 Ecology's guidance says that the goal of a RSP is better management of wetlands than  
2 could be achieved through strict adherence to rigid guidelines. RSPs establish a  
3 collaborative agreement between property owners and a local government to tailor  
4 management specific to a rural parcel of land. Ecology's recommendations include  
5 provisions for restoration, maintenance, long-term monitoring and specifications for the  
6 width of buffers within the RSP. <sup>181</sup>  
7

8  
9 Island County allows for a reduction in the intensity determination of a development  
10 proposal from high to medium or medium to low based on the County approval of a RSP. <sup>182</sup>  
11 The specifics for what the Plan needs to include contains mandatory provisions and some  
12 choices among mandatory options contained in the Rural Stewardship Guide that is  
13 adopted by the County after a public hearing. <sup>183</sup>  
14

15 WEAN's Issue Statement challenges the Rural Stewardship Guide and several Island  
16 County code provisions dealing with RSPs. WEAN contends the County's permitting of  
17 RSPs for buffer reductions do not protect wetlands for the following reasons: (1) no required  
18 verification of owner conducted wetland determinations, delineations and typing or  
19 restoration, maintenance or monitoring, (2) no public scrutiny of wetland reductions because  
20 they are Type One decisions that require no public notice or review and (3) criteria for RSPs  
21 do not justify buffer reductions.  
22

23  
24 The Board disagrees that RSPs do not require verification by the County of wetland  
25 determinations, delineations, typing or restoration. ICC17.02A.040 D 5, requires that if a  
26 RSP is submitted with a development proposal, then it is subject to the review process for  
27 that type of proposal. The County bears the responsibility of approving the proposal and  
28 this is done either by a Planning Administrator, a Hearings Examiner, or the County  
29  
30  
31

32 <sup>181</sup> R9343B *Volume 2* at 11.

<sup>182</sup> ICC 17.02.090 D.5.

<sup>183</sup> ICC 17.020A.040 C.2.

1 Commission.<sup>184</sup> None of the County's review processes delegate these decisions to  
2 property owners.

3  
4 WEAN objects that for some RSPs no public notice is required. This is true for Type 1  
5 decisions that include reasonable use determinations, single family home permits, and  
6 RSPs.<sup>185</sup> ICC 16.18.040 states that Type 1 decisions are decisions that require little  
7 discretion on the part of the administrator. From our review of the RSP Application, we find  
8 that is true. The County's RSP Application presents mandatory and optional choices from  
9 which a property owner must choose. We find that the mandatory choices address several  
10 of WEAN's objections to the ordinance concerning use of pesticides, herbicides and  
11 reduction of impervious surface and clearing.<sup>186</sup> This application was adopted by  
12 Ordinance C-63-08, and therefore is part of the County's regulations for protecting  
13 wetlands.<sup>187</sup>

14  
15  
16 In answer to WEAN's concerns about lack of RSP monitoring, the County maintains that this  
17 will be addressed through its adaptive management program. However, unlike the County's  
18 provision for mitigation monitoring that allows the County reasonable access to property  
19 where mitigation is being allowed (ICC 17.02A.070 A.3), the County only will conduct  
20 monitoring activities on properties that it has been granted permission to enter. While the  
21 County's Wetland Monitoring Reports include a review of Land Use Intensity Determinations  
22 (ICC 17.02A.080 G. 7), this does not ensure that a RSP will continue to provide the wetland  
23 protection to which the property owner agreed.

24  
25  
26 **Conclusion:** The Board finds that the inclusion of RSPs in the County's wetland protection  
27 measures could provide for better management of wetlands. We find that they require  
28 County verification. We conclude that the lack of notice for Type 1 RSPs is not clearly  
29

30  
31 \_\_\_\_\_  
<sup>184</sup> ICC 16.18.040. Table B.

32 <sup>185</sup> The Board assumes that these are RSPs for the purpose of reducing property tax evaluation and those  
submitted with Type 1 decisions.

<sup>186</sup> Exhibit I to County's Plan. WEAN challenges this Exhibit, but calls it the Rural Stewardship Guide.

<sup>187</sup> R9849 at 1.

1 erroneous. Even so, the Board finds that the lack of monitoring of RSPs does not ensure  
2 that the RSPs will continue to be implemented and that lack is not consistent with Ecology's  
3 BAS-based recommendation, the only science in the record for this issue. For those  
4 reasons, we find the lack of monitoring of RSPs does not comply with RCW 36.70A.060(2)  
5 and RCW 36.70A.172(1).  
6

7  
8 **Overall Conclusion: Buffers**

9 The Board concludes that the County's system for determining buffers set out in ICC  
10 17.020A.090 will not for the most part produce inadequate buffers and for the most part  
11 complies with RCW 36.70A.060(2) and RCW 36.70A.172(1) except for the ICC 17.020A.  
12 090 F. 5's lack of requirement for monitoring RSPs and ICC 17.02A.090 G. 5's limitation on  
13 buffer increases to 25 percent. WEAN claims 17.02A.030 Definitions: Buffers, 17.02A.030  
14 Definitions: Highly Erodible Soils, 17.02A.040, 17.02A.080, RCW 17.02A.090 and Rural  
15 Stewardship Guide (Exhibit-I), do not comply with RCW 36.70A.060(2) and RCW  
16 36.70A.172(1) because the Ordinance's inadequate consideration of spatial considerations,  
17 lack of requirements for increasing vegetation, the use of herbicides, pesticides, and control  
18 of pets, buffers for mature forested wetlands, and notice and verification of RSPs. Based  
19 on the foregoing discussion and analysis, except for ICC 17.020A.090 G.5, the RSP  
20 Application, and ICC 17.02A.090 D.5, the Board concludes that WEAN has not carried its  
21 burden of proof that the County's system for determining buffers does not comply with RCW  
22 36.70A.060(2) and RCW 36.70A.172(1).  
23  
24

25  
26 *J. Lack of Permanent Fencing Required*

27 **Positions of the Parties**

28 *WEAN's Issue Eleven:* Does C-02-08 fail to comply with RCW 36.70A.060(2) and RCW  
29 36.70A.172(1) because it fails to protect critical areas and include the best available science  
30 by not allowing permanent fencing of critical areas and buffers to be required?  
31  
32

1 WEAN states that permanent fencing of wetlands is a recognized wetland protection tool.  
2 WEAN argues that the Ordinance's lack of a requirement to at least allow for permanent  
3 fencing of wetlands does comply with the GMA.<sup>188</sup>

4  
5 The County replies that ICC 17.020.040 B. allows the Planning Director to require all CAs  
6 and CA buffers to be permanently marked and requires temporary fencing when  
7 undisturbed vegetation is retained. The County asserts that WEAN does not cite any  
8 authority for its argument.<sup>189</sup>

9  
10 WEAN says that by not even providing the authority to require permanent fencing the  
11 County is not considering WEAN's failure to protect claim which is independent of the BAS  
12 challenge. The County has eliminated the possibility of using the acknowledged "most  
13 effective method of protection" and has offered no rational basis for departing from BAS.  
14 Also, WEAN replies that the use of temporary measures has no bearing on the use of  
15 permanent measures.<sup>190</sup>

### 17 18 **Board Discussion**

19 WEAN alleges that the County's failure to include the option to require permanent fencing of  
20 wetlands and their buffers in the Ordinance fails to protect wetlands and does not comply  
21 with the requirement to include BAS. ICC 17.02A.040 B. Critical Areas Protection  
22 Measures, does not include the authority to require permanent fencing of wetland buffers.  
23 WEAN cites Ecology's *Volume 1* that says that permanent fencing effective in preventing  
24 the alteration of buffers by humans and BAS requires the County to include options for  
25 fencing.<sup>191</sup> Ecology's *Volume 2*, recommends various types of measures to prevent human  
26 and pet buffer disturbance that includes including permanent fencing, planting of dense  
27 vegetation, and putting the wetland and its buffer in a separate tract.<sup>192</sup> CTED's *Critical*  
28  
29

30  
31 \_\_\_\_\_  
32 <sup>188</sup> WEAN's Hearing Brief at 36.

<sup>189</sup> Island County's Response Brief at 41.

<sup>190</sup> WEAN' Reply at 28 and 29.

<sup>191</sup> R9343B *Volume 1* at 5-50.

<sup>192</sup> R9343 B *Volume 2* at Appendix D at 10

1 *Areas Assistance Handbook's* Model Ordinance provisions include a provision for  
2 permanent markers.<sup>193</sup> While ICC17.02A.040 B. does not include any of the protection tools  
3 listed in *Volume 2*, it does allow for affixing permanent markers to delineate a critical area  
4 and its buffer, as suggested by CTED. Also, 17.02.090 F. allows the County to require  
5 buffer enhancement if buffer vegetation is inadequate to protect the functions and values of  
6 a critical area, so dense vegetation could be provided under this provision.  
7

8 **Conclusion:** From our review of BAS in the record, the Board finds that the County has  
9 provided some tools that could prevent human and pet intrusion in wetlands and their  
10 buffers. While it seems short sighted not to employ the broadest range of tools including  
11 permanent fencing to prevent this type of intrusion into wetlands and their buffers, the Board  
12 does not find that BAS in the record requires permanent fencing. Therefore, the Board  
13 finds that not providing the option for permanent fencing is not a clearly erroneous violation  
14 of RCW 36.70A.060(2) and RCW 36.70A.172(1).  
15  
16

17 K. Monitoring and Adaptive Management

18 WEAN's Issue 12: Does C-02-08 generally, including 17.02.080, fail to comply with RCW  
19 36.70A.060(2) and RCW 36.70A.172(1), and fail to implement Comprehensive Plan  
20 Wetland Overlay policy A because it fails to protect critical areas and include the best  
21 available science by not requiring protective action before damage occurs, and by not  
22 requiring corrective action when damage to critical areas is detected?  
23

24 **Positions of the Parties**

25 WEAN urges the Board to find ICC 17.02A.080, the County's monitoring and adaptive  
26 management program, noncompliant for two reasons. First, it does not require stopping  
27 ongoing damage. Second, the time that the County may spend seeking compliance is  
28 unlimited. For these reasons, WEAN argues it fails the Board's standards for adaptive  
29 management.<sup>194</sup>  
30  
31  
32

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<sup>193</sup> Critical Areas Assistance Handbook at A-29.

<sup>194</sup> WEAN' Hearing Brief at 36 and 37.

1 The County responds that its program is pioneering and no standards exist to measure  
2 wetland health, so it hasn't set benchmarks. The County states that it will use its  
3 monitoring program to both determine if enforcement is needed and the effectiveness of its  
4 CA regulations. The County asserts that WEAN has already challenged its surface water  
5 management monitoring program and this Board's Compliance Order/Final Decision and  
6 Order in *WEAN v. Island County*, WWGMHB Case Nos. 98-2-0023c and 06-2-0012c found  
7 WEAN's arguments without merit.<sup>195</sup>  
8

9  
10 WEAN replies the County concedes it has developed no benchmarks, therefore, WEAN  
11 contends that without benchmarks there are no triggers for recognizing damage or for taking  
12 corrective action. Another deficiency according to WEAN is no monitoring of land use  
13 intensity outside the wetland and its buffer.<sup>196</sup>  
14

#### 15 **Board Discussion**

16 The Board has made several rulings in the recent past on monitoring and adaptive  
17 management.<sup>197</sup> In those cases, the Board looked to WAC 365-195 -920 which says:  
18

19 **Criteria for addressing inadequate scientific information.**—Where there is  
20 an absence of valid scientific information or incomplete scientific information  
21 relating to a county's or city's critical areas, leading to uncertainty about which  
22 development and land uses could lead to harm of critical areas or uncertainty  
23 about the risk to critical area function of permitting development, counties and  
24 cities should use the following approach:

25 (1) A "precautionary or a no risk approach," in which development and land  
26 use activities are strictly limited until the uncertainty is sufficiently resolved; and

27 (2) As an interim approach, an effective adaptive management program that  
28 relies on scientific methods to evaluate how well regulatory and nonregulatory

29  
30 <sup>195</sup> Island County's Response Brief at 41 and 42.

31 <sup>196</sup> WEAN's Reply at 28 and 29.

32 <sup>197</sup> See *Swinomish Tribe v. Skagit County (Swinomish)*, WWGMHB 02-2-0012 (Compliance Order, December 12, 2003 and Compliance Order, January 13, 2005), *Olympic Environmental Council v. Jefferson County (Jefferson County)*, WWGMHB 02-2-0015, (Compliance Order, October 31, 2003), and *Whidbey Environmental Council v. Island County (WEAN)*, WWGMHB Case No. 98-2-0023c (Order Finding Compliance for Critical Areas Protection in Rural Lands, August 6, 2003).

1 actions achieve their objectives. Management, policy, and regulatory actions  
2 are treated as experiments that are purposefully monitored and evaluated to  
3 determine whether they are effective and, if not, how they should be improved  
4 to increase their effectiveness. An adaptive management program is a formal  
5 and deliberate scientific approach to taking action and obtaining information in  
6 the face of uncertainty. To effectively implement an adaptive management  
7 program, counties and cities should be willing to:

8 (a) Address funding for the research component of the adaptive  
9 management program;

10 (b) Change course based on the results and interpretation of new  
11 information that resolves uncertainties; and

12 (c) Commit to the appropriate time frame and scale necessary to reliably  
13 evaluate regulatory and nonregulatory actions affecting critical areas protection  
14 and anadromous fisheries.

15 The *Swinomish, Jefferson County, and WEAN* cases can be distinguished from this case  
16 because the situation addressed in those cases was different. In *Swinomish and Jefferson*  
17 *County*, these counties had developed less than precautionary measures. In *Swinomish*,  
18 Skagit County adopted water course protection measures and voluntary agricultural best  
19 management practices in lieu of protective buffers to protect fish and wildlife habitat in  
20 agricultural lands and planned to use a monitoring and adaptive management program that  
21 had no benchmarks or triggers to adjust their regulations if monitoring showed violation of  
22 “do no harm standard.”<sup>198</sup> In *Jefferson County*, the County continued to allow chloride  
23 levels to rise above levels where scientific consensus existed that those levels indicated sea  
24 water intrusion.<sup>199</sup> In *WEAN*, Island County adopted a system that included the National  
25 Conservation Resources Service (NCRS) Best Management Practices (BMPs) to protect  
26 agricultural activities in rural lands and CTED, Ecology, and Fish and Wildlife recommended  
27 a monitoring and adaptive management program due to the lack of information about  
28 implementation of NCRS BMPs.<sup>200</sup> Further, in Skagit County there was uncertainty about  
29  
30  
31

32 <sup>198</sup> *Swinomish* at 47 and 48.

<sup>199</sup> *Jefferson County* at 28.

<sup>200</sup> *WEAN* at 15.

1 information about fish and wildlife habitat areas and in Jefferson County little information  
2 about seawater intrusion in its coastal areas. In these situations, the Board found an  
3 adaptive management program with benchmarks, triggers, and assurance that needed  
4 corrective action would be taken was necessary.<sup>201</sup>  
5

6 The situation in this case is different for several reasons. First, Island County has done an  
7 extensive study of the health of its wetlands.<sup>202</sup> Second, the County has adopted a program  
8 that includes buffers to protect its wetlands that compares favorably with the  
9 recommendations of Ecology, based on BAS, and which Ecology has stated support. While  
10 Ecology acknowledges that its wetland protection recommendations all involve a moderate  
11 amount risk, it appears that Ecology finds the amount of risk Island County has undertaken  
12 is acceptable. The County is following the recommendations in Volume 2-on monitoring  
13 and adaptive management that include annual reporting of trends, compliance actions, and  
14 source identification, wetland monitoring priorities, approved development proposals that  
15 included wetland buffer alteration, review of land intensity determinations, buffer  
16 modification decisions, and summary of wetland health and effectiveness of critical areas  
17 regulations.<sup>203</sup> Therefore, because Island County is well along is establishing a baseline for  
18 certain wetland parameters due the completion of the assessment and survey completed for  
19 the *Phase 1 Report*, has adopted a system of protective buffers, and is following Ecology's  
20 recommendations on what kind of information to collect and report, the Board finds that an  
21 adaptive management and monitoring program with benchmarks and triggering mechanism  
22 that the Board found necessary in previous cases is not critical at this stage of the County's  
23 monitoring and adaptive management program.  
24  
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30 <sup>201</sup> Currently Jefferson County has a compliant monitoring and adaptive management program for seawater  
31 intrusion, and Island County's adopted management program related to its NCRS BMPs was found compliant.  
32 Skagit County's program remains noncompliant and is awaiting the outcome of the negotiations taking place  
as a result SSB 5248.

<sup>202</sup> R 8899 *Phase 1 Report* at 11-15.

<sup>203</sup> R 9343B *Volume 2* at 8-12 and 8-13 and ICC 17,02A.080 G.

1 As for WEAN's concerns that the County's adaptive management program does not provide  
2 for swift enforcement, this is not the purpose of the County's program. ICC 17.02A.080 A.  
3 states,

4       The primary purpose of the County's Wetland Monitoring Program will be to  
5 determine the overall health of a Wetland. To do so, the County will track both  
6 chemical indicators through measuring water quality and biological indicators by  
7 sampling Wetland Vegetation. These measures will be used to evaluate the  
8 effectiveness of County's regulations.

9 The County's primary enforcement tools are provided in ICC 17.03.260 and can be used to  
10 enforce violations of the County's critical areas regulations. The monitoring and adaptive  
11 management program allows for enforcement if the County's monitoring system detects a  
12 change in wetland health and can determine its source. If a change is detected, the County  
13 will encourage voluntary compliance before it initiates compliance action under ICC 17.03.  
14 260.<sup>204</sup> WEAN objects that the County has not limited the amount of time for  
15 encouragement before it takes enforcement action. We do not find a lack of a deadline for  
16 initiating enforcement actions noncompliant, as depending on the type of violation, flexibility  
17 might be needed, and the sequence described by the County is the normal process in  
18 enforcement actions. Additionally, the Board finds that these provisions enhance the  
19 County's enforcement program to detect violations and is proactive, as usually enforcement  
20 works on a compliant driven system and the County has an enforcement system to address  
21 complaints or other violations it discovers or are reported.  
22  
23  
24

25 **Conclusion:** Based on the foregoing, the Board finds that WEAN has not carried its burden  
26 that the County's monitoring and adaptive management program and ICC 17.02.080 does  
27 not comply with RCW 36.70A.060(2) and RCW 36.70A.172(1). In fact, the Board  
28 commends the County on instituting a monitoring and adaptive management program so its  
29 regulations' effect can continue to be evaluated.  
30  
31  
32

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<sup>204</sup> ICC 17.020A.080 F.

1 L. Wetland Identification Guide

2 CARE's Issue 5: Does Island County's failure to adopt standards for the dissemination of  
3 accurate information to the public regarding the identification and protection of wetlands,  
4 and adoption of an incomplete and inaccurate "Wetland Identification Guide" as Exhibit H to  
5 Ordinance No. C-02-08-PLG-011-07, violate the Island County Comprehensive Plan at  
6 Policy Plan/Land Use Element pp. 1-50 to 1-51, Island County Comprehensive Plan Policies  
7 Critical Areas 1, 3-4, 11, RCW 36.70A.020(9-10), 36.70A.040, 36.70A.060, 36.70A.130, and  
8 36.70A.172?

9 **Positions of the Parties**

10 CARE alleges the County's incomplete and misleading Wetland Identification Guide (Guide)  
11 misrepresents the wetland protection regulations a citizen must follow. According to CARE  
12 the deficiencies in the Wetland Identification Guide include the following: the lack of  
13 explanation that delineations must be made to the Washington State Wetland Delineation  
14 Manual; expectations that homeowners make complex determinations about wetland plant  
15 species; incomplete information on herbaceous vegetation and grasses, hydric soils, and  
16 bog characteristics; and failure to inform homeowners that they cannot grade wetlands  
17 without a permit.<sup>205</sup>

18  
19 The County replies the Board of County Commissioners did not adopt the Guide and the  
20 Guide to which CARE refers is one attached to the Petition for Review, an earlier draft. The  
21 Guide currently being used is Exhibit R 9861. The County declares that it adopted only the  
22 Field Indicators, Land Intensity, and Wetland Buffer Worksheets. The County also says that  
23 CARE ignores the fact that technical determinations are made by the County, not the  
24 landowner, and notes that CARE does not criticize the Field Indicators Worksheet which is a  
25 document for use of single-family homeowners. The County points out that CARE and the  
26 County disagree on the role homeowners should play in the review and regulation of  
27 wetlands. The County believes that homeowners will be more invested in outcomes if they  
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<sup>205</sup> CARE's Hearing on the Merits Brief at 18 and 19.  
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1 know how determinations are made and reasons for restrictions. The County observes the  
2 only claims of violations are to RCW 36.70A.040(4) and RCW 36.70A.060<sup>206</sup>

3  
4 **Board Discussion**

5 The County states and the Ordinance confirms<sup>207</sup> that the County did not adopt the Guide,  
6 but adopted only the Field Indicators, Land Intensity, and Wetland Buffer Worksheets. RCW  
7 36.70A.280 gives limits the Board's jurisdiction to

8 "only those petitions alleging either: (a) That, except as provided otherwise by this  
9 subsection, a state agency, county, or city planning under this chapter is not in  
10 compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to  
11 the adoption of shoreline master programs or amendments thereto, or chapter  
12 43.21C RCW as it relates to plans, development regulations, or amendments,  
13 adopted under RCW 36.70A.040 or chapter 90.58 RCW...."

14 Therefore, because the Guide is neither an adopted comprehensive plan or development  
15 regulation amendment, the Board has no jurisdiction to decide on its compliance with the  
16 GMA.

17  
18 **Conclusion:** Because the Guide is not an adopted comprehensive plan or development  
19 regulation amendment, the Board does not have jurisdiction over the Guide pursuant to  
20 RCW 36.70A.280. Further, the Field Indicators, Land Intensity, and Wetland Buffer  
21 Worksheets adopted by County, refer to the Guide as an informational resource, and allow  
22 and assist property owners' participation in determining land use intensity and buffer widths.  
23  
24

25 M. Invalidity

26 *WEAN ISSUE 13:* Does all or part of Ordinance C-02-08 substantially interfere with the  
27 fulfillment of the goals in RCW 36.70A.020(9), (10) and should those portions found to  
28 substantially interfere be determined invalid?

29 **Positions of the Parties**  
30  
31  
32

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<sup>206</sup> Island County's Response Brief at 24 and 25.

<sup>207</sup> County's Exhibit 1, Ordinance C-6308, R9849.

1 WEAN argues that numerous provisions of C-02-08 fail to comply with GMA requirements.  
2 WEAN points out that this Board has held that a finding of substantial interference is  
3 warranted when the actions that may occur will prevent or make it difficult for future  
4 compliance to occur. WEAN alleges that the Ordinance's provisions are so intertwined that  
5 the whole Ordinance needs to be found invalid. WEAN contends that actions under any  
6 applications that vest will result in damage to critical areas and substantially interfere with  
7 Goal 9, the GMA's open space and recreation goal and Goal 10, the environmental  
8 protection goal.<sup>208</sup>

10  
11 CARE does not raise the need to impose invalidity as an issue, but seeks it as a remedy for  
12 many of the same reasons that WEAN does. CARE argues that building or earth movement  
13 can damage the wetland forever, and continued validity of the County's Ordinance will allow  
14 vesting to occur that will allow this damage.<sup>209</sup>

15  
16 The County says that CARE and WEAN offer only brief and conclusory arguments<sup>210</sup>. At  
17 argument, the County declared that the County generally issues only 600 residential  
18 building permits a year and mostly on already platted lots.<sup>211</sup> Additionally, the County  
19 declared that the Ordinance contains no savings clause so that finding the County's  
20 Ordinance to be invalid would leave the County with no wetland protections.  
21

## 22 **Board Discussion**

23  
24 The Board has found in numerous decisions that invalidity should be imposed where there  
25 is reasonable risk that will development will occur during the planning period that will  
26  
27  
28  
29  
30

31 <sup>208</sup> WEAN's Hearing Brief at 37.

32 <sup>209</sup> CARE's Hearing Brief on the Merits at 34.

<sup>210</sup> Island County's Response Brief at 42.

<sup>211</sup> Id at 9.

1 interfere with the city or county's ability to engage in planning according to the goals and  
2 requirements of the GMA.<sup>212</sup>

3  
4 Here, the Board has found noncompliance for three sections of ICC 17.020.A, the County's  
5 new wetland protection program: ICC 17.02A.020 Definition of Reasonable Use, ICC  
6 17.02A.090 G.5, the limits on buffer modification to 25 percent, and ICC 17.02.090 D.5 and  
7 the Rural Stewardship Plan application that allows a reduction of intensity of a RSP without  
8 a monitoring requirement. However, while these requirements could cause a substantial  
9 loss of wetland function and value over time, the provisions of ICC 17.02A.040 A.5, ICC  
10 17.02.050 B.1 and ICC 17.02A.080 mitigate this risk. The fact that the County has no  
11 savings clause to its Ordinance leaves a greater risk that the County would be left without  
12 any wetland protections and is a greater risk than keeping regulations in place.

13  
14  
15 **Conclusions:** For these reasons, the Board finds that the County's noncompliant  
16 provisions will not substantially interfere with GMA goals 9 and 10.  
17

## 18 19 VII. FINDINGS OF FACT

- 20 1. Island County is located west of the crest of the Cascade Mountains and is required  
21 to plan in accordance with RCW 36.70A.040.  
22 2. On March 17, 2008 Island County adopted County approved Ordinance C-63-08  
23 adopting a new program of development regulations to protect wetlands.  
24 3. CARE filed a timely petition for review (PFR) on May 21, 2008. WEAN filed a timely  
25 PFR on May 20, 2008 and an amended PFR on June 6, 2008.  
26 4. All parties accept Ecology's *Wetlands in Washington Volume 1, Synthesis of the*  
27 *Science* and *Volume 2, Protecting and Managing Wetlands* as BAS.  
28 5. *Volume 2* acknowledges that local governments are not in a position to implement a  
29 landscape –based approach that it describes and many jurisdictions will have  
30 difficulty meeting the GMA deadline for updates, even without incorporating a  
31 landscape perspective.

32  

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212 *Futurewise v. Whatcom County*, WWGMHB Case No. 05-2-0013 (Final Decision and Order, September 13, 2005). *Vinaterieri v. Lewis County*, WWGMHB Case No. 03-20020c (Final Decision and Order) *Irondale Community Action Neighbors. V. Jefferson County*, WWGMHB 04-2-0011(Final Decision and Order).

- 1 6. *Volume 2* recommends local governments should at a minimum adopt strong wetland  
2 regulations until they can incorporate landscape-based plans, policies, and non-  
3 regulatory elements.
- 4 7. *Volume 2* points out methods for landscape analysis are currently lacking an analysis  
5 of wildlife habitat and corridors.
- 6 8. In relationship to Land Use Intensity and Wetland Buffers, the County incorporates  
7 the definition of impervious surface provided within its zoning code at ICC 17.03.040.
- 8 9. WEAN references several jurisdictions from around the country which treat graveled  
9 driving and parking surfaces as impervious as well as Washington's own Department  
10 of Ecology.
- 11 10. All of these documents relate to the management of stormwater and not the  
12 protection of a critical area.
- 13 11. The management of stormwater addresses both water quality and water quantity and  
14 although it may have science behind certain elements, other aspects of stormwater  
15 management are engineer driven.
- 16 12. Simply citing to code provisions from out-of-state jurisdictions does not necessarily  
17 correlate to a finding that these provisions were adopted based on a standard of  
18 BAS.
- 19 13. Critical Areas Policy 1 requires the consideration of BAS.
- 20 14. Critical Areas Policy 3 allows the County to consider other sources of BAS that are  
21 not based on local circumstances.
- 22 15. The appropriate place to incorporate standards that apply to "reasonable and  
23 practical" is in the development regulations.
- 24 16. Critical Areas Policy 4 is consistent with the concept of mitigation sequencing  
25 supported by BAS in the record. In considering whether to grant a "reasonable use",  
26 mitigation sequencing requires that avoidance of impacts should be sought first but  
27 recognizes that other options of reduction, restoration, and mitigation in that order  
28 may have to be employed.
- 29 17. CARE does not point to the science in the record that supports its contention that  
30 Critical Areas Policy 11 does not comply with RCW 36.70A.172(1).
- 31 18. Ecology has developed sources of BAS and recommendations based on that BAS  
32 assert that buffers provided to protect wetland species also protect most terrestrial  
species.
19. Ecology's recommendations for buffer widths are similar to the County's system for  
determining the appropriate buffer for a wetland, where the function of wetland that  
produces the highest score should determine the appropriate buffer.
20. The County's comparison of the application of its wetland protection system to  
statistically selected wetlands in Island County with Ecology's recommendations  
show that only in relatively few instances were buffers imposed under the County's  
system less than Ecology's recommended buffers.
21. The County's *Phase I Report* shows that relatively little clearing, filling, and grading in  
or near the County's wetlands is occurring and that these activities are declining  
based on the County's visits to 103 wetlands and an analysis of these wetlands

1 through maps, Geographic Information System (GIS) data, aerial photographs, and  
2 permit files.

- 3 22. ICC17.02A. 040 B.6 requires a notice be attached to the property's title for  
4 development near a critical area that identifies the type of critical area associated  
5 with the permitted development and any restrictions imposed by the County.  
6 23. The County requires each property owner to which a development permit is granted  
7 on land containing a critical area to file an affidavit with the County that contains the  
8 information for the notice. This affidavit also includes language that the land use  
9 intensity rating could restrict current and future land use activities on the property.  
10 This affidavit is filed with the auditor with a copy to the Planning Department for  
11 inclusion in the permit file.  
12 24. The Board's review of the Ordinance confirms that ICC 17.02.090 D provides for  
13 buffer determination for each new development proposal based on the intensity on a  
14 lot and that ICC17.02A.040 A.1, 5, 6, and ICC 17.02A.G.2 together provide for  
15 increasing buffers adjacent to existing development on a lot to achieve an  
16 appropriate overall buffer.  
17 25. The County's monitoring and adaptive management system that requires the  
18 County will review its land intensity determinations and a description of buffer  
19 alterations, the actions taken, and the reasons for the alteration and will publish  
20 them annually will assist the County and the public in determining whether its  
21 wetland protection program needs adjustment.  
22 26. According to Ecology's wetland rating system, mature forests are forests with an  
23 average dbh (average diameter) exceeding 21 inches or trees of 80 to 200 years old.  
24 27. The definitions that are contained within Ecology's wetland guidance documents for  
25 mature forests and mature forested wetlands are based on the Washington  
26 Department of Fish and Wildlife's definition for priority habitat.  
27 28. Ecology recognizes that mature trees within wetlands are smaller and reflect this in  
28 the rating system's emphasis as to the importance of age, rather than size.  
29 29. Approval of a Reasonable Use is mandated when the applicant has satisfied three  
30 criteria: (1) prepared a Reasonable Use Report, (2) the development proposal is a  
31 reasonable use of the lot *and* the alteration has been reduced as required by ICC  
32 17.02A.040.A.5, and (3) the Development Proposal includes mitigation if the impacts  
the use cannot be avoided, reduced, or restored.  
30. Mitigation sequencing is supported by Ecology's and CTED's recommendations  
based on BAS.  
31. Under the Island County CAO, to be "existing", a building, lot, or use must have been  
"legally established, created, or erected." Therefore, under the County's regulations  
an existing use can be either a legally established use currently authorized by the  
zoning code *or* a legally-established use that does not currently conform to the  
zoning code due to amendments that have occurred since the use was established.  
32. The County's permitting process improperly uses existing uses that are no longer  
consistent with its zoning code as one of the benchmark of uses in the vicinity of

- 1 critical areas and merely perpetuates the establishment of potential uses that are  
2 incompatible with BAS.
- 3 33. WAC 365-195-905 sets out the criteria to evaluate whether scientific information is  
4 BAS.
- 5 34. The *Phase 1 Report* is a scientific method that could be classified according to WAC  
6 365-195-905 as an Assessment and a Survey and uses aerial photographs and site  
7 visits in part to collect its data.
- 8 35. CTED and Ecology, agencies charged with providing guidance to cities and counties  
9 on how to include BAS in their critical areas ordinances support these methods as  
10 valid scientific methods to collect this kind of data.
- 11 36. The *Phase 2 Report* depicts its work as a synthesis of pertinent scientific knowledge  
12 done since the publication of *Volumes 1 and 2* regarding wetlands, as well as expert  
13 opinion of its author, Dr. Paul Adamus, a wetland scientist and wildlife biologist, that  
14 has been peer reviewed.
- 15 37. CARE does not provide any countering data on why the County's conclusions about  
16 sediment loading and nitrate concentrations in Island County should not be used to  
17 describe Island County's local circumstances nor any science that shows that Island  
18 County's farms produce similar impacts as livestock feedlots.
- 19 38. CTED and Ecology support the *Phase 2 Report* as a source of BAS.
- 20 39. The County's wetland protection measures adopted by the Ordinance correspond to  
21 recommendations for buffer widths described as Option Three in Ecology's *Volume 2*.
- 22 40. *Volume 2*'s Option Three does not include any direction that monitoring like the kind  
23 CARE asserts the County must adopt before pursuing the wetland protection  
24 program which it adopted.
- 25 41. ICC 17.02A.090 F. provides that during the development review process described in  
26 17.02A.040 A.6(b) and (d) and 17.02A.090 G.2., the Planning Director has discretion,  
27 when there is inadequate vegetation, to require the buffer be enhanced or  
28 compensated for so that the functions and values of the wetland are protected.
- 29 42. The County concedes that a 25 percent limitation on buffer increases is arbitrary.
- 30 43. The County's assertion that the Planning Commission felt the need to limit the  
31 Planning Director's discretion is not supported by evidence in the record.
- 32 44. WEAN makes no suggestions about what the criteria should be for determining  
buffers on spatial consideration and points to no BAS or recommendations based on  
BAS as to what these criteria should be.
45. *Phase 2 Report* attributes the importance of forested wetlands to the persistence of  
wildlife (especially amphibians) and native plants and because they function to  
maintain natural patterns of temperature, humidity, wind, and soil.
46. The *Phase 2 Report* and *Volume 2* both recount the results of several studies by  
Pollock and Kennard, also referenced in *Volume 1*, that recommend buffers of 76 to  
115 feet for forested wetlands to prevent blowdown or windthrow.
47. Ecology recommends that Category I buffers, analogous to Category A in the  
County's system, should be determined by their habitat rating.

- 1 48. The Board notes *Volume 2's* recommendations do not include other forested  
2 wetlands as a specific wetland type nor does the County's approach.
- 3 49. Both Ecology's and the County's rating systems' rating sheets used to determine  
4 wetland buffers show points given for their habitat characteristics, including those  
5 related to forested wetlands.
- 6 50. In the County's rating system, all buffers that receive scores requiring a buffer to  
7 protect habitat receive a buffer of at least 75 feet or as much as 300 feet.
- 8 51. For buffers for Mature Forested (MF) Wetlands, the science can be interpreted in two  
9 ways. Either they required a buffer from 76 to 115 feet to protect from blowdown or  
10 their buffers should be determined by their habitat rating.
- 11 52. According to the County's rating system, a MF Wetland with an outlet near a low  
12 intensity use with a low habitat rating would receive a 45 foot buffer, less than the  
13 recommended buffer to protect from blowdown.
- 14 53. Site visits to a statistical sample of County's wetlands revealed no Mature Forested  
15 Wetlands. However, it is unclear whether this conclusion was based on Ecology's  
16 definition of MF wetlands or the County's new definition which establishes a criterion  
17 of 18 inches dbh as opposed to Ecology's 21 inch measurement.
- 18 54. Ecology and CTED support the buffers in the Ordinance as sufficient to protect for  
19 water quality.
- 20 55. Ecology asserted that low intensity uses do not generate significant pollutants to  
21 require larger buffers.
- 22 56. *Volume 2* says that no specific information on impacts of domestic pets on wetlands  
23 has been found, but goes on to say some studies have found that housecats in  
24 residential developments near wetlands have a significant impact on birds, small  
25 mammals, and even some amphibians.
- 26 57. *Volume 2* recommends various types of measures to prevent human and pet buffer  
27 disturbance including permanent fencing, planting of dense vegetation, and putting  
28 the wetland and its buffer in a separate tract. <sup>213</sup> CTED's *Critical Areas Assistance  
29 Handbook's* Model Ordinance provisions include a provision for permanent markers.
- 30 58. The County's Ordinance allows for an increase in dense vegetation and permanent  
31 markers to delineate buffers.
- 32 59. Ecology's recommendations for Rural Stewardship Plans (RFPs) include provisions  
for restoration, maintenance, long-term monitoring and specifications for the width of  
buffers within the RSP.
60. This RSP Application was adopted by Ordinance C-63-08, and therefore is part of the  
County's regulations for protecting wetlands. This application does not contain any  
provisions for monitoring RSPs.
61. ICC17.02A.040 C.5 requires that if a RSP is submitted with a development proposal,  
then it is subject to the review process for that type of proposal. The County bears  
responsibility of approving the proposal and this is done either by a Planning

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<sup>213</sup> Volume 2 at Appendix D at 10  
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1 Administrator, a Hearings Examiner, or the County Commission. ICC 16.18.040.  
2 Table B.

- 3 62. The County is following the recommendations in *Volume 2's* recommendations on  
4 monitoring and adaptive management that includes annual reporting of trends,  
5 compliance actions, and source identification, wetland monitoring priorities,  
6 approved development proposals that included wetland buffer alteration, review of  
7 land intensity determinations, buffer modification decisions, and summary of wetland  
8 health and effectiveness of critical areas regulations.  
9 63. The *Phase 1 Report* has gone a long way in establishing a baseline for habitat  
10 conditions.  
11 64. The Rural Stewardship Plan Application that was adopted by the County and details  
12 the requirements for RSPs does not require monitoring.  
13 65. The County's primary enforcement tools are provided in ICC 17.03.260 and can be  
14 used to enforce violations of the County's critical areas regulations.  
15 66. The monitoring and adaptive management program allows for enforcement if the  
16 County's monitoring system detects a change in wetland health and can determine its  
17 source.  
18 67. The County has not adopted the Wetland Guide as a Comprehensive Plan policy or  
19 development regulation.  
20 68. Any Finding of Fact later determined to be a Conclusion of Law is adopted as such.

## 17 VIII. CONCLUSIONS OF LAW

- 18 A. The Board has jurisdiction over the subject matter and parties in this case except for  
19 the issues specified below.  
20 B. Petitioners CARE and WEAN have standing to raise the issues in this case except on  
21 those they were denied standing as stated in the Order on the Motion.  
22 C. The County's decision to use a site-based approach to protecting wetlands rather  
23 than a landscape-based approach is not a clearly erroneous violation of RCW  
24 36.70A.040(3), RCW 36.70A.060, and RCW 36.70A.170(1).  
25 D. WEAN's challenge to the definition set forth in ICC 17.03.040 is not untimely  
26 because WEAN is not challenging ICC 17.03.040 in isolation but the incorporation of  
27 this provision into the critical areas ordinance (CAO) which are required to include  
28 BAS.  
29 E. WEAN has failed to demonstrate that the County's CAO's definition for impervious  
30 surface as it relates to land use intensity for wetland protections violates RCW  
31 36.70A.172.  
32 F. The Board has no jurisdiction to determine Petitioners' claims as to whether the  
County's regulations exceed what is necessary to protect the County from a  
constitutionally-based takings claim as this is a question for the courts.  
G. The question of whether Island County's development regulations protect all the  
functions and values of wetlands and are supported by BAS is a GMA-based  
question over which the Board has jurisdiction.

- 1 H. Critical Areas Policies 1, 2, 4, and 11 comply with RCW 36.70A.172(1).  
2 I. CARE and WEAN have not carried their burden of proof that the County's system of  
3 determining wetland buffers do not protect habitat for terrestrial species or for that  
4 reason has not proved that the Ordinance does not comply with RCW 36.70A.060(2)  
5 and RCW 36.70A.172(1).  
6 J. The Board finds and concludes the County has sufficiently mitigated the risk that  
7 buffers for future development on a site cannot be adequately provided in its  
8 approach to determining wetland buffers based in part on land use intensity. For this  
9 reason this approach is not a clearly erroneous violation of RCW 36.70A.060(2) and  
10 RCW 36.70A.172(1).  
11 K. WEAN has failed to demonstrate that Island County's definition of mature forested  
12 wetlands, as set forth in ICC 17.02A.030, fails to comply with the GMA's requirement  
13 for BAS as provided in RCW 36.70A.172(1).  
14 L. The language of ICC 17.02A.030 Definition "Reasonable Use" which permits a  
15 determination of "reasonable use" to be based on an existing use that includes uses  
16 legally established, but which are no longer consistent with the current zoning code,  
17 does not comply with RCW 36.70A.172 and RCW 36.70A.060(2).  
18 M. The *Phase 1* can be considered BAS pursuant to WAC 365-195-905(5)(b) and RCW  
19 36.70A.172.  
20 N. CARE has not carried its burden of proof that the *Phase 2 Report* cannot be  
21 considered a source of BAS.  
22 O. ICC 17.020A.090 G.5 does not comply with RCW 36.70A.060(2) and RCW  
23 36.70A.172(1).  
24 P. Given the conflicting evidence in the record and the deference that needs to be given  
25 to County decisions based on local circumstances, the Board does not find the  
26 buffers for forested wetlands, including MF wetlands, fail to comply with RCW  
27 36.70A.060(2) or RCW 36.70A.172(1).  
28 Q. WEAN has not carried its burden of proof that the County's wetland protection  
29 measures do not protect the water quality function and value of wetlands from low  
30 intensity uses or do not comply with RCW 36.70A.060(2) or RCW 36.70A.172(1).  
31 R. WEAN has failed to carry its burden of proof to establish that the County's measures  
32 to protect wetlands and their buffers from human and pet intrusion violate RCW  
36.70A.172 or RCW 36.70 A.060(2).  
S. WEAN has not carried its burden of proof that not including the requirement for  
permanent fencing in its wetland protection measures is a clearly erroneous violation  
of RCW 36.70A.172(1) or RCW 36.70A.060(2).  
T. WEAN has not carried its burden of proof that the County's monitoring and adaptive  
management system (ICC 17.02A.080) does not comply with RCW 36.70A.060 and  
RCW 36.70A.172.  
U. The lack of monitoring provisions for rural RSPs cause ICC 17.02A.090 D.5 and the  
Rural Stewardship Application (Exhibit I) to not comply with RCW 36.70A.060(2) and  
RCW 36.70A.172(1).

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- V. The Board does not have jurisdiction over the Wetland Guide pursuant to RCW 36.70A.280.
- W. Any Conclusion of Law later determined to be a Finding of Fact is adopted as such.

**IX. ORDER**

The County must bring the wetland protection measures adopted by Ordinance C-9-63-08 found to be noncompliant in this order into compliance within the next 180 days according to the following schedule:

<b>Compliance Due</b>	May 13, 2009
County's Statement of Actions Taken Due	May 25, 2009
Petitioners' Objection to a Finding of Compliance, if any	June 8, 2009
County's Response, if needed	June 22, 2009
<b>Compliance Hearing</b>	June 29, 2009

So ordered this the 17<sup>th</sup> day of November, 2008.

\_\_\_\_\_  
Holly Gadbow, Board Member

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James McNamara, Board Member

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William Roehl, 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.**

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

5 **Enforcement.** The petition for judicial review of this Order shall be filed with the  
6 appropriate court and served on the Board, the Office of the Attorney General, and all  
7 parties within thirty days after service of the final order, as provided in RCW  
8 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,  
9 but service on the Board means actual receipt of the document at the Board office  
within thirty days after service of the final order.

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

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