

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

TULALIP TRIBES OF)	Case No. 96-3-0029
WASHINGTON,)	FINAL DECISION AND ORDER
Petitioners,)	
v.)	
SNOHOMISH COUNTY,)	
Respondent.)	
)	
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I. Procedural history

On July 12, 1996, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review from the Tulalip Tribes of Washington (the **Tribes**). The matter was assigned Case No. 96-3-0029, and is referred to as *Tulalip v. Snohomish County*. The Tribes challenge Snohomish County (the **County**) Amended Ordinance No. 96-011 (the **Ordinance**), amending interim development regulations for critical areas, on grounds that it does not comply with the Growth Management Act (**GMA** or the **Act**), the State Environmental Policy Act (**SEPA**), and certain decisions of this Board.

On September 5, 1996, the Board entered a “Prehearing Order” (the **Prehearing Order**). The Prehearing Order established September 13, 1996 as the deadline for the submittal of motions, including Motions to Supplement the Record.

On October 2, 1996, the Board entered an Order on Motions (the **Order on Motions**). The Order on Motions denied the “Tulalip Tribes’ Dispositive Motion for Determination that RCW 36.70A.172(1) Requires Local Governments to Use and Include the Best Available Science in Designating and Protecting Critical Areas and Request for Oral Argument” (the **Tribes’ Dispositive Motion**). The Order on Motions also denied the Tribes’ motion for witness testimony and directed the County to supplement the index with exhibits from CPSGMHB Case No. 95-3-0047 *Pilchuck, et al. v. Snohomish County (Pilchuck II)*. Order on Motions, at 4.

On October 11, 1996, the Board received “Snohomish County’s Response to Direction to Supplement the Index and Rebuttal Exhibit List.”

On October 14, 1996, the Board received from the Tulalip Tribes a “Motion to Reconsider” the

Order on Motions (the **Tribes' Motion to Reconsider**).

On October 17, 1996, the Board issued an "Order Requiring Response to Motion."

On October 18, 1996, the Board received "Snohomish County's Motion to Supplement the Record" (the **County's Motion to Supplement**), "Snohomish County's Supplement to the Index of the Record," "Snohomish County's Statement of Exhibits in Lieu of Stipulated Exhibit List" and "Revised Index of Documents Considered by the County in Enacting Amended Ordinance 96-011, Amending Critical Areas Regulations" (the **County's Revised Index**).

On October 23, 1996, the Board received the "Tulalip Tribes' Prehearing Memorandum" (the **Tribes' PHB**). On this same date, the Board received the "County's Response to Tulalip Tribes' Motion to Reconsider Interpretation of RCW 36.70A.172(1)."

On October 28, 1996, the Board received the "Tulalip Tribes' Reply Memorandum in Support of Motion for Reconsideration."

On November 1, 1996, the Board issued an "Order Denying Tulalips' Motion to Reconsider, Revising Date for Hearing on the Merits and Briefing Schedule and Setting Schedule for Oral Argument" (the **Order Denying Tribes' Motion**). The Order Denying Tribes' Motion also amended the schedule for the submittal of prehearing briefs.

On November 8, 1996, the Board received "Snohomish County's Prehearing Brief" (the **County PHB**). On this same date, the Board received "Snohomish County's Motion to Strike Appendix 2 to Tribes' Prehearing Brief and Objections to Unofficial Transcripts" (the **County's Motion to Strike**).

On November 14, 1996, the Board received "Tulalip Tribes' Reply Brief" (the **Tribes' Reply**).

On November 21, 1996, the Board received "Snohomish County's Request for Board to Take Official Notice of Tulalip Tribes' Zoning Ordinance" (the **County's Request for Official Notice**).

The Board held a hearing on the merits beginning at 10:00 a.m. on Tuesday, November 19, 1996, in the conference room of the Board's office at 2329 One Union Square in Seattle, Washington. Board members Chris Smith Towne, Edward G. McGuire and Joseph W. Tovar, presiding officer, were present for the Board. James H. Jones represented the Tulalip Tribes and Marya J. Silvernale represented the County. No witnesses testified.

On January 3, 1997, the Board received "Snohomish County's Statement of Supplemental Authority" to which was attached Exhibit A, a "Decision on Appeal" (the **Decision on Appeal**) entered in King County Superior Court in Case No. 96-2-05662-6 SEA, *Master Builders Association of King & Snohomish Counties v. Central Puget Sound Growth Management Hearings Board*. The Decision on Appeal was entered on December 18, 1996. This Superior Court case was an appeal by the Master Builders Association of the Board's Final Decision and Order in *Pilchuck II*.

II. ORDER ON MOTIONS

The County's Request for Official Notice of the Tulalip Tribes' Zoning Ordinance is **denied**.

The County's Motion to Strike Appendix 2 to the Tribes' PHB is **granted**.

III. FINDINGS OF FACT

1. On June 28, 1995, the County passed Ordinance 94-125, adopting the County's Comprehensive Plan. Exhibit (**Ex.**) 539.

2. On March 7, 1995, the County passed Ordinance 94-108, designating and adopting critical areas regulations (codified at Chapter 32.10 Snohomish County Code (**SCC**)). *Pilchuck II*, Finding of Fact 57.

3. On December 6, 1995, the Board issued its Final Decision and Order in *Pilchuck II*. The Board found the County's critical areas regulations in compliance with the Act with the following exceptions:

A. All provisions of the CAO [Ordinance 94-108] that exempt or exclude lands from being designated and/or protected as critical areas, or have that effect, including but not limited to SCC 32.10.030, .040, .110 (11, 21, 23, 33, 38, 41), .410, .420, .510, .520, and .560.

B. SCC 32.10.110 (14), part 300, SCC 32.10.310 and .320, for failure to define and regulate "fish and wildlife habitat *conservation areas*."

C. SCC 32.10.580(2) to the extent it addresses exemptions contained in SCC 32.10.510.

The Board's Order further provided:

The CAO is **remanded** and the County is directed to amend Ordinance 94-108 to bring it into compliance with the GMA, as interpreted by the Board in this decision.

Furthermore, because the County has already adopted a comprehensive plan, it is no longer possible for the County to adopt an interim critical areas ordinance. Rather, the critical areas ordinance(s) that the County adopts upon remand must be consistent with and implement its comprehensive plan pursuant to RCW 36.70A.040. This may be accomplished by a free-standing ordinance or by inclusion of a "critical areas chapter" in the County's yet-to-be-adopted GMA zoning ordinance. In either case, the process used to develop the County's critical areas ordinance implementing regulations must meet the requirements of RCW 36.70A.020(11) and RCW 36.70A.140, as well as any County adopted local procedures. (Emphasis in original.)

4. On April 30, 1996, the County passed Ordinance 96-011, amending chapter 32.10 SCC to comply with the Board's decision in *Pilchuck II*. Ordinance 96-011 amended, among other things, standard buffer width requirements of SCC 32.10.520. Amended buffer width requirements are summarized below.

Stream Rural Buffer Urban Buffer

Type 1 100 feet 100 feet

Type 2 100 feet 100 feet

Type 3 100 feet 100 feet with anadromous fish
50 feet without anadromous fish

Type 4 50 feet 25 feet

Type 5 25 feet 10 feet

Wetland Rural Buffer Urban Buffer

Category 1 100 feet 75 feet

Category 2 75 feet 50 feet

Category 3 50 feet 25 feet

Category 4 25 feet 25 feet

(Category 4 buffer width is dependent on vegetation type)

Ex. 99, at 20-21 (SCC 32.10.520 (1) - (4)).

5. On July 18, 1996, the Board issued its Finding of Compliance in *Pilchuck II*, finding that the County had procedurally complied with the Board's Order. The Board found that the issues of substantive compliance as to whether the County was required to eliminate the CAO distinction between urban and rural areas, and the compliance of Ordinance 96-011 with RCW 36.70A.172(1) would be addressed in Case No. 96-3-0029, *Tulalip v. Snohomish County*. *Pilchuck II*, Finding of Compliance, July 18, 1996, at 7.

6. The County considered numerous scientific and technical publications, listed in Ex. 546, in amending its critical areas ordinance. Among the publications considered are:

- *A Literature Review of Recommended Buffer Widths to Maintain Various Functions of Stream Riparian Areas*, Johnson & Ryba, Feb. 1992.
- *Buffer Needs of Wetland Wildlife (draft)* Washington Department of Wildlife, Habitat

Management Division, Nov. 27, 1991.

- *Management Proposal for Wetlands In Forested Environments (draft)*, Washington Department of Wildlife, Habitat Management Division, Sept. 1991.

- *Model Wetlands Protection Ordinance*, Department of Ecology, Sept. 1990.

- *Quilceda/Allen Watershed Characterization (draft)*, Snohomish County Surface Water Management Division for Quilceda/Allen Watershed Management Committee, May 1994.

- *Assessment of Cumulative Effects of Urbanization on Small Streams in the Puget Sound Lowland Ecoregion: Implications for Salmonid Resource Management*, Christopher W. May, 1996.

- *The New Watershed Imperative, A New Approach to Restore America's River Ecosystems and Biodiversity*, The Pacific Rivers Council, Eugene, Oregon, 1993.

7. The Department of Ecology's Model Wetlands Protection Ordinance utilizes standard buffer widths. Ex. T-50, at 21.

8. The County Plan's Natural Environment section contains the following plan policies:

1.C.8 The county shall coordinate and participate in the Watershed Analysis process being used by state and federal agencies.

...

3.D.7A tiered approach shall be used to classify wetlands based on their function and value. The size and placement of vegetated buffers shall be determined based on their classification and on their location in an urban or rural area in the county. Urban locations can support lesser buffer widths than rural locations.

...

3.F.3 The county shall identify and prioritize critical aquatic ecosystems for possible future acquisition of lands or easement rights.

...

4.D.1 The county shall develop watershed management plans which address area specific habitat needs of important fish and wildlife species and cumulative effects of land

management on fish and wildlife habitat. Appropriate watershed management policies may be adopted as part of the comprehensive plan. The county should implement watershed management to reduce nonpoint pollution of surface and groundwater.

...

4.D.6 The county shall consider incentives that encourage project applicants to commence land clearing only after permit approval in order to achieve protection of native growth, wildlife habitat or other sensitive areas.

...

4.F.2 The county shall investigate funding opportunities for the acquisition of habitat areas.

Ex. 539, at NE-3, NE-7, NE-8, NE-10, NE-11.

9. The County's critical areas regulations, chapter 32.10 SCC, integrate watershed level analysis concepts into specific regulations. For example, when mitigation is required for loss of functional value of wetlands, streams and buffers, off-site mitigation may be used

only in those situations where appropriate, adequate, on-site mitigation is not feasible to achieve. When off-site mitigation is allowed, it must occur within the same sub-drainage basin as the project impact SCC 32.10.560(1)(e).

10. The County's critical areas regulations state that the County shall investigate the feasibility of developing programs pertaining to:

(6) The future use of county watershed management plans approved pursuant to GMA. Watershed management plans should be integrated into this chapter and should provide a means of supplementing or replacing certain provisions of this chapter with basin specific watershed management plan provisions; . . .

(8) Analysis of functional values at individual wetland level and at broader watershed level; Chapter 32.10 SCC, Code Reviser's notes, § 4.

11. Pursuant to WAC 242-02-660, the Board takes official notice of the Decision on Appeal.

IV. Abandoned Issues

The Board's Prehearing Order reminds parties that "issues not briefed will be deemed to have been abandoned." **The Board holds that if a petitioner fails to brief an issue in its required**

Prehearing Brief, the issue will be deemed abandoned; it is not sufficient for a petitioner to brief an issue for the first time in a Reply Brief. [\[1\]](#)

V. Specific Legal Issues

For reasons of efficiency and clarity, the Board combines its discussion of Legal Issues 7.2, 1, 2, 8, 7.1, and 7.4. These issues are interconnected such that resolution of one issue is dependent on the resolution of another. Resolution of Legal Issue 7.2 is fundamental to resolving Legal Issues 1, 2, and 8. Resolution of Legal Issues 1, 2, and 8 necessarily answers Legal Issues 7.1 and 7.4.

A. LEGAL ISSUE NO. 7.2

Did the County, in adopting the Ordinance or otherwise, comply with the GMA provisions mentioned in Legal Issues 2-6, with respect to the failure of the regulations to provide for conducting watershed level analysis, and conducting and implementing watershed level analysis and management plans?

B. LEGAL ISSUE NO. 1

Did the adoption by Snohomish County (the County) of Ordinance No. 96-011 (the Ordinance) or its action(s) otherwise, constitute compliance with the County's obligation under RCW 36.70A.040, .060, .120, .140 and .170 to adopt final development regulations that designate and protect critical areas by the statutory deadline for the adoption of such regulations?

C. LEGAL ISSUE NO. 2

Did the County, by adopting the Ordinance or otherwise, comply with the requirements of RCW 36.70A.040, .060, .120, .140 and .170 to adopt final development regulations that designate and protect critical areas?

D. LEGAL ISSUE NO. 8

Did the County, by adopting the Ordinance or otherwise, comply with its obligation under RCW 36.70A.040, .060, .120, .140 and .170(1) to adopt final development regulations that designate and protect critical areas and that are consistent with and implement its comprehensive plan adopted under the GMA?

E. LEGAL ISSUE NO. 7.1

Did the County, in adopting the Ordinance or otherwise, comply with the GMA provisions mentioned in Legal Issues 2-6, with respect to the stream and wetland buffers of SCC 32.10.520?

F. LEGAL ISSUE NO. 7.4

Did the County, in adopting the Ordinance or otherwise, comply with the GMA provisions

mentioned in Legal Issues 2-6, with respect to the continued provision in SCC 32.10.520 of lesser protection of critical areas in urban areas than in rural areas?

Discussion

Abandoned Issues

Issues 1, 2, and 8 allege violations of five GMA provisions, RCW 36.70A.040, .060, .120, .140, and .170. Four of those provisions were not briefed by the Tribes. Section .040 requires, among other things, that local governments adopt development regulations that implement their comprehensive plans. Section .120 requires local governments to “perform [their] activities and make capital budget decisions in conformity with [their] comprehensive plan[s].” Section .140 addresses public participation requirements. Section .170 requires designation of natural resource lands and critical areas. The Tribes have failed to offer any legal argument explaining how the County has violated these four GMA provisions; only section .060 will be considered below. **The Board holds that the Tribes have abandoned Legal Issues 1, 2, and 8 as they relate to these four GMA provisions.**

Watershed Level Analysis and Implementation

The sole remaining substantive issue of Legal Issues 1, 2, and 8 is the allegation that the County is in noncompliance with RCW 36.70A.060. The heart of the Tribes’ argument is stated in Legal Issue 7.2 and paraphrased here as: Does the GMA require that critical areas development regulations “provide for conducting watershed level analysis, and conducting and implementing watershed level analysis and management plans?” The Tribe contends that the answer is “yes,” that the Act requires watershed level analysis in critical areas development regulations and that the County’s CAO, as amended by Ordinance No. 96-011, fails to provide such analysis or to implement it.

The County argues that the CAO meets the Act’s requirements. Its first argument is that there are many non-regulatory ways to protect critical areas (*e.g.*, acquisition, incentives, education, etc.) and that the County does not have to rely solely upon development regulations to protect critical areas. *See* County PHB, at 25-27. The County also argues that development regulations that attempt to apply watershed level analysis are impractical. County PHB, at 37-41.

To determine if the Act does create a duty for critical areas development regulations to provide for watershed level analysis and to implement that analysis through management plans and implementing regulations, the Board examines the specific language of the Act, analyzes the arguments advanced by the parties, reviews a relevant holding from a prior case addressing the County’s immediately prior critical areas development regulations, the *Pilchuck II* case, and considers the clarification provided by the Superior Court in its Decision on Appeal.

The GMA requires all local governments to designate critical areas pursuant to RCW 36.70A.170 and to adopt development regulations to protect designated critical areas pursuant to RCW 36.70A.060, which provides in part:

(2) Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170. . . .

The terms “critical areas” and “development regulations” are defined at RCW 36.70A.030 as follows:

(5) “Critical areas” include the following areas and ecosystems: (a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas.

. . .

(7) “Development regulations” means the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto. A development regulation does not include a decision to approve a project permit application as defined in RCW 36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city. (Emphasis added.)

The term “ecosystem” is not defined in the GMA nor in the minimum guidelines or procedural criteria adopted by the Department of Community, Trade and Economic Development. Where, as here, a statute does not define a material term, the word should be given its ordinary meaning. In ascertaining common meaning, resort to dictionaries is acceptable. *TLR, Inc. v. Town of La Conner*, 68 Wn. App. 29, 33, ___ P.2d ___ (1992) (citations omitted).

“Ecosystem” is defined as:

An ecological community with its physical environment, regarded as a unit. *Webster’s II New Riverside University Dictionary* 417 (1988) (emphasis added).

“Ecological” is a derivative of “ecology” which, in turn, is defined as:

1. The science of the relationships between organisms and their environments. 2. The relationship between organisms and their environment. *Webster’s II* 416.

Of the five “areas and ecosystems” named in the definition of critical areas, the two that most clearly have “organisms” and communities of organisms which are dependent upon a physical environment, *i.e.*, habitat, are “wetlands,” RCW 36.70A.030(5)(a), and “fish and wildlife habitat conservation areas,” RCW 36.70A.030(5)(c).

The Board has previously examined the question of the relationship between natural systems that are present on a specific parcel and the broader physical context, such as a watershed or other functional catchment area. In *Pilchuck II* the Board held that:

[T]he Act’s requirement to protect critical areas means that the structure, values and functions of such natural systems are inviolate. While local governments have the discretion to adopt development regulations that may result in localized impacts upon, or even the loss of, some critical areas, such flexibility must be wielded sparingly and carefully for good cause, and in no case result in a net loss of the structure, value and functions of such natural systems within a watershed or other functional catchment area. *Pilchuck II*, at 21 (emphasis added).

Although RCW 36.70A.172(1) ^[2] was not at issue within the scope of the *Pilchuck II* case, it is relevant in the instant case. It provides:

In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries. (Emphasis added.)

The above emphasized portions of .172(1) convey a legislative intent that protection is to be afforded to the *functions* and *values* of critical areas. Moreover, local governments are directed to give “special consideration” to “conservation or protection measures” to preserve or enhance anadromous “fisheries.” In view of the status of “wetlands” and “fish and wildlife habitat conservation areas” as ecosystems, the language in .172 makes apparent the inter-relatedness of these systems and the importance of the value and functions of these systems, particularly as they relate to fisheries. The importance of fisheries is further underscored by the Act’s direction at ^[3] RCW 36.70A.020 to maintain and enhance fisheries and to conserve fish and wildlife habitat.

There are few verbs in the Act more clear or directive than “maintain” and “enhance.” ^[4]

In view of the Decision on Appeal, and the additional evidence and argument presented in the instant case, the Board concludes that it is appropriate to revise, clarify and amplify the *Pilchuck II* holding. For purposes of comparison, the Board repeats below language from the *Pilchuck II*

holding, showing new language with underlining and deleted language with strike-throughs:

The Board holds that the Act's requirement to protect critical areas, particularly wetlands and fish and wildlife habitat conservation areas, means that the ~~structure, values and functions of such natural ecosystems are inviolate~~ must be maintained. While local governments have the discretion to adopt development regulations that may result in localized impacts upon, or even the loss of, some critical areas, such flexibility must be wielded sparingly and carefully for good cause, and in no case result in a net loss of the ~~structure, value and functions of such natural ecosystems~~ within a watershed or other functional catchment area.

Thus, local governments have the flexibility to adopt critical area development regulations that would permit the reduction of the geographic extent of, for example, a wetland. See *Pilchuck II*, at 20. This could result in the loss of all or a portion of an individual site-specific critical area, so long as the values and functions of the ecosystem in which the critical area is located are not diminished. The nature of ecosystems necessitates that such site-specific judgments, e.g., whether to allow filling in a small wetland, be made in the context of the likely impact on the function and values of the larger system. This means that, in the circumstance that a local government permits elimination of a wetland, for example, it has a duty to assure that the net values and functions of the ecosystem are not diminished. How far afield it must look to make this determination is dependent on the specific circumstances, whether it is at the level of an entire a watershed ecosystem, a sub-basin, or other functional catchment area.

The Board notes that the County has acknowledged that certain critical areas, such as wetlands and fish and wildlife habitat areas, constitute ecosystems that transcend the boundaries of individual properties and jurisdictions, and that it is therefore necessary to address certain critical areas issues at a watershed level. See County PHB, at 41. Indeed, the County cites numerous efforts that it has undertaken with state agencies, tribes, cities and others to move in the direction of watershed-based planning. County PHB, at 37-38.

The Board commends the County for pursuing its non-regulatory strategies as well as the regulatory approach adopted in Ordinance 96-011. Jurisdictions are mandated by the Act to adopt development regulations that protect critical areas. RCW 36.70A.060. **The Board holds that jurisdictions have the authority to supplement the GMA's mandated regulatory protection of critical areas with non-regulatory programs.**

The Board also commends the County for choosing to adopt in its comprehensive plan an optional element to provide a policy basis for its efforts, both regulatory and non-regulatory, to protect critical areas. The broader geographic scope of a county-wide comprehensive plan provides a logical framework to examine certain critical areas on an ecosystem/watershed basis, where appropriate, and to establish appropriate localized policies and inter-jurisdictional

coordination. The duty created by RCW 36.70A.060 is to “adopt development regulations that protect critical areas” while at the same time acknowledging that certain critical areas, particularly wetlands and fish and wildlife habitat conservation areas, constitute “ecosystems” that frequently are larger in scope than individual parcels, and may even extend beyond the boundaries of individual jurisdictions.

Moreover, in counties planning under the Act, development regulations adopted under GMA must be consistent with comprehensive plans. RCW 36.70A.040 and .120. Thus, the legislature intended that the broader context for the operation of detailed development decisions would be, in most cases, provided by the policy framework of comprehensive plans. Although the legislature did not mandate that counties adopt such a “critical areas” or “natural systems” policy framework as a comprehensive plan element, the Board notes that King, Kitsap and Pierce Counties, in the

[5] Central Puget Sound region, have done so. See King County Comprehensive Plan, Chapter 7, “Natural Environment” (1994); Kitsap County Comprehensive Plan, Part II, Chapter 1, “Natural Systems and Resource Lands” (1994); Pierce County Comprehensive Plan, Chapter 5, “Environmental and Critical Areas Element” (1994).

The Board agrees with the Tribes that the Act’s mandate to “protect critical areas with development regulations” and the Act’s definition of certain critical areas, specifically wetlands and fish and wildlife habitat conservation areas, as “ecosystems” means that individual parcels of land with certain critical areas designations must be evaluated in the context of the larger natural system, *i.e.*, the ecosystem. The Board has previously characterized this broader context as a “watershed or other functional catchment area.” See *Pilchuck II*, at 21.

The Board affirms its *Pilchuck II* holding, as modified above, and enters the following holding in the present instance:

The Board holds that the Act’s requirement to protect critical areas, particularly wetlands and fish and wildlife habitat conservation areas, means that the values and functions of such ecosystems must be maintained. While local governments have the discretion to adopt development regulations that may result in localized impacts upon, or even the loss of, some critical areas, such flexibility must be wielded sparingly and carefully for good cause, and in no case result in a net loss of the value and functions of such ecosystems within a watershed or other functional catchment area.

The Tribes have argued that the County’s regulatory approach, relying on fixed width buffers and critical areas studies of site specific factors “is inadequate to ensure that the structure, value and functions of critical areas will be protected from ‘net loss’ in the context of watersheds as a whole.” Tribes’ PHB, at 16. The Tribes argue that “[i]n order to protect critical areas, it is necessary to assess and manage the watershed level affects of land use.” Tribes’ PHB, at 20.

The Tribes assert that the County's reliance on fixed width buffers to protect streams and wetlands demonstrates the County's failure to protect critical areas as required by the Act. Tribes' PHB, at 20. However, the exhibits relied on by the Tribes merely argue for larger fixed buffer widths; they do not support the Tribes' contention that the County was required to use a watershed level analysis. The Tribes' conclusory statements do not persuade the Board that the County's CAO fails to comply with the Act. In contrast, the County argues that its critical areas regulations "integrate drainage basin and watershed level analysis concepts into specific regulations to the extent possible at this time." County PHB, at 38. The County's regulations provide that watershed level analysis may be required for site-specific critical area studies and mitigation plans. See SCC 32.10.550 and SCC 32.10.560.

Although the Tribes are correct that individual parcels within certain designated critical areas must be evaluated in the context of the larger natural system, the Tribes have not met their burden to show, by a preponderance of the evidence, that the regulatory approach taken by the County fails to maintain the values and functions of critical areas.

Buffers

The Tribes also allege that, if standard width buffers may be used to protect critical areas, the County's selected buffer widths are inadequate (Legal Issue 7.1). In addition, the Tribes allege that the County's CAO impermissibly provides for lesser protection of wetlands and streams within urban areas than in rural areas (Legal Issue 7.4).

The record reveals that the County's selected buffers, in both urban and rural areas, are within the range of buffers used by other jurisdictions and recommended in scientific literature. Finding of Facts 4, 6, and 7; see SCC 32.10.520; Ex. 10 (Planning Commission Exhibit 39aa), at 10, 12-15 (*A Literature Review of Recommended Buffer Widths to Maintain Various Functions of Stream Riparian Areas, Prepared for: King County Surface Water Management Division, Johnson & Ryba (Feb., 1992)*); *Model Wetlands Protection Ordinance*, Department of Ecology, Sept. 1990, at 21. The Tribes have not shown that these buffers fail to protect critical areas as required by RCW 36.70A.060. **The Board holds that the Tribes have failed to meet their burden to show, by a preponderance of the evidence, that the County's selected standard buffer widths, including the distinction between urban and rural areas, fail to protect critical areas as required by RCW 36.70A.060.**

Conclusions No. 1, 2, 8, 7.2, 7.1, and 7.4

The Tribes have **abandoned** those portions of Legal Issues 1, 2, and 8 that address RCW 36.70A.040, .120, .140, and .170.

With regard to the watershed based regulations, the Board concludes that the Act creates a duty to protect critical areas in a manner that recognizes the “ecosystem” context of certain critical areas. This “ecosystem” context may be described as “watershed” based, but it may also be described as smaller hydrologic units, such as drainage basins, sub-basins or other functional catchment areas; the context must be determined on a site-specific basis. Protection of critical areas, particularly wetlands and fish and wildlife habitat conservation areas, means that the value and functions of such an area are to be maintained. While the characteristics of an individual critical area may be disrupted, or even destroyed, the value and function of the larger affected ecosystem, watershed or functional catchment area must be maintained.

The Tribes have failed to meet their burden to show, by a preponderance of the evidence, that the County’s critical areas regulations are not in compliance with RCW 36.70A.060.

G. LEGAL ISSUE NO. 3

Did the County, in adopting the Ordinance or otherwise, fail to be guided by and comply with the goal of RCW 36.70A.020(8) to, among other things, maintain and enhance natural resource industries, including fisheries industries?

H. LEGAL ISSUE NO. 4

Did the County, in adopting the Ordinance or otherwise, fail to be guided by and comply with the goal of RCW 36.70A.020(9) to, among other things, conserve fish and wildlife habitat?

Discussion

Legal Issues 3 and 4 challenge the County’s compliance with two of the Act’s planning goals. RCW 36.70A.020 provides that the planning goals “are adopted to guide the development and adoption of comprehensive plans and development regulations.” Section 020 provides in part:

(8) Natural resource industries. Maintain and enhance natural resource-based industries, including . . . fisheries industries. . . .

(9) Open space and recreation. . . . [C]onserve fish and wildlife habitat

The Board has previously observed that a number of the Act’s planning goals listed at RCW 36.70A.020 are implemented by specific requirements contained in the Act. *Litowitz v. Federal Way*, CPSGMHB Case No. 96-3-0005, Final Decision and Order (July 22, 1996), at 7. For example, the public participation goal of 36.70A.020(11) is implemented by section .140 which provides specific requirements. The Board notes that there are no specific GMA sections implementing RCW 36.70A.020(8) and (9). For the Tribes to meet their burden of showing noncompliance with RCW 36.70A.020(8) and (9), they must show that the County’s CAO is not consistent with those GMA planning goals. See *Association of Rural Residents v. Kitsap County*, CPSGPHB Case No. 93-3-0010, Final Decision and Order (June 3, 1994), at 28.

The Tribes argue:

Given the seriously deteriorated state of critical areas . . . and the seriously declined state of the anadromous fishery itself, the County’s failure to adopt a critical areas regulatory approach sufficient to enable it to assess and avoid development impacts that will result in a net loss of the structure, functions and values in the context of watershed ecosystems as a whole, and its failure to even adopt static protections sufficient to protect all of the important functions and values of critical areas, reflects a failure to achieve substantive compliance with the GMA’s goals to maintain and enhance natural-resource based industries, including productive fisheries, and to conserve fish and wildlife habitat. Tribes’ PHB, at 29 (emphasis, citations, and footnotes omitted).

The County argues that it has complied with RCW 36.70A.020(8) and (9). The County’s amendments to its critical areas regulations “specifically addressed protection of the fisheries natural resource industry by increasing the buffer width for anadromous fish” as required by planning goal 8. County PHB, at 24. In addition, the County argues that its critical areas regulations provide “special considerations for fisheries and contains specific provisions for Habitat Management Plans and coordination with state and federal regulatory programs which overlay the County’s [critical areas regulations].” County PHB, at 24.

The Tribes assert that the County’s failure to adopt watershed level analysis in its CAO is sufficient evidence to show that the County failed to comply with planning goals 8 and 9. The Tribes conclusory statement does not explain how the County’s CAO is not consistent with planning goals 8 and 9. Therefore, the Board is not persuaded by the Tribes’ argument. Consequently, **the Board holds that the Tribes have failed to show, by a preponderance of the evidence, that the County has failed to comply with RCW 36.70A.020(8) and (9).**

Conclusions No. 3 and 4

The Tribes have failed to show, by a preponderance of the evidence, that the County has failed to comply with RCW 36.70A.020(8) and (9).

I. LEGAL ISSUE NO. 5

Did the County, in adopting the Ordinance or otherwise, comply with its obligation under RCW 36.70A.172(1) that, in designating and protecting critical areas under the GMA, the County shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas?

J. LEGAL ISSUE NO. 6

Did the County, in adopting the Ordinance or otherwise, comply with its obligation under

RCW 36.70A.172(1) that, in designating and protecting critical areas under the GMA, the County shall, in addition, give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries?

Discussion

RCW 36.70A.172(1) provides:

In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries. Emphasis added.

Best available science must be included by counties and cities in their process of developing policies and development regulations so that the local government can properly consider this science when making its legislative decisions. *HEAL v. Seattle*, CPSGMHB Case No. 96-3-0012, Final Decision and Order (August 21, 1996), at 19-20. The Board's review is limited to "whether the best available science was included by the [County] during the development of [the CAO]." *HEAL*, at 20.

The Tribes actively participated in the County's process of adopting the CAO. The Tribes state:

The Tribes presented a significant body of scientific evidence concerning the well-accepted and well-defined watershed analysis and management for addressing the status of, and impacts to, the structure, functions and values of critical areas at a watershed level. Tribes' PHB, at 7 (footnote omitted).

As the Tribes state and the record reveals, the County had the best available science before it when it developed and adopted the CAO. See Finding of Fact 6. Having this information before it means that the County included it in developing its CAO. Therefore, **the Board holds that the County has complied with RCW 36.70A.172(1).**

Conclusions No. 5 and 6

The County has complied with RCW 36.70A.172(1) in its adoption of its CAO.

K. REMAINDER OF LEGAL ISSUE NO. 7

Did the County, in adopting the Ordinance or otherwise, comply with the GMA provisions mentioned in Legal Issues 2-6, with respect to:

7.3 The failure of the regulations to regulate effective impervious surface levels?

7.5 The failure of the regulations to prevent the removal of large woody debris from streams?

Discussion

The Tribes have presented no legal argument regarding Legal Issues 7.3 and 7.5. For Legal Issue 7.3, the Tribes state that impervious surfaces affect hydrologic processes. The Tribes rely on this simple statement for the proposition that County's CAO violates the GMA. Assuming the Tribes' statement is correct, the Tribes have not argued how or why the County's CAO violates the GMA. Even more threadbare is the Tribes' argument regarding Legal Issue 7.5. The Tribes present no argument regarding removal of large woody debris from streams. **The Board holds that the Tribes have failed to meet their burden to show, by a preponderance of the evidence, that the County has not complied with the GMA with regard to Legal Issues 7.3 and 7.5.**

Conclusions No. 7.3 and 7.5

The Tribes have failed to meet their burden to show, by a preponderance of the evidence, that the County has not complied with the GMA with regard to Legal Issues 7.3 and 7.5.

VI. ORDER

Having reviewed and considered the above-referenced documents, having considered the arguments of the parties, and having deliberated on the matter, the Board finds that the Snohomish County Critical Areas Regulations are **in compliance** with RCW 36.70A.060. So ORDERED this 8th day of January, 1997.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP
Board Member

Joseph W. Tovar, AICP
Board Member

Chris Smith Towne
Board Member

Note: This Final Decision and Order constitutes a final order as specified by RCW 36.70A.300 unless a party files a Petition for Reconsideration pursuant to WAC 242-02-830.

[1]

An issue is "briefed" when legal argument is provided; it is not sufficient for a petitioner to make conclusory statements, without explaining how, as the law applies to the facts before the Board, a local government has failed to

comply with the Act.

[2]

RCW 36.70A.172 was adopted in 1995, five years after the legislature created the duty to protect critical areas with the adoption of RCW 36.70A.060. This evidences the ongoing legislative concern with the importance of anadromous fisheries and the hydrologically based ecosystems, such as wetlands and other fish and wildlife habitat areas, upon which fisheries are dependent. *See also*, discussion of Legal Issues 5 and 6, *infra*.

[3]

RCW 36.70A.020 provides in pertinent part:

(8) Natural resource industries. *Maintain and enhance natural resource-based industries*, including productive timber, agricultural, and *fisheries* industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.

(9) Open space and recreation. Encourage the retention of open space and development of recreational opportunities, *conserve fish and wildlife habitat*, increase access to natural resource lands and water, and develop parks. Emphasis added.

See also, discussion of Legal Issues 3 and 4, *infra*.

[4]

”Maintain” is defined as:

1. to continue: carry on. 2. To preserve or keep in a given existing condition. 3. a. To provide for. b. To keep in existence: SUSTAIN. 4. To defend, as against danger or attack. *Webster’s*, at 717.

“Enhance” is defined as:

To increase or make greater, as in value, beauty, or reputation: AUGMENT. *Webster’s*, at 433.

[5]

To the extent that the allegation in Legal Issue No. 7.2 is that RCW 36.7A.060 requires the CAO to incorporate or undertake policies or plans, the Board rejects that argument. The phrases “provide for” and “conduct . . . management plans” could be construed as intending to describe a duty to undertake a comprehensive planning (*i.e.*, policy) exercise. However, RCW 36.70A.060 requires the adoption of development regulations, not plans or policies, to protect critical areas. The definition of development regulations states that they are “controls placed upon development or land use activities.” Comprehensive plans under the GMA are not development regulations, because they are not land use controls within the meaning of RCW 36.70A.030(7). Plans control development regulations, which in turn control development or land use activities. *See Aagaard v. Bothell*, CPSGMHB Case No. 94-3-0011 (1995), at 6; *See also, Snoqualmie v. King County*, CPSGPHB Case No. 92-3-0004 (1993), at 12.