

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

TAHOMA AUDUBON SOCIETY,	)	
PEOPLE FOR PUGET SOUND, and	)	<b>CPSGMHB Consolidated</b>
CITIZENS FOR A HEALTHY BAY,	)	<b>Case No. 05-3-0004c</b>
	)	
Petitioners,	)	<i>(Tahoma-Puget Sound)</i>
	)	
v.	)	<b>ORDER FINDING COMPLIANCE</b>
	)	<b>[Re: Ordinance No. 2005-80s -</b>
PIERCE COUNTY,	)	<b>Marine Shoreline Critical Salmon</b>
	)	<b>Habitat Provisions]</b>
Respondent.	)	
	)	
	)	
_____	)	

**I. BACKGROUND**

On July 12, 2005, the Board issued its Final Decision and Order (**FDO**) in this case. The FDO provided, in relevant part:

- Pierce County’s adoption of Ordinance 2004-56s was **clearly erroneous** and **does not comply** with the requirements of RCW 36.70A.172(1) in that Pierce County failed to use best available science to designate and protect fish and wildlife habitat conservation areas in marine shorelines, failed to “protect the functions and values” of marine shorelines as critical salmon habitat, and failed to “give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries” in its regulation of marine shorelines. Pierce County’s adoption of Ordinance 2004-56s also was **clearly erroneous** and **does not comply** with RCW 36.70A.480.
  
- Therefore, the Board **remands** Ordinance 2004-56s to Pierce County with directions to take the necessary legislative action to comply with the requirements of RCW 36.70A.172(1) and RCW 36.70A.480 with respect to fish and wildlife habitat conservation areas, including salmonid habitat in marine shorelines, pursuant to the following schedule:
  1. By no later than **January 12, 2006**, Pierce County shall take appropriate legislative action to bring its critical areas ordinance into compliance with the requirements of RCW 36.70A.172(1) and RCW 36.70A.480 as set forth in this Order.

2. By no later than **January 26, 2006**, Pierce County shall file with the Board an original and four copies of the legislative enactment(s) adopted by Pierce County to comply with this Order along with a statement of how the enactments comply with RCW 36.70A.172(1) and RCW 36.70A.480 (**compliance statement**). The County shall simultaneously serve a copy of the legislative enactment(s) and compliance statement on Petitioners People for Puget Sound and Citizens for a Healthy Bay.
3. By no later than **February 9, 2006**, Petitioners People for Puget Sound and Citizens for a Healthy Bay *may* file with the Board a Petitioners' Response to the County's compliance statement and the legislative enactments. Petitioners shall simultaneously serve a copy of such comment on the County.
4. Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance Hearing in this matter for **10:00 a.m. February 17, 2006** at the Board's offices. [The only matter at issue at this compliance proceeding will be whether Pierce County has brought its critical areas regulations into compliance with RCW 36.70A.172(1) and RCW 36.70A.480 with respect to the designation and protection of critical salmon habitat in marine shorelines.]

If Pierce County takes the required legislative action prior to the January 12, 2006, deadline set forth in this Order, the County may file a motion with the Board requesting an adjustment to this compliance schedule.

On October 12, 2005, Respondent notified the Board electronically that its attorney would not be available for the February 17, 2006, hearing date and requested an amendment to the compliance schedule. Subsequently, on November 28, 2005, Respondent notified the Board electronically that the County Council had taken legislative action to comply with the Board's Order, and both parties stipulated by email to earlier dates for the compliance proceedings. On November 29, 2005, the Board entered its Order Amending Compliance Schedule, accelerating the deadlines for the parties to file the SATC, response, and reply, and setting the Compliance Hearing for 2:00 p.m. January 12, 2006 at the Board's offices.

On December 6, 2005, the Board received Respondent Pierce County's Statement of Actions Taken to Comply, [SATC] with 14 attachments. The SATC indicated that the County had enacted Pierce County Ordinance No. 2005-80s, "Regarding the Designation and Protection of Marine Shoreline Critical Salmon Habitat and Shoreline Density Exceptions," in order to comply with the FDO. Ordinance No. 2005-80s – specifically, Exhibits A and C - amended the County's Critical Areas Regulations by designating and mapping approximately 20 lineal miles of marine shorelines as "Marine Shoreline Critical Salmon Habitat" and by requiring vegetative buffers to protect salmon habitat in the designated high-value shorelines.<sup>1</sup>

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<sup>1</sup> Ordinance No. 2005-80s also amends Pierce County's development regulations by deleting a provision that allowed denser residential development in rural shorelines. Ordinance 2005-80s, at 8; Exhibit B. The amendment was in response to the Board's ruling in *Bonney Lake, et al., v. Pierce County*, CPSGMHB 05304c *Tahoma-Puget Sound v. Pierce County* (January 12, 2006)

On December 14, 2005, the Board received Petitioners Notice of Substitution of Council and Petitioners People for Puget Sound and Citizens for a Healthy Bay's Response to Pierce County's Statement of Actions Taken to Comply [**Petitioners' Response**]. Petitioners indicated they will not contest the County's action, stating:

By offering greater protections for important portions of Pierce County shorelines, as required by the GMA, Puget Sound believes that Ordinance No. 2005-80s addresses the concerns it raised in its initial Petition.

Petitioners' Response, at 3.

For the convenience of the parties, the Compliance Hearing was convened by telephone conference call at 10:00 a.m. January 12, 2006, pursuant to the Board's December 16, 2005, Order Rescheduling Compliance Hearing. Board member Margaret Pageler convened the hearing, with Board members Bruce Laing and Ed McGuire and Board extern Justin Titus in attendance. Respondent Pierce County was represented by Pierce County Deputy Prosecuting Attorney Pete Phillely. Petitioners People for Puget Sound and Citizens for a Healthy Bay were represented by Kristen L. Boyles and Esther C. Bartfeld of Earthjustice.<sup>2</sup> The proceedings were recorded by audio tape.

## **II. DISCUSSION**

### **The Action Taken:**

Pierce County Ordinance No. 2005-80s [**the Ordinance**] – specifically, Exhibits A and C - amends the County's Critical Areas Regulations by designating and mapping approximately 20 lineal miles of marine shorelines as "Marine Shoreline Critical Salmon Habitat" and by requiring vegetative buffers to protect salmon habitat in the designated high-value shorelines. The Ordinance was adopted, as stated in its title, "responding to the decisions and orders issued by the Central Puget Sound Growth Management Hearings Board." Ordinance, Title.

The Board's synopsis of its Final Decision and Order summarizes the issues on remand:

*People for Puget Sound and Citizens for a Healthy Bay challenged the provisions of Ordinance 2004-56s concerning fish and wildlife habitat conservation areas. Petitioners asserted that Pierce County's failure to designate marine shorelines as Critical Fish and Wildlife Habitat Conservation Areas and failure to require a*

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Case No. 05-3-0016c, Final Decision and Order (August 4, 2005), where the Board found the shoreline density exception noncompliant with the GMA and entered an order of invalidity. The compliance hearing in *Bonney Lake* is set for March 16, 2006. The present ruling makes no determination with respect to the shoreline density component of Ordinance No. 2005-80s.

<sup>2</sup> Additional parties to the consolidated case – Petitioner Tahoma Audubon Society, Intervenor Park Junction Partners, and Amicus Snohomish County – were not involved and did not appear in the compliance proceeding.

*150-foot vegetated buffer on marine shorelines does not comply with RCW 36.70A.172(1) and other GMA requirements.*

*Pierce County countered that a number of its critical areas designations protect areas of the marine shore and that in sum, these overlapping designations, determined on a site-by-site review, provide protection for anadromous fish. Pierce County also argued that the science of marine buffer widths is immature. Both Pierce County and Amicus Curiae Snohomish County point the Board to ESHB 1933, establishing the legislature's determination that shorelines of the state are not critical areas per se and should not be subject to "blanket" designation.*

*The Board found that the science in the Pierce County record uniformly documents the importance of Puget Sound marine shorelines in the lifecycle of anadromous fish. The Board found that a recent nearshore assessment identifies the specific reaches of Pierce County's marine shores that provide, or can be restored to provide, high quality salmon habitat. The Board also found ample science in the record concerning the role of marine riparian vegetation in protecting the "functions and values" of marine shorelines as salmonid habitat. The Board was persuaded that the action of Pierce County was clearly erroneous.*

*The Board concluded that Pierce County **failed to comply** with RCW 36.70A.172(1) in failing to use best available science to designate and protect fish and wildlife habitat conservation areas, in failing to "protect the functions and values" of marine shorelines as critical salmon habitat, and in failing to "give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries." The Board entered an **order of non-compliance** and **remanded** Ordinance 2004-56s to Pierce County to amend the Ordinance consistent with this opinion.*

FDO, at 2.

By Ordinance No. 2005-80s, Pierce County created a critical area classification of "Marine Shoreline Critical Salmon Habitat." Ordinance No. 2005-80s, Exhibit A; SATC, Ex. 2. Using a scientific study which included data collection, field observations, and a recognized methodology (Tidal Habitat Model – THM) that can be replicated, Pierce County identified stretches of marine shoreline with high habitat values for salmon. Ordinance, at 6, 7; SATC, Ex. 3, with attachments. These areas were designated as Marine Shoreline Critical Salmon Habitat. *Id.* Finally, the County reviewed the studies already in its record, supplemented by additional scientific commentary [e.g., SATC, Ex. 7], concerning vegetative buffers as protective of salmon habitat functions and values along marine shorelines. SATC, Ex. 9, 10, 11. Based on this analysis, the County established a 100-foot vegetative buffer requirement on those marine shorelands being developed in areas identified as high-value salmon habitat. Ordinance, at 7; Exhibit C, at 7.

Positions of the Parties:

Pierce County asserts, and Petitioners concur, that adoption of Ordinance 2005-80s brings the County into compliance with the GMA requirements that were the basis for the challenge in this matter. Both Petitioners commented on the Ordinance during the public process prior to its enactment. Petitioner Citizens for a Healthy Bay supported the 100-foot vegetative buffer requirement but argued that the designation of salmon habitat protected areas should extend to a second tier of medium-high-value shoreline stretches. SATC, Ex. 13.

Petitioner People for Puget Sound expressed similar concern about “gaps” in protection, but their concerns were addressed by the County staff’s map which overlaid the proposed critical salmon habitat CAO protections over the previously adopted CAO designations to show cumulative protections. SATC, Ex. 14, at 2. In their comment letter, People for Puget Sound stated:

The proposed critical salmon habitat buffer, when coupled with the existing CAO provisions for shoreline erosion hazard areas, wetlands, and Fish and Wildlife Species and Habitat Conservation Areas<sup>3</sup> support an ecosystem approach towards protecting marine shoreline ecological functions and values, including salmon migration corridors and rearing areas....

We therefore support your adoption of the proposed critical salmon habitat provisions. The critical salmon habitat designation, if implemented through the 100-foot vegetated buffer provision, would protect the following marine shoreline ecological functions and values; salmonid rearing and migratory habitat, including fish prey production; soil slope stability; wildlife; water quality, including temperature control and pollutant removal; sediment and erosion control; habitat structure; and shading.

SATC, Ex. 14, at 1, 2.

Board Discussion:

The Board’s FDO concluded that Pierce County’s critical areas regulations “failed to use best available science to designate and protect fish and wildlife habitat conservation areas in marine shorelines, failed to “protect the functions and values” of marine shorelines as critical salmon habitat, and failed to “give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries” in its regulation of marine shorelines.” FDO, at 53.

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<sup>3</sup> Section 18E.40.020, Pierce County Code, which protects federal and state listed species and associated habitats; species of local importance and their associated habitats, and habitats of local importance: commercial and recreational shellfish beds, kelp and eelgrass beds, herring, smelt and sandlance spawning areas, estuaries and tide marshes, and waters of the state.

In remanding the non-compliant regulations to Pierce County, the Board pointed out that Pierce County's record already contained abundant science concerning the matters at issue. FDO, at 2, 37-43. Nevertheless, Pierce County undertook an additional public process and re-analysis in developing the proposal for Ordinance 2005-80s. SATC, Ex. 12. Based on the prior well-developed record, as refined in the compliance process, Pierce County has now enacted both *designation* of critical salmon habitat in Pierce County marine shorelines and *measures to protect* the functions and values of that habitat.

While there are various ways that the science in the record might have been applied by Pierce County to comply with the requirements of RCW 36.70A.172(1) and RCW 36.70A.480, the Board is persuaded that Ordinance 2005-80s meets the GMA standard.<sup>4</sup>

### **III. FINDINGS and CONCLUSIONS**

The Board finds and concludes:

1. Pierce County's adoption of Ordinance 2005-80s used best available science to designate and protect fish and wildlife habitat conservation areas in marine shorelines.
2. By Ordinance No. 2005-80s, Pierce County created a critical area classification of "Marine Shoreline Critical Salmon Habitat." Ordinance No. 2005-80s, Exhibit A; SATC, Ex. 2.
3. Using a scientific study which included data collection, field observations, and a recognized methodology (Tidal Habitat Model – THM) that can be replicated, Pierce County identified stretches of marine shoreline with high habitat values for salmon. Ordinance, at 6, 7; SATC, Ex. 3, with attachments. These areas were designated as Marine Shoreline Critical Salmon Habitat. *Id.*
4. Ordinance 2005-80s designated approximately 20 lineal miles of marine shorelines as Marine Shoreline Critical Salmon Habitat.
5. Pierce County's adoption of Ordinance 2005-80s used best available science to "protect the functions and values" of marine shorelines as critical salmon habitat.
6. On remand from the Board's FDO, Pierce County reviewed the studies already in its record, supplemented by additional scientific commentary [e.g., SATC, Ex. 7], concerning vegetative buffers as protective of salmon habitat functions and values along marine shorelines. SATC, Ex. 9, 10, 11.
7. Based on this analysis, the County established a 100 foot vegetative marine shoreline buffer requirement on those lands being developed in areas identified as high value salmon habitat. Ordinance, at 7; Exhibit C, at 7.

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<sup>4</sup>The recent Washington Supreme Court decision in *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 123 P.3d 102 (2005) supported the Eastern and Western Washington Growth Management Hearings Boards' review of best available science challenges under a standard that requires the local jurisdiction to provide a "scientific foundation, evidence of analysis, and a reasoned process to justify [critical areas regulations]." 155 Wn.2d at 835. The Court also pointed to subsequently-enacted CTED guidelines at WAC 365-195-900 through -925 as providing appropriate guidance on BAS for local jurisdictions and for the Boards. *Id.* at fn. 9.

8. Pierce County's adoption of Ordinance 2005-80s "give[s] special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries" in its regulation of marine shorelines.
9. Pierce County's adoption of Ordinance 2005-80s complies with RCW 36.70A172(1) and with RCW 36.70A.480.

#### **IV. FINDING OF COMPLIANCE**

Based upon review of the July 12, 2005 Final Decision and Order, the Pierce County SATC, Petitioners' Response to the SATC, the Board's review of Ordinance No. 2005-80s and other documents in the record, the arguments and comments offered in the briefing and at the compliance hearing, the Board finds:

- By adopting Ordinance No. 2005-80s [Marine Shoreline Critical Salmon Habitat Provisions] Pierce County has complied with the goals and requirements of the GMA as set forth in the aforementioned Board FDO and the GMA. The Board therefore enters a **Finding of Compliance** for Pierce County Re: Ordinance No. 2005-80s [Marine Shoreline Critical Salmon Habitat Provisions].

#### **V. ORDER**

Based upon review of the July 12, 2005 Final Decision and Order, the Pierce County SATC, Petitioners' Response to the SATC, the Board's review of Ordinance No. 2005-80s and other documents in the record, the arguments and comments offered in the briefing and at the compliance hearing, and having deliberated on the matter, the Board ORDERS:

CPSGMHB Case No. 05-3-0004c, *Tahoma-Puget Sound v. Pierce County*, is **closed**. Pierce County's adoption of Ordinance No. 2005-80s corrects the deficiencies found in Ordinance No. 2004-56s and **complies** with the goals and requirements of the GMA as set forth in the Board's July 12, 2005 FDO. The Board therefore enters a **Finding of Compliance** for Pierce County Re: Ordinance No. 2005-80s [Marine Shoreline Critical Salmon Habitat Provisions].

So ORDERED this 12<sup>th</sup> day of January, 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Bruce C. Laing, FAICP  
Board Member

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Edward G. McGuire, AICP  
Board Member

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Margaret A. Pageler  
Board Member

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