

1000 FRIENDS OF WASHINGTON, EVERGREEN  
ISLANDS, and SKAGIT AUDUBON SOCIETY,

Petitioners,

v.

CITY OF ANACORTES,

Respondent.

No. 03-2-0017

**FINAL DECISION  
AND ORDER**

**I. SUMMARY OF THE DECISION**

In this case we are asked to determine if the City of Anacortes (City) had failed to act to designate and protect critical areas prior to the adoption of Ordinance No. 2623. Although the City took this action to moot the appeal in the prior case, the City continues to argue that it had already taken action with respect to critical areas and that Ordinance No. 2623 is a simple “readoption” over which the Board has no jurisdiction. We determine that we have jurisdiction over this case, noting that the earlier ordinance on which the City relies failed to enact any designations for fish and wildlife conservation habitat conservation areas or protections for either fish and wildlife, or wetlands.<sup>1</sup>

Under the merits of this petition, we are asked whether the designations and protections enacted by the City comply with the requirements of the Growth Management Act (GMA). Petitioners place great reliance upon the Minimum Guidelines adopted by the Department of Community, Trade and Economic Development (CTED) to assist counties and cities in designating critical areas. While we agree with the City that the Minimum Guidelines are not mandatory, we find that

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<sup>1</sup> Several months after the petition was filed, Anacortes adopted several ordinances for the designation and protection of aquifer recharge areas that Petitioners agreed resolved the issues regarding aquifer recharge areas raised in this petition. The Board, therefore, dismisses the challenge to ordinance’s aquifer recharge areas designation and protection.

the record must show that they were considered pursuant to RCW 36.70A.170(2). Likewise, best available science (BAS) must be included in designations and protections for critical areas pursuant to RCW 36.70A.172. Our examination of the Forest Plan, Chapter 17.65 AMC, and the very limited record in this case, shows no evidence that the City considered the Minimum Guidelines. Similarly, there is no indication that BAS was included in the City's designation of FWHCAs through the Forest Plan or that BAS was included in the development of Chapter 17.65 AMC and the Forest Plan for the purpose of complying with RCW 36.70A.040 and RCW 36.70A.060(2). For these reasons, we find that the designation and protection of FWHCAs and protection of wetlands in Ordinance No. 2623 do not comply with the GMA. RCW 36.70A.040(3)(b), RCW 36.70A.060(2), RCW 36.70A.170, and RCW 36.70A.172.

Petitioners provided no evidence that the City's enforcement of its decade-old regulations is causing egregious harm to the environment such that we need to impose invalidity during the remand period. In this regard, we find it significant that the City is progressing expeditiously to improve its critical areas designations and protections, much of which Petitioners support.

## **II. PROCEDURAL HISTORY**

On April 2, 2003 the Western Washington Growth Management Hearings Board received a petition for review from 1000 Friends of Washington, Evergreen Islands, and Skagit County Audubon Society that challenged the City of Anacortes' failure to act as required by the Growth Management Act to designate and protect critical areas. That case was assigned Case No. 03-2-0012. A Motions Hearing was held in Anacortes on June 4, 2003 to hear argument on both the City's Motion to Dismiss the Petition and the Petitioners' Motion to Decide the Case or in the Alternative Exclude Evidence. The chief issue at this hearing was whether the Board had jurisdiction to

hear the Petition as a failure to act claim, or whether the City had already acted by adopting a critical areas ordinance.<sup>2</sup>

After the Hearing, on June 16, 2003, the City adopted Ordinance No. 2623 entitled “The GMA Critical Areas Ordinance 1991/ 2003”. On June 17, 2003, we received the City’s Motion to Dismiss Petition for Review in WWGMHB Case No. 03-2-0012. The City’s motion asserted that the failure to act claim was mooted because the City had enacted Ordinance No. 2623. On June 23, 2003, the Board received a draft Order Dismissing Petition for Review from the City that was approved as to form by Mr. Ryan Vancil, Petitioners’ attorney. On June 30, 2003, the Board issued an Order Dismissing Petition for Review that was almost identical to the one submitted by Mr. Ian Munce, the City’s attorney. The Order recited the reason for dismissing the Petition: “Because Anacortes has acted to designate and protect critical areas, there is no longer an issue before the Board to adjudicate.” WWGMHB Case No. 03-2-0012 (Order to Dismiss Petition for Review, June 30, 2003) at 2.

On August 15, 2003, the Board received a second Petition for Review from 1000 Friends of Washington, Evergreen Islands, and the Skagit Audubon Society. This Petition challenges Ordinance No. 2623 entitled “The GMA Critical Areas Ordinance 1991/ 2003”. The Petition alleges that the new ordinance does not comply with the Growth Management Act because it fails to designate or protect certain types of critical areas. This case was assigned WWGMHB Case No. 03-2-0017.

The Board held a Hearing on the Merits in Case No. 03-2-0017 in Anacortes on December 17, 2003. Mr. Charles Cottrell and Mr. John Zilavy represented the

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<sup>2</sup> At this hearing the Board allowed the City of Anacortes to submit additional documents related to the adoption of Ordinance No. 2198. On July 16, 2003, the City submitted exhibits that are listed in Appendix A.

Petitioners, and Mr. Ian Munce represented the City. All three Board Members attended.<sup>3</sup>

### III. BURDEN OF PROOF

Pursuant to RCW 36.70A.320(1), Ordinance No. 2326 is presumed valid upon adoption. The burden is on the petitioners to demonstrate that the action taken by the City is not in compliance with the requirements of the GMA. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board “shall find compliance unless it determines that the action by [City of Anacortes] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” In order to find the City’s action clearly erroneous, we must be “left with the firm and definite conviction that a mistake has been made.” *Department of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

### IV. JURISDICTION

Before we can proceed to the issues raised in the petition, the Board must determine whether the Board has jurisdiction in this case. The City argues that Ordinance No. 2623 simply readopts existing ordinances and that therefore the Board does not have jurisdiction to review them. The City argues that the Petition in this case challenges a readoption of an unchanged set of existing development regulations and that, as such, the Board has no jurisdiction to review it. The City cites *Montlake Community Club v. Central Puget Sound Growth Management Hearings Board*, 110 Wn. App. 731, 740, P.3d 57 (2002), *North Cascades v. Whatcom County*, Case No. 94-2-0001 (Final Decision and Order, June 30, 1994), and *Panesko v. Lewis County*, Case No. 98-2-

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<sup>3</sup> At the hearing, the Board denied the City’s motion to strike portions of the Petitioners’ Reply Brief that cited Anacortes’ Forest Plan on the ground that the Petitioners’ arguments concerning Anacortes’ Forest Plan were in response to the County’s arguments that cited the Forest Plan in its Response Brief. The Board also allowed the City to supplement the record with the items that are listed in Appendix B.

0011c (Final Decision and Order, March 5, 2001) to support its position. Additionally, the City points out that it is in the process of updating its adopted critical areas ordinances – a process in which the Petitioners are participating – and argues that for that reason, this case is not ripe for review.

Petitioners argue that the Board does have jurisdiction over this matter because the City failed to act as required by the GMA until it adopted Ordinance No. 2623, on June 16, 2003. Petitioners point out that the City adopted Ordinance No. 2623 in response to the Petitioners' claim in WWGMHB Case No. 03-2-0012, that the City had failed to act with respect to certain critical areas. Therefore, when the City enacted Ordinance No. 2623, it was the first time that the City enacted wetland protections and Fish and Wildlife Habitat Conservation Area designations and protections to meet the requirements of RCW 36.70A.060(2), RCW 36.70A.170, and RCW 36.70A.040. Petitioners contend that the City's Motion to Dismiss Petition for Review in the earlier case supports their position and establishes that the adoption of Ordinance No. 2623 was the City's adoption of critical areas protections for purposes of the GMA. They cite the following language:

Anacortes adopted an interim controls ordinance re-designating and protecting critical areas on June 16, 2003 (the Ordinance). This Ordinance, in part, addresses concerns raised by Petitioners that enforceable GMA critical areas protections are not in place. This Ordinance is now included in the Anacortes Municipal Code ("AMC"), and sets forth how critical areas are designated by the City, and how they are protected. Even, (sic) were there to be a question in the past regarding whether the City has "acted" to adopt critical areas regulations, the question of whether Anacortes "acted" is now moot. Because Anacortes has acted, the Board no longer has jurisdiction over this matter.

WWGMHB Case No. 03-2-0012 (Motion to Dismiss Petition for Review, June 16, 2003) at 1.

Petitioners cite *Whidbey Environmental Action Network (WEAN) v. Island County*, 118 Wn. App. 567, 76 P.3d 1215, 2003 Wash. App. LEXIS 2236 (2003) to support their argument that the Board has jurisdiction over Ordinance No. 2623.

## **Discussion**

To begin our discussion of the jurisdictional challenge, we examine the ordinance that the City claims was adopted as its critical areas protections in 1991. The City claims that Ordinance No. 2198 adopted development regulations to protect critical areas. However, our examination of Ordinance No. 2198 shows only the following statement regarding the adoption of a wetlands protection ordinance:

Whereas, wetland areas are already protected through 17.54.040, 17.54.050, and 17.54.060 of the City of Anacortes Zoning Ordinance...  
Ordinance No. 2198 (August 19, 1991) at 2.

This statement simply declares what kind of protection the City currently has for wetlands. The ordinance does not adopt those sections of the Anacortes Municipal Code for the purposes of satisfying the requirement in RCW 36.70A.060(2) that critical areas be protected; it merely references them.

With regard to Fish and Wildlife Habitat Conservation Areas, Ordinance No. 2198 includes the following statement:

Whereas, the City of Anacortes protects fish and wildlife habitat conservation areas through the City of Anacortes Comprehensive Plan/Zoning Ordinance/Shoreline Master Program/SEPA/ Ordinance...  
Ordinance No. 2198 (August 19, 1991) at 1.

Again, the statement regarding Fish and Wildlife Habitat Conservation Areas in Ordinance No. 2198 does not adopt regulations protecting fish and wildlife habitat areas pursuant to RCW 36.70A.060(2), but just refers to measures the City already had

adopted. The ordinance only actually adopts a change in the zoning ordinance to replace the City Engineer with the Zoning Administrator; the City's steep slope regulations; a change in the identification of "geological hazardous areas"; and a provision imposing transcript costs on the party filing an appeal. Anacortes Ordinance No. 2198 (August 19, 1991).

We have held that review of an adopted critical areas ordinance for purposes of determining consistency with a subsequently adopted comprehensive plan does not confer jurisdiction to review the readoption. *CCNR v. Clark County*, WWGMHB Case No. 96-2-0017 (Order on Motion, September 12, 1996). However, this rule requires that the City had actually adopted development regulations to protect critical areas as required by RCW 36.70A.060(2) and 36.70A.040 in the first place. As we have seen, the City never did adopt development regulations to protect critical areas under the requirements of the GMA; it merely referenced them in the preamble to an ordinance adopting *other* City regulations. The language of a preamble may be a useful guide to determining legislative intent, but it does not itself create legal obligations. *See State ex. rel. Berry v. Superior Court of Thurston County*, 92 Wash. 16, 32, 159 P.2d, 1916 Wash. LEXIS 746 (1916).

In addition, when the same Petitioners in this case asserted that the City had failed to act to designate and protect certain critical areas including wetlands and fish and wildlife habitat areas in WWGMHB Case No 03-2-0012, the City did not wait for the Board to rule. Instead, the City adopted Ordinance No. 2623 on June 16, 2003 and asserted that this action mooted the earlier Petition. WWGMHB Case No. 03-2-0012 (Motion to Dismiss Petition for Review, June 16, 2003). The Board's order dismissing the Petition followed almost verbatim, the text prepared by the City:

“...The ordinance is now specifically included in the Anacortes Municipal Code (“AMC”), and designates and

protects critical and areas...Because Anacortes has acted to designate and protect critical areas, there is no longer an issue before the Board to adjudicate.”

WWGMHB Case No. 03-2-0012, (Order Dismissing Petition for Review, June 30, 2003) at 1-2.

The Western Washington Growth Management Hearings Board cases that the City cites<sup>4</sup> apply to circumstances where counties have either only reviewed critical areas ordinances or readopted ordinances that had been previously adopted pursuant to RCW 36.70A.060(2) after completing a review to determine whether the critical areas ordinances were consistent with a comprehensive plan or development regulations that was being adopted pursuant to RCW 36.70A.040(3)(b). In those circumstances, this Board has found that we have no jurisdiction. However, these are not the circumstances that apply to this case. In this case, the City did not reenact critical area designations and/or protections for certain critical areas, including wetlands and fish and wildlife habitat areas in 1991, pursuant to RCW 36.70A.040(3)(b) and RCW 36.70A.060(2). It merely stated that the City had such regulations. From the record available for our review, Ordinance No. 2623 adopts protections for wetlands and designations and protections for FWHCAs pursuant to RCW 36.70A.040(3)(b), RCW 36.060(2) and RCW 36.70A.170(1)(d) for the first time.

**Anacortes Ordinance No. 2198 did not enact protections for wetlands nor did it designate and protect Fish and Wildlife Conservation Areas. Ordinance 2198 only contained statements that listed the code provisions the City had enacted previously, without adopting those as its development regulations to protect critical areas pursuant to RCW 36.70A.060(2) and RCW 36.70A. 170(1)(d). By contrast, Ordinance No. 2623 expressly adopts a comprehensive plan amendment**

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<sup>4</sup> *North Cascades v. Whatcom County*, WWGMHB Case No. 94-2-0001 (Final Decision and Order, June 30, 1994), and *Panesko v. Lewis County*, WWGMHB Case No. 98-2-0011c (Final Decision and Order, March 5, 2001). Also see *CCNRC v. Clark County* 96-20017 (9-12-96).

and development regulations to protect wetlands and to designate and protect Fish and Wildlife Habitat Conservation Areas pursuant to RCW 36.70A.040(3)(b) and RCW 36.70A.060(2). For these reasons, we find that the Board has jurisdiction over this case to determine whether Ordinance No. 2623 complies with the goals and requirements of the GMA.

#### V. ISSUES TO BE DISCUSSED

1. *Does Anacortes City Ordinance No. 2623 violate RCW 36.70A.020(10) (planning goal requiring protection and enhancement of the environment); RCW 36.70A.170 (requiring designation of critical areas); RCW 36.70A.172 (requiring the use of best available science); RCW 36.70A.050 (guidelines for the designation and protection of critical areas); and RCW 36.70A.040 and .060 (requiring the enactment of development regulations to protect critical areas), when the ordinance fails to include regulations to protect the fish and wildlife habitat areas including those designated as priority species and habitats by the Washington Department of Fish and Wildlife?*

2. *Does Anacortes City Ordinance No. 2623 violate RCW 36.70A.020(10) (planning goal requiring protection and enhancement of the environment); RCW 36.70A.170 (requiring designation of critical areas); RCW 36.70A.172 (requiring the use of best available science); RCW 36.70A.050 (guidelines for the designation and protection of critical areas); and RCW 36.70A.040 and .060 (requiring the enactment of development regulations to protect critical areas) when the ordinance fails to designate, or include a process for designating, fish and wildlife species of local importance?*

3. *Does Anacortes City Ordinance No. 2623 violate RCW 36.70A.020(10) (planning goal requiring protection and enhancement of the environment); RCW 36.70A.170 (requiring designation of critical areas); RCW 36.70A.172 (requiring*

*the use of best available science); RCW 36.70A.050 (guidelines for the designation and protection of critical areas); and RCW 36.70A.040 and .060 (requiring the enactment of development regulations to protect critical areas) when the ordinance fails to designate, regulate, or protect aquifer recharge areas?*

**4.** *Does Anacortes City Ordinance No. 2623 violate RCW 36.70A.020(10) (planning goal requiring protection and enhancement of the environment); RCW 36.70A.170 (requiring designation of critical areas); RCW 36.70A.172 (requiring the use of best available science); RCW 36.70A.050 (guidelines for the designation and protection of critical areas); and RCW 36.70A.040 and .060 (requiring the enactment of development regulations to protect critical areas) when the ordinance fails to designate or protect Type 1-5 Waters?*

**5.** *Does Anacortes City Ordinance No. 2623 violate RCW 36.70A.020(10) (planning goal requiring protection and enhancement of the environment); RCW 36.70A.170 (requiring designation of critical areas); RCW 36.70A.172 (requiring the use of best available science); RCW 36.70A.050 (guidelines for the designation and protection of critical areas); and RCW 36.70A.040 and .060 (requiring the enactment of development regulations to protect critical areas) when the ordinance fails to protect wetlands by failing to include mitigation ratios, fails to require mitigation, or fails to provide for any necessary standards for development in and around wetlands?*

**6.** *Does Anacortes City Ordinance No. 2623 violate RCW 36.70A.020(10) (planning goal requiring protection and enhancement of the environment); RCW 36.70A.170 (requiring designation of critical areas); RCW 36.70A.172 (requiring the use of best available science); RCW 36.70A.050 (guidelines for the designation and protection of critical areas); and RCW 36.70A.040 and .060 (requiring the*

*enactment of development regulations to protect critical areas) when the ordinance relies on the State Environmental Policy Act (SEPA), with its numerous exemptions, to protect fish and wildlife habitat areas, streams, and wetlands?*

*7. Considering the failure to comply with the above-noted sections of Chapter 36.70A. RCW, should the Board issue a finding of invalidity pursuant to RCW 36.70A.302 when the Anacortes City Ordinance No. 2623 and the ordinances referenced therein substantially interfere with the goals of the Growth Management Act (GMA)? In particular, within Section 2 of Ordinance No. 2623, do Section 6, Section 7, Section 9, Section 10, and Section 12 substantially interfere with the fulfillment of the goals of the GMA? Also, do the following sections of the Anacortes Municipal Code (AMC), incorporated by reference in the above-listed sections of Ordinance No. 2623, substantially interfere with the goals of the GMA: AMC Chapters 13.10, 13.16, 13.40, 18.04, 18.12, 17.65, and 18.04.240?*

## **V. DISCUSSION OF THE ISSUES**

### **Issues 1, 2, 4, and 5**

We will discuss these issues together because all four issues challenge the use of the WAC 365-190 (Minimum Guidelines) and the best available science (BAS).

### **Applicable Laws and WACs**

RCW 36.70A.170(1)(d) and (2)  
RCW 36.70A.040(3)(b)  
RCW 36.70A.060(2)  
RCW 36.70A.172(1)  
WAC 365-190-020  
WAC 365-195-040 (1)  
WAC 365-195-030  
WAC 365-195-080

### **Positions of the Parties**

Petitioners point out that Ordinance No. 2623 does not provide regulations to protect fish and wildlife habitat conservation areas (FWHCAs) including regulations to protect priority species identified by the Washington Department of Fish and Wildlife or for species of local importance and that this failure violates explicit requirements of the GMA. They also contend that this ordinance contains no performance standards for designating new critical areas and is devoid of language to protect any newly designated critical areas.

Petitioners point out that WAC 365-190-080(5) includes areas where endangered, threatened, and sensitive species have a primary association, priority species and habitats, and “habitats and species of local importance” in the definition of FWHCAs. In regard to habitat for priority species, while Petitioners acknowledge that Ordinance No. 2623 adopts by reference previously designated critical areas, they argue that this ordinance fails to designate, categorize, or classify priority species by type. Petitioners reference *Diehl v. Mason County*, WWGMHB Case No. 95-2-0073 (Order Finding Continued Noncompliance and Invalidity, March 22, 2000) in which Mason County was found out of compliance with the GMA because it failed to identify and protect habitats and species of local importance.

Petitioners further argue that the City is required to use best available science (BAS) in designating and protecting FWHCAs. Petitioners reference *Diehl*, WWGMHB Case No. 95-2-0073 (Compliance Order, March 14, 2001), where Mason County was found out of compliance for having buffers well below the ranges indicated by BAS. Petitioners stress that the City of Anacortes FWHCAs have no buffers at all.

Petitioners maintain that the GMA requires cities and counties to adopt regulations protecting “waters of the state as defined by WAC 22-16-031.” To support their

position they cite WAC 365-190-080(5)(a)(vi) and (5)(c)(vi) and Western Washington Hearings Board decisions in the following cases: *CCNRC v. Clark County*, WWGMHB Case No. 96-2-0017 (Final Decision and Order, December 6, 1996); *Diehl v. Mason County*, WWGMHB Case No. 95-2-0073, (Order Finding Continued Noncompliance and Invalidity, March 22, 2000); and *Island County Growth Management Coalition v. Island County*, WWGMHB Case No. 98-2-0023c (Final Decision and Order, June 2, 1999) that was recently upheld by the Washington State Court of Appeals, Division I.<sup>5</sup>

The City argues that Ordinance No. 2623 provides that its forest lands are its FWHCAs, which include habitats for priority species, species of local importance, and Type 1-5 waters. The City maintains that it protects these FWHCAs through its Forest Plan. It does this through conservation easements and deed restrictions, and through standard protections set forth in its comprehensive plan, development regulations, and ordinances that implement the State Environmental Policy Act (SEPA). The City asserts that, although the GMA does not require that the City identify species of local importance, it has done so through its Forest Plan.

The City further asserts that the buffers on Type 1-5 Waters provided in the Forest Plan extend through the entire Community Forest Lands preserve. Each lake and stream is protected by thousands of acres, it claims, and Petitioners have failed to identify any waters that are *not* protected.

## **Discussion**

### ***The Application Of Ch. 365-190 WAC To The City's Designation Of Critical Areas***

A common thread running throughout the Petitioners' claims is the failure of the City to follow the "Minimum Guidelines" adopted pursuant to the delegation to the

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<sup>5</sup> *Whidbey Environmental Action Network (WEAN) v. Island County*, 118 Wn. App. 567, 76 P.3d 1215, 2003 Wn. App. LEXIS 2236 (2003) -

Department of Community, Trade and Economic Development (CTED) in RCW 36.70A.050 to adopt guidelines to assist cities and counties in designating (among others) critical areas. These Minimum Guidelines are found in Chapter 365-190 WAC -- “Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands and Critical Areas.” Petitioners argue that the provisions of Chapter 365-190 WAC are mandatory and the City asserts that compliance with the guidelines is not required. Because this dispute is common to many of the issues in this case, we will address it first.

Pursuant to RCW 36.70A.170(2), the City must “consider” the Minimum Guidelines in its designation process:

In making the designation required by this section, counties and cities shall consider the guidelines established pursuant to RCW 36.70A.050.

RCW 36.70A.170(2)

Where a local jurisdiction departs from the Minimum Guidelines, the record must contain evidence of the City’s “consideration” of the Minimum Guidelines or the statutory direction becomes meaningless. *See Diehl v. Mason County*, WWGMHB Case No. 95-2-0073 (Final Decision and Order, January 8, 1996).

With regard to FWHCAs, the City contends that because the GMA itself does not define FWHCAs, the City has the discretion to define them as it sees fit. However, the Legislature delegated the duty to develop guidelines for the classification of critical areas to the Department of Community, Trade and Economic Development (“CTED”). RCW 36.70A.050. In developing these Minimum Guidelines, CTED was directed to consult with a variety of interest groups, as well as with other state agencies with expertise in the technical areas on which guidance was developed. *Ibid.* The intent of these guidelines is to assist cities and counties in designating, *inter alia*, critical areas. By directing all cities and counties to “consider” the Minimum Guidelines, the Legislature did not order them to adopt the recommendations contained in the

Minimum Guidelines, but assured that the decisions of cities and counties would be informed by the guidance CTED developed.

The City makes no argument that it considered any of the guidance in the Minimum Guidelines and there is no evidence in the record that the City considered the guidelines in designating FWHCAs. Instead, Ordinance No. 2623 simply declares that the City's Forest Lands, as defined in the City's Forest Plan adopted in May 1991, are designated as its FWHCAs.

The City relies upon the Forest Plan as its designation of fish and wildlife habitat conservation areas. While the City insists that it is not required to designate habitats for priority species or species of local importance, it says the Forest Plan does designate them. When we examine the Forest Plan, we find a list of species found on City of Anacortes' land and a table entitled "Use by Eighty-four Birds of the Douglas Fir Sere in Oregon West of the Cascades Mountain Summit". There is no explanation of how the habitats listed in this table relate to any specific habitat described in the Forest Plan. Management Plan for the Anacortes Community Forest Lands at 29-35. There is no evidence in the record for the adoption of Ordinance No. 2623 or discussion in the Forest Plan itself that shows that the City considered the Department of Fish and Wildlife's data on priority habitat species, determined what habitats or species on the list were of local importance, or what habitats defined in the Plan are locally important, as WAC 365-190-080(5)(c)(ii) recommends.

The Forest Plan is a visionary and commendable ongoing effort for conserving and utilizing the City's forest lands for aesthetic and recreational resources. While the Forest Plan almost certainly provides habitat for some species, there is nothing in the stated purpose of the Forest Plan showing that the City adopted the Forest Plan as its method for designating FWHCAs. Management Plan for the Anacortes Community

Forest Lands at 1. Further, to comply with RCW 36.70A.170(1)(d), the City should have considered the Minimum Guidelines pursuant to RCW 36.70A.172(2) before it adopted the Forest Plan for the purpose of designating FWHCAs and should have explained in the record either why the use of the Forest Plan for designating FWHCAs is consistent with the Minimum Guidelines or how designating the lands as set forth in the Forest Plan was of comparable benefit as the process specified in the Minimum Guidelines. The very limited record submitted by the City does not demonstrate such “consideration” of the Minimum Guidelines.

Petitioners also challenge whether the City has adequately designated or protected Type 1-5 Waters. The GMA does not dictate the use of a five-tier classification system for waters of the state. However, WAC 365-190-080(5)(c)(vi) recommends this classification system and RCW 36.70A.170(2) requires that this guidance be considered. Again the record contains no evidence that the City considered this guideline when it adopted the Forest Plan to designate critical areas in Ordinance No. 2623. Just as with the designation of species and habitats of priority and local importance, the City should consider this guideline in designating Type 1-5 Waters and provide a rationale for departing from it, if it chooses to do so. From the maps provided by the City, for example, it appears that there are Type 1-5 Waters outside the lands managed in the Forest Plan. Exhibit 7112. This raises questions regarding the City’s choice not to designate them as critical areas.

**We hold that the City failed to consider the Minimum Guidelines for the designation of fish and wildlife conservation habitat areas, including priority species and their habitats, species of local importance and their habitats, and for Type 1-5 Waters pursuant to RCW 36.70A. 172.**

***Challenges To The Sufficiency Of Development Regulations To Protect Critical Areas***

The Minimum Guidelines are directed to the designation process. Petitioners do not argue that the City has failed to *designate* wetlands as critical areas. Petitioners' Opening Brief at 9–11 and Petitioners Reply Brief at 11–14. Petitioners only argue that the City failed to properly designate fish and wildlife conservation habitat areas. As to wetlands, Petitioners do not challenge the City's *designation* policies; they challenge the *protections* adopted for wetlands. WAC 365-195-080 (5)(a)(i) is part of the Minimum Guidelines that are required to be considered in the *designation* of critical areas. It applies to the protection of wetlands only indirectly. Therefore, Chapter 365-190 WAC does not apply to Petitioners' challenge to the City's protection of wetlands. RCW 36.70A.172, on the other hand, requires the City to include BAS in both the designation and protection of critical areas. We will consider that requirement next.

The City maintains that it protects FWHCAs through its Forest Plan. Petitioners argue that the City failed to include BAS in the development of these protection measures; that the Forest Plan was not developed for the purpose of protecting FWHCAs; that the Forest Plan provides for no protection of FWHCAs outside the lands managed by the Forest Plan; and that the Forest Plan provides for only minimal protection for FWHCAs that are managed in the Forest Plan.

FWHCAs are a critical area according to RCW 36.70A.030(5)(c) for which the functions and values must be protected according to RCW 36.70A.060(2). To protect FWHCAs, the City must include BAS and give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries pursuant to RCW 36.70A.172(1). Ordinance No. 2623 states that FWHCAs are protected by the City's Forest Plan. There is no evidence in the record for the adoption of Ordinance No. 2623 to show that the City included BAS or gave any

consideration to protection or conservation measures for anadromous fisheries; nor does our review of the Forest Plan show that it includes BAS.

The same analysis applies to Ordinance No. 2623's adoption of Chapter 17.25 for wetland protection in July 2003. These regulations were originally adopted before the City adopted the 1991 critical areas ordinance and not reenacted by that ordinance before RCW 36.70A.172 was adopted. In WWGMHB Case No. 96-2-0017, *CCNRC v. Clark County* (Final Decision and Order, December 6, 1996), this Board provided parameters for the use of BAS by counties and cities in developing critical areas ordinances:

The adoption of section .172 by the Legislature shrinks the discretion parameters available to local governments but does not eliminate them. Because of that local discretion, it is not possible for us to establish a "bright-line" definition of BAS for critical areas. Rather, in keeping with one of the basic tenets of the Act, regional and local diversity, we will decide each case individually, based upon the record. We will base our decision upon the following factors: (1) The scientific evidence contained in the record; (2) Whether the analysis by the local decision-maker of the scientific evidence and other factors involved a reasoned process; and (3) Whether the decision made by the local government was within the parameters of the Act as directed by the provisions of RCW 36.70A.172(1).

WWGMHB Case No. 96-2-0017, *CCNRC v. Clark County* (Final Decision and Order, December 6, 1996) at 9.

In the adoption of Ordinance No. 2623, the City provided in the record neither scientific evidence, analysis by local decision makers of scientific evidence, nor other factors involved in a reasoned process, including local circumstances.<sup>6</sup> RCW 36.70A.172 requires BAS to be applied both to the designation process and to the protection measures.

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<sup>6</sup> See RCW 36.70A.3201.

Petitioners have provided us with many instances where this Board has found that certain counties' critical areas regulations were not consistent with BAS. The rulings that this Board made relative to regulations regarding protections for various categories of wetlands, mitigation of wetland loss, and fish and wildlife protection designations and protections were based on science that was included in the specific records in these cases. Neither Petitioners nor the City has provided us with scientific information or a reasoned discussion of how this scientific evidence should be applied to local conditions. Nevertheless, Ordinance No. 2623 fails to comply with RCW 36.70A.172 in regard to both the designation and protection of FWHCAs and the protection of wetlands. Because the City chose to use the Forest Plan to designate and protect FWHCAs and Chapter 17.65 AMC to protect wetlands in the adoption of Ordinance No. 2623 in 2003 to meet the requirements of RCW 36.70A.060(2) and RCW 36.70A.040(3)(b), the City must include scientific evidence in the record that supports the City's choice of adopted protective measures. The record lacks such BAS.

The decision of Washington State Court of Appeals, Division I that upheld this Board's decision in a similar situation in Island County supports this conclusion. In that case, the County relied on its 1992 wetlands regulations to satisfy the 1995 requirement that the County include best available science to protect FWHCAs in its 1998 ordinance. The Court of Appeals said:

Thus, the 1992 wetlands regulations were subject to challenge to the extent the County relied on them to fulfill requirements imposed by the 1995 amendments.

No other conclusion makes sense. If the County is relying substantively on wetland buffers to satisfy its obligation under RCW 36.70A.172 for the protection of fish and wildlife critical areas, those preexisting regulations must be subject to the applicable critical areas analysis to ensure compliance with GMA requirements. Otherwise, a county

could use myriad preexisting regulations in an attempt to satisfy critical areas requirements without having to include BAS analysis.

*Whidbey Environmental Action Network (WEAN) v. Island County*, 118 Wn. App. 567, 76 P.3d 1215, 2003 Wash. App. LEXIS 2236 (2003) at 24.

State and federal agencies, private entities, and environmental groups, among others, have developed an extensive amount of information about BAS for both of these critical areas since 1995 when this requirement was adopted. This information was available for the City to consider when it adopted Ordinance No. 2623 enacting designations and protections for FWHCAs and protection for wetlands. Our review of Exhibits 7109-7112, draft amendments to the City's critical areas regulations shows that the City is aware and is making use of this scientific evidence. However, these drafts have not been adopted.

**In adopting Ordinance No. 2623, the City has not included BAS or a discussion of local circumstances in developing protection measures for FWHCAs and wetlands in accordance with RCW 36.70A.172(1). For these reasons, we find that the protection measures for FWHCAs and wetlands provided in Ordinance No. 2623 do not comply with the GMA, including RCW 36.70A.060(2), RCW 36.70A.040, and RCW 36.70A.172.**

#### *Critical Aquifer Recharge Areas*

***3. Does Anacortes City Ordinance No. 2623 violate RCW 36.70A.020(10) (planning goal requiring protection and enhancement of the environment); RCW 36.70A.170 (requiring designation of critical areas); RCW 36.70A.172 (requiring the use of best available science); RCW 36.70A.050 (guidelines for the designation and protection of critical areas); and RCW 36.70A.040 and .060 (requiring the enactment of development regulations to protect critical areas) when the ordinance fails to designate, regulate, or protect aquifer recharge areas?***

The City states that it has adopted ordinances that address protection for critical aquifer recharge areas (Ordinance Nos. 2623, 2628, and 2635) and that Petitioners are now satisfied with the City's approach to protecting aquifer recharge areas. In Petitioners' Reply Brief (December 11, 2003), Petitioners acknowledge that the City's adoption of Ordinance No. 2628 addresses many of the concerns raised by the Petitioners and agree with the City that this issue is now moot. **Based on the agreement of the parties, we dismiss Issue No. 3 regarding aquifer recharge areas.**

*Reliance Upon SEPA For Critical Area Protections*

*6. Does Anacortes City Ordinance No. 2623 violate RCW 36.70A.020(10) (planning goal requiring protection and enhancement of the environment); RCW 36.70A.170 (requiring designation of critical areas); RCW 36.70A.172 (requiring the use of best available science); RCW 36.70A.050 (guidelines for the designation and protection of critical areas); and RCW 36.70A.040 and .060 (requiring the enactment of development regulations to protect critical areas) when the ordinance relies on the State Environmental Policy Act (SEPA), with its numerous exemptions, to protect fish and wildlife habitat areas, streams, and wetlands?*

**Positions of the Parties**

The City states that it has merely added its critical area regulations as SEPA substantive policy. This enables the City to add conditions to protect critical areas as part of the SEPA process. The City argues that it has never purported to use SEPA alone to protect critical areas.

Petitioners recognize that the City has specified its critical areas as SEPA substantive policy, but argue that this is a stopgap measure. Petitioners contend that with

inadequate regulations, SEPA cannot save this ordinance from its identified inadequacies.

### **Discussion**

The Board has already found that designation and protection of FWHCAs and the protection of wetlands does not comply with the GMA. The City does not claim to use SEPA as its sole means for protecting critical areas. Ordinance No. 2623 does not comply with the GMA relative to the protection of FWHCAs and wetlands because of its failure to include BAS in developing these protection measures, not because the City adopted its critical areas ordinances as substantive SEPA policy.

**We find that the City's adoption of substantive SEPA policies is not intended to substitute for adequate critical areas protections. The City must bring its critical areas protections into compliance with the GMA, but its use of substantive SEPA policy to protect the environment as a supplementary protective measure complies with the GMA.**

### ***Invalidity***

***7. Considering the failure to comply with the above-noted sections of Chapter 36.70A, RCW, should the Board issue a finding of invalidity pursuant to RCW 36.70A.302 when the Anacortes City Ordinance 2623 and the ordinances referenced therein substantially interfere with the goals of the Growth Management Act (GMA)? In particular, within Section 2 of Ordinance No. 2623, do Section 6, Section 7, Section 9, Section 10, and Section 12 substantially interfere with the fulfillment of the goals of the GMA? Also, do the following sections of the Anacortes Municipal Code (AMC), incorporated by reference in the above-listed sections of Ordinance No. 2623, substantially interfere with the goals of the GMA: AMC Chapters 13.10, 13.16, 13.40, 18.04, 18.12, 17.65, and 18.04.240?***

### **Positions of the Parties**

Petitioners argue that by failing to consider WAC 365-190 in the designation of FWHCAs and wetlands; and failing to include BAS in the designation and protection of wetlands, the City has failed to designate and protect these critical areas in conformance with the GMA. They claim the City has not had these protections in place for 12 years and that this is egregious. This lack of protection, they argue, substantially interferes with three GMA goals.

The City points out that this Board has stated that invalidity will be used in only the most egregious cases. The City argues that Petitioners have not shown how the code provisions that they have cited interfere with the goals of the GMA. At argument, the City contended that Petitioners had not shown any areas that had failed to be protected as a result of this argument.

### **Discussion**

We have found that the designation and protection of FWHCAs and protection of wetlands does not comply with RCW 36.70A.170(2), RCW 36.70A.060(2), RCW 36.70A.040(3)(b) and RCW 36.70A.172(1) because there is no evidence in the record that Chapter 365-190 WAC was considered, no scientific evidence was included, and no reasoned discussion of this rule or scientific evidence was conducted. While we agree that failure to consider Chapter 195-360 WAC and BAS in Ordinance No. 2623 fails to comply with Goal 8, (“Environment”), we are not persuaded that a finding of invalidity is necessary to ensure that proper planning will take place as the City makes efforts to achieve compliance. *See FOSC v. Skagit County*, WWGMHB Case No. 95-2-0065 (Compliance Order, February 7, 1996). The Board appreciates that the City has already drafted extensive changes to its critical areas regulations. Petitioners acknowledge that the draft amendments address many of their concerns. Exhibits 7109–7112. It appears to us that the City is moving expeditiously to include the

Minimum Guidelines and/or BAS to improve its designations and protective regulations. The Board recognizes that the adoption of critical areas regulations are controversial and need a broad public participation process. We have not been presented sufficient evidence to warrant a finding of invalidity at this time. **Petitioners' request for invalidity is denied.**<sup>7</sup>

## VI. FINDINGS OF FACTS

1. The City of Anacortes is a city located in Skagit County, a county located west of the Cascade Mountains, and required to plan under RCW 36.70A.040(3)(b).
2. Petitioners are organizations that offered written or oral comments to the City regarding the provisions challenged here during the adoption process.
3. In 1991, the City adopted Ordinance No. 2198. Ordinance No. 2198, in its preamble, referenced City ordinances regarding wetlands and fish and wildlife habitat conservation areas, but it failed to enact either designations of fish and wildlife habitat conservation areas, or protection measures for fish and wildlife habitat conservation areas and/or wetlands as required by the GMA. RCW36.70A.170(2), RCW 36.70A.060(2), and RCW 36.70A.040(3)(b).
4. On April 2, 2003, Petitioners filed a Petition for Review in WWGMHB Case No. 03-2-0012, alleging that the City had failed to act to adopt designations of fish and wildlife habitat conservation areas, and development regulations protecting fish and wildlife habitat conservation areas, and wetlands.

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<sup>7</sup> It is unfortunate that the Petitioners and the City could not work together to resolve this matter themselves instead of having this Board adjudicate it. Neither party has obtained what they wanted in this case. The City wanted their 1991 regulations to be found in compliance and time to review and update their ordinance by December 2005 as required by RCW 36.70A.130(4)(b). Petitioners wanted invalidity in lands where there are FWHCAs and wetlands during the time that it will take for the City to amend its ordinance. The following order requires that the City amend its regulations only several months before the deadline. We can't help but believe that time, effort, and resources would have been better spent producing a better ordinance rather than arguing about the adequacy of Ordinance No. 2623 before the Board.

5. On June 16, 2003, the City adopted Ordinance 2623 in which the City adopted designations for fish and wildlife habitat conservation areas through its Forest Plan, and development regulations to protect fish and wildlife habitat conservation areas (also through the Forest Plan) and wetlands (Chapter 17.65 AMC).
6. On June 17, 2003, the City moved to dismiss the Petition for Review in WWGMHB Case No. 03-2-0012 because “[the City} has acted”.
7. Petitioners joined in the City’s Motion to Dismiss Petition and the Board dismissed WWGMHB Case No. 03-2-0012 on June 30, 2003.
8. On August 15, 2003, Petitioners filed a Petition for Review in the instant case, including allegations that the designation of fish and wildlife habitat conservation areas, and the development regulations to protect fish and wildlife habitat conservation areas and wetlands, fail to comply with the Growth Management Act.
9. Ordinance No. 2623 adopts the City’s Forest Lands Plan as designation and protection measures for FWHCAs pursuant to RCW 36.70A.170(1)(d), RCW 36.70A.060(2), and RCW 36.70A.040(3)(b).
10. Ordinance No. 2623 adopts protection for wetlands pursuant to RCW 36.70A.040 and RCW 36.70A.060(2).
11. The record for the adoption of Ordinance No. 2623 does not show that the City considered the Minimum Guidelines for designation of resource lands and critical areas (Chapter 365-190 WAC) in designating FWHCAs as required by RCW 36.70A.170(2) and RCW 36.70A.040(3)(b) of the GMA.
12. The record for the adoption of Ordinance No. 2623 does not show that the City included best available science (“BAS”) in the adoption of protection measures for FWHCAs and wetlands as required by RCW 36.70A.172(1) of the GMA.
13. Both Petitioners and the City agree that the protection of aquifer recharge areas in Ordinance No. 2628 (a subsequent City enactment) complies with the requirements of the GMA.

14. The City is currently drafting, but has not adopted, extensive amendments to its critical area ordinances.

## **VII. CONCLUSIONS OF LAW**

1. The Western Washington Growth Management Hearings Board has jurisdiction over the parties and subject matter of this case.

2. Petitioners have standing to raise the challenges in the Petition for Review.

3. Because the record fails to show that the City considered the Minimum Guidelines for the designation of fish and wildlife habitat conservation areas (Chapter 365-190 WAC) in the adoption of Ordinance No. 2623, this ordinance does not comply with RCW 36.70A.170(2).

4. Because the record does not show that the City included the best available science (BAS) in the adoption of development regulations to protect fish and wildlife habitat conservation areas or wetlands areas as required by RCW 36.70A.172(1), Ordinance No. 2623 does not comply with the Growth Management Act..

5. Because the record does not show that the City included the best available science as required by RCW 36.70A.172(1), the designation and protection of FWHCAs and in the adoption of development regulations for the protection of wetlands Ordinance No. 2623 does not comply with RCW 36.70A.060(2), RCW 36.70A.040(3)(b), and RCW 36.70A.020(10).

## **VIII. ORDER**

Ordinance No. 2623 is remanded to the City for the purpose of bringing its designations and protections for FWHCAs and wetland protection measures into compliance with the GMA requirements for designation and protection of critical areas, including RCW 36.70A.060 (2), RCW 36.70A.170(1)(d), RCW 36.70A.170(2), RCW 36.70A.172(1) and RCW 36.70A.040. The City must complete this work within 180 days from the date of this order. The City must submit a compliance report

to the Board and copies of the compliance report to the Petitioners no later than August 28, 2004, showing its compliance efforts in response to this remand order.

A compliance hearing is scheduled in this case for October 27, 2004. The briefing schedule for that hearing is as follows: Parties will follow the following briefing schedule:

August 28, 2004 – Compliance Report and Index Submission Deadline

September 9, 2004 – Deadlines for motions to participate, additions to the Index, and motions to supplement the record

September 24, 2004 – Petitioners’ Opening Briefs setting forth objections (if any) to a finding that the City is now in compliance.

October 15, 2004 – City’s Response Brief

October 22, 2004 – Petitioners’ Reply (Optional)

October 27, 2004 – Compliance Hearing

This is a Final Order under RCW 36.70A.300(5) for purposes of appeal.

Pursuant to WAC 242-02-832(1), a motion for reconsideration may be filed within ten days of issuance of this final decision

SO ORDERED this 10th day of February 2004.

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Holly Gadbow, Board Member

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Nan Henriksen, Board Member

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Margery Hite, Board Member