

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2  
3 EVERGREEN ISLANDS, FUTUREWISE and  
4 SKAGIT AUDUBON SOCIETY,

5  
6 Petitioners,

7 v.

8 CITY OF ANACORTES,

9  
10 Respondent.

Case No. 05-2-0016

FINAL DECISION AND ORDER

11  
12  
13 **I. SYNOPSIS OF DECISION**

14 Anacortes is a city located on Fidalgo Bay in Puget Sound with many assets. These assets  
15 include miles of shorelines shared by critical habitat and industrial uses, preserved forest  
16 lands that cover almost half of the city, and a historic downtown. This case arises out of the  
17 City's efforts to protect the City's considerable environmental resources while managing  
18 future growth and maintaining and enhancing its shoreline industrial resources.

19  
20 This matter comes to the Board as an appeal of the City of Anacortes Ordinance 2702  
21 (Ordinance), an ordinance that repealed the City's previous critical areas regulations and  
22 enacted a new stand-alone critical areas ordinance (CAO). Petitioners are Evergreen  
23 Islands, Futurewise, and the Skagit Audubon Society. Petitioners challenge the  
24 Ordinance's wetland buffer widths and exemptions, the adequacy of wetland buffer widths  
25 for shoreline habitat areas, the alleged lack of standards for buffers in forest habitat areas,  
26 and the use of the term "professional scientific analysis" rather than "best available science"  
27 in the City's development regulations.  
28  
29

30  
31 ///

1 The City has kept its commitment to the Board made during a previous case<sup>1</sup> involving the  
2 same Petitioners to replace its original critical areas regulations as early as possible. The  
3 City has responsibly enacted new, more protective regulations ahead of its December 1,  
4 2006, update deadline. Previously, with commendable foresight, the City had set aside  
5 nearly half of the City's land by permanently protecting over 2600 acres through its  
6 Community Forest Lands program.  
7

8  
9 The City argues that the Board does not have jurisdiction over its wetland buffer widths or its  
10 wetland exemptions because it plans to review and possibly revise these regulations before  
11 its December 1, 2006, update deadline. The Board finds that it does have jurisdiction over  
12 these regulations because they are a new enactment of development regulations, over  
13 which the Board has jurisdiction pursuant to RCW 36.70A.280(1).  
14

15  
16 Understanding that the City acknowledges that its work on these regulations is not yet done,  
17 the Board must still find that the wetland buffers and exemptions do not comport with best  
18 available science (BAS). They do not comport with the only BAS included in the record,  
19 provided by the Petitioners and the Washington State Department of Ecology (Ecology).  
20 The City has neither provided a reasoned discussion of why it has departed from the BAS  
21 offered by an agency with expertise nor provided an alternative source of BAS.  
22

23  
24 The City argues that the adaptive management program enacted by the Ordinance will  
25 monitor and measure the impact of the adopted buffer widths and exemptions. The Board  
26 agrees that for a small city which issues relatively few building permits, a workable adaptive  
27 management program is a real possibility. However, we cannot find this approach  
28 compliant without a description of how the monitoring and adaptive management program  
29  
30  
31  
32

---

<sup>1</sup> *Evergreen Islands, Futurewise, and Skagit Audubon Society v. the City of Anacortes*, Case No. 03-2-0017.

1 will be conducted, what scientific methods would be used, and how the effectiveness will be  
2 measured and monitored.

3  
4 The City also argues that the Board does not have jurisdiction over the challenges to the  
5 critical areas regulations applicable in the City's shorelines because such critical areas  
6 regulations are now governed by the Shoreline Management Act. The Board received two  
7 amicus briefs on this subject, as well as briefs from the City and the Petitioners. In light of  
8 the express legislative intent in adopting ESHB 1933, we find that the repeal of the prior  
9 critical areas regulations governing critical areas in the shorelines and the adoption of new  
10 critical areas regulations (some of which apply to critical areas in the shorelines) amend the  
11 City's shoreline master program. As a result, those amendments must be submitted to  
12 Ecology by the City for review and approval.  
13  
14

15  
16 As for Petitioners' challenge to the lack of standards for buffers, we find that in forest lands,  
17 determination of buffer widths for habitat areas on a case-by-case basis is consistent with  
18 the best available science in the record - the advice given by the Washington Department of  
19 Community, Trade and Economic Development (CTED) Critical Areas Assistance  
20 Handbook. While a more specific standard for these habitat areas would be preferable, we  
21 find that the City's requirements that an extensive critical area report must be prepared by a  
22 biologist with experience in the type of habitat being regulated and the general standard that  
23 the review will be based upon protecting the functions and values of habitat make this  
24 regulation compliant.  
25  
26

27 Petitioners challenge the use of the term "professional scientific analysis" rather than "best  
28 available science" in sections of the new CAO that deal with (1) procedures in the City's  
29 comprehensive plan for nominating for designation habitat areas and species when  
30 management strategies are included for these local nominations, (2) specifications for  
31 issuing conditional use permits allowing development in habitat conservation areas or their  
32

1 buffers, and (3) reductions in riparian buffers. RCW 36.70A.172(1) requires that BAS must  
2 be substantively included in the formulation of development regulations. We do not read  
3 RCW 36.70A.172(1) to require another BAS investigation for issuing permits.  
4

5  
6 The regulation that codifies procedures located in the City's comprehensive plan for the  
7 nomination process for habitat areas and species of local importance establishes a  
8 procedure for making an addition to the City's development regulations. Because this  
9 process will establish a new development regulation(s), it must include BAS. Since it does  
10 not, this section of the new CAO does not comply with the Growth Management Act (GMA).  
11

12 On the other hand, the sections of the new CAO that establish permitting processes are not  
13 required to incorporate BAS in the permitting process. The regulations for issuing  
14 conditional use permits which allow development in habitat conservation areas or their  
15 buffers and establish conditions for reductions in riparian buffers detail the requirements for  
16 conditions imposed on development at the time that permits are issued. While we find that  
17 RCW 36.70A.172(1) does not require a new BAS investigation at the time of permitting, we  
18 find, as we have in previous cases, that discretion in issuing permit decisions should be  
19 guided by specific criteria. The City's requirements for an extensive critical areas report by  
20 a qualified biologist, coupled with the requirement that habitat alterations or mitigations must  
21 protect the quantitative and qualitative functions and values of habitat conservation areas  
22 when permits are issued, make these regulations compliant.  
23  
24

25  
26 We find that the Petitioners' request for invalidity is not justified in this case. Invalidity here  
27 would have the effect of suspending the newly adopted and more protective critical areas  
28 regulations. The Board sees no reason to question the City's good faith in pursuing the  
29 adoption of critical areas regulations that fully protect the functions and values of critical  
30 areas. The Board encourages the City to keep the provisions of Ordinance 2702 in place  
31 while it completes its update work.  
32

1 **II. PROCEDURAL HISTORY**

2 On April 18, 2005, the City of Anacortes adopted Ordinance 2702 (Ordinance) that enacted  
3 a new stand-alone chapter of the Anacortes City Code for protecting critical areas, and  
4 published a notice of adoption on April 27, 2005. On June 27, 2005, Evergreen Islands,  
5 Futurewise, and Skagit Audubon Society filed a petition for review challenging Ordinance  
6 2702. The City filed an answer to the petition for review on July 18, 2005.  
7

8  
9 The Board issued a Notice of Hearing and Preliminary Schedule on July 6, 2005.  
10

11 A prehearing conference was held telephonically on July 19, 2005. Charles Cottrell  
12 represented Petitioners, Ian Munce represented the City, and Board member Holly Gadbow  
13 presided.  
14

15  
16 On July 27, 2005, Petitioners filed an amended petition for review that included in the issue  
17 statement the sections of the challenged ordinance that Petitioners alleged violated the  
18 Growth Management Act (GMA).  
19

20 A prehearing order was issued on August 1, 2005.  
21

22  
23 The City filed Motion to Dismiss or Alternatively, Summary Judgment (Substantive Motion)  
24 on August 15, 2005. On August 23, 2005, the Board issued an order deciding not to  
25 consider the City's motion due to the Board's schedule of cases.  
26

27 On October 10, 2003, Petitioners filed their prehearing brief. The City submitted its  
28 opposition brief on October 24, 2005. Petitioners submitted a Reply Brief on October 21,  
29 2005.  
30  
31  
32

1 The Washington State Departments of Community, Trade and Economic Development  
2 (CTED), Ecology, and Fish and Wildlife (WDFW) moved for permission to file an Amicus  
3 Brief on October 24, 2005. On that same day, the Washington Public Ports Association also  
4 moved for permission to file an Amicus Brief and submitted an Amicus Brief. The City filed  
5 a response to the motions to file amicus briefs on November 1, 2005, and offered no  
6 objection to allowing either brief, if the City's response was allowed.  
7

8  
9 The Board held a hearing on the merits on November 3, 2005, at the Anacortes City Hall.  
10 Charles Cottrell represented Petitioners. Ian Munce represented the City. All three Board  
11 members attended.  
12

13  
14 At the hearing on the merits, the Presiding Officer made the following rulings:

- 15 a. CTED, Ecology, and WDFW were granted leave to submit an Amicus Brief.
- 16 b. The Washington Public Ports Association was granted leave to submit an  
17 Amicus Brief.
- 18 c. The City was granted leave to submit a response to the amicus briefs.
- 19 d. The Board admitted the following as exhibits:
  - 20 i. Ordinance 2706 with attached oversized maps - Exhibit 176
  - 21 ii. Document titled: Plan for Habitat Protection, Restoration, and  
22 Enhancement Fidalgo Bay and Guemes Channel – Exhibit 177
  - 23 iii. Shoreline Master Plan for City of Anacortes – Exhibit 178
  - 24 iv. Revised Final Integrated Fidalgo Bay-Wide Plan and  
25 (January 18, 2000) – Exhibit 179.  
26  
27

### 28 III. ISSUES PRESENTED

- 29  
30 **1. Do provisions ACC 17.65.051 (D) (2) and (E) (1), ACC 17.65.210, ACC 17.65.053 (F)**  
31 **(1), ACC 17.41.00, and ACC X.60.040 adopted by Ordinance No. 2702 violate RCW**  
32 **36.70A.020(10), RCW 36.70A.040, RCW 36.70A.050, RCW 36.70A.060, RCW**

1 **36.70A.130, RCW 36.70A.130, RCW 36.70A.172 and RCW 36.70A.175 when the**  
2 **ordinance fails to protect critical areas functions and values and fails to consider**  
3 **best available science by allowing buffers on all categories of wetlands, Type 3**  
4 **streams, and marine shorelines that are unsupported by best available science, by**  
5 **allowing Class II sized-buffers on a Class I Wetland and Class III sized-buffers on a**  
6 **Class II Wetland, and by exempting certain category II and III Wetlands from buffer**  
7 **requirements altogether?**

8 **2. Does ACC X.60.020G adopted by Anacortes Ordinance No. 2702 violate RCW**  
9 **36.70A.020(9), RCW 36.70A.020(10), RCW 36.70A.040, RCW 36.70A.050, RCW**  
10 **36.70A.060, RCW 36.70A.130 and RCW 36.70A.172 by failing to tie buffer width for**  
11 **development adjacent to fish and wildlife habitat conservation areas to any**  
12 **standards and by precluding consistent and assured protections of the functions**  
13 **and values of the habitat conservation areas?**

14 **3. Does Appendix F to Anacortes Ordinance No. 2702 on pages 85, 90, and 94**  
15 **adopted by Ordinance No. 2702 to the extent that it substitutes the term**  
16 **professional scientific analysis for best available science violate RCW**  
17 **36.70A.020(9), RCW 36.70A.020(10), RCW 36.70A.040, RCW 36.70A.050, RCW**  
18 **36.70A.060, RCW 36.70A.130 and RCW 36.70A.172 when the substituted term has**  
19 **no definition or standard under the GMA and therefore cannot protect critical area**  
20 **functions and values?**

21 **4. Considering the failure to comply with the above-noted sections of Chapter 36.70A**  
22 **RCW, should this board issue a finding of invalidity pursuant to RCW 36.70A.302**  
23 **when Anacortes' City Ordinance No. 2702 substantially interferes with the**  
24 **fulfillment of the goals of the Growth Management Act?**

#### 25 **IV. BURDEN OF PROOF**

26 For purposes of board review of the comprehensive plans and development regulations  
27 adopted by local government, the GMA establishes three major precepts: a presumption of  
28 validity; a "clearly erroneous" standard of review; and a requirement of deference to the  
29 decisions of local government.

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

32 Except as provided in subsection (5) of this section, comprehensive plans and  
development regulations, and amendments thereto, adopted under this chapter are  
presumed valid upon adoption.

RCW 36.70A.320(1).

1 The statute further provides that the standard of review shall be whether the challenged  
2 enactments are clearly erroneous:

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

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

10  
11  
12 Within the framework of state goals and requirements, the boards must grant deference to  
13 local government in how they plan for growth:

14         In recognition of the broad range of discretion that may be exercised by counties and  
15         cities in how they plan for growth, consistent with the requirements and goals of this  
16         chapter, the legislature intends for the boards to grant deference to the counties and  
17         cities in how they plan for growth, consistent with the requirements and goals of this  
18         chapter. Local comprehensive plans and development regulations require counties and  
19         cities to balance priorities and options for action in full consideration of local  
20         circumstances. The legislature finds that while this chapter requires local planning to  
21         take place within a framework of state goals and requirements, the ultimate burden and  
22         responsibility for planning, harmonizing the planning goals of this chapter, and  
23         implementing a county's or city's future rests with that community.  
24 RCW 36.70A.3201 (in part).

25 In sum, the burden is on the Petitioners to overcome the presumption of validity and  
26 demonstrate that any action taken by the City is clearly erroneous in light of the goals and  
27 requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).

28 Where not clearly erroneous and thus within the framework of state goals and requirements,  
29 the planning choices of local government must be granted deference.

30 ///

31 ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

## V. DISCUSSION

### ***Jurisdiction***

#### Positions of the Parties

As a threshold issue, the City challenges the Board's jurisdiction to determine the compliance of portions of its newly adopted critical area ordinance (CAO) with the GMA. The City argues that its work is not done on its wetland buffers and exemptions. City of Anacortes Opposition Brief (October 24, 2005) at 1. Because it has until the GMA update deadline to complete its work, the City asserts, the Board does not have jurisdiction to consider the "interim" regulations it adopted here. *Id.*

Petitioners contend that when the City enacted its CAO, it subjected these regulations to the Board's jurisdiction and a review for GMA compliance. Petitioners argue that a municipality cannot adopt critical areas protections and then evade Board scrutiny with the condition that "further review" will be conducted by the next GMA update deadline. Petitioner points out building permits continue to vest under these adopted regulations. Petitioner's Reply (October 31, 2005) at 2.

#### Board Discussion

The Board's review of the record shows conflicting evidence on whether Ordinance 2702 updated the City's critical area ordinance pursuant to RCW 36.70A.130(1), (2), and (4). The City argues in its brief that it adopted a new stand-alone CAO and the City Council minutes show that the City considered its CAO an "update," except for the regulations related to wetland buffers and wetland exemptions which will be subject to further review before the City's December 1, 2006, deadline. Exhibit 163 at 2. The City says failure to do this will constitute an opportunity for an appeal to the Growth Board. City of Anacortes Opposition Brief at 7. At argument the City stated that the critical areas ordinance adopted by the Ordinance was an annual revision pursuant to RCW 36.70A.130(1) and (2), but not a seven year "update" pursuant to RCW 36.70A.130(1), (2), and (4).

1 To help us determine whether or not Ordinance 2702 is an update, we look to our decision  
2 in a case that presented a similar situation, *1000 Friends of Washington and Pro-Whatcom*  
3 *v. Whatcom County*, WWGMHB Case No. 04-2-0010. In that case, this Board said:

4 The threshold question that we must answer is whether Ordinance 2004-017 is an  
5 update of the County's comprehensive plan (or part of it) pursuant to RCW  
6 36.70A.130(1)(a) and (2)(a). We look to RCW 36.70.130 to determine what is  
7 required for an update. This provision of the GMA (RCW 36.70.130) contains two  
8 major kinds of revision requirements for comprehensive plans and development  
9 regulations. First, comprehensive plans and development regulations adopted  
10 pursuant to Ch. 36.70A RCW are subject to "continuing review and evaluation."  
11 While there is no express requirement that this be done every year, this type of  
12 review is usually done in an annual comprehensive amendment cycle, RCW  
13 36.70A.130(2)(a). The amendments adopted under this process may be appealed to  
14 the boards to determine whether the adopted amendments comply with the GMA; but  
15 these types of amendments are not required to ensure that the local jurisdiction's  
16 entire comprehensive plan and development regulations comply with all the  
17 provisions of the GMA.

18 "Updates" on the other hand, require a review and revision, if needed, of both the  
19 comprehensive plan and the development regulations to ensure their compliance  
20 with the GMA, according to a staggered schedule set out in RCW 36.70A.130(4):  
21 "Updates" means to review and revise, if needed, according to subsection (1) of this  
22 section, and the time periods specified in subsection (4) of this section. RCW  
23 36.70A.130(2)(a)(in part).

24 An update requires that counties and cities review and revise, as needed, their plans  
25 and regulations, to ensure compliance with the GMA. RCW 36.70A.130(1)(a) and  
26 (2)(a).

27 *1000 Friends of Washington and Pro-Whatcom v. Whatcom County*, WWGMHB Case No.  
28 04-2-0010, Order on Motions to Dismiss (August 2, 2004) at 7 and 8.

29 Also in *1000 Friends of Washington and Pro-Whatcom v. Whatcom County*, the Board said  
30 this about the necessary components of legislative actions taken by cities and counties  
31 completing updates according to RCW 36.70A.130(1):

32 The statute specifies that a local jurisdiction must take "legislative action" in adopting  
its update. RCW 36.70A.130(1)(a). Legislative action is defined as "the adoption of  
a resolution or ordinance following notice and a public hearing indicating *at a*  
*minimum*, a finding that a review and evaluation has occurred and identifying the  
revisions made, or that a revision was not needed and the reasons therefore." RCW

1 36.70A.130(1)(a) (emphasis added). Until the County takes legislative action  
2 indicating what it has revised, what it has not revised, and the reasons for its  
3 decision, it has not undertaken an update. RCW 36.70A.130(1)(a). Because  
4 Ordinance 2004-017 does not include such findings, it is not an update within the  
5 meaning of RCW 36.70A.130.

6 *1000 Friends of Washington and Pro-Whatcom v. Whatcom County*, WWGMHB Case No.  
7 04-2-0010, Motion on Order to Dismiss (August 2, 2004) at 8, 9, and 11.

8 In light of conflicting views in the record on what type of review was adopted in the  
9 Ordinance, the Board will look to the actual language of Ordinance 2702. The Board's  
10 examination of the Ordinance shows that the City has not made "a finding that a review and  
11 evaluation has occurred and identifying the revisions made, or that a revision was not  
12 needed and the reasons therefore." Ordinance 2702, Opening Recitals and Findings. The  
13 Board concludes that, without such a finding, no update pursuant to RCW 36.70A.130(1),  
14 (2)(a), and (4) has occurred. Therefore, to the extent the City has not acted to update its  
15 CAO, any challenges to the sufficiency of that update under RCW 36.70A.130 are not ripe.  
16

17  
18 Nevertheless, the City has enacted new regulations. Ordinance 2702, Section 3.  
19 Ordinance 2702 repeals the City's prior critical areas regulations and enacts a new, stand-  
20 alone critical areas ordinance (CAO). This puts the issue of the sufficiency of the new CAO  
21 to protect critical areas squarely before the Board. Thus, the challenges to the adequacy of  
22 the protections adopted arise under RCW 36.70A.060 and RCW 36.70A.172(1).  
23

24  
25 Cities and counties amend their comprehensive plans from time to time according to RCW  
26 36.70A.130(2)(a). They may also amend or adopt development regulations. According to  
27 RCW 36.70A.280(1), these amendments are subject to the jurisdiction of a growth  
28 management hearings board if they are "permanent." While the City says that some parts of  
29 this ordinance are interim, no words in the adopting language of the Ordinance describe  
30 these regulations as interim or temporary. Section 17.65.01 states that Section  
31 17.65.053(F)(1) (Standard Buffer Widths) and Section 17.65.210 (Isolated Wetland  
32

1 Exemptions) will be revised before the City's update deadline of December 1, 2006, and  
2 that failure to do so will create an appeal opportunity but the Ordinance itself does not make  
3 these regulations temporary and has no sunset clause.  
4

5 **Conclusion:** The City's newly enacted regulations governing development in critical areas,  
6 even those considered "interim," must comply with the goals and requirements of the GMA.  
7 The City has enacted new regulations in regard to wetland buffers and exemptions, buffers  
8 for fish and wildlife habitat areas, and its habitat conservation area protections where it uses  
9 the term "professional scientific analysis." Therefore, the Board has jurisdiction over these  
10 new enactments pursuant to RCW 36.70A.280(1).  
11  
12

### 13 **Wetland Buffers and Exemptions (Issue 1)**

#### 14 Positions of the Parties

15  
16 Having found that the Board has jurisdiction over the City's protection measures for wetland  
17 buffers and exemptions, the Board will examine whether these provisions comply with the  
18 Growth Management Act (GMA).  
19

#### 20 **Petitioners' Position**

21 Petitioners argue that the protections for wetlands adopted by the Ordinance fail to protect  
22 the functions and values of wetlands because the Ordinance establishes buffers for all  
23 categories of wetlands that are less than those recommended by a state agency that used  
24 BAS. Likewise, Petitioners contend that the Ordinance's exemption from wetland  
25 protections for certain isolated wetlands, specifically Category II and III wetlands of less than  
26 2,500 square feet and Category IV wetlands of less than 10,000 square feet, is not  
27 supported by BAS. Petitioners' Prehearing Brief (October 3, 2005) at 6.  
28  
29

30 Petitioners point out that the Ordinance establishes the following buffer widths for wetlands:  
31 Category I – 200 feet, Category II – 150 feet, Category III – 50 feet, and Category IV – 35  
32

1 feet. Petitioners contrast this to Department of Ecology’s (Ecology) advice for wetland  
2 buffer widths, which are tied to intensity of surrounding uses: Category I High Intensity – 300  
3 feet, Moderate Intensity – 250 feet, Low Intensity – 150 feet; Category II High Intensity –  
4 200 feet; Moderate Intensity – 150; Low Intensity – 100 feet; Category III High Intensity –  
5 100 feet, Moderate Intensity – 75 feet, Low Intensity – 50 feet; and Category IV High  
6 Intensity – 50 feet, and Moderate and Low Intensity - 35 feet. *Id.* at 7. Petitioners also  
7 include for comparison Ecology’s recommendations for wetland buffer widths based on  
8 wetland category alone: Categories I and II – 300 feet, Category III – 150 feet, and  
9 Category IV – 50 feet. *Id.* at 7.  
10  
11

12 Petitioners point out that the City has adopted buffer sizes recommended by Ecology for the  
13 lowest land use intensity. These are not recommended for all intensities of use, Petitioners  
14 argue. Citing *Whidbey Environmental Action Network v. Island County*,<sup>2</sup> Petitioners further  
15 contend that “deviations from recognized BAS standards nevertheless must be justified on  
16 the record and the other GMA goals for supporting such a decision must be identified.” *Id.*  
17 at 8. Petitioners allege that no justification exists in the record for the City’s choice of buffer  
18 widths recommended for areas of low intensity uses, when Ecology recommends larger  
19 buffers for wetlands in busy cities like Anacortes. *Id.* at 8 and 9.  
20  
21

22 As for the exemption for Category III and IV wetlands of certain sizes, Petitioners cite  
23 Ecology’s letter to the City which indicates the lack of scientific support for blanket  
24 exemptions from critical areas protection without an examination of cumulative effects.  
25 Exhibit 154 at 2. Petitioners contend that Ecology’s advice is the only BAS in the record on  
26 the issue of these exemptions and the City’s record does not contain any explanation of  
27 reasons for the exemptions or the BAS support for this decision. They rely upon the Board’s  
28  
29  
30

31 \_\_\_\_\_  
32 <sup>2</sup> *Whidbey Environmental Action Council (WEAN) v. Island County*, 122 Wn. App. 93 P.3d 885(2004), *review denied*, 153 Wn.2d 1025 (2005).

1 December 20, 1995, decision in *Whatcom Environmental Council v. Whatcom County*,  
2 WWGMHB Case No. 95-2-0071 to support their argument. *Id.* at 9.

3  
4 Petitioners anticipate the City's argument that its adaptive management program will  
5 mitigate any deficiencies in its buffer requirements. Petitioners assert that a vague adaptive  
6 management plan without specific criteria for assessing the ecological functions and values  
7 on a citywide basis cannot be relied upon to ensure protection of wetlands when buffers are  
8 below BAS recommendations. *Id.* at 10 and 11.

9  
10  
11 **City's Position**

12 The City argues that the wetland buffers adopted by the Ordinance comply with the GMA  
13 because the selected buffer widths fall within the range supported by BAS, and those widths  
14 are supplemented by other complementary measures including an adaptive management  
15 strategy and mandatory width increases. City of Anacortes' Opposition Brief at 9. The City  
16 argues that while the buffer widths are set at the minimum threshold, the Ordinance's  
17 adaptive management program mitigates this by requiring an increase in buffer widths  
18 where necessary to protect wetland functions and values and a commitment to reviewing  
19 buffers annually. *Id.* at 5. The City notes that Ecology called its wetlands protection  
20 approach "innovative." The City also contends that Ecology's "example" guidelines are  
21 general, and not directed specifically to the circumstances in the City. Nevertheless, the  
22 City asserts its adopted buffer widths fall within the "example's" range. *Id.* at 9.

23  
24  
25  
26 Further, the City declares that these exemptions are within the City's discretion. The City  
27 cites the Board's November 6, 1996, Final Decision and Order in *Clark County Natural*  
28 *Resources Council v. Clark County*, WWGMHB Case No. 92-2-0001 as support for this  
29 argument. *Id.* at 10.

30  
31  
32 ///

1 Board Discussion

2 **Wetland Buffers (ACC 17.65.051 (D)(2) and E(1) ), (Issue 1)**

3 The Board will examine Petitioners' challenge that the wetland buffers adopted by the  
4 Ordinance do not comport with BAS, and for that reason, do not protect wetlands. While  
5 Anacortes maintains that the wetland buffers it adopted are within Ecology's guidance  
6 parameters, Petitioners contend that they are not. Since Ecology's guidance is the only  
7 BAS in the record, Petitioners argue, when the City departed from this guidance it should  
8 have provided other sources of BAS to justify its departure.  
9

10  
11 RCW 36.70A.060 requires the City to adopt development regulations to protect critical  
12 areas. RCW 36.70A.172(1) requires the city to include BAS in developing policies and  
13 development regulations to protect the functions and values of critical areas. WAC 365-  
14 195-900 through WAC 365-195-925 are guidelines "intended to assist counties and cities in  
15 identifying and including the best available science in newly adopted policies and  
16 regulations and in this periodic review and evaluation and in demonstrating they have met  
17 their statutory obligations under RCW 36.70A.172(1)." Also, previous decisions of this  
18 Board, the other growth management hearings boards, and Washington's court of appeals  
19 have laid the foundation for evaluating challenges to critical area ordinances.  
20  
21

22  
23 In *Clark County Natural Resources Council v. Clark County*, Case No. 96-2-0017, this Board  
24 said:

25 ...The adoption of section .172 by the Legislature shrinks the discretion parameters  
26 available to local governments but does not eliminate them. Because of that local  
27 discretion, it is not possible for us to establish a "bright-line" definition of BAS for  
28 critical areas. Rather, in keeping with one of the basic tenants of the Act, regional  
29 and local diversity, we will decide each case individually, based upon the record. We  
30 will base our decision upon the following factors:

- 31 (1) The scientific evidence contained in the record;  
32 (2) Whether the analysis by the local decision-maker of the scientific evidence and  
other factors involved a reasoned process; and

1 (3) Whether the decision made by the local government was within the parameters of  
2 the Act as directed by the provisions of RCW 36.70A.172(1).  
3 *Clark County Natural Resources Council v. Clark County*, Case No. 96-2-0017, Final  
4 Decision and Order, (December 12, 1996) at 9.

5  
6 The Washington Court of Appeals, Division I, said this about including BAS in critical areas  
7 ordinances:

8 We hold that evidence of the best available science must be included in the record  
9 and must be considered substantively in the development of critical areas policies  
10 and regulations...The policies at issue here deal with critical areas, which are  
11 deemed "critical" because they may be more susceptible to damage from  
12 development. The nature and extent of this susceptibility is a uniquely scientific  
13 inquiry. It is one in which the best available science is essential to an accurate  
14 decision about what policies and regulations are necessary to mitigate and will in fact  
15 mitigate the environmental effects of new development.

16 *Honesty in Environmental Analysis and Legislation v. CPSGMHB*, 96 Wn. App. 522, 979,  
17 P.2d 864 (1999) at 532 and 533.

18 The Board's examination of the record here shows that Ecology's guidance is the only BAS  
19 on wetlands protection in the record. Importantly, the record also shows that Ecology was  
20 concerned about the City's adoption of buffer widths for high intensity urban uses that were  
21 recommended by Ecology for low intensity uses. A February 22, 2004, letter states how  
22 Ecology viewed the City's actions:

23 In particular we support the innovative proposal to monitor future changes in wetland  
24 functions and values that may result from development...and would allow for  
25 adaptive management of regulations based on an evaluation of their effectiveness  
26 after implementation. Ecology can accept the proposal for buffer averaging for  
27 Category III and IV wetlands with this additional regulatory monitoring.

28 We are encouraged that the City is considering incorporating requirements for best  
29 management practices (BMP) and best operating procedures (BOP) into proposed  
30 wetland buffer width regulations, to enable smaller buffer widths than those  
31 recommended for high intensity land uses to those recommended for moderate  
32 intensity land uses, but not to low intensity buffers. Ecology considers urban  
33 development as a high intensity land use, primarily for its impacts on adjacent wildlife  
34 habitat.

35 Exhibit 154 at 1.

1 The Amicus Brief of the Washington State Department of Community, Trade and Economic  
2 Development, Washington State Department of Ecology, and Washington State Department  
3 of Fish and Wildlife (October 24, 2005) (the Amicus Brief of State Agencies) explains how  
4 state agencies' guidance should be regarded: "Each state agency prepares these  
5 [guidance] documents in reliance on science that, in the agency's assessment, satisfy the  
6 criteria set forth in CTED's best available science rules, WAC 365-195-900 through -925."  
7 State Agencies' Brief at 6. However, the Amicus Brief of State Agencies also points out this  
8 "technical and scientific information constitutes assistance, not a mandate." *Id.* at 3.  
9

10  
11 Ecology's comment letter related to its guidance <sup>3</sup> states that its guidance is general, and  
12 there may be instances where its recommendations are too restrictive, and others where  
13 they are not restrictive enough. The guidance goes on to say that its recommendations are  
14 based on the assumptions that a wetland will be protected only at the scale of the site itself,  
15 and do not reflect buffers and ratios that might result from a larger scale, landscape  
16 approach. Exhibit 139(m) at 1.  
17

18  
19 Based on the documentation provided by the state agencies demonstrating that their  
20 recommendations are based on BAS, the Board considers the recommendations offered by  
21 Ecology as BAS, but also notes that this is not the only BAS the City could have considered.  
22 The Board also sees flexibility in Ecology's recommendations based on local circumstances,  
23 data, and approach. Therefore, the Board looks to whether the analysis by the local  
24 decision-maker of the scientific evidence and other factors involved a reasoned process in  
25 order to determine whether the City's wetland buffer widths and exemptions comply with the  
26 GMA. The Board's examination of the evidence before us shows no scientific information  
27 except that provided by Petitioners and Ecology on the issue of appropriate buffer widths for  
28  
29  
30

31  
32 <sup>3</sup> Appendix 8 – C, Guidance on Widths of Buffers and Ratios for compensatory Mitigation to be Used with the  
Western Washington Wetland Ratings System (July, 2004).

1 wetlands. There is also no reasoned discussion of scientific evidence or other factors  
2 causing the City to depart from the BAS submitted from Ecology.

3  
4 The City did not rest with the buffer widths it adopted, however. The City also committed to  
5 an adaptive management program to monitor the impact of development on wetlands over  
6 time, to assess the impacts on an annual basis, and to make changes in its wetland  
7 protection measures based on this assessment. ACC 17.65.320. Adaptive management  
8 has been advised for use when the science is uncertain or incomplete, in WAC 365-195-  
9 920.

10  
11  
12 Under certain circumstances, this Board has accepted the use of adaptive management  
13 where the city or county adopts a less-than-precautionary approach to protecting certain  
14 critical areas. See *OEC v. Jefferson County*, WWGMHB Case No. 01-2-0015, Compliance  
15 Order, (October 31, 2003). However, “this approach calls for an effective adaptive  
16 management program that relies on scientific methods to evaluate how well regulatory and  
17 non regulatory actions adopted by the County achieve their objectives.” *Swinomish Tribal*  
18 *Community, v. Skagit County*. WWGMHB Case No. 02-2-0012c, Compliance Order,  
19 (December 8, 2003) at 47.  
20  
21

22  
23 The City recognizes that its protective measures require an adaptive management program  
24 and includes it in the ordinance. ACC 17.65.220. Ecology also is supportive of requiring an  
25 adaptive management program if the City intends to retain greater flexibility than imposing  
26 Ecology’s recommended buffers. Exhibit 154 at 1.  
27

28  
29 The necessary components of an adaptive management program are: (1) Collection and  
30 evaluation of meaningful data concerning the effectiveness of the less-than-precautionary  
31 measures; and (2) Provision for swift and certain corrective action in response to any  
32 indications that the protective measures are not sufficient to protect the critical areas at

1 issue. See *Swinomish Tribal Community v. Skagit County*, WWGMHB Case No. 02-2-  
2 0012c, Compliance Order – Adaptive Management (January 13, 2005) at 17 – 22.

3  
4 Our evaluation of the Ordinance shows that the City’s adaptive management program  
5 contains a commitment to provide for swift and certain corrective action in response to any  
6 indications that the protective measures are not sufficient to protect the critical areas at  
7 issue. Ordinance 2702, Section 17.65.220. However, the evidence before the Board and in  
8 the language of the ordinance itself does not include a description of how the monitoring  
9 and adaptive management program will be conducted, what scientific methods would be  
10 used, and how the effectiveness will be measured and monitored. The City candidly  
11 admitted at the hearing that it is currently working on these important details.  
12

13  
14 **Conclusion:** Anacortes’ wetland protection measures are clearly a work in progress. The  
15 City has responsibly enacted new measures that are more protective while it finishes its  
16 update work. Nevertheless, the City has adopted measures that have been appealed and  
17 over which the Board has jurisdiction. The Board finds it unfortunate that the relationship  
18 between the City and these Petitioners is such that each step in the process must be  
19 challenged and resources end up being devoted to these challenges rather than developing  
20 protection measures. However, this being the case, the Board has no choice but to find the  
21 City wetland protection measures do not comply with RCW 36.70A.060 and RCW  
22 36.70A.172(1) due to lack of information in the record concerning the City’s choice in  
23 adopting less than the precautionary measures than the science in the record recommends,  
24 and lack of detail on the City’s adaptive management program’s implementation. Given the  
25 City’s commitment to providing this detail, this noncompliance is already scheduled for  
26 correction.  
27  
28

29  
30 **Wetland exemptions (ACC 17.65.210) (Issue 1)**

31 Petitioners argue the Ordinance’s exemptions for Category II and Category III wetlands of  
32 2,500 square feet and Category IV wetlands of 10,000 square feet are not supported by

1 BAS, and that Ecology expressed its concern to the City about allowing these exemptions  
2 without examining the exemptions' cumulative effects. Exhibit 154 at 2. Petitioners argue  
3 that although this Board previously ruled that all wetlands do not need to be protected,<sup>4</sup> it  
4 has ruled that before exemptions are allowed, the cumulative impacts of the exemptions  
5 should be examined.<sup>5</sup> Petitioners' Prehearing Brief at 8 and 9.  
6

7  
8 The City of Anacortes contends that exemptions on the scale the Ordinance allows are  
9 consistent with what Clark County allowed when similar exemptions were found compliant in  
10 *Clark County Natural Resources Council v. Clark County*, WWGMHB 92-02-0001, Final  
11 Decision and Order (November 6, 1992). City of Anacortes' Opposition Brief at 9 and 10.  
12

13  
14 In the Final Decision and Order, December 20, 1995, in *Whatcom County Natural*  
15 *Resources Council v. Whatcom County*, WWGMHB Case No. 95-2-0071, this Board said:

16 We have previously held that all critical areas must be designated, and, while all  
17 critical areas need not be protected, a detailed and reasoned justification for any  
18 critical areas not protected must be made. *Clark County Natural Resources Council,*  
*et al., v. Clark County*, WWGMHB 92-2-0001.

19 *Whatcom County Natural Resources Council v. Whatcom County*, WWGMHB Case No. 95-  
20 2-0071, Final Decision and Order (December 20, 1995).  
21

22 The record in this current case shows that Ecology has concerns about the adoption of  
23 wetland exemptions without an examination in the record of the cumulative impacts of these  
24 exemptions. See Exhibit 154 at 2. Just as in the discussion of wetland buffers, the Board's  
25 examination of the evidence here shows no scientific information except that provided by  
26 Ecology and no reasoned discussion as the basis for the City's departure from the only  
27 science in the record.  
28

29  
30 <sup>4</sup> *Clark County Natural Resources Council v. Clark County*, WWGMHB Case No. 92-02-0001, Final Decision  
and Order (November 6, 1992).

31 <sup>5</sup> *Whatcom County Natural Resources Council v. Whatcom County*, WWGMHB 95-2-0071, Final Decision and  
32 Order (December 20, 1995).

1 At argument, the City maintained that its adaptive management program will cause it to  
2 reconsider these exemptions if information produced by the adaptive management program  
3 shows detrimental cumulative impacts. As well, Anacortes offers that an adaptive  
4 management program for a small city like Anacortes which issues relatively few permits is  
5 feasible both in terms of affordability and manageability of data.  
6

7  
8 **Conclusion:** The City's proposed adaptive management program has the potential to  
9 monitor the City's less than precautionary approach to wetlands protection and includes a  
10 commitment to change course if wetland exemptions prove to be detrimental. Still, the  
11 City's adaptive management lacks detail about how a monitoring and adaptive management  
12 program will be conducted, what scientific methods would be used, and how the  
13 effectiveness will be monitored. The Board finds that the lack of reasoned and detailed  
14 discussion about why the levels of protection supported by BAS should not be imposed here  
15 and the absence of the detail listed above in the City's adaptive management program,  
16 cause the Ordinance's wetland exemptions to be noncompliant with RCW 36.70A.060 and  
17 RCW 36.70A.172(1).  
18

### 19 20 **Type 3 Stream Buffers (Issue 1)**

21 In their Reply Brief and at argument, Petitioners stated that they had abandoned their  
22 challenge concerning the Ordinance's Type 3 Steam Buffers. Petitioner's Reply at 7.  
23

24  
25 **Conclusion:** With the abandonment of the challenge to the Ordinance Type 3 Stream  
26 Buffers, the City's Type 3 Steam Buffers comply with RCW 36.70A.060.  
27

### 28 **Marine Shorelines Critical Areas Challenges (Issue 1)**

29 Petitioners also challenge the sufficiency of the marine shorelines critical areas protections  
30 in the City's new, stand-alone critical areas ordinance. Ordinance 2702. This challenge  
31 raises the question of the effect of ESHB 1933, Laws of 2003, on the Board's review. We  
32

1 find this issue to be dispositive of the extent of the Board's review in this case and therefore  
2 begin with it.

3  
4 **Positions of the Parties**

5  
6 Petitioners allege that "ACC 17.41.100 and other city regulations do not adequately protect  
7 marine shorelines." Petitioners' Prehearing Brief at 15. Petitioners' claims are brought  
8 pursuant to the Growth Management Act, RCW 36.70A.020(9) and (10), .040, .050, .060,  
9 .130, .172, and .175.  
10

11  
12 The City responds with three major arguments challenging the Board's jurisdiction over this  
13 issue. First, the City states that it has not designated its urban shorelines as fish and wildlife  
14 critical areas. City of Anacortes' Opposition Brief at 17. Because they are not designated,  
15 the City argues, they are not subject to critical areas requirements. *Id.* Second, the City  
16 points out that its Shoreline Master Program was updated in 2000 and that update was not  
17 appealed. For this reason, the City urges that the Petitioners' challenge is untimely. *Id.* at  
18 20. Third, the City argues that ESHB 1933 transferred protection of critical areas of  
19 shorelines of the state to local shoreline master programs. The City asserts that the  
20 Legislature rejected a proposed provision that the jurisdiction of protection of critical areas  
21 within the shorelines of the state be transferred only to master programs adopted after 2003  
22 and instead transferred jurisdiction to those programs generally; according to the City, this  
23 means that the City's present shoreline master program should govern. *Id.* at 20-1.  
24  
25

26  
27 Petitioners respond to the City's three arguments as follows: First, Petitioners argue that  
28 the City did designate its urban shorelines as fish and wildlife habitat conservation areas.  
29 The City designated its fish and wildlife habitat conservation areas in Chapter X.60, the  
30 portion of the critical areas regulations adopted by Ordinance 2702 pertaining to fish and  
31 wildlife conservation areas. Petitioners' Prehearing Brief at 12 -13. Petitioners point out  
32 that ACC X.60.010(A)(1) designates "Areas With Which State or Federally Designated

1 Endangered, Threatened, and Sensitive Species Have a Primary Association" as fish and  
2 wildlife habitat conservation areas. *Id.* Petitioners point to exhibits which demonstrate that  
3 these species extensively use near shore marine and estuarine areas for juvenile rearing,  
4 adult and juvenile migration, and residence for adult Chinook salmon. *Id.* at 13. Petitioners  
5 also point out that ACC X.60.010(A)(3)(b)(5) designates herring and smelt spawning areas  
6 as fish and wildlife habitat areas and that these, too, are located in Anacortes' marine  
7 shorelines. *Id.* at 14.

9  
10 Petitioners argue that Anacortes' existing shoreline master program does not protect critical  
11 areas within its shorelines and that the Legislature did not intend to transfer jurisdiction over  
12 critical areas in the shorelines to shoreline master programs until the master programs were  
13 updated. Petitioners' Prehearing Brief at 24. Petitioners assert that the rejected language  
14 considered in ESHB 1933 that applied the transfer to future master programs "adopted  
15 under revised shoreline guidelines effective after January 1, 2003" was only changed  
16 because ESHB 1933 was not adopted until May 15, 2003. *Id.* at 23. Petitioners assert that  
17 a reading of ESHB 1933 as a whole shows "that the only way the shift in jurisdiction works  
18 is after an update of the SMP that addresses all of the requirements of SHB[sic] 1933." *Id.*  
19 at 24.  
20  
21

22  
23 Two amicus briefs were filed on this issue. The Washington State Department of  
24 Community, Trade and Economic Development (CTED), the Washington State Department  
25 of Ecology (Ecology), and the Washington State Department of Fish and Wildlife (WDFW),  
26 collectively the "state agencies," argue that the transfer of authority for protection of critical  
27 areas protections to the shoreline master programs occurs only when the local government  
28 adopts a critical areas segment in its shoreline master program and it is approved by  
29 Ecology. Amicus Brief of Washington State Department of Community, Trade and  
30 Economic Development, the Washington State Department of Ecology, and the Washington  
31 State Department of Fish and Wildlife (Amicus Brief of State Agencies) at 9. The state  
32

1 agencies argue that Ecology did not review the critical areas protections in shorelines  
2 before the adoption of ESHB 1933 - "the vast majority of counties and cities left the  
3 protection of critical areas along shorelines to their critical areas regulations adopted under  
4 the GMA" - and therefore existing shoreline master programs do not address protections for  
5 critical areas. *Id.* at 11-12. For this reason, the state agencies argue that critical areas  
6 within the shorelines of the state are not governed by shoreline master programs until  
7 Ecology approves the critical areas protections in those SMPs.  
8

9  
10 The Washington Public Ports Association (WPPA) also filed an Amicus Brief on this issue.  
11 WPPA expresses concern that the Board's decision in this case "maintain the integrity of the  
12 overall framework [of the relationship between the applicability of the GMA and the SMA]  
13 that has resulted from such intense and often rancorous debate." Amicus Curiae Brief of  
14 the WPPA at 2. WPPA proposes that the Board find that the amendment to ACC 17.41.100  
15 applies exclusively within shorelines jurisdiction and addresses a topic that is inherently  
16 shorelines limited. *Id.* at 14. On its face, WPPA argues, the regulation is a shoreline  
17 regulation. Therefore, WPPA urges the Board should find that the amendment effectively  
18 seeks to amend the City's shoreline master program which should be remanded for  
19 conformance with the requirements for such an amendment under Ch. 90.58 RCW. *Id.* at  
20 15.  
21  
22

## 23 24 **Board Discussion**

25 As to the City's first argument, we find that the City did designate critical areas in the  
26 shorelines. The designation of "Areas With Which State or Federally Designated  
27 Endangered, Threatened, and Sensitive Species Have a Primary Association" and the  
28 designation of herring and smelt spawning areas as fish and wildlife habitat areas in  
29 Ordinance 2702 makes those areas in the shorelines "critical areas." RCW 36.70A.060.  
30

31 ///

32 ///

1 The other two arguments concerning the Board's jurisdiction to decide the issues relating to  
2 the marine shorelines critical areas regulation arise out of the interpretation of ESHB 1933.  
3 The Board must therefore consider the meaning of ESHB 1933 in this regard in order to  
4 decide this issue.  
5

6  
7 All parties and amicus curiae agree that ESHB 1933 transfers authority for governing critical  
8 areas in the shorelines of the state from the Growth Management Act to the Shoreline  
9 Management Act. The dispute is over timing. The City argues that this change in authority  
10 made its shoreline master program (updated in 2000) the sole source of its critical areas  
11 regulations in the shorelines. City of Anacortes' Opposition Brief at 20. Petitioners argue  
12 that if such a change happened automatically upon the effective date of ESHB 1933, there  
13 would be a ten year gap between the date when shoreline master programs were the sole  
14 means of regulating critical areas and when Ecology reviewed those plans for sufficiency of  
15 critical areas regulations. Petitioners' Prehearing Brief at 22. The state agencies are  
16 similarly concerned that such an "automatic" and retroactive transfer of authority would  
17 result in an unintended gap in critical areas protections. Amicus Brief of State Agencies at  
18 12-13.  
19  
20

21  
22 The first principle in construing legislation is to give effect to legislative intent. *Sheehan v.*  
23 *Transit Authority*, 155 Wn.2d 740, 747, 2005 Wash. LEXIS 917 (2005). Here, the  
24 Legislature has made its intention in adopting ESHB 1933 very clear. In the first section of  
25 ESHB 1933, the Legislature expressly stated its intention that critical areas within the  
26 shorelines of the state be governed by the Shoreline Management Act, while all other critical  
27 areas are governed by the Growth Management Act:  
28

29       The legislature intends that critical areas within the jurisdiction of the shoreline  
30       management act shall be governed by the shoreline management act and that critical  
31       areas outside the jurisdiction of the shoreline management act shall be governed by  
32       the growth management act.

Section 1, Paragraph 3, ESHB 1933.

1 Both the City and the Petitioners point to the amendment in RCW 36.70A.480 to support  
2 their positions regarding the time at which shoreline master programs will govern critical  
3 areas regulations in the shorelines. ESHB 1933 amends RCW 36.70A.480 in a variety of  
4 ways, including a provision regarding the date upon which the shoreline master programs of  
5 local jurisdictions become the sole source of critical areas regulations in the shorelines:  
6

7 As of the date the department of ecology approves a local government's shoreline  
8 master program adopted under applicable shoreline guidelines, the protection of  
9 critical areas as defined by RCW 36.70A.030(5) within shorelines of the state shall be  
10 accomplished only through the local government's shoreline master program and  
11 shall not be subject to the procedural and substantive requirements of this chapter,  
12 except as provided in subsection (6) of this section.

13 RCW 36.70A.480(3)(a).

14 The purport of this provision relative to when master programs shall govern the protection of  
15 critical areas is ambiguous at best. The City claims it means that the City's existing  
16 shoreline master program governs critical areas in the shorelines and because it was last  
17 amended in 2000, it cannot be challenged here. Petitioners and the state agencies argue  
18 that this amendment means that critical areas in the shorelines will not be governed by the  
19 SMA until new master programs are enacted and approved according to the schedule  
20 adopted in RCW 90.58.080.  
21

22 Because this provision is ambiguous, the Board must construe it to give effect to legislative  
23 intent. As cited above, the express legislative intent in enacting ESHB 1933 is to provide  
24 that critical areas within the jurisdiction of the Shoreline Management Act be governed by  
25 the Shoreline Management Act, while all other critical areas are governed by the Growth  
26 Management Act. Section 1, Paragraph 3, ESHB 1933.  
27  
28

29 CTED reads RCW 36.70A.480(3)(a) to mean that until such time as Ecology approves a  
30 new shoreline master program, protection of critical areas within the shorelines is governed  
31 by the GMA requirements for critical areas generally, including best available science  
32

1 (BAS). CTED has issued guidance on this issue, advising that:

2 During the period of time between the effective date of ESHB 1933 and a local  
3 government's update of its SMP, the local government's GMA critical areas  
4 regulations continue to apply to designated critical areas throughout the jurisdiction.  
5 If the local government updates its critical areas ordinance under the GMA before it  
6 updates its Shoreline Mast Program then the GMA's BAS requirements will apply to  
7 the critical area update in the shoreline jurisdiction until the SMP is updated.

8 Appendix B to Amicus Brief of State Agencies.

9 While we agree that critical areas within the shorelines of the state are not stripped by  
10 ESHB 1933 of protections given to them by existing critical areas regulations, we do not  
11 agree that ESHB 1933 allows amendments to those regulations to continue to be governed  
12 by the GMA. We find it impossible to square such a result with the plain legislative intent  
13 expressed in ESHB 1933. As Petitioners point out, because of the statutory deadlines for  
14 adopting new shoreline master programs, such a gap would result in a delay of 10 years.  
15 Petitioners' Prehearing Brief at 22. By continuing to apply the GMA to critical areas  
16 regulations enacted between the time of the adoption of ESHB 1933 and the time Ecology  
17 approves new shoreline master programs under the schedule adopted in RCW 90.58.080,  
18 this Board would be declining to conform its review of newly adopted critical areas  
19 regulations with the express legislative intent for that review until 2011 (at the earliest).  
20 Because the Legislature could not have been plainer in indicating that it wants the boards to  
21 apply the SMA rather than the GMA and BAS in reviewing challenges to critical areas  
22 regulations in the shorelines, we cannot adopt this construction of ESHB 1933.

23  
24  
25  
26 The City argues that this means that its shoreline master program, adopted in 2000,  
27 governs critical areas regulations in the shorelines. To accept the City's position, the Board  
28 would have to determine that ESHB 1933 was meant to apply retroactively to master  
29 programs adopted prior to its enactment. A legislative amendment is presumed to apply  
30 prospectively unless there is clear legislative intention to apply it retroactively. "A legislative  
31 enactment is resumed to apply prospectively only and will not be held to apply  
32

1 retrospectively unless such legislative intent is clearly expressed." *Puyallup v. Pac.*  
2 *Northwest Bell Tel. Co.*, 98 Wn.2d 443, 450, 656 P.2d 1035, 1982 Wash. LEXIS 1727  
3 (1982). See also *Margula v. Benton Franklin Title*, 131 Wn.2d 171, 930 P.2d 307, 1997  
4 Wash. LEXIS 85 (1997); *Barstad v. Stewart Title Guaranty Co.*, 145 Wn.2d 528, 39 P.2d  
5 934, (2002) Wash. LEXIS 109 (2001) (setting out conditions for retroactive application).  
6 Such a clear expression of retroactive application is not apparent in ESHB 1933.  
7

8  
9 In fact, retroactive application would contradict another expression of legislative intent found  
10 in RCW 36.70A.480(4):

11         Shoreline master programs shall provide a level of protection to critical areas located  
12         within shorelines of the state that is at least equal to the level of protection provided  
13         to critical areas by the local government's critical area ordinances adopted and  
14         thereafter amended pursuant to RCW 36.70A.060(2).  
15 RCW 36.70A.480(4).

16  
17 Before they can be assured of providing a level of protection "at least equal to the level of  
18 protection provided to critical areas by the local government's critical areas ordinance,"  
19 shoreline master programs must be reviewed by Ecology for that purpose. According to the  
20 Amicus Brief of the State Agencies, Ecology did not review those critical areas protections  
21 before ESHB 1933 was adopted. This is evidently the case for the Anacortes Shoreline  
22 Master Program. Under the terms of Anacortes' master program, critical areas regulations  
23 adopted for the City's critical areas generally govern critical areas in the shorelines:

24  
25         The policies and regulations of this Master Program shall apply to all shorelines  
26         within the corporate limits of the City of Anacortes. Development within the  
27         shorelines must also comply with the City Comprehensive Plan, the Fidalgo Bay Sub-  
28         Area Plan, and the City Development Regulations (including critical areas  
29         ordinances).  
30 City of Anacortes Shoreline Management Master Program, Section 3: Scope.

31 When the City repealed its existing critical areas regulations and enacted its new CAO  
32 through Ordinance 2702, it changed the regulations governing critical areas in its

1 shorelines. This change is an amendment to its master program and must be reviewed by  
2 Ecology.

3  
4 We note that the Legislature anticipated that critical areas regulations in the shorelines may  
5 be adopted and reviewed prior to adoption of the entire shoreline master program under  
6 revised shoreline guidelines. ESHB 1933 amends the SMA to provide that Ecology may  
7 approve the segment of a master program relating to critical areas:  
8

9       The department shall approve the segment of a master program relating to critical  
10 areas as defined by RCW 36.70A.030(5) provided the master program segment is  
11 consistent with RCW 90.58.020 and applicable shoreline guidelines, and if the  
12 segment provides a level of protection of critical areas at least equal to that provided  
13 by the local government's critical areas ordinances adopted and thereafter amended  
14 pursuant to RCW 36.70A.060(2).  
15 RCW 90.58.090(4).

16 By applying the procedural and substantive terms of the SMA to critical areas regulations  
17 adopted and/or updated after the effective date of ESHB 1933, the SMA applies  
18 prospectively to ensure appropriate review by Ecology but does not delay application of the  
19 SMA to those critical areas when they are amended. Accordingly, we find that Anacortes'  
20 repeal of prior critical areas regulations applicable in its shoreline and its adoption of a new  
21 CAO in Ordinance 2702 must meet the requirements for a segment of a master program  
22 relating to critical areas in the shorelines. RCW 90.58.090(4). Further, the segment of the  
23 Anacortes' master program that relates to shoreline critical areas must be submitted to  
24 Ecology for review and approval before appeal to the Board may be had.  
25  
26

27 In this case, Ordinance 2702 also makes a finding that its shoreline master program  
28 includes land necessary for buffers for critical areas that occur within the shorelines of the  
29 state. This tracks RCW 36.70A.480(6) (adopted in ESHB 1933), which provides:

30       If a local jurisdiction's master program does not include land necessary for buffers for  
31 critical areas that occur within shorelines of the state, as authorized by RCW  
32

1 90.58.030(2)(f), then the local jurisdiction shall continue to regulate those critical  
2 areas and their required buffers pursuant to RCW 36.70A.060(2).

3  
4 Such a determination should also be reviewed by Ecology.

5  
6 In sum, we find that, in Ordinance 2702, Anacortes repealed the critical areas regulations  
7 applicable in the shorelines under its master program and that its new CAO (to the extent it  
8 applies in the shorelines) constitutes the segment of its master program which governs  
9 protection of critical areas in the shorelines. Review of the critical areas segment of  
10 Anacortes' master program is governed by the SMA and those new regulations become  
11 effective only after they have been presented to and approved by Ecology under the  
12 direction provided in ESHB 1933, that is, as containing regulations that protect the functions  
13 and values of critical areas in the shorelines.  
14

15  
16 As we have said, the foremost consideration in construing legislation is to give effect to  
17 legislative intent. At the same time, we cannot help but be concerned with the impact of any  
18 construction of the statute we make. In this case, though, we find that the impact on  
19 protections for critical areas in the shorelines is positive. First, we note that there is nothing  
20 in this transfer of authority that in any way lessens protections for critical areas. ESHB 1933  
21 expressly provides that "[S]horeline master programs shall provide a level of protection to  
22 critical areas located within shorelines of the state that is at least equal to the level of  
23 protection provided to critical areas by the local government's critical area ordinances  
24 adopted and thereafter amended pursuant to RCW 36.70A.060(2)." Second, the addition of  
25 Ecology's review and approval process can only benefit all parties, including the boards, in  
26 assuring appropriate protections are in place. The expertise that Ecology offers in reviewing  
27 master programs and amendments, together with the inclusive process that it brings to  
28 bear, will be of major assistance to the boards in applying sound scientific principles to the  
29 review of critical areas protections.  
30  
31  
32

1 **Conclusion:** Those critical areas regulations governing critical areas in the shorelines of  
2 Anacortes adopted by Ordinance 2702 must be reviewed by Ecology to ensure that they  
3 provide “a level of protection to critical areas located within shorelines of the state that is at  
4 least equal to the level of protection provided to critical areas by the local government's  
5 critical area ordinances adopted and thereafter amended pursuant to RCW 36.70A.060(2).”  
6 RCW 90.58.090(4). Until those regulations have been reviewed by Ecology, the changes to  
7 critical areas regulations in the shorelines are not compliant and not ripe for Board review.  
8

9  
10 **Forest Buffers (Issue 2)**

11 Positions of the Parties

12  
13 With regard to the buffer requirements applicable to forest habitat (as distinct from buffers  
14 on wetlands, streams and shorelines), Petitioners argue that RCW 36.70A.050 and WAC  
15 365-190-080(b)(5) require that cities and counties designating critical areas must create  
16 buffer zones to separate incompatible uses from habitat areas. Petitioners state that  
17 although that ACC X.60.30(G)<sup>6</sup> recommends that the City establish buffers on a case-by-  
18 case basis as shown in CTED’s “example code,”<sup>7</sup> it differs from CTED’s recommendations  
19 because it does not require buffer widths to be consistent with recommendations of WDFW.  
20 Petitioners contend that the Ordinance lacks standards to determine appropriate buffer  
21 widths. Petitioners’ Prehearing Brief at 25.  
22  
23  
24  
25  
26

27 <sup>6</sup> Both the Amended Prehearing Order (July 27, 2005) and the Prehearing Order (August 1, 2005) list this  
28 provision as ACC X.60.020(G). No such provision exists in Ordinance 2702. The Petitioners’ Prehearing Brief  
29 states the provision as ACC X. 60.030(G), the provision related to buffers for habitat areas. The City did not  
30 object to the change in code number in the issue statement, and responded to Petitioners’ arguments  
31 regarding this code provision, so the Board will address this issue.

32 <sup>7</sup> Critical Areas Assistance Handbook, Protecting Critical Areas within the Framework of the Growth  
Management Act (November 2003)

1 The City argues that half of its upland acreage is classified as a habitat area that protects  
2 species' richness and prevents habitat fragmentation. City of Anacortes' Opposition Brief at  
3 22. Further, the City maintains it requires additional buffers adjacent to habitat areas based  
4 on the nature of existing vegetation, sensitivity of habitat, and intensity of human activity  
5 nearby. *Id.* at 22. The City also points out that WDFW had the opportunity to comment on  
6 this provision of the Ordinance and has not requested additions or changes to this  
7 requirement. *Id.* at 22.  
8

9  
10  
11 Board Discussion

12 Petitioners continue to allege, as they did in Case No. 03-2-0017 in which they and the City  
13 of Anacortes were also parties, that Chapter 365-190 WAC (the Minimum Guidelines) sets  
14 out requirements with which counties and cities must comply. See *1000 Friends of*  
15 *Washington, Evergreen Islands, and Skagit Audubon Society v. City of Anacortes*,  
16 WWGMHB Case No. 03-2-0017 at 14. It does not. In fact, RCW 36.70A.050, which  
17 Petitioners contend the City violated, only directs CTED to adopt guidelines to assist cities  
18 and counties in the designation and classification of natural resource lands and critical  
19 areas. RCW 36.70A.170(1) directs cities and counties to *consider* the Minimum Guidelines,  
20 but does not require that the cities and counties follow the "requirements" of WAC 365-190-  
21 080(5)(b) to buffer habitat areas from incompatible uses.<sup>8</sup>  
22  
23

24  
25  
26 The Board determines that the buffers challenged in this part of Petitioners' brief are the  
27 buffers for habitat areas that occur in or near forest habitat, as other parts of this issue  
28 challenge the buffers for wetlands, riparian areas, and shorelines. CTED's Critical  
29

30 \_\_\_\_\_  
31 <sup>8</sup> While the issue statement asserts that ACC X.60.030(G) violates RCW 36.70A.060, .130, and .172 because  
32 it does not require buffers to be consistent with the recommendations from the WDFW, as recommended by  
CTED's "example code," Petitioners' brief offers no argument concerning why CTED's "example code" must  
be followed in this regard.

1 Assistance Handbook language suggests that such buffers should be considered on a case-  
2 by-case basis:

3           The (director) shall require establishment of buffer areas *when needed* to protect  
4           habitat conservation areas. [Emphasis added.]  
5 Critical Areas Assistance Handbook, Protecting Critical Areas within the Framework of the  
6 Growth Management Act (November 2003) at A-102.

7  
8 CTED's advice is the only science in the record concerning forest buffers cited by any party  
9 in this case. It is therefore consistent with the BAS that the determination of appropriate  
10 buffers on forest habitat be made on a case-by-case basis.

11  
12  
13 Petitioners argue that the Ordinance lacks standards for establishing such buffers.  
14 Petitioners' Prehearing Brief at 25. The Board agrees that buffers for habitat protection  
15 need to be judged by standards. However, we disagree that the Ordinance lacks sufficient  
16 standards. Section 17.65.030 G requires:

17  
18           Buffers shall consist of an undisturbed area of native vegetation or areas identified  
19           for restoration established to protect the integrity, functions, and values of the  
20           affected habitat. Required buffers shall reflect the nature of the existing vegetation,  
21           sensitivity of the habitat, and type and intensity of human activity proposed to be  
22           conducted nearby.

23 Section 17.65.030 G.

24 The standard is therefore that the buffers "protect the integrity, functions and values of the  
25 affected habitat."

26  
27 Furthermore, Section X.60.020 requires an extensive critical area report that must be  
28 prepared by a qualified professional who is a biologist with experience with the relevant  
29 habitat. The critical area report must contain a discussion of any federal, state, or local  
30 special management recommendations, including those of WDFW for the species or  
31 habitats located on or adjacent to the project site.  
32

1 The Board disagrees that WAC 365-190-080(5)(b) mandates that counties and cities create  
2 buffer zones in every case to separate incompatible uses from habitat areas. We do not  
3 read the science in Chapter 365-190 WAC or CTED's guidance to mandate buffers for all  
4 habitat areas.  
5

6  
7 **Conclusion:** The record before the Board contains no evidence that standard buffer widths  
8 are required for all habitat conservation areas. The City has relied upon best available  
9 science in determining that buffer requirements for forest areas should be determined on a  
10 case-by-case basis. The standard for determining what buffers are needed (those which  
11 "protect the integrity, functions and values of the affected habitat") could be more rigorous  
12 but falls short of noncompliance. In addition, the City requires extensive information on  
13 which to base its decision for permitting conditions for forest habitat buffers, including  
14 relevant information from WDFW, and also requires that these habitats must protect the  
15 functions and values of forest habitat. For these reasons, in the case of forest habitat, we  
16 find that Petitioners have not sustained their burden of proof pursuant to RCW 36.70A.320  
17 that ACC X.60.30(G) does not comply with RCW 36.70A.020(9), RCW 36.70A.020(10),  
18 RCW 36.70A.040, RCW 36.70A.050, RCW 36.70A.060, RCW 36.70A.130 and RCW  
19 36.70A.172.  
20  
21

### 22 23 **Best Available Science (Issue 3)**

#### 24 Positions of the Parties

25  
26 Petitioners challenge various provisions of Appendix F to Ordinance 2702 that uses a new  
27 and undefined term - "professional scientific analysis" - as the basis upon which decisions  
28 about buffers in forest lands will be made. The term is used in the following situations: (1)  
29 as a standard to judge management strategies for newly nominated species or habitats; (2)  
30 as criteria for development of a habitat conservation area or its buffer; and (3) in reductions  
31 in buffer sizes. Petitioners further contend that the Ordinance's use of "professional  
32

1 scientific analysis” to establish conditions for development differs from CTED’s “example  
2 code” that recommends the use of BAS in these situations. Petitioners conclude that all  
3 these situations are policy decisions and require substantive determinations regarding  
4 appropriate critical area protections that require BAS. Petitioners’ Prehearing Brief at 27  
5 and 28.  
6

7  
8 The City responds that the GMA requires consideration of BAS in creating development  
9 regulations for protection of critical areas, but the GMA does not require including the term  
10 BAS in the critical areas regulations themselves. The City cites *Honesty in Environmental*  
11 *Analysis and Legislation v. CPSGMHB*, 96 Wn. App. 522, 979, P.2d 864(1999) to support  
12 its position. Additionally, Anacortes contends that the City is not required to follow CTED’s  
13 example ordinance recommending the use of the term BAS in the actual ordinance. City of  
14 Anacortes’ Opposition Brief at 21 and 22.  
15

16  
17 Board Discussion

18 Based on RCW 36.70.172(1), all three growth management hearings boards, as well as  
19 Division I of the Court of Appeals,<sup>9</sup> have clearly decided that best available science must be  
20 included in developing both policies and regulations for protecting critical areas. RCW  
21 36.70A.172(1) provides “In designating and protecting critical areas under this chapter,  
22 counties and cities shall include the best available science in developing policies and  
23 development regulations to protect the functions and values of critical areas.”  
24  
25  
26  
27  
28

---

29 <sup>9</sup> *FOSC v. Skagit County*, WWGMHB Case No. 96-2-0025c (Compliance Order, August 9, 2000) and FOSC  
30 *Skagit County*, WWGMHB 00-2-0033c, Final Decision and Order (August 9, 2000), *Honesty in Environmental*  
31 *Analysis (HEAL) v. City of Seattle*, CPSGMHB 96-3-0012, Final Decision and Order (August 21, 1996) *Saddle*  
32 *Mountain Minerals v. City of Richland*, EWGMHB 99-1-0005, Order Finding Partial Compliance (April 18,  
2005), and *Honesty in Environmental Analysis and Legislation (HEAL) v. CPSGMHB*, 96 Wn. App. 522, 979,  
P2d 864(Div. I, 1999).

1 Petitioners do not challenge the science that was used to develop these challenged policies  
2 and regulations, but challenge the lack of application of best available science in the actual  
3 permitting of development in or near habitat conservation areas. Petitioners object to the  
4 use of “professional scientific analysis” instead of “best available science” in the following  
5 provisions of Ordinance 2702:  
6

- 7 (1) ACC X.60.010 A(3)(a)(v) - part of the codification of Appendix A, procedures in  
8 the City’s comprehensive plan for nominating for designation habitat areas and  
9 species if management strategies are included for these local nominations;  
10 (2) ACC X. 60.30 D – specifications for issuing conditional use permits allowing  
11 development in habitat conservation areas or their buffers; and  
12 (3) ACC X.60.040 C(4)(f.) – reductions in riparian buffers.

13 Petitioners’ Prehearing Brief at 27.

14 Division I of the Court of Appeals has said this about the meaning of RCW 36.70A.172(1):

15 The key portion of the section in dispute in this issue is “in developing.” By using this  
16 language the Legislature clearly has not mandated any substantive outcome, or  
17 product, when counties and cities take actions that are subject to the provisions of  
18 this section. Rather, the Legislature has required counties and cities to make the  
19 best available science part of their process of “developing policies and development  
20 regulations to protect the functions and values of critical areas.”

21 *Honesty in Environmental Analysis and Legislation (HEAL) v. CPSGMHB*, 96 Wn. App. 522,  
22 979, P.2d 864(1999) at 529.

23 The plain language of the statute does not require that “best available science” be included  
24 in the language or the application of the regulation itself, just in the development of the  
25 regulations. Requiring the substantive use of best available science in developing policies  
26 and development regulations is not the same as requiring best available science to be  
27 referenced in the regulations themselves and applied again during the permit process.

28 RCW 36.70A.172(1) requires that BAS must be substantively included in the formulation of  
29 development regulations. We do not read RCW 36.70A.172 to require another BAS  
30 investigation for issuing permits. Even though CTED’s “example code” recommends the  
31 use of BAS in permitting decisions, the Board cannot require its use for these decisions if  
32

1 the GMA does not. While the definite use of best available science in application of policies  
2 and regulations to permits might produce better results on the ground, as CTED's "example  
3 code" recommends, the Board only judges the compliance of development regulations  
4 within the parameters of the goals and requirements of the Act.  
5

6  
7 Only ACC X.60.010 A(3)(a)(v) is on its face both a policy and a development regulation.  
8 Appendix D of Anacortes' City Code says this about nominations of habitats and species of  
9 local importance:

10           Additions, corrections, and deletions for these lists may be proposed at any time by  
11           submitting a suggestion to the Planning Director. Proposed changes will be  
12           considered through the annual cycle of amending the City Comprehensive Plan and  
13           Development Regulations.

14 Anacortes City Code, Chapter 17.70, Appendix D.

15  
16 ACC X.60.010 A(3)(a)(v) is a development regulation that guides the city council in making  
17 a legislative decision that will become an addition to the City's development regulations.

18 Therefore, although this provision is part of the City's development code, it is also a policy  
19 guiding the creation of a new development regulation. RCW 36.70A.172 requires that BAS  
20 should be used in the development of management strategies that are adopted as a  
21 development regulation. For this reason, ACC X.60.010 A(3)(a)(v) must include a  
22 requirement that BAS be included in the process of nominating for designation habitat areas  
23 and species.  
24

25  
26 The other challenged provisions, ACC X. 60.30 D and ACC X.60.040 C(4)(f) are  
27 development regulations that detail the requirements for conditions imposed on  
28 development at the time that permits are issued. ACC X.60.020 requires a critical areas  
29 report for habitat conservation areas that meet the requirements of ACCX.60.010. This  
30 report requires extensive information with detailed specifications, including the requirement  
31 that the preparation of the report be done by a biologist with experience preparing reports  
32

1 for that type of habitat. Section X.60.030 establishes performance standards, including the  
2 standard that a habitat conservation area may be altered only if the proposed alteration of  
3 the habitat or the mitigation does not degrade the quantitative and qualitative functions and  
4 values of the habitat.  
5

6  
7 This Board has held that discretion in guiding permit decisions should be limited by specific  
8 criteria. See *Whatcom Environmental Council v. Whatcom County*, WWGMHB Case No.  
9 95-2-0071, Final Decision and Order, (December 21, 1995). In this case, the solid  
10 information the City requires and the requirement that habitat alterations or mitigations must  
11 protect the quantitative and qualitative functions and values of habitat conservation areas  
12 set a standard by which conditions for the issuance of permits may be measured.  
13

14  
15 **Conclusion:** RCW 36.70A.172(1) requires the City to include BAS *in developing* policies  
16 and regulations to protect the functions and values of critical areas. It does not require that  
17 BAS must be applied again in implementing those development regulations. ACC X.60.010  
18 A(3)(a)(v) is a development regulation that defines a process for crafting a management  
19 strategy that will, in turn, become (part of) a development regulation. Therefore, RCW  
20 36.70A.172(1) requires that BAS be incorporated into the creation of this regulation.  
21 Because the language of ACC X.60.010 A(3)(a) uses “professional scientific analysis”  
22 without defining it as BAS in this process, ACC X.60/010 A.3(a)(v) does not comply with  
23 RCW 36.70A.172(1).  
24

25  
26 On the other hand, ACC X. 60.30 D and ACC X.60.040 C(4)(f) are regulations that apply to  
27 permitting decisions. Because RCW 36.70A.172(1) does not require the inclusion of BAS in  
28 making permitting decisions and because the City requires solid information and parameters  
29 to guide its permitting decisions, the Board finds that Petitioners have not sustained their  
30 burden of proof that ACC X. 60.30 D and ACC X.60.040 C(4)(f) are clearly erroneous and  
31 do not comply with RCW 36.70A.060, RCW 36.70A.172 and RCW 36.70A.060.  
32

1 **Invalidity (Issue 4)**

2 Positions of the parties

3  
4 Petitioners argue that the Ordinance's failures to meet BAS standards for wetlands, to tie  
5 buffer widths for habitat areas to BAS, to adopt appropriate buffers for shoreline critical  
6 areas, and to substitute standards mandated by BAS for making substantive and policy  
7 decisions do not protect the environment, maintain or enhance natural resource-based  
8 industries, or conserve fish and wildlife habitat. For this reason, Petitioners allege the  
9 certain challenged provisions, except for the provisions dealing with stream buffers,  
10 substantially interfere with Goals 8, 9, and 10 of the GMA. Petitioners' Prehearing Brief at  
11 28.  
12

13  
14 Anacortes responds that if the Board invalidates its interim critical area protections, the  
15 GMA would give the City the option of rescinding all of its increased protections until its  
16 December 1, 2006, update deadline, which would leave its less protective regulations in  
17 place until the deadline. The City contends invalidity would produce an absurd result. City  
18 of Anacortes' Opposition Brief at 7 and 8.  
19

20  
21 Board Discussion

22 To find invalidity, the Board must first find noncompliance. Having found that only the  
23 provisions that apply to wetland buffer widths and exemptions and ACC X.60.010 A.3 and  
24 the critical areas segment of the City's shoreline master program do not comply with the  
25 GMA, the Board could only find invalidity in regard to these provisions.  
26  
27

28 In recent cases, the Board has said this about invalidity:  
29

30 We have held that invalidity should be imposed if continued validity of the  
31 noncompliant comprehensive plan provisions or development regulations would  
32 substantially interfere with the local jurisdiction's ability to engage in GMA-compliant

1 planning. See *Butler v. Lewis County*, WWGMHB Case No. 99-2-0027c, Order  
2 Finding Noncompliance and Imposing Invalidity (February 13, 2004).  
3 *1000 Friends v. Thurston County*, WWGMHB Case No. 05-2-0002, Final Decision and  
4 Order (July 20, 2005) at 30.

5 **Conclusion:** In this case, it is obvious that invalidity is not necessary to ensure that proper  
6 compliant planning can be accomplished during the period of remand. The City is already  
7 committed to incorporating needed detail into its adaptive management program and  
8 making its wetland protections compliant with the GMA. At argument, the City made it plain  
9 that it is willing to make adjustments to its CAO as needed to comply with GMA  
10 requirements.

11  
12  
13 Further, here, invalidity would have the effect of making the newly enacted more protective  
14 critical areas protections unenforceable. The Board sees no need to impose invalidity and  
15 encourages the City to keep the provisions of Ordinance 2702 in place while it completes its  
16 update work. The Board finds that the provisions for wetland buffer widths and exemptions  
17 and ACC X.60.010 A.3 do not substantially interfere with RCW 36.70A.020(8), (9), and (10)  
18 and declines to impose invalidity.  
19  
20

## 21 VI. FINDINGS OF FACT

- 22
- 23 1. The City of Anacortes is a city in Skagit County, which is located west of the crest of  
24 the Cascade Mountains. The cities of Skagit County are required to plan pursuant to  
25 RCW 36.70A.040.
  - 26 2. Petitioners Evergreen Islands, Futurewise, and Skagit Audubon Society are nonprofit  
27 organizations that participated in the adoption of Ordinance 2702 in writing and  
28 orally. These Petitioners addressed the issues raised in their Petitions for Review in  
29 its participation below.
  - 30 3. On April 18, 2005, the City of Anacortes adopted Ordinance 2702, repealing an  
31 existing critical areas regulation and enacting a new critical areas ordinance (CAO) –  
32 a stand-alone chapter of the Anacortes' City Code for protecting critical areas.
  4. The City published a notice of adoption of Ordinance 2702 on April 27, 2005.

- 1 5. On June 19, 2005, Evergreen Islands, Futurewise, and Skagit Audubon Society filed  
2 a petition for review challenging Ordinance 2702. On July 27, 2005, Petitioners filed  
3 an amended petition for review.
- 4 6. In Ordinance 2702, the City did not make an express finding that a review and  
5 evaluation of its comprehensive plan policies and development regulations had  
6 occurred, identifying the revisions made, or that revisions were not made, and the  
7 reasons therefore. Ordinance 2702, Opening Recitals and Findings.
- 8 7. While the City says that some parts of this ordinance are interim, no words in the  
9 adopted language of the Ordinance describe these regulations as interim or  
10 temporary.
- 11 8. Ecology's guidance is the only science on wetlands protection in the record.
- 12 9. The record also shows that Ecology was concerned about the City's adoption of  
13 buffer widths for high intensity urban uses that were recommended by Ecology for  
14 low intensity uses.
- 15 10. Ecology relies on science that, in the agency's assessment, satisfies the criteria set  
16 forth in CTED's best available science rules, WAC 365-195-900 through -925 in its  
17 guidance and comment letters.
- 18 11. Ordinance 2702 adopts the following buffer widths for wetlands in the City of  
19 Anacortes: Category I wetlands – 200 feet, Category II – 150 feet, Category III – 50  
20 feet, and Category IV – 35 feet.
- 21 12. Using best available science, Ecology recommends the following buffer widths for  
22 wetlands, based on category of wetland and intensity of surrounding land use:  
23 Category I High Intensity – 300 feet, Moderate Intensity – 250 feet, Low Intensity –  
24 150 feet; Category II High Intensity – 200 feet, Moderate Intensity – 150 feet, Low  
25 Intensity – 100 feet; Category III High Intensity – 100 feet, Moderate Intensity – 75  
26 feet, Low Intensity – 50 feet; and Category IV High Intensity – 50 feet, and Moderate  
27 and Low Intensity 35 feet.
- 28 13. Using best available science and based on wetlands category alone, Ecology  
29 recommends the following wetland buffers: Categories I and II – 300 feet, Category  
30 III – 150 feet, and Category IV – 50 feet.
- 31 14. The wetland buffer widths adopted by the City do not comport with the  
32 recommendations of Ecology, based on best available science.

- 1 15. The City adopted buffer widths for wetlands that were narrower than those  
2 recommended by Ecology without a discussion of why the BAS in the record was not  
3 followed or how another source of BAS supports the adopted approach.
- 4 16. Ordinance 2702 also commits to an adaptive management program to monitor the  
5 impact of development on wetlands over time, to assess the impacts on an annual  
6 basis, and to make changes in its wetland protection measures based on this  
7 assessment.
- 8 17. The key components of an adaptive management program are: (1) Collection and  
9 evaluation of meaningful data concerning the effectiveness of the less-than-  
10 precautionary measures, and (2) Provision for swift and certain corrective action in  
11 response to any indications that the protective measures are not sufficient to protect  
12 the critical areas at issue.
- 13 18. The City has committed to an adaptive management program for its wetlands buffers  
14 program, but the Ordinance does not specify how the monitoring and adaptive  
15 management program will be conducted, what scientific methods would be used, and  
16 how the effectiveness will be measured and monitored.
- 17 19. Ordinance 2702 adopts exemptions for Category II and Category III wetlands of  
18 2,500 square feet and Category IV wetlands of 10,000 square feet.
- 19 20. Ecology expressed concern about exempting Category II and Category III wetlands  
20 of 2,500 square feet and Category IV wetlands of 10,000 square feet without  
21 examining the cumulative effects of these exemptions.
- 22 21. The City did not examine the cumulative effects of exempting from buffer  
23 requirements Category II and Category III wetlands of 2,500 square feet and  
24 Category IV wetlands of 10,000 square feet. The City also did not include in the  
25 record a discussion about why it failed to incorporate the only BAS in the record or  
26 adopt another source of BAS to support its approach to exempting certain wetlands  
27 from buffer requirements.
- 28 22. The City designated "Areas With Which State or Federally Designated Endangered,  
29 Threatened, and Sensitive Species Have a Primary Association" and herring and  
30 smelt spawning areas as fish and wildlife habitat areas in Ordinance 2702. Some of  
31 these designations are within the shorelines.
- 32 23. Under the terms of Anacortes' master program, critical areas regulations adopted for  
the City's critical areas generally govern critical areas in the shorelines.

- 1 24. When the City repealed its existing critical areas regulations and enacted its new  
2 CAO through Ordinance 2702, it changed the regulations governing critical areas in  
3 its shorelines.
- 4 25. The City failed to submit the amendments to its shoreline master program adopted in  
5 Ordinance 2702 to Ecology for review and approval.
- 6 26. Petitioners abandoned their challenge to the City's buffer widths for Type 3 streams.  
7
- 8 27. Ordinance 2702 provides that buffers for habitat areas that occur in or near forest  
9 habitat will be considered on a case-by-case basis.
- 10 28. The best available science in the record, CTED's Critical Assistance Handbook  
11 recommends that such buffers should be established on a case-by-case basis.
- 12 29. Section X.60.020, requires an extensive critical area report that must be prepared by  
13 a qualified professional who is a biologist with experience with the relevant habitat  
14 and must include specific information that includes a discussion of any federal, state,  
15 or local special management recommendations, including those of WDFW for the  
16 species or habitats located on or adjacent to the project site.
- 17 30. Section 17.65.030 G requires that buffers for habitat conservation areas shall consist  
18 of an undisturbed area of native vegetation or areas identified for restoration  
19 established to protect the integrity, functions, and values of the affected habitat.  
20 Required buffers shall reflect the nature of the existing vegetation, sensitivity of the  
21 habitat, and type and intensity of human activity proposed to be conducted nearby.
- 22 31. ACC X.60.010 A.3.(a)(v) establishes a process for nominating and designating  
23 species of local importance for habitat conservation. It is a development regulation  
24 that guides the city council in making a legislative decision that will become an  
25 addition to the City's development regulations.
- 26 32. ACC X.60.010 A.3.(a)(v) fails to incorporate best available science in the legislative  
27 decision concerning nomination and acceptance of species of local importance for  
28 habitat conservation.
- 29 33. ACC X. 60.30 D and ACC X.60.040 C(4)(f) are regulations that apply to permitting  
30 decisions. Petitioners do not challenge the science that was used to develop these  
31 regulations, but challenge the lack of application of best available science in the  
32 actual permitting development in or near habitat conservation areas.

- 1 34. Section X.60.030 includes performance standards including the standard that a  
2 habitat conservation area may be altered only if the proposed alteration of the habitat  
3 or the mitigation proposed does not degrade the quantitative and qualitative functions  
4 and values of the habitat.
- 5 35. The scientific analysis and information required for permitting decisions under ACC  
6 X. 60.30 D and ACC X.60.040 C(4)(f) provide a basis for sufficient protection of the  
7 functions and values of critical areas in or near forest lands.
- 8 36. Any Finding of Fact hereafter deemed to be a Conclusion of Law is hereby adopted  
9 as such.

## 10 VII. CONCLUSIONS OF LAW

- 11 A. The Board has jurisdiction over the parties and subject matter of this consolidated  
12 petition.
- 13 B. The petition was timely brought and the petitioners have standing to raise the issues  
14 in their petition for review.
- 15 C. The petition and the amended petition challenge the City's adoption of Ordinance  
16 2702, which repeals prior critical areas regulations and enacts a new stand-alone  
17 critical areas ordinance.
- 18 D. ACC 17.65.051 D(2) and E(1) ), regulations establishing wetland buffers and (ACC  
19 17.65.210) regulations exempting certain size wetlands from protection, are clearly  
20 erroneous and do not comply with RCW 36.70A.060 or RCW 36.70A.172(1).
- 21 E. ACC X.60.30 G complies with RCW 36.70A.060 and RCW 36.70A.172(1).
- 22 F. ACC X.60.010 A.3.a is clearly erroneous and does not comply with RCW 36.70A.060  
23 or RC 36.70A.172(1).
- 24 G. ACC X. 60.30 D and ACC X.60.040 C(4)(f) comply with RCW 36.70A.060 and RCW  
25 36.70A.172(1).
- 26 H. The repeal of existing critical areas regulations and the adoption of critical areas  
27 regulations adopted by Ordinance 2702 that apply to critical areas in the shoreline  
28 including ACC 17.41.00 constitute amendments to Anacortes' shoreline master  
29 program. Amendments to the shoreline master program must be submitted by the  
30 City to Ecology for review. RCW 90.58.090 and 36.70A.290(2)(c).
- 31  
32

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

**VIII. ORDER**

Based on the foregoing, the City is required to bring Ordinance 2702 into compliance with the GMA no later than **December 1, 2006**. The Board finds that developing critical areas protections and an adaptive management program are of sufficient scope and complexity and provide sufficient reason for the Board to provide more than 180 days for compliance, pursuant to RCW 36.70A.300. RCW 36.70A.130(4) sets the deadline for the city's update of its comprehensive plan and development regulations as December 1, 2006, to complete the requirements of RCW 36.70A.130(1), including an update of its critical areas regulations. For these reasons the Board sets **December 1, 2006**, as the date by which the City must bring its regulations for wetland buffers and exemptions and ACC X.60.010 A(3)(a)(v) into compliance with RCW 36.70A.060 and RCW 36.70A.172. Because a finding of noncompliance could make the City ineligible for certain state grants and loans pursuant to RCW 43.17.250, the Board stands ready to consider an earlier compliance date at the City's request.

Item	Date Due
Compliance	December 1, 2006
Compliance Report	December 21, 2006
Objections to a Finding of Compliance, if any	January 11, 2007
Response to Objections, if needed	February 1, 2007
<b>Compliance Hearing</b>	February 13, 2007

Pursuant to RCW 36.70A.300 this is a final order of the Board.

**Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a petition for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy to all other parties of record. **Filing means actual receipt of the document at the Board office.** RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

1 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the  
2 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for  
3 judicial review may be instituted by filing a petition in superior court according to the  
4 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil  
5 Enforcement. The petition for judicial review of this Order shall be filed with the  
6 appropriate court and served on the Board, the Office of the Attorney General, and all  
7 parties within thirty days after service of the final order, as provided in RCW  
8 34.05.542. Service on the Board may be accomplished in person or by mail, but  
9 service on the Board means actual receipt of the document at the Board office within  
thirty days after service of the final order. A petition for judicial review may not be  
served on the Board by fax or by electronic mail.

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

12 Entered this 27th day of December 2005.

13  
14  
15  
16 \_\_\_\_\_  
17 Holly Gadbaw, Board Member

18  
19  
20 \_\_\_\_\_  
21 Margery Hite, Board Member

22  
23  
24 \_\_\_\_\_  
25 Gayle Rothrock, Board Member