

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

HOOD CANAL ENVIRONMENTAL)	
COUNCIL, <i>et al</i> ,)	
)	Case No. 06-3-0012c
Petitioners,)	
and)	(Hood Canal)
)	
SUQUAMISH TRIBE)	FINAL DECISION AND ORDER
)	
Intervenors,)	
and)	
)	
PACIFIC LEGAL FOUNDATION, <i>et al</i> ,)	
)	
<i>Amici Curiae</i> ,)	
)	
v.)	
)	
KITSAP COUNTY,)	
)	
Respondent.)	

SYNOPSIS

*On December 1, 2005, Kitsap County adopted Ordinance No. 351-2005 (hereinafter **CAO Update** or **Ord. 351-2005**), codified as Chapter 19, Kitsap County Code (**KCC**), updating its critical areas regulations (**CAO**). The CAO Update was the outcome of more than two years of public review and debate, involving environmental advocates, tribes, property rights advocates, and relevant state agencies. Certain provisions of the CAO update were challenged by a group of Petitioners (collectively, **Hood Canal**), joined by the Suquamish Tribe as Intervenor, asserting that the CAO Update did not adequately protect environmental resources. Kitsap Alliance of Property Owners (**KAPO**), supported by the Pacific Legal Foundation and the Kitsap County Association of Realtors as Amicus Curiae, also challenged provisions of the CAO. Additionally, KAPO intervened in support of the County in opposition to Hood Canal.*

KAPO alleged that the County violated the public process requirements of the GMA. The Board concluded that KAPO abandoned this issue by failing to provide any argument based on the relevant statutory provisions. Alternatively, the Board found that Kitsap's elaborate and thorough public process complied with RCW 36.70A.035, .140, and .020(11). [Legal Issue No. 3]

Hood Canal challenged the County's exemption from CAO regulation of certain small, isolated, low-function wetlands. KCC 19.200.210.C. Based on the ruling of the Court of Appeals (Division II) in Clallam County v. Western Washington Growth Management Hearings Board, 130 Wash. App. 127, 140, 121 P.3d 764 (2005), the Board determined that the exemption does not comply with RCW .020(9) and (10), .060, .130, .170, and .172. [Legal Issue No. 1]

KAPO challenged the County's designation of all its shorelines as fish and wildlife habitat conservation areas [KCC 90.300.310], arguing that under RCW 36.70A.480(5) the County was required to identify the specific areas of its shorelines that are critical areas, using best available science (BAS). KAPO particularly objected to the designation of shorelines that are a fully-developed, built environment. The Board determined that the County relied on the resource-mapping and other scientific data provided by state and federal resource agencies as BAS in designating all its shores as fish and wildlife habitat conservation areas. The Board determined that KAPO failed to carry its burden of proof on the issue. [Legal Issue No. 4]

KAPO further challenged the County's use of "uniform buffers in the built environment" as not supported by BAS. KAPO cited to science which it provided to the County critiquing the County's buffer-based approach to protecting functions and values of wetlands and shorelines and proposing alternatives. The Board found that the County considered KAPO's scientific submittals and instead chose a buffer-based approach which was supported by BAS in the County's record. KAPO further challenged the buffer regulations, when applied in the built environment, as following a "restoration" model rather than "protection," lacking criteria to guide administrative discretion, void for vagueness, and infringing on property rights. The Board concluded that KAPO failed to carry its burden of proof on these issues. [Legal Issue Nos. 5, 6, and 8]

Hood Canal challenged the 35-foot buffer width adopted to protect marine shorelines designated as Urban, Semi-rural, and Rural under the County's Shoreline Management Program (SMP) [KCC 19.300.310]. The County cited to science in its record supporting the buffer as providing the low end of protection for sediment control and pollution removal. However, the Board determined that the County's marine buffer regulations are keyed to SMP land-use classifications, rather than to the functions and values of the County's marine shorelines as fish and wildlife habitat conservation areas, as required by RCW 36.70A.172(1). The BAS in the County's record supports the designation of all the County's marine shorelines as fish and wildlife habitat conservation areas, but those areas have a range of functions and values depending, for example, on use by particular species. While acknowledging that some specific marine shoreline areas are already identified and protected under other provisions of the CAO – for example, estuaries and creek mouths, eagle nests, and steep bluffs – the Board found that the County's SMP-based regulation is not an application of BAS to protect shoreline habitat functions and values; thus the CAO Update fails to comply with RCW 36.70A .020(9) and (10), .060, .130, .170, and .172. [Legal Issue No. 2]

The Board remanded Ordinance 351-2005 to Kitsap County to take legislative action to bring the Ordinance into compliance with the GMA as set forth in this Final Decision and Order.

TABLE OF CONTENTS

I. Background.....3

II. Presumption of Validity, Burden of Proof, Standard of Review, And Deference to Local Jurisdictions.....6

III. Board Jurisdiction and Preliminary Matters

A. Board Jurisdiction.....7

B. Prefatory Note.....8

IV. The Challenged Action.....8

V. Legal Issues and Discussion

A. Legal Issue No. 3 – Public Participation.....9

B. Legal Issue No. 1 – Wetlands Exemptions.....(hyperlinked)14

C. Legal Issue No. 4 – Shoreline Designations.....20

D. Legal Issues No. 5 and No. 6 – Critical Areas Buffers in the Built Environment31

E. Legal Issue No. 2 – Marine Shoreline Buffer Widths...(hyperlinked)..... 37

F. Legal Issues No. 6 and No. 8 – Enforceability and Property Rights.....44

VI. Order.....52

I. BACKGROUND¹

In February 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received two Petitions for Review (**PFR**) challenging Kitsap County’s (**Respondent** or the **County**) adoption of Ordinance No. 351-2005 (**CAO Update**) amending the County’s critical areas regulations (**CAO**). A PFR was received from Hood Canal Environmental Council, *et al.* (**Hood Canal** or **Petitioners**) on February 27, 2006, and the matter was assigned Case No. 06-3-0010, hereafter referred to as *Hood Canal, et al. v. Kitsap County*. Hood Canal challenges Kitsap’s CAO Update as noncompliant with various provisions of the Growth Management Act (**GMA** or **Act**) alleging that it provides inadequate protection for wetlands and marine shorelines.

A PFR was received from Kitsap Alliance of Property Owners, *et al.* (**KAPO**) on February 28, 2006, and the case was assigned CPSGMHB Case No. 06-3-0012. KAPO challenges Kitsap County’s CAO Update for enacting regulations that are too restrictive,

¹ The complete chronology of procedures is set forth in Appendix A.

in violation of various provisions of the GMA, the State Environmental Policy Act (SEPA), and the Shoreline Management Act (SMA).

The cases were consolidated as CPSGMHB Consolidated Case No. 06-3-0012c (*Hood Canal, et al. v. Kitsap County*). Notice of Hearing and Order of Consolidation (March 3, 2006). Board member Bruce C. Laing was the Presiding Officer for the consolidated case.

The Prehearing Conference was conducted on March 30, 2006 and the Prehearing Order (PHO) issued on April 3, 2006. In the PHO, the Board listed eight legal issues to be addressed in the consolidated case – Legal Issues 1 and 2 as stated in the Hood Canal PFR and Legal Issues 3 through 8 summarizing the statement of issues in the KAPO PFR.²

On March 30, 2006, the Board received Respondent's Index of the Record (**Index**). The Index lists 1,045 items by Index number. On April 12, 2006, the Board received the following Core Documents (**Core Doc**) from Kitsap County:

- **Core Doc 1** - Shoreline Management Master Program, February 8, 1999
- **Core Doc 2** - Redline/strike-through version of Ordinance 351-2005
- **Core Doc 3** -Map titled Kitsap County Wetlands and Hydric Soils, August 2005
- **Core Doc 4** - Map titled Kitsap County Streams and Surface Water – 2005 Data – Fish Habitat Water Type Codes, December 2, 2005
- **Core Doc 5** - Map titled Kitsap County Shoreline Master Plan Environmental Designations, March 22, 2004

Motions Practice

In April 2006, the Board received a number of motions. Suquamish Tribe moved to intervene on the side of Petitioner Hood Canal. KAPO moved to intervene in opposition to Hood Canal and on the side of the County in regard to Hood Canal issues. Hood Canal moved to supplement the record with various exhibits. Kitsap County moved to dismiss KAPO's Legal Issue No. 7, alleging SEPA violations, on the grounds that KAPO lacks SEPA standing.

Briefing on the motions was timely filed, and on May 8, 2006, the Board issued its Order on Motions. The Order on Motions granted Kitsap County's Motion to Dismiss Legal Issue No. 7, denied Hood Canal's Motion to Supplement the Record, granted KAPO's Motion to Intervene on behalf of Respondent Kitsap County, granted Suquamish Tribe's Motion to Intervene on behalf of Petitioner Hood Canal and denied Suquamish Tribe's Motion to Intervene on behalf of Kitsap County in opposition to Petitioner KAPO.

² The full statement of KAPO's Legal Issues is set forth in Appendix B at p. 59-68. Hereafter they are referenced as 'KAPO PFR Issue xx.'

Briefing and Hearing on the Merits

All briefs on the merits were timely filed and are referenced herein as follows:

- Intervenor Suquamish Tribe's Opening Brief (**Suquamish PHB**)
- Petitioner KAPO's Prehearing Brief (**KAPO PHB**)
- Petitioner Hood Canal's Prehearing Brief (**Hood Canal PHB**)
- Respondent Kitsap County's Prehearing Brief (**County Response**)
- Response of Intervenor KAPO to the Prehearing Briefs of Petitioner Hood Canal and Intervenor Suquamish Tribe (**KAPO Intervention**)
- Petitioner KAPO's Reply Brief (**KAPO Reply**)
- Petitioner Hood Canal's Reply Brief (**Hood Canal Reply**)

The briefs were accompanied by exhibits, most of which were numbered according to the County's Index numbers and are so referenced herein.

On May 26, 2006 the Board received the "Motion of Pacific Legal Foundation [**PLF**] and Kitsap County Realtors Association [**KCAR**] to File a Brief Amicus Curiae" [**Amicus Motion**] and the "Brief *Amicus Curiae* of Pacific Legal Foundation and Kitsap County Association of Realtors" [**Amicus PLF**] with three exhibits.

KAPO's PHB included a Request for Reconsideration of Board's Order Dismissing KAPO's SEPA Claims.

The County's Response included a Motion to Deny and/or Strike Portions of Proposed Amicus Curiae Brief of PLF/KCAR, and a response to KAPO's Motion for Reconsideration on SEPA Issues.

Prior to the Hearing on the Merits, the Board issued its Order Denying KAPO's Request for Reconsideration of the Board's Order on Motions Dismissing Legal Issue No. 7 (SEPA Claims) (June 19, 2006). The Board also issued its Order Granting *Amicus* and Granting Motion to Strike (June 20, 2006). This Order granted the PLF/KCAR Motion to file *Amicus Curiae* Brief, limiting PLF/KCAR to briefing on just Legal Issue No. 4, and granted the County's Motion to Strike Section II of the *Amicus* Brief.

The Hearing on the Merits was convened at 10:03 a.m. and adjourned at 3:37 p.m. on June 26, 2006, in Room 2430, 900 Fourth Avenue, Seattle, Washington. Present for the Board were Board Members Margaret Pageler, Edward McGuire and Bruce Laing, Presiding Officer; also present were Board Law Clerk Julie Taylor, and Board Externs Kris Hollingshead and Brian Payne. Petitioner Hood Canal was represented by Alexandria K. Doolittle and John T. Zilavy. Petitioner/Intervenor KAPO was represented by Alexander W. Mackie and Heather L. Burgess. Respondent Kitsap County was represented by Lisa J. Nickel, accompanied by Patty Charnas. Intervenor Suquamish was represented by Mark L. Bubenik. Amicus PLF/KCAR was represented by Andrew C.

Cook. Reporting services were provided by Christy Sheppard of Byers and Anderson, Inc.

During the HOM the following exhibits were entered:

- **HOM 1:** Map entitled: Kitsap County, Washington – FISH AND WILDLIFE HABITAT – January 18, 2005;
- **HOM 2:** Map entitled: Kitsap County, Washington – CLASS 1 WILDLIFE CONSERVATION AREAS – for ESA Listed Salmon Species – October 2003;
- **HOM 3:** Appendix 1 to KAPO PHB, consisting of 21 aerial photographs numbered 1-A through 1-T.

At the Hearing, the Board requested Petitioner KAPO to provide a map showing the locations of the shorelines shown in the HOM 3 photographs. On June 30, 2006, the Board received from KAPO copies of HOM 1 and HOM 2 showing the locations of HOM 3 photographs, which the Board marked as follows:

- **HOM 4:** Copy of HOM 1 showing the general locations of HOM 3 photographs;
- **HOM 5:** Copy of HOM 2 showing the general locations of HOM 3 photographs.

The Board ordered a transcript of the proceedings. The transcript was received on July 6, 2006, and is cited herein as **HOM Transcript**.

On August 9, 2006, Board Member Margaret Pageler replaced Board Member Bruce Laing³ as Presiding Officer for this case.

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, STANDARD OF REVIEW, AND DEFERENCE TO LOCAL JURISDICTIONS

Upon receipt of a petition challenging a local jurisdiction's GMA actions, the legislature directed the Boards to hear and determine whether the challenged actions were in compliance with the requirements and goals of the Act. *See* RCW 36.70A.280. The legislature directed that the Boards "after full consideration of the petition, shall determine whether there is compliance with the requirements of [the GMA]." RCW 36.70A.320(3); *see also*, RCW 36.70A.300(1). *Ferry County v. Concerned Friends of Ferry County, et al. (Ferry County)*, 155 Wn.2d 824, 833, 123 P.3d 102 (2005): "The Board adjudicates compliance with the GMA and must find compliance unless a county's or city's action is clearly erroneous."

Petitioners challenge the County's adoption of the CAO Update, adopting updated critical areas regulations. Comprehensive plans and development regulations, and amendments thereto, adopted by Kitsap County pursuant to the Act, are presumed valid upon adoption. RCW 36.70A.320(1).

³ Bruce Laing's service on the Board was extended by Governor Gregoire until August 9, 2006. Board member David Earling, who replaced Bruce Laing as the third member of this Board on August 10, 2006, took no part in the decision of this case.

The burden is on the Petitioners to demonstrate that the actions taken by the County are not in compliance with the Act. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board “shall find compliance unless it determines that the actions taken by [Kitsap County] are clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” For the Board to find Kitsap County’s actions clearly erroneous, the Board must be “left with the firm and definite conviction that a mistake has been made.” *Dep’t of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

The GMA affirms that local jurisdictions have discretion in adapting the requirements of the GMA to local circumstances and that the Board shall grant deference to local decisions that comply with the goals and requirements of the Act. RCW 36.70A.3201. Pursuant to RCW 36.70A.3201, the Board will grant deference to Kitsap County in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. The State Supreme Court’s most recent delineation of this required deference states: “We hold that deference to county planning actions that are consistent with the goals and requirements of the GMA . . . cedes only when it is shown that a county’s planning action is in fact a ‘clearly erroneous’ application of the GMA.” *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board*, 154 Wn.2d 224, 248, 110 P.3d 1132 (En Banc 2005).

The *Quadrant* decision is in accord with prior rulings that “Local discretion is bounded . . . by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board (King County)*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). As the Court of Appeals explained, “Consistent with *King County*, and notwithstanding the ‘deference’ language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not ‘consistent’ with the requirements and goals of the GMA.” *Cooper Point Association v. Thurston County*, 108 Wash. App. 429, 444, 31 P.3d 28 (2001); *affirmed Thurston County v. Western Washington Growth Management Hearings Board*, 148 Wn.2d 1, 15, 57 P.3rd 1156 (2002); *Quadrant*, 154 Wn.2d 224, 240 (2005).

The scope of the Board’s review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to those issues presented in a timely petition for review.

III. BOARD JURISDICTION AND PRELIMINARY MATTERS

A. Board Jurisdiction

The Board finds that the Petitioners’ PFRs were timely filed, pursuant to RCW 36.70A.290(2); that Petitioners have standing to appear before the Board, pursuant to

RCW 36.70A.280(2)⁴; and that the Board has subject matter jurisdiction over the challenged ordinance, which amends the County’s critical areas regulations, pursuant to RCW 36.70A.280(1)(a).

B. Prefatory Note

The Board addresses the legal issues in the following order:⁵

- A. Legal Issue No. 3 – Public Participation (KAPO PFR Issue A.1-A.7)
- B. Legal Issue No. 1 – Wetlands Exemption (Hood Canal PFR Issue 1)
- C. Legal Issue No. 4 – Shorelines Designations (KAPO PFR Issue B.1-B.6)
- D. Legal Issues No. 5 and No. 6 [D.4 and D.5] – BAS and Critical Area Buffers in the Built Environment (KAPO PFR Issues C.1-C.5, D.4 and D.5)
- E. Legal Issue No. 2 – Marine Shoreline Buffer Widths (Hood Canal PFR Issue 2)
- F. Legal Issues No. 6 and No. 8 – Enforceability and Property Rights (KAPO PFR Issues D.1-D.3, D.6, F.1-F.7)

IV. THE CHALLENGED ACTION

Beginning in 2003, Kitsap County undertook to update its critical areas regulation (CAO) in compliance with requirements of the Growth Management Act. The Act requires counties and cities in the Central Puget Sound region, including Kitsap County, to review and update their comprehensive plans and development regulations to ensure compliance with the GMA. RCW 36.70A.130. This review “shall include ... consideration of critical area ordinances” [.130(1)(c)]. The legislative deadline for this review was originally set at December 1, 2004, then extended to December 1, 2005. [.130(4), (8), (10)].

For two full years Kitsap County worked on its CAO update, assembling best available science, convening an extensive and thorough public process, and considering various alternatives. See generally, Section V.A below.

The County’s process was highly contentious. County staff and officials heard from advocates for stricter regulation, including Petitioners Hood Canal, *et al.*, and Intervenor Suquamish Tribe, and from advocates for a reduced amount of regulation, including Petitioners KAPO and *Amici* Pacific Legal Foundation, *et al.* Various state agencies also provided comment on the issues under consideration by the County.

⁴ Petitioner KAPO’s Legal Issue No. 7 was dismissed for lack of SEPA standing. Order on Motions (May 8, 2006).

⁵ Legal Issue No. 7 – SEPA Process – was dismissed on motions. The PHO states Legal Issue 7 as follows: *Did Kitsap County violate (fail to comply with) the State Environmental Policy Act, Chapter 43.21C RCW, in the adoption of Ordinance 351-2005 when material changes were made in the regulations after the County had issued an MDNS on August 4, 2004 for the June 22, 2004 Draft Critical Areas Ordinance, and none of the material changes made in 2005 were subject to supplemental environmental review as required by Chapter 43.21C RCW and supporting regulations, Chapter 197-11 WAC? [Intended to reflect Issue E, pp. 8-9 of the KAPO PFR].*

On December 1, 2005, Kitsap County adopted Ordinance No. 351-2005 (**CAO Update**), updating its critical areas regulations. Two challenges were timely filed with the Board and consolidated in this proceeding.

V. LEGAL ISSUES AND DISCUSSION

A. Legal Issue No. 3 – Public Participation

In Legal Issue No. 3,⁶ Petitioner KAPO asserts that Kitsap County violated the public participation requirements of the GMA in enacting the CAO Update. The PHO states Legal Issue No. 3 as follows:

Legal Issue No. 3. Did Kitsap County fail to comply with the public participation process required by RCW 36.70A.020, Goal 11, RCW 36.70A.035, RCW 36.70A.140, and/or WAC 365-190-040(2)(4) in adopting Ordinance 351-2005? [Intended to reflect Issue A, pp. 3-4 of the KAPO PFR].

Applicable Law

One of the planning goals of the GMA is to “encourage the involvement of citizens in the planning process.” RCW 36.70A.020(11). This goal is underscored by specific statutory requirements. RCW 36.70A.035 mandates reasonable notice procedures and requires that, if legislative changes to a proposed plan or development regulation are considered after the close of public comment, an opportunity for public review and comment shall be provided before the final vote.

RCW 36.70A.140 provides:

Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments.

Statement of Facts

⁶ The full text of Issue No. 3 [KAPO PFR Issue A], is set forth in Appendix B.

Kitsap County began the process of considering possible revisions to its existing CAO in 2003. Index #114 at 8. The County's first public process step was to gather the Best Available Science (**BAS**) related to the critical areas defined in RCW 36.70A.030(5) for the County Department of Community Development (**DCD**) to use in drafting the revised ordinance. See RCW 30.70A.172(1); KCC Title 19, Section 2.C (General Procedural Findings).

The County convened a Technical Review Committee (**TRC**) to review available scientific information for possible use in the CAO revision process. The TRC was composed of technical specialists from local, state and natural resource agencies, tribes, and various community stakeholder groups. KAPO PHB, at 52-3; see KCC Title 19, Section 2.C. KAPO representative Don Flora, Suquamish Tribe representative Tom Ostrom, and John Nantz of the West Sound Conservation Council – one of the Hood Canal group of petitioners – were TRC members. Index 627. TRC agendas, notes, and materials, including links to scientific references, were posted on the County website. KAPO PHB at 53.

Following the TRC proceedings, the County staff revised the CAO, releasing the first public draft for review and comment in June 2004. *Id.* Section 2.E; Index 1332. The County developed and disseminated a “Summary of Best Available Science” to accompany the First Draft of the CAO. Index 114. The County encouraged public participation and comment on the First Draft, including facilitating presentations from stakeholder groups to the Board of County Commissioners, receiving and considering public comments made to the Commissioners and County staff, and holding a series of DCD-sponsored booths and open houses throughout the County. See KCC Title 19, Section 2.F-2.P; Index 1379. These activities continued through August 2004. *Id.*

In October 2004, the County assembled a panel of Northwest scientific experts to address questions from the public about critical areas and best available science. A series of community roundtable discussions followed the panel presentation. Index 109, at 5.

KAPO members participated actively in this round of public discussion. KAPO PBH, at 5. KAPO provided the County with a great deal of information – both scientific and other opinion - primarily regarding the effectiveness and appropriateness of critical area buffers; County staff reviewed and commented on this input internally. See Index 123, 124, 255, 272, 273, 317, 414, 416, 417, 418, 419, 420, 421, 448, 534, 559, 645, 647, 804, 1209, and 1210.

Intervenor Suquamish Tribe participated in the CAO update development process, commenting during public meetings and hearings, participating on the TRC, and submitting several letters in support of protecting critical areas. Suquamish PHB at 3, referencing, but not attaching, Index Nos. 146, 199, 252, 302, 305, 306, 671, 685, 724, 780, and 887.

The Hood Canal group of Petitioners is comprised of three individuals – Jim Trainer and Judith and Irwin Kringsman – and five community or environmental-advocacy

organizations – Hood Canal Environmental Council, People for Puget Sound, West Sound Conservation Council,⁷ Kitsap Citizens for Responsible Planning, and Futurewise. These Petitioners also were actively involved in the public discussion that preceded adoption of the CAO update.

State agencies also participated and commented. A Washington Department of Fish and Wildlife [**WDFW**] scientist served on the TRC, and WDFW sent a series of comment letters.⁸ Washington Department of Ecology [**DOE**],⁹ the Puget Sound Action Team,¹⁰ and Department of Community, Trade and Economic Development [**CTED**]¹¹ commented at various times in the process. KAPO raised and addressed concerns about the state-agency models, which it characterized as “the limitations of the buffer-only approach, the lack of selectivity in designation, and concerns about the validity of the approach taken.” KAPO PHB, at 5, fn. 2.

As a result of this process, County Staff issued a Second Draft of the CAO Update on May 17, 2005, with a new Science Support Document. See KCC Title 19, Section 2.Q; Index 109. KAPO fully participated in the public comment period that followed, including attending and testifying at the Planning Commission and Board of County Commissioners (**BOCC**) meetings and hearings leading up to the CAO adoption. KAPO PFR, at 55.

Again KAPO provided the County with multiple submissions containing scientific information and asked that the material be included in the range of BAS considered by the County. *Id.* The County developed an Information Flow Chart and “BAS Ellipse” to indicate how new scientific information was evaluated using criteria from the CTED guidelines for BAS, in WAC 365-195-900-925. Index 1025. KAPO states that the information it presented was excluded by County staff because they erroneously applied the CTED guidelines. KAPO PFR, at 55-61.

Beginning in May 2005, the Kitsap County Planning Commission held a series of workshops and public hearings on the CAO proposal, then a number of deliberative meetings in October and November, 2005, to formulate recommendations. See Index 117, 119, 924, 959, 965, 975, 996, 997, 1032, 1033, 1034, 1368, 1371, 1321. Unable to agree on a recommendation, the Planning Commission prepared two CAO update drafts and a majority and minority opinion. Index 1315. The DCD, with many qualified scientists among its own staff [Index 1367, County Response, at 4, fn 10], was concerned

⁷ West Sound Conservation Council is an association of Kitsap County community organizations including Kitsap Audubon, Kitsap Conservation Voters, Stillwaters, Friends of Miller Bay, Trees, and Chums of Barker Creek. West Sound Conservation Council members participated in the County’s CAO process, see, KAPO Ex. 2-M at 293, 298, 301, Ex 2-N at 327-28, 330, 331, 332-33, 335, 341; Index 785; Index 1386, at 288-98.

⁸ Index 625 (letter March 30, 2004); Index 1293 (letter Aug. 6, 2004); Index 1292 (letter Aug. 26, 2004); Index 795 (letter Aug. 26, 2005).

⁹ Index 309 (letter Aug. 27, 2004); Index 343 (letter Nov. 14, 2005).

¹⁰ Index 789 (letter Aug. 10, 2005); Ex. 2-M, at 275-76 (public hearing testimony).

¹¹ Index 1285 (letter Aug. 9, 2004); Index 312 (letter Aug. 10, 2005).

that the majority Planning Commission recommendation deviated from staff's BAS analysis and so prepared a Staff Draft of the CAO. Index 1315.

Four drafts of the CAO were forwarded to the BOCC. The County Commissioners were also provided with information about science submitted by KAPO. See, Index 966.¹² The County Commissioners held a public hearing at which representatives of KAPO testified primarily in opposition to any CAO update or in favor of the Planning Commission majority report, while representatives of Suquamish Tribe and each of the Hood Canal Petitioner organizations and individuals testified in favor of the Staff Draft or Planning Commission minority report – or even stronger protections. Index 1386. The County Commissioners held four days of public deliberations, including side-by-side comparisons of the four drafts, and section-by-section discussion and modification, that resulted in adoption of Ordinance 351-2005 - the County's 2005 CAO Update. County Response, at 4-5.

Discussion and Analysis

Positions of the Parties

KAPO contends that, although Kitsap County provided ample opportunity for public input and participation, the County staff did not take seriously the scientific information provided by participating citizens. KAPO PHB at 55-57. KAPO complains about a lack of documentation of the County staff's review of post-TRC scientific information submitted during the public comment period and the County's "erroneous exclusion of essentially all of KAPO's scientific submissions from possible consideration as BAS." *Id.* at 57. KAPO states that County staff "summarily disregarded" KAPO's submissions and, "by failing to perform SEPA analysis for the second draft of the CAO, improperly precluded the public from participating in the consideration of impacts and alternatives." KAPO Reply, at 3-4.

Kitsap County asserts that KAPO has abandoned some or all of Legal Issue 3.¹³ County Response at 7-11. In addition, the County points out that KAPO's SEPA issues have been dismissed, and argues that KAPO does not have standing to reargue the same points in the guise of public process violations. *Id.*

Board Discussion

Legal Issue No. 3 alleges that the County's process did not comply with the public participation requirements of the GMA – specifically RCW 36.70A.020, Goal 11, RCW 36.70A.035, RCW 36.70A.140, and/or WAC 365-190-040(2)(4). This issue has been inadequately briefed and must be deemed abandoned. See WAC 242-02-570(1) ("Failure

¹² Memo (Nov. 17, 2005) from DCD staff Jim Bolger to Commissioner Chris Endressen: "You will have access to the science that has been turned in by the public with staff notes included. We are currently making copies of everything ... This includes Dr. Duff's, Dr. Flora's, Dr. Buell's, Dr. Crittenden, Mr. Gustavsen, etc. [KAPO's experts]."

¹³ KAPO insists that it has abandoned only issues A.2 and A.4. KAPO PHB at 4; KAPO Reply at 34.

... to brief an issue shall constitute abandonment of the unbriefed issue.”) An issue is inadequately briefed when only conclusory statements are made, without explaining how the law applies to the facts before the Board and how a local government has failed to comply with the law. *Tulalip Tribes of Washington v. Snohomish County*, CPSGMHB Case No. 96-3-0029, Final Decision and Order (Jan. 8, 1997), at 7. The Board can find only a single sentence in KAPO’s 72-page opening brief that refers to the statutory provisions at issue, and this sentence makes only a cursory assertion of non-compliance with the cited statute.¹⁴ The issue is deemed **abandoned**.

Indeed, KAPO’s prehearing brief makes clear that the County provided ample opportunity for public input and debate, and the County’s record is replete with evidence of that process, including extensive participation by KAPO. As required by RCW 36.70A.140, Kitsap “provide[d] for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments.” KAPO’s real disagreement is with the weight the County gave to KAPO’s input, particularly to the scientific information KAPO provided.

A similar objection was raised in a challenge to King County’s update of its critical areas regulations: *Maxine Keesling v. King County (Keesling CAO)*, CPSGMHB Case No. 05-3-0001, Final Decision and Order (July 5, 2005). Ms. Keesling attended numerous public meetings leading up to King County’s adoption of its CAO and had submitted comments and critiques, including materials calling into question the science relied on by the County. King County’s record included the materials submitted by Ms. Keesling, summaries of her comments in public meetings, and staff notes responding to her issues. Nevertheless, Ms. Keesling alleged a failure to comply with GMA public participation requirements because “there was no county response and no apparent consideration given to Petitioner’s suggestion.” *Id.* at 5.

The Board rejected Ms. Keesling’s public process challenge, noting that:

The GMA imposes no duty on jurisdictions to respond to specific citizen comments in the public process surrounding consideration of regulations. *MacAngus Ranches, Michael Leung and Dennis Daley v. Snohomish County*, CPSGMHB No. 99-3-0017, Final Decision and Order, (March 23, 2000), at 12 (Holding that “Respond to” public comments does not mean that counties and cities must react in response to all citizen questions or comments... It means only that citizen comments and questions must be considered...); See *Montlake Community Club v. City of Seattle*, CPSGMHB No. 99-3-0002c, Final Decision and Order, (July 30, 1999), at 9 (Petitioner’s arguments regarding public participation amounted to a

¹⁴ KAPO PHB at 60-61: “In addition, KAPO believes the County’s failures to properly apply the BAS guidelines results in the erroneous exclusion of scientifically valid material and constitutes a clear error in the Kitsap County public process sufficient for the Board to find the process *failed to achieve the objectives of RCW 36.70A.140* under the guidance offered in WAC 365-190-020, 040, and WAC 365-195-900”(emphasis supplied).

disagreement with the City over the policy choices made by the City Council. Petitioner's dissatisfaction with the decision made by the City does not mean that the public participation process used by the City...failed to comply with the requirements of RCW 36.70A.140).

Keesling CAO, at 14.

In the present matter, it is apparent from Kitsap County's record that KAPO's comments were considered and analyzed by County staff,¹⁵ although they were not given the weight to which KAPO believes they were entitled. Further, KAPO's input was presented and discussed at Planning Commission meetings, where, in fact, KAPO member and Planning Commissioner Mike Gustavson persuaded the Commission to adopt some of KAPO's proposals. See, e.g., Ex. 2-Q, at 12-15; KAPO Reply, at 17, fn. 10.

Under the GMA, the County has a duty to provide reasonable opportunity for public input but no duty to accept citizen comments or adopt them. "Citizen disappointment in the final choices made by local government does not mean that the citizens have not had a chance to express their view." *Sky Valley v. Snohomish County*, CPSGMHB Case No. 95-3-0068c, Final Decision and Order (March 12, 1996), at 24.

The Board finds that Kitsap County **complied** with the GMA public process requirements - RCW 36.70A.035, .140 and .020(11) - in its enactment of the CAO Update.

KAPO's complaint that the County failed to provide opportunity to comment on the second draft of the CAO by failing to prepare and publish a revised SEPA determination [KAPO PFR Issue A.5 and A.6] is disposed of by this Board's ruling that KAPO lacks SEPA standing. Order on Motions (May 6, 2006). Further, it is apparent from the record that even after the second draft of the CAO was issued in May 2005, the full range of disputed issues remained in play, and KAPO and others availed themselves of ample opportunity for continued comment.¹⁶

KAPO's concerns about the County's evaluation of scientific information provided by KAPO [KAPO PFR Issue A.1] are discussed below in the Best Available Science section - Legal Issue No. 5 - in the context of the requirements of RCW 36.70A.172.

Conclusion

Petitioner KAPO **abandoned** Legal Issue No. 3 [KAPO PFR Issues A.1-A.7] by failing to provide briefing on *any of the statutory provisions* alleged to have been violated. Further, the Board finds and concludes that, in adopting the CAO Update, Kitsap County

¹⁵ County staff notes or reports on the materials provided by KAPO are included in Index 255, 314, 412, 413, 424, 425, 426, 427, 428, 429, 527.

¹⁶ Kitsap County lists this among the issues abandoned by KAPO, noting, correctly, that "Nowhere in any of the briefing submitted by KAPO does KAPO explain and analyze how the lack of a second SEPA checklist or threshold determination fails to comply with GMA's public participation requirements. KAPO has failed to brief these issues and has, therefore, abandoned them." Kitsap Response, at 11.

complied with RCW 36.70A.035, .140 and .020(11), the public participation requirements of the Act. Legal Issue No. 3 is **dismissed**.

B. Legal Issue No. 1 – Wetlands Exemption

In Legal Issue No. 1, Petitioner Hood Canal challenges the provisions of the CAO Update that exempt certain small, isolated, low-value wetlands from critical-areas regulations.

The PHO states Hood Canal’s Legal Issue No. 1 as follows:

Legal Issue No. 1. Does the adoption of Ordinance 351-2005, adopting an updated and revised critical area ordinance, fail to comply with RCW 36.70A.130, RCW 36.70A.020(9), RCW 36.70A.020(10), RCW 36.70A.060, RCW 36.70A.170 and 36.70A.172 when it adopts a critical areas ordinance that exempts Class III and IV wetlands under 2500 and 7500 square feet respectively and therefore doesn’t consider best available science and doesn’t protect the functions and values of critical areas as required by the GMA?

Applicable Law

The GMA requires all counties and cities, whether or not planning under the Act, to designate critical areas. RCW 36.70A.170(1)(d), .040(3).¹⁷ Critical areas include wetlands, RCW 36.70A.030(5)(a), which are specifically defined in the Act. RCW 36.70A.030(21). In designating critical areas, cities and counties “shall consider” the minimum guidelines promulgated by CTED in consultation with DOE pursuant to RCW 36.70A.050(1) and (3); .170(2).

Having designated critical areas, including wetlands, counties and cities must adopt development regulations to protect the identified critical areas. RCW 36.70A.040(3),

¹⁷ RCW 36.70A.040(3):

(3) Any county or city that is initially required to conform with all of the requirements of this chapter under subsection (1) of this section shall take actions under this chapter as follows: ... (b) the county and each city located within the county shall designate critical areas ... and adopt development regulations ... protecting these designated critical areas, under RCW 36.70A.170 and 36.70A.060;

RCW 36.70A.170:

(1) On or before September 1, 1991, each county, and each city, shall designate where appropriate: ... (d) Critical areas.

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

.060(2).¹⁸ The requirement to designate and protect critical areas applies to every city and county in the state of Washington, not just those required to fully plan under the GMA, and applies to all categories of land, whether urban, rural, or natural resource lands.

In sum, the Legislature listed mandatory categories of critical areas to be protected [RCW 36.70A.030(5)], directed CTED to adopt guidelines to assist local governments [RCW 36.70A.050, .190; see WAC Chapter 365-190], and required local governments to adopt regulations to protect functions and values of critical areas [RCW 36.70A.060(2), .172(1)].

In 1995 the GMA was amended to add a new requirement for critical areas regulations: “best available science.” Under RCW 36.70A.172(1), critical areas ordinances *shall* include best available science (**BAS**), must *protect critical area functions and values*, and *shall* give special consideration to preservation of anadromous fisheries. RCW 36.70A.172(1).¹⁹ Specific to wetlands, an additional mandate was added concurrently requiring that wetlands be delineated in accordance with the DOE manual. RCW 36.70A.175.

In 2002, Section .130 of the Act was amended to require review and update of plans, including critical areas regulations, on a regular cycle “to ensure these policies and regulations comply with the requirements of this chapter.” RCW 36.70A.130(1)(a), (c).²⁰ These updates must include best available science.

Statement of Facts

¹⁸ RCW 36.70A.060(2):

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

¹⁹ RCW 36.70A.172(1):

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

(Emphasis supplied).

²⁰ RCW 36.70A.130(1):

(a) Each comprehensive land use plan and development regulations shall be subject to continuing review and evaluation by the county or city that adopted them. A county or city shall take legislative action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter according to the time periods specified in subsection (4) of this section.... (c) ...The review and evaluation required by this subsection *shall include*, but is not limited to, *consideration of critical area ordinances*....

In crafting its 2005 CAO update, the source of BAS for wetlands protection upon which Kitsap County primarily relied was the Department of Ecology's *Wetlands in Washington State – Volume 1: A Synthesis of the Science (Wetlands Vol. I)* [Index 590] and *Wetlands in Washington State – Volume 2: Guidance for Protecting and Managing Wetlands (Wetlands Vol. 2)* [Index 1217]. County Response, at 19.

The classification section of the CAO Update - KCC 19.200.210 – Wetland Identification and Functional Rating, establishes a new wetland rating system for Kitsap County, in which wetlands are ranked from high function (Category I) to low function (Category IV). Wetlands which are not regulated by the CAO are isolated Category III wetlands under 2,500 square feet [0.057 acres] and isolated Category IV wetlands under 7,500 square feet [0.172 acres].²¹ KCC 19.200.210(C)(1) and (2).

“Isolated wetlands” are defined by the County as wetlands that (a) are not contiguous to any one-hundred year floodplain of a lake, river, or stream and (b) have no other wetland within a 100-foot radius. KCC 19.150.690. “Mosaic wetlands,” which are regulated, are defined by the County as “groups of isolated wetlands, any one or more of which may be smaller than any of the regulated categories, but which in aggregate may be as valuable as any of the regulated categories.” KCC 19.150.695. “Mosaic wetlands,” by their very definition, pick up some very small, otherwise unregulated wetlands, and protect them based on aggregate values. The classification and regulation of mosaic wetlands and the 100-foot radius definition of an isolated wetland are new provisions in Kitsap’s 2005 CAO update. *See*, Index 1379.

Discussion and Analysis

Positions of the Parties

The Hood Canal Petitioners object to the County’s exemption of small, isolated wetlands from the designation and protection scheme of the CAO. Hood Canal argues that there is no science in the County’s record supporting such an exemption. Indeed, Petitioners assert, the BAS primarily relied on by Kitsap County – *Wetlands Vol. I* [Index No. 590] – has a section on the important functions of small wetlands, which the County has ignored.

In support of its assertions, Hood Canal cites a pre-BAS Board decision: *Pilchuck v. Snohomish County (Pilchuck II)*, CPSGMHB Case No. 95-3-0047c, Final Decision and Order (Dec. 6, 1995), at 21:

[T]he Act requires that all critical areas be designated and that all designated critical areas be protected. ... Exemption, exclusion, limitation of applicability, or other drafting mechanisms that achieve the same effect, do not constitute designation and protection of critical areas. Local governments do have discretion as to how and even the degree to which they protect, but the inescapable conclusion from a plain reading of the Act is that critical areas must be protected.

²¹ The 1998 CAO exempted Category IV wetlands under 10,000 square feet. County Response, at 18 fn. 28.

Suquamish Tribe, intervening on the side of Hood Canal, finds no science in the County's record supporting the exemption and reasons that "allowing these small wetlands to be filled and destroyed will obviously result in a net loss to the ecosystem." Suquamish PHB, at 4, 12.

In response, Kitsap County states that its wetlands exemptions are consistent with the BAS in *Wetlands Vol. 1*. The County cites to the section on small wetlands and notes that "no studies were found that documented the role that small wetlands play in providing water quality or hydrologic functions." *Wetlands Vol. 1* [Index 590], at 5-8. As to wildlife habitat functions, the County concluded that "habitat structure, connectivity and wetland hydroperiod are much more significant factors in determining habitat functions than size alone." *Id.* at 5-10. The County asserts that it carefully tailored its definition of "isolated" wetlands and added the provision for protection of "mosaic wetlands" in recognition of the importance of retaining habitat connectivity for wildlife. County Response, at 21. Further, the County limits its exemption to Category III and IV wetlands, whose functionality is already limited. *Id.* at 22, fn. 36.

Finally, the County underscores a sentence in *Wetlands Vol. 1* that states: "None of the studies evaluated the role of wetlands less than 0.5 acre, so the implications of exempting wetlands less than 0.25 acre, as is commonly done in local wetland regulations, are unknown." Index 590, at 5-10.

Hood Canal counters with the following passages from *Wetlands Vol. 2*:

- While recognizing that local governments have to make difficult choices about where to expend their efforts, we do not believe it is appropriate to recommend a general threshold for exempting small wetlands in Washington because the scientific literature does not provide support for such a general exemption. Volume 1 (chapter 5) documents the relationship between the lower levels of protections afforded to small wetlands and the resulting fragmentation and increase in distance between wetlands on the landscape as well as the important functions provided by small wetlands. The loss of small wetlands is one of the most common cumulative impacts on wetlands and wildlife in Washington.
- As with exempting a certain wetland size, there is no scientific basis for exempting wetland impacts under any particular size without an analysis of the cumulative effects of the exemption. A study of the management area is needed in order to measure the net result of the exemption as applied over time. If a local government chooses to move forward with an exemption for small area impacts, a restoration program and/or in lieu fees program should be created to offset the impacts. Given the potential for cumulative impacts from exempting small wetlands and small impacts to wetlands, local governments should monitor and report the effectiveness

of their wetland provisions or critical areas ordinance to achieve “no net loss.”

- There is no scientific justification for exempting isolated wetlands from regulation (See Chapter 5 in Volume 1). Isolated wetlands are generally defined as those wetlands that are hydrologically isolated from other aquatic features. Hydrologic isolation is not a determinant factor in the function of wetlands. Isolated wetlands in Washington perform many of the same important functions as other wetlands, including recharging aquifers, storing floodwaters, filtering pollutants from water, and providing habitat for a host of plants and animals. Many wildlife species, including amphibians and waterfowl, are particularly dependent on isolated wetlands for breeding and foraging.

Wetlands Vol. 2 [Index 590], at 8-13 and 8-14.

Board Discussion

The GMA requires counties and cities to designate critical areas, including wetlands, and to enact development regulations to protect their functions and values, based on best available science. While there is a growing body of accepted science about wetlands functions and values, the competent science relied on by Kitsap County – DOE’s *Wetlands Vol. 1 and Vol. 2* - indicates “the absence of studies on the role of wetlands smaller than half an acre.” *Wetlands Vol. 1*, at 5-10. Nevertheless, Kitsap County’s regulations protect even the smallest wetlands if they are adjacent to other wetlands, to a floodplain, or part of a wetland mosaic. Similarly, Kitsap protects even the smallest wetlands if they function at a Category I or Category II level. Exemptions from regulation are permitted only for very small (0.057 and 0.172 acre), truly isolated, and poorly-functioning wetlands (Category III and IV).

State agencies advised Kitsap that exemption of small isolated wetlands was not supported by BAS.²² For the smallest wetlands, where buffers are impracticable, best management practices or a mitigation/*in lieu* option may provide appropriate protection.²³ WDFW proposed that “Alternatively, compensatory on-site or off-site mitigation should be required for the loss of small, isolated wetlands.” Index 795, at 2.

²² See, e.g., Index 309 (DOE letter, Aug. 27, 2004) at 2: “Science offers no justification for excluding some wetlands from protection based on size or ‘isolation.’ ... Any exemptions ... should be justified by analysis of their cumulative impact ... In-lieu fees ... may be considered in place of direct mitigation for minor impacts.”; Index 1293 (WDFW letter, Aug. 6, 2004) at 4: “It is unclear what science and/or justification the county is using to support its continued exemption of small isolated wetlands,” citing importance to waterfowl and amphibians; Index 625 (WDFW letter, Mar. 30, 2004) at 5: “small isolated wetlands ... are critical to waterfowl and herptile populations...”; Index 795 (Aug. 26, 2005, WDFW letter) at 2.

²³ The Board notes that buffers on very small wetlands may be substantially larger than the wetlands themselves. DOE has developed alternative strategies: “Ecology can recommend a strategy for exempting wetlands less than 1,000 square feet from regulation and exempting Category III and IV wetlands between 1,000 and 4,000 square feet from the requirement to avoid impacts if certain criteria are met.” Index 343 (Nov. 14, 2005, DOE letter), at 7.

Division II of the Court of Appeals, in its recent review of a decision of the Western Washington Growth Management Hearings Board, explained the limitations on exemptions from critical areas regulations that counties may enact based on local circumstances.

If the County, to meet its local conditions, wants to exempt a number of small farms, it must then show that by using best available science it has tailored the exemption to reasonably ameliorate potential harm to the environment and fish and wildlife. And the regulations must specifically address any threatened harm peculiar to the number and size of farms exempted. ...

The County may expand its exempt agricultural land to meet its local conditions. But the County must balance such expanded exemption with corresponding restrictions that take into account the specific harms threatened by the expanded class of farm lands.

Clallam County v. Western Washington Growth Management Hearings Board (Clallam County), 130 Wash. App. 127, 140, 121 P.3d 764 (2005). The Board reads the Court's opinion to require CAO exemptions to be supported by some analysis of cumulative impacts and corresponding mitigation or adaptive management.

Here, Kitsap County has not expanded its small wetlands exemption; in fact, the exemption has been somewhat narrowed. But there is no evidence in the record of the likely number of exempt wetlands, no cumulative impacts assessment or adaptive management, and no monitoring program to assure no net loss. In light of the Court's guidance in *Clallam County*, which the Board finds controlling, the Board is persuaded that a mistake has been made; Kitsap's wetlands exemption is **clearly erroneous**.

Conclusion

The Board finds and concludes that the action of the County in exempting certain wetlands from protection under its CAO **fails to comply** with RCW 36.70A.130, RCW 36.70A.020(9), RCW 36.70A.020(10), RCW 36.70A.060, RCW 36.70A.170 and 36.70A.172. The Board **remands** Ordinance 351-2005 to the County to take legislative action consistent with this order.

C. Legal Issue 4 – Shorelines Designations

Both groups of Petitioners challenge Kitsap County's shoreline protections, with Petitioner KAPO (supported by Amicus PLF) saying that they go too far and Petitioners Hood Canal (with Intervenor Suquamish) saying that they don't go far enough.

In Legal Issue No. 4, KAPO challenges the County’s decision to designate all its shorelines as critical areas. KAPO contends that the broad designation is contrary to RCW 36.70A.480(5) and not based on science.

In Legal Issue No. 5, as part of its opposition to buffers generally, KAPO asserts that “blanket buffers” on County shorelines violate the GMA because they are not supported by BAS. [Discussion at V.D, below].

In Legal Issue No. 2, Hood Canal asserts that the 35-foot buffer requirements for marine shorelines are too small to protect the functions and values of the shorelines and are inconsistent with BAS. [Discussion at V.E, below]

The PHO states KAPO’s Legal Issue No. 4 as follows:²⁴

Legal Issue No. 4: Did Kitsap County fail to comply with RCW 36.70A.480(5) in adopting KCC 19.300.310(A),(B) through the adoption of Ordinance 351-2005? [Intended to reflect Issue B, pp. 4-5 of the KAPO PFR].

Applicable Law

RCW 36.70A.170(1) requires counties to designate critical areas. Critical areas are defined in the GMA to include “fish and wildlife habitat conservation areas” - a term which is not otherwise defined in the Act. RCW 36.70A.030(5)(c). Concerning designation of critical areas, the GMA requires that a county or city:

- “shall consider the guidelines” provided by CTED [.170(2)],
- “shall include best available science” [.172(1)] ,
- “shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.” [.172(1)]

The GMA contains a special provision with respect to designating critical areas along or within shorelines of the state – RCW 36.70A.480(5) (Emphasis added):

(5) Shorelines of the state *shall not* be considered critical areas under this chapter *except* to the extent that specific areas located within shorelines of the state qualify for critical area designation based on the definition of critical areas provided by RCW 36.70A.030(5) and have been designated as such by a local government pursuant to RCW 36.70A.060(2).

The Legislature charged CTED with developing guidelines for critical area designation, RCW 36.70A.050, and required CTED to provide counties and cities with technical assistance in complying with the GMA. RCW 36.70A.190. In *Ferry County v. Concerned Friends of Ferry County, et al., (Ferry County)*, 155 Wn.2d 824, 835 n.9, 123 P.3d 102(2005), the Supreme Court’s recent ruling concerning application of best

²⁴ The full text of Legal Issue No. 4 [KAPO PFR Issue B] is set forth in Appendix B.

available science to the designation of fish and wildlife habitat conservation areas, the Court underscored the importance of following the guidelines developed by CTED at the Legislature's behest. CTED's guidelines for fish and wildlife habitat conservation area designation are at WAC 365-190-080(5)(a)-(b).²⁵

Statement of Facts

Kitsap County's CAO Update designates all saltwater shorelines, stream segments with flow greater than 20 cubic feet per second, and lakes greater than 20 acres as critical areas under the category of "fish and wildlife habitat conservation areas." The section of the CAO Update designating fish and wildlife habitat conservation areas on shorelines is codified as KCC 19.300.310, and the development standards for these areas are at KCC 19.300.315. In this part of its CAO Update, Kitsap County largely retains the CAO designations and buffer widths it adopted for its shorelines in 1998.

The County's record indicates discussion of this proposal over at least a 22-month public process. Meeting materials provided to the TRC in February 2004 and rather sketchy TRC meeting notes indicate that the County staff presented and discussed with the TRC the various species associated with the proposed fish and wildlife habitat conservation

²⁵ (a) Fish and wildlife habitat conservation areas include:

- (i) Areas with which endangered, threatened, and sensitive species have a primary association;
 - (ii) Habitats and species of local importance;
 - (iii) Commercial and recreational shellfish areas;
 - (iv) Kelp and eelgrass beds; herring and smelt spawning areas;
 - (v) Naturally occurring ponds under twenty acres and their submerged aquatic beds that provide fish or wildlife habitat;
 - (vi) Waters of the state;
 - (vii) Lakes, ponds, streams, and rivers planted with game fish by a governmental or tribal entity; or
 - (viii) State natural area preserves and natural resource conservation areas.
- (b) Counties and cities may consider the following when classifying and designating these areas:
- (i) Creating a system of fish and wildlife habitat with connections between larger habitat blocks and open spaces;
 - (ii) Level of human activity in such areas including presence of roads and level of recreation type (passive or active recreation may be appropriate for certain areas and habitats);
 - (iii) Protecting riparian ecosystems;
 - (iv) Evaluating land uses surrounding ponds and fish and wildlife habitat areas that may negatively impact these areas;
 - (v) Establishing buffer zones around these areas to separate incompatible uses from the habitat areas; and
 - (vi) Restoring of lost salmonid habitat.

areas along County shorelines. Index 1367; see, e.g., January 21, 2004, “Fish and Wildlife Habitat Conservation Areas – Best Available Science Review.”²⁶

County staff reviewed their First Draft CAO Update provisions for fish and wildlife habitat conservation areas with the Planning Commission on July 20, 2004. Ex. 2-E, at 220-225. Designation of shorelines as fish and wildlife habitat conservation areas, the relation between GMA and SMA regulations, and the role of buffers or site-specific protections such as habitat management plans were actively discussed. *Id.*

The County’s December 2004 Summary of Best Available Science Review identifies Fish and Wildlife Habitat Conservation Areas as including saltwater shorelines, lakes greater than 20 acres, stream-segments with flow greater than 20 cubic feet per second, and some lesser streams. Index 114, at 14. The summary of BAS also notes that “[S]pecies supported by these [habitat conservation] areas include ... salmon, shellfish, kelp, eelgrass, large and small mammals, birds, amphibians, reptiles and a wide variety of invertebrates.” *Id.* In addition, it is noted that Class I habitats are “habitat areas for species listed as endangered, threatened or sensitive by federal and state agencies; areas targeted for preservation by federal, state and/or local government that provide fish and wildlife benefits; areas that contain habitats and species of local importance.” *Id.*

The County’s Science Support Document, issued May 17, 2005, in connection with its Second Draft CAO Update, identifies proposed shoreline buffers - increasing stream buffer widths for streams with listed fish species and reducing buffers for streams without fish. Index 109, at 9. For saltwater and lake shorelines, the County proposed no change to the 1998 35-foot buffer width for Urban, Semi-rural and Rural shorelines [as identified in the County’s Shoreline Management Program], no change to the 100 foot buffer width for Natural shorelines, and a revised range of 0-100 feet in buffer width for Conservancy shorelines depending on development. *Id.* at 10. The Science Support Document stated that the County’s proposed buffers, in combination with the Shoreline Management Program (SMP), “provide an acceptable level of conservation for important shoreline habitat features, ... ensure no net loss of riparian functions, and address the consideration to anadromous fish.”²⁷ *Id.*

On September 2, 2005, the federal government designated the marine nearshore of Puget Sound [waterward of extreme high tide] as critical habitat for Puget Sound Chinook and Hood Canal Summer Chum. Index 779. Both of these species are considered “threatened” under the Endangered Species Act, 16 USC 35, Sec. 1531-1544.

In Kitsap County, the issue of saltwater shoreline designation remained open for public discussion. At the October 31, 2005, Planning Commission meeting, KAPO member and Planning Commissioner Mike Gustavson made a motion (which carried) that Kitsap County identify specific critical areas for protection within marine shorelines, rather than

²⁶ Salmon and trout species considered in this analysis included summer and fall chum, coho, fall Chinook, winter steelhead, and coastal cutthroat.

²⁷ The County’s Shoreline Management Program requires a 15 foot building setback from the buffer and an additional setback from the top of bluffs. County Response, at 25.

an overall designation. Appendix 2-Q, at 12-15; KAPO Reply, at 17, fn. 10. However, after further deliberation, the County retained its general designation of shorelines as fish and wildlife habitat conservation areas and retained the 35-foot buffer requirement for Urban, Semi-rural, and Rural shorelines.

Discussion and Analysis

Positions of the Parties

Petitioner KAPO argues, first, that the County violated RCW 36.70A.480(5) by designating *all* its shorelines as critical areas, rather than applying a detailed assessment of the specific habitat or lack thereof along each stretch of shore. KAPO PHB, at 8-11. Second, KAPO contends that there is no science in the record, nor did the County undertake a reasoned process that would justify a wholesale designation of the County's shorelines as habitat conservation areas. *Id.* KAPO asserts that the County has failed to "show its work," and that the designation and regulation of critical areas on the County's shorelines – KCC 19-300-3110 and .315 – do not comply with RCW 36.70A.480(5). *Id.* at 10.

Petitioner KAPO also introduces a new issue which was not stated in the detailed 9-page statement of issues in KAPO's PFR – "Whether the County's failure to provide a specific exemption for SMP-permitted uses in the CAO creates an irreconcilable conflict between Kitsap County's CAO (Title 19) and the County's SMP (Title 22)." KAPO PHB, at 11-13.

Amicus Curiae PLF relies upon RCW 36.70A.480(5), which provides that shorelines of the state are not *per se* critical areas. PLF at 3-4. PLF argues that Kitsap's designation of all its shorelines as fish and wildlife habitat conservation areas is a *per se* designation that is clearly erroneous. *Id.* Like KAPO, PLF contends that the County "failed to show its work," and that, until the County "properly designates the specific areas ... that satisfy as GMA critical areas, the shorelines should continue to be regulated under the County's shoreline master program." *Id.* at 5-6.

The County responds that the County indeed based its designations on best available science and that its record demonstrates consideration of the scientific information provided by competent federal and state agencies. County Response at 34-35. The County points to mapping of virtually its entire Hood Canal shoreline for summer chum habitat, its Puget Sound shoreline for Chinook habitat, and significant areas for herring spawning grounds and shellfish beds.²⁸

²⁸ See e.g., Index 778, Puget Sound Action Team mapping of Puget Sound Herring Spawning Areas, in State of the Sound 2004; Index 779, NOAA Final Critical Habitat Designations in Washington ... for Endangered and Threatened Pacific Salmon and Steelhead (Aug. 12, 2005); Index 1367, WDFW and Point No Point Treaty Tribes Summer Chum Salmon Conservation Initiative (Apr. 2000), identifying the Hood Canal nearshore of Kitsap County as summer chum migratory habitat; Index 1367, Puget Sound Action Team Shellfish Growing Areas (Mar. 2004), at Figure 1.

KAPO replies that there was very little public input or discussion about making the entire shoreline a critical area and no public discussion about integration of the County's CAO and SMP. KAPO Reply, at 5. KAPO insists that reliance on the federal salmon habitat designation is not a valid substitute for the "reasoned analysis" required by the Court in *Ferry County*, 155 Wn.2d at 853, and the inventory or similar documentation that the Board approved in *Tahoma Audubon Society v. Pierce County (Tahoma Audubon)*, CPSGMHB 05-3-0004c, Final Decision and Order (July 12, 2005). KAPO Reply, at 18-19.

Board Discussion

The Board will not hear new issues.

In arguing that Kitsap County's CAO Update for shorelines creates an "irreconcilable conflict" with its SMP, KAPO seeks to introduce an issue that was not included in its PFR's 9-page issue statement. See, Appendix B (in particular, B.1-B.6). RCW 36.70A.290(1) *forbids* the Board to issue opinions "on issues not presented to the board in the statement of issues, as modified by any prehearing order." Accordingly, the Board **strikes** KAPO PHB, pages 11-13.

Interaction between statutory regimes for GMA critical areas and SMA shorelines

ESHB 1933 amended RCW 36.70A.480 in an attempt to clarify the relation between GMA critical areas protection and SMA shoreline regulation. On their face, the GMA provisions concerning critical areas require integration with the SMA regulatory regime for shoreline management.

Critical areas are defined in the Growth Management Act to include wetlands, critical aquifer recharge areas, fish and wildlife habitat conservation areas, frequently flooded areas and geologically hazardous areas. RCW 36.70A.030(5). Fish and wildlife habitat conservation areas are defined in CTED's minimum guidelines as set forth above. WAC 365-190-080(5)(a). CTED's guidelines further require that certain marine shorelines – shellfish areas, kelp and eelgrass beds, herring and smelt spawning areas – "**shall be** classified as critical areas." WAC 365-190-080(5)(c)(iii) and (iv).²⁹

City and county updates to their critical areas regulations are required (1) to include best available science (**BAS**) in designation and regulation, (2) to protect functions and values

²⁹ In *Ferry County*, 155 Wn.2d at 835 fn. 9, the Supreme Court underscored the importance of following the CTED guidelines in applying best available science to the designation of fish and wildlife habitat conservation areas.

of critical areas, and (3) to give special consideration to the preservation and enhancement of anadromous fisheries. RCW 36.70A.172(1).³⁰

The Shoreline Management Act, RCW 90.58, requires local development and adoption of shoreline master programs and regulations, with a legislated update cycle.³¹ Areas within SMA jurisdiction include:

- Marine waters and shorelands 200 feet landward of ordinary high water mark;
- Streams and rivers greater than 20 cubic feet per minute mean annual flow – and associated 200-foot shorelands;
- Lakes larger than 20 acres – and associated 200-foot shorelands;
- The 100-year floodplain and all wetlands within the floodplain; and
- Wetlands and river deltas associated with any of the above.

RCW 90.58.030(d), (e), (f), (g), and (h). Unlike CAOs and other GMA enactments, Shoreline Master Programs and amendments must be submitted to DOE for state approval prior to their becoming effective.

*How do Central Puget Sound cities and counties construe ESHB 1933?*³²

Since the enactment of ESHB 1933 in 2003, the Board has been presented with a number of challenges to local CAO enactments involving **critical areas**, as defined by the GMA, that are within **shorelines**, as defined by the SMA. Since ESHB 1933, at least six CAO updates have been challenged before this Board – three counties and three cities. First, no jurisdiction whose CAO update has been appealed to this Board has omitted CAO regulations for wetlands, freshwater shorelines, or floodplains on the basis of ESHB 1933. Similarly, no jurisdiction, to our knowledge, has submitted its CAO update to DOE for approval under the SMA. Central Puget Sound counties and cities appear to agree that – *for wetlands, freshwater shorelines, and floodplains* - the current round of CAO updates is a GMA process that must be based on the GMA best available science provisions notwithstanding the interaction with SMA land use designations.

For example, King County’s CAO update, which included rivers, streams, lakes, and wetlands, was not submitted to DOE for SMA approval. King County Ordinance No.

³⁰ Central Puget Sound cities and counties were required by statute to complete updating their critical areas regulations by December 1, 2004, a deadline that was legislatively postponed to December 1, 2005, with additional allowance for “reasonable progress.” RCW 36.70A.130 (4), (8), (10).

³¹ SSB 6012, also adopted by the 2003 Legislature along with ESHB 1933, amended the SMP update deadlines to phase in coordination with the deadlines for CAO updates under the GMA; the legislative scheme calls for coordinated updating of CAOs and SMPs every seven years, beginning in 2012. DOE/CTED Q&A on ESHB 1933, at 4-5.

³²The Board is mindful of the Washington Supreme Court’s admonition that Growth Management Hearings Boards must be cautious about “filling the gaps” in the GMA and must defer to reasonable local government application of the statute based on local circumstances. See *Quadrant*, 154 Wn.2d 224. Therefore the Board asks: how have Central Puget Sound cities and counties construed the overlapping regimes of GMA critical areas regulations and SMA shoreline management post-ESHB 1933?

15051; see, *Keesling CAO v. King County*, CPSGMHB Case No. 05-3-0001, Final Decision and Order (July 5, 2005). Similarly, the City of Mukilteo's updated wetlands regulation was not submitted to DOE for approval. City of Mukilteo Ordinance No. 1112; see *Pilchuck V v. City of Mukilteo*, CPSGMHB Case. No. 05-3-0029, Final Decision and Order (Oct. 10, 2005). In other words, these jurisdictions construed their updates as GMA actions, not SMA actions.

The City of Kent's critical areas update was appealed to the Board by DOE and CTED. City of Kent Ordinance No. 3746; see *DOE/CTED v. City of Kent (DOE/CTED)*, CPSGMHB Case No. 05-3-0034, Final Decision and Order (Apr.19, 2006). The state agencies challenged Kent's failure to include best available science in its wetlands regulations – a GMA challenge. Kent's Ordinance No. 3746 also amended Kent's protections for streams, lakes, and a portion of the Green River and its floodplain, but neither the City of Kent nor the state agencies suggested that any of these shorelines should be protected under the SMA regime rather than as GMA critical areas.

The only area of ambiguity on the question appears to be concerning *salt-water (marine) shorelines*. ESHB 1933 clarified that shorelines of statewide significance are not critical areas simply because they are shorelines of statewide significance. RCW 36.70A.480(5) reads:

Shorelines of the state shall not be considered critical areas under this chapter [GMA] except to the extent that specific areas located within shorelines of the state (1) qualify for critical area designation based on the definition of critical areas provided by RCW 36.70A.030(5) and (2) have been designated as such by a local government pursuant to RCW 36.70A.060(2).

(Numeration added). On its face the statute does not apply exclusively to marine shorelines, but a few jurisdictions have read it so.

In updating its critical areas regulations, Pierce County read ESHB 1933 to preclude designating marine shorelines uniformly as GMA critical areas. Pierce County's CAO update included lakes, rivers, streams, and wetlands. Pierce County Ordinance Nos. 2004-56s; see *Tahoma Audubon Society, et al. v. Pierce County*, CPSGMHB 05-3-0004c, Final Decision and Order (July 12, 2005). Pierce County also designated significant portions of its marine shorelines as critical areas, for example, where steep slopes, salt-marshes, eelgrass or shellfish beds, smelt spawning areas, heron rookeries or eagle nests were present. *Id.* Appendix C, Finding of Fact No. 20, at 62. The draft ordinance under consideration in Pierce County designated all marine shorelines as fish and wildlife habitat conservation areas, but the County Council, in enacting the CAO, deleted references to marine shorelines as fish and wildlife habitat conservation areas, in reliance on the ESHB 1933 language that shorelines of the state are not *per se* critical areas. Appendix C, FoF Nos. 3, 15, 16. Significantly, Pierce County did not argue that ESHB 1933 precluded its critical area designations of shorelines of the state in general - for

lakes, rivers and streams, or other marine shoreline habitat values – only for fish and wildlife habitat as it concerned salmon.³³

Pierce County's BAS record included a detailed marine shoreline inventory and ranking of areas according to their quality as habitat for salmon, commissioned by Pierce County as part of its response to the ESA Chinook salmon listing. FoF #12-13. The Board found that the County's record supported the conclusion that not all the County's salt-water shore should be designated fish and wildlife habitat conservation area, but remanded the ordinance to the County for designation and protection of those areas of the shoreline consistent with the inventory of salmon habitat in the County's record. *Id.* at 53. On remand the County designated 29 miles of marine shoreline (out of a total of 179 miles) as high-value salmon habitat, and protected them with a 100-foot vegetated buffer; the Board found compliance. Order Finding Compliance (Jan. 12, 2006).

On the other hand, some jurisdictions – like Kitsap County - have designated *all* their marine shorelines as critical areas. The City of Shoreline, for example, designates all its marine shorelines as fish and wildlife habitat conservation areas; Shoreline also protects streams and wetlands as critical areas without reference to the SMA. City of Shoreline Ordinance No. 398; see *Garwood v. City of Shoreline*, CPSGMHB Case No. 06-3-0021, Order of Dismissal, (June 5, 2006) (settled).

The Board finds that there is no single interpretation of the ambiguity inherent in ESHB 1933 – specifically RCW 36.70A.480(5) – but a range of reasonable responses by local cities and counties in the Central Puget Sound region.³⁴ The Board will defer to the

³³ Two other challenges are pending before the Board on similar facts. The City of Tacoma adopted updated critical areas regulations that designate streams and riparian areas, wetlands, floodplains, and fish and wildlife habitat conservation areas, specifically including shellfish harvest areas, kelp and eelgrass beds, and herring and smelt spawning areas. City of Tacoma Ordinance No. 27431; see *Citizens for a Healthy Bay, et al., v. Tacoma*, CPSGMHB Case No. 06-3-0001 (settlement extension). A consortium of environmental organizations has challenged the Tacoma CAO for failure to properly designate marine shorelines as critical areas.

The City of Bainbridge Island adopted a critical areas update under the GMA which regulates wetlands, streams and floodplains. City of Bainbridge Island Ordinance No. 2005-003; see *Suquamish Tribe v. City of Bainbridge Island*, CPSGMHB Case No. 06-3-0006 (settlement extension). However, the ordinance states that “Marine Critical Areas” – defined to include commercial and recreational shellfish areas, kelp and eelgrass beds, marine and estuarine waters, and herring, sand lance and smelt spawning areas – are expressly regulated under the City's Shoreline Master Program. The Suquamish Tribe has challenged the Bainbridge CAO for failure to designate marine shorelines as critical areas.

³⁴ The Board notes that the Washington Courts of Appeals appear to differ on their opinion as to the interaction of the GMA and the SMA. Compare *Biggers v. City of Bainbridge Island*, 124 Wash. App. 858 (Div. II 2004) (holding RCW 36.70A.480 dictates that the SMA policies and regulations take priority over those adopted under the GMA, provided the provisions are internally consistent with the statutes enumerated in RCW 36.70A.480(3)) to *Preserve Our Islands v. Shorelines Hearings Board*, 137 P.3d 31 (Div. I 2006) (disagreeing with the *Biggers* Court, holding that RCW 36.70A.480 requires that regulations implementing the GMA and the SMA be harmonized in the process of overall land use planning and regulation; that the County's SMP goals and policies are part of the GMA comprehensive plan).

6312c Hood Canal, et al., v. Kitsap County (Aug. 28, 2006)

County's decision, based on local circumstances, unless persuaded by Petitioners that the County's approach was clearly erroneous.³⁵

KAPO has not demonstrated that Kitsap's designation of its marine shorelines as critical areas is clearly erroneous. There is ample evidence in the record, cited and relied on by the County, which supports its action.

Kitsap County's CAO Update is presumed valid; Petitioners bear the burden of demonstrating non-compliance with the GMA.

RCW 36.70A.480(5) provides that shorelines of the state are only critical areas where (1) they qualify for critical area designation based on the definition of critical areas provided by RCW 36.70A.030(5) and (2) they have been so designated by a local government pursuant to RCW 36.70A.060(2). Here, on the record before it, Kitsap County (1) concluded that its shorelines qualified as fish and wildlife habitat conservation areas, under the definition of .030(5)(d) as clarified by WAC 365-190-080(5)(a), based on the facts provided by state and federal resource agencies, and so (2) designated them in the CAO Update. On its face, the County's action is consistent with RCW 36.70A.480(5).

RCW 36.70A.172 requires the inclusion of best available science in designation of critical areas. The Board finds that the County's record includes science and technical information from state and federal agencies mapping or otherwise designating Kitsap County shorelines as critical habitat for fish and wildlife, including numerous species and habitats of concern – anadromous fish [Index 779, 1367], forage fish spawning grounds [Index 590, 778], kelp and eelgrass, shellfish beds. See maps at HOM Ex. 1 and 2. For example, specific to Kitsap shorelines, recent studies by WDFW and Suquamish Tribe document Puget Sound Chinook salmon migrating within the east Kitsap County nearshore. The Port Gamble S'Klallam Tribe has documented utilization of the Hood Canal nearshore by Hood Canal summer chum salmon and Puget Sound Chinook. These are Endangered Species Act (ESA) listed species. Index 1292, at 2.

The April 2001 White Paper entitled Marine and Estuarine Shoreline Modification Issues [Index 590] provides detailed information about the use of Puget Sound marine nearshore areas by various fish populations during specific portions of their life cycles: "It may be emphasized," the authors say, "that two salmon species (fall Chinook and summer chum salmon) federally listed as threatened under the Endangered Species Act in Puget Sound, are also the most estuarine/shoreline dependent species/stocks in the region." *Id.* at 12.

Based on this science, Kitsap County states: "[P]laces where listed, endangered, threatened, and sensitive species have a primary association, places with commercial and

³⁵ Kitsap County construes ESHB 1933 as follows: Currently, the SMP governs *what* can be built; the CAO governs *where* it can be built. This is in effect during the transition period between when ESHB 1933 was enacted and when a local jurisdiction updates its SMP. This relationship will change when Kitsap County updates its SMP in accordance with RCW 90.58.080, at which time the protection of critical areas in shorelines is transferred to the SMP. In accordance with RCW 36.70A.480(3)(a), the protection of critical areas in the shoreline remains under the CAO until the DOE approves the County's SMP that has been updated under the shoreline guidelines adopted in 2003. County Response at 42-42.

recreational shellfish beds, places with kelp and eelgrass beds, and places with spawning areas are worthy of designation ...[as are small areas in between] ... to create a connected system of fish and wildlife habitat.... Kitsap County’s entire marine shoreline consists of one or more of these areas.” County Response, at 35.

However, Petitioner KAPO and Amicus PLF seek to impose a “show your work” requirement. KAPO PHB, at 10; Amicus PLF, at 5-6. It would appear that Petitioner KAPO construes “show your work” to mean that the County must “conduct independent analysis and research.” *Id.* Petitioner KAPO contends that the County may not rely on federal habitat designations undertaken for another purpose but must conduct its own shoreline inventory or “independent analysis” and show in the record its own “reasoned process.” KAPO Reply, at 12-19.

The Board, however, reasons that the “best *available* science” requirement includes the word “available” as an indicator that a jurisdiction is not required to sponsor independent research but may rely on competent science that is provided from other sources. Here, Kitsap County’s January 2004 BAS document on Fish and Wildlife Habitat Conservation Areas [Index 1367] cited to the King County BAS review, Bellevue’s Critical Areas Update BAS paper, the Christopher May 2003 study, and a WDFW Summer Chum Conservation Initiative – science that was available and regionally relevant. While the CAO was still under discussion and public review, NOAA issued its September 2, 2005 designation of Puget Sound nearshore as critical habitat for Puget Sound Chinook and Hood Canal summer chum [Index 779]; the County relied on this science as well.³⁶ The Board concludes that the County appropriately relied on available science.

The same analysis applies equally to the County’s designation of lake shores and streams as fish and wildlife habitat conservation areas. [KAPO PFR Issues B.2, B.3, B.5]. The County was within its discretion, consistent with RCW 36.70A.480(5), in determining that these shorelines (1) qualify for critical area designation based on the statutory definition of critical areas and (2) so designating them.

The Board notes that the County here has in many respects adopted its prior regulations for shorelines. These designations and buffer restrictions have been in place since 1998 and were under active discussion in Kitsap’s CAO update process from at least the TRC meetings of February 2004 to the Planning Commission meetings of October 2005. Petitioner KAPO has had ample opportunity to make its case with specific facts if there were specific stretches of shoreline that should *not* be designated as fish and wildlife habitat. Instead, the Board has been provided with hypotheticals, rhetorical questions and conclusory arguments. In contrast, the Board notes that the County’s record includes a study identifying juvenile Chinook salmon habitat even in the highly urbanized Sinclair Inlet between Bremerton and Port Orchard. Index 774. Similarly, several of Kitsap County’s herring spawning areas, identified by the Puget Sound Action Team’s 2004 State of the Sound Report, are in highly urbanized areas – Port Orchard/Port Madison, for example. Index 778.

³⁶ See also sources cited at fn. 28, *supra*.

The Board finds and concludes that Petitioner KAPO **has not met its burden of proving** that Kitsap County's CAO Update failed to comply with RCW 36.70A.480(5) in its designation of shorelines as fish and wildlife habitat conservation areas.

Conclusion

The Board finds and concludes that Petitioner KAPO **has not carried its burden of proof** with respect to Legal Issue No. 4 [KAPO PFR Issues B.1, B.2, B.3, B.5, B.6] concerning critical areas designations along shorelines. The Board is not persuaded that the action of Kitsap County in adopting the fish and wildlife habitat conservation area designations along County shorelines – KCC 19.300.310, .315 – is clearly erroneous or fails to comply with RCW 36.70A.480(5). Legal Issue No. 4 is **dismissed**.

D. Legal Issue No. 5 and No. 6 [D.4 and D.5] - Critical Area Buffers in the Built Environment

In Legal Issue No. 5, Petitioner KAPO challenges the buffer requirements in the CAO Update as not based on best available science, as required by RCW 36.70A.172(1), when applied in the built environment.

The PHO states KAPO's Legal Issue No. 5³⁷ as follows:

Legal Issue No. 5. Did Kitsap County fail to include best available science as required by RCW 36.70A.172 in adopting provisions in KCC Chapters 19.100, 19.200 and 19.300 through the adoption of Ordinance 351-2005? [Intended to reflect Issue C, pp. 5-6 of the KAPO PFR].

In Legal Issue No. 6, subsections D.4 and D.5, KAPO challenges the County's reliance on two specific references: Christopher May, *Stream Riparian Ecosystems in the Puget Sound Lowland Eco-Region: A Review of Best Available Science*, Watershed Ecology LLC (2003) (**May**) and K.L. Knutsen and V.L. Naef, *Management Recommendations for Washington's Priority Habitats: Riparian*, Washington Department of Fish and Wildlife (1997) (**Knutsen & Naef**).

Statement of Facts

As discussed above, Kitsap County's BAS review began in November 2003 with the convening of a Technical Review Committee (**TRC**) which included representation from each of the parties to this proceeding. KAPO was represented by Dr. Don Flora,³⁸ a qualified scientist who provided Kitsap with scientific references and quotations

³⁷ The full text of KAPO's Legal Issue 5 [PFR Issue C] is set forth in Appendix B.

³⁸ Dr. Flora's abbreviated resume is at Index 1262.

throughout the process of developing and adopting the CAO. See, e.g., Index 255, 534, 559, 647, and 804. Dr. Flora opposes prescriptive buffers because, according to Dr. Flora, they are too often based on studies in places with dissimilar soil, climate, vegetation and development patterns. See, generally Index 804 (Aug. 26, 2005 letter to J. Bolger) at 5. Dr. Flora urges an array of alternatives such as low-impact development practices and good stormwater management, taking into consideration the buffering functions already provided by suburban lawns and gardens, and paired with a campaign to reduce use of lawn and garden chemicals. Index 647.

Petitioner KAPO provided input from several other scientists, notably Dr. Robert Crittenden³⁹ and Dr. J. Buell. Dr. Crittenden submitted two papers critiquing DOE's *Wetlands Vol. 1 and Vol. 2* and other science which Kitsap proposed to rely on for BAS. Index 123, 448.⁴⁰ Dr. Crittenden challenged DOE's "mechanistic model" of wetlands buffers and asserted that the primary flaw in these reports was that they were the result of a desire to reach consensus, rather than on-the-ground research.⁴¹ Dr. Buell provided two opinion pieces concluding that one-size-fits-all buffers are not the most effective strategy for protection of critical areas. Index 123, 124.

In order to sort and organize the scientific reports and opinions submitted by various participants in the CAO review process, Kitsap County planning staff – with scientific credentials of their own [see Index 1367] – evaluated the "science," including the KAPO input, and tested it against the BAS criteria developed by CTED in compliance with RCW 36.70A.050.⁴² The County developed a review process which they called the "BAS Ellipse" to guide them in applying the CTED factors to the scientific submissions in the record. Index 1025. The County staff determined that some of the material submitted by KAPO was non-scientific (e.g., four documents authored by KAPO's attorney – Index 272, 273, 1209, 1210 - and one by KAPO spokesperson Karl Duff – Index 317) and some was expert opinion, but largely it was not peer-reviewed and was accorded less weight by County staff. County Response at 54, 58-59.⁴³ County staff identified eight studies submitted by KAPO as within the "zone" of BAS. Index 414, 416-421, 654. These studies were analyzed by County staff with notes to the file. Index 413, 424-429, 527.

While considering the documents and BAS provided by KAPO, the County ultimately chose to rely on other sources of BAS as the basis of its CAO regulations update. The CAO Update states that Kitsap's wetlands buffer regulations are based on DOE's *Wetlands Vol. 1* (see, Index 109 at 7), marine and lake shorelines buffers are based on

³⁹ Dr. Crittenden's resume is at Index 874.

⁴⁰ DOE's rebuttal of Dr. Crittenden's critique of *Wetlands I* was provided to the County. Index 1037.

⁴¹ Index 448, at 2, 6-7: "They used group processes to reach their decisions; in particular ... the Delphi and consensus processes."

⁴² The CTED criteria include peer review, use of standardized and replicable scientific methods, logical conclusions and reasonable inferences, based on data that has undergone qualitative analysis, containing information and data that is put into context, citation to relevant credible literature and other pertinent information. WAC 365-195-905(a)(1)-(6).

⁴³ For a complete listing of documents submitted by KAPO as "science documents," see KAPO PHB at 54, fn. 59, 55 at fn.60.

May (see Index 109, at 10), and buffers for streams are based on both *May* and *Knutson & Naef* (see Index 109, at 9). In applying this science, the Ordinance asserts:

[the] County was careful to base its buffers on the BAS reflective of the lowland, urbanizing context like Kitsap County, rather than that science based on steep-sloped forested areas where the environmental needs are entirely different (which represents the bulk of published work).

Ordinance 351-2005, Section 3.E(2)

Discussion and Analysis

Positions of the Parties

KAPO challenges Kitsap’s enactment of buffer-focused CAO update regulations. In KAPO’s opinion, a buffer-only approach is not BAS, at least not when applied uniformly across the built environment. KAPO PHB, at 29. KAPO points out that many areas subject to buffering requirements are already developed and that the science relied on by the County primarily deals with the functions of critical areas in the natural environment – or perhaps subject to forestry or agricultural activities. KAPO contends that the County’s record has no specific science “supporting the effectiveness and appropriateness of buffers to protect critical areas and function in the built environment.” *Id.* at 31. KAPO looks to DOE *Wetlands Vol. I*, relied on by the County for wetlands regulations, and finds no science on wetland buffer effectiveness in the built environment. *Id.* at 34. Similarly, according to KAPO, *May* provides no science on shoreline buffers along a built-out shore [*id.* at 37] and *Knutsen & Naef* provides no scientific basis for buffers along streams in the built environment. *Id.* at 38-40.

KAPO points out that the County acknowledges that an on-site report is the “best available science,” [Ordinance 3.C]; therefore, KAPO concludes, universal buffers are not BAS.

Kitsap counters that merely alleging lack of science in the County’s record does not meet the GMA burden of proving the County’s action “clearly erroneous.” County Response at 48-49. Kitsap relies on the four-part test articulated by the Board in *DOE/CTED*, CPSGMHB Case No. 05-3-0034, Final Decision and Order (Apr. 19, 2006) at 42:

- (a) Scientific evidence contained in the record
- (b) Analysis of evidence by a reasoned process
- (c) Decision within the parameters of the science
- (d) Justification for departure from BAS, if any

The County states that only the first part of the test is challenged by KAPO with respect to buffers. County Response, at 49. The County states there is no real allegation by KAPO that the County failed to conduct a reasoned process or that the buffers are not

within the scope of the science in the County's record,⁴⁴ further, KAPO is not complaining about a departure from science in the County's record. *Id.* at 49-50, also 47, citing KAPO PHB at 28, n. 21.

The County asserts that the science it relied on indeed took into consideration the effects of urban development. County Response at 52. The County cites DOE's *Wetlands Vol. I* which notes in the introduction that "studies on buffers in urban and suburban settings conducted in the Pacific Northwest region are clearly relevant." Index 590. DOE's wetland rating system includes intensity of adjacent land use as one of the criteria in scoring the functions and values of a wetland. *Id.* Further, the County points out that the documents relied on by KAPO "do not actually advocate for no buffers within the built environment;" rather they "are heavy in denouncing the science relied upon by the County and weak in providing their own BAS to support smaller buffers that still protect the whole range of functions and values required to be protected." *Id.* at 53-54.

The County contends that it effectively evaluated the KAPO submissions, using the CTED guidelines as an objective screen [BAS Ellipse – Index 1025] to determine whether a document was competent science. As to the eight KAPO documents that qualified as competent science in the County's screen, upon analysis Kitsap determined they had "limited value due to their tenuous applicability to Kitsap County, their focus on protecting forestry production rather than the functions and values of critical areas, or their limited practical relevance to developing and updating a regulatory scheme." *Id.* at 61.

In rebuttal, KAPO objects to the lack of documentation to show that "the County engaged in any meaningful consideration of the KAPO submissions that presented competing perspectives regarding the effectiveness of buffers." KAPO Reply, at 33. KAPO characterizes the County's reference to its "BAS Ellipse" as an "ex post facto scientific analysis" of KAPO's documents and states that there is no evidence the County staff or legislative body ever actually engaged in such an analysis. *Id.*⁴⁵

Board Discussion

The first leading case to explain the GMA's BAS requirement is *Honesty in Environmental Analysis and Legislation v. Seattle (HEAL)*, 96 Wash. App. 522, 979 P.2d 864 (1999). *HEAL v. City of Seattle*, heard by this Board as CPSGMHB Case No. 96-3-0012, Final Decision and Order (Aug. 21, 1996), involved the City of Seattle's regulations for landslide-prone slopes. The City's revised policies and implementing regulations called for minimizing disturbance and enhancing existing vegetative ground cover. HEAL challenged the City's action, arguing that engineered solutions were "best available science" for stabilization of landslide-prone slopes. In the proceedings before

⁴⁴ Compliance with this part of the test is challenged by Hood Canal and Suquamish with respect to marine shoreline buffers, however.

⁴⁵ From the outset, KAPO has complained that the County's documentation or lack thereof is frustrating, the indexing is inaccurate and marred by inappropriate editorializing, and the record is incomplete. See, e.g., KAPO Reply, at 33, fn. 25.

the Board, the City laid out the expert opinion and information upon which it relied for a “natural systems” solution, and HEAL spent its argument in either discrediting the City’s science or establishing its own “engineered system” approach. The Board ruled that the GMA required deference to the City’s choice as between two scientifically-supported approaches, each based on “evidence of presumably equal dignity.” *HEAL*, at 14-15, citing *State of Louisiana v. Verity*, 853 F.2d 322, 329 (5th Cir. 1988).

Much of HEAL’s Prehearing and Reply Briefs [like KAPO’s in the present case] is dedicated to explaining the extensive amount of scientific information and expert opinions that HEAL and others presented to the City. The Board must assume that the City included that information and those opinions in its development of the challenged amendments. HEAL’s complaint is that the City failed to heed that externally supplied information, and instead based its decision upon its own data.

HEAL, at 15. The Board found the City of Seattle had complied with the BAS requirement, as competent science in the record supported the City’s approach, and the Court of Appeals affirmed.

The case before us presents a similar situation. Kitsap County has developed and adopted regulations relying on prescriptive buffer widths to protect the functions and values of wetlands, streams, lake and marine shorelines. The County relies on science concerning the functions generally performed by vegetated buffers – sediment and pollutant capture, wildlife habitat and the like. Contrary to KAPO’s assertions, there is site-specific flexibility, through buffer averaging, habitat conservation plans, off-site mitigation options, variances, and reasonable use provisions.

KAPO presents science (or a critique of the County’s documents) which supports site-specific protections, pointing out that the County’s own BAS indicates the superiority of site-specific measures. For KAPO, especially where homes, lawns and gardens, shopping malls and parking lots, docks and shoreline armoring create a variety of impacts on the resource to be protected, “universal buffers” are unsupportable. KAPO argues that BAS requires the County to eliminate uniform buffer requirements in the built environment and find a more fine-tuned and site-specific mechanism for protecting critical areas.

Kitsap County analyzed the information presented by KAPO and concluded that some of it was not science⁴⁶ and that several of the science documents were opinion pieces entitled to little weight. The Board generally concurs. Nevertheless, giving KAPO and its consultants the benefit of the doubt, *HEAL* reminds us that the choice of a city or county, when faced with competing options for protecting critical areas – *each based on*

⁴⁶For example, Planning Commissioner Mike Gustafson requested that the Planning Commission be provided with copies of materials presented by KAPO’s attorney Alexander Mackie at a Kitsap County Board of Realtors meeting. The attorney’s papers [CLE power point and presentation, and ‘White Paper’ prepared for Realtors – Index 272, 273, 1209, 1210] were accordingly forwarded to the Planning Commission with a staff cover-memo stating that they “do not meet the requirements of Best Available Science.” Index 569.

competent and current science – is entitled to deference. Kitsap County chose the prescriptive buffer approach, with flexible alternatives, because it found the BAS supporting that approach more persuasive⁴⁷ and because it was administratively feasible. The Board is not persuaded that the County’s choice was erroneous.

The Court of Appeals in *HEAL* explained that the purpose of the best available science requirement is to ensure that critical areas regulations are not based on speculation and surmise, but on meaningful, reliable, relevant evidence. *HEAL*, 96 Wash. App. at 531. The *HEAL* Court explained that critical areas "are deemed critical because they may be more susceptible to damage from development. The nature and extent of this susceptibility is a uniquely scientific inquiry. It is one in which the best available science is essential to an accurate decision about what policies and regulations are necessary to mitigate and will in fact mitigate the environmental effects of new development." *Id.* at 532-33.

In *DOE/CTED*, the City of Kent’s BAS consultant advised the City that a site-specific evaluation of each wetland/buffer complex would allow the most effective and tailored regulation to protect functions and values, but would be impracticable; therefore a prescriptive approach – applying standard buffer widths to broad categories of wetlands – “must protect the most vulnerable systems and should therefore err on the side of protecting more rather than less in terms of both acreage and function.”⁴⁸ *DOE/CTED*, at 32.

KAPO specifically challenges the BAS that the County relied on for its decision to use buffers to protect critical area functions. According to the recitals in the Ordinance, the County’s marine and lake shorelines buffers are based on *May*, and the buffers for streams are based on both *May* and on *Knutsen & Naef*. See Index 109, at 9, 10. KAPO’s argument is that the “limited summary analysis” of these science sources in the County’s ordinance is insufficient to demonstrate a BAS basis for buffer-based protections of critical areas in the built environment.⁴⁹ KAPO PHB, at 36, 38-39.

The Board is not persuaded that the County’s reliance on these science sources as BAS was clearly erroneous. Without question the County engaged in a deliberative process, reviewing and comparing various studies, analyses, and recommendations and chose accordingly. KAPO has not met its burden of proving that the County’s resultant

⁴⁷ A site-specific approach may *not* be best science, as the Board pointed out with respect to marine shorelines protections in *Tahoma Audubon*: “Deferring salmon habitat protection to a site-by-site analysis based on *disaggregated factors* is inconsistent with Pierce County’s best available science. The County’s record documents the interactive functions of marine shorelines and demonstrates that ‘near shore areas, beaches and bluffs form a dynamic system’ that is essential to shore birds, forage fish, and salmonids. Nothing in the science amassed by the County supports disaggregating the values and functions of marine shorelines. ‘The highest quality shorelines ... [featured] multiple process-related indicators (feeder bluffs, salt marsh, eelgrass beds) that greatly increase their habitat function.’” *Tahoma Audubon*, at 40 (citations omitted) emphasis supplied.

⁴⁸ The City of Kent chose a prescriptive system, but then failed to assess the functions and values to be protected and failed to require effective buffer widths to protect those functions. *Id.* at 30.

⁴⁹ KAPO critiques the study by *Knutsen & Naef* at length. KAPO Intervention, at 8-14.

adoption of a buffer-based regulatory program for protection of certain critical areas, including in the built environment, fails to comply with RCW 36.70A.172(1).

Conclusion

The Board finds and concludes that Petitioner KAPO **has failed to carry its burden of proof** with respect to Legal Issue No. 5 [KAPO PFR Issue C.1-C.5] and sub-issues of Legal Issue 6 [KAPO PFR Issue D.4 and D.5]. The Board is not persuaded that Kitsap County's regulations requiring buffers as a means of protecting the functions and values of certain critical areas, including in the built environment, are clearly erroneous or non-compliant with RCW 36.70A.172(1). Legal Issue No. 5 [KAPO PFR Issue C.1-C.5] and sub-issues of Legal Issue 6 [KAPO PFR Issue D.4 and D.5] are **dismissed**.

E. Legal Issue No. 2 – Marine Shoreline Buffer Widths

The PHO states Hood Canal's Legal Issue No. 2 as follows:

Legal Issue No. 2. Does the adoption of Ordinance 351-2005, adopting an updated and revised critical area ordinance, fail to comply with RCW 36.70A.130, RCW 36.70A.020(9), RCW 36.70A.020(10), RCW 36.70A.060, RCW 36.70A.170 and 36.70A.172 when it requires buffer widths on urban, semi-rural and rural saltwater shorelines of 35 feet when such widths fail to consider the best available science and fail to protect the functions and values of these shoreline areas as required by the GMA?

Applicable Law

For Legal Issue 2, Petitioner Hood Canal relies on the sections of the GMA set forth previously which require local jurisdictions to update their critical areas regulations and to designate critical areas and protect their functions and values, in a process which includes BAS and gives special consideration to anadromous fisheries: RCW 36.70A.060, .130, .170, and .172.

For Legal Issue 2, Hood Canal also relies on GMA Planning Goals 9 and 10:

RCW 36.70A.020

(9) Open space and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities.

(10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

Statement of Facts

In the CAO Update, Kitsap County essentially retained its 1998 marine shoreline CAO regulations, which prescribed a 35-foot buffer for all marine shorelines within the Urban, Semi-rural and Rural designation under Kitsap's Shoreline Management Program. The Ordinance Findings state:

“...while there is scientific data examining the marine-riparian interactions, none suggests protective buffer widths. Accordingly, Kitsap County reviewed the buffers established in 1998 along with the added protection established in Title 22 Kitsap County Shoreline Management Program and made changes in accordance with BAS. These changes provide an acceptable level of conservation for important shoreline habitat features, ensure a no net loss of riparian functions, and address the consideration to anadromous fish.”

Ordinance Section 3.E.3.

The County's Critical Areas Ordinance Science Support document states that the County's shoreline buffers are based on Christopher May's 2003 *Stream-Riparian Ecosystems in the Puget Sound Lowland Eco-Region; a Review of Best Available Science (May)*. [Index 1192, at 10]

Discussion and Analysis

Positions of the Parties

Petitioner Hood Canal contends that the County failed to include best available science when setting marine riparian buffers at just 35 feet for Urban, Semi-rural and Rural shorelines. Hood Canal PHB at 9. Hood Canal indicates that they “marshaled substantial science on marine riparian buffers” and provided it to the County, yet the County's findings in Ordinance Section 3.E.3 state that there is no science in the record to support a marine riparian buffer width. *Id.* at 11.

Hood Canal notes that the County's Critical Areas Ordinance Science Support document [Index 1192, at 10] states that the County's shoreline buffers are based on *May*, yet *May* recommends a 30-meter buffer (98 feet) for a healthy forested corridor, suggesting wider buffers under other circumstances. Hood Canal argues that Kitsap did not substantively consider science but retained its previously-established marine buffers, which are outside the scope of BAS, without reasoned justification. *Id.* at 18-20.

Intervenor Suquamish Tribe asserts that the County's Urban, Semi-rural and Rural shoreline designations are 68% of its saltwater shorelines and that a mere 35-foot buffer does not provide the necessary “protection against further pollution, sediment problems, eagle perch trees, and share for foraging fish.” Suquamish PHB, at 7.

Kitsap County responds by asserting that, while the presence of marine life along its shorelines supports designation of shorelines as critical areas, it does not require the size of buffers urged by Hood Canal or the Tribe. The County points out that, compared to studies of the functions and values of freshwater riparian buffers, there has been less study of marine riparian areas; so the County extrapolated from studies of the freshwater environment to find support for its 35 foot marine shoreline buffer. County Response at 25-28. Since its Urban, Semi-rural and Rural shorelines are largely already developed with residences, the County focused on water quality functions, rather than providing wildlife corridors, for example. *Id.* at 29. The County found support in *May* for a 30-foot buffer for the bottom range of protection of water quality riparian functions. *Id.*

KAPO is an Intervenor with respect to this issue in the Hood Canal case. KAPO objects to “universal buffers,” and argues that the larger buffers advocated by Hood Canal, Suquamish and the state agencies “fail to comply with the GMA to the extent that the buffers effectively treat the entire marine shoreline as a critical area without the specific designation that RCW 36.70A.480(5) requires.” KAPO Intervention at 3.

In rebuttal, Hood Canal asserts that Kitsap is doing what the Supreme Court forbade in *Ferry County* – ignoring the best available science in favor of the science it prefers. Citing *Ferry County*, 155 Wn.2d at 824, 833 (2005). Here, according to Hood Canal, Kitsap has not only ignored other sources of good science but even ignored specific recommendations within *May*, the study on which it purportedly relies, ignoring the current science that does not provide its desired outcome and “relying on the oldest, least restrictive studies included in the publication.” Hood Canal Reply, at 8. Hood Canal cites this Board’s recent decision in *DOE/CTED*, where the Board stated: “retention of an obsolete, albeit comfortable system, makes a mockery of and totally ignores the requirements of RCW 36.70A.130(1) that local cities and counties must update CAOs based upon BAS, which is continually being refined.” *Id.*, citing *DOE/CTED*, at 34.

Board Discussion

Marine buffers keyed to SMP land use classifications – not to critical area “functions and values”

Kitsap County’s marine buffer widths are assigned based on SMA land use classifications, not based on the functions and values of the critical area designation – here, fish and wildlife habitat conservation areas. The GMA requires the County to “adopt development regulations that *protect* critical areas” – RCW 36.70A.060(2) - that are required to be designated - RCW 36.70A.170 – and reviewed and updated – RCW 36.70A.130(1)(c). RCW 36.70A.172(1) provides:

In designating and protecting critical areas under this chapter, counties and cities *shall include the best available science* in developing policies and development regulations *to protect the functions and values* of critical areas. In addition, counties and cities *shall give special consideration to*

conservation or protection measures necessary to preserve or enhance *anadromous fisheries*.

(Emphasis supplied).

In the matter before us, Kitsap County chose a buffer-based regulatory scheme to protect the functions and values associated with marine shorelines designated as fish and wildlife habitat conservation areas. However, the County has not differentiated among the functions and values that may need to be protected on shorelines that serve, for example, as herring and smelt spawning areas, juvenile chum rearing areas, Chinook migratory passages, shellfish beds or have other values. Rather, they have chosen an undifferentiated buffer width that is at or below the bottom of the effective range for pollutant and sediment removal cited in *May*. And they have applied that buffer to SMP land use classifications, not to the location of specific fish and wildlife habitat.

In the public process leading up to adoption of these provisions of the CAO, state resource agencies urged the County to *differentiate* ecological resources on the shoreline and also to differentiate protection levels for urban and rural areas.⁵⁰ WDFW urged Kitsap to specifically identify the most important shoreline reaches to be protected and to adopt significantly larger [150-250 feet] marine shoreline buffers. “WDFW requests that the County have kelp and eelgrass beds, shellfish areas, forage fish spawning areas, feeder bluffs, riparian areas, and juvenile salmon migration corridors as separate listed categories. *This will allow specific protection to be applied to these critical areas....*” Index 1293 (WDFW letter Aug 6, 2004), at 7 (emphasis supplied).

The Puget Sound Action Team, the agency with primary responsibility for coordinating the state’s efforts to protect the Puget Sound and Hood Canal and their aquatic resources, commented that Kitsap’s proposed buffers “*appear to be based primarily on land use classifications*” rather than being designed to protect nearshore functions and values. Index 789 (Aug. 10, 2005 letter) at 2-3 (emphasis supplied). PSAT emphasized the importance of “primary association” areas to the recovery of ESA-listed Puget Sound Chinook, identifying specific Kitsap-shoreline sub-basins – Hood Canal, Admiralty Inlet, Central Puget Sound, and Port Madison/Sinclair Inlet. *Id.* PSAT recommended that Kitsap protect shoreline features essential to “primary association” habitat for salmonids, as well as for forage fish beach spawning areas. *Id.*

In public testimony before the Planning Commission PSAT’s spokesman urged: “*Explicitly designate* primary association areas along the marine shoreline for anadromous fish such as juvenile salmon (providing a list of the primary association areas)” Ex. 2-M, at 275 [PSAT testimony at Sept. 22, 2005, Planning Commission public hearing]. “The proposed standard buffer widths for all urban, semi-rural and rural shorelines may put critical nearshore processes, functions and values at risk.” *Id.*

⁵⁰The Board notes that KAPO’s illustrative exhibits (HOM Ex. 3: KAPO Appendix 1) show areas of highly-developed shoreline. All but one of these photos is of Urban or Semi-rural areas; only one is Rural (HOM Ex. 3: 1-M, N) and that’s a lake, not a marine shoreline. See HOM Ex. 4, 5. Several of the photos show wooded bluffs which suggest wildlife corridors or other habitat.

The flaw is illustrated by the fact that eelgrass, kelp, and shellfish beds are protected by larger buffers if they happen to be off shores designated Natural or Conservancy, while the same critical resources – eelgrass, kelp, shellfish – have just 35 feet of buffer off the Urban, Semi-rural or Rural shore.⁵¹ Protection for critical areas *functions and values* should be based first on the needs of the resource as determined by BAS.

The Board recognizes that *some* of the marine shoreline functions and values essential to salmon are protected by Kitsap’s regulations for streams, wetlands and geologically hazardous areas. There are 200-foot buffers on the banks and estuaries of Kitsap’s seven salmon streams (Type S), 150-foot buffers on smaller fish-bearing streams (Type F), buffers on wetlands (30-200 feet), including salt marshes on the shoreline, and protections including setbacks from the top of shoreline bluffs. KCC 19.200.220.A; 19.300.315A; 19.400.415.B.

Here Kitsap County has opted to designate its whole shoreline as critical area but then has not followed through with the protection of *all* the applicable functions and values. In particular, it has disregarded the advice of the responsible state agencies and without any solid science – rather, an appeal to the *lack* of applicable science – on which to base its rejection.

The “Immature Science” Dilemma

The GMA recognizes that science is a dynamic enterprise and that scientific understandings will grow over time. Thus, in addition to requiring that best available science be used substantively to develop critical areas regulations [.172(1)], the GMA requires that CAOs be updated on a regular cycle [.130(1)(c)]. As the Supreme Court admonished in *Ferry County*: “a [city or county] cannot choose its own science over all other science and cannot use outdated science to support its choice.” *Ferry County*, 155 Wn.2d at 837-838 (emphasis supplied).

Kitsap County contends that appropriate marine buffer widths have not yet been determined by the scientists, therefore reenactment of its 1998 marine buffer widths, which provide sediment and pollution control, is a reasonable application of BAS.

The Board takes **official notice** of the state and federal focus on Puget Sound/Hood Canal and on local salmon species. In the last seven years, the federal government has listed several species of Puget Sound/Hood Canal anadromous fish under the Endangered Species Act. In response, communities around the Sound, through collaborative watershed planning and other efforts, have sponsored studies and nearshore inventories to learn how best to protect salmon and other aquatic resources. The Governor has launched an initiative to clean up Puget Sound and the Hood Canal, underscoring the imperative for shoreline communities to prevent pollutants from entering the waters of the state. The

⁵¹ The County’s attorney was unable to answer this question at the Hearing on the Merits. See generally, HOM Transcript, at 46-48. [McGuire: “Related to the eelgrass, herring spawning areas, shellfish areas – how does the identification of those areas correspond to the urban, semirural, and rural versus natural and conservancy areas?”]

State Legislature in the 2005 Legislative Session enacted new legislation declaring Hood Canal an “aquatic rehabilitation zone” and establishing “a statutory framework for future regulations ... directed at recovery of this important aquatic resource.” RCW 90.88.005.

One result of the federal, state and local commitment to protecting aquatic resources has been a wealth of scientific research. The Board notes that many such studies and study-compilations express the need to know more; after all, a good scientist is in the business of asking the next question and testing the next hypothesis, so one expects a caveat at the beginning of a scientific report saying that more studies are needed.⁵² In the last several years, the Board has considered several cases where one or another party attempted to rely on the scientists’ caveat to assert that there was not enough relevant science to support a CAO decision. In each case, the record in fact contained a number of relevant, current, and local sources of BAS.

In *Tahoma Audubon* the Board said:

The Board takes official notice that nearshore salmon habitat assessments are being or have been conducted in many Puget Sound locations since the federal ESA listing of Puget Sound Chinook salmon in 1999. A number of these reports, in Pierce County’s record here, begin with the observation that there is more science on interior wetlands and stream riparian buffers than on marine shorelines, but cumulatively the studies appear to the non-scientist to have built a wealth of information.

The Board finds the County’s “immature science” argument unpersuasive. A decade ago the science of wetland buffers was uncertain [*see Pilchuk II*, where the consultant’s report stated: “The data on (wetland) buffer effectiveness are still relatively sparse, with studies scattered in sites all over the U.S.”] but the Board and the Court of Appeals in *WEAN* required Island County to use the best science available. *WEAN*, 122 Wash. App. at 173.

Tahoma Audubon, at 43, and fn. 27 [see multiple Puget Sound-specific studies cited at 38-44]. See also, *Samson v. City of Bainbridge Island*, CPSGMHB Case No. 04-3-0013, Final Decision and Order (Jan. 19, 2005), at 19, and studies on Puget Sound marine nearshore environments listed at fn. 25 [affirmed, Thurston County Superior Court No. 05-2-0031-3, Apr. 17, 2006].

Similarly, there are multiple studies in Kitsap County’s records which may provide a basis for identifying and protecting functions and values of marine shorelines as fish and wildlife habitat conservation areas, particularly when designations are linked to shoreline resources to be protected, rather than to SMP land use categories.⁵³

⁵² The 2004 Proceedings of the DFO/PSAT-Sponsored Marine Riparian Experts Workshop, cited by the County as demonstrating scientific inconclusiveness on marine buffer widths, was in fact a meeting of scientists to lay out a further research agenda. Index 1364.

⁵³ See, e.g., “Marine and Estuarine Shoreline Modification Issues,” G. D. Williams and R. M. Thom, Batelle Marine Sciences Laboratory for WDFW, April, 2001. Index 590.

“Special consideration” to measures to preserve or enhance anadromous fisheries

The State’s resource agencies and CTED were unanimous in their objections to Kitsap’s buffer provisions for Urban, Semi-rural and Rural marine shorelines.⁵⁴

The Puget Sound Action Team provided Kitsap with a wealth of expertise and advice. In an August 10, 2005 letter to Kitsap, PSAT referenced and attached their June 28, 2005 submittal to NOAA of “Regional Nearshore and Marine Aspects of Salmon Recovery in Puget Sound” as part of the Draft Puget Sound Salmon Recovery Plan. The study identified marine shoreline buffers as a key protection measure: “Effective marine buffers can protect critical nearshore processes, functions and values at risk throughout the marine shoreline for the benefit of biological resources such as forage fish spawning areas (herring, sand lance, and smelt), kelp and eelgrass beds, shellfish growing areas, and beaches that serve as migratory corridors for juvenile salmonids.” Index 789, at 2-3. While acknowledging that few Puget Sound empirical studies directly answer the marine shoreline buffer width question, PSAT recommended that “these buffers should, if following a precautionary approach, be at least as protective as those the county has proposed for fish-bearing freshwater shorelines (Table 4: 200 foot buffer for Type S streams).” *Id.* See also, Ex. 2-M, PSAT testimony at Sept. 22, 2005, Planning Commission public hearing, at 275.

From the beginning of the County’s process, WDFW was emphatic: “The proposed saltwater shoreline buffers are inadequate according to BAS. It is unclear what

Riparian vegetation affects the quality of aquatic habitats by increasing slope stability, providing erosion protection, and buffering against pollution and sediment runoff. Marine riparian vegetation also performs a number of increasingly recognized habitat functions at the interface of aquatic and terrestrial zones. For example, overhanging riparian vegetation provides shading that regulates microclimates important to intertidal invertebrate distribution and surf smelt spawning. Vegetated riparian zones deliver organic matter and invertebrate prey to the nearshore and create complex structure that is important for fish (e.g., refuge and spawning) and wildlife (e.g., bird nesting and roosting).

Id. at 9, citations to nine studies omitted.

[Marine riparian vegetation] is a key element of shoreline ecological function and has a significant impact on habitat value, both in the riparian zone itself, and in adjacent aquatic and terrestrial areas. Riparian vegetation contributes to maintenance of fisheries habitat and water quality, functioning as shade, cover for fish and wildlife, organic matter input, and source of insect prey. It may have particularly high value in Puget Sound because of its contributions to marine forage fish that utilize the upper intertidal for spawning and to juvenile salmonids for cover and foraging.

Id. at 62, citations to five studies omitted.

See also, Brennan and Culverwell, 2004 *Marine Riparian; An Assessment of Riparian Functions in Marine Ecosystems* [Index 776, at 4] (recommending minimum buffer widths of 89 feet for limiting pollution). The Brennan & Culverwell work in particular, reports on studies correlating freshwater and marine riparian functions: “Although marine riparian systems have not been subject to the same level of scientific investigation, a growing body of evidence suggests that riparian systems serve similar functions regardless of the salinity of the water bodies they border [citing studies].” Index 776.

⁵⁴ Ironically, KAPO asserts that Kitsap County’s CAO is a product of County capitulation to agency pressure. KAPO PHB, at 5-6.

6312c Hood Canal, et al., v. Kitsap County (Aug. 28, 2006)

Final Decision and Order

Page 43 of 68

justification is being used by Kitsap County to stray from the BAS.” Index 1292 (Aug. 26, 2004), at 2.⁵⁵ A year later, WDFW commented that Kitsap’s proposed marine shoreline buffers posed “perhaps the most significant adverse impacts to fish and wildlife resources.” Index 795 (Aug. 26, 2005), at 2.⁵⁶ The agency noted that Urban, Semi-rural and Rural shorelines constitute the County’s largest shoreline zones and “the proposed 35-foot buffer is far below that which best available science describes as necessary to protect fish and wildlife habitat along the shorelines.” WDFW suggested either the 250-foot marine shoreline buffer recommended by CTED or “at a minimum, a buffer setback similar to that provided for Type S streams.” *Id.*

CTED urged Kitsap to follow the advice of WDFW and the Puget Sound Action Team or the example of King County (115-foot marine shoreline buffer) or Whatcom County (proposed 150-foot marine shoreline buffer). Index 312 (Aug. 10, 2005), at 3.

These comment letters cite to relevant science in the County’s record – for example, the Lemieux report – *Proceedings of the DFO/PSAT Sponsored Marine Riparian Experts Workshop* (2004) [Index 509 Riparian Function] – indicating that in many respects marine riparian functions parallel freshwater stream riparian functions, and that similar protective schemes are appropriate for protecting salmon and other marine habitat functions and values.

The Board is persuaded that the County’s adoption of a 35-foot buffer based on SMP land use classifications **does not comply** with the GMA mandate to include BAS in protecting the functions and values of critical areas and is **clearly erroneous**. While acknowledging the difficulty of the questions the County has attempted to address, the Board is left with a definite and firm conviction that a mistake has been made. This is especially so in light of the statutory requirement that, in protection of critical areas, cities and counties give special consideration to the preservation and enhancement of anadromous fisheries. RCW 36.70A.172(1).⁵⁷

Similarly, the County was not guided by the GMA goals to “conserve fish and wildlife habitat” and “protect the environment.” RCW 36.70A.020(9) and (10).

Conclusion

The Board finds and concludes that the CAO Update, in adopting a 35-foot marine shoreline buffer for its Urban, Semi-rural and Rural shoreline classifications, **does not comply** with RCW 36.70A.130, RCW 36.70A.060, RCW 36.70A.170 and 36.70A.172

⁵⁵ See also Index 625 (Mar. 10, 2004 WDFW letter) at 5: “WDFW recommends that the County modify the CAO buffer requirements to meet BAS standards with an additional emphasis on anadromous fish species protection,” (appending relevant science).

⁵⁶ See also Index 1292, at 2-3, citing *Lemieux, et. al.*, for the proposition that marine riparian systems serve similar functions to freshwater riparian systems – functions including soil and slope stability, nutrient input, fish prey production [terrestrial insects such as spiders and aphids which juvenile salmon consume], sediment control, microclimate, water quality, habitat structure, and shade. Index 1293 (WDFW Aug. 6, 2004) contains the same material at 8.

⁵⁷ *May*’s Table 7, summarizing “Riparian Research on Wildlife Habitat,” list studies indicating buffer widths of 30 meters (minimum) for Chinook salmon and cutthroat trout, and 20-70 meters for “salmonids.” The summary does not indicate the extent to which the cited studies may assess stream-based (as distinct from marine) salmon habitat values. *May*, at 42.

and is **clearly erroneous**. The challenged provisions of the Ordinance are **not guided by** GMA goals 9 and 10 - RCW 36.70A.020(9) and (10). The Board will **remand** the Ordinance for legislative action to bring it into compliance with the GMA as set forth in this order.

F. Legal Issues 6 and 8 – Enforceability and Property Rights

Petitioner KAPO challenges the CAO Update as non-compliant with the GMA because the regulations, especially as applied to the built environment, are unenforceable, irrational and in violation of private property rights. The PHO states Legal Issues 6 and 8 as follows:⁵⁸

Legal Issue No. 6. Did Kitsap County violate (fail to comply with) RCW 36.70A.050, 060(2) and WAC 365-190-020, 040, 080(5) and RCW 36.70A.172 in adopting provisions in KCC Chapters 19.200 and 19.300 through the adoption of Ordinance 351-2005? [Intended to reflect Issue D, pp. 6-8 of the KAPO PFR].

Legal Issue No. 8. Did Kitsap County fail to include best available science to protect critical area functions and values as required by RCW 36.70A.060, 172, and fail to consider and properly apply the limitations under goal RCW 36.70A.020(6) in adopting Ordinance 351-2005? [Intended to reflect Issue F, pp. 9-12 of the KAPO PFR].

Applicable Law

For Legal Issues 6 and 8, Petitioner KAPO relies on the sections of the GMA set forth previously which require the designation of critical areas and adoption of development regulations based on BAS: RCW 36.70A.050, 060(2) and .172.

For Legal Issue 8, Petitioner KAPO also relies on GMA Planning Goal 6 – Property Rights:

RCW 36.70A.020(6)

Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

Discussion and Analysis

Substantive due process and other constitutional issues

Many of Petitioner KAPO’s issues and arguments rest on substantive due process. KAPO asserts that regulations must be the product of a legitimate objective of government, must be “reasonably necessary” to achieve the stated objective, and must satisfy the

⁵⁸ The full text of Legal Issues 6 and 8 is set forth in Appendix B.

requirements of nexus and rough proportionality. KAPO PHB at 14. KAPO asserts: “[S]ince the County has the burden of proving both objectivity and reasonable necessity ... the Ordinance, as written, is patently and indefensibly vague and unenforceable on these points.” *Id.* at 18. Similarly, KAPO objects that many provisions of the Ordinance are not understandable by the ordinary citizen, lack measurable criteria to guide administrative decision-making, and otherwise are unenforceable due to vagueness. In fact, KAPO asserts “many of the County’s CAO provisions are so vague as to defy ordinary understanding.” *Id.* at 15

KAPO appeals to constitutional principles which are beyond the Board’s jurisdiction and must be reserved for resolution by the courts. The GMA, in fact, imposes no burden on the County to prove objectivity or reasonable necessity; to the contrary, under the GMA, the County’s action is presumed valid upon adoption.

KAPO asserts that there are GMA compliance questions for the Board to resolve, but KAPO cites to and relies on cases decided on a constitutional basis.⁵⁹ Again, the *Keesling CAO* case is instructive. In her challenge to King County’s CAO, Ms. Keesling alleged violation of the property rights goal of the GMA, citing numerous court cases in support. However, when the Board reviewed each of the cases, it found that “the legal precedents relied on by Petitioner here construe state and federal constitutional protections ... Whether or not King County’s rural land use restrictions amount to inverse condemnation or a ‘taking’ must be decided in the courts, not by this Board.” *Keesling CAO*, at 29 (see cases cited at fn. 21).

KAPO’s claims in Legal Issues 6 and 8 [KAPO PFR Issues D and F] based on substantive due process, “void for vagueness,” and “takings” are beyond this Board’s jurisdiction and are **dismissed**.

Abandoned issues

KAPO PFR Issue F.4, objecting to the terminology – “habitat,” “function” and “values” – as unduly vague and subjective, and PFR Issue F.5, objecting to the provisions of KCC 19.200.225(E), and KCC 19.300.315(G)(2), were not addressed in KAPO’s opening brief and are **abandoned**.

⁵⁹ As the County notes, KAPO cites to the following as the legal authority for its arguments in these issues: *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907 (1990)(considering constitutional takings and substantive due process claims); *Isla Verde v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002)(discussing the applicability of RCW 82.02.020, which is not within this Board’s jurisdiction to hear, nor was it even alleged to have been violated in KAPO’s PFR); *Nollan v. California Coastal Comm.*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d. 677(1987)(considering constitutional takings claims and establishing the nexus requirement); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994)(considering constitutional takings claims and establishing the reasonable relationship/rough proportionality requirement); *Unlimited v. Kitsap County*, 50 Wash. App. 723, 750 P.2d 651 (1988)(considering constitutional takings claims); and *Anderson v. Issaquah*, 70 Wash. App. 64, 851 P.2d 744 (1993)(considering constitutional due process claims for vagueness).

Definitions and Standards

KAPO challenges Kitsap’s CAO Ordinance for failing to define or – in the many cases where the term *is* defined – failing to create criteria for determining application of the various provisions of the CAO. KAPO alleges that the County violated the GMA because it used “undefined and undefinable terms to ‘support *regulated* fish or wildlife species or habitat’” [KAPO PFR Issue B.4]. KAPO asserts that the County’s definitions are excessively broad so that property owners, and reviewing courts, may only guess as to the regulatory scope and activity intended. [KAPO PFR Issue F.6] In addition, KAPO argues the County failed to identify and consider BAS in support of definitions that lack specificity or adequate guidance. [KAPO PFR Issue F.6].

The definitions which KAPO specifically challenge include:

- Alteration (KCC 19.150.110)
- Best Available Science (KCC 19.150.155)
- Buffer (KCC 19.150.170)
- Clearing (KCC 19.150.185)
- Excavation (KCC 19.150.285)
- Fill (KCC 19.150.320)
- Grading (KCC 19.150.280)
- Normal Maintenance (KCC 19.150.480)
- Priority Habitat (KCC 19.150.525)
- Reasonable Use (KCC 19.150.565)
- Riparian Area (KCC 19.150.595)
- Wetlands (KCC 19.15.685)

[KAPO PFR Issue F.6(a)-(l)].⁶⁰

KAPO asserts that words and phrases used by the County in the CAO Update provide no objective guidance from which County staff can determine when an area could be, for example, classified as a Class II wildlife habitat or which standards are to be utilized to determine when something is “most protective,” has a “detrimental impact,” or when “specific measures” are needed to protect fish and wildlife habitat. KAPO PHB at 18, 20, 23-24. In addition, KAPO objects to provisions of the CAO that, under prior rulings of this Board, KAPO believes delegate responsibility to administrative staff without clear standards. [KAPO PFR Issues F.3]. KAPO argues that without objective criteria for enforcement of the ordinance, the County has delegated the protective measures to subjective judgments or ad hoc interpretations. KAPO PHB at 19.

In support of its argument that Kitsap’s regulations lack criteria to guide administrative decision-making, KAPO points to the wetlands mitigation requirement of KCC

⁶⁰ In addition, KAPO’s opening brief questions other words or phrases found within the challenged ordinance. These include: all activities, harmful, adequate, most protective, detrimental impact, riparian, specific measures, adjacent, grubbing, and priority species. *KAPO PHB* at 20-24, 44-45. The County responds to KAPO’s challenge to words and phrases on pages 37-47, 55-57 of KAPO PHB.

19.200.250, stating that it lacks clarity or guidance, and invites “subjectivity to the point it is indecipherable as the operative standard.” KAPO PHB, at 19-20, 25. In response, Kitsap County provides a reasonable explanation based on the express language of the questioned provisions. County Response, at 41. Again, this case parallels *Keesling CAO*, where Ms. Keesling challenged several provisions of King County’s CAO that were highly technical and confusing, in that they required piecing together provisions from several documents and from different sections of the ordinance. Notwithstanding genuine sympathy for Ms. Keesling’s confusion, the Board, after reading and piecing together related provisions of the County’s CAO, did not find that the County had violated the GMA. *Keesling CAO*, at 22. Similarly, in the present matter, the GMA isn’t violated just because KAPO does not understand some provisions of Kitsap’s CAO.

KAPO cites to *Anderson v. Issaquah*, 70 Wash. App. 64 (1993) and *Pilchuck II* in support of its allegation that clear guidance must be provided for administration of an ordinance. *Id.* at 21. While the Board has occasionally addressed this issue, the Board has simply required that the regulations provide administrators with criteria that provide “regulatory sideboards and policy direction.” *Pilchuck II* at 99-108. Here, the County has provided the required sideboards and directions within the KCC.⁶¹

To the extent KAPO’s objections are based on a constitutional “void for vagueness” theory, they are beyond the Board’s purview.⁶² However, to the extent a GMA issue is raised, the Board notes again that the County’s action is presumed valid. RCW 36.70A.320; *Alberg et. al., v. King County*, CPSGMHB Case No. 95-3-0041c, Final Decision and Order (Sept. 13, 1995) at 13; *Burien et. al., v. City of Seatac and Port of Seattle*, CPSGMHB Case No. 98-3-0010, Final Decision and Order (Aug. 10, 1998) at 4. The burden is on Petitioners to demonstrate non-compliance with the GMA.

Indeed, given the well-established precedents, KAPO’s arguments are without merit. Washington Courts have fully recognized that some level of vagueness is inherent in the language of statutes and ordinances. Although it is well recognized that “[A] statute is void for vagueness . . . if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application” *Id.* (citing *Myrick v. Board of Pierce County Comm'rs*, 102 Wn.2d 698, 707 (1984), the ordinance does not need to “meet impossible standards of specificity.” *Id.* (citing

⁶¹ KCC 19.100.120 provides standards for evaluating a request for a development proposal regulated by KCC Title 19. In evaluating a request, the reviewing authority is to look to the nature and type of critical area, whether the development proposal is consistent with KCC Title 19, whether proposed alterations to critical areas are appropriate under the standards contained in KCC Title 19, and whether the protection mechanisms and the mitigation and monitoring plans and bonding measures proposed by the applicant are sufficient to protect the public health, safety and welfare consistent with the goals, purposes and objectives of KCC Title 19.

⁶² *Gutschmidt v. City of Mercer Island*, CPSGMHB Case No. 92-3-0006, Final Decision and Order (March 16, 1993) (The Board does not have jurisdiction to determine federal and state constitutional issues. Challenges to the constitutionality of a local jurisdiction's actions under the Growth Management Act must be filed with the superior courts); *County’s PHB* at 37 citing to *Bridgeport Way Community Association v. City of Lakewood*, CPSGMHB Case No. 04-3-0003 FDO (July 14, 2004) and *NW Golf v. Kitsap County*, CPSGMHB Case No. 99-3-0014 Order on Motions (Sept. 29, 1999).

Anderson v. City of Issaquah, 70 Wash. App. 64, 75 (1993) (Emphasis added)).⁶³ The Board, like the courts, will “avoid readings of statutes that result in unlikely, strained, or absurd consequences,” and will “favor an interpretation that is consistent with the spirit or purpose of the enactment ... over a literal reading that results in unlikely or strained consequences.” *Premera v. Kreidler*, 133 Wash. App. 23, 37 (2006).

Applying these principles, the Board does not find KAPO’s definitional objections persuasive. First, if an undefined term is not technical, a dictionary definition may be used to establish the meaning of the word. *Burton v. Lehman*, 153 Wash.2d 416, 423 (2005) (see also, *Dept. of Ecology v. Campbell & Gwinn LLC*, 146 Wn.2d 1, 10-11 (2002) (holding that an undefined statutory term must be given its ordinary meaning, taking into account legislative purposes that are explicitly included in the statute); *Pilchuck II, FDO at IV 20* (holding that when a statutory term is undefined, “the word should be given its ordinary meaning [and] resort to dictionaries is acceptable”).

Second, some of the disputed terminology in Kitsap’s CAO Update comes from CTED, WDFW, or other state or federal agency rules or guidelines. Petitioner KAPO argues that the County’s reliance on words derived from or areas designated by state resource agencies abdicates its responsibility to set and support policy. KAPO’s PHB at 20. However, the GMA expressly contemplates that local governments will rely on federal and state agencies in technical matters. For example, CTED is charged with assisting local jurisdictions by providing minimum guidelines for designating critical areas and for identifying best available science. RCW 36.70A.050. Thus, Kitsap County’s reliance on terminology or guidelines provided by CTED, WDFW, DOE and other state or federal agencies is not an abdication of local responsibility.

Third, many of the terms questioned by KAPO are terms that are familiar to and well understood by professionals in land use planning and wildlife/fisheries management such as “Riparian,” “Priority Species,” and “Priority Habitat.” KAPO PHB at 20, 24, 45. For example, KAPO argued that the phrase “primary association” is not defined in the KCC and is therefore ambiguous. HOM Transcript at 131-32, 139. The Board notes that “primary association” is a commonly-accepted biological term of art utilized by wildlife and fisheries biologists and, assumingly, commonly understood by professional planners. See e.g., Index 789. In addition, the phrase could be easily understood by utilizing the ordinary meaning of the words “primary” and “association,” in addition to viewing it within the context of the area it pertains to – endangered, threatened, and sensitive species. The meaning could also be derived in the context of other provisions of the County’s code and planning documents or guided by other jurisdiction’s meaning of the phrase.⁶⁴ This same rationale applies to other technical words that KAPO challenges –

⁶³ The purpose of the void for vagueness doctrine is to limit arbitrary and discretionary enforcements of the law (*Burien Bark Supply v. King County*, 106 Wn.2d 868, 871 (1986)); therefore when a challenged ordinance involves land use regulation, the ordinance is judged as applied, not evaluated for facial vagueness. *Swoboda v. Town of La Conner*, 97 Wash. App. 613, 619 (Div I, 1999) (citing *Association of Rural Residents v. Kitsap County*, 95 Wash. App. 383, 394 (1999)).

⁶⁴ The Board takes official notice, for example, that Snohomish County specifically defines “primary association” to mean “use of a habitat area by a critical species for rearing young, roosting, feeding, or foraging on a regular basis during the appropriate season.” SCC 30.91P.290. The City of Everett defines

such as “riparian” or “priority habitat.” Statutes and ordinances which employ technical words which are commonly understood within an industry, generally will be sustained against a charge of vagueness. *Anderson*, at 74 (citing *State v. Reader's Digest Ass'n*, 81 Wn.2d 259, 273-74 (1972)).

The Board is not persuaded that the alleged failure to define or specify criteria for any of the terms listed above constitutes a violation of the cited provisions of the GMA. The Board must assume that they will be applied in good faith and in accord with the common professional understanding of their meaning.

The Board cannot assume that the [local government] will elect to act unlawfully. Instead, the Board will assume that prospective governmental actions will be taken in good faith in an effort to comply with the Act.

Central Puget Sound Regional Transit Authority v. City of Tukwila, CPSGMHB Case No. 99-3-0003, Final Decision and Order (Sept. 15, 1999), at 11.

Property rights, retroactive application and “restoration”

KAPO contends that Kitsap’s CAO Update is unfairly retroactive and imposes a restoration agenda, rather than limiting its scope to the prospective and protective purposes in the statute. [KAPO PFR issues D.1, D.2, D.3, D.6]. KAPO argues that the CAO is retroactive because it applies to “all uses and activities” and that the plain language of the CAO renders all structures presently within critical areas or their buffers as nonconforming uses. KAPO PHB at 41-43; KAPO Reply at 22-23. Therefore, KAPO argues, the CAO imposes significant limits on an owner’s capacity to use and enjoy his property. *Id.*

KAPO further argues that the CAO Update violates the GMA property rights goal, in that it is arbitrary and discriminatory as applied to the built environment. [KAPO PFR Issue F] KAPO PHB at 61. KAPO argues that the CAO is arbitrary because it is not based on BAS and discriminatory because it will have direct and measurable impacts on property owners. Essentially, KAPO grounds the “arbitrary and discriminatory” allegation on a failure to apply BAS because the CAO “will apply to property without a rationally related factual predicate or basis for its application.” KAPO PHB at 62-64.

In response, the County asserts that the CAO is prospective in nature, applying only to future conduct within a critical area or buffer and, if an action was previously permitted, it does not require the removal of existing structures within buffers and/or the reversal of a past activity. County Response at 43. The County argues that the CAO is not arbitrary or discriminatory because it is not “completely baseless” nor was it adopted on a “whim”

the phrase to mean “habitats of primary association [are] a critical component of the habitat of federally or state-listed endangered, threatened, candidate, sensitive, priority, and monitored species which, if altered, may reduce the likelihood that the species will maintain and reproduce over the long term. [These areas include] ... mitigation ranges, breeding sites, nesting sites, ... and priority habitat list by [the State].” EMC 19.4.020.

(citing to *LMI/Chevron* and *Keesling CAO*) nor does it single out a particular person or class of persons for different treatment or constitute unjustified localized planning (citing *Shulman v. City of Bellevue* and *LMI/Chevron*). County Response at 62-63.

In reply, KAPO states that it is not asking the Board to rule on the constitutionality of the CAO but rather that the County's "utter failure to make and/or justify its failure to make key distinctions" (i.e. preemption of the SMP) renders the CAO arbitrary and discriminatory. KAPO Reply at 9.

As to KAPO's claim that the CAO imposes a 'restoration agenda' (KAPO PHB at 14 - 15), the Board reads KCC Title 19 to be a protection and preservation ordinance. The goal statement reads: "It is the goal of Kitsap County that the beneficial functions and values of critical areas be *preserved*, and potential dangers or public costs associated with the inappropriate use of such areas be minimized by reasonable regulation of uses within, adjacent to or directly affecting such areas, for the benefit of present and future generations." KCC 19.100.105(A).

In addition, the Board notes that many of the same CAO regulations have been in effect in Kitsap County since 1998. While there may be some effect on existing uses, the Board finds that KCC 19.100 specifically sets forth standards for *existing* development and provides for varying methods by which property owners can apply for relief from the CAO, namely variances, buffer modifications, and reasonable use exceptions. KCC 19.100.135 (Variance); KCC 19.100.140 (Reasonable Use Exception); KCC 19.200.220 (Buffer Modification). KAPO does not demonstrate how this violates the GMA.⁶⁵

Further, some impacts on existing uses appear to be within the intent of the GMA. In its 2005 ruling in *Clallam County*, the Court of Appeals concluded that the GMA provisions for protection of critical areas should be read to allow regulation of current land use activities, as well as future uses. *Clallam County* dealt with the application of critical areas regulation to preexisting agricultural uses. The Court reviewed the legislative history, the statutory language,⁶⁶ western and eastern Board interpretations of the statute, and the *WEAN* decision's ruling on an agricultural exemption. The Court said:

⁶⁵A consequence of land use regulation that has been inherent since zoning was first applied to land is that it will create non-conforming uses and interference with a property owner's expectations, but it has nonetheless been repeatedly supported by our legal system since the early 1900s. See *Village of Euclid v. Ambler Realty*, 272 US 365 (1926); *Open Door Baptist v. Clark County*, 140 Wn.2d 143, 150 (En Banc 1999) (holding that "[i]t is well established that zoning ordinances are constitutional in principle as a valid exercise of the police power." (citing *State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee*, 50 Wn.2d 378, 381, (1957))). By its nature, land use regulation interferes with owners' uses of property. However, "[I]t is hornbook law that 'mere interference' with the property owner's personal plans and desires relative to his property is insufficient to invalidate a zoning ordinance." *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 674, n.8 (1976).

⁶⁶ The Court said: "[RCW 36.70A.030] defines 'Development regulations' as 'controls placed on development and *land use activities*.' And section .172 requires counties and cities to use best available science in 'developing *policies* and development regulations to protect the function and values of critical areas.' Thus, the GMA defines 'development regulations' more broadly than simply future development regulations; it includes controls placed on land use activities. RCW 36.70A.030. And in protecting critical areas, counties and cities must use the best available science to promulgate not just development

We conclude that the plain language of chapter 36.70A demonstrates the legislature's intent that GMA counties and cities exercise some measure of control over preexisting uses in critical areas. Reading a broad exemption into critical areas regulation for preexisting uses would frustrate, not further, the legislature's intent.

130 Wn.App. at 137 (emphasis supplied).

Lastly, as to KAPO's assertion that the CAO violates the property rights goal of the GMA because it is arbitrary and discriminatory, again, KAPO has not proved its case. As noted *supra*, a review of the County's records in enacting the CAO, from workshops, to committees, to review of scientific documents, demonstrates that the CAO was adopted through a reasoned process and not on a "whim." The Ordinance is not arbitrary. And, as the County correctly noted in its Response, the CAO applies to all persons within Kitsap County, both property owners and non-property owners. The Ordinance is not discriminatory. Again, see *Keesling CAO*, at 28-33.

The Board finds that Petitioner KAPO has **failed to carry the burden of proof** with respect to Legal Issues 6 and 8. Further, to the extent that Kitsap County's CAO may apply to existing land uses, including the built environment, this Board is governed by the *Clallam County* holding. Legal Issues 6 and 8 [KAPO PFR issues D.1, D.2, D.3, D.6, F.1, F.2., F.3, F.6, and F.7] are **dismissed**.

Conclusion

The Board finds that Legal Issues 6 and 8 [KAPO PFR Issues D and F] assert constitutional issues. The Board has no jurisdiction over KAPO's constitutional claims, whether substantive due process or property rights. All constitutional claims in Legal Issue Nos. 6 and 8 [KAPO PFR Issues D.1, D.2, D.3, D.6, F.1, F.2., F.3, F.6, and F.7] are **dismissed with prejudice**.⁶⁷

The Board finds and concludes that KAPO has **failed to carry its burden of proof** that the CAO Update violated RCW 36.70A.050, .060(2), .172 or failed to consider and apply GMA Goal 6 – RCW 36.70A.020(6) – as set forth in Legal Issues 6 and 8 [KAPO PFR Issues D.1, D.2, D.3, D.6, F.1, F.2., F.3, F.6, and F.7].⁶⁸ Legal Issues 6 and 8 are **dismissed with prejudice**.

VI. ORDER

regulations, but *policies* intended to protect critical areas. RCW 36.70A.172. With this language, the legislature signaled its intent that the counties regulate critical areas, including existing uses, to advance the GMA's goals. RCW 36.70A.020." 130 Wn.App. at 135-36 (emphasis in original).

⁶⁷ The Board understands that these issues are reserved for appeal to the courts.

⁶⁸ KAPO PFR Issues F.4 and F.5 are deemed abandoned and dismissed, *supra*, fn. 59.

Based upon review of both Petitions for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board Orders and case law, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

1. Petitioner KAPO abandoned Legal Issue No. 3. Alternatively, KAPO did not carry its burden of proof with respect to Legal Issue No. 3, and the Board found that the County complied with RCW 36.70A.020(11), .035, and .140. Legal Issue No. 3 is **dismissed**.
2. Petitioner KAPO failed to carry its burden of proof with respect to Legal Issue Nos. 4, 5, 6, and 8, challenging Kitsap County's adoption of various provisions of Ordinance No. 351-2005 for failure to comply with RCW 36.70A.480(5), .172, .050, .060(2), and .020(6). Legal Issue Nos. 4, 5, 6, and 8 are **dismissed**.
3. Kitsap County's adoption of Ordinance No. 351-2005, the Critical Areas Ordinance, was **clearly erroneous** with respect to certain wetlands exemptions and certain marine buffers provisions, as set forth in this order. The Ordinance provisions challenged in Legal Issue Nos. 1 and 2 [KCC 19.200.210 and KCC Table 19.300.315] **do not comply** with the requirements of RCW 36.70A..060, .130, .170, and .172 and **are not guided** by GMA goals RCW 36.70A.020(9) and (10).
4. Therefore the Board **remands** Ordinance No. 351-2005 to Kitsap County with direction to the County to take legislative action to comply with the requirements of the GMA as set forth in this Order.
5. The Board sets the following schedule for the County's compliance:
 - The Board establishes **February 23, 2007**, as the deadline for Kitsap County to take appropriate legislative action.
 - By no later than **March 9, 2007**, Kitsap County shall file with the Board an original and four copies of the legislative enactment described above, along with a statement of how the enactment complies with this Order (**Statement of Actions Taken to Comply - SATC**). By this same date, the County shall also file a **Compliance Index**, listing the procedures (meetings, hearings etc.) occurring during the compliance period and materials (documents, reports, analysis, testimony, etc.) considered during the compliance period in taking the compliance action.
 - By no later than **March 19, 2007**,⁶⁹ the Petitioners may file with the Board an original and four copies of Response to the County's SATC.
 - By no later than **March 26, 2007**, the County may file with the Board a Reply to Petitioners' Response.

⁶⁹ March 19, 2007, is also the deadline for a person to file a request to participate as a "participant" in the compliance proceeding. See RCW 36.70A.330(2). The Compliance Hearing is limited to determining whether the City's remand actions comply with the Legal Issues addressed and remanded in this FDO.

- Each of the pleadings listed above shall be simultaneously served on each of the other parties to this proceeding, including intervenors, and upon *amici*, at their request.
- Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance Hearing in this matter for **April 2, 2007, at 10:00 a.m.** The hearing will be held at the Board's offices.⁷⁰ If the parties so stipulate, the Board will consider conducting the Compliance Hearing telephonically. If Kitsap County takes the required legislative action prior to the February 23, 2007, deadline set forth in this Order, the County may file a motion with the Board requesting an adjustment to this compliance schedule.

So ORDERED this 28th day of August, 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP
Board Member

Margaret A. Pageler
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.⁷¹

⁷⁰ The Board's office will relocate on October 10, 2006, to Suite 2348, Bank of America Fifth Avenue Plaza, 800 Fifth Avenue, Seattle.

⁷¹ 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 motion 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 served on 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, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Procedural History – CPSGMHB Case No. 06312c

On February 27, 2006⁷², the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Hood Canal Environmental Council, *et al.* (**Hood Canal** or **Petitioners**). The matter was assigned Case No. 06-3-0010. The matter is hereafter referred to as *Hood Canal Environmental Council, et al. v. Kitsap County*. Board member Bruce Laing is the Presiding Officer (**PO**) for this matter. Petitioners challenge Kitsap County's (**Respondent** or the **County**) adoption of Ordinance No. 351-2005 amending the County's Critical Areas regulations. The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**).

On February 28, 2006, the Board received a PFR from Kitsap Alliance of Property Owners, *et al.* (**KAPO**). The case was assigned CPSGMHB Case No. 06-3-0012. Bruce Laing is the PO in this matter. KAPO also challenges Kitsap County's adoption of Ordinance No. 351-2005 amending the County's Critical Areas regulations. The basis for the challenge is noncompliance with various provisions of the GMA, the State Environmental Policy Act (**SEPA**) and the Shoreline Management Act (**SMA**).

On March 3, 2006, the Board issued its Notice of Hearing (**NOH**) and Order of Consolidation consolidating CPSGMHB Case No. 06-3-0010 and CPSGMHB Case No. 06-3-0012 as CPSGMHB Consolidated Case No. 06-3-0012c (*Hood Canal, et al. v. Kitsap County*), setting a date for Prehearing Conference (**PHC**), and proposing a tentative schedule for the case.

On March 30, 2006, the Board received Respondent's Index of the Record (**Index**). The Index lists 1,045 items by Index number.

On March 30, 2006, the Board conducted the PHC in Room 2430, Union Bank of California Building, 900 Fourth Avenue, Seattle. Board member Bruce Laing, Presiding Officer in this matter, conducted the conference, with Board member Margaret Pageler, Board member Edward McGuire and Board extern Amie Hirsch in attendance. Petitioners Hood Canal Environmental Council, *et al.* were represented by Tim

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior Court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior Court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate Court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but 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.

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

⁷² The PFR was received electronically on February 27, 2006, and in hard copy on March 1, 2006. Where pleadings and case materials have been submitted by e-mail or fax as well as in hard copy, this chronology indicates only the date first received.

Trohimovitch and Alexandria Doolittle. Petitioners Kitsap Alliance of Property Owners, *et al.* were represented by Alexander W. Mackie and Heather Burgess. Respondent Kitsap County was represented by Lisa J. Nickel.

On April 3, 2006, the Board issued its Prehearing Order (**PHO**) setting a final schedule for the case and stating eight legal issues which the Board will address.

On April 12, 2006, the Board received the following Core Documents (**Core Doc**) from Kitsap County: Shoreline Management Master Program, Feb. 8, 1999 (**Core Doc 1**); Redline/strike-through version of Ord. 351-2005 (**Core Doc 2**); Map titled Kitsap County Wetlands and Hydric Soils, August 2005 (**Core Doc 3**); Map titled Kitsap County Streams and Surface Water – 2005 Data – Fish Habitat Water Type Codes, Dec. 2, 2005 (**Core Doc 4**); Map titled Kitsap County Shoreline Master Plan Environmental Designations, Mar. 22, 2004 (**Core Doc 5**).

Motion to Dismiss

On April 12, 2006, the Board received Kitsap County's Motion to Dismiss Legal Issue No. 7 with exhibits (**County Motion to Dismiss**).

On April 20, 2006, the Board received Petitioner KAPO's Response to County's Motion to Dismiss SEPA Claims with exhibits and Declaration of Karl Huff (**KAPO Response to Dismiss and Huff Declaration**).

On April 27, 2006, the Board received Kitsap County's Rebuttal to Motion to Dismiss KAPO's SEPA Claims with Declaration of Dave Greetham (**County Rebuttal – Dismiss and Greetham Declaration**).

Motion to Supplement

On April 12, 2006, the Board received Hood Canal's Motion to Supplement the Record with exhibits and Declaration of Cyrilla Cook (**Hood Canal Motion to Supplement**).

On April 20, 2006, the Board received Kitsap County's Response to Hood Canal Motion to Supplement (**County Response to Supplement**).

On April 20, 2006, the Board received KAPO's Response to Hood Canal Motion to Supplement (**KAPO Response to Supplement**). In their response, KAPO joined with the County in their arguments pertaining to the Hood Canal Motion to Supplement.

On April 26, 2006, the Board received Hood Canal's Rebuttal to County's Response to Supplement (**Hood Canal Rebuttal - Supplement**).

Motions to Intervene

On April 12, 2006, the Board received Petitioner KAPO's Motion to Intervene on behalf of the County (**KAPO Motion to Intervene**).

On April 14, 2006, the Board received a Motion to Intervene from the Suquamish Tribe (**Suquamish Motion to Intervene**).

Order on Motions

On May 8, 2006, the Board issued its Order on Motions (**OoM**) which grants Kitsap County's Motion to Dismiss Legal Issue No. 7, denies Hood Canal's Motion to Supplement the Record, grants KAPO's Motion to Intervene on behalf of Respondent Kitsap County, grants Suquamish Tribe's Motion to Intervene on behalf of Petitioner Hood Canal and denies Suquamish Tribe's Motion to Intervene on behalf of Kitsap County in opposition to Petitioner KAPO.

On May 25, 2006, the Board received Intervenor Suquamish Tribe's Opening Brief (**Suquamish PHB**).

On May 26, 2006 the Board received the "Motion of Pacific Legal Foundation [**PLF**] and Kitsap County Realtors Association [**KCAR**] to File a Brief Amicus Curiae" [**Amicus Motion**] and the "Brief *Amicus Curiae* of Pacific Legal Foundation and Kitsap County Association of Realtors" [**Amicus Brief**] with three exhibits. PLF and KCAR request leave to submit a brief *amicus curiae* in support of Petitioner KAPO.

On May 26, 2006, the Board received Petitioner KAPO's Prehearing Brief (**KAPO PHB**) and Request for Reconsideration of Board's Order Dismissing KAPO's SEPA Claims (**KAPO Motion for Reconsideration**) with exhibits.

On May 26, 2006, the Board received Petitioner Hood Canal's Prehearing Brief (**Hood Canal PHB**) with exhibits.

On June 12, 2006, the Board received Respondent Kitsap County's Prehearing Brief (**County Response**) with exhibits. The County's Brief includes a Motion to Deny and/or Strike Portions of Proposed Amicus Curiae Brief of PLF/KCAR (**County Motion to Strike**), and a response to KAPO's Motion for Reconsideration on SEPA Issues (**County Response – Reconsideration**).

On June 12, 2006, the Board received Response of Intervenor KAPO to the Prehearing Briefs of Petitioner Hood Canal and Intervenor Suquamish Tribe (**Intervenor KAPO Response**).

On June 19, 2006, the Board received Petitioner KAPO's Reply Brief (**KAPO Reply**) with exhibits and Declaration of Heather Burgess.

On June 19, 2006, the Board received Petitioner Hood Canal's Reply Brief (**Hood Canal Reply**) with exhibits.

On June 19, 2006, the Board issued its Order Denying KAPO's Request for Reconsideration of the Board's Order on Motions Dismissing Legal Issue No. 7 (SEPA Claims).

On June 20, 2006, the Board issued its Order Granting *Amicus* and Granting Motion to Strike. This Order granted the PLF/KCAR Motion to file *Amicus Curiae* Brief, limited to Legal Issue No. 4. And the Order granted the County's Motion to Strike Section II of the *Amicus* Brief.

On June 21, 2006, the Board received Petitioners KAPO's Corrected Table of Contents to KAPO Reply Brief.

The Hearing on the Merits was convened at 10:03 a.m. and adjourned at 3:37 p.m. on June 26, 2006, in Room 2430, 900 Fourth Avenue, Seattle, Washington. Present for the Board were Board Members Margaret Pageler, Edward McGuire and Bruce Laing, Presiding Officer; Also present were Board Law Clerk Julie Taylor, and Board Externs Chris Hollingshead and Brian Payne. Petitioner Hood Canal was represented by Alexandria K. Doolittle and John T. Zilavy. Petitioner/Intervenor KAPO was represented by Alexander W. Mackie and Heather L. Burgess. Respondent Kitsap County was represented by Lisa J. Nickel, accompanied by Patty Charnas. Intervenor Suquamish was represented by Mark L. Bubenik. Amicus PLF/KCAR was represented by Andrew C. Cook. Reporting services were provided by Christy Sheppard of Byers and Anderson, Inc.

During the HOM the following exhibits were entered:

- **HOM 1:** Map entitled: Kitsap County, Washington – FISH AND WILDLIFE HABITAT – January 18, 2005;
- **HOM 2:** Map entitled: Kitsap County, Washington – CLASS 1 WILDLIFE CONSERVATION AREAS – for ESA Listed Salmon Species – October 2003;
- **HOM 3:** Appendix 1 to KAPO PHB, consisting of 21 aerial photographs numbered 1-A through 1-T. The Board requested Petitioner KAPO to provide a map showing the locations of the shorelines shown in the HOM 3 photographs.

On June 30, 2006, the Board received from KAPO copies of HOM 1 and HOM 2 showing the locations of HOM 3 photographs, which the Board marked as follows:

- **HOM 4:** Copy of HOM 1 showing the general locations of HOM 3 photographs;
- **HOM 5:** Copy of HOM 2 showing the general locations of HOM 3 photographs.

The Board ordered a transcript of the proceedings. The transcript was received on July 6, 2006, and is cited herein as **HOM Transcript**.

On August 10, 2006, Board Member Margaret Pageler replaced Board Member Bruce Laing as Presiding Officer for this case.

APPENDIX B

Petitioner KAPO's Statement of Issues

STATEMENT OF THE ISSUES

All statements of issue below are directed to whether Kitsap County failed to comply with the specified provisions of the Washington State Growth Management Act (Chapter 36.70A) and/or SEPA (Chapter 43.21C RCW) and Shoreline Management Act (SMA, Chapter 90.56 RCW), as applicable to actions taken pursuant to Chapter 36.70A RCW, in substance, process, or both, in the adoption of The CAO Update, as adopted December 1, 2005, and as ultimately published effective December 31, 2005.

- A. Did Kitsap County fail to comply with the public participation process required by RCW 36.70A.020, Goal 11, RCW 36.70A.035, RCW 36.70A.140, and/or WAC 365-190-040(2)(4), due to:
1. Failure to properly identify and explain how the “best available science” included in the County science reports was applicable and appropriate for utilization, particularly in developed areas, including the establishment and limitations on use of wetlands, and fish and wildlife habitat—critical areas, buffers, and uses.
 2. Cancellation of numerous work sessions where materials were to be discussed and explained, precluding the public from fully understanding the applicability and propriety of the “science” included in the staff recommendations and alternatives that may have been available.
 3. Failure to identify and follow a process that would assure full public understanding and ability to meaningfully participate in the proposed changes under review, particularly the “Second Draft” dated May 17, 2005, and “Staff Draft” dated November 1, 2005, through the adoption of the Critical Areas Ordinance (“CAO”) in December 2005.
 4. Adoption of changes to the critical areas ordinance that were brought up only after the public hearings had closed and opportunity for public review and comment were cut off.
 5. Failure to advise the public of the changes between the June 6, 2004 First Public Draft (discussed in a SEPA checklist and MDNS issued in August 4, 2004), and the materially revised drafts submitted for public hearing and adoption in 2005 with no new checklist, threshold determination, or comment period on the material changes.
 6. Failure to advise the public through an amended environmental checklist and opportunity to comment, on material changes and potentially

significant impacts and alternatives under the 2005 CAO drafts concerning direct and immediate impacts to property, including limitations on ability to use existing property and facilities on property covered by the new buffer rules, or the limited ability to rebuild in the event of damage on such properties and the environmental consequences of the significant increase in buffer properties and nonconforming uses.

7. The matter of lack of adequate public participation reflected in A(1-6) above was raised by KAPO and its members, Mr. Ross and Mr. Palmer, and is not in compliance with the requirements of the Washington State Growth Management Act provisions on public participation noted above. The failure affects the entire ordinance and the Board is requested to rule said The CAO Update not in compliance under the provisions of RCW 36.70A.300.

[NOTE: KAPO's Issue A was restated in the PHO as Legal Issue No. 3 - *Did Kitsap County fail to comply with the public participation process required by RCW 36.70A.020, Goal 11, RCW 36.70A.035, RCW 36.70A.140, and/or WAC 365-190-040(2)(4) in adopting Ordinance 351-2005? [Intended to reflect Issue A, pp. 3-4 of the PFR].*

- B. Did Kitsap County fail to comply with RCW 36.70A.480(5) in adopting 19.300.310(A),(B):
 1. In designating all marine shorelines, regulated under the Shoreline Master Program (KCC Title 22), as critical areas, for fish and wildlife habitat conservation without the specification as to why each element of the marine shoreline was a "critical area" under the terms used in RCW 36.70A.030(5) as required by RCW 36.70A.480(5). (Affects KCC 19.300.310(B)(2)(a).)
 2. In designating all lakes 20 acres and greater in surface area, regulated under the Shoreline Master Program, as "critical areas" for fish and wildlife habitat conservation without specification as to why each such feature was a "critical area" under the terms used in RCW 36.70A.030(5) as required by RCW 36.70A.480(5). (Affects KCC 19.300.310(B)(2)(a).)
 3. In designating all streams meeting the criteria for Type S, regulated under the Shoreline Master Program, as set forth in WAC 222-16-030 as "critical areas" for fish and wildlife habitat conservation without specification as to why each such feature was a "critical area" under the terms used in RCW 36.70A.030(5) as required by RCW 36.70A.480(5). (Affects KCC 19.300.310(B)(1).)
 4. In using undefined and undefinable terms to "support *regulated* fish or wildlife species or habitat" as provided in KCC 19.300.310(A).

5. Other sections affected by this concern: KCC 19.300.315(A)(1) Table, which includes Type S Streams; Saltwater Shorelines and Lakes; Urban, Semi Rural and Rural shorelines; Conservancy and Natural shorelines; Wildlife Habitat Conservation Areas I and II as applied to shorelines, and all related definitions.
6. The matter of inadequate scope and specificity (or lack thereof) of coverage was a matter raised by KAPO and the failure to address these matters as required by RCW 36.70A.480(5) is not in compliance with the Growth Management Act. The failure affects the provisions of KCC 19.300.310, 315 listed above. The matters at issue are clearly erroneous under the facts and record in this case and not in compliance with legal requirements of the GMA, and the Board is requested to rule such provisions “not in compliance” with the GMA as provided in RCW 36.70A.300.

[NOTE: KAPO’s Issue B was restated in the PHO as Legal Issue No. 4 - *Did Kitsap County fail to comply with RCW 36.70A.480(5) in adopting KCC 19.300.310(A),(B) through the adoption of Ordinance 351-2005? [Intended to reflect Issue B, pp. 4-5 of the PFR].*

- C. Did Kitsap County fail to include best available science as required by RCW 36.70A.172:
 1. When it failed to identify that science supporting the buffers or other mitigation requirements imposed are either necessary or appropriate to protect wetlands identified in KCC 19.200-250 and subsections therein, and/or that the science referenced did not support the application of the buffers to the full array of locations covered by the ordinance, and particularly areas with substantial development within the proposed buffer areas.
 2. When it failed to identify that science supporting the buffers or other mitigation requirements imposed are either necessary or appropriate to protect streams, lakes, and saltwater shorelines (KCC 19.300, 310, 315 and subsections therein) and/or that the science referenced did not support the application of the buffers to the full array of locations covered by the ordinance, and particularly areas of substantial development within the proposed buffer areas.
 3. When it identified on-site reports as “the best available science” and then imposed significant limitations on the ability to use or develop properties already developed within the new buffer areas rendered nonconforming by the expanded regulations and failed to allow such reports to be used to identify standards to protect critical area functions and values for wetlands (KCC 19.200.215(A)(1)), streams, lakes, and saltwater shorelines (KCC

19.300.315) in specific locations where such reports had been properly completed.

4. When it fails to identify the source, criteria for, appropriate application, and/or use and limitations of the “science” used to support the buffers, mitigation, and resulting development, use, and activity restrictions imposed on elements of the built environment (homes, businesses, roads, parks, and other developments) within the buffers established for wetlands, streams, lakes, and saltwater shorelines. This concern affects all sections of KCC Chapters 19.200 and 19.300, which impose buffers or limitations on development or activity across areas of existing development or active use.
5. When it failed to demonstrate (show its work) concerning the science used and its proper applicability to lands already developed within the adopted buffer areas where such rules were projected beyond areas of existing natural vegetated buffer areas, and had the effect of rendering existing developed areas nonconforming. Kitsap County failed to do so for the buffers and other mitigating conditions and use limitations in KCC Chapters 19.200 and 19.300. The matters of concern were raised by KAPO and its members and are not in compliance with the requirements of the Washington State Growth Management Act. The failure affects Kitsap County Code as follows:

Chapter 19.100	Chapter 19.200	Chapter 19.300
19.100.110(A),(B),(F) 19.100.125(B),(C) 19.100.130(B) 19.100.135(A)(6) 19.100.140 19.100.150-definitions as noted below and pertinent to sections cited 19.100.155(F)	19.200.205 19.200.210(B),(C) 19.200.215 19.200.220 19.200.225(D),(E)(2),(H)(2)(3) 19.200.230 19.200.250(A),(D)	19.300.310 19.300.315(A)(1,2,4,5,7,8,9) (B),(C),(G)(2),(J),(K), (N)

The challenge includes the provisions cited and all related definitions as applied to the built environment and include both action and “failure to act” where the section was continued without change without including any scientific basis for the provision. The matters at issue are clearly erroneous under the facts and record in this case and not in compliance with legal requirements of the GMA and the Board is requested to rule said provisions of the ordinance are not in compliance with GMA under the provisions of RCW 36.70A.300.

[NOTE: KAPO’s Issue C was restated in the PHO as Legal Issue No. 5 - *Did Kitsap County fail to include best available science as required by RCW 36.70A.172 in adopting provisions in KCC Chapters 19.100, 19.200 and 19.300*

through the adoption of Ordinance 351-2005? [Intended to reflect Issue C, pp. 5-6 of the PFR].

- D. Did Kitsap County violate RCW 36.70A.050, 060(2) and WAC 365-190-020, 040, 080(5) and RCW 36.70A.172 in adopting provisions in KCC Chapters 19.200 and 19.300 and related subsections referenced in ¶C(1-5):
1. In failing to define or identify criteria by which to determine or recognize differences between critical areas in different locations within the built environment, and in following a model designed to force “restoration” of critical area habitat to some predevelopment state and “preclude development” in critical areas and buffers, rather than “protect existing functions and values” and recognize material differences based upon location and possible use.
 2. In the adoption of regulations for wetlands, Chapter 19.200, and particularly 19.200.210(A)-(D), 19.200.220(A)-(F), which go far beyond a protection model to a model of restoration to some undefined pre-development condition; and the failure of such sections to discuss alternatives available to address protecting functions and values of wetlands through methods other than buffers for existing structures, including homes, yards, businesses, and related structures.
 - a. With respect to the sections identified in ¶D(2) above, in failing to reasonably identify or define the functions and values to be protected in areas of existing residential or commercial development, including homes, buildings, yards, and associated accessory uses.
 - b. In the adoption of KCC 19.200.220(A)-(C) with no measurable or identifiable criteria by which the various alternatives would be judged, nor any identification of the “science” by which an applicant would be able to judge whether one choice were better than another.
 - c. In the adoption of KCC 19.200.250 without the adoption of any criteria (scientific or legal) by which to judge or evaluate a selection
 3. In the adoption of a restoration model of regulations for fish and wildlife, KCC Chapter 19.300, and particularly 19.300.315(A),(B),(C),(G)(2),(J), and (K); and the failure of such sections to discuss alternatives available to address protection of existing functions and values of fish and wildlife with methods other than buffers, particularly for existing structures, including homes, yards, businesses, and related structures.
 - a. With respect to the sections identified in ¶D(3) above, in failing to reasonably identify or define the functions and values to be

protected in areas of existing residential or commercial development, including homes, buildings, yards, and associated accessory uses.

- b. In the adoption of KCC 19.300.315 and subsections therein with no measurable or identifiable criteria by which the various alternatives would be judged, nor any identification of the “science” by which an applicant would be able to judge whether one choice were better than another.
4. As to the Code sections noted above, and all related definitions, Kitsap County was clearly erroneous in fact and legally in error in relying on the 2003 publication authored by Christopher May⁷³ as best available science when (a) the document was evidently not peer reviewed, and (b) the document is clearly an advocacy piece for restoration, not science in support of “protection” of functions and values as required by RCW 36.70A.170, 172 and 060(2), and WAC 365-195-905.
5. As to the Code sections noted above, Kitsap County was clearly erroneous in fact and legally in error in relying on Knutson and Naef,⁷⁴ and other materials cited, in support of science addressing the management of critical areas to support expanded natural buffers in areas where such buffers do not presently exist and likely did not exist in areas of the built environment where significant portions of the recommended “buffer areas” are disturbed or fully developed.
6. The matter of the applicability of the science relied upon by the County to support the imposition of buffers, mitigation ratios, criteria for increasing or decreasing buffers, and for limitations on use or activity, criteria for separate tracts, was addressed by KAPO and its member Mr. Ross. The Code sections affected by this matter are identified in paragraphs C(1-5), D(1-5) above, and all related definitions. The matters at issue are clearly erroneous under the facts and record in this case and not in compliance with legal requirements of the GMA and the Growth Board is requested to hold all such sections not in compliance with the GMA as provided in RCW 36.70A.310.

⁷³ Christopher W. May, *Stream Riparian Ecosystems in the Puget Sound Lowland Eco-Region: A Review of Best Available Science*, Watershed Ecology LLC (2003), referenced in “A Summary of Best Available Science” published Dec. 2004 by Kitsap County and relied upon in Finding B of §3 of Ord. 351-2005.

⁷⁴ K.L. Knutson and V.L. Naef, *Management Recommendations for Washington's Priority Habitats: Riparian*, Washington Department of Fish and Wildlife (1997), referenced in “A Summary of Best Available Science” published Dec. 2004 by Kitsap County and relied upon in Finding B of §3 of Ord. 351-2005.

[NOTE: KAPO's Issue D was restated in the PHO as Legal Issue No. 6 - *Did Kitsap County violate (fail to comply with) RCW 36.70A.050, 060(2) and WAC 365-190-020, 040, 080(5) and RCW 36.70A.172 in adopting provisions in KCC Chapters 19.200 and 19.300 through the adoption of Ordinance 351-2005? [Intended to reflect Issue D, pp. 6-8 of the PFR].*

- E. Did Kitsap County violate the State Environmental Policy Act, Chapter 43.21C RCW, in the adoption of The CAO Update when material changes were made in the regulations after the County had issued an MDNS on August 4, 2004 for the June 22, 2004 Draft Critical Areas Ordinance, and none of the material changes made in 2005 were subject to supplemental environmental review as required by Chapter 43.21C RCW and supporting regulations, Chapter 197-11 WAC:
1. The need to address the changes between the June 2004 draft and the 2005 draft submitted for public hearing was raised at public hearings by members of KAPO, and specifically by William Palmer. KAPO's members are residents and property owners in Kitsap County, as is Mr. Ron Ross. KAPO and its members, including Mr. Ross (and Mr. Palmer as a participant personally and on behalf of client property owners), are within the zone of interest which the SEPA statute was designed to protect, and are directly and immediately and adversely affected by reason of the enactment of The CAO Update without SEPA review of the 2005 changes. Mr. Ross and many members of KAPO own land, including or proximate to critical areas directly and adversely affected by the expanded buffers and limitations set forth in the 2005 drafts.

[NOTE: KAPO's Issue E was dismissed on motion – Order on Motions Dismissing Legal Issue No. 7 (SEPS Claims), - date]

- F. Did Kitsap County fail to include best available science to protect critical area functions and values as required by RCW 36.70A.060, 172, and fail to consider and properly apply the limitations under goal RCW 36.70A.020(6) in adopting The CAO Update sections specifically identified above which:
1. As applied to private property that is developed with homes, yards, businesses, and/or other accessory structures (rendered nonconforming by the natural area restoration model used in the ordinance), which is not reasonably related to the object of state law (“protection of critical areas”), not supported by best available science (particularly the application of natural buffer analysis and science to the built or developed environment), and denying opportunity to use less onerous alternatives to achieve the required result.
 2. As applied to private property that is developed with homes and yards, businesses, and/or other accessory structures, provides for the acquisition of public rights in private property (critical area and buffer tracts) without adequate protection or justification.

3. As applied to private property that is developed with homes and yards, businesses, and/or other accessory structures, provides definitions without adequate standards or guidance so that a property owner may only guess at the meaning or what is required or prohibited, and permits administrative discretion without adequate guidance or ability to control through legal processes, including failure to consider or identify best available science in support of provisions applicable to the newly expanded provisions of the Ordinance:
 - a. Unlawful delegation of discretionary review to the Department of Fish and Wildlife without adequate definition or authority and without agency rules governing standards for review. KCC 19.150.525 and 19.300.315(A)(4).
 - b. Application of the code limits to all “activities,” KCC 19.100.110(B, D, F), without the required nexus of permit or development-related activity.
 - c. The criteria that the provision most protective of critical areas “as determined by the department” prevails, as provided in KCC 19.100.115, with no criteria by which to make such judgment.
 - d. Failure to identify standards for review and failure to properly address existing lawful uses of structures, yards, and activities whether or not maintained for a period of 5 years. KCC 19.100.125(B and C).
 - e. Failure to adequately address property, structures, and uses made nonconforming by this ordinance, particularly where studies may demonstrate alternate methods of protecting existing functions and values. KCC 19.100.130(B).
 - f. Unnecessarily forcing property owners to seek “reasonable use” exceptions based upon buffers not supported by best available science in the areas not characterized by meaningful stands of native vegetation (e.g. the developed or built environment) and for which a special study may enable the use of the property without the restrictions. KCC 19.100.140(A).
4. Failure to provide identifiable or measurable standards by which to address “habitat,” “function,” and/or “value” to be protected, and, as such, unlawfully bases regulations on criteria which are unduly vague and subjective. These terms are left undefined at Chapter 19.150 KCC.
5. Forcing critical areas and related buffers into critical area tracts, KCC 19.200.225(E), 19.300.315(G)(2), with no provision for identifying whether such dedications or limitations are “reasonably necessary,” both generally and particularly with respect to lands already developed.

6. As applied to private property whether or not developed with homes and yards, businesses, and/or other accessory structures, the County failed to identify or consider best available science in support of definitions without adequate specificity or guidance and to which a property owner may only guess at the meaning or what is required or prohibited, and permits administrative discretion without adequate guidance or ability to control through legal processes, including definitions that are excessively broad to achieve the consistency or “compliance” with the GMA and/or to which property owners and reviewing courts may only guess as to the regulatory scope and activity intended throughout the revised buffers and boundaries:
 - a. “Alteration,” a human induced action which [includes] “relocating or removing vegetation” (this definition could include activities such as gardening or mowing a lawn). KCC 19.150.110.
 - b. “Best available science” according to WAC 365-195-905, which conflicts with state law on limitations on the discretion granted concerning the regulation of land. KCC 19.150.155. [Adaptive Management Mandate conflicts with limitations on mandating buffers.]
 - c. “Buffer,” a non clearing vegetation area as applied to elements of the built or developed environment including houses lawns, roads, buildings, and accessory uses. KCC 19.150.170.
 - d. “Clearing,” including any removal of vegetation (here again, gardening and mowing lawns). KCC 19.150.185.
 - e. “Excavation,” defined as the removal of earth material regardless of quantity. KCC 19.150.285.
 - f. “Fill” as the deposit of earth or “natural materials” with no definition or guidance (here again, gardening, mulch, or lawn mowing as “fill”). KCC 19.150.320.
 - g. “Grading,” as “any” excavation without regard to size or location (roto-tilling an existing garden, for example). KCC 19.150.280.
 - h. “Normal maintenance,” limited to bridge and crossings, by implication prohibiting such activity elsewhere. KCC 19.150.480.
 - i. “Priority habitat,” with deference to WDFW without regard to the adequacy of any definition or inquiry as to applicability or propriety in Kitsap County. KCC 19.150.525.
 - j. “Reasonable use,” with no standards or guidelines for what is “fair,” “reasonable return,” or “beneficial use.” KCC 19.150.565.

- k. “Riparian area,” with no specific reference by which to identify an area subject to regulation and why. KCC 19.150.595.
 - l. “Wetlands,” failing to distinguish between lakes and open water wetlands for the application of lake or wetland buffers, creating an area of ambiguity and scientific confusion. KCC 19.150.685.
7. KAPO and its members, and individual petitioners addressed the matters raised herein and particularly the failure to identify or evaluate BAS in support of the matters alleged, and consider the arbitrary and discriminatory consequences arising from impact on KAPO members’ property as that is an element of GMA concern. KAPO members include property owners directly and adversely affected by the failures identified herein. The matters of concern apply to the County Code sections referenced in this section F(1-6) above and related definitions and the Board is requested to find such provisions clearly erroneous, and/or legally in error, and as such “not in compliance” with the GMA as provided in RCW 36.70A.300.

[NOTE: KAPO’s Issue F was restated in the PHO as Legal Issue No. 8 - *Did Kitsap County fail to include best available science to protect critical area functions and values as required by RCW 36.70A.060, 172, and fail to consider and properly apply the limitations under goal RCW 36.70A.020(6) in adopting Ordinance 351-2005? [Intended to reflect Issue F, pp. 9-12 of the PFR]*

- G. Findings clearly erroneous. Kitsap County made a number of findings with respect to the adoption of The CAO Update. KAPO submits the findings are clearly erroneous as to the matters addressed above, or not supported by substantial evidence, and cannot stand to support the sections under review in sections A-F above. Petitioners object particularly to the Findings at §3 of Ord. 351-2005 regarding the consideration and review of Best Available Science. As the findings are detailed and overlapping, KAPO will address the specific findings at issue with each of the sections addressed in our briefing to the court.