

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2  
3 WHIDBEY ENVIRONMENTAL ACTION  
4 NETWORK,

5 Petitioner,

Case No. 06-2-0012c

6 v.

7 ISLAND COUNTY,

**FINAL DECISION AND ORDER**

8 Respondent  
9

10 **I. SYNOPSIS**

11 This case appeals Ordinances C-150-05 and C-22-06, ordinances adopted to achieve  
12 compliance in WWGMHB Case No. 98-2-0023c. In the compliance case, the Board recently  
13 found that the program of Natural Resource Conservation Service (NRCS) best  
14 management practices (BMPs) adopted in Ordinance C-150-05, and the monitoring and  
15 adaptive management program established in Ordinance C-22-06, comply with the Growth  
16 Management Act's requirements for the protection of critical areas as to agricultural  
17 practices in rural lands. RCW 36.70A.060(2) and 36.70A.172(1).<sup>1</sup>  
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20 This appeal was brought by WEAN to ensure that all the challenges it wished to raise with  
21 respect to Ordinances C-150-05 and C-22-06 would be decided by the Board, even if those  
22 challenges were to exceed the scope of the issues for compliance. Therefore, there is  
23 some duplication of issues. We find that the challenge to whether Ordinances C-150-05  
24 and C-22-06 protect critical areas and include best available science is the same challenge  
25 that was decided in WWGMHB Case No. 98-2-0023c. As we did in the compliance case,  
26 we find that the County's program of NRCS BMPs, together with its monitoring and adaptive  
27 management program, protect the functions and values of critical areas by regulating  
28 agricultural practices in rural lands. Although the benefits of standard buffers along  
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1 streams and wetlands are well-established, the evidence shows that the use of BMPs to  
2 regulate agricultural activities near critical areas (BMPs that also include vegetated buffers)  
3 can also protect the functions and values of those critical areas. For that reason, both the  
4 Department of Ecology and the Department of Fish and Wildlife recommend BMPs to  
5 protect critical areas where agricultural practices are in operation. By coupling a system of  
6 mandatory BMPs with an annual monitoring and adaptive management program, the  
7 County has developed a strategy that targets agricultural practices that may impact critical  
8 areas, timely assesses the effectiveness of the BMPs required, and provides for prompt  
9 corrective action where needed. The annual report on data collected and actions taken  
10 provides the public with current information on the status of the BMP program.  
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13 Originally, WEAN challenged the elimination of the requirement in the Island County Code  
14 that critical areas that have been illegally altered be restored. However, the County has  
15 stipulated that it did not intend to eliminate this requirement and will revise its code to make  
16 that clear in the near future. On the basis of that stipulation, WEAN has agreed to dismiss  
17 that challenge.  
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20 This case also raises a challenge to the SEPA review conducted of the challenged  
21 ordinances. However, we find that WEAN has not met its burden of proof on this issue by  
22 failing to provide a sufficient factual record for the Board to review, and by failing to  
23 adequately address the environmental determination that the County performed.  
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## 26 **II. PROCEDURAL HISTORY**

27 On July 12, 2006, the Board received two petitions for review from Whidbey Environmental  
28 Action Network (WEAN). WEAN is also the petitioner in WWGMHB Case No. 98-2-0023c  
29 and filed these petitions for review regarding two ordinances that were adopted to achieve  
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32 <sup>1</sup> *WEAN v. Island County*, WWGMHB Case No. 98-2-0023c (2006 Order Finding Compliance on Critical Areas  
Protections in Rural Lands, August 30, 2006)

1 compliance in WWGMHB Case No. 98-2-0023c. These new petitions challenge Island  
2 County Ordinance C-150-05 and Ordinance C-22-06. WEAN expressly filed the new  
3 petitions (consolidated in the instant case) to ensure that it could raise all its challenges to  
4 the compliance of Ordinance C-150-05 and Ordinance C-22-06 with the requirements of the  
5 Growth Management Act (GMA) and the State Environmental Policy Act (SEPA).  
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8 By letter dated July 13, 2006, the Presiding Officer proposed coordinating the decision on  
9 the two new petitions with the compliance decision in WWGMHB Case No. 98-2-0023c  
10 through an expedited schedule. This proposal was made because the issues in the  
11 consolidated case are closely related to the compliance issue in WWGMHB Case No. 98-2-  
12 0023c. The County responded that it objected to consolidating the new case with the  
13 compliance case and requested the Board to decide the compliance case independently of  
14 the two new petitions.<sup>2</sup> WEAN responded that it concurred in an expeditious resolution of  
15 the new petitions but would like more time than originally proposed.<sup>3</sup> The County also  
16 requested a modified schedule for briefing on the two new petitions. To ensure that all  
17 arguments had been heard on the challenged ordinances before a decision in the  
18 compliance case (WWGMHB Case No. 98-2-0023c) was issued, the Board set an expedited  
19 briefing and hearing schedule.<sup>4</sup>  
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22  
23 The hearing on the merits was held on August 28, 2006. Steve Erickson appeared for  
24 WEAN. Island County was represented by attorney Keith Dearborn and deputy prosecuting  
25 attorney Joshua Choate. All three board members attended.  
26

### 27 **III. RECORD**

28 Because the issues set forth in the consolidated petitions for review had already been  
29 briefed in large part in WWGMHB Case No. 98-2-0023c, and because the record had  
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32 <sup>2</sup> Letter of Keith Dearborn to Presiding Officer, July 14, 2006.

<sup>3</sup> Letter of Steve Erickson to Presiding Officer, July 14, 2006.

1 already been developed for those challenges in WWGMHB Case No. 98-2-0023c, the  
2 parties were allowed to submit any exhibits to support the arguments of the parties in this  
3 case from the record in WWGMHB Case No. 98-2-0023c.  
4

5  
6 The County brought two motions to supplement the record of the County below in this  
7 case.<sup>5</sup> Petitioners had no objection to either motion. Therefore, the record below is  
8 supplemented with R8799, 8839, 8844, 8845, 8847, 8850, 8851, 8853, 8854, 8857.  
9

10 WEAN also brought a motion to supplement the record below.<sup>6</sup> The County filed no  
11 objection. Although the County noted an objection on grounds of relevance at the hearing  
12 on the merits, the Board supplemented the record with P-38, P-40, P-41, P-43, P-44, P-45,  
13 P-46, P-47, P-48, R3367, R4042, R8309, R8392 and R8704, to be given appropriate  
14 weight.  
15

#### 16 17 **IV. BURDEN OF PROOF**

18 For purposes of board review of the comprehensive plans and development regulations  
19 adopted by local government, the GMA establishes three major precepts: a presumption of  
20 validity; a “clearly erroneous” standard of review; and a requirement of deference to the  
21 decisions of local government.  
22

23 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and  
24 amendments to them are presumed valid upon adoption:  
25

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

29 <sup>4</sup> Prehearing Order, August 16, 2006.

30 <sup>5</sup> Island County’s Motion to Supplement the Record and Memorandum in Support, August 21, 2006; Island  
31 County’s Second Motion to Supplement the Record and Memorandum in Support, August 22, 2006. Island  
32 County’s first motion was dated August 17, 2006 but inexplicably did not arrive in the Board offices until  
August 28, 2006.

<sup>6</sup> WEAN’s Motion of August 17, 2006 to Supplement the Record.

1 RCW 36.70A.320(1).

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

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

8 RCW 36.70A.320(3)

9  
10 In order to find the County's action clearly erroneous, the Board must be "left with the firm  
11 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,  
12 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

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

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

26 RCW 36.70A.3201 (in part).

27  
28 In sum, the burden is on the Petitioners to overcome the presumption of validity and  
29 demonstrate that any action taken by the County is clearly erroneous in light of the goals  
30 and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).  
31 Where not clearly erroneous and thus within the framework of state goals and requirements,  
32 the planning choices of local government must be granted deference.

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3 **V. ISSUES PRESENTED**

4 Issues raised in the petition for review in WWGMHB Case No. 06-2-0011 were incorporated  
5 into this consolidated case as Issues 1-4. Upon stipulation of the County<sup>7</sup>, WEAN agreed to  
6 dismiss Issues 1-4. Therefore, Issues 1-4 will be dismissed.  
7

8  
9 The remaining issues, raised in the petition for review filed in WWGMHB Case No. 06-2-  
10 0012, are as follows:

- 11 5. Does the adoption of Ordinance C-150-05 and C-22-06 fail to protect critical areas  
12 and include best available science (RCW 36.70A.060, 36.70A.130, and 36.70A.172).  
13  
14 6. Do Ordinance C-150-05 and C-22-06 substantially interfere with GMA's goals and  
15 requirements for the protection of critical areas (RCW 36.70A.020(9)(10), and  
16 36.70A.130).  
17  
18 7. Did Island County fail to comply with the State Environmental Policy Act (RCW  
19 43.21C) in adopting C-150-05 and C-22-06.  
20

21 **VI. DISCUSSION**

22 ***Issue No. 5: Does the adoption of Ordinance C-150-05 and C-22-06 fail to protect***  
23 ***critical areas and include best available science (RCW 36.70A.060, 36.70A.130, and***  
24 ***36.70A.172).***

25 **Positions of the Parties**  
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28 <sup>7</sup> The County stipulated as follows:

29 Island County stipulates C-150-05 makes no substantive change in the restoration requirements  
30 contained in ICC 17.03.250.I related to the issues raised in WWGMHB Case No. 06-2-0011. During  
31 the current update of the wetland regulations, the County will take legislative action to make this intent  
32 clear in the Island County Code. That update is scheduled to be finished by Feb. 28, 2007. The  
County agrees that if it does not take this action it will not object or raise any legal argument in  
opposition to Whidbey Environmental Action Network bringing this issue back before the Western  
Washington Growth Management Hearings Board.

August 22, 2006 stipulation signed on behalf of Island County by attorney Keith Dearborn.

1 WEAN includes by reference all the arguments it made in its brief in WWGMHB Case No.  
2 98-2-0023c, WEAN's Response of May 29, 2006.<sup>8</sup> WEAN argues that the NRCS BMPs "fall  
3 below the GMA's minimum standards even with goal balancing."<sup>9</sup> WEAN argues that the  
4 adopted BMPs reduce the buffer standards for protection of critical areas below acceptable  
5 levels.<sup>10</sup> WEAN asserts that undisturbed buffers are necessary for a variety of reasons:  
6 without them, the cumulative impact is wildlife habitat fragmentation; only buffers can  
7 stabilize wetland functioning; buffers provide shade which in turn affects water temperature;  
8 and buffers provide water quality filtration functions only if they are left undisturbed.<sup>11</sup>

10  
11 As to the County's adaptive management program (C-22-06), WEAN claims that only  
12 failures to implement BMPs can trigger enforcement action.<sup>12</sup> WEAN also asserts that the  
13 use of "adversely affecting critical areas" is not a standard for enforcement and the period  
14 during which educational efforts may be used for enforcement is open-ended.<sup>13</sup> Lastly,  
15 WEAN argues that the County's adaptive management program will only respond after  
16 damage has occurred and thus is not protective.<sup>14</sup>

18  
19 The County also incorporates its prior pleadings and arguments (from WWGMHB Case No.  
20 98-2-0023c) by reference.<sup>15</sup> The County further responds that the local circumstances in  
21 Island County justify the extension of its BMP program to noncommercial agricultural  
22 practices.<sup>16</sup> Buffers are not eliminated in the revised BMP program, the County asserts;  
23 buffers are increased in size for low intensity agriculture but haying is allowed.<sup>17</sup> Livestock  
24 are not allowed in the buffers, the County maintains, and manure cannot be applied unless  
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27 <sup>8</sup> WEAN's Hearing Brief at 3.

28 <sup>9</sup> *Ibid* at 13.

29 <sup>10</sup> *Ibid* at 13-14.

30 <sup>11</sup> *Ibid* at 14-17.

31 <sup>12</sup> WEAN's Hearing Brief at 18.

32 <sup>13</sup> *Ibid* at 18-19.

<sup>14</sup> *Ibid*.

<sup>15</sup> Island County's Response Brief at 1

<sup>16</sup> *Ibid* at 2-3.

1 a custom farm plan has been prepared.<sup>18</sup> Overall, the County argues that its revised BMP  
2 program does not weaken BMP protection.<sup>19</sup> Further, the County maintains that NRCS  
3 BMPs conform to the best available science and allowing buffers to be managed is  
4 consistent with best available science.<sup>20</sup>  
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6  
7 As to the adaptive management program, the County points to its enforcement procedures,  
8 which place critical areas violations ahead of every other code complaint except those  
9 involving “life safety and health”.<sup>21</sup> The County also notes that, in the event that a person is  
10 dissatisfied with the County’s enforcement action, County code allows any aggrieved person  
11 to initiate and prosecute a complaint.<sup>22</sup> The County further contends that WEAN has  
12 overlooked the role of the Conservation Districts in monitoring and enforcement of BMPs.<sup>23</sup>  
13

#### 14 **Board Discussion**

15  
16 The Board has addressed the arguments of the parties on this issue in its September 1,  
17 2006 compliance decision in WWGMHB Case No. 98-2-0023c.<sup>24</sup> The Board adopts the  
18 same reasoning here and incorporates it by reference to the attached decision. With  
19 respect to buffers in particular, the Board finds that standard buffer widths respond to a  
20 variety of possible circumstances, but that BMPs and farm plans are able to target more  
21 specifically the practices that are actually in use on each farm. In light of the fact that the  
22 state agencies with expertise in the protection of critical areas – Department of Ecology and  
23 the Washington Department of Fish and Wildlife – expressly recommend BMPs for  
24 agricultural practices, the Board finds that the use of BMPs for agricultural practices as  
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28 <sup>17</sup> *Ibid* at 5.

29 <sup>18</sup> *Ibid* at 6.

30 <sup>19</sup> *Ibid*.

31 <sup>20</sup> *Ibid* at 7-8.

32 <sup>21</sup> *Ibid* at 10.

<sup>22</sup> *Ibid*.

<sup>23</sup> *Ibid* at 11.

<sup>24</sup> *WEAN v. Island County*, WWGMHB Case No. 98-2-0023c (2006 Order Finding Compliance of Critical Areas Protections in Rural Lands, September 1, 2006).

1 adopted in Island County complies with the GMA requirements to protect the functions and  
2 values of critical areas. We note that the Conservation Practice Standards adopted by  
3 Island County include vegetated buffers as part of the regulatory package for farms with  
4 streams and wetlands. As in the compliance case, the Board finds that the County's  
5 program incorporates best available science and protects critical areas:  
6

7 Based on the County's reasoned review of the factors in WAC 365-195-905(5) for  
8 determining if the NRCS BMPs constitute best available science; and the  
9 assessment of the state agencies with expertise in this area – Ecology, Fish and  
10 Wildlife, and CTED – we find that the NRCS BMPs constitute best available science  
11 for the regulation of ongoing noncommercial agricultural practices in Island County,  
12 so long as they are accompanied by monitoring and an adaptive management  
13 program.<sup>25</sup>

14 As to the monitoring and adaptive management part of the County's program, the Board  
15 finds that this is key to the success of the BMPs. The County will monitor nine parameters  
16 of water quality - dissolved oxygen, fecal coliform, nitrate, pH, phosphorus, temperature,  
17 turbidity, conductive, hardness, and vegetation. In addition to identifying potential  
18 contamination, these water quality monitoring parameters are indicative of functions and  
19 values of fish and wildlife habitat such as shade and woody debris.<sup>26</sup> The County monitoring  
20 and adaptive management program then will use any data showing that water quality  
21 standards have been exceeded to identify the source of the contamination.<sup>27</sup> From that  
22 information, the County will determine whether the BMPs must be changed or whether the  
23 problem can be addressed through education or other means. With recommendations from  
24 the Conservation Districts, NRCS or a certified farm planner, the Planning Director has been  
25 delegated the authority to impose site specific modifications.<sup>28</sup>  
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30 <sup>25</sup> *Ibid* at 15.

31 <sup>26</sup> *Draft Water Quality Data Synthesis and Recommendations for a Surface Freshwater Monitoring Program*,  
32 January 18, 2006. Authored by Dr. Paul Adamus, Island County Department of Planning and Community  
Development, and Joe Eilers, Max Depth Aquatics.

<sup>27</sup> ICC 17.02.040L.(4)

<sup>28</sup> ICC 17.02.040L.(6)

1 In addition, the County will report annually on the data collected in the monitoring program,  
2 any compliance assessments and source identification actions, education and/or BMP  
3 modifications, and future monitoring priorities.<sup>29</sup> This annual report is made public and  
4 allows for public review of the effectiveness of the BMP program. As we found in the  
5 compliance case, the Board finds here that:  
6

7 ...the County's monitoring and adaptive management program for the NRCS BMPs it  
8 has adopted to regulate farming activities in critical areas meet the scientific  
9 standards for such programs.<sup>30</sup> The County's program sets monitoring parameters  
10 that are reasonably related to the protection of the functions and values of critical  
11 areas affected by agricultural activities. The program will establish baseline  
12 conditions, monitor water quality according to State standards, tie any contamination  
13 to the source, and refer this information to the Planning Director for action. The  
14 Planning Director is directed to make changes to the BMPs to address any  
15 contamination issues that are not cured through education and enforcement.<sup>31</sup>

16 **Conclusion:** Under the local circumstances in Island County, Ordinance C-150-05 and C-  
17 22-06 establish regulations that protect critical areas for rural noncommercial agricultural  
18 practices and incorporate best available science. Since the impacts of BMPs are not well-  
19 established, the County's annual monitoring and adaptive management program is a  
20 necessary component of the protections so that any failings in the BMPs may be detected  
21 and corrected promptly.

22 **Issue No. 6: Do Ordinance C-150-05 and C-22-06 substantially interfere with**  
23 **GMA's goals and requirement for the protection of critical areas (RCW**  
24 **36.70A.020(9)(10), and 36.70A.130).**

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26 Because the Board does not find that Ordinance C-150-05 and C-22-06 are noncompliant,  
27 the question of invalidity may not be reached. RCW 36.70A.302(1)(a).  
28  
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31 <sup>29</sup> *Ibid* at ICC 17.02.040 L.7

32 <sup>30</sup> See discussion in *Swinomish Tribal Community v Skagit County*, WWGMHB Case No. 02-2-0012c  
(Compliance Order – Adaptive Management, January 13, 2006)

1 **Issue No. 7: Did Island County fail to comply with the State Environmental Policy**  
2 **Act (RCW 43.21C) in adopting C-150-05 and C-22-06.**

3 **Positions of the Parties**

4 WEAN argues that Ordinances C-150-05 and C-22-06 “will have probable significant  
5 adverse environmental impacts”.<sup>32</sup> This argument, in turn, comes from WEAN’s Hearing  
6 Brief before the Island County Hearing Examiner in APP 023/06.<sup>33</sup> There, WEAN argues  
7 that an environmental impact statement must be prepared for these ordinances because the  
8 activities to be allowed under the ordinances have “previously caused significant adverse  
9 environmental impacts”.<sup>34</sup> WEAN alleges that the impacts of existing and ongoing  
10 agriculture are: polluted surface waters throughout Island County, polluted groundwater,  
11 degraded aquatic ecosystem function, degraded riparian habitat function, recreation, and  
12 public health.<sup>35</sup> For these, and other reasons<sup>36</sup>, WEAN argues that an environmental impact  
13 statement must be prepared.  
14

15  
16 The County responds that the new BMP and adaptive management program does not  
17 reduce protections for critical areas below those currently in effect.<sup>37</sup> The County asserts  
18 that the definitions are the same in both programs but that the revised program regulates  
19 agricultural activities by intensity of use.<sup>38</sup> Both the existing and the revised programs use  
20 NRCS Conservation Practices, the County maintains, and the revised program expands  
21 monitoring and adaptive management to require reporting by Conservation Districts and  
22 action by the Planning Director in the event that water quality standards have been  
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26 <sup>31</sup> *WEAN v. Island County*, WWGMHB Case No. 98-2-0023c (2006 Order Finding Compliance of Critical Areas  
27 Protections in Rural Lands, September 1, 2006).

28 <sup>32</sup> WEAN’s Response of May 29, 2006 at 30-31 in WWGMHB Case No. 98-2-0023c, incorporated by reference  
29 in WEAN’s Hearing Brief at 3.

30 <sup>33</sup> R-8769

31 <sup>34</sup> *Ibid* at 16.

32 <sup>35</sup> *Ibid* at 16-19.

<sup>36</sup> WEAN argues extensively about the elimination of the “restoration requirement” for illegal alteration of critical  
areas. However, issues related to the restoration requirement have been settled and dismissed from this  
appeal.

<sup>37</sup> Island County’s Response Brief at 3.

<sup>38</sup> *Ibid* at 3-4.

1 exceeded.<sup>39</sup> The County further argues that buffer widths have been increased in the  
2 revised program and the only restriction that has been altered is to allow haying within  
3 buffers.<sup>40</sup> The County also disputes WEAN's assertion that agricultural practices have  
4 caused shellfish closures and that nitrate pollution results from those practices as well.<sup>41</sup>  
5

### 6 **Board Discussion**

7 WEAN has offered only its prior briefing on this issue, which are its submissions before the  
8 hearings examiner. This makes it difficult to discern what aspects of the SEPA  
9 determination are at issue here. WEAN failed to show at the hearing on the merits in this  
10 case that the County's environmental determination was flawed because WEAN did not  
11 discuss the County's determination at all. WEAN did argue that an environmental impact  
12 statement should have been prepared because the challenged ordinances change prior  
13 BMPs but WEAN did not address previous environmental reviews of the BMPs or show how  
14 the prior environmental review did not encompass the impacts argued to occur as a result of  
15 the changes to the BMPs. WEAN also failed to include a request for a remand for a SEPA  
16 review in the relief requested in its hearing brief.<sup>42</sup>  
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20 Any allegation must be supported by the relevant evidence. Here, WEAN has not provided  
21 the Board with enough evidence to enable the Board to assess the County's determination.  
22 In fact, WEAN never mentions the County's determination other than to say that an  
23 environmental impact statement should have been prepared. Since all of WEAN's  
24 arguments on this point were submitted in prior hearings, it is not clear whether the County's  
25 determination itself is part of the evidence in this case, and to what extent (if any) the DNS  
26 relied upon prior environmental reviews.  
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31 <sup>39</sup> *Ibid.*

32 <sup>40</sup> *Ibid* at 5.

<sup>41</sup> *Ibid* at 12-13.

<sup>42</sup> WEAN's Hearing Brief at 25.

1 Under these circumstances, the Board finds that WEAN has not met its burden of proof on  
2 this issue.

### 3 **VII. FINDINGS OF FACT**

- 4 1. Island County is located west of the crest of the Cascade Mountains and is required  
5 to plan according to RCW 36.70A.040.
- 6 2. WEAN has participated orally and in writing in the process to adopt Ordinance C-150-  
7 05 and Ordinance C-22-06.
- 8 3. On May 15, 2006, the Island County Board of Commissioners took final action to  
9 update the County's critical areas regulations relating to existing and ongoing  
10 agriculture and adopted Ordinance C-150-05 and Ordinance C-22-06.
- 11 4. The County's study of noncommercial agriculture in rural lands found approximately  
12 14,000 acres in noncommercial agricultural use in rural zones (RA, RR and RF),  
13 compared with 10,000 acres in commercial agricultural zones (CA and RA).
- 14 5. The study further estimates that 40% of the agricultural land in the rural zones is  
15 being used for livestock production; 35% for horticulture; 14% for both livestock and  
16 horticulture; and 6% listed for unidentified agriculture on the Assessor's property  
17 database.
- 18 6. Of the lands being used for livestock, the County's study found that the majority have  
19 less than one animal per acre.
- 20 7. The County's study further found that the average size of the rural noncommercial  
21 farms surveyed was less than ten but more than five acres.
- 22 8. It also showed that approximately 72% of the noncommercial agricultural activity in  
23 Island County is occurring in areas in or near critical areas.
- 24 9. The County Commissioners found that both commercial and noncommercial farming  
25 are important to the rural character of Island County. Rural character, they found, is  
26 part of the economy and culture of the County. They determined that noncommercial  
27 farming activities in rural designations contribute to the rural character of Island  
28 County and preserve the County's agricultural heritage. Therefore, the  
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1 Commissioners found that the contributions of both noncommercial farming and  
2 commercial farming should be recognized and protected.

3 10. Because of the number of critical areas located on parcels in rural noncommercial  
4 agricultural use, the Commissioners found that the standard buffer requirements  
5 would threaten the ability of rural agriculture to continue and that best management  
6 practices (BMPs) would assist rural agriculture to coexist in conformity with GMA  
7 requirements for the protection of critical areas.  
8

9 11. Based on its local circumstances, the County has established a sufficient basis for  
10 the need to adopt special measures to protect critical areas that also preserve  
11 existing and ongoing agricultural activities in its noncommercial rural zones.  
12

13 12. The County's program for protection of critical areas in farmed lands utilizes the best  
14 management practices (BMPs) developed by the Natural Resources Conservation  
15 Service (NRCS).

16 13. The County established BMP requirements for existing and ongoing noncommercial  
17 agricultural activity at three levels of intensity – low, medium and high. Landowners  
18 conducting agricultural activities of low intensity may protect critical areas through  
19 standard farm management plans. Medium and high intensity agricultural activities  
20 require a custom farm management plan.  
21

22 14. Property owners who wish to exercise the option for farm plans in lieu of the buffer  
23 requirements otherwise imposed by the County's critical areas ordinance must  
24 submit a questionnaire to the County within six months of the effective date of the  
25 ordinance and follow with a completed farm plan.  
26

27 15. The standard farm plan (low intensity uses) uses a standard set of NRCS BMPs to  
28 protect critical areas generally and more specifically for those activities occurring in  
29 the drainage basins of salmon-bearing streams. The custom farm management  
30 plans are developed for each farm and address the specific issues pertinent to the  
31 higher intensity activities on that property. The custom farm management plans also  
32 implement NRCS BMPs.

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16. A vegetated buffer strip for streams and wetlands is required by the Conservation Practice Standards.
17. The County performed a review of the NRCS BMPs to determine whether they incorporate the best available science following the principles for determining best available science in WAC 365-195-905(5).
18. The County concluded that BMPs are developed using scientific methods and through a valid scientific process; they are peer reviewed; the scientific methods are clearly stated and can be replicated; the BMPs are developed using logical conclusions based on reasonable assumptions; the data used that were properly analyzed and placed in appropriate context; and the BMPs were developed using techniques, assumptions and conclusions that reference relevant, credible literature.
19. The State Departments of Ecology and Fish and Wildlife, for agricultural practices, recommend BMPs rather than buffers as protection for the functions and values of critical areas.
20. The County submitted its proposed BMP program to three state agencies for review: the Department of Community, Trade and Economic Development (CTED), the Department of Fish and Wildlife (WDFW) and the Department of Ecology (Ecology). All three approved of the County's program.
21. The use of farm plans has the advantage of making the protection of critical areas an interactive process that involves and educates the landowner in the effect of agricultural practices on critical areas.
22. Farm plans are geared to the particular agricultural activities that are occurring on farmed property. BMPs and farm plans are able to target the practices that are actually in use on each farm.
23. Enforcement of the best management practices program is tiered, beginning with education efforts but then utilizing standard County enforcement actions.

- 1 24. The Island County program includes a default to buffers in the event that BMPs are  
2 not being fully implemented. This is a key aspect of the program since it provides an  
3 ongoing incentive to the landowner to meet his or her commitments in the farm plan.  
4 25. Because of limited data on implementation of NRCS BMPs, CTED also advised that  
5 the monitoring and adaptive management components of the County's proposed  
6 strategy were very important.  
7 26. Based on local circumstances, the NRCS BMPs constitute best available science for  
8 the regulation of ongoing noncommercial agricultural practices in Island County, so  
9 long as they are accompanied by monitoring and an adaptive management program.  
10 27. Ordinance C-22-06 establishes the County's monitoring and adaptive management  
11 program in relation to the use of BMPs for agricultural activities.  
12 28. The County will monitor water quality standards established by Chapter 173-201A  
13 WAC as part of its program for implementing BMPs.  
14 29. There are three components to the program: baseline monitoring, source  
15 identification, and adaptive management. If the established water quality standards  
16 are exceeded, the County is responsible for addressing adaptive management  
17 actions that may be required to ensure that the BMPs are effective.  
18 30. The monitoring parameters include dissolved oxygen, fecal coliform, nitrate, pH,  
19 phosphorus, temperature, turbidity, conductive, hardness, and vegetation.  
20 31. Many of the water quality parameters are indicators of conditions of fish and wildlife  
21 habitat that are not directly monitored – temperature relates to shade, for example,  
22 and turbidity (cloudiness of water) indicates disruptive activity, such as animal access  
23 to streams, in the vicinity of habitat.  
24 32. The County monitoring and adaptive management program then will use any data  
25 showing that water quality standards have been exceeded to identify the source of  
26 the contamination.  
27 33. From the monitoring data, the County will determine whether the BMPs must be  
28 changed or whether the problem can be addressed through education or other  
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1 means. With recommendations from the Conservation Districts, NRCS or a certified  
2 farm planner, the Planning Director has been delegated the authority to impose site  
3 specific modifications of the BMPs.

4 34. The public is advised of the County's actions in response to monitoring information  
5 through the reporting requirements of the program. The annual report includes  
6 information about the monitoring program, any compliance assessments and source  
7 identification actions, education and/or BMP modifications, and future monitoring  
8 priorities.

9 35. The County's program sets monitoring parameters that are reasonably related to the  
10 protection of the functions and values of critical areas affected by agricultural  
11 activities.

12 36. The program will establish baseline conditions, monitor water quality according to  
13 State standards, tie any contamination to the source, and refer this information to the  
14 Planning Director for action.

15 37. The Planning Director is directed to make changes to the BMPs to address any  
16 contamination issues that are not cured through education and enforcement.

17 38. WEAN has failed to introduce a sufficient evidentiary record for the Board to  
18 determine whether the County's SEPA determination for the adoption of Ordinances  
19 C-150-05 and C-22-06 was clearly erroneous.

20 39. Any Finding of Fact hereafter determined to be a Conclusion of Law is hereby  
21 adopted as such.  
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## 25 **VIII. CONCLUSIONS OF LAW**

26 A. The Board has jurisdiction over the parties and subject-matter of this action.

27 B. WEAN has standing to bring its challenges to Island County Ordinances C-150-05 and  
28 C-22-06.

29 C. Ordinances C-150-05 and C-22-06 protect the functions and values of critical areas and  
30 include best available science in compliance with RCW 36.70A.060(2) and 36.70A.172(1).  
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1 D. Island County complied with the State Environmental Policy Act (RCW 43.21C) when it  
2 adopted Ordinances C-150-05 and C-22-06.

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4 **IX. ORDER**

5 Based upon the agreement of the parties, Issues 1-4 of the Prehearing Order are hereby  
6 DISMISSED. Ordinances C-150-05 and C-22-06 COMPLY with the Growth Management  
7 Act and this case is hereby CLOSED.  
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10 Entered this 14<sup>th</sup> day of September 2006.  
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Margery Hite, Board Member

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Holly Gadbow, Board Member

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Gayle Rothrock, Board Member  
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22 Pursuant to RCW 36.70A.300 this is a final order of the Board.

23 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the  
24 mailing of this Order to file a petition for reconsideration. Petitions for  
25 reconsideration shall follow the format set out in WAC 242-02-832. The original and  
26 three copies of the petition for reconsideration, together with any argument in  
27 support thereof, should be filed by mailing, faxing or delivering the document directly  
28 to the Board, with a copy to all other parties of record and their representatives.  
29 **Filing means actual receipt of the document at the Board office.** RCW 34.05.010(6),  
WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for  
filing a petition for judicial review.

30 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the  
31 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for  
32 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

1 **Enforcement.** The petition for judicial review of this Order shall be filed with the  
2 appropriate court and served on the Board, the Office of the Attorney General, and all  
3 parties within thirty days after service of the final order, as provided in RCW  
4 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,  
5 but service on the Board means actual receipt of the document at the Board office  
within thirty days after service of the final order.

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

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