



**ISLAND COUNTY  
PLANNING & COMMUNITY DEVELOPMENT**

**ISLAND COUNTY PLANNING COMMISSION**

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**~FINDINGS AND CONCLUSIONS~**

**TO:** Board of Island County Commissioners

**FROM:** Island County Planning Commission

**DATE:** July 19, 2021

**REGARDING:** Amendments to Island County Critical Areas Regulations to Address the Court of Appeals Decisions in *WEAN v. W. Wash Growth Mgmt. Hearings Bd. ("Fish & Wildlife")*, No. 80093-1-1 (2020) and *WEAN v. W. Wash Growth Mgmt. Hearings Bd. ("Western Toad")*, 14 Wn.App.2d 514,471 P.3d 960 (2020)

**SUMMARY**

The Island County Planning Commission held a public hearing on this matter on July 12, 2021 and continued to July 19, 2021. At the hearing, the Commission considered the staff presentation on the proposed amendments, and gathered public testimony concerning the amendments. After due deliberation, the Commission adopted the following Findings of Fact:

**FINDINGS OF FACT**

1. On September 22, 2014, Island County adopted new Fish and Wildlife Habitat Conservation Areas policies and regulations.
2. Those regulations were appealed to the Growth Management Hearings Board by Whidbey Environmental Action Network ("WEAN"). On June 24, 2015, the Growth Management Hearings Board (GMHB) issued an order (Case Co. 14-2-009) in response to an appeal finding that the County's update complied with the Growth Management Act with respect to five of the issues raised in the appeal, and did not comply with respect to seven other issues.

- a. **Issue 1** – Definitions of Reasonable Use and Permitted Alterations. Addressed via Ordinance C-44-16.
- b. **Issue 2** – Definition of Clearing. The GMHB determined WEAN failed to meet its burden of proof to establish violations of the Revised Code of Washington (RCW) and Washington Administrative Code (WAC).
- c. **Issue 3** – Exemption for Removal of Beaver and Beaver Dams. Addressed via Ordinance C-44-16.
- d. **Issue 4** – Abandoned as a result of WEAN's acknowledgement of abandonment or as a result of the GMHB's determination that WEAN failed to adequately brief.
- e. **Issue 5** – Standard Habitat Management Plans. The GMHB determined WEAN failed to meet its burden of proof to establish violations of the RCW and WAC.
- f. **Issue 6** – Buffer Requirements for Natural Area Preserves. Initially addressed via Ord. C-71-16, which was found to be inadequate by the Court of Appeals in *WEAN v. Island County, et al. ("Fish & Wildlife")*, No. 80093-1-I (2020). **To be addressed via the enclosed amendments in ICC 17.02B.430.**
- g. **Issue 7** – Designating and Protecting Habitat of Listed Flora Species. Addressed via Ordinance C-71-16.
- h. **Issue 8** – Designating and Protecting the Habitats of Westside Prairie, Oak Woodland, and Herbaceous Balds. Initially addressed via Ord. C-71-16, which was found to be inadequate by the Court of Appeals in *WEAN v. Island County, et al. ("Fish & Wildlife")*, No. 80093-1-I (2020). **To be addressed by the enclosed amendments in ICC 17.02B.230.**
- i. **Issue 9** – Designating and Protecting the Habitat of the Western Toad. Initially addressed via Ordinance C-71-16, and then again via Ordinance C-02-17 after remand from the GMHB. Ordinance C-02-17 was found to be inadequate by the Court of Appeals in *WEAN v. Island County, et al. ("Western Toad")*, 14 Wn.App.2d 514,471 P.3d 960 (2020). **To be addressed by the enclosed amendments in ICC 17.02B.210.**
- j. **Issue 10** – Definitions of Agricultural Activities, Existing and Ongoing; and Exempt Activities. Addressed via Ordinance C-44-16.
- k. **Issue 11** – Definitions of Agricultural Activities, Existing and Ongoing and Best Management Practices; Exempt Activities; and Protection Standards for Streams and other Aquatic Habitats. The GMHB determined WEAN failed to provide sufficient argument to meet its burden of proof to establish violations as alleged.
- l. **Issue 12** – Definitions of Regulated and Unregulated Streams; and Exempt Activities. The GMHB determined WEAN failed to provide sufficient argument to meet its burden of proof to establish violations as alleged.
- m. **Issue 13** - Abandoned as a result of WEAN's acknowledgement of abandonment or as a result of the GMHB's determination that WEAN failed to adequately brief.
- n. **Issue 14** – Comprehensive Plan Fish and Wildlife Habitat Conservation Areas Overlay Policies. The GMHB determined WEAN was unable to establish a violation of the RCW and WAC.

3. During remand, Island County commissioned a best available science review on Island County's Natural Area Preserve, the Western Toad, Westside Prairies, Oak Woodlands, and Herbaceous Balds to ensure its legislative action amending the critical areas code included best available science as required by RCW 36.70A.172.
4. The County hired the Watershed Company to conduct this review and they subsequently issued three reports on May 5, 2016 entitled Western Toad Best Available Science Review; Prairies, Herbaceous Balds, and Oak Woodlands Best Available Science Review; and Natural Area Preserve Buffer Best Available Science Review.
5. The Western Toad Best Available Science Review (The Watershed Company, 2016) addressed population trends, distribution in Island County, habitat use, known stressors, and management strategies for the Western Toad.
6. The Prairies, Herbaceous Balds, and Oak Woodlands Best Available Science Review (The Watershed Company, 2016) addressed definitions, distribution in Island County, associated wildlife and plants, known stressors, existing protections, gaps in protections, and management strategies for each of the three habitats.
7. The Natural Area Preserve Buffer Best Available Science Review (The Watershed Company, 2016) addressed existing conditions and protections and management strategies.
8. On July 17, 2017, the GMHB issued an order finding compliance. This decision was appealed to superior court, which upheld the GMHB's finding of compliance. The superior court's decision was then appealed to the state court of appeals.
9. The Court of Appeals issued two different decisions deriving from the original GMHB case: *WEAN v. Island County, et al. ("Fish & Wildlife")*, No. 80093-1-I (2020) and *WEAN v. Island County, et al. ("Western Toad")*, 14 Wn.App.2d 514,471 P.3d 960 (2020). In both cases, the Court of Appeals reversed the findings of compliance on certain issues and remanded the matter back to the superior court, which in turn remanded the matter to the GMHB for further proceedings. The GMHB has instituted compliance proceedings and has given the County a deadline of October 15, 2021 to address remaining issues.
10. Four issues were remanded by the Court of Appeals:
  - a. Adoption of a buffer to protect the Natural Area Preserve;
  - b. Designation of Prairies, Herbaceous Balds, and Oak Woodlands;
  - c. Designation of habitat for the Western Toad; and
  - d. Standards for waiver of the requirement to complete a biological site assessment.
11. Natural Area Preserve (NAP).
  - a. The court of appeals disapproved of the language in ICC 17.02B.430.E, which states:

*Buffers shall not be required adjacent to these areas as long as these areas encompass the land required for species preservation. The Planning Department shall confirm the public agency establishing and managing the area has included sufficient land within these areas to ensure no net loss of habitat functions and values. If buffers are required, they shall reflect the habitat sensitivity and the type and intensity of activity proposed to be conducted nearby.*

- b. The court of appeals found that the NAP provision when read as a whole, “*does not ensure the values and functions of NAP will be protected from external impacts by buffers. Instead, this provision strictly limits that protection to situations requiring ‘species protection,’ a limit that is contrary to the mandate of the GMA.*”
- c. Island County has only one State designated NAP, a 33-acre site north of Camp Casey and Keystone Harbor known as the Naas, or Admiralty Inlet, NAP. The site is owned by the Whidbey Camano Land Trust (Land Trust) and jointly managed by the Land Trust and the State Department of Natural Resources (DNR).
- d. The recommendation from the Department of Natural Resources and the Natural Area Preserve Buffer Best Available Science Review (The Watershed Company, 2016) recommend that the county adopt a 100-foot buffer along the southern portion of the NAP to minimize blow-down.
- e. The proposed amendments (ICC 17.02B.430) also clarify that buffers shall be required adjacent to other state natural resource conservation areas and state wildlife areas as necessary to ensure no net loss of habitat function and values, and shall be based on management recommendations from the agency managing the specific resource.

#### 12. Mapping of Prairies, Herbaceous Balds, and Oak Woodlands.

- a. In the amendments adopted on June 3, 2016, the County identified Prairies, Herbaceous Balds and Oak Woodlands habitats as habitats of local importance in ICC 17.02B.230(C). The court of appeals found that, “Island County’s decision to include only a list and a map that is ‘not a survey,’ rather than performance standards or definitions, fails to meet the directive of the DOC guidelines for designation.” They also note that the County, “created an information gap that leaves these habitats vulnerable.”
- b. The County's BAS Report reviewed and identified 12 prairie and oak woodland areas within unincorporated Island County, with one located entirely in shoreline jurisdiction, and eight partially or potentially within shoreline jurisdiction. The majority of the acreage is protected through other critical areas regulation requirements.
- c. The proposed amendments (ICC 17.02B.230) would remove the list of known Native Prairies, Herbaceous Balds and Oak Woodlands and instead adopt by reference designation criteria outlined in the most current version of the “Priority Habitats and Species List” prepared by the Washington Department of Fish and Wildlife (WDFW).

#### 13. Western Toad – Designated Occurrences.

- a. Island County’s most recently adopted code (17.02B.210) designates all presently known and later-identified occurrences of Western Toad breeding sites as critical areas, as well as all upland occurrences known on the date the ordinance was adopted. Later-discovered upland Western Toad occurrences are not designated as critical areas. The code requires a biological site assessment (BSA) for any development project proposed within 1,000 feet of a critical area,

though the County can waive this requirement if the impacts of the development would be minor.

- b. The court of appeals found that, *“any occurrence of the western toad should be designated as a critical area”* and that, *“the Board misapplied the GMA’s best available science requirement by upholding the County’s decision that only those upland occurrences known to the County at the time the ordinance was adopted would be designated as critical areas.”* Additionally they noted the *“decision also violated the precautionary approach because the lack of scientific understanding regarding upland Western Toad habitat means upland occurrences should be designated and protected when they are discovered.”*
  - c. The code amendments (ICC 17.02B.210) would amend the designation criteria to designate any upland occurrence without any specified time limitation. The change to the Western Toad occurrence language of ICC 17.02B.210 would designate all breeding and upland occurrences as a regulated FWHCA, in accordance with the Court of Appeals decision.
14. Western Toad – Standards for Waiver of the Requirement to Complete a Biological Site Assessment.
- a. The court of appeals determined that the code provision allowing the Planning Director to waive the requirement for a biological site assessment based on minor impacts lacked specific criteria to limit Director discretion.
  - b. The proposed code amendments provide new and specific criteria limiting waiver of biological site assessments (BSA) for minor impacts. The criteria are drawn from State Environmental Policy Act criteria, exemption criteria in ICC 17.02B.300, and low impact development techniques outlined by the Department of Ecology.
15. State Environmental Policy Act (SEPA) Compliance. As a non-project action which provides increased protections for critical areas, these amendments are exempt from SEPA per RCW 43.21.C.450(3)(a).
16. Washington State Department of Commerce Notification. The Planning Department complied with RCW 36.70A.106 by sending the proposed amendments to the Washington State Department of Commerce on June 22, 2021 .
17. The Planning Commission finds the proposed amendments, as described above are necessary and adequate to address the issues remanded to the County by the Court of Appeals in *WEAN v. Island County, et al. (“Fish & Wildlife”)*, No. 80093-1-I (2020) and *WEAN v. Island County, et al. (“Western Toad”)*, 14 Wn.App.2d 514,471 P.3d 960 (2020).

## **CONCLUSION**

The Island County Planning Commission has reviewed the proposed changes to Island County Code Chapter 17.02B and hereby recommends that the Board of County Commissioners adopt an ordinance to incorporate the proposed amendments, attached hereto as Exhibit A into Island County Code.

Respectfully submitted through the Island County Planning Department to the Board of Island County commissioners, pursuant to RCW 36.70.430, this \_\_\_\_\_ day of \_\_\_\_\_, 2021 by,

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Darin Hand  
Chair, Island County Planning Commission

**Enclosures:**

Exhibit "A" –Amendments to the Island County Code Chapter 17.02B