

1 BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
2 WESTERN WASHINGTON REGION
3 STATE OF WASHINGTON
4

5 FRIENDS OF THE SAN JUANS, P.J.
6 TAGGARES COMPANY, COMMON SENSE
7 ALLIANCE, WILLIAM H. WRIGHT, AND SAN
8 JUAN BUILDERS ASSOCIATION,

9 Petitioners,

10 v.

11
12 SAN JUAN COUNTY,

13 Respondent.
14

Case No. 13-2-0012c

**ORDER FINDING COMPLIANCE
AND CONTINUING NONCOMPLIANCE**

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16 THIS matter came before the Board for a compliance hearing on April 24, 2014, in
17 Friday Harbor, Washington and was attended by Board members Raymond Paolella and
18 William Roehl with Mr. Roehl presiding. Board member Nina Carter viewed the hearing via
19 the internet and submitted questions for the parties. Thereafter, the Board scheduled a
20 second compliance hearing which was held in Anacortes, Washington on July 10, 2014, and
21 attended by all three members of the panel. The purpose of the hearings was to consider
22 whether San Juan County had achieved GMA compliance following the Board's issuance of
23 its Final Decision and Order of September 6, 2013.
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25 Kyle A. Loring represented the Friends of the San Juans (the Friends) while Common
26 Sense Alliance (CSA) and P.J. Taggares Company (Taggares) (collectively, CSA) were
27 represented by Alexander W. Mackie. William H. Wright (Wright) appeared *pro se* while the
28 San Juan Builders Association did not take part in either hearing. San Juan County (the
29 County) was represented by Amy S. Vira.
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1 The parties filed the following prior and subsequent to the Compliance Hearing:

- 2 1. San Juan County's Compliance Report, filed March 19, 2014;
- 3 2. Petitioner Friends of the San Juans' Objections to Finding of Compliance, filed
4 April 2, 2014;
- 5 3. Objections to a Finding of Compliance and Request for Invalidity
6 [CSA/Taggares], filed April 3, 2014;
- 7 4. San Juan County's Response to Objections, filed April 14, 2014;
- 8 5. San Juan County's Supplemental Compliance Response, filed July 3, 2014;
- 9 6. Summary of Issues Raised by CSA/Taggares, filed July 24, 2014.

10 11 12 **I. BACKGROUND**

13 The twelve Petitions for Review in this matter challenged the County's adoption of
14 Ordinance 26-2012 (which included general critical areas regulations), Ordinance 27-2012
15 (which addressed Geologically Hazardous Areas and Frequently Flooded Areas), Ordinance
16 28-2012 (Wetlands) and Ordinance 29-2012 (Fish & Wildlife Habitat Conservation Areas).
17 CSA and Taggares only challenged Ordinance Nos. 26-2012, 28-2012, and 29-2012, while
18 the other petitioners challenged all four ordinances.
19

20 The Board's Final Decision and Order (FDO) included findings of violations of RCW
21 36.70A.060 and RCW 36.70A.172 and failures to be guided by RCW 36.70A.020(9) and
22 (10).
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24 In order to address the findings of non-compliance, the County adopted Ordinance
25 No. 2-2014 (sometimes referred to merely as "the Ordinance") on March 5, 2014. The
26 amendments included in the Ordinance are the subject of this order.
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28 **II. BURDEN OF PROOF**

29 Following a finding of noncompliance, the jurisdiction is given a period of time to
30 adopt legislation to achieve compliance.¹ After the period for compliance has expired, the
31 Board is required to hold a hearing to determine whether the jurisdiction has achieved
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¹ RCW 36.70A.300(3)(b).

1 compliance.² For purposes of Board review of the comprehensive plans and development
2 regulations adopted by local governments in response to a noncompliance finding, the
3 presumption of validity applies and the burden is on the challenger to establish the new
4 adoption is clearly erroneous.³ In order to find San Juan County's action clearly erroneous,
5 the Board must be "left with the firm and definite conviction that a mistake has been made."⁴
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7 The burden is thus on the petitioners to overcome the presumption of validity by
8 demonstrating the action taken by San Juan County is clearly erroneous in light of the goals
9 and requirements of chapter 36.70A RCW (the Growth Management Act).

10 III. PRELIMINARY MATTERS

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12 On April 3, 2014, Wright filed a motion to supplement the record⁵ with a Department
13 of Ecology (DOE) October, 2013 update regarding wetland buffers.⁶ Wright observed the
14 document provided new scientific information regarding freshwater wetlands. At the
15 commencement of the April 24 Compliance Hearing, no objection to the proposed
16 supplementation was made and the Presiding Officer allowed the record to be
17 supplemented with the DOE publication, finding allowance would be of substantial
18 assistance under WAC 242-03-565.⁷
19

20 On April 2, 2014, the Friends filed a motion to supplement the record with a Draft
21 2013 Year End Report of San Juan County's environmental health programs and activities.⁸
22 That document provided information regarding the County's on-site sewage treatment
23 program and it was asserted to be relevant to the amendments regarding those systems
24 contained in the Ordinance.⁹ Again, no objection was made, and the record was
25 supplemented with that document as it was found to be of substantial assistance pursuant
26 to WAC 242-03-565.
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29 ² RCW 36.70A.330(1) and (2).

30 ³ RCW 36.70A.320(1), (2), and (3).

31 ⁴ *Department of Ecology v. PUD 1*, 121 Wn.2d 179, 201, (1993).

32 ⁵ Petitioner William Wright's Second Motion to Supplement the Record (sic).

⁶ T. Hruby, 2013. *Update on Wetland Buffers: The State of the Science, Final Report*, October 2013, Washington State Department of Ecology Publication #13-06-11.

⁷ One or more of the parties believed the document was already in the record.

⁸ Petitioner Friends of the San Juans' Second Motion to Supplement the Record.

⁹ Draft 2013 Year End Report-Review of Environmental Health Programs/Activities.

1 CSA had asserted the County's compliance legislation violated the Voluntary
2 Stewardship Program (VSP).¹⁰ At the commencement of the Compliance Hearing, counsel
3 for CSA withdrew the objection based on the VSP.¹¹

4 CSA also focused extensively in its brief on the County's alleged failure to comply
5 with the requirements of RCW 82.02.020 which CSA states requires a jurisdiction to
6 demonstrate imposed development conditions must be shown to be ". . . reasonably
7 necessary as a direct result of the proposed development or plat to which the dedication of
8 land or easement is to apply." CSA's argument relates to the imposition of water quality
9 buffers for all FWHCAs regardless of the physical conditions, type of development and the
10 resulting impacts.¹² Counsel acknowledged the Board has found it lacks jurisdiction to
11 address violations of RCW 82.02.020.¹³ That is indeed the case; the Board has not been
12 granted jurisdiction to consider violations of RCW 82.02.020 and, consequently, will not
13 address CSA's RCW 82.02.020 arguments.¹⁴

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16 Wright filed no brief prior to the compliance hearings but did appear and spoke. He
17 focused on the County's RCW 36.70A.172 requirement to include BAS in developing
18 policies and development regulations to protect the functions and values of critical areas. It
19 was his assertion the County has failed from the beginning to include BAS and that the
20 individual who assembled the County's *BAS Synthesis*¹⁵ failed to have the document peer
21 reviewed. Wright restated his BAS concerns at the second hearing, stating the County's
22 Comprehensive Plan was adopted without consideration of BAS. In neither instance did
23 Wright raise any specific allegations regarding the County's compliance legislation; rather,
24 his contentions questioned the County's consideration of the *BAS Synthesis* as BAS at all.
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28 ¹⁰ Objections to a Finding of Compliance and Request for Finding of Invalidity, p. 11; RCW 36.70A.705-760.

29 ¹¹ Compliance Hearing Transcript, pp. 10, 11, 21.

30 ¹² Objections to a Finding of Compliance and Request for Finding of Invalidity, p. 6 and following.

31 ¹³ Compliance Hearing Transcript, p. 20.

32 ¹⁴ *Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hearings Bd.*, 166 Wn. App. 172, 196: "Upon reconsideration, we note that the Board lacks the jurisdictional authority to decide claims alleging a violation of property rights, including a violation of RCW 82.02.020." The *Olympic Stewardship* Court cited Board decisions to the same effect: *Citizens for Rational Shoreline Planning v. Whatcom County*, Case No. 08-2-0031, Order on Dispositive Motion, pp. . 8-9 as well as *WEAN v. Island County*, Case No. 06-2-0023, FDO, p. 8.

¹⁵ Adopted by the County in May, 2011; Ordinance 2-2014, Background ¶ B.

1 In that Wright elected not to focus on specific compliance actions taken by the County and
2 relate those actions to his BAS concerns, the Board will not address his observations.

3 Finally, the Board's review of Ordinance No. 2-2014 was of a draft showing
4 amendments and deletions from the prior, originally challenged ordinances. Prior to the
5 conclusion of the first Compliance Hearing, the Board took official notice pursuant to WAC
6 242-03-630 of a clean draft of the ordinance from the County's website, although references
7 in this Order are to the draft attached to the County's Compliance Report.
8

9 IV. DISCUSSION

10 The Board found and concluded that some specific sections of Ordinances 26-2012,
11 28-2012, and 29-2012 violated the Growth Management Act, as more specifically described
12 in the following sections of this order. The Board will address each of those in turn, setting
13 forth the County's compliance actions, the parties' objections and the Board's analysis and
14 conclusions.
15

16 The most far reaching areas of non-compliance found by the Board involved water
17 quality and habitat buffer widths. Specifically, the Board found and concluded:
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- 19 • **San Juan County's Findings of Fact relating to water quality buffers and**
20 **habitat buffers were not supported by substantial scientific evidence in the**
21 **record;**
- 22 • **San Juan County's water quality buffer widths and habitat buffer widths**
23 **adopted in Ordinance Nos. 28-2012 and 29-2012 fell outside of the range for**
24 **buffer widths recommended by the Best Available Science, without any**
25 **reasoned justification;**
- 26 • **San Juan County's water quality buffers and habitat buffers adopted in**
27 **Ordinance Nos. 28-2012 and 29-2012 failed to protect the functions and**
28 **values of Critical Areas comprised of wetland ecosystems and fish and**
29 **wildlife ecosystems;**
- 30 • **The County's water quality buffer and habitat buffer methodologies**
31 **combined with the lack of monitoring and an adaptive management program**
32 **failed to protect Critical Areas from degradation and did not comply with**
RCW 36.70A.060 and RCW 36.70A.172, and such actions were not guided by
RCW 36.70A.020(9) and (10).

1 In the FDO, the Board concluded the minimum water quality¹⁶ and habitat¹⁷ buffer
2 widths fell short of the BAS recommendations. The Board also determined some of the
3 proposed buffers were designed to remove between 60% and 70% of pollution, contrary to
4 BAS, and the allowance of various uses within critical areas and their buffers all contributed
5 to a high level of risk to critical areas.¹⁸

6 With its compliance action, the County replaced its originally proposed wetland typing
7 system with the Department of Ecology's *Washington State Wetland Rating System for*
8 *Western Washington-Revised*.¹⁹ The County states the regulations now provide that San
9 Juan County's wetlands will be rated based on conditions at the time of permit application
10 and the new site-specific procedures include both water quality and habitat buffers. Widths
11 of those buffers, according to the County, are established based on the DOE's wetland
12 rating system and *Wetlands in Washington State Volume 2: Guidance for Protecting and*
13 *Managing Wetlands*.²⁰ That methodology incorporates the intensity of the proposed
14 development, use, or activity. Furthermore, the County states the pollution removal
15 percentage found to be unsupported by the BAS in the FDO was addressed as the DOE's
16 methodology includes 70% pollution removal. In addition, buffer widths are to be increased
17 by 50% if the proposed development is on a slope exceeding 30%. Finally, the County
18 contends the Aquatic FWHCA water quality buffers (Table 3.6) and the FWHCA water
19 quality buffers designed to protect certain plants (Table 3.10) were amended to incorporate
20 proposed land-use intensity and the water quality buffers applicable to Category I and II
21 wetlands.²¹

22 While the Friends acknowledge the County's revisions in the Ordinance addressed
23 some of the FDO's findings of non-compliance, they raise numerous concerns. It asserts the
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28 ¹⁶ Final Decision and Order, p. 53.

29 ¹⁷ *Id.*, p. 54.

30 ¹⁸ *Id.*, p. 59.

31 ¹⁹ T. Hruby, 2004. *Washington State Wetland Rating System for Western Washington – Revised*. Washington
32 State Department of Ecology Publication # 04-06-025.

²⁰ T. Granger,, T. Hruby, A. McMillan, D. Peters, J. Rubey, D. Sheldon, S. Stanley, E. Stockdale. April 2005,
Wetlands in Washington State - Volume 2: Guidance for Protecting and Managing Wetlands. Washington
State Department of Ecology. Publication #05-06-008. Olympia, WA. Referred to hereafter as "*Wetlands*
Volume 2."

²¹ San Juan County Compliance Report, p. 6.

1 widths of wetland water quality buffers, the use of wetland water quality buffers for FWHCA
2 buffers (a challenge also raised by CSA), and allowed habitat buffer averaging fail to reflect
3 BAS in the record. In addition, it challenges the County's allowance of some on-site sewage
4 system components within critical areas or their buffers, buffer averaging in UGAs, and its
5 modifications of the adopted DOE land-use intensity tables.
6

7 **A. Buffer widths for wetlands**

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9 Local jurisdictions have utilized buffers of a specific width as a common method for
10 the protection of the functions and values of wetlands. *Wetlands Volume 2* includes three
11 alternative sets of recommendations for establishing buffer widths, all of which are based on
12 the BAS included in *Wetlands Volume 1*.^{22 23} Some of the analysis below involves the
13 differences in buffer widths produced through application of Alternatives 2 and 3 in
14 *Wetlands Volume 2*.

15 As discussion of water quality buffer widths is closely related to that regarding the
16 application of those widths to FWHCA buffers, which is considered below, some of the
17 analysis may be repetitious.
18

19 The Friends assert the compliance ordinance's wetland buffer widths do not comport
20 with DOE's recommendations. Specifically, it observes that while the compliance ordinance
21 requires both water quality and habitat buffers for wetlands, its allowance of various
22 activities within habitat buffers would result in greater impacts to wetlands, referencing the
23 authorization of mowing for orchards and gardens and tree removal for septic systems.²⁴
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25 The Friends also argue the County departed from DOE recommendations by
26 establishing buffers smaller than those recommended by DOE for Category I and II
27 wetlands, stating that only the 50/75/100-foot buffers of the Ordinance's Table 3.3 apply.
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29 ²² D. Sheldon, T. Hruby, P. Johnson, K. Harper, A. McMillan, T. Granger, S. Stanley, and E. Stockdale. March
30 2005. *Wetlands in Washington State - Volume 1: A Synthesis of the Science*. Washington State Department of
31 Ecology. Publication #05-06-006. Olympia, WA. Referred to hereafter as "*Wetlands Volume 1*."

32 ²³ *Wetlands Volume 2*, Appendix 8-C, p. 3: Buffer Alternative 1. (Width based only on wetland category); Buffer
Alternative 2. (Width based on wetland category and the intensity of impacts from proposed changes in land
use); Buffer Alternative 3. (Width based on wetland category, intensity of impacts, and wetland functions or
special characteristics.).

²⁴ Petitioner Friends of the San Juans' Objections to Finding of Compliance, p. 12.

1 They refer to Tables 8C-6 and 8C-7 from *Wetlands Volume 2*, which recommend buffer
2 widths for Category I estuarine and coastal lagoon wetlands at 100 feet for low-impact
3 uses, 150 feet for moderate uses and 200 feet for high impact uses with narrower buffers for
4 the same type of Category II wetlands.²⁵

5 This petitioner alleges that due to the County's allowance of activities within buffers,
6 buffer widths should be increased as the science includes an underlying assumption that
7 "the buffer will remain relatively undisturbed in the future within the width specified."²⁶ The
8 Friends' Objections to Compliance includes the following quote: "... [t]he buffer should either
9 be planted to create the appropriate plant community or the buffer should be widened to
10 ensure that adequate functions of the buffer are provided."²⁷

11 Finally, the Friends state the buffer system is inadequate as it fails to protect certain
12 local species, including the Common Loon and the Sandhill Crane. The buffers for bogs are
13 also criticized.
14

15 The County counters the Friends' arguments by observing references made by the
16 Friends are to portions of *Wetlands Volume 2* applicable to Alternative 3.²⁸ That is, the
17 various widths suggested by the Friends as compliant with BAS appear in Alternative 3,
18 while the County used widths from Alternative 2.
19

20 As previously stated, *Wetlands Volume 2* includes three alternatives for protecting
21 wetland functions using buffers: Alternative 1, Alternative 2, and Alternative 3. Buffer
22 Alternative 2 establishes widths based on wetland category and the intensity of impacts
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26 ²⁵ *Wetlands Volume 2*, Appendix 8-C, pp. 7-8.

27 ²⁶ IR 9415, *Wetlands Volume 2*, Appendix 8-C, pp. 3.

28 ²⁷ The Board reviewed the Objection Brief's citation to IR 9415, Tab 9109, *Wetlands Volume 2*, Appendix 8-C,
29 at 3, but found no such quotation. The following quotation does appear on that page: "If the vegetation in the
30 buffer is disturbed (grazed, mowed, etc.), proponents planning changes to land use that will increase the
31 impact to wetlands need to rehabilitate the buffer with native plant communities that are appropriate for the
32 ecoregion, or with a plant community that provides similar functions."

²⁸ Counsel for San Juan County stated during the Compliance Hearing: "... you'll see that those numbers are
part of Ecology's Buffer Alternative 3, which is a more site-specific approach. The County didn't use that. We
used Buffer Alternative 2, and so our numbers are in line with those that are found on [IR] 9417, which is page
5 of this Appendix 8-C in that wetland document. And so it's true those numbers Mr. Loring provided aren't the
ones we used, and it's because we were using Alternative 2, not Alternative 3." Compliance Hearing
Transcript, p. 107, lines 13-21.

1 from proposed land use changes.²⁹ *Wetlands Volume 2*'s Alternative 2 provides for
 2 increased regulatory flexibility by including the concept that not all proposed changes in land
 3 uses have the same level of impact.³⁰ Alternative 2, at Table 8C-2 follows:³¹

4
 5 **Table 8C-2. Width of buffers needed to protect wetlands in western Washington**
 6 **considering impacts of proposed land uses (Buffer Alternative 2).**

7

8 Category of Wetland	Land Use with Low Impact	Land Use with Moderate Impact	Land Use with High Impact
9 IV	25 ft	40 ft	50 ft
10 III	75 ft	110 ft	150 ft
11 II	150 ft	225 ft	300 ft
12 I	150 ft	225 ft	300 ft

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 15 * See Table 8C-3 below for types of land uses that can result in low, moderate, and high
 16 impacts to wetlands.

17 The Board understands the DOE recommendations included in Table 8C-2
 18 encompass buffer widths designed to protect the various functions and values provided by
 19 wetlands, including both water quality and habitat:

20 In addition to reducing the impacts of adjacent land uses, buffers also protect
 21 and maintain a wide variety of functions and values provided by wetlands.
 22 For example, buffers can provide the terrestrial habitats needed by many
 23 species of wildlife that use wetlands to meet some of their needs.³²

24
 25 Review of the Friends' citations confirms the County's observation regarding which
 26 Alternative was incorporated into the County's buffer widths. The buffer widths the Friends
 27 state DOE recommends for Category I and II estuarine and coastal lagoon wetlands are
 28 from *Wetlands Volume 2*'s Tables 8C-6 and 8C-7 which apply to Buffer Alternative 3.
 29 Section 8C.2.3 begins on page 6 of Appendix 8-C and is titled *Buffer Alternative 3: Width*
 30 *Based on Wetland Category, Intensity of Impacts, Wetland Functions, or Special*
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32 ²⁹ See *Wetlands Volume 2*, Appendix 8-C, p. 3.

³⁰ *Id.*, p. 4.

³¹ *Id.*, p. 5.

³² *Wetlands Volume 2*, Appendix 8-C, 8C-2, p. 2.

1 *Characteristics*. Both Tables follow and are also prefaced with a reference to Buffer
2 Alternative 3.³³

3 Consequently, to determine whether the County's compliance legislation comports
4 with BAS, it is necessary to compare the wetland buffer widths included in the Ordinance
5 with *Wetlands Volume 2's* Table 8C-2 from Alternative 2.

6 The County's buffer approach differs from DOE's as the County provided separate
7 water quality and habitat buffer widths in the Ordinance while DOE's buffer widths are
8 designed to include both. The compliance ordinance's Table 3.3³⁴ sets applicable water
9 quality buffer widths while Table 3.4³⁵ creates habitat buffer widths:

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12 **Table 3.3 Water Quality Buffers**

<u>Water Quality Buffers</u>			
<u>Wetland Rating</u>	<u>Land Use Intensity</u>		
	<u>Low</u>	<u>Medium</u>	<u>High</u>
<u>Category I Bogs and Natural Heritage Wetlands</u>	<u>125 feet</u>	<u>190 feet</u>	<u>250 feet</u>
<u>Categories I and II</u>	<u>50 feet</u>	<u>75 feet</u>	<u>100 feet</u>
<u>Category III</u>	<u>40 feet</u>	<u>60 feet</u>	<u>80 feet</u>
<u>Category IV</u>	<u>25 feet</u>	<u>40 feet</u>	<u>50 feet</u>

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32 ³³ *Id.*, Appendix 8-C, p. 1, also refers to the various tables included in that appendix. Tables 8C-6 and 8C-7 both refer in parentheses to Buffer Alternative 3.

³⁴ Ordinance 2-2014, p. 41.

³⁵ *Id.*, p. 47.

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Table 3.4

<u>Habitat Buffers</u>			
<u>Wetland Category</u>	<u>Land Use with Low Impact</u>	<u>Land Use with Moderate Impact</u>	<u>Land Use with High Impact</u>
<u>I</u>	<u>150 feet</u>	<u>225 feet</u>	<u>300 feet</u>
<u>II</u>	<u>150 feet</u>	<u>225 feet</u>	<u>300 feet</u>
<u>III</u>	<u>75 feet</u>	<u>110 feet</u>	<u>150 feet</u>
<u>IV</u>	<u>25 feet</u>	<u>40 feet</u>	<u>50 feet</u>

In order to compare the County’s buffer widths with those from *Wetlands Volume 2*, it is necessary to compute various buffer widths using the County’s methodology. SJCC 18.30.150. A (Ordinance 2-2014, p. 35) provides that buffer calculations apply if the development activity, vegetation removal, or site modification is within 300 feet of a wetland. Then, SJCC 18.30.150.D.1 (Ordinance, p. 40, line 12) adds:

Two separate buffer components, a water quality component, and habitat component are considered in the procedure. When determining the required buffers for a wetland, the stricter (i.e., wider) applies except where otherwise noted. . . ³⁶

The Water Quality Buffer is determined first based on the wetland rating category and land use intensity from Tables 3.3 and 3.3A provided in Step 4 below.... The Habitat Buffer is then determined from Table 3.4.

Drainage direction is also taken into account (Step 2, p. 40):

If the area proposed to be developed or modified drains to the wetland, delineate the wetland in accordance with subsection (E) of this section, and proceed to determine the required Water Quality Buffer. If the area proposed

³⁶ The sentence “When determining the required buffers for a wetland, the stricter (i.e., wider) applies except where otherwise noted. . .” should have been deleted during the County’s compliance legislation adoption, according to the County. San Juan County’s Supplemental Response, p. 3.

1 to be developed or modified does not drain to the wetland, a Water Quality
2 Buffer is not required and only a Habitat Buffer applies.

3 Step 3, page 41 requires a determination of the wetland rating. The County's ratings
4 include Category I Bogs and Natural Heritage Wetlands, as well as Categories I-IV from the
5 DOE Rating System. Step 3 also includes a notification that wetlands containing certain
6 protected plants or animals may raise the wetland rating.
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8 Step 4 then applies Tables 3.3 and 3.3A to determine the width of the Water Quality
9 Buffer. Examples of application of those steps follow:

- 10 • Assume the proposed development is of a medium Land Use Intensity (using
11 Table 3.3A, p. 42) and that its location drains to a Category III wetland.
12 Applying those facts to Table 3.3 (p. 41) produces a 60 foot Water Quality
13 Buffer.
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- 15 • The next step is to determine the Habitat Buffer (pp. 46, 47). Table 3.4
16 establishes a 110-foot Habitat Buffer.

17 The County's system produces a total buffer width of 110 feet; the first 60 feet, beginning at
18 the wetland, constitutes the Water Quality Buffer, and is followed by a 50-foot Habitat Buffer
19 for the remainder.³⁷ DOE's recommended buffer from *Wetlands Volume 2*, Table 8C-2, for a
20 Category III wetland with a moderate impact use intensity is also 110 feet.
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22 Calculations for Category I or II wetlands and a high intensity use produce a Water
23 Quality Buffer of 100 feet and a Habitat Buffer of 300 feet. Again, applying the County's
24 explanation, the total buffer width would be 300 feet including a Water Quality Buffer of 100
25 feet and a Habitat Buffer encompassing the remaining 200 feet.³⁸ The DOE Table 8C-2
26 buffer is also 300 feet. Finally, Category I Bogs and Natural Heritage Wetlands are subject
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31 ³⁷ San Juan County's Supplemental Compliance Response, p. 4. The County's attorney restated and clarified
the buffer calculation methodology at the second compliance hearing.

32 ³⁸ Counsel for Friends acknowledged during the second compliance hearing that the total buffer widths
determined under both the County and DOE systems appeared to be the same. The Friends, however,
contend the use exceptions allowed by the County result in inadequate critical area protection, contrary to the
BAS.

1 to buffer widths of 125, 190 or 250 feet depending on the land use intensity under the
2 County's system while DOE's recommendations are identical.³⁹

3 If the proposed development activity does not drain to a wetland, only the Habitat
4 Buffer applies.⁴⁰ Examples of County and DOE buffer widths in similar situations reflect the
5 following:

		County ⁴¹	DOE ⁴²	
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7				
8	Category III	medium intensity use	Habitat Buffer = 110 feet	---110 foot buffer
9	Category I,	high-intensity use	Habitat Buffer = 300 feet	---300 foot buffer
10	Category II	low intensity use	Habitat Buffer = 150 feet	---150 foot buffer
11				

12 The Board notes the statement in *Wetlands Volume 2* that "In general, the
13 information available indicates that buffers between 100 and 300 feet are adequate to
14 protect most species closely associated with wetlands in Washington."⁴³

15 While the methodology differs between the County's approach and that of DOE, the
16 County's results in total buffer widths equal to those recommended by DOE. The one
17 evident difference between the County's system and DOE's is that different uses/activities
18 are allowed within water quality and habitat buffers with the County's system.

19 The Board finds San Juan County has achieved compliance regarding the application
20 of buffer widths for wetlands. The Friends of the San Juans has failed to establish the action
21 taken by San Juan County related to wetland buffer widths, and the activities allowed within
22 them, is clearly erroneous in light of the goals and requirements of chapter 36.70A RCW.
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25 **B. Wetland buffer widths applied to Aquatic FWHCAs**

26 The basis for compliance challenges regarding Aquatic FWHCA buffer widths raised
27 by both CSA and the Friends is the County's use of the previously discussed wetland water
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31 ³⁹ DOE's recommendations are included in Table 8C-7, *Wetlands Volume 2*, which references Buffer
Alternative 3.

32 ⁴⁰ Ordinance 2-2014, p. 40, Step 2

⁴¹ Ordinance 2-2014, p. 47, Table 3.4

⁴² *Wetlands Volume 2*, Appendix 8-C, p. 5, Table 8C-2

⁴³ *Wetlands Volume 2*, Appendix 8-A, p. 3

1 quality buffer widths for FWHCA buffers. The adopted Aquatic FWHCA water quality
2 buffers⁴⁴ included in the Ordinance's Table 3.6 vary based on land-use intensity: for low
3 intensity land-use activities, buffers are set at 50 feet, for medium at 75 feet and for high
4 intensity at 100 feet. In addition, buffers are to be increased by 50 percent on slopes
5 exceeding 30 percent.⁴⁵

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7 CSA argues inclusion of the 50/75/100-foot buffers included in the Ordinance's Table
8 3.6 fail to incorporate BAS as it does not take into account San Juan County's varied marine
9 shoreline conditions, or the actual impact from proposed development.⁴⁶ For example, CSA
10 contrasts a bedrock marine shoreline fronting deep water subject to fast currents with a
11 shallow bay with extensive mudflats and little current. CSA contends use of wetland buffers
12 for any critical area other than wetlands is rejected by BAS, citing Hruby, where the
13 following appears:

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15 The rating system is primarily intended for use with vegetated, freshwater,
16 wetlands, as identified using the State of Washington delineation method
17 (WAC 173-22-080). It also categorizes estuarine wetlands but does not
18 characterize their functions. The rating system, however, does not
19 characterize streambeds, riparian areas, and other valuable aquatic
resources.⁴⁷

20 CSA also refers to a Technical Memorandum from Dr. Lyndon Lee, a document prepared at
21 the request of CSA, in which the author stresses the need to tailor regulatory approaches to
22 specific conditions.⁴⁸

23
24 The Friends argue BAS supports buffers in excess of those in Table 3.6. It states the
25 adopted buffer widths combined with the "allowance for significant development" fail to
26 protect FWHCAs from negative impacts. In support of the Friend's argument for wider

27
28 ⁴⁴ Aquatic FWHCAs contain or are inundated with water at some point during a normal year and include:
29 streams, lakes, naturally occurring ponds providing fish and wildlife habitat, shellfish areas, kelp and eelgrass
30 beds, spawning and holding areas for forage fish, mud flats, intertidal habitats with vascular plants, pocket
beaches, bluff backed beaches, and areas which have a primary association with various listed species.

31 Ordinance 2-2014, p. 57, ¶ E.

32 ⁴⁵ Ordinance 2-2014, Table 3.6, p. 60.

⁴⁶ CSA's Objections to a Finding of Compliance/Invalidity Request, p. 3.

⁴⁷ *Washington State Wetland Rating System For Western Washington*, Revised Annotated Version August
2006, Ecology Publication # 04-06-025, p. 2.

⁴⁸ IR 51488, *Technical Memorandum*, Lyndon H. Lee, August 18, 2012. Another Lee, *Technical Memorandum*
is dated April 29, 2012, IR 0700183.

1 buffers, a Washington Department of Fish and Wildlife publication (*Protection of Marine*
2 *Riparian Functions in Puget Sound*, below cited as *Brennan*) is referenced extensively.⁴⁹

3 The County acknowledges the *Brennan* analysis and recommendations referred to by
4 the Friends, states it considered those recommendations, but opted to use DOE's wetland
5 buffer widths after concluding the recommended widths were comparable.⁵⁰

6 The County observes the BAS states the adopted buffer areas provide similar water
7 quality protection for both marine and freshwater, citing its *BAS Synthesis*:
8

9 Although information on the application and effectiveness of marine buffers is
10 more limited than for freshwater systems, many of the same physical
11 processes occur, particularly with regard to transport of pollutants, organic
12 material, and food and nutrients from the land to the water.⁵¹

13 It also refers to the following from the *BAS Synthesis*:

14 Because much of the existing riparian and buffer literature is related to
15 freshwater systems, WDFW established a panel of scientists in 2008 to
16 assess the freshwater riparian scientific literature to establish its applicability
17 to marine shoreline systems. The result of the literature review, and the
18 Marine Riparian Workshop Proceedings conducted by the scientific panel in
19 2008 was a common consensus that freshwater riparian buffer research was
generally applicable to marine shorelines (2009).⁵²

20 The County then states it compared the recommendations contained in *Brennan* and the
21 DOE buffer widths and found each produced a similar range of buffer widths. With the goal
22 of simplification in mind, it adopted DOE's wetland buffer widths ". . . so that there would be
23 one system for all of those areas."⁵³

24 First of all, the Board acknowledges the statement in the *BAS Synthesis* that the
25 science regarding application and effectiveness of marine buffers is more limited than that
26 for freshwater systems.⁵⁴ The Board also notes the statements in the *BAS Synthesis* that
27 similar physical processes occur with both marine shorelines and freshwater, "particularly
28

29
30 ⁴⁹ IR 3761, *Protection of Marine Riparian Functions in Puget Sound, WA*, Brennan et al.

31 ⁵⁰ Ordinance 2-2014, p. 9, ¶ XXII; Transcript, p. 108.

32 ⁵¹ IR 5743, *San Juan County Best Available Science Synthesis*, p. 64.

⁵² IR 5745, *San Juan County Best Available Science Synthesis*, p. 66.

and *Protection of Marine Riparian Functions in Puget Sound, WA*, Brennan. et al, p. 5.

⁵³ Compliance Hearing Transcript, p. 108.

⁵⁴ IR 005743.

1 with regard to transport of pollutants, organic material, and food and nutrients from the land
2 to the water,”⁵⁵ together with the *Brennan* conclusion that “freshwater riparian buffer
3 research is generally applicable to marine shorelines.”⁵⁶

4 Having said that, under Ordinance 2-2014, Aquatic FWHCAs are potentially subject
5 to water quality buffers,⁵⁷ Tree Protection Zones,⁵⁸ coastal geologic buffers⁵⁹, and additional
6 regulations designed to protect specific named plants and animals,⁶⁰ just as they were in the
7 originally challenged Ordinance, No. 29-2012.⁶¹ In that ordinance, the aquatic water quality
8 buffers were the same as those for wetlands, as they are with the compliance ordinance.
9 However, Ordinance No. 29-2012 included a difference: its buffers were sized for 60%
10 pollution removal.⁶² In reaching its conclusion of noncompliance, the Board found a 60%
11 pollution removal percentage did not reflect consideration of BAS. The Board also
12 determined the minimum water quality buffers (30 feet) fell outside of the range of BAS⁶³
13 and, when combined with the low percentage pollution removal, resulted in noncompliance
14 with RCW 36.70A.060(2) and RCW 36.70A.172(1).
15
16

17 Through adoption of Ordinance 2-2014, the minimum buffer widths are 50 feet for
18 proposed land uses with low impact, 75 feet for moderate impacts and 100 feet for high
19 impact land uses.⁶⁴ Those widths comport with DOE recommendations and also include a
20 pollution removal percentage of 70 percent or more, as indicated by the following:
21
22

23 ⁵⁵ *Id.*

24 ⁵⁶ *Id.*, p. 005745.

25 ⁵⁷ Ordinance 2-2014, p.60, Table 3.6.

26 ⁵⁸ *Id.*, Table 3.7.

27 ⁵⁹ *Id.*, p. 58. Coastal geologic buffers apply to areas subject to erosion caused by currents, tidal action, or
28 waves.

29 ⁶⁰ *Id.* p. 73, Table 3.9.

30 ⁶¹ IR 040136, Ordinance No. 29-2012, Figure 3.2; Final Decision and Order, p. 62.

31 ⁶² Final Decision and Order, p. 62: “The water quality buffers applicable to FWHCAs are the same as those for
32 wetlands with the exception that the buffer is sized for 60% pollution removal.” IR 40134-40135.

⁶³ Final Decision and Order, p. 52: “The County has adopted water quality buffer widths ranging from 30 feet to
205 feet for wetlands with a high water quality sensitivity, 30 to 160 feet for medium and 30 to 125 feet for low
impacts, buffer widths which on the low end fall outside the DOE recommendations. The County states it used
the Mayer recommendations regarding buffer width rather than DOE’s. However, a review of Mayer fails to
support the establishment of water quality buffers as narrow as 30 feet.”

FDO, p. 53: “The County minimum water quality buffer widths are not supported by the Mayer analysis and
fall outside of the range of BAS.”

⁶⁴ Ordinance 2-2014, p. 60.

1 **8E.2.3.1 Width of Buffers**

2 **In both eastern and western Washington:** 100 feet for proposed land uses
3 with high impacts; 75 feet for moderate impacts; 50 feet for low impacts.
4 The functions of water quality improvement within a wetland can be
5 degraded if excess pollutants (e.g., sediments, nutrients, toxic materials)
6 enter the wetland. Buffers of 100 feet are recommended for wetlands that are
7 currently performing these functions well, in order to prevent further
8 degradation. Reviews of data indicate that a buffer of approximately 100 feet
9 will remove 70% or more of the sediment and pollutants from surface runoff
10 before they reach the wetland (Desbonnet, et al. 1994). This was judged to
11 be adequate to prevent further degradation even though specific
12 experimental data are lacking to confirm this assumption.⁶⁵

13 The Board appreciates CSA’s continuing focus on the need to fashion buffer widths
14 to take into account the varied types of shorelines and marine characteristics, in essence a
15 property-specific variable buffer width approach to protection of FWHCAs. The variable-
16 width approach was also supported by Dr. Lyndon Lee, as argued by CSA.⁶⁶ CSA and
17 Wright both cite a recent DOE wetland science update, hereinafter referred to as the
18 *Update*.⁶⁷ CSA points to the *Update*’s focus on site-specific factors.⁶⁸ It should be noted,
19 however, that several observations in the *Update* make it clear the information included in
20 that publication does not address how its information can be incorporated into critical areas
21 ordinances.⁶⁹

22 Establishing property-specific buffers is indeed one approach and, as stated in
23 *Wetlands Volume 2* “. . . is probably the most consistent with what a review of the scientific
24 literature reveals about buffer effectiveness.”⁷⁰ However, that is not the only method: “Three
25

26 ⁶⁵ IR 9465; *Wetlands Volume 2*. Appendix 8-E. 2.3.1.

27 ⁶⁶ Neither Lee’s Technical Memorandum nor the Hruby *Update on Wetland Buffers* are included in the BAS
28 Synthesis assembled by the County during its years-long critical areas regulations update.

29 ⁶⁷ Hruby, T. 2013. *Update on Wetland Buffers: The State of the Science, Final Report*, October 2013.
30 Washington State Department of Ecology Publication #13-06-11.

31 ⁶⁸ *Update* states wetland science is constantly increasing and changing with additional research, and that
32 includes the science related to the ability of buffers to protect the functions and values of critical areas. *Update*
33 on *Wetland Buffers*, p. 1.

34 ⁶⁹ DOE introduction to the availability of the *Update*: “This update does not address how this new information
35 can be incorporated into critical areas ordinances.” *Update*, p. 2: “This synthesis DOES NOT contain agency
36 recommendations or suggestions for implementing programs to protect or manage wetlands using buffers.”
37 (emphasis in original).

38 ⁷⁰ *Wetlands, Vol. 2*, Section 8.3.8.1, p. 8-38.

1 basic types of buffer regulations are generally recognized: variable-width, fixed-width, or
2 some combination.”⁷¹ As *Wetlands Volume 2* states: “. . . this approach [variable-width] is
3 time-consuming, costly to implement, and provides a less predictable outcome.”⁷² The
4 buffer width systems suggested by DOE and the one adopted by the County employ an
5 approach which combines a fixed-width buffer system with site-specific variables.
6

7 The methodology suggested by CSA would have been an option. However, the
8 County took a different approach: a combination of a fixed width method with site-specific
9 variables. *Wetlands Volume 2* observes “Some drawbacks of the fixed-width approach can
10 be rectified by using a wetland rating system that divides wetlands into different categories
11 based on specific characteristics. Then different standards for buffer width can be assigned
12 to each category. This approach provides predictable widths, yet allows some tailoring of
13 buffer widths to wetland functions”⁷³ and then states “Most local governments in Washington
14 currently designate buffer widths based on the state wetland rating systems or a rating that
15 is similar.”⁷⁴
16

17 The Board finds San Juan County has achieved compliance regarding the application
18 of wetland buffer widths to FWHCAs. The Friends of the San Juans, CSA and Wright have
19 failed to establish the action taken by San Juan County related to Aquatic FWHCA buffers is
20 clearly erroneous in light of the goals and requirements of chapter 36.70A RCW.
21

22 **C. Departure from BAS**

23 Some of the issues before the Board involve the County’s departure from BAS in its
24 adopted compliance development regulations, including: the allowance of some on-site
25 sewage system components in critical areas and their buffers, buffer averaging in UGAs and
26 the modification of land use tables regarding agriculture. The requirement to include BAS is
27 found in RCW 36.70A.172(1):
28

29 In designating and protecting critical areas under this chapter, counties and
30 cities shall include the best available science in developing policies and
31

32 ⁷¹ IR 5569, BAS Synthesis, p. 36.

⁷² *Wetlands, Vol. 2*, Section 8.3.8.1, p. 8-38.

⁷³ *Id.*

⁷⁴ *Id.*, p. 8-39.

1 development regulations to protect the functions and values of critical areas.
2 In addition, counties and cities shall give special consideration to
3 conservation or protection measures necessary to preserve or enhance
4 anadromous fisheries.

5 WAC 365-195-915(1) addresses a jurisdiction's departure from BAS (relevant portion
6 underlined):

7 To demonstrate that the best available science has been included in the
8 development of critical areas policies and regulations, counties and cities
9 should address each of the following on the record:

10 (a) The specific policies and development regulations adopted to protect
11 the functions and values of the critical areas at issue.

12 (b) The relevant sources of best available scientific information included
13 in the decision-making.

14 (c) Any nonscientific information—including legal, social, cultural,
15 economic, and political information—used as a basis for critical area policies
16 and regulations that depart from recommendations derived from the best
17 available science. A county or city departing from science-based
18 recommendations should:

19 (i) Identify the information in the record that supports its decision to depart
20 from science-based recommendations;

21 (ii) Explain its rationale for departing from science-based
22 recommendations; and

23 (iii) Identify potential risks to the functions and values of the critical area
24 or areas at issue and any additional measures chosen to limit such risks.

25 State Environmental Policy Act (SEPA) review often provides an opportunity
26 to establish and publish the record of this assessment.

27 BAS departure has also been considered by the appellate courts.

28 Because the GMA merely requires a county to “include” the best available
29 science in its record and does not require a county to follow the best
30 available science, a county may depart from the best available science if it
31 provides a reasoned justification for such a departure. *Yakima County v. E.*
32 *Wash. Growth Mgmt. Hearings Bd.*, citing *Swinomish*, 161 Wn.2d at 430-
31.⁷⁵ (emphasis added)

Moreover, the GMA does not require the county to follow BAS; rather, it is
required to “include” BAS in its record. RCW 36.70A.172(1). Thus, the county
may depart from BAS if it provides a reasoned justification for such a
departure. See *Ferry County v. Concerned Friends*, 155 Wn.2d 824, 837-38,

⁷⁵ 168 Wn. App. 680, 691 (2012).

1 123 P.3d 102 (2005); WAC 365-195-915(1)(c)(i)-(iii), Swinomish Indian Tribal
2 Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.⁷⁶

3 The *Yakima* court referred to the GMHB' s FDO observation:

4 “[s]ince the County did not believe it was deviating from [best available
5 science], it made no specific findings” to explain its departure from the
6 scientific studies or to identify other goals of the GMA it was implementing by
7 making such a choice.⁷⁷

8 Remand allows Yakima County to reconsider the best available science and
9 either amend the buffers to comply with that science or establish a reasoned
10 justification for departure from that science.⁷⁸

11
12 The question before the Board in addressing those compliance issues where San
13 Juan County’s action failed to include BAS is whether the County “established a reasoned
14 justification for departure.”

15 As more fully addressed below, the Board finds that in three specific instances, the
16 County acknowledged its compliance legislation departed from, or may have departed from,
17 BAS. That legislation includes the following:

- 18
19 1. Allowance of sewage disposal systems in critical areas and their buffers;
20 2. Authorization of water quality buffer averaging in UGAs;
21 3. Amendment of land use intensity tables regarding agriculture.

22 **D. Avoidance/Mitigation**

23 Another allegation raised by the Friends is applicable to several of the compliance
24 issues before the Board. Specifically, the allegation is that the County omits the first step in
25 mitigation sequencing, avoidance. The issue of avoidance generated lengthy discussions
26 during the compliance hearings and involves an interpretation of the County’s Code in
27 regards to mitigation sequencing, specifically the avoidance of actions that would negatively
28 affect critical area functions and values.⁷⁹ That argument arises, for example, with the
29 compliance legislation’s allowance of some sewage disposal systems components in critical
30

31 _____
32 ⁷⁶ 161 Wn.2d 415, 430 (Wash. 2007).

⁷⁷ *Yakima County v. E. Wash. Growth Mgmt. Hearings Bd.*, 168 Wn. App. 680, 693.

⁷⁸ *Id.*, p. 694.

⁷⁹ See, e.g., Compliance Hearing Transcript, pp. 105-107, 128-130, 144-146.

1 areas and their buffers, the allowance of “temporary development activities” and the general
2 exemption for the installation and construction of certain utility lines and equipment.

3 Mitigation sequencing is addressed in *Wetlands Volume 1* and, as is evident,
4 avoidance is the first step in that process:

5 Mitigation is a series of actions that requires addressing each action, or step,
6 in a particular order. This sequence of steps is used to reduce the severity of
7 negative impacts from activities that potentially affect wetlands. When a
8 change in land use has the potential to adversely affect a wetland, regulatory
9 agencies require the applicant to illustrate how the project has considered
10 the six sequential steps of mitigation. According to the rules implementing the
11 Washington State Environmental Policy Act (Chapter 197.11 WAC),
mitigation involves the following:

12 1. Avoiding the impact altogether by not taking a certain action or parts
13 of an action;

14 2. Minimizing impacts by limiting the degree or magnitude of the action
15 and its implementation, by using appropriate technology, or by taking
16 affirmative steps to avoid or reduce impacts;

17 3. Rectifying the impact by repairing, rehabilitating, or restoring the
18 affected environment;

19 4. Reducing or eliminating the impact over time by preservation and
20 maintenance operations during the life of the action;

21 5. Compensating for the impact by replacing, enhancing, or providing
22 substitute resources or environments; and/or

23 6. Monitoring the impact and taking appropriate corrective measures
24 (WAC 197.11.768). (emphasis added)⁸⁰

25 The Friends repeatedly stress the argument that the County does not require
26 avoidance:

27 Although the provisions [regarding on-site sewage system components]
28 reference the mitigation sequence that the CAO establishes, they inherently
29 authorize a departure from the principal step in that sequence by allowing
30 development to skip the highest priority avoidance of impacts.⁸¹

31 During the first Compliance Hearing, counsel for the Friends stated:

32 It does state that mitigation requirements are designed and required to
protect critical areas from potential adverse impacts. That's one of the

⁸⁰ *Wetlands Volume 1*, Chapter 6, p. 6-4, Section 6.2.1.

⁸¹ Petitioner Friends of the San Juans' Objections to Finding of Compliance, p. 6.

1 statements that they make here. And yet that statement omits the fact that
2 one skips over the avoidance step in the mitigation sequence, which is really
3 the premier step in a mitigation sequence, so it does not necessarily protect
4 critical areas.⁸²

5 The Friends argument is based on the inclusion of the phrase “reasonable efforts are
6 made to avoid” in reference to many of the uses allowed within critical areas or their
7 buffers.⁸³ For example, some on-site sewage disposal system components are allowed to
8 be placed within wetlands and their buffers subject to the caveat that “reasonable efforts are
9 made to avoid impacts.” Similarly, “temporary development activities” are authorized within
10 wetland buffers subject to the same caveat as the allowance of certain storm water
11 management components.⁸⁴ The Friends argue the “reasonable efforts” clause conflicts with
12 the County’s assertion that the avoidance step of the mitigation sequencing process applies.
13 Rather, the Friends take the position the critical areas regulations’ use of the terms
14 “reasonable efforts to avoid” in conjunction with “must mitigate” indicates there are two
15 separate processes, and that only mitigation is required, thus skipping the avoidance step.⁸⁵

17 First of all, the Board agrees with the County’s observation regarding the difficulty
18 one meets in interpreting the SJCC’s requirement to first avoid impacts to critical areas.
19 Avoidance as the first step in the mitigation sequencing is indeed difficult to find.
20

21 However, the Board notes Table 3.5 and Table 3.8 are both prefaced with the
22 following paragraph:

23 Structures, uses and activities that are listed as “yes” uses in Table 3.5 [or
24 Table 3.8] below are allowed in wetlands or wetland buffers [or within aquatic
25 FWHCAs and required water quality buffers], subject to compliance with the
26 San Juan County Code. State or federal requirements administered by the
27 WA Department of Ecology, WA Dept. of Fish and Wildlife, WA Dept. of
28 Natural Resources, or U.S. Army Corps of Engineers may also apply to these
29 areas. (emphasis added)

31 ⁸² Compliance Hearing Transcript, p. 72.

32 ⁸³ Compliance Hearing Transcript, p., 144.

⁸⁴ Ordinance No. 2-2014, Table 3.5 (pp. 49, 50, 51), subsections f, n (a section identical to “f”), p, and u; Table 3.8 (pp. 63, 64, 65), subsections g, o, and s).

⁸⁵ See Compliance Hearing Transcript, p. 145.

1 Compliance with the San Juan County Code would arguably trigger the mitigation
2 sequencing requirements of SJCC 18.30.110.E.8.d (p. 27 of Ordinance 2-2014) and
3 18.30.160.E.7.a.i.(A) (p. 67 of Ordinance 2-2014). Avoidance is listed as the first step in
4 those mitigation sequencing processes.

5 In addition, the County strenuously denies the allegation regarding avoidance made
6 by the Friends:

7
8 And this seems like a good time to address Mr. Loring's concern about
9 avoidance in the mitigation sequencing the County has. I believe his claim
10 was that we don't require avoidance as part of mitigation. That is not
11 accurate. It's perhaps not as obvious when you look at it as he may care for.
12 I think typically, when you go through mitigation sequencing, it says right at
13 the top "avoid," and if you can't avoid, then do this, then do this.

14 And you have to search for it a little bit more in our ordinance, but it is there.
15 For areas within the shoreline, you can find it here on the ordinance on page
16 67. It says, "The following mitigation sequence: (A) avoid the impact
17 altogether by not taking the action or part of the action," and then you go on
18 to B. That's within the shoreline. For areas outside the shoreline, you can find
19 the mitigation avoidance requirement in San Juan County Code 18.30.110(E)
20 8(d) as in "dog." And it has similar language, but it's for the upland areas. . . .
21 If reasonable efforts are made to avoid, it will later require mitigation, and
22 mitigation does require you to go through that sequencing, first seeing if you
23 can avoid it.⁸⁶

24 So you first have to have established that you can't do this somewhere else
25 under the avoidance part of the mitigation.⁸⁷

26 While the County Code in this regard is less than a model of clarity, the Board must
27 defer to the County's interpretation, provided that interpretation is logical.⁸⁸ In this instance,
28 the Board concludes the County's reading of the regulations is a plausible one. The Board

29 ⁸⁶ *Id.*, p. 105, line 23 and following.

30 ⁸⁷ *Id.*, p. 121, lines 18-20.

31 ⁸⁸ *Keller v. Bellingham*, 92 Wn.2d 726, 731 (1979): "Considerable judicial deference is given to the construction
32 of legislation by those charged with its enforcement. *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d
441, 536 P.2d 157 (1975); *Morin v. Johnson*, 49 Wn.2d 275, 300 P.2d 569 (1956)."

Citizens for a Safe Neighborhood v. City of Seattle, 67 Wn. App. 436, 440, (1992): "It is a well-established rule
of statutory construction that considerable judicial deference should be given to the construction of an
ordinance by those officials charged with its enforcement."

WEAN v. Island County, Case No. 95-2-0063 (Compliance Order, p. 8, Oct. 6, 1997). A GMHB will review a
DR's language and also its interpretation by those who administer it in deciding whether the regulation meets
the substantial interference test.

1 finds and concludes, based on the language of SJCC 18.30.110.E.8.d (p. 27 of Ordinance
2 2-2014) and 18.30.160.E.7.a.i.(A) (p. 67 of Ordinance 2-2014), that under the San Juan
3 County Code, the first requirement is avoidance of an activity that would adversely affect a
4 critical area when authorization of the use first requires that “reasonable efforts are made to
5 avoid” impacts to critical area functions and values.⁸⁹ That requirement applies to the
6 allowance of temporary development activities,⁹⁰ the installation and construction of a
7 limited number of utility lines and equipment,⁹¹ and on-site sewage disposal system
8 components⁹² included in the Ordinance’s Tables 3.5 and 3.8.
9

10 11 **E. Sewage Disposal Systems in Wetlands**

12 **Final Decision and Order** The 2013 FDO noted that in allowing “components” of
13 sewage disposal systems in wetlands, the County explicitly took action [Ordinance 28-2012]
14 to “depart from the BAS.”⁹³

15 In the FDO, the Board found and concluded that the County’s allowance of sewage
16 disposal systems in wetlands, FWHCAs, and their buffers does not comply with RCW
17 36.70A.060 and RCW 36.70A.172, and such actions were not guided by RCW 36.70A.020
18 (9) and (10). The Board reasoned, in part, as follows:
19

20 This finding [departing from Best Available Science] does not identify any
21 science that supports sewage systems in wetlands and their buffers nor has
22 it offered any reasoned justification for departing from the BAS
23 recommendations to keep sewage systems and pollutants away from
24 wetlands. There is no science-based reasoning supporting the “no
25 practicable alternative” provision. There is no information before the Board
26 regarding how “state standards” would apply. The Board also observes that
27 while authorization for the installation of such systems within a wetland is
28 allowed only if no practicable alternative exists, there is no such qualifier for
29 installation of these systems in FWHCAs. Additionally, there are no apparent
30 standards for ascertaining the lack of a practicable alternative.

31 ⁸⁹ The County would be well served if the avoidance/mitigation requirement was more clearly set forth.

32 ⁹⁰ Ordinance 2-2014, p. 49, 50, Sections “f” and “n” and p. 63, Section “g”.

⁹¹ Ordinance 2-2014, p. 22 — SJCC 18.30.110(C)(3)(b).

⁹² Ordinance 2-2014, p. 51, Section “u” and p. 64, Section “s”.

⁹³ FDO, p. 57. See also Ordinance 28-2012, p. 10 of 39.

1 The County is required to “protect” critical areas, including wetlands and
2 FWHCAs, and assure there is “no net loss” of ecological functions and
3 values. The science in the record points to potentially significant harm and
4 loss of ecological functions if sewage disposal systems are allowed in
5 wetlands and FWHCAs. The science also points to further degradation of
6 water quality in the Puget Sound ecosystem, potentially in conflict with a key
7 State priority to restore Puget Sound. The County cannot protect critical
8 areas and assure no net loss of the functions and values when on-site
9 sewage systems are allowed in wetlands and FWHCAs.

10 Allowing the installation of on-site sewage disposal systems in designated
11 wetlands, FWHCAs, and their buffers fails to protect critical areas and fails to
12 comport with BAS.⁹⁴

13 **Ordinance 2-2014**

14 In response to the 2013 FDO, on March 5, 2014 the County adopted Ordinance 2-
15 2014 in an attempt to achieve compliance with the GMA. Ordinance 2-2014 allows “sleeved
16 and water-tight sewer lines” in wetlands but no longer allows water-tight septic tanks and
17 pump chambers in wetlands.⁹⁵ This latest ordinance also states the County’s rationale for
18 departing from science-based recommendations against allowing sewage disposal systems
19 in wetlands.⁹⁶

20 **Positions of the Parties**

21 Petitioner Friends has the burden of proof to demonstrate the following: the County
22 failed to include the Best Available Science in developing regulations to protect the
23 functions and values of Wetlands and, for any departures from Best Available Science,
24 Friends must show the County failed to provide a reasoned justification.

25 The Friends assert the County’s amendments still fail to consider BAS or protect
26 critical areas. They contend the County created a “complicated scheme” rather than merely
27 excluding all sewage system components from FWHCA, wetlands, and their buffers. They
28 cite the concerns expressed in the BAS regarding the inability of on-site sewage systems to
29 effectively treat many substances, concerns considered and shared by the Board in the
30
31

32 ⁹⁴ FDO, pp. 57-58.

⁹⁵ Ordinance 2-2014, p. 51 of 81 (March 5, 2014).

⁹⁶ *Id.* at pp. 7-8.

1 FDO.⁹⁷ The Friends reference *Wetlands in Washington State, Vol. 2*, Appendix 8-E, page 9
2 which suggests maintaining a distance of 300 feet between “septic systems” and wetlands
3 draining to natural heritage wetlands,⁹⁸ concerns expressed in the BAS Synthesis regarding
4 the effect of non-saline water seepage on tidal wetlands,⁹⁹ and the inability of septic
5 systems to detoxify many synthetic chemicals¹⁰⁰. Finally, the Friends point to the Draft 2013
6 Year End Report which reflects that only 47% of on-site sewage systems located in
7 sensitive areas had current inspections in 2013.¹⁰¹

8
9 The County first states its compliance action differentiates between on-site sewage
10 system components and, when a component of such a system is allowed, it is only “. . .
11 when they conform with local and State requirements, reasonable efforts are made to avoid
12 impacts to wetland functions and values, and according to the County:

- 13 (A) Appropriate BMPs are used to minimize erosion, sedimentation, and
14 soil disturbance;
15 (B) For new systems, limited tree removal is allowed in habitat buffers,
16 provided:
17 (1.) Stumps are retained and disturbance of the soil and duff layer is
18 minimized;
19 (2.) The remaining forest consists of trees that are multi-aged and well
20 distributed across the buffer in the canopy cover for the remaining
21 forest is at least 65%;
22 (3.) All vegetation overhanging streams, ponds, lakes, wetlands, and
23 marine waters is retained; and
24 (4.) Trees equal to or greater than 12 inches dbh are retained; and
25 (C) Any adverse impacts to critical areas or their buffers are mitigated in
26 accordance with SJCC 18.30.110(E).¹⁰²

27 Secondly, the County asserts: the amended regulations do not allow water-tight
28 septic tanks and pump chambers within wetlands or FWHCAs; however, subject to the
29 preceding requirements, sleeved and water-tight sewer lines are allowed within wetlands,
30 FWHCAs and their associated buffers; drainfields are not allowed within wetlands or

31 ⁹⁷ FDO, p. 56.

⁹⁸ IR 009469.

⁹⁹ IR 5564.

¹⁰⁰ IR 5574.

¹⁰¹ IR 152125. The Board observes the percentage of such inspections had increased from 2012 when only
27% were current.

¹⁰² See Ordinance 2-2014, p. 51 of 81, Table 3.5, u.

1 FWHCAs, are not allowed within the water quality buffers of either but they may be
2 authorized outside of the water quality buffer associated with that critical area, again subject
3 to the aforementioned requirements. Finally, the County alleges any negative impacts to
4 critical areas are subject to mitigation requirements, including avoidance, minimizing
5 impacts, re-establishment, rehabilitation, restoration, creation and enhancement.¹⁰³
6

7 Applicable Law

8 The Growth Management Act requires counties and cities to protect the functions and
9 values of Critical Areas, including wetland ecosystems. RCW 36.70A.060(2), 36.70A.172(1),
10 RCW 36.70A.030(5), and WAC 365-196-830. "Protection" of Critical Areas "means
11 preservation of the functions and values of the natural environment, or to safeguard the
12 public from hazards to health and safety."¹⁰⁴ "Development regulations may not allow a net
13 loss of the functions and values of the ecosystem that includes the impacted or lost critical
14 areas."¹⁰⁵ Counties and cities must assure no net loss of functions and values and must
15 include the best available science.¹⁰⁶
16

17 GMA Planning Goal 10 states: "Protect the environment and enhance the state's high
18 quality of life, including air and water quality, and the availability of water."¹⁰⁷
19

20 In designating and protecting Critical Areas, "counties and cities shall include the best
21 available science [BAS] in developing policies and development regulations to protect the
22 functions and values of critical areas." RCW 36.70A.172(1).¹⁰⁸ Evidence of the Best
23 Available Science must be included in the record and must be considered substantively in
24 the development of critical areas policies and regulations.¹⁰⁹ "Although BAS does not
25 require the use of a particular methodology, at a minimum BAS requires the use of a
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29 ¹⁰³ Ordinance 2-2014, SJCC 18.30.110.E(8), pp. 25-28 & SJCC 18.30.160.E.7.a, pp. 67, 71.

30 ¹⁰⁴ WAC 365-196-830(3).

31 ¹⁰⁵ WAC 365-196-830(4).

32 ¹⁰⁶ WAC 365-196-830(8).

¹⁰⁷ RCW 36.70A.020(10).

¹⁰⁸ Underlining added.

¹⁰⁹ *Honesty in Env'tl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 532, 979 P.2d 864 (1999).

1 scientific methodology.”¹¹⁰ Although a county need not develop scientific information
2 through its own means, it must rely on scientific information and must analyze that
3 information using a reasoned process.¹¹¹

4 A county may depart from BAS if it provides a reasoned justification for such
5 departure. *Swinomish Indian Tribal Community v. WWGMHB*, 161 Wn.2d 415, 430-431
6 (2007). For example in *Swinomish*, Snohomish County decided not to require mandatory
7 riparian buffers because doing so would impose requirements to restore habitat functions
8 and values that no longer exist – the native vegetation along streams had been cleared long
9 before there was a legal impediment to doing so. The Supreme Court held that this was a
10 reasoned justification for departing from the Best Available Science because there was no
11 GMA requirement to enhance habitat.
12

13 **Board Analysis**

14 As to the County’s allowance of sleeved and water-tight sewer lines in wetlands, the
15 issue before the Board is whether the County provided a reasoned justification for departing
16 from the Best Available Science.
17

18 The Board’s September 6, 2013, FDO found that the County cannot protect critical
19 areas and assure no net loss of the functions and values when on-site sewage systems are
20 allowed in wetlands. Under Ordinance 2-2014 the County still allows certain components of
21 on-site sewage systems (“sleeved and water-tight sewer lines”) to be constructed and
22 operated in wetlands notwithstanding science in the record pointing to potentially significant
23 harm and loss of ecological functions if sewage disposal systems are allowed in wetlands.
24

25 There is no science in the record supporting the installation, construction, and
26 maintenance of individual “components” of sewage systems in wetlands, especially since
27 such systems can fail and cause direct harm to wetlands functions and values. In particular,
28 Washington State Department of Ecology cautions about construction and pollutants
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¹¹⁰ *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d. 824, 837 (2005).

¹¹¹ *Id.* at 836-837.

1 coming from septic “systems.”¹¹² Science in the record shows on-site sewage systems that
2 (1) over time fail to work as designed, (2) are not properly maintained, or (3) are not
3 designed to effectively treat the full-range pollutants can result in discharges and the loss of
4 Critical Area ecosystem functions and values. Pollution from failing on-site sewage systems
5 and excess nutrient inputs (e.g. phosphorus) to wetlands, lakes, streams, and into Puget
6 Sound are causing significant degradation of ecological functions and values around the
7 state.¹¹³ The federal Environmental Protection Agency estimates that 10% to 20% of U.S.
8 on-site sewage systems malfunction each year, causing pollution in the environment and
9 creating a risk to public health.¹¹⁴ Additionally, while the County has implemented an
10 education and inspection program, it has yet to meet the County’s inspection goals.¹¹⁵

11 Ordinance 2-2014 allows sleeved and water-tight sewer lines in wetlands when
12 “reasonable efforts are made to avoid impacts to wetlands functions and values” and
13 adverse impacts to wetlands are mitigated. But the term “reasonable efforts” is not defined,
14 and there are no standards for determining what qualifies as reasonable. Further,
15 “reasonable efforts” to avoid impacts are less rigorous than and do not meet the GMA’s
16 requirement to assure no net loss of the functions and values of wetland ecosystems.
17

18 WAC 365-190-090 provides:

19 The wetlands of Washington state are fragile ecosystems that serve a
20 number of important beneficial functions. Wetlands assist in reducing
21 erosion, siltation, flooding, ground and surface water pollution, and provide
22 wildlife, plant, and fisheries habitats. Wetlands destruction or impairment may
23 result in increased public and private costs and property losses. Additionally,
24 counties and cities should consider wetlands protection guidance provided by
25 the department of ecology, including the management recommendations
26

27
28 ¹¹² *Wetlands Volume 2*, “To protect the water quality functions of a wetland, the authors of Volume 1
29 recommend minimizing the local input of any additional pollutants generated by changes in land use. For
30 example, when a forest adjacent to a wetland is changed to a residential development care should be taken to
31 control the new input of sediment **from construction and the pollutants** coming from lawns, landscaping,
32 **septic systems**, and pets.” (emphasis added)

¹¹³ *Wetlands Volume 1*, p. 3-29; *2014/2015 Action Agenda for Puget Sound, Puget Sound Partnership*, pp. ES-
3, ES-104 (May 2014, officially noticed per WAC 242-030-630); *2013 State of the Sound Report on the
Recovery of Puget Sound*, Puget Sound Partnership, p. 64 (May 2014, officially noticed per WAC 242-030-630).

¹¹⁴ USEPA Septic System Fact Sheet at <http://water.epa.gov/infrastructure/septic/index.cfm> (accessed June
11, 2014; officially noticed per WAC 242-030-630).

¹¹⁵ San Juan County’s Draft 2013 Year End Report-Review of Environmental Health Programs/Activities, p. 2.

1 based on the best available science, mitigation guidance, and provisions
2 addressing the option of using wetland mitigation banks.

3 Moreover, there is BAS in the record indicating that the functions and values of
4 wetlands are degraded when human activities (1) modify wetlands vegetation, (2) disturb
5 soils [digging, trenching, tilling, compacting], (3) alter hydrologic functions, (4) degrade water
6 quality, (5) introduce invasive species:
7

8 Septic systems do not prevent nitrates, a major plant nutrient in wastewater,
9 from entering groundwater. Many wetlands in Washington receive at least
10 some of their water, if not all, from groundwater. This means that nutrients
11 released by septic systems can enter a wetland and impact species that are
12 rare or sensitive to disturbance in the same way as surface water. By
13 keeping septic systems at least 300 feet from the wetland edge (usually
14 called a *setback* in regulations) there is a better chance that impacts from
15 nutrients will be minimized. There is no “safe” setback, however, for septic
16 systems if there is a direct groundwater connection (underground flow)
17 between the septic system and the wetland. A 300-foot distance, however,
18 will increase the chance that the nitrogen will be diluted before it reaches the
19 wetland.¹¹⁶

20 Many [household chemicals and personal care products] are not consistently
21 removed by onsite septic systems [and] can be expected to occur chronically
22 in the effluent from many households . . . These include some surfactants
23 (detergents, shampoo, antibacterials), pharmaceuticals, estrogens, synthetic
24 fragrances, fire retardants (organobromines), and plastics (phthalates,
25 bisphenol-A). Household chemicals and personal care products may interfere
26 with fish and wildlife populations by influencing fertility, natural chemical cues
27 needed for homing and communication, and/or disease susceptibility; can
28 contaminate aquifers; and have been found in Puget Sound . . . water
29 seeping from septic systems or irrigation located immediately upslope can
30 dilute their [tidal wetlands] salinity and add nutrients, resulting in changes to
31 plants and animals of tidal wetlands. . . . Over 63,000 synthetic chemicals are
32 in common use in the United States, many in households with septic systems
incapable of effectively detoxifying them. . . . The incompleteness of septic
systems for processing surfactants, or the persistence of surfactants applied
with herbicides, is hinted at by the discovery of surfactants in every one of 32
lakes, ponds, and streams sampled in July-August 2008 in SJC [San Juan
County]. The incompleteness of septic systems for processing surfactants,
estrogenetic pharmaceuticals, and other household substances that may be
ecologically hazardous is also suggested by many peer-reviewed studies.

¹¹⁶ *Wetlands Volume 2*, p. 9.

1 Phosphorus and nitrate . . . nutrients are widely known to be significant
2 “nonpoint source” pollutants that can cause shifts in species composition and
3 habitat structure.¹¹⁷

4 Nutrients are introduced into runoff from a number of different sources that
5 include nutrients bound to sediment from construction sites, fertilizers applied
6 to lawns, and decomposing grass clippings and leaves left on impervious
7 surfaces. Nutrients are also increased in groundwater in areas where
8 wastewater is treated by septic systems. More specifically, nutrients from
9 septic systems have been correlated with an increase in nutrients in the
10 groundwater that flows into lakes and their associated wetlands in urbanizing
11 areas.¹¹⁸

12 Buffers will not adequately protect functions in a wetland if polluted waters
13 bypass the buffer and enter the wetland directly via pipes, ditches, or other
14 channels.¹¹⁹

15 Physically disturbing wetland soils during the dry season, through tillage,
16 compaction, excavation, or other means, can allow invasion by non-native
17 plant species. It can also destroy much of the viable seed bank. Tilling the
18 soil often reduces diversity, including both richness and evenness. The tillage
19 treatment disrupted the roots of perennials more than burning, and it
20 encouraged germination of annuals in the seed bank and colonization by
21 several invasive species. Invasive plants, especially non-native plants,
22 significantly alter the species composition of many wetlands, sometimes
23 even forming nearly monotypic stands. Continuously disturbing the soil, for
24 example through compaction and road building, can alter species
25 composition. These disturbed conditions can lead to a decline in both the
26 biomass of native species and a change in the soil conditions that support
27 them. Use of all-terrain vehicles also impacted wetlands on the Atlantic
28 coastal plain, reducing the density of seed in wetland seed banks and
29 allowing common rushes to displace rare species. Excavation and clearing of
30 gas pipeline rights-of-way through forested wetlands in Florida resulted in
31 increased species richness within the wetland clearings but an increased
32 percent cover of non-native species.¹²⁰

Generally, any use that results in the creation of impervious areas, clearing
of vegetation, or compaction of soils will be incompatible with buffer

¹¹⁷ *San Juan County Best Available Science Synthesis*, Ch. 2 *Wetlands*, pp. 16, 31, 41 and Ch. 4 *Upland Habitat*, pp. 17-18 (May 24, 2011).

¹¹⁸ *Wetlands Volume 1*, p. 3-29.

¹¹⁹ *Wetlands Volume 2*, p. 5.

¹²⁰ *Wetlands Volume 1*, p. 4-63.

1 functions. Typically, buffers need to be densely vegetated with appropriate
2 native vegetation to perform water quality and habitat-related functions.¹²¹

3 Not having any mainland, the San Juan Islands have less ecological
4 resilience. Native wildlife and plants are especially sensitive to introduced
5 species.¹²²

6 Excavation potentially removes the biologically-essential organic substrate
7 present in naturally-occurring wetlands, or at least may cause some
8 compaction of the organic substrate currently present.¹²³

9 Soil compaction reduces the effectiveness of wetlands buffers and is
10 incompatible with buffer functions.¹²⁴

11 Compacted soils found in lawns and landscaped areas function just as
12 impervious surfaces do in altering the water regime.¹²⁵

13
14 Compacted soil, deep excavation, and pipeline trenches can alter the water
15 regime.¹²⁶

16 The Board notes that the challenged Ordinance does not address impacts to wetland
17 functions and values of installation and construction of sewer lines, potential for damaged
18 lines, and need for continual maintenance of the sewage lines.

19 The central question before the Board is whether San Juan County provided a
20 “reasoned justification” for departing from Best Available Science in developing its
21 regulations to protect the functions and values of Critical Areas. In Ordinance 2-2014, San
22 Juan County states its rationale for departing from science based recommendations:
23

- 24 i. Development in San Juan County is predominantly in rural areas where
25 connection to a public sewer system is not permitted or available due to
26 lack of infrastructure. Approximately 75 percent of San Juan County's
27 population relies on on-site septic systems. According to Chapter 4 of the
28 *BAS Synthesis* (page 15) very little area in San Juan County is suitable
29 for conventional on-site septic systems, so alternative septic systems
30 designed to provide an additional level of treatment are often used. These

31 ¹²¹ *Wetlands Volume 2*, p. 8-41.

32 ¹²² San Juan County Best Available Science Synthesis, Chapter 2 Wetlands, p. 12 (May 24, 2011).

¹²³ *Id.*, p. 23.

¹²⁴ *Wetlands Volume 2*, pp. 3-10, 8-41.

¹²⁵ *Wetlands Volume 1*, p. 3-11.

¹²⁶ *Wetlands Volume 2*, Appendix 8-D, p. 23.

1 are the only systems available to manage sewage in most parts of the
2 County and are often necessary to support existing and new
3 development.

- 4 ii. Sometimes there is no practicable alternative to siting an on-site sewage
5 system line in a wetland, FWHCA, or their buffer.
- 6 iii. Soil disturbance and vegetation removal associated with installation of
7 on-site septic systems are usually of short duration and limited to small
8 areas that can be quickly revegetated.
- 9 iv. Mitigation requirements are designed and required to protect critical areas
10 from potential adverse impacts.
- 11 v. Onsite sewage systems are also regulated by San Juan County Health &
12 Community Services under statewide standards adopted in WAC 246-
13 272A, Rules and Regulations of the State Board of Health for On-site
14 Sewage Systems. These standards regulate the siting, design,
15 installation, operation and maintenance of on-site sewage treatment and
16 disposal systems. The proposal follows these regulations and protects
17 public health by minimizing both the potential for exposure to sewage
18 from on-site sewage systems, and the adverse effects of discharges from
19 on-site sewage systems on ground and surface waters.
- 20 vi. Under WAC 246-272A-0270, owners of on-site septic systems are
21 responsible for the operation, monitoring and maintenance of the system.
22 On-site septic systems are required to be inspected once every three
23 years for septic tank/gravity systems and annually for all other systems. In
24 addition, maintenance records and a complete seller disclosure statement
25 is required for residential real property transfers to keep owners informed
26 of their responsibilities. When needed, system upgrades are often
27 required prior to building permit issuance or property transfer. San Juan
28 County Health & Community Services enforces the regulations and
29 implements established programs that bring noncompliant systems into
30 alignment with local and State standards.
- 31 vii. WAC 246-272A-0210 establishes horizontal separations between system
32 components and sensitive areas including those from surface waters
measured from the Ordinary High Water Mark (OHWM). This includes a
100 foot separation of dispersal components (drainfields) and reserve
areas from surface waters. In addition, sewage tanks and distribution
boxes must be located 50 feet from surface waters. In both instances, the
separation is measured from the OHWM. When any site conditions

1 indicate a greater potential for contamination or pollution, such as
2 excessively permeable soils, the health official may increase the
3 horizontal separation.

- 4 viii. San Juan County Health and Community Services adopted and is actively
5 implementing a countywide comprehensive On-site Sewage Operation
6 and Maintenance Program. The program follows adopted State
7 regulations and requires O&M inspections every three years for gravity
8 distribution systems and annually for all other system types. The program
9 is designed to insure systems are functioning properly, preventing
10 inadequately treated sewage from surfacing or entering surface and or
11 groundwater water.¹²⁷
- 12 ix. San Juan County Health & Community Services designates sensitive
13 areas that are subject to increased operation and maintenance
14 requirements including shellfish protection districts and shellfish growing
15 areas. These areas require annual inspection of sewage systems.
- 16 x. Chapter 70.118A RCW requires San Juan County Health & Community
17 Services to identify and develop Marine Recovery Areas (MRA) and
18 propose an MRA where existing on-site sewage disposal systems are a
19 significant factor contributing to concerns associated with threatened or
20 downgraded shellfish growing areas, marine water with low dissolved
21 oxygen or fecal coliform, and marine waters where nitrogen has been
22 identified as a contaminant of concern. Based on all available data, no
23 Marine Recovery Areas are designated in the County.
- 24 xi. San Juan County Health & Community Services regulations help to
25 protect critical areas through the regulation of materials, design, setbacks,
26 construction, inspection, and notification of owner responsibilities.
27 Education and financial assistance programs also help support the
28 upgrade of existing systems.¹²⁸

29 Although no appellate court has yet defined the term “reasoned justification” for
30 purposes of departing from science-based recommendations, the Supreme Court has held

31 ¹²⁷ See IR 5384: One of the options referenced in the BAS for protection of freshwater critical areas is:
32 “Continue to support the On-site Sewage System Operation and Maintenance Program with annual
inspections of septic systems near sensitive marine waters, and if possible expand to also include annual
inspections of systems closest to streams, lakes, wetlands and those on soils least suitable for effective waste
treatment. . . .”

¹²⁸ Ordinance 2-2014, pp. 7-8 of 81.

1 that BAS requires the use of a “scientific methodology”¹²⁹ and local governments must
2 analyze scientific information using a “reasoned process.”¹³⁰ The Supreme Court has held
3 that the absence of native vegetation due to historic land-clearing before there was a legal
4 impediment to doing so constitutes a reasoned justification for departing from the Best
5 Available Science because there was no legal requirement in the GMA to enhance existing
6 habitat conditions.¹³¹

7
8 Thus, a “reasoned justification” should include a consideration of the science in the
9 record together with predominantly scientific, technical, or legal factors that support a
10 departure from Best Available Science recommendations. Social, cultural, or political factors
11 should not predominate over the scientific, technical, and legal factors as a rationale for
12 departing from science-based recommendations.¹³²

13
14 In the present case, the County’s rationale for departing from BAS relies substantially
15 on state health regulations in WAC chapter 246-272A. Departure rationales i, v, vi, vii, and
16 viii rely on sewage treatment systems prescribed by state health regulations to protect
17 human health not to protect ecosystem functions and values.¹³³

18 But the County’s reliance on the State Board of Health regulations for on-site sewage
19 systems is not reasoned because those health regulations do not seek to broadly protect
20 wetlands functions and values but rather focus more narrowly on human health. A review of
21 State Health regulations in WAC chapter 246-272A indicates that the human health
22 regulations target for treatment the following sewage constituents: carbonaceous
23 biochemical oxygen demand, total suspended solids, oil and grease, fecal coliform, and
24 nitrogen. But the Health Department on-site sewage regulations do not mention any
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28 ¹²⁹ *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d. 824, 837 (2005).

¹³⁰ *Id.* at 836-837.

¹³¹ *Swinomish Indian Tribal Community v. WWGMHB*, 161 Wn.2d 415, 430-431 (2007).

¹³² WAC 365-195-915(1)(c) suggests the possibility of non-scientific factors being used as a basis for critical area policies and regulations that depart from science-based recommendations; however, this regulation does not indicate how nonscientific factors should be weighed and balanced with legal and technical factors. It must be borne in mind that the fundamental standard is the statutory requirement to include the Best Available Science in developing regulations that “protect” Critical Areas. If non-scientific, social, or political factors could be used as the predominant rationale for departing from science, then the Legislature’s policy objective to promote science-based land use decisions would be substantially undermined or unrealized.

¹³³ Ordinance No. 2-2014, pp. 7-8 of 81.

1 treatment or standard to protect the functions and values of wetlands, which is required by
2 the GMA.¹³⁴ For example, Health Department regulations do not mention any treatment
3 targeting excess phosphorus outputs, which can result in eutrophication, degraded water
4 quality, and oxygen depletion that is harmful to fish and other aquatic species. *Futurewise v.*
5 *Washington State Department of Ecology*, EWGMHB Case No. 13-1-0003c, Final Decision
6 and Order (FDO) pp. 30-32, 48 (December 23, 2013).¹³⁵ The Board notes that in analogous
7 shoreline areas when there are potentially overlapping water quality regulations from
8 different agencies, the Department of Ecology requires the application of regulations that
9 are the most protective of *ecological functions*.¹³⁶

11 The Board finds this rationale for departing from BAS, which relies substantially on
12 state human health regulations to protect wetlands, is not reasoned because these human
13 health standards do not protect ecological functions and values of wetlands as required by
14 the GMA.

16 In departure rationale ii, Ordinance 2-2014 states “[s]ometimes there is no practicable
17 alternative to siting an on-site sewage system line in a wetland.” In the 2013 FDO, the Board
18 determined: “There is no science-based reasoning supporting the “no practicable
19 alternative” provision. . . . Additionally, there are no apparent standards for ascertaining the
20 lack of a practicable alternative.” Ordinance 2-2014, page 6 states that the condition “If no
21 practicable alternative exists” has been deleted for components of stormwater management
22 facilities; and the words “no practicable alternative” have been deleted from Table 3.85u on
23

25 ¹³⁴ WAC 246-272A-0010, WAC 246-272A-0110, WAC 246-272A-0230. These Department of Health
26 regulations focus on treating septic system outputs that have human health implications as distinguished from
27 the GMA which focuses on ecosystem health.

28 ¹³⁵ Septic tank elimination and concomitant phosphorus reduction are key strategies used by the Department
29 of Ecology to clean up water pollution in other areas of Washington State, especially where there is hydraulic
30 continuity between groundwater and surface water. *Futurewise v. Washington State Department of Ecology*,
31 EWGMHB Case No. 13-1-0003c Final Decision and Order (FDO), pp. 30, 42 (December 23, 2013). Pollution
32 from failing on-site sewage systems and excess nutrient inputs (e.g. phosphorus) to wetlands, lakes, streams,
and into Puget Sound are causing significant degradation of ecological functions and values around the state.
Wetlands Volume 1, p. 3-29 (2005); *2014/2015 Action Agenda for Puget Sound, Puget Sound Partnership*, pp.
ES-3, ES-104 (May 2014, officially noticed per WAC 242-030-630); *2013 State of the Sound Report on the
Recovery of Puget Sound, Puget Sound Partnership*, p. 64 (May 2014, officially noticed per WAC 242-030-
630). GMA land use planning policies promote actions to mitigate or cleanse discharges that pollute waters of
the state, including Puget Sound or waters entering Puget Sound. See e.g. RCW 36.70A.070(1).

¹³⁶ WAC 173-26-221(6)(b)(ii), officially noticed per WAC 242-03-630.

1 page 51 of Ordinance 2-2014. However, Ordinance 2-2014 page 9 states: “Requirements
2 limit the potential risks to the functions and values of critical areas by . . . Allowing on-site
3 sewage sewer lines in wetlands, FWHCAs and/or their buffers only when there is no
4 practicable alternative.” Ordinance 2-2014, page 6 states: “Sometimes there is no
5 practicable alternative to siting an on-site sewage system in a wetland. . . .” Thus,
6
7 Ordinance 2-2014 does not consistently or adequately address the Board’s 2013 FDO
8 finding that the “no practicable alternative” provision is not supported by any science-based
9 reasoning. The Board finds this rationale for departing from BAS (i.e., allowing sewer lines
10 in wetlands when there is “no practicable alternative”) is not reasoned.

11 In departure rationales iii, iv, and xi, the County suggests that construction impacts
12 and soil disturbance in wetlands are usually of short duration and can be mitigated.
13 Rationale iii states “[s]oil disturbance and vegetation removal associated with installation of
14 on-site septic systems are usually of short duration and limited to small areas that can be
15 quickly revegetated.” However, rationale iii is contrary to the science which indicates
16 degradation of ecological functions can be longer lasting, and soil disturbance/trenching
17 can significantly alter: (1) the water regime and (2) the native vegetation by introducing
18 invasive species, forming nearly monotypic stands.¹³⁷ This rationale is not reasoned.

19
20 Ordinance 2-2014 allows sewer line components in wetlands when “reasonable
21 efforts are made to avoid impacts to wetland functions and values” and “adverse impacts to
22 critical areas or their buffers are mitigated in accordance with SJCC 18.30.110(E).”¹³⁸ SJCC
23 18.30.110(E) provides for mitigation plans, approved by the County, in which proposed
24 development is designed and located “to avoid adversely impacting the functions and
25 values of critical areas, considering the Best Available Science.” Under the mitigation plan, if
26 adverse impacts cannot be avoided, then “they must be mitigated so there will be no net
27 loss of critical area functions and values, considering the Best Available Science.” But SJCC
28 18.30.110(E)(8)(d) does not consider how the “preferred sequence” of mitigation will avoid
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¹³⁷ *Wetlands Volume 1*, p. 4-63; San Juan County Best Available Science Synthesis, Ch. 2 Wetlands, p. 12 (May 24, 2011); *Wetlands Volume 2*, Appendix 8-D, p. 23.

¹³⁸ Ordinance 2-2014, pp. 51-52 of 81.

1 or prevent the longer duration loss of functions and values identified in the BAS, such as
2 altered water regimes and the replacement of native vegetation with invasive vegetation.

3 The Board finds this wetlands mitigation provision to be incoherent and internally
4 inconsistent because the BAS already establishes that construction, operation, and
5 maintenance of sewer lines in wetlands will degrade wetland functions and values, and the
6 science-based approach to preventing a loss of functions and values is to disallow sewer
7 lines in wetlands. It is unclear in the County's scientific record how they will mitigate (or
8 whether it is even feasible to mitigate) impacts from allowing new sewer lines in wetlands.
9 Science in the record indicates that allowing new sewer lines in wetlands results in long-
10 term loss of wetland functions and values (not of "short term duration") when human
11 activities (a) modify wetlands vegetation, (b) disturb soils [digging, trenching, tilling,
12 compacting], (c) alter hydrologic functions and water regimes, (d) degrade water quality, or
13 (e) introduce invasive species. There is no evidence in the record indicating that these
14 impacts can be effectively mitigated to satisfy the standard of "no net loss of ecological
15 functions and values."
16

17 The County's BAS departure rationale fails to consider the science showing that
18 wetland impacts from soil disturbance and vegetation removal when digging, trenching, and
19 compacting the soil when constructing or maintaining sewer lines can be significant, of long
20 duration, and difficult to mitigate. The County requires stormwater pollution prevention best
21 management practices to address the short-term construction impacts but this does not
22 address the long-term degradation of wetland functions and values resulting from
23 compacted soils and ground disturbing activities that can disrupt the roots of perennials,
24 encourage germination of annuals in the seed bank and colonization by several invasive
25 species, and alter wetland water regimes. The science indicates construction activities in
26 wetlands inherently degrade wetland functions and values. Science shows there are long-
27 term adverse impacts to wetlands functions and values (e.g. water regime) caused by
28 construction activities, soil disturbance, and the introduction of invasive species in wetlands.
29 Science does not support the notion that all adverse impacts can be prevented through the
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1 County's existing mitigation plan provisions.¹³⁹ Thus, the County has not protected the
2 ecological functions and values of wetlands, as required by RCW 36.70A.172. The Board
3 finds this rationale for departing from BAS is not reasoned.

4 Finally, the Board notes that San Juan County has enacted in SJCC § 18.30.110D a
5 "Reasonable Use Exception" from standard critical area protection regulations "to protect
6 the constitutional property rights of the applicant" and to "avoid the taking of property without
7 just compensation."¹⁴⁰ The County intends this Reasonable Use Exception to cover the rare
8 instance when application of a critical area regulation to a specific property "would deprive
9 the land owner of all economic or beneficial use of the property."¹⁴¹

11 The foregoing analysis of "Sewage Disposal Systems in Wetlands" is focused on
12 whether San Juan County has **provided a reasoned justification for its departure from**
13 **the Best Available Science**. This analysis should not be misinterpreted as absolutely
14 precluding any activity that BAS indicates would negatively impact any critical area – the
15 GMA does not prescribe such an absolute outcome. Rather, the GMA prescribes the
16 inclusion of the Best Available Science in protecting against the degradation of ecological
17 functions and values. A county could potentially allow activities with negative impacts in
18 critical areas if science-based mitigation adequately protects against the loss of ecological
19 functions and values, or if there is a reasoned justification for departing from BAS while still
20 protecting the critical area, or if a reasonable use exception is required to prevent a
21 constitutional taking of property.
22
23

24 In conclusion, the County's allowance of sleeved and water-tight sewer lines in
25 wetlands fails to assure no net loss of ecosystem functions and values, fails to include the
26 Best Available Science to protect the functions and values of Critical Areas, and fails to
27 provide a reasoned justification for departing from the Best Available Science.
28
29
30
31

32 ¹³⁹ *Id.*, p. 26 of 81. The County must require compensatory mitigation if its development regulations allow harm to wetlands. RCW 36.70A.172 and WAC 365-196-830(4).

¹⁴⁰ *Id.*, p. 22 of 81.

¹⁴¹ *Id.*, p. 24 of 81.

BOARD FINDINGS OF FACT

1
2 1. Nutrients released by on-site sewage systems can enter a wetland and
3 degrade the quality of both groundwater and surface water.

4 2. On-site sewage systems do not effectively process common household
5 chemicals, pharmaceuticals, estrogens, antibacterial soaps, and surfactants (shampoo,
6 laundry and dishwasher detergents) that may be ecologically hazardous. These
7 common household substances can contaminate aquifers, have been found in Puget
8 Sound, and may interfere with fish and wildlife populations by influencing fertility, natural
9 chemical cues needed for homing and communication, and/or disease susceptibility.
10

11 3. Wetland ecosystem functions and values can be degraded by on-site sewage
12 systems that malfunction, are not properly maintained, or are not designed to effectively
13 treat the full range of exported chemicals and substances.

14 4. There is no science in the record indicating that sleeved and water-tight
15 sewer lines in wetlands have a different impact on wetlands functions and values as
16 compared to other sewer system components in wetlands.

17 5. There is no evidence in the record indicating that impacts from installing
18 sewer lines in wetlands can be effectively mitigated to satisfy the standard of “no net
19 loss of ecological functions and values.”
20

21 6. State health regulations in WAC Chapter 246-272A are narrower in scope
22 and intended to protect human health but are not intended to protect broader ecosystem
23 functions and values.
24

25 7. The County failed to substantively consider the Best Available Science on the
26 loss of functions and values of wetland ecosystems when human activities (a) modify
27 wetlands vegetation, (b) disturb soils [digging, trenching, tilling, compacting], (c) alter
28 hydrologic functions and water regimes, (d) degrade water quality, or (e) introduce
29 invasive species.
30

31 8. The County’s development regulations pertaining to on-site sewage systems
32 do not require adequate compensatory mitigation to protect ecological functions and
values of wetlands from long-term harm caused by construction activities, soil

1 disturbance/trenching, altered water regimes, and the introduction of invasive vegetation
2 species.

3 9. Ordinance 2-2014 contains inconsistent provisions on whether to allow
4 sewage system lines in wetlands when there is no practicable alternative.

5 10. As to protecting the functions and values of wetland ecosystems, the
6 County's rationale for departing from the Best Available Science is not reasoned.

7 11. The County's allowance of sleeved and water-tight sewer lines in wetlands
8 fails to assure no net loss of ecosystem functions and values.
9

10 **BOARD CONCLUSIONS OF LAW**

11 Based on the foregoing Findings of Fact, the Board concludes as follows:

12 1. The Growth Management Act requires counties and cities to protect the functions
13 and values of Critical Areas, including wetland ecosystems.

14 2. The County failed to protect the functions and values of wetland ecosystems, in
15 violation of RCW 36.70A.060(2), 36.70A.172(1), and RCW 36.70A.030(5).
16

17 3. The County failed to include the Best Available Science to protect the functions
18 and values of Critical Areas, in violation of RCW 36.70A.172.
19

20 4. The County failed to provide a reasoned justification for departing from the Best
21 Available Science.

22 5. The Board has a firm and definite conviction that a mistake has been made.

23 6. San Juan County Ordinance No. 2-2014 is clearly erroneous in view of the entire
24 record before the Board and in light of the goals and requirements of the Growth
25 Management Act.
26

27 7. San Juan County is not in compliance with the requirements of RCW
28 36.70A.060(2) and RCW 36.70A.172.
29

30 **F. Sewage Disposal System Components in FWHCAs**

31 The allowance of some sewage system components in FWHCAs and their buffers is
32 also challenged by the Friends. This petitioner again asserts the County's decision fails to

1 reflect consideration of BAS. The Friends has the burden of proof to establish a lack of
2 consideration of BAS or to establish a failure on the part of the County to provide a
3 reasoned justification for BAS departure.

4 The Friends' arguments primarily cite BAS related to wetlands. While it is true there is
5 considerably more scientific information included in the record regarding wetlands, it
6 remains incumbent upon the Friends to meet the burden of proof. However, the Friends
7 merely state "The County acknowledged that the exception departs from BAS" and "In the
8 absence of any claimed unique local circumstances that would justify constructing septic
9 system components in critical areas and their buffers, the CAO Revisions fail to include BAS
10 or protect critical areas" ¹⁴² Unlike the discussion in Compliance Order Section E above
11 where Friends pointed to substantial scientific evidence of harm to wetlands functions and
12 values, here Friends has failed to come forward with scientific evidence of harm to FWHCA
13 functions and values.
14

15 In this instance, the Board finds the Friends of the San Juans has failed to meet the
16 burden of proof to establish the inclusion of some sewage system components in FWHCAs
17 and/or their buffers, as authorized by San Juan County Ordinance 2-2014, constitutes a
18 violation of RCW 36.70A.060(2) and RCW 36.70A.172.
19
20

21 **G. Water Quality Buffer Averaging-UGAs**

22 A second area of the County's compliance in which the County acknowledged it
23 departed from BAS involves water quality buffer averaging in UGAs. ¹⁴³
24

25 The Friends reference the concerns expressed in the FDO regarding water quality
26 buffer averaging, asserting that allowing such averaging within UGAs fails to reflect BAS. ¹⁴⁴
27

28 The applicable Ordinance sections challenged by the Friends are located in SJCC
29 18.30.150.D.1.a. Step 4 in regards to wetlands and SJCC 18.30.160.E.1. Step 3 in regards
30 to FWHCAs. The challenges relate to the underlined portions below (Ordinance 2-2014, p.
31 41 of 81 (Wetlands); p. 59 of 81 (FWHCAs)):
32

¹⁴² Petitioner Friends of the San Juans' Objections to Finding of Compliance, pp. 20, 21.

¹⁴³ Ordinance 2-2014, p. 6, ¶ XVIII.

¹⁴⁴ Final Decision and Order, pp. 54-59.

1 **Wetlands**

2 Identify the Water Quality Buffer Width. Using Tables 3.3 and 3.3A below,
3 determine the water quality buffer based on the wetland rating category and
4 land-use intensity of the proposed development. Buffers are measured
5 horizontally from the edge of the wetland.

6 The director may reduce the standard buffer widths in an Urban Growth Area
7 when impacts to critical areas are mitigated according to SJCC 18.30.110(E)
8 and the buffer reduction is consistent with all other applicable requirements
9 of this section provided:

10 A. The buffer of a Category I or II wetland shall not be reduced to less
11 than 75 percent of the required buffer or 50 feet, whichever is greater,
12 and

13 B. The buffer of a Category III or IV wetland shall not be reduced to less
14 than 50 percent of the required buffer, or 25 feet, whichever is greater.

15 **FWHCAs**

16 The director may reduce the standard buffer widths in an Urban Growth Area
17 when impacts to critical areas are mitigated according to SJCC 18.30.110(E)
18 and the buffer reduction is consistent with all other applicable requirements
19 of this section provided that the buffer of an Aquatic FWHCA shall not be
20 reduced to less than 75 percent of the required buffer or 50 feet, whichever is
21 greater.

22 The Friends assert these potential UGA water quality buffer reductions fail to address
23 the impacts the BAS attributes to averaging or to compensate by adding buffer area equal
24 to the reductions due to that averaging. It argues the SJCC provisions skip over the primary
25 step in a “mitigation sequence”-avoidance.¹⁴⁵ This petitioner further argues the
26 administrative discretion allowed to the director lacks clear guidelines for decision-
27 making.¹⁴⁶

28 The County, however, acknowledges buffer averaging represents a departure from
29 BAS. See Ordinance No. 2-2014, XVIII, p. 6:

30 Section 9, buffer reductions in an Urban Growth Area (UGA) are a departure
31 from the Best Available Science. WAC 365-195-915 provides guidance on
32 including the Best Available Science in the development of critical area

¹⁴⁵ Petitioner Friends of the San Juans’ Objections to Finding of Compliance, p. 6.

¹⁴⁶ Compliance Hearing Transcript, p. 66.

1 regulations. When departing from science-based recommendations, this
2 guidance specifies that the County should identify any information in the
3 record that supports the decision, explain the rationale for departing from
4 science-based recommendations, identify potential risks to the functions and
5 values of critical areas, and identify any measures chosen to limit such risk.
6 The following amendment may be a potential departure from the Best
7 Available Science. Throughout the process the public expressed concern
8 that imposing large buffers in the County's two small, non-municipal urban
9 growth areas would make it difficult to achieve other GMA goals, and could
10 significantly affect the character of those communities as well as those who
11 own property adjacent to wetlands and Aquatic FWHCAs. To help
12 accommodate growth within UGAs, and to support other GMA goals, the
13 proposed regulations include a reduced buffer option in those areas.
14 Potential risks to the functions and values of critical areas are limited by the
15 condition that any adverse impacts are identified and mitigated. In addition to
16 requiring mitigation of impacts, which is an acceptable alternative when
17 impacts cannot be avoided, the County and other service providers have and
18 continue to expand the water, wastewater and storm water infrastructure that
19 will help reduce ongoing impacts to wetlands in UGAs. These improvements
20 include a storm water treatment system recently completed in Eastsound.
21 The UGA buffer reduction provision is also permitted for Aquatic FWHCAs
22 water quality buffers for and water quality buffers for designated plants in
23 Ordinance Section 8, SJCC 18.30.160 Fish and Wildlife Habitat Conservation
24 Areas (sic).

25 A review of the FDO discussion¹⁴⁷ of buffer averaging makes it clear that averaging
26 was being addressed there in a broader context: it was not limited to UGAs, and included
27 narrow water quality and habitat buffers combined with various critical area regulation
28 exceptions and exemptions. On compliance, the Friends are challenging a much more
29 limited exception – wetland and FWHCA water quality buffer averaging in the County's two,
30 small non-municipal UGAs.

31 As stated, the County acknowledged the departure from BAS, set forth its rationale
32 for that departure, identified the potential risks to the functions and values of critical areas
and identified the measures chosen to limit those risks pursuant to WAC 365-195-915(1)(c).
The County states that if the director authorizes buffer reductions under either of these
sections, mitigation is required under SJCC 18.30.110(E), following the initial consideration

¹⁴⁷ Final Decision and Order, pp. 54, 55.

1 of avoidance. If avoidance is not possible, then mitigation plans must be prepared by a
2 qualified professional, include BAS, and must be reviewed and approved by either the
3 director or the hearing examiner.

4 Compliance has been substantially achieved by limiting the extensive authorization of
5 buffer averaging originally allowed. The question remaining before the Board is whether the
6 County's BAS departure allowing wetland and FWHCAs buffer averaging within the two
7 UGAs has been supported by a reasoned justification.

8
9 The County refers to public opinion regarding the negative impact of large buffers on
10 the community character of its two non-municipal UGAs, Lopez Village and Eastsound. The
11 County states buffer averaging would accommodate growth within those two areas, thus
12 contributing to the achievement of other GMA goals. It also observes both the County and
13 individual utility service providers have and are continuing to expand water, wastewater and
14 stormwater infrastructure in those areas. Specific reference is made to a recently completed
15 Eastsound stormwater treatment system.

16
17 The *Yakima County* decision required a reasoned explanation of a jurisdiction's BAS
18 departure decision or identification of other GMA goals being implemented by that
19 decision.¹⁴⁸ San Juan County is made up entirely of islands, has a very small population,
20 only one incorporated municipality and only two, small non-municipal UGAs. In this
21 particular instance, based on the unique nature of the County and having both explained its
22 departure and desire to further the GMA urban growth and sprawl reduction goals,¹⁴⁹ the
23

24
25 ¹⁴⁸ The court referenced the GMHB's *Hazen 2008* decision (*Hazen v. Yakima County*, Case No. 08-1-0008c,
26 p. 43), "[s]ince the County did not believe it was deviating from [best available science], it made no specific
27 findings" to explain its departure from the scientific studies or to identify other goals of the GMA it was
28 implementing by making such a choice. *Yakima County v. E. Wash. Growth Mgmt. Hearings Bd.*, 168 Wn.
29 App. 680, 693; See also *Whidbey Env'tl. Action v. Island County*, 122 Wn. App. 156, 173: However, if a local
30 government elects to adopt a critical area requirement that is outside the range that BAS alone would support,
31 the local agency must provide findings explaining the reasons for its departure from BAS and identifying the
32 other goals of GMA which it is implementing by making such a choice.

¹⁴⁹ See *HEAL v. Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 531: Best available science must be
"included" in the record, but contrary to the City's position . . . that "[t]his statute unambiguously creates a
procedural requirement--and only a procedural requirement," mere inclusion is not all that is required. The
GMA requires balancing of more than a dozen goals and several specific directives in implementing those
goals. The Legislature passed RCW 36.70A.172(1) five years after the GMA was adopted. It knew of the other
factors, but neither made the best available science the sole factor, the factor above all other factors nor made
it purely procedural. Instead, the Legislature left the cities and counties with the authority and obligation to take

1 Board finds San Juan County has provided a reasoned justification for departure from BAS.
2 It has achieved compliance in regards to water quality buffer averaging in the UGA. The
3 Friends of the San Juans has failed to establish the action taken by San Juan County is
4 clearly erroneous in light of the goals and requirements of chapter 36.70A RCW.
5

6 **H. Habitat Buffer Averaging**

7 The Friends challenge the County's compliance regarding habitat buffer averaging,
8 contending averaging is allowed based on "development desires" and that the County failed
9 to consider BAS.¹⁵⁰ In support, recommendations from *Wetlands Volume 2* are cited.
10

11 However, the Board found the County to be non-compliant based on buffer averaging
12 which resulted in buffer width reductions of between 37½ percent to in excess of 60
13 percent.¹⁵¹ DOE correspondence submitted to the County contended such reductions were
14 not consistent with BAS and the Board agreed.¹⁵² The compliance legislation directly
15 addressed that concern by deleting language authorizing minimum buffer widths of as little
16 as 30 feet. The ordinance now limits such averaging to no more than 25%, the maximum
17 recommended by DOE.
18

19 San Juan County has achieved compliance in regards to habitat buffer averaging.
20 The Friends of the San Juans has failed to establish the action taken by San Juan County is
21 clearly erroneous in light of the goals and requirements of chapter 36.70A RCW.
22

23 **I. DOE land-use intensity table modifications**

24 The County also differed from BAS recommendations when it amended DOE's
25 *Wetlands Volume 2* land-use intensity tables.
26
27
28

29 scientific evidence and to balance that evidence among the many goals and factors to fashion locally
appropriate regulations based on the evidence not on speculation and surmise.

30 ¹⁵⁰ Petitioner Friends of the San Juans' Objections to Finding of Compliance, p. 11.

31 ¹⁵¹ Final Decision and Order, p. 55.

32 ¹⁵² IR 51669: The proposed habitat buffer averaging is not consistent with BAS, and reducing the width of
buffers that are already inadequate should not be allowed. Allowing a minimum of a 30-foot habitat buffer will
not protect wetland functions, particularly on high habitat importance wetlands (a 63% reduction in the required
buffer width). To protect wetland functions, we recommend that the width of the buffer not be reduced by more
than 25%.

1 The concerns expressed by the Friends regarding these modifications is that when
2 the County incorporated DOE's Land Use Intensity tables into its Code, it improperly
3 amended the tables by reclassifying moderate-intensity agriculture from a moderate to a low
4 intensity use and hobby farms from a high intensity use to a moderate one. The Friends
5 allege that reclassification results in buffer width reductions of "up to nearly 35%".¹⁵³

6 *Wetlands Volume 2*, in Appendix 8-C includes the following:

7
8 **8C.2.2 Buffer Alternative 2: Width Based on Wetland Category and
9 Modified by the Intensity of the Impacts from Proposed Land Use**

10 The second alternative increases the regulatory flexibility by including the
11 concept that not all proposed changes in land uses have the same level of
12 impact (Table 8C-2). For example, one new residence being built on 5 acres
13 of land near a wetland is expected to have a smaller impact than 20 houses
14 built on the same 5 acres. Three categories of impacts from proposed land
15 uses are outlined: land uses that can create high impacts, moderate impacts,
16 and low impacts to wetlands. Different land uses that can cause these levels
17 of impacts are listed in Table 8C-3.¹⁵⁴

18 Table 8C-3 from *Wetlands Volume 2* does list "Hobby Farms" as having a high "Level Of
19 Impact From Proposed Change In Land Use." Similarly, a "Conversion to moderate-intensity
20 agriculture (orchards, hayfields, etc.);" is shown as having a moderate level of impact.¹⁵⁵

21 These reclassifications produce the following results:¹⁵⁶

22 Hobby Farm wetland buffer widths are reduced as follows:

- 23 Category IV wetlands buffers are reduced from 50 feet to 40 feet
24 Category III wetlands buffers are reduced from 150 feet to 110 feet
25 Category I and II wetlands buffers are reduced from 300 feet to 225 feet

26 Conversion to moderate-intensity agriculture wetland buffer widths are reduced:

- 27 Category IV wetlands buffers are reduced from 40 feet to 25 feet
28 Category III wetlands buffers are reduced from 110 feet to 75 feet
29 Category I and II wetlands buffers are reduced from 225 feet to 150 feet

30
31
32 ¹⁵³ Petitioner Friends of the San Juans' Objections to Finding of Compliance, p. 8.

¹⁵⁴ *Wetlands Volume 2*, Appendix 8-C, p. 4.

¹⁵⁵ *Wetlands Volume 2*, Appendix 8-C, p. 5.

¹⁵⁶ *Id.*, Appendix 8-C, Table 8C-2, p. 5.

1 The reclassification of intensity is defended by San Juan County based on the scale
2 and significance of the County's agriculture:

3 Agriculture in San Juan County is a vital part of our heritage and an integral
4 part of the County's landscape, culture and economy. The County's quality of
5 life depends on the successful integration of sustainable agriculture and
6 ecological health. Ecology's land-use intensity table was modified because
7 the scale of agriculture, especially hobby farms, orchards, and hay fields on
8 the Islands are generally small family farm operations. According to Table 26
9 of Appendix 1 of the San Juan Comprehensive Plan, approximately 37
10 percent of the County's agricultural parcels are less than 10 acres in size, 22
11 percent are ten to twenty acres in size, 25 percent are between 20 and 40
12 acres, and 17 percent are 40 acres or more. According to the latest
13 Census of Agriculture, of 291 farms in San Juan County, 213 generate less
14 than \$10,000 annually and 37 generate less than \$20,000 annually. Only 41
15 farms generate more than \$20,000.¹⁵⁷

16 As before, the question to be answered is whether a reasoned justification has been
17 provided by the County.

18 *Wetlands Volume 2* in referring to agricultural activities states as follows:

19 The literature synthesized in Chapters 2, 3, and 4 in [*Wetlands*] *Volume 1*
20 demonstrated that agricultural activities can negatively affect wetlands. One
21 of the goals of the GMA is to protect wetlands and other critical areas.
22 Equally important, the GMA seeks to maintain and enhance industries that
23 rely on natural resources, encourage the conservation of productive
24 agricultural lands, and discourage incompatible uses.

25 and then continues with the following observation:

26 Local governments should consider the types of agriculture being practiced
27 in their watersheds and craft their critical area protection programs to
28 address impacts from agriculture accordingly.¹⁵⁸

29 It appears to the Board San Juan County has considered the type and scale of
30 agriculture being conducted in the County and tailored its critical area protection programs
31
32

¹⁵⁷ Ordinance No. 2-2014, p. 5, Section XVII, line 42.

¹⁵⁸ *Wetlands Volume 2*, ch. 8, § 8.3.3.7, pp. 8-18.

1 to address the impacts.¹⁵⁹ The County observes the importance of agriculture to its heritage,
2 landscape, culture, and economy. The small scale of agricultural activities in San Juan
3 County is apparent: 37 percent of its agricultural parcels are less than 10 acres and 84
4 percent are less than 40 acres. Additionally, the low revenue generation from its farms is
5 indicative of the small scale. Finally, the deletion of allowance of new and expanding
6 agricultural activities in wetlands, FWHCAs, and their buffers, as addressed in the following
7 section, adds further support to the County's decision.
8

9 The Board finds San Juan County has provided a reasoned justification for departure
10 from BAS in regards to its adjustment of the land-use intensity tables. The Friends of the
11 San Juans has failed to establish the action taken by San Juan County is clearly erroneous
12 in light of the goals and requirements of chapter 36.70A RCW
13

14 J. Agriculture

15 **The County's allowance of new and expanding agricultural activities in**
16 **wetlands and their buffers and in FWHCA buffers failed to comply with RCW**
17 **36.70A.060 and RCW 36.70A.172, and was not guided by RCW 36.70A.020(9)**
18 **and (10).**

19 The County addressed that conclusion by deleting the allowance of new and
20 expanding agricultural activities from the Use Tables (Tables 3.5 and 3.8) included in the
21 Wetlands and FWHCA regulations.¹⁶⁰ It also amended the definitions of "Agricultural
22 Activities" and "Agricultural Equipment and Facilities" to conform to the definitions used in
23 RCW 36.70A.703, the Voluntary Stewardship Program, and deleted the definition of "New
24 and Expanding Agriculture."¹⁶¹
25

26 The Friends of the San Juans, the petitioner that raised this issue, agreed the County
27 achieved compliance in this regard and the Board concurs.¹⁶²
28
29

30 ¹⁵⁹ *Clallam County v. Hearings Bd.*, 130 Wn. App. 127, 139 (2005) Under the GMA, counties must balance
31 protecting the environment (including water quality) and maintaining natural resource industries including
32 agriculture.

¹⁶⁰ Ordinance No. 2-2014, pp. 49 and 63.

¹⁶¹ San Juan County's Compliance Report, p.3.

¹⁶² Compliance Hearing Transcript, p. 38, line 12.

1 **K. Transmission/Utility Lines**

2 **The County's exemption for transmission and utility lines within private or**
3 **public rights of way authorized by SJCC 18.30.110.C.3 failed to comply with**
4 **RCW 36.70A.060 and RCW 36.70A.172, and such action was not guided by**
5 **RCW 36.70A.020(9) and (10).**

6 **The County's public agency and public/private utility exception included in**
7 **Ordinance 26-2012 failed to comply with RCW 36.70A.060 and RCW 36.70A.172,**
8 **and such action was not guided by RCW 36.70A.020(9) and (10). [SJCC**
9 **18.30.110.E]**

10 The Optional Public Agency and Utility Exception was available to those entities if
11 they had "difficulty meeting standard critical area protection requirements." This exemption
12 was previously included in SJCC 18.30.110.E adopted in Ordinance 26-2012, but was
13 deleted in its entirety by Ordinance 2-2014.¹⁶³ Accordingly, the Board finds San Juan
14 County in compliance with the GMA regarding repeal of the "Optional Public Agency and
15 Utility Exemption" by Ordinance 2-2014.

16 However, the Friends argue the utility exemption included in SJCC 18.30.110.C.3
17 was expanded in both geographic scope and the uses authorized. While this petitioner
18 acknowledges the County included language that could reduce potential impacts to critical
19 areas, it contends the manner established by the County will prevent appropriate
20 oversight.¹⁶⁴ Rather than exempting only electrical lines, telecommunication lines and
21 water and sewer lines, the Friends observe the compliance legislation includes an
22 **expansion of uses within the exceptions** "electrical, telecommunications, cable, water,
23 sewer, and other utility lines and equipment within existing structures, facilities,
24 infrastructure systems, development areas and uses, utility easements, and public and
25 private rights-of-way."¹⁶⁵

26 In addressing the original wording of SJCC 18.30.110.C.3 in the FDO, the Board
27 concluded "a blanket exemption for activities which could result in significant impacts to a
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29
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31
32

¹⁶³ Ordinance 2-2014, pp. 24, 25.

¹⁶⁴ Petitioner Friends of the San Juans' Objections to Finding of Compliance, p.3.

¹⁶⁵ Ordinance 2-2014, p. 22.

1 critical area, without any consideration of the quality of a wetland, and which does not
2 include steps to avoid, minimize or mitigate, fails to protect critical areas.”¹⁶⁶

3 The prior ordinance included few conditions; it allowed the installation, replacement
4 and modification of some utility lines subject only to soil erosion control and revegetation/
5 stabilization as appropriate. Although the amended version arguably expands the excepted
6 uses,¹⁶⁷ those uses are now subject to the following:

- 7
- 8 i. There is no further intrusion into geologically hazardous areas, frequently
9 flooded areas, wetlands, or FWHCAs or their buffers;
 - 10 ii. Soil erosion is controlled;
 - 11 iii. Disturbed areas are promptly stabilized; and
 - 12 iv. Actions do not have any additional adverse effect on the functions and
13 values of critical areas.

14 Ordinance 2-2014 also added SJCC 18.30.110.C.3.b which now allows:

- 15 b. Installation and construction of utility lines and equipment not previously
16 covered in SJCC 18.30.110(C)(2) and (C)(3)(a) above provided that
17 reasonable efforts are made to avoid impacts to critical area functions and
18 values, and:
 - 19 i. BMPs are used to minimize clearing, erosion, sedimentation, and other
20 soil disturbance;
 - 21 ii. Disturbed areas are promptly stabilized and regurgitated; and
 - 22 iii. Any adverse impacts to critical areas are mitigated in accordance with
23 SJCC 18.3 0.110(E).

24 It is unclear what type of utility lines and equipment would be covered by this exemption as
25 SJCC 18.30.110.C.2 and 18.30.110.C.3.a would appear to include all utility lines and
26 equipment. However, at the compliance hearing counsel for San Juan County observed the
27 intent was to encompass utility lines and equipment not currently envisioned.¹⁶⁸ In addition,
28 the County cannot foresee the types of utilities and the mitigation requirements needed in
29 the future.

30
31
32 ¹⁶⁶ Final Decision and Order, p. 71.

¹⁶⁷ “electrical , telecommunication and water and sewer lines” are now “ electrical, telecommunications, cable,
water, sewer, and other utility lines and equipment”.

¹⁶⁸ See Compliance Hearing transcript, p. 127, line 18 through p. 128, line 12.

1 **Applicable Law**

2 The Growth Management Act requires counties and cities to protect the functions and
3 values of Critical Areas, including wetland ecosystems. RCW 36.70A.060(2), 36.70A.172(1),
4 RCW 36.70A.030(5), and WAC 365-196-830. “Protection” of Critical Areas “means
5 preservation of the functions and values of the natural environment, or to safeguard the
6 public from hazards to health and safety.”¹⁶⁹ “Development regulations may not allow a net
7 loss of the functions and values of the ecosystem that includes the impacted or lost critical
8 areas.”¹⁷⁰ Counties and cities must assure no net loss of functions and values and must
9 include the best available science.¹⁷¹

10 In designating and protecting Critical Areas, “counties and cities shall include the best
11 available science [BAS] in developing policies and development regulations to protect the
12 functions and values of critical areas.” RCW 36.70A.172(1).¹⁷² Evidence of the Best
13 Available Science must be included in the record and must be considered substantively in
14 the development of critical areas policies and regulations.¹⁷³ “Although BAS does not
15 require the use of a particular methodology, at a minimum BAS requires the use of a
16 scientific methodology.”¹⁷⁴ Although a county need not develop scientific information
17 through its own means, it must rely on scientific information and must analyze that
18 information using a reasoned process.¹⁷⁵

19 WAC 365-190-090 provides:

20 The wetlands of Washington state are fragile ecosystems that serve a
21 number of important beneficial functions. Wetlands assist in reducing
22 erosion, siltation, flooding, ground and surface water pollution, and provide
23 wildlife, plant, and fisheries habitats. Wetlands destruction or impairment may
24 result in increased public and private costs and property losses. Additionally,
25 counties and cities should consider wetlands protection guidance provided by
26 the department of ecology, including the management recommendations
27
28

29 ¹⁶⁹ WAC 365-196-830(3).

30 ¹⁷⁰ WAC 365-196-830(4).

31 ¹⁷¹ WAC 365-196-830(8).

32 ¹⁷² Underlining added.

¹⁷³ *Honesty in Env'tl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn.
App. 522, 532, 979 P.2d 864 (1999).

¹⁷⁴ *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d. 824, 837 (2005).

¹⁷⁵ *Id.* at 836-837.

1 based on the best available science, mitigation guidance, and provisions
2 addressing the option of using wetland mitigation banks.

3
4 **Board Analysis**

5 The question before the Board is whether San Juan County included the Best
6 Available Science in developing its utility regulations in and around wetlands to protect the
7 functions and values of Critical Area ecosystems?

8 There is BAS in the record indicating that the functions and values of wetlands are
9 degraded when utilities that are installed or constructed in wetlands (1) modify wetlands
10 vegetation, (2) disturb soils [digging, trenching, tilling, compacting], (3) alter hydrologic
11 functions, (4) degrade water quality, and (5) introduce invasive species:
12

13 Physically disturbing wetland soils during the dry season, through tillage,
14 compaction, excavation, or other means, can allow invasion by non-native
15 plant species. It can also destroy much of the viable seed bank. Tilling the
16 soil often reduces diversity, including both richness and evenness. The tillage
17 treatment disrupted the roots of perennials more than burning, and it
18 encouraged germination of annuals in the seed bank and colonization by
19 several invasive species. Invasive plants, especially non-native plants,
20 significantly alter the species composition of many wetlands, sometimes
21 even forming nearly monotypic stands. Continuously disturbing the soil, for
22 example through compaction and road building, can alter species
23 composition. These disturbed conditions can lead to a decline in both the
24 biomass of native species and a change in the soil conditions that support
25 them. Use of all-terrain vehicles also impacted wetlands on the Atlantic
26 coastal plain, reducing the density of seed in wetland seed banks and
27 allowing common rushes to displace rare species. Excavation and clearing of
28 gas pipeline rights-of-way through forested wetlands in Florida resulted in
29 increased species richness within the wetland clearings but an increased
30 percent cover of non-native species.¹⁷⁶

31 Generally, any use that results in the creation of impervious areas, clearing
32 of vegetation, or compaction of soils will be incompatible with buffer
functions. Typically, buffers need to be densely vegetated with appropriate
native vegetation to perform water quality and habitat-related functions.¹⁷⁷

¹⁷⁶ *Wetlands Volume 1*, p. 4-63.

¹⁷⁷ *Wetlands Volume 2*, p. 8-41.

1 Not having any mainland, the San Juan Islands have less ecological
2 resilience. Native wildlife and plants are especially sensitive to introduced
3 species.¹⁷⁸

4 Excavation potentially removes the biologically-essential organic substrate
5 present in naturally-occurring wetlands, or at least may cause some
6 compaction of the organic substrate currently present.¹⁷⁹

7 Soil compaction reduces the effectiveness of wetlands buffers and is
8 incompatible with buffer functions.¹⁸⁰

9 Compacted soils found in lawns and landscaped areas function just as
10 impervious surfaces do in altering the water regime.¹⁸¹

11 Compacted soil, deep excavation, and pipeline trenches can alter the water
12 regime.¹⁸²

13
14 In light of this BAS in the record, the Board finds the County failed to substantively
15 consider the BAS relating to, and the County did not provide any rationale or reasoning for,
16 departing from this science.

17 Ordinance 2-2014 fails to consider the science showing that wetland impacts from
18 soil disturbance and vegetation removal when digging, trenching, and compacting the soil
19 when constructing or maintaining utility lines are significant and difficult to mitigate. The
20 County requires stormwater pollution prevention best management practices to address the
21 short-term construction impacts but this does not address the long-term degradation of
22 wetland functions and values resulting from compacted soils and ground disturbing activities
23 that can disrupt the roots of perennials, encourage germination of annuals in the seed bank
24 and colonization by several invasive species, and alter water flow regimes.¹⁸³

25 The County must require compensatory mitigation if its development regulations
26 allow harm to wetlands.¹⁸⁴ Ordinance 2-2014 contains a circular, inconsistent provision
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30 ¹⁷⁸ *San Juan County Best Available Science Synthesis*, Ch. 2 Wetlands, p. 12 (May 24, 2011).

31 ¹⁷⁹ *Id.*, p. 23.

32 ¹⁸⁰ *Wetlands Volume 2*, pp. 3-10, 8-41.

¹⁸¹ *Wetlands Volume 1*, p. 3-11.

¹⁸² *Wetlands Volume 2*, Appendix 8-D, p. 23.

¹⁸³ Ordinance 2-2014, p. 4, 22.

¹⁸⁴ RCW 36.70A.172 and WAC 365-196-830(4).

1 allowing utility construction in wetlands if there are no adverse effects on the wetlands. But
2 the science indicates construction activities in wetlands inherently degrade wetland
3 functions and values. Science in the record shows there are long-term adverse impacts to
4 wetlands functions and values (e.g., water regime) caused by construction activities, soil
5 disturbance, and the introduction of invasive species in wetlands. Science does not support
6 the notion that all adverse impacts can be prevented through the County's existing
7 mitigation plan provisions.¹⁸⁵

8
9 Thus, the County has not required adequate compensatory mitigation for long-term
10 harm to wetlands from ground-disturbing utility line construction. The County has not
11 protected the ecological functions and values of wetlands, as required by RCW 36.70A.172.

12 Regarding the General Utility Exemption from complying with Critical Areas
13 Regulations adopted in San Juan County Ordinance 2-2014, SJCC § 18.30.110C(3), the
14 Board makes the following Findings of Fact:
15

16 **BOARD FINDINGS OF FACT**

17
18 1. There is no evidence in the record indicating that impacts from installing utility
19 lines in wetlands can be effectively mitigated to satisfy the standard of "no net loss of
20 ecological functions and values."

21 2. The County failed to substantively consider BAS on degrading the functions and
22 values of wetlands when utilities that are installed or constructed in wetlands (1) modify
23 wetlands vegetation, (2) disturb soils [digging, trenching, tilling, compacting], (3) alter
24 hydrologic functions and water regimes, (4) degrade water quality, and (5) introduction of
25 invasive species.
26

27 3. The County's development regulations pertaining to utility lines do not require
28 adequate compensatory mitigation for long-term harm to wetlands caused by construction
29 activities, soil disturbance, altered water regimes, and the introduction of invasive species.
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¹⁸⁵ Ordinance No. 2-2014, p. 26 of 81.

1 **BOARD CONCLUSIONS OF LAW**

2 Based on the foregoing Findings of Fact, the Board concludes as follows:

3 1. The Growth Management Act requires counties and cities to protect the functions
4 and values of Critical Areas, including wetland ecosystems.

5 2. The County failed to protect the functions and values of wetland ecosystems, in
6 violation of RCW 36.70A.060(2), 36.70A.172(1), and RCW 36.70A.030(5).

7 3. The County failed to include the Best Available Science to protect the functions
8 and values of Critical Areas, in violation of RCW 36.70A.172.

9 4. The County failed to provide a reasoned justification for departing from the Best
10 Available Science.

11 5. The Board has a firm and definite conviction that a mistake has been made.

12 6. San Juan County Ordinance No. 2-2014 is clearly erroneous in view of the
13 entire record before the Board and in light of the goals and requirements of the Growth
14 Management Act.

15 7. San Juan County is not in compliance with the requirements of RCW
16 36.70A.060(2) and RCW 36.70A.172.

17 **L. Definition of Development**

18 **The County's definition of "development" in Ordinance 26-2012 failed to**
19 **comply with RCW 36.70A.060 and RCW 36.70A.172, and such action was not**
20 **guided by RCW 36.70A.020(9) and (10).**

21 In the FDO, the Board found the definition of development failed to protect critical
22 areas as there were no "standards to ascertain the actual duration of such activities or to
23 address the potential impacts on critical areas".¹⁸⁶ The prior definition of "development"
24 provided a full exemption from application of critical areas regulations for activities lasting
25 less than twenty-four months that did not adversely alter critical areas, including, but not
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¹⁸⁶ Final Decision and Order, p. 32

1 limited to, construction, draining, mining, and dredging.¹⁸⁷ On compliance, the 24-month
2 exception clause was deleted from the definition of “Development” and the County added a
3 new, related definition:

4 “Temporary Development Activity” means for the purposes of critical area
5 regulations in SJCC Title 18, temporary uses or activities associated with
6 development on a permitted active construction site. Temporary uses and
7 activities include mobile contractor offices, equipment storage and storage
8 yards, portable toilets, on-site equipment repair, on-site staging, and
9 workshops.”¹⁸⁸

10 Temporary Development Activity was then added to the Ordinance’s Tables 3.5 and 3.8 with
11 the result that such defined activities [temporary development] are now allowed in wetland
12 and FWHCA buffers provided reasonable efforts are made to avoid impacting critical area
13 functions and values and any adverse impacts are mitigated. However, those activities are
14 not allowed in the critical areas themselves.¹⁸⁹ The specific language included in Tables 3.5
15 (Wetlands) and 3.8 is identical, although Table 3.8 applies to Aquatic FWHCAs:
16

17 Temporary development activities defined in SJCC 18.20.200 provided that
18 reasonable efforts are made to avoid impacts to wetland functions and
19 values and any adverse impacts are mitigated in accordance with SJCC
20 18.30.110(E).

21 The Friends argue the County’s compliance action addressing the “development”
22 definition fails to achieve compliance. It states construction activities, such as those allowed
23 by the definition “would impose harm to wetlands and FWHCAs,” referencing the *BAS*
24 *Synthesis*¹⁹⁰ and *Protection of Marine Riparian Functions in Puget Sound, Washington*.¹⁹¹
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28 ¹⁸⁷ Originally challenged Ordinance 26-2012 included the following: “‘Development’ means the division of a
29 parcel into two or more parcels; the construction, reconstruction, conversion, structural alteration, relocation, or
30 enlargement of any structure; any grading, draining, dredging, drilling, filling, paving, excavation, mining,
31 landfill; or any extension of the use of land. (See also “Shoreline development.”) For purposes of critical area
32 regulations, development does not include activities with a duration of less than 24 months that do not
adversely alter critical areas. Not all development requires a permit or review.”

¹⁸⁸ Section 5, SJCC 18.20.200, (“T” Definitions), Ordinance No. 2-2014, p. 20.

¹⁸⁹ Ordinance No. 2-2014, p. 49 at subsection “f” and “n”; p. 63 at subsection “g”.

¹⁹⁰ IR 5554-58.

¹⁹¹ IR 3770-3793.

1 The County responds by stating the amended language first requires avoidance and,
2 if that is not possible, then any adverse impacts to critical areas are required to be
3 mitigated. It states the included conditions ensure no net loss of critical area functions and
4 values.

5 The question before the Board is whether the amendments address the Board's
6 concerns regarding ". . . standards to ascertain the actual duration of such activities or to
7 address the potential impacts on critical areas. . . ." First of all, the challenged definition of
8 "development" included a total exemption from the critical area regulations for that activity.
9 Consequently, development, as defined, was allowed within critical areas and their buffers.
10 The compliance action taken by the County no longer allows those activities within critical
11 areas. Development activities, when located in a critical area buffer, are now subject to the
12 requirement that reasonable efforts are made to avoid impacts to critical area functions and
13 values. As addressed above in Section D of this Order, entitled "Avoidance/Mitigation," the
14 Board has found and concluded the County's mitigation sequencing process's first
15 requirement is avoidance of an activity that would adversely affect a critical area. See
16 SJCC 18.30.110.E.8.d (p. 27 of Ordinance 2-2014) and 18.30.160.E.7.a.i.(A) (p. 67 of
17 Ordinance 2-2014). If the location of these defined development activities cannot be
18 avoided, mitigation is required. Furthermore, there is no longer a blanket exemption and
19 "development activities" are only allowed in buffers, not the critical areas themselves. And,
20 while the Friends observe building permits are valid for five years with a one-year
21 extension, the authorization also limits this use to active construction sites.
22
23
24

25 The Board finds and concludes San Juan County has achieved compliance regarding
26 allowance of development activities. The Friends of the San Juans has failed to establish
27 the action taken by San Juan County in that regard is clearly erroneous in light of the goals
28 and requirements of chapter 36.70A RCW.
29

30 The Board assumes the County's reference to wetland functions and values in the
31 Ordinance's Table 3.8 was an inadvertent error and the reference should have been to
32 Aquatic FWHCAs functions and values. That should be addressed during compliance.

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V. ORDER

Based on the foregoing, the Board determines San Juan County, through the adoption of Ordinance No. 2-2014, has addressed the findings of noncompliance as set out in the Board's September 6, 2014 Final Decision and Order other than in the following particulars:

1. San Juan County's allowance of sleeved and water-tight sewer lines in wetlands fails to include the Best Available Science to protect the functions and values of Critical Areas, in violation of RCW 36.70A.172, and fails to protect the functions and values of wetland ecosystems, in violation of RCW 36.70A.060(2), 36.70A.172(1), and RCW 36.70A.030(5).
2. San Juan County's allowance of utility lines in wetlands fails to include the Best Available Science to protect the functions and values of Critical Areas, in violation of RCW 36.70A.172, and fails to protect the functions and values of wetland ecosystems, in violation of RCW 36.70A.060(2), 36.70A.172(1), and RCW 36.70A.030(5).
3. San Juan County is found to be in continuing noncompliance as addressed above and must take legislative action to achieve compliance pursuant to this Order, according to the following schedule:

Compliance Due	February 17, 2015
Compliance Report and Index to the Record Due (County to file and serve on all parties)	March 3, 2015
Any Objections to a Finding of Compliance Due	March 17, 2015
County's Response Due	March 27, 2015
Compliance Hearing (location to be determined)	April 7, 2015 10:00 a.m.

1 Dated this 20th day of August, 2014.
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5 _____
6 William Roehl, Presiding Officer
7 Concurring in Part, Dissenting in Part,
8

9 _____
10 Nina Carter, Board Member
11

12 _____
13 Raymond Paolella, Board Member
14

15 **Note: This is a final decision and order of the Growth Management Hearings Board**
16 **issued pursuant to RCW 36.70A.300.¹⁹²**
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30 _____
31 ¹⁹² Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all
32 parties within ten days of mailing of the final order. WAC 242-3-830(1), WAC 242-3-840.
A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days
as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970.
It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth
Management Hearings Board is not authorized to provide legal advice.

1 **Board Member William Roehl’s Dissenting Opinion (Sewage Disposal Systems) and**
2 **Opinion Concurring in Result (Transmission Lines)**

3
4 **I. Sewage Disposal Systems in Wetlands**

5 I respectfully disagree with much of the analysis and the ultimate conclusion reached
6 by the majority in regards to the County’s compliance regulations authorizing possible
7 placement of some on-site sewage system components in wetlands and thus dissent from
8 that portion of this Order. The question of sewage disposal systems arose in the context of
9 the following FDO finding and conclusion:

10 **The County’s allowance of sewage disposal systems in wetlands,**
11 **FWHCAs and their buffers failed to comply with RCW 36.70A.060 and**
12 **RCW 36.70A.172, and was not guided by RCW 36.70A.020(9) and (10).**

13 Ordinance No. 28-2012 and No. 29-2012 allowed on-site sewage disposal systems
14 within wetlands, FWHCAs and their associated buffers subject to the following:

15 If no practicable alternative exists, components of on-site sewage disposal
16 systems in conformance with local and State requirements, provided:

- 17
- 18 i. Appropriate BMPs are used to minimize erosion, sedimentation, and soil
19 disturbance;
 - 20 ii. For new systems, trees within Tree Protection Zones are retained in
21 conformance with subsection (E.1) of this section.
 - 22 iii. For replacement of existing, failing systems where there is no other
23 alternative that will meet State requirements (including locating the new
24 system in the same place as the old system), trees within Tree Protection
25 Zones are retained to the greatest extent possible.¹⁹³

26 On compliance, the County opted to regulate the location of sewage disposal
27 systems by tailoring the regulations so as to focus on the separate components of such
28 systems. Rather than allowing all system components in wetlands and FWHCAs, now only
29 “sleeved and water-tight sewer lines” are authorized, and then in only limited circumstances.
30 In addition, the conditions under which those components would be allowed were
31 strengthened.
32

¹⁹³ Ordinance 28-2012, p. 28 and Ordinance 29-2012, p.22.

1 **Mitigation Sequencing**

2 However, before addressing the specifics of the regulations, it is apparent the
3 majority’s analysis fails to account for the County’s initial mitigation sequencing step, the
4 avoidance requirement, as well as the mitigation requirements that follow. The majority
5 describes the County’s mitigation provisions as “incoherent and internally inconsistent
6 because the BAS already establishes that construction, operation, and maintenance of
7 sewer lines in wetlands will degrade wetland functions and values” Such a statement
8 clearly implies that an activity that potentially negatively impacts wetlands (or any other
9 critical area) can never be allowed. While that may be an ideal to strive for, it is not the law.
10 Here, it is true that the BAS establishes construction of a sewer line in a wetland will have
11 negative impacts. That is a given based on the record before the Board as well as common
12 sense. However, that does not address the question which is departure from BAS and
13 which is addressed in the following section on BAS departure.
14

15 While the majority expresses a concern that the County’s use of the words
16 “reasonable efforts” has not been defined, the Board and the parties spent considerable
17 time examining that phrase during the compliance hearings. The Board has already
18 concluded that inclusion of the clause “reasonable efforts . . . to avoid” triggers the
19 mitigation sequencing process. The Board found: “ . . . based on the language of SJCC
20 18.30.110.E.8.d (p. 27 of Ordinance 2-2014) and 18.30.160.E.7.a.i.(A) (p. 67 of Ordinance
21 2-2014), the first requirement is avoidance of an activity that would adversely affect a critical
22 area when authorization of the use requires that “reasonable efforts are made to avoid”
23 impacts to critical area functions and values.”¹⁹⁴ The majority appears to disregard those
24 findings and proceeds to discuss the County’s potential allowance of sleeved and water-
25 tight sewer lines within wetlands as if it would constitute an outright exemption from wetland
26 critical area protections and that no mitigation of harm would be required. That is not the
27 case. Rather, the Ordinance’s inclusion of the phrase “reasonable efforts are made to avoid
28 impacts”¹⁹⁵ commences application of the county’s mitigation sequencing requirements, the
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¹⁹⁴ See pp. 23, 24 above.

¹⁹⁵ Ordinance 2-2014, p. 51, section “u”; p. 65, section “s”.

1 first requirement of mitigation sequencing being avoidance.¹⁹⁶ Sleeved and water-tight
2 sewer lines would be allowed in wetlands if, and only if, “adverse impacts [to critical areas]
3 cannot be avoided.” See Ordinance No. 2-2014, p.27 (for areas outside SMA jurisdiction)
4 and p. 67 (for SMA areas). If avoidance is not possible, any adverse impacts to critical areas
5 must be mitigated. The majority’s statement that the regulations “do not require adequate
6 compensatory mitigation for long-term harm” is simply inaccurate.
7

8 Mitigation sequencing is designed to reduce the severity of negative impacts and to
9 provide compensation for those impacts when appropriate.¹⁹⁷

10 Mitigation is a series of actions that requires addressing each action, or step,
11 in a particular order. This sequence of steps is used to reduce the severity of
12 negative impacts from activities that potentially affect wetlands and to
13 determine what types of impacts may be permitted and what types of
14 compensatory mitigation may be appropriate (see the following section for a
discussion of compensatory mitigation).

15 According to the rules implementing the Washington State Environmental
Policy Act, mitigation involves the following (WAC 197.11.768):

- 16 1. Avoiding the impact altogether by not taking a certain action or parts of
17 an action;
- 18 2. Minimizing impacts by limiting the degree or magnitude of the action
19 and its implementation, by using appropriate technology, or by taking
affirmative steps to avoid or reduce impacts;
- 20 3. Rectifying the impact by repairing, rehabilitating, or restoring the
21 affected environment;
- 22 4. Reducing or eliminating the impact over time by preservation and
23 maintenance operations during the life of the action;
- 24 5. Compensating for the impact by replacing, enhancing, or providing
25 substitute resources or environments; and/or
- 26 6. Monitoring the impact and taking appropriate corrective measures.¹⁹⁸

27 San Juan County’s mitigation sequencing provisions are located at SJCC
28 18.30.110(E) (and SJCC 18.30.160(E)(7)(a) for areas within shoreline jurisdiction) and
29 include the same steps set forth in WAC 197-11-768, *Wetlands, Volume 1*¹⁹⁹ and *Wetlands,*
30

31 ¹⁹⁶ Ordinance 2-2014, p. 27. SJCC 18.30.110.E.8.d; See also WAC 197-11-768. That rule is identical to the
32 wording included in *Wetlands Volume 2*, § 8.3.6, p. 8-26.

¹⁹⁷ *Wetlands Volume 2*, § 8.3.6, p. 8-26.

¹⁹⁸ *Id.*

¹⁹⁹ *Wetlands, Volume 1*, § 6.2.1, p. 6-4.

1 Volume 2: avoid, minimize, rectify, reduce, compensate and monitor. There is neither
2 incoherency nor inconsistency.

3
4 SJCC 18.30.110(E).

5 **Critical Area Mitigation Requirements.**²⁰⁰
6

- 7
8 1. This section outlines the provisions for mitigating adverse impacts to
9 critical area functions and values when mitigation is authorized or
10 required by the San Juan County Code. Possible mitigation actions may
11 include minimizing impacts as well as re-establishment, rehabilitation,
12 restoration, creation, and enhancement.
13 2. Mitigation, monitoring, and adaptive management plans must be
14 developed by a qualified professional (s).
15 3. Mitigation, monitoring, and adaptive management plans are reviewed and
16 approved by the decision-maker for the underlying permit or approval
17 (director or hearing examiner, depending on type of permit/approval).
18 4. Preparation of mitigation, monitoring, and adaptive management plans,
19 and their review by the County, which may include referral to independent
20 qualified professionals, shall be at the applicant's expense. If review by
21 third-party is necessary because of the complexity of the plans or
22 apparent errors, the Department may require advance payment of fees
23 for this review based on the estimated review time. As an alternative to
24 third-party review, the applicant and the director may jointly select a
25 qualified professional who will complete the plans.
26 5. Mitigation options include the use of certified mitigation banks and
27 approved in-lieu fee mitigation sites when they are developed.
28 6. Removal of illegal modifications cannot be used to mitigate new adverse
29 impacts to critical areas when those modifications were made by the
30 owner of the property that is the subject of the application.
31 7. Mitigation plans must be appropriate for the scale and scope of the
32 project, and include adequate information for the decision maker to
determine that the project and application are in conformance with
approval criteria. Potential components of an application include the
following:
a. For both the area proposed for development or vegetation removal,
and of the proposed mitigation site, the applicable items listed in
SJCC Section 18.80.020.C (Project Permit Applications-Forms) as
well as photos of both the development and mitigation sites,

²⁰⁰ Ordinance No. 2-2014, pp. 25-27.

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- b. Any related project documents such as applications to other agencies or environmental documents prepared pursuant to the State Environmental Policy Act;
- c. For both the area proposed for development or vegetation removal, and the proposed mitigation site, applicable critical area reports, critical area delineations and Best Available Science documents supporting the proposal.
- d. For both the area proposed for development or vegetation removal and the mitigation site, copies of any proposed or approved storm water and erosion control plan required by SJCC 18.60.
- e. A narrative describing anticipated adverse impacts to critical area functions and values, the mitigation proposal (including the goals of the proposal, performance standards that will be used to gauge the effectiveness of their proposal, construction methods, and the sequence and timing of actions), and explaining how the proposal meets the plan approval criteria. Assessment of adverse impacts to critical area functions and values and of the effectiveness of proposed mitigation shall be based on the Best Available Science.
- f. For offsite mitigation actions, an explanation of why on-site mitigation was not feasible, along with the site selection criteria employed.
- g. Grading and excavation details. If grading or excavation is proposed, pre-and post-construction contour plans are required at a scale that is suitable for the site.
- h. A planting plan (if planting is proposed) identifying plant species, quantities, sizes, locations, spacing, and density, along with proposed measures to protect and maintain the plants until they are established.
- i. Any other drawings necessary to illustrate the proposal.
- j. Monitoring and adaptive management plans appropriate for the scale and scope of the project. These plans must describe measurable data that will be collected to assess the effectiveness of the project, must include a monitoring schedule (monitoring is required at least once each year, with a report submitted to the Department by November 1), and must explain corrective actions that will be taken to deal with any problems. The project shall be monitored for three (3) years or until the director determines that it is successful, functioning as designed, and that established performance standards have been met.
- k. For mitigation of adverse impacts to wetlands, the plan, including associated wetland replacement ratios, must be consistent with the guidance provided in *Wetland Mitigation in Washington State - Part 1: Agency Policies and Guidance*, Ecology publication 06-06-011a ;

1 and Wetland Mitigation in Washington State - Part 2, publication 06-
2 06-011b. As an alternative, mitigation actions may follow the
3 procedures described in Ecology Publication No. 10-06-011,
4 Calculating Credits and Debits for Compensatory Mitigation in
5 Wetlands of Western Washington or another mitigation approach or
6 publication approved by Ecology.

- 7 l. A description of the report author's education and experience
8 relevant to designing and implementing the proposed actions.
9 m. A cost estimate, prepared by a qualified professional, for
10 implementing the mitigation plan and monitoring the site for a period
11 of three (3) years or until the project is anticipated to be fully
12 completed and functional as determined by the qualified professional
13 and approved by the decision-maker (director or hearing examiner,
14 depending on type of underlying permit).
15 n. Financial Guarantee. Unless exempt under RCW 36.32.590, a
16 financial guarantee and associated agreement covering 115% of the
17 cost of implementing the mitigation and monitoring plans. This
18 guarantee and the associated agreement must meet the
19 requirements of SJCC 18.80, and for mitigation of adverse impacts
20 to Wetlands and Fish and Wildlife Habitat Conservation Areas, it
21 must initially be established to cover a time period of three (3) years
22 or until the project is anticipated to be fully completed and functional
23 as determined by the qualified professional and approved by the
24 decision-maker (director or hearing examiner, depending on type of
25 underlying permit). Note: The maximum cost to the property owner is
26 the original cost for implementing and monitoring the project, plus
27 115% of that cost.
28 o. A statement, signed by the property owner, agreeing to periodic
29 inspections as established in the monitoring plan. The purpose of
30 inspections is to determine compliance with approved plans, and
31 inspections can be performed by either a qualified professional hired
32 by the property owner, or a County representative. If a County
representative conducts the inspection(s), they shall be by
appointment or following advance written notice.

Section 8 then sets forth the approval criteria:²⁰¹

8. Mitigation Plan Approval Criteria. Approval of mitigation plans shall be based on conformance with the following criteria:

- a. The application includes the applicable items listed in SJCC 18.30.110.E.7.
b. Mitigation is authorized or required by the San Juan County code.

²⁰¹ Ordinance No. 2-2014, pp. 27-28.

- 1 c. The mitigation, monitoring and adaptive management plans were
 2 developed by qualified professionals. For wetlands, the plans, including
 3 associated wetland replacement ratios, shall be consistent with the
 4 guidance provided in *Wetland Mitigation in Washington State – Part 1:*
 5 *Agency Policies and Guidance, Ecology publication 06-06-011a; and*
 6 *Wetland Mitigation in Washington State – Part 2, publication 06-06-011b.*
 7 These and other wetland mitigation and monitoring guidance documents
 8 are available from the Department of Ecology. As an alternative,
 9 mitigation requirements may be determined through application, by a
 10 qualified professional, of procedures described in Ecology Publication
 11 No. 10-06-011, *Calculating Credits and Debits for Compensatory*
 12 *Mitigation in Wetlands of Western Washington* or another mitigation
 13 approach or publication approved by Ecology.
 14 d. For areas outside Shoreline jurisdiction, proposed development is
 15 designed and located in such a way as to avoid adversely impacting the
 16 functions and values of critical areas, considering the Best Available
 17 Science. If adverse impacts cannot be avoided, then they must be
 18 mitigated so there will be no net loss of critical area functions and values,
 19 considering the Best Available Science. When necessary, mitigation
 20 actions shall occur in the following preferred sequence: (emphasis
 21 added)
 22 i. Reduce or minimize adverse impacts limiting the degree and
 23 magnitude of the action, or by applying appropriate technology and
 24 engineering;
 25 ii. Rectify adverse impacts by repairing, rehabilitating, or restoring the
 26 affected environment;
 27 iii. Compensate for adverse impacts by replacing, enhancing, or
 28 providing similar resources or environments that will substitute for
 29 those functions and values that were adversely affected.
 30 e. For areas within Shoreline jurisdiction, the negation actions must be
 31 consistent with the mitigation sequence outlined in SJCC 18.30. 160.E.7.
 32

The majority states “ . . . SJCC 18.30.110(E)(8)(d) does not consider how the
 ‘preferred sequence’ of mitigation will avoid or prevent the longer duration loss of functions
 and values identified in the BAS. . . .” The Critical Area Mitigation Requirements provide that
 mitigation plans “must be consistent with the guidance provided in *Wetland Mitigation in*
Washington State - Part 1: Agency Policies and Guidance, Ecology publication 06-06-011a ;
and Wetland Mitigation in Washington State - Part 2, publication 06-06-011b.” How can it be
 argued the County does not require adequate compensatory mitigation programs when the

1 regulations [SJCC 18.30.110(E)(8)(c)] require consistency with DOE's *Wetlands Volume 1*
2 *and Wetlands Volume 2*? The majority opinion observes: "A county could potentially allow
3 activities with negative impacts in critical areas if science-based mitigation adequately
4 protects against the loss of ecological functions and values. . . ." That is exactly what San
5 Juan County has done [applied science-based mitigation] by mandating mitigation plans
6 based on the BAS included in *Wetlands 1* and *2*. Finding of Fact No. 8 is not supported by
7 the Record as the development regulations do indeed require "adequate compensatory
8 mitigation."²⁰² To conclude otherwise is to suggest the guidance provided by DOE in
9 *Wetlands Volume 1* and *Wetlands Volume 2* fails to properly address compensatory
10 mitigation.
11

12 The majority further criticizes the County's compliance legislation, stating it is
13 "unclear . . . how they will mitigate . . . impacts from allowing new sewer lines in wetlands"
14 and that the record fails to include evidence indicating those impacts can be effectively
15 mitigated.²⁰³ Addressing in a critical areas ordinance how a given negative wetland impact
16 resulting from a specific project should be mitigated would be an impossible task. It is clearly
17 sufficient to require mitigation sequencing and to then tailor any mitigation actions to the
18 specifics of the proposal. For example, what category of wetland is under consideration?
19 What is the extent of the wetland disturbance? Those and a myriad of related questions
20 should be addressed by the jurisdiction's administrative personnel and wetland
21 professionals. The GMA does not place a burden upon the County to include in the record
22 "evidence indicating that these impacts can be effectively mitigated."
23
24

25 **Departure From BAS-Reasoned Justification**

26 As to the regulations themselves, the County's compliance action is a significant
27 improvement over the regulations applicable to on-site sewage systems included in the
28 original ordinances. Taking into account the location of the specific components of these
29
30

31 ²⁰² The County's development regulations pertaining to on-site sewage systems do not require adequate
32 compensatory mitigation to protect ecological functions and values of wetlands from long-term harm
caused by construction activities, soil disturbance/trenching, altered water regimes, and the introduction
of invasive vegetation species.

²⁰³ p. 38.

1 systems focuses directly on the problem. Precluding the location of drainfields within critical
2 areas and their associated water quality buffers addresses a major area of concern.²⁰⁴ The
3 drainfield component constitutes the greatest threat to critical area functions and values as
4 they are the dispersal component of on-site sewage systems. Sleeved and water-tight
5 sewer lines, the least likely component to result in negative impacts to wetland critical area
6 functions and values, are allowed within wetlands when their placement there cannot be
7 avoided and then only under certain conditions, followed by the requirement that adverse
8 impacts be mitigated.
9

10 Nevertheless, as the majority observes, sewage system components, including
11 sleeved and water-tight sewer lines, can and do fail,²⁰⁵ with resulting impacts to critical
12 areas.²⁰⁶ Furthermore, it is true that a careful review of the record finds but a single
13 reference in DOE correspondence regarding drainfields.²⁰⁷ The record contains no other
14 references to the separate components of on-site sewage systems. All discussion appears
15 to refer to these “systems” in their entirety.
16

17 As stated by the Friends, even assuming no failure, the installation and maintenance
18 of components, such as the ditching required for installation of sewer lines, would inevitably
19 impact critical areas.²⁰⁸ Additionally, while the County has implemented a septic system
20 education and inspection program, it has yet to meet the County’s inspection goals.²⁰⁹
21

22 Consequently, I agree with the majority and disagree with the County’s assertion that
23 the compliance legislation allowing these sewage system components to be located in

24 ²⁰⁴ Drainfields may be only be authorized outside of the water quality buffer associated with wetlands and
25 FWHCAs. San Juan County’s Compliance Report, p. 3; see Ordinance No. 2-2014, pp. 51-52, 64-65.

26 ²⁰⁵ The majority’s reference to an EPA, nation-wide septic system malfunction rate estimate is questionable as
27 it is not included in the record of this matter. That estimate’s lack of relationship to San Juan County’s
28 experience is reflected in the 2013 Year End Report admitted into the record at the commencement of the
29 Compliance Hearing. That Report indicates that of 3,656 septic system inspections conducted by an inspector
30 other than the homeowner in the years 2011, 2012 and 2013, only 73 failures were identified, approximately
31 2% during a three (3) year period.

32 ²⁰⁶ *Wetlands Volume 2*, Appendix 8-A, p. 5: “Buffers will not adequately protect functions in a wetland if
polluted waters bypass the buffer and enter the wetland directly via pipes, ditches, or other channels. To
maintain the current levels at which a wetland improves water quality, it may be necessary to limit the
introduction of any additional pollutants that might come in through untreated runoff that bypasses the buffer.”

²⁰⁷ “Allowing installation of a septic drainfield in a wetland draining directly to marine water with commercial or
recreational shellfish beds poses a serious health risk as well as ecological degradation.” IR 51669.

²⁰⁸ Compliance Hearing Transcript, p. 53.

²⁰⁹ Draft 2013 Year End Report-Review of Environmental Health Programs/Activities, p. 2.

1 critical areas, including wetlands, “may” represent a departure from BAS.²¹⁰ It is a departure.
2 The majority has repeated and amplified the significant concerns reflected in the BAS
3 regarding the inability of on-site sewage systems to effectively treat many substances as
4 well as the effects on the functions and values of critical areas through the introduction of
5 those substances.

6
7 As the majority observes, the question before the Board is whether San Juan County
8 “established a reasoned justification for departure”? First of all, the basic requirement to
9 include BAS is found in RCW 36.70A.172(1):

10 In designating and protecting critical areas under this chapter, counties and
11 cities shall include the best available science in developing policies and
12 development regulations to protect the functions and values of critical areas.

13 In addition, counties and cities shall give special consideration to
14 conservation or protection measures necessary to preserve or enhance
15 anadromous fisheries. (emphasis added)

16 But jurisdictions may also depart from BAS. Departure has been addressed by the appellate
17 courts.

18 Because the GMA merely requires a county to “include” the best available
19 science in its record and does not require a county to follow the best
20 available science, a county may depart from the best available science if it
21 provides a reasoned justification for such a departure. *Yakima County v. E.*
22 *Wash. Growth Mgmt. Hearings Bd.*, citing *Swinomish*, 161 Wn.2d at 430-
31.²¹¹ (emphasis added)

23 Moreover, the GMA does not require the county to follow BAS; rather, it is
24 required to “include” BAS in its record. RCW 36.70A.172(1). Thus, the county
25 may depart from BAS if it provides a reasoned justification for such a
26 departure. See *Ferry County v. Concerned Friends*, 155 Wn.2d 824, 837-38,
27 123 P.3d 102 (2005); WAC 365-195-915(1)(c)(i)-(iii), Swinomish Indian Tribal
Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.²¹² (emphasis added)

28 The *Yakima* court referred to the EWGMHB’s Final Decision and Order observation (Case
29 No. 08-1-0008c):

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²¹⁰ Ordinance No. 2-2014, p. 7, line 18.

²¹¹ 168 Wn. App. 680, 691 (2012).

²¹² 161 Wn.2d 415, 430 (2007).

1 “[s]ince the County did not believe it was deviating from [best available
2 science], it made no specific findings” to explain its departure from the
3 scientific studies or to identify other goals of the GMA it was implementing by
4 making such a choice.²¹³ (emphasis added)

5 Remand allows Yakima County to reconsider the best available science and
6 either amend the buffers to comply with that science or establish a reasoned
7 justification for departure from that science.²¹⁴

8 WAC 365-195-915(1) addresses a jurisdiction’s departure from BAS (relevant portion
9 italicized and underlined):

10 To demonstrate that the best available science has been included in the
11 development of critical areas policies and regulations, counties and cities
12 should address each of the following on the record:

13 (a) The specific policies and development regulations adopted to protect
14 the functions and values of the critical areas at issue.

15 (b) The relevant sources of best available scientific information included
16 in the decision-making.

17 (c) Any nonscientific information—including legal, social, cultural,
18 economic, and political information—used as a basis for critical area policies
19 and regulations that depart from recommendations derived from the best
20 available science. A county or city departing from science-based
21 recommendations should:

22 (i) Identify the information in the record that supports its decision to depart
23 from science-based recommendations;

24 (ii) Explain its rationale for departing from science-based
25 recommendations; and

26 (iii) Identify potential risks to the functions and values of the critical area
27 or areas at issue and any additional measures chosen to limit such risks.

28 State Environmental Policy Act (SEPA) review often provides an opportunity
29 to establish and publish the record of this assessment.

30 The County’s compliance Ordinance addressed the WAC 365-195-915 requirements
31 by including the County’s rationale for BAS departure, set forth what it believed to be the
32 potential risks to the functions and values of critical areas and identified the measures

²¹³ *Yakima County v. E. Wash. Growth Mgmt. Hearings Bd.*, 168 Wn. App. 680, 693; referencing EWGMHB
Case No. 08-1-0008c, FDO, April 5, 2010, p. 43.

²¹⁴ *Id.* p. 694.

1 chosen to limit those risks. The rationale, risks and limiting measures are found in
2 Ordinance 2-2014, Section XXI, pages 7-9:

3
4 **a. Rationale for departing from science based recommendations.**

- 5
6 i. Development in San Juan County is predominantly in rural areas where
7 connection to a public sewer system is not permitted or available due to lack
8 of infrastructure. Approximately 75 percent of San Juan County's population
9 relies on on-site septic systems. According to Chapter 4 of the *BAS*
10 *Synthesis* (page 15) very little area in San Juan County is suitable for
11 conventional on-site septic systems, so alternative septic systems designed
12 to provide an additional level of treatment are often used. These are the
13 only systems available to manage sewage in most parts of the County and
14 are often necessary to support existing and new development.
- 15
16 ii. Sometimes there is no practicable alternative to siting an on-site sewage
17 system line in a wetland, FWHCA, or their buffer.
- 18
19 iii. Soil disturbance and vegetation removal associated with installation of on-
20 site septic systems are usually of short duration and limited to small areas
21 that can be quickly revegetated.
- 22
23 iv. Mitigation requirements are designed and required to protect critical areas
24 from potential adverse impacts.
- 25
26 v. Onsite sewage systems are also regulated by San Juan County Health &
27 Community Services under statewide standards adopted in WAC 246-272A,
28 Rules and Regulations of the State Board of Health for On-site Sewage
29 Systems. These standards regulate the siting, design, installation, operation
30 and maintenance of on-site sewage treatment and disposal systems. The
31 proposal follows these regulations and protects public health by minimizing
32 both the potential for exposure to sewage from on-site sewage systems,
and the adverse effects of discharges from on-site sewage systems on
ground and surface waters.
- vi. Under WAC 246-272A-0270, owners of on-site septic systems are
responsible for the operation, monitoring and maintenance of the system.
On-site septic systems are required to be inspected once every three years
for septic tank/gravity systems and annually for all other systems. In
addition, maintenance records and a complete seller disclosure statement is
required for residential real property transfers to keep owners informed of
their responsibilities. When needed, system upgrades are often required

1 prior to building permit issuance or property transfer. San Juan County
2 Health & Community Services enforces the regulations and implements
3 established programs that bring noncompliant systems into alignment with
4 local and State standards.

- 5 vii. WAC 246-272A-0210 establishes horizontal separations between system
6 components and sensitive areas including those from surface waters
7 measured from the Ordinary High Water Mark (OHWM). This includes a 100
8 foot separation of dispersal components (drainfields) and reserve areas
9 from surface waters. In addition, sewage tanks and distribution boxes must
10 be located 50 feet from surface waters. In both instances, the separation is
11 measured from the OHWM. When any site conditions indicate a greater
12 potential for contamination or pollution, such as excessively permeable
13 soils, the health official may increase the horizontal separation.²¹⁵
- 14 viii. San Juan County Health and Community Services adopted and is actively
15 implementing a countywide comprehensive On-site Sewage Operation and
16 Maintenance Program. The program follows adopted State regulations and
17 requires O&M inspections every three years for gravity distribution systems
18 and annually for all other system types. The program is designed to insure
19 systems are functioning properly, preventing inadequately treated sewage
20 from surfacing or entering surface and or groundwater water.
- 21 ix. San Juan County Health & Community Services designates sensitive areas
22 that are subject to increased operation and maintenance requirements
23 including shellfish protection districts and shellfish growing areas. These
24 areas require annual inspection of sewage systems.
- 25 x. Chapter 70.118A RCW requires San Juan County Health & Community
26 Services to identify and develop Marine Recovery Areas (MRA) and
27 propose an MRA where existing on-site sewage disposal systems are a
28 significant factor contributing to concerns associated with threatened or
29 downgraded shellfish growing areas, marine water with low dissolved
30 oxygen or fecal coliform, and marine waters where nitrogen has been
31 identified as a contaminant of concern. Based on all available data, no
32 Marine Recovery Areas are designated in the County.
- xi. San Juan County Health & Community Services regulations help to protect
critical areas through the regulation of materials, design, setbacks,

²¹⁵ See IR 5384: One of the options referenced in the BAS for protection of freshwater critical areas is:
“Continue to support the On-site Sewage System Operation and Maintenance Program with annual
inspections of septic systems near sensitive marine waters, and if possible expand to also include annual
inspections of systems closest to streams, lakes, wetlands and those on soils least suitable for effective waste
treatment. . . .”

1 construction, inspection, and notification of owner responsibilities. Education
2 and financial assistance programs also help support the upgrade of existing
3 systems.

4 **b. Potential risks to the functions and values of critical areas:**

- 5 i. Improperly maintained or malfunctioning septic systems could result in
6 harmful viruses and bacteria in surface or groundwater. However, such
7 systems are required to be repaired or replaced.
- 8 ii. Properly functioning on-site sewage systems effectively remove bacteria
9 and nutrients (nitrate and phosphorus). However, as indicated in the *BAS*
10 *Synthesis* various household chemicals and personal care products may not
11 be consistently removed by onsite septic systems. These foreign
12 substances may interfere with fish and wildlife populations by influencing
13 fertility, natural chemical cues needed for homing/communication, and/or
14 disease susceptibility.
- 15 iii. Nutrients, viruses, bacteria, and chemicals from septic tanks can also enter
16 stormwater when ponded or inadequately treated effluent flows into surface
17 runoff. However, such systems are required to be repaired or replaced
18 limiting such events.

19 **c. The requirements limit potential risks to the functions and values of
20 critical areas by:**

- 21 i. Prohibiting water-tight septic tanks, pump chambers and drainfields in
22 aquatic FWHCAs and wetlands.
- 23 ii. Allowing on-site sewage sewer lines in wetlands, FWHCAs and/or their
24 buffers only when there is no practicable alternative.
- 25 iii. Limiting the location of drainfields to areas outside of wetland and FWHCA
26 water quality buffers.
- 27 iv. Requiring the mitigation of adverse impacts to critical areas or their buffers
28 when system components are permitted in a wetland, FWHCA, or their
29 buffers.
- 30 v. Requiring best management practices to minimize erosion, sedimentation
31 and soil disturbance when system components are permitted in a wetland,
32 FWHCA, or their buffers.

- 1 vi. Limiting tree removal.
- 2
- 3 vii. Following well established and accepted State regulations for siting, design,
- 4 installation, operation and maintenance of on-site sewage treatment and
- 5 disposal systems.

6 BAS in the record and the County's justification for departure from BAS establish the

7 following. San Juan County is unique as it is comprised entirely of islands. The County has

8 only two small, non-municipal UGAs and development is primarily located in rural shoreline

9 areas. The current County population is less than 16,000. Seventy-five percent of that

10 population resides outside the "urban" areas: the Town of Friday Harbor and the two non-

11 municipal UGAs.²¹⁶ Public sewer systems are either not permitted or are unavailable for

12 most of that rural population.

13

14 The islands tend to have very shallow soils.²¹⁷ Consequently, conventional on-site

15 septic systems are the exception. Rather, alternative on-site septic systems are common,

16 providing an additional level of treatment. Those alternative sewage systems are often the

17 only way to support existing and new development. The installation of sleeved and water-

18 tight sewer lines involves small areas of soil disturbance and vegetation removal. Those

19 areas can be quickly revegetated. Regular septic system inspections are required, either

20 annually or every three years, depending on the type of treatment system. Annual

21 inspections are required for all County designated sensitive areas. Although not included in

22 the County's justification for departure from BAS, the 2013 Year End Report-Review of

23 Environmental Health Programs/Activities included a finding that of 3,656 septic system

24 inspections conducted by an inspector (other than the homeowner) in the years 2011, 2012

25 and 2013, only 73 failures were identified, a total of approximately 2% during a three year

26 period, or .66% annually. That evidence is directly relevant to the situation in San Juan

27 County and refutes the majority's reference to a nation-wide estimated failure rate of 10-

28 20%.

29

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²¹⁶ IR 5513.

²¹⁷ IR 5545.

1 The majority states the county's rationale for BAS departure "relies substantially" on
2 State Board of Health regulations.²¹⁸ In addition to addressing human health concerns,
3 those regulations also address the proper installation, operation and ongoing maintenance
4 of these systems²¹⁹ and thus do further support the County's decision. However, I suggest
5 the County's references to those regulations are merely additive to the sufficient justification
6 set forth in the Ordinance and referenced in the preceding paragraphs.
7

8 It is also appropriate to comment on the majority's expressions of concern over the
9 County's use of the phrase "no practicable alternative." The majority acknowledges the
10 County deleted the clause from the regulations included in Ordinance 2-2014, as suggested
11 in the FDO, but states the continued use of the clause in the Background Recitals in the
12 Ordinance somehow results in an unreasoned justification for departure from BAS. It is the
13 development regulations which control land-use activities, not the Ordinance's recitals. Use
14 of that clause in the justification for BAS departure is of no consequence in regards to
15 whether or not the regulations themselves are GMA compliant. What the Board's FDO found
16 to be non-compliant was the use of that clause in the development regulations.²²⁰
17

18 When a jurisdiction enacts regulations which depart from BAS, does so based on a
19 reasoned justification, and those regulations will negatively impact a critical area, mitigation
20 is required in order to protect the functions and values of those critical areas. Contrary to its
21 assertion, the result of the majority's analysis would be to preclude any action that BAS
22 indicates would negatively impact any critical area. It ignores the allowance of departure
23 from BAS and it ignores the accepted mitigation sequencing process – first seek to avoid
24 and, when that is not feasible, follow the sequence of minimizing, rectifying, reducing,
25 compensating and monitoring.
26

27 I would find San Juan County has provided a reasoned justification pursuant to
28 *Yakima County v. E. Wash. Growth Mgmt. Hearings Board, Swinomish Indian Tribal Cmty.*
29

30
31 ²¹⁸ pp. 35, 36.

²¹⁹ See, e.g., WAC 246-272A-0270.

32 ²²⁰ FDO, p. 57: "The Board also observes that while authorization for the installation of such systems within a wetland is allowed only if no practicable alternative exists, there is no such qualifier for installation of these systems in FWHCAs. Additionally, there are no apparent standards for ascertaining the lack of a practicable alternative."

1 v. *W. Wash. Growth Mgmt. Hearings Board* and WAC 365-195-915(1) for departure from
2 BAS in its allowance of the installation of sleeved and water-tight sewer lines within
3 wetlands pursuant to its adopted compliance regulations.

4 5 **II. Transmission/Utility Lines**

6 I concur with the majority when it finds SJCC 18.30.110.C.3.a fails to include a
7 requirement for adequate compensatory mitigation. On that basis alone I would remand to
8 the County.

9 The Board concluded in the FDO as follows:

10
11 The Board finds and concludes that a blanket exemption for activities which
12 could result in significant impacts to a critical area, without any consideration
13 of the quality of a wetland, and which does not include steps to avoid,
14 minimize or mitigate, fails to protect critical areas. (emphasis added)²²¹

15 SJCC 18.30.110.C.3.a does include a proviso that the exemption “. . . not have any
16 additional adverse effect on the functions and values of critical areas.”²²² However, as the
17 majority makes clear, such activities do have adverse effects. Consequently, it is imperative
18 that mitigation requirements clearly apply.

19 The lack of a mitigation requirement in SJCC 18.30.110.C.3.a contrasts with SJCC
20 18.30.110.C.3.b which specifically requires mitigation.²²³ Nor does SJCC 18.30.110.C.3.a
21 include the mitigation sequencing trigger: “reasonable efforts . . . to avoid.”
22

23
24 ²²¹ FDO, p. 71. Interestingly, SJCC 18.30.110. C.2 similarly fails to include a compensatory mitigation
25 requirement but that section is not before the Board.

26 ²²² Ordinance 2-2014, p. 22, SJCC 18.30.110.C.3.a.” Installation and construction of electrical,
27 telecommunications, cable, water, sewer, and other utility lines and equipment within existing structures,
28 facilities, infrastructure systems, development areas, and uses, utility easements, and public and private
29 rights-of-way, provided:

- 30 i. There is no further intrusion into geologically hazardous areas, frequently flooded areas, wetlands, or
31 fish and wildlife habitat conservation areas or their buffers;
32 ii. Soil erosion is controlled;
iii. Disturbed areas are promptly stabilized; and
iv. *Actions do not have any additional adverse effect on the functions and values of critical areas.*”(emphasis added)

²²³ Ordinance 2-2014, p. 22, SJCC 18.30.110.C.3.b. “Installation and construction of utility lines and
equipment not previously covered in SJCC 18.30.110(C)(2) and (C)(3)(a) above provided that reasonable
efforts are made to avoid impacts to critical area functions and values, and;

- i. BMPs are used to minimize clearing, erosion, sedimentation, and other soil disturbance;

1 Compliance in this regard requires the application of mitigation sequencing to the
2 consideration of uses pursuant to SJCC 18.30.110.C.3.a.
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7 _____
8 William Roehl, Board Member
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- ii. Disturbed areas are probably stabilized and revegetated;
- iii. *Any adverse impacts to critical areas are mitigated in accordance with SJCC 18.30.110(E).*"
(emphasis added)