

**STATE OF WASHINGTON  
EASTERN WASHINGTON  
GROWTH MANAGEMENT HEARINGS BOARD**

SAVE OUR BUTTE SAVE OUR BASIN SOCIETY,	Petitioner	)	)	)
ICICLE CANYON COALITION,	Petitioner	)	)	)
N. CENTRAL WASHINGTON AUDUBON SOCIETY,	Petitioner	)	)	)
SUZANNE SABERHAGEN,	Petitioner	)	)	)
SAVE CHELAN ALLIANCE,	Petitioner	)	)	)
LEAF ADOPT-A-FOREST,	Petitioner	)	)	)
YAKAMA INDIAN NATION,	Petitioner	)	)	)
<b>COMPLIANCE AND RESCINDING</b>		)	)	)
CITIZENS FOR RURAL ENVIRONMENT <b>CONCERNING</b>		)	)	)
AND AGRICULTURAL LAND,	Petitioner	)	)	)
CHELAN-DOUGLAS LAND TRUST,	Petitioner	)	)	)
<del>CHELAN COUNTY CONSERVATION</del> <del>DISTRICT,</del>	<del>Petitioner</del>	)	)	)
1000 FRIENDS OF WASHINGTON,	Petitioner	)	)	)
NORTH CASCADES CONSERVATION COUNCIL AND WASHINGTON ENVIRON-		)	)	)

CONSOLIDATED  
CASE NO. 94-1-0015

**ORDER ON**

**INVALIDITY**

**CRITICAL AREAS**

MENTAL COUNCIL	Petitioner	)
		)
STATE OF WASHINGTON,	Petitioner	)
	)	
vs.		)
		)
<u>CHELAN COUNTY,</u>	<u>Respondent</u>	<u>)</u>

**PROCEDURAL HISTORY**

On August 8, 1994, the Board issued its Final Order and Decision in this matter. The Board, in response to the County's enactment of Resolution No. 93-158, found Chelan County had failed to designate and conserve agricultural and forest resource lands and had failed to designate and protect critical areas.

On January 2, 1996 in response to Petitioners' Motion for Determination of Invalidity, the Board found Chelan County continued to be in non compliance with regard to critical areas designation and protection, specifically finding that sections 531 and 832 of the Critical Areas chapter, dealing with riparian and wetland buffers, were invalid.

In September 1997, Chelan County presented timelines for completion of their efforts to bring Chelan County into compliance with the Growth Management Act. A briefing schedule was established and a compliance hearing was set for August 5, 1998 at 10:00 a.m. in Wenatchee, Washington.

On June 30, 1998, Chelan County filed Motion for Rescission of Invalidity. A Motion for Modification of Order of Invalidity for Consistency with the 1997 Amendments to the GMA was also filed.

On July 23, 1998, the State of Washington filed a Motion to Supplement the Record and to Shorten Time for Response.

Pursuant to RCW 36.70A.330, numerous letters were received from persons who believed they had standing to challenge the legislation enacted in response to the board's final order and wished to participate in the hearing with the petitioners, state agencies and the county.

The parties that participated were the County through their attorney Susan Kinkle, Deputy Prosecuting Attorney; State of Washington, Fronda Woods and Alan D. Copsey, Assistant Attorneys General; the Yakama Indian Nation, through their attorney, John W. Ogan; James M. Urness for the Lake Chelan Waterfront Property Owners for a Responsible Riparian Ordinance; Tom Kriskovic, Wenatchee Association of Realtors; Marion E. Hill, for him and his wife; Robert Brody, President Chelan/Douglas County Farm Bureau; and Mr. Don Holman, of Cashmere, Washington.

Board Member Judy Wall gave notice that she wished to recuse herself from these matters due to the presence of a family member's name on the letterhead of a participating organization's papers submitted to this Board. After hearing comments from the participants and hearing no objections to her continued participation in the case, Board member Wall will recuse herself from the issue involving riparian areas. Board Member Wall has participated only in the wetland area portion of this opinion.

### **FINDINGS OF FACT**

1. In 1993, Chelan County adopted resolution No. 93-158, their first attempt at interim regulation and the designation of agricultural, forest, mineral and critical areas. In 1995, via Resolution No. 95-160, the County repealed resolution No. 93-158. This was itself later repealed by resolution No. 96-14 returning resolution No. 93-158 as law.
2. On June 2, 1998, the Chelan County Board of Commissioners adopted Resolutions 98-62 and 98-63, intending to revise the wetland and riparian areas interim regulations, portions of which were previously held invalid by this Board. These new revisions were comprehensive amendments to the interim wetlands and riparian area regulations, not just the invalidated sections.
3. Resolution No. 98-62 regulates Class I, II, III, IV and V streams. A conservation area and a review area for each riparian management zone are established. The area adjacent to and closest to the shoreline is the conservation area and, with few exceptions, no development is allowed in this area.
4. The area adjacent and upland from the conservation area is a review area. Resolution No. 98-62 requires individual site review where an alternative to the established buffer width is desired. With this alternative, discretion resides with the administrator of the riparian management area regulations, not with the property owner. The administrator must agree with the landowner upon an appropriate conservation area width, size, mitigation, restoration, or enhancement measures for the riparian area or a habitat management and mitigation plan shall

be required. (No. 98-62 sec. 13 & 14)

5. The Administrator mentioned in the above paragraph is neither required to possess any special training or experience nor is required to give notice to any State of Washington Departments, neighbors or others possibly interested in such an agreement.

6. Resolution No. 98-63 contains Revised Interim Regulations for Wetland Areas. This too provides for an “Administrative Variance” that is very similar to that found in No. 98-62. (No. 98-63 Sec. 12 & 13)

### **III. DISCUSSION OF LEGAL ISSUES AND CONCLUSIONS**

#### **State’s Motion to Supplement the Record:**

The State moved this Board for an order supplementing the record with documents not listed in the Index submitted by the County. The County stipulated to the addition of a majority of the requested documents, objecting to 10 items. The County’s primary objection was the failure of the State to provide the Board evidence the documents listed had been submitted to the County.

**Decision:** Having heard the arguments and having reviewed the documents, the Board grants the State’s motion to supplement the record. All the documents with the exception of the Management Recommendations for Washington’s Priority Habitats are included in the Record. The omitted document was not prepared until after the final adoption of the Resolutions before us.

#### **County’s Request to Clarify Order of Invalidity:**

Chelan County requested the Board to clarify the Order of Invalidity entered January 2, 1996 in this matter. They ask the order declare any development permit applications meeting the definitions established in RCW 36.70A.302(3)(b)(I-iii) were not affected by the order.

**Decision:** The Board has removed the finding of invalidity. The interpretation of the impact of the Order of Invalidity or its recession is not properly before us. The statute is clear and must be applied in individual cases. Clarification of Orders of Invalidity provided for in the GMA, RCW 36.70A.335, does not include this type of declaratory ruling.

**ISSUE 1: Whether revised interim riparian areas regulations adopted by Chelan county as Resolution No. 98-62, will no longer substantially interfere with the fulfillment of Goals nine and ten of the Growth Management Act? (GMA)**

**ISSUE 2: Whether Revised interim wetland areas regulations adopted by Chelan County as Resolution No. 98-63, will no longer substantially interfere with the fulfillment of Goals nine and ten of the Growth Management Act?**

**Discussion:** RCW 36.70A.302(1)(b) provides that the Growth Management Hearings Board may determine whether part or all of a comprehensive plan or development regulations are invalid if there is a finding the continued validity of such part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of the GMA. The Resolution prior to its amendment, 93-158 substantially interfered with the fulfillment of the goals of the GMA. However, Chelan County has done much to address the defects of this Resolution.

The actions of the County are substantial and credible steps along the path of planning for the future and preservation and protection of the Riparian and Wetland Areas. We applaud their efforts. These provisions no longer substantially interfere with the fulfillment of the goals of the GMA.

**Conclusion:** The invalidity of the Interim Riparian Areas Regulations and Interim Wetland Areas Regulations is rescinded.-

**ISSUE 3: Whether the record reflects that Chelan County included the Best Available Science when considering the adoption of Resolutions No. 98-62 and No. 98-63.**

**Petitioners' Position:** The State of Washington believes the County has not used the “best available science” in identifying and protecting the critical areas under their jurisdiction. They draw our attention to the impressive volume of science contrary to the avenue chosen by the County. The major flaw listed by the State is the failure to protect the critical areas with adequate buffers and restrictions against development:

Because Chelan County (“County”) has not included “best available science,” as required under RCW 36.70A.172(1), in developing and adopting sections 531 and 800 of its new interim critical areas ordinance, and because sections 531 and 800 provide inadequate riparian and wetland protection when compared with the “best available science” submitted to the County when it developed its new interim critical areas ordinance, the State contends the County’s motion should be denied. (State Brief p.1)

The Yakama Nation joins the State in their objections and emphasizes individual cases where the County has not demonstrated their Resolution conserves fish and wildlife and uses the “best

available science”. The County’s lack of a sufficient regulatory trigger that ensures riparian areas will be protected from damaging fill, grading and clearing activities, and the case of the ordinance’s exemption for single family residence bulkheading along Lake Wenatchee, causes the Tribe much concern.

Both the State and the Yakama Nation believe the County has come a long way, just not far enough.

The individuals and associations that participated pursuant to RCW 36.70A.330 were helpful in their observations and suggestions. These demonstrate the difficulty the County has in balancing the needs of the citizens of Chelan County while complying with the Growth Management Act.

**Respondent’s Position:** The County believes the Board should give the County’s actions the due deference the Legislature asks. The County further believes there was a great amount of scientific evidence in the record; the analysis by Chelan County of the scientific evidence and other factors involved a reasoned process; and the decision made by the County was within the parameters of the GMA.

The County listed the wide range of scientific information in the record and used in their process. They discussed the “reasoned process” used in determining the final buffer widths included in the revised riparian and wetland area interim regulations. They discussed the lack of uniform widths in Eastern Washington. They contended the County has conducted a reasoned process, which included the best available science harmonized with all of the goals of the GMA and the content of the public participation offered. The results are well within the range of options contained in this record and consistent with the actions of other jurisdictions.

**Discussion:** The Board on August 4, 1994, found Chelan County out of compliance. The Board entered an order that included the following:

The Board finds that Chelan County Resolution 93-158 fails to adequately designate critical areas, including aquifer recharge areas, wetlands, fish and wildlife habitat conservation areas, as required by RCW 36.70A.170(1)(d) and (2).

...

...[D]oes not adequately protect Fish and Wildlife Habitat Conservation Areas, including breeding habitats, winter range, riparian areas, nesting and roosting sites, critical winter range and movement corridors, as required by RCW 36.70A.020(9) and RCW 36.70A.060 (2).

...

...[D]oes not adequately protect wetlands, aquifer recharge areas and/or frequently flooded areas as required by RCW 36.70A.060(2). (Final Decision and Order 94-1-0015

p.22, 25 and 27)

On the second day of June 1998, Chelan County adopted Resolutions 98-62 and 98-63 but contended more will be done and the whole package should be looked at before judging the ability of these laws to protect the critical areas. (Letter to Yakama Indian Nation, August 3, 1998):

“When adopting Resolutions 98-62 and 98-63, the county endeavored mainly to win the recession of invalidity and thus revised the basic riparian area and wetland buffers. Chelan County has not yet completed the task of fish and wildlife habitat designation. This has only begun; Resolution 98-62 covers only the baseline designation of fish and wildlife habitat. Further designation of fish and wildlife habitat which will occur with the continued revision of noncompliant interim regulations will likely boost standards along riparian corridors depending on whether or not an association with a particular species can be shown. In short, the remaining noncompliant sections of the critical area ordinance contained in 93-158 are yet to be revised...”. P.5

This Board is very concerned with the protection of fish and wildlife habitat conservation areas, riparian areas and wetlands. The EWGMHB Final Decision and Order at 24 and 27 found the original language in sections 531 and 832, noncompliant. The County has moved a long way in their effort to prevent or mitigate adverse impacts upon the habitat and wetland areas. However, more needs to be done.

**Conclusion:** The Board finds the County continues to be in non-compliance in sections 531 and 800. We complement Chelan County on their effort to protect wetlands and riparian areas and the wildlife located there. However, we must wait until the balance of the regulations mentioned in the County’s letter to the Yakama Nation is enacted. However the Board wishes to comment on the work done to date.

We agree with the County, no one size buffer or riparian management area fits all. There is science in the record that supports an individual, site specific, review of the areas to be protected. Missing, however, is the criteria or standards to be used when the site is reviewed and an agreement is negotiated between the Administrator and the landowner. Missing also is any training or experience requirements for the administrator making the critical decisions about the protection of Chelan County’s critical areas. Further, there is no notice to interested parties or to the State so they might provide input on the management of the land. Review of the agreement” is limited, thus reducing confidence in the individual carrying out the laudable goals of the County.

**ISSUE 4: Whether Chelan County’s adoption process complied with the public participation requirement of the Growth Management Act?**

The County held numerous public hearings on the legislation passed in response to our finding of invalidity. The County Commissioners need not agree with all that participate or even with the majority of those speaking, as long as they comply with the Growth Management Act. They must, however, give the people of Chelan County a chance to express their views on pending County action. There is no evidence this has not been done.

**Conclusion:** The Board finds the County has complied with the public participation requirements of the Growth Management Act in the matters now before the Board.

**ORDER**

**Issues No. 1 and 2:** The January 2, 1996 finding of invalidity of Chelan County’s Interim Riparian Areas Regulations and Interim Wetland Area Regulations is rescinded.

**Issue No. 3:** The Board finds Chelan County to be in continued non-compliance in sections 531, Interim Wetlands and 800, Interim Riparian Management Areas regulations found in Resolutions 98-62 and 98-63. Chelan County is directed to bring these sections into compliance with the Growth Management Act within 120 days from the date of this Order.

**Issue No. 4:** The Board finds Chelan County is no longer out of compliance with the GMA’s public participation in the matters now before the Board.

This is a final order for purposes of appeal.

Pursuant to WAC 242-02-832, a motion for reconsideration may be filed within ten days of service of this final decision and order.

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SO ORDERED this 2<sup>nd</sup> day of September, 1998.

EASTERN WASHINGTON  
GROWTH MANAGEMENT HEARINGS

BOARD

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Dennis A. Dellwo, Presiding Officer

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Judy Wall, Board Member

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D. E. "Skip" Chilberg, Board Member