STATE OF WASHINGTON
EASTERN WASHINGTON
GROWTH MANAGEMENT HEARINGS BOARD

[Case Title shortened to save space]

SAVE OUR BUTTE SAVE OUR BASIN SOCIETY, et. al Petitioners	)	CONSOLIDATED CASE NO. 94-1-0015
vs.	)	COMPLIANCE HEARING ORDER
CHELAN COUNTY, Respondent.	)	

I. 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 conserve forest resource lands and had failed to designate and conserve agricultural resource lands and 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, specifically finding that sections 531 and 832 of the Critical Areas chapter, dealing with riparian and wetland buffers, were invalid.

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

On August 5, 1998 a hearing was held on the County's motions and for a determination of compliance with the GMA.

On September 2, 1998, the Board issued its order rescinding invalidity of the affected sections but finding continued non-compliance. The County was given 120 days to bring these provisions into compliance with the GMA. On November 3, 1998 and January 5, 1999 Chelan County adopted ordinances in response to that order and a hearing was set for review of their compliance.

On March 5, 1999, the Board held a compliance hearing in Wenatchee, Washington. The parties attending were the County through their attorney Susan Hinkle, Deputy Prosecuting Attorney; the State of Washington, Fronda Wood and Alan D. Copsey, Assistant Attorney General and the Yakama Indian Nation, through their attorney, John W. Ogan.

II. 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 In 1995, via Resolution No. 95-160, the County repealed Resolution No. 93-158. This was itself repealed in 1996 by Resolution No. 96-14 reinstating Resolution No. 93-158 as the law.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; this Board previously held portions of those invalid. These new revisions were comprehensive amendments to the interim wetlands and riparian area regulations.

3. Resolution No. 98-62 regulated Class I, II, III, IV and V streams. A conservation area and a review area for each riparian management zone were 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 to 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 above with neither required to possess any special training or experience nor was required to give notice to any State of Washington Departments, neighbors or other s possibly interested in such agreement.

6. Resolution No. 98-63 contains Revised Interim Regulations for Wetland Areas. This too provided for an “Administratiave Variance”, very similar to that found in No. (8-62. (No. 98-63 Sec. 12 & 13).

7. In 1998 and 1999, Chelan County adopted the following new resolutions:

a. Resolution No. 98-139, Revised Interim Regulations for Frequently Flooded Areas.
b. Resolution No. 98-140, Revised Interim Regulations for Aquifer Recharge Areas.
c. Resolution No. 99-4, Revised Interim Regulations for Fish and Wildlife Conservation Areas.
d. Resoltuion No. 99-5, Revised Interim Regulations for Wetland Areas.

These resolutions constituted a revision by Chelan County of the Interim Critical Areas Regulations and designations contained with the former Resolution 93-158 and with regard to Resolution No. 99-4 and Resolution No. 99-5, they amended former Resolutions No. 98-62 and 98-63, respectively.

III. DISCUSSION OF LEGAL ISSUES AND CONCLUSIONS

The Chelan County Commissioners have moved a long way from where the County was in 1993, making excellent advances towards compliance. However, additional changes are needed.

The Board finds Chelan County in continued non-compliance with the Growth Management Act (GMA). Section 400, Aquifer Recharge Areas, Section 500, Fish and Wildlife Habitat Conservation Areas, Section 600, Frequently Flooded Areas and Section 800, Wetlands are remanded and the County is directed to correct the deficiencies listed below.

At the March 5, 1999 compliance hearing, the Eastern Washington Growth Management Hearings Board (the Board) walked the parties step by step through the problem areas identified by the Petitioners. We will review the problems identified at the hearing and some of the solutions discussed. This Board will not direct specific solutions. Our intention is to aid the County'' efforts to come into compliance.

SECTION 500 FISH AND WILDLIFE HABITAT CONSERVATION AREAS

A. Buffer Zones and use of Best Available Science:

The County utilizes narrow Riparian Buffers for high intensity land use and then reduces them by 50% for low intensity land use. The distinction between high and low intensity land use is not dramatic, yet the reduction is substantial. The low intensity uses include duplexes; dependent care housing, commercial and industrial structures less than 1,500 square feet in size, and accessory structures. The widest buffer for the low intensity land use is 50 feet. This means any kind of duplex, single family dwelling unit or accessory structure may be built within 50 feet of a Type 1 Stream. The “Review Area” beyond the buffer does not add the protections needed with the starting point so narrow.

The guidelines require a larger buffer for all stream types, buffers without the large automatic reduction in size. The County has provided landowners several options to modify the treatment of the land and the size of the buffers near these streams. In this and other hearings, the County has not included the best available science in a substantive way in the protection of critical area. The best available science does not support the size of the buffers provided for in Section 500 and 800.

This Board recognized that one size buffer or riparian manaagement area does not fit all. Yet the protection provided for critical areas must prevent adverse impacts or, at the very least, mitigate adverse impacts. However, before the parcel by parcel individual treatment should begin, buffers must be set at a width sufficiently wide to protect that strea and the fish and wildlife in the are. Then the individual landowern can bring his or her special needs or conditions to the Administrator in charge of the variances allowed under the law.

CONCLUSION: This Section adequately classifies and designates fish and wildlife habitat conservation areas. However, the County's protection of the designated areas does not comply with the Growth Management Act. The board finds the Riparian buffers inadequate and contrary to the Best Available Science.

B. Individual Site Review (500-7, 8 and 11):

Subsections 7 and 8 of Section 500 give the developer three options for most types of development: a.) Follow a short list of "standards" found in Subsection 7.2, if a Planning Department employee agrees that they are adequate; b.) Prepare a habitat management and mitigation plan under Subsection 12; or c.) Request an individual site review under Subsection 11. Habitat management plans can be avoided by requesting an individual site review.

Subsection 11 of the Fish and Wildlife Habitat conservation Areas ordinance allows for individual site review and modification of the standard buffers and the treatment for these areas required under Subsections 7, 8, 9 and 10. This Board recognizes the County may provide for individual review of specific parcels of land for appropriate changes to the standard buffers. However, we found in our previous order that standards or criteria must be listed to insure the protection of these critical areas required by the GMA. (FDAO September 1998). Subsection 11.3 lists these criteria, but only directs the Administrator to "consider" them. Also, 11-3(A) provides that the measures be "adequate to avoid significant degradation to the fish or wildlife habitat area." There is no definition of "significant". There should be no degradation of the habitat area. At the compliance hearing March 5, 1999, the County Attorney indicated they believed the criteria was intended to be mandatory and such a change would be appropriate.

CONCLUSION: Subsection 11 of the Fish and Wildlife Habitat Conservation areas is not in compliance with the GMA and our Orders herein. The primary problem is the failure of this subsection to require the meeting of the criteria listed. There is also a failure to define the words "significant degradation" and to prevent degradation of the habitat area.

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This is a final order for purposes of appeal.

Pursuant to WAC 242-02-832, a motion for reconsideration may be filed within ten (10) days of services of this final decision and order.

SO ORDERED this 8th day of April, 2000.

EASTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD

/s Dennis A. Dellwo, Presiding Officer
/s Judy Wall, Board Member