

motions hearing for June 24, 1996, and at Respondent's request rescheduled the hearing to July 2, 1996. The Board considered and denied the County's motion for dismissal of appeal. The Board considered and denied the petitioner's motion to seek scientific review and expertise based on insufficient information before the Board.

OVERVIEW

Petitioners raise three issues in their petition for review: 1) Whether Whitman County has adequately protected fish and wildlife habitat and species; 2) Whether Whitman County has met the Growth Management Act (GMA) requirements with respect to critical areas, and 3) Whether Whitman County met the GMA requirements for public participation in adopting fish and wildlife habitat and critical areas ordinances. Underlying issues (1) and (2) is a question of whether "best available science" was used, as specified in the Act.

Summarizing briefly, the petitioners argue that Whitman County has made no designations of habitat or species, and ignored available scientific evidence which would indicate habitat and species exist which should be designated. Further, petitioners argue that exemption of all agricultural and forest lands is not consistent with the law or with adequate protection of these areas. Petitioners argue that Whitman County failed to give serious consideration to designation and protection of critical areas, again ignoring generally available scientific evidence. Regarding public participation in these matters, petitioners argue that the citizen advisory committee did not represent a "balanced" viewpoint.

In response, Whitman County argued that its ordinance relied upon Washington State Department of Fish and Wildlife expertise, including their maps, for minimum compliance with habitat and species designations and protection.

The County further argues that the Washington State Uniform Building Code, and its application in Whitman County, provides adequate protections for geologically hazardous critical areas. Frequently flooded areas are adequately dealt with by Whitman County Code 19.50, previously adopted. Regarding aquifer recharge areas, Whitman County argues that there is no evidence of any existing in Whitman County, and therefore, an ordinance is unnecessary.

Discussion

Issue No. 1. Whether Whitman County's enactment of Chapter 19.20, Fish and Wildlife Habitat Conservation Areas, fails to bring the County into substantive compliance with the Growth Management Act because it does not provide the protections necessary to meet the minimum requirement of the Act?

At the hearing on the merits, Whitman County stated that it had been their intent to adopt the Department of Fish and Wildlife maps designating habitat conservation areas, as their own designation. However, the County was unable to provide documentary evidence confirming that designation, required by RCW 36.70A.170, had been done. Whitman County Code 9.20 provides process which utilizes review by the Department of Fish and Wildlife, and references their maps of habitat areas, but designation via adoption of these maps apparently did not take place.

Conclusion: Whitman County has failed to designate fish and wildlife habitat conservation areas as required by RCW 36.70A.170.

Issue No. 1A. Whether Whitman County Chapter 19.20 fails to meet the minimum

requirement of the Act, because it exempts all ongoing agricultural, mining and timber uses, asserting that current state and federal regulations are adequate to protect these areas?

Petitioners challenge the exemption afforded all agricultural, mineral, and forest lands by WCC Ch.9.20. Whitman County Code Chapter. 9.20.040 states:

"Exempt and Non-regulated Habitat.

1. All existing agricultural, mineral and forestry land and/or ongoing agricultural, mineral and forestry activities are exempt from this ordinance. Only when agricultural, mineral, or forestry land uses change will it then be subject to regulation by this ordinance."

The County defends this language by citing this Board in Moore v. Whitman County, 95-1-0002, Final Decision and Order, August 16, 1995. In that case Whitman County's Wetland Ordinance provided:

"All ongoing agricultural activities are exempt from this ordinance. Only when an agricultural activity changes to a non-agricultural land use will it be subject to regulation by this ordinance."
(Emphasis added.)

The Board found the above language was in compliance with the GMA. As the Board noted at page 8: "RCW36.70A.060 says in part...". Regulations adopted under this subsection may not prohibit uses legally existing on any parcel prior to their adoption and shall remain in effect until the county adopts development regulations pursuant to RCW36.70A.120." (Emphasis added)

The County has failed to distinguish between exemption of uses which is covered by RCW

36.70A.060, and addressed by this Board's cited decision, and the exemption of all existing agricultural, mineral and forestry land, as provided in WCC 9.20.040. The County must take notice of WAC365-190-020, as referenced by petitioner's brief.

WAC 365-190-020 makes it clear that critical areas designations and natural resource areas designations may overlap. RCW 36.70A.170 requires designation of agricultural, mineral and forest lands of long-term commercial significance. Only legally existing uses are exempted from development regulations by RCW 36.70A.060, not designated lands. Therefore, Whitman County has no legal basis for exempting all designated agricultural, mineral or forest lands of long-term commercial significance from development regulations, including WCC Chapter 9.20. Protection of critical areas within designated natural resource lands may require restrictions on changes in use. As an example, converting agricultural land that has been used for grazing to crop production may damage critical areas, and thus need to be restricted. This Board does not view any provisions of the Growth Management Act as an attempt to regulate agricultural farming practices. However, conversion of land from non-tillage uses to tillage uses within a designated critical area requires review by qualified specialists to ensure the protection of the critical area.

Conclusion: Whitman County Code Chapter 9.20.040, by exempting all agricultural, mineral, and forest lands from the protections and provisions of the Ordinance, fails to meet the requirements of RCW 36.70A.060(2), protection of critical areas.

Issue No. 1B. Whether Whitman County failed to comply with the Growth

Management Act, in that it failed in adopting this measure to meet the best available science requirement imposed by RCW 36.70A.172?

Petitioners argue that Whitman County failed to meet the "best available science" requirement imposed by RCW 36.70A.172. The principal reasoning behind Petitioners' argument is that Section 9.20.030(4) allows the applicant to hire a fish and wildlife specialist from a list created by the County, or "a person of his/her own choosing." This Board notes that Chapter 9.20 did establish a definition for "Qualified Fish and Wildlife Specialist or Specialist", and a process for establishing a list of such specialists to be utilized by the applicant. The process developed by the County would meet the requirements of the law as long as the "person" selected by the applicant met the County's criteria as a "qualified fish and wildlife specialist", which the current provision does not require.

Petitioners further argue that Whitman County failed to meet the requirements of RCW 36.70A.172 by not consulting scientists in the development of WCC 9.20. This Board accepts the

approach taken by Whitman County as meeting the "best available science" requirement. We recognize that small counties, particularly, cannot be expected to employ scientific specialists either in the development of these regulations or in the review of development applications. Whitman County has developed an innovative process utilizing scientific review and mitigation plans whenever development occurs within a fish or wildlife habitat conservation area. We find that, with the correction needed as noted previously, this process meets the intent of the law in providing protection for fish and wildlife habitat conservation areas.

Conclusion: Whitman County Code Chapter 9.20.030(4), by allowing a "person" without specific qualifications to develop a plan utilizing "best available science" in protecting critical areas, fails to comply with RCW 36.70A.172.

Issue No. 2. Whether Whitman County Resolution 049103, concerning Critical Areas

and including Aquifer Recharge Areas, Geologically Hazardous Areas and Frequently Flooded Areas, fails to bring the County into substantive compliance with the Growth Management Act?

During the hearing on the merits, Issue2A was presented and considered simultaneously with Issue 2.

Issue No. 2A Whether the adoption of Resolution 049103 fails to comply with RCW 36.70A.172 because it is contrary to accepted scientific theory and relevant scientific studies?

Whitman County Code 19.50, previously adopted, addresses building in frequently flooded areas. Whitman County has also adopted by reference the State Uniform Building Code, which addresses building in geologically hazardous areas. In the absence of any evidence to the contrary, this Board will presume validity for the County's actions dealing with these two matters. Petitioners have not shown that these actions by Whitman County are inadequate to protect the subject critical areas. We find that Whitman County, by use of these existing statutes, has adequately addressed the requirements of the Growth Management Act in these matters. This Board finds that petitioners have failed to demonstrate that Whitman County has not met the requirements of the GMA regarding geologically hazardous areas and frequently flooded areas.

Whitman County relies on a lack of forthcoming evidence at the public hearing for non-action relating to the designation of aquifer recharge areas. Respondent's brief acknowledges that the U. S. Environmental Protection Agency has amassed a great deal of scientific evidence, albeit

arguable, regarding the existence of a sole-source aquifer under much of Whitman County. The County then concludes, without seeking scientific advice, that there is no evidence any aquifer has been contaminated as a basis for not protecting it. This Board finds that Whitman County must seek out scientific evidence regarding the existence and protection of aquifer recharge areas in Whitman County. Relying upon a lack of public input as a basis for non-action does not meet the requirements of the Growth Management Act, specifically RCW 36.70A.172.

Conclusion: Whitman County has failed to meet the requirements of RCW 36.70A.170 in regards to designation of aquifer recharge areas. Further, Whitman County has failed to meet the requirements of RCW 36.70A.172 in considering designation and protection of aquifer recharge areas in Whitman County. Whitman County has met the requirements of RCW 36.70A.060(2) regarding geologically hazardous areas and frequently flooded areas.

Issue No. 2B. Whether the adoption of Resolution 049103 failed to meet the public participation requirements of the Growth Management Act RCW 36.70A.140 and WAC 365-190-040 establish guidelines for continuous public involvement in adoption of GMA actions.

Whitman County has established that any one who applied to be on the citizen advisory committee (CAC) was appointed. The County did seek out representatives of a variety of groups present in Whitman County to serve on the CAC. Petitioners have failed to demonstrate that the County did not follow the spirit of the law in providing for public input to its actions.

This Board recognizes that any citizen will come to a committee with biases and a viewpoint to present. The democratic process of government belongs to those who participate. The County Commissioners can only invite participation, they cannot impose it. Further, ultimate responsibility still rests with the County Commissioners for action, regardless of advice from the CAC.

Conclusion: Petitioners have failed to show that Whitman County has not met the GMA requirements for public participation in adopting WCC Chapter 9.20 and Resolution 049103.

Findings of Fact

1. Whitman County adopted Whitman County Code Chapter 9.20, Fish and Wildlife Habitat Conservation Areas ordinance on January 29, 1996. This ordinance failed to designate fish and wildlife habitat conservation areas.

2. WCC 9.20.040 exempts all agricultural,
3. WCC 9.20.030(4) states: "The list of Qualified Fish and Wildlife Specialists, as created by the Board, shall be given to each applicant. The applicant may either hire a Specialist from this list or may hire a person of his/her own choosing."
4. Whitman County adopted Resolution 049103 on January 29, 1996. Resolution 049103 represents Whitman County's response to RCW 36170A.060(2), regarding geologically hazardous areas, frequently flooded areas, and aquifer recharge areas.
5. Whitman County Ordinance 19.50 provides sufficient protection for frequently flooded areas as required by RCW 36.70A.060.
6. Whitman County has adopted by reference the Uniform Building Code as adopted by the State of Washington, which provides sufficient protections against geologically hazardous areas in Whitman County.
7. Whitman County's actions concerning designation or protection of aquifer recharge areas are inadequate and not in substantive compliance with RCW 36.70A.170 and RCW 36.70A.060(2).
8. Whitman County has failed to use "best available science" as required by RCW 36.70A.172, in considering designation and protection of aquifer recharge areas.
9. Whitman County has followed a plan for public participation in meeting the requirements of WAC 365-190-040 which is inclusive of all interested citizens.

FINAL DECISION AND ORDER.

NOW, THEREFORE, the Board FINDS

1. Whitman County has failed to designate fish and wildlife habitat conservation areas as required by RCW 36.70A.170.
2. By exempting all agricultural, mineral and forest lands, Whitman County has failed to protect fish and wildlife habitat conservation areas as required by RCW 36.70A.060.
3. Whitman County has failed to meet the requirements of RCW 36.70A.172 by allowing a person without specific qualifications to develop a plan utilizing best available science in protecting critical areas.

4. Whitman County has met the requirements of RCW 36.70A.060(2) regarding geologically hazardous areas and frequently flooded areas.
5. Whitman County has failed to meet the requirements of RCW 36.70A.172, RCW 36.70A.170, and RCW 36.70A.060(2) regarding aquifer recharge areas.
6. Whitman County has met the requirements of RCW 36.70A.140 and WAC 365-1909-040 regarding public participation in GMA actions.

The Board remands the matters to Whitman County for appropriate action to be completed no later than 120 days from the date of this order.

The Board further orders Whitman County, within ten (10) days of this order to provide this Board with a schedule of actions to be taken which will bring Whitman County into compliance with the Growth Management Act.

This is a Final Order under RCW 36.70A.300 for purposes of appeal.

SO ORDERED this 7th day of October, 1996.

**EASTERN WASHINGTON
GROWTH MANAGEMENT HEARINGS BOARD**

D. E. "Skip" Chilberg, Presiding Officer

Judy Wall, Board Member

Dennis A. Dellwo, Board Member

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