

State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

EASY,)	
)	Case No. 96-1-0016
)	
WASHINGTON ENVIRONMENTAL)	
COUNCIL,)	FINAL DECISION AND ORDER
)	
Petitioner)	
)	
vs.)	
)	
SPOKANE COUNTY,)	
)	
)	
Respondent)	
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Procedural History

On September 30, 1996, Easy, of Spokane, Washington, filed a petition for review with the board.

On October 14, 1996, a petition for review was filed by the Washington Environmental Council of Spokane, Washington.

The Board consolidated the petitions inasmuch as both petitions seek review of the same county ordinance.

On December 13, 1996, the Board held its prehearing conference in Spokane, Washington and on December 17, 1996 issued its Prehearing Order. On January 7, 1997, an Amended Prehearing Order was issued, rewording the issues and requesting comment. On January 22, 1997, the Board issued a Second Amended Prehearing Order revising the issues. The issues were established as:

1. Did Spokane County meet the requirements of RCW 36.70A.170(1)(d) in the designation of wetlands and fish and wildlife habitat conservation areas?

2. Does the Spokane County Critical Areas Ordinance adequately protect the wetlands and fish and wildlife habitat conservation areas as required by RCW 36.70A.060(2)?

3. Did Spokane County include the best available science in the designation and protection of wetlands and fish and wildlife habitat conservation areas including the designation of riparian

buffer widths in these areas as required by RCW 36.70A.172(1)?

4. Did Spokane County consider the guidelines established pursuant to RCW 36.70A.050 in their designation of wetlands and fish and wildlife habitat conservation areas as required by RCW 36.70A.170(2), specifically WAC 365-190-040, .080 (1) and .080 (5) as those guidelines pertain to the areas identified in issues #1 and #2 above?

On January 6, 1997, Respondent filed a Motion to Dismiss Petitioner Washington Environmental Council's petition for lack of jurisdiction due to insufficiency of service of the petition and dismissing Petitioners' allegations relating to designating critical areas, as untimely.

On January 22, 1997, the Board issued its Order denying the motion to dismiss on insufficiency of service.

Legal Issues

ISSUE NO. 1: DID SPOKANE COUNTY MEET THE REQUIREMENTS OF RCW 36.70A.170(1) (d) IN THE DESIGNATION OF WETLANDS AND FISH AND WILDLIFE HABITAT CONSERVATION AREAS?

Petitioners positions:

Petitioner Washington Environmental Council (WEC) states WAC 365-190-080(5)(a)(i) defines "fish and wildlife conservation areas" to include "sensitive" species as part of its definition. The term "sensitive" does not appear in the County's final Critical Areas Ordinance.

The Petitioners did not address other aspects of this issue in their brief. Subsequent Legal Issues encompass this same area.

Respondent's Position:

The County agrees their critical areas ordinance, section 11.20.020, does not contain the word or the term "sensitive" which is included in the WAC. The County goes on to say that "notwithstanding the lack of applicability of the term 'sensitive' at this time, the County would intend to insert this term in the final critical areas ordinance." Respondent's brief, page 15.

Discussion:

The record shows that the Spokane County final CAO #96-0302 dated July 9, 1996 omitted the term "sensitive" in its definition of the Fish and Wildlife Habitat Conservation Areas. In Spokane County Critical Areas Ordinance Resolution No. 96-0302 dated July 9, 1996, the definition for fish and wildlife

habitat conservation areas state in pertinent part: “a) areas with which primarily endangered, threatened and candidate species have a primary association”. Exhibit 36, p. 593.

Conclusion No. 1: The Critical Areas Ordinance is remanded to Spokane County with direction to insert the word “sensitive” between the words “threatened” and “candidate” in the current definition of Fish and Wildlife Habitat Conservation Areas, Spokane County CAO, Section 11.20.020.

ISSUE NO. 2: DOES THE SPOKANE COUNTY CRITICAL AREAS ORDINANCE ADEQUATELY PROTECT THE WETLANDS AND FISH AND WILDLIFE HABITAT CONSERVATION AREAS AS REQUIRED BY RCW 36.70A.060(2)?

Petitioners’ Position: Petitioner have identified seven areas where the County’s final CAO failed to protect fish and wildlife habitat conservation areas identified pursuant to RCW 36.70a.170. They are:

- 1) Exemptions for Priority Habitat Species (PHS) found within a UGA(Urban Growth Area) or IUA (Interim Urban Areas) :** Here the County classified the PHS on a two-tiered scale. Level I PHS warrant the greatest degree of protection. Level II PHS requires a somewhat lesser degree of protection. However, the Spokane County CAO exempts from review, the regulated uses and activities affecting level II PHS if located in UGA/UIA.
- 2) PHS for which no management recommendations have been designed:** Washington Department of Fish and Wildlife (WDFW) has an ongoing process of developing management recommendations for PHS. These recommendations are applied on a statewide basis to aid biologists in the design of management plans for specific development proposals. The CAO for Spokane County will defer protection for any PHS which has not been included in this publication.
- 3) Riparian buffer areas:** Here the County CAO establishes buffer zones for riparian areas, considerably less than the minimum buffer zones recommended by the experts in this area and adopted by the Planning Commission.
- 4) Mitigation banking for wetlands:** Petitioner WEC states Class I Wetlands were essentially irreplaceable and therefore should not be candidates for wetland banking. The Department of Ecology indicated “Spokane County has no known Class I wetlands, however, if some exist, these wetlands are the most important wetlands and are very difficult to replace. Therefore no mitigation banking should be allowed for Class I wetlands.”. P-29, p. 512.
- 5) The “sensitive species” question was answered in Issue #1 and will not be addressed here.**
- 6) Removal of the penalty provisions:** The BOCC deleted the criminal and civil penalties for violation of the CAO. Violation of the CAO will result in no penalty or corrective action.
- 7) Deletion of requirement for wetlands reports:** The BOCC deleted the requirement that a wetland report be prepared by a qualified wetlands specialist who, by education and training, is competent to

delineate wetlands and recommend appropriate steps to assure compliance with the CAO.

Respondent's Position:

The Respondent contends the County focuses on the preservation of the structure, value, and functions of critical areas rather than the critical areas themselves. Their brief lists the sections of the County's Critical Areas Ordinance providing protection of wetlands and wildlife habitat conservation areas. The County believes these fully satisfy the requirements of RCW 36.70A.060(2).

The Respondent states the "protect critical areas" mandate does not equate to "do not alter or negatively impact critical areas in any way." While the preservation of the structure, value and functions of wetlands, for example, is of paramount importance, the Act does not flatly prohibit any alteration of or negative impacts to such critical areas. Respondent's brief, p. 7 and 8.

The County believes that civil and criminal penalties are unnecessary in the CAO because other penalties attach to the same activities. Examples of these penalties include building permits, state regulations, etc.

The Respondent believes that wetland reports by an expert is unnecessary. The land owner can provide the information and, if an additional report is needed, the County can require an on-site examination.

Discussion:

RCW 36.70A.060(2) provides in part:

(2) Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170....

RCW 36.70A.060(2) requires that all lands designated under RCW 36.70A.170 be protected and lacks any qualifying language to suggest that regulated critical areas are a sub-set of all critical areas. All lands that are designated critical areas pursuant to RCW 36.70A.170 must be protected by critical area development regulations adopted pursuant to RCW 36.70A.060, and such lands may not be exempted or excluded from protection. However, not all critical areas must be protected in the same manner or to the same degree.

In *Pilchuck et al v. Snohomish County CPSGMHB 95-1-0047*, the Central Puget Sound Board said:

"It is significant to note the legislature did not simply direct cities and counties adopt regulations to implement their critical areas designations pursuant to RCW 36.70A.170. Instead, the legislature directed that local governments were to protect those areas. This conveys both a higher order of directive and a higher order of urgency. Even the legislature's choice of the term "critical" to describe these areas conveys an importance greater than, for example, "natural systems" or "environmentally sensitive" areas. Finally, the fact the legislature directed critical areas were to be designated and protected before any other GMA planning proceeded, underscores the paramount importance it intended for this statutory mandate."

We agree. Protection of all critical areas is required by the Act. The Board must look at the acts of the County and determine whether they have complied with these requirements of the Act.

The evidence before the County Commissioners showed that Class I Wetlands were essentially irreplaceable and would not be candidates for wetland banking. Although the evidence also showed that there were no wetlands of this class in Spokane County, mitigation banking for this class should not be allowed in the CAO. If a Class I Wetland were found, the County must properly protect it.

The absence of penalties for violations of the CAO takes the teeth out of these important regulations. The fact that there may be other regulations to punish similar violations, such as building permits, gives us little comfort. Such alternative penalties do not exist in all cases.

The County's deferral of the protection of a PHS until WDFW develops recommendations, defeats the purpose of designation and is inconsistent with the concept of protection. The County is able, with a properly trained biologist, to devise a management plan without these management recommendations.

The failure of the County to require that a wetlands report be prepared by a person with measurable qualifications for such a report, allows little assurance of uniform enforcement of the CAO.

While the County has established regulations that provide some protection to these critical areas, protection is not complete until the defects listed above are corrected.

Conclusion No. 2: The County has failed to adequately protect the critical areas and are out of compliance with the Growth Management Act. The CAO is remanded to the County. They are directed to address the deficiencies identified herein.

ISSUE NO. 3. DID SPOKANE COUNTY INCLUDE THE BEST AVAILABLE SCIENCE IN THE DESIGNATION AND PROTECTION OF WETLANDS AND FISH AND WILDLIFE HABITAT CONSERVATION AREAS INCLUDING THE DESIGNATION OF RIPARIAN BUFFER WIDTHS IN THESE AREAS AS REQUIRED BY RCW 36.70A.172(1)?

Petitioners' position:

Petitioners contend the record before Spokane County included substantial scientific evidence pertaining to the issues raised in this Petition. Further in establishing riparian buffer areas, Spokane County failed to apply a reasoned process to the analysis of evidence, or to include the Best Available Science in the CAO. In addition, Petitioners contend the exemption afforded PHS where located in a UGA/IUGA or where no management recommendations have been developed, and the omission of protection for shrub/steppe habitat, reflect a disregard for Best Available Science (BAS) in adoption of the critical areas ordinance.

Respondent's position:

Spokane County claims they considered best available science in its process, pursuant to the WWGMHB

“HEAL” (96-3-0012) decision, and substantive inclusion of BAS in the CAO is not required by RCW 36.70A.172(1). Although Respondent gave a rationale for its Riparian Buffer width as “generally consistent” with Department of Fish and Wildlife’s recommendation”(s), Respondent’s brief made no reference to exemptions in UGAs/IUGAs, or shrub/steppe habitat.

Discussion:

RCW36.70A.172 Critical Areas--Designation and protection--Best Available Science to be used.

(1) In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

In *HEAL v. City of Seattle*, CPSGMHB No. 96-3-0012 (Final Decision and Order, August 21, 1996), the Central Puget Sound Growth Management Hearings Board considered the meaning of the term “include” and held as follows:

“Include” is defined as “to have or take in as part or member.” Webster’s II New Riverside University Dictionary 619 (1988). “Include the best available science in developing policies and development regulations” instructs counties and cities they must “have” best available science “as a part of” their development of policies and development regulations, *Supra*, p. 19.

Here, the Central Board reasoned, however, that “include” does not mandate a substantive result, only that the record reflect “best available science” was included in the process. *Supra*, p. 22.

In the more recent decision of *Clark County Natural Resources Council, et al. v. Clark County, et al.*, WWGMHB No. 96-2-0017 (December 6, 1996), the Western Washington Board rejected the “process” interpretation of *HEAL* and determined that RCW 36.70A.172(1) required inclusion of best available science in a substantive way in both the designation and protection of critical areas. *Clark County*, p. 8. The WWGMHB considered the legislative history of the act and found the plain language contained in these bill reports directs the inclusion of best available science in a substantive way in both the designation and the protection components of critical areas. *Supra*.

The Western Washington Growth Management Hearings Board also compared the use of the word “shall include” with the phrase “shall consider” used in RCW 36.70A.170(2). In this regard the Board stated:

“Secondly, the use of the words “shall include” involves a more substantive outcome than the process-oriented “shall consider” language contained in RCW 36.70A.170(2). All three boards have interpreted a substantive result from the language in section RCW 36.70A.020. The goals of the Act are to “guide the development and adoption of” plans and regulations. The language of RCW 36.70A.172(1) is much more directive than the RCW 36.70A.020 language.”

Finally, subsection RCW 36.70A.172.(2) directs that a Board may hire independent experts in situations involving petitions relating to critical areas. The purpose of the independent expert is the same as the test for supplemental evidence, i.e., “necessary or of substantial assistance.” If the Legislature intended Boards to only review process issues involving best available science, there would be no need for authorization to hire “experts”. Rather, the interpretation which gives full consideration to all portions of the statute is experts are available to assist a Board in reviewing the *substance* of an issue concerning BAS. (WWGMHB NO. 96-2-0017)

Based on the above reasoning, the WWGMHB found the following factors should be analyzed to determine compliance with the Act:

1. The scientific evidence contained in the record;
2. Whether the analysis by the local decision-maker of the scientific evidence and other factors involved a reasoned process; and
3. Whether the decision made by the local government was within the parameters of the Act as directed by the provisions of RCW 36.70A.172(1). *Supra*, p. 9.

In their subsequent analysis of the Clark County Ordinance, the Western Board discussed an issue identical to one raised by this appeal;. The petitioners had alleged Clark County had disregarded scientific evidence regarding riparian buffer zones. The record contained overwhelming evidence from WDFW supporting 250 foot buffers for Type 1 and 2 streams, 150 to 200 foot buffers for Type 3 streams, and 150 to 225 foot buffers for Type 4 and 5 streams.

The Clark County Board decision determined there was “no scientific evidence nor reasoned analysis was found in this record for such a deviation from BAS. The inadequate buffering of riparian habitat does not comply with the Act.” *Supra*, p. 17.

We agree with the Western Board’s interpretation of RCW 36.70A.172 quoted above. We hold that the requirement the Counties use the Best Available Science is a requirement of inclusion of BAS in a substantive way in both the designation and protection of critical areas. There is no evidence that Spokane County included the Best Available Science when they modified the recommendations from the Planning Commission. We are not saying that the county might not come up with the same conclusion. We are saying that the County must analyze the scientific evidence and other factors in a reasoned process. The County must take into account the practical and economic application of the scientific evidence to determine if it is the “best available”.

Conclusion No. 3: Based on review of all materials before us, this Board concludes:

1. RCW 36.70A.172(1) imposes a substantive requirement to include best available science in the designation and protection of critical areas. We conclude that consideration of best available science in the process of adopting a CAO is not sufficient to comply with RCW 36.70A.172(1).
2. Spokane County has not included “best available science” in the substance of its Critical Areas

Ordinance 96-0302. The CAO is remanded to the County and they are directed to include the best available science in the correction of the deficiencies discussed herein. (see discussion in Issue 2)

ISSUE NO. 4: DID SPOKANE COUNTY CONSIDER THE GUIDELINES ESTABLISHED PURSUANT TO RCW 36.70A.050 IN THEIR DESIGNATIONS OF WETLANDS AND FISH AND WILDLIFE HABITAT CONSERVATION AREAS AS REQUIRED BY RCW 36.70A.170(2), SPECIFICALLY WAC 365-190-040, .080 (1) AND .080 (5) AS THOSE GUIDELINES PERTAIN TO THE AREAS IDENTIFIED IN ISSUES #1 AND #2 ABOVE?

Petitioners' Position:

Petitioner WEC alleges Spokane County not only must follow the guidelines established pursuant to RCW 36.70A.050 as minimums, but they must also use best available science in reaching those guidelines.

Respondent Position:

Spokane County asserts RCW 36.70A.050 provides guidelines to assist counties in designating the classification of critical areas. The county also states WAC 365-190-020, under "Purpose", reiterates the intent of RCW 36.70A.050 to establish guidelines which shall be considered by counties in designating critical areas.

Discussion:

RCW 36.70A.050(1) provides in part..."the department shall adopt guidelines, under chapter. 34.05 RCW, no later than September 1, 1990 to guide the classification of (a) agricultural lands; (b) forest lands; (c) mineral resource lands; and (d) critical areas." The record shows Spokane County used the department minimum guidelines as just that, guidelines.

RCW 36.70A.050(3) states "The guidelines under subsection (1) of this section shall be minimum guidelines that apply to all jurisdictions, but also shall allow for regional differences that exist in Washington state. The intent of these guidelines is to assist counties and cities in designating the classification of agricultural lands, forest lands, mineral resource lands, and critical areas under RCW 36.70A.170."

The Board agrees with the County's argument that the Minimum Guidelines are advisory rather than mandatory. However, the County has not shown how it has included the "best available science" in considering the minimum guidelines that have been established under RCW 36.70A.050 and .170(2).

Conclusion No. 4:

1. The Board finds Spokane County has met the requirement to consider the guidelines pursuant to RCW 36.70A.050(3).
2. Spokane County has not included "best available science" in consideration of the minimum guidelines

established pursuant to RCW 36.70A.050 and RCW 36.70A.170(2). On remand, Spokane County must consider and decide what best available science shall be included in the designation and protection of wetlands and fish and wildlife habitat conservation areas.

MOTION TO DISMISS

On January 22, 1997 an order was entered deferring the Petitioner's motion to dismiss on untimeliness until the final hearing. At that time evidence was to be presented regarding the publication date for the enactment of the designation of critical areas and the beginning of the 60 day appeal period.

Upon reviewing the briefs of the parties regarding Respondent's motion to dismiss on untimeliness, no evidence of a publication date for the enactment of the designation of Critical Areas was presented to establish a timeline on which to base a 60 day appeal period. [RCW 36.70A.290(2)(b)]. Without this evidence, we must find this petition is timely. The Motion to Dismiss is **DENIED**.

Findings Of Fact

1. In March 1992, Spokane County's planning efforts under the Growth Management Act started with the initiation of a critical areas work program in conjunction with the Department of Community Trade and Economic Development.
2. In June 1992, the Planning Commission of Spokane County adopted a citizens based sub-committee to develop policies for identification and protection of critical areas. The statements of policy provided for the protection of wetlands, fish and wildlife habitat conservation areas, geologically hazardous areas, frequently flooded areas and aquifer recharge areas.
3. On July 1, 1993, Spokane County was mandated by law to plan under the Growth Management Act
4. In January 1994, the citizen sub-committee produced a product which was unanimously recommended for approval by Spokane County Board of Commissioners. It was subsequently adopted as a section to the comprehensive plan in Resolution 94-0380.
5. In January 1994, the Spokane County Board of County Commissioners in resolution 94-0442 requested the establishment a citizen advisory group for the development of the interim regulations to protect wetlands, fish and wildlife habitat conservation areas and geologically hazardous areas.
6. The citizen advisory group (CAG) was comprised of various segments from the community. They held 25 public meetings and 3 workshops. They consulted representatives from the Washington Department of Fish and Wildlife, the Washington State Department of Ecology, the United States Forest Service, the Natural Resource Conservation Service and attended field trips to Painted Hills Golf Course, the Lower Little Spokane River and Turnbull Wildlife Refuge.
7. On November 30, 1994 the first draft of the Critical Areas Ordinance was developed. It was submitted for comment to approximately 150 interested parties and agencies. The CAG received comments from the Washington Department of Fish and Wildlife, Department of Ecology and United States Forest Service.

8. On August 5, 1995, the CAG voted to submit the second major draft to the Planning Commission. Comments were submitted by the same entities.
9. The Spokane County Division of Building and Planning completed a SEPA non-project action checklist and issued a determination of non-significance on September 7, 1995.
10. The Planning commission conducted hearings on October 12, 1995, October 18, 1995 and November 9, 1995 on the proposed regulations. At the last meeting special expert presentations from the Washington Department of Fish and Wildlife and the DOE on riparian and wetland buffer recommendations and tax incentives related to wetland and habitat preservations were given. The Planning Commission voted to recommend the citizen advisory group/critical areas ordinance with certain changes. These recommendations were finalized in findings of fact, conclusions and recommendations dated November 15, 1995 and incorporated into the third draft.
11. On February 27, 1996, the Board of County Commissioners conducted a public hearing on the Planning Committee's recommendations. It heard testimony from representatives from the Washington Department of Fish and Wildlife and DOE as well as receiving written letters from these agencies. The final version of the critical areas ordinance was adopted on July 9, 1996. The County Commissioners made a number of significant changes in the Planning Commission recommendations.

ORDER

Based upon the records and files herein, including the administrative record submitted by petitioners and respondent Spokane County, with the exhibits and attachments thereto, and the briefing and argument of counsel,

IT IS HEREBY ORDERED:

1. Issue No. 1: The Critical Areas Ordinance is remanded to Spokane County with direction to insert the word "sensitive" between the words "threatened" and "Candidate" in the current definition of Fish and Wildlife Habitat Conservation Areas, Section 11.20.020.
2. Issue No. 2: Spokane County is not in compliance with the Act with regard to the protection of Critical Areas. The Critical Areas Ordinance is remanded and the County is directed to address the deficiencies identified herein.
3. Issue No. 3 Spokane County has failed to include the "best available science" in the substance of its Critical Areas Ordinance, specifically with respect to the deficiencies identified in Issue 2. The County is directed to come into compliance with the act and include the best available science in the designation and protection of Critical Areas required to be designated under the Act.
4. Issue No. 4 The County has not included the "best available science" in the consideration of the guidelines developed pursuant to RCW 36.70A.050(3). The County is directed to consider and decide

what best available science shall be included in the designation and protection of wetlands and fish and wildlife habitat conservation areas

IT IS HEREBY ORDERED the Critical Areas Ordinance is REMANDED to Spokane County and they are directed to bring it into compliance with the Growth Management Act within 90 days from the date of entry of this order.

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

SO ORDERED this 10th day of April, 1997.

**EASTERN WASHINGTON
GROWTH MANAGEMENT HEARINGS BOARD**

Judy Wall, Presiding Officer

D. E. "Skip" Chilberg, Board Member

Dennis A. Dellwo, Board Member