

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

SADDLE MOUNTAIN MINERALS,
LLC, a Washington corporation, and
GARY MAUGHAN,

Petitioners,

v.

CITY OF RICHLAND, a municipal
corporation,

Respondent

Case No. 99-1-0005

ORDER FINDING
PARTIAL COMPLIANCE

I. PROCEDURAL HISTORY

On June 21, 2000 the Board issued a final decision and order finding continued non-compliance by the City of Richland on three issues:

1. The City of Richland is not in compliance with the Final Decision and Order dated October 1, 1999 due to their failure to utilize best available science as required by RCW 36.70A.172 in enacting development regulations to protect the functions and values of critical areas;
2. The City of Richland is not in compliance with the Board's order regarding internal consistency of the comprehensive plan and development regulations for the failure to allow public participation in the review process; and
3. The City of Richland continues to be in non-compliance with the Board's Order regarding RCW 36.70A.140, public participation requirements. They are directed to develop and broadly disseminate a plan for seeking public input in the GMA process.

On July 11, 2000 the parties hereto stipulated to an extension of the compliance schedule to allow Richland 180 days. By correspondence dated September 7, 2000, the Board set a compliance date of December 18, 2000.

On January 22, 2001 Richland submitted a brief with extensive attachments titled "Respondent City of Richland's Compliance Hearing Brief," documenting the City's effort to comply with the

Board's Order.

On February 1, 2001, the Petitioner's requested a compliance hearing and briefing schedule.

On February 2, 2001 the Board set a briefing schedule and established a compliance hearing date of March 13, 2001 in Richland, Washington.

On March 13, 2001 the Board held a compliance hearing in Richland. Petitioners Saddle Mountain Minerals, LLC and Gary Maughan were represented by Gregory S. McElroy of the McElroy Law Firm, PLLC with Saddle Mountain principal Michael J. Alberg attending. Respondent City of Richland was represented by Thomas O. Lampson and Rick Simon, director of long range planning.

Petitioner did not contest the City of Richland's demonstration of compliance on Issue 2, concerning the public review of the internal consistency of the comprehensive plan, and Issue 3, concerning Richland's adoption and broad dissemination of its written public participation plan. The hearing concerned Richland's effort to comply with the Board's order and to implement the Best Available Science requirement for development regulations intended to preserve the functions and values of critical areas and to protect and enhance the anadromous fishery.

II. POSITIONS OF THE PARTIES

A. Petitioners' Position. Petitioners Saddle Mountain Minerals and Gary Maughan contend that Richland remains non-compliant with the Board's order regarding the Best Available Science (BAS) requirement of RCW 36.70A.172 by failing to either independently identify the current scientific basis for its development regulations, or utilize identified BAS from state and federal agencies following a procedure equivalent to the guidelines promulgated by CTED and codified at WAC 365-195-900 through WAC 365-195-925. Petitioners believe that it is not sufficient for local government to passively provide copies of proposed ordinances for review by state and federal agencies and assume compliance with the BAS standard if not comments are received.

In those instances where Richland obtained current science from the Washington State Department of Ecology, petitioners allege that the record produced by Richland, provides no basis, scientific or otherwise, to modify the buffers, wetland classifications, and exemptions recommended by DOE as "Best Available Science." Petitioners further contend that Richland gave no special consideration to the protection and enhancement of the anadromous fishery, and did not subject all of its scientifically based development regulations to the BAS standard, especially those development regulations, like stormwater regulations, that are not contained within the sensitive areas ordinance, but have been identified as important to protect the functions and values of critical areas.

B. Respondent's Position. Respondent City of Richland contends that it met the BAS requirements because it utilized scientific data in originally adopting its sensitive areas ordinance in 1993. In 2000, Richland submitted its proposed ordinances to various state and federal

agencies requesting a review for BAS. When Richland received comments from DOE on wetland and riparian buffers it considered those comments and made modifications to the ordinances that increased protections. Richland contended that it was not required to contact all agencies with potential expertise and in the event that no comments were received neither RCW 36.70A.172, nor the CTED guidelines, required further investigation or inquiry. In regard to riparian areas, critical habitat, and the protection and enhancement of the anadromous fishery, Richland noted that the state shoreline requirements were currently under challenge and that Richland 's development decisions were insignificant compared to habitat impairment cause by dams on the Columbia River and impaired water quality upstream on the Yakima River.

III. DISCUSSION

As the Board noted in its order on compliance, RCW 36.70A.172(1) requires a jurisdiction enacting or re-enacting its critical areas ordinance and related development regulations to utilize "Best Available Science."

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.

The role of the BAS standard has been interpreted by the courts to require more than mere "consideration" of science. BAS must substantively control the standard established and must be reflected in the record:

Whether scientific evidence is respectable and authoritative, challenged or unchallenged, controlling or of no consequence when balanced against other factors, goals and evidence to be considered, if first in the province of the city or county to decide. Then, if challenged, it is for the Growth Management Hearings Board to review. The Legislature has given great deference to the substantive outcome of that balancing process. We hold that evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations.

Honesty in Environmental Analysis and Legislation (HEAL) v. Central Puget Sound Growth Management Hearings Bd., 96 Wn.App. 522 at 532, 979 P.2d 864 at 870, (Wash.App. Div 1 1999).

A local jurisdiction is not constrained to adopt only the science recognized by state or federal agencies, but variation from formally identified BAS must be supported in the record by evidence that also meets the BAS standard.

The science the legislative body relies on must in fact be the best available to support its policy decisions. Under the cases and statutes cited above, it cannot ignore the best available science in favor of the science it prefers simply because the latter supports the

decision it wants to make.

Id., 96 Wn.App. at 534, 979 P.2d at 871 (footnotes deleted).

The BAS guidelines adopted by CTED at WAC 365-195-900 through 365-195-925 are intended to describe a process for utilization of scientific information in decision-making and to ease the burden on local governments by directing them to authoritative resources that have been certified by the agencies as meeting the BAS standard.

(2) Counties and cities may use information that local, state or federal natural resource agencies have determined represents the best available science consistent with criteria set out in WAC 365-195-900 through 365-195-925. The department will make available a list of resources that state agencies have identified as meeting the criteria for best available science pursuant to this chapter. Such information should be reviewed for local applicability.

(3) The responsibility for including the best available science in the development and implementation of critical areas policies or regulations rests with the legislative authority of the county or city. However, when feasible, counties and cities should consult with a qualified scientific expert or team of qualified scientific experts to identify scientific information, determine the best available science, and assess its applicability to the relevant critical areas. The scientific expert or experts may rely on their professional judgment based on experience and training, but they should use the criteria set out in WAC 365-195-900 through 365-195-925 and any technical guidance provided by the department. Use of these criteria, also should guide counties and cities that lack the assistance of a qualified expert or experts, but these criteria are not intended to be a substitute for an assessment and recommendation by a qualified scientific expert or team of experts.

WAC 365-195-915

In regard to BAS, the City of Richland is correct that it can either independently develop expertise or rely on expertise of local, state, and federal agencies, but the process utilized by Richland failed to fully implement the BAS requirement. A process that is limited to “review and comment” by state agencies of existing ordinances is not sufficient to meet the spirit and intent of the CTED guidelines or RCW 36.70A.172. If a local jurisdiction chooses to follow the agency assistance path, without independently developing its own science, actual discussions and collaboration must occur. It is not permissible to assume that agency silence is acquiescence and eliminates any further requirement that the science actually used be documented in the record and substantively used to guide the decision.

The Board specifically notes that a local jurisdiction is not required to follow without modification the recommendations or science of State agencies. When a local jurisdiction chooses to vary from recognized BAS, however, the science relied upon by the jurisdiction must be part of a reasoned process developed in the record providing the scientific support for the decision actually made.

The Board is not judging whether or not the decisions made by the City of Richland have a valid scientific basis. A problem arises because Richland has not documented in the record the scientific support for the decisions made, and especially the scientific rationale for deviating from the BAS recommendations of the Department of Ecology.

The Board has particular concerns in the following areas identified by the Petitioners:

1. Richland provides no scientific basis for deviating from the replacement ratios for Category I wetlands recommended by DOE and documented as BAS.
2. Richland provides no scientific basis for allowing “low impact” land uses within 25 feet of wetlands, deviating from DOE’s science regarding minimum 50 foot wetland buffers.
3. Richland provides no scientific basis for exempting small wetlands from evaluation under the wetland ordinance, deviating from the scientific basis provided by DOE.
4. Protections for the Yakima River corridor are absent from Richland’s development regulations.
5. Richland provides no scientific basis for protecting, by doubling, only “existing” buffers along the Columbia River.
6. Special consideration of the protection and enhancement of the anadromous fishery, utilizing BAS, is absent from Richland’s sensitive areas ordinance and development regulations.
7. Richland provides no scientific basis for the modifications made to its geologic hazard ordinance.
8. Richland must apply the BAS standard to development regulations outside its sensitive areas ordinance, but only to the extent those ordinances are intended to protect the functions and values or critical areas.

The Board finds that the “Best Available Science” standard must be applied even to the process of re-evaluating and re-adopting existing ordinances to consider current science and to determine that the ordinances continue to reflect science that is the “best available.”

IV. ORDER

The Board makes the following findings:

1. The City of Richland has achieved compliance with the Board’s order regarding internal consistency of the comprehensive plan and development

regulations by allowing public participation in the review process;

2. The City of Richland has achieved compliance with the Board's Order regarding RCW 36.70A.140, public participation requirements by developing and broadly disseminating a plan for public input in the GMA process; but

3. The Board finds the City of Richland is in continuing non-compliance for failure to utilize best available science and document it in the record as required by RCW 36.70A.172.

4. The City of Richland shall comply within 90 days of the date of issuance of this order.

5. The Board orders that a telephonic status conference will occur each 30 days.

Overall, the Board finds that the City of Richland has made substantial effort and progress to achieve compliance with the Board's order of June 21, 2000, and therefore, the Board does not recommend sanctions against Richland for continued non-compliance in regard to "Best Available Science."

This is a final order for purposes of appeal pursuant to RCW 36.70A.300(5).

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

SO ORDERED this 18th day of April, 2001.

**EASTERN WASHINGTON
GROWTH MANAGEMENT HEARINGS BOARD**

D.E. "Skip" Chilberg, Board Member

Judy Wall, Board Member

Dennis A. Dellwo, Board Member