

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

LARSON BEACH NEIGHBORS and  
JEANIE WAGENMAN,

Petitioners,

v.

STEVENS COUNTY,

Respondent

Case No. 00-1-0016

FINAL DECISION AND ORDER

I. Procedural History

On July 20, 2001, Larson Beach Neighbors and Jeannie Wagenman filed a Petition for Review relating to the adoption of a revised Steven County Critical Areas Interim Designation (ICAO) and Development Regulations, Resolution No. 75-2000 on July 11, 2000. On August 18, 2000, Petitioners filed Amendment of Petition including additional Issues 10, 11 and 12 and subsequently added Issues 13, 14, 15, and 16.

On August 24, 2000, the Board issued its Prehearing Order setting forth the legal issues and motions and briefing schedule.

On April 19, 2001, Respondent filed a motion seeking dismissal of the Petitioners' issues.

On May 9, 2001, a motion hearing was held in Colville and on May 16, 2001 the Board issued a Order on Motions dismissing Issues 1, 2, 4, 6, 13 and 15.

On June 26, 2001, the Board held a motion hearing on Petitioners' request to admit exhibits 43 through 94. Respondent stipulated to the admission of said exhibits.

On June 29, 2001, the Board held a hearing on the merits in Colville, Washington. Present for the Board were Dennis Dellwo, Board Member, and Skip Chilberg, Presiding Officer. Present for Stevens County was Lloyd Nickel and Jeanie Wagenman for Petitioners.

II. Findings of Fact

1. On July 11, 2000, Stevens County Adopted Resolution 75-2000, Stevens County

Critical Areas Interim Designation and Development Regulations. (ICAO).

2. Resolution 75-2000 establishes buffers and setbacks for wetlands and riparian areas, which deviate from recommendations of the State of Washington, without citation or discussion of “best available science” as required by RCW 36.70A.172.
3. Resolution 75-2000 makes no provision for designation of species of local importance or designation and protection of habitat for such species.
4. Resolution 75-2000 has no provision for enforcement of the regulations it contains.

### III. Legal Issues

**Issues 1, 2, 4, 6, 13 and 15 have been dismissed by a previous order of this Board.**

**Issue 3. Has the County adequately protected wetlands as critical areas?  
(Section 3.1.030 Wetlands)**

**Issue 7. Does exempting or waiving the requirements of no wetland delineation, by county staff, violate the intent of GMA and fail to adequately protect the value and function of wetlands? (Section 4.1 Delineation/Wetland Designation)**

**Issue 8. Do the exemptions listed in Section 5.1, and discussed below, still adequately provide the necessary protection for wetlands in Stevens County?  
(Chapter 5, Wetland Development Setbacks/Buffers and Exemptions)**

**Issue 9(b) Does the wetland/riparian buffers and setbacks in this section adequately protect wetlands and are these standards based upon the best available science as required by the Act?**

**Issue 10. Does Stevens County’s ICAO fail to protect the values and function of wetlands because it fails to define what are buffers and what are setbacks and uses them interchangeably. Does the ambiguous nature of this section and document with regards to setbacks/buffers then fail to protect the wetlands?**

**Issue 16. Does the Interim Critical Areas Ordinance also fail to properly designate/classify wetlands as critical areas?**

We have grouped the above issues together for ease of discussion. Collectively, these issues question whether Stevens County has adequately designated and protected wetlands and riparian

areas, utilizing best available science.

**Petitioners position:** Petitioners argue that the two maps used for identification of wetlands, i.e., the national wetlands inventory maps and the Eastern Washington University wetland maps, are incomplete and therefore are not an adequate designation. Petitioners contend the only other method listed for designation of wetlands, depends on the landowner or applicant for a permit to disclose “to the best of their ability” that a wetland exists on the property. Petitioners argue this is inadequate to ensure “no net loss” of wetlands, a stated goal of Stevens County.

For the protection for wetlands, Petitioners argue that Stevens county has not followed the recommendations of the Washington State Department of Ecology (DOE) and asks whether this deviation is based on best available science as required by RCW 36.70A.172. The Petitioners contend that the buffers and setbacks are less than recommended and no science is cited which would justify this reduction.

Petitioners also raise questions regarding buffer averaging, mitigation plans, lack of definitions, lack of a ‘rating’ method for wetlands, and concern regarding ‘reasonable use’ exemptions. The Petitioners contend that all of these further reduce buffers without standards or criteria.

**Respondent’s position:** Respondent argues that Petitioners have failed to carry their burden of proof regarding all issues argued. Respondent relies solely on a letter from the DOE, Doug Pineo, Shorelands Specialist, dated August 21, 2000, to the Stevens County planning department, which states in part:

The wetlands provisions of this CAO, while not perfect, still substantially protect isolated wetlands in Stevens County, and those wetlands associated with shorelines and shorelines of statewide significance as defined in the Shoreline Management Act, and the Stevens County Shoreline Master Program. The county responded to concerns about various draft wetland protection provisions, raised by wetlands experts at Ecology and by other resource management and community planning agencies.

**Discussion:** The Petitioners have a heavy burden of proof. They have carried this burden in two of the areas raised above, the County’s failure to have enforcement provisions in the ICAO and its failure to use the best available science in the sizing of buffers.

The Board recognized in *CFFC v. Ferry County* (97-1-0018) that existing maps were not adequate for designating wetlands, and that a process in addition to the maps was necessary and appropriate for adequate designation. In that case, the County corrected the deficiency by providing for on-site visits to verify the existence of wetlands. However, here, the process depends upon the landowner’s cooperation. The voluntary disclosure by the landowner of

existing wetlands is inadequate without a site inspection or other enforcement provisions. An individual might not have the expertise or desire to identify wetland and such voluntary disclosure provides inadequate protection.

Voluntary disclosure of the presence of wetlands is inadequate for compliance with the requirements for identification and protection of wetlands. Conceivably, penalties in an enforcement section for failure to disclose the presence of a wetland may be adequate to ensure such disclosure. If the penalty is non-existent or inadequate, the County must provide for a different mechanism, such as on-site inspection before permit issuance, to ensure the protection of wetlands.

The present sizing of buffers may or may not be appropriate. The County did not follow the recommendations of the State of Washington. However the record does not reflect other science supporting the different sizes. RCW 36.70A.172 requires the use of the best available science in the designation and protection of critical areas. There is no record this was done.

**Conclusion:** The Petitioners have met their burden of proof and shown that the failure of the County to use the best available science as is required by RCW 36.70A.172 in the sizing of buffers is clearly erroneous and fails to comply with the GMA. Further, the Petitioners have shown that the County has clearly erred in not including enforcement provisions in its Critical Areas Ordinance. Except for the above, the Board finds that the Petitioners have not carried their burden of showing that the actions of the County were clearly erroneous in the other issues raised above.

**Issue 5. Has the County failed to properly designate and protect Fish and Wildlife Habitat Conservation Areas as required by the Act?**

**Issue 9(a). Has the county failed to properly designate and protect fish and wildlife habitat conservation areas as required by RCW 36.70A.060 and.170?**

**Issue 11. Does Stevens County's failure to designate and define how habitats and species of local importance are to be given added protection or consideration, make this section in the ICAO vague and unenforceable, therefore giving no added protection?**

**Issue 14. Does Stevens County's Interim Critical Areas Ordinance 75-2000 fail to comply with RCW 36.70A.172 by failing to use Best Available Science in designating and protecting critical areas?**

**Petitioners' position:** Petitioners argue that 1) Stevens County has failed to provide for habitat

designation and protection for species of local importance; 2) Development may occur in these areas if the planning administrator determines the activity will not “significantly” degrade the habitat conservation area, without providing standards for that decision. 3) Riparian buffers are inadequate particularly for salmonid, and 4) failure to use best available science in reaching its decisions.

Petitioners document certain shortcomings in the ICAO. They also point to an absence in the record for scientific support for Stevens County’s failure to follow recommended guidelines for fish and wildlife habitat designation and protection, including specifically the size of buffers.

**Respondent’s position:** Respondent in its two page pre-hearing brief provides no specific refutation to the issue presented, relying on DOE’s supportive letter and arguing that Petitioners failed to carry their burden of proof.

**Discussion:** While the County’s actions are presumed valid, this presumption is rebutted when the Petitioners show the actions of the County are clearly erroneous in view of the entire record and in light of the goals and requirements of the GMA. The Petitioners have met this burden. The County’s response has been limited, and the County has not even addressed the Petitioners evidence regarding Fish and Wildlife Habitat Conservation areas designation and protection. The Board finds the County out of compliance. The Board shares the concerns raised in Petitioners’ brief, namely:

(1) WAC 365-190-080(5) provides that a process must be in place to allow for the designation and protection of species of local importance. At the present time, there is no procedure for such designation.

(2) The Board is convinced that a lack of standards or criteria for determining “significance” of a development activity can and must be addressed. Petitioners identifies a letter in the record from the Department of Commerce Trade and Economic Development suggesting certain activities which should be regulated in habitat conservation areas. Ex. 44.

(3) The County provides no basis for deviating from Department of Fish and Wildlife recommended buffers and setbacks to protect wild salmonid and other threatened endangered or sensitive species. The DFW guidelines must be followed in the absence of provisions for mitigation, or scientific evidence that supports a different buffer or setback. *Friends of Ferry County v. Ferry County*, 97-1-0018.

**Conclusion:** Petitioners have met their burden of proof. Stevens County’s actions are clearly erroneous in their (1) failure to provide a process for protection of species of local importance; (2) failure to clearly define and restrict activities that degrade critical habitat and (3) failure to establish adequate buffers for protection of fish and wildlife and protect the quality of the waters

and wetlands of the County.

**Issue 12. Does Stevens County’s lack of an “Enforcement” section in their ICAO, fail then to protect critical areas?**

**Petitioners position:** Petitioners contend the ICAO has no enforcement provisions. They argue that without provisions for enforcement, the regulations have no “teeth”, and therefore fail to protect the values and functions of critical areas, contrary to RCW 36.70A.

**Respondent position:** Respondent makes no specific rebuttal of the Petitioners’ argument other than the general assertion that Petitioners have failed to carry their burden of proof. At the hearing on the merits, Respondent stated that this ICAO does not have an enforcement section, but a new draft Critical Areas Ordinance does contain an enforcement section.

**Discussion:** A review of the ordinance readily reveals a lack of any enforcement provisions. In *Easy v. Spokane County*, 96-1-0016, the Board stated: “ The absence of penalties for violations of the CAO takes the teeth out of these important regulations.” Clearly, without provisions for enforcement, the Critical Areas Regulations fail to protect the values and functions of critical areas.

**Conclusion:** Stevens County has clearly erred in not including enforcement provisions in its Critical Areas Ordinance.

**IV. ORDER**

1. The Board finds the County’s failure to use the best available science in the sizing of buffers and the lack of enforcement provisions as part of the ICAO to be clearly erroneous and out of compliance with the GMA. The Petitioners failed to carry their burden of proof in the balance of issues raised in this section.
2. The Board finds the County’s action has been shown to be clearly erroneous on Issues 5, 9 (a), 11 and 14. The County is erroneous in its failure to provide a process for protection of species of local important, failure to clearly define and restrict activities that degrade critical habitat and failure to establish adequate buffers for protection of fish and wildlife and protect the quality of waters and wetlands of the County.
3. The Board finds in Issue 12 that the County has clearly erred in not including enforcement provisions in its Critical Areas Ordinance.
4. Stevens County shall comply with this order within 90 days of the date of this action.

**Pursuant to RCW 36.70A.300(5), 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.**

SO ORDERED this 13<sup>th</sup> day of July 2001.

**EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS  
BOARD**

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D. E. “Skip” Chilberg, Board Member

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Judy Wall, Board Member

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Dennis A. Dellwo, Board Member