

**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

ORDER ON COMPLIANCE

I. Procedural History

On July 20, 2000, Larson Beach Neighbors and Jeannie Wagenman filed a Petition for Review.

On July 13, 2001, the Board issued its Final Decision and Order requiring Stevens County come into compliance within 90 days of the date of that action.

On July 8, 2002, the Board received from Petitioners Larson Beach Neighbors and Jeanie Wagenman a Motion for Compliance Hearing and Motion for Clarification of Present Non-Compliance Status.

The Board held a telephonic hearing on July 18, 2002. On July 25, 2002, the Board issued an Order of Continued Non-Compliance.

On December 2, 2002, Petitioners filed a request for an extension of time, offering the County an additional 60 days to come into compliance.

On December 6, 2002, Respondent requested an additional 6 months to come into compliance.

On December 10, 2002, the Board received Petitioner's response to Respondent's 6-month request.

On December 19, 2002, the Board held a telephonic hearing. On December 20, 2002, the Board issued an Order Extending Time for Compliance.

On February 26, 2003, the Board received a preliminary report from Stevens County requesting an extension of the compliance schedule. February 28, 2003, Jeanie Wagenman requested an extension of time for filing Petitioners brief since the County would be adopting a new Critical Areas Ordinance.

On March 17, 2003, the Board received from Jeanie Wagenman a request for an extension of time for filing Petitioner's brief. Petitioner had not yet received a copy of the Critical Areas Ordinance adopted on March 4, 2003, by Stevens County Board of County Commissioners.

On March 18, 2003, the Board received a letter and copies of Resolution 32-2003, the new Critical Area Ordinance from Lloyd Nickel, Deputy Prosecuting Attorney. The County had no objections to the requested extension of time.

On March 31, 2003, the Board received Petitioner's brief and exhibits for the compliance hearing scheduled on April 23, 2003. On April 9, 2003, the Board received Stevens County's Response to Petitioner's Pre-Hearing Brief. Stevens County contended they adopted Title 13, a new CAO, making the old ICAO moot and the Board has no further jurisdiction. In the alternative, Stevens County requested an additional 30 days to file their brief if the Board found it has jurisdiction over Title 13.

On April 16, 2003, the Board held a teleconference to determine whether to proceed with the compliance hearing.

After hearing oral argument from the parties, the Board determined they would hold a compliance hearing in Case Number 00-1-0016 and granted Stevens County's request for an additional 30 days to file their brief.

On June 13, 2003, the Board held a telephonic compliance hearing in this matter.

II. FINDINGS OF FACT

On July 11, 2000, Stevens County Repealed Resolution NO. 57-2000 and adopted a revised Stevens County Critical Areas Interim Designation and Development Regulations (Resolution No. 75-2000). (ICAO).

On March 4, 2003, Stevens County adopted a Critical Areas Ordinance as a new and separate title, Title 13 of the Stevens County Code. Resolution No. 75-2000 was not repealed.

Discussion:

On July 13, 2001, the Eastern Washington Growth Management Hearings Board (Board) entered a Final Decision and Order finding Stevens County's Interim Critical Area Ordinance (ICAO) out of compliance due to its failure to use the best available science in the sizing of buffers. The Board further found the County out of compliance for its failure to provide a process for the protection of species of local importance, failure to provide enforcement provisions as part of the ICAO, failure to clearly define and restrict activities that degrade critical habitat and failure to establish adequate buffers for protection of fish and wildlife and the quality of waters and wetlands of the County. The County, in its April 9, 2003 Response to Petitioner's Pre-hearing brief, asked this Board to find it does not have jurisdiction to review County Title 13 in this case. In that Response, the County pointed out that they adopted a new title, Title 13, encompassing their new CAO and no changes were made to ICAO, which had been found out of compliance. The County contends that a new Petition must be filed to initiate challenges to Title 13. A new Petition has been filed challenging Title 13, case No. 03-1-0003.

The County briefing for the Compliance hearing contained repeated assertions that the Petitioner had raised new issues, issues not dealt with in the Final Decision and Order in this case. Further, in his oral argument, the County's attorney, Lloyd Nickel, informed the Board that the ICAO had not been repealed and the County may choose to repeal Title 13 and make corrections to the original Ordinance 75-2000:

Our strategy here is, in the worst case scenario, we could go back and amend that old ordinance to add those four areas that you addressed in your Final Decision and Order and with Ms. Wagenman's new appeal that's still is an option that the County may look at, we may just repeal the entire new ordinance, and throw in the enforcement provisions the habitat of local species and our analysis of best available science into the old one and just stay with that. Because after all the

work and effort that goes into adopting a new Critical Area Ordinance, for her to challenge everything about it like she has in her new petition for review, just makes it not worth our while to even go through the exercise anymore. So one of the things we may do, if she wants to complain about every provision of the new Critical Area Ordinance we may just go back and amend the old one to address the areas you told us to address in your Final Decision and Order, and then she'll have that one. (Record of June 13, 2003 Compliance hearing.)

Upon review of the arguments of the parties and review of the party's briefing and the determination that the ICAO, which this board found out of compliance, was not repealed or in any way modified, the Board determines the ICAO continues to be out of compliance with the Order of this Board and the GMA. The Board further finds that Title 13 is better reviewed in the case begun pursuant to the new petition, now filed under case Number 03-1-0003.

Conclusion:

The Board finds the Stevens County ICAO to be in continued non-compliance. Issues dealing with Stevens County Title 13 will be resolved in the new case, Case No. 03-1-0003.

III. INVALIDITY

In briefing for this compliance hearing, Petitioners request a finding of invalidity for ICAO 75-2000 buffer widths for type 1-5 waters, the 100 foot minimum riparian buffer for "ESA" listed species, and wetland buffers for categories 2, 3, and 4. (Section 5.2)

The Board clearly has the authority to consider a request for invalidity at this time. RCW 36.70A.330(4) provides:

"In a compliance hearing, upon petition of a party, the Board shall also reconsider its final order and decide, if no determination of invalidity has been made, whether one now should be made."

In considering invalidity, the Board must consider whether the non-compliant provisions of Ordinance 75-2000 substantially interfere with the Growth Management Act (GMA). (RCW 36.70A.330 (3)). Further, the Board may consider "the extended length of time that (a county) has been without a compliant ordinance... may well approach substantial interference with The Act and be grounds for a finding of invalidity."

Diehl et al v. Mason

County _____, 95-2-0073. The Board also notes the Western Board decision in Seaview Coast

Conservation Coalition

v. Pacific County _____, 95-2-0076:

“In making the decision regarding the scope of invalidity, we take into account the local government’s compliance or non-compliance with the Act along with current and past efforts to achieve compliance to meet the deadlines established by the Legislature.”

Section 13.00.040, of Title 13, provides that the more restrictive development regulation shall apply, if there is a conflict. Petitioners point out the new CAO (Title 13) reduces buffer requirements for Type 1 waters from 150 feet (high intensity uses) to 100 feet, and for Type 5 waters from 50 feet (high intensity uses) to 25 feet. While the Interim Critical Areas Ordinance remains out of compliance, the finding of invalidity of the setback/buffer provisions contained therein will weaken protections while the County pursues their compliance with the GMA. The Board therefore denies Petitioners’ request for a finding of invalidity.

III. ORDER

1. The Board finds Stevens County’s ICAO remains out of compliance.
2. The request for a finding of invalidity is denied.
3. Stevens County has until September 8, 2003, to take the necessary legislative action in order to comply with the Board’s Final Decision and Order.

Pursuant to RCW 36.70A.300, 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 order.

SO ORDERED this 10th day of July 2003.

EASTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD

Judy Wall, Board Member

D.E. "Skip" Chilberg, Board Member

Dennis A. Dellwo, Board Member