

**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 THIRD
COMPLIANCE
HEARING

I. Procedural History

On July 20, 2000, Larson Beach Neighbors and Jeanie 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 Order.

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

The Board held a telephonic compliance 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 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 an additional request for an extension of time for filing Petitioner's brief. Petitioner had not yet received a copy of the Critical Areas Ordinance (CAO) 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 No. 32-2003, the new Critical Area Ordinance, from Lloyd Nickel, Deputy Prosecuting Attorney. The County had no objections to the requested extension of time for briefing.

On March 31, 2003, the Board received Petitioner's brief and exhibits for the compliance hearing scheduled for April 23, 2003. On April 9, 2003, the Board received Stevens County's Response to Petitioner's Pre-Hearing Brief. In their response, Stevens County contended that, having adopted Title 13, a new CAO, the Order concerning the old ICAO was moot and the Board has no further jurisdiction. 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 No. 00-1-0016 and granted Stevens County an additional 30 days to file their brief.

On June 13, 2003, the Board held the second telephonic compliance hearing in this matter. On July 10, 2003, the Board issued its second Order of Continued Non-Compliance.

On August 18, 2003, the Board received Petitioner's Motion for Compliance Briefing/Hearing.

On August 19, 2003, the Board issued an Order Scheduling the Compliance Briefing/Hearing.

The Board held the third compliance hearing on September 26, 2003.

II. SYNOPSIS OF THE CASE

This is the Third compliance review, following an initial finding of non-compliance on July 13, 2001, an Order of Continued Non-Compliance on July 25, 2002, and a

Second Order of Continued Non-Compliance on July 10, 2003. The record illustrates a series of extensions granted throughout the process, with the County, on September 9, 2003, amending their ICAO. This latest action taken is identified as Resolution No. 109-2003. The issues remaining to be resolved herein are Stevens County's:

1. Failure to include provisions for enforcement of the critical areas protections,
2. Failure to provide a process for protection of species of local importance.
3. Failure to protect critical wildlife habitat, and
4. Failure to establish adequate buffers to protect the quality of water and wetlands, utilizing best available science (BAS).

On March 4, 2003, with Resolution No. 32-2003, Stevens County adopted a Critical Areas Ordinance, Title 13. The County's ICAO was not repealed. Resolution No. 32-2003 is the subject of another Petition for Review, 03-1-0003, filed by the same petitioners as in this case, and with similar, and in some instances identical issues. Although the rulings from this review may have bearing on Case No. 03-1-0003, this review is specific to Petition for Review Case No. 00-1-0016.

In addition to the issues identified above, Petitioners have challenged Stevens County's failure to follow their established public participation plan in the adoption of Resolution No. 109-2003. Petitioners charge the action was taken without adequate notice to the public, without hearings by the Planning Commission, and without consulting planning staff. The Board notes that, following a series of extensions over a period of two years, the County passed the subject Resolution amending their ICAO, one day after the compliance deadline without presenting a draft of the resolution for public review or comment prior to the meeting at which the resolution was adopted.

Substantively, the Board herewith finds Resolution No. 109-2003 and the Amended Stevens County Critical Areas Interim Designation and Development Regulations, fail to (1) establish adequate buffers or other methods to protect the quality of water and wetlands, utilizing best available science, and (2) the County has failed to designate and protect fish and wildlife habitat areas. The "no harm" provision inadequately protects the values and functions of wetlands and riparian areas. The Board finds the actions of the County continue to be clearly erroneous.

The Board does, however, find that the County has complied with its Order to

establish enforcement provisions for protection of critical areas. However, the provisions are effectively unenforceable until the County provides the standards and criteria found missing in their ICAO as amended.

The Board in a majority opinion also finds that the County has adopted provisions for nomination and protection of species of local importance that complies with its Final Decision and Order.

The Board further finds the County has failed to provide for adequate public participation in the adoption of Resolution No. 109-2003. After more than two years of continued non-compliance, the County's assertion that they lacked adequate time to include public review is without merit.

Stevens County is found in continued non-compliance with the GMA and with the Board's Order entered July 13, 2001.

III. STANDARD OF REVIEW

Comprehensive plans and development regulations (and amendments thereto) adopted pursuant to Growth Management Act ("GMA" or "Act") are presumed valid upon adoption by the local government. RCW 36.70A.320. The burden is on the Petitioner to demonstrate that any action taken by the respondent jurisdiction is not in compliance with the Act. RCW 36.70A.320.

The Washington Supreme Court has summarized the standards for Board review of local government actions under Growth Management Act. It was stated:

The Board is charged with adjudicating GMA compliance, and, when necessary, with invalidating noncompliant comprehensive plans and development regulations. RCW 36.70A.280, .302. The Board "shall find compliance unless it determines that the action by the state agency, county or city is clearly erroneous in view of the entire record before the county, or city is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of [the GMA]." RCW 36.70A.320(3). To find an action "clearly erroneous" the Board must be "left with the firm and definite conviction that a mistake has been committed."

Dept. of Ecology v.

Pub. Util. Dist. No.

1, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

The Board will grant deference to counties and cities in how they plan under

Growth Management Act. RCW 36.70A.3201. But, as the Court has stated, "local discretion is bounded, however, by the goals and requirements of the GMA."

King County v. Central

Puget Sound Growth

Management Hearings

Board, 142 Wn.2d 543, 561, 14 P.2d 133 (2000). It has been further

recognized that "[c]onsistent with *King County*, and

notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly

when it foregoes deference to a . . . plan that is not 'consistent with the requirements

and goals of the GMA." *Thurston County v.*

Cooper Point Association,

108 Wn.App. 429, 444, 31 P.3d 28 (2001).

The Board has jurisdiction over the subject matter of the Petition for Review. RCW 36.70A.280(1)(a).

IV. FINDINGS OF FACT

1. Stevens County adopted Resolution No. 109-2003, amending Resolution No. 75-2000 and the Stevens County Critical Areas Interim Designation and Development Regulations.

2. Resolution No. 109-2003 eliminates wetland and Fish and Wildlife Conservation buffers, setbacks and mitigation ratios from the Stevens County Critical Area Interim Designation and Development Regulations.

3. Stevens County Resolution No. 32-2003, adopting Title 13, addressed many of the same issues as does Resolution No. 75-2000 and is still in effect.

4. There is no scientific evidence in the record supporting Stevens County's choice of the "no harm" method of protecting critical areas.

5. There is extensive scientific evidence in the record supporting the use of minimum buffers as an important part of a County's plan to protect critical areas.

6. There are no criteria or standards in the County's ICAO which will guide the county or the landowners in determining whether the

development upon the land or planned development will damage the critical areas.

7. The “no harm” method of protecting critical areas is prospective only and does not regulate existing land uses, which may be causing damage in critical areas.

V. ISSUES

A. Species of Local Importance:

The Board, in its Final Decision and Order (FDO), found that Stevens County was clearly erroneous in its failure to provide a process for protection of species of local importance.

Petitioner’s Position:

The Petitioners contend Stevens County has not designated any Habitats or Species of Local Importance despite submission of nominations and the provision of best available science. The Petitioners contend the County has provided a method for a nomination process but this method will not bring about the protection necessary. Only when a citizen or agency comes forward, is there a chance that Habitats and Species of Local Importance might be recognized.

The Petitioners contend, if the Stevens County Commissioners determine the nomination is not feasible, the nomination would be denied, leaving no designation or protection. The Petitioners contend the County failed to follow its own public participation policy when, in receiving comments, and recommendations, the County did not respond to those who asked if a certain species would be recognized.

The Petitioners contend that the GMA and Minimum Guidelines mandate that counties should determine which habitats and species are of local importance and at least consider the information prepared by the Wash. Dept. of Wildlife. The assumption found in the ICAO is, someone will assume this responsibility instead of the county and submit, through a difficult and costly process, a nomination for a Habitat or Species of Local Importance that is not even guaranteed to be accepted.

The Petitioners cite *English v. Columbia*

County (93-1-0002) wherein an ordinance, that leaves it uncertain which species and habitats will be protected, doesn’t meet GMA standards. In that case, the Board found:

“There must be a specific objective standard for review in the ordinance that

will protect with reasonable certainty.”

The Petitioners cite *Diehl v. Mason*

County, (95-2-0073) CO 3/22/00 which stated:

“A local government’s failure to include designation of species of local importance for FWHCA does not comply with the Act.”

The Petitioners list, in the record, at least seven letters, including one from the Dept. of Ecology and one from Dr Michael Fulsom, PHD Geographical Services, wetland biologist. These letters request that Loon and Deer Lakes be considered by Stevens County to be Habitats of Local Importance in their Critical Areas Ordinance. The Common Loon and Red-necked Grebe are referenced as species that can only persist on Category 1 wetlands, which are in a very limited supply. Exhibit 4-c, 4-d, 4,e and 4-f.

The Petitioners question, after seven requests, with no response from Stevens County, how is this process by the County expected to work?

The Petitioners contend they, along with Mr. Aaron Engeldinger and Steve Erickson submitted into the record a list of state sensitive, threatened, and endangered plants in Stevens County. (Attachment 4-k). When the County was asked why they did not consider these plants, the response was, at the time of consultation with different agencies, none represented their area of expertise.

The Petitioners again contend the County did not follow their own Public Participation Policy. Stevens County’s PPP under Chapter 8, Consideration of and Response to Public Comments states:

“The planning department shall review all written and oral comments received and may respond to the comment in writing or verbally during the public discussion. After consideration of and as a result of the public comments, the Planning Department may also recommend to the hearing body to accept changes to the draft regulation or may recommend that the draft regulation stand as written.”

The Petitioners question, after seven requests made to the County Commissioners, some by accepted professional individuals, why they were never responded to.

Respondent’s Position:

The Respondent states amendment 1, page 11, specifies the process for protection of species of local importance by allowing any individual, organization, state or local

agency to identify and nominate the habitats and species.

Discussion:

RCW 36.760A.030(5) and WAC 365-195-410 defines critical areas. Fish and wildlife habitat conservation areas are considered critical areas under the Act. Furthermore RCW 36.70A.170(2) states:

“In making the designations required by this section, counties and cities shall consider the guideline established pursuant to RCW 36.70A.050”

RCW 36.70A.050 established WAC 365-190 (guidelines), which is properly titled: Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands and Critical Areas. The purpose of WAC 365-190-020 states that:

“These guidelines shall be considered by counties and cities in designating these lands...It is more costly to remedy the loss of natural resource lands or critical areas than to conserve and protect them from loss or degradation.”

WAC 365-190-080(5) lists Fish and Wildlife habitat conservation areas and included in these areas are (ii) Habitats and species of local importance; Under 365-190-080(5) c, (ii):

“Counties and cities should determine which habitats and species are of local importance. ...they may be further classified in terms of their relative importance. Counties and cities may use information prepared by the Wash. Dept. of Wildlife to classify and designate locally important habitats and species. Priority habitats and priority species are being identified by the department of wildlife for all lands in Wash. State.”

Stevens County has amended their ICAO with Resolution No. 109-2003 to include a process for the nomination of habitats and species of local importance. (Amendment 1). Here, the Petitioners argue the County assumes no responsibility or initiative in the process. All responsibilities for nomination and scientific investigation are that of the citizens and other agencies or organizations. Further, Petitioners argue the amendment places no obligation upon the Commissioners of Stevens County to act should any nomination be made. The Petitioners also contend that no Public Participation Policy was followed in the adoption of this amendment.

The Petitioners acknowledge Stevens County has adopted a process, they argue the County will take no action pursuant to that process. However, the process, if followed

by the County, provides a method for the nomination and designation and protecting habitat and species of local importance. The County is able, under the ordinance, to initiate the designation process. As "Local Government", they too are listed as parties able to nominate habitats and species of local important. If the County does not follow its own process, the Petitioner's remedy is not before this Board.

The Petitioners have failed to carry their burden of proof on this issue. The Board must presume the validity of the County action unless their action is found to be clearly erroneous. We do not find so in this case.

The Board notes this amendment was previously adopted as part of Stevens County Title 13 with Ordinance No. 32-2003, and, as such, was subjected to public review and comment. Failing to have additional public participation in this case does not cause this action to be non-compliant.

Conclusion:

Amendment 1, Interim Critical Areas Ordinance, Nomination Process for Habitats and Species of Local Importance, complies with the requirements of the GMA.

B. Enforcement Provisions:

The Board found in its FDO that the County clearly erred in not including enforcement provisions in its Critical Areas Ordinance (CAO).

Petitioner's Position:

The Petitioners claim the Enforcement section of CAO 32-2003 is the same as the ICAO 75-2000 with the exception of the last sentence, which was added, giving the Prosecuting Attorney, on behalf of the County, the right to enforce the provisions of this Code.

The Petitioners claim the public was not allowed to comment on this change and therefore the public participation process was not followed.

Respondent's Position:

The Respondent states in Amendment 3, page 14, Stevens County included enforcement provisions making it a misdemeanor to violate the provisions of the County's Code. The Respondent further states the Prosecuting Attorney is the enforcement officer for the County and prosecutes the misdemeanors in Stevens County.

Discussion:

Stevens County amended its Interim Critical Areas Ordinance to include enforcement provisions for the enforcement of the Critical Areas Ordinance. This amendment selects language found in Stevens County Title 13 and incorporates it into the amended ICAO. A sentence was added giving the County Prosecuting Attorney responsibility for such enforcement.

Petitioners argue first, the public was not given an opportunity to comment on the changes, and second, the Prosecutor is unlikely to enforce the Ordinance provisions. Petitioners acknowledge the enforcement provisions, minus assigning responsibility to the Prosecutor, were subjected to public review and comment when passed as part of Title 13.

The Board finds the actions of the County here are in compliance with the requirements of the GMA. The enforcement provisions, having been subject to public review and comment, need not in this case go through a second review. The addition of a sentence assigning responsibility for enforcement to the Prosecuting Attorney need not separately be subject to the Public Participation requirements. The addition of this provision is more clarifying than adding anything new. The County Prosecuting Attorney is the person at the county level that would have already been responsible for handling misdemeanor offences.

The Petitioners' concerns that the Ordinance will not be enforced are outside the jurisdiction of this Board and will not be addressed.

Conclusion:

Stevens County has complied with the Board's Order to include enforcement provisions for the Critical Areas Protections.

C. Protection of Critical Areas:

The Board in its Final Decision and Order, found that Stevens County failed to use the best available science in the sizing of buffers and was clearly erroneous and out of compliance with the Growth Management Act (GMA). Further, the Board found Stevens County failed to clearly define and restrict activities that degrade critical habitat and failed to establish adequate buffers for protection of fish and wildlife and protection of the quality of waters and wetlands of the County. These issues will be dealt with together in the following discussion.

Petitioner's Position:

The Petitioners speak of two levels of compliance. The County is first required to develop policies that would advance or meet certain criteria that, if followed, would protect the values and functions of critical areas. The County did cite the "Recommended Sources of Best Available Science" but did not use any of it in developing their policy of "no harm". The Petitioners point out that the very science cited in the County Record support the contention that buffers do help protect the values and functions of wetlands and riparian areas. The Petitioners contend that, to do away with buffers and setbacks and replace them with a concept of "no harm", with no BAS supporting their actions, violates the GMA.

Second, the County must implement the policies by regulations developed to protect critical areas. The Petitioners contend the regulations are so vaguely written that there is no way to know how this will be done. The Petitioners point out there are two sentences identifying a review process which will use a site-by-site analysis, yet the Ordinance says nothing about who will do the analysis, with what criteria or if this person is required to have an understanding of BAS.

The Petitioners contend the only difference between the Amended Resolution, 109-2003 and CAO 75-2000 is that the county has deleted wetland and Fish and Wildlife Conservation buffers, setbacks and mitigation ratios and replaced these with a "no harm" concept. The Petitioners contend the county has not clearly defined nor restricted any activities that degrade critical habitat, water quality and wetlands. The Petitioners contend Stevens County has failed to prohibit those activities harmful or incompatible in or near Critical Areas.

The county has "regulated" (but not based on BAS) activities by "permitting" any activity inside or adjacent to critical habitat and wetlands. The Petitioners contend Stevens County does not meet the Goals of the Act, the Minimum Guidelines to Classify Critical Areas and the EWGMHB Order of 7/13/01.

Stevens County claims that this method is one used by Skagit County. However, Skagit County applied this method of protection only to existing Agricultural activities.

The Petitioners claim there is no definition of "no harm", leaving the public guessing as to the standard. The Petitioners go on to claim there is no criteria triggering the critical areas site analysis and no standard minimum buffers in Ordinance No. 107-2003, as the County deleted sections where set backs and mitigation ratios were listed.

The Petitioners also contend the public and the Planners had no knowledge of these changes until the hearing itself and no drafts were offered to the public to review, or opportunities to communicate concerns or suggest changes to the Board of County Commissioners.

Respondent's Position:

The Respondent states Stevens County has drafted revisions to their old ICAO, taking a "no harm" approach for protection of all critical areas. The Respondent states that BAS will be used on a site-by-site basis to insure no harm is done to the functions and values of the County's critical areas.

The Respondent further states all buffers will be established based upon the unique site-specific characteristics of the critical area and the size of the buffers will depend on the analysis of the specifics of each location and adequately sized to do no harm to the functions and values.

The Respondent states #3.1 of the old ICAO was left in the ordinance but added new language to it at 3.1.050, which states:

"3.1.050 in Fish and Wildlife Habitat Conservation Areas: any land use or other activity that ~~significantly degrades~~ results in the net loss of the functions and values of fish and wildlife habitat conservation areas, as defined in Sections 2.3 (a)(b)(c)(d)(e) and (f), including lands owned or held by any local state or federal agency"

The Respondent states the language is very clear that a critical areas permit is required when any proposal would result in a net loss of the functions and values of fish and wildlife habitat conservation areas, and the permit would only be issued if the project, as mitigated, adequately protected the functions and values of the critical area.

Discussion:

The Growth Management Act (GMA) requires a County's adoption of development regulations to protect the functions and values of critical areas, recognizing particularly fish and wildlife habitat conservation areas, and substantively considering BAS when adopting those regulations. RCW 36.70A.060(2), .020(8), WAC 365-195-825(2)(b) and .172(1). Development regulations are "controls" placed on development or land use activities. RCW 36.70A030(7). The County must use BAS both to develop critical areas regulations and also to evaluate their effectiveness in providing

the protection required under the GMA.

Stevens County has previously adopted Title 13, a Critical Areas Ordinance. The County did not repeal Title 13, but did amend Stevens County Critical Areas Interim Designation and Development Regulations (ICAO) previously adopted by Resolution No. 75-2000. The County made the changes discussed herein to that Ordinance. With these changes, Stevens County adopted a review process utilizing site-by-site review, without any criteria in place or a trigger for notifying the County there may be critical areas in the new development area. It is up to the developer or some agency or citizen to contact the County about a possible wetland or other critical area involvement. In adopting development regulations, counties cannot rely on vague exhortations to do the right thing, but must develop specific protection measures that include requirements or standards sufficient to demonstrate that GMA mandates will be met. If the County wishes to rely on voluntary implementation of best management practices or BAS to protect critical areas, benchmarks, timeframes and monitoring must be developed and funding to ensure that these voluntary actions are working to achieve the needed protection. It is of particular importance to the success in providing adequate protection to fish and wildlife resources, that the program includes a rigorous monitoring program and adaptive management process. The program and process must be capable of detecting changes in the functions and values of habitat in a timely manner, and must include processes through which management techniques are reevaluated and modified as necessary in response to this information, to ensure that the goals of management are being met.

Further, laws can be so vague that they simply are unenforceable. That is the case here. Such an ordinance cannot satisfy GMA's duty to adopt enforceable "development regulations" to "protect" critical areas. A person should be able to determine what the law is by reading the published code. Ordinance No. 109-2003 (ICAO) relies on language too vague to create an enforceable standard and therefore cannot not operate to "control" land use activities and does not satisfy the County's GMA obligation to adopt "development regulations" to protect critical areas. The enforcement measures adopted by the County provide only for ad hoc enforcement. This does not constitute a reasoned adaptive management program, particularly where, as here, there is no provision for the monitoring of compliance.

The Court of Appeals, in *Anderson v.*

Issaquah, 70 Wn. App. 64, 851 P. 2d 744 (1993), rejected “ad hoc case-by-case policymaking” during design review as allowed by the City of Issaquah’s design review ordinance. 70 Wn. App. at 79. The Court rejected the City’s design review standards because they failed to contain sufficient standards or ascertainable criteria by which an applicant or the City could determine whether a given building design would pass muster under the code. *Id.* At 81. The Court stated: “whenever a community adopts such standards, they can and must be drafted to give clear guidance to all parties concerned” and it is “unreasonable and deprivation of due process” to expect or allow a city to create standards on an ad hoc basis during project review. *Id.* At 82-83.

See also: *City of Seattle v.*

Crispin, 149 Wn.2d 896, 905, 71 P.3d 208 (2003), which states in relevant part:

“However, as we recognized in *Dillingham*, the statute does not support the distinction the Court of Appeals draws between adjustments that are minor compared with substantial. Nor would such a rule be workable, and would perhaps be unconstitutional. We have recognized that the regulation of land use must proceed under an express written code and not be based on ad hoc unwritten rules so vague that a person of common intelligence must guess at the law’s meaning and application.”

Emphasis added.

Stevens County lacks any clearly defined biological performance standards and any specific habitat objectives for triggers to ensure that the fish have the essential functions and values of habitat they need to survive. With its new “no harm” standard, the County continues to provide no real protection for fish or their habitat.

The County’s new ICAO creates the illusion of protection by identifying a “no harm” standard. But the seemingly broad expanse of that term is undermined by the failure to define the terms and develop standards and criteria by which compliance may be measured and enforcement will be effective. The provision of the “no harm” standard is unworkable, and, ultimately, contrary to GMA requirements.

The County further has eliminated the buffer requirements in all cases unless

otherwise required by law or is part of a site-specific management plan. The abandonment of a riparian buffer requirement and the essential functions it serves is unexplained. The heavy weight of scientific evidence favors riparian buffers and these buffers provide essential functions for fish and wildlife survival. The report of the County's expert recognized the need for minimal riparian and wetland buffers. Buffers are especially beneficial where the jurisdiction has limited resources and expertise to review each site individually.

The original ICAO and the subsequent CAO, Title 13, adopted minimum buffer and mitigation schedules. While the Board felt the ICAO buffers were inadequate, they were clearly better than the amended ICAO. The self-monitoring and limited County involvement does not have a workable procedure for an adaptive management process and has not established a process for the development of habitat parameters for development of baseline conditions and the monitoring program. The County has also not adopted specific predetermined management responses to unmet standards and objectives. It is critical that these elements be well defined, given the risk to fish and wildlife habitat that the amended ordinance may allow.

The County is responsible not only to assure that landowners and operators are following the requirements of the ordinance, but that the County itself is complying with and implementing its own ordinance.

While the Stevens County Ordinance prescribes that developers are to do "no harm" to the existing functions and values of fish habitat, it nevertheless fails to protect fish habitat. First, it uses as a baseline the current or existing condition of the habitat – even though that habitat may already be degraded. Also it is not clear how landowners will be able to ensure compliance with this no harm or degradation standard via BAS as determining compliance should require ongoing monitoring of water quality and/or prior determination of background sediment levels.

Given that the Critical Area Ordinance does not require any specific remedial action by the land owner and instead allows a land owner to choose the method of avoiding harm AND given that no enforcement will occur unless a site-specific complaint is filed, it will be almost, if not completely, impossible for a person, the County or any concerned citizen to determine whether that land owner is causing harm.

Conclusion:

The County continues to be out of compliance with the GMA and the FDO on the issues contained in this section. It is clear also that the County failed to provide for adequate public participation in this process and future action must follow the Stevens County Public Participation Plan.

VI. ORDER

1. Stevens County is found by a majority of the Board to have adopted a process for protection of species of local importance. The County is in compliance on this issue.
2. Stevens County is found to have adopted enforcement provisions in its Critical Areas Interim Designation and Development Regulations. The County is in compliance on this issue.
3. The County continues to be out of compliance in that it failed to use the best available science (BAS) in the protection of Critical Areas. Further, the Board finds Stevens County again failed to clearly define and restrict activities that degrade critical habitat and failed to establish adequate buffers for protection of fish and wildlife and protection of the quality of waters and wetlands of the County.
4. Stevens County has 90 days from the date of this Order to come into compliance.

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 from the date of service of this Order.

SO ORDERED this 14th day of November 2003.

EASTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD

D.E. "Skip" Chilberg, Board Member

Dennis A. Dellwo, Board Member

DISSENT

Judy Wall, Presiding Officer in Case No. 00-1-0016, does not agree with the majority opinion regarding issue A. This Board member believes the legislature was clear in RCW 36.70A.170 and RCW 36.70A.060, which states counties, **shall** designate and protect critical areas. Critical areas include habitats and species of local importance.

RCW 36.70A.170 Natural Resource Lands and Critical Areas – Designation.

(1)(d) Critical Areas

(2) In making the designations required by this section, counties and cities shall consider the guidelines established pursuant to RCW 36.70A.050.

RCW 36.70A.060 Natural Resource Lands and Critical Areas – Development Regulations.

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

The Respondents Amendment 1 - Nomination Process for 'Habitats and Species of Local Importance'. "These habitats and species may be identified or nominated by state, or local agencies, individuals, or organizations." This Amendment does not say the County **shall** designate or protect as required by RCW 36.70A.170 and RCW 36.70A.060.

This process not only does not meet the statutory mandates for designating habitats and species of local importance, it continues to provide no real protection for the same. Stevens County, instead, transferred the statutory obligation to individual citizens and others.

Two of the Act's most powerful organizing concepts to combat sprawl are the identification and conservation of resource lands and the protection of critical areas and the subsequent setting of urban growth areas to accommodate urban growth. It is significant that the Act required cities and counties to identify and conserve resource lands and to identify and protect critical areas before the date that IUGAs had to be adopted. This sequence illustrates a fundamental axiom of growth management: "the land speaks first." CPSGMHB *Bremerton v.*

Kitsap County

, Case No. 95-3-0039c.

Therefore, this Board member pursuant to RCW 36.70A.170 and RCW 36.70A.060 finds Stevens County is in continued non-compliance and Stevens County's actions are clearly erroneous on Issue A.

Dated this 14th day of November 2003.

Judy Wall, Presiding Officer