

**BEFORE THE WESTERN WASHINGTON GROWTH  
MANAGEMENT HEARINGS BOARD**

JOHN E. DIEHL, KERRY HOLM, GORDON JACOBSON, )  
and VERN RUTTER, individually, and as members of the )  
MASON COUNTY COMMUNITY DEVELOPMENT )  
COUNCIL (MCCDC), )

Petitioners, )

v. )

MASON COUNTY, )

Respondent, )

and )

PETER OVERTON, DONALD B. PAYNE, McDONALD )  
LAND COMPANY, HUNTER CHRISTMAS TREES, )  
HUNTER FARMS, SKOOKUM LUMBER COMPANY, )  
MANKE LUMBER COMPANY and MASON COUNTY )  
PRIVATE PROPERTY ALLIANCE (MCPPA), )

Intervenors, )

No. 95-2-0073  
(Geologically-  
Hazardous Areas)

COMPLIANCE  
HEARING ORDER  
(#14)

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**Synopsis of the Order**

We agree with Petitioners MCCDC that Ordinance #88-00 is a “vast improvement” over previous sections of the Mason County Code relating to geologically-hazardous areas (GHAs). In this order we find that the County has achieved compliance regarding exceptions to 50-foot buffer reductions, densities in GHAs, administrative discretion, and standards, monitoring and enforcement. Only in the realm of buffers and application of best available science (BAS) to buffers does the County remain noncompliant, and only on two limited issues. We find the County still noncompliant regarding its habitat conservation area buffers in shorelines as they relate to GHAs. Habitat

conservation areas (HCA) and shoreline buffers will be addressed by the County in September of 2001 in response to a previous remand in this case regarding HCAs. The County must also remove the confusion surrounding the difference between GHA buffers and GHA triggering distances for geotechnical reports and geological assessments. This confusion occurred during the adoption process. The County must afford the public full opportunity to participate in that process.

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**Sequencing**

As this segment of the case centers in part on buffers and HCAs, it may be useful to set forth the buffer considerations in other related aspects of this case: Frequently-flooded areas (FFAs) and fish and wildlife habitat conservation areas.

Interrelated buffer consideration sequencing:

March 22, 2000      Compliance Orders (CO) #9 (HCAs) and #10 (GHAs)  
November 8, 2000      Compliance Hearings (CH) #13 (HCA) and #14 (GHA)  
December 1, 2000      CO entered re: HCA invalidity (CO #13)  
March 14, 2001      CO entered re: HCA compliance (CO #13)  
June 5, 2001      CH #15 (FFAs)  
June 27, 2001      CO entered re: FFAs (CO #15)  
July 13, 2001      CO entered re: GHAs (CO #14)

In CO #13 (March 14, 2001), we found that fish and wildlife habitat conservation area buffers remained below the ranges indicated by BAS. Further, development standards for buffers in saltwater shorelines and shorelines of lakes 20 acres or greater remained noncompliant. Buffer reductions of 25% were found noncompliant because administrative guidelines were insufficient and no public hearing was required. However, we found other BAS and mitigation provisions compliant because of the involvement of Washington Department of Fish and Wildlife (WDFW) and the Tribe in the development of HMPs and avoidance of adverse impacts and consideration of mitigation.

Subsequent to CO #13 regarding buffers, we found the frequently-flooded areas ordinance noncompliant, in part because the Shoreline Management Program and HCA ordinances which enumerate the functions and values protected in parts of the FFA remained noncompliant.

We now return to the noncompliance regarding buffers in GHAs found noncompliant in our order (CO #10) of March 22, 2000. In that order, we noted that the County had failed to reference, as it pertains to GHAs, inclusion of BAS used in the aquatic management (HCA) section of the Mason County Resource Ordinance. We also required removal of administrative discretion to reduce buffer width below 50 feet in order to accommodate BAS. This order (CO #14) addresses the relationship of buffer compliance in other sections of the Resource Ordinance (HCAs, FFAs) to GHAs.

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## **Introduction**

In response to our order regarding CO #10, finding continued noncompliance with GHAs, the County adopted Ordinance #88-00 on August 29, 2000. A compliance hearing was held November 8, 2000 at the Shelton Civic Center (CH #14). The County was represented by Mr. Mike Clift, Chief Deputy Prosecuting Attorney, and Special Deputy Prosecutor Robert Sauerlender. Mr. Michael Gendler, representing Petitioners MCCDC was present. He reiterated MCCDC's previously-submitted declaration that they were "not briefing or arguing the County's compliance regarding geologically hazardous areas." MCCDC's declaration also noted that "while there are some provisions in the County's new ordinance which are less protective than we would have desired, we believe that the ordinance is a vast improvement over the ones previously ruled noncompliant by this Board." Petitioner Diehl, who had briefed the issues in this proceeding, was not present.

## **Challenged Issues From Previous Compliance Order (Compliance Order #10)**

In CO #10, we had remanded Sections 17.01.100, .102 and .104 of the Resource Ordinance to be brought into compliance.

1. We called upon the County to reference the inclusion of BAS in the aquatic management section (the fish and wildlife habitat conservation area section) of the resource ordinance as these references pertained to geologically hazardous areas.
2. We required the County to consider appropriate densities in GHAs.
3. We required the County to provide standards and definitions for minimum soil, tree and vegetation disturbance and to minimize impact to anadromous fish.

4. We required the County to require permits for clearing, extend protection of GHAs to already-platted lots, and to remove discretion to reduce buffer width below 50 feet.

In this proceeding (C.H. #14), Ordinance 88-00 was challenged only by Petitioner Diehl who alleged the following noncompliance by the County:

1. Failure to comply with the Growth Management Act public participation notice provisions.
2. Failure to include BAS regarding the distances triggering geotechnical reports and geological assessments and by allowing reduction within landslide hazard areas of buffers less than 50 feet.
3. Failure to regulate existing mining and agricultural uses, thereby failing to protect GHAs.
4. Failure to consider restrictions on densities in GHAs.
5. Failure to provide for adequate monitoring and enforcement of its regulations regarding GHAs.
6. Overreliance on mitigation of adverse environmental impacts in GHAs.

### **Contentions Regarding Issues**

#### **Buffers**

Petitioner Diehl contended that the action of the Board of County Commissioners (BOCC) on August 29, 2000 failed to provide opportunity for public participation. The BOCC was considering the recommendations of the Planning Commission when all practical opportunity for public review and comment had passed. At that time, Commissioner Cady proposed and her fellow commissioners approved a reduction from 300 to 200 feet of the distance from GHA boundaries that triggers a geological assessment. Petitioner noted that the BOCC next approved a reduction from 150 feet to 100 feet of the distance which triggers a geotechnical report for oversteepened and potentially unstable slopes. Mr. Diehl contended that these actions were clear failures to allow public participation.

In describing the adoption process before the BOCC, Petitioner Diehl claimed that the County had failed to include BAS, when its consultant, Mr. McCabe, offered only an “impromptu response” to the reduction of distances triggering geotechnical and geological studies. Petitioner Diehl characterized the allowance of an exception to the 50 foot buffer minimum as a further failure to include BAS.

Mr. Diehl also maintained that because the mitigation element of the standard is not qualified, it is too weak to ensure protection.

With regard to public participation the County responded that the proposals to reduce triggering of assessments and reports were adopted by the BOCC “after discussion in an arena that was open to the public” and that the County was under a tight deadline to accomplish the changes made to the ordinance.

### **Mining and Agriculture**

Petitioner Diehl charged that failing to regulate existing mining and agricultural uses within GHAs failed to comply with the Act. The County countered that the question of existing mining and agricultural uses regulation was not part of our order of March 22, 2000 (CO #10), and that even if it were, the use of best management practices was appropriate under the guidance of State agencies.

### **Densities**

Petitioner Diehl further charged that the County failed to “consider appropriate densities in GHAs” asserting that densities should be considered before geological assessments and geotechnical reports are done, and not after.

The County maintained that it had considered densities in GHAs, pointing to its acknowledgement that densities in GHAs may be required to be reduced or transferred out of the critical area to avoid or mitigate impacts. The County noted that it had precluded density bonuses in GHAs under any circumstances.

### **Monitoring and Enforcement**

Petitioner Diehl maintained that the County failed to provide adequate monitoring and enforcement of its regulations, citing the exchange during the planning commission meeting of August 14, 2000, in which Mr. Clift asked “who is going to determine (the engineer’s) expertise in certain limited areas of engineering?” to which consultant Marty McCabe responded, “no one is.” Petitioner Diehl recommended more prescriptive regulations to make up for what he characterized as a lack of resource and expertise by the County to fully determine qualifications of those preparing the assessments and reports upon which it relies.

In response, the County referenced Section 17.01.200 of the Resource Ordinance, which, it declared, provided full enforcement capability.

Regarding BAS, the County maintained that it would use experts, including tribal and state reviewers, for engineering and environmental impacts through the habitat management plan (HMP) process. Site-specific reviews, declared the County, are much better science than “sweeping generalities”.

### **Mitigation**

Finally, Mr. Diehl criticized the County for its reliance on mitigation of significant adverse environmental impacts. He was alarmed that the County would be allowed to waive the requirement for geotechnical reports if there was “adequate information to determine the development’s impacts and appropriate mitigating measures”.

The County responded that mitigation is part of the HMP process and would be reviewed by State agencies and tribes. Environmental impacts to critical areas functions and values would be addressed through site-specific HMP review. The County noted that “an HMP shall consider measures to preserve and protect the wildlife habitat, consider effects of land use intensity, buffers, setbacks, impervious surfaces, erosion control, and retention of natural vegetation on the functions and values of FWHCA.” The County suggested that there was no more meaningful way to measure adequacy of HMPs as well as to provide checks and balances than coordination with the tribes and the WDFW.

### **Conclusions**

#### **Report-triggering Distances**

We find that the record does not show inclusion of BAS with regard to the August 29, 2000,

reduction of distances triggering geotechnical reports and geological assessments. In November 1997, Mr. Marty McCabe, consultant for Dames and Moore said “I now believe that the 150 foot distance is probably too short considering that landslide-prone areas are typically continuous over distances of at least 500 feet. A more sensible distance (for triggering) might be 300 or 400 feet.” Ex. #2003, p. 1 of 3. Ex. #2620 describes a discussion of buffers. It quotes Mr. McCabe stating that “50 feet is the narrowest of buffers, 100 feet is average and 300 feet would be conservative”. The special meeting notes go on to say, “Commissioner Cady suggested 200 feet. This would trigger an analysis of what could happen and there are some very unstable steep slopes in the County.” The record shows that Commissioner Cady misunderstood Mr. McCabe’s reference. Mr. McCabe was discussing buffers. Commissioner Cady was addressing the distance from the outer edge of the buffer which would trigger a geotechnical report or geological assessment. These are two very different concepts. The discussion had started with Commissioner Bolender asking about the purpose of the 50-foot buffer, not the triggering distance for geotechnical reports. That “distance” is the one referred to by Mr. McCabe in his remarks in Ex. #2003 in 1997. The record shows that the reduction of triggering distance was adopted without opportunity for the staff or the public to note that the two concepts were being intermingled by the BOCC. We find that the adoption of this reduction does not represent inclusion of BAS. In this case we find that Mr. McCabe’s 1997 studies and remarks represented BAS. Mr. McCabe stated very clearly in the record that 300 feet was a sensible distance for triggering geotechnical studies. We infer that the “sensible” 300 or 400 feet triggering distance includes the 50-foot buffer, so that the minimum “sensible” distance recommended by Mr. McCabe would equal 250 feet, excluding the buffer.

### **Exception to the 50-foot Minimum Buffer Distance**

Regarding the question of exceptions to the minimum 50 foot buffer distance, the County has provided in Section 6.C. of Section 100.D. (development standards) that an application to reduce buffers for constructing a single family residence on a lot existing or vested by December 6, 1996, shall be approved only if it is consistent with recommendations contained within the required geotechnical report or geological assessment. Any environmental impacts must be addressed through the HMP process. We find the applicable standards for qualifications of report preparers and for involvement of agencies in the HMP process to be of sufficient detail that they comply with the Act. We are not convinced the County has made a clear error in approving this amendment for exceptions to 50-foot buffers.

## **Mining and Agriculture**

We find that regulation of existing mining and agricultural uses is not properly before us as part of this compliance proceeding. It was not addressed in the March 22, 2000 order.

## **Densities**

We find that the record shows appropriate County consideration of densities in geologically hazardous areas, Ex. #2600 at p. 22 as required in our March 2000 order.

## **Monitoring, Enforcement, Mitigation, Standards**

Mason County had demonstrated its enforcement capability in Section .200 of the ordinance. MCC 17.01.100.E.2 allows waiver of “some” geotechnical reports only upon a written finding in the Geological Assessment regarding impact and mitigations. We conclude that this provision ensures appropriate review and mitigating measures. We further conclude that the more extensive standards for clearing, set forth in revised MCC 17.01.100.D, make this section compliant with the Act.

## **HCA Reference**

17.01.100.E.7 references avoidance and mitigation of impacts to FWHCA and anadromous fish through avoidance or mitigation in an approved HMP. Now that WDFW and the Tribe are involved in HMP and mitigation determination, only those GHA buffers in shoreline areas still noncompliant under our HCA order remain in question here.

## **ORDER**

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We find the following previously-noncompliant aspects of the GHA section of the RO to now be compliant:

1. Process of exceptions to the 50-foot minimum buffer requirement.
2. Provisions for soil and vegetative standards.
3. Administrative discretion.
4. Appropriate densities in GHAs.
5. Standards and definitions.

We find the following to be noncompliant:

1. Distance which triggers requirements for geological assessments and geotechnical reports.
2. Public participation in deliberations regarding triggering distances.
3. HCA shoreline buffers as they relate to GHAs.

The County has 180 days from the date of this order in which to achieve compliance. A report on actions taken to achieve compliance is due January 4, 2002.

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

Pursuant to WAC 242-02-832(1), motions for reconsideration may be filed within ten days of this order.

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

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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Les Eldridge  
Board Member

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William H. Nielsen  
Board Member