

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

WHATCOM ENVIRONMENTAL COUNCIL,	)	
WATERSHED DEFENSE FUND, and	)	
WASHINGTON ENVIRONMENTAL COUNCIL,	)	
	)	No. 95-2-0071
Petitioners,	)	
	)	ORDER RE: FINDING
vs.	)	OF CONTINUED NON-
	)	COMPLIANCE,
WHATCOM COUNTY,	)	INVALIDITY AND
	)	SANCTIONS
Respondent,	)	
	)	
and	)	
	)	
STATE OF WASHINGTON, DEPARTMENTS	)	
OF ECOLOGY, FISH AND WILDLIFE, AND	)	
COMMUNITY, TRADE AND ECONOMIC	)	
DEVELOPMENT,	)	
	)	
Intervenor.	)	
_____	)	

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**SYNOPSIS OF THE ORDER**

Whatcom County began its attempt to protect critical areas with passage of a 1992 Critical Areas Ordinance (“original CAO”). The original CAO did provide a significant level of protection. A referendum the next year removed many of those protections. When the referendum was found by the State Supreme Court to be an inappropriate mechanism for the implementation of the Growth Management Act, the County Council adopted an emergency ordinance and later extended it. Its provisions for protection were at the same level as the referendum. We found this “new CAO” to be so lacking in protection for critical areas that it substantially interfered with the goals of the Act. We therefore declared it invalid in December, 1995.

The subject of this Order is an amendment (Ordinance #96-17) to the non-compliant and invalid

“new CAO” (Ordinance #95-020). Lamentably, the amendment still falls short of the minimal protection levels required by the Act. An effort to improve the new CAO was put forth by County Council, Staff and Planning Commissions. In most instances, they opted only to begin development of solutions to the non-compliant aspects of the new CAO, rather than present the completed solution. For example, the amended CAO called for development of:

1. a wetlands functional rating system.
2. a riparian stream rating system.
3. a Habitat Board to clarify, recommend and identify Habitat Conservation Areas.
4. an administrative procedure to implement the agriculture section.
5. procedures for clear administrative review.

None of these laudable tasks were completed with passage of Ordinance 96-17. Until they are complete, the Ordinance remains in continued non-compliance.

In this Order, we find that the County’s response to our Order of Remand and Finding of Invalidity does not “cure” the substantial interference with the goals of the Act. We once again remand the Ordinance and allow 180 days for it to be brought into compliance. We note that the County has not yet asked for a removal of the finding of invalidity.

We reserve judgment on Petitioners’ and Intervenor’s request for a recommendation to the Governor for sanctions until the next compliance hearing.

### PROCEDURAL HISTORY

Ordinance #95-020 was remanded to the County on December 20, 1995, to be brought into compliance 120 days from that date. A finding of invalidity was entered. Amendments to the Ordinance (Ordinance #96-17, or the amendments) were adopted April 30, 1996. A hearing to determine whether the amendments brought the Ordinance into compliance was held June 25, 1996. All three Board members were present. Civil Senior Deputy Prosecuting Attorney Dan Gibson represented the County; Mr. Toby Thaler represented petitioners; Ms. Deborah Mull appeared for Intervenor State of Washington (Dept. of Ecology, Fish and Wildlife, CTED); Mr. Geoff Menzies appeared as a participant pursuant to RCW 36.70A.330(2).

## DISCUSSION

### Burden of Proof and Presumption of Validity

The County argued that with the passage of the amendments to the Ordinance, the presumption of validity was once again present and the burden of proof as to compliance remained with the Petitioners. Petitioners and Intervenor responded that while RCW 36.70A.320 provides that amendments to comprehensive plans and development regulations are presumed valid on adoption as a general rule, the exception to that rule is RCW 36.70A.300 which provides that, where a comprehensive plan or development regulation has been invalidated,

"any development application that would otherwise vest after the date of the board's order [shall be subject] to the ordinance or resolution that both is enacted in response to the order of remand and determined by the board pursuant to RCW 36.70A.330 to comply with the requirements of this chapter."

They argued that a jurisdiction whose ordinance has been found to be non-compliant must subsequently demonstrate how it complied with the Act. This interpretation is supported by the fact, alleged the Intervenor, that the County is the only mandatory party at a compliance hearing. RCW 36.70A.330(2). Parties with standing to challenge the enactment in the first instance and the petitioner may participate in the compliance hearing. Their participation is not mandatory. As such, the County, the mandatory party, is the only party which can carry the burden of proof, the Intervenor argued. To rule otherwise would result in an absurd outcome, absent any participation by the permissive parties. The Intervenor postulated that under the County's argument, if only the County appeared at a compliance hearing, the Board would have no choice but to find the ordinance compliant and valid, even if there were no showing of compliance.

We adhere to our previous rulings that the respondent jurisdiction has the burden of showing compliance. *Friends of Skagit County v. Skagit County* WWGMHB #95-2-0065. We find the Intervenor's argument to be persuasive.

### Stream Buffers

The County argued that the amendments contained adequate provisions for the establishment of

buffers. Intervenor State of Washington responded that instead of increasing buffers the County actually reduced them. Intervenor cited a total reduction of buffer area for Type 1 and Type 2 waters of 193 acres. Type 1 waters were previously subject to the Shoreline Master Program (SMP). Under the amendments a reduction of 50% of the setback established under the shoreline area designation is allowed. Intervenor also noted a County staff statement that merely referencing the SMP would establish no buffer protection in many of the streams in Whatcom County (State's Compliance Exhibit #2, page 4).

Buffers for Type 2 waters were reduced from 100 ft. to 50 ft., while buffers for Type 4 and 5 waters were increased from 0 to 5 ft. The County in its Finding #15 regarding the amendments stated that "the audio-visual presentation at the hearing illustrated how 5 ft. buffers provide shade and protection to fish and streams in Whatcom County." Yet, at that presentation County Planner Terry Galvin stated:

"I want it real clear, to be understood, that staff does not support that statement so we do not, it was not our intent of the audio-visual presentation to demonstrate how a 5 ft. buffer or small buffers could provide protection or adequate protection. It was the intent of the audio-visual display to show how even with a small buffer, you have enhanced protection, but not certainly demonstrate how a 5 ft. buffer is adequate protection." (4-30-96 work session tape)

The record shows no scientific support for a buffer of this size. That buffer, and the other buffers established by the amendments do not comply with the Act.

### Stream Buffers: Administrative Criteria

In our December 1995, Order we noted the Central Board's admonition that "failure to provide administrators with clear and detailed criteria would undermine, perhaps fatally, the duty of the legislative body to articulate its requirements with regard to critical areas protection."

CPSGMHB #95-3-0047. *Pilchuck, et al v. Snohomish Co. (Pilchuck II)*. The lack of appropriate administrative criteria was a factor in determining the invalidity of the Ordinance. In response, the amendments regarding stream buffers called for the County to "develop a quantitative rating system to assist the technical administrator in making site-specific buffer determinations." The

County noted that "the literature on buffer widths is clear in pointing to the scientific superiority of.... a case-by-case basis."

The County stated that it intends to use the criteria established in Whatcom County Code (WCC) 16.16.500(B)(3) as a regulatory basis for such a rating system. WCC 16.16.500(B)(3) contains criteria which are undefined. As Intervenor pointed out, it calls for applicants to demonstrate "that relatively small buffers will not disturb the ecological integrity of the stream". "Relatively small buffers" and "ecological integrity of the stream" are undefined. Further, a stream is defined as including "drainage ditches or other artificial water courses where there is evidence of significant fish populations". "Significant fish population" is undefined.

In the amendments, the County added a provision (WCC 16.16.070 C) directing the development of procedures to provide criteria for administrators. This is particularly important in view of the County's choice of using variable methodology for wetland protection. These criteria have not yet been developed. We conclude that the County remains in non-compliance regarding criteria for administrative decisions until we can review the developed criteria.

#### Stream Buffers: Activities within Buffers

Intervenor pointed out that the new CAO prohibited activities within buffers. The amendments permit activities where there are "minimum adverse impacts to the river/stream including its topography, vegetation and fish and wildlife resources" WCC 16.16.500(D)(1). Intervenor argued that the new allowance of adverse impacts within buffers that are already inadequate is not protective of critical areas. The County did not address this additional permission. We agree that additional stress on buffers found non-compliant is inappropriate.

#### Stream Buffers: Straightened Streams and Ditched Wetlands

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In response to the Order, Ordinance #96-17 does replace straightened streams and ditched wetlands in the definition of "Streams" WCC 16.16.030.11., thereby addressing what the County terms "previous concerns about the exclusion of ditches from regulations."

## Conclusion: Stream Buffers

The stream rating system and other criteria proposed in this section (WCC 16.16.360.E) are a step in the right direction, but must be completed before compliance can be found. Criteria now in the ordinance are undefined. It is clear from the record that the amendments to the CAO in some instances provide less protection for streams than the CAO did previously. Activities within buffers, not previously allowed, are now permitted. Buffers have been reduced or minimally increased. This section remains out of compliance.

## Wetlands

The County maintained that small Category III wetlands and all Category IV wetlands were not very important and did not need protection. It pointed to the fact that Category IV wetlands were by definition under five acres, hydrologically isolated and did not provide significant aquifer recharge functions or critical wildlife habitat.

The State maintained that Category IV wetlands are critical areas for functional characteristics (flow enhancement, filtration, peak discharge attenuation) and should not be "dismissed outright" (County's Compliance Ex. 34). An attached letter from the Corps of Engineers (County's Compliance Ex. 35) noted that the Corps did not treat their Category IV wetland regulation in a "relaxed manner", countering a contention made in testimony before the County Council. Intervenor pointed out that approximately 2,160 Category IV wetlands exist (Original Exhibit #314) in Whatcom County. The Department of Ecology asserted that "Category III and IV wetlands are the vast majority of the County's resource.....and perform the lion's share of the water quality, storm water absorption, attenuation, low flow release, habitat and related functions" (State's Compliance Exhibit #7). The record offered no scientific support for exemption of that number of wetlands.

Intervenor also contended that the County simply chose to ignore the recommendations of agencies with expertise. It alleged that while the Category III(A) wetlands reduction in threshold from one acre to half an acre appears, on the surface, to increase protection, no real increase in protection actually resulted. Intervenor contended that only a small portion of Category III

wetlands would be classified as III(A) (States' Compliance Exhibit #11) and that the best estimate was that 19% of wetlands in Whatcom County would still remain unregulated, the same portion previously found non-compliant.

The State also pointed out that new exemptions were added by the amendments, without discussion regarding the effects of these exemptions.

### Conclusion - Wetlands

The inclusion of a Category III (A) wetlands threshold at .5 acre is an improvement to the CAO. There are, however, no additional scientific data nor discussion in the record to support the continued exclusion of Class IV wetlands. There is no evidence that the Category III (A) wetland reduction would provide any more protection than the previously unregulated wetlands. The proposed functional rating system (WCC 16.16.360.E) needs to be developed and completed. We conclude that the County remains in non-compliance regarding wetlands protection.

### Shellfish

The County argued that new provisions in the amendments provided protection for shellfish. Intervenor pointed out that the definition of shellfish excluded many species that remain unprotected, and that the amendments merely provided that fish populations would be considered in establishing stream buffers and in ruling on development proposals. Participant Menzies (owner, Drayton Harbor Oyster, Inc.) maintained that the "CAO fails to bring forth a coherent policy..... Listing these programs (24 non-GMA, County and State programs and plans) under the heading of "Regulatory Requirements" (WCC 16.16.550 C) is very misleading as well, since at least half are not regulatory in nature." Further, he observed that "the responsibility of identifying and managing Shellfish Habitat Conservation Areas (SHCAs) is left largely to a committee appointed by the County Council. This is the work that should have been done by this Council and County Planning Staff as part of the GMA process. It is irresponsible at this point in time to appoint a committee without a budget or timeframe to perform this task." Menzies strongly urged the County to set a time frame and provide a budget for the development of a shellfish protection program.

## Conclusion - Shellfish

WCC 16.16.560 provides for a process to create a fish and wildlife advisory committee which will develop a protocol for protection of shellfish. Section .550 provides for “consideration” of Shellfish habitat when establishing stream and wetland buffers. Stream and wetland buffers await the completion of their own rating systems. Section .550c lists 24 non-GMA programs and plans without any description of how they will use these programs to ensure "long range viability of fish and shellfish populations." It is simply a "laundry list". Until these protocols and systems are completed and adequate protections adopted, the County remains out of compliance for shellfish protection.

## Reliance on Statutes other than the GMA to Provide Critical Areas Protection

The County, in commenting on critical areas, asserted that there is no particular legislative format required for CAOs. The County referred to a "quasi-judicial gloss" applied to the phrase "CAO" which "apparently mandates a single ordinance which, if it does not contain all of the pieces of CA protection, at least references them and indicates an intent to rely on them." The County asserted that this "notion" is only applicable to the public participation requirements of comprehensive plans and their implementing development regulations and not to CAOs.

Notwithstanding this assertion, the County noted that it "specifically identified a significant number of regulatory regimes which are in place, at least on paper."

Again, the County misses the point. The public has a right to understand how these non-GMA "regimes" work together to provide protection. Identification of regimes in place "at least on paper", is not sufficient to ensure protection of critical areas.

As with its previous effort, the County failed to go beyond a mere listing to describe how these non-GMA statutes provide the protection called for under GMA. Nothing in the record shows any deliberations on how these programs work together, or how they support the critical areas ordinance. Our Order required that if non-GMA laws were specifically adopted as part of a

protection umbrella for critical areas, the County needed to demonstrate how these laws were sufficient to protect critical areas. Absent such a demonstration, the amendments fail to comply with the Act.

State Environmental Policy Act

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In light of our ruling in this case we do not need to address the State Environmental Policy Act issues.

CONCLUSION

The amendments to the CAO in response to our December remand provided some improvements to the protection of critical areas in Whatcom County. Sections regarding Wetlands, Stream Buffers, and Shellfish still offer inadequate protection. Most of the changes in the amendments are in the form of prospective development of systems and criteria to clarify, in order to more clearly delineate the protective measures of the CAO. They are not yet in existence. The CAO remains in noncompliance with the Act. The CAO and its amendments are remanded to the County. They must be brought into compliance with the Act within 180 Days of this Order. Findings of Fact and Conclusions of Law in our December 1995, Order are incorporated herein by reference and appended.

SO ORDERED this 12th day of September, 1996.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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Les Eldridge  
Presiding Officer

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Nan A. Henriksen  
Board Member

APPENDIX 1

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Findings of Fact

1. Critical Areas Ordinance (CAO) 92-032 was adopted June 23, 1992.
2. A County referendum was passed in November of 1993, removing many protections to the critical areas contained in CAO 92-032.
3. The County Council adopted CAO 95-016 in December 1994. Its provisions were the same as the referendum's.
4. CAO 95-016 was extended April 11, 1995 and CAO 95-020 was adopted April 26, 1995.
5. A petition challenging CAO 95-020 was filed June 27, 1995.
6. CAO 95-020 excludes type 4 and 5 waters from regulation and reduces the buffers in type 2 and 3 waters significantly below the levels necessary to protect these critical areas.
7. CAO 95-020 exempts category IV wetlands and category III wetlands under one acre from regulation, significantly reducing critical areas protection.
8. CAO 95-020 fails to address shellfish protection.
9. CAO 95-020 has no mitigation measures to avoid significant adverse environmental effects.
10. The record shows no deliberations concerning the reasons for removing the protections previously noted.
11. The County has been without these protections for 38 months.

From the foregoing findings of fact, we make the following:

Conclusions of Law

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1. Sections 9, 10, 11, and 12 of CAO 95-020 substantially interfere with the fulfillment of RCW 36.70A.020(8) (9) and (10).
2. Those sections of 95-020 are hereby declared invalid under the provisions of 36.70A.300(2).