

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

JOHN E. DIEHL, KERRY HOLM, GORDON)	
JACOBSON, and VERN RUTTER, individually,)	No. 95-2-0073 (HCAs)
and as members of the MASON COUNTY)	
COMMUNITY DEVELOPMENT COUNCIL)	COMPLIANCE
(MCCDC),)	ORDER
RE:)	PREVIOUS
Petitioners,)	FINDINGS OF
)	NONCOMPLIANCE
v.)	(13 th Compliance Hearing)
)	
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.)	
<hr style="width:50%; margin-left:0;"/>		

INTRODUCTION

-

The compliance order for compliance hearing #13 was bifurcated into an order on issues previously found invalid (December 1, 2000) and this order regarding issues previously found noncompliant but not invalid.

On November 8, 2000, compliance hearing #13 in the above-captioned case was held regarding

aquatic management areas of habitat conservation areas (HCAs). The hearing took place at the Shelton Civic Center. Present for the Board were Les Eldridge and William H. Nielsen. Petitioner John Diehl appeared for himself and Mr. Michael Gendler represented Petitioners MCCDC. The County was represented by Chief Deputy Prosecutor Mike Clift and Special Deputy Prosecutor Robert Sauerlender.

Previously: (in compliance order of March, 2000)

We held that Mason County's treatment of buffers as HCAs failed to comply with the Growth Management Act (GMA, Act) and that the County's section on exceptions to riparian buffer requirements was also noncompliant. We held that the County had failed to adequately designate HCAs and delineate HCA categories. We insisted on a longer comment period for agencies with expertise regarding habitat management plans (HMPs) and regarding a Washington Department of Fish and Wildlife (WDFW) opportunity to offer advice on species including habitats and species of local importance. We identified as noncompliant the County's policy on listing of species and called for their extension and for their designation of shellfish areas in the shoreline management plan (SMP). In short, we called for better buffers, more consultation with agencies with expertise regarding HCAs, species designation and listing, and shellfish area designation.

Among these noncompliant findings we also found invalid HCA categories and designations, HCA buffers, non-permitted activities, consistency of terrestrial HCAs with aquatic HCAs, designation of habitat and species of local importance, and consultation opportunity for agencies with expertise.

-
-
Subsequently (re: invalidity) in invalidity order December, 1, 2000:

We continued our findings of invalidity regarding exceptions to buffer requirements and development within HCA buffers on saltwater shorelines and lakes of more than 20 acres. (See also reference in March 1, 2001, compliance order in Case #96-2-0023c, *Dawes v. Mason County*, p. 15 re: development in shorelines). We found continuing invalidity regarding the County's SMP and shorelines regulations. We removed invalidity regarding opportunities for

consultation and advice from agencies with expertise as well as HCA designations and categories.

-
-

**Presumption of Validity, Burden of Proof,
and Standard of Review**

Pursuant to RCW 36.70A.320(1), amendments are presumed valid upon adoption.

The burden is on Petitioners to demonstrate that the action taken by Mason County is not in compliance with the requirements of the GMA. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), we “shall find compliance unless it determines that the action by [Mason County] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” In order to find the County’s action clearly erroneous, we must be “left with the firm and definite conviction that a mistake has been made.” *Department of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

-
-
-
-

Issues Previously Found Noncompliant

We now turn to contentions and conclusions regarding both the noncompliance of issues previously found invalid and other issues previously found noncompliant.

Outline of Noncompliant Issues (HCAs)

1. HCAs in marine shorelines and lakes of 20 acres or more.
2. SMP buffers, riparian HCA functions, agricultural exceptions to riparian buffer requirements.
3. Habitat designation: a) priority species; b) species of local importance.
4. Comment opportunities for agencies with expertise regarding HMP review.

5. Priority habitat and species (PHS) maps as a trigger for review of HMPs by a qualified fish and wildlife professional.
6. HMPs for as-yet-unused sites offering suitable breeding and feeding habitat for priority species which may be needed when currently-used sites are abandoned.
7. Protection and mitigation for HCAs.
8. Economic development as a factor in considering de-listing.
9. Wetland HCA protection.
10. HCA categories.
11. Application review process, permit exemptions, and administrative discretion.
12. Riparian habitat designation.

-
-
-
-
CONTENTIONS
-

The County maintained that it was no longer noncompliant regarding fish and wildlife habitat conservation areas (FWHCAs). The County acknowledged that the SMP is in need of being updated in the near future. The County declared its intention to complete the SMP update as soon as the resource ordinance is deemed compliant. The County further contended that it had properly designated HCAs. It maintained that it was using the PHS database as a guiding tool because it contains species specifically listed under state and federal programs, in addition to others in the PHS database.

It contended that the topic of specificity and regulations dealing with implementation management and monitoring of HMPs was not a subject of the Board's March 22, 2000, order. Nonetheless, it pointed out Mason County will integrate its approval of HMPs with WDFW and the Tribes. It contended that there is no more meaningful way to measure the adequacy of HMPs than coordination in the HMP process with those participants. The County declared that it would use the PHS program database as a guiding tool for regulations, and that consultation with

WDFW, and the tribes regarding use of PHS would form the basis for habitat management plans.

The County noted that both the Tribe and WDFW have accepted the approach offered by the County regarding application of current BAS to permit review specifically for the site under consideration for development. State and Tribal input will be included, claimed the County, when developing mitigation and monitoring protocols for projects. The County's use of the concept of mitigation, it declared, was appropriate because of the fact that development of any kind will displace wildlife of some type to some degree. Mitigation will enable the County to avoid adverse impacts.

The County contended that it had made substantial changes to the buffers section for the new ordinance and increased the amount of time for comments for 15 to 28 days for agencies with expertise, and had used best available science and the recommendation of agencies with expertise in determining species of local importance.

-
Amicus Curiae Washington Department of Fish and Wildlife (WDFW) noted that the County had made significant improvements on riparian buffer requirements, and had extended the habitat management plan (HMP) comment period from 15 to 28 days for agencies with expertise. WDFW complimented the County on its revised designation of FWHCAs to include areas associated with or inhabited by threatened, endangered, or sensitive species in Mason County and State candidate and monitor species, its combination of aquatic and terrestrial management areas, its clarification of the role of the priority habitat and species (PHS) program database and upon using channel migration zones in determining riparian buffers. However, WDFW further noted that the County had failed to submit any amendments of its Shoreline Management Program (SMP) to WSDOE. WDFW argued that the current ordinance on saltwater shoreline buffers was inadequate to protect marine shoreline fish and wildlife habitats. WDFW also characterized the buffer reduction provisions as unchanged, and noncompliant.

-
WDFW cited the County's quote of a recommendation from DOE that the County "not attempt to amend its SMP until after the new rules were in place." WDFW observed that recommendation was made without anticipating that the adoption process for the new rules would be halted, returned, and delayed for many months and is still not complete. WDFW asserted that the

County ignored the Board's compliance schedule by waiting for the DOE rule.

WDFW noted that buffers may be decreased without public hearing up to 25% by using buffer averaging and contended that this was contrary to our previous order.

WDFW recommended that the County adopt interim buffers consistent with the previous noncompliance order, using BAS, in order to provide the necessary protection for marine shoreline fish and wildlife habitat.

-
Participant Skokomish Indian Tribe declared that Mason County has “substantively addressed most of the major concerns raised by the Tribe in these proceedings.” The Tribe referenced its remaining major concern: lack of protection for marine shorelines and lakes greater than 20 acres. The Tribe had previously accepted the invitation of Mason County to work together on a government-to-government basis to draft a new improved shorelines master program following adoption by the Washington State Department of Ecology (WSDOE) of the Shoreline Management Act (SMA) guidelines.

Petitioners MCCDC alleged that the County's saltwater buffer and shellfish protection provisions were based on a pre-GMA and outdated SMP. They noted that the County failed to update or revise its SMP and noted that WDFW characterized the SMP buffers as not the best available science (BAS), inadequate, and outdated. MCCDC noted further that the County's SMP designates virtually all of the County's shorelines as urban so that the minimal and plainly inadequate buffers now apply in areas throughout the County that no one would regard to as urban in nature.

MCCDC noted that the SMP updates required by the Board in its previous order also included shellfish area protection.

Petitioner Diehl noted improvements in riparian buffers and the list of designated species but maintained that the County had failed to bring into compliance listing of species of local importance, permit exemptions, administrative discretion, criteria for listing and de-listing, and shoreline buffers.

-

Petitioner Diehl asserted that the County still had not properly designated HCAs, and had failed to designate riparian habitat areas according to BAS. He claimed the County had failed to provide adequate marine and freshwater buffers, and failed to define ‘sideboards’ for buffer reduction. Despite invalidation of §17.01.110.F, he noted, the County continued to exempt activities in buffers from its regulations without a reasoned basis.

CONCLUSIONS AND ORDER

We find that the issues found still invalid in our December 1, 2000, order (Numbers 1 and 2) are also in continued noncompliance. Fish and wildlife HCA buffers are below the ranges indicated by best available science (BAS). Development standards for buffers in saltwater shorelines and shorelines of lakes 20 acres or greater are noncompliant. Buffer reduction of 25% is noncompliant because administrative guidelines are insufficient and no public hearing is required. Administrative discretion must be accompanied by clear guidelines for reductions, consultation with resource agencies, and by a public hearing.

Section 110.F of Ordinance #89-00 continues in noncompliance. Blanket exemptions create disincentives for adequate protection of critical areas. *FOSC v. Skagit County* #96-2-0025, *CCNRC v. Clark County*, #96-2-0017.

We find that the consideration of “economics” in listing and de-listing is discretionary. Support of economics “where possible” may only be applied after all other considerations listed in Section .110.M.3 and 4 of the MCC are considered. This complies with the Act.

We find that the habitat categories and designations of priority species and species of local importance have been markedly improved. They now include areas associated with or inhabited by threatened, endangered, and sensitive species in Mason County and state candidate and monitor species. This section of the County code now complies with the Act.

The provision in Mason County Code Section 110.I, application review process, requires that FWHCA boundaries be determined after consultation with resource agency personnel (e.g., WDFW) and consultation with the Skokomish, Quinault, and/or Squaxin Island Indian Tribes.

The use of the WDFW database and active consultation with WDFW and other resource agencies ensures a level of protection for vulnerable species which we find in compliance with the Act. While it may be desirable, as Mr. Diehl proposes, to anticipate the migration of breeding and nesting habitat for species that move, such as the great blue heron, it is beyond the requirements of the Act and the resources of counties to provide HMPs for such as- yet-to-be-used sites.

We find that the improvements in HCA protection, and the requirements for consultation with resource agencies regarding alterations in HCAs now comply with the Act.

Other than in the sections of the ordinance noted above as noncompliant, Petitioners have failed to meet their burden of demonstrating clear error on the part of the County,

The County must bring those noncompliant sections into compliance within 180 days of the date of this order.

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

Pursuant to WAC 242-02-832(1), a motion for reconsideration may be filed within ten days of issuance of this final decision.

So ORDERED this 14th day of March, 2001.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Les Eldridge
Board Member

William H. Nielsen
Board Member

