

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

JOHN E. DIEHL, KERRY HOLM, GORDON )  
JACOBSON, and VERN RUTTER, individually, ) No. 95-2-0073  
and as members of the MASON COUNTY ) (HCA)  
COMMUNITY DEVELOPMENT COUNCIL )  
(MCCDC), ) ORDER RE:  
 ) INVALIDITY  
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. )  
\_\_\_\_\_)

**INTRODUCTION**

Notwithstanding the fact that the compliance hearing for habitat conservation areas (HCAs) was set by our order rather than through a request for rescission by the County, we choose to impose the timeline of 30 days from the date of the compliance hearing for the entry of this order pursuant to the legislative intent expressed in RCW 36.70A.302(6). We also recognize the effect of the 30-day time constraint on our ability to review thoroughly questions of both invalidity and noncompliance. Accordingly, we will bifurcate the compliance order for compliance hearing #13

into this order on issues previously found invalid, and a subsequent 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 or 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.

We had previously denied Mr. Diehl's motion to call an expert witness. We likewise denied the County's motion to call an expert witness.

### **burden of proof**

Pursuant to RCW 36.70A.320(4), a county or city subject to a determination of invalidity has the burden of demonstrating that the ordinance it has enacted in response to the determination of invalidity will no longer substantially interfere with the fulfillment of the goals of this chapter under the standard in RCW 36.70.302(1).

### **SUMMARY OF CHALLENGES**

The County maintained that it was no longer substantially interfering with the goals of GMA relating to fish and wildlife habitat conservation areas (FWHCAs) and requested that we rescind our order of invalidity.

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 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.

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 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.

Petitioners MCCDC commented only on the SMP marine shoreline buffer inadequacies in its brief on issues found invalid, although it adopted by reference Petitioner Diehl's briefs and reserved the right to argue those issues.

Petitioner Diehl noted improvements in riparian buffers and the list of designated species but maintained that the County had failed to remove substantial interference with fulfillment of the goals of the Act regarding species of local importance, permit exemptions, administrative discretion, criteria for listing and delisting, and shoreline buffers.

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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. 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 plan.

MCCDC countered 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.

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 in waiting for the DOE rule. It 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.

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 existing agriculture from its regulations without a reasoned basis.

### **REQUEST FOR EXHIBITS**

Petitioner Diehl requested us to require the County to produce two exhibits, 1513 and 1517 which he contended the County relies upon to design and implement its protection of HCAs. They comprised databases displayed as maps of priority habitats and species. He noted that they are too large for duplication and asserted the County has not allowed him to see them, stating that the maps could not be located or that they contained sensitive data which the County was obliged to keep confidential. Mr. Diehl noted that the ordinance in Section .110.G states that:

“habitat management plans are only prepared when a major new development is proposed within a quarter mile of the listed species point location as identified through the WDFW PHS database which triggers a preliminary review by a qualified fish and wildlife professional which, in turn, leads the County to determine the development will intrude into an HCA or its buffer.”

Mr. Diehl contended that the maps frequently underrepresent species of vulnerable fish and wildlife.

As Mr. Diehl's request was made during compliance hearing #13, we ruled that Mr. Diehl could present a generalized map and oral argument and that we would review his request after the hearing. Our review of the specific language of the ordinance will determine whether or not the large maps needed to be produced and whether or not it was clear from those maps if the HMP process could be properly carried out using the PHS database. We note that New Section –110.I, “Application Review Process” states under 2.c that:

“the boundary of all other FWHCAs may be determined using *published databases*, resource agency personnel, consultation with the Skokomish, Quinault, and/or Squaxin Island Tribe, and/or by a qualified environmental professional based on site-specific assessment and species presence.” (Emphasis supplied)

Section 110.G (in Ordinance #118-99) was not invalidated, even though it now incorporates section .110.H, which was. As Section G was not invalidated, we will not address the efficacy of its triggering mechanisms in this order, but will review and rule upon it in our subsequent order on issues found noncompliant but not invalid.

## CONCLUSION

### **Ordinance #89-00, 17.160.110.D**

We enter a finding of continued invalidity regarding Section 110.D of Ordinance #89-00 (Establishment of Buffers on Fish and Wildlife HCAs). Two areas need to be addressed before a finding of invalidity can be removed.

Table 4, development standards for saltwater shorelines and lakes 20 acres or greater, contained buffers which are below the ranges indicated by BAS. The adequacy of these buffers must be addressed within 180 days of this order regardless of the status of the WSDOE shorelines guidelines.

Reductions to buffers of 25% must be accompanied by a public hearing.

We note the improvements in the riparian buffers as set forth in Table 3.

**Ordinance #89-00, 17.160.110.F**

We enter a finding of continued invalidity regarding section 110.F of Ordinance #89-00. Section 110.F was invalidated because it exempted existing agriculture, as noted by Petitioner Diehl. The County did not amend the section.

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**Other Previously Invalid Sections**

We find that substantial interference with the fulfillment of the goals of the Act has been removed for Sections B, C, old section H, I, and K.3 paragraph 2. We rescind our findings of invalidity for these sections. We find the comments of Petitioners, Participants, and the WDFW to be persuasive. HMPs are now required for activities for any development proposed within a FWPCA or buffer and must avoid adverse environmental impacts. The comment period for agencies with expertise has been extended from 15 to 28 days.

Questions of noncompliance regarding Ordinance #89-00 will be addressed in a subsequent order.

The County must remove substantial interference within 180 days of the date of this order. Findings of Fact and Conclusions of Law pursuant to RCW 36.70A.302(1)(b) are adopted and attached as Appendix I and incorporated herein by reference.

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 1<sup>st</sup> day of December, 2000.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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Les Eldridge  
Board Member

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William H. Nielsen  
Board Member

**Findings of Fact**  
**Appendix I**

1. WDFW is an agency with expertise in HCAs.
2. The County allows its minimum buffer width to be reduced by 25% at the discretion of the County with no public hearing.
3. The County based its saltwater buffer and shellfish area protection on a pre-GMA, outdated, inadequate SMP which does not incorporate BAS.
4. The County exempts existing agriculture from its FWHCA and buffer requirements.

**Conclusions of Law**

1. The provision in the ordinance for decreasing buffers substantially interfere with Goals 9 and 10 of the Act and continues to be invalid.
2. The provisions establishing saltwater buffer widths and designations substantially interfere with Goals 9, 10, and 14 and are invalid.
3. The provision exempting existing agriculture from FWHCA and buffer requirements substantially interferes with Goals 9 and 10 and continues to be invalid.