

**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	)	(AQUATIC
COMMUNITY DEVELOPMENT COUNCIL	)	MANAGEMENT
(MCCDC),	)	AREAS)
	)	
Petitioners,	)	ORDER FINDING
)	)	CONTINUED
v.	)	NONCOMPLIANCE
	)	AND INVALIDITY
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.	)	
_____	)	

While we have chosen, for brevity, to use Mason County’s terminology (Aquatic Management Areas) in captioning the subject of these proceedings, we note that the actual subject matter in Growth Management Act (GMA, Act) language is “Fish and Wildlife Habitat Conservation Areas” (HCAs). (*See* RCW 36.70A.030(5)(c) and Settlement Progress Report of the Skokomish Indian Tribe November 5, 1998 at 3.)

**TABLE OF CONTENTS**

## SYNOPSIS OF THE ORDER

### INTRODUCTION/PROCEDURAL HISTORY

### DISCUSSION

Amicus Washington State Department of Fish and Wildlife (WDFW)

Participant Skokomish Indian Tribe

Testimony of Martin Ereth – Skokomish Tribal Fish Biologist

Petitioner John Diehl

Diehl re: Shoreline Master Program (SMP)

Diehl re: Shellfish Areas

Diehl re: Invalidity

Testimony of Gary Schirato – WDFW Biologist

### MCCDC

MCCDC re: Buffers

Mason County

### CONCLUSION

Balancing of GMA Goals

Buffers

Terrestrial Management Areas

Fish and Wildlife Species Designation

Internal Consistency – Species Habitats

Shellfish Areas Protection

Invalidity

### ORDER

1. Buffers

2. Aquatic and Terrestrial Management Areas

3. Fish and Wildlife Species Designation

4. Internal Consistency - Aquatic and Terrestrial Management Areas

5. Shellfish Areas Protection

### INVALIDITY

### APPENDIX I

### APPENDIX II

## **SYNOPSIS OF THE ORDER**

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We find that Mason County is in continued noncompliance with the Act because it has not included best available science (BAS) regarding buffers, terrestrial and aquatic management areas, shellfish area protection, and fish and wildlife designation. It has failed to properly designate and protect species and HCAs. Further, with regard to designation of aquatic and terrestrial habitat and species, we find the ordinance internally inconsistent and therefore noncompliant. We find that the extended five-year period of time in which the County's fish and wildlife HCAs have been noncompliant presents a situation in which irrevocable harm is being done to Mason County's species and we find several sections of the ordinance to substantially interfere with Goal 10 of the Act (Environment) and Goal 9 (Fish and Wildlife Habitat) and determine that they are invalid.

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## **INTRODUCTION/PROCEDURAL HISTORY**

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Following the fifth compliance hearing held on February 25, 1998, the parties entered into settlement discussions regarding the County's critical areas ordinance. *See* Order dated February 27, 1998. Throughout 1998, the parties pursued settlement negotiations in relation to Section 17.01.110, Aquatic Management Areas, and Section 17.01.112, Terrestrial Management Areas of the Mason County Resource Ordinance. The Mason County Department of Community Development (DCD) and their consultants, Applied Environmental Services, Inc. (AES), held several meetings with the Skokomish Indian Tribe's (Tribe) Department of Natural Resources, the Skokomish Tribal Attorney's Office and Petitioners MCCDC to discuss amendments to the ordinance which would properly designate and adequately protect fish and wildlife HCAs based on BAS.

Following several continuances requested by the parties, we established a compliance deadline of December 31, 1998, for Mason County to "complete its efforts" regarding aquatic management areas. *See* Order October 7, 1998. In late October, the parties produced a draft "Fish & Wildlife Habitat Conservation Areas" ordinance for the public review process. *See* Index No. 1818, October 23, 1998.

Mason County failed to meet this compliance deadline. Owing to the lack of notification regarding whether Mason County had adopted the amendments, we scheduled a compliance hearing for March 9, 1999. *See* Pre-Compliance Hearing Order (Compliance Hearing #7), January 15, 1999. On January 26, 1999, Mason County filed a motion for continuance, conceding that any compliance hearing at this time “would, by default, produce results of continued noncompliance or continued invalidity.” *See* Motion at 2. In response to this motion, the Tribe, Petitioners and the County agreed on a stipulated order which stated that “ordinance 57-97 is noncompliant and falls short of meeting the mandate of the GMA to protect fish and wildlife habitat conservation areas.” *See* Joint Motion for Stipulated Order Finding Continuing Noncompliance, February 8, 1999, at 2.

By Order dated February 10, 1999, we granted the joint motion and entered the stipulated order which stated:

“The parties have stipulated and we find that Ordinance 57-97 is noncompliant and falls short of meeting the mandate of the GMA to protect fish and wildlife habitat conservation areas as follows:

1. Ordinance 57-97 fails to provide adequate protection for Type-1 and Type-1+ waters. The ordinance must include specific enforceable standards and buffer widths for Type-1 and Type-1+ waters based on best available science.
2. The term “vegetation areas” is ambiguously defined and provides no standards by which it can be determined that adequate protection is being afforded Type-2 through Type-5 waters. Further, the vegetation areas contained within the Class II Management Area Guidelines are inadequate and not based on best available science. The ordinance must provide clear standards for vegetation areas and/or adequate buffer widths for Type-2 through Type-5 waters based on best available science.
3. Ordinance 57-97 fails to identify and protect habitats and species of local importance pursuant to WAC 365-190-080(5)(a)(ii). The County must identify habitats and species of local importance (*e.g.* habitat for Roosevelt elk; nesting areas and feeding grounds for great blue herons) and provide adequate protections based on best available science.

4. Ordinance 57-97 failed to revise the Terrestrial Management Areas section which only designated areas “identified by the presence of any terrestrial state endangered, or state threatened species.” The exclusion of other vulnerable species may result in their becoming imperiled to the point that they become listed and require extraordinary measures. The County must adopt development regulations that adequately protect areas with which endangered, threatened, and sensitive species have a primary association.

5. Much of the protection afforded by Ordinance 57-97 is illusory due to the vague and ambiguous language. Several provisions must be rewritten to establish discernable standards for the protection of these critical areas (*e.g.* erosion control plan; tree removal; and permit requirements). The County shall continue its efforts in relation to fish and wildlife habitat conservation areas as summarized within its Motion for Continuance with final action in compliance with this Stipulated Order and the GMA by the Board of Commissioners no later than June 30, 1999.”

Yet again, Mason County failed to meet this newest compliance deadline. Two weeks after the June 30, 1999 deadline, Mason County filed another motion for continuance requesting a new compliance date of August 31, 1999. *See* Respondent’s Motion for Continuance on Aquatic Management Compliance, July 14, 1999. The Tribe conveyed its support once again for Mason County’s efforts.

Based on the motion and response, we granted Mason County’s request that the deadline for compliance be continued until August 31, 1999.

For the third time, Mason County failed to meet a compliance deadline to which it had agreed. Three weeks later, Mason County filed yet another motion for continuance. *See* Respondent’s Motion for a Second Continuance on Aquatic Management Areas, September 22, 1999, at 2. Mason County proposed offering the public an opportunity to respond to “minor changes by written comment only until October 5, 1999. Then, the Mason County Board of County Commissioners (BOCC) would consider the comments and make a decision by October 15, 1999.

On October 12, 1999, the Mason County Commissioners passed Ordinance #118-99 (the Ordinance) approving and adopting the amendments to Mason County Resource Ordinance #77-

93 entitled “Fish and Wildlife Habitat Conservation Areas.” Index No. 1800. By Order dated November 15, 1999, we set compliance hearing #9 for January 25, 2000, to determine whether Ordinance #118-99 complied with the requirements of the GMA. We later rescheduled the hearing for February 3, 2000.

The Tribe and Petitioner Diehl both requested the opportunity to call expert witnesses as supplemental evidence. RCW 36.70A.290(4). The County objected only to the Tribe’s motion, stating both that the testimony, already in the record, would be redundant because the BOCC had heard such testimony before, and the proposed testimony would misdirect us from review of other material already in the record. We granted each motion to call expert witnesses. In response to each motion we offered the County the opportunity to call its own expert witnesses. The County declined to do so.

Compliance hearing #9 (aquatic management areas) was held February 3, 2000, at the Washington State Board of Industrial Insurance Appeals in Olympia, Washington. Present for the Board were Les Eldridge, Nan Henriksen, and William H. Nielsen. Chief Deputy Prosecutor Michael E. Clift represented Respondent Mason County. Mr. Richard Guest represented Participant Skokomish Indian Tribe. Petitioner John Diehl represented himself. Mr. Michael Gendler represented Petitioners MCCDC, Kerry Holm, Gordon Jacobsen, and Vern Rutter. An *amicus curiae* brief was submitted by Mr. Neil Wise representing Washington Department of Fish and Wildlife (WDFW).

Testimony was received from Mr. Greg Schirato, Habitat Biologist for WDFW and Mr. Marty Ereth, Fish Biologist for the Skokomish Indian Tribe. After the testimony we find, as argued by the County, that the evidence was presented to the BOCC and is in the record. We accept the testimony from witnesses Ereth and Schirato for ease of reference to facts already in the record.

### **DISCUSSION**

The challenges from Participant and Petitioners to Ordinance #118-99, amendments to the Mason County resource ordinance, included the following:

- The County had failed to properly designate fish and wildlife species.
- The County had relied upon outdated and misapplied science.
- The County had failed to protect and conserve HCAs.
- The County had failed to take measures necessary to preserve and enhance anadromous fisheries in HCAs.
- The County had failed to preserve the functions and values of HCAs.
- The County had failed to protect shellfish areas.
- The County had afforded the Director of the Mason County DCD (the Director) an inordinate amount of administrative discretion.
- The County had improperly prohibited the Director from obtaining information from applicants in assessing whether or not buffers should be increased.
- The County had failed to include the BAS before it, and in so failing, had not heeded the admonition of the Court of Appeals regarding critical areas in *HEAL v. Hearings Board*, 96 Wn.App.522 (1999) (*HEAL*) when it stated “the Legislative body...cannot ignore the best available science in favor of the science it prefers simply because the latter supports the decision it wants to make.”
- The ordinance substantially interferes with the goals of the Act in that the County has failed to correct its serious deficiencies in protection of fish and wildlife in the six years since its passage in 1995.
- The County is using a strategy of perpetual delay to defeat the goals and objectives of the GMA under the guise of terming its actions as a “complex, but time consuming, ordinance--drafting process,” and in doing so, is substantially interfering with the goals of the Act.

The relevant portions of RCW 36.70A (the Act) and Washington Administrative Code (WAC) 365-190 (minimum guidelines to classify agriculture, forest, mineral lands, and critical areas) regarding HCAs are as follows:

RCW 36.70A.172: “Critical areas—Designation and protection—Best available science to be used. (1) In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

WAC 365-190-030(9):

“Habitats of local importance include a seasonal range or habitat element with which a given species has a primary association, and which, if altered, may reduce the likelihood that the species will maintain and reproduce over the long-term. These might include areas of high relative density or species richness, breeding habitat, winter range, and movements corridors. These might also include habitats that are of limited availability or high vulnerability to alternation, such as cliffs, talus, and wetlands.”

WAC 365-190-030(19):

“Species of local importance are those species that are of local concern due to their population status or their sensitivity to habitat manipulation or that are game species.”

WAC 365-190-080(5):

“Fish and wildlife conservation areas. Fish and wildlife conservation areas habitat conservation means land management for maintaining species in suitable habitats within their natural geographic distribution so that isolated subpopulations are not created. This does not mean maintain all individuals of all species at all times, but it does mean cooperative and coordinated land use planning is critically important among counties and cities in a region. In some cases, intergovernmental cooperation and coordination may show that it is sufficient to assure that a species will usually be found in certain regions across the state.

(a) Fish and wildlife habitat conservation areas include:

- (i) Areas with which endangered, threatened, and sensitive species have a primary association;
- (ii) Habitats and species of local importance;
- (iii) Commercial and recreational shellfish areas;...”

**Amicus Washington State Department of Fish and Wildlife (WDFW)**

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WDFW noted that it is an agency with expertise regarding fish and wildlife issues. It remarked that it did not receive a copy of the draft of Ordinance #118-99 until 14 days before its adoption (October 12, 1999), even though the draft was released September 21, 1999, and comments were due October 5, 1999. WDFW filed its comments on October 13, 1999, “only to discover nearly three weeks later that Mason County had sent an outdated draft.” WDFW observed that the draft version it finally received was significantly different from prior drafts and inadequate to address WDFW’s concerns. WDFW asserted that the lack of any meaningful opportunity to comment

prompted it to participate as an *amicus curiae* in these proceedings.

WDFW noted that bait fish species are important food sources for threatened chinook and chum salmon. Sand lance is an essential baitfish. Their spawning areas are well documented along Mason County shorelines and should be classified as fish and wildlife HCAs, according to WDFW. Ex. #1950. WDFW noted that the table of listed species in the ordinance is incomplete and the list of habitat and species of local importance is inadequate and inaccurate. Puget Sound Chinook are federally listed as threatened and found in the waters of Mason County. Marbled murrelets, bull trout (both federal threatened), and fisher (state endangered) are documented in Mason County and should be included in the table. WDFW cited our holding that “the failure of the County to also include species of local importance results in noncompliance with the Act.” *Clark County Natural Resource Council, et al. v. Clark County, et al.* WWGMHB #96-2-0017 (FDO 12-6-96 at 15) (*Clark County*).

WDFW also maintained that state Candidate species inhabiting Mason County should be designated as species of local importance. Candidate species are all considered vulnerable due to limited population or habitat loss. Ex. #1950. Mason County rejected this recommendation in its findings of fact because “such species merely need to be nominated to Candidate species and do not go through a scientific review.” WDFW refuted this finding, stating: “On the contrary, a species will only be considered for designation as a state Candidate species if sufficient evidence suggests that its status may meet the listing criteria for endangered, threatened, or sensitive found in WAC 232-12-297(3.3) WDFW Policy M-6001(1). WDFW Candidate species procedure also requires extensive scientific review by WDFW biologists. See Procedure M-6001-1.”

WDFW concurred with Petitioners and the Tribe that buffers are not based on BAS and are inadequate to protect critical areas. Further, WDFW noted that MCC 17.01.110.D.2 contains a provision for decreasing buffers. WDFW observed that the Director can reduce the buffers by as much as 25% without any public review process. WDFW also pointed out that Section .110.D.2 is redundant and unnecessary in the face of the “reasonable use” exception in Section .120(O). WDFW contended that “until Mason County develops a process based on science with special consideration for anadromous fisheries there is no reason to allow unilateral reductions of buffer

sizes by county administrators without even so much as a public hearing.”

WDFW further pointed out that the ordinance defaults to the Mason County Shoreline Master Program (SMP) for protection of saltwater habitats and noted that the SMP was outdated, not developed under GMA requirements, and not based on BAS. In the opinion of WDFW, the SMP is not adequate to protect fish and wildlife using these habitats.

Amicus WDFW observed that the ordinance only requires a habitat management plan (HMP) for terrestrial management areas and not for aquatic management areas. The ordinance provides only 15 days in which WDFW and other agencies with expertise may comment, an “impossible work load demand for the agency.” They characterized this abbreviated comment period as providing “no opportunity for effective review by state resource agencies.”

WDFW was also critical of the ordinance’s weakening of protections by allowing buffer alterations for view corridors, removal of “danger trees,” and construction of trails through buffers. It charged that the HMP is not governed by any standard or requirements. The exemptions, WDFW claimed, must “be supported by reasoned choices based on appropriate factors actually considered as contained in the record,” and “written tightly enough to minimize negative impacts on critical areas and their buffers,” quoting our findings in *Friends of Skagit County, et al. v. Skagit County*, Case #96-2-0025 (FDO 1-3-97).

### **Participant Skokomish Indian Tribe**

The Tribe noted that riparian forests and watersheds need well-reasoned development regulations which will enhance them and repair their “current degraded conditions.” The Tribe alleged that the ordinance provided less functionality to stream channels and their associated riparian habitats than required even to maintain, much less repair, current degraded conditions. It maintained the ordinance utterly failed to protect functions and values of critical habitat areas for wildlife. The only wildlife species listed is the Roosevelt Elk. The Tribe contended that Mason County appeared to have assembled most of the best available science regarding HCAs and then intentionally ignored much of it, choosing instead the “science” it preferred. It pointed to glaring contradictions in the County’s two consultant reports, over reliance on the representation of one

out-of-state expert (Buell) and the “stacking” of scientific record with a county commissioner’s readings from selected chapters of just one book, “Upstream.” The Tribe maintained that the County clearly erred by excluding from designation areas with which endangered, threatened, and sensitive species have a primary association, as well as by excluding habitats and species of local importance. Ex. #1800.

Further, the Tribe maintained the County erred by limiting the classification of terrestrial management areas to federal or state endangered, threatened or sensitive species. It noted that the actual presence of other species of local importance has been confirmed. Only three endangered, threatened or sensitive species: bald eagle, northern spotted owl, and summer chum, and two species of local importance: Roosevelt Elk and Dolly Varden, are listed. (Dolly Varden was proposed because the County stated it is “threatened enough to be actively proposed for federal listing.” WDFW explained that this statement is inaccurate. Dolly Varden is neither listed nor proposed. It is, WDFW noted, frequently confused with bull trout, which are listed, but which were not designated by Mason County, even though bull trout are present in the County). The Tribe pointed out that the marbled murrelet, the gray wolf, and the Puget Sound chinook are endangered, threatened, or sensitive and should have been listed. In the Tribe’s words, “extinction appears to be an option in Mason County.”

The Tribe noted that under both *Clark County*, and *HEAL*, Mason County is required not only to assemble BAS, but engage in a reasoned process which balances BAS against other goals. The Tribe pointed out that Mason County relied upon the recommendations contained in the June 11, 1999, memorandum of its consultant, Wayne Wright of AES, Ex. 1872, which were inconsistent with his memorandum of November 1998, and also relied upon comments from Dr. James W. Buell based on misapplication of data.

The Tribe noted that Mr. Wright first recommended minimum riparian buffers of 150 feet in his November 1998 technical memorandum. In support, AES provided a thorough review and analysis of Washington State Scientific Literature and a bibliography of 161 references. The second technical memorandum dated June 11, 1999, attempts to defend reduced riparian buffers of 100 feet for Types 1 through 3, 75 feet for Type 4, and 50 feet for Type 5, without any significant discussion of BAS. It included only 40 references in its bibliography.

The Tribe observed that AES memorandum #2 cited use of site potential tree height (SPTH) to justify the reduced buffer. Wright failed to note that the SPTH distance does not work in channels where extensive flood plains and channel migration zones (CMZ) exist. The Tribe contended that the edge of the CMZ or flood plain is the point from which to measure the SPTH. Ordinance #118-99, in contrast, measured the riparian buffer width from ordinary high water mark (OHWM). The Tribe pointed that AES in memorandum #2, relied extensively on McDade (1990) as did Dr. Buell, but AES failed to note that the streams in the McDade Study were predominantly Type 4 and 5 streams and smaller Type 3 streams located in narrow v-shape valleys, far different from the meandering streams to which the County tried to apply the McDade Study data.

**Testimony of Martin Ereth – Skokomish Tribal Fish Biologist**  
**(included for ease of reference – already in the record)**

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Several points stand out from the testimony of witness Ereth. The functions and values of HCA are protected in particular by “lands around water.” Forest buffers are exceptionally important because they provide debris, protect pools, help to collect sediment, maintain temperature, create bars for spawning, and provide areas for invertebrates breaking down detritus for nutrient. Large woody debris is critical, and is provided by adequate buffers. Mason County watersheds are somewhat degraded. U.S. forest lands in Mason County are less degraded than its private lands. The ordinance buffers are too narrow. The point of measurement for buffers should not be the OHWM but rather should be the CMZ outer edge.

Mr. Ereth testified that it is essential to accommodate the CMZ in order to protect endangered species such as bull trout, chum, and Chinook, all of which are found in the Skokomish River. He noted that the table on Endangered Species Act (ESA) protection was removed from the ordinance and the species therein are now at risk. Mr. Ereth said that when Commissioner Bolander mistakenly declared that no Chinook were present in the Skokomish, the Tribe provided the information which demonstrated that they were.

Mr. Ereth pointed out that the Department of Community, Trade, and Economic Development (CTED) white paper which recommends 100 feet for riparian zones is a recommendation for

healthy, not degraded environments. He noted the WDFW wild salmonid policy says 150 feet is essential for degraded environments such as found in much of Mason County. During cross-examination, Mr. Clift elicited the comment from Mr. Ereth that all this testimony had been before the BOCC. The County did not attempt to refute Mr. Ereth's testimony during cross-examination.

### **Petitioner John Diehl**

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Petitioner Diehl noted that the mandate of the GMA regarding fish and wildlife is to designate and protect fish and wildlife habitat conservation areas pursuant to sections .060 and .172. Diehl noted that this is a broad mandate, not limited to the more charismatic species, nor to sites or locales of special importance, nor yet to species deemed on the verge of extinction. Rather, he said, the emphasis on values and functions of habitat emphasizes that effective conservation cannot be achieved by narrow focus on individual animals or isolated locales. He pointed out that the ordinance relies fundamentally on performance standards which need to be clear, fair, and give predictable results.

He pointed out that Mason County has designated only a fraction of the habitats of local importance and, for example, has not classified the winter range or breeding habitat of any bird, or wetlands and associated vegetative uplands, as HCAs. The County has designated only one species of wildlife, Roosevelt Elk, and one fish, Dolly Varden, as species of local importance. The County has ignored candidates for state endangered, threatened, and sensitive species. The ordinance did not even recognize the habitat needs of the great blue heron, a species emblematic of Mason County. No detailed reasoned analysis accompanies these exclusions, he declared.

Petitioner Diehl pointed out that the Director would have the discretion to make all decisions on increasing buffer widths on a case-by-case basis. Section 110.D.3. The Director was also given the discretion to reduce buffer widths by 25% without a public hearing and with no standard other than "if the County determines the conditions are sufficient to protect the affected habitat." Diehl further pointed out that the ordinance contained no provisions for monitoring of buffers or HMPs. He noted that Section 17.01.230 calls for the Director to make a formal written evaluation of the effectiveness of the ordinance annually. This charge had not been carried out in

any of the six years since the ordinance's adoption, said Diehl.

### **Diehl re: Shoreline Master Program (SMP)**

Mr. Diehl argued that the ordinance's buffer provisions are internally inconsistent as they set different buffers for shoreline areas and riparian areas without any rationale to justify the difference. MCC Section 110.D.1 establishes buffers from its SMP which provide 10 feet for rural shorelines, buffers, or single family residences, and 60 feet from non-water-dependent commercial development. Diehl noted that "nothing in the record purports to show that the buffers set in SMP were based on BAS or were adequate to protect HCAs."

### **Diehl re: Shellfish Areas**

Petitioner Diehl cited *WEC v. Whatcom County*, #95-2-0071, (FDO 12-20-95) in which we ruled that omission of a shellfish area designation where shellfish harvesting is a significant enterprise, did not comply with the GMA. Diehl charged that the ordinance contained no regulatory requirement to protect water quality and avoid the risk of decertification of shellfish beds. He maintained that there are no standards to protect shellfish beds designated as aquatic management areas.

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### **Diehl re: Invalidity**

Diehl noted the lengthy period during which the County has been out of compliance regarding HCAs, the noncompliance of the present revisions, and the County's failure to protect functions and values of HCAs. He claimed that these factors, taken together, constituted substantial interference with GMA goals.

### **Testimony of Gary Schirato – WDFW Biologist** **(included for ease of reference – already in the record)**

Mr. Schirato testified that neither species of local importance nor unusually declining species are designated. His examples included the blue grouse, the great blue heron, the wood duck, the

harlequin duck, the golden eagle, the hooded merganser, the merlin, the mountain quail, and the pilliated woodpecker. The County did not attempt to refute Mr. Schirato's testimony during cross-examination.

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**MCCDC**

Petitioners MCCDC noted that GMA intends protection focus on habitats rather than on the known residential areas of individual species. The County, they pointed out, has limited designation to only those areas which have ESA-protected species in residence. Section 17.01.110 (B) and (C). Further, they alleged the County has improperly deferred adoption of protection standards to a vague and undefined HMP process. They argued that the County's ordinance is internally inconsistent because it designated only HCAs which contain threatened, endangered, or sensitive species, but adopted by reference the WDFW's priority habitat and species program database which is much more inclusive. Section 17.01.040(1)(g).

MCCDC noted that the County's reliance on Kitsap County's critical area ordinance for reduction of 200 foot buffers to 100 feet pursuant to a HMP overlooked the fact that the Kitsap HMP must be prepared by a professional fish or wildlife biologist. Therefore, in Kitsap's, there must be a scientific foundation for a buffer reduction. This requirement is not present in Mason County's ordinance.

**MCCDC re: Buffers**

MCCDC claimed that the County's provisions for increasing buffers offer no protection for fish and wildlife because they offer no opportunity for obtaining the information necessary to base a decision on BAS. As a case in point, MCC Section .110.D.3 prohibits the Director from obtaining any information from the applicant to be used as a basis for increasing buffer width. Petitioners pointed out that this is probably a State Environmental Policy Act (SEPA) violation as SEPA requires an applicant to complete an environmental checklist for the very purpose of providing information to be used in fashioning conditions needed to protect the environment.

This ordinance, they said, ensures that the County will never acquire such information, either from the applicant or through its own efforts.

## **Mason County**

The County argued that its ordinance amendments were based on BAS at an appropriate level of protection for function and values of critical areas. The County pointed out that it received a range of scientifically-based recommendations and that it relied on recommendations within that range. It cited buffers as an example, stating that its consultant, AES, recommended 100 feet for Types 1, 2, and 3; 75 for Type 4; and 50 feet for Type 5 streams. The County asserted that the proposed buffers appeared to be within the range provided by BAS.

The County also cited the CTED white paper, Ex. #1814, which it said “proposed minimum 100-foot buffers for healthy salmon streams as the best available science (done by King County and UW researchers).” The County maintained that buffers were in the range supported by science and that their decision harmonized the goals of GMA, considering the burden on the landowner versus the landowner’s share of the responsibility for the current status of the fish species. Other GMA goals which were advanced, according to the County, included affordable housing, continuing existing business, keeping cost of protection low, imposing proportional and necessary regulations or timely or less burdensome permitting, agricultural use and natural harvest, recreational and educational trails and activities, responding to citizen requests for clarity, minimum restrictions, and flexibility, consistency with adjoining jurisdictions, and providing for roads and utilities. The County maintained that using the OHWM rather than the CMZ as a buffer edge avoided a “taking of the land.”

## **CONCLUSION**

### **Balancing of GMA Goals**

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Balancing of goals can take place only after goals are met through compliance. The County cited takings of property rights as a reason for choosing buffer widths which did not include BAS. The

record does not indicate instances of takings. A county reference to possible takings in FFAs as a result of wide buffers in flood zone residential areas failed to note its FFA ordinance is in continued noncompliance regarding density in the flood zone.

## **Buffers**

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WDFW did not have the opportunity to comment on the ordinance until after it was adopted.

CTED's March 1999 white paper was cited by the County as BAS for a 100 foot buffer width. It said that:

“a wide (at least 100 foot) and near continuous riparian zone appears necessary for healthy streams” (emphasis added).

Separately, it said “Best available science (done by King County and UW researchers) indicates that as the level of basin development increases above 5% total impervious area, a precipitous decline in biological integrity occurs and there are significant losses of physical habitat necessary to support biological diversity and complexity.”

Unrefuted testimony (Marty Ereth) and the argument of an agency with expertise (WDFW) characterized Mason County habitat and streams as “degraded,” not “healthy.”

In contrast to CTED's 100 foot healthy stream riparian zone, the County failed to cite Ex. 1814, a memorandum to Commissioner Bolander from CTED Senior Planner Chris Parsons written six months after the 1998 CTED white paper in which Parsons strongly urged that the ordinance incorporate buffer provisions of 250 feet for Type 1 and 2, 200 feet for Type 3, 150 feet for Type 4 and 5 streams.

**In ignoring BAS recommendations from agencies with expertise, in applying BAS for healthy streams to degraded ones, and, in the case of WDFW, precluding its timely submission of BAS recommendations, the County was clearly erroneous.**

**The administrative discretion provided the Director to reduce buffers by 25% without a hearing, and the preclusion of the County from gathering information from the applicant in order to justify buffer width increase, are also clearly erroneous.**

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The November 1998 technical memorandum from Wayne Wright of AES stated that it had elected to be guided by our 1996 decision (*Clark*) when we said “the result must be more heavily weighted towards science when dealing with anadromous fish. The special consideration language directs that local government must go beyond what might otherwise be done in designating and protection other kinds of critical areas.”

AES then applied this admonition to buffer widths. The November report was an exhaustive review in which AES actually criticized WDFW for not considering more wide-ranging data in its buffer recommendations and went on to cite studies such as Desbonnet, et al. (1994), Knutson and Naef (1997), Waters (1995), Payne and Bryant (1994), CTED (Critical Areas Review 1998), and the Wild Salmonid Policy Riparian Buffer Widths (1997). The November report examined the riparian habitat functions of temperature control, large woody debris, filter sediments, filter pollutants, erosion control, windthrow protection, micro-climate influence, wildlife habitat and instream habitat. It went on to say that “it appears that a more supportable riparian buffer width recommendation would be 150 feet for fish bearing streams to meet all habitat functions parameters with the exception of micro-climate and wildlife habitat.

Further, AES said “our recommendation also supports the Wild Salmonid Policy Riparian Buffer Widths: information that has been published by Washington State and specifically labeled ‘best available science’ in its text regarding riparian buffer widths. Wildlife habitat provided by these recommended riparian buffer widths is considered to be a minimum (emphasis added) for general wildlife uses and corridor travel.” Further, AES stated “the data used in our assessment of the literature has far exceeded that cited by WDFW and CTED.” AES concluded that “the information summarized in this technical memorandum reflects our evaluation of a significant amount of scientific data.... AES has attempted to .... include a thorough yet reasoned analysis.”

In his next report, June 11, 1999, Mr. Wright of AES took issue with himself by recommending 100-foot buffers. In his letter to the Director of Mason County DCD he noted “we have performed this work at your request,” work relating to proposed stream buffer widths “developed by Mason County in response to the public process.” We conclude that the public did not endorse AES’ original recommendation of 150-foot buffers. Mr. Wright did not claim that this

second report was a “thorough yet reasoned analysis.” He stated that the proposed 100-foot buffers greatly improve stream protection measured by Mason County and will promote better habitat conditions. No where in this report summary can we find the phrase “best available science” nor the extensive review of literature he used to support his original 150 foot recommendation. **Choosing the second Wright recommendation and discarding the first was a failure by the County to include BAS, is clearly erroneous and the type of action referred to by the Court of Appeals in *HEAL* when it said a legislative body “cannot ignore the best available science in favor of the science it prefers simply because the latter supports the decision it wants to make.”**

### Terrestrial Management Areas

**The County clearly erred in providing only 15 days for resource agency habitat biologists to respond to an HMP.**

### Fish and Wildlife Species Designation

**The County’s failure to include Candidate species and the inclusion of only two species of local importance does not comply with the Act in the face of clear and strong recommendations to the contrary by those agencies responsible for the protection of fish and wildlife habitat. Limiting inclusion of federal or state endangered, threatened or sensitive species to only three species, in the face of advice to the contrary from agencies with expertise, does not represent inclusion of BAS and is clearly erroneous. AES stated that the gray wolf data were accurate, yet the County failed to designate the gray wolf.**

### Internal Consistency – Species Habitats

**The County was clearly erroneous in designating only limited threatened, endangered, and sensitive species and then adopting the WDFW priority habitat list which includes many more species. The ordinance is not internally consistent.**

## **Shellfish Areas Protection**

**The County clearly erred in failing to include BAS in its efforts to protect shellfish areas, relying instead on a pre-GMA SMP with inadequate buffers.**

**The County also clearly erred in relying on the SMP for saltwater habitat protection as SMP buffers were not based on BAS and the SMP is not, in the opinion of an agency with expertise (WDFW), adequate to protect fish and wildlife.**

## **Invalidity**

**The County is clearly erroneous in its failures to include BAS and to protect fish and wildlife habitat conservation areas. The ordinance substantially interferes with the goals of the Act because of its failure to protect species of local importance, candidate species, and endangered or threatened species, and because of inadequate buffering, shellfish protection, and failure to include BAS. The County's refusal to adopt compliant designations and DRs since the September 1, 1992, legislative deadline provides an independent and additional basis for invalidity.**

## **ORDER**

By September 1, 2000, and in accordance with the reporting, briefing, and hearing schedule appended as Appendix II, the County must amend the ordinance to include BAS, and review that science and the recommendations of agencies with expertise regarding designation, protection of the functions and values of HCAs, and give special consideration to conservation and protection measures necessary to *preserve and enhance* anadromous fisheries. That necessary protection must include BAS for buffers. The County must accomplish compliance and eliminate substantial interference with the goals of the Act as follows:

### **1. Buffers**

- Include BAS in submitting an amendment of the SMP to Department of Ecology (DOE) to make its buffers consistent for saltwater habitat with those of other HCAs in the ordinance.

- Revise the buffer reduction provisions to preclude reducing buffers below the minimum set in the ordinance except for the “reasonable use exception” 170.01.120.0, or provide defined “sideboards” to limit the discretion of the Director in granting reductions or require public hearing. Allow buffer reduction only under specific scientific criteria and review.
  - Require an applicant to submit information to justify buffer increases.
  - Reanalyze the question of buffer widths to include BAS from agencies with expertise including WDFW and CTED.
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- Include in BAS the characterization by agencies with expertise of Mason County HCAs and buffers as “degraded” and avoid applying BAS for healthy streams and environments to degraded environments in determining buffer widths.

## **2. Aquatic and Terrestrial Management Areas**

Extend the comment period afforded agencies with expertise beyond 15 days to make it possible for them to comment on terrestrial and aquatic HMPs. Require an HMP for aquatic management areas.

## **3. Fish and Wildlife Species Designation**

Consider the advice and BAS set forth by agencies with expertise regarding additional threatened, endangered, or sensitive species and listing of Candidate species as of local importance, and make appropriate designations.

## **4. Internal Consistency - Aquatic and Terrestrial Management Areas**

Make the listing of species’ habitats internally consistent by extending designated HCAs beyond those which are threatened, endangered, or sensitive species to include those on the priority habitat list included by reference in the ordinance.

## **5. Shellfish Areas Protection**

Include the BAS set forth by consultant Wright regarding buffer width for shellfish area protection and provide analysis of buffers as a tool to preclude endangering shellfish areas, Ex.

771, and make appropriate revisions in the ordinance and SMP, as necessary.

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## **INVALIDITY**

Fish and wildlife species and habitats are currently unprotected and degraded. The current ordinance does not serve to enhance or preserve anadromous fisheries.

The procedural history demonstrates that we cannot rely upon Mason County to meet deadlines set by this Board. *See* memorandum this date requiring progress reports prior to compliance deadlines. It has been five years since the passage of the original ordinance and compliance has not yet been achieved. Given the long period of noncompliance, the uncertainty of County compliance action, and the irrevocable harm to fish and wildlife species and habitats which now ensues from this extended noncompliance, we find the following sections of Ordinance #118-99 substantially interfere with goals 9 and 10 of the Act and are invalid:

**MCC 17.01.110.B – HCAs**

**MCC 17.01.110.C – Designations**

**MCC 17.01.110.D – Buffers**

**MCC 17.01.110.F – Activities not requiring a Mason County environmental permit**

**MCC 17.01.110.H – Permits terrestrial management areas**

**MCC 17.01.110.I – Habitats and species of local importance**

**MCC 17.01.110.K.3 – Paragraph 2 – requiring WDFW, affected Tribes, and U.S. Fish and Wildlife to respond in writing within 15 days from the date of issuance of a draft HMP.**

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 22<sup>nd</sup> day of March, 2000.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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Les Eldridge  
Board Member

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Nan A. Henriksen  
Board Member

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William H. Nielsen  
Board Member

**APPENDIX I**

**Findings of Fact Pursuant to RCW 36.70A.302(1)(b)**

**Case #95-2-0073**

1. WDFW was not afforded the opportunity to comment on Ordinance #118-99 prior to its adoption.
2. WDFW is an agency with expertise in HCAs.
3. The BOCC did not have WDFW's comments on BAS before it at the time it adopted Ordinance #118-99 through no fault of WDFWs.
4. The BOCC mischaracterized the selection process for candidate species by alleging that no scientific review is necessary when in fact extensive scientific review is required.
5. The BOCC noted "earlier assurances from DNR that there are no marbled murrelets in Mason." The record does not detail or reference these assurances.
6. WDFW states "marbled murrelets are documented in Mason County, Ex. 1950, pg. 5, and also Bull Trout, Puget Sound Chinook, and Fisher."
7. All the above species are endangered, threatened, or sensitive. None are listed in MCC 17.01.110 Table I.
8. The BOCC had before it a wide range of science regarding buffers from a variety of consultants and agencies with expertise.
9. The County cited BAS regarding healthy streams and incorrectly applied it to degraded streams.
10. The County ignored newer and wider buffer recommendations from CTED in favor of older and narrower recommendations. The County allows its minimum buffer width to be reduced by 25% at the discretion of the Director with no public hearing.

11. The County precluded the Director from collecting information from property owners to justify buffer increase.
12. The County's HCAs have been noncompliant since 1995.
13. The County based its saltwater buffer and shellfish area protection on a pre-GMA SMP.
14. The County's terrestrial HCAs are largely undesignated.
15. The ordinance does not preserve or enhance anadromous fisheries.

### **CONCLUSIONS OF LAW**

1. The County has failed to include BAS in protection of functions and values, designation of HCAs, threatened, endangered, or sensitive species, and species of local importance.
2. The provisions in the ordinance for decreasing buffers, exemption from Mason County environmental permits, and requirement for a 15-day response from agencies with expertise regarding draft HMPs substantially interfere with Goals 9 and 10 of the Act and are invalid. The provisions establishing buffer widths and designations substantially interfere with Goals 9 and 10 and are invalid.

### **APPENDIX II**

**Case #95-2-0073**

### **Aquatic Management Areas (Compliance Hearing #13)**

**Progress Report on Actions Taken to Comply Due  
Compliance Due  
(County action on SMP amendment must be taken**

**July 14, 2000  
September 1, 2000**

by this date. State DOE action will follow at a later date).

<b>County Additions to the Record Due</b>	<b>September 8, 2000</b>
Motions & <b>Further</b> Additions to the Record Due	September 18, 2000
Response to Motions Due	September 25, 2000
Motions Hearing (if necessary)	September 29, 2000

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**Compliance: Regarding internal consistency, shellfish area protection, SMPs:**

Petitioners' Briefs Due	October 13, 2000
Response Briefs Due	October 27, 2000
Reply Brief (optional)	November 3, 2000

**Invalidity: Regarding buffer reduction, HMP comment period, buffers, terrestrial management areas, fish and wildlife species designation, aquatic and terrestrial species habitat exemption from environmental permits:**

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County Brief Due	October 13, 2000
Petitioner's Response Due	October 27, 2000
County Reply Due (optional)	November 3, 2000

Compliance Hearing	November 8, 2000
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The compliance hearing and the motions hearing will be held at the Shelton Civic Center, 525 Cota, Shelton, Washington.

Intervenors, Participants, and Amicus Curiae should select the appropriate due dates from the schedule above.