

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

ADVOCATES FOR RESPONSIBLE	)	
DEVELOPMENT and JOHN DIEHL,	)	No. 98-2-0005
	)	
Petitioners,	)	ORDER FINDING
	)	COMPLIANCE
v.	)	
CITY OF SHELTON,	)	
	)	
Respondent.	)	
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**Synopsis of the Order**

We find the City of Shelton in compliance with the Growth Management Act (GMA, Act) regarding critical aquifer recharge areas (CARAs).

**Compliance Requirements Established in Our  
August, 1999 Final Decision and Order (FDO)**

On August 10, 1998, we entered an order in this case requiring the City to:

- (1) establish a means to monitor and enforce implementation of Best Management Practices (BMPs) regarding CARAs;
- (2) establish CARA protection for activities which at the time of adoption of the ordinance were legally existing but possessing serious potential for pollution of CARAs; and
- (3) designate and adopt an appropriate level of protection for Class III CARAs.

On June 10, 1999, a compliance hearing was held at the Elenore Room of the Mason General Hospital in Shelton, Washington. Benjamin Settle represented the City of Shelton. John Diehl appeared for Advocates for Responsible Development and for himself. All three board members were present.

**Finding of Compliance Regarding BMPs and DRs**

**(FDO Requirements 1 and 2, respectively)**

Mr. Diehl argued only the question of whether the City complied with RCW 36.70A.170(d), which requires the designation of critical areas, when it adopted Ordinance No. 1516-0499. Based on a review of the whole record we find the City of Shelton in compliance regarding protection through development regulations (DRs) and enforcement and monitoring of BMPs.

**FDO Requirement #3: Designate and Adopt Appropriate Level  
of Protection for Class III CARAs**

Mr. Diehl noted that our order had called upon the City to designate what it had determined as Class III (moderately critical) CARAs. He asserted that the City had again failed to do so. He maintained that the City had merely changed the definition of Class III CARAs to Class IV, substituted a portion of Class II CARAs as Class III, and then failed to designate Class IV CARAs, even though a majority of the Aquifer Recharge Ordinance Study Group had recommended that designation. Mr. Diehl claimed that the failure to designate left these aquifers vulnerable to possible rescission of the DRs which now protect them because there was no requirement to keep those DRs in effect for areas not designated as CARA. He argued that the City should have designated the previously identified CARAs even if it believed they had very low vulnerability.

Mr. Diehl conceded that regulation without designation is preferable to the reverse, but he expressed again his concern that future city commissions could remove the DRs. Opponents of such an action would then have no recourse under GMA. Petitioner Diehl noted that the Study Group's and staff's recommendations for designation were made in the absence of Gordon Adams and Kirk Cook, the "technical experts". Mr. Diehl ventured that their subsequent comments to the Board of City Commissioners opposing designation could have confused the Commission.

Petitioner Diehl noted Mr. Adams' acknowledgement of localized shallow aquifers and permeable areas in Class IV aquifer areas. He also noted Mr. Cook's remark that if a radiator shop went in next door to his theoretical house in a Class IV area, he would frequently test his well. These points, Mr. Diehl maintained, strengthened the argument for Class IV designation. Mr. Diehl argued that if an aquifer recharge area is vulnerable enough for regulation, it should be

designated as “critical”.

The City identified “critical” as the key word in this dispute. “Not all aquifer recharge areas are critical,” said Mr. Settle. He maintained that the Commission had included best available science (BAS) in its policy process as called for in RCW 36.70A.172. The City argued that the City Commission relied on the whole record and the opinions of Gordon Adams and Kirk Cook in opting not to designate Class IV aquifer areas as CARAs. Mr. Adams was the “primary technical resource to the study group”. The City noted Adams’ opinion that “there was no scientific evidence to justify the designation of the old Class III aquifer area as CARAs because the area was not vulnerable to contamination and did not require regulation”. Mr. Cook participated in the Study Group representing the Washington State Department of Ecology. Cook and Adams were asked by planner Paul Rogerson whether Class IVs “should even rightfully be defined as critical areas”. The minutes, said Mr. Settle, reflected the answer: “both said no - they should be eliminated from the critical areas map”.

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### **Conclusion**

The City quoted the definition in WAC 365-190-030: “Areas with a critical recharging effect on aquifers used for potable water are areas where an aquifer that is the source of drinking water is *vulnerable to contamination* that would affect the potability of the water”. (emphasis is supplied) The City included in its deliberations BAS gleaned from Adams and Cook which indicated Class IV areas “were not vulnerable to contamination”.

The action by the City in regulating non-vulnerable areas by city-wide DRs was prudent. Such action does not require designation of such aquifers as CARAs. Only “critical” or vulnerable areas are mandated by GMA to be designated and protected.

The members of the Study Group, at the behest of the City Commission, reexamined the question of Class III (later Class IV) designation. They offered conflicting advice. Their technical expert and the representative of an agency with expertise recommended no Class IV designation. The Commission accepted their recommendation. Although their action may not have responded to the specific language of our FDO, we have said in many cases that the essence of GMA compliance is compliance with the Act, not necessarily compliance with the specific language of

our orders. Affording this latitude to local governments is in keeping with RCW 36.70A.3201. City action was well within the range of BAS options.

We do not have a firm and definite conviction that the City has erred in failing to classify Class IV aquifer areas as critical aquifer recharge areas. We find that the City was within the scope of its discretion in accepting the advice and opinion of two experts in the field of aquifer recharge areas that Class IV areas were not vulnerable to contamination and did not require designation. Petitioners have failed to meet their burden of proof. We find the City in compliance with the GMA regarding CARA designation.

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 17<sup>th</sup> day of June, 1999.

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

