BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

ADVOCATES FOR RESPONSIBLE DEVELOPMENT and JOHN DIEHL,	)	No. 98-2-0005
Petitioners,	)	
v.	)	FINAL DECISION AND ORDER
CITY OF SHELTON,	)	
Respondent.	)	

SYNOPSIS OF THE ORDER

We commend the City of Shelton for the hard work of its Aquifer Recharge Ordinance Study Group, staff, and public officials in developing Ordinance #1492-0298. We find the City's failure to designate and consider the need for protection of (Class III) moderately critical acquifer recharge areas (CARA) is not in compliance with the Growth Management Act (GMA, Act). The Ordinance's blanket exemption of commercial and industrial businesses legally existing at the time of the adoption of the Ordinance from any requirements for protection of CARAs also fails to comply with the Act. We find that, given this record, the City's allowance of certain limited commercial/industrial activities involving hazardous materials and waste in the CARAs (so long as best management practices (BMPs) are followed) is in compliance with the Act. However, we find that the mere requirement of submission of a plan to use BMPs does not constitute protection. If BMPs are to be relied upon for protection, some form of monitoring and enforcement must be included to ensure that the BMP plans are actually implemented and followed.

INTRODUCTION

Advocates for Responsible Development and John Diehl challenged Ordinance #1492-0298, the City of Shelton's CARA ordinance. Petitioners charged that the City failed to comply with the Act by:

I. Failing to designate and protect Class III critical acquifer recharge areas.

II. Allowing hazardous waste to be generated and hazardous substances to be used in new commercial/industrial activities sited above CARAs. They contended that the City's use of BMPs as a control for such generation was inadequate to safeguard the CARAs.

III. Exempting existing commercial and industrial uses from the requirement to employ BMPs.

PROCEDURAL HISTORY

The hearing on the merits (HOTM) was held July 22, 1998, at the Shelton Municipal Courtroom. Present for the Board were Les Eldridge, Nan A. Henriksen, and William H. Nielsen. John Diehl presented argument for Petitioners and the City was represented by Benjamin Settle.

We admitted Ex. 120, a map of the CARA classifications, city limits, and the urban growth boundary, for illustrative purposes. In response to our request, the City provided us copies of certain exhibits from the index that were not attached to the brief of either of the parties. We reviewed those exhibits subsequent to the HOTM.

DISCUSSION AND CONCLUSIONS

I. Designation and Protection of Class III CARAs

Petitioners contended that RCW 36.70A.170 requires that all critical areas (CAs) be designated. The City identified three categories of CARAs: Class I ("Extremely Critical"), Class II ("Highly Critical"), and Class III ("Moderately Critical"). The City did not provide a general location determination or performance standards for determining specific locations for Class III CARAs. Instead, the City designated Class I and Class II CARAs and "reserved" action on Class III CARAs.

Petitioners further contended that RCW.36.70A.060(2) mandates the City to protect CAs that are required to be designated. They acknowledged that we have previously held that not all CAs must be protected. However, if not protected, a detailed and reasoned justification must be part of the record.

The City responded that by creating a classification of Class III CARA, that was held in reserve but not delineated or protected, the City had not failed to comply with the Act. The City stated:

> "RCW 36.70A.170(1)(d) requires designating critical areas 'where appropriate.' The Study Group determined that the only 'appropriate' critical areas relating to aquifer recharge areas were those that could be currently identified and thus were designated as Class I (Extremely Critical) and Class II (Highly Critical). This finding was implicitly adopted by the Commission of the City of Shelton in the adoption of the current ordinance."

The City further contended with regard to protection:

> "First, it is questionable whether or not there has yet been a determination made that there exists any <u>critical</u> area in the nature of a critical acquifer recharge area other than those designated Class I or Class II. The ordinance has 'reserved' for later determination whether or not there is in fact other <u>critical</u> acquifer recharge areas. At least for now, according to the only known science being provided by Mr. Adams, the only acquifer recharge areas that are vulnerable are those within Class I and Class II. Accordingly, the acquifer recharge areas outside these are not yet actually deemed a 'critical area' in need of additional protection."

The City further stated:

> "Even if it was determined that the City erred in providing a classification without delineation or regulation, the immediate cure would be for the City to amend the ordinance and repeal the classification of Moderately Critical Acquifer Recharge Area. The City could do so based upon its right to designate what lands are critical areas and in light of the geologic studies currently available."

Petitioners replied in part:

> "The City acknowledges that it adopted a recommendation of its Aquifer Recharge Ordnance Study Group that classified three categories of critical acquifer recharge area (CARA) within the City's urban growth area. Two of these were delineated, albeit based on marginally adequate data. One of them – the category of 'moderately critical aquifer recharge areas' – was only 'reserved' for possible future action.
>
> The City had originally deemed all land within the city limits a CARA, but adopted no regulations to protect it. Now the City proposes to achieve GMA compliance by

regulating only 'extremely' and 'highly' critical aquifer recharge areas. Thus, by its own action the City has acknowledged a category of CARA that it did not designate, contrary to RCW 36.70A.170(d) and this Board's interpretation of this statute. Whatcom Environmental Council v. Whatcom County, #95-2-0071; and Friends of Skagit County v. Skagit County, #96-2-0025, Final Decision and Order.

The City now says it is 'questionable' whether there are any CARAs other than those deemed 'extremely critical' or 'highly critical.' But the retired petroleum geologist on whose volunteer efforts the City seems to be relying did not deny the existence of 'moderately critical' acquifer recharge areas. In fact, as the City itself points out (p. 4), Mr. Adams ventured the opinion that the remainder of the county not classified as 'extremely critical' or 'highly critical' would properly be classified as 'moderately critical.' In fact, until Mr. Diehl questioned Mr. Rogerson about the lack of regulation of moderately critical acquifers, the draft ordinances being considered by the City's committee all included a definition of 'Class III (Moderately critical)' aquifer recharge areas specifying these as areas not designated as Class I or Class II, and where, consequently, 'some soil overlay' results in 'filtration' of recharge water.

In other words, until it became apparent that there was no justification for exempting all Class III CARAs from regulation, the City was perfectly prepared to acknowledge the existence of Class III CARAs. Moreover, in light of the definition of Class II ('Highly Critical') CARAs, as having 'no significant fine soil overlay' (§21.66.040. C.2), it should be evident that at least some Class III CARAs, namely, those with some, but not much soil overlay, are still quite vulnerable to contamination, especially from substances that do not quickly biodegrade.

Even if Class III CARAs did not require regulatory protection, it would not excuse failing to designate them. But Mr. Adams' remarks, particularly given his lack of expertise in hydrology, do not comprise the detailed and reasoned justification that this Board has found necessary to warrant a decision not to protect a designated critical area. See Whatcom Environmental Council v. Whatcom County, #95-2-0071; and Friends of Skagit County v. Skagit County, #96-2-0025, Final Decision and Order….

…But the Ordinance fails to include any provision that would result in analysis of areas outside the extremely and highly critical aquifer recharge areas, and so such areas, if this ordinance were found in compliance, might remain both undesignated and unregulated in perpetuity, even though at least some of this area, according to the comments of Mr. Adams, is a critical aquifer recharge area with little soil overlay;

and some, for all the City knows, may fit the definitions of extremely or highly critical acquifer recharge areas….

…The City appears to be taking the position that it can comply with the act by neither conducting further investigation, nor designating, nor regulating Class III CARAs. If this position were correct, then local governments might escape the mandate of the law simply by remaining as ignorant as possible about their critical areas. That is plainly not the intent of the law. If it were, the law would be a sham, requiring only the shuffling of paper, but no real protection of natural resources."

Board Discussion and Conclusion:

We agree with the contentions of the Petitioners. The record shows that volunteer geologist consultant Adams indicated that Class III CARAs, characterized by some soil overlay, needed to be more fully examined to determine the extent of their boundaries and their vulnerability. He characterized this class as potentially vulnerable and recommended additional study to add to the knowledge base. The record demonstrates the existence of Class III CARAs, but a lack of knowledge as to their actual extent and degree of vulnerability. We could find nothing in the Ordinance or the record setting a course of action or timelines for such additional Class III CARA study, designation, and protection. The City decided to take no action. This does not comply with the Act.

II. New Uses Allowed Over Class I and Class II CARAs With BMP Permit

Petitioners charged in part:

"The Ordinance would allow anywhere, even in extremely critical aquifer recharge areas, and subject only to issuance of a so-called 'Aquifer Area Protection Permit' based on implementation of a Best Management Practices (BMP) Report, more than 20 activities that carry with them the potential for contamination of aquifers, including medium and large quantity generators of 'dangerous, acutely hazardous, and toxic extremely hazardous waste.' §§21.66.070 and .080. …

…BMPs, although reducing the risk of pollution, do not remove that risk or reduce it to a level that it makes such activities safe within CARAs. …

…Certainly there is no reasoned statement of why it would be wise or prudent to allow these hazardous uses within such extremely or highly sensitive areas, given the opportunities for human error and accident and given that the City has virtually no

resources to enforce implementation of BMPs.

Thus, because there is no reasoned basis for relying upon BMPs to protect CARAs from a variety of contaminants that even in small quantities would destroy the aquifer as a source of drinking water, the Ordinance is out of compliance with RCW 36.70A.060 and .172."

The City responded:

"Petitioners' argument is in effect that the only regulations that this board can approve are those which will guarantee that no contamination of a critical aquifer can occur (see Petitioners' Brief page 6, second paragraph). If this is the standard by which the City's action is reviewed then the board must overturn not just this ordinance but every ordinance over which it has jurisdiction. …

The fact is that the Best Management Practices (BMP's) approach employed in the ordinance, and which has the endorsement of the geologist and the representative of the Department of Ecology, is a reasonable method to regulate potentially harmful activities. The BMP's adopted are those which have been developed and published by the state agency with the most expertise in this area, the Department of Ecology. Petitioners have not right to demand, as they do in their brief, that in order to be acceptable the BMP's 'will', as opposed to 'can', prevent pollution. (Petitioners' Brief, page 6)."

Petitioner replied:

"The City misrepresents Petitioners' argument. Petitioners do not demand that the City take actions that guarantee its acquifers will not become contaminated. But Petitioners request, supported by RCW 36.70A.20 and .60, that the City take action to adequately protect its CARAs. The point is that there is no detailed and reasoned justification in the record by which one can conclude that the Ordinance would protect the City's CARAs, and particularly that it makes sense to rely upon agreements to adopt so-called 'Best Management Practices' (BMP) to protect extremely critical acquifers from more than 20 activities that carry with them the potential for contamination of acquifers, including medium and large quantity generators of 'dangerous, acutely hazardous, and toxic extremely hazardous waste,' §§21.66.070 and .080. …

Thus, because there is no reasoned basis for relying upon BMPs to protect CARAs from a variety of contaminants that even in small quantities would destroy the aquifer

as a source of drinking water, the Ordinance is out of compliance with RCW 36.70A.060 and .172."

Board Discussion and Conclusion:

The minutes of the Study Group indicated lengthy discussions regarding which activities should be prohibited in Class I and II CARAs, and which should be allowed with application of BMPs. This was in part based on input by the Department of Ecology member of the group as to the effectiveness of BMPs and existing federal and state regulations pertaining to the various types of uses. The record, therefore, shows a reasoned process involving local and DOE expertise in selecting businesses and activities for inclusion in the Ordinance's section .070, (uses requiring an acquifer recharge protection permit).

We conclude that the City, under this record, has the discretion under RCW 36.70A.060, .120, .170, and .172 to allow limited commercial and industrial activities producing dangerous or extremely hazardous substances so long as they comply with appropriate BMPs. However, the mere requirement of submission of a plan to use the BMPs does not constitute protection. Protection requires that some form of monitoring and enforcement be included to ensure that the BMP plans are actually being implemented and followed. Therefore, the City must institute an adequate monitoring system in order to comply with the Act.

III. Exemption from Regulation of Activities Which Legally Existed at the Time of the Adoption of the Ordinance

Petitioners contended:

> "The Ordinance exempts from regulation all activities that legally existed at the time it was adopted, regardless of the potential of these activities to result in contamination of CARAs, #119, §21.66.050. But no detailed and reasoned justification for such an exemption is to be found in the record.
>
> Again, such evidence as there is in the record points to the need to be concerned about the potential impact of existing activities. For example, the City's Water Comprehensive Plan identifies the Shelton School District's bus maintenance facility to the west side of the City's wells as a potential source of 'detergents, oils, greases,

and other organic compounds which may pose a long-term threat to the City's water supply.' #2, p. IV-9. But the City ignored such documented threats posed by existing activities, and so failed to include the best available science in developing regulations to protect the functions and values of CARAs, as required by RCW 36.70A.060(2) and .172.

Nor does it make sense to exempt all existing activities from regulation when the Comprehensive Plan calls for protecting against 'incompatible levels or types of development' (LU3a), giving City well heads and springs protection from land uses that 'present a threat to surface or ground water quality' (LU3b), regulating businesses storing, transporting, making, or using hazardous substances above sensitive acquifers used as a public water source (LU3e), and giving 'close scrutiny' to those areas outside the City limits that were 'identified by the County and/or the City as acquifer recharge areas' (LU3g). These goals do not distinguish between existing activities and proposed activities, so why should existing activities be exempted? As this Board noted in an analogous case, 'there is no incentive to improve practices if existing activities are already exempt.' Friends of Skagit County v. Skagit County. Because they cannot be exempted consistent with Comprehensive Plan policies, the provision of the Ordinance exempting existing activities fails to comply with RCW 36.70A.120.

The City responded:

Petitioners appear to misapprehend the nature and scope of the Critical Aquifer Recharge Ordinance by raising a challenge to its legality because it implicitly 'grandfathered' existing uses from the application of the ordinance. It should be immediately apparent that the ordinance adopts a regulatory scheme that either outright prohibits, or conditionally restricts, the locating of certain activities within the extremely or highly critical acquifer recharge areas. To extend these rules to existing activity would be to violate RCW 36.70A.060(1) which provides that, 'Regulations adopted under this section may not prohibit uses legally existing on any parcel prior to their adoption…'

The new ordinance does not purport to add regulatory requirements beyond federal and state standards for development in connection with the operation of activity which involves dangerous or hazardous materials."

Petitioners replied:

> "The City argues that because it has adopted a 'regulatory scheme that either outright prohibits, or conditionally restricts, the locating of certain activities within the extremely or highly critical aquifer recharge areas,' it would violate RCW 36.70A.060 (1) to extend these rules to existing activities. P. 6. But the statute cited only provides that regulations may not prohibit legally existing uses, not that existing uses should go unregulated. If part of the City's 'regulatory scheme' involves prohibition, then it follows that a different scheme is needed to address the problem posed by existing land uses within CARAs, not that such land uses should escape regulation."

Board Discussion and Conclusion:

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RCW 36.70A.060 precludes "prohibition" of legally existing uses, but does not preclude their regulation. The record showed that during the December 16, 1998, study group meeting, Warren Dawes stated that existing uses should be required to adopt BMPs that upgrade practices and procedures even if facility upgrades were not required. The blanket exemption of existing uses from all BMP requirements is a disincentive to adequate protection of the aquifer by these businesses. We have found noncompliance of similar existing use exemptions in *Friends of Skagit County v. Skagit County*, Case #96-2-0025 and *CCNRC v. Clark County*, Case #96-2-0017.

We find the City not in compliance with the Act regarding the blanket exemption of activities that legally existed at the time of adoption of the Ordinance from any requirements for protection of CARAs.

ORDER

The BMP provisions that are contained in the Ordinance comply with the Act.

In order to fully comply with the Act the City must take the following action:

1. Within 120 days, establish a means to monitor and enforce implementation of BMPs regarding CARAs.

2. Within 120 days, 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.

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3. Within 180 days, designate and adopt an appropriate level of protection for Class III CARAs. If the City finds the scope or complexity of correcting this noncompliance to be unusual, we would consider a motion to extend the deadline under RCW 36.70A.300(3)(b).

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Findings of Fact pursuant to RCW 36.70A.270(6) are adopted and appended as Appendix I.

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 ___ day of August, 1998.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Not available for signature----------_____
Les Eldridge
Board Member

_____
Nan A. Henriksen
Board Member

_____
William H. Nielsen
Board Member

APPENDIX I

Case #98-2-0005

FINDINGS OF FACT

1. The City of Shelton adopted Ordinance #1492-0298 regarding critical acquifer recharge areas (CARAs) on February 17, 1998.

2. The Ordinance exempts existing uses in the CARA from regulation under this Ordinance.

3. Discussion of existing federal and state regulations and their impact on existing uses are not contained in the record.

4. The Ordinance allows commercial/industrial enterprises producing hazardous waste, as long as accompanied with the implementation of best management practices. However, no monitoring or enforcement provisions for best management practices are set forth in the Ordinance.

5. The Ordinance designates Class I CARAs (extremely critical) and Class II CARAs (highly critical) but does not designate or protect Class III CARAs (moderately critical).