

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

WILLAPA GRAYS HARBOR OYSTER GROWERS)	
ASSOCIATION, a Washington nonprofit corporation)	
)	No. 99-2-0019
Petitioners,)	
)	FINAL
v.)	DECISION AND
)	ORDER
PACIFIC COUNTY and BOARD OF COUNTY)	
COMMISSIONERS FOR PACIFIC COUNTY,)	
its legislative body,)	
)	
Respondent.)	
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Along the state’s western shores, abutting the Pacific Ocean lies Pacific County. The Long Beach Peninsula is self-proclaimed as “the world’s longest beach”. Northeast of the peninsula the Town of South Bend claims itself to be the “oyster capital of the world”. Between these two locations lies Willapa Bay, the cleanest remaining estuary in the nation, against which all other national estuaries are judged for water quality. (Ex. 31). Willapa Bay has avoided such ecological disasters as red tides and excessive fecal chloroform bacteria. While many share credit for the quality of Willapa Bay water, certainly the vigilance of the Willapa Bay-Grays Harbor Oyster Growers Association (Growers) is a major factor. In this county of 21,500 people, the \$50 million per year shellfish industry has a significant economic impact. In Pacific County the oyster is King, although the cranberry is most assuredly Queen.

On April 13, 1999, Pacific County adopted Ordinance 147A, an amendment to its critical areas (CAs) ordinance. Ordinance 147A is Pacific County’s development regulation (DR) for “wetland mitigation banking”. A petition challenging compliance of Ordinance 147A with the Growth Management Act (GMA, Act) was filed by the Growers on June 11, 1999. A prehearing conference was held July 14, 1999 and a prehearing order issued July 22, 1999. The hearing on the merits (HOM) was held October 13, 1999.

The concept of wetland mitigation banking is accurately summarized at page 2 of petitioner’s

brief:

“In general, wetland mitigation banking is the practice of restoring, creating, enhancing, and in exceptional circumstances, preserving wetlands for the purpose of compensating for unavoidable wetland losses. Units within approved wetland banks are then used as credits which may be withdrawn to mitigate for wetland losses at project development sites.”

In 1995 federal resource agencies issued guidelines governing the use and application of wetland mitigation banks at 60 FR 58605. Our State Legislature adopted RCW 90.84 in 1998 to provide authorization for the use of wetland banks. In RCW 90.84.005 the Legislature determined that such banks “are an important tool for providing compensatory mitigation for unavoidable impacts to wetlands”. The legislation provides that state and local governments are authorized to develop and use wetland mitigation banks. The Washington State Department of Ecology (DOE) was directed to adopt, through a collaborative process, rules providing for certification, operation and monitoring of wetland mitigation banks and guidelines for release of credits from such banks. Prior to adoption, these proposed rules are required to be first submitted to “appropriate standing committees of the Legislature.”

Under RCW 90.84.050 the Legislature has directed that *prior to use* of credits from a wetland mitigation bank project, “all appropriate and practical steps have been undertaken to first avoid and then minimize adverse impacts to wetlands” located in the potential receiving property. Credits from such a bank may only be approved when:

- “(1) The credits represent the creation, restoration or enhancement of wetlands of like kind and in close proximity when estuarine wetlands are being mitigated;
- (2) There is no practicable opportunity for on-site compensations; or
- (3) Use of credits from a bank is environmentally preferable to on-site compensation.”

Pursuant to the authority of RCW 90.84, Pacific County adopted Ordinance 147A. The ordinance provides for wetland mitigation banks permitting after DOE rules are adopted. The ordinance also provides for a “limited number of demonstration” wetland mitigation bank projects

immediately. On July 20, 1999, the County approved a “Demonstration Project Wetland Mitigation Bank” for property owned by Mr. Joe McHugh (McHugh project). That project involves a potential restoration of approximately six acres of wetland pasture and dike to a Class I “high salt marsh” on Willapa Bay. The approval was given after a public hearing as provided for in Ordinance 147A. An appeal by petitioners was filed with the Board of County Commissioners on August 6, 1999. The record does not reflect the status of the appeal.

In its petition for review Growers challenged both the demonstration and non-demonstration aspects of Ordinance 147A. At the prehearing conference and at the HOM the County asserted that a proper interpretation of Ordinance 147A was that the non-demonstration aspects of the ordinance would not be effective until DOE adopted rules under RCW 90.84. Because of that guarantee, the prehearing order limited the issues in this case to demonstration projects as allowed by the ordinance. This order is thus limited to compliance of the ordinance with GMA as it relates to demonstration projects only. No advisory opinion will be issued as to the issue of compliance of the ordinance with GMA for all wetland mitigation banking. RCW 36.70A.290(1).

This well may be important at a later date. Once the DOE rules are adopted and if Pacific County wishes to implement the ordinance fully, it must do so by some type of legislative adoption incorporating the DOE rules and making any changes deemed necessary for local wetland mitigation banking permitting. The 60-day appeal time limit for any challenges to that action will commence upon appropriate notification as provided in the GMA.

Petitioners’ attacks on the demonstration aspects of Ordinance 147A were threefold:

(1) The Determination of Non-Significance (DNS) adopted under the authority of the State Environmental Policy Act (SEPA) did not comply because the demonstration wetland banking system represents a potentially significant adverse environmental impact. Additionally, an Environmental Impact Statement (EIS) should have been adopted;

(2) The demonstration system involved in Ordinance 147A failed to comply with the “protection” standard of RCW 36.70A.060(2) and the best available science (BAS) requirement of RCW 36.70A.172(1); and

(3) The actions of the County were egregious enough to substantially interfere with goals 8, 9, and 10, requiring a finding of invalidity.

SEPA

We review a DNS under the clearly erroneous standard. RCW 36.70A.320(3). *Mahr v. Thurston County*, # 94-2-0007. Ex. 16 disclosed that the SEPA checklist and preliminary DNS, consisting of approximately 10 pages, were prepared and dated December 18, 1998. The record discloses no further analysis or action, save for the adoption of the final DNS. No conditions were imposed for the DNS issuance.

The concept of wetland mitigation banking involves both the locational establishment of the bank and the distribution of the credits from that location to different sites where environmental degradation is unavoidable or cannot be totally mitigated. The *creation* of new wetlands could not have a “probable significant adverse impact on the environment” sufficient to find that the DNS adoption was clearly erroneous. Petitioners also claimed that since DOE issued a determination of significance for adoption of its rules, Pacific County should also be required to do so. We find that argument unpersuasive because the issue here is only a “limited number” of demonstration projects, not the entire banking concept and use to be addressed by DOE.

We do find, however, that as to the establishment and distribution of credits, petitioners have sustained their burden of proof and overcome the presumption of validity. A non-conditioned DNS for this aspect of the demonstration projects under Ordinance 147A is clearly erroneous. There is nothing in this record that shows any environmental consideration of such issues as the sizing of the bank service area, location criteria, assignments of credits and the timing of release of credits or appropriate performance criteria for the distribution of such credits.

Petitioners contended that we should require Pacific County to prepare an EIS in the event of a finding of non-compliance. We do not have such authority. An incorrectly adopted DNS will be remanded with a finding of non-compliance. It is the appropriate decision of the County to determine the level of SEPA analysis and action to be taken after the remand. *Seaview Coast Conservation Coalition v. Pacific County*, #96-2-0010. RCW 36.70A.300(3)(b).

Protection and BAS

RCW 36.70A.060(2) requires local governments to adopt DRs “that protect critical areas”. There is no question that Ordinance 147A was adopted to comply with that GMA requirement.

Inherent in that “protection” duty is a requirement that appropriate and specific criteria and standards be adopted in the DR. *WEC v. Whatcom County*, #95-2-0071. In Ordinance 147A such criteria and/or standards is lacking. We find that petitioners have sustained their burden of proof under the clearly erroneous standard and that the presumption of validity attached to Ordinance 147A has been overcome.

There are, for instance, no standards defining or establishing how many a “limited number” of demonstration projects is. There are no criteria to determine when a release of credits is properly timed, whether the receiving location is one that is proximate to the bank, whether there is a size restriction on “demonstration” banks, whether there is a restriction of transfer of credits for in-kind vs. out-of-kind wetlands (i.e., fresh water v. estuarian) and/or whether a transfer of credits to a buffer area requires further mitigation of the wetland itself. *See* RCW 90.84.050.

We recognize that the Ordinance incorporates some of the standards found in RCW 90.84 and requires DOE and Army Corps of Engineers approval. Unfortunately, those standards are not sufficient by themselves to fully comply with the duty to protect critical areas.

Likewise, the adoption of Administrative Rule No. 1 on September 23, 1999, did not provide all the necessary criteria and/or standards required to protect critical areas. The process used for adoption of Administrative Rule No. 1 was shown to be vulnerable to attack in court. DRs to protect critical areas must not only contain appropriate criteria and standards, they must be adopted in such a manner as to be legally effective.

An example of the potential vulnerability of the Ordinance relating to demonstration projects occurred in the McHugh project approval. A long list of appropriate conditions was attached to the approval. However, during the questioning portion of the HOM, the County was unable to articulate its authority for imposing those conditions. Presumably, the County relied on its substantive SEPA authority. Use of SEPA policies only does not fulfill the requirements of RCW

36.70A.060(2). *CCNRC v. Clark County*, #96-2-0017.

RCW 36.70A.172(1) requires that a local government procedurally and substantively incorporate BAS in its development regulations to “protect the functions and values of critical areas”. *Heal v. Hearings Bd.*, 96 Wn. App. 522 (1999). *CCNRC v. Clark County*, #96-2-0017. The County acknowledged that its mitigation sequence found in § (1) (V)(2) equates to a no-net-loss-of-function-and-values wetlands policy. In its remand review for determining standards and criteria, the County must incorporate BAS into its decision. We recognize that wetland mitigation banking is an emerging area with relatively little in the way of scientific experience. We applaud Pacific County for its attempt to be on the cutting edge of such scientific experience and to take some “bureaucratic risk” to expand scientific knowledge and provide its citizens with reasonable alternatives while at the same time executing its duty to protect critical areas. Because of our finding of non-compliance for criteria and/or standards, we conclude that petitioners’ challenge to the failure to include BAS in Ordinance 147A has been rendered moot.

Invalidity

Petitioners have failed to sustain their burden of proving substantial interference with the goals of the Act.

Findings of Fact under RCW 36.70A.270(6) are attached as Appendix A.

In order to comply with the GMA, Pacific County must take the following actions:

- (1) Adopt appropriate SEPA analysis concerning transfer of wetland mitigation credits; and
- (2) Adopt appropriate criteria and/or standards concerning transfer of credits from demonstration wetland mitigation banks as well as determining a finite number and size of such banks that comply with the GMA duty to protect critical areas.

Under the provisions of RCW 36.70A.300(3)(b), the County has 120 days from the date of this order to comply with the GMA.

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 28th day of October, 1999.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

William H. Nielsen
Board Member

Nan A. Henriksen
Board Member

Les Eldridge
Board Member

APPENDIX A

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FINDINGS OF FACT

PURSUANT TO RCW 36.70A.270(6)

1. Ordinance 147A dealing with wetland mitigation banking was adopted on April 13, 1999.
2. The provisions of the ordinance apply only to demonstration wetland mitigation banking

projects at this time.

3. The environmental checklist and proposed declaration of non-significance were dated December 18, 1998.
4. Subsequent to that date a non-conditioned DNS was adopted.
5. The establishment of a wetland mitigation bank location does not involve any probable significant environmental impact. The distribution of credits may have a probable significant environmental impact.
6. There was no specific environmental consideration for the establishment and distribution of credits for demonstration wetland mitigation banking projects.
7. The ordinance does not contain specific standards and/or criteria concerning sizing, and a limitation of the number, of demonstration wetland mitigation banking projects.
8. The ordinance does not contain specific standards and/or criteria for the establishment, distribution and/or timing of demonstration wetland mitigation banking projects.
9. The evidence did not demonstrate substantial interference with the goals of the Act.

