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

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| PROTECT THE PENINSULA'S FUTURE and, WASHINGTON ENVIRONMENTAL COUNCIL | ) | |
| | ) | No. 00-2-0008 |
| Petitioner, | ) | |
| | ) | FINAL DECISION |
| v. | ) | AND ORDER |
| CLALLAM COUNTY, | ) | |
| Respondent, | ) | |

Clallam County adopted its initial critical areas ordinance (CAO) on June 16, 1992. By its terms the 1992 ordinance expired within one year after completion of the County's comprehensive plan (CP). On June 16, 1995, Clallam County published its final environmental impact statement (FEIS) (Ex. 317) and thereafter adopted its CP.

The Board of County Commissioners (BOCC) then appointed a review committee to make recommendations for an updated CAO. The committee held workshops and a public hearing and ultimately issued a recommendation to the BOCC on July 30, 1996 (Ex. 317 Attachment B). During the next two years the BOCC held "worksessions" on the draft ordinance, but did enact annual extensions to the 1992 CAO

On November 25, 1998, the County issued a determination of nonsignificance (DNS) for the proposed replacement of the 1992 CAO. The DNS adopted several existing environmental documents.

On December 29, 1998, the BOCC voted to adopt a new CAO effective January 24, 1999. Because a new Commissioner was seated in January 1999, the effective date was suspended and ultimately on March 9, 1999, the recently adopted ordinance was repealed. After another series

of worksessions and public hearings and a remand to staff for revisions, the BOCC adopted Ordinance #681 on December 28, 1999, along with accompanying findings and conclusions (Ex. 99). On March 1, 2000, Petitioners filed their petition for review (PFR). They filed an amended PFR on April 3, 2000. After extensions to allow the parties more time to mediate issues, a prehearing conference was held and a prehearing order (PHO) was issued August 4, 2000. Requests of Petitioners to supplement the record were decided by orders dated September 20, 2000, and October 10, 2000. A hearing on the merits (HOM) was held in Port Angeles on October 24, 2000.

At the beginning of the hearing the County stipulated to a noncompliance remand because of its failure to enact buffers for Type 5 streams. CCC 27.12.035(9) was also acknowledged by the County as being inconsistent with other provisions of the CAO. We accept the County's request to remand both matters because of noncompliance.

Pursuant to RCW 36.70A.320(1), Ordinance #681 is presumed valid upon adoption.
The burden is on Petitioners to demonstrate that the action taken by Clallam County is not in compliance with the requirements of the GMA. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), we "shall find compliance unless [we] determine that the action by [Clallam County] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." In order to find the County's action clearly erroneous, we must be "left with the firm and definite conviction that a mistake has been made." *Department of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993). Additionally the issuance of a DNS is reviewable under the clearly erroneous standard. *Mahr v. Thurston County* 94-2-0007.

Here, Clallam County issued a DNS on November 25, 1998, and adopted several existing environmental documents under WAC 197-11-630. Relying upon WAC 197-11-600(3)(b), Petitioners claimed that the replacement of the 1992 CAO involved substantial changes "likely to have significant adverse environmental impacts." The County claimed that the added protections of the 1999 CAO were in fact more protective of critical areas. After reviewing this record we find that the Petitioners have not sustained their burden of showing that adoption of the DNS failed to comply with the State Environmental Policy Act provisions relating to GMA.

At the HOM the County raised an issue not presented in its responsive brief. The County claimed that the issue of wildlife habitat areas was not properly before us since the Petitioners had only challenged the riparian buffer widths, which the County adopted only for protection of fish species and their habitat. The County claimed that other provisions of the CAO dealt with habitat conservation areas (HCAs) and that much of Petitioners' claims of inadequate buffer widths were premised upon inclusion of "terrestrial species considerations" which added significantly to the buffer widths recommended by the *Washington Department of Fish and Wildlife management recommendations for Washington's priority habitats* (December 1997) (PHS) (Ex. 691).

The scope of the HOM is governed by RCW 36.70A.290(1). The PFR must include a "detailed statement of issues." From there, a Growth Management Hearings Board "shall not" include any "advisory opinions" outside of the detailed statement of issues except "as modified by any prehearing order."
In the instant case the County had ample opportunity to raise this claim long before presenting it as part of its oral argument in the HOM. Since the claim was not briefed, we consider it abandoned. WAC 242-02-570(1).

Moreover, Issues 1 and 2 of the PHO related to the questions of whether the stream buffer provisions of the CAO included best available science (BAS) and/or protected critical areas (CAs). Those issues are found both in the PFR and the amended PFR. The issues, by their very language, were not limited to inclusion of BAS and protection for only fish and aquatic species habitat, but included all "wildlife habitat conservation areas" under RCW 36.70A.030(5) and .060 (2). We decline to limit consideration in this case to only aquatic species' buffer requirements.

Petitioners' major challenge to the CAO was premised upon the assertion found at p. 5 of their opening brief and p. 6 of their reply brief; that the PHS "<u>is</u> the authoritative source for stream buffer width recommendations based on best available science." Petitioners concluded that unless a buffer width *recommended* by the PHS was adopted, compliance with the GMA would be impossible because the buffer widths in the PHS are definitionally BAS.

We are aware of some commentators' belief that our earlier BAS decisions have reached that same result. Those commentators, and Petitioners here, have failed to accurately read the FDOs of our previous cases and have failed to understand what was and was not contained in the record that we reviewed. The cases where we found noncompliance with the BAS requirement involved records that included no other "science" than the PHS and/or involved situations where the local government simply ignored BAS in favor of the conclusion it wanted to reach. We have never held, nor does the GMA require, that only the PHS provides BAS for stream buffer widths. We specifically reject Petitioners' contention that "best" under RCW 36.70A.172(1) includes one, and only one, scientific document. Rather we reiterate our conclusion first stated in *CCNRC v. Clark County* 96-2-0017 (12-6-96) that:

> "'Available' means not only that the evidence must be contained in the record, but also that the science must be practically and economically feasible. 'Best' means that within the evidence contained in the record a local government must make choices based upon the scientific information presented to it. The wider the dispute of the scientific evidence, the broader the range of discretion allowed to local governments. Ultimately, a local government must take into account the practical and economic application of the science to determine if it is the 'best available'."

Rather, with the exceptions set forth in later in this order, the GMA requirements of RCW 36.70A.172(1) envision a process and decision identical to the one engaged in by Clallam County.

As disclosed by this record (Ex. 12) Clallam County contains a very diverse landscape with significant geographical differences. As noted in the exhibit:

> "This diversity ranges between the low evaluation, flat areas in the Dungeness Valley where the majority of the streams have been straightened and significantly altered by past land use practices, and [are] in need of regaining lost functions, to the central part of the County wherein the streams are associated with ravines that are more or less functional and not as altered, to the western part of the County where the small portion of the non-forestry land uses are clustered along major river valleys."

In addition to the PHS, Clallam County incorporated into its record and its analysis a December 19, 1996, document prepared by Management Technology entitled *An Ecosystem Approach to*

*Salmonid Conservation* (ManTech) (Ex. 714), a September 1997, document entitled *Washington Department of Natural Resources Final Habitat Conservation Plan* (Ex. 670), a December 5, 1997, document entitled *Policy of Washington Department of Fish and Wildlife and Western Washington Treaty Tribes Concerning Wild Salmonids* (WSP) (Ex. 613), and an April 29, 1999, draft of the *Forests and Fish Report* (Ex. 680). The County also took into account its August 1995 Assessment of Wetland Functions and Wetland Management Guidance for the lower Dungeness area and Squim Bay watersheds and the 1992 Department of Ecology Stormwater Management Manual. The CAO Review Committee's analysis and recommendations were also considered.

In a June 25, 1999, worksession with the BOCC (Ex. 1005) staff summarized the various scientific positions in an oral presentation and specifically included Ex. 452 in its "functions and values" buffer analysis. The County, under this record, had before it all the relevant BAS, engaged in a wide-ranging public participation process, and analyzed the relevant BAS and goals and requirements of the Act.

Ordinance #681 generally requires 150-foot "aquatic habitat conservation area" buffers for both Type 1 and Type 2 waters, 100 feet for Type 3, and 50 feet for Type 4. Other provisions of the CAO provide additional protections. Non-riparian wildlife HCAs and wildlife habitat units and migration corridors were designated in the CP. Additional protections involved designation of wetlands, geologically hazardous areas (GHAs), and frequently flooded areas (FFAs) which provide for additional buffer space, mitigation plans, and requirement of compliance with DOE Stormwater Management Manual. The County's classification system included classification of any streams involving fish as Type 1, 2, or 3 waters. The County included a provision that adopts buffer widths for endangered species as those are adopted by the National Marine Fisheries Service. The CAO also required some degree of restoration of previously damaged buffer areas as a condition of permit issuance.

It is important to recognize, as the County did, that the PHS involves only recommendations and not requirements, and is based upon the department's analysis of a variety of studies proposing a variety of buffer widths for a variety of CA functions and values. We note that DFW in an *Amicus* brief dated October 25, 2000, in *Diehl v. Mason County*, #95-2-0073, commented on

Mason County's establishment of 150-foot buffers for Type 1-3 waters noting that while the buffer width did not fully meet the PHS recommendations they were "within the range of distances reported in the scientific literature" and also did "satisfy the basic recommendation for salmonids found in the wild salmonid policy (WSP)."

GMA is fundamentally based upon local governments making local planning decisions as long as the parameters established in the Act are followed. Except in the limited instances noted below, Clallam County has done an excellent job of recognizing, modifying, synthesizing, and applying BAS to its local conditions.

We specifically find that, except as to the issues set forth in the remainder of this order, Petitioners have failed to sustain their burden of showing that Clallam County has failed to comply with the Act.

In carving its exclusions and exemptions from the ordinance, however, Clallam County failed to carry through with BAS and its reasoned analysis. Initially, the County decided to create a separate category of reduced buffer widths for what it termed "minor new development." These reduced buffers included 35 feet for Type 4 waters, 50 feet for Type 3 waters, 65 feet for Type 2 waters, and a variety of buffer widths from a low of 35 feet to a high of 150 feet for Type 1 waters depending upon their designations under the existing SMP.

CCC 27.12.900(37) sets forth three separate definitions of "minor new development." First, the reduced buffers applied to "construction or placement of a single family dwelling and associated appurtenances" which could include a garage, deck, driveway, utilities, or fence. The definition also provides that *each* structure (house, garage, driveway, deck, fence) must have a footprint of less than 4,000 square feet. An "associated home enterprise" is also considered "minor." Additionally, any grading not exceeding 250 cubic yards and any clearing not exceeding 20,000 square feet is defined as "minor."

The second subsection of the definition provides that reduced buffers apply to "construction and practices normal or necessary for farming, irrigation, and ranching activities, including agricultural service roads and utilities." Construction of an agricultural building of less than

4,000 square feet is “minor” as are irrigation channels, pumping facilities, and headgates. Feedlots, processing plants, alteration of contour of wetlands or streams other than from normal cultivation are not considered “normal or necessary farming or ranching activities.”

Finally, minor development is also defined as “clearing, grading, or filling less than one acre.”

There is simply no science in the record to support reduced buffers for the type of activities defined in this ordinance as “minor new development.” Clallam County must use BAS in determining whether “minor” development should be excluded from full buffer width requirements. This record contains no such analysis. A 4,000 square foot single family dwelling unit with a 4,000 square foot garage, a 4,000 square foot deck, a 4,000 square foot shed, etc., could not in any way be considered minor, even if BAS supported a reduction of buffer widths for one such building to the exclusion of the others. Likewise as is discussed under the ongoing agricultural activities exemption, while the ordinance defines “agriculture” in a way that involves primarily devoted to production with long-term commercial significance, the ordinance does not define farming, irrigation, or ranching activities, nor agricultural activities. The “minor new development” provisions of Ordinance #681 do not comply with the Act.

We also find that reducing the buffers for “minor new development” found in CCC 27.12.315(1) to any widths smaller than those adopted for “major” activities as well as any new development within 50 feet of Type 5 waters, substantially interferes with Goal 10 and 14 of the Act and are determined to be invalid under the test set forth in RCW 36.70A.302(1).

CCC 27.12.025(7) “recognizes legally established, preexisting land uses and developments.” Any “maintenance, expansion, or change” must be consistent with CCC 27.12.040. CCC 27.12.040 states that all uses, including structures lawfully established prior to the ordinance’s effective date may be continued. The section then goes on to state, in a somewhat confusing fashion, that “any development regulated by this chapter to alter, expand, replace, or reconstruct, or otherwise increase the nonconformity” of the preexisting use located within the CA or buffer that “does not meet the standards” of the ordinance shall be “reviewed for compliance.” Frankly, we are mystified as to the meaning of that section and find that it does not comply with the Act’s requirement to plainly set forth what is to be accomplished by the DR. The subparagraphs

of .040 do little to clarify the situation or provide compliance. (1) allows "expansions" or "minor changes" that must conform to the DR "in the best way possible," although they "may be allowed" even if they do not conform to the DR standards. Proposals "that cannot meet the provisions of this subsection shall require a variance or reasonable use exception approval, as necessary." (2) allows "repair, reconstruction, or substantial improvements within landslide hazard or floodway areas that conform to the current ordinance" to the maximum extent possible to avoid negative impacts. The County must more clearly define what it means in this section.

A County must regulate preexisting uses in order to fulfill its statutory duty to "protect critical areas" under RCW 36.70A.060(2). GMA requires any exemptions for pre-existing use to be limited and carefully crafted. *FOSC v. Skagit County* 96-2-0025 (FDO 1-3-97) (*Skagit*).

Because of the significant environmental impact of ongoing agricultural activities, the GMA does not allow such activities to be completely exempt. *Skagit* determined that balancing the goals and requirements of the Act as to ongoing agricultural activities could only be done for designated agricultural resource lands (ARL) under RCW 36.70A.170, and not generally where any agricultural activity would be allowed. CCC 27.12.035(7) exempting "existing and ongoing agricultural activities" suffers from all of the deficiencies pointed out in *Skagit.*

The County noted that it only had approximately 7,500 acres of designated ARL. Thus, the County claimed that the exemption would not significantly impact CAs. While we might disagree that 7,500 acres of non-protection of CAs in Clallam County would not be significant, an important aspect of exemption (7) is that it is not limited to designated ARL. The exemption allows any "agricultural activity" lawfully operated prior to the effective date of the ordinance. While presumably the entire 7,500 acres of designated ARL would qualify, so would potentially thousands of other acres. The County has no way of knowing the extent of the exemption's coverage particularly given the lack of definition of "agricultural activities." We specifically find that the exemption fails to comply with the Act. As applied within any buffer area established under the ordinance for "major" new development, as well as within 50 feet of any Type 5 stream, where new construction or expansion of any agriculture activity is allowed, the ordinance substantially interferes with Goal 10 and Goal 14 (RCW 36.70A.480) and is declared invalid under the test in RCW 36.70A.302(1).

CCC 27.12.035(8) allows an exemption for normal repair and maintenance of certain uses, provided that no expansion take place. Of particular concern are the exemption for "farm ponds," "manure lagoons," and "livestock water ponds." The only BAS is this record relating to those type of operations recommends a buffer of at least 200 feet for "ponds" and 600 feet for "manure lagoons." Because of the significant adverse environmental impacts created by such uses, total exemption from regulation, even for repair and maintenance, fails to comply with the Act. The exemption does not, however, allow expansion or new construction and thus does not substantially interfere with the goals of the Act.

CCC 27.12.035(10) allows "replacement, operation, or alternation" of utility, gas, and telephone lines and facilities, provided that in FFAs the CA standards for those areas apply. At p. 32 of the County's brief in discussing this exemption, the County noted that it was "restricted to existing utilities in critical areas" and "only applies to existing facilities, any new structure would have to be a replacement." Nonetheless, the first word in exemption (10) is "replacement" which is not defined in the ordinance, but which certainly could allow a completely new facility. The exemption does not comply with the GMA because it does not adequately protect CAs other than FFAs and allows both replacement and alternation which could involve significant impacts to CAs. We do not find, however, that substantial interference with the goals of the Act has been shown as to this exemption.

CCC 27.12.715 allows certain buffer averaging and variances under the very limited conditions specified in CCC 27.12.725 and that also comply with the standards set forth in CCC 27.12.730. We agree with the County's stipulation that the administrative variance and hearing examiner variance criteria found in .715(2)(3) should cross-reference the variance standards specified in CCC 27.12.725. The essence of the buffer averaging as set forth in these three sections of the ordinance is that "no net loss of the total buffer area" be allowed and that no particular buffer width be reduced more than 25% at any one point. Petitioners have failed to sustain their burden of showing noncompliance, except as to the necessity of cross- referencing CCC 27.12.725.

Petitioners finally contended that various sections of the CAO were inconsistent with provisions of the County's SMP. Specifically, CCC 27.12.315(Table 6) was challenged. That section

(table) is covered by our finding of noncompliance and substantial interference with regard to "minor new development" reduced buffers. Since CCC 27.12.010 directs that the CAO provisions are in addition to the SMP, we find that Petitioners have failed to sustain their burden of showing inconsistency between the CAO and the SMP, except as previously noted.

## ORDER

We find that the County has failed to comply with the Act in the following areas:

1. Failure to establish buffers for Type 5 waters;
2. Failure to resolve the inconsistency between CCC 27.12.035(9) and other provisions of the Ordinance;
3. Reducing the buffer widths on "minor new development" as set forth in CCC 27.12.315 (Table 6);
4. Failure to protect CAs under the provisions of CCC 27.12.025(7) and .040;
5. Failure to protect CAs under the exemption found in CCC 27.12.035(7), (8), and (10); and,
6. Failure to cross-reference CCC 27.12.725 with .715 and .730 for variances and buffer averaging.

In order to comply with the Act the County must remedy items 1, 2, and 6, within 90 days of the date of this order and must remedy the deficiencies found in items 4, 5, and 6, within 180 days of the date of this order.

We find the following provisions substantially interfere with Goal 10 and/or Goal 14 of the Act and are declared invalid:

1. The allowance of reduced buffer widths for "minor new construction" set forth in CCC 27.12.315(1) (Table 6) or within 50 feet of type 5 waters.
2. Provisions that allow any type of agricultural activity or new construction, expansion, or alteration of preexisting land uses as allowed by CCC 27.12.035(7) within the buffer areas established under "major" activities or within 50 feet of Type 5 waters.

Findings of Fact pursuant to RCW 36.70A.270(6) are adopted and attached as Appendix I and incorporated herein by reference. Findings of Fact and Conclusions of Law pursuant to RCW 36.70A.302(1)(b) are adopted and attached as Appendix II 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 19th day of December, 2000.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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William H. Nielsen
Board Member

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Les Eldridge
Board Member

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Nan A. Henriksen
Board Member

## Appendix I
## Findings of Fact
## Pursuant to RCW 36.70A.270(6)

1. Clallam County adopted its initial CAO on June 16, 1992.
2. Clallam County published a FEIS on June 16, 1995 and thereafter adopted its CP.

3. On November 25, 1998, the County issued a DNS for the proposed replacement of the 1992 CAO. The DNS adopted several existing environmental documents including the FEIS for the CP.
4. The County adopted its CAO as Ordinance #681 on December 28, 1999.
5. The County stipulated to noncompliance from its failure to enact buffers for Type 5 streams.
6. The County stipulated to noncompliance because of the inconsistency between CCC 27.12.035(9) and other provisions of the CAO.
7. The issues presented in the PFR and amended PFR and PHO sufficiently challenged the County's buffer width determinations for both aquatic and terrestrial species.
8. The WDFW document (Ex. 691) known as the PHS is not the only document that satisfies the BAS requirements of RCW 36.70A.172(1).
9. The County's incorporation of the PHS, ManTech, Habitat Conservation Plan, WSP and draft Forest and Fish Report as well as local documentation and staff analysis complied with the requirement for incorporating BAS into Ordinance #681.
10. The County complied with GMA's SEPA requirements.
11. The County complied with the CA protection requirements of RCW 36.70A.060(2) except as noted below.
12. The allowance of reduced buffer sizes for minor new construction does not incorporate BAS, does not protect CAs, and does not comply with the GMA.
13. The total exemption of preexisting uses and developments set forth by CCC 27.12.025(7) and .040 are too broad, not clearly defined, and not supported by BAS. .025(7) and .040 do not comply with the GMA.
14. CCC 27.12.035(7) that exempts "existing and ongoing agricultural activities" is not limited to agricultural resource areas, is written too broadly, fails to protect CAs, and does not comply with the GMA.
15. CCC 27.12.035(8) exempts maintenance and repair of "farm ponds," "livestock water ponds," and "manure lagoons." This provision does not incorporate BAS and fails to protect CAs. The provision does not comply with the GMA.
16. CCC 27.12.35(10) allows both replacement and potentially significant alternation of utility, gas, and telephone lines and facilities, except in FFAs. The exemption does not incorporate BAS and does not protect critical areas. The exemption does not comply with

the GMA.

17. The buffer averaging and variance allowances under CCC 27.12.715 need to cross-reference the requirements of CCC 27.12.725 in order to comply with the Act.
18. The CCC 27.12.010 provision that directs the CAO requirements are in addition to the SMP does not render the CAO and the SMP inconsistent.

## Appendix II
## Findings of Fact and Conclusions of Law
## Pursuant to RCW 36.70A.302(1)(b)

1. The findings set forth in Appendix I are incorporated by reference.
2. The reduced buffer widths for minor new construction found in Table 6, are unsupported by any scientific evidence, allows for significant adverse environmental impacts because of the numerous activities allowed under the definition contained in CCC 27.12.900(37), are not supported by any reasoned analysis and substantially interfere with Goal 10 and/or 14 of the Act.
3. Provisions of CCC 27.12.035(7) that allow existing and ongoing agricultural activities within the buffers established for major new development in Table 6 or within 50 feet for Type 5 waters substantially interfere with Goals 10 and/or 14 of the Act.

## Conclusions of Law

1. The buffer widths for minor new construction set forth in CCC 27.12.315(1)(Table 6) that occur within buffer areas established for major new construction or within 50 feet of Type 5 waters are declared invalid.
2. The provisions of CCC 27.12.035(7) that occur within buffer areas established for major new construction or within 50 feet of Type 5 waters are declared invalid.