

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

OLYMPIC ENVIRONMENTAL COUNCIL, et al.,

Petitioners,

v.

JEFFERSON COUNTY,

Respondent.

No. 01-2-0015

COMPLIANCE
ORDER

I. INTRODUCTION

Jefferson County is home to some of the loveliest coastal communities in the state. Unfortunately, with the growth of communities along the coast, the demand for adequate sources of potable water has come into conflict with the geography of the area. This case concerns Jefferson County's efforts to grapple with the complex technical issues involved in ensuring water quality for its residents.

II. PROCEDURAL HISTORY OF THE CASE

This case came before the Board for a compliance hearing after a Board Final Decision and Order (FDO) issued January 10, 2002, found the County out of compliance with the Growth Management Act (GMA). Petitioners are the Olympic Environmental Council and Shine Community Action Council. Respondent is Jefferson County.

The underlying petition for review was filed by petitioners on March 5, 2001. The petition challenged the County's adoption of Ordinance 11-1218-00 – its Unified Development Code. The case was continued for several months for purposes of settlement discussions and ultimately went to a hearing on the merits on December 5, 2001. On January 10, 2002, this Board issued a final

decision and order. The Board found the County out of compliance with the Growth Management Act:

1. For failing to properly classify and designate vulnerable seawater intrusion areas as critical areas.
2. For adopting development regulations that fail to protect aquifers used for potable water from further seawater degradation.
3. For adopting regulations which are inconsistent with the goals and policies related to aquifer protection in the County's comprehensive plan.

The Board directed the County to take five actions^[1] within 180 days of the date of the order.

Those directions were:

1. Make agreed changes to the Unified Development Code within 90 days of the date of the order.
2. Properly classify and designate vulnerable seawater intrusion areas as critical aquifer recharge areas (CARAs), utilizing best available science, within 180 days.
3. Develop and adopt protection standards for CARAs based on best available science to prevent further groundwater degradation from seawater intrusion within 180 days.
4. If the County wishes to adopt less than precautionary protection standards, it must also develop and adopt an adaptive management program that includes a scientifically defensible methodology for collecting, managing and analyzing groundwater monitoring data to regularly evaluate the effectiveness of adopted performance standards. The plan must also include more restrictive development regulations to be implemented at once if the adopted strategies are found not to be adequate. This action must be taken within 180 days.
5. Before adopting new development regulations, analyze them to ensure that they are consistent with and fully implement the relevant goals and policies of the County's comprehensive plan.

On August 7, 2002, the County filed its compliance brief, requesting that the Board find the

County in compliance with the directives of January 10, 2002, and the Growth Management Act. Petitioners opposed a finding of compliance and filed their response to Jefferson County's compliance brief on August 28, 2002.

On September 27, 2002, the County provided supplemental information, indicating changes to the County's ordinance and the Coastal Seawater Intrusion Policy (No. 07-0723-02). Petitioners filed a reply brief in response to the County's September 23, 2002, amendment and supplemental information. The County then filed its supplemental brief on October 10, 2002.

The compliance hearing was held on October 22, 2002. The hearing was held telephonically at the request of the parties. Collette Kostelec appeared on behalf of the petitioners. Deputy Prosecutor David Alvarez and Dave Christiansen, Manager of the County's Natural Resources Division, appeared for the respondent. Board members in attendance were Nan Henriksen, Les Eldridge and Margery Hite.

III. BURDEN OF PROOF

Pursuant to RCW 36.70A.320(1), and the 2000 amendments thereto, the County's actions are presumed valid upon adoption. The burden is on petitioners to demonstrate that the action taken by the County is not in compliance with the requirements of the GMA. RCW 36.70A.320(2). Pursuant to RCW 36.70A.320(3), the Board "shall find compliance unless [it] determine[s] that the action by [the 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, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

IV. ISSUES PRESENTED

The petitioners and respondent agree that the County is in compliance with respect to the first and second directives of the Board's January 10, 2002 Final Decision and Order. Three directives^[2] are challenged and raise these issues:

1. Has the County developed and adopted protection standards for critical aquifer recharge areas based on best available science to prevent further groundwater degradation from seawater intrusion?

2. If the County’s adopted standards are “less than precautionary”, has the County adopted an adaptive management strategy that provides a scientifically defensible method for evaluating the effectiveness of the County’s standards?
3. Do the new development regulations respecting groundwater comply with the goals and policies of the County’s comprehensive plan?

V. SUMMARY OF DECISION

The Board is very impressed with the progress made by Jefferson County in addressing this technically complex area. The protection of aquifers used for potable water from seawater intrusion is vitally important to the citizens of Jefferson County and the County has taken a reasoned approach. However, the absence of clear standards in the Unified Development Code on the basis for exceptions to well-drilling restrictions, the level of impact on water quality that will constitute “degradation”, and the failure to set more restrictive protection standards for Marrowstone Island despite the science in the record, prevent us from finding compliance.

VI. ANALYSIS AND DISCUSSION OF ISSUES

ISSUE NO. 1: Has the County developed and adopted protection standards for critical aquifer recharge areas based on best available science to prevent further groundwater degradation from seawater intrusion?

Applicable Law

The Growth Management Act, Chapter 36.70A RCW, requires that cities and counties planning under the Act designate and protect critical areas. RCW 36.70A.170. Critical areas include areas with a critical recharging effect on aquifers used for potable water. RCW 36.70A.030(5)(b). The GMA specifically requires local jurisdictions to “include the best available science in developing policies and development regulations to protect the functions and values of critical areas”. RCW 36.70A.172(a).

The GMA planning goals also address water quality and the availability of water:

The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are

required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations:

....

(10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

RCW 36.70A.020.

Positions of the Parties

The petitioners argue that the County's adopted standards are not effective because they do not address the need to balance groundwater withdrawals with fresh water recharge. The Unified Development Code, they allege, permits new groundwater wells to be drilled in "at-risk" and Coastal Seawater Intrusion Protection Zones. Rather than providing specific protections, the Unified Development Code allows exceptions on a case-by-case basis to protective measures which would otherwise be imposed in at-risk and Seawater Intrusion Protection Zones. There are no standards governing what kind of hydrogeologic assessment would justify an exception to the stormwater disposal regulations, for example.

The County, on the other hand, argues that best available science shows that not all coastal areas are at risk. Some of the wells do not have high chloride readings, some do have high chloride readings, and some vary wildly from reading to reading. Further, the County points out, not all high chloride wells are caused by seawater intrusion. Some result from connate or residual seawater, so the fact of a high chloride reading does not necessarily indicate the risk of further seawater intrusion. The County states that there are multiple, complex factors which affect seawater intrusion. In fact, the risk areas which have been drawn on the County's maps may not actually represent the aquifers which are feeding high-chloride wells, since they are just a circle of potential risk. An applicant in a Seawater Intrusion Protection Zone has about a fifty-fifty chance of digging a non-impacted well. Therefore, each applicant should be entitled to a site-specific review of the circumstances of his proposed well. The County's Unified Development Code should be found in compliance because it uses such individual review processes.

Discussion

This challenge to the County's Unified Development Code (UDC) focuses on water available for

development, specifically the problem of seawater intrusion and potable water supplies. The question is whether the County's standards for protection of areas critical to aquifer recharge are sufficient to protect their functions and values, as required by the GMA.

The County's protection standards for land use activities in the Seawater Intrusion Protection Zones (SIPZ) are found in Section 3 of the UDC groundwater protection/seawater intrusion amendments, in conjunction with Coastal Seawater Intrusion Policy (as adjusted September 23, 2002). Seawater Intrusion Protection Zones (SIPZ) are critical aquifer recharge areas and are defined as "aquifers and land overlying aquifers with some degree of vulnerability to seawater intrusion." Coastal Seawater Intrusion Protection Zones include all islands and land within a quarter mile of marine shorelines and their associated aquifers. UDC 3.6.5.a(4). In addition to Coastal Seawater Intrusion Protection Zones, there are two other types of SIPZ: areas with specified chloride levels in the groundwater source are considered either "at risk" SIPZ, if the chloride analysis ranges between 100 milligrams per liter and 200 milligrams per liter, or "high risk" SIPZ, if the chloride analysis exceeds 200 milligrams per liter. UDC 3.6.5.a(4). However, in recognition that connate ("relic" seawater as opposed to active seawater intrusion) may lead to high chloride level readings that are not indicative of seawater intrusion, scientific evidence that demonstrates this fact will allow the UDC administrator to consider the area to be neither an at risk nor a high risk SIPZ. UDC 3.6.5.a(4).

There are nine land use activities for which protections are provided in the UDC. The well drilling provisions have been added to address the Board's concerns in its Final Decision and Order. Section 3.6.5(d)(9) of the UDC provides:

Well Drilling, Land Division, and Building Permits in Seawater Intrusion Protection Zones.

i. *Well Drilling*: The Washington State Department of Ecology regulates well drilling pursuant to the Water Well Construction Act. Proposed wells, including those exempt from permitting requirements, must be sited at least 100 feet from "known or potential sources of contamination," which include "Sea-saltwater intrusion areas" (WAC 178[sic]-160-171), unless a variance is obtained from Ecology per WAC 173-160-106.

ii. *Subdivisions*. Applications for land division (UDC Section 7) when the average net density proposed is less than five acres per dwelling unit must include specific and conclusive proof of adequate supplies of potable water

through a qualifying hydrogeologic assessment (relevant components of an Aquifer Recharge Area Report per UDC 3.6.10.e) that demonstrates that the creation of new lots and corresponding use of water will not impact the subject aquifer such that water quality is degraded by seawater intrusion.

UDC, § 3.6.5(d)(9)

In the Coastal Seawater Intrusion Policy, individual groundwater sources with a history of chloride analyses greater than 200 mg/L are considered “seawater intrusion areas” for purposes of WAC 173-160-171(3)(b)(v). Coastal Seawater Intrusion Policy, September 24, 2002, at 1. The WAC, in turn, requires a minimum of 100-foot well setbacks from seawater intrusion areas. WAC 173-160-171(3)(b)(v). The 100-foot setbacks that the County has set for seawater intrusion areas are the minimum setback distances established by the Department of Ecology on a statewide basis. WAC 173-160-171(3)(b)(v).

While there is some ambiguity in the language of the UDC and Coastal Seawater Intrusion Policy, it appears that the County has settled on a standard of 200 mg/L chloride readings as a protection measure for well drilling. That is, well samples that show readings greater than 200 mg/L will preclude use of a well at that site as the water source for new construction. The ambiguity comes from the use of the term “history of chloride analyses above 200 mg/L” to define seawater intrusion areas in the Coastal Seawater Intrusion Policy. Since the mandatory measures themselves do not provide that well sample chloride concentrations greater than 200 mg/L will disqualify a site, the standard must be seen as coming from the definition of a seawater intrusion area. However, that definition refers to a *history* of chloride *analyses*, suggesting that a single well sample would not be sufficient to create a seawater intrusion area. Based on the County’s arguments to the Board, it appears that the County’s intention is to prohibit well drilling where the sample provided shows a chloride concentration greater than 200 mg/L. However, we would request the County to make that standard clear in the UDC so there is no confusion about the effect of a well sample on a building permit application.

Other protection measures imposed vary by whether the area in which the well will be dug is a Coastal Seawater Intrusion Protection Zone (Coastal SIPZ), an At-Risk Seawater Intrusion Protection Zone (At-Risk SIPZ), or a High Risk Seawater Intrusion Protection Zone (High Risk SIPZ). Applicants in the Coastal SIPZ must use public water systems if available. If not, then

the applicant must submit a chloride concentration laboratory test of sample well water. Applicants in the At-Risk SIPZ must use available public water systems, submit the same type of water sample, install a flow meter, be subject to on-going well monitoring for chloride concentrations, and submit data for both flow and chloride levels to the County's monitoring program. In High Risk SIPZs, conservation measures are mandatory and wells are not permitted unless the applicant obtains a variance from the Department of Ecology or, if not subject to Department of Ecology variance, provides the County with evidence in the form of a hydrogeologic assessment that there is a reasonable probability that the proposed well would not degrade "the subject aquifer". This means that wells could be permitted within 100 feet of a groundwater source showing greater than 200 mg/L chloride concentrations or within 100 feet of a marine shoreline if the applicant provides evidence "through a hydrogeologic assessment . . . of a reasonable probability that the subject aquifer will not be degraded by the proposed use of the well". UDC 3.6.5(d)(9)(iv)(C)(3).

In summary, the County has drawn zones which are at risk for seawater intrusion and requires that applicants in those zones submit water samples showing chloride concentrations. However, only applicants submitting well samples showing greater than 200 mg/L chloride levels will be denied the ability to drill at that site. Any reading of 200 mg/L or less will trigger monitoring requirements but will not affect the prospective well's location.

The heart of the dispute here is whether best available science dictates greater protection standards than the County has decided to impose. The County's consultants, Hong West, describe chloride concentrations of 100 mg/L as the "threshold for possible seawater intrusion". Ex. 23-45 at 2. The Department of Ecology's Water Supply Bulletin No. 59 (Ex. 24-1) states: "The oft-used 100 mg/L chloride concentration threshold is a reliable indicator of intrusion, but, by definition, seawater intrusion is already a problem by the time it is identified". Ex. 24-1, at 70.

The County's protective measures are triggered when chloride concentrations of 100 mg/L are found and apply to the area within 1000 feet of the groundwater source from which came the chloride concentrations at issue. UDC 3.6.5(a)(4). However, at this stage of chloride concentration, the protective measures imposed primarily involve monitoring.

When chloride concentrations exceed 200 mg/L, the regulations create a rebuttable presumption that the high chloride readings are caused by seawater intrusion. UDC 3.6.5(a)(4). This presumption may be rebutted if a hydrogeologic assessment shows that the readings are caused by connate or residual seawater. In such high-risk zones, wells are permitted only if a Department of Ecology variance is obtained or if the County is provided a hydrogeologic assessment that the proposed well will not degrade water quality in the aquifer.

Based on the scientific consensus that 100 mg/L chloride concentrations are linked to seawater intrusion, the County could have chosen to limit well construction in At-Risk SIPZ as well as in High Risk SIPZ. Petitioners argue that this choice is dictated by the scientific evidence. However, the County regulations essentially track the recommendations of the Department of Ecology in the draft WDOE Seawater Intrusion Policy. Exhibit 53. With knowledge that lesser chloride concentration readings may be indicative of seawater intrusion, the County has elected to monitor those wells rather than to restrict them from the outset. If the readings on those wells reach greater than 200 mg/L, then the High Risk SIPZ will be re-drawn to show that. The County's development regulations restrict wells where the chloride concentrations are greater than 200 mg/L (assuming the UDC is clarified to reflect this position). We cannot say that this policy does not provide protection of water quality, even if it is not the greatest protection that the County might have chosen to provide.

However, the situation with respect to Marrowstone Island is markedly different from the rest of Jefferson County. The excerpt from the 1994 "Support Document for Designation of the Marrowstone Island Aquifer System As A Sole Source Aquifer" prepared by the Environmental Protection Agency submitted as Exhibit 51, at 5, refers to four studies which "indicate seawater intrusion is occurring in the fresh ground water aquifer system underlying the Island". The wells drawing on this aquifer have shown high levels of chloride contamination. SIPZ Map. As Petitioners point out, the County's SIPZ map itself shows a dense configuration of High-Risk SIPZs, which by definition have a history of chloride concentrations greater than 200 mg/L. The Department of Ecology report of 1994 similarly finds seawater intrusion into the Marrowstone Island aquifer. Ex. 24-1, at 62.

The County argues that the Department of Ecology recommended only monitoring of the wells on Marrowstone Island, which is consistent with the protection standards adopted by the County in its UDC. Petitioners respond with Exhibit 67, a letter from the Department indicating that those recommendations were “near-term best management practices, to minimize the spread of intrusion, until a viable long-term solution is found”, rather than “end-all solutions”. Exhibit 67. Exhibit 67 notes that the “Island average” for wells constructed between 1990 and 1995 was 232 mg/L. Based on this information, the letter states that, if the question of permits were up to the Department, their decision would be to deny them.

The County argues vigorously that Exhibit 67 simply represents the point of view of a single Department employee. We see nothing in the record from the Department disclaiming the positions set forth in Exhibit 67. Whatever the weight to be given the Department of Ecology’s recommendations in 1994 and 1995, it is plain that many years have gone by. The County’s SIPZ map notes the problem of seawater intrusion on Marrowstone Island, the EPA report noted the problem and recommended designating it a sole source aquifer, and the Department of Ecology noted the problem and recommended immediate actions.

We do not see anything in the protection standards of the UDC which provides the heightened protection to Marrowstone Island that the record indicates is due. A case-by-case review of permits may be acceptable where the intrusion risk is slight. In Marrowstone Island, the fact of seawater intrusion is established. Simply monitoring the known seawater intrusion is like taking notes while a train crashes. The County cannot meet its obligations under the GMA without protection standards for Marrowstone Island that ensure that there is *no additional* seawater intrusion. These are absent from the UDC.

Petitioners also challenge the standard by which the Administrator under the UDC may permit a well to be installed in a High Risk SIPZ. The ordinance requires a hydrogeologic assessment “of a reasonable probability that the subject aquifer will not be degraded by the proposed use of the well”. UDC 3.6.5(d)(9)(iv)(C)(3). Petitioners argue that this standard is not specific enough to provide necessary protection. We agree.

Despite several questions from the Board at the compliance hearing, the County was unable to

state what measure would constitute “degradation”. In the compliance brief of Jefferson County, the County asserts that its adaptive management plan will include the definition of a “statistically significant” degradation of water quality which would lead to more restrictive development regulations. Compliance Brief, at 15-16. At oral argument, the County conceded that there would be a standard for measuring degradation beyond any change however slight but the County was unable to point to the source of that standard. The Board has also been unable to find such a standard in its own review of the County’s materials. Without a standard by which degradation can be measured, the County’s restriction on high chloride wells is too vague to be meaningfully applied. The need for a definition of “degradation” extends to subdivision applications as well. UDC 3.6.5(d)(0)(ii).

There is also lack of clarity on how well readings on monitored wells will be used. If a well sample provided with a building permit application in an At-Risk SIPZ shows chloride concentrations between 100 mg/L and 200 mg/L, the applicant will be allowed to drill. If subsequent monitoring shows water quality degradation (however that is defined), then the well may still be used. Only *later* permit applicants will be affected, but there is no express language indicating *how* the data from monitoring will affect later applications. At a minimum, the County should set the time frames in which the monitoring data will be applied to the existing SIPZ demarcations.

Conclusion: We find that the County has established protection standards, subject to the County providing clarifying language in the UDC on: (1) the fact that a well sample showing chloride concentrations greater than 200 mg/L will be the basis for denying a well as a potable water source for a building permit; (2) the definition of “degradation”; and (3) the timeframe in which monitoring data will be applied to the SIPZ maps. We also require the County to set protection standards for Marrowstone Island that reflect the established fact of seawater intrusion in the aquifer. In addition, as discussed in Issue No. 2 below, we find that these protection standards are less than precautionary and require an adaptive management program to monitor and respond to actual performance.

ISSUE NO. 2: If the County’s adopted standards are “less than precautionary”, has the County adopted an adaptive management strategy that provides a scientifically defensible

method for evaluating the effectiveness of the County's standards?

Positions of the Parties

Petitioners allege that the standards adopted by the County are not “precautionary”. They argue that by permitting wells in the areas identified as at risk for seawater intrusion, the County is not preventing further groundwater degradation and is therefore not using precautionary measures.

The County counters that the County now has the most stringent and protective system to designate and protect aquifers “in a way that complies with best available science found in any county in this state”. Supplemental Brief on Behalf of Respondent Jefferson County, at 5. The County argues that it cannot impose conditions on a well if the best available science shows a very slim likelihood that seawater intrusion is occurring or will occur at the subject well. Compliance Brief of Respondent Jefferson County, at 14.

Jefferson County argues that it has created precautionary standards, and that it has created an adaptive management program that complies with Directive No. 4 of the Board's January 10, 2002 Final Decision and Order and WAC 365-195-920. This program includes ongoing monitoring in areas at risk to seawater intrusion, a plan to create standards for the monitoring, and a provision for more restrictive development regulations to be implemented if the adopted strategies are found not to be adequate. Compliance Brief of Respondent Jefferson County, at 15-16.

Petitioners argue that the County's adaptive management program lacks requirements for water quality monitoring and flow metering in all of the seawater intrusion zones, lacks specificity with respect to the adaptive management program itself, and is not codified, but is merely a policy statement. Reply Brief on Compliance, at 6.

Discussion

The Board must first determine whether the standards adopted by the County are “precautionary”. In the Final Decision and Order issued January 10, 2002, the Board used the term “precautionary” to refer to measures that ensure that degradation will not take place. Given the scientific evidence in the record that readings of 100 mg/L are positive indicators of seawater

intrusion, the County's choice to set a standard greater than 200 mg/L creates a minimal level of protection. Furthermore, at the hearing, the County conceded that if wells were permitted that are later shown through monitoring to cause degradation of water quality, those wells would continue to be used. The County considers such a risk to be worth taking, balancing the chilling effect on development against stricter standards of chloride readings. *See* Ordinance No.04-0422-02; Findings No. 22, 23.

Therefore, although we have found that the County has established protection standards for critical aquifer recharge areas based on best available science to prevent further groundwater degradation from seawater intrusion, we conclude that such protection standards are not "precautionary". The County must also have an adaptive management program to monitor the effectiveness of its protection standards and must have, in place, development regulations that will be implemented at once if the adopted strategies are not found to be adequate. *See* Final Decision and Order, January 10, 2002, at 19 (citing WAC 365-195-920).

The County has proposed an adaptive management program that will involve a number of agencies in collecting and assessing data gathered concerning seawater intrusion. The group of agencies that are proposed includes the Public Utility District, Washington State University, and the Water Resource Inventory Area Planning Units operating in Jefferson County. Coastal Seawater Intrusion Policy, September 24, 2002.

Of necessity, this program requires the agreement of the other agencies. The County has provided those entities with proposed agreements but has not yet had a response. Until the County gets the response of those other entities, the actual program cannot be finalized. This also means that the Board is unable to assess the sufficiency of the adaptive management program in reaching GMA requirements until the final program is before it.

However, the Board notes a few concerns with the present adaptive management plan. First, it lacks specificity with respect to standards that will apply to determine whether the County's protective measures are effective. In particular, there is no definition of the "degradation" which would trigger stricter development regulations. The County is committed to creating such a definition and has responsibly decided to do that with the assistance of scientific experts and

other government agencies working in the field. However, in the absence of a quantifiable standard for determining when water quality has been degraded, we cannot find that the plan complies with the requirements for an adaptive management program.

Second, the timeframe in which the County must act on the monitoring data it receives is not clear. The Board's Final Decision and Order of January 10, 2002, required that the adaptive management plan provide for immediate action in the event that the County's protective measures are not effective. The County states that SIPZ map will be updated "at least annually". Compliance Brief of Respondent Jefferson County, at 5. However, no provision of the UDC or the Coastal Seawater Intrusion Policy appears to create any timeframes. If monitoring data is to provide a backstop in the event that wells actually do degrade water quality, then the County must promptly act on data suggesting seawater intrusion. Not only must the data be used expeditiously to update the SIPZ maps, it also must be quickly presented to and considered by the County commissioners for the purpose of enacting the remedial measures in the Coastal Seawater Intrusion Policy of September 24, 2002, adopted by Resolution No. 61-02. As the Hong West report of December 7, 1994 states:

Unfortunately, the mechanics of seawater intrusion are such that even after over pumping has been halted, it may take years and in some cases decades for the impacts of seawater intrusion to diminish.

Exhibit 23-45, at 1. Therefore, the County's response to evidence that seawater intrusion is taking place must be quick and decisive.

Conclusion: The County's development regulations establish protection standards that are less than precautionary. Therefore, the County must also have an adaptive management program to monitor and respond quickly to the data about actual performance of the protection standards. Although the County has outlined a responsible adaptive management plan to be carried out in conjunction with other public entities, that plan has not been finalized. Further, the plan must specify standards for degradation and for action should there continue to be seawater intrusion and thus degradation of water quality. The County is not in compliance with the GMA requirements in this respect.

ISSUE NO. 3: Do the new development regulations respecting groundwater comply with the goals and policies of the comprehensive plan?

Applicable Law

RCW 36.70A.040(4)(d) provides, in pertinent part:

Any county or city that is required to conform with all the requirements of this chapter, as a result of the county legislative authority adopting its resolution of intention under subsection (2) of this section, shall take actions under this chapter as follows:

....

(d) the county and each city located within the county shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan . . .

RCW 36.70A.040(4)(d)

Positions of the Parties

Petitioners argue that the County is not in compliance with requirements that the development regulations be consistent with the comprehensive plan. They argue that the Coastal Seawater Intrusion Policy must be incorporated within the comprehensive plan and not simply adopted by resolution. This would ensure consistency and provide notice to the public of the existence of the Coastal Seawater Intrusion Policy. Response to Jefferson County's Compliance Brief, at 6-7.

The County provides a matrix in its opening brief of the goals or policies of the comprehensive plan which the County asserts have been implemented consistently through the new development regulations. Compliance Brief of Respondent Jefferson County, at 20-26. Petitioners argue that the new regulations do not provide the protection of groundwater resources that is called for in Policy 1.3, Goal 2.0, Policy 2.1, Policy 2.6, Goal 13.0, Policy 13.1 and Policy 13.2. Petitioners argue that there is no monitoring plan, that the designation of protection zones does nothing without enforceable protection standards, and that a development moratorium is justified in certain parts of the county based on information the County already has. They further challenge the County's efforts to work with the Department of Ecology. Reply Brief on Compliance.

The County responds that the development regulations provide protection standards for new wells in the At-Risk and High-Risk SIPZ, that the County is working collaboratively with other public entities to maximize available resources and expertise, and that the County's choices are

based on best available science. Supplemental Brief on Behalf of Respondent Jefferson County, at 11-15.

Discussion

The development regulations, which are the subject of this challenge, are indeed directed to the goals and policies of the comprehensive plan. To the extent that the development regulations actually implement protection standards for groundwater, they are consistent with the goals and policies cited by the parties. When the County undertakes the clarification and definitions that have been discussed in the first two issues above, the development regulations will be consistent with the County's comprehensive plan as well.

One point raised by petitioners is the status of the Coastal Seawater Intrusion Policy. Although the amendments to the UDC were adopted by ordinance, the Coastal Seawater Intrusion Policy was adopted by resolution without amending the comprehensive plan. Petitioners argue that this policy must become part of the comprehensive plan in order to have equal force of law.

The County did not brief this point. As we are remanding this matter to the County for compliance on the points set out above, we ask that the County also address the question of the status of the Coastal Seawater Intrusion Policy.

An ordinance is traditionally the means by which a municipal government establishes a permanent rule which will continue in force until the ordinance is repealed:

An ordinance is distinctively a legislative act; a resolution, generally speaking, is simply an expression of opinion of mind or policy concerning some particular item of business coming within the legislative body's official cognizance, ordinarily ministerial in character and relating to the administrative business of the municipality. Thus, it may be stated broadly that all acts that are done by a municipal corporation in its ministerial capacity and for a temporary purpose may be put in the form of resolutions, and that matters on which the municipal corporation desires to legislate must be put in the form of ordinances.

McQuillen, Municipal Corporations, §15.02.

However, in Washington in the planning context, it is evident that the distinction between the

term “resolution” and the term “ordinance” does not carry such weight. The Planning Enabling Act, Ch.36.70 RCW, provides that the word “ordinance” as used in that chapter is synonymous with the term “resolution”, and represents any legislative enactment by a board of county commissioners. RCW 36.70.020(12). RCW 35.63.100 provides that a comprehensive plan or any amendment to it may be adopted by resolution or ordinance.

The Growth Management Act itself expressly envisions that either amendments to comprehensive plans or development regulations or both may be made by resolution or ordinance. For example, RCW 36.70A.035 describes an exception to the circumstances under which the public process requirements of the GMA are triggered as follows:

(2)(a) Except as otherwise provided in (b) of this subsection, if the legislative body for a county or city chooses to consider *a change to an amendment to a comprehensive plan or development regulation*, and the change is proposed after the opportunity for review and comment has passed under the county’s or city’s procedures, an opportunity for review and comment on the proposed change shall be provided before the local legislative body votes on the proposed change.

(b) An additional opportunity for public review and comment is not required under (a) of this subsection if:

a. An environmental impact statement has been prepared under chapter 43.21C RCW for the pending *resolution or ordinance* and the proposed change is within the range of alternatives considered in the environmental impact statement.

RCW 36.70A.035(2) (emphasis added).

This language is strongly indicative that the use of title, either “resolution” or “ordinance”, is not critical.

For our purposes here, the critical question is what the status of the Coastal Seawater Intrusion Policy is within Jefferson County’s land use regulation scheme and whether it has been adopted with the public process and review requirements that the GMA mandates.

The Coastal Seawater Intrusion Policy relates to critical areas but it is not part of the County’s critical areas ordinance or the Unified Development Code. Much of the policy is reflected in the

UDC but significant portions, primarily those related to remedial measures to be taken in the event that the adaptive management program demonstrates continued degradation of well water, appear nowhere else.

Public participation in the event of any change to the policy is essential. The public participation requirements of RCW 36.70A.035 apply to proposed amendments to comprehensive plans and development regulations. Similarly, the ability to challenge a County's action to the growth management boards is limited to an adopted comprehensive plan, development regulation, or permanent amendment thereto. RCW 36.70A.290(2). Since the County has chosen not to amend the Comprehensive Plan to include the Coastal Seawater Intrusion Policy, a change to the Policy would not be an amendment to the Comprehensive Plan and would not trigger the public participation requirements or Board review under the GMA on those grounds. Instead, the Policy would have to be seen as a development regulation:

(7) "Development regulations" or "regulation" means the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto. A development regulation does not include a decision to approve a project permit application, as defined in RCW 36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city.

RCW 36.70A.030(7).

In fact, in order to be before this Board at all as evidence of County compliance with the GMA, the policy must be a development regulation. RCW 36.70A.290(2). We assume that the County has offered it on that basis. However, we note petitioners' concern that this policy may be invisible or at least hard to find. The important factors in the Board's view are whether the notice, public participation and petition to the Board provisions of the GMA apply to the Coastal Seawater Intrusion Policy. We invite the County to respond on this point at the next hearing on this matter.

Conclusion: The Coastal Seawater Intrusion Policy is an important part of the protection standards that the County has adopted. On remand, we ask the County to address its status within

Jefferson County land use policy and regulations. Otherwise, when the County comes into compliance as indicated in Issues No. 1 and 2, the County will be in compliance on Issue No. 3 as well.

VII. FINDINGS OF FACT

1. Jefferson County is a county which has chosen to plan under Chapter 36.70A.
2. Petitioners participated in hearings before the Board of County Commissioners regarding the protection standards needed to address seawater intrusion.
3. Seawater intrusion typically affects coastal communities.
4. Seawater intrusion occurs when groundwater withdrawals exceed aquifer recharge.
5. Chloride concentration readings of 250 mg/L and above indicate contaminated drinking water under federal drinking water standards.
6. Chloride concentration readings over 100 mg/L are indicative of seawater intrusion, although other factors may cause such readings.
7. The Environmental Protection Agency, Ground Water Section, recommended that Marrowstone Island be designated a sole source aquifer in 1994.
8. The chloride concentration readings taken from wells on Marrowstone Island from 1990-1995 average 232 mg/L.
9. Existing wells on Marrowstone Island have been affected by seawater intrusion.
10. Jefferson County has set 200 mg/L as the level of chloride concentration well readings above which wells will not be permitted as a source of potable water for residential building permits.
11. Jefferson County has designated At-Risk Seawater Intrusion Protection Zones (“SIPZ”) which encompass an area of a 1000-foot radius around a groundwater source with a history of chloride readings of 100 mg/L to 200 mg/L.
12. Well samples and monitoring of well water over time for chloride contamination is required for new wells in At-Risk SIPZ.

13. Jefferson County has designated High-Risk Seawater Intrusion Protection Zones (SIPZ) which encompass an area of 1000-foot radius round a groundwater source with a history of chloride readings greater than 200 mg/L.
14. New private wells are not permitted in High-Risk SIPZ unless a hydrogeologist certifies “of a reasonable probability that the subject aquifer will not be degraded by the proposed use of the well”. UDC 3.6.5(d)(9)(iv)(C)(3). “Degradation” is not defined in the Uniform Development Code.
15. Coastal SIPZ encompass all islands and land area within ¼ mile of marine shorelines and their associated aquifers under the Jefferson County Unified Development Code.
16. An individual well may serve as a potable water source for new construction in a Coastal SIPZ if no public water source is available and if a chloride concentration sample is submitted with the application for a building permit.
17. The County is developing a well monitoring program as part of its adaptive management strategy on seawater intrusion into groundwater.
18. Multiple agencies are being asked to work with the County to implement its adaptive management strategy. The County has proposed agreements for this purpose but has not yet heard back from the other agencies.
19. The County’s Coastal Seawater Intrusion Policy of September 24, 2002, provides that the county commissioners will impose moratoria on building in areas affected by seawater intrusion, if they find that the current protection standards are not effective in preventing seawater intrusion. This policy was passed by resolution.
20. However, the Coastal Seawater Intrusion Policy does not specify times at which the county commissioners will be advised of information indicating seawater intrusion has taken place nor does it indicate the timeframe in which the county commissioners will act upon that information.
21. The County intends to re-draw the Seawater Intrusion Protection Zones (SIPZ) to reflect any well readings in excess of 100 mg/L for At-Risk SIPZ or in excess of 200mg/L for High Risk SIPZ. However, neither the UDC nor the Coastal Seawater Intrusion Policy

specify the times at which the SIPZ maps will be re-drawn.

VIII. CONCLUSIONS OF LAW

1. This Board has jurisdiction over this challenge to Jefferson County's development regulations and policies pertaining to seawater intrusion.
2. Petitioners have standing to challenge Jefferson County's development regulations and policies pertaining to seawater intrusion.
3. The County's development regulations regarding seawater intrusion lack clarity with regard to: the chloride concentration level in a proposed well which will constitute a basis for denial of that well as a source of potable water needed for a building permit; what will constitute "degradation" of groundwater under the development regulations and Coastal Seawater Intrusion Policy; and timeframes in which the County will act to redraw SIPZ maps. Until these matters are specified, the County is not in compliance with the GMA with respect to protection of critical areas (RCW 36.70A.170), critical aquifer recharge areas (RCW 36.70A.030(5)(b)), and the quality and availability of potable water (RCW 36.70A.020(10)).
4. With the adoption of a standard of greater than 200 mg/L as the level of chloride concentrations at which a new well will not be permitted, the County has adopted less than precautionary standards for protection of critical aquifer recharge areas from seawater. These less than precautionary standards must be accompanied by an adaptive management strategy which will promptly impose more rigorous protection standards if scientific evidence shows that seawater intrusion is occurring despite the existing protection standards. The County has formulated such a plan but it is not yet finalized. Further, the plan does not specify the degree of seawater intrusion which will constitute degradation for purposes of imposing more rigorous protection standards nor does it specify needed times for action. Until such plan and clarification is incorporated into County code, the County is not in compliance with the GMA. (Protection of critical areas – RCW 36.70A.170, critical aquifer recharge areas – RCW 36.70A.030(5)(b), and water quality and availability – RCW 36.70A.020(10)).
5. The County has failed to provide adequate protection standards for the sole source

aquifer on Marrowstone Island that respond to the scientific evidence in the record of seawater intrusion into the entire aquifer.

IV. ORDER

Petitioners and respondent agree that the County is in compliance with respect to the first and second directives of the January 10, 2002 Final Decision and Order. After review of the record, we find the County in compliance as to those directives.

As to the three directives that are being challenged, in order to bring its development regulations (UDC) and Seawater Intrusion Policy into compliance with the Growth Management Act, the County must, within 180 days, complete the following:

1. Clarify the language of the UDC and Coastal Seawater Intrusion Policy that a well sample reading greater than 200mg/L would preclude use of a well at that site as the water source for new construction.
2. Clearly define what will constitute “degradation” of groundwater under the UDC and Coastal Seawater Intrusion Policy.
3. Set specific timeframes in which the County will act to redraw SIPZ maps.
4. Finalize the adaptive management program with the other agencies, including the specific degree of seawater intrusion which will constitute “degradation” for purposes of imposing more rigorous protection standards, and the time within which these more rigorous standards must be imposed.

In addition, within 90 days, the County must adopt more stringent protection standards for the sole source aquifer on Marrowstone Island that responds to the scientific evidence in the record.

A compliance hearing will be held on April 9, 2003, at 9:00 a.m. If the County does not adopt more stringent protection standards applicable to Marrowstone Island or adopt a moratorium on development proposals that rely on a groundwater well as proof of potable water while that more stringent standard is being developed, we will hear argument on noncompliance and invalidity on Marrowstone Island at that hearing. The location and briefing schedule for the April 9, 2003

Compliance Hearing will be issued in early March 2003.

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 5th day of December, 2002.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Nan A. Henriksen
Board Member

Les Eldridge
Board Member

Margery Hite
Board Member

[\[1\]](#) The Board also issued a sixth “catch-all” directive not at issue here.

[\[2\]](#) The sixth directive was a “catch-all” provision with no specific actions challenged by Petitioners.