

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

PROTECT THE PENINSULA'S FUTURE and WASHINGTON ENVIRONMENTAL COUNCIL)	No. 00-2-0008
)	
Petitioners,)	COMPLIANCE ORDER
)	
v.)	
)	
CLALLAM COUNTY,)	
)	
Respondent,)	
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PROTECT THE PENINSULA'S FUTURE, et al.,)	No. 01-2-0020
)	
Petitioners,)	FINAL DECISION AND ORDER
)	
v.)	
)	
CLALLAM COUNTY)	
)	
Respondent,)	
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In the final decision and order (FDO) dated December 19, 2000, we found that Clallam County had done an excellent job of incorporating best available science (BAS) in its new critical areas ordinance (CAO). We found six limited instances of noncompliance and further made two determinations of invalidity.

After a significant number of public hearings and workshops, the Board of County Commissioners (BOCC) adopted Ordinance #709 which amended the original CAO. Clallam County filed a statement of compliance actions on July 20, 2001. The County did not file a specific motion to rescind or modify invalidity. By agreement among the County, the petitioners and us, a compliance hearing date of October 4, 2001, and a briefing schedule was established. During that interim period, petitioners Protect the Peninsula's Future and Washington Environmental Council, filed a new petition for review to challenge Ordinance #709. Petitioners, with the County's agreement, requested consolidation with the compliance case and further requested that the Board continue the issues established in the compliance case for the new petition. An order of consolidation was issued on September 11, 2001, which also established the issues and briefing schedule coincidentally with the compliance case.

At the consolidated compliance hearing and hearing on the merits, we admitted petitioners' Exs. 1025 and 1026, along with newly submitted County map Exs. 901, 902, 903, and 904. We also admitted the declarations of Bruce Emery and Joel Freudenthal in support of the newly submitted County exhibits. We received a complete

copy of Ex. 899, Chapter 2 of the draft Environmental Impact Statement (EIS) for the “Forests and Fish Report” dated April 29, 1999 (Ex. 680).

Presumption of Validity, Burden of Proof, and Standard of Review

Pursuant to RCW 36.70A.320(1), Ordinance #709 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 it determines 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).

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As to specific determinations of invalidity, the County bears the burden of showing that the new development regulations (DRs) no longer substantially interfere with the goals of the Act.

Agreed Compliance

The parties agreed that compliance had been achieved concerning: (1) the inconsistency between Clallam County Code (CCC) 27.12.035(9) and other provisions of the ordinance; and (2) the revision for exemptions found in CCC 27.12.035 (8) and (10); and (3) cross referencing CCC 27.12.725 with .715 and .730 for variances and buffer averaging.

We have independently reviewed the record on these agreed compliance actions and with regard to those issues find that the County has complied with the Act.

Disputed Compliance

Type 5 Waters

During the briefing leading up to the original FDO, the County recognized that it had not established any buffers for Type 5 streams and thus stipulated to noncompliance and a remand. The County then adopted revised CCC 27.12.315 (Table 6), which established a 50-foot buffer along Type 5 streams. Petitioners objected to the County’s concomitant adoption of definitional criteria for Type 1-5 waters as a failure to designate all critical areas. Petitioners also objected to an exemption from coverage for any Type 5 stream less than 500 feet in length and to the allowance of buffer averaging that could ultimately reduce Type 4 and Type 5 buffers to a minimum 25-foot width, a 50% reduction from the initial buffer. Petitioners characterized those actions as a failure to protect critical areas and asked that a new determination of invalidity be imposed for the 50% buffer averaging reduction.

During the remand period, the County noticed that in Part Three of the CAO, it had adopted the definitional criteria for Type 1-5 waters as set forth in WAC 242-16-020 and -030 “as amended.” However, in Part Nine the County had included verbatim definitions of Type 1-5 waters as they then appeared in WAC 242-16-030. Observing that

the Department of Natural Resources (DNR) adopted a new water-typing strategy in WAC 242-16-030 in May of 2001, the County decided to leave the preceding version of WAC 242-16-030 in place and adopted its previous verbatim definitions as its CAO definitions.

Petitioners claimed that taking this action amounted to a failure to designate critical areas and a failure to include the most recent BAS as contained in the new DNR WACs. Collaterally, petitioners claimed that the County's failure to adopt the new DNR definition of Type 3 waters amounted to a "substantial amendment."

The County pointed out that it chose to retain the current Type 1-5 hierarchy, but it did nonetheless review the newer definitions developed by DNR. The County incorporated some of the new DNR criteria for "improvements in the definition of Type 5 waters" although it did not overhaul its entire water-typing system.

Given this record, we find that petitioners have failed to show that the County's action in adopting the Part Nine criteria for designation of Type 1-5 waters was clearly erroneous. We do not find that the failure to adopt the new Type 3 definitions constituted a "substantial amendment" or any amendment at all. At this time, the County had the right, under the BAS in this record, to clarify its ordinance by eliminating the potential inconsistency between Part Three and Part Nine. Whether the same can be said by the time the County completes its legislatively mandated review and update due September 1, 2002, remains to be seen.

For its exemption of protection for any Type 5 stream less than 500 feet, the County pointed to the EIS (Ex. 899) for the "Forest and Fish Report" and the fact that many Type 5 streams shorter than 500 feet were still regulated by other provisions of the CAO.

Examination of Ex. 899 does not reveal any scientific support to the County's assertion. DNR regulations and the Fish and Forests Report agreement (Ex. 680) do not support any scientific decision for an exemption of buffer protection for Type 5 streams less than 500 feet. Ex. 878 shows that approximately two thirds of all Type 5 streams in Clallam County are not covered by other provisions of the CAO. The County has carried its burden of showing that this exemption no longer substantially interferes with the goals of the Act, but the petitioners have also carried their burden of showing that the exemption does not comply with the Act.

The County also provided a 50% buffer averaging provision for Type 4 and 5 waters, which allows reduction to a 25-foot buffer. As noted by the County, the requirements for this buffer averaging include a demonstration that the variance is justified and will not be materially detrimental to the critical area, is the minimum necessary to afford relief and further requires a mitigation plan. CCC 27.12.725, .730. The averaging only applies to "minor new development." However, as petitioners pointed out, the County's additional scientific inquiry during the remand period, as well as the original record contained in this case, demonstrates that a 25-foot buffer is "functionally ineffective" (Ex. 854). There simply is no science in this record, much less BAS, to justify an allowance of a 25-foot buffer in any designated critical area. While we acknowledge the County's variance procedures are very strict, the requirements of RCW 36.70A.172(1) do not allow reduction of buffers to this degree even for minor new development.

The County has failed to sustain its burden of showing that the buffer averaging provisions for Type 5 streams

no longer substantially interferes with the goals of the Act and petitioners have carried their burden of showing the buffer averaging to 25 feet for Type 4 and 5 streams does not comply with the Act and substantially interferes with Goal 10 of the Act.

Minor New Development

In the FDO we found that the reduced buffer widths for “minor new development” did not comply with the Act and substantially interfered with the goals of the Act. In response, Clallam County amended CCC 27.12.315 (Table 6) which increased buffer widths for minor new development along Type 5, 4, and 3 waters. Additionally, CCC 27.12.900(39) tightened the definition of minor new development.

In reviewing BAS for this issue, the County relied heavily on Ex. 838, a memo dated June 20, 2001 from County Biologist Joel Freudenthal, and a 1998 research paper by Christopher May concerning impacts to buffers found in Ex. 854. The County noted that it had restricted the definition of minor new development to a total footprint of 4,000 square feet and a total clearing area of 20,000 square feet. The County increased the buffer widths for Type 5, 4, and 3 waters at Table 6 and noted that the increases for Type 4 and 5 waters amounted to the same buffering as for major new development. The County argued that based on Ex. 854 many factors other than pure width size were necessary for proper stream function. May noted that in rural areas the degree of disturbance was typically much less than would be found with a higher “urbanization” of the watershed area. At page 52 of Ex 854, May pointed out that one of the common measures of watershed degradation is the percentage of total impervious area (TIA). Impairment of the stream ecosystem begins when the TIA reaches approximately 10% of the area in question. May also noted at p. 56 that a buffer width less than ten meters (30 + feet) is considered functionally ineffective. While the County appropriately analyzed all of the science in the record and appropriately relied heavily on the Ex. 854, it applied the BAS in this record in an inconsistent manner. Specifically, the County has sustained its burden in removing invalidity as to minor new development in Type 2, 3, 4, and 5 waters (except for the 25-foot buffer averaging process set forth in CCC 27.12.730, discussed at p. 5). In a County illustration at the hearing, the new definitions, applied to a five-acre parcel, resulted in a TIA of less than 10%. However, the County did not apply this standard to any rural lots smaller than 5 acres. Thus, while the County has sustained its burden of removing invalidity, petitioners have sustained their burden of showing noncompliance as to rural lots less than five acres in size having a reduced buffer width but still allowing a 4,000 square footprint in a 20,000 square foot clearing area. BAS in the record does not support the County’s failure to reduce footprint and clearing areas for lots smaller than 5 acres.

Buffer width for Type 1 waters involving minor new development was changed only by adding the term “and as hereafter amended” to the reliance on the setback requirements found in Clallam County’s Shoreline Master Program (SMP) using the typical 5 category system found in most SMPs. In the “Natural” area the 150-foot buffer width was applied to both minor and major new development. In the “Conservancy” area in Type 1 waters, minor new development widths were and currently are established at 75 feet. In “Rural” areas widths are fixed at 50 feet. Those choices are supported by the BAS in this record and the County has sustained its burden of removing substantial interference as to Type 1 waters for the “natural”, “conservancy” and “rural” SMP elements.

The most inconsistent application of BAS in this record involved the County’s failure to change the 35-foot buffer requirement for Type 1 waters in the SMP designated “suburban” and “urban” areas. At p. 17 of the

County's brief it noted that "except for urban and suburban shorelines" the newly established buffers for the newly defined minor new development were within the range of BAS in the record. It correctly noted that "low-density rural areas do not require as wide of stream buffers as do urban areas to protect stream function." At the hearing, the County presented the new maps (Exs. 901-4) which showed the degree of suburban and urban lots already in place in the few areas throughout the County with those designations.

As petitioners pointed out, there is simply no science in this record that allows these inadequate buffers in the urban and suburban SMP classifications. The buffer widths for these two areas are barely above the "functional ineffectiveness" standard established in Ex. 854. The areas do not, in any way, qualify as "low-density rural areas." The County has not met its burden of showing removal of substantial interference and petitioners have more than demonstrated noncompliance as to these two categories relating to minor new development.

Pre-existing and Ongoing Agriculture

In the FDO we found that the County's exemption of CA protections from pre-existing and ongoing agriculture throughout the County did not comply and substantially interfered with the goals of the Act. In response, Clallam County rejected limiting reduced CA protections to only designated resource land (RL) areas and allowed the reduced protection to apply to all existing agricultural uses in any zone that were in existence as of 1992 (the date of adoption of the original CAO) and that were also enrolled in the open space taxation program found in RCW 84.34. Additionally, the County established a requirement that best management practices (BMPs) established with other agencies would suffice in lieu of CA protections under Ordinance #706. Those other agency "farm plans" involved those authorized by the Natural Resources Conservation Service (NRCS) (formerly Soil Conservation Service), or any farm plan that adopted standard BMPs published NRCS "as now or hereafter amended" or any plan that "demonstrates consistency with total maximum daily loads (TMDL) established by the Department of Ecology for specific operations".

The County noted the statement we made in *FOSC v. Skagit County* 96-2-0025 (CO 9-16-98) that balancing of GMA's goals for conservation of the agricultural industry and those for protection of critical areas was not appropriate for non-designated agricultural uses. Clallam County went on to point out, however, that in *ICCGMC v. Island County* 98-2-0023c (CO 11-7-00) (*ICCGMC*) we found compliance where Island County adopted a BMP program for reduced CA protections in a non-resource land agricultural designated area. Thus, the County concluded, it had discretion to allow reduced CA protections anywhere throughout the County when a parcel of land was enrolled in the open space taxation program. The County's reading of *ICCGMC* is erroneous.

In *ICCGMC* we found compliant a program that differs greatly from the one presented by this ordinance. Island County allowed reduced CA protections in a rural agricultural (RA) zone where agriculture use was the only authorized use, although the zone did not qualify as one of long-term commercial significance. The right-to-farm ordinance applied to the RA zone and properties were also required to be enrolled in the open space taxation program in order to qualify.

However, that case went on to hold that the County's attempt to expand lower CA protections to agriculture activity in the general rural zone did not comply with the Act. We noted in that case that:

“If agricultural activity impacting critical areas in the rural zone is important enough to be afforded lessened critical areas protection, it must also be important enough to be designated RA and afforded “right-to-farm” protections.”

Thus, the critical factors in finding compliance were the exclusive zoning designations for agricultural activity in addition to the notice and nuisance protection provisions of the ordinance.

We recognize that there are important local circumstances in Clallam County because of the small agricultural uses, the existing fragmentation of agricultural uses and some significant soil criteria problems in the west end of the County. Nonetheless, adopting a process that involves reduction of CA protections for lots as small as 1 acre is not a proper, nor allowable, balancing of GMA goals. There are many exhibits in this record that demonstrate significant damage to critical areas through ongoing small-scale agricultural practices. We note that under Ex. 842 the County has designated only 6,995 acres as agricultural RL, but would allow almost 22,000 acres (Ex.842) to qualify for reduced CA protections. By its own admission (Ex. 881) results from a recently begun audit through the Clallam County auditor’s office reveal that as much as 1/3 of that 22,000 acres did not, and probably does not, qualify for open space designation.

Clallam County’s attempt to apply reduced CA protections through the criteria established in RCW 84.34 does not comply with the Act. The County has failed to sustain its burden of proof that its action no longer substantially interferes with the goals of the Act.

We also note in passing that a County may not discharge its duty for CA protections by merely acknowledging filing of BMPs with other agencies and without an effective monitoring program, although that question is not before us given the ruling above. RCW 36.70A.290(1).

The petitioners also challenged the language in CCC 27.12.040 as allowing another “loophole” for an ongoing agricultural exemption. The County responded that the only section of Ordinance #706 that applies to pre-existing and ongoing agricultural activities is CCC 27.12.035(7). That result comes about from the County’s interpretation of its own ordinance and the general rule that a specific exemption would apply rather than a general. Nonetheless, the County has failed to clarify this issue and with the language as written is thus noncompliant with the Act. Reference to pre-existing and ongoing agricultural activities should be deleted from CCC 27.12.040. We do not find, given the County’s interpretation of its own ordinance, that petitioners have sustained their burden of demonstrating substantial interference with the goals of the Act as to section .040.

We find that Clallam County has achieved compliance with the GMA in the following respects:

1. The provisions of CCC 27.12.035(9) are now consistent with other provisions of the ordinance;
2. The revisions for exemptions in CCC 27.12.035(8) and (10) now comply with the Act;
3. Cross referencing of CCC 27.12.725 with .715 and .730 now complies with the Act;
4. The adoption of the Part Nine criteria for designation of Type 1-5 waters complies with the Act; and
5. Allowance of reduced buffers for minor new development in the Natural, Conservancy and Rural SMP designated areas complies with the Act.

We find the County’s actions in the following respects fail to comply with the Act:

1. The exemption of Type 5 streams of less than 500 feet;
2. The allowance of buffer averaging in Type 4 and 5 waters to a minimum of 25 feet;
3. The allowance of a 4,000 square foot footprint and 20,000 square foot clearing in rural areas for lots smaller than 5 acres;
4. Reducing CA protections throughout the County based upon participation in the open space taxation provisions of RCW 84.34; and
5. Failing to resolve the inconsistency between CCC 27.12.035(7) and .040.

We find that the County has sustained its burden of removing substantial interference with the goals of the Act in the following respects:

1. The exemption of coverage for Type 5 waters of less than 500 feet;
2. Buffer widths for minor new development in Type 2-5 waters; and
3. Buffer widths for Type 1 waters in the Natural, Conservancy, and Rural designated areas under the SMP.

We find that the County has not sustained its burden of showing its actions no longer substantially interfere with the goals of the Act in the following respects:

1. The allowance of a 25-foot buffer averaging under CCC 27.12.734 for minor new development in Type 4 and 5 waters;
2. Reduced buffers for Type 1 waters under the urban and suburban designations found in the SMP; and
3. Allowance of reduced CA protection for all properties enrolled in the open space taxation program found in RCW 84.34.

Findings of fact and conclusions of law are attached hereto as Appendix I.

This is a Final Order under RCW 36.70A.300(5) for purposes of appeal.

Pursuant to WAC 242-02-832(1), a motion for reconsideration may be filed within ten days of issuance of this final decision.

So ORDERED this 26th day of October, 2001.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

William H. Nielsen
Board Member

Les Eldridge
Board Member

Appendix I
Findings of Fact

1. Clallam County's adoption of the water typing definition criteria set forth in Part Nine of the ordinance is within its range of discretion and BAS found in this record.
2. Clallam County's failure to adopt a new Type 3 definition does not constitute an amendment to either the CP or the DRs.
3. Exemption of any CA protection from Type 5 waters of less than 500 feet is not within the range of BAS found in this record.
4. Buffers of any width less than 10 meters are functionally ineffective under the BAS found in this record.
5. Allowance of buffer averaging to 25 feet on minor new development in Type 4 or 5 waters is not within the range of BAS within this record.
6. Allowance of buffer reductions for minor new developments in Type 2-5 waters (except buffer averaging) is within BAS found in this record for 5-acre or larger parcels.
7. Allowance of reduced buffers for minor new development in Type 2-5 waters for lots that are smaller than 5 acres is not within the BAS found in this record.
8. A buffer width established for natural, conservancy and rural SMP designations in Type 1 waters is within the BAS found in this record.
9. Thirty-five foot buffers for urban and suburban SMP classifications for Type 1 waters does not adequately consider and incorporate BAS found in this record.
10. Reduced CA protection in rural areas based only upon qualification for open space taxation under RCW 84.34 does not properly balance agricultural goals with CA goals and requirements.
11. CCC 27.12.035(7) sets forth language which is inconsistent with CCC 27.12.040.

Conclusions of Law

12. Allowing 25-foot buffer averaging for minor new developments in Type 4 and 5 waters substantially interferes with Goal 10 of the Act.
13. Thirty-five foot buffers for urban and suburban SMP designations in Type 1 waters substantially interferes with Goal 10 of the Act.
14. Reduced CA protection for all properties enrolled in the open space taxation program found in RCW 84.34 substantially interferes with Goal 10 of the Act and is not appropriately balanced by consideration of Goal 8.