BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

OLYMPIC ENVIRONMENTAL COUNCIL, et al.,	)	
	)	No. 01-2-0015
Petitioners,	)	
	)	FINAL DECISION
v.	)	AND ORDER
	)	
	)	
JEFFERSON COUNTY,	)	
	)	
Respondent	)	
	)	

On March 5, 2001, we received a petition for review (PFR) from the Olympic Environmental Council (OEC) and the Shine Community Action Council (SCAC) challenging Jefferson County Ordinance #11-1218-00 regarding surface and groundwater resources, critical aquifer recharge areas (CARAs), critical areas (CA) designation, best available science (BAS) and seawater intrusion. After we granted extensions for several months to enable the parties to reach a settlement on these issues, the parties requested that we proceed through the hearing process.

On December 5, 2001, a hearing on the merits was held at the Port Townsend Council Chambers in Port Townsend, Washington. OEC and SCAC were represented by Colette Kostelec. The County was represented by David Alvarez, Chief Civil Deputy Prosecuting Attorney.

We admitted proposed exhibits 57-63 to the record.

The County agreed to make the following corrections to the UDC where errors had "slipped through" during the adoption process:

1. The County concurs with Petitioners that Ground Water Management Areas as delineated by the State Department of Ecology should be a fourth category of "Special Aquifer Recharge Protection Areas," or "SARPAs" as listed at UDC §3.6.5(a)(3); (See Ex. #2-1, p. 3-15);
2. The County concurs with Petitioners that asphalt batch plants should be prohibited in any

SARPA (a term of art which includes both regions designated as Sole Source Aquifers [such as all of Marrowstone Island] and all Wellhead Protection Areas) and that such asphalt batch plants may be located in a Susceptible Aquifer Recharge Area (or "SARA") only if best management practices (BMPs) are implemented and would be willing to add this language as a new section of UDC §3.6.5(c) (see pages 3-15 and 3-16 of Exhibit #2-1.);

3. The County concurs with Petitioners that the "Protection Standards" listed in UDC §3.6.5 (d)(1) [Ex. #2-1, p. 3-16] should apply to land use activities in both SARAs and SARPAs, not merely in SARAs and Special Aquifer Protection Areas or "SAPAs;"
4. The County concurs with Petitioners that UDC §3.6.5(d)(8) [Ex. #2-1, p. 3-17] entitled "Hazardous Materials" should be amended to reflect the insertion of an additional sentence from ICAO §7.509, specifically the sentence that when a "hazardous materials management plan" is submitted that plan must demonstrate "that the development will not have an adverse impact on groundwater quality." County 11-13-01 Response brief pp. 21-22

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

Pursuant to RCW 36.70A.320(1), Ordinance 11-1218-00 is presumed valid upon adoption.

The burden is on Petitioners to demonstrate that the action taken by Jefferson County is not in compliance with the requirements of the Growth Management Act (GMA, Act). RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), we "shall find compliance unless it determines that the action by [Jefferson 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).

Discussion of Issues

Petitioners made three major charges, claiming the County was clearly erroneous in the adoption of the Critical Aquifer Recharge provisions in the Unified Development Code (UDC) because the code:

1) Failed to adequately classify and designate CARAs;

2) Failed to adequately identify performance standards to protect CARAs; and

3) Was inconsistent with, and failed to implement the comprehensive plan (CP) because of the failures in (1) and (2), and also because of the failure to implement a groundwater monitoring program for CARAs.

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Issue 1

Has Jefferson County failed to comply with Planning Goal 10 of the GMA (RCW 36.70A.020), RCW 36.70A.172(1), and Jefferson County Comprehensive Plan (CP) Goals ENG 2.0 and ENG 13.0 by adopting development regulations (DRs) which inadequately classify and designate critical aquifer recharge areas within the County?

Petitioners claimed:

1) By purposely excluding seawater intrusion areas in the designation of CARAs, despite the evidence in the record of groundwater degradation that is occurring within the County due to this phenomenon, the County has ignored BAS in direct violation of the GMA.

2) Previous studies by Department of Ecology (DOE), CH2M Hill and others identified seawater intrusion as a source of groundwater degradation in Jefferson County.

3) The County has discontinued its groundwater monitoring program, thereby eliminating the possibility of developing a characterization of the hydrogeology.

4) The Western Board found that a lack of knowledge as to extent and degree of vulnerability of an aquifer is not a justifiable reason to take no action towards study, designation and protection of those aquifers. *ARD v. Shelton* WWGMHB #98-2-0005 (FDO 8-10-98) at p. 6.

5) The UDC failed to designate any CARAs specifically on the basis of seawater intrusion. This is in direct contradiction with the GMA and County CP policies ENG 2.0 and ENG 13.0.

6) Although the County committed to designation of seawater intrusion areas as CARAs as part of its 1995 Stipulated Agreement, minutes before UDC adoption by the Board of County Commissioners (BOCC) all provisions related to designation of seawater intrusion areas were deleted.

7) The evidence in the record supports the fact that property within close proximity of the marine shorelines is vulnerable to seawater intrusion and should be designated as a seawater intrusion CARA. Additional CARAs should also be designated around all existing wells showing elevated chloride levels.

8) The County criteria required so many wells in such close proximity that no areas could meet the criteria for designation as vulnerable seawater intrusion areas.

9) Even if the County methodology were appropriate, the County applied its methodology inappropriately by ignoring local BAS in the record thereby ensuring that no seawater intrusion areas would be designated.

10) In the face of inadequate data, the County should have taken a precautionary approach until adequate data could be developed. Instead, it did nothing as to the designation of seawater intrusion areas as CARAs.

The County responded in part:

1) GMA states that BAS serves to protect the functions of "critical areas", not to protect the functions of aquifers. To the County, this is a crucial difference. Both the GMA and the relevant Washington Administrative Code (WACs) define CARAs as areas with critical recharging effect on aquifers used for potable water, not the aquifers themselves. Further, finding the word "recharge" within the standard definition proves that CARAs are places where fresh water enters the ground to recharge aquifers and not where fresh water is being withdrawn.

2) Jefferson County has complied with and exceeded the requirements of the 1998 DOE Guidance Document for the Establishment of Critical Aquifer Recharge Areas (Guidance Document). The County has applied BAS both procedurally and substantively in drafting and eventually adopting the UDC provisions that relate to critical areas. Many of those provisions are more protective of actual critical areas than the 1995 Interim critical areas ordinance (ICAO).

3) The UDC, while discussing seawater intrusion, dealt with that topic in a different manner than the ICAO because the excluded methodology was found unworkable. The primary methodology omitted from the UDC was a process by which a region, based upon its supposed susceptibility or vulnerability to seawater intrusion, would be designated as a CARA. Additionally, once an area was deemed "vulnerable",

BMPs were to be adopted within six months to protect that area. The County's decision to use a different approach does not make that choice non-GMA-compliant.

4) BAS in the record suggests that areas of high chloride may be due to other factors than seawater intrusion and does not necessarily mean that the quality of groundwater in the County is being degraded by human activity.

5) The County has provided the Watershed Planning Group responsible for Watershed Resource Inventory Area #17 (WRIA #17) with the data on chloride concentrations gathered by the County. The Watershed Planning Unit for WIRA#17 represents a broad spectrum of entities, persons and agencies having a stake in the water resource issues facing eastern Jefferson County and Clallam County. Work on water resource issues should be done on a watershed-by-watershed basis rather than by a county, which is restrained by arbitrarily drawn county boundary lines.

6) Nothing in the GMA, applicable WAC provisions or the DOE Guidance Document suggests that the human activity of digging a well and finding high-saline water at a specific location then demands that such a location must be given the status of a CARA. Instead, CARAs are defined by the geology that is in place at the given location.

7) The County did an analysis of priorities of various tasks it must perform and decided other issues (i.e. salmon) were more important to deal with now.

8) Jefferson County has sufficiently classified and designated its critical areas, as that term is defined in the GMA, and Petitioners have not satisfied their burden of proof with respect to Issue #1.

Petitioners replied in part:

1) The County has completely failed to understand the purpose of the CARA provisions of the GMA.

> "The GMA requires designation and protection of 'areas with a critical recharging effect on aquifers used for potable water.' RCW 36.70A.030(5)(b). Does this mean protect the aquifer or protect the recharge area? The answer is clearly BOTH. The potability of the aquifer must be protected by ensuring that a clean supply of fresh water is recharging it. If there is any potential for a contaminant entering the aquifer to impact the potability of the aquifer, there must be standards in place to prevent that from occurring. If there is any potential for a withdrawal to impact the potability of the aquifer, such as by removing a quantity of water that causes an imbalance in the

system (for example, between fresh water and seawater), there must be standards in place to prevent that from occurring." 11-27-01 Reply brief p. 1

2) DOE Guidance Document is not the only BAS in the record. The DOE Marrowstone Island report, CH2M Hill/Forbes report and other local studies are also BAS. Further, the UDC does not precisely mirror or exceed the Guidance Document as claimed by the County.

3) Several clear errors were made in the analysis leading the County to the conclusion that there were no vulnerable seawater intrusion areas in Jefferson County:

a) The County's consultant recommended methodology inconsistent with, and less conservative than, the ICAO and the County adopted BAS;

b) The County used a different, and again less conservative, criterion than that recommended by the consultant; and

c) The County either did not apply the criteria accurately, or did not apply them to all the available data.

Therefore, the County's conclusion that no vulnerable seawater intrusion areas exist is without merit.

4) The County cannot abdicate its responsibility for seawater intrusion designation and regulation to the WRIA Planning Unit. Under GMA and its own CP policies, that is the County's responsibility. WRIA #17 has no authority to take binding action on this issue even if it chose to, because it is only an advisory body.

Board Discussion on Issue 1

According to GMA Goal 10, local governments must:

> 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.030(5) states:

> "Critical areas" include the following areas and ecosystems:
> (a) wetlands, (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas. (Emphasis added.)

RCW 36.70A.172 begins:

> Critical areas – Designation and protection – Best available science to be used.

Further, Jefferson County's CP goals and policies recognized the County's obligation to designate and protect aquifers using BAS:

> "Protect the quality and quantity of surface and groundwater resources and enhance and restore them where they have been damaged." ENG 2.0
>
> "Protect aquifer recharge areas from depletion of aquifer quantity or degradation of aquifer quality." ENG 13.0
>
> "Aquifer recharge areas should be designated and managed based on the best available science." ENP 13.1

In *CCNRC v. Clark County*, WWGMHB #96-2-0017 (FDO, 12-6-96 at p. 8), we held that local jurisdictions are required:

> "to include BAS in a substantive way in both the designation and the protection components of critical areas."

The definition of CAs in RCW 36.70A.030(5) is not restricted to the County's argument at p. 5. If we accepted the County's interpretation, it would lead us to an absurd result.
Given the above, it is obvious that both the Act and the County's own CP require Jefferson County to protect not only those places where freshwater enters the ground, but also the aquifers that they feed. Therefore, the County must classify and designate seawater intrusion areas as CAs, including BAS in a substantive way.

We further agree with Petitioners that the DOE Guidance Document was not the only BAS in the record. Ignoring the local studies that had previously been done was clearly erroneous. **After studying the entire record, we find that the County did not substantively apply the BAS in the record in adoption of its final UDC as regards to seawater intrusion areas.**

The County also erred in setting and applying its designation criteria in such a way as to enable the County to conclude that no vulnerable seawater intrusion areas exist in Jefferson County.

Although the County claimed that the data in the record was not adequate to designate vulnerable seawater intrusion areas, that does not nullify the County's obligation to take action to designate and protect CARAs including aquifers used for potable water. In the 8-10-98 FDO

in *ARD v. Shelton* 98-2-0005, we ruled that where the record demonstrated the existence of CARAs but there was a lack of knowledge as to their actual extent and degree of vulnerability, a decision by the local government to take no action did not comply with the GMA.

The County is correct that a county's decision to use a different approach then previously adopted does not necessarily make that choice non-GMA-compliant. However, the new approach must comply with the Act. In this case, the County's approach of failing to designate any vulnerable seawater intrusion areas as critical areas, does not comply with the Act.

We sympathize with the County's lack of funding and its need to deal with other issues requiring its money and manpower. However, we have no authority to find compliance simply because of this lack of manpower and funding. Only the Legislature can make that decision.

It makes great sense for the WRIA #17 planning group to study water issues on a watershed basis. However, that group has no authority to take binding action on this issue. Therefore, the County cannot abdicate its GMA responsibility for seawater intrusion designation to the WPU.

Given this record, Petitioners have sustained their burden of showing that the County erred in failing to properly classify and designate vulnerable seawater intrusion areas as critical areas.

Issue 2

Has Jefferson County failed to comply with RCW 36.70A.172(1) and Jefferson County Comprehensive Plan Goals ENG 2.0 and ENG 13.0 by adopting development regulations that fail to identify adequate protection standards to be applied to land uses within Critical Aquifer Recharge Areas?

The County stated at pp. 54 and 55 of its response brief:

> "Since the County has concluded that the human activity of digging a well is not sufficient proof that a CARA exists at a particular location, it is completely true that the County does not protect 'vulnerable to seawater intrusion' areas. That is because the GMA definitions are silent as to the withdrawal of water

triggering the presence of a CARA." (Emphasis added.)

The County went on to point out that Title 90 of the Revised Code of Washington, and not the GMA, regulates withdrawal of ground water from individual wells. DOE administers Title 90, not the County. Therefore, the County lacks any authority to regulate the consumption of water by individuals from so-called exempt wells. The County supported this position by arguing three principles of statutory construction (failure of the Legislature to amend Title 90, specific statues control over general ones, and no absurd consequences should arise from comparing two statutes.)

The County further stated at pp. 60 and 61 of its response brief:

> "While the County strongly disagrees that it has the power under GMA to impose water conservation measures upon owners of exempt wells, the issue at hand can be further distilled into the simple statement that Jefferson County, whether or not it is so empowered, chooses not to impose (or attempt to enforce) water conservation measures. Jefferson County holds that prerogative because what it has enacted adequately classifies, designates and protects critical areas, as that term of art is defined in the GMA.
>
> These water conservation measures disguised as BMPs, when proposed by County staff, were met with a resounding lack of enthusiasm by the County's Planning Commission, which only halfheartedly forwarded them to the County Commissioners for consideration by those elected officials."

The County pointed out that it had adopted UDC §3.6.5(c)(3) to help to protect aquifers from further seawater intrusion caused by new development. That subsection provides:

> "Seawater Intrusion Areas. Marine shorelines and islands are susceptible to a condition that is known as seawater intrusion. Seawater intrusion is a condition in which the saltwater/freshwater interface in an aquifer moves inland so that wells drilled on upland areas cannot obtain freshwater suitable for public consumption without significant additional treatment and cost. Maintaining a stable balance in the saltwater/freshwater interface is primarily a function of the rate of aquifer recharge (primarily through rainfall) and the rate of groundwater withdrawals (primarily through wells). The Washington Department of Ecology is the only agency with authority to regulate groundwater withdrawal for individual wells in Jefferson County. Therefore, new development and land use activities on islands and in close proximity to marine shorelines in particular should be developed in such a manner to

maximize aquifer recharge and maintain the saltwater/freshwater balance to the maximum extent possible by infiltrating stormwater runoff so that it recharges the aquifer. To help prevent seawater from intruding landward into underground aquifers, all new development activity on Marrowstone Island, Indian Island and within 500 feet of any marine shoreline shall be required to infiltrate all stormwater runoff, to the maximum extent practicable, onsite."

The County officials were concerned that any additional protections as recommended by staff could make the County liable to a "takings" claim.

Further, the BOCC deleted the workplan for monitoring of seawater intrusion areas, claiming the UDC was not the appropriate venue for workplans, since the UDC is a development regulation.

In addition to the arguments presented under Issue 1, Petitioners countered in part:

"While Jefferson County claims that Ecology is the only agency with the authority to regulate groundwater withdrawals from individual 'exempt' wells, it is important to understand from what regulatory authority individual wells are exempt. 'Small withdrawals' are <u>exempt only</u> from the requirements that an application be made and a permit received from Ecology prior to withdrawal of public ground water. RCW 90.44.050. This is a water rights issue, not a water quality issue. Small withdrawals are <u>not exempt</u> from any of the other substantive provisions of the Ground Water Code. Chapter 90.44 RCW. Although small withdrawals are exempt from the requirements to obtain a permit, they cannot affect surface water rights (RCW 90.44.030), cannot be wasted without economical beneficial use (RCW 90.44.110), and are subject to the same system of priorities as all other appropriators, that is, where the first right is the better right (RCW 90.44.130).

The exemption of RCW 90.44.050 **should not and does not** limit a local jurisdiction from complying with **its mandate** for protection of groundwater quality and quantity under the GMA. Where seawater intrusion is obviously occurring as a result of withdrawals from individual wells, it is the duty of the local jurisdiction to deal with the situation by first recognizing such wells in a designation of seawater intrusion areas as CARAs, and then by applying protection standards to land uses and groundwater withdrawals within those areas.

Having taken a position that it cannot address groundwater <u>withdrawals</u>, the County has left itself no other option than to try to address seawater intrusion

through regulation of recharge. The County attempts to do this by requiring 'to the maximum extent practicable' infiltration of stormwater runoff for development that occurs within 500 feet of a marine shoreline and on all areas of Marrowstone and Indian Islands. There is no evidence in the record to indicate that this decision is justified through best available science ('BAS'). In fact, the Western Board has found that such language does no even constitute a protection standard:

> 'The provision…that 'trees and vegetation shall be retained to the extent feasible' is not a standard, but merely…an 'exhortation to do the right thing.'
> *Diehl v. Mason County*, WWGMHB No. 95-2-0073 (CO. 3-22-00) at 7……

In order for the County's chosen protection standard for seawater intrusion areas to be considered valid, the results of an analysis would have to show that the volume of recharge achieved through its methodology equaled or exceeded the volume of groundwater withdrawn from the regulated aquifers on a seasonal, as well as annual, basis.

There is nothing in the record to show that the County has done any such data analysis. Instead, they have chosen to adopt a regulation that is easily implemented but which is very likely ineffective as a protection standard." Petitioners 10-25-01 brief, pp. 20-22. (Emphasis in original.)

Petitioners also contended that in order to protect County aquifers from further degradation due to seawater intrusion, measures must be designed and adopted which, in one way or another, reduce the amount of water that is withdrawn from an impacted aquifer. Jefferson County was aware of this, but declined to adopt any protective measures in the UDC related to groundwater withdrawals.

Petitioners further noted that although the County has stated that "any program to address seawater intrusion would require staff resources and should be balanced against other environmental and public health priorities" (Ex. #13-27 at 7), nothing in the record shows the County's analysis of those competing priorities and why protection of the County's potable water supplies does not deserve a higher ranking. Further, BAS in the record requires additional protection from seawater intrusion.

As to the County's "takings" concerns Petitioners stated:

> "The County is concerned that requiring best management practices such as a moratorium on subdivisions, mandatory lot consolidation and a complete moratorium on new wells in seawater intrusion areas would make the County liable to a 'takings' claim under the Fifth Amendment to the Constitution. Id. at 61, 62. In fact, it seems more likely that the County will be subject to a takings claim by property owners whose existing wells are becoming contaminated and potentially unusable by the County's continued approval of additional wells within seawater intrusion areas. The County is especially vulnerable to this claim since the protection standards contained in the UDC related to seawater intrusion are so inadequate and are not scientifically defensible, as shown in Petitioners' Opening Brief. Opening Brief at 21, 22." Petitioners 11/27/01 brief at pp. 13-14.

Petitioners further pointed out that many of the proposed BMPs could not be construed as directly infringing on a persons "right" to withdraw water from an individual well (education programs, notice to title, metering and reporting usage, use of alternative water sources, etc).

Petitioners added:

> "The County has argued that it didn't approve any BMPs for seawater intrusion areas because the Planning Commission at the time was not wholeheartedly in favor of the proposed regulations and so the Board of County Commissioners ("BOCC") **never acted to either reject or adopt the BMPs.** Id. at 38, 39. The Planning Commission is an advisory body to the BOCC, and the citizens of this county rely on the elected officials to make the hard decisions that are for the good of all of the people, now and in the future. Clearly the BOCC fell short of its duty in this case." Id. at p. 15. (Emphasis in original.)

Petitioners contended that the BAS in the record was clear that given the documented seawater intrusion problem in Jefferson County, the County must include an adaptive management program containing a scientifically defensible groundwater monitoring element and workplan to ensure compliance with the BMPs:

> "Whether the County puts its workplan for adaptive management in the UDC or in a separate GMA ordinance, **the County should be found not in compliance with the Act until it adopts an effective adaptive management program** that protects Jefferson County potable aquifers from seawater intrusion and other contaminants.
>
> With the County's history of failure to develop and implement workplans when required by Ordinance (e.g., the failure to implement either the CAO requirements for a hazardous materials monitoring workplan or the UDC adoption ordinance requirement for a workplan to address seawater intrusion), it is difficult for the Petitioners to believe that the County will be any more likely to do so as part of any other process. However, at least when such workplans are identified as a component of a GMA-related document, there is the

possibility for filing an appeal to, and reviewing compliance by, the Hearings Board. As the County has failed to offer any other mechanism for ensuring development and implementation of workplans, Petitioners would argue that they are an appropriate component of the UDC.

As pointed out in Petitioners' Opening Brief, protection standards are only as good as their implementation, monitoring and enforcement. Protection standards must be supported by a willingness (as indicated by adequate staffing, funding and workplan) to ensure implementation of standards. The Guidance Document clearly states that 'the local jurisdiction is expected to design and implement a monitoring or inspection procedure(s) that will give some degree of assurance that the conditions imposed are being followed.' Ex. 24-2 at 20, emphasis added. Any such assurance is completely lacking in the UDC or in the County's history of implementation of ordinances affecting critical areas." Id. at pp. 18 and 20.

Board Discussion on Issue #2

All of our discussion on issue 1 is equally applicable to issue 2. We will not reiterate what we said there, but incorporate by reference those points into this discussion. That discussion led us to the conclusion that under GMA, the County must protect its groundwater consistent with BAS. Further, per GMA Goal 10, the County has the overriding responsibility to protect its groundwater quality whether or not it has officially designated seawater intrusion areas as CARAs.

In previous decisions regarding the protection of CARAs we have held:

1) The lack of specific DRs or requirements to meet the goals of the County's CAO did not comply with the GMA. *Diehl v. Mason County* 95-2-0073 (FDO 1-8-96)

2) A local government is required to adopt permanent regulations which address protection of CARAs. *Dawes v. Mason County* 96-2-0023 (FDO 12-5-96)

3) If BMPs are relied upon for protection of CAs, some form of monitoring and enforcement must be included to ensure that the plans are actually implemented and followed. *ARD v. Shelton* 98-2-0005 (FDO 8-10-98)

We disagree with the County's claim that it held the prerogative not to impose groundwater conservation measures (whether or not it was empowered to do so) because what it had enacted

adequately protected CAs. The record does not support that assertion, since there is no evidence in the record that the County's chosen action will adequately protect the quality and quantity of groundwater.

We are not persuaded by the County's arguments that it has no authority to impose some form of water conservation measures, limiting the number of new wells allowed or other measures to reduce the withdrawal of groundwater from individual wells if that withdrawal would disrupt the seawater/freshwater balance and lead to greater seawater intrusion. The exemption of RCW 90.44.050 does not limit a local jurisdiction from complying with its mandate for protection of groundwater quality and quantity under the GMA.

We find no evidence in the record that the limited action taken by the County will actually prevent further degradation of the aquifers. In fact, as written, UDC §3.6.5(c)(3) ensures nothing but only exhorts people to do the right thing. We previously found in *Diehl v. Mason County* WWGMHB 95-2-0073 that such language did not constitute a protection standard.

Even if the County's recharge "requirement" were given the needed teeth to actually be a protection standard, there would also need to be an analysis in the record to show that the volume of recharge achieved through the recharge requirement would at least equal the volume of groundwater withdrawn, so as not to exacerbate the seawater intrusion problem.

The Office of Community Development's rules regarding BAS (WAC 365-195-920(1)) state that in the face of inadequate scientific information, counties should use 'a precautionary or no-risk approach in which development and land use activities are strictly limited until the uncertainty is sufficiently resolved." WAC 365-195-920(2) also states that, if a more lenient protection standard is adopted, an adaptive management program must be implemented in order to acquire more data, evaluate the adopted protection strategy, and have stricter remedial actions planned and ready to implement in case that strategy is not working adequately.

The record shows that the County continues to require saline readings for new wells. However, it has no plan for evaluating this new well data and has discontinued the monitoring of existing wells. If the County, upon remand, wishes to adopt less-than-precautionary protection standards

and BMPs, an adaptive management program must be developed and implemented that would ensure that monitoring of new and existing wells would continue and more strict protective action were planned for and ready to implement in case the adopted strategies are not adequate. **Petitioners have met their burden on this issue. We are convinced that the County erred in adopting DRs to protect aquifers used for potable water from further seawater degradation.**

Petitioners also argued that the County's BMPs for asphalt batch plants within CARAs were not adequate. Although the BMP package could be improved, after consideration of the record, the entire package of adopted BMPs, and parties arguments, Petitioners have failed to convince us that the County clearly erred.

Issue 3

Has Jefferson County failed to comply with RCW 36.70A.040 and RCW 36.70A.060(3) by adopting regulations that are inconsistent with the Jefferson County Comprehensive Plan Goals ENG 2.0 and ENG 13.0 and Policies ENP 1.3, ENP 2.1, ENP 2.6, ENP 2.8, ENP 2.9, ENP 13.1 and ENP 13.2?

Since we already determined under issue 1 that the County's challenged UDC provisions were inconsistent with ENG 2.0, ENG 13.0 and ENP 13.1, we find no reason to further discuss this issue. We incorporate the discussion under Issue 1 and 2.

Petitioners have met their burden on this issue. We are convinced that the County erred in adopting regulations which are inconsistent with the CP goals and policies related to aquifer protection. Upon remand, the County must adopt regulations in its UDC which are consistent with and fully implement the listed CP goals and policies.

ORDER

In order to comply with the Act, the County must take the following actions by the deadlines specified:

1) Make the changes agreed to and listed on p. 2 of this decision within 90 days.

2) Properly classify and designate vulnerable seawater intrusion areas as CARAs, including BAS in a substantive way, within 180 days.

3) Within 180 days, develop and adopt protection standards for CARAs, based on BAS, to prevent further groundwater degradation from seawater intrusion.

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 DRs 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 DRs, analyze them to ensure that they are consistent with and fully implement the relevant CP goals and policies.

6) Any findings of noncompliance in previous sections of the FDO that have not been listed here are incorporated by reference.

Findings of Fact pursuant to RCW 36.70A.270(6) are adopted and attached as Appendix I 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 10th day of January, 2002.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____

Nan A. Henriksen

Board Member

_____

William H. Nielsen
Board Member

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Les Eldridge
Board Member

Appendix I

Findings of Fact pursuant to RCW 36.70A.270(6)

1) Studies by Department of Ecology, CH2M Hill and others have identified seawater intrusion as a source of groundwater degradation in some areas of Jefferson County.

2) The County had previously stipulated that it would designate vulnerable seawater intrusion areas as CARAs. However, the County claimed that it did not have enough data to designate any vulnerable seawater intrusion areas as CARAs when it adopted the UDC. Instead of taking a precautionary approach, the County chose to designate none.

3) All provisions related to the designation of seawater intrusion areas were deleted from the UDC.

4) The County methodology set testing criteria in such a way that no vulnerable seawater intrusion areas were identified. Further, the County ignored BAS in the record that would have enabled it to identify and designate such areas.

5) The County turned over any possible provision for future designation and protection to WRIA #17, which has no authority to take such action.

6) The County stated at p. 54 of its response brief:

"Since the County has concluded that the human activity of digging a well is not

sufficient proof that a CARA exists at a particular location, it is completely true that the County does not protect 'vulnerable to seawater intrusion' areas."

7) The County deleted from the UDC its workplan for monitoring of seawater intrusion areas, claiming the UDC was not the appropriate venue for workplans. It also discontinued all monitoring except for new wells.

8) The County provided no evidence in the record that the single recharge requirement included in the UDC would ensure protection from seawater degradation of aquifers used for potable water.

9) The County failed to adopt an adaptive management plan providing for ongoing monitoring and evaluation to ensure that the County's chosen protection mechanism was actually working.

10) There was also no evidence in the record to show that the County acted to ensure that its newly adopted UDC was consistent with its CP goals and policies related to groundwater quality.

Glossary of Terms

BAS	Best Available Science
BMP	Best Management Practices
BOCC	Board of County Commissioners
CA	Critical Area
CARA	Critical Aquifer Recharge Area
CP	Comprehensive Plan
DOE	Department of Ecology
DR	Development Regulation
FDO	Final Decision and Order
GMA	Growth Management Act
ICAO	Interim Critical Areas Ordinance

OEC	Olympic Environmental Council
SCAC	Shine Community Action Council
UDC	Unified Development Code
WAC	Washington Administrative Code
WRIA	Watershed Resource Inventory Area