

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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YAKIMA COUNTY and  
YAKIMA COUNTY FARM BUREAU, INC., et. al.,

Respondents,

v.

EASTERN WASHINGTON  
GROWTH MANAGEMENT HEARINGS BOARD,  
FUTUREWISE, and  
CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION,  
et. al.,

Appellants.

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**BRIEF OF APPELLANT CONFEDERATED TRIBES AND BANDS  
OF THE YAKAMA NATION**

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Yakama Nation

**FILED**

JUN 13 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

No. 297632

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## **I. INTRODUCTION**

Appellants Confederated Tribes and Bands of the Yakama Nation (Yakama Nation) and Futurewise are appealing the Superior Court of Yakima County's Decision on Petition for Judicial Review, which reversed the Final Decision and Order of the Eastern Washington Growth Management Hearings Board (EWGMHB or Board) in Case No. 08-1-0001c. This appeal arises out of Respondent Yakima County's adoption of amendments updating its Critical Areas Ordinance (Ordinance 13-2007) pursuant to the Growth Management Act on December 18, 2007. In its decision the EWGMHB determined that Yakima County's ordinance violated the Growth Management Act (GMA) because the adopted vegetative buffer widths for streams failed to protect all functions and values of riparian areas as required by the statute. This ruling is consistent with the case law interpreting the GMA, and is supported by substantial evidence. The Board's decision should therefore be upheld by the Court.

## **II. ASSIGNMENT OF ERROR**

The Superior Court for Yakima County erred in entering its decision of February 8, 2011, which: 1) reversed a ruling by the EWGMHB that Yakima County's proposed stream buffer widths in its revised Critical Areas Ordinance violated the GMA, and 2) remanded the case to the Board for further proceedings consistent with its decision. CP 4.

### **ISSUE ON APPEAL**

Was the EWGMHB correct in determining that Yakima County violated the GMA by failing to protect all the functions and values of critical areas in its designation of stream buffer widths, and also failing to provide a reasoned justification for not using the best available science?

## **III. STATEMENT OF THE CASE**

In 1995, the Legislature amended the Growth Management Act to include a provision requiring the use of

the “best available science” (BAS) in protecting the functions and values of critical areas through development regulations. RCW 36.70A.172(1). That same year, Yakima County enacted its existing Critical Areas Ordinance (CAO) after a Finding of Compliance was issued by the EWGMHB. See *Confederated Tribes and Bands of the Yakima Indian Nation v. Yakima County*, EWGMHB Case No. 94-1-0021 (Sept. 25, 1995). The new BAS requirement was therefore not included in the development of the existing CAO.

The County began its public process of considering possible 7-year amendments to the 1995 ordinance in 2005. Administrative Record (AR) 3466.<sup>1</sup> To compile and review the BAS, the County formed a Science Advisory Group in October 2002, in which the Yakama Nation was represented. AR 3470. A first draft of the BAS Review was released to the

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<sup>1</sup> The Administrative Record as transmitted by the Superior Court uses the original index numbers. All references to the record before the EWGMHB are cited as “Administrative Record (AR)” with the original Bates Stamp number. References to the Superior Court decision cite the CP and page number.

public for comment in March 2004, and a final draft was issued in October 2006. AR 3471.

In 2005 and 2006, a series of Roundtable sessions were held with representatives of various interest groups within Yakima County, including the Yakama Nation. Draft chapters of a revised CAO were distributed for comment by the participants. AR 3466. Public hearings were then held by the County from December 2006 to December 2007. AR 3462-63. The revised CAO, Yakima County Code (YCC) Chapter 16C, was enacted by the Board of County Commissioners (BOCC) as Ordinance No. 13-2007 on December 18, 2007.

The Yakama Nation timely filed a Petition for Review (PFR) with the EWGMHB on February 19, 2008 (PFR 08-1-0007), challenging the CAO on a number of different grounds pursuant to the GMA. AR 363-67. Respondent Yakima County Farm Bureau intervened in the proceeding before the Board, which was consolidated with several other petitions. Only the issues numbered 12 and 15 were ultimately briefed

and argued by the Yakama Nation in a Hearing on the Merits before the EWGMHB on March 11, 2010.

The Hearings Board issued its Final Decision and Order on April 5, 2010. *Hazen, et. al. v. Yakima County*, EWGMHB Case No. 08-1-0008c, FDO (April 5, 2010). Regarding Issue 15, the Board ruled that Yakima County violated the GMA's provisions at RCW 36.70A060(2) and 36.70A.172(1) by approving widths for vegetative buffers in YCC § 16C.06.16 that "fall outside of the range supported by BAS." AR 3774. Relying on *Whidbey Environmental Action Network v. Island County*, 122 Wn.App. 156, 93 P.3d 885 (2004) (*WEAN*), the Board concluded that "the County has provided no reasoned justification for departing from BAS." *Id.*

On May 4, 2010, the County filed a Petition for Review in the Superior Court of Yakima County, pursuant to the Administrative Procedure Act, challenging *inter alia* the Board's findings and conclusions regarding the stream buffers. The following day the Farm Bureau also filed a

Petition with the court challenging the FDO. The court granted a joint motion to consolidate the two cases.

The Superior Court issued its decision on February 8, 2011, reversing the EWGMHB's ruling on Issue 15. In a cursory opinion the court summarily concluded that "the County's determination that the existing buffers had been, for the most part, adequately performing their intended function was a reasoned justification for the buffers adopted in the CAO." CP 4. Based on this finding, the court then held that "the Board's determination that the buffers violated the GMA was in error." *Id.* This appeal followed, and the Respondents then cross-appealed.

#### **IV. ARGUMENT**

##### **A. Standard of Review**

Judicial review of the Growth Management Hearings Board's final decisions is governed by the Administrative Procedure Act (APA), Chapter 34.05 RCW. *Quadrant*

*Corporation v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005). Under the APA, the burden of demonstrating the invalidity of agency action is on the party asserting the invalidity, meaning the petitioner (in this case the Respondents, Yakima County and the Yakima County Farm Bureau). *Id.*

Amendments to development regulations are presumed valid upon adoption, and the Board must find compliance unless it determines that the regulations are “clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” RCW 36.70A.320(1) and (3); *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 340, 190 P.3d 38 (2008). In finding that they are “clearly erroneous,” the Board “must have a ‘firm and definite conviction that a mistake has been committed.’” *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 497, 139 P.3d 1096 (2006).

This Court stands in the same position as the court below in reviewing the Hearings Board's decision. *Thurston County*, 164 Wn.2d at 341. The Board's legal conclusions are reviewed *de novo*, "giving substantial weight to the Board's interpretation of the statute it administers." *Swinomish Indian Tribal Community v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 424, 166 P.3d 1198 (2007). Factual findings are reviewed under the substantial evidence test, by which "there is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). On mixed questions of law and fact, reviewing courts "determine the law independently, then apply it to the facts as found by the agency." *Lewis County*, 157 Wn.2d at 498. Although courts are not bound by a Board's decision, deference is accorded to agency interpretations of the law where the agency has special expertise in such issues. *City of Redmond*, 136 Wn.2d at 46.

The Legislature has directed reviewing courts to accord counties substantial deference in their planning decisions under the GMA, superseding any deference to the EWGMHB as a state agency pursuant to the APA. RCW 36.70A.3601; *Quadrant*, 154 Wn.2d at 238. However, this deference is not unlimited; “local discretion is bounded...by the goals and requirements of the GMA.” *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 561, 14 P.2d 133 (2000). A court may forego deference to a regulation “that is not ‘consistent with the requirements and goals of the GMA.’” *Thurston County v. Cooper Point Ass’n*, 108 Wn.App. 429, 444, 31 P.2d 28 (2001). In sum, such deference ends “when it is shown that a county’s actions are in fact a ‘clearly erroneous’ application of the GMA.” *Yakima County v. E. Wash. Growth Mgmt. Hearings Bd.*, 146 Wn. App. 679, 687, 192 P.3d 12 (2008).

**B. The Board's conclusion that the County's designated stream buffer widths fail to protect all functions and values of critical areas is supported by both the GMA and substantial evidence in the record.**

The EWGMHB's decision to invalidate the County's stream buffer widths was based on logical conclusions informed by a substantial amount of evidence in the record regarding the "best available science." This ruling was also based on the GMA's requirement that all functions and values of critical areas be protected.

The GMA requires that the County adopt development regulations that protect its designated critical areas. RCW 36.70A.060(2). In doing so, the County must "include best available science in developing policies and development regulations to protect the functions and values of critical areas." RCW 36.70A.172(1); WAC 365-195-900(2). In determining whether the County has included BAS in its CAO amendments, the Board should have considered the following factors: 1) the scientific evidence contained in the record; 2)

whether the analysis by the County of the scientific evidence and other factors involved a reasoned process; and 3) whether the decision made by the County was within the parameters of the GMA as directed by the provisions of RCW 36.70A.172(1). *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 834, 123 P.3d 102 (2005). In other words, the County must “analyze the scientific evidence and other factors in a reasoned process.” *Id.* at 835. However, if the County decides to adopt a CAO amendment that is outside the range of BAS, it “must provide findings explaining the reasons for its departure from BAS and identifying the other goals of GMA which it is implementing by making such a choice.” *WEAN*, 122 Wn.App. at 173.

In this case, the County’s buffers for streams are addressed in § 16C.06.16 of the CAO. AR 2893. That section provides that buffer widths “shall be determined according to stream or wetland type.” YCC § 16C.06.16(1), *Id.* “Type 2” streams are “those surface water features which require

protection due to the nature of their contributions to the functional properties listed in Section 16C.06.05.” YCC § 16C.06.06(2), AR 2887. The ordinance specifically identifies eight Type 2 streams within Yakima County, which are listed in Appendix A. AR 2909. “Type 3” streams include “all perennial streams within Yakima County not classified as Type 1 or 2;” “Type 4” streams are all intermittent streams not classified as Type 1, 2 or 3.<sup>2</sup> YCC § 16C.06.06(3)-(4), AR 2887.

The standard and minimum widths are listed in Table 6-1 of the revised CAO. AR 2893. The County establishes a “standard” vegetative buffer for Type 2 streams of 75 feet, and a “minimum” of 25 feet. Buffers for Type 3 are 50 feet standard and 25 feet minimum; Type 4 buffers are set at only 25 feet standard and 15 feet minimum. *Id.* The County provides for downward adjustment of the buffer to the

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<sup>2</sup> “Type 1” streams are those that meet the criteria under the Shoreline Management Act (SMA) for “shorelines of the state” and “shorelines of statewide significance,” and are outside of GMA jurisdiction. YCC § 16C.06.06(1).

minimum width based on criteria in a process outlined elsewhere in the ordinance. YCC § 16C.06.16(2)-(3), *Id.*; YCC § 16C.03.23, AR 2856. There is no provision for increasing the buffers beyond the “standard” width where necessary to protect the functions and values of critical areas.

The Hearings Board is correct in holding that these stream buffer widths (and their potential adjustments to minimums) are not within the range of the best available science. In this case the record shows, and the Board’s decision reflects, that the County: 1) did not use a reasoned process, 2) failed to establish stream buffers that are within the range of BAS, and 3) provided no findings explaining the reasons for its departure. Court should therefore hold that the EWGMHB’s decision is supported by the record and the goals of the GMA.

The object of the BAS review for the Yakima County CAO “was to examine the range of science and assess how the

current buffers fit within that range.” AR 3765. In theory this was the “reasoned process” that *Ferry County* requires:

The BAS review identified a range of buffer widths that would be acceptable for different functions. When the combination of the different functions is compiled together, it also resulted in a range for a general buffer width.

AR 3478. However, the County’s conclusion that “the buffers in the proposed CAO fell within that range” failed to recognize that some functions of critical areas were simply not going to be protected by the narrow margins being proposed.

*Id.* As the Board correctly points out in its decision, the County’s idea of the proper “range of science” was skewed because the widths within that range fell below what is protective of all functions and values of critical areas. See *WEAN*, 122 Wn.App. at 174 (“functions and values” of critical areas required to be protected under the GMA “means all functions and values”). The significance of this deviation is explained:

As was held by the *WEAN* court, Yakima County is required to protect *all* the functions and values, not just

a single function or a select few. Thus its buffers are required, *at the minimum*, to protect the entirety of the functions attributed to these areas. Yakima County has provided the functional properties in YCC 16C.06.05 ranging from stream bank stabilization to pollutant filtration to wildlife habitat. Except for a handful of isolated studies limited to a particular function, almost all of the studies cited within the BAS Review recommend buffers of greater than 75 feet.

AR 3767 (emphasis in original). In other words, although it may be true that the buffer widths listed in the CAO technically “fall within the range” of recommended buffers for *some* functions of critical areas, they do not do so for *all* of those functions.

The most obvious examples of how the CAO’s proposed buffers fail to protect all functions are the BAS ranges for large woody debris, sediment filtration and erosion control.<sup>3</sup> A 1997 WDFW study that was liberally cited in the BAS Review recommends a minimum buffer width of 98-100 feet (about 30 meters) for all three of those functions. This is illustrated in the table provided by the Board in its decision.

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<sup>3</sup> These functions are listed as “Functional Properties” of Yakima County streams in § 16C.06.05(1) of the revised Critical Areas Ordinance.

AR 3766; *see also* AR 1222-24; AR 1318-20. It is clear in tables from a number of studies cited in the BAS Review that a minimum buffer of 100 feet is necessary to protect those particular functions. AR 3386-97. The Board points out that the County's range of 25 to 75 feet falls "below the range of buffer widths for *all* functions *except* temperature control and pollutant filtration." AR 3766 (emphasis in original). In other words, even if you ignore the "mean" or average widths and look only at the minimums, the County's selected range of buffers fails to protect all functions and values of critical areas.

Simply put, the record does not support the County's choices. The Board for its part looked at all of the factors required in *Ferry County* and concluded that the buffer widths in Table 6-1 of YCC § 16C.06.16 were simply not going to protect all functions and values of critical areas as required by the GMA. This decision is backed by substantial evidence of studies in the BAS Review that overwhelmingly

recommended a minimum of 100 foot buffers for at least three of those functions, all of which applied to the streams in Yakima County as outlined in the revised CAO. In light of this evidence and goals for protecting critical areas, the Court should hold that the County's standards for vegetative buffers for streams are clearly erroneous, that the Board's decision was not arbitrary and capricious, and that the Board correctly interpreted and applied the GMA.

**C. The County has failed to provide a reasoned justification for its departure from BAS.**

Like Island County in *WEAN*, Yakima County has failed to provide any specific findings “explaining the reason for its departure and identify other goals of the GMA which it is implementing by making such a choice.” AR 3767; *WEAN*, 122 Wn.App. at 172-173. The EWGMHB correctly observed that it did not even attempt to make such findings, “since the County did not believe it was deviating from BAS.” AR

3767-3768. Although the County managed to convince the Superior Court that the “paucity of applicable BAS” relating to arid Eastern Washington lands somehow justifies its deviation, this position is not based on any evidence in the record. CP 4. Indeed, the court points to nothing in the record supporting its finding that the County got around this problem through “a systematic analysis of the available data, including information derived from the actual stream buffers which had been in place since 1995.” *Id.* The court then makes an even greater deductive leap when it concludes that “the County’s determination that the existing buffers had been, for the most part, adequately performing their intended function was a reasoned justification” for not using BAS. *Id.* However, the record is devoid of any evidence that the County even examined the existing buffers for streams in Yakima County.<sup>4</sup>

*See* BAS Review, AR 3195-3206. The court’s opinion

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<sup>4</sup> The only reference in the record to existing buffers in Yakima County is the statement by the BOCC in Ordinance 13-2007 that “there has been no evidence or testimony that any significant environmental degradation has occurred within the existing wetland buffers.” AR 2812-2813. Aside from the fact that the finding only applies to wetlands, this is hardly a “systematic analysis of available data.” CP 4.

therefore fails to recognize that the County has the burden of proof under the APA, and that it has failed to meet that burden with any documentation, either in the BAS Review or anywhere else in the record. *Quadrant*, 154 Wn.2d at 233.

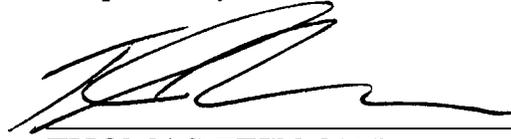
As a result, despite what the court below held, the County has failed to come up with any reasonable excuse to justify its failure to follow BAS in its choice of riparian buffer widths in the CAO. This is not permissible under the GMA, and the Court should therefore hold the proposed ordinance invalid.

## **V. CONCLUSION**

The Court should reverse the decision of the court below for the reasons indicated in Part IV, and remand the case to the Superior Court for an order affirming the decision of the Eastern Washington Growth Management Hearings Board regarding Issue 15.

DATED this 10th day of June, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Zeilman', written over a horizontal line.

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NO. 297632

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PROOF OF SERVICE OF  
BRIEF OF APPELLANT CONFEDERATED TRIBES AND  
BANDS OF THE YAKAMA NATION

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## PROOF OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 10<sup>th</sup> day of June, 2011, I mailed a true and correct copy of Brief of Appellant Confederated Tribes and Bands of the Yakama Nation and this Proof of Service to the parties herein at the addresses indicated below by depositing the same in the U.S. Mail, first class, postage prepaid as follows:

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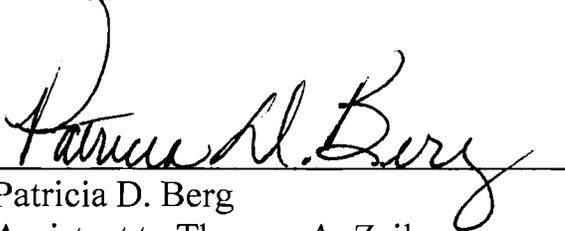
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DATED at Yakima, WA this 10<sup>th</sup> day of June, 2011.

  
\_\_\_\_\_  
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