



1 Respondent in the above matter advised the Board that Exhibits 206-209 would be removed  
2 and stricken from the record and designated as supplemental documents received after  
3 adoption of Title 13.

4 After hearing oral argument and reviewing the response from Stevens County, the  
5 Board admitted to the record Exhibits 203, 204, and 205. The Board struck Exhibits 206,  
6 207, 208, and 209 from the Index of Record in the Board's Order on Motions entered on  
7 August 19, 2003.

8 On September 2, 2003, the Board received a Stipulation signed by all parties  
9 requesting a 90-day extension. The Board granted the extension.

10 On December 22, 2003, the Board held the Hearing on the Merits. Present were D.E.  
11 "Skip" Chilberg, Presiding Officer, and Board Members Dennis Dellwo and Judy Wall.  
12 Present for Petitioners was Jeanie Wagenman. Present for Respondent was Lloyd Nickel.  
13 Present for Intervenors was Tom Young, Assistant Attorneys General.

14 At the Hearing on the Merits, the Respondent County requested that the Board  
15 require the Petitioner list the specific Title 13 language she objects to or what suggested  
16 language would address her objections. The Board believed the motion was untimely, but  
17 asked the Petitioners if she would be willing to submit additional details listing the specifics  
18 objections to Title 13 as the County requested. This was timely done by the Petitioner.  
19 January 12, 2004, the County responded to the Petitioner's submission with a substitution  
20 of Counsel, Peter G. Scott of Preston Gates & Ellis LLP, and a brief addressing the issues  
21 raised in this case. January 19, 2004, the Petitioner filed a motion to strike all or portions of  
22 such response, contending the brief was not the appropriate response to the Board's  
23 direction.

## 24 II. FINDINGS OF FACT

- 25 1. Stevens County adopted Resolution #32-2003, a new "Critical Areas"  
26 ordinance, (CAO), on March 4, 2003. This Resolution was codified in  
the Stevens County Code as "Title 13", and was adopted pursuant to  
RCW 36.70A. The existing ICAO was not repealed.

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2. Title 13 fails to adequately define wetlands, erroneously excluding wetlands created by construction of roads or railroads prior to 1990, in violation of RCW 36.70A.030(20).
3. Title 13 erroneously exempts wetlands in Categories 2 and 3 containing less than 2500 square feet and category 4 wetlands containing less than 10,000 square feet, thus failing to meet the requirements of the GMA to protect critical areas, RCW 36.70A.170(d), utilizing best available science, RCW 36.70A.172.
4. Stevens County failed to respond to most of the public comments to its GMA planning activities, specifically those comments received during the consideration and adoption of Title 13, as required by the County's Public Participation Program and RCW 36.70A.140.
5. Stevens County failed to substantively include BAS in establishing minimum riparian buffers and wetland setbacks, and failed to include in the Record the scientific basis for deviation from BAS recommendations.
6. Provisions in Title 13 authorize exemptions from the protections afforded in the Title for "reasonable use" but does not provide a definition of "reasonable" or give standards for such use to be measured by.
7. Provisions in Title 13 authorized mitigation for critical areas degradation without requiring review by a qualified professional.
8. Provisions in Title 13 authorize a 30% increase in structure expansion toward the shoreline for non-conforming structures.
9. Title 13 has no provisions that initiate designation or protection of Critical Aquifer Recharge Areas (CARA's). Stevens County relies on State, Federal, and Health District regulations to protect CARA's.
10. Existing and ongoing agricultural activities are excluded from the provisions of Title 13.

1 **III. STANDARD OF REVIEW/JURISDICTION**

2 Comprehensive plans and development regulations (and amendments thereto)  
3 adopted pursuant to Growth Management Act ("GMA" or "Act") are presumed valid upon  
4 adoption by the local government. RCW 36.70A.320. The burden is on the Petitioners to  
5 demonstrate that any action taken by the respondent jurisdiction is not in compliance with  
6 the Act.

7 The Washington Supreme Court has summarized the standards for Board review of  
8 local government actions under Growth Management Act. It was stated:

9 The Board is charged with adjudicating GMA compliance, and, when  
10 necessary, with invalidating noncompliant comprehensive plans and  
11 development regulations. RCW 36.70A.280, .302. The Board "shall find  
12 compliance unless it determines that the action by the state agency, county or  
13 city is clearly erroneous in view of the entire record before the county, or city  
14 is clearly erroneous in view of the entire record before the Board and in light  
15 of the goals and requirements of [the GMA]." RCW 36.70A.320(3). To find an  
16 action "clearly erroneous" the Board must be "left with the firm and definite  
17 conviction that a mistake has been committed." *Dep't of Ecology v. Pub. Util.*  
18 *Dist. No. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

19 *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543,  
20 552, 14 P.3d 133, 138 (2000).

21 The Board will grant deference to counties and cities in how they plan under Growth  
22 Management Act (GMA). RCW 36.70A.3201. But, as the Court has stated, "local discretion is  
23 bounded, however, by the goals and requirements of the GMA." *King County v. Central*  
24 *Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 561, 14 P.2d 133  
25 (2000). It has been further recognized that "[c]onsistent with *King County*, and  
26 notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly  
when it foregoes deference to a . . . plan that is not 'consistent with the requirements and  
goals of the GMA.'" *Thurston County v. Cooper Point Association*, 108 Wn.App. 429, 444, 31  
P.3d 28 (2001).

1 The Board has jurisdiction over the subject matter of the Petition for Review. RCW  
2 36.70A.280(1)(a).

#### 3 **IV. LEGAL ISSUES, DISCUSSION AND CONCLUSIONS**

##### 4 **Issues of the Intervenor:**

5 The Intervenor, the Washington State Department of Ecology, DOE, intervened and  
6 argued two issues. The DOE argued that the County's Critical Areas Ordinance is  
7 inconsistent with the Growth Management Act because it defines wetlands to exclude  
8 wetlands created by road and railroad construction prior to 1990; and that Stevens County's  
9 CAO is inconsistent with best available science because it excludes small wetlands from  
critical areas protections.

10 Stevens County concedes in their brief that Title 13 fails to adequately define  
11 wetlands, erroneously excluding wetlands created by construction of roads or railroads prior  
12 to 1990, in violation of RCW 36.70A.030(20). Stevens County also concedes it has  
13 erroneously excluded exempted wetlands in Categories 2 and 3 containing less than 2500  
14 square feet and category 4 wetlands containing less than 10,000 square feet, from Title 13,  
15 thus failing to meet the requirements of the GMA to protect critical areas, RCW  
16 36.70A.170(d), utilizing best available science, RCW 36.70A.172.

##### 17 **CONCLUSION:**

18 The Intervenor has carried its burden of proof and the County is found out of  
19 compliance with the GMA in these two issues raised by the Intervenor and the Petitioners.

##### 20 **Issue 1:**

21 Has Stevens County failed to designate and protect Critical Areas, based upon Best  
22 Available Science (BAS) and include BAS? Does this fail to comply with RCW 36.70A.170  
and .060 and .172 and WAC 365-190, should be designated and protected? Does this fail to  
comply with the Act RCW 36.70A?

##### 23 **Issue 4:**

24 Has Steven's County protected Critical Areas by prohibiting, limiting, regulating,  
25 inappropriate/incompatible actions and land use development, based upon BAS?  
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1 **Issue 8:**

2 Are Stevens County's buffers based upon BAS? Should the County have included in  
3 the buffer sizes the channel migration of the stream or riparian area? Is this omission based  
4 upon BAS? Does this comply with the Act and does this substantially interfere with the  
5 Goals of the Act? Does the lack of a clear requirement that wetlands shall be delineated and  
6 done so by profession to represent BAS, fail to comply with the Act?

6 **Issue 15:**

7 Is Stevens County's standard buffer width review of 200 feet for Category 1 or 2  
8 wetlands based upon BAS? (13.10.025) Is the County's standard 200-foot buffer  
9 (13.10.034) for endangered, threatened or sensitive species based upon BAS and include  
10 BAS? Do these then fail to protect Critical Areas and fail to comply with the Act?

10 **Positions of the Parties:**

11 The Petitioners contend the County has failed to designate and protect Critical Areas  
12 and streams or riparian areas and did not substantively consider BAS. The Petitioners  
13 further contend the County failed to consider Channel Migration as part of the buffer width.  
14 They point out BAS consistently recognizes that streams or rivers migrate in areas and that  
15 this migration is an important value to fish and wildlife. The County's own expert is alleged  
16 to have been disregarded on this issue.

17 The Petitioners further contend that the BAS does not support the county's standard  
18 200-foot buffer for endangered, threatened or sensitive species (ETS). The Petitioners point  
19 out there is no science in the record to support that even a standard of 200 feet for all ETS  
20 species will suffice. In many instances they contend it does not. They also add there is no  
21 adequate process to increase buffers when necessary. There is no project review process or  
22 minimum standards sufficient to meet the needs of fish and wildlife.

23 The Petitioners argue extensively that the County's buffers are inadequate and that  
24 there is no BAS cited to support the chosen size. They point out that the County's own  
25 expert, Mr. Kovalchik, recommends greater widths. The County did not follow their expert's  
26 recommendation and adopted lower buffer sizes without any science cited. The Petitioners  
observe that if the old CAO with larger buffers was found non-compliant because of

1 deficient buffer standards, how could the County's reduced buffers be compliant? The  
2 Petitioners contend that all the science found in the County's record demands larger buffers  
3 for Category 1-4 wetlands and Type 1-5 streams.

4 The Petitioners contend the County allows all activities within Critical Areas if they  
5 meet the protection requirements of Title 13. The County allows certain activities within the  
6 buffers if regulated unless they are exempt from regulation. The Petitioner believes the  
7 seven examples of exemptions are terribly damaging to buffers with no indication of what  
8 regulations will be used to "regulate" these activities.

9 Stevens County contends it has designated and protected critical areas based upon  
10 Best Available Science and has complied with the GMA. The County further contends it is  
11 clear from reading Title 13 that adequate protections based upon BAS are included. Stevens  
12 County says the Petitioners fail to specify any section or portions thereof which are  
13 inadequate and fail to meet the burden of proof. The supplemental brief contends BAS was  
14 surveyed and the County "substantively considered" BAS in adopting a CAO. The County  
15 contends they need not do more than consider BAS substantively. The County asserts they  
16 need to balance that science with the other Goals of the GMA and decide if the science is of  
17 consequence when balanced against other GMA goals.

18 **DISCUSSION:**

19 RCW 36.70A.060(2) and (3) require the County to adopt development regulations  
20 that protect critical areas. Critical areas include: (a) wetlands; (b) areas with a critical  
21 recharging effect on aquifers used for potable water; (c) fish and wildlife habitat  
22 conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas.  
23 RCW 36.70A.030(5).

24 RCW 36.70A.172(1) requires that best available science (BAS) shall be included "in  
25 developing policies and development regulations to protect the functions and values of  
26 critical areas." The Court of Appeals, Division I, held "that evidence of the best available  
science must be included in the record and must be considered substantively in the  
development of critical areas policies and regulations." *Honesty in Environmental Analysis &*

1 *Legislation (HEAL) v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522,  
2 532, 979 P.2d 864 (1999).

3 Recently the Court of Appeals decided a case similar to *HEAL, supra, Whidbey*  
4 *Environmental Action Network v. Island County et al*, 118 Wn. App. 567; 76 P.3d 1215,  
5 (WEAN) and reinforced the *HEAL* interpretation of BAS and how it must be used. In *WEAN*  
6 the County appealed the WWGMHB's decision finding a 25-foot buffer for type 5 streams  
7 failed to comply with the GMA for 5 steam buffers. The Court found the "County fails to  
8 point to any part of the record outlining the applicability of unique local conditions to justify  
9 a departure downward from the buffer width requirements outlined in the scientific  
10 literature. *HEAL* requires that evidence of BAS must be included in the record and must be  
11 considered substantively in the development of critical areas policies and regulations... BAS  
12 does not support the use of a 25-foot buffer." (*WEAN, supra* at p. 584).

13 The Court of Appeals in *WEAN, supra*, found the Superior Court erred when it  
14 reversed the Western Washington Growth Management Hearings Board's ruling that 25-foot  
15 buffers for type 5 streams were inadequate. In that case, the County had argued that  
16 substantial evidence did not support the Western Board's order, and that the Western Board  
17 failed to defer to the County's discretionary balancing of the best available science (BAS)  
18 with other factors. The County also argued that the Western Board erred when it ignored  
19 the testimony of the County's expert and determined that his expert opinion was not BAS.

20 The County in *WEAN* contended the 25-foot buffer fell within the range of some of  
21 the evidence given and therefore the County's decision should be affirmed. The *WEAN*  
22 Court disagreed. "While 25-foot buffers did fall within the range of some of the evidence  
23 given, they did so only with specific and narrow functions in mind, rather than the entirety  
24 of functions attendant to type 5 streams." (*Supra* p. 585). The GMA requires the regulations  
25 for critical areas to protect the "functions and values" of those designated areas. This  
26 means all functions and values.

Here, Stevens County has no articulated evidence in the record supporting the  
buffers adopted for their streams and wetlands. Their counsel's argument that the BAS,

1 including from their own expert, was considered in adopting "other provisions of Title 13,"  
2 does not satisfy the requirements found in the two Court of Appeal cases, *HEAL* and *WEAN*  
3 cited above. The Record, after our exhaustive review, contains no evidence supporting the  
4 buffer widths chosen, with the exception of Wetland Category 1.

5 Stevens County contracted with Mr. Bud Kovalchik, a wetlands consultant with over  
6 20 years experience as a wetland/riparian ecologist with the U.S. Forest Service, to review  
7 the BAS and make recommendations regarding appropriate protections for wetlands and  
8 riparian areas in Stevens County. The Board has reviewed his work, including  
9 recommendations of the State of Washington Departments of Fish and Wildlife, Ecology,  
10 and the Office of Community Development. Mr. Kovalchik's did make a credible effort to  
11 develop a record of examining BAS and preparing recommendations for the County.

12 The Stevens County Planning Commission, after several public work sessions, and at  
13 least three public hearings, ultimately concurred with Mr. Kovalchik's recommendations with  
14 a minor exception of dropping the "+" sign from two categories. Those recommendations  
15 were forwarded to the Board of County Commissioners (BOCC). Many of Mr. Kovalchik's  
16 conclusions were included within the body of Title 13. However, with one exception,  
17 Category 1 Wetlands, the buffer size recommendations of the Planning Commission and Mr.  
18 Kovalchik were rejected by the BOCC. The County, when asked about this, informed the  
19 Board that their expert said, "I can live with that", after his recommendations were not  
20 followed. If this was his response, we cannot consider such a response as the reasoned  
21 opinion of an expert. The County does not point to any science used to vary from the  
22 recommendations given by their expert or the other BAS reviewed as is required by the  
23 Court of Appeal decisions quoted above.

1 A table of the recommendations of the Planning Commission and Mr. Kovalchik,  
 2 compared to Title 13 is shown below:

Wetland Buffers			
Category	Recommended	Adopted Title 13	
1	200	200	
2	150	100	
3	100	50	
4	50	25	

Riparian Buffers			
STREAM TYPES	Recommended	Adopted Title 13	
1	150	100	
2	150	100	
3	100	75	
4	100	50	
5	50	25	

20 Mr. Kovalchik did qualify his recommendation for stream Type 5 setbacks for low  
 21 intensity agricultural practices, such as pasturing, to allow a 25' setback. This was not his  
 22 recommendation. The suitability of a 25' setback is severely limited and would not be for  
 23 most Type 5 Streams.

24 The BOCC clearly deviated from the recommendations of their Planning Commission  
 25 and their consultant. The Board finds considerable support in the record for the

1 recommendations made, but no support for those adopted by the County in Title 13. The  
2 BOCC received a letter from Mr. Dennis Sweeney, a former Stevens County planning  
3 director, recommending most of the protections ultimately adopted in Title 13. (Ex. 197).  
4 However, in his letter he states, "I admit that we don't have the peer reviewed science  
5 required to support 50' and 100 foot buffers." Mr. Sweeny's letter states only his belief that  
6 these numbers are "defensible". This letter/recommendation was received after the public  
7 comment period of the BOCC hearing had closed. Therefore, it didn't even become public  
8 until the final hearing of the BOCC on March 4, 2003, which was closed to public comment.

9 The Board is also unable to find any part of the record reflecting the applicability of  
10 unique local conditions to justify a departure downward from the buffer width requirements  
11 outlined in the scientific literature. *WEAN* requires that evidence of BAS must be included in  
12 the record and must be considered substantively in the development of critical areas  
13 policies and regulations. *WEAN, supra*, at 532.

14 The Court of Appeals, *WEAN, supra*, requires that the County base the Critical Area  
15 Ordinance either on externally supplied science or on County supplied science. Stevens  
16 County has based the size of their buffers, with the exception of 200 feet for Category I  
17 wetlands, on no science found in the record. Best Available Science, however, does exist  
18 for larger buffer sizes.

19 **CONCLUSION:**

20 The Petitioners have carried their burden of proof and the Board finds the County is  
21 clearly erroneous in view of the entire record and in light of the goals and requirements of  
22 the GMA for failing to adequately protect Wetlands and Riparian areas within their  
23 jurisdiction.

24 **Issue 2:**

25 Has Stevens County failed to follow their own Public Participation Policy as well as  
26 the Public Participation requirements set forth in the Growth Management Act?

1 **Positions of the Parties:**

2 Petitioners allege Stevens County failed to follow the requirements of the GMA and  
3 their own Public Participation Policy (PPP) by failing to hold an additional public hearing  
4 before deviating from planning commission and the County's expert's recommendation for  
5 riparian buffers, by failing to include a variety of interests on various planning committees,  
6 and by failing to "respond" to public input as required by RCW 36.70A.140.

7 The Petitioners contend the County failed to comply with the GMA requirements of  
8 public participation, RCW 36.70A.020, RCW 36.70A.140, RCW 36.70A.035, RCW 36.70A.070  
9 and RCW 36.70A.130. They further contend the County failed to comply with the County's  
10 own Public Participation Policy and their County-Wide Planning Policies. Petitioners contend  
11 the County failed to respond to public comment, as required by the GMA and the County's  
12 PPP, and included in the record approximately 30 comments submitted, with no evident  
13 response from the County.

14 Stevens County contends that nothing more could have been done to ensure public  
15 participation. They contend the commissioners' deviation from the draft ordinance before  
16 them regarding riparian buffers was within their prerogative based on balancing the  
17 competing goals of the GMA, and within parameters of previously submitted public input.  
18 The Deputy Prosecutor for the County countered in his briefing and oral argument, that the  
19 record shows the County responded to Petitioner. He pointed out one instance where "her  
20 suggestion led to adoption of changes she requested. In other instances, her public  
21 participation did not lead to results she wanted. That was the response." (P. 5  
22 Respondent's brief.)

23 The County further contends it complied with the requirements of broad  
24 dissemination of proposals and alternatives, opportunity for written comments, public  
25 meeting after effective notice, provision for open discussion, communication programs,  
26 information services, consideration of and response to public comments and the inclusion of  
a variety of interests on planning committees. The County directs our attention to a letter

1 received from Mr. Sweeney suggesting the lower buffers. The County contends Petitioners  
2 have failed to carry their burden of proof.

3 **DISCUSSION:**

4 The GMA provides the County shall establish procedures to provide for broad  
5 dissemination of proposals and alternatives, opportunity for written comments, public  
6 meetings after effective notice, provisions for open discussion, communication programs,  
7 information services, and consideration of and response to public comments. RCW  
8 36,70A.140. Very similar language exists in Steven County's Public Participation Policies but,  
9 to some extent, that language uses the words "may" or "should."

10 The County's Public Participation Policy states its purpose as: "to exceed the  
11 minimum requirements of the Growth Management Act by providing early and continuous  
12 public participation opportunities equally to all residents of Stevens County at all stages...."  
(Chapter 1 Purpose, Attachment 1-B).

13 The County seems to be contending that all of the provisions of the Program are  
14 discretionary. The first paragraph in their PPP, stating their Policy, reads: "The Planning  
15 Department shall review all written and oral comments received and may respond to the  
16 comment in writing or verbally during the public discussion." The County's Policy's  
17 statement that the Planning Department "may" respond to the comment in writing or  
18 verbally, gives the County the choice. The County will do one or the other. To interpret  
19 otherwise would ignore the GMA and the County's own statement of purpose.

20 Later in the County's Policy the hearing body is encouraged to orally address public  
21 comments in public hearings and make oral findings of fact to support the decision.  
(Chapter 8, Stevens County Public Participation Program. Petitioners' Brief, Attch. 1A)

22 If the County believes their frequent use of "should" results in removing mandatory  
23 requirements from their Policy, we need only look to the dictionary to see that "should" is  
24 mandatory and not discretionary. "Should, past tense of shall. 1. Used to express duty or  
25 obligation." Webster's II, New Riverside University Dictionary. 1984. Where the GMA  
26 specifically requires (shall) the Counties to establish procedures to consider and respond to

1 public comment, we must believe the county's language is an effort to comply. To comply,  
2 the County is required to consider and respond to public comments. If there are choices  
3 offered by the County's Program, we can only find that the County shall choose one of  
4 them. Here the County did nothing. This lack of any response cannot be the interpretation  
5 of the County's Program adopted to comply with the GMA's mandate to consider and  
6 respond to public comment.

7 The County's own briefing and oral argument listed what was done in response to  
8 the Petitioner's approximately 30 letters provided at different times to the County as  
9 comment. The County attorney said: "The Record shows that the County has responded to  
10 Petitioner. In at least one instance, her suggestions led to adoption of changes she  
11 requested. In most of the other instances, her public participation did not lead to results  
12 she wanted. That was the response." (Page 5, Respondent's Brief.) In this case the County  
13 did not respond other than refusing, silently, to adopt or consider the comments. This is not  
14 enough. The County, through its own Public Participation Program, is required to receive  
15 the comments of the public, consider them and respond to them. The record reflects no  
16 response to public comment, particularly to the comments of the Petitioners.

17 The Petitioners contend the County failed to include a variety of interests on various  
18 planning committees and are out of compliance. The Board believes a diversity of interest  
19 on planning committees is vital for a good public participation program; however, the  
20 Petitioners have not overcome the presumption the County's actions are in compliance. We  
21 do not believe the Petitioners have carried their burden of proof on this portion of this  
22 issue.

23 The County adopted important changes to the CAO at the time of final passage of  
24 the Title 13 without further public hearing. The reduction of the buffers and setbacks for  
25 the most part were changes that had not been considered by the public prior to their  
26 adoption nor were they part of a previous proposal under consideration at a hearing before  
the BOCC. A public hearing should have been held.

1 RCW 36.70A.020(11) is one of the listed Goals of the Growth Management Act:  
2 Citizen participation and coordination. Encourage the involvement of citizens  
3 in the planning process and ensure coordination between communities and  
jurisdictions to reconcile conflicts.

4 RCW 36.70A.035(2) again provides for public participation, but in the specific area of  
5 comment upon amendments to a comprehensive plan or development regulations:

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

11 RCW 36.70A.140 is another, but more universal provision for public participation  
12 under the GMA. In that statute, the County is required to:

13 ...establish and broadly disseminate to the public a public participation program  
14 identifying procedures providing for early and continuous public participation in the  
development and amendment of comprehensive land use plans and development  
15 regulations implementing such plans. . . .

16 These three statutes convince us that the legislature intended that public  
17 participation enjoy a high priority under the Growth Management Act. "This Board has  
18 always held that public participation was the very core of the Growth Management Act."  
19 *Wilma et al. v. Stevens County*, EWGMHB Case No.: 99-1-0001c Final Decision and Order p.  
20 6 (May 21, 1999). At a minimum, this means that the public must have an opportunity to  
21 comment on amendments to the Planning Commission recommendation prior to adoption  
22 by the local legislative body unless the amendments fall under one of the exceptions in  
RCW 36.70A.035(2)(b).

23 The amendments discussed herein were "considered" by the BOCC after the  
24 opportunity for public review and comment had passed. An additional opportunity for  
25 review and comment on the proposed changes was required before adoption by the BOCC.  
26

1 RCW 6.70A.035(2)(a). Cities and counties have discretion under RCW 36.70A.035(2) on  
2 how to give notice and how to provide opportunities for public comment. A hearing, for  
3 example, is not required in all cases although it should be considered where, as here, there  
4 are major changes covering the size of buffers.

5 Stevens County argues that the amendments were considered before and therefore  
6 the County is exempted from holding further public hearings on the amendments. The  
7 Board declines to accept this argument. First, RCW 36.70A.035(2) does provide an  
8 exemption to the requirement to provide an opportunity to review and comment on the  
9 amendments for correcting errors or clarifying language "without changing its effect." That  
is not the case here.

10 Second, the amendments challenged by Petitioner change a policy from the Planning  
11 Commission's Recommended Critical Area Ordinance in a way that does not fall under any  
12 of the exemptions in RCW 36.70A.035(2)(b). The amendments change the size of buffers  
13 for Type one through five streams and Category two through four wetlands. These are  
14 substantial changes.

15 Stevens County further argues that all of the challenged amendments were within  
16 the scope of alternatives available for public comment at the previous public hearings. A  
17 letter is cited as evidence. The County argues that no public hearing was therefore required  
pursuant to RCW 36.70A.035(2)(b)(ii).

18 The fact that the County received letters from certain citizens requesting or  
19 discussing language adopted later as amendments, does not demonstrate that the  
20 amendments were within the scope of alternatives available for public comment. The  
21 Growth Management Act requires that the public have the opportunity to contribute its  
22 voice to the development of comprehensive plans and development regulations. Preceding  
23 that opportunity must be effective notice, reasonably calculated to alert the public to the  
24 alternatives that may become part of the final comprehensive plan. There was nothing in  
25 the notices for the public hearings, or in the text of the Planning Commissions  
26 recommended Critical Areas Ordinance that was the subject of the hearings that would alert

1 the general public that the adopted amendments at issue were on the table for  
2 consideration. Nor was there any notice that the county had received letters requesting  
3 changes and inviting the public to review the letters and comment on the changes being  
4 considered. The Board therefore finds that the changes to the CAO made at the time of  
5 final passage were not among the scope of alternatives available for public comment. The  
6 Board finds through clear and convincing evidence that the County has failed to follow its  
7 Public Participation Program and the Countywide Planning Policies and as a result is out of  
8 compliance with the GMA.

8 **CONCLUSION:**

9 The Board finds the County's actions as challenged by Petitioners were clearly  
10 erroneous under RCW 36.70A.035 of the Growth Management Act. The County failed to  
11 provide an opportunity for the public to comment on the amendments to the adopted  
12 Comprehensive Plan at issue in this case. The County has further failed to respond to public  
13 comment, violating the GMA, the County's Public Participation Program and County-wide  
14 Planning Policies. The Petitioners have not carried their burden, however, in showing that  
15 there was insufficient diversity upon the Planning Committees.

16 **Issue 3:**

17 Has Stevens County failed to designate and protect Critical Aqua Recharge Areas as  
18 required by the Act, in RCW 36.70A.170, .060, .172 and WAC 365-190 and to do so by  
19 using Best Available Science? Does this fail to comply with the Act.

20 **Position of the Parties:**

21 Petitioners contend Stevens County has failed to protect Critical Aquifer Recharge  
22 Areas (CARAs) by not prohibiting certain activities in CARAs. Petitioners further argue the  
23 County has no criteria to determine if a CARA exists when a development application is  
24 reviewed, and that even when a CARA is present, Title 13 (SCC 13.10.046) provides no, or  
25 inadequate, protection.  
26

1 Petitioners argue the County has failed to properly designate CARAs. Without proper  
2 and clear designation of the existence of a CARA, no "trigger" is present to mandate when a  
3 development application should undergo a review for protection of the CARA.

4 Petitioners argue the County relies on two pre-GMA ordinances for protection, neither  
5 of which has been subjected to a "Best Available Science" scrutiny, as required by the GMA.  
6 Further, these two ordinances do not prohibit any development activity over CARAs  
7 including storage of hazardous wastes, or any other high-risk activities.

8 Petitioners claim the exemption for agricultural activities from the provisions of Title  
9 13 fails to protect CARAs. Petitioners argue some agricultural activities may have a harmful  
10 effect on CARAs.

11 Petitioners supplied the County with recommendations for designation and protection  
12 of CARAs based on BAS, including Department of Ecology publication 97-30, "Guidance of  
13 Document for Establishment of Critical Aquifer Recharge Area Ordinances". Petitioners  
14 contend the County failed to enact the recommended protection measures, and in fact  
15 adopted no protection measures.

16 Stevens County contends they have included steps recommended by the Department  
17 of Ecology for establishing CARAs. If this two step process "indicates the presence of a  
18 CARA on a development site, the required protection measures of SCC 13.10.046 are  
19 applied."

20 Stevens County contends BAS has been substantively considered, and then balanced  
21 with other goals of the GMA. The County argues they have included steps recommended by  
22 DOE for establishing CARAs. The County quotes from a letter from DOE stating, "if the  
23 County completes the steps outlined in Ecology's guidance document for establishment of  
24 CARAs, adequate protection should be provided." (Ex. 47)

25 **DISCUSSION:**

26 Title 13, while not designating CARAs, details a methodology for such a designation  
to be made. The Board recognizes that an adequate process for designation without  
mapping of CARAs can meet the requirements of RCW 36.70A.170. However, the Board

1 finds nothing in the record or arguments of the Respondent to indicate when or if the  
2 adopted process will be "triggered". The Critical Areas checklist relies upon the applicant for  
3 a development permit to indicate the presence of a critical area on the subject property.  
4 There is no requirement found in Title 13 to ensure the noted "two-step" process would be  
5 used. With that missing, designation is unsure, and thus protection is unsure.

6 Regarding protection measures, Title 13.10.046 states in its entirety:

7 It is important to note that land uses which have the greatest potential to  
8 impact groundwater quality and recharge ability are currently regulated by  
9 federal or state statute or regulations.<sup>32</sup> These regulations may or may not be  
10 enforced by Stevens County.

- 11 1. Structures that produce wastewater flow require an on-site sewage  
12 disposal system and are subject to the minimum lot size requirements  
13 and design standards of the Northeast Tri-County Health District, in  
14 order to protect against ground water contamination.
- 15 2. Developments or construction must comply with the requirements and  
16 recommendations of the Washington State Department of Health and  
17 the Department of Ecology, as they pertain to groundwater protection.
- 18 3. Any application for a Stevens County permit for a use that utilizes or  
19 generates hazardous or toxic material shall be required to comply with  
20 the applicable state and federal regulations and to the Stevens County  
21 Hazardous Waste Ordinance NO. 3-1991.

22 Petitioners contend Stevens County, by this section, assumes no responsibility for  
23 protection of CARAs. While the methodology for identifying CARAs recommended by the  
24 Department of Ecology is in the Ordinance, there is no assurance they or the protections  
25 will be used. There is not an adequate "trigger" bringing these provisions into play.

26 Petitioners further argue certain agricultural activities can have a devastating impact  
on any critical area, not just CARAs. Stevens County should take notice, as an example, of  
the degradation possible from a 5000 cow dairy operation in or near Critical Areas, as exist  
in some counties of our state. To exempt such an operation from critical areas protection is

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<sup>32</sup> DOE Guidance Document to the establishment of Critical Aquifer Recharge Area Ordinances.

1 clearly an error, as Petitioners have argued. Ongoing agricultural activities can be  
2 preserved with reasonable regulation over their activities in or around critical areas. This  
3 Board finds the County has erred in exempting agricultural activities from the provisions of  
4 Title 13.

5 **CONCLUSION:**

6 The Board finds the County has erred in exempting existing and ongoing agricultural  
7 activities from the provisions of Title 13. Certain unregulated agricultural activities can have  
8 a devastating impact on critical areas, including CARAs. To exempt all existing and ongoing  
9 agricultural operations from regulation is clearly an error.

10 The Board further finds the Petitioners have carried their burden of proof in showing  
11 the County failed, through Title 13, to adopt an appropriate trigger for when the  
12 methodology for identifying CARAs and the protective regulations will be used. Title 13 must  
13 include adequate provisions for initiating a review for the presence of a CARA before a  
14 development permit is issued.

15 **Issue 5:**

16 Are Stevens County's Exemptions in the CAO failing to Protect Critical Areas?

17 **Positions of the Parties:**

18 The Petitioners contend the exceptions in the CAO fail to protect Critical Areas. The  
19 exceptions listed by the Petitioners include: wetland sizes, wetland definition, buffer uses,  
20 "minimal" mowing pruning, use of chemical, and any agricultural uses. Wetland sizes and  
21 definitions are addressed in Issue No. 1. Agriculture exemptions are also addressed in Issue  
22 No. 3. The Petitioners are concerned with vague language in Title 13, which could allow  
23 destruction of buffers without best available science and without a professional  
24 determination concerning this destruction and required mitigation. The Petitioners point out  
25 there is no definition of "minimal" nor is there a requirement of review by a qualified person  
26 before an activity is allowed in the buffer area. The petitioners believe there is absolutely no  
manner in which allowing mowing and pruning and use of chemicals will protect the  
wetland as well as support the values and functions of the wetland.

1 The Respondent contends a reading of section 13.20.016 shows some activities may  
2 be allowed only if the protection requirements are met. They point out that DOE did not  
3 appeal these provisions and that DOE has not determined that all mowing of vegetation  
4 around Loon Lake should be prohibited. The County contends when BAS specifies these  
5 activities shall be prohibited, the county would revisit the issue. The County believes the  
6 Petitioner should mobilize the Loon Lake community to voluntarily remove all lawns and  
7 non-native vegetation and discontinue the use of chemicals. Enforcement of such  
8 regulations at Loon Lake could only be accomplished through voluntary compliance at this  
9 time.

10 The County further contends the Petitioner failed to show where the GMA prohibits  
11 these activities in the Buffers. They contend Title 13 directs such activities be minimized in  
12 buffer areas. The County believes the Petitioner has not shown the County made a mistake  
13 by allowing minimal use of chemicals or mechanical removal of plants while at the same  
14 time requiring owners to maintain the natural condition of buffer vegetation as feasible.

**DISCUSSION:**

15 The Respondent has conceded they are out of compliance in the exemption from  
16 Title 13 of Categories 2 and 3 wetlands containing less than 2500 square feet and category  
17 4 wetlands containing less than 10,000 square feet. Further the County concedes they failed  
18 to adequately define wetlands, exempting wetlands created by construction of roads or  
19 railroads prior to 1990. However, the County believes the other exemptions are compliant  
20 with the GMA.

21 The activities the County has allowed as exempt in the Buffer areas are without clear  
22 limits. Without any limitation other than a direction that the mowing and chemical use  
23 should be minimized in buffers, these activities are exempted.

24 The record is full of evidence that the listed exempted activities should be prohibited  
25 in buffers or at least carefully regulated. Title 13 requires no review or approval for what  
26 the landowner believes is necessary or minimal. Contrary to the statement of the County,  
the DOE objected to the sentence where such activities should be minimal. The DOE

1 declared this a "too wide loophole". DOE suggested this language be narrowed by adding  
2 "in order to meet the specified objectives of the mitigation plan, for noxious weed control."  
3 Department of Ecology feared a mowed lawn would often replace the superior native plants  
4 in the buffer. (Brian Farmers letter from the Dept. of Ecology dated 5/22/02 to Mr.  
5 Sweeney).

6 Mr. J. Azerrad, in the Department of Fish and Wildlife's letter of 4/1/02, objected to  
7 the words "as feasible" in the first sentence and to the same language objected to in Mr.  
8 Farmers' letter above. Mr. Azerrad contended that the buffers should be kept as close to a  
9 natural state as possible to ensure that buffers provide good fish and wildlife habitat.

10 From all the Record and reports from the experts, including the County's, it is clear  
11 that, to be beneficial, buffers must remain in their natural state. The values and functions  
12 of the Critical Areas all have to be protected.

13 The Board, in Issue No. 3, CARAs, addressed the concerns regarding the exemption  
14 for agricultural activities. While mowing and use of chemicals are not always agriculturally  
15 related, the arguments for regulating agricultural practices in critical areas are the same. To  
16 exempt existing and ongoing agricultural practices in critical areas is clearly erroneous, and  
17 fails to protect critical areas from degradation.

18 **CONCLUSION:**

19 The Petitioners have carried their burden of proof. The Board finds the actions of the  
20 County clearly erroneous regarding exceptions without review and possible mitigation  
21 determined by an appropriately trained individual and fail to protect critical areas.

22 **Issue 6:**

23 Does the Non-Conforming structures/Common line setback provision in the CAO  
24 protect Critical Areas?

25 **Positions of the Parties:**

26 Petitioners object to provisions in Stevens County Code 13.20.041 which permit  
expansion of non-conforming buildings toward the shoreline by up to 30% of the buildings  
size, and depending on location of neighboring buildings, even up to the ordinary high

1 water mark (OHWM). Petitioners contend SCC 13.30.032 does not ensure that any  
2 mitigation would be required in such instances. They contend such allowances without  
3 mitigation will cause degradation of the functions and values of critical areas, and are not  
4 supported by BAS or any scientific review in the record. Petitioners reference agency  
5 comments in the record supporting their arguments.

6 Stevens County responds, "SCC 13.20.040 expressly states that where a conflict  
7 exists, the more restrictive regulation will apply. For example, Title 13 would prohibit new  
8 construction where another regulation like the County's Shoreline Master Program, might  
9 allow it. The County further contends they have properly exercised their discretion to  
10 balance competing GMA goals of protecting function and value in critical areas with private  
11 property rights.

11 **DISCUSSION:**

12 Stevens County Code 13.20.041 provides for administrative review under SCC  
13 13.30.030 for any development proposal affecting a "non-conforming" structure. A non-  
14 conforming structure is defined for purposes of Title 13 as any existing structure located in  
15 a critical area or associated buffer that was established prior to the adoption of Title 13.

16 No science is found in the record that supports any construction within buffers or  
17 setbacks. The science clearly mandates that any development activity which occurs within a  
18 buffer must either be prohibited or mitigated, regardless of where neighboring structures  
19 are located (common-line setback provisions) or whether it involves expansion or  
20 replacement of an existing structure. The record does not support these provisions within  
21 Title 13 that allow development activity in critical areas without ensuring adequate  
22 protection for the affected area.

23 Stevens County's contention that allowing such development activity is merely a  
24 balancing of conflicting goals of the GMA is not supportable. All property owners have a  
25 right to the use and enjoyment of their property without encroachment from neighbors who  
26 would degrade it. "Private property rights" gives no one the right to degrade critical areas,  
streams, or lakes. The County's actions are clearly erroneous, and in violation of the GMA.

1 The Board recognizes expansion or replacement of non-conforming structures could  
2 be permitted under certain conditions. However, SCC 13.30.032 provides inadequate  
3 assurance any impacts will be mitigated. SCC 13.30.032 provides: "The outcome of the  
4 Administrative Review is generally one of the following:" (Emphasis added). That statement  
5 is no assurance that even the listed possible outcomes will be achieved. Those listed  
6 possible outcomes includes an administrative determination by a person without  
7 professional expertise that the development within a critical area, perhaps even up to a  
8 shoreline, has no impact on the critical area. Such provisions are effectively no protection at  
9 all and are clearly erroneous. As in other "mitigation issues", the Board finds the absence of  
10 a qualified professional determination of required mitigation measures to be clearly  
11 erroneous. The only way to ensure the functions and values of critical areas are protected is  
12 to have those mitigation measures determined by BAS. The only way to ensure BAS on a  
site-specific development proposal is to engage a qualified professional.

13 **CONCLUSION:**

14 Provisions in Title 13 addressing common-line setbacks and non-conforming  
15 structures without mitigation determined by a qualified professional fail to protect critical  
16 areas and are clearly erroneous.

17 **Issue 7:**

18 Has the County failed to designate and protect habitat and species of local  
19 importance? Does the County's method of "nomination" fail to ensure that Habitat and  
Species of Local Importance will with certainty be designated and protected?

20 **Position of the Parties:**

21 The Board in a majority opinion, in Case No. 00-1-0016, ruled that Stevens County  
22 had developed a process for nomination of habitat and species of local importance  
23 compliant with the GMA. The issue presented here is different from that case, namely, has  
24 the County failed to designate and protect habitat and species of local importance?  
25  
26

1 Petitioners give several examples of species, which have been nominated, including  
2 recommendations from the Department of Fish and Wildlife, (DFW). Petitioners contend the  
3 County has taken no action, and made no response, to any nomination.

4 The County's briefs do not address this aspect of the issue, and characterize  
5 Petitioners brief as only re-addressing criticism of the nomination process.

6 **DISCUSSION:**

7 In a case dealing with a very similar set of circumstances, the Western Washington  
8 Growth Management Hearings Board (WWGMHB) ruled: "the County must make a reasoned  
9 analysis, on the record, including best available science and other local factors, and take  
10 official substantive action on (WEAN's) nominations..." *Island County Citizens' Growth*  
11 *Management Coalition, et al. v. Island County*, Compliance Hearing on Issue 13, WWGMHB  
Case No. 98-2-0023c (11/26/2001).

12 While the Board in its majority opinion, ruled that the County's nomination process is  
13 compliant, that is not to say that the County has designated and protected habitats and  
14 species of local importance. While at this point it is not possible for the Board to determine  
15 if the nominated species should be designated and protected, the County's failure to  
16 respond to nominations is clearly a failure to designate and protect. Stevens County must,  
17 as affirmed in *WEAN* make a reasoned analysis, on the record, including best available  
18 science and take official substantive action on nominations. To fail to respond is clearly  
erroneous, and a failure to designate and protect habitat and species of local importance.

19 **Conclusion:**

20 By failing to respond to nominations of species and habitat of local importance,  
21 Stevens County has failed to protect species and habitat of local importance.

22 **Issue 9:**

23 Has Stevens County failed to protect Critical Areas by failing to specify that mitigation  
24 shall be required to offset impacts to critical areas and defining when this mitigation is  
25 required and that this should be based upon BAS and include BAS? Does the failure of the  
26 CAO to require a professional opinion for its mitigation plan fail to comply with the Act?  
Does the failure of the CAO to specify an enhancement rations as well as detailing a

1 method/plan for monitoring this mitigation, providing follow-up fail then to comply with the  
2 Act? Does this substantially interfere with the goals of the Act?

3 **Issue 11:**

4 Does the County's failure to deny "off site" compensation where the loss of a  
5 particular wetland cannot be replaced and are too valuable to lose by allowing "off site  
6 compensation", fail to comply with the Act and fails to represent BAS and include BAS?

7 **Issue 13:**

8 Are the Buffer Alternatives, General Buffer Requirements and uses allowed in buffers  
9 in the CAO based upon BAS and include BAS and do they fail then to protect Critical Areas?  
10 Does this fail ten to comply with the Act?

11 **Issue 14:**

12 Does the County's failure to require mitigation for impact resulting from the  
13 use/development of the property for Reasonable Use exception, Non-Conforming Structures  
14 fail to comply with the Act? Does this substantially interfere with the goals of the Act?

15 **Position of the Parties:**

16 Petitioners argue Title 13 has no requirement that a qualified professional determine  
17 mitigation measures. If a qualified professional does not determine the mitigations  
18 necessitated by a development proposal, then the critical areas functions and values may  
19 not be adequately protected. Petitioners further contend the "Reasonable Use" exemption,  
20 requiring no mitigation for development in a critical area, fails to protect critical areas.

21 Petitioners also argue Title 13 provisions for Wetland Restoration, Creation and  
22 Enhancement (13.20.020) require ratios not supported by BAS. They argue off-site  
23 compensation should never be permitted. Title 13 allows off-site mitigation when mitigation  
24 on-site is not feasible. By definition on-site mitigation is not feasible, it is therefore an  
25 acknowledgement that the critical area will suffer degradation.

26 Petitioners argue Title 13 fails to protect critical areas, by authorizing exemptions for  
"reasonable use," by authorizing mitigation for critical areas degradation without review by  
a qualified professional, by authorizing a 30% increase in structure size toward the

1 shoreline for non-conforming structures, and by authorizing "off-site" mitigation in certain  
2 instances.

3 Stevens County argues that any development proposal "resulting in a critical area  
4 alteration that cannot adequately mitigate its impacts to a critical area or its associated  
5 buffer shall be denied" (SCC 13.20.020). The County contends this provision will ensure the  
6 protection of critical areas. Regarding off-site mitigation provisions, Stevens County argues  
7 the "preferred (off-site) location is within the same drainage basin or the same watershed  
8 as the affected critical area." Therefore, "Petitioner has failed to demonstrate that this  
9 approach fails to protect critical areas."

10 Stevens County again argues Petitioners have failed to carry their burden of proof  
11 that Title 13 is inadequate to protect critical areas. They further argue the County must  
12 balance competing goals of the GMA, recognizing a priority for private property rights.

13 Regarding the "reasonable use" exception, the County argues a hearing examiner  
14 must approve any exception. The County contends the reasonable use exception is an  
15 appropriate harmonization of competing GMA goals.

16 **DISCUSSION:**

17 The Board finds the absence of a qualified professional determination of required  
18 mitigation measures to be clearly erroneous. The only way to ensure that the functions and  
19 values of critical areas are protected is to have those mitigation measures determined by  
20 BAS. The only way to ensure BAS on a site-specific development proposal is to engage a  
21 qualified professional.

22 Title 13.20.020 provides: "The applicant, Planning Department, agencies with  
23 expertise and often times, a qualified professional may (emphasis added) be involved in the  
24 mitigation process." This provision is inadequate. Mitigation, to ensure protection, must be  
25 determined by a qualified professional.

26 The Board finds that if a qualified professional were to determine the mitigation  
requirements when mitigation is called for, Petitioners would have failed to carry their  
burden on the other mitigation arguments. Ratios for replacement, enhancement, etc., if

1 determined by a professional, can be expected to protect the critical area. Likewise, before  
2 a "reasonable use" exception is granted, a professional determination of any mitigation  
3 measures required, ensures the protections necessary.

4 The Board recognizes off-site mitigation compensation sometimes is necessary and  
5 appropriate if the functions and values of the affected critical area are maintained or  
6 enhanced. However, this determination also can be made only by a qualified professional.  
7 Petitioners have failed to carry their burden of proof with the exception of their argument  
8 for use of a qualified professional.

8 **Conclusion:**

9 By failing to require the use of a qualified professional in determining mitigation  
10 measures, Title 13 fails to protect critical areas, and is clearly erroneous.

11 **Other Issues:**

12 Petitioners' Petition for Review raised several other issues, which were either  
13 abandoned or were addressed in the issues dealt with above.

14 **V. INVALIDITY**

15 The Petitioners requested that the Board make a finding of invalidity, thus finding  
16 that the Stevens County Critical Area Ordinance is invalid. After considering the arguments  
17 of the Petitioner and the Record before us, the Board will not at this time enter a finding of  
18 invalidity.

18 **VI. ORDER**

19 1. Stevens County Code Title 13 is found non-compliant with the GMA in the  
20 following aspects:

- 21 a. Title 13 fails to adequately define wetlands, erroneously excluding  
22 wetlands created by construction of roads or railroads prior to 1990, in  
23 violation of RCW 36.70A.030(20).  
24 b. Title 13 erroneously exempts wetlands in Categories 2 and 3 containing  
25 less than 2500 square feet and category 4 wetlands containing less  
26 than 10,000 square feet, thus failing to meet the requirements of the

1 GMA to protect critical areas, RCW 36.70A.170(d), utilizing best  
2 available science, RCW 36.70A.172.

- 3 c. Stevens County failed to respond to most of the public comments to its  
4 GMA planning activities, specifically those comments received during  
5 the consideration and adoption of Title 13, as required by the County's  
6 Public Participation Program and RCW 36.70A.140.
- 7 d. Stevens County failed to substantively include BAS in establishing  
8 minimum riparian buffers and wetland setbacks, and failed to include in  
9 the Record the scientific basis for deviation from BAS  
10 recommendations.
- 11 e. Provisions in Title 13 authorizing exemptions from the protections  
12 afforded in the Title for "reasonable use" without providing a definition  
13 of "reasonable" or giving standards for such use to be measured by, fail  
14 to protect critical areas, in violation of RCW 36.70A.170.
- 15 f. Provisions in Title 13 authorizing mitigation for critical areas  
16 degradation without requiring review by a qualified professional fail to  
17 protect critical areas, in violation of RCW 36.70A.170.
- 18 g. Provisions in Title 13 authorizing a 30% increase in structure expansion  
19 toward the shoreline for non-conforming structures, fail to protect  
20 critical areas, in violation of RCW 36.70A.170.
- 21 h. Title 13 has no provisions that initiate designation or protection of  
22 Critical Aquifer Recharge Areas (CARA's), thus failing to protect critical  
23 areas in violation of RCW 36.70A.170.
- 24 i. Provisions in Title 13 that exclude existing and ongoing agricultural  
25 activities fail to protect critical areas in violation of RCW 36.70A.170.
- 26 2. Stevens County must take the appropriate legislative action to bring  
Title 13 into compliance with this Order by **June 9, 2004**, 120 days  
from the date issued. The Board will schedule periodic status  
conferences during this period to determine progress as part of our on-  
going consideration of the request for a finding of invalidity.

1 Pursuant to RCW 36.70A.300(5), this is a Final Order for purposes of  
2 appeal. Pursuant to WAC 242-02-832, a motion for reconsideration may  
3 be filed within ten days of service of this Final Decision and Order.

4 **SO ORDERED** this 10<sup>th</sup> day of February 2004.

5 EASTERN WASHINGTON GROWTH MANAGEMENT  
6 HEARINGS BOARD

7  
8 \_\_\_\_\_  
D.E. "Skip" Chilberg, Board Member

9  
10 \_\_\_\_\_  
11 Judy Wall, Board Member

12  
13 \_\_\_\_\_  
Dennis Dellwo, Board Member