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**State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON**

CONCERNED FRIENDS OF FERRY COUNTY
and DAVID ROBINSON, RIPARIAN OWNERS
OF FERRY COUNTY and SHARON
SHUMATE,

Case No. 04-1-0007c

FINAL DECISION AND ORDER

Petitioner,

v.

FERRY COUNTY,

Respondent.

I. SYNOPSIS

RIPARIAN OWNERS OF FERRY COUNTY and SHARON SHUMATE (Shumate) filed a petition wherein they contend the County went too far in the development and final adoption of their Critical Ordinance. Their primary contention was the County reduced the value of landowner's property or took their property by action of the Ordinance.

CONCERNED FRIENDS OF FERRY COUNTY and DAVID ROBINSON (Robinson) filed a petition wherein he contends the County did not go far enough in the protection of the County's Riparian lands and Critical Areas.

The Issues raised by Shumate were based primarily on the belief that ongoing agriculture was limited. There was a belief that the County should have paid the landowner for the land if it was to be a buffer or Riparian Area and they did not do so. Ms. Shumate

1 and Riparian Owners of Ferry County also raised constitutional issues that the Eastern
2 Washington Growth Management Hearings Board (Board) lacks the authority to decide. The
3 Growth Management Hearings Boards are empowered to review the actions of the Counties
4 and Cities to determine if they are in compliance with the Growth Management Act (GMA)
5 and not the Federal or Washington State Constitutions. The Board did, however, review the
6 GMA to determine whether the actions of the County objected to by Shumate were out of
7 compliance. Except for problems addressed in Robinson's issues, Shumate has not carried
8 her burden of proof and shown this Board where the County is out of compliance.

9 The Board does find, however, the County is out of compliance by failing to
10 adequately protect Critical Areas and using Best Available Science (BAS) for that protection.
11 Specifically, the County is found out of compliance for the improper sizing of the Riparian
12 Areas (Buffers) for Type 1 and 2 Waters; Section 1.07, Riparian Area Width Averaging;
13 Section 1.08, Common Line Setback; and Section 1.15, Variance and Appeal Provision. The
14 balance of the County's Riparian Area Protection Ordinance is not found out of compliance.

14 II. PROCEDURAL HISTORY

15 On May 25, 2004, RIPARIAN OWNERS OF FERRY COUNTY and SHARON SHUMATE,
16 by and through their representative, Sharon Shumate, filed a Petition for Review.

17 On June 25, 2004, the Board held a telephonic Prehearing conference. Present were
18 Judy Wall, Presiding Officer, and Board Member D.E. "Skip" Chilberg. Board Member Dennis
19 Dellwo was unavailable. Present for Petitioner was Sharon Shumate. Present for
20 Respondent was Steve Graham.

21 On June 30, 2004, the Board issued its Prehearing Order.

22 On July 6, 2004, CONCERNED FRIENDS OF FERRY COUNTY and DAVID ROBINSON,
23 by and through their representative, David Robinson, filed a Petition for Review.

24 On August 10, 2004, the Board held a telephonic Prehearing conference. Present
25 were Dennis Dellwo, Presiding Officer, and Board Members Judy Wall and D.E. "Skip"
26 Chilberg. Present for Petitioner was David Robinson. Present for Respondent was Steve
Graham.

1 On August 10, 2004, the Board sent a letter to the parties named above advising the
2 Board was considering consolidation of EWGMHB Case No. 04-1-0006, RIPARIAN OWNERS
3 OF FERRY COUNTY and SHARON SHUMATE v. FERRY COUNTY with EWGMHB Case No. 04-
4 1-0007, CONCERNED FRIENDS OF FERRY COUNTY and DAVID ROBINSON v. FERRY
5 COUNTY and asking that objections be provided to the Board no later than August 17,
6 2004.

7 On August 17, 2004, the Board received objections from Petitioners, Riparian Owners
8 of Ferry County and Sharon Shumate.

9 On August 20, 2004, the Board issued its Prehearing Order and Order on
10 Consolidation, consolidating the two cases.

11 On October 8, 2004, the Board received Petitioner, Riparian Owners of Ferry County
12 and Sharon Shumate's Hearing on the Merits.

13 On October 20, 2004, the Board received Petitioner, Concerned Friends of Ferry
14 County and David Robinson's Hearing on the Merits.

15 On November 23, 2004, a Hearing on the Merits was held in Republic, the parties or
16 their representative were there together with the Presiding Officer, Dennis Dellwo and
17 Board Members, Judy Wall and John Roskelley.

18 **III. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF**
19 **REVIEW**

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

25 The Board will grant deference to counties and cities in how they plan under Growth
26 Management Act (GMA). RCW 36.70A.3201. But, as the Court has stated, "local discretion is
bounded, however, by the goals and requirements of the GMA." *King County v. Central
Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 561, 14 P.2d 133

1 (2000). It has been further recognized that “[c]onsistent with *King County*, and
2 notwithstanding the ‘deference’ language of RCW 36.70A.3201, the Board acts properly
3 when it foregoes deference to a . . . plan that is not ‘consistent with the requirements and
4 goals of the GMA.” *Thurston County v. Cooper Point Association*, 108 Wn.App. 429, 444, 31
5 P.3d 28 (2001).

6 Pursuant to RCW 36.70A.320(3) we “shall find compliance unless [we] determine
7 that the action by [Jefferson County] is clearly erroneous in view of the entire record before
8 the Board and in light of the goals and requirements of [the GMA].” In order to find the
9 County’s action clearly erroneous, we must be “left with the firm and definite conviction that
10 a mistake has been made.” *Department of Ecology v. Public Utility Dist. 1*, 121 Wn.2d 179,
201, 849 P.2d 646 (1993).

11 The Board has jurisdiction over the subject matter of the Petition for Review. RCW
12 36.70A.280(1)(a).

13 IV. LEGAL ISSUES AND DISCUSSION

14 **A. THE CHALLENGED ACTION:**

15 In 1993, the County adopted its Interim Critical Area Ordinance (ICAO) wherein it
16 classified and designated critical areas and resource lands pursuant to RCW 36.70A.060.
17 Development regulations were not adopted at that time. In Case No. 00-1-0013, this Board
18 found the County failed to comply with the GMA by adopting development regulations (DRs)
19 inconsistent with the Comprehensive Plan (CP). The County has now adopted Ordinance
20 2004-03, which the County contends protects Riparian areas. This Ordinance is the subject
21 of the Board’s review at this time. The following are the specific provisions that are referred
to in this order.

22 The Petitioner Robinson objects to the following sections in Ordinance No. 2004-03:

23 **Section 1.05 RIPARIAN AREA WIDTHS:**

24 <u>Stream Type</u>	<u>Riparian Area Width</u>
25 1 or S	100 feet
26 2 or F	100 feet

1	3 or F	100 feet
2	4 or Np	50 feet
3	5 or Ns	50 Feet

4 If a dispute arises concerning a water type, the Department of Natural
5 Resources (DNR) will be notified. DNR regulations include procedures for
6 those contesting water types.

7 **Section 1.07 RIPARIAN AREA WIDTH AVERGING**

8 Standard riparian area widths may be modified by averaging riparian area
9 widths or a combination of averaging and reduction. Riparian area width
10 averaging shall be allowed only where the applicant demonstrates the
11 following:

- 12 A. Averaging will not decrease the functions and values of the riparian
13 area necessary to protect the biological, chemical and physical
14 components of water quality, and
- 15 B. The total area contained within the riparian area after averaging is no
16 less than that contained with the standard riparian area prior to
17 averaging. The Riparian area width shall not be reduced by more than
18 50 percent of the standard riparian area or be less than 25 feet unless
19 authorized under Section 1.09 of this attachment.

20 **Section 1.08 COMMON-LINE SETBACK**

21 For the purpose of accommodating views in developed residential areas,
22 setbacks for residential structures may be reduced consistent with the
23 following:

- 24 A. Where there are existing (legally nonconforming) residences that
25 encroach on the established setback within 150 feet of either side of
26 the proposed building site, the required setback of the proposed
structure may be reduced by review and approval of the Administrator.
In such cases, proposed residential structures may be set back (from
OHWM) common to the average of the setbacks of the existing
adjacent residences.
- B. In those instances where only one existing nonconforming single-family
residence is within 150 feet of the proposed building site, the setback

1 of the proposed structure may be reduced (with the approval of the
2 Administrator) to the average of the setbacks for the existing adjacent
3 residence and the applicable setback for the adjacent vacant parcel.

4 C. In no case shall the reduced setbacks applied above be less than 25
5 feet landward of the OHWM.

6 **Section 1.15 VARIANCE AND APPEAL PROVISIONS**

7 Variances and appeals shall be subject to the provisions as stated in Sections
8 12.01 and 12.04 through 12.10 of Ferry County Interim Ordinance 93-020
9 "Designate and Classify Resource Lands and Critical Areas."

10 **B. ROBINSON LEGAL ISSUES:**

11 **Petitioner Robinson** raises the following two issues. These will be discussed first.

12 **Issue 1:** Did the County fail to comply with RCW 36.70A.040, -.060, -.120, and -.172
13 and interfere substantially with GMA goals (RCW 36.70A.020) by not establishing adequate
14 vegetative buffers, by modifying standard riparian area widths through averaging down to
15 25 feet, and by allowing common line setbacks down to 25 feet or other adequate means
16 for protecting and regulating activities within riparian areas?

17 **Issue 2:** Do the Ferry County Development Regulations violate RCW 36.70A.040 (which
18 requires that development regulations be consistent with and implement the comprehensive
19 plan) because it adopts by reference Section 12 of the Ferry County Interim Ordinance
20 Number 93-02 "Designate and Classify Resource Lands and Critical Areas"? Do these
21 development regulations fail to utilize Best Available Science, and fail to provide adequate
22 standards for Planning Department Review, in violation of RCW 36.70A.172 and fail to
23 comply with RCW 36.70A.060(2) requirement that the regulations protect critical areas?

24 **DISCUSSION AND ANALYSIS:**

25 **The Parties' Positions:**

26 Petitioner Robinson contends the County failed to comply with the GMA by not
establishing adequate vegetative buffers, by modifying standard riparian area widths
through averaging down to 25 feet, and by allowing Common-Line Setbacks down to 25
feet or other adequate means for protecting and regulating activities within riparian areas.
Robinson also contends the adoptions by reference of the Ferry County Interim Ordinance
Number 93-02, the County Development Regulations, are not consistent with and

1 implement the Comprehensive Plan. Robinson contends further these development
2 regulations failed to utilize Best Available Science and failed to provide adequate standards
3 for Planning Department Review.

4 A major concern of Petitioner Robinson is the allowance for buffers to drop to as little
5 as 25 feet if averaging is used. He points out there is no science in the record that would
6 permit such a small buffer. Another major concern is the Common-Line Setback that can
7 also reduce the buffers to 25 feet.

8 The County contends Best Available Science (BAS) was used in the sizing of the
9 buffers established for the rivers and lakes and wetlands. The use of "averaging" and
10 "Common-Line Setback" to modify the buffers is not simply reductions of buffer widths.
11 Both of these buffer adjustments require the property owner to retain the buffer area that
12 would have existed had the adjustment not occurred. This buffer area would extend to the
13 sides of the development. The Ordinance also requires that none of the values and
14 functions of the riparian area necessary to protect the biological, chemical, and physical
15 components of water quality not be decreased. The Buffer can be reduced to no more than
16 half of the normally required buffer.

17 The Common-Line Setback is claimed to be a practical and equitable approach to
18 proposed use of remnant lots – lake or streamside lots which are adjacent to or between
19 lots which have been developed with legal residences nearer to the water than would now
20 be allowed. The County contends the riparian area has already been compromised and
21 equity and reasonable use indicate a common-sense approach to protecting the riparian
22 area on the "late-comer" lot.

23 The Petitioner contends Section 1-15 is out of compliance because it adopts by
24 reference noncompliant provisions of Ordinance 93-02. Sections 12.01 and 12.04 through
25 12.10 of Ferry County Interim Ordinance 93-02 were found out of compliance in a previous
26 case before the Board, and they remain so. The Respondent contends this is not the place
to argue another case. Let these issues be resolved in the previous case.

1 **Discussion and Analysis:**

2 The GMA requires all Counties, even those who are not fully planning under the
3 GMA, to adopt development regulations that protect the functions and values of Critical
4 Areas. RCW 36.70A.060(2) and (3) and RCW 36.70A.172. Critical Areas include: (a)
5 wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c)
6 fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e)
7 geologically hazardous areas. RCW 36.70A.030(5).

8 RCW 36.70A.172(1) requires that Best Available Science (BAS) shall be included "in
9 developing policies and development regulations to protect the functions and values of
10 critical areas." The Court of Appeals, Division I, held "that evidence of the best available
11 science must be included in the record and must be considered substantively in the
12 development of critical areas policies and regulations. "*Honesty in Environmental Analysis &*
13 *Legislation (HEAL) v. Central Puget Sound Growth Management Hearings Bd.*, 96 Wn. App.
522, 532, 979 P.2d 864 (1999).

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

23 The Court of Appeals in *WEAN, supra*, found the Superior Court erred when it
24 reversed the Western Washington Growth Management Hearings Board's ruling that 25-foot
25 buffers for Type 5 streams were inadequate. In that case, the County had argued that
26 substantial evidence did not support the Western Board's order, and that the Western Board

1 failed to defer to the County's discretionary balancing of the Best Available Science (BAS)
2 with other factors. The County also argued that the Western Board erred when it ignored
3 the testimony of the County's expert and determined that his expert opinion was not BAS.

4 The County in *WEAN* contended the 25-foot buffer fell within the range of some of
5 the evidence given and therefore the County's decision should be affirmed. The *WEAN*
6 Court disagreed. "While 25-foot buffers did fall within the range of some of the evidence
7 given, they did so only with specific and narrow functions in mind, rather than the entirety
8 of functions attendant to Type 5 streams." (*Supra* p. 585). The GMA requires the
9 regulations for Critical Areas to protect the "functions and values" of those designated
10 areas. This means all functions and values.

11 Here, Ferry County has no expert or scientific evidence in the record supporting the
12 buffers adopted for their streams and wetlands or the evidence dealt with specific and
13 narrow functions, rather than the entirety of functions of that stream. The Respondents'
14 argument that BAS, including from their own expert, was considered in adopting the
15 Ordinance, does not satisfy the requirements found in the two Court of Appeal cases, *HEAL*
16 and *WEAN* cited above. The Record, after our exhaustive review, contains no evidence
17 supporting the buffer widths chosen for Type 1 and 2 waters or for the exceptions allowing
18 reduction to 25 feet.

19 Stevens County, adjacent to Ferry County, has similar lands and rivers. Both are
20 adjacent to the Columbia River and have streams and rivers and lakes with no great growth
21 of population. Stevens County did hire an expert to review all the data available and
22 prepared recommendations to the County for the establishment of buffers and other
23 protections required by the GMA. The recommendations were very conservative and did not
24 follow the DFW suggestions. This Board found them in compliance because of the required
25 deference to the validity of County actions and the existence of Best Available Science
26 (BAS) in the record supporting the choices made. Here that does not exist.

Stevens County had been found out of compliance for failure to protect Critical Areas
and failure to use BAS. They were also found out of compliance for their use of Common-

1 Line Setbacks. (Final Decision and Order 03-1-0003, February 10, 2004). However, after
2 obtaining expert help and amending their Critical Area Ordinance, Stevens County was
3 found in compliance. Stevens County established 150-foot buffers for Type 1 and 2 waters,
4 100 feet for Type 3 and 4 waters and 50 feet for Type 5 waters. This is in addition to
5 another 10-foot building setback. (Section 13.20.12).

6 The buffers established for Type 1 and 2 waters in Ferry County are inadequate and
7 do not comply with the Growth Management Act's requirements to protect Critical Areas
8 and use Best Available Science in doing so. There is no science in the record that purports
9 to support the buffer width established herein.

10 The Common-Line Setbacks and the Riparian Area Width Averaging, Sections 1.07
11 and 1.08, are also out of compliance to the extent that they would allow the buffer to be
12 reduced below the 100 feet for Type 3 and 4 waters and 50 feet for Type 5 waters. These
13 sections would also be out of compliance for any reduction to Type 1 and 2 waters. There is
14 no science in the record supporting this reduction. The County is required to protect Critical
15 Areas and use BAS in developing the protection.

16 In Section 1.15 of Ferry County Ordinance No. 2004-03, the County adopts by
17 reference Sections 12.01 and 12.02 through 12.10 of Interim Ordinance 93-02. On June 14,
18 2002, this Board found Ferry County Ordinance No. 2001-09 out of compliance. Ordinance
19 2001-09 incorporated the Interim Critical Area Regulations (ICAO) therein, including Section
20 12. This Ordinance was found out of compliance, in part, for the failure of Section 12 of the
21 ICAO, incorporated in 2001-09, to provide adequate standards to protect critical areas in
22 the granting of variances. The County has failed to make corrections necessary to bring
23 themselves into compliance and still remain out of compliance. While this is a finding in
24 another case, the adoption of these same noncompliant provisions is before us now and
25 may be reviewed. These provisions continue to lack adequate standards to guide the
26 administrative action allowed therein.

1 **Conclusions:**

2 The Board concludes that, while the County has moved a long way towards
3 compliance, it is out of compliance in several important areas. The County has failed to
4 adequately protect critical areas and failed to include best available science. Specifically, the
5 County failed to provide for adequate Riparian Areas (buffers) for Type 1 and 2 waters; and
6 the County failed to adequately protect critical areas by allowing inappropriately small
7 setbacks with its Common Line Setbacks and Riparian Area Width Averaging. The County is
8 further out of compliance in the adoption by reference, ICAO Sections 12.01 and 12.04
9 through 12-10 as the Variance and Appeal Provisions in Section 1.15 of Ordinance No.
10 2004-03. The Board concludes the Petitioner has carried his burden of proof and the Board
11 is left with a firm and definite conviction that a mistake has been made by the County. The
12 Board finds the County is clearly erroneous in view of the entire record and in light of the
13 goals and requirements of the GMA for failing to adequately protect Wetlands and Riparian
Areas within their jurisdiction.

14 **C. SHUMATE LEGAL ISSUES:**

15 **Petitioner Shumate** raised the following seven issues.

16 **Issue 3:** Is the County's adoption of Riparian Area Protection as an attachment to
17 "Designate and Classify Resource Lands and Critical Areas" inconsistent with the definitions
of critical areas contained in RCW 36.70A.030(5)?

18 **Issue 4:** Did the County's adoption for Riparian Area Protection of standard-width
19 riparian area listing regulated activities fail to comply with RCW 36.70A.020(6) because it
restricts the use and management of private riparian lands?

20 **Issue 5:** Did the County's adoption of its Riparian Area Protection fail to comply with
21 the requirement of RCW 36.70A.160 because it does not provide for purchase of corridors
22 and controls the resource development of the lands?

23 **Issue 6:** Did the County's adoption of its Riparian Area Protection fail to comply with
24 RCW 36.70A.020(8) to maintain and enhance natural resource-based industries, by
25 including vegetation removal, harvesting, and vegetation disturbance on private riparian
26 lands as regulated activities?

1 **Issue 7:** Did the County fail to comply with 43.21.C.030(2)(b) and (c) because it did
2 not consider the economic long-term productivity of riparian lands when regulating activities
of harvesting, vegetation removal and alteration of riparian areas?

3 **Issue 8:** Did the County adoption of Riparian Area Protection fail to comply with RCW
4 36.70A.020(6) because it designates private riparian lands as fish and wildlife conservation
5 areas without just compensation?

6 **Issue 9:** Is the County's adoption of its Riparian Area Protection Ordinance outside the
7 intent of the Planning Enabling Act RCW 3.670A.010 – Purpose and Intent for Growth
Management and its subsequent chapters of 36.70A, 36.70B, and 36.70C?

8
9 **DISCUSSION AND ANALYSIS:**

10 **1. Legal Issue No. 3:**

11 **The Parties' Positions:**

12 Petitioner Shumate contends that nowhere in the CP does it say anything about
13 "Riparian Areas". The Petitioner contends there is no mention of "Riparian Areas" in the
14 definition of Critical Areas. Apparently, the Petitioners are objecting to the use of the
descriptive term "Riparian Areas."

15 The County contends that the terms are not inconsistent. The County believes the
16 Petitioner is needlessly complicating the issue by referring to wording in early drafts of the
17 Ordinance. While the County admits there is no specific requirement under the law for the
18 County to adopt riparian area protection, there is explicit authority for the County to do so.
19 (WAC 365-190-080). The County contends the ordinance is consistent with the definition of
Critical Areas.

20 **Board Discussion:**

21 The Board does not find that the County improperly is calling the buffer area,
22 "Riparian Areas". This is a better description than "setback" that had been previously used
23 instead of "buffer". This wording clearly has authority in case law and regulations. (WAC
24 365-190-080 and Case No. 95-3-0047 *Pilchuck Audubon Society v. Snohomish County*).

1 While the Board would prefer the use of "buffer" to avoid confusion, the County's use of
2 Riparian Areas does not cause the County to be out of compliance.

3 **Conclusion:**

4 The Board concludes Petitioners have failed to carry their burden of proof and the
5 Board does not find the County out of compliance on Issue 3 herein.

6 **2. Legal Issue No. 4:**

7 **The Parties' Positions:**

8 The Petitioners contend the County is out of compliance because it restricted the use
9 and management of private riparian lands. They list the sections of the Ordinance that
10 restricts development in any riparian areas and finds present uses and structures within
11 riparian areas as nonconforming. They contend that nowhere in the Ordinance are
12 agricultural activities exempt. The Petitioners contend this is a violation of RCW 36.70A.160,
13 which allows restriction-free agricultural activity within the open spaces identified by the
County.

14 The County contends the issue fails by its own terms because it does not violate
15 RCW 36.70A.020(6) to restrict the use and management of private riparian lands. The
16 County argues the Ordinance does not violate any statute or Constitutional precept. The
17 County contends that if the Petitioners argue that any restriction or management of private
18 lands is improper, the government would be powerless to restrict the landowner from using
their property to store nuclear waste or grow marijuana.

19 While the County admits that many or most uses of the riparian zone are limited, the
20 landowner may apply for a variance if there are compelling reasons. However, the County
21 points out that if agricultural practice and use was ongoing at the time of the Ordinance's
22 enactment, then it amounts to "existing and ongoing agricultural activities" under Section
23 1.17, which is exempt.

24 **Board Discussion:**

25 The Petitioner has not shown the Board that the County has violated the GMA. The
26 regulation of private land by the County is directed by the GMA to the extent necessary to

1 protect Critical Areas. The County is also right that ongoing agriculture activities are
2 exempted under section 1.17. The Board does not see where the activities of the County
3 are in violation of the statutes cited by the Petitioner.

4 **Conclusion:**

5 The Petitioners have failed to carry their burden of proof and the Board does not find
6 the County out of compliance on Issue 4 herein.

7 **3. Legal Issue No. 5:**

8 **The Parties' Positions:**

9 The Petitioners contend the County is out of compliance because they did not buy
10 the Riparian Areas and the travel corridors therein. They point out that the Department of
11 Fish and Wildlife has paid property owners for designated private lands conservation areas.
12 Petitioners list several exhibits that confirm the government purchases these types of lands.
13 They also point out, using RCW 36.70A.160, where the purchase of open spaces and
14 corridors is authorized. They contend there is no reference to compensation being made or
15 offer of purchase to the landowners of Ferry County for acquisition of private riparian lands
16 to be used as Fish and Wildlife conservation and travel corridors.

17 The County contends the Petitioner misconstrued this statute. The County points out
18 that this section deals with open space corridors "within and between urban growth areas."
19 Unincorporated Ferry County does not have any Urban Growth Areas. Further, that statute
20 states that the County or City may restrict agricultural or forest uses on such lands only if
21 the County or City acquires interest in the lands. The subject Ordinance does not seek to
22 restrict agricultural or forest uses. Existing and ongoing agricultural uses are categorically
23 exempt from the ordinance.

24 **Board Discussion:**

25 RCW 36.70A.160 does not deal with the Riparian Areas (buffers) found in this
26 Ordinance. That statute is about the City acquiring open spaces and corridors for wild life
within incorporated areas. It gives them the authority to purchase the land if they wish.

1 That is not the case here. The County is not required or even authorized to purchase the
2 buffers under the GMA.

3 **Conclusion:**

4 The Petitioners have failed to carry their burden of proof and the Board does not find
5 the County out of compliance on Issue 5 herein.

6 **4. Legal Issue No. 6:**

7 **The Parties Positions:**

8 In this issue, the Petitioners contend the County has, under Ordinance No. 2004-03,
9 placed further regulatory requirements and restrictions on the conduct of all resource
10 industries in Ferry County by declaring a standard-width riparian area of 50' to 100' on each
11 side of all waters where no development is allowed including existing and ongoing
12 agricultural activities.

13 The County again points out that all ongoing agricultural activities from regulation
14 are exempt. The County states that this exemption was adopted because it was clear that it
15 was essential for maintaining and enhancing the agricultural resource-based industry.

16 **Board Discussion:**

17 The Petitioners continue to contend that ongoing agricultural activities are being
18 restricted. That is not the case. Most counties restrict such activities to some extent, but the
19 County has not done so here.

20 **Conclusion:**

21 The Petitioners have failed to carry their burden of proof and the Board does not find
22 the County out of compliance on Issue 6 herein.

23 **5. Legal Issue No. 7:**

24 **The Parties' Positions:**

25 The Petitioners contend the County failed to consider the economic long-term
26 productivity of riparian lands when regulating activities or harvesting, vegetation removal
and alteration of riparian areas. They contend this is a violation of RCW 43.21C.030(2)(b)
and (c). The Petitioners believe the County was incorrect when it published a Determination

1 of Nonsignificance. They believe the County should have prepared an Environmental Impact
2 Statement (EIS), and did not.

3 The County contends the Board does not have authority to enforce Title 43. Further,
4 the County points out that neither of the findings from DOE, as to the cost of the lost
5 agricultural productivity in buffer zones under rules to implement the State Shorelines
6 Management, is directly applicable to the County's Riparian Areas Protection Ordinance.

7 **Board Discussion:**

8 The Board has jurisdiction to review compliance with RCW 43.21C as it relates to
9 plans, development regulations or amendments to such plans or regulations. (RCW
10 36.70A.280(1)(a)). However, the impact at issue is not applicable here due to the fact that
11 ongoing agricultural activities are exempt. The County will be reexamining the buffer size
for many of the rivers and, if an EIS is required, we would expect it to be performed.

12 **Conclusion:**

13 The Petitioners have failed to carry their burden of proof and the Board does not find
14 the County out of compliance on Issue 7 herein.

15 **6. Legal Issue No. 8:**

16 **The Parties' Positions:**

17 The Petitioners contend the County failed to comply with RCW 36.70A.020(6)
18 because it designated private riparian lands as fish and wildlife conservation areas without
just compensation.

19 The Respondent County asks that the Board refer to Issue 4 for their response. They
20 contend this is the same issue as was raised before.

21 **Board Discussion:**

22 The Petitioners have not given the Board any legal authority, which requires the
23 County to compensate the private landowner for land that is declared to be riparian lands
24 (buffers). There is no requirement for such a payment unless all reasonable uses are
25 prohibited by such an ordinance. The County has not prohibited ongoing agricultural uses

1 on these lands. There are also other provisions for reasonable use that would allow
2 exceptions if all reasonable uses are prevented.

3 **Conclusion:**

4 The Petitioners have failed to carry their burden of proof and the Board does not find
5 the County out of compliance on Issue 8 herein.

6 **7. Legal Issue No. 9:**

7 **The Parties' Positions:**

8 The Petitioners contend the Riparian Area Protection Ordinance is outside the intent
9 of the Planning Enabling Act, RCW 36.70.010, the purpose and intent for the Growth
10 Management Act.

11 The County contends that nothing in the Petitioners' statement indicates that
12 adoption of the ordinance is outside the intent of these cited statutes.

13 **Board Discussion:**

14 The request for relief summarizes what the Petitioners are asking the Board to do.
15 The Petitioners wish to be paid for their land and water rights. The Board does not have
16 any authority to grant such relief. The Board can only determine whether the County is in
17 compliance with the GMA or not. The arguments of the Petitioners in this issue do not raise
18 any credible challenge to the Ordinance adopted by the County. The Petitioners have not
19 carried their burden of proof. The Board is directed by the GMA to presume that the actions
20 of the County are valid unless it is left with the firm and definite conviction that a mistake
21 has been made. That is not the case here and the County is not found out of compliance
22 on this issue.

23 **Conclusion:**

24 The Petitioners have failed to carry their burden of proof and the Board does not find
25 the County out of compliance on Issue 9 herein.

26 **V. FINDINGS OF FACT**

1. The Petitioners timely filed a Petition for review.
2. The Petitioners' have standing pursuant to RCW 36.70A.280(2).

1 3. The Board remands Ordinance 2004-03 to the County with directions to
2 take appropriate legislative action to bring it into compliance with the
3 goals and requirements of the Act.

4 Ferry County must take the appropriate legislative action to bring themselves into
5 compliance with this Order by **April 19, 2005, 120-days** from the date issued.

6 By no later than **April 26, 2005**, the County shall file with the Board an original and
7 four copies of a Statement of Action Taken to Comply (SATC) with the GMA, as interpreted
8 and set forth in this FDO. The SATC shall attach copies of legislation enacted in order to
9 comply. The County shall simultaneously serve a copy of the SATC, with attachments, on
10 the Petitioners. By this same date, the County shall file a "Remand Index," listing the
11 procedures and materials considered in taking the remand action.

12 By no later than **May 10, 2005**, the Petitioners shall file with the Board an original
13 and four copies of Comments and legal arguments on the County's SATC. Petitioners shall
14 each simultaneously serve a copy of its Comments on the County's SATC on the County and
15 each other.

16 By no later than **May 17, 2005**, the County shall file with the Board an original and
17 four copies of the County's Response to Comments and legal arguments. The County shall
18 simultaneously serve a copy of such Response on the Petitioners.

19 By no later than **May 24, 2005**, the Petitioners shall file with the Board an original
20 and four copies of their Reply to Comments and legal arguments. The Petitioners shall serve
21 a copy of its brief on the County and each other.

22 Pursuant to RCW 36.70A.330(1) the Board hereby schedules the Compliance Hearing
23 in this matter for **10:00 a.m. June 1, 2005**, at 852 Clark, Republic, WA. With the consent
24 of the parties, the compliance hearing may be conducted telephonically.

25 If the County takes legislative compliance actions prior to the date set forth in this
26 Order, it may file a motion with the Board requesting an adjustment to this compliance
schedule.

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 be filed
3 within ten days of service of this Final Decision and Order.

4 SO ORDERED this 21st day of December 2004.

5 EASTERN WASHINGTON GROWTH MANAGEMENT
6 HEARINGS BOARD

7 _____
8 Dennis Dellwo, Board Member

9 _____
10 Judy Wall, Board Member

11 _____
12 John Roskelley, Board Member