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

CONCERNED FRIENDS OF FERRY COUNTY  
and DAVID ROBINSON

Petitioner,

v.

FERRY COUNTY,

Respondent.

Case No. 01-1-0019

**THIRD ORDER ON COMPLIANCE**

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**I. SUMMARY OF DECISION**

On October 22, 2001, Ferry County adopted Development Regulations Ordinance No. 2001-09. Concerned Friends of Ferry County and David L. Robinson, Petitioners, filed a timely Petition for Review on December 21, 2001 to the Eastern Washington Growth Management Hearings Board (Board) raising eleven legal issues.

The Board issued its Final Decision and Order (FDO) for Case No. 01-1-0019 on June 14, 2002. In that decision, the Board found Ferry County out of compliance in nine of the eleven issues. One issue was found in compliance and the Petitioner removed one.

Since the FDO was issued, the Board has held three separate compliance hearings. The Board issued Orders on Compliance on December 16, 2003, and August 27, 2004. As a result of those two hearings, the Board found four of the remaining nine issues in compliance. Two of the remaining issues were later resolved prior to the third compliance hearing.

On May 18, 2006, the Board held a third compliance hearing on the three remaining issues from the original FDO. The Petitioners request that the Board issue a finding of non-compliance, order the County to come into compliance within a set date, issue a finding of

1 invalidity for those sections of Ordinance 2005-04 that interfere with the goals and  
2 requirements of the GMA and recommend the Governor impose sanctions.

3 The Board finds Ferry County in continued non-compliance on the three remaining  
4 issues, but at this time will not invoke invalidity of the new RLCAO or recommend sanctions  
5 be imposed by the Governor. Invalidity and sanctions are the Board's next step to obtain  
6 compliance by Ferry County in a timely manner.

7 As the Board has found throughout this case, the County is still in non-compliance for  
8 using a pre-GMA Shorelines Management Program in its ordinances as part of its effort to  
9 comply with the GMA. The Board recognizes the immense step the County has recently  
10 taken in adopting the Ferry County Resource Lands and Critical Areas Ordinance No. 2006-  
11 03, but finds that two of the pre-GMA SMP references in the ordinance are in direct conflict  
12 with the new riparian widths and wetland setbacks. Despite assurances from the County's  
13 attorney that the new regulations take precedence over the older SMP, the Board finds that  
14 a change in the document, either in the removal of the references to the pre-GMA SMP or a  
15 mitigation statement is necessary to eliminate the conflict.

16 The Respondents did not argue that they are in compliance on Issue No. 2. The  
17 County continues to be in non-compliance by not protecting agricultural resource lands of  
18 long-term significance and for allowing urban-like densities within the agricultural zone.

19 In Issue No. 3, the Board finds the County has again failed to include adequate  
20 reference to best available science (BAS) in its ordinances to protect the functions and  
21 values of critical areas, as required by the GMA. The Board believes by requiring the use of  
22 best available science in a county's or city's regulations and ordinances ensures decisions  
23 are made by using science and not arbitrary factors as required by the GMA. The Board also  
24 notes the County deliberately left out of its new ordinance any requirement for public  
25 participation in the variance section as suggested by CTED's Model Ordinance. Although not  
26 required in the variance section of the ordinance, public participation should always be  
given a priority by governments when developing regulations and ordinances.

1 **II. PROCEDURAL BACKGROUND**

2 On December 21, 2001, CONCERNED FRIENDS OF FERRY COUNTY and DAVID L.  
3 ROBINSON, by and through David L. Robinson, filed a Petition for Review.

4 On February 13, 2002, Respondent, Ferry County filed its Motion to Dismiss.

5 On February 26, 2002, Petitioners filed a Motion to Supplement the Record.

6 On March 28, 2002, the Board held a telephonic Motions Hearing. Present were Skip  
7 Chilberg, Presiding Officer, Dennis Dellwo and Judy Wall, Board Members, David Robinson  
8 was present for Petitioners and Stephen Graham was present for Respondent.

9 On April 5, 2002, an Order on Motions was entered allowing the Petitioners' request  
10 for additions to the Record and denying the County's motion to dismiss.

11 On April 11, 2002, the Board received from Ferry County Prosecuting Attorney,  
12 Stephen Graham, a letter objecting to the Board's previously issued Motions Order. The  
13 Motions Order was modified to correct the inadvertent errors.

14 On May 9, 2002, a final Hearing on the Merits was held in Republic, Washington.  
15 Present were Presiding Officer, D. E. "Skip" Chilberg, and Board Members Dennis A. Dellwo  
16 and Judy Wall. Present for Petitioners were David Robinson. Present for Respondent was  
17 Stephen Graham, Deputy Prosecuting Attorney.

18 On June 14, 2002, the Board issued its Final Decision and Order directing Ferry  
19 County to come into compliance within 120-days from the date of the Order. Ferry County  
20 appealed the Board's Order to Superior Court. September 29, 2003, the Board received the  
21 Order of Dismissal of the Superior Court case.

22 On September 30, 2003, the Board issued its Order Setting Compliance Hearing and  
23 Briefing Schedule.

24 On October 31, 2003, the Board received a Motion for Continuance from  
25 Respondent's attorney Steve Graham, asking the Board to move the compliance hearing  
26 due to a scheduling conflict.

On November 3, 2003, the Board granted Respondent's request for continuance.

1 On November 24, 2003, the Board held a telephonic compliance hearing. Present for  
2 the Board was Judy Wall and Dennis Dellwo. Present for Petitioners were David Robinson.  
3 Present for Respondent was Stephen Graham. D. E. "Skip" Chilberg reviewed the recorded  
4 hearing prior to participating in the following order.

5 On December 16, 2003, the Board issued its First Order on Compliance.

6 On April 8, 2004, the Board received Petitioner's Memo to the Board with Regards to  
7 a 2<sup>nd</sup> Compliance Hearing and Motion for Sanctions from David L. Robinson.

8 On June 7, 2004, the Board held the second telephonic compliance hearing. Present  
9 were Presiding Officer, D. E. "Skip" Chilberg, and Board Members Dennis A. Dellwo and  
10 Judy Wall. Present for Petitioners were David Robinson. Present for Respondent was  
11 Stephen Graham, Deputy Prosecuting Attorney.

12 On August 27, 2004, the Board issued its Second Order on Compliance.

13 On February 2, 2006, the Board received Petitioners Memo to the Board with  
14 Regards to 3<sup>rd</sup> Compliance Hearing.

15 On March 8, 2006, the Board received Petitioners Request to the Board with Regards  
16 to 3<sup>rd</sup> Compliance Hearing Briefing Schedule.

17 On March 13, 2006, the Board issued an Order Setting Compliance Hearing and  
18 Briefing Schedule.

19 On March 28, 2006, the Board received Respondent's Statement of Action Taken and  
20 Compliance Brief for 3<sup>rd</sup> Compliance Hearing.

21 On April 4, 2006, the Board received Petitioner's Reply Brief on Ferry County  
22 Resolution NO. 2005-04 for 3<sup>rd</sup> Compliance Hearing.

23 On April 11, 2006, the Board held a telephonic compliance hearing. Present were  
24 Presiding Officer John Roskelley and Board Member Dennis Dellwo. Board Member Judy  
25 Wall was unavailable. Present for Petitioners was David Robinson. Present for Respondent  
26 was Steve Graham. At the end of the telephonic compliance hearing the Board decided to  
continue this matter to allow additional briefing by the parties.

1 On April 25, 2006, the Board received Respondent's Second Brief for 3<sup>rd</sup> Compliance  
2 Hearing.

3 On May 2, 2006, the Board received Petitioner's 2<sup>nd</sup> Reply Brief on Ferry County  
4 Resolution NO. 2005-04 for 3<sup>rd</sup> Compliance Hearing.

5 On May 18, 2006, the Board held a compliance hearing. Present were Presiding  
6 Officer John Roskelley and Board Member Dennis Dellwo. Board Member Judy Wall was  
7 unavailable. Present for Petitioners was David Robinson. Present for Respondent was Steve  
8 Graham.

### 9 III. STANDARD OF REVIEW

10 Comprehensive plans and development regulations (and amendments thereto)  
11 adopted pursuant to Growth Management Act ("GMA" or "Act") are presumed valid upon  
12 adoption by the local government. RCW 36.70A.320. The burden is on the Petitioner to  
13 demonstrate that any action taken by the respondent jurisdiction is not in compliance with  
14 the Act. RCW 36.70A.320.

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

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

27 The Board will grant deference to counties and cities in how they plan under Growth  
28 Management Act. RCW 36.70A.3201. But, as the Court has stated, "local discretion is

1 bounded, however, by the goals and requirements of the GMA." *King County v. Central*  
2 *Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 561, 14 P.2d 133  
3 (2000). It has been further recognized that "[c]onsistent with *King County*, and  
4 notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly  
5 when it foregoes deference to a . . . plan that is not 'consistent with the requirements and  
6 goals of the GMA." *Thurston County v. Cooper Point Association*, 108 Wn.App. 429, 444, 31  
7 P.3d 28 (2001).

8 The Board has jurisdiction over the subject matter of the Petition for Review. RCW  
9 36.70A.280(1)(a).

#### 10 **IV. ISSUES AND DISCUSSION**

##### 11 **Issue No. 1:**

12 Did Ferry County fail to comply with RCW 36.70A.040, .060, .120, and .172 and  
13 interfere substantially with GMA goals (RCW 36.70A.020) by relying, without adequate  
14 reason, on a pre-GMA Shorelines Master Program to protect shorelines and their associated  
15 onshore and offshore habitat?

##### 16 **The Parties Positions:**

##### 17 **Petitioners' Position:**

18 The Petitioners contend Ferry County has not complied with three of the five issues  
19 found out of compliance in the Board's Second Order on Compliance issued on August 27,  
20 2004. Despite a Final Decision and Order (FDO) and two compliance hearings over a four-  
21 year period, the Petitioners feel Ferry County's failure to comply with three of the issues is  
22 grounds for sanctions.

23 Second Compliance Issue #1 refers to whether Ferry County failed to comply with  
24 the Growth Management Act (GMA) by relying on a pre-GMA Shorelines Master Program  
25 (SMP) to protect shorelines and their associated onshore and offshore habitat. Petitioners  
26 argue that the County has not adopted any new changes to its Shoreline Master Plan as  
required by the Boards FDO and its First and Second Orders on Compliance, thus rendering  
Ferry County's Development Regulations, found in Ordinance No. 2005-04, non-compliant.

1 The County, according to the Petitioners, is relying on an out-dated SMP to enforce its new  
2 development regulations. The out-dated SMP fails to satisfy the GMA goals of water and  
3 environmental quality, fails to reference the Critical Areas Ordinance or adequately protect  
4 fish, wildlife and riparian zones. In addition, the Petitioners contend there is nothing in the  
5 record to show that the buffers set in the out-dated SMP were based on best available  
6 science, nor that the County consulted with the Department of Ecology (DOE) or the  
7 Washington Department of Fish and Wildlife (WDFW) on the adequacy of the County's SMP  
8 before relying on it in its development regulations ordinance.

9 In their reply brief concerning Issue #1, the Petitioners contend the County "has yet  
10 to have a Riparian Ordinance that has reached compliance with this Board with regards to  
11 EWGMHB Case No. 4-01-0007c" and argues that "until this case is resolved the sentence  
12 from Ordinance #2005-04 (Development Regulation Ordinance), Section 1.00 Shorelines, is  
13 still valid and unchanged." The Petitioners believe Section 1.00 in the Ferry County  
14 Development Regulations Ordinance, which states, "All development adjacent to  
15 "Shorelines" and "Shoreline of State-wide Significance" shall be subject to the provisions of  
16 Sections 1 through 33 of the Ferry County Shorelines Master Program", references a pre-  
17 GMA regulation and therefore fails to protect the shorelines. The Petitioners also contend  
18 there is nothing in the record to indicate that best available science was used in the  
19 development of the buffers or that the County consulted with the DOE or WDFW.

18 **Respondents Position:**

19 The Respondent contends their recently enacted legislation, the Ferry County  
20 Resource Lands and Critical Areas Ordinance #2006-03, brings the County into compliance  
21 with the Boards Second Order on Compliance. The new CAO establishes different buffer  
22 zones and balances the competing values of environmental protection and private property  
23 rights. The ordinance provides up-to-date definitions; resource land policies, classifications  
24 and designation and protection measures; critical areas classification, designation and, in  
25 the case of wetlands and fish and wildlife conservation areas, protective buffer zones and

1 new riparian "widths" (the term "buffer" is not used in this ordinance, only in the  
2 Respondent's brief); and administrative regulations, including a section on variances.

3 The Respondent argues that the County is working toward compliance and the Board  
4 should find the County in compliance concerning riparian and wetland buffers and give the  
5 County "more time on agricultural lands." Respondent's Statement of Action Taken and  
6 Compliance Brief for 3<sup>rd</sup> Compliance Hearing (page numbering missing).

7 In the Respondent's Second Brief for 3<sup>rd</sup> Compliance Hearing, Respondent clarifies  
8 the County's CAO and the Petitioners argument by stating that the "new ordinance applies  
9 to all riparian areas and not just local waters or waters over which the county enjoys sole  
10 jurisdiction." Respondent's Second Brief for 3<sup>rd</sup> Compliance Hearing, pg. 2. Further, the  
11 Respondent contends that Ferry County's Shoreline Master Program is no longer used by  
12 the County to comply with the GMA. Only one provision in the County's development  
13 regulations references the pre-GMA Shoreline Master Program. Specifically, the Respondent  
14 argues, "We do not rely on the pre-GMA SMP to protect shorelines and their habitats for  
15 GMA purposes or compliance. For habitat protection, we rely on our new riparian protection  
16 provisions."

17 **Board Discussion:**

18 The Ferry County Board of County Commissioners (BOCC) enacted the Ferry County  
19 Resource Lands and Critical Areas Ordinance (RLCAO), #2006-03 on March 20, 2006.  
20 According to the Respondent's representative, Mr. Steve Graham, this ordinance applies to  
21 all riparian areas, including local and state waters, and takes precedence over the County's  
22 pre-GMA Shoreline Management Program. The County no longer relies on its pre-GMA SMP.  
23 In his brief, Mr. Graham writes, "Rather, Ferry County relies on its riparian protection  
24 provisions to comply with the GMA." And further in the brief, "Ferry County wants to be  
25 clear. We do not rely on the pre-GMA SMP to protect shorelines and their habitats for GMA  
26 purposes or compliance. For habitat protection, we rely on our new riparian protection  
provisions." Respondents Second Reply Brief at 2.

1 After significant questioning concerning the role the County's pre-GMA SMP will play  
2 in the future, the Board believes it is the intent of the County to use the recently adopted  
3 RLCAO to protect riparian areas and wetlands. The sentence inserted in the Development  
4 Regulations Ordinance that references the pre-GMA SMP, Sections 1 through 33, is moot,  
5 according to the Respondent. With the passage of the County's RLCAO, which has  
6 substantially increased wetland buffers and riparian widths from previous regulations, and  
7 with statements from the County's representative that the new RLCAO takes precedence  
8 over the pre-GMA SMP, the County is close to being in compliance. Unfortunately, the Board  
9 can not accept verbal promises from the Respondent's attorney that the pre-GMA SMP will  
10 not be used in setting riparian widths or wetland buffers. Two of the pre-GMA SMP  
11 references, as worded in the document, may have precedence over the new RLCAO.

12 The County references its pre-GMA SMP in four places in the RLCAO. Two references  
13 need to be eliminated, mitigated or replaced with references to the new RLCAO. They are:

- 14 • Section 11.00 FISH AND WILDLIFE CONSERAVATION AREA - SECTION 11.02  
15 CLASSIFICATION - 4. Waters of the State:  
16 Type 1 Water: All waters inventoried as "shorelines of the state" under  
17 Chapter 90.58 RCW. These waters are protected by the Ferry County  
18 Shorelines Master Program.
- 19 • Section 11.03 DESIGNATION – A. Ferry County will utilize the "Ferry County  
20 Shorelines Master Program" when reviewing Development Permits and  
21 activities within Washington State Water Types. (Underline emphasis by the  
22 Board.)

23 With the removal of these two references to the County's Shoreline Master Program,  
24 the County will be in compliance on this issue.

25 Clearly, the County is reluctant to use the phrase "best available science" in any of its  
26 regulations or ordinances, appearing to believe doing so would imperil its citizens' private  
property rights. The Board recognizes the rural nature of Ferry County, but continues to

1 encourage its elected officials to protect the County's natural resources, environment and  
2 wildlife by using science based on sound technology. State agencies, such as the DOE and  
3 WDFW, employ experts in their fields and are available for local governments as sources of  
4 scientific information. The County's original SMP, referenced in its development regulations,  
5 is woefully inadequate and fails to protect fish, wildlife and riparian areas as required by  
6 RCW's 36.70A.060 and .172. While the County may bring itself into compliance without  
7 doing so, the Board strongly recommends that Ferry County prepare, process and adopt a  
8 new SMP as soon as possible. In the interim, the County has a responsibility to eliminate or  
9 properly mitigate references to the pre-GMA SMP.

9 **Conclusion:**

10 The Board finds that the Petitioners have carried their burden of proof and find Ferry  
11 County's actions clearly erroneous. The County has failed to comply with RCW 36.70A.040,  
12 .060, and .172 and has interfered substantially with GMA goal No. 10 in RCW 36.70A.020.

13 **Issue No. 2:**

14 Did the County fail to comply with RCW 36.70A.040, .060, and .120 and interfere  
15 substantially with GMA goals (RCW 36.70A.020) by not adopting implementing regulations  
16 to restrict subdivision and density of development adequate to conserve designated  
17 agricultural lands of long-term commercial significance?

17 **Petitioners' Position:**

18 Second Compliance Order Issue #2 refers to Ferry County's failure to adopt  
19 implementing regulations to restrict subdivision and density of development adequate to  
20 conserve designated agricultural resource lands or agricultural lands of long-term  
21 commercial significance. The Petitioners argue that the crux of the issue is the 2.5-acre  
22 minimum lot size for agricultural resource lands, which the Board has found is too small for  
23 protecting designated agricultural lands. According to the Petitioner, the County has the  
24 ability by analyzing a parcel's tax status to determine which lands can be classified as  
25 agricultural resource lands or agricultural lands of long-term commercial significance, but  
26 has chosen not to use this option.

1 **Respondents Position:**

2 The County concedes it has not complied with the Board's Order and is in continued  
3 non-compliance for its failure to protect agricultural resource lands or agricultural lands of  
4 long-term significance. In their brief, the Respondent cites problems with the County  
5 obtaining the Department of Agriculture's new soil classifications, lack of planning  
6 personnel, insufficient funds and other priorities as its reasons for not complying.

7 **Board Discussion:**

8 The Board finds the County's failure to bring itself into compliance on this issue  
9 disturbing. The designation of agricultural resource lands and agricultural lands of long-term  
10 significance is a GMA priority and one that should be given the County's full attention. The  
11 County has the capability through recorded property tax status to designate many of the  
12 agricultural resource lands and agricultural lands of long-term commercial significance in  
13 Ferry County, yet has failed to do so. The Department of Community, Trade and Economic  
14 Development (CTED) provides guidelines for the classification of agricultural lands of long-  
15 term commercial significance. Counties and cities are required to use the land-capability  
16 classification system of the U. S. Department of Agriculture Soil Conservation Service. In  
17 addition, though, counties and cities shall also consider the combined effects of proximity to  
18 population areas and the possibility of more intense uses of the land as indicated by a list of  
19 ten criteria, including, (b) Tax status.

20 The Board encourages the County to protect the agricultural resource lands it has  
21 already identified, while continuing to locate and designate additional agricultural resource  
22 lands and agricultural lands through soil surveys and other means at its disposal. According  
23 to the Respondent's attorney and the County's Planning Director, the County has in its  
24 possession the long-overdue, anticipated soil provisions from the Department of Agriculture,  
25 so that excuse is no longer a detriment to compliance.

1 The County has already designated "Open Space/agricultural" lands and allows these  
2 lands a different tax status. With these criteria already available, designating agricultural  
3 lands via tax status should be straightforward and easy to accomplish.

4 "The tax status of Open Space/agricultural is applied to lands in Ferry County  
5 that are above 20 acres and show income from agricultural practices. There  
6 are exceptions to the 20 acre minimum, if substantial income can be shown  
7 from less acreage. This provides substantial incentive to the landowner to  
8 keep land in Open Space/agriculture." (Ferry County RLCAO 2006-03.)

9 The Board agrees with the Petitioners that the crux of the issue is the 2.5-acre  
10 minimum lot size for agricultural resource lands. Although there is no "bright line" for sizing  
11 a minimum lot size in agricultural resource lands or agricultural lands of long-term  
12 commercial significance, 2.5-acres is generally considered urban in nature and too small for  
13 commercial production.

14 In *City of Moses Lake v. Grant County*, EWGMHB Case No. 99-1-0016, Order on  
15 Petitioner's Motion for Reconsideration (August 16, 2000), the Eastern Board wrote the  
16 following:

17 "There is no requirement that the minimum lot size in agricultural resource  
18 lands be the average size of farms existing there. The establishing of a 40-  
19 acre lot size minimum is not unreasonable and is an appropriate lot size in the  
20 County's effort to protect the farmland from loss or damage."

21 In *Bremerton, et al. v. Kitsap County*, CPSGMHB Case No. 95-3-0039c FDO (October  
22 6, 1995), the Central Board dealt with urban densities and concluded (Eastern Board  
23 emphasis):

24 "A pattern of 1 and 2.5-acre lots meets the Act's definition of urban  
25 growth...However, a pattern of 1 or 2.5-acre lots is not an appropriate urban  
26 density either...An urban land use pattern of 1 or 2.5-acre parcels would  
constitute sprawl; such a development pattern within the rural area would also  
constitute sprawl."

1 The Western Board, in *Durland v. San Juan County*, WWGMHB Case No. 00-2-0062c,  
2 FDO (May 7, 2001), seemed to indicate five-acre lots as the minimum for rural density:

3 "In determining a rural density, statistical averaging of existing and projected  
4 average lot sizes has value primarily as a starting point for the analysis. Five-  
5 acre lots are often a guideline to showing a rural density, but are not a bright  
6 line determination."

6 In another case, *Smith v. Lewis County*, WWGMHB Case No. 98-2-0011, FDO (April  
7 5, 1999), the Western Board indicated density below five-acre lots was not rural:

8 "Densities that are more intense than 1 du per 5 acres are not typically rural  
9 in character and exist in the rural environment, in the main, as part of  
10 [L]AMIRDS."

10 On the other hand, The Central Board also passed on setting a "bright line" for  
11 agricultural lands in *City of Gig Harbor, et al., v. Pierce County*, CPSGMHB Case No. 95-3-  
12 0016c, FDO (October 31, 1995):

13 "The Board declines the invitation to establish a minimum lot size for  
14 agricultural parcel sizes."

15 This Board notes a pattern in these decisions and others by the Growth Boards. Five-  
16 acre lots are generally considered the minimum lot size in the rural/agricultural areas and  
17 only when a variety of larger lot sizes are available, while 2.5-acre lot sizes are more urban  
18 and promote sprawl. The most important criterion for establishing minimum lot sizing in  
19 agricultural resource lands is establishing a process. How did the county or city establish the  
20 lot size, is there a variety of lot sizes available and is the process outlined in the record?

21 In *Save Our Butte Save Our Basin Society, et al. v. Chelan County*, EWGMHB 94-1-  
22 0015, FDO (August 8, 1994), the Eastern Board noted that process was important:

23 "While there is opportunity for the exercise of local judgment, the conclusion  
24 reached must be the product of a valid process. The record must show that  
25 the County considered the factors for determination of agricultural lands of  
26 long-term significance given in WAC 365-190-050."

1 Clearly, there is nothing in the record established by Ferry County that indicates a  
2 process was followed by the County to determine that 2.5-acres is a justifiable lot size in  
3 the agricultural zone.

4 **Conclusion:**

5 The Board finds that the Petitioners have carried their burden of proof and that Ferry  
6 County's actions are clearly erroneous. The County is in continued non-compliance in this  
7 issue and in violation of RCW 36.70A.040 and .060, and the County's non-compliance  
8 interferes substantially with GMA Goal No. 8 under RCW 36.70A.020.

9 **Issue No. 3:**

10 Second Compliance Order No. 5. Do the Ferry County Development Regulations  
11 violate RCW 36.70A.040 (which requires that development regulations be consistent with  
12 and implement the comprehensive plan) because it adopts by reference Sections 7.00 and  
13 12 of the Ferry County Interim Ordinance No. 93-02 "Designate and Classify Resource  
14 Lands and Critical Areas"?

15 Second Compliance Order No. 6. Do the Ferry County Development Regulations  
16 violate RCW 36.70A.040 (which requires that development regulations be consistent with  
17 and implement the comprehensive plan) adopts by reference Sections 4.00 and 12 of the  
18 Ferry County Interim Ordinance No. 93.02 "Designate and Classify Resource Lands and  
19 Critical Areas"?

20 **Petitioners' Position:**

21 The Petitioners group Second Compliance Order Issues #5 and #6 into their Issue  
22 No. 3, which covers variances and administrative review. The Petitioners contend the  
23 County arbitrarily rejected the "best available science" language found in CTED's Model  
24 Ordinance in the County's new Resource Lands and Critical Areas Ordinance #2006-03. In  
25 their argument, the Petitioners point out that the Board, in their First Order on Compliance  
26 in 01-1-0019, found the County in continued non-compliance for its failure to utilize best  
available science and for failure to provide adequate standards for administrative review.

The Petitioners contend there is inconsistency between the County's Critical Areas  
Ordinance and its Development Regulations Ordinance. They note CTED's recommendation  
that, "Time limits for variances should generally be consistent with other adopted time

1 limits, such as those for preliminary plats." The two ordinances have different time limits for  
2 variances. In addition, the Petitioners contend the County intentionally eliminated any  
3 reference to public involvement for variances involving critical areas.

4 **Respondent's Position:**

5 Under Issue #3, the Respondent argues that the variance provisions in the  
6 development regulations pertain solely to rural service areas and variance criteria for rural  
7 service areas are not held to the standard of BAS. The Respondent contends the County's  
8 variance regulations are similar to the model ordinance offered by the Community, Trade  
and Economic Development Department.

9 **Board Discussion:**

10 As in Issue No. 1, the Board continues to see evidence of reluctance on the part of  
11 the County to obtain and use best available science from state agencies to protect and  
12 preserve critical areas without further degradation. In this issue, the reluctance can be seen  
13 in the variance process. Counties and cities that are obligated to plan under GMA must use  
14 best available science in formulating their ordinances and regulations, which designate and  
15 protect critical areas. A variance is a development regulation that modifies the protection of  
16 critical areas, as well as other land use.

17 **Critical areas – Designation and protection – Best available science to be use.**

18 (1) In designating and protecting critical areas under this chapter, counties  
19 and cities shall include the best available science in developing policies and  
20 development regulations to protect the functions and values of critical areas.  
21 In addition, counties and cities shall give special consideration to conservation  
or protection measures necessary to preserve or enhance anadromous  
fisheries. RCW 36.70A.172(1).

22 The Board in its FDO for this case found the following:

23 "Regarding the adequacy of the development regulations to implement the  
24 listed goals of the comprehensive plan, the Board has a major concern: the  
25 development regulations must utilize best available science in protecting  
critical areas. Nothing in the record indicates best available science was  
26 included in these regulations. In fact, what evidence exists suggests that best  
available science has been rejected. RCW 36.70A.172 is specific. Best

1 available science must be utilized in protecting critical areas. Ordinance 2001-  
2 09 is flawed by not "including the best available science in developing policies  
3 and development regulations to protect the functions and values of critical  
4 areas". (RCW 36.70A.172). We need not address each specific goal  
5 challenged by the Petitioners.

6 It seems to this Board that very little has changed since the FDO was issued.

7 The Western Board, in *FOSC v. Skagit County*, found that to protect critical areas,  
8 best available science is a mandatory element in a county's development regulations:

9 "The GMA requires a local government to adopt development regulations that  
10 protect designated critical areas. In discharging its duty to protect critical  
11 areas, a local government must include best available science and give special  
12 consideration to conservation or protection measures necessary to preserve or  
13 enhance anadromous fish." *FOSC v. Skagit County*, WWGMHB Case No.  
14 96-2-0025c, Compliance Order (Aug. 9, 2000).

15 CTED's Model Ordinance contains suggested language for counties and cities. For  
16 instance, under B. Variance Criteria No. 6, CTED specifically recommends "The decision to  
17 grant the variance includes best available science..." The County deliberately left Variance  
18 Criteria No. 6 out of its ordinance. The Board believes this is a blatant disregard of its FDO,  
19 its First Order on Compliance and its Second Order on Compliance.

20 First Order on Compliance (in part):

- 21 8. Ferry County is in continued non-compliance for their failure to utilize  
22 Best Available Science, and failure to provide adequate standards for  
23 administrative review, in violation of RCW 36.70A.172.

24 Second Order on Compliance (in part):

- 25 5. Ferry County is in continued non-compliance for their failure to utilize  
26 Best Available Science, and failure to provide adequate standards for  
administrative review, in violation of RCW 36.70A.172. Ferry County is  
in procedural compliance on items No. 2 and No. 5 of the Board's First  
Compliance Order. (Second Order on Compliance.)

1           There are many areas in Ferry County's Resource Lands and Critical Areas Ordinance  
2 that need reference to "best available science", not just on page 41, Section 11.04  
3 RIPARIAN AREA PROTECTION. Referencing "best available science" is an indication that  
4 government will rely on something tangible, such as science, to base its decisions, not  
5 arbitrary analysis of outside factors.

6           Although CTED's Model Ordinance leaves the door open for a local jurisdiction's  
7 discretion by using the word "should" in regards to public review, its Model Ordinance  
8 recommends that counties and cities provide public review and a public hearing process if  
9 proposals need a variance from critical areas regulations. In addition, CTED recommends  
10 that notices and hearings for a project should be consolidated and integrated with the  
11 environmental and permit review process. The County also chose not to include these  
12 suggestions from CTED. The Board finds this is not a fatal flaw because of the word  
13 "should", but it still leaves too much power and discretion to administrative decisions  
14 without public input.

15           The Board further finds that Ferry County's Development Regulations Ordinance,  
16 which allows only one year after approval, and its RLCAO, which allows up to five years  
17 after approval, are inconsistent. CTED's Model Ordinance only suggests "time limits for  
18 variances should generally be consistent with other adopted time limits, such as those for  
19 preliminary plats." Again, the word "should" allows counties and cities discretion. The Board  
20 urges the County to make the variance time limits consistent with each other, but  
21 recognizes this is up to the County to do so.

22 **Conclusion:**

23           The Board finds that the Petitioners have carried their burden of proof and that Ferry  
24 County's actions are clearly erroneous. The County is in continued non-compliance in this  
25 issue and in violation of RCW 36.70A.172. The County has failed to include best available  
26 science in the variance process. Although not required, the Board strongly encourages the  
County to allow public participation in the variance process and to fix the timing issue. The

1 County's continuing non-compliance interferes substantially with GMA Goal No. 10 under  
2 RCW 36.70A.020.

### 3 VIII. ORDER

- 4 1. Ferry County is in continued non-compliance for its failure to protect  
5 shorelines under RCW 36.70A.060 and RCW 36.70A.172.
- 6 2. Ferry County is in continued non-compliance for its failure to protect  
7 agricultural resource lands and agricultural lands of long-term  
8 commercial significance, in violation of RCW 36.70A.040 and RCW  
9 36.70A.060.
- 10 3. Ferry County is in continued non-compliance for its failure to utilize best  
11 available science in violation of RCW 36.70A.172.
- 12 4. Ferry County is to provide a proposed schedule to the Board by June  
13 23, 2006, to achieve compliance on the remaining issues.
- 14 5. Ferry County must take the appropriate legislative action to bring the  
15 County into compliance with the goals and requirements of the Act as  
16 so ordered by the Board by **September 12, 2006, 90 days** from the  
17 date issued.
- 18 6. The request for invalidity of the adopted ordinances is denied.
- 19 7. Request for Sanctions: The Board acknowledges the progress Ferry  
20 County is making, and will not at this time recommend sanctions be  
21 applied.
- 22 • The County shall file with the Board by **September 18, 2006, an**  
23 **original and four copies** of a Statement of Actions Taken to Comply  
24 (SATC) with the GMA, as interpreted and set forth in this Order. The  
25 SATC shall attaché copies of legislation enacted in order to comply. The  
26 County shall simultaneously serve a copy of the SATC, with  
attachments, on the parties. By this same date, the County shall file a  
"Remanded Index," listing the procedures and materials considered in  
taking the remand action.

- 1           • By no later than **October 2, 2006**, Petitioners shall file with the Board  
2           an **original and four copies** of Comments and legal arguments on  
3           the County's SATC. Petitioners shall simultaneously serve a copy of  
4           their Comments and legal arguments on the parties.
- 5           • By no later than **October 16, 2006**, the County shall file with the  
6           Board an **original and four copies** of the County's Response to  
7           Comments and legal arguments. The County shall simultaneously serve  
8           a copy of such on the parties.
- 9           • By no later than **October 23, 2006**, Petitioners shall file with the  
10          Board an **original and four copies** of their Reply to Comments and  
11          legal arguments. Petitioners shall serve a copy of their brief on the  
12          parties.
- 13          • Pursuant to RCW 36.70A.330(1) the Board hereby schedules a  
14          telephonic Compliance Hearing for **October 30, 2006, at 10:00 a.m.**  
15          The parties will call **360-357-2903 followed by 18220 and the #**  
16          **sign**. Ports are reserved for Mr. Robinson and Mr. Graham. If additional  
17          ports are needed please contact the Board to make arrangements.

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

21           **Pursuant to RCW 36.70A.300 this is a final order of the Board.**

22           **Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the**  
23           **mailing of this Order to file a petition for reconsideration. The original and four**  
24           **copies of a motion for reconsideration, together with any argument in support**  
25           **thereof, should be filed with the Board by mailing, faxing, or otherwise**  
26           **delivering the original and four copies of the motion for reconsideration directly**  
              **to the Board, with a copy served on all other parties of record. Filing means**  
              **actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-**  
              **02-240, WAC 242-02-330. The filing of a motion for reconsideration is not a**  
              **prerequisite for filing a petition for judicial review.**

1 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal  
2 the decision to superior court as provided by RCW 36.70A.300(5). Proceedings  
3 for judicial review may be instituted by filing a petition in superior court  
4 according to the procedures specified in chapter 34.05 RCW, Part V, Judicial  
5 Review and Civil. The petition for judicial review of this Order shall be filed with  
6 the appropriate court and served on the Board, the Office of the Attorney  
7 General, and all parties within thirty days after service of the final order, as  
8 provided in RCW 34.05.542. Service on the Board may be accomplished in person  
9 or by mail. Service of the Board means actual receipt of the document at the  
10 Board office within thirty (30) days after service of the final order. A petition for  
11 judicial review may not be served on the Board by fax or electronic mail.

12 **Service.** This Order was served on you the day it was deposited in the United  
13 States mail. RCW 34.05.010(19).

14 **SO ORDERED** this 14<sup>th</sup> day of June 2006.

15 EASTERN WASHINGTON GROWTH MANAGEMENT  
16 HEARINGS BOARD

17 \_\_\_\_\_  
18 John Roskelley, Board Member

19 \_\_\_\_\_  
20 Dennis Dellwo, Board Member

21 **Partial Dissent:**

22 This case is almost 6 years old. The Board has continuously been thoughtful to the  
23 limitations of the Ferry County. The County is small, has limited funds, and staff. There  
24 comes a time when the Board needs to say, yes we understand your limitations, but the  
25 County must come into compliance. In this decision the Board has said in different ways  
26 how disappointed we are in the County's lack of willingness to come into compliance. While  
this Board Member agrees with this decision, I do not think the Board went far enough. This

1 Board Member feels that Ferry County should be not just found in non-compliance, but that  
2 sanctions should be requested.

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Judy Wall, Board Member

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