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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

ORDER ON COMPLIANCE

Petitioner,

v.

FERRY COUNTY,

Respondent.

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I. SUMMARY OF DECISION

The Petitioners are challenging certain provisions contained in the recently adopted Ferry County Resource Lands and Critical Areas Ordinance #2006-03 (CAO). They contend that components of the original Riparian Ordinance (ICAO), found out of compliance by the Eastern Washington Growth Management Hearings Board are incorporated within the new critical areas ordinance and therefore the County continues to be out of compliance with the Boards Final Decision and Order (FDO) dated December 21, 2004. Specifically, the County continues to allow 100-foot buffers for designated Type 1 & 2 streams, a buffer width previously found out-of-compliance by the Board for these stream types.

As found previously in the original FDO concerning the ICAO, the Board again finds the 100-foot buffers established in the Ferry County Resource Lands and Critical Areas Ordinance #2006-03 for Type 1 and 2 waters for Low Intensity Land Use in Ferry County are inadequate and do not comply with the Growth Management Act's requirements found

1 in RCW 36.70A.060 and RCW 36.70A.172 to protect the functions and values of critical
2 areas using best available science.

3 The variable widths or variances in the width allowed by the County's Critical Area
4 Ordinance must be based upon scientific review of the site and the development of the
5 buffer size appropriate for that location. That is not done here. The variances section is also
6 out of compliance but could be compliant if best available science supporting such variance
7 is required prior to the modification of a complaint standard buffer.

8 II. PROCEDURAL HISTORY

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

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

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

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

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

22 On August 10, 2004, the Board sent a letter to the parties named above advising the
23 Board was considering consolidation of EWGMHB Case No. 04-1-0006, RIPARIAN OWNERS
24 OF FERRY COUNTY and SHARON SHUMATE v. FERRY COUNTY with EWGMHB Case No. 04-
25 1-0007, CONCERNED FRIENDS OF FERRY COUNTY and DAVID ROBINSON v. FERRY
26 COUNTY and asking that objections be provided to the Board no later than August 17,
2004.

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

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

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

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

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

12 On December 21, 2004, the Board issued its Final Decision and Order. Ferry County
13 was to take legislative action to bring themselves into compliance by April 19, 2005.

14 On March 10, 2005, the Board received a stipulation signed by Petitioner Dave
15 Robinson and Respondent's attorney Steve Graham requesting an additional 30 days to take
16 legislative action to correct the non-compliance issues raised in the Petition for Review filed
17 by Robinson.

18 On May 19, 2006, the Board received Respondent's Motion to Set Compliance
19 Hearing.

20 On August 22, 2006, the Board held a telephonic compliance hearing. Present were,
21 Dennis Dellwo, Presiding Officer, and Board Members Judy Wall and John Roskelley. Present
22 for Petitioner was David Robinson. Present for Respondent was Steve Graham. Petitioners
23 Riparian Owners of Ferry County and Sharon Shumate did not participate.

24 **III. STANDARD OF REVIEW**

25 Comprehensive plans and development regulations (and amendments thereto)
26 adopted pursuant to Growth Management Act ("GMA" or "Act") are presumed valid upon
adoption by the local government. RCW 36.70A.320. The burden is on the Petitioner to

1 demonstrate that any action taken by the respondent jurisdiction is not in compliance with
2 the Act. RCW 36.70A.320.

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

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

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

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

IV. ISSUES PRESENTED

ISSUE #1:

Did the County fail to comply with RCW 36.70A.040, .060, .120 and .172 and
substantially interfere with GMA goals (RCW 36.70A.020) by not establishing adequate
vegetative buffers, (*by modifying standard riparian area widths through averaging down to*

1 25 feet, and by allowing common line setbacks down to 25 feet) or other adequate means
2 for protecting and regulating activities within riparian areas?

3 **Issue #2:**

4 Do the Ferry County Development Regulations violate RCW 36.70A.040 because it
5 adopts by reference Section 12 of the Ferry County Interim Ordinance Number 93-02
6 "Designate and Classify Resource Lands and Critical Areas"? Do these development
7 regulations fail to utilize best available science, and fail to provide adequate standards for
8 Planning Department Review, in Violation of RCW 36.70A.172 and fail to comply with RCW
9 36.70A.060(2) requirement that the regulations protect critical areas?

8 **V. ARGUMENT, DISCUSSION AND ANALYSIS**

9
10 **ISSUE #1:**

11 Did the County fail to comply with RCW 36.70A.040, .060, .120 and .172 and
12 substantially interfere with GMA goals (RCW 36.70A.020) by not establishing adequate
13 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
14 for protecting and regulating activities within riparian areas?

14 **The Parties Positions:**

15 **Petitioners' Position:**

16 The Petitioners are challenging certain provisions contained in the recently adopted
17 Ferry County Resource Lands and Critical Areas Ordinance #2006-03. They contend that
18 components of the original Riparian Ordinance, found out of compliance by the Eastern
19 Washington Growth Management Hearings Board (Board), are incorporated within the new
20 critical areas ordinance and therefore the County continues to be out of compliance with
21 parts 1.a. and 1.c. of the Boards Final Decision and Order dated December 21, 2004. The
22 Petitioners argue that stream Types 1-5 are "waters of the state" and are included under
23 Fish and Wildlife Habitat Conservation Areas (FWHCA). WAC 365-190-080, which pertains to
24 critical areas, includes FWHCA. The GMA requires all counties and cities to adopt
25 development regulations that protect the functions and values of critical areas. RCW
26

1 36.70A.060(2) and RCW 36.70A.172. In addition, counties and cities are required to use
2 best available science (BAS) when developing these regulations.

3 The Petitioners contend that the Ferry County Resource Lands and Critical Areas
4 Ordinance #2006-03 fails to comply with the GMA in several ways. Specifically, the County
5 still allows riparian buffers of 100 feet for Type 1 and 2 streams and fails to use best
6 available science. According to the Petitioners, without an adequate buffer pursuant to the
7 prevailing science, the functions and values of the critical areas are not protected.

8 The Petitioners argue that the record contains no scientific basis for allowing a buffer
9 width that the Board has previously found out-of-compliance with the GMA. In fact, the
10 record contains comment letters from state agencies that urge the County to adopt buffer
11 widths greater than 100 feet based on peer-reviewed science.

12 The Office of Community Development (OCD) letter, which includes comments from
13 the Washington Department of Fish and Wildlife (WDFW) states,

14 "The functions and values not protected by the 100-foot buffers in the
15 ordinance included: Large woody debris recruitment (147' recommended),
16 sediment filtration (137' recommended), erosion control (112' recommended),
17 microclimate control (412' recommended), and wildlife habitat (287'
18 recommended)."

19 In addition, the letter states,

20 "If the BAS cannot demonstrate how these functions and values can be
21 protected, you may wish to reevaluate the adopted buffer widths." Index #28.

22 Additional letters from OCD and WDFW at various times during the ordinance phase
23 recommended larger buffer widths. Index #'s 114 and 115.

24 In a report identified as best available science by Chris Parsons, OCD (Index #3),
25 WDFW recommends 250-foot wide buffers for Type 1 and 2 streams (Index #133). The
26 WDFW recommends this buffer width because "...the GMA requires that the regulations for
critical areas must protect the 'functions and values' of those designated areas. RCW
36.70A.172(1). This means all functions and values". *Wean v. Island County*, 122 Wn. App.

1 156, 174-175, 93 P.3d 885, 894 (2004). The Petitioners point out the conflict between the
2 County's 100-foot buffer and the recommended buffer widths for many functions necessary
3 to protect fish, wildlife, habitat and stream structure located in Type 1 and 2 stream buffer
4 areas.

5 The Petitioners argue that the County has changed the definitions of both high and
6 low intensity land use, not only from the original Interim CAO, but also from the model CAO
7 recommended by the state. They contend the County has designated a 2.5 acre minimum
8 lot size for the entire County, which is out-of-compliance for resource agricultural lands,
9 thus allowing the new so-called low-intensity designation the same impacts for a majority of
10 the lots in the County, namely a 100-foot buffer. This, the Petitioners contend, is contrary
11 to best available science.

12 The Petitioners claim the new adopted CAO changed the definition of High Impact
13 Land Use (HILU) and Low Impact Land Use (LILU) from the original ICAO and Model CAO
14 recommendations to defining new subdivisions and new homes at densities of one dwelling
15 unit per 2.5 acres as a LILU. They also contend the adopted CAO is not based on best
16 available science.

17 **Respondent's Position:**

18 The Respondent argues that the new ordinance clearly provides restrictions and
19 limitations for activities in riparian areas and has increased the buffer width for HILU. The
20 Respondent contends that Ferry County's new ordinance compares favorably with Stevens
21 County, even though Stevens County requires a 150-foot fixed width for stream Types 1
22 and 2 with no differentiation for intensity of the proposed land use. The Respondent quotes
23 a Stevens County expert review as an example that the, "fixed-buffer width approach does
24 not lend itself well to the complicated ecological processes inherent in wetland and riparian
25 areas." Exhibit 137, page iii.

26 The Respondent takes the Petitioner, Mr. Robinson, to task for not acknowledging
the County now requires a 200-foot buffer for high intensity uses, nor does Mr. Robinson

1 note the provision in the Ferry County ordinance for increasing the standard riparian area
2 width beyond 200 feet on a case-by-case basis.

3 The Respondent argues that there is no constitutional reason to require effective
4 buffers as stated by the Petitioners and acknowledges that if a county does have
5 regulations that restrict uses on private property, then they must have a sound scientific
6 basis to pass constitutional muster. "The science must be shown." (Respondent's HOM
7 Response Brief, page 5). The Respondents claim Ferry County has "...sound science that we
8 have in the record." (Same page).

9 The Respondent also claims the Petitioners rely on out-of-date comment letters from
10 the state agencies, arguing that the agency comments are directed toward earlier
11 ordinances, not the most recently adopted CAO. The Respondent also argues that the
12 Petitioners are using exhibits from a past case, not the current application, and cites
13 documents outside of the record.

14 Under the heading entitled, "Functions and Values" on page 7, the Respondent cites
15 the Washington State Department of Fish and Wildlife's buffer width recommendations and
16 refers to the Petitioners argument for at least a 147-foot buffer for large woody debris
17 recruitment. The Respondent then argues that the County's Planning Commission refuted
18 the WDFW's recommendations in its findings of fact and based its decision for variable
19 width buffers on Ferry County's priority goals and recent BAS that indicates WDFW standard
20 widths for values and functions are unnecessarily conservative.

21 The Respondent, under the heading, "Woody Debris", argues that seven studies
22 recommend a variety of buffer widths to maintain woody debris, ranging from a low of 100
23 feet to a high of 180 feet. The Respondent contends that Ferry County does not have the
24 same development intensity as other counties, or the pressure of subdivision or industrial
25 development. The County's Planning Commission recognized this and recommended the low
26 end of the recommendations for recruitment of woody debris.

1 The Respondent then details the Petitioners arguments for a wider buffer to recruit
2 large woody debris, followed by an argument that the County's CAO will prohibit the
3 homebuilder from clearing the natural vegetation in the buffer.

4 The Respondent's next discussion is under the heading, "Sediment Filtering". Stating
5 that the Petitioner will not be content with even the low-end of the state recommendations,
6 the Respondent argues the Planning Commission again chose to fit the regulations to Ferry
7 County, not other counties, and its Findings of Fact are cited. The Planning Commission
8 cites the WDFW categories of development harmful to riparian areas and it subsequently
9 dismisses these as "outside the purview of the development to be covered by Ferry County
10 land use controls." Respondents HOM Response Brief, page 10. The Respondent then
11 argues deference should be given to the elected and appointed representatives of Ferry
12 County.

13 The Respondent argues under the heading, "Deference to County Authority", that
14 Ferry County has very limited funds and minimal staff with which to develop an intricate
15 scientific record. What is required is that "[c]ounties and cities must analyze the scientific
16 evidence and other factors in a reasoned process [;], they must take into account the
17 practical and economic application of the scientific evidence to determine if it is the best
18 available." According to the Respondent, as stated in one of their numerous species
19 appeals, "The Board recognizes the prerogative of Ferry County to not adopt the DFW
20 recommendation, as long as that decision is based on a sound, reasoned process that
21 includes best available science." *Concerned Friends of Ferry County v. Ferry County*, 97-1-
22 0018, Second Order on Compliance; (May 23, 2000). The Respondent includes several other
23 cases pertaining to BAS; challenging a county's record; and local deference. These cases
24 are quoted in Respondent's brief as well.

25 The Respondent argues there is no direct regulatory requirement to include "riparian
26 area" as a category of "critical area" to be protected, thus Ferry County should be afforded
discretion within the law. They also argue that protection of riparian area is not specified by

1 the GMA, nor is it a requirement of the administrative rules promulgated to implement the
2 GMA.

3 In addition, the Respondent contends the GMA requirement to use BAS in adopting
4 development regulations was the deciding factor in the County's decision to include riparian
5 areas as a category of lands to be protected as critical areas. Thus, in deciding to adopt a
6 riparian area protection ordinance, the County demonstrated its commitment to use BAS in
7 protecting critical areas. The Respondent argues that the WDFW document cited by the
8 Petitioner is only one of the many studies available as sources of BAS, according to the OCD
9 Citations publication. In addition, the Respondent contends that the WDFW
10 recommendations are "based solely on the perspective and interest of WDF&W and do not
11 purport to present a balanced view". Respondent's HOM Brief, pg. 14. The WDFW
12 recommendations, according to the Respondent, "do not allow for any of the other GMA
13 goals which the County must consider, including property rights, encouraging economic
14 development, and protecting the viability of resource industries, particularly agriculture."
15 Respondent's HOM Response Brief, page 14. The Respondent quotes one study by Margaret
16 O'Connell that the Planning Commission found to reveal "the fallacy of relying on
17 conclusions from out of region." Respondent's HOM Response Brief, page 14. The
18 Respondent further notes that the WDFW recommendations are the subject of scientific
19 criticism and quote the GEI Consultant study, Exhibit 139.

20 The Respondent argues that in the future the science may change. The County has
21 used "sound judgment, based on assessment of the BAS, in adopting riparian area widths".
22 The Planning Commission, which adopted many of the qualitative management
23 recommendations by the WDFW, recognizes that the study of riparian area functions and
24 values is on-going and may change as new studies are completed.

25 The Respondent, under the next heading, "High v. Low Density Land Uses",
26 discusses the issue in comparison to the County's original ICAO, not the Model Ordinance.
According to the Respondent, the new definition places more potential development into
the "high density" category than did the original ICAO, thus subjecting potentially more

1 proposals to the wider buffer widths required for "high intensity" uses. The current
2 definition includes any residential development with a density greater than one unit per 2.5
3 acres as "high intensity". New agricultural use in proximity to waters of the state would be
4 classified under "low intensity". All other existing agricultural use is exempt.

5 **Petitioners Reply Position:**

6 The Petitioners disagree with the Respondent's position that the County is not
7 required to protect riparian areas. The GMA requires all counties, even those not planning
8 under the GMA, to adopt development regulations that protect the functions and values of
9 critical areas, which include riparian areas by definition. RCW 36.70A.030. Further, the
10 Court of Appeals has held that local governments must protect all of the functions and
11 values of critical areas including wildlife functions of riparian areas. *WEAN v. Island County*,
122 Wn. App. 156, 174-75, 93 P.3d 885-95 (2004).

12 The Petitioners argue that the 100-foot buffer width for Type 1 and 2 streams will
13 not protect the functions and values of critical areas and cite studies documenting the
14 necessary buffer widths to accomplish protection. The Petitioners document the four County
15 responses that justify the 100-foot buffer and offer counterpoints to each. In the first
16 response, the County attributes the requirement to protect critical areas functions and
17 values to the Petitioner. The Petitioner contends the statement is the holding of the Court of
18 Appeals in the *WEAN* case.

19 In the second, the County argues that the compilation of BAS is "probably not a final
20 and inviolable tabulation of all functions and values. The Petitioner agrees, but believes the
21 science the County relies on is not the BAS.

22 In the Respondents third argument, they contend the 100-foot buffer protects some
23 of the functions and values. The Petitioner argues that the County never counters the
24 evidence that many important functions are not protected by the 100-foot buffer width.
25 Notably, the County actually states that the science shows an even wider buffer may be
26 needed for wildlife habitat and microclimate control. The Petitioners clarify the O'Connell

1 study, which actually shows that 100-foot buffer widths or wider are needed for Type 3 and
2 4 streams. The Petitioners then do a complete recap of the study to prove their point.

3 In the fourth main argument, the County attacks the WDFW: *Management*
4 *Recommendations for Washington's Priority Habitats: Riparian*, by using the County's
5 Planning Commission's Findings of Fact. The Petitioner contends these attacks fail. The
6 WDFW study documents riparian habitats in Eastern Washington taking into account
7 regional differences, uses high quality studies by acknowledged experts in their fields, is
8 backed by legitimate letters from state agencies that support the WDFW study, and finally
9 does not advocate a position on development as implied by the Respondent.

10 The Petitioners argue in their Section D. that the County can use a variety of science
11 and reasons to make its decision, but the Court of Appeals has held that this balancing must
12 be based on evidence in the record. *WEAN v. Island County*, 122 Wn. App. 156, 172 & 183,
13 93 P.3d 885, 893 & 899 (2004). The County has failed to provide this evidence to deviate
14 from the recognized BAS. The County's Planning Commission's Findings of Fact states
15 generalities and not BAS.

16 The Petitioners cite the Washington Supreme Court that when balancing the goals of
17 the GMA, counties and cities must look to the specific language of the goals to find the right
18 balance. The Petitioners argue that a goal with verbs that mandates specific action trumps
19 goals with less directive verbs.

20 The Petitioners contend that rural can be defined as lots larger than 2.5 acres. Lots
21 under 2.5 acres are urban development in Ferry County and can not be allowed outside a
22 designated urban growth area. *Woodmansee and CFFC v. Ferry County*, EWGMHB Case No.
23 95-1-0010, FDO, page 5-6 (May 13, 1996). The Board's statement in this case set the stage
24 for Ferry County to keep the adoption of its 2.5-acre lots over the whole county. The Board
25 subsequently found the County out-of-compliance for not preserving agricultural lands of
26 long-term significance.

The Petitioners argue that the 2.5 acre lot size for rural land is still out-of compliance
with the Board's FDO in Case No. 01-1-0019 and that the 100-foot buffer was found out-of-

1 compliance by this Board in Case No. 04-1-0007c and in subsequent Compliance Orders.
2 The Petitioners also contend that agricultural land is classified as moderate to high intensity
3 land use, not "low intensity" as argued by the County.

4 **Board Discussion:**

5 The Petitioners argue that in Section 11.04.05 RIPARIAN AREA WIDTHS, the 100-
6 foot buffer width for Type 1 and 2 streams will not protect all the functions and values of
7 critical areas as required by RCW 36.70A.060(2) and RCW 36.70A.172. The Board agrees.

8 The GMA requires all counties, even those not fully planning under the GMA, to
9 adopt development regulations that protect the functions and values of critical areas. RCW
10 36.70A.060(2) and (3) and RCW 36.70A.172. Critical areas include: (a) wetlands; (b) areas
11 with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife
12 habitat conservation areas (FWHCA); (d) frequently flooded areas; and (e) geologically
13 hazardous areas. RCW 36.70A.030(5).

14 WAC 365-190-080, which pertains to critical areas, includes FWHCA. In turn, fish and
15 wildlife conservation areas include "waters of the state" [WAC 365-190-080(5)(a)(vi)],
16 which are classified under the interim water typing system, Type 1-5 (WAC 222-16-031) or
17 the permanent water typing system, Type "S", "F", "Np", and "Ns", as defined under WAC
18 222-16-030.

19 The Ferry County Resource Lands and Critical Areas Ordinance (#2006-03), under
20 Section 11.00 FISH AND WILDLIFE CONSERVATION AREA, documents the County's goals
21 as: "To preserve and protect priority habitats and species in Ferry County. To incorporate
22 cooperative, coordinated and reasonable land use planning in relation to the priority
23 habitats and species in our county." The County follows with Section 11.02
24 CLASSIFICATION, and details the areas defined as fish and wildlife habitat conservation
25 areas per WAC 365.190.

26 Under Section 11.04 RIPARIAN AREA PROTECTION, the County has chosen to
protect riparian areas based on, "The requirement that critical area protection be based on
best available science indicates the inclusion of riparian area as a critical area." The new

1 CAO then documents the County's purpose and goals; activities regulated and not
2 regulated; classification; riparian area (buffer) widths; reasonable use exceptions and other
3 protections.

4 RCW 36.70A.172(1) requires that best available science (BAS) shall be included "in
5 developing policies and development regulations to protect the functions and values of
6 critical areas." The Court of Appeals, Division I, held "that evidence of the best available
7 science must be included in the record and must be considered substantively in the
8 development of critical areas policies and regulations." *HEAL v. CPSGMHB*, 96 Wn. App.
9 522, 532, 979 P.2d 864 (1999). Subsequently, the Court of Appeals reinforced the *Heal*
10 interpretation of BAS and how it must be used in *WEAN v. Island County et al*, 118 Wn.
11 App. 567; 76 P.3d 1215. The Court found that the record must contain "applicability of
12 unique local conditions to justify a departure downward from the buffer width requirements
outlined in the scientific literature." (*WEAN*, supra at p. 584).

13 This Board's FDO (04-1-0007c), issued December 21, 2004, concluded that, "Ferry
14 County has no expert or scientific evidence in the record supporting the buffers adopted for
15 their streams and wetlands or the evidence dealt with specific and narrow functions, rather
16 than the entirety of functions of that stream." This same scenario exists here.

17 The County has arbitrarily concluded that a variable width buffering for Type 1 and 2
18 streams based on High Intensity Land Use versus Low Intensity Land Use is appropriate for
19 Ferry County. The County bases its decision in part on a statement found in "Review of Best
20 Available Science For Wetlands and Riparian Buffers" by Landau Associates, attributed to a
21 Stevens County expert consultant, Mr. William Towey, who concluded that, "An
22 overwhelming sentiment articulated by the various authors' conclusions regarding
23 establishment of buffer areas for wetland and riparian areas, was that fixed-buffer width
24 approach does not lend itself well to the complicated ecological processes inherent in
wetland and riparian areas." Exhibit 113, p. iii.

25 Despite this statement, the report cited above concludes in its Executive Summary
26 that, "Nevertheless, the recommendations for wetland and riparian buffers presented in this

1 report are based on fixed-buffer requirements in regards to the protection of water quality
2 parameters, wildlife, and aquatic resources." Exhibit 113, p. iii.

3 At the end of the report, Mr. Towey recommends fixed-width wetland and riparian
4 buffer widths cited within the best available science literature reviewed. His
5 recommendation for Stevens County falls far short of the buffer widths for Type 2, 3, 4 and
6 5 streams recommended by the Washington State Department of Fish and Wildlife, which
7 based its recommendation on a review of 1,500 pieces of literature. Mr. Towey bases his
8 final recommendation for buffer widths on general requirements for "wildlife habitat, fishery
9 habitat, water quality and minimum buffer requirements" proposed by Kovalchik (2002).

10 Mr. Towey also reviewed the document used by Ferry County in its final
11 determination entitled, "Efficacy and Economics of Riparian Buffers on Agricultural Lands"
12 by GEI Consultants, Inc., and concluded, "...the report does not provide for a range of
13 recommended riparian buffer widths for the protection of wildlife habitat." He also
14 concludes that, "This report exclusively addresses agricultural land use relating to
15 establishment of riparian buffer requirements." Yet, the Board notes that Ferry County is a
16 predominately forest and agricultural county, not just agriculture.

17 The WDFW, on the other hand, developed statewide riparian management
18 recommendations based on the best available science. Nearly 1,500 pieces of literature on
19 the importance of riparian areas to fish and wildlife were evaluated, and land use
20 recommendations designed to accommodate riparian-associated fish and wildlife were
21 developed. The report recommended fixed-width buffers and includes specific
22 recommendations for agriculture.

23 As in another Ferry County case, the Board wrote,

24 "The County provides no basis for deviating from Department of Fish and
25 Wildlife recommended buffers and setbacks to protect wild salmonid and other
26 threatened endangered or sensitive species. The DFW guidelines must be
followed in the absence of provisions for mitigation, or scientific evidence that
supports a different buffer or setback. *Friends of Ferry County v. Ferry
County*, 97-1-0018. Final Decision and Order, July 31, 1998.

1 Ferry County has failed to provide a scientific basis to deviate from the Department
2 of Fish and Wildlife's recommended buffers.

3 Regarding variable riparian widths, such as those adopted by Ferry County, the
4 report states, "While variable riparian habitat widths may allow landowners greater
5 flexibility, sufficient information does not currently exist to provide variable width
6 recommendations that adequately accommodate the extreme variability of riparian widths,
7 land uses, and fish and wildlife communities across the Washington landscape. Therefore,
8 any application of variable riparian widths must first include additional site-specific and
9 watershed-level studies". Management Recommendations for Washington's Priority
Habitats: Riparian; K. L. Knutson and V. L. Naef, WDFW.

10 Variable width riparian buffers are cost intensive. Either the county or the citizens
11 must pay for site-specific and watershed-level studies to determine the optimum riparian
12 buffer width. One of the major advantages to fixed-width buffers for Type 1 through 5
13 streams, if done using best available science, is that the adopted width is deemed
14 appropriate for all necessary functions and values, including large woody debris, sediment
15 filtration, erosion control, microclimate control and wildlife habitat, not just one function or
16 another. Ferry County has stated in the past it has "very limited funds and minimal staff
17 with which to develop an intricate scientific record". Respondent's HOM Reply Brief, pg. 10.
18 With that in mind, the cost of site-specific and watershed-level studies would fall on the
19 citizens. Ordinance #2006-03 fails to require these studies to be done or detail how they
would be paid for.

20 The information relied upon by Ferry County to substantiate variable width riparian
21 buffers is not scientific study. It is a compilation of the summaries from scientific
22 information and recommendations based on best available science. Under WAC 365-195-
23 910, Criteria for Obtaining the Best Available Science, the state suggests that counties and
24 cities should consult with state and federal natural resource agencies and tribes to develop
25 scientific information and recommendations. Many letters were included in the record from
26 state and federal agencies recommending larger buffer widths for Type 1 and 2 streams. In

1 addition, if an entity compiles scientific information it should assess whether the scientific
2 information constitutes the best available science using the criteria in the previously
3 mentioned ordinance and any technical guidance provided by the department (CTED).

4 The County's variable width 100-foot riparian buffer is based on non-scientific
5 averaging of past studies, and uses the study written specifically for Stevens County as a
6 basis for its decision to use a variable width buffer. The record does not indicate Ferry
7 County's planning staff or the Planning Commission made any attempt to document their
8 decision based on scientific analysis. What the record shows is use of anecdotal information
9 and observations, not part of an organized scientific effort. This is not an adequate
10 substitution for scientific information, although it may be used to supplement scientific
11 information.

12 In *King County v. Central Puget Sound Growth Management Hearings Board*, the
13 Court of Appeals has affirmed that the Board(s) will grant deference to counties and cities
14 in how they plan under the GMA. But, as the Court stated, "local discretion is bounded,
15 however, by the goals and requirements of the GMA." *King County v. CPSGMHB*, 142 Wn.2d
16 543, 561, 14 P.2d 133 (2000). It has been further recognized that "[c]onsistent with King
17 County, and notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts
18 properly when it foregoes deference to a ... plan that is not 'consistent with the
19 requirements and goals of the GMA." *Thurston County v. Cooper Point Association*, 108 Wn.
20 App. 429, 444, 31 P.3d 28 (2001).

21 Ferry County defends its right to ask for deference based on several factors, neither
22 of which can overcome the burden on the County to meet the requirements and goals of
23 the GMA. First, the County believes it has analyzed the scientific evidence provided to
24 Stevens County and concluded it was the best available science. The Board found no
25 evidence in the record of scientific study related to Ferry County's reduction in buffer width
26 for Type 1 and 2 streams, only an analysis study of other science with a recommendation to
lower the buffer width below that recommended by the WDFW. The second reason given
was that according to the County there is no direct regulatory requirement to include

1 "riparian area" as a category of "critical area" to be protected. Thus, for including riparian
2 areas in its CAO, Ferry County should be afforded discretion within the law. The County's
3 new CAO, under Section 11.04 RIPARIAN AREA PROTECTION, promotes the protection of
4 riparian areas and their inclusion as a critical area:

5 "The requirement that critical area protection be based on best available
6 science indicates the inclusion of riparian area as a critical area."

7 Discretion is given to counties and cities for following the goals and requirements of
8 the GMA and basing decisions on sound and proven best available science. Ferry County
9 has arbitrarily chosen to use reduced buffer widths for Type 1 and 2 streams without the
10 required science to back up its decision. A critique of past scientific study and an arbitrary
11 recommendation by the County's Planning Commission does not rise to the standard of best
12 available science.

12 **Conclusion:**

13 As found previously in the original FDO concerning the ICAO, the Board finds the
14 100-foot buffers established in the Ferry County Resource Lands and Critical Areas
15 Ordinance #2006-03 for Type 1 and 2 waters for Low Intensity Land Use in Ferry County
16 are inadequate and do not comply with the Growth Management Act's requirements found
17 in RCW 36.70A.060 and RCW 36.70A.172 to protect the functions and values of critical
18 areas using best available science.

19 **Issue #2:**

20 Do the Ferry County Development Regulations violate RCW 36.70A.040 because it
21 adopts by reference Section 12 of the Ferry County Interim Ordinance Number 93-02
22 "Designate and Classify Resource Lands and Critical Areas"? Do these development
23 regulations fail to utilize best available science, and fail to provide adequate standards for
24 Planning Department Review, in Violation of RCW 36.70A.172 and fail to comply with RCW
25 36.70A.060(2) requirement that the regulations protect critical areas?
26

1 **Petitioner's Position:**

2 The Petitioners point out that the County has not modified the criteria or standards
3 for the granting of a buffer variance. (See Sec 12.1 *et seq.*) They also remind the Board
4 that it has already found the County out of compliance because it failed to comply with the
5 GMA by not protecting critical areas. See *Robinson v. Ferry County* No. 01-1-0019, FDO
6 December 21, 2004.

7 The Petitioners also point out that the record contains nothing new that should
8 change the Board's mind on the ineffectiveness of Section 12 to protect critical areas.

9 In their Reply brief, the Petitioners draw the attention of the Board to the fact that
10 the County still made no mention of Issue # 2, Variances. They believe that the finding of
11 noncompliance should remain as the FDO found.

12 **Respondent's Position:**

13 The County did not respond to the arguments of the Petitioners and nothing was said
14 in their brief concerning the validity of the variance provisions of the Ordinance or changes
15 made.

16 **Discussion:**

17 The County has not modified the criteria or standards for the granting of a buffer
18 variance in its Critical Areas Ordinance, (See Sec 12.1 *et. Seq.*) The County was previously
19 found out of compliance in this section because it failed to protect critical areas and thus
20 comply with the GMA. (See *Robinson v. Ferry County* No. 01-1-0019, FDO December 21,
21 2004.)

22 The problem with the provisions covering Variances is the failure of the County to
23 require that such variances be based upon best available science. The use of best available
24 science will require a review of the affected parcel by an expert competent in the area. This
25 is required by RCW 35.70A.170 and without it, critical areas are exposed to encroachment
26 without adequate protections. A variance might very well be appropriate; yet, such
variance must be based upon the conditions of that specific parcel, what the variance would
do to the critical area and the science it is based upon.

1 One of the documents relied upon by the County as best available science, "Efficacy
2 and Economics of Riparian Buffers on Agricultural Lands" GEI Consultants, Inc. October
3 2002, asserts that variable buffers would be acceptable in the protection of critical areas.
4 However, this report informs the reader that variances would be expensive due to the need
5 for scientific review of the individual proposals. Each proposal to reduce the buffer is
6 expected, by that study, to be examined by an expert and the most effective size buffer
7 recommended. Without this necessary and unfortunate costly review, the size of the buffer
8 cannot be correctly determined and the recommendation of the GEI Consultants, Inc. would
9 not be followed. (See p. 26-28 of GEI study.)

10 As quoted in Issue #1, variations in buffer width requires more than the County has
11 provided for: "While variable riparian habitat widths may allow landowners greater
12 flexibility, sufficient information does not currently exist to provide variable width
13 recommendations that adequately accommodate the extreme variability of riparian widths,
14 land uses, and fish and wildlife communities across the Washington landscape. Therefore,
15 any application of variable riparian widths must first include additional site-specific and
16 watershed-level studies". Management Recommendations for Washington's Priority
17 Habitats: Riparian; K. L. Knutson and V. L. Naef, WDFW. Variable width riparian buffers are
18 cost intensive. The cost of site-specific and watershed-level studies would fall on the
19 citizens. The County however fails to require these studies to be done or provide for how
20 they would be paid for.

21 As in the width of the buffers found in Issue #1, the County cannot establish them
22 without the use of best available science. Variable widths or variances in the width must be
23 based upon scientific review of the site and the development of the buffer size appropriate
24 for that location. Because the County has limited resources, it is less expensive to set a
25 standard buffer width. This width could be modified if sufficient evidence shows that a
26 different width would adequately protect the water, wetland or habitat. That is not done
here. The variances section could be compliant if best available science supporting such
variance is required prior to the modification of a complaint standard buffer.

1 **Conclusion:**

2 The County remains out of compliance on this issue. It needs to include best
3 available science in the review of a request for variance of the width of the buffers.

4 **VII. ORDER**

- 5 1. The Board finds the 100-foot buffers established in the Ferry County
6 Resource Lands and Critical Areas Ordinance #2006-03 for Type 1 and
7 2 waters for Low Intensity Land Use in Ferry County are inadequate
8 and do not comply with the Growth Management Act's requirements
9 found in RCW 36.70A.060 and RCW 36.70A.172 to protect the functions
10 and values of critical areas using best available science.
- 11 2. The County remains out of compliance on this issue. It needs to
12 include best available science in the review of a request for variance of
13 the width of the buffers.
- 14 • Ferry County must take the appropriate legislative action to bring
15 themselves into compliance with the goals and requirements of the Act
16 as so ordered by the Board by **November 21, 2006, 60 days** from
17 the date issued.
 - 18 • The County shall file with the Board by **December 5, 2006, an**
19 **original and four copies** of a Statement of Actions Taken to Comply
20 (SATC) with the GMA, as interpreted and set forth in this Order. The
21 SATC shall attaché copies of legislation enacted in order to comply. The
22 County shall simultaneously serve a copy of the SATC, with
23 attachments, on the parties. By this same date, the County shall file a
24 "Remanded Index," listing the procedures and materials considered in
25 taking the remand action.
 - 26 • By no later than **December 19, 2006**, Petitioners shall file with the
Board an **original and four copies** of Comments and legal arguments
on the County's SATC. Petitioners shall simultaneously serve a copy of
their Comments and legal arguments on the parties.

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- By no later than **January 3, 2007**, the County shall file with the Board an **original and four copies** of the County's Response to Comments and legal arguments. The County shall simultaneously serve a copy of such on the parties.
 - By no later than **January 10, 2007**, Petitioners shall file with the Board an **original and four copies** of their Reply to Comments and legal arguments. Petitioners shall serve a copy of their brief on the parties.
 - Pursuant to RCW 36.70A.330(1) the Board hereby schedules a telephonic Compliance Hearing for **January 16, 2007, at 10:00 a.m.** The parties will call **360-357-2903 followed by 17198 and the # sign**. Ports are reserved for Mr. Robinson and Mr. Graham. If additional ports are needed please contact the Board to make arrangements.

11

12 If the County takes legislative compliance actions prior to the date set forth in this

13 Order, it may file a motion with the Board requesting an adjustment to this compliance

14 schedule.

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

16 **Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the**

17 **mailing of this Order to file a petition for reconsideration. The original and four**

18 **copies of a motion for reconsideration, together with any argument in support**

19 **thereof, should be filed with the Board by mailing, faxing, or otherwise**

20 **delivering the original and four copies of the motion for reconsideration directly**

21 **to the Board, with a copy served on all other parties of record. Filing means**

22 **actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-**

23 **02-240, WAC 242-02-330. The filing of a motion for reconsideration is not a**

24 **prerequisite for filing a petition for judicial review.**

25 **Judicial Review. Any party aggrieved by a final decision of the Board may appeal**

26 **the decision to superior court as provided by RCW 36.70A.300(5). Proceedings**

for judicial review may be instituted by filing a petition in superior court

according to the procedures specified in chapter 34.05 RCW, Part V, Judicial

Review and Civil. The petition for judicial review of this Order shall be filed with

the appropriate court and served on the Board, the Office of the Attorney

General, and all parties within thirty days after service of the final order, as

1 provided in RCW 34.05.542. Service on the Board may be accomplished in person
2 or by mail. Service of the Board means actual receipt of the document at the
3 Board office within thirty (30) days after service of the final order. A petition for
judicial review may not be served on the Board by fax or electronic mail.

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

6 **SO ORDERED** this 22nd day of September 2006.

7 EASTERN WASHINGTON GROWTH MANAGEMENT
8 HEARINGS BOARD

9
10 _____
Dennis Dellwo, Board Member

11
12 _____
Judy Wall, Board Member

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14 _____
John Roskelley, Board Member