State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

FUTUREWISE, Petitioner, v. STEVENS COUNTY, Respondent.	Case No. 05-1-0006 FINAL DECISION AND ORDER

I. SYNOPSIS

The Petitioners, Futurewise, filed a timely petition claiming Stevens County failed to protect the habitats of endangered, threatened or sensitive species (ETS species) when the County adopted Resolution #65-2005, amending SCC 13.10.034, thus violating the Growth Management Act (GMA).

The Petitioners argue that SCC 13.10.034(3)(C) renders moot or eliminates the protections required for critical habitat of ETS species by the GMA and fails to designate all of the identified habitats of ETS species as fish and wildlife habitat conservation areas. They also contend that the County did not use best available science (BAS) in designating all ETS species habitat and establishing protections for the functions and values of critical habitat areas.

The Respondent, Stevens County, contends the Petitioner's claim is barred by the doctrines of res judicata and collateral estoppel. In addition, the Respondent argues that protections for habitat areas established by statute or rule-making are in addition to the GMA compliant protections already required by the County for habitat associated with listed species.

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The Board looked to the statutes and the law to determine whether the County was in compliance with the GMA.

The doctrines of Res judicata and collateral estoppel are not applicable in this appeal. The Petitioner's arguments are substantial and the Board agrees with the Petitioner's conclusions.

As to the fundamental question, which is whether the County has protected all listed species habitat as required by the GMA, the Board finds the County clearly out of compliance.

The statutes are clear. The County is responsible for protecting critical areas through BAS. Critical areas include fish and wildlife habitat conservation areas. The County can't pick and choose one segment of ETS species habitat over another by protecting only habitat around point observations and not habitat defined by polygons. Fish and wildlife use habitat differently and their range or habitat area is substantially different. A 1000-foot buffer around a point observation of an endangered Northern Leopard frog may be quite sufficient, but the same buffer for a lynx would be totally inadequate. This is why the WDFW uses both polygon and point observations in its critical habitat mapping.

The County protected critical habitat in SCC 13.10.034(A) and (B), then eliminated these protections with section SCC 13.10.034(C). The County then chose not to include polygons from the Priority Habitats and Species database maps, which eliminated the area-wide habitat protection necessary for listed species, such as the lynx. The solution is clear and can easily be fixed.

The Board has determined that the Petitioners have carried their burden of proof and finds Stevens County out of compliance with the GMA for failure to protect listed species habitat and use BAS to do so.

II. PROCEDURAL HISTORY

On July 22, 2005, FUTUREWISE, by and through its representatives, John Zilavy, filed a Petition for Review.

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On August 22, 2005, the Board held a telephonic Prehearing conference. Present were, John Roskelley, Presiding Officer, and Board Members Dennis Dellwo and Judy Wall. Present for Petitioners was John Zilavy. Present for Respondent was Peter Scott.

On August 25, 2005, the Board issued its Prehearing Order.

On September 12, 2005, Petitioners filed a Motion to Correct the Index of Record.

On September 22, 2005, Respondents filed a Response and Objection to Petitioner's Motion to Correct the Index of Record, Affidavit of Dianne Balch, and Affidavit of Jenni Anderson.

On October 3, 2005, Petitioners filed Futurewise's Rebuttal to Response to Motions and Futurewise's Request for Written Permission to File a Motion and Motion to Supplement the Record.

On October 6, 2005, Respondent filed a Motion to Change Telephonic Motion Hearing Time.

On October 10, 2005, the Board was advised Petitioners have no objection to the time change of the telephonic motion hearing.

On October 19, 2005, the Board held a telephonic motion hearing. Present were, John Roskelley, Presiding Officer, and Board Members Dennis Dellwo and Judy Wall. Present for Petitioners was John Zilavy. Present for Respondent was Peter Scott.

On October 19, 2005, the Board issued its Order on Motions.

On November 8, 2005, the Board received Petitioner's Hearing on the Merits Brief.

On November 23, 2005, the Board received Respondent's Motion to Shorten Time for Hearing to Consider Motion for Limited Discovery, Motion for Limited Discovery, Affidavit of Peter G. Scott.

On November 29, 2005, the Board received Respondent's Hearing on the Merits Brief.

On December 2, 2005, the Board received Petitioners' Response to County's Motion to Allow Discovery.

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On December 6, 2005, the Board received Respondent's Reply to Plaintiff's Response to Respondent's Motion to Allow Discovery and Request for Leave to File Motion to Supplement the Record.

On December 6, 2005, the Board received Futurewise's Hearing on the Merits Reply Brief.

On December 7, 2005, the Board held a telephonic hearing on Respondent's Motion to Allow Discovery. Present were, John Roskelley, Presiding Officer, and Board Members Dennis Dellwo and Judy Wall. Present for Petitioners was John Zilavy. Present for Respondent was Peter Scott.

On December 8, 2005, the Board issued its Order on Motion to Allow Discovery.

On December 15, 2005, the Board held the Hearing on the Merits. Present were, John Roskelley, Presiding Officer, and Board Members Dennis Dellwo and Judy Wall. Present for Petitioners was John Zilavy. Present for Respondent was Peter Scott.

III. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF REVIEW

Comprehensive plans and development regulations (and amendments thereto) 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 Petitioners to demonstrate that any action taken by the respondent jurisdiction is not in compliance with the Act.

The Hearings Board will grant deference to counties and cities in how they plan under Growth Management Act (GMA). RCW 36.70A.320. 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 (2000). It has been further recognized that "[c]onsistent with *King County,* and notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent with the requirements and

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goals of the GMA." *Thurston County v. Cooper Point Association,* 108 Wn. App. 429, 444, 31 P.3d 28 (2001).

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

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

IV. ISSUES AND DISCUSSION

Issue No. 1:

Does the adoption of Resolution 65-2005 and its adoption of an amendment to the fish and wildlife habitat conservation areas protection requirements of SCC 13.10.034(4) fail to comply with RCW 36.70A.020(8), RCW 36.70A.020(9), RCW 36.70A.020(10), RCW 36.70A.060, RCW 36.70A.170, and RCW 36.70A.172 when the regulations fail to designate all of the identified habitats of endangered, threatened, and sensitive species as fish and wildlife habitat conservation areas?

Issue No. 2:

Does the adoption of Resolution 65-2005 and its adoption of amendments to the fish and wildlife habitat conservation areas protection requirements of SCC 13.10.034 fail to comply with RCW 36.70A.020(8), RCW 36.70A.020(9), RCW 36.70A.020(10), RCW 36.70A.060, RCW 36.70A.170, and RCW 36.70A.172 when the regulations fail to consider best available science in designating all of the identified habitats of endangered, threatened, and sensitive species as fish and wildlife habitat conservation areas in establishing protections for the functions and values of critical habitat areas within the County?

The Parties' Position:

Petitioners:

The Petitioners present seven arguments on behalf of their position:

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A. The Growth Management Act requires Stevens County to designate the habitats of endangered, threatened, and sensitive species as fish and wildlife habitats including best available science.

In this argument, Petitioners contend that Stevens County must adopt development regulations identifying and protecting critical areas. RCW's 36.70A.050 and 36.70A.060. The critical area at issue here comprises fish and wildlife conservation habitat. RCW 36.70A.030(5)(c). The designation must be based on BAS.

B. Stevens County Code (SCC) 13.10.034(3)(C) only protects the habitats of endangered, threatened, and sensitive species if the specific habitat is designated by law or rule.

The Petitioner, after restating SCC 13.10.034(3)(C), argues that by defining "critical habitat" as "only those areas designated by a state or federal agency through a formal statutory or rule-making process" [SCC 13.10.034(5)(C)], Resolution 65-2005 does not give protection to habitats for ETS species habitats not designated by statute or rule. The Petitioners argue that the Washington State Department of Fish and Wildlife does not designate habitats by "formal statutory or rule-making process" and the United States only designates some habitats by "formal statutory or rule-making process", making SCC 13.10.034(5)(C) useless in protecting ETS habitat.

C. Washington State designates endangered, threatened, and sensitive species by rule, but not their habitats.

The Petitioners contend that statutes RCW 77.12.020(6) and WAC 232-12-297, contained in state law and/or the state regulations, do not require designation of specific habitats where the fish and wildlife live, nor do they designate any habitats. No state law or state regulation designates any specific areas as habitats for ETS species, with possibly one exception, the generalized bull trout habitat overlay map. The Petitioners use a letter in the Index, No. T13A 193, from Mr. Steven Penland, of the Washington State Department of

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Fish and Wildlife (WSDFW) to emphasize this point. This letter is also corroborated by Mr. Kevin Robinette of the WSDFW (T13A 193).

D. The United States designates endangered and threatened species by rule, but only certain habitats by rule.

The Petitioners contend the United States government is different than Washington State in that the federal government does designate by rule some habitats, referred to as "critical habitat". The federal government lists many species as "threatened" or "endangered" through formal rule making, but often times it does not list the species "critical habitat". The regulatory protections for the listed species and the critical habitat are not the same. Consequently, the federal government currently lists only critical habitat for bull trout in Stevens County, not critical habitat for the lynx or grizzly bear at this time.

E. Stevens County Code SCC 13.10.034(3), by failing to designate the habitats of endangered, threatened, and sensitive species habitats, violates the GMA.

The Petitioners refer back to arguments A. through D. to emphasize their point. They argue that SCC 13.10.034(3)(C), by defining "critical habitat" as "only those areas designated by a state or federal agency through a formal statutory or rule-making process, is moot and a failure to protect ETS species and their habitat. The Petitioners also contend that SCC 13.10.034(4) only applies to "point observations", where some habitats, such as the lynx, need protection by using polygons or extended areas beyond point observations.

F. The Washington State Department of Fish and Wildlife priority species and habitats database is best available science, but Stevens County will only use the point data from the database in designating endangered, threatened and sensitive species habitats, but not polygon data.

The Petitioners use a Court of Appeals case (Ferry County, 121 Wn. App. At 856-57, 90 P.3d at 702) and several documents in the Record to emphasize that WSDFW in its Priority Habitats and Species Database updates its polygon and point observations as data

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becomes available and is for use by governments to update their critical habitat designations and species listing. The Petitioners also contend that the Wildlife Heritage Database contains significant species site observations based on field surveys and reports from reputable sources, which provide point observations to comprise best available science for ETS species and their habitat.

G. These violations warrant invalidity.

The Petitioners contend that SCC 13.10.034(3) substantially interferes with the fulfillment of the GMA goals 9 and 10. They argue that Stevens County, after 13 years since the last deadline for all cities and counties to designate and protect critical areas, maintains a critical areas regulation that only protects one ETS species, the bull trout, and no wildlife species. The County's critical areas provision substantially interferes with protecting the environment and the quality of life. The Petitioners contend that invalidity is clearly warranted.

Respondent Stevens County:

The Respondent argues two points:

A. Petitioner's claim is barred by the doctrines of Res Judicata and Collateral Estoppel.

The Respondent argues that this appeal is res judicata or relitigation of claims that were litigated in a prior action. They contend that Futurewise asserts an interest in protecting habitat for listed species, which is exactly the interest in a previous appeal filed by Ms. Jeanie Wagenman. Because Ms. Wagenman and Futurewise have the same interest, the "identity of the parties" requirement is satisfied and Futurewise's claim is barred.

In addition, the Respondent claims that collateral estoppel also applies. The Respondent argues that the issues presented by Futurewise are identical to those previously ruled on by the Hearings Board in Case No. 03-1-0006c. Thus, if Futurewise was in privity with Ms. Wagenman and no injustice results the issues many not be relitigated. The Respondent contends Futurewise, by its own admission, was in privity with Ms. Wagenman.

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The Respondent further argues that SCC 13.10.034(3)(C) was fully and fairly litigated and that the record is the same as that presented in the earlier challenge.

B. Protections for habitat areas established by statute or rule-making are in addition to the GMA compliant protections already required by the County for habitat associated with listed species.

The Respondent contends that, if for some reason the Board concludes that it should consider the merits of the petition, it should rule, as it previously did, that SCC 13.10.034(3)(C) not only complies with the GMA, but exceeds the requirements of the GMA. The Respondent argues that under Stevens County's Title 13, habitat associated with listed species known to be present in the County is designated and protected under Title 13 as Fish and Wildlife Habitat Conservation Areas (FWHCA). Wetlands are similarly designated and protected. SCC 13.10.020.

The Respondent contends that in designating and protecting FWHCA and wetlands the County relied on BAS, including priority habitat and species maps provided by WSDFW. They contend the Board has already ruled that Title 13 gives protection to habitats for ETS species habitats.

What is at issue, the Respondent argues, is whether the County may use formal rule-making as a trigger for additional measures to protect habitat that is associated with a listed species. They cite the Board's decision in Case No. 03-1-0006c and quote a part of a line in the Compliance Order at 11.

The Respondent also argues that Futurewise's contention that the County's action falls short because "no state law or state regulation designates any specific areas as habitats for ETS species, is erroneous. They provide examples to show that the State has promulgated rule-making in the past, such as for salmon in Puget Sound (WAC 220-47) and "Bald Eagle Protection Rules" (WAC 220-12-292).

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The Respondent also notes that Futurewise acknowledges the federal government designates habitat areas for the protection of listed species, citing bull trout habitat in the Columbia River system.

The Respondent asks the Board to dismiss Futurewise's petition for review or write another order establishing that SCC 13.10.034(3)(C) complies with the GMA.

Petitioner's Hearing on the Merits Reply:

The Petitioner's, in their reply brief, segment their arguments into four Sections. They contend in their Section II(A) that nothing in Stevens County's Title 13 protects the habitats of ETS species that are represented by polygons outside of wetlands or riparian areas (see Parties Positions: Petitioners).

In Section II(B)(1), the Petitioners argue that SCC 13.10.030 does not designate and protect the habitats of ETS species that are represented by polygons outside wetlands or riparian areas. They contend it's a "purpose statement". (Pet. Reply Brief, pg. 5).

In Section II(B)(2), the Petitioner claims that SCC 13.10.031 classifies ETS species, but does not protect ETS species habitats.

In Section II(B)(3), the Petitioners argue that SCC 13.10.032 designates habitat areas that meet SCC 13.10.031 classification criteria as FWHCA's, but contains no provisions to protect the habitats of ETS species.

In Section II(B)(4), the Petitioners contend that SCC 13.10.033 catalogs the documents the County reviewed to establish development regulations to protect the functions and values of fish and wildlife areas. It contains no reference to the WDFW priority species and habitat maps. Again, they argue, this section does not protect any fish or wildlife habitats.

In Section II(B)(5), the Petitioners argue that SCC 13.10.034(1) contains adequate provisions for protection of waters and riparian habitats, but no protection for ETS species habitats outside the riparian buffer area. SCC 13.10.034(2) contains adequate building setbacks from riparian buffers, but again does not protect ETS species habitats outside the riparian buffer area. And, according to the Petitioners, SCC 13.10.034(3) does not protect

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ETS species habitat, with the exception of bull trout (see pages 5-10, HOM Brief). In addition, SCC 13.10.034(4) does not protect ETS species habitat whose habitats are represented by polygons on the Priority Species and Habitat maps. It only protects point observations.

In Section II(B)(6), the Petitioners argue that no other provision of SCC 13.10.030 *et seq.* designates or protects the habitats of ETS species outside of wetlands or riparian areas and gives a brief description and explanation of each section.

In Section II(B)(7), the Petitioners give a summary and quote the WDFW, who concluded, after examining Stevens County's Code Title 13, the following:

> Adoption of the proposed amendment by Stevens County would likely lead to greatly reduced consideration for endangered, threatened and sensitive species in the county, and some occurrences of these species would not receive any protection in the land use planning process.

In another Section II(B), (Petitioner's listing error, HOM Reply Brief), the Petitioners also contend that SCC 13.10.020 through 13.10.025 do not designate or protect the habitats of ETS species outside of wetlands.

In Section II(C), the Petitioners argue that SCC 13.10.034(3)(C) does not trigger additional protection measures. As amended in Resolution #65-2005, it fails to protect ETS habitats not otherwise protected by Stevens County Title 13 and is an erroneous interpretation of RCW 36.70A.172 and RCW 36.70A.060(2).

Under Section II(D), the Petitioners argue Stevens County's purported identification of ETS species designated by rule, such as salmon preserves, bald eagle protection rules, and game preserves, proves their point that Washington State does not designate the specific habitat of ETS species by rule or statute. The Petitioners point out that the Respondent did not produce any evidence to counter that from the two WDFW staffers who confirmed that, "No state agency, including WDFW, designates areas through formal statutory or rule-making process for endangered, threatened, and sensitive species."

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Under Section III, the Petitioners argue the Res Judicata and Collateral Estoppel issues raised by the Respondent. In addition to the summary given here of each section, they brief each argument in A through D.

In Section III(A), the Petitioners argue Res Judicata and collateral Estoppel do not apply because the County has not shown identity of parties or privity between the parties.

In Section III(B), the Petitioners contend that Res Judicata does not apply because the County did not establish concurrence of identity as to the four required elements.

In Section III(C), the Petitioners claim Res Judicata does not apply because the County did not establish concurrence of identity as subject matter, cause of action, and the quality of the persons for or against whom the claim is made.

In Section III(D), the Petitioners contend that collateral estoppel does not apply because application of collateral estoppel would work an injustice against Futurewise.

Board Analysis:

The Board will group the two issues together in its analysis.

The Growth Management Act provides that: On or before September 1, 1991, each county, and each city, shall designate where appropriate: (d) critical areas. RCW 36.70A.170(d).

In designating and protecting critical areas under this chapter (36.70A.172(1), counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas.

RCW 36.70A.060(2) provides that every county shall adopt development regulations that protect critical areas. The definition of “critical areas” includes “fish and wildlife habitat conservation areas” (FWHCA). RCW 36.70A.030(5)(c).

WAC 365-190-080(5)(a)(i) & (ii) explains why it is critical to protect these habitats and what they include:

> (5) Fish and wildlife habitat conservation areas. Fish and wildlife habitat conservation means land management for maintaining species in suitable habitats within their natural geographic distribution so that isolated subpopulations are not created. This does not mean maintaining all individuals

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of all species at all times, but it does mean cooperative and coordinated land use planning is critically important among counties and cities in a region. In some cases, intergovernmental cooperation and coordination may show that it is sufficient to assure that a species will usually be found in certain regions across the state.

(a) Fish and wildlife habitat conservation areas include:

(i) Areas with which endangered, threatened, and sensitive species have a primary association;

(ii) Habitats and species of local importance;

In designating fish and wildlife habitat conservation areas, the County must at least designate "areas with which endangered, threatened, or sensitive species have a primary association and the designation" must be based on best available science as required by 36.70A.172.

At issue in this appeal is whether Stevens County has protected fish and wildlife habitat conservation areas or, in other words, critical habitat for endangered, threatened, and sensitive species as required by the GMA.

The Petitioner argues that Stevens County's regulation, SCC 13.10.034(3)(C), fails to protect endangered, threatened, and sensitive species habitats because such habitat has to be designated by statute or rule. SCC 13.10.034(3)(C) states:

> C. For purposes of this section, <u>critical habitat shall include only those areas designated by a state or federal agency through a formal statutory or rule-making process for endangered, threatened, or sensitive species.</u> Critical habitat for species of local importance shall be limited to those areas determined by the County when designating such a species. (Board emphasis).

The County has done an admirable job of requiring pre-set buffers or alternative buffers set on a case by case basis, and requiring a report from a qualified professional to set management recommendations, if a development is within "a mapped critical habitat area" for ETS species. But the County falls short by defining "critical habitat" as "only those areas designated by a state or federal agency through a formal statutory or rule-making process.

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The Petitioner has provided evidence that the state agency responsible for the protection of wildlife and their habitat, the Washington Department of Fish and Wildlife, does not "map or designate 'Critical Habitat' for State listed endangered, threatened, or sensitive species through a formal statutory or rule making process." (T13A, exhibit 193, e-mail from Kevin Robinette, WDFW, July 28, 2004).

This is corroborated in another letter written, but unsigned, by Stephen Penland, WDFW, dated March 28, 2005. In his letter, written on WDFW stationary, he states:

> "This proposed amendment refers to a process within state agencies that simply does not exist. No state agency, including WDFW, designates areas through formal statutory or rule-making process for endangered, threatened, or sensitive species." (Same exhibit number).

Mr. Penland, in reference to SCC 13.10.034(3)(C), further states:

> "Therefore, the effect of the county's proposed revision would be the loss of any consideration during the land use planning process for species whose existence is seriously threatened in Washington State. This in turn could significantly contribute to their extinction in the state."

This last statement is important. Within the definition of fish and wildlife conservation areas is the following statement:

> This does not mean maintaining all individuals of all species at all times, but it does mean cooperative and coordinated land use planning is critically important among counties and cities in a region. In some cases, intergovernmental cooperation and coordination may show that it is sufficient to assure that a species will usually be found in certain regions across the state.

If Stevens County does not designate fish and wildlife conservation areas for certain listed species using BAS and all the information available from WDFW, but neighboring counties, such as Ferry County and Pend Oreille County do, then there would be a disconnect in protection for the listed species and extinction a real possibility. To protect ETS species and their habitat, such as the lynx, which knows no country, state or county

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boundary, there must be intergovernmental cooperation and coordination, as stated in WAC 365-190-080(5).

As for the federal government, Mr. Chris Warren, U. S. Fish and Wildlife Service, in an e-mail to Ms. Wagenman wrote:

> "Under the Endangered Species Act (ESA) we can list individual species as either "threatened" or "endangered" through a formal rule-making process, which provides them federal regulatory protections: and we can also designate critical habitat (CH) for those species under a separate rule-making process, after which those designated areas are also protected by federal regulations. We have not designated CH for many listed species, and the regulatory protections for the listed species and the CH are not the same."

Mr. Warren concludes with:

> "Under the ESA, federal agencies or their authorized actions can not "adversely effect" or "adversely modify" CH. <u>The regulatory protections for CH apply to non-federal lands only to the extent that there is a federal nexus (federal funding, etc.)."</u> (Board emphasis)

Simply put, the federal government can designate critical habitat for ETS species, but under a separate rule-making process and, for the most part, only for federal lands. Therefore, the U.S. Fish and Wildlife Service rule-making does not have an effect on most state or Stevens County lands.

Ms. Denise Howard, another employee for the U. S. Fish and Wildlife Service, wrote the following in an e-mail to Ms. Wagenman:

> "We currently only have critical habitat for Bull Trout in Stevens County. There is no federally listed critical habitat for Lynx or Grizzly bear at this time."

The Board asks the following question. If the state does not have the legislative authority to designate critical habitat for ETS species through a rule-making process and the federal government's rule-making for ETS species habitat is separate from its listed species, then what jurisdiction is responsible to protect the ETS species habitat? This question is answered by Mr. Kevin Robinette in his e-mail to Ms. Wagenman on July 28, 2004:

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> "Since Critical Areas are designated by Counties and Cities under the Growth Management Act (with input from WDFW and the public), the formal rule making process is that of the local municipalities."

To determine whether Stevens County has protected the ETS species habitat to the extent required by the GMA, the Board looks to the County's Code, Title 13.

The County, in SCC 13.10.030, Fish & Wildlife Habitat Conservation Areas, specifically states, "It is the purpose of this Title to protect, conserve and restore, where practical, natural habitats of those listed species." It is therefore understood that Stevens County wants to protect the "natural habitats" of its six listed species.

Under SCC 13.10.031, Classifications, the County lists six state listed species located in Stevens County. Of those six, the bald eagle, golden eagle, bull trout and steelhead, have habitat that is either fully or partially protected, either through federal or state action or the County's Code, generally found in SCC 13.10.031(1), (4), (5) and (6). The Common Loon, because it inhabits the County's lakes and waterways, also seems to be protected, although somewhat limited because of a lack of regulatory protections on lakes.

The lynx is not protected. As a predator, the lynx has an extended range and must be protected "within its natural habitat", as stated in the County's Title 13, and/or as defined in WAC 365-190-080(5), "in natural geographic distribution so that isolated subpopulations are not created."

The WDFW bases its Priority Habitats and Species Database on information collected by WDFW biologists using the best information available from research efforts, surveys, and/or field observations. They describe the exact source of each delineated feature in an accompanying report. They also state that "these data represent known occurrences of priority habitats and species, not potential or theoretical." The WDFW does the same with the Wildlife Heritage Database, which is continually being updated on 230 species. WDFW uses BAS to develop these maps.

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Stevens County used some of the data collected by the WDFW to protect wetlands, riparian areas, lakes and streams, but failed to use BAS in developing protections for all the listed species in SCC 13.10.031(1).

The Petitioner's appeal centers on SCC 13.10.034(3)(C). The County in SCC 13.10.034(3)(A) seems to protect critical habitat areas for ETS species from development near lakes, rivers and streams by a buffer and in SCC 13.10.034(3)(B) the County requires a report from a qualified professional setting forth management recommendations specific to the site and proposed development, but these protections are all for naught when the County amended the chapter to include SCC 13.10.034(3)(C).

Since there is no "formal statutory or rule-making process for ETS species critical habitat", SCC 13.10.034(3)(C) fails to protect Fish and Wildlife Habitat Conservation Areas as required by the GMA. The protection measures are based on a specific "mapped critical habitat area". As stated by Mr. Robinette in his e-mail of July 28, 2004:

> "We don't map critical habitat, though habitat for ETS might be included as a "Priority Habitat" or Priority Species" area in our Priority Habitats and Species database."

To reiterate, in his letter he further writes:

> "The State does not map or designate "Critical Habitat" for State listed, endangered, threatened, or sensitive species through a formal statutory or rule making process."

The County, to its credit, does protect habitat through buffers and a Habitat Management plan in SCC 13.10.034(4), but only for mapped point species observations. Lynx habitat and, in the future, habitat of some species that may become listed, is therefore not protected. Protection for lynx habitat can only be done properly through polygons, area-wide habitat, delineated and mapped in the Washington Department of Fish and Wildlife's Priority Habitats and Species Database, which also maps points that describe occurrences of priority habitats and species. It is important to note that all priority species mapped areas represent known use areas; they are not potential habitats. The County failed to use BAS,

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notably WDFW's Priority Habitats and Species Database, which provides polygon data, to designate all fish and wildlife conservation areas as required by the GMA.

The Respondent, Stevens County, argues that the Board has already ruled, in Case No. 03-1-006c, that the County used BAS and is in compliance with the GMA requirement to designate and protect FWHCA and wetlands. In addition, the Respondent argues that the Board already determined the GMA does not obligate the County to adopt the additional protective measures established by SCC 13.10.034(3) for habitat associated with listed species, so limiting those measures to areas designated by rule making authority that WDFW and USFW routinely exercise cannot conceivably violate the GMA.

The Board recognizes they relied on the record and the amicus brief submitted by the WDFW in Case No. 03-1-0006c, which did not mention the agency's inability to carry out formal statutory or rule-making authority, to render their final Order. The Board also weighed heavily the County's argument that it was a question of [due process and indicated that if "priority habitat" were used to trigger additional protection requirements, landowners would be deprived of their right to notice and an opportunity to be heard because WDFW makes those designations without notice and comment.] The County also argued that [using "critical habitat" designated by rule-making to trigger the additional requirements cures that defect.] (*LLPO, et al v. Stevens Co.*, EWGMHB #03-1-0006c, Order On Compliance, pg. 11 (Oct. 15, 2004). Unfortunately, neither the WDFW nor the County was accurate in their assessment.

The Petitioner's appeal is based on the County's adoption of Resolution #65-2005, which formally amended Title 13. The County's action can and was appealed to the Board. In light of the new evidence submitted with this appeal, in particular letters from Mr. Kevin Robinette and Mr. Stephen Penland, both staff members working for WDFW, the Board must determine whether the County's Code is fully compliant with the GMA based on this new information.

As required by the GMA, the County must protect listed species and their habitat. Even though the County has protected five of the six listed species to some degree by

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protecting riparian areas, wetlands, lakes and waterways, it has not fully complied by protecting all fish and wildlife conservation areas for listed species using BAS. If the County had not added SCC 13.10.034(3)(C) and if they had referenced and adopted the use of the WDFW's Priority Habitats and Species Database maps, which include polygon habitat areas for species such as the lynx, as the County did with SCC 13.10.034(4) Mapped Point Species Observations, it would be in compliance. But the County did not.

The County also contends that the administrative code is "replete with examples where the State has designated habitat through rule making." (Respondent's HOM Brief.) For instance, they contend the State designated certain areas in Puget Sound as a critical habitat for salmon through rule making. WAC 220-47-307. In another example, the Respondent references 31 preserves set aside by rule for the protection of game species.

The Board believes the Petitioner addressed these and other examples appropriately and correctly. In addition, the Board, upon examining the statutory authority upon which several of these examples are based, did not find where the agency (WDFW) could designate habitat by formal statutory or rule-making. The information provided by WDFW staff is correct.

Concerning the Puget Sound salmon protection areas (WAC 220-47-307) and the 31 preserves set aside for the protection of game species (WAC 220-16-010) the Board finds that the WDFW Game Commission did create these areas and does have authority to make rules, but is restricted in scope by the legislature in RCW 77.12.047.

As seen in RCW 77.12.047, the Commission may adopt, amend, or repeal rules. The rules that pertain to the examples are found in (1)(b) and (k), which state:

> (b) Specifying the areas and waters in which the taking and possession of wildlife, fish, or shellfish is lawful or unlawful.
>
> (k) Establishing game reserves and closed areas where hunting for wild animals or wild birds may be prohibited.

Designating critical habitat for ETS species is not within the Washington State Game Commission's authority.

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The Respondent devoted much of their brief to the argument that the Petitioner's claim is barred by the doctrine of res judicata and collateral estoppel. Petitioners, in their reply brief, responded with arguments that these doctrines do not apply in this case.

The Board believes the evidence does not show that the Petitioner, Futurewise, was before us on this issue at an earlier date, nor does the Board believe the specific issue being decided in this case has been decided before in another case. The Board's decision will be made upon the facts presented and with the parties before us at this time. Neither res judicata nor collateral estoppel applies in this case.

Conclusions:

The Petitioners have carried their burden of proof. By clear, cogent and convincing evidence they have shown that Stevens County's Resolution No. 65-2005, amending SCC 13.10.034, violates the Growth Management Act by failing to designate all of the identified habitats of ETS species as fish and wildlife conservation areas and for failing to consider BAS in designating all of the identified habitats of ETS species as fish and wildlife habitat conservation areas in establishing protections for the functions and values of critical habitat areas within the County.

The Board does not believe the continued validity of part or parts of SCC 13.10.030 would substantially interfere with the fulfillment of the goals of the GMA under RCW 36.70A.302(1) at this time. The request for invalidity is denied.

V. FINDINGS OF FACT

1. On July 6, 2004, Stevens County adopted Resolution #80-2004. The resolution amends Title 13, the County's Critical Areas Ordinance to comply with the Final Decision and Order issued on February 10, 2004, by the EWGMHB.
2. Stevens County received a letter from Futurewise on April 4, 2005, with WDFW attachments.
3. On May 10, 2005, Stevens County adopted Resolution #65-2005 approving the adoption of amendment SCC 13.10.034(3)(C).

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4. The County failed to protect a listed species and potentially future listed species critical habitat as required by the GMA.

VI. CONCLUSIONS OF LAW

1. The Petitioners, Futurewise have participation standing, pursuant to RCW 36.70A.280(2) and (4), to pursue their appeal on the issues presented to the Board.
2. Counties are required to designate and protect critical areas. RCW 36.70A.060(2) and 36.70A.170(d).
3. The definition of "critical areas" include "fish and wildlife habitat conservation areas" (FWHCA). RCW 36.70A.030(5)(c).
4. Counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. RCW 36.70A.172(1).
5. Fish and wildlife habitat conservation areas are described under WAC 365-190-080(5)(a) and include (i) Areas with which endangered, threatened, and sensitive species have a primary association.
6. WAC 232-12-297 sets out the process and criteria used to classify wildlife as endangered, threatened or sensitive.
7. Endangered species are listed in WAC 232-12-014.
8. Threatened and sensitive species are listed in WAC 232-12-011.
9. The Petitioners have carried their burden of proof and shown by the evidence in the record that the actions of Stevens County are clearly erroneous.

VII. ORDER

1. The Board finds Stevens County out of compliance in Issues 1 and 2 for failure to protect endangered, threatened and sensitive species habitat, specifically those habitats best represented by polygons. By this action,

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the County violated the GMA and did not properly follow the requirements set forth in the GMA.

2. The Board finds Stevens County out of compliance and remands Resolution #65-2005 back to Stevens County Board of County Commissioners to amend SCC 13.10.034 and protect all listed species habitat using BAS.

3. The Board feels the County's lack of compliance at this time does not require invoking invalidity. Title 13, as written and adopted, has in place the protections necessary to protect the habitats of the majority of the listed species during the period it takes the County to come into compliance.

4. Stevens County must take the appropriate legislative action to bring itself into compliance with this Order by **May 15, 2006**, **120** days from the date issued. The following schedule for compliance, briefing and hearing shall apply:

Compliance Due	**May 15, 2006**
Statement of Action Taken to Comply (County to file and serve on all parties)	**May 22, 2006**
Petitioners' Objections to a Finding of Compliance Due	**June 5, 2006**
County's Response Due	**June 19, 2006**
Petitioners' Optional Reply Brief Due	**June 26, 2006**
Telephonic Compliance Hearing. Parties will call: **360-357-2903 followed by 15166 and the # sign. Ports are reserved for Mr. Zilavy and Mr. Scott**	**July 6, 2006, 10 a.m.**

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

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

Reconsideration:

Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and four (4) copies of the petition for reconsideration, together with any argument in support thereof, should be filed by mailing, faxing or delivering the document directly to the Board, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review:

Any party aggrieved by a final decision of the Board may appeal 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.

Enforcement:

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 provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail. Service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order.

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<u>Service</u>:

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

SO ORDERED this 13th day of January 2006.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____
John Roskelley, Board Member

_____
Judy Wall, Board Member

_____
Dennis Dellwo, Board Member

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