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

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CONCERNED FRIENDS OF FERRY COUNTY  
and DAVID L. ROBINSON,

Case No. 06-1-0003

FINAL DECISION AND ORDER

Petitioners,

v.

FERRY COUNTY,

Respondent.

**I. SYNOPSIS**

The Petitioners, Concerned Friends of Ferry County and David L. Robinson, are challenging certain provisions contained in the recently adopted Ferry County Resource lands and Critical Areas Ordinance #2006-03 (RLCAO). The Petitioners contend that the adopted RLCAO fails to designate and protect critical areas as required by the Growth Management Act (GMA). Specifically, the RLCAO fails to adequately protect wetlands and riparian areas, allows variances that fail to protect critical areas, eliminates or excludes adequate policies and development standards for resource lands, eliminates the species list found in the original ICAO, relies on a pre-GMA Shoreline Master Program, fails to provide adequate enforcement of the RLCAO, and fails to protect fish and wildlife habitat conservation areas.

As found previously in Case Nos. 01-1-0019 and 04-1-0007c, the Board again finds Ferry County out of compliance for failing to protect fish and wildlife habitat conservation areas and for failing to protect critical areas, such as riparian areas, by not providing buffer widths based on best available science. In addition, the Board finds the County failed to comply in a number of other issues as well, including failing to adopt a compliant variance

1 section, failing to list species and habitats that need protection, and failing to use an up-  
2 dated Shoreline Master Program.

3 The Board believes the County has worked hard to find a compromise between over-  
4 regulating private property and designating and protecting critical areas. Unfortunately, the  
5 County did not rely on best available science in adopting regulations and thus failed to  
6 comply with the GMA to protect critical areas.

7 Compliance with RCW 36.70A.170 and RCW 36.70.172 is critical to the County's  
8 future success. Neither statute was followed as required by the GMA. The Board found  
9 sections of exceptional compliance in some areas of the RLCAO and exceptional  
10 noncompliance in others. As in many of the cases filed against Ferry County, the  
11 compromises reached by the County in writing and adopting its RLCAO did not adequately  
12 protect critical areas using best available science as a compliant CAO must.

13 The Board finds that the Petitioners have carried their burden of proof on Issue Nos.  
14 1, 2, 4, 5, and 7, but failed to carry their burden of proof on Issue No. 3, in regards to  
15 protecting natural resource lands, and Issue No. 6, regarding the enforcement of the  
16 RLCAO.

## 17 **II. PROCEDURAL HISTORY**

18 On May 18, 2006, CONCERNED FRIENDS OF FERRY COUNTY and DAVID L.  
19 ROBINSON, filed a Petition for Review, by and through their representative, David  
20 Robinson.

21 On June 13, 2006, the Board held a telephonic Prehearing conference. Present  
22 were, John Roskelley, Presiding Officer, and Board Members Dennis Dellwo. Board Member  
23 Judy Wall was unavailable. Present for Petitioners was David Robinson. Present for  
24 Respondent was Steve Graham.

25 On June 19, 2006, the Board issued its Prehearing Order.

26 On September 19, 2006, the Board held the Hearing on the Merits. Present were,  
John Roskelley, Presiding Office, and Board Member Dennis Dellwo. Board Member Judy

1 Wall was unavailable. Present for Petitioners was David Robinson. Present for Respondent  
2 was Steve Graham.

3 **III. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF**  
4 **REVIEW**

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

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

19 Pursuant to RCW 36.70A.320(3) we "shall find compliance unless [we] determine  
20 that the action by [Jefferson County] is clearly erroneous in view of the entire record before  
21 the Board and in light of the goals and requirements of [the GMA]." In order to find the  
22 County's action clearly erroneous, we must be "left with the firm and definite conviction that  
23 a mistake has been made." *Department of Ecology v. Public Utility Dist. 1*, 121 Wn.2d 179,  
24 201, 849 P.2d 646 (1993).

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

1 **IV. ISSUES AND DISCUSSION**

2 **Issue No. 1:**

3 Did the County fail to comply with RCW 36.70A.040, -.060, -.120, and -.172  
4 and interfere substantially with GMA goals (RCW 36.70A.020) by not establishing adequate  
5 vegetative buffers for wetlands and riparian areas, by modifying the definitions for "high  
6 and low intensity land use" from the original Interim Critical Areas Ordinance and other  
adequate means for protecting and regulating activities within riparian areas?

7 **The Parties' Position:**

8 **Petitioners:**

9 The Petitioners contend the Ferry County Resource Lands and Critical Areas  
10 Ordinance #2006-03 (RLCAO) fails to establish adequate vegetative buffers for wetlands  
11 and riparian areas. They argue that the "Growth Management Act (GMA) requires that the  
12 regulations for critical areas must protect the 'functions and values' of those designated  
13 areas. RCW 36.70A.172(1). This means all functions and values." *WEAN v. Island County*,  
14 122 Wn. App. 156, 174-175, 93 P.3d 885, 894 (2004). The Petitioners also argue that the  
15 County, based on the record, did not use best available science (BAS) in determining the  
buffer widths and the adopted buffer widths do not protect all the functions and values.

16 The Petitioners argue that the RLCAO fails to meet BAS for the definitions of High  
17 and Low Intensity Land Use near wetlands. The record shows that in a letter written to  
18 Ferry County by Chris Merker, a wetlands specialist for the Department of Ecology (DOE),  
19 Mr. Merker recommended including annual tillage and animal feedlots under High Intensity  
20 Land Use. The County added animal feedlots, but failed to include annual tillage, thus  
failing to meet acknowledged BAS.

21 The Petitioners contend the County deliberately changed the definitions of High  
22 Intensity Land Use (HILU) and Low Intensity Land Use (LILU) from the original ICAO to  
23 allow the County to keep the buffers and impacts virtually the same for HILU and LILU in  
24 the RLCAO. This is contrary to BAS as submitted by the DOE for what HILU and LILU are  
25 and for what buffers are required for the different wetland categories. The County set its  
26

1 buffers lower than the standard BAS recommendations without providing a record as to how  
2 the County arrived at its buffer widths.

3 The Petitioners contend that the County's 2.5 minimum acre lot size for Ferry County  
4 rural areas is out of compliance for agricultural lands, thus the new LILU definition allows  
5 the same impacts for a majority of the lots in the County. To redefine LILU to have a lot  
6 size of over 2.5 acres and to have buffers much lower than recommended by BAS for a  
7 majority of lots in the County is contrary to BAS. The Petitioners argue that the definitions  
8 of HILU and LILU and the adopted buffer widths are not based on BAS and should be found  
9 out of compliance.

9 **Respondent:**

10 The Respondent contends that some of Issue No. 1 was argued in Case #04-1-0007c  
11 and they will not reargue those points here. The Respondent does, however, disagree with  
12 the Petitioners' contention that all "functions and values" must be protected, even in light of  
13 the GMA's other goals. The Respondent, citing *Kipp Dunlap v. City of Nooksack*, contends  
14 that the Western Board agreed that each function and value definitely needs to be  
15 protected; but each function or value does not need to be protected 100 percent in all  
16 areas. *Kipp Dunlap v. City of Nooksack*, Case No. 06-2-0001, WWGMHB, GMHB LEXIS 58  
17 July 7, 2006.

18 In regards to the letter written by Mr. Chris Merker, DOE, the Respondent argues  
19 that the County did incorporate Mr. Merker's comments into the final draft, as evidenced by  
20 a change in the buffer width for Category III streams found in the ICAO and changed in the  
21 RLCAO. The Respondent contends the County's finished product is very close to the  
22 recommendation of Mr. Merker. In addition, the Respondent argues that the Petitioners did  
23 not appeal the ICAO buffer widths, so did not preserve the issue for appeal in this case.

23 **Petitioners Reply Brief:**

24 The Petitioner argues that the buffers for Class II and III wetlands are nearly half  
25 that of the recommendations by Mr. Merker and BAS. Furthermore, the County did not cite  
26 to any science in designating the lesser buffer widths.

1 In regards to the *Dunlap v. City of Nooksack* decision, the Petitioner contends that  
2 this case exempted ongoing agriculture, but required other measures to protect critical  
3 areas including farm plans and best management. "Unlike the City of Nooksack, Ferry  
4 County has not pointed to any provisions in the CAO that protect the functions and values  
5 of critical areas and justify the narrower buffers." Petitioners HOM Reply Brief.

6 **Board Analysis:**

7 Ferry County is required by RCW 36.70A.040(3)(b) to "...designate critical areas,  
8 agricultural lands, forest lands, and mineral resource lands, and adopt development  
9 regulations conserving these designated agricultural lands, forest lands, and mineral  
10 resource lands and preserving these designated critical areas, under RCW 36.70A.170 and  
11 36.70A.060;". RCW 36.70A.060(2) requires the County to adopt development regulations  
12 that protect critical areas and RCW 36.70A.170 requires the County to designate natural  
13 resource lands and critical areas. RCW 36.70.172 requires the County to use best available  
14 science when designating critical areas.

15 Ferry County adopted the Ferry County Resource Lands and Critical Areas Ordinance  
16 #2006-03 on March 20, 2006, approximately thirteen years after adopting its Interim  
17 Critical Areas Ordinance. The Petitioners contend the County did not comply with the above  
18 statutes required by the GMA to protect critical areas by using best available science. The  
19 Board agrees.

20 In *Concerned Friends of Ferry County and David Robinson*, EWGMHB Case No. 04-1-  
21 0007c, Order on Compliance, September 22, 2006, the Board found Ferry County out of  
22 compliance for failure to protect the functions and values of critical areas, namely riparian  
23 area buffers, using best available science:

24 As found previously in the original FDO concerning the ICAO, the Board again  
25 finds the 100-foot buffers established in the Ferry County Resource Lands and  
26 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 in RCW 36.70A.060 and RCW  
36.70A.172 to protect the functions and values of critical areas using best

1 available science. *Concerned Friends of Ferry County and David Robinson*,  
2 EWGMHB, Case #04-1-0007c, Order on Compliance, (Sept. 22, 2006).

3 The same is true in Case No. 06-1-0003. The County has arbitrarily concluded that it  
4 can establish buffer widths for wetlands and riparian areas lower than what is  
5 recommended based on best available science. The County bases its decision in part on a  
6 statement found in "Review of Best Available Science For Wetlands and Riparian Buffers" by  
7 Landau Associates, attributed to a Stevens County expert consultant, Mr. William Towey. He  
8 concluded that,

9 "An overwhelming sentiment articulated by the various authors' conclusions  
10 regarding establishment of buffer areas for wetland and riparian areas, was  
11 that fixed-buffer width approach does not lend itself well to the complicated  
12 ecological processes inherent in wetland and riparian areas." Exhibit 113, p. iii.

13 Even though this was a strong statement, the report cited above concluded in its  
14 Executive Summary just the opposite:

15 "Nevertheless, the recommendations for wetland and riparian buffers  
16 presented in this report are based on fixed-buffer requirements in regards to  
17 the protection of water quality parameters, wildlife, and aquatic resources."  
18 Exhibit 113, p. iii.

19 As we can see from the chart below, Ferry County chose to reduce the  
20 recommended buffer widths for Category I by 20%, Category IV by 25%, and Category II  
21 and III by 50% without basing its decision on any documented science in the record.  
22 Furthermore, the County also changed the definitions of High Intensity Land Use and Low  
23 Intensity Land Use to allow additional uses in these areas.

	<u>Category</u>	<u>Ferry County Buffer</u>	<u>DOE Recommended Buffer</u>
24	A. Category I wetland:	200' HILU	250' HILU
25		100' LILU	125' LILU
26	B. Category II wetland:	100' HILU	200' HILU
		50' LILU	100' LILU

1	C. Category III wetland:	75' HILU	150' HILU
2		35' LILU	75' LILU
3	D. Category IV wetland:	40' HILU	50' HILU
4		25' LILU	25' LILU

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

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

12 Ferry County has again failed to provide a scientific basis to deviate from the  
13 Department of Fish and Wildlife's or the Department of Ecology's recommended buffers.

14 As found previously in the original FDO concerning the ICAO and again in the  
15 Compliance Order, the Board finds the reduced buffers established in the Ferry County  
16 Resource Lands and Critical Areas Ordinance #2006-03 for Category I through IV Wetlands  
17 in HILU and LILU and Type 1 and 2 waters for LILU in Ferry County are inadequate and do  
18 not comply with the Growth Management Act's requirements found in RCW 36.70A.060 and  
19 RCW 36.70A.172 to protect the functions and values of critical areas using best available  
20 science.

21 **Conclusion:**

22 The Board finds the Petitioners have carried their burden of proof and that the  
23 County's actions are clearly erroneous in Issue No. 1. The County has failed to protect  
24 critical areas by adopting inadequate and scientifically unsubstantiated buffer widths.

25 **Issue No. 2:**

26 Did the County fail to comply with RCW 36.70A.040, -.060, -.120, and -.172  
and interfere substantially with GMA goals (RCW 36.70A.020) by modifying the definitions  
for variances from the original Interim Critical Areas Ordinance and other adequate means  
for protecting and regulating activities within critical areas using best available science?

1 **Petitioners:**

2 This issue was argued by the Petitioners in Case No.'s 01-1-0019 and 04-1-007c. The  
3 Board ruled that the County's standard for variances failed to protect critical areas and  
4 therefore failed to comply with the GMA.

5 **Respondent:**

6 Respondent does not argue this issue and agrees with the Petitioners that the  
7 County is out of compliance on these variance provisions.

8 **Petitioners Reply Brief:**

9 Nothing noted.

10 **Board Analysis:**

11 Section 12.01 in the RLCAO is not based on best available science or any  
12 documented science found in the record.

13 **Conclusion:**

14 The Board finds the Petitioners have carried their burden of proof and that the  
15 County's actions are clearly erroneous in Issue No. 2 for not using best available science in  
16 adopting variance provisions.

17 **Issue No. 3:**

18 Did the County fail to comply with RCW 36.70A.040, -.060, -.120, and -.172  
19 and interfere substantially with GMA goals (RCW 36.70A.020) by modifying, eliminating and  
20 or excluding adequate "Policies" and development standards for resource lands including  
21 the setting of minimum lot sizes for agricultural lands?

22 **Petitioners:**

23 The Petitioners contend that Ferry County has failed to conserve forest lands by  
24 adopting certain development regulations according to RCW 36.70A.170 where the County  
25 "shall" "assure the conservation of" forest lands. The Petitioners cite *Save Our Butte Save*  
26 *our Basin Society, et al. v. Chelan County*, as an example where a 200-foot setback was  
imposed by a county for development within and on adjacent lands, the purpose being to  
protect homes from fire and forest practices that may adversely affect the home or

1 residents. *Save Our Butte Save our Basin Society, et al. v. Chelan County*, EWGMHB Case  
2 No. 94-1-0015, FDO, pg. 10 (August 8, 1994).

3 The Petitioners ask that the forest provisions be remanded back to the County for  
4 action consistent with the GMA.

5 **Respondent:**

6 The Respondent did not argue this issue, except to claim that the Petitioners make  
7 no reference to what policies were changed, eliminated or modified in the final CAO and to  
8 argue that there is no Exhibit 501 as cited by the Petitioners.

9 **Petitioners Reply Brief:**

10 The Petitioners cite their HOM brief and add that the County "has failed to comply  
11 with the GMA to protect resource lands by failing to adopt setbacks to protect homes in  
12 forest resource lands and allow normally (sic) forestry operations without adversely  
13 effective (sic) neighbors." Petitioners Reply Brief.

14 **Board Analysis:**

15 RCW 36.70A.040(4)(a) requires counties and cities to adopt a county-wide planning  
16 policy under RCW 36.70A.210; and (b) adopt development regulations conserving  
17 agricultural lands, forest lands, and mineral resource lands it designated under RCW  
18 36.70A.060.

19 RCW 36.70A.060 requires that counties and cities "assure the conservation of  
20 agricultural, forest, and mineral resource lands designated under RCW 36.70A.170." It also  
21 requires development regulations to "... assure that the use of lands adjacent to  
22 agricultural, forest, or mineral resource lands shall not interfere with the continued use, in  
23 the accustomed manner and in accordance with best management practices, of these  
24 designated lands for the production of food, agricultural products, or timber, or for the  
25 extraction of minerals."

26 Key to this issue is the following requirement in RCW 36.70.060(1), "Counties and  
cities shall require that all plats, short plats, development permits, and building permits  
issued for development activities on, or within five hundred feet of, lands designated as

1 agricultural lands, forest lands, or mineral resource lands, contain a notice that the subject  
2 property is within or near designated agricultural lands, forest lands, or mineral resource  
3 lands on which a variety of commercial activities may occur that are not compatible with  
4 residential development for certain periods of limited duration.”

5 There is no requirement in the GMA for counties and cities to adopt certain setbacks  
6 within agricultural lands, forest lands, or mineral resource lands, other than the requirement  
7 of a notice, which Ferry County has done in Section 5.04 in its RLCAO.

8 RCW 36.70A.120 is irrelevant to this issue and RCW 36.70A.170 simply requires  
9 counties and cities to designate agricultural lands, forest lands, mineral resource lands and  
10 critical areas “where appropriate”.

11 **Conclusion:**

12 The Board finds the Petitioners have not carried their burden of proof in Issue No. 3.

13 **Issue No. 4:**

14 Did the County fail to comply with RCW 36.70A.040, -.060, -.120, and -.172  
15 and interfere substantially with GMA goals (RCW 36.70A.020) by eliminating the species list  
16 as found in the ICAO?

17 **Issue No. 7:**

18 Whether Ordinance No. 2006-03 protects fish and wildlife habitat conservation areas  
19 in compliance with RCW 36.70A.020(8), RCW 36.70A.020(9), RCW 36.70A.020(10), RCW  
20 36.70A.040, RCW 36.70A.060, RCW 36.70A.170, RCW 36.70A.172 and substantially  
21 interferes with the GMA goals (RCW 36.70A.020)?

22 **Petitioners:**

23 Issues No. 4 and No. 7 have been combined by the Petitioners and will be argued  
24 together.

25 The Petitioners contend that the County has failed to protect fish and wildlife habitat  
26 conservation areas and has eliminated the species list found in the original ICAO. The  
27 Petitioners cite numerous RCW's and WAC's to further their argument, including RCW  
28 36.70A.170, RCW 36.70A.030(5), RCW 36.70A.060, RCW 36.70A.172, WAC 365-190-  
29 080(5), and WAC 365-190-080(5)(c)(i). They also rely on *Ferry County v. Concerned*

1 *Friends of Ferry County*, 155 Wn.2d 824, 832-33, 123 P.3d 102, 106 (2005) as a case that  
2 substantiates their argument that the County has not protected fish and wildlife habitat  
3 conservation areas or certain species found in Ferry County.

4 The Petitioners cite the above case to show that the County has failed to protect  
5 critical areas, specifically fish and wildlife habitats. The County's Section 11.04.10 fails to  
6 protect the functions and values of critical areas in three ways. First, the County does not  
7 require habitat management and mitigation plans. Second, the provision seems to apply  
8 only to developments that are not exempt from SEPA. And third, Section 11.04.10 only  
9 covers "state endangered, threatened, and sensitive species or species of local importance."  
10 Federal species, such as the bull trout, that are not state designated endangered,  
11 threatened or sensitive would not be protected. Ferry County concedes there are bull trout  
12 in the county, acknowledges that the bull trout is an ETS species, but is not protected by its  
13 RLCAO, Section 11.04.10.

13 **Respondent:**

14 The Respondent acknowledges that the original fish and wildlife species listed in the  
15 ICAO were not included in the new RLCAO, but believes the Petitioners missed the appeal  
16 deadline for this and this issue is being resolved in case number 97-1-0018.

16 **Petitioners Reply Brief:**

17 The Petitioners contend the Respondent has failed to counter their arguments in their  
18 HOM brief and ask the Board to find the Respondent out of compliance in this issue.

19 **Board Analysis:**

20 At the Hearing on the Merits and in their brief, the Respondents admit that the  
21 County is still out of compliance in this issue, citing the RLCAO was too far along in the  
22 process to go back and add a species list or protections for fish and wildlife habitat  
23 conservation areas.

24 The decision in the Court of Appeals case, *Ferry County v. Concerned Friends of*  
25 *Ferry County*, *supra*, was entered November, 2005, five months prior to the adoption of the  
26 Ferry County Resource Lands and Critical Areas Ordinance No. 2006-03. The County should

1 have had the time and information available to develop a fish and wildlife habitat  
2 conservation area plan and species list and to take this plan and list it to the public for  
3 hearings, but chose not to do so. The RLCAO is incomplete without it and has to be held  
4 out of compliance for ignoring this important requirement.

5 **Conclusion:**

6 The Board finds the Petitioners have carried their burden of proof in Issues No. 4 and  
7 No. 7 and finds that the County is out of compliance by failing to protect fish and wildlife  
8 habitat conservation areas and certain species found in Ferry County, as it did in Case No.  
01-1-0019.

9 **Issue No. 5:**

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

13 **Petitioners:**

14 The Petitioners believe this issue has been ruled on by the Board in Case No. 01-1-  
15 0019 and is waiting for compliance by the County in that case.

16 **Respondent:**

17 The Respondent argues that the County is "deemed in compliance with all its  
18 shorelines ordinances, and shoreline related ordinances and programs."

19 **Petitioners Reply Brief:**

20 The Petitioners argue that the County is not in compliance because the Board has  
21 not ruled in Case No. 04-1-0007c and Case No. 01-1-0019.

22 **Board Analysis:**

23 The Board recently determined the County was out of compliance for failing to  
24 provide adequate buffers along riparian areas based on best available science. Riparian  
25 areas are Waters of the State as identified in WAC 222-16-031. The Board's Conclusion in  
04-1-0007c is as follows:

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

6 The County has made no changes to this section and remains out of compliance for  
7 not protecting shorelines based on best available science as required by the GMA.

8 **Conclusion:**

9 The Board finds the Petitioners have carried their burden of proof and find the  
10 County out of compliance in Issue No. 5 for failing to protect shorelines based on best  
11 available science.

12 **Issue No. 6:**

13 Whether the violations provisions of Section 12.12 to require that persons  
14 violating the regulations **knowingly** commence a regulated activity in a riparian area,  
wetland, or its buffer violates the requirements of RCW 36.70A.020(10), 060, 170, & 172?  
(emphasis added)

15 **Petitioners:**

16 The Petitioners argue that the County fails to protect critical areas in its RLCAO  
17 because in Section 12.12 the wording and enforcement falls short in three ways: It only  
18 addresses regulated activities in riparian areas or regulated wetlands and their buffers; it  
19 does not cover unauthorized activities on forest land, agricultural lands, and mineral lands;  
20 and the person or land owner must "knowingly" commence a regulated activity.

21 The Petitioners contend that the ordinance should cover not only riparian areas or  
22 regulated wetlands and their buffers, but also aquifer recharge areas, frequently flooded  
23 areas and geologically hazardous areas. They argue there is no effective enforcement for  
24 the four defined critical areas.

25 The Petitioners also contend that Section 12.12 does not cover unauthorized  
26 activities on the other lands as mentioned above. According to the Petitioners, failing to

1 comply with the regulations in Ordinance No. 2006-03 for all three resource lands is not a  
2 violation of the ordinance. Therefore, these provisions, including the minimum lot sizes for  
3 forest lands cannot be enforced.

4 The Petitioners further argue that the word "knowingly" exempts some violations.  
5 The Petitioners define culpability and believe the County has created loopholes in the  
6 violation section of the RLCAO.

7 Finally, the Petitioners contend Ordinance 2006-03 lacks effective enforcement  
8 provisions and will not conserve resource lands or protect critical areas.

8 **Respondent:**

9 The Respondent contends the Ordinance has criminal and civil enforcement and  
10 cites Sections 12.12 and 12.14. Civil enforcement can be done and is typically done  
11 irrespective of whether a person commits an act knowingly or unknowingly. The  
12 Respondent argues that criminal violations of the act must be done knowingly and they give  
13 several examples of violations and the resulting enforcement capabilities.

14 **Petitioners Reply Brief:**

15 The Petitioners argue that the Respondent addressed only one of the Petitioners  
16 arguments concerning the Violations Section, the argument concerned the word  
17 "knowingly". The Petitioners believe the County conceded two of the Petitioners arguments.

18 As to the civil remedy, the Petitioners argue that Section 12.14 does not authorize  
19 the County to issue civil penalties or restoration orders, unless the County files a civil  
20 lawsuit. The Petitioners also contend that the civil penalty under Section 12.13 that  
21 authorizes a court to impose penalties only applies to "knowing" violations. According to the  
22 Petitioners, the County cites no authority for its argument that all crimes require evidence of  
23 a knowing violation.

23 **Board Analysis:**

24 The Critical Areas Ordinance is the tool for carrying out the GMA requirement that all  
25 jurisdictions, whether or not they plan under GMA, must designate and protect critical  
26 areas, which include wetlands, areas with a critical recharging effect on aquifers used for

1 potable water, frequently flooded areas, geologically hazardous areas and fish and wildlife  
2 habitat conservation areas. In designating and protecting critical areas, counties and cities  
3 shall include the best available science in developing policies and development regulations  
4 to protect the functions and values of critical areas. RCW 36.70A.030(5), RCW 36.70A.170  
5 and RCW 36.70A.172.

6 While the GMA is specific as to what critical areas counties and cities must designate  
7 and protect using best available science, the Act is silent on what a county or city must do  
8 to enforce these requirements or punish violations of them. Enforcement of the Act through  
9 local comprehensive plan regulations and critical areas ordinances are where counties and  
10 cities are allowed to use their discretion. This discretion, of course, is bounded by state law  
11 governing waters of the state under the Shoreline Management Act.

12 Section 12.12 VIOLATION, in Ferry County's RLCAO, may leave much to be desired  
13 by the Petitioner, but the wording essentially fulfills the void on enforcement left untouched  
14 by the GMA. The word "knowingly" is not necessary within the context of the section, but  
15 again, this area is left to the discretion of the jurisdiction.

16 Section 12.14 CIVIL REMEDY, provides the cover for all the critical areas, including  
17 forest land, agricultural lands, and mineral lands. By including, "This ordinance...", in the  
18 section, any violation of defined critical areas can be enforced by civil action.

19 Even if Section 12.12 VIOLATION, fails to accomplish the necessary enforcement  
20 action, the state has the authority to cooperatively or singularly take enforcement action if  
21 necessary. WAC 365-195-825(2)(g) **Regulations specifically required by the act**,  
22 requires the protection of critical areas and encourage state and local authorities to make  
23 regulations and programs fit together with regional, state and federal programs. WAC 173-  
24 27-240 **Authority and purpose**, implements the enforcement responsibilities of state and  
25 local government under the Shoreline Management Act and provides for a variety of means  
26 of enforcement, including civil and criminal penalties, orders to cease and desist, orders to  
take corrective action and permit rescission. WAC 173-27-260 **Policy**, states that these  
regulations should be used by local government in carrying out enforcement responsibilities

1 under the act, unless local government adopts separate rules to implement the act's  
2 (Shoreline Management Act) enforcement provision. WAC 173-27-270 **Order to cease and**  
3 **desist**, gives local government and/or the department (DOE) the authority to serve upon a  
4 person a cease and desist order.

5 What we see is the capability of both local and state government to step in and  
6 protect, not only shorelines of the state, but critical areas in general.

7 In addition to the state law previously mentioned above, there are other provisions  
8 to protect shorelines of the state. RCW 90.58.220 **General penalty**, puts teeth into the  
9 enforcement action by directing that guilty parties in violation of the shorelines of the state  
10 can be punished by fines or imprisonment. RCW 90.58.210 **Court actions to insure**  
11 **against conflicting uses and to enforce – Civil penalty – Review**, provides that the  
12 attorney general's office shall bring charges if a violation is found or a permit is not  
13 obtained.

14 Perhaps one of the most important laws is RCW 90.58.200 **Rules and regulations**,  
15 which simply states that the department (DOE) and local governments are authorized to  
16 adopt such rules as are necessary and appropriate to carry out the provisions of this  
17 chapter, leaving counties and cities to either adopt the state's laws, their own, or a  
18 combination.

19 The County has included a violation section, a penalty section and a civil remedy  
20 section in its final RLCAO. It may not be the most comprehensive, but it provides a legal  
21 remedy and enforcement for violations of the critical areas ordinance. The Board looks to  
22 these sections and the state's enforcement capabilities to ensure that Ferry County's critical  
23 areas will be protected as required.

## 24 **Conclusion:**

25 The Board finds the Petitioners did not carry their burden of proof for Issue No. 6.

## 26 **V. FINDINGS OF FACT**

1. Ferry County is a county located east of the crest of the Cascade Mountains and has chosen to plan under Chapter 36.70A.

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2. Petitioners are citizens of Ferry County and participated in the adoption of Ordinance #2006-03 in writing and through testimony.
3. Ferry County enacted the Ferry County Resource Lands and Critical Areas Ordinance #2006-03 (RLCAO) on March 20, 2006.
4. Petitioners raised seven legal issues in their Petition for Review to the Board.
5. Petitioners filed their petition for review of Ordinance #2006-03 on May 18, 2006.
6. Ferry County's RLCAO amends Ordinance #93-02 for the designation and protection of resource lands and critical areas.
7. The RLCAO established buffer widths for wetlands and riparian areas based on Ferry County Planning Commission recommendations and a study by Landau Associates, "Review of Best Available Science for Wetlands and Riparian Buffers". This review concluded "fixed-width buffers do not lend itself well to the complicated ecological process inherent in wetland and riparian areas."
8. Ferry County adopted a system of variable width buffers based on "High Impact Land Use" (HILU) and "Low Impact Land Use" (LILU) for wetlands and riparian areas, well below the buffer widths recommended by best available science.
9. Ferry County failed to protect fish and wildlife habitat conservation areas in the RLCAO and eliminated the species list found in the original ICAO.
10. Ferry County inserted a requirement in Section 5.04 in its RLCAO to notify potential land owners of potential aggravating activities in adjacent agricultural lands, forest lands, or mineral resource lands.
11. Ferry County's RLCAO contains enforcement capabilities based on local discretion.

1 **VI. CONCLUSIONS OF LAW**

- 2 1. This Board has jurisdiction over the parties to this action.
- 3 2. This Board has jurisdiction over the subject matter of this action.
- 4 3. Petitioners have standing to raise the issues listed in the Prehearing
- 5 Order.
- 6 4. The Petition for Review in this case was timely filed.
- 7 5. Ferry County's RLCAO fails to comply with RCW 36.70A.060 and RCW
- 8 36.70A.172 for failing to protect critical areas by using best available
- 9 science to designate wetland and riparian area buffer widths.
- 10 6. Ferry County's RLCAO fails to comply with RCW 36.70A.020(9) and (11), RCW
- 11 36.70A.060(2), and RCW 36.70A.172 by adopting a variance section that fails
- 12 to comply with two planning goals of the GMA, fails to protect critical areas
- 13 and for failure to use best available science in determining the County's
- 14 variance section.
- 15 7. Ferry County failed to comply with RCW 36.70A.020(9) and (10), RCW
- 16 36.70A.040(3)(b), RCW 36.70A.060((2), RCW 36.70.170 and RCW
- 17 36.70A.172 by failing to protect fish and wildlife habitat conservation
- 18 areas and certain species found in Ferry County.
- 19 8. Ferry County failed to comply with RCW 36.70A.040(3)(b), RCW
- 20 36.70A.060(2), and RCW 36.70A.172 for failing to protect shorelines based on
- 21 best available science.
- 22 9. Ferry County has adopted adequate enforcement language that, in
- 23 conjunction with the state's enforcement policies, will protect critical
- 24 areas.

25 **VIII. ORDER**

- 26 1. The Board finds the Petitioners have carried their burden of proof and have shown that the actions of the County were clearly erroneous in Issue Nos. 1, 2, 4, 5 and 7.

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2. The Board finds the Petitioners have not carried their burden of proof in Issue Nos. 3 and 6.

3. Ferry County must take the appropriate legislative action to bring itself into compliance with this Order by **January 2, 2007, 90** days from the date issued. The following schedule for compliance, briefing and hearing shall apply:

- The County shall file with the Board by **January 16, 2007, an original and four copies** of a Statement of Actions Taken to Comply (SATC) with the GMA, as interpreted and set forth in this Order. The SATC shall attach copies of legislation enacted in order to comply. The County shall simultaneously serve a copy of the SATC, with attachments, on the parties. By this same date, the County shall file a "Remanded Index," listing the procedures and materials considered in taking the remand action.
  
- By no later than **January 30, 2007**, 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.
  
- By no later than **February 13, 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 **February 20, 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 **February 26, 2007, at 10:00 a.m.** The parties will call **360-357-2903 followed by 17809 and the # sign**. Ports are reserved for Mr. Robinson and Mr. Graham. If additional ports are needed please contact the Board to make arrangements.

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

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

5 **Reconsideration:**

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

15 **Judicial Review:**

16 Any party aggrieved by a final decision of the Board may appeal the decision to  
17 superior court as provided by RCW 36.70A.300(5). Proceedings for judicial  
18 review may be instituted by filing a petition in superior court according to the  
19 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil.

20 **Enforcement:**

21 The petition for judicial review of this Order shall be filed with the appropriate  
22 court and served on the Board, the Office of the Attorney General, and all parties  
23 within thirty days after service of the final order, as provided in RCW 34.05.542.  
24 Service on the Board may be accomplished in person or by mail. Service on the  
25 Board means **actual receipt of the document at the Board office** within thirty  
26 days after service of the final order.

1 Service:

2 **This Order was served on you the day it was deposited in the United States mail.**

3 **RCW 34.05.010(19)**

4 **SO ORDERED** this 2<sup>nd</sup> day of October 2006.

5 EASTERN WASHINGTON GROWTH MANAGEMENT  
6 HEARINGS BOARD

7 \_\_\_\_\_  
8 John Roskelley, Board Member

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10 Dennis Dellwo, Board Member

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12 Judy Wall, Board Member

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