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

LOON LAKE PROPERTY OWNERS
ASSOCIATION, LOON LAKE DEFENSE
FUND, WILLIAM SHAWL, and JANICE
SHAWL, LARSON BEACH NEIGHBORS, and
JEANIE WAGENMAN

Petitioner,

DEPARTMENT OF ECOLOGY,

Intervenor,

v.

STEVENS COUNTY,

Respondent.

Case No. 03-1-0006c

ORDER ON REMAND

I. PROCEDURAL BACKGROUND

On February 2, 2004, the Board issued an Order consolidating EWGMHB Case Nos. 00-1-0016, 03-1-0003 and 03-1-0006 under new Case No. 03-1-0006c.

On February 10, 2004, the Board issued its Final Decision and Order in Case No. 03-1-0003.

On March 17, 2004, the Board refused to reconsider its order or issue an Amended Final Decision and Order.

On October 15, 2004, the Board issued its Order on Compliance.

On February 11, 2005, the Board received a request for Compliance Hearing from Petitioners' in the above matter.

1 On April 14, 2005, the Board held a telephonic compliance hearing. Present were
2 Presiding Officer, John Roskelley, and Board Members Judy Wall and Dennis Dellwo. Present
3 for Petitioners were Jeanie Wagenman, Mr. and Mrs. Shawl, and Bruce Erickson. Present for
4 Respondent were Peter Scott and Lloyd Nickel.

5 On May 20, 2005, the County filed a Motion to Reconsider. On May 25, 2005, the
6 Board received a response to the Motion for Reconsideration from Petitioner Jeannie
7 Wagenman.

8 On June 2, 2005, the Board issued its Amended Second Order on Compliance
9 Regarding Motion for Reconsideration.

10 On June 9, 2005, Stevens County filed a Petition for Review with Stevens County
11 Superior Court.

12 On September 29, 2005, the Board received Respondent's Statement of Action Taken
13 to Comply.

14 On November 18, 2005, the Board held the third telephonic compliance hearing.
15 Present were Presiding Officer, John Roskelley, and Board Members Judy Wall and Dennis
16 Dellwo. Present for Petitioners was Jeanie Wagenman, representing Larson Beach
17 Neighbors. Present for Respondent was Peter Scott, representing Stevens County.

18 On December 21, 2005 the Board issued its Third Order on Compliance, which was
19 appealed to the courts. The Court of Appeals issued their decision on July 22, 2008.

20 On November 17, 2006, the Superior Court for Stevens County, No. 06-2-00021-6,
21 Rebecca M. Baker, J., entered a judgment reversing the board's compliance order, ruling
22 that neither the habitat nor the species was properly nominated for protection.

23 On July 22, 2008, the Court of Appeals of Washington, Division Three, filed its
24 decision holding that res judicata did not bar the county from raising the nomination issue
25 in the trial court and that substantial evidence does not support the Board's finding that the
26

1 habitat and species were properly nominated for protection, and the court *affirmed* the
2 judgment of Superior Court.¹

3 On May 20, 2009, the Board issued its Order Setting Remand Hearing.

4 On June 1, 2009, the Board held a telephonic remand hearing. Present were
5 Presiding Officer, John Roskelley, and Board Members Joyce Mulliken and Ray Paoella.
6 Present for Petitioners was Isaac Thomason, representing Jeanie Wagenman and Larson
7 Beach Neighbors, and Jeanie Wagenman. Present for Respondent was Peter Scott,
8 representing Stevens County.

9 II. PRELIMINARY MATTERS

10 The Superior Court remanded Case No. 03-1-0006c back to the Eastern Washington
11 Growth Management Hearings Board (Board) for compliance proceedings. RCW
12 36.70A.280(1), states that it is the Growth Management Hearings Boards that “hear and
13 determine only those petitions alleging” a violation of the GMA, while under RCW
14 36.70A.320(3), it is clear “the board...shall determine whether there is compliance with the
15 requirements of this chapter (RCW 36.70A).

16 From court cases, remand is the preferred method when reviewing matters within an
17 agency's discretion. Here, finding compliance and/or non-compliance with the GMA has
18 always been the province of the Board. The following are several court cases which define
19 the Growth Boards' authority.

20 In 1998, the Court of Appeals in *Manke Lumber v. WWGMHB*, 91 Wn. App. 793, 809
21 the Court stated:

22 We agree with the Board that the superior court lacked authority to find the
23 County's IRO in compliance with the GMA. RCW 34.05.574(1) [the section of
24 the APA dealing with judicial review of agency actions] specifically provides
25 that:

26 In reviewing matters within agency discretion, the court shall limit its function
to assuring that the agency has exercised its discretion in accordance with

¹ *Stevens Co. v. Loon Lake Property Owners Association*, et al., 146 Wn. App. 124; 187 P.3d 846; 2008 Wash. App.

1 law, and shall not itself undertake to exercise the discretion that the
2 legislature has placed in the agency. The court shall remand to the agency for
3 modification of agency action, unless remand is impractical or would cause
unnecessary delay.

4 Even though the superior court in part usurped the Board's role of determining
5 GMA compliance, the superior court nevertheless properly remanded to the
Board for further proceedings consistent with its opinion.

6 This same position is referenced in *WEAN v. Island County*, 122 Wn. App. 156, 165-
7 66 (2004). In a Division III Court of Appeals case from 2008, *Coffey v. City of Walla Walla*,
8 145 Wn. App. 435, the tension between LUPA and GMA was present with the Court noting
9 the Legislature's grant of authority to the Boards as opposed to the Courts to determine
10 compliance with the GMA.

11 In the Supreme Court's 2007 decision in *Woods v. Kittitas County*, 162 Wn.2d 597,
12 614-15, addressing a LUPA appeal and a Superior Court's finding that the site specific
13 rezone complied with the GMA, the Supreme Court specifically noted that:

14 If a project permit is consistent with a comprehensive plan, then the only way
15 that it could violate the GMA is if the plan itself violated the GMA. Thus, in this
16 case, Woods' challenge to the rezone's compliance with the GMA is a
17 disguised challenge to the adequacy of the comprehensive plan itself. This is a
matter within the exclusive jurisdiction of a GMHB, not a superior court.

18 **Conclusion:**

19 Therefore, this case on remand is properly before this Board.

20 **III. DISCUSSION**

21 Case No. 03-1-0006c is a consolidation of three cases, Case Nos. 00-1-0016, 03-1-
22 0003 and 03-1-0006, all of which pertain to Stevens County's (County) process for
23 nomination/designation of habitat and species of local importance (HSLI). Under Case No.
24 00-1-0016, the Board found the County out of compliance with the Growth Management Act
25 (GMA) for failure to have a nomination and designation process for HSLI. This was
remedied by the County and in November 2003, under the third compliance order for Case

1 No. 00-1-0016, the Board found the County had adopted a GMA-compliant nomination and
2 designation of HSLI process.

3 In 2003, Petitioners² filed two Petitions for Review (PFR)³ challenging the actions
4 taken by the County in regards to compliance with the GMA with its Critical Areas Ordinance
5 (CAO). In its Final Decision and Order (FDO) under consolidated Case No. 03-1-0006c, the
6 Board found that the County had not responded to previous requests by Petitioners for the
7 nomination and designation of HSLI, specifically the Common Loon, Red-necked Grebe, and
8 Loon Lake wetlands. Three compliance orders for this case were issued by the Board
9 beginning in October 2004, with the First Order on Compliance and ending in December
10 2005, with the Board's Third Order on Compliance.

11 In its first Order on Compliance, issued October 15, 2004, the Board acknowledged
12 the County's new nomination and designation process, but noted again that prior to this
13 process the County had received nomination and designation requests⁴ for which the
14 County had not responded and was contending that prior nominations were moot and the
15 "new" process had to be followed. The Board found the County out of compliance again for
16 "failure to adequately respond to the previous nominations of species and habitat of local
17 importance made prior to the adoption of Appendix B in amended Title 13."⁵

18 With its Second Order on Compliance, issued May 10, 2005, the Board found the
19 County had presented scientific evidence supporting its decision not to designate the
20 Common Loon, but in continued non-compliance for failing to "include best available science
21 in their denial of the Petitioners' nominations of species and habitat of local importance,"⁶
22 specifically the Red-necked Grebe and Loon Lake wetlands, and ordered the County to

23 ² Loon Lake Property Owners Association (LLPOA), Loon Lake Defense Fund, William and Janice Shawl, Larson Beach
24 Neighbors, and Jeanie Wagonman.

25 ³ Case Nos. 03-1-0003 and 03-1-0006.

26 ⁴ Although the County did not have a process in place for nominating and designating HSLI, citizens and citizen groups
submitted nominations through written and oral testimony during the CAO public hearing process to designate the
Common Loon, Red-necked Grebe, and the Loon Lake wetlands as HSLI.

⁵ *LLPOA, et al., v. Stevens County*, EWGMHB Case No. 03-1-0006c, Order on Compliance, pg. 11 (Oct. 15, 2004).

⁶ *LLPOA, et al., v. Stevens County*, EWGMHB Case No. 03-1-0006c, Second Order on Compliance, pg. 14 (May 10,
2005).

1 include best available science as required by the GMA and "show their work as to how they
2 arrived at their decision using such science."⁷

3 With its Third Order on Compliance, issued December 21, 2005, the Board again
4 found that "Stevens County's failure to designate the Red-necked Grebe as a Species of
5 Local Importance and the Loon Lake wetlands as a Habitat of Local Importance is clearly
6 erroneous."⁸ The Board evaluated the scientific evidence provided by the County's expert,
7 Mr. William T. Towey (Towey Ecological Services), and found his report lacked "the credible
8 scientific evidence needed to overcome the overwhelming scientific information and best
9 available science in the record provided by the Petitioners."⁹ Based on this significant and
10 overwhelming science in the record provided by Petitioners, the Board found the County in
11 continuing non-compliance for not properly considering best available science. The County
12 appealed the Board's decision to Superior Court.

13 Rather than summarize the Superior Court's decision and the Appeals Court's
14 decision, the Board will include both courts' judgments and their reasoning verbatim.

15 **Superior Court:**

16 *In summary, on November 17, 2006, the Superior Court for Stevens County, No. 06-
17 2-00021-6, Rebecca M. Baker, J., entered a judgment reversing the Board's compliance
18 order, ruling that neither the habitat nor the species was properly nominated for protection.*

19 **Court of Appeals: (Taken from the decision directly)**

20 *Holding that res judicata did not bar the county from raising the nomination issue in
21 the trial court and that substantial evidence does not support the board's finding that the
22 habitat and species were properly nominated for protection, the court affirms the judgment.*

23 The Appeals Court decided the case on the following facts, separating the case into
24 two parts – A. Nominations Process; and B. Substantial Evidence Requirement:

25 *In 2003, Ms. Wagenman initially challenged Stevens County's critical areas ordinance
26 (CAO). She requested designation of the Loon Lake wetlands as a locally important habitat*

⁷ Ibid at 15.

⁸ *LLPOA, et al., v. Stevens County*, EWGMHB Case No. 03-1-0006c, Third Order on Compliance, pg. 31 (Dec. 21, 2005).

⁹ Ibid at 3.

1 for the Red-necked Grebe. In October 2004, the GMHB issued its first order of compliance,
2 ordering the County to respond. The GMHB construed Ms. Wagenman's request as a formal
3 "nomination" under the GMA and found, "The County has received nominations to
4 designate species and/or habitat of local importance." Clerk's Papers (CP) at 444 (Finding of
5 Fact 7).

6 In June 2005, the GMHB issued its second order of compliance, ordering the County
7 to use the best available science, as required by the GMA, in making its designation
8 decision. The GMHB found, "The County received nominations to designate species and/or
9 habitat of local importance by the Petitioners." CP at 223.

10 In October 2005, the County passed a resolution denying Ms. Wagenman's requests
11 for special designations. The GMHB issued a third order of compliance. But the GMHB again
12 found, "The County received nominations to designate species and/or habitat of local
13 importance by the Petitioners." CP at 502.

14 The County petitioned the Stevens County Superior Court for review of the third
15 order of compliance. The court expressed concern that the record was deficient regarding
16 nominations and continued the proceedings in the hopes, "one or more of the parties would
17 see fit to request a supplementation of the record." CP at 450. [***4] [**848] **Neither
18 party did** (Board emphasis).

19 A. Nominations Process

20 Counties must determine which habitats and species are of local importance. WAC
21 365-190-080(5)(c)(ii). The County requires HSLI to be nominated by an agency, individual,
22 or organization. Stevens County Code, Title 13 (Critical Areas Ordinance), app. B. The
23 County enacted a specific process for nominations. *Id.*

24 Here, Ms. Wagenman challenged [***7] the County's CAO in 2003. She requested
25 designation of the Loon Lake wetlands as a locally important habitat for the Red-necked
26 Grebe. In October 2004, the GMHB issued its first order of compliance, ordering the County
to respond. Based on public input and information from the Fish and Wildlife Department,
the County passed a resolution in March 2005, denying the HSLI designation. The GMHB

1 then issued its second order of compliance, ordering the County to use best [**849]
2 available science, as required by the GMA, in making its designation decision. Then, based
3 on Mr. Towe's review of the best available science, the County again passed a resolution
4 denying Ms. Wagenman's requests for special designations. The GMHB issued a third order
5 of compliance. The County appealed to the superior court, arguing the nominations process
6 was not followed.

7 *The series of compliance orders arise out of the same proceeding. The central issue*
8 *has remained whether the County should designate the wetlands and Red-necked Grebe as*
9 *HSLI. Nominations are part of the designation process. Under Clallam County, we reject Ms.*
10 *Wagenman's contrary contentions. Accordingly, we conclude the superior court properly*
11 *considered [***8] the nominations issue raised by the County on appeal.*

12 *B. Substantial Evidence Requirement*

13 *The issue is whether substantial evidence supports the GMHB's three findings*
14 *supporting its three compliance orders that the County received HSLI nominations.*

15 *[7, 8] ¶14 Ms. Wagenman contends a plain reading of the first order of compliance*
16 *provides substantial evidence that nominations were properly received. She extensively*
17 *quotes the first order of compliance in her reply brief. This order, however, is not in our*
18 *record. On appeal, we will not consider matters not in the record. RAP 9.2(b). Ms.*
19 *Wagenman has the burden to provide an adequate record to review her issues; the trial*
20 *court's decision must stand if this burden is not met. RAP 9.2; Story v. Shelter Bay Co., 52*
21 *Wn. App. 334, 345, 760 P.2d 368 (1988).*

22 *¶16 The [***9] superior court expressed its concern that the record was deficient*
23 *regarding nominations and continued the proceedings to allow the parties to request to*
24 *supplement the record. Neither party did.*

25 **Board Summary:**

26 According to the Court of Appeals' judgment, the Board can summarize that any
nominations sought by petitioners, including those involved with Case No. 03-1-0006c, must
comply with the procedures set forth in Appendix B of the County's CAO. Since this did not

1 occur after Appendix B was adopted, and Petitioners failed to substantiate their pre-
2 Appendix B nominations, substantial evidence does not support the Board's holding that the
3 County failed to consider the nominations. Whereas, the Board would argue that
4 nominations were presented to the County by Petitioners prior to the nomination
5 procedures in Appendix B were adopted, Superior Court and the Court of Appeals did not
6 find substantial evidence of this in the record. Therefore, because there were no
7 nominations, the courts determined that the Board erred in finding the County's actions did
8 not comply with the GMA.

8 The Board held a remand hearing with the parties to determine compliance with the
9 GMA. The parties expressed their opinions as to the Superior Court's judgment and
10 subsequent findings of the Court of Appeals. Despite argument by Petitioners' attorney that
11 there is proof the species and habitat were nominated prior to the County's adoption of
12 Appendix B; that Petitioners' complied with the nomination process then in place; and that
13 the Board repeatedly found the County in non-compliance for failing to process these prior
14 nominations, Petitioners' failed to provide substantial evidence of this into the record before
15 the courts, even though ample opportunity was afforded Petitioners to do so by Superior
16 Court. As per the Board's duty to determine compliance or non-compliance, we must find
17 the County in compliance at this time based on the Superior Court's and Court of Appeal's
18 judgments and findings.

18 Unfortunately, it is the Red-necked Grebe, the Loon Lake wetland, and subsequently,
19 the citizens of Stevens County who are poised to lose in this proceeding. It would be tragic
20 to lose a species or a habitat that supports many species to a technicality, such as whether
21 a nomination was submitted prior to an adopted nomination process. It is evident to this
22 Board that Petitioners had serious concerns about several species and a wetland habitat
23 important to Stevens County early on in the GMA process and, despite the County's failure
24 to include a nomination process originally in its CAO, Petitioners still tried to encourage the
25 County to protect these species and habitat through their own initiative during the public
26 hearing process. Given the County's adopted nomination process, which includes an

1 onerous financial requirement of \$1,500.00 to nominate a species or habitat of local
2 importance, it has effectively eliminated future citizen input into its HSLI process, which in
3 turn places habitats and species within Stevens County at risk.

4 **IV. ORDER**

5 With the judgment of the Stevens County Superior Court, which was upheld by the
6 Court of Appeals, the Superior Court has remanded the Board's Third Order on Compliance
7 back to the Board to determine compliance. The Board, after holding a remand hearing with
8 the parties, finds Stevens County in compliance because, according to the courts, neither
9 the habitat nor the species was properly nominated for protection, and Petitioners failed to
10 provide substantial evidence to the contrary. Case No. 03-1-0006c is closed.

11 **SO ORDERED** this 8th day of June 2009.

12 EASTERN WASHINGTON GROWTH MANAGEMENT
13 HEARINGS BOARD

14 _____
15 John Roskelley, Board Member

16 _____
17 Joyce Mulliken, Board Member

18 _____
19 Raymond Paoella, Board Member