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

5 CONCERNED FRIENDS OF FERRY COUNTY
6 and DAVID ROBINSON, RIPARIAN OWNERS
7 OF FERRY COUNTY and SHARON
8 SHUMATE,

Petitioner,

9 v.

10 FERRY COUNTY,

11 Respondent.
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Case No. 04-1-0007c

THIRD ORDER ON COMPLIANCE

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I. SYNOPSIS

On December 1, 2008, Ferry County (County) enacted Ordinance Nos. 08-01, entitled "An Ordinance to Adopt the Ferry County Comprehensive Plan and the Curlew Lake Sub Area Plan"; Ordinance No. 08-02, entitled "Ferry County Critical Areas Ordinance"; and Ordinance No. 08-03, entitled "Ferry County Development Regulations Ordinance," and claims to have come into compliance with the Eastern Washington Growth Management Board's (Board) Final Decision and Order (FDO) and previous compliance orders in this case. The County claims it addressed each of the two non-compliant issues, (1) riparian buffer widths and (2) variances, in this case and took action to bring the County into compliance in both issues.

The Concerned Friends of Ferry County, Riparian Owners of Ferry County, and David Robinson (Petitioners) disagree with the County and claim the County failed to: (1) include best available science (BAS) in adopting Type 1, 2 and 3 buffer widths; and (2) provide for

1 a public hearing process for variances as recommended by the Community Trade and
2 Economic Development (CTED).

3 The Board, after thorough study of the submitted briefs and exhibits, consideration
4 of argument provided by the parties at the third compliance hearing on February 2, 2009,
5 investigation of past Hearings Boards cases, case law, and in light of the Growth
6 Management Act (GMA), the Board finds and concludes the County: (1) failed to adopt
7 riparian area buffer widths, specifically for stream Types 2 and 3, to protect the functions
8 and values of critical areas using BAS as required by RCW 36.70A.060 and RCW
9 36.70A.172; and (2) has resolved Issue No. 2 by adding Criteria No. 10 to its Critical Areas
10 Ordinance (CAO), Section 10.01, and is now in compliance. Furthermore, the County is not
11 required by statute to provide for a public hearing under RCW 36.70B for variances and,
12 therefore, this issue is resolved.

12 II. PROCEDURAL HISTORY

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

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

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

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

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

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

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

3 On September 22, 2006, the Board issued its Order on Compliance.

4 On October 2, 2006, the Board received Respondent's Motion for Reconsideration.

5 On October 17, 2006, the Board received Respondent's Memorandum in Support of
6 Motion for Reconsideration asking the Board to extend the deadline for Ferry County to
7 "take appropriate legislative action to bring themselves into compliance" from two months
8 to twelve months.

9 On October 27, 2006, the Board received Petitioners' Memorandum Regarding
10 Motion for Reconsideration of September 22, 2006, Order on Compliance and Agreement to
11 Extend Deadline for Compliance by 30 Days.

12 On October 30, 2006, the Board issued its Order on Motion for Reconsideration.

13 On November 20, 2006, the Board issued its Order Setting Compliance Hearing and
14 Briefing Schedule.

15 On April 3, 2008, the Board issued its Order Setting Compliance Hearing and Briefing
16 Schedule.

17 On June 3, 2008, the Board held the compliance hearing. Present were John
18 Roskelley, Presiding Officer, Board Members Joyce Mulliken and Dennis Dellwo. Present for
19 Petitioners was David Robinson. Present for Respondent was Steve Graham.

20 On June 9, 2008, the Board issued its Second Order on Compliance.

21 On December 18, 2008, the Board received Respondent's Statement of Action Taken
22 to Comply.

23 On January 2, 2009, the Board received Petitioners' Third Compliance Hearing Brief.

24 On February 2, 2009, the Board held the compliance hearing. Present were John
25 Roskelley, Presiding Officer, and Board Members Joyce Mulliken and Raymond Paoella.
26 Present for Petitioners was David Robinson. Present for Respondent was Steve Graham.

1 **III. STANDARD OF REVIEW**

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

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

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

21 The Board will grant deference to counties and cities in how they plan under Growth
22 Management Act. RCW 36.70A.3201. But, as the Court has stated, "local discretion is
23 bounded, however, by the goals and requirements of the GMA." *King County v. Central*
24 *Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 561, 14 P.2d 133
25 (2000). It has been further recognized that "[c]onsistent with *King County*, and
26 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
goals of the GMA." *Thurston County v. Cooper Point Association*, 108 Wn.App. 429, 444, 31
P.3d 28 (2001).

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

1 **IV. DISCUSSION AND ANALYSIS**

2 **Parties Position:**

3 **Respondent’s Statement of Action Taken to Comply:**

4 According to the County, the two issues remaining in this case are: (1) adequacy of
5 buffers for water types 1 and 2; and (2) failure to include BAS when considering variances.

6 **Issue No. 1: Buffer Widths.**

7 The County adopted Riparian Areas Protection Ordinance 04-03 in 2004, which
8 included 100-foot buffers for both Type 1 and 2 waters of the state. According to the
9 County, the Board found the County out of compliance for inadequate buffers for Type 1
10 and 2 waters, allowing buffer-width averaging, and common-line setback to reduce a
11 portion of the buffer to as little as 25 feet. In 2006, the County adopted Resource Lands
12 and Critical Areas Ordinance (RLCAO) No. 2006-03, which differentiated buffers for Type 1
13 and 2 waters by low versus high intensity land use. Buffer-width averaging and common-
14 line setbacks were removed from the Ordinance. The Board again found the County out of
15 compliance.

16 Subsequently, the County adopted Ordinance 08-02, Section 9.03 on December 1,
17 2008, which adopted standard buffer widths, rather than buffer widths based on low or high
18 land use intensity. The County credits Futurewise as also recommending a standard buffer
19 width system.¹ The County adopted buffer widths as follows: (A) Type 1 – 150’; (B) Type 2
20 – 100’; (C) Type 3 – 75’ or 100’ (the larger buffer for streams with Bull Trout present); (D)
21 Type 4 – 50’; and (E) Type 5 – 50’.²

22 In addition, the County, under Section 9.03, sub-section 4, provides for increased
23 buffer width on a case-by-case basis when needed; under sub-section 5, provides for buffer
24 width reduction in conjunction with the variance procedure and based upon BAS
25 appropriate for the site, “when it is determined that a smaller area is adequate to protect
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¹ Ferry County’s Statement of Action to Comply at 8-9 (Dec. 18, 2008).

² Id. at 9.

1 the functions and values based on site-specific characteristics;"³ and under sub-section 6,
2 allows buffer-width averaging under certain conditions.

3 **Issue No. 2: Variances.**

4 The County contends its RLCAO included a new section on variances copied from the
5 CTED's Model Ordinance, but omitted the criteria to include BAS, which triggered the Board
6 to find the County out of compliance. Under Ordinance 08-02, Section 10.01 Variances, the
7 County claims it has come into compliance by added criteria #10 to its list, which states,
8 "The decision to grant the variance includes consideration of Best Available Science."⁴

8 **Petitioners:**

9 Petitioners claim the County is still out of compliance with both issues; the buffer
10 widths are still inadequate and not based on BAS, and proposals for variances should
11 trigger a public hearing process as recommended by CTED.

12 **Issue No. 1: Buffer Widths.**

13 Petitioners contend the County fails to comply with RCW 36.70A.060(2), and .172,
14 which require counties and cities to adopt development regulations that protect the
15 functions and values of critical areas, including fish and wildlife habitat conservation areas.
16 These areas include "waters of the state", which in turn include streams of Types 1-5.⁵ In
17 addition, Petitioners argue the use of best available science is required⁶ and counties are
18 required to consider the minimum guidelines promulgated by CTED.⁷

19 Petitioners claim the County continues to allow a riparian buffer width of 100 feet for
20 "Class 2 waters"⁸ in its CAO, which does not reflect BAS. Petitioners also contend the
21 County's definitions of High, Moderate and Low Intensity Land Use is considerably different
22

23 ³ Id.

24 ⁴ Id. at 10.

25 ⁵ WAC 365-190-050.

26 ⁶ RCW 36.70A.172.

⁷ RCW 36.70A.050.

⁸ Petitioner's 3rd Compliance Brief at 7 (Jan. 5, 2008).

1 than that of the Department of Ecology's Model CAO, allowing more intense use, particularly
2 in the Low Intensity Land Use.

3 **Issue No. 2: Variances.**

4 Petitioners argue the County's variance process does not allow for a public hearing.
5 According to the Petitioners, RCW 36.70B.110 requires a public notice of application for
6 every project application not categorically exempt under the State Environmental Policy Act
7 (SEPA). Petitioner claims the County clearly does not require a public hearing on a variance
8 proposal.

8 **Respondent's Reply Brief:**

9 **Issue No. 1: Buffer Widths.**

10 The County claims this issue concerns the adequacy of the adopted buffer widths for
11 Type 1 and 2 waters. According to the County, Types 3, 4 and 5 were found compliant by
12 the Board in an earlier proceeding.^{9 10}The County argues it eliminated the variable width
13 buffers using low-intensity and high-intensity buffer widths and has adopted standard buffer
14 widths in the new CAO under Section 9.03. According to the new County standards the
15 buffer widths for stream types are: Type 1 - 150 feet; Type 2 – 100 feet; Type 3 – 75 feet
16 (100 feet if Bull Trout are present); Types 4 & 5 – 50 feet.

17 The County claims there should be no question of compliance for Types 1, 4 and 5
18 waters, but Types 2 and 3 are questionable. The County contends there is no "controlling or
19 absolute science" in the BAS arena¹¹ and further contends that with all the science available
20 there is no agreement as to buffer width for streams. The County acknowledges that the
21 preferred source of science is put forward by the WDFW's document, "Management

22 ⁹ *Concerned Friends of Ferry County v. Ferry County*, EWGMHB Case No. 04-10007c, Order on Compliance (Sept. 22,
2006).

23 ¹⁰ The Board notes that stream Types 4 and 5 were not specifically challenged in the Petition. As such, the Board will not
24 rule in this case on whether buffer widths for these Types were designated using BAS and are GMA compliant. The
25 record shows that the WDFW (Exhibit 6) and CTED (Exhibit 7) recommended the Knutson/Naef buffer widths for all
26 stream Types, including Types 4 and 5 and the County's fixed buffer widths are significantly less than the BAS in the
record. In regards to stream Type 3, the County's buffer width was reduced from 100 feet to 75 feet, with no
corresponding BAS to justify the reduction. Thus, the Board's original finding is void.

¹¹ Respondent's Memo for Third Compliance Hearing at 4.

1 Recommendations for Washington's Priority Habitat – Riparian” by Knutson and Naef
2 (Knutson/Naef), but claims the study is inherently flawed “in that it does not directly relate
3 to buffer requirements but is based on the broad concept of protecting ‘riparian habitat area
4 (RHA) as a category of wildlife habitat.”¹² The County argues the GMA/WAC guidance does
5 not include riparian habitat area as a type of fish and wildlife habitat area requiring
6 protection and riparian areas may be considered by cities and counties. In addition, the
7 County claims it has reviewed numerous adopted county CAO’s and has not found one
8 which incorporates standard buffers matching the WDFW RHA recommendations.

9 The County believes that because the WDFW/Knutson/Naef recommendations have
10 not been incorporated by any jurisdiction, their recommendation is a negotiable standard at
11 best. The County argues that Knutson and Naef reviewed numerous studies, yet chose to
12 “jump to an endorsement of recommendations by one study,”¹³ with no rationale
13 presented. The County contends its process to adopt the present buffer widths was
14 extensive using the Stevens County fish and wildlife section, Ferry County demographics,
15 sources of BAS and other factors. The Ferry County Planning Commission recommended
16 standard buffer widths and these buffer widths were adopted by the Board of County
17 Commissioners (BOCC) in Ordinance No. 2008-02.

18 **Issue No. 2: Variances.**

19 The County argues it has complied with the variance issue by the inclusion of best
20 available science as a factor in evaluating requests for a critical areas variance.

21 **Other Issues:**

22 Public hearing for variances: The County claims the Petitioners are attempting to
23 introduce new issues or to re-open settled issues. The first issue concerns the public
24 hearing process for variances. The County argues the Board, under Case No. 01-1-0019,
25 Third Order on Compliance, ruled on this topic finding that it is an option. The County

26 ¹² Id. at 5.

¹³ Id. at 6.

1 contends that a public hearing at the Planning Commission level was proposed, but not
2 enacted by the BOCC, so it was never “removed” as the Petitioner alleges.¹⁴

3 Automatic reference to documents: The County argues Petitioners’ request for an
4 automatic update to a referenced agency’s guidance document is a new issue in the
5 compliance proceeding. According to the County, this issue is addressed in the CAO under
6 Section 10.18, which implies that references to regulations, maps or documents from
7 agencies other than Ferry County apply to its ordinance only if dated prior to adoption of
8 the ordinance.

9 Stream Typing systems: Again, the County claims this is Petitioners’ attempt to insert
10 a new issue into the compliance proceeding. According to the County, stream typing
11 systems are not one of the open legal issues. The County argues it continues to use the
12 DNR’s “Interim” steam-typing system rather than the revised typing system to facilitate
13 relating to previous Board orders, as well as relating to statements in the sources of BAS.¹⁵

14 Land-use-intensity definitions: The County contends Petitioner addressed this issue in
15 the wrong case. According to the County, land-use-intensity definitions is an issue for Case
16 No. 06-1-0003 and is addressed in that case’s reply brief.¹⁶

17 Reduction of buffers for Types 4 and 5 waters: The County contends the buffers set
18 for Type 4 and 5 waters is set at 50 feet and has been found compliant by the Board.¹⁷ The
19 County explains that the Planning Commission has, in the past, discussed the idea of

20 ¹⁴ Id. at 10.

21 ¹⁵ In the proposed Ferry County Resource Lands and Critical Areas Ordinance #2006-03, the revisions sent to
22 commenting agencies included both the new (Types S, F, Np and Ns) and interim (Types 1-5) typing systems and can be
23 found under Section 11.00 Fish and Wildlife Conservation Area, sub-section 11.02(4) definitions of Waters of the State;
24 sub-section 11.04.04 Classification; and sub-section 11.04.05 Riparian Area Widths. Rather than adopt the updated
25 Department of Natural Resources (DNR) new water tying classification as proposed in the County’s Ordinance #2006-03
26 and as recommended by the WDFW in several letters, the County removed any reference to the new DNR typing system
in its final Ordinance No. 2008-02. The Board highly recommends the County change to the new system or insert both
typing systems as proposed in Ordinance #2006-03.

¹⁶ The County is correct. This issue will be addressed in detail in the 06-1-0003 Second Compliance Order.

¹⁷ See footnote #10.

1 eliminating buffers for some water types, but that was not done. The County claims the
2 Petitioner is wrong to object to past proposals that have not been enacted by ordinance.

3 **Petitioner's Reply Brief:**

4 **Issue No. 1: Buffer widths.**

5 Petitioners contend the County was held out of compliance for 100-foot buffers in
6 "class one and two streams, using low and high intensity method to determine buffer."¹⁸ In
7 Ordinance 2008-02, Petitioners claim the County dropped the low and high intensity and
8 adopted a fixed buffer for class one¹⁹ streams of 150 feet, below the previous high intensity
9 of 200 feet and above the low intensity level of 100 feet. The County continues with a 100-
10 foot buffer for class two streams (Type 2). Petitioners also argue that the County changed
11 the buffer for class III streams²⁰ with a caveat that lessens the buffer for ETS species if
12 found.

13 Petitioners contend the County ignores the BAS and replaces it with its own
14 conclusions and cites the County's brief as to the Planning Commission's findings that "their
15 own review of BAS aligned with an independent review..."²¹ Petitioners argue that the
16 County ignored the WDFW's recommendations for its own science.

17 Petitioners argue the County fails to comply with the requirement that the buffer
18 requirement must reflect BAS and must protect the functions and values of the riparian
19 areas, which are mutually affected. Petitioners argue 100-foot buffers for class one streams
20 is not BAS and the "county brief (page 4) still admits it was found out of compliance also."²²
21 All state agencies recommend wider buffers, according to the Petitioners' citations.

22 **Issue No. 2: Variances.**

23 Petitioners contend when variances within critical areas are considered the County
24 should also require a public review through a public hearing and notice process and cites to
25 _____

26 ¹⁸ Petitioner's 3rd Compliance Hearing Reply Brief at 1 (Jan. 27, 2009).

¹⁹ Board note: Petitioner is referring to the County's Type 1 waters.

²⁰ Board note: Petitioner is referring to the County's Type 3 waters.

²¹ Id. at 2.

²² Id. at 3.

1 comments made by Futurewise and CTED to that effect.²³ Petitioners also cite to the
2 County's Public Participation Plan (PPP), Section 1.02, which does not cover this situation.
3 Petitioners claim the County was found out of compliance for "failure to include BAS and
4 variances in critical areas should require public input; otherwise, there is no check on
5 variances."²⁴

6 **Board Discussion and Analysis:**

7 **Issue No. 1: Buffer Widths.**

8 RCW 36.70A.060 requires the County to "adopt development regulations that protect
9 critical areas that are required to be designated under RCW 36.70A.170." Critical areas are
10 defined, in part, as "fish and wildlife habitat conservation areas."²⁵ Fish and wildlife habitat
11 conservation areas include "waters of the state,"²⁶ which are classified in WAC 222-16-030.
12 In designating and protecting critical areas, the County "shall include the best available
13 science in developing policies and development regulations to protect the functions and
14 values of critical areas."²⁷

15 In 2005, the Washington State Supreme Court held that Ferry County need not
16 develop Best Available Science through its own means, but it must rely on scientific
17 information in adopting critical areas. If the County chooses to disagree with or ignore
18 scientific recommendations and resources provided by the state agencies and the Colville
19 Tribe, which it could do, the County has to "unilaterally develop and obtain valid scientific
20 information."²⁸ Although BAS does not require the use of a particular methodology, at a
21 minimum BAS requires the use of a scientific methodology.²⁹ In a 2007 case, the Supreme

22 ²³ Id. at 4.

23 ²⁴ Id. at 5.

24 ²⁵ RCW 36.70A.030(5)(c).

25 ²⁶ WAC 365-190-080(5)(a)(vi).

26 ²⁷ RCW 36.70A.172(1).

27 ²⁸ *Ferry Co. v. Concerned Friends of Ferry Co.*, 155 Wn. 2d 824, 836 (2005).

28 ²⁹ Id. at 837.

1 Court held that a County may depart from BAS, but it must provide a reasoned justification
2 for such a departure.³⁰

3 WAC 365-195-915(1) provides that to demonstrate that the best available science
4 has been included in the development of critical areas policies and regulations, counties and
5 cities should address each of the following on the record:

6 (a) The specific policies and development regulations adopted to protect the
7 functions and values of the critical areas at issue.

8 (b) The relevant sources of best available scientific information included in the
9 decision-making.

10 (c) Any nonscientific information -- including legal, social, cultural, economic, and
11 political information -- used as a basis for critical area policies and regulations that
12 depart from recommendations derived from the best available science. A county or
13 city departing from science-based recommendations should:

14 (i) Identify the information in the record that supports its decision to depart from
15 science-based recommendations;

16 (ii) Explain its rationale for departing from science-based recommendations; and

17 (iii) Identify potential risks to the functions and values of the critical area or areas
18 at issue and any additional measures chosen to limit such risks. State Environmental
19 Policy Act (SEPA) review often provides an opportunity to establish and publish the
20 record of this assessment.

21 Ferry County enacted the Ferry County Critical Areas Ordinance #2008-02 on
22 December 1, 2008, amending its previously adopted critical areas ordinances. In that
23 document, the County defined critical areas as found in RCW 36.70A.030(5) and WAC 365-
24 190-080,³¹ reiterated the requirement for BAS,³² and documented its "record of science
25 considered in requiring buffers to protect the values and functions of rivers, streams and
26 lakes."³³ The County classifies its riparian areas using WAC 222-16-031, the interim water

24 ³⁰ *Swinomish Indian Tribal Community v. WWGMHB*, 161 Wn. 2d 415, 431 (2007).

25 ³¹ Ferry County Critical Areas Ordinance #2008-02, Section 4.00.

26 ³² *Id.*, Section 4.01.

³³ *Id.* Appendix C2.

1 typing system,³⁴ and determined the following fixed buffers for Type 1 through Type 5
2 waters: Type 1: 150 feet; Type 2: 100 feet; Type 3: 75 feet (100 feet if Bull Trout are
3 present); Type 4: 50 feet; and Type 5: 50 feet.

4 The Petitioners challenged the County's buffer widths for Types 1 and 2 in their
5 petition and the Board found the County in non-compliance for failing to use BAS in
6 designating Types 1 and 2 buffer widths.³⁵ In enacting the Ferry County Critical Areas
7 Ordinance #2008-02, the County chose to reduce the buffer width for Type 3 waters, a
8 significant change, which is now challenged by the Petitioner. Types 4 and 5 buffer widths,
9 although considerably less than recommended by agency-accepted BAS, were not
10 challenged by the Petitioners in the original petition and, therefore, are not addressed by
11 the Board in this petition.

12 To determine if the County's buffer widths for stream Types 1, 2 and 3 are in
13 compliance with the GMA, the Board must examine the BAS used by the County in reaching
14 its decision. There are three factors the Board will consider: (A) The scientific evidence
15 contained in the record; (B) whether the local government's analysis of the scientific
16 evidence and other factors involved a reasoned process; and (C) whether the local
17 government's decision was within the parameters of the GMA as directed by the provisions
18 of RCW 36.70A.172(1).³⁶ The Board will examine each of the criteria separately.

19 **Scientific evidence:**

20 The statute establishes that the objective of including science is "to protect the
21 functions and values of critical areas." Science plays a central role in delineating critical
22 areas, identifying functions and values, and recommending strategies to protect their
23 functions and values. Scientifically valid information should help with an evaluation and
24

25 ³⁴ See footnote 14.

26 ³⁵ *Concerned Friends of Ferry County, et al. v. Ferry County*, EWGMHB Case No. 04-1-0007c, FDO (Dec. 21, 2004).

³⁶ *1000 Friends of Wash. V. City of Anacortes*, WWGMHB Case. No. 03-2-0017 (Feb. 10, 2004).

1 discussion of the applicability, relevance, and limitation, if any, of the science that is
2 contained in the record.³⁷

3 Furthermore, CTED's Critical Areas Guidebook states that "[L]ocal governments may
4 accept or solicit scientific information from state and federal agencies, universities, tribes,
5 subject matter experts, and others, but the burden ultimately is on the local government to
6 determine whether the scientific information assembled in fact constitutes the best available
7 science."³⁸

8 WAC 365-195-905 states that scientific information can be produced only through a
9 valid scientific process and to ensure that the best available science is being included, a
10 county or city should consider the following "characteristics of a valid scientific process": (1)
11 peer review; (2) methods; (3) logical conclusions and reasonable inferences; (4)
12 quantitative analysis; (5) context; and (6) references. With these factors in mind, the
13 County's adopted policies and regulations must protect the functions and values of critical
14 areas. In addition, "[I]f the local government determines this protection can be ensured
15 using an approach different from that derived from the best available science, the local
16 government must demonstrate on the record how the alternative approach will protect the
17 functions and values of critical areas."³⁹ (Board emphasis).

18 The County goes to great lengths in its briefs to ensure the Board is aware of the
19 County's following thought process: (1) There is no controlling or absolute science in this
20 arena; (2) the "preferred source of science"⁴⁰ put forward by the Washington Department
21 of Fish and Wildlife is the document: "Management Recommendations for Washington's
22 Priority Habitat – Riparian", by K. Lea Knutson and Virginia L. Naef (1997);⁴¹ (3) the
23 Knutson/Naef study, according to the County, is "inherently flawed in that it does not
24 directly relate to buffer requirements, but is based on the broad concept of protecting

24 ³⁷ Community Trade and Economic Development Critical Areas Guidebook, pg. 12.
25 ³⁸ Id.
26 ³⁹ Id.
⁴⁰ Respondents Memo at 4.
⁴¹ Id. at 4.

1 "riparian habitat area" (RHA) as a category of wildlife habitat";⁴² (4) the Knutson/Naef
2 recommendations have not been incorporated by any jurisdiction and is a "negotiable
3 standard at best";⁴³ (5) the Planning Commission recommendations, which were adopted
4 by the BOCC, were based on a variety of modifications to Stevens County's CAO buffer
5 widths, Ferry County demographics (Appendix C3), sources of BAS (Appendix C2),⁴⁴ and a
6 final decision to adopt standard buffer widths, rather than variable, as recommended by
7 Futurewise.⁴⁵

8 The Board agrees with the County that there is no "controlling or absolute science"⁴⁶
9 as to the best buffer width for any of the five DNR "types" of waters, but the Board also
10 points out there is best available science as recommended by science-based agencies and
11 organizations. It's the County's responsibility to include BAS to calculate buffer widths
12 broadly enough to accomplish the task of protecting the functions and values of multiple
13 fish and wildlife habitat areas, as required by RCW 36.70A.172(1).

14 Despite the County's efforts to undermine the integrity of the Knutson/Naef
15 document,⁴⁷ this study, which incorporates over 1,500 sources of science, is considered by
16 the state agencies to be the treatise on best available science for management of priority
17 habitat in the riparian area. The Knutson/Naef study recommends buffer widths that most
18 closely agree with the WDFW's synthesis of the accepted scientific literature. The
19 Knutson/Naef study documents riparian habitats in Eastern Washington taking into account
20 regional differences, uses high quality studies by acknowledged experts in their fields, is
21 backed by legitimate letters from state agencies that support the WDFW study, and finally
22 does not advocate a position on development.

23 ⁴² Id. at 5.

24 ⁴³ Id. at 6.

25 ⁴⁴ Id. at 7-8.

26 ⁴⁵ Id. at 8.

⁴⁶ Id. at 4.

⁴⁷ Ferry County CAO Ordinance #2008-02, Appendix C2, pg C2-2.

1 In addition to the Knutson/Naef study, the County reviewed "several other statewide
2 and local studies,"⁴⁸ including (1) "Effectiveness of Riparian Management Zones in Providing
3 Habitat for Wildlife", Final Report, Timber, Fish and Wildlife (May 2000), known as the
4 O'Connell report;⁴⁹ (2) the Wendell Gilliam's report;⁵⁰ (3) the Castell & Johnson study;⁵¹ (4)
5 the Kettle Tri-Watershed Water Quality Study;⁵² and (5) DNR's Eastern Washington Forest
6 Practice Regulations and Riparian Management Zones (WAC 222-30-022).⁵³ In addition, the
7 County did a comparison study on sources of BAS and their recommended buffer widths.⁵⁴

8 As a summary contained in Appendix C2, the County concluded that the
9 Knutson/Naef recommendations "are general and statewide, and do not directly apply to
10 conditions in Ferry County," and these recommendations are "based solely on requirements
11 of fish and wildlife."⁵⁵ Contrary to BAS, the County decided, "[I]n recognition of the
12 depressed local economy, Ferry County must accord economic issues a greater urgency
13
14

15 ⁴⁸ Id. at C2-4.

16 ⁴⁹ The O'Connell report contributed to the findings of the "Forest and Fish" project and resulted in the current Forest
Practice Regulations under WAC 222-30-022.

17 ⁵⁰ This study found that "wide buffers are likely to be more effective than narrow buffers" for pollutant removal, but
returns diminish quickly per added foot of buffer width. In addition, the study concluded there is no one ideal buffer
width for all landscape situations.

18 ⁵¹ This study, "Riparian Vegetation Effectiveness", an article in the National Council for Air and Stream Improvement
Technical Bulletin #799, found that for "five or six functions considered, the effectiveness of riparian buffers increases
19 with buffer width. In summary, the County concluded from the article that "[M]ost of the potential contributions of the
20 riparian vegetation to these functions are realized within the first 5 to 25 m from the stream bank. Disproportionately
wider buffers are needed to achieve greater effectiveness..."

21 ⁵² The Kettle Tri-Watershed Water Quality Study was done to determine what it would take to remove Ferry County
streams from the "303D" list of the U.S. Environmental Protection Agency. As part of this study conducted by the Ferry
County Conservation District, the team evaluated the riparian areas of three streams for Properly Functioning Conditions
22 (PFC). The study found only three of the 22 stream reaches were found to be non-functioning, and these because of
natural disturbance (i.e. floods, fire). According to the County, this study "validates the fact that traditional rural and
23 agricultural development patterns of Ferry County have not been a cause of degradation..."

24 ⁵³ This is a reference to the Eastern Washington Forest Practice Regulations, WAC 222-30-022, which prescribe a
Riparian Management Zone (RMZ) for any forest practices bordering on water types. The County paid "particular
25 attention" to the DNR's experience with the relevant science because much of Ferry County land base is within or
adjacent to forested areas.

26 ⁵⁴ Ferry County CAO; C2-7.

⁵⁵ Id. at C2-9

1 than might be required in more prosperous urbanized counties of the State,"⁵⁶ and
2 reference RCW 36.70A.011 and RCW 36.70A.020(5) as "mandates."⁵⁷

3 The Board notes that goals are to be considered by counties and cities, but neither of
4 these statutes are mandates, as both are prefaced by permissive language. Furthermore,
5 the County seems to believe protecting the functions and value of critical areas, such as
6 adopting WDFW recommended buffer widths for riparian areas, is detrimental to the overall
7 economy of Ferry County, but fails to document how buffer width requirements would have
8 an adverse effect on its economy.

9 The Board recognizes that the studies documented in Appendix C2 may be
10 considered scientific literature, but the County is required to weigh these recommendations
11 in terms of protecting the functions and value of fish and wildlife habitat areas as required,
12 not primarily on forest practices,⁵⁸ pollutant removal,⁵⁹ or traditional rural and agricultural
13 development patterns. Considerable discussion in Appendix C2 is devoted to the O'Connell
14 study and its contribution to the Forest Practice Regulations found in WAC 222-30-022,
15 which seems to be used by the County to justify buffers much smaller than those
16 recommended in the WDFW's Riparian Management Recommendations.

17 According to the WDFW, the County's conclusion from the O'Connell study⁶⁰ is taken
18 out of context. The WDFW wrote, "The O'Connell report was done in the context of land
19 managed for forest uses, not in the developing landscape, which is the primary focus of
20 critical areas and associated development regulations."⁶¹ The WDFW letter further clarifies
21 the O'Connell report and makes a critical point:⁶²

22 There is a fundamental difference between the short-term impacts or
23 disturbance regime of a timber harvest versus the permanence and/or
24 additional disturbance associated with development... **Based on the science,**

25 ⁵⁶ Id.

26 ⁵⁷ Id. at 10.

⁵⁸ See footnote 45 and 49.

⁵⁹ See footnote 46.

⁶⁰ Id. at 5.

⁶¹ Letter from WDFW to Irene Whipple; Exhibit 6, pg. 4 (July 10, 2008).

⁶² Id.

1 **riparian areas in the developing landscape need larger more**
2 **structurally complex buffers and riparian connectivity to upland**
3 **areas in order to provide the life function needs of multiple species.**
4 (Board emphasis).

5 In addition, the Board is concerned that the County relies in large part on the
6 economic and demographic statistics found in Ferry County to justify relatively small
7 riparian habitat buffer widths. Economics may be considered in terms of the overall
8 Comprehensive Plan as encouraged by Goal 5 and other statutes, but it does not qualify
9 under BAS.⁶³ The same can be said about demographics, which is considered characteristics
10 and statistical information, not science.

11 As the Board wrote in its first Compliance Order for this case, "Discretion is given to
12 counties and cities for following the goals and requirements of the GMA and basing
13 decisions on sound and proven best available science."⁶⁴ Ferry County has chosen buffer
14 widths to protect its riparian areas which are considerably less than those recommended by
15 the WDFW's BAS, and based its decision on alternative riparian studies and Ferry County
16 economics and demographics. The Record shows the Planning Commission looked at the
17 science, but made arbitrary recommendations based on factors outside of BAS, specifically
18 Ferry County economics and demographics. A brief critique and listing of selective scientific
19 study, a critical thrashing of the scientifically-acknowledged BAS in the Knutson/Naef report,
20 and an arbitrary recommendation by the County's Planning Commission does not rise to the
21 standard of best available science.

22 The Court of Appeals, Division I, held "that evidence of the best available science
23 must be included in the record and must be considered substantively in the development of
24 critical areas policies and regulations."⁶⁵ Subsequently, the Court of Appeals reinforced the
25 *Heal* interpretation of BAS and how it must be used in *WEAN v. Island County et al.* The

26

⁶³ RCW 36.70A.020(5); RCW 36.70A.011.

⁶⁴ *Concerned Friends of Ferry Co, et al. v. Ferry County*, EWGMHB Case No. 04-1-0007c; CO (Sept. 22, 2006).

⁶⁵ *Heal v. CPSGMHB*, 96 Wn. App. 522, 532, 979 P.2d 864 (1999).

1 Court found the record must contain “applicability of unique local conditions to justify a
 2 departure downward from the buffer width requirements outlined in the scientific
 3 literature.”⁶⁶

4 A review of the recommendations found in Appendix C-2 shows a wide range of
 5 buffer widths for various stream types. The County details the Knutson/Naef buffer width
 6 recommendations, including buffer widths recommended by functions, such as wildlife
 7 habitat, pollution filtration, large woody debris, and others. The results are buffer widths
 8 recommended to protect all functions and values, not just a few select functions. The
 9 Washington State Forest Riparian Management Zones are for forest practices within riparian
 10 areas and do not differentiate between DNR “Type” waters. Biologist Don McKnight’s
 11 recommendations are from “letters reviewing riparian protection and possible ordinance
 12 input,”⁶⁷ and based on Ferry County local conditions.

13 Source	Type 1	Type 2	Type 3	Type 4	Type 5
14 Knutson/Naef	250	250	150-200	150-225	150-225
15 WS Forest RMZ ⁶⁸	100-130	75-130	75-130	50	30
16 Don McKnight	100	100	100	50	50
17 Ecology ⁶⁹	200	200	200	200	200
18 Ecosystem ⁷⁰	100	100	100	100	50

19 The scientific information provided is sparse, other than that provided in the
 20 Knutson/Naef study, and shows that Ferry County’s buffer width for Type 1 of 150 feet is on
 21 the low end to protect wildlife habitat, but within the scientific range of the majority of the
 22 studies presented in Appendix C-2. The buffer width of 100 feet for Type 2 waters, which

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 24 ⁶⁶ *WEAN v. Island County*, et al. 118 Wn. App. 567, 76 P.3d 584 and 1215.

⁶⁷ Ferry County CAO; Appendix C-2, pg. 12, Reference #10.

⁶⁸ Study considered in the Knutson/Naef recommendations.

⁶⁹ *Id.*

⁷⁰ *Id.*

1 are fish-bearing streams, but not considered shorelines of the state, is substantially lower
2 than needed to protect the functions and values of the riparian habitat, including fish and
3 wildlife habitat, and is not justified by the science presented. The County's buffer width of
4 75 feet (100 feet if Bull Trout are present) for Type 3 is substantially lower than the
5 majority of the studies and is also not justified by the science intended to protect fish and
6 wildlife habitat.

7 The Board finds the County failed to justify its significant departure from BAS (i.e.,
8 the WDFW's recommended buffer widths.) The County's buffer widths for Type 2 and Type
9 3 are found to be in non-compliance based on the record before the Board. The Board finds
10 the County: (1) failed to show by including BAS how a 100-foot buffer width for Type 2
11 waters would protect the functions and values of the riparian areas; and (2) failed to show
12 by including BAS how a 75-foot buffer (100-foot if Bull Trout are present) for Type 3 waters
13 protects the functions and values of the riparian areas. The Board notes that it did not find
14 the County out of compliance in its first Order on Compliance for the 200-foot buffer for
15 Type 1 waters, only for "100-foot buffers established in the Ferry County Resource Lands
16 and Critical Areas Ordinance #2006-03 for Type 1 and 2 waters for Low Intensity Land Use
17 in Ferry County (that) are inadequate and do not comply with the Growth Management
18 Act's requirements...using best available science."⁷¹ The Board encourages the County to
19 increase the buffer width protection for Type 1 waters to its original 200 feet.

18 **A Reasoned Process:**

19 The Board finds the County used a "reasoned process" to study buffer widths, but
20 failed to use this process in its final determination and recommendation. The Planning
21 Commission, according to the briefing, examined the various studies documented in
22 Appendix C2 and C3, but came to its decision through arbitrarily selecting parts of Stevens
23 County's adopted buffer widths and outside factors, including economics and demographics
24 of Ferry County (Appendix C3). Their recommendation is what the BOCC adopted. The

25 _____
26 ⁷¹ Id. at 18.

1 Board failed to find in the record a "reasoned process" in determining buffer widths to
2 protect the functions and value of fish and wildlife habitat areas, including riparian areas for
3 Type 2 and 3 waters.

4 **Within the Parameters of the GMA:**

5 Counties and cities are required under RCW 36.70A.172(1) to include BAS in
6 developing policies and development regulations to protect the functions and values of
7 critical areas. The Board finds the County examined a variety of studies, including the
8 Knutson/Naef study and the O'Connell study (DNR), in developing the Ferry County Critical
9 Areas Ordinance, but failed to provide a reasoned justification for its significant departure
10 from the agency-based and scientifically approved recommendations. There is nothing in
11 the record to determine how the Planning Commission concluded through BAS to adopt the
12 fixed riparian buffer widths found in the Ferry County Critical Areas Ordinance #2008-02. In
13 addition, the County's Planning Commission "voted to adopt the fish and wildlife section
14 from the Stevens County CAO to replace Ferry County's 2006 ordinance,"⁷² then arbitrarily
15 reduced several of the stream Type buffer widths without showing a reasoned process in
16 the record for reducing the buffer widths.

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

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

24 "The County provides no basis for deviating from Department of Fish and
25 Wildlife recommended buffers and setbacks to protect wild salmonid and other
26 threatened endangered or sensitive species. The DFW guidelines must be

⁷² Respondent's Memo at 7.

1 followed in the absence of provisions for mitigation, or scientific evidence that
2 supports a different buffer or setback.

3 Ferry County failed to provide a reasoned justification including BAS to deviate from
4 the BAS as recommended by the Department of Fish and Wildlife's recommended buffers.

5 **Conclusion:**

6 The Board finds and concludes the following: (1) the County's Type 1 buffer width is
7 within the low range of BAS presented in the record; (2) the County failed to adopt riparian
8 area buffer widths to protect the functions and values of critical areas by including BAS as
9 required by RCW 36.70.060 and RCW 36.70A.172. Therefore, Ferry County's Critical Areas
10 Ordinance at Section 9.03, Type 2 and 3 standard buffer widths, is found out of compliance.
11 Types 4 and 5 buffer widths, although significantly smaller than recommended by WDFW,
12 are not argued by the Petitioners and, therefore, the Board will not address these buffer
13 widths in this Order.

14 **Issue No. 2: Variances.**

15 The Board found in the Order on Compliance, "[T]he problem with the provisions
16 covering variances is the failure of the County to require that such variances be based upon
17 best available science," and "[T]he variances section could be compliant if best available
18 science supporting such variance is required prior to the modification of a complaint
19 standard buffer."⁷³ The County added Criteria #10 to Ordinance #2008-02, Section 10.01
20 Variances, which states: "The decision to grant the variance includes consideration of Best
21 Available Science."⁷⁴ Having completed the task as the Board suggested, the County argues
22 it is now in compliance.

23 In the Order on Compliance, the Board determined its findings on certain provisions,
24 or lack thereof, contained in the Ferry County Resource Lands and Critical Areas Ordinance
25 #2006-03. The County inserted the above mentioned language in Section 10.01 in the CAO
26

⁷³ Id. at 19 and 20.

⁷⁴ Ferry County CAO at 46.

1 Ordinance #2008-02, but also failed to include language from an earlier draft,⁷⁵ in
2 particular that language which would require a public notice for variance applications.

3 A variance is a site-specific project permit. Although it is not specifically listed in
4 36.70B.020 – definitions of project permit – the listing provided in the definition is not
5 exclusive and does address “approvals required by critical areas ordinances.” A variance
6 from the buffer provisions of the CAO would satisfy. A county’s approval process for a
7 variance is provided for in its development regulations. There is no statutory requirement
8 that a public hearing on every type of project permit be held. The County, therefore, can
9 elect to provide appeals of project permit decisions, but is not required to do so. An appeal
10 of any decision would go directly to court under the Land Use Petition Act (LUPA), RCW
11 36.70C.

12 If there was a statutory requirement to include a public hearing for variances, CTED
13 and/or the Petitioner would have referenced the RCW in their arguments or letters to the
14 County. The CTED Model Ordinance is suggestive and recommends that “[I]f existing land
15 use regulations do not require a public hearing, it is recommended that such sections be
16 revised to require a public hearing for variances concerning critical areas.”⁷⁶

17 Again, as in previous orders, the Board strongly urges the County to reevaluate its
18 decision to not allow a public hearing or public notice under its variance section. Variances
19 handed out through administrative decisions can pit neighbor against neighbor, destroy the
20 functions and values of critical areas, and undermine the public trust in its government.
21 There is no logical reason in today’s society to allow a project permit that may have
22 significant detrimental effects to a community to be administratively authorized without
23 seeing the “light of day” through a public process, so as to expose any defects to the
24 decision makers.

25 ⁷⁵ Ferry County Ordinance 2006-03 Resource Lands and Critical Areas, Section 12.01, pg. 50.

26 ⁷⁶ CTED Critical Areas Assistance Handbook, Appendix A, pg. 27.

1 **Conclusion:**

2 The Board finds and concludes the County has resolved Issue No. 2 by adding
3 Criteria No. 10 to its CAO, Section 10.01, and is now in compliance.

4 **V. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

- 5 1. Ferry County is a county located east of the crest of the Cascade
6 Mountains and has chosen to plan under Chapter 36.70A.
- 7 2. Petitioners are citizens of Ferry County and participated in the adoption
8 of Ordinance Nos. 08-01, 08-02, and 08-03 in writing and through
9 testimony.
- 10 3. The Board issued its FDO in this matter on April 19, 2005.
- 11 4. After two compliance hearings, two issues still remain out of
12 compliance from the original FDO: (1) Riparian buffer widths for stream
13 Types 1, 2 and 3 (the County changed Type 3, thus the reduced buffer
14 width is part of this issue); and (2) failure to include BAS when
15 considering variances.
- 16 5. The Board finds and concludes the County's Type 1 fixed buffer width
17 of 150 feet is on the low end of BAS and may not protect the functions
18 and values of riparian areas know as shorelines of the state, but within
19 the range acceptable to the science presented.
- 20 6. The Board finds and concludes the County failed to adopt Type 2 and 3
21 riparian area buffer widths to protect the functions and values of critical
22 areas by including BAS as required by RCW 36.70.060 and RCW
23 36.70A.172. Therefore, Ferry County's Critical Areas Ordinance at
24 Section 9.03, Type 2 and 3 standard buffer widths, is found out of
25 compliance.
- 26 7. The Board finds and concludes buffer widths for stream Types 4 and 5,
although significantly smaller than recommended by WDFW and the
best available science, were not argued by the Petitioner in this case,

1 therefore the Board will not address Types 4 and 5 buffer widths in this
2 Order.

3 8. The Board finds and concludes the County has resolved Issue No. 2 by
4 adding Criteria No. 10 to its CAO, Section 10.01, and is now in
5 compliance.

6 9. The Board finds and concludes pursuant to RCW 36.70B, the County is
7 not required by statute to provide a public hearing when considering
8 variance applications.

9 10 The Board finds and concludes the issue of land use intensity
10 definitions is not an issue in this case and, therefore, will not be
11 addressed by the Board in this order.

11 VI. ORDER

12 Based upon the Board's review of the GMA, prior decisions of the Hearings Boards,
13 briefing and presentation by the parties at the February 2, 2009, compliance hearing, and
14 having discussed and deliberated on the matter, the Board enters a finding of **Non-**
15 **Compliance** in Issue No. 1, for failure of the County to adopt riparian area buffer widths to
16 protect the functions and values of critical areas using BAS as required by RCW 36.70.060
17 and RCW 36.70A.172, specifically for stream Types 2 and 3. As to Issue No. 2, the Board
18 finds the County in **Compliance** having determined the County has resolved this issue by
19 adding Criteria No. 10 to its CAO, Section 10.01. The Board directs the County to bring itself
20 into compliance with the Board's Order and the GMA by **July 8, 2009, 120 days**, from the
21 date of this Order.

- 22 • The Board establishes **July 8, 2009**, as the deadline for the County to
23 take appropriate legislative action to comply with the GMA and this
24 Order. The following schedule for compliance, briefing and hearing shall
25 apply:
 - 26 • The County shall file with the Board by **July 15, 2009, 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

1 SATC shall attach copies of legislation enacted in order to comply. The
2 County shall simultaneously serve a copy of the SATC, with
3 attachments, on the parties. **By this same date, the County shall**
4 **file a “Remanded Index,” listing the procedures and materials**
5 **considered in taking the remand action.** In addition, the Board
6 requests the parties send their briefing electronically in Microsoft Word
7 format to: aandreas@ew.gmhb.wa.gov. The parties are requested to
8 use Times New Roman or a similar font with the type size of 12 or
9 larger, and line spacing shall be 1.5 or more.

- 10 • By no later than **July 29, 2009**⁷⁷, Petitioners shall file with the Board
11 an **original and four copies** of Comments and legal arguments on
12 the County's SATC. Petitioners shall simultaneously serve a copy of
13 their Comments and legal arguments on the parties. In addition, the
14 Board requests the parties send their briefing electronically in Microsoft
15 Word format to: aandreas@ew.gmhb.wa.gov. The parties are
16 requested to use Times New Roman or a similar font with the type size
17 of 12 or larger, and line spacing shall be 1.5 or more.
- 18 • By no later than **August 12, 2009**, the County shall file with the Board
19 an **original and four copies** of their Response to Comments and legal
20 arguments. The County shall simultaneously serve a copy of such on
21 the parties. In addition, the Board requests the parties send their
22 briefing electronically in Microsoft Word format to:
23 aandreas@ew.gmhb.wa.gov. The parties are requested to use Times
24 New Roman or a similar font with the type size of 12 or larger, and line
25 spacing shall be 1.5 or more.
- 26 • By no later than **August 19, 2009**, 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.
In addition, the Board requests the parties send their briefing
electronically in Microsoft Word format to: aandreas@ew.gmhb.wa.gov.
The parties are requested to use Times New Roman or a similar font
with the type size of 12 or larger, and line spacing shall be 1.5 or more.

⁷⁷ July 29, 2009, is also the deadline for a person to file a request to participate as a “participant” in the compliance proceeding. *See* RCW 36.70A.330(2).

- 1 • Pursuant to RCW 36.70A.330(1) and WAC 242-02-891⁷⁸ the Board
2 hereby schedules a telephonic Compliance Hearing for **August 25,**
3 **2009, at 10:00 a.m. The compliance hearing shall be limited to**
4 **consideration of the Legal Issues found noncompliant and**
5 **remanded in this Order.** The parties will call **360-407-3780**
6 **followed by 183539 and the # sign.** Ports are reserved for: **Mr.**
7 **Robinson and Mr. Graham.** If additional ports are needed please
8 contact the Board to make arrangements.

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

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

13 **Reconsideration:**

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

23 **Judicial Review:**

24 Any party aggrieved by a final decision of the Board may appeal the decision to
25 superior court as provided by RCW 36.70A.300(5). Proceedings for judicial
26 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

⁷⁸ The Presiding Officer may issue an additional notice after receipt of the SATC to set the format and additional
procedures for the compliance hearing.

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

4 Service:

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

7 SO ORDERED this 10th day of March 2009.

8 EASTERN WASHINGTON GROWTH MANAGEMENT
9 HEARINGS BOARD

10 _____
11 John Roskelley, Board Member

12 _____
13 Joyce Mulliken, Board Member

14 _____
15 Raymond Paolella, Board Member

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