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

CONCERNED FRIENDS OF FERRY COUNTY  
and DAVID L. ROBINSON,

Petitioners,

v.

FERRY COUNTY,

Respondent.

Case No. 06-1-0003

SECOND ORDER ON  
COMPLIANCE

**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 order in this case. The County claims it addressed each of the four non-compliant issues with the adoption of these ordinances: (1) riparian buffer widths (discussed under Case No. 04-1-0007c) and wetland buffers; (2) variances for critical areas (discussed under Case No. 01-1-0019); (3) Fish & Wildlife Habitat Areas (discussed under Case No. 97-1-0018); and (4) pre-GMA SMP (discussed under Case No. 01-1-0019).

Concerned Friends of Ferry County and David Robinson (Petitioners) disagree with the County that the amended ordinances comply with the Board's FDO and claim the County failed to comply with RCW's 36.70A.040; .060; .120, .170, .172, and GMA goals No. 8, 9, and 10 in the four remaining issues.

1 The Board, after thorough study of the submitted briefs and exhibits, consideration  
2 of argument provided by the parties at the second compliance hearing on February 2, 2009,  
3 investigation of past Hearings Boards cases, case law, and in light of the Growth  
4 Management Act (GMA), the Board finds and concludes the County is in **non-compliance**  
5 in the following issues: Issue No. 1(A) and (B), riparian area buffer widths (as per Case No.  
6 04-1-0007c) and wetland buffers (Low Intensity Land Use definition); and Issue No. 3, Fish  
7 and Wildlife Habitat areas (as per Case No. 97-1-0018). The Board enters a finding of  
8 **compliance** in the following issues: Issue No. 2, Variances (as per Case No. 01-1-0019);  
9 and Issue No. 4, pre-GMA SMP (as per Case No. 01-1-0019).

## 10 II. PROCEDURAL HISTORY

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

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

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

19 On September 19, 2006, the Board held the Hearing on the Merits. Present were,  
20 John Roskelley, Presiding Office, and Board Member Dennis Dellwo. Board Member Judy  
21 Wall was unavailable. Present for Petitioners was David Robinson. Present for Respondent  
22 was Steve Graham.

23 On October 2, 2006, the Board issued its Final Decision and Order.

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

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

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

4 On June 9, 2008, the Board issued its Fourth Order on Compliance.

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

7 On January 2, 2009, the Board received Petitioners' Second Compliance Hearing.

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

### 11 **III. STANDARD OF REVIEW**

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

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

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

1 The Board will grant deference to counties and cities in how they plan under Growth  
2 Management Act. RCW 36.70A.3201. But, as the Court has stated, "local discretion is  
3 bounded, however, by the goals and requirements of the GMA." *King County v. Central*  
4 *Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 561, 14 P.2d 133  
5 (2000). It has been further recognized that "[c]onsistent with *King County*, and  
6 notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly  
7 when it foregoes deference to a . . . plan that is not 'consistent with the requirements and  
8 goals of the GMA." *Thurston County v. Cooper Point Association*, 108 Wn.App. 429, 444, 31  
9 P.3d 28 (2001).

10 The Board has jurisdiction over the subject matter of the Petition for Review. RCW  
11 36.70A.280(1)(a).

#### 12 IV. DISCUSSION AND ANALYSIS

##### 13 Parties Positions:

##### 14 Respondent: Statement of Action to Comply.

15 According to the Respondent, Ferry County (County), there are four issues still  
16 remaining in Case No. 06-1-0003: Issue No. 1, the adequacy of buffers for water Types 1  
17 and 2, which was discussed and decided under Case No. 04-1-0007c, while the sub-issue of  
18 wetland buffers pertains to this case; Issue No. 2, variances for critical areas, which was  
19 discussed and decided under Case No. 01-1-0019; Issue No. 3, Fish & Wildlife Habitat Areas  
20 which was discussed and decided under Case No. 97-1-0018; and Issue No. 4, reliance on  
21 the pre-GMA SMP, which is now in compliance with the adoption of Ferry County Ordinance  
22 No. 08-02.

##### 23 **Issue No. 1(A): Adequacy of buffers for water Types 1 and 2.**

24 As stated in Case No. 04-1-0007c, the County adopted Riparian Areas Protection  
25 Ordinance No. 04-03 in 2004, which included 100-foot buffers for both Type 1 and 2 waters  
26 of the state. According to the County, the Board found the County out of compliance for  
inadequate buffers for Type 1 and 2 waters, allowing buffer-width averaging, and common-  
line setback to reduce a portion of the buffer to as little as 25 feet. In 2006, the County

1 adopted Resource Lands and Critical Areas Ordinance (RLCAO) No. 2006-03, which  
2 differentiated buffers for Type 1 and 2 waters by low versus high intensity land use. Buffer-  
3 width averaging and common-line setback were removed from the Ordinance. The Board  
4 again found the County out of compliance.

5 Subsequently, the County adopted Ordinance No. 08-02, Section 9.03 on December  
6 1, 2008, which adopted standard buffer widths recommended by Futurewise.<sup>1</sup> The County  
7 adopted buffer widths as follows: A.) Type 1 – 150’; B.) Type 2 – 100’; C.) Type 3 – 75’ or  
8 100’ (the larger buffer for streams with Bull Trout present); D.) Type 4 – 50’; and E.) Type  
9 5 – 50’.<sup>2</sup>

10 In addition, the County, under Section 9.03, subsection 4, provides for increased  
11 buffer width on a case-by-case basis when needed; under sub-section 5, provides for buffer  
12 width reduction in conjunction with the variance procedure and based upon BAS  
13 appropriate for the site, “when it is determined that a smaller area is adequate to protect  
14 the functions and values based on site-specific characteristics;”<sup>3</sup> and under sub-section 6  
15 allows buffer-width averaging under certain conditions.

**Issue No. 1(B): Wetlands buffers inadequate per BAS.**

16 The County claims Ordinance No. 08-02, Section 5.00 – Wetlands, includes a total  
17 replacement of protection requirements for wetlands. Consequently, the County’s wetlands  
18 section is compliant and incorporates BAS as provided by the Department of Ecology (DOE).  
19 The County has adopted DOE’s three-dimensional system of buffer widths considering three  
20 factors and adopted new definitions for land use intensity, adding a category of “moderate  
21 intensity”.<sup>4</sup> The County has also adopted DOE’s guidance as to mitigation ratios and buffer  
22 width averaging.

24 <sup>1</sup> Ferry County’s Statement of Action to Comply at 8-9 (Dec. 18,2008).

25 <sup>2</sup> Id. at 9.

26 <sup>3</sup> Id.

<sup>4</sup> Id. at 11.

1 **Issue No. 2: Variance for critical areas not based on BAS.**

2 As stated in Case No. 01-1-0019, Issue No. 3, [V]ariance for Critical Areas Not Based  
3 on Best Available Science (BAS). The County contends it was found out of compliance  
4 because it did not mention BAS in criteria for considering a request for a variance from CAO  
5 regulations and leaving out Model Ordinance variance criteria number 6, which states: "The  
6 decision to grant the variance includes the best available science and gives special  
7 consideration to conservation or protection measures necessary to preserve or enhance  
8 anadromous fish habitat."<sup>5</sup>

9 The County contends it has complied with the Board's order by adopting Ordinance  
10 No. 08-02, which under Section 10.01: Variances, provides criteria No. 1 through 9 and the  
11 addition of criteria No. 10, which states: "The decision to grant the variance includes  
12 consideration of Best Available Science."<sup>6</sup> The County notes it does not have anadromous  
13 fish.

13 **Issue No. 3: Fish & Wildlife Habitat Conservation Areas.**

14 As stated in Case No. 97-1-0018, Issue No. 1, [O]n December 1, 2008, Ferry County  
15 (County) enacted Ordinance No. 08-01, entitled "An Ordinance to Adopt the Ferry County  
16 Comprehensive Plan and the Curlew Lake Sub Area Plan"<sup>7</sup>, and Ordinance No. 08-02,  
17 entitled "Ferry County Critical Area Plan."<sup>8</sup> According to the County, Ordinance No. 08-01  
18 "resolves this issue for the Comprehensive Plan"<sup>9</sup> and notes specifically the revision of  
19 Comprehensive Plan (CP) Chapter 7.4.14 and Chapter 4.1.

20 The County claims Chapter 7.4.17 designates the Ferry County Critical Areas  
21 Ordinance (CAO) to "define, classify, designate and regulate fish and wildlife habitat  
22 conservation areas"<sup>10</sup> and recognizes the official Federal and State sources of the listing of  
23 species as endangered, threatened or sensitive (ETS species). According to the County,

24 <sup>5</sup> Id. at 7.

25 <sup>6</sup> Id.

26 <sup>7</sup> Ferry County's Statement of Action to Comply at 1, Dec. 18, 2008.

<sup>8</sup> Id.

<sup>9</sup> Id at 3.

<sup>10</sup> Id.

1 Chapter 4.1 includes a definition of "Primary Association Area"<sup>11</sup> based on the Community,  
2 Trade and Economic Department's (CTED) Model Ordinance.

3 According to the County, Ordinance No. 08-02 revises the CAO at Section 3.0 and  
4 Section 9.01 and brings the County into compliance on this issue of designating ETS species  
5 by defining Primary Association Area and recognizing the official Federal and State sources  
6 for ETS species and guidance from the Washington State Department of Fish and Wildlife  
7 (WDFW).<sup>12</sup>

7 **Issue No. 4: Relying on pre-GMA SMP.**

8 The County argues that the Board concluded only that the RLCAO failed to protect  
9 shorelines based on BAS by allowing a buffer width of 100 feet for Type 1 waters, not that  
10 the County was relying on its pre-GMA SMP. The County claims Ordinance No. 08-02  
11 changed the buffer width for Type 1 waters from 100 feet to 150 feet bringing the County  
12 into compliance.

13 **Petitioners:**

14 Petitioners contend the County has adopted Ordinance No. 08-02, Critical Areas  
15 Ordinance (CAO), and Ordinance No. 08-03, Development Regulations (DRO) to update  
16 both documents and come into compliance with the Board's orders. Petitioners argue that  
17 five issues from this case are still out of compliance, Issue Nos. 1, 2, 4, 5, and 7.

17 **Issue No. 1(A): Riparian buffer widths.**

18 According to Petitioners' argument under Case No. 04-1-0007c, the County fails to  
19 comply with RCW 36.70A.060(2), and .172, which require counties and cities to adopt  
20 development regulations which protect the functions and values of critical areas, including  
21 fish and wildlife habitat conservation areas, including "waters of the state", which in turn  
22 includes streams of Types 1-5.<sup>13</sup> In addition, Petitioners argue the use of best available  
23

24  
25 <sup>11</sup> Id.

<sup>12</sup> Id at 4.

<sup>13</sup> WAC 365-190-050.

1 science is required<sup>14</sup> and counties are required to consider the minimum guidelines  
2 promulgated by the Washington Department of Community Trade and Economic  
3 Development (CTED).<sup>15</sup>

4 Petitioners claim the County continues to allow a riparian buffer width of 100 feet for  
5 "Class 2 waters"<sup>16</sup> in its Critical Areas Ordinance (CAO), which does not reflect BAS.

6 **Issue No. 1(B): Wetlands buffers.**

7 Petitioners contend the County's definitions of High, Moderate and Low Intensity  
8 Land Use for wetland buffers is considerably different than that of the Department of  
9 Ecology's Model CAO, allowing more intense use, particularly in the Low Intensity Land Use.  
10 Citing RCW 36.70A.172(1), and Court of Appeals cases *WEAN v. Island County*<sup>17</sup> and *Ferry*  
*County v. Concerned Friends of Ferry County*,<sup>18</sup> the County must consider three factors.

11 Petitioners claim the County followed factor (1) and has included scientific evidence within  
12 the record, but it is unclear from the record the County followed factor (2), whether  
13 deciding on the definitions for land use intensity involved a reasoned process. As to factor  
14 (3), Petitioners argue it is clear that the buffers created by the County using a less  
15 protective definition of land use intensity are inadequate to protect all of the functions and  
16 values of wetlands, a clear failure to comply with RCW's 36.70A.172(1) and .060(2).

17 According to Petitioners, the County changed very little from its original definitions of high  
18 intensity and low intensity land use to the present definitions in the new ordinances, in  
19 particular annual agricultural use and residential intensity (lot sizes of 1 unit/2.5 acres).

20 According to Petitioners, the County's definitions are inconsistent with CTED's Model  
21 CAO, different from the Wetlands in Washington State Manual Table 8D-3, and not near the  
22 buffers recommended by DOE when the lesser land use definitions from the CAO are used.

23 \_\_\_\_\_  
24 <sup>14</sup> RCW 36.70A.172.

25 <sup>15</sup> RCW 36.70A.050.

26 <sup>16</sup> Petitioner's 3<sup>rd</sup> Compliance Brief at 7 (Jan. 5, 2008).

<sup>17</sup> *Whidbey Environmental Action Network v. Island County*, 122 Wn. App. 156, 174-175, 93 P.3d 885 (2004).

<sup>18</sup> *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 123 P.3d 102, 107 (2005).

1 **Issue No. 2: Variances.**

2 Petitioners claim under 04-1-0007c, the County’s variance process does not allow for  
3 a public hearing. According to Petitioners, RCW 36.70B.110 requires a public notice of  
4 application for every project application which is not categorically exempt under the State  
5 Environmental Policy Act (SEPA). Petitioners assert the County clearly does not require a  
6 public hearing on a variance proposal.

7 **Issue No. 4 and 7: Fish and Wildlife Habitat Conservation Areas.**

8 Petitioners claim the County’s language contained in the new RLCAO “appears to  
9 come close to the requirements of the GMA at first glance,” but fails to define what  
10 constitutes an area “with endangered, threatened and sensitive species (which) have a  
11 primary association.”<sup>19</sup> Petitioners argue the County fails to link the Federal and State  
12 designations of ETS species to the County’s designation in any concrete way. In addition,  
13 Petitioners contend that the County’s ordinance only identifies the Federal and State data  
14 and states the County will only look at it, but it does not provide a substantive description  
15 for how it will then actually do the designations. In addition, Petitioners claim the County  
16 has “inexplicably removed language from 9.03(2)(3) to exempt any area with “forest  
17 practice activities regulated by the DNR “ from buffer protection, which is not GMA  
18 compliant.

19 **Issue No. 5: Pre-GMA SMP.**

20 Petitioner contends this issue was argued under 04-1-0007c.

21 **Respondent’s Brief:**

22 **Issue No. 1(A): Riparian Buffer Widths.**

23 The County claims Petitioners argued this issue under 04-1-0007c and the County  
24 incorporates its arguments by reference here.  
25

26 <sup>19</sup> Petitioner’ 2<sup>nd</sup> Compliance Hearing Brief at 11, Case No. 06-1-0003 (Jan. 5, 2009).

1 **Issue No. 1(B): Wetland Buffer Widths.**

2 The County contends that Petitioners only complaint under this issue is with the  
3 County's land-use-intensity definitions, which Petitioners claim weaken the concept of  
4 wetland protective buffers. The County argues that Petitioners may have a basic  
5 misconception as to how land-use intensities operate. The County authorizes wider buffer  
6 areas to higher density areas and thus accords a higher level of protection in wider  
7 standard buffers. For the current CAO, the County adopted new DOE guidance for wetland  
8 buffers, which required a three-level definition of land-use intensity and the PC studied  
9 appropriate definitions for low, moderate and high use. The County claims the PC reviewed  
10 CAO ordinances from a variety of counties, the CTED Model Ordinance and DOE's guidance  
11 to develop the County's land-use intensity definitions. The County found three counties with  
12 low-density residential components in low-intensity areas, although the state agency models  
13 did not have residential components. According to the County, Petitioners have not  
14 presented any credible evidence as to why the County's three land-use intensity definitions  
15 are not compliant.<sup>20</sup>

16 The County, after describing CTED's Model Ordinance and Ecology's definitions for  
17 land-use intensity, claims there is obviously not one accepted standard for the intensity  
18 definitions.<sup>21</sup> According to the County, its definitions of land-use intensity provided more  
19 protective buffers than would strict adoption of Ecology's definitions.

20 The County claims Petitioners are correct in observing that the DOE recommends a  
21 high-intensity classification for new agriculture involving tillage, dairies, greenhouses,  
22 nurseries or raising animals, whereas Ferry County only recognizes a feed lot as high-  
23 intensity, and argues it cannot adjust its CAO provisions for agricultural activities due to a  
24 legislative moratorium.<sup>22</sup>

25 <sup>20</sup> Respondent's Memo for Second Compliance Hearing at 10 (Jan. 21, 2009).

26 <sup>21</sup> Id. at 11.

<sup>22</sup> SSHB 5248; RCW 36.70A.560.

1 **Issue No. 2: Variances for Critical Areas.**

2 The County claims the Petitioners argued this issue under 04-1-0007c and the  
3 County also will incorporate by reference its arguments from that brief. The County believes  
4 it has fixed the language and the issue is resolved.

5 **Issue No. 3: Fish and Wildlife Habitat Conservation Areas and PHS:**

6 The County argues this issue was resolved under Case No. 97-1-0018 and is formally  
7 discussed in documents related to that case. The County claims Petitioners take issue with  
8 language in the CAO, Section 9.01, but fails to acknowledge the County's CAO includes a  
9 definition of "primary association area" in Section 3.00, and Section 9.01(1) states that  
10 Ferry County will use the WDFW/PHS products in identifying areas with which the species  
11 have a primary association. The County fails to understand Petitioners' concerns about the  
12 language in Section 9.01 when CTED's Model Ordinance treats the subject matter in a  
13 similar fashion to Ferry County's CAO section. The County also points out that the WDFW  
14 did not take issue with the language, in regards to ETS species, but did express concern  
15 about priority species other than ETS species. In regards to this issue, the County and  
16 WDFW are working together to address the WDFW's concerns, possibly with a  
Memorandum of Understanding.

17 **Remaining Issues:**

18 Forest practice activities: Petitioners cite two different sets of wording which state  
19 forest practice activities are not regulated by Ferry County as to stream buffers. The County  
20 contends that regulation of forest practices is the prerogative of the Washington State  
21 Department of Natural Resources (DNR) and, therefore, County stream buffers do not apply  
22 on public land. The County adopted the entire Fish and Wildlife habitat section from Stevens  
23 County's CAO to replace Ferry County's ordinance. The language Petitioners refer to was  
24 not changed in the adoption. The County argues there should be no concern now with the  
25 language as it stands. Additionally, Petitioners cannot raise this issue because this was not  
26 raised during the public comment period and should be dismissed.

1 **Petitioners Reply Brief:**

2 Petitioners reiterate their request for the Board to impose invalidity “to protect the  
3 County’s working farms from incompatible development focusing on the natural resources  
4 goal in Case No. 01-1-0019.”<sup>23</sup> Petitioners claim five issues remain.

5 **Issue No. 1: Wetland buffers.**

6 Petitioners argue the County’s low intensity category requires a minimum buffer and  
7 includes not only residential, but agricultural uses as well, and will disturb those areas next  
8 to wetlands and riparian areas. Petitioners contend the low intensity definitions that accept  
9 agricultural use and residential use combined with the buffers is not acceptable to WDFW  
for riparian and will cause a loss of functions and values.

10 Petitioners compare the definitions and allowed uses within the various land use  
11 intensity’s of the County’s Interim CAO, its current CAO and CTED’s Model CAO and  
12 concludes the County’s definitions are inconsistent with the Model CAO and different from  
13 the Wetlands in Washington State Manual Table. Petitioners argue that the County’s land  
14 use definitions and buffers are not based on BAS.

15 **Issue No. 2: Variances.**

16 Petitioners contend this issue was argued under Case No. 04-1-0007c.

17 **Issue Nos. 4 and 7: Fish and Wildlife Habitat Conservation Areas.**

18 Petitioners assert the County did not address priority species other than ETS species.  
19 Petitioners claim the County failed to address the WDFW’s concerns in the CAO and now  
20 “points to some future remedy” that will do so<sup>24</sup> and cite to WDFW comments concerning  
21 Section 9.04 of the CAO, which indicate the CAO does not protect those species and habitat  
that are not ETS species.

22 **Issue No. 5: Pre-GMA SMP.**

23 Petitioners contend this issue was argued in Case No. 04-1-0007c and, therefore, will  
24 stand by their argument in that case.

25 <sup>23</sup> Petitioner’s 2<sup>nd</sup> Compliance Hearing Reply Brief and Motion to Strike at 2 (Jan. 26, 2009).

26 <sup>24</sup> Id. at 6.

1 **Board Discussion and Analysis:**

2 **Issue No. 1(A): Adequacy of buffers for water Types 1 and 2.**

3 This issue is, for the most part, the same issue addressed by the Board in Case No.  
4 04-1-0007c.<sup>25</sup> As such, the Board will incorporate their findings and conclusions from that  
5 case in the conclusion and address the land use intensities below.

6 In regards to land use intensity in riparian areas, the Petitioners claim the Low  
7 Intensity Land Use definition includes residential and agricultural uses, in both wetland and  
8 riparian areas. This seems to be the case with the wetland areas, but not the riparian areas.  
9 The Board notes that riparian buffer widths are now fixed by Ordinance #2008-02 and the  
10 CAO, Section 9.03, and do not differentiate between low, medium or high land intensities  
11 for riparian areas. Petitioners claim, "The buffers for riparian areas are brought up in Case  
12 No. 04-1-0007c, and we will argue wetland buffers here." After researching the documents  
13 in Case No. 04-1-0007c, the Board finds that Petitioners' arguments in that case pertain  
14 exclusively to wetland buffer land use intensity, not riparian.

15 Petitioners' Reply Brief states the "low intensity definitions that accept ag use and  
16 residential use combined with the buffers that are not acceptable to WDFW for riparian will  
17 cause a loss of functions and values."<sup>26</sup> On the issue of agricultural or residential use in its  
18 letter of July, 10, 2008, for either wetlands or riparian areas, the WDFW suggested in their  
19 letter<sup>27</sup> the County consider removing or reviewing from Section 9.03(2), Activities Not  
20 Regulated in Buffers, the following: (1) Item No. 11, Pedestrian trails; (2) Item No. 15,  
21 review the process for riparian alterations for view corridors; and (3) encouraged the  
22 County to cross reference the activities not regulated to the SMP. The WDFW was "pleased"  
23 with the comprehensive list of regulated activities. Neither agricultural use nor residential  
24 use activities was mentioned in the WDFW letter as a potential problem in riparian buffers,

25 <sup>25</sup> *CRFC, et al. v. Ferry County*, EWGMHB Case No. 04-1-0007c Third Order on Compliance (March 11, 2009).

26 <sup>26</sup> Petitioners' 2<sup>nd</sup> Compliance Hearing Reply Brief and Motion to Strike at 3.

27 <sup>27</sup> WDFW letter to Irene Whipple, July 10, 2008; Exhibit #6.

1 although all listed uses were alluded to in (3) above by encouraging the County to “cross  
2 reference the activities not regulated to the SMP.”

3 **Conclusion:**

4 As to riparian buffer widths for Type 1 and 2 waters, the Board finds and concludes  
5 the following (as found in Case No. 04-1-0007c): (1) the County’s Type 1 buffer width is  
6 within the low range of BAS presented in the record; (2) the County failed to adopt riparian  
7 area buffer widths for Type 2 and 3 waters to protect the functions and values of critical  
8 areas by including BAS as required by RCW 36.70.060 and RCW 36.70A.172. Therefore,  
9 Ferry County’s Critical Areas Ordinance at Section 9.03, Type 2 and 3 standard buffer  
10 widths, is found out of compliance. Types 4 and 5 buffer widths, although significantly  
11 smaller than recommended by WDFW, are not argued by the Petitioners and, therefore, the  
12 Board will not address these buffer widths in this order.

13 As to the issue of the definition of Low Intensity Land Use and regulated/non-  
14 regulated uses concerning riparian areas only, the Board finds the Petitioners’ argument  
15 concerning the uses is lacking in substance, science, and references, and Petitioners fail to  
16 meet their burden of proof.

17 **Issue No. 1(B): Wetlands buffers inadequate per BAS.**

18 Petitioners are asking the Board to determine if the County complied with RCW’s  
19 36.70A.040, .060, .120 and .172 and interfere substantially with RCW 36.70A.020 (goals  
20 not specified). The Board agrees with the County that Petitioners focus their argument on  
21 the County’s land-use-intensity definitions, specifically the definition of Low Intensity Land  
22 Use, which allows annual agricultural activity and residential use contrary to the BAS  
23 included in the record. Petitioners claim the buffers created by using a less protective  
24 definition of land use intensity are inadequate to protect all of the functions and values of  
25 wetlands, a clear failure to comply with RCW’s 36.70A.060(2) and .172(1).

26 RCW 36.70A.060(2) requires counties and cities to adopt development regulations  
which protect critical areas. RCW 36.70A.172(1) requires counties and cities to include BAS  
in developing policies and development regulations to protect the functions and values of

1 critical areas, which include fish and wildlife habitat areas. Petitioners agree the County has  
2 included BAS in the record,<sup>28</sup> specifically the DOE's Wetlands in Washington State, Volumes  
3 1 & 2, but claim it is unclear from the record the County's decision on the definitions for  
4 land use intensity involved a reasoned process, and the buffers are adequate to protect all  
5 of the functions and values given these definitions.

6 The County contends it "cannot at this time adjust its CAO provisions for agricultural  
7 activities due to a legislative moratorium,<sup>29</sup> which prohibits counties from making changes  
8 to their CAO with respect to agricultural activities,"<sup>30</sup> but will address this subject when the  
9 moratorium expires on July 1, 2010.

10 The County is referring to legislation which enacted RCW 36.70A.560(1), allowing  
11 counties and cities to defer amending or adopting critical area ordinances under RCW  
12 36.70A.060(2) as they specifically apply to agricultural activities for the time period stated.  
13 Under RCW 36.70A.560(3), "agricultural activities" means agricultural uses and practices  
14 currently existing or legally allowed on rural land or agricultural land designated under RCW  
15 36.70.170. According to the definition above, the Board agrees this statute applies to Ferry  
16 County.

17 To determine if the County's land use definitions protect the functions and values of  
18 critical areas and are in compliance with the GMA, the Board must examine the BAS  
19 included by the County in reaching its decision. There are three factors the Board will  
20 consider: (A) The scientific evidence contained in the record; (B) whether the local  
21 government's analysis of the scientific evidence and other factors involved a reasoned  
22 process; and (C) whether the local government's decision was within the parameters of the  
23

24 <sup>28</sup> Petitioner's 2<sup>nd</sup> Compliance Hearing brief at 6.

25 <sup>29</sup> Board note: This is in reference to RCW 36.70A.560, which states, "For the period beginning May 1, 2007, and  
26 concluding July 1, 2010, counties and cities may not amend or adopt critical area ordinances under RCW 36.70A.060(2)  
as they specifically apply to agricultural activities."

<sup>30</sup> Respondent's Memo for Second Compliance Hearing at 12.

1 GMA as directed by the provisions of RCW 36.70A.172(1).<sup>31</sup> The Board will examine each of  
2 the criteria separately.

3 **(1) Scientific Evidence:**

4 The County adopted the DOE's "three dimensional system of buffer widths"<sup>32</sup>  
5 considering (1) wetland category; (2) intensity of proposed land use adjacent to the  
6 wetland; and (3) functional score for wildlife habitat. The County's buffer widths are the  
7 same as those found in Wetlands in Washington State, Volume 2, Appendix 8D, Tables 8D-4  
8 through 8D-7. What the County did not adopt in full as recommended by the DOE are the  
9 low, moderate and high land intensity definitions. Ferry County changed several of the  
10 definitions for residential use and, according to the County's calculations, only "Residential  
11 at less than 1 unit per 5 acres" has a less-wide buffer than Ecology's recommendation. The  
12 County lists this category under Low Intensity, while Ecology lists the same category under  
13 Moderate Intensity. The County's explanation for the difference in definitions is "there is not  
14 one accepted standard for the intensity definitions; choices and judgment by the County are  
15 required."<sup>33</sup>

15 The County is correct in that it has some local government discretion in adopting its  
16 regulations, but if the County departs from the science in the record or parameters of BAS,  
17 then it must include the BAS it used in order to prevent speculation and surmise in an area  
18 that is scientific in nature, identify other GMA goals which it is implementing, and provide  
19 reasoned justification when departing from BAS.<sup>34</sup> Departure from BAS does not amount to  
20 a relinquishment of the duty to protect the functions and values of wetlands.

21 \_\_\_\_\_  
22 <sup>31</sup> *1000 Friends of Wash. V. City of Anacortes*, WWGMHB Case. No. 03-2-0017 (Feb. 10, 2004).

23 <sup>32</sup> Ferry County CAO #2008-02, Section 5 Wetlands, pg. 23.

24 <sup>33</sup> Respondent's Memo at 11.

25 <sup>34</sup> *WEAN v. Island County*, et al. 122 Wn.App. 156 (2004). In regards to this issue, the Court stated: This does not mean  
26 that the local government is required to adopt regulations that are consistent with BAS because such a rule would interfere  
with the local agency's ability to consider the other goals of the GMA and adopt an appropriate balance between all the  
GMA goals. However, if a local government elects to adopt a critical area requirement that is outside the range that BAS  
alone would support, the local agency must provide findings explaining the reasons for its departure from BAS and  
identifying the other goals of GMA which it is implementing by making such a choice ...

1 The following chart highlights the important discrepancies between the DOE's land  
 2 use intensity definitions and those of Ferry County's:

Level of Impact from proposed change in land use	DOE	Ferry County
High	Commercial; urban; industrial Institutional; retail; residential (more than 1 unit/acre); high intensity Agriculture; high intensity recreation; hobby farms.	High-intensity recreation; golf courses; ball fields; master-planned resorts; feed lots; commercial or industrial uses; institutional uses; new subdivisions (lots less than 2.5 acres/residence; multi-family residential.
Moderate	Residential (1 unit/acre or less; open space; moderate-intensity agriculture; paved trails; logging road construction; utility corridors.	Paved trails; small scale tourism businesses; camp sites; residential (5 acres or less); subdivisions (lots between 2.5 and 5 acres; rural small scale business.
Low	Forestry; low-intensity open space; unpaved trails; utility corridor w/o maintenance road or management.	Open space passive recreation; unpaved trails; nature viewing areas; camping or fishing sites; <b>agriculture</b> ; forest management; <b>residential (1 unit/5 acre); new subdivisions (lots greater than 5 acres).</b>

19 In regards to agricultural activities, the County admits the DOE "recommends a high-  
 20 intensity classification for new agriculture which involves annual tillage, dairies, nurseries,  
 21 raising animals, or for 'hobby farms'."<sup>35</sup> The County explains it cannot adjust its CAO  
 22 provisions for agricultural activities due to RCW 36.70A.560, but will address it after July 1,  
 23 2010.

24  
 25  
 26 <sup>35</sup> Id. at 12.

1 The only science in the record for wetland protection is the DOE's Wetlands in  
2 Washington State, Volumes 1 and 2, which the County used, for the most part, in  
3 developing its wetlands section.<sup>36</sup> After an inspection of Vol. 1, Synthesis of Science,  
4 Chapter 3.3, which addresses disturbances caused by agriculture, the Board notes the  
5 science in the record shows the following impacts: (1) agriculture disturbs the physical  
6 structure of wetlands directly by converting wetlands into fields/pastures via filling/tilling,  
7 draining, grazing, dam creation for irrigation, etc.; (2) irrigation for agricultural activity  
8 alters water flow patterns, which results in either increasing or decreasing water availability  
9 and water level fluctuations; (3) agriculture activity increases sediment input due to tilling  
10 and grazing; (4) agriculture typically increases nutrient input (fertilizer); (5) agriculture  
11 increases toxic contaminant input (herbicide/pesticides); (6) agricultural activity increases  
12 salt content due to higher level of evapotranspiration; and (7) agriculture fragments  
13 habitat. Thus, it is clear that agricultural activities and residential use, which has many of  
14 the same impacts, have a detrimental effect on critical areas.

14 The County specifically states, "Based on the guidance of these two documents,<sup>37</sup>  
15 Ferry County has adopted Ecology's three dimensional system of establishing buffer widths  
16 considering three factors: Wetland Category; Intensity of proposed land use; Wildlife  
17 habitat score."<sup>38</sup> The Board finds that this statement is not completely correct, as shown by  
18 the land use definition chart above.

18 With the insertion of two uses, agriculture and residential, into the Low Intensity  
19 definition, the County allows potential degradation and disturbance of the wetlands and fails  
20 to protect the functions, values, and special characteristics of wetlands as explained in  
21 Wetlands in Washington State, Volume 1, as noted above. In addition, as explained in the  
22 DOE's Wetlands in Washington State, Volume 2:

23 The review of the scientific literature has shown, however, that buffers alone  
24 cannot adequately protect all functions that a wetland performs. Additional

25 <sup>36</sup> Ferry County CAO; Appendix C1-1.

26 <sup>37</sup> The County is referring to Wetlands in Washington State, Volumes 1& 2.

<sup>38</sup> Ferry County CAO #2008-02, Appendix C1 at C1-1.

1 guidance is, therefore, provided on other ways in which wetlands can be  
2 managed and regulated to provide some of the necessary protection that  
3 buffers alone do not provide.<sup>39</sup> (Board emphasis).

4 The County chose to protect wetlands using the DOE's Buffer Alternative 3, which is  
5 "[W]idth based on wetland category, intensity of impacts, and wetland functions or special  
6 characteristics."<sup>40</sup> The intensity of impacts criteria, which are directly related to the  
7 frequency and duration of disturbance,<sup>41</sup> is a key component of Alternative 3. By allowing  
8 high impact agricultural activities and residential use in its low intensity wetland areas, the  
9 County failed to protect the functions and values of wetlands, and failed to provide any  
10 reasoned justification, such as scientific-based information, to depart from the DOE's land  
11 use recommendations for Low Intensity Land Use. This is in stark contrast to the County's  
12 wholesale adoption of DOE's Alternative 3 recommendations for buffer widths.

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

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

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

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

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

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

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<sup>39</sup> Wetlands in Washington State, Volume 2, pg. 2 (Exhibit 5).

<sup>40</sup> Id. at 3.

<sup>41</sup> Wetlands in Washington State, Volume 1.

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

5 In *HEAL*, the Court, held "that evidence of the best available science must be  
6 included in the record and must be considered substantively in the development of critical  
7 areas policies and regulations."<sup>42</sup> According to the Court, the purpose of BAS is to ensure  
8 that critical areas regulations are not based on speculation and surmise, but on meaningful,  
9 reliable, relevant evidence with the inquiry a uniquely scientific one so that BAS is essential  
10 to an accurate decision to mitigate environmental effects of development.

11 Subsequently, the Court reinforced the *Heal* interpretation of BAS and how it must be  
12 used in *WEAN v. Island County et al.* The Court in *WEAN*, a case related to stream and  
13 wetland buffers, found in part that the record must contain "applicability of unique local  
14 conditions to justify a departure downward from the buffer width requirements outlined in  
15 the scientific literature."<sup>43</sup> The Court further found that the GMA requires that the  
16 regulations for critical areas must protect the functions and values of those designated  
17 areas, meaning all functions and values.

18 The Court in *Ferry County v. CFFC*,<sup>44</sup> while approving of the Western Board's three  
19 part test for considering BAS issues, also held that a local jurisdiction can't simply choose its  
20 own science over all other science, and can't use outdated science.

21 **(2) Reasoned Process:**

22 The County made an excellent choice in deciding to adopt DOE's Buffer Alternative 3  
23 and the recommendations found in Wetlands in Washington State, Volumes 1 & 2. These  
24 two volumes are, as stated by the County, "[A]n extensive two-volume study relevant to the  
25 science and management of wetlands in Washington State [was] published in 2005 and is  
26

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<sup>42</sup> *Heal v. CPSGMHB*, 96 Wn. App. 522, 532, 979 P.2d 864 (1999).

<sup>43</sup> *WEAN v. Island County, et al.* 122 Wn.App. 156 (2004).

<sup>44</sup> *Ferry County v. CFFC, et al.*, 155 Wn.2d 824,

1 recommended by Ecology as the most current and most comprehensive scientific guidance  
2 for protecting wetlands." The County adopted, for the most part, every recommendation,  
3 but failed to provide any scientific evidence in the record to deviate from the DOE's  
4 recommended uses under certain land use intensity definitions, in particular the County's  
5 allowance of agriculture and residential in its Low Intensity Land Use.

6 To reiterate from the *HEAL* and *WEAN* cases, the Court concluded:

- 7 1. Evidence of BAS must be included in the record.
- 8 2. BAS must be considered substantively during the development of  
9 critical areas regulations.
- 10 3. Local governments may adopt critical areas regulations outside of the  
11 range of BAS.
- 12 4. But if a regulation is outside of the range of BAS, then the local  
13 government must provide reasoned justification for departure from BAS  
14 and identify other GMA goals being implemented.
- 15 5. Critical areas regulations must protect all the functions and values of  
16 designated critical areas.

### 17 **(3) Within GMA Parameters:**

18 Counties and cities are required under RCW 36.70A.172(1) to include BAS in  
19 developing policies and development regulations to protect the functions and values of  
20 critical areas. The County failed to protect the functions and values of wetlands by  
21 arbitrarily defining Low Intensity Land Use to include agriculture and residential uses  
22 without providing reasoned justification for its departure from BAS found in the record.

### 23 **Conclusion:**

24 The Board finds and concludes the County failed to comply with RCW's  
25 36.70A.172(1) and .060 and protect all the functions and values of wetlands. The County's  
26 definition of Low Intensity Land Use allows agriculture and residential uses within critical  
areas that are determined by the science presented in the record to have detrimental  
effects on the functions and values of wetlands.

### **Issue No. 2: Variances.**

1 This issue was addressed by the Board in Case No. 04-1-0007c.<sup>45</sup> As such, the Board  
2 will incorporate their discussion, findings and conclusions from that case here.

3 **Conclusion:**

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

6 **Issue No. 3: Fish and Wildlife Habitat Conservation Areas and PHS: (Petitioners'**  
7 **Issue Nos. 4 and 7).**

8 This issue was addressed by the Board in Case No. 97-1-0018.<sup>46</sup> As such, the Board  
9 will incorporate their discussion, findings and conclusions from that case here.

10 **Conclusion:**

11 The Board finds and concludes: (1) the County failed to designate, or in the  
12 alternative, support its decision not to designate in light of the scientific evidence in the  
13 record, fish and wildlife habitat and species by including BAS, in particular the County's  
14 habitats and species of local importance; (2) the County failed to include BAS to protect  
15 mapped habitat represented by polygon data for low intensity land uses.; and (3) the County  
16 is out of compliance with the GMA for requiring WDFW, a state agency without authority to  
17 enforce local CAO provisions, to validate point observations and polygon observations in  
18 Ordinance No. 08-02, which would only then trigger protection measures. Thus, pursuant to  
19 RCW 36.70A.040(3)(b), RCW 36.70A.060(2), RCW 36.70A.170, RCW 36.70A.172, and as  
20 designated in WAC 365-190-080(5), the Board finds the County in continuing non-

21 **Issue No. 4: Relying on pre-GMA SMP.**

22 This issue was addressed by the Board in Case No. 97-1-0018.<sup>47</sup> As such, the Board  
23 will incorporate their discussion, findings and conclusions from that case here.

24 **Conclusion:**

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25 <sup>45</sup> Footnote 25.

26 <sup>46</sup> *CFFC et al. v. Ferry County*; EWGMHB Case No. 97-1-0018, Fifth Order on Compliance (Feb. 20, 2009).

<sup>47</sup> *Id.*

1 The Board finds and concludes under Issue No. 4 (as found in Case No. 97-1-0018)  
2 that both parties agree the County is in compliance. Therefore, the Board has determined  
3 the County has resolved this issue.

#### 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 October 2, 2006.
- 11 4. After one compliance hearing, there are four issues remaining in this  
12 case. They are: (a) Issue No. 1(A) and (B), the adequacy of buffers for  
13 water Types 1 and 2, and wetland buffers; (b) Issue No. 2, variances  
14 for critical areas; (c) Issue No. 3, Fish & Wildlife Habitat Areas; and (d)  
15 Issue No. 4, reliance on the pre-GMA SMA.
- 16 5. The Board finds and concludes under Issue No. 1(A) the following (as  
17 found in Case No. 04-1-0007c): (1) the County's Type 1 buffer width is  
18 within the low range of BAS presented in the record; (2) the County  
19 failed to adopt riparian area buffer widths for Type 2 and 3 waters  
20 which protect the functions and values of critical areas by including BAS  
21 as required by RCW 36.70.060 and RCW 36.70A.172. Therefore, Ferry  
22 County's Critical Areas Ordinance at Section 9.03, Type 2 and 3  
23 standard buffer widths, is found in **non-compliance**. Types 4 and 5  
24 buffer widths, although significantly smaller than recommended by  
25 WDFW, are not argued by the Petitioners and, therefore, the Board will  
26 not address these buffer widths in this Order. The Board also finds and  
concludes under Issue No. 1(A) that Petitioners' argument concerning  
Low Intensity Land Use in the riparian areas is lacking in substance,

1 science, and references, and Petitioners fail to meet their burden of  
2 proof for this sub-issue.

- 3 6. The Board finds and concludes under Issue No. 1(B) that the County  
4 fails to comply with RCW's 36.70A.172(1) and .060 and, therefore, fails  
5 protect the functions and values of wetlands and is found in **non-**  
6 **compliance**. The County's definition of Low Intensity Land Use allows  
7 agriculture and residential uses within critical areas that are determined  
8 by the science presented in the record to have detrimental effects on  
9 the functions and values of wetlands. The County fails to include  
10 reasoned justification for its departure for the BAS in the record.
- 11 7. The Board recognizes the deferral requirement found in RCW  
12 36.70A.560(1), although the County may still be found in non-  
13 compliance. The County may, however, adopt or employ voluntary  
14 measures or programs to protect or enhance critical areas associated  
15 with agricultural activities.<sup>48</sup>
- 16 8. The Board finds and concludes under Issue No. 2, variances, the  
17 County has resolved this issue by adding Criteria No. 10 to its CAO,  
18 Section 10.01, and is now in **compliance**. A public hearing process is  
19 strongly recommended by CTED, but not required by statute.
- 20 9. The Board finds and concludes under Issue No. 3, Fish and Wildlife  
21 Habitat Areas (as found in Case No. 97-1-0018): (1) the County failed  
22 to designate, or in the alternative, support its decision not to designate  
23 in light of the scientific evidence in the record, fish and wildlife habitat  
24 and species utilizing Best Available Science, in particular the County's  
25 habitats and species of local importance; (2) the County failed to  
26 include BAS to protect mapped habitat represented by polygon data for

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<sup>48</sup> RCW 36.70A.560(1)(c).

1 low intensity land uses; and (3) the County is out of compliance with the  
2 GMA for requiring WDFW, a state agency without authority to enforce  
3 local CAO provisions, to validate point observations and polygon  
4 observations in Ordinance 08-02, which would only then trigger  
5 protection measures. Thus, pursuant to RCW 36.70A.040(3)(b), RCW  
6 36.70A.060(2), RCW 36.70A.170, RCW 36.70A.172, and as designated  
7 in WAC 365-190-080(5), the Board finds the County in continuing **non-**  
8 **compliance** in this issue.

9 10. The Board finds and concludes under Issue No. 4, pre-GMA SMP (as  
10 found in Case No. 97-1-0018), that both parties agree the County is in  
11 **compliance**. Therefore, the Board has determined the County has  
12 resolved this issue.

#### 13 **V. ORDER**

14 Based upon the Board's review of the GMA, prior decisions of the Hearings Boards,  
15 briefing and presentation by the parties at the February 2, 2009, compliance hearing, and  
16 having discussed and deliberated on the matter, the Board enters a finding of **non-**  
17 **compliance** in the following issues: Issue No. 1(A), Riparian area buffer widths for Type 2  
18 & 3 waters (as per Case No. 04-1-0007c); Issue No. 1(B), Wetlands, for failure of the  
19 County to protect the functions and values of critical areas and include BAS in its decision to  
20 include agriculture and residential uses in its Low Intensity Land Use definition; and Issue  
21 No. 3, Fish and Wildlife Habitat areas (as per Case No. 97-1-0018). The Board enters a  
22 finding of **compliance** in the following issues: Issue No. 2, Variances (as per Case No. 01-  
23 1-0019); and Issue No. 4, pre-GMA SMP (as per Case No. 01-1-0019). The Board directs the  
24 County to bring itself into compliance with the Board's Order and the GMA.

25 The compliance schedule for Issue No. 1(A) is per the Board's Compliance Order for  
26 Case No. 04-1-0007c; for Issue No. 3, the compliance schedule is per the Board's  
Compliance Order for Case No. 97-1-0018; and for Issue No. 1(B) it is **120** days from the  
date of this Order.

- 1           • The Board establishes **July 15, 2009**, as the deadline for the County  
2           to take appropriate legislative action to comply with the GMA and this  
3           Order. The following schedule for compliance, briefing and hearing shall  
4           apply:
- 5           • The County shall file with the Board by **July 22, 2009, an original  
6           and four copies** of a **Statement of Actions Taken to Comply**  
7           (SATC) with the GMA, as interpreted and set forth in this Order. The  
8           SATC shall attach copies of legislation enacted in order to comply. The  
9           County shall simultaneously serve a copy of the SATC, with  
10          attachments, on the parties. **By this same date, the County shall  
11          file a "Remanded Index," listing the procedures and materials  
12          considered in taking the remand action.**
- 13          • By no later than **August 5, 2009<sup>49</sup>**, Petitioners shall file with the  
14          Board an **original and four copies** of Comments and legal arguments  
15          on the County's SATC. Petitioners shall simultaneously serve a copy of  
16          their Comments and legal arguments on the parties. In addition, the  
17          Board requests the parties send their briefing electronically in Microsoft  
18          Word format to: aandreas@ew.gmhb.wa.gov. The parties are  
19          requested to use Times New Roman or a similar font with the type size  
20          of 12 or larger, and line spacing shall be 1.5 or more.
- 21          • By no later than **August 19, 2009**, the County shall file with the Board  
22          an **original and four copies** of their Response to Comments and legal  
23          arguments. The County shall simultaneously serve a copy of such on  
24          the parties. In addition, the Board requests the parties send their  
25          briefing electronically in Microsoft Word format to:  
26          aandreas@ew.gmhb.wa.gov. The parties are requested to use Times  
27          New Roman or a similar font with the type size of 12 or larger, and line  
28          spacing shall be 1.5 or more.
- 29          • By no later than **August 26, 2009**, Petitioners shall file with the Board  
30          an **original and four copies** of their Reply to Comments and legal  
31          arguments. Petitioners shall serve a copy of their brief on the parties.  
32          In addition, the Board requests the parties send their briefing

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<sup>49</sup> August 5, 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 electronically in Microsoft Word format to: aandreas@ew.gmhb.wa.gov.  
2 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.

- 3
- 4 • Pursuant to RCW 36.70A.330(1) and WAC 242-02-891<sup>50</sup> the Board  
5 hereby schedules a telephonic Compliance Hearing for **September 1,**  
6 **2009, at 10:00 a.m. The compliance hearing shall be limited to**  
7 **consideration of the Legal Issues found noncompliant and**  
8 **remanded in this Order.** The parties will call **360-407-3780**  
9 **followed by 858885 and the # sign.** Ports are reserved for: **Mr.**  
10 **Robinson and Mr. Graham.** If additional ports are needed please  
11 contact the Board to make arrangements.

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

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

16 **Reconsideration:**

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

26 **Judicial Review:**

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

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<sup>50</sup> 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 review may be instituted by filing a petition in superior court according to the  
2 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil.

3 **Enforcement:**

4 The petition for judicial review of this Order shall be filed with the appropriate  
5 court and served on the Board, the Office of the Attorney General, and all parties  
6 within thirty days after service of the final order, as provided in RCW 34.05.542.  
7 Service on the Board may be accomplished in person or by mail. Service on the  
8 Board means actual receipt of the document at the Board office within thirty  
9 days after service of the final order.

8 **Service:**

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

11 SO ORDERED this 17<sup>th</sup> day of March 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  
20  
21  
22  
23  
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26