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

KITTITAS COUNTY CONSERVATION et al.,

Petitioners,

v.

KITTITAS COUNTY,

Respondent,

BUILDING INDUSTRY ASSOCIATION OF
WASHINGTON (BIAW), CENTRAL
WASHINGTON HOME BUILDERS
ASSOCIATION (CWHBA), MITCHELL
WILLIAMS, d/b/a MF WILLIAMS
CONSTRUCTION CO., TEANAWAY RIDGE,
LLC, KITTITAS COUNTY FARM BUREAU

Intervenors,

ART SINCLAIR and BASIL SINCLAIR,

Amicus Parties.

Case No. 07-1-0004c

**ORDER ON PARTICIPANT
AMERICAN FOREST LAND
COMPANY'S MOTION FOR
CLARIFICATION AND
RECONSIDERATION
REGARDING LEGAL ISSUE 3**

On February 4, 2009, the Eastern Washington Growth Management Hearings Board (Board) issued its Partial 2nd Compliance Order in regards to nine legal issues previously found non-compliant by the Board in the above-captioned matter. Participant American

1 Forest Land Company (AFLC)¹ seeks clarification and reconsideration in regards to just one
2 of these issues – Legal Issue 3. This issue pertains to Kittitas County's criteria for the
3 designation and de-designation of Forest Lands of Long-Term Commercial Significance
4 (LTCS Forest). With its motion, AFLC requests the Board reconsider its finding that the
5 County's action, with respect to Legal Issue No. 3, continues to be GMA-noncompliant.

6 I. PROCEDURAL HISTORY

7 On August 20, 2007, the Board issued its FDO in the above-captioned matter. The
8 case represented a challenge to Kittitas County's enactment of Ordinance 2006-63
9 amending its Comprehensive Plan (CP) pursuant to RCW 36.70A.130. In the FDO, the Board
10 found Kittitas County had complied with the GMA in some regard, but several of its actions
11 were also non-compliant and, for some, warranted the imposition of a Determination of
12 Invalidity.

13 On August 7, 2008, the Board issued its 1st Compliance Order which, relevant to the
14 present motion, found the County in continuing non-compliance as to Legal Issues 3.²

15 As noted *supra*, on February 4, 2009, the Board issued its Partial 2nd Order RE:
16 Compliance, finding Kittitas County once again in continuing non-compliance as to Legal
17 Issue 3.

18 On February 17, 2009, AFLC filed a Motion for Clarification and Reconsideration
19 Regarding Issue No. 3.

20 On February 18, 2009, AFLC filed a Correction to its Motion for Clarification and
21 Reconsideration Regarding Issue No. 3, which solely denoted that the table contained in its
22 original motion had erroneously been identified as "mbf" (thousand board feet) but were, in
23 fact, "mmbf" (millions of board feet).

24 ¹ American Forest Land Company (AFLC) did not participate in the original proceedings in this matter, with the
25 Board's Final Decision and Order being issued in August 2007. In June 2008, after the case had entered into
26 the compliance phase, AFLC sought and was granted participation into the case in regards to forest lands.
Since that time, AFLC has submitted briefing related to both compliance hearings in this case.

² August 7, 2008 1st Compliance Order, at 9-12.

1 **II. DISCUSSION**

2 Pursuant to WAC 242-02-832, a party may file a motion for reconsideration with the
3 Board. A motion for reconsideration shall be based on a least one of the following grounds:³

4 (a) Errors of procedure or misinterpretation of fact or law, material to the
5 party seeking reconsideration;

6 (b) Irregularity in the hearing before the board by which such party was
7 prevented from having a fair hearing; or

8 (c) Clerical mistakes in the final decision and order.

9 Although the WAC does not specifically address a Motion for Clarification, the Board has
10 previously responded to this type of Motion.⁴

11 AFLC does not cite to a specific provision of WAC 242-02-832 which supports its
12 motion. However, in reading the motion, it appears AFLC is contending the Board has
13 misinterpreted facts that are material to AFLC, which would result in a motion based on
14 WAC 242-02-832(2)(a).

15 AFLC asserts it appears the Board took "judicial notice of an alleged fact" and then
16 relied "on that alleged fact as a basis for its decision finding Kittitas County in continuing
17 non-compliance as to Legal Issue 3."⁵ AFLC points to a single aspect of the Board's 2nd
18 Compliance Order, citing to Page 24 where the Board stated:

19 The Board is also cognizant of the fact that most of Washington's wood and
20 timber products are exported out-of-state, with a significant percentage of
21 raw logs exported to foreign markets, and therefore the consideration of the
22 "proximity to markets" would be of little relevance due to the global
23 marketplace.

24 ³ WAC 242-02-832(2)

25 ⁴ See e.g., *Wilma, et al v. Stevens County*, Case No. 06-1-0009c, Order on Clarification (June 25, 2008); *Loon
26 Lake Property Owners, et al v. Stevens County*, Case No. 01-1-0002c, Order on Clarification (Oct. 26, 2001).
See also, *Friends of San Juan, et al v. San Juan County*, WWGMHB Case No. 03-2-0003c, Order on
Clarification (Oct. 7, 2003), *King County v. Snohomish County*, CPSGMHB Case No. 03-3-0011, Order on
Clarification (Dec. 15, 2003).

⁵ AFLC Motion, at 2.

1 AFLC contends the record is devoid of evidence to support this statement; especially in
2 regards to wood/timber products originating in Kittitas County. AFLC further asserts the
3 Board's statement is founded on "an incorrect assumption that there is a robust global
4 market for wood and timber products from Kittitas County."⁶ AFLC then submits statistics as
5 to the condition of the timber market in Washington State, in general, and specifically to
6 Kittitas County.⁷

7 AFLC is first reminded that a Motion for Reconsideration/Clarification is not the time
8 to present new evidence to the Board. Evidence supporting whether the County's action
9 was compliant with the GMA was due prior to the issuance of the Board's Compliance
10 Order, not after. However, since AFLC submits this evidence to counter what it believes is
11 an erroneous assumption posited by the Board, the evidence will be allowed.

12 Although the statistics presented by AFLC demonstrate a decline in Washington's
13 timber industry, the Board's finding of non-compliance was not solely founded on the
14 County's inclusion of the "proximity to markets" within its LTCS Forest designation criteria.⁸
15 Rather, in the February 2009 Partial 2nd Compliance Order, the Board explicitly held:⁹

16 By establishing a permissive process which defines **forest lands by**
17 **terminology other than that provided within the GMA and by**
18 **including factors to determine the long-term commercial significance**
19 **of forest land which fall outside of the GMA's mandate to conserve,**
20 **maintain, and enhance, Kittitas County fails to comply with the RCW**
21 **36.70A.020(8), 36.70A.060, 36.70A.170. Since the County's de-**
22 **designation process establishes a distinctly separate process and**
23 **relies on flawed criteria,** a failure to maintain and enhance the industry is
24 immortalized and **violates the cited GMA provisions as well.**

25 ⁶ AFLC Motion, at 2.

26 ⁷ AFLC Motion, at 3-5.

⁸ The Board's knowledge as to the timber industry comes from its everyday experience with media and government reports, such as CTED's 2008 Wisser Report which ranks the wood/wood products industry as 8th for Washington exports, and Employment Security's LMEA reports as to the state of industries within Washington. Although AFLC would like the Board to believe not a single piece of Kittitas County wood every leaves the County, this, given today's marketplace, is a hard fact to accept.

⁹ February 2009 Partial 2nd Compliance Order, at 28 (Emphasis in Original)

1 Thus, although the Board used the consideration of markets as an example of the type of
2 factor which appeared to be inapplicable to GMA's mandate to maintain and enhance the
3 commercial forest industry, as the Board also did with the availability of water supplies, the
4 Board's conclusion that Kittitas County's designation criteria failed to comply with RCW
5 36.70A.020(8), .060, and .170 was not based solely on this single, isolated criterion – as
6 AFLC appears to believe. Rather, the determination of non-compliance was based on the
7 County's failure to develop criteria which adequately reflects the GMA's mandate to
8 conserve these lands and maintain and enhance the industry which relies on them. This
9 failure stemmed not only from the inclusion of inapplicable criteria but also the County's use
10 of permissive, non-inclusive terminology, the duplicity of factors, the lack of objective
11 standards for applying criteria, and developing an unclear designation process.¹⁰

12 V. ORDER

13 Based upon a review of the Board's February 4, 2009, Partial Second Order RE:
14 Compliance and Participant American Forest Land Company's Motion for Clarification and
15 Reconsideration, the Board **DENIES** reconsideration of the Board's conclusion set forth in
16 the February 2009 Order that the County's action, with respect to Legal Issue No. 3,
17 continues to be GMA-non-Compliant.

18 The Board's conclusion set forth in the February 4, 2009, Partial Second Order RE:
19 Compliance, finding Kittitas County's designation and de-designation process for its LTCS
20 Forest land non-compliance, is affirmed.

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25 ¹⁰ February 2009 Partial 2nd Compliance Order, at 19-25.

1 No other aspect of the Board's February 4, 2009, Partial Second Order RE:
2 Compliance is modified by this Order.

3 **SO ORDERED** this 2nd day of March 2009.

4 EASTERN WASHINGTON GROWTH MANAGEMENT
5 HEARINGS BOARD

6 _____
7 Joyce Mulliken, Board Member

8 _____
9 John Roskelley, Board Member

10 _____
11 Raymond Paoella, Board Member

12 **NOTE:** This order constitutes a final order as specified at WAC 242-02-832(4). Orders on
13 Reconsideration are not subject to additional motions for reconsideration. WAC 242-02-
14 832(3).