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

CONCERNED FRIENDS OF FERRY COUNTY  
and DAVID ROBINSON

Petitioner,

v.

FERRY COUNTY,

Respondent.

Case No. 97-1-0018

SEVENTH ORDER ON  
COMPLIANCE

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**I. SYNOPSIS**

12 On December 1, 2008, Ferry County (County) enacted Ordinance Nos. 08-01, entitled  
13 "An Ordinance to Adopt the Ferry County Comprehensive Plan and the Curlew Lake Sub  
14 Area Plan"; Ordinance No. 08-02, entitled "Ferry County Critical Areas Ordinance"; and  
15 Ordinance No. 08-03, entitled "Ferry County Development Regulations Ordinance" and  
16 claims to have come into compliance with the Eastern Washington Growth Management  
17 Board's (Board) orders. The County added significant language and eliminated definitions  
18 and other language to "fix the legal deficiencies determined in the last orders of the  
19 board,"<sup>1</sup> including Case No. 97-1-0018.

20 Petitioner, David Robinson, on behalf of Concerned Friends of Ferry County,  
21 disagrees the County fixed the deficiencies and claims the County failed to bring itself into  
22 compliance with the Board's previous orders, specifically the County's failure to use Best  
23 Available Science (BAS) in reaching its conclusion concerning habitats and species of local  
24 importance, along with other noted deficiencies and changes in the Comprehensive Plan  
and Critical Areas Ordinance. Petitioner also argued the County eliminated significant and

25 <sup>1</sup> Ferry County's Statement of Action to Comply at 1 (Dec. 16, 2008).

1 important definitions and language from these documents which is as significant to  
2 compliance as the language added.

3 After thorough study of the submitted briefs and exhibits, consideration of testimony  
4 provided by the parties at the seventh compliance hearing on February 2, 2009,  
5 investigation of past Hearings Boards cases, and in light of the Growth Management Act  
6 (GMA), the Board finds the County: (1) failed to use BAS to designate, or in the alternative,  
7 support its decision not to designate in light of the scientific evidence in the record, fish and  
8 wildlife habitat and species, in particular the County's habitats and species of local  
9 importance; (2) failed to use BAS to protect mapped habitat represented by polygon data for  
10 low intensity land uses; and (3) failed to protect endangered, threatened and sensitive  
11 species (ETS species) with validated point and polygon observations by requiring WDFW, a  
12 state agency without authority to enforce local CAO provisions, to validate point  
13 observations and polygon observations.

## 14 **II. PROCEDURAL HISTORY**

15 On July 31, 1998, the Eastern Washington Growth Management Hearings Board  
16 issued its Final Decision and Order for Case No. 97-1-0018.

17 On May 23, 2000, the Board issued its Second Order on Compliance in the above-  
18 entitled matter. The Board directed Ferry County to (1) designate fish and wildlife habitat  
19 and species utilizing Best Available Science within 120 days of the Order, and (2) develop  
20 policies for designation of frequently flooded areas and aquifer recharge areas utilizing BAS  
21 within 90 days of the Order.

22 On January 26, 2001, the Board issued its Third Order on Compliance in the above  
23 matter and found the County out of compliance in all issues.

24 On June 21, 2002, the Board issued its Fourth Order on Compliance and entered a  
25 finding that Ferry County had brought themselves into compliance on issues concerning  
26 frequently flooded areas and aquifer recharge areas. A mistake was made in the drafting of  
the order. While the Board found that Ferry County complied with the Board Order

1 regarding frequently flooded areas and aquifer recharge areas, the order mistakenly  
2 declared Ferry County has complied with all issues in Case No. 97-1-0018.

3 On January 24, 2003, the Board issued its Amended Fourth Order on Compliance  
4 correcting the mistake made in drafting the Fourth Order.

5 On December 23, 2002, the Board issued its Fifth Order on Compliance and ordered  
6 a continuance in this case pending an order from the Court of Appeals.

7 On June 9, 2008, the Board issued its Sixth Order on Compliance finding Ferry  
8 County in continuing non-compliance for the County's failure to identify endangered,  
9 threatened and sensitive species for which habitat will be protected.

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

12 On February 2, 2009, the Board held the seventh compliance hearing in this matter.  
13 Present were John Roskelley, Presiding Officer, and Board Members Joyce Mulliken and  
14 Raymond Paoella. Present for Petitioners was David Robinson. Present for Respondent was  
15 Steve Graham.

### 16 **III. STANDARD OF REVIEW**

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

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

24 The Board is charged with adjudicating GMA compliance, and,  
25 when necessary, with invalidating noncompliant comprehensive  
26 plans and development regulations. RCW 36.70A.280, .302. The  
Board "shall find compliance unless it determines that the action  
by the state agency, county or city is clearly erroneous in view of  
the entire record before the county, or city is clearly erroneous

1 in view of the entire record before the Board and in light of the  
2 goals and requirements of [the GMA]." RCW 36.70A.320(3). To  
3 find an action "clearly erroneous" the Board must be "left with  
4 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).

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

14 The Board has jurisdiction over the subject matter of the Petition for Review. RCW  
15 36.70A.280(1)(a).

#### 16 IV. DISCUSSION

##### 17 Parties Positions:

##### 18 Respondent's Statement of Action to Comply:

19 On December 1, 2008, Ferry County enacted Ordinance No. 08-01, entitled "An  
20 Ordinance to Adopt the Ferry County Comprehensive Plan and the Curlew Lake Sub Area  
21 Plan"<sup>2</sup>, and Ordinance No. 08-02, entitled "Ferry County Critical Area Plan."<sup>3</sup> According to  
22 the County, Ordinance No. 08-01 "resolves this issue for the Comprehensive Plan"<sup>4</sup> and  
notes specifically the revision of Comprehensive Plan (CP) Chapter 7.4.14 and Chapter 4.1.

23 \_\_\_\_\_  
24 <sup>2</sup> Ferry County's Statement of Action to Comply at 1, Dec. 18, 2008.

25 <sup>3</sup> Id.

26 <sup>4</sup> Id at 3.

1 The County claims Chapter 7.4.17 designates the Ferry County Critical Areas  
2 Ordinance (CAO) to “define, classify, designate and regulate fish and wildlife habitat  
3 conservation areas”<sup>5</sup> and recognizes the official Federal and State sources of the listing of  
4 ETS species. According to the County, Chapter 4.1 includes a definition of “Primary  
5 Association Area”<sup>6</sup> based on the Community, Trade and Economic Department’s (CTED)  
6 Model Ordinance.

7 Ordinance No. 08-02 revises the CAO at Section 3.0 and Section 9.01 and, again  
8 according to the County, brings the County into compliance on this issue of designating ETS  
9 species by defining Primary Association Area and recognizing the official Federal and State  
10 sources for ETS species and guidance from the WDFW.<sup>7</sup>

**Petitioner’s Brief:**

11 Petitioners, Concerned Friends of Ferry County and David Robinson, claim the County  
12 “has accumulated ample scientific evidence”<sup>8</sup> to determine critical areas which need  
13 protecting and the best way to implement these protections. Petitioners cite to *Easy, et al.*  
14 *v. Spokane County*<sup>9</sup> to emphasize the factors identified by the Board it will review to  
15 determine whether BAS has been used in developing the County’s CAO.

16 Petitioners agree that the issue of a Habitat Management Plan to protect Fish and  
17 Wildlife Habitat Conservation Areas in the current CAO “has largely been addressed in a  
18 GMA-compliant manner,”<sup>10</sup> but for a few revisions, and claim the County’s current CAO was  
19 insufficient to: A.) protect all priority species and habitats; B.) protect Types 4 and 5  
20 streams and adopt adequate buffers to protect water quality; and C.) protect point and  
21 polygon data wildlife habitats.

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22 <sup>5</sup> Id.

23 <sup>6</sup> Id.

24 <sup>7</sup> Id at 4.

25 <sup>8</sup> Petitioner’s Brief For 7<sup>th</sup> Compliance Hearing at 2, Jan. 5, 2009.

26 <sup>9</sup> *Easy, et al. v. Spokane County*, EWGMHB Case No. 96-1-0016, FDO (April 10, 1998).

<sup>10</sup> Petitioner’s brief at 3.

1 Petitioners claim the new CAO has a Habitat Management and Mitigation Plan used  
2 to protect fish and wildlife habitat conservation areas, but is inadequate per (former) WDFW  
3 Biologist Kevin Robinette's suggestions because the County's CAO does not have a "well-  
4 written habitat management plan."<sup>11</sup>

5 Petitioners argue the present CP fails to define or describe wildlife species and  
6 habitat conservation areas using the "State's DF&W Priority Habitat and Species"<sup>12</sup> and left  
7 out previously inserted descriptive scientific language. Petitioners claim the County failed to  
8 include scientific evidence in the most recent CP that was included in the earlier CP,  
9 including the Priority Habitat and Species (PHS) system, which serves as the foundation on  
10 which the CAO is built, but acknowledges the PHS data is in the present CAO.<sup>13</sup>

11 Petitioners argue the County has "jettisoned"<sup>14</sup> the WDFW PHS Program and PHS  
12 list and, although not required to adopt the WDFW PHS classification to designate and  
13 protect fish and wildlife species and habitat, the County failed to support a reasoned  
14 process through BAS "to justify its dramatic reduction of the number of designated species  
15 to be protected."<sup>15</sup> Petitioners claim the County failed to not only list the ten ETS species in  
16 Ferry County, but also did not state it would use the PHS mapping and system to protect  
17 PHS in the CP. Petitioners contend the County's CP amendments reject BAS and weaken the  
18 overall protective scheme the County has established in other sections of the CP and CAO.  
19 Petitioners claim the County's continued reluctance to consider and incorporate BAS has  
20 resulted in the continued degradation of critical areas.

21 **Respondent's Response Brief:**

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

23 <sup>12</sup> Id at 5.

24 <sup>13</sup> Id.

25 <sup>14</sup> Id. at 8.

26 <sup>15</sup> Id.

1 In response, the County argues that only one issue in this case was out of  
2 compliance, which was "the County's failure to identify endangered, threatened and  
3 sensitive species for which habitat will be protected."<sup>16</sup> Petitioner's two "extraneous claims,  
4 protection of frequently flooded areas and aquifer recharge areas, and failure to designate  
5 Priority Habitats and Species (PHS) are inappropriate and were resolved earlier by the  
6 County."<sup>17</sup> The County dismisses the frequently flooded areas and aquifer recharge areas  
7 issue in one paragraph, but delves into the PHS issue extensively over many pages and is  
8 paraphrased in the following paragraphs.

9 The County claims Petitioner is trying to equate the term "Priority Habitats and  
10 Species with the term "Endangered, Threatened and Sensitive Species" (ETS Species),  
11 indicating the two are requirements of the GMA. The County contends that under WAC 365-  
12 190-080 habitat protection is required for ETS Species, but optional for the "other  
13 components of the WDFW/PHS program."<sup>18</sup> According to the County, WAC 365-190-  
14 080(5)(a) does not require or include WDFW PHS areas for protection. In addition, WAC  
15 365-190-080 includes permissive phrases, such as "Counties and cities **should** determine  
16 which habitats and species are of local importance,"<sup>19</sup> and "While these priorities are those  
17 of the department, they and the data on which they are based **may** be considered..."<sup>20</sup> The  
18 County argues that if state agencies feel strongly that the PHS program should be  
19 mandatory, then they should address it in administrative rule-making. The County also  
20 contends the state agencies can petition the County for adoption of habitat and species of  
21 local importance, but have not done so.

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22 <sup>16</sup> EWGMHB Sixth Order on Compliance at 4 (June 9, 2008).

23 <sup>17</sup> Respondent's Memo for Seventh Compliance Hearing at 1-6.

24 <sup>18</sup> Id. at 3.

25 <sup>19</sup> WAC 365-190-080(5).

26 <sup>20</sup> WAC 365-190-080(5)(c)(ii).

1           The County claims the recently adopted CAO recognizes and designates all of the  
2 required fish and wildlife habitat conservation areas which apply in Ferry County. The  
3 County argues that the Board used the terminology "designation of priority species and  
4 habitat areas", in finding the County out of compliance on September 30, 1999, and  
5 December 23, 2002, but claim these findings referred to the fact that the County had  
6 chosen to ignore species endemic to the area deemed threatened or endangered without  
7 the inclusion of BAS.<sup>21</sup> The County contends the Board has "correctly distinguished between  
8 "priority" species and "ETS" species,<sup>22</sup> in its First Order on Compliance for Case No. 06-1-  
0003.<sup>23</sup>

9           As to the other issues, the County claims the Petitioner states that the proposed CAO  
10 does not sufficiently protect stream Types 4 and 5. The County contends the CAO protects  
11 stream Types 4 and 5 by setting standard buffer widths of 50 feet, which have been found  
12 compliant in Case Nos. 04-1-0007c and 06-1-0003. As to Petitioner's concern regarding  
13 mapped habitat areas represented as either point and polygon data, the County claims only  
14 moderate or high intensity land uses will require polygon mapping as low intensity use is  
15 located almost exclusively on public land and these uses are located in open space, forest  
16 and agricultural areas.

17           The County argues it has recognized that the listing of species is the prerogative of  
18 Federal and state wildlife agencies and this is reflected in its CP Section 7.4.17(1) and CAO  
19 Section 9.01. The County will use WDFW/PHS data products in identifying areas with which  
20 endangered, threatened and sensitive species have a primary association along with other  
21 tools. The County claims because species are added and deleted from the ETS list it will not  
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23 <sup>21</sup> Respondent's Memo at 5.

24 <sup>22</sup> Id. at 6.

25 <sup>23</sup> Mr. Graham is speculating as to the Board's intent and meaning of its Order. There is nothing in the record to  
26 corroborate his assumptions.

1 list them in the CAO, but acknowledges WDFW and the U.S. Fish and Wildlife Service as  
2 sources of currently applicable tables of listed species.

3 **Petitioner's Reply Brief:**

4 Petitioners contend the County failed to insert the actual words of the WDFW  
5 classification system, which the County claims to adopt. In addition, the Comprehensive  
6 Plan fails to mention the WDFW classification system and contends the species  
7 recommended by the WDFW has not been included in the CP or CAO. Petitioners claim the  
8 County has not shown any BAS in the record why species with Primary Association have not  
9 been listed.

10 Petitioners further assert that previously inserted language in earlier versions of the  
11 CP concerning priority habitats and species have been eliminated from the current version  
12 of the CP and, in fact, reject the WDFW/PHS program, stating that no WAC or statute  
13 requires following WDFD recommendations. Petitioners argue that the CP sets the  
14 foundation for the CAO, not the other way around and the County fails to do this.

15 Petitioners claim the County's process "appears to defer entirely to a nomination process"  
16 and "does not provide protection to those habitats and species currently known to exist in  
17 Ferry County."<sup>24</sup> Petitioners argue the WDFW strongly encouraged "the county to revisit its  
18 BAS on the record and designate habitats and species of local importance pro-actively."<sup>25</sup>  
19 According to the Petitioners, the County has not shown how it will protect listed species of  
20 local importance. Furthermore, Petitioners claim the County's CAO, Section 9.04 uses the  
21 WDFW to validate every primary association and cites to Section 9.04 and Exhibit #6.

22 Petitioners contend the County's CP does not reference any mechanism for a future  
23 Memorandum of Agreement with the WDFW and does not mention PHS. Petitioners again  
24 reference Section 9.04.

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25 <sup>24</sup> Petitioner's Reply Brief for 7<sup>th</sup> Compliance Hearing at 5 (Jan. 27, 2009).

26 <sup>25</sup> Id. at 5; Exhibit #34.

1 In a separate issue, Petitioners argue the County is required to use BAS to protect  
2 rivers, streams and lakes and maintain current conditions, but fails to adopt the typing  
3 system currently used by the DNR. Petitioners cite to two exhibits and language found in  
4 Section 7.4.17 of the CP.

5 **Board's Discussion and Analysis:**

6 **BAS: Habitats and Species of Local Importance**

7 The FDO in this case ordered Ferry County "to bring its comprehensive plan into  
8 compliance with the Growth Management Act, specifically RCW 36.70A.172..." and  
9 concluded that the County's "Second Amended Comprehensive Plan (SACP) is not in  
10 compliance with the Growth Management Act."<sup>26</sup> A subsequent Second Order on  
11 Compliance issued May 23, 2000, ordered the County to "(1) designate fish and wildlife  
12 habitat and species utilizing Best Available Science (BAS) within 120 days of the Order." The  
13 Board's Fourth Order on Compliance did not did not address the issues of species and  
14 habitat because both parties acknowledged the County was still out of compliance in this  
15 issue. The Sixth Order on Compliance stated the remaining issue to be "the County's failure  
16 to identify endangered, threatened and sensitive species for which habitat will be  
17 protected."<sup>27</sup>

18 Despite the changing language through numerous orders, the initial order from the  
19 FDO remains the same. In designating critical areas, Ferry County shall include BAS in  
20 developing policies and development regulations to protect the functions and values of  
21 critical areas.

22 The GMA requires counties to designate critical areas<sup>28</sup> and adopt development  
23 regulations protecting these designated critical areas under RCW 36.70A.170 and

24 <sup>26</sup> *Concerned Friends of Ferry County v. Ferry Co.*, EWGMHB Case No. 97-1-0018, FDO (July 31, 1998).

25 <sup>27</sup> *Concerned Friends of Ferry County and David Robinson v. Ferry Co.*, EWGMHB Case No. 97-1-0018, Sixth Order  
26 on Compliance (June 9, 2008).

<sup>28</sup> RCW 36.70A.040(3)(b).

1 36.70A.060. Counties are also required to protect critical areas under the Rural Element<sup>29</sup> in  
2 their comprehensive plan. Counties shall designate critical areas where appropriate<sup>30</sup> and  
3 shall include best available science in developing policies and development regulations to  
4 protect the functions and values of critical areas.<sup>31</sup> Critical areas include (a) wetlands; (b)  
5 areas with a critical recharging effect on aquifers used for potable water; (c) **fish and**  
6 **wildlife habitat conservation areas**; (d) frequently flooded areas; and (e) geologically  
7 hazardous areas.<sup>32</sup>

8 The County has been found in compliance in those issues concerning frequently  
9 flooded areas and critical aquifer recharge areas, therefore, the one remaining issue in Case  
10 No. 97-1-0018 is the County's failure to designate and protect (c) fish and wildlife habitat  
11 conservation areas using BAS.<sup>33</sup> **WAC 365-190-080(5)** defines fish and wildlife habitat  
12 conservation areas to include (among others): **(1) Areas with which endangered,**  
13 **threatened, and sensitive species have a primary association; and (2) habitats**  
14 **and species of local importance.**

15 To determine if the County is in compliance with the remaining issue, and has  
16 protected and designated fish and wildlife habitat conservation areas using BAS, the Board  
17 looks to two of the adopted ordinances and the science used by the County to make its  
18 decision. On December 1, 2008, the County enacted three ordinances: (1) Ordinance No.  
19 08-01 entitled "An Ordinance to Adopt the Ferry County Comprehensive Plan and the  
20 Curlew Lake Sub Area Plan"; (2) Ordinance No. 08-02 entitled "Ferry County Critical Areas  
21 Ordinance"; and (3) Ordinance No. 08-03 entitled "Ferry County Development Regulations  
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23 <sup>29</sup> RCW 36.70A.070(5).

24 <sup>30</sup> RCW 36.70A.170

25 <sup>31</sup> RCW 36.70A.172.

26 <sup>32</sup> RCW 36.70A.030(5).

<sup>33</sup> RCW 36.70A.172(1).

1 Ordinance. Ordinances 08-01 and 08-02 pertain to fish and wildlife habitat conservation  
2 areas.

3 According to the County, Ordinance 08-01 resolves the last remaining issue for the  
4 Comprehensive Plan by adopting revisions to Chapter 7.4.17, which states the County's CAO  
5 "shall define, classify, designate and regulate fish and wildlife habitat conservation areas"<sup>34</sup>  
6 and then lists six areas that shall be considered fish and wildlife conservation areas,  
7 including: (1) Areas with which endangered, threatened and sensitive species have a  
8 primary association; (2) Habitats and species of local importance; (3) Naturally occurring  
9 ponds under 20 acres that provide fish or wildlife habitat; (4) Rivers, streams, and lakes;  
10 (5) Lakes, ponds, streams, and rivers planted with game fish by a governmental or Tribal  
11 entity; and (6) State Natural Area Preserves and Natural Resource Conservation Areas.<sup>35</sup>

12 Ordinance 08-01 also includes a definition of "Primary Association Area" based on the  
13 CTED Model Ordinance and is defined, in part, as, "[T]he area used on a regular basis by,  
14 or in close association with, or is necessary for the proper functioning of the habitat of an  
15 endangered, threatened or sensitive species..." In conjunction with changes in the CP, the  
16 County also amended sections of its CAO with Ordinance 08-02, including CAO Section 3.0  
17 Definitions, to include the same definition of Primary Association Area; and Section 9.01  
18 Classification, Sub-section 1, which recognizes the official Federal and State sources for  
19 listing of species as endangered, threatened or sensitive, and also recognizes guidance from  
20 the WDFW.

21 The County claims that under WAC Chapter 365-190 that only habitat protection is  
22 required for endangered, threatened, and sensitive species, but "optional for the other  
23 components of the WDFW/PHS program"<sup>36</sup> claiming WAC 365-190-080(5) does not include  
24 required protection for WDFW priority habitats and species, and provides

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25 <sup>34</sup> Ferry County Comprehensive Plan and Curlew Lake Sub Area Plan, Chapter 7.4.17

26 <sup>35</sup> The Board notes these fish and wildlife conservation areas are similar to those listed in WAC 365-190-080(5), except  
number (4), which deviates from the WAC listing at (5)(vi) Waters of the State.

<sup>36</sup> Respondent's Memo for Seventh Compliance Hearing at 3.

1 optional/permissive "sources and methods" for counties and cities to consider other than  
2 the WDFW PHS program.

3 The Board disagrees. The County's reading of WAC 365-190-080(5) fails to consider  
4 that BAS is required to be included to justify its decision whether or not to protect and  
5 designate fish and wildlife habitat conservation areas, which include "habitats and species  
6 of local importance. The County needs to keep in mind WAC 365-190 is a guideline adopted  
7 by the State to guide the classification of critical areas, the intent of which is to assist  
8 counties and cities in designating the classification of critical areas under RCW  
9 36.70A.170.<sup>37</sup> In other words, the RCW's control. The optional/permissive "sources and  
10 methods" under WAC 365-190-080(5)(c) allows counties to use other sources for BAS  
11 "other than the WDFW PHS program," not completely ignore habitats and species of local  
12 importance, particularly if the County has the science available in the record that shows  
13 certain habitat and species of local importance in the County are "candidates", a step from  
14 ETS listing. That science was submitted by the WDFW and not refuted by any other science  
15 in the record.

16 To reiterate the key language, the County is required by RCW 36.70A.172 to include  
17 BAS in developing policies and development regulations to protect the functions and values  
18 of critical areas. If the County chooses to disagree with or ignore scientific  
19 recommendations and resources made by state agencies, which it may, then the County  
20 must unilaterally develop and obtain valid scientific information.<sup>38</sup>

21 Critical areas are, among other areas, fish and wildlife habitat areas,<sup>39</sup> which include  
22 not only areas with which endangered, threatened, and sensitive species have a primary  
23 association, but habitats and species of local importance. If habitats and species of local

24 <sup>37</sup> RCW 36.70A.050.

25 <sup>38</sup> *Ferry County v. Concerned Friends of Ferry County*, 155 Wn. 2d 824 (2005).

26 <sup>39</sup> WAC 365-190-080(5).

1 importance weren't required elements to be protected, they would not have been listed  
2 under fish and wildlife Habitat areas.

3 In a case with similar circumstances, the Western Board in *Clark County Natural*  
4 *Resources Council (CCNRC) et al. v. Clark County*,<sup>40</sup> found Clark County out of compliance  
5 for failing to provide reasoned analysis for their omission of scientific evidence to refute the  
6 need for designating habitat and species of local importance:

7 While reliance upon DFW priority habitat and species designations is one of  
8 the strong points of the ordinance, the failure of the County to also include  
9 species of local importance results in non-compliance with the Act. WAC 365-  
10 190-080(5)(a)(ii) and (c) (ii) discusses the advisability and necessity for  
11 designating fish and wildlife habitat conservation areas of local importance.

12 **In this record scientific evidence, as opposed to general opinion**  
13 **evidence, was submitted in support of designations of FWHs of local**  
14 **importance.** The County submitted that evidence to DFW only for the  
15 purpose of determining whether the designations fell within the definitions  
16 and criteria of "priority" areas. **The fact that the local areas did not**  
17 **qualify under PHS definitions and criteria does not absolve the**  
18 **County of providing for their designations, particularly because of**  
19 **the BAS in this record.** There was no scientific evidence in the record to  
20 refute the need for designation of these areas. There was no reasoned  
21 analysis for their omission. Clark County has not complied with the Act  
22 because of the failure to include FWHs of local importance designations.  
23 (Board highlights).

24 The Western Board continued this theme in their compliance order issued later in the  
25 same case and speaks, not only to the requirement for science, but also to the nomination  
26 process, which is the "future designation" mentioned below:

Where the scientific evidence in support of designations of habitats of local  
importance was unrefuted and only a future designation process was  
established, compliance was not achieved. <sup>41</sup>

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24 <sup>40</sup> CCNRC, et al. v. Clark County, et al., WWGMHB Case No. 96-2-0017, FDO (Dec. 6, 1996)

25 <sup>41</sup> CCNRC, et al. v. Clark County, et al., WWGMHB Case No. 96-2-0017, Compliance Order (Nov. 2, 1997).

1 In *Easy, et al. v. Spokane County*,<sup>42</sup> the Board identified factors it would review to  
2 determine whether BAS has been used in drafting ordinances to protect critical areas. They  
3 are: (1) the scientific evidence contained in the record; (2) whether the analysis by the local  
4 decision-makers of the scientific evidence and other factors involved a reasoned process;  
5 and (3) whether the decision made by the local government was within the parameters of  
6 the GMA as directed by the provisions of RCW 36.70A.172(1).

7 As to (1) scientific evidence, the Board finds that the only scientific evidence in the  
8 record considered by the County for fish and wildlife habitat conservation areas was  
9 submitted on the County's request by WDFW.<sup>43</sup> This exhibit, which contains a table with the  
10 heading, "WDFW Priority Habitats and Species (PHS) List (of) species occurring in Ferry  
11 County with Federal and/or State Listing Status (TES)",<sup>44</sup> lists 29 priority habitats and  
12 species found in Ferry County, 20 of which are federal or state candidate species, meaning  
13 they are not ETS species, but priority species. Without protection now, these species are  
14 highly vulnerable to becoming ETS species. A nomination process for habitats and species  
15 of local importance is necessary for listing those habitats and species which become  
16 candidates in the future, not as the sole process to protect those already in danger. It is not  
17 the responsibility of the WDFW or any other state agency, as suggested by the County, to  
18 petition the County to adopt a habitat, species or both.<sup>45</sup> The GMA specifically requires the  
19 County to protect fish and wildlife conservation areas, thus ETS species and habitats and  
20 species of local importance.

21 In a more recent letter sent to the County by WDFW on July 10, 2008, Karin Divens,  
22 PHS/GMA Biologist, reiterated in very strong language that the CAO's Classification section

23 <sup>42</sup> *Easy, et al. v. Spokane County*, EWGMHB Case No. 96-1-0016, FDO (April 10, 1998).

24 <sup>43</sup> Exhibit 24; letter from WDFW, February 28, 2006.

25 <sup>44</sup> Additional WDFW information: "Priority Habitats and Species Database" and "WDFW Fish and Wildlife Priority  
26 Habitats and Species Program", and "WDFW Heritage Database".

<sup>45</sup> Respondent's Memo at 4.

1 and Designation section "fail to designate the majority of locally vulnerable species and their  
2 associated habitats found in Ferry County."<sup>46</sup> Significantly, the Board notes that WDFW  
3 acknowledges the County has designated endangered, threatened and sensitive species,  
4 but points out that the classification of "habitats and species of local importance" is deferred  
5 entirely to a nomination process.<sup>47</sup> Furthermore, given that the GMA is forward-looking  
6 legislation, WDFW expresses concern that if the County relies exclusively on a nomination  
7 process, in other words, fails to act pro-actively, habitats and species of local importance  
8 may be irreparably damaged and species may become ETS species before they can be  
9 protected. Ms. Diven's statement below is followed by the WDFW's strong recommendation  
10 that the 20 candidate species and their associated habitats be protected by the CAO as  
locally important:

11 Reliance on a future, potential nomination of local habitats or species does not  
12 provide protection to those habitats and species currently known to exist in  
13 Ferry County, based on BAS. We strongly encourage the county to revisit its  
14 BAS on record and designate habitats and species of local importance pro-  
actively.<sup>48</sup>

15 Therefore, as to scientific evidence and BAS, the County fails to obtain valid science  
16 when it disagreed with or chose to ignore the science provided by the WDFW that shows  
17 the County has 29 species which have a primary association with the County and need  
18 protection through policies in the CP, as well as designation in the CAO. There is no citation  
19 to the record by the County of any science which would lead the County to disregard the  
20 WDFW recommendation to designate habitats and species of local importance.

21 As to the second factor, (2) a reasoned process by the decision makers in evaluating  
22 the scientific record, the Board can only conclude from the record, or lack thereof, that no  
23 additional scientific analysis was done. The County is required to include BAS in its

24 <sup>46</sup> Exhibit 6; letter from WDFW, July 10, 2008.

25 <sup>47</sup> Id. at 2.

26 <sup>48</sup> Id. at 3.

1 designation and protection of fish and wildlife habitat conservation areas. As mentioned  
2 under scientific evidence, the only source of BAS used was provided by the WDFW, which  
3 the County discarded by interpreting WAC 365-190-080(5) as allowing it to avoid altogether  
4 protecting and designating habitats and species of local importance without scientific  
5 analysis.

6 As to the third factor, (3) whether the County followed RCW 36.70A.172, the Board  
7 finds the County failed to protect and designate habitats and species of local importance as  
8 directed by the GMA. The County may have eliminated the WDFW PHS program from its CP  
9 and CAO, but it is still required to include BAS in protecting and designating fish and wildlife  
10 habitat conservation areas, including habitats and species of local importance. Setting aside  
11 the County's protection language for ETS species, the Board agrees with the Petitioner that  
12 several of the County's amendments, including elimination of key language from previous  
13 versions of its CP and CAO, weaken the protection and designation of fish and wildlife  
14 habitat conservation areas.

**Polygon Data: Low Intensity**

15 The Petitioners claim Section 9.04 of the CAO should "protect wildlife habitats  
16 represented as either point or polygon data for low, moderate and high intensity land  
17 use."<sup>49</sup> The County chose to eliminate polygon mapping, thus habitat protection, for low  
18 intensity uses, stating that the Planning Commission and the BOCC "felt that there would  
19 not be the need for habitat mitigation and management plans for low-intensity uses in the  
20 polygon-mapped areas,"<sup>50</sup> claiming there's only one ETS species for which Ferry County  
21 habitat is currently mapped, the lynx, and low intensity uses are primarily open space,  
22 forest practices and agricultural activities for which County permits are not applicable.  
23

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24 <sup>49</sup> Petitioner's Brief at 4.

25 <sup>50</sup> Respondent's Memo at 7.

1 Polygon and point data are based on actual field surveys and observations of the  
2 species. The science is irrefutable. WDFW claims if a habitat is mapped, then a species  
3 inhabits or has been known to inhabit that area.

4 Again, the Board failed to find any BAS or reasoned scientific analysis included by the  
5 County for it to reach its conclusion that polygon data for low intensity use was not  
6 necessary. While the County feels "Section 9.04 adequately handles the subject of WDFW  
7 habitat mapping, for both point locations and polygons," the GMA requires science. Species  
8 are not static, they are generally mobile and "this should be accounted for in any resource  
9 protection ordinance."<sup>51</sup> Locations of nest sites, burrows, roosts and other critical habitat  
10 can change over time. Thus, it is essential the County protect all types of intensity land use,  
11 including low intensity, which by its very nature has a high probability of ETS species and  
12 habitats, whether now or in the future. The Board has held that failing to protect both point  
13 and polygon data violates the GMA.<sup>52</sup> Section 9.04(2) of the County's CAO is out of  
14 compliance with the GMA for failing to use BAS to protect mapped habitat represented by  
15 polygon data for low intensity land uses.

15 **Point and Polygon Validation:**

16 As to point and polygon validations in Section 9.04, the Board finds this section is out  
17 of compliance with RCW's 36.70A.060 and 36.70A.172 for failure to protect ETS species by  
18 requiring WDFW, a state agency without authority to enforce local CAO provisions (or any  
19 Ferry County code provisions, even if they relate to fish and wildlife), to validate point  
20 observations and polygon observations, which would only then trigger protection  
21 measures.<sup>53</sup> The WDFW provides technical assistance and data to counties and cities "to  
22 support local fish and wildlife habitat protection under the Growth Management Act," not  
23

24 <sup>51</sup> Exhibit 6 at 5.

25 <sup>52</sup> *Futurewise v. Stevens County*, EWGMHB Case No. 05-1-0006, FDO (Jan. 13, 2006).

26 <sup>53</sup> Letter from WDFW to Virginia Sweetland,; Exhibit 31 (Jan. 12, 2009).

1 regulate or enforce local jurisdiction's CAO's.<sup>54</sup> As stated in the WDFW's January 12<sup>th</sup> letter  
2 to Ms. Sweetland, CAO implementation is the responsibility of the County's, not that of the  
3 WDFW.

4 The WDFW indicated in another letter written July 10, 2008 by PHS/GMA Biologist  
5 Karin Divens similar concerns:

6 This same perspective applies to the use of Validated Point Observations and  
7 Validated Polygon Observations. The WDFW PHS data is updated regularly, is  
8 considered BAS, and is most up to date knowledge we can provide about  
9 species and habitats. WDFW regularly updates the data, which is available to  
10 Ferry County and landowners upon request. **WDFW will not be able to  
11 formally validate every point and polygon in PHS on a case-by-case  
12 basis.** If the point or polygon appears in PHS, it is valid.<sup>55</sup> (Board emphasis).

13 The County asks the Board to "pay particular attention" to Exhibit 32, as well.<sup>56</sup>  
14 Exhibit 32 is a letter from WDFW's Karin Divens explaining WDFW's concerns with the  
15 language regarding the validation of the department's Priority Habitat and Species (PHS)  
16 data in Section 9.04 of the CAO. As an option to resolving the outstanding issues, the  
17 WDFW suggests a Memorandum of Agreement (MOA) for an interim agreement to be put in  
18 place "until such time that the CAO can be amended."<sup>57</sup> The County, in its brief, agrees this  
19 MOA "...could provide the mechanism for the agencies to work cooperatively to implement  
20 the current language of the CAO in a manner which meets the requirements of both  
21 agencies,"<sup>58</sup> but has not, as yet, acted to adopt this MOA. The Board sees the MOA between  
22 the County and WDFW, which was attached to the letter, as an *interim step* to provide  
23 protection for habitats and species as indicated in Ordinance 08-02 and to provide clear and  
24 consistent guidance for land use planning. But, until the CAO is amended to stipulate that

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25 <sup>54</sup> Id.

26 <sup>55</sup> Letter from WDFW to Irene Whipple, Planning Director, Ferry County; Exhibit 6 (July 10, 2008).

<sup>56</sup> Respondent's Memo at 8.

<sup>57</sup> Letter from WDFW to Virginia Sweetland; Exhibit 32 (Jan. 13, 2009).

<sup>58</sup> Respondent's Memo at 8.

1 the County is the regulatory agency and responsible for enforcing its own code provisions,  
2 Section 9.04, as written, is out of compliance with the GMA.

3 **Conclusion:**

4 The Board finds and concludes: (1) the County failed to designate, or in the  
5 alternative, support its decision not to designate in light of the scientific evidence in the  
6 record, fish and wildlife habitat and species utilizing Best Available Science, in particular the  
7 County's habitats and species of local importance; (2) the County failed to include BAS to  
8 protect mapped habitat represented by polygon data for low intensity land uses.; (3) the  
9 County is out of compliance with the GMA for requiring WDFW, a state agency without  
10 authority to enforce local CAO provisions, to validate point observations and polygon  
11 observations in Ordinance 08-02, which would only then trigger protection measures. Thus,  
12 pursuant to RCW 36.70A.040(3)(b), RCW 36.70A.060(2), RCW 36.70A.170, RCW  
13 36.70A.172, and as designated in WAC 365-190-080(5), the Board finds the County in  
14 continuing non-compliance.

14 **IV. FINDINGS AND CONCLUSIONS**

- 15 1. Ferry County is a county located east of the crest of the Cascade  
16 Mountains and has chosen to plan under Chapter 36.70A.
- 17 2. Petitioners are citizens of Ferry County and participated in the adoption  
18 of Ordinance Nos. 08-01, 08-02, and 08-03 in writing and through  
19 testimony.
- 20 3. The Board issued its Final Decision and Order in this matter on July 31,  
21 1998 and found Ferry County out of compliance in two of the six  
22 issues; Issue No. 1, failure to protect critical areas; and Issue No. 2,  
23 failure to use BAS.
- 24 4. The Board held six compliance hearings since issuing the FDO. In the  
25 Sixth Compliance Order, the Board found the County in continuing non-  
26

1 compliance for failure to identify endangered, threatened and sensitive  
2 species for which habitat will be protected.

- 3 5. On December 1, 2008, the County enacted Ordinance No. 08-01,  
4 entitled "An Ordinance to Adopt the Ferry County Comprehensive Plan  
5 and the Curlew Lake Sub Area Plan"; Ordinance No. 08-02, entitled  
6 "Ferry County Critical Areas Ordinance"; and Ordinance No. 08-03,  
7 entitled "Ferry County Development Regulations Ordinance" and  
8 claimed to have come into compliance with the Board's orders.
- 9 6. The Board finds and concludes the County is out of compliance with  
10 RCW 36.70A.040(3)(c), RCW 36.70A.170, and RCW 36.70A.172 for  
11 failing to designate, or in the alternative, support its decision not to  
12 designate in light of the scientific evidence in the record, fish and  
13 wildlife habitat and species utilizing Best Available Science, in particular  
14 the County's habitats and species of local importance.
- 15 7. The Board finds and concludes the County is out of compliance with  
16 RCW 36.70A.172 for failing to include BAS to protect mapped habitat  
17 represented by polygon data for low intensity land uses, or in the  
18 alternative to justify its decision not to include polygon data for low  
19 intensity land uses in light of the scientific record.
- 20 8. The Board finds and concludes the County is out of compliance with  
21 RCW 36.70A.060, RCW 36.70A.170 and RCW 36.70A.172 for requiring  
22 validation by WDFW, a state agency without authority to enforce local  
23 CAO provisions, to validate point observations and polygon  
24 observations in Ordinance 08-02, Section 9.04(2), which would only  
25 then trigger protection measures.

#### 26 **IV. ORDER**

Based upon the Board's review of the GMA, prior decisions of the Hearings Boards,  
briefing and presentation by the parties at the February 2, 2009 compliance hearing, and

1 having discussed and deliberated on the matter, the Board enters a Finding of Non-  
2 compliance and directs the County to bring itself into compliance with the Board's Order  
3 and the GMA by **June 15, 2009, 120 days**, from the date of this Order.

- 4
- 5 • The Board establishes **June 15, 2009**, as the deadline for the County  
6 to take appropriate legislative action to comply with the GMA and this  
7 Order. The following schedule for compliance, briefing and hearing shall  
8 apply:
- 9 • The County shall file with the Board by **June 22, 2009, an original**  
10 **and four copies** of a **Statement of Actions Taken to Comply**  
11 (SATC) with the GMA, as interpreted and set forth in this Order. The  
12 SATC shall attach copies of legislation enacted in order to comply. The  
13 County shall simultaneously serve a copy of the SATC, with  
14 attachments, on the parties. **By this same date, the County shall**  
15 **file a "Remanded Index," listing the procedures and materials**  
16 **considered in taking the remand action.**
- 17 • By no later than **July 6, 2009<sup>59</sup>**, Petitioners shall file with the Board an  
18 **original and four copies** of Comments and legal arguments on the  
19 County's SATC. Petitioners shall simultaneously serve a copy of their  
20 Comments and legal arguments on the parties. In addition, the Board  
21 requests the parties send their briefing electronically in Microsoft Word  
22 format to: aandreas@ew.gmhb.wa.gov. The parties are requested to  
23 use Times New Roman or a similar font with the type size of 12 or  
24 larger, and line spacing shall be 1.5 or more.
- 25 • By no later than **July 20, 2009**, the County shall file with the Board an  
26 **original and four copies** of their Response to Comments and legal  
arguments. The County shall simultaneously serve a copy of such 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

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<sup>59</sup> \_\_\_\_\_, 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 New Roman or a similar font with the type size of 12 or larger, and line  
2 spacing shall be 1.5 or more.

- 3 • By no later than **July 27, 2009**, Petitioners shall file with the Board an  
4 **original and four copies** of their Reply to Comments and legal  
5 arguments. Petitioners shall serve a copy of their brief on the parties.  
6 In addition, the Board requests the parties send their briefing  
7 electronically in Microsoft Word format to: aandreas@ew.gmhb.wa.gov.  
8 The parties are requested to use Times New Roman or a similar font  
9 with the type size of 12 or larger, and line spacing shall be 1.5 or more.
- 10 • Pursuant to RCW 36.70A.330(1) and WAC 242-02-891<sup>60</sup> the Board  
11 hereby schedules a telephonic Compliance Hearing for **August 6,**  
12 **2009, at 10:00 a.m. The compliance hearing shall be limited to**  
13 **consideration of the Legal Issues found noncompliant and**  
14 **remanded in this Order.** The parties will call **360-407-3780**  
15 **followed by 727759 and the # sign.** Ports are reserved for: **Mr.**  
16 **Robinson and Mr. Graham.** If additional ports are needed please  
17 contact the Board to make arrangements.

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

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

22 **Reconsideration:**

23 Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this  
24 Order to file a petition for reconsideration. Petitions for reconsideration shall  
25 follow the format set out in WAC 242-02-832. The original and four (4) copies of  
26 the petition for reconsideration, together with any argument in support thereof,  
should be filed by mailing, faxing or delivering the document directly to the  
Board, with a copy to all other parties of record and their representatives. **Filing**  
**means actual receipt of the document at the Board office.** RCW 34.05.010(6),

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<sup>60</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 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite  
2 for filing a petition for judicial review.

3 **Judicial Review:**

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

7 **Enforcement:**

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

13 **Service:**

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

16 **SO ORDERED** this 13<sup>th</sup> day of February 2009.

17 EASTERN WASHINGTON GROWTH MANAGEMENT  
18 HEARINGS BOARD

19 \_\_\_\_\_  
20 John Roskelley, Board Member

21 \_\_\_\_\_  
22 Joyce Mulliken, Board Member

23 \_\_\_\_\_  
24 Raymond Paoella, Board Member