

STATE OF WASHINGTON  
GROWTH MANAGEMENT HEARINGS BOARD  
FOR EASTERN WASHINGTON

CONCERNED FRIENDS OF FERRY  
COUNTY,

Petitioner,

v.

FERRY COUNTY,

Respondent

Case No.: No. 97-1-0018

SECOND ORDER ON  
COMPLIANCE

I. PROCEDURAL HISTORY

In the Board's Final Decision and Order of July 31, 1998, the Board found Ferry County out of compliance and required Ferry County to bring its Comprehensive Plan into compliance with the Growth Management Act, specifically RCW 36.70A.172.

On December 7, 1998, Ferry County adopted an Amendment to Ferry County Ordinance 95-06 in response to the above Final Decision and Order.

On September 30, 1999, the Board issued an Order finding Ferry County continued to be out of compliance and directed Ferry County to:

1. Consider and include best available science in the designation of priority species and habitat areas;
2. Consider and include best available science in the policies for designation of frequently flooded areas and aquifer recharge areas.

On March 1, 2000, the Board received a letter from Ferry County Prosecutor Stephen Graham advising Ferry County adopted a critical areas section to their comprehensive plan and requesting a schedule and date for a compliance hearing in the above matter.

The Board held a compliance hearing on March 27, 2000 in Republic, Washington. All parties were present and represented.

## II. FINDINGS OF FACT

1. On February 28, 2000 Ferry County adopted Ordinance 95-06, amending Ferry County's Comprehensive Plan in response to this Board's Order on Compliance dated September 30, 1999.
2. The Washington State Department of Fish and Wildlife lists the following as endangered, threatened or sensitive species in Ferry County:

### Birds

Bald Eagle	Threatened
Ferruginous Hawk	Threatened
Peregrine Falcon	Endangered
Sandhill Crane	Endangered
Upland Sandpiper	Endangered
American White Pelican	Endangered

### Mammals

Lynx	Threatened
Pygmy Rabbit	Endangered
Gray Wolf	Endangered
Grizzly Bear	Endangered
Woodland Caribou	Endangered

### Fish

Bull Trout	Sensitive
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3. Ferry County's Comprehensive Plan, as amended on February 28, 2000, lists only the bald eagle and lynx as "specially protected species of Ferry County". This listing was done based on research by a biology consultant. Sec 7.4.13 FCCP.

## III. ISSUES

**Board Issue No. 1:** Has Ferry County complied with the Board's Order to include "Best Available Science" in the designation of priority species and habitat areas?

**Petitioners' position:** Petitioners argue that the adopted amendments reject Best Available Science and weaken the overall protective scheme Ferry County has established in other sections of the Comprehensive Plan and in the Interim Critical Areas Ordinance. Further, to now include language unsupported by Best Available Science or omit protections found in other vital sections results in a shaky foundation upon which development regulations will be built.

Petitioners contend "...the County rejected Best Available Science recommendations in the

amended Second Amended Comprehensive Plan without a sound scientific foundation, evidence of analysis, or a reasoned process. Sound scientific evidence was presented to decision makers. The county's "analysis" of scientific evidence was merely procedural, not substantive. There was not a reasoned process by which the substantive recommendations of the scientists were compared or applied. The mere existence of scientific evidence in the record cannot be interpreted to comprise by itself a reasoned process or else any county would be free to shun every bit of scientific input and still be in fulfillment of the requirements of the Act (Growth Management Act)."

Petitioners further contend there must be a threshold substantive inclusion of Best Available Science in the Comprehensive Plan to ensure an appropriate decision about what protections for critical areas are necessary to mitigate the environmental effects of new development. The Second Amended Comprehensive Plan, if adopted with recommendations supported by Best Available Science, would provide a reliable tool for landowners and protection for critical areas.

At the hearing on the merits, the Petitioners raised a challenge to the credibility of the County's biology consultant. Petitioners questioned whether he had done work in the county or had relied only upon published material which may be outdated. Their brief also pointed out that his recommendations had not been subjected to peer review.

Petitioners request that the Board hold the applicable parts of the February 28, 2000 Second Amended Comprehensive Plan amendments to be in non-compliance with the requirements of the Growth Management Act enumerated under RCW 36.70A.172. Petitioners further request the Board find those sections invalid, and that the continued validity of the amendments substantially interferes with the fulfillment of the goals of the Growth Management Act.

Respondent's position: Ferry County stated it had again considered the science offered by the Department of Fish and Wildlife in its priority habitat and species program but rejected some of it in favor of its own biology consultant. Furthermore, Respondent argues the Department of Fish and Wildlife attempted to pass off as "science" what was really unsupported personal opinions.

The County contends guidelines found in WAC 365-190-080 were used as a starting point for designation and definition of its own fish and wildlife habitat conservation areas. The County's definition of fish and wildlife habitat conservation areas begins with the same language as the above WAC, i.e. "Areas with which endangered, threatened and sensitive have a priority association (emphasis added). Second Amended Comprehensive Plan Section 4.4.12. Ferry County contends the Washington Administrative Code makes no reference to Department of Fish and Wildlife's suggested Priority Habitats and Species Program. Furthermore, Ferry County argues the Priority Habitats and Species list includes species that are not in the county.

The Priority Habitats and Species list was further rejected because it includes not just state endangered, threatened and sensitive, but also candidate species, “animal aggregations considered vulnerable”, and those species of recreational, commercial or tribal importance. See Priority Habitats and Species definition in Exhibit No. A-28-89. None of these species are envisioned as criteria for Fish and Wildlife Habitat Conservation Areas under WAC 365-190-080(5) or anywhere else in the law. Ferry County has provisions under 7.4.12 #2 for nomination, enactment, and creation of habitats and species of local importance [EX.A-28-97] and there is no requirement that Ferry County adopt the state’s recommendation.

Further, Ferry County’s biology consultant recommended that Ferry County should not impose further restrictions on lynx habitat, as the U.S. Forest Service was developing a management plan for protection of lynx habitat on their lands.

Ferry County also argued that state requirements to protect fish and wildlife habitat are an unfunded mandate, contrary to state law.

### Discussion:

Petitioners divided their arguments on designation of fish and wildlife habitat conservation areas into 5 “issues”. These arguments are designated sub-issues “A” through “D”.

### **1A. (Petitioners’ Issue 6.) Section 7.4.10 Fish and Wildlife Habitat Conservation areas reject BAS recommendations to develop and include a Habitat Management Plan to protect Fish and Wildlife Habitat Conservation areas.**

- Washington Department of Fish and Wildlife recommended the following language be included in the Comprehensive Plan [EX A-28-51]:

- “Ferry County will protect Fish and Wildlife Habitat Critical Areas by requiring a habitat management plan for land use changes proposed within priority habitats or within ¼ mile of a priority species point location”.

(Emphasis added).

The Department of Community, Trade and Economic Development recommended that Ferry County consider either management plans or a design review process to protect habitats and species. [Ex A-28-6]

Sec. 7.4.12.2 of the Second Amended Comprehensive Plan, “Habitats and species of local importance” states that areas nominated for such status shall be selected partly on the effectiveness of habitat management strategies. Further, Comprehensive Goal L-3 directs the

County to “preserve natural resources throughout the County and offer special protection to areas designated as critical areas, or environmentally sensitive areas.” RCW 36.70A.070 requires that the comprehensive plan be an internally consistent document.

The County’s wildlife consultant did not address the recommendation for a habitat management plan for land use changes proposed within priority habitats or within ¼ mile of a priority species point location. The County offered no arguments against this recommendation other than ”Ferry County considered again the science offered by the Department of Fish and Wildlife in its priority habitat and species program but have rejected it in favor of our own biology consultant” (Respondent. brief, pg.2)

Petitioners reply brief, p. 7, presents further arguments, un rebutted by the Respondent, on this issue:

“In a recent Court of Appeals decision the court affirmed that there must be BAS to support policies for areas,

“which are deemed “critical” because they may be more susceptible to damage from development. The nature and extent of this susceptibility is a uniquely scientific inquiry. It is one in which the best available science is essential to an accurate decision about what policies and regulations are necessary to mitigate and will in fact mitigate the environmental effects of new development.”

*Honesty in Environmental Analysis and Legislation v. Central Puget Sound Growth Management Hearings Board, No. 40939-5-I, (Slip Op., June 21, 1999), at pps 9-10.* (Emphasis added).

Petitioners further state: “Sound scientific evidence was presented to the county regarding the necessity for a habitat management plan to protect habitat critical areas. The county here has failed to identify information in the record, explain its rationale or identify potential risks to critical areas to justify its departure from valid scientific research. The county has failed to provide a scientific foundation, evidence of analysis, or a reasoned process to justify its rejection.”

The Board agrees with the arguments presented by Petitioners. The purpose of the Comprehensive Plan is to provide policies and direction for the critical areas ordinance. The County has stated many times during the past four years that a new critical areas ordinance is being drafted. The recommended language would not only be internally consistent with other provisions in the Comprehensive Plan, it would provide the foundation for consistent development regulations. In the absence of a scientific foundation, evidence of analysis, or a reasoned process to justify its rejection, the language recommended by the DFW must be

included.

**Conclusion:** Ferry County is not in compliance with RCW 36.70A.172 regarding designation and protection of fish and wildlife habitat conservation areas, by failing to require a habitat management plan.

**1B. (Petitioners' Issue No. 7).** Section 7.4.12 Designation of Fish & Wildlife Habitat Conservation Areas is unsupported by BAS and fails to adequately designate critical areas and fails to define and describe fish and wildlife species and habitat conservation areas. (Emphasis added.)

Prior to the most recent amendments, the Comprehensive Plan contained the following language:

Sec. 7.4.15. Fish and Wildlife Habitat Conservation Areas. The designated Fish Habitat Conservation Areas are the principle streams utilized in the life cycles of fish. Several factors are important in the survival of young fish, including water temperature, and volume of stream flow. Wildlife habitat can be described as the geographic area containing necessary combinations of food, water, and protective cover for the survival and propagation of a species of animal. (Emphasis added) Habitats differ between species, but are closely related to the plant communities. A single plant community such as a wetland, for example may provide all the necessary habitat requirements for certain small mammals or amphibians. Larger mammals may require more than one plant community to complete their habitat, such as forest cover and wetlands for food and water. Areas of particular concern have been identified by the Washington Department of Fish and Wildlife priority Habitat and Species Program. These areas consist primarily of rivers and wetland sites.”

This entire paragraph has been deleted in the current version of the Comprehensive Plan. Further, prior to the most recent amendments the Comprehensive Plan read in pertinent part:

7.4.17 Designation. The Department of Community, Trade and Economic Development guidelines do not require local governments to use any particular system for classifying priority fish and wildlife habitat conservation areas. The Ferry County Critical Areas Ordinance shall define, designate and regulate Fish and Wildlife habitat areas. The following areas are designated as priority fish and wildlife habitat conservation areas:

Washington Department of Fish & Wildlife Priority Habitat & Species:

The Washington Department of Wildlife Priority Habitats and Species quad overlay maps shall be used to designate these critical areas.

This language has been replaced with:

7.4.12 Designation. The Department of Community, Trade and Economic Development guidelines do not require local governments to use any particular system for classifying fish and wildlife habitat conservation areas. The Ferry County Critical Areas Ordinance shall define, designate and regulate fish and wildlife habitat areas. The following areas are designated as fish and wildlife habitat conservation areas:

Washington Department of Fish & Wildlife Priority Habitat & Species:

The Washington Department of Wildlife Priority Habitats and Species quad overlay maps shall be considered among other scientific sources to designate these critical areas.

While the previous language made clear what was designated, Petitioners argue that the new language is impermissibly vague, and is not a designation at all. Ferry County cites no rationale for the new language, nor did their biology consultant.

RCW 36.70A.170 requires the County to designate critical areas. This Board's decision in Save Our Butte et al v. Chelan County (EWGMHB 94-1-0015) established that the designated areas must be readily identifiable. The County's most recent actions fail on both counts. The County presents no conclusive arguments, no evidence of a reasoned process, no scientific analysis, that justify the changes. This action is clearly erroneous.

**Conclusion:** Ferry County is not in compliance with RCW 36.70A.170, regarding designation of fish and wildlife habitat conservation areas.

**1C. (Petitioners' Issue No. 8.) Sec. 7.4.12 Designation of Fish and Wildlife Conservation Areas fails to provide reasonable citizen review of county habitat decision making.**

Petitioners argue that by establishing a standard of review of "arbitrary and capricious" for challenges to Board of Commissioners' decision, regarding nominations for designation of habitat an species of local importance, the Growth Management Act goal of public participation, and utilization of best available science, will be hindered. Petitioners contend no analysis was done to justify this higher standard, and the action is clearly erroneous.

The Board does not agree. We are not convinced that the process established in Sec. 7.4.12 for designation of habitat and species of local importance is in itself a hindrance to citizen

participation or utilization of best available science. Requiring a standard of “arbitrary and capricious” is within the legislative authority of Ferry County.

**Conclusion:** Ferry County is in compliance with applicable Growth Management Act laws regarding its citizen review process in Sec 7.4.12.

**1D.** (Petitioners’ Issue No. 9.) Sec. 7.4.12 Fish & Wildlife Habitat Conservation Areas fails to include best available science since it rejects best available science recommendations that Washington Department of Fish and Wildlife Priority Habitat and Species Program be incorporated into Second Amended Comprehensive Plan and is internally inconsistent with Ferry County Interim Critical Areas Ordinance goals to preserve and protect priority habitats and species.

**1E.** (Petitioners’ Issue No. 10.) Sec. 7.4.13 State Endangered, Threatened and Sensitive Species rejects best available science recommendation to include 12 species as endangered, threatened and sensitive species in Ferry County.

Issues 9 and 10 deal with designation of protected species and habitat for those designated species. Since these issues are interrelated, they will be discussed together.

Previous to the most recent amendments, the Comprehensive Plan contained the following language:

1. “Areas with priority species; Priority species are wildlife species of concern due to their population status and their sensitivity to habitat alteration.”
2. “Priority habitats; as identified by the Washington Department of Fish & Wildlife. Priority habitats are areas with one or more of the following attributes: comparatively high wildlife density, significant wildlife species richness, significant wildlife breeding habitat, significant wildlife seasonal ranges, significant movement corridors for wildlife, limited availability, and/or high vulnerability.” [EX: A-28-53, EWGMHB No. 97-1-0018 (Section 7.4.17.1 Designation, Second Amended Comprehensive Plan Amendments 12/7/98)].

The prior 12/7/98 Second Amended Comprehensive Plan amendments also incorporated the Department of Fish and Wildlife identification scheme for classifying priority habitats and species in Ferry County.

“The priority habitats and species of Ferry County are identified from the Washington Department of Fish and Wildlife priority habitats and species

program.” [EX: A-28-53, EWGMHB No. 97-1-0018 (Section 7.4.18 Priority Habitats and Species of Ferry County, Second Amendment Comprehensive Plan Amendments 12/7/98.)]

The current version eliminates this language, or any reference to DFW priority habitat and species Program. In fact, the County response brief makes a point of rejection of the DFWPHS program, stating that no WAC or statute requires following DFW recommendation.

Petitioners contend the omissions are clearly erroneous, and are not based on a scientific foundation, a reasoned process, or evidence of analysis.

The interim Critical Areas Ordinance provided a list of priority species shown in the Management Recommendations for Washington’s Priority Species manual as living in Ferry County:

Bald Eagle, Big Horn sheep, Black Backed Woodpecker, Blue Grouse, Hooded Mergansers, Wood Ducks, Common Loon, Cutthroat Trout, Flammulated Owl, Golden Eagle, Great Blue Heron, Kokanee, Lewis Woodpecker, Lynx, Marten, Merriam’s Turkey, Moose, Mountain sucker, Mountain Whitefish, Osprey, Pileated Woodpecker, Rainbow Trout, Rocky Mountain Mule Deer, Spotted Frog, Vaux’s Swift, Western Bluebird, and Whiteheaded Woodpecker.

All but the Bald Eagle and Lynx are omitted from the current comprehensive plan version.

Department of Fish and Wildlife biologist Kevin Robinette recommended in December, 1998 that the Second Amended Comprehensive Plan include twelve species of birds, mammals, and fish as endangered, threatened or sensitive species in Ferry County:

Birds

Bald Eagle	Threatened
Ferruginous Hawk	Threatened
Peregrine Falcon	Endangered
Sandhill Crane	Endangered
Upland Sandpiper	Endangered
American White Pelican	Endangered

Mammals

Lynx	Threatened
Pygmy Rabbit	Endangered
Gray Wolf	Endangered
Grizzly Bear	Endangered
Woodland Caribou	Endangered

Fish

Bull Trout

[EX: A-28-51, EWGMHB No. 97-1-0018 (Kevin Robinette, WDFW Biologist, 9/25/98 letter, Enclosure #3, Priority Habitats and Species List).]

The 12/7/98 Second Amend Comprehensive Plan amendments included only four endangered, threatened and sensitive species:

<u>Birds</u>	Bald Eagle	Threatened
	Ferruginous Hawk	Threatened
	Peregrine Falcon	Endangered

<u>Mammals</u>	Lynx	Threatened
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[EX: A-28-53, EWGMHB No. 97-1-0018 (Second Amended Comprehensive Plan Amendments 12/7/98).]

The present Second Amended Comprehensive Plan amendments now include only two species as Endangered Threatened Species:

<u>Birds</u>	Bald Eagle	Threatened
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<u>Mammals</u>	Lynx	Threatened
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[EX: A-28-57, EWGMHB No. 97-1-0018 (Second Amended Comprehensive Plan Amendments 2/28/00).]

Mr. Robinette, Department of Fish and Wildlife, commented again on February 17, 2000 as he did on December 16, 1998 that the Bull Trout should also be listed as an endangered and threatened species. [EX: A-28-58 EWGMHB No. 97-1-0018 (2/17/00 letter from Kevin Robinette, WDFW biologist).]

Ferry County claims that the Second Amended Comprehensive Plan’s inclusion of only two Endangered Threatened Sensitive species is supported by science provided by a biology consultant. Petitioners point out “ ..a county cannot choose its own science over all other science and cannot use outdated science to support its choice”. *Island County Citizen’s Growth Management Coalition, et al., v. Island County WWGMHB No. 98-2-0023c, (Compliance order RE: RA, RF, PRDs, CAs, March 6, 2000) (citing Honesty in Environmental Analysis and Legislation v. Central Puget Sound Growth Management Hearings Board, No. 40939-5-I, (Slip*

Op., June 21, 1999).

Petitioners contend “..the County’s consultant does not rely on or cite to any research for his conclusion that caribou, grizzly bear, timber wolves, or bull trout do not inhabit Ferry county. The County consultant claims he contacted a Game Department biologist to develop his assertion that the pygmy rabbit should not be listed as Endangered Threatened Sensitive species, but he does not provide any documentation of that person’s research, thus leaving us with a hearsay assertion. The County consultant does cite to a single birding book as the sole source for his opinion that five bird species should not be classified as Endangered Threatened Sensitive species (American White Pelican, Sandhill Crane, Upland Sandpiper, Ferruginous Hawk and Peregrine Falcon).”

Petitioners further contend “..the consultant here did not provide any research that has been subject to peer review. Moreover, the County consultant here admits he has been retired the past 11 years, which leads to the concern that perhaps outdated science may be being used to support his conclusion since he cites no other recent scientific source besides the 1997 birding book.”

Petitioners argue the County did not engage in a reasoned process since the rejection of the BAS recommendations is internally inconsistent with the Comprehensive Plan’s Policy L 19 which reads as follows:

“Work with the Department of Fish and Wildlife to take measures to protect the habitat of wildlife in Ferry County, especially those listed on the endangered species list.” *[Ex: A-3 EWGMHB No. 95-1-0010 (Ferry County Comprehensive Plan, Section 6.2.2 Planning Goals for Land Use & Rural)]*

The Board recognizes the prerogative of Ferry County to not adopt the DFW recommendation, as long as that decision is based on a sound, reasoned process which includes best available science. The County has consulted with a credentialed biologist, but the process he undertook to develop his recommendations is inadequate. There is no evidence in the record that that the consultant coordinated his recommendation with any other scientists with expertise in Ferry County, such as the Colville tribe, U.S. Forest Service, or the DFW. There is no evidence that any on-site field observations were conducted. With specific reference to the Peregrine Falcon, his recommendation seems to conflict with activities of the Colville Tribe. Regarding Bull Trout, a sensitive species documented to exist in Ferry County, he makes no mention at all. (See 1E.).

Having said that, the Board finds no requirement for Ferry County to address species other than endangered, threatened, or sensitive in their Comprehensive Plan. While inclusion of other listed priority species may be desirable, not including them is within the legislative authority of Ferry County. However, Ferry County has provided insufficient evidence that its limited listing of

species that are endangered, threatened, or sensitive is based on best available science as required by RCW 36.70A.172.

The Board determines the County has not provided a scientific foundation, evidence of analysis, or a reasoned process to justify their listing, while rejecting the recommendations of endangered, threatened and sensitive species and wildlife habitat conservation areas provided by DFW. Such action was a mistake and is clearly erroneous.

**Conclusion:** Ferry County is not in compliance with RCW 36.70A.172 regarding protection of wildlife habitat.

**Board Issue No. 2:** Has Ferry County complied with the Board's Order to include Best Available Science in the Policies for Designation of Frequently Flooded Areas and Aquifer Recharge Areas?

**Petitioner's position:** As Ferry County has conceded this issue, the burden of proof for petitioners has been met. We see no reason to restate their arguments here.

**Respondent's position:** Respondent acknowledges failure to comply with the Board's Order and requests remand for a period of 90 days to "readopt the already approved August 1997 language on aquifer recharge/frequently flooded areas in its entirety."

**Discussion:** We have no record that the August 1997 language has been approved by this Board.

**Conclusion:** Ferry County is in continued non-compliance regarding policies for designation of frequently flooded areas and aquifer recharge areas.

**Request for Invalidity:**

RCW 36.70A.302(1) provides in part, "A Board may determine that part or all of a comprehensive plan or development regulations are invalid if the Board determines: (b) ...that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter."

The Board cannot determine such interference in this case. This lack of substantial interference is not because of the seriousness of the omissions and errors of Ferry County, but because of the very limited amount of development occurring in Ferry County. Petitioners have not established that development activity during the remand period will substantially impact the critical areas. The request for invalidity of the non-compliant sections is denied.

## Summary of Conclusions

- Issue No. 1A. Ferry County is found in non-compliance with RCW 36.70A.172 regarding designation and protection of fish and wildlife habitat conservation areas, by failing to require a habitat management plan. (Petitioners' Issue No. 6)
- Issue No. 1B. Ferry County is found not in compliance with RCW 36.70A.170, regarding designation of fish and wildlife habitat conservation areas. (Petitioners' Issue No.7)
- Issue No. 1C. Ferry County is found in compliance with the Growth Management Act regarding its citizen review process in Sec. 7.4.12. re designation of fish and wildlife conservation areas. (Petitioners' Issue No. 8)
- Issue No. 1D. Ferry County is found partially in compliance with the Growth Management Act on Petitioners' Issue No. 9. finding no requirement to address species other than endangered, threatened, or sensitive in their comprehensive Plan.
- Ferry County is found in non-compliance with the Growth Management on Petitioners' Issue No. 9 for providing insufficient evidence that its failure to list all species that are endangered, threatened or sensitive is based on best available science as required by RCW 36.70A.172.
- Issue No. 1E. Ferry County is found not in compliance with RCW 36.70A.172 regarding protection of wildlife habitat. (Petitioner's Issue 10.)
- Issue No. 2. Ferry County is found in continued non-compliance with the Growth Management Act regarding polices for designation of frequently flooded areas and aquifer recharge areas.

Respondent's brief and arguments alleged that Ferry County was not obligated to comply fully with the Growth Management Act because changes to the Growth Management Act constitute mandates by the State which have not been funded by the State. A decision on that argument is not within the jurisdiction of this Board. The Board recommends that Ferry County consult with the Department of Community, Trade and Economic Development, Department of Ecology and other agencies as appropriate to achieve compliance. Devising a compliant comprehensive plan and development regulations need not be an expensive process for Ferry County.

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#### **IV. ORDER**

1. Ferry County is directed to designate fish and wildlife habitat and species utilizing best available science within 120 days of this Order.
2. Ferry County is directed to develop policies for designation of frequently flooded areas and aquifer recharge areas utilizing best available science within 90 days of this Order.
3. The request for a finding of invalidity is DENIED.

SO ORDERED this 23<sup>rd</sup> day of May, 2000.

EASTERN WASHINGTON  
GROWTH MANAGEMENT HEARINGS

BOARD

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D. E. "Skip" Chilberg, Presiding Officer

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Judy Wall, Board Member

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Dennis A. Dellwo, Board Member