

State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

CONCERNED FRIENDS OF FERRY
COUNTY,

Petitioner,

vs.

FERRY COUNTY,

Respondent

Case No.: No. 97-1-0018

ORDER ON COMPLIANCE

I. PROCEDURAL HISTORY

On December 7, 1998, Ferry County adopted an Amendment to Ferry County Ordinance 95-06 in response to the Board's Final Decision and Order of July 31, 1998.

On January 7, 1999, the Board set a compliance hearing for February 4, 1999. On January 8, 1999, the Board received a letter from the Ferry County Prosecutor on behalf of both parties requesting a stay of the proceedings to allow the parties to come to an agreement.

On January 13, 1999, the Board issued an Order Staying Proceedings.

On May 26, 1999, the Board received Petitioners' Request for Hearings Board Mediator. On June 4, 1999, the Board received Respondent's letter declining to enter mediated negotiations.

On June 11, 1999, the Board set a briefing schedule for a compliance hearing to be held July 22, 1999 in Republic, Washington.

On July 5, 1999, the Petitioners filed a Motion to Supplement Record with certain documents dated after adoption of the Amendment to the Comprehensive Plan.

On July 13, 1999, a revised briefing schedule was issued and the compliance hearing rescheduled to August 13, 1999.

On July 28, 1999, Petitioners filed an additional Motion to Supplement the Record with Expert Witness Testimony.

On August 12, 1999, Respondent filed Objection to Petitioners' Motions to Supplement the Record.

On August 13, 1999, the Board held its Compliance hearing in Republic, Washington. All parties were present or represented. Present for the Board were Presiding Officer D. E. "Skip" Chilberg and Board members Judy Wall and Dennis Dellwo.

Petitioner's Motion to Supplement the Record were denied.

On August 26, 1999, Respondent, at the Board's request, filed a Supplemental Brief on Designation of Priority Species.

II. FINDINGS OF FACT

1. In response to this Board's Order dated July 31, 1998, Ferry County, has on December 7, 1998, adopted Amendments to the Second Amended Comprehensive Plan for Ferry County.

2. The record provides no evidence that Ferry County considered "best available science" in designating fish and wildlife habitat conservation areas and identification of priority habitats and species.

3. The record provides no evidence that Ferry County considered "best available science" in designation of flood plains and aquifer recharge areas.

III. DISCUSSION

Petitioners' Reply Brief delineates seven compliance issues which Respondent has also responded to. This order will address those seven issues.

Issue #1: Section 7.4.4 Designation of Wetlands rejects BAS recommendation that wetland boundaries should be delineated according to the Department of Ecology's "Washington State Wetlands Identification and Delineation Manual."

Petitioners' position: Petitioners contend that Ferry County must give specific reference to the Department of Ecology (DOE) "Washington

State Wetlands Identification and Delineation Manual", Ecology Pub. #96-94, in its comprehensive plan.

Respondent's position: Ferry County's Comprehensive Plan includes the following language regarding this issue: "Once on site, the wetland will be further designated and classified by using the Ferry County CAO (Critical Areas Ordinance) and the Department of Ecology Wetlands manuals." Ferry County contends this language accomplishes the same thing as proposed by Petitioners without the need to change the language when a new manual is produced by the Department of Ecology.

Discussion: The Board finds no evidence that the wording chosen by Ferry County is an attempt to lessen the protection of wetlands. From a policy standpoint for the SACP, the County has included best available science.

Conclusion: Ferry County is in compliance with the GMA on Issue #1.

Issue #2: Section 7.4.5 Classification of Wetlands and 7.4.17.8 Protection of Fish & Wildlife Habitat Conservation Areas reject BAS recommendations that protective buffers be required.

Petitioners' position: Ferry County's Comprehensive Plan, Sec. 7.4.5, includes the following sentence: "Ferry County will protect wetlands by requiring protective setbacks". Sec. 7.4.17.8 reads, in part, "Because of the unique and irreplaceable nature of our fish and wildlife habitat conservation areas, they will be protected by requiring protective setbacks". Petitioners contend the term "setback" is not defined, and includes only structures, not limiting other development activity. The term "Buffer" is necessary to provide adequate protection for wetlands and fish and wildlife habitat conservation areas.

Respondent's position: Respondent counters that the differences are semantic and the County believes they have similar meanings. More clear definition of setback requirements should be deferred to the Critical Areas Ordinance.

Discussion: The Board finds the language chosen by Ferry County is adequate for purposes of the broad policy as outlined in the SACP. The protection of wetlands and fish and wildlife habitat conservation areas will need further clarification and definition in the Critical Areas Ordinance.

Conclusion: Ferry County is in compliance with the GMA on Issue #2.

Issue #3: Section 7.4.17.1 Designation of Fish & Wildlife Habitat Conservation Areas rejects BAS recommendation that designations include areas with which priority species (as determined by the Washington Department of Fish & Wildlife) have a primary association.

Issue #4: Section 7.4.18 Priority Habitats and Species of Ferry County rejects BAS recommendations for identification of Priority Habitats and Species and protection of Fish and Wildlife Habitat conservation areas.

Petitioners' position: Petitioners argue that Ferry County has chosen to ignore eight species endemic to the area which are deemed threatened or endangered by the Washington State Department of Fish and Wildlife, without the inclusion of Best available science. Further, by ignoring certain recommendations from the Washington Department of Fish and Wildlife, the County has failed to designate and protect fish and wildlife habitat conservation areas. Petitioners contend the County had not provided a scientific foundation, evidence of a reasoned process, or evidence of analysis to justify the rejection of recommendations by the Department of Fish and Wildlife.

Respondent's position: Respondent contends it has authority to designate threatened and endangered species, and in the absence of clearly defined state standards, their designation is not in conflict with the Growth Management Act. The County claims it has authority under the Constitution to designate threatened and endangered species. Further, they contend that no evidence exists that the species omitted from their listing are found in Ferry County.

Discussion: The County has not provided sufficient evidence that BAS was considered or included in its designation of priority species or habitat areas for priority species. The County provides no rationale for excluding species designated by DFW except vague references to Constitutional authority and "local legislative authority's discretion". The Board finds that Petitioners have met their burden of proof that Ferry County acted erroneously in the designation of priority species and habitat areas.

Conclusion: Ferry County is not in compliance with the GMA on Issues #3 and #4.

Issue #5: Sections 7.4.1 Wetlands and 7.4.4 Classification reject BAS recommendation that the wetlands definition be amended to omit "if permitted by the county."

Petitioners' position: Petitioners contend the definition of "wetlands" in the above-referenced sections concludes: "However, wetlands shall include those artificial wetlands intentionally created from non-wetland areas created to mitigate conversation of wetlands, if permitted by the county". Petitioners argue the term "if permitted by the County", should be stricken. By including that term, landowners may conclude that artificially created wetlands not permitted by the County are not protected.

Respondent's position: Respondent counters that the suggested change came to the county after the public comment period had ended.

Discussion: The Board finds the language chosen by the County does not in itself violate the legal requirement to include best available science in protecting wetlands. The Petitioners have not met their burden of proof. Clarification of the County's intent can be made in the Critical Areas Ordinance.

Conclusion: Ferry County is in compliance with the GMA on Issue #5.

Issue #6: Section 7.4.6 Floodplains, Section 7.4.11. Goals, and Section 7.4.12 Designation of Flood Plains reject BAS by allowing development to occur within the Floodplain.

Issue #7: Section 7.4.14 Designation of Aquifer Recharge Areas

Petitioners' position: Petitioners argue the County did not use INCLUDE best available science in designation and protection of flood plains and aquifer recharge areas.

Respondent's position: Respondent counters these issues are not part of this compliance process, as they had been previously "litigated". They also contend Petitioners failed to cite specific scientific recommendation. The County provides no record that action has been taken on these issues.

Discussion: The Board finds our Final Decision and Order 97-1-0018, July 31, 1998, Issues 1 and 2 specifically included frequently flooded areas and aquifer recharge areas. The County provides no citation where prior "litigation" resolved these issues. It is the county's

obligation to include best available science in the designation and protection of frequently flooded areas. Ferry County, by its failure to demonstrate otherwise, forces this Board to conclude that best available science was not included in developing policies in the SECTIONS OF THE SCAP under review.

Conclusion: Ferry County is not in compliance with the GMA on Issues #6 and #7.

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IV. ORDER ON MOTION FOR INVALIDITY

Petitioner have not convinced the Board that the errors made by Ferry County constitute a serious threat to the goals of the GMA. Therefore, the request for a finding of invalidity is denied.

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V. ORDER

1. The Board directs Ferry County to consider and include best available science in the designation of priority species and habitat areas, and in the policies for designation of frequently flooded areas and aquifer recharge areas.

2. The County is granted ninety days from the date of this order to come into compliance with the GMA and this Order.

Pursuant to RCW 36.70A.300, this is a final order for purposes of appeal.

Pursuant to WAC 242-02-832, a motion for reconsideration may be filed within ten days of service of this compliance order.

DATED this 30th day of September, 1999.

EASTERN WASHINGTON
GROWTH MANAGEMENT HEARINGS

BOARD

D. E. "Skip" Chilberg, Presiding

Officer

Judy Wall, Board Member

Dennis A. Dellwo, Board Member