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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

**AMENDED FOURTH ORDER ON
COMPLIANCE**

I. PROCEDURAL HISTORY

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

On May 3, 2002, the Board received a letter from Stephen Graham, Ferry County Prosecuting Attorney requesting the Board hold a compliance hearing addressing designation of aquifer recharge areas and frequently flooded areas.

On June 14, 2002, the Board held a telephonic compliance hearing. Present were Presiding Officer, D. E. "Skip" Chilberg, and Board Members Dennis Dellwo and Judy Wall. Present for Petitioners was David Robinson. Present for Respondent was Stephen Graham, Deputy Prosecuting Attorney.

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2 On June 21, 2002, an Order was entered finding that Ferry County had brought
3 themselves into compliance on frequently flooded areas issues. A mistake was made in the
4 drafting of the order. While the Board found that Ferry County complied with the Board
5 Order regarding frequently flooded areas, the order mistakenly declared Ferry County has
6 complied with all issues in Case No. 97-1-0018. This Amended Order is entered to correct
7 that error.

8 **II. FACTUAL BACKGROUND**

9 On January 26, 2001, the Hearings Board issued the Third Order on Compliance,
10 directing the County to "develop policies for designation of frequently flooded areas and
11 aquifer recharge areas utilizing best available science...."

12 On April 22, 2002, Ferry County passed Ordinance 2002-05, Amending Ordinance 95-
13 06 Ferry County Comprehensive Plan, Aquifer Recharge Areas. At the same time, they
14 passed Ordinance 2002-06, development regulations for implementing the policies adopted
15 in Ordinance 2002-05. The Comprehensive Plan previously had no policies addressing
16 aquifer recharge areas.

17 In response to this Board's Order regarding frequently flooded areas, Ferry County
18 submitted a transcript of a phone conversation between Ferry County officials and Ted
19 Olsen, an employee of the Washington State Department of Ecology. Ferry County took no
20 official action to amend existing policies on frequently flooded areas.

21 **III. STANDARD OF REVIEW**

22 Comprehensive plans and development regulations (and amendments thereto)
23 adopted pursuant to Growth Management Act ("GMA" or "Act") are presumed valid upon
24 adoption by the local government. RCW 36.70A.320. The burden is on the Petitioner to
25 demonstrate that any action taken by the respondent jurisdiction is not in compliance with
26 the Act. RCW 36.70A.320; *Grant County of Association of Realtors v. Grant County*, Eastern

1 Washington Growth Management Hearings Board (EWGMHB) Case No.: 99-1-0018, Final
2 Decision and Order, page 6 of 10 May 23, 2000); and 1000 Friends of Washington v.
3 Spokane County, Eastern Washington Management Hearings Board (EWGMHB) Case No.:
4 01-1-0018, Final Decision and Order, page 3 of 14 (June 4, 2002).

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

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

13 *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543,
14 552, 14 P.3d 133, 138 (2000).

16 IV. ISSUES

17 **Issue 1:** Has Ferry County complied with the Hearings Board's Order to "develop
18 policies for designation of aquifer recharge areas utilizing best available science (BAS)?"

19 **Petitioners' position:**

20 Petitioners acknowledge the progress made by Ferry County in its efforts to include
21 BAS in its Comprehensive Plan policies to designate aquifer recharge areas. However,
22 Petitioners argue that the Ordinance fails to include certain recommendations from the
23 Washington State Office of Community Development (WSOCD) guidance document,
24 specifically "that landfills, certain types of underground injection wells, mining, and wood
25 treatment facilities be prohibited within aquifer recharge areas susceptible to
contamination", "that conditional permitted activities should employ all known, available,

1 and reasonable treatment (AKART) technology to ensure that the highest degree of
2 protection is afforded to the aquifer(s)" and "that within aquifer recharge areas susceptible
3 to contamination, residences that use on-site septic systems should be limited to "a
4 maximum density of one system per one acre [which] is sufficient to avoid ground water
5 contamination."

6 Further, Petitioners argue that the County has failed to document any justification for
7 rejection of these recommendations, which they argue is required by the Washington
8 Administrative Code.

9 **Respondent's position:**

10 Ferry County contends the Board's Order is from a "failure to act" challenge and
11 thus, only procedural compliance is under review at this time. Since the County has
12 amended its Comprehensive Plan to include policies addressing aquifer recharge areas, the
13 County has complied with the Board's Order. Any substantive challenge will be considered
14 only if a petition is timely filed. During oral arguments, Respondent contended Petitioners
15 had failed to carry the burden of proof that the County had not included BAS in its policies.

16 **Discussion:**

17 The Board finds the earlier Compliance Order was a "failure to act" order. Thus,
18 Ferry County, by adopting policies addressing aquifer recharge areas, has complied with the
19 order. Any decision regarding substantive issues in that action can only be made after a
20 new petition is filed and arguments heard.

21 **Conclusion:**

22 Ferry County has complied with the Boards Order to adopt policies for aquifer
23 recharge areas utilizing best available science.

24 **Issue 2:** Has Ferry County complied with the Boards Order to develop policies to
25 designate frequently flooded areas utilizing best available science (BAS)?

26 **Petitioner's position:**

1 Petitioners argue that the County has taken no official action to comply with the
2 Board's Order; therefore, the County remains out of compliance. The question here is not
3 procedural, but whether the County has included "BAS" in its policies. Petitioners contend
4 nothing in the record demonstrates consideration of "BAS".

5 **Respondent's position:**

6 Ferry County acknowledges no official action has been taken in response to the
7 Board's Order, only that they have now documented consultation with appropriate State
8 agencies regarding their policies. The County provides in their brief a transcript of a phone
9 conversation with the State Department of Ecology. The Department, therein acknowledges
10 Ferry County's efforts to consult with the Department, and confirms that Ferry County's
11 policy on frequently flooded areas includes best available science as required by law. Ferry
12 County contends it had failed only to inform the Board of its contacts with Department of
13 Ecology, and the Departments input to its policies, resulting in our Order of non-compliance.
14 With this confirmation, Ferry County argues the Board should now find compliance.

15 **Discussion**

16 The Board finds that Petitioners have failed to carry their burden of proof. While the
17 County admits to adopting only "minimal" requirements, Petitioners have not shown that
18 the policies adopted are in error. The Board also finds that Ferry County has made
19 reasonable efforts to include best available science, with appropriate participation by the
20 State Department of Ecology.

21 **Conclusion:**

22 Ferry County has complied with the Board's Order regarding frequently flooded
23 areas.

24 **ORDER**

25 Ferry County has complied with all compliance issues in Case No. 97-1-0018, except
26 the issue from our Second Compliance Order concerning the designation of fish & wildlife
habitat and species.

