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**GROWTH MANAGEMENT HEARINGS BOARD  
FOR EASTERN WASHINGTON**

LOON LAKE PROPERTY OWNERS  
ASSOCIATION, LOON LAKE DEFENSE  
FUND, WILLIAM SHAWL, and JANICE  
SHAWL, LARSON BEACH NEIGHBORS, and  
JEANIE WAGENMAN

Petitioner,

DEPARTMENT OF ECOLOGY,

Intervenor,

v.

STEVENS COUNTY,

Respondent.

**Case No. 03-1-0006c**

ORDER ON COMPLIANCE

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**I. PROCEDURAL BACKGROUND**

On February 2, 2004, the Board issued an Order consolidating EWGMHB Case Nos. 00-1-0016, 03-1-0003 and 03-1-0006 under new Case No. 03-1-0006c.

On February 6, 2004, the Board issued its Order on Motions from Case Nos. 00-1-0016, 03-1-0003 and 03-1-0006.

On February 10, 2004, the Board issued its Final Decision and Order in Case No. 03-1-0003.

On February 13, 2004, Respondent, Stevens County filed a Motion for Reconsideration of the Boards Order on Motions filed February 6, 2004, granting intervention status to Loon Lake Property Owners Association (LLPOA).

On February 20, 2004, Petitioners Larson Beach Neighbors and Jeanie Wagenman filed a Motion for Clarification/Reconsideration on FDO 2/10/04. Loon Lake Property Owners Association, Loon Lake Defense Fund, and William and Janice Shawl, (LLPOA et al.) filed LLPOA Answer to County's Motion for Reconsideration of Intervention Order.

1 On March 1, 2004, the Board held a telephonic status conference. Present were D.E.  
2 "Skip" Chilberg, Presiding Officer, and Board Members Dennis Dellwo and Judy Wall.  
3 Present for Petitioners were Jeanie Wagenman and Bruce Erickson. Present for Respondent  
4 was Peter Scott. Present for Intervenor was Tom Young, Assistant Attorneys General.

5 On March 3, 2004, the Board issued an Order on Motion for Reconsideration directing  
6 the parties to file objections no later than March 11, 2004.

7 On March 17, 2004, the Board refused to reconsider its order or issue an Amended  
8 Final Decision and Order.

9 On May 7, 2004, the Respondent filed its Motion to Dismiss Petitions for Review Nos.  
10 00-1-0016 and 03-1-0006.

11 On May 10, 2004, the scheduled status conference was held and arguments were  
12 heard on the Motion to Dismiss. The Board issued its Order on Motion to Dismiss on May  
13 20, 2004.

14 On May 17, 2004, the Board received Respondent, Stevens County's Motion to  
15 Extend Time requesting an additional 30 days to bring themselves into compliance with the  
16 Board's Final Decision and Order dated February 10, 2004. Stevens County was to be in  
17 compliance by June 9, 2004.

18 On August 2, 2004, the Board held a telephonic compliance hearing. Present were  
19 D.E. "Skip" Chilberg, Presiding Officer, and Board Members Dennis Dellwo and Judy Wall.  
20 Present for Petitioners were Jeanie Wagenman and Bruce Erickson. Present for Respondent  
21 was Peter Scott. Intervenor's representative was not present during this telephonic  
22 compliance hearing.

23 On August 4, 2004, the Board issued its Order of Continuance of Compliance Hearing  
24 to allow additional briefing regarding the issue of Protection of Habitat and Species. The  
25 Board also solicited briefing from any interested State agency.

26 On August 9, the Board received Respondent's Supplemental Brief.

On August 20, 2004, the Board received Petitioner's Supplemental Reply to  
Respondent, and Washington State Department of Fish and Wildlife's Amicus Brief.

1 On August 25, 2004, the Board received from Petitioner, a Motion to Allow Response  
2 to Amicus Brief of WDFW, Petitioners' Response to WDFW Amicus Brief of 8/20/04, and  
3 Motion to Admit Additional Evidence.

4 On September 1, 2004, the Board received Respondent's, Response to Motions to  
5 Allow Response to Amicus Brief and to Admit Additional Evidence, and the Proposed Order  
6 on Compliance.

7 On September 7, 2004, the Board sent all parties a letter requesting inclusion in the  
8 proposed order of a response to previously made nominations of habitats and species of  
9 local importance.

10 On September 17, 2004, the Board and all parties received a proposed draft of the  
11 Order on Compliance.

12 On September 22, 2004, Petitioners submitted suggested changes to the proposed  
13 order.

## 14 **II. FINDINGS OF FACT**

- 15 1. On March 9, 2004, the Stevens County Board of County Commissioners  
16 (BOCC) enacted a moratorium on the application and enforcement of  
17 the interim critical areas ordinance (ICAO) and all amendments thereto.
- 18 2. On April 27, 2004, Stevens County repealed Resolution 75-2000  
19 adopting the ICAO and all amendments thereto, including those  
20 adopted in September 2003, by Resolution No. 109-2003.
- 21 3. On July 6, 2004, Stevens County adopted Resolution #80-2004. The  
22 resolution amends Title 13, the County's Critical Areas Ordinance, to  
23 comply with the Final Decision and Order issued on February 10, 2004,  
24 by the Eastern Washington Growth Management Hearings Board.
- 25 4. In adopting Resolution 80-2004, the County responded to public  
26 comments by preparing for the record a summary of the comments  
received and the County's response thereto. No summary exists for the  
public participation in which Title 13 (32-2003) was originally adopted.

- 1           5. Title 13, as amended, provides a specific trigger process for initiating  
2           the designation and protection of Critical Aquifer Recharge Areas  
3           (CARA).
- 4           6. Title 13, as amended, establishes adequate protection requirements for  
5           Fish and Wildlife Habitat Conservation Areas. It establishes additional  
6           protections for listed species and habitat associated with listed species.
- 7           7. The County has received nominations to designate species and/or  
8           habitat of local importance. These nominations were not responded to.
- 9           8. The County adopted Appendix B of Title 13 as amended. A letter was  
10          sent detailing what the new process involved for nominations of species  
11          of local importance, but did not respond to the previous nominations.

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

12           Comprehensive plans and development regulations (and amendments thereto)  
13           adopted pursuant to Growth Management Act ("GMA" or "Act") are presumed valid upon  
14           adoption by the local government. RCW 36.70A.320. The burden is on the Petitioners to  
15           demonstrate that any action taken by the respondent jurisdiction is not in compliance with  
16           the Act.

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

19           The Board is charged with adjudicating GMA compliance, and, when  
20           necessary, with invalidating noncompliant comprehensive plans and  
21           development regulations. RCW 36.70A.280, .302. The Board "shall find  
22           compliance unless it determines that the action by the state agency, county or  
23           city is clearly erroneous in view of the entire record before the county, or city  
24           is clearly erroneous in view of the entire record before the Board and in light  
25           of the goals and requirements of [the GMA]." RCW 36.70A.320(3). To find an  
26           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).

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

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

9 The Board has jurisdiction over the subject matter of the Petition for Review. RCW  
10 36.70A.280(1)(a).

#### 10 **IV. ARGUMENT, DISCUSSION AND ANALYSIS**

11 Stevens County adopted Resolution 80-2004 on July 6, 2004, to amend its critical  
12 areas ordinance, Title 13, to come into compliance with the Hearings Board's Final Decision  
13 and Order (FDO) issued February 10, 2004, in EWGMHB Case No. 03-1-0003. The FDO  
14 identified nine areas of non-compliance – eight substantive compliance issues involving the  
15 designation and protection of critical areas and one procedural compliance issue involving  
16 the requirement for a response to public comments.

17 Resolution 80-2004 addresses each of the substantive compliance issues and the  
18 County made changes in the way it responds to public comment. Petitioners William Shawl,  
19 Janice Shawl and the Loon Lake Property Owners Association do not challenge Resolution  
20 80-2004, nor does Intervenor, the Washington Department of Ecology.

21 Petitioner Jeanie Wagenman's compliance brief, dated July 19, 2004, challenges the  
22 County's action with respect to one of the substantive compliance issues – whether Title 13,  
23 as amended, satisfies the requirement to designate and protect critical aquifer recharge  
24 areas (CARA). She also challenges the public process – whether the County's response to  
25 public comments is sufficient. Ms. Wagenman also questions the County's failure to respond  
26 to letters urging the County to designate species and habitat of local importance. The Board

1 had determined that the failure to respond to such nominations causes the County to fail to  
2 protect species and habitat of local importance. (FDO 2/10/04).

3 In her brief, dated July 29, 2004, Ms. Wagenman raises two additional issues 1)  
4 whether the protection requirements for habitat primarily associated with listed species are  
5 adequate; 2) whether the County violated the requirements of the public participation  
6 process in making changes to those protection requirements.

7 With the exception of issues raised by Ms. Wagenman, the County's action to amend  
8 Title 13 is unchallenged and therefore presumed valid. RCW 36.70A.320. Consequently, the  
9 following discussion and analysis is limited to the issues properly before the Board.

10 **Compliance Issue No. 1 – Critical Aquifer Recharge Areas:**

11 The Board's FDO orders Stevens County to amend Title 13 by adding a provision(s)  
12 to initiate the designation and protection of critical aquifer recharge areas (CARA).

13 The County amended the relevant section of Title 13 (SCC 13.10.045) to require  
14 consideration of all available information for possible CARA designation when adopting a  
15 comprehensive plan or sub-area plan. Under the amendments, until CARA designations are  
16 made, the County must evaluate all development proposals to determine the aquifer's level  
17 of susceptibility. For proposals in areas deemed to be "highly susceptible," the protection  
18 requirements set forth in SCC 13.10.046 apply.

19 Ms. Wagneman argues that Title 13, as amended, does not comply with the GMA. In  
20 her brief, she summarizes the argument as follows:

21 Petitioners contend that the County's amended Title 13 is inadequate in  
22 designation and protection of CARA's. The 'triggers' and 'provisions' the  
23 County has placed into the document are not adequate and fail to meet  
24 Growth Management designation and protection of CARA's as mandated by  
25 the law. As such they fail to comply with the EWGMHB order of 2/10/04.

26 Ms. Wagenman argues that sufficient information exists to designate CARA now, and  
that any delay in doing so undermines the County's legal obligation under GMA to protect  
CARA. As we understand her argument, if sufficient information is available, the  
requirement to designate CARA is triggered as a matter of law. Thus, the County's decision

1 to delay CARA designation until a comprehensive plan (or sub-area plan) is adopted falls  
2 short of the County's obligation. Ms. Wagenman also points out that Title 13 still does not  
3 *require* the County to designate CARA.

4 The County responds, first, by pointing out that the compliance issue before the  
5 Board is not whether Title 13 adequately designates or protects CARA, but whether there is  
6 a concrete trigger for imposing those requirements. This shortcoming has been addressed,  
7 according to the County, by imposing a duty on the County to review and evaluate all  
8 development proposals for potential impact on highly susceptible areas of the County unless  
9 or until CARA designations are completed, and by creating a process to review and evaluate  
10 the available information during the comprehensive planning process in order to make  
11 decisions about CARA designation. Implicit in the County's argument is a belief that the  
12 available information may not be sufficient to make CARA designations, at least not County-  
13 wide.

14 Previously, the CARA protection requirements in Title 13 were triggered only if  
15 certain disclosures were made in a checklist to be completed by project applicants. The  
16 Board found there was no appropriate trigger and was non-compliant with GMA because, in  
17 the Board's opinion, it did not adequately assure that the appropriate protection  
18 requirements would be imposed. The Board did not find the process for designating CARA  
19 to be noncompliant, nor did the Board find the protection requirements to be noncompliant,  
20 and the Board will not revisit those issues here.

21 In amending Title 13, the County implemented a process for assessing all  
22 development proposals using available scientific information, and requiring additional review  
23 for certain activities or where insufficient information exists to assess possible impacts. SCC  
24 13.10.045. These steps remain in place unless or until CARA designations are completed.  
25 *Id.* As a result of this change, the submission of any development application triggers  
26 review by the County and project applicants are no longer the primary source of information  
regarding CARA susceptibility, resulting in more reliable application of the appropriate

1 protection requirements. Petitioner Wagenman has failed to meet her burden of  
2 demonstrating that the County's action is clearly erroneous.

3 **Compliance Issue No. 2 – Public Participation:**

4 The Hearings Board concluded in its FDO that the County had failed, when adopting  
5 Title 13, to respond to public comments as required by RCW 36.70A.140. In her compliance  
6 brief Ms. Wagenman notes that many citizens did not receive a letter from the County in  
7 response to their comments, and questions whether the County will be sending out letters  
8 in response to public comment after the record closes. Ms. Wagenman expressly declines to  
9 “contest this aspect of public participation [,]” but does contend that the County is out of  
10 compliance because it has yet to respond to nominations to designate certain species and  
11 habitat as having local importance, despite being directed to do so in the FDO. She asks  
12 that the County be ordered to respond to the Loon Lake Association's request for  
13 designation of habitat and species of local importance.

14 In responding, the County first notes that the FDO does not order the County to  
15 prepare responses to comments received during the process of adopting Title 13.  
16 Therefore, according to the County, the order should be interpreted as requiring  
17 prospective compliance with the pertinent public participation standards. The County  
18 contends that it met those standards by preparing, for the record, a summary of the  
19 comments received and the actions taken by the County in response thereto.

20 The County contends the nomination of species and habitat of local importance is  
21 totally separate, having nothing to do with the adoption or amendment of Title 13, and,  
22 therefore, is not properly before the Board.

23 Ms. Wagenman, in her reply brief, takes exception to the County's assertion that the  
24 FDO should be interpreted prospectively. She argues that, standing alone, the order of  
25 noncompliance and the requirements for public participation would be meaningless if the  
26 County is not forced to respond to public comments received during the adoption of Title  
13.

1 The Board sees no practical purpose in ordering the County to reopen the record for  
2 the purpose of responding to public comments on an action that was taken more than a  
3 year ago. With respect to the amendment of Title 13, the County has prepared, for the  
4 record, a detailed summary of public comments and the County's response thereto in  
5 accordance with the requirements of WAC 365-195-600. The Petitioners have not met their  
6 burden of proof.

7 Turning to the subject of species and habitat of local importance, the Board  
8 previously stated, "the County's failure to respond to nominations is clearly a failure to  
9 designate and protect." *FDO* at 25.

10 The new nominating process is set forth in Appendix B of Title 13. Under that the  
11 nomination of species and or habitat of local importance require the submission of a petition  
12 containing specified information and an environmental checklist prepared by a qualified  
13 professional.

14 The Board recognizes that the County has taken certain actions to come into  
15 compliance with the Board's Final Decision and Order. The Board has concerns that the  
16 County has received letters requesting nominations under their older draft, prior to the  
17 adoption of Appendix B. The Petitioners clearly sent requests or recommendations for  
18 nominations and Stevens County ignored them and is using the adoption of Appendix B as a  
19 reason to continue to ignore them. For instance, Mr. Poleschook testified at the Planning  
20 Council Meeting #1 on March 28, 2002, specifically requesting that the wetlands on Loon  
21 Lake be designated a habitat of local importance because of the Red-necked Grebe and  
22 Common Loon. Mr. Poleschook also distributed a packet at this meeting detailing his  
23 concerns. In addition, four letters were received from the Loon Lake Loon Association  
24 requesting that the wetlands on Loon Lake should be considered for nomination as habitats  
25 of local importance, along with the Red-necked Grebe and Common Loon as species of local  
26 importance. Stevens County should process those nominations previously provided for by  
27 Petitioners under the original Title 13. Because of this the County has failed to remedy this  
28 aspect of this Board's finding of non-compliance.

1 **Supplemental Issue No. 1 – Protection of Habitat for Listed Species:**

2 Petitioner Wagenman raised a substantive compliance issue regarding changes made  
3 by the County to the protection requirements in Title 13 for habitat associated with listed  
4 species. She also questioned whether the requirements of public participation had been  
5 violated in making those changes. The County objected to these new issues at the  
6 telephonic compliance hearing, arguing that they are not properly before the board, having  
7 been raised for the first time in a reply brief.

8 Upon further discussion, the parties agreed that, rather than forcing the submission  
9 of another petition, it would be in everyone's interest for the Board to examine the merits of  
10 the newly raised compliance issue. A continuance was granted and supplemental briefing  
11 was ordered. In addition, the Board granted intervenor status to the Washington  
12 Department of Fish and Wildlife (WDFW) for the purpose of addressing the new compliance  
13 issue.

14 Earlier versions of the draft resolution imposed additional protection requirements,  
15 above and beyond those for other fish and wildlife habitat conservation areas, whenever a  
16 development proposal was submitted in an area identified by WDFW as "priority habitat." A  
17 new section, SCC 13.10.034(3)(C), restricts the application of those additional protection  
18 requirements to areas of the County formally designated as "critical habitat" by statute or  
19 rulemaking.

20 The new section was added, according to Ms. Wagenmen, sometime between the  
21 public meeting held on June 22, and June 27, 2004, when the final draft was presented to  
22 the County's planning commission. The change is non-compliant with GMA, she contends,  
23 because there is no designated "critical habitat" in Stevens County and therefore listed  
24 species will not get the protection they need. Ms. Wagenman requests that the Board order  
25 the County to revise or delete the new section.

26 The County responds that nothing in GMA requires counties to provide greater  
protection to priority habitat, beyond what is provided for all fish and wildlife habitat.  
Notwithstanding, the County asserts that Title 13 provides substantially more protection for

1 listed species and associated habitat. Ultimately, the County argues that it is a question of  
2 due process. If "priority habitat" were used to trigger additional protection requirements,  
3 landowners would be deprived of their right to notice and an opportunity to be heard,  
4 because WDFW makes those designations without notice and comment. Using "critical  
5 habitat" designated by rulemaking to trigger the additional requirements cures that defect.

6 WDFW submitted an amicus brief on the subject, in which it "agrees with the County  
7 that the GMA does not expressly require that priority habitats must be protected with  
8 measures above and beyond what is required for areas that are not priority habitats." The  
9 question for the Board, according to WDFW, is whether Title 13 protects functions and  
10 values in accordance with best available science.

11 We agree with WDFW that GMA does not require additional protection for priority  
12 habitat, even priority habitat associated with listed species. In other words, priority habitat  
13 is subject, at most, to the protection requirements found necessary for the protection of  
14 that habitat. Ms. Wagenman does not contend that the protections in Title 13 for fish and  
15 wildlife habitat conservation areas fail to protect functions and values. Ms. Wagenman has  
16 not met the burden of showing that the County's action is clearly erroneous and that the  
17 priority habitat is not adequately protected.

#### 18 **V. ORDER**

19 Now therefore, having considered Title 13, as amended, and having considered the  
20 remaining issues briefed and argued by Petitioner Wagenman, the County's response  
21 thereto and amicus briefing from the Washington Department of Fish and Wildlife, as well  
22 as relevant portions of the record. The following order is entered:

23 The Board finds the County is no longer out of compliance on the bulk of the issues  
24 raised in the subject petitions because the Petitioners have either not objected to the new  
25 language or failed to carry their burden of proof. However, the Board continues to find the  
26 County out of compliance due to their failure to adequately respond to the previous  
nominations of species and habitat of local importance made prior to the adoption of  
Appendix B in amended Title 13.

