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

FUTUREWISE,

Petitioner,

v.

STEVENS COUNTY,

Respondent.

Case No. 05-1-0006

FINAL DECISION AND ORDER

I. SYNOPSIS

The Petitioners, Futurewise, filed a timely petition claiming Stevens County failed to protect the habitats of endangered, threatened or sensitive species (ETS species) when the County adopted Resolution #65-2005, amending SCC 13.10.034, thus violating the Growth Management Act (GMA).

The Petitioners argue that SCC 13.10.034(3)(C) renders moot or eliminates the protections required for critical habitat of ETS species by the GMA and fails to designate all of the identified habitats of ETS species as fish and wildlife habitat conservation areas. They also contend that the County did not use best available science (BAS) in designating all ETS species habitat and establishing protections for the functions and values of critical habitat areas.

The Respondent, Stevens County, contends the Petitioner's claim is barred by the doctrines of res judicata and collateral estoppel. In addition, the Respondent argues that protections for habitat areas established by statute or rule-making are in addition to the GMA compliant protections already required by the County for habitat associated with listed species.

1 The Board looked to the statutes and the law to determine whether the County was
2 in compliance with the GMA.

3 The doctrines of Res judicata and collateral estoppel are not applicable in this appeal.
4 The Petitioner's arguments are substantial and the Board agrees with the Petitioner's
5 conclusions.

6 As to the fundamental question, which is whether the County has protected all listed
7 species habitat as required by the GMA, the Board finds the County clearly out of
8 compliance.

9 The statutes are clear. The County is responsible for protecting critical areas through
10 BAS. Critical areas include fish and wildlife habitat conservation areas. The County can't pick
11 and choose one segment of ETS species habitat over another by protecting only habitat
12 around point observations and not habitat defined by polygons. Fish and wildlife use habitat
13 differently and their range or habitat area is substantially different. A 1000-foot buffer
14 around a point observation of an endangered Northern Leopard frog may be quite
15 sufficient, but the same buffer for a lynx would be totally inadequate. This is why the
16 WDFW uses both polygon and point observations in its critical habitat mapping.

17 The County protected critical habitat in SCC 13.10.034(A) and (B), then eliminated
18 these protections with section SCC 13.10.034(C). The County then chose not to include
19 polygons from the Priority Habitats and Species database maps, which eliminated the area-
20 wide habitat protection necessary for listed species, such as the lynx. The solution is clear
21 and can easily be fixed.

22 The Board has determined that the Petitioners have carried their burden of proof and
23 finds Stevens County out of compliance with the GMA for failure to protect listed species
24 habitat and use BAS to do so.

25 **II. PROCEDURAL HISTORY**

26 On July 22, 2005, FUTUREWISE, by and through its representatives, John Zilavy,
filed a Petition for Review.

1 On August 22, 2005, the Board held a telephonic Prehearing conference. Present
2 were, John Roskelley, Presiding Officer, and Board Members Dennis Dellwo and Judy Wall.
3 Present for Petitioners was John Zilavy. Present for Respondent was Peter Scott.

4 On August 25, 2005, the Board issued its Prehearing Order.

5 On September 12, 2005, Petitioners filed a Motion to Correct the Index of Record.

6 On September 22, 2005, Respondents filed a Response and Objection to Petitioner's
7 Motion to Correct the Index of Record, Affidavit of Dianne Balch, and Affidavit of Jenni
8 Anderson.

9 On October 3, 2005, Petitioners filed Futurewise's Rebuttal to Response to Motions
10 and Futurewise's Request for Written Permission to File a Motion and Motion to Supplement
11 the Record.

12 On October 6, 2005, Respondent filed a Motion to Change Telephonic Motion Hearing
13 Time.

14 On October 10, 2005, the Board was advised Petitioners have no objection to the
15 time change of the telephonic motion hearing.

16 On October 19, 2005, the Board held a telephonic motion hearing. Present were,
17 John Roskelley, Presiding Officer, and Board Members Dennis Dellwo and Judy Wall. Present
18 for Petitioners was John Zilavy. Present for Respondent was Peter Scott.

19 On October 19, 2005, the Board issued its Order on Motions.

20 On November 8, 2005, the Board received Petitioner's Hearing on the Merits Brief.

21 On November 23, 2005, the Board received Respondent's Motion to Shorten Time for
22 Hearing to Consider Motion for Limited Discovery, Motion for Limited Discovery, Affidavit of
23 Peter G. Scott.

24 On November 29, 2005, the Board received Respondent's Hearing on the Merits
25 Brief.

26 On December 2, 2005, the Board received Petitioners' Response to County's Motion
to Allow Discovery.

1 On December 6, 2005, the Board received Respondent's Reply to Plaintiff's Response
2 to Respondent's Motion to Allow Discovery and Request for Leave to File Motion to
3 Supplement the Record.

4 On December 6, 2005, the Board received Futurewise's Hearing on the Merits Reply
5 Brief.

6 On December 7, 2005, the Board held a telephonic hearing on Respondent's Motion
7 to Allow Discovery. Present were, John Roskelley, Presiding Officer, and Board Members
8 Dennis Dellwo and Judy Wall. Present for Petitioners was John Zilavy. Present for
Respondent was Peter Scott.

9 On December 8, 2005, the Board issued its Order on Motion to Allow Discovery.

10 On December 15, 2005, the Board held the Hearing on the Merits. Present were,
11 John Roskelley, Presiding Officer, and Board Members Dennis Dellwo and Judy Wall. Present
12 for Petitioners was John Zilavy. Present for Respondent was Peter Scott.

13 **III. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF**
14 **REVIEW**

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

19 The Hearings Board will grant deference to counties and cities in how they plan
20 under Growth Management Act (GMA). RCW 36.70A.320. But, as the Court has stated,
21 "local discretion is bounded, however, by the goals and requirements of the GMA." *King*
22 *County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 561,
23 14 P.2d 133 (2000). It has been further recognized that "[c]onsistent with *King County*, and
24 notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly
25 when it foregoes deference to a . . . plan that is not 'consistent with the requirements and
26

1 goals of the GMA." *Thurston County v. Cooper Point Association*, 108 Wn. App. 429, 444, 31
2 P.3d 28 (2001).

3 Pursuant to RCW 36.70A.320(3) we "shall find compliance unless [we] determine
4 that the action by [Jefferson County] is clearly erroneous in view of the entire record before
5 the Board and in light of the goals and requirements of [the GMA]." In order to find the
6 County's action clearly erroneous, we must be "left with the firm and definite conviction that
7 a mistake has been made." *Department of Ecology v. Public Utility Dist. 1*, 121 Wn.2d 179,
8 201, 849 P.2d 646 (1993).

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

11 **IV. ISSUES AND DISCUSSION**

12 **Issue No. 1:**

13 Does the adoption of Resolution 65-2005 and its adoption of an amendment to the
14 fish and wildlife habitat conservation areas protection requirements of SCC 13.10.034(4) fail
15 to comply with RCW 36.70A.020(8), RCW 36.70A.020(9), RCW 36.70A.020(10), RCW
16 36.70A.060, RCW 36.70A.170, and RCW 36.70A.172 when the regulations fail to designate
17 all of the identified habitats of endangered, threatened, and sensitive species as fish and
18 wildlife habitat conservation areas?

19 **Issue No. 2:**

20 Does the adoption of Resolution 65-2005 and its adoption of amendments to the fish
21 and wildlife habitat conservation areas protection requirements of SCC 13.10.034 fail to
22 comply with RCW 36.70A.020(8), RCW 36.70A.020(9), RCW 36.70A.020(10), RCW
23 36.70A.060, RCW 36.70A.170, and RCW 36.70A.172 when the regulations fail to consider
24 best available science in designating all of the identified habitats of endangered,
25 threatened, and sensitive species as fish and wildlife habitat conservation areas in
26 establishing protections for the functions and values of critical habitat areas within the
County?

27 **The Parties' Position:**

28 **Petitioners:**

The Petitioners present seven arguments on behalf of their position:

1 **A. The Growth Management Act requires Stevens County to**
2 **designate the habitats of endangered, threatened, and**
3 **sensitive species as fish and wildlife habitats including best**
4 **available science.**

5 In this argument, Petitioners contend that Stevens County must adopt development
6 regulations identifying and protecting critical areas. RCW's 36.70A.050 and 36.70A.060. The
7 critical area at issue here comprises fish and wildlife conservation habitat. RCW
8 36.70A.030(5)(c). The designation must be based on BAS.

9 **B. Stevens County Code (SCC) 13.10.034(3)(C) only protects the**
10 **habitats of endangered, threatened, and sensitive species if**
11 **the specific habitat is designated by law or rule.**

12 The Petitioner, after restating SCC 13.10.034(3)(C), argues that by defining "critical
13 habitat" as "only those areas designated by a state or federal agency through a formal
14 statutory or rule-making process" [SCC 13.10.034(5)(C)], Resolution 65-2005 does not give
15 protection to habitats for ETS species habitats not designated by statute or rule. The
16 Petitioners argue that the Washington State Department of Fish and Wildlife does not
17 designate habitats by "formal statutory or rule-making process" and the United States only
18 designates some habitats by "formal statutory or rule-making process", making SCC
19 13.10.034(5)(C) useless in protecting ETS habitat.

20 **C. Washington State designates endangered, threatened, and**
21 **sensitive species by rule, but not their habitats.**

22 The Petitioners contend that statutes RCW 77.12.020(6) and WAC 232-12-297,
23 contained in state law and/or the state regulations, do not require designation of specific
24 habitats where the fish and wildlife live, nor do they designate any habitats. No state law or
25 state regulation designates any specific areas as habitats for ETS species, with possibly one
26 exception, the generalized bull trout habitat overlay map. The Petitioners use a letter in the
Index, No. T13A 193, from Mr. Steven Penland, of the Washington State Department of

1 Fish and Wildlife (WSDFW) to emphasize this point. This letter is also corroborated by Mr.
2 Kevin Robinette of the WSDFW (T13A 193).

3 **D. The United States designates endangered and threatened**
4 **species by rule, but only certain habitats by rule.**

5 The Petitioners contend the United States government is different than Washington
6 State in that the federal government does designate by rule some habitats, referred to as
7 "critical habitat". The federal government lists many species as "threatened" or
8 "endangered" through formal rule making, but often times it does not list the species
9 "critical habitat". The regulatory protections for the listed species and the critical habitat are
10 not the same. Consequently, the federal government currently lists only critical habitat for
11 bull trout in Stevens County, not critical habitat for the lynx or grizzly bear at this time.

12 **E. Stevens County Code SCC 13.10.034(3), by failing to designate**
13 **the habitats of endangered, threatened, and sensitive species**
14 **habitats, violates the GMA.**

15 The Petitioners refer back to arguments A. through D. to emphasize their point. They
16 argue that SCC 13.10.034(3)(C), by defining "critical habitat" as "only those areas
17 designated by a state or federal agency through a formal statutory or rule-making process,
18 is moot and a failure to protect ETS species and their habitat. The Petitioners also contend
19 that SCC 13.10.034(4) only applies to "point observations", where some habitats, such as
20 the lynx, need protection by using polygons or extended areas beyond point observations.

21 **F. The Washington State Department of Fish and Wildlife priority**
22 **species and habitats database is best available science, but**
23 **Stevens County will only use the point data from the database**
24 **in designating endangered, threatened and sensitive species**
25 **habitats, but not polygon data.**

26 The Petitioners use a Court of Appeals case (Ferry County, 121 Wn. App. At 856-57,
90 P.3d at 702) and several documents in the Record to emphasize that WSDFW in its
Priority Habitats and Species Database updates its polygon and point observations as data

1 becomes available and is for use by governments to update their critical habitat
2 designations and species listing. The Petitioners also contend that the Wildlife Heritage
3 Database contains significant species site observations based on field surveys and reports
4 from reputable sources, which provide point observations to comprise best available science
5 for ETS species and their habitat.

6 **G. These violations warrant invalidity.**

7 The Petitioners contend that SCC 13.10.034(3) substantially interferes with the
8 fulfillment of the GMA goals 9 and 10. They argue that Stevens County, after 13 years since
9 the last deadline for all cities and counties to designate and protect critical areas, maintains
10 a critical areas regulation that only protects one ETS species, the bull trout, and no wildlife
11 species. The County's critical areas provision substantially interferes with protecting the
12 environment and the quality of life. The Petitioners contend that invalidity is clearly
13 warranted.

14 **Respondent Stevens County:**

15 The Respondent argues two points:

16 **A. Petitioner's claim is barred by the doctrines of Res Judicata
17 and Collateral Estoppel.**

18 The Respondent argues that this appeal is res judicata or relitigation of claims that
19 were litigated in a prior action. They contend that Futurewise asserts an interest in
20 protecting habitat for listed species, which is exactly the interest in a previous appeal filed
21 by Ms. Jeanie Wagenman. Because Ms. Wagenman and Futurewise have the same interest,
22 the "identity of the parties" requirement is satisfied and Futurewise's claim is barred.

23 In addition, the Respondent claims that collateral estoppel also applies. The
24 Respondent argues that the issues presented by Futurewise are identical to those previously
25 ruled on by the Hearings Board in Case No. 03-1-0006c. Thus, if Futurewise was in privity
26 with Ms. Wagenman and no injustice results the issues may not be relitigated. The
Respondent contends Futurewise, by its own admission, was in privity with Ms. Wagenman.

1 The Respondent further argues that SCC 13.10.034(3)(C) was fully and fairly litigated
2 and that the record is the same as that presented in the earlier challenge.

3 **B. Protections for habitat areas established by statute or rule-**
4 **making are in addition to the GMA compliant protections**
5 **already required by the County for habitat associated with**
6 **listed species.**

7 The Respondent contends that, if for some reason the Board concludes that it should
8 consider the merits of the petition, it should rule, as it previously did, that SCC
9 13.10.034(3)(C) not only complies with the GMA, but exceeds the requirements of the GMA.
10 The Respondent argues that under Stevens County's Title 13, habitat associated with listed
11 species known to be present in the County is designated and protected under Title 13 as
12 Fish and Wildlife Habitat Conservation Areas (FWHCA). Wetlands are similarly designated
13 and protected. SCC 13.10.020.

14 The Respondent contends that in designating and protecting FWHCA and wetlands
15 the County relied on BAS, including priority habitat and species maps provided by WSDFW.
16 They contend the Board has already ruled that Title 13 gives protection to habitats for ETS
17 species habitats.

18 What is at issue, the Respondent argues, is whether the County may use formal rule-
19 making as a trigger for additional measures to protect habitat that is associated with a listed
20 species. They cite the Board's decision in Case No. 03-1-0006c and quote a part of a line in
21 the Compliance Order at 11.

22 The Respondent also argues that Futurewise's contention that the County's action
23 falls short because "no state law or state regulation designates any specific areas as
24 habitats for ETS species, is erroneous. They provide examples to show that the State has
25 promulgated rule-making in the past, such as for salmon in Puget Sound (WAC 220-47) and
26 "Bald Eagle Protection Rules" (WAC 220-12-292).

1 The Respondent also notes that Futurewise acknowledges the federal government
2 designates habitat areas for the protection of listed species, citing bull trout habitat in the
3 Columbia River system.

4 The Respondent asks the Board to dismiss Futurewise's petition for review or write
5 another order establishing that SCC 13.10.034(3)(C) complies with the GMA.

6 **Petitioner's Hearing on the Merits Reply:**

7 The Petitioner's, in their reply brief, segment their arguments into four Sections.
8 They contend in their Section II(A) that nothing in Stevens County's Title 13 protects the
9 habitats of ETS species that are represented by polygons outside of wetlands or riparian
10 areas (see Parties Positions: Petitioners).

11 In Section II(B)(1), the Petitioners argue that SCC 13.10.030 does not designate and
12 protect the habitats of ETS species that are represented by polygons outside wetlands or
13 riparian areas. They contend it's a "purpose statement". (Pet. Reply Brief, pg. 5).

14 In Section II(B)(2), the Petitioner claims that SCC 13.10.031 classifies ETS species,
15 but does not protect ETS species habitats.

16 In Section II(B)(3), the Petitioners argue that SCC 13.10.032 designates habitat
17 areas that meet SCC 13.10.031 classification criteria as FWHCA's, but contains no provisions
18 to protect the habitats of ETS species.

19 In Section II(B)(4), the Petitioners contend that SCC 13.10.033 catalogs the
20 documents the County reviewed to establish development regulations to protect the
21 functions and values of fish and wildlife areas. It contains no reference to the WDFW
22 priority species and habitat maps. Again, they argue, this section does not protect any fish
23 or wildlife habitats.

24 In Section II(B)(5), the Petitioners argue that SCC 13.10.034(1) contains adequate
25 provisions for protection of waters and riparian habitats, but no protection for ETS species
26 habitats outside the riparian buffer area. SCC 13.10.034(2) contains adequate building
setbacks from riparian buffers, but again does not protect ETS species habitats outside the
riparian buffer area. And, according to the Petitioners, SCC 13.10.034(3) does not protect

1 ETS species habitat, with the exception of bull trout (see pages 5-10, HOM Brief). In
2 addition, SCC 13.10.034(4) does not protect ETS species habitat whose habitats are
3 represented by polygons on the Priority Species and Habitat maps. It only protects point
4 observations.

5 In Section II(B)(6), the Petitioners argue that no other provision of SCC 13.10.030 *et*
6 *seq.* designates or protects the habitats of ETS species outside of wetlands or riparian areas
7 and gives a brief description and explanation of each section.

8 In Section II(B)(7), the Petitioners give a summary and quote the WDFW, who
9 concluded, after examining Stevens County's Code Title 13, the following:

10 Adoption of the proposed amendment by Stevens County would likely lead to
11 greatly reduced consideration for endangered, threatened and sensitive
12 species in the county, and some occurrences of these species would not
13 receive any protection in the land use planning process.

14 In another Section II(B), (Petitioner's listing error, HOM Reply Brief), the Petitioners
15 also contend that SCC 13.10.020 through 13.10.025 do not designate or protect the
16 habitats of ETS species outside of wetlands.

17 In Section II(C), the Petitioners argue that SCC 13.10.034(3)(C) does not trigger
18 additional protection measures. As amended in Resolution #65-2005, it fails to protect ETS
19 habitats not otherwise protected by Stevens County Title 13 and is an erroneous
20 interpretation of RCW 36.70A.172 and RCW 36.70A.060(2).

21 Under Section II(D), the Petitioners argue Stevens County's purported identification
22 of ETS species designated by rule, such as salmon preserves, bald eagle protection rules,
23 and game preserves, proves their point that Washington State does not designate the
24 specific habitat of ETS species by rule or statute. The Petitioners point out that the
25 Respondent did not produce any evidence to counter that from the two WDFW staffers who
26 confirmed that, "No state agency, including WDFW, designates areas through formal
statutory or rule-making process for endangered, threatened, and sensitive species."

1 Under Section III, the Petitioners argue the Res Judicata and Collateral Estoppel
2 issues raised by the Respondent. In addition to the summary given here of each section,
3 they brief each argument in A through D.

4 In Section III(A), the Petitioners argue Res Judicata and collateral Estoppel do not
5 apply because the County has not shown identity of parties or privity between the parties.

6 In Section III(B), the Petitioners contend that Res Judicata does not apply because
7 the County did not establish concurrence of identity as to the four required elements.

8 In Section III(C), the Petitioners claim Res Judicata does not apply because the
9 County did not establish concurrence of identity as subject matter, cause of action, and the
10 quality of the persons for or against whom the claim is made.

11 In Section III(D), the Petitioners contend that collateral estoppel does not apply
12 because application of collateral estoppel would work an injustice against Futurewise.

12 Board Analysis:

13 The Board will group the two issues together in its analysis.

14 The Growth Management Act provides that: On or before September 1, 1991, each
15 county, and each city, shall designate where appropriate: (d) critical areas. RCW
16 36.70A.170(d).

17 In designating and protecting critical areas under this chapter (36.70A.172(1),
18 counties and cities shall include the best available science in developing policies and
19 development regulations to protect the functions and values of critical areas.

20 RCW 36.70A.060(2) provides that every county shall adopt development regulations
21 that protect critical areas. The definition of "critical areas" includes "fish and wildlife habitat
22 conservation areas" (FWHCA). RCW 36.70A.030(5)(c).

23 WAC 365-190-080(5)(a)(i) & (ii) explains why it is critical to protect these habitats
24 and what they include:

25 (5) Fish and wildlife habitat conservation areas. Fish and wildlife habitat
26 conservation means land management for maintaining species in suitable
habitats within their natural geographic distribution so that isolated
subpopulations are not created. This does not mean maintaining all individuals

1 of all species at all times, but it does mean cooperative and coordinated land
2 use planning is critically important among counties and cities in a region. In
3 some cases, intergovernmental cooperation and coordination may show that it
is sufficient to assure that a species will usually be found in certain regions
across the state.

4 (a) Fish and wildlife habitat conservation areas include:

5 (i) Areas with which endangered, threatened, and sensitive species have a
primary association;

6 (ii) Habitats and species of local importance;

7 In designating fish and wildlife habitat conservation areas, the County must at least
8 designate "areas with which endangered, threatened, or sensitive species have a primary
9 association and the designation" must be based on best available science as required by
10 36.70A.172.

11 At issue in this appeal is whether Stevens County has protected fish and wildlife
12 habitat conservation areas or, in other words, critical habitat for endangered, threatened,
13 and sensitive species as required by the GMA.

14 The Petitioner argues that Stevens County's regulation, SCC 13.10.034(3)(C), fails to
15 protect endangered, threatened, and sensitive species habitats because such habitat has to
16 be designated by statute or rule. SCC 13.10.034(3)(C) states:

17 C. For purposes of this section, critical habitat shall include only those
18 areas designated by a state or federal agency through a formal
19 statutory or rule-making process for endangered, threatened, or
20 sensitive species. Critical habitat for species of local importance shall be
limited to those areas determined by the County when designating such
a species. (Board emphasis).

21 The County has done an admirable job of requiring pre-set buffers or alternative
22 buffers set on a case by case basis, and requiring a report from a qualified professional to
23 set management recommendations, if a development is within "a mapped critical habitat
24 area" for ETS species. But the County falls short by defining "critical habitat" as "only those
25 areas designated by a state or federal agency through a formal statutory or rule-making
26 process.

1 The Petitioner has provided evidence that the state agency responsible for the
2 protection of wildlife and their habitat, the Washington Department of Fish and Wildlife,
3 does not "map or designate 'Critical Habitat' for State listed endangered, threatened, or
4 sensitive species through a formal statutory or rule making process." (T13A, exhibit 193, e-
5 mail from Kevin Robinette, WDFW, July 28, 2004).

6 This is corroborated in another letter written, but unsigned, by Stephen Penland,
7 WDFW, dated March 28, 2005. In his letter, written on WDFW stationary, he states:

8 "This proposed amendment refers to a process within state agencies that
9 simply does not exist. No state agency, including WDFW, designates areas
10 through formal statutory or rule-making process for endangered, threatened,
11 or sensitive species." (Same exhibit number).

12 Mr. Penland, in reference to SCC 13.10.034(3)(C), further states:

13 "Therefore, the effect of the county's proposed revision would be the loss of
14 any consideration during the land use planning process for species whose
15 existence is seriously threatened in Washington State. This in turn could
16 significantly contribute to their extinction in the state."

17 This last statement is important. Within the definition of fish and wildlife conservation
18 areas is the following statement:

19 This does not mean maintaining all individuals of all species at all times, but it
20 does mean cooperative and coordinated land use planning is critically
21 important among counties and cities in a region. In some cases,
22 intergovernmental cooperation and coordination may show that it is sufficient
23 to assure that a species will usually be found in certain regions across the
24 state.

25 If Stevens County does not designate fish and wildlife conservation areas for certain
26 listed species using BAS and all the information available from WDFW, but neighboring
counties, such as Ferry County and Pend Oreille County do, then there would be a
disconnect in protection for the listed species and extinction a real possibility. To protect
ETS species and their habitat, such as the lynx, which knows no country, state or county

1 boundary, there must be intergovernmental cooperation and coordination, as stated in WAC
2 365-190-080(5).

3 As for the federal government, Mr. Chris Warren, U. S. Fish and Wildlife Service, in
4 an e-mail to Ms. Wagenman wrote:

5 "Under the Endangered Species Act (ESA) we can list individual species as
6 either "threatened" or "endangered" through a formal rule-making process,
7 which provides them federal regulatory protections: and we can also
8 designate critical habitat (CH) for those species under a separate rule-making
9 process, after which those designated areas are also protected by federal
10 regulations. We have not designated CH for many listed species, and the
11 regulatory protections for the listed species and the CH are not the same."

12 Mr. Warren concludes with:

13 "Under the ESA, federal agencies or their authorized actions can not
14 "adversely effect" or "adversely modify" CH. The regulatory protections for CH
15 apply to non-federal lands only to the extent that there is a federal nexus
16 (federal funding, etc.)." (Board emphasis)

17 Simply put, the federal government can designate critical habitat for ETS species, but
18 under a separate rule-making process and, for the most part, only for federal lands.

19 Therefore, the U.S. Fish and Wildlife Service rule-making does not have an effect on most
20 state or Stevens County lands.

21 Ms. Denise Howard, another employee for the U. S. Fish and Wildlife Service, wrote
22 the following in an e-mail to Ms. Wagenman:

23 "We currently only have critical habitat for Bull Trout in Stevens County. There
24 is no federally listed critical habitat for Lynx or Grizzly bear at this time."

25 The Board asks the following question. If the state does not have the legislative
26 authority to designate critical habitat for ETS species through a rule-making process and the
federal government's rule-making for ETS species habitat is separate from its listed species,
then what jurisdiction is responsible to protect the ETS species habitat? This question is
answered by Mr. Kevin Robinette in his e-mail to Ms. Wagenman on July 28, 2004:

1 "Since Critical Areas are designated by Counties and Cities under the Growth
2 Management Act (with input from WDFW and the public), the formal rule
3 making process is that of the local municipalities."

4 To determine whether Stevens County has protected the ETS species habitat to the
5 extent required by the GMA, the Board looks to the County's Code, Title 13.

6 The County, in SCC 13.10.030, Fish & Wildlife Habitat Conservation Areas, specifically
7 states, "It is the purpose of this Title to protect, conserve and restore, where practical,
8 natural habitats of those listed species." It is therefore understood that Stevens County
9 wants to protect the "natural habitats" of its six listed species.

10 Under SCC 13.10.031, Classifications, the County lists six state listed species located
11 in Stevens County. Of those six, the bald eagle, golden eagle, bull trout and steelhead, have
12 habitat that is either fully or partially protected, either through federal or state action or the
13 County's Code, generally found in SCC 13.10.031(1), (4), (5) and (6). The Common Loon,
14 because it inhabits the County's lakes and waterways, also seems to be protected, although
15 somewhat limited because of a lack of regulatory protections on lakes.

16 The lynx is not protected. As a predator, the lynx has an extended range and must
17 be protected "within its natural habitat", as stated in the County's Title 13, and/or as
18 defined in WAC 365-190-080(5), "in natural geographic distribution so that isolated
19 subpopulations are not created."

20 The WDFW bases its Priority Habitats and Species Database on information collected
21 by WDFW biologists using the best information available from research efforts, surveys,
22 and/or field observations. They describe the exact source of each delineated feature in an
23 accompanying report. They also state that "these data represent known occurrences of
24 priority habitats and species, not potential or theoretical." The WDFW does the same with
25 the Wildlife Heritage Database, which is continually being updated on 230 species. WDFW
26 uses BAS to develop these maps.

1 Stevens County used some of the data collected by the WDFW to protect wetlands,
2 riparian areas, lakes and streams, but failed to use BAS in developing protections for all the
3 listed species in SCC 13.10.031(1).

4 The Petitioner's appeal centers on SCC 13.10.034(3)(C). The County in SCC
5 13.10.034(3)(A) seems to protect critical habitat areas for ETS species from development
6 near lakes, rivers and streams by a buffer and in SCC 13.10.034(3)(B) the County requires a
7 report from a qualified professional setting forth management recommendations specific to
8 the site and proposed development, but these protections are all for naught when the
9 County amended the chapter to include SCC 13.10.034(3)(C).

10 Since there is no "formal statutory or rule-making process for ETS species critical
11 habitat", SCC 13.10.034(3)(C) fails to protect Fish and Wildlife Habitat Conservation Areas
12 as required by the GMA. The protection measures are based on a specific "mapped critical
13 habitat area". As stated by Mr. Robinette in his e-mail of July 28, 2004:

14 "We don't map critical habitat, though habitat for ETS might be included as a
15 "Priority Habitat" or Priority Species" area in our Priority Habitats and Species
16 database."

17 To reiterate, in his letter he further writes:

18 "The State does not map or designate "Critical Habitat" for State listed,
19 endangered, threatened, or sensitive species through a formal statutory or
20 rule making process."

21 The County, to its credit, does protect habitat through buffers and a Habitat
22 Management plan in SCC 13.10.034(4), but only for mapped point species observations.
23 Lynx habitat and, in the future, habitat of some species that may become listed, is therefore
24 not protected. Protection for lynx habitat can only be done properly through polygons, area-
25 wide habitat, delineated and mapped in the Washington Department of Fish and Wildlife's
26 Priority Habitats and Species Database, which also maps points that describe occurrences of
priority habitats and species. It is important to note that all priority species mapped areas
represent known use areas; they are not potential habitats. The County failed to use BAS,

1 notably WDFW's Priority Habitats and Species Database, which provides polygon data, to
2 designate all fish and wildlife conservation areas as required by the GMA.

3 The Respondent, Stevens County, argues that the Board has already ruled, in Case
4 No. 03-1-006c, that the County used BAS and is in compliance with the GMA requirement to
5 designate and protect FWHCA and wetlands. In addition, the Respondent argues that the
6 Board already determined the GMA does not obligate the County to adopt the additional
7 protective measures established by SCC 13.10.034(3) for habitat associated with listed
8 species, so limiting those measures to areas designated by rule making authority that
9 WDFW and USFW routinely exercise cannot conceivably violate the GMA.

10 The Board recognizes they relied on the record and the amicus brief submitted by
11 the WDFW in Case No. 03-1-0006c, which did not mention the agency's inability to carry
12 out formal statutory or rule-making authority, to render their final Order. The Board also
13 weighed heavily the County's argument that it was a question of [due process and indicated
14 that if "priority habitat" were used to trigger additional protection requirements, landowners
15 would be deprived of their right to notice and an opportunity to be heard because WDFW
16 makes those designations without notice and comment.] The County also argued that
17 [using "critical habitat" designated by rule-making to trigger the additional requirements
18 cures that defect.] (*LLPO, et al v. Stevens Co.*, EWGMHB #03-1-0006c, Order On
19 Compliance, pg. 11 (Oct. 15, 2004). Unfortunately, neither the WDFW nor the County was
20 accurate in their assessment.

21 The Petitioner's appeal is based on the County's adoption of Resolution #65-2005,
22 which formally amended Title 13. The County's action can and was appealed to the Board.
23 In light of the new evidence submitted with this appeal, in particular letters from Mr. Kevin
24 Robinette and Mr. Stephen Penland, both staff members working for WDFW, the Board
25 must determine whether the County's Code is fully compliant with the GMA based on this
26 new information.

As required by the GMA, the County must protect listed species and their habitat.
Even though the County has protected five of the six listed species to some degree by

1 protecting riparian areas, wetlands, lakes and waterways, it has not fully complied by
2 protecting all fish and wildlife conservation areas for listed species using BAS. If the County
3 had not added SCC 13.10.034(3)(C) and if they had referenced and adopted the use of the
4 WDFW's Priority Habitats and Species Database maps, which include polygon habitat areas
5 for species such as the lynx, as the County did with SCC 13.10.034(4) Mapped Point Species
6 Observations, it would be in compliance. But the County did not.

7 The County also contends that the administrative code is "replete with examples
8 where the State has designated habitat through rule making." (Respondent's HOM Brief.)
9 For instance, they contend the State designated certain areas in Puget Sound as a critical
10 habitat for salmon through rule making. WAC 220-47-307. In another example, the
11 Respondent references 31 preserves set aside by rule for the protection of game species.

12 The Board believes the Petitioner addressed these and other examples appropriately
13 and correctly. In addition, the Board, upon examining the statutory authority upon which
14 several of these examples are based, did not find where the agency (WDFW) could
15 designate habitat by formal statutory or rule-making. The information provided by WDFW
16 staff is correct.

17 Concerning the Puget Sound salmon protection areas (WAC 220-47-307) and the 31
18 preserves set aside for the protection of game species (WAC 220-16-010) the Board finds
19 that the WDFW Game Commission did create these areas and does have authority to make
20 rules, but is restricted in scope by the legislature in RCW 77.12.047.

21 As seen in RCW 77.12.047, the Commission may adopt, amend, or repeal rules. The
22 rules that pertain to the examples are found in (1)(b) and (k), which state:

23 (b) Specifying the areas and waters in which the taking and possession of
24 wildlife, fish, or shellfish is lawful or unlawful.

25 (k) Establishing game reserves and closed areas where hunting for wild
26 animals or wild birds may be prohibited.

Designating critical habitat for ETS species is not within the Washington State Game
Commission's authority.

1 The Respondent devoted much of their brief to the argument that the Petitioner's
2 claim is barred by the doctrine of res judicata and collateral estoppel. Petitioners, in their
3 reply brief, responded with arguments that these doctrines do not apply in this case.

4 The Board believes the evidence does not show that the Petitioner, Futurewise, was
5 before us on this issue at an earlier date, nor does the Board believe the specific issue
6 being decided in this case has been decided before in another case. The Board's decision
7 will be made upon the facts presented and with the parties before us at this time. Neither
8 res judicata nor collateral estoppel applies in this case.

8 **Conclusions:**

9 The Petitioners have carried their burden of proof. By clear, cogent and convincing
10 evidence they have shown that Stevens County's Resolution No. 65-2005, amending SCC
11 13.10.034, violates the Growth Management Act by failing to designate all of the identified
12 habitats of ETS species as fish and wildlife conservation areas and for failing to consider
13 BAS in designating all of the identified habitats of ETS species as fish and wildlife habitat
14 conservation areas in establishing protections for the functions and values of critical habitat
15 areas within the County.

16 The Board does not believe the continued validity of part or parts of SCC 13.10.030
17 would substantially interfere with the fulfillment of the goals of the GMA under RCW
18 36.70A.302(1) at this time. The request for invalidity is denied.

18 **V. FINDINGS OF FACT**

- 19 1. On July 6, 2004, Stevens County adopted Resolution #80-2004. The
20 resolution amends Title 13, the County's Critical Areas Ordinance to
21 comply with the Final Decision and Order issued on February 10, 2004,
22 by the EWGMHB.
- 23 2. Stevens County received a letter from Futurewise on April 4, 2005, with
24 WDFW attachments.
- 25 3. On May 10, 2005, Stevens County adopted Resolution #65-2005
26 approving the adoption of amendment SCC 13.10.034(3)(C).

1 the County violated the GMA and did not properly follow the
2 requirements set forth in the GMA.

- 3 2. The Board finds Stevens County out of compliance and remands
4 Resolution #65-2005 back to Stevens County Board of County
5 Commissioners to amend SCC 13.10.034 and protect all listed species
6 habitat using BAS.
- 7 3. The Board feels the County's lack of compliance at this time does not
8 require invoking invalidity. Title 13, as written and adopted, has in
9 place the protections necessary to protect the habitats of the majority
10 of the listed species during the period it takes the County to come into
11 compliance.
- 12 4. Stevens County must take the appropriate legislative action to bring
13 itself into compliance with this Order by **May 15, 2006, 120** days
14 from the date issued. The following schedule for compliance, briefing
15 and hearing shall apply:

16 Compliance Due	May 15, 2006
17 Statement of Action Taken to 18 Comply (County to file and serve on 19 all parties)	May 22, 2006
20 Petitioners' Objections to a Finding 21 of Compliance Due	June 5, 2006
22 County's Response Due	June 19, 2006
23 Petitioners' Optional Reply Brief Due	June 26, 2006
24 Telephonic Compliance Hearing. 25 Parties will call: 360-357-2903 26 followed by 15166 and the # sign. Ports are reserved for Mr. Zilavy and Mr. Scott	July 6, 2006, 10 a.m.

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

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

5 **Reconsideration:**

6 Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this
7 Order to file a petition for reconsideration. Petitions for reconsideration shall
8 follow the format set out in WAC 242-02-832. The original and four (4) copies of
9 the petition for reconsideration, together with any argument in support thereof,
10 should be filed by mailing, faxing or delivering the document directly to the
11 Board, with a copy to all other parties of record and their representatives. **Filing**
12 **means actual receipt of the document at the Board office.** RCW 34.05.010(6),
13 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite
14 for filing a petition for judicial review.

14 **Judicial Review:**

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

18 **Enforcement:**

19 The petition for judicial review of this Order shall be filed with the appropriate
20 court and served on the Board, the Office of the Attorney General, and all parties
21 within thirty days after service of the final order, as provided in RCW 34.05.542.
22 Service on the Board may be accomplished in person or by mail. Service on the
23 Board means **actual receipt of the document at the Board office** within thirty
24 days after service of the final order.

1 Service:

2 **This Order was served on you the day it was deposited in the United States mail.**

3 **RCW 34.05.010(19)**

4 **SO ORDERED** this 13th day of January 2006.

5 EASTERN WASHINGTON GROWTH MANAGEMENT
6 HEARINGS BOARD

7
8 _____
9 John Roskelley, Board Member

10
11 _____
12 Judy Wall, Board Member

13
14 _____
15 Dennis Dellwo, Board Member