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

SCOTT SIMMONS, RIPARIAN OWNERS OF
FERRY COUNTY, and GARY HOWDEN

Petitioner(s),

Case No. 09-1-0002c

v.

FINAL DECISION AND ORDER

FERRY COUNTY,

Respondent(s).

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I. SYNOPSIS

On December 1, 2008, the Ferry County Board of County Commissioners (BOCC) adopted Ordinance #2008-02, amending the Ferry County Resource Lands and Critical Areas Ordinance (RLCAO). With this amendment, Ferry County (County) adopted buffer widths for rivers, streams and lakes to protect fish and wildlife habitat areas pursuant to the Growth Management Act (GMA).

On January 28, 2009, Mr. Scott Simmons (Petitioner Simmons) filed a timely petition for review (PFR) with five issues. On January 30, 2009, Riparian Owners of Ferry County, and Mr. Gary Howden (Petitioners RO) filed a separate PFR with four similar issues. The County filed a Motion to Dismiss all the issues in both cases. The Eastern Washington Growth Management Hearings Board (Board), after briefing by the parties, dismissed all the issues, except portions of Issue No. 3 in both cases. The Board consolidated the cases into Case No. 09-1-0002c.

The Board finds Petitioner Simmons and Petitioners RO failed to carry their burden of proof in their respective issues. Under Petitioner Simmons' Issue No. 3, the Board agrees with the County that it evaluated documented BAS and there were maps in the record

1 available to the parties, and data was available in the record or by reference. Under
2 Petitioners RO's Issue No. 3, the Board determined the BOCC has the authority under RCW
3 36.32.120 to adopt ordinances and resolutions not in conflict with state law. There is no
4 statutory authority that limits the BOCC to adopting draft recommendations.

5 Any issues not in the original PFR or amended per WAC 242-02-260 were rejected by
6 the Board.

7 **II. INVALIDITY**

8 The Board DENIES Petitioner Simmons' and Petitioners RO's request for a
9 determination of invalidity.

10 **III. PROCEDURAL HISTORY**

11 On January 28, 2009, SCOTT SIMMONS filed a Petition for Review (PFR) challenging
12 Ferry County's adoption of Ordinance No. 2008-02. This matter was assigned Case No. 09-
1-0001, with Board member Ray Paolella serving as Presiding Officer.

13 On January 30, 2009, RIPARIAN OWNERS OF FERRY COUNTY and GARY F. HOWDEN
14 filed a PFR challenging Ferry County's adoption of Ordinance No. 2008-02. This matter was
15 assigned Case No. 09-1-0002, with Board member John Roskelley serving as Presiding
16 Officer.

17 On March 5, 2009, the Board held telephonic Prehearing Conferences in these
18 matters with the Board issuing its Prehearing Order for both cases on March 10, 2009.

19 Since issuance of the Board's March 10 Prehearing Orders, Ferry County filed a
20 Motion to Dismiss both of the above-referenced cases based on, among other things, lack
21 of subject matter jurisdiction.¹ In two separate orders concerning these motions, the Board
22 denied in part and granted in part the County's request.²

23 ¹ March 25, 2009 Respondent's Motion to Dismiss – Case No. 09-1-0001; March 25, 2009 Respondent's Motion
to Dismiss – Case No. 09-1-0002.

24 ² April 22, 2009 Order on Motion to Dismiss – Case No. 09-1-0002; April 23, 2009 Order on Motion to Dismiss
– Case No. 09-1-0001. In regards to Case No. 09-1-0001, Petitioner set forth five issues for the Board to
25 address. Of these five issues, with the Board's April 23 Order, Issues 1, 2, 4, and 5 were dismissed in their
entirety leaving only Issue 3 to advance to the Hearing on the Merits. However, in regards to Issue 3, the
26 Board struck language from that issue related to nexus and proportionality. *See April 23 Order, at 3-4.* In

1 On June 22, 2009, the Board held the hearing on the merits. Present were, John
2 Roskelley, Presiding Officer, and Board Members Joyce Mulliken and Raymond Paoella.
3 Present for the Petitioners was Scott Simmons and Gary Howden. Present for the
4 Respondent was Steve Graham.

5 **IV. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF**
6 **REVIEW**

7 Comprehensive plans and development regulations (and amendments thereto)
8 adopted pursuant to the Growth Management Act ("GMA" or "Act") are presumed valid
9 upon adoption by the local government. RCW 36.70A.320. The burden is on the Petitioners
10 to demonstrate that any action taken by the respondent jurisdiction is not in compliance
11 with the Act. The Board ". . . shall find compliance unless it determines that the action by
12 the . . . County. . . is clearly erroneous in view of the entire record before the Board and in
13 light of the goals and requirements of the [Growth Management Act]." RCW 36.70A.320.
14 To find an action clearly erroneous, the Board must be ". . . left with the firm and definite
15 conviction that a mistake has been committed." *Department of Ecology v. Central Puget*
Sound Growth Management Hearings Board, 142 Wn.2d 543, 552, 14 P.3d 133 (2000).

16 The Hearings Board will grant deference to counties and cities in how they plan
17 under the Growth Management Act (GMA). RCW 36.70A.3201. But, as the Court has stated,
18 "local discretion is bounded, however, by the goals and requirements of the GMA." *King*
County v. Central Puget Sound Growth Management Hearings Board, 142 Wn.2d 543, 561,
19 14 P.2d 133 (2000). It has been further recognized that "[c]onsistent with *King County*, and
20 notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly
21 when it foregoes deference to a . . . plan that is not 'consistent with the requirements and
22 goals of the GMA." *Thurston County v. Cooper Point Association*, 108 Wn. App. 429, 444, 31
23 P.3d 28 (2001).

24 regards to Case No. 09-1-0002, Petitioners set forth four issues for the Board to address. Of these four
25 issues, with the Board's April 22 Order, Issues 1, 2, and 4 are dismissed in their entirety. As for Issue 3, the
26 Board dismissed that portion of the issue related to RCW 36.70A.020(6), leaving argument related to RCW
36.70A.172(1) for the Hearing on the Merits. *See April 22 Order, at 10-12.*

1 The Board finds that the Petition for Review was timely filed, pursuant to RCW
2 36.70A.290(1); the Petitioners have standing to bring this matter before the Board,
3 pursuant to RCW 36.70A.280(2); and the Board has jurisdiction over the subject matter of
4 the Petition for Review, pursuant to RCW 36.70A.280(1)(a).

5 **V. ISSUES AND DISCUSSION**

6 **Petitioner Simmons' Issue No. 3:**

7 Did Ferry County fail to comply with the requirements of RCW 36.70A.172(1) when it
8 adopted Sec. 9.04 of Ordinance #2008-02 designating Mapped Priority Habitat Areas and
9 Species Observation Points without determining BAS for said areas and or without
10 considering data supporting the generation of said maps used to designate said areas?

11 **Petitioners Riparian Owners, et al. Issue No. 3:**

12 Did Ferry County fail to comply with RCW 36.70A.172(1) when they adjusted buffers
13 from those recommended in the version of the CAO presented to the public in December
14 2007 to those incorporated in the adopted version?

15 **The Parties' Position:**

16 **Petitioner Simmons:**

17 Petitioner Simmons claims there are no maps showing validated point observations
18 or validated polygon observations to be used by the County to regulate the properties.
19 Petitioner Simmons also argues no data is contained in the record to generate the maps.
20 According to Petitioner, the County is required to use best available science (BAS) when
21 designating critical areas and this science must be in the record. Petitioner Simmons claims
22 that without the maps, the County is unable to designate critical areas.³

23 **Petitioners Riparian Owners, et al (Petitioners RO):**

24 Petitioners RO contend the County adjusted and added buffers to those buffers
25 recommended in the draft Resource Lands and Critical Areas Ordinance (RLCAO) and failed
26 to consider BAS in doing so. Petitioners RO claim the County's Planning Commission (PC)

³ Petitioners Brief for Simmons Issue No. 3, pages 3-4; May 20, 2009.

1 did an exhaustive study of documents on BAS, which were incorporated into the RLCAO as
2 Appendices C1-3, and resulted in the PC's recommendation issued for public review in
3 December 2007.⁴ The documents contained numerous opinions among the researchers.

4 According to Petitioners RO, the Washington State Department of Fish & Wildlife
5 (WDFW), recommended the work of staff members Knutson and Naef's, *Management*
6 *Recommendations for Washington's Priority Habitats*,⁵ which resulted in WDFW
7 recommending the riparian habitat buffer widths presented by Cederholm as "...most closely
8 agreed with WDFW's synthesis of the literature."⁶ The PC claimed the Knutson/Naef study
9 failed to provide a basis for duplicating the WDFW's decision process or an explanation of
10 the high width recommendations.⁷

11 Petitioners RO cite to *Swinomish Indian Tribal Council v. WWGMHB*⁸ to emphasize
12 that the GMA does not require counties to follow BAS, rather they are required to include
13 BAS in the record. Furthermore, according to Petitioners RO, the Court said that the
14 requirement for local government to consider BAS in developing their CAO's "...does not
15 mean that local government is required to adopt regulations that are consistent with BAS
16 because such a rule would interfere with the local agency's ability to consider other goals of
17 GMA and adopt appropriate balance between all the GMA goals."⁹ Petitioners RO believe the
18 Court's rulings in *Swinomish* and *WEAN* allow local governments a more permissive
19 interpretation of RCW 36.70A.172.

20 Petitioners RO agree the County did consider, analyze and decide on a balanced
21 application of the GMA goals and BAS to determine its standard buffers for Type 1-5 waters,
22 but arbitrarily changed the buffer widths recommended in the draft RLCAO to those
23 recommended by Futurewise. Petitioners RO contend the changes were "solely out of

24 ⁴ Riparian Owners and Gary Howden Brief in Support of Issue 3, pg. 3; May 20, 2009.

25 ⁵ Ibid at 4.

26 ⁶ Ibid at 5.

⁷ Exhibit 1, draft RLCAO, pg. 84, Dec. 13, 2007.

⁸ *Swinomish Indian Tribal Community, et al. v Western Washington Growth Management Hearings Board*, 161 Wn.2d
415, 423-24, 166 P.3d 1198 (2007).

⁹ *WEAN*, 122 Wn. App. At 173.

1 concern for (Growth) Board reaction, and for possible litigation and without further
2 consideration of BAS or the 'deference' granted the County by the GMA to balance fish and
3 wildlife goals with other goals."¹⁰ Petitioners RO acknowledge that Ordinance #2008-02 was
4 put out for a 60-day public comment period with the enlarged buffer recommendations, but
5 during this time failed to recognize it no longer had jurisdiction to be establishing buffers
6 under the GMA on any ponds, lakes, or streams. According to Petitioners RO, these bodies
7 of water were under the jurisdiction and regulation of the Shoreline Management Act (SMA)
8 as ordered by the Supreme Court on July 31, 2008.¹¹ Petitioners RO argue that the County
9 has an approved Ferry County Shorelines Master Program (Ordinance 2002-09), which was
10 enacted October 14, 2002, that already identifies regulations for designated SMA shorelines
and shore lands.

11 **Respondent's Reply to Petitioner Simmons:**

12 The County incorporates by reference all arguments made in regards to
13 the Petition filed by Petitioners RO argued below.

14 The County contends Petitioner Simmons' issue is very narrow and asks
15 whether the County failed to comply with RCW 36.70A.172(1) by enacting a CAO
16 "without considering data supporting the generation of said maps used to
17 designate said areas."¹² The County contends Petitioner Simmons references
18 general best available science issues in the phrasing of his issue, but fails to brief
19 this issue in any way other than his concern over WDFW maps. The County
20 argues that issues not briefed are deemed abandoned and cite to *Ridge v.*
*Kittitas County*¹³ and *McVittie v. Snohomish County*.¹⁴

21 According to the County, Petitioner Simmons argues Ferry County's CAO
22 violates RCW 36.70A.172(1) because the maps supporting designated Mapped
23

24 ¹⁰ Riparian Owners, et al., at 7.

¹¹ Petitioners RO cite to *Futurewise v. WWGMHB and City of Anacortes*, No. 80396-0.

25 ¹² Respondent's HOM brief at 15.

¹³ *Ridge v. Kittitas County*, EWGMHB, Case No. 00-1-0017, FDO (June 7, 2001).

26 ¹⁴ *McVittie v. Snohomish County*, CPSGMHB, Case No. 01-3-0004c, FDO (August 15, 2001).

1 Priority Habitat Areas and Species Observation Points were not available, nor was
2 the best available science. The County argues the appropriate WDFW maps are
3 in the record,¹⁵ along with the BAS used in designating these areas and points.
4 The County contends that BAS, even by reference, is included in the record, and
5 in this case, the WDFW has explained that more detailed information is available
6 in "formal metadata maintained for each dataset and distributed with datasets."¹⁶

7 Furthermore, the County argues Petitioner Simmons fails to brief his
8 reference to the agreement that the County signed (Exhibit 155) that limits
9 dissemination of much of the data behind the mapping. The County contends
10 there is no case or precedent that holds that the requirement to show your work
11 means violating state law with respect to maintaining certain records
12 confidential, which the County acknowledges it did with WDFW three years
13 before. The County argues Petitioner Simmons raises this issue in his brief for
14 the first time and he did not give the County notice that he had a problem with
15 the confidentiality of the species data.

16 **Respondent's Reply to Petitioners RO:**

17 The County argues there is no authority for the proposition that a jurisdiction has to
18 justify departures or modifications from earlier drafts, and draft ordinances are not within
19 the Board's jurisdiction. According to the County, a draft ordinance is not a legally
20 recognizable act or creation, and is not a public record under RCW 42.56.280. The County
21 claims draft documents are distributed for the "sole purpose of advising the public of what
22 was being considered."¹⁷

23 The County's HOM brief contends one of the Petitioners is on the PC and liked an
24 earlier draft of the CAO; that a majority of the PC liked a later draft (of the CAO); and the
25 BOCC enacted the later draft. The County also claims there was no intimidation by

26 ¹⁵ Exhibit 140.

¹⁶ Respondents HOM brief, reference to Exhibit 141, pg. 2, WDFW document.

¹⁷ Respondent's HOM brief, page 6 (June 17, 2009).

1 Futurewise to adopt their recommended buffers “under assumed or implied threat of
2 litigation.”¹⁸

3 The County argues that the Board should show deference to the County because of
4 RCW 36.70A.320(1) and RCW 36.70A.320(3), although where this same statute requires
5 the Board to give deference to a jurisdiction, the jurisdiction’s actions must be consistent
6 with the goals and requirements of the GMA. Petitioners RO fail to understand the GMA
7 permits local legislative bodies to give varying degrees to the GMA goals in order to
8 harmonize and balance the goals. The County cites to *City of Wenatchee v. Chelan*
9 *County*,¹⁹ where the Eastern Board cited and interpreted the *Swinomish* decision, and
10 *Olympic Stewardship Foundation, et al, v. Jefferson Co.*, which states “...that if a jurisdiction
11 seeks to deviate from BAS it must provide a reasoned justification for such a deviation.”²⁰
12 The County also cites to this Board’s Third Order on Compliance, Case No. 04-1-0007c,
13 issued March 10, 2009, claiming Petitioners RO’s arguments are similar to those posed by
14 the County in defending its buffers in that action, which the Board rejected and found the
15 County’s actions in non-compliance.

16 The County also argues Petitioners improperly challenge the CAO buffers in the SMP
17 shorelines, which was never raised in his PFR. The County addresses the issue nevertheless,
18 citing *Futurewise v. WWGMHB*,²¹ where it argues this case “stands for the proposition that
19 the GMA and Growth Boards do not have jurisdiction” (to riparian protections in shorelines).
20 The County claims Petitioners RO misread the Supreme Court’s decision. In rejecting the
21 GMA authority, the Western Board in *Futurewise v Anacortes*²² explained:

22 ...[T]here is nothing in this transfer of authority that in any way lessens
23 protections for critical areas. ESHB 1933 expressly provides that “[S]horeline
24 master programs shall provide a level of protection to critical areas located
25 within shorelines of the state that is at least equal to the level of protection
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24 ¹⁸ Ibid.

25 ¹⁹ *City of Wenatchee v. Chelan County*, EWGMHB, Case No. 08-1-0015, FDO (March 6, 2009).

26 ²⁰ *Olympic Stewardship Foundation, et al, v. Jefferson County*, WWGMHB, Case No. 08-2-0029(c), (Nov. 19, 2009).

²¹ *Futurewise v. WWGMHB*, 164 Wn.2d 242 (2008).

²² *Futurewise v. Anacortes*, WWGMHB, Case No. 05-2-0016, FDO (Dec. 27, 2006).

1 provided to critical areas by the local government's critical area ordinances
2 adopted and thereafter amended pursuant to RCW 36.70A.060(2)." (emphasis
3 added).

4 The County argues Petitioners RO "cannot maintain a petition in front of a growth
5 board if the GMA does not apply."²³

6 Furthermore, the County contends Petitioners RO failed to request invalidity in the
7 PFR and, therefore the Board must reject this request because it has previously held that
8 invalidity must be in the PFR for a finding of invalidity. (The County provides no citation to
9 this authority.)

9 **Petitioner Simmons Reply:**

10 Petitioner Simmons incorporates all arguments set forth by Petitioners RO by
11 reference and argues the following: (1) that an argument doesn't have to be supported by
12 case citations; (2) that Exhibit 140 did not contain actual maps, but only descriptions of
13 maps and digital products available from WDFW; (3) that the Petitioner did, in fact, request
14 maps from the planning department; (4) that the County "appears to concede the issue"²⁴
15 there is no BAS concerning maps in the record; and (5) that Petitioner Howden, while a
16 member of the Planning Commission, has never seen said maps.

16 **Petitioners RO Reply:**

17 Petitioners RO argues the following in response to the County's brief: (1) the County
18 has the right to amend the draft based on review and comments, but it changed the PC's
19 recommended buffer widths without a rational basis; (2) that the draft sent out for public
20 review was the "final draft RLCAO,²⁵ not just a draft; (3) that whether or not Petitioner
21 Howden was a member of the PC is irrelevant; (4) that there is nothing in the record to
22 support the County considered or reviewed BAS supporting Futurewise's buffer
23 recommendations; and (5) that excessive riparian area buffers can violate BAS.

24 As to the merits of the case, Petitioners RO claim the draft RLCAO was sent out for

25 ²³ Respondent's HOM brief at 12.

²⁴ Petitioners Response to the Respondents HOM brief, pg. 11 (June 17, 2009).

26 ²⁵ Ibid at 4.

1 only a 30 day public comment period, rather than a 60 day period as required by the
2 County's Public Participation Plan (PPP). Petitioners RO also assert the County failed to
3 include records of public notice in their Index of Record. Petitioners RO argue that the
4 County incorrectly believes Petitioner Howden's statement in a PC meeting was "not part of
5 the record,"²⁶ but in fact is found in the Index at Exhibit 162. According to Petitioners RO,
6 economics and statistical analysis are science and contend the County is wrong to judge
7 otherwise.

8 Petitioner RO argues the County "lacks the authority to make changes to buffers in
9 critical area segments governed by the Shoreline Management Act (SMA).²⁷ Petitioners RO
10 contend the County must first change its SMA regulations and have them reviewed by the
11 Department of Ecology (DOE) prior to incorporating them in the CAO. Furthermore,
12 Petitioners RO contend there is no evidence in the Record that any map even suggests
13 there are no waters of the state in Ferry County and there is no BAS that "supports the
14 position that there are no segments of streams in Ferry County governed by the SMA and
15 that the County can apply buffers across the board to all streams in Ferry County.

16 **Board Analysis:**

17 One of the primary goals of the GMA is to protect the environment and enhance the
18 state's high quality of life, including air and water quality and the availability of water.²⁸ To
19 accomplish this task, jurisdictions are required to adopt guidelines to classify critical areas,²⁹
20 which include wetlands, critical aquifer recharge areas, fish and wildlife habitat conservation
21 areas,³⁰ frequently flooded areas, and geologically hazardous areas.³¹ Jurisdictions which
22 are required to plan or voluntarily opt to plan, like Ferry County, are also required to

23 ²⁶ Ibid at 7.

24 ²⁷ Ibid at 8.

25 ²⁸ RCW 36.70A.020(10).

26 ²⁹ RCW 36.70A.050(1).

³⁰ Fish and wildlife habitat conservation areas are described under WAC 365-195-080(5) and include waters of the state defined under WAC 222-16-031.

³¹ RCW 36.70A.030(5).

1 designate critical areas on or before September 1, 1991,³² and shall include BAS in
2 developing policies and development regulations to protect the functions and values of
3 critical areas.³³

4 On December 1, 2008, Ferry County adopted Ordinance #2008-02, which amended
5 its previous Critical Areas Ordinance. Ordinance #2008-02 included Section 9.00 - Fish and
6 Wildlife Habitat Conservation Areas, and amended buffer widths for protecting streams,
7 rivers and lakes.³⁴

8 **Board Analysis of Petitioner Simmons Issue:**

9 The Board agrees with the County that the record contains BAS and maps which
10 were relied on by the BOCC. This same BAS data and maps were also available to
11 Petitioners and the public. As to Petitioner Simmons' argument concerning the
12 confidentiality of the species data, this was not included in Petitioner's Statement of Issues
13 and, therefore, is not before this Board. RCW 36.70A.290(1).

14 Petitioner Simmons argues the County failed to comply with the requirements of
15 RCW 36.70A.172(1) when it designated Mapped Priority Habitat Areas and Species
16 Observation Points without determining BAS for said areas and without considering data
17 supporting the generation of maps used to designate areas. In short, Petitioner Simmons
18 asserts the data and maps to determine priority habitat areas and species observation
19 points were insufficient or not available to the public and decision makers.

20 The burden is on the Petitioner to demonstrate that Ferry County's actions were not
21 in compliance with the GMA, and to carry that burden Petitioner must come forward with
22 evidence and argument showing such non-compliance when Ordinance No. 2008-02 was
23 adopted. RCW 36.70A.320(2). At the Hearing on the Merits, Petitioner claimed that the
24 County's decision was made based on data not in the record, and that the County did not

25 ³² RCW 36.70A.170(1)(d).

26 ³³ RCW 36.70A.172(1).

³⁴ Ferry County's adopted buffer widths were appealed in Case Nos. 04-1-0007c and Types 1, 2 and 3 were found non-compliant by this Board in its Third Order on Compliance issued March 17, 2009.

1 review any of the maps that will be used to regulate land uses. However, Petitioner offered
2 no evidence and pointed to no documents to support these claims. Petitioner also offered
3 no alternative scientific data or evidence showing that Ferry County failed to include BAS in
4 its 2008 amendments to the RLCAO. Thus, Petitioner Simmons failed to carry his burden of
5 proof on Issue 3.

6 In contrast, the County offered substantial evidence that it included Best Available
7 Science in developing the 2008 amendments. The County, in its brief and at the Hearing on
8 the Merits (HOM), showed that the data and maps were either in the Record (Exhibits 140,
9 141), or included by reference and accessible through the Ferry County Planning
10 Department, WDFW's website, or available WDFW documents. Exhibit 140 clearly contains
11 maps and Exhibit 141 contains data or references to data compiled by the WDFW and
12 available to the parties. As expressed by Karen Divens, WDFW, in a letter written to the
13 County, "The WDFW PHS data is updated regularly, is considered BAS, and is the most up
14 to date knowledge we can provide about species and habitats."³⁵ More in-depth data was
15 available at the WDFW's website, in datasets,³⁶ or by request.³⁷ The Board notes that
16 sensitive and restricted material concerning fish and wildlife information, including more
17 detailed maps and species information, is exempt from public dissemination by RCW
18 42.56.210 and the County signed an agreement to this effect with the WDFW in December
19 2005.³⁸

20 The Index of Record in this case was compiled by the County, filed with the Board
21 and a copy served on the parties per WAC 242-02-520. The Index of Record, comprising all
22 material used in taking the action which is the subject of the petition for review, was
23 reviewed and accepted by the parties, including Mr. Simmons.³⁹

24 ³⁵ Letter from Karen Divens, WDFW to Ferry County; July 10, 2008.

25 ³⁶ Exhibit 141.

26 ³⁷ Karen Divens letter; July 10, 2008.

³⁸ Exhibit 155.

³⁹ Mr. Simmons acknowledged at the HOM he had reviewed the record and did not dispute the content or file a motion for the County to supplement the record.

1 **Board Analysis of Petitioners RO Issue:**

2 Petitioners RO contend the County's adopted buffer widths in the amended ordinance
3 were a violation of RCW 36.70A.172 because the buffer widths were adjusted from the
4 version of the CAO recommended by the planning commission and presented to the public
5 in December 2007, to those incorporated in the adopted version. However, Petitioners RO
6 offer no statute, rule, or legal authority to support this argument.

7 The Board agrees with the County—there is no authority for the proposition that the
8 BOCC cannot depart from a planning commission recommendation or modify draft
9 documents at the time of final enactment. County commissioners have broad powers
10 authorized by RCW 36.32.120, which include the adoption of resolutions and ordinances not
11 in conflict with state law. According to RCW 36.70A.3201, counties (and cities) have a
12 “broad range of discretion that may be exercised...consistent with the requirements of this
13 chapter.”⁴⁰ Furthermore, in the same chapter, the “legislature finds that while this chapter
14 requires local planning to take place within the framework of state goals and requirements,
15 the ultimate burden and responsibility for planning, harmonizing the planning goals of this
16 chapter, and implementing a county’s or city’s future rests with that community.”⁴¹

17 The Ferry County Planning Commission, which the Petitioner argues recommended
18 draft buffer widths, did exactly what it is authorized to do—assemble and analyze data and
19 make a recommendation to the BOCC. Under RCW 35.63.060, it is an advisory body and
20 has only those duties authorized by that chapter.

21 The Board cannot consider the two other arguments presented in Petitioners RO
22 briefs: (1) the political and mathematical sciences issue; and (2) the CAO buffers in SMA
23 shorelines; because these issues were not raised in the PFR Statement of Issues or
24 presented through a timely motion to amend the PFR, the Board lacks authority to consider
25 these issues.⁴²

24 ⁴⁰ RCW 36.70A.3201

25 ⁴¹ Ibid.

26 ⁴² RCW 36.70A.290(1); WAC 242-02-210(c) and WAC 242-02-260(1) & (2)

1 **Conclusion:**

2 The Board finds and concludes Petitioner Simmons and Petitioners RO failed to carry
3 their burden of proof in demonstrating that the County's action in adopting the 2008 RLCAO
4 amendments was non-compliant with GMA.

5 **VII. FINDINGS and CONCLUSIONS**

- 6 1. Ferry County is a county located east of the crest of the Cascade
7 Mountains and opted to plan under the GMA and is therefore required
8 to plan pursuant to RCW 36.70A.040.
- 9 2. On December 1, 2008, Ferry County enacted Ordinance #2008-02.
- 10 3. The Petitioners filed a timely appeal of the County's action by filing a
11 Petition for Review with the Board. Pursuant to RCW 36.70A.280 and
12 .290, this Board has jurisdiction over the parties and subject matter of
13 this action and the Petitioners have standing to raise the issues
14 presented in the Petition for Review.
- 15 4. The Board finds the Index of Record contains WDFW maps and data, or
16 references to such data, to determine validated point observations or
17 validated polygon observations to be used by the County to regulate
18 properties.
- 19 5. The Board recognizes and acknowledges that the WDFW PHS data is
20 considered BAS for species point observations and polygon
21 observations, is updated regularly, and is available to the County and
22 landowners upon request.
- 23 6. The Board finds that County commissioners have broad powers
24 authorized by RCW 36.32.120, which include the adoption of
25 resolutions and ordinances not in conflict with state law.
- 26 7. The Board finds that after due consideration of the planning
commission's recommendation, public testimony, and material in the
record, the BOCC adopted buffer widths for rivers, streams and lakes
categorized in WAC 222-16-031 that were changed from the initial draft
RLCAO.
8. The Board finds Petitioner Simmons failed to meet his burden of proof
per WAC 242-02-632, insofar as the County provided the maps and

1 data (Exhibits 140, 141) available to the BOCC to adopt Ordinance
2 #2008-02.

3 9. The Board finds Petitioners RO failed to meet their burden of proof per
4 WAC 242-02-632, insofar as the buffers were increased from an earlier
draft RLCAO recommended by the planning commission.

5 10. The Board finds the RLCAO remains out of compliance for the reasons
6 stated in Case Nos. 97-1-0018, 01-1-0019, 04-1-0007c, and 06-1-0003.

7 **VIII. ORDER**

8 Based upon review of the Petition for Review, the briefs and exhibits submitted by
9 the parties, the GMA, prior Board Orders and case law, having considered the arguments of
10 the parties, and having deliberated on the matter the Board finds Petitioner Simmons and
11 Petitioners RO have failed to carry their burden of proof on their respective Issues No. 3.
12 Ferry County's process for adopting the 2008 amendments to the RLCAO complied with
13 GMA, but the RLCAO as a whole remains out of compliance with the Growth Management
14 Act as determined in earlier Orders of the Eastern Washington Growth Management
Hearings Board.

15 **SO ORDERED** this 30th day of June 2009.

16 EASTERN WASHINGTON GROWTH MANAGEMENT
17 HEARINGS BOARD

18 _____
19 John Roskelley, Board Member

20 _____
21 Joyce Mulliken, Board Member

22 _____
23 Raymond L. Paoella, Board Member
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1 Pursuant to RCW 36.70A.300 this is a final order of the Board.

2 **Reconsideration:**

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

9 **Judicial Review:**

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

13 **Enforcement:**

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

19 **Service:**

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

21 RCW 34.05.010(19)

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