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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

COMPLIANCE ORDER

11 THIS Matter comes to the Board following a Compliance hearing held on November 16,
12 2009.

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I. BACKGROUND

On January 13, 2006, the Board issued its Final Decision and Order (FDO). The FDO concluded that Stevens County's (County) Resolution No. 65-2005, amending SCC 13.10.034, violated the Growth Management Act (GMA). The GMA violation was based on the County's failure to designate all of the identified habitats of Endangered, Threatened, and Sensitive (ETS) species as fish and wildlife conservation areas and its failure to consider Best Available Science (BAS) in designating all of the identified habitats of ETS species as fish and wildlife habitat conservation areas in establishing protections for the functions and values of critical habitat areas within the County as required by RCW 36.70A.020, RCW 36.70A.060, 36.70A.170, and 36.70A.172.¹

22 On February 9, 2006, Stevens County appealed the Board's FDO to Stevens County
23 Superior Court.²

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¹ FDO, at 20-21.

² Cause No. 06-2-00055-1. Subsequent to the filing of the Petition for Judicial Review, the parties stipulated to a stay and, on May 22, 2006, the Stevens County Superior Court issued a stay of the Board's January 2006 FDO.

1 On March 13, 2007, the Superior Court issued an order affirming the Board's conclusion that
2 the critical habitat protection provisions of the County's land use code did not comply with the
3 GMA.

4 On March 30, 2007, Stevens County appealed the Superior Court's decision to the Court of
5 Appeals, Division III, which, on June 28, 2008, issued its decision affirming the Board.³

6 On April 13, 2009, the Court of Appeals issued its mandate terminating its review and was
7 returned to the Board via a Stipulated Remand issued by the Superior Court.⁴

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9 On June 23, 2009, the Board issued its Order Setting Compliance Hearing and Briefing
10 Schedule.

11 II. BURDEN OF PROOF

12 After a board has entered a finding of non-compliance, the local jurisdiction is given a period
13 of time to adopt legislation to achieve compliance.⁵ After the period for compliance has
14 expired, the board is required to hold a hearing to determine whether the local jurisdiction
15 has achieved compliance.⁶ For purposes of board review of the comprehensive plans and
16 development regulations adopted by local governments in response to a non-compliance
17 finding, the presumption of validity applies and the burden is on the challenger to establish
18 that the new adoption is clearly erroneous in view of the entire record before the board and in
19 light of the goals and requirements of this chapter.⁷

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22 ³*Stevens County v. Futurewise*, 146 Wn. App. 493 (2008). Pursuant to a motion by Futurewise to publish, the
23 decision was published on September 4, 2008. The Court of Appeals issued its mandate, terminating review,
on April 13, 2009.

24 ⁴ The County requested and the parties stipulated to a stay of the compliance proceedings. Superior Court
issued a stay on May 22, 2006. As such, Stevens County was not required to take any legislative action to
achieve compliance until after the court had terminated review (terminated April 2009).

25 ⁵ RCW 36.70A.300(3)(b).

26 ⁶ RCW 36.70A.330(1) and (2).

⁷ RCW 36.70A.320(1), (2), and (3).

1 In order to find the County's action clearly erroneous, the Board must be "left with the firm
2 and definite conviction that a mistake has been made."⁸

3 Within the framework of state goals and requirements, the boards must grant deference to
4 local governments in how they plan for growth:

5 In recognition of the broad range of discretion that may be exercised by counties
6 and cities in how they plan for growth, consistent with the requirements and goals
7 of this chapter, the legislature intends for the boards to grant deference to the
8 counties and cities in how they plan for growth, consistent with the requirements
9 and goals of this chapter. Local comprehensive plans and development
10 regulations require counties and cities to balance priorities and options for action
11 in full consideration of local circumstances. The legislature finds that while this
chapter requires local planning to take place within a framework of state goals and
requirements, the ultimate burden and responsibility for planning, harmonizing the
planning goals of this chapter, and implementing a county's or city's future rests
with that community. RCW 36.70A.3201 (in part).

12 In sum, during compliance proceedings the burden remains on the Petitioner to overcome
13 the presumption of validity and demonstrate that any action taken by the County is clearly
14 erroneous in light of the goals and requirements of Ch. 36.70A RCW (the Growth
15 Management Act).⁹ Where not clearly erroneous and thus within the framework of state goals
16 and requirements, the planning choices of the local government must be granted deference.

17 III. PRELIMINARY MATTERS

18 **Petitioners' Motion to Correct Record:**

19 Futurewise (Petitioner) filed a Request For Written Permission to File a Motion on October
20 30, 2009, and at the same time filed a Motion to Correct the Record. The Board granted the
21 Petitioner's request to File a Motion on November 3, 2009,¹⁰ and gave the County until
22 November 13, 2009 to brief the Motion to Correct the Record.

23 **Positions of the Parties:**

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25 ⁸ *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

26 ⁹ RCW 36.70A.320(2).

¹⁰ WAC 242-02-522(5) and WAC 242-02-531(2).

1 The Petitioner contends it submitted a comment letter to the Board of County Commissioners
2 (BOCC) on October 7, 2009, and enclosed along with this letter “two data CDs that
3 contained scientific and scholarly documents underlying and referenced by Futurewise’s
4 analysis” set forth in the comment letter.¹¹ The County sent a letter to Futurewise indicating
5 the County’s legal counsel had instructed the County to return the CDs and to not accept any
6 of the contained information in the County’s Record of Decision. The County returned one
7 set of the three sets sent to Futurewise. Futurewise then submitted hard copies of the
8 portions of the data CDs which were expressly referenced in its comment letter to the
9 County.

10 According to the Petitioner, the County bears the burden of maintaining and indexing the
11 Record¹² and the Record is developed, in part, through the County’s public participation
12 program, which includes opportunity for written comments and consideration of and
13 response to public comments.¹³ The Petitioner claims the County is required by RCW
14 36.70A.290 and RCW 42.56.010(3), as read together, to accept the data CDs as part of the
15 Record. The Petitioner points to a Western Washington Growth Management Hearings
16 Board (WWGMHB) case where the Western Board upheld the addition of electronic
17 documents as part of the record and that there is “no authority by which the Board may limit
18 the record based merely on volume.”¹⁴

19 The Petitioner contends the Western Board’s earlier decisions are consistent. In *Mahr et al.*
20 *v. Thurston County*, the WWGMHB wrote that “unless there is a dispute as to accuracy and
21 authenticity, the mechanism in providing the evidence is immaterial.”¹⁵ In *Reading v.*
22 *Thurston County*, the WWGMHB added documents discovered in government files after the

23 ¹¹ Futurwise’s Request for Written Permission to File a Motion and Motion to Correct the Record (Oct. 28, 2009)
24 at pg. 1.

25 ¹² RCW 36.70A.290 and WAC 242-02-520.

26 ¹³ The Public Disclosure Act in RCW 42.56.010(3) provides a definition of written or writing, which includes
“every other means of recording any form of communication or representation” “including, but not limited
to...discs.”

¹⁴ *DCC v. Clallam County, WWGMHB Case No. 07-2-0018c, Order on Motion to Correct or Supplement the
Index (Jan. 7, 2008).*

¹⁵ *Mahr, et. al. v. Thurston County, WWGMHB Case No. 94-2-0007 FDO (Nov. 30, 1994) at pp. 4-5.*

1 index was created explaining that the index should contain all material in files that were used
2 in the development of the action being challenged and is an exhaustive list of the record
3 developed.¹⁶

4 According to the Petitioner, the County's stated rationale for refusing to include the CDs in
5 the Record, which was "too much volume of material," is not recognized by the GMA. The
6 Petitioner believes the County's action limits material the Board can review and sets a
7 precedent for other Board cases, or taken one step further, could eliminate evidence of
8 standing.¹⁷ The Petitioner claims it can move the Board to consider the submissions as
9 supplemental evidence, but this is an unnecessary burden on the Petitioner in time, trouble,
10 and material.¹⁸

11 The Petitioner claims the Index should contain all the material, whether relevant to this
12 particular litigation or not. It is then left to the Petitioner to sort out that which is relevant and
13 include the particular pages required along with the briefing.¹⁹ Since these documents were
14 provided to the County as part of the amendment process, they should have been included
15 in the original index.

16 The County contends it declined to accept or review the CDs because the two CDs
17 contained 713 MB of data, the equivalent of 465,000 pages of text,²⁰ yet the Petitioner's
18 letter cites to approximately 11 pages of that electronic material. The County points to RCW
19 36.70.280(4), which states "a person must show that his or her participation before the
20 county or city [is] reasonably related to the person's issue as presented to the board." The
21 County also contends the Western Board in *Friends of Skagit County et al. v. Skagit
22 County*,²¹ said that "[simply] submitting an article on the subject matter, without some type of

23 ¹⁶ *Reading v. Thurston County*, WWGMHB Case No. 94-2-0019 FDO (March 23, 1995) p. 4.

24 ¹⁷ Motion to Correct the Record at 7.

25 ¹⁸ *Id.* at 7.

26 ¹⁹ Futurewise's Request at 8.

²⁰ Stevens County's Objection to Motion Regarding Record, Exhibit CAO-17.

²¹ *Friends of Skagit County et al. v. Skagit County*, WWGMHB Case No. 07-2-0025c, FDO (May 12, 2008) at pp. 14-15.

1 subsequent analysis which relates it to the issues being presented, does not confer
2 participation standing.”²² Thus, according to the County, it is “the Petitioner’s responsibility,
3 not the County’s, to explain the materiality of any submittals to the issue(s) raised in a public
4 comment and any subsequent compliance matter.”²³

5 The County asserts it “properly declined to accept hundreds of thousands of pages of
6 unexplained information”²⁴ just for a single provision in the County’s Critical Areas Ordinance
7 (CAO). The County states it allowed Futurewise to submit copies of the information cited to
8 in its written comments after the deadline for submittal,²⁵ which Futurewise did. The County
9 contends it reviewed the information submitted and it is included in the Record of decision
10 and as exhibits.

11 **Applicable Law:**

12 RCW 36.70A.290(4) states that the Board “shall base its decision on the
13 record developed by the city, county, or the state and supplemented with
14 additional evidence if the board determines that such additional evidence
15 would be necessary or of substantial assistance to the board in reaching its
16 decision.”²⁶

17 WAC 242-02-520 Record. This WAC requires the respondent to file with the
18 board and serve a copy on the parties of an index of all material used in taking
19 the action which is the subject of the petition for review. Written or tape
20 recorded record of the legislative proceedings where action was taken shall be
21 available to the parties for inspection.²⁷

22 WAC 242-02-52002(4) Documentary Evidence. This WAC states that when
23 only portions of a document are to be relied upon, the offering party shall
24 adequately identify and prepare the pertinent excerpts and shall supply copies
25 of such excerpts to the presiding officer and to the other parties. However, the
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23 ²² Skagit is related to standing, not the record. Skagit County argued that you can’t get standing if you don’t
articulate some concern on the basis of submitted documents. That’s not the case here.

24 ²³ Stevens County’s Objection to Motion Regarding Record at 2.

25 ²⁴ Id. at 2.

26 ²⁵ Id.

27 ²⁶ RCW 36.70A.290(4) (emphasis added).

²⁷ WAC 242-02-520.

1 whole of the original document shall be made available for examination and for
2 use by all parties to the proceeding.²⁸

3 WAC 242-02-540 New or supplemental evidence. This WAC states that a
4 “board will review only the record developed by the city, county, or state in
5 taking the action...” and a party by motion may request that a board allow such
6 additional evidence as would be necessary or of substantial assistance to the
7 board in reaching its decision. In addition, “[a] board may order, at any time,
8 that new or supplemental evidence be provided.”²⁹

7 **Board Analysis:**

8 Growth Management Hearings Boards base their decisions on the record developed by
9 cities, counties and, in some instances, the state. Occasionally, the record is supplemented
10 with additional evidence “if the board determines that such additional evidence would be
11 necessary or of substantial assistance to the board in reaching its decision.”³⁰ The
12 respondent is required to file a complete index of all material, regardless of the format, the
13 decision makers used in taking the action.³¹ From this record, which includes information
14 presented through the public hearing process, the parties are required to attach to their briefs
15 evidence consisting of exhibits cited in those briefs.³²

15 In this case, the Petitioner submitted two CDs into the Record during the public hearing
16 process containing scientific and scholarly documents relevant to the issues, including
17 documents containing information on best available science, critical areas, and ETS species
18 and habitats, and later submitted exhibits from those documents as evidence. Stevens
19 County sent a letter to Futurewise returning the two CDs and stated that the County would
20 not accept the two CDs based on the volume of the material on the CDs and because
21 Futurewise had not demonstrated relevancy of the documents or connection to the action.
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24 ²⁸ WAC 242-02-52002(4).

25 ²⁹ WAC 242-02-540 (emphasis added).

26 ³⁰ RCW 36.70A.290(4).

³¹ WAC 242-02-520.

³² WAC 242-02-52001.

1 Subsequent to the County's request, the Petitioner identified and submitted portions of their
2 documents as "documentary evidence" (exhibits) from the material contained on the CDs,
3 which were then distributed to the Board and County.³³ Importantly, the original documents
4 on the CDs from which the evidence was obtained were excluded by the County, all of
5 which, according to Futurewise, are relevant to critical areas.³⁴ At the HOM, Futurewise
6 testified that the two CDs contain their organization's standard critical areas "package".³⁵
7 The Hearings Boards generally accept that a jurisdiction makes a good faith effort to
8 document the proceedings and the materials used by the city or county in taking the GMA
9 action.³⁶ ³⁷ The Hearings Boards rely on counties and cities to include all relevant material
10 into the record. With that said, the County can't sift through and select specific documents
11 submitted through the public hearing process and essentially keep those it finds acceptable
12 and either refuse to accept or return those documents it feels are not in its best interest (in
13 this case, too lengthy or voluminous).³⁸

14 The Eastern Board addressed a similar issue regarding the record with Stevens County in
15 *Wagenman v. Stevens County*, but rather than adding documents to the record, as in that
16 case, the County in this case removed material from the record.³⁹

17 Although the contents of the Record are the province of the County, this does
18 not permit the County to amend the Record at will to incorporate documents

19 ³³ WAC 242-02-52002(4).

20 ³⁴ Stevens County's Objection to Motion Regarding Record, Exhibit CAO-17, details the "Files Currently on the
21 CD" and include files entitled "CARAs", "CTED CA Handbook", "Fish & Wildlife Habitat", "Flooded Areas", "Geo
22 Hazards", "GMA & Regs", "Guides", "Info Best Available Science", "Low Impact Development", "Presentations",
23 "SMA & Regs", "Value of Ecological Services", "Water Quality", "Watershed Planning", "Wetlands", "Lynx
24 Science" and several other related files.

25 ³⁵ The Board agrees with Futurewise that the vast majority of the contents as titled on the CDs seem to contain
26 documents related to BAS, critical areas, fish and wildlife species and habitat, and lynx. But this procedure to
pad the record with a "package" of standard material, if used, must also be relevant to the jurisdiction's actions
under review. The Board encourages petitioners to submit relevant "portions" of documents, such as a single
chapter or chapters, rather than an entire document, such as the CTED CA Handbook.

³⁶ *Larson Beach/Wagenman v. Stevens County*, EWGMHB Case No. 07-1-0013, FDO at 8 (Oct. 6, 2008).

³⁷ *Ramey v. City of Seattle*, CPGMHB Case No. 99-3-0022, Order on Motions (Nov. 11, 2000).

³⁸ *Cascade Bicycle v. Lake Forest Park*, CPGMHB Case No. 07-2-0010c, Order on Motions (March 19, 2007).

The Central Board noted the argument of the petitioners that the City can't "cherry pick" those documents which
would support its position and exclude those which may put the City's action in a less favorable light.

³⁹ *Larson Beach Neighbors/Wagenman v. Stevens County*, EWGMHB Case No. 07-1-0013, FDO (Oct. 6,
2008).

1 which were irrefutably not before the County when making the decision under
2 challenge... [the board] will not tolerate a similar distortion and misapplication
3 of the Record.

4 In *Dry Creek v. Clallam County*,⁴⁰ the WWGMHB stated that if the policy underlying RCW
5 36.70A.290(4) is to have any meaning, then local jurisdictions can't exclude material based
6 on volume, credibility, or the ability to foster meaningful comment. Additionally, the
7 WWGMHB said the record needs to include materials the jurisdiction chose to rely on, as
8 well as those they choose not to rely on.

9 The Board notes there is no mention as to the volume of material that can be submitted
10 during the public process in the GMA or the Stevens County Code, Title 1, Public
11 Participation Policy. In Chapter 7 of the Stevens County Code, Opportunities For Written
12 Testimony And Comment, Stevens County states, "[A]t all appropriate stages of the planning
13 process written comment and testimony will be encouraged." In addition, the policy
14 emphasizes, "Coherent and concise written comment and testimony is encouraged." And,
15 as to electronic material, the County encourages submission of new technology and writes,
16 "The use of electronic communication technologies such as email and document file
17 attachments to email messages will be studied and explored as well as other innovative
18 technologies to decrease the expense and time delays often associated with traditional
19 mailed written documents."⁴¹

20 The Parties should keep in mind that the Board shall base its decision on the record
21 developed by the County, and the index of the record is all the material used in taking the
22 action which is the subject of the petition. The whole of the original document shall be made
23 available for examination and for use by all parties to the proceeding. WAC 242-02-522(12)
24 authorizes the presiding officer and/or the Board to rule on issues concerning the content of
25 the record. The files on the CDs, although lengthy and most likely redundant to the original

25 ⁴⁰ *Dry Creek v. Clallam County*, WWGMHB Case No. 07-2-0018c, Order on Motion to Correct or Supplement
the Index (Jan. 7, 2008) at 5.

26 ⁴¹ Stevens County Code, Title 1, Public Participation Policy, Chapter 7, p. 14.

1 material the County used to create its CAO, contain pertinent information concerning critical
2 areas, as testified to by Futurewise.⁴²

3 **Conclusion:**

4 The Petitioner's Motion to Correct the Record is **DENIED** based on the Board's belief the
5 motion is more relevant to supplementing the Record under RCW 36.70A.290(4). In that
6 light, the Board finds that the additional evidence contained on the CDs would be necessary
7 or of substantial assistance to the Board in reaching its decision. Therefore, the Board
8 **ORDERS** the Record to be supplemented with the two CDs.

9 **IV. ISSUES PRESENTED**

10 *Issue No. 1:* Does the adoption of Resolution 65-2005 and its adoption of an amendment to
11 the fish and wildlife habitat conservation areas protection requirements of SCC 13.10.034(4)
12 fail to comply with RCW 36.70A.020(8), RCW 36.70A.020(9), RCW 36.70A.020(10), RCW
13 36.70A.060, RCW 36.70A.170, and RCW 36.70A.172 when the regulations fail to designate
all of the identified habitats of endangered, threatened, and sensitive species as fish and
wildlife habitat conservation areas?

14 *Issue No. 2:* Does the adoption of Resolution 65-2005 and its adoption of amendments to
15 the fish and wildlife habitat conservation areas protection requirements of SCC 13.10.034 fail
16 to comply with RCW 36.70A.020(8), RCW 36.70A.020(9), RCW 36.70A.020(10), RCW
17 36.70A.060, RCW 36.70A.170, and RCW 36.70A.172 when the regulations fail to consider
18 best available science in designating all of the identified habitats of endangered, threatened,
and sensitive species as fish and wildlife habitat conservation areas in establishing
19 protections for the functions and values of critical habitat areas within the County?

20 **V. DISCUSSION**

21 In January 2006, the Board issued its FDO in this matter which concluded that Stevens
22 County's adoption of Resolution No. 65-2005, amending Stevens County Code (SCC)
23 13.10.034, violated the Growth Management Act (GMA). Specifically, the Board held:⁴³

- 24 1. The Board finds Stevens County out of compliance in Issues 1 and 2 for
25 failure to protect endangered, threatened and sensitive species habitat,
26 specifically those habitats best represented by polygons. By this action,

⁴² See footnote 33 for content.

⁴³ January 13, 2006 FDO, at 21-22.

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 Throughout the FDO, the Board discussed Stevens County's non-compliant action in
8 relationship to RCW 36.70A.060(2), 36.70A.170(1)(d), and 36.70A.172. In addition,
9 although invalidity was not granted, two GMA goals – RCW 36.70A.020(9) and .020(10) –
10 were evaluated. Both the Superior Court and the Court of Appeals affirmed the Board's
11 holding. Thus, upon termination of the review before the courts, Stevens County was
12 required to take legislative action to achieve compliance with those provisions of the GMA
13 noted in the Board's FDO.

14 On October 20, 2009, with the adoption of Ordinance No. 8-2009, the County took legislative
15 action to amend SCC 13.10.034. With this Ordinance, the County removed and/or modified
16 language in relationship to Fish and Wildlife Habitat Conservation Areas.⁴⁴

17 **Applicable Law:**

18 RCW 36.70A.020(9). This is the GMA goal to retain open space, enhance recreational
19 opportunities, conserve fish and wildlife habitat, etc.

20 RCW 36.70A.020(10). This is the GMA goal to protect the environment.

21 RCW 36.70A.060(2). This is the GMA statute that requires cities and counties to
22 adopt development regulations to protect natural resource lands and critical areas.

23 RCW 36.70A.170(1)(d). This is the GMA statute that requires cities and counties to
24 designate critical areas.

25 RCW 36.70A.172. This is the GMA statute that requires cities and counties to include
26 best available science to designate and protect critical areas. Evidence of the best
27 available science must be included in the record and must be considered
28 substantively in the development of critical areas policies and regulations. *Honesty in*

⁴⁴ Index 22, Ordinance 8-20009

1 *Envtl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings*
2 *Bd., 96 Wn. App. 522, 532, 979 P.2d 864 (1999).*

3 • **Issues 1 and 2**

4 **Parties Positions:**

5 Petitioner:

6 Petitioner contends the amendment contained in the County's Ordinance No. 8-2009 fails to
7 protect the fish and wildlife habitats. The County, according to the Petitioner, is required to
8 protect endangered, threatened, or sensitive fish and wildlife species and their habitats (ETS
species and habitats) as affirmed by the Court of Appeals, which said:⁴⁵

9 "Fish and wildlife habitat conservation areas are critical areas."⁴⁶ "Areas with
10 which endangered, threatened, and sensitive species have a primary
11 association" are included in the category of fish and wildlife habitat
12 conservation areas to be protected.⁴⁷ The GMA directs counties to determine
what lands are primarily associated with listed species, and then to adopt
regulations protecting those lands. RCW 36.70A.020(9), .030(5), .060(2),
.170(1)(d).⁴⁸

13 The Petitioner contends decisions on designating and protecting fish and wildlife habitats
14 must be based on best available science and this amendment does not protect ETS species
15 and habitats. According to the Petitioner, the actual location of most fish and wildlife
16 habitats are identified through the Washington State Department of Fish and Wildlife's
17 Priority Habitats and Species (PHS) Database, and habitat data may be included in the
18 database as either point or polygon data.⁴⁹ The Petitioner argues that habitat represented
19 by polygons includes steelhead, bull trout, waterfowl nesting areas, elk winter ranges and
20 lynx habitats, most of which are found in Stevens County.⁵⁰ The Petitioner claims the
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23 ⁴⁵ *Ferry County v. Concerned Friends of Ferry County*, 121 Wa. App. 850,853, 90 P.3d 698, 700 (2004)
affirmed by *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 123 P.3d 102 (2005).

24 ⁴⁶ RCW 36.70A.030(5).

25 ⁴⁷ WAC 365-190-080(5)(a)(i).

⁴⁸ *Ferry County v. Concerned Friends of Ferry County*, Id. 40.

⁴⁹ Futurewise's Objection to a Finding of Compliance at 5.

26 ⁵⁰ Id. at 6.

1 County's existing regulations fail to protect the lynx⁵¹ and the amended regulations do not
2 cure this failure to protect.

3 The Petitioner cites the Washington State Recovery Plan for the lynx as an example where
4 the County allows road building and recreation that directly impacts lynx. The Petitioner
5 contends the County's amendment "provides no review and no protection for lynx habitat
6 when the uses and activities are located immediately adjacent to the habitat, only
7 development proposals⁵² within the habitat area are subject to review and potential
8 protection measures."⁵³ The Petitioner believes this does not meet the GMA standard of
9 adopting regulations to protect all critical areas within the County.

10 The Petitioner also contends that the County removed a previously required buffer width of
11 200 feet measured from the ordinary high water mark of a lake, river, or stream when that
12 water body was the habitat of ETS species and designated species of local importance, with
13 protections now falling to the standard aquatic buffers in SCC 13.10.034(1). The Petitioner
14 gives several examples⁵⁴ where BAS recommends buffers over 200 feet to protect small
15 animals and certain species and claims that although the previous 200-foot buffer wasn't
adequate, "they were better" than the standard buffers.⁵⁵

16 County:

17 The County contends the GMA does not require the County to manage habitat for listed
18 species outside of areas designated by BAS. The County argues that Futurewise asserts
19 that all polygons representing priority habitat for trout, waterfowl, elk, lynx and other
20 unnamed priority habitat and species must be protected, which is unsupported by any

21 _____
22 ⁵¹ *Stevens County v. Futurewise*, 146 Wn. App. 493, 514-15, 192 P.3d 1 (2008), *rev. denied*, 165 Wn.2d 1038,
205 P.3d (2009).

23 ⁵² Stevens County's "development proposals" include proposals that require approval under existing or
24 subsequently adopted regulations and does not include road building, which may increase recreation in these
areas.

⁵³ Futurewise's Objection at 7.

25 ⁵⁴ Petitioner's brief, Exhibit 14-8, IR 14 (and IR 20), Knutson, K. L., and V. L. Naef, Management
Recommendations for Washington's Priority Habitats: Riparian; p. 37, 161, 168.

26 ⁵⁵ Futurewise's Objection at 9.

1 citation to authority and alleges compliance issues that are not before this Board.⁵⁶
2 According to the County, the only compliance issue in this case is whether SCC
3 13.10.034(3) protects the functions and value of lynx habitat identified in the PHS database.

4 The County claims Futurewise fails to cite any authority for their proposition that
5 development proposals on property that are not identified as lynx habitat must also be
6 reviewed for potential impacts. The County contends Ordinance 8-2009 requires review of
7 all development proposals within habitat designated as having a primary association with
8 listed species. The County alleges SCC 13.10.034(3) requires the use of BAS (usually the
9 PHS database) to identify habitat associated with a listed species in SCC 13.10.034(1).⁵⁷

10 The County claims Futurewise cites to letters from staff of the Washington Department of
11 Fish and Wildlife (WDFW) written in 2004, instead of the WDFW letter submitted to the
12 County pursuant to the established process for agency comment concerning the current
13 amendment. This letter from WDFW⁵⁸ concluded that the changes appear consistent with
14 the requirements of the GMA, and was echoed by official comment from the Washington
15 Department of Commerce (Commerce).⁵⁹

16 The County contends that the parties appeared to agree in the absence of site specific data
17 that the PHS database prepared by WDFW represents BAS for designating habitat
18 associated with listed species. The County claims Futurewise successfully argued that the
19 County must designate and protect habitat associated with the lynx that is identified by a
20 polygon in the PHS database, but is now attempting to extend management requirements
21 beyond habitat areas identified by WDFW and relied upon by BAS. According to the County,
22 it protects lynx habitat, such as dens or other confirmed point observations, under SCC
23 13.10.034(4), which requires development proposals within 1000 feet of a lynx den or other

24 ⁵⁶ Stevens County's Compliance Brief at 3.

25 ⁵⁷ Id. at 3-4.

26 ⁵⁸ Stevens County's brief, Exhibit CAO-7.

⁵⁹ Id., Exhibit CAO-8.

1 confirmed point observation to meet specified protection requirements.⁶⁰ The County
2 contends those requirements are apart from the protection requirements specified in the
3 amended provision and apply whether or not the point observation is in or near PHS habitat.

4 As to the removal of the 200-foot buffer width, the County claims this is not a compliance
5 issue and points to the WDFW and Commerce letters, which do not question the County's
6 decision to rely on its existing buffers to protect habitat. The County also contends this issue
7 was decided in an earlier case and cites to *Loon Lake Property Owner's Association v.*
8 *Stevens County*, where the Board wrote, "[w]e agree with WDFW that GMA does not require
9 additional protection for priority habitat, even priority habitat associated with listed
10 species."⁶¹ The County argues that the adequacy of the County's aquatic buffers is not at
11 issue and the Hearings Board should not consider it now.⁶²

12 **Board's Findings and Conclusions:**

13 On January 13, 2006, the Board found Stevens County out of compliance for its failure to
14 protect ETS species habitat, specifically those habitats best represented by polygons, and
15 ordered the County to amend SCC 13.10.034 to protect all listed species habitat using BAS.

16 The Board concluded:

17 The County is responsible for protecting critical areas through BAS. Critical
18 areas include fish and wildlife habitat conservation areas. The County can't pick
19 and choose one segment of ETS species habitat over another by protecting
20 only habitat around point observations and not habitat defined by polygons.
21 Fish and wildlife use habitat differently and their range or habitat area is
22 substantially different. A 1000-foot buffer around a point observation of an

23 ⁶⁰ Polygons are rarely fixed distances, such as 1000-feet. Rather, polygons are areas of occurrences of priority
24 habitats and species. The WDFW website explains that geographic data usually have one of three basic forms;
25 a point, a line, or a polygon. Points have a single coordinate location and can represent a feature such as a bird
26 nest. Lines have a starting and ending location, and points in between that describe their shape. A stream or
highway may be represented in the GIS as a line. The last shape data can take is a polygon. A polygon is
formed when a line defines a closed shape. Examples of polygon features include lakes or real estate parcels.
The polygon layer within the PHS database identifies locations of groupings of animals sensitive to disturbance,
such as waterfowl concentration areas, as well as rare or critical habitat types, such as bat caves or eelgrass
beds. (Fish and Wildlife)

⁶¹ *LLPOA et. al v. Stevens County*, EWGMHB Case No. 03-1-0006c, Order on Compliance (Oct. 15, 2004) p.
11.

⁶² Stevens County's Compliance Brief at 6.

1 endangered Northern Leopard frog may be quite sufficient, but the same buffer
2 for a lynx would be totally inadequate. This is why the WDFW uses both
3 polygon and point observations in its critical habitat mapping.

4 The County protected critical habitat in SCC 13.10.034(A) and (B), then
5 eliminated these protections with section SCC 13.10.034(C). The County then
6 chose not to include polygons from the Priority Habitats and Species database
7 maps, which eliminated the area-wide habitat protection necessary for listed
8 species, such as the lynx.⁶³

9 Again, what is at issue during these compliance proceedings is whether the County, by
10 adopting Ordinance No. 8-2009, has protected fish and wildlife habitat conservation areas
11 or, in other words, critical habitat for ETS species as required by the GMA. The County,
12 under SCC 13.10.031, lists six state listed species located in Stevens County. Of those six,
13 only the lynx is not protected “within its natural habitat”, as stated in the County’s Title 13,
14 and/or as defined in WAC 365-190-080(5), “in natural geographic distribution so that
15 isolated subpopulations are not created.” Thus, the County failed initially to include BAS in
16 developing protections for all the listed species found in SCC 13.10.031(1).

17 As stated in the Final Decision and Order (FDO):

18 The Petitioner’s appeal centers on SCC 13.10.034(3)(C). The County in SCC
19 13.10.034(3)(A) seems to protect critical habitat areas for ETS species from
20 development near lakes, rivers and streams by a buffer and in SCC
21 13.10.034(3)(B) the County requires a report from a qualified professional
22 setting forth management recommendations specific to the site and proposed
23 development, but these protections are all for naught when the County
24 amended the chapter to include SCC 13.10.034(3)(C).⁶⁴

25 The Board clearly articulated the problem with the County’s protection of listed species and
26 their habitat:

If the County had not added SCC 13.10.034(3)(C) and if they had referenced
and adopted the use of the WDFW’s Priority Habitats and Species Database
maps, which include polygon habitat areas for species such as the lynx, as the

⁶³ *Futurewise v. Stevens County*; EWGMHB Case No. 05-1-0006, FDO (Jan. 13, 2006) at pg. 2.

⁶⁴ *Id.* at 17.

1 County did with SCC 13.10.034(4) Mapped Point Species Observations, it
2 would be in compliance. But the County did not.⁶⁵

3 The County claims it has cured its errors by adopting Ordinance No. 8-2009, which removed
4 SCC 13.10.034(3)(C) and modified .034(3)(A) to include that the County's determination
5 shall be based on the best available science for the development proposal site.

6 SCC 13.10.032 requires the use of BAS in developing Comprehensive Plans
7 and implementing development regulations. PHS maps are considered a form
8 of BAS and have been adopted in SCC 13.00.062 (along with other maps) as
a non-regulatory guide to assist the county in evaluating a development
proposal for the potential presence of critical areas.⁶⁶

9 It's worth noting, however, that nowhere in the County's old or new statute language is the
10 term "polygon" used. It seems as though the County is alluding to polygons because of its
11 use of BAS, but refuses to acknowledge the County may have polygons present.

12 The Petitioner's main argument focuses on whether the language in SCC 13.10.034 protects
13 lynx habitat as required by the GMA, specifically when the County references "development
14 proposals". According to SCC 13.00.050, development proposals do not include road
15 building, an action that leads to potential recreational conflicts with lynx and other listed
16 species from vehicles and other personal access. The definition of development proposal is
17 found under SCC 13.00.050:

18 **Development proposal** includes proposals that require approval under
19 existing or subsequently adopted Stevens County regulations. This includes
20 the following permits: Building, On-site sewage disposal system, Flood plain,
Shoreline exemption or substantial development, Conditional use permit,
Variance, Rezone, Short Plat or Long Plat.⁶⁷

21 Futurewise is correct in that the County's definition of "development proposal" does not
22 include road building, which is considered a significant impact on lynx habitat, according to
23 WDFW and other sources. The WDFW Lynx Recovery Plan states:

24 _____
25 ⁶⁵ Id. at 19.

26 ⁶⁶ Stevens County's Compliance brief, Exhibit CAO-13 at 4.

⁶⁷ SCC 13.00.050

1 Executive Summary - vii

2 "The lynx is the rarest of three cat species native to Washington probably
3 numbering fewer than 100 individuals in the state. The lynx was listed as a
4 state threatened species in 1993 and became a Threatened species under the
5 federal Endangered Species Act (ESA) in April 2000. Lynx are relatively
6 tolerant of human activity, but recreational developments and roads with high
7 traffic volumes may affect lynx movements. Anecdotal observations have
8 fueled speculation that snow compaction on forest roads and trails may affect
9 the degree to which lynx must compete with coyotes and other carnivores, but
10 few data exist from which to draw conclusions about the affect on lynx.⁶⁸

11 The WDFW recovery plan concludes:

12 Habitat quality is affected, either positively or negatively, by forest succession,
13 forest management, fires, roads, recreation, and beetle epidemics.⁶⁹

14 The WDFW, in its report on management recommendations for riparian priority habitats,
15 which is one of the sources of BAS listed in the County's Title 13 at SCC 13.10.033, also
16 points to roads as a problem:

17 Recommendation. Close unnecessary roads and retain roadless areas. Close
18 roads when not in use and deactivate unnecessary roads in unstable or
19 erosive terrain. Fish and wildlife will best be served if areas that are currently
20 roadless remain so...

21 Rationale and Consequences. By keeping presently roadless areas in a
22 roadless condition, large areas of intact, undisturbed habitat used by species
23 requiring large areas (e.g. lynx...) can be sustained in Washington.⁷⁰

24 The United States Department of Agriculture has similar concerns about roads in lynx
25 habitat:

26 Other forms of human disturbance also affect lynx. According to Koehler and
Brittell (1990), minimal human disturbance is important to denning site
selection . Winter recreation may have a significant effect on lynx populations.
The increase in interactions between human and lynx, primarily because of

68 Petitioner's Exhibit14-5; Washington State Lynx Recovery Plan, WDFW March 2001; Executive Summary at vii.

69 Id. at 37.

70 Petitioner's Exhibit 14-8; Management Recommendations for Washington's Priority Habitats: Riparian (Dec. 1997); pg. 107.

1 increased use of off-highway vehicles (including snowmobiles), may result in
2 increased lynx mortality ...⁷¹

3 The County argues that both the WDFW and Department of Commerce concluded that the
4 County's proposed changes appeared consistent with the requirements of the GMA. This is
5 true, but their letters are only two submissions to the Record and it is the Board that
6 determines GMA compliance, not WDFW or Commerce. The Board can only conclude from
7 the evidence in the Record that the state agencies focused on their specific and immediate
8 concerns and did not investigate in depth the definition of "development proposal" as
9 defined by Stevens County - as did Futurewise. A reasonable person would conclude that a
10 "development proposal" would include any land use activity that required an approval or
11 permit, including road building. In this case, it does not.

12 As to Futurewise's concerns over development proposals adjacent to a known habitat area,
13 such as road building, the County claims SCC 13.10.034(4) protects confirmed point
14 observations by requiring "development proposals" within 1000 feet of a lynx den, for
15 example, to meet specified protection requirements. These "requirements are apart from the
16 protection requirements specified in the amended provision and apply whether or not the
17 point observation is in or near PHS habitat."⁷² Again, the County says nothing about
18 polygons.

19 There are two problems with the County's argument. First, a priority species habitat
20 polygon, such as a lynx polygon area, is not limited to 1000 feet. It can be the animal's
21 range and/or occurrences. The Board addressed this issue in its January 2006 FDO and is
22 worth repeating here:

23 Fish and wildlife use habitat differently and their range or habitat area is
24 substantially different. A 1000-foot buffer around a point observation of an
25 endangered Northern Leopard frog may be quite sufficient, but the same buffer

26 ⁷¹ Petitioner's Exhibit 14-7; Source Habitats for Terrestrial Vertebrates of Focus in the Interior Columbia Basin –
Volume 2 – Group Level Results; pg. 246.

⁷² Stevens County's brief at 5.

1 for a lynx would be totally inadequate. This is why the WDFW uses both
2 polygon and point observations in its critical habitat mapping.⁷³

3 In fact, polygon and point data accuracy ranges from within one-quarter mile to a general
4 area.⁷⁴ It's not uncommon for polygons to be in square miles because of an animal's range
5 or known occurrences. Thus, it's the polygon area that needs protection, whether it's within
6 a known habitat area or adjacent to a habitat area subject to review. According to the
7 WDFW report, Management Recommendations for Washington's Priority Habitats,⁷⁵
8 "[M]anagement recommendations should be addressed whenever priority habitats and
9 species occur in a particular area whether or not the WDFW maps show that occurrence."

10 The lynx has a broad home range size that is reflective of food availability and often has
11 overlapping range with other lynx.⁷⁶ In fact, typical home ranges of lynx in Washington range
12 from 37 to 69 square kilometers (approximately 17 to 31 sq. miles).⁷⁷ So to confine a lynx's
13 polygon to a 1000-foot buffer from a point observation reduces its protection considerably.
14 While maybe a frog's polygon can be defined by a particular wetland, a carnivore, such as
15 the lynx, need protections far from point observations, within and outside of defined critical
16 areas.

17 Second, the County refers only to "development proposals", which by the County's definition
18 limits protection to those uses as defined. Roads, and the subsequent increase in recreation
19 from road access, are not covered by "development proposals", leaving lynx habitat
20 vulnerable to additional human activities and potential conflict. As explained in the WDFW's
21 Priority Habitats and Species List, "[A]lthough the exact mapped locations are undoubtedly
22 important, the area surrounding these locations may also need to be evaluated to determine
23 what land uses are compatible or incompatible with the requirements of species using the
24 area."⁷⁸

25 ⁷³ *Futurewise v. Stevens County*; EWGMHB Case No. 05-1-0006, FDO (Jan. 13, 2006) at pg. 2.

26 ⁷⁴ Petitioner's Exhibit 14-1 at 6.

⁷⁵ Petitioner's Exhibit 14-8, pg. 2.

⁷⁶ Petitioner's Exhibit 14-5; Stinson, D. W. 2001; Washington State Recovery Plan for the Lynx. WDFW; pg. 5.

⁷⁷ Id. Table 1.

⁷⁸ Petitioner's Exhibit 14-3; Priority Habitats and Species List at 3.

1 **Conclusion:**

2 The Board finds the County failed to comply with the requirements of the GMA in adopting
3 Ordinance No. 8-2009, specifically RCWs 36.70A.020(9), 36.70A.060, and 36.70A.172. The
4 County did not rely upon scientific information and has failed to define polygon areas that are
5 adjacent, as well as within, critical area habitat. The County’s definition of “development
6 proposal” limits protection for lynx to only those uses defined by the County, thus exposing
7 lynx habitat to uses that threaten the survival of the species.

8 • **Removal of the 200-foot buffer from SCC 13.10.034**

9 Upon remand and subsequent changes to SCC 13.10.034, the County removed reference
10 to the 200-foot buffer as measured from the OHWM⁷⁹ for “development proposals within a
11 mapped critical habitat area” and indicated this buffer would apply “except when it is
12 determined on a site-by-site basis that an alternative buffer method described in Section
13 13.20.014⁸⁰ will protect the functions and values of the habitat area.”⁸¹ The County argues
14 that the Petitioners are alleging the existing County aquatic buffers are inadequate and that
15 this Board wrote in a previous order that “GMA does not require additional protection for
16 priority habitat, even priority habitat associated with listed species.”⁸² But that statement by
17 the Board was followed by this clarifying statement, “In other words, priority habitat is
18 subject, at most, to the protection requirements found necessary for the protection of that
19 habitat.”⁸³ As introduced in the following paragraph, BAS clearly indicates a 200-foot buffer
20 is a minimum when it comes to protecting all the functions and values of ETS species and
21 habitat.⁸⁴

22 ⁷⁹ OHWM – ordinary high water mark.

23 ⁸⁰ In part, SCC 13.20.014 states: This determination shall be supported by appropriate documentation prepared
24 by a qualified professional, DOE or WDFW showing that an increase is necessary based on *one* or more of the
25 following:

26 A. A larger buffer is needed to maintain critical habitat for existing, documented federal or state listed
endangered, threatened or sensitive species or a species of local importance, or...

⁸¹ Quotes from original language in SCC 13.10.034(3)(A).

⁸² LLPOA et al. v. Stevens County, EWGMHB Case No. 03-1-0006c, Order on Compliance (Oct. 15, 2004) at
11.

⁸³ Id.

⁸⁴ SCC 13.10.034(3)(A) and (B) both indicate that Fish and Wildlife Habitat Conservation area will be subject to
County review to determine if the development proposal will impair the functions and values of the habitat area.

1 The 200-foot buffer originally adopted by the BOCC under Resolution #32-2003 (March 4,
2 2003) and Resolution #80-2004 (July 6, 2004) was accepted by state agencies and the
3 public alike to protect PHS critical areas.

4
5 The Board in the First Compliance Order in Case No. 03-1-0006c stated:

6 On July 6, 2004, Stevens County adopted Resolution #80-2004. The
7 resolution amends Title 13, the County's Critical Areas Ordinance, to comply
8 with the Final Decision and Order issued on February 10, 2004, by the Eastern
9 Washington Growth Management Hearings Board and Title 13, as amended,
10 establishes adequate protection requirements for Fish and Wildlife Habitat
11 Conservation Areas. It establishes additional protections for listed species and
12 habitat associated with listed species.⁸⁵

13 Additional protections for ETS species and habitat are warranted and justified by their distinct
14 designation. That's why the state established specific and greater protections for ETS
15 species and habitats and the Federal government created the Endangered Species Act. The
16 County considered greater protections during its original CAO process because the record
17 showed ETS species and habitat need larger buffers according to the County's own BAS in
18 the Record.⁸⁶ The 200-foot buffer was vetted through the public process and adopted
19 because of this process.

20 In Management Recommendations for Washington's Priority Habitats – Riparian, a report
21 written by Knutson and Naef for the WDFW, the BAS in Table 3 on page 87 shows that the
22 buffer recommendations for Type 1 and 2 streams, shorelines of the state, and shorelines of
23 statewide significance should be 250 feet; while Type 3 streams or other perennial or fish
24 bearing streams should be 200 feet in width. Even special Type 4 and 5 streams or
25 intermittent streams and washes with high mass wasting potential are recommended to be
26 set at 225 feet. In addition, the report recommends additional protections for priority species:

25 ⁸⁵ Id.

26 ⁸⁶ Stevens County Critical Area Regulations; Bibliography of Resource Materials; pg. 55; referencing the use of
Management Recommendations for Washington's Priority Habitats: Riparian (Dec. 1997).

1 *The following are important additions to the recommended RHA⁸⁷ widths in Table 3: Larger*
2 *RHA widths may be required where priority species occur...⁸⁸*

3 The Board found Stevens County in non-compliance in the FDO based on the GMA,
4 information provided by the parties, their briefs, case law and other factors. The 200-foot
5 buffer for priority species and habitat was part and parcel of the issues stated and NOT
6 stated by the Petitioner. In other words, what was not at issue in the petition for review was
7 accepted by the Petitioners. The Board's decision reflected this acceptance of the 200-foot
8 buffer, as well as those issues brought to light that were not in compliance. The County's
9 compliance to the FDO is judged by all the changes it makes to the CAO, whether additions
10 to or subtractions from the CAO, to bring itself into compliance. The standard buffers are not
11 being challenged by the Petitioners, as alleged by the County, just the ETS protections
12 adopted by the County based on its original BAS when it passed its CAO.

13 The Board concludes that the 200-foot buffer originally designated in Stevens County's CAO
14 was based on BAS.⁸⁹ The County adopted regulations which protect the functions and
15 values⁹⁰ of the critical areas and that means all the functions and values, including riparian
16 habitat functions that protect all the ETS species found in Stevens County. The 200-foot
17 buffer covers most, but not all of the functions and values and is better than the County's
18 standard riparian buffers found in SCC 13.10.034(1). Therefore, the County needs to use a
19 reasoned process and must rely upon scientific information to remove the 200-foot buffer for
20 ETS species and habitat. Claiming the 200-foot buffer is excessive or unnecessary according
21 to a segment of the Hearings Board's statement is not including BAS as required by the
22 County's own CAO.

24 ⁸⁷ Riparian Habitat Area.

25 ⁸⁸ Id. at 87.

26 ⁸⁹ SCC 13.10.033.

⁹⁰ RCW 36.70A.172(1).

1 **Conclusion:**

2 The Board finds the County failed to protect the functions and values of its critical areas by
3 arbitrarily reducing the 200-foot riparian buffer established for ETS species and habitats to
4 the lesser buffer widths found in SCC 13.10.034(1). The County failed to comply with the
5 requirements of the GMA in adopting Ordinance No. 8-2009, specifically RCW
6 36.70A.172(1), and rely on BAS to determine adequate buffer widths for ETS species and
7 habitat in light of its initial determination of designating a 200-foot buffer using BAS in the
8 Record when it adopted its CAO.

9 **VI. ORDER**

10 Based upon the foregoing, the Board determines that:

- 11 1. Stevens County has taken legislative action to bring itself partially into compliance by
12 removal of SCC 13.10.034(3)(C) and for adding language to include BAS in SCC
13 13.10.034(A).
- 14 2. Stevens County is in non-compliance for failure to include BAS to protect ETS species
15 and habitat, specifically from road building and its associated recreational activities,
16 and for failure to rely on scientific information to justify the removal of buffer
17 requirements for priority species that protect all the functions and values of ETS
18 species and habitat as determined by the County's BAS in the Record.

19 Therefore, the Board directs Stevens County to take legislative action to achieve compliance
20 with the GMA pursuant to both the Board's January 13, 2006 FDO and this Order on
21 Compliance for the issues found in non-compliance. Such action shall be taken no later than
22 90 days from the date of this Order. The following schedule shall apply:

23 Respondent's Statement of Actions Taken to 24 Comply	March 22, 2010
25 Petitioner's Brief due	April 12, 2010
26 Respondent briefs due	April 22, 2010
Compliance Hearing (Telephonic) Call 360 407-3780 pin 809981#	May 4, 2010 10:00 am.

1 Entered this 24th day of December, 2009.

2 _____
John Roskelley, Board Member

3
4 _____
Raymond L. Paoella, Board Member

5
6 _____
Joyce Mulliken, Board Member

7
8
9 Pursuant to RCW 36.70A.300 this is a final order of the Board.

10 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the date
11 of mailing of this Order to file a petition for reconsideration. The original and three
12 copies of a motion for reconsideration, together with any argument in support
13 thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the
14 original and three copies of the motion for reconsideration directly to the Board, with
15 a copy to all other parties of record. **Filing means actual receipt of the document at
the Board office.** RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing
of a motion for reconsideration is not a prerequisite for filing a petition for judicial
review.

16 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
17 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
18 judicial review may be instituted by filing a petition in superior court according to the
19 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
20 Enforcement. The petition for judicial review of this Order shall be filed with the
21 appropriate court and served on the Board, the Office of the Attorney General, and all
22 parties within thirty days after service of the final order, as provided in RCW
34.05.542. Service on the Board may be accomplished in person or by mail, but
service on the Board means **actual receipt of the document at the Board office** within
thirty days after service of the final order. A petition for judicial review may not be
served on the Board by fax or by electronic mail.

23 **Service.** This Order was served on you the day it was deposited in the United States
24 mail. RCW 34.05.010(19).