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No. 70796-5-I
(Consolidated with Nos. 72132-1-I and 70896-1-I)

IN THE COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

WHATCOM COUNTY,
Petitioner/Cross-Respondent,

v.

ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS and DAVID STALHEIM, FUTUREWISE, AND WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD,
Respondents/Cross Petitioner,

and

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, WASHINGTON REALTORS, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, WASHINGTON STATE FARM BUREAU, AND WASHINGTON STATE ASSOCIATION OF COUNTIES,
Amici Curiae.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Eric Hirst, Laura Lee Brakke, Wendy Harris, David Stalheim, and Futurewise ("Hirst") ask this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Hirst asks this court to review the Court of Appeals, Division 1 opinion in *Whatcom County v. Hirst*, Docket No. 70796-5-I (consolidated with Dckt. Nos. 72132-1-I and 70896-1-I), filed on February 23, 2015. A copy of the decision is in Appendix A. The Court of Appeals decision in turn reviewed the Growth Management Hearings Board (Board) Final Decision and Order (FDO) in *Hirst v. Whatcom County*, No. 12-2-0013, filed on June 7, 2013, and the Second Order on Compliance filed on April 15, 2014. A copy of the FDO is in Appendix B. A copy of the Second Order on Compliance is in Appendix C.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in reversing the Board's conclusion that the County's "rural element" policies and regulations do not comply with Growth Management Act (GMA) requirements to protect water resources, particularly by finding inapplicable the precedent set forth in *Postema v. Pollution Control Hearings Board* (2000) and *Swinomish Indian Tribal Community v. Department of Ecology* (2013) that

permit-exempt wells must comply with the priority rules as well as evidence showing that instream flows were not being met and that the permit-exempt wells withdraw water in hydraulic continuity with the Nooksack River and its tributaries?

2. Does Whatcom County's failure to assign error to the Board's findings of fact that "water is not available" in the Nooksack River basin and that the land uses in the basin are polluting surface and ground water make these facts verities on appeal?
3. May the Court of Appeals rely on an amicus curiae brief as evidence of interpretation of a regulation, or must appellate review under the Administrative Procedure Act (APA) rely on the record created before the agency, in this case, the Board?
4. Did the Court of Appeals err in finding that the Board improperly supplemented the record with two state agency reports showing that the link between land use planning and water resources is well-established, where the County was not prejudiced because it conceded that land uses adversely impact water quality?
5. Did the Court of Appeals err in finding that the Board's consideration of evidence of "pre-existing" pollution violates the GMA because it results in a requirement of "enhancement" of water quality rather than "protection" of water quality?

6. Was the Board's conclusion that Hirst had "not met the standards for a declaration of invalidity" of the County's rural element ordinance an incorrect interpretation or application of the GMA?

D. STATEMENT OF THE CASE

1. Introduction.

Whatcom County ("County"), in Ordinance No. 2012-032,[1] adopted the Comprehensive Plan ("Plan") amendments at issue in this appeal. Fundamentally at issue in this case are the requirements of the GMA to ensure that local comprehensive plans governing rural development protect water quality and quantity. The issue of the GMA's requirement to integrate land use planning with water quality and quantity arises because of (1) water scarcity in the County's rural area, a fact reflected in the establishment of instream flows and the closure of much of the County to further water withdrawals, either year-round or during dry periods, and (2) severe water pollution in Whatcom County, as documented in the record before the Board.

Ordinance No. 2012-032 represents the County's response to a series of rulings from the Board and the Courts, dating back to 2005, requiring that the County's rural comprehensive plan and development

regulations be brought into compliance with the GMA.[2] The County's 2005 Comprehensive Plan "largely retained the rural land use designations in its 1997 Comprehensive Plan."[3] The 1997 Plan, in turn, was adopted two months prior to the effective date of amendments to the GMA intended to prevent sprawl by clarifying limits on rural development.[4] The County's delayed implementation of GMA rural planning requirements has resulted in a Plan that allows substantial rural development.[5]

2. The Board's Final Decision and Order (FDO).

The FDO addresses the County's compliance with the GMA. The Board addressed the question of "whether Whatcom County has adopted measures that apply the GMA requirements about water under the local circumstances here."[6]

The Board made a finding that there is "substantial evidence in the record about water availability limits and water pollution in rural

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[1] Administrative Record (AR) 12-180. Unless otherwise specified, the AR citations are to the administrative record for Case No. 70796-5-1.
[2] AR 1356-57, FDO at 9-10 of 51.
[3] AR 1357, FDO at 10 of 51.
[4] *Gold Star Resorts v. Futurewise*, 167 Wn.2d 723, 727, 222 P.3d 791 (2009).
[5] See AR 1390, FDO at 43 of 51 (referring to "the intensity of rural development allowed under the County's plan"). *See also Governors Point v. Whatcom County*, Growth Mgmt. Hearings Bd., Western Wash. Region, Case Nos. 11-2-0010c and 05-2-0013, Final Decision and Order and Order Following Remand on Issue of LAMIRDs (Jan. 9, 2012) at 121 of 177 ("unrebutted evidence demonstrates that vacant lots in existing rural areas can accommodate 33,696 additional people, where only 2,651 are expected").
[6] AR 1370, FDO at 23 of 51.

Whatcom County,"[7] citing eleven Whatcom County-specific sources.[8] The Board then found that "the link between land development and water resources is well established,"[9] basing this finding on a discussion of the County-specific *2010 WRIA 1 State of the Watershed Report.*[10]

Based on "the evidence in the record about the extent and persistence of water pollution and lack of water availability in Whatcom County, and the need to integrate land use and water resource planning," the Board found that "the County has not employed effective land use planning that contains measures to protect water supply and water quality as required by the GMA."[11]

The Board adopted findings for each challenged provision of the Ordinance.[12] Policy 2DD-2.C.6 addresses water availability for subdivision applications. Policy 2DD-2.C.7 "[r]egulate[s] groundwater withdrawals" but applies only to "purveyors of public water systems and private water system applicants"[13] and not building permit applicants seeking to rely on exempt wells. Both policies adopt by reference existing

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[7] AR 1370, FDO at 23 of 51.
[8] AR 1370-75, *Id.* at 23-28 of 51.
[9] AR 1377, *Id.* at 30 of 51.
[10] AR 1377-78, *Id.* at 30-31 of 51. WRIA means "Water Resource Inventory Area" geographical areas established by Ecology following basin boundaries.
[11] AR 1381-82, FDO at 34-35 of 51.
[12] AR 1383-91, *Id.* at 36-44 of 51.
[13] AR 1387, *Id.* at 40 of 51.

Whatcom County Code provisions that allow the approval of subdivisions and building permits relying on the use of exempt wells in closed watersheds. The only exception is "where DOE has determined by rule that water for development does not exist."[14]

The Board found that these provisions demonstrate that the County requires no consideration of the legal availability of water prior to issuing subdivision approvals and building permits for projects that rely on permit-exempt wells, even in closed sub-basins that do not meet instream flows. The Board found that the County's policies do not govern development in a way that protects rural character.[15] The record supports this conclusion. Between 1986 and 2011, exempt wells in WRIA 1 increased 270 percent, from an estimated 3,294 wells to an estimated 12,195 wells.[16] Approximately 77 percent of the increase was in the parts of WRIA 1 closed to the appropriation of water part or all of the year.[17] From 1986 to 2009, the Nooksack River failed to meet instream flows 72 percent of the time during the July-September flow period.[18] This failure to meet instream flows results in a loss of habitat connectivity, reduces

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[14] AR 1387, *Id.*, citing Whatcom County Code (WCC) 21.04.090 (in AR 744), WCC 21.05.080 (in AR 745), and WCC 24.11.050 (in AR 748).
[15] AR 1388-89, FDO at 41-42 of 51.
[16] AR 1263, R-153 Northwest Indian Fisheries Commission, *2012 State of Our Watersheds* at 80 in Appendix D.
[17] *Id.*

habitat, strands juvenile salmon, increases instream temperatures, and decreases water quality.[19] Continued well water withdrawals "is in direct conflict with the guidance of the Salmonid Recovery Plan, which recommends reducing out of stream uses in sub-basins impacted by low stream flows."[20]

In addressing Policy 2DD-2.D.7, the Board found that "the record contains a letter provided by Ecology explaining the effect of closed basins and instream flows on rural residential development."[21] Ecology provided the County with this letter during the pendency of the revision of the Comprehensive Plan, advising the County that the letter contained "information that may be of interest and/or helpful to you."[22] Following a discussion of the letter and of GMA provisions, the Board found that, "according to Ecology, the County must deny a new permit for a new building or subdivision unless the applicant can demonstrate factually that a proposed new withdrawal from a groundwater body hydraulically connected to an impaired surface water body will not cause further adverse

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[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] AR 1388, FDO at 41 of 51.
[22] AR 1388, FDO at 41, referencing AR 456 (No. 70796-5-I), Ex. C-678 Ecology, Maia Bellon letter to Clay White, Snohomish County PDS (Dec. 19, 2011) at 7. See also AR 809, Ex. R-082 at 4 Kasey Ignac, Ecology, email to Whatcom County staff.

impact on flows."[23]

The Board's findings on water quality issues include determinations that protective policies are limited to specific areas of the County and do not apply throughout the Rural Area[24] and that regulations fail to protect water quality from faulty septic tanks.[25]

The Board remanded Ordinance 2012-032 to the County to take action to achieve GMA compliance.[26] As stated in the FDO, "the County has many options for adopting measures to reverse water resource degradation in its Rural Area through land use controls."[27]

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Hirst seeks review pursuant to RAP 13.4(b)(1), (2), and (4) where the Supreme Court will accept a petition for review only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or . . .
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

1. The Court of Appeals decision is in conflict with decisions of this

[23] AR 1389, FDO at 42 of 51 (emphasis added).
[24] AR 1383, FDO at 36 of 51 (addressing Policy 2DD-2.C.1); AR 1385, *id.* at 38 of 51 (addressing Policy 2DD-2.C.3); AR 1385-86, *id.* at 38-39 of 51 (addressing Policy 2DD-2.C.4); AR 1389-90, *id.* at 42-43 of 51 (addressing policies 2DD-2.C.8 and 2DD-2.C.9).
[25] AR 1383-85, FDO at 36-38 of 51 (addressing Policy 2DD-2.C.2).
[26] AR 1397, *Id.* at 50 of 51.
[27] AR 1390, *Id.* at 43 of 51.

Court and the Court of Appeals.

a. The Court of Appeals decision misstates this Court's precedent regarding the status of permit-exempt wells and their relationship to instream flows, resulting in a decision that conflicts with the Court's previous determination of counties' obligation to protect water resources under the GMA.

With respect to Issue 1, listed in Section C above, the Court of Appeals misinterpreted decisions of this Court relating to permit-exempt wells, instream flow regulations, and counties' GMA obligations to protect water resources. The Board found that the Plan policies and development regulations for the rural area were deficient in part because they failed to require the County to determine whether water is legally available for permit-exempt wells, as required by the GMA,[28] when such wells withdraw water that would deplete instream flows adopted by rule.

The Court of Appeals, relying on Ecology's *ad hoc* interpretation of the 1985 Nooksack Rule, reasoned that Ecology's interpretation of the instream flow is the sole governing law that determines the County's obligation to protect water resources. The state Water and Groundwater

[28] *Kittitas* at 180. *See also* GMA provision in RCW 36.70A.070(5)(c)(vi) in Appendix E; WAC 365-196-825 ("Each applicant for a building permit of a building needing potable water shall provide evidence of an adequate water supply for the intended use of the building. Local regulations should be designed to produce enough data to make such a determination, addressing both water quality and water quantity issues"); AR 1389 fn. 156, FDO at 42 fn. 156.

Codes, as interpreted in *Postema v. Pollution Control Hearings Board.*[29] ("*Postema*") and *Dep't of Ecology v. Campbell & Gwinn*[30] ("*Campbell & Gwinn*"), the Court held, do not govern permit-exempt wells; only the Nooksack Rule applies. Consequently, under the Court's ruling, state law of prior appropriation does not apply to junior permit-exempt well users, and such junior users may deplete senior instream flows without limit.

Relying on Ecology's assertion that prior appropriation does not apply to permit-exempt wells in Whatcom County, the Court further found that the GMA also does not protect depleted senior instream flows from junior permit-exempt wells. The Court of Appeals thus failed to acknowledge or implement the independent effect of the GMA's requirements to protect water resources and to determine the legal availability of water, ruling that "cooperation" with Ecology is sufficient.[31]

In the course of its erroneous portrayal of the Nooksack Rule – an agency regulation – as eliminating the overriding state law of prior appropriation for exempt wells, the Court of Appeals made several findings that flatly contradict this Court's prior rulings regarding permit-exempt wells and instream flows. First, the Court failed to acknowledge

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[29] 142 Wn.2d 68, 111 P.3d 726 (2000).
[30] 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

that permit-exempt wells represent water rights that are identical to all other water rights in Washington, save that they do not require a permit, contradicting this Court's ruling in *Campbell & Gwinn* (once perfected, the permit-exempt right "is otherwise treated in the same way as other perfected water rights," including the "first in time" priority principle).[32]

The Court of Appeals failed to acknowledge that the instream flows established in the Nooksack Rule, WAC 173-501-030, -040, are a form of water right that must be protected from impairment, including by permit-exempt wells. In so ruling, the Court explicitly failed to apply this Court's ruling in *Swinomish Indian Tribal Community v. Department of Ecology*, holding that instream flows are a water right that are entitled to and must be protected from impairment.[33] Compounding this error, the Court of Appeals failed to apply several rules of law from *Postema* to Whatcom County's GMA policies and ordinances. The Court of Appeals explicitly and erroneously held *Postema* inapplicable on the basis that *Postema* involved water right permits, and was not addressed to permit-exempt wells. This ruling, which was effectively rejected in *Swinomish, supra*, contradicts *Postema*'s fundamental holding regarding ground and

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[31] RCW 36.70A.070(5)(d)(iv) "Protecting critical areas, as provided in RCW 36.70A.060, and surface water and groundwater resources . . ."
[32] 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

surface water management, which is applicable to permit-exempt wells because such wells are treated just like permitted water rights.[34]

The Court of Appeals' determination that "cooperation" with Ecology suffices to meet GMA requirements does not meet GMA standards and conflicts with *Kittitas*. While *Kittitas* states that Ecology "ought to *assist* counties in their land use planning to adequately protect water resources,"[35] it does not does not substitute "cooperation" for substantive compliance with GMA requirements to protect water quantity and to determine the legal availability of water. *Kittitas* held that:

> [T]his issue is fundamentally a question of law regarding how the GMA requires counties to protect water resources. The court gives " 'substantial weight' " to a board's interpretation of the GMA. . . . The GMA requires that counties provide for the protection of groundwater resources and that county development regulations comply with the GMA.[36]

Combined, the Court of Appeals' rulings fail to adhere to the *Kittitas* standard that GMA policies and regulations adopted by counties must be consistent with Water Code requirements and with the GMA goal and requirements mandating actual protection of water resources.[37]

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[33] *Swinomish Indian Tribal Community v. Dep't. of Ecology,* 178 Wn.2d 571, 584, 591-93, 311 P.3d 6 (2013).
[34] *Campbell & Gwinn,* 146 Wn.2d at 9.
[35] *Kittitas*, 172 Wn.2d at 180 (emphasis added).
[36] *Kittitas*, 172 Wn.2d at 180.
[37] RCW 36.70A.020(10) in Appendix E; RCW 36.70A.070(1); .070(5)(c)(iv).

b. The Court of Appeals decision subverts longstanding APA and RAP requirements that parties present evidence at hearing, and assign error to challenged facts, to promote orderly and fair administrative appeals.

With respect to Issues 2 and 3, listed in Section C above, the Court of Appeals has ignored the requirements of the Administrative Procedure Act (APA), RCW Ch. 34.05, and court rules that require parties to present their evidence and at the time of hearing, and then argue from that evidence at the appellate stage. These critical rules promote efficient and fair resolution of administrative appeals. With exceptions not relevant here, appellate courts must always decide cases based on the record created before the administrative tribunal.[38] Further, for APA appeals, the party "challenging an administrative adjudicative order under RCW 34.05 shall set forth a separate concise statement of each error which a party contends was made by the agency issuing the order, together with the issues pertaining to each assignment of error."[39] Unchallenged agency findings are verities on appeal.[40]

This ruling involves compound error. First, Division 1 erred in

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[38] RCW 34.05.558; *Lemire v. Dep't of Ecology*, 178 Wn.2d 227, 245, 309 P.3d 395, 404 (2013).

[39] RAP 10.3(h); *Kittitas County v. Kittitas County Conservation*, 176 Wn. App. 38, 54, 308 P.3d 745 (2013); See also *Clark County v. Western Washington Growth Mgt. Hrgs. Bd.*, 177 Wn.2d 136, 143-46, 298 P.3d 704 (2013) (appellate courts decide only those issues raised and briefed by the parties).

[40] *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279, 1282 (1980)

waiving the RAP 10.3(h) requirement that the County assign error to the Board's findings of fact that water is not available in many areas of the Nooksack River basin.[41] By refusing to accept the Board's findings as verities and ignoring the evidence, the Court then freed itself to defer to Ecology's newfound interpretation of the Instream Resources Protection Program – Nooksack Water Resource Inventory Area (WRIA) 1 ("Nooksack Rule"), WAC Ch. 173-501, an Ecology interpretation that ignores and contradicts the Board's findings of fact.[42]

These two errors subvert the requirements that evidence and argument be presented to the administrative tribunal, and that parties then assign error to that evidence and argument to ensure appellate review of the record and decisions of the administrative board.

c. The decision appealed conflicts with other Court of Appeals decisions governing official notice.

As to Issue 4, the Court of Appeals concluded that the Board violated RCW 34.05.570(1)(d) by taking official notice of two state agency reports.[43] To show a violation of RCW 34.05.570(1)(d), the

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[41] See section D(2) of this Petition *supra*.
[42] AR 1388, FDO at 41 of 51. The interpretations espoused in Ecology's *amicus* brief are not codified in rule, set forth in agency policy, nor discussed in any Attorney General Opinion. Further, Ecology's *amicus* brief was not offered to the Board at the hearing stage of this appeal.
[43] *Whatcom County v. Growth Management Hearings Board*, Case No. 70796-5-1 Slip Op. 31-36 (Feb. 23, 2015) in App. A. Hereinafter "Decision."

County "must show must show that (1) the agency did not correctly follow its own procedure, and (2) the irregularity substantially prejudiced the [County.]"[44]

Here the county was not prejudiced because other documents in the record document the link between land use and water pollution and the County did not dispute the link. The Board cited "three authoritative references" to support its finding that "the link between land development and water resources is well-established."[45] The Board's finding "the link between land development and water resources is well-established"[46] is amply supported by the *2010 WRIA 1 State of the Watershed Report.*[47] Furthermore, the County does not even dispute the Board's finding. The first page of the County's opening brief states that "the County does not dispute that rural development can impact water resources."[48] Because the County has not been substantially prejudiced by the Board's official notice, the Court of Appeals erred in granting relief on this ground and this grant was inconsistent with Division III's *Alpha Kappa Lambda Fraternity*

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[44] *Alpha Kappa Lambda Fraternity v. Washington State University*, 152 Wn. App. 401, 414, 216 P.3d 451, 458 (2009).
[45] AR 1377-78, FDO at 30-31 of 51.
[46] AR 1377-78, FDO at 30-31 of 51.
[47] AR 1377, FDO at 30 of 51, citing AR 474, C-683A.14 *WRIA 1 State of the Watershed Report* at 5 (2010).
[48] Whatcom County Case No. 70796-5-I App. Brief at 1 (emphasis added).

decision and Division II's *K.P. McNamara Northwest, Inc.* decision.[49]

d. The decision appealed conflicts with the Supreme Court's 2007 *Swinomish* decision governing the GMA's requirements to protect and enhance water quality.

With respect to Issue 5, the Court erroneously found that the Board's consideration of evidence of "preexisting" pollution – in other words, pollution monitoring results from government agencies –violated the GMA by requiring "enhanced" water quality, rather than water quality protection.[50]

The Board found that "[t]he proliferation of evidence in the record of continued water quality degradation resulting from land use and development activities underscores the need for protective measures for water resources."[51] The Board found that the County's protective policies did not cover the County's entire rural area, leaving many geographical areas subject to policies that do not protect water quality.[52] The Board also cited evidence establishing that the County's "self-inspection" system for septic tanks did not protect water quality from malfunctioning septic tanks.[53] Nowhere did the Board require "enhancement" in concluding that

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[49] *K.P. McNamara Northwest, Inc. v. Dep't. of Ecology*, 173 Wn. App. 104, 121, 292 P.3d 812, 820 (2013).
[50] Decision at 37.
[51] AR 1382, FDO at 35 of 51.
[52] AR 1383, AR 1385-86, FDO at 36, 38-39 of 51.
[53] AR 1383-86, FDO at 36-38 of 51.

the County had not protected water resources.

The Court of Appeals cited *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board* (*"Swinomish"*).[54] *Swinomish* contrasted the GMA requirement to "protect" (not enhance) critical areas with GMA Goal 10, which explicitly requires comprehensive plans and development regulations to "enhance . . . water quality. . ."[55] *Swinomish* distinguished this "duty to enhance the quality of water" from the requirement to "protect" fish habitat at issue in that case.[56] The Court's summary dismissal of the legislative directive to enhance water quality as "a ***goal*** of the GMA, not a requirement"[57] is inconsistent with *Swinomish.*

The Court's decision that Boards may not consider evidence of the current level of pollution eliminates most, if not all, sources of evidence regarding water pollution and eviscerates the legislative direction to both protect and enhance water quality.

e. The decision appealed conflicts with prior Court of Appeals precedent regarding determinations of invalidity.

With respect to Issue 6, the Board and Court of Appeals have

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[54] 161 Wn.2d 415, 166 P.3d 1198 (2007).
[55] *Id.* at 161 Wn. 2d at 429; Goal 10 is at RCW 36.70A.020(10).
[56] *Id.*
[57] Decision at 41 (emphasis in original).

created a new standard for declarations of invalidity that conflicts with both the GMA and a prior decision of the Court of Appeals interpreting that statute. This new standard avers that the Board will "declare invalid only the most egregious noncompliant provisions which threaten the local government's future ability to achieve compliance with the Act."[58]

Nowhere does RCW 36.70A.302 require a finding that noncompliant provisions are "the most egregious" or that they "threaten the local government's *future* ability" to comply with the GMA.[59] Rather, the Board is to determine whether "the continued validity of the plan or regulation will *substantially* [not "egregiously"] *interfere* with the *fulfillment of the goals of the GMA* [not with "future ability to achieve compliance"] . . . RCW 36.70A.302(1)."[60]

While the Board may interpret the requirements of RCW 36.70A.302(1), the Board may not substitute or add to these requirements.[61] By altering the standards in RCW 36.70A.302(1) the Board and the Court of Appeals have erroneously interpreted the GMA in

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[58] AR 1397 FDO at 50 of 51; Decision at 42-46.
[59] *Davidson Serles & Associates v. Central Puget Sound Growth Management Hearings Bd.*, 159 Wn. App. 148, 157, 244 P.3d 1003, 1007 (2010).
[60] RCW 36.70A.302.
[61] *City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 116 Wn. App. 48, 56, 65 P.3d 337, 341 (2003) The Board cannot use a test that "has no support in the GMA." *Review denied City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 150 Wn.2d 1007, 77 P.3d 651 (2003).

conflict with other court decisions.[62]

2. This petition involves issues of substantial public interest.

This case presents compelling questions regarding this Court's interpretation of the intersections between the GMA and the Water Codes, an evolving area of law that is of substantial public interest. The Court of Appeals decision on Issue 1, i.e. the scope of local government responsibility to protect water resources, is inconsistent with this Court's prior decisions and fails to respect Washington's priority system for water rights and the policy of sustainable water management.

RCW 36.70A.070(5)(c)(vi) requires that the rural element "shall include measures that apply to rural development" including "[p]rotecting critical areas, as provided in RCW 36.70A.060, and surface water and groundwater resources . . ." In *Kittitas*, the Washington State Supreme Court concluded that "several relevant statutes indicate that the County *must* regulate to some extent to assure that land use is not inconsistent with available water resources."[63] The relevant statutes include RCW 36.70A.070(5)(c)(iv)[64] and "[a]dditional GMA provisions, codified at RCW 19.27.097 and 58.17.110," which "require counties to assure

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[62] RCW 34.05.570(3)(d).
[63] *Kittitas*, 172 Wn.2d at 178 (emphasis in original).
[64] *Id.*, citing RCW 36.70A.070(1) and 36.70A.070(5)(c)(iv).

adequate potable water is available when issuing building permits and approving subdivision applications."[65] This case addresses the question of whether the measures must actually protect surface and ground water resources. The record in this case shows that the measures adopted by the County do not in fact protect these important resources. Whether the County must adopt measures to protect surface and ground water is an issue of substantial public interest.

F. CONCLUSION

This Court should accept review for the reasons indicated in Part E and (1) uphold the Board's FDO on its interpretation of the GMA's water resource protection requirements and (2) remand the matter to the Board with direction to use the correct standard to determine if a determination invalidity should be made.

Dated: March 24, 2015 and respectfully submitted,

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[65] *Id.* at 178-79 (emphasis added).

Appendix A:

Court of Appeals decision in
Whatcom County v. Hirst, Docket No. 70796-5-I (consolidated with Docket Nos. 72132-1-I and 70896-1-I) filed on February 23, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WHATCOM COUNTY, Petitioner, ERIC HIRST; LAURA LEIGH BRAKKE; WENDY HARRIS; DAVID STALHEIM; and FUTUREWISE, Cross Petitioners, v. WESTERN WASHINGTON GROWTH MANAGEMENT HEARING BOARD, Respondent.	No. 70796-5-I (consolidated with Nos. 72132-1-I and 70896-1-I) DIVISION ONE PUBLISHED FILED: February 23, 2015

Cox, J. — Whatcom County appeals the Growth Management Hearings Board's Final Decision and Order dated June 7, 2013 (FDO). The Board determined that the Rural Element of the County's comprehensive plan and zoning code, as amended by Ordinance No. 2012-032, fails to comply with the Growth Management Act (GMA). Eric Hirst, Laura Leigh Brakke, Wendy Harris, David Stalheim, and Futurewise (collectively Hirst) cross-appeals the FDO, arguing that the Board erred by declining to declare the ordinance invalid.

We hold that the Board engaged in unlawful procedure by taking official notice of and relying on two documents without first providing the County the opportunity to contest information in these documents. We also hold that the Board erroneously interpreted and applied the law in determining that Ordinance No. 2012-032 fails to comply with the GMA. But the Board did not abuse its discretion by declining to declare the ordinance invalid. We affirm in part, reverse in part, and remand for further proceedings.

In August 2012, Whatcom County adopted Ordinance No. 2012-032.[1] By its terms, Ordinance No. 2012-032 amended the Whatcom County Comprehensive Plan and Zoning Code.[2] Among other things, this ordinance amended certain Rural Element policies and adopted by reference various pre-existing County regulations. These amendments were in response to a series of prior rulings from the Board and the courts requiring that the Rural Element of the County's comprehensive plan and development regulations be brought into compliance with the GMA.

Hirst petitioned the Board for review, challenging the adoption of Ordinance No. 2012-032. In particular, Hirst challenged the ordinance on rural land use planning, which included a challenge to the adequacy of the County's measures to protect surface and groundwater resources.

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[1] Clerk's Papers (Case No. 70796-5) at 178-93.

[2] Id. at 178.

The Board held a hearing in April 2013. Thereafter, the Board issued its FDO. The Board concluded that the Rural Element amendments to the County's comprehensive plan and development regulations do not constitute measures to protect rural character by protecting surface and groundwater resources. Thus, according to the Board, Hirst met its burden of demonstrating that the County failed to comply with the GMA, specifically RCW 36.70A.070(5)(c).[3] But the Board denied Hirst's request for a declaration of invalidity.[4] The Board remanded the ordinance to the County to take corrective action within 180 days.[5]

Both parties appealed. The County sought review in Skagit County Superior Court, challenging the Board's determination of noncompliance with the GMA. Hirst sought review in Thurston County Superior Court, challenging the Board's decision not to declare the ordinance invalid.

Thurston County superior court transferred Hirst's appeal to Skagit County superior court, where the cases were consolidated under the Skagit County cause number.[6] The Board issued its Certificates of Appealability regarding the FDO, certifying the consolidated appeals for direct review by this court.

In April 2014, the Board held a compliance hearing. The Board concluded that "Whatcom County [was] in continuing non-compliance with the Growth

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[3] Id. at 1559 (FDO at 44).

[4] Id. at 1565 (FDO at 50).

[5] Id.

[6] Id. at 147-149.

Management Act [as determined in the FDO]."[7] The Board issued a Second Order on Compliance.[8]

The County moved for discretionary review of the FDO, and we accepted the consolidated appeals for direct review. We also granted the County's request for discretionary review of the Second Order on Compliance. Based on the agreement of the parties at oral argument and our review of the records before us, we consolidate these matters.[9]

LEGAL PRINCIPLES

In reviewing growth management hearings board decisions, courts give "'substantial weight'" to a board's interpretation of the GMA.[10] "Courts' deference to boards is superseded by the GMA's statutory requirement that boards give deference to county planning processes."[11] Accordingly, a board's ruling that

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[7] Clerk's Papers (Case No. 72132-1) at 26 (emphasis omitted).

[8] Id. at 19-26.

[9] Pursuant to RAP 3.4, the title of this case in this court remains the same as in the superior court. See Joint Stipulation, Motion, and Order Consolidating Appeals. Clerk's Papers (Case No. 70796-5) at 147-49.

[10] Kittitas County v. E. Wash. Growth Mgmt. Hr'gs Bd., 172 Wn.2d 144, 154, 256 P.3d 1193 (2011) (internal quotation marks omitted) (quoting Lewis County v. W. Wash. Growth Mgmt. Hr'gs Bd., 157 Wn.2d 488, 498, 139 P.3d 1096 (2006)).

[11] Id.

fails to apply this "more deferential standard of review to a county's action is not entitled to deference" from the courts.[12]

Comprehensive plans and development regulations are presumed valid upon adoption.[13] "To make a finding of noncompliance with the GMA, a board must find that the county's actions are clearly erroneous, meaning the board has a 'firm and definite conviction that a mistake has been committed.'"[14] The GMA "'is not to be liberally construed.'"[15]

The Administrative Procedures Act (APA) governs judicial review of challenges to decisions by a board. Courts apply the standards of the APA, chapter 34.05 RCW, and look directly to the record before the board.[16] The party challenging the board's decision bears the burden of proving it is invalid.[17] The validity of the decision is determined under the standards of review provided in

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[12] Quadrant Corp. v. State Growth Mgmt. Hr'gs Bd., 154 Wn.2d 224, 238, 110 P.3d 1132 (2005) (internal quotation marks omitted).

[13] RCW 36.70A.320(1); Town of Woodway v. Snohomish County, 180 Wn.2d 165, 174, 322 P.3d 1219 (2014).

[14] Kittitas County, 172 Wn.2d at 154-55 (citation omitted) (internal quotation marks omitted) (quoting Lewis County, 157 Wn.2d at 497).

[15] Id. (quoting Thurston County v. W. Wash. Growth Mgmt. Hr'gs Bd., 164 Wn.2d 329, 342, 190 P.3d 38 (2008)).

[16] Id. at 155.

[17] Thurston County v. Cooper Point Ass'n, 148 Wn.2d 1, 7, 57 P.3d 1156 (2002).

RCW 34.05.570(3), which sets forth nine subsections for granting relief from the board's decision.

A court reviews de novo alleged errors of law under RCW 34.05.570(3)(b), (c), and (d).[18] In reviewing claims under RCW 34.05.570(3)(e) that an order is not supported by substantial evidence, a court determines whether there is "'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.'"[19]

Here, the County primarily relies on three of these grounds for relief—RCW 34.05.570(3)(c), (d), and (e)—to argue that the Board erred when it concluded that the County's measures to protect water resources (water availability and water quality) did not comply with the GMA.

ASSIGNMENTS OF ERROR

As an initial matter, Hirst argues that the County's failure to assign error to the Board's findings of fact in its opening brief makes them verities on appeal. We disagree.

RAP 10.3(g) requires a party to assign error to each finding of fact it contends was improperly made with reference to the finding by number. "The appellate court will only review a claimed error which is included in an

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[18] Kittitas County, 172 Wn.2d at 155.

[19] Id. (internal quotation marks omitted) (quoting Thurston County, 164 Wn.2d at 341).

assignment of error or clearly disclosed in the associated issue pertaining thereto."[20] Unchallenged findings of fact become verities on appeal.[21]

But a "'technical violation of the rules will not ordinarily bar appellate review, where justice is to be served by such review.'"[22] The Rules of Appellate Procedure "allow appellate review of administrative decisions in spite of technical violations when a proper assignment of error is lacking but the nature of the challenge is clear and the challenged finding is set forth in the party's brief."[23]

Here, the Board did not enumerate and consolidate its findings of fact in one location. But, to the extent it made such findings, the nature and extent of the County's challenges to them are clear. Thus, this court's review is not in any way hindered by the absence of any formal assignments of error. Significantly, Hirst fails to claim any prejudice by the County's failure to assign error to any findings in its opening brief. For both of these reasons, we reject Hirst's argument and reach the merits of the County's challenges.

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[20] RAP 10.3(g).

[21] Spokane County v. E. Wash. Growth Mgmt. Hr'gs Bd., 176 Wn. App. 555, 576, 309 P.3d 673 (2013), review denied, 179 Wn.2d 1015 (2014).

[22] State v. Olson, 126 Wn.2d 315, 322, 893 P.2d 629 (1995) (quoting Daughtry v. Jet Aeration Co., 91 Wn.2d 704, 592 P.2d 631 (1979)).

[23] Ferry County v. Growth Mgmt. Hr'gs Bd., ___ Wn. App. ___, 339 P.3d 478, 495 (2014); see also Yakima County v. E. Wash. Growth Mgmt. Hr'gs Bd., 168 Wn. App. 680, 687 n.1, 279 P.3d 434 (2012) (concluding that the court was sufficiently apprised of the challenged findings for review despite Yakima County's failure to assign error to the Growth Management Hearing Board's informal findings).

WATER AVAILABILITY

The County argues that the Board erred when it concluded that the County's measures to protect water availability were clearly erroneous. Specifically, the County contends that the Board's conclusion is based on an erroneous interpretation of the law under RCW 34.05.570(3)(d). We agree.

Under RCW 34.05.570(3)(d), courts "'accord deference to an agency interpretation of the law where the agency has specialized expertise in dealing with such issues, but [courts] are not bound by an agency's interpretation of a statute.'"[24]

GMA Provisions

RCW 36.70A.020 states goals to guide the development and adoption of comprehensive plans and development regulations. One of the stated goals is to "[p]rotect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water."[25]

RCW 36.70A.070 sets forth mandatory elements of a comprehensive plan. It states that "[c]ounties shall include a rural element."[26] It further states that the rural element "shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by . . . [p]rotecting . .

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[24] Utter v. Dep't of Soc. & Health Servs., 140 Wn. App. 293, 300, 165 P.3d 399 (2007) (quoting City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd., 136 Wn.2d 38, 46, 959 P.2d 1091 (1998)).

[25] RCW 36.70A.020(10).

[26] RCW 36.70A.070(5).

. surface water and groundwater resources . . . ."[27] "'Rural character' refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan" that, among other things, "are compatible with the use of the land by wildlife and for fish and wildlife habitat" and "are consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas."[28]

After looking to these statutes and others, the Board concluded that the GMA is "replete with requirements to protect ground and surface water and ensure land uses are compatible for fish and wildlife."[29] It also concluded that a county's comprehensive plan rural lands provision "must include measures governing rural development to protect water resources."[30]

We agree that these initial conclusions of the Board were proper interpretations of the law. The County properly concedes in its opening brief that the GMA requires it to "adopt a rural element that includes measures to protect [water availability and water quality]."[31] Accordingly, the question is whether the Board properly concluded that the ordinance fails to protect water availability and water quality as required by the GMA.

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[27] RCW 36.70A.070(5)(c)(iv).

[28] RCW 36.70A.030(15)(d), (g).

[29] Clerk's Papers (Case No. 70796-5) at 1537 (FDO at 22).

[30] Id. at 1536 (FDO at 21).

[31] Brief of Appellant Whatcom County at 1.

In Kittitas County v. Eastern Washington Growth Management Hearings Board, the supreme court interpreted the GMA requirements for the protection of water resources, specifically water availability.[32] At issue in that case was whether the Board properly concluded that Kittitas County's subdivision regulations failed to protect water resources as required by the GMA.[33] The Board concluded that the subdivision regulations violated the water protection requirements of the GMA because they "allow[ed] multiple subdivisions side-by-side, in common ownership, which then [could] use multiple exempt wells."[34] And the Board concluded that this "fail[ed] to assure that authorized subdivisions [did] not contravene or evade water permitting requirements."[35]

In upholding the Board's decision, the supreme court rejected the argument that Kittitas County was preempted from adopting regulations related to the protection of groundwater resources.[36] Rather, it concluded that "several relevant statutes indicate that the County ***must*** regulate to some extent to assure that land use is not inconsistent with available water resources."[37] It first pointed to one of the same provisions we quoted earlier in this opinion to assert that the

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[32] 172 Wn.2d 144, 175-81, 256 P.3d 1193 (2011).

[33] Id. at 175.

[34] Id. (internal quotation marks omitted).

[35] Id. at 177.

[36] Id. at 178.

[37] Id. at 178.

"GMA directs that the rural and land use elements of a county's plan include measures that protect groundwater resources."[38] It then pointed to other provisions, codified at RCW 19.27.097 and 58.17.110, to assert that these provisions "require counties to assure adequate potable water is available when issuing building permits and approving subdivision applications."[39] After looking to these provisions it concluded, "[T]he County is not precluded and, in fact, is required to plan for the protection of water resources in its land use planning."[40]

Accordingly, with respect to the issue in that case, the supreme court held that the Board properly interpreted the GMA's mandate to protect water "to at least require that the County's subdivision regulations conform to statutory requirements by not permitting subdivision applications that effectively evade compliance with water permitting requirements."[41] And it affirmed the Board's decision that Kittitas County's subdivision regulations failed to comply with that mandate.

Here, as the Board expressly acknowledged in the FDO, the County's subdivision regulations do not present the same problem that was at issue in Kittitas. As the Board stated, the subdivision regulations "do not allow the 'daisy-chaining' of plat applications that was the specific target of the Supreme Court's

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[38] Id. at 178 (citing RCW 36.70A.070(1), (5)(c)(iv)).

[39] Id. at 179.

[40] Id.

[41] Id. at 181.

finding of noncompliance in the Kittitas case."[42] In fact, the County's subdivision regulations state that "[a]ll contiguous parcels of land in the same ownership ***shall*** be included within the boundaries of any proposed long or short subdivision of any of the properties" and that "lots so situated ***shall*** be considered as one parcel . . . ."[43]

Rather, at issue in this case, is the Board's decision that certain provisions of the Whatcom County Code do not comply with the GMA because they incorporate Department of Ecology rules respecting water availability and "this is not the standard to determining legal availability of water."[44] Specifically, the Board took issue with Policies 2DD-2.C.6 and 2DD-2.D.7.

> Policy 2DD-2.C.6 states:
>
> Limit water withdrawals resulting from land division through the standards in the following Whatcom County Land Division regulations, adopted herein by reference:
>
> a. WCC 21.04.090 Water supply, Short Subdivisions
> b. WCC 21.05.080 Water supply, Preliminary Long Subdivisions.[45]

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[42] Clerk's Papers (Case No. 70796-5) at 1555 (FDO at 40).

[43] WHATCOM COUNTY CODE 21.01.040(3)(a) (emphasis added).

[44] Clerk's Papers (Case No. 70796-5) at 1556 (FDO at 41).

[45] Id. at 1554-55 (FDO at 39-40).

With respect to this policy, the Board concluded: "Policy 2DD-2.C.6 does not govern development in a way that protects surface water flows and thus fails to meet the requirements of RCW 36.70A.070(5)(c)(iv)."[46]

The Board noted similar concerns with Policy 2DD-2.D.7, which states:

> Regulate groundwater withdrawals by requiring purveyors of public water systems and private water system applicants to comply with Washington State Department of Ecology ground water requirements per WCC 24.11.050, adopted herein by reference.[47]

With respect to this policy, the Board determined that Policy 2DD-2.C.7 "fails to limit rural development to protect ground or surface waters with respect to individual permit-exempt wells as required by RCW 36.70A.070(5)(c)(iv)."[48]

In reaching these conclusions, the Board focused on the following: "The Board notes the water withdrawals allowed under Policy 2DD-2.C.6 and 2.C.7 adopt by reference three existing code sections all of which allow use of exempt wells except 'where [the Department of Ecology] has determined by rule that water for development does not exist.' However, this is not the standard to determining legal availability of water."[49]

As we read these regulations, they essentially provide that in determining the availability of water, the County seeks to meet the requirements of the GMA

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[46] Id. at 1556 (FDO at 41).

[47] Id.

[48] Id. at 1557 (FDO at 42).

[49] Id. at 1556 (FDO at 41).

by following consistent Department of Ecology regulations regarding the availability of water. Yet, the Board concluded that the County's use of Ecology's rules as a means of meeting the requirements of the GMA fails to comply with this statute. Rather, the Board appears to conclude that the County must make its own, separate determination of the availability of water in order to fulfil the requirements of the GMA. This conclusion is an erroneous interpretation of the law.

As explained earlier, Kittitas established that counties are not preempted from adopting regulations for the protection of groundwater resources.[50] The supreme court squarely rejected Kittitas County's argument that only Ecology has this authority, stating that preemption prevents counties from "separately ***appropriating*** groundwaters."[51] The court went on to hold that counties "must regulate to some extent to assure that land use is not inconsistent with available water resources."[52]

The court was silent about what other actions counties may take in order to comply with the GMA. Thus, Kittitas does not expressly answer the question before this court—whether the County must make its own determination about the availability of water or whether it may meet the requirements of the GMA by invoking the assistance of Ecology by the code provisions at issue here.

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[50] Kittitas County, 172 Wn.2d at 178.

[51] Id.

[52] Id. (emphasis omitted).

While Kittitas does not expressly answer this question, it provides helpful guidance into the proper relationship between Ecology and counties for purposes of the GMA. In rejecting Kittitas County's argument, based on RCW 90.44.040, that it was preempted from adopting regulations related to the protection of groundwater resources, the supreme court stated:

> While [RCW 90.44.040] preempts the County from separately appropriating groundwaters, it does not prevent the County from protecting public groundwaters from detrimental land uses. ***Nothing in the text of chapter 90.44 RCW expressly preempts consistent local regulation.***[53]

It further explained:

> While Ecology is responsible for appropriation of groundwater by permit under RCW 90.44.050, the County is responsible for land use decisions that affect groundwater resources, including subdivision, at least to the extent required by law. In recognizing the role of counties to plan for land use ***in a manner that is consistent with the laws regarding protection of water resources*** and establishing a permitting process, we do not intend to minimize the role of Ecology. Ecology maintains its role, as provided by statute, and ought ***to assist counties in their land use planning to adequately protect water resources.***[54]

Thus, the supreme court in Kittitas anticipated ***consistent*** local regulation by counties in land use planning to protect water resources. This necessarily contemplates proper cooperation between Ecology and counties regarding the protection of such resources.

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[53] Id. (emphasis added) (emphasis omitted).

[54] Id. at 180 (emphasis added).

Here, under the County's regulations, it will only approve a subdivision or building permit application that relies on an exempt well when the well site "does not fall within the boundaries of an area where [Ecology] has determined by rule that water for development does not exist."[55] For example, relevant to this case, the County's regulations do not permit development based on a private well that is inconsistent with Ecology's rule for the Nooksack Water Resource Inventory Area (WRIA 1), the "Nooksack Rule."

By incorporating Ecology's regulations to determine availability of water for development, the County's regulations provide for cooperation between the County's exercise of its land use authority and Ecology's management of water resources. This method is consistent with the cooperative relationship contemplated by Kittitas and is consistent with the laws regarding protection of water resources under the GMA. The Board erred when it concluded otherwise.

Additionally, the Board's conclusion that the County may not rely on Ecology to assist in this determination allows for inconsistent conclusions between the County and Ecology about the availability of water. The Board's conclusion would mandate such a result in this case, where the Board's conclusions about the availability of water in WRIA 1 is contrary to Ecology's own interpretation about the availability of water in that area. We address this more fully in the next section.

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[55] Clerk's Papers at 1555 (FDO at 40).

Nooksack Rule

As stated earlier, the Board determined that the County's comprehensive plan and development regulations fail to protect instream flows from impairment by groundwater withdrawals. And the Board determined that the policies fail to protect ground or surface waters with respect to individual permit-exempt wells. Contained in its analysis is the Board's determination that the County must deny a building or subdivisions permit in WRIA 1 unless the applicant can demonstrate that the proposed groundwater withdrawal in that area will not impair minimum instream flows. By concluding that the GMA mandate to protect water resources requires the County to deny such applications, the Board again erroneously interpreted the law and effectively required the County to adopt a policy inconsistent with Ecology's administrative rules.

To provide context, we turn to the supreme court's review of general water law principles in Postema v. Pollution Control Hearings Board and other relevant cases.[56] The doctrine of prior appropriation applies when an applicant seeks to obtain a water right in Washington.[57] "Under this doctrine, a water right may be acquired where available public water is appropriated for a beneficial use, subject to existing rights."[58] The same principles apply to groundwater.[59]

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[56] 142 Wn.2d 68, 79, 11 P.3d 726 (2000).

[57] Id.

[58] Id.

[59] Id.

Ecology is responsible for appropriation of groundwater by permit under RCW 90.44.050. When a person seeks a permit to appropriate groundwater, Ecology must investigate the application pursuant to RCW 90.03.290 and "affirmatively find": "(1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights, or (4) be detrimental to the public welfare."[60] "The groundwater code recognizes that surface waters and groundwater may be in hydraulic continuity."[61] Thus, "when Ecology determines whether to issue a permit for appropriation of public groundwater, Ecology must consider the interrelationship of the groundwater with surface waters, and must determine whether surface water rights would be impaired or affected by groundwater withdrawals."[62]

An exemption to the groundwater permitting requirement exists in RCW 90.44.050. Specifically, that statute provides an exemption for withdrawal of groundwater for domestic uses in an amount not exceeding 5,000 gallons a day.[63] Accordingly, where the exemption applies, Ecology does not engage in the usual review of a permitting application under RCW 90.03.290.[64]

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[60] Id.

[61] Id. at 80.

[62] Id. at 80-81.

[63] Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 4, 43 P.3d 4 (2002).

[64] Id. at 16.

Ecology also has the exclusive authority to establish minimum instream flows or levels to protect fish, game, birds, other wildlife resources, and recreational and aesthetic values.[65] Under this exclusive authority, Ecology adopted a regulation dividing the state into 62 areas, commonly known as "Water Resource Inventory Areas" (WRIAs).[66] Ecology has adopted various rules governing new appropriations of water in these areas.

Here, the Board stated its view of the law as follows:

> In Postema v. Pollution Control Hearings Board, the Supreme Court made clear that where Ecology has administratively by adoption of rules closed a surface water body as in much of Whatcom County, and an applicant intends to rely on a new withdrawal from a hydraulically connected groundwater body, new water is no longer legally available for appropriation and the application must be denied. Likewise where Ecology has set minimum instream flow by rule, as in Nooksack WRIA 1, subsequent groundwater withdrawals may not contribute to the impairment of the flows.[67]

The Board then concluded that the County's regulations, which allow approval of a subdivision or building permit that relies on a private well when the proposed well site does not fall within the boundaries of an area where Ecology has determined by rule that water for development does not exist, "falls short of the Postema standard, as it does not protect instream flows from impairment by groundwater withdrawals."[68]

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[65] RCW 90.03.247; RCW 90.22.010.

[66] WAC 173-500-040.

[67] Clerk's Papers (Case No. 70796-5) at 1555 (FDO at 40).

[68] Id.

The Board also concluded that the County's regulations allowing approval of a subdivision or building permit using an exempt well except "where [Ecology] has determined by rule that water for development does not exist" was inconsistent with the availability of water in closed basins or where instream flows were not met.[69] It stated:

> ***If Ecology has closed a stream to additional withdrawals, it is unlawful to initiate a permit-exempt groundwater withdrawal that would impact the stream. Where the proposed groundwater withdrawal is located within a basin closed to new surface water appropriations, or where Ecology has set instream flows that are not consistently met, there is a presumption that no additional water is legally available.*** Under RCW 19.27.097 or RCW 58.17.110, it is the applicant's burden to "provide evidence" that water is available for a new building or subdivision. Thus, ***according to Ecology, the County must deny a permit for a new building or subdivision unless the applicant can demonstrate factually that a proposed new withdrawal from a groundwater body hydraulically connected to an impaired surface water body will not cause further adverse impact on flows.*** The Board notes Whatcom County's regulations allow mitigations, purchase or transfer of water rights, and other appropriate strategies, but ultimately, a building permit for a private single-residential well does not require the applicant to demonstrate that groundwater withdrawal will not impair surface flows.[70]

Implicit in its analysis is the Board's determination that water is not available for permit-exempt withdrawals in WRIA 1. And it effectively concluded that the County must deny a building or subdivisions permit unless the applicant

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[69] Id. at 1556 (FDO at 41).

[70] Id. at 1556-57 (FDO at 41-42) (emphasis added).

can demonstrate that a proposed new permit-exempt groundwater withdrawal will not impair minimum instream flows.

The Board's conclusions are erroneous for several reasons.

First, the Board erroneously interpreted and applied Postema. The Board concluded that the County's regulations fell short of the "Postema standard." But Postema addressed issues arising from Ecology's denial of "applications for groundwater appropriation permits" not permit-exempt withdrawals.[71] Thus, the County's regulations do not "fall short" of the "Postema standard," as we read that case, because Postema does not squarely address the protection of instream flows from permit-exempt groundwater withdrawals.

Second, the Board erroneously applied legal principles from one rule, the Skagit River Basin Instream Flow Rule, to the rule at issue in this case, the rule for WRIA 1 also known as the "Nooksack Rule."[72] As stated earlier in this opinion, the Board concluded that "[i]f Ecology has closed a stream to additional withdrawals, it is unlawful to initiate a permit-exempt groundwater withdrawal that would impact the stream."[73] And it concluded that "according to Ecology, the County must deny a permit for a new building or subdivision unless the applicant can demonstrate factually that a proposed new withdrawal from a groundwater

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[71] Postema, 142 Wn.2d at 73.

[72] See ch. 173-501 WAC.

[73] Clerk's Papers at 1556-57 (FDO at 41-42).

body hydraulically connected to an impaired surface water body will not cause further adverse impact on flows."[74]

To support these conclusions, the Board relied on a December 19, 2011 letter from Ecology to the Director of Snohomish County Planning and Development Services. According to the Board, it believed that letter "explain[ed] the effect of closed basins and instream flows on rural residential development."[75] Significantly, the instream flow rule discussed in the letter was the Skagit River Basin Instream Flow Rule, WAC 173-503.[76] That is not the Nooksack Rule, which covers most of Whatcom County. Nevertheless, the Board reasoned, "While Snohomish County facts differ, the applicable legal principles are the same."[77]

But the Board's reasoning directly conflicts with Postema. That is because it is based on a uniform interpretation of instream flow rules, erroneously assuming that they regulate permit-exempt withdrawals in different regions in the same manner. In Postema, the supreme court recognized that different basin rules contain different language and expressly declined "to search for a uniform meaning to rules that simply are not the same."[78] Thus, the Board

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[74] Id. at 1557 (FDO at 42).

[75] Id. at 1556 (FDO at 41).

[76] Clerk's Papers (Case No. 70796-5) at 616.

[77] Id. at 1556 (FDO at 41 n.154).

[78] Postema, 142 Wn.2d at 87.

improperly relied on this letter concerning another basin to apply its reasoning to the Nooksack Rule.

Finally, the Board erroneously interpreted the Nooksack Rule and required the County to adopt an interpretation that is inconsistent with Ecology's interpretation of the rule.

As the Board noted in the FDO, "WRIA 1 comprises most of Whatcom County."[79] The regulation is fully set forth in WAC 173-501-010 et seq. In its regulation for WRIA 1, Ecology established minimum instream flows and closed specific sub-basins to new surface water appropriations.[80]

The Board concluded that if Ecology has closed a stream to additional withdrawals, or if Ecology has set instream flows that are not consistently met, it is unlawful to initiate a permit-exempt groundwater withdrawal that would impact the stream. Accordingly, this assumes that the Nooksack Rule's closure of certain water bodies bars permit-exempt groundwater use in WRIA 1 as a matter of law. But this is contrary to Ecology's interpretation of the Nooksack Rule, which is that the Nooksack Rule does not govern permit-exempt withdrawals.

On this latter point, we base our conclusion on the Department of Ecology's amicus curiae brief in this case.[81] We do so because courts generally

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[79] Clerk's Papers (Case No. 70796-5) at 1530 (FDO at 15 n.44).

[80] See WAC 173-501-030-040.

[81] State of Washington, Department of Ecology's Amicus Curiae Brief.

"accord deference to an agency interpretation of the law where the agency has specialized expertise in dealing with such issues."[82]

Ecology argues that "the Nooksack Rule does not mandate that water is no longer available for certain new permit-exempt groundwater uses in rural areas of Whatcom County and that land use applications relying on private wells for water supply would have to be denied in all instances."[83]

First, Ecology argues that the express language of the Nooksack Rule "only governs water uses proposed through the water right permitting system, and not permit-exempt groundwater withdrawals."[84] We agree.

Several provisions in the rule pertain only to whether water rights may be established under the permitting system. And as Ecology asserts, "This emphasis on the permitting system indicates that Ecology did not intend this Rule to govern permit-exempt groundwater use under RCW 90.44.050."[85] These provisions are as follows:

WAC 173-501-030, which establishes instream flows in WRIA 1, states in subsection (4), "Future consumptive ***water right permits*** issued hereafter for

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[82] Utter, 140 Wn. App. at 300.

[83] State of Washington, Department of Ecology's Amicus Curiae Brief at 20.

[84] Id. at 14.

[85] Id. at 16.

diversion of surface water in the Nooksack WRIA and perennial tributaries shall be expressly subject to instream flows . . . ."[86]

WAC 173-501-040, which establishes closures and partial year closures of certain areas of the Nooksack River and in several creeks, states that when a project is proposed on a stream that is closed to further appropriations, "the department ***shall deny the water right application*** unless the project proponent can adequately demonstrate that the project does not conflict with the intent of the closure."[87]

WAC 173-501-060 relates to groundwater use. It provides:

> If department investigations determine that there is significant hydraulic continuity between surface water and the proposed groundwater source, any water right permit or certificate issued shall be subject to the same conditions as affected surface waters. If department investigations determine that withdrawal of groundwater from the source aquifers would not interfere with stream flow during the period of stream closure or with maintenance of minimum instream flows, ***then applications to appropriate public groundwaters may be approved.***[88]

As Ecology correctly states, "The language in all the above sections pertains to the issuance of water right permits, and cannot be read to also apply to permit-exempt groundwater withdrawals which occur outside of the permitting system administered by Ecology."[89]

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[86] (Emphasis added.)

[87] WAC 173-501-040(2) (emphasis added).

[88] WAC 173-501-060 (emphasis added).

[89] State of Washington, Department of Ecology's Amicus Curiae Brief at 17-18.

Additionally, WAC 173-501-070, which is titled "Exemptions," provides the following exemption:

> (2) ***Single domestic***, (including up to 1/2 acre lawn and garden irrigation and associated noncommercial stockwatering) ***shall be exempt from the provisions established in this chapter***, except that Whatcom Creek is closed to any further appropriation, including otherwise exempted single domestic use. For all other streams, when the cumulative impact of single domestic diversions begins to significantly affect the quantity of water available for instream uses, then any water rights issued after that time shall be issued for in-house use only, if no alternative source is available.[90]

As Ecology notes, this expressly exempts single domestic uses and there is no express language in this section limiting the exempted domestic use to groundwater.

In sum, these provisions do not, by their express terms, indicate that water is not available under the circumstances of this case. We agree with Ecology that "the Nooksack Rule, in its present form, does not govern permit-exempt groundwater use."[91]

Ecology also argues that this is clear when read in contrast to water management rules for other basins which include express language indicating that they govern permit-exempt uses of water. For example, Ecology cites WAC 173-503, the rule for the Skagit River Basin. This is the basin rule in the December 2011 letter on which the Board relied. The Skagit River Basin rule

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[90] (Emphasis added.)

[91] State of Washington, Department of Ecology's Amicus Curiae Brief at 18.

states that "[f]uture consumptive water right permits issued hereafter for diversion of surface water in the Lower and Upper Skagit (WRIA 3 and 4) and perennial tributaries, ***and withdrawal of groundwater in hydraulic continuity with surface water*** in the Skagit River and perennial tributaries, ***shall be expressly subject to instream flows*** . . . ."[92] As this emphasized language makes clear, in contrast to the Nooksack Rule, this rule expressly indicates that it governs permit-exempt uses of water

In sum, the Board's decision effectively requires the County to reach a legal conclusion regarding water availability for permit-exempt withdrawals that is inconsistent both with Postema and with Ecology's interpretation of the Nooksack Rule. That simply is not the law.

The County also argues that the Board's "conclusion regarding the County's obligations in making water availability determinations in closed basins is not supported by substantial evidence . . . ."[93] In support of this, it argues that the Board improperly relied on the December 2011 letter from Ecology to the Director of Snohomish County Planning and Development Services. We agree. The letter addresses issues in another basin having nothing to do with the Nooksack Rule. Thus, it is not evidence of how Ecology administers the Nooksack Rule.

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[92] WAC 173-503-040(5) (emphasis added).

[93] Brief of Appellant Whatcom County at 25.

Hirst argues that the County "may not raise the issue of a controlling 'Ecology Interpretation' for the first time on appeal."[94] But the issue of how to properly interpret the Nooksack Rule was before the Board. And the County expressly argued to the Board the legal position that Ecology confirms in its amicus brief. Thus, this argument is without merit.

Hirst argues that Steensma v. Department of Ecology & Bayes Brothers LLC, a case cited by the County to support its position that Ecology has interpreted the Nooksack Rule in a manner inconsistent with that advanced by the Board, does not constitute a uniform agency interpretation that is entitled to great weight.[95] But the County cited this case as an example, to illustrate that Ecology interpreted the rule this way in this one instance. It did not cite it to establish a formal Ecology interpretation of the rule.

In any event, Ecology's amicus brief in this appeal fully explains its interpretation of the Nooksack Rule. And that interpretation is fully consistent with the position that the County took below and continues to take in this appeal.

Hirst argues that even if there was "an 'Ecology interpretation' expressing a 'legal conclusion' that the [Nooksack Rule] 'was not intended to apply to permit exempt withdrawals,' as the County claims, it would not immunize the County

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[94] Appellants' Brief & Brief of Respondents Eric Hirst, Laura Leigh Brakke, Wendy Harris and David Stalheim, and Futurewise at 20.

[95] Brief of Appellant Whatcom County at 21-23 (citing Steensma v. Dep't of Ecology & Bayes Bros., LLC, No. 11-053, 2011 WL 4301319 (Wash. Pollution Control Hr'gs Bd. Sept. 8, 2011)).

from its obligation to protect surface and ground water under the GMA."[96] We agree. But that argument does not come to grips with our conclusion that it is proper for the County to fulfill its requirements under the GMA by adopting regulations that are consistent with Ecology's Nooksack Rule.

Hirst argues that the Board's decision and reasoning are consistent with state water law. Hirst is mistaken.

Hirst argues that "Postema establishes that 'a minimum flow set by rule is an existing right which may not be impaired by subsequent groundwater withdrawals."[97] And he cites Swinomish Tribal Community v. Department of Ecology for the proposition that the water code "does not contain 'any provision permitting a jump to the head of the line in priority' for exempt wells."[98] Accordingly, he asserts that "Postema and Swinomish . . . support the Board's conclusion that the GMA requires the County to avoid impairment of surface waters" and that even if the County's interpretation of the Nooksack Rule was correct, "this original intent must change with changes in science and the law."[99]

As we already discussed, Postema did not address the issue of permit-exempt withdrawals. Rather, its focus was on interpretation and application of

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[96] Brief of Respondents Eric Hirst, Laura Leigh Brakke, Wendy Harris, David Stalheim, and Futurewise at 29.

[97] Id. at 30 (emphasis omitted) (quoting Postema, 142 Wn.2d at 81)

[98] Id. at 31-32 (internal quotation marks omitted) (quoting Swinomish Indian Tribal Cmty. v. Dep't of Ecology, 178 Wn.2d 571, 598, 311 P.3d 6 (2013)).

[99] Id. at 32.

the decision criteria when reviewing applications for permits. Additionally, Swinomish is distinguishable on its facts, as it involved the Skagit Basin Rule, a rule that expressly prohibited permit exempt withdrawals.[100] In short, Hirst's reliance on these cases is not persuasive.

We conclude that the Board incorrectly interpreted and applied the relevant law in determining that the ordinance fails to comply with the GMA by failing to include measures to protect rural character by protecting surface and groundwater resources. Moreover, the letter on which it relied to interpret WRIA 1 requirements is not substantial evidence of how Ecology administers the Nooksack Rule.

WATER QUALITY

The County next argues that the Board erred when it concluded that the County's measures to protect surface and ground water quality were clearly erroneous. Specifically, the County contends that the Board's conclusion is based on an unlawful procedure. The County also contends that the Board's conclusion is based on an erroneous interpretation and application of the law and is not supported by substantial evidence.

Unlawful Procedure

The County argues that the Board's conclusion is based on unlawful procedure because it took official notice of two documents in a manner inconsistent with its own rules. We agree.

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[100] Swinomish, 178 Wn.2d at 577.

RCW 34.05.570(3)(c) provides for relief from an agency order if the court determines that the agency "has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure." This court reviews de novo a claim under this subsection.[101]

Additionally, RCW 34.05.570(h) provides for relief from an agency order if the court determines that the order "is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency."

WAC 242-03-630, which was promulgated by the Board, provides that the board or presiding officer may officially notice matters of law, including Washington state law. The "Washington state law" category includes, among other things, "decisions of administrative agencies of the state of Washington" and "codes or standards that have been adopted by an agency of this state or by a nationally recognized organization or association."[102]

Another regulation, WAC 242-03-640, provides that, "[i]n the absence of conflicting evidence, the board or presiding officer, upon request made before or during a hearing, may officially notice" certain material matters including, (a) business customs, (b) notorious facts, and (c) technical or scientific facts.[103] It further states, "Parties ***shall*** be notified either before or during a hearing of the

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[101] Spokane County, 176 Wn. App. at 583.

[102] WAC 242-03-630(2).

[103] WAC 242-03-640(1).

material fact(s) proposed to be officially noticed, and ***shall*** be afforded the opportunity to contest such facts and materials."[104]

Here, as part of its analysis in the FDO of water availability and water quality problems the Board cited three documents that it termed "authoritative references."[105] The first document is the *2010 WRIA 1 State of the Watershed Report*.[106] The other two documents are documents of which the Board took official notice—the Puget Sound Partnership's *2012/2013 Action Agenda for Puget Sound*, and the Washington State Department of Fish and Wildlife's *Land Use Planning for Salmon, Steelhead and Trout*.[107] The Board described the first document as "a document adopted by a state agency" and described the second document as "a science-based land use planner's guide to salmonid habitat protection and recovery."[108] The Board cited WAC 242-03-630 as its authority to take official notice of these documents.[109]

Under WAC 242-03-630(2), the Board is authorized to take notice of, among other things, "decisions of administrative agencies of the state of Washington" or of "codes or standards that have been adopted by" a state

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[104] WAC 242-03-640(3) (emphasis added).

[105] Clerk's Papers (Case No. 70796-5) at 1545 (FDO at 30).

[106] Id.

[107] Id. at 1524, 1546-50 (FDO at 9, 31-35).

[108] Id. at 1524 (FDO at 9).

[109] Id.

agency.[110] Neither of these two documents falls within these categories. And no other categories in this regulation appear to apply to these documents.[111] Thus, the Board improperly relied on this regulation to take official notice of these two documents.

Hirst argues that the Board had the authority to take official notice of government documents under a different regulation, WAC 242-03-640.[112] We disagree.

Under this regulation, the Board may take official notice of material facts including "specific facts which are capable of immediate and accurate demonstration by resort to accessible sources of generally accepted authority" such as "facts stated in any publication authorized or permitted by law to be made by any federal or state officer, department, or agency."[113] Any party may

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[110] WAC 242-03-630(2) ("The board or presiding officer may officially notice . . . (2) Washington state law. The Constitution of the state of Washington; decisions of the state courts; acts, resolutions, records, journals, and committee reports of the legislature; decisions of administrative agencies of the state of Washington; executive orders and proclamations by the governor; all rules, orders, and notices filed with the code reviser; and codes or standards that have been adopted by an agency of this state or by a nationally recognized organization or association.").

[111] See WAC 242-03-630(1)-(6).

[112] Appellants' Brief & Brief of Respondents Eric Hirst, Laura Leigh Brakke, Wendy Harris and David Stalheim and Futurewise at 41-42.

[113] WAC 242-03-640(1)(b) ("In the absence of conflicting evidence, the board or presiding officer, upon request made before or during a hearing, may officially notice . . . (b) Notorious facts. Facts so generally and widely known to all well-informed persons as not to be subject to reasonable dispute or specific facts which are capable of immediate and accurate demonstration by resort to accessible sources of generally accepted authority, including, but not exclusively,

request that official notice be taken of a material fact, or the board or presiding officer may take official notice of a material fact on its own initiative.[114] Taking such notice is expressly conditioned on "the absence of conflicting evidence."[115]

Hirst's argument fails for several reasons.

First, there is no showing that there was an "absence of conflicting evidence" required under this subsection in order for the Board to take notice of such material facts.[116] Second, under this regulation, the parties "***shall*** be notified either before or during a hearing of the material fact(s) proposed to be officially noticed, and ***shall*** be afforded the opportunity to contest such facts and materials."[117] This record fails to show any notice to any party either before or during the hearing that the Board intended to take notice of these documents. Finally, there is no showing that the parties were provided an opportunity to contest these materials. To the contrary, the briefing indicates the County was first aware that these two documents were the subjects of official notice by the Board in its analysis when it issued the FDO.

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facts stated in any publication authorized or permitted by law to be made by any federal or state officer, department, or agency.").

[114] WAC 242-03-640(2).

[115] WAC 242-03-640(1).

[116] Id.

[117] WAC 242-03-640(3) (emphasis added).

Hirst argues that the notice requirement "only applies to materials 'proposed' to be officially noticed."[118] And he argues that these materials were not "proposed," but rather, the Board took notice on its own initiative. But we cannot accept the untenable proposition that the County should be deprived of the opportunity to contest these materials on the basis that the Board took official notice on its own initiative. Notice and an opportunity to be heard are, necessarily, a part of these procedures. In short, this argument is not persuasive.

For these reasons, we conclude that the Board engaged in unlawful procedure when it took official notice of these two documents without notifying the County and without affording it an opportunity to contest the materials prior to the FDO. Additionally, the Board's actions are inconsistent with its rules, and the Board did not explain the inconsistency. Accordingly, the question is what remedy is appropriate.

Hirst argues that even if the Board erred, the County was not substantially prejudiced.[119] We cannot agree.

In the FDO, the Board characterized these two documents as "authoritative references" when it discussed the factual basis for identifying water availability and water quality issues. As such, we reject the argument that the

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[118] Appellants' Brief & Brief of Respondents Eric Hirst, Laura Leigh Brakke, Wendy Harris and David Stalheim, and Futurewise at 42.

[119] Id. at 43-44.

Board's reliance on these documents for its decision did not prejudice the County.

Hirst points out that in addition to these two documents, the Board relied on a third document to support its finding that the link between land development and water resources is well-established. Hirst contends that the third document, alone, could support this finding.

We do not quarrel with the proposition that land development can and does impact water resources. We acknowledge that the Board refers in the FDO to other evidence that was properly part of the administrative record as part of its analysis of the water quality issue. Nevertheless, we simply do not know whether the Board would have reached the same decision without the documents that it improperly considered in its analysis. It is not our function to make factual findings in this important area. Rather, it is the Board, in the first instance, who must do so. We decline to speculate on what the Board would have done on the basis of a proper record.

We conclude that the proper remedy is to reverse this portion of the FDO and remand for reconsideration by the Board on a proper administrative record.

Erroneous Interpretation and Application of the Law

The County also argues that the Board's conclusion on the County's measures protecting water quality is based on an erroneous interpretation and application of the law "by effectively requiring the County to correct past or

existing impacts."[120] The County argues that this conclusion is implicit based on the Board's reliance on preexisting water quality problems as evidence to find new regulations inadequate. To the extent that the Board implicitly concluded that the County has a duty to "enhance" water quality rather than "protect" it, we agree.

RCW 34.05.570(3)(d) provides that the court shall grant relief from an agency order if it determines that the agency has erroneously interpreted or applied the law. A court reviews de novo a claim brought under this subsection.[121]

Under the GMA, the County is required to include measures to protect water quality. RCW 36.70A.070(1) states, "The land use element ***shall provide for protection of the quality and quantity of groundwater*** used for public water supplies."[122] RCW 36.70A.070(5)(c)(iv) states, "Counties shall include a rural element," which "shall include measures that apply to rural development and protect the rural character of the area . . . by . . . [***p***]***rotecting . . . surface water and groundwater resources*** . . . ."[123] Rural character "refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan" that, among other things, "are consistent with

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[120] Brief of Appellant Whatcom County at 47.

[121] Kittitas County, 172 Wn.2d at 155.

[122] (Emphasis added.)

[123] (Emphasis added.)

the ***protection of natural surface water flows and groundwater and surface water recharge and discharge areas.***"[124]

In Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board, the supreme court expressly considered the definition of the word "protect" as it was used in RCW 36.70A.172(1), which requires counties "to protect the functions and values of critical areas."[125] In that case, the Board had concluded that the requirement under the GMA to "protect" critical areas is met when local governments prevent new harm to critical areas.[126] The Swinomish Indian Tribal Community challenged this, arguing that where an area is already in a degraded condition, it is not being protected unless that condition is improved or enhanced.[127]

The supreme court rejected this argument. First, it looked to the dictionary definition of the word "protect" provided by the Tribe, which was "to shield from injury, danger or loss" and to protect, which "***can*** result in [an object's] enhancement."[128] The supreme court stated that even under this definition, "'can' is used to describe an ***option*** of enhancement, rather than a ***requirement***

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[124] RCW 36.70A.030(15)(g) (emphasis added).

[125] 161 Wn.2d 415, 427-30, 166 P.3d 1198 (2007).

[126] Id. at 427.

[127] Id.

[128] Id. at 428 (alteration in original) (internal quotation marks omitted).

of enhancement, when defining 'protect.'"[129] And it concluded that this definition "illustrates that something can be protected without it being enhanced."[130]

Further, the supreme court looked to the GMA itself and noted that "[t]he legislature has also recognized that 'protect' has a different meaning than 'enhance.'"[131] It cited to several examples to support this assertion. After reviewing these statutes, the court concluded that the legislature had not imposed a duty on local governments to enhance critical areas, although it does permit it.[132] It stated, "Without firm instruction from the legislature to require enhancement of critical areas, we will not impose such a duty."[133] Thus, it concluded that the "no harm" standard protects critical areas by maintaining existing conditions.[134]

Swinomish Indian Tribal Community is instructive here. While that case involved a different provision under the GMA, there is no reason this distinction should be viewed differently in this context. A review of the relevant GMA provisions provided above shows that the legislature has not imposed a duty on the County to "enhance" the water quality as part of its efforts to protect it.

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[129] Id.

[130] Id.

[131] Id. at 429.

[132] Id. at 429-30.

[133] Id. at 430.

[134] Id.

Rather, each of the relevant statutes requires the County to include measures to "protect" water quality. Accordingly, like in Swinomish Indian Tribal Community, without firm instruction from the legislature to require enhancement, we decline to impose a duty to enhance water quality.

In sum, to the extent that the Board concluded that the County has an obligation under the GMA to "enhance" water quality, this was an erroneous interpretation of law.

Hirst argues that "the legislature ***has*** imposed a duty to 'enhance' water quality."[135] In support of this, Hirst points to Swinomish Indian Tribal Community and asserts that, the supreme court, after examining RCW 36.70A.020(10), "discussed the 'duty to enhance the quality of water.'"[136]

It is true that in that case the supreme court cited and briefly discussed RCW 36.70A.020(10).[137] It stated, "RCW 36.70A.020(10)[] lists as a goal of the GMA to 'enhance the state's high quality of life, including air and water quality.'"[138] It is also true that the supreme court, in concluding that there was no duty to enhance critical areas, later stated, "***A duty to enhance the quality of***

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[135] Appellants' Brief & Brief of Respondents Eric Hirst, Laura Leigh Brakke, Wendy Harris and David Stalheim, and Futurewise at 40.

[136] Id. (emphasis omitted) (quoting Swinomish Indian Tribal Cmty., 161 Wn.2d at 429-30).

[137] Swinomish Indian Tribal Cmty., 161 Wn.2d at 429.

[138] Id. (quoting RCW 36.70A.020(10)).

water is not a duty to enhance fish habitat."[139] But whether RCW 36.70A.020(10) imposes a duty to enhance the water quality was not at issue in Swinomish Indian Tribal Community. Further, RCW 36.70A.020(10) sets forth a ***goal*** of the GMA, not a requirement. Accordingly, reliance on this case and statute as establishing a duty to enhance water quality is not persuasive.

Substantial Evidence

The County contends that the Board's conclusion that the County's measures fail to protect water quality is not supported by substantial evidence.[140] First, the County argues that the Board's conclusion is based on general evidence of existing water quality problems, which are insufficient to prove that the ordinance fails to comply with the GMA. Second, the County also asserts that the Board did not adequately evaluate or consider its water quality protections. We conclude that we need not decide either question on the basis of the record that is currently before us. But we do express concerns the Board should consider on remand.

With regard to the first question, we need not decide whether the County's characterization of the Board's action is correct. But it is something the Board should address on remand. Importantly, as we already discussed, two of the three documents that the Board considered as "authoritative resources" were improperly considered by the Board in its FDO.

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[139] Id. (emphasis added).

[140] Brief of Appellant Whatcom County at 38-45.

As for the second question, we view that as a question whether the Board has adhered to the standard set in the GMA that "boards give deference to county planning processes."[141] As the law provides, a board's ruling that fails to apply this "'more deferential standard of review' to a county's action is not entitled to deference" from the courts.[142]

Beyond these two observations, we need not address the question of water quality any further.

REQUEST FOR FINDING OF INVALIDITY

In his cross-appeal, Hirst contends that the Board erred when it denied his request for a finding of invalidity. Specifically, Hirst argues that the Board erroneously interpreted and applied the GMA because it applied an incorrect legal standard. We hold that the Board did not abuse its discretion in declining to make a determination of invalidity.

"If the growth board finds that the plan or regulation is flawed, it has two options: (1) it may enter a finding of noncompliance or (2) it ***may*** enter a finding of invalidity."[143] If the growth board finds noncompliance, it remands the matter to the county with instructions to comply within a certain time, and the county plans and regulations remain valid during the remand period.[144] "If the flaw in the

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[141] Kittitas County, 172 Wn.2d at 154.

[142] Quadrant Corp., 154 Wn.2d at 238.

[143] Town of Woodway, 180 Wn.2d at 174 (emphasis added).

[144] Id.

plan or regulation represents a major violation of the GMA, the growth board ***has the option*** of determining that the plan or regulation is invalid."[145] "'Upon a finding of invalidity, the underlying provision would be rendered void.'"[146]

RCW 36.70A.302(1) sets out the legal standards to apply in deciding whether to make a determination of invalidity. It provides:

> (1) The Board ***may*** determine that part or all of a comprehensive plan or development regulations are invalid if the board:
>
> (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
>
> (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
>
> (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.[147]

Here, the Board denied Hirst's request for a finding of invalidity. It did so after determining that the ordinance failed to comply with the GMA.

As the use of the word "may" necessarily implies, this decision is a matter of discretion.[148] Thus, the question is whether the Board abused its discretion.

In the final order, it stated:

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[145] Id. at 175 (emphasis added).

[146] Id. (quoting King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd., 138 Wn.2d 161, 181, 979 P.2d 374 (1999)).

[147] RCW 36.70A.302(1) (emphasis added).

[148] See Strenge v. Clarke, 89 Wn.2d 23, 28, 569 P.2d 60 (1977).

> This Board has previously held that it will declare invalid only the most egregious noncompliant provisions which threaten the local government's future ability to achieve compliance with the Act. Although the Board finds areas of noncompliance with the GMA, [Hirst] ha[s] not met the standard for a declaration of invalidity.[149]

As case law and the relevant statute indicate, the Board's decision to make a finding of invalidity is discretionary. As the supreme court stated, "If the growth board finds that the plan or regulation is flawed, it has two ***options*** . . ."[150] And as the GMA states, "The board ***may*** determine that part or all of a comprehensive plan or development regulations are invalid . . . ."[151] Here, the Board's statements merely reflect its view that this not a proper case to find invalidity, not that Hirst failed to satisfy the statutory requirements for invalidity. This is a proper exercise of discretion.

Hirst argues, "The standard for a determination of invalidity is not 'the most egregious noncompliant provisions which threaten the local government's future ability to achieve compliance with the Act.'"[152] And Hirst points out that RCW 36.70A.302 nowhere requires a finding that noncompliant provisions are "the most egregious" or that they threaten the local government's "future ability"

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[149] Clerk's Papers (Case No. 70796-5) at 1565 (FDO at 50) (footnote omitted).

[150] Town of Woodway, 180 Wn.2d at 174 (emphasis added).

[151] RCW 36.70A.302(1) (emphasis added).

[152] Appellants' Brief & Brief of Respondents Eric Hirst, Laura Leigh Brakke, Wendy Harris and David Stalheim, and Futurewise at 45-46 (quoting Clerk's Papers (Case No. 70796-5) at 1565 (FDO at 50)).

to comply with the GMA. But with these statements, the Board was not attempting to state the applicable test for invalidity under the statute. Rather, it appears to be stating its own specific standard of when it chooses to exercise its statutory authority to make an invalidity determination. This is seen by the opening sentence, which states, "***This*** Board has previously held it will declare invalid only the most egregious noncompliant provisions which threaten the local government's future ability to achieve compliance with the Act."[153] This is consistent with the GMA, which as stated above, grants the Board discretion.

Hirst also argues that the Board's denial of the invalidity request is not supported by substantial evidence.[154] Hirst argues that the record before the Board shows that all of the requirements for invalidity are met, and he points to different documents and evidence in the record to support the assertion that continued validity of the ordinance will "substantially interfere with the goals of the GMA."[155] But given that this is a discretionary decision by the Board, this argument is not relevant.

Hirst cites Spokane County v. Eastern Washington Growth Management Hearings Board, where Division Three upheld a Board's determination of invalidity, stating that the Board had "correctly interpreted and applied the law

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[153] Clerk's Papers (Case No. 70796-5) at 1565 (FDO at 50) (emphasis added).

[154] Appellants' Brief & Brief of Respondents Eric Hirst, Laura Leigh Brakke, Wendy Harris and David Stalheim, and Futurewise at 44-50.

[155] Id. at 47 (internal quotation marks omitted).

upon thorough reasoning with due consideration for the facts."[156] Hirst contrasts Spokane County, arguing that in this case, the Board summarily dismissed his invalidity argument. But because that case involved a determination of invalidity, rather than a Board's decision not to find invalidity, it is distinguishable and not helpful.

SECOND ORDER ON COMPLIANCE

The County also asks this court to reverse the Second Order on Compliance. That order followed issuance of the FDO and a subsequent hearing on whether the County had corrected the problems to bring the County into compliance with the GMA. The County argues that the Board erred when it concluded that the County's measures to protect surface and groundwater availability, including the measures incorporated by the 2014 Ordinance, were clearly erroneous.[157] We agree.

As an initial matter, Hirst argues that the County is barred from raising and arguing the issues it raises in this case "because it did not argue them before the board, as RCW 34.05.554 requires."[158] But because "[t]he various stages of this litigation are part of a single proceeding," we reject this argument.[159]

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[156] 176 Wn. App. 555, 578, 309 P.3d 673 (2013), review denied, 179 Wn.2d 1015 (2014).

[157] Opening Brief of Whatcom County (Case No. 72132-1) at 3.

[158] Respondents' Brief of Eric Hirst, Laura Leigh Brakke, Wendy Harris, David Stalheim, and Futurewise (Case No. 72132-1) at 11.

[159] Clallum County v. W. Wash. Growth Mgmt. Hr'gs Bd., 130 Wn. App. 127, 131-33, 121 P.3d 764 (2005).

This issue is controlled by the prior parts of this opinion. We held that the FDO should be reversed and the matter remanded to the Board for reconsideration on a proper record. Thus, we also reverse the second order.

We affirm the FDO on its invalidity determination and reverse on its determinations regarding water availability and water quality. We also reverse the Second Order on Compliance. We remand to the Board for reconsideration on a proper record.

COX, J.

WE CONCUR:

Trickey, J

Schindler, J

Appendix B:

Growth Management Hearings Board (Board) Final Decision and Order (FDO) in *Hirst v. Whatcom County*, No. 12-2-0013, filed on June 7, 2013

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS, DAVID STALHEIM, AND FUTUREWISE

Petitioners,

v.

WHATCOM COUNTY,

Respondent.

Case No. 12-2-0013

FINAL DECISION AND ORDER

SYNOPSIS

Petitioners challenged Whatcom County Ordinance No. 2012-032 on rural land use planning. This case addresses whether the County Comprehensive Plan's Rural Element includes measures limiting rural development to protect rural character by protecting surface water and groundwater resources, as required by RCW 36.70A.070(5)(c)(iv). The case also addresses the consistency of the County's transportation planning with its rural land use planning.

The Board found the County's Rural Element, as amended by Ordinance No. 2012-032, does not include measures which protect the rural character. These policies fail to protect rural character because they either apply to limited areas of the County, and do not apply to the entire Rural Area, or are limited to subdivisions of land rather than all rural development. The Board finds the County does not have measures required in RCW 36.70A.070(5)(c)(iv) to protect rural character by protecting surface water and groundwater resources. The Board remands Issue 1 to the County.

Petitioners contend the County's Transportation Element conflicts with the Rural Element in the Comprehensive Plan, thus creating an inconsistency within the

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Comprehensive plan in violation of RCW 36.70A.070(5) and .130. Petitioners did not successfully argue that the County's Rural Element amendments would preclude achieving policies in the Transportation Element. Petitioners failed to satisfy their burden to prove inconsistency between the Rural Element, as amended in Ordinance No. 2012-032, and the Transportation Element of the Comprehensive Plan. Issue 2 is dismissed.

I. PROCEDURAL BACKGROUND

On October 10, 2012, Eric Hirst, Laura Leigh Brakke, Wendy Harris, David Stalheim, and Futurewise filed a Petition for Review (PFR) with the Board challenging Whatcom County's adoption of Ordinance No. 2012-032 relating to rural land use planning.[1] This Ordinance was adopted by the County in response to the Board's January 9, 2012 Final Decision and Order and Order Following Remand on Issue of LAMIRDs (FDO on Remand) in *Futurewise v. Whatcom County*, Case Nos. 11-2-0010c and 05-2-0013, which found portions of the County's rural element out of compliance with the GMA. Upon compliance,[2] the Board found that while the County had made "significant progress in aligning its Comprehensive Plan's Rural Element with the GMA,"[3] it still failed to meet some GMA requirements.[4] The Board noted in its Compliance Order that Petitioners had filed a new Petition for Review resulting in the present Case No. 12-2-0013. This case addresses whether the County's Rural Element includes measures governing rural development which protect surface and groundwater resources. In its Compliance Order, the Board reserved decision on the County's measures to protect rural water resources to allow the question to be thoroughly briefed and argued in the present Case No. 12-2-0013.[5]

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[1] Adopted August 7, 2012.
[2] Case Nos. 11-2-0010c and 05-2-0013, Compliance Order and Order Following Remand on Issue of LAMIRDS (Compliance Order) (January 4, 2013).
[3] *Id.* at 3.
[4] The County is still under a compliance order and the next compliance hearing for Case No. 11-2-0010c is scheduled for August 21, 2013.
[5] Compliance Order, at 3 and 4.

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To begin with, the Board granted a settlement extension to allow the parties an opportunity to narrow the issues in the case.[6] At the Prehearing Conference the parties confirmed that Issue 1 would be amended, Issues 2 and 3 deleted, but Issues 4 and 5 would remain the same. The Board's January 22, 2013 Prehearing Order confirmed three issues in the case.

The parties subsequently filed prehearing briefs and exhibits as follows:

- Petitioners' Prehearing Brief, March 22, 2013 (Petitioners' Brief)
- Whatcom County's Response Brief, April 5, 2013 (County's Brief)
- Petitioners' Reply Brief, April 19, 2013 (Petitioners' Reply Brief)

The Hearing on the Merits (HOM) was convened on April 26, 2013 at the Whatcom County Courthouse. Present for the hearing were Board Members Margaret Pageler, Raymond Paolella, and Nina Carter, presiding officer. Petitioners were represented by Jean Melious. The County was represented by Karen Frakes and Tadas Kisielius. The hearing provided the Board an opportunity to ask questions clarifying important facts in the case and providing better understanding of the legal arguments of the parties.

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, AND STANDARD OF REVIEW

Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations, and amendments to them, are presumed valid upon adoption.[7] This presumption creates a high threshold for challengers as the burden is on the petitioners to demonstrate that any action taken by the local jurisdiction is not in compliance with the GMA.[8]

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[6] Order Granting Settlement Extension and Amending Preliminary Schedule (November 2, 2012).
[7] RCW 36.70A.320(1) provides: [Except for the shoreline element of a comprehensive plan and applicable development regulations] comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.
[8] RCW 36.70A.320(2) provides: [Except when city or county is subject to a Determination of Invalidity] the burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter.

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The Board is charged with adjudicating GMA compliance and, when necessary, invalidating noncompliant plans and development regulations.[9] The scope of the Board's review is limited to determining whether a local jurisdiction has achieved compliance with the GMA only with respect to those issues presented in a timely petition for review.[10] The GMA directs that the Board, after full consideration of the petition, shall determine whether there is compliance with the requirements of the GMA.[11] The Board shall find compliance unless it determines that the local jurisdiction's action is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA.[12] In order to find the local jurisdiction's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been committed."[13]

In reviewing the planning decisions of local jurisdictions, the Board is instructed to recognize "the broad range of discretion that may be exercised by counties and cities" and to "grant deference to counties and cities in how they plan for growth."[14] However, the County's actions are not boundless; their actions must be consistent with the goals and requirements of the GMA.[15]

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[9] RCW 36.70A.280, RCW 36.70A.302.
[10] RCW 36.70A.290(1).
[11] RCW 36.70A.320(3).
[12] RCW 36.70A.320(3).
[13] *City of Arlington v. CPSGMHB,* 162 Wn.2d 768, 778, 193 P.3d 1077 (2008) (Citing to *Dept. of Ecology v. PUD District No. 1 of Jefferson County,* 121 Wn.2d 179, 201, 849 P.2d 646 1993); See also, *Swinomish Tribe v. WWGMHB,* 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007); *Lewis County v. WWGMHB,* 157 Wn.2d 488, 497-98, 139 P.3d 1096 (2006).
[14] RCW 36.70A.3201 provides, in relevant part: In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action 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.
[15] *King County v. CPSGMHB,* 142 Wn.2d 543, 561, 14 P.2d 133 (2000) (Local discretion is bounded by the goals and requirements of the GMA). See also, *Swinomish,* 161 Wn.2d at 423-24. In *Swinomish,* as to the degree of deference to be granted under the clearly erroneous standard, the Supreme Court has stated: The amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the [jurisdiction's] actions a "critical review" and is a "more intense standard of review" than the arbitrary and capricious standard. *Id.* at 435, n. 8.

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Thus, the burden is on Petitioners to overcome the presumption of validity and demonstrate that the challenged action taken by the County is clearly erroneous in light of the goals and requirements of the GMA.

III. BOARD JURISDICTION

The Board finds that the Petition for Review was timely filed pursuant to RCW 36.70A.290(2). The Board finds that Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2). The Board finds that it has jurisdiction over the subject matter of the petition pursuant to RCW 36.70A.280(1)(a).

IV. PRELIMINARY MATTERS

A. Petitioners' Motion to Supplement the Record

On February 4, 2013, Petitioners requested to supplement the record with two documents.[16] No objections were filed by the County. On February 20, 2013, the Board issued an Order on Motion to Supplement the Record with documents submitted by Petitioners.[17]

B. County's Motion to Amend the Index or Take Official Notice or Supplement the Record

On April 5, 2013, the County submitted a Motion to Amend the Index or Take Official Notice or Supplement the Record with proposed Exhibits R-127, R-128, and R-129.[18]

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[16] Petitioners' Motion to Supplement (February 4, 2013), *Ex. C-671-N* Bellingham Herald Article from July 25, 2012; *Exs. C-683-A* and *C-788-A* documents to clarify Index.
[17] Order on Motion to Supplement the Record with C-671-N, C-683-A and C-788-A (February 20, 2013).
[18] Whatcom County's Motion to Amend the Index (April 5, 2013), *Ex. R-127* Coordinated Water System Plan Map; *Ex. R-128* June 28, 2013 Delahunt Memorandum to Louws; *Ex. R-129* May 27, 2013 Davis Memo to Wholpers.

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C. Petitioners' Opposition to Amend the Index; Opposition in Part to Motion to Supplement the Record, or Take Official Notice; Motion to Supplement the Record in Rebuttal and in Support of Invalidity[19]

Petitioners opposed the County's motion to amend the index because it was not timely filed. However, Petitioners did not oppose supplementing the record with the County's Exhibit R-127 (Water System Map), if Petitioners could also supplement the record with Exhibit R-150 which is Whatcom County's Coordinated Water System Plan. Petitioners argued that the Board needed to see the Plan as well as the Map so both would be placed into context. The County had no objection to adding Exhibit R-150. Petitioners had no objection to supplementing the record with the County's Exhibits R-128 and R-129.[20]

Petitioners requested Exhibit R-151 supplement the record to provide "useful current information about ...water quality in the County" and to support their request for invalidity.[21] Exhibit R-151 is an April 12, 2013 article from the Bellingham Herald regarding Drayton Harbor and a March 20, 2013 website page from the Department of Ecology about Whatcom County's water program. At the HOM, the County objected to supplementing the record with Exhibit R-151 as both documents were not considered by the County Commissioners when adopting the challenged Ordinance.

Petitioners requested the Board take official notice of Exhibit R-152[22] which is a form from the County Health Department to show water availability when obtaining a building permit. Petitioners request the Board take official notice and allow this exhibit in rebuttal in accordance with WAC 242-03-630(4) and -565(1). The County objected stating the form is neither a regulation nor a comprehensive plan and thus, should not be a deciding factor about the County's GMA compliance.

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[19] Filed April 15, 2013.
[20] *Id.* at 5.
[21] *Id.* at 6.
[22] Petitioners' Reply Brief at 7.

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Petitioners' proposed Exhibit R-153[23] is an excerpt from a report by the Northwest Indian Fisheries Commission about the state of watersheds in Washington. Petitioners requested that it be admitted under WAC 242-03-630(4) and -565(1) in rebuttal and for invalidity. The County objected to admitting Exhibit R-153 because it is an advocacy piece from tribes for salmon recovery and was adopted after the County took action on the challenged Ordinance.[24]

Petitioners' proposed Exhibit R-154 is a file accompanying the well logs used to make water maps. Petitioners requested the Board take official notice of this exhibit. The County did not respond.

D. Board Decision on Motions and Requests to Take Official Notice

The Board heard oral arguments at the Hearing on the Merits and makes the following decisions:

- The County's Motion to Amend the Index is **denied** because the County filed its motion 10 days after Petitioners' Prehearing Brief was due. This filing contradicts the Board's rules under WAC 242-03-510(4) Index of the Record:

  > (4) Respondent may file a corrected index to add, delete, or correct the listing of documents it considered, without the necessity for a motion to supplement the record, by no later than a week before the date for filing the petitioner's prehearing brief.

- The County's Motion to Supplement is **granted** and Exhibits R-127, R-128, and R-129[25] are **admitted**. The Board finds that the map, memorandum and Department of Health's regulation describing the County's septic system program will assist the Board in understanding the issues.[26] The three documents were before the County as it adopted the challenged Ordinance. The Board finds such

[23] *Id.* at 9. Petitioners' Reply Brief has a typographical error in Footnote 45; Petitioners request the Board take official notice of Ex. R-152 in the footnote when they actually meant Ex. R-153.
[24] Whatcom County's Objections to Petitioners' Proposed Exhibits (April 25, 2013) at 4.
[25] Whatcom County's Motion to Amend the Index (April 5, 2013).
[26] The Board notes the map – Ex. R-127 – shows the service territory boundaries for the various water districts. The map does not represent whether the districts have water available for new uses in the designated areas.

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evidence would be necessary or of substantial assistance to the Board in reaching its decision, as specified in RCW 36.70A.290(4) and WAC 242-03-565(1).

- Petitioners' Motion to Supplement the Record with Exhibit R-150 is **granted** and the County's Coordinated Water System Plan Update is **admitted.** The Board finds this exhibit assists the Board in understanding the full scope of the water issues and the information will be necessary or of substantial assistance to the Board in reaching its decision, as specified in RCW 36.70A.290(4) and WAC 242-03-565(1).
- Petitioners' motion to admit Exhibit R-151 is **denied** because these documents do not shed more light on the water quality and quantity problems already documented in Petitioners' Prehearing Brief.
- Petitioners' motion to admit Exhibit R-152 is **granted** and the County's Health Department form for water availability to obtain a building permit is **admitted**. The Board finds this form may provide information concerning the County's measures to protect surface and groundwater quantity. The form contains information necessary or of substantial assistance to the Board in reaching its decision, as specified in RCW 36.70A.290(4) and WAC 242-03-565(1).
- Petitioners' motion to admit Exhibit R-153 is **granted** and excerpts from the Northwest Indian Fisheries Commission State of Our Watersheds Report are **admitted.** The Board finds this information shows the extent of water withdrawals in Whatcom County and how tribal governments link this information with fish habitat and salmonid recovery. The report contains information necessary or of substantial assistance to the Board in reaching its decision, as specified in RCW 36.70A.290(4) and WAC 242-03-565(1).
- Petitioners' motion to admit Exhibit R-154 is **granted** and the water well log information is **admitted.** Similar to Exhibit R-152, the Board finds this information shows how the County's comprehensive plan and development regulations are

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administered and how data is maintained on water withdrawals. The form contains information necessary or of substantial assistance to the Board in reaching its decision, as specified in RCW 36.70A.290(4) and WAC 242-03-565(1).

- Petitioners' request to take official notice of Exhibit R-155, Ordinance No. 2003-012, which contains proposed amendments to the Transportation Chapter of the Whatcom County Comprehensive Plan, is **granted.**
- **The Board takes official notice** of The Puget Sound Partnership's *2012/2013 Action Agenda for Puget Sound* (August 28, 2012) pursuant to WAC 242-03-630. The Action Agenda is a document adopted by a state agency – the Puget Sound Partnership – describing the work needed to protect and restore Puget Sound. The Board admits this Action Agenda as Supplemental Exhibit 1.
- **The Board also takes official notice** of The Washington State Department of Fish and Wildlife's document Knight, K (2009) *Land Use Planning for Salmon, Steelhead and Trout* pursuant to WAC 242-03-630. The Department's document is a science-based land use planner's guide to salmonid habitat protection and recovery. The Board admits this Report as Supplemental Exhibit 2.

E. Abandoned Issues

Petitioners' Prehearing Brief noted that Issue 3 will not be addressed. Legal Issue 3 is deemed **abandoned** and is **dismissed.**

V. THE CHALLENGED ACTION AND POSTURE OF THE CASE

On August 7, 2012, Whatcom County adopted Ordinance No. 2012-032 amending its comprehensive plan, zoning code and future land use map with respect to rural areas. Ordinance No. 2012-032 represented the County's response to a series of rulings from the Board and the Courts requiring that the County's rural plan and development regulations be brought into compliance with the GMA.

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The matter goes back to January 25, 2005, when Whatcom County adopted its 2005 Comprehensive Plan (CP) Update in Resolution 2005-006 pursuant to RCW 36.70A.130(1) and (4). In the update, the County largely retained the rural land use designations in its 1997 comprehensive plan, including its LAMIRD criteria and boundaries. Futurewise challenged the rural element of the County's plan, alleging the County's LAMIRDs and allowances for densities greater than one dwelling unit per five acres violated the GMA.[27] In its Final Decision and Order issued September 20, 2005, the Board ruled that Whatcom County's LAMIRD designation criteria and higher rural densities failed to protect rural character.

On appeal, the Court of Appeals affirmed the Board on both issues.[28] However, the Supreme Court in *Gold Star Resorts, Inc. v. Futurewise* affirmed as to LAMIRDs, but disagreed as to rural densities.[29] The case was remanded for reconsideration on LAMIRDs, but without regard to a bright-line rule for rural densities.[30]

Responding to the Court's *Gold Star* mandate, on May 5, 2011 Whatcom County adopted Ordinance No. 2011-013, amending its comprehensive plan and development regulations with respect to rural densities and LAMIRDs. Prior to the Compliance Hearing, four petitions for review were filed with the Board challenging various aspects of the amendments adopted by Ordinance No. 2011-13.[31] The Board first heard and decided the

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[27] *Futurewise v. Whatcom County*, Case No. 05-2-0013, Final Decision and Order (September 20, 2005) at 1.
[28] *Gold Star Resorts, Inc., v. Futurewise*, 140 Wn. App. 378, 161 P.3d 748 (2007). The FDO was appealed by Gold Star Resorts, Inc., owner of properties along I-5 in the Birch-Bay LAMIRD area and an intervenor in the case before the Board.
[29] *Gold Star Resorts, Inc., v. Futurewise*, 167 Wn.2d 723, 222 P.3d 791 (2009).
[30] 167 Wn.2d at 732.
[31] PFRs were filed as follows: Governors Point challenged the County's failure to designate its property in the Chuckanut area as a LAMIRD; City of Bellingham challenged (a) development allowances in the Lake Whatcom watershed likely to pose increasing threat to water quality for the region's primary urban water source and (b) LAMIRDs adjacent or near the Bellingham UGA not coordinated with or competing with the City's urban development and services; Hirst, et al. and Futurewise raised a number of objections concerning the LAMIRD provisions and designations, but also asserted noncompliance with the RCW 36.70.070(5)(c) requirement of measures to protect rural character and raised issues concerning extension of urban services and consistency of population allocations.

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remanded issues concerning rural densities, concluding limited application of higher densities, when properly contained, did not violate the GMA.[32]

The remaining issues in the four PFRs were consolidated as Case No. 11-2-0010c.[33] Briefing and argument were coordinated with Case No. 05-2-0013 Compliance Hearing on LAMIRDs. On January 9, 2012, the Board issued its FDO on Remand in Case Nos. 11-2-0010c and 05-2-0013.[34] Germane to the present matter, the FDO on Remand determined the County's Rural Element lacked "measures required to protect rural character" in several respects as required in RCW 36.70A.070(5)(c).

In response to the FDO on Remand, on August 7, 2012 Whatcom County adopted Ordinance No. 2012-032 which is the action challenged here. Petitioners Hirst, et al. and Futurewise filed objections to a finding of compliance. The Petitioners also filed a new PFR – Case No. 12-2-0013 – challenging various provisions of Ordinance No. 2012-032 as creating internal Plan inconsistencies or violating other provisions of the GMA.

Meanwhile, after briefing and a Compliance Hearing, on January 4, 2013 the Board issued its Compliance Order in Case Nos. 11-2-0010c and 05-2-0013. The Compliance Order found the County had made significant progress in aligning its Comprehensive Plan's Rural Element with the GMA, correcting certain rural density and LAMIRD provisions, and adopting various measures to protect rural character and contain development. However, the Board found the County's Rural Element still out of compliance with specific GMA provisions and remanded to the County for further amendment.[35]

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[32] Case No. 05-2-0013, Order Following Remand from the Supreme Court (Rural Densities) (September 9, 2011).
[33] *Governor's Point Development Co. v. Whatcom County*, Case No. 11-2-0010c.
[34] The FDO on Remand found some remaining inconsistencies between the County's rural plan and its land use element, as well as LAMIRD development regulations in violation of RCW 36.70A.070(5)(d).
[35] Compliance Order at 1-2: The Board found the County still violates GMA requirements by failing to provide a variety of rural densities, by lacking permanent provisions for lot clustering, by failing to provide required protection for Lake Whatcom water resources, by allowing exemptions for Type I, II and III LAMIRDs, by not establishing logical outer boundaries for some LAMIRDs or internally consistent boundaries for some Rural Neighborhoods, and by creating an internal inconsistency in its plans and regulations regarding water transmission lines.

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In its January 4, 2013 Compliance Order, the Board also ruled on the County's measures to protect Lake Whatcom water resources. However, noting that Petitioners' new PFR challenging Ordinance No. 2012-032 included a challenge to the County's measures to protect surface and groundwater resources, the Board reserved decision on the broader question of the County's rural water resources protections, beyond Lake Whatcom. This present case, then, addresses whether the County's Rural Element contains measures limiting rural development to protect rural character by protecting surface water and groundwater resources, as required by RCW 36.70A.070(5)(c)(iv). The case also addresses the consistency of the County's transportation planning with its rural land use planning – a new issue in these proceedings.

VI. ISSUES AND DISCUSSION

Issue 1: Failure to protect surface and groundwater quality, failure to protect water availability, failure to protect water for fish and the comprehensive plan is internally inconsistent.

Detailed Statement of Issue 1 from Petition for Review:

> Do the future land use map and related policies and development regulations, including the amendment to Chapter 1, Policies 2DD-1, 2DD-2, 2GG-2, the "Rural Communities" narrative in the Comprehensive Plan, 2JJ-6, 2LL-2, the "Rural Neighborhoods" narrative in the Comprehensive Plan, Goal 2MM and all policies thereunder (*i.e.*, all Policies 2MM), WCC Chapters 20.32, 20.36, 20.60, 20.61, 20.63, 20.64, 20.67 and 20.69, WCC 20.80.100 and WCC 20.82.030 violate RCW 36.70A.030(15) and (16), RCW 36.70A.040(3), RCW 36.70A.070, RCW 36.70A.130(1)(d), RCW 36.70A.070(5), RCW 36.70A.020(9) and (10), and case law because the enactments fail to protect water resources, including surface and groundwater quality and quantity?

Applicable Law

RCW 36.70A.020 Planning Goals.

> (9) Open space and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities.

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(10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

RCW 36.70A.030 Definitions.

(15) "Rural character" refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan:

. . .

(d) That are compatible with the use of the land by wildlife and for fish and wildlife habitat; . . .

(g) That are consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas.

(16) "Rural development" refers to development outside the urban growth area and outside agricultural, forest, and mineral resource lands designated pursuant to RCW 36.70A.170. Rural development can consist of a variety of uses and residential densities, including clustered residential development, at levels that are consistent with the preservation of rural character and the requirements of the rural element. Rural development does not refer to agriculture or forestry activities that may be conducted in rural areas.

RCW 36.70A.070 Comprehensive plans — Mandatory elements.

(1) A land use element designating the proposed general distribution and general location and extent of the uses of land, where appropriate, for agriculture, timber production, housing, commerce, industry, recreation, open spaces, general aviation airports, public utilities, public facilities, and other land uses. The land use element shall include population densities, building intensities, and estimates of future population growth. The land use element shall provide for protection of the quality and quantity of groundwater used for public water supplies. Wherever possible, the land use element should consider utilizing urban planning approaches that promote physical activity. Where applicable, the land use element shall review drainage, flooding, and storm water run-off in the area and nearby jurisdictions and provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state, including Puget Sound or waters entering Puget Sound . . .

(5) Rural element. Counties shall include a rural element including lands that are not designated for urban growth, agriculture, forest, or mineral resources.

. . .

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> (c) Measures governing rural development. The rural element shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by . . .
> (iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface water and groundwater resources; and . . .

(Emphasis Added.)

RCW 36.70A.130 Comprehensive plans — Review procedures and schedules — Amendments.

> (1)(d) Any amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan. (Emphasis Added.)

Positions of the Parties

Petitioners' Allegations

Petitioners assert that the GMA requires local jurisdictions to ensure that development in non-urban, rural areas occurs "at levels consistent with preserving rural character..." RCW 36.70A.030(16). Preserving rural character requires "patterns of land use and development" compatible with habitat for fish and wildlife and with protections for surface water and groundwater. (See RCW 36.70A.030(15)(d) and (g)).[36] All comprehensive plan measures adopted by the County must meet GMA requirements, be internally consistent, and must meet GMA goals.[37]

Petitioners argue the County's water quality and quantity policies and regulations adopted by reference in Ordinance No. 2012-032 are flawed because County development regulations apply, too narrowly, to only some parts of the Rural Area. Further, the Rural Element does not contain "measures" governing rural development that protect surface and

[36] Petitioners' Prehearing Brief at 4.
[37] Petitioners' Prehearing Brief at 4. Petitioners' Footnotes 17-22 claim the following GMA provisions are violated by the County: RCW 36.70A.030(15) and (16); .040; .070 and specifically .070(5)(c)(vi); .130(1)(d); .020(9) and (10).

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ground water resources in the Rural Area as required by the GMA.[38] Petitioners argue the County lacks "measures" to ensure that land uses are consistent with available water resources[39] and they claim the County is required under *Kittitas*[40] to plan for protection of water resources in its land use planning by adopting specific measures to ensure protection.[41]

Water Resources

Specifically, regarding water availability, Petitioners contend the County "does not assure that land use is consistent with available water resources."[42] They cite our State Supreme Court's *Kittitas* decision which emphasizes that the "County must regulate to some extent to assure that land use is not inconsistent with available water resources ...The GMA requires that counties provide for the protection of groundwater resources and that county development regulations comply with the GMA."[43] Petitioners support their argument by citing studies and reports demonstrating water resource limitations in Whatcom County.[44]

Petitioners say the County's response to the lack of water, as shown in numerous reports, was merely to adopt Policy 2DD-2.C.6 and 7 as "measures" to protect ground and

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[38] *Id.* at 5 and 7.
[39] Petitioners' Prehearing Brief at 13.
[40] *Kittitas County v. EWGMHB*, 172 Wn.2d 144, 181, 256 P.3d 1193 (2011) "The GMA requires counties to protect water resources."
[41] Petitioners' Prehearing Brief at 13, and Petitioners' Reply Brief at 6-9.
[42] Petitioners' Prehearing Brief at 13.
[43] *Kittitas County,* 172 Wn.2d at 178-179.
[44] Water resource limitation problems: *Ex. C-683-A.14* Whatcom County *WRIA 1 State of the Watershed Report* (2010) showing closed water basins; *Ex. C-671-G* Department of Ecology, *Focus on Water Availability: Nooksack Watershed, WRIA 1* at 1. *Note:* WRIA 1 comprises most of Whatcom County. *See* http://cfpub.epa.gov/surf/huc.cfm?huc_code=17110004 stating most water in the Nooksack Watershed is legally spoken for; 637 water right applications pending with the County as of March 2011 in Petitioners' Prehearing Brief at 13; *Ex. C-671-D* Whatcom County's *Water Resource Plan* (1999) stating the "difficulties for effective water resource management"; Whatcom County's *Comprehensive Plan Chapter 11: Environment* states water supply is over-allocated; no new water is available; significant number of exempt wells causes difficulties in estimating total water used; *Ex. C-671-C The Bertrand Creek Watershed Report* lists water problems and offers nine solutions ; *Ex. C-671-B* September 6, 2011 resolution by Whatcom County approving fund for Water Supply Planning Project to address economic needs demonstrates the County recognizes the existing water problem; *Ex. C-678* Department of Ecology analysis of county responsibilities for water availability in land use planning.

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surface water. However, Petitioners argue, these policies reference existing subdivision regulations and do not solve the problem of proliferation of individual exempt wells and thus do not contain adequate measures protecting water resources.[45] Petitioners contend the County has long been aware of its water supply problems, yet did not take action to address the issue when amending its Comprehensive Plan's Rural Element.

Water Quality

Similarly, Petitioners contend the County's surface and ground water quality is not protected as required in RCW 36.70A.070(5)(c)(iv). The County policies and development regulations either do not contain specific measures to protect water quality, or are limited to critical areas, urban areas or watershed overlay areas, and do not apply throughout the rural area. Further, Petitioners complain County programs such as septic tank self-inspections and low impact development are not successful or have not been implemented.

Petitioners support their arguments with data or reports from the Washington State Department of Ecology, Washington State Department of Health, Whatcom County Public Works Department, and Whatcom County Water Resources Program.[46] Petitioners contend, as with water availability, the County's Rural Element does not contain "measures" protecting water quality because the policies merely incorporate existing development regulations which have demonstrably failed to control or prevent water pollution. Indeed, although the County's Comprehensive Plan contains policy statements about controlling or reducing water pollution, the implementing regulations have not done so, thus making the Comprehensive Plan inconsistent with the development regulations.[47]

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[45] Petitioners' Prehearing Brief at 16.

[46] *Ex. C-685-I* Whatcom County Public Works – Natural Resources Progress Report #3 (January-June 2011) Birch Bay/Terrell Creek Water Quality Monitoring Project; *Ex. C-685-J* Birch Bay Initial Closure Response Report, May 2009, Birch Bay Shellfish Growing Area; *Ex. C-685-L* Washington State Department of Health: Status and Trends in Fecal Coliform Pollution in Shellfish Growing Areas of Puget Sound: Year 2011; *Ex. C-685-M* Washington State Department of Health: Status and Trends in Fecal Pollution in Puget Sound Shellfish Growing Areas Through 2010; *Ex. C-685-N* Washington State Department of Ecology Nitrate Contamination in Sumas-Blaine Aquifer, Whatcom County, Washington; *Ex. C-685-O* Washington State Department of Ecology Sumas-Blaine Nitrate Contamination Summary (June 2012).

[47] Petitioners' Prehearing Brief at 12-13.

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Fish and Wildlife Habitat

In regards to water quantity and quality for fish and wildlife, Petitioners argue that federal, state, and local studies show that endangered salmon use the creeks and rivers of Whatcom County. The watershed reports state that "water quantity, water quality and instream flows and habitat problems ... pose serious challenges for the community."[48] Petitioners argue the County's Comprehensive Plan and development regulations do not protect the rural character by protecting fish and wildlife habitat as required by RCW 36.70A.060 and .070(5)(c)(iv).

County's Response to Allegations

The County argues Petitioners' claim is in an erroneous legal framework. They state this case is not about the extent of water pollution or the lack of water. Rather, it is about whether the County complies with the GMA's requirements to have a comprehensive plan implemented through development regulations. Adequacy of the regulations to prevent pollution or supply sufficient water is not the standard, but instead the standard is whether the County is compliant with the Rural Element requirements in the GMA.[49]

Water Resources

The County contends the Supreme Court's decision in the *Kittitas* case was a narrower ruling than Petitioners imply. *Kittitas* focused on a county's role "to protect water resources in the context of development regulations governing land use approval."[50] *Kittitas* addressed how to prevent landowners from submitting multiple subdivision applications and segmenting their projects in order to qualify for multiple exempt domestic wells under RCW 90.44.050.[51] Whatcom County's current subdivision regulations expressly require applicants to provide evidence of an adequate water supply prior to approval and require

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[48] *Id.* at 18-19.
[49] County's statement at the Hearing on the Merits, April 26, 2013.
[50] County's Brief at 3.
[51] *Id.* at 4.

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"contiguous parcels of land in the same ownership shall be included within the boundaries of any proposed ...subdivision."[52] These subdivision regulations were adopted prior to the present case and therefore are not subject to appeal. Thus, the County concludes it has met the requirements of *Kittitas*.

The County claims Petitioners have not proved the County's development regulations are inconsistent with its Comprehensive Plan and Ecology's water regulations.[53] The County argues Petitioners are incorrect in suggesting new wells in closed basins are evidence the County failed to protect groundwater and surface water resources.[54] The County's subdivision regulations ensure that well locations for subdivisions or new construction do "not fall within the boundaries of an area where DOE has determined by rule that water for development does not exist."[55] The County explains Ecology's current 1985 administrative regulation established minimum instream flows for new surface water withdrawals, closed specific sub-basins, and encouraged groundwater withdrawals.[56] This administrative code does not regulate exempt wells, according to the County.[57] Further, even if Ecology regulated exempt wells, this would not limit rural development by the County because Ecology authorizes new surface water and groundwater withdrawals – even in closed basins – when the appropriator can demonstrate their water withdrawal "does not conflict with the intent of the basin closure" or if an applicant can purchase water rights, transfer water rights or mitigate the water use.[58] The County argues that water may be available, even if a basin is closed, depending on the specific facts of the case.[59] Thus, the County contends Petitioners' argument that numerous exempt wells in closed basins demonstrate

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[52] *Id.* at 4, citing WCC 21.01.040.
[53] County's statement at the Hearing on the Merits, April 26, 2013.
[54] County's Brief at 7.
[55] *Id.* at 7.
[56] WAC 173-501.
[57] County's Brief at 8.
[58] *Id.* at 8 and 9. See also WAC 173-501-040(2) When a project (as described in WAC 173-501-030(5)) is proposed on a stream that is closed to further appropriations, the department shall deny the water right application unless the project proponent can adequately demonstrate that the project does not conflict with the intent of the closure.
[59] *Id.* at 9.

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noncompliance with the GMA is without merit because the County complies with Ecology's water resource regulations. The County observed Ecology recently adopted rules regulating exempt wells in other counties, and suggested that if Petitioners want regulations for exempt wells in Whatcom County, they should petition Ecology to adopt such a rule.[60]

Water Quality

In regards to water quality, the County contends its existing stormwater and on-site septic system regulations apply throughout the County and adequately address water quality protections for rural development.[61] The County asserts Petitioners fail to present evidence that a uniform, county-wide impervious surface regulation is needed in addition to the many regulations governing stormwater.[62]

The County complains that Petitioners' evidence was taken out of context or was misleading. For example, shellfish studies for Drayton Harbor and Birch Bay are from areas that already have strict regulations through the Stormwater Special Districts or Water Resource Management Areas. And, the federal listing of impaired water bodies does not support Petitioners' claims of noncompliance because meeting Total Maximum Daily Loads is a broader regulatory effort to address all water quality issues. Thus, according to the County, Petitioners' examples of water pollution do not offer sufficient evidence to require a County-wide impervious surface regulation.[63] If the County tried to impose such a

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[60] *Id.* at 10.

[61] Stormwater regulations in WCC 20.80.630 and .636 apply throughout the County: small projects must employ Best Management Practices, large projects must have approved preliminary stormwater proposals, and in some cases, engineered stormwater design report or water quality treatment facilities to minimize runoff from impervious surfaces. More stringent stormwater controls are required in specific areas of the County -- such as urban areas listed in Phase II of the National Pollution Discharge Elimination System (NPDES) Stormwater Permit; lakes and watersheds listed as Stormwater Special Districts; watersheds for Lake Whatcom, Samish and Padden shown in the Watershed Protection Overlay. The County's zoning districts for Urban Residential, Urban Residential Medium Density and Residential Rural limit impervious surface to 20% and 10% in the Rural District.

[62] *Id.* at 15.

[63] *Id.* at 17-18.

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regulation, it would run afoul of Constitutional issues and violate GMA Goal 6. Rather, the County properly tailored its restrictions to areas that needed them.[64]

In response to Petitioners' complaint about homeowner self-inspection of septic systems, the County states the program was modeled after Washington State regulation WAC 246-272A, which was approved by the Washington State Department of Health and is consistent with state regulations and regulatory approaches by other jurisdictions.[65] The program is enforced throughout the County and enforcement action is taken when violations are reported.[66]

Lastly, the County argues Petitioners' inconsistency claims do not provide grounds for relief. When Petitioners cite Comprehensive Plan policies from the Environment Chapter, and then attempt to apply and compare these to the Rural Element Chapter, this does not make the County's plan inconsistent.[67]

Fish and Wildlife Habitat

The County did not respond to Petitioners' arguments about the effect of water quantity or quality upon fish and wildlife.

Board Discussion

Statutory Provisions and Court Decisions on GMA and Water Resources

The GMA requires cities and counties to address water availability in comprehensive land use plans and development regulations. RCW 36.70A.020(10) states that local jurisdictions' plans shall be guided by fourteen goals. GMA Goal 10 says local jurisdictions must "Protect the environment and enhance the state's high quality of life, including air, and water quality, and the availability of water." (Emphasis added.)

Within each comprehensive plan, a county must plan for its rural or non-urban area. RCW 36.70A.030(15)(d) and (g) define "Rural Character" as patterns of land use and

[64] *Id.* at 19.
[65] *Ex. R-129* Letter of Approval from Washington State Department of Health.
[66] County's Brief at 20.
[67] County's Brief at 22.

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development established by a county in the rural element of its comprehensive plan that are compatible with fish habitat and consistent with protection of natural surface water flows and groundwater recharge. RCW 36.70A.070(1) defines the mandatory elements of a comprehensive plan, and in this, it requires a Land Use element which "shall provide for protection of the quality and quantity of groundwater used for public water supplies." (Emphasis added.)

RCW 36.70A.070(1) further refines the duties of the County by stating the land use element "shall review drainage, flooding, and stormwater run-off in the area and nearby jurisdictions and provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state, including Puget Sound or waters entering Puget Sound." (Emphasis added.)

Finally, RCW 36.70A.070(5)(c)(iv) requires that "[t]he Rural Element shall include measures that apply to rural development and protect the rural character of the area...by: (iv) Protecting critical areas...and surface water and groundwater resources." (Emphasis added.)

Read together, these GMA provisions indicate that patterns of land use and development in rural areas must be consistent with protection of instream flows, groundwater recharge, and fish and wildlife habitat. A County's Comprehensive Plan rural lands provision must include measures governing rural development to protect water resources.

Other applicable GMA requirements pertinent to this case are the requirement that a County's development regulations must be consistent with and implement the comprehensive plan.[68] Also, any amendment or revision to a comprehensive plan shall conform to the GMA chapter or, if any development regulation is amended, it shall be consistent with the comprehensive plan, including those mandatory elements of a

[68] RCW 36.70A.040(4)(d): "The county and each city that is located within the county shall adopted a comprehensive plan and development regulations that are consistent with and implement the comprehensive plan..."

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comprehensive plan that protect surface and groundwater resources.[69] Additional GMA provisions, codified at RCW 58.17.110 and RCW 19.27.097 require the county to assure availability of potable water prior to building permit or subdivision approval. The GMA is replete with requirements to protect ground and surface water and ensure land uses are compatible for fish and wildlife. Our Supreme Court has also recently addressed the GMA water requirements and how local governments must incorporate them in their plans.

In considering the above statutes relating to water quantity and quality, the Supreme Court in *Kittitas County*[70] held that local governments are required to ascertain that there will be adequate potable water supply before building permits and subdivision applications may be approved. That involved, according to the Court, ensuring the County's land use plan and regulations were not inconsistent with water availability.

> Several relevant statutes indicate that the County *must* regulate to some extent to assure that land use is not inconsistent with available water resources. The GMA directs that the rural and land use elements of a county's plan include measures that protect groundwater resources. RCW 36.70A.070(1), (5)(c)(iv). Additional GMA provisions, codified at RCW 19.27.097 and 58.17.110, require counties to assure adequate potable water is available when issuing building permits and approving subdivision applications.[71]

The Supreme Court's reasoning in *Kittitas County* concerns water availability, but is equally applicable to water quality. Local land use plans and regulations must seek to avoid groundwater contamination as well as managing surface water runoff to prevent pollution of

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[69] RCW 36.70A.130(1)(d): "Any amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan."

[70] *Kittitas County v. EWGMHB*, 172 Wn.2d 144, 256 P.3d 1193 (2011).

[71] *Kittitas County*, 172 Wn.2d at 178-179, emphasis in original. Note that the statutory provisions requiring a local jurisdiction to determine availability of potable water before approving a building permit or subdivision – RCW 19.27.097 and RCW 58.17.110 – were enacted as part of the GMA and construed by the *Kittitas* Court as GMA requirements though not codified in Chapter 36.70A RCW. See also *Knight v. City of Yelm*, 173 Wn.2d 325, 267 P.3d 973 (2011), a case decided under LUPA, where the Supreme Court explains the local jurisdiction's responsibility to determine availability of potable water for subdivisions.

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Puget Sound.[72] Ecology provides technical assistance and model regulations, but County land use plans and regulations are necessary to assure protection of rural character, including water resource protection. The *Kittitas* Court "recogniz[ed] the role of counties to plan for land use in a manner that is consistent with the laws providing protection of water resources and establishing a permitting process."[73] Thus, the Court held that in making a land use decision that requires a finding that there is adequate water supply to support the proposed development, it is the local government – and not Ecology – that is responsible to make the decision on water adequacy as part of its land use decision, and in particular, with respect to exempt wells.[74] The question before the Board is whether Whatcom County has adopted measures that apply the GMA requirements about water under the local circumstances here. Further, the question is whether *Kittitas County* requires the County to change its other long-range planning (including residential density, LAMIRD designations, and other regulations such as lot coverage governing intensity of allowed usage) commensurate with water availability and water quality.

Evidence Showing Water Quantity and Water Quality Problems

The Board finds substantial evidence in the record about water availability limits and water pollution in rural Whatcom County. The record demonstrates the following in the County's Rural Area regarding surface and groundwater resources:

- Ecology's *WRIA 1 State of the Watershed Report*[75] shows year-round or seasonally closed watersheds account for a large portion of the County.
- Ecology's *Focus on Water Availability* report states "Most water in the Nooksack watershed is already legally spoken for."[76] Instream flows for WRIA 1 were

[72] RCW 36.70A.070(1) "Where applicable, the land use element shall review drainage, flooding, and storm water run-off in the area and nearby jurisdictions and provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state, including Puget Sound or waters entering Puget Sound."
[73] *Id* at 180.
[74] As evidence of water availability, the County will of course accept a water right granted by Ecology. RCW 19.27.097; RCW 58.17.110(2).
[75] *Ex. C-683-A.14 WRIA 1 State of the Watershed Report* (2010).

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established in 1985 and codified at WAC 173-501. As a result of instream flow requirements, some of the water sources are closed year round to additional withdrawals and some are closed part of the year. [77] The record indicates average minimum instream flows in the mainstem and middle fork Nooksack River are not met an average of 100 days a year.[78]

- In its 1999 Water Resource Plan, the County reported a proliferation of rural residential exempt wells already created "difficulties for effective water resource management"[79] by drawing down underlying aquifers and reducing groundwater recharge of streams. Petitioners document 1,652 wells have been drilled within closed basins since 1997 and argue that despite basin closures, 637 water right applications were pending as of March 2011.[80] The record does not disclose what portion of these exempt wells meet the criteria for legal availability of water.[81]
- A 2012 Northwest Indian Fisheries Commission report[82] shows that 77% of the increase in exempt wells in WRIA 1 has taken place in basins closed year round or seasonally to water withdrawal. The link between stream flows and groundwater withdrawals in the shallow Whatcom aquifers is well documented. "A number of studies indicate that shallow aquifers of the County are responsible for approximately 70% of base stream flow."[83]

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[76] *Ex. C-671-G* Department of Ecology, *Focus on Water Availability: Nooksack Watershed, WRIA 1* at 1. Note: WRIA 1 comprises most of Whatcom County. *See* http://cfpub.epa.gov/surf/huc.cfm?huc_code=17110004
[77] *Ex. C-683-A*, Figure 6; *Ex. C-671-G.*
[78] *Ex. C-761-G*, at 3.
[79] *Ex. C-671-D*, Whatcom County Water Resource Plan, at 49.
[80] *See* Petitioners' Prehearing Brief at 13-14 and extensive documentation from well logs and other data
[81] *See* RCW 90.44.050, RCW 19.27.097, WAC 35-196-825, and AGO 1992 No. 17. And see, *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 81, 90, 95, 11 P.3d 726 (2000): Where a development intends to utilize an exempt well, its right to water is junior to other ground and surface water withdrawals in the basin, and junior to instream flows. Where the proposed groundwater withdrawal is located within a basin that has been closed to new surface water appropriations, or where Ecology has set instream flows that are not consistently met, there is a presumption that no additional water is legally available.
[82] *Ex. R-152.*
[83] *Ex. C-788-A.15*, Whatcom County Draft EIS, 10-Year Urban Growth Area Review (2009), at 4.3-2 – 4.3-3

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- A 2008 Department of Ecology report documents nitrate contamination of a rural Whatcom aquifer.[84] The Sumas-Blaine aquifer is the only readily available drinking water source for 27,000 rural residents of Whatcom County. Nitrate contamination in the aquifer has been documented for over 40 years. In a recent study, 75% of sampled wells failed to meet drinking water standards for nitrates.[85] Groundwater withdrawals are not prohibited in the Sumas-Blaine aquifer.[86]
- The County's most recent Water Resource Plan was adopted in 1999 and has not been updated.
- On September 6, 2011, the County Council unanimously approved a Resolution to fund a Water Supply Planning Project[87] to comply with RCW 70.116 to update water system plans. The County appropriated funds because "Counties should update their plans if there are major or significant changes to land use plans that would be impacted by water supply for potable purposes."[88] The County Resolution states: "Land use decisions are made assuming sufficient water resources will be available to serve these land uses. In Whatcom County, water supply is not sufficient to meet all competing needs whether it is because of water rights, water quality or water quantity."[89] (Emphasis added.)
- Whatcom County's Comprehensive Plan Chapter 11 Environment explains that "Surface and groundwater quality problems can be found in many areas of Whatcom County and are described in various chapters of the Comprehensive Plan. There are significant legal limitations in obtaining water. Management

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[84] *Ex. C-685-N*, Ecology, Nitrate contamination in Sumas-Blaine Aquifer (2008)
[85] *Id.* While the report indicates dairy manure and fertilizers are the primary nitrate pollutants, the report notes 23,000 residents use on-site sewage systems which contribute an estimated 207,000 pounds of nitrogen per year to area groundwater.
[86] *See Ex. R-152*, Whatcom County Health Department Water Availability Notification, at 3.
[87] *Ex. C-671-B* Whatcom County Council adoption of Economic Development Investment Program recommendation
[88] *Ex. C-671-B* Whatcom County Council Agenda, Economic Development Investment Board Request, September 6, 2011 at 1 of *Water Supply Planning For Economic Certainty in Whatcom County (WRIA 1).*
[89] *Id.* at 2.

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actions between and within jurisdictions are not always well coordinated or consistent. . . These problems and issues have already led to many impacts. . . includ[ing] health concerns associated with drinking contaminated water; fisheries depletion and closure of shellfish harvesting areas and other instream problems; a lack of adequate water storage and delivery systems to meet the requirements of growth and development; concerns with the availability of water to meet existing agricultural and public water supply demands; potential difficulties and additional costs associated with obtaining building permits and subdivision approvals; and other related increasing financial costs to the community. Long-term resolution of the numerous, complex and changing water issues requires actions in many areas."[90]

- A 2012 Department of Ecology report on nitrate contamination for wells in the Sumas-Blaine Aquifer[91] states 29% of wells in northwestern Whatcom County exceeded maximum nitrate contamination levels and 14% of wells had more than double the maximum allowed rate of contamination. Thirty-six percent (36%) of shallow wells (less than 40 feet in depth) exceed allowable nitrate contamination levels, while 20% of deeper wells also exceed the standard.[92] Ecology's report documents the percentage nitrate contribution from various sources and states the Sumas-Blaine Aquifer is "especially vulnerable to contamination from overlying land uses."[93] Ecology recommends seven steps the County could take to address aquifer nitrate contamination.[94]

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[90] Whatcom County Comprehensive Plan, Ch. 11 Environment at 11-14 and 15.
[91] *Ex. C-685-O* Department of Ecology, Sumas-Blaine Aquifer Nitrate Contamination Summary (June 2012).
[92] *Id.* at 5. Nitrate contamination is caused by shallow wells, limited thickness of the aquifer, heavy rainfall and intensive agricultural practices using manure.
[93] *Id.* at 22.
[94] *Id.* at 29.

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- A 2012 Washington State Health Department study on fecal coliform pollution in Puget Sound[95] ranks Drayton Harbor as the second highest contaminated shellfish bed in Puget Sound. Drayton Harbor's shellfish beds had a fecal pollution index (FPI) between 1.50 and 2.00; FPIs above 1.0 indicates an area has "experienced significant fecal pollution."[96]
- The Birch Bay Initial Closure Response Strategy (May 2009) describes increased fecal coliform pollution in Birch Bay from 2005 to 2008, another shellfish growing area in Whatcom County.[97] In 2008, the Washington State Department of Health closed Birch Bay to commercial shellfish harvesting. Two sources of contamination were listed: wastewater collection/disposal and agricultural activities. The report recommended identifying ways to bring private sewer systems into compliance with the County's operating and maintenance standards.[98]
- In the 2006 Bertrand Creek: State of the Watershed Report, the County and other cooperating organizations documented land use changes in the Bertrand Creek Watershed which include "loss of water-retention capacity of wetlands and the increase in pavement, rooftops, and other hard surfaces resulting in a "flashy watershed." Such watersheds mean these areas reach flood stage quickly, have more pollution potential, and dwindle down to extremely low flow during the driest months.[99] The Bertrand Creek report offers nine solutions ranging from water conservation, water "banking", importing water, protecting wetlands and "substituting groundwater sources for current surface water rights...only if there was no significant continuity between surface and groundwater, and if there were

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[95] *Id.* at 11, citing *Status and Trends of Fecal Coliform Pollution in Shellfish Growing Areas of Puget Sound: Year 2011*, Washington State Department of Health (June 2012).
[96] *Status and Trends of Fecal Coliform* at 5.
[97] Petitioners' Brief at 11-12.
[98] *Ex. C-685-J* Birch Bay Shellfish Growing Area Initial Closure Response Strategy (May 2009) at 1-2.
[99] *Ex. C-671-C* Bertrand Creek: State of the Watershed Report (October 2006) at 3.

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no serious water quality issues with the groundwater. Potential problems include high nitrates, iron, salts and low oxygen, in groundwater."[100]

- Whatcom County is listed with "impaired water bodies" in the *2010 State of the Watershed Report*[101] which is the U.S. Environmental Protection Agency's report on the status of Section 303(d) of the Clean Water Act.[102] Since 2000, Whatcom County's "impaired water bodies" have increased from 47 to 77. Of those, only 6 water bodies have been analyzed and have had standards established for allowable total allowable pollution (Total Maximum Daily Loads (TMDLs)). The standards and policies derived from these TMDLs have not been adopted by reference as measures governing land use in the Rural Element and do not appear to be addressed in the development regulations for affected rural areas in the Ordinance No. 2012-032 amendments. In *Butler v. Lewis County,*[103] the Western Board found the County was aware of an Ecology TMDL Study with recommendations for water management practices. The Board ruled the County's failure to adopt any policies into its land use plan violated RCW 36.70A.070(1). While *Butler* was decided under the GMA's mandatory provisions for the land use element,[104] the requirements for "measures" in the Rural Element are no less specific.

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[100] *Id.* at 6.

[101] *Ex. C-683-A.14 WRIA 1 State of the Watershed Report* (2010). *Note:* WRIA 1 covers 1,410 square miles, is located in the northwest corner of Washington State and covers a significant portion of Whatcom County.

[102] The term "303(d) list" is short for the list of impaired and threatened waters (stream/river segments, lakes) that the Federal Clean Water Act requires all states to submit for EPA approval every two years on even-numbered years. The states identify all waters where required pollution controls are not sufficient to attain or maintain applicable water quality standards, and establish priorities for development of TMDLs based on the severity of the pollution and the sensitivity of the uses to be made of the waters, among other factors (40C.F.R. §130.7(b)(4)). States then provide a long-term plan for completing TMDLs within 8 to 13 years from first listing.

[103] Case No. 99-2-0027c, Final Decision and Order (June 20, 2000) at 56.

[104] "The land use element shall provide for protection of the quality and quantity of groundwater used for public water supplies. ... Where applicable, the land use element shall review drainage, flooding, and storm water run-off in the area [and] provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state."

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Water for Fish and Wildlife Habitat

Petitioners argue the County's Comprehensive Plan and regulations do not protect the availability of clean water for fish because impervious surfaces impair groundwater recharge areas, instream temperatures increase during summer low flows, and capacity to assimilate and dilute contaminants is lost. The County did not respond to Petitioners' complaints about the link between rural development and the altered hydrogeologic processes that may increase threats to fish and wildlife survival.

As indicated above, instream flows were established in 1985 for WRIA 1, but minimum flows in the mainstem and middle fork Nooksack River are not met an average of 100 days a year.[105] Rural development continues to draw groundwater from the shallow aquifers that are responsible for 70% of base flows.[106]

RCW 36.70A.070(5)(c)(iv) requires that a County's Rural Element protects rural character. The Rural Element shall include measures to protect the rural character of the area by protecting surface water and groundwater resources. Rural character is defined as "patterns of land use and development . . . consistent with the use of the land by fish and wildlife [and] . . . consistent with the protection of surface water flows. . . ." Protecting surface and groundwater resources is an essential component of fish habitat protection and thus the County's rural element must have measures governing rural development to protect these resources.

Board Analysis of Evidence on Water Quantity and Quality Problems

The Board reviewed the parties' positions on the numerous reports of Whatcom County's water resource issue. It found that even where a basin has been "closed" by the Department of Ecology for surface water appropriations, the County might authorize water withdrawals for subdivisions under the 1985 administrative code if an applicant was not withdrawing surface water and could demonstrate no significant hydraulic continuity

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[105] *Ex. C-761-G* at 3.
[106] *Ex. R-152, Ex. C-788-A.15*, at 4.3-2 – 4.3-3.

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between groundwater and surface water.[107] Applicants can also purchase existing water rights or obtain transferred water rights to a new place of use; each water use is fact-specific.[108] In regards to water quality, the County argues it has codified stormwater regulations throughout the County and its regulations are tailored to meet the needs identified.

Conversely, the Board also read reports on contaminated groundwater and drinking water;[109] increase in shellfish contamination;[110] an increase in exempt wells for single residential use without required proof that the groundwater withdrawal will not impact stream flows;[111] governing regulations from the last century (1985 state administrative regulations and a 1999 County Water Resource Plan);[112] and the County's own resolution and Comprehensive Plan, stating its water resources are unknown and the future water uses are uncertain.[113]

The Board finds the link between land development and water resources is well-established. The Board notes three authoritative references, two of which deal specifically with Whatcom County, documenting the need for land use planning to be coordinated with water resource planning by local jurisdictions. The *2010 WRIA 1 State of the Watershed Report* states that "[l]and use information is important in describing WRIA 1 because it relates to how much water is needed for the different uses occurring on the land."[114] Plus, this report states "[l]and use is also important in helping identify potential causes of water quality and habitat degradation."[115] The report goes onto say the County should monitor

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[107] WAC 173-501 Instream Resources Protection Program — Nooksack WRIA 1.
[108] County's Brief at 9.
[109] *Ex. C-684-N* Ecology's Nitrate Contamination in the Sumas-Blaine Aquifer, Whatcom County, WA (2008).
[110] *Ex. C-685-V* USGS Puget Sound Ecosystem Portfolio Model -- Shellfish Pollution Model
[111] The Board notes the County's Water Availability Notification form [Ex. R-152] has no requirement for a rural residential applicant to prove there is no hydraulic continuity, despite the fact that the County's Draft EIS states that "[a] number of studies indicate that shallow aquifers of the County are responsible for approximately 70% of base stream flow." [Ex. C-788-A.15 at 4.3-2- 4.3-3.]
[112] WAC 173-501 Instream Resources Protection Program – Nooksack WRIA 1, and *Ex. C-671-D* Whatcom County Water Resource Plan.
[113] *Ex. C-671-B* and Whatcom County Comprehensive Plan, Chapter 11, Environment at 11-15.
[114] *Ex. C-683-A.14* at 5.
[115] *Id.* at 5 and 6.

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water quality through Ecology's 303(d) List as a "useful indicator of the status of water quality because it represents lakes, rivers, streams, and bays that have sections that are falling short of water quality standards" and these indicators can identify potential causes of water quality impairment. [116]

Specifically, for Whatcom County this report lists potential causes of water pollution for each watershed. The causes range from increasing urbanization, to malfunctioning septic systems, agricultural runoff, and removal of riparian vegetation. This report states the strategies to obtain sufficient and clean water in Whatcom County must include monitoring water quality and understanding "how watershed activities and land management practices may be influencing water quality."[117] Strategies recommended in this report are better integration between salmon recovery and watershed management, funding and monitoring water quality and quantity data, and communicating results to the public.

Further information about land use planning and water resources, comes from the Washington State Department of Fish and Wildlife's (WDFW) report "Land Use Planning for Salmon, Steelhead and Trout."[118] This guide recommends various land use planning strategies to assist local governments to meet salmon recovery and land use planning laws. Specifically, on urban and rural growth, the report explains:

> Development in rural and urban areas is often located in low-gradient areas.... Urban growth in these riparian environments can alter land surface, soil, vegetation and hydrology by increasing the area of impervious surface. Impervious surface area is strongly correlated with adverse impacts on stream conditions including extensive changes in basin hydrology, channel morphology, and physio-chemical water quality (May et al. 1996; Booth 2000; R2 Resource Consultants et al. 2000)....
>
> Implementing land use planning for salmon, steelhead and trout can avoid many impacts associated with urban and rural growth by maintaining

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[116] *Id.* at 7.
[117] *Id.* at 8.
[118] The Board takes official notice of Knight, K. 2009. *Land Use Planning for Salmon, Steelhead and Trout.* Washington Department of Fish and Wildlife. Olympia, Washington, as Supplemental Exhibit 2. http://wdfw.wa.gov/publications/00033/wdfw00033.pdf
Note: See page 132 summary of scientific and stakeholder review process

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> estuarine, wetland and riparian habitats, and adjacent upland habitats, among others. For example, limiting impervious surface in the watershed and locating development away from riparian systems (using native vegetation buffers) would improve salmonid habitat function and hence survival (May 2003; May 2009). [119]

Further information on stormwater management shows the link between impervious surfaces and water quality degradation:

> "Traditional urban and rural development practices remove forests, vegetation and topsoil, compact soils, and increase impervious surface areas, diminishing the land's ability to hold and infiltrate rainwater. The remaining water becomes stormwater runoff, rushing off impervious surfaces such as roofs, roads and compacted soils instead of infiltrating the soil column (Booth 2000). Runoff is of particular concern in regions of intense rainfall, such as glacial outwash regions surrounding Puget Sound, or limited vegetation and landscapes with thin soils, such as the arid and semiarid interior east of the Cascade Range (Booth 2000).
>
> Recent research in western Washington has determined that measurable degradation to downstream aquatic habitat occurs where impervious cover exceeds 5-10% and native forest cover is reduced to less than 65% of watershed area (May et al. 1996; Booth 2000). Washington state agencies such as the Puget Sound Partnership and the State of Washington Department of Ecology, as well as the federal Environmental Protection Agency, have determined that stormwater runoff is the leading contributor to water quality pollution of urban waterways in western Washington State (*http://www.psp.wa.gov/stormwater.php*). Therefore, it is imperative that local governments manage stormwater with policies, regulations and incentive programs (e.g., Low Impact Development (LID) to reduce and treat stormwater runoff."[120] (Emphasis added.)

Finally, the WDFW report touches on the causes of water pollution with the following analysis and suggestions:

> While climate change may influence water quality over the long-term, most water quality degradation can be attributed to land use development practices. Development removes native vegetation, increases water

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[119] *Id.* at 22.
[120] *Id.* at 39-40.

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> temperatures, and compromises water quality by causing excessive runoff and stormwater discharge which washes nutrients, contaminants, and toxic materials from impervious surfaces into waterways (R2 Resource Consultants et al. 2000). Though these changes are most noticeable in streams draining highly urbanized watersheds (May et al. 1996), smaller scale development impacts are also important in less urbanized watersheds. (Emphasis added.)
>
> Other sources of water quality degradation include sewage and septic discharges, direct application of chemicals to tidelands, marine dumping, and airborne contaminants, and mis-application of pesticides and herbicides, all of which introduce toxic substances that may threaten salmonid survival."[121]

Lastly, the Board takes official notice of the Puget Sound Partnership's most recent Action Plan for 2012/2013.[122] In this plan, the Board found numerous examples of sources of water quality and quantity problems and how to address them. The Puget Sound Partnership works with local governments to identify problems and solutions. The Action Plan states:

> "City and county governments will be the primary implementers of many of the priorities, strategies, and actions identified in the Action Agenda. Since 2008 with the development of the first Action Agenda, local areas have been working toward both a structure and an approach to implement, as well as integrate, local community efforts to advance the Action Agenda."[123]

The Partnership states the problems facing Puget Sound and lists options to address them:

> "Land cover and land development are essential contributors to the health of both terrestrial and aquatic ecosystem processes and habitats. Due to land conversion from growth and development pressures, many Puget Sound habitats have been reduced in size, diminished in quality, and

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[121] *Id.* at 77.
[122] The Board takes official notice of Puget Sound Partnership, 2012/2013 Action Agenda for Puget Sound Strategies and Actions to Recover Puget Sound to Health (August 28, 2012), as Supplemental Exhibit 1. http://www.psp.wa.gov/downloads/AA2011/083012_final/Action%20Agenda%20Book%202_Aug%2029%202012.pdf
[123] *Id.* at 28.

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> fragmented, and the ecosystem processes (e.g., water quality, flow, and retention) that form and sustain these habitats have been degraded and disrupted."[124]

Specific to the GMA, the Partnership proposes these goals:

> For avoiding development of ecologically important areas: Basin-wide, by 2020, loss of vegetation cover on indicator land base over a 5-year period does not exceed 0.15 percent of the 2011 baseline land area. For directing growth to urban growth areas: By 2020, the proportion of basin-wide growth occurring within Urban Growth Areas is at least 86.5 percent (equivalent to all counties exceeding goal by 3 percent) and all counties show an increase over their 2000-2010 percentage.[125]

The Action Agenda has specific activities for Whatcom County developed in concert with local governments, businesses, and residents. Some recommendations from the Agenda are:[126]

- Whatcom County has 15 identified "regional pressures" ranging from agriculture, wastewater discharges, run-off from the built environment to transportation.[127]
- Limit forest and farm conversions to other uses such as residential, commercial, or industrial uses.[128]
- Implement onsite sewage system operation and maintenance programs including continued inspections of on-site septic systems (OSS), community trainings, and low interest loan programs.[129]

Thus, current science-based studies conclude that most water resource degradation in the Puget Sound region and Whatcom County in particular can be attributed to land use and land development practices.[130] The GMA requires rural character to be protected by measures governing development that provide patterns of land use consistent with water resource protection. From the evidence in the record about the extent and persistence of

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[124] *Id.* at 37.
[125] *Id.* at 38.
[126] *Id.* at 343-356.
[127] *Id.* at 346.
[128] *Id.* at 347.
[129] *Id.* at 348.
[130] E.g., Supplemental Exhibit 2 at 77: "Most water quality degradation can be attributed to land use development practices."

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water pollution and lack of water availability in Whatcom County, and the need to integrate land use and water resource planning, the Board finds the County has not employed effective land use planning that contains measures to protect water supply and water quality as required by the GMA.

Board Analysis of County's Comprehensive Plan Amendments

The Board's FDO on Remand concluded the rural element of Whatcom County's Plan was not in compliance with the RCW 36.70A.070(5)(c)(iv) requirement to adopt measures protecting surface and groundwater resources. In response, the County adopted Ordinance No. 2012-023, amending the Rural Element Policy 2DD-2.C incorporating water resource provisions. Amendments to Policy 2DD-2.C adopt by reference various pre-existing County regulations.

The Board has reviewed the County's amendments to Policy 2DD-2.C in light of the GMA requirement for measures governing rural development that protect water quality and quantity. The Board concludes the existing development regulations adopted by reference in Policy 2DD-2.C, though generally representing important efforts, fail to limit rural development so as to protect rural surface and groundwater quantity or quality and do not meet the GMA mandates of RCW 36.70A.020(10), .030(15), .070(1), and (5)(c)(iv).

The proliferation of evidence in the record of continued water quality degradation resulting from land use and development activities underscores the need for protective measures for water resources. In 2011, the Washington Supreme Court ruled "the statutory language of the GMA is clear that protective measures *shall* be included in the [Comprehensive] Plan."[131] The GMA requires measures to protect the Rural Character of the area by protecting critical areas and surface water and groundwater resources.[132]

In requiring these measures, the Legislature intended to prevent harm to the public interest resulting from "uncoordinated and unplanned growth," which the Legislature found

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[131] *Kittitas County v. Eastern Washington Growth Management Hearings Board,* 172 Wn.2d 144, at 164 (2011).
[132] RCW 36.70A.070(5)(c)(iv).

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to "pose a threat to the environment, sustainable economic development, and the health safety, and high quality of life enjoyed by residents of this state."[133] According to the *Kittitas* Court, the Rural Element must use directive language that ensures protection of rural areas.[134] The measures must "limit development so it is consistent with rural character and not characterized by urban growth."[135]

Whatcom County's amendments to the Rural Lands chapter in Ordinance No. 2012-032 adopt by reference the County's existing regulatory provisions as listed below, and the Board makes the following findings about each:[136]

> **Policy 2DD-2.C.1**. Protect the functions and values of critical areas (geologically hazardous areas, frequently flooded areas, critical aquifer recharge areas, wetlands, and habitat conservation areas) and the ecological processes that sustain them, through WCC 16.16 Critical Areas provisions, adopted herein by reference.

Although Policy 2DD-2.C.1 will be implemented through development regulation WCC 16.16, protections in this section of the code are limited to critical areas and will not apply throughout the Rural Area. This policy and its associated code comply with GMA protections for critical areas, as required in RCW 36.70A.060, but not for the totality of RCW 36.70A.070(5)(c)(iv) which broadly requires protection for surface and groundwater resources throughout the rural area. This rural element policy does not limit development so as to protect water resources.

> **Policy 2DD-2.C.2.** Minimize the adverse effects of discharges from on-site sewage systems on ground and surface waters through WCC 24.05, adopted herein by reference.

This policy is implemented through WCC 24.05 with the purpose of protecting public health by minimizing public exposure to sewage.[137] The code allows private homeowners to

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[133] RCW 36.70A.010.
[134] *Kittitas County* at 163.
[135] *Id.* at 167.
[136] County's Brief, Ex. R-075 at 11 and 12.

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inspect their own septic systems if they meet certain requirements.[138] The County allows homeowners to inspect their own onsite septic tanks in Rural Areas, but the County requires professional inspections of onsite septic systems only in the Lake Whatcom and Drayton Harbor watersheds.[139] Petitioners argue the self-inspection program (as shown in Exhibit R-128) "reveals that of the few homeowners who "self-inspect", only 7.8% reported failure...compared to the 40.4% of professional inspections" which report failure.[140] Petitioners point out the self-inspection program for septic tanks in the rural area does not have the same compliance rates as the County documents from professionally inspected tanks in the Lake Whatcom and Drayton Harbor watersheds.[141]

The Board found that the *2010 WRIA 1 State of the Watershed Report* lists malfunctioning on-site septic systems as a potential cause of water quality failures in three of the County's seven watershed areas.[142] The Board finds other studies shown above document water quality contamination from faulty septic systems. The Board is led to conclude the current development regulation does not protect water quality in Whatcom County's rural areas. Policy 2DD-2.C.2 incorporating WCC 24.05 is not a measure limiting

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[137] WCC 24.05.010 A. The purpose of this chapter is to protect the public health by minimizing: 1. The potential for public exposure to sewage from on-site sewage systems; and 2. Adverse effects to public health that discharges from on-site sewage systems may have on ground and surface waters. B. This chapter regulates the location, design, installation, operation, maintenance, and monitoring of on-site sewage systems to: 1. Achieve long-term sewage treatment and effluent dispersal; and 2. Limit the discharge of contaminants to waters of the state.

[138] WCC 24.05.160 B. OSS owners may perform their own OSS evaluation in accordance with subsection C of this section except for the following: 1. OSS technologies that are listed as proprietary on the Washington State DOH list of registered on-site treatment and distribution products where the contract with the private proprietary manufacturer prohibits homeowner evaluations; 2. Community drainfields; 3. Nonconforming replacement systems that do not meet vertical and horizontal separation installed as a result of a system failure; 4. OSS serving food service establishments. C. OSS owners who choose to perform their own evaluations shall complete O&M homeowner training as approved by the health officer. Upon completion of training, OSS owners may perform their own evaluations until property transfer. In cases of hardship, the health officer may approve the homeowner's selection of a designee who has completed the appropriate class to perform the evaluation. If OSS owners are discovered to be noncompliant with this section, the health officer may proceed with legal remedies in accordance with Chapter 24.07 WCC.

[139] Petitioners' Brief at 6.

[140] Petitioners' Reply Brief at 4.

[141] *Ex. R-128* at 2, Memorandum at p. 145, Health Department memorandum (June 28, 2012) proposing increased enforcement, particularly in the Lower Nooksack basin.

[142] *Ex. C-683-A.14*, Table 3 "malfunctioning onsite septic systems".

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development to protect water resources as required in RCW 36.70A.070(5)(c)(iv). The Board does not find that this rural element policy is a measure that limits development to protect water resources; thus, this policy does not meet the requirements of RCW 36.70A.070(5)(c)(iv).

> **Policy 2DD-2.C.3**. Preserve and protect unique and important water resources through development standards in WCC 20.71 Water Resource Protection Overlay District, adopted herein by reference.

Policy 2DD-2.C.3 references WCC 20.71.021, the water resource protection overlay district, but it only applies to a portion of the county's rural area: Lake Whatcom, Lake Samish, and Lake Padden Watersheds.[143] The Board's January 4, 2013 Compliance Order addressed Lake Whatcom water quality issues. The Board finds that Policy 2DD-2.C.3 does create measures to limit development to protect water resources in these three lake areas. However, no measures exist to limit development to protect water resources in the remaining portions of the County's Rural Area. Thus, the County does not have measures to satisfy the requirements in RCW 36.70A.070(5)(c)(iv).

> **Policy 2DD-2.C.4**. Protect surface and ground water resources through stormwater management standards established in the County's Development Standards per WCC 20.80.630 and 12.08.035 and referenced in the following Zoning Code provisions, adopted herein by reference.

As with the Water Resource Overlay Areas, County Policy 2DD-2.C.4 references development standards at WCC 20.80.630 which only apply to limited areas as defined in Ecology's NPDES Phase II permit boundaries; that is, only urban areas in Ferndale and Bellingham. Only those areas must use the most current and more stringent version of

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[143] WCC 20.71.010 Purpose. The Water Resource Protection Overlay District is an overlay zone that is intended to impose additional controls to preserve and protect unique and important water resources within Whatcom County. This district is designed to protect the long-term viability of the Lake Whatcom, Lake Samish and Lake Padden watersheds while creating a regulatory framework to address the needs of these watersheds that are not otherwise provided for in the underlying zone districts.

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Ecology's stormwater manual.[144] Ecology's stormwater manual only applies to urbanized areas and not to the remainder of the County's Rural Area. The Board finds Policy 2DD-2.C.4, which adopts by reference more restrictive stormwater management regulations, does not apply to the County's entire Rural Area and thus, the County's Stormwater Manual does not provide measures to protect groundwater throughout the County's Rural Area.

In addition, references to Title 20 Zoning in Policy 2DD-2.C.4 inadequately address stormwater because, even though it restricts *lot coverage* to 20%,[145] the definition of "lot coverage" is restricted to *structures and combination of structures* and does not include all impervious surfaces such as driveways, parking lots, or other covered areas which create stormwater runoff.[146]

> **Policy 2DD-2.C.5**. Assure that subdivisions meet requirements for critical areas, shoreline management, and stormwater management through the standards in the following Whatcom County Land Division regulations, adopted herein by reference:
>
> a. WCC 21.04.034 Application Procedures, Short Subdivisions
> b. WCC 21.05.037 Hearing Examiner Notice Hearing and Decision, Preliminary Long Subdivisions
>
> **Policy 2DD-2.C.6**. Limit water withdrawals resulting from land division through the standards in the following Whatcom County Land Division regulations, adopted herein by reference:

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[144] WCC 20.80.630 (3) Unless other county stormwater management provisions are more restrictive, all development activity ***within NPDES Phase II area boundaries***, as delineated at the time that the county determines that the development application is complete, ***shall comply with the most current editions of***: The Washington State Department of Ecology Stormwater Management Manual for Western Washington; and Appendix 1, Minimum Technical Requirements for New Development and Redevelopment, of the Western Washington Phase II Municipal Stormwater Permit; and Appendix 7, "Determining Construction Site Sediment Damage Potential," of the Western Washington Phase II Municipal Stormwater Permit. NOTE: **1.3. Whatcom County Regulated Area** Regulated areas within Whatcom County can be found in ***APPENDIX A***: Map of the Whatcom County NPDES Phase II Regulated Area on page 22.

[145] Each title references the same language: "All development activity within Whatcom County shall be subject to the stormwater management provisions of the Whatcom County Development Standards unless specifically exempted. No project permit shall be issued prior to meeting submittal requirements relating to stormwater management in the appropriate chapters of the Whatcom County Development Standards."

[146] WCC 20.32.450 Lot coverage. No structure or combination of structures shall occupy or cover more than 5,000 square feet or 20 percent, whichever is greater, of the total area, not to exceed 25,000 square feet. Buildings used for livestock or agricultural products shall be exempt from this lot coverage requirement.

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a. WCC 21.04.090 Water supply, Short Subdivisions
b. WCC 21.05.080 Water supply, Preliminary Long Subdivisions.

Policy 2DD-2.C.5 and 2.C.6 address subdivision applications, 2.C.5 with respect to stormwater and 2.C.6 with respect to water availability. The County points out, and the Board agrees, that its subdivision regulations do not allow the "daisy-chaining" of plat applications that was the specific target of the Supreme Court's finding of noncompliance in the *Kittitas* case.[147] However, the water supply provisions referenced in 2DD-2.C.6 (WCC 21.04.090 and WCC 21.05.080) do not require the County to make a determination of the legal availability of groundwater in a basin where instream flows are not being met.

In *Postema v. Pollution Control Hearings Board*,[148] the Supreme Court made clear that where Ecology has administratively by adoption of rules closed a surface water body as in much of Whatcom County, and an applicant intends to rely on a new withdrawal from a hydraulically connected groundwater body, new water is no longer legally available for appropriation and the application must be denied. Likewise where Ecology has set minimum instream flow by rule, as in Nooksack WRIA 1, subsequent groundwater withdrawals may not contribute to the impairment of the flows.[149]

Whatcom County's regulations only allow approval of a subdivision or building permit that relies on a private well when the proposed well site "does not fall within the boundaries of an area where DOE has determined by rule that water for development does not exist."[150] This restriction falls short of the *Postema* standard, as it does not protect instream flows from impairment by groundwater withdrawals.

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[147] County's Brief at 4, citing WCC 21.01.040.
[148] 142 Wn.2d 68, 90, 95, 11 P.3d 726 (2000).
[149] 142 Wn.2d at 81, 93. While a ground water withdrawal must be denied or otherwise not allowed if the groundwater is in continuity with a "closed" surface water, a ground water withdrawal in continuity with a surface water that has minimum instream flows must be denied or otherwise not allowed if other pertinent factors show that the continuity would cause impairment, such as number of days the instream flows are not met and whether it is upstream or downstream from or higher or lower than the surface water flow or level.
[150] WCC 24.11.090(B)(3); WCC 24.11.160(D)(3); WCC 24.11.170(E)(4).

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This Board has previously held that exemption for private wells does not exempt the County from complying with the GMA's mandate to protect critical aquifers.[151] Similarly, the exemption does not exempt Whatcom County from complying with the GMA rural element requirements. The GMA mandates comprehensive plan measures to protect rural character, defined as "patterns of land use and development ... consistent with the protection of natural surface water flows."[152] Policy 2DD-2.C.6 does not govern development in a way that protects surface water flows and thus fails to meet the requirements of RCW 36.70A.070(5)(c)(iv).

> **Policy 2DD-2.D.7.** Regulate groundwater withdrawals by requiring purveyors of public water systems and private water system applicants to comply with Washington State Department of Ecology ground water requirements per WCC 24.11.050, adopted herein by reference.

This policy and the referenced regulation address only water withdrawals by "water system" applicants, leaving a large ambiguity for a building permit applicant seeking to rely on an exempt well. The Board notes the water withdrawals allowed under Policy 2DD-2.C.6 and 2.C.7 adopt by reference three existing code sections all of which allow use of exempt wells except "where DOE has determined by rule that water for development does not exist."[153] However, this is not the standard to determining legal availability of water. The Board finds the record contains a letter provided by Ecology explaining the effect of closed basins and instream flows on rural residential development.[154] If Ecology has closed a

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[151] In *Olympic Environmental Council v. Jefferson County*, Case No. 01-2-0015, Final Decision and Order (January 10, 2002) at 14, the Western Board ruled the County must protect its groundwater from salt-water intrusion caused by the proliferation of exempt wells. "We are not persuaded by the County's argument that it has no authority to impose some form of water conservation measures, limiting the number of new wells allowed or other measures to reduce the withdrawal of groundwater from individual wells if that withdrawal would disrupt the seawater/freshwater balance and lead to greater seawater intrusion. The exemption of RCW 90.44.050 does not limit a local jurisdiction from complying with its mandate for protection of groundwater quality and quantity under the GMA."

[152] RCW 36.70A.030(15)(g).

[153] *See* WCC 21.04.090, WCC 21.05.080, WCC 24.11.050.

[154] *Ex. C-678*, Department of Ecology, Maia Bellon letter to Clay White, Snohomish County Planning and Development services (December 19, 2011) at 7. While Snohomish County facts differ, the applicable legal principles are the same.

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stream to additional withdrawals, it is unlawful to initiate a permit-exempt groundwater withdrawal that would impact the stream. Where the proposed groundwater withdrawal is located within a basin closed to new surface water appropriations, or where Ecology has set instream flows that are not consistently met, there is a presumption that no additional water is legally available. Under RCW 19.27.097 or RCW 58.17.110, it is the applicant's burden to "provide evidence" that water is available for a new building or subdivision.[155] Thus, according to Ecology, the County must deny a permit for a new building or subdivision unless the applicant can demonstrate factually that a proposed new withdrawal from a groundwater body hydraulically connected to an impaired surface water body will not cause further adverse impact on flows.[156] The Board notes Whatcom County's regulations allow mitigations, purchase or transfer of water rights, and other appropriate strategies, but ultimately, a building permit for a private single-residential well does not require the applicant to demonstrate that groundwater withdrawal will not impair surface flows.[157]

The Board finds Policy 2DD-2.C.7 fails to limit rural development to protect ground or surface waters with respect to individual permit-exempt wells as required by RCW 36.70A.070(5)(c)(iv).

> **Policy 2DD-2.C.8.** Limit phosphorus entering Lake Whatcom and Lake Samish due to the application of commercial fertilizers to residential lawns and public properties through WCC 16.32, adopted herein by reference.

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[155] RCW 19.27.097 provides that a building permit applicant must provide evidence of an adequate water supply which "may be in the form of a water right permit from the department of ecology, a letter from an approved water purveyor stating the ability to provide water, or another form sufficient to verify the existence of an adequate water supply." When a building permit applicant indicates that their water supply will be obtained through a permit-exempt well, because they cannot provide a water right permit or a letter from a purveyor as evidence, the County must require the applicant to provide evidence of the legal availability of water in another form or deny the application, according to Ecology. *Ex. C-678.*

[156] The Board notes it has no jurisdiction over the issuance of building permits but only over development regulations. Pursuant to RCW 36.70A.320(3) the Board is required to consider the guidelines adopted by the Department of Commerce, codified at Chapter 365-196 WAC, when it decides whether a jurisdiction's actions comply with the GMA. These guidelines, at WAC 365-196-825, provide: "Each applicant for a building permit of a building needing potable water shall provide evidence of an adequate water supply for the intended use of the building. Local regulations should be designed to produce enough data to make such a determination, addressing both water quality and water quantity issues."

[157] *Ex. R-152.*

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Policy 2DD-2.C.9. Protect vital drinking water, sensitive habitats, and recreational resources within the Department of Ecology's designated Western Washington Phase II Municipal Stormwater Permit area and the Lake Whatcom watershed by prohibiting illicit discharges to the county's stormwater collection system through WCC 16.36 Illicit Discharge Detection and Elimination Program, adopted herein by reference.

Policies 2DD-2.C.8 and 2.C.9 place limits on phosphorus discharges or illicit discharges to stormwater only in Lake Whatcom or Lake Padden watersheds or the cities of Bellingham and Ferndale; neither restriction applies to the entire Rural Area. These land use policies and associated development regulations are clearly valuable. However, they do not limit rural development to protect water quality throughout the rural area. Thus, they do not constitute measures to protect the Rural Area as required by limiting development activities to protect water resources and are not in compliance with RCW 36.70A.070(5)(c)(iv).

In sum, the County is left without Rural Element measures to protect rural character by ensuring land use and development patterns are consistent with protection of surface water and groundwater resources throughout its Rural Area. This is especially critical given the water supply limitations and water quality impairment documented in this case and the intensity of rural development allowed under the County's plan. The record shows that the County has many options for adopting measures to reverse water resource degradation in its Rural Area through land use controls. As is discussed by state agency reports and the County's own Comprehensive Plan, the County may limit growth in areas where water availability is limited or water quality is jeopardized by stormwater runoff. It may reduce densities or intensities of uses, limit impervious surfaces to maximize stream recharge, impose low impact development standards throughout the Rural Area, require water conservation and reuse, or develop mitigation options. The County may consider measures based on the strategies proposed in the Puget Sound Action Agenda, the WRIA 1 process, WDFW's Land Use Planning Guide, Ecology's TMDL or instream-flow assessments, or other ongoing efforts. It may direct growth to urban rather than rural areas.

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In essence, the County's Rural Element, as amended by Ordinance No. 2012-032, in Policy 2DD-2.C.2, .3, .5, .6, .7, .8 and .9 does not include the measures needed to protect the rural character in the County's Rural Area by ensuring patterns of land use and development consistent with water resource protection. These policies fail to protect rural character because they either apply to limited areas of the County and do not apply to the entire Rural Area, or are limited to subdivisions of land rather than all rural development. The Board finds and concludes the County does not have measures as required in RCW 36.70A.070(5)(c)(iv) to protect surface water and groundwater resources.

Conclusion on Issue 1

The Board finds the Rural Element amendments adopted by Whatcom County in Ordinance No. 2012-032 and Policy 2DD-2.C do not constitute measures to protect rural character by protecting surface water and groundwater resources. The Petitioners have met their burden of demonstrating the County has failed to comply with RCW 36.70A.070(5)(c). The Board is left with a firm and definite conviction that a mistake has been made. Ordinance No. 2012-032 is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act.

Issue 2: Comprehensive Plan inconsistent with the Transportation Plan

Detailed Statement of Issue 2 from Petition for Review:

> Do the "Rural" designation descriptor, future land use map, and related policies and development regulations, including the amendment to Chapter 1, the "Rural Character and Lifestyle" narrative in the Comprehensive Plan, Policies 2DD-1, 2DD-2, 2GG-2, 2GG-3, 2GG-7, the "Rural Communities" narrative in the Comprehensive Plan, Policy 2JJ-6, the "Rural Neighborhoods" narrative in the Comprehensive Plan, Goal 2MM and all policies thereunder (*i.e.*, all Policies 2MM), WCC Chapters 20.32. 20.36, 20.60, 20.61, 20.63, 20.64, 20.67 and 20.69, and WCC 20.80.100 violate RCW 36.70A.030(17), RCW 36.70A.040(3), RCW 36.70A.130(1)(d), RCW 36.70A.070, RCW 36.70A.070(5), RCW 36.70A.020(1), (2), (3) and (12), and case law because the enactments are inconsistent with and fail to carry out the County's Transportation Element?

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Applicable Law

RCW 36.70A.020(1), (2), (3) and (12)

(1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.

(2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

(3) Transportation. Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.

. . .

(12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

RCW 36.70A.030(17)

"Rural governmental services" or "rural services" include those public services and public facilities historically and typically delivered at an intensity usually found in rural areas, and may include domestic water systems, fire and police protection services, transportation and public transit services, and other public utilities associated with rural development and normally not associated with urban areas. Rural services do not include storm or sanitary sewers, except as otherwise authorized by RCW 36.70A.110(4).

RCW 36.70A.040(3)

Any county or city that is initially required to conform with all of the requirements of this chapter under subsection (1) of this section shall take actions under this chapter as follows: (a) The county legislative authority shall adopt a countywide planning policy under RCW 36.70A.210; (b) the county and each city located within the county shall designate critical areas, agricultural lands, forest lands, and mineral resource lands, and adopt development regulations conserving these designated agricultural lands, forest lands, and mineral resource lands and protecting these designated critical areas, under RCW 36.70A.170 and 36.70A.060; (c) the county shall designate and take other actions related to urban growth areas under RCW 36.70A.110; (d) if the county has a population of fifty thousand or more, the county and each city located within the county shall adopt a comprehensive plan under this chapter and development

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regulations that are consistent with and implement the comprehensive plan on or before July 1, 1994, and if the county has a population of less than fifty thousand, the county and each city located within the county shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan by January 1, 1995, but if the governor makes written findings that a county with a population of less than fifty thousand or a city located within such a county is not making reasonable progress toward adopting a comprehensive plan and development regulations the governor may reduce this deadline for such actions to be taken by no more than one hundred eighty days. Any county or city subject to this subsection may obtain an additional six months before it is required to have adopted its development regulations by submitting a letter notifying the *department of community, trade, and economic development of its need prior to the deadline for adopting both a comprehensive plan and development regulations.

RCW 36.70A.130(1)(d)
Any amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.

RCW 36.70A.070 and .070(5)
The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map. A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140.

. . .

(5) Rural element. Counties shall include a rural element including lands that are not designated for urban growth, agriculture, forest, or mineral resources. The following provisions shall apply to the rural element...
(6) A transportation element that implements, and is consistent with, the land use element.
(a) The transportation element shall include the following sub-elements:
(i) Land use assumptions used in estimating travel;
(ii) Estimated traffic impacts to state-owned transportation facilities resulting from land use assumptions to assist the department of transportation in monitoring the performance of state facilities, to plan

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improvements for the facilities, and to assess the impact of land-use decisions on state-owned transportation facilities;....

Positions of the Parties

Petitioners contend the County's Transportation Element conflicts with the Rural Element in the Comprehensive Plan. The conflict arises because in 2004 the County assumed rural population would increase by just over 11,000 residents; however, according to the actual 2010 Census data, rural population has increased by approximately 19,000 residents.[158] In addition, Petitioners say the County's Rural Element allows for "51,297 additional people in the Rural Area" instead of 11,000 residents as projected in the Transportation Element.[159] Petitioners argue this population discrepancy is different than the Board's finding in its Compliance Order which stated the County's annual review and adjustment of planned and actual population was GMA-compliant.[160] Petitioners' complaint, in this case, is that the Transportation Element is now inconsistent with the Rural Element because the latter already allows more residents than assumed in the Transportation Element and the County has not revised its Transportation Element to accommodate the actual population increases (as shown in the 2010 Census), nor to reconcile the population differences with the Rural Element. Petitioners point out the Board's January 4, 2013 Compliance Order did not apply to the Transportation Element, but only to the inconsistency between population projections in the Comprehensive Plan and capacity in the Development Regulations. Thus, inconsistency between the Rural and Transportation Elements remains to be resolved.

The County responds by stating Petitioners err in assuming the "transportation planning in the Comprehensive Plan must be based on population at full build-out of the

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[158] Petitioners' Prehearing Brief at 23.
[159] *Id.* at 24.
[160] Compliance Order at 29: "The Board finds the County, by adoption of Ordinance 2012-032, has taken important steps toward reducing the overcapacity of its rural lands in order to contain and control rural development. The County's amended Plan acknowledges the overcapacity and adopts a mechanism to reconcile inconsistencies between its CP and DR through an annual review process. Given the posture of this case, the Board does not find Policy 2DD-1 to be clearly erroneous."

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rural area" because the GMA does not require projections based on full build-out. The County does not need to revise its Transportation population projections until 2016.[161] Furthermore, Petitioners compare the County's Transportation population projections from 2004 with the actual 2010 Census figures. Again, the County argues it is not obligated to amend its population figures until 2016 during the next Comprehensive Plan update and does not need to update its current plan with 2010 Census information. Finally, the County critiques the Petitioners' use of Appendix G because this appendix was a model used to project transportation needs and possible impact fees from future development. This model was background information for a policy discussion about transportation impact fees, not a projection of all transportation needs in the Transportation Element.[162] Therefore, Petitioners' claim of a discrepancy between the Transportation and Rural elements is unfounded, according to the County. The County states it has reduced density in the rural area, will monitor its rural population growth, and will adjust its comprehensive plan as needed when it updates its plan.[163]

Board Discussion and Analysis

Petitioners' prehearing and reply briefs do not include clear legal arguments about GMA violations. Instead, their argument hinges on comparing actual population counts from the 2010 Census with the County's projected population from 2004 and potential population growth for the Rural Area. Petitioners reference RCW 36.70A.020(3) which encourages efficient multimodal transportation systems and states that counties should ensure that public facilities and services "shall be adequate to serve the development at the time the development is available for occupancy and use."[164] (Emphasis added.)

RCW 36.70A.070 (preamble) provides that the Comprehensive Plan must be an internally consistent document and all elements shall be consistent with the future land use

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[161] County's Brief at 22-23.
[162] *Id.* at 23.
[163] *Id.* at 25.
[164] RCW 36.70A.020(3) and (12).

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map. "Consistency" means that "differing parts of the comprehensive plan must fit together so that no one feature precludes the achievement of any other."[165]

The County's current Transportation Plan Goal 6D states it will support land use planning including land use types and densities reducing reliance on single occupancy vehicles.[166] The County's development regulations require concurrency between transportation facilities and development in Whatcom County Code Ch. 20.78.[167] Regarding population projections, the County's Transportation Plan Action Step #8 states that when the County updates its Comprehensive Plan, it will "ensure affected elements, transportation policies, and programs are also updated."[168] The County has not yet started its 2016 update, but the County Rural Element Policy 2DD-1 states it will review population increases and adjust its Plan accordingly.[169]

Petitioners did not point to any policy language in the recent Rural Element amendments that would preclude the achievement of policies in the pre-existing Transportation Element. Petitioners have failed to satisfy their burden to prove an inconsistency between the Rural Element, as amended in Ordinance No. 2012-032, and the Transportation Element of the Comprehensive Plan.

Conclusion on Issue 2

The Board finds and concludes Petitioners failed to carry their burden of demonstrating the County's Transportation Element and Rural Element of its Comprehensive Plan create an internal inconsistency which violates RCW 36.70A.070 (preamble) or RCW 36.70A.130.

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[165] WAC 365-196-500(1).
[166] *Ex. CP2* at 6-8.
[167] WCC 20.78.010 Purpose. The purpose of this chapter is to ensure that adequate transportation facilities are available or provided concurrent with development, in accordance with the Growth Management Act (RCW 36.70A.070) and consistent with WAC 365-195-510 and 365-195835. No development permit shall be issued except in accordance with this chapter. (Ord. 2009-047 § 1 (Ex. A), 2009).
[168] *Ex. CP2* at 6-17.
[169] Compliance Order at 29.

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VII. REQUEST FOR FINDING OF INVALIDITY

This Board has previously held that it will declare invalid only the most egregious noncompliant provisions which threaten the local government's future ability to achieve compliance with the Act.[170] Although the Board finds areas of noncompliance with the GMA, Petitioners have not met the standard for a declaration of invalidity.

VIII. ORDER

Based on the foregoing, the Board determines that Whatcom County's adoption of Ordinance No. 2012-032 fails to comply with RCW 36.70A.070(5).

Petitioners failed to meet their burden of demonstrating the County's Rural Element amendments, adopted in Ordinance No. 2012-032, are inconsistent with the Transportation Element in violation of RCW 36.70A.030(17), RCW 36.70A.040(3), RCW 36.70A.130(1)(d), RCW 36.70A.070, RCW 36.70A.070(5), or RCW 36.70A.020(1), (2), (3) and (12).

The Ordinance is remanded to the County to take the necessary action to achieve compliance as set forth is this Order within 180 days. The following schedule shall apply:

Item	Date Due
Compliance Due on identified areas of noncompliance	December 4, 2013
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	December 18, 2013
Objections to a Finding of Compliance	January 2, 2014
Response to Objections	January 13, 2014
Compliance Hearing Location to be determined	**January 21, 2014** **9:00 a.m.**

SO ORDERED this 7th day of June, 2013.

Nina Carter

Nina Carter, Board Member

[170] *Abenroth v. Skagit County*, WWGMHB Case No. 97-2-0060c, Final Decision and Order (July 22, 1998).

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Raymond L. Paolella, Board Member

Margaret Pageler, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[171]

[171] Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.
A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

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BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION

Case No. 12-2-0013
Eric Hirst, Laura Leigh Brakke, Wendy Harris, David Stalheim, and Futurewise
v. Whatcom County

DECLARATION OF SERVICE

I, LYNN TRUONG, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the Office Assistant for the Growth Management Hearings Board. On the date indicated below a copy of the FINAL DECISION AND ORDER in the above-entitled case was sent to the following through the United States postal mail service:

Jean O. Melious
Nossaman LLP
1925 Lake Crest Dr
Bellingham WA 98229

Tim Trohimovich
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Civil Deputy Prosecuting Attorney
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Tadas Kisielius
Jay P. Derr
Van Ness Feldman GordonDerr
719 2nd Ave Ste 1150
Seattle WA 98104

DATED this 7TH day of June, 2013.

Lynn Truong, Office Assistant

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Appendix C:

Growth Management Hearings Board (Board) Second Order on Compliance in *Hirst v. Whatcom County*, No. 12-2-0013, filed on filed on April 15, 2014

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS, DAVID STALHEIM, AND FUTUREWISE,

Petitioners,

v.

WHATCOM COUNTY,

Respondent.

Case No. 12-2-0013

SECOND ORDER ON COMPLIANCE

THIS MATTER came before the Board at a compliance hearing held April 1, 2014, following submittal of Whatcom County's (County) Compliance Report or Request for Stay of Compliance Schedule, filed February 28, 2014. The Compliance Report described the County's response to the Board's June 7, 2013, Final Decision and Order. Petitioners Hirst, et al. and Futurewise filed an Objection to a Finding of Compliance on March 10, 2014. On April 1, 2014, a Compliance Hearing was held telephonically and was attended by Board members Nina Carter, Raymond Paolella, and Margaret Pageler with Ms. Carter presiding. Petitioners Hirst, et al. and Futurewise were represented by Jean O. Melious and Tim Trohimovich. Whatcom County appeared through its attorney Karen Frakes.

I. SYNOPSIS OF DECISION

The Board found the County did not comply with the Growth Management Act. It found continuing non-compliance and imposed an extended compliance schedule in view of the complexity of the issues and the pendency of proceedings before the Court of Appeals. A Board letter of continuing non-compliance was sent to the Governor in accordance with RCW 36.70A.330(3).

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II. PROCEDURAL HISTORY

On June 7, 2013, the Board found Whatcom County's Ordinance 2012-032 did not comply with RCW 36.70A.070(5) because the County failed to include measures governing rural development in the Rural Element of its Comprehensive Plan protecting surface and groundwater quality, water availability, and water for fish and wildlife.[1] This Order established a compliance deadline of December 4, 2013, and set a compliance hearing for January 21, 2014. In November and December 2013, the County and Petitioners submitted motions requesting a compliance date extension, supplementation of the record, and a petition to impose invalidity. Following a December 18, 2013, Compliance Hearing, the Board found the County had not taken action to comply with the Growth Management Act, and thus, found the County in continuing non-compliance and extended the compliance schedule.[2] The Board also denied Petitioners' request for invalidity because the Board cannot impose invalidity on **pre-existing** regulations not challenged within 60 days of original adoption.[3]

III. BURDEN OF PROOF

After the Board has entered a finding of noncompliance, the local jurisdiction is given a period of time to adopt legislation to achieve compliance.[4] After the period for compliance has expired, the Board is required to hold a hearing to determine whether the local jurisdiction has achieved compliance.[5] For purposes of Board review of the comprehensive

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[1] *Hirst v. Whatcom County*, Case No. 12-2-0013, Final Decision and Order (FDO) (June 7, 2013) at 12 and 37- 42.
[2] *Hirst v. Whatcom County*, Case No. 12-2-0013, Compliance Order (January 10, 2014) at 2-8 and 9.
[3] GMHB Case No. 12-2-0013 Compliance Order (January 10, 2014) at 5: "From the evidence in the record, the Board found and concluded the County's Comprehensive Plan did not comply with RCW 36.70A.070(5) because the County failed to include measures in the rural element of its comprehensive plan protecting surface and groundwater quality, water availability, and water for fish and wildlife. The County must comply by strengthening its plan and development regulations to protect water quality, the supply of water resources, and conserving fish and wildlife habitat; **but the Board cannot impose invalidity on pre-existing development regulations. The Board's authority to invalidate adopted plans and regulations is strictly limited by statute (RCW 36.70A.302.)** Previously enacted regulations not challenged within sixty days are not within the Board's reach **but, if they are deficient, they do not constitute the measures** required by RCW 36.70A.070 (5)(c)(iv)." (emphasis added)
[4] RCW 36.70A.300(3)(b).
[5] RCW 36.70A.330(1) and (2).

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plans and development regulations adopted by local governments in response to a non-compliance finding, the presumption of validity applies and the burden is on the challenger to establish that the new adoption is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of the GMA.[6]

In order to find the County's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made."[7] Within the framework of state goals and requirements, the Board must grant deference to local governments in how they plan for growth.[8] In sum, during compliance proceedings the burden remains on the Petitioner to overcome the presumption of validity and demonstrate that **any action** taken by the County is clearly erroneous in light of the goals and requirements of chapter 36.70A RCW (the Growth Management Act).[9] Where not clearly erroneous and thus within the framework of state goals and requirements, the planning choices of the local government must be granted deference.

IV. POSITIONS OF THE PARTIES

In the Board's FDO, it found the County's Rural Element, as amended by Ordinance No. 2012-032 and Policy 2DD-2.C, "does not include the measures needed to protect rural character in the County's Rural Area by ensuring patterns of land use and development consistent with water resource protection" as required by RCW 36.70A.070(5)(c)(iv). The County's policies incorporating existing regulations failed to protect rural character because the particular regulations either applied only to limited areas of the County and did not apply to the entire Rural Area or were limited to subdivisions of land rather than all rural development.[10]

In the County's Compliance Report and during the Compliance Hearing, the County clarified that it had appealed the Board's FDO to the Court of Appeals Division I. However,

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[6] RCW 36.70A.320(1), (2), and (3).
[7] *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).
[8] RCW 36.70A.3201.
[9] RCW 36.70A.320(2).
[10] GMHB Case No. 12-2-0013, Final Decision and Order (June 7, 2013) at 44, following discussion and analysis at 20-44.

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on January 28, 2014, the County adopted Ordinance 2014-002 amending various land use provisions in its Comprehensive Plan to cross-reference to existing Whatcom County Codes related to water resources. In its compliance report and at the compliance hearing, the County recognized that the Board might not find the County in compliance, and thus, requested a stay of the compliance proceedings or an extension of the compliance actions until the Court of Appeals issues a ruling.[11]

Petitioners objected to the County's compliance efforts by pointing out that Ordinance 2014-002 did not change the Comprehensive Plan or development regulations to meet the GMA's requirements in the June 7, 2013, FDO. Petitioners cite a memorandum from the County's Long Range Planning Manager which contains the sentence: "No changes to existing regulations are being proposed."[12] Rather than addressing the non-compliant provisions, the County made "five minor amendments to its rural element" which addressed a limited area of the County instead of the entire Rural Area.[13] Petitioners then elaborate on why each amendment in Ordinance 2014-002 does not meet the FDO requirements.[14] Petitioners objected to the County's request for a stay of the compliance proceedings because their request violated the Board's rules of practice in WAC 242-03-860. Petitioners requested the Board deny the County's stay request.[15] Finally, Petitioners requested the Board impose invalidity on specific County policies which if left in effect would substantially interfere with the fulfillment of the goals of GMA.[16]

V. BOARD DISCUSSION AND ANALYSIS

Relevant Authorities

RCW 36.70A.300 Final orders.

(3) In the final order, the board shall either:

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[11] County Compliance Report (February 28, 2014) at 1.
[12] Petitioner Futurewise's Concurrence with and Objections to Compliance Finding (March 10, 2014) at 1.
[13] *Id.* at 6-13.
[14] County Compliance Report (February 28, 2014), Ex. R-166.
[15] Petitioner Futurewise's Concurrence with and Objections to Compliance Finding (March 10, 2014) at 14.
[16] During the compliance hearing, Futurewise referred to Policies 2DD-2.C.8 & Policy 2DD-2.C.9 as those policies that should be declared invalid.

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(a) Find that the state agency, county, or city is in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption or amendment of shoreline master programs, or chapter 43.21C RCW as it relates to adoption of plans, development regulations, and amendments thereto, under RCW 36.70A.040 or chapter 90.58 RCW; or

(b) Find that the state agency, county, or city is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption or amendment of shoreline master programs, or chapter 43.21C RCW as it relates to adoption of plans, development regulations, and amendments thereto, under RCW 36.70A.040 or chapter 90.58 RCW, in which case the board shall remand the matter to the affected state agency, county, or city. The board shall specify a reasonable time not in excess of one hundred eighty days, or such longer period as determined by the board in cases of unusual scope or complexity, within which the state agency, county, or city shall comply with the requirements of this chapter. The board may require periodic reports to the board on the progress the jurisdiction is making towards compliance

RCW 36.70A.302 Growth management hearings board — Determination of invalidity — Vesting of development permits — Interim controls.

(1) The board may determine that part or all of a comprehensive plan or development regulations are invalid if the board:

(a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;

(b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and

(c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

WAC 242-03-860 Stay.

The presiding officer pursuant to RCW 34.05.467 or the board pursuant to RCW 34.05.550(1) may stay the effectiveness of a final order upon motion for stay filed within ten days of filing an appeal to a reviewing court.
A stay may be granted if the presiding officer or board finds:
(1) An appeal is pending in court, the outcome of which may render the case moot; and
(2) Delay in application of the board's order will not substantially harm the interest of other parties to the proceedings; and

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(3)(a) Delay in application of the board's order is not likely to result in actions that substantially interfere with the goals of the GMA, including the goals and policies of the Shoreline Management Act; or
(b) The parties have agreed to halt implementation of the noncompliant ordinance and undertake no irreversible actions regarding the subject matter of the case during the pendency of the stay; and
(4) Delay in application of the board's order furthers the orderly administration of justice.
The board's order granting a stay will contain appropriate findings and conditions. A board order denying stay is not subject to judicial review.

During the compliance hearing, the County stated that while it did take legislative action, it is not claiming it is or is not in compliance with GMA. The County appealed the Board's June 7, 2013, FDO to the Court of Appeals and seeks the Court's decision on the County's status regarding GMA compliance. Thus, the County requested a stay or an extended compliance schedule. Petitioners raised numerous objections to the County's legislative action, objected to the request to stay compliance proceedings, and asked the Board to impose invalidity on certain County policies.

The Board reviewed the County's legislative action and found it in continuing non-compliance for several reasons. Amendments in Ordinance 2014-002 did not change existing regulations found non-compliant by the Board's June 7, 2013, FDO. The existing regulations continue to apply water quality or quantity controls in **limited areas** of the County and do not apply measures to protect water quality or quantity throughout the Rural Area of the County. Further, the County made minor changes to Whatcom County policies such as changing "ground" water to water "rights" in reference to a Department of Ecology publication, referencing an existing development code requiring evidence of adequate water supply, and cross-referencing to a development code regarding land clearing activity in Water Resource Special Management Areas.[17] None of these actions meet the GMA requirement to impose measures governing land use and development to protect rural character by protecting water quality and quantity throughout Whatcom County's Rural Area. The Board finds the County **in continuing non-compliance.**

[17] County Compliance Report (February 28, 2014) Ex. R-165; Ex. A, Chapter 2 Land Use at 1-4.

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In regard to the County's request for a stay of compliance proceedings, the Board finds the County has not met the requirements of WAC 242-03-860. This rule requires parties to file a request for stay within ten days of filing an appeal with a reviewing court. The County did not meet this requirement. More importantly, the rule provides a stay may be granted only if delay will not substantially harm the interest of other parties to the proceeding, for example, when implementation of the non-compliant ordinance has been halted and no development will vest during pendency of the stay. These criteria are not met in this case. The Board **denies** the County's request for a stay.

Alternatively, the County requested an extended compliance schedule pursuant to RCW 36.70A.300(3)(b) which provides, in part:

> The board shall specify a reasonable time not in excess of one hundred eighty days, or such longer period as determined by the board in cases of unusual scope and complexity, within which the [county] shall comply with the requirements of this chapter.

The Board has previously determined that the issue of measures to protect water resources in rural areas is a matter of unusual scope and complexity.[18] Accordingly, the Board sets an extended schedule for the County to come into compliance.

In regard to the Petitioner's request for invalidity on specific policies, the Board has previously ruled on this request in its January 10, 2014, Compliance Order. In this order, the Board once again reiterates it cannot retroactively impose invalidity on regulations that were not timely appealed nor does imposing invalidity on Policies 2DD-2.C.8 and Policy 2DD-2.C.9 improve the compliance with GMA. Invalidity could in fact reduce protections as can be seen in Policy 2DD-2. C.9: "Determine adequacy of water supply for building permit applications proposing to use a well, spring, or surface water, per WCC 24.11.090, .100, .110, .120, .130, .160, and .170, adopted herein by reference."[19] The effect of imposing invalidity on this policy would be to eliminate the requirement to determine the adequacy of water supply. The Board **denies** the request to impose invalidity.

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[18] See, Certificate of Appealability (Skagit County Superior Court), Case No. 12-2-0013, August 15, 2013.
[19] *Id.* at Ex. 165; Ex. A at 3.

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VI. ORDER

Whatcom County is in **continuing non-compliance** with the Growth Management Act as found in the Board's June 7, 2013, FDO. This matter is remanded to the County to take action to comply with the Growth Management Act pursuant to the following schedule. The Board requires the County to file a status report in early October 2014 with compliance action to follow:

Compliance Status Report Due	October 1, 2014
Compliance Due	November 21, 2014
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	December 5, 2014
Objections to a Finding of Compliance	December 19, 2014
Response to Objections	December 29, 2014
Compliance Hearing – (Telephonic) Call 1-800-704-9804 and use pin 7579646#	**January 6, 2015** **10:00 a.m.**

DATED this 15th day of April, 2014.

Nina Carter, Board Member

Raymond L. Paolella, Board Member

Margaret Pageler, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[20]

[20] Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.
A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

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BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION

Case No. 12-2-0013

Eric Hirst, Laura Leigh Brakke, Wendy Harris, David Stalheim, and Futurewise

v. Whatcom County

DECLARATION OF SERVICE

I, LYNN TRUONG, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the Office Assistant for the Growth Management Hearings Board. On the date indicated below a copy of the SECOND ORDER ON COMPLIANCE in the above-entitled case was sent to the following through the United States postal mail service:

Jean O. Melious
Nossaman LLP
1925 Lake Crest Dr
Bellingham WA 98229

Tim Trohimovich
Futurewise
816 2nd Ave Ste 200
Seattle WA 98104-1535

Karen Frakes
Civil Deputy Prosecuting Attorney
311 Grand Ave Ste 201
Bellingham WA 98225

Tadas Kisielius
Jay P. Derr
Van Ness Feldman GordonDerr
719 2nd Ave Ste 1150
Seattle WA 98104

DATED this 15th day of April, 2014.

Lynn Truong, Office Assistant

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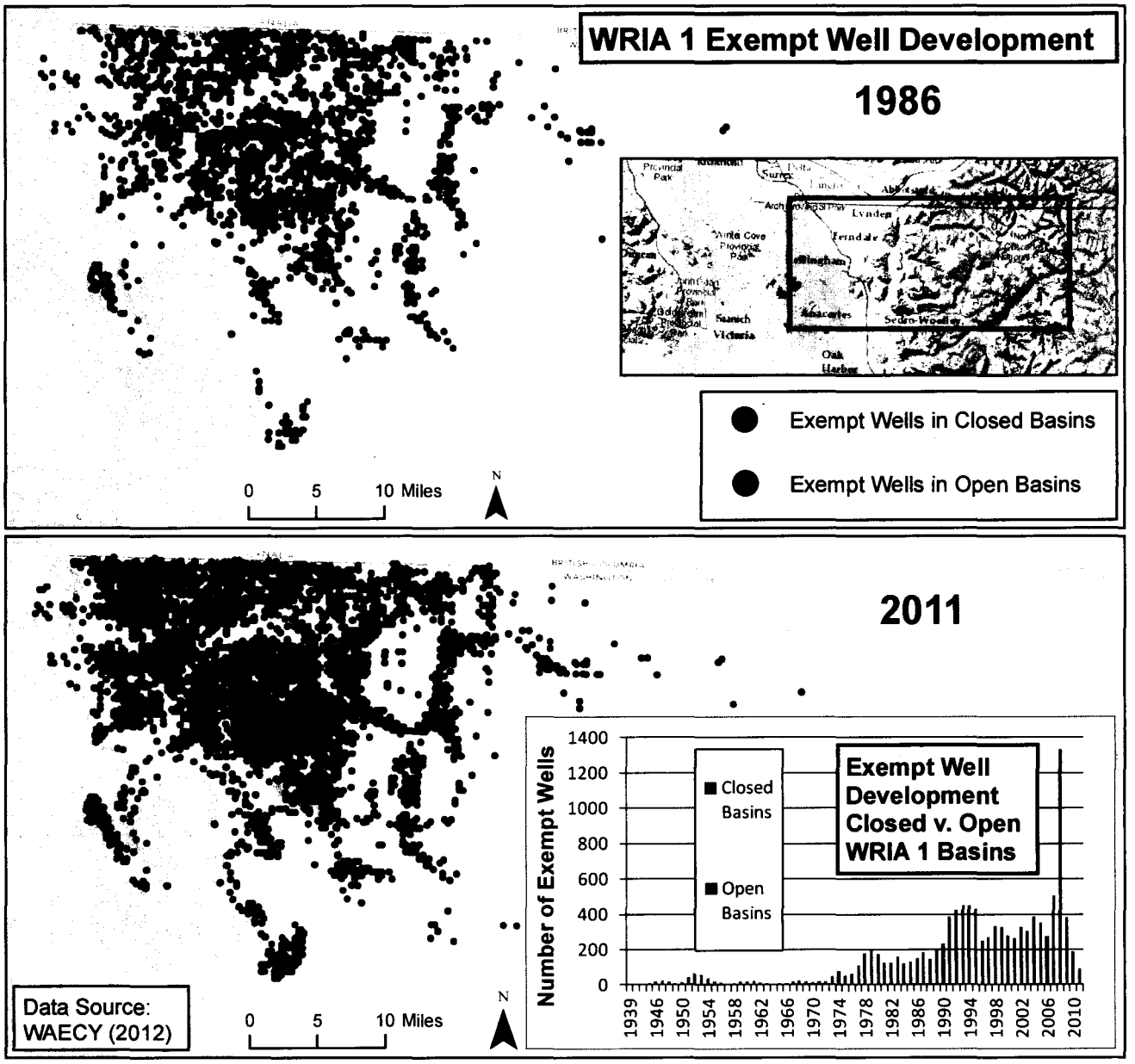
Appendix D:

AR 1263, R-153 Northwest Indian Fisheries Commission, *2012 State of Our Watersheds* at 80

Exempt Well Development Expands in WRIA 1 While Instream Flow Rules Continue to be Violated

Since 1986, exempt wells in WRIA 1 have increased 270% from an estimated 3,294 wells to an estimated 12,195 wells. Approximately 77%, of that increase has been in basins either seasonally closed or closed year-round to water withdrawal. From 1986 to 2009, flows in the Nooksack River failed to meet instream flow rule requirements 72% of the time during the July-September flow period (Essington et al. 2012).



According to the WRIA 1 Salmonid Recovery Plan, not meeting instream low flows in streams results in loss of habitat connectivity, reduced habitat volume, stranding of juvenile salmon, higher stream temperature, and general decrease in water quality. The WRIA 1 watershed instream flow rules were set in 1986 to "protect and preserve" instream resources from low flow exceedances. As displayed in the map and table above, permit exempt wells have continued to be developed in WRIA 1 since 1986. While legal under State water law, continued exempt well development in basins targeted for limited or no additional withdrawal under the State flow rule is in direct conflict with the guidance of the Salmonid Recovery Plan, which recommends reducing out of stream uses in sub-basins impacted by low instream flows.

Appendix E:

RCW 36.70A.020 and RCW 36.70A.070

RCW 36.70A.020
Planning goals.

The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations:

(1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.

(2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

(3) Transportation. Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.

(4) Housing. Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock.

(5) Economic development. Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployed and for disadvantaged persons, promote the retention and expansion of existing businesses and recruitment of new businesses, recognize regional differences impacting economic development opportunities, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities.

(6) Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

(7) Permits. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability.

(8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.

(9) Open space and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities.

(10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

(11) Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

(12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is

available for occupancy and use without decreasing current service levels below locally established minimum standards.

(13) Historic preservation. Identify and encourage the preservation of lands, sites, and structures, that have historical or archaeological significance.

[2002 c 154 § 1; 1990 1st ex.s. c 17 § 2.]

RCW 36.70A.070
Comprehensive plans — Mandatory elements.

The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map. A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140.

Each comprehensive plan shall include a plan, scheme, or design for each of the following:

(1) A land use element designating the proposed general distribution and general location and extent of the uses of land, where appropriate, for agriculture, timber production, housing, commerce, industry, recreation, open spaces, general aviation airports, public utilities, public facilities, and other land uses. The land use element shall include population densities, building intensities, and estimates of future population growth. The land use element shall provide for protection of the quality and quantity of groundwater used for public water supplies. Wherever possible, the land use element should consider utilizing urban planning approaches that promote physical activity. Where applicable, the land use element shall review drainage, flooding, and storm water run-off in the area and nearby jurisdictions and provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state, including Puget Sound or waters entering Puget Sound.

(2) A housing element ensuring the vitality and character of established residential neighborhoods that: (a) Includes an inventory and analysis of existing and projected housing needs that identifies the number of housing units necessary to manage projected growth; (b) includes a statement of goals, policies, objectives, and mandatory provisions for the preservation, improvement, and development of housing, including single-family residences; (c) identifies sufficient land for housing, including, but not limited to, government-assisted housing, housing for low-income families, manufactured housing, multifamily housing, and group homes and foster care facilities; and (d) makes adequate provisions for existing and projected needs of all economic segments of the community.

(3) A capital facilities plan element consisting of: (a) An inventory of existing capital facilities owned by public entities, showing the locations and capacities of the capital facilities; (b) a forecast of the future needs for such capital facilities; (c) the proposed locations and capacities of expanded or new capital facilities; (d) at least a six-year plan that will finance such capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes; and (e) a requirement to reassess the land use element if probable funding falls short of meeting existing needs and to ensure that the land use element, capital facilities plan element, and financing plan within the capital facilities plan element are coordinated and consistent. Park and recreation facilities shall be included in the capital facilities plan element.

(4) A utilities element consisting of the general location, proposed location, and capacity of all existing and proposed utilities, including, but not limited to, electrical lines, telecommunication lines, and natural gas lines.

(5) Rural element. Counties shall include a rural element including lands that are not designated for urban growth, agriculture, forest, or mineral resources. The following provisions shall apply to the rural element:

(a) Growth management act goals and local circumstances. Because circumstances vary from county to county, in establishing patterns of rural densities and uses, a county may consider local circumstances, but shall develop a written record explaining how the rural element harmonizes the

planning goals in RCW 36.70A.020 and meets the requirements of this chapter.

(b) Rural development. The rural element shall permit rural development, forestry, and agriculture in rural areas. The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. To achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character.

(c) Measures governing rural development. The rural element shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by:

(i) Containing or otherwise controlling rural development;

(ii) Assuring visual compatibility of rural development with the surrounding rural area;

(iii) Reducing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area;

(iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface water and groundwater resources; and

(v) Protecting against conflicts with the use of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170.

(d) Limited areas of more intensive rural development. Subject to the requirements of this subsection and except as otherwise specifically provided in this subsection (5)(d), the rural element may allow for limited areas of more intensive rural development, including necessary public facilities and public services to serve the limited area as follows:

(i) Rural development consisting of the infill, development, or redevelopment of existing commercial, industrial, residential, or mixed-use areas, whether characterized as shoreline development, villages, hamlets, rural activity centers, or crossroads developments.

(A) A commercial, industrial, residential, shoreline, or mixed-use area shall be subject to the requirements of (d)(iv) of this subsection, but shall not be subject to the requirements of (c)(ii) and (iii) of this subsection.

(B) Any development or redevelopment other than an industrial area or an industrial use within a mixed-use area or an industrial area under this subsection (5)(d)(i) must be principally designed to serve the existing and projected rural population.

(C) Any development or redevelopment in terms of building size, scale, use, or intensity shall be consistent with the character of the existing areas. Development and redevelopment may include changes in use from vacant land or a previously existing use so long as the new use conforms to the requirements of this subsection (5);

(ii) The intensification of development on lots containing, or new development of, small-scale recreational or tourist uses, including commercial facilities to serve those recreational or tourist uses, that rely on a rural location and setting, but that do not include new residential development. A small-scale recreation or tourist use is not required to be principally designed to serve the existing and projected rural population. Public services and public facilities shall be limited to those necessary to serve the recreation or tourist use and shall be provided in a manner that does not permit low-density

sprawl;

(iii) The intensification of development on lots containing isolated nonresidential uses or new development of isolated cottage industries and isolated small-scale businesses that are not principally designed to serve the existing and projected rural population and nonresidential uses, but do provide job opportunities for rural residents. Rural counties may allow the expansion of small-scale businesses as long as those small-scale businesses conform with the rural character of the area as defined by the local government according to RCW 36.70A.030(15). Rural counties may also allow new small-scale businesses to utilize a site previously occupied by an existing business as long as the new small-scale business conforms to the rural character of the area as defined by the local government according to RCW 36.70A.030(15). Public services and public facilities shall be limited to those necessary to serve the isolated nonresidential use and shall be provided in a manner that does not permit low-density sprawl;

(iv) A county shall adopt measures to minimize and contain the existing areas or uses of more intensive rural development, as appropriate, authorized under this subsection. Lands included in such existing areas or uses shall not extend beyond the logical outer boundary of the existing area or use, thereby allowing a new pattern of low-density sprawl. Existing areas are those that are clearly identifiable and contained and where there is a logical boundary delineated predominately by the built environment, but that may also include undeveloped lands if limited as provided in this subsection. The county shall establish the logical outer boundary of an area of more intensive rural development. In establishing the logical outer boundary, the county shall address (A) the need to preserve the character of existing natural neighborhoods and communities, (B) physical boundaries, such as bodies of water, streets and highways, and land forms and contours, (C) the prevention of abnormally irregular boundaries, and (D) the ability to provide public facilities and public services in a manner that does not permit low-density sprawl;

(v) For purposes of (d) of this subsection, an existing area or existing use is one that was in existence:

(A) On July 1, 1990, in a county that was initially required to plan under all of the provisions of this chapter;

(B) On the date the county adopted a resolution under RCW 36.70A.040(2), in a county that is planning under all of the provisions of this chapter under RCW 36.70A.040(2); or

(C) On the date the office of financial management certifies the county's population as provided in RCW 36.70A.040(5), in a county that is planning under all of the provisions of this chapter pursuant to RCW 36.70A.040(5).

(e) Exception. This subsection shall not be interpreted to permit in the rural area a major industrial development or a master planned resort unless otherwise specifically permitted under RCW 36.70A.360 and 36.70A.365.

(6) A transportation element that implements, and is consistent with, the land use element.

(a) The transportation element shall include the following subelements:

(i) Land use assumptions used in estimating travel;

(ii) Estimated traffic impacts to state-owned transportation facilities resulting from land use assumptions to assist the department of transportation in monitoring the performance of state facilities, to plan improvements for the facilities, and to assess the impact of land-use decisions on state-owned transportation facilities;

(iii) Facilities and services needs, including:

(A) An inventory of air, water, and ground transportation facilities and services, including transit alignments and general aviation airport facilities, to define existing capital facilities and travel levels as a basis for future planning. This inventory must include state-owned transportation facilities within the city or county's jurisdictional boundaries;

(B) Level of service standards for all locally owned arterials and transit routes to serve as a gauge to judge performance of the system. These standards should be regionally coordinated;

(C) For state-owned transportation facilities, level of service standards for highways, as prescribed in chapters 47.06 and 47.80 RCW, to gauge the performance of the system. The purposes of reflecting level of service standards for state highways in the local comprehensive plan are to monitor the performance of the system, to evaluate improvement strategies, and to facilitate coordination between the county's or city's six-year street, road, or transit program and the office of financial management's ten-year investment program. The concurrency requirements of (b) of this subsection do not apply to transportation facilities and services of statewide significance except for counties consisting of islands whose only connection to the mainland are state highways or ferry routes. In these island counties, state highways and ferry route capacity must be a factor in meeting the concurrency requirements in (b) of this subsection;

(D) Specific actions and requirements for bringing into compliance locally owned transportation facilities or services that are below an established level of service standard;

(E) Forecasts of traffic for at least ten years based on the adopted land use plan to provide information on the location, timing, and capacity needs of future growth;

(F) Identification of state and local system needs to meet current and future demands. Identified needs on state-owned transportation facilities must be consistent with the statewide multimodal transportation plan required under chapter 47.06 RCW;

(iv) Finance, including:

(A) An analysis of funding capability to judge needs against probable funding resources;

(B) A multiyear financing plan based on the needs identified in the comprehensive plan, the appropriate parts of which shall serve as the basis for the six-year street, road, or transit program required by RCW 35.77.010 for cities, RCW 36.81.121 for counties, and RCW 35.58.2795 for public transportation systems. The multiyear financing plan should be coordinated with the ten-year investment program developed by the office of financial management as required by RCW 47.05.030;

(C) If probable funding falls short of meeting identified needs, a discussion of how additional funding will be raised, or how land use assumptions will be reassessed to ensure that level of service standards will be met;

(v) Intergovernmental coordination efforts, including an assessment of the impacts of the transportation plan and land use assumptions on the transportation systems of adjacent jurisdictions;

(vi) Demand-management strategies;

(vii) Pedestrian and bicycle component to include collaborative efforts to identify and designate planned improvements for pedestrian and bicycle facilities and corridors that address and encourage enhanced community access and promote healthy lifestyles.

(b) After adoption of the comprehensive plan by jurisdictions required to plan or who choose to plan under RCW 36.70A.040, local jurisdictions must adopt and enforce ordinances which prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development. These strategies may include increased public transportation service, ride sharing programs, demand management, and other transportation systems management strategies. For the purposes of this subsection (6), "concurrent with the development" means that improvements or strategies are in place at the time of development, or that a financial commitment is in place to complete the improvements or strategies within six years.

(c) The transportation element described in this subsection (6), the six-year plans required by RCW 35.77.010 for cities, RCW 36.81.121 for counties, and RCW 35.58.2795 for public transportation systems, and the ten-year investment program required by RCW 47.05.030 for the state, must be consistent.

(7) An economic development element establishing local goals, policies, objectives, and provisions for economic growth and vitality and a high quality of life. The element shall include: (a) A summary of the local economy such as population, employment, payroll, sectors, businesses, sales, and other information as appropriate; (b) a summary of the strengths and weaknesses of the local economy defined as the commercial and industrial sectors and supporting factors such as land use, transportation, utilities, education, workforce, housing, and natural/cultural resources; and (c) an identification of policies, programs, and projects to foster economic growth and development and to address future needs. A city that has chosen to be a residential community is exempt from the economic development element requirement of this subsection.

(8) A park and recreation element that implements, and is consistent with, the capital facilities plan element as it relates to park and recreation facilities. The element shall include: (a) Estimates of park and recreation demand for at least a ten-year period; (b) an evaluation of facilities and service needs; and (c) an evaluation of intergovernmental coordination opportunities to provide regional approaches for meeting park and recreational demand.

(9) It is the intent that new or amended elements required after January 1, 2002, be adopted concurrent with the scheduled update provided in RCW 36.70A.130. Requirements to incorporate any such new or amended elements shall be null and void until funds sufficient to cover applicable local government costs are appropriated and distributed by the state at least two years before local government must update comprehensive plans as required in RCW 36.70A.130.

[2010 1st sp.s. c 26 § 6; 2005 c 360 § 2; (2005 c 477 § 1 expired August 31, 2005); 2004 c 196 § 1; 2003 c 152 § 1. Prior: 2002 c 212 § 2; 2002 c 154 § 2; 1998 c 171 § 2; 1997 c 429 § 7; 1996 c 239 § 1; prior: 1995 c 400 § 3; 1995 c 377 § 1; 1990 1st ex.s. c 17 § 7.]

Notes:

Expiration date -- 2005 c 477 § 1: "Section 1 of this act expires August 31, 2005." [2005 c 477 § 3.]

Effective date -- 2005 c 477: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 13, 2005]." [2005 c 477 § 2.]

Findings -- Intent -- 2005 c 360: "The legislature finds that regular physical activity is essential to maintaining good health and reducing the rates of chronic disease. The legislature further finds that providing opportunities for walking, biking, horseback riding, and other regular forms of exercise is

best accomplished through collaboration between the private sector and local, state, and institutional policymakers. This collaboration can build communities where people find it easy and safe to be physically active. It is the intent of the legislature to promote policy and planning efforts that increase access to inexpensive or free opportunities for regular exercise in all communities around the state." [2005 c 360 § 1.]

Prospective application -- 1997 c 429 §§ 1-21: See note following RCW 36.70A.3201.

Severability -- 1997 c 429: See note following RCW 36.70A.3201.

Construction -- Application -- 1995 c 400: "A comprehensive plan adopted or amended before May 16, 1995, shall be considered to be in compliance with RCW 36.70A.070 or 36.70A.110, as in effect before their amendment by this act, if the comprehensive plan is in compliance with RCW 36.70A.070 and 36.70A.110 as amended by this act. This section shall not be construed to alter the relationship between a countywide planning policy and comprehensive plans as specified under RCW 36.70A.210.

As to any appeal relating to compliance with RCW 36.70A.070 or 36.70A.110 pending before a growth management hearings board on May 16, 1995, the board may take up to an additional ninety days to resolve such appeal. By mutual agreement of all parties to the appeal, this additional ninety-day period may be extended." [1995 c 400 § 4.]

Effective date -- 1995 c 400: See note following RCW 36.70A.040.