

FILED
NOV 21, 2013
Court of Appeals
Division III
State of Washington

Case No. 31331-0-III

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

FERRY COUNTY,

Respondent,

v.

GROWTH MANAGEMENT HEARINGS BOARD, ENVIRONMENTAL
AND LAND USE HEARINGS OFFICE,

Respondents,

And

CONCERNED FRIENDS OF FERRY COUNTY, DAVID L.
ROBINSON, AND FUTUREWISE,

Appellants,

And

SCOTT L SIMMONS, RIPARIAN OWNERS OF FERRY COUNTY,
AND FERRY COUNTY CATTLEMAN'S ASSOCIATION, INC.,

Respondents.

**BRIEF OF APPELLANTS CONCERNED FRIENDS OF FERRY
COUNTY, DAVID L. ROBINSON, AND FUTUREWISE**

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I. INTRODUCTION

Over 22 years ago Ferry County, along with every other county and city in Washington State, was required to designate fish and wildlife habitats under the Growth Management Act (GMA).¹ Unlike most counties and cities in Washington State, Ferry County has yet to comply with this state law.² This is all the more amazing since Ferry County has appealed the designation fish and wildlife habitat all of the way to the Washington State Supreme Court losing at every level.³

The Concerned Friends of Ferry County, David L. Robinson, and Futurewise (Concerned Friends) respectfully submit this Brief of Appellants to answer to the Brief of Respondent Ferry County. This brief will show that the Growth Management Hearings Board's (Board) Compliance Order correctly interpreted the law in concluding that Ferry County's decision to not designate any habitats and species of local importance violated the Growth Management Act (GMA), including the Washington State Supreme Court's controlling 2005 *Ferry County*

¹ RCW 36.70A.170(1)(d); RCW 36.70A.030(5).

² *Concerned Friends of Ferry County et al. v. Ferry County*, GMHB Case No. 97-1-0018c, Order Finding Continuing Noncompliance [Fish and Wildlife Habitat Conservation Areas] (Jan. 23, 2013), at 1 of 25, 2013 WL 486650, at *1 “Between 1999 and 2013, the Board has issued 15 separate Orders Finding Continuing Non-Compliance with the GMA for Ferry County’s failure to include Best Available Science in designating and protecting Critical Areas, and in particular, the County’s failure to designate and protect Fish and Wildlife Habitat Conservation Areas.”

³ *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 824 – 26, 123 P.3d 102, 102 – 03 (2005).

decision.⁴ The Board’s decision is also supported by substantial evidence. The Concerned Friends respectfully request that this Court affirm the Board’s Compliance Order as to habitats and species of local importance.

II. PROCEDURAL POSTURE

The Concerned Friends were petitioners before the Board in this long-running compliance proceeding and prevailed on the merits.⁵ Ferry County was the respondent before the Board.

Ferry County (County) appealed the Board’s Compliance Order on the habitats and species of local importance issue to Ferry County Superior Court where the County prevailed.⁶ The Concerned Friends filed this appeal to the Court of Appeals. Because Ferry County has the burdens of proof and persuasion on appeal, the Concerned Friends offered to let the County file the first and reply briefs.

III. ASSIGNMENT OF ERROR, ISSUE, AND SHORT ANSWER

The Brief of Respondent Ferry County made the assignments of error on pages 1 and 2. The Court of Appeals applies “the standards of

⁴ *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 123 P.3d 102 (2005).

⁵ Certified Administrative Documentary Record (AR) 1566 – 67, *Concerned Friends of Ferry County et al. v. Ferry County*, GMHBEWR Case Nos. 97-1-0018 and 06-1-0003, Compliance Order (Dec. 1, 2011), at 15 – 16 (Hereinafter Compliance Order), 2011 WL 7809240, at *10. We cite the Compliance Order to the AR page numbers given to it by the Board when it compiled the record and the Compliance Order page numbers for ease of reference.

⁶ Clerk’s Papers (CP) 272, *Ferry County v. Growth Management Hearings Board et al.*, Ferry County Superior Court Case No. 12-2-00001-1 Findings of Fact, Conclusions of Law and Order Granting Partial Summary Judgment p. 3 (Nov. 8, 2012).

RCW 34.05 directly to the record before the agency, sitting in the same position as the superior court.”⁷ However, as appellants of the Superior Court decision we assign error to one of the Superior Court’s findings of fact and one of the conclusions.

Assignment of Error 1: Ferry County Superior Court’s finding of fact 7 and conclusion of law 6, set out in full below, are not supported by substantial evidence and, to the extent they contain a legal conclusion, are an erroneous interpretation of the law.

7. The County did consider each candidate species and did so according to a methodology that is apparent in the record and which took into consideration information provided by the Department of Fish and Wildlife and other sources;
6. Ferry County did separately consider each the proposed candidate species pursuant to a methodology that considered best available science;⁸

Issue 1: Did the Board correctly find that Ferry County did not include best available science in designating Fish and Wildlife Habitat Conservation Areas and that Ferry County did not have a reasoned justification for departing from best available science in designating Fish

⁷ *City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091, 1093 (1998).

⁸ CP 271 – 72, *Ferry County v. Growth Management Hearings Board et al.*, Ferry County Superior Court Case No. 12-2-00001-1 Findings of Fact, Conclusions of Law and Order Granting Partial Summary Judgment pp. 2 – 3 (Nov. 8, 2012).

and Wildlife Habitat Conservation Areas and did the Superior Court err in making findings of fact to the contrary? Yes.

IV. FACTS

The Growth Management Act, in RCW 36.70A.170(1), required all cities and counties in Washington State to designate critical areas including fish and wildlife habitat conservation areas by September 1, 1991.⁹ Although counties and cities are also required to protect critical areas, this appeal by Ferry County only addresses the designation of fish and wildlife habitat conservation areas.

While Ferry County adopted an interim critical areas ordinance 1993, the County has yet to adopt a final Growth Management Act (GMA) complaint ordinance.¹⁰ In 1997, Ferry County amended its comprehensive plan and interim critical areas ordinance to weaken protections for wetlands and fish and wildlife habitats.¹¹ The Board found the county had

⁹ RCW 36.70A.170(1); RCW 36.70A.030(5).

¹⁰ *Concerned Friends of Ferry County v. Ferry County*, Eastern Washington Growth Management Hearings Board (EWGMHB) Case No. 97-1-0018, Final Decision and Order (July 31, 1998), at 2, 1998 WL 498783, at *1. While formerly there were three separate Growth Management Hearings Boards consisting of three members each, in an economy move they have been consolidated into one Board which operates through three person regional panels. RCW 36.70A.250; RCW 36.70A.260. The December 1, 2011, Compliance Order before this court was decided by the Growth Management Hearings Board Eastern Washington Region (GMHB) or Board.

¹¹ *Concerned Friends of Ferry County v. Ferry County*, EWGMHB Case No. 97-1-0018, Final Decision and Order (July 31, 1998), at 2, 1998 WL 498783, at *1 – 2.

failed include evidence the County considered best available science (BAS) and so the amendments violated RCW 36.70A.172.¹²

Best available science is a concept borrowed from federal law.¹³

The Board and court decisions on best available science have addressed the meaning of the term. “‘Best’ means that within the evidence contained in the record a local government must make choices based upon the scientific information presented to it[.]” and the characteristics of a valid scientific process.¹⁴ “Available” means that the evidence must be contained in the record. If there is no science applicable to an issue, WAC 365-195-920 recommends that a city or county adopt a precautionary or no risk approach and an adaptive management program.¹⁵ “[S]cience is a process involving methods used to understand the workings of the natural world. This process consists of four stages: ‘making observations, forming hypotheses, making predictions from these hypotheses, and testing those

¹² *Id.*

¹³ *Honesty in Environmental Analysis and Legislation (HEAL) v. Central Puget Sound Growth Management Hearings Bd.*, 96 Wn. App. 522, 531, 979 P.2d 864, 870 (1999).

¹⁴ *Clark County Natural Resources Council (CCNRC), et al. v. Clark County, et al.*, WWGMHB Case No. 96-2-0017c, Final Decision and Order (Dec. 6, 1996), at *7, 1996 WL 716195, at *5; WAC 365-195-905.

¹⁵ WAC 365-195-920(2) explains that adaptive management uses “scientific methods to evaluate how well regulatory and nonregulatory actions achieve their objectives. Management, policy, and regulatory actions are treated as experiments that are purposefully monitored and evaluated to determine whether they are effective and, if not, how they should be improved to increase their effectiveness. An adaptive management program is a formal and deliberate scientific approach to taking action and obtaining information in the face of uncertainty.”

predictions.”¹⁶ The characteristics of a valid scientific process include: findings that have been critically reviewed by qualified scientific experts in the field, the methods used are standard in the field or peer reviewed, the conclusions are logical and the inferences reasonable given the data and methods, the data have been analyzed using standard or peer reviewed quantitative or statistical methods, the data and findings are placed in their proper context, and the assumptions, analytical techniques, and conclusions are well referenced to the relevant, credible scientific literature.¹⁷ Not all forms of science have all of these characteristics of a valid scientific process, but the more characteristics incorporated, the more reliable the science is likely to be.¹⁸

After the Board issued a second order finding Ferry County noncompliant in this case (GMHB Case No. 97-1-0018) for failing to include best available science, Ferry County appealed that order to

¹⁶ *Friends of Skagit County, et al. v. Skagit County*, WWGMHB Case No. 96-2-0025 Compliance Hearing Order & *Skagit Audubon Society, et al. v. Skagit County*, WWGMHB Case No. 00-2-0033c, Final Decision and Order (August 9, 2000) at *10, 2000 WL 1175121, at *7 [citing Alan D. Copsey, *Including Best Available Science in the Designation and Protection of Critical Areas Under the Growth Management Act*, 23 SEATTLE U. L. REV. 97, 107 (1999)] partially affirmed and partially reversed in *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, Thurston County Superior Court Cause No. 01-2-00278-1 Letter Opinion November 16, 2001, Final Order (March 28, 2002).

¹⁷ WAC 365-195-905.

¹⁸ *Id.*

superior court.¹⁹ Thurston County Superior Court affirmed the Board.²⁰ Ferry County then appealed to the court of appeals which affirmed the Board.²¹ Ferry County then appealed to the Washington State Supreme Court which for the third time affirmed the Board, by affirming the court of appeals, finding that substantial evidence supported the Board's finding that Ferry County did not use BAS in designating the habitats of only two species as fish and wildlife conservation areas.²²

Since the Washington State Supreme Court decision in 2005, Ferry County has failed to adopt a critical areas ordinance that complies with the GMA. The Compliance Order for GMHB Case Nos. 97-1-0019 (the same case decided by the supreme court) and 06-1-0003 which is the subject of this appeal is just the latest in a many year string of orders finding the County out of compliance with state law.²³

While the County was considering whether to designate any habitats and species of local importance as critical areas on remand from a prior compliance order, the Washington State Department of Fish and

¹⁹ *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 827, 123 P.3d 102, 103 (2005).

²⁰ *Id.*

²¹ *Ferry County*, 155 Wn.2d at 829 – 32, 123 P.3d at 104 – 06.

²² *Ferry County*, 155 Wn.2d at 830 – 39, 123 P.3d at 105 – 09.

²³ *Concerned Friends of Ferry County et al. v. Ferry County*, GMHB Case No. 97-1-0018c, Order Finding Continuing Noncompliance [Fish and Wildlife Habitat Conservation Areas] (Jan. 23, 2013), at 1 of 25, 2013 WL 486650, at *1.

Wildlife (WDFW) provided Ferry County with a list of 27 “Priority Species” known to live in Ferry County.²⁴

“Priority species” are fish and wildlife species requiring protective measures and/or management actions to ensure their survival. A species identified and mapped as priority species are those that WDFW has listed as State endangered, threatened, or sensitive and those that are candidates for listing. Also included as priority species are those species or groups of animals susceptible to significant population declines by virtue of their inclination to aggregate (e.g. great blue heron rookeries), as well as species of recreational, commercial, or tribal importance.²⁵

Priority species are included on the WDFW Priority Habitats and Species (PHS) list.²⁶ The PHS List is peer reviewed.²⁷

WDFW recommends that our Priority Habitats and Species (PHS) list and PHS mapped data be consulted and used to assist in designating Fish and Wildlife Habitat Conservation Areas under the Critical Areas Ordinance. The PHS data includes mapped habitat areas and species point and polygon data. This data is based on known observations in the field and science-based survey and mapping projects, but is incomplete as all areas have not been surveyed. WDFW does not have PHS requirements, but we offer the use of the information as a science-based technical assistance tool, that meets the best available science requirements under the Growth Management Act. Use of PHS will assist jurisdictions in making planning decisions that consider the effect that a development may

²⁴ AR 1565, Compliance Order at 14; AR 1484 – 86, 2010 *Washington Department of Fish and Wildlife Priority Species occurring in Ferry County with Federal and State Listing status*.

²⁵ AR 690, State of Washington Department of Fish and Wildlife letter to the Ferry County Planning Director p. *1 (March 25, 2010).

²⁶ AR 690 – 91, *Id.* pp. *1 – 2.

²⁷ AR 660, Washington Department of Fish and Wildlife Priority Habitats and Species List p. 4 (Aug. 2008).

have on habitat composition, connectivity, and configuration.²⁸

While WDFW recommended that the data on the 27 Priority Species be used in designating habitats and species of local importance, Ferry County chose to designate no species or habitats as habitats and species of local importance.²⁹ The Board concluded that this failure to designate even a single habitat or species violated the GMA.³⁰

V. STANDARD OF REVIEW

A. Standard of Review under the Administrative Procedure Act.

In Kittitas County v. Eastern Washington Growth Management

Hearings Board, the Supreme Court of Washington State succinctly stated the standard of review for appeals of Board decisions:

¶ 14 Courts apply the standards of the Administrative Procedure Act [APA], chapter 34.05 RCW, and look directly to the record before the board. *Lewis County*, 157 Wn.2d at 497, 139 P.3d 1096; *Quadrant Corp.*, 154 Wn.2d at 233, 110 P.3d 1132. Specifically, courts review errors of law alleged under RCW 34.05.570(3)(b), (c), and (d) *de novo*. *Thurston County*, 164 Wn.2d at 341, 190 P.3d 38. Courts review challenges under RCW 34.05.570(3)(e) that an order is not supported by substantial evidence by determining whether there is ““a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.”” *Id.* (internal quotation marks omitted) (quoting *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings*

²⁸ AR 690, State of Washington Department of Fish and Wildlife letter to the Ferry County Planning Director p. *1 (March 25, 2010).

²⁹ AR 1565, Compliance Order at 14.

³⁰ AR 1565 – 67, Compliance Order at 14 – 16.

Bd., 136 Wn.2d 38, 46, 959 P.2d 1091 (1998)). Finally, courts review challenges that an order is arbitrary and capricious under RCW 34.05.570(3)(i) by determining whether the order represents “ ‘willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.’ ” *City of Redmond*, 136 Wn.2d at 46–47, 959 P.2d 1091 (internal quotation marks omitted) (quoting *Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6*, 118 Wn.2d 1, 14, 820 P.2d 497 (1991)).³¹

“Under the judicial review provision of the APA, the ‘burden of demonstrating the invalidity of [the Board’s decision] is on the party asserting the invalidity.’”³² In this case that is Ferry County. The Concerned Friends may argue and the appellate court may sustain the Board’s order on any ground supported by the record even if the Board did not consider it.³³

“Substantial weight is accorded to a board’s interpretation of the GMA, but the court is not bound by the board’s interpretations.”³⁴ In interpreting the GMA, the courts do not give deference to local government interpretations of the law.³⁵ The Brief of Respondent Ferry County argues on page 9 footnote 1 that the Court should not give the

³¹ *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144, 155, 256 P.3d 1193, 1198 (2011).

³² *Thurston County v. Cooper Point Ass’n.*, 148 Wn.2d 1, 7 – 8, 57 P.3d 1156, 1159 – 60 (2002) citing RCW 34.05.570(1)(a).

³³ *Whidbey Envtl. Action Network (“WEAN”) v. Island County*, 122 Wn. App. 156, 168, 93 P.3d 885, 891 (2004).

³⁴ *Thurston County v. Western Washington Growth Management Hearings Bd.*, 164 Wn.2d 329, 341, 190 P.3d 38, 44 (2008).

³⁵ *Kittitas County*, 172 Wn.2d at 156, 256 P.3d at 1199.

Board's interpretation of the GMA any particular weight because it is the Washington State Department of Commerce that adopts guidelines for designating critical areas. But the Washington State Court of Appeals in a case analyzing the meaning of best available science wrote: "We accord deference to an agency interpretation of the law where the agency has specialized expertise in dealing with such issues, but we are not bound by an agency's interpretation of a statute."³⁶ The court used the term agency to refer to the Board, which is a state agency.³⁷

On mixed questions of law and fact, the court determines the law independently, and then applies it to the facts as found by the Board.³⁸ The reviewing court does not weigh the evidence or substitute its view of the facts for that of the Board.³⁹

The Brief of Respondent Ferry County cites to *Palermo at Lakeland LLC v. City of Bonney Lake* for the proposition that the reasonableness of a legislative decision is reviewed under the arbitrary and capricious standard of review. In the *Palermo* decision, the court of appeals concluded that "where a court is asked to review a legislative decision, the applicable standard of review is the 'arbitrary and capricious'

³⁶ *HEAL*, 96 Wn. App. at 526, 979 P.2d at 867.

³⁷ *Id.*

³⁸ *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 8, 57 P.3d 1156, 1160 (2002).

³⁹ *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 676, 929 P.2d 510, 516 n.9 (1997) review denied *Callecod v. Wash. State Patrol*, 132 Wn.2d 1004, 939 P.2d 215 (1997).

test.”⁴⁰ But the Board is not a court and it does not use the arbitrary and capricious standard, it uses the clearly erroneous standard.⁴¹ And this Court applies the standards of the Administrative Procedure Act to the Board’s decision.⁴² That is because the question in this case is whether the County complied with the goals and requirements of the GMA.⁴³

In considering this appeal, it is important to note that appeals by citizens and citizen groups are the mechanism that the Governor and Legislature adopted to enforce the GMA.⁴⁴ Unlike some laws, such as Washington’s Shoreline Management Act, there is no state agency that reviews and approves or disapproves GMA comprehensive plans and development regulations. The responsibility to appeal noncompliant comprehensive plans and development regulations to the Board is that of citizens and groups such as the Concerned Friends.

⁴⁰ *Palermo at Lakeland, LLC v. City of Bonney Lake*, 147 Wn. App. 64, 78, 193 P.3d 168, 174 (2008) review denied *Palermo at Lakeland, LLC v. City of Bonney Lake*, 166 Wn.2d 1003, 208 P.3d 1123 (2009).

⁴¹ RCW 36.70A.320(3) “The board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of this chapter.”

⁴² *Kittitas County*, 172 Wn.2d at 155, 256 P.3d at 1198.

⁴³ RCW 36.70A.320(3).

⁴⁴ *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 175 – 77, 979 P.2d 374, 380 – 82 (1999).

B. Ferry County misreads the Supreme Court precedents in arguing that this Court owes deference to the County.

The Brief of Respondent Ferry County argues, on pages 5 through 9, that this Court owes difference to the County, not the Board. This is a misreading of the *Bainbridge Citizens United*, *Sherman v. State*, *Quadrant Corp.*, and *Kittitas County* decisions.

The *Bainbridge Citizens United* case dealt with the question of whether the court had properly dismissed a Uniform Declaratory Judgments Act lawsuit claiming that the Washington State Department of Natural Resources was properly managing alleged trespassers on the state's aquatic lands.⁴⁵ It did not address the deference due the Board or even deference in general.⁴⁶

Sherman v. State addressed whether the University of Washington School of Medicine properly terminated a physician from its anesthesiology residency program.⁴⁷ It did not address deference or the deference due to the Board.⁴⁸

In the *Quadrant Corp.* decision the Supreme Court wrote:

¶ 23 In the face of this clear legislative directive, we now hold that deference to county planning actions, that are consistent with the goals and requirements of the GMA,

⁴⁵ *Bainbridge Citizens United v. Washington State Dept. of Natural Resources*, 147 Wn. App. 365, 367 – 68, 198 P.3d 1033, 1034 (2008).

⁴⁶ *Id.* at 147 Wn. App. 367 – 76, 198 P.3d at 1034 – 38.

⁴⁷ *Sherman v. State*, 128 Wn.2d 164, 169, 905 P.2d 355, 360 (1995).

⁴⁸ *Id.* at 128 Wn.2d at 168 – 207, 905 P.2d at 360 – 79.

supersedes deference granted by the APA and courts to administrative bodies in general.^{FN7} See, e.g., *State v. Bradshaw*, 152 Wn.2d 528, 535, 98 P.3d 1190 (2004) (general desire of legislature to promote uniformity must give way to legislature's specific direction), *cert. denied*, 544 U.S. 922, 125 S.Ct. 1662, 161 L.Ed.2d 480 (2005); *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 24, 978 P.2d 481 (1999) (holding specific provisions must prevail over more general statutes). While we are mindful that this deference ends when it is shown that a county's actions are in fact a “clearly erroneous” application of the GMA, we should give effect to the legislature's explicitly stated intent to grant deference to county planning decisions. Thus 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 this court.⁴⁹

In the *Quadrant Corp.* decision the Board did not correctly apply the standard of review in construing a part of the GMA that had not yet been interpreted by the courts. The supreme court wrote that “[i]n reaching this conclusion the Board makes three errors: (1) it fails to abide by the legislature’s mandated deference to county planning actions consistent with the GMA, (2) it fails to adequately address the definition of the pivotal term ‘growth’ as used in the GMA, and (3) it fails to take into account the legal consequences of vesting.”⁵⁰

Here the Board did not make any of those errors or any error. The Washington State Supreme Court has already concluded that Ferry County

⁴⁹ *Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 238, 110 P.3d 1132, 1139 (2005).

⁵⁰ *Quadrant Corp.*, 154 Wn.2d at 236, 110 P.3d at 1138.

must designate habitats and species of local importance.⁵¹ Also the supreme court concluded that “[i]n designating and protecting critical areas ... counties and cities shall include best available science in developing policies and development regulations to protect the functions and values of critical areas. RCW 36.70A.172(1).”⁵² The Board simply took the supreme court’s rules of law and applied them to this stage of the case as it must.⁵³ Further, the Board gave deference to the County’s decisions as the GMA commands.⁵⁴ And the Board only owes deference to county planning actions “that are consistent with the goals and requirements of the GMA”⁵⁵

Despite the Brief of Respondent Ferry County’s claim on page 8 that the *Kittitas County* decision affirmed that the Board decisions are not entitled to deference by the courts, what the Washington State Supreme Court wrote in the *Kittitas County* decision was that:

¶ 13 In reviewing growth management hearings board (board) decisions, courts give “substantial weight” to a board’s interpretation of the GMA. *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 498, 139 P.3d 1096 (2006) (quoting *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000)). Courts’ deference to boards is

⁵¹ *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 832 – 33, 123 P.3d 102, 106 (2005).

⁵² *Ferry County*, 155 Wn.2d at 833, 123 P.3d at 106.

⁵³ AR 1554 – 67, Compliance Order at 3 – 16.

⁵⁴ AR 1552 – 53, Compliance Order at 1 – 2.

⁵⁵ *Quadrant Corp.*, 154 Wn.2d 224, 238, 110 P.3d 1132, 1139 (2005).

superseded by the GMA's statutory requirement that boards give deference to county planning processes. *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005) ("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 this court").⁵⁶

Since, as we have seen the Board did grant the county the deference it was due, this Court must give substantial weight to the Board's interpretation. In addition, as we will see in the next section, deference to the Board's interpretation of the GMA not much of an issue in this case since the Washington State Supreme Court's *Ferry County* decision controls this case and requires that the Board's Compliance Order on habitats and species of local importance must be affirmed.

On pages 6 and 7, the Brief of Respondent Ferry County argues that RCW 36.70A.3201 requires the Board to defer to local decision-making. However, the Brief of Respondent Ferry County omitted the underlined parts of RCW 36.70A.3201 which is set out in full in the following quote.

The legislature intends that the board applies a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. 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 board to grant deference to

⁵⁶ *Kittitas County*, 172 Wn.2d at 154, 256 P.3d at 1198.

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.

So we see that RCW 36.70A.3201 requires the Board to grant deference to county decisions that are “consistent with the requirements and goals of this chapter.” Unfortunately as the arguments below will show, Ferry County’s decision not to designate any habitats and species of local importance fails to comply with the requirements of the GMA.

VI. ARGUMENT

A. **Ferry County did not assign error to any of the Board’s factual determinations so they are verities on appeal.**

The Brief of Respondent Ferry County, on pages 1 and 2, did not assign error to any of the Board’s factual findings. Ferry County also did not assign error to any of the Board’s findings before the superior court.⁵⁷ So they are verities on appeal.⁵⁸ This matters because the Board made the following findings of fact:

⁵⁷ CP 64 – 65, Ferry County’s Motion for Partial Summary Judgment pp. 4 – 5.

⁵⁸ *Kitsap County v. Central Puget Sound Growth Management Hearings Bd.*, 138 Wn. App. 863, 872, 158 P.3d 638, 642 (2007) “Where an agency’s findings of fact are unchallenged, we treat the findings as verities on appeal. *Manke Lumber Co. v. Cent.*

As to designation of Fish and Wildlife Habitat Conservation Areas, the Board finds and concludes as follows:

- There is no substantial evidence in the record to support a County finding that BAS was included in designating Ferry County's Fish and Wildlife Habitat Conservation Areas.
- Ferry County failed to include the Best Available Science in designating (1) Areas where ETS Species have a Primary Association, and (2) Habitats and Species of Local Importance. Ordinance 2011-02 designations of Fish and Wildlife Habitat Conservation Areas (relating to ETS Habitats and Species, and Species of Local Importance) were clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act.⁵⁹

The first bullet is a finding of fact. The first sentence in the second bullet is also a finding of fact. They are both verities in this appeal.

B. The Washington State Supreme Court's 2005 *Ferry County* decision requires Ferry County to designate habitats and species of local importance and include best available science in the designation.

As the "Facts" section of this brief documented, GMHB Case No. 97-1-0018 and the question of what, if any, habitats and species Ferry County must designate using what scientific evidence has been under litigation for over a decade. As part of Ferry County's earlier appeal of

Puget Sound Growth Mgmt. Hearings Bd., 113 Wn. App. 615, 628, 53 P.3d 1011 (2002)."

⁵⁹ AR 1566 – 67, Compliance Order at 15 – 16.

this case, GMHB Case No. 97-1-0018, the Washington State Supreme Court concluded that:⁶⁰

¶ 14 The GMA directs counties and cities to designate critical areas. RCW 36.70A.170. RCW 36.70A.030(5) lists types of critical areas: (1) fish and wildlife habitat conservation areas, (2) wetlands, (3) frequently flooded areas, (4) critical aquifer recharge areas, and (5) geologically hazardous areas. Fish and wildlife habitat conservation areas are at issue here.

¶ 15 Fish and wildlife habitat conservation areas include areas where ETS species have a primary association, habitats and species of local importance, and waters of the state that provide fish and wildlife habitat.^{FN7} WAC 365–190–080(5). Counties and cities should “classify seasonal ranges and habitat elements with which federal and state listed endangered, threatened and sensitive species have a primary association and which, if altered, may reduce the likelihood that the species will maintain and reproduce over the long term.” WAC 365–190–080(5)(c)(i). Counties and cities must also determine which habitats and species are of local importance:

Counties and cities may use information prepared by the Washington department of wildlife to classify and designate locally important habitats and species. Priority habitats and priority species are being identified by the department of wildlife for all lands in Washington state. While these priorities are those of the department, they and the data on which they are based may be considered by counties and cities.

[Former] WAC 365–190–080(5)(c)(ii).

⁶⁰ *Ferry County*, 155 Wn.2d at 827, 123 P.3d at 103.

^{FN7}. This list does not include all of the fish and wildlife habitat conservation areas mentioned in [former] WAC 365–190–080(5).⁶¹

Former WAC 365–190–080(5)(c)(ii) recommended that counties and cities use the information prepared by the Washington State Department of Fish and Wildlife in designating habitats and species of local importance.

That recommendation has been moved to WAC 365-190-130(4)(b):

(b) Habitats and species areas of local importance. Counties and cities should identify, classify and designate locally important habitats and species. Counties and cities should consult current information on priority habitats and species identified by the Washington state department of fish and wildlife. Priority habitat and species information includes endangered, threatened and sensitive species, but also includes candidate species and other vulnerable and unique species and habitats. While these priorities are those of the Washington state department of fish and wildlife, they should be considered by counties and cities as they include the best available science. The Washington state department of fish and wildlife can also provide assistance with identifying and mapping important habitat areas at various landscape scales. Similarly, the Washington state department of natural resources' natural heritage program can provide a list of high quality ecological communities and systems and rare plants.

On pages 14 through 18, the Brief of Respondent Ferry County argues, without addressing the *Ferry County* decision, that the WAC's authorize the county to decide whether or not to designate habitats and

⁶¹ *Ferry County*, 155 Wn.2d at 832 – 33, 123 P.3d at 106.

species of local importance. They do not. WAC 365-190-130(2) provides in relevant part:

(2) Fish and wildlife habitat conservation areas that must be considered for classification and designation include:

(a) Areas where endangered, threatened, and sensitive species have a primary association;

(b) Habitats and species of local importance, as determined locally;

....

So the guidelines provide that habitats and species of local importance must be designated, but the habitats and species are locally determined. This reading is consistent with Washington State Supreme Court's *Ferry County* decision which, in a decision that controls this appeal, concluded that Ferry County, like all counties and cities in Washington State, must designate habitats and species and of local importance.⁶² That designation must include best available science.⁶³

Like the part of this appeal that was decided by the supreme court, Ferry County has again failed to properly designate fish and wildlife habitats and to properly include best available science. In the 2005 decision the question was whether Ferry County had properly designated

⁶² *Ferry County*, 155 Wn.2d at 832 – 33, 123 P.3d at 106.

⁶³ *Ferry County*, 155 Wn.2d at 833, 123 P.3d at 106.

endangered, threatened, and sensitive species. The Washington State

Supreme Court answered no, reasoning:

¶ 23 Ferry County need not develop the scientific information through its own means, but it must rely on scientific information. Because it chose to disagree with or ignore scientific recommendations and resources provided by the state agencies and the Colville Tribe, which it could do, the county necessarily had to unilaterally develop and obtain valid scientific information.

¶ 24 Ferry County's real quarrel with the Board seems to be based on the 12 ETS species recommended by DFW—Ferry County argues that there is no evidence of species other than the lynx and bald eagle being present in Ferry County. The validity of the DFW list is largely irrelevant here; however, Ferry County could have listed whatever species it deemed appropriate if it supported its decision by BAS. Similarly, the dissent's argument that the DFW list is not supported by BAS is immaterial. We review only the Board's determination that Ferry County's listing did not include BAS, not whether listing 12 species is supported by BAS.

¶ 25 Contrary to the dissent's assertions, we do not require Ferry County to prove the absence of the additional ETS species. We are asked to answer only whether substantial evidence supports that BAS was used by Ferry County in developing its own list of ETS species. The answer is clearly no.

¶ 26 The information relied on by the county does not rise to the level of scientific information and, therefore, cannot possibly qualify as BAS. Although the dissent emphasizes Dr. McKnight's 30 years of experience working as a wildlife biologist in Alaska, nothing in Dr. McKnight's background indicates any familiarity with the wildlife of Ferry County. From his two letters, it is clear that Dr. McKnight used few to no scientific methods to obtain the species data himself and did not discuss the methods used

by the sources he consulted.^{FN10} In his discussion of the sources he consulted, Dr. McKnight cited only two sources with any specificity—a 1997 birding manual and a wildlife biologist he consulted regarding pygmy rabbits. Otherwise, Dr. McKnight merely stated that he relied “upon various field guides and big game texts for general information.” Outside of consulting these limited sources, Dr. McKnight did not employ any other scientific methods, such as conducting on-site observations or conferring with other experts in the area. Although BAS does not require the use of a particular methodology, at a minimum BAS requires the use of *a* scientific methodology.

^{FN10}. Dr. McKnight's resume and letters of October 11, 1999 and December 7, 1999 are attached to this opinion as appendices A, B, and C, respectively. Dr. McKnight's two letters constitute the entirety of Ferry County's research into the presence of ETS species in Ferry County.

¶ 27 The information used to support the county's listing does not pass the smell test for BAS regardless of how it is defined. Far from rising to the level of BAS, the information obtained through Dr. McKnight's methods more greatly resembles nonscientific information, and his conclusions are more similar to speculation or surmise, which the requirement of BAS seeks to prevent. *See HEAL*, 96 Wn. App. at 532, 979 P.2d 864. The fact that the county's listing omits both the peregrine falcon and the bull trout, both of which are ETS species known to be present in Ferry County, further supports that the listing was not generated using BAS.

¶ 28 Furthermore, the steps taken in analyzing the information do not constitute a reasoned process. The county directs us to no evidence of it evaluating the science produced by Dr. McKnight. Nor is there sufficient evidence of the county comparing science provided by Dr. McKnight to any other resources, such as science available from state or federal agencies or the Colville Tribe. As the Western Washington Growth Management Hearings Board correctly stated, a “[c]ounty cannot choose its own science over all

other science and cannot use outdated science to support its choice.” *Island County Citizens' Growth Mgmt. Coalition v. Island County*, No. 98–2–0023c, 2000 WL 268939, at *7 (W. Wash. Growth Mgmt. Hr'gs Bd. Mar. 6, 2000).⁶⁴

The facts in the current, 2011, version of this case are similar. The question in this appeal is whether Ferry County properly designated habitats and species of local importance when it chose to designate no habitats and species.⁶⁵ Like the 2005 case; where the Washington State Department of Fish and Wildlife (WDFW) provided Ferry County with a list of 12 endangered, threatened, and sensitive (ETS) species they recommended that Ferry County designate; here WDFW provided a list of 27 “priority species” that reside in Ferry County and recommended that Ferry County designate them.⁶⁶ Eighteen of the species are state candidate species which WDFW recommended for listing as species and habitats of local importance because they vulnerable to future listing as endangered or threatened species unless they are given additional protection measures.⁶⁷

In some respects this case is worse. Ferry County 2005 fish and wildlife decision at least listed two species; here the County chose to list

⁶⁴ *Ferry County*, 155 Wn.2d at 836 – 38, 123 P.3d at 108 – 09.

⁶⁵ AR 1565, Compliance Order at 14.

⁶⁶ AR 1484 – 86, 2010 *Washington Department of Fish and Wildlife Priority Species occurring in Ferry County with Federal and State Listing status* pp. 1 – 3; AR 1495, State of Washington Department of Fish and Wildlife letter to the Ferry County Planning Director p. *3 (July 5, 2010).

⁶⁷ AR 1484 – 86, 2010 *Washington Department of Fish and Wildlife Priority Species occurring in Ferry County with Federal and State Listing status* pp. *1 – 3; AR 1547, State of Washington Department of Fish and Wildlife letter to the Ferry County Planning Director p. 4 (July 5, 2011).

no habitats or species of local importance.⁶⁸ In the amendments at issue in 2005, there was evidence that the two species the County failed to list lived in Ferry County, here there is evidence that that 27 “priority species” and 18 “candidate species” reside in Ferry County.⁶⁹ As the supreme court concluded “[t]he fact that the county’s listing omits both the peregrine falcon and the bull trout, both of which are ETS species known to be present in Ferry County, further supports that the listing was not generated using BAS.”⁷⁰ The omission of all of the 27 “priority species” and 18 “candidate species,” one which is again the bull trout, also supports a conclusion that the 2011 list was not done using BAS.

In 2005 decision the County had the services of a wildlife biologist with 30 years of experience in Alaska, although no familiarity with the wildlife of Ferry County.⁷¹ In this case there is no evidence that Ferry County had the assistance of any wildlife biologist. The WDFW tried to help. Karin Divens, a WDFW Priority Habitat and Species Biologist with 16 years of experience with Washington wildlife and who works in the northeastern Washington region, attended the April 14, 2010, Ferry

⁶⁸ *Ferry County*, 155 Wn.2d at 828 – 29, 123 P.3d at 104; AR 1565, Compliance Order at 14.

⁶⁹ *Ferry County*, 155 Wn.2d at 828 – 29, 123 P.3d at 104; AR 1484 – 86, 2010 *Washington Department of Fish and Wildlife Priority Species occurring in Ferry County with Federal and State Listing status* pp. *1 – 3.

⁷⁰ *Ferry County*, 155 Wn.2d at 837 – 38, 123 P.3d at 109.

⁷¹ *Ferry County*, 155 Wn.2d at 837, 123 P.3d at 108.

County Planning Commission meeting and discussed the proper designation of fish and wildlife conservation areas.⁷² Ms. Divens wrote numerous letters and urged the designation of habitats and species of local importance.⁷³ But it all came to naught.

Like Dr. Knight's two letters at issue in the supreme court's 2005 decision, Ferry County's table and supporting findings used few to no scientific methods to obtain species data and do not discuss the methods used by the sources consulted.⁷⁴ Dr. Knight cited only two specific sources and several general ones.⁷⁵ Ferry County's Review cites only five sources, one of which is WDFW's Priority Habitats and Species List.⁷⁶ Like Dr. Knight, Ferry County did not employ any other methods such as conducting on-site observations or conferring with other experts or in the case of the 2011 designation of habitats and species of local importance any experts.⁷⁷ There is no indication biologists reviewed or peer reviewed

⁷² AR 1460 & AR 1472, April 14, 2010 Discussion with Karin Divens at the Planning Commission Regular Meeting p. 1 & p. 13.

⁷³ See for example AR 1547, State of Washington Department of Fish and Wildlife letter to the Ferry County Planning Director p. 4 (July 5, 2011).

⁷⁴ Ferry County, 155 Wn.2d at 837, 123 P.3d at 108; AR 1505 – 08, *2011 Ferry County Review of Washington Fish and Wildlife PHS Candidate Species for Possible Habitats and Species of Local Importance Designation* pp. *1 –4; AR 1539 – 40, *Ferry County Planning Commission Findings of Fact Concerning the Comprehensive Plan and the Critical Areas Ordinance July 13, 2011* pp. *1 –2.

⁷⁵ Ferry County, 155 Wn.2d at 837, 123 P.3d at 108.

⁷⁶ AR 1505 – 08, *2011 Ferry County Review of Washington Fish and Wildlife PHS Candidate Species for Possible Habitats and Species of Local Importance Designation* pp. *1 –4.

⁷⁷ Ferry County, 155 Wn.2d at 837, 123 P.3d at 108; AR 1505 – 08, *2011 Ferry County Review of Washington Fish and Wildlife PHS Candidate Species for Possible Habitats*

the Planning Commission's 2011 table or the County's findings. So like Dr. Knight's letters, Ferry County's materials are not best available science.

Furthermore, as in 2005 there is no evidence that the county evaluated the documents. In the present case, the evidence from WDFW, the U.S. Fish and Wildlife Service, and the Colville Tribes all support the designation of habitats and species of local importance. The WDFW Priority Species and Habitats List, letters, and the transcript cited above all called for designating habitats and species of local importance. The U.S. Fish and Wildlife Service stated that the "bull trout, a threatened species may occur in your county"⁷⁸ WDFW's science documents that the bull trout does occur in Ferry County.⁷⁹ The Colville Indian Tribes requested that the county designate species that have been nominated to be added to federal or state endangered or threatened lists along with the Tribes' "list of endangered, threatened, and sensitive species as well as a species of concern that are protected because of traditional or cultural values."⁸⁰

and Species of Local Importance Designation pp. *1 –4; AR 1539 – 40, *Ferry County Planning Commission Findings of Fact Concerning the Comprehensive Plan and the Critical Areas Ordinance July 13, 2011* pp. *1 –2.

⁷⁸ AR 1489, US Fish and Wildlife Service email to Planning Department, Ferry County p. *1 (Jan. 26, 2006).

⁷⁹ AR 1486, *2010 Washington Department of Fish and Wildlife Priority Species occurring in Ferry County with Federal and State Listing status* p. *3.

⁸⁰ AR 1501 – 02, Colville Confederated Tribes letter to Ferry County Planning Department pp. *1 – 2 (March 2, 2011).

So like Ferry County's letters in 2005, Ferry County's 2011 materials were not based on best available science (BAS). As the Board wrote:

These holdings of the Supreme Court [in the *Ferry County* decision] are mandatory authority, and this Board must adhere to and apply the Supreme Court's rulings. In the present case, Ferry County failed to provide a reasoned justification for departing from the Best Available Science in designating habitats and species known to be present in Ferry County. As in the earlier Ferry County Supreme Court case, the omission here of all 22 species of possible local importance supports a finding that the ordinance was not generated using BAS.⁸¹

As we have seen, the Board was correct. Further, the 2005 *Ferry County* decision is not just binding authority; it is also the law of the case since that the 2005 *Ferry County* decision was an appeal of this very case.⁸² “In its most common form, the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation.”⁸³ So the supreme court's *Ferry County* decision is binding here both because it is a binding precedent and because of the law of the case doctrine. And as this answer has shown the facts line up between the 2005 decision and this appeal. So the Court should uphold the Board's Compliance Order.

⁸¹ AR 1566, Compliance Order at 15.

⁸² *Ferry County*, 155 Wn.2d at 827, 123 P.3d at 103.

⁸³ *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844, 848 – 49 (2005).

C. Ferry County’s argument that the County has the discretion to decide whether “any habitats and species are of local importance” regardless of best available science violates the 2005 *Ferry County* decision.

As we have seen, the Washington State Supreme Court has concluded that Ferry County must designate fish and wildlife habitats including habitats and species of local importance and use best available science in that designation.⁸⁴ The Brief of Respondents Ferry County, on pages 14 through 18, argues that the County has the discretion to decide whether “any habitats and species are of local importance.” As part of this argument Ferry County ignores the 2005 *Ferry County* decision even though it was the basis of the Board’s decision.⁸⁵ As the supreme court wrote “[c]ounties and cities must also determine which habitats and species are of local importance ...”,⁸⁶ not if there are any habitats and species of local importance. As we have also seen, WAC 365-190-130(2) requires the designation of habitats and species of local importance. Ferry County’s failure to follow *Ferry County* and its attempt to twist the Washington State Department of Commerce’s regulations to allow it to fail to designate habitats and species of local importance must be rejected by this Court.

⁸⁴ *Ferry County*, 155 Wn.2d at 832 – 33, 123 P.3d at 106.

⁸⁵ AR 1566, Compliance Order at 15.

⁸⁶ *Ferry County*, 155 Wn.2d at 832, 123 P.3d at 106.

D. The Growth Management Hearings Board did not shift the burden of proof, it followed the 2005 *Ferry County* decision and Ferry County did not meet the requirements for basing its decision on best available science.

The Brief of Respondent Ferry County, on pages 18 and 20, argues that the Board improperly shifted the burden of proof from the Petitioners to the County. The Board did not do this.

As we have seen, the Washington State Supreme Court has held that:

¶ 23 Ferry County need not develop the scientific information through its own means, but it must rely on scientific information. Because it chose to disagree with or ignore scientific recommendations and resources provided by the state agencies and the Colville Tribe, which it could do, the county necessarily had to unilaterally develop and obtain valid scientific information.⁸⁷

As with the provisions at issue in 2005 decision, Ferry County again disregarded the recommendations of the WDFW and the Colville Tribe.⁸⁸ Indeed, on pages 21 and 22 the Brief of Respondent Ferry County acknowledges the WDFW recommendations and admits the County did not follow them. As we documented in Part VI B of this brief, Ferry County's information did not comply with the requirements for valid

⁸⁷ *Ferry County*, 155 Wn.2d at 836, 123 P.3d at 108.

⁸⁸ AR 1484 – 86, 2010 *Washington Department of Fish and Wildlife Priority Species occurring in Ferry County with Federal and State Listing status* pp. *1 – 3; AR 1547, State of Washington Department of Fish and Wildlife letter to the Ferry County Planning Director p. 4 (July 5, 2011); AR 1501 – 02, Colville Confederated Tribes letter to Ferry County Planning Department pp. *1 – 2 (March 2, 2011).

scientific information. So Ferry County violated the GMA. The Brief of Respondent Ferry County on pages 22 and 23 lists the state and federal resources that the county considered, but none of them support the County's decision to not designate a single habitat or species of local importance. Indeed, as we have documented the WDFW letters and consultations all call for the County to designate habitats and species of local importance. The County writes that it cited numerous legal and scientific sources listed on pages 22 and 23 of the Brief of Respondent Ferry County, but the County misreads *Ferry County* (assuming the County has read it). That decision held that Ferry County has to “develop and obtain valid scientific information” to support its decision not to designate habitats and species of local importance.⁸⁹ This the county has not done. As will be discussed below the County could seek to depart from best available science, but the County has not done that correctly either.

The Board correctly found that Ferry County failed to include best available science in designating habitats and species of local importance as the supreme court's *Ferry County* decision requires.⁹⁰ Further as we documented in Part VI A of this brief, the County failed to assign error to the Board's finding. Finally, as we have seen, the Superior Court was wrong to conclude in conclusion 6 that the County considered best

⁸⁹ *Ferry County*, 155 Wn.2d at 836, 123 P.3d at 108.

⁹⁰ AR 1567, Compliance Order at 16.

available science. As we have shown, the county ignored best available science. The Board should be affirmed.

E. Ferry County did not follow the process for a reasoned departure from best available science as required by the *Swinomish Tribal Community* and the *Ferry County* decisions. (Concerned Friends Assignment of Error 1 and Issue 1)

The Brief of Respondent Ferry County, on pages 24 through 29, argues that the County considered and then departed from BAS based on a reasoned process. As to the argument that the County considered BAS in a reasoned process, we again note that in the *Ferry County* decision the Washington State Supreme Court has held that if the County chooses to the disregard the WDFW's and Colville Tribes' recommendations then the "county necessarily had to unilaterally develop and obtain valid scientific information."⁹¹ This the County has not done.

First in the *Ferry County* decision and then in the *Swinomish Tribal Community* decision the supreme court has recognized that a county or city can depart from best available science (BAS). As the Washington State Supreme Court wrote "the county may depart from BAS if it provides a reasoned justification for such a departure. *See Ferry County v.*

⁹¹ *Ferry County*, 155 Wn.2d at 836, 123 P.3d at 108.

Concerned Friends, 155 Wn.2d 824, 837 – 38, 123 P.3d 102 (2005);

WAC 365–195–915(1)(c)(i)–(iii).”⁹² The cited part of *Ferry County* reads:

¶ 28 Furthermore, the steps taken in analyzing the information do not constitute a reasoned process. The county directs us to no evidence of it evaluating the science produced by Dr. McKnight. Nor is there sufficient evidence of the county comparing science provided by Dr. McKnight to any other resources, such as science available from state or federal agencies or the Colville Tribe. As the Western Washington Growth Management Hearings Board correctly stated, a “[c]ounty cannot choose its own science over all other science and cannot use outdated science to support its choice.” *Island County Citizens' Growth Mgmt. Coalition v. Island County*, No. 98–2–0023c, 2000 WL 268939, at *7 (W. Wash. Growth Mgmt. Hr'gs Bd. Mar. 6, 2000).⁹³

The Brief of Respondent Ferry County, on pages 24 and 25, first argues that the reasoned process does not need to be based on science. But the above quote from the Washington State Supreme Court’s *Ferry County* decision cited by the *Swinomish Tribal Community* decision does require that the process must be based on science. Strangely Ferry County cites to this very passage for the proposition that it does not have to be based on science despite the fact that the quote includes the word “science” six times!

The Brief of Respondent Ferry County then argues, on page 25, that departing is not a high bar and that the County only needs to address

⁹² *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Bd.*, 161 Wn.2d 415, 431, 166 P.3d 1198, 1206 (2007).

⁹³ *Ferry County*, 155 Wn.2d at 837 – 38, 123 P.3d at 109.

on the record the relevant sources of best available science included in the record. But that is not what the Washington State Supreme Court wrote in the *Swinomish Tribal Community* decision, “the county may depart from BAS if it provides a reasoned justification for such a departure. *See Ferry County v. Concerned Friends*, 155 Wn.2d 824, 837 – 38, 123 P.3d 102 (2005); WAC 365–195–915(1)(c)(i)–(iii).”⁹⁴ And, as the *Ferry County* quote above documents the county’s reasoned analysis must cite evidence that the county evaluated the scientific information it seeks to substitute for best available science and the county must provide “sufficient evidence” that it compared its scientific information with the science available from the state and the Colville Tribes.⁹⁵ Ferry County has cited to none of this required evidence.⁹⁶ The County did not make a reasoned departure from best available science.

The Washington State Supreme Court’s *Swinomish Tribal Community* decision also cited WAC 365–195–915(1)(c)(i)–(iii).⁹⁷ Those provisions provide that:

(c) Any nonscientific information-including legal, social, cultural, economic, and political information-used as a basis for critical area policies and regulations that depart from recommendations derived from the best available

⁹⁴ *Swinomish Indian Tribal Community*, 161 Wn.2d at 431, 166 P.3d at 1206.

⁹⁵ *Ferry County*, 155 Wn.2d at 837 – 38, 123 P.3d at 109.

⁹⁶ Brief of Respondent Ferry County pp. 24 – 29.

⁹⁷ *Swinomish Indian Tribal Community*, 161 Wn.2d at 431, 166 P.3d at 1206.

science. A county or city departing from science-based recommendations should:

(i) Identify the information in the record that supports its decision to depart from science-based recommendations;

(ii) Explain its rationale for departing from science-based recommendations; and

(iii) Identify potential risks to the functions and values of the critical area or areas at issue and any additional measures chosen to limit such risks. State Environmental Policy Act (SEPA) review often provides an opportunity to establish and publish the record of this assessment.⁹⁸

Again, the Brief of Respondent Ferry County does not cite to any of this information in record. Again, Ferry County has failed to follow a reasoned process to depart from best available science.

The Brief of Respondent Ferry County on page 25 quotes from a part of the *Swinomish Indian Tribal Community* decision for the proposition that local deference can trump best available science.

However, the supreme court did not say that that local deference can trump best available science.⁹⁹ Rather what the supreme court wrote was that the legislature's 1995 adoption of RCW 36.70A.172(1)'s best available science requirement and the legislature's 1997 adoption of the language in RCW 36.70A.3201 providing "that growth management

⁹⁸ WAC 365-195-915(1)(c).

⁹⁹ *Swinomish Indian Tribal Community*, 161 Wn.2d at 426 – 27, 166 P.3d at 1204 – 05.

hearings boards should ‘grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter’ and that ‘[l]ocal comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances’” could “arguably conflict.”¹⁰⁰ So “with these numerous tensions in mind that [the court] must decide whether Skagit County's critical areas ordinance complies with the GMA.”¹⁰¹ The court did not conclude that that local deference can trump best available science, the court was setting the stage for its analysis.¹⁰²

The Brief of Respondent Ferry County on page 26 argues that the Board took the opposite view from the Washington State Supreme Court. But this argument is based on the County’s erroneous conclusion that the supreme court decided that BAS may necessarily need to yield to local deference which, as this brief just showed, was a conclusion the Washington State Supreme Court did not make.

Ferry County then argues that in the *Swinomish Tribal Community* decision the supreme court upheld Skagit County’s decision not to require buffers on salmonid-bearing streams “because imposing buffers would be

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

detrimental to the agricultural community” and the vegetation had already been destroyed.¹⁰³ However, as the Board correctly concluded the supreme court approved the departure from the best available science that would otherwise have required riparian buffers on the salmon streams because the GMA does not require restoration of areas where native vegetation has been removed.¹⁰⁴ As the supreme court wrote:

¶ 24 If the omission of mandatory buffers from the county’s critical areas ordinance is a departure from BAS, it is a justified departure of the kind that is tolerated by the GMA. As we have noted above, the GMA’s requirement to protect does not impose a corresponding requirement to enhance. That holding guides us here. A requirement to develop buffers would impose an obligation on farmers to replant areas that were lawfully cleared in the past, which is the equivalent of enhancement. Without a duty to enhance being imposed by the GMA, however, we cannot require farmers within Skagit County to replant what was long ago plucked up. The county need not impose a requirement that farmers establish riparian buffers.¹⁰⁵

The court did not identify detriment to the agricultural community as a part of the decision. Also as the Board correctly noted nothing in the best available science for designating habitats and species of local importance would create new duties not already imposed by law such as a duty to enhance habitat.¹⁰⁶

¹⁰³ Brief of Respondent Ferry County p. 27.

¹⁰⁴ AR 1565 – 66, Compliance Order at 14 – 15.

¹⁰⁵ *Swinomish Indian Tribal Community*, 161 Wn.2d at 431 – 32, 166 P.3d at 1207.

¹⁰⁶ AR 1566, Compliance Order at 15.

On page 27 the Brief of Respondent Ferry County argues that unlike the *Swinomish* decision where Skagit County was allowed not to require buffers on several of the largest salmon bearing streams in the state, “Ferry County has merely decided there are no habitats and species of local importance” This argument fails for two reasons. First, while Skagit County justified a departure from best available science, as we have seen Ferry County has not.

The second reason is that while Skagit County did not have to adopt buffers to protect the salmon rivers because it properly departed from best available science, the county still had to adopt development regulations to protect the salmon habitat in the rivers. This is because three sections of the GMA control the designation and projection of critical areas. The requirement to include best available science in designing and protection critical areas is in RCW 36.70A.172. However, there is an independent requirement to designate critical areas, including fish and wildlife habitats, in RCW 36.70A.170(1)(d). There is also an independent requirement to protect critical areas in RCW 36.70A.060. The supreme court affirmed the Growth Management Hearing Board which both found that Skagit County could depart from the best available science requirements and that the county’s regulations, specifically its monitoring

program, to protect the salmon streams violated the GMA.¹⁰⁷ As the supreme court wrote: “In short, under GMA regulations, local governments must either be certain that their critical areas regulations will prevent harm or be prepared to recognize and respond effectively to any unforeseen harm that arises.”¹⁰⁸

If, like Skagit County, Ferry County had properly departed from best available science requirement in RCW 36.70A.172, Ferry County would still have to designate fish and wildlife habitat conservation areas under RCW 36.70A.170(1)(a). Of course, as we have documented above, Ferry County has not properly departed from best available science.

The Brief of Respondent Ferry County argues, on page 27, that it has created a process by which to nominate habitats and species of local governments and so it did not ignore local species or the best available science as to those local species. There are two problems with this argument. The first problem is that RCW 36.70A.170(1) provides in relevant part that “[o]n or before September 1, 1991, each county, and each city, shall designate where appropriate: ... (d) [c]ritical areas.” RCW 36.70A.170(1) requires a designation of fish and wildlife habitat conservation areas, not a process for future designation. The second

¹⁰⁷ *Swinomish Indian Tribal Community*, 161 Wn.2d at 437, 166 P.3d at 1210.

¹⁰⁸ *Swinomish Indian Tribal Community*, 161 Wn.2d at 436, 166 P.3d at 1209.

problem, as the Board properly concluded, is that the process the county adopted did not comply with WDFW's best available science.¹⁰⁹

The Brief of Respondent Ferry County on pages 28 and 29 that the Washington State Court of Appeals' *Olympic Stewardship Foundation* decision somehow affects the regulations related to departures from best available science. However, *Olympic Stewardship Foundation* dealt not with a county that departed from best available science, but rather with a county that complied with best available science.¹¹⁰ So it is not relevant to this case. In any case, the court of appeals could not change the Washington State Supreme Court's *Ferry County* decision.

The Brief of Respondent Ferry County on page 29 argues that the Board erred in requiring that the analysis of best available science had to be in County's ordinance. But the Board did not say that it had to be in ordinance, only that there is "no indication that BAS was included or analyzed with a reasoned process."¹¹¹ And as we have seen, the Board was right that the County did not base its decision not to designate any habitats or species of local importance on best available or to properly depart from best available science.

¹⁰⁹ AR 1564, Compliance Order at 13 quoting the Washington State Department of Fish and Wildlife letter to Ferry County pp. 3 – 4 (July 5, 2011). The cited pages of this letter are at AR 1546 – 47.

¹¹⁰ *Olympic Stewardship Foundation v. Western Washington Growth Management Hearings Bd.*, 166 Wn. App. 172, 192 – 95, 274 P.3d 1040, 1049 – 51 (2012).

¹¹¹ AR 1564, Compliance Order at 13.

So we can see that the Superior Court's conclusion that Ferry County used a methodology that considered best available was incorrect as the County did follow the *Ferry County* decision. Rather the Board was correct that the county did not correctly depart from best available science.

F. Ferry County did not address the BAS in the record using a reasoned process.

In attacking the Board's finding that Ferry County did not base its decision not to designate habitats and species of local importance on best available science, Ferry County gets off on the wrong foot by stating the wrong standard of review. The Brief of Respondent Ferry County on page 30 states "[t]he question is whether the County's legislative reasoning was arbitrary and capricious." Actually the question is whether the Board's decision violated any of the standards in RCW 34.05.570(3).¹¹²

The Brief of Respondent Ferry County on page 31 then argues that its economic base is hampered by a lack of private land, but cites no evidence in the record supporting such an argument.

The Brief of Respondent Ferry County on page 31 then concedes that two of the species listed in WDFW's best available science were listed by the federal government, the threatened lynx and grizzly bear and seven other species are endangered, threatened, and sensitive (ETS)

¹¹² *Kittitas County*, 172 Wn.2d at 155, 256 P.3d at 1198.

species. Actually three of the species are listed by the federal government as “threatened,” the lynx, grizzly bear, and bull trout.¹¹³ The County notes that these species will be addressed in pending revisions to the critical areas regulations apparently conceding that the County had wrongly failed to designate these species. So at least as to these species, the Court should affirm the Board.

The Brief of Respondent Ferry County on pages 32 and 33 then argues that the for the “Columbia Spotted Frog, the Western Toad, the Golden Eagle, the Merlin, the Yellow-billed Cuckoo, the Western Grebe, the Townsends’ Big Eared Bat, the Bull Trout, the Silver-Bordered Fritillary and the California Floater, the habitat for these species are wetlands and/or streams or other riparian areas.” And these areas are already protected by the county.

This argument fails for two reasons. First, the Board found Ferry County out of compliance for failing to designate habitats and species of local importance.¹¹⁴ As we have seen, this is required by RCW 36.70A.170(1). Whether other regulations may protect the species affects the question of whether the county needs to adopt additional regulations to

¹¹³ AR 1489, US Fish and Wildlife Service email to Planning Department, Ferry County p. *1 (Jan. 26, 2006); AR 1505 – 08, *2011 Ferry County Review of Washington Fish and Wildlife PHS Candidate Species for Possible Habitats and Species of Local Importance Designation* pp. *1 –4.

¹¹⁴ AR 1567, Compliance Order at 16.

protect these species which is required by RCW 36.70A.060 and is a separate issue. If existing regulations are adequate to protect them, then why not designate the habitats when best available science supports their designation as it does here?¹¹⁵ RCW 36.70A.170(1) and RCW 36.70A.172 require designation of the habitats if designation is supported by best available science as it is here.¹¹⁶ Second, even if whether the species were protected by other regulations was relevant, neither the Brief of Respondent Ferry County nor the Planning Commission cite any evidence that the County's existing regulations and buffers are adequate to protect these species.¹¹⁷ And there is evidence in the record they are not adequate. As WDFW wrote in their most recent letter on the 2011 critical areas regulations compliance update "[a]s provided in previous comment letters, the riparian habitat area (buffer) widths proposed in the ordinance, are significantly less than what WDFW recommends in our science-based recommendations for riparian habitat areas."¹¹⁸

¹¹⁵ AR 1484 – 86, *2010 Washington Department of Fish and Wildlife Priority Species occurring in Ferry County with Federal and State Listing status* p. *1 – 3.

¹¹⁶ *Id.*

¹¹⁷ AR 1505 – 08, *2011 Ferry County Review of Washington Fish and Wildlife PHS Candidate Species for Possible Habitats and Species of Local Importance Designation* pp. *1 –4; AR 1539 – 40, *Ferry County Planning Commission Findings of Fact Concerning the Comprehensive Plan and the Critical Areas Ordinance July 13, 2011* pp. *1 –2.

¹¹⁸ AR 1548, State of Washington Department of Fish and Wildlife letter to the Ferry County Planning Director p. 5 (July 5, 2011).

The Brief of Respondent Ferry County on pages 33 and 34 also argues that because forest practices are under the jurisdiction of the federal government on federal land, the state government, and the Colville Bands and Tribes (for land on the reservation) that “the County cannot conserve any of these areas for the following species: the Black-backed Woodpecker, the Golden Eagle, the Lewis’ Woodpecker, the Northern Goshawk, the Pileated Woodpecker, the Vaux’s Swift, the White-headed Woodpecker, the Juniper Hairstreak, the Townsend’s Big Eared Bat, and the Wolverine.” This argument fails for three reasons. First, Ferry County does have jurisdiction over developments that are not forest practices on forested private land which provide habitats for these species.¹¹⁹ Second, not all of these species live entirely in forests. The golden eagle, for example, has habitat associations with grass lands and cliffs.¹²⁰ There are documented golden eagle nest sites in the valley bottoms.¹²¹ WDFW’s science recommends that the grass lands used for foraging and breeding areas such as nests should be conserved.¹²² Townsend’s big eared bat has

¹¹⁹ AR 137 – 39 & AR 143, Ferry County Critical Areas Ordinance 2011-02 Section 9.03 Protection Requirements pp. 43 – 45 & Section 10.03 Establishment of Development Permit p. 49; AR 1484 – 86, *2010 Washington Department of Fish and Wildlife Priority Species occurring in Ferry County with Federal and State Listing status* p. *1 – 3.

¹²⁰ AR 1484, *2010 Washington Department of Fish and Wildlife Priority Species occurring in Ferry County with Federal and State Listing status* p. *1.

¹²¹ AR 1545, State of Washington Department of Fish and Wildlife letter to the Ferry County Planning Director p. 2 (July 5, 2011).

¹²² *Id.*; AR 1484, *2010 Washington Department of Fish and Wildlife Priority Species occurring in Ferry County with Federal and State Listing status* p. *1.

associations with shrubsteppe, eastside steppe, riparian habitats, lakes, and rivers and WDFW's science recommends that all areas associated with the bat should be protected.¹²³ Third, Ferry County asserts regulatory jurisdiction over the fee lands within the Colville Reservation, so it is responsible for protecting habitats on those lands.¹²⁴ The county argues that responsibility for Merriam's shrew, and the Preble's shrew lies with those agencies that issue grazing leases, but state grazing lands are subject to the county's jurisdiction as are private grazing lands.¹²⁵

The Brief of Respondent Ferry County on page 35 argues that there is no information on breeding habitat for the merlin, the Vaux's swift, the western grebe, the white headed woodpecker, the yellow-billed cuckoo, the juniper hairstreak, the Shepard's pamassian, the silver-bordered fritillary, the bull trout, Merriam's shrew, Townsend's big eared bat, the wolverine, and the Preble's shrew. But breeding habitats are not the only habitats that need to be protected. For the western grebe WDFW's science recommends protecting areas that have regular concentrations, stopover areas, and winter concentrations.¹²⁶ For the

¹²³ *Id.* at AR 1485, p. *2.

¹²⁴ AR 147, Ferry County Critical Areas Ordinance 2011-02 Section 10.16 Colville Tribe p. 53.

¹²⁵ AR 137 – 39 & AR 143, Ferry County Critical Areas Ordinance 2011-02 Section 9.03 Protection Requirements pp. 43 – 45 & Section 10.03 Establishment of Development Permit p. 49.

¹²⁶ AR 1484, *2010 Washington Department of Fish and Wildlife Priority Species occurring in Ferry County with Federal and State Listing status* p. *1.

Vaux's swift WDFW's science calls for protecting communal roosts in addition to breeding areas.¹²⁷ WDFW's science calls for protecting regular occurrences of the white headed woodpecker.¹²⁸ WDFW's science calls for protecting any occurrence of the yellow-billed cuckoo, the silver-bordered fritillary, Merriam's shrew, Townsend's big eared bat, the wolverine, and the Preble's shrew.¹²⁹ Ferry County cites to no science showing that only breeding habitats need to be protected. Why did the county chose not to designate these species just because they did not have data on where they breed when the best available science calls for protecting these other habitat types? That decision is not based on best available science. Again, the Board's finding that the county did not base these decisions on best available science is supported by substantial evidence.

The Brief of Respondent Ferry County, on pages 36 and 37, argues that the golden eagle should not be protected because protecting this species will have a negative impact on the entire economy of Ferry County citing only to a finding of fact that the county's economy is fragile. However AR 1293, the part of the record cited by Ferry County, contains no evidence that protecting the golden eagle will harm the county

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ AR 1484 – 86, *2010 Washington Department of Fish and Wildlife Priority Species occurring in Ferry County with Federal and State Listing status* pp. *1 – 3.

economy. The failure to have any evidence supporting this assertion causes the County's argument to fail. As the Washington State Supreme Court held:

¶ 23 Ferry County need not develop the scientific information through its own means, but it must rely on scientific information. Because it chose to disagree with or ignore scientific recommendations and resources provided by the state agencies and the Colville Tribe, which it could do, the county necessarily had to unilaterally develop and obtain valid scientific information.¹³⁰

Ferry County chose to disregard the WDFW's scientific recommendations on the golden eagle.¹³¹ But they County did it without any science, even economic science. So substantial evidence supports the Board's conclusion that the County's decision not to designate habitats and species of local importance violates the GMA.

In footnote 8 on page 36 of the Brief of Respondent Ferry County Ferry County's states that only 18 percent of Ferry County is privately owned. We first note that although Ferry County asserts regulatory authority over the fee lands on the Colville Tribes' reservation, they always exclude those privately owned lands from their calculations. Be that as it may, there is no evidence that designating species and habitats of local importance will affect a material part of the private land. And there is

¹³⁰ *Ferry County*, 155 Wn.2d at 836, 123 P.3d at 108.

¹³¹ AR 1484 2010 *Washington Department of Fish and Wildlife Priority Species occurring in Ferry County with Federal and State Listing status* p. *1.

best available science showing that there are important habitats on private lands including documented golden eagle nest sites in the valley bottoms.¹³² However, if an economic hardship is caused by a particular habitat, the County’s critical areas regulations allow for variances and reasonable use exceptions.¹³³ The legislature adopted the best available science requirement so that counties and cities would “fashion locally appropriate regulations based on the evidence not on speculation and surmise.”¹³⁴ Unfortunately, here Ferry County succumbed to speculation and surmise and disregarded the evidence. The Board correctly interpreted the law and substantial evidence supports the Board’s Compliance Order. The order should be upheld.

It is important to note that the Board did not order the County to designate all of the species in WDFW’s science recommendations as habitats and species of local importance or any particular species as a habitat and species of local importance.¹³⁵ Instead the County can either follow the science or provide for a reasoned departure from best available science.¹³⁶ That is a pretty reasonable position considering that the

¹³² AR 1545, State of Washington Department of Fish and Wildlife letter to the Ferry County Planning Director p. 2 (July 5, 2011).

¹³³ AR 142 – 43, Ferry County Critical Areas Ordinance 2011-02 Section 10.01 Variances & Section 10.02 Reasonable Use Exceptions pp. 48 – 49.

¹³⁴ *HEAL*, 96 Wn. App. at 532, 979 P.2d at 870.

¹³⁵ AR 1563 – 67, Compliance Order at 12 – 16.

¹³⁶ AR 1567, Compliance Order at 16.

Washington State Supreme Court ordered the County to base fish and wildlife conservation area decisions on best available science eight years ago.¹³⁷

VII. CONCLUSION

As we have seen, the Board correctly concluded that Ferry County's decision to not designate any species or habitats of local significance was not based on best available science nor it is based on a reasoned departure from best available science. Substantial evidence supports the Board's Compliance Order. The Board also correctly interpreted and applied the law. We respectfully request that the Court uphold the Board's Compliance Order.

Respectfully submitted this 21st day of November 2013.



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¹³⁷ *Ferry County*, 155 Wn.2d at 824 – 26, 123 P.3d at 102 – 03.

CERTIFICATE OF SERVICE

I, Tim Trohimovich, declare under penalty of perjury and the laws of the State of Washington that, on November 21, 2013, I caused a PDF file of the original and true and correct copies of the following document to be served on the persons listed below in the manner shown: **Brief of Appellants Concerned Friends of Ferry County, David L. Robinson, and Futurewise.**

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