70796-5

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No. 70796-5-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

WHATCOM COUNTY,

Appellant,

v.

ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS, DAVID STALHEIM, FUTUREWISE, AND WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD,

Respondents.

REPLY BRIEF OF APPELLANT / CROSS-RESPONDENT WHATCOM COUNTY

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I. INTRODUCTION

In this appeal, the Court is asked to make important decisions regarding the obligations of Washington counties under the Growth Management Act (GMA) to include measures in the rural elements of their comprehensive plans that "protect the rural character of the area" by "[p]rotecting . . . surface and ground water resources" under RCW 36.70A.070(5)(c). This case raises the question of how far the Supreme Court's holding in *Kittitas County* should be extended beyond the facts in that case to determine whether Whatcom County's rural measures addressing water availability and water quality comply with the GMA.

In reviewing the issue of water availability, in particular, the Court is asked to evaluate the duties of counties in areas subject to Instream Resources Protection Program regulations ("IRPP rules") promulgated by the Department of Ecology ("Ecology").[1] Whatcom County's regulatory system incorporates Ecology's legal interpretation of the applicable IRPP rule in Whatcom County, thereby implementing measures that ensure the County exercises its land use authority in a manner that is cooperative with Ecology's regulatory program. The County's cooperative approach complies with the GMA as interpreted by the Supreme Court in *Kittitas County*, which recognized Ecology's longstanding role as the "primary administrator"[2] of the Water Code charged with managing and protecting the water resource and making legal interpretations regarding water

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[1] The IRPP rules are codified at WAC Chapter 173-501 through Chapter 173-515.

[2] *Kittitas Cnty. v. E. Washington Growth Mgmt. Hearings Bd. ("Kittitas County")*, 172 Wn.2d 144, 180, 256 P.3d 1193, 1210 (2011).

availability. Unlike the situation presented to the Court in *Kittitas County*, where Kittitas County was allowing land use applicants to circumvent Ecology's management of water resources, Whatcom County's program in this case complements and reinforces Ecology's program.

Importantly, and contrary to Petitioners'[3] assertions in their brief, the County does not argue that Ecology's interpretation of its IRPP rule "supersedes and invalidates" GMA requirements, or that water law "preempts" the GMA provisions at issue in this case.[4] Rather, the County contends that the GMA provisions at issue in this case require the County to exercise its land use authority in a manner consistent with and complementary to Ecology's regulation of water resources. By contrast, and for the first time in this proceeding, Petitioners squarely assert that the GMA obligates Washington counties to make legal interpretations regarding water availability under the Water Code that are independent of Ecology's interpretation, even if the interpretation conflicts with Ecology's program, as is the case in this scenario. The Petitioners' assertion is not supported by the law.

On the issue of water quality, the Court is asked to determine the extent to which a county's rural measures must resolve water quality problems that are pre-existing and caused by a variety of sources. The County's rural measures to protect water quality under RCW

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[3] As in the County's Opening Brief, the County refers to the Respondents/Cross-Appellants in this appeal as "Petitioners," their designation before the Board. The County refers to the Brief of Respondents/CrossAppellants as "Petitioners' Brief."

[4] Petitioners' Brief at 2, 25.

36.70A.070(5)(c) address water quality problems specifically caused by rural development. By comparison, in their brief, the Petitioners argue that the County's rural element is required to address pre-existing water quality problems, including problems that are not caused by rural uses. In advancing this interpretation, Petitioners fail to give appropriate consideration to the causal link between particular water quality problems and the lack of particular rural measures. Their interpretation is also inconsistent with analogous legal principles of proximate causation, which are instructive in determining whether the County's rural element should be deemed legally responsible for a particular water-related problem under the GMA. Petitioners' and the Board's interpretation creates absurd results, and it is inconsistent with the GMA and cases interpreting the statute.

Even though the Petitioners have agreed that these are fundamental issues of statewide importance that should be addressed by this Court,[5] in their brief, the Petitioners attempt to distract the Court by raising a series of unfounded procedural objections. Petitioners' procedural arguments are without merit, and this Court should fully consider the merits of the important issues in this case. Moreover, like the Board, Petitioners advocate an interpretation of RCW 36.70A.070(5)(c)(iv) that is fundamentally flawed. The Board's and the Petitioners' interpretations are not supported by the law or the record in this case.

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[5] *See* CP 1956-64; CP 1929-39.

The County's interpretation of RCW 36.70A.070(5)(c), in contrast, is consistent with the GMA as interpreted by the Supreme Court in *Kittitas County*, it is consistent Ecology's interpretation of the IRPP rule for WRIA 1 and the underlying laws and court decisions, and it is consistent with applicable rules of statutory construction. Accordingly, and for the reasons more fully discussed below, the Court should adopt the County's interpretation of RCW 36.70A.070(5)(c), grant the County's appeal, and reverse the Board's conclusions regarding the adequacy of the County's rural measures to protect water availability and water quality. Because the Petitioners failed to carry their burden in their cross-appeal of showing any error in the Board's decision not to issue a determination of invalidity, the Court should also deny Petitioners' cross-appeal.[6]

II. ARGUMENT

A. Standard of Review

The County's primary allegations of error are that the Board erroneously interpreted and applied the law under RCW 34.05.570(3)(d) and that the Board's Final Decision and Order (FDO) was not supported by substantial evidence under RCW 34.05.570(3)(e).[7]

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[6] The Parties to this appeal are following the briefing protocol for cross-appeals pursuant to RAP 10.1(f). In this brief, the County's reply arguments on issues raised in its appeal are in sections II.B and II.C. The County's arguments in response to arguments raised in Petitioners appeal are in Section II.D.

[7] Contrary the Petitioners' arguments, the County did not waive its related arguments under RCW 34.05.570(3)(a) and (i). The County's briefing was adequate to raise these issues, and the Court may conclude that those criteria are met for the same reasons that the Board's decision erroneously and interpreted and applied the law and was not supported by substantial evidence.

As the Petitioners recognize, in considering the County's claim under RCW 34.05.570(3)(d), the Court reviews the Board's legal conclusions *de novo*, and the Court "is not bound" by the Board's legal interpretations.[8] When interpreting the GMA, the Court must avoid constructions "that yield unlikely, strange or absurd consequences."[9] The Court must apply the plain language of the statute, without adding words or clauses.[10] Moreover, "the GMA 'is not to be liberally construed.'"[11]

In reviewing the County's claim under RCW 34.05.570(3)(e), the Court determines whether there is "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order."[12]

B. The Board's Conclusions Regarding Water Availability Were Erroneous.

1. <u>The Board erroneously interpreted and applied RCW 36.70A.070(5)(c) in reaching its conclusions regarding water availability.</u>

The Board's interpretation of the water availability requirements of RCW 36.70A.070(5)(c)[13] is inconsistent with all of the relevant authorities

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[8] Response Brief, p. 13, n. 60 (citing *Thurston Cnty. v. Western Washington Growth Management Hearings Bd.*, 164 Wn.2d 329, 341, 190 P.3d 38, 44 (2008)).

[9] *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030, 1036 (2001).

[10] *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792, 795 (2003).

[11] *Kittitas Cnty.*, 172 Wn.2d at 155 (citing *Thurston County*, 164 Wn.2d at 342).

[12] *Id.* (quoting *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998)) (internal quotation marks omitted).

[13] CP 1554-57 (concluding that the County was required to include measures in its comprehensive plan providing for the denial of 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").

cited by the parties. First, the Board's interpretation is inconsistent with the *Kittitas County* decision. As explained in the County's Opening Brief, *Kittitas County* requires counties to adopt rural measures that are cooperative and consistent with Ecology's water resource management decisions.[14] *Kittitas County* affirmed that "Ecology is the primary administrator of chapter 90.44 RCW" and that "Ecology maintains its role, as provided by statute, and ought to assist counties in their land use planning to adequately protect water resources."[15] The Court determined that Kittitas County's measures did not comply with the GMA because they allowed applicants to circumvent Ecology's management of water resources. Contrary to these clear statements in *Kittitas County*, the Board's decision that is the subject of this appeal requires Whatcom County to reach beyond its complementary regulatory system and take actions and make decisions that are independent of and contrary to Ecology's role as the primary administrator of chapter 90.44 RCW.

The Board's interpretation of the water availability requirements of RCW 36.70A.070(5)(c) is also inconsistent with rules of statutory construction. The Board's liberal interpretation would lead to absurd results, including unnecessary conflict and duplication between Ecology's authority to interpret IRPP rules for particular WRIA basins and the County's obligation to protect water availability during subdivision and

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[14] Brief of Appellant Whatcom County dated February 27, 2014 ("Opening Brief") at 14-16 (citing *Kittitas Cnty.*, 172 Wn.2d at 175-81).

[15] *Kittitas Cnty.*, 172 Wn.2d at 180.

building permit processes. It would require the County to exercise its responsibility to make water availability determinations in a vacuum, without reference to the framework of water allocation established by Ecology. The Board's reading would force the County to require permit applicants relying on permit-exempt withdrawals to submit to a water rights impairment analysis that Ecology does not require. It would require County planning staff reviewing subdivision and building permit applications to make independent factual determinations and legal interpretations regarding water availability in complex and unsettled areas of law. It would needlessly expose the County to potential liability to permit applicants for requiring applicants to submit costly impairment analyses that are not required by Ecology, and for making independent water availability determinations during the permitting process that are contrary to Ecology's interpretations. Fortunately, these absurd results can easily be avoided by rejecting the Board's interpretation.

Moreover, as explained in the County's Opening Brief, the Board's interpretation of RCW 36.70A.070(5)(c) conflicts with Ecology's historic interpretation regarding the applicability of the WRIA 1 IRPP rule to permit-exempt withdrawals, which is supported by the plain language of the rule.[16] In responding to the County's brief, the Petitioners mischaracterize several of the County's arguments regarding Ecology's

[16] Opening Brief at 19-25.

interpretation, setting up a series of "straw man" arguments.[17] As explained below, Petitioners' arguments are without merit.

a. *Steensma* confirms the existence of Ecology's WRIA 1 interpretation.

First, the County is not arguing that Ecology has adopted a formal interpretation that is entitled to judicial deference, as suggested by the Petitioners.[18] Such deference would only be at issue in a proceeding to directly review the Ecology interpretation. Instead, the County is explaining that Ecology has historically interpreted the WRIA 1 IRPP rule differently than the Board did in its FDO. The County does not argue that deference should be given to the correctness of Ecology's interpretation, but simply that consideration must be given to its existence because, under *Kittitas County,* the County is required to follow Ecology's interpretations regarding water availability.

The Petitioners suggest that the Ecology interpretation apparent in the *Steensma v. Dept. of Ecology* decision should be limited as a matter of legal precedent, but Petitioners do not deny that *Steensma* reflects an Ecology interpretation of the WRIA 1 IRPP rule that is contrary to the Board's interpretation.[19] The interpretation reflected in *Steensma* contradicts the Board's conclusion that Ecology treats exempt wells the same in Whatcom County as it does in Snohomish County. The Board's

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[17] Petitioners' Brief at 20-23, 27, 30-33.

[18] *Id.* at 22-23.

[19] *Id.* (citing *Steensma v. Ecology*, PCHB No. 11-053).

conclusion that the various independent IRPP rules have the same effect in all basins is also inconsistent with the Supreme Court's decision in *Postema*, which rejected the uniform interpretation of IRPP rules advanced by the Board.[20]

b. The County's water availability determinations must be consistent with Ecology's WRIA 1 interpretation.

Second, the Petitioners mischaracterize the County's arguments regarding Ecology's role in the water availability processes required under RCW 19.27.097 and 58.17.110.[21] The County has never denied that it "has the legal responsibility under RCW 19.27.097 and 58.17.110 to determine water availability before it issues permits"[22]; rather, the County contends that its determinations must be guided by Ecology's interpretations of IRPP rules promulgated by Ecology and relevant water law statutes and case law. Similarly, the County has not argued that Ecology's interpretation would "immunize"[23] the County from complying with GMA obligations; instead, the County is arguing that under the correct reading of the GMA, consistency with Ecology's interpretation would result in compliance with the GMA. The Petitioners also incorrectly assert that "the County does not contest" that "the County regulations incorporated by reference into Policies 2DD-2.C6 and 2DD-

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[20] *Postema v. PCHB*, 142 Wn.2d 68, 87, 11 P.3d 726 (2000).

[21] Petitioners' Brief at 27.

[22] *Id.*

[23] *Id.* at 29.

2.C6 do not require any showing that water is legally available."[24] In fact, those regulations require a showing that water is legally available, consistent with the WRIA 1 IRPP rule, by limiting reliance on exempt wells to areas that do not "fall within the boundaries of an area where DOE has determined by rule that water for development does not exist."[25]

c. *Postema and Swinomish v. Ecology* do not require the County to contradict Ecology's WRIA 1 interpretation.

Third, the Petitioners' arguments are based on misreadings of the *Postema* and *Swinomish v.Ecology* decisions.[26] Both the Board in the FDO and Petitioners in their brief rely on *Postema* to advance a uniform interpretation of all IRPP rules under which all IRPP rules regulate permit-exempt withdrawals in the same manner.[27] However, the Court in *Postema* expressly rejected similar arguments urging the Court to apply a "consistent interpretation" to all WRIAs or a "uniform meaning to rules that simply are not the same."[28] Instead, the Court concluded that

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[24] *Id.* at 28.

[25] WCC 24.11.090(B)(3), Appendix to Opening Brief at p. 32; WCC 24.11.150, Appendix to Opening Brief at p. 37; WCC 24.11.170(E)(4), Appendix to Opening Brief at p. 40.

[26] Petitioners' Brief at 30-33 (citing *Postema*, 142 Wn.2d at 81, 83, 90-91; *Swinomish Tribal Community v. Dept. of Ecology*, 178 Wn.2d 571, 576, 579, 598, 311 P.3d 6 (2013)).

[27] Indeed, as explained in the County's Opening Brief, the Board in its FDO mistakenly concludes that an Ecology letter regarding an IRPP Rule from a different IRPP Rule with specific provisions expressly regulating permit-exempt withdrawals is representative of how to interpret IRPP rule for WRIA, despite critically different language. *See* Opening Brief at 25-28.

[28] *Postema*, 142 Wn.2d at 84 ("Ultimately, we are unconvinced by the parties' arguments urging their respective versions of a consistent interpretation applying to all WRIAs...While there is some appeal to the idea that all of the rules should mean the

differences in the rules result in different regulatory outcomes. Critically, in this case, the governing IRPP rule for WRIA 1 applies to permits and certificates and expressly includes an exemption for domestic uses, which is controlling when considering the effect of the IRPP rule on permit-exempt withdrawals.[29] Pursuant to *Postema*, the Board should have given the WRIA 1 IRPP rule its own meaning.[30]

Moreover, *Postema* addressed a very different legal question from the issue in this case. While *Postema* involved "applications for groundwater appropriation permits," and the four-part test that Ecology uses when reviewing applications for groundwater permits under RCW 90.03.290, this case involves the legal effect of an IRPP rule on permit-exempt withdrawals.[31] In other words, *Postema* focused on the interpretation and application of the decision criteria Ecology applies when reviewing applications for new permits – a decision-making process from which permit-exempt withdrawals are exempt.

To the extent that *Postema* addressed the question of permit-exempt withdrawals, it was only to conclude that the exemption from the permitting process for certain domestic uses is not relevant to the criteria applied by Ecology when evaluating new permit applications.[32]

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same thing therefor, we too decline to search for a uniform meaning to rules that simply are not the same.").

[29] Opening Brief at 22-23 (citing WAC 173-501-070, WAC 173-501-030(4), WAC 173-501-060).

[30] *Postema*,142 Wn.2d at 84.

[31] *Postema*,142 Wn.2d at 73.

[32] *Id.*, 142 Wn.2d at 89.

Specifically, the Court rejected an appellant's arguments that Ecology's decision criteria allow for *de minimis* impacts on existing rights. In support of this argument, the appellant analogized to exemptions for domestic use, including the exemption under RCW 90.44.050 and a provision in an IRPP rule exempting single family domestic use even where the withdrawal is from a stream closed to further appropriation.[33] The Court rejected the analogy because the exemptions did not apply to the permit application at issue in that case and were therefore irrelevant to the Court's analysis of standards applied under RCW 90.03.290 for permit applications. Indeed, Petitioners' own brief recognizes this critical distinction from the legal issue in *Postema* by suggesting that *Postema's* sole discussion of IRPP rules with exemptions for domestic uses is "tangential" to the Court's holding.[34] The Court did not, however, as Petitioners contend in this case, question those domestic exemptions or conclude as Petitioners do in this case, that domestic exemptions are prohibited by all IRPP rules.[35] *Postema* thus does not support the Petitioners' claims or the Board's holding.

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[33] *Id.* (citing WAC 173-508-080(2)). Notably, the IRPP rule for WRIA 1 includes a similar exemption. *Compare* WAC 173-501-070(2) *with* WAC 173-508-080(2).

[34] Petitioners' Brief at 31, n.142.

[35] To the extent that Petitioners in their arguments suggest that this Court should opine regarding the validity of the exemption in the rule, it simply demonstrates that Petitioners are pursuing their claims in the wrong venue. This is not the proper venue to challenge Ecology's rule or its interpretation of the rule. Rather, the Court is presented with the question of whether the County complies with GMA by adopting regulations that incorporate Ecology's rule and implement Ecology's interpretation.

Nor does the *Swinomish v. Ecology* case[36] support Petitioners' claims. *Swinomish v. Ecology* involved a challenge to Ecology's amendment to the IRPP rule for the Skagit basin to create a reservation for new withdrawals that would impair minimum flows set by rule. Ecology justified its amendment on the basis of the exception for "overriding considerations of the public interest" under RCW 90.54.020(3)(a). The IRPP rule at issue expressly governed permit exempt-withdrawals, in addition to permits and certificates. In this case, the IRPP rule for WRIA 1 is different from the IRPP rule and its amendment at issue in *Swinomish v. Ecology*. As noted above, the IRPP rule for WRIA 1 excludes new single domestic uses, and it expressly regulates only water right permits or certificates and not permit-exempt wells.[37] As a result, Ecology has historically interpreted the WRIA 1 IRPP rule as not prohibiting new permit exempt withdrawals. In short, the holdings in *Postema* and *Swinomish v. Ecology* do not apply to the WRIA 1 rule because of the specific language in the governing IRPP rule.

It bears emphasis that it is not the County's duty to defend the correctness of Ecology's interpretation, and that this is not the appropriate forum for Petitioners to challenge the legality of the WRIA 1 IRPP rule or Ecology's interpretation of that rule.[38] Petitioners have other potential

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[36] *Swinomish,* 178 Wn.2d 571.

[37] Opening Brief at 22-23 (citing WAC 173-501-070, WAC 173-501-030(4), WAC 173-501-060).

[38] *See id.* at 28-29.

avenues to seek relief from the WRIA 1 rule, but this is not the appropriate forum for that dispute.

d. Ecology's WRIA 1 interpretation is not a "new issue."

Fourth, contrary to Petitioners' contentions, the County's arguments regarding the meaning of the WRIA 1 IRPP rule do not represent a "new issue" that was not raised before the Board under RCW 34.05.554(1).[39] First, the underlying "issue" here is whether the County's rural measures complied with the GMA obligation to protect water availability, not the sub-issues of how Ecology has interpreted the WRIA 1 rule or what legal effect Ecology's interpretations of IRPP rules should have on the Board's evaluation of GMA compliance. These questions are merely components of the larger issue of compliance with water availability requirements.[40] Second, the County clearly raised even these sub-issues in its brief before the Board,[41] and the Board recognized them in its FDO:

> 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. This administrative code does not regulate exempt wells, according to the County . . . The County observed Ecology recently adopted rules regulating exempt wells

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[39] Petitioners' Brief at 20-23.

[40] *Compare Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 870, 947 P.2d 1208, 1213 (1997) ("Haggen suggests the issue is R-2A zoning; Haggen is wrong. The issue is the city council's ability to approve a commercial PUD in a residential neighborhood and on property zoned residential.").

[41] CP 1007-08, n. 20.

> 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.
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> [...]
>
> 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." 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. 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.[42]

Indeed, the Board's conclusions regarding the WRIA 1 IRPP rule surprised the County by going beyond what the parties had argued before the Board. To the extent that the County has refined or re-worded the argument it presented to the Board, it has done so in response to the Board's FDO, which is entirely appropriate in an appeal of the Board's order. The APA anticipates that parties should craft and refine their arguments to address the conclusions of the agency decision under appeal.

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[42] CP 1554-57.

These are clearly not new issues, and the Court should reject the Petitioners' attempts to avoid the merits of these issues through a hypertechnical reading of RCW 34.05.554(1).[43]

2. The Board's conclusion regarding water availability is not supported by substantial evidence.

The County's challenge under RCW 34.05.570(3)(e) is a mixed issue of fact and law that requires the Court to first interpret the GMA, and then to apply that interpretation to the facts in evaluating whether the Board's order is supported by substantial evidence. "On mixed questions of law and fact, we determine the law independently, then apply it to the facts as found by the agency."[44]

The Board's conclusion regarding water availability is not supported by substantial evidence showing Ecology's treatment of exempt wells in Whatcom County. The Board's conclusion is based on evidence regarding Ecology's practices in Snohomish County in a different basin that is subject to a different IRPP rule than the WRIA 1 rule applicable to Whatcom County. There was no evidence before the Board showing that Ecology has adopted that same interpretation of the WRIA 1 IRPP rule, and the Board made no express findings on this material fact. Because the Board made no findings regarding Ecology's practices in WRIA 1, the

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[43] *See Gold Star Resorts, Inc. v. Futurewise*, 140 Wn. App. 378, 396, 166 P.3d 748, 757 (2007) aff'd in part, rev'd in part, 167 Wn.2d 723, 222 P.3d 791 (2009), rev'd on other grounds by *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 726, 222 P.3d 791, 793 (2009)(holding that "no purpose would be served by barring substantive review").

[44] *Thurston Cnty. v. W. Washington Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 341-42, 190 P.3d 38, 44 (2008) (quoting *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 8, 57 P.3d 1156 (2002)).

Court should deem this fact to have been found against the Petitioners.[45] The absence of any evidence reflecting Ecology's practices in WRIA 1 further supports the County's legal analysis of the WRIA 1 rule and Ecology's interpretation of that rule.

Contrary to the Petitioners' suggestion, the County's substantial evidence challenge under RCW 34.05.570(3)(e) is consistent with the requirements for assignment of error to the Board's findings and conclusions. Notably, unlike decisions of some quasi-judicial agencies that include specifically-identified "findings of fact" and "conclusions of law," the Board's 51-page FDO does not contain any formal findings of fact at all, much less "numbered" findings as referenced in RAP 10.3(g).[46] The Petitioners acknowledge the absence of findings in the FDO when they refer "the findings of fact inherent in the Board's conclusion" at issue in their cross-appeal.[47] The mere fact that the Board uses the phrase "the Board finds . . ." does not make a particular Board determination a finding of fact. Instead, a conclusion of law mislabeled as a finding will be treated as a conclusion.[48] None of the cases cited by Petitioners specifically

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[45] *Manufacturers Acceptance Corp. v. Irving Gelb Wholesale Jewelers, Inc.*, 17 Wn. App. 886, 892, 565 P.2d 1235 (1977) (citing *Baillargeon v. Press*, 11 Wn. App. 59, 67, 521 P.2d 746 (1974)).

[46] *See* RAP 10.3(g) ("A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number."). RAP 10.3 also notes that "[t]he appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." Thus, issues may be raised in an assignment of error or in the related issue statement.

[47] Petitioners' Brief at 5 (emphasis added).

[48] *Moulden & Sons, Inc. v. Osaka Landscaping & Nursery, Inc.*, 21 Wn. App. 194, 197, 584 P.2d 968, 970 (1978). "Findings of fact that are actually conclusions of law will be

address the question of whether the County would be required to include specific assignments of error to any Board "findings" under these circumstances,[49] and general precedent suggests otherwise.[50]

More importantly, the issues raised by the County do not involve any affirmative challenge to findings of fact made by the Board. The County's argument under RCW 34.05.570(3)(e) is not that the Board adopted erroneous factual findings that are not supported by the record, but rather that the Board failed to make findings regarding material facts necessary to support its conclusion that the County's rural measures violate the GMA. In other words, the County challenges the legal consequence the Board assigned to the evidence it reviewed. An agency's

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treated as conclusions of law, and it is therefore unnecessary to set them out verbatim in the brief." *State v. Reader's Digest Ass'n, Inc.*, 81 Wn.2d 259, 266-67, 501 P.2d 290, 296 (1972).

[49] Petitioners' Brief at 14, n. 66 (citing *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279, 1282 (1980); *Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings Bd.* 113 Wn. App. 615, 628, 53 P.3d 1011, 1018 (2002), rev. denied, 148 Wn.2d 1017, 64 P.3d 649 (2003)). Unlike the Board's FDO in this case, the trial court's decision on review in *Davis* included designated and numbered findings of fact. Davis, 94 Wn.2d at 123-24. *Manke* similarly involved a decision that included formal findings of fact adopted by the Kitsap County Board of Commissioners in adopting a county comprehensive plan. *Manke*, 113 Wn. App. at 628,. Moreover, the Court in *Davis* confirmed that, even when considering unchallenged findings of fact, the Court was still required "to ascertain that they support the conclusions of law and the judgment." *Davis*, 94 Wn.2d at 124.

[50] RAP 1.2(a) (appellate rules liberally interpreted to promote justice and facilitate a decision of cases on the merits); *State v. Olson*, 126 Wn.2d 315, 318-319, 893 P.2d 629 (1995) (technical violations should normally be overlooked and the issues decided on the merits, particularly where the violation is minor, and results in no prejudice to the other party and no more than a minimal inconvenience to the appellate court); *Havlina v. Washington State Dep't of Transp.*, 142 Wn. App. 510, 515, n. 1, 178 P.3d 354, 356 (2007) (reviewing issues despite brief's noncompliance with RAP where "the nature of the appeal is clear," "the relevant issues are argued in the body of the brief," "citations are supplied so that the Court is not greatly inconvenienced," and "the respondent is not prejudiced").

conclusions must still be supported by adequate findings, even when no error is assigned to the agency's findings in an appeal.[51] As noted above, "[t]he failure to make an express finding on a material fact is deemed to have been found against the party having the burden of proof" – here, the Petitioners before the Board.[52] Because the Board made no findings regarding Ecology's interpretation of the WRIA 1 IRPP rule, the Petitioners failed to meet their burden of proof on that issue.

Thus, the County's challenge under RCW 34.05.570(3)(e) requires the Court to evaluate whether the Board's conclusions were supported by adequate evidence and findings, but it does not require the Court to "search the record" to determine whether there is evidence supporting the Board's findings – the underlying concern that RAP 10.3(g) is intended to address.[53] The County has complied with all applicable requirements for assignments of error in its brief, and the County's issues regarding the correct interpretation of RCW 36.70A.070(5)(c) are properly before the Court. The Court should reject Petitioners' unfounded procedural objections and consider the merits of the County's challenge.

In sum, the Board erroneously interpreted and applied the GMA's water availability requirements in a manner that requires the County to disagree with Ecology, and the Board's FDO was not supported by substantial evidence regarding Ecology's practice and interpretation in

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[51] *Manufacturers Acceptance Corp.*, 17 Wn. App. at 892.

[52] *Id.* (citing *Baillargeon*, 11 Wn.App. at 67).

[53] *See Davis*, 94 Wn.2d at 123 (citing RAP 10.3(g)).

WRIA 1. The Board's conclusions regarding water availability should be reversed.

C. The Board's Conclusion Regarding Water Quality Was Erroneous.

1. The Board erroneously interpreted and applied RCW 36.70A.070(5)(c) in reaching its conclusion regarding water quality.

The Board's interpretation and application of RCW 36.70A.070(5)(c) failed to include any consideration of causation in determining compliance with the requirement to protect water quality. The Board adopted the County's statement that "[l]ong-term resolution of the numerous, complex and changing water issues requires actions in many areas," and the Petitioners do not contest this obvious fact, but the Petitioners' and the Board's interpretations of the GMA both fail to account for the complexity of the causes of and solutions to water quality problems.[54]

While the Board discusses many different causes of water quality problems in general terms, the Board cited no evidence and made no findings or conclusions specifically linking any particular water quality problem to the absence of a particular rural measure in Whatcom County's comprehensive plan. The general causes of problems identified by the Board range from "increasing urbanization, to malfunctioning septic systems, agricultural runoff, and removal of riparian vegetation"; "land

[54] CP 1541.

use development practices"; "sewage and septic discharges, direct application of chemicals to tidelands, marine dumping, and airborne contaminants, and mis-application of pesticides and herbicides"; "loss of vegetation cover"; "agriculture, wastewater discharges, run-off from the built environment [and] transportation"; and "forest and farm conversions."[55]

Based on this generalized evidence, the Board jumped to the conclusion that the County must be in violation of the GMA's provisions requiring that the County adopt rural measures to protect surface and groundwater resources: "From 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 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."[56] In this statement, it is clear that the Board's interpretation of RCW 36.70A.070(5)(c) presumed that noncompliance can be established by introducing general evidence of problems with water quality, and that specific evidence causally linking a problem to a particular measure is not required. Under the Board's liberal interpretation of the GMA, the County would never be in compliance as long as any water quality problems remain. Any remaining problems

[55] CP 1546-49.

[56] CP 1549-50

would *ipso facto* be deemed the result of the County's choices regarding rural measures.[57] That is an absurd result, and it cannot be the law.

The Board's evaluation of compliance with the requirement to "protect" water quality in RCW 36.70A.070(5)(c) must consider whether there is evidence specifically linking a potential or existing problem to the need for a particular measure limiting rural development, and must include a consideration of what can be realistically and legally be accomplished by adopting rural measures in the County's comprehensive plan. The County cannot realistically solve all water quality problems through the adoption of rural measures, but the County can reasonably limit rural development, and it has done that. Unless the absence of a particular measure is shown to be the proximate cause of a problem, the County cannot be deemed legally responsible and noncompliant with the GMA for having decided not to adopt that measure.[58] Instead, the Board is required to defer to the County's choices regarding "what measures will best protect rural character."[59] By holding the County's rural measures legally responsible for all existing water quality problems without considering their cause, the

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[57] *See id.*

[58] Proximate cause under Washington law recognizes two elements: cause in fact and legal causation. *Christen v. Lee*, 113 Wn.2d 479, 507, 780 P.2d 1307 (1989). Cause in fact refers to the "but for" consequences of an act (or, as here, an omission) – the physical connection between an act or omission and an injury. *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). Legal causation involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. The focus is on "whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability." *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 478-79, 951 P.2d 749 (1988).

[59] *Kittitas County*, 172 Wn.2d at 164.

interpretations of the Board and the Petitioners would render this deference requirement meaningless. No room for local choice would remain.

Like the Board, the Petitioners' interpretation of the water quality requirements of RCW 36.70A.070(5)(c) would treat any evidence of water pollution (regardless of its source) as proof of the inadequacy of the County's rural measures, and as sufficient to establish a *per se* GMA violation: they argue that the County's rural measures "are not sufficient to protect water resources, as evidenced by continuing and increasing levels of pollution."[60] Moreover, the Petitioners would go even further than the Board. The Petitioners urge the Court to import a broad GMA goal into the specific requirements of RCW 36.70A.070(5)(c), and to conclude that the County's duty to "protect" water quality under RCW 36.70A.070(5)(c) includes a duty to perpetually "enhance" water quality.[61] Contrary to rules of statutory construction, the Petitioners' interpretation would liberally construe the GMA, and it would effectively add words to RCW 36.70A.070(5)(c) by holding that "protect" means to "enhance." The Petitioner's interpretation would also rely on the language of a single GMA goal in isolation to "independently create substantive requirements," a practice that has been expressly prohibited by the Washington Supreme Court.[62]

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[60] Petitioners' Brief at 35-36.

[61] *Id.* at 3-4, 40.

[62] *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 246, 110 P.3d 1132, 1143 (2005) (explaining that a prior Supreme Court decision "did not rely on the

Petitioners' suggestion is not supported by the *Swinomish v. GMHB* case, which clearly recognized that the GMA goal to "[p]rotect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water" under RCW 36.70A.020(10) is a goal, not a requirement.[63] That decidion does not support Petitioners' attempt to import the goal to "enhance" in RCW 36.70A.020(10) into the requirement to "protect" in RCW 36.70A.070(5)(c). On the contrary, in evaluating GMA requirements, *Swinomish v. GMHB* held that a requirement to "protect" meant the prevention of new harm, not the restoration of pre-existing harms. Petitioners' interpretation would make compliance impossible, subjecting Washington counties to a rigid, perpetual, and ever-elusive duty to further "enhance" water quality that could never be fully met.

The Court should reject the Board's and the Petitioners' flawed interpretations of RCW 36.70A.070(5)(c). The duty to "protect" water quality must include some recognition of the factual and legal causes of water quality problems.

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applicable goal in isolation nor did it hold the goals to independently create substantive requirements," but rather "construed the GMA's relevant agricultural provisions there as a whole as a means of discerning legislative intent," and noting that "some of [the GMA's goals] are mutually competitive.").

[63] *Swinomish Tribal Community v. Western Washington Growth Management Hearings Board,* 161 Wn.2d 415, 427-30, 166 P.3d 1198 (2007).

2. The Board's conclusion regarding water quality was not supported by substantial evidence.

Because the Board made no findings linking particular water quality problems to the absence of particular rural measures in the County's Comprehensive Plan, this fact should be deemed to have been found against the Petitioners.[64] As explained in the County's Opening Brief, none of the Board's findings specifically linked the water quality problems discussed in the FDO to the need for particular county-wide restrictions, such as limits on impervious surfaces or more stringent requirements for the inspection of On-Site Sewage (OSS) systems. As a result, the Board should have concluded that the Petitioners failed to meet their burden of proving that particular water quality problems are causally related to the inadequacy of the County's rural measures. Because the Board failed to do so, its decision was not supported by substantial evidence.

For example, the Petitioner suggests that water quality problems are being caused by the County's failure to adopt Ecology's Stormwater Manual for Western Washington as a rural measure, but they cite no evidence showing that adoption of Ecology's manual is needed to address any particular water quality problem resulting from rural uses. Moreover, as explained in the County's Opening Brief, the County does, in fact, require rural development to use Best Management Practices from the "latest edition" of Ecology's stormwater manual as part of the Stormwater

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[64] *Manufacturers Acceptance Corp.*, 17 Wn. App. at 892.

Development Standards included in Chapter 2 of the County's Public Works Development Standards.[65] Petitioners cite to the County's Environmental Impact Statement (EIS) for its 10-Year Urban Growth Area Update to support their argument that the County "has not yet adopted" Ecology's manual, but that EIS does not discuss the Stormwater Development Standards, and it does not trump the requirements in the County's adopted code.[66] Petitioners also attempt to mischaracterize the Stormwater Development Standards as "non-regulatory" based on a statement in the County's code that the standards are "are not intended to establish new land use regulations," but this reading of the code is clearly contradicted by other language in the same section of the code stating that the standards are "requirements":

> Whatcom County shall establish uniform, comprehensive and distinct requirements which shall be applied to all developments. These requirements shall be established as "Whatcom County development standards" and shall exist to provide clear development guidelines for all construction activity within the county. These standards shall establish administrative and technical requirements for the implementation of land use regulations and shall provide the basis by which developments are evaluated to ensure compliance with county regulations.[67]

Thus, not only does the Petitioner fail to link any specific water quality problems to the absence of particular rural measures, the Petitioner

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[65] Opening Brief at 33 (citing WCC 20.80.630(2), Appendix to Opening Brief at pp. 2-3).

[66] Petitioners' Brief at 35, n. 158.

[67] WCC 12.08.035.A (emphasis added), available at http://www.codepublishing.com/wa/whatcomcounty/.

also makes statements regarding the County's existing measures that are simply incorrect.

3. The Board's conclusion regarding water quality is based on unlawful procedure.

As discussed in the County's Opening Brief, the Board violated its own rules of procedure by taking official notice of two documents without following the proper procedures for considering those documents.[68] The Petitioners' arguments to the contrary are without merit. The documents noticed by the Board do not fall within the bounds of WAC 242-03-640(1)(b),[69] and in any case the Board was not exempt from the notice requirements of WAC 242-03-640(3).[70] The Board's violation of its own rules underscores the lack of substantial evidence supporting the Board's conclusion regarding water quality.

D. Petitioners Fail to Demonstrate Error in the Board's Conclusion that a Determination of Invalidity Is Not Warranted.

The Board's decision not to issue a determination of invalidity was a discretionary one. Under RCW 36.70A.302(1), the Board "may

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[68] Opening Brief at 45-47.

[69] The documents cited by the Board are not so well-accepted as to constitute the source of "notorious facts," and the "facts" cited by the Board from these documents are too generalized to constitute "specific facts which are capable of immediate and accurate demonstration" under WAC 242-03-640(1)(b).

[70] The Petitioners offer no support for their suggestion that the phrase "material fact(s) proposed to be officially noticed" in WAC 242-03-640(3) excludes facts that may be proposed to be noticed by the Board. Petitioners' narrow reading of the notice requirements of WAC 242-03-640(3), which would allow the Board to take official notice of documents after a hearing without providing prior notice to the parties or an opportunity to contest the materials, is not supported by the language of WAC 242-03-640 or principles of due process.

determine that part or all of a comprehensive plan or development regulations are invalid" (emphasis added). The ordinary meaning of the word "may" conveys the idea of choice or discretion.[71] Indeed, the Petitioners admit the Board has the "authority to invalidate" under RCW 36.70A.302(1) rather than a duty to do so.[72] Petitioners fail to show that the Board abused its discretion by refusing to issue a determination of invalidity in this case.

The cases cited by Petitioners do not support their argument that the Board was required to issue a determination of invalidity.[73] Petitioners admit that the cited *Spokane County* decision "upheld a Board determination of invalidity" rather than reversing a decision that invalidity was not warranted.[74] Similarly, in the *Davidson Serles & Associates* decision, the court upheld a Board decision not to invalidate an ordinance, as the Court should do in this case.[75] Petitioners fail to support their argument with any cases in which a court reversed a Board decision not to issue a determination of invalidity.

Contrary to the Petitioners' suggestion, the mere fact that the Board exercised its discretion to declare invalid only "the most egregious

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[71] *Strenge v. Clarke*, 89 Wn.2d 23, 28, 569 P.2d 60, 63 (1977).

[72] Petitioners' Brief at 46.

[73] Petitioners' Brief at 49 (citing *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 176 Wn. App. 555, 581-82, 309 P.3d 673, 685-86 (2013), rev. denied, 179 Wn.2d 1015, 318 P.3d 279 (2014); *Davidson Serles & Associates v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 159 Wn. App. 148, 153, 244 P.3d 1003, 1005 (2010)).

[74] *Id.* (citing *Spokane County*, 176 Wn. App. at 581-82).

[75] *Davidson*, 159 Wn. App. at 153.

noncompliant provisions which threaten the local government's future ability to achieve compliance with the Act" does not establish that the Board failed to follow the standards for invalidity in RCW 36.70A.302(1).[76] That phrase in the FDO is entirety consistent with the standards for invalidity in RCW 36.70A.302(1).

More importantly, the Petitioners failed to meet their burden of proving that the continued validity of the County's rural measures will substantially interfere with the goals of the GMA. This burden requires the Petitioners to show that some harm to the GMA's goals will come from a decision not to impose invalidity and allow the existing rural measures to remain in place. In challenging the adequacy of the County's rural measures, however, the Petitioners have not alleged that existing measures are affirmatively causing harm, but rather that harm is being caused by the absence of more protective measures.[77] The Board's FDO was similarly focused on the need for additional measures[78], but invalidity does not result in the addition of protective measures. On the contrary, invalidity would remove the County's existing protective measures. In a recent decision rejecting Petitioners' repeated requests for invalidity in the ongoing compliance proceedings before the Board, the Board recognized

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[76] Petitioners' Brief at 45-46.

[77] Petitioners' Brief at 14-50 (alleging need for more protective measures to address water availability and water quality problems).

[78] CP 1550 ("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).").

that "[i]nvalidity could in fact reduce protections."[79] The Court should reject the Petitioners' arguments, which fail to acknowledge that the invalidation of the County's existing rural measures will do nothing to protect water availability or water quality.

Further, the Petitioners' arguments in favor of invalidity are based on a misreading of the Board's authority to impose invalidity. It is well established that the Board lacks the authority to invalidate preexisting development regulations, such as the regulations the County incorporated into its comprehensive plan as rural measures in this case. As the Board found in a recent decision rejecting the Petitioners' repeated requests for invalidity during the ongoing compliance proceeding before the Board in this case, "[t]he 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."[80] Thus, the Board lacks authority to grant Petitioners' invalidity request.

The Court should affirm the Board's decision not to issue a determination of invalidity. The Board correctly applied that the criteria for a invalidity under RCW 36.70A.302(1) and properly exercised its discretion under the statute.

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[79] *Hirst et al. v. Whatcom County*, GMHB Case No. 12-2-0013, Second Order on Compliance (April 15, 2014), 2014 WL 1884669 at * 5. A copy of the Board's Second Order on Compliance is attached as Appendix A to this brief.

[80] *Hirst et al. v. Whatcom County*, GMHB Case No. 12-2-0013, Compliance Order (January 10, 2014), 2014 WL 494486 at * 3. A copy of the Board's Compliance Order is attached as Appendix B to this brief.

III. CONCLUSION

For the reasons stated herein, the Court respectfully requests that the Court grant the County's appeal and deny the Petitioners' cross-appeal. The Court should reverse the conclusions in the Board's FDO regarding the adequacy of the County's measures to protect water availability and water quality and affirm the Board's decision not to issue a determination of invalidity.

Respectfully submitted this 16th day of June, 2014.

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Appendix A

2014 WL 1884669 (West.Wash.Growth.Mgmt.Hrgs.Bd.)

Western Washington Growth Management Hearings Board

State of Washington

ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS, DAVID STALHEIM, AND FUTUREWISE, PETITIONERS
v.
WHATCOM COUNTY, RESPONDENT

Case No. 12-2-0013
April 15, 2014

SECOND ORDER ON COMPLIANCE

*1 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).

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 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]

*2 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, 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]

Relevant Authorities

V. BOARD DISCUSSION AND ANALYSIS

***3 RCW 36.70A.300** Final orders.

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

(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** (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**.

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.

***5** 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.

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.

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

Nina Carter
Board Member
Raymond L. Paolella
Board Member
Margaret Pageler
Board Member

Footnotes

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).

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.

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.

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

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.

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

Appendix B

2014 WL 494486 (West.Wash.Growth.Mgmt.Hrgs.Bd.)

Western Washington Growth Management Hearings Board

State of Washington

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

v.

WHATCOM COUNTY, RESPONDENT

Case No. 12-2-0013
January 10, 2014

COMPLIANCE ORDER: FINDING CONTINUING NONCOMPLIANCE, EXTENDING COMPLIANCE SCHEDULE, SUPPLEMENTING THE RECORD AND DENYING INVALIDITY

***1** 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 in the Rural Element of its Comprehensive Plan protecting surface and groundwater quality, water availability, and water for fish and wildlife.[1] The June 2013, Final Decision and Order established a compliance deadline of December 4, 2013, and set a compliance hearing January 21, 2014.

I. PROCEDURAL HISTORY

On November 15, 2013, Whatcom County submitted a Motion for Continuance of the Compliance Date. On November 25, 2013, Petitioners Hirst, et al. filed a motion to Supplement the Record and a Petition to Impose Invalidity as to certain development regulations. On December 2, 2013, the Board issued an order setting a compliance hearing for December 18, 2013, to discuss the motions. On December 3, 2013, the County filed an Amended Reply in Support of Motion for Continuance and Response to Petition for Invalidity. On December 13, 2013, Petitioners filed a Motion to Supplement the Record with rebuttal evidence in support of invalidity. On the same day, the County filed its Initial Response to the Motion to Supplement. On December 18, 2013, the Board held a telephonic compliance hearing.

II. BOARD DISCUSSION

Finding of Continuing Non-Compliance and Extension of Compliance Schedule

The Board finds as follows: The June 7, 2013, Final Decision and Order (FDO) set a December 4, 2013, date for the County to take action to comply. The County acknowledges it has not yet taken such action. The County indicates their Council will hold its next meeting on January 13, 2014, and will subsequently consider action to comply with the FDO.

The Board finds and concludes Whatcom County has not taken any action to achieve compliance with the GMA since the June 7, 2013, Final Decision and Order; and thus the Board finds the County in continuing non-compliance with the Growth Management Act. The Board grants an extended compliance schedule.

Motion to Supplement the Record

Both parties here have provided additional evidence and documentation pertaining to the County's delay in compliance and the development activity in the County. The Board's rules indicate evidence arising subsequent to the adoption of challenged legislation may be allowed when such evidence is necessary to the Board's decision concerning invalidity. (WAC 242-03-565(2)) The Board may also allow a later motion for supplementation on rebuttal or for other good cause. (WAC 242-03-565(1)).

Petitioners' Exhibit A is a list of land division applications filed in 2013. Petitioners explain this information is necessary for

the Board to consider because it shows the number of land divisions being made under non-GMA compliant policies and regulations. The Board finds Exhibit A necessary and of substantial assistance in reaching its decision, as specified in RCW 36.70A.290(4) and **ADMITS** Exhibit A to supplement the record.

*2 Exhibit B is a supplemental budget request by the County Health Department to address increasing workload for septic tank installations. Petitioners argue this "establishes an increase in the amount of non-urban development dependent on septic tanks."[2] However, Petitioners have not explained the link between the budget request and, as the County explains, "to increase the projected 2012 revenue over the estimated budget amount - not to request additional funds for on-site sewage system (OSS) permitting."[3] The Board cannot determine if a supplemental budget request implies GMA non-compliance. The Board **DOES NOT ADMIT** Exhibit B to supplement the record.

Exhibits C, D, and E are emails to the public about a Planning Commission meeting December 12, 2013, regarding water resources and a staff report to the Planning Commission about GMA requirements for measures to be included in the comprehensive plan to protect water resources. Each of these three exhibits includes the statement from the County that "No new regulations or changes to existing regulations are being proposed."[4] This statement assists the Board in verifying that the County did not take action to comply with the Board's June 7, 2013 FDO. The Board finds Exhibits C, D, and E are necessary and of substantial assistance in reaching its decision, as specified in RCW 36.70A.290(4) and **ADMITS** Exhibits C, D, and E to supplement the record.

Finding of Non-Compliance and Request for Invalidity

Pursuant to RCW 36.70A.302, the Board has the authority to invalidate all or part of a comprehensive plan or development regulation. RCW 36.70A.302(1) provides:
A 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.

Under RCW 36.70A.330(4), at a compliance hearing the board shall also reconsider its final order and decide, if no determination of invalidity has been made, whether one now should be made under RCW 36.70A.302.

Petitioners ask the Board to invalidate a number of development regulations concerning permit-exempt wells, on-site septic systems (OSS), and stormwater management. With Ordinance 2013-032, Whatcom County incorporated these regulations by reference into the rural element of its comprehensive plan in an effort to include measures to protect surface and groundwater resources as required by RCW 36.70A.070 (5)(c)(iv). Petitioners objected that the County's pre-existing regulations failed to protect water quantity and quality and did not meet the statutory mandate. Petitioners argue the Board must impose invalidity based on substantial interference with GMA Goal 9 (Open space and recreation) and Goal 10 (Environment). They maintain the County's policies and regulations interfere with the goal of conserving fish and wildlife habitat, fail to protect water quality and the availability of water.[5]

*3 The Board's June 7, 2013, FDO analyzed the County's comprehensive plan amendments in light of the Supreme Court's *Kittitas County* ruling that "the statutory language of the GMA is clear that protective measures *shall* be included in the Plan."[6] According to the *Kittitas* Court, the Rural Element must use directive language that ensures protection of rural areas.[7] The measures must "limit development so it is consistent with rural character and not characterized by urban growth."[8] The FDO concluded that several comprehensive plan policies adopting, by reference, pre-existing regulations failed to limit development to protect water resources.[9] However, focusing on the deficiencies of these pre-existing development regulations, as Petitioners urge, may distract from the adoption of comprehensive plan measures that genuinely limit development to protect rural character in Whatcom County.

Whatcom County Ordinance 2013-032 adopted comprehensive plan policies in an attempt to establish "measures" to protect rural character. 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.[10] 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.[11] 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).

That said, since no legislative action has been taken since issuance of the FDO, the Board finds the existing development regulations continue to lack sufficient regulatory power to protect water quality and quantity and protect fish and wildlife. In sum, as stated in the FDO, 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.[12]

The FDO pointed to the importance of protecting surface water flows and groundwater quantity and quality through controls on location, density, and intensity of rural development. Such measures must "limit development so it is consistent with rural character," as the *Kittitas* Court said. In the FDO the Board provided numerous suggestions:[13]
***4** 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.

Thus, while revisions to the cross-referenced regulations found deficient by the Board and proposed for invalidity by Petitioners will certainly be useful, the County needs to take a broader look at its rural element in order to adopt measures governing development that are consistent with protection of surface and groundwater resources as required by RCW 36.70A.070(5)(c)(iv). The Board notes that in achieving compliance with measures to protect Lake Whatcom, the County addressed the location, density and intensity of rural development. For Lake Whatcom, the County:
· identified the unique vulnerability of the Lake as the primary source of its urban drinking water;

· reduced allowed rural densities;

· eliminated the RRDO - Rural Residential Density Overlay;

· reduced impervious surface allowance from 20% to 10% for new development, and

· provided "zero-phosphorus" stormwater regulations.[14]

Similar analysis and measures may be required for other rural areas where water availability is inadequate, water quality is impaired or aquatic resources are at risk.

The Board must now consider whether the cited County Code sections (development regulations) substantially interfere with fulfillment of the goals of the GMA to warrant the imposition of invalidity as requested by Petitioners. For example, the County's self-inspection program for on-site sewage septic systems allows the land owner to monitor their own septic waste. In the record to this case and in its FDO, the Board found numerous references to failing septic systems, resulting water

quality degradation, and the difference in compliance rates between professionally inspected systems as compared to home-owner inspected systems.[15] In addition, the homeowner inspection program emphasis on protecting "public health"[16] is appropriate, but protecting "rural character" under the GMA involves a broader focus on maintaining healthy ecosystem processes.[17] Self-inspections by homeowner of their on-site septic system does not constitute adequate protection of surface and groundwater resources in vulnerable watersheds and aquifers as required by RCW 36.70A.070(5)(c)(iv).[18]

***5** Next, Petitioners request the Board impose invalidity on many exemptions to drainage plans and permits. The effect of imposing invalidity would be to eliminate the exemptions. Upon review of the numerous exemption sections of the development regulations for the rural area, the Board notes that the criteria in WCC 12.08.035 (G) Exemptions are vague and could be left to broad interpretation when granting exemptions. For example, in WCC 12.08.035 G.2.B., the County administrator may grant an exemption when "the legislative intent of all Whatcom County regulations is strictly observed." It is not clear how an administrator will know all legislative intent by County Council members when granting an exemption.

Lastly, the FDO reviewed WCC 21.04.090 and WCC 21.05.080 addressing water supply to assess their adequacy in meeting "measures to protect water quality and quantity."[19] Petitions requested invalidity for these regulations, but again, the Board cannot retroactively impose invalidity on pre-existing regulations. The Board did, however, note that both regulations allow private water supplies be used when "the water source is ground water *and not* surface water"[20] (emphasis added). In effect, this allows the County to grant private wells to use groundwater without analyzing the hydraulic connections to surface water. From evidence in the record and common knowledge of hydraulic continuity, the FDO found that this regulation does not protect water resources if it allows ground water withdrawals without assessing the connection to surface waters where minimum instream flows are not being met.[21]

After reviewing the specific County Code sections referenced above by Petitioners, there is evidence in the record that would support a finding of substantial interference with GMA planning goals. However, the Board must **DENY** the request for a determination of invalidity at this time because the County Code sections that Petitioners reference were all enacted sometime prior to the adoption of Ordinance 2012-032 and were not challenged at that time and, therefore, are not before the Board in this case.

III. ORDER

Whatcom County is in **CONTINUING NON-COMPLIANCE** 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. This matter is remanded to the County to take action to comply with the Growth Management Act pursuant to the following schedule:

Item	Date Due
Compliance Due on identified areas of non-compliance from the June 7, 2013 FDO	February 14, 2014
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	February 28, 2014[22]
Objections to a Finding of Compliance	March 10, 2014
Response to Objections	March 20, 2014
Compliance Hearing (Location to be determined)	April 1, 2014 10:00 a.m.

DATED this 10th day of January, 2014.
***6 Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.**[23]

Nina Carter
Board Member
Raymond L. Paolella
Board Member
Margaret Pageler
Board Member

Footnotes

22 If the County has not taken action by this date, then they must submit a compliance work plan.

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, et al.'s Motion to Supplement the Record of Whatcom County's Motion for Continuance at 2 (December 13, 2013).

3 County's Additional Response to Motion to Supplement the Record (December 20, 2013) at Ex. 1 at 1.

4 Hirst, et al.'s Motion to Supplement the Record of Whatcom County's Motion for Continuance, Exs. C and D at 1 (December 13, 2013).

5 Hirst et al.'s Response to Whatcom County's Motion for Continuance of Compliance Date and Petition for Determination of Invalidity (November 25, 2013) at 10. Petitioner's Supplement to Petition for Invalidity, Attachment 1, Invalidity Response Matrix (December 20, 2013).

6 *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144, 164, 256 P.3d 1193 (2011).

7 *Kittitas County*, 172 Wn.2d at 163.

8 *Id.* at 167.

9 *Hirst v. Whatcom County*, Case No. 12-2-0013, Final Decision and Order, (June 7, 2013) (hereafter FDO) at 35-44. *See e.g.*: Policy 2DD-2.C.1 cross-referencing WCC 16.16: "This rural element policy does not limit development so as to protect water resources." FDO, at 36. Policy 2DD-2.C.2 cross referencing WCC 24.05: "The Board does not find that this rural element policy is a measure that limits development to protect water resources." FDO, at 38. Policy 2DD-2.C.6 cross referencing WCC 21.04.090 and 21.05.080: "Policy 2DD- 2.C.6 does not govern development in a way that protects surface water flows." FDO at 41.

10 FDO at 44. "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."

11 RCW 36.70A.302. And *see*, *Davidson Serles & Assoc. v. City of Kirkland*, 159 Wn.App. 148, 158-162, 244 P.3d 1003 (2010), holding GMHB's authority to impose invalidity is narrowly construed and cannot be expanded based on remedies that the judiciary has fashioned for violation of SEPA.

12 FDO at 43.

13 FDO, at 43, emphasis added.

14 Compliance Order, Case No. 11-2-0010c and 05-2-0013 (January 4, 2013) at 51-52; Order Finding Compliance regarding Issue 3, Case No. 11-2-0010c (November 21, 2013), at 15.

15 FDO at 37, and referenced evidence in the record.

16 WCC 24.05.010.

17 See RCW 36.70A.030(15)(a)(d)(g).

18 Compare, *Futurewise v. Spokane County and Washington State Department of Ecology*, Case No. 13-1- 0003c, Final Decision and Order (December 23, 2013), at 48-50, finding the County and Ecology's deferral to local health district OSS standards addressed human health concerns but failed to provide ecosystem protection and ensure "no net loss of ecological functions" as required by the Shoreline Management Act.

19 FDO at 39-40.

20 Whatcom County Code WCC 21.04.090 and WCC 21.05.080 Water Supply.

21 FDO at 40-41, noting "rural character" requires "patterns of land use and development ... consistent with the protection of natural surface water flows."

23 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.

2014 WL 494486 (West.Wash.Growth.Mgmt.Hrgs.Bd.)