



# Department of Commerce

## Determination of Compliance - Ferry County

Date – February 28, 2017

---

### Section I - Statutory Authority and Procedural Background

In 2014, the Legislature adopted Engrossed House Bill 1224, which amended RCW 36.70.040, 36.70A.060, and 36.70A.280. This legislation authorized a process for counties with a population of 20,000 or fewer inhabitants between April 1, 2010 and April 1, 2015 to withdraw from fully planning under the Growth Management Act (GMA). Ferry County was the only eligible jurisdiction that exercised the option to withdraw from voluntary planning under the GMA. Ferry County's legislative authority adopted a resolution to opt out of fully planning under the GMA on September 22, 2014. The County complied with the notice requirements of RCW 36.70A.040(2)(b). Ferry County was not in compliance with the GMA at the time the County's legislative authority adopted the resolution.

A county that adopts a resolution of partial planning under RCW 36.70A.040(2)(b) and that is not in compliance with the planning requirements of RCW 36.70A.060, 36.70A.040(4), 36.70A.070(5), 36.70A.170, and 36.70A.172 at the time the resolution is adopted must apply for a determination of compliance from Commerce.<sup>1</sup> A county that is not in compliance with these planning requirements must notify Commerce in writing of its intent to apply for a determination of compliance. The notice of intent provides Commerce the opportunity to review proposed actions prior to final adoption and advise a county of necessary actions to achieve compliance.<sup>2</sup>

After taking legislative action necessary to address the outstanding noncompliance issues, a county may apply for a determination of compliance, as long as the application is submitted to

---

<sup>1</sup> RCW 36.70A.060, WAC 365-199-030(1)

<sup>2</sup> WAC 365-199-030(2)

Commerce by January 30, 2017.<sup>3</sup> Commerce must approve or deny the application within 120 days, or by June 30, 2017, whichever date is earlier.<sup>4</sup> The decision will include findings of fact and conclusions; along with a formal notification process outlined in WAC 365-199-030(4)(c).

## Section II - Scope of Review and Statement of Issues

The scope of the Commerce review is limited to outstanding findings of noncompliance established in an order from the Growth Management Hearings Board or a court decision. Issues or provisions of the ordinance that were found in compliance, or were not timely challenged at the time of adoption, are not subject to review by the department. The key decisions are the Growth Management Hearings Board decision in *Concerned Friends of Ferry County et al. v. Ferry County*, GMHB Case No. 97-1-0018c, Order Finding Continuing Noncompliance (Feb. 5, 2014), and the decisions of the Washington State Court of Appeals in *Ferry County v. Growth Management Hearings Board*, 184 Wn. App. 685 (2014) and *Concerned Friends of Ferry County v. Ferry County*, 191 Wn. App. 803 (2015).

Commerce and Ferry County held a joint hearing to take public comment on the scope of the Commerce review on December 16, 2015 at 6:00 PM in Republic, WA. One day prior to the scheduled hearing, on December 15, 2015, the Court of Appeals published an opinion which reversed the Growth Management Hearings Board decision on Ferry County's designation of Agricultural Resource Lands. As a result of this decision, Commerce extended the opportunity to submit written comments on the statement of issues on which Ferry County is out of compliance. Commerce held an additional joint hearing with Ferry County on March 23, 2016 at 6:00 PM in Republic, WA.

The following statement of issues, identified in Ferry County's letter to Commerce dated August 15, 2016 constitutes Commerce's scope of review for this compliance determination:

1. Failure to designate and protect Bull Trout and Common Loon, including their associated habitats, or provide a reasoned justification for a departure from the Best Available Science (BAS).
2. Habitat and Species of Local Importance: The County must consider Best Available Science (BAS) when making decisions on species and habitats of local importance. Ferry County's critical area protections must designate and protect the associated habitats for

---

<sup>3</sup> WAC 365-199-030(3)(a)

<sup>4</sup> RCW 36.70A.060, WAC 365-199-030(4)(a)

species which require protection based on the BAS and the local planning process. The County should use the Priority Habitats and Species (PHS) List as a starting point when including BAS in the designation and protection of habitats and species of local importance consistent with WAC 365-190-130(4)(b).

3. Failure to designate a critical mass of commercially significant agricultural resource lands.

To address those issues, Ferry County took legislative action on March 28, 2016 and August 8, 2016 and submitted the required components of an application for a determination of compliance to Commerce on November 3, 2016. The decision in this matter is based on the record developed by Ferry County which was submitted to Commerce as part of the application for a determination of compliance.<sup>5</sup>

### **Section III – Analysis**

#### **Findings:**

Commerce established rules under the authority of RCW 36.70A.060(1)(d)(v) for use when making a determination of compliance. Chapter 365-199 WAC provides the procedures for making a determination of compliance for jurisdictions seeking voluntary reversion to partial planning status. A determination of compliance requires a finding that Ferry County's Comprehensive Plan and development regulations are in compliance with the planning requirements of RCW 36.70A.060, 36.70A.040(4), 36.70A.070(5), 36.70A.170, and 36.70A.172.

The Ferry County Board of Commissioners approved Resolution 2014-20 and complied with the requirements of RCW 36.70A.040(2)(b). To be eligible for a determination of compliance, Ferry County is required to address the findings of noncompliance identified in the statement of issues identified in Section II.

As required by WAC 365-199-030, Ferry County submitted a notice of intent to apply for a determination of compliance on October 29, 2015. After taking legislative action to address the outstanding issues of noncompliance, the Ferry County Board of Commissioners submitted a letter to Commerce requesting a determination of compliance on August 15, 2016. The cover letter represented one of the requirements for an application for a determination of compliance.<sup>6</sup> The County completed their application when they provided Commerce with a

---

<sup>5</sup> WAC 365-199-040(3)

<sup>6</sup> WAC 365-199-030(3)(b)

copy of the record developed by the County during the process of coming into compliance on November 3, 2016. The County also provided a copy of the record to the Growth Management Hearings Board and the parties of record.

## Conclusions:

### Issues 1 and 2: Critical Areas Ordinance

Ferry County took two separate legislative actions to address findings of noncompliance by the Court and the Growth Management Hearings Board. In the first legislative action, Ferry County adopted Critical Areas Ordinance No. 2016-03, which amended Critical Areas Ordinance 2014-03 on March 28, 2016. This action addressed the first and second noncompliance issues related to the County's Critical Areas Ordinance.

After consulting with Commerce and WDFW, the County incorporated recommendations from WDFW and adopted the WDFW Priority Habitats and Species list as habitats and species of local importance. WDFW submitted recommended changes to the County's Critical Areas Ordinance based on WDFW best available science. WDFW is the agency with expertise regarding the protection of Bull Trout, Common Loon, and the associated habitats of those species. Commerce also relied on WDFW expertise and recommendations in the matter of incorporating BAS into the designation and protection of habitats and species of local importance. WDFW provided a letter of support to Ferry County regarding the amendments to Ferry County Critical Areas Ordinance #2014-03 and Fish and Wildlife Habitat Conservation Areas (Section 9.00).<sup>7</sup> After a review of the County's actions, and giving weight to the agency with expertise, Commerce concludes that the County's legislative action addressed the outstanding issues of noncompliance for their Critical Areas Ordinance.

### Issue 3: Designation of Agricultural Resource Lands of Long-Term Commercial Significance

In response to the Court of Appeals decision in *Concerned Friends of Ferry County v. Ferry County*, 191 Wn. App. 803 (2015), Ferry County adopted Ordinance 2016-04 on August 8, 2016 designating commercially significant Agricultural Resource Lands. Ordinance 2016-04 was designed to address the third noncompliance issue identified in Section II. The County designated 498,668 acres of land subject to long-term grazing allotments through the US Forest Service and/or the WA Department of Natural Resources, 405 acres of land subject to long-term conservation easements, and 2,939.98 acres of land used for agricultural purposes that is

---

<sup>7</sup> The letter is dated January 8, 2015, but was actually sent on January 8, 2016 based on a review of email correspondence.

part of a block group of 100 acres or more and scored 4 points or higher using the County's designation point system.

In 2013, Ferry County adopted Ordinance No. 2013-05 which relied on a process for review and designation of Agricultural Resource Lands that utilized a set of criteria based on WAC 365-190-050. Both the Growth Management Hearings Board and the Courts reviewed the assumptions and underlying rationale for the County's criteria, and upheld those as compliant. While the Court ruled that the criteria were not clearly erroneous, the Court found that the County's failure to designate Agricultural Resource Lands was noncompliant.

In response, Ferry County engaged with agricultural operators and reassessed their designation criteria and point system to address the Court's ruling. A comment letter from Futurewise, a petitioner in the Court of Appeals case, expressed dissatisfaction with the County's approach to designating Agricultural Resource Lands for a variety of reasons; however, the County's record indicates that they considered these comments and that they did not implement the recommendations for defensible reasons.

Ferry County's action addressed the concerns identified by the Court of Appeals and designated Agricultural Resource Lands based on revised criteria to protect the long-term viability of the County's commercially significant agricultural industry. The County has designated the most productive farmland in Ferry County, and developed a process for analyzing land based on the unique characteristics of the County. The County decreased the threshold of blocks of agricultural land from 500 acres to 100 acres because of the unique conditions in the County, such as topography and geography. The County engaged in a defensible process to ensure that sufficient privately-owned land is designated to protect the County's primary agricultural industry, and the designation is based on an accurate implementation of the criteria upheld by the Court and the Growth Management Hearings Board. The County considered the goals and policies of the GMA, and complied with our agency's guidelines specified in WAC 365-190-050.

## **Section V – Determination**

Based on the review of the record compiled in this matter, Commerce concludes that Ferry County has addressed the outstanding issues of noncompliance and Ferry County's Comprehensive Plan and development regulations are in compliance with the planning requirements of RCW 36.70A.060, 36.70A.040(4), 36.70A.070(5), 36.70A.170, and 36.70A.172 as a result of legislative actions taken on March 28, 2016 and August 8, 2016.

## Section VI – Appeals

A petition for review of this determination of compliance may be filed with the Growth Management Hearings Board within sixty days of the issuance of this decision.<sup>8</sup> In the event a petition for review is filed, Commerce and Ferry County must equally share any costs incurred by Commerce in defending this determination of compliance before the Growth Management Hearings Board.<sup>9</sup>

---

<sup>8</sup> RCW 36.70A.060(1)(d), RCW 36.70A.280(1)(f)

<sup>9</sup> WAC 365-199-050(1)