

1 **BEFORE THE WESTERN WASHINGTON GROWTH**
2 **MANAGEMENT HEARINGS BOARD**

3
4 WARREN DAWES, JOHN E. DIEHL, GORDON JACOBSON,
5 JUTTA RIEDIGER, VERN RUTTER, and KERRY HOLM,
6 individually and as members of the KERRY HOLM, individually
7 and as members of the MASON COUNTY COMMUNITY
8 DEVELOPMENT COUNCIL (MCCDC), a non-profit association,

9 Petitioners,

10 v.

11
12 MASON COUNTY,

13 Respondent,

14 and

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16
17 PETER E. OVERTON, et al., McDONALD LAND COMPANY,
18 HUNTER CHRISTMAS TREES, HUNTER FARMS, SOUTH 101
19 CORRIDOR GROUP, Inc., and MANKE LUMBER COMPANY,

20 Intervenor

No. 95-2-0073

**COMPLIANCE
ORDER FOR
COMPLIANCE
HEARING NO. 17
(Critical Areas)**

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23 **I. SYNOPSIS OF THE CASE**
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25 Almost eight years have passed since the petition for review was filed in this case on July 14, 1995.
26 It has involved numerous petitioners and intervenors. Members of the Mason County Board of
27 Commissioners have changed during the course of this case, as have the members of the planning
28 commission and staff that have assisted them in trying to achieve compliance with the Growth
29 Management Act (GMA). Seventeen compliance hearings have been held.
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1 The Board finds that actions Mason County (County) has taken through the adoption of Ordinance
2 09-03 have removed substantial interference with the goals of the GMA and the County has achieved
3 compliance on the remaining issues in this case. The County's Flood Damage Protection Ordinance
4 is now in compliance through the adoption of the following amendments: (1) dike monitoring
5 procedures and regulations that preclude individual homeowners from preventing inspection (2)
6 provisions for inspecting, monitoring, and listing existing dikes; (3) measures that preclude new
7 residential and commercial construction in the Skokomish River Valley Frequently Flooded Area
8 (FFA); and (4) the designation of this FFA as a floodway and an avulsion zone. The County's
9 Resource Ordinance is now in compliance through the adoptions of buffers of 100 feet for saltwater
10 shorelines and lakes of greater than 20 acres and through the elimination of exemptions from critical
11 area protection for agriculture.
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15 Two of the members of this Board are newcomers to the Mason County compliance process. We feel
16 somewhat like speakers at a graduation ceremony that have been asked to hand out the diplomas and
17 give the congratulatory speeches. The Board Members who have come before us have provided
18 Mason County the appropriate compliance framework. Nevertheless, this Board would like to
19 commend Mason County's elected officials, staff, advisory committees, and citizen petitioners for the
20 hard work that has been expended to bring Mason County's critical areas protection regulations into
21 compliance despite what may have seemed for some a forced march. In the long run, these
22 regulations will protect Mason County's critical areas for future generations.
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24 **II. PROCEDURAL HISTORY**

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26 On May 16, 2002, the Western Washington Growth Management Hearings Board held its sixteenth
27 compliance hearing on Mason County compliance issues. On August 23, 2002 the Board found parts
28 of Mason County's (County) development regulations in regard to frequently flooded areas, buffers
29 for saltwater shorelines and lakes 20 acres or greater, and the blanket buffer exemption for agriculture
30 noncompliant and invalid. The Board provided guidance to Mason County to do the following within
31 180 days in regard to these requirements and regulations:
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- 1 1. Adopt dike monitoring procedures and regulations which will preclude individual homeowners
2 from preventing inspections and which will make provision for inspecting, monitoring, and
3 listing existing dikes.
- 4 2. Preclude new construction in the Frequently Flooded Area (FFA). (FFA means Zone A and A2
5 of the Skokomish River and Vance Creek tributaries.)
- 6 3. Designate the FFA as a designated floodway under County code.
- 7 4. Declare the designated floodway an avulsion zone.
- 8 5. Raise buffers to best available science (BAS) ranges not less than 100 feet for saltwater
9 shorelines and lakes 20 acres or greater.
- 10 6. Eliminate the Mason County Code (MCC) blanket buffer exemption for agriculture.
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14 On November 7, 2002 the Board received a progress report from Mason County on their work for
15 meeting the compliance order. On January 29, 2003, the Board received another progress report that
16 showed that the County was on track to adopt regulations intended to comply with the compliance
17 order in mid February. On February 11, 2003, the Board received a report announcing that the
18 County Board of Commissioners had adopted development regulations intended to comply with the
19 compliance order, and a request for an expedited hearing. On February 18, the Board received a
20 proposed prehearing order from the County. On February 21, 2003, the Presiding Officer issued a
21 prehearing order that included the schedule for submitting briefs. On February 24, 2003, the Board
22 received a motion to dismiss the McDonald Land Company as an Intervenor. On March 5, 2003,
23 Petitioner Diehl filed a motion to supplement the record with Theresa Kirkpatrick's letter to the editor
24 and the Declaration of Warren Dawes. On March 10, 2003 the Board received a response from the
25 County objecting to Mr. Diehl's motion to supplement the record. On March 11, 2003, the Board
26 received Mr. Diehl's reply to the County's objection. On April 2, 2003, the Presiding Officer issued
27 an order denying Mr. Diehl's Motion to Supplement the Record. On April 21, 2003 the Board
28 received a motion from Sarah Smyth McIntosh to participate in the compliance hearing. On April 28,
29 2003, Sarah Smyth McIntosh submitted a Reply Brief. The Board does not accept the Reply Brief.
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1 On May 2, 2003 the Board received a response from Mr. Diehl objecting to Ms. Smyth McIntosh's
2 participating in the compliance hearing. On May 6, 2003, the PO issued an order to not allow Ms.
3 Smyth McIntosh to participate in the hearing. A Compliance Hearing was held on May 7, 2003 at the
4 Mason County Veterans Hall, 210 West Franklin Street, Shelton, Washington, that lasted
5 approximately four hours.
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8 The County was represented by Deputy Prosecutor Darren Nienaber, who was assisted by Senior
9 Planner Bob Fink and Allan Borden. Mr. John Diehl represented himself.
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11 **III. STANDARD OF REVIEW, PRESUMPTION OF VALIDITY,**
12 **BURDEN OF PROOF**

13 Pursuant to RCW 36.70A.320, ordinance amendments made in response to a finding of
14 noncompliance are presumed valid.
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16 Under RCW 36.70A.320(2), the burden is on petitioners to demonstrate that the action taken by
17 Mason County is not in compliance with the requirements of the GMA.
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19 Pursuant to RCW 36.70A.320(3), we "shall find compliance unless [we] determine that the action by
20 [Mason County] is clearly erroneous in view of the entire record before the board and in light of the
21 goals and requirements of [the GMA]." In order to find the County's action clearly erroneous, we
22 must be "left with the firm and definite conviction that a mistake has been made." *Department of*
23 *Ecology v. PUD 1*, 121 Wn.2d 19, 201 (1993).
24
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26 Under RCW 36.70A.320(4), to rescind the Board's previous finding of invalidity, respondent Mason
27 County must demonstrate that the provisions of Ordinance #10-02 enacted in response to the finding
28 of invalidity, "will no longer substantially interfere with fulfillment of the goals of [the Growth
29 Management Act]..."
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IV. ISSUES PRESENTED

Issue Number 1: *Has the County adopted dike monitoring procedures and regulations that will preclude individual homeowners from preventing inspections and that will make provision for inspecting, monitoring, and listing existing dikes? Does this action comply with the GMA?*

Issue Number 2: *Has the County precluded new construction in the Skokomish Valley Frequently Flooded Area (FFA (Skokomish River Valley)). Does this action comply with the GMA?*

Issue Number 3: *Has the County designated this FFA as a designated floodway under County code? Does this action comply with the GMA?*

Issue Number 4: *Has the County declared the designated floodway an avulsion zone? Does this action comply with the GMA?*

Issue Number 5: *Did the County raise buffers to BAS ranges not less than 100 feet for saltwater shorelines and lakes 20 acres or greater. Does this action comply with the GMA?*

Issue Number 6: *Did the County eliminate the MCC blanket buffer exemption for agriculture? Does this action comply with the GMA?*

1 V. ANALYSIS AND DISCUSSION OF THE ISSUES

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3 We will discuss Issue Nos. 1 – 4, listed above, together.

4 **Applicable Laws and Rules**

5 Planning Goals. Environment. The following goals are adopted to guide
6 the development and adoption of comprehensive plans and development
7 regulations of those counties and cities that are required or choose to plan
8 under RCW 36.70A.040: The following goals are not listed in order of
9 priority and shall be used exclusively for the purpose of guiding the
10 development of comprehensive plans and development regulations: ...
11 (10) Environment. Protect the environment and enhance the state's high
12 quality of life, including air and water quality, and the availability of
13 water.

12 RCW 36.70.020(10).

13 Natural resource lands and critical areas -- Development regulations. ...
14 (2) Each county and city shall adopt development regulations that protect
15 critical areas that are required to be designated under RCW 36.70A.170.

16 RCW 36.70A.060 (in pertinent part)

17 Natural resource lands and critical areas -- Designations. (1) On or before
18 September 1, 1991, each county, and each city, shall designate where
19 appropriate: (a) Agricultural lands that are not already characterized by
20 urban growth and that have long-term significance for the commercial
21 production of food or other agricultural products; (b) Forest lands that are
22 not already characterized by urban growth and that have long-term
23 significance for the commercial production of timber; (c) Mineral resource
24 lands that are not already characterized by urban growth and that have
25 long-term significance for the extraction of minerals; and (d) Critical
26 areas.

24 RCW 36.70A.170

25 Critical areas -- Designation and protection -- Best available science to be
26 used. (1) In designating and protecting critical areas under this chapter,
27 counties and cities shall include the best available science in developing
28 policies and development regulations to protect the functions and values
29 of critical areas. In addition, counties and cities shall give special
30 consideration to conservation or protection measures necessary to preserve
31 or enhance anadromous fisheries.

32 RCW 36.70A.172.

1 ...

2 (3) Frequently flooded areas. Floodplains and other areas subject to
3 flooding perform important hydrologic functions and may present a risk to
4 persons and property. Classifications of frequently flooded areas should
5 include, at a minimum, the 100-year floodplain designations of the Federal
6 Emergency Management Agency and the National Flood Insurance
7 Program.

8 Counties and cities should consider the following when designating and
9 classifying frequently flooded areas:

10 (a) Effects of flooding on human health and safety, and to public facilities
11 and services;

12 (b) Available documentation including federal, state, and local laws,
13 regulations, and programs, local studies and maps, and federal flood
14 insurance programs;

15 (c) The future flow floodplain, defined as the channel of the stream and
16 that portion of the adjoining floodplain that is necessary to contain and
17 discharge the base flood flow at build out without any measurable increase
18 in flood heights;

19 (d) The potential effects of tsunamis, high tides with strong winds, sea level
20 rise resulting from global climate change, and greater surface runoff
21 caused by increasing impervious surfaces.

22 WAC 365-190-080 Critical areas.

23 **Positions of the Parties**

24 The Petitioner does not dispute that the County has complied with the Board's order in regard the
25 Frequently Flooded Areas. The County states that through the adoptions of Ordinance 09-03 that it
26 now complies with the compliance order and the GMA.
27

28
29 **Discussion of the Facts**

30 On February 11, 2003, the County adopted Ordinance 09 – 03, Amendments to the Mason County
32 Comprehensive Plan, Development Regulations, and Resource Ordinance, including the following:

- Dike monitoring procedures and regulations which will preclude individual homeowners from preventing inspections and which will make provision for inspecting, monitoring, and listing existing dikes; Ordinance No. 09-03, Mason County Flood Prevention Ordinance (MCFPO) Section 5.4.2 (4), Index #3401;
- Measures that preclude new residential and commercial construction in the FFA (Skokomish River Valley); Ordinance No. 09-03, MCFPO Sections 4.4-2(6) and 4.4-3 and 5.4.1, Index #3401;
- The designation of the FFA as a designated floodway (Zones A and A2 floodplain of the Skokomish River, Vance Creek, and tributaries and is illustrated on FIRM map Community Panels #530115-0175D and #530115-0180D) under County code; Ordinance No. 09-03, MCFPO Section 5.4.1, Index #3401 and Index #3448; and
- Declaration of the above-mentioned designated floodway as an avulsion zone. Index #3401, Ordinance No. 09-03, Section 5.4.1 and Sections 2.0 Definitions, “Avulsion” and “Avulsion Risk”.

Decision

Through the adoption of the Ordinance 09-03 that includes the amendments listed above, the County has complied with the Board’s order in regard to Issues 1 through 4. **We find that the County regulations in regard to provisions for dike monitoring, inspecting and listing dikes, measures prohibiting the preclusion by individual homeowners of inspections, measures precluding new residential and commercial construction in the FFA, the designation of the Skokomish Valley as an FFA, and the designation of this FFA as an avulsion zone now comply with the GMA. We rescind the Board’s finding of invalidity.**

The Board notes that the County has stated in its brief that it has prevented development in the Skokomish River Valley in response to a Board order and is worried about their liability for a “takings”. Mason County Brief on Invalidity Issues at 4 and 21.

1 In regard to the Board's authority's to order a particular action, we refer the County to Board
2 Member Hite's concurring opinion attached to this order.

3
4 The Board would like to point out that the County has not prohibited all development in the
5 Skokomish River Valley, but has prohibited residential and commercial construction. There are other
6 uses allowed in the Skokomish River Valley. See Mason County Flood Protection Ordinance 5.41,
7 and 2.0 Definitions, Development. Index #3401 at 5 and 22.
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10 **Issue Number 5: *Did the County raise buffers to BAS ranges not less than 100 feet for saltwater***
11 ***shorelines and lakes 20 acres or greater? Is this consistent with the GMA?***

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13 **Issue Number 6: *Did the County eliminate the MCC blanket buffer exemption for agriculture? Is***
14 ***this consistent with the GMA?***

15 We will discuss these two issues together.
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18 **Applicable Laws**

19 Planning Goals. Environment. The following goals are adopted to guide
20 the development and adoption of comprehensive plans and development
21 regulations of those counties and cities that are required or choose to plan
22 under RCW 36.70A.040: The following goals are not listed in order of
23 priority and shall be used exclusively for the purpose of guiding the
24 development of comprehensive plans and development regulations: ...
25 (10) Environment. Protect the environment and enhance the state's high
26 quality of life, including air and water quality, and the availability of
27 water.

28 RCW 36.70.020 (10).

29 Natural resource lands and critical areas -- Development regulations. ...
30 (2) Each county and city shall adopt development regulations that protect
31 critical areas that are required to be designated under RCW 36.70A.170.

32 RCW 36.70A.060

Critical areas -- Designation and protection -- Best available science to be
used. (1) In designating and protecting critical areas under this chapter,

1 counties and cities shall include the best available science in developing
2 policies and development regulations to protect the functions and values
3 of critical areas. In addition, counties and cities shall give special
4 consideration to conservation or protection measures necessary to preserve
or enhance anadromous fisheries.

5 RCW 36.70A.172.

6 **Criteria for determining which information is the "best available**
7 **science."** ... 5) Scientific information can be produced only through a
8 valid scientific process. To ensure that the best available science is being
9 included, a county or city should consider the following: ... (b) **Common**
10 **sources of scientific information.** Some sources of information routinely
11 exhibit all or some of the characteristics listed in (a) of this subsection.
12 Information derived from one of the following sources may be considered
13 scientific information if the source possesses the characteristics in Table 1.
14 A county or city may consider information to be scientifically valid if the
15 source possesses the characteristics listed in (a) of this subsection. The
16 information found in Table 1 provides a general indication of the
17 characteristics of a valid scientific process typically associated with
18 common sources of scientific information.

19 WAC 365-195-905

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TABLE 1

CHARACTERISTICS

SOURCES OF SCIENTIFIC INFORMATION	Peer Review	Methods	Logical Conclusions & Reasonable Inferences	Quantitative Analysis	Context	References
A. Research. Research data collected and analyzed as part of a controlled experiment (or other appropriate methodology) to test a specific hypothesis.	X	X	X	X	X	X
B. Monitoring. Monitoring data collected periodically over time to determine a resource trend or evaluate a management program.		X	X	Y	X	X
C. Inventory. Inventory data collected from an entire population or population segment (e.g., individuals in a plant or animal species) or an entire ecosystem or ecosystem segment (e.g., the species in a particular wetland).		X	X	Y	X	X
D. Survey. Survey data collected from a statistical sample from a population or ecosystem.		X	X	Y	X	X
E. Modeling. Mathematical or symbolic simulation or representation of a natural system. Models generally are used to understand and explain occurrences that cannot be directly observed.	X	X	X	X	X	X
F. Assessment. Inspection and evaluation of site-specific information by a qualified scientific expert. An assessment may or may not involve collection of new data.		X	X		X	X
G. Synthesis. A comprehensive review and explanation of pertinent literature and other relevant existing knowledge by a qualified scientific expert.	X	X	X		X	X
H. Expert Opinion. Statement of a qualified scientific expert based on his or her best professional judgment and experience in the pertinent scientific discipline. The opinion may or may not be based on site-specific information.			X		X	X

X = characteristic must be present for information derived to be considered scientifically valid and reliable
 Y = presence of characteristic strengthens scientific validity and reliability of information derived, but is not essential to ensure scientific validity and reliability

1 **Criteria for addressing inadequate scientific information.** Where there
2 is an absence of valid scientific information or incomplete scientific
3 information relating to a county's or city's critical areas, leading to
4 uncertainty about which development and land uses could lead to harm of
5 critical areas or uncertainty about the risk to critical area function of
6 permitting development, counties and cities should use the following
7 approach: ... (2) As an interim approach, an effective adaptive
8 management program that relies on scientific methods to evaluate how
9 well regulatory and nonregulatory actions achieve their objectives.
10 Management, policy, and regulatory actions are treated as experiments
11 that are purposefully monitored and evaluated to determine whether they
12 are effective and, if not, how they should be improved to increase their
13 effectiveness. An adaptive management program is a formal and
deliberate scientific approach to taking action and obtaining information
in the face of uncertainty. To effectively implement an adaptive
management program, counties and cities should be willing to:

- 14 (a) Address funding for the research component of the adaptive
15 management program;
- 16 (b) Change course based on the results and interpretation of new
17 information that resolves uncertainties; and
- 18 (c) Commit to the appropriate timeframe and scale necessary to reliably
19 evaluate regulatory and nonregulatory actions affecting critical areas
20 protection and anadromous fisheries.

21 WAC 365-195-920

22
23 **Positions of the Parties**

24 The County states that it raised buffers to BAS ranges not less than 100 feet for saltwater shorelines
25 and for lakes 20 acres or greater as ordered by the Board, and these buffers now comply with the
26 GMA. Mason County Brief on Invalidity Issues (March 24, 2003) at 6.

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29 The Petitioner argues that a 100-foot buffer is not accepted by Department of Fish and Wildlife
30 (WDFW) as BAS. The Petitioner argues that the County eliminated the 15-foot setback for
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1 shorelines other than shorelines designated conservancy and provided no rationale for why 15-foot
2 setbacks were appropriate for stream buffers, but not shoreline buffers.

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4 The Petitioner cites a February 10, 2003 letter from the WDFW that states 100-foot buffers, even on
5 an experimental basis, offers minimum adequate protection. The Petitioner argues that this buffer
6 width should be treated as falling within a category of an interim approach sanctioned by WAC 365-
7 195-920(2), so the County should have adopted an adaptive management program to monitor the
8 results of adopting these buffers. Petitioner's Response on Invalidity Issues (April 21, 2003) at 8.

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11 The County responded that BAS does not require a setback of 15 feet for shoreline buffers. The
12 County notes that the information in the letter cited by the Petitioner from the Washington
13 Department of Fish and Wildlife cannot be deemed to be BAS by the criteria set forth in WAC 365-
14 195-905(5). The County argues that WDFW's letter did not meet the logical conclusions, context, or
15 references criteria of this WAC. The County also argued that the only harm suggested by WDFW
16 letter that requires a building setback from a buffer is danger tree removal and fire safety. The
17 County states that County's Resource Ordinance has protections and provisions regarding danger tree
18 removal and fire safety. Mason County's Reply to Petitioner's Response (April 28, 2003) at 3 – 4.

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21 The County states that it has eliminated the blanket exemption of agriculture from critical area
22 protection. The Petitioner does not dispute that the County has eliminated the MCC blanket
23 exemption for agriculture.
24

25 **Discussion**

26 **Buffers for Saltwater Shorelines and Lakes of 20 Acres or Greater**

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28 The issue of whether 100-foot buffer was the minimum buffer recommended according to BAS was
29 discussed and understood by the Board when it issued its August 23, 2002 order. The record showing
30 whether the 100-foot buffer needed to be accompanied by the adaptive management program was
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1 before the Board when we issued our August 23, 2002 order. The order does not include an adaptive
2 management approach to accompany the establishment of a 100-foot buffer. The order states that the
3 County should raise buffers to **BAS ranges** (emphasis added) of not less than 100 feet for shorelines
4 and lakes of 20 acres or greater. While WDFW's April 28 letter does call the 100-foot buffer
5 "experimental" and the minimum necessary for protection, the letter does not call for an adaptive
6 management approach or cite WAC 365-195-920. Index #3404.
7

8
9 The WDFW letter also explains that the reason for requiring a setback of fifteen feet is to keep the
10 buffer as undisturbed as possible. WDFW is concerned that without a setback there is a danger that
11 property owners would remove trees that were endangering their property or a fire hazard. WDFW's
12 letter did not cite a source of BAS to corroborate their opinion. Index #3404.
13

14
15 The BOCC considered WDFW's April 28, 2003 letter at the February 11, 2003 meeting where they
16 adopted the buffer of 100 feet for saltwater shorelines and lakes of 20 acres or greater and eliminated
17 the 15 foot setback for these areas, except for conservancy designations. The BOCC asked their
18 Senior Planner, Bob Fink, about the reasons for the setback. Mr. Fink explained WDFW's rationale
19 and pointed out that the County could mitigate these concerns through the County's Resource
20 Ordinance that required buffers to remain in an undisturbed state, an arborist to evaluate danger trees
21 before they could be cut down, and that trees that were cut down in the buffer had to be left in the
22 buffer to provide for habitat. Index #3447, at 5.
23

24 25 **Decision**

26 Whether BAS requires an adaptive management program to accompany establishing buffers of 100
27 feet for these areas was considered by the Board before we issued our August 23, 2002 order. This
28 order is silent on whether a buffer of 100 feet for saltwater shorelines and lakes greater than 100 acres
29 requires an adaptive management program. *See Diehl v. Mason County*, WWGMHB No. 95-2-0073
30 (August 23, 2002) at 11-13. To require an adaptive management program now would mean that the
32

1 target that the Board set is being moved without additional information in the record to justify
2 moving the target. While BAS does change over time, there is no information in the record that
3 shows that it has changed since the August 23, 2002 order.
4

5 There are also no references in the record, or in WDFW's letter, that show that BAS requires a
6 setback of 15 feet from the buffer. Petitioner's Response Brief at 7. The Petitioner says most
7 counties require setbacks from the buffer. The County's Senior Planner says he is not aware of
8 counties that do. Neither party gives the Board any examples.
9

10
11 The County has taken a minimalist's approach to protecting these areas. Although we would agree
12 with the Petitioner that an adaptive management plan and a setback of fifteen feet from the buffer
13 would better protect the functions and values of saltwater shorelines and lakes of 20 acres, we cannot
14 find that the County's decision is clearly erroneous. **We find that the County's adoption of a
15 buffer of 100 feet for saltwater shorelines and lakes of greater than 20 acres has removed
16 substantial interference with the goals of the GMA. We lift the Board's previous finding of
17 invalidity and find that the County has established buffers for these areas that now comply
18 with the GMA.**
19
20

21
22 **Exemptions of Agricultural Areas from Critical Area Protection:**

23 The County has eliminated the MCC blanket exemption for agriculture and regulates existing
24 agricultural activities within Fish and Wildlife buffers through the adoption of Ordinance Number 9-
25 03 that amends Section 17.01.110 F. 3 and G 1.j and eliminates Section G. 2.c. Exhibit 3401, pages
26 34 and 38.
27

28 **Decision**

29 **We find that through the adoption of amendments that Ordinance C-9-03 makes to the**
30 **County's Resource Ordinance that the County has eliminated the MCC code blanket**
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1 exemption for agriculture. These provisions no longer provide a blanket exemption for
2 agriculture, comply with the GMA and no longer substantially interfere with the goals of the
3 GMA. We lift the Board's previous finding of invalidity on this matter.
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6 **VI. FINDINGS OF FACT**

- 7 1) On February 11, 2003, the Mason County Board of County Commissioners adopted Ordinance C-
8 9-03.
- 9 2) The Petitioner does not dispute that the County has complied with the Board's order in regard the
10 Frequently Flooded Areas and eliminating the exemption from critical area protection for
11 Agricultural Lands.
- 12 3) Ordinance 09-03, through the addition of Section 5.4.(2) to the Mason County Flood Protection
13 Ordinance (MCFPO), adds dike monitoring procedures and regulations which will preclude
14 individual homeowners from preventing inspections and which will make provision for
15 inspecting, monitoring, and listing existing dikes.
- 16 4) Ordinance 09-03, through the addition of Sections 4.4 – 3 and 5.4.1 of MCFPO, includes
17 measures that preclude new residential and commercial construction in the FFA (Skokomish
18 River Valley).
- 19 5) Ordinance 09-03, through the addition of MCFPO Section 5.4.1, designates the FFA (Zones A
20 and A2 floodplain of the Skokomish River, Vance Creek, and tributaries and is illustrated on
21 FIRM map Community Panels #530115-0175D and #530115-0180D) as a designated floodway
22 under County code.
- 23 6) Ordinance 09-03, through the addition of Sections 5.4.1 and Section 2.0 Definitions, "Avulsion"
24 and "Avulsion Risk Area", declares the above- designated floodway an avulsion zone.
- 25 7) Ordinance 09-03 through amendments to Section 17.01. 110 D of the County's Resource
26 Ordinance establishes a buffer of 100 feet for saltwater shorelines and lakes of 20 acres or greater.
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1 8) Ordinance Number 09-03, that amends Sections 17.01.110 F. 3 and G 1.j of the County Resource
2 Ordinance and eliminates Section G. 2.c, eliminates the MCC exemption of agriculture from
3 critical area protection.
4

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6 **VII. CONCLUSIONS OF LAW**

7 Mason County's enactment of Ordinance 09-03 cures the noncompliance found by the Board in its
8 August 23, 2002 compliance order by adding the following to the MCC: dike monitoring procedures
9 and regulations that preclude individual homeowners from preventing inspection and that make
10 provision for inspecting, monitoring, and listing existing dikes; measures that preclude new
11 residential and commercial construction in the FFA (Skokomish River Valley); designation of this
12 FFA as a floodway and an avulsion zone; establishment of buffers of 100 feet for saltwater shorelines
13 and lakes of 20 acres or greater; and elimination of the MCC code exemption of agriculture from
14 critical area protection.
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17 **VIII. ORDER**

18 Based upon review of the Board's August 11, 2000 FDO, Mason County Ordinance 09-03, the
19 arguments of the parties at the compliance hearing, and considering Findings of Fact 1-8 and
20 Conclusion of Law, *supra*, the Board finds that Mason has **complied** with the requirements of the
21 GMA as set forth in the aforementioned Board Orders.
22

23 The Board **rescinds** its determination of invalidity in Case No. 95-2-0073 and issues this **Finding of**
24 **Compliance**.

25 So ordered this 6th day of June, 2003.

26 WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD
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29 _____
Holly Gadbow, Board Member

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31 _____
Nan Henriksen, Board Member
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2 Hite, concurring separately:
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4 I concur with the majority that the County has come into compliance with the GMA with respect to
5 the four areas in which this Board found non-compliance in the August 23, 2002 order.
6

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8 I write separately to discuss a point that may not be entirely clear in the majority opinion: the
9 distinction between the effect of the Board's guidance in the August 23, 2002 order and compliance
10 under the GMA. The board's authority is strictly limited by statute to finding compliance (RCW
11 36.70A.300(3)(a)), noncompliance (RCW 36.70A.300(3)(b)), or invalidity (RCW 36.70A.302). The
12 board may also "require periodic reports to the board on the progress the jurisdiction is making
13 towards compliance." RCW 36.70A.300(3)(b). The statutory grants of authority to the board are
14 thus very limited.
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17 The board does not have authority to order the County to take any particular actions to bring itself
18 into compliance. *See, e.g., ARD v. Shelton*, WWGMHB 98-2-0005 (Compliance Order, June 17,
19 1999); *Achen v. Clark County*, WWGMHB 95-2-0067 (Compliance Order, November 16, 2000);
20 *Ellis v. San Juan County*, WWGMHB 97-2-0006 (Final Decision and Order, June 19, 1997).
21 Therefore, when the board lists actions to be taken in any given case, that list must be viewed only as
22 guidance and not as the standard against which compliance is measured.
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25 While I am sympathetic to the concern that the target not keep shifting, it is important to remember
26 that the target is always the same thing – compliance with the goals and policies of the Act. When
27 the board provides guidance, it is with the information thus far presented in mind. However, should
28 new information (such as new science) be presented to the board in a compliance hearing, the board
29 should not close its eyes to the new information because it gave guidance at a prior hearing without
30 such information. At a compliance hearing, the question is not whether the board's direction was
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1 followed but whether compliance was achieved. In this case, both were accomplished and the
2 County is to be congratulated.

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5 _____
6 Margery Hite, Board Member
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