

**CENTRAL PUGET SOUND  
GROWTH MANAGEMENT HEARINGS BOARD  
STATE OF WASHINGTON**

TULALIP TRIBES OF	)	<b>Case No. 96-3-0029</b>
WASHINGTON,	)	<b>ORDER ON MOTIONS</b>
Petitioners,	)	
v.	)	
SNOHOMISH COUNTY,	)	
Respondent.	)	
	)	
	)	
	)	
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	)	
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**I. Procedural Background**

On July 12, 1996, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review from the Tulalip Tribes of Washington (**Tulalip**). The matter was assigned Case No. 96-3-0029, and will be referred to hereafter as ***Tulalip v. Snohomish County***. Tulalip challenges Snohomish County (the **County**) Amended Ordinance No. 96-011 (the **Ordinance**), amending interim development regulations for critical areas, on grounds that it does not comply with the Growth Management Act (**GMA** or the **Act**), and the State Environmental Policy Act (**SEPA**), and certain decisions of this Board.

The Board held the prehearing conference on August 23, 1996, at the Board's office, 2329 One Union Square, Seattle, and entered a Prehearing Order (the **Prehearing Order**) on September 5, 1996. The Prehearing Order set forth the legal issues and a schedule for the filing of motions and briefs, and set dates for a tentative hearing on motions and the hearing on the merits.

On September 13, 1996, the Board received the "Tulalip Tribes' Dispositive Motion for Determination that RCW 36.70A.172(1) Requires Local Governments to Use and Include the Best Available Science in Designating and Protecting Critical Areas (With Corrections) and Request for Oral Argument" (the **Tulalips' Dispositive Motion**), the "Tulalip Tribes' Motion to Supplement the Record" (the **Tulalips' Motion to Supplement**) and the "Tulalip Tribes' Preliminary Exhibit and Witness List" (the **Tulalips' Preliminary Exhibit and Witness List**).

On September 16, 1996, the Board received the "Tulalip Tribes' Motion for Extension to Time and Allowance of Later Supplementation of Their Preliminary Exhibit and Witness List" (the **Tulalips' Motion for Extension and Later Supplementation**) and the "Tulalip Tribes' Preliminary Exhibit

and Witness List (with Corrections)” (the **Tulalips’ Corrected Exhibit and Witness List**).

On September 20, 1996, the Board received the “County’s Response in Opposition to Tulalip Tribes’ Dispositive Motion Regarding Applicability and Interpretation of RCW 36.70A.172(1)” (the **County’s Response to Dispositive Motion**), the “County’s Response in Opposition to Tulalip Tribes’ Motion to Supplement the Record and Motion for Extension of Time and Allowance of Later Supplementation of Exhibit List” (the **County’s Response to Tulalips’ Motion for Extension and Later Exhibit Supplementation**) and the “County’s Response in Opposition to Tulalip Tribes’ Preliminary Exhibit and Witness List and Motion for Extension of Time and Allowance of Later Supplementation of Witness List” (the **County’s Response to Tulalips’ Motion for Extension and Later Witness Supplementation**).

On September 25, 1996, the Board received a pleading ten pages in length entitled the “Tulalip Tribes’ Rebuttal Concerning Particular County Responses in Opposition to Tribes’ Preliminary Exhibit and Witness List and Non-Dispositive Motions” (the **Tulalips’ First Rebuttal**), together with three items from CPSGMHB Case No. 95-3-0047: an undated “Declaration of David J. Somers;” a “ Stipulated Exhibit List (corrected);” and an “Index of Documents Considered by the County in Enacting Critical Areas Ordinances Nos. 94-108 and 94-109.” Later on this same date, the Board received a second pleading, eight pages in length, also entitled “Tulalip Tribes’ Rebuttal Concerning Particular County Responses in Opposition to Tribes’ Preliminary Exhibit and Witness List and Non-Dispositive Motions” (the **Tulalips’ Second Rebuttal**).

## **II. FINDINGS OF FACT**

1. On March 7, 1995, the Snohomish County Council (the **Council**) enacted Ordinance 94-108, an ordinance designating and adopting regulations to protect critical areas (the **Critical Areas Ordinance** or **CAO**). On this same date, the Council adopted Ordinance 94-109, adding the CAO to the list of regulations the County uses as substantive authority under the State Environmental Policy Act (**SEPA**).

2. Petitions for Review were filed against the CAO by the Pilchuck Audubon Society, the Tulalip Tribes of Washington and the State of Washington on May 11, June 5, and June 9, 1995, respectively. The petitions were consolidated in CPSGMHB Case No. 95-3-0047 and captioned *Pilchuck, et al. v. Snohomish County* [**Pilchuck**].

3. On December 6, 1995, the Board entered its Final Decision and Order in the *Pilchuck* case.

4. On January 25, 1996, the Board entered its Order Partially Granting Motions for Reconsideration and Clarification in the *Pilchuck* case.

5. On April 22, 1996, David Somers, a biologist for the Tulalip Tribes of Washington, submitted a letter to the Snohomish County Council, addressing the pending adoption of amendments to the County’s CAO. In his letter, Mr. Somers incorporated by reference the exhibits admitted in the

*Pilchuck* case.County Index Ex. 49.

6.On April 30, 1996, the Council adopted Ordinance 96-011.By its terms, Ordinance 96-011 adopted amendments to Snohomish County Code Chapter 32.10, Critical Areas Regulations under the Growth Management Act and in response to the December 6, 1995 and January 25, 1996 Orders of the Central Puget Sound Growth Management Hearings Board.Petition for Review, attached Snohomish County Notice of Action published May 10 and 17, 1996.

7.On July 12, 1996, the Tulalip Tribes of Washington filed a petition for review with the Board alleging that Ordinance 96-011 does not comply with the goals and requirements of the GMA.The matter was assigned Case No. 96-3-0029 and is entitled *Tulalip v. Snohomish County [Tulalip]*.

### **III. ORDER ON MOTIONS TO SUPPLEMENT**

The Board’s statutory criteria for considering motions to supplement the record are set forth at RCW 36.70A.290(4) which provides:

The board shall base its decision on the record developed by the city, county, or the state and supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision.

Parties are reminded that they are to attach to their prehearing briefs a copy of any exhibit cited, or the portions of those exhibits cited.The parties are cautioned that each exhibit attached to a brief must be **relevant** to the specific legal issues before the Board.An exhibit’s listing on the Index as a part of the record below, or its admission as a supplemental exhibit, does not necessarily mean that a specific exhibit is relevant to the legal issues set forth in the Prehearing Order.

In the summary tables below:

- Proposed Exhibits or Witness Testimony that indicate “Denied” do not become supplemental exhibits.
- “Already in Record” means that the exhibit is either already listed on the Index, or should be listed in a supplement to the Index.As such it need not be the subject of a motion to supplement.

#### **Proposed Exhibits Identified in Tulalips’ Motion to Supplement the Record and Tulalips’ Corrected Preliminary Exhibit and Witness List**

<b>Proposed Exhibit: Documents</b>	<b>Ruling</b>
1.Materials from the record in <i>Pilchuck</i> [1]	[2] <b>Already in Record.</b>

<b>Proposed Exhibit: Witness Testimony</b>	<b>Ruling</b>
1. David J. Somers	<b>Denied</b>
2. Other unnamed proposed expert witnesses	<b>Denied</b>

The Board will decide the case based upon the information in the record below. As noted, the record below includes exhibits from the *Pilchuck* case. The Board agrees with the County that it is not the purpose of the present case to re-litigate the *Pilchuck* case. Nevertheless, by incorporating that prior record by reference, the petitioners have broadened the scope of the exhibits that must be included in a supplement to the County's index in this case.

As to the proposed witness testimony, in person or by declaration, the Board rejects the petitioners' requests. The Board has repeatedly expressed its view first stated in *Twin Falls, et al., v. Snohomish County [Twin Falls]*, CPSGMHB Case No. 93-3-0003 (1993):

This Board interprets ... RCW 36.70A.290(4) to mean that the Board shall limit its review to the record below and only in special circumstances, allow additional evidence, either by way of documents or witness testimony. *Twin Falls*, Order Partially Granting Petitioners' Motions to Supplement the Record and Order Granting County's Motion for Limited Discovery, (June 4, 1993) at 3.

The Board concludes that the petitioners had ample opportunity to place written and oral expert testimony before the County. A failure to do so does not constitute a special circumstance that justifies the granting of the Tulalips' Motion to Supplement.

**IV. ORDER ON TULALIPS' MOTION FOR EXTENSION AND LATER SUPPLEMENTATION**

The Tulalip Tribes requested the Board to grant the Tribes an extension of time and leave to supplement their preliminary exhibit and witness list regarding expert testimony. The Board will deny all motions for witness testimony, either with live witnesses or declarations, and will also deny the Tulalips' Dispositive Motion. The Tulalips' Motion for Extension and Later Supplementation will likewise be denied.

**V. ORDER ON TULALIP TRIBES' DISPOSITIVE MOTION**

**BACKGROUND**

On September 27, 1996, the presiding officer orally denied the Tulalips' request for oral argument and so informed the parties.

At issue in the Tulalips' Dispositive motion is the Board's reading of RCW 36.70A.172 which provides:

(1) In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

(2) If it determines that advice from scientific or other experts is necessary or will be of substantial assistance in reaching its decision, a growth management hearings board may retain scientific or other expert advice to assist in reviewing a petition under RCW 36.70A.290 that involves critical areas.[1995 c 347 § 105.]

The Board addressed this section of the GMA in a case of first impression, *Honesty in Environmental Analysis and Legislation (HEAL) v. City of Seattle [HEAL]*, CPSGMHB Case No. 96-3-0012, Final Decision and Order (August 21, 1996). The Board observed that neither the GMA itself, nor the procedural criteria, define “best available science,” and concluded that the process described by RCW 36.70A.172 granted broad discretion to local government to determine the appropriate local substantive outcome. The Board concluded that:

...by including the phrase “... in developing policies and development regulations” in RCW 36.70A.172, the legislature has not mandated any substantive outcome, or product; rather, it has required counties and cities to make the best available science a part of their process of “developing policies and development regulations”...*HEAL*, at 19. Emphasis in original.

In the present case, the Tulalips’ Dispositive Motion asks the Board to revisit the *HEAL* decision. The Tulalips ask:

... that the Board determine, as a question of law, that RCW 36.70A.172(1) requires local governments to use and include the best available science in designating and protecting critical areas. Tulalips’ Dispositive Motion, at 1.

## DISCUSSION

The Board need not inquire as to the legislative history of a statutory provision where the words in the statute are unambiguous. The Board affirms its prior conclusion that RCW 36.70A.172 imposes a *process* requirement upon local government, but does not impose a substantive outcome. The legislature did not define “best available science” nor did it limit a local government’s discretion to determine for itself what “best available science” is.

The legislature directed local governments to “include...[best available science] in developing policies and regulations...” If the legislature had intended to require a specific outcome, it could have chosen the types of directive verbs it used elsewhere in the GMA. For example, it could have directed local governments to adopt policies and regulations that consist of the best available science, or that use the best available science or that are based upon the best available science. It did none of these. **The Board holds that, because RCW 36.70A.172 requires that local governments “include” best available science in the development of policies and regulations, rather than incorporate or base such enactments upon best available science, this section of the GMA requires a process rather than a substantive outcome.** The Board therefore will decline the Tulalips’ request to revisit *HEAL*.

## Vi. ORDER

Having reviewed the above-referenced documents and having deliberated on the matter, the Board enters the following order.

1)The Tulalips' Dispositive Motion is **denied**.

2)The Tulalips' Motion to Supplement the Record with witness testimony, either in person or by declarations, is **denied**.

3)The Tulalips' Motion for Extension and Later Supplementation is **denied**.

So ORDERED this 2nd day of October, 1996.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Edward G. McGuire, AICP  
Board Member

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Joseph W. Tovar, AICP  
Board Member

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Chris Smith Towne  
Board Member

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[1] The Tulalip Tribes' list proposed as supplemental exhibits:

...all exhibits, testimony, comments and other materials filed with the Board as exhibits by the Tulalip Tribes, Pilchuck Audubon Society and State agencies in *Pilchuck Audubon Society, et al., v. Snohomish County*, CPSGMHB Case No. 95-3-0047, including the supplemental exhibits, declarations and reply declarations filed therein, except the Declaration of Ellen Gray...Tulalips' Preliminary Exhibit and Witness List, at 1-2.

[2] The April 22, 1996 letter from David J. Somers to the Snohomish County Council, identified in the Index as County Council Exhibit No. 49, incorporated by reference the exhibits admitted in the *Pilchuck* case. Finding of Fact 5. Therefore, they are properly part of the record that was before the County in the present case, and the Index should be supplemented to so indicate.