

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

THE TULALIP TRIBES OF)	
WASHINGTON,)	Case No. 99-3-0013
)	
Petitioner,)	<i>[Tulalip II]</i>
)	
v.)	FINAL DECISION AND ORDER
)	
CITY OF MONROE, WASHINGTON,)	
)	
Respondent.)	
_____)	

i. PROCEDURAL BACKGROUND

On July 15, 1999, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (the **PFR**) from the Tulalip Tribes of Washington (**Petitioner, Tulalip, or the Tribes**) challenging an action by the City of Monroe (**Monroe or the City**) adopting the North Area Community Plan (the **Subarea Plan**). The matter was assigned Case No. 99-3-0013, and given the caption *Tulalip v. Monroe*. To distinguish it from an earlier case involving the Tribes, the short title for the present case is ***Tulalip II***.

On September 15, 1999, the Board conducted its prehearing conference in the matter.

On September 24, 1999, in response to direction from the Board, the Tribes submitted “The Tribes’ Informal Statement of Issues.”

On September 27, 1999, the Board conducted a continued prehearing conference in the matter.

On September 29, 1999, the Board received a letter confirming and reiterating the oral stipulation by the parties to a 30-day extension pursuant to RCW 36.70A.300(2)(b).

On October 25, 1999, the Board received a letter from the Tribes indicating that they wished to proceed with the case and all of the issues set forth in the Informal Statement of Issues.

On October 27, 1999, the Board issued “Order Granting 30-day Extension and Prehearing Order” setting a schedule for the case and a statement of legal issues.

On November 1, 1999, the Board received “Respondent City of Monroe’s Dispositive

Motions” (the **City’s Dispositive Motions**).

On November 15, 1999, in response to a stipulation from the parties, the Board issued an “Order Modifying Prehearing Schedule” which set November 17 as the deadline for Response to Motions, November 22 as the deadline for Rebuttal to Response to Motions, and November 24 for the issuance of the Board Order on Motions.

On November 16, 1999, in response to a stipulation from the parties, the Board issued a signed “Stipulation and [proposed] Order Modifying Prehearing Schedule” in which the deadlines were revised again as follows: November 24 for the Response to Motions, December 1 for both the Board Order on Motions and the submittal of the Tulalip Prehearing Brief, December 15 for the submittal of the Monroe Prehearing Brief, and December 17 for the submittal of the Tulalip Reply Brief.

On November 24, 1999, the Board received “Petitioner Tribes’ Response to City of Monroe’s Dispositive Motions” (**Tribes’ Response to Dispositive Motions**) together with an attached 2-page “Declaration of Andy Loch” (the **First Loch Declaration**).

On November 29, 1999, the Board received “Respondent City of Monroe’s Reply Memorandum on its Dispositive Motions.”

On December 2, 1999, the Board received from the Tribes “Petitioner Tulalip Tribes’ Prehearing Brief” (the **Tribes’ PHB**) together with an attached six-page “Declaration of Andy Loch” (the **Second Loch Declaration**) and a “Motion and Memorandum in Support of Motion to Supplement Record” (the **Tribes Motion to Supplement**). Later on this same date, the Board received “Respondent City of Monroe’s Motion to Strike and Request for Early Disposition of its Motion” (the **City’s First Motion to Strike**).

On December 10, 1999, the Board issued an “Order on Motions, Revising Briefing Schedule and Revising Time for Hearing on the Merits” (**December 10, 1990 Order on Motions**) that, among other things, granted the City’s First Motion to Strike and established 1:15 p.m. on December 20, 1999 for the hearing on the merits.

On December 17, 1999, the Board received “City of Monroe’s Prehearing Memorandum” (**City’s Response**).

On the morning of December 20, 1999, the Board received a telephone call from Sharon I. Haensly, an attorney in the office of Mason Morisset, counsel for the Tribes, indicating that Mr. Morisset was quite ill and that the Tribes would be filing an emergency motion for continuance. Because the presiding officer was not present, Board member Edward McGuire took the call and subsequently contacted Tayloe Washburn, counsel for the City, who indicated that they would be filing a Response in opposition to the emergency motion for continuance. Mr. McGuire

subsequently contacted presiding officer Joe Tovar to relate the essence of the Tribes' request and the City's opposition. Mr. Tovar indicated that he would orally approve the request for a continuance, subject to identifying an alternative date. Mr. McGuire related this decision to Ms. Haensly and Mr. Washburn.

Later in the morning of December 20, 1999, the Board received Monroe's "Response to Emergency Motion for Continuance." At the end of the day, the Board issued an "Order Changing Date for Hearing on the Merits" which granted the Tribes' motion for continuance and set the hearing on the merits for 10:00 a.m. on Monday, January 3, 2000. Also on this date, the Board received "Tulalip Tribes' Reply to City of Monroe's Prehearing Memorandum."

On December 21, 1999, the Board received "Respondent City of Monroe's Second Motion to Strike" (the **City's Second Motion to Strike**).

On December 23, 1999, the Board received "Tulalip Tribes' Response to City's Second Motion to Strike, and Motion for Official Notice of Attachments 2 and 4 to the Tribes' Reply Brief."

On January 3, 2000, beginning at 10:00 a.m., the Board conducted the Hearing on the Merits in Room 1022 of the Financial Center, 1215 Fourth Avenue, Seattle, WA. Present for the Board were Board Members Edward G. McGuire, Lois H. North and Joseph W. Tovar, Presiding Officer. Also present was Andrew Lane, the Board's Law Clerk. Representing the Tribes was Mason Morisset. Also present for the Tribes were Sharon Haensly and Daryl Williams. J. Tayloe Washburn and Steven G. Jones represented the City. Also present for the City was Nicole Baird. No witnesses testified. Robert H. Lewis, Tacoma, provided Court reporting services.

II. Findings of fact

1. The City adopted its GMA comprehensive plan (by updating its pre-GMA comprehensive plan) in December 1994. City's Ex. 8. A Draft Supplemental Environmental Impact Statement was prepared for this plan in August 1994. City's Ex. 9.
2. The City adopted its Sensitive Areas Guidelines (**SAG**) in August 1991. City's Ex. 16.
3. Final Supplemental Environmental Impact Statement (**FSEIS**) for the Subarea Plan was issued March 29, 1999. City's Ex. 3. The cover letter sent with the FSEIS stated that the period for filing an appeal of the FSEIS ends on April 5, 1999. City's Ex. 4. The City subsequently extended the appeal deadline to April 15, 1999.
4. The Addendum to FSEIS was issued on April 28, 1999. The cover letter sent with the Addendum stated that the period for filing an appeal of the Addendum ends on May 5, 1999. City's Ex. 5.

5. The City adopted the North Area Community Plan on May 12, 1999. City's Ex. 1.

iii. PREFATORY NOTE

Petitioner has raised important and provocative questions about the responsibility of a city to protect fish habitat in view of recent federal listings of Chinook salmon, bull trout, and other species. The GMA contains specific requirements for local governments to designate and protect critical areas, including fish and wildlife habitat. The requirement to designate resides in RCW 36.70A.170(1) while the requirement to adopt protective critical areas regulations resides in RCW 36.7A.060(2). Significantly, the Tribes insist that they are not challenging the City's critical areas regulations adopted pursuant to those GMA provisions. They instead assert that the City action at bar, a plan (the Subarea Plan) adopted pursuant to RCW 36.70A.080, violates the GMA because the Subarea Plan and the Monroe's critical areas regulations (the **Sensitive Areas Guidelines** or **SAG**) are inextricably intertwined. ^[1]

While there is an important directive linkage between them, policies (i.e., plans) and regulations are distinct GMA creatures. The Act's consistency requirements give plans directive effective over regulations, however, this does not convert policy documents into land use controls. Simply put, plans are not regulations. Critical areas regulations not properly before the Board, no matter how obsolete or inadequate to perform their function, cannot be attacked through a petition for review of a plan amendment. The Tribes have not presented facts or argument to show that a plan must provide the fish habitat protection that the Act explicitly assigns to regulations, i.e., the critical areas provisions of RCW 36.70A.060(2). Indeed, none of the issues listed in the Prehearing Order (the **PHO**) explicitly frame this question.

The Board notes that Monroe has responsibly committed to undertake amendments to the SAG in response to the imminent issuance of the draft 4(d) rule promulgated by the National Marine Fisheries Service and in coordination with the Tri-County Framework developed by local governments in Snohomish, King and Pierce counties. *See City's Response*, at 5, 26. The Board urges the City to do so. When any local government in the Central Puget Sound region adopts amendments to policies and regulations that purport to protect critical areas pursuant to RCW 36.70A.060(2), those enactments will be subject to meeting the best available science requirements of RCW 36.70A.172 and the potential of appeal to this Board pursuant to RCW 36.70A.280. Unless and until those events take place, the Board will not reach many of the questions raised in these proceedings by the Tribes.

iv. dispositive motions

Monroe presented four arguments to dismiss issues: relating to the State Environmental Policy Act (**SEPA**) allegations, the City argues that the Tribes failed to exhaust administrative remedies;

with regard to Endangered Species Act (**ESA**) allegations, the City argues ripeness and lack of jurisdiction; with regard to the allegations re: RCW 36.70A.090 the City argues that there is no basis for finding non-compliance with GMA; and with respect to allegations about the inadequacies of the Addendum to FSEIS, the City argues that it is not an appealable document.

A. SEPA

The City argues that the State Environmental Policy Act (**SEPA**)-related issues should be dismissed because the Tribe failed to appeal the City's SEPA actions to the City, failing to exhaust administrative remedies. Portions of Issues 3 and 4, and all of Issues 5 through 10 are SEPA-related issues.

“‘The GMA and SEPA are two distinct statutes with their own standing requirements that each must be met by petitioners if they intend to challenge actions for not complying with both statutes.’ . . . Obtaining GMA standing ‘does not automatically bestow SEPA standing upon petitioner.’” *Rural Bainbridge Island v. City of Bainbridge Island*, CPSGMHB Case No. 98-3-0030c, Order on Dispositive Motions (Oct. 16, 1998), at 3 (quoting *Robison v. City of Bainbridge Island*, CPSGMHB Case No. 94-3-0025, Order on Dispositive Motions (Feb. 16, 1995), at 6-7). Therefore, to challenge the City's action under SEPA, the Tribes must comply with SEPA's appeal requirements.

The SEPA statute provides:

If a person aggrieved by an agency action has the right to judicial appeal and if an agency has an administrative appeal procedure, such person shall, prior to seeking any judicial review, use such agency procedure if any such procedure is available, unless expressly provided otherwise by state statute.

RCW 43.21C.075(4). Courts have limited the application of this statutory exhaustion requirement in cases where the available administrative remedy was not adequate to “alleviate the harmful consequences of the governmental activity at issue” and where resort to administrative procedures would be futile. *Orion v. State of Washington*, 103 Wn.2d 441, 456-57 (1985). This Board has followed the direction of the courts and has consistently required petitioners to exhaust a local jurisdiction's administrative SEPA appeal process before seeking SEPA review before the Board. *See Association of Rural Residents v. Kitsap County*, CPSGMHB Case No. 93-3-0010, Order Granting Dispositive Motions (Feb. 16, 1994); *West Seattle Defense Fund v. City of Seattle*, CPSGMHB Case No. 94-3-0016, Order Granting Seattle's Motion to Dismiss SEPA Claim (Dec. 30, 1994); *Benaroya v. City of Redmond*, CPSGMHB Case No. 95-3-0072, Order on Redmond's Dispositive Motions and Benaroya's Motion to Intervene as a Party (Jan. 9, 1996).

Here, the Tribes did not avail itself of the City's administrative SEPA appeal procedure. The FSEIS on the challenged Subarea Plan was issued on March 29, 1999. The City mailed a copy of

the FSEIS to the Tribes, among others. ^[2] The cover letter accompanying the FSEIS stated: “Pursuant to Chapter 20.04 of the Monroe Municipal Code, any appeal must be filed by [April 5, 1999].” City’s Ex. 4, at 2. The City Council extended this deadline to April 15, 1999. The City issued an Addendum to the FSEIS on April 28, 1999. The cover letter accompanying the Addendum stated: “Pursuant to Chapter 20.04 of the Monroe Municipal Code (MMC), any appeal must be filed in person by [May 5, 1999].” City’s Ex. 5, at 3.

The Tribes did not appeal either the FSEIS or the Addendum to the City. ^[3] In addition, the Tribes did not argue that the City’s administrative appeal procedure did not provide an adequate remedy, or that the City’s administrative appeal procedure would be futile in resolving the Tribes’ objections. Based on the record before the Board in this case, the City’s motion to dismiss SEPA-related issues for failing to exhaust administrative remedies is **granted**. Those portions of Issues 3 and 4 alleging SEPA non-compliance, and all of Issues 5 through 10 are **dismissed with prejudice**.

2. ESA

The City argues that, to the extent Issues 4 and 6 allege non-compliance with the Endangered Species Act (**ESA**), these issues should be dismissed based on lack of ripeness and lack of Board jurisdiction over these claims. In response, the Tribes state: “[T]he Tribe has not alleged that the FSEIS, Addendum or [Subarea] Plan violate the federal Endangered Species Act.” Response to Dispositive Motions, at 3. In other words, listing of salmon pursuant to the ESA is merely another fact the Tribes offer for the Board to consider in its deliberation.

The Board agrees with the Tribes that Issue 4 does not allege non-compliance with the ESA. Also, the Board has already dismissed Issue 6 in its entirety for lack of exhaustion of administrative remedies. Therefore, the City’s motion to dismiss ESA claims need not be granted and is **denied**.

3. RCW 36.70A.090

The City argues that RCW 36.70A.090, raised in Issue 2, provides no basis for finding non-compliance with the GMA. This provision states:

A comprehensive plan should provide for innovative land use management techniques, including, but not limited to, density bonuses, cluster housing, planned unit developments, and the transfer of development rights.

RCW 36.70A.090 does not create a GMA duty; it simply encourages local jurisdictions to include “innovative land use management techniques” in their comprehensive plans. The Tribes

“agree[] that this statutory provision is not drafted in legally binding language, [but] disagrees that this portion of the claim should be dismissed” and argues that the Board “should be able to consider the [Subarea] Plan’s near or complete absence of innovative land use management techniques as evidence of these inadequacies.” Tribes’ Response to Dispositive Motions, at 5.

RCW 36.70A.090 does not create a GMA duty and is therefore not a basis for finding non-compliance with the GMA. The City’s motion to dismiss is **granted**. That portion of Issue 2 alleging non-compliance with RCW 36.70A.090 is **dismissed with prejudice**. However, to the extent the Tribes utilize RCW 36.70A.090 in its argument regarding compliance with other provisions of the GMA, the Board will consider this argument as appropriate.

4. Addendum to the FEIS

Because the Board has dismissed all SEPA-related issues, the Board need not, and will not, address this portion of the City’s dispositive motion.

v. abandoned issues

In addition to the issues dismissed above, the Tribes have abandoned several issues. An issue is abandoned if it is not briefed. WAC 242-02-570(1). The Board notes that the Tribes’ prehearing brief fails to address two challenges contained within Issues 3 and 4: non-compliance with the Shoreline Management Act, Chapter 90.58 RCW (**SMA**); and non-compliance with Monroe Municipal Code (**MMC**) § 20.04. Since the Tribes did not brief these portions of Issues 3 and 4, they are deemed **abandoned**.

The City also argues that the Tribes have abandoned that portion of Issue 1 that alleges non-compliance with RCW 36.70A.070(1) and that portion of Issue 2 that alleges non-compliance with RCW 36.70A.130(9). However, the Tribes have presented argument on RCW 36.70A.070(1)^[4] and the Board will address this issue elsewhere in this Order. The City’s motion to dismiss that portion of Issue 1 that alleges non-compliance with RCW 36.70A.070(1) is **denied**. “RCW 36.70A.130(9)” is a typographical error, as .130 does not contain a sub-section (9). The Tribes have presented argument regarding .130. The City’s motion to dismiss that portion of Issue 2 that alleges non-compliance with RCW 36.70A.130(9) is **denied** and this citation in Issue 2 is hereby amended to read “RCW 36.70A.130.”

vi. legal issues^[5]

Legal Issue 1: Does the City of Monroe’s (the City) North Area Community Plan (the Plan), as adopted by Resolution No. 1162:

a. substantially interfere with and fail to be guided by RCW 36.70A.020(9), which is the

goal of encouraging retention of open space and development of recreational opportunities, conservation of fish and wildlife habitat, increasing access to natural resource lands and water, and development of parks; and by RCW 36.70A.020(10), which is the goal of protecting the environment and enhancing the state's high quality of life, including air and water quality, and the availability of water; and

b. fail to comply with the requirements of RCW 36.70A.060(3), because the City failed to review and bring into compliance its pre-Growth Management Act (GMA or Act) Sensitive Area Guidelines when adopting the Plan; with the requirements of RCW 36.70A.070(1) because the City failed to include, as part of the Plan's land use element, a review of drainage, flooding, and storm water runoff in the area covered by the Plan and nearby jurisdictions, and to provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state, in particular French and Woods creeks and their tributaries; with the requirements of RCW 36.70A.130(1) by failing to ensure that the Plan conforms to the GMA; with the requirements of RCW 36.70A.172(1) because the City failed to use the best available science, or to give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries in the Plan's policies and goals, and in its improper reliance on the City's inadequate, pre-GMA Sensitive Areas Guidelines, relative to protection and enhancement of anadromous fish and their habitat; and with the requirements of all subsections mentioned above, because the Plan improperly allows utility corridors to be placed in or excessively close to critical areas, and otherwise fails to protect critical areas, including anadromous fish and their habitat?

Legal Issue 2: Does the Plan fail to comply with the requirements of the GMA (RCW 36.70A.090, RCW 36.70A.130(9), RCW 36.70A.160, and RCW 36.70A.172), because it fails to adequately protect critical areas by failing to ensure the placement of steep slopes and other sensitive lands, including adequately sized buffers, in Native Growth Protection Easements; because it excludes streams and adequately sized buffers from open space; and because it allows the placement of utility corridors in or excessively close to sensitive areas?

Legal Issue 3: Do[es] the Plan and Final Supplemental Environmental Impact Statement (FSEIS) fail to comply with the requirements of the GMA (RCW 36.70A.020(9), .020(10), .070(1), .130, .172(1)); the Shoreline Management Act (SMA) (RCW 90.58.020); the State Environmental Policy Act (SEPA) (RCW 43.21C.010, 43.21C.030, 43.21C.031(1), 43.21C.060, 43.21C.240); and the Monroe Municipal Code (MMC) (§20.04) because they do not contain adequate measures or require the development of adequate measures to protect and enhance sensitive areas, fish and wildlife habitat and open space that will likely be harmed by construction of the East/West Connector?

Legal Issue 4: Do[es] the Plan and FSEIS fail to comply with the requirements of the GMA

(RCW 36.70A.020(9), .020(10), .070(1), .130, .172(1); the SMA (RCW 90.58.020); SEPA (RCW 43.21C.010, 43.21C.030, 43.21C.031(1), 43.21C.060, 43.21C.240); and MMC §20.04, because they do not contain adequate measures or require the development of adequate measures to protect and enhance habitat utilized by or necessary for species of anadromous fish designated as threatened under the Endangered Species Act (ESA) such as Puget Sound Chinook salmon, including such measures as revising the City's inadequate, pre-GMA Sensitive Area Guidelines?

A. Standard of Review

The City's actions in adopting Resolution 1162 are presumed valid. RCW 36.70A.320(1). The burden of proof is on Petitioner to demonstrate that the City's actions are not in compliance with the GMA. RCW 36.70A.320(2). The Board “shall find compliance unless it determines that [the City's] action[s are] clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” RCW 36.70A.320(3). For the Board to find the City's actions clearly erroneous, the Board must be “left with the firm and definite conviction that a mistake has been made.” *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

B. Discussion

The Tribes' briefing neither recites to nor refers to the Legal Issues contained in the PHO. Because the Tribes' briefing does not conveniently relate to the discrete Legal Issues as stated in the PHO, the Board will organize this discussion in the manner utilized by the Tribes, while being mindful to “not issue advisory opinions on issues not presented to the board in the statement of issues, as modified by [the] prehearing order.” RCW 36.70A.290(1).

1. Review and update of Sensitive Area Guidelines upon adoption of subarea plan (Tribes' PHB ¶ 4.1.1; PHO Legal Issue 1.b)

The Tribes state: “Subarea plans are subject to the same GMA requirements as the original comprehensive plan.” Tribes' PHB, at 9. Based on this premise, the Tribes argue that RCW 36.70A.060(3) required the City to “review and bring into compliance its outdated [Sensitive Area] Guidelines when adopting the [Subarea] Plan.” Tribes' PHB, at 10.

The GMA required all counties and cities in the State to designate critical areas by September 1, 1991. RCW 36.70A.170(1)(d). These counties and cities were also required to adopt development regulations to protect these designated critical areas. RCW 36.70A.060(2). For counties and cities required to plan under RCW 36.70A.040, like Monroe, the deadline for adopting these development regulations was September 1, 1991. *Id.* On the other hand, the deadline for certain counties and cities, including Monroe, to adopt their comprehensive plans pursuant to RCW 36.70A.040 was July 1, 1994, subject to possible extensions. RCW 36.70A.040

(3)(d). When adopting this comprehensive plan, the GMA required counties and cities to re-examine the earlier-adopted critical areas designations and development regulations. RCW 36.70A.060(3) provides that:

[Counties and cities] shall review these designations and development regulations when adopting their comprehensive plans under RCW 36.70A.040 and implementing development regulations under RCW 36.70A.120 and may alter such designations and development regulations to insure consistency.

The critical area scheme set out by the GMA for the City is: (1) designate critical areas by September 1, 1991; (2) adopt development regulations to protect these designated critical areas by September 1, 1991; and (3) when adopting a comprehensive plan by the July 1, 1994 deadline, review the critical area designations and protective development regulations. In other words, the requirement of RCW 36.70A.060(3) applies to the adoption of the initial comprehensive plan required by RCW 36.70A.040; nothing in RCW 36.70A.060(3) creates a duty for the City to review its critical area designations and development regulations upon adoption of a subsequent subarea plan. Therefore, the City did not fail to comply with the requirements of RCW 36.70A.060(3) when it adopted the Subarea Plan.

2. Necessary elements of the subarea plan (Tribes' PHB ¶ 4.1.2, PHO Legal Issue 1.b)

The Tribes' heading for this argument is "The Plan's Land Use Element Does Not Include Necessary Components." As a threshold matter, the Board notes that the Subarea Plan does not include a land use element. The Board now examines whether the Subarea Plan is required to contain a land use element.

The Tribes assert that the mandatory comprehensive plan elements set out in RCW 36.70A.070 also apply to subarea plans, relying on RCW 36.70A.130(1) and *West Seattle Defense Fund v. City of Seattle (WSDF III)*, CPSGMHB Case No. 95-3-0073, Final Decision and Order (Apr. 2, 1996). More specifically, the Tribes argue that the Subarea Plan does not contain a "review [of] drainage, flooding, and storm water run-off in the area and nearby jurisdictions and provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state, including Puget Sound or waters entering Puget Sound." See RCW 36.70A.070(1).^[6]

RCW 36.70A.130(1) provides, in pertinent part, that "[a]ny amendment or revision to a comprehensive land use plan shall conform to [chapter 36.70A RCW], and any change to development regulations shall be consistent with and implement the comprehensive plan." In *WSDF III*, the Board noted that subarea plans are subject to the goals and requirements of the Act and must be consistent with the comprehensive plan. *WSDF III*, at 25. Neither RCW 36.70A.130(1) nor *WSDF III* stand for the proposition that subarea plans must contain, in every case, each of

the mandatory comprehensive plan elements set out in RCW 36.70A.070.^[7] The Tribes have failed to meet its burden to show that the Subarea Plan must contain a land use element as specified in RCW 36.70A.070(1).

3. Protection of critical areas (Tribes' PHB ¶ 4.1.3, PHO Legal Issues 1.a, 1.b, and 2)

The Tribes state: “The [Subarea] Plan contains many new policies, none of which use ‘best science’ to protect the values or functions of the North Area’s critical areas or which demonstrate that the City gave ‘special consideration’ to conservation or protection measures necessary to preserve or enhance anadromous fisheries.” Tribes’ PHB, at 11. The Tribes cite RCW 36.70A.020(9), (10), and .172(1).

RCW 36.70A.020 sets out GMA goals to be used “exclusively for the purpose of guiding the development of comprehensive plans and development regulations.” Subarea plans are subject to the GMA goals. *WSDF III*, at 25. RCW 36.70A.020(9), the open space and recreation goal, provides:

Encourage the retention of open space and development of recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks.

RCW 36.70A.020(10), the environment goal, provides:

Protect the environment and enhance the state’s high quality of life, including air and water quality, and the availability of water.

The Tribes do not present argument in this section of its brief explaining how the City fails to comply with RCW 36.70A.020(9) and (10). The Tribes have failed to meet its burden to show that the City failed to be guided by RCW 36.70A.020(9) and (10).

RCW 36.70A.172(1) provides:

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.

The Tribes assert that the policies contained within the Subarea Plan fail to include best available science because they “repeatedly and mistakenly rel[y] on the City’s outdated [Sensitive Area] Guidelines to protect critical areas which . . . is wholly inadequate.”^[8] Tribes’ PHB, at 11.

However, the Tribes fail to explain how best available science was not included for any specific policies. [\[9\]](#)

The Tribes also state that “the [Subarea] Plan allows utility corridors to be placed in or excessively close to critical areas.” Tribes’ PHB, at 11. However, the Tribes present no argument explaining how this fails to comply with the GMA. In addition, the Tribes state that the Subarea Plan’s “R-4 zoning allows developers to construct a total impervious area of up to 50% ‘of the lot area.’ [citation omitted] Increasing impervious surface area leads to increased runoff, which in turn harms water quality, increases peak flows, and reduces macroinvertebrate [sic] communities and salmonid habitat.” *Id.* The City argues that the cited policies and regulations are not critical areas policies and regulations. City’s Response, at 29. Even if these are critical areas policies and regulations, the Tribes have not explained how best available science was not included. [\[10\]](#)

There is no disagreement that the GMA imposes upon local governments a duty to adopt regulations to protect critical areas, including fish habitat. However, the Tribes cannot meet its burden to show that the City breached a duty to comply with the requirements of RCW 36.70A.172(1) in its Subarea Plan.

4. Open space and habitat conservation requirements (Tribes’ PHB ¶ 4.1.4, PHO Legal Issue 1.a and 3)

The Tribes state: “The GMA requires that comprehensive plans and sub-area plans contain [RCW 36.70A.020(9)]” and to “identify open space corridors.” Tribes’ PHB, at 11. RCW 36.70A.020(9) is the GMA planning goal that encourages the retention of open space and development of recreational opportunities, conservation of fish and wildlife habitat, increased access to natural resource lands and water, and development of parks. RCW 36.70A.160 provides:

Each county and city that is required or chooses to prepare a comprehensive land use plan under RCW 36.70A.040 shall identify open space corridors within and between urban growth areas. They shall include lands useful for recreation, wildlife habitat, trails, and connection of critical areas as defined in RCW 36.70A.030. Identification of a corridor under this section by a county or city shall not restrict the use or management of lands within the corridor for agricultural or forest purposes. Restrictions on the use or management of such lands for agricultural or forest

purposes imposed after identification solely to maintain or enhance the value of such lands as a corridor may occur only if the county or city acquires sufficient interest to prevent development of the lands or to control the resource development of the lands. . . .

The Tribes argue: “Instead of retaining open space, the [subarea] Plan contains numerous loopholes and shortcuts designed to allow developers to maximize density and profits at the expense of open space and fish habitat.” Tribes’ PHB, at 12. The Tribes offer no authority for this assumption.

In addition, the Tribes’ arguments do not support its position. For example, the Tribes argue that the Subarea Plan “rewards developers with a density bonus, which allows them to build more units within a project than otherwise permitted under normal density limits.” Tribes’ PHB, at 12. However, as the City explains, to utilize the density bonus, developers must use the Planned Residential Development provisions that results in more open space and recreational land than if the developer chose not to use the density bonus. City’s Response, at 32.

The Tribes also argue that there are no requirements regarding how open space is to be preserved or restored and that the subarea Plan “should require that developers preserve a significant percentage of the open space in an undisturbed forest state.” Tribes’ PHB, at 13. This is a statement of the Tribes’ preference; however, the Tribes do not identify a GMA requirement to support this preference.

The Tribes have failed to meet its burden to show that the City’s Subarea Plan fails to be guided by the provisions of RCW 36.70A.020(9) or to comply with the requirements of .160.

5. Subarea plan consistency with comprehensive plan (Tribes’ PHB ¶ 4.3, No corresponding PHO Legal Issue)

In its prehearing brief, the Tribes argue for the first time that the Subarea Plan fails to comply with the requirements of RCW 36.70A.080(2), requiring subarea plans to be consistent with comprehensive plans. Because this is an issue that was not included in the statement of Legal Issues in the PHO, the Board will not address it. *See* RCW 36.70A.290(1).

C. Conclusions

1. The City did not fail to comply with the requirements of RCW 36.70A.060(3) when it adopted the Subarea Plan.
2. The Tribes have failed to meet the burden to show that the Subarea Plan must contain a land use element as specified in RCW 36.70A.070(1).

Board Member

Lois H. North
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.

[1] Even the City, at the hearing, characterized the Plan and the SAG as “fused together.”

[2] According to the City, the Draft EIS was mailed to “Impact Assessment Officer, Tulalip Tribes, 6700 Totem Beach Road, Marysville, WA 98270.” Apparently, this is the address to which the City mailed the FSEIS. After the City mailed the FSEIS, the Tribes sent a letter dated April 20, 1999, to the City in which the Tribes requested that the City notify Andy Loch, the Tribes’ aquatic ecologist, of SEPA actions relating to the Subarea Plan.

[3] The City argues that the Addendum to the FSEIS is not an appealable document. The Board does not reach this issue.

[4] See Tribes’ PHB, at 10.

[5] The portions of Legal Issues dismissed elsewhere in this Order are shown in strikethrough text.

[6] RCW 36.70A.070(1) provides in full:

A land use element designating the proposed general distribution and general location and extent of the uses of land, where appropriate, for agriculture, timber production, housing, commerce, industry, recreation, open spaces, general aviation airports, public utilities, public facilities, and other land uses. The land use element shall include population densities, building intensities, and estimates of future population growth. The land use element shall provide for protection of the quality and quantity of ground water used for public water supplies. Where applicable, the land use element shall review drainage, flooding, and storm water run-off in the area and nearby jurisdictions and provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state, including Puget Sound or waters entering Puget Sound.

[7] The Board recognizes that, in some cases, subarea plans may be subject to the requirements of RCW 36.70A.070. In *LMI v. Town of Woodway*, this Board observed:

[A] subarea plan for a city may refine the land use, housing, utility, capital facility or transportation policies or projects affecting the subarea. However, these refinements must be consistent with the jurisdiction’s comprehensive plan and comply with the goals and requirements of the Act. Where the subarea plan modifies only certain portions of the jurisdiction’s comprehensive plan for the subarea, the unaffected provisions of the comprehensive plan continue to apply and govern in the subarea. **The Board holds that when a subarea plan refines one of the mandatory elements of the jurisdiction’s comprehensive plan the requirements set forth in RCW 36.70A.070 apply to that subarea plan.**

LMI v. Town of Woodway, CPSGMHB Case No. 98-3-0012, Final Decision and Order (Jan. 8, 1999), at 51.

However, in the present case, the Tribes have not shown that the Subarea Plan refines the comprehensive plan’s land use element to such a degree as to require the Subarea Plan to contain the drainage, flooding, and storm water run-off review set out in RCW 36.70A.070(1).

[8] As acknowledged by the Tribes, the SAG is not the subject of this appeal.

[9] The Declaration of Andy Loch, attached to the Prehearing Brief addressed the SAG, not the Subarea Plan policies. Citations and references to this Declaration were stricken by the Board as an untimely attempt to supplement the record. *See* December 10, 1999 Order on Motions.

[10] The Tribes have not offered admissible evidence to show that, in formulating the Subarea Plan, the City included science from “study X” when only “study Y” constituted best available science or that the City failed to include any science at all.