

A. Ecology's Motion for Reconsideration

Ecology contends that the Board misinterpreted certain statements by the City of Everett in reaching its decision on the Simpson site. Ecology quotes the following language from the Board's FDO:

The Board's reasoning regarding the Simpson site states:

The City stated that the so-called central 45 acres or the development pad "is comprised of over 650,000 cubic yards of fill material it is not a wetland or any other critical area." City PHB, at 31. The City went on to point out that the island of fill material is beyond 200 feet from the high-water mark of the Snohomish River. *Id.*, at 30. Based on this second statement, the Board must conclude that the development pad portion of the Simpson site is outside the jurisdiction of the SMA. Additionally, review of the SEWIP figures provide little support for any designation, since it is not evaluated in several of the maps. This too supports the conclusion that the site is outside the jurisdiction of the SMA.

DOE Motion, at 2, quoting FDO, at 55.

DOE goes on to argue that, "The City was not contending that the site is more than 200 feet from the ordinary high water mark (OHWM). The city was not contending, nor did any of the other parties in this case contend, that the Simpson development pad is outside shoreline jurisdiction." DOE Motion, at 2. DOE further explains, "Shoreline jurisdiction is measured 200 feet from the ordinary high water mark."

DOE continues:

Here, the Simpson site is surrounded by wetlands that are hydrologically connected to the Snohomish River. (Citations omitted). Although the exact location has not been determined, the OHWM of the river lies somewhere in the wetlands to the north of the development pad. See Figure 4.14 (stating that "the OHWM and boundary of shoreline jurisdiction will be determined at the time a development is proposed"). Thus, while the pad may be more than 200 feet from the main body of the river, it is less than 200 feet from the OHWM. In the absence of any expert testimony on this issue, or any evidence in the record regarding the exact location of the ordinary high water mark on the site, the Board should not have concluded the pad is outside jurisdiction.

DOE Motion, at 2-3.

The City of Everett asks the Board to reaffirm its conclusion regarding shoreline jurisdiction as it applies to the Simpson pad. The City asserts:

Figure 4.14 of the SMP, which shows the designation for the Simpson site, identifies the Ordinary High Water Mark as occurring along the mainstem of the Snohomish River, not in the wetland north of the Simpson pad, as Ecology argues. (Citation omitted). The notation on Figure 4.14 stating that the OHWM will be determined at the time of development is identical to the note found on every figure showing shoreline designations. (Citations omitted). This notation does not support Ecology's assertion that the OHWM is in the wetland.

Everett Answer, at 2.

No other party filed a response to Ecology's Motion for Reconsideration. Within the Shoreline Master Program (SMP), that was adopted by Everett and approved by Ecology, there are a series of maps indicating the SMP Shoreline Use Designations. Figure 4.1 graphically illustrates the shoreline use designations for the entire Everett area. Figures 4.2 through 4.23 show a more detailed area map for the use designations along various stretches of the river (and lakes). As Everett notes, each of the detailed area maps (Figures 4.2 through 4.23) contains the following note: "Shoreline jurisdiction boundaries are approximate. The OHWM and boundary of shoreline jurisdiction will be determined at the time development is proposed." *See* SMP Figures 4.2 through 4.23; Everett Answer, at 2.

Figure 4.14, which is cited by both Ecology and Everett, not only includes this note, but also includes a depiction on the map of the "Ordinary High Water Mark." Additionally, the scale for this map figure is given as 1 inch = 800 feet. The depiction of the OHWM on Figure 4.14 parallels the river for over 1000 feet south of the site and over 1000 feet north of the site; it does not extend westward into the wetland to the north of the Simpson pad. Where the Simpson pad parallels the river it appears to be well beyond 200 feet of the OHWM (from between 300 to 400 feet). The Board's review of this evidence, from the SMP itself, leads the Board to agree with the City and **affirm** its original conclusion. The Simpson pad is not within 200 feet of the OHWM and therefore it is outside the jurisdiction of the SMA. DOE's motion to reconsider is **denied**.

B. Tribes' Motion to Reconsider and Clarify

The Tribe asks the Board to reconsider the language of the FDO in order to clarify two areas: first, the Board's conclusions about the compliance of the City's three core scientific documents [\[1\]](#) with the best available science requirements of the GMA/SMA total statutory scheme, set forth on page 42 of the FDO; second, the compliance of the Urban Industrial designation for the

Snohomish River Mainstem, set forth on pages 50-51.

As to the “best available science” portion of the Tribes’ Motion, the Tribe quotes a portion of the FDO:

But for the critical areas/BAS error discussed, *supra*, the Board would find the following regarding the City’s core scientific documents: 1) that the SEWIP complies with RCW 90.58.100(1) and constitutes BAS [RCW 36.70A.172] in support of certain use designations established by the City’s SMP; 2) that concerning the compensatory mitigation measures in the SOSEWIP, the Board does not have the same degree of confidence in concluding that the SOSEWIP constitutes BAS; and 3) regarding the actual regulatory measures to be applied within the various shoreline use designations, the Board again is not confident that it can conclude that the Pentec Report constitutes BAS.

Tribes Motion, at 1, citing FDO, at 42.

The Tribe seeks clarification that the first phrase of the above-cited text (*i.e.*, “*But for* the critical areas/BAS error discussed, *supra*”) applies to all three scientific core documents, rather than just the first. Tribes Motion, at 1. The Tribes propose alternative language, as follows:

But for the critical areas/BAS error discussed, *supra*, the Board would find that the City’s core scientific document SEWIP complies with RCW 90.58.100(1) and constitutes BAS [RCW 36.70A.172] in support of certain use designations established by the City’s SMP. Concerning the compensatory mitigation measures in the SOSEWIP, another core scientific document, the Board does not have the same degree of confidence in concluding that the SOSEWIP constitutes BAS. And regarding the actual regulatory measures to be applied within the various shoreline use designations, the Board again is not confident that it can conclude that the Pentec Report, also a core scientific document, constitutes BAS.

The Board agrees with the Tribes that the “but for” language in the first phase applies to all three of the City’s core scientific documents. As the Board detailed, a fundamental flaw in the City’s action was a failure to grasp that these SMA shorelines of state-wide significance are also GMA critical areas, the protection of which must be assured by development regulations that must be developed including “best available science.” This flaw undermines all three core scientific documents because none of them were identified as being BAS pursuant to the critical areas requirements of RCW 36.70A.060 and .172. The Board therefore will **grant** this portion of the Tribes’ Motion.

Turning to the compliance of the Urban Industrial Designation of the Snohomish River Mainstem, the Tribe suggests that the FDO, at 51, “is unclear whether the Board is upholding or rejecting the City’s designation of the Mainstem as Urban Industrial.” Tulalip Motion, at 2. The City did not address the Tribe’s request in its Answer, nor did any other party file a response to this portion of the Motion.

Upon a review of the relevant portions of the FDO, the Board understands the Tribes’ request for clarification. While the Tribe did not offer any specific language for the Board to consider, the Board concludes that it is necessary and appropriate to offer further explanation. Not only is it important to spell out what the answer is for the Mainstem of the Snohomish River, it is important to clarify: (1) why the Board has concluded that these SMA shorelines of state-wide significance are also GMA critical areas; (2) what the consequence of that determination is for urban waterfronts that are already characterized by a strongly committed pattern of intensive uses; and (3) the protections required by the critical areas status.

1. Clarification of why SMA Shorelines of State-wide Significance are GMA Critical Areas

As the FDO observes, the legislature’s adoption of RCW 36.70A.480 integrated the policy component of local SMPs into local comprehensive plans and the regulatory component of local SMPs into local development regulations. FDO, at 14-15. Therefore, there can be no question that the City’s SMA development regulations, whether labeled by the City as such, have been rendered by **RCW 36.70A.480** as GMA development regulations.

More to the point, the natural systems that are purported to be regulated by the City’s SMP for shorelines of state-wide significance reveals that these areas^[2] constitute critical areas and are subsumed within the hydrological ecosystems discussed at RCW 36.70A.030(5)^[3] and discussed in the FDO, at 23-26. As the Board stated, *these* hydrological ecosystems include not only wetlands, but other natural systems that are functionally connected:

In addition to wetlands, such “ecosystems” include “areas with a critical recharging effect on aquifers used for potable water,” “fish and wildlife habitat conservation areas,” and “frequently flooded areas.” These features collectively constitute the component parts of the hydrologic ecosystems that are “*shorelines of state-wide significance.*”

Indeed, it is difficult to imagine a shoreline ecology, that is the subject of the SMA planning regime, that **does not** consist of “ecosystem” values and functions defined by wetlands, critical aquifer recharge areas, fish and wildlife habitat conservation areas and frequently flooded areas. These two regulatory schemes plainly address the

same natural landscape, the same natural attributes, and the same natural processes. It is an inescapable conclusion that SMA “shorelines of state-wide significance,” are critical areas that are “large in scope, complex in structure and functions, and of a high rank order value.” *See Litowitz and LMI/Chevron, supra.* In short, **the Board concludes that shorelines of state-wide significance are critical areas subject to both the GMA and the SMA.**

FDO, at 24. Footnotes omitted.

2. Clarification of the Consequence that SMA Shorelines of State-wide Significance are also GMA Critical Areas

The Board plainly stated that the SMA designation for the Mainstem as Urban Industrial complied with the use preferences of Chapter 90.58 RCW. Here, the Board recognized that, where a strongly developed and committed land use pattern of intensive urban uses exists, it is within the discretion of a local government to allow the continued operation and even redevelopment of such uses. The Board stated:

[A]s the Board concluded, *supra*, some degree of development will continue to be permitted within the shorelines of the state, particularly within areas where a strongly developed *land use pattern* of such uses exists. Here, the Board finds that the existing *pattern* of water-oriented development uses along the Snohomish River Mainstem (*e.g.*, port, marina, and water dependant industry facilities) is permitted by 90.58.020. Because this portion of Everett’s shoreline is among the most substantially altered, it has relatively less importance for shoreline restoration and thus is an appropriate location to respond to the economic development objectives of RCW 36.70A.020(5) and 90.58.100(2)(a). This means that continued operation, and even redevelopment of such committed sites (*i.e.*, lands where such an intensive pattern exists) is consistent with the SMA (RCW 90.58.020). Nevertheless, even in such “degraded” environments, the SMA’s preservation/restoration imperative applies because even impaired habitats continue to provide ecosystem functions. For example, the record shows that the Snohomish River is a fish migration corridor.

The Board finds that the City’s designation as Urban Industrial for the Snohomish River Mainstem was appropriate and is consistent with the SMA (RCW 90.58.020). The well-established and prevalent pattern of industrial uses along the Mainstem of the Snohomish River, and the science used to support this designation indicates a relative lack of restoration potential in this area. *But for* the fact that the City did not make this designation pursuant to the GMA’s “critical areas/BAS” requirements, the Board would find that this designation

complies with the total statutory scheme of the GMA/SMA.

FDO, at 51, footnotes omitted.

Notably, the Board's conclusion that *these* SMA shorelines of state-wide significance are GMA critical areas **does not limit or skew** the range of preferred or permitted land use designations adopted pursuant to the SMA **nor does it preclude development** within 200 feet of the ordinary high-water mark.^[4] It is understandable that this may be a new and different concept, given that traditional critical areas regulations have frequently focused on such inland aquatic features as wetlands, streams, lakes and rivers, rather than estuaries and salt-water environments. Moreover, such traditional critical areas regulations have been largely concerned with matters such as buffers and setbacks. However, while development standards will continue to be an issue even in shorelines with an intensive, committed pattern of land use, the primary consequence of the critical areas status for such lands will be a duty to evaluate and take necessary actions to assure protection of these ecosystems.

In this case, the City's Urban Industrial designation for the Snohomish River Mainstem, abuts the Snohomish River, a documented fish-migratory corridor. The relationship between the near-shore and the river itself is an ecosystem relationship that merits the protections afforded by RCW 36.70A.060 and .172.

3. Clarification of the protections for critical areas

Once critical areas^[5] have been identified and designated, they must also be *protected*. See RCW 36.70A.060 and .172. There are at least two levels of protection: first, the designation level, which prescribes the permitted uses allowed within the designated area(s); and second, the development standards level, which articulates the specific requirements and standards that governs the actual development of the permitted uses within the designation. In this case, the Board reviewed the designation level – the designations adopted by Everett, and approved by Ecology, to five different area designations in the Shoreline Master Program. Through the use of the information portrayed and contained in the SEWIP (a BAS document), the Board concluded that either specific designations did, or did not, comply with the first level protections required by the integrated GMA/SMA statutory scheme. However, since the City conceded it had relied, in part, upon its *existing* sensitive areas regulations (which contain the development standards), which had not been revised or updated as required by RCW 36.70A.172, the Board found that this level of protection did not comply with the requirements of the integrated GMA/SMA statutory scheme.

III. NOTICE OF SCRIVENER'S ERRORS

A number of scrivener's errors were contained in the FDO.

Page 3, line 27 - insert a comma and the word "of" after the word "time."

Page 14 – the last paragraph in footnote 8 should be indented on both sides because it is part of the citation.

Page 26, line 22 – delete the comma between the word "Goal" and the word "has."

Page 29, line 43 – delete the word "are" before the word "likewise" and add a comma after the word "likewise."

Page 34, line 2 – add the word "which" after the word "questions."

Page 41, footnote 59 – Replace the backslash symbol at the end of the first sentence with a period.

Page 42, line 33 – Delete the word "that" between the words "policies" and "comply."

Page 63, line 13 – Replace the word "its" with "it."

Page 65, line 19 – insert the word "of" before the word "ecosystem."

These corrections are noted in the "Corrected Final Decision and Order" posted on the Boards' website at www.gmhb.wa.gov.

IV. ORDER

Based upon review of the Motions, Answer, the FDO, the SMP, SEWIP, and having deliberated on the written arguments presented in this matter, the Board ORDERS:

- The Board **affirms** its conclusion regarding the Simpson site; DOE's motion for reconsideration is **denied**.
- The Board **agrees** to modify its language regarding the core scientific documents found in the FDO, at 42; and agrees to modify its language that **upholds** the County's designation, and DOE's approval, of the "Urban Industrial" designation for the Snohomish River Mainstem, found in the FDO, at 51. The Tulalip Tribe's motion for reconsideration

and clarification is **granted**.

- The Boards' FDO is clarified and augmented as set forth in this Order.
- Scrivener's errors in the Final Decision and Order are noted above.

So ORDERED this 10th day of February 2003.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP
Board Member

Lois H. North
Board Member

Joseph W. Tovar, AICP
Board Member

Note: This Order constitutes a final order as specified by RCW 36.70A.300. Pursuant to WAC 242-02-832(3), a board order on a motion for reconsideration is not subject to a motion for reconsideration.

[1] The three documents are the SEWIP, the SOSEWIP and the Pentec report.

[2] The SEWIP and SOSEWIP confirm that the Snohomish Estuary hydrological system is made up of critical areas as defined in RCW 36.70A.030(5).

[3] RCW 36.70A.030(5) provides:

"Critical areas" include the following areas and ecosystems: (a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas.

Emphasis added.

[4] In an early case, the Board clarified:

[The GMA] requires that critical areas be protected. As long as that mandate is met, other, non-critical portions of land can be developed as appropriate under the applicable land use designation and zoning requirements. Furthermore, development of critical areas is not absolutely prohibited as long as those areas are adequately protected.

Association to Protect Anderson Creek v. Kitsap County, CPSGMHB Case No. 95-3-0053c, FDO, Dec. 26, 1995, at 19

[5] In this case, these shorelines of statewide significance constitute critical areas as defined in RCW 36.70A.020(5).