

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2 Advocates for Responsible Development and
3 John E. Diehl,

4 Petitioners,

5
6 v.

7 Mason County,

8 Respondent.

9
10 And

11 The Skokomish Indian Tribe,

12 Intervenor.
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14

Case No. 07-2-0010

ORDER FINDING COMPLIANCE

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16 This matter comes before the Board following the submittal of Mason County's (County)
17 Compliance Report¹ in response to the Board's January 16, 2008 Final Decision and Order
18 (FDO). The Compliance Report states that the County adopted Ordinance 87-08 on July 8,
19 2008, amending the Mason County Flood Damage Prevention Ordinance (FDPO), to
20 address the FDO findings of noncompliance and invalidity.
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23 **I. SYNOPSIS**

24 The Board finds that the County has achieved compliance with the Growth Management Act
25 (GMA) by rescinding those portions of the County FDPO which the Board previously found
26 non-compliant and by reinstating a dike monitoring program the Board found the County
27 had rescinded without reliance on Best Available Science.
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32 ¹ Mason County's Compliance Report and Index Re: FDPO, July 18, 2008.

1 **II. PERTINENT PROCEDURAL HISTORY**

2 On July 17, 2007 the County adopted Ordinance 81-07, amending its FDPO to address
3 Frequently Flooded Areas (FFAs) in the Skokomish River Valley. Petitioners filed a timely
4 appeal and on January 16, 2008 the Board issued an FDO. In the FDO the Board held that
5 the absence of peer review and adequate references in the Channel Migration and Avulsion
6 Potential Analysis (CMZ study) upon which Mason County based amendments to its FDPO
7 precluded it from being accepted as Best Available Science (BAS).
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10 The Board held that because the CMZ study was not BAS, the changes the County made in
11 its FDPO in reliance on that study, including the decision to abandon its dike monitoring
12 program, were not compliant with the GMA. The Board found that the deletion of the dike
13 monitoring program in Section 5.4-2 of the FDPO was not based on BAS and therefore
14 failed to comply with RCW 36.70A.172.
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16 The Board further found that the substantial risk that new development would vest under
17 Sections 5.5-3 and 5.5-4 of the 2007 Ordinance during the period of compliance merited the
18 imposition of invalidity as to those sections.
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20 On remand, the County took a number of steps to comply with RCW 36.70A.172,
21 specifically:
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- 23 • The County adopted Ordinance 87-08 on July 8, 2008, amending the Mason
24 FDPO.
- 25 • Ordinance 87-08 reinstated the dike monitoring provisions as they existed prior to
26 the adoption of Ordinance 81-07.
- 27 • Ordinance 87-08 rescinded Sections 5.5-3 and 5.5-4 of Ordinance 81-07.
- 28 • Ordinance 87-08 reinstated the previous language of Section 5.4-1 and 4.4-3.
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1 The County presented the details of this adoption process to the Board in its Compliance
2 Report. The Compliance Report and attached Ordinance 87-08 demonstrate that the
3 County chose to cure the areas of GMA non-compliance by deleting the areas the Board
4 found to be non-compliant, and reinstating those areas whose removal the Board found had
5 not been based on BAS.

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7 Following the submittal of the County's Compliance Report, Petitioners and Intervenor filed
8 objections to a finding of compliance.
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10 A compliance hearing was conducted telephonically on August 28, 2008. Petitioners were
11 represented by John Diehl. The County was represented by Monty Cobb. The Intervenor,
12 the Skokomish Indian Tribe, was represented by attorney Lori Nies. All three Board
13 members attended the hearing.
14

15 16 **III. BURDEN OF PROOF**

17 After a board has entered a finding of non-compliance, the local jurisdiction is given a period
18 of time to adopt a legislative enactment to achieve compliance. RCW 36.70A.300(3)(b).

19 After the period for compliance has expired, the board is required to hold a hearing to
20 determine whether the local jurisdiction has achieved compliance. RCW 36.70A.330(1) and
21 (2). For purposes of Board review of the comprehensive plans and development
22 regulations adopted by local governments in response to a non-compliance finding, the
23 presumption of validity applies and the burden is on the challenger to establish that the new
24 adoption is clearly erroneous. RCW 36.70A.320(1), (2) and (3).
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27 Only if a finding of invalidity has been entered is the burden on the local jurisdiction to
28 demonstrate that the ordinance or resolution it has enacted in response to the finding of
29 invalidity no longer substantially interferes with the goals of the GMA. RCW 36.70A.320(4).

30 In this case, the Board found that the provisions of Sections 5.5-3 and 5.5-4 of the Flood
31 District Protection Ordinance which rely on the Channel Migration Zone study were not
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1 based on Best Available Science and were not compliant with the GMA. The Board also
2 found the allowance of construction in areas earlier determined to be at risk of a major
3 avulsion and the failure to base Sections 5.5-3 and 5.5-4 on BAS substantially interfered
4 with GMA goals 1 (sprawl reduction), 8 (natural resource industries) and 10 (environment).
5

6 On remand, the County bears the burden of demonstrating that the provisions of Sections
7 5.5-3 and 5.5-4 no longer substantially interfere with these goals. As to the other areas of
8 non-compliance, the Board did not find that they substantially interfered with the goals of the
9 GMA, and therefore the burden of proving lack of compliance remains with the Petitioner
10 and Intervenors.
11

12 In order to find the County's action clearly erroneous, the Board must be "left with the firm
13 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,
14 121 Wn.2d 179, 201, 849 P.2d 646 (1993).
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16
17 Within the framework of state goals and requirements, the boards must grant deference to
18 local governments in how they plan for growth:

19 In recognition of the broad range of discretion that may be exercised by counties and
20 cities in how they plan for growth, consistent with the requirements and goals of this
21 chapter, the legislature intends for the boards to grant deference to the counties and
22 cities in how they plan for growth, consistent with the requirements and goals of this
23 chapter. Local comprehensive plans and development regulations require counties
24 and cities to balance priorities and options for action in full consideration of local
25 circumstances. The legislature finds that while this chapter requires local planning to
26 take place within a framework of state goals and requirements, the ultimate burden
27 and responsibility for planning, harmonizing the planning goals of this chapter, and
28 implementing a county's or city's future rests with that community.
29 RCW 36.70A.3201 (in part).

30 In sum, except for those provisions which the Board found to be invalid (Sections 5.5-3 and
31 5.5-4) the burden is on the Petitioners to overcome the presumption of validity and
32 demonstrate that any action taken by the County is clearly erroneous in light of the goals

1 and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).
2 Where not clearly erroneous and thus within the framework of state goals and requirements,
3 the planning choices of the County must be granted deference.
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5 **IV. ISSUE PRESENTED**

6 Has the County cured the areas of GMA non-compliance identified in the Board's January
7 16, 2008 FDO?
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9 **V. POSITIONS OF THE PARTIES**

10 Following remand, the County submits that it has cured the areas of non-compliance
11 identified in the Board's January 16, 2008 FDO. The County points out that the Board ruled
12 that the amendments to the County's FDPO which eliminated the dike monitoring program,
13 allowed for new construction in the special flood hazard area, and deleted the designated
14 floodway and reasonable use exceptions all violated the GMA.² In response to that Board
15 ruling, the County relates that it adopted Ordinance 87-08 thereby rescinding those portions
16 of Ordinance 81-07 which amended the FDPO. In particular, the County rescinded Sections
17 5.5-3 and 5.5-4 of Ordinance 81-07 relating to the Conditional Build Zone and the Detailed
18 Study Area. The County reinstated the dike monitoring provisions as they existed prior to
19 Ordinance 81-07 and reinstated the prior designated floodway language of Section 5.4-1.
20 Finally, the County reinstated the prior language in Section 4.4-3 regarding reasonable use.
21 Based on these changes, the County contends it is in full compliance with the GMA.³
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25 Petitioners and Intervenor do not dispute that the County has removed the provisions of the
26 FDPO which the Board found non-compliant or that it has reinstated the earlier version of its
27 dike monitoring program. However, Petitioners argue that the County failed to include BAS
28 when it adopted the amendments originally challenged in this case, and errs in returning to
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32 ² Mason County's Compliance Report and Index Re: FDPO at 1.

³ Id. at 3.

1 the previous wording of its ordinance without application of BAS.⁴ Petitioners also argue
2 that the County has ignored the requirement contained in RCW 36.70A.172(1) that special
3 consideration be given anadromous fish in any development regulations adopted to protect
4 critical areas.⁵

5
6 Intervenor argues that, while the BAS that was utilized to develop the original dike
7 monitoring program is still in effect, reverting to the prior language is not sufficient.

8 Intervenor argues that the dike monitoring program should outline a plan to treat problem
9 dikes.⁶

11 VI. DISCUSSION

12 Collateral Estoppel

13 The County argues that objections raised by Petitioners and Intervenor are precluded by
14 collateral estoppel, because the objections they raise here are identical to the arguments
15 raised and rejected in 2003 regarding the adequacy of the County's monitoring program and
16 anadromous fish concerns.⁷ The Board recently held in Friends of Skagit County, et al. v.
17 Skagit County, WWGMHB No. 07-2-0025c, FDO (5/12/08) that:

18 This Board, as have our colleagues at the other Growth Management Hearings Boards,
19 have previously stated that the GMA has granted it no authority to apply equitable
20 doctrines and has denied applicability of such doctrines. The Board affirms these
21 previous holdings.
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23 Therefore, the Board will not resolve this proceeding through the application of equitable
24 principles such as collateral estoppel. Instead, we will examine the County's actions on the
25 record before us in this appeal to determine if it has achieved compliance with the GMA.
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27 Sections 5.5-3 and 5.5-4

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30 ⁴ Petitioners' Objections to a Finding of Compliance, at 1.

31 ⁵ Id. at 3.

32 ⁶ Intervenor's Joinder in Petitioners' Objection at 1-2.

⁷ Mason County's Response to Objections at 2.

1 The burden of proof for demonstrating that those areas the Board had found to substantially
2 interfere with the goals of the GMA is upon the County. The County rescinded those
3 provisions the Board had found to be invalid: Sections 5.5-3 and 5.5-4 relating to the
4 construction of homes in areas of special flood hazard. Neither Petitioners nor Intervenor
5 has argued that this failed to cure the basis for non-compliance and invalidity. Rescinding
6 invalid regulations is an appropriate response in this instance to a finding of invalidity.
7

8 **Conclusion:** The Board finds that the County has thereby removed the basis for the
9 Board's earlier determination of invalidity and the County's FDPO no longer interferes with
10 GMA goals 1, 8, and 10. Therefore, the Board rescinds its earlier finding of invalidity in
11 regard to Sections 5.5-3 and 5. 5-4 as the County has removed basis for the Board's earlier
12 finding of noncompliance in regards to these sections.
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15 Sections 5.4-1 and 4.4-3

16 The County reinstated the previous language of Sections 5.4-1 and 4.4-3 (relating to the
17 floodway and reasonable use exceptions for the Skokomish River Valley) which the Board
18 found had been altered without the support of (BAS). This aspect of Ordinance 81-07 had
19 not been determined to be invalid by the Board, therefore the presumption of validity
20 associated with Ordinance 87-08's reinstatement of the original language applies. Here
21 again, Petitioners and Intervenor have not raised any objection to the reinstatement of the
22 earlier language.
23

24
25 **Conclusion:** The Board finds that the County has removed the basis for the Board's earlier
26 finding of non-compliance with regard to these sections.
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28 Section 5.4-2 (now Section 5.5-5) - Dike Monitoring

29 Petitioners' and Intervenor's principal objection to the County's compliance strategy is that
30 the reinstatement of the dike monitoring program was not based on BAS and the program
31 does not go far enough.
32

1 As with Sections 5.4-1 and 4.4-3, while the Board had found that the County's removal of
2 the dike monitoring provisions from the FDPO was not based on BAS and was therefore not
3 compliant with the GMA, the Board did not find that that this action substantially interfered
4 with the goals of the GMA so as to merit imposition of invalidity. Because the County was
5 not addressing an area of invalidity in reinstating its dike monitoring program, the County's
6 actions are presumed valid and the burden of proving those actions noncompliant rests with
7 Petitioners and Intervenor. Therefore, the Board will consider whether the Petitioners and
8 Intervenor have carried their burden to demonstrate that the County's action in reinstating
9 the dike monitoring program was clearly erroneous.
10

11
12 Petitioners allege that "the record in this case shows that the dike monitoring program was
13 inadequate"⁸, yet provides no citation to the record to support that claim. The County points
14 out that "The language found compliant at hearing #17 in 2003 is the same language at
15 issue here."⁹ In fact, the dike monitoring program which the County readopted via
16 Ordinance 87-08 was accepted by the Board when it issued its June 6, 2003 Compliance
17 Order for Compliance Hearing No. 17 in Case No. 95-2-0073. Clearly, the Board did not
18 find the dike monitoring program inadequate on that record – the only opportunity the Board
19 had to consider the record of the adoption of the dike monitoring program.¹⁰ Therefore, in
20 order to challenge the reinstatement of the dike monitoring program in Ordinance 87-08
21 Petitioners must point to some evidence that demonstrates that its provisions violate the
22 GMA.
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25 While Petitioners insist that the County "needs to include the current BAS, and not rest on
26 previous BAS"¹¹ they offer no evidence that the previous BAS has changed, or is otherwise
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29 ⁸ Petitioners' Objections to a Finding of Compliance, at 1.

30 ⁹ Mason County's Reply to Objections at 2.

31 ¹⁰ Petitioners at that time raised no objections to a finding of compliance. See *Dawes. v. Mason County*,
WVGMHB Case No. 95-2-0073 (Compliance Order for Compliance Hearing #17, June 6, 2003) at 7.

32 ¹¹ Petitioners' Objections to a Finding of Compliance, at 2.

1 no longer applicable. The Board had previously accepted the Skillings-Connolly report as
2 the BAS for the Skokomish River Valley.¹²

3
4 At the compliance hearing, Petitioners argued that Channel Migration and Avulsion Study
5 (CMZ study) pointed out the problems that arise from not addressing problem dikes, and
6 that the Board should rely on that as BAS for a dike monitoring program. However,
7 Petitioners and Intervenor argued in the previous proceeding that the CMZ study was not
8 BAS. The Board agreed that the County could not rely on it as BAS for its FDPO because it
9 was not peer reviewed.¹³ For that reason, the Board will not consider it BAS for the purpose
10 of considering compliance of the monitoring program.
11

12
13 Intervenor, on the other hand, appears to acknowledge that “the BAS that was utilized to
14 develop the original dike monitoring program is still in effect”.¹⁴ Rather than argue that the
15 applicable BAS has changed, Intervenor claims that “additional information produced in the
16 record in this case must also be considered”.¹⁵ Yet, Intervenor does not state what that
17 other “additional information” is, and why, if it were considered, this would demonstrate that
18 the County’s actions in readopting its dike monitoring program were clearly erroneous.
19

20 **Conclusion:** Petitioners have failed to present any argument why the Skillings-Connolly
21 report is no longer relevant BAS and have failed to present evidence of new BAS. Nor have
22 they shown why the dike monitoring program, previously held to be compliant, is at odds
23 with new BAS. Therefore, the Board concludes that neither the Petitioners nor the
24 Intervenor have demonstrated that the County’s actions in reinstating its dike monitoring
25 program are clearly erroneous based on a failure to consider BAS or other unspecified
26 “additional information”.
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30 ¹² Diehl v. Mason County, WWGMHB No. 95-2-0073, 7th Compliance Order, 5/4/99.

31 ¹³ Final Decision and Order at 12.

32 ¹⁴ Intervenor’s Joinder in Petitioners’ Objection at 1.

¹⁵ Id.

1 Furthermore, to the extent that the Petitioners or Intervenor are suggesting that the dike
2 monitoring program is insufficient because it is not being properly implemented, the parties
3 are reminded that the Board's role is to determine if the County's Comprehensive Plan and
4 development regulations are in compliance with the GMA. The Board does not have any
5 role in ensuring that the County fully implements its regulations.
6

7 Consideration of Anadromous Fish

8 Petitioners also argue that in addition to not relying on BAS, the County failed to give
9 special consideration to anadromous fish as required by RCW 36.70A.172(1).¹⁶

10 The County points out that RCW 36.70A.172 was in effect in its present form in 2003 when
11 the Board issued its Compliance Order finding the County ordinances, including its dike
12 monitoring program, compliant. The Board found at that time:

13 We find that the County regulations in regard to provisions for dike monitoring,
14 inspecting and listing dikes, measures prohibiting the preclusion by individual
15 homeowners of inspections, measures precluding new residential and commercial
16 construction in the FFA, the designation of the Skokomish Valley as an FFA, and
17 the designation of this FFA as an avulsion zone now comply with the GMA. We
18 rescind the Board's finding of invalidity.¹⁷

19
20 The County insists that since the issue of anadromous fish was specifically raised, it is
21 without question that the County gave this matter proper consideration, and the Board
22 necessarily approved of such consideration when it found the County compliant in 2003.¹⁸

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24 While the Board recognizes that in asserting that the County "failed to consider"
25 anadromous fisheries, Petitioners are put in the difficult position of attempting to prove a
26 negative, the Petitioners have not presented any evidence that the County, in adopting or
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30 ¹⁶ RCW 36.70A.172(1) provides, in part, "In addition, counties and cities shall give special consideration to
31 conservation or protection measures necessary to preserve or enhance anadromous fisheries."

32 ¹⁷ Diehl et al. v. Mason County, WWGMHB No. 95-2-0073, Compliance Order for Compliance Hearing #17
(6/6/03).

¹⁸ Mason County's Reply at 2.

1 re-adopting the dike monitoring program has failed to consider anadromous fish. At the very
2 least, Petitioners should be expected to point to the record of the present ordinance and
3 demonstrate that the record is deficient in this regard. Petitioners did not do this. Instead,
4 Petitioners argue that diking has a harmful effect on fish habitat.¹⁹ However, even if one
5 were to accept this as true, it does not prove, as Petitioners appear to suggest, that the
6 County in readopting a dike monitoring program failed to “give special consideration to
7 conservation or protection measures necessary to preserve or enhance anadromous
8 fisheries”. That dikes may have a deleterious effect on anadromous fish does not
9 demonstrate that the County did not consider this effect. Therefore the Board concludes that
10 Petitioners have not demonstrated that the County has violated RCW 36.70A.172 by failing
11 to consider anadromous fisheries.
12

13 14 **VII. FINDINGS OF FACT**

- 15 1. Mason County is located west of the crest of the Cascade Mountains and is required to
16 plan under the terms of RCW 36.70A.040.
- 17 2. On July 17, 2007, the County adopted Ordinance 81-07, amending its Flood Damage
18 Protection Ordinance.
- 19 3. Following a timely appeal the Board found that the absence of peer review and
20 adequate references in the Channel Migration and Avulsion Potential Analysis (CMZ study)
21 upon which Mason County based amendments to its Flood Damage Protection Ordinance
22 precluded it from being accepted as Best Available Science.
- 23 4. The Board also held that because the CMZ study was not BAS, the changes the County
24 made in its Flood Damage Protection Ordinance in reliance on that study were not
25 compliant with the GMA.
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¹⁹ Petitioners’ Objections at 3.
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- 1 5. The Board further found that the substantial risk that new development would vest under
2 Sections 5.5-3 and 5.5-4 of the ordinance during the period of compliance merited the
3 imposition of invalidity as to those sections.
- 4 6. The County adopted Ordinance 87-08 on July 8, 2008, amending the Mason County
5 Flood Damage Prevention Ordinance.
- 6 7. Ordinance 87-08 rescinded those portions of Ordinance 81-07 which amended the FDPO
7 and which were the basis for the present appeal.
- 8 8. Ordinance 87-08 reinstated the dike monitoring provisions as they existed prior to the
9 adoption of Ordinance 81-07.
- 10 9. Ordinance 87-08 rescinded Sections 5.5-3 and 5.5-4 of Ordinance 81-07.
- 11 10. Ordinance 87-08 reinstated the previous language of Section 5.4-1.
- 12 11. The Board had previously accepted the Skillings-Connolly report as the BAS for the
13 Skokomish River Valley.
- 14 12. Petitioners offer no evidence that the BAS in the Skillings-Connolly report has changed,
15 or is otherwise no longer applicable.
- 16 13. No appeal of Ordinance 87-08 was filed within the applicable appeal period.
- 17 14. Any Finding of Fact later determined to be a Conclusion of Law is adopted as such.
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21 **VIII. CONCLUSIONS OF LAW**

- 22 A. The Board has jurisdiction over the parties and subject matter of this appeal.
- 23 B. The County has repealed those provisions of its Flood Damage Prevention Ordinance
24 which the Board had held violated the GMA.
- 25 C. Rescinding invalid regulations is an appropriate response to a finding of invalidity, and
26 the Board finds that by rescinding Sections 5.5-3 and 5.5-4 of Ordinance 81-07 the County
27 has removed the basis for the Board's earlier determination of invalidity.
- 28 D. Petitioners and Intervenor have not proven that the County's re-adoption of its dike
29 monitoring program did not include BAS, or that in doing so the County failed to consider
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1 anadromous fisheries. For those reasons, the re-adoption of its dike monitoring program is
2 not clearly erroneous.

3 E. Any Conclusion of Law later determined to be a Finding of Fact is adopted as such.
4

5 **IX. ORDER**

6 The County has now cured the areas of noncompliance identified in the Board's January 16,
7 2008 Final Decision and Order.
8

9 Accordingly, this case is CLOSED.
10

11 Entered this 20th day of October, 2008.
12

13 _____
14 James McNamara, Board Member

15 _____
16 William Roehl, Board Member

17 _____
18 Holly Gadbaw, Board Member
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22 Pursuant to RCW 36.70A.300 this is a final order of the Board.
23

24 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the date
25 of mailing of this Order to file a petition for reconsideration. The original and three
26 copies of a motion for reconsideration, together with any argument in support
27 thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the
28 original and three copies of the motion for reconsideration directly to the Board, with
29 a copy to all other parties of record. **Filing means actual receipt of the document at**
30 **the Board office.** RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing
of a motion for reconsideration is not a prerequisite for filing a petition for judicial
review.

31 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
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1 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
2 judicial review may be instituted by filing a petition in superior court according to the
3 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
4 Enforcement. The petition for judicial review of this Order shall be filed with the
5 appropriate court and served on the Board, the Office of the Attorney General, and all
6 parties within thirty days after service of the final order, as provided in RCW
7 34.05.542. Service on the Board may be accomplished in person or by mail, but
8 service on the Board means actual receipt of the document at the Board office within
9 thirty days after service of the final order. A petition for judicial review may not be
10 served on the Board by fax or by electronic mail.

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32 Service. This Order was served on you the day it was deposited in the United States
mail. RCW 34.05.010(19).