

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.
13
14

Case No. 07-2-0010

FINAL DECISION AND ORDER

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17 **I. SYNOPSIS OF THE DECISION**

18 In this Order the Board finds that Mason County failed to “include the best available
19 science” (BAS) as required by RCW 36.70A.172(1) when it amended its Flood Damage
20 Protection Ordinance (FDPO). The Board recognizes the substantial and valuable work that
21 the County and its consultants have accomplished in seeking to provide for compatible
22 development in the Skokomish River Valley. The Board does not find that that the study
23 upon which the County relied (the CMZ Study) could not be accepted as BAS with adequate
24 peer review and proper references. Nor does the Board find that the County could not
25 make the policy decision to forgo dike monitoring. However, the choices the County makes
26 in amending its critical areas ordinance must include Best Available Science.
27
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29 WAC 365-195-905(5)(a) describes the characteristics of BAS. Among those characteristics
30 are that it has been subject to peer review and includes adequate references. The absence
31 of peer review and adequate references in the Channel Migration and Avulsion Potential
32 Analysis (CMZ Study) upon which Mason County based amendments to its Flood Damage

1 Protection Ordinance preclude it from being accepted as BAS at this time. In particular,
2 there is a lack of adequate references because the CMZ Study did not demonstrate that it
3 considered the earlier Skillings-Connolly reports which were previously accepted as BAS or
4 the potential effects of the Cushman dam relicensing.

5
6 Because the CMZ Study is not BAS, the changes the County made in its Flood Damage
7 and Protection Ordinance, in reliance on that study, are not compliant with the GMA. The
8 substantial risk that new development will vest under §§5.5-3 and 5.5-4 of the ordinance
9 during the period of compliance merits the imposition of invalidity as to those sections.
10

11 II. PROCEDURAL HISTORY

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13 Mason County's Flood Damage and Protection Ordinance ("FDPO") was previously before
14 the Board in *Diehl v. Mason County*, WWGMHB No. 95-2-0073. After almost eight years
15 and seventeen compliance hearings, the Board issued a Finding of Compliance on the final
16 issues remaining in the case on June 6, 2003¹.

17
18 On July 17, 2007 the County adopted Ordinance 81-07, amending the FDPO. On July 20,
19 2007 Petitioners filed a timely appeal. On August 31, 2007 the Board granted the
20 Skokomish Indian Tribe's ("Tribe") Motion to Intervene.²
21

22
23 On September 28, 2007, Petitioners brought a dispositive motion, which the Tribe joined
24 and argued that, under the doctrine of collateral estoppel, the Board's decision in *Diehl v.*
25 *Mason County*, WWGMHB No. 95-2-0073 was dispositive of the issues in the present case.
26 On October 17, 2007 the Board declined to decide the challenge on motions and deferred a
27 decision on the arguments made in that motion to the Final Decision and Order.
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¹ Compliance Order for Compliance Hearing No.17 (Critical Areas), June 6, 2003.

² Order Granting Intervention to Skokomish Indian Tribe.

1 On October 22, 2007 the Board denied Petitioners' Motion to Supplement the Record and
2 ordered documents offered by Petitioners as additions to the Index to be made available for
3 the County's review.

4
5 On November 5, 2007, following the parties' review of the documents offered by Petitioners,
6 the Board granted the County's motion to strike Petitioners' additions to the Index, and
7 denied Petitioners' motion for supplemental evidence and its motion for reconsideration of
8 the October 22nd order.

9
10 Following submittal of the prehearing briefs by the parties, the Hearing on the Merits was
11 conducted on December 19, 2007 at the Board's offices in Olympia.³ Petitioners were
12 represented by John Diehl. The County was represented by TJ Martin. Intervenor, the
13 Skokomish Indian Tribe, was represented by Lori Nies. All three Board members attended.
14 James McNamara was the Presiding Officer.

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16
17 **Dispositive Motion**

18 On September 28, 2007, Petitioners brought a dispositive motion, in which the Tribe joined.
19 The Board declined to decide the challenge on motions and deferred a decision on the
20 arguments made in that motion to the Final Decision and Order. We now turn to that motion.
21 In its motion, Petitioners urged that our decision in this case was controlled by the doctrine
22 of collateral estoppel. That is, Petitioners argued that the earlier Board decision in *Diehl v.*
23 *Mason County*, WWGMHB Case No 95-2-0073 (1996) should determine the result in this
24 case.
25

26
27 When a subsequent action is of a different claim, yet depends on issues which were
28 determined in a prior action, the re-litigation of those issues is barred by collateral estoppel.⁴
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31 _____
32 ³ The December 5, 2007 date proposed in the Pre-Hearing Order was rescheduled due to the flooding related
closure of I-5 and US 101, making travel to the hearing impossible.

⁴ City of Arlington v. Central Puget Sound Growth Management Hearings Board, 138 Wn.App. 1, 24, 154 P.3d
936 (2007), quoting Hilltop Terrace Homeowners Ass'n v. Island County, 126 Wn.2d 22, 31, 891 P.2d 29
(1995).

1 Collateral estoppel, or issue preclusion, requires: (1) identical issues; (2) a final judgment on
2 the merits; (3) the party against whom the plea is asserted must have been a party to or in
3 privity with a party to the prior adjudication; and (4) application of the doctrine must not work
4 an injustice on the party against whom the doctrine is to be applied.⁵

5
6 In the present case, the first element is clearly absent. Although the issue of the County's
7 FDPO is once again before the board, there the similarity of the issues ends. As the County
8 correctly points out, Ordinance 81-07 is not Ordinance 77-93 (the latter being the ordinance
9 at issue in the 1995 case).⁶ The new ordinance is entitled to the presumption of validity
10 pursuant to RCW 36.70A.320(1) and the question for the Board is whether the new
11 ordinance is clearly erroneous.⁷ The record before the Board in each case is entirely
12 different, most notably in that, in adopting each ordinance, the County relied upon separate
13 and distinct studies.

14
15
16 The Board's inquiry is whether, based on the record, the County's actions were clearly
17 erroneous.⁸ Our review focuses upon the record and decisions made in adopting Ordinance
18 81-07. Therefore, collateral estoppel does not apply.

19
20 **Conclusion:** Accordingly, our prior determinations in case no. 95-2-0073 do not dictate our
21 decision in this case. Collateral estoppel is not applicable in this case. Petitioners'
22 dispositive motion is denied.
23

24 III. ISSUES PRESENTED

- 25
26 1. Does the elimination of the dike monitoring program from §5.4-2 of the Mason County
27 Code fail to protect Frequently Flooded Areas pursuant to RCW 36.70A.060 through
28 inclusion of best available science ("BAS") as required by RCW 36.70A.172, and
29 substantially interfere with GMA goals 2 and 8-10?
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32 ⁵ Id.

⁶ Mason County's Response to Petitioner's Motions, at 2.

⁷ RCW 36.70A.320(3)

⁸ *Ibid*; WAC 242-02-634.

- 1 2. Does the provision in §5.2-7 for repairs, reconstruction, replacement, or
2 improvements to existing houses in areas of special flood hazard, regardless of
3 whether the cost exceeds 50 percent of the market value of the structure, fail to
4 comply with RCW 36.70A.060 through inclusion of BAS as required by RCW
5 36.70A.172, and substantially interfere with GMA goals 2 and 8-10?
6
7 3. Do the provisions in §5.5-3 and §5.5-4 for construction of new homes in areas of
8 special flood hazard fail to comply with RCW 36.70A.060 through inclusion of BAS as
9 required by RCW 36.70A.172, and substantially interfere with GMA goals 2 and 8-
10 10?
11
12 4. Does the deletion of the designated floodway for the Skokomish River Valley in §5.4-
13 1 and deletion of the provision disallowing reasonable use exceptions in the
14 Skokomish River Valley in §4.4-3 fail to comply with RCW 36.70A.060 through
15 inclusion of BAS as required by RCW 36.70A.172, and substantially interfere with
16 GMA goals 2 and 8-10?

17
18 **IV. BURDEN OF PROOF**

19 For purposes of board review of the comprehensive plans and development regulations
20 adopted by local government, the GMA establishes three major precepts: a presumption of
21 validity; a “clearly erroneous” standard of review; and a requirement of deference to the
22 decisions of local government.
23

24 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and
25 amendments to them are presumed valid upon adoption:
26

27 Except as provided in subsection (5) of this section, comprehensive plans and
28 development regulations, and amendments thereto, adopted under this chapter are
29 presumed valid upon adoption.
30

31 The statute further provides that the standard of review shall be whether the challenged
32 enactments are clearly erroneous:

1 The board shall find compliance unless it determines that the action by the state
2 agency, county, or city is clearly erroneous in view of the entire record before the
3 board and in light of the goals and requirements of this chapter.

4 RCW 36.70A.320(3)

5 In order to find the County's action clearly erroneous, the Board must be "left with the firm
6 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,
7 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

8
9 Within the framework of state goals and requirements, the boards must grant deference to
10 local government in how they plan for growth:

11 In recognition of the broad range of discretion that may be exercised by counties and
12 cities in how they plan for growth, consistent with the requirements and goals of this
13 chapter, the legislature intends for the boards to grant deference to the counties and
14 cities in how they plan for growth, consistent with the requirements and goals of this
15 chapter. Local comprehensive plans and development regulations require counties
16 and cities to balance priorities and options for action in full consideration of local
17 circumstances. The legislature finds that while this chapter requires local planning to
18 take place within a framework of state goals and requirements, the ultimate burden
19 and responsibility for planning, harmonizing the planning goals of this chapter, and
20 implementing a county's or city's future rests with that community.

21 RCW 36.70A.3201 (in part).

22 In sum, the burden is on Petitioners to overcome the presumption of validity and
23 demonstrate that any action taken by the County is clearly erroneous in light of the goals
24 and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).
25 Where not clearly erroneous and thus within the framework of state goals and requirements,
26 the planning choices of local government must be granted deference.

27 V. DISCUSSION

28 Best Available Science

29 As each of the four issues in this appeal include an allegation that the County failed to rely
30 on Best Available Science, we begin our analysis with a consideration of whether the
31 changes to the County's FDPO were based on BAS.

32 RCW 36.70A.172 provides that:

1 (1) In designating and protecting critical areas under this chapter, counties and cities
2 shall include the best available science in developing policies and development
3 regulations to protect the functions and values of critical areas. * * *

4 Critical areas include frequently flooded areas.⁹

5
6 The County agrees that the science upon which it relied in amending its FDPO ordinance
7 was the CMZ Study.¹⁰ The Channel Migration and Avulsion Potential Analysis (“CMZ
8 Study”) was prepared pursuant to the scope of work issued prior to the County’s
9 development of new flood plain regulations by GeoEngineers, Inc . Therefore, we will first
10 consider whether the CMZ Study constitutes “the best available science.”
11

12 Criteria for determining which information is BAS are described in the Procedural Criteria for
13 Adopting Comprehensive Plans and Development Regulations, Chapter 365-195 WAC. In
14 WAC 365-195-905(5), there are listed six elements that a local jurisdiction should consider
15 to determine whether the scientific information that has been produced was obtained
16 through a valid scientific process such that it is the best available science.¹¹ The
17 “characteristics of a valid scientific process” are: peer review, methods, logical conclusions
18 and reasonable inferences, quantitative analysis, context, and references. Of these, the
19 parties challenge the adequacy of the references to “credible literature and other pertinent
20 existing information” (WAC 365-195-905(5)(a)(6); and the absence of appropriate peer
21 review WAC 365-195-905(5)(a)(1)).
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24 References

25 WAC 365-195-905(5)(a)(6) provides that one of the characteristics of a valid scientific
26 process is its references: “The assumptions, analytical techniques, and conclusions are
27 well referenced with citations to relevant, credible literature and other pertinent existing
28 information.” (emphasis supplied)
29
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31 ⁹ RCW 36.70A.030(5)(d).

32 ¹⁰ While the County does not agree that it amended its critical areas protections with its amendments to the
FDPO, it does agree that it relied upon the CMZ study in making amendments to the FDPO.

¹¹ WAC 365-195-905(5)

1 In this case, the Petitioner and Tribe challenge the failure of the CMZ Study to reference, or
2 adequately consider, either the Skillings-Connolly reports or the ongoing efforts to increase
3 the flow of water below the Cushman dam.

4
5 The Skillings-Connolly reports were accepted as BAS in previous hearings before the
6 Board. As was noted in an earlier Compliance Order, "There is no dispute that the Skillings-
7 Connolly report constitutes BAS for the Skokomish River Valley".¹² In fact, review of the
8 three Skillings-Connolly reports, which analyzed the risk of erosion and river avulsions in
9 the Skokomish River Valley, was a required element of the Scope of Work issued prior to
10 the County's development of new flood plain regulations.¹³ Nevertheless, the Channel
11 Migration and Avulsion Potential Analysis ("CMZ Study") prepared pursuant to that Scope of
12 Work by GeoEngineers, Inc, does not reference the Skillings-Connolly reports.¹⁴ This is a
13 serious deficiency, and one that standing alone would preclude the CMZ Study from being
14 accepted as BAS. Clearly, the Skillings-Connolly reports are "other pertinent existing
15 information" within the meaning of WAC 365-195-905(5)(a)(6) which the CMZ Study ought
16 to have referenced.
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19 It may well be that the Skillings-Connolly reports and the CMZ Study are entirely consistent.
20 However, at the Hearing on the Merits, the County admitted that it did not know if there were
21 conflicts between the two. The County pointed out that field conditions had likely changed
22 between the time of the drafting of the Skillings-Connolly reports and the CMZ Study. While
23 that may be true, it is for the County to determine to what extent the prior studies may be
24 relevant, and to disclose the basis for either relying upon or departing from studies that have
25 been accepted as BAS. Until that is done, the CMZ Study cannot be accepted as BAS. To
26 the extent that the amendments to Ordinance 81-07 rely upon a study that cannot yet be
27 accepted as BAS, they fail to comply with RCW 36.70A.172(1).
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32 ¹² Diehl v. Mason County, WWGMHB No. 95-2-0073, 7th Compliance Order, 5/4/99.

¹³ Index No. 65, at 2.

¹⁴ See, Index No. 17.

1 In addition, the CMZ Study fails to reference “pertinent existing information” regarding future
2 flows of water from the Cushman dam and how those flows may be affected by the
3 relicensing of the Cushman Project. The Tribe points out that, as a result of the City of
4 Tacoma’s decision to not appeal the *City of Tacoma v. FERC* case, the license for the
5 Cushman dam is required to include the Department of Interior’s proposed section 4(e)
6 condition for minimum base flows.¹⁵ The license includes a requirement of a minimum in-
7 stream flow of 240 cubic feet per second (cfs)(or inflow, whichever is less).¹⁶ This flow is
8 anticipated to be implemented by March 2008.¹⁷ Such an in-stream flow level will increase
9 the flows in the Skokomish River by as much as 80%.¹⁸ Any increase in the base flows of
10 the Skokomish River could subject additional areas of the Skokomish River Valley to
11 flooding. A change in the base flows would undermine the assumptions upon which the
12 CMZ Study were based. ¹⁹

15 While the County asserts it cannot be expected to actively monitor litigation to which they
16 are not a party, the impact of the litigation could be significant and, in fact, the County was
17 placed on notice of the impact of this litigation. In its August 21, 2006 letter to the Mason
18 County Planning Advisory Commission, the Tribe pointed out that its consultant had
19 assumed for its stream model that the future stream flow from the North Fork Skokomish
20 River will remain the same as it is currently.²⁰ The Tribe advised that the future flows are
21 tied to the Cushman hydro-electric project whose license “is currently under appeal. . . .
22 The flows proposed by the Skokomish Tribe and currently under appeal would eventually
23 restore as much as 80% of the annual flow over the term of the new license.”²¹ Yet, the
24 County’s consultant and author of the CMZ Study stated that she “did not consider, in the
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28 ¹⁵ Skokomish Indian Tribe’s Reply Brief, at 3.

29 ¹⁶ Skokomish Indian Tribe’s Prehearing Brief at 6.

30 ¹⁷ Id.

31 ¹⁸ Index No. 29

32 ¹⁹ The Tribe asserts that minimum flows will be approximately four times greater than they are now. However, this is not supported by any citation to the record and at oral argument the Tribe’s attorney acknowledged that this information is not in the record. However, our determination does not turn on this allegation of a fourfold increase in stream flow.

²⁰ Index No. 29.

²¹ Id.

1 results of their study, the option of turning the north fork flows back on again. We
2 understood that for the time being, and well into the future, that is not a likely probability.”²²

3
4 The County also argues that there was no certainty about the outcome of the Cushman re-
5 licensing ²³ and that the process is still in mediation. However, this misses the mark. That
6 the flow of water below the Cushman dam will increase appears to be a certainty. The Tribe
7 has noted that the licensing decision of *City of Tacoma v. FERC*, which will increase flows to
8 240 cfs has not been appealed.²⁴ It does not appear that the mediation between the Tribe
9 and the City of Tacoma will change the fact of the increased flow. The failure of the CMZ
10 Study to consider the increased flow of the Skokomish River, as “other pertinent existing
11 information” is a significant flaw, because no consideration was given to the effect of the
12 increase flows on the critical areas.
13

14 15 Peer Review

16 The Tribe also argues that the CMZ Study is not BAS. The tribe notes that the CMZ Study
17 was not subject to peer review, that it does not make reasonable inferences, that the
18 information it contains has not been placed in the proper context (including the impact of the
19 Cushman Hydroelectric Project and the Tribe and County “General Investigation Study”),
20 and that it does not refer to the earlier Skillings-Connolly reports which were previously
21 accepted by this Board as BAS. Each of these elements is necessary for the CMZ Study to
22 be accepted as BAS, the Tribe asserts.²⁵
23

24
25 With regard to the issue of BAS, the County notes that the Scope of Work for the CMZ
26 Study calls for review of the prior studies, including the Skillings-Conolly reports.²⁶ The
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31 ²² Index No. 37, at 10.

32 ²³ Mason County’s Pre-Hearing Response Brief, at 8.

²⁴ Skokomish Indian Tribe’s Reply Brief at 3.

²⁵ Skokomish Indian Tribe’s Pre-Hearing Brief at 4.

²⁶ Mason County’s Pre-Hearing Response Brief at 11.

1 County argues that peer review is not an expected attribute of a site-specific assessment,
2 and not mandated by BAS.²⁷

3
4 In reply, the Tribe reasserts its contention that peer review is an expected attribute of even a
5 site-specific assessment, required by WAC 365-195-905.²⁸ The Tribe notes that, while the
6 Skillings-Connolly reports are mentioned in the CMZ Study and other documents, there is
7 no qualitative analysis of those reports, or of prior studies, and no discussion of how the
8 new information developed by the County supports or contradicts the earlier work.²⁹

9
10 With regard to the Cushman Hydroelectric Project, the Tribe argues that, due to the City of
11 Tacoma's decision to not appeal the August 22, 2006 decision of the D.C. Circuit Court of
12 Appeals in *City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006), minimum flows below the
13 dam will increase to 240 cfs (or inflow, whichever is less).³⁰

14
15
16 The parties are in dispute over whether peer review is a mandatory element of BAS. WAC
17 365-195-905 (5) provides:

18 (5) Scientific information can be produced only through a valid scientific process. To ensure
19 that the best available science is being included, a county or city should consider the
20 following:

21 * * *

22 1. *Peer review.* The information has been critically reviewed by other persons who are
23 qualified scientific experts in that scientific discipline. The criticism of the peer reviewers has
24 been addressed by the proponents of the information. Publication in a refereed scientific
25 journal usually indicates that the information has been appropriately peer-reviewed.

26 The County asserts that this language does not mandate peer review. In response, the
27 Tribe argues that, in the absence of adequate peer review, the CMZ Study should not be
28 accepted as BAS. The County counters that there has been no showing that peer review

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32 ²⁷ Id.

²⁸ Skokomish Indian Tribe's Reply Brief, at 1-2.

²⁹ Id. at 2-3.

³⁰ Id. at 3.

1 was applied to the previous reports used to establish the avulsion based restrictions.³¹ This
2 is not a sufficient objection, as those reports were apparently accepted by the parties as
3 BAS, and are not the subject of this appeal in any event.
4

5 In *Concerned Friends of Ferry County v. Ferry County*, 155 Wn2d 824 (2005), the Supreme
6 Court noted that the County's BAS did not rise to the level of scientific information because
7 the expert (1) did not conduct on-site observations or (2) confer with other experts in the
8 area (i.e. peers). The Court went on to say: "Although BAS does not require the use of a
9 particular methodology, at a minimum BAS requires the use of a scientific methodology."
10 Thus, the CTED guidelines provide guidance for the scientific methodology of the evidence.
11 We need not decide whether peer review is mandated in *every* case. The failure of the
12 CMZ Study to consider the Skillings Connolly reports or the relevant information regarding
13 future flows from the Cushman dam demonstrates that peer review is necessary in *this*
14 case.
15
16

17 **Conclusion:** The CMZ Study upon which the County based amendments to its Flood
18 Damage and Protection Ordinance is not BAS because it does not meet two of the
19 characteristics of a valid scientific process: (1) it failed to properly reference pertinent
20 existing information (WAC 365-195-905(5)(a)(6)); and (2) it was not properly subjected to
21 peer review WAC 365-195-905(5)(a)(1). Until the CMZ Study has been subjected to peer
22 review, and shows due consideration of the Skillings-Connolly reports as well as the effect
23 of altered flows from the Cushman dam, it cannot be accepted as BAS.
24
25

26 Having concluded that the CMZ Study is not BAS, we must also consider whether the
27 challenged amendments needed to be based on BAS. We now turn to the four issues
28 raised in this appeal.
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³¹ Mason County's Pre-hearing Response Brief at 6.

1 **Issue #1: Does the elimination of the dike monitoring program from §5.4-2 of the**
2 **FDPO fail to protect Frequently Flooded Areas pursuant to RCW 36.70A.060 through**
3 **inclusion of best available science (“BAS”) as required by RCW 36.70A.172, and**
4 **substantially interfere with GMA goals 2 and 8-10?**

5 **Positions of the Parties**

6 ARD maintains that nothing in the record warrants removing the existing regulations calling
7 for dike monitoring.³² Instead, ARD argues, BAS points to the need for dike monitoring as a
8 basis for a comprehensive flood management program to mitigate the effects of flooding.³³

9 Monitoring would allow the County to discern whether dikes need to be reconstructed to
10 withstand floods, or to be removed or lowered, ARD claims. Furthermore, monitoring and
11 evaluating existing dikes would permit the County to direct financial resources in an
12 intelligent way, whether it be to repair or relocate dikes for flood control, breach select dikes
13 for off-channel storage, or to install bank protection in key areas to prevent channel
14 avulsion.
15

16
17 The Tribe argues that there was no justification for the removal of the dike monitoring
18 program provisions from the FDPO and no evidence that BAS was used in making the
19 decision to delete the program.³⁴
20

21 The Tribe points out that the requirement to add a dike monitoring program was imposed by
22 this Board in *Diehl v. Mason County*, WWGMHB No. 95-02-0073, following the 7th
23 Compliance Hearing³⁵ and it was the adoption of that program by Ordinance No. 09-03 that
24 brought the County into compliance.³⁶ The Tribe further argues that the “CMZ Study”, which
25 the County relied upon in making other changes in the FDPO, does not recommend
26 eliminating the dike monitoring program, but instead provides reasons to continue it.³⁷
27
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30 _____
31 ³² Petitioners’ Prehearing Brief at 4.

32 ³³ Id.

³⁴ Skokomish Indian Tribe’s Pre-Hearing Brief at 8.

³⁵ Id. at 9.

³⁶ Id. at 10.

³⁷ Id. at 12.

1 The County responds there is no support for the contention that the GMA requires a dike
2 monitoring program for privately owned dikes.³⁸ The County notes that many of the dikes
3 were found to be ineffective and not designed to an adequate standard.³⁹ Furthermore, the
4 CMZ Study was based on the presumption that the dikes would not be maintained nor
5 shorelines armored to prevent migration or avulsion. Why then, the County asks, should the
6 County be required to monitor the dikes? The County points out a further problem – with
7 one exception, the dikes are on private property over which the County has little control and
8 no right to access.⁴⁰ On areas subject to County permitting, dike monitoring requirements
9 have been maintained.⁴¹

12 **Board Discussion**

13 There is some dispute over whether the removal of the dike monitoring program was
14 required to be based on BAS. The Tribe urges that if the original FDPO without a dike
15 monitoring program was not compliant with the GMA, Ordinance 81-07 without a dike
16 monitoring program would also be non-compliant.⁴² The County, on the other hand,
17 maintains that responsibility for the dikes is a legal question, not a question of BAS.⁴³

19 While the County may have valid policy reasons to seek abandonment of the dike
20 monitoring program, it is apparent from the compliance history in this case that its dike
21 monitoring program was adopted as part of its critical areas protections. Thus, it must
22 comply with the provision of the GMA that dictates that “In designating and protecting critical
23 areas under this chapter, counties and cities shall include the best available science in
24 developing policies and development regulations to protect the functions and values of
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30 ³⁸ Mason County’s Pre-Hearing Response Brief at 9.

31 ³⁹ Id.

32 ⁴⁰ Id. at 10.

⁴¹ Id. at 11.

⁴² Skokomish Indian Tribe’s Pre-Hearing Brief at 12.

⁴³ Mason County’s Pre-Hearing Brief, at 10.

1 critical areas."⁴⁴ The County cannot make such a change to its critical areas' protections
2 unless BAS is included in the record.

3
4 The procedural criteria for BAS contained in the Washington Administrative Code supports
5 this approach. In particular, WAC 365-195-915 (1)(c) provides:

6 WAC 365-195-915. Criteria for including the best available science in developing policies and
7 development regulations

8 (1) To demonstrate that the best available science has been included in the
9 development of critical areas policies and regulations, counties and cities should address
10 each of the following on the record:

11 * * *

12 (c) Any nonscientific information--including legal, social, cultural, economic, and political
13 information--used as a basis for critical area policies and regulations that depart from
14 recommendations derived from the best available science. A county or city departing from
15 science-based recommendations should:

16 (i) Identify the information in the record that supports its decision to depart from science-
17 based recommendations;

18 (ii) Explain its rationale for departing from science-based recommendations; and

19 (iii) Identify potential risks to the functions and values of the critical area or areas at issue and
20 any additional measures chosen to limit such risks. State Environmental Policy Act (SEPA)
21 review often provides an opportunity to establish and publish the record of this assessment.

22 Here, the record does not demonstrate that any BAS was included in the record when the
23 County made its decision to abandon the dike monitoring program. While the County may
24 eventually conclude that practical and legal considerations support this choice, it must
25 include BAS in arriving at that conclusion.

26
27 In WWGMHB Case No. 96-2-0017, *CCNRC v. Clark County*, this Board said:

28 We conclude, as we have in all our cases, that local discretion is available for choices
29 within the parameters of the Act as set forth by the Legislature. ...Rather, in keeping
30 with one of the basic tenants of the Act, regional and local diversity, we will decide
31 each case individually, based upon the record. We will base our decision upon the
32 following factors:(1) The scientific evidence contained in the record; (2) Whether the

1 analysis by the local decision-maker of the scientific evidence and other factors
2 involved a reasoned process; and (3) Whether the decision made by the local
3 government was within the parameters of the Act as directed by the provisions of
4 RCW 36.70A.172(1).

5 In this case, the County must consider BAS to address whether the dikes have an impact
6 on the river flows and flooding. If BAS supports the determination that the dikes have
7 minimal impact, monitoring them may serve no useful purpose, and then the dike monitoring
8 program could be abandoned. Or, if the County chooses to depart from BAS, the record
9 must show an analysis by the County's decision-makers of the scientific analysis and other
10 factors, including the identification of potential risks of the chosen approach and measures
11 to minimize these risks. (WAC 365-195-915 (1)(c)(iii)).
12

13 **Conclusion:** Here, the record does not include BAS, a reasoned analysis of BAS by the
14 decision makers, or an identification of the risks of departing from BAS and measures to
15 minimize these risks. Therefore, the County's decision to abandon its dike monitoring
16 program does not comply with RCW 36.70A.172.
17

18
19 **Issue #2: Does the provision in §5.2-7 of the FDPO for repairs, reconstruction,**
20 **replacement, or improvements to existing houses in areas of special flood hazard,**
21 **regardless of whether the cost exceeds 50 percent of the market value of the**
22 **structure, fail to comply with RCW 36.70A.60 through inclusion of BAS as required by**
23 **RCW 36.70A.172, and substantially interfere with GMA goals 2 and 8-10?**

24 **Positions of the Parties**

25 ARD asserts that BAS does not support allowing construction or reconstruction of
26 residences in the floodway due to the risk of future avulsions of the Skokomish River.⁴⁵
27 ARD notes that flood mapping based on the river's 50 year migration distance, or 25 year
28 severe migration potential areas is insufficient, as the planned life of new or reconstructed
29 residences exceeds 25 or 50 years. ARD argues that the Avulsion Potential Zone (APZ)
30
31
32

⁴⁵ Petitioners; Prehearing Brief at 6.
FINAL DECISION AND ORDER
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1 identifies only the “most likely avulsion routes” and thereby implies that it is safe to build
2 outside the APZ.⁴⁶

3
4 ARD further argues that BAS does not support the concept that it is protective of the
5 functions and values of Frequently Flooded Areas (FFAs) to allow new
6 construction/reconstruction in the floodplain, although outside the APZ. ARD also claims
7 that the delineation of the APZ fails to take into account the impact of flooding on areas that,
8 while not inundated, may become isolated by floodwaters.⁴⁷

9
10 In response, the County points out that §5.2-7 of the FDPO was deleted from the
11 regulations prior to adoption.⁴⁸

12
13 In its reply, Petitioners note that the copy of the ordinance included in the Index does not
14 bear the signature of the County Commissioners. Petitioners assert that, until proof is
15 presented that §5.2-7 of the FDPO has been properly removed, the issue is not moot.⁴⁹

16
17 **Board Discussion**

18
19 It is apparent from the record that the language of proposed §5.2-7 was never in fact
20 adopted.⁵⁰ Petitioners have objected to language that, while part of an earlier draft, was
21 removed prior to final adoption. Therefore, the issue of whether that language was based
22 on BAS is moot.

23
24 Petitioners’ assertion that the burden is on the County to prove that this section has been
25 removed is incorrect. A copy of that ordinance was attached to the County’s Prehearing
26 Response Brief filed on November 26, 2007. Petitioners had ample opportunity between
27 then and the time of the December 19, 2007 hearing on the merits to present evidence that
28 the ordinance offered by the County was not in fact the ordinance adopted on July 17, 2007.

29
30
31 _____
⁴⁶ Id, at 6.

32 ⁴⁷ Id. at 8.

⁴⁸ Mason County’s Pre-Hearing Response Brief at 11, referencing Index # 2 and Index #10.

⁴⁹ Petitioners’ Reply Brief at 3.

⁵⁰ See, Index #2.

1 It has offered no such evidence. Therefore, the ordinance submitted by the County,
2 although not signed, is presumed to contain the language adopted by the County.

3
4 **Conclusion:** The language of proposed §5.2-7 was never adopted in Ordinance 81-07.
5 Therefore there is no basis for finding that this section fails to comply with the Growth
6 Management Act.

7
8 **Issue #3: Do the provisions in §5.5-3 and §5.5-4 of the FDPO for construction of new**
9 **homes in areas of special flood hazard fail to comply with RCW 36.70A.060 through**
10 **inclusion of BAS as required by RCW 36.70A.172, and substantially interfere with**
11 **GMA goals 2 and 8-10?**

12 **Positions of the Parties**

13 ARD advances the same argument in support of Issue 3, with regard to new construction in
14 areas of special flood hazard, as advanced for repairs and reconstruction in Issue 2. ARD
15 asserts that the County has provided no reasons to support new residential construction in
16 the Skokomish River Valley floodplain.⁵¹

17
18 The County responds that BAS contained in the CMZ Study identified certain areas not
19 subject to the risks of channel movement.⁵² It notes that §5.5-4 of the FDPO, pertaining to
20 the detailed study area, applies additional restrictions not required elsewhere.⁵³

21
22 **Board Discussion**

23
24 The County states that the CMZ Study provides the BAS on which the provisions of §§ 5.5-3
25 and 5.5-4 of the FDPO allowed limited development.⁵⁴ It claims that the amendments would
26 allow fewer than 100 new residents (assuming 37 residences and 2.5 persons per
27 household).⁵⁵

28
29
30
31 ⁵¹ Petitioners' Prehearing Brief at 8-9.

32 ⁵² Mason County's Pre-Hearing Brief at 2.

⁵³ Id. at 3.

⁵⁴ Id.

⁵⁵ Id.

1 We have earlier concluded that the CMZ Study was not BAS. RCW 37.70A.172 (1)
2 mandates that “In designating and protecting critical areas under this chapter, counties and
3 cities shall include the best available science in developing policies and development
4 regulations to protect the functions and values of critical areas”. As a result, the provisions in
5 §5.5-3 and §5.5-4 of the FDPO which rely on the CMZ Study were not based on BAS.
6

7 **Conclusion:** The issue of allowing new residential construction in frequently flooded areas
8 is a question of protection of critical areas. Pursuant to WAC 365-195-825(2)(b),
9 “protection” of critical areas also means “to safeguard the public from hazards to health and
10 safety.” Whether to allow new residential construction in a frequently flooded area is a
11 matter of hazards to public health and safety. Therefore, the adoption of regulations
12 allowing such residential construction must include BAS. Because these rest only upon the
13 CMZ Study, which is not BAS, they are non-compliant.
14
15

16 **Issue #4: Does the deletion of the designated floodway for the Skokomish River**
17 **Valley in §5.4-1 of the FDPO and deletion of the provision disallowing reasonable use**
18 **exceptions in the Skokomish River Valley in §4.4-3 of the FDPO fail to comply with**
19 **RCW 36.70A.060 through inclusion of BAS as required by RCW 36.70A.172, and**
20 **substantially interfere with GMA goals 2 and 8-10?**

21 **Positions of the Parties**

22 ARD notes that the Board has previously required the County to designate a floodway for
23 the Skokomish River Valley and that the failure to do so was a basis for a finding of
24 noncompliance and invalidity.⁵⁶ ARD asserts that it has now been removed without any
25 scientific basis.
26

27 ARD also argues that the provisions disallowing reasonable use exceptions within
28 designated floodways was removed without a scientific basis, and that to do so puts people
29 and property in the path of floods and/or channel avulsions.⁵⁷
30
31

32 _____
⁵⁶ Petitioners’ Prehearing Brief at 9.

⁵⁷ Id.

1 With regard to the floodway, the County argues that the prior ordinance was internally
2 inconsistent in designating the entire Skokomish River Valley floodplain as a floodway, and
3 did not meet federal or state definitions of a floodway. Instead, the adopted No New
4 Footprint areas provide an alternative way to provide for a floodway with equivalent
5 restrictions, the County maintains.⁵⁸
6

7 The County also argues that the provision for the reasonable use provision does not
8 necessarily mean that this provision will allow for construction of new buildings and
9 specifically does not allow residential development in designated floodways or the No New
10 Footprint zone.⁵⁹
11

12 **Board Discussion**

13 *Floodway*

14
15 The No New Footprint Zone was an effort by the County to provide an alternative way to
16 provide for a floodway and have equivalent restrictions.⁶⁰ However, the removal of the
17 floodway designation in §5.4-1 of the FDPO and its replacement with the No New Footprint
18 provisions of §5.5-2 of the FDPO were predicated upon the CMZ Study. Because we find
19 that the CMZ Study was not BAS, these provisions are not compliant with RCW 37.70A.172
20 (1) which mandates that “In designating and protecting critical areas under this chapter,
21 counties and cities shall include the best available science in developing policies and
22 development regulations to protect the functions and values of critical areas”.
23
24

25 *Reasonable Use*

26 While §4.4-3 of the FDPO allows for some level of development in areas subject to flooding,
27 it is incorrect to assume, as ARD maintains, that this section allows “new construction or
28 major reconstruction that puts people and property in the path of floods and/or channel
29
30
31

32 ⁵⁸ Mason County's Pre-Hearing Brief at 4-5.

⁵⁹ Id. at 3-4.

⁶⁰ Mason County's Prehearing Response Brief at 5.

1 avulsions.”⁶¹ We agree with the County that §4.4-3 of the FDPO clearly does not allow
2 residential development in designated floodways or in the No New Footprint Zone. It
3 provides “The reasonable use exception is not intended to allow residential development in
4 designated floodways or in No New Footprint Zones.” Furthermore, the uses allowed under
5 this section are subject to review by the County Hearings Examiner, who applies standards
6 including that “The proposed development does not pose a threat to the public health,
7 safety or welfare on or off the site”.⁶²
8

9
10 Nevertheless, we have earlier concluded that the CMZ Study was not BAS. As a result, the
11 provisions in §5.4-1 and §4.4-3 of the FDPO which rely on the CMZ Study were not based
12 on BAS and are for that reason non-compliant.

13
14 **Conclusion:** The Board does not find that the County could not adopt a reasonable use
15 exemption which would adequately provide for the protection of public health, safety and
16 welfare. However, in doing so, the County must include BAS in its decision-making. Since
17 the CMZ Study was not BAS, and the amendments to the FDPO found in §5.4-1 and §4.4-3
18 rely only on the CMZ Study, they are non-compliant.
19

20 As we have tried to make clear in this decision, the studies that the County relied upon in
21 revising the FDPO may reach entirely different conclusions than earlier studies and, as a
22 result, the County may choose to adopt a different approach to protecting FFAs in the
23 Skokomish River Valley. Our finding of noncompliance in this case is not a determination
24 that the County’s actions need to be controlled by past studies or Board decisions based on
25 those studies, but instead that its actions must be informed by BAS.
26
27
28
29
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32

⁶¹ Petitioners’ Prehearing Brief at 9.

⁶² §4.4-3(1)(ii).

1 **Request for Imposition of Invalidity**

2 **Positions of the Parties**

3 ARD argues that because the County’s revisions to the FDPO increase, not reduce, the
4 prospect of flood damage, and because they fail to include BAS they should be found not
5 only noncompliant but invalid. ARD asserts that, without a determination of invalidity, new
6 development may vest, substantially interfering with the ability of the County to bring itself
7 into compliance.⁶³
8

9
10 The Tribe also requests a determination of invalidity. It claims that the challenged sections
11 of Ordinance 81-07 are invalid because they substantially interfere with the fulfillment of
12 GMA goals 2, 8, 9, and 10, although no further elaboration than that was offered.⁶⁴

13 The County did not address the issue of invalidity in its briefing and presumably rests upon
14 its assertion that the FDPO is compliant with the GMA.⁶⁵
15

16 **Board Discussion**

17 A finding of invalidity may be entered when a board makes a finding of noncompliance and
18 further includes a “determination, supported by findings of fact and conclusions of law that
19 the continued validity of part or parts of the plan or regulation would substantially interfere
20 with the fulfillment of the goals of this chapter.” RCW 36.70A.302(1) (in pertinent part).
21

22 We have held that invalidity should be imposed if continued validity of the noncompliant
23 comprehensive plan provisions or development regulations would substantially interfere with
24 the local jurisdiction’s ability to engage in GMA-compliant planning. See *Butler v. Lewis*
25 *County*, WWGMHB Case No. 99-2-0027c (Order Finding Noncompliance and Imposing
26 Invalidity, February 13, 2004). Under this analysis, a finding of invalidity has been imposed
27 where there is a serious risk of significant inconsistent development vesting before the date
28 on which the local jurisdiction is expected to achieve compliance.
29
30

31 _____
32 ⁶³ Petitioners’ Prehearing Brief at 10.

⁶⁴ Skokomish Indian Tribe’s Pre-Hearing Brief at 13.

⁶⁵ Mason County’s Pre-Hearing Response Brief.

1 The extent of the risk is dependent upon the facts of each case. In this case, we find that
2 the risk that new residences may be permitted in an area subject to frequent or severe
3 flooding exists so long as the provisions of §§ 5.5-3 and 5.5-4 of the FDPO remain in effect.
4 The hazard to public health and safety when residences are flooded by the Skokomish
5 River is substantial, both for the residences themselves and for others attempting to provide
6 them assistance. Therefore, we find that the allowance of construction in areas earlier
7 determined to be at risk of a major avulsion, and the failure to base the revisions to the
8 FDPO ordinance on BAS, substantially interferes with the fulfillment of GMA goals 2 (sprawl
9 reduction), 8 (natural resources industries) and 10 (environment). The risk that new
10 development will vest during the period this matter is remanded for compliance justifies the
11 imposition of invalidity.
12

13
14 We do not find that the amendments to §5.4-2 (dike monitoring), §5.4-1 (designated
15 floodway) or §4.4-3 (reasonable use exception) of the FDPO, while non-compliant, merit the
16 imposition or invalidity.
17

18 While the County's decision to rescind the dike monitoring provisions of the FDPO were not
19 supported by BAS, Petitioners and Intervenor have not demonstrated that removal of that
20 program from the FDPO during the period of the compliance remand would substantially
21 interfere with the fulfillment of the goals of the GMA. As noted in the reconnaissance done
22 by GeoEngineers, several of the dikes have been degraded or destroyed since the 2001
23 survey.⁶⁶ The County notes that its regulations are premised on the fact that the dikes are
24 not effective and can be expected to fail.⁶⁷ ARD offers no reasons to impose invalidity in
25 this case except for the risk of the vesting of new development under Ordinance 81-07 yet,
26 unlike the case with of §§ 5.5-3 and 5.5-4 of the FDPO, there is no relationship between
27 dike monitoring and the ability of new development to vest.
28
29
30
31
32

⁶⁶ Index No. 68 at 4.

⁶⁷ Mason County's Pre-Hearing Brief at 9.

1 With regard to §5.4-1 (designated floodway) or §4.4-3 (reasonable use exception) of the
2 FDPO, as well, Petitioners have not demonstrated that these amendments, left in place
3 during the compliance period, would substantially interfere with the fulfillment of the goals of
4 the GMA. As we noted above, the No New Footprint Zone was an effort by the County to
5 provide an alternative way to provide for a floodway and have equivalent restrictions. In
6 addition, we did not find that the County could not adopt a reasonable use exemption which
7 would adequately provide for the protection of public health, safety and welfare. Instead,
8 we found that in adopting these provisions, the County did not rely on BAS. This is far short
9 of finding that these provisions substantially interfere with the goals of the GMA or that there
10 is a serious risk of significant inconsistent development vesting under these sections before
11 the date on which the local jurisdiction is expected to achieve compliance.
12
13

14 **Conclusion:** The Board finds that the risk of new development vesting under §5.5-3 and
15 §5.5-4 of the FDPO before the County achieves compliance substantially interferes with the
16 fulfillment of GMA goals 2 (sprawl reduction), 8 (natural resources industries) and 10
17 (environment) and warrants the imposition of invalidity.
18

19 VI. FINDINGS OF FACT

- 20 1. Mason County is a county located west of the crest of the Cascade Mountains that is
21 required to plan pursuant to RCW 36.70A.040.
- 22 2. On July 17, 2007 the County adopted Ordinance 81-07, amending the FDPO.
- 23 3. Petitioners participated in written comments to the County Board of Commissioners
24 during consideration of Ordinances 81-07.
- 25 4. On July 20, 2007 Petitioners filed a timely appeal.
- 26 5. On August 31, 2007 the Board granted the Skokomish Indian Tribe's Motion to
27 Intervene.
- 28 6. The Skillings-Connolly reports which analyzed the risk of erosion and river avulsions in
29 the Skokomish River Valley were accepted as BAS in previous hearings before the Board.
- 30 7. The science upon which the County relied in amending its FDPO ordinance was the CMZ
31 Study.
32

1 8. The “characteristics of a valid scientific process” as set forth in WAC 365-195-505 are:
2 peer review, methods, logical conclusions and reasonable inferences, quantitative analysis,
3 context, and references.

4 9. In this case, the Petitioner and Tribe challenged the failure of the CMZ Study to
5 reference, or adequately consider, either the Skillings-Connolly reports or the ongoing
6 efforts to increase the flow of water below the Cushman dam and the failure to subject the
7 CMZ Study to peer review.
8

9 10. While the Skillings-Connolly reports appear to have been reviewed by the County’s
10 consultants, there is no qualitative analysis of those reports, or of prior studies, and no
11 discussion of how the new information developed by the County supports or contradicts the
12 earlier work.

13 11. The Skillings-Connolly reports are “other pertinent existing information” within the
14 meaning of WAC 365-195-905(5)(a)(6).
15

16 12. The CMZ Study fails to reference “pertinent existing information” regarding future flows
17 of water from the Cushman dam and how those flows may be affected by the relicensing of
18 the Cushman Project.

19 13. As a result of the City of Tacoma’s decision to not appeal the *City of Tacoma v. FERC*
20 case, the license for the Cushman dam on the Skokomish River is required to include the
21 Department of Interior’s proposed section 4(e) condition for minimum base flows.
22

23 14. The license for the Cushman dam includes a requirement of a minimum in-stream flow
24 of 240 cubic feet per second (cfs) (or inflow, whichever is less). This flow is anticipated to
25 be implemented by March 2008. Such an in-stream flow level will increase the flows in the
26 Skokomish River by as much as 80%.

27 15. Any increase in the base flows of the Skokomish River could subject additional areas of
28 the Skokomish River Valley to flooding. A change in the base flows would undermine the
29 assumptions upon which the CMZ Study were based.
30

31 16. The author of the CMZ Study did not consider, in the results of that study, the option of
32 turning the north fork flows back on again.

17. The CMZ Study was not subjected to peer review.

1 18. The record does not demonstrate that BAS was included in the record when the County
2 made its decision to abandon the dike monitoring program.

3 19. The dike monitoring program was adopted as part of the County's protections of
4 frequently flooded areas and the deletion of the program requires the inclusion of BAS.

5 20. The language of proposed §5.2-7 of the FDPO was never in fact adopted. Petitioners
6 have objected to language that, while part of an earlier draft, was removed prior to final
7 adoption.
8

9 21. The provisions of §§ 5.5-3 and 5.5-4 of the FDPO permitting limited development would
10 allow fewer than 100 new residents (assuming 37 residences and 2.5 persons per
11 household).

12 22. The amendment to include provisions of §§ 5.5-3 and 5.5-4 in the FDPO relied on the
13 CMZ Study as BAS.

14 23. The No New Footprint Zone was an effort by the County to provide an alternative way to
15 provide for a floodway and have equivalent restrictions.
16

17 24. The removal of the floodway designation in §5.4-1 of the FDPO and its replacement with
18 the No New Footprint provisions of §5.5-2 of the FDPO were changes in protections of
19 critical areas that must include BAS but they were predicated upon the CMZ Study only.

20 25. While §4.4-3 of the FDPO allows for some level of development in areas subject to
21 flooding, it does not allow residential development in designated floodways or in the No
22 New Footprint Zone.
23

24 26. Any Findings of Fact later determined to be a Conclusion of Law is hereby adopted as
25 such.
26

27 **VII. FINDINGS RELATING TO INVALIDITY**

28 27. §5.5-3 and §5.5-4 of the FDPO allow for construction of new homes in areas of special
29 flood hazard.
30

31 28. These amendments would allow approximately 100 new residents (assuming 37
32 residences and 2.5 persons per household).

1 29. §5.4-1 and §4.4-3 of the FDPO were adopted in reliance on the CMZ Study which we
2 have concluded was not based on BAS.

3 30. The risk that new residences may be permitted in an area subject to frequent or severe
4 flooding exists so long as the provisions of §§ 5.5-3 and 5.5-4 of the FDPO remain in effect.

5 31. The hazard to public health and safety when residences are flooded by the Skokomish
6 River is substantial, both for the residences themselves and for others attempting to provide
7 them assistance.
8

9 10 **VIII. CONCLUSIONS OF LAW**

11 A. The Board has jurisdiction over the parties to this action.

12 B. The Board has jurisdiction over the subject matter of this action.

13 C. Petitioners have standing to raise the issues in this case.

14 D. The CMZ Study is not best available science within the meaning of RCW 36.70A.172.

15 E. The deletion of the dike monitoring program in §5.4-2 of the FDPO (Issue #1) did not
16 include BAS and therefore fails to comply with RCW 36.70A.172.

17 F. The issue of whether the language of proposed §5.2-7 of the FDPO (Issue #2) was
18 based on BAS is moot because it was not adopted as part of the amendments to the FDPO
19 in Ordinance 81-07.
20

21 G. The provisions in §5.5-3 and §5.5-4 of the FDPO for construction of new homes in areas
22 of special flood hazard (Issue # 3) did not include BAS. The issue of allowing new
23 residential construction in frequently flooded areas is a question of protection of critical
24 areas. The adoption of regulations allowing such residential construction must include BAS.
25 Because these sections rest only upon the CMZ Study, which is not BAS, they do not
26 comply with RCW 36.70A.172.
27

28 H. Because the CMZ Study was not BAS the provisions in §5.4-1 and §4.4-3 of the FDPO
29 (Issue #4) which rely on the CMZ are for that reason non-compliant.
30

31 I. Any Conclusion of Law later determined to be a Finding of Fact is hereby adopted as such
32

1 **IX. CONCLUSIONS OF LAW REGARDING INVALIDITY**

2 J. The provisions in §5.5-3 and §5.5-4 of the FDPO which rely on the CMZ Study were not
3 based on BAS and are non-compliant.

4 K. The allowance of construction in areas earlier determined to be at risk of a major
5 avulsion, and the failure to base §5.5-3 and §5.5-4 on BAS, substantially interferes with
6 GMA goals 2 (sprawl reduction), 8 (natural resources industries) and 10 (environment).
7

8 **X. ORDER**

9
10 Petitioners' dispositive motion, in which the Tribe had joined, is DENIED.

11
12 Based on the foregoing, the City is ordered to bring its Flood Damage and Protection
13 Ordinance into compliance with the Growth Management Act pursuant to this decision within
14 180 days. Compliance shall be due no later than July 10, 2008. The following schedule for
15 compliance, briefing and hearing shall apply:
16

Item	Date Due
Compliance Due	July 10, 2008
Compliance Report and Index to Compliance Record	July 17, 2008
Objections to a Finding of Compliance	July 31, 2008
Response to Objections	August 14, 2008
Compliance Hearing	August 28, 2008

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24 DATED this 16th day of January, 2008.

25
26
27
28 _____
James McNamara, Board Member

29
30
31 _____
Margery Hite, Board Member
32

Holly Gadbow, Board Member

Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and three copies of the petition for reconsideration, together with any argument in support thereof, should be filed by mailing, faxing or delivering the document directly to the Board, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person, by fax or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order.

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

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