

1 **SHORELINES HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 SNO-KING WATERSHED COUNCIL, &
4 WILLIAM LIDER, PE,

5 Petitioners,

6 v.

7 SNOHOMISH COUNTY, DEPARTMENT
8 OF PLANNING AND DEVELOPMENT &
9 PUBLIC WORKS DEPARTMENT, and
10 STATE OF WASHINGTON,
11 DEPARTMENT OF ECOLOGY

12 Respondents.

SHB No. 18-016

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

13 **I. INTRODUCTION**

14 On October 26, 2018, Petitioners Sno-King Watershed Council and William Lider (Sno-
15 King) filed a petition with the Shorelines Hearings Board (Board) for review of a Snohomish
16 County Shoreline Substantial Development Permit No. 17-119707 SHOR, Snohomish County
17 Shoreline Conditional Use Permit No. 17-119711 SHOR, & Snohomish County Shoreline
18 Variance Permit No.17-119710 SHOR (collectively, Permits).

19 The Board deciding this matter consisted of Neil L. Wise, Presiding, and Board Members
20 Jennifer Gregerson and Allen Estep.¹ William Lider appeared on his own behalf and for the
21 Sno-King Watershed Council. Deputy Prosecuting Attorney Brian J. Dorsey appeared on behalf
of Snohomish County (County). Pursuant to WAC 461-08-440, the Presiding Officer joined the

¹ As authorized by RCW 90.58.185, this case was assigned to a panel of three Board Members.

1 State of Washington, Department of Ecology (Ecology) as a party and Assistant Attorney
2 General Cheerful Catunao represented Ecology.

3 The Board entered an Amended Prehearing Order on November 29, 2018, and
4 established 11 legal issues for resolution. On December 28, 2018, the County filed a motion to
5 dismiss some of those issues for lack of subject matter jurisdiction. Sno-King filed a response
6 and the County replied. Ecology did not participate in this motion.

7 In its motion, the County requested that the Board dismiss the following issues for lack of
8 subject matter jurisdiction:

- 9 • Issues 1A-1C (compliance with engineering stamp requirements under WAC 196-23-
10 020);
- 11 • Issues 2A-2D (compliance with County Drainage Code);
- 12 • Issue 3 (runoff/drainage manual equivalencies);
- 13 • Issue 6 (compliance with County Drainage Code); and,
- 14 • Issue 8 (validity of stormwater modification).

15 The County also requested that the Board rule in favor of the County as a matter of law on Issue
16 4 (compliance with Snohomish County Code (SCC) 30.62B.330) and dismiss the issue. The
17 Board granted the County's motion on Issues 1A-1C, 2A-2D, 3, 6, and 8, and dismissed those
18 issues. The Board denied the County's motion with respect to Issue 4. Issue 9 (Board
19 jurisdiction) was dismissed as moot. Issues 4, 5, 7, 10, and 11 proceeded to hearing.

20 The Board held a three-day hearing in Everett, Washington. Mr. Lider testified on behalf
21 of Sno-King. Crilly Ritz and Larry Brewer testified for the County. Joe Burcar and Chad Yunge

1 testified for Ecology. At the hearing, the Board received into evidence 63 exhibits from Sno-
2 King, 36 exhibits from the County, and seven exhibits from Ecology.

3 Having fully considered the record, the Board enters the following:

4 **II. FINDINGS OF FACT**

5 1.

6 On August 21, 2018, the County approved the Permits authorizing a shoreline project for
7 the repair of Index-Galena Road, located in southeastern Snohomish County along the North
8 Fork Skykomish River. Ex. R-2, p.1 (Snohomish County shoreline permit decision). Index-
9 Galena Road is a public roadway that was built in 1911 and has been designated as a Major
10 Collector (Rural) roadway in Snohomish County's Comprehensive Plan. *Id.*, p. 7; Ex. R-5
11 (Route Feasibility Study), p. i. Portions of the road, including the proposed project area, are
12 located on United States Forest Service (USFS) land in a roadway right of way easement. Ex. R-
13 18 (Environmental Assessment), p. 1.

14 2.

15 The North Fork of the Skykomish River has been designated a Shoreline of Statewide
16 Significance and the project would be located in Rural Conservancy and Aquatic shoreline areas.
17 Ex. R-2, pp. 2, 17.

18 3.

19 In November 2006, a flood event on the North Fork Skykomish River washed out
20 multiple sections of Index-Galena Road between mileposts 6.4 and 6.9. A side channel of the
21 river now occupies sections of the roadway alignment. The County closed the road at milepost

1 6.4 and established a seasonal 40-mile detour route. *Id.*, pp. 5-6. This route is not designed to
2 safely accommodate the increased vehicle traffic. Exs. R-2, p. 6; R-18, p. 4. The road was the
3 primary access to private homesites and properties and public access to two USFS campgrounds
4 and hiking trails. USFS timber sale planning and administration has been impacted by the loss
5 of the road. Response times for emergency services have increased due to the length of the
6 detour. *Id.*, pp. 4-7; Ex. R-2, pp. 5-6. The project will re-establish road connectivity on Index-
7 Galena Road for residences, emergency services, recreationists, and land managed by USFS. *Id.*,
8 p. 3.

9 4.

10 The County coordinated with the Federal Highway Administration (FHA) and the
11 Washington Department of Transportation (WSDOT) to obtain federal Emergency Relief funds.
12 *Id.*, pp. 6, 9-10. These funds are from a special program used for the repair or reconstruction of
13 Federal-aid highways which have suffered damage as a result of natural disasters. Ex. R-18, p.
14 11.

15 5.

16 The County contracted for a Route Feasibility Study, which was completed in March of
17 2009. Ex. R-5; Ritz Testimony. Fourteen alternatives were developed and evaluated based on
18 environmental criteria, design standard considerations, right of way impacts and needs, and
19 project purpose. *Id.*, p. i. The choices were narrowed to four alternatives that were carried
20 forward into a Design Report phase. These alternatives were:

- 1 • Alternative 1A: No action;
- 2 • Alternative 2C: Reconstruct road within the existing alignment;
- 3 • Alternative 3B: Relocation of the roadway at the toe of the slope within the Channel
- 4 Migration Zone (CMZ),² and;
- 5 • Alternative 4B: Relocation of the roadway upslope outside of the CMZ.

6 The feasibility study recommended Alternative 4B as the preferred alternative because that
7 alternative met the project’s purpose and need (restore a route that maintains essential travel on
8 Index-Galena Road); had reduced environmental impacts as compared to the other alternatives;
9 and was expected to result in lower construction costs relative to the other alternatives. *Id.*, pp.
10 30-31.

11 6.

12 The goal of the Design Report was to recommend a proposed project alternative that
13 would be subject to National Environmental Policy Act (NEPA) review. The Design Report,
14 issued in 2011, considered five alternatives:

- 15 • IG-1: no action alternative;
- 16 • IG-2: rebuild on existing alignment;
- 17 • IG-3: lower alignment (Option 1—10% retaining walls, 35% reinforced slopes);
- 18 • IG-4: lower alignment (Option 2—50% retaining walls, 20% reinforced slopes);
- 19 • IG-5: upper alignment.

21 ² CMZ is defined as “the land adjacent to the current river channel that is at high risk of occupation by the channel within the next 100 years.” SCC 30.91C.067.

1 Ex. R-12 (Design Report), p. 2.

2 7.

3 The design team concluded that Alternative IG-2 would be subject to the risk of future
4 washouts, would impact the river's side channel and other riparian habitat, and would result in
5 all of the roadway remaining in the CMZ. *Id.*, pp. 21-22, 53. Alternative IG-5 would require the
6 greatest amount of excavation and fill, two new bridges, and would result in a one-half mile
7 longer road with steeper grades and greater environmental impacts. *Id.*, pp. 29-33, 53; Ritz
8 Testimony. Estimated costs for Alternative IG-2 were \$26.4 million, \$15.6 million for
9 Alternative IG-3, and \$34.9 million for Alternative IG-5. Ex. R-12, pp. 44-45.

10 8.

11 The Design Report recommended IG-3: Lower Alignment (Option 1 with 10% retaining
12 walls and 35% reinforced slopes). This option was chosen because it restores roadway
13 connectivity for the area, transitions the road outside of the 100-year flood plain and the CMZ,
14 and balances the impacts to the surrounding natural environment with construction costs in a
15 more cost-effective manner. *Id.*, pp. 1-2, 53; Ex. R-18, p. 12. The USFS and the FHA also
16 preferred this alternative. Ritz Testimony.

17 9.

18 The final proposed project would move the existing roadway alignment to the south and
19 establish a route upslope from the existing damaged road. The relocation would elevate the road
20 above the 100-year floodplain and CMZ for most of the new alignment and the new section of
21 road would be landward of the river side channel that has formed in the existing alignment. Ex.

1 R-2, p. 3. The relocated roadway will cross side slopes and parallel the existing roadway. *Id.*;
2 Ex. R-15 (DNS), p. 1.

3 10.

4 The proposed design would include a pavement width of 22 feet with 10 foot travel lanes
5 and one foot shoulders. Ex. R-2, p. 7. The project will require extensive excavation and fill due
6 to steep river valley slopes, totaling 1,090 feet of cut slopes and 575 feet of soil embankments.
7 *Id.*, pp. 2, 7. Approximately 100,000 cubic yards of material would be excavated and about
8 165,000 cubic yards of rock and topsoil would be placed as fill. *Id.*, p. 9.

9 11.

10 The entire project area is located within the riparian buffer for the North Fork Skykomish
11 River. Exs. R-18, p. 54; R-2, p. 8. The relocated roadway will cross nine streams (eight non-fish
12 and one fish bearing) which will be routed under the road through culverts. About 1,285 linear
13 feet of non-fish bearing stream will be impacted. A bridge will be constructed over a fish
14 bearing stream/wetland complex near the project's northeast end at milepost 6.9. Exs. R-2, p. 8;
15 R-10 (Surface Water Discipline Report), p. 1-2. The bridge will impact 960 square feet of the
16 fish bearing stream. Ex. P-33 (Critical Area Study), p. ii. There are four wetlands within the
17 project limits. The project will permanently impact 680 square feet of wetlands and will result in
18 an estimated 14 acres of land disturbance in buffers. Exs. R-2, p. 9; P-33, p. ii.

19 12.

20 Unavoidable project impacts will be mitigated according to County critical area
21 regulations. Buffer mitigation will include buffer enhancement with stream buffer plantings.

1 Mitigation for impacts will include removal of existing road debris from the river side channel,
2 installation of instream and terrestrial habitat structures, restoring riparian buffers, revegetating
3 hillside stream channels, and replanting affected areas with native vegetation. Large woody
4 debris will be placed in areas adjacent to the side channel to enhance riparian habitat. The new
5 road section will be narrower than the original. Offsite mitigation will occur through the
6 Skykomish Habitat Mitigation Bank to meet mitigation requirements that cannot be satisfied in
7 the project area. Exs. R-18, p. 54; R-2, p. 9; P-33, p. ii; Ritz Testimony.

8 13.

9 The bridge will be a 180-foot single-span structure that will provide for unimpeded flow
10 of a seasonal stream located in a large wetland. The bridge piers will be placed above the
11 Ordinary High Water Line (OHWL). The bridge will maintain existing water levels in the
12 wetland and would also help to prevent future blockages associated with seasonal high flows.
13 Ex. R-9 (Geology, Soils, and Groundwater Discipline Report), p. 4.

14 14.

15 Where the roadway is located adjacent to or within the CMZ, a buried rock revetment
16 will be placed next to the toe of the roadway embankment. Materials subject to erosion will be
17 removed and replaced with large rock material. The revetment trench will also be filled with
18 large woody debris on the river side and a layer of salvaged forest floor material will be placed
19 on top of the revetment to support riparian plantings. *Id.*; Ex. R-10, p. 3-2.

1 15.

2 A stormwater pollution prevention plan will be developed for the project. Ex. R-18, p.
3 55. Stormwater runoff will be managed in accordance with the WSDOT Highway Runoff
4 Manual (HRM). *Id.*, p. 54. The stormwater treatment proposed for this project is Natural
5 Dispersion augmented with Compost-Amended Vegetated Filter Strips (CAVFS). Exs. R-22
6 (Engineering and Economic Feasibility Evaluation), p. 2; R-18, p. 54. With this system, the
7 relocated roadway would be sloped to maintain sheet flow throughout the project length. Ex. R-
8 10, p. 3-4. This sheet flow is then directed into CAVFS along the north side of the roadway.
9 After flowing through the CAVFS, the runoff will be dispersed naturally through native
10 vegetation. Ex. R-22, p. 13. Natural flow dispersion uses the existing vegetation, soils and
11 topography to reduce runoff velocities and runoff treatment. Infiltration into soils, evaporation,
12 and transpiration by vegetation will remove pollutants from the stormwater. Exs. R-2, p. 8; R-
13 18, p. 54; R-10, pp. 6-11 to 6-13; Brewer Testimony.³

14 16.

15 Using Natural Dispersion and CAVFS for this project will not meet HRM standards
16 because the slopes in the project area are too steep,⁴ the total length for dispersion is limited, and
17 there is not enough shoulder width. Ex. R-22, p. 2; Brewer Testimony. To meet the HRM
18 standard for water quality treatment, at least 91% of the runoff volume must be treated. The
19 amount of runoff treated by the proposed CAVFS ranges from 34.92% to 48.7% and so does not

20 _____
21 ³ In response to a concern expressed by Mr. Lider, the County stipulated to the fact that Mr. Brewer had not received the current WSDOT HRM training. The Board considered this stipulation when evaluating Mr. Brewer's testimony.

⁴ Only about 10% of the receiving slopes on this project meet the steepness criteria. Ex. R-10, p. 6-12.

1 meet the standard. Also, the amount of flow control under the proposed measures is insufficient
2 in portions of the project area. Ex. P-42 (On-site Drainage Report), pp. 27-34. The rugged
3 terrain and forested areas also makes construction of onsite stormwater management facilities
4 such as ponds or tanks infeasible. Ex. R-22, pp. 7-9; Brewer Testimony.

5 17.

6 The HRM allows the use of an Engineering and Economic Feasibility (EEF) Evaluation
7 when practical limitations present obstacles to fully meeting water quality treatment and flow
8 control requirements. Exs. R-23 (Stormwater Modification), p. 1; R-22, p. 2. The EEF
9 evaluation was conducted and reached the following conclusions. The potential at the project
10 site for vehicle generated pollution is minimal and only basic water quality treatment is required.
11 Usually, these types of remote USFS road projects do not require extensive drainage treatment
12 structures. The proposed area of impervious surface is 3.23 acres, with about 2.21 acres of
13 pollution-generating impervious surface to be treated. R-22, pp. 3, 7. Because of limited
14 shoulder widths along the roadway, the proposed CAFVS design will treat only a portion of the
15 required volume treatment criteria set by HRM standards. Ex. R-23, p. 2. Natural dispersion
16 will treat the sheet flow that was not treated by CAVFS. Exs. R-22, p. 8; R-23, p. 2.

17 18.

18 The EEF analysis confirmed that the construction of standard stormwater facilities in the
19 project area was not feasible in the majority of the project site. However, low traffic volumes,
20 mature forest soils, and the abundance of dense vegetation made the project site suitable for a
21 deviation from the standard design criteria. Also, geotechnical evaluations confirmed that the

1 onsite soils have high infiltration rates and there is no shallow groundwater. Exs. R-22, pp. 13-
2 14; R-18, pp. 54-55. Therefore, the County's experts recommended deviations from the standard
3 criteria for Natural Dispersion and the CAVFS width. Ex. R-22, pp. 13-14.

4 19.

5 Pursuant to SCC 30.63A.170, the County applied for a stormwater modification. The
6 application requested modification of the HRM stormwater design requirements that were not
7 fully met at the project site due to steep slopes and site constraints that limit dispersion lengths
8 and CAVFS widths. Ex. R-23, p.1; Brewer Testimony. The County Engineer concluded that
9 using Natural Dispersion augmented with CAVFS, along with modifications to the HRM design
10 standards, was the best approach for stormwater treatment and approved the application. Ex. R-
11 23, pp. 4-5.

12 20.

13 The federal funding triggered an Environmental Assessment (EA)⁵ under NEPA and
14 Finding of No Significant Impact (FONSI).⁶ The County adopted the EA and the FONSI and
15 issued a Determination of Nonsignificance (DNS)⁷ under the State Environmental Policy Act
16 (SEPA). Ex. R-2, p. 4. The EA included an evaluation of climate change impacts. Ex. R-18, pp.
17 150-155. The project design included consideration of climate change. For example, roadway
18 embankments along the river will be designed to withstand erosion effects associated with future
19

20 ⁵ Exhibit R-18.

21 ⁶ Exhibit R-19.

⁷ Exhibit R-15.

1 lateral migration of the river and culvert sizes will be increased to accommodate higher flows.

2 Ex. R-18, pp. 154-155; Ritz Testimony.

3 21.

4 The National Marine Fisheries Service (NMFS) prepared a biological opinion on the
5 project's impacts to listed fish. NMFS concluded that the project was not likely to jeopardize the
6 continued existence of Puget Sound Chinook salmon and Puget Sound steelhead or result in the
7 destruction or adverse modification of designated critical habitat for Puget Sound Chinook
8 salmon. Ex. P-24 (NMFS BiOp), p. 1; Ritz Testimony. The U.S. Fish & Wildlife Service
9 (USFWS) also prepared a biological opinion on the project's impacts to bull trout, marbled
10 murrelets, and designated bull trout critical habitat. USFWS concluded that the project would
11 not appreciably reduce the likelihood of survival and recovery of the bull trout in the wild and
12 the project was not likely to jeopardize the continued existence of the bull trout. The agency also
13 concluded that the project would not appreciably reduce the likelihood of survival and recovery
14 of the marbled murrelet in the wild and the project was not likely to jeopardize the continued
15 existence of the marbled murrelet. Ex. P-25 (USFWS BiOp), pp. 73-74; Ritz Testimony.

16 22.

17 The County obtained a Hydraulic Project Approval (HPA) from the Washington
18 Department of Fish and Wildlife for construction of the new bridge and culvert installation. Ex.
19 R-21 (HPA). The purpose of this permit is to provide for the proper protection of fish life and
20 fish habitat. RCW 77.55.021(1), (7).

1 23.

2 The project required a shoreline substantial development permit and a Land Disturbing
3 Activity permit. Exs. R-5, p. 25; R-15, p. 3, R-50. The project also requires a shoreline
4 conditional use permit because of the structural shoreline and bank stabilization components.
5 SCC 30.67.575(2)(b); Exs. R-2, p. 11; R-33 (Ecology Approval Letter), p. 1. A shoreline
6 variance is required because the project will include land disturbance in landslide hazard areas
7 associated with steep slopes and debris flow areas and setback deviations. Exs. R-2, p. 13; R-33.
8 Ecology approved the conditional use permit and the variance on October 8, 2018. *Id.*; Burcar
9 Testimony.

10 24.

11 Other studies and reports were prepared to analyze the proposed project, including a
12 CMZ report (2009); Critical Area study (2017); Critical Area Addendum (2018); Geology, Soils,
13 and Groundwater Discipline Report (2016); Surface Water Discipline report (2014); and a
14 Geotechnical Design report (2017). Exs. R-6, P-33, R-7, R-9, R-10, R-11; Ritz Testimony.

15 25.

16 The following studies and reports were provided by the County during the Permit
17 application process: Final On-Site Drainage Report; Final Off-Site Drainage Report;
18 Geotechnical Data Report; River Hydraulic Assessment Report; Critical Area Study, Mitigation
19 Report, and Habitat management Plan; and a North Fork Channel Migration Study. Ex. R-2, p.
20 10.

1 26.

2 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

3 Based on the foregoing Findings of Fact, the Board enters the following:

4 **III. CONCLUSIONS OF LAW**

5 1.

6 The Board has jurisdiction over the parties and the subject matter in this case pursuant to
7 RCW 90.58.180 and WAC 461-08-315. The Board's scope and standard of review of this case
8 is *de novo*. WAC 461-08-500(1). The Board generally makes findings of fact based on the
9 preponderance of the evidence. *Id.*, at (2). As the petitioner, Sno-King has the burden of
10 proving the Permit approvals were inconsistent with the requirements of the Shoreline
11 Management Act (SMA). *Id.*, at (3); *Donovan v. Ecology*, SHB No. 10-024, p. 19 (July 13,
12 2011).

13 2.

14 The Board considers the following legal criteria:

- 15 a) Consistency with SEPA;
- 16 b) Snohomish County Shoreline Master Program (SMP) and Snohomish County Code;
- 17 c) SMA provisions, ch. RCW 90.58; and,
- 18 d) Ecology's implementing regulations, ch. 173-27 WAC.

19 WAC 461-08-505.

20 Also, WAC 173-27-160 contains general review criteria for conditional use permits, and WAC
21 173-27-170 contains general review criteria for variance permits.

1 3.

2 The following list of legal issues governed the hearing:

- 3 4. May Snohomish county issue itself shoreline permits to allow fill dirt and rock
4 riprap to be placed within the CMZ of the North Fork of the Skykomish River, in
5 alleged violation of SCC 30.62B.330?
- 6 5. For purposes of SEPA, will the roadway construction activity proposed by the
7 Project within the CMZ for the North Fork of the Skykomish River result in
8 significant unmitigated harm to threatened fish species in the river including, but
9 not limited to, effects of warming climates and changing precipitation and
10 hydrologic regimes?
- 11 7. For purpose of SEPA, will the roadway construction activity proposed by the
12 Project within the stream buffer for the North Fork of the Skykomish River
13 consisting of construction of riprap, retaining walls, and other stormwater
14 treatment facilities result in significant unmitigated harm to the river or threatened
15 species?
- 16 10. Whether Ecology's conditional approval of the shoreline permits as specified in
17 Ecology's decision for Project ID: 2018-NW-4394 was based on adequate
18 information.
- 19 11. Whether Ecology's conditional approval of the shoreline permits as specified in
20 Ecology's decision for Project ID: 2018-NW-4394 authorizing the removal,
21 relocation, and reconstruction for a roadway is consistent with the SMA, RCW
90.58.

Issue 4: Violation of SCC 30.62B.330

4.

SCC 30.62B.330(3)⁸ prohibits any development activities or actions requiring a project permit in the CMZ, except for:

- new public bridges and transportation structures when no other feasible alternative exists or the alternative would result in unreasonable and disproportionate costs;

⁸ SCC 30.62B has been incorporated into the County's SMP. SCC 30.67.030(1)(d).

- normal maintenance or repair of existing flood control and bank stabilization structures, roads, or bridges;
- shoreline and bank stabilization and flood protection measures pursuant to the general requirements contained in SCC 30.62B.320(2);⁹ or,
- habitat restoration and enhancement projects.

SCC 30.62B.330(3)(a)(iii), (v), (vi), (vii).

5.

“Normal maintenance” includes actions to prevent a decline, lapse, or cessation from a lawfully established condition. “Normal repair” means to restore a development to a state comparable to its original condition, including but not limited to its size, shape, configuration, location and external appearance, within a reasonable period after decay or partial destruction, except where repair causes substantial adverse effects [to] the environment. Replacement may be authorized as repair where it is the common method of repair for the type of structure and the replacement is comparable to the original structure in size, shape, configuration, location and appearance, and does not cause substantial adverse effects to the shoreline environment. SCC 30.91N.095.

6.

On this issue, Mr. Lider testified that portions of the County project are in the CMZ and therefore, SCC 30.62B.330 applies. Mr. Lider also contends that the CMZ report is faulty because it is a 50-year CMZ evaluation instead of the required 100-year CMZ,¹⁰ and that the

⁹ SCC 30.62B.320 is entitled “General standards and requirements for erosion and landslide hazard areas.”

¹⁰ Mr. Lider apparently bases his assertion on the CMZ definition, which references a 100-year time span.

1 OHWL has not been properly delineated. Mr. Lider bases this argument primarily on his site
2 visits and observations of survey stake locations and river and riparian conditions. In Mr.
3 Lider's opinion, the CMZ and OHWL determinations were both out of date and unreliable. Mr.
4 Lider testified that the upper alignment alternative for the roadway should have been used.

5 7.

6 Mr. Lider testified that the project is not repair or maintenance for the following reasons:
7 the project's scope (amount of cut and fill, includes a new bridge); project impacts to the
8 shoreline ecosystem (water quality impacts from stormwater runoff and fill washing into the
9 river); the existence of other feasible alternatives (the upper alignment option) and stormwater
10 control measures; and the fact that federal Emergency Relief funds are not usually available for
11 normal repair and maintenance. Mr. Lider also argues that normal repair and maintenance does
12 not even require a shoreline substantial development permit.¹¹

13 8.

14 In response, the County witnesses agreed that portions of the project are within the CMZ
15 (roadway bank protection) and that SCC 30.62B.330 applies. The County witnesses note that
16 CMZ delineations are never flagged in the field, although the OHWL might be surveyed and
17 flagged prior to project construction. Ritz Testimony. A County witness testified that the CMZ
18 and OHWL determinations have been updated and were still valid. Ritz Testimony. The CMZ
19 boundary was determined in 2009 and updated in 2011. Ex. P-37 (Shannon & Wilson

20 _____
21 ¹¹ The County obtained a shoreline substantial development permit and several exhibits (i.e. Exs. R-5, R-15) in the
record state that this permit was required. Whether or not a shoreline permit was required is not a legal issue before
the Board in this case.

1 Memorandum), p. 2. One of the County’s experts concluded that a 100-year CMZ boundary
2 would not likely be significantly different from a 50-year CMZ boundary, considering the
3 conformation and geology of the river valley. *Id.*, pp. 1, 3-4.

4 9.

5 The County maintains that the majority of the project is normal repair and maintenance as
6 allowed by SCC 30.62B.330. The replacement road is comparable in size, shape, and
7 configuration; it has a parallel alignment joined at each end to the existing road and is the same
8 type of road (although narrower); and there is adequate mitigation to address any adverse
9 impacts. Brewer Testimony. County witnesses testified that the upper alignment is not a
10 feasible alternative, as that option would result in a longer road with more environmental
11 impacts, a requirement of two bridges and would be cost prohibitive. The new bridge is also
12 allowed under SCC 30.62B.330, as there are no other feasible alternatives for crossing the
13 wetland and fish bearing stream.

14 10.

15 The Board agrees with the County. Compliance with SCC 30.62B.330 is within the
16 Board’s jurisdiction because the County has incorporated this portion of its local law into the
17 SMP. *See* SCC 30.67.030. SCC 30.62B.330 applies to at least a portion of the project because it
18 is a development activity,¹² or action requiring a project permit, that proposes activities in the
19 CMZ. Some project components are exempt from the prohibition on development in the CMZ

20
21 _____
¹² *See* SCC 30.91D.240.

1 under the listed exceptions: (1) public bridges with no other feasible alternative; (2) normal
2 repair and maintenance; (3) shoreline and bank stabilization and flood protection measures; and,
3 (4) habitat restoration and enhancement projects.

4 11.

5 Given the design of the project, there is no other feasible alternative to a new bridge over
6 the wetland/stream complex. Brewer Testimony. The remainder of the project is most
7 accurately described as a “replacement” under SCC 30.91N.095. A replacement of a
8 transportation structure may be authorized as repair where it is: (1) the common method of repair
9 for the type of structure; (2) the replacement is comparable to the original structure in size,
10 shape, configuration, location and appearance; and, (3) does not cause substantial adverse effects
11 to the shoreline environment. SCC 30.91N.095. Replacing a washed out road is a common
12 method of repair. The replacement road is comparable to the prior structure and any significant
13 impacts to the shoreline have been mitigated.¹³ Brewer Testimony.

14 12.

15 Where the roadway intersects the CMZ of the Skykomish River, the County proposes to
16 install riprap and fill as a bank stabilization and flood protection measure. The County also plans
17 to remove the remaining asphalt from the old roadway in the river’s side channel. The asphalt
18 removal could be considered a habitat restoration or enhancement project. These aspects of the
19 project are also exempt from the development prohibition. SCC 30.62B.330(3)(a)(vi), (vii).

21 ¹³ Even if the project is not a “replacement,” the only elements of the project within the CMZ, the roadside
revetments and the asphalt removal, are exempt from SCC 30.62B.330’s prohibition.

1 13.

2 The Board concludes that the road replacement project does not violate SCC
3 30.62B.330(3) and therefore, rules in favor of the Respondents on Issue 4.

4 **Issues 5, 7: SEPA Violations**

5 14.

6 SEPA is primarily a procedural statute that seeks to ensure that environmental impacts
7 are properly considered by decision makers. *Save Our Rural Environment v. Snohomish Co.*, 99
8 Wn.2d 363, 371, 662 P.2d 816 (1983). An agency is required to make a threshold determination
9 whether a proposal under review is likely to have probable significant adverse environmental
10 impacts. WAC 197-11-330(1)(b). If such impacts are likely, the agency will issue a
11 Determination of Significance and proceed to develop an Environmental Impact Statement (EIS).
12 WACs 197-11-360; 330(4). Otherwise, an agency will issue a DNS and an EIS is not required.
13 WAC 197-11-340(1).

14 15.

15 Agency threshold decisions under SEPA are accorded substantial deference. RCW
16 43.21C.090; *Anderson v. Pierce Co.*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997). The Board
17 reviews SEPA threshold determinations under a “clearly erroneous” legal standard. *Ass’n of*
18 *Rural Residents v. Kitsap Co.*, 141 Wn.2d 185, 195-96, 4 P.3d 115 (2000). For its SEPA
19 challenge, Sno-King must meet this standard and prove the County’s issuance of a DNS was
20 “clearly erroneous.” To satisfy this burden, Sno-King must present sufficient evidence that the
21 Board is left with a definite and firm conviction that the project will have a significant

1 environmental impact despite any conditions imposed on the permits. *Murden Cove*
2 *Preservation Ass'n v. Kitsap Co.*, 41 Wn. App. 515, 523, 704 P.2d 1242 (1985); *Donovan*, SHB
3 No. 10-024, p. 19. For a DNS to survive review, the record need only show that environmental
4 factors were considered in a manner sufficient to make an initial showing of compliance with the
5 procedural requirements of SEPA. WAC 197-11-330(1)(b); *Brown v. Tacoma*, 30 Wn. App.
6 762, 764, 637 P.2d 1005 (1981).

7 16.

8 Sno-King argues that project SEPA review was flawed and that the impacts of the project
9 should have triggered an EIS. In his testimony, Mr. Lider contended that the improperly
10 delineated CMZ and OHWL misled SEPA reviewers, and that many of the reports relied on were
11 out of date and no longer valid. The environmental review did not consider the effects of climate
12 change and the proposed mitigation is inadequate to prevent erosion and water quality impacts.
13 Further, Mr. Lider testified that the project's stormwater and erosion controls do not meet the
14 standards in WSDOT's HRM and therefore, the project will result in unmitigated impacts to
15 water quality. Mr. Lider noted that the project area is too steep for natural dispersion and
16 CAVFS, and the CAVFS design did not meet the minimum width standards. Mr. Lider also
17 recommended that the stormwater/drainage treatment should include stormwater detention vaults
18 and filter drains. Mr. Lider contended that fill would be placed below the CMZ and OHWL,
19 which would result in water quality impacts.

1 17.

2 The County cites to the strict standard of review for SEPA challenges and contends that
3 the project was subject to adequate environmental review, including analysis of the effects of
4 climate change, and that any significant project impacts have been sufficiently mitigated. The
5 County witnesses testified that Mr. Lider merely presumed impacts based on noncompliance
6 with HRM standard criteria and had no hard data or independent studies showing water quality
7 impacts. On cross examination, Mr. Lider admitted that he was relying solely on data provided
8 in the County studies and reports.

9 18.

10 The County witnesses testified that Mr. Lider's field observations likely misinterpreted
11 the significance of the survey stakes found onsite. Ritz, Brewer Testimony. On cross
12 examination, Mr. Lider admitted he did not have any certifications or training relevant to
13 CMZ/OHWL determinations. The County's experts used geologic mapping, historical aerial
14 photographs, hydraulic modeling, and field mapping to derive the CMZ boundary. Ex. P-37, p.
15 3. Mr. Brewer testified that there would be at least 100 feet between the roadway and the
16 OHWL and a 20 foot rise in elevation between the two points. Therefore, no fill would be
17 placed below the OHWL.

18 19.

19 While strict compliance with WSDOT's HRM was not feasible, the County obtained a
20 stormwater modification from the County Engineer as allowed by SCC 30.63A.170 and
21

1 30.63A.830.¹⁴ The County Engineer concluded that using Natural Dispersion augmented with
2 CAVFS, along with modifications to the HRM design standards, was the best approach for
3 stormwater treatment. Sno-King presented no direct evidence of potential water quality impacts
4 from contaminated stormwater runoff from the road. The USFWS and NMFS prepared
5 Biological Opinions which concluded the project would not cause any long term adverse effects
6 to listed species. The County obtained an HPA for the project with conditions to protect fish life.
7 Unavoidable environmental impacts resulting from the project were sufficiently mitigated either
8 through onsite mitigation or participation in mitigation banking. The environmental review
9 considered climate change and project design addressed the impacts of climate change.

10 20.

11 As stated in Conclusions of Law 6 and 7, Mr. Lider preferred the upper alignment
12 alternative for the project. However, this option would have greater environmental impacts than
13 the alternative chosen by the County, would result in a one-half mile longer road with steeper
14 grades, and require the greatest amount of excavation and fill and two new bridges. This
15 alternative would also be prohibitively expensive. FF 7, 8.

16 21.

17 The evidence presented by Sno-King did not leave the Board with a definite and firm
18 conviction that the project will have significant adverse environmental impacts despite any
19

20 ¹⁴The Board has already ruled that compliance with SCC 30.63A is not within the Board's jurisdiction, but this
21 analysis is relevant to compliance with SCC 30.62B.330, environmental impacts considered during SEPA review,
and Ecology's approval of the Permits. *See Sno-King Watershed Council v. Snohomish Co.*, SHB No. 18-016, pp.
11-13 (Feb. 21, 2019).

1 conditions imposed on the permits. In other words, the Board was not convinced that the
2 County's reliance on the NEPA EA and FONSI and the resulting issuance of a DNS was clearly
3 erroneous. The Board concludes that SEPA review for the project was adequate and that an EIS,
4 or any further SEPA review, is not required. Consequently, the Board rules in favor of
5 Respondents on Issues 5 and 7.

6 **Issues 10, 11: Ecology's Approval of the Permits**

7 22.

8 Ecology has the authority to approve or disapprove conditional use permits or variances
9 issued by local governments. RCW 90.58.140(10); WAC 173-27-200; SCC 30.44.240. Ecology
10 evaluates conditional use permits and variances against the standards in WACs 173-27-160 and
11 170. The Board has the authority to review Ecology's decisions on these matters pursuant to
12 RCW 90.58.140 and 90.58.180. *Coalition for a Sustainable 520 v. Seattle*, SHB No. 12-002c,
13 pp. 17-18, 20-21 (June 20, 2012).

14 23.

15 Sno-King argues that Ecology's approval of the conditional use and variance permits was
16 unlawful because the decision was based on the false assumptions that the project was outside of
17 the CMZ and that the stormwater and erosion treatments were adequate. Sno-King also contends
18 that Ecology did not have sufficient information about the project to conduct an adequate
19 analysis. Finally, Sno-King argues that since the project violates SCC 30.62B.330(3), it cannot
20 be consistent with the SMP and so the conditional use and the variance should have been denied.

1 24.

2 Ecology witnesses testified that the County provided sufficient information about the
3 project for an adequate review. Mr. Yunge listed all of the studies and reports reviewed by
4 Ecology prior to making its decision, including the Critical Area study, CMZ report,
5 geotechnical reports, route feasibility studies, design reports, etc. The County provided any
6 additional information requested by Ecology. Yunge Testimony; Ex. R-33.

7 25.

8 Mr. Lider's allegations about improperly delineated OHWL and CMZ were not supported
9 by evidence sufficient to meet Sno-King's burden of proof. The County provided evidence that
10 Mr. Lider's site visit observations could have been mistaken. It is likely the stakes Mr. Lider
11 observed were not indicating the road boundary, but could have been riprap boundaries, culvert
12 routes, cut and fill locations, etc. Ritz Testimony; Brewer Testimony. The County's experts
13 have delineated the OHWL and CMZ, and these locations were recently updated. Mr. Lider's
14 testimony and photographs were insufficient to rebut the expert determinations regarding the
15 OHWL and the CMZ.

16 26.

17 Ecology's approval was consistent with the SMA and WACs 173-27-160 and 170.
18 Burcar Testimony; Yunge Testimony; Ex. R-33. As discussed above, there was also no violation
19 of SCC 30.62B.330, and any significant adverse environmental impacts have been adequately
20 mitigated.

1 27.

2 The Board concludes that Ecology's approval of the conditional use and variance permits
3 was based on adequate information and that Ecology's approval was consistent with the SMA.
4 Therefore, the Board rules in favor of Respondents on Issues 10 and 11.

5 28.

6 Any Finding of Fact deemed to properly be a Conclusion of Law is hereby adopted as such.

7 Based on the above Findings of Fact and Conclusions of Law, the Board enters the
8 following:

9 **IV. ORDER**

- 10 1. The Board rules in favor of the Respondents on Issues 4, 5, 7, 10, and 11;
- 11 2. The issuance of Snohomish County Shoreline Substantial Development Permit No.
12 17-119707 SHOR, Snohomish County Shoreline Conditional Use Permit No. 17-
13 119711 SHOR, & Snohomish County Shoreline Variance Permit No.17-119710
14 SHOR is affirmed.
- 15 3. This appeal is dismissed.

16 SO ORDERED this 19th day of June, 2019.

17 **SHORELINES HEARINGS BOARD**

18 NEIL L. WISE, Presiding

19 JENNIFER GREGERSON, Board Member

20 ALLEN ESTEP, Board Member

21