

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SWINOMISH INDIAN TRIBAL)	
COMMUNITY and WASHINGTON)	No. 76339-9
ENVIRONMENTAL COUNCIL,)	
)	
Petitioners,)	En Banc
)	
v.)	
)	
WESTERN WASHINGTON GROWTH)	
MANAGEMENT HEARINGS BOARD;)	
SKAGIT COUNTY, a municipal)	
corporation of the State of Washington;)	
SKAGIT COUNTY FARM BUREAU;)	
SKAGITONIANS TO PRESERVE)	
FARMLAND; WESTERN WASHINGTON)	
AGRICULTURAL ASSOCIATION;)	
SKAGIT COUNTY DIKING DISTRICT)	
NO. 3; SKAGIT COUNTY DIKING)	
DISTRICT NO. 12; SKAGIT COUNTY)	
DRAINAGE DISTRICT NO. 17; and)	
SKAGIT COUNTY CONSOLIDATED)	
DIKING DISTRICT NO. 22,)	
)	
Respondents.)	
)	
SKAGIT COUNTY, a municipal)	
corporation of the State of Washington;)	
SKAGIT COUNTY FARM BUREAU;)	
SKAGITONIANS TO PRESERVE)	
FARMLAND; WESTERN WASHINGTON)	
AGRICULTURAL ASSOCIATION;)	
SKAGIT COUNTY DIKING DISTRICT)	
NO. 3; SKAGIT COUNTY DIKING)	
DISTRICT NO. 12; SKAGIT COUNTY)	
DRAINAGE DISTRICT NO. 17; and)	Filed September 13, 2007

Swinomish Indian Tribal Cmty. v. Skagit County, No. 02-2-0012c, 2005 GMHB LEXIS 2, at *2-3 (WWGMHB Jan. 13, 2005) (hereinafter 2005 Compliance Order). After review, we uphold both of the Board’s decisions.

I. FACTUAL AND PROCEDURAL HISTORY

In 1990, the legislature adopted the GMA, chapter 36.70A RCW. One section of that act, RCW 36.70A.060(2), required local governments to enact development regulations protecting so called “critical areas” by September 1, 1991. “Critical areas” are defined as “(a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas.” RCW 36.70A.030(5). The requirement to “protect” critical areas is a part of the GMA’s larger purpose of requiring comprehensive land use planning within the state of Washington. See RCW 36.70A.020(10) (providing that local governments will “[p]rotect the environment”); RCW 36.70A.010 (describing the legislature’s intent in adopting the GMA to provide for “comprehensive land use planning”).

The legislature created three regional boards to review compliance with the GMA by the cities and counties that are located within each board’s jurisdictional boundaries. See RCW 36.70A.250-.350. One of the boards, the Western Washington Growth Management Hearings Board, is responsible for reviewing Skagit County’s compliance with the GMA.

Since 1996, Skagit County has made several efforts to comply with the GMA's critical areas mandate.¹ In 2002, the Board held that the county's then-current critical areas ordinance did not comply with the GMA because there was "no mandatory, fallback approach in place to ensure the protection of CAs [critical areas] and anadromous fish." *Swinomish Indian Tribal Cmty. v. Skagit County*, No. 02-2-0012c, 2002 GMHB LEXIS 67, at *13 (WWGMHB Dec. 30, 2002). Consequently, the Board ordered the county to "adopt an alternative that . . . must include the adoption of mandatory development regulations for agriculture as necessary to comply with RCW 36.70A.060(2) and .172(1)." *Id.* Whether Skagit County complied with this directive is the primary issue in this consolidated appeal.

In 2003, following the Board's 2002 finding of noncompliance, Skagit County adopted Ordinance 020030020, which contained a "no harm" standard for protecting anadromous fish habitat in agricultural areas. The Swinomish Indian Tribal Community (Tribe) and the Washington Environmental Council (WEC) challenged the ordinance's "no harm" standard, alleging that it failed to protect critical areas, as required by RCW 36.70A.060(2). After reviewing the challenge, the Board upheld the ordinance, concluding that the county was "in compliance with the [GMA] except for the

¹See, e.g., *Friends of Skagit County v. Skagit County*, Nos. 96-2-0025 & 00-2-0033c, 2001 GMHB LEXIS 53 (WWGMHB Feb. 9, 2001); *Friends of Skagit County v. Skagit County*, Nos. 96-2-0025 & 00-2-0033c, 2000 GMHB LEXIS 323 (WWGMHB Aug. 9, 2000); *Friends of Skagit County v. Skagit County*, No. 96-2-0025, 1998 GMHB LEXIS 283 (WWGMHB Sept. 16, 1998); *Friends of Skagit County v. Skagit County*, No. 96-2-0025, 1997 GMHB LEXIS 344 (WWGMHB Jan. 3, 1997).

No. 76339-9

enforcement of watercourse protection measures and the need for more specificity in its monitoring program and adaptive management process.” 2003 Compliance Order, 2003 GMHB LEXIS 73, at *3.

The Tribe and the WEC each petitioned the Thurston County Superior Court to review the Board’s decision. The petitions were consolidated by the superior court. Thereafter, all three parties (Skagit County, the Tribe, and the WEC) requested, pursuant to the provisions of chapter 34.05 RCW, that the Board certify its decision for direct review by Division Two of the Court of Appeals. The Board agreed that the standard for direct review had been met and, consequently, it granted the motion. Division Two of the Court of Appeals then granted direct review.

In 2004, while appellate review was pending, Skagit County adopted Ordinance 020040011. It responded to the Board’s directions regarding the need for enforcement of watercourse protection measures and greater specificity in its monitoring and adaptive management program. The Tribe and WEC argued to the Board that the 2004 ordinance did not bring the county into full compliance with the GMA. The Board agreed. See 2005 Compliance Order, 2005 GMHB LEXIS 2. The county then petitioned Division Two of the Court of Appeals to directly review the Board’s decision, alleging that the Board failed to give proper deference to its interpretation of adaptive management and that the Board used improper procedures in reaching its decision. The Court of Appeals accepted direct review and consolidated the appeal with the

pending appeal of the 2003 Compliance Order. We subsequently accepted the Tribe's motion to transfer the consolidated appeal from the Court of Appeals to this court. We now review the decisions of the Board that Skagit County's 2003 Ordinance, with two exceptions, complied with the GMA and its decision that the county's 2004 ordinance did not fully comply with the GMA.

II. STANDARD OF REVIEW

The Board is charged with determining compliance with the GMA and, when necessary, invalidating noncomplying comprehensive plans and development regulations. *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 142 Wn.2d 543, 552, 14 P.3d 143 (2000) (citing RCW 36.70A.280, .302). The Board "shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." RCW 36.70A.320(3). An action is "clearly erroneous" if the Board is "left with the firm and definite conviction that a mistake has been committed." *Cent. Puget Sound Hr'gs Bd.*, 142 Wn.2d at 552 (quoting *Dep't of Ecology v. Pub. Util. Dist. No. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993)). "[C]omprehensive plans and development regulations [under the GMA] are presumed valid upon adoption." RCW 36.70A.320(1). Although RCW 36.70A.3201 requires the Board to give deference to a county, the county's actions must be consistent with the goals and requirements of the GMA. *Cent. Puget Sound Hr'gs Bd.*, 142 Wn.2d at 561.

This court, in turn, reviews the Board's decisions pursuant to the Administrative Procedure Act (APA), chapter 34.05 RCW. RCW 34.05.570(3). The Board's legal conclusions are reviewed "de novo, giving substantial weight to the Board's interpretation of the statute it administers." *Cent. Puget Sound Hr'gs Bd.*, 142 Wn.2d at 553. If the Board's findings of fact are reviewed, the substantial evidence test is used. *Id.*

III. ANALYSIS

A. Background to the 2003 and 2005 Board Decisions

The GMA was enacted largely "in response to public concerns about rapid population growth and increasing development pressures in the state." *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 154 Wn.2d 224, 232, 110 P.3d 1132 (2005) (internal quotation marks omitted) (quoting *Cent. Puget Sound Hr'gs Bd.*, 142 Wn.2d at 546). As we have already noted, one of the central requirements of the GMA is that counties and cities, which plan under it, must protect "critical areas." RCW 36.70A.060(2). But the GMA places additional, and sometimes competing, obligations on local governments. For example, it lists as "planning goals" to both "[m]aintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries" and "[e]ncourage the conservation of . . . productive agricultural lands, and discourage incompatible uses." RCW 36.70A.020(8). Local governments are not, however, given much direction by that statute as to whether

No. 76339-9

protection of critical areas or the maintaining of agricultural lands is a priority. In fact, the GMA explicitly eschews establishing priorities: “The [GMA’s planning] goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations.” RCW 36.70A.020.

The lack of priority in the planning goals becomes especially problematic when local governments are faced with land that qualifies as both agricultural land *and* as a critical area (for example, a parcel of agricultural land that abuts a water source).

Skagit County, in particular, had to confront this tension between maintaining agricultural land and protecting critical areas. This was necessary because the county contains approximately 115,000 acres of agricultural land that have been designated under the GMA as agricultural lands of long-term commercial significance. Furthermore, a significant portion of these lands are located in areas that, although historically part of the Skagit and Samish River deltas and/or floodplains, have been cleared, diked, and drained to make them suitable for agricultural production. Some of this activity occurred as long ago as 100 years. Thus, present day agricultural production in the area depends, in part, upon this network of well established drains and dikes.

At the same time, the State has identified the Skagit and Samish Rivers watershed as the “most significant watershed in Puget Sound” in terms of salmon

recovery. Admin. R. (AR) at 4074. It is home to at least six species of salmon and two fish species that are listed under the Endangered Species Act.² As the county acknowledges, “[t]he anadromous fish stocks in the Skagit and Samish River systems are another valuable Skagit County natural resource.” Resp’t Skagit County’s Resp. Br. at 9. The resource is also of economic significance because just as farmers depend on agricultural land for their livelihood, persons involved in the fishing industry and belonging to the Tribe depend upon healthy rivers for theirs.

Despite the explicit lack of a prioritization in the planning goals section of the GMA, the legislature has provided some guidance for determining GMA priorities. Specifically, in 1995, the legislature amended the GMA to strengthen protection of critical areas:

In designating and protecting critical areas under this chapter, counties and cities *shall include the best available science* in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities *shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.*

RCW 36.70A.172(1) (emphasis added). The GMA was amended again in 1997 to provide that growth management hearings boards should “grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter” and that “[l]ocal comprehensive plans and development regulations

²Endangered and Threatened Wildlife and Plants, 64 Fed. Reg. 58,910 (Nov. 1, 1999) (Coastal-Puget Sound Bull Trout); Endangered and Threatened Species, 64 Fed. Reg. 14,308 (Mar. 24, 1999) (Puget Sound Chinook).

require counties and cities to balance priorities and options for action in full consideration of local circumstances.” RCW 36.70A.3201. But these amendments add little in the way of guidance. For example, the requirements to be guided by the “best available science” (BAS) in developing critical areas regulations and to “give special consideration” to protecting anadromous fisheries arguably conflict with the legislature’s directive that growth management hearings boards defer to local balancing of “local circumstances,” if that local balancing is not in favor of critical areas. *Id.* It is with these numerous tensions in mind that we must decide whether Skagit County’s critical areas ordinance complies with the GMA.

B. The 2003 Board Decision

1. The “no harm” standard

Riparian farm land in Skagit County qualifies as both “agricultural land” and “critical areas” under the GMA. See RCW 36.70A.030(2), (5). In an effort to “protect” both, consistent with what the GMA requires in RCW 36.70A.020(10), the county’s 2003 ordinance established a “no harm” standard that ongoing agricultural operators must meet. AR at 988 (Skagit County Ordinance 020030020, at 78) (hereinafter 2003 Ordinance). Under the 2003 Ordinance, farmers are to conduct ongoing agricultural activities “so as not to cause harm or degradation to the existing Functional Values” of critical areas. *Id.* In effect, the county’s no harm standard sets the “existing” condition of local critical areas as the baseline for measuring harm. *Id.* The county contended

before the Board that the no harm standard protects critical areas in a manner consistent with the GMA. The Board largely agreed with the county.

At the core of the Board's decision was its interpretation of the word "protect," as it appears in RCW 36.70A.172(1). The Board held that the requirement under the GMA to "protect" critical areas is met when local governments prevent new harm to critical areas. See 2003 Compliance Order, 2003 GMHB LEXIS 73, at *7-9. Accordingly, it held that the county protects these areas by adopting the no harm standard because it does not allow existing conditions to further degrade. See *id.*

The Tribe asserts here, as it did before the Board, that where an area is already in a degraded condition, it is not being protected unless that condition is improved or enhanced.³ It contends that the Board's "construction of 'protect' to allow maintenance of degraded, status quo conditions nullifies the legislature's direction to 'protect the functions and values of critical areas.'" Am. Br. of Swinomish Indian Tribal Cmty. at 38.

The Board's refusal to conflate "protect" and "enhance," the Tribe asserts, "is based on a false premise—that 'protect' and 'enhance' are mutually exclusive." Am. Br. of Swinomish Indian Tribal Cmty. at 39. The Tribe argues that because the terms are not mutually exclusive, the Board cannot "exclude from the 'protect' mandate measures which both 'protect' and 'enhance.'" Am. Br. of Swinomish Indian Tribal Cmty. at 42.

³For purposes of simplicity, we discuss similar positions and arguments that are put forward separately by the Tribe and the WEC by referring only to the first party, the Tribe. For example, both the Tribe and the WEC challenge the no harm standard in the 2003 Ordinance, but we refer to it as the Tribe's position.

In our effort to determine if the Board erred, we have endeavored to ascertain the meaning of the word “protect.” The legislature, unfortunately, has not defined “protect” within the GMA. We therefore accord the word its common meaning, and where necessary, consult a dictionary. See *Quadrant Corp.*, 154 Wn.2d at 239 (citing *Dahl-Smyth, Inc. v. City of Walla Walla*, 148 Wn.2d 835, 842-43, 64 P.3d 15 (2003)). The Tribe cites *Webster’s New World Dictionary of the American Language* (College Ed. 1966) in support of its contention that “protect” means “to shield from injury, danger, or loss” and that to protect “can result in [an object’s] enhancement.” Am. Br. of Swinomish Indian Tribal Cmty. at 39 (emphasis added). The Tribe, however, fails to recognize that even under the definition it offers, “can” is used to describe an *option* of enhancement, rather than a *requirement* of enhancement, when defining “protect.”

That difference is significant. We say that because it illustrates that something can be protected without it being enhanced. For example, an individual charged with protecting his friend’s dilapidated automobile discharges that duty despite not refurbishing it. If the car is returned in its same condition, it was protected, but not enhanced.⁴

⁴The dissent attempts to buttress its position that “protect” entails “enhance” by asserting that the automobile analogy is “unavailing.” Dissent at 6. It concludes, “[s]imply returning [the automobile] in the same condition does not demonstrate how the individual protected it; rather, it shows only that the individual returned it.” *Id.* The dissent, in our view, confuses the question of how an object is protected with the question of *whether* it was protected. Because this case turns upon what “protect” means, it is the latter question that is determinative. Asking how the object was protected is secondary. To answer the relevant question of whether an object has been protected: If it is returned in the same condition it was given, surely no new harm

The legislature has also recognized that “protect” has a different meaning than “enhance.” In several sections of the GMA, the legislature *allows* enhancement of natural conditions under the GMA without *requiring* enhancement. For example, RCW 36.70A.172(1) requires counties to “give special consideration to . . . protection measures necessary to preserve *or* enhance anadromous fisheries.” (Emphasis added.) This statute clearly gives counties a choice between preserving “or” enhancing. Furthermore, the requirement is to give “special consideration to” such measures, not necessarily to adopt them. See WAC 365-195-925(2) (a county must include “in the record” evidence of special consideration to comply with RCW 36.70A.172(1)). Another statute, RCW 36.70A.020(10), lists as a goal of the GMA to “enhance the state’s high quality of life, including air and water quality.” However, the GMA allows counties to decide how to achieve the goal of enhancing water quality without specifically requiring enhancement of a damaged fish habitat. In our judgment, water quality and fish habitat are related, but they are not the same. A duty to enhance the quality of water is not a duty to enhance fish habitat. A third example is RCW 36.70A.460. It recognizes that under chapter 77.55 RCW, fish habitat enhancement projects that meet certain criteria are entitled to a streamlined permitting process. Nothing in that chapter, however, requires a county to undertake such projects. See RCW 77.55.181.

As the foregoing illustrates, the legislature has not imposed a duty on local

has befallen it and it was protected. This is true by definition.

governments to enhance critical areas, although it does permit it. Without firm instruction from the legislature to require enhancement of critical areas, we will not impose such a duty. Therefore, to the extent that the Tribe argues that the GMA places a higher burden upon the county than the duty to prevent new harm to critical areas, we disagree. The “no harm” standard, in short, protects critical areas by maintaining existing conditions.

2. Mandatory Buffers

We next consider whether, as the Tribe contends, the GMA requires the county to establish mandatory buffers along streams and rivers on the upland strip of land. Buffers are strips of land contiguous to a watercourse, usually containing indigenous shrubs and trees. They are generally not used for agricultural purposes. See, e.g., *Am. Br. of Swinomish Indian Tribal Cmty.* at 5-6. The Tribe argued to the Board that because a provision of the GMA, RCW 36.70A.172(1), requires the county to use BAS in developing protections for critical areas and because BAS supports requiring mandatory riparian buffers, then the GMA requires the county to establish such buffers. The Board held that BAS, and by extension the GMA, does not require the county to establish mandatory riparian buffers. Again, we agree with the Board.

In reaching this determination, we began by reviewing how the GMA instructs local governments to employ BAS. The legislature has expressly delegated to counties and cities the function of developing the specific means for protecting critical areas.

See RCW 36.70A.3201. Under the GMA, counties and cities “have broad discretion in developing . . . [development regulations] tailored to local circumstances.” *King County*, 142 Wn.2d at 561 (alteration in original) (quoting *Diehl v. Mason County*, 94 Wn. App. 645, 651, 972 P.2d 543 (1999)). Moreover, the GMA does not require the county to follow BAS; rather, it is required to “include” BAS in its record. RCW 36.70A.172(1). Thus, the county may depart from BAS if it provides a reasoned justification for such a departure. See *Ferry County v. Concerned Friends*, 155 Wn.2d 824, 837-38, 123 P.3d 102 (2005); WAC 365-195-915(1)(c)(i)-(iii). Here, the county justified its decision to not require mandatory riparian buffers on the basis that doing so would “impos[e] requirements to restore habitat functions and values that no longer exist.” Resp’t Skagit County’s Resp. Br. at 44. This was based on a recognition of the fact that the vegetation that had made up the riparian buffers along streams and rivers was cleared long before there was a legal impediment to doing so.

If the omission of mandatory buffers from the county’s critical areas ordinance is a departure from BAS, it is a justified departure of the kind that is tolerated by the GMA. As we have noted above, the GMA’s requirement to protect does not impose a corresponding requirement to enhance. That holding guides us here. A requirement to develop buffers would impose an obligation on farmers to replant areas that were lawfully cleared in the past, which is the equivalent of enhancement. Without a duty to enhance being imposed by the GMA, however, we cannot require farmers within Skagit

County to replant what was long ago plucked up. The county need not impose a requirement that farmers establish riparian buffers.

C. The 2005 Board Decision

As we observed above, the Board did not fully approve the 2003 Ordinance. It withheld its approval of two parts of the ordinance: “the enforcement of watercourse protection measures and the need for more specificity in its monitoring program and adaptive management process.” 2003 Compliance Order, 2003 GMHB LEXIS 73, at *3. Furthermore, the Board ordered the county to address these issues in accord with RCW 36.70A.300(1). Consequently, as we have already noted, the county revised its critical areas ordinance in 2004 (Ordinance 020040011) (hereinafter 2004 Ordinance). The Tribe again challenged the county’s compliance with the GMA. After reviewing the county’s effort, the Board held in early 2005 that the watercourse protection measures were now compliant with the GMA. 2005 Compliance Order, 2005 GMHB LEXIS 2. It withheld approval, however, of the monitoring program and adaptive management sections of the 2004 Ordinance. The county appealed that decision, arguing that the Board followed improper procedure in reaching its decision and that, in any case, the Board should have approved the revised ordinance.

1. Alleged Procedural Errors

The county argues, first, that the Board committed procedural error by consulting an outside expert and consulting factual materials that were not a part of the record that

was submitted to the Board. Specifically, it asserts that the Board erred in using a technical adviser, Dr. Oscar Soule,⁵ without giving the parties an opportunity to rebut or object to the technical advice provided by Dr. Soule. This argument overlooks the fact that the Board is expressly authorized to consult experts “[i]f it determines that advice from scientific or other experts is necessary or will be of substantial assistance in reaching its decision.” RCW 36.70A.172(2).⁶ While the GMA provides no specific procedure for the utilization of an expert under RCW 36.70A.172(2), the practices and procedures of the growth management hearings board are governed by the APA, chapter 34.05 RCW. RCW 36.70A.270(7). A provision in the APA permits the Board to engage in ex parte communications with persons “who have not participated in the proceeding in any manner, and who are not engaged in any investigative or

⁵Dr. Soule is a retired professor of environmental studies at The Evergreen State College.

⁶The concurrence/dissent cites various statutes and a regulation in support of its conclusion that “[i]mproper procedures [i.e., reliance on Dr. Soule] are also grounds for reversal.” Concurrence/dissent at 9 (citing RCW 36.70A.290(4), .270(7); RCW 34.05.449(2), .452(3); WAC 242-02-540). None of the cited statutes or the regulation provides justification for reversing the Board’s decision. Furthermore, they do not override the clear authorization for ex parte consultation with experts that RCW 36.70A.172(2) and 34.05.455(1)(c) provide. For example, RCW 36.70A.270(7) directs the Board to comply with the APA and WAC provisions for using evidence in its decisions. Those provisions, including the two cited by Justice J.M. Johnson, WAC 242-02-540 and RCW 36.70A.290(4), provide the Board with the discretion to supplement the record with additional evidence. Additionally, RCW 34.05.449(2) provides for a response to introduced evidence only “[t]o the extent necessary” as determined by the Board. Finally, RCW 34.05.452(3) merely provides that “[a]ll testimony of parties and witnesses . . . be made under oath.” Thus, if there is any tension between these provisions and the Board’s use of Dr. Soule, and it appears that there is not, it does not justify reversing the Board’s decision.

prosecutorial functions in the same or a factually related case.” RCW 34.05.455(1)(c).

Accordingly, we conclude that the Board did not err in consulting Dr. Soule.

The county claims, additionally, that the Board erred in using nonrecord materials to define the concept of “adaptive management.”⁷ The county argues that the Board is prohibited from consulting nonrecord materials because “[f]indings of fact shall be based exclusively on the *evidence* of record in the adjudicative proceeding and on matters officially noticed in that proceeding.” Skagit County’s Opening Br. at 38 (emphasis added) (quoting RCW 34.05.461(4)). In our view, the Board did not err in considering these nonrecord materials because the materials were not evidence. Rather, the Board used the publications to assist in interpreting the term “adaptive management” as used in WAC 365-195-920(2). See 2005 Compliance Order, 2005 GMHB LEXIS 2, at *21-22. Such use of scholarly materials does not, in our view, transform these materials into “evidence.” In sum, the Board’s use of the nonrecord

⁷The amount of nonrecord materials is very slight in comparison to the entirety of the administrative record. The materials in question consisted of four publications:

“(1) Hymanson, Kingma-Rymek, Fishbain, Zedler and Hansch, California Coastal Commission: ‘Procedure Guidance for Evaluating Wetland Mitigation Projects in California’s Coastal Zone’;

“(2) ‘Use of Monitoring and Adaptive Management to Promote Regeneration in the Allegheny National Forest,’ Lois DeMarco, USFS [United States Forest Service] National Silvicultural Workshop, Kalispell, Montana;

“(3) Salafsky, Margoluis and Redford, “Adaptive Management: A Tool for Conservation Practitioners,” World Wildlife Fund, Inc. (2001); and

“(4) The British Columbia Forest Practices Code.” Skagit County’s Opening Br. at 17. A reference to any of these four documents occurs only on three pages of the Board’s 2005 order.

materials to aid it in defining the term “adaptive management” did not violate the APA or the GMA.

2. Alleged Substantive Errors

We next address the county’s substantive challenges to the Board’s 2005 decision. The Board determined that the county’s revised ordinance failed to bring its monitoring and adaptive management processes into compliance with the GMA. It concluded that the monitoring process provided for in the 2004 Ordinance lacked the necessary benchmarks for comparing the data it gathered. 2005 Compliance Order, 2005 GMHB LEXIS 2, at *25-26. The Board concluded, additionally, that even if the monitoring process was adequate in detecting degradation of critical areas, the ordinance did not have an effective adaptive management process that was capable of responding to the detected harm. *Id.* at *32-33.

The monitoring program set forth in the 2004 Ordinance consists of two components: a water quality monitoring program and a salmon habitat monitoring program. The county contends that both programs “describe in great detail the schedule for monitoring, methods for selecting sites, monitoring parameters and protocols (how and what will be measured), quality control procedures, and data assessment procedures.” Skagit County’s Opening Br. at 13. This contention overlooks the fact that the Board took issue with how the county proposed to use the data it collected. More specifically, the Board held that the county could not sufficiently

No. 76339-9

analyze the data because its monitoring program lacked appropriate benchmarks to compare data as it was collected. See 2005 Compliance Order, 2005 GMHB LEXIS 2, at *25-26.

We agree with the Board that the county has not established appropriate benchmarks. In fact, the county is unable to produce a description of any such benchmarks, despite its statement that “the County’s program *does* include sufficient benchmarks.” Skagit County’s Opening Br. at 50. That same brief contains an assertion by the county that it *cannot* adopt benchmarks because salmon habitat monitoring program “science has not established[,] and the state has not adopted[,] specific numbers or quantities” to use as benchmarks. *Id.* at 54. Any deficiencies in the State’s monitoring process do not, however, excuse the deficiencies of the county’s monitoring process. A benchmark is needed to compare data as it is recorded. Data that cannot be analyzed, via comparison to the benchmark, is essentially meaningless because a harm cannot be detected unless there is a benchmark by which to define a harm in the first place.

We are also unpersuaded by the county’s argument that in the absence of an adequate benchmark, it does the “next best thing” by proposing to monitor current conditions in an effort to develop a benchmark in the future. Skagit County’s Opening Br. at 56. No indication is given as to when this process will be complete. Instead, the county merely notes that it will take at least three years to complete the initial

monitoring of current conditions before a benchmark is established. *Id.* At best, then, the county can provide full compliance with the GMA three years after it went before the Board and argued that it was compliant. We find no reason to reverse the Board's holding that such an assurance by the county is insufficient.⁸

The issue of the benchmarks in the monitoring program dovetails into what the role of adaptive management is in the protection of critical areas. When a monitoring system detects newly discovered risks to critical areas from land use or development, adaptive management is a process used to confront the scientific uncertainty surrounding them. WAC 365-195-920. As part of the GMA's regulations describe it, critical areas regulations are "treated as experiments that are purposefully monitored and evaluated to determine whether they are effective and, if not, how they should be improved to increase their effectiveness." WAC 365-195-920(2). An effective adaptive management program thus "relies on scientific methods to evaluate how well regulatory

⁸The concurrence/dissent asserts that we should reverse the Board's 2005 decision because the Board failed to give the proper "deference" to the county's "assurance[]" of future compliance under the "clearly erroneous" standard. Concurrence/dissent at 7. Without question, the "clearly erroneous" standard requires that the Board give deference to the county, but all standards of review require as much in the context of administrative action. The relevant question is the degree of deference to be granted under the "clearly erroneous" standard. The amount is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the county's actions a "critical review" and is a "more intense standard of review" than the arbitrary and capricious standard. See, e.g., *Cougar Mountain Assocs. v. King County*, 111 Wn.2d 742, 749, 765 P.2d 264 (1988). And even the more deferential "arbitrary and capricious" standard must not be used as a "rubber stamp" of administrative actions. See *Ocean Advocates v. United States Army Corps of Eng'rs*, 361 F.3d 1108, 1118, 1119 (9th Cir. 2004).

and nonregulatory actions achieve their objectives.” *Id.* In short, under GMA regulations, local governments must either be certain that their critical areas regulations will prevent harm or be prepared to recognize and respond effectively to any unforeseen harm that arises. In this respect, adaptive management is the second part of the process initiated by adequate monitoring.

In its 2005 Compliance Order, the Board did not approve the county’s adaptive management program.⁹ It noted that “clear goals, objectives, performance standards, and a well-defined monitoring program” are essential to a successful adaptive management program and that the county did not demonstrate them. AR at 1312-13. Because we agree with the Board that the monitoring system set forth in the 2005 Ordinance by the county is fatally flawed, we need not reach the question of whether its adaptive management system complies with the GMA. Without a compliant monitoring system, the adaptive management program cannot be compliant as the county cannot adequately adapt its management of critical areas if it is unable to adequately detect changes to them.

V. CONCLUSION

⁹The Board specifically held, “The question is what will work to protect fish habitat in the same environment where ongoing agriculture is well-functioning and being conserved. Adaptive management is a creative tool to explore possible solutions, but it requires rigor, commitment, and prompt change in response to indications of problems in order to ensure that the county’s less-than-precautionary protections of fish habitat in ongoing agricultural lands comply with RCW 36.70A.040, .060, and .172. The monitoring and adaptive management system . . . still does not establish an overall protection strategy for fish and wildlife habitat in ongoing agricultural lands that complies with these provisions of the GMA.” AR at 1304-05.

No. 76339-9

In sum, we affirm the Board's 2003 and 2005 Compliance Orders.

No. 76339-9

AUTHOR:

Chief Justice Gerry L. Alexander

WE CONCUR:

Justice Tom Chambers

Justice Charles W. Johnson

Justice Barbara A. Madsen

Justice Mary E. Fairhurst

Justice Bobbe J. Bridge

**BEFORE THE WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD**

SWINOMISH INDIAN TRIBAL COMMUNITY, et al.,

Petitioners,

and

WASHINGTON ENVIRONMENTAL COUNCIL, et al.,

Intervenors,

v.

SKAGIT COUNTY,

Respondent,

and

AGRICULTURE FOR SKAGIT COUNTY, et al.,

Intervenors.

No. 02-2-0012c

**COMPLIANCE
ORDER**

I. OVERVIEW OF CASE

Over the past six years the County has brought its entire Critical Areas Ordinance (CAO) into compliance with the Growth Management Act (GMA, Act) except for protection of critical areas within agricultural lands of long-term commercial significance. Once again, the County comes to us with an ordinance and resolution that it hopes will finally bring its entire package of critical area protections into compliance with the Act.

Our goal in the long series of cases dealing with on-going agriculture and critical areas protection has been twofold:

(1) Establish Best Management Practices (BMPs) and development regulations (DRs) that adequately address both GMA obligations to protect critical areas and anadromous fish, as well as the GMA obligation to conserve agricultural lands of long-term commercial significance and the farmers who work those lands.

(2) Encourage all parties to work together to expeditiously implement actual, on-the-ground fish habitat protection in those ongoing agricultural lands. This second goal is based on the truism that a good plan implemented is better than a perfect plan always on the drawing board but never implemented.

Common sense tells us that farmers are much more apt to implement protective critical areas measures if they perceive those measures to be necessary, reasonable, fair, effective, and applicable to their local circumstances. If the farmers perceive that the required measures are unreasonable, unfair, unnecessary, ineffective, and/or mandated by outsiders who have never worked the land or faced the demands of making a livelihood from farming, they are very unlikely to implement those changes unless an army of enforcement officers force them to do so.

At page 9 of the December 30, 2002 FDO/CO in this case we said: “Protection of critical areas and anadromous fish has always been the key, not the specific mechanism of achieving that goal.” We also said, at page 27:

We ask all parties to put down their weapons and work together to develop and implement a plan which meets the GMA obligations to protect critical areas and fisheries and also the GMA obligations to conserve agricultural lands of long-term significance and the farmers who work those lands.

Final Decision and Order/Compliance Order (December 30, 2002 at 9).

Unfortunately, the parties continue to battle over the compliance of this latest attempt to balance the GMA requirements for conservation of on-going agriculture with the protection of critical areas. After months of difficult deliberation, the majority of the Board determines here that the County is in compliance with the Act except for the enforcement of watercourse protection measures and the need for more specificity in its monitoring program and adaptive management process.

We hope the parties will now work together to get these provisions implemented, add more detail to the monitoring and adaptive management provisions and put additional energy and dollars into estuarine recovery projects to enhance salmonid rearing habitat in Skagit County.

II. STANDARD OF REVIEW, PRESUMPTION OF VALIDITY, BURDEN OF PROOF

Ordinances and Resolutions adopted in response to a finding of noncompliance are presumed valid. RCW 36.70A.320.

The burden is on petitioners to demonstrate that the action taken by Skagit County is not in compliance with the requirements of the Growth Management Act (GMA, Act). RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), we “shall find compliance unless [we] determine that the action by [Skagit County] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” In order to find the County’s action clearly erroneous, we must be “left with the firm and definite conviction that a mistake has been made.” *Department of Ecology v. PUD 1*, 121 Wn.2d 19, 201 (1993).

Thus, it is not our role under the provisions of GMA to determine how the County could better protect critical areas in ongoing agricultural lands. The legislature has made it perfectly clear that our role is only to determine if petitioners have met their burden of showing that the County's chosen approach does not comply with the Act.

III. SKAGIT COUNTY'S OVERALL APPROACH AS CODIFIED IN ORDINANCE 02003002 AND RESOLUTION R20030210

Skagit County contends that Ordinance 02003002 (Ordinance) (Ex. 286) and Resolution R20030210 (Resolution) (Ex. 285) represent its best efforts at meeting GMA obligations to protect both existing agriculture and the existing functions and values of fish habitat in agricultural areas. The County points out that it has worked with state agencies whose mission involves assistance in implementing the GMA and protecting water quality and fish and wildlife habitat conservation areas (FWHCA). The Department of Community, Trade & Economic Development (CTED) and the Department of Ecology (Ecology) wrote encouraging letters about the County's process and product (Ex. 194(7 & 8); Ex. 284(24); Ex. 288). The County further contends that its efforts are based on a careful assessment of the science as applied to the specific context in Skagit County (Ex 286, at 13-14, Findings 32 -33). The County's efforts are based on the County's unique understanding of the local circumstances where this ordinance will be applied. The County contends that, taken as a whole, the County's Ordinance and Resolution satisfy the GMA's requirements for protection of CAs in the context of existing agriculture. The County asks us to say "Good enough" and find the County in compliance on this one remaining provision of its critical areas ordinance (CAO). The State agencies in the record have said let's try this and get it on the ground and the County asks this Board to do the same.

On pp. 9-10 of the County's August 8, 2003 response brief, the County states:

Petitioners'/Intervenors' demands for more should, finally, be rejected and the County's Ordinance and Resolution found to be in compliance with GMA. Finding compliance

will then enable the County to focus its efforts and its resources on implementing the programs under the Ordinance and Resolution, in particular the monitoring and adaptive management components identified in the Resolution. It will also free the County to fulfill the expressed commitment to pursuing habitat restoration projects with other interested parties, so that some real, on-the-ground, salmon protection and restoration efforts can get underway. The State agencies have recognized it is time to move forward, beyond GMA compliance into implementation. [Exhibit 194(7); Exhibit 194(8); Exhibit 284(24); Exhibit 288.] The Hearings Board should agree.

County's Response Brief for Compliance Hearing at 9-10

This quote emphasizes one of the major challenges of this Board in accessing the Best Available Science (BAS) in the record while giving consideration to local circumstances. It is clear that the BAS requirements of 36.70A.172 must be balanced with the emphasis in RCW 36.70A.3201 to fully consider local circumstances in making our determinations. As the County points out, it has the best knowledge of local circumstances after years of walking the contested area, studying the situation, receiving public input, and analyzing the alternatives. The Planning Commission (PC) and the Board of County Commissioners (BOCC) took extensive site tours to better understand the local circumstances. Therefore, the County asks that the Board to give them deference.

A recent Clallam County Superior Court decision by Judge George Wood found that in several instances, we impermissibly exalted science over local circumstances. The judge reminded us that local conditions often dictate the applicability of BAS. Ex. 262(3). While Judge Wood's decision is not binding here, his observations have certainly been considered.

Finding 30 of the May 21, 2003 Planning Commission recorded motion explains how local and state finances impacted the range of solutions available to the County:

Both the State and the County face significant funding constraints in implementing the ongoing monitoring, adaptive management and salmon habitat restoration program. As such, the ordinance strives to complement, not duplicate, programs, and provides an increased level of County cooperation and coordination, with the expectation that more can be accomplished with the limited funds. Lack of staff and funding is also part of the reason why the ordinance includes individual and voluntary solutions in addition to agency-prepared farm plans. The ordinance and the accompanying resolution regarding monitoring, adaptive management and habitat programs anticipates prioritizing efforts to accomplish the greatest benefit using limited available funding.

Exhibit 286, Attachment 5, at 41.

We commend the County for stretching scarce state and local dollars by developing an Ordinance that strives to complement, and not duplicate, other programs, and provides an increased level of County cooperation and coordination, with the expectation that more can be accomplished with the limited funds. We understand that lack of staff and funding at the Department of Ecology, Department of Fish and Wildlife, Skagit Conservation District and the County was a major influence on the County's decision to include individual and voluntary solutions in addition to agency-prepared farm plans. We also understand that the County is trying to prioritize its efforts to accomplish the greatest benefit to anadromous fish with the very limited available funding. We know that a perfect program that is impossible to fund gives no protection at all.

This Existing Agriculture-Critical Areas issue hits right at the heart of the GMA's dual mandates to conserve existing, ongoing agricultural activity and to protect critical areas (CAs). RCW 36.70A.020(8), (9); RCW 36.70A.060 (1), (2).

As the County has reminded us, the record demonstrates that no other jurisdiction in the state has been required to go to the lengths that Skagit County has been forced to go to study, document and impose local regulations upon existing agricultural activity (DEIS, Ex. 165(1), at 1-7). This Board and Department of Fish and Wildlife (WDFW) have both acknowledged that Skagit County is way out front on this GMA dilemma.

We must also keep in mind where this ordinance does not apply. This ordinance does not apply to areas where forested riparian corridors still exist in the agricultural zone. (SCC 14.24.120(1)), Ex. 286, at 77-78. Those areas are not defined as “ongoing agriculture” under the ordinance and are subject to the standard critical areas protections in SCC 14.24.530(2) & (3); Ex. 315(16), (18), of case 00-2-0033c Index. The ordinance does not permit expansion of existing, ongoing agricultural areas into adjoining lands unless such expansion can comply with all other requirements of the County’s CAO. (SCC 14.24.120(2)(b), Ex. 286, at 78).

This distinction is very important to understand what habitat area functions and values still exist and need to be protected.

We commend the County for providing an extensive public review process in developing this ordinance. The draft environmental impact statement (DEIS) and draft ordinance were released for public review and comment on February 12, 2003. (Ex. 286, at 35-36, Finding 12). Comments were received until March 31, 2003. *Id.* The Planning Commission conducted 12 nights of briefings and deliberations on the ordinance, including consideration of over 1,800 pages of public comments. *Id.* Numerous changes were made to the ordinance in response to those comments. Ex. 251(5). Planning Commission Recorded Motion, Finding 49, shows numerous changes between the February 12, 2003 draft and the May 2003 final Planning Commission revision.

A final EIS was prepared, also responding to the comments on the DEIS (Ex. 268). The BOCC held a public hearing and took written comments on the revised ordinance before adopting the final ordinance and resolution (Ex. 286, Ordinance at 1-3; Ex. 285, Resolution at 1-2).

We note in this process that Skagit County committed to, and completed, a programmatic EIS to assess options for ongoing agriculture. These alternatives included:

- (1) No Action (exemption of existing agriculture) Alternative;
- (2) Mandatory Conservation Reserve Enhancement Program (CREP) Style Buffer Program Alternative
- (3) Site-specific Best Management Practices Alternative; and
- (4) Mandatory Buffers as Required by the Current County CAO Alternative.

(Ex. 165(1) (DEIS); Ex. 268 (FEIS))

The state agencies reviewing the County's new ordinance commended the County for undertaking an EIS and for the thoroughness of its review. (Ex. 194(7), March 31, 2003 letter from CTED; Ex. 284(24), June 13, 2003 fax from CTED).

Skagit County spent significant effort meeting with interest groups and state resource agencies to solicit comments on its analysis and on the ordinance in an effort to do its very best job to take advantage of that expertise and respond to reasonable concerns. (Ex. 104, September 23, 2002 letter from County soliciting input; Ex. 222, April 21, 2003 memo from County with questions for agencies; Ex. 256, May 28, 2003 emails between County staff and WDFW; Ex. 286, at 53-55, Finding 48).

State resource agencies again commended the County on its efforts and noted that this indicates a significant beginning to the ongoing efforts necessary to address salmon and agricultural issues in Skagit County. A March 27, 2003 letter from Ecology

states: “We believe the proposed ordinance is headed in the right direction and that a cooperative program utilizing the local, state and federal agencies can achieve protection and conservation of fish and wildlife habitat”. (Ex. 194(8))

The Ordinance is based on the requirement that existing ongoing agricultural activities must be conducted from here forward such that those existing ongoing activities do not harm or degrade the existing functions and values of the fish habitat.

This leads us to a discussion of one of the overarching disagreements between the parties: “When does protection become enhancement and is enhancement required?” The County contends that the Act only requires protection of the existing functions and values of critical areas. Protection means preserving the existing situation from further degradation. The County points out that the evidence in the record demonstrates that the existing environment of critical areas in the deltas of the Skagit and Samish Rivers has been altered from its original, natural condition by diking and drainage infrastructure and the agricultural operations that have been conducted on some of these lands for nearly a century. Therefore, the County believes the following:

There is nothing in the GMA that requires the County to enhance fish habitat by adopting regulatory measures to reshape the landscape to some prior or restored condition. Both the Tribe and WEC demand that the County adopt a regulation that imposes a mandatory buffer along salmon-bearing streams, which would require that farmers take that land (placed in the buffer) out of existing agricultural production. The GMA contains no such requirement where there is no specific showing that the agricultural activities on those lands are degrading habitat.

(County’s Response Brief at 38)

The County further states that under the GMA, fisheries do not trump agriculture of long-term significance and the County is in the best position to find the proper

balance. They point out that we found in *Mitchell v. Skagit County*, WWGMHB No. 01-2-0004c that enhancement of CAs is not required by the Act. The County contends that the Tribe's Best Available Science (BAS) relates to enhancement and not protection. The County argues that the Act requires that the County protect existing functions and values, but does not require restoration or enhancement.

The County and agricultural community resent the Tribe and Washington Environmental Council's (WEC) basic assumption or assertion that all farming is causing harm to fish. The County contends that the record in this case does not support that assertion. The County points out that the references cited by WEC and the Tribe refer to agriculture generically, without reference to implementation of the kinds of practices and best management practices(BMPs) that are built into Skagit County's Ordinance to prevent harm. Further, the County shows that documents cited by the Tribe describe, primarily, dry land agriculture in Eastern Washington. (Tribe's July 21, 2003 Brief at 25, 28). While the County concedes that unchecked livestock access to streams, unregulated use of pesticides, unregulated irrigation practices, etc. would have impacts on fish habitat, the County contends Petitioners have not presented evidence from the record how agricultural practices conducted pursuant to the obligations of this Ordinance will cause such harm. That same document cited above by the Tribe at 28 also notes the successes of several of the voluntary BMP approaches similar to what the County is proposing. (Ex. 21, Ecology Publication No. 99-26 (April 2000) *Washington's Water Quality Management Plan to Control Nonpoint Source Pollution*, at 76-77). In contrast, many documents in the record suggest that agricultural practices, when conducted with BMPs and the "do no harm" standard, are likely to prevent or at least minimize these effects. (Ex. 194(8), at 3-4; Ex. 194(9), March 31, 2003 letter from WDFW at 2.) The DEIS also indicated that if BMPs, tailored to the problem that is causing harm, are used (as required by this

Ordinance if harm is occurring), then the impacts to fish habitat are likely to be mitigated. (Ex.165(1)).

The County points out that this Board previously approved reliance on voluntary BMPs in Skagit County, provided monitoring and a regulatory fallback are included. *Friends v. Skagit County*, WWGMHB Case No. 96-2-0025 (Compliance Hearing Order, September 16, 1998 at 25.) The County demonstrates that this Ordinance not only relies on voluntary BMPs, but also includes mandatory watercourse protection measures, requires BMPs if harm is shown to be occurring, and substantially expands the monitoring and enforcement requirements. Thus, the County contends, this Ordinance addresses the concerns we expressed about the voluntary BMP program in the above 1998 decision. Further, in Resolution No. R20030210, the BOCC committed to a substantially revised and expanded monitoring and adaptive management program and expressed a County commitment to partner with the other agencies and interested parties in habitat restoration efforts. Ex. 285.

The County further contends that there is much public comment in the record that the great majority of agricultural operations are not causing harm. If some are, the Ordinance requires that farmers must modify their practices. Farmers argued strongly that buffers are not required and trees are not needed where they never were. Therefore, performance standards for a mature forest stand are not appropriate for the local circumstances. The farmers concluded that a requirement for return to a mature forest stand in this situation makes no sense and would be at a huge financial burden to the farmers. One-half of the Planning Commission thought this ordinance is over-regulating agriculture and refused to vote for its recommendation to the BOCC.

Findings 23 through 25 (May 21, 2003 Planning Commission Recorded Motion, Attachment 5 to Ordinance 020030020, (Ex.286) clearly state the County's position on this issue:

23. The existing condition of these watercourses and associated fish habitat is altered from the forested natural state identified in much of the scientific literature that details the historic (pre-European settlement) environmental conditions of Skagit County. This ordinance must recognize the existing context and characteristics of the area where the ordinance is to be applied. It only applies to those areas where agricultural activity exists and is ongoing, where historic, natural, forested riparian buffers were long ago removed, and/or where natural watercourses were modified by diking and drainage district operations pursuant to their statutory authority under Titles 85 and 86 RCW. The salt water dikes that altered the estuary were constructed in the late 1800's. In those agricultural areas where forested or vegetated riparian buffers still exist, (where a pasture or field has not been established up to the edge of a watercourse) the standard provisions of the CAO riparian buffers in SCC 14.24.530 apply and will protect those existing riparian corridors. Based on the existing, altered riparian condition of the agricultural areas subject to this ordinance, GMA's obligation to protect existing functions and values of the riparian habitat means something different than it would in a situation where the natural riparian buffer had not previously been disturbed. This fact has been taken into account in developing the ordinance.

24. The GMA does not require enhancement. According to Judge Pomeroy's ruling, the GMA does not require enhancement of critical areas or their functional values, but only protection of existing characteristics and functional values (see finding 10 above). To the extent that the ongoing agricultural areas to which this ordinance applies have already lost some of the functions and values as compared to a historic, pre-agriculture, natural state, the GMA does not obligate property owners to restore areas to that prior state. This is especially relevant for forested

riparian buffer, channel complexity, shade and large woody debris components of the functional values for fish habitat. Those characteristics no longer exist in many of the locations to which this ordinance applies.

25. Those habitat functions and values that no longer exist in Ongoing Agricultural areas should be addressed in a broader, multi-party and County-wide effort, not exclusively in regulation of the ongoing agricultural operations that are the subject of this ordinance. To address broader habitat needs that are an important part of restoring salmon runs in the County, the Planning Commission recommends a proposed Resolution that includes County commitments to ongoing monitoring, adaptive management and salmon habitat restoration efforts on a broader, county-wide and multi-party cooperative approach.

Exhibit 286, at 40, Findings 23-25

The County further contends that a blanket mandatory buffer requirement for riparian buffers would jeopardize eligibility for federal farm programs, including the CREP program which provides substantial resources and incentives to establish riparian buffers (Exhibit 95 and Case 00-2-0033c Index, Exhibits344). The County had to structure its program to preserve federal farm program eligibility. (Exhibit 286 at 37-38, Finding 17). The County believes that the “do no harm”/BMP approach accomplishes that balance. (Exhibit 284(28)).

The County further believes that if it followed the Tribe’s and WEC’s insistence for mandatory buffers on all agricultural lands regardless of any showing of specific adverse impacts of agricultural activities on salmon habitat, they would push GMA beyond its constitutional limits. The Tribe’s and WEC’s interpretation of GMA is contrary to requirements that limitations on the use of land be proportional to the impacts created by the use of the land.

The constitutional limitations of critical areas ordinances were addressed in *HEAL v. CPSGMHB*, 96 Wn. App.522, 979 P.2d 864(1999). The *HEAL* Court noted that GMA policies and regulations must comply with the nexus and rough proportionality limits placed on local government power or else they could face constitutional problems. The *HEAL* Court stated that the nexus and proportionality standard presented “an important constitutional limitation on local governments’ discretion in adopting policies and regulations under GMA. *Id.* at 533. The County states that it will not impose a requirement that a farmer take land out of existing agricultural production and put it in a buffer where there is no specific showing that the current agricultural activities on the land are harming fish habitat. The County contends that its choice is not only supported by the GMA, it is required by the Constitution.

The County similarly responds to the Tribe and WEC’s complaints that the County’s Ordinance does not impose obligations or remedies, or initiate enforcement, unless there is a proven, direct link to the activities of the landowner or operator (Tribe 7-21-03 Brief at 22; WEC Response Brief at 26-27). The County contends that if the County cannot identify that link, imposing burdens or initiating enforcement would not meet necessary constitutional and statutory requirements for reasonable regulation.

The Tribe disagrees, claiming that the Act requires better than the status quo. The fatal flaw is that the County’s approach is premised on allowing damaging practices as long as they do not make conditions worse. Thus, the stream banks remain degraded. The areas along the streams are currently degraded and ongoing agricultural use causes recurring damage and the land is not allowed to heal. The Petitioners consider this approach to be noncompliant. They ask that harmful agricultural activity be stopped and that the land be allowed to heal. The Petitioners are concerned that a simple no-harm standard will not protect all the functions and values of FWHCAs.

Petitioners contend that GMA requires protection of all seven functions, and voluntary BMPs, without buffers along every stretch of every salmon-bearing stream or stream that contributes to a salmon-bearing stream, put fish at risk. They believe that salmon are at too great a risk to be dependent on a voluntary approach such as this because watercourse measures leave the choice of BMPs to the farmer, with no County review. The Petitioners point out that farmers must guess as to the adequacy of the BMPs they choose. Further, since only significant degradation is not allowed, additional gradual harm will be allowed to occur.

We said in the 2002 Order, “In order to comply with the Act, the County must adopt a plan and development regulations which protect critical areas and anadromous fish habitat in ongoing agricultural lands.” *Swinomish Indian Tribal Community v. Skagit County*, FDO 2002, at 25. The Tribe asks: Is the County, with its new approach to protect fish, actually protecting fish as required by GMA and the previous order? RCW 36.70A.060(2), .172(1).

The Tribe’s major concerns are:

- (1) GMA does not authorize a county to exempt from a CAO farming activities that cause significant harm to the functions and values of the salmon habitat.
- (2) The No-Harm Standard does not protect all of the necessary functions and values of fish habitat as required by the GMA. Because all seven functions must be fulfilled in order for fish to survive, providing for only some functions does not meet the requirements of the Act. Temperature moderation, sediment and pollutant filtration, litter fall and nutrient input, bank stabilization, erosion control, shading, large woody debris and instream habitat must all be provided.
- (3) If the County just maintains the degraded condition it does not and will not protect functions and values of CAs or anadromous fish. The Tribe is only asking for protection. This may improve conditions, but the Tribe is not asking for active

enhancement. Even though most streams are Type 4 and 5 nonfish-bearing streams, they still have impact on fish-bearing waterways.

The Tribe and WEC contend that the County's "do no harm" standard, on its face, protects only four of the seven essential functions. The County defines "do no harm" to mean:

- (i) meeting state water quality standards;
- (ii) meeting requirements of any Total Maximum Daily Load (TMDL) established by Ecology pursuant to RCW 90.48;
- (iii) meeting applicable requirements of the state Hydraulic Code (RCW 77.55);
- (iv) meeting specific watercourse protection measures; and,
- (v) no evidence of significant degradation to the existing fish habitat characteristics of the watercourse from those characteristics identified in the baseline inventory described in Resolution No. R2003210 that can be directly attributed to the agricultural activities that are described in the ordinance.

Intervenor Washington Environmental Council (WEC) supports the Tribe's positions. Further, it reinforces that reasonable regulation of recurring activities is not enhancement; it just limits future activities. Since the County's approach fails to protect all seven functions necessary for fish, it explicitly allows harm. Since it does not require buffers, it fails to include BAS. Further, farmers will not be required to choose a buffer if the current voluntary plan fails.

WEC further asserts that BAS shows that extinction of endangered salmonid species is inevitable within the decade. (WEC Response to County's Statement of Actions Taken to Achieve Compliance at 3.) The County responds that this statement relies on old data and does not include more recent data that show several salmon runs have substantial increases. A simple trend analysis, as was described in the exhibit cited by

WEC, using the more current information would show positive rather than negative trends for many species described. (County Response Brief at 6.) (Ex. 165(2) DEIS Vol. 2, Table 2 and 7(8), 2002 SASSI Update.) The DEIS, Chapter 3, identifies increased estimates for many runs in more recent years (Ex. 165(1), at 3-21 to 3-28).

The County claims that Resolution No. R2003210 on page 7 does make it clear that farmers “shall use BMPs” and “shall” use Watercourse Protection Measures.” Further, the County defines “significant” as measurable and believes it would be unfair and/or impossible to require them to take action on a change that was not measurable.

Also, the Ordinance makes these substantial requirements clear:

(c) Owners or operators regulated under this subsection shall conduct their Ongoing Agricultural operations in a manner sufficient to meet the no harm or degradation standard of subsection (3)(a) above, including, if necessary, developing and implementing BMPs to meet this standard. ... BMPs must be designed for site-specific conditions and shall include pollution prevention and control measures that effectively address the following management areas:. ... (list omitted) (emphasis added).

SCC 14.24.120(3) Ex. 286, at 78-79

The County further states:

The Ordinance does not, as the Swinomish Indian Tribal Community (Tribe) asserts, allow the farmer to “do nothing at all” or to allow “cows to trample creekside vegetation and defecate in the stream,” or conduct agricultural practices “to the whim of the landowners and operators.” (Tribe’s Motion for Non-Compliance and Sanctions and Memorandum in Support Thereof (Motion) at pp. 16, 25, 27.) The Ordinance requires no harm. If BMPs are the way to accomplish no harm, then the Ordinance requires BMPs. Further, according to the resource agencies, if a farm seeks an approved farm plan and that farm contains a

watercourse that contains fish, riparian buffers would be one of the BMPs implemented. [Exhibit 221, notes from meeting of County staff with Natural Resources Conservation Services (NRCS) and Soil Conservation District (SCD).] It is correct under the Ordinance that if a farming operation is not causing any harm, it will not be obligated to change something or do something. However, if there is no harm, not enforcing or not regulating is not a violation of the GMA.

Skagit County Response Brief at 11.

The County also points out that SCC 14.24.120(1) not only recognizes the altered state of the existing ongoing agricultural area to which the Ordinance applies, but also explains the basic purpose and intent of the Ordinance. The County took into consideration the range and scope of other existing regulatory programs to avoid duplication or inconsistent overlap. By doing this, the County did not abdicate its GMA responsibility to those other programs. Rather, consistent with an existing Memorandum of Agreement with Ecology, the County is committing to cooperate and coordinate its efforts with the existing programs and efforts of the state agencies. The agencies concurred with this approach. (Ex. 194(7); Ex. 194(8); Ex. 288.)

Ecology agrees with use of the State Water Quality standards as the appropriate measure for water quality impacts from agricultural operations (Ex. 188). The County claims that neither the Tribe nor WEC points to any evidence in the record that those standards are inadequate for fish, for the parameters identified. Further, using narrative standards rather than exclusively a numeric standard is not proof that there is no standard.

As to reliance on TMDLs, the County states:

Here, the County has committed, within its Ordinance, to serve as the regulatory tool, if necessary, to implement TMDL requirements. If a TMDL determines that a mandatory, regulatory change is the only solution to

address an impaired water, than the County Ordinance and Resolution commit to that solution. TMDLs have been recognized as really the only effective method to address larger, impaired waterbody situations where nonpoint sources are at least a part of the problem. ECY supports this approach. The County has included it. A similar approach to TMDLs was upheld recently in Clallam County. (Exhibit 262(3)).

The fact that a TMDL is not initiated until a water body is impaired does not negate the significance of this commitment. If a waterbody is not impaired, if existing agricultural activities are being conducted in a manner to meet State Water Quality Standards, then there is no impact demonstrated and no reason to impose additional regulations or other requirements. The Tribe and WEC implicitly want this Hearings Board to rule that agriculture must be regulated or, perhaps, must be penalized, even if there is no evidence of any harm. That is not the GMA standard or requirement.

Skagit County's Response Brief for Compliance Hearing at 18-19

The County further points out that the current ordinance, at SCC 14.24.120(4)(c)(iv) (Ex. 286, at 81) relies on information contained in the SHIAPP Limiting Factors Analysis, prepared by the Washington Conservation Commission, which represents the best available information on fish presence and fish habitat characteristics. (SHIAPP Limiting Factors map, Ex. 295.) This mapping data supports the County's long-held assertion that most of the drainage district watercourses located upstream of tidegates, floodgates, and pump stations are not identified as salmonid habitat. The County contends that using this data analysis as BAS removes the "not knowing" whether fish are present from previous decisions.

The County explains that the required Watercourse Protection Measures represent a significant (and first of its kind) local attempt to impose agricultural practice standards

on those practices which the County determined have the greatest potential to cause harm or degradation.

The County further explains that initially it did not include in its proposed ordinance existing fish habitat conditions in its “do no harm” standard. However, after much discussion and debate with WDFW and other state resource agencies, the County agreed to include fish habitat baseline inventory in its Resolution for the monitoring program to obtain information on how the existing habitat is continuing to change. The County points out that the Ordinance further commits them to reassess this habitat in five-year increments, an increment suggested by WDFW (Exhibit 284(24) at 2-3). The County states that the Tribe and WEC are incorrect when they claim that the ordinance does not address these habitat functions.

Although the Tribe and WEC, in their efforts to ensure protection of anadromous fish habitat, may choose to downplay the GMA’s requirement to conserve lands in ongoing agricultural production, the GMA requires the County and this Board to give equal weight to agricultural and fisheries industries. The State Supreme Court in *King County v. Central Puget South Growth Management Hearings Board*, 142 Wn.2d 543, 14 P.3d at 554 noted that the GMA creates “an agricultural conservation imperative that imposes an affirmative duty on local governments to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural resource industry”. Thus, although RCW 36.70A.020(9), .040(3)(b), and .060(2) require that fish habitat be protected, RCW 36.70A.020(8) and RCW 36.70A.040(3)(b) and .060(1) also require that agricultural lands be conserved.

We find that these two mandates of the GMA need to be balanced and agree with Judge Pomeroy that one of these goals should not supercede the other. We also surmise that the Legislature did not find that these two goals are incompatible. To

support our conclusion, we will examine the language of the GMA and the Procedural Criteria, Chapter 365-195 WAC.

RCW 36.70A.040(3) states that the County “shall” adopt development regulations that “protect these designated critical areas. RCW 36.70A.060(2) requires that counties protect critical areas. It does not use the term “enhance”. In fact, .060 does not even mention fisheries, only agriculture. (“Each county . . . shall adopt development regulations . . . to assure the conservation of agricultural lands designated under RCW 36.70A.170”). RCW 36.70A.170 requires “designation” of both agricultural lands of long-term commercial significance and critical areas. RCW 36.70A.170(1)(a), (d).

RCW 36.70A.172(1) requires counties to include BAS to “protect the functions and values of critical areas.” It further requires counties to “give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.”

RCW 36.70A.020(8) directs cities and counties required to plan under the GMA to “maintain and enhance natural resource industries, including productive timber, agricultural, and fisheries industries...”

RCW 36.70A.020(9) directs cities and counties required to plan under the GMA to ...“conserve fish and wildlife habitat....”

WAC 365-190-020 provides, in the pertinent part:

It is more costly to remedy the loss of natural resource lands or critical areas than to conserve and protect from loss or degradation . . .

Precluding incompatible uses and development does not mean a prohibition of all uses or development. Rather, it

means governing changes in the land uses, new activities, or development that could adversely affect critical areas . . .

Regarding natural resources lands, counties and cities should allow existing and ongoing resource management operations, that have long-term commercial significance, to continue. Counties and cities should encourage utilization of best management practices where existing and ongoing resources management operations that have long-term commercial significance include designated critical areas. Future operations or expansion of existing operations should be done in consideration of protecting critical areas. (emphasis added).

WAC 365-190-020

All of the above quotes from the RCW and the WAC reflect an overall intent to assure no further degradation, no further negative impacts, no additional loss of functions or values of critical areas. They also focus on new activities and preventing new impacts or new degradation rather than requiring enhancement of existing conditions.

Further, WAC 365-195-410(2)(b) focuses efforts on those natural areas that can be maintained; not on imposing burdens on farmers to retrofit or return natural conditions of habitat areas long since altered: “Critical areas should be designated and protected wherever the applicable natural conditions exist . . .”

WAC 365-195-825(2)(b) specifically defines what is meant by the term “protection”.

‘Protection’ in this context is construed to mean measures designed to preserve the structure, values and functions of the natural environment or to safeguard the public from hazards to health and safety.

WAC 365-195-825(2)(b)

There is no mention in the definition to improve or enhance the structures, values and functions, only to “preserve” them.

WAC 365-195-925 (3) explains what the conservation measures and preservation measures to preserve or enhance anadromous fisheries should include:

Conservation or protection measures necessary to preserve or enhance anadromous fisheries include measures that protect habitat important for all life stages of anadromous fish, including, but not limited to, spawning and incubation, juvenile rearing and adult residence, juvenile migration downstream to the sea, and adult migration upstream to spawning areas. Special consideration should be given to habitat protection measures based on the best available science relevant to stream flows, water quality and temperature, spawning substrates, instream structural diversity, migratory access, estuary and nearshore marine habitat quality, and the maintenance of salmon prey species. Conservation or protection measures can include the adoption of interim actions and long-term strategies to protect and enhance fisheries resources.

WAC 365-195-925 (3).

We will also examine what the Central Puget Sound Hearings Board (Central Board) has said about the protection of critical areas. In *Tulalip Tribes of Washington v. Snohomish County*, Case No. 02-3-0029 (Final Decision and Order, January 8, 1997)¹ the Central Board said:

The Board holds that the Act's requirement to protect critical areas, particularly wetlands and fish and wildlife habitat conservation areas, means that the ~~structure, values and functions of such natural ecosystems are inviolate~~ must be maintained. While local governments have the discretion to adopt development regulations that may result in localized impacts upon, or even the loss of, some critical areas, such flexibility must be wielded sparingly and carefully for good cause, and in no case result in a net loss of the ~~structure, value and~~

¹ The Central Board revised, clarified, and amplified its *Pilchuck II* holding. For the purposes of comparison, the Board repeated its language from *Pilchuck II* and showed the new language with underlining and strikethroughs. See CPSGMHB Case No. 03-3-0029 (Final Decision and Order, January 8, 1997) at 8.

functions of such ~~natural~~ ecosystems within a watershed or other functional catchment area.

Thus, local governments have the flexibility to adopt critical area development regulations that would permit the reduction of the geographic extent of, for example, a wetland. *See Pilchuck II*, at 20. This could result in the loss of all or a portion of an individual site-specific critical area, so long as the values and functions of the ecosystem in which the critical area is located are not diminished. The nature of ecosystems necessitates that such site-specific judgments, *e.g.*, whether to allow filling in a small wetland, be made in the context of the likely impact on the function and values of the larger system. This means that, in the circumstance that a local government permits elimination of a wetland, for example, it has a duty to assure that the net values and functions of the ecosystem are not diminished. How far afield it must look to make this determination is dependent on the specific circumstances, whether it is at the level of an entire watershed ecosystem, a sub-basin, or other functional catchment area.

The Board notes that the County has acknowledged that certain critical areas, such as wetlands and fish and wildlife habitat areas, constitute ecosystems that transcend the boundaries of individual properties and jurisdictions, and that it is therefore necessary to address certain critical areas issues at a watershed level.

Tulalip Tribes v. Snohomish County, CPSGMHB Case No. 96-3-0029 (Final Decision and Order, January 8, 1997), at 8-9.

When we read all these laws and guidelines together, and consider the Central Board's holding, we find that RCW 36.70A.060(2) and .040(1) do not require buffers on every stretch of every watercourse containing or contributing to a watercourse bearing anadromous fish, to protect the existing functions and values of FWHCAs. However, we also note that the County is also required by RCW 36.70A.172(1) to give special consideration to conservation and protection measures necessary to preserve or enhance anadromous fisheries including measures that protect habitat important for all life stages of anadromous fish as defined in WAC 365-195-925 (3). We observe that

the County's ordinance does not exempt agricultural areas from protecting the existing function, and values of FWHCAs. The County's "do no harm" approach, in fact, requires that a buffer or a BMP will be required if a farming practice is shown "doing harm to FWHCAs" and is needed to protect the function necessary for that life stage of anadromous fish. The County's DEIS points out that not all functions are needed for anadromous fish at every location or for every situation. DEIS at 1-10.

The DEIS says this about that Alternative 3, which is the alternative that is most like the County's approach:

Alternative 3 is likely to provide the fastest response time and greatest increase in stream habitat functions, again if riparian buffers are included where warranted by stream functions and agricultural impacts.

DEIS at 3-42.

The County's approach is also consistent with the Central Board's observation in *Tulalip*, which is the following:

"The nature of ecosystems necessitates that such site-specific judgments, *e.g.*, whether to allow filling in a small wetland, be made in the context of the likely impact on the function and values of the larger system. This means that, in the circumstance that a local government permits elimination of a wetland, for example, it has a duty to assure that the net values and functions of the ecosystem are not diminished. How far afield it must look to make this determination is dependent on the specific circumstances, whether it is at the level of an entire watershed ecosystem, a sub-basin, or other functional catchment area.

Tulalip Tribes of Washington v. Snohomish County, Case No. 02-3-0029 (Final Decision and Order, January 8, 1997) at 8-9.

Therefore, particularly critical to the County's approach of protecting FWHCAs and anadromous fish is the Resolution that commits the County to adaptive management program to assess the progress of their program for protecting the function and values of

fish habitat in Skagit County. The Central Board points out that FWHCAs are a larger system and a long-term broader program that is not site specific to ensure that the protection of FWHCAs is acceptable. However, the Central Board emphasized that the existing protection of the functions and values must be regulated. *See Tulalip* at 9. The County's approach does that.

We also find that the requirement to consider conservation and protection measures necessary to protect or enhance anadromous fisheries does not mean that all these measures must be regulatory. RCW 36.70A.040 and .060 imposes the obligation to protect the existing function and values of critical areas on the County. RCW 36.70A.3201 gives the County discretion on how to provide this protection as long as critical areas are protected. RCW 36.70A.172(1) imposes the requirement that the County give special consideration to conservation or protection measures that preserve anadromous fish. Conservation and protection measures can include the adoption of interim actions and long-term strategies to protect and enhance fisheries resources as WAC 365-195-925 (3) clarifies, and other measures such as enhancement projects, voluntary actions, purchase of land, and education. Nevertheless, all these measures must add up to providing for the preservation of anadromous fish. On page 13 of this order, we included the County's Findings of Fact 13, where the County's strategy included in Resolution 20030210 for protecting FWHCAs and preserving anadromous fish are defined as a long-term strategy and interim actions that have multi-party responsibility. The strategy also includes a commitment to monitor and adapt the strategy over time.

We agree with the County's argument on page 38 of its Response Brief:

“There is nothing in the GMA that requires the County to enhance fish habitat by adopting regulatory measures to reshape the landscape to some prior or restored condition. Both the Tribe and WEC demand that the County adopt a regulation that imposes mandatory buffers along salmon-

bearing streams, which would in turn require that farmers take that land (placed in the buffer) out of existing agricultural production. The GMA contains no such requirement *where there is no specific showing that the agricultural activities on those lands are degrading the habitat.*" (emphasis added)

County's Response Brief at 38

Contrary to the Tribe and WEC claim, we find nothing in RCW 36.70A.060 or RCW 36.70A.040 that mandates buffers along *all* fish-bearing streams passing through existing ongoing agriculture areas. Both the Tribe and WEC base their demands for buffers on their belief that BAS requires buffers to achieve all seven functions and values of fish habitat on every stretch of a salmon-bearing stream. However, as the County argued, where current stream conditions do not meet all those functions and values, and where the functions and values in that location are not necessary to preserve anadromous fish, requiring farmers to remove from agriculture all their lands abutting those streams in an effort to achieve those functions and values, not met for many years, would be mandating enhancement of fish habitat. After careful examination, it appears clear that these statutes require protection of the existing functions and values of the natural environment from loss or degradation.

We understand why the County is reluctant to impose mandatory buffers, which is very similar to Alternative 4 in the EIS. The record shows that imposition of a mandatory buffer requirement would have a substantial negative impact on agricultural production in Skagit County. For example, requiring mandatory 75-foot buffers on ongoing agricultural lands located on Type 1 – 3 streams and 25-foot buffers on Types 4 – 5 streams would take 3,142 acres out of production, with an estimated cost (lost market value of land and buffer maintenance cost) of between \$6,789,293 and \$12,824,714. (Exhibit 268, FEIS, at 22-23, 33).

Although the Tribe says it is not asking for active restoration in the buffers, evidence in the records of these consolidated cases showed that farmers would have constantly been fighting blackberry vines and many other invasive plants if the land by the streams were just abandoned from agricultural uses.

In the August 9, 2000 FDO/CO in cases 96-2-0025 and 00-2-0033c at 32 we said:

“We understand and appreciate the great value the farmers of Skagit County provide to this State. We understand that the County has an obligation under GMA to conserve designated agricultural lands. We also understand that there would be no reason for an ongoing agricultural exemption if the County had to adopt buffers as wide as and CA requirements as rigid as for all other uses.”

Friends v. Skagit County, WWGMHB Case No. 96-2-0025; *Skagit Audubon Society v. Skagit County*, WWGMHB Case. No. 00-2-0033c (Final Decision and Order/Compliance Order, August 9, 2000, at 32.)

We went on to say that the record showed that buffers were needed for many of the functions to protect fish. We assumed at that time that all functions needed to be provided in all stretches of fish bearing streams.

After careful consideration of all the arguments, and the entire record, we are no longer convinced that the Act requires the County to mandate that regulation of critical areas provide for all the functions in every watercourse that contains or contributes to watercourses that contain anadromous fish in ongoing commercially significant agricultural lands where some of those functions have been missing for many years and where these functions are not required for a particular life stage of anadromous fish.

The GMA does not impose an explicit standard for protection of existing functions and values of critical areas and asks counties and cities to set these standards by

including BAS pursuant to RCW 36.70A.172(1). While the Legislature could have imposed a more precise standard, the requirement to base the protection standard on BAS recognizes that science will change over time and the standards and protection measures will need to be revised. Standards and protection measures that are informed by BAS also provide cities and counties more flexibility to craft regulations that reflect local conditions. Nevertheless, this flexibility imposes on the County the complex responsibility of both setting a protection standard consistent with BAS, when the sources are sometimes conflicting, and harmonizing the goals and requirements of the GMA, while taking into consideration local conditions.

The GMA also imposes on the County the difficult task of balancing two equally important goals for preservation of two fragile natural resource industries important to the economy of Washington State. This balancing act involves significant risks for both industries. Weighting too heavily in one direction can mean significant harm to the other. To try to achieve this balance, the County has established a no harm protection standard that does not impose buffers or mandatory BMPs without evidence of harm by the agricultural industry. The County has also instituted protection for the existing functions and values of FWHCAs which give special consideration to conservation and protection measures to preserve or enhance anadromous fish through the following measures: (1) setting a protection standard for FWHCAs (SCC 14.24.120); (2) imposing regulations that protect existing conditions (SCC 14.24.120(4)); beginning a county-wide monitoring and adaptive management program (Resolution 20030210); and (4) establishing some interim actions and long-term strategies to protect and enhance fisheries resources (Resolution 20030210).

The Tribe and WEC believe that the County's approach is too risky, is not precautionary, and shifts the balance in favor of agriculture. We find that since the information about existing fish habitat at this time is incomplete, it is not clear that this

in fact is the case. However, we agree with the Tribe, WEC, and the WDFW that effective monitoring and adaptive management are key ingredients to achieving this balance and reducing the risk. We will examine below whether these standards and protection measures and monitoring and adaptive management strategies are consistent with the GMA and have the ability to manage the risk to existing functions and values and allow the County to institute effective conservation and protection measures for the preservation of anadromous fish.

By reaching the above conclusions, we are not saying that farmers do not need to alter their practices if they are continuing activities which will further degrade the streams. Those activities must stop and practices must be implemented which ensure no additional harm or loss of functions. We will discuss the County's provisions for such changes of practices in subsequent sections of this decision.

IV. REQUIRED WATERCOURSE PROTECTION MEASURES

The Tribe and WEC accused the watercourse protection standards as being “riddled with exceptions and weak measures” and only “a precatory statement or laudable goal.” (WEC Response at 20-21; Tribe Response at 34). The County counters that the Watercourse Protection Measures found in SCC 14.24.120(4) are mandatory and represent a significant regulatory commitment to FWHCAs in existing agricultural areas. These measures describe what result is needed in sufficiently detailed and enforceable terms. They contain clear behavioral obligations. The end result of each is meeting the “do no harm” standard. That result is measurable and/or observable.

The County has adopted four mandatory Watercourse Protection Measures:

- (a) Livestock and Dairy Management;
- (b) Nutrient and Farm Chemical Management;

- (c) Soil Erosion and Sediment Control Management; and,
- (d) Operation and Maintenance of Public and Private Agricultural Drainage Infrastructure.

(a) Livestock and Dairy Management

SCC 14.24.120(4)(a) states:

(a) Livestock and Dairy Management. Livestock and dairy operations shall be conducted so as not to contribute any wastes or sediments into a Natural or Modified Natural Watercourse in violation of adopted State water quality standards. Livestock and dairy operations shall meet the following minimum Watercourse Protection Measures:

(i) Livestock shall not be permitted uncontrolled access to any Watercourse. Access to a Watercourse for livestock watering and/or stream crossings shall be limited to only the amount of time necessary for watering and/or crossing a Watercourse, shall be constructed consistent with applicable NRCS conservation practice standards, and shall not be constructed to provide access to agricultural land that does not meet the definition of Ongoing Agriculture unless that agricultural land and the crossing can meet all requirements of SCC 14.24.

(ii) Dairy operations shall comply with the requirements of RCW 90.64 (Dairy Nutrient Management Act).

(iii) Livestock pasture shall be managed so as to maintain vegetative cover sufficient to avoid contributing sediments to a Watercourse in violation of state water quality standards.

(iv) Any existing or new livestock confinement or concentration of livestock areas that is located up gradient from a Watercourse which results in bare ground (such as around a watering trough) shall be constructed and maintained to prevent sediment

and/or nutrient runoff contaminants from reaching a Watercourse in violation of state water quality standards.

The County reminds us that the language in this section uses “shall” throughout. This is not merely an encouragement for the owner to meet this requirement if he/she wishes. It also stresses the outcome that must occur. Simply using the word “sufficient” does not make an ordinance precatory or unenforceable; when the end result, meeting the water quality standard, is clear. The County further points out that these livestock watering and crossing requirements reflect a substantial change from current unregulated practice. Crossings are now limited. Duration is limited. The County further states:

While Ecology expressed concerns about this practice in its initial comment letter, after further meetings with the agencies to discuss comments and practical difficulties (Ex. 222, Ex. 256) Ecology concluded with a letter that congratulated the County on adoption of the new Ordinance (Ex. 288). From a practical, agricultural standpoint, when the watercourse provides the only source for livestock watering, or when a watercourse must be crossed to get from one pasture to another, crossing is the only practical alternative. (Ex. 286, at 44, Finding 35.) By limiting the crossing and the duration, the County has taken significant steps to address the stream bank erosion and greater fecal coliform contamination concerns from unregulated access that led to this Watercourse Protection Measure. (*See also*, Ex. 5, NRCS FOTG 575.) Remember that the “do no harm” standard (not violating state water quality standards) still applies.

County Response Brief at 46-47

We will not quote the other Watercourse Protection Measures. They are of the same type of specificity and outcome orientation.

(b) Nutrient and Farm Chemical Management.

The County explains that this measure does not permit violation of state water quality standards as asserted by the Tribe. (Tribe's Opening Brief at 39-40). Nothing in this section repeals or excepts the "do no harm" standard requirements. Even if an express reference to state water quality standards is not repeated in every subsection, the "do no harm" "umbrella" standard applies to all. Even though WEC asserts that compliance with federal and state laws regarding farm chemical management is inadequate, WEC has not met its burden of demonstrating how any of these requirements are inadequate.

(c) Soil Erosion and Sediment Control Management.

The greatest disagreement concerning this measure is the continuing use of V-ditching. The County explains that V-ditching is a crucial agricultural practice in the Skagit Delta (Ex. 221, at 3; Ex. 286, at 44, Finding 34). The County further reminds us that last September, we solicited comments from Skagit County farmers who documented, again and again, the importance that V-ditching plays in their livelihood. (See, e.g., Declaration of Keith Morrison, Ex. 498(29); Declaration of Kim Nelson, Ex. 498(34); Declaration of John Roozen, Ex. 498(38) (and photographs 13, 14, and 17 attached thereto); Declaration of Jack Wallace, President of Skagit Potato Growers, Ex. 498(45)). These declarations explain that much of the water that is being drained by V-ditches is groundwater, not surface water. V-ditches and the associated drainage function, is absolutely necessary to facilitate earlier spring plantings, since they help dry the fields earlier.

They further explained that V-ditches are necessary to prevent late-fall, over-winter, and perennial crops from being destroyed. In some cases, if the water is not removed within as little as 24 hours, the crops are destroyed. Often, by the time even a seasonal crop is removed it is too late in the season to plant a cover crop. The County points out that that's the reason the Tribe's simple solution of insisting on cover crops is not

practical and why NRCS has not adopted a BMP for V-ditches. NRCS does have BMPs for surface drainage, more generally, which are intended to address sediment impacts. (*See* Ex. 5, NRCS FOTG 607.)

The County further points out that SHIAPP map in the record shows that the vast majority of V-ditches do not drain directly into salmonid-bearing waters. The County further claims that evidence in the record shows that sediments that might be transported by a V-ditch are typically deposited within a few feet of where the V-ditch enters the drainage ditch, and do not end up downstream in the fish habitat. (Ex. 286, at 43-44, Findings 33, 35.) Only if there is no alternative can the V-ditch be cut so as to drain into a salmonid-bearing water. (Ex. 286, at 81, SCC 14.24.120(4)(c)(iv).) Even in this circumstance measures must be taken to minimize potential for sediment. (*Id.*) What measures are appropriate are fact- and site-specific (Ex. 221, p. 3). The County's findings adequately explain the reasons its solution is an appropriate choice based on the unique fish and agricultural circumstances at issue in Skagit County. The County further explains on page 50 of its Response Brief:

The Tribe's suggestion that V-ditch BMPs should include 50-150 foot buffers is absurd. V-ditches are not permanent watercourses. They are cut in each season, after the crop has been removed, and tilled under prior to planting. The purpose of V-ditches is to get the water off the field – into the nearby drainage ditch. If a 50-100-foot no-touch buffer were required, the V-ditch would not get the water to the drainage ditch.

(d) Drainage infrastructure maintenance.

Among the Tribe's major concerns about the drainage infrastructure maintenance requirements are:

- (1) There are so many ways to avoid the maintenance window that it will just be business as usual for the drainage districts.
- (2) Mowing these watercourses can be done any time.

(3) There are no new requirements in the checklist. It merely checks to see if the districts are complying with other laws.

The County explains these measures on pages 51-54 of its response brief. Some of its major justifications are:

(1) Many of the watercourses at issue in this ordinance are drainage infrastructure and, in many cases, do not contain fish. (Ex. 295; Ex. 286, at 39, Finding 21.)

(2) Those watercourses that do contain fish, but may also provide an essential drainage function, such as the Skagit River, the Samish River, Hill Ditch, etc., are subject to HPA jurisdiction for work within the ordinary high water mark, including dredging and drainage maintenance. The Watercourse Protection Measure for drainage maintenance does not change those requirements. Instead, these extra measures impose additional affirmative obligations on drainage maintenance. (SCC 14.24.120(4)(d), Ex. 286, at 81-83.)

(3) The established work window can only be changed if weather, soil and fish run conditions justify a change and only after consultation with parties with expertise. (*Id.*)

(4) Drainage maintenance cannot be prohibited if agriculture is to survive. (Ex. 286, at 38-39, Finding 20.)

(5) If buffers were required as the Petitioners would like, drainage maintenance could not happen. (*Id.*; Ex. 498(34); 498(35); 498(38); 498(45); 498(46).

(6) Many of Ecology's concerns were addressed in the final version of the Ordinance, at least to a sufficient degree to receive "congratulations" from Ecology on the final product. (Ex. 288.)

(7) Even if the presence of fall or winter crops prevents regularly scheduled maintenance during the work window, the farmers must strive to schedule around the maintenance requirements and BMPs must be used (SCC 14.24.120(4)(d)(i)(C), Ex. 286, at 82.)

(8) Districts conducting this maintenance must file an annual statement reflecting awareness of these requirements and explaining how their work will be conducted consistent with the requirements of the subsection. (SCC 14.24.120(4)(d)(i), Ex. 286, at 81-82.)

(9) Mowing is one method of drainage maintenance that does not require disturbance of sediments and, thus, is a method to be encouraged. Drainage flow can be substantially impacted if vegetation is not controlled within the ditches. (Ex. 498(38); Ex. 498(34); Ex. 498(35); Ex. 498(46).)

The County also reminds us that these drainage courses are vital to maintaining agricultural production, not just in the area within the first 100 or 200 feet from the drainage course, but within much of the agricultural area in the delta. Ex 194(16). Impairing or preventing ongoing drainage function will result in substantial impact to agricultural operations. Ex 165(1) DEIS, Chapter 4. This Board previously received volumes of declarations and briefing attesting to this fact. (September 6, 2002 Order in Response to Court Remand, Case 00-2-0033c at 3.

Dike and Drainage District Intervenors (Districts) emphasized in their August 8, 2003 Reply Brief their right and statutory obligation to exercise their discretion about maintenance and operation of existing facilities to provide flood control and drainage benefits. They point out that this new ordinance withdraws the exemption of critical area regulation from land and facilities upstream from tidegates, floodgates, and pump stations by amending SCC 14.24.100(g) and adopting 14.24.120(4)(d). Even though the new development regulations do not impose buffers on land within municipal districts which provide flood control and internal drainage using tidegates, floodgates, and pump stations, they **do** impose regulations.

The Districts remind us that there has been no material change in the land base protected by dikes and drains since the 1950s. (Ex. 284(8) at 2.) They also point out that much recent scientific analysis published in such publications as Nature, Scientific American, and National Geographic supports the proposition that terrestrial fresh water habitat is not the cause of decline in fish such as Coho and Chinook Salmon. The Tribe and WEC have made no showing that it is agricultural practices that have caused fish decline. Although WEC's greatest concern is "conversion of habitat to Ag use" (WEC Response Brief at 4), the opposite is true. A recent Skagit Watershed Council study from 1954-2001 showed 1,000 acres of additional estuary and habitat created by the North and South forks of the Skagit River during those years. The Districts assert that there are no farmland conversions of wetlands or estuarian habitat which has occurred in recent history on the Samish or Skagit Rivers.

The Districts further contend that what the Tribe advocates is not Growth Management but micromanagement of the agricultural lands and its supportive infrastructure. At the hearing, the Districts further asserted that it appears that the Tribe and WEC's theory is that the Districts must endure additional pain in order for these provisions to be worthwhile. The checklist is already painful enough. It forces the Districts to disclose every year what they are doing. This disclosure is valuable to the Tribe and not appreciated by the Districts. This added reporting is also a financial hardship to the Districts.

We agree with the County that the Watercourse Protection Measures found in SCC 14.24.120(4) are expressed in mandatory terms and represent a significant regulatory commitment to FWHCAs in existing agricultural areas. These measures describe what result is needed in sufficiently detailed and enforceable terms that the average citizen or farmer can understand. This seems like a reasonable and workable way to

change farming practices which the County has found to be most threatening to FWHCAs.

The language in the individual Watercourse Protection Measures continually uses “shall meet”, “shall not place”, etc. to show that they are mandatory. We are concerned, however, about the wording of the leading paragraph of SCC14.24.120(4), which states in part: “Failure to comply with the following may result in County enforcement pursuant to SCC 14.44.085.” (Emphasis added.) Since the County is relying on these measures as the mandatory element of its protection plan, farmers need to be made aware that failure to comply with the Watercourse Protection Measures shall result in enforcement. Without that assurance of implementation follow through, these measures might become mere “laudable goals” as the Tribe fears. This leads us to a discussion of the adequacy of the enforcement of all the County’s provisions to protect water quality and FWHCAs from further degradation.

V. ENFORCEMENT

The County contends in its August 8, 2003 Response Brief that, while it is true that an enforcement action is only initiated if an owner or operator is violating the Ordinance and causing harm (see Tribe 7/21/03 Brief at 25-26), such is the case with enforcement of any ordinance in Skagit County. The County should only be obligated to initiate an enforcement action if there is a violation, a harm or degradation. The County should not be obligated to initiate enforcement actions against farmers who have not been shown to be causing any harm.

The County contends that neither the Tribe nor WEC has shown why this complaint-driven enforcement system is not in compliance. The provisions of SCC 14.44.085 are supplemental to all those provisions elsewhere in the enforcement chapter of the County Code. (SCC 14.44.085(1)). Further, neither the Tribe nor WEC has

demonstrated that the County's existing Code enforcement scheme is not working. In contrast, the record shows that the County's code enforcement officer explained to the Planning Commission that the County's current complaint-driven procedure works well. (Ex. 232, at 4-11). The comments on the record of the code enforcement officer are also contrary to WEC's claim that adjacent land owners are unlikely to complain against neighbors. (WEC response at 29). The code enforcement officer stated that the vast majority of critical area complaints were by neighbors against neighbors. (Ex. 232 at 10).

The County also refutes the Tribe and WEC's charges that through this approach the County is ignoring the cumulative impacts of violations. The County contends that it is not ignoring them, but is addressing them in a systematic manner that protects people's property rights consistent with GMA Goal 6. The County explains this systematic approach:

First, the Ordinance addresses TMDLs which themselves specifically deal with cumulative water quality impacts. (See discussion, section III.B.2, above.) Second, WEC specifically complains that where it is impossible to show that a particular farm is causing a problem, there will not be enforcement. The County agrees, but that is not a concern. The County reminds this Board that both RCW 36.70A.020(6) and the Constitution prohibit the County from arbitrarily imposing upon any property owner enforcement measures where the County is unable to show specific harm being caused by that property owner. That is why the County has enacted a program to monitor water quality trends for impacts, to try to better identify the location of water quality violations. WEC's demand for immediate buffers on all agricultural land brands property owners guilty until proven innocent. The Tribe's suggestion (Motion at p. 50) that the County should undertake random, presumably warrantless, inspections of property, with no expectation of an existing violation, reflects a lack of understanding of the limits of both local government's resources and the Constitution. This is

particularly true where farmers already feel “overregulated.” [Exhibit 284(27).] The County’s program adequately addresses this concern of cumulative impacts without violating GMA’s Goal 6 and the Constitution.

County’s Response Brief at 58-59

The County clarified that the enforcement provisions were originally in SCC 14.24.120. However, the County received much public comment against the need for a separate, perhaps stricter, perhaps conflicting, enforcement section. (Exhibit 286 at 55-58, finding 49). In response, the Planning Commission opted to move the necessary enforcement provisions to the County’s existing Enforcement Code, SCC 14.44. They favored this consolidation because it provides for greater clarity and consistency in all County enforcement actions, does not single out existing agriculture for its own “separate set of police”, and takes advantage of the strengths and procedures already established for County code enforcement. The state agencies commented favorably on the enforcement provisions (Ex. 281, para. 8). CTED liked the fact that the County consolidated enforcement on these critical areas in ongoing agriculture in the same chapter with its other code enforcement provisions (Ex. 284(24) at 2). The WDFW was “pleased to see the enforcement section expanded and clarified”. (Ex. 284(23) at 5).

The County points out that in this Ordinance, respect and appreciation are shown to farmers who have voluntarily enrolled in Conservation Reserve Enhancement Program (CREP) and/or have gotten a Dairy Nutrient Management Plan (DNMP) or Resource Management System Plan (RMS) reviewed, approved and implemented with the NRCS standards. Under this Ordinance these farmers are still obligated to comply with the “do no harm” standard (SCC 14.24.120(5)(b), Exhibit 286 at 83). If one of these farmers appear to be in violation of the “do no harm” standard, the farmer is first given the opportunity to work with the resource agencies to figure out what is causing

the problem, adjust the plan and the BMP's , and solve the problem on their own. Ecology supports this approach. Exhibit 288.

This, the County explains, is consistent with typical enforcement actions generally, where voluntary compliance is always a preferred and first approach. (Exhibit 165(7), 5-16-89 Compliance Memorandum of Agreement among Ecology, SCD and State Conservation Commission relative to Agriculture Water Quality Management). The County further contends that an old plan, that does not address fish issues and does not prevent harm to the fish habitat, will not satisfy the “do no harm” requirements of the Ordinance. Further resource agencies in the record explained that the requirement for a DNMP or a RMS Plan specifically requires certain Natural Resource Conservation Service Field Office Technical Guide (NRCS FOTG) standards that would include fisheries protection, including riparian buffers, if a fish-bearing watercourse were present on the farm (Exhibit 5, NRCS, FOTGs, (FOTG 391); Ex. 221). The above evidence in the record directly refutes Tribe claims to the contrary. Such voluntary incentive approaches to compliance should be encouraged, not criticized, the County concluded.

We can understand the frustration and difficulty foreseen by the Tribe and WEC in the enforcement of these provisions. However, as the County has effectively argued, the County's choice of incorporating the enforcement provisions of this ordinance into the County's existing enforcement code, SCC 14.44, takes advantage of the strengths and procedures established for county code enforcement as explained in the record and ensures that all county code violations will be handled consistently. Farmers will not be singled out for stricter enforcement as the Tribe and WEC would prefer.

Even if we might like to see stricter scrutiny of farming practices, the County's concern about honoring GMA and constitutional protections for individual farmers or

farmers as a whole is valid. We agree with the County that farmers should not be considered guilty until proven innocent and should be shown the same respect as all other citizens in the County when critical areas provisions are enforced..

VI. RESOLUTION R20030210 – MONITORING AND ADAPTIVE MANAGEMENT

Resolution R20030210, a Resolution “Adopting a Proposal Related to Monitoring and Adaptive Management of Riparian Areas in Conjunction with Skagit County Code (SCC 14.24.120 . . .”. (Exhibit 285)) is a companion to the County’s new ordinance. The County explains that this Resolution commits the County to a substantial ongoing monitoring effort, not only continuation of the County’s existing water quality monitoring but an expansion of that program to include additional water courses that were not monitored under the County’s prior ordinance. *Id.*

The intent of this monitoring effort is to continue to collect water quality data throughout the agricultural area, including at locations at the outlet of each agricultural drainage district, to gain understanding of what the existing conditions are. *Id.* This information will assist Ecology in its preparation of TMDLs where necessary. Ecology has complimented the County on this program, and on its continuation to accompany the new Ordinance. (Exhibit 288).

The County further explains that this Resolution includes, for the first time, a baseline inventory of existing fish habitat characteristics in representative stream reaches to begin to gain a better understanding of the existing condition of those habitat characteristics (Exhibit 285, pp 60-61, Section 2). In addition to the initial inventory, the Resolution commits to a reassessment of these habitat characteristics at five-year intervals as recommended by WDFW. (Exhibit 285)

The County also says that the Resolution commits to an adaptive management process to take advantage of the information gathered from monitoring, habitat inventory, and enforcement actions, to make changes to the County's programs in the future. *Id.* at 61-62, Section 3.

The County asserts that the Resolution expressly commits to following the framework in the recent state publication, "The Washington Comprehensive Monitoring Strategy for Watershed Health and Salmon Recovery." This publication reflects the State's latest and best thinking on monitoring and adaptive management for salmon recovery. The State resource agencies encouraged the County to follow this approach. (Exhibit 281).

The County further points out that the Resolution continues and expands the County's commitment to participate in ongoing habitat restoration and salmon recovery efforts in the County. This, too, helps to satisfy the GMA's requirements for protection of Fish and Wildlife Habitat critical areas in the context of existing agriculture.

Petitioners contend that since the County's approach involves more risk to the protection of fish and wildlife resources than would a standardized buffer requirement, the program must include a rigorous monitoring program and adaptive management process. They argue that this program and process must be capable of detecting changes in the functions and values of habitat in a timely manner, and must include processes through which management techniques are reevaluated and modified as necessary in response to this information to ensure that the goals and requirements of the Act are being met.

WDFW gives the most detailed concerns about the County's monitoring program. These concerns include:

- The lack of detail about the data to be collected does not allow assessment of its usefulness in identifying trends in habitat conditions to allow evaluation of the success of the County's ordinance.
- The lack of specification about the kind of monitoring data and protocols make it difficult to determine whether the County's monitoring effort will produce statistically valid and scientifically useful data.

WDFW also details its concerns about the deficiencies in the County's adaptive management program, including:

- No specific biological performance standards
- No timelines for meeting standards
- No predetermined management responses
- No established funding for the adaptive management program.

The County responds to these concerns with the following:

- The County has already adopted the State Water Quality Standards as performance targets for water quality parameters, so what seems to be left and at issue are the fish habitat parameters.
- The County has committed in the Resolution to using the adaptive management process outlined in Volume 2 of the Washington Comprehensive Monitoring Strategy for Watershed Health and Salmon Recovery, the best guidance available on adaptive management.
- The County has committed to five-year updates of its habitat inventory.
- BAS in the record recognizes that much of the adaptive management must be decided and tailored to site specific location circumstances.
- Neither the Tribe nor WDFW have explained to the County how the "more" they insist on could be determined in advance of site specific implementation.

- The County will need to do its inventory to determine what exists before it can develop biological performance standards.
- The “do no harm” standard requires that changes will be made to water course standards as a result of the monitoring and BMPs specific to reported violations that are found to be causing harm.
- The County can not craft predetermined responses to monitoring information and triggers because this would prejudice the legislative process.

WDFW responds regarding its concerns about the deficiencies in the County’s adaptive management process:

- The document only includes a diagram on how the adaptive management process should work. The County needs to show how this process would work in Skagit County.
- WDFW is concerned about what the words “data conclusively demonstrates” mean. It points out that these words are vague and open-ended and not defined in the resolution. Thus it is impossible to determine what level of change will be necessary to trigger corrective action. The kind of parameters that WDFW seeks are general parameters such as the length of time period for data collection from which conclusions can be drawn and the area for which the data will be averaged.
- For predetermined responses, WDFW suggests that when BMPs are found to be necessary based on the data generated from monitoring, a timeline could be instituted for instituting the BMPs. WDFW does not believe that incorporating changes to watercourse standards that the data suggests are necessary as part the County required update² to their CAO, is timely or effective enough.

² RCW 36.70A.130(4) requires updates to comprehensive plans and development regulations, including critical areas ordinances, every seven years. Skagit County’s first required update is December 1, 2005. The next update would not occur until December 1, 2012.

The Tribe echoes these complaints about lack of detail, but only as to the adaptive management components (Tribe's Response Brief at 52-53).

For guidance for determining whether the County's monitoring and adaptive management program will be adequate we will review WAC 365-195-920 for guidance, which states:

Criteria for addressing inadequate scientific information. Where there is an absence of valid scientific information or incomplete scientific information relating to a county's or city's critical areas, leading to uncertainty about which development and land uses could lead to harm of critical areas or uncertainty about the risk to critical area function of permitting development, counties and cities should use the following approach:

(1) A "precautionary or a no risk approach," in which development and land use activities are strictly limited until the uncertainty is sufficiently resolved; and

(2) As an interim approach, an effective adaptive management program that relies on scientific methods to evaluate how well regulatory and nonregulatory actions achieve their objectives. Management, policy, and regulatory actions are treated as experiments that are purposefully monitored and evaluated to determine whether they are effective and, if not, how they should be improved to increase their effectiveness. An adaptive management program is a formal and deliberate scientific approach to taking action and obtaining information in the face of uncertainty. To effectively implement an adaptive management program, counties and cities should be willing to:

(a) Address funding for the research component of the adaptive management program;

(b) Change course based on the results and interpretation of new information that resolves uncertainties; and

(c) Commit to the appropriate timeframe and scale necessary to reliably evaluate regulatory and nonregulatory

actions affecting critical areas protection and anadromous fisheries.

This WAC advice is consistent with what we said in the 96-02-0025 Compliance Order (9/16/98) at 24:

There also must be a non-voluntary, fallback approach established to be implemented if the voluntary BMP approach is not working or is too slow in producing required results to protect CAs.

The WAC is also consistent with what we said in the August 9, 2000 Final Decision and Order/Compliance Order in WWGMHB Cases 96-2-0025 and 00-2-0033c on page 34, where we noted that Natural Resource Consultants, scientists hired by the County, stressed the absolute need for effective monitoring and evaluation of effectiveness, and a responsive adaptive management program to ensure necessary changes and enhancements are made.

The situation that Skagit County finds itself in when developing its critical areas ordinance is one where there is incomplete scientific information about the County's FWHCAs, as well as uncertainty about which activities and land uses causes harm to these critical areas. Of the approaches recommended by this WAC, we agree with the Petitioners that the County has not chosen a precautionary approach. Rather, they have adopted a combination of a nonvoluntary approach in its Watercourse Protection Measures and voluntary BMPs that only become mandatory if there is evidence of harm to FWHCAs to respond to violations of the "no harm" standard. We agree with the Petitioners that this approach calls for an effective adaptive management program that relies on scientific methods to evaluate how well regulatory and nonregulatory actions adopted by the County achieve their objectives.

The WAC advises that management, policy, and regulatory actions should be purposefully monitored and evaluated to determine whether they are effective and, if not, how they should be improved to increase their effectiveness. Therefore, we find that the County needs to do as WFDW has suggested and add specific protocols that the monitoring will follow and detail on the data that will be collected.

As for effective adaptive management, the WAC suggests that counties and cities fund a research component of the adaptive management, program; be prepared to change course based on the results and interpretation of a new information that resolves uncertainties; and commit to the appropriate timeframe and scale necessary to reliably evaluate regulatory and nonregulatory actions affecting critical areas protection and anadromous fisheries. Again, we find that WAC 365-195-920 provides direction and WDFW provided recommendations that can be incorporated into the County's adaptive management program. These recommendations include providing parameters for the length of time data will be collected before conclusions about the effectiveness of the adaptive management will be made and the area for which the data will be collected and timelines for implementing improved BMPs if the data indicates they are needed.

We commend the County for establishing a framework for an adaptive management program that includes habitat parameters for FWHCAs because it is a critical element in making sure that the functions and values for these critical areas are being maintained on more than a site-specific basis and that anadromous fisheries are being preserved. We recognize that crafting the first adaptive management program in the state is daunting, however necessary. However, because the adaptive management is so important to ensuring that the County's approach to maintaining the protection of FWHCAs we find that the County's monitoring and adaptive management program

need more detail and specificity. We encourage the County to work with the Petitioners to craft a more detailed adaptive management process for fish habitat.

We agree with the County that a public process will be required to adopt more specific fish habitat parameters. However, we are unable to determine if the County's total protection package meets the Act's requirement to give special consideration to the protection of anadromous fish until such parameters are adopted at least in general terms. The adaptive management Policy must make it clear that the County will take prompt and effective remedial action if the monitoring data demonstrate that the current actions have been insufficient to protect the critical areas and water quality from further degradation. The County must also clearly define "data conclusively demonstrates" so it will be clear what level of change will be necessary to trigger corrective action. We also find that only including changes to watercourse standards with critical areas updates that are required only every seven years by RCW 36.70A.130 is too long to be timely and effective.

As for the funding component that is also necessary for effective adaptive management process, we find that very difficult to judge. County revenues fluctuate annually and we cannot monitor the County's budgets. In Capital Facility planning and budgeting, counties and cities often make assumptions that grant funding in the past will be likely to continue in the future. We will make a similar assumption about the County's willingness to fund its adaptive management program. The record shows that the County has obtained millions of dollars of grant money and has committed much of their own money for habitat enhancement projects. The record also shows that the County has prepared cost estimates for its adaptive management program. (Exhibit 294.) We will assume, based on the County's track record of aggressively pursuing grants and funding enhancement programs, that it will do the same for its adaptive management program.

VII. FINDINGS OF FACT

1. Ordinance 02003002 (Ordinance) does not apply to areas where forested riparian corridors still exist in the agricultural zone. (SCC 14.24.120(1)), Ex. 286, at 77-78. Those areas are not defined as “ongoing agriculture” under the Ordinance and are subject to the standard critical areas protections in SCC 14.24.530(2) & (3); Ex. 315(16), (18), of case 00-2-0033c Index. The Ordinance does not permit expansion of agricultural areas that were not in existing, ongoing agriculture, unless such expansion can comply with all other requirements of the County’s CAO. (SCC 14.24.120(2)(b), Ex. 286, at 78).

2. We find that the County’s ordinance does not exempt existing on-going agriculture from critical area protection.

2. The County provided an extensive public review process in developing this Ordinance. The DEIS and draft Ordinance were released for public review and comment on February 12, 2003. (Ex. 286, at 35-36, Finding 12). Comments were received until March 31, 2003. *Id.* The Planning Commission conducted 12 nights of briefings and deliberations on the Ordinance, including consideration of over 1,800 pages of public comments. *Id.* Numerous changes were made to the Ordinance in response to those comments. Ex. 251(5), Planning Commission Recorded Motion, Finding 49, shows numerous changes between the February 12, 2003 draft and the May 2003 final Planning Commission revision. A final EIS was prepared, also responding to the comments on the DEIS (Ex. 268). The BOCC held a public hearing and took written comments on the revised Ordinance before adopting the final Ordinance and resolution (Ex. 286, Ordinance at 1-3; Ex. 285, Resolution at 1-2).

3. Skagit County completed, a programmatic EIS to assess options for ongoing agriculture. These alternatives included:

- (1) No Action Alternative;
- (2) Mandatory CREP Style Buffers Alternative
- (3) Site-specific Best Management Practices Alternative; and,

- (4) Mandatory Buffers as in Current County CAO Alternative.
(Ex. 165(1)(DEIS); Ex. 268 (FEIS))

The state agencies reviewing the County's new Ordinance commended the County for the thoroughness of its review. Ex. 194(7), March 31, 2003 letter from Office of Community Development (OCD); Ex. 284(24), June 13, 2003 fax from OCD.

4. The Ordinance is based on the requirement that existing ongoing agricultural activities must be conducted from here forward such that those activities do not harm or degrade the existing functions and values of the fish habitat.

5. The record demonstrates that the existing environment of critical areas in the deltas of the Skagit and Samish Rivers has been altered from its original, natural condition by diking and drainage infrastructure and the agricultural operations that have been conducted on some of these lands for nearly a century

6. We found in *Mitchell v. Skagit County*, WWGMHB No. 01-2-0004c that enhancement of critical areas is not required by the Act.

7. This Board previously approved reliance on voluntary BMPs in Skagit County, provided monitoring and a regulatory fallback are included. *Friends v. Skagit County*, WWGMHB Case No. 96-2-0025 (Compliance Hearing Order, September 16, 1998).

8. This Ordinance not only relies on voluntary BMPs, but also includes mandatory watercourse protection measures, requires BMPs if harm is shown to be occurring, and substantially expands the monitoring and enforcement requirements.

9. The FEIS documents that a mandatory buffer requirement would be a huge financial burden to Skagit County farmers. For example, requiring mandatory 75-foot buffers on ongoing agricultural lands located on Type 1 – 3 streams and 25-foot buffers on Types 4 – 5 streams would take 3,142 acres out of production, with an

estimated cost (lost market value of land and buffer maintenance cost) of between \$6,789,293 and \$12,824,714. (Exhibit 268, FEIS pt 22-23, 33).

10. This Ordinance only applies to those areas where agricultural activity exists and is ongoing, where historic, natural, forested riparian buffers were long ago removed, and/or where natural watercourses were modified by diking and drainage district operations pursuant to their statutory authority under Titles 85 and 86 RCW.

11. The County's strategy is to provide those habitat functions and values that no longer exist in Ongoing Agricultural areas in a broader, multi-party and county-wide effort, that does not rely exclusively on regulation of the ongoing agricultural operations that are the subject of this Ordinance. To address broader habitat needs that are an important part of restoring salmon runs in the County, the BOCC has adopted a Resolution that includes County commitments to ongoing monitoring, adaptive management and salmon habitat restoration efforts.

12. The record shows that a blanket mandatory buffer requirement for riparian buffers would jeopardize eligibility for federal farm programs, including the CREP program which provides substantial resources and incentives to establish riparian buffers (Exhibit 95 and Case 00-2-0033c Index, Exhibit 344).

13. The constitutional limitations of critical areas Ordinances were addressed in *HEAL v. CPSGMHB*, 96 Wn. App.522, 979 P.2d 864(1999). The *HEAL* Court noted that GMA policies and regulations must comply with the nexus and rough proportionality limits placed on local government power or else they could face constitutional problems. The *HEAL* Court stated that the nexus and proportionality standard presented "an important constitutional limitation on local governments' discretion in adopting policies and regulations under GMA."

14. Department of Ecology agrees with use of the State Water Quality standards as the appropriate measure for water quality impacts from agricultural operations (Ex. 188).

15. The County has committed, within its Ordinance, to serve as the regulatory body, if necessary, to implement Total Maximum Daily Load (TMDL) requirements. If a TMDL determines that a mandatory, regulatory change is the only solution to address an impaired water, than the County Ordinance and Resolution commit to that solution. TMDLs have been recognized by the scientific community as the only effective method to address larger, impaired waterbody situations where nonpoint sources are at least a part of the problem. Ecology supports this approach.

16. The current Ordinance, at SCC 14.24.120(4)(c)(iv) (Ex. 286, at 81) relies on information contained in the SHIAPP Limiting Factors Analysis, prepared by the Washington Conservation Commission, which represents the best available information on fish presence and fish habitat characteristics. SHIAPP Limiting Factors map, Ex. 295. This mapping data shows that most of the drainage district watercourses located upstream of tidegates, floodgates, and pump stations are not identified as salmonid habitat.

17. The State Supreme Court in *King County v. Central Puget South Growth Management Hearings Board*, 142 Wn.2d 543, 14 P.3d at 554 noted that the GMA creates “an agricultural conservation imperative that imposes an affirmative duty on local governments to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural resource industry”.

18. Evidence in the record shows that sediments that might be transported by a V-ditch are typically deposited within a few feet of where the V-ditch enters the drainage ditch, and do not end up downstream in the fish habitat. (Ex. 286, at 43-44, Findings 33, 35.) Only if there is no alternative can the V-ditch be cut so as to drain into a salmonid-bearing water. (Ex. 286, at 81, SCC 14.24.120(4)(c)(iv)).

19. Those watercourses that do contain fish, but may also provide an essential drainage function, such as the Skagit River, the Samish River, Hill Ditch, etc., are subject to Hydraulic Project Approval (HPA) jurisdiction for work within the ordinary high water mark, including dredging and drainage maintenance. The Watercourse Protection Measure for drainage maintenance does not change those requirements. Instead, these extra measures impose additional affirmative obligations on drainage maintenance. (SCC 14.24.120(4)(d), Ex. 286, at 81-83.)

20. Districts conducting drainage maintenance must file an annual statement reflecting awareness of these requirements and explaining how their work will be conducted consistent with the requirements of the subsection. (SCC 14.24.120(4)(d)(i), Ex. 286, at 81-82.)

21. These drainage courses are vital to maintaining agricultural production, not just in the area within the first 100 or 200 feet from the drainage course, but within much of the agricultural area in the delta. Ex 194(16). Impairing or preventing ongoing drainage function will result in substantial impact to agricultural operations. Ex 165(1) DEIS, Chapter 4. This Board previously received volumes of declarations and briefing attesting to this fact. (September 6, 2002, Order in Response to Court Remand, Case 00-2-0033c at 3.)

22. This new Ordinance withdraws the exemption from critical area regulation from land and facilities upstream from tidegates, floodgates, and pump stations by amending SCC 14.24.100(g) and adopting 14.24.120(4)(d). Even though the new development regulations do not impose buffers on land within municipal districts which provide flood control and internal drainage using tidegates, floodgates, and pump stations, they do impose regulations.

23. The record shows that the County's code enforcement officer explained to the Planning Commission that the County's current complaint-driven procedure works well. (Ex. 232, at 4-11). The code enforcement officer also stated that the vast

majority of critical area complaints were by neighbors against neighbors. (Ex. 232, at 10).

24. The County included necessary enforcement provisions for this Ordinance in the County's existing Enforcement Code, SCC 14.44. This consolidation provides for greater clarity and consistency in all County enforcement actions, does not single out existing agriculture for separate enforcement, and takes advantage of the strengths and procedures already established for County code enforcement. The State agencies commented favorably on the enforcement provisions (Ex. 281, para. 8).

25. Resolution R20030210, a Resolution "Adopting a Proposal Related to Monitoring and Adaptive Management of Riparian Areas in Conjunction with Skagit County Code (SCC 14.24.120 . . .)". (Exhibit 285)) is a companion to the County's new Ordinance. This Resolution commits the County to a substantial ongoing monitoring effort, not only a continuation of the County's existing water quality monitoring but an expansion of that program to include additional water courses that were not monitored under the County's prior Ordinance.

26. This Resolution includes, for the first time, a baseline inventory of existing fish habitat characteristics in representative stream reaches to begin to gain a better understanding of the existing condition of those habitat characteristics (Exhibit 285, pp 60-61, Section 2). In addition to the initial inventory, the Resolution commits to a reassessment of these habitat characteristics at five-year intervals as recommended by WDFW. (Exhibit 285).

27. The Resolution also commits the County to an adaptive management process to take advantage of the information gathered from monitoring, habitat inventory, and enforcement actions, to make changes to the County's programs in the future. *Id.* at 61-62, Section 3. The Resolution expressly commits the County to use the framework in the recent state publication, "The Washington Comprehensive Monitoring Strategy for Watershed Health and Salmon Recovery." This publication reflects the State's

latest and best thinking on monitoring and adaptive management for salmon recovery. The State resource agencies encouraged the County to follow this approach. (Exhibit 281).

28. The adaptive management plan does not, however, provide adequate detail as to the County's commitment to a timely and effective response if the monitoring program demonstrates that the current actions have been insufficient to protect critical areas and water quality from further degradation.

29. The Resolution continues and expands the County's commitment to participate in ongoing habitat restoration and salmon recovery efforts in the County. This, too, helps to satisfy the GMA's requirements for protection of Fish and Wildlife Habitat critical areas in the context of existing agriculture.

30. Petitioners expressed concerns about the County's monitoring program and adaptive management process. They contend that since the County's approach involves more risk to the protection of fish and wildlife resources than would a standardized buffer requirement, the program must include a rigorous monitoring program and adaptive management process. This program and process must be capable of detecting changes in the functions and values of habitat in a timely manner, and must include processes through which management techniques are reevaluated and modified as necessary in response to this information to ensure that the goals of the Act are being met.

31. The County's monitoring program lacks detail about the data that will be collected and what protocols for monitoring will be used.

32. The County's adaptive management program does not show how it will take timely and effective action if the monitoring data demonstrate that the current actions have been insufficient to protect the critical areas from further degradation.

33. Any Finding of Fact which should be properly deemed a Conclusion of Law is hereby adopted as such.

VIII. CONCLUSIONS OF LAW

1. We find the County can use different protection measures in existing, ongoing agricultural lands with altered riparian condition to protect existing functions and values of the riparian habitat than it would in a situation where the natural riparian buffer had not previously been disturbed.

2. We find Ordinance 02003002 in compliance with the Act except for the need for a clear statement that failure to comply with the required Watercourse Protection Measures shall result in enforcement and lack of detail in its adaptive management program, including its proposed monitoring strategy.

3. We find that the County's approach that uses a no-harm standard to protect the existing functions and values of riparian fish habitat in areas of ongoing agricultural is not precautionary.

4. We find the monitoring and adaptive management process outlined in the Resolution does not include necessary specificity as to how monitoring will be conducted, the process that will be used to take corrective action, as well as timelines that ensure corrective action will be taken promptly if the monitoring program demonstrates that the current actions have been insufficient to protect critical areas and water quality from further degradation.

5. Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

IX. ORDER

Having considered the entire record, including local circumstances, and all Parties' briefs and oral arguments, we find the County in compliance with the Act as to protection of critical areas within ongoing agricultural lands of long-term commercial significance except for those shortcomings listed in this decision and order.

In order to achieve compliance, within 180 days of the date of this order, the County must do the following:

Amend the leading paragraph of SCC14.24.120(4) in Ordinance 02003002 to make it clear that failure to comply with the mandatory Watercourse Protection Measures shall result in enforcement upon complaint.

Add specificity to Resolution R20030210 as to how monitoring will be conducted, how the resulting data will be used, what process will be used to take corrective action, and include timelines that ensure prompt corrective action and/or additional regulations if the monitoring program demonstrates that the current mandatory Watercourse Protection Measures and voluntary BMPs have been insufficient to protect critical areas and water quality from further degradation.

Any finding of noncompliance in previous sections of this decision are incorporated by reference.

Skagit County shall submit a report on its action to achieve compliance to this Board and to all parties in this case by June 24, 2004. Any party wishing to contest the County's compliance must submit written objections to finding compliance to the Board and other parties by July 15, 2004. The County and those parties supporting the

County's compliance shall submit responses by August 5, 2004. Opposing Parties' replies are due August 12, 2004.

A compliance hearing is set for August 19, 2004, at 9:00 am at a location to be determined later.

This is a Final Order under RCW 36.70A.300(5) for purposes of appeal.

Pursuant to WAC 242-02-832(1), a motion for reconsideration may be filed within ten days of issuance of this final decision.

So ORDERED this 8th day of December, 2003.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Nan A. Henriksen, Board Member

Holly Gadbow, Board Member

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

**BEFORE THE WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD**

SWINOMISH INDIAN TRIBAL COMMUNITY, et al.,

Petitioners,

and

WASHINGTON ENVIRONMENTAL COUNCIL, et al.,

Intervenors,

v.

SKAGIT COUNTY,

Respondent,

and

AGRICULTURE FOR SKAGIT COUNTY, et al.,

Intervenors.

No. 02-2-0012c

**COMPLIANCE
ORDER –
ADAPTIVE
MANAGEMENT**

I. SUMMARY OF THE DECISION

This matter comes to the Board to determine Skagit County’s compliance with the Growth Management Act’s (the GMA or the Act) requirements to protect critical areas in designated and ongoing agricultural lands. RCW 36.70A.172, 36.70A.040, and 36.70A.060. For almost a decade, Skagit County (County) has struggled to strike a balance between the conservation of agricultural lands and the protection of fish and wildlife habitat critical areas (FWHCAs) in ongoing agricultural lands. This has been a contentious but very significant undertaking since the County strives to maintain two

1 of its most important assets - productive agricultural lands and wild salmon. The
2 Board found in December 2003 that the County's approach failed to protect FWHCAs
3 in ongoing agricultural lands because of the following: (1) the ordinance failed to
4 ensure that its critical areas regulations in ongoing agricultural lands indeed would be
5 enforced, and (2) the ordinance's monitoring and adaptive management program did
6 not adequately ensure the protection of these FWHCAs. On June 21, 2004, the
7 County adopted Ordinance 020040011 and Resolution No. R20040211 for the purpose
8 of bringing its critical area protections in ongoing agricultural lands into compliance
9 with the GMA. Resolution No. R20040211 was also then appealed by the Swinomish
10 Tribe (the Tribe), alleging that the County's approach still did not protect FWHCAs.
11
12

13 In this decision, the Board finds that the County has amended its ordinance to ensure
14 that alleged violations will be investigated and corrective action will be enforced, if
15 violations have occurred. However, the Board also finds that the County's monitoring
16 and adaptive management program does not ensure the protection of the existing
17 functions and values of FWHCAs in ongoing agricultural lands as required by RCW
18 36.70A.040, RCW 36.70A.060, and RCW 36.70A.172. The County has adopted
19 minimal protective regulations in ongoing agricultural lands which must be buttressed
20 with an adaptive management program to ensure that protection is actually provided.
21 However, the County's program fails to provide the needed adaptive management to
22 ensure that its protection measures are, in fact, protecting FWHCAs. Fundamentally,
23 the program lacks benchmarks and triggers for corrective action and the ability to
24 detect the cause of any deterioration in the existing functions and values of FWHCAs
25 in a timely way so that the current protection measures could be adjusted to provide
26 adequate protection of fish habitat.
27
28
29
30
31
32

1 **II. PROCEDURAL HISTORY**

2 This case has a long and complicated history. Case No, 02-2-0012c is the final result
3 of the consolidation of Case Nos. 96-2-0025, 01-2-0004c, 00-2-0033c, 02-2-0009, and
4 02-2-0012c. The overriding issue in these now consolidated cases is whether the
5 County has complied with the GMA’s requirements to protect critical areas and
6 anadromous fish habitat in ongoing agricultural lands.
7

8
9 On December 8, 2003, the Board found that the County’s approach failed to protect
10 fish and wildlife habitat areas because of lack of clarity about whether the limited
11 watercourse protection measures it imposed would actually be enforced and because
12 of the lack of an effective monitoring and adaptive management program to ensure
13 that the protective measures were actually working.
14

15
16 On June 21, 2004, the County adopted Ordinance 020040011 and Resolution No.
17 R20040211 for the purpose of bringing its critical area protections in ongoing
18 agricultural lands into compliance with the GMA.
19

20 A compliance hearing was held on August 19, 2004. Alix Foster represented the
21 Tribe. Samuel “Billy” Plauche represented the County. Sheila Lynch, Assistant
22 Attorney General, represented the Washington Department of Fish and Wildlife
23 (WDFW). All three Board members attended. At the Compliance Hearing, the
24 Presiding Officer ruled on several of the Tribe’s and County’s motions to supplement
25 the record. The following documents were admitted as supplements to the record:
26

- 27
- 28 • Index # 377 - Centennial Clean Water Agreement
 - 29 • Index # 379 - Letter to the County from WDFW (June 8, 2004)
 - 30 • Index # 380 - A June 28, 2004 email from Dan Penttila
 - 31 • Index # 383 - Skagit County’s Field Form, Channel Constraint and Field
32 Chemistry - Streams/Rivers

- 1 • Index # 402 - Critical Assistance Handbook, Appendix ----(Washington
2 Department of Community, Trade, and Economic Development, November
3 2003)

4 The Board took official notice of the following documents:

- 5 • Item # 384 - Concise Explanatory Statement of Responses Study WAC 173-
6 201A- 200
7 • Item # 385 - Evaluation Standards for Protecting Aquatic Water Life
8 (Department of Ecology publication # 00-10-070)

9 The Board denied the motion to add the following items as supplements to the record:

- 10 • Index # 379 - Declaration of Keith Knutzen
11 • Index # 381 - Study of No-name Slough
12 • Index # 382 - Federal Register Notice (June 14, 2004)
13 • Index # 409 - May 29, 2004 e-mail from Rich Costello to Dan Penttila
14 • Index # 401 - June 21, 2005 e-mail from Rich Costello to Peter Birch
15

16

17 III. BURDEN OF PROOF

18 Comprehensive plans and development regulations and amendments to them are
19 presumed valid upon adoption. RCW 36.70A.320.
20

21

22 The burden is on petitioners to demonstrate that the action taken by Skagit County is
23 not in compliance with the requirements of the GMA. RCW 36.70A.320(2).
24

25

26 Pursuant to RCW 36.70A.320(3), we “shall find compliance unless [we] determine
27 that the action by [Skagit County] is clearly erroneous in view of the entire record
28 before the board and in light of the goals and requirements of [the GMA].” In order to
29 find the County’s action clearly erroneous, we must be “left with the firm and definite
30 conviction that a mistake has been made.” *Department of Ecology v. PUD 1*, 121
31 Wn.2d 19, 201 (1993).
32

1 IV. ISSUES TO BE DISCUSSED

2
3 Compliance Issues¹:

4
5 *1) Whether the County has amended Ordinance 02003002 to make it clear that*
6 *failure to comply with the mandatory Watercourse Protection Measures will result*
7 *in enforcement upon complaint.*

8
9
10 *2) Whether the County has provided adequate specificity in its regulations*
11 *applicable to FWHCAs in ongoing agricultural lands as to how monitoring will be*
12 *conducted, how the resulting data will be used, what process will be used to take*
13 *corrective action, and included timelines that ensure prompt corrective action*
14 *and/or additional regulations if the monitoring program demonstrates that the*
15 *current mandatory Watercourse Protection Measures and voluntary BMPs have*
16 *been insufficient to protect critical areas and water quality from further*
17 *degradation.*

18
19
20 New Issues² & ³:

21
22
23 *a. Whether the Resolution violates the Growth Management Act (“GMA”) by*
24 *failing to comply with the requirement of RCW 36.70A.040(3) and .060(2) that the*
25 *County shall protect the functions and values of critical areas.*

26
27 ¹ From the December 8, 2003 Compliance Order

28 ² From the Petition for Review filed in *Swinomish Indian Tribal Community v. Skagit County*,
29 WWGMHB Case No. 04-2-0016 (August 12, 2004), challenging Ordinance 020040011 and Resolution
30 No. R20040211.

31 ³ This case was consolidated with Case No. 02-2-0012c. See *Swinomish Tribal Community v. Skagit*
32 *County*, Case No. 02-2-0012c and *Swinomish Tribal Community v. Skagit County*, Case No. 02-2-0016
(Order on Consolidation, August 24, 2004).

1 *b. Whether the Resolution violates the GMA by failing to consider best*
2 *available science and by failing to give special consideration to conservation or*
3 *protection measures necessary to preserve or enhance anadromous fisheries in*
4 *violation of RCW 36.70A.172(1) and WAC 365-195-920.*

5
6
7 *c. Whether Skagit County has failed to comply with RCW 36.70A.060,*
8 *36.70A.170; and 36.70A.172(1) and WAC 365-195-920 by failing to adopt*
9 *monitoring and adaptive management programs that will result in changes to the*
10 *County's ordinance in the event that the County's ordinance fails to protect the*
11 *functions and values of fish habitat.*

12
13
14 *d. Whether Skagit County has failed to comply with RCW 36.70A.060,*
15 *36.70A.170; and 36.70A.172(1) and WAC 365-195-920 by failing to adopt*
16 *monitoring and adaptive management programs that will result in timely changes to*
17 *the County's ordinance in the event that the County's ordinance fails to protect the*
18 *functions and values of fish habitat.*

19
20
21 *e. Whether Skagit County has failed to comply with RCW 36.70A.060,*
22 *36.70A.170; and 36.70A.172(1) and WAC 365-195-920 by failing to adopt*
23 *monitoring and adaptive management programs that contain performance criteria*
24 *that will trigger changes to the County's ordinance in the event that the County's*
25 *ordinance fails to protect the functions and values of fish habitat.*

26
27 *f. Whether Skagit County has failed to comply with RCW 36.70A.172(1) and*
28 *WAC 365-195-920 by failing to adopt scientifically valid monitoring and an adaptive*
29 *management programs.*
30
31
32

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

V. DISCUSSION OF THE ISSUES

A. *Enforcement Measures:*

Whether the County has amended its regulations to make it clear that failure to comply with the mandatory Watercourse Protection Measures will result in enforcement upon complaint.

The County added the following language to SCC 14.24.120(4): “Failure to comply with these mandatory Watercourse Protection Measures for Ongoing Agricultural shall result in enforcement as provided in SCC 14.44.085.”

No Petitioner argued that this amendment to the County’s code did not comply with the Board’s December 8, 2004 order or the GMA.

The Board finds that the amended language makes it clear that violations of the Watercourse Protection Measures will be investigated if a complaint is filed and that enforcement will occur if a violation is found.

Conclusion: The Board finds this amendment to SCC 14.24.120(4) now complies with the Board’s December 8, 2003 order. This portion of the County’s regulations for protecting critical areas in ongoing agricultural lands is now compliant with RCW 36.70A.040, RCW 36.70A.060, and RCW 36.70A.172.

B. *Monitoring and Adaptive Management:*

Whether the County has provided adequate specificity in its regulations applicable to FWHCAs in ongoing agricultural lands as to how monitoring will be conducted, how the resulting data will be used, what process will be used to take corrective action, and include timelines that ensure prompt corrective action and/or additional regulations if the monitoring program demonstrates that the current mandatory Watercourse Protection Measures and voluntary BMPs have been insufficient to protect critical areas and

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

water quality from further degradation. (Remaining Compliance Issue from December 8, 2003 Compliance Order)

Whether the Resolution violates the GMA by failing to comply with the requirement of RCW 36.70A.040(3) and .060(2) that the County shall protect the functions and values of critical areas.

Whether the Resolution violates the GMA by failing to consider best available science and by failing to give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries in violation of RCW 36.70A.172(1) and WAC 365-195-920.

Whether Skagit County has failed to comply with RCW 36.70A.060, 36.70A.170, and 36.70A.172(1) and WAC 365-195-920 by failing to adopt monitoring and adaptive management programs that will result in changes to the County's ordinance in the event that the County's ordinance fails to protect the functions and values of fish habitat.

Whether Skagit County has failed to comply with RCW 36.70A.060, 36.70A.170; and 36.70A.172(1) and WAC 365-195-920 by failing to adopt monitoring and adaptive management programs that will result in timely changes to the County's ordinance in the event that the County's ordinance fails to protect the functions and values of fish habitat.

Whether Skagit County has failed to comply with RCW 36.70A.060, 36.70A.170; and 36.70A.172(1) and WAC 365-195-920 by failing to adopt monitoring and adaptive management programs that contain performance criteria that will trigger changes to the County's ordinance in the event that the County's ordinance fails to protect the functions and values of fish habitat.

Whether Skagit County has failed to comply with RCW 36.70A.172(1) and WAC 365-195-920 by failing to adopt scientifically valid monitoring and an adaptive management programs.

((Issues from the new Petition filed in WWGHMB Case No. 04-2-0016, challenging Resolution R20040211, *Swinomish Tribal Community v. Skagit County*, Case No. 04-2-0016 (Petition for Review, August 12, 2004) at 2 and 3.))

1 We will discuss these related issues together.

2

3 **Board Discussion**

4 In its last order, this Board found that the County's development regulations to protect
5 salmon habitat in ongoing agricultural lands must include monitoring and adaptive
6 management to comply with RCW 36.70A.172. Compliance Order (December 8,
7 2003) at 56. The Board determined that the GMA requires the protection of the
8 *existing* functions and values of fish habitat in ongoing agricultural lands. Compliance
9 Order (December 8, 2003) at 27. That decision also emphasized that the County
10 approach adopted in Ordinance 02003002 is acceptable because the County requires
11 that ongoing agriculture activities must be conducted such that those activities do not
12 harm the existing functions and values of fish habitat. Compliance Order (December
13 8, 2004) at 51. The Board acknowledged that the County could impose a lesser level
14 of precaution in designated ongoing agricultural lands to protect fish habitat than is
15 required in all other county designations,⁴ if, at the same time, this "less than
16 precautionary" approach was supported by a monitoring and adaptive management
17 program that identifies and responds to any elements of the County's strategy that fail
18 to protect the existing functions and values of fish habitat.
19
20
21

22

23 As a result of the Board's December 8, 2003 Compliance Order and the Tribe's
24 August 12, 2004 Petition for Review, this matter is before the Board to determine
25 whether the County's recently adopted monitoring and adaptive management
26 programs are adequate to ensure the protection of FWHCAs in ongoing agricultural
27 lands. The Tribe argues that the adaptive management program is non-compliant.
28 They point to several deficiencies they see in the program: it suffers from a lack of
29 required targets and benchmarks (a threshold for each parameter); it has no
30

31

32 ⁴ Other than on lands with ongoing agriculture, the County imposes a buffer requirement to protect fish habitat. New development in designated agricultural lands also requires buffers.

1 requirement for corrective action; it cannot determine the cause and effect of any
2 agricultural practices; it doesn't have a timeline for monitoring that will give
3 information quickly enough; and it fails to monitor on agricultural lands if the
4 landowner doesn't consent. Tribe's Motion for Noncompliance and Memorandum of
5 Support Thereof (July 15, 2004) at 13 – 27.
6

7
8 The Washington State Department of Fish and Wildlife (WDFW, the Department)
9 also argues against a finding of compliance. At the outset, the Department notes that
10 the County's approach involves more risk to fish than would a buffer requirement.
11 WDFW points out that it is still unclear what level of change will trigger corrective
12 action because the "information conclusively demonstrates" standard is vague and
13 uncertain. WDFW further notes that the process for responding to changes is highly
14 subjective because change is only required when "deemed necessary." Opening Brief
15 of Washington Department of Fish and Wildlife Regarding the August 19, 2004
16 Compliance Hearing (WDFW's Opening Brief, July 15, 2004) at 2 – 4. As to the
17 subjects that the County has chosen to monitor, WDFW notes that stream habitat
18 parameters do not include water temperature; that "wadeable streams" is not a defined
19 term; and that the monitoring program fails to segregate data from streams with a
20 salmonid presence from those without such a presence. The Department further
21 criticizes the failure of the program to characterize substrates within the sampling and
22 to ensure that sampling is done at the same times each year. WDFW's Opening Brief
23 at 4 and 5.
24
25
26

27 The County, on the other hand, responds that there were only two areas for
28 compliance under the Board's last order: requiring enforcement if there is a failure to
29 comply with the mandatory Watercourse Protection Measures; and development of a
30 Monitoring and Adaptive Management Program to comply with the Board's
31 December 8, 2003 order. Skagit County's Response Brief for Compliance Proceeding
32

1 (Skagit County's Response Brief, August 5, 2004) at 5. The County points out that
2 the new plan shows how monitoring will occur and how data will be collected,
3 provides specificity as to how the data will be used, establishes statistically significant
4 water quality trends, collects data and evaluates this data at five-year intervals,
5 provides for evaluation and corrective action, and sets timelines for prompt corrective
6 action (at least every three years). Skagit County's Response Brief at 5 – 14. The
7 County argues that what the Tribe and WDFW want is beyond the scope of
8 compliance and that Petitioners have not met their burden of proof because the County
9 has added the specificity to its monitoring and adaptive management program that the
10 Board's December 8, 2003 directed. Skagit County's Response Brief at 5. The
11 County argues that the failure to identify the cause of trends isn't a flaw in the
12 program because this can be determined later if deterioration in functions has been
13 proved. Skagit County's Response Brief at 22 – 24. It also asserts that the opt-out
14 provisions which allow landowners to refuse to allow monitoring on their lands do not
15 make the system biased. Skagit County's Response Brief at 18 – 20.
16
17
18

19 **A. The Scope of this Decision**

20 The Board has labored over this compliance decision, in part because the County's
21 implementation of an adaptive management program has highlighted some critical
22 deficiencies in the County's plan overall. We are mindful that the County is entitled
23 to finality on those issues that were decided in its favor in the 2003 Compliance Order.
24 However, this Board has stated in several decisions that the issue before the Board at a
25 compliance hearing is not whether the County has complied with the Board's remand
26 order but whether the County's action complies with the GMA pursuant to RCW
27
28
29
30
31
32

1 36.70A.330(1) .⁵ For instance, in *Achen v. Clark County*, WWGMHB Case No. 95-2-
2 0067(Compliance Order, 10/6/95), the Board said:

3 We have previously held in *Port Townsend v. Jefferson County*,
4 WWGMHB #94-2-0006 (*Port Townsend*) that the clear
5 language of RCW 36.70A.330(1) directs that the ultimate
6 question in a compliance hearing is whether there is compliance
7 with the Act, not necessarily whether there is specific
8 compliance with the remand order.

9 *Achen v. Clark County*, Case No. 95-2-0067(Compliance Order,
October 1, 1996) at 2.

10 Furthermore, the Tribe has filed a timely petition that challenges Resolution No.
11 R20040211. In the new petition, the Tribe asks the Board to determine that the
12 challenged enactments do not comply with RCW 36.70A.040, RCW 36.70A.060, and
13 RCW 36.70A.172 on the grounds that: (1) the monitoring and adaptive management
14 program does not protect the functions and values of FWHCAs, (2) best available
15 science was not considered in designing the monitoring and adaptive management
16 program needed to preserve anadromous fish, (3) the monitoring and adaptive
17 management program cannot make timely changes if the County's protection
18 measures fail to protect FWCHAs and anadromous fish, and (4) the monitoring and
19 adaptive management program do not contain performance measures to trigger timely
20 changes if protection measures fail. *Swinomish Tribal Community v. Skagit County*,
21 WWGMHB Case No. 04-2-0016 (Petition for Review, August 12, 2004).

22
23
24
25 Therefore, consistent with RCW 36.70A.330(1), previous decisions of this Board, and
26 the obligation to review all the issues raised in a timely filed petition, the Board will
27 decide whether the County's monitoring and adaptive management program complies
28
29
30

31 ⁵ The Board shall set a hearing for the purpose of determining whether the state
32 agency, county, or city is in compliance with the requirements of this chapter.
(RCW 36.70A.330(1)).

1 with the goals and requirements of the GMA, in light of the findings in the Board's
2 earlier compliance decisions.

3
4 **B. Why an Adaptive Management Program is Critical**

5 We note that the County's approach to critical areas regulations in ongoing
6 agricultural lands must be viewed as an integrated strategy; if one piece of that
7 strategy does not work, then it implicates the whole. Therefore, the effectiveness of
8 the monitoring and adaptive management program cannot be viewed as some ancillary
9 issue; it is central to approval of the County's approach to regulation of critical areas
10 in ongoing agricultural lands. Our December 8, 2003 Compliance Order described
11 the lack of certainty of the scientific information regarding existing fish habitat in
12 Skagit County's ongoing agricultural lands and agreed that the County could pursue
13 its minimal protection measures in ongoing agricultural lands provided they were
14 buttressed by an adaptive management program to ensure their effectiveness in
15 protecting fish habitat:
16
17

18 The Tribe and WEC believe that the County's approach is too risky, is
19 not precautionary, and shifts the balance in favor of agriculture. We
20 find that since the information about existing fish habitat is at this time
21 incomplete, it is not clear that this in fact is the case. However, we
22 agree with the Tribe, WEC, and the WDFW that effective monitoring
23 and adaptive management are key ingredients to achieving this balance
24 and reducing the risk.

25 Compliance Order (December 8, 2003) at 30.

26 For this reason, the Board found that a less-than precautionary approach in ongoing
27 agricultural lands could be compliant with the requirements of RCW 36.70A.172,
28 36.70A.040 and 36.70A.060, but only if it included a well-defined and responsive
29 adaptive management program. The Board found that while the County's Resolution
30 outlined its monitoring and adaptive management program, it was not sufficiently
31 described to provide the needed safety net for the County's less-than-precautionary
32

1 strategies and did not comply with the GMA. Compliance Order (December 8, 2003)
2 at 57.

3
4 **C. The Concept of “Adaptive Management”⁶**

5 “Adaptive management” is a term used to describe an approach to managing
6 regulations to achieve effectiveness in the highly complex area of ecological
7 functions. In the GMA context, the idea of adaptive management is used where there
8 is uncertain or insufficient scientific information about critical areas in a given
9 jurisdiction. WAC 365-195-920. This administrative provision provides that in such
10 circumstances a “precautionary” approach should be adopted (WAC 365-195-920(1))
11 together with “an effective adaptive management program that relies on scientific
12 methods to evaluate how well regulatory and nonregulatory actions achieve their
13 objectives.” WAC 365-195-920(2). It provides that management, policy and
14 regulatory actions should be treated as experiments that are purposefully monitored
15 and evaluated to determine whether they are effective and, if not effective, improved
16 to increase their effectiveness. WAC 365-195-920.

17
18
19
20 Although the Board did not require the County to take a “precautionary or no risk
21 approach” in ongoing agricultural lands, it did reference WAC 365-195-920; the
22 Board referred to this guidance as setting out the basis for a monitoring and adaptive
23 management program to ensure that the limited development regulations (and
24 voluntary measures) that the County adopted are indeed effective in protecting the
25 existing functions and values of fish habitat.
26
27
28
29

30 ⁶ Pursuant to RCW 36.70A.172(2), the Board consulted with Dr. Oscar Soule, Ph.D., retired professor
31 of Environmental Studies at The Evergreen State College, to assist the Board in reaching its decision
32 involving critical areas. Dr. Soule provided expert review of the Board’s decision regarding adaptive
management principles. Attached as Appendix A to this decision is a copy of the Notice of
Consultation with Scientific Expert Pursuant to RCW 36.70A.172(2) provided to the parties.

1 Adaptive management is an approach used in a variety of different environmental
2 contexts. Under Washington administrative regulations, adaptive management is
3 recognized as a regulatory approach utilized in forest practices and shorelines
4 protection, as well as in protection of critical areas under the GMA. See WAC 173-
5 26-201(1)(g) (relating to shorelines protections) and WAC 222-08-160 (relating to
6 forest practices).
7

8
9 The concept of adaptive management to address scientific uncertainties in complex
10 ecosystems has also been adopted in other jurisdictions as well. See, for example,
11 Hymanson, Kingma-Rymek, Fishbain, Zedler and Hansch, California Coastal
12 Commission: Procedural Guidance for Evaluating Wetland Mitigation Projects in
13 California's Coastal Zone, "Use of Monitoring and Adaptive Management to Promote
14 Regeneration in the Allegheny National Forest," Lois DeMarco, USFS National
15 Silvicultural Workshop, Kalispell, Montana (regarding the Allegheny National Forest
16 in Pennsylvania); and the British Columbia Forest Practices Code.
17

18
19 An adaptive management program incorporates research into conservation action.
20 Salarfsky, Margoluis and Redford, "Adaptive Management: A Tool for Conservation
21 Practitioners," World Wildlife Fund, Inc. (2001). Both policy and science are required
22 to design a monitoring program that is capable of providing timely and accurate
23 information to policy makers and habitat managers so that they can effectively react to
24 trends. Memorandum from W. Gregory Hood Ph.D. to Larry Wasserman, The Skagit
25 County Salmon Habitat Monitoring Program, May 30, 2004, Ex. 364.5.1 at 2. Thus,
26 an adaptive management program should accomplish two major objectives: it should
27 collect and evaluate meaningful data concerning the effectiveness of the less-than-
28 precautionary protection measures; and it should provide for swift and certain
29 corrective action in response to indications that those measures are not sufficient to
30 protect the critical areas at issue. The establishment of clear goals, objectives,
31
32

1 performance standards, and a well-defined monitoring program are key to a successful
2 adaptive management program. Procedural Guidance for Evaluating Wetland
3 Mitigation Projects in California's Coastal Zone, California Coastal Commission,
4 *supra*.

5
6 This description of adaptive management is consistent with previous direction the
7 Board has given the County. In our compliance order in *Skagit Audubon Society v.*
8 *Skagit County*, Case No. 00-2-0033c, in a similar instance where the Board accepted
9 an untested, innovative approach to protecting FWHCAs in ongoing agricultural lands,
10 the Board said:
11

12
13 Since MARP uses an untested approach, the effectiveness and
14 responsiveness of the monitoring and adaptive management program
15 will be key. We will maintain jurisdiction to ensure that the design and
16 development of that program contains the following elements:

- 17 (1) clearly defined biological performance standards,
- 18 (2) specific habitat objectives for triggers,
- 19 (3) specific predetermined management responses to unmet
20 standards and objectives,
- 21 (4) timelines by which standards must be met and required
22 timelines for predetermined management responses, and
- 23 (5) funding and work program established.

24 *Skagit Audubon Society v. Skagit County*, WWGMHB Case No. 00-2-0033c
25 (Compliance Order, 2/9/01) at 2.

26 **D. The County's Adaptive Management Program**

27 Here, uncertainty exists about the efficacy of the Watercourse Protection Measures
28 and the voluntary best management practices allowed in ongoing agricultural lands for
29 the purpose of protecting the functions and values of fish habitat. While the County
30 has added specificity to its regulations defining how monitoring will be conducted,
31 how the resulting data will be used,⁷ and the process that will be used to take

32 ⁷ Skagit County's Response Brief for Compliance Proceeding (August 5, 2004) at 7 and 8.

1 corrective action, specificity alone does not make the County's monitoring and
2 adaptive management program compliant with the GMA. Until there is specificity
3 about what to expect of the County's program, compliance with the GMA could not be
4 determined. That is why the Board required specificity in the County's program.
5 Now, the County has provided specificity so that the merits of the program in reaching
6 the needs to protect fish habitat can be assessed.
7

8
9 WDFW advised the County about the important components of an effective adaptive
10 management program:

11 "Clearly defining what constitutes success or failure and what triggers
12 action by policy before the data are collected is a critical part of
13 adaptive management."

14 Memo from WDFW Review of the Skagit County Salmon Habitat Monitoring
15 Program Quality Assurance Project Plan. (Draft March 27, 2004), Exhibit
16 364.5.4 at 2.

17 Under the circumstances here, the adaptive management program should provide
18 meaningful data concerning the effectiveness of the less-than-precautionary protection
19 measures adopted by the County to protect salmon habitat in ongoing agricultural
20 lands; and it should provide for swift and certain corrective action in response to
21 indications that those measures are not sufficient to actually protect that habitat. In
22 this way, the adaptive management program will provide the basis for taking any
23 needed corrective action in order to protect the existing functions of FWHCAs (RCW
24 36.70A.040 and .060). We examine the County's adaptive management program to
25 determine whether it accomplishes these aims.
26

27
28 ***1) Collect and evaluate meaningful data concerning the effectiveness of the***
29 ***less-than-precautionary protection measures***

30 To acquire meaningful data, the program should start with benchmarks that describe
31 the state of the existing functions and values of fish habitat in ongoing agricultural
32 lands. This is necessary because there must be a baseline from which the effectiveness

1 of the protective regulations is measured. Tribe's Memorandum at 13 – 17, Reply
2 Brief of Washington Department of Fish and Wildlife Regarding the Department of
3 Fish and Wildlife Regarding the August 9, 2004 Compliance Hearing at 2, and
4 Exhibit 364.5.4 at 1 and 2. As the County admits, it still has not developed these
5 benchmarks. County's Response Brief at 25. While the County points to difficulties
6 in establishing benchmarks, these difficulties do not obviate the need for a baseline
7 from which effectiveness can be measured.
8

9
10 In fact, it appears that the County was very close to making to having some
11 benchmarks at the time Resolution No. R20040211 was adopted:

12
13 The County will conduct a baseline survey of physical and in-stream
14 physical and in-stream salmon characteristics of representative salmon-
15 bearing watercourses countywide prior October 31, 2004.
16 Resolution No. R20040211, Section 2(a).

17 However, the County's adaptive management program in support of its less-than-
18 precautionary protective measures cannot be found compliant without a baseline that
19 shows the existing status of the habitat that requires protection.

20
21 Second, the data should measure those characteristics of fish habitat that are necessary
22 to support fish. The adaptive management program should look to science to
23 determine what characteristics of the existing functions and values of fish habitat in
24 ongoing agricultural lands are necessary to sustain fish. We were told, at argument,
25 for example, that there are certain levels of salt that will kill fish or fish at various
26 stages of development. The County's program needs to establish triggers to change
27 management practices affecting the existing functions and values of fish habitat well
28 before that level is reached. These triggers for change should be set both in light of
29 the benchmarks for existing conditions *and* in accordance with scientifically-based
30 habitat minimums. Exhibit 364.5.2 at 2 and Exhibit 364.5.4 at 1 – 4. Our last
31
32

1 compliance order also expressed the Board's concern about the County's adaptive
2 management program's lack of benchmarks and triggers:

3
4 The County must also clearly define "data conclusively demonstrates"
5 so it will be clear what level of change will be necessary to trigger
6 corrective action."

7 Compliance Order (12/8/03) at 49.

8 An examination of the County's Resolution shows that the County has not changed its
9 approach to address the Board's direction that the County clearly define what level of
10 change will be necessary to trigger correction action.

11
12 If at any time monitoring data *conclusively demonstrates* that the
13 current Watercourse Protection Measures specified in SCC
14 14.24.120(4) are not sufficient to meet the No Harm or Degradation
15 Standard, then the County shall consult with the Skagit Conservation
16 District, the Natural Resource Conservation Service, the Washington
17 Department of Ecology, the Washington Department of Fish and
18 Wildlife, and/or other state or federal agencies with jurisdiction or
19 technical expertise to recommend revisions, or amendments or to assist
20 in the development of new Watercourse Protection Measures sufficient
21 to meet the No Harm or Degradation Standard and sufficient to meet
22 the County's GMA obligations to preserve and protect agriculture. If
23 any changes to the Watercourse Protection Measures are *deemed*
24 *necessary* to meet the No Harm or Degradation Standard, proposals to
25 amend, revise or add new requirements to the County's critical areas
26 ordinance (SCC 14.24) will be considered by the County at a
27 minimum, consistent with the 3 year evaluation of the regulatory and
28 monitoring program.... (emphasis added).

29 Resolution No. R20040211 at Section (3)(v).

30 While the County Commissioners may obtain recommendations from federal and
31 state agencies and other entities with expertise, the County's adaptive management
32 program does not have standards or performance objectives to determine whether an
33 evaluation of the program is necessary or criteria to evaluate these recommendations.

34 If the County's adaptive management program does not set the standard for a change
35 in regulations to account for deterioration in fish habitat, then it is not addressing a key

1 component of adaptive management – a response system that uses the information to
2 make appropriate changes. The County’s program makes it possible to put off
3 protection measures, no matter what the degree of danger to fish.
4

5 Third, the data collected should be tied to the protective measures that are being
6 assessed. The objective of an adaptive management program is to monitor the
7 effectiveness of protective measures whose efficacy is uncertain and make
8 adjustments if they are not working adequately to provide protection. See WAC 365-
9 195-920. The County must have some way of knowing how the information that it
10 collects relates to the regulations that are in effect in ongoing agricultural lands. While
11 there are many difficulties in determining the efficacy of voluntary practices (because
12 those practices are unknown), the County cannot rely upon them if they are not
13 evaluated through the monitoring program. Moreover, the County should be able to
14 monitor whether the specific Watercourse Protection Measures (such as prohibiting
15 stock in the streams) it adopted are having the impact on bank erosion and pollutant
16 contamination that was forecast.
17
18

19
20 The County establishes two ways of monitoring: (1) trends and conditions monitoring
21 through the Environmental Monitoring and Assessment Program (EMAP) and (2)
22 monitoring for investigations in regard to complaints about violation of the
23 Watercourse Protection Measures. While the monitoring for specific complaints will
24 result in a change in practices, if necessary, the EMAP system is not presently
25 designed to provide an expeditious measure of the effectiveness of the County’s
26 protective measures. As designed, the EMAP system takes a much longer time to
27 determine the cause of a significantly negative trend, a deterioration in existing
28 conditions, or the reason the Watercourse Protection Measures are inadequate than
29 would be needed to buttress the limited protective measure applicable in ongoing
30 agricultural lands. Under this program, it will take six years of data collection before
31 the County can get a full look at trends and conditions. The County will post its
32

1 information on its website regularly. If a significantly negative trend is identified
2 before that, the County can consult with local, federal, and state agencies and entities
3 with expertise to make recommendations for changes in the Watercourse Protection
4 Measures. These agencies and the public have an opportunity at three-year intervals
5 to make recommendations about needed changes to the County's Watercourse
6 Protection Measures.
7

8
9 We have no reason to doubt the scientific validity of the EMAP monitoring system for
10 monitoring overall trends and conditions and its usefulness to a statewide view of
11 salmon habitat. However, adaptive management is not just a question of monitoring
12 trends – an adaptive management program must monitor and respond to the
13 effectiveness of the specific protection measures that are at issue.
14

15 ***2) Provide for swift and certain corrective action in response to any indications that***
16 ***the protective measures are not sufficient to protect the critical areas at issue***
17

18 In this regard, setting performance measures that will trigger the need for change in
19 protective regulations is the heart of the adaptive management program. *See*
20 Procedural Guidance for Evaluating Wetland Mitigation Projects in California's
21 Coastal Zone, California Coastal Commission, *supra*. As is the case in setting habitat
22 minimums, this is a situation where the County should incorporate best available
23 science to determine what levels of key functions in fish habitat will require a change
24 in the protective measures that are in place.
25

26
27 Second, the County should commit to undertaking change in management practices if
28 evidence of habitat deterioration meets the trigger points established in accordance
29 with best available science. Exhibit 364.5.4 at 2. A chief complaint of both the Tribe
30 and WDFW continues to be that there are no standards for determining when change
31 is required. The County argues that this will be a legislative decision for the Board of
32

1 County Commissioners and that decision will be reviewable. However, that could
2 mean that fish habitat could be deteriorating without a County commitment to take
3 action.

4
5 Third, the County should move expeditiously if the triggers are reached. What
6 constitutes “expeditious” action will depend upon the level at which the triggers are
7 set. The current scheme provides for consideration of monitoring data every 3-5 years.
8 If the triggers are set well in advance of danger levels, then more time could be
9 allotted for response. If danger points have been reached, waiting years for response
10 is clearly insufficient. If triggers are set when actual danger to fish survival is
11 imminent, then the response time must occur almost immediately. *See Ex. 364.5.15*
12 (discussing critical response needs depending upon function measured). Once
13 environmental damage is done, it may take many years to repair, if it is even possible
14 to remedy the loss. *See Kucera v. State*, 140 Wn.2d 200, 211, 995 P.2d 63 (2000)
15 (noting the “irreparable nature of environmental injury”). An adaptive management
16 program as part of a less-than-precautionary regulatory approach should evaluate
17 performance more frequently than once every three to five years to provide a back-
18 stop for measures whose efficacy is still uncertain. Therefore, timely response to
19 evidence of injury to fish habitat is essential to the adaptive management program
20 here.

21
22
23
24 Finally, we remind the County that none of the requirements for adjusting protection
25 measures in critical areas to address the causes of deterioration in FWHCAs or the
26 danger to fish should be viewed as punishment for individuals; nor is a determination
27 that a protection measure is insufficient a finding of fault. The question is what
28 works, not where fault should lie. By definition, the County’s evaluation of its
29 protection measures should begin from a position of uncertainty as to how these
30 practices will impact fish habitat, a position that the Board recognized when it allowed
31 the County’s less-than-precautionary approach,. Therefore, an appropriate adaptive
32

1 management program should start from a neutral position, and not presume that the
2 adopted practices are sufficient or insufficient. Starting from a position of uncertainty
3 and presumption of neutrality, the adaptive management system should not require an
4 elevated level of proof to adjust and refine better practices. Instead, the adaptive
5 management program must measure the effect of the practices whose impacts are not
6 certain, and modify them promptly when they appear to be failing to prevent a
7 deterioration of functions.
8

9
10 We do not, with these comments, intend to dictate the terms of the adaptive
11 management program that the County should develop. The Board has neither the
12 expertise nor the authority to design an adaptive management program for these
13 circumstances; that is for the County to accomplish. However, we highlight those
14 points of an adaptive management program in this situation that should be provided in
15 order to actually measure and adjust for changes in fish habitat; without that ability,
16 the adaptive management program cannot be an effective part of a protection strategy.
17

18 **E. Conclusion**

19
20 Our finding of noncompliance here does not mean that the Board discounts the hard
21 work, public process, and creative thinking the County Commissioners, staff, and
22 citizens from all perspectives have done to try to achieve the difficult balance of
23 conserving agriculture lands and fish habitat. The question is what will work to
24 protect fish habitat in the same environment where ongoing agriculture is well-
25 functioning and being conserved. Adaptive management is a creative tool to explore
26 possible solutions but it requires rigor, commitment and prompt change in response to
27 indications of problems in order to ensure the County's less-than-precautionary
28 protections of fish habitat in ongoing agricultural lands comply with RCW
29 36.70A.040, .060, and .172. The monitoring and adaptive management system
30 embodied in amended Resolution No. R20040211 still does not establish an overall
31
32

1 protection strategy for fish and wildlife habitat in ongoing agricultural lands that
2 complies with these provisions of the GMA.

3
4 *Conclusion:* The monitoring and adaptive management system embodied in amended
5 Resolution No. R20040211 does not comply with RCW 36.70A.040, .060, and .172,
6 to protect the functions and values of fish habitat in ongoing agricultural lands.
7

8 **FINDINGS OF FACT**

9
10 1. Skagit County is a county located west of the Cascades and required to plan under
11 RCW 36.70A.040.

12 2. On June 21, 2004 the County adopted Ordinance 020040011 and Resolution No.
13 R20040211 for the purpose of bringing its critical area protections in ongoing
14 agricultural lands into compliance with the Growth Management Act (“GMA”).

15 3. On August 12, 2004, Resolution No. R20040211 was appealed by the Swinomish
16 Tribe (the Tribe), alleging that the County’s approach still did not protect fish and
17 wildlife habitat critical areas (FWHCAs).

18 4. The County has amended its regulations to ensure that alleged violations of its
19 Watercourse Protection Measures will be investigated and corrective action will be
20 enforced, if violations have occurred.
21

22 5. In the December 8, 2003 Compliance Order issued in this case, the Board found
23 that a less-than-precautionary approach to protecting critical areas in ongoing
24 agricultural lands could be compliant with the requirements of RCW 36.70A.172,
25 36.70A.040 and 36.70A.060, but only if it included a well-defined and responsive
26 adaptive management program.
27

28 6. The County requires scientifically based buffers on all streams in the County
29 except those in designated ongoing agricultural lands. In ongoing agricultural lands,
30 the County imposes voluntary best management practices and its Watercourse
31 Protection Measures instead of buffers.
32

1 7. Uncertainty exists about the efficacy of the Watercourse Protection Measures and
2 the voluntary best management practices allowed by the County in ongoing
3 agricultural lands for the purpose of protecting the functions and values of fish habitat.
4 Because of that uncertainty, these measures are less-than-precautionary and require an
5 adaptive management program to ensure that needed changes can be made promptly if
6 these measures are not sufficient to protect FWHCAs.
7

8 8. Under the circumstances of this case, an adaptive management program should
9 accomplish two major objectives: it should collect and evaluate meaningful data
10 concerning the effectiveness of the less-than-precautionary protection measures; and it
11 should provide for swift and certain corrective action in response to any indications
12 that those measures are not sufficient to protect the critical areas at issue.
13

14 9. To acquire meaningful data, the program should start with benchmarks that
15 describe the state of the existing functions and values of fish habitat in ongoing
16 agricultural lands. This is necessary because there must be a baseline from which the
17 effectiveness of the protective regulations is measured.

18 10. The data should also measure those characteristics of fish habitat that are
19 necessary to support fish, utilizing the best available scientific information. This will
20 allow the triggers for change to be set both in light of the benchmarks for existing
21 conditions *and* in accordance with scientifically-based habitat minimums.
22

23 11. The data collected should be tied to the protective measures that are being
24 assessed. The objective of an adaptive management program is to monitor the
25 effectiveness of protective measures whose efficacy is uncertain and make
26 adjustments if they are not working adequately to provide protection.
27

28 12. Providing for swift and certain corrective measures requires setting performance
29 measures that will trigger the need for change in protective regulations.

30 13. Adaptive management also requires the County to commit to undertaking change
31 in management practices if evidence of habitat deterioration meets the trigger points
32 established in accordance with best available science. The need for change in

1 protective measures should be determined at the outset to ensure that it is determined
2 independent of politics.

3 14. Further, to make the adaptive management program meaningful, the County
4 should commit to moving quickly if the triggers are reached. The time set for a
5 County response should be closely related to the level at which triggers are set so that
6 timely response to evidence of injury to fish habitat will occur.

7
8 15. Under Washington administrative regulations, adaptive management is recognized
9 as a regulatory approach utilized in forest practices and shorelines protection, as well
10 as in protection of critical areas under the GMA. *See* WAC 173-26-201(1)(g) (relating
11 to shorelines protections) and WAC 222-08-160 (relating to forest practices).

12 16. The County's program does not provide benchmarks from which the effectiveness
13 of its the less than precautionary Watercourse Protection Measures can be evaluated.

14 17. The County's adaptive management program does not include specific habitat
15 triggers or biological objectives based on best available science.

16 18. The County's adaptive management program does not tie its monitoring program
17 to the less than precautionary protective measures that are being evaluated.

18 19. The County's adaptive management program does not provide predetermined
19 management responses based on best available science.

20 20. The County's adaptive management program does not provide criteria based on
21 best available science to evaluate the extent of habitat deterioration or how well the
22 Watercourse Protection measures are working.

23 21. The environmental monitoring and assessment program (EMAP), the habitat
24 monitoring program that the County is using, measures trends and conditions in
25 salmon habitat over time but does not monitor the effectiveness of protective measures
26 whose efficacy is uncertain and make adjustments if they are not working adequately
27 to provide protection.

28 22. Under EMAP, it will take six years of data collection before the County can get a
29 full look at trends and conditions in fish habitat.
30
31
32

1 23. With EMAP, it will be very difficult and time consuming to determine the cause of
2 deteriorating habitat conditions or failure of the Watercourse Protection measures to
3 protect the existing functions and values of FWHCAs in designated ongoing
4 agricultural lands.

5 24. The County's approach to protecting the existing functions and values of
6 FWHCAs in designated ongoing agricultural lands fails to buttress its less than
7 precautionary protection measures with an adaptive management program that will
8 ensure that swift and effective corrective measures are taken if the less than
9 precautionary measures fail to protect existing functions and values of fish habitat.
10
11

12 CONCLUSIONS OF LAW

13 A. The Board has jurisdiction over this case pursuant to RCW 36.70A.330(1).
14

15 B. Petitioners have standing to challenge the Resolution No. R20040211 that
16 establishes the County's monitoring and adaptive management program, an integral
17 part of their approach to protecting FWHCAs in designated ongoing agricultural lands,
18 because they participated in the review of this resolution in the manner prescribed by
19 the County and/or filed Petition for Review of Resolution in a timely way pursuant to
20 RCW 36.70A.290(2).
21

22 C. The amendment to SCC 14.24.120(4) providing for enforcement upon the
23 filing of a complaint now complies with the Board's December 8, 2004 order. This
24 portion of the County's regulations for protecting critical areas in ongoing agricultural
25 lands is now compliant with RCW 36.70A.040, RCW 36.70A.060, and RCW
26 36.70A.172.

27 D. The County's protection measures for fish and wildlife habitat critical areas in
28 ongoing agricultural lands fail to comply with RCW 36.70A.040, 36.70A.060, and
29 36.70A.172.
30
31
32

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

ORDER

The County must bring its regulations to protect FWHCAs in designated ongoing agricultural lands into compliance with RCW 36.70A.040, RCW 36.70A.060, and RCW 36.70A.172 within 180 days of this order.

Compliance Due	July 12, 2005
County's Statement of Actions Taken	July 28, 2005
Petitioners' Objections, if any, to a Finding of Compliance	August 18, 2005
County's Response	September 8, 2005
Petitioners' Reply (Optional)	September 15, 2005
Compliance Hearing	September 28, 2005

This is a final order for purposes of appeal pursuant to RCW 36.70A.300(5) and for reconsideration pursuant to WAC 242-02-832.

So ORDERED this 13th day of January 2005.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Holly Gadbow, Board Member

Margery Hite, Board Member

Gayle Rothrock, Board Member

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

APPENDIX A
BEFORE THE WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD

SWINOMISH INDIAN TRIBAL COMMUNITY, et al.,

Petitioners,

and

WASHINGTON ENVIRONMENTAL COUNCIL, et al.,

Intervenors,

v.

SKAGIT COUNTY,

Respondent,

and

AGRICULTURE FOR SKAGIT COUNTY, et al.,

Intervenors.

No. 02-2-0012c

**NOTICE OF
CONSULTATION
WITH SCIENTIFIC
EXPERT
PURSUANT TO
RCW 36.70A.172(2)**

THE BOARD hereby gives notice to all parties that it has consulted with a scientific expert in reaching its decision with regard to critical areas in this case. The Board retained Oscar Soule, Ph.D., an expert in environmental studies, to review the Board's

1 decision with respect to the principles of adaptive management articulated in the
2 decision. The letter provided by Dr. Soule is attached to this notice, as is Dr. Soule's
3 curriculum vitae.
4

5 ENTERED this 13th day of January, 2005.
6
7
8

9 WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD
10
11
12

13 _____
14 Holly Gadbow, Presiding Officer
15

16 _____
17 Margery Hite, Board Member
18

19 _____
20 Gayle Rothrock, Board Member
21
22
23
24
25
26
27
28
29
30
31
32