

Supreme Court Decision on Swinomish Indian Tribal Community vs. Western Washington GMA Hearings Board

Key issues for Shoreline Management

The Washington Supreme Court issued its decision in *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board* (No. 76339-9). Key points of relevance to shoreline management include those discussed below.

This very long-standing case revolves around agricultural practices and protection of fish habitat. We need to go back to the original order language to understand the full picture in this case. The first two points below are from Compliance Order Case No. 02-2-0012c December 8, 2003:

1. The Growth Management Act (GMA) requires protection for both agriculture and habitat lands.

“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.”

2. Critical areas must be protected from on-going harm, including harm from existing agricultural activities.

The County’s program is intended to achieve a “no harm” standard. The 2003 GMHB decision emphasizes the need to act to address on-going harm. The 2007 Court decision revolves around whether the County program is achieving no harm. As described in the 2003 decision:

“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.”

The Board was very emphatic regarding the need to address protection from harm due to existing agricultural uses. They placed in bold the following:

“By reaching the above conclusions (regarding protection under GMA), 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.” (Compliance Order Case No. 02-2-0012c December 8, 2003)

3. **Enhancement is not required for GMA compliance.** The 2007 Court decision found that a GMA-compliant Critical Areas Ordinance (CAO) does not need to *require* enhancement of critical areas, although GMA *allows* such requirements. The Tribe and WEC argued that protection sometimes requires enhancement of a degraded condition. The Court found that protecting critical areas means maintaining existing conditions. And they specifically examined the “special consideration” requirement for anadromous fisheries:

“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.

“[T]he legislature has not imposed a duty on local 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.”**

4. **Mandatory buffers are not required on existing agricultural lands.** The Court found that best available science (BAS) does not create a GMA requirement for mandating buffers on existing farmed areas. The Tribe and WEC unsuccessfully argued that mandatory buffers must be established along streams and rivers to protect anadromous fish, because buffers are supported by the best available science (BAS):

“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.”**

5. **“Benchmarks” are required as the basis for monitoring and adaptive management.** This was a key outcome of the decision. The County’s adaptive management program is at the heart of their approach to avoid mandatory actions such as buffers. The concept is to identify and correct actual problems caused by existing agricultural activities.

Skagit County challenged the Board’s 2005 conclusion that their GMA program lacked appropriate benchmarks for comparison of monitoring results. The Court affirmed the Board, specifically rejecting the County’s approach of identifying benchmarks from results of the initial three years of monitoring.

A lot of folks have hitched a lot of wagons to “monitoring and adaptive management.” Perry Lund suggests that this may be the most significant element of the decision for the Shorelands Program. For example, we need to consider where the “benchmarks” will be in our updated shoreline master programs (SMPs) and how they will be deployed in light of the findings in this case:

“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 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

6. The Court continues to affirm the Board’s authority to critically assess compliance with the GMA: the deference due local governments by the Board does not “approximate a rubber stamp.”
7. And for those interested in administrative law, the Court affirmed the use of technical experts where authorized by law - even where the parties are not given an opportunity to respond formally to the opinions and analysis provided by the expert. The scholarly works used to assist in understanding a technical term (“adaptive management”) did not constitute “extra-record evidence” here. (In this case, the scholar in question was our own retired Evergreen prof Oscar Soule.)

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Case is at <http://www.courts.wa.gov/opinions/?fa=opinions.disp&filename=763399MAJ>