

**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 a 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)

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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

**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 - DISSENT**

I respectfully dissent. In my judgment, Skagit County's reliance on voluntary best management practices and acceptance of a level of ongoing harm to some of the functions and values of fish habitat in ongoing agricultural lands fail to comply with the GMA requirement to protect critical areas.

Skagit County has done major work toward balancing the competing needs of fish and agriculture in the Skagit Valley. In no way does my dissent reflect a lack of appreciation for the difficult task facing the county commissioners or the earnest efforts that have been undertaken by them.

That having been said, in my view, the approach taken by the County is flawed in its basic underpinnings. The strategy that the County has adopted fails in the fundamental requirement to protect fish habitat by *preventing* harm, injury or loss to fish habitat. The County has developed a process for monitoring, detecting and enforcing sanctions against those who harm existing fish habitat but, with the exception of its Watercourse Protection Measures, the County's policies and development regulations do not prevent that harm from occurring in the first place.

The County requires riparian buffers throughout the County to protect fish and wildlife habitat except in ongoing agricultural lands. The use of these riparian buffers comports with the best available science for protection of fish habitat. It is reasonable for the County to provide an alternative to mandatory buffers in ongoing agriculture because of the enormous negative impact those buffers could have on the ability of farmers to continue to farm. However, the regulations established in lieu of mandatory buffers must still meet the statutory requirements for protection of designated critical areas, and include best available science in doing so. They must protect from harm all of the seven functions and values of fish habitat.

The County's strategy for protection of fish habitat in agricultural lands relies upon best management practices in lieu of its standard buffer requirement in ongoing agricultural lands. However, instead of making those best management practices mandatory, the County has made them "voluntary". Under the County's new ordinance, the County will only require an individual farmer to adopt best management practices if that farmer can be shown to have caused harm to fish habitat. This approach shifts the emphasis from prevention to punishment; from protecting the functions and values of fish habitat to waiting for proof that harm has been caused. It also accepts the current status of fish habitat relative to shade, large woody debris, and litter fall and nutrient input, without regard to what the impact of the current status

may be on fish. This approach allows for environmental harm which may take years to remedy.

This case is before the Board in a compliance posture. It has already been shown that agricultural activity harms fish habitat if for no other reason than it removes the natural vegetation along rivers and streams that would otherwise protect fish habitat. The “do no harm” standard ignores this reality. It further ignores the fact that the harm caused is no one individual’s “fault” but largely results from the cumulative impact of longstanding agricultural practices. I would hold that the County could exempt ongoing agriculture from mandatory buffer requirements if meaningful performance requirements or practices were mandated in their stead. While the Watercourse Protection Measures are meaningful performance requirements, they were not established using best available science to protect each of the seven identified functions and values of fish habitat and do not accomplish necessary protection as a result. For these reasons, I would find the County in noncompliance with the GMA.

“Protect” Means “Shield From Harm” Not “Preserve The Status Quo”

The parties argue extensively over whether or not the County has to “enhance” fish habitat. I do not reach that question due to the fact that I conclude that the County does not meet the GMA standard for *protection* of critical areas. The County asks us to conclude that “protect” means “preserve the status quo”. The County derives this definition from the decision of Thurston County Superior Court Judge Pomeroy’s finding that “protect” does not mean “enhance”. If the County does not have to enhance critical areas, the County argues, then it only has to preserve what is there now.

The County emphasizes a “preserve the status quo” interpretation because the County’s strategy assumes that certain functions of fish habitat in ongoing agricultural lands have been altered and should not have to be restored. The County argues that

the past hundred years of agricultural activity in Skagit County have removed or reduced some of the functions and values of fish habitat from ongoing agricultural lands. Therefore, the County argues, it can only preserve the level that is there now and it cannot require that habitat be restored. The Tribe and the Washington Environmental Council (WEC), on the other hand, argue that ongoing agricultural practices destroy fish habitat in the form of riparian vegetation and that if the activities were discontinued, the land would “heal” itself. The Tribe and WEC maintain that agriculture should be regulated to prevent ongoing destruction of riparian buffers that provide essential functions and values of fish habitat.

The statutory mandate that is at issue here is the charge to “adopt development regulations that protect critical areas...” RCW 36.70A.060(2). The statute does not provide us with a definition of the term “protect”. Since the GMA does not define the word “protect”, we look to the plain and ordinary meaning of the word in the dictionary and in common usage. Legislative definitions provided in a statute are controlling but, in the absence of a statutory definition, courts may give a term its plain and ordinary meaning by reference to a standard dictionary. *Fraternal Order of Eagles v. Grand Aerie of Fraternal Order of Eagles, Washington State Ass’n*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002); *see also HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 479, 61 P.3d 1141 (2003) (without a statutory definition, courts employ the dictionary definition); *Thurston County v. Cooper Point Ass’n*, 148 Wn.2d 1, 12, 57 P.3d 1156 (2002) (upholding the Board’s interpretation of “necessary” as consistent with the dictionary definition).

The dictionary definition of the word “protect” is not “to preserve the status quo”. Instead, Webster’s defines “protect” as “to shield from injury, danger, or loss.” *Webster’s New World Dictionary of the American Language (College Edition, 1966)*. To “protect” implies actions that will improve an existing situation if the situation is

presently dangerous or bad. For example, we would never conclude, in the ordinary meaning of the word, that the police had “protected” a battered woman or an abused child by allowing a continued practice of battery and abuse. While that would preserve the status quo, it would not protect the victim. “Protect”, in that context, would require intervention and change.

In addition, the term “status quo” is defined as “the existing state of affairs (at any given time) or the existing condition (of anything specified).” *Webster’s New World Dictionary of the American Language (College Edition, 1966)*. Preserving the status quo assumes a particular time at which the “existing state of affairs” should be preserved. However, there is nothing in the GMA setting the protection standard as of a particular date or time, let alone at the level existing in 2003. Upon questioning at oral argument, the County argued that it could set the status quo as of 2003 because of the *lack* of any date in the GMA itself. The County pointed out that if the Legislature wishes to set a date at which a level should be measured, it does so in no uncertain terms. We have only to look at the provisions for limited areas of more intensive rural development in RCW 36.70A.070(5) to see how the Legislature goes about setting a date by which development may be measured, the County argued. This is true. However, the absence of such date militates *against* the idea that a protection standard should be read to mean leaving things in the state they were in at a particular time; if the existing state of critical areas were to be preserved, surely it would be necessary to define the timeframe at which the existing state of affairs should be determined.

Taken to its logical extreme, the County’s argument would mean that a destructive situation could be “preserved” and meet the County’s obligation to “protect”. Once environmental damage is done, it may take many years to repair, if it is even possible to remedy the loss. *See Kucera v. State*, 140 Wn.2d 200, 211, 995 P.2d 63 (2000) (noting the “irreparable nature of environmental injury”). This is the reason why the

obligation falls on the County to establish development regulations to protect critical areas – to *prevent* harm that may well be irremediable from occurring.

If the Legislature had wanted the County to preserve things as they presently are, then it could easily have used the word “preserve”. Since it did not, I would find that the use of the word “protect” carries with it a more active duty than just leaving things as they are.

The Regulations Must Protect All The Functions And Values Of Fish Habitat

RCW 36.70A.172(1) describes the designation and protection required for 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 fish.

RCW 36.70A.172(1)(emphasis added)

RCW 36.70A.172 provides that development regulations must protect the functions and values of critical areas. The County asserts that vegetated buffers do not exist along the rivers and streams in ongoing agricultural lands and therefore the County does not have to mandate such buffers. However, this mistakes the focus in protection of critical areas. It is not territory that is protected (although this may be one way of providing protection) but the functions and values of the critical areas. The statute does not direct protection of the rivers and streams as geographical phenomena. Rather, it directs protection of their functions and values as fish habitat. Instead of focusing on the existence or non-existence of natural vegetation along the rivers and streams, we should look to the functions and values of fish habitat.

In analyzing the GMA obligation to protect the functions and values of critical areas, the Court of Appeals has said: “This means all functions and values.” *WEAN v. Island County*, ___ Wn. App. ___, 76 P.3d 1215, 1224, 2003 Wn. App. LEXIS 2238 (2003). Therefore, in determining compliance with the GMA, we must assess whether the development regulations of ongoing agriculture protect all the functions and values of designated fish habitat.

Over the past six years, an extensive scientific record has been developed in this case. The record establishes that there are seven functions and values of fish habitat: temperature moderation; sediment and pollutant filtration; litter fall and nutrient input; bank stabilization and erosion control; shading; large woody debris; and instream habitat (including food sources for fish). According to the scientific evidence submitted in this case, all seven of these functions and values are protected by riparian buffers, particularly if those buffers include large trees. However, there is a paucity of evidence that voluntary best management practices will protect those functions and values.

The Development Regulations Do Not Protect All Seven Functions And Values Of Fish Habitat

The County’s plan to protect most of the functions and values of fish habitat relies heavily upon the “do no harm” standard. County’s Response Brief for Compliance Hearing at 33-34. The “do no harm” standard, in turn, rests on results rather than on regulating activities.

The “do no harm” standard defines “no harm or degradation” as: meeting the water quality standards required by RCW 90.48 and WAC 173-201A; meeting the requirements of any Total Maximum Daily Load (“TMDL”) requirements established by the Department of Ecology; meeting all applicable requirements of the Hydraulics Code (RCW 77.55 and WAC 220-110); meeting the requirements of the County’s

Watercourse Protection Measures. The County also defines “no harm or degradation” as including “no evidence of significant degradation to the existing fish habitat characteristics of the watercourse from those characteristics identified in the baseline inventory”. SCC 14.24.120(3).

The state water quality standards are found in Ch. 90.48 RCW and in WAC 173-201A. These water quality standards are extensive and expressly cover “aquatic life uses”, including salmon and trout spawning, rearing and migration. WAC 173-201A-200. They set levels of desirable water temperature, dissolved oxygen levels, turbidity levels, total dissolved gas percentages, pH levels and bacterial levels. WAC 173-201A-200.

The County’s choice to use these water quality standards for monitoring purposes cannot be faulted. No party has suggested that these standards do not represent best available science. However, the standards, in and of themselves, do not provide guidance concerning appropriate agricultural practices. Without meaningful performance requirements, those standards provide a way of *measuring* harm but not of *preventing* it. Indeed, the state water quality standards regulations themselves emphasize the need for individualized best management practices in order to achieve compliance with the standards. WAC 173-201A-510(3)(a) and (c).¹

¹ In order to achieve compliance, the regulations call for the establishment of best management practices for individual actors who generate nonpoint source pollution:

The primary means to be used for requiring compliance shall be through *best management practices required in waste discharge permits, rules, orders and directives issued by the department* for activities which generate nonpoint source pollution.

WAC 173-201A-510(3)(a)(emphasis added)

In contrast, the Watercourse Protection Measures are the kind of specific performance requirements that address agricultural practices that are harmful to fish habitat; livestock and dairy management; nutrient and farm chemical management; soil erosion and sediment control management; and operation and maintenance of public and private agricultural drainage infrastructure. SCC 14.24.120(4). These are important measures and they specifically prohibit some seriously damaging practices, such as allowing cattle unimpeded access to salmon-bearing streams. However, the scientific evidence does not show that the Watercourse Protection Measures will protect all the functions and values of fish habitat. Indeed, the County does not claim that they will. The County itself argues that the Watercourse Protection Measures primarily address only one of the functions and values of fish habitat - stream bank and erosion impacts. County's Response Brief for Compliance Hearing at 33.

The County's strategy also effectively accepts as a given that the riparian conditions in ongoing agricultural lands will not protect three of the functions and values of fish habitat. The County argues this is appropriate because the habitat is already altered due to ongoing agricultural practices. However, the County does not argue that cattle should be allowed unrestricted access to salmon-bearing waters, even if that is a long-standing agricultural practice. Instead, the County responsibly regulates those activities in its Watercourse Protection Measures. The same should be true for other activities affecting the functions and values of fish habitat.

It is also clear that even if mandatory buffers are not required for every stretch of the rivers and streams in ongoing agricultural lands, some natural vegetation is likely to be necessary in some locations. An individualized review of a farm or farms most likely would result in the need to plant trees and other vegetation along portions of rivers and streams as a best management practice. The County's own draft programmatic environmental impact statement (EIS) makes this point:

If farm plans apply BMPs that address the specific adverse effects of farming practices at each farm location to stream and riparian habitat functions, this alternative is like to do more overall for fish, wildlife, and their habitats than either of the other action alternatives. This is especially true for sediment, nutrient and erosion control functions. If riparian buffers are included as a BMP where required to address temperature, large woody debris and/or litter fall, this may be true for these habitat functions as well. Buffers, where applied, would be designed and managed to perform the specific functions needed.

Ex. 165.1, Draft Programmatic Environmental Impact Statement, Vol. I, February 2003, at 3-41.

Instead of addressing the need for trees and other natural vegetation, the County expressly sets the protection standard for shade, large woody debris, and litter fall and nutrient input at existing levels. This leaves open the question: If the failure to meet some water quality standard (for example temperature) can be traced to the lack of vegetated buffers, could buffers even be imposed as a best management practice? Utilizing a standard of a virtual lack of any trees or natural vegetation along rivers and streams in ongoing agricultural lands appears to exempt ongoing agriculture from any consequences that arise from lack of the vegetated buffers. Even if specific, individualized proof of the negative impacts on fish habitat has been provided, the standard suggests that no immediate remedy would be required.

Thus it is difficult to credit the County's assertion that it can protect the functions and values of fish habitat only by preserving what is there now, i.e., the lack of natural riparian buffers.

Mandatory Best Management Practices Could Achieve Protections For All Functions And Values Of Fish Habitat

If the County determines to exempt ongoing agriculture from the mandatory buffer requirement, the County must find another way to achieve the protection of the

functions and values of fish habitat that buffers would otherwise provide. Best management practices, if actually required, could do just that.

A mandatory best management practices standard for all the functions and values of fish habitat would require plans or practices for agricultural activities that address the specific experience and activities of the farms being regulated. The County's draft programmatic environmental impact statement (EIS) is persuasive in its analysis that such mandatory best management practices could be designed to protect all the functions and values of fish habitat. Ex. 165

The County argues that if it were to impose best management practices on farmers in ongoing agricultural lands it would be assuming that the farmers were guilty of practices that harm fish. However, the scientific record is well established that the farmers who farm within 200 feet of rivers and streams *are* harming fish habitat. Even if they are doing nothing else, the farmers are affecting the vegetation that would otherwise form a riparian buffer with its attendant benefits for fish habitat. The balancing of GMA goals to conserve agricultural lands allows the County to make special provisions for ongoing agriculture but it must be admitted that agricultural practices in those areas periodically affect the natural vegetation that would otherwise exist and are therefore harmful to fish habitat.

Best management practices to achieve compliance with the state water quality standards are not voluntary or elective under the state regulations. They are "required" for activities which contribute to nonpoint source pollution. WAC 173-201A-510(3)(a) Further, the best management practices themselves set a standard by which compliance may be measured:

Activities which contribute to nonpoint source pollution shall be conducted utilizing best management practices to prevent violation of water quality criteria. When best

management practices are not being implemented, the department may conclude individual activities are causing pollution in violation of RCW 90.48.080.
WAC 173-201A-510(3)(c)(in pertinent part)

Given the removal of vegetated areas that would naturally protect the functions and values of fish habitat in ongoing agricultural lands, farming activity should be regulated so that it will protect those functions and values in other ways. However, the absence of mandatory best practices developed using the best available science to protect the functions and values of fish habitat means that the County's development regulations fail to actually prevent harm. For the most part, the County has established the "no harm or degradation" standard without performance requirements, and has adopted an enforcement process to catch offenders *after* the harm has occurred.

Had the County enacted development regulations that required the implementation of the best management practices alternative that it studied in the draft programmatic EIS, it seems likely that it would have met its obligations under the GMA. However, until the development regulations and policies exempting ongoing agriculture from the County's standard buffer requirements protect all functions and values of fish habitat, I do not believe the County is in compliance.

Dated this 8th day of December 2003.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Margery Hite, Board Member