

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

FRIENDS OF SKAGIT COUNTY, et al.,)	
)	No. 96-2-0025
Petitioners,)	
)	COMPLIANCE
v.)	HEARING ORDER
)	
SKAGIT COUNTY,)	
)	
Respondent,)	
)	
and)	
)	
SKAGIT COUNTY DIKING DISTRICTS, et al.,)	
)	
Intervenors.)	
_____)	

On January 3, 1997, we issued a final decision and order (FDO) in this case generally approving the Skagit County (County) Critical Areas Ordinance (CAO) but remanding to the County eleven items requiring actions to achieve compliance with the Growth Management Act (GMA, Act):

- (1) Review all exemptions in .090 and conduct reasoned analysis to ensure that exemptions meet the criteria cited by the County and are worded as tightly as possible to meet those criteria with least possible impact to critical areas (CAs), and that they direct restoration to maximum extent possible.
- (2) Modify the Forest Practices Act exemption to make it clear that any use other than continuing forest use would not be exempt under .090 and would be subject to CA review.
- (3) Develop additional Best Management Practices (BMPs) to reasonably regulate existing agricultural activities that are damaging CAs and/or their buffers.
- (4) Include a clear statement that no alterations that adversely affect CAs or their standard buffers' functions and values can occur without County approval whether or not a development permit is required.
- (5) Complete the work under SCC 14.06.500(4) and designate and protect the most

significant habitats of local importance as determined under .500(3).

(6) Modify SCC 14.06.080(4) to make it clear that if the County has relied on misinformation provided by the applicant in the checklist and therefore no site visit was triggered, the contested protection of .080(4) does not apply.

(7) Correct wording in SCC 14.06.510(1)(b) to reflect the County's intent to protect anadromous fish not yet endangered or threatened.

(8) Correct the definition and use of the term "primary association" in SCC 14.06.040(26)(h) and (50) to reflect the County's intent to protect anadromous fish not yet endangered or threatened.

(9) Clarify the wording in SCC 14.06.090(5) to reflect the County's intent of requiring county approval for removal of live trees from CAs and their buffers.

(10) Clarify SCC 14.06.530(2)(d) to disallow activity in a buffer that prevents or inhibits its natural recovery to pre-damaged condition and function.

(11) Include a CA review notice in SCC 14.01 "notice of application" or adopt a more effective notice mechanism.

On January 27, 1998, the County adopted amendments to the CAO through Ordinance 16857. The Petitioners, Skagit Audubon Society (Audubon), Friends of Skagit County (FOSC), and the Swinomish Tribal Community (Tribe) filed briefs challenging the County's actions on nine of the eleven issues. **The other two, (7) and (8), were not challenged and are found to be in compliance.**

The compliance hearing was held August 27, 1998, in Hearing Room C of the Skagit County Administration Building in Mount Vernon, Washington. All three board members were present. Representing the County was John Moffat; representing FOSC was Gerald Steel; representing Audubon was Doyle McClure; representing the Tribe was Allan Olson; representing Skagit County Diking Districts 3, 9, 12 and Drainage Districts 17 and 22 (Districts) was Gary Jones; representing Western Washington Farm Crop Association, Skagit County Farm Bureau, Skagitonians to Preserve Farmland, and Skagit County Dairy Association (Ag) was Charles Klinge.

On April 9, 1998, an order regarding the record was issued. Items 10, 11, and 12 of Exhibit 1419 were preliminarily admitted for the limited purpose of evidence concerning the requested invalidity. After the compliance hearing, we decided to admit these items to the record for

invalidity consideration only.

STANDARD OF REVIEW

The standard of review in this case is the clearly erroneous test. The County's actions must be found in compliance unless the petitioners show that those actions were clearly erroneous in view of the entire record before us and in light of the goals and requirements of the Act. The relevant consideration is "Has petitioner demonstrated by competent evidence that the County is clearly erroneous in its adoption of the current ordinance as it relates to the issues properly under consideration in this compliance hearing?" *Whatcom Environmental Council v. Whatcom County*, #95-2-0071 (Compliance Order 7/15/98).

Furthermore, as we stated in *City of Port Townsend v. Jefferson County*, #94-2-0006:

"The issue to be decided at a compliance hearing is whether the local government has complied with the Act, and not necessarily whether there has been strict adherence to the recommendations issued in the final order...

We remain committed to the fundamental concept of the Growth Management Act that local decision-makers are the proper persons to implement GMA as long as the parameters established by the Act are adhered to. The specific mechanism for achieving compliance rests solely with local government."

And we have often stated that our responsibility is to decide whether actions of a jurisdiction comply with the Act rather than whether a better solution could have been found than the one adopted.

Exhibit 1250, memo to staff from the new County Directors of the Planning and Permit Center, stated in part:

"You are all encouraged to take risks in making calls in favor of the property owner. When was the last time anyone in this department was threatened with unemployment for taking a risk and saying yes to someone? You will never be expected to say yes in violation of our regulations, HOWEVER, there is almost always interpretative flexibility in our codes. As a rule of thumb, if you think it is possible that your denial may be overturned when it is appealed to a higher authority, why not just say yes in the first place and avoid the stress and bad public relations? Let your supervisor, Roxanne or I know if you need help in justifying any decision....

The BCC [Board of County Commissioners] made it clear that their expectation is that we (departmental personnel) will make most of the interpretive legal calls, and those calls will be in favor of the property owner when possible.”

Petitioners claimed this memo proved that the higher-ups expect planning staff to make political, rather than professional decisions, with little concern for the broader public interest. They further charged that since protection of CAs and enforcement of codes is not a priority, a very concrete and detailed ordinance is necessary in order to assure adequate protection of CAs in Skagit County.

The County responded that we have not and may not assume the County is unwilling or unable to administer and enforce its ordinances. It further stated that even if there were an inadequate effort at enforcement of the CAO (which the County denied), such an administrative issue was not properly before us. Poor enforcement would not demonstrate that the CAO was out of compliance with the GMA. Compliance, the County asserted, is the only matter that should be of our concern.

Whether or not it should be our concern, we make the following observations. Almost no one wants a public official to be a simple reading robot with code book in-hand, possessing zero flexibility and common sense. If ways can be found so that the intent of the code is met or surpassed by an alternative approach, petitioners’ and CAs’ interests have not been harmed. However, if the flexibility is used to circumvent the requirement to protect CAs, then much harm has been done. It is hard to say whether this memo was a poorly worded attempt to encourage the former or a sad pressure to encourage the latter. Regardless, we will look carefully at the amendment for clarity, which is part of our responsibility.

Given that background information we will now discuss the nine remanded issues which have been contested.

(1) Review all exemptions in .090 and conduct reasoned analysis to ensure that exemptions meet the criteria cited by the County and are worded as tightly as possible to meet those criteria with least possible impact to CAs, and that they direct restoration to maximum extent possible.

With respect to the FDO requirement of an analysis to ensure that the exemptions in .090 meet the County’s criteria, the County adopted the following finding:

“In reviewing the CAO exemptions under WWGMHB Decision and Order (p. 17, lines 8-11), the Planning Commission considered the ‘criteria cited by the County’ which was: 1) does not impact critical areas, 2) is necessary to address an emergency, or 3) is related to lawfully existing uses that may not be prohibited if not expanded by adoption of the CAO. See WWGMHB Order 96-2-0025, p. 9 at 24. In responding to this order, the Planning Commission has attempted to elaborate on these points by providing supporting evidence, including existing state laws which already address the activity such as for fish protection (RCW 75.20) and flood control (RCW 86). The Planning Commission has also tried to strike a balance among the goals of GMA, including protection o(f) critical areas, protection of property rights, and conservation of natural resource lands. The purpose statement of WAC 365-190-020 clearly indicates a need to consider multiple land use designations and to ‘. develop appropriate regulatory and nonregulatory actions in response.’”

Exhibit 1424, RM, General Finding 8, p. 13.

The County also adopted six pages of findings to show that it had used a reasoned analysis on each of the exemptions.

The County responded to the latter part of the above remand issue by adding the following to the introductory section of SCC 14.06.090 General Exemptions:

“All exempt activities shall be carried out in ways that cause the least impact on critical areas and their buffers. If any damage is caused to a critical area or buffer in connection with such activity the critical area and its buffer must be restored to the extent feasible.”

Petitioners challenged the adequacy of this added pronouncement, claiming that the provision provided no practicable protection at all, because areas that are exempt undergo no review and there are no procedures to determine whether or not the “least impact” on critical areas was attained. They further complained that “extent feasible” was too vague and were words without meaning that served only to avoid real, quantifiable restoration if damage to CAs occurred.

Even though these added sentences may not be as protective as Petitioners would like, the County has made it clear to those reading the Ordinance that exempt activities must be carried out in a way that has least impact on CAs, and if impacted, must be restored to the extent feasible. This meets the intent of that section of remand issue (1).

Petitioners claimed that the County had not conducted a reasoned analysis and that the extensive

findings were just a sham to give the appearance that a reasoned analysis had taken place. The County countered that Petitioners have not explained what findings they disagree with or what portion of the County's analysis therein is not "reasoned." We will discuss the adequacy of the reasoned analysis in the context of the specific exemptions below.

[1] Emergencies

Petitioners failed to convince us that the emergency exemption is clearly erroneous. **We therefore find exemption [1] Emergencies to be in compliance with the Act.**

[2] Ongoing Agriculture Operations and (3) BMPs for Existing Agriculture

We will discuss the agricultural exemption and remand issue (3) together, since it is so difficult to separate the two. Remand issue (3) states: Develop additional BMPs to reasonable regulate existing agricultural activities that are damaging CAs and/or their buffers.

The County amended subsection (2) of .090 by adding the following language:

“Existing and ongoing agricultural activities shall, however, comply with best management practices contained within any conservation plan between the property owner and the Department of Ecology pursuant to Title RCW 89 and shall also comply with the requirement in RCW 75.20.103 that written approval be obtained from the state Department of Fish and Wildlife for streambank stabilization including but not limited to log and debris removal, bank protection (including riprap, jetties and groins), gravel removal and erosion control as required by that section.

The County has developed a set of voluntary performance guidelines for implementing best management practices. These guidelines are designed specifically to increase protection for anadromous fish and are located in this ordinance under Section 14.06.095. Farmers, dike and drainage districts, and sub-flood control districts should take these guidelines into consideration and should implement them in conjunction with ongoing activities. The County shall develop a strategic plan, under the provisions of 14.06.096, for the protection of wild salmonids. This plan shall evaluate the need for additional protection requirements when the activities noted in this subsection are occurring next to fish bearing waters.”

The County also adopted definitions for “Agricultural land” and “Ongoing Agriculture”:

“‘Agricultural land’ means land primarily devoted to the commercial production of horticultural (including fiber production such as hybrid cottonwoods), viticultural, floricultural, dairy, apiary, vegetable or animal products or of berries, grain, hay, straw, turf, seed, Christmas trees not subject to the excise tax imposed by RCW 84.33.100 through

84.33.140, finfish in upland hatcheries, or livestock (including livestock raised for personal use), and that has long-term commercial significance for agricultural production. The Revised Code of Washington, for 1997, has several definitions for agriculture. The State Hydraulics Code (RCW 75.20) is necessary to implement the riparian protection section of the CAO; it requires the use of the definitions of agriculture as given in RCW 84.34.020(e) and (f) and 36.70A.030(2). Emphasis added.

‘Ongoing agriculture’ means the continuation of any existing activity defined as agriculture in this ordinance including crop rotations and changes in activity (for example, from pasturing to crop farming). Activities undertaken after the adoption date of this ordinance (as amended by Ordinance #16851) which bring an area into agricultural use are not part of an ongoing operation.”

Further, the County adopted twelve findings supporting the reasoned nature of its actions. The last two of these findings describe the intent of added sections 14.06.095 and .096 of the Ordinance:

“1.2.11 The County has developed a set of voluntary performance guidelines for implementing best management practices. These guidelines are designed specifically to increase protection for anadromous fish and are located in this ordinance under section 14.06.095. Farmers, dike and drainage districts, and sub-flood control districts should take these guidelines into consideration and should implement them in conjunction with ongoing activities.

1.2.12 The County has committed to developing a strategic plan, under the provisions of 14.06.096, for the protection of wild salmonids. This plan shall evaluate the need for additional protection requirements.”

In its opening brief the Tribe asserted in part:

“Not surprisingly, the County did not provide any reasoned analysis based on BAS for the blanket exemption for existing and ongoing agricultural operations. The County instead relied upon ‘guidelines’ adopted by the Department of Community, Trade and Economic Development (‘DCTED’) WAC 365-190-020. Although admitting ‘GMA...does require the use of best available science (to designate critical areas),’ the County makes the blatantly erroneous finding that ‘[t]here is no requirement providing guidance as to the extent to which ongoing agricultural practices must be regulated, or as to what constitutes ‘reasonable’ regulation of them’ (County’s General Finding No. 6.g.) and that ‘[t]here is no requirement in GMA, beyond encouraging the use of BMP’s, that the County must increase regulation of ongoing natural resource management operations...’ (County’s Specific Finding No. 1.2.1) In addition to ignoring GMA’s (RCW 36.70A.172) direct application of BAS to designation

of critical areas (regardless of where they are located), the County has evidently also chosen to ignore the Board's directive to use BAS within a 'reasoned process' and within the 'parameters of the Act directed by the provisions of RCW 36.70A.172(1). Final Decision at p. 7.

Rather than comply with the Board's requirement to develop additional BMP's that 'reasonably regulate existing agricultural activities,' SCC 14.06.090(2) continues to provide an overly broad blanket exemption for existing and ongoing agricultural practices....

The County's plan to exempt all existing and ongoing activities occurring on agricultural lands therefore violates the GMA requirement that counties use BAS to designate and protect critical areas. See RCW 36.70A.172(1). Notwithstanding this requirement, SCC 14.06.090 (2) continues to explicitly exempt existing and ongoing activities that impact critical areas so long as they 'do not result in an increase in impact to a critical area beyond that which has been occurring prior to the effective date of this ordinance.' In other words, if animals have been allowed to enter and defecate in a stream or river before, they can continue that activity under the categorical exemption of SCC 14.06.090(2)....

Under the definition in SCC 14.06.040, exemptions for agricultural land encompasses approximately 95,000 acres throughout Skagit County. Exhibit 1292. In addition, the exemption equates the use of personal livestock with agriculture of longterm commercial significance. Individuals that allow livestock raised for personal use to graze and degrade riparian areas are provided the same exemptions as commercial agriculture throughout the county.

The Tribe further pointed out: (1) Exhibit 632, County's own staff report, stated that 73 percent of fish-bearing streams are in agricultural and rural areas; (2) Several exhibits in the record showed that ongoing agricultural activities are currently harming fish habitat; (3) Indians are totally dependent on fishing both economically and culturally; (4) The County has gone to great lengths to ensure the economic viability of agribusiness but at the expense of the fisheries economy; and (5) The County has relied on other factors to totally ignore Best Available Science (BAS), thereby violating 36.70A.172.

Audubon supplied many exhibits supporting the Tribe's claims, particularly in regards to failure to use BAS and failure to protect anadromous fish. Audubon further pointed out that .095 (Voluntary Performance Guidelines for riparian management areas (RMAs)) and .096 (Strategic Plan for Protecting Wild Salomids) totally fail to provide protection for CAs and anadromous fish at this

time. The first is voluntary and the second is prospective.

The County defended its actions, stating that ongoing agriculture operations are an allowable exemption from CA regulations for several reasons: (1) WAC 365-190-020 recognizes the importance of ongoing agricultural operations; (2) ongoing agriculture operations within the ordinary high water mark of streams are already regulated by the Washington Department of Fish and Wildlife (WDFW) and the Department of Ecology (DOE); (3) the County has established voluntary performance guidelines to ensure the effectiveness of BMPs for RMAs designed specifically to increase protection of anadromous fish under .095; (4) the County is committed, under .096, to developing a strategic plan for the protection of wild salmonids consistent with the State Wild Salmonid Policy including any additional necessary controls on ongoing agriculture; (5) the County balanced needs of “the long-term survival of the agricultural resource industry and survival needs of anadromous fish;” (6) WAC 365-190-020 advises that counties “should allow existing and ongoing resource management operations that have long-term commercial significance to continue”; (7) 36.70A.170(2), instructing counties to use the WACs, was not changed when .172 was added by the legislature; and (8) there is evidence in the record from the Skagit Conservation District that voluntary performance guidelines for implementing BMPs have been successful.

The County further elaborated:

“Combined with this, the County established, through .096, a strategic plan for protecting wild salmonids. This involves a committee of technically-qualified individuals developing ‘implementation action plan to achieve the long-term goal of restoring and protecting habitat consistent with the State’s adopted wild salmonid policy.’ SCC 14.06.096(2)(a); Exhibit 1424, Attachment A, p. 18. This process would take a year and the plan would be consistent with the State’s Wild Salmonid Policy (WSP).

This is an important point and demonstrates the County’s commitment to the protection of fish-bearing streams. GMA does not require counties to follow the WSP, yet the County has chosen to. The WSP recognizes the need to work cooperatively with farmers. See Exhibit 1364 at pp. 16-18. This is why the Washington Department of Fish and Wildlife’s recommended alternative in the DEIS for the WSP was for a flexible policy which accepted some negative ecological impacts (Exhibit 1089 at p.8) and that alternative was formally adopted in the WSP. The WSP notes that the exact method of implementation shall be determined both locally and cooperatively:

Maintenance of less intensive land uses, such as agriculture and forestry, when managed consistent with this policy, are integral to achieving the goals of the Wild

Salmonid Policy. Providing technical assistance and other incentives to encourage landowners to continue in forestry and agriculture, consistent with the principals of this Policy, should be an integral part of watershed plans and/or collaborative rule-making processes.

The exact methods and products that will be developed to implement the habitat components of the policy are beyond the scope of this Policy. It is anticipated that additional plans, actions, agreements, and/or regulations will be developed, in most cases in arenas outside the WDFW rule-making process. It is also expected that additional SEPA review will be done to address the specific environmental impacts of those implementation actions subject to SEPA. In any event, successful implementation of the policy will require close coordination and cooperation of agencies, tribes, and individual landowners.

Exhibit 1364 at p. 17. The County's plan may well include the adoption of regulations mandating certain actions in connection with ongoing agricultural operations, but that will await completion of the Plan. The County's strategic plan is consistent with the WSP. Exhibit 1330, pp. 6-7; Exhibit 1366, pp. 8, 78-79....

Audubon's concern about the inclusion of 'livestock raised for personal use' as part of the definition of 'agriculture' included in the ongoing agricultural exemption is misplaced. There are many existing agricultural activities in rural (non-NRL) areas already in existence. If they do not expand, there is no need to regulate them as long as they are 'carried out in ways that cause the least impact on critical areas and their buffers,' and if damage occurs, that the CAs and their buffers 'must be restored to the extent feasible.' SCC 14.06.090. Perhaps the most telling evidence in the record of Petitioners' misplaced concern of the CAO definition of 'agriculture land' is the fact that when DOE offered comments on an earlier draft of it, it did not object at all to the inclusion of the language 'including livestock raised for personal use' in the definition of 'Agriculture' (Exhibit 1309), although it had other comments on the definitions."

As to the charges of failure to use BAS, the County responded in part:

"Although Petitioners criticize the County for not using best available science (BAS), the County has used it consistent with GMA. BAS cannot and should not be considered in the abstract; it must be based in the realities of other relevant factors. The science which the County is using is the science that considers all aspects of the CAs and the resource areas that need to be protected; the science that recognizes that BMPs must be tailored to site-specific circumstances and cannot be applied across the board; the science that recognizes that applying BMPs voluntarily through agricultural resource agencies is working; the science that recognizes that providing incentives to impose BMPs is more effective than imposing them as regulations; the science that recognizes that there are complex issues involved in the

WSP process that involves the input from stakeholders before regulations are imposed; the science that recognizes the practical difficulty of repairing and maintaining dikes that have extensive trees and vegetation on them; and the science that refuses to shut down barely economically profitable agricultural operations with excessive buffer requirements. What the County is not following is the science urged by Audubon and the Tribe that the County must impose the most severe regulations. Such an approach is faulty, because it is based on pure research and not on any analysis of whether such science works on a practical level through a set of land use controls, particularly in light of other factors GMA requires counties to consider. The Tribe and Audubon argued this same position last time and this Board rejected it. To impose the large buffer requirements urged by the Tribe and Audubon would be unreasonably detrimental to the farming industry by imposing stream buffers that would remove approximately 4,000 acres of land from agricultural productions. See Exhibit 1212, p. 31; Finding 1.2.7, Exhibit 1424, RM at p. 17. However, the County has used and considered BAS.”

The County’s use of BAS was outlined in General Finding 3:

“BAS was considered by the Planning Commission together with GMA’s intent (WAC 365-190-020) to preserve ongoing resource management activities. There is a balance to be struck, and the Planning Commission has made a reasoned analysis of all the evidence contained in the record, including the role and responsibility the State plays in protecting fish under the authority of RCW 75.20. The protection of anadromous fish, in particular wild salmonids, is a statewide concern. The State has taken measures by attempting to establish a policy on protecting wild salmonids. In the DEIS and FEIS on the Wild Salmonid Policy (WSP) issued by the Department of Fish and Wildlife, which represents BAS at a level far beyond what a local government could be expected to attempt under GMA, the selected alternative (Alternative 3) relies on ‘locally-based planning efforts for specific implementation plans’ (FEIS, pp. 42-43). The FEIS sets the framework for a watershed based planning effort, and accepts the fact that a ‘balance of local implementation processes and state level regulation is essential to habitat protection and restoration. The FEIS recognizes that much of the local ground work is yet to be done before the WSP can be successfully implemented. This includes a ‘watershed assessment’ identifying limiting factors, with an emphasis on locally developed proposals for habitat preservation, protection and restoration. There is also an expectation that technical support, incentives or funding to remedy habitat problems that have been identified through the assessments will be provided. The FEIS also acknowledges the need to maintain agricultural and forest lands:

‘as a key component of protection and restoration of wild salmonids. Implementation of the action strategies [in the FEIS] necessary to meet the following performance measures will require recognition and consideration of the need to maintain strong and vibrant economic conditions for forestry and agriculture over the long term. Providing technical assistance and other incentives to encourage landowners to continue in forestry and agriculture, should be an integral part of watershed plans and/or

collaborative rule-making processes' (FEIS p. 44).

What the County has proposed is a strategic planning process, one that is designed to implement the state WSP, to be developed at the local level with support from the state.”

The County further stated:

“This Board has stated clearly that a county is not required to base its GMA choices solely on BAS, but must consider (1) the scientific evidence in the record, (2) whether the analysis by the local decisionmaker of the scientific evidence and other factors involved a reasoned process, and (3) whether the local decision was within the parameters of GMA. Clark County Natural Resources Council, et al. v. Clark County, et al. No. 96-2-0017, Final Decision and Order (December 6, 1996) (CPC 2208-09). This Board has recognized not only in this case but others as well, the broad discretion GMA gives counties in choosing options where BAS is conflicting. (FDO, pp. 6-7; Storedahl & Sons, Inc. v. Clark County, No. 96-2-0016, Compliance Order (December, 1997); Diehl, et al. v. Mason County, No. 95-2-0073, Order Finding Continuing Non-Compliance, etc., (September 18, 1997) (CPC 2685 at 2688).”

The County concluded:

“Here, based on the evidence in the record, the County opted for a balanced approach towards ongoing agricultural use, establishing voluntary performance guidelines for compliance with existing and developing BMPs (an approach that has proven to be effective), and working towards the adoption of a strategic plan to protect wild salmonids. Based on the record, this choice was within the range allowed by GMA.”

In their March 20, 1998, brief the Agricultural Intervenors responded to petitioners in part:

“The petitioners’ papers rely on common themes—an assumption of bad faith on the part of the County, an assumption that nothing is being done to protect wetlands and wildlife, and a naïve belief that the County and the affected agriculture community have unlimited budgets. The Agricultural Intervenors are committed to making further progress in protecting critical areas. However, environmental issues are complex and take time to fully understand the most cost-effective solutions. They also believe that, rather than impose absolute, across the board requirements, a far more effective approach is to target the problem areas for repair first. For instance, rather than fence off every waterway in Skagit County, a focus should first be made to target for improvement the more concentrated problem areas associated with high intensity livestock use, such as dairies. Rather than paint everyone with the same brush, the County should focus on the identifiable point sources of pollution and work to solve the worst problems first.

In relation to the problems with fish, the Agricultural Intervenors contend that a comprehensive solution involving all the stakeholders is far more likely to be effective than a

purely bureaucratic regulatory regime. Cooperation is more effective than enforcement; cooperative involvement by the affected parties in developing the best strategy is more likely to result in real progress, rather than a top down, command and control approach. More rules without support from the affected parties will produce nothing but a contempt for laws that cannot be enforced.

Over the last 100 years, a large amount of land in Skagit County has been used continuously for agricultural purposes. This stability of land use is far more conducive to finding the solution for environmental issues because the effect of practices can be evaluated and remedied over time. If regulatory controls make commercial agriculture no longer viable, that land will be used for some other purpose, resulting in an instability of use and making solutions to environmental problems even more difficult to address. Farming is more fish-friendly than many other economic uses of land. In order to assure continuation of commercial agriculture, the County has struck a balance, consistent within its discretion in dealing with the conflicting goals of the GMA, which over the long term will protect and enhance fish and wildlife and also allow commercial agriculture to continue.”

The Ag group’s brief further supported the County’s response with evidence from the record and extensive argument. Just a few of the key points made were: (1) Re: Local Discretion – the 1997 Legislature amended the GMA to require Growth Boards to give more deference to local decision-makers required to “balance priorities and options for action in full consideration of local circumstances.” (2) Re: BAS – quoted T.H. Huxley “Science is nothing but trained and organized common sense.” (3) Re: BAS – if the BAS were to totally dictate the County’s policies, there would be no reason for public participation. (4) Re: Cost/Benefit – Petitioners’ theory may sound good but practical application of their demands may cost a whole lot more than the value added to streams and fish.

In regards to the inclusion of “livestock for personal use” in the definition of “agricultural land,” the Ag Intervenors stated at p. 18 of their brief:

“Petitioners suggest that the County’s inclusion of the phrase ‘livestock raised for personal use’ within the definition of ‘agricultural land’ in SCC 14.06.040 somehow turns every property on which a cow is pastured for personal use into agricultural land exempt from the CAO. This is not true. If it were true, the Agricultural Intervenors would severely object to opening up relief based on the GMA goal to assure the continued viability of commercial agriculture to those with non commercial agricultural operations.”

Instead of petitioners’ reading, the Board should read the entire definition of agricultural land which includes the GMA requirements that it be ‘land primarily devoted to the commercial

production of agricultural products. SCC 14.06.040. The Agricultural Intervenors read inclusion of 'livestock raised for personal use' not to eliminate the requirement for commercial production. Instead, these provisions should be read together. Clearly, it means that land used for commercial production of agricultural products does not lose its designation merely because part of the land may be used by livestock for personal use.

Personal use of livestock includes 4H and FFA livestock projects. Commercially viable farmers often have portions of their farm acreage used for 'personal use,' a longstanding tradition, necessary to make the entire operation profitable. The County did not violate the GMA by assuring those in commercial agricultural operations that they did not lose their designation simply because part of their land was used for personal use."

(Emphasis added)

Ag Intervenors' brief concluded:

All of the parties before the Board are committed to the survival of fish-bearing streams. The County, through a reasoned process, which relied on the state's Wild Salmonid Policy, concluded that voluntary performance guidelines were more effective than pure regulation. Moreover, there is no mandate in the GMA the BMPs be established by regulation. *Cf.* WA 365-190-020 which only encourages BMPs. The State's WSP recommends a flexible policy and the County followed that recommendation. Its decision to do so is eminently reasonable in light of the commitment by all interested stakeholders. The evidence showed that BMPs established through the Skagit County Conservation District have been successful. Exhibit 1179, Exhibit 1282, Exhibit 1152.

In light of the new clearly erroneous standard, petitioners have an uphill battle to prove the County's new CAO is out of compliance with the GMA. After a year of public input and collection of scientific, economic, and public policy advice, the County made choices well within the GMA's mandate. The County has the obligation to balance the goals of the GMA and the duty to protect agriculture is no less than the duty to protect critical areas. As President Eisenhower observed, 'farming looks mighty easy when your plow is a pencil and you're a thousand miles from the cornfield.' Skagit County properly considered the realistic difficulties in making a critical areas ordinance work with the practical constraints of the agricultural industry.

With the commitment of all stakeholders to make the Wild Salmonid Policy work in Skagit County, the County's decisions to base its ordinance on that policy should be respected and given the opportunity to work."

Some of the key points of Audubon's reply included: (1) Neither .095 nor .096 specify any requirements for CAO protection nor a reliable process for implementation. (2) The County's

discussion of existing regulations is illusory because the referenced legislation provides no protection for essential vegetated buffers beyond the stream banks. (3) .095 completely fails to meet the requirements of the WSP and the County has refused to adopt even the lesser prescriptions of .095 as regulatory measures. (4) The County's intent of applying the agriculture exemption to lands not designated as long-term agriculture clearly allows avoidance of CA protection throughout rural Skagit County.

Audubon concluded:

“Without doubt, this proposal provides the strongest possible evidence that the County is knowingly attempting to subvert both the letter and the intent of the GMA to protect CAs, especially as related to anadromous fish habitat. We request that the Board find that this definition of agriculture, along with the exemption .090(2), does not comply with the GMA, and interferes with its goals.”

In its March 30, 1998, reply brief the Tribe responded in part:

“Other than minor technical corrections, the County's revised CAO does not provide any more protection to critical areas than the previous CAO the Board previously found not to be in compliance with the Act. The County has adopted instead voluntary programs and prospective processes that fail to protect Critical Areas.

The County argues that Petitioners' objections to these voluntary and prospective provisions are unsupported. However, Petitioners' made their case based and carried their burden of proof based upon BAS before the Board at the hearing on the merits. It goes without saying that the Board granted Petitioner's motion for a finding of noncompliance based upon well supported claims and arguments. For purposes of this compliance hearing, the Tribe hereby incorporates that record by reference, specifically the Tribe's Opening and Reply Briefs. Where a county merely adopts a 'process' to start implementation of its CAO in the future, but fails to refute previously submitted scientific evidence in a compliance hearing, the Board has found continued noncompliance under the new clearly erroneous standard of review:

When previously submitted evidence was unchanged and only a process for future designations was established, compliance cannot be achieved.

Clark County Natural Resources Council v. Clark County, No. 96-2-0017 (p. 10 of Compliance Order, November 2, 1997)....

Contrary to the County's allegations, it is the Petitioners that have presented factual evidence and argued Best Available Science ('BAS') and the County that has made unsupported allegations and generally disparaged BAS as 'pure research.' Rather than provide reasoned

analysis of a range of alternatives, the County begins with the unsupported dogmatic assumption that any additional limitations on agricultural activities will threaten the economic viability of agricultural activities and then fashions an administrative record to protect and defend that assumption. The County's general approach has been to prioritize the 'economic needs' of the agri-business stakeholders over the 'costs' of designating and protecting Critical Areas. This approach does not meet the requirement of 'reasoned analysis' mandated by the GMA and this Board's FDO....

The County's conflict model assumes an 'either or' situation where there is no overlap between the circles of interests. The County protects and defends its assumptions by providing categorical exemptions for activities that can and should be regulated. This is not the case in Skagit County and this is not BAS. Many of the County's exempted 'activities' within Critical Areas can be regulated in a manner that provides necessary protection to Critical Areas without jeopardizing the viability of other goals and objectives of the GMA.

The County cites Clark County, supra, for the proposition that it can rely on 'other factors' and select alternatives that are not within the range of BAS, but the County reads too much into this case. BAS provides a range of alternatives available that a county may consider. 'Local (County) discretion' is permitted to consider 'local diversity' on a case-by-case basis. 'Local diversity has an impact in determining what is 'best science,' not whether or not BAS should be applied.

'Best' means that within the evidence contained in the record a local government must make choices based upon the scientific information presented to it. The wider the dispute of the scientific evidence, the broader the range of discretion allowed to local governments. Ultimately, a local government must take into account the practical and economic application of the science to determine if it is 'best available.' (Emphasis added)

Clark County, pp. 9-10 of the FDO.....

This Board has held that the level of County discretion is more limited with regard to the protection of anadromous fish. Clark County, supra at p. 10 of FDO. RCW 36.70A.172(1) requires counties to give 'special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.'"

This part of the statute directs measures for both preservation and enhancement. It therefore limits the discretion available to local governments when dealing with anadromous fish. In balancing the scientific evidence against issues of practicality and economics the result must be more heavily weighed towards science when dealing with anadromous fish. The 'special consideration' language directs that local governments must go beyond what might otherwise be done in designating and protecting other kinds of critical areas."

Further, regarding the expansion of the exemption to include agricultural activities outside designated agriculture land, the Tribe stated in its November 14, 1996, reply brief:

“The County disputes the Tribe’s assertion that only agricultural lands with long-term commercial significance should receive special treatment, either through an exemption (which the Tribe strongly opposes) or relaxed regulation (which the Tribe could support if the wording is clear and not overbroad). If the County intends to give special treatment to the agricultural industry by relaxing critical areas regulation, then the land should truly be agricultural. The best way to insure that is to extend relaxed standards only to designated agricultural lands, which the GMA requires have long-term commercial significance. Anything less would allow property owners with minimal agricultural activity, such a few berry bushes, to avoid regulation. The absence of an agricultural land designation undercuts the County’s ability to provide ‘a detailed and reasoned justification’ for providing less (or no) critical areas protection for such lands. See Whatcom Environmental Council (WEC) v. Whatcom County, WWGMHB No. 94-2-0071 (Final Decision and Order, 12/20/95).”

FOSC’s reply included these key points:

- (1) Although the County and Ag Intervenors touted a proposed “Riparian Summit,” nothing has been done to proceed with it during the past year while CAs have continued to be damaged.
- (2) FOSC would support the Board’s encouragement of such an approach as proposed by Audubon and Ag Intervenors.
- (3) Even the Ag Intervenors recognized that there is a need for “a set of minimum acceptable performance standards.” But the County has failed to adopt even a minimum set of rules.
- (4) FOSC does not object to voluntary guidelines for improving CA habitat as long as these are not substituted for required minimum regulation.
- (5) There is not even a basic requirement for any “conservation plans” alluded to in .090(2).

Board Decision and Conclusions

Definitions of “Agriculture Land” and “Ongoing Agriculture”

GMA gives protection to designated agriculture resource lands from incompatible adjacent uses and brings into play the balancing act between GMA’s goals for the conservation of agricultural industries and protection of critical areas. The price paid for that deference is removal of development potential. The County is providing relief from GMA’s CA protection requirements while still providing higher development potential. This is in violation of the Act.

Exhibit 1309, DOE 10/20/97, letter to Skagit County Planning states in part:

“If the agriculture definition is not tied to ‘commercial agriculture’ then every owner of property greater than 0.5 acre will be claiming that they have been part of an ongoing agricultural operation even if the activity involved occasional disking for weed control or vegetable gardens. A number of wetland consultants now regularly advise clients to initiate disking of fields in order to escape regulation of wetlands that are on-site. Many of these areas have not been farmed for 10 years or more and some were just cleared initially for development prior to wetland regulation and were never farmed. The present definition of agriculture will result in continued headaches for both Skagit County and Ecology in trying to sort out those that are legitimate agricultural operations and those that are not.”

WAC 365-190-020 concludes:

“...Regarding natural resource 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 resource 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)

Even Ag Intervenors stated that they would severely object to opening up relief based on the GMA goal to assure continued viability of commercial agriculture to those with no commercial agriculture operations.

One Board member agreed with the interpretation of Ag Intervenors, that the definition of “agriculture land” clearly requires both primarily devoted to and having long-term commercial significance. Therefore, the addition of “including livestock raised for personal use” would not extend the exemption to hobby farmers in the rural area. However, another Board member agreed just as strongly with the interpretation of the County and the Petitioners, that that addition to the definition of agricultural land plus the definition of ongoing agriculture would certainly open the door for such an expansion of the exemption. Thus, we conclude that this regulation is unclear.

CPP 7.4 incorporated into the CP mandates that there be “clear regulations” to avoid multiple interpretations by staff and applicants. Clear regulations are also essential for GMA compliance. As we stated above, these definitions have been the subject of multiple interpretations. The

County's interpretation would extend this exemption well beyond designated agricultural lands. Such an application would not only be clearly erroneous but would substantially interfere with Goals 9 and 10 of the Act.

-

14.06.095/Best Management Practices

The County's attempts to work cooperatively with the farming community to develop BMPs which protect CAs is commendable. The performance guidelines of .095 are a good step forward.

Exhibit 1041, letter from Skagit County Farm Bureau to the Board of County Commissioners seems to sum up the CA/Agriculture dilemma quite well:

“The operative issue, then, appears to be how to create incentives to improve (in favor of habitat-related issues) existing agricultural practices. As used by the Hearings Board, “BMPs” are shorthand for a much broader concept – how to get farmland managers to change/evolve today's practices to reflect a changing set of values while providing the necessary discretion to manage their lands in an economically efficient manner so that they remain as active stewards.”

Exhibit 1408, 1/14/98 letter from Martin Environmental to County Planning, and many other exhibits point out that effective RMAs and other BMPs to restore and protect anadromous fish habitat must be individualized to specific locations and conditions. Also dollars spent must be on those projects which are most likely to make a real improvement. Flexibility is essential.

Exhibit 1179, August 1997, Planning Commission Meeting, Ms. Kelly, Director of Soil Conservation District, testified that the voluntary plans and projects worked out with farmers has worked “really well” in Skagit County.

WAC 365-190-020 says that counties and cities should encourage utilization of BMPs where existing and ongoing resource operations of long-term commercial significance include CAs.

Even given all of the above, more work must be done before we are able to find compliance for 14.06.095 and its adopted voluntary approach. There must be some assurance that CAs and anadromous fish are actually protected. As we said in our recent Shelton decision:

“If BMPs are to be relied upon for protection, some form of monitoring and enforcement must be included to ensure that the BMP plans are actually implemented and followed.”

BMPs may be voluntary and individually developed, but benchmarks, timeframes and monitoring must be established to ensure that these voluntary BMPs are working to achieve needed protection. 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. All this must be done using BAS. **14.06.095 cannot comply with the Act until such safeguards are adopted.**

14.06.096/Strategic Plan for Protecting Wild Salmonids

Once again the approach outlined in .096 is a good one. However, as we have previously stated, the County cannot rely on a plan not yet developed to claim compliance with the Act's requirement to give special protection to anadromous fish. *Clark County Natural Resources Council v. Clark County, #96-2-0017.*

The County has stated that the strategic plan that will be developed by committee and adopted by the County will be consistent with the State Wild Salmonid Policy including any necessary additional controls on ongoing agriculture. The County has also stated that the Strategic Plan will use BAS to protect anadromous fish.

We are unable to find compliance until the County fulfills these pledges and adopts a plan which provides adequate protection for CAs and anadromous fish.

[3] and [4] Normal and Routine Repair

Petitioners failed to convince us that the Routine Repair exemptions are clearly erroneous. **We therefore find exemptions [3] and [4] Normal and Routine Repair to be in compliance with the Act.**

[5] and [6] Modification of Single Family Residence and Non-Single Family Use; [7] Outdoor Recreation; [8] Harvesting of Wild Crops; [10] Education and Scientific Research; and [12] Site Investigation

The County added a clause to exemptions [5] through [8], [10] and [12], requiring that the exempted activities do not adversely impact critical areas and their buffers.

Petitioners have presented no convincing arguments that these exemptions are clearly erroneous.

Exemptions [5], [6], [7], [8], [10] and [12] are in compliance with the Act.

[9] Ongoing Operation of Diking and Drainage Systems

This exemption reads:

“Ongoing operation and maintenance of diking and drainage systems and sub-flood control zones, which are part of a system of existing dikes, levees, ditches, drains, or other facilities which were created, developed or utilized primarily as a part of a drainage or diking system as defined by this ordinance. The area exempt from CAO review for maintenance and operation is the land occupied by an existing system of dikes and levees, extending from the ordinary high water mark to the toe of the slope on the landward side of the dike or levee which must be maintained in a manner that meets the federal standards for funding assistance for dike and levee repairs; provided, further that restoration of the ongoing maintenance and protection of the dike system occurs to the extent feasible. Operation and maintenance does not include the expansion or creation of new dikes, levees or drainage ditches and related facilities. (Refer to 14.06.095(4) for voluntary protection guidelines).”

Audubon contended that the “blanket” exemption of all diking and drainage operations was erroneous for three major reasons:

- (a) Dike set-backs along much of the Skagit River are sufficiently large to permit important protection for anadromous fish that does not interfere with maintenance or integrity of the dike prism.
- (b) Essential protection of vegetative buffers along major fish-bearing streams is consistent with diking/drainage operations.
- (c) The County and Districts assertions that other laws and regulations are adequate to protect CAs is false.

The Tribe was particularly concerned about the expansion of this exemption to include sub-flood control zones. It claimed that the establishment of new sub-flood control zones would damage CAs and destroy salmon habitat. Further, no provisions were provided for the protection of fish habitat when these new zones were established. The Tribe claimed that the record contains no reasoned

analysis of BAS or of the impact of this exemption on fisheries habitat.

The Tribe also supported Audubon's assertion (c) by pointing out that: the record clearly shows that the Corps of Engineers (Corps) has no regulatory authority on lands riverward to the toe of levee slopes; these activities are also not regulated to protect fish habitat by DOE, by the Corps, or by WDFW for those activities conducted above the ordinary high water mark.

The County countered that:

- (a) General Findings 4 and 6 demonstrate that there are numerous regulations already in existence which control diking and drainage district operations. There is no need for another burdensome layer of regulations.
- (b) The Corps regulations do not permit funding for repair of dikes where "Tree, weed and brush cover exists in the levee requiring removal to re-establish or ascertain levee integrity." If buffers were imposed which resulted in tree or brush cover along dikes, it could prevent diking districts from obtaining federal money to perform repairs.
- (c) The record contains more than fifteen exhibits which demonstrate that the County looked at these factors, reasonably considered them, and determined that this exemption was drawn tightly enough.

The Districts' brief supported the County's assertions with greater detail. At the compliance hearing the districts further stated that: (a) the Districts' exemption only extends from toe to toe of the dike and that surplus land is rarely in the Districts' ownership; (b) this ordinance as written is already an added financial burden on the Districts because they will need to develop a ten-year plan and maintenance procedures; (c) Petitioners have provided no proof that their demanded approach would actually produce a benefit and without such proof these added requirements make no sense; (d) the record showed that work needs to be targeted where you can make a real difference, not shotgun regulations for everyone; (e) do not alienate citizens to the extent that they disregard the ordinance altogether.

The Tribe stated that if the Districts were correct, that this exemption was only for District property, (generally toe-to-toe), that the Tribe would not be as concerned about that exemption. We are confused by the exemption language in this regard. The first sentence appears to say that only district activities are exempt. However, the second sentence states "The area exempt from

CAO review for maintenance and operation is the land occupied by an existing system of dikes and levees, extending from the ordinary high water mark to the toe of the slope on the landward side...”

The record showed that dike set-backs along much of the Skagit River are sufficiently large to permit important protection for anadromous fish that does not interfere with maintenance of integrity of the dike prism. We have found no evidence in the record to support the exemption applying to those areas. There seemed to be considerable confusion about whether those areas were covered by the exemption as written. The wording of exemption [9] is confusing and could be interpreted several ways as to who, what, and where is exempt. **Therefore, we cannot determine compliance until the applicability of exemption [9] is clarified in the Ordinance by the County.**

[11] Construction or modification of navigational aids and channels markers.

We received no challenge to this exemption and find it in compliance.

[13] Activity adjacent to artificial watercourses which are constructed and actively maintained for irrigation and drainage

The County included in this exemption the requirements that:

- (a) any activity shall comply with RCW 75.20.100 and .103 by securing written approval from the WDFW.
- (b) The activity must comply with all applicable state and local drainage erosion and sedimentation control requirements for water quality.

Petitioners have failed to convince us that exempting these activities is clearly erroneous.

Exemption [13] Artificial Watercourses complies with the Act.

(2) Modify the Forest Practices Act Exemption to make clear that any use other than continuing forest use would not be exempt under SCC 14.06.090 and would be subject to CA Review.

The County in response to the FDO, removed the Forest Practices Exemption from former SCC 14.06.090(6) and established it as a new section, SCC 14.06.094, in Ordinance 16851. The Ordinance clarifies that the County has CA review over Class IV conversions, Conversion Option

Harvest Plans, forest practice applications within urban growth areas, as well as other forest practices not regulated by the Department of Natural Resources. The County also adopted Specific Findings 2.1-2.10 to further clarify when it does and does not have jurisdiction and what the County requires when it does have jurisdiction.

Audubon raised many concerns about the inadequacy of the protection provided and presented many good ideas of how the level of protection could be improved. However, the FDO's requirement of the County was very narrow: a clarification of activities covered by CA review. The FDO's finding of non-compliance did not require the County to provide additional protection for CAs over which it had jurisdiction. We have not been convinced by Petitioners that the County was clearly erroneous in adopting section SCC 14.06.094 in response to the FDO. **We therefore find the County in compliance on this issue.**

(3) Develop additional best management practices to reasonably regulate existing agricultural activities that are damaging CAs and/or their buffers.

This issue was discussed and decided under Exemption [2] pp. 8 to 27.

(4) Include a clear statement that no alterations that adversely affect CAs or their standard buffers' functions and values can occur without County approval whether or not a development permit is required.

In response to the FDO, the County amended the first paragraph of Section 14.06.060 to read in part:

“With the exception of activities that are exempt under SCC 14.06.090, any proposed alteration that adversely affects a CA or its standard buffers' functions must comply with the substantive and procedural requirements of this chapter regardless of whether such alteration requires a County development permit or approval.”

Audubon claimed on page 19 of its March 6, 1998, brief that this action by the County was erroneous and substantially interfered with the goals of the Act for two reasons:

“First, it clearly states that alterations causing adverse impacts on CAs or their buffers for the wide range of exempted activities are not prohibited or even regulated. Second, the statement that substantive/procedural compliance with the CAO is required when no other permit/

approval is required cannot be met in practice.... The remedy for both errors is the same: a process for CA discovery, review and conditioning is necessary to ensure that all activities, which have significant potential to damage CAs and which can be conducted to alleviate such damage, actually comply with the GMA requirement to protect CAs.”

On page 29 of its brief, the County responded:

“Audubon’s objections to this amendment (Brief at pp. 18-19) are without merit. First, Audubon complains that SCC 14.06.060 precludes from CA review all exempt activities (under .090) even if they adversely affect CAs or their standard buffers’ functions. This contention ignores the first paragraph of .090 which requires exempt activities to be carried out in a way to ‘cause the least impact on critical areas and their buffers’ and further requires that CAs and their buffers be restored to the extent feasible if damage occurs. It is not true that just because an activity is exempt from CA regulation that it is open season on the CAs and their buffers. Audubon’s second complaint regarding the County’s alleged inability to enforce administratively this provision, has not been proven. Section .700 gives the County powers to enforce the provisions of the CAO. This is yet another example of Audubon simply not liking the language of the County’s ordinance. That does not mean it is out of compliance with GMA. Audubon is really arguing that a property owner needs a separate permit for every activity that may impact a critical area. This Board already rejected that contention in the FDO in this case. The County made the changes to its Ordinance per the FDO.”

The Petitioners have not met their burden of proof in this matter. **We therefore find the County in compliance on this issue.**

(5) Complete the work under SCC 14.06.500(4) and designate and protect the most significant habitats of local importance as determined under SCC 14.06.500(3).

The County amended SCC 14.06.500(4) to identify nine species of local importance following the procedure in SCC 14.06.500(3). Further, the County adopted the Planning Commission’s finding 5.1 to address the matter:

“The map proposed with the original staff draft is now supported and nominated as a starting point for species and habitats of local importance. The record also contains a substantial number of additional nominated sites and species for consideration. There is a great deal of work to be done and not enough time under the WWGMHB order to thoroughly consider all the nominations. The recommendations by one of the commentators to move forward with the original proposal and appoint a technical committee with the task of reviewing all the material and come up with a set of nominations and associated management

recommendations makes sense...Protection of these designated species and habitats shall be on a case-by-case basis, using Department of Fish and Wildlife Priority Habitats and Species Division Habitat Program and recommendations from those agencies referenced in SCC 14.06.530. This provision should be in place for 6 months or until such time that the County adopts new protection standards after it considers the efforts of the technical advisory committee.”

Audubon stated that it supports the initial designations of the nine species now included in the CAO along with the adopted species/habitat maps. However, Audubon is concerned that the County has not completed the task of designating species/habitats of local importance. Petitioners stated that the most grievous shortcoming of the amendment is that it fails to provide mandated protection for designated species/habitats, including use of BAS.

We agree with the County and Petitioners that the proposed process is a good one. **However, we will be unable to find compliance with GMA and FDO’s protection requirements until the technical advisory committee’s work is completed and permanent protections are adopted by the County. The new protection standards developed and adopted must be based on BAS.**

(6) Modify SCC 14.06.080(4) to make clear that if the County has relied on misinformation provided by the applicant in the checklist and therefore no site visit was triggered, the contested protection of that subsection does not apply.

The County addressed this issue by amending SCC 14.06.080(4) to add the following language at the end of that paragraph:

“[P]rovided, however, that the County shall not be prevented from reopening the critical areas review process if it relied on misinformation provided by the applicant in the checklist and therefore no site visit was conducted. For the purposes of this subsection, ‘misinformation’ means information regarding the presence of a critical area on the subject property which the applicant knew or should have known was relevant at the time of the submittal of the checklist. Prior to reopening a critical areas review under this subsection, the County shall make a site visit. No critical areas review shall be reopened under this section unless the County determines, after the site visit, that the applicant provided misinformation.

If a critical areas review is reopened under this subsection after a permit or approval is

granted, the burden of proof on whether the applicant submitted ‘misinformation’ at the time of submittal of the checklist shall be on the County. The fact that the applicant no longer owns the subject property at the time the County discovers the misinformation shall not be a bar to reopening critical areas review. The applicant or landowner who submitted the critical areas checklist upon which the misinformation was discovered shall be the responsible party for compliance with this ordinance, including any necessary mitigation.”

Exhibit 1424, Attachment A, p.6.

Audubon contended:

“The amended CAO language is erroneous because it places complete responsibility for misinformation in a checklist on the ‘applicant or landowner’ who submits it, resulting in ambiguity as to who is accountable at the outset. Furthermore, this amendment clearly fails to establish accountability for CAO restoration should the applicant and/or the original landowner leave County jurisdiction. Title constraints need to be established on the property to ensure accountability where CAO review is terminated without a site visit due to an erroneous checklist, with appropriate disclosure requirements to ensure that any new owner is duly informed of potential liability.”

The County responded that rather than failing to establish accountability, this wording gives the County additional enforcement power by allowing it to seek mitigation for CA violations under .080 (4) against either the permit applicant or the original landowner. The County further contended that Audubon had failed to indicate what portion of the FDO, remand (6), the County did not comply with or what portion of GMA is inconsistent with the County’s language.

We agree with the County. Petitioners have failed to meet their burden. **The County is in compliance on remand issue (6).**

(7) and (8) were not contested. We find the County in compliance regarding these remand issues.

(9) Clarify the wording in SCC 14.06.090(5) to reflect the County’s intent of requiring County approval for removal of live trees from CAs and their buffers.

The County addressed this remand issue by adding new paragraph (e) to SCC 14.06.530(2):

“In the riparian buffer, removal of hazardous, diseased or dead trees and vegetation when necessary to control fire, or to halt the spread of disease or damaging insects consistent with

the State Forest Practices Act, Chapter 76.09 RCW or when the removal is necessary to avoid a hazard such as landslides, or pose a threat to existing structures may be permitted with prior written approval. Any removed tree or vegetation shall be replaced with appropriate species. Replacement shall be performed consistent with accepted restoration standards for riparian areas within 1 calendar year. The County may approve alternative tree species to promote fish and wildlife habitat. Prior to commencement of tree or vegetation removal and/or replacement, the landowner must obtain written approval from the Planning and Permit Center, unless it qualifies as an emergency under 14.06.090(1).”

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Petitioners provided no convincing arguments that this addition to .530(2) did not comply with our order or the GMA. **We therefore find the County in compliance on remand issue (9).**

(10) Clarify SCC 14.06.530(2)(d) to disallow activity in a buffer that prevents or inhibits its natural recovery to pre-damaged condition and function.

The County addressed this remand issue by amending paragraph (d) of SCC 14.06.530(2) to read:

“Allowed uses in buffers. Low impact uses and activities which are consistent with the purpose and function of the habitat buffer and do not detract from its integrity may be permitted within the buffer depending on the sensitivity of the habitat involved provided that such activity shall not prevent or inhibit the buffer’s recovery to at least pre-altered condition or function. Examples of uses and activities which may be permitted in appropriate cases, as long as the activity does not retard the overall recovery of the buffer, include removal of noxious vegetation, pedestrian trails, viewing platforms, stormwater management facilities such as grass-lined swales, and utility easements.”

The Tribe contested this action on pages 12 and 13 of its March 6, 1998, brief:

“SCC 14.06.530(1) describes five riparian forest functions that influence the quality of fish habitat and SCC 14.06.530(2) requires that established buffers not be altered and that minimum standards for these forest functions be restored. However, SCC 14.06.530(2)(d) provides for repeated low impact uses to already degraded riparian areas by requiring restoration only to ‘pre-altered’ conditions. SCC 14.06.040(3) defines alteration as ‘any human induced action which changes the **existing** condition of the critical area.’ In many of the riparian areas along streams, the existing condition is already severely compromised. See Tribe’s Opening Brief at 20. By requiring restoration only to prealtered conditions, subsequent impacts are permitted when the prealtered ‘existing’ condition is attained but before the riparian area is allowed to fully recover to its natural condition. The evidentiary record clearly indicates that planning commissioners felt the level of protection was for a pre-

altered state that does not allow the recovery of function and values of riparian buffers, but rather perpetuates a degraded condition.”

Although the Tribe brings up some valid concerns, we find that the amendments to SCC 14.06.530 (2)(d) comply with the intent of our remand. **The County is in compliance on remand issue (10).**

(11) Include a CA review notice in SCC Chapter 14.01 in the “Notice of Application” or adopt a more effective notice mechanism.

In response to this FDO remand the County amended SCC 14.01.040(1)(f) to include in the notice a provision “that the County will perform a critical areas review under Chapter 14.06 SCC.”

Finding 11.1 and 11.2 relating to this remand issue provides:

“11.1 Skagit County’s public notification requirement, under SCC 14.01.040, includes CAO review notification. This notification procedure is limited to those permits which are not exempt from SCC 14.01 notification procedures, including building permits, fill and grade permits, short plats, etc. For all projects requiring a notice of a application (NOA) under SCC 14.01.040 notification that CAO review for critical areas is occurring concurrent with other reviews of the project. The public has 15 days to comment on an NOA.

11.2 The basis of this order deals with additional notice to the tribe. The Country has complied with the WWGMHB order by incorporating CAO review into the NOA provisions of SCC 14.01 to provide notice not only to theTribe, but to the broader general public. The basis of the order from the WWGMHB was to ‘encourage the Tribe and County to seek a joint planning agreement.’ The County and the Tribe will continue to work toward better communication and cooperation.”

Audubon asserted that the amendment to SCC 14.01.040(1)(f) was inadequate because it: (a) fails to inform the public of mandated CAO review/conditioning for a large number of development activities that have the potential to damage CAs; and (b) fails to provide timely opportunity for the public to review and comment on proposed and final County conditioning of projects as required to protect CAs.

The County asserted:

“What Audubon really wants is a change to the list of the types of applications which require a notice. In fact, RCW 36.70B.110(2) already provides that information, and the County is following that statute. Audubon should be required to go to Olympia if it wants to change the

requirements of a notice of application.”

Here again, the notice provisions may not be as complete and/or effective as petitioners would like, but the County has complied with the Act as set forth in FDO remand issue (11). **We therefore find the County in compliance on remand issue (11).**

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ORDER

The Planning Commission put an incredible amount of work into Ordinance 16857. We have found compliance in the great majority of the remanded issues. However, in order to achieve total compliance, the County must:

- (1) By December 1, 1998, amend the definition of agricultural land and ongoing agriculture to make it perfectly clear that the agricultural exemption only applies to ongoing activities on designated agricultural lands. If the County does not take such action by that date, an order of invalidity on the agricultural land exemption will be issued without further hearings.
- (2) Within 180 days, adopt required benchmarks, timelines and monitoring to ensure that the County’s voluntary BMPs are actually protecting CAs. Also adopt a regulatory approach that will be implemented if the voluntary approach does not achieve required results. The County must use BAs in formulating these added safeguards.
- (3) Within 360 days, implement .096 adopting a strategic plan consistent with the State Wild Salmonid Policy including any necessary additional controls on ongoing agriculture. This strategic plan must use BAS to protect anadromous fish.
- (4) Within 60 days, clarify exemption [9] ongoing operation of Diking and Drainage systems so it is clear to whom, what, and where the exemption applies.
- (5) Within 180 days, adopt permanent protection for designated species/habitats of local importance including use of BAS.

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 16th day of September, 1998.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Nan A. Henriksen
Board Member

Les Eldridge
Board Member

William H. Nielsen
Board Member