

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

FRIENDS OF SKAGIT COUNTY, et al.,)	
Petitioners,)	No. 96-2-0025
)	
v.)	COMPLIANCE
)	HEARING ORDER
)	
SKAGIT COUNTY,)	
)	
Respondent,)	
)	
and)	
)	
SKAGIT COUNTY DIKING DISTRICTS, et al.,)	
)	
Intervenors.)	
)	
SKAGIT AUDUBON SOCIETY, et al.,)	
Petitioners,)	No. 00-2-0033c
)	
v.)	FINAL DECISION AND
)	ORDER
)	
SKAGIT COUNTY,)	
)	
Respondent,)	
)	
and)	
)	
AGRICULTURE FOR SKAGIT COUNTY, et al.,)	
)	
Intervenors.)	
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TABLE OF CONTENTS

INTRODUCTION

PROCEDURAL HISTORY FOR CASE #96-2-0025c

PROCEDURAL HISTORY FOR CASE #00-2-0033c

BURDEN OF PROOF & STANDARD OF REVIEW

CAO STANDARDS

COUNTY’S MANAGED BUFFER PLAN

County’s Use of BAS

Board Discussion on County’s Use of BAS

Further Substantive Concerns

Board Discussion on Further Substantive Concerns

EXEMPTIONS, LIMITATIONS, & DEVIATIONS

Farm Plan Exemption/Section 14.06.095(4)(i)(i)

Type 4 and 5 Streams

80% Requirement for Buffer Plan Compliance – SCC 14.06.095(4)(e)

15% Of Parcel Limitation – SCC 14.06.095(4)(b)

Bank Armoring – SCC 14.06.095(4)(i)(ii)

Enhanced/Restored Watercourses – SCC 14.06.095(8)(a) and (d)

Unforeseen Circumstances Proviso

EXEMPTION FROM CAO FOR DIKING AND DRAINAGE SYSTEMS –SCC 14.06.090(9)

STRATEGIC PLAN – SCC 14.06.096

Board Discussion

INVALIDITY/REQUEST FOR SANCTIONS

RELIANCE ON TEMPORARY CAO ORDINANCES

ORDER

FINDINGS OF FACT

TABLE OF ACRONYMS

-
-
-
INTRODUCTION

We commend Skagit County for its willingness to adopt innovative approaches in its efforts to balance Growth Management Act (GMA, Act) goals regarding the protection of critical areas (CAs) in agricultural lands. The current approach, while appropriate for a pilot program, needs significant modification and additions before it will suffice for a compliant program county-wide. We urge the County to take quick action to appoint the Science Advisory Panel (SAP), put the needed “flesh” on this “framework” plan, widen the riparian buffer zone (RBZ), delete or tighten the noncompliant exemptions, and take any other action needed to bring the plan into compliance with the Act.

In the alternative, the County must immediately adopt more protective CA standards for ongoing agriculture county-wide and use this “25/25” approach in limited areas as a pilot program. The timeliness of the County’s action is absolutely crucial for the preservation of threatened salmonids in Skagit County.

PROCEDURAL HISTORY FOR CASE #96-2-0025c

Skagit County adopted its critical areas ordinance (CAO) in June of 1996. Friends of Skagit County (FOSC), Swinomish Indian Tribal Community (Tribe), and Skagit Audubon Society (Audubon) challenged the adequacy of the CAO in numerous respects in Cases #96-2-0018, -0022, and -0024, respectively. These cases were later consolidated into Case #96-2-0025c. On January 3, 1997, we issued a final decision and order (FDO) in which we found that the agricultural exemption (14.06.090(2)) was too broad and failed to comply with the Act. We required the County to “develop additional best management practices (BMPs) to reasonably regulate existing agricultural activities that are damaging CAs and/or their buffers.” FDO at 17.

On January 27, 1998, the County adopted Ordinance #16851. This ordinance retained the agricultural exemption -.090(2) and added two new sections, 14.06.095 and -.096, which respectively provided voluntary BMPs and established a strategic plan provision.

A compliance hearing was held in late August 1998, after which we issued a compliance order (CO) on September 16, 1998, and an order on reconsideration (RO) on October 30, 1998, in

which we determined that in order to comply the County must:

- (1) 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.
- (2) 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) Implement -.096 by adopting a strategic plan consistent with the State Wild Salmonid Policy (WSP) including any necessary additional controls on ongoing agriculture. This strategic plan must use BAS to protect anadromous fish.
- (4) Clarify exemption [9], ongoing operation of Diking and Drainage systems, so it is clear to whom, what, and where the exemption applies.

RO at 4-5.

In response to the RO, the County took the following actions:

- (1) On February 3, 1999, the County adopted permanent Ordinance #17306 amending the definitions of "agricultural land" and "ongoing agriculture" consistent with our order.
- (2) On June 1, 1999, the County addressed item (4) above by adopting interim Ordinance #17456, which amended SCC 14.06.040 and 14.06.090(9), relating to definitions and the exemption for ongoing diking and drainage activities.
- (3) On October 5, 1999, the County adopted interim Ordinances #17595 and #17596. Ordinance #17595 included the new CAO, except for sections 14.06.095 and -.096. As a result of input from Intervenor Agriculture for Skagit County (ASC) and Natural Resources Consultants (NRC) the County made changes to SCC 14.06.095 and -.096 from what had been recommended by staff and what had been advertised. Those changes were codified into interim Ordinance #17596, which set forth the managed riparian buffer program (-.095). The County subsequently hired the NRC consultants to refine and provide

background documentation for this already-adopted buffer program.

On December 22, 1999, at the Tribe's and Audubon's request, we set a compliance hearing for April 12, 2000.

On January 3, 2000, Skagit County adopted interim Ordinance #17712 with findings in support of, and minor amendments to, Ordinance #17596. On February 1, 2000, the County adopted interim Ordinance #17749 which readopted Ordinance #17595.

On February 11, 2000, we issued an order granting intervention to the Washington Environmental Council (WEC).

On February 25, 2000, we issued a memo requesting that parties let us know by March 3, 2000, of any objections to combining the new petitions (listed in the next section) with the compliance proceedings in #96-2-0025c.

A conference call regarding the April 12, 2000, compliance hearing schedule was held on March 7, 2000. That hearing date was canceled. The new combined compliance hearing for #96-2-0025c and the hearing on the merits for #00-2-0025c (at the time #00-2-0010c) were set for May 23-24, 2000.

On April 4, 2000, the County adopted interim Ordinance #17828 which readopted Ordinance #17596 as amended by Ordinance #17712.

On April 10, 2000, we issued an order granting intervention to ASC.

On May 23-24, 2000, a compliance hearing was held at the Skagit County Administration Building, Mount Vernon, Washington. At the time of the hearing the County's CAO consisted of two interim ordinances:

(1) #17749 which:

(a) comprised the entire CAO with the exception of Sections 14.06.095 and -.096;
and

(b) contained the amendments to the CAO relating to items (1) and (4) in the RO.

(2) #17828 which:

(a) comprised SCC 14.06.095 and -.096; and

(b) contained the amendments to the CAO relating to items (2) and (3) in the RO.

PROCEDURAL HISTORY FOR CASE #00-2-0033c

On February 22, 2000, we received a petition for review (PFR) from Audubon (Case #00-2-0006). On March 6, 2000, we received a PFR from WDFW (Case #00-2-0009). On March 6, 2000, we received a PFR from the Tribe (Case #00-2-0010). All three PFRs challenged the adoption of CAOs (Ordinance #17712 and/or Ordinance #17749). On March 13, 2000, an order of consolidation was issued under Case #00-0010c.

On March 23, 2000, we received a PFR from FOOSC which also challenged Ordinance #17749. On April 3, 2000, a second order of consolidation was issued under Case #00-2-0014c.

On April 7, 2000, we received another PFR from FOOSC challenging the adoption of Ordinance #17828 which replaced Ordinance #17712 previously challenged by the original Petitioners. FOOSC asked that this petition also be consolidated with the above cases. On April 14, 2000, an order of consolidation was issued under Case #00-2-0017c.

On April 10, 2000, we issued an order granting intervention to ASC.

On May 3, 2000, we received another PFR from the Tribe challenging the adoption of Ordinance #17828 which replaced Ordinance #17712 (previously challenged by the original Petitioners) and Ordinance #17749. The Tribe asked that this petition also be consolidated with the above cases. On May 9, 2000, another order of consolidation was issued under Case #00-2-0018c.

On May 23-24, 2000, a hearing on the merits on the consolidated cases was held at the Skagit

County Administration Building, Mount Vernon, Washington.

On June 1, 2000, we received another PFR from WDFW challenging Ordinance #17828. WDFW had previously challenged #17712 but wished to ensure that their challenge also included the readoption of that ordinance by Ordinance #17828. WDFW requested that its PFR be consolidated with the above cases without an additional hearing. WDFW also requested that all of its prior briefing and submittals be incorporated into the consolidated cases. On June 5, 2000, another order of consolidation was issued under Case #00-2-0021c.

On June 19, 2000, we received another PFR from FOOSC. The petition challenged Ordinance #17891 (replacing #17749) and #17896 (replacing #17828) adopted on June 6, 2000. FOOSC requested that all prior briefing and submittals of all parties then in Case #00-2-0021c be incorporated into the consolidated cases with no further briefing allowed. On June 20, 2000, another order of consolidation was entered under Case #00-2-0024c.

On June 27, 2000, we received a PFR from the Tribe. This petition also challenged Ordinance #17891 and Ordinance #17896. The Tribe requested that all prior briefing and submittals of all parties now in Case #00-2-0024c be incorporated into the consolidated cases with no further briefing allowed. On July 7, 2000, an order of consolidation was entered under Case #00-2-0025c.

Throughout all the above readoptions and changes in ordinance numbers, Petitioners, in their series of PFRs, asked us to do the following:

- (1) WDFW – find SCC 14.06.095 and -.096 out of compliance
- (2) FOOSC – find SCC 14.06.090(2), -.095, and -.096 out of compliance and invalid for substantial interference with RCW 36.70A.020(5), (8), (9), (10).
- (3) Audubon – same as FOOSC
- (4) Tribe – find SCC 14.06.090(9), -.095, and -.096 out of compliance and invalid for substantial interference with the goals of the Act and recommend that the Governor impose sanctions.

On July 24, 2000, Skagit County adopted Ordinance #17938 which readopted its CAO as part of

its Unified Development Code (UDC), Title 14, replacing the part of SCC 14.06 adopted previously by Ordinance #17891 and readopting the remaining part, adopted previously by Ordinance #17896 as SCC 14.06.095 and -.096, now to be renumbered as SCC 14.24.120 and -.130, respectively.

On July 31, 2000, we received yet another PFR from FOSC and Audubon. The petition challenged SCC 14.24.100(2) [previously 14.06.090(2) in Ordinance #17891] and SCC 14.24.120, -.130 [previously 14.06.095 and -.096 in Ordinance #17896] as readopted by Ordinance #17938. Petitioners requested that this petition be consolidated with Case #00-2-0025c and that all prior briefing and submittals of all parties now in Case #00-2-0025c be incorporated into the consolidated cases with no further briefing allowed.

On August 1, 2000, we received yet another PFR from the Tribe. The petition challenged SCC 14.24.100(9) [previously 14.06.090(9)] readopted by Ordinance #17938. The Tribe requested that this petition be consolidated with Case #00-2-0025c with no additional briefing.

On August 4, 2000, an order of consolidation was entered with new Case #00-2-0033c.

Since all briefing and oral argument were presented prior to the adoption of the UDC (in which new section numbers were assigned), in this decision we will refer to the section numbers in the ordinances prior to the UDC.

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BURDEN OF PROOF & STANDARD OF REVIEW
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Pursuant to RCW 36.70A.320(1), all the above ordinances are presumed valid upon adoption.

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

Pursuant to RCW 36.70A.320(3), a Board “shall find compliance unless it determines 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 179, 201 (1993).

CAO STANDARDS

The GMA lays out particular standards for CAOs. RCW 36.70A.060(2) requires each county to adopt development regulations that protect designated CAs. RCW 36.70A.172(1) provides that when protecting CAs, counties “shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas.” In addition, counties “shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.”

We first explained our reading of these standards at p. 9 of the FDO for *CCNRC v. Clark County*, (*Clark*) #96-2-0017. In that decision we held that we would base our decisions of compliance with .172(1) on the following factors:

- (1) The scientific evidence contained in the record;
- (2) Whether the analysis by the local decision-maker of the scientific evidence and other factors involved a reasoned process; and
- (3) Whether the decision made by the local government was within the parameters of the [GMA] as directed by the provisions of RCW 36.70A.172(1).

At p. 10 we defined the phrase “best available:”

“ ‘Available’ means not only that the evidence must be contained in the record, but also that the science must be practically and economically feasible. ‘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 the ‘best available’.”

As to the requirement pertaining to anadromous fisheries, we held:

“This part of the statute directs measures for both preservation and enhancement. It therefore limits the discretion available to local government when dealing with anadromous fish. In balancing the scientific evidence against issues of practicality and economics the result must be more heavily weighted 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.”

Recently, in *HEAL v. Hearings Board*, 96 Wn.App 522 (1999), (*HEAL*) the Court of Appeals discussed the concept of BAS and specifically held that “evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations.”

In reaching its holding *HEAL* discussed the issue of “how much best available science controls the substantive outcome of the policy making process, under this statute.” (p. 530). The Court referred to the “best available science” requirement in the Endangered Species Act (ESA) and the 5th Circuit case that held:

“[W]here the agency presents scientifically respectable conclusions which appellants are able to dispute with rival evidence with presumably equal dignity, we will not displace the administrative choice. Nor will we remand the matter to the agency in order that the discrepant conclusions be reconciled.”

HEAL adopted that approach and stated that the “purpose” of RCW 36.70A.172(1) was to “ensure that regulations not be based on speculation and surmise.”

In reviewing legislative history by noting that .172 was passed five years after GMA was initially adopted, *HEAL* specifically recognized that the GMA requires balancing of more than a dozen goals and several specific directives. The Court acknowledged that the Legislature left to local governments the “authority and obligation” to take scientific evidence and balance it among the goals and requirements of the Act to fashion locally-appropriate regulations based on the evidence, not on speculation and surmise. (p. 532).

HEAL went on to make some further statements about the deference afforded local governments to the “substantive outcome of that balancing process” at p. 532. In a footnote to support that quote the Court cited to RCW 36.70A.320 and asserted that a petitioner has the burden to prove a local government acted “arbitrarily or capriciously” in view of the entire record and goals and requirements of the Act. RCW 36.70A.320(3) imposes the “clearly erroneous” standard of review as the burden imposed upon petitioners. Previous to that 1997 amendment the burden of proof on petitioners was by a preponderance of the evidence. Never has the arbitrary and capricious standard been inserted into the GMA by the Legislature. Ultimately, the *HEAL* decision, by relying upon the incorrectly stated arbitrary and capricious test as legislative direction for greater deference “to the substantive outcome of that balancing process” question, raises questions as to the scope of the Court’s direction, given that the clearly erroneous standard is a less deferential standard than arbitrary and capricious.

We are aware of RCW 36.70A.320(1), not cited in the *HEAL* decision, that directs us to apply a “more deferential standard of review” than the preponderance standard. That statute also imposes a requirement on Growth Management Hearings Boards to allow additional discretion to counties and cities on how they plan for growth.

Another puzzling statement is found beginning at p. 532 of the *HEAL* decision where the Court says:

“While the balancing of the many factors and goals *could* mean the scientific evidence does not play a major role in the final policy in *some GMA contexts*, it is hard to imagine in the context of critical areas.” (Emphasis supplied)

The puzzling part of that statement is that under the language of .172(1) the concept of BAS applies only to CAs. *HEAL* noted that CAs are categorized as such because of a greater susceptibility to damage, and that the “nature and extent of this susceptibility is a uniquely scientific inquiry.”

The parties in this case agree, as do we, that our previous FDOs address the test for “best” and “available” but do not specifically address a definition for “science.” Candidly, none of the language from *HEAL* specifically addresses that issue either. Ex. #0031 in the record is an article

that does discuss the question of what constitutes “science” in the GMA CA requirement. Copsey, 23 Seattle U. L. Rev. 97 (1999) discusses the work of the technical team assembled by the Department of Community, Trade, and Economic Development (CTED) that defines and sets forth items which constitute science. At p. 107 the article points out that science is a process involving methods used to understand the workings of the natural world. This process consists of four stages: “making observations, forming hypotheses, making predictions from these hypotheses, and testing those predictions.”

One of the major principals of scientific inquiry is the concept of replication. A scientific hypothesis is accepted or rejected only after it is replicated by additional tests or validated by further predictions and testing. The most general process used in the scientific community to review the principal of replication is peer review, which is most generally accomplished after publication of the hypotheses.

Although the *HEAL* case did not directly answer the question of “what is science?”, it did recognize that there are balancing factors to be considered once BAS has been established. The Court, however, did recognize that in the realm of CAs, the review is a “uniquely scientific inquiry.” Further, the Court held that while the local government possesses some discretion to define BAS, “it cannot ignore the BAS in favor of the science it prefers simply because the latter supports the decision it wants to make.”

COUNTY’S MANAGED BUFFER PLAN

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Skagit County’s ordinance requires a “25/25”-foot buffer for ongoing agricultural activities on designated agricultural-NRL lands. SCC 14.06.095(4)(a). This buffer includes a 25-foot RBZ measured horizontally from the ordinary high water mark or the edge of associated wetlands. Landward of the RBZ is a 25-foot agricultural management zone (AMZ). The RBZ is to be maintained as a revegetation zone or in its natural state and designed to prevent use by livestock. SCC 14.06.095(2)(g). Normal agricultural activities may occur in the AMZ except no livestock are allowed from November 1st to March 31st, and cover crops or pasture are to be maintained during this time.

County's Use of BAS

We have discussed the Act's BAS requirements in general in the section above. As to this case specifically, Petitioners charged:

- (1) It is not adequate for the County to merely consider BAS in the record, BAS must be included in the ordinance.
- (2) In *Clark* we said that when dealing with anadromous fish, in balancing the scientific evidence against issues of practicality and economics, the result must be more heavily weighted towards science. The County has done the opposite.
- (3) NRC scientists never claimed their work constituted BAS. Their buffer plan is not even supported by the science they provided in the record.
- (4) The County's earlier draft of this Ordinance stated that 125 feet was a minimum buffer to fit the BAS range. The County has not explained why its previous findings were incorrect.
- (5) In SCC 14.06.096 the County adopted the WSP and found that that represented BAS. WSP calls for 100-150 foot buffers.
- (6) GMA and our previous decisions require the County to define the range of BAS and then do economic and other factors analyses to make a choice within that range. The County used the latter factors, without proper analysis, to make a choice outside the range of BAS.
- (7) BAS is in the record. All the agencies showed the 25-foot RBZ to be well below their range of BAS. Just a few of the examples given were the following exhibits:

1617	National Marine Fisheries (NMFS) letter
1619	Department of Ecology letter
1620	WDFW letter
1704B	WDFW letter
1622	NMFS letter to USDA/FSA regarding CREP program
0018	Management Recommendations for Washington's Priority Habitat: Riparian (PHS) - WDFW
1588	WSP WDFW/Tribes
1706A	Man Tech Report (Broad Study – Federal counterpart to PHS and WSP)

- (8) PHS table 4 at 89 is a summary of 1500 independently-done studies. This includes a section on impact of agriculture and provides BAS.
- (9) The FEMAT curve (included in Appendix F of ordinance) describes the impact of Agriculture. It also shows that in addition to fish being impacted, most forms of wildlife are dependent on riparian buffers.
- (10) The County disregarded the BAS in the record and chose 25-foot buffers for Type I, II and III streams and 0 for IVs and Vs. In doing this the County did exactly what *HEAL* said it could not do: "...it cannot ignore the BAS in favor of the science it prefers simply because the latter supports the decision it wants to make"

The County responded in part:

- (1) *HEAL* held that BAS is only one factor to be considered. GMA requires the County to conserve natural resource lands. The County must balance this directive with CA protection.
- (2) Ex. #25 p. 5 provides evidence that farming is down. The record also contains testimony showing threats to farming.
- (3) The great majority of the standard BAS does not apply because it is irrelevant to the low gradient agricultural lands in Western Washington. It is therefore not BAS for Skagit County agricultural land.
- (4) There is a need for a location specific plan as adopted. This plan will create new science for low gradient farmland.
- (5) Pages 94 and 95 of the PHS manual talk about farm plans. That is what the County has done here.
- (6) None of our decisions have said that agency recommendations necessarily equal BAS.
- (7) We have recognized in previous decisions that the choice within BAS is unique to each case. As long as the choice is within the range, we should approve it.
- (8) No one has proven that 125-feet is the best buffer or the minimum acceptable

buffer under BAS.

(9) Local decision-makers have knowledge that should be used to balance the opposing factors in this very difficult decision.

(10) This plan applies to those areas most critical to anadromous fish and may well do the necessary job.

ASC further responded to Petitioners accusations:

(1) This proposal has had some peer review. Unfortunately that review has not been favorable or helpful.

(2) This is an excellent opportunity to apply known science to a new situation.

(3) There is no current available science for agricultural land in Skagit County. Relevancy of current science is very important in determining BAS.

(4) Evidence in the record showed that as to erodability of soil, the buffer needed to prevent erosion on a 0% percent slope was 9 meters while on a 30% slope it was 32 meters.

(5) The NRC scientists and the County did include BAS in developing the ordinance. That is what the Act requires.

(6) The FEMAT report is focused on upland forested areas where logging has affected streams. How does this apply to low-gradient Agricultural lands?

(7) There are two kinds of BAS:

a. That cited by Petitioners; and

b. Scientific research projects. The County, ASC and NRC scientists want to establish this kind of science, since it is totally lacking now. This project will be the subject of much publication and peer review in the future.

(8) This is not fringe science.

(9) No one has challenged the high level of expertise of the NRC scientists who developed this plan.

(10) EPA in Ex. #1703 supported this early, proactive action while debate of what is adequate continues.

(11) Unlike the BAS provided by Petitioners, this is a managed buffer and therefore can meet many of the buffer functions in fewer feet.

(12) One needs to ask the question “What is the science being proposed ‘best’

for?” Is it “best” for fish only, or is it “best” for fish and agriculture?

Petitioners replied in part:

- (1) Appendix F is the centerpiece of the County’s defense. However, this is mainly undisputed fish life information that does not support the decisions made by the County.
- (2) The EPA letter cited above took no position as to the adequacy of this program for protecting fish.
- (3) As stated above, the BAS supplied by Petitioners does apply to these lands. GMA requires the County to use available science and extrapolate if needed.
- (4) Science must be tested. Therefore the adopted plan cannot qualify as science even though ASC and the County have hired good scientists.
- (5) PHS is a summary of all available relevant literature, not just State agency science.
- (6) The main difference with a managed buffer is time not width. The 25/25 feet buffers do not meet the needs and functions required under BAS in the record.
- (7) There is no scientific dispute here. All experts agree except NRC consultants.
- (8) If more studies are done on these lower elevation agricultural areas, the results may well show that these lands need even wider buffers than those in PHS due to the constant intrusion, tilling, etc.
- (9) Petitioners have not argued that 125-foot or any other specific buffer width is BAS.

The Tribe, in replying to respondents’ claim that there was no BAS for Skagit County agricultural land, stated at the hearing:

“This, however, is a revised version of ‘Let’s wait for better science later.’ GMA does not require perfect science or certain science. It requires the best available science. The best available science is what we have now and what is in the record now.”

Audubon, at p. 8 of its reply brief, warned about accepting respondents’ justification that BAS is in a constant state of flux and therefore it would be unfair of us to claim that this plan does not or would not work to meet the GMA protection requirements:

“If this speculative theory, undocumented and unaccepted by any federal, state, or tribal resource agency responsible for anadromous fisheries, were allowed to stand, it would destroy the meaning and purpose of the RCW 36.70.172(1) requirements to include BAS in CAO prescriptions for protection of CAs and fish habitat. Under this pernicious theory, every jurisdiction could claim that any and all BAS is so ephemeral that what is accepted today will not be applicable tomorrow, reducing CA protection using BAS to a meaningless exercise in futility.”

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WEC summarized its position as to BAS at the compliance hearing:

“The County and ASC have not provided the best available science because they have not provided the available science. What they are proposing is, as they admit, untested. To the extent that there has been any peer review, there has been no peer acceptance as ASC has admitted. This can never qualify as best available science. It’s not available, and they admit it will not be available for five years.”

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Board Discussion on County’s Use of BAS

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The County adopted this agricultural buffer program even though the overwhelming scientific evidence in the record failed to support having only a 25-foot RBZ buffer. PHS, WSP, Man Tech Report, CREP Program and agencies with expertise showed 25 feet to be below the range of BAS. Also, the BAS in the record was of reasonable relevance to low gradient agricultural lands. For example, PHS (a summary of 1500 independently-done studies) included a section on the application to agriculture, and the CREP program dealt directly with agricultural lands.

ASC, in its response brief at p. 10 stated “the managed, compact buffer zone adopted in the County’s CAO has not been tested in Skagit County, or in other riparian/anadromous fish ecosystems.” ASC also stated that -.095 was based on “new science” that would be refined and tested by implementing the plan.

Since “science” must be pre-tested, the adopted plan could not qualify as science even though ASC and the County hired excellent scientists to develop the plan. Further, the NRC scientists never claimed their work constituted BAS.

We agree with the WEC summary quoted above. The basic problem with this approach is that GMA (specifically RCW 36.70A.172) requires protection of CAs and preservation or enhancement of anadromous fisheries using current “best available science.” In the section on

CAO standards above we discussed at length what BAS means. Given those considerations, the County's untested, 25-foot RBZ-managed buffer plan does not represent the BAS in the record. It is more a county-wide demonstration project outside of established BAS which could create "new science" as the plan is implemented and monitored. While this approach might provide valuable new scientific information, it does not meet the requirements of RCW 36.70A.172 and therefore does not comply with GMA.

Further Substantive Concerns

In addition to the Petitioners' concerns about the science in the record and what the County did or did not do with it, Petitioners had many substantive concerns about the County's managed buffer plan.

The Tribe pointed out the following additional concerns:

- (1) We are not opposed to a managed buffer plan *per se*, but are opposed to the width of the managed buffer chosen by the County.
- (2) The County did not address the key question, which is: "Assuming the use of a managed buffer, how wide must that buffer be and what vegetation will be effective?"
- (3) The County has never assessed the impact on fish of its buffer width choice and has never said that "25/25" buffer meets the needs of fish.
- (4) This managed buffer plan is hypothetical and never before tested. The County must use caution when the outcome is unknown. The County might be able to use this plan to conduct demonstration projects in a few non- crucial places with careful monitoring, but not county-wide.
- (5) The plan's reliance on adaptive management cannot be counted on because nothing in the ordinance requires the County to make changes or guarantees that the County will stiffen requirements if shown to be needed.
- (6) The buffer and monitoring programs have not even been designed, making assessment of compliance impossible.
- (7) As to functions needed by fish, in Ex. #0025 NRC concedes that this plan only fully meets two of the required functions. All the functions are interconnected and act as a unit. Fish need the entire unit of functions. There is no evidence in the record that the

effectiveness percentage claimed by the County is sufficient to protect and enhance anadromous fish.

(8) In Appendix F (Figure one) of the ordinance, the County's choice of average tree height in Skagit County is lower than the actual average tree height and therefore shows higher effectiveness percentages than should be.

(9) The County has chosen to measure required buffers from the ordinary high water mark rather than the channel migration zone. Therefore, they cannot ensure the provision of riparian functions in the future.

WDFW added the following concerns:

(1) PHS lists the functions and values shown by science to be needed for fish. In Appendix F, the FEMAT curve (Figure 1 p. 11) shows the percent effectiveness for various functions of various buffer widths. The County assumed 50-foot buffers for all functions in determining percentages. However, since 25 feet will be plowed or used for other agricultural purposes 7 months out of the year, the primary function of the AMZ is nutrient and sediment filtration and root strength. Therefore, the percentage of effectiveness was overstated for many functions such as litterfall, shade and large woody debris.

(2) The shading is very important to wildlife as well as fish since it has a temperature modification effect (it's cooler than other lands in summer and warmer in winter). This effect also attracts livestock.

(3) Bottom line is that all functions must be met for fish protection and the 25/25 buffer does not provide the majority of the essential functions, let alone all.

WEC emphasized that this is an experimental plan which claims adaptive management as a "panacea." WEC claimed that this is not adaptive management, because adaptive management must be based on BAS, tight monitoring and specific feedback and guaranteed quick response. Specifically, WEC contended that adaptive management requires:

(1) Clearly defined biological performance standards for enhancement.

- (2) Specific habitat objectives for triggers.
- (3) Specific predetermined management responses to standards and objectives if not met.
- (4) Timelines by which standards must be met and required timelines for predetermined management response – all based on BAS.
- (5) Must be funded and work program established. None of the above exists in the County managed buffer plan.

WEC further argued that even if all the above did exist, studies in the record indicate that it would be difficult if not impossible to be able to react in time to save rare species, if adverse impact detection was necessary to trigger such adaptive action. WEC asserted that, given the perilous condition of threatened salmonids, the County should err on the side of caution and salmon conservation rather than take the high risk of not being able to react and put additional protections in place after monitoring and finding that the initial measures were not protective enough.

Finally, WEC was particularly concerned about the impact of pesticides and the toxic components of fertilizer on fish with the County's extremely narrow buffers. WEC claimed that there is no evidence in the record that the County or its hired scientists seriously considered this real threat in its choice of buffer width. Additionally, from this record, no one has any idea how many miles of riparian habitat have no required buffers with pesticides, sediments and fertilizers going right into the water.

Audubon added:

- (1) The ordinance is inconsistent with the County's CPPs which require clear regulations and protection of CAs.

- (2) The total lack in the record of a reasoned analysis of the impacts on fish, agriculture, and other factors is a fatal flaw. For example, the number of productive acres lost, if adequate buffering for all streams had been chosen by the County, was never figured. The County did not analyze any actual data as to the level of distress of fisheries and agricultural industries when making its choice based on perceived hardship to farmers.

Petitioners provided a WSU study which showed that income from farms in Skagit County was up 80% between 1987 and 1997.

(3) Two years ago the County Ordinance included a quite good BMP program which has been totally abandoned and replaced with this much less adequate managed buffer plan.

FOSC added that this is called a managed buffer plan. However:

(1) There is no actual management plan in the Ordinance – only a proposal to develop such a plan.

(2) There is no assigned manager for the management plan. The County has no legal obligation under the Ordinance to manage.

(3) The lease program only lasts for five years, then reverts to the owner with no clear requirement for continued buffer maintenance after the five year lease ends. In fact, according to the language of the Ordinance, the County is prohibited from managing the buffer after five years.

(4) The CO required reasonable regulations with monitoring, benchmarks and required timeframes and none of that is in this Ordinance. In order to comply with the CO and the GMA, the SAP should have been put together and all the above worked out before the Ordinance was adopted.

The County responded:

(1) Orthographic maps were developed for the entire County, assuming a 130-foot buffer on Type I – III streams. These maps show the feet needed to come up with 130-foot buffers. These maps also show that much of the land already contains some buffers.

(2) The County discovered that it could not afford the money and manpower to adopt and enforce the BMPs provided for in the previous ordinance.

(3) Ex. #1039 lists many other laws and levels of government that govern agricultural practices. Many farmers are already overburdened from all these regulations.

(4) This is a regulatory 50-foot buffer program.

(5) The table in the ordinance does include timelines.

- (6) Only the lease ends in five years. The buffer requirements continue.
- (7) The SAP will design the buffer vegetation program.
- (8) Monitoring and benchmarks require baseline data. Protocol for that will be developed by the County and the SAP.
- (9) It would have been an extreme waste of County resources to appoint the SAP and have them develop the specific features of the program before the County got approval of this approach from the Board.
- (10) The language in the Ordinance does require action if the initial provisions are not effective. Section 11 of -.095 and 14.06.700 provide for enforcement.
- (11) As to funding, the County has committed \$400,000. The Legislature committed \$1.5 million for the year 2000 if the plan is found to comply. Appendix D and E of Ordinance plus - .096 show the County's major financial commitment (past and future) to salmonid protection and enhancement.
- (12) Ex. #12 map shows that this plan will be in effect in those areas that the County believes most productive at preserving and enhancing anadromous fish – particularly spawning areas.
- (13) These lessened buffer provisions only apply to ongoing agriculture on designated agricultural lands. Ongoing agriculture in several counties is totally exempt from CAO requirements. Why should Skagit County farmers be subjected to even more onerous provisions when farmers in other counties face no restrictions at all?

ASC added to the response:

- (1) Even though there are no guarantees, this program should protect CA functions and values and preserve and enhance anadromous fish.
- (2) GMA is not simply a Fisheries Protection Act; other goals must be considered and balanced.
- (3) It is already very difficult for many farmers to afford to stay in the farming business. The more restrictive provisions demanded by the Petitioners would be the last straw that would force many farmers to sell their land to developers. Compared to development, agriculture is the fish's friend.
- (4) This Ordinance sets up the concept of the managed buffer zone. The SAP will fill in

all the details and make it work. Unlike with the onerous requirements demanded by Petitioners, the agricultural community is committed to making this plan work. If this program does not work in five years, the alternative will be bad for farmers.

(5) This plan provides exactly what is most needed; quick action to provide rapid improvement to buffers.

All the Petitioners provided a long list of replies, many reiterating what we listed previously. Some additional key replies were:

(1) The County has said that “monitoring will make it possible to adaptively manage.” However, the ordinance does not require it.

(2) Respondents have made no rebuttal of WEC’s charge of lack of information on the number of miles of streams with no buffers required under this plan.

(3) There has been no economic analysis of the impacts of this plan vs. the previous 125-foot buffer plan.

(4) Appendix F shows no funding for adaptive management. This was from the County’s own consultants.

(5) The County has said that this plan provides a safe harbor for farmers. This is a safe harbor for farmers at the expense of fish and wildlife and does not provide for the CA protections the GMA requires.

(6) The County stated that it abandoned the previous BMP program because it could not develop and enforce all those individual plans. How then can we be asked to believe that this aggressive adaptive management plan, for which the Ordinance has no enforcement requirements whatsoever, is somehow going to get done, even though financial compensation for landowners expires in five years or less.

(7) The County contended that after five years the land would still be subject to buffer requirements. It is not clear in the Ordinance that that is so, and must be made clear in the Ordinance if that is to be so.

(8) ASC said there are 7,000 acres impacted in the lowlands. Even with the County’s 130-foot buffer mapping on each side of the streams, the County’s estimate was less than half that acreage. It is impossible to tell from this record how many acres are affected and what the economic

impact would be. The County cannot show that, under this record, it has made a reasoned analysis and provided reasoned justification for adopting this inadequate buffer program.

(9) ASC said that if this program doesn't work in five years the alternative is bad for farmers. We think it might turn out good for farmers because (a) the ordinance expires, (b) all the threatened fish will probably be gone, and (c) although adjustments may be needed, they are not required by this Ordinance.

(10) The County said fish would be protected by requirements of the Clean Water Act and other statutes. This argument has previously been rejected by the Boards. If the legislature thought that existing laws were sufficient, they would not have imposed this new requirement.

(11) The County contended that compliance and monitoring were not limited to five years. However, under section 4(e) (County's managed buffer program) the administrative official only has to determine two things:

(a) Whether or not there is compliance with the buffer lease program (who has signed up and who has not).

(b) Whether there is compliance with the buffer revegetation program once it is in place (to be determined by whether or not the land owner has provided a signed statement of compliance).

The Ordinance provides no monitoring thereafter except for representative sampling or complaint-driven site visits. The problem is that once the lease is over and the farmer has presumably complied with the Ordinance (thus, no longer subject to any fine or penalty), there is no basis upon which the County can enforce any noncompliance.

(12) The County said that there will be a monitoring program and that it will evaluate all the relevant functions that fish need. However, there must be standards to evaluate against. These standards have not been developed. We have no way of knowing what the details of that monitoring program will be and whether or not the to-be-established standards and monitoring protocol will satisfy the requirements of the Act.

(13) The County said that the Ordinance applies to those areas it believes are most productive at preserving and enhancing anadromous fish. The County

representative said that meant spawning areas – not rearing areas, not feeding areas, not migratory areas. The map the County provided at the hearing essentially exempts a tremendous amount of area that historically and currently are salmon rearing and migratory areas. These are critical habitat for salmon. Other than a small number of specific study areas within the Skagit delta, the entire delta is left out. This area historically was very important productive salmon habitat and is not protected in this Ordinance.

(14) In violation of Board rules, Petitioners were not made aware of the existence of the orthographic maps, which the County relied on in its response, until one week before their reply briefs were due. Even after being given an additional ten days after the hearing to review the maps, Petitioners were unable to determine (due to the poor quality of the maps and lack of supporting documentation) the completeness or accuracy of the resulting area values claimed by the County.

(15) There is nothing in the GMA that exonerates a jurisdiction from its mandated responsibility under the law just because some other jurisdictions may have adopted noncompliant ordinances that were not brought before the Board(s) to be reviewed and remanded.

Board Discussion on Further Substantive Concerns

It was pointed out in the record that this is the first time in Washington where the agricultural community has gone from a position of opposing buffers and the State Salmon Strategy to one of supporting buffers, cooperating to make something happen and voluntarily acting to get salmon protection on the ground as soon as possible. We commend the Skagit County agricultural community for committing to help reach the goal of protecting and restoring salmon habitat.

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. However, the record shows that buffers are needed for many functions to protect fish (temperature moderation, sediment and pollutant filtration, litterfall and nutrient input, bank

stabilization and erosion control, shading, large woody debris, and instream habitat). Even with NRC's generous assumptions (short average tree height and 50-foot buffer for all functions), which overstate effectiveness, the 25/25 buffer only meets four of the seven essential functions. Since fish need all functions, this is too far outside the range of BAS even for ongoing agriculture. A balancing is necessary, but in this case, the RBZ choice was simply too narrow.

If the RBZ were of adequate width, the concept of the County's managed buffer plan could be a good one, since it would provide a proactive jump-start to effective buffers in agricultural lands. The last thing we want to do is encourage farmers to give up on farming and sell their land to developers. Equally devastating would be the extinction of threatened fish in Skagit County.

We held in the September 16, 1998, compliance order at p. 25:

“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.”

The same must certainly apply to this experimental plan.

SCC 14.06.095(6) establishes a SAP “to design and develop a revegetation and maintenance buffer program.” The SAP is not yet appointed and the program design remains in the future.

Further, in .095(9) and in these proceedings, the County has stated that the monitoring strategy will be developed to provide pertinent data that will make it possible to implement changes and modifications incrementally and in the timely manner required for responsible adaptive management. None of this has yet been designed and adopted by the County.

In Ex. #0025, NRC, the scientists who designed this plan, described this ordinance as a “framework” and “platform” from which the stakeholders can work together to address the issue of CA protection and anadromous fish enhancement. In that letter the NRC scientists also stressed the absolute necessity of faithful implementation, effective monitoring and evaluation of

effectiveness, and a responsive adaptive management program to ensure necessary changes and enhancements are made.

Yes, this plan might work if all the contingencies happen that NRC's letter said would have to happen in order for it to have a chance of working. However, this ordinance does not ensure that any of these contingencies will happen. This ordinance does not have the benchmarks (e.g., specific measurable performance criteria for buffer functions and values, specifics of the revegetation requirements); accountability (e.g., who must revegetate and maintain the RBZ next year and in ten years); specific timeliness (e.g., revegetation plan, monitoring and enforcement sections). Without these specifics in place it is impossible for us to discern if this plan has a good chance of actually protecting CAs and preserving anadromous fisheries. Further, the adaptive management program does not contain the specifics listed by WEC to ensure quick and effective remedial action if monitoring shows that this untested plan is not achieving the needed protection. Also, it needs to be made clear that after the 5-year lease ends, the land will still be subject to the buffer requirements.

A lot of work has been done, but as to agricultural lands, the County is no further along in ensuring the protection of CAs and anadromous fish than it was three years ago. **The County therefore remains in noncompliance with the January 3, 1997 FDO, the September 19, 1998 CO and the Act.**

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EXEMPTIONS, LIMITATIONS, & DEVIATIONS

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Petitioners contended that even if the County's managed riparian buffer plan were acceptable, it is so riddled with exemptions as to deem it meaningless. Petitioners pointed out that even though these exemptions, limitations and deviations are being addressed separately below, the cumulative impact of all of them must be considered. Further, Petitioners contended that there are serious deficiencies common to all:

- (1) Failure to provide for any CA review or for any process to determine appropriate mitigation.
- (2) Parties other than the land owner receive no notice of the exempted activity and have

no opportunity to comment on the appropriateness of the exempted activity, to suggest mitigation measures, or to appeal.

(3) In contrast to the general exemptions found in Section 14.06.090, these exemptions specific to agricultural activities result in certain lands not being designated as CAs.

(4) Rather than conducting the required reasoned analysis using BAS, the County has chosen to characterize its decision-making process as a balance between applying BAS to CA protection and the economic needs of agriculture.

(5) Instead of determining the range of BAS and conducting a reasoned analysis to make choices within that range, the County ignored the BAS range and made no proper analysis of the extent of impacts on anadromous fish of its choices for exemptions, limitations, and deviations.

(6) At a minimum, these over-broad exemptions must be more narrowly crafted.

Farm Plan Exemption/Section 14.06.095(4)(i)(i)

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Section 14.06.095(4)(i)(i) states:

(i) “Agricultural parcels of land that are currently being operated pursuant to a Conservation or Farm plan approved by the Skagit Conservation District are exempt from the buffer requirements. Deviations or exemptions from the agricultural buffer on salmon bearing waters may be allowed pursuant to the approval of a site specific resource management plan (Farm Plan) approved by the Skagit Conservation District, pursuant to 14.06.095(3).”

Petitioners’ major concerns about this subsection included:

(1) Existing plans are exempted regardless of whether or not they protect fish:

“There is no evidence in the record of what standards, if any, the District used in approving these existing plans in the past. The failure of the record to demonstrate that those plans protect fish habitat or to include the standards upon which their approval was based, requires a determination by the Board that this exemption is not supported by the record; does not “protect” fish habitat; does not incorporate BAS; and, therefore is clearly erroneous.” (Tribe opening brief at p. 12).

(2) Future plans are to be judged by the Conservation District, which focuses on preserving soil, not fish:

“Most important, the District has no obligation to reject a plan on the basis that it does not protect fish adequately. The District is not obligated to require buffers protective of fish habitat. There is no legislative mandate directing that these plans include provisions to assure fish are protected...The record is devoid of any data supporting the adequacy of the NRCS standards for protecting fish habitat. The County’s implicit conclusion that these plans are sufficient to protect fish is simply not supported in the record.” (Tribe opening brief p. 14).

(3) Even if plans will actually benefit fish and fish habitat, it is not enough to require a plan. There must also be a requirement to implement the plan. As written, the CAO requires at best that a plan be developed and approved.

(4) The deviations portion of the above subsection allows buffers and other protection and enhancement provisions to be developed on a farm-by-farm basis. Therefore, the procedural and substantive requirements applicable to the CAO must be incorporated into the process of approving the plans. They are not. The missing procedural and substantive requirements include:

- a. No requirement that the administrative official consider BAS to protect anadromous fish or “give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries” as required by RCW 36.70A.172(1).
- b. No scientific standards are identified by which the administrative official is to make this decision. “The failure to provide administrators with clear and detailed criteria would undermine, perhaps fatally, the duty of the legislative body to articulate the requirements with regard to critical areas protection.” *WEC v. Whatcom County*, #95-2-0071 (9-12-96).
- c. The SAP is to decide whether deviations from the standards are consistent with the protection of fish resources. However, the ordinance does not require that members of the SAP have any fisheries expertise. Without a guarantee that SAP members will have the expertise required to make this determination, the Board cannot find that the ordinance meets GMA requirements.

The Tribe summarized its concerns on p. 16-17 of its opening brief:

“In brief, the County has allowed for deviations without meaningful standards to assure that the deviations retain protection of fish and their habitat, and without

assurance that those making the deviation decisions have the competence to make that determination. Even if the standard buffer requirements in § 14.06.095(4) were found to be adequate to protect fish resources, the deviations allowed pursuant to approved conservation plans under subsection (3) would preclude the Board from finding that the system as a whole will operate to achieve that GMA mandated result. Second, since the Administrative Official is authorized to deviate from the standard buffer requirements on a case by case basis, the procedural protections of GMA in developing a CAO are absent. *See* RCW 36.70A.020; .035(2). The public effectively is precluded from reviewing and commenting on any deviation sought by an individual landowner. By failing to set forth deviation standards by which the Administrative Official is to make his/her decisions, the County has punted its responsibility to develop regulations to each individual farm.”

The County responded that:

- (1) Under ESA and federal case law, farm plans which anticipate federal agency enforcement, such as farm plans that tie certain agricultural practices to receiving federal funding, require a Section 7 consultation and compliance with whatever provisions are deemed necessary to protect fish for ESA purposes. ESA “no take” requirements for listed fish species are in excess of those required under GMA.
- (2) The Natural Resource Conservation Service is in the process of updating its field office technical guides to include provisions to address the ESA salmon listing. Future farm plan review and approval will be guided by those updated requirements, regardless of whether federal funding is involved.
- (3) The County’s intent behind this exemption was to allow a farmer that has completed that level of scrutiny to be free from another layer of local requirements covering the same issues. The County did not intend the exemption to apply to farm plans that did not include any measures addressing fish habitat.
- (4) “If the Board believes the exemption as currently drafted is not sufficiently clear, the County is amenable to reviewing this language as part of a compliance order, and specifying that only approved farm plans that include measures to protect fish habitat at least comparable to the buffers required in SCC 14.06.095 are exempt.”

Petitioners replied:

- (1) The plans that the Conservation Service is approving are for soil conservation and not for enhancement of anadromous fisheries.

(2) The County neglected to address farm plans already in existence that do not anticipate federal agency enforcement or federal funding.

(3) The standard under Section 7 of the ESA is “no jeopardy.” In contrast, under GMA, the County is required to preserve and enhance anadromous fisheries. Further, ESA does not protect those stocks of anadromous fish that are not endangered or threatened.

(4) While the County is amenable to tightening this exemption up, if ordered by the Board, it makes clear that the only measures that it will require to be included are the 25/25 foot buffers which the Tribe has demonstrated do not meet the functions and values of fish habitat.

Petitioners have sustained their burden of showing that through this exemption the County has allowed for deviations without meaningful standards to assure that the deviations retain protection of fish and their habitat, and without assurance that those making the deviation decisions have the expertise to make that determination. If the County wishes to provide such an exemption it must set deviation standards to ensure the incorporation of BAS and the protection of fish and their habitat in the review of these plans by the administration official.

We agree with the County’s intent of trying to spare farmers with farm plans from another layer of local requirements. However, as written, SCC 14.06.095(4)(i)(i) is much too broad, does not ensure the protection of fish and their habitat and does not incorporate BAS.

Type 4 and 5 Streams

SCC 14.06.095(4)(a) limits the buffer requirement to “salmon bearing waters.” SCC 14.06.095(2)(h) defines “salmon bearing waters” as “those natural watercourses, rivers, streams, and associated wetlands currently inhabited by salmonid species during any stage of the life cycle. Salmon bearing waters shall not include artificial watercourses.” Therefore, Type 4 and 5 (nonfish-bearing) waters are, in effect, exempted from the buffer program.

Petitioners charged that this exemption fails to comply with the Act since:

(1) The quality of the water flowing from these tributaries can have a major impact on

salmon habitat downstream. The record contained letters from WDFW and Department of Ecology warning that sediments and pollutants discharged into the water along agricultural lands with no riparian buffers may be carried downstream and smother or poison salmon eggs or fry.

(2) The reason no salmon are present in certain streams is due to culverts that create fish barriers and prevent anadromous fish from accessing waters above the culverts.

(3) Landowners have rerouted and channelized natural watercourses making it difficult to determine the original nature of the watercourse. Since the ordinance does not include artificial watercourses, this creates an obstacle to enforcement of the buffer requirement.

(4) Although state law requires all ditches be properly screened to prevent fish from entering them, failure to do so has allowed juvenile salmonids to “intrude” into some man-made ditches providing the County an excuse for excluding artificial watercourses.

(5) Skagit County has designated “waters of the state” as defined by WAC 222-16 as fish and wildlife habitat conservation areas (FWHCA). WAC 222-16 contains the Washington Department of Natural Resources water typing system (Types 1-5). This includes all natural fish-bearing and non-fish-bearing streams and rivers. This Board held in *WEC v. Whatcom County*, #95-2-0071, that if designated, CAs must be protected unless a detailed and reasoned justification for non-protection is contained in the record. The County has done neither.

In response, the County generally emphasized:

(1) These waters, by definition, are not fish-bearing streams.

(2) Many of these Type IV & V waters do not connect to fish-bearing streams.

(3) The County has tried to place its regulations and invest its dollars in projects on those waters where it can do the most good and make the most difference (spawning areas and salmonid bearing natural waterways).

(4) To require buffers on all Type IV & V waters would riddle many farmlands for very little positive gain.

The record is replete with evidence that the temperature and quality of downstream fish-bearing waters is highly dependent on the temperature and quality of the upstream non-salmon-bearing waters. Therefore, it is critical to provide protection for waters that flow into salmon-bearing

waters. Neither the County nor ASC denied the importance of that protection, nor have they claimed that zero buffers for Type IV and V streams is in the range of BAS. **At a minimum, this ordinance must require some protection of Type IV and V waters that feed into salmon-bearing waters.**

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80% Requirement for Buffer Plan Compliance – SCC 14.06.095(4)(e)

SCC 14.06.095(4) contains a provision [both in Table Y and subsection (e)(iii)] that the County’s goal is that 80% of owners of property requiring buffers enter into the voluntary buffer lease program within 540 days after the Ordinance was adopted. SCC 14.06.095(4)(e)(iii) provides:

“(iii) If at the end of 540 days from the effective date of this Ordinance eighty (80%) percent of the property owners who have lands requiring buffers subject to this section of 14.06 have not signed a lease, then a fine shall be administered (see 14.06.095(11)). The property owner will not be eligible for compensation and the property shall remain subject to all the requirements of section 14.06.095. The agricultural buffer on salmon bearing waters shall become effective for all non-compliant properties within the entire Agriculture-NRL zone 90 days from the date of the report.”

Petitioners complained that this provision has several deficiencies:

- (1) The County is only requiring 80% compliance with the buffer program, immediately writing off 20% of the landowners that own property along the streams with no reasoned basis in the record for that write-off.
- (2) The percentage is based on the number of landowners, and not the relevant acreage of land adjacent to streams. If the 20% of nonparticipating landowners includes those individuals with the most riparian acreage, then the majority of the riparian areas may well not be included in the program.
- (3) Skagit County has already exceeded GMA CA compliance deadlines by several years. This buffer schedule will result in another substantial delay. Since bull trout and Puget Sound Chinook salmon have been listed as threatened pursuant to ESA, the delay has become even more critical.

The County responded that:

- (1) Petitioners are misreading -.095(4).
- (2) According to the last two sentences in -.095(4)(e)(iii) any property owner who does not sign a voluntary buffer lease is still required to comply with the requirements of the buffers program.
- (3) The buffer requirements apply to everyone, but those who do not sign the lease within the regulatory time period get fined and lose the right to compensation.
- (4) The fact that the buffer requirement applies to everyone is made clear from the intent expressed by the Board of County Commissioners: “This section shall apply to all existing ongoing agricultural activities as defined in this Chapter.” SCC 14.06.095(1).

Petitioners replied that regardless of the County’s claimed intent, the words in the section do not reflect that intent. If 80% sign up within 540 days, even though they might only be protecting 30% of the streams, there is no regulatory requirement on the remainder to sign on.

We agree with Petitioners that, as written, it is not at all clear that all property owners must comply with the requirements of the buffer program whether or not they sign a voluntary buffer lease and whether or not 80% of the landowners sign up within 540 days. **The County must act on its stated intent and must make it perfectly clear in -.095(4) that after 540 days all lands not exempted must comply with an appropriate buffer requirement.**

15% Of Parcel Limitation – SCC 14.06.095(4)(b)

SCC 14.06.095(4)(b) provides that the buffer complex zone shall not exceed 15% of the landowner’s parcel, although the RBZ still has to be 25 feet.

Petitioners contended:

- (1) The 15% is totally arbitrary, not based on BAS, and not supported by reasoned analysis in the record.
- (2) The percentage is determined parcel by parcel, not by total ownership. Under this exception, a landowner could have a series of smaller parcels along a stream, which could result in a maximum 25-foot buffer along that stretch of the watercourse, even though that

landowner might have a farm of several hundred acres.

(3) Skagit County already has other ordinances to address property rights concerns if the required buffer too severely restricts a very small farm.

(a) SCC 14.06.100 provides for variances when “a literal enforcement of the provisions of this chapter would result in unnecessary hardship.”

(b) SCC 14.06.110 allows for a reasonable use exception if “the application of this chapter would result in denial of all reasonable and economically viable use of a property,” and if the applicant cannot obtain a variance. That provision does provide that “any proposed modification to a CA will be the minimum necessary to allow reasonable and economically viable use of the property.”

The County responded that:

(1) The purpose of this provision is to prevent an excessive amount of land being taken by the buffer requirement where the particular parcel of land along the stream is very small, thereby depriving the property owner of a reasonable use of his land.

(2) This provision was provided to protect the very small landowner from losing a very high proportion of this land to the buffer requirement effectively putting him out of business.

(3) This provision is believed to apply to less than 1% of Ag-NRL lands and therefore has little impact on the overall buffer picture. However, to property owners with small affected parcels, this is an important provision.

(4) This provision represents an appropriate balancing of property rights, long-term agricultural production and the County’s efforts to enhance salmon habitat in other locations.

(5) If the County relied on the reasonable use exception every small farm owner would have to go through administrative hassle and a public fight to get relief.

The County did not respond to Petitioners’ concern about larger landowners with a series of smaller parcels profiting from this exemption. Further, the County stated at the hearing that its 1% estimate did not include those multiple-parcel farms. **At a minimum, this provision must be tightened and clarified to ensure that only small, single-parcel farms would be affected by this exemption. Also, an assessment must be made of the location of these small farms**

and the functions and values the streams going through them provide to anadromous fish. If some of these small farms are along streams especially critical to salmon protection, some other means of relief must be used.

Bank Armoring – SCC 14.06.095(4)(i)(ii)

SCC 14.06.095(4)(i)(ii) exempts parcels with permanent bank armoring from the buffer requirement.

Petitioners complained:

- (1) Bank armoring decreases the quality of the habitat for salmon, and should ultimately be replaced by more fish friendly bank protection.
- (2) Even if armoring is not removed, there is no biological basis to exempt armored areas from riparian protection. These areas would still benefit from water filtration through vegetated buffers and these buffers could provide large woody debris, shading and other benefits.
- (3) As written, the ordinance exempts the entire parcel, not just the length of stream that is currently armored.

The County responded that:

- (1) The bank armoring exemption is based on guidelines from the U.S. Army Corps of Engineers to facilitate maintenance of armored banks and flood fighting activities as part of regulated diking systems.
- (2) There is clear evidence in the record to support this exemption.
- (3) The County has chosen to allocate its limited resources to areas where the stream bank has not already been altered by armoring.
- (4) “The purpose of the exemption was to apply only to the armored portions of the parcels along the banks, and not to exempt other parts of land along the stream banks which are not armored. This is a drafting matter which can be cleared up if the Board so orders.”

Some of the Intervenor Districts’ responses included:

- (1) The Intervenor Districts do not regard maintenance and repair of permanent bank armoring where it exists as a proper subject for CAs regulation. They have acknowledged that expansion or modification of a design for diking and drainage systems is subject to Critical Areas regulation.
- (2) Armoring has been used to benefit particularly vulnerable areas where high dollar cost damage would be done by failing to maintain flood protection. These points are associated with high speed flood water and changes should not be made to prevent repairs or replacement of armoring when necessary.
- (3) Where armoring occurs, there is often a potential for developing side channels or velocity reducing improvements on the opposite shore of the water body. The opportunity should improve fish habitat.
- (4) Nothing in the CAO under appeal prevents change which accommodates both fish and flood protection. In order to achieve both, a strategic plan must be allowed to develop.

WDFW replied:

- (1) The Army Corps guidelines usually give no consideration for the needs of anadromous fish, and these guidelines should not dictate CA exemptions.
- (2) If certain areas need to be exempted from buffer requirements to protect public health and safety, that is appropriate. However, not all bank armoring is associated with dikes, and the County exempts all armored banks adjacent to agricultural lands.
- (3) WDFW is not opposed to routine maintenance of diking and drainage systems. This type of activity is regularly permitted by WDFW through its Hydraulic Projects Approvals.

The Tribe replied in part:

“Much of the Districts’ arguments concerning permanent bank armoring is directed not to agricultural lands, but to urban areas...Not only has the Tribe not advocated that armored banks in urban areas be removed, it has not advocated that they be removed in agricultural NRL-lands. Rather, the Tribe seeks to provide some vegetation in the buffer beyond the rip rap area, to ensure that the natural portions of partially armored parcels are not exempted from re-vegetation, and to afford habitat enhancement opportunities by re-vegetating areas now armored in selected restoration areas.”

The Petitioners have met their burden of showing that SCC 14.06.095(4)(i)(ii), as written, does not comply with the Act. It is obvious that entire parcels may not be exempted simply because there is some armoring currently on that parcel. Further, the County needs to assess current bank armoring to determine which are essential for public health and safety (qualify for this outright exemption); which are in especially critical areas most needing restoration (should be excluded from exemption); and which need some level of exemption for ongoing maintenance and repair but would still be required to provide some vegetation in a buffer beyond the rip rap to benefit anadromous fish.

Enhanced/Restored Watercourses – SCC 14.06.095(8)(a) and (d)

SCC 14.06.095(8)(a) limits riparian protection to waters “determined to be salmon bearing as of the effective date of this [ordinance].” SCC 14.06.095(8)(d) provides that waters “recognized as not being salmon bearing which are opened up to utilization by wild salmonids through restoration or enhancement projects shall not be considered salmon bearing waters for the purposes of this [ordinance]”

Petitioners charged:

- (1) It makes absolutely no sense to fail to protect areas opened to anadromous fish by habitat enhancement projects or culvert replacements.
- (2) This exemption would also render the fish passage projects in Appendix E meaningless, to the extent they involve agricultural lands.
- (3) This exemption creates a massive disincentive to any stream rehabilitation projects.
- (4) This exemption penalizes salmon restoration projects which are the only hope for listed salmon.

The County responded on pp. 47 and 48 of its brief:

“First, this Board has stated that ‘a major purpose of the GMA is to provide coordinated and predictable planning.’ Achen, et al. v. Clark County, No. 95-2-0067, Second Compliance Order, December 17, 1997 (CPC 2755) (emphasis added). Farmers need predictability in planning as well: predictability in planning what land they will be able to use for agricultural purposes next year and five years from now. It would be counterproductive to the agricultural property owners to have a regulation that says that a property owner may use certain land abutting a stream for agricultural purposes now

because the stream does not have fish in it, but that land may be taken away two years from now for a buffer because fish are then in the stream.

Second, it is very unlikely that any fish enhancement buffer program will succeed if the property owner participating will simply lose more land to buffer requirements if it is successful. The prospect of losing more land to a buffer on new fish-bearing streams is a disincentive to property owners complying with the buffer requirements, either voluntarily or through enforcement efforts. This provision provides a “safe harbor” protection for a property owner. It provides assurance that if he participates in the program, he will not lose additional land regardless of how successful the program is at fish enhancement.

Third, the County’s managed buffer program is all about enhancement of the fish habitat beyond the current conditions. This satisfied the County’s obligation under RCW 36.70A.172(1) to ‘preserve and enhance anadromous fisheries.’ The Tribe’s reference (Brief at p. 44) to federal rules relating to the protection of critical habitat relates to ESA, not GMA. GMA does not require the County to save every fish by providing buffers on every stream that has a fish now, let alone at any time in the future.

WDFW replied at p. 12 of its reply brief:

“...the fact remains that there is no point in restoring habitat if it will not be protected. The County references a ‘safe harbor’ protection for the property owner, but does not explain how that approach is consistent with adaptive management and the County’s commitment to further enhancements.”

This is a real “Catch-22” issue. We expect that by requiring protection for Type IV and V streams which feed into Type I-III salmon-bearing waters, we have also addressed this concern. If not, we will review the matter at a later time.

Unforeseen Circumstances Proviso

Appendix F at p. 33 provides that “circumstances and information may change over time and the plan may need to be revised.” In the event that circumstance develop which “result in a substantial and adverse change in the status of fish, fish habitat, or the agricultural buffers” and which were unforeseen by the County and the agricultural community, any “obligations” of the framers will be “suspend[ed]” until changes are negotiated with which the landowners agree.

The Tribe contended that this provision essentially provides the farmers with an open-ended,

unilateral veto. It feared that the ill-defined “unforeseen circumstances” would allow farmers to unilaterally suspend their obligations and to have the right to determine the content of any new regulatory scheme. It concluded that the County may not grant one interest group such total control over the regulatory process.

The County responded at pp. 51 and 52 of its brief:

“The Tribe charges (Brief at pp. 38-39) that Appendix F (p. 33) to the Ordinance provides an additional exemption or loophole, allowing the County to suspend any obligations of property owners due to unforeseen circumstances. Again, the Tribe’s interpretation of this provision as a loophole is a stretch. The cited language in the Ordinance provides:

Unforeseen circumstances are defined here as changes in circumstances surrounding the Agricultural Buffer Plan that were not or could not be anticipated by the Agricultural Community and the County that result in substantial and adverse change in the status of fish, fish habitat, or the agricultural buffers. Any such circumstances will suspend the respective obligations of the County and the landowners until mutually acceptable modifications are negotiated and agreed to by both parties.

(Exhibit 42, Appendix F thereto, p. 33.) This provision is not a uniform exemption to be loosely applied. It would be made by the technical advisory group following a review of the ‘unforeseen circumstances,’ such as an infestation of rats which might adversely impact the integrity of the farm and lead to a decision to permit the use of pesticides. The Tribe’s assertion that this is blanket exemption is unwarranted. There is no evidence in the record that this provision will be a problem or misused, any more than the potential for a declaration of emergency (which is always a possibility to suspend any rule) makes that rule flawed.”

The Tribe has failed to meet its burden of showing that the unforeseen circumstances proviso fails to comply with the Act.

EXEMPTION FROM CAO FOR DIKING AND DRAINAGE SYSTEMS –SCC 14.06.090

(9)

The CO required that the County clarify exemption (9) so it is clear to whom, what, and where the exemption applies.

In response, Skagit County adopted Ordinance #17456 which amended and clarified 14.06.090(9) to read:

“(9) The lawful operation and maintenance of public and private diking and drainage systems which protect life along the Skagit and Samish Rivers and tidal estuaries in Skagit County. This exemption shall apply to the existing structures and design prism of levees, dikes, and artificial watercourses...forty (40) feet landward of the landward toe of the structure or facility and forty (40) feet waterward of the waterward toe of the structure measured horizontally from the face of the levee, dike, or bank of the artificial drainage structure toward the Ordinary High Water Mark. The exempt area for operation and maintenance may be managed to meet federal standards for funding assistance established by the United States Army Corps of Engineers under Public Law 84-99 or other laws and regulations adopted to guide the diking and drainage functions. This exemption shall not apply to public or private activities which expand the levee, dike or drain beyond its design characteristics at the time of adoption of this Critical Areas Ordinance, and activities which expand or create new facilities shall not be exempt.”

The Tribe was the only Petitioner to raise objection to this redrafted exemption. Among the Tribe’s contentions were: (1) exempting 40 feet on each side of the prism is too much; (2) the County provided no documentation or reasoned analysis regarding the impacts to fisheries resources associated with this exemption; (3) the County did not comply with the BAS requirements of RCW 36.70A.172(1) when drafting this exemption; and (4) Army Corps of Engineers has recognized that vegetation, including trees, may be planted within 15 feet of the toe of the dike without harming the structure of the dike prism.

The County responded that our September 1998 compliance order already approved of this exemption but required that it be drawn more tightly so as to restrict the exemption to lawful, existing operations, which did not allow expansion or new projects. The County concluded that it had complied with our order to clarify.

Intervenor Districts presented many responses to the Tribe’s concerns, a few of which were:

- (1) Exhibits in the record showed the extreme threat to population centers and natural resource lands if the diking system is not maintained;
- (2) Failure to maintain a functioning system of diking and drainage, including a 40-foot

setback adequate to accommodate emergencies, maintenance and repairs, poses an overwhelming risk to life and property which must be reconciled with the Tribe's fish and wildlife habitat concerns.

(3) The Army Corps of Engineers requires there be a root-free zone in addition to the vegetation-free zone adjacent to dike prisms. Access to federal funding for repairs is dependent on preserving compliance with Army Corps rules.

(4) The adoption of a 40-foot rule is within the range determined by the County to prevent the causes of dike failure and meet the requirements of flood fighting and dike maintenance and repair.

The Tribe replied in part that (1) buffer vegetation would in fact improve bank stability and therefore reduce sediment; (2) the Army Corps manual does provide for a 15-ft vegetation-free zone in addition to the required root-free zone. However, the manual shows that it is possible to have trees in the root-free zone by using impermeable barriers; and (3) the County has made no showing that the 40-foot exemption needs to be as broad as it is.

We studied this exemption in great detail before issuing the September 1998 compliance order. The record in those proceedings contained many exhibits which demonstrated that the County had gone through a detailed and reasoned process in developing exemption (9). However, we stated at p. 29 of the CO:

“...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.**”

The County’s clarification of exemption (9) has dealt with our previous concerns as to the applicability of this exemption. **We find the County in compliance as to SCC 14.06.090(9).**

STRATEGIC PLAN – SCC 14.06.096

The RO gave the County one year to:

“Implement .096 adopting a strategic plan consistent with the State Wild Salmonid Policy including necessary additional controls on ongoing agriculture. This strategic plan must use BAS to protect anadromous fish.”

FOSC claimed:

(1) Instead of developing a strategic plan to preserve and enhance anadromous fish that uses BAS as required by the Act, the County has simply made a list of its current inadequate project efforts to protect salmon and stated that it will be “initiating studies” and eventually will develop a Salmon Recovery Plan (SRP).

(2) The strategic plan should have been the SRP. The plan should provide goals and policies based on BAS that would guide the County in the selection of salmon recovery projects in the future. The plan should include county-wide benchmarks, timelines and monitoring to assure that the program is preserving and enhancing anadromous fisheries consistent with the GMA. As written the plan has no goals, objectives, procedures, benchmarks, timelines, or monitoring and provides no assurance that anadromous fisheries will be protected by BAS.

The Tribe asserted at pp. 58-59 of its opening brief:

“The plan is divided into 2 phases: Phase I includes both implementation of projects for the ‘immediate benefit of salmon (Appendix D) and the commencement of studies to evaluate possible enhancement sites (Appendix E). §14.06.096(3). Phase II is the development of the County’s Salmon Recovery Program. §14.06.096(4).

Neither phase of this ‘plan’ adequately protects critical areas; neither is consistent with the State’s Wild Salmonid Policy (WSP), or with other salmon recovery requirements as determined by BAS; and neither is in compliance with the Board’s order and the GMA, including RCW 36.70A.020(8) –(10), -.040(3), -.060(2), and -.172(1); and Skagit County Resolution No. 14378, including CPPs 8.5, 8.7, 8.8, 8.10, and 10.1. Additionally, the strategic plan is inconsistent with SCC §14.06.020(5), .140(1), and .140(2)(c).”

The County responded that:

- (1) The County had told us before we issued the RO that it wished to develop a strategic plan consistent with the State of Washington Agricultural Strategy to be developed through the Governor’s office. The State has not adopted its “State Agricultural Strategy.” Therefore, the County cannot be found out of compliance.
- (2) The County has moved ahead on implementation in Phase I and budgeted and invested major sums of money on these projects.
- (3) The County has amended SCC 14.06.096 in a manner which demonstrates a commitment to a meaningful strategic plan.

The Tribe replied on p. 32 of its reply brief:

“The County confuses the State’s Wild Salmonid Policy (‘WSP’) with the Governor’s ‘Extinction without an Option’ Plan (‘Governor’s Plan’). The former is a final, signed document; while the latter remains in draft form. It was the WSP with which the County’s ‘strategic plan’ was to be consistent. Moreover, even though the State has not yet adopted an ‘Agricultural Strategy’ as part of the Governor’s Plan, as the County had hoped, the County still is obligated under the GMA to protect critical areas. Where agricultural practices threaten critical areas, the County must act, and cannot delay without violating the GMA, to protect those areas by enacting a strategic plan sufficient to implement protections. Despite the fact that the Board granted, over the Tribe’s strenuous objections, the County’s plea that it be given a full year rather than 6 months as originally ordered, the County still does not have a ‘strategic plan’ in place that identifies goals, objectives or measures for success, timetables, work plans and work products or deliverables. (The Board’s Order was issued on September 16, 1998 and it is now mid-May, 2000—1 year and 8 months later). The County’s delay and intransigence is nothing more than a sorry excuse for its failure to act and must not be condoned by the Board. § 14.06.096 should be found to be out of compliance and to substantially interfere with the goals of GMA.”

Board Discussion

During the briefing and hearing process before we issued the CO, the County stated very clearly that it was committed, under -.096, to developing a strategic plan for the protection of wild salmonids consistent with the WSP including any additional necessary controls on ongoing agriculture. It further stated that its strategic plan was and would continue to be consistent with the WSP.

We took the County at its word and stated at p. 26 of the CO:

“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.”

Since the CO in 1998, the County has added to -.096 a listing of projects it is undertaking to provide immediate, observable benefits to wild salmonid stocks in Skagit County. However, -.096 does not contain a strategic plan to preserve and enhance anadromous fish that uses BAS as required by the Act and the CO. Although we are assured by the County that it has amended SCC 14.06.096 in a manner which demonstrates its commitment to a meaningful strategic plan, we were convinced of that commitment two years ago.

The County remains in noncompliance with the Act as to the CO order to “implement .096 adopting a strategic plan consistent with the WSP including any necessary additional controls on ongoing agriculture. This strategic plan must use BAS to protect anadromous fish.”

INVALIDITY/REQUEST FOR SANCTIONS

FOSC and Audubon asked us to find SCC 14.06.090(2), -.095 and -.096 invalid for substantial interference with RCW 36.70A.020(5), (8), (9), and (10). The Tribe asked us to find SCC 14.06.090(9), -.095, and -.096 invalid for substantial interference with goals (5), (8), (9), (10) and (11) of the Act. Further, the Tribe asked us to recommend that the Governor impose sanctions on Skagit County.

Petitioners presented many good reasons why the above sections should be found invalid. Among the most compelling, was the claim that severe and irreparable damage to water quality and fish and wildlife habitat continue as a result of the County's failure to take action to truly protect CAs and anadromous fish. Petitioners reminded us that GMA required that this protection be adopted nearly ten years ago. Since then there has been a precipitous decline in the fisheries industry and several species of fish have been declared threatened. Yet, ongoing agriculture in Skagit County continues unrestricted as to activities next to waterways. We share the frustrations of Petitioners, but intend to give the County one more opportunity to bring itself into compliance before finding invalidity and/or recommending sanctions.

We note that the County must achieve compliance on this program by the end of this year in order to receive the \$1.5 million promised by the Legislature. We will therefore hold a compliance hearing on November 29, 2000. At that time we will relook at the County's actions to bring the noncompliant provisions into compliance. If significant progress has not been made toward actual protection of CAs and preservation of anadromous fish in agricultural lands, we will consider declaring the most egregious provisions invalid and also consider recommending that the Governor impose sanctions on Skagit County.

RELIANCE ON TEMPORARY CAO ORDINANCES

The Tribe and Audubon contested the County's adoption of its CAO as interim ordinances. Audubon pointed out that we decided in *North Cascades Audubon Society v. Whatcom County* #94-2-0001 that there is no language in the GMA that allows CAOs to be anything but permanent. Further, the Central Board decided in *Tulalip Tribe of Washington v. Snohomish*

County, CPSGMHB #96-3-0029 that it is no longer possible for the County to adopt an interim CAO after it has adopted its CP.

The County responded that it had adopted a series of interim CAO ordinances to fulfill a settlement agreement with FOSC and to adopt and keep in force necessary CAO protections without further burdening its already overworked planning commission. The County stated that it recognized that, because the ordinances were interim, we could not find the County totally in compliance as of June 2000. However, that would be resolved through adoption of the County's permanent DRs (UDC) in July.

Subsequent to the hearing the County adopted the UDC which made permanent 14.06.090(9) (The Diking Exemption which we found to be in compliance). Ordinance #17306 (amending the definitions of "agriculture land" and "ongoing agriculture") was adopted as a permanent ordinance.

SCC 14.06.095 and -.096 remain interim even though readopted in the UDC. We have already found those sections noncompliant for many other reasons. By the time of the compliance hearing in November, we would expect these sections to be amended in a permanent ordinance.

ORDER

The County is in compliance as to CO remand Issue 1 regarding the definition of agricultural land and application of the exemption to ongoing agricultural activities on designated agricultural lands.

The County is also in compliance as to CO remand Issue 4 regarding clarification of the diking exemption.

If the County chooses to implement the provisions of -.095 county wide, in order to comply with the GMA and remand Issue 2, the County must within 180 days:

- (1) Immediately appoint the SAP and ensure its work is on a "fast track."
- (2) Widen the RBZ.

- (3) Complete the design and development of the buffer revegetation and maintenance program.
- (4) Complete the development of an effective monitoring strategy and enforcement mechanism.
- (5) Complete design and development of the adaptive management program to include:
 - a. clearly defined biological performance standards,
 - b. specific habitat objectives for triggers,
 - c. specific predetermined management response to unmet standards and objectives,
 - d. timelines by which standards must be met and required timelines for predetermined management response, and
 - e. funding and work program established.
- (6) Clarify and strengthen the ordinance language to make it clear:
 - a. after the 5-year County lease ends, the land will still be subject to the buffer requirements;
 - b. who is legally accountable for the revegetation and management of the buffers, both short-term and after the 5-year lease ends;
 - c. after 540 days all lands not exempted must comply with an appropriate buffer requirement; and
 - d. the County is required to swiftly implement pre-determined, more rigorous standards if shown to be needed.
- (7) Eliminate or tighten the farm plan exemption [Section 14.06.095(4)(i)(i)].
 - (8) Provide protection for Type IV and V waters that feed into salmon-bearing waters.
 - (9) Eliminate or tighten the 15% of parcel limitation [SCC 14.06.095(4)(b)] to ensure that only small, single-parcel farms would be affected by this exemption. Also ensure that if any of these small farms are along streams especially critical to salmon preservation, some other means of relief is used.
 - (10) More narrowly craft the bank armoring exemption [SCC 14.06.095(4)(i)(ii)].

In the alternative, if the County chooses not to make the changes listed above and rather chooses to use its managed buffer program in limited, less critical areas as a pilot program, the County must within 90 days adopt a less risky plan which better protects CAs and preserves anadromous fish in agricultural lands.

In order to comply with the GMA and remand Issue 3 of the RO, the County must within 180 days implement .096 adopting an actual strategic plan consistent with the WSP including any necessary additional controls on ongoing agriculture. This strategic plan must use BAS to protect anadromous fish.

Any findings of noncompliance in previous sections of the FDO are incorporated by reference.

A compliance hearing will be held on November 29, 2000, at 9:00 a.m. At that time we will relook at the County's actions to bring the noncompliant provisions into compliance. If significant progress has not been made toward actual protection of CAs and preservation of anadromous fish in agricultural lands, we will consider declaring the most egregious provisions invalid and also consider recommending that the Governor impose sanctions on Skagit County.

The location and briefing schedule for the November 29, 2000, compliance hearing will be issued in October.

Findings of Fact pursuant to RCW 36.70A.270(6) are adopted and attached as Appendix I and incorporated herein by reference.

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 9th day of August, 2000.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Nan A. Henriksen
Board Member

Les Eldridge
Board Member

William H. Nielsen
Board Member

APPENDIX I

FINDINGS OF FACT

1. The Skagit River Basin encompasses 3,100 square miles and is the largest drainage basin associated with Puget Sound. In 1978, Congress designated the Skagit River as a federal wild and scenic river. Agriculture is one of the predominant land uses in the lower portion of the Skagit River Basin. In the lower Skagit River Basin there are “more than 50,000 acres of farmland, and more than 50 commercial dairy farms with a total of more than 20,000 animals.” Ex. #0042, Appendix F of Ordinance.
2. In March of 1999, the Puget Sound Chinook salmon was listed as threatened under the ESA. Spawning habitat for the Puget Sound Chinook salmon is concentrated in the Skagit and Snohomish River systems, “which together have nearly as many miles of spawning

habitat as the next ten largest rivers in Puget Sound combined.” These rivers support “more wild Chinook than all other major river systems combined. Skagit River system spring and summer/fall Chinook together comprise the largest natural Chinook runs in Puget Sound.” The Skagit system also provides necessary rearing habitat and migration routes for the Chinook. Ex. #0042, Appendix F of Ordinance.

3. The Bull Trout, which also inhabits the Skagit Basin, is listed as threatened pursuant to the ESA. 64 Fed. Reg. 58910, 58927 (Nov. 1, 1999).
4. Salmonids have specialized and unique habitat requirements that are met by functioning riparian habitat. These requirements include:
 - a. adequate but not excessive stream flows;
 - b. cool, well-oxygenated, unpolluted water;
 - c. streambed gravels that are relatively free of fine sediments;
 - d. an adequate food supply;
 - e. instream structural diversity (pools, riffles, hiding and resting cover); and,
 - f. facilitation of successful migration.

Ex. #0018, PHS.

5. Agricultural activities have two major impacts on stream and riparian systems:
 - a. loss of riparian habitat through conversion to agriculture use, and
 - b. non-point source pollution.

Loss of riparian habitat will deprive the salmonids of many of the requirements listed above. The pollution can consist of sediments, fertilizers, pesticides, and animal wastes. Erosion from croplands accounts for 40-50% of the sediment in our nation’s waterways.

Ex. #0018, PHS.

6. More than 75% of salmon-rearing habitats in the lower Skagit Basin have been lost due to diking, filling and other modifications for agriculture and urban development. Ex. 1617, NMFS letter.

7. Sedimentation in fish-bearing waters affects habitat quality and fish survival in a number of ways:
 - a. sediments can suffocate fish eggs and fry;
 - b. large sediment deposits can create barriers to fish passage;
 - c. suspended sediments clog the gills of fish, decrease dissolved oxygen levels, inhibit fish feeding and growth, and suppress some food sources; and,
 - d. turbidity caused by sedimentation also increases stream temperatures.

Ex. #0018, PHS.

8. Pesticides impact fish by decreasing survival rates in juveniles and by causing birth defects, altered reproduction, and lower productivity. Amphibians are particularly sensitive to aquatic contaminants.

Ex. #0018, PHS.

9. Animal wastes contaminate streams with microorganism, organic matter, nutrients, and salts. Run-off from manure sources can cause lethal conditions for fish by using up the available oxygen and producing ammonia. Ex. #0018, PHS.

10. Approximately 85% of Washington's terrestrial wildlife species use riparian habitat for essential life activities. Ex. #0018, PHS.

11. The lands addressed in the Ordinance lie within a highly developed area. The majority of this land is in private ownership and is designated agricultural land under GMA. With the displacement of agriculture comes the potential for urban development and increased impervious surface. Studies show that as impervious area increases between 5 to 20% through development, there is a decline in biological integrity and physical habitat conditions. Since the 1970s, more than 20% of the best farm land in the Skagit Valley has been converted to urban area. Ex. #0025, NRC letter.

12. A 1996 survey of County residents conducted by Skagitonians to Preserve Farmland found that 82% of the respondents thought that steps should be taken to preserve agricultural land. Today agricultural land is less than 10% of the Skagit watershed. Ex. #0025, NRC

letter.

13. While any development, including agriculture, creates significant challenges where it interfaces with wildlife habitat, some types of development are “better” than “others.” For example, agricultural land, in addition to minimizing impervious surfaces, affords a unique opportunity to manage vegetation and accelerate and direct the recovery of the desired functions. Ex. #0025, NRC letter.
14. Crops produced in the Skagit Valley (including seeds, berries, potatoes, row crop vegetables, bulbs, flowers) contribute nearly \$200 million to the local economy annually. Skagit County’s famous tulip festival attracts one million visitors each spring, generating \$65 million in annual tourism revenue. Unlike urban development, agriculture had a positive fiscal impact on Skagit County in 1997. For every dollar of revenue generated, farm, forest and open land only cost the County 51 cents in services. Residential development overall did not pay for itself, requiring \$1.25 in services for every dollar of revenue generated. Ex. #1125, NRC letter.
15. Most cropland and pastureland in the County is located in the floodplain delta area. Floodplain soils are highly productive under dry land farming. These lands are exposed to tidal activity and an average annual precipitation of 32 inches per year, resulting in regular flood events. Farming operations on these former wetlands are dependent upon adequate and continuous drainage of the area and protection from episodic flooding and water incursions from three directions: the sea, the surface river, and the sub-surface river. This has required the installation of a system of dikes, levees, culverts, tide gates and ditches. While flood control and diking has made it possible for the Skagit community to thrive, it has significantly affected the natural salmonid-rearing areas located in this segment of the watershed. Ex. #0025, NRC letter.
16. Drainage maintenance operations require unencumbered access to the ditches to allow for efficient, effective cleaning. Ex. #0025, NRC letter.
17. Army Corps of Engineers’ rules require the regular cleaning and maintenance of dikes.

These dikes must be kept clear of any but the most nominal vegetation to permit safe operation of equipment and to avoid breaking the integrity of the dike structure. Ex. #0025, NRC letter.

18. BAS is in the record. The 25-foot RBZ is well below their range of BAS. Just a few of the examples given were the following exhibits:

1617	National Marine Fisheries (NMFS) letter
1619	Department of Ecology letter
1620	WDFW letter
1704B	WDFW letter
1623	NMFS letter to USDA/FSA regarding CREP program
0018	Management Recommendations for Washington's Priority Habitat: Riparian (PHS) - WDFW
1588	WSP WDFW/Tribes
1706A	Man Tech Report (Broad Study – Federal counterpart to PHS and WSP)
1704A	CREP Program - U.S. Department of Ag and Washington State

19. PHS table 4 at 89 is a summary of 1,500 independently-done studies. This includes a section on impact of agriculture and provides BAS.

20. The NRC scientists who developed this plan have a high level of expertise.

21. The County and ASC have not provided the best available science because they have not provided the available science. What they are proposing is untested. To the extent that there has been any peer review, there has been no peer acceptance, as ASC has acknowledged.

22. ASC, in its response brief at p. 10 stated “the managed, compact buffer zone adopted in the County’s CAO has not been tested in Skagit County, or in other riparian/anadromous fish

ecosystems.” ASC also stated that this provision is based on “new science” that will be refined and tested by implementing the plan. Since “science” must be pre-tested, the adopted plan cannot qualify as science even though ASC and the County hired excellent scientists to develop the plan. Further, the NRC scientists never claimed their work constituted BAS.

23. GMA (specifically RCW 36.70A.172) requires protection of CAs and preservation or enhancement of anadromous fisheries using current “best available science.”
24. The County’s untested, 25-foot RBZ-managed buffer plan does not represent the BAS in the record. It is more a county-wide demonstration project outside of established BAS which could create “new science” as the plan is implemented and monitored. While this approach might provide valuable new scientific information, it does not meet the requirements of RCW 36.70A.172 and therefore does not comply with GMA.
25. The County has never assessed the impact on fish of its buffer width choice and has never said that “25/25” buffer meets the needs of fish.
26. All functions must be met for fish protection and the 25/25 buffer does not provide even the majority of the essential functions, let alone all.
27. Even with NRC’s generous assumptions (short average tree height and 50-foot buffer for all functions), which overstates effectiveness, the 25/25 buffer only meets four of the seven essential functions. Since fish need all functions, this is too far outside the range of BAS even for ongoing agriculture. A balancing is necessary, but in this case, the RBZ choice was simply too narrow.
28. In Ex. #0025, NRC (the scientists who designed this plan) described this ordinance as a “framework” and “platform” from which the stakeholders can work together to address the issue of CA protection and anadromous fish enhancement. In that letter the NRC scientists also stressed the absolute necessity of faithful implementation, effective monitoring and evaluation of effectiveness, and a responsive adaptive management program to ensure

necessary changes and enhancements are made.

29. Adaptive management requires:

- a. clearly defined biological performance standards for enhancement;
- b. specific habitat objectives for triggers;
- c. specific predetermined management responses to standards and objectives if not met;
- d. timelines by which standards must be met and required timelines for predetermined management response – all based on BAS; and
- e. establishment and funding of a work program.

The County plan has none of these in place.

30. The County said that there will be a monitoring program and that it will evaluate all the relevant functions that fish need. However, there must be standards to evaluate against. These standards have not been developed. There is no way of knowing what the details of that monitoring program will be and whether or not the to-be-established standards and monitoring protocol will satisfy the requirements of the Act.

31. The County has stated that the monitoring strategy will be developed to provide pertinent data that will make it possible to implement changes and modifications incrementally and in a timely manner required for responsible adaptive management. None of this has yet been designed and adopted by the County.

32. SCC 14.06.095(6) establishes a SAP “to design and develop a revegetation and maintenance buffer program.” The SAP is not yet appointed and the program design remains in the future.

33. This ordinance does not have the benchmarks (e.g., specific measurable performance criteria for buffer functions and values, specifics of the revegetation requirements); accountability (e.g., who must revegetate and maintain the RBZ next year and in ten years); specific timeliness (e.g., revegetation plan, monitoring and enforcement sections). Without these specifics in place it is impossible to discern if this plan has a good chance of actually protecting CAs and preserving or enhancing anadromous fisheries.

34. The record is replete with evidence that the temperature and quality of downstream fish-bearing waters is highly dependent on the temperature and quality of the upstream non-salmon-bearing waters. Therefore, it is critical to provide protection for waters that flow into salmon-bearing waters. Neither the County nor ASC denied the importance of that protection, nor have they claimed that zero buffers for Type IV and V streams is in the range of BAS.
35. As written, it is not at all clear that all property owners must comply with the requirements of the buffer program whether or not they sign a voluntary buffer lease and whether or not 80% of the landowners sign up within 540 days.
36. In SCC 14.06.095(4)(b), the 15% of parcel limitation, the percentage is determined parcel by parcel, not by total ownership. Under this exception, a landowner could have a series of smaller parcels along a stream, which could result in a maximum 25-foot buffer along that stretch of the watercourse, even though that landowner might have a farm of several hundred acres.
37. As written, SCC 14.06.095(4)(i)(ii) exempts the entire parcel, not just the length of stream that is currently armored.
38. If certain areas need to be exempted from buffer requirements to protect public health and safety, that is appropriate. However, not all bank armoring is associated with dikes, and the Ordinance exempts all armored banks adjacent to agricultural lands.
39. The Army Corps of Engineers requires there be a root-free zone in addition to the vegetation-free zone adjacent to dike prisms. Access to federal funding for repairs is dependent on preserving compliance with Army Corps rules.
40. We studied SCC 14.06.090(9), the diking exemption in great detail before issuing the September 1998 compliance order. The record in those proceedings contained many exhibits which demonstrated that the County had gone through a detailed and reasoned

process in developing exemption (9).

41. The RO gave the County one year to: “Implement .096 adopting a strategic plan consistent with the State Wild Salmonid Policy including necessary additional controls on ongoing agriculture. This strategic plan must use BAS to protect anadromous fish.” During the briefing and hearing process before we issued the CO, the County stated very clearly that it was committed, under -.096, to developing a strategic plan for the protection of wild salmonids consistent with the WSP including any additional necessary controls on ongoing agriculture. It further stated that its strategic plan was and would continue to be consistent with the WSP. Since the CO in 1998, the County has added to -.096 a listing of projects it is undertaking to provide immediate, observable benefits to wild salmonid stocks in Skagit County. However, -.096 does not contain a strategic plan to preserve and enhance anadromous fish that uses BAS as required by the Act and the CO.
42. The procedural history and CAO standards sections of this decision are incorporated by reference as additional findings.

TABLE OF ACRONYMS

AMZ	Agricultural Management Zone
ASC	Agriculture for Skagit County
Audubon	Skagit Audubon Society
BAS	Best Available Science
BMP	Best Management Practice
CA	Critical Area
CAO	Critical Areas Ordinance
CO	Compliance Order
CREP	Conservation Reserve Enhancement Program
CTED	Community, Trade, and Economic Development
ESA	Endangered Species Act
FDO	Final Decision and Order
FOSC	Friends of Skagit County
FWHCA	Fish and Wildlife Habitat Conservation Areas
GMA, Act	Growth Management Act
NMFS	National Marine Fisheries Service

NRC	Natural Resource Consultants
PFR	Petition for Review
PHS	Management Recommendations for Washington's Priority Habitat: Riparian
RBZ	Riparian Buffer Zone
RO	Order on Reconsideration
SAP	Science Advisory Panel
SRP	Salmon Recovery Plan
Tribe	Swinomish Indian Tribal Community
UDC	Unified Development Code
WEC	Washington Environmental Council
WDFW	Washington State Department of Fish and Wildlife
WSP	Wild Salmonid Policy