

**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.)
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SKAGIT AUDUBON SOCIETY, et al.,)
) No. 00-2-0033c
) Petitioners,)
) COMPLIANCE
) v.) HEARING
) ORDER
)
SKAGIT COUNTY,)
)
) Respondent,)
)
) and,)
)
AGRICULTURE FOR SKAGIT COUNTY, et al.,)
)
) Intervenors.)
_____)

On August 9, 2000, we entered an order finding noncompliance in Case #00-2-0033c, and continued noncompliance in Case #96-2-0025c (FDO/CO). The order stated:
“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.”

We also stated at p. 59 of the decision:

“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.”

On November 29, 2000, a compliance hearing was held at the Port of Skagit County, 15400 Airport Drive, Burlington, Washington, in the above-entitled cases.

Participating at the hearing were representatives of Skagit County (County), Friends of Skagit County and Skagit Audubon Society (SAS), Swinomish Indian Tribal Community (Tribe), Washington State Department of Fish and Wildlife (WDFW), Washington Environmental Council (WEC), and Agriculture for Skagit County, et al., (ASC).

We reminded the parties at the beginning of the compliance hearing that this interim hearing was being held to focus on two things (1) whether the County had complied with the order's requirements regarding the Managed Agricultural Riparian Plan (MARF) and would therefore qualify for a finding of compliance and release of state funds, and (2) whether insufficient progress had been made toward the actual protection of critical areas (CAs) and preservation of anadromous fish in agricultural lands, and therefore findings of invalidity and/or request for sanctions as requested by various Petitioners would be appropriate.

On December 27, 2000, we issued a memorandum to all parties giving advance notice on (1) above which stated:

“As you know, the 1999 legislature appropriated \$1.5 million for the implementation of Skagit County's innovative Managed Agricultural Riparian Plan (MARF). In order for the County to receive those funds, we must find the MARF in compliance with the Growth Management Act by December 31, 2000. Since the final briefs in these cases were not due until the week before Christmas, it is impossible for us to issue a fully written decision by that date.

However, we wish to notify you, the legislature and the Governor's office that we find the MARF framework in compliance. We ask that the appropriated funds be released so the important task of restoring and rehabilitating critical salmon habitat in agricultural lands in Skagit County will proceed with no further delay. While the initial MARF framework is compliant, we intend to maintain jurisdiction to ensure that the Science Advisory Panel

timely fulfills its critical role of putting needed “flesh” on that framework, including:

- (a.) recommendations for baseline monitoring and sampling, and specific monitoring methodology,
- (b.) development of MARP revegetation and maintenance buffer program,
- (c.) approval of MARP planting plans and techniques, and
- (d.) development of an adaptive management program for the MARP.

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

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

We will discuss three categories of issues in this compliance order:

- (1) An elaboration of the advanced decision on the MARP as promised in the advance notice above,
- (2) Progress made on (7) through (10) of the FDO/CO and extension of the ordinance application to rural resource lands, and
- (3) Consideration of Petitioners’ requests for invalidity and sanctions.

Petitioners’ challenges beyond those topics will not be dealt with in this compliance order. The compliance date for all remaining issues from the August 9, 2000, order is March 5, 2001. A new petition has been filed by the Tribe. The new concerns raised by the adoption of Ordinance #18069 will be considered through that process.

Presumption of Validity, Burden of Proof, and Standard of Review

Petitioners challenge Skagit County's adoption of Ordinance 18069. Pursuant to RCW 36.70A.320 (1), Ordinance 18069 is 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 Growth Management Act (GMA, Act) RCW 36.70A.320 (2).

Pursuant to RCW 36.70A.320(3), the 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]." For the Board to find the County's action clearly erroneous, the Board 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).

Actions Taken to Achieve Compliance

The County chose to modify its MARP provisions to bring that innovative program into compliance for county-wide application, rather than limit its use to selected, less critical areas of the County. We will therefore first discuss the County's actions regarding the six remedies required by the August 9, 2000, FDO/CO to make the MARP process compliant for county-wide use on designated agricultural lands.

(1) Immediately appoint the Scientific Advisory Panel (SAP) and ensure its work is on the "fast track."

County's Statement of Actions Taken

The County sought input from Petitioners and affected property owners regarding the SAP makeup, responsibilities and appointments. This took considerable time. Meanwhile, the County completed significant additional work and obtained scientific input on the proposed planting plan, monitoring plan, and adaptive management plan and thus began several of the tasks that will be taken over and implemented by the SAP. The Ordinance now includes a substantially revised (and shorter) time frame for completion of many of the features of the managed buffer program putting the work of

the SAP on a “fast track.”

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Petitioners’ Challenges

WDFW responded:

“Because of its many duties, the membership and decision-making process of the SAP will probably determine whether or not this ordinance is effective in protecting riparian areas. The SAP should be an unbiased, independent body made up of qualified professionals representing the appropriate areas of expertise, and all of the members should have an equal voice. As the County recognized in Resolution No. 18082, the areas of expertise should include hydrology, riparian and fisheries biology, agricultural science, geomorphology, silviculture and/or botany, and water quality. The SAP membership must include representatives from the relevant federal, state, and tribal governments.

There are no details regarding the SAP’s procedural protocols or decision criteria in the ordinance. Appendix III of the NRC Rationale has a section on the SAP that contains many of the necessary details, but those requirements are not incorporated into the ordinance. Actually, Resolution No. 18082, which appoints the SAP, is inconsistent with Appendix III. If the SAP procedures are not in the ordinance, the County can amend them unilaterally, without any public notice or comment. Also, the Board and Petitioners cannot evaluate the SAP without knowing how it is going to function.”

WDFW further pointed out that there was no one named to the SAP to represent WDFW or Skagit Systems Cooperative.

The Tribe added that it did not believe that the SAP members were either prepared or capable of making all of the determinations required by the Ordinance. The effectiveness of the County’s Ordinance depends upon the ability of the SAP to function well. However, the Ordinance failed to identify needed process protocols or operating procedures for the SAP. In addition, the Ordinance did not provide the SAP with sufficient criteria to make its decisions.

SAS charged that the County made no provisions to ensure that the SAP personnel, collectively, have the expertise, necessary time, local knowledge, or objectivity to carry out the important responsibilities assigned to them.

The County countered that the makeup of the SAP should be a matter of County choice. SAP

decision-making would be subject to public review and comment and most of the concerns were sheer speculation about potential implementation problems that should not be the concern of the Board.

(2) Widen the RBZ.

County's Statement of Actions Taken

The new MARP has a buffer that is 75 feet in width; 50 feet of trees and shrubs (RBZ) and 25 feet of vegetative filter strip including year round requirements on all 75 feet. The previous buffer was 25 feet of trees and 25 feet of cover crop that permitted grazing during certain times of year. This represents a 100 percent increase in the RBZ from the previous Ordinance.

Petitioners' Challenges

The Tribe claimed that the new buffer width, even with active planting and management, was still too narrow. That width cannot meet the functions and values of riparian areas which most scientists agree are needed by fish. The County has not shown to what extent the proposed buffer is even likely to result in compliance with one or all of the proposed performance measures in Table Y. No other agency believes that 75 feet meets best available science (BAS).

WDFW added that the 75-foot buffer still only meets 4 of the 7 functions needed for fish and therefore is not BAS. SAS agreed, stating that the buffers still are only one-half of accepted BAS.

(3) Complete the design and development of the buffer revegetation and maintenance program.

County's Statement of Actions Taken

The new Ordinance includes substantial additional detail regarding the riparian planting and maintenance plan. The SAP will still have a role to review and revise the plan, but this Ordinance establishes a detailed starting point for implementation.

Petitioners' Challenges

The Tribe claimed that the County had failed to complete the design of the buffer revegetation program. Table X in the Ordinance shows that it will not be complete until July 2001. The County

described the Ordinance and Appendix D as a “starting point for implementation” and that the SAP may revise even the skeletal framework. Appendix D is not incorporated by reference, and therefore it is not actually part of the Ordinance. Despite the recommendations within the appendices, the SAP and the County retain considerable discretion in developing the revegetation and maintenance program.

(4) Complete the development of an effective monitoring strategy and enforcement mechanism.

County’s Statement of Actions Taken

The baseline monitoring requirements are set forth in SCC 14.24.120(3)(f) and the timeline in (g).

“(f) Baseline Monitoring.

Strategic baseline monitoring and sampling of all options shall occur based on recommendations from the SAP. Monitoring of the various programs will vary in complexity depending on information priorities identified by the SAP, available funding and cooperation from other agencies and universities.

At a minimum, a monitoring program shall include the following parameters:

- The alternative plans shall be sampled for baseline data prior to any buffer plans being implemented; and
- Sampling shall continue on a three-year schedule; and
- Sampling shall include the testing requirements indicated in Table Y, Methods of Measurement (except for the macroinvertebrate inventory).

The specific methodology of monitoring shall be developed by the SAP. Compliance tracking shall occur and be consistent with SCC 14.24.700.”

The specific monitoring requirements for the MARP are referenced in SCC 14.24.120(4)(d)(xi) and the MARP monitoring table as well as described in further detail in Appendix E to the Ordinance. State water quality requirements are identified as the measure for monitoring performance. The SAP will have an ongoing role in recommending specific monitoring locations and adjustments to the monitoring program.

Enforcement is described in SCC 14.24.120(6) and utilizes all the enforcement tools contained in the County’s general development code enforcement section.

Petitioners' Challenges

Tribe – Appendix E provides only generalized statements about monitoring programs and suggested monitoring issues to be addressed in the future by the SAP. The Ordinance itself only specifies 4 out of 11 performance standards. The rest simply do not qualify as performance standards. It also delays development of the actual baseline monitoring plan to the future: SCC 14.24.120(f).

WEC – Timing is crucial for survival of several fish species. The County's actions are too slow. Ex. A attached to the County's November 9, 2000 statement of actions taken shows that the monitoring program will not be finalized until March 2002. Baseline monitoring is not reflected in the Ordinance schedule.

SAS – The monitoring plan 14.120(3)(f) is meaningless because it is not based on any specific performance parameters that assure mandated protections of CA function and value.

The County replied that the County was beginning baseline monitoring right away or as soon as an option was selected. Later dates are to monitor the effectiveness of planted, managed buffers. The County's monitoring program was based on Man Tech and WDFW monitoring.

(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.

County's Statement of Actions Taken

These features of the program are described in SCC 14.24.120(4)(d), especially subsection (i) and (xii) and elaborated in more detail in Appendices D and E to the Ordinance. The MARP monitoring program in Table Y sets forth specific goals/targets for monitoring.

Petitioners' Challenges

WDFW replied:

“In the MARP section, the ordinance references an adaptive management program which will be ‘developed cooperatively by the County and the SAP.’ SCC 14.24.120(4)(d)(i)(C). The ordinance also requires the SAP to annually review and recommend changes to MARP buffers based on monitoring results. *Id.* at (d)(xii). Appendix F contains ‘principals, concepts, and rational [*sic*] to be considered during the development of the adaptive management program.’ *Id.* These are the primary references to the critical adaptive management process in the entire ordinance.

While the County has made some progress toward the eventual development of an adaptive management program, this program is by no means completed and is limited to the MARP option. The Board listed the required elements of an effective adaptive management program in its Order, but none of these elements are present in the ordinance. The adaptive management program should also be based on BAS, and legally enforceable.

Given the County’s emphasis on MARP, the lack of an effective adaptive management program is a serious flaw in the ordinance. The risks associated with small buffers make adaptive management even more critical to the proper protection of the fish and wildlife resources in Skagit County.”

Tribe concerns included:

- (1) All we have so far are undefined and undeveloped proposals.
- (2) The Ordinance states that the adaptive management program “is to be developed.”
- (3) Neither Appendix D nor E have required details.
- (4) Appendix F is merely principles, concepts, and “Rationale for a Managed Agricultural Buffer Zone in Skagit County” (*Rationale*) to be considered.
- (5) Without clearly defining the required quantitative performance standards, it is impossible to develop a monitoring or adaptive management plan, because it is unknown what elements will specifically be measured, and with what degree of precision these elements must be measured in order to result in changes to pre-existing practices.
- (6) Without adequate quantitative performance standards, not only will it be impossible to determine when changes to previously approved practices must be made, but it will also be impossible to determine the type and magnitude of changes that must be made.
- (7) There is no way of knowing if appendices will be adopted by the SAP and the County.
- (8) Despite the County’s promise to make changes in the event its plan does not work, there is nothing in the latest Ordinance which requires such changes. SCC 14.24.120(3)(d) states:

“The County will reopen this section for review and possible amendment upon a consensus conclusion of the AFW process which includes landowners.”

WEC added:

- (1) Monitoring and adaptive management provisions must be comprehensive, rigorous and based in BAS.
- (2) The County’s adaptive management program “does not contain the specifics... to ensure quick and effective remedial action if monitoring shows that this untested plan is not achieving the needed protection,” as required by the FDO/CO.
- (3) By its own terms, the adaptive management program for the MARP is still not developed and the Ordinance fails to require any of the five elements specified in the FDO/CO. There are no standards, timelines, triggers, or predetermined management options in the Ordinance.

(6) Clarify and strengthen the language to make it clear:

(a) After the 5-year lease ends, the land will still be subject to the buffer requirements;

This is addressed in SCC 14.24.120(4)(d)(i)(D) and (x).

(b) Who is legally accountable for the revegetation and management of the buffers, both short-term and after the 5-year lease ends;

The County clarified that it is accountable. This is addressed in Section 14.24.120(4)(d)(i)(C) and (iii)(A), and in more detail in Appendix D to the Ordinance.

(c) After 540 days all lands not exempted must comply with an appropriate buffer requirement.

This is addressed in SCC 14.24.120(4) (e) and (f), and the time period for selecting a buffer option has been shortened from the original 540-day proposal to 360 days.

(d) The County is required to swiftly implement pre-determined, more rigorous

standards if shown to be needed.

This is addressed in SCC 14.24.120(4)(d)(i)(C), (xi), and (xii), the timetable in Table X and Appendices D & E to the Ordinance.

Petitioners' Challenges

- Tribe - (a) No certainty of maintenance after lease.
(b) No way of knowing if techniques referenced in Appendix D will be approved by SAP and adopted by the County.
(d) Monitoring does not begin until 2004.
- SAS - (c)&(d) Ordinance completely fails to ensure timely protection of CAs, due to unnecessary time lapse of 2-3 years.

Use of Best Available Science

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An issue transcending most of the various compliance challenges to SCC 14.24.120 is whether or not the County included BAS in its choices regarding CA protection in designated natural resource lands (NRL) lands.

County's Statement of Actions Taken

The County contended that its choices in SCC 14.24.120 were within the range of relevant BAS for anadromous fish. Natural Resource Consultants (NRC) scientists did an extensive review of the scientific literature. Their submittal to the record, "Rationale for a Managed Agricultural Buffer Zone in Skagit County" (*Rationale*) evaluated the new 75-foot buffer program and concluded that it was supported by the BAS on riparian buffers. Certainly some credit should be given for revegetated, managed buffers.

The County pointed out that the new WAC rule on BAS specifically acknowledges the need for each jurisdiction to review BAS "for local applicability," and encourages the County to consult with qualified scientific experts to help the

County judge the science's "applicability to the relevant critical areas." WAC 365-195-905. This, the County claimed, was exactly what it had done.

The County concluded:

"The science debate is not just in the realm of the particular details, facts or data points of any individual study any longer. It needs also to recognize the admitted limitations of the studies relied on by the petitioners. Decisions also need to be made in the realm of common sense with appropriate application to the circumstances in Skagit County and with significant deference given to the local authorities who have explored the specific local applications and limitations. Even though the new BAS rule encourages a "conservative" approach if the science is not clear, it also encourages exactly the kind of local review and choice that has occurred in this process in Skagit County. While "bigger" might always be considered "more conservative," when bigger really is not justified by the science presented and when "bigger" comes at the expense of a significant portion of the productive agricultural land in Skagit County, common sense must guide the conservative approach."

Petitioners' BAS Challenges

Tribe –

- (1) While the GMA allows the County to engage in a balancing between the goals of supporting agriculture and protecting fish and wildlife, particularly anadromous fish, the bottom line is that the final result must protect fish.
- (2) The County chose its own science rather than using the BAS in the record.
- (3) The new BAS rule tells the County to consider science first and economic factors later.
- (4) WAC 365-195-920 also states that where science is incomplete the County is to:
 - (a) use a no risk approach until the uncertainty is resolved, and
 - (b) use adaptive management.
- (5) MARP is not limited as to time frame or scale.
- (6) The addition of 25 feet to the RBZ and expulsion of cattle from the vegetative filter strip are not sufficient to meet BAS.

WDFW - All outside experts agree the NRC analysis and MARP are not BAS.

WEC – Regarding listed species, there can be no compromise possible on what anadromous fish need to live.

SAS –

- (1) To be BAS the NRC analysis must be submitted for peer review.

- (2) The BAS to be used to satisfy RCW 36.70A.172(1) is that to protect the function and values of CAs, especially anadromous fish habitat.
- (3) Instead of balanced protection of anadromous fish and agriculture, the County's objective was protection of agriculture in Skagit County to the maximum extent possible without due regard for the risk to anadromous fish.
- (4) The County inappropriately used red cedar to calculate site potential tree height (SPTH) in assessing adequate buffer requirements.
- (5) Provided extensive detail of BAS in PHS (Management Recommendations for Priority Habitats: Riparian), FEMAT (U.S. Fish and Wildlife Forest Ecosystem Management Assessment Team), the Man Tech Report, and many other sources.

The County responded:

- (1) BAS is not just "Agency, Agency, PHS" as Petitioners continue to chant. The County choices are consistent with science.
- (2) The State is not even clear or consistent on what its position on existing agriculture should be.
 - (a) While the Wild Salmonid Policy (WSP) does make recommendations for all land uses, as noted by the Tribe, it also recognizes that the issues involved in existing, ongoing agriculture should be worked out through the still-ongoing agriculture, fish and wildlife process. The WSP recognizes the "politics" of the process and specifically notes that the document is not intended to be applied to local governments, since they were not a party to the agreement.
 - (b) Department of Ecology has recently approved new shoreline management regulations, its major tool for addressing salmon habitat issues. This document specifically exempts existing, ongoing agriculture.
 - (c) The PHS manual may represent a version of the State's "position" on the topic, but the manual itself notes very strongly that it is not intended to be applied as an across-the-board regulation and may not be directly applicable to every local circumstance. The manual does not specifically address the issue of existing, ongoing agriculture, nor the balancing needed to protect commercial agriculture that is also mandated in GMA.
- (3) The County did not ignore BAS. It engaged and assessed it:
 - (a) The record clearly demonstrates that the County thoroughly engaged and assessed the scientific documents presented as the basis of BAS, and drew appropriate

conclusions and made appropriate modifications to apply to the designated existing, ongoing agricultural exemption in Skagit County.

(b) The County did not “choose its own science” as argued by the Tribe. The County evaluated the science presented and applied it, consistent with the science’s own admitted limitations, to the specific circumstances at issue in Skagit County in the context of this limited, partial exemption for existing ongoing agriculture.

(c) While it is true that the PHS manual received significant peer review, none of the Petitioners have presented the same level of peer review for their premise that all salmon buffers, regardless of circumstances, must be imposed by absolute regulation and be within the range of the buffer widths recommended by the table on p. 89 of the PHS manual.

(d) The record demonstrates that the County did not ignore the FEMAT model information, but also relied on scientific evidence presented that indicated that the FEMAT computer-generated model and assumptions may not sufficiently predict the actual data results upon which it was supposed to be based.

(e) The new BAS regulations encourage the County to do exactly what it did: Hire expertise to assist the County in evaluating and applying the BAS contained in the record.

(f) Nothing in WAC 365-195-920 denies the County the ability to use the assistance of scientific expertise in evaluating BAS and its local applicability until after that scientific assistance has, itself, been subject to a lengthy peer review process.

(4) The County did not use economics to override or ignore BAS:

“Petitioners simply extract an isolated statement or two from hundreds of pages of scientific explanation and then allege that isolated statement somehow “proves” the County inappropriately was motivated by economics and farmers and ignored the science. The Petitioners have failed to carry their burden with this challenge.

Of course the County considered its obligation to protect agricultural land of long-term commercial significance. GMA requires the County to do so. Of course the County considered the testimony from the affected farmers regarding the loss of productive agricultural land and the costs associated with that loss. [See Exhibit 67 (letters from John Mower and Steve Sakuma); Exhibit 125, (letter from Anne Schwartz of Blue Heron Farms)]. Who better to explain the site-specific effect of a buffer width than the property owner affected? Of course the County then made a local choice, based on the input from its scientific experts, that also considered and balanced the needs of agriculture. GMA permits this. HEAL v. CPSGMHB, 96 Wn. App. at 531-532. The

HEAL court specifically recognized the significant role of local choice in the context of applying and including BAS....

Just because the County recognized the inherent limitations in the BAS presented by the agencies does not mean the County ignored the BAS, nor that it somehow inappropriately applied economics and agriculture to override science in the choices contained within SCC 14.24.120. Petitioners have not met their burden on the BAS challenge.”

- (5) The County’s record contains sufficient information to explain the SPTH choice of red cedar and red alder it made in assessing adequate buffer requirements.
- (6) The County summed up its BAS argument on p. 48 of its December 14th brief: “Simply arguing “bias” because the County’s choices do not fall within the range or at the average of the recommendations in the PHS Manual is insufficient to meet Petitioners’ burden of proof. The County’s record adequately demonstrates its considerations of the best available science and explains the local choices made consistent with that science and in keeping with the additional GMA mandate to protect agricultural lands of long term commercial significance.”

ASC supported the County’s arguments and reminded us all:

“The requirement to utilize BAS should be viewed with some measure of humility and skepticism in light of the shifts, turns and even reversals of presumed wisdom that have occurred over the past century in regards to fisheries and natural resource management strategies.”

Board Conclusion – BAS Challenges

We consider the NRC *Rationale* as an analysis and report which assisted the County in understanding BAS in the record and applying it to its own circumstances. Neither the NRC scientists nor the County have claimed that the *Rationale* or the MARP framework should themselves be considered BAS and we do not see them as such.

The County previously did a BAS analysis for CA buffers throughout Skagit County. We have already determined that the County’s general buffer requirements were compliant and reflected the BAS in the record. We are now dealing with a modification to those standard buffer requirements to balance the CA and NRL goals. If the managed buffer widths in designated agricultural lands were required to be as wide as BAS for general CA buffers, there would be no reason for an

agriculture modification.

The County has done an exhaustive job of evaluating BAS in the record and determining its local applicability to existing, ongoing agriculture NRL lands in Skagit County.

Discussion on Overall MARP Compliance

In our August 9, 2000, order we stated:

“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.”

The Tribe and other Petitioners acknowledged that the County made improvements to the Ordinance since that decision. However, they continued to argue that the plan must be complete to give any chance of discerning if it will comply with the GMA requirements to protect CAs and anadromous fish using BAS. Despite development of a “framework” for revegetation, monitoring, and adaptive management plans by NRC and the County, those plans remain uncompleted and in violation of the Board’s September 16, 1998 and August 9, 2000 orders. Table X shows the general monitoring plan to be finished by July 1, 2001, and the adaptive management plan to be completed by July 1, 2002.

The Tribe summed up its concerns in its December 18, 2000, reply:

“...the Board should turn its attention to the real issues before it: is the County’s new ordinance with its 50’-25’ managed buffer, other experimental buffer programs, numerous exemptions, inadequate map, lack of developed monitoring and adaptive management programs, delayed time lines, ineffectively and unlawfully functioning SAP, and inadequate funding supported by the best available science as required by RCW 36.70A.172(1)? Does it protect and enhance critical areas as required by RCW 36.70A.060(2), .170(2)? Does it provide “special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries” as required by RCW 36.70A.172(1)? The Tribe believes that the only answer to these questions is a resounding “no.””

WDFW continued to argue against the county-wide availability of the MARP option, contending that it should be available only in those areas with low risk to local fish populations. At least until a responsive and effective adaptive management program is in place, the SAP should determine which sites would be low risk and appropriate for use of the MARP option. The use of the MARP could be expanded in the future; provided that this expansion is supported by monitoring data and effective adaptive management strategies.

The County responded that Petitioners’ demands for perfection and finality of details of the MARP and mapping puts the County in a real “catch-22” situation. The plan will never be “complete”: it will always be evolving. The County has worked hard to map out where to start. Time frames allowed must take into account such things as when successful planting can occur, which Petitioners are ignoring.

The County concluded in its November 27, 2000, reply brief:

“The County has demonstrated a willingness to be responsive to the demands of the petitioners and the Hearings Board in this matter and has dramatically expanded its agricultural buffer program. The County remains essentially the ONLY jurisdiction in the state to even try to tackle buffers for existing agriculture at this level of detail. Even the State’s AFW process has not gotten this far in its deliberations. This Board should give Skagit County credit for the significant sacrifices it has made with this program and find compliance.”

ASC supported the County at the November 29, 2000 hearing and in its December 12, 2000 brief. ASC reminded us what a large sacrifice this program will require from many Skagit County farmers and stated in part:

“Today we would urge you to not tip the scales against agriculture when you have a choice to make a decision that will maintain the viability of agriculture and provide the opportunity to

restore and enhance habitat for fish....

As Mr. William Ruckleshouse, the head of the Salmon Recovery Board, said in a presentation earlier this year in Mount Vernon, “we are not going to get salmon heaven with lawyers.” It will require willing landowners who share the goal of salmon restoration integrated with successful farming. The obligation of the Hearing Board is to find the right balance between the obligations required of using Best Available Science, the needs of anadromous fish and their critical habitat, the property rights of the affected landowners, and support commercially significant natural resource industry farming in the Skagit Valley...

We would urge you for the sake of balance, common sense, equity, flexibility and acceptability to find the County’s efforts adequate for the requirements of the Growth Management Act, and to let other venues decide the adequacy of the Skagit County ordinance for Endangered Species Act and the Clean Water Act compliance. It is important to note that the County’s ordinance includes a section which indicates that it will be reopened and revised based upon the outcome of the Agriculture, Fish and Water process, which process is trying to simultaneously incorporate issues of the Endangered Species Act and the Clean Water Act and other such federal requirements in a comprehensive fashion....

But you need to view your approval of this ordinance as both meeting the test of adequacy under the Growth Management Act and further that your approval would free resources to begin an essential task which must be done – the restoration and rehabilitation of our salmon resources. But that effort will be expensive, time consuming, frustrating, complicated, lengthy and extensive. Whatever you do here, will be followed by the recommendations of the Ag, Fish and Water process. Our obligation is to start now and to show what can be done on the ground so that we can demonstrate that there are positive things that can come from farmland landowners engaged with the process of salmon recovery and staying in business.

I would come back to a statement that my friend and colleague, Mr. Billy Frank, made during numerous sessions of the Sustainable Forestry Roundtable Negotiations of which we were both a part. And Billy’s comment always was, “is this going in the right direction?” The farming community of Skagit County believes that this ordinance is going in the right direction. Salmon recovery needs partners not enmity. Our attempts as a County and as a farming community to address the complex concerns of fish and wildlife habitat, property rights and keeping agriculture viable in this County are best addressed by your approval and finding of sufficiency for the current ordinance before you.”

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Board Conclusion – Overall MARP

Having considered all the factors above and since the MARP framework itself appeared to comply, we decided to issue the advance notice of compliance of the framework and request for the State to

release the \$1.5 million which the Legislature had appropriated to assist the County in implementing the MARP framework. This alternative was more appropriate than continuing to wait for the National Marine Fisheries Service (NMFS) and the State to develop requirements for ongoing Agriculture. Time being of the essence for fish in Skagit County, it makes no sense to continue to hold the County back until all the required “flesh” is on the framework.

In *WEC v. Whatcom County* 95-2-0071 (CO 9-12-96) we said:

“failure to provide administrators with clear and detailed criteria would undermine, perhaps fatally, the duty of the legislative body to articulate its requirements with regard to critical area protection.”

The adequacy of the riparian buffer proposal to meet the requirements of the Act is ultimately measured not by the characteristics of the buffer, but by the effect of that buffer on fish habitat. In order to answer the question of how successful this buffer proposal will be in protecting and/or enhancing fish habitat depends on how the County defines “success.” “Success” will be evaluated by comparing actual habitat conditions with as yet not adopted quantitative performance standards.

Without such criteria or “flesh” in place, we are hard pressed to determine if the Ordinance complies with RCW 36.70A.172(1), .060(2), and .170(2). NRC scientists stated, “The monitoring and adaptive management component is critical to the long-term success as well as the interim credibility of the Skagit County Managed Agricultural Buffer Plan.” We agree, and reiterate the concerns we stated in the August 9, 2000, FDO/CO quoted on p. 19 of this decision. The quality of the monitoring and adaptive management program will be the key to success or failure of the MARP.

The County claimed that it has provided an appropriate level of detail to allow the scientists on the SAP to provide the necessary refinements, based on their scientific input. This is true only if the SAP follows protocols similar to those recommended by NRC; adopts effective monitoring and adaptive management programs, and those SAP recommendations are actually adopted and implemented by the County. If the SAP does not operate properly, or the SAP recommendations are not timely implemented for political, philosophical or other reasons, the MARP will surely fail to preserve anadromous fish.

RCW 36.70A.330 gives us the authority to find the basic MARP framework in compliance and

maintain noncompliance for the planting, monitoring and adaptive management “flesh” that are not yet specified, but are to be developed shortly, through the SAP process.

We will retain jurisdiction until the SAP provides the “flesh” adequate to preserve anadromous fish, the County adopts the SAP recommendations, and those are found to be compliant.

In order to achieve compliance the SAP must timely fulfill its critical role of putting needed “flesh” on the compliant MARP framework including:

- (1) recommendations for baseline monitoring and sampling, and specific monitoring methodology,
- (2) development of MARP revegetation and maintenance buffer program,
- (3) approval of MARP planting plans and techniques, and
- (4) development of an effective adaptive management program for the MARP.

The design and development of the adaptive management program must contain the following elements:

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

We will now outline the four remedies required in the August 9, 2000, FDO/CO which were not focused on the MARP.

(7) Eliminate or tighten the farm plan exemption [Section 14.06.095(4)(i)(i)].

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County’s Statement of Actions Taken

The farm plan option has been revised to clarify that any farm plan under this option must either

meet the standards of the fish and wildlife habitat area portion of the CAO and/or new Natural Resource Conservations Service Field Office Technical Guidelines (FOTG) that have been determined to satisfy salmonid habitat requirements. Public review, comment and tracking of this option have been added to ensure compliance and adequate protection. Any farms plans in existence prior to the date of this Ordinance must either have already been reviewed and approved by NMFS Endangered Species Act Section 7 consultation or must be resubmitted for review and subject to the standards of this section.

Petitioners' Challenges

The Tribe complained that the language is not clear and may still “grandfather” in old plans. Also, someone may select a partial farm plan and escape the obligations of the Ordinance for their land not covered by the farm plan. SAS complained that there were no required time frames for the FOTG modification to comply with requirements to protect salmon.

County Response

The Tribe ignores the clear language of the Ordinance that applies to new FOTGs, and does not attempt to inappropriately “grandfather” old plans. If a partial farm plan is chosen, the farmer must select some other option for the remainder of the property or be subject to the default buffer under subsection SCC 14.24.120(4)(e). SCC 14.24.120(4) requires all Ag-NRL and RRc-NRL lands with ongoing agriculture to select an option.

Board Conclusion

The County has complied with the Act regarding our previously stated concerns about the farm plan exemption.

(8) Provide some protection for Type IV and V waters that feed into salmon-bearing waters.

County's Statement of Actions Taken

This was addressed in Section 14.24.120(3)(e).

“(e) Type IV and V Waters.

Type IV and V streams which empty into salmon-bearing waters on the AMM shall be required to have a VFS of at least 25 feet in width on each side of the stream as measured

from the ordinary high water mark (OHWM). In addition, the last 400 feet of the Type IV and V streams where they enter salmon-bearing waters shall not be mowed to facilitate native growth of shrubs or trees sufficient to accomplish 75 percent canopy cover or, at the property owner's option and expense, this area may be planted with native trees or shrubs from those listed in Appendix D to accomplish the canopy cover.”

A 25-foot vegetative filter strip is required for sediment and pollutant filtration. Small shrub growth along the 400 feet prior to where the Type 4 or 5 water enters a salmon-bearing water is required to shade the Type 4 and 5 water. The monitoring program is designed to measure water temperature and quality and to require adjustments to those Type 4 and 5 requirements, if deemed necessary to protect anadromous species. Language has been included in this section to allow continued management of noxious weeds, consistent with state law requirements, and to allow drainage function maintenance, consistent with the drainage exemption already approved.

Petitioners' Challenges

Tribe – The Ordinance exempts drainage systems and artificial water courses and sets no timeline for Type IV and V buffer compliance.

WDFW – The chosen protection is not adequate, so monitoring and responsive adaptive management will be crucial.

SAS – 25-foot buffers for Type 5 streams have previously been found invalid by this Board.

The County responded in its December 14, 2000, brief:

“The County has required some protection of the Type 4 and 5 waters that do not interfere with existing farming drainage systems which are above tidegates, floodgates and pump stations. The County has offset the impact from the exemption for areas above tidegates, floodgates, and pump stations [in SCC 14.24.120(3)(b)] on salmonid habitat by establishing evaluation areas for future salmonid habitat [SCC 14.24.120(3)(c)]. Further, contrary to the Tribe's assertions, these evaluation areas are not testing grounds. They are areas for mitigation and enhancement. The consideration of economic impacts to farmers, as described in SCC 14.24.120(3)(i), and balancing of those impacts with BAS and other factors, is not only appropriate, but mandated under GMA. RCW 36.70A.020(8), .060; HEAL v. CPSGMHB, 96 Wn. App. 522, 531-32, 979 P.2d 864 (1999).”

The County concluded that it has adequately addressed Type 4 and 5 waters while recognizing the need to protect drainage systems behind the tidegates, floodgates, and pump stations.

Board Conclusion

Given this record, we find the County in compliance. If monitoring shows that adjustments are needed, the County must take swift action to increase its protection of Type 4 and 5 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.

County's Statement of Actions Taken

This is addressed in Section 14.24.120(4)(d)(iv), by eliminating the flat 15% limit and relying, instead, on the reasonable-use exception hearing process found in the CAO, SCC 14.24.150. That reasonable use exception requires consideration of any other reasonable alternative with less impact to the critical area and permits imposition of additional restrictions to minimize critical area impacts. Part of the County's Aquatic Lands Enhancement Account is designed to target particularly important or sensitive habitat areas for public acquisition.

Board Conclusion

Petitioners have not met their burden of showing the County is in noncompliance on this issue.

(10) More narrowly craft the bank armoring exemption [SCC 14.06.095 (4)(i)(ii)]

County's Statement of Actions Taken

This is addressed in SCC 14.24.120(4)(d)(v):

“In any land areas within a MARP where permanent bank armoring is in place which is essential to protect public health, safety or existing public infrastructure, access for maintenance and repairs of existing armoring to retain the integrity of the existing armoring shall be allowed within the buffer and required plantings may be modified as necessary to protect the integrity of the armoring.”

These areas are no longer totally exempt from any requirements and the issue of whether presence

of armoring on a portion of a parcel exempted the entire parcel has been eliminated. Now modifications to what otherwise would be the riparian buffer planting and maintenance requirements are permitted as necessary to protect and maintain armoring that is “essential to protect public health, safety or existing public infrastructure.” These modifications are intended to permit access to and maintenance of the armoring, but do not eliminate the need for riparian buffers not inconsistent with these armoring requirements.

The Tribe argued that these provisions are still overly broad and no criteria have been included to determine on a site-by-site basis which areas fall under the exemption.

The County resounded that the application of this Ordinance to a particular site will be subject to public review, comment and potential appeal under SCC 14.06.110. Any site-specific concerns will be adequately addressed in that individual context.

Board Conclusion

Petitioners have not met their burden of showing the County is in noncompliance on this issue.

Inclusion of Rural Resource – NRL (RRc)

The Tribe and SAS challenged the County’s inclusion of RRc lands which are in ongoing agricultural production as eligible for buffers under SCC 14.24.120. The Tribe argued that the County could not add RRc without proper analysis of potential negative impacts of that addition.

The County responded:

- (1) The County fully stated its reasons for RRc addition in Finding 15 of Ordinance #18069.
- (2) RRc is a category of NRLs designated by Skagit County under GMA.
- (3) RRc lands are not a less favored category of NRLs. Owners of those lands which are in ongoing agricultural production should be entitled to the same buffer options under SCC 14.24.120 as Ag-NRL owners.
- (4) The Ordinance allows RRc lands to be eligible for the buffer program options under .120 (4) only if they meet the definition of “ongoing agriculture” and their owners forfeit the right to subdivide such lands under the CaRD option.
- (5) As NRLs, the RRc lands are protected by the County’s Right-to-Mange NRL Ordinance

and its disclosure protections.

(6) GMA does not require the analysis demanded by the Tribe. However, the record does contain an assessment of the potential acreage affected. The County mapping department submitted a map showing information on RRc parcels in ongoing agriculture. Assuming a 75-foot buffer, there are about 1,340 acres of land along fish-bearing streams, actually impacting less than 403 acres.

Board Conclusion

In our September 16, 1998, compliance order in Case #96-2-0025c, we stated:

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

The County’s inclusion of RRc-NRL lands, which meet the definition of “ongoing agriculture” and where owners have forfeited the right to subdivide those lands under the CaRD option, comply with the Act and our previous interpretation of the Act’s requirements.

Invalidity and Sanction Requests

The Tribe and SAS outlined a plethora of reasons to support their requests for invalidity and a recommendation of sanctions to the Governor. Underlying all of these is their frustration that, although the County was required to protect CAs in 1991 and has been given 11 tries to get it right, they are convinced that there is still no actual protection for CAs under the County’s ongoing agricultural exemption.

We share some of Petitioners’ frustration. However, the County has made major improvements to SCC 14.24.120 since the August 9, 2000 Order. The record shows that the County staff, consultants, PC and BOCC worked very hard to bring this Ordinance into compliance. There is no evidence in the record that the County, even though it may have proceeded erratically in the past, is not currently proceeding in good faith, a prerequisite for sanctions under RCW 36.70A.345.

Now, with the help of released state funding, the County is proceeding to put the needed detailed parameters into SCC 14.24.120 and take positive, on the ground, action. We want the County to proceed with no further delay on the important task of restoring and rehabilitating critical salmon habitat in agricultural lands in Skagit County. Invalidation would thwart that action. Further, the Governor is very unlikely to invoke sanctions when Skagit County is actually working to protect CAs and anadromous fish from existing ongoing agriculture while many counties have not yet tackled that problem.

Every six months we will review the County's progress in meeting its commitments to refine and effectively implement the MARP framework. If the County does not timely meet those commitments or, for some reason, reverses its course yet again, we will consider invalidation and sanctions as the Tribe and SAS have requested.

ORDER

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We find the County in compliance as to remand issues (2), (6), (7), (8), (9), and (10), the overall framework of the MARP, and application of SCC 14.24.120 to RRc-NRL. In order to achieve compliance on (1), (3), (4), and (5) the County must:

- (1) Within 90 days, adopt by ordinance procedural protocols, decision criteria and provisions which ensure the independence and professionalism of the SAP.
- (2) Complete the design and development of the buffer revegetation and maintenance program by July 1, 2001.
- (3) By July 1, 2001, complete the development of an effective monitoring strategy and adoption of specific performance standards by ordinance. Begin baseline monitoring within 90 days.
- (4) Complete the 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.

The adaptive management program must contain specifics to ensure quick and effective remedial action if monitoring shows that this untested plan is not achieving needed protection. The completed adaptive management program must be adopted by ordinance by March 1, 2002.

Any findings of noncompliance in previous sections of this FDO are incorporated 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 February, 2001.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Nan A. Henriksen
Board Member

Les Eldridge
Board Member

William H. Nielsen
Board Member