

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

| | | |
|--|---|------------------|
| SWINOMISH INDIAN TRIBAL COMMUNITY, et al., |) | |
| |) | No. 02-2-0009c |
| Petitioner, |) | |
| |) | ORDER DENYING |
| v. |) | REQUEST FOR TWO- |
| |) | TRACK COMPLIANCE |
| |) | SCHEDULE |
| SKAGIT COUNTY, |) | |
| |) | |
| Respondent |) | |
| |) | |
| and |) | |
| |) | |
| AGRICULTURE FOR SKAGIT COUNTY, et al. |) | |

Brief History

1. In the February 9, 2001 Compliance Hearing Order in Case Nos. 96-2-0025 and 00-2-0033c we found the County in compliance with the Growth Management Act (the Act, GMA) on certain portions of Ordinance No. 18069 and out of compliance with the GMA on other portions of that Ordinance.
2. The Tribe appealed the “in compliance” parts of the ruling and the County appealed the “out of compliance” portions.
3. Judge Pomeroy’s March 27, 2002 Order upheld the “out of compliance” portion of the Compliance Hearing Order. We have scheduled a Compliance Hearing for November 20, 2002, on those issues.
4. In the same Order, Judge Pomeroy reversed our ruling that the County was “in compliance” on certain issues, and remanded the matter to this Board for further proceedings. It is that ruling that necessitated a September 3, 2002 teleconference with the parties and our September 6, 2002 Order in Response to Court Remand.

5. In its September 3, 2002 memorandum in advance of the teleconference, the Tribe stated at p. 3:

“There is absolutely no reason why the County cannot immediately repeal the various exemptions and options that the Superior Court found in violation of the GMA. That would provide the salmon with some of the immediate protections they need. Then the County could take all the time it wants to develop a successor buffer options and exceptions narrower than those in the earlier program.

We suggest that the Board establish a two-track compliance schedule. In the short term the Board should require the County to adopt an interim ordinance on an emergency basis by September 30, 2002 that eliminates the deficient MARP program; eliminates the overbroad exceptions to the buffer program; applies to Type 4 and 5 waters in agricultural areas the same protective measures as are applicable to Type 4 and 5 waters outside of agricultural areas; and triggers the default option for farmers who have not selected one of the other options by the end of this month.”

6. After discussion of this issue at the teleconference, we issued the Order in Response to Remand which stated in part:

“We understand the Tribe’s frustration and desire to give the County and the agricultural community a real incentive to adopt a plan which complies with the Act. However, we will not consider making such a drastic requirement without a better understanding of the impacts that interim requirement would have on the farming community and others in Skagit County. We therefore ask the parties to provide briefing on their opinions to the impacts of temporarily doing away with the ongoing agricultural exemption from the County’s critical areas ordinance. We set the following briefing schedule:

| | |
|--------------------|--|
| September 19, 2002 | Original briefs on impacts to farming and others (from all parties who wish to participate). |
| September 30, 2002 | Responses to original briefs. |
| October 7, 2002 | Replies to responses. |

After carefully considering the above briefing, we will decide if an order regarding interim action is appropriate.”

7. We have conducted no compliance hearing under RCW 36.70A.330 on “in compliance” remanded issues. The September 6, 2002 Order in Response to Court Remand set the compliance schedule on those issues.

Swinomish Indian Tribal Community (Tribe) Position

In its September 19, 2002 brief the Tribe stated:

“Given that the Board construed this request as seeking elimination of the agricultural exemption entirely, some elaboration and clarification is needed.”

The Tribe clarified the following:

1. The request for immediate compliance does not seek total elimination of the agricultural exemption.
2. For Types 1-3 streams, farmers must make a buffer option choice and get a plan approved and implemented as soon as reasonably possibly.
3. For Type 4 and 5 streams, farmers would be subject to the 50-foot default option. However, it would not be necessary to wholly eliminate the exemption for ditch maintenance. It would be sufficient to narrow that exemption so that only essential ditch maintenance would be allowed and conducted only in a way that minimizes impacts on fish.
4. The Board should require the County to adopt an initial compliance ordinance within 30 days of the Board issuing its order.
5. The Board’s compliance order need not directly order the County to adopt a particular ordinance. But the Board is authorized to set a time within which the County must comply with the Act’s requirements and provide the County with guidance as to the type of ordinance required for compliance.

6. Only a tough interim ordinance will give the County and farmers the incentive to act to protect fish.

Further the Tribe's October 7, 2002 brief, pp. 11 and 12 stated:

“The Tribe believes that it is time for the Board to insure as much compliance as possible in as short a time frame as possible. Two years ago, this Board gave the County ‘one more opportunity to bring itself into compliance before finding invalidity and/or recommending sanctions.’ Friends, WWGMHB Nos. 96-2-0025/00-2-0033c (CHO/FDO 8-9-00) at 59. This Board saw the necessity of making ... ‘significant progress...toward actual protection of critical areas and anadromous fish in agricultural lands.’ Id. Unfortunately, rather than progress, the County has encouraged delay with the result that actual protection remains a mirage.

The Tribe respectfully requests that the Board issue an order consistent with that proposed in Attachment A, attached to this brief. This document sets forth the language that the Tribe believes would be appropriate for the Board to include in its compliance order.”

We have attached a copy of Attachment A to this Order.

Skagit County Position

The County argued:

1. We have no legal authority to order the County to adopt any particular regulations to be in effect during the remand period.
2. We found the County in compliance on these issues. We were reversed by Judge Pomeroy. In response to that remand, we issued an order on September 6, 2002 requiring the County to do the things required in Judge Pomeroy's remand. In that order, we set a compliance schedule.
3. We have no authority to order interim action during a remand period once we have set

a compliance schedule with no finding of invalidity. In effect, this would be issuing a compliance order requiring interim action before the compliance period has lapsed and before a compliance hearing is held.

4. The Tribe's insistence on an immediate interim ordinance that presumes the outcome of the needed analysis regarding best available science and impacts on existing agricultural operation should be rejected. The County is currently doing that analysis in the Environmental Impact Statement process for the new ordinance it is developing and adopting in response to Judge Pomeroy's remand.

5. New information gained through the Agriculture, Fish and Water (AFW) process brings into question some of the Tribe's presumed outcome assumptions.

6. Requiring interim action would distract the County and stakeholders' time, energy, and money from the challenging task of developing a new ordinance.

7. This Board and the Courts have both recognized the limitations on the Boards jurisdiction and, in particular, that the Board does not have the ability to order adoption of a particular ordinance.

September 30, 2002 Brief

8. While the Tribe seems to now recognize that the Board does not have authority to order a specific ordinance, it, nonetheless, tells the Board in very precise detail what the Board should tell the County to do.

9. Under the Tribe's proposal, there would be no buffer options to select other than the default buffer:

- a. The Managed Agriculture Riparian Plan (MARP) has been repealed.
- b. The Conservation Farm Management Plan buffer option is not available until the new guidelines are adopted.
- c. The Custom Buffer Option is being challenged by the Tribe in Court.

d. The moment a buffer is mandated, the Conservation Reserve Enhancement Program eligibility disappears even for those who have started the process to enroll.

10. The Clean Water Act, State Water Pollution Control Action, and the new Dairy Nutrient Management Plan are in place and providing some water quality protection.

11. The Board should reject the Tribe's request that the County be forced to adopt any interim ordinance that would have significant impacts to drainage and agriculture in the County, especially without the benefit of completing the analysis that the County has commenced in its compliance effort.

October 7, 2002 Brief

12. The Tribe's request for an interim ordinance keeps changing.

13. The County further stated:

“The existing compliance schedule for the new ordinance is the appropriate (and the only appropriate) time frame to adequately address the concerns raised. If the County is making some progress with what the Tribe is now requesting, that is exactly the kind of discussion, SEPA review, and evaluation that is ongoing with the new ordinance. This Board should reject what is now a request for a ‘two-track’ compliance schedule (instead of a specific ordinance) and allow all of us to get on with the ongoing work to complete a new ordinance by next June The Board should let the county's process scrutinize these issues with proper thoroughness. After that county process is complete, the Board can properly review the basis of the County's decisions for compliance with the Growth Management Act.”

Board Discussion

We find the County's arguments to be persuasive. The County argues that we have no authority under the Act to grant the Tribe's request. The Tribe argues that we have the authority under the Act “to enter compliance orders that specify compliance schedules.” However, the Tribe misses the fact that under the GMA, our authority to enter compliance orders is only triggered after the time period for compliance with a Board's final decision and order (FDO) entered

under RCW 36.70A.300(3)(b) has lapsed, or at an earlier time at the request of a County to lift invalidity. RCW 36.70A.330(1). This case involves neither of these situations.

The Tribe is requesting us to enter a compliance order under RCW 36.70A.330(2) before the time period for compliance (set in our September 6, 2002 Order) has lapsed and before we conduct a compliance hearing. The Tribe's analysis of RCW 36.70A.300(3) and .330(2) appears to be based upon the improper assumption that we may enter a compliance order before we have held a compliance hearing. We find no authority in the Act to order the County to adopt any particular regulations to be in effect during the "remand" period.

On September 6, 2002, we set the compliance schedule for those issues wherein Judge Pomeroy reversed our finding of compliance. The Tribe has not sought reconsideration of that schedule. In fact, the Tribe has indicated that the schedule is reasonable for development of a permanent ordinance given public process and notification requirements. Instead, the Tribe has asked us to set up a "two-track" compliance schedule. The Act gives us no authority to order the County to take additional action to change, during the remand period, the same regulations that are subject to the original compliance schedule.

Through the original GMA legislation and subsequent amendments, the Legislature has made it very clear that our authority is limited to that which the legislation clearly gives us. We have been directed by the Legislature to defer to local governments, as they are the ones to do the actual development of laws and regulations required by the GMA.

If the Tribe believes we should have such proactive authority (as it has requested here), it needs to lobby the Legislature. Perhaps we might need this additional "hammer" to truly protect critical areas and anadromous fish in this state, but only the Legislature can add those powers to our current authority.

We do have authority to modify the compliance schedule set out in our September 6, 2002 Order. However, even if we interpreted the Tribe's request as one to shorten the existing compliance schedule to a 30-day remand period, we do not believe it would be appropriate to grant such a request. The County, at p. 2 of Resolution No. R20020214, listed several reasons why the process of developing a new ordinance will take until next June:

“**WHEREAS**, GMA requires significant opportunity for public and agency input into any new regulatory or voluntary approaches, including but not limited to a minimum of 60 days agency review after a proposed ordinance is drafted and the requirement of an additional round of public review and comment any time a substantive change is made to a draft. Consideration of Best Available Science and a more thorough assessment of the field circumstances for the exemptions, as ordered by the court, involves significant staff and scientific review to satisfy the level of scrutiny required by the court order; and

WHEREAS, Diking and drainage infrastructure that has been lawfully established pursuant to statutory mandate exists throughout the agricultural area that would be affected by any existing agricultural CAO and is necessary not only for the agricultural industry in the delta, but also for flood control in urban areas of the County like Burlington. The affects of any ordinance on drainage and diking infrastructure maintenance and operations must clearly be understood as part of this ordinance adoption; and

WHEREAS, RCW 36.70A.370 obligates the County to also consider regulatory takings implications of any such regulations developed which requires an understanding of the economics and the impacts of any proposed regulation on the individual affected property owner. The court's order criticized the County for not gaining a sufficient understanding of these issues before making decisions regarding the impacts to agriculture; and

WHEREAS, RCW 43.21C required consideration of probably significant adverse environmental impacts of any proposed new regulation, including requiring an opportunity for public input on this issues; and

WHEREAS, It is the intent of the County Commissioners to develop an existing agriculture critical areas ordinance that addresses the issues and public input requirements in GMA, as instructed by recent Growth Management Hearings Board and Court orders, as expeditiously as feasible given the significant demands for adequate input and information required by GMA and those order.”

We do not believe it is appropriate to set a compliance schedule that is impossible to meet and would not allow time for public input. The changes to the ordinance that the Tribe has proposed (see Attachment A) are not simple ones. Argument and testimonials we received indicate that there is much disagreement on many issues such as viability of agricultural options offered, effect on diking and ditch maintenance, and whether interim buffers would be “no touch,” to name just a few.

As the Washington Environmental Council said on p.2 of its September 30, 2002 brief:

“Clearly, designing an ordinance that allows the drainage and cultivation of the delta while protecting habitat, water quality and salmonids will require the best technical, engineering, and legal design and drafting of all involved.”

We share the Tribe’s concern and frustration that after all this time there is still no permanent ordinance in place that has resulted in on the ground protection of critical areas and salmonids in ongoing agricultural lands. However, the legal proceedings themselves have worked against solutions. The Tribe has challenged portions of the critical areas ordinance since it feels the ordinance provides insufficient protections for fish and if it does not challenge the critical areas ordinance now, it potentially will lose its ability to challenge the ordinance in the future. The County has challenged that portion of the Board’s decision finding the County out of compliance since if it does not do this, it must follow a decision the County feels is erroneous.

Yet the upshot of all these legal challenges is that there are no buffer requirements in ongoing agricultural lands even though all parties agree that some protections are necessary. Despite the good faith of all parties in pursuing their legal remedies, those challenges have not resulted in a critical areas ordinance that meets the requirements of the GMA. If the County and Tribe had spent as much time, energy and money working together to solve these difficult issues as they have spent trying to have our previous decisions reversed in court, it is very likely there would be on-the-ground protection today. We decline to encumber the process further. We will not order the parties to tackle an interim process that would rob any additional time, energy, and/or money from the County's current compliance process.

We thank all those who took the time to write testimonials about their perception of the effects of us requiring a protective interim ordinance. There are obviously no easy answers to the question of how to balance the needs of agriculture, critical areas, fish, and fisheries. We acknowledge that the Board of County Commissioners has an extremely difficult task before it. We urge them to stay the course and work with all the stakeholders to develop a realistic and balanced ordinance that complies with the Act.

So ORDERED this 5th day of November, 2002.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Nan A. Henriksen
Board Member

Les Eldridge
Board Member

Margery Hite
Board Member

ATTACHMENT A

LANGUAGE PROPOSED FOR INCLUSION IN BOARD'S COMPLIANCE ORDER

1. On March 27, 2002, Thurston County Superior Court Judge Christine A. Pomeroy entered an order directing this Board to take certain action regarding the Skagit County Critical Area Ordinance. The Board is required to establish a compliance schedule for various tasks identified in Judge Pomeroy's order.

2. The Board also has before it the issue of establishing a compliance schedule with regard to the selection of buffer options for Type 1 through 3 waters. The County has stipulated in Cause No. 02-2-0009 that it is not in compliance (because the emergency ordinance at issue there further deferred the deadline for farmers to opt in to one of the buffer options to November 20, 2002). The parties in that cause have agreed that the compliance schedule relating to that matter will abide by the compliance schedule established in this matter. [ALTERNATIVELY, in the event that the matters have been consolidated: That matter has been consolidated with this matter and so this compliance schedule will apply to those issues, too.]

3. Except as provided in Paragraphs 4-6 below, the Board abides by the compliance schedule set forth in Order in Response to Court Remand (Sept. 6, 2002). Generally, that Order provides the County with 180 days to bring itself into compliance but provides that if the County can show at 150 days that it is meeting its Work Plan Schedule, that the Board would grant a 90 day extension.

4. Within 30 days of this Order, the County shall adopt an ordinance which includes

buffers for Type 4 and S waters that is supported by BAS, protects the functions and values of critical areas, and preserves or enhances anadromous fisheries. The County may comply with this order by applying the regulations protecting Type 4 and 5 waters outside of agricultural

areas to Type 4 and 5 waters within agricultural areas.

5. The County shall within 30 days of this Order adopt an ordinance which narrows the exceptions to the buffer program. The Tribe has proposed that if within 30 days of this Order the exemption for Type 1 through 3 streams in "evaluation areas" is eliminated and if the ditch maintenance exception is narrowed so that only essential ditch maintenance conducted in a way that minimizes impacts to fish were still exempt, then the Tribe would agree to an extension of the compliance deadline until June 2003 to allow additional time for the County to evaluate other aspects of the overbroad exemptions. The Board agrees that an adequate short-term response to this part of Judge Pomeroy's order would be to eliminate the evaluation area exception and narrow the ditch maintenance exception as described above within 30 days of this Order. Alternatively, the County may choose another set of actions to narrow the exceptions in a way that will significantly improve protection for salmonid habitat, but those actions, too, must be enacted by the County within 30 days of this Order. The Board will provide the County with the full 180 days to conduct a broader review of the exemptions.

6. Within 30 days, the County shall adopt an ordinance that requires farmers along Type 1-3 streams to choose one of the three buffer options (CREP, CFMP, OR CBP) or else be subject to the default option.

6.1 For farmers who otherwise would be exempted by SCC § 14.24. 120(3)(b) (pertaining to lands behind tidegates and dikes) or SCC § 14.24. 120(3)(c) (pertaining to evaluation areas), the ordinance shall provide that the option selection be made no later than March 1, 2003. For all other farmers i.e. those who have not been exempted from the buffer option in the past and have not made selections only because the County has repeatedly delayed the sign up deadline, the ordinance shall provide that the selection be made no later than thirty days from the date the ordinance is adopted.

6.2 The ordinance should also assure that the next two steps in the process are completed as soon as possible. One, for farmers choosing one of the options, the ordinance must establish a date by which the individual conservation or custom plan is approved. If a plan is not approved by that date, the default buffers would apply. Setting a deadline for plan approval is necessary to assure that steps are taken to translate the ordinance's protective mechanisms into real protection in the field. Based on the information before the Board, it appears that a reasonable date for plan approval is six months from the date a farmer opts in.

6.3 Once a plan is approved, the second step is to implement in the field.

The ordinance must establish a reasonably prompt deadline for this step, too. Based on the information before the Board, it appears that it would be reasonable to require implementation in the field to occur prior to the beginning of the first growing season after plan approval or once plant materials are available, whichever occurs first, but in no case later than June 2004. Because no planting is required for default buffers, they shall be implemented as soon as they are selected or become applicable. Farmers that choose the CREP option will be able to crop their lands along Type 1-3 streams until June 2004, thereby maintaining the availability of the CREP option so as to maximize participation.