

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

SWINOMISH INDIAN TRIBAL COMMUNITY, et al.,

Petitioners,

v.

SKAGIT COUNTY,

Respondent,

and

AGRICULTURE FOR SKAGIT COUNTY, et al.,

Intervenors

No. 02-2-0012c

FINAL DECISION  
AND ORDER AND  
COMPLIANCE  
HEARING ORDER

**I. INTRODUCTION**

The key issue in these now-consolidated cases is whether the County has complied with the Growth Management Act (GMA, Act) requirements to protect critical areas and anadromous fish habitat in ongoing agricultural lands. The three topics we will deal with in this decision are smaller pieces of that bigger question. The three topics are:

- A. Compliance regarding the strategic plan in previous Case Nos. 00-2-0033c and 96-2-0025.
- B. Compliance with the February 9, 2001 Order in previous Case Nos. 00-2-0033c and 96-2-0025 (affirmed by Judge Pomeroy) and the Tribe's request for sanctions.
- C. The Tribe's request for sanctions based on the County's extension of the buffer sign-up

deadline in Case Nos. 02-2-0012 and 02-2-0009c.

## **II. PROCEDURAL HISTORY**

We will provide procedural history under each of the topics listed above.

## **III. BURDEN OF PROOF**

Pursuant to RCW 36.70A.320(1), County 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), 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].” 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).

## **IV. ANALYSIS AND DISCUSSION OF ISSUES**

### **Remand Issue A - Strategic Plan Compliance in Previous Case Nos. 00-2-0033c and 96-2-0025**

#### **Procedural History of This Issue**

The County first adopted a strategic plan to protect anadromous fish in Ordinance 16851 on January 27, 1998. The County did this by adopting former Skagit County Code (SCC) 14.06.096, enacting the County’s Strategic Plan to Protect Wild Salmonids. At that time, the County also adopted former SCC 14.06.095, which provided for voluntary best management practices (BMPs) to be used on lands in ongoing agriculture.

We reviewed those regulations in the August 1998 Compliance Hearing in Case No. 96-2-0025. In the September 16, 1998 Compliance Hearing Order, we found SCC 14.06.096 out of compliance with the GMA because it relied on an as-yet-unadopted strategic plan that would be developed by a committee but was not yet developed or adopted.

On remand, the County adopted a new version of SCC 14.06.096 through Interim Ordinance 17596 on October 5, 1999. We conducted a compliance hearing on that ordinance in May of 2000 and issued a Compliance Hearing Order on August 9, 2000, again finding the County's strategic plan out of compliance with the GMA because it only added a listing of projects it was undertaking to provide immediate observable benefits to wild salmonid stocks in Skagit County.

The County stated in its September 5, 2002 Update of Action Taken that the County has struggled since then with the adoption of a new strategic plan, giving the following background:

1. The County Commissioners adopted an Interim Ordinance in March 2001 (No. 18200) imposing a new strategic plan. That proposal went to the Planning Commission for public hearings and deliberations in August and September of 2001. The Planning Commission could not agree on language for a strategic plan or even whether one should be adopted, and failed to forward a recommendation to the Board of County Commissioners (BOCC) for a permanent ordinance.
2. The County has concluded that, based on the continued objections of petitioners and continued findings of noncompliance by this Board, the County's attempts to acknowledge its existing salmon restoration and recovery efforts will not be deemed sufficient to meet strategic plan compliance requirements.
3. In light of all that has transpired regarding regulatory riparian buffers in existing agricultural lands over the past few years, on July 20, 2002, the BOCC decided to delete any reference to a strategic plan and adopted Interim Ordinance R20020263, which amended portions of SCC 14.24.120 (the "AG buffer" ordinance), and repealed SCC 14.24.130, the strategic plan section of the Code. On October 21, 2002, the BOCC adopted these changes in a permanent ordinance.

## **Position of Parties**

The County gave the following rationale for repealing the strategic plan section:

1. The GMA does not require counties to adopt a strategic plan for protection of anadromous fish. The County was spending an inordinate amount of time in litigation before this Board and at the staff level attempting to adopt a regulation satisfactory to this

Board that was not even required by GMA. Ultimately, the County decided that its limited resources could be better spent on other GMA-mandated tasks.

2. It was the County which originally chose to impose on itself the requirement of a strategic plan. It did so in 1998 at the same time it adopted its “voluntary best management practices” approach to regulating ongoing agriculture on the basis that a strategic approach to salmon restoration, consistent with then pending state efforts, was a better approach than individual local regulations on ongoing existing agriculture.

3. Subsequent decisions by this Board and the Courts indicated that mandatory, not voluntary, regulation of critical areas on ongoing agricultural lands is required under the GMA. Thus, the playing field has shifted since 1998.

The Tribe responded:

1. The County concedes that it has not complied with the Board’s orders to develop a GMA compliant strategic plan.

2. The County failed to appeal either of the Board’s orders regarding the strategic plan and it is too late to challenge them now.

3. The Board’s orders directing the County to adopt a strategic plan are firmly grounded in the goals and requirements of the Act.

While the County is obliged first and foremost to comply with the GMA, rather than the precise letter of every Board order . . . the County has failed to adopt any alternative to comply with the goals and requirements of the Act in lieu of its pledge to adopt a strategic plan. The Board’s orders are indisputably consistent with the GMA and do not infringe upon County prerogatives because they simply memorialize the County’s pledge. The County is bound by them.

Tribe’s October 4, 2002 Brief, at 8-9.

4. There has been no significant change in circumstances since the Board mandated adoption of a strategic plan. From its inception, both the County and the Board recognized that the strategic plan could entail adoption of mandatory

development regulations for agriculture as necessary to comply with RCW 36.70A.060(2) and .172(1). Contrary to the Board's order in *Friends II*, there is still no mandatory fallback approach in place to ensure the protection of critical areas.

5. The County's self-serving statement of its new priorities does not excuse noncompliance. This Board has consistently rejected finding compliance on the basis of promises to develop complying plans or regulations at some point in the future. This is not a case where the order to adopt a strategic plan has been rendered moot because the County has adopted and implemented some other regulatory controls to comply with GMA requirements.

6. The County is not proceeding in good faith to meet GMA requirements and is not acting in a timely manner to comply with valid Board orders.

The County has reneged on its own pledge, flouted two Board orders, delayed for four years, and is frustrating achievement of the Act's goals to maintain and enhance natural resource industries, conserve fish habitat, and protect and enhance water quality. RCW 36.70A.020(8)-(10).

Tribe's October 4, 2002 Brief, at 13-14.

The County's pattern of behavior and the current lack of on-the-ground salmon protection calls for the imposition of sanctions.

The County responded in part:

1. The Tribe points to no legal requirement in GMA that the County have a strategic plan. Instead, the Tribe argues, without persuasive legal authority, that the County may not choose a different course from one it chose four years ago.

2. The County's obligation under GMA is to protect critical areas; it may choose to fulfill that obligation without a strategic plan. The County recognizes that repealing reference to the strategic plan in its regulations does not achieve GMA compliance on its obligation to protect these critical areas. The key issue in these now-consolidated cases is whether the County has complied with the GMA requirements to protect critical areas and anadromous fish habitat. This strategic plan issue should be dropped as a separate issue in this case, and

the County's compliance with the GMA's requirements to protect critical areas and anadromous fish habitat folded into future hearings to be conducted after the County's scheduled adoption of a new regulation on that issue in June 2003.

3. The Tribe completely ignores the fact that the strategic plan was adopted to go hand-in-hand with the voluntary best management practices (BMPs) approach. The fact that the voluntary BMPs approach is no longer viable is precisely the type of change in circumstances that justifies why the County has chosen not to have a strategic plan in a regulation.

4. The County has accomplished many of the tasks included in the earlier strategic plan such as:

- a. Designated salmon streams on its Agricultural Master Map.
- b. Provided incentives to landowners to protect salmon through bonus payments for signing up for the Conservation Reserve Enhancement Program (CREP), a federal buffer program.
- c. Involved the Skagit Conservation District in the process to encourage farmers to use BMPs through the Conservation Farm Management Program (CFMP) buffer option in SCC 14.24.120(4)(b), which the Board found compliant with the GMA in the February 9, 2001 Compliance Hearing Order.

5. The Board did **not** order the County to adopt a strategic plan in 1998; the County **chose** to adopt a strategic plan. In the August 9, 2000 Compliance Hearing Order the Board's comments on the strategic plan were based upon the County's representation that it was using the plan at that time to achieve the GMA's requirements to give special protection to anadromous fish. The Board simply said that if the County chose to adopt a strategic plan in order to comply, it had to be one that met the GMA's requirements for protecting fish.

6. The County has spent millions of dollars on salmon restoration projects. In the February 9, 2001 Compliance Hearing Order, the Board recognized that Skagit County is doing more for fish in ongoing agricultural areas than any other county.

7. The County's strategic plan was originally adopted in 1998 to match the Governor's proposed State Wild Salmonid Policy for Agriculture. In light of the fact that the State still has not adopted such a policy, it is difficult to see how this Board could recommend, or the Governor's Office could impose sanctions on the County for not having completed a task that the State itself has been unable to complete.

In addition to its previous arguments, the Tribe replied in part:

1. The County's list of accomplishments does not excuse its failure to adopt development regulations for protection of critical areas.
2. The County's rationalizations for why it declined to adopt a strategic plan are insufficient to justify its failure to protect critical areas.
3. The County cannot blame the Governor, the Tribe, and the Board for its failure to adopt a strategic plan.
4. The Board may recommend imposition of sanctions in situations where the County has acted in bad faith or has unreasonably delayed action. After many years, there is still no strategic plan and no operational development regulations providing on-the-ground protection.

After years of giving the County one more opportunity, all the Board has to show are a few farmers implementing voluntary BMPs under the CREP program and another promise from the County that it will comply in the future. The Board has no basis on which to rest a reasonable belief that the County will adhere to its commitment of developing a new compliant ordinance by June 2003.

Tribe's November 8, 2002 Reply Brief, at 13.

## **Board Discussion and Conclusion**

We agree with the County that GMA does not require counties to adopt a strategic plan for the protection of anadromous fish. In 1998, the County chose to impose upon itself the requirement of a strategic plan, in conjunction with voluntary BMPs, for the protection of anadromous fish in ongoing agricultural lands. We ruled that the County's voluntary approach, by itself, was not sufficient to meet GMA

mandates: “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.” *Friends of Skagit County v. Skagit County, (Friends II)*, Case No. 96-2-0025, Compliance Hearing Order, September 16, 1998, at 24. We further held that while the strategic plan concept appeared sound, the County could not rely on a plan not yet developed to claim compliance with the Act’s requirement to give special protection to anadromous fish declaring:

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.**

*Friends of Skagit County v. Skagit County, (Friends II)*, Case No. 96-2-0025, Compliance Hearing Order, September 16, 1998, at 25 (emphasis in original).

We have never said the only way the County could comply with the Act was to develop an adequate strategic plan. We said if the County is going to rely on a strategic plan for compliance with the Act, it must adopt a plan which provides adequate protection for CAs and anadromous fish. Protection of critical areas and anadromous fish has always been the key, not the specific mechanism of achieving that goal.

We agree with the Tribe’s statement that although the County is obligated first and foremost, to comply with the GMA, rather than the precise letter of every Board order, it must adopt an alternative that does comply with the goals and requirements of the Act in view of its pledge to adopt a strategic plan. That alternative must include the adoption of mandatory development regulations for agriculture as necessary to comply with RCW 36.70A.060(2) and .172(1). There is still no mandatory, fallback approach in place to ensure the protection of CAs and anadromous fish. Thus, the County remains in noncompliance.

If we believed, after reviewing the record, that the County was changing its approach to compliance yet again just to avoid taking meaningful action, we would request the imposition of sanctions. However, that is not the case here. We have given the County until June 2003, to develop and adopt a new plan that ensures the protection of CAs and anadromous fish. If the County fails to meet that obligation, a request for sanctions may be appropriate. In light of the fact that the State still has not adopted a State Wild Salmonid Policy for Agriculture, it seems unlikely that the Governor’s Office would impose

sanctions on a county for not completing a task that the State itself has been unable to complete.

## **Remand Issue B – Compliance With The February 9, 2001 Compliance Hearing Order**

### **Procedural History of These Remand Issues**

In the February 9, 2001 Compliance Hearing Order in Case Nos. 00-2-0033c and 96-2-0025 we found the County in compliance with the GMA on certain portions of Ordinance 18069 and out of compliance with the GMA on other portions of that ordinance.

The Tribe appealed the “in compliance” parts of the ruling and the County appealed the “out of compliance” portions.

Judge Christine Pomeroy’s March 27, 2002 Order reversed our ruling that the County was “in compliance” on certain issues and remanded the matter to us for further proceedings. In the September 6, 2002 Order in Response to Court Remand, we set a compliance schedule for those issues.

In the same order, Judge Pomeroy upheld the “out of compliance” portion of the compliance hearing order. Those are the issues we heard argument on at the November 20, 2002 hearing and will rule on in this section of the Order.

That portion consists of:

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.
- e. Funding and work program established.

## **Position of Parties**

In the County's September 24, 2002 Update of Actions taken it contended:

1. The County complied with Issue 1. On June 29, 2001, it adopted Resolution No. 18291, establishing Procedural Protocols, Decision Criteria for Making Recommendations, and other provisions for the Science Advisory Panel (SAP).
2. Issues 2 and 4 dealt with requirements under the MARP. Since Judge Pomeroy's Order found that the MARP option did not meet best available science (BAS), the Board of County Commissioners ordained that it would not process nor accept applications for the MARP option, and that anyone who had selected the MARP option had to select another buffer option. Since the MARP option is no longer in effect, the Board's finding of noncompliance regarding the MARP is no longer applicable. Thus, the County should be found in compliance on Issues 2 and 4 and/or those noncompliance issues should be found moot.
3. Issue 3 regarding monitoring, pertained to both the baseline monitoring requirement in SCC 14.24.120(3)(f) and (g) applicable to all buffer options and to monitoring requirements for the MARP. Since the County is not accepting MARP applications, there is no need for developing any further monitoring requirements for the MARP. The County has developed a baseline monitoring plan, begun baseline monitoring and issued a Baseline Monitoring Project Annual Report. Thus, the County should be found in compliance on Issue 3.

The Washington Department of Fish and Wildlife (WDFW), in its October 15, 2002 Opening Brief,

noted that the County is only in compliance as to Issue 3, monitoring requirement, and stated at page 6:

As explained above, Skagit County has effectively completed only one of the four tasks required in the Board's February 9 order. Therefore, the County remains out of compliance with this order.

However, the effect and relevance of this noncompliance is uncertain, as the Board has also accepted the County's plan to start over with a new ordinance, and the proposed schedule for the adoption of this ordinance. Order in Response to Court Remand, p. 2. In addition, the appropriate remedy for the lack of compliance is unclear. Requiring the County to complete missing portions of an ordinance that will no longer exist (as of June 2003) does not seem appropriate. Therefore, the Board should determine that a Science Advisory Panel, buffer revegetation, and an effective adaptive management strategy are necessary components for any riparian buffer ordinance regulating agricultural lands in Skagit County, and order the County to include these components in the new ordinance.

The Tribe, in its October 15, 2002 Brief, contended in part:

1. Issues 2, 3 (the part pertaining to effective monitoring strategy), and 4 are now moot.
2. Proof of action taken to comply with Issue 1 convinced the Tribe of the County's compliance on that issue.
3. The Tribe is only contesting the baseline monitoring portion of Remand Issue 3.
4. Additionally, the Board should find invalidity and recommend that the Governor impose sanctions.
5. As to baseline monitoring, County actions taken do not comply with the Board's order or with its own requirements:
  - a. SCC 14.24.120(3)(f) requires baseline monitoring of all options. The County has not done this.
  - b. The baseline monitoring plan also fails to require any monitoring of Type 1-5 waters in the delta.
  - c. It also fails to monitor Type 4 and 5 waters throughout the County.

d. Finally, it fails to require monitoring of channel migration zones (CMZ).

In its November 5, 2002 Response Brief, the County opened its arguments with the following introduction:

What this case really is and should be about is getting development regulations in place that adequately address both the Growth Management Act (GMA) obligations to conserve agricultural lands of long-term commercial significance and GMA obligations to protect critical areas. Based on the ruling from Superior Court, developing such regulations is not a simple “tweak” to an existing program, but requires fundamental reworking of Skagit County’s (County) program. The County has mapped out and is proceeding on a course from now until next June that it believes will get there, including the necessary SEPA/environmental review and best available science (BAS) support. The Board has agreed with this schedule. The specific issues and arguments that present themselves in this round of proceedings are really a tangent, a diversion, or a ‘tentacle’ of that fundamental and central effort that should not be used to cloud or further divert this effort. The Swinomish Indian Tribal Community (Tribe) keeps insisting on dragging the County before the Board for interim proceeding after interim proceeding, each time insisting on sanctions. The Board has really, basically, already rejected these efforts by agreeing that adoption in June 2003 of new development regulations is an acceptable schedule to address this GMA conundrum. As such, the Board should reject the Tribe’s demands for sanctions and should find that the County is in compliance with the specific issues that are before the Board in these interim proceedings, should find that one or more of these issues are now moot, or should set a compliance schedule to accomplish whatever portion of these issues will still be relevant for GMA compliance in the context of the new ordinance that matches the Work Plan approved by the Board in its Order in Response to Court Remand dated September 6, 2002.

County’s Response Brief, at 1-2.

In that brief the County also answered the specific concerns raised above. Some key points included:

1. The Tribe contested only one of the four compliance issues – Remand Issue 3 regarding a baseline monitoring plan.
2. WDFW conceded that the County is in compliance on the baseline monitoring issue.
3. The County not only adopted a baseline monitoring plan as required by the Board, but

also carried out the plan.

a. The County presented its proposed baseline monitoring plan to the SAP on March 5, 2001.

b. After debating the plan for several meetings, the Watershed Scale Baseline Monitoring Plan was adopted unanimously by the SAP on July 9, 2001.

It is disingenuous for the Tribe to claim that the baseline monitoring plan does not comply with its own ordinance when it was developed and unanimously approved by the SAP, which includes as one of the most active members, Larry Wasserman, a representative of Skagit Systems Cooperative.

c. The plan provided for baseline assessment of both riparian conditions and water quality including temperature, dissolved oxygen, turbidity, PH, conductivity, fecal coliform, nutrients and flow.

d. The SAP established water quality monitoring parameters and quality assurance for monitoring accuracy.

e. Monitoring sites were generally to be selected at two locations on streams: one upstream from agricultural lands and one downstream.

f. Twenty-seven sites within nine watersheds were to be monitored.

g. Once the County had adopted the plan, it then implemented that plan over the succeeding year and published the results in the Baseline Monitoring Project Annual Report (July 2001 to June 2002).

h. None of the four points raised by the Tribe demonstrate that the County has not complied with the GMA. Although the baseline monitoring plan is geared primarily towards the MARP and test sites, the information gathered may be used for all buffer options. The monitoring is at the watershed scale and covers as broad a portion of the non-exempt acres as possible without monitoring every watercourse.

- i. The Board already found that the areas to be monitored in the Baseline Monitoring Ordinance were compliant with the GMA. The time for the Tribe to challenge the parameters of the Baseline Monitoring Ordinance has passed and the Tribe is barred from trying to challenge it now.
- j. There is nothing in SCC 14.24.120(3)(f) that requires baseline monitoring of the delta area. The Baseline Monitoring Program was specifically geared to implementing and measuring the effectiveness of the buffer options, which do not apply to the delta.
- k. The baseline monitoring plan is designed to monitor water quality in fish bearing streams (Types 1-3) to determine if there needs to be changes to the buffering requirements on Types 4-5 streams.
- l. The Tribe points to no requirement either in GMA or the Board's February 9, 2001 Compliance Hearing Order that specifically requires the County to perform baseline monitoring on channel migration zones.
- m. WDFW does not oppose a finding of compliance on this task. The County should be found in compliance.

The County also responded to WDFW's vague concerns about the other compliance tasks.

In its November 14, 2002 Reply Brief, the Tribe reiterated and expanded on many of its previous arguments. A few of the additional replies were:

1. Mr. Wasserman's recommendations on the SAP are not inconsistent with the Tribe's position in this proceeding.
2. Given that protection of estuarine habitat in the Skagit River Delta is vital for salmon, the failure of the baseline monitoring plan to monitor delta waters violates the GMA.
3. The County's baseline monitoring program violates its promise to this Board to monitor Type 4 and 5 waters.
4. The County has reneged on its commitment to monitor channel migration zones.

## **Board Discussion and Conclusion**

As to Remand Issues 2, 3 (the part pertaining to effective monitoring strategy) and 4, we agree with the County and the Tribe that these issues are now moot and will not discuss them further.

As to Issue 1, we agree with the County and the Tribe that the County is in compliance on that remand issue and will discuss it briefly. WDFW contended that since the County has discontinued use of the SAP and intends to abolish this group in the ordinance it is now developing, the County should not be found in compliance.

The record shows that the SAP was appointed, adopted protocols, and completed its baseline monitoring tasks. Since the Court has reversed our decision finding the framework of the MARP in compliance, the County is currently developing a new approach to protection of CAs and anadromous fish in ongoing agricultural lands. We commend the County for appointing an excellent, independent, and professional SAP. The County would be wise to use this group in implementing its new plan, but there is nothing in the Act or our compliance hearing order which requires them to do so. WDFW has not sustained its burden of proving the County's failure to comply in this regard. Therefore, we find the County in compliance on Remand Issue 1.

As to Remand Issue 3 (the part dealing with baseline monitoring), we also find the County in compliance. We agree with the Tribe that the baseline monitoring program would have been more thorough if it included more areas, more monitoring sites upstream and downstream of Type 4 and 5 streams and readings in the delta and channel migration zones. It is not our job, however, to determine whether a plan could be better.

The County did develop the baseline monitoring parameters and did actually do the baseline monitoring. The County did what was outlined in its ordinance. WDFW agreed that the County had done what we said had to be done to comply. The baseline readings have been taken regardless of which option the farmers will choose.

It would have been most meaningful to get baseline readings of every watercourse in the County. However, given the County's limited resources, it has done a good job of baseline monitoring. If more complete baseline monitoring is needed, the State or federal governments need to step in with personnel and dollars. The Tribe has failed to leave us with the firm and definite conviction that a mistake has been made. We find the County in compliance as to Remand Issue 3.

We will not discuss the Tribe's request for invalidity and sanctions recommendation since we have found the County in Compliance on those issues not found moot.

**Issue C – The Tribe's Request For Sanctions Based On the County's Extension of the Buffer Sign-Up Deadline In Case Nos. 02-2-0012 and 02-2-0009c**

**Procedural History on this Issue**

On July 17, 2002, we received a new petition for review (PFR) from the Swinomish Indian Tribal Community (Tribe). The Tribe submitted an amended PFR on July 26, 2002. The Tribe challenged Skagit County's Interim Ordinance R20020168 adopted May 20, 2002, extending the deadline for choosing a buffer option and implementing site-specific critical areas protection plans in ongoing agricultural lands. The petition raised seven issues.

On September 9, 2002, the Tribe filed a Dispositive Motion on Issue 3 which states:

Whether Skagit County has failed to comply with RCW 36.70A.020(8), (9), (10), -.170(2), and -.172(1) by delaying selection of implementation of riparian buffers on qualifying agricultural lands under Sections 14.24.120(3), (g) (Table X), and (4)(c)?

The parties agreed to the following Order dated October 17, 2002:

**ORDER**

After careful consideration of the parties' briefs, letters, and oral argument, we enter the following order:

1. The Tribes Dispositive Motion on Issue 3 is granted. The compliance schedule will match the schedule we set out in the September 6, 2002 Response to Court Remand Order in Cases 00-2-0033c and 96-2-0025.
2. The parties will abide by our upcoming decision on requiring the County to take interim protective action in Cases 00-2-0033c and 96-2-0025.
3. All other issues in this case are withdrawn except for Issue 7 ("Whether the Interim Ordinance R20020168 should be declared invalid for substantial interference with RCW 36.70A.020(5), (8), (9), and (10) and sanctions recommended"). Briefing on Issue 7 will proceed according

to the schedule in the August 28, 2002 Prehearing Order. Issue 7 will be argued at the November 20, 2002 Hearing.

Order on Dispositive Motion, October 17, 2002, at 2.

The parties also requested that we consolidate Case Nos. 02-2-0009, 00-2-0033c, and 96-2-0025. On October 17, 2002, we consolidated the cases under Case No. 02-2-0009c.

On November 18, 2002, the County readopted the contested extension for six more months. On November 20, 2002, the Tribe filed a petition against that Interim Ordinance 020020009. As we had earlier promised, we consolidated the new petition for review (Case No. 02-2-0012) with 02-2-0009c under Case No. 02-2-0012c.

Thus, the only issue before us from the new case is:

Whether the Interim Ordinance 020020009 should be declared invalid for substantial interference with RCW 36.70A.020(5), (8), (9), and (10) and sanctions recommended?

### **Position of Parties**

The Tribe asked us not to just look at the specifics of the extension ordinance in our deliberations on this issue. It listed many reasons why it believes invalidity and sanctions recommendation are warranted, including:

1. The record shows the County continues to consider only the desires of its agricultural constituents in its decision to extend option choice in violation of GMA's mandate to adopt development regulations to protect critical areas and fish habitat. RCW 36.70A.060(2).
2. The County has proceeded in bad faith to not meet the requirements of the Act and has unreasonably delayed taking the required actions, thus, meeting the test for a sanctions recommendation.

Sanctions are appropriate where the County has delayed protecting critical areas in agricultural areas for eleven years, where it continues to delay protection, where it remains reluctant to impose a regulatory scheme, and where it has failed to develop a strategic plan for the protection of salmon

as directed by Board Order and as proffered by the County as mitigation for its broad delta exemptions.

Tribe's October 15, 2002 Brief, at 13.

3. The County has had an egregious pattern of avoidance and delay and appears, when faced with opposition by an organized agricultural community, to simply lack the political will to adopt the necessary protections.

4. In the 2000 Order, the Board responded to the Tribe's request for sanctions by declaring: [I]f significant progress has not been made toward actual protection of critical areas and preservation of anadromous fish in agricultural lands [by November 29, 2000], we will consider declaring the most egregious provisions invalid and also consider recommending that the Governor impose sanctions on Skagit County.

August 9, 2002 Final Decision and Order/Compliance Hearing Order, at 59.

5. After providing a long list of County delays the Tribe stated:

As a result, there is **no** actual protection of fish-bearing waters (because of the buffer sign-up delay), **no** protection of evaluation areas (because of the failure to begin implementation of estuarine recovery projects), and **no** protection of non-fish-bearing waters that flow into fish-bearing waters (because of failure to plant buffers). Contrary to the language in its own ordinance and the Board's orders, there is today **no** protection of fish habitat in agricultural lands.

Tribe's October 15, 2002 Brief, at 18.

6. In both its 2000 and 2001 Compliance Orders, the Board articulated a consistent theme urging Skagit County to expeditiously implement actual on-the-ground fish habitat protection. By failing to meet its commitments and by reversing its course and refusing to cure defective development regulations, the County has met the conditions the Board specified for its reconsidering whether sanctions should be recommended. The Tribe concluded:

Issuance of a recommendation for sanctions would send a strong signal to the County that the Board will no longer wait for the County to comply with GMA, that the County can no longer assure the Board that it is taking protective measures and then not take them, that the County must protect critical areas now, and that Board orders cannot be ignored with impunity. The County's pattern of egregious behavior and the current lack of on-the-ground salmon protection calls for the imposition of sanctions.

Tribes' October 15, 2002 Brief, at 22.

The County began its response:

This Board cannot recommend sanctions for not ‘complying’ with its Orders in general when the last two times the County was before the Board regarding Ordinance No. 18069 (2/09/01 CHO in this case; 8/06/01 FDO in Mitchell v. Skagit County, No. 01-2-0004c), this Board found the County’s general approach to this issue compliant with GMA. The only reason this is back before this Board now is because of Judge Pomeroy’s Order reversing this Board’s finding of compliance. This Board may not issue a recommendation of sanctions based upon Judge Pomeroy’s Order.

The Tribe’s scattershot request for a recommendation of sanctions against the County blurs GMA’s clear requirements regarding sanctions. The GMA does not allow the Board to issue a recommendation for sanctions on an issue the Board is hearing for the first time, but only following a compliance hearing. Further, at such a compliance hearing, a recommendation of sanctions may only be issued based upon the specific actions of the local government relative to the specific compliance issues addressed at that compliance hearing. Based on these limited GMA factors, the Tribe has clearly failed to sustain its burden for a recommendation of sanctions.

....

Because the Tribe is unable to justify its request for sanctions based on the limited issues specifically before this Board in the November 20 hearing in the No. 02-2-0009 hearing on the merits and the No. 00-2-0033c compliance hearing on the 2/09/01 CHO, it attempts to base its request on allegations that go beyond those issues and are therefore legally improper in this hearing. GMA does not allow the type of broad brush approach to an award of sanctions that the Tribe is pushing on this Board. The Tribe tries to lump everything the County has done (or not done) since 1991 into its request for sanctions. GMA does not allow the Tribe to cut such a wide swath through the record in this case. A recommendation of sanctions may only occur following a compliance hearing, and be based on findings of non-compliance relevant at that hearing.

Skagit County’s Response Brief, at 17-18.

The County further pointed out:

1. For the last two years this Board has generally found the County in compliance with GMA with respect to the protection of CAs in ongoing agricultural lands. Although Judge Pomeroy overturned the Board’s approval of the MARP framework, the Board has not found the County out of compliance with GMA on that issue, and in fact, approved the County’s schedule to adopt a new ordinance in June 2003.
2. The Board has no authority to recommend an award of sanctions based upon the

County's extension of the buffer sign-up deadline. RCW 36.70A.300 does not authorize a recommendation of sanctions following a hearing on the merits. Sanctions may only be recommended following a compliance hearing conducted under RCW 36.70A.330.

3. The Board may not recommend an award of sanctions based on matters not before the Board in this hearing.

4. In light of Judge Pomeroy's Orders, the County is unable to carry out SCC 14.24.120 in the manner it had intended. It has no choice but to go back and re-craft a new ordinance to address the protection of fish habitat on lands in ongoing agriculture.

5. It is not true that the County is doing nothing for fish. The fact that the County is not doing what the Tribe wants it to is not grounds for a recommendation of sanctions.

6. The extension of the sign-up deadline was intended to preserve the status quo until a new ordinance is adopted in June 2003. The County showed the adverse impacts that the agricultural industry would suffer if mandatory buffers were imposed on a temporary basis while the new ordinance is being developed. The Tribe's constant demand to protect fish ignores GMA's concurrent directive to the County to protect agricultural lands.

7. The punitive nature of the Tribe's demands for sanctions should be rejected by the Board.

In addition to a reiteration of previous arguments, the Tribe states in its Reply Brief:

1. The Board's desire to see on-the-ground protection of critical areas as soon as possible was an overriding theme in its past decisions.

2. The fact that the Tribe filed a new petition for review should not affect its ability to seek sanctions when the focus should be on getting development regulations in place to protect critical areas.

3. The Board's consolidation of Case No. 02-2-0009 with Case Nos. 00-2-0033c and 96-2-0025 reflects the recognition that these cases are all about the same issue: whether the County's development regulations for ongoing agriculture adequately protect critical areas in a timely manner. The time is ripe for a recommendation of sanctions.

The Tribe ended its Reply with:

For eleven years, this Board has attempted to encourage compliance by patience, encouragement, cajoling, and deadlines. None of these techniques have worked. The Board is obligated to use all the techniques at its disposal in order to secure GMA compliance. Aside from the County's promise of future compliance, the Board has no reason to believe that the County is any more prepared to enact lawful development

regulations than it has ever been. We urge the Board to recommend the imposition of sanctions as a way of giving the County an incentive to keep its promise.

Tribe's November 14, 2002 Reply Brief, at 14-15.

### **Board Discussion and Conclusion**

After a careful review of the record and arguments of the parties, we do not believe that the County showed bad faith in extending the deadline for choosing a buffer option and implementing site-specific critical areas protection plans in ongoing agricultural lands, while a new ordinance is being developed.

The Tribe is right in stating that our focus for the past four years has been on urging Skagit County to expeditiously implement actual on-the-ground fish habitat protection in these ongoing agricultural lands. However, we reiterate the statement we made in the November 5, 2002 Order Denying Request for Two-Track Compliance Schedule:

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.

Two years ago we said the MARP framework looked sound and found it in compliance. County staff and the SAP then worked very hard to put the required "flesh" on the plan. The Tribe succeeded in getting the MARP framework found noncompliant in Superior Court. The County then had to start all over again to develop a plan that would comply. The resulting unfortunate delay is not totally attributable to Skagit County. If the MARP had not been taken to Court and another of the options still being challenged by the Tribe in Court, the County would now be implementing the MARP rather than

starting over again. When the County began its new process, it adopted a series of 6-month interim extensions until that work is completed in June of 2003.

It does not appear sanctionable for a local government to refuse to require farmers to sign up for and spend time, energy, and dollars implementing plans that may not be in the ordinance now being developed and adopted. Requiring farmers to take such action before the new ordinance is adopted would be sure to arouse even more confusion and resentment than already exists in the Skagit County farming community.

In the September 6, 2002 Order in Response to Court Remand, we stated:

Because of the unusual scope and complexity of this order, under the provisions of Chapter 429, Laws of 1997, Section 14(3)(b), we set the following dates for compliance:

Initially, we give the County 180 days to take action to bring itself into compliance. However, if the County can show at 150 days that it is meeting its own attached Work Plan schedule, we will grant a 90-day extension to reach compliance in June 2003. If at 150 days, the County cannot show that a Planning Commission public hearing is actually being held in February 2003, we will schedule a compliance hearing in April 2003 with no time extension. We attach the County Work Plan as Attachment A.

We will track the County's progress in adopting its new protective ordinance and reconsider this decision if the County does not meet its own work plan and a compliance hearing must be held in April 2003.

We ask all the parties to put down their weapons and work together to develop and implement a plan which meets the GMA obligations to protect critical areas and fisheries and also the GMA obligations to conserve agricultural lands of long term commercial significance and the farmers who work those lands.

## **V. ADDITIONS TO THE RECORD**

The following proposed exhibits are added to the record:

498-509

534-546

548

549

556

001-003

005

006

The following proposed exhibits are allowed only for consideration of sanctions and invalidity:

550-554

007

The following proposed exhibits are denied:

510

001

555

## **VI. FINDINGS OF FACT**

The following Findings of Fact pursuant to RCW 36.70A.270(6) are adopted:

1. Skagit County is a county planning under Chapter 36.70A.

### **Compliance Regarding Strategic Plan in Previous Case Nos. 00-2-0033c and 96-2-0025.**

2. In 1998, Skagit County chose to impose upon itself the requirement of a strategic plan in

conjunction with voluntary BMPs for the protection of anadromous fish in ongoing agricultural lands.

3. The Board did not order the County to adopt a strategic plan in 1998. The Board said in the August 9, 2000 Compliance Hearing Order that if the County chose to adopt a strategic plan in order to comply, it had to be one that met GMA's requirements for protection of CAs and anadromous fish.

4. The County has not yet adopted an alternative to the strategic plan that complies with the GMA requirements for protection of CAs and anadromous fish.

5. The record does not support the Tribes claim that the County is again changing its approach to compliance just to avoid taking meaningful, on-the-ground action.

**Compliance With the February 9, 2001 Order in Previous Case No. 00-2-0033c and 96-2-0025 (Affirmed by Judge Pomeroy) and the Tribe's Request For Sanctions**

6. Judge Christine Pomeroy upheld the "out of compliance" portion of the February 9, 2001 Compliance Hearing Order in Case Nos. 00-2-0033c and 96-2-0025.

7. Those remand issues were considered at the November 20, 2002 Compliance Hearing.

8. On June 29, 2001, the County adopted Resolution No. 18291, establishing Procedural Protocols, Decision Criteria for Making Recommendations, and other provisions for the Science Advisory Panel (SAP).

9. Issues 2, 3 (the part that deals with monitoring requirements for the MARP) and 4 have become moot since after Judge Pomeroy found the MARP option did not meet BAS, the Board of County Commissioners abandoned the MARP and began working on a different solution.

10. The County developed a baseline monitoring plan through the SAP, began baseline monitoring and issued a Baseline Monitoring Project Annual Report.

11. The Washington Department of Fish and Wildlife (WDFW), in its October 15, 2002 Opening Brief, noted that the County was in compliance on baseline monitoring.

## **Tribe's Request For Sanctions Based on the County's Extension of the Buffer Sign-Up Deadline in Case Nos. 02-2-0012 and 02-2-0009c - Now Consolidated**

12. Two years ago the Board found the MARP framework in compliance with GMA. This decision was overturned by Judge Pomeroy who found that the MARP did not include best available science.
13. In light of Judge Pomeroy's Order, the County was unable to carry out SCC 14.24.120 in the manner it had intended. It then chose to craft a new ordinance to address the protection of fish habitat on lands in ongoing agriculture.
14. The extension of the sign-up deadline was intended to preserve the status quo until a new ordinance is adopted in June 2003.
15. The resulting unfortunate delay is not totally attributable to Skagit County as the Tribe's successful appeal of our MARP framework decision in Superior Court necessitated a new approach to compliance with GMA requirements.

### **VII. CONCLUSIONS OF LAW**

1. This Board has jurisdiction over these challenges to Skagit County's provisions pertaining to the protection of critical areas and anadromous fish habitat in ongoing agricultural lands.
2. Petitioners have standing to challenge Skagit County's provisions pertaining to the protection of critical areas and anadromous fish habitat in ongoing agricultural lands.

### **Strategic Plan**

3. The GMA does not require counties to adopt strategic plans for the protection of anadromous fish.
4. Since the County has not adopted a mandatory fallback approach to ensure the protection of critical areas and anadromous fish (in lieu of a compliant strategic plan), it remains in noncompliance.
5. The Tribe's request for sanctions is not warranted at this time.

## **Compliance With the February 9, 2001 Order**

6. The record shows that the County complied with the Compliance Hearing Order Requirement 1 (Within 90 days, adopt by ordinance procedural protocols, decision criteria, and provisions which ensure the independence and professionalism of the SAP).
7. The adoption of the above requirement by resolution fulfills the intent of the remand.
8. Remand Issues 2, 3 (the part pertaining to effective monitoring of the MARP) and 4 are moot.
9. As to Remand Issue 3 (the part dealing with baseline monitoring), we find the County in compliance.

## **Tribe's Request For Sanctions Based On Adoption of Extension Ordinance**

10. After careful consideration of the record and parties' arguments, we do not believe a recommendation of sanctions is appropriate at this time.

## **VIII. ORDER**

In order to comply with the Act, the County must adopt a plan and development regulations which protect critical areas and anadromous fish habitat in ongoing agricultural lands.

Initially, we give the County until March 3, 2003, to bring itself into compliance. However, if the County can show by February 3, 2003, that it is meeting its own attached Work Plan schedule, we will grant a 90-day extension to reach compliance in June 2003. If, by February 3, 2003, the County cannot show that a Planning Commission public hearing is actually being held in February 2003, we will schedule a compliance hearing in April 2003 with no time extension. We attach the County Work Plan as Attachment A.

Remand Issues 2, 3 (the part pertaining to effective monitoring of the MARP) and 4 of the February 9, 2001 Order are now moot.

The County is in compliance as to Remand Issues 1 and 3 (the part dealing with baseline monitoring) of

the February 9, 2001 Order.

After careful consideration of the record, we do not believe a recommendation of sanctions is appropriate at this time.

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 30<sup>th</sup> day of December, 2002.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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Nan A. Henriksen  
Board Member

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Les Eldridge  
Board Member

**Hite, concurring:**

I concur with the results reached by my colleagues. I write separately to address two issues that were emphasized at oral argument: the significance of the County's failure to adopt a strategic plan; and the Tribe's ability to challenge the County's baseline monitoring plan.

**1) The significance of the failure to adopt a strategic plan.**

The Tribe challenges the County's failure to produce a strategic plan to protect anadromous fish as a breach of good faith on the part of the County. The Tribe's

argument is twofold. First, the Tribe points out that the County itself offered the idea of a strategic plan to come into compliance with the Board's directives. The past compliance orders, the Tribe argues, have been written around the County proposal; the County cannot now just discard this. If the County simply drops the idea of a strategic plan, the Tribe goes on, it is flouting the Board's orders and demonstrating a lack of good faith in proposing such a plan in the first place.

Second, the Tribe asserts that a strategic plan is essential in and of itself. A strategic plan is necessary to ensure that development regulations truly protect critical areas. An overall plan is needed to ensure that the protective measures adopted by the County are coordinated to make the best use of County resources.

The County responds that the Growth Management Act does not require a strategic plan. The County argues that the over-riding issue is how to protect both resource lands and critical areas. A strategic plan is a huge project. Even though the State has been working with the interested parties for years, it has not yet been able to develop a strategic plan for the protection of wild salmonids in agricultural areas. The County is actively engaged in the statewide effort and believes that is where the policy will be developed. The County asks the Board to drop the strategic plan requirement and accept the new critical areas ordinance as the source of the County's policies on protection of anadromous fish.

As the majority opinion states, it is not the Board's role to decide the best approach for the County to take. We have been directed by the legislature to defer to local jurisdictions in the solutions they craft to account for local circumstances:

In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to *grant deference to*

*counties and cities* in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action *in full consideration of local circumstances*.

The legislature finds that while this

chapter requires local planning to take place within a framework of state goals and requirements, *the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county or city's future rests with that community.*

RCW 36.70A.3201(in pertinent part)(emphasis added).

There are certainly strong points in favor of a strategic plan that provides direction for all County actions affecting anadromous fish. Nevertheless, it is up to the County to develop its policies under the GMA and there is no GMA requirement for a strategic plan.

Furthermore, the earlier Board orders in this case should not be read as requiring that the County adopt a strategic plan. Those orders were drafted with the understanding that the County's proposal involved development of a strategic plan. Where the County's design for meeting its obligations under the Growth Management Act included a strategic plan, the Board directed certain requirements of that strategic plan. Now that the County proposes to meet its obligations in another fashion, the Board's directives regarding the strategic plan are essentially moot.

That having been said, the Tribe's main point regarding the strategic plan still remains – has the County been guilty of bad faith in proposing and then abandoning strategies for protecting fish? After all is said and done, there are no development regulations in place in on-going agricultural lands for the protection of anadromous fish. The CREP program, the only option still existing, is a voluntary one. If, as the Tribe appears to believe, the County is trying to avoid any regulation of farming practices in agricultural lands, the County has accomplished that aim. This is troubling and it is the heart of the Tribe's complaint about compliance in this case.

On the other hand, the County points out that it had a strategy in place which this Board approved in many respects. The County took significant steps towards implementing

this strategy but did not require farmers to select a type of buffer plan while it was still under challenge in court. The County maintains that it is because the Thurston County Superior Court has disapproved the County strategy that the County has gone back to the drawing board to develop a new plan.

Because I concur with my colleagues that the County has not shown bad faith in trying to meet its GMA obligations, I do not believe sanctions are in order. Able counsel for the County has demonstrated that the County's efforts to reach a workable plan are genuine. However, the County should by no means take this as a signal that they can avoid the problem by just starting and then abandoning efforts to protect fish in agricultural lands. Striking a balance between protecting fish and preserving on-going agriculture in Skagit County has proved extremely difficult but it must be done. Were we to find the bad faith that the Tribe argues has been shown, sanctions would definitely be in order.

## **2) The Tribe's challenge to the County's baseline monitoring program.**

The County asserts that the Tribe cannot challenge the baseline Monitoring program because the program was adopted through the Scientific Advisory Panel and the Tribe's representative on the Scientific Advisory Panel voted to approve the program. The County further points out that the baseline monitoring program was adopted by the Scientific Advisory Panel ("SAP") on July 9, 2001. Over a year has passed since the County began implementing the baseline monitoring program. The County argues that the Tribe should be estopped from challenging the baseline monitoring program now.

The Tribe argues that it should not be bound by the statements or actions of Mr. Wasserman, its nominee to the SAP. He was not acting as a tribal representative in his role with the SAP, the Tribe asserts; instead, Mr. Wasserman was acting as a scientist. At the hearing on the merits, the Department of Fish and Wildlife echoed this concern and asked that this Board hold that a participating scientist acting on an advisory panel does not bind a party in subsequent legal proceedings. The concern of the Department is apparently that scientific representatives should be free to give their professional opinions, without fear of somehow binding a party to a particular future legal position.

In this decision, the Board does not decide whether the principles of estoppel apply in

this case. Whether or not the *Tribe* should be estopped from challenging the baseline monitoring program, the *Board* clearly has authority to review the County's compliance with its order to:

By July 1, 2001, complete the development of an effective monitoring strategy and adoption of specific performance standards by ordinance.  
Begin baseline monitoring in 90 days.

Paragraph 3, Compliance Hearing Order of February 9, 2001.

The Board has done its own review and finds the baseline monitoring program compliant with the goals and requirements of the Growth Management Act.

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Margery Hite  
Board Member