BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

SWINOMISH INDIAN TRIBAL COMMUNITY, et al., Petitioners, and WASHINGTON ENVIRONMENTAL COUNCIL, et al., Intervenors, v. SKAGIT COUNTY, Respondent, and AGRICULTURE FOR SKAGIT COUNTY, et al., Intervenors.	No. 02-2-0012c **COMPLIANCE ORDER - DISSENT**

I respectfully dissent. In my judgment, Skagit County's reliance on voluntary best management practices and acceptance of a level of ongoing harm to some of the functions and values of fish habitat in ongoing agricultural lands fail to comply with the GMA requirement to protect critical areas.

Skagit County has done major work toward balancing the competing needs of fish and agriculture in the Skagit Valley. In no way does my dissent reflect a lack of appreciation for the difficult task facing the county commissioners or the earnest efforts that have been undertaken by them.

That having been said, in my view, the approach taken by the County is flawed in its basic underpinnings. The strategy that the County has adopted fails in the fundamental requirement to protect fish habitat by *preventing* harm, injury or loss to fish habitat. The County has developed a process for monitoring, detecting and enforcing sanctions against those who harm existing fish habitat but, with the exception of its Watercourse Protection Measures, the County's policies and development regulations do not prevent that harm from occurring in the first place.

The County requires riparian buffers throughout the County to protect fish and wildlife habitat except in ongoing agricultural lands. The use of these riparian buffers comports with the best available science for protection of fish habitat It is reasonable for the County to provide an alternative to mandatory buffers in ongoing agriculture because of the enormous negative impact those buffers could have on the ability of farmers to continue to farm. However, the regulations established in lieu of mandatory buffers must still meet the statutory requirements for protection of designated critical areas, and include best available science in doing so. They must protect from harm all of the seven functions and values of fish habitat.

The County's strategy for protection of fish habitat in agricultural lands relies upon best management practices in lieu of its standard buffer requirement in ongoing agricultural lands. However, instead of making those best management practices mandatory, the County has made them "voluntary". Under the County's new ordinance, the County will only require an individual farmer to adopt best management practices if that farmer can be shown to have caused harm to fish habitat. This approach shifts the emphasis from prevention to punishment; from protecting the functions and values of fish habitat to waiting for proof that harm has been caused. It also accepts the current status of fish habitat relative to shade, large woody debris, and litter fall and nutrient input, without regard to what the impact of the current status

may be on fish. This approach allows for environmental harm which may take years to remedy.

This case is before the Board in a compliance posture. It has already been shown that agricultural activity harms fish habitat if for no other reason than it removes the natural vegetation along rivers and streams that would otherwise protect fish habitat. The "do no harm" standard ignores this reality. It further ignores the fact that the harm caused is no one individual's "fault" but largely results from the cumulative impact of longstanding agricultural practices. I would hold that the County could exempt ongoing agriculture from mandatory buffer requirements if meaningful performance requirements or practices were mandated in their stead. While the Watercourse Protection Measures are meaningful performance requirements, they were not established using best available science to protect each of the seven identified functions and values of fish habitat and do not accomplish necessary protection as a result. For these reasons, I would find the County in noncompliance with the GMA.

"Protect" Means "Shield From Harm" Not "Preserve The Status Quo"

The parties argue extensively over whether or not the County has to "enhance" fish habitat. I do not reach that question due to the fact that I conclude that the County does not meet the GMA standard for *protection* of critical areas. The County asks us to conclude that "protect" means "preserve the status quo". The County derives this definition from the decision of Thurston County Superior Court Judge Pomeroy's finding that "protect" does not mean "enhance". If the County does not have to enhance critical areas, the County argues, then it only has to preserve what is there now.

The County emphasizes a "preserve the status quo" interpretation because the County's strategy assumes that certain functions of fish habitat in ongoing agricultural lands have been altered and should not have to be restored. The County argues that

the past hundred years of agricultural activity in Skagit County have removed or reduced some of the functions and values of fish habitat from ongoing agricultural lands. Therefore, the County argues, it can only preserve the level that is there now and it cannot require that habitat be restored. The Tribe and the Washington Environmental Council (WEC), on the other hand, argue that ongoing agricultural practices destroy fish habitat in the form of riparian vegetation and that if the activities were discontinued, the land would "heal" itself. The Tribe and WEC maintain that agriculture should be regulated to prevent ongoing destruction of riparian buffers that provide essential functions and values of fish habitat.

The statutory mandate that is at issue here is the charge to "adopt development regulations that protect critical areas…" RCW 36.70A.060(2). The statute does not provide us with a definition of the term "protect". Since the GMA does not define the word "protect", we look to the plain and ordinary meaning of the word in the dictionary and in common usage. Legislative definitions provided in a statute are controlling but, in the absence of a statutory definition, courts may give a term its plain and ordinary meaning by reference to a standard dictionary. *Fraternal Order of Eagles v. Grand Aerie of Fraternal Order of Eagles, Washington State Ass'n,* 148 Wn.2d 224, 239, 59 P.3d 655 (2002); *see also HJS Dev., Inc. v. Pierce County,* 148 Wn.2d 451, 479, 61 P.3d 1141 (2003) (without a statutory definition, courts employ the dictionary definition); *Thurston County v. Cooper Point Ass'n.,* 148 Wn.2d 1, 12, 57 P.3d 1156 (2002) (upholding the Board's interpretation of "necessary" as consistent with the dictionary definition).

The dictionary definition of the word "protect" is not "to preserve the status quo". Instead, Webster's defines "protect" as "to shield from injury, danger, or loss." *Webster's New World Dictionary of the American Language (College Edition, 1966).* To "protect" implies actions that will improve an existing situation if the situation is

presently dangerous or bad. For example, we would never conclude, in the ordinary meaning of the word, that the police had "protected" a battered woman or an abused child by allowing a continued practice of battery and abuse. While that would preserve the status quo, it would not protect the victim. "Protect", in that context, would require intervention and change.

In addition, the term "status quo" is defined as "the existing state of affairs (at any given time) or the existing condition (of anything specified)." *Webster's New World Dictionary of the American Language (College Edition, 1966).* Preserving the status quo assumes a particular time at which the "existing state of affairs" should be preserved. However, there is nothing in the GMA setting the protection standard as of a particular date or time, let alone at the level existing in 2003. Upon questioning at oral argument, the County argued that it could set the status quo as of 2003 because of the *lack* of any date in the GMA itself. The County pointed out that if the Legislature wishes to set a date at which a level should be measured, it does so in no uncertain terms. We have only to look at the provisions for limited areas of more intensive rural development in RCW 36.70A.070(5) to see how the Legislature goes about setting a date by which development may be measured, the County argued This is true. However, the absence of such date militates *against* the idea that a protection standard should be read to mean leaving things in the state they were in at a particular time; if the existing state of critical areas were to be preserved, surely it would be necessary to define the timeframe at which the existing state of affairs should be determined.

Taken to its logical extreme, the County's argument would mean that a destructive situation could be "preserved" and meet the County's obligation to "protect". Once environmental damage is done, it may take many years to repair, if it is even possible to remedy the loss. *See Kucera v. State,* 140 Wn.2d 200, 211, 995 P.2d 63 (2000) (noting the "irreparable nature of environmental injury"). This is the reason why the

obligation falls on the County to establish development regulations to protect critical areas – to *prevent* harm that may well be irremediable from occurring.

If the Legislature had wanted the County to preserve things as they presently are, then it could easily have used the word "preserve". Since it did not, I would find that the use of the word "protect" carries with it a more active duty than just leaving things as they are.

The Regulations Must Protect All The Functions And Values Of Fish Habitat

RCW 36.70A.172(1) describes the designation and protection required for critical areas:

> In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to *protect the functions and values of critical areas*. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fish.
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> RCW 36.70A.172(1)(emphasis added)

RCW 36.70A.172 provides that development regulations must protect the functions and values of critical areas. The County asserts that vegetated buffers do not exist along the rivers and streams in ongoing agricultural lands and therefore the County does not have to mandate such buffers. However, this mistakes the focus in protection of critical areas. It is not territory that is protected (although this may be one way of providing protection) but the functions and values of the critical areas. The statute does not direct protection of the rivers and streams as geographical phenomena. Rather, it directs protection of their functions and values as fish habitat. Instead of focusing on the existence or non-existence of natural vegetation along the rivers and streams, we should look to the functions and values of fish habitat.

In analyzing the GMA obligation to protect the functions and values of critical areas, the Court of Appeals has said: "This means all functions and values." *WEAN v. Island County,* __ Wn. App. __, 76 P.3d 1215, 1224, 2003 Wn. App. LEXIS 2238 (2003). Therefore, in determining compliance with the GMA, we must assess whether the development regulations of ongoing agriculture protect all the functions and values of designated fish habitat.

Over the past six years, an extensive scientific record has been developed in this case. The record establishes that there are seven functions and values of fish habitat: temperature moderation; sediment and pollutant filtration; litter fall and nutrient input; bank stabilization and erosion control; shading; large woody debris; and instream habitat (including food sources for fish). According to the scientific evidence submitted in this case, all seven of these functions and values are protected by riparian buffers, particularly if those buffers include large trees. However, there is a paucity of evidence that voluntary best management practices will protect those functions and values.

The Development Regulations Do Not Protect All Seven Functions And Values Of Fish Habitat

The County's plan to protect most of the functions and values of fish habitat relies heavily upon the "do no harm" standard. County's Response Brief for Compliance Hearing at 33-34. The "do no harm" standard, in turn, rests on results rather than on regulating activities.

The "do no harm" standard defines "no harm or degradation" as: meeting the water quality standards required by RCW 90.48 and WAC 173-201A; meeting the requirements of any Total Maximum Daily Load ("TMDL") requirements established by the Department of Ecology; meeting all applicable requirements of the Hydraulics Code (RCW 77.55 and WAC 220-110); meeting the requirements of the County's

Watercourse Protection Measures. The County also defines "no harm or degradation" as including "no evidence of significant degradation to the existing fish habitat characteristics of the watercourse from those characteristics identified in the baseline inventory". SCC 14.24.120(3).

The state water quality standards are found in Ch. 90.48 RCW and in WAC 173-201A. These water quality standards are extensive and expressly cover "aquatic life uses", including salmon and trout spawning, rearing and migration. WAC 173-201A-200. They set levels of desirable water temperature, dissolved oxygen levels, turbidity levels, total dissolved gas percentages, pH levels and bacterial levels. WAC 173-201A-200.

The County's choice to use these water quality standards for monitoring purposes cannot be faulted. No party has suggested that these standards do not represent best available science. However, the standards, in and of themselves, do not provide guidance concerning appropriate agricultural practices. Without meaningful performance requirements, those standards provide a way of *measuring* harm but not of *preventing* it. Indeed, the state water quality standards regulations themselves emphasize the need for individualized best management practices in order to achieve compliance with the standards. WAC 173-201A-510(3)(a) and (c).[1]

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[1] In order to achieve compliance, the regulations call for the establishment of best management practices for individual actors who generate nonpoint source pollution:

> The primary means to be used for requiring compliance shall be through *best management practices required in waste discharge permits, rules, orders and directives issued by the department* for activities which generate nonpoint source pollution.

WAC 173-201A-510(3)(a)(emphasis added)

In contrast, the Watercourse Protection Measures are the kind of specific performance requirements that address agricultural practices that are harmful to fish habitat; livestock and dairy management; nutrient and farm chemical management; soil erosion and sediment control management; and operation and maintenance of public and private agricultural drainage infrastructure. SCC 14.24.120(4). These are important measures and they specifically prohibit some seriously damaging practices, such as allowing cattle unimpeded access to salmon-bearing streams. However, the scientific evidence does not show that the Watercourse Protection Measures will protect all the functions and values of fish habitat. Indeed, the County does not claim that they will. The County itself argues that the Watercourse Protection Measures primarily address only one of the functions and values of fish habitat - stream bank and erosion impacts. County's Response Brief for Compliance Hearing at 33.

The County's strategy also effectively accepts as a given that the riparian conditions in ongoing agricultural lands will not protect three of the functions and values of fish habitat. The County argues this is appropriate because the habitat is already altered due to ongoing agricultural practices. However, the County does not argue that cattle should be allowed unrestricted access to salmon-bearing waters, even if that is a long-standing agricultural practice. Instead, the County responsibly regulates those activities in its Watercourse Protection Measures. The same should be true for other activities affecting the functions and values of fish habitat.

It is also clear that even if mandatory buffers are not required for every stretch of the rivers and streams in ongoing agricultural lands, some natural vegetation is likely to be necessary in some locations. An individualized review of a farm or farms most likely would result in the need to plant trees and other vegetation along portions of rivers and streams as a best management practice. The County's own draft programmatic environmental impact statement (EIS) makes this point:

> If farm plans apply BMPs that address the specific adverse effects of farming practices at each farm location to stream and riparian habitat functions, this alternative is like to do more overall for fish, wildlife, and their habitats than either of the other action alternatives. This is especially true for sediment, nutrient and erosion control functions. If riparian buffers are included as a BMP where required to address temperature, large woody debris and/or litter fall, this may be true for these habitat functions as well. Buffers, where applied, would be designed and managed to perform the specific functions needed.

Ex. 165.1, Draft Programmatic Environmental Impact Statement, Vol. I, February 2003, at 3-41.

Instead of addressing the need for trees and other natural vegetation, the County expressly sets the protection standard for shade, large woody debris, and litter fall and nutrient input at existing levels. This leaves open the question: If the failure to meet some water quality standard (for example temperature) can be traced to the lack of vegetated buffers, could buffers even be imposed as a best management practice? Utilizing a standard of a virtual lack of any trees or natural vegetation along rivers and streams in ongoing agricultural lands appears to exempt ongoing agriculture from any consequences that arise from lack of the vegetated buffers. Even if specific, individualized proof of the negative impacts on fish habitat has been provided, the standard suggests that no immediate remedy would be required.

Thus it is difficult to credit the County's assertion that it can protect the functions and values of fish habitat only by preserving what is there now, i.e., the lack of natural riparian buffers.

Mandatory Best Management Practices Could Achieve Protections For All Functions And Values Of Fish Habitat

If the County determines to exempt ongoing agriculture from the mandatory buffer requirement, the County must find another way to achieve the protection of the

functions and values of fish habitat that buffers would otherwise provide. Best management practices, if actually required, could do just that.

A mandatory best management practices standard for all the functions and values of fish habitat would require plans or practices for agricultural activities that address the specific experience and activities of the farms being regulated**.** The County's draft programmatic environmental impact statement (EIS) is persuasive in its analysis that such mandatory best management practices could be designed to protect all the functions and values of fish habitat. Ex. 165

The County argues that if it were to impose best management practices on farmers in ongoing agricultural lands it would be assuming that the farmers were guilty of practices that harm fish. However, the scientific record is well established that the farmers who farm within 200 feet of rivers and streams *are* harming fish habitat. Even if they are doing nothing else, the farmers are affecting the vegetation that would otherwise form a riparian buffer with its attendant benefits for fish habitat. The balancing of GMA goals to conserve agricultural lands allows the County to make special provisions for ongoing agriculture but it must be admitted that agricultural practices in those areas periodically affect the natural vegetation that would otherwise exist and are therefore harmful to fish habitat.

Best management practices to achieve compliance with the state water quality standards are not voluntary or elective under the state regulations. They are "required" for activities which contribute to nonpoint source pollution. WAC 173-201A-510(3)(a) Further, the best management practices themselves set a standard by which compliance may be measured:

> Activities which contribute to nonpoint source pollution shall be conducted utilizing best management practices to prevent violation of water quality criteria. When best

> management practices are not being implemented, the department may conclude individual activities are causing pollution in violation of RCW 90.48.080.
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> WAC 173-201A-510(3)(c)(in pertinent part)

Given the removal of vegetated areas that would naturally protect the functions and values of fish habitat in ongoing agricultural lands, farming activity should be regulated so that it will protect those functions and values in other ways. However, the absence of mandatory best practices developed using the best available science to protect the functions and values of fish habitat means that the County's development regulations fail to actually prevent harm. For the most part, the County has established the "no harm or degradation" standard without performance requirements, and has adopted an enforcement process to catch offenders *after* the harm has occurred.

Had the County enacted development regulations that required the implementation of the best management practices alternative that it studied in the draft programmatic EIS, it seems likely that it would have met its obligations under the GMA. However, until the development regulations and policies exempting ongoing agriculture from the County's standard buffer requirements protect all functions and values of fish habitat, I do not believe the County is in compliance.

Dated this 8th day of December 2003.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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Margery Hite, Board Member