



Phone: 360/466-3163  
Fax: 360/466-5309

**Swinomish Indian Tribal Community**  
A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476

11404 Moorage Way  
La Conner, WA 98257

October 27, 2011

The Honorable Ken Dahlstedt  
The Honorable Sharon Dillon  
The Honorable Ron Wesen  
Board of County Commissioners  
1800 Continental Place  
Mount Vernon, WA 98273

RE: Proposed Ag Critical Areas Ordinance and Voluntary Stewardship Enrollment

Dear Commissioners, Dahlstedt, Dillon and Wesen,;

On behalf of the Swinomish Indian Tribal Community, I write to express our dismay with the proposed changes to the County's current critical areas ordinance on Agricultural Lands. As you know, the Tribe has long been dissatisfied with the way in which the County has proposed to protect critical areas on agricultural lands. The Tribe challenged the current ordinance and the supporting resolution that purported to establish monitoring and adaptive management programs. The County has always maintained, and indeed the Growth Management Board found, that these two parts of its critical areas program for ongoing agriculture, namely, the ordinance and the supporting resolution, were integrally related. *See Swinomish Indian Tribal Community v. Skagit County*, WWGMHB No. 02-2-0012, Compliance Order on Adaptive Management dated January 13, 2005 at p. 2 ("The County has adopted minimal protective regulations in ongoing agricultural lands which must be buttressed with an adaptive management program to ensure that protection is actually provided."); Skagit County Code 14.24.120(3) (Ag-CAO to be applied "in conjunction" with the monitoring, adaptive management and habitat commitments in resolution). While upholding the ordinance, the Board subsequently found the County's monitoring and adaptive management programs in violation of the Growth Management Act. *Id.* Agreeing with the Board, the state Supreme court held that the County's monitoring program violated state law. It did not reach the issue of compliance by the adaptive management program in light of the noncompliant monitoring program since one cannot know what to change without adequate monitoring. *Swinomish Indian Tribal Community, et al., v. Western Washington Growth Management Hrgs. B.d., et al.*, 161 Wn. 2d 415 (2007).

Throughout the litigation as well as many of the planning sessions of the Ruckelshaus Center (until the Tribe terminated its participation), the Tribe has taken the position first, that voluntary

The Honorable Ken Dahlstedt  
The Honorable Sharon Dillon  
The Honorable Ron Wesen  
October 27, 2011  
Page 2 of 4

measures are insufficient by themselves; and second, that existing regulations, both state and local, are either inadequate or lack robust enforcement. As you undoubtedly are aware, Washington's Independent Science Panel found, "reliance on historically ineffective voluntary measures . . . is likely to result in false expectations and is not based in science"; reliance on voluntary measures has "little chance for success" in reversing salmon decline. "Statewide Strategy to Recover Salmon: Extinction is Not an Option", Rpt. 2000-1 (May 2000) at i, 5. *See also*, Independent Multi-Disciplinary Science Team, "Recovery of Wild Salmonids in Western Oregon Lowlands", Tech. Rpt. 2002-1 (2002) at 135 ("The poor condition of lowland systems demonstrates that land use practices and management have been ineffective in maintaining healthy streams and anadromous fish populations. An example may be the use of complaint-driven processes by state natural resource agencies."). The National Marine Fisheries Service has reiterated these same findings in its recent 2011 Implementation Status Assessment Final Report. *See 2011 Implementation Status Assessment Final Report: A Qualitative Assessment of Implementation of the Puget Sound Chinook Salmon Recovery Plan*, found at <http://www.nwr.noaa.gov/Salmon-Recovery-Planning/Recovery-Domains/Puget-Sound/upload/implement-rpt.pdf> at 36 ("All but a few watersheds are relying on existing and/or planned updates to state and local land use regulatory programs to protect habitat against further decline. However, our cursory survey of federal, state and local regulatory programs found that despite the ESA listing of Puget Sound Chinook salmon in 1998, few regulatory programs have changed much since that time.") The clear message from the scientific community is that the status quo is simply not good enough. Successful protection measures must be supported by regulatory measures and enforcement. It is that message that we took to the Legislature and the Governor. As you know, that message was rejected and the Ruckleshaus bill (ESHB 1882) has now become law.

That law provides that counties are to elect between developing critical area ordinances for ongoing agriculture and opting into the Voluntary Stewardship Program (VSP). Section 4.1(a) (alternatives discussed). The County, however, has chosen to do both. As the work plan that the County is to develop as part of the VSP to protect critical areas is to incorporate "existing development regulations" House Substitute Bill at Section 6(1)(h), this would allow the County's proposed amendments to go substantively unchallenged. We do not believe that this is what the Legislature intended.

Turning to the proposed ordinance itself, I now highlight a few of the problems with the proposed ordinance. First, the Tribe is extremely troubled by the County's taking this opportunity to modify its current Agricultural critical areas ordinance (Ag-CAO), when the Tribe has no ability to mount a substantive challenge. This is not to say that we now support the current ordinance, which, of course, we do not, but for the County to weaken further an already weak ordinance is to diminish even further the likelihood that salmon will be protected in waters flowing through the County. Specifically, County comments to the draft ordinance advise that the Planning Commission has indicated that it wishes to expand the definition of ongoing agriculture. No longer would on going agriculture be limited to Agricultural-Natural Resource Lands or Rural Reserve – Natural Resource Lands. Allowing this expansion to cover

The Honorable Ken Dahlstedt  
The Honorable Sharon Dillon  
The Honorable Ron Wesen  
October 27, 2011  
Page 3 of 4

agricultural activities on additional lands in the County would remove those activities from the County's critical area ordinance for all other lands (CAO), an ordinance that the Tribe and the County collaboratively developed to protect salmon and salmon habitat. The Ag-CAO specifically prohibited expansion of Ongoing Agriculture unless it complied with standard buffers and setbacks in SCC 14.24.530. We do not believe that the mandate from the Legislature allows for this expansion.

Second, as the County will still be accepting farm plans (which are confidential under state law and thus unreviewable by the public or the Tribe, a co-manager with the State of fisheries resources) that are either prepared or approved by the Conservation District, it seems inappropriate to delete the requirement that the individual assisting the farmer in developing a farm plan, whether called a qualified expert or qualified professional, have "substantial demonstrated experience as a practicing specialist." (Section 14.04.020 (definition of best management practices (BMPs))). An individual without such experience will be ill-qualified to assist a farmer in developing robust BMPs. Removal of the language requiring that BMPs within the farm plans must be developed to meet the "no harm or degradation" standard on a site specific basis and must include pollution prevention and control measures further enfeebles the current Ag-CAO.

Third, the change from meeting water quality standards to meeting the state water pollution control laws weakens the ordinance and reduces the likelihood even further of enforcement. Further, the new language referring to baseline and natural conditions further weakens whatever protection the Ag-CAO had provided before.

Fourth, the Tribe believes that reliance upon agreements formulated under the Drainage-Fish Initiative or the Tidegate-Fish Initiative is insufficient to protect fish and fish habitat. Those agreements are between individual diking and/or drainage districts and the Washington Department of Fish and Wildlife, which has no authority to enforce water quality violations. To date, they have failed to provide adequate protection to fish life.

Fifth, while the Department may now be directed to enforce the purported mandatory watercourse protection measures, enforcement will be impossible without a robust monitoring program.

In conclusion, we are disappointed in the County's response to the new law and hope that the County will reverse direction and choose not to adopt the substantive changes to its Ag-CAO.

Sincerely,



Brian Cladoosby  
Chairman

The Honorable Ken Dahlstedt  
The Honorable Sharon Dillon  
The Honorable Ron Wesen  
October 27, 2011  
Page 4 of 4

cc: Governor Christine Gregoire  
Gary Christensen, Director  
Skagit County Planning & Development Services