



# Planning & Development Services

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## Memorandum

**To:** Planning Commission  
**From:** Betsy Stevenson, Senior Planner  
Ryan Walters, Civil Deputy Prosecuting Attorney  
**Date:** 5/19/2009  
**Re:** PDS Responses to Public Comments on Proposed Permanent WMB Code Amendments

Planning and Development Services accepted public comment on the proposed amendments regarding wetland mitigation banks (WMBs) through the end of the Planning Commission public hearing on May 5, 2009. All received comments seemed to support in general the Department's proposal to prohibit wetland mitigation banks (WMBs) on Ag-NRL.

We have attempted to summarize below the public comments we received on the proposal, and follow each comment with the Department's response. Written comments are listed first. Some comments are not particularly relevant to the code amendment proposal, but responses are provided for your information.

### 1. Letter from Allen Rozema, Skagitonians to Preserve Farmland (May 5, 2009)

*Comment 1A: SPF does not believe the placement of WMBs, public or private, on farmland is consistent with state and local policies to protect and conserve prime agricultural land.*

**Response 1A:** The proposed code amendment would prohibit private WMBs on lands zoned Ag-NRL. If the Planning Commission would like to extend the proposal to also prohibit public banks, the Planning Commission could simply strike the word "private" and the associated definition. The Department would support such a change.

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*Comment 1B: Mitigation banks do not belong on Ag-NRL zoned lands.*

**Response 1B:** The proposed code amendment would prohibit private WMBs on lands zoned Ag-NRL.

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*Comment 1C: SPF proposes other example text for a code amendment.*

**Response 1C:** If the Planning Commission would like to extend the proposal to also prohibit public banks, the Department would prefer that it simply strike the word "private" and the associated definition. Rozema's oral testimony of May 5 indicates SPF supports the Department's proposed code amendment without the public/private distinction.

## 2. Letter from Mary Heinrich, Ag Prospects (May 5, 2009)

Comment 2A: *County should use the “unclassified use process” to assess the impacts and set appropriate standards and locations for wetland mitigation banks.*

**Response 2A:** As the Department indicated in its letter to Friends of Skagit County of September 5, 2007, a wetland mitigation bank is not an “unclassified use” as defined in SCC 14.16.600. Unclassified uses are major, regional “essential public facilities” such as airports; state education facilities; state or regional transportation facilities; state and local correctional facilities; solid waste handling facilities; and in-patient facilities including substance abuse facilities, mental health facilities, group homes, and secure community transition facilities. RCW 36.70A.200. Additionally, in order to be considered an unclassified use, the use must not be otherwise handled by Skagit County Code. The Department has determined that wetland mitigation banks are rightly encompassed by the defined “habitat enhancement and/or restoration projects” use, which is a Hearing Examiner special use in Ag-NRL zones.

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Comment 2B: *Wetlands banks are not habitat restoration.*

**Response 2B:** The Department has considered mitigation banks to qualify as habitat restoration projects in the past, which is why the Department recommends excluding mitigation banks from that definition in the proposed code change.

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Comment 2C: *County should develop standards and processes for reviewing other types of mitigation projects.*

**Response 2C:** The Department agrees that adding special use criteria for other types of projects to the code may be beneficial, but given our current limited resources, we do not foresee pursuing development of such code at the present time.

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Comment 2D: *Ecology’s “Mitigation that Works” group is superseding wetland banks.*

**Response 2D:** Commenter is referring to a forum that Ecology held with the same title. The official report of the forum describes the group’s recommendations. Recommendation 3 is “develop and implement a wide variety of compensatory mitigation tools,” and Recommendation 3.2 is “improve the wetland banking system.” It appears wetland mitigation banking is not going away, and the Department believes that the proposed code change addresses the immediate community concerns about allowing mitigation banks in agricultural lands.

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Comment 2E: *Ecology “is targeting Skagit County for the bulk of the mitigation and restoration within Puget Sound.”*

**Response 2E:** The Department is not aware of any such targeting, or “region-wide mitigation” programs. Skagit County is actively seeking additional monies for habitat restoration projects, however, and would welcome additional funding for acquisition.

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Comment 2F: *Agricultural land is targeted for wetland projects because it's cheaper than other land.*

**Response 2F:** In the Department's experience, habitat projects are typically sited based on the probability of success. Much agricultural land in Skagit County was historically drained from wetter conditions. Agricultural land is primarily considered because it has the potential in some instances to be returned to its historical, natural condition and would provide the ecological lift that could make a bank successful.

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Comment 2G: *County should find ways to avoid wetland destruction and thus avoid the need for banks that fail on a larger scale than on-site wetland replacement.*

**Response 2G:** The county's existing Critical Areas Ordinance includes mitigation sequencing that allows offsite mitigation only as a last resort. SCC 14.24.080(5)(b). The first step in the sequence is avoidance of the impact to the critical area. The Department believes that it will be development within the county's cities, particularly Mount Vernon (which has more liberal critical area mitigation requirements), that would supply most of the business for wetland mitigation banks in Skagit County.

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Comment 2H: *County should create transfer of development rights [TDR] programs that allows developers to transfer the rights from parcels encumbered by wetlands to cities and urban growth areas.*

**Response 2H:** Skagit County contracted with Ms. Heinrich in 2006 to perform a study of TDR programs and their feasibility in Skagit County. At that time, Ms. Heinrich found that "Skagit lacks the existing urban/suburban element that absorbs the transferred rights." At this time, Skagit County does not have the financial resources to pursue development of a TDR program but remains interested in such a proposal.

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Comment 2I: *WMBs fail over 50% of the time. In Washington, they fail close to 80% of the time.*

**Response 2I:** The Department has seen no support for these figures. Commenter seems to be confusing the overall failure rate of wetland mitigation projects (50%) with the failure rate for banks, which are intended to avoid the pitfalls of smaller mitigation projects. Moreover, mitigation banks have not been permitted long enough in Washington State to generate such a statistic; the first applications were not accepted until 2005. Today, only 19 banks are currently permitted or proposed statewide.

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Comment 2J: *An opinion of the Attorney General's office requested by Senator Haugen found that the Department of Ecology does not have to follow the Growth Management Act.*

**Response 2J:** Senator Haugen received an official opinion from the Attorney General's Office that responds to several questions, including whether local governments must follow the GMA when siting wetland mitigation banks. The AG's answer was yes. The Attorney General's Opinion is available at the following address: <http://www.atg.wa.gov/opinion.aspx?id=18758>.

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Comment 2K: *Ecology's draft rule for WMBs provides no way for Ecology to reject a WMB application.*

**Response 2K:** RCW 90.84.040 prohibits Ecology from certifying banks that do not comply with the requirements of that chapter. WAC 173-700-230 provides additional authority to deny certification.

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### 3. Letter from Ellen Bynum, Friends of Skagit County (April 23, 2009)

This letter addresses the Board of County Commissioners' action to certify the Mitigation Banking Instrument issued by the Department of Ecology for the Nookachamps Wetland Mitigation Bank. That action was not related to the county's effort to change the land use code for future wetland mitigation banks. The letter is therefore not relevant to the matter currently before the Planning Commission.

The Department has not validated the farmland conversion estimates FOSC provided as an attachment.

### 4. Testimony of Andrea Xaver (May 5, 2009)

Comment 4A: *Skagit County needs an inventory of natural functioning wetlands.*

**Response 4A:** Developing a land use inventory has been a work program priority and identified as a 2005 GMA Update "trailing issue," but the county has no resources to develop such an inventory. To our knowledge, no county in Washington has a complete critical areas inventory.

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Comment 4B: *Proposed code amendment could be seen as setting up a monopoly for private gain.*

**Response 4B:** One wetland mitigation bank is already permitted in Skagit County. Another has applied and is vested under existing code. Other forms of mitigation would continue to be available to developers who must mitigate wetland impacts.

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Comment 4C: *Department of Ecology and Army Corps of Engineers say wetland mitigation banks have a high failure rate.*

**Response 4C:** Commenter is confusing wetland mitigation in general with wetland mitigation banking in particular.

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### 5. Testimony of Randy Good, Skagit County Cattlemen's Association (May 5, 2009)

Comment 5A: *"True science proves manmade wetland banks function at mediocrity at the best."*

**Response 5A:** See Response 4C.

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Comment 5B: *Planning Commission should follow the original intent of this moratorium and dismiss the proposed amendment.*

**Response 5B:** By state law, emergency moratoria are limited to six months. Case law indicates emergency moratoria may not be renewed indefinitely. Without a renewal or a permanent ordinance of some kind (i.e. if the Planning Commission recommends disapproval or takes no action), the current moratorium will expire on August 8, 2009.

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## 6. Testimony of Ellen Bynum, Friends of Skagit County

Comment 6A: *County should “revisit” the two already-accepted applications for wetland mitigation banks.*

**Response 6A:** Under state vesting law, complete applications are reviewed under the development regulations in place at the time of submittal. Amendments to county code adopted after that date may have no effect on the review process for vested applications.

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Comment 6B: *Draft WMB rule cannot allow you to pass recommendations that would violate GMA.*

**Response 6B:** County code must comply with all applicable state laws and regulations, as read together. See also Response 7D.

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Comment 6C: *Land could not have been zoned Ag-NRL if it’s not “prime ag soils.”*

**Response 6C:** Skagit County’s Comprehensive Plan contains designation criteria for Ag-NRL lands that are not solely based on the presence of prime agricultural soils. Some of the lands designated as agricultural soils do have a caveat that they are subject to frequent flooding or have drainage constraints, but with proper drainage and flood protection they could be considered as prime agricultural soil.

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Comment 6D: *State agencies are going to use Skagit County as the place to do mitigation for all kinds of stuff.*

**Response 6D:** Wetland mitigation banks have a limited “service area”—the area to which the bank can sell credits for projects that need mitigation. For the two banks under consideration, the service area consists of WRIA 3 with the exception of the islands, and those areas tidally-influenced, which is almost entirely in Skagit County.

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## 7. Testimony of Diane Freethy, Skagit Citizens Alliance for Rural Preservation

Comment 7A: *Proposed moratorium “is a classic case of closing the barn door long after the cows have escaped.”*

**Response 7A:** See vesting issues as discussed in Response 6A.

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Comment 7B: *Board of County Commissioners should have imposed a moratorium before now.*

**Response 7B:** See vesting issues as discussed in Response 6A.

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Comment 7C: *Board’s approval of the Nookachamps WMB has “set a precedent for permitting this type of commercial enterprise in Skagit County.”*

**Response 7C:** Approval of applications vested under prior land use code sets no legal precedent or mandate that would require approval of applications submitted after new land use code has been approved.

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Comment 7D: *County code references Ecology's draft WMB rule, which is unapproved.*

**Response 7D:** The Washington State Administrative Procedures Act (RCW 34.05) allows an agency to test a rule before it is formally adopted. The county code references the draft rule because Ecology has not yet adopted a final rule. When it does, the Department will propose to update the county code. Ecology currently expects to adopt the rule by July 31, 2009.

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Comment 7E: *There "is an air of conspiracy that needs to be addressed."*

**Response 7E:** The Department is not aware of a conspiracy, its members, nor its aims.

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