



Planning & Development Services

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Supplemental Staff Report

Offsite Compensatory Mitigation Prohibition

To: Skagit County Planning Commission
From: Jenn Rogers, Long Range Planner
Date: October 11, 2022
Re: Offsite Compensatory Mitigation Prohibition

Summary

Planning and Development Services (PDS) is providing this supplementary staff report in advance of the October 11, 2022, Planning Commission meeting to deliberate on proposed offsite compensatory mitigation prohibition. This report supplements the September 13, 2022, staff report by providing responses from PDS staff to written comments received from citizens and stakeholders during the open comment period from September 8 through September 29, 2022.

Offsite Compensatory Prohibition Deliberation

On September 13, 2022, the Planning Commission held a work session to discuss the proposed prohibition of offsite compensatory mitigation projects on properties zoned Agriculture-Natural Resource Lands (Ag-NRL). The Department received 33¹ written comments, and 19 citizens provided testimony at the public hearing on September 27, 2022.

The following individuals or groups commented in favor of the ordinance: Upper Skagit Indian Tribe, Sauk-Suiattle Indian Tribe, Skagit County Agricultural Advisory Board, Skagit County Drainage and Irrigation Districts Consortium, Skagitians to Preserve Farmland, Skagit County Farm Bureau, Friends of Skagit County, Skagit County Cattlemens' Association, Anne Schwarz and Michael Brondi, Audrey Gravely and Bill McGuinness, Cindy Kleinhuisen, David Pierson, Gary Sippel, Gene and Marilyn Derig, Jana Kite Fernandes, Jenn Smith, Karen Stafford, Kate Scott, Kim Mower, Roseann Wuebbels, Scott DeGraw, Tara McGown, Tony Wisdom, Matt Steinman, John Roozen, John Anderson, Andrea Xaver, Brian Waltner, Howard Stafford, Maddy Vanderkooy, Kim Rubenstein, David Christianson, Lorna Ellestad, Don McMoran, John Parent, Melissa Norris

¹ Some of the comments are duplicates and this includes comments received by the Board of County Commissioners on the underlying emergency ordinance.

The following individuals or groups commented in opposition to the ordinance: Skagit Land Trust, Martha Bray, Swinomish Indian Tribal Community, Leslie Parks, John Parks

This report will address negative comments in detail, identifying the central themes articulated by commenters, then providing a response.

Response to Negative Comments

1. **Comment: The proposed ordinance amendment infringes on the property rights of landowners to engage in habitat restoration projects.**

Summary:

The Skagit Land Trust, Martha Bray, Leslie Parks, and John Parks express concern that the proposed ordinance will infringe on the property rights of agricultural landowners who may wish to sell their Ag-NRL zoned land for offsite mitigation-funded habitat projects.

Staff Response:

The proposed amendment has no effect on a landowner's right to sell their land for whatever reason they wish, including for habitat restoration. The proposed amendment only prevents large scale habitat restoration projects done as offsite compensatory mitigation for environmental impacts occurring on non-Ag-NRL lands.

Based on the comments furnished to the Board of Commissioners and Planning Commission, the Department finds that the commenters' concern is not shared by a substantial majority of Ag-NRL landowners and their representatives.

2. **Comment: The problems the proposed amendment seeks to resolve can be addressed by existing regulations.**

Summary:

Skagit Land Trust and Martha Bray argue that the current Hearing Examiner Special Use Permit requirement is a sufficient tool to regulate large scale habitat projects on lands zoned Ag-NRL. The Skagit Land Trust suggests in the alternative that the proposed amendments be replaced with modifications to the Hearing Examiner Special Use Permit process, such as requiring an applicant to show that the proposed project meets the agreed goals of the Tidegate Fish Initiative or other relevant plans.

Staff Response:

In 2009, Skagit County banned mitigation banking via large scale habitat projects on farmland over concern that large amounts of mitigation capital targeting Skagit Ag-NRL lands would increasingly create inappropriate economic and political pressure to convert farmland far above and beyond regulatory requirements. The proposed amendment simply expands that prohibition to include situations in which a party pursuing offsite mitigation is not selling third party environmental credits, but rather is pursuing mitigation on its own account. It is not a major change to existing code.

The proposed amendment is based on a substantive determination by the Board of Commissioners that offsite compensatory mitigation funding associated with large habitat projects on Skagit Ag-NRL land creates conditions fundamentally inconsistent with Skagit County's Comprehensive Plan and the broader public interest.

By contrast, the existing Hearing Examiner Special Use Permit process is intended to help ensure that the physical aspects of large-scale habitat projects are planned appropriately. However, even in that context, problem habitat projects on Ag-NRL land (including Wiley Slough, Hansen Creek, and Day Creek) reflect shortcomings in planning and funding for post-project contingencies, which the proposed amendments will help address.

The existing Hearing Examiner Special Use Permit process does not adequately resolve the principal concern that the ordinance seeks to address, whether in its current form or with amendments that the Skagit Land Trust proposes.

3. Comment: Regulation of compensatory mitigation should be based on watershed, and not a zoning category.

Summary:

The Skagit Land Trust, Martha Bray, and Leslie Parks assert that any mitigation within the Skagit River watershed must be considered onsite mitigation so long as the environmental impact arises anywhere within the Skagit watershed. Commenters argue that mitigation cannot appropriately be delimited by political boundaries such as zoning, but instead must be based solely on a "watershed approach."

Staff Response:

Onsite mitigation is preferable in most instances. Commenters are correct that it is preferable to conduct offsite mitigation in the same watershed when offsite mitigation must occur. Nevertheless, even if in the same watershed, it still constitutes offsite mitigation.

The Skagit River watershed in its entirety drains over 1.7 million acres of land. Skagit County seeks to protect approximately 88,000 acres of that as prime farmland. This proposed amendment has no bearing or effect on approximately 1.62 million acres within the Skagit watershed that are *not* designated as prime farmland by Skagit County's Comprehensive Plan.

Commenters' point of view does not account for Skagit County's jurisdictional authority and its long-standing policy to protect farmland by strictly limiting conversion to those situations necessary to meet regulatory objectives determined by resource agencies with the standing and legal authority to do so.

Were commenters' point of view correct, Skagit County would be obligated to accommodate on Skagit farmland all forms of offsite mitigation arising from environmental impacts in the 1.7 million acres of the Skagit Watershed, by anyone, for any reason. For example, Skagit County would be obligated to accept offsite mitigation on Ag-NRL lands arising from mining activity in the portion of the Skagit River within British Columbia, it being within the same watershed.

Skagit County supports specific recovery actions as a public investment, the 2005 Skagit Chinook Recovery Plan in particular. At the same time, Skagit County's Comprehensive Plan inherently

places the protection of farmland at a higher level of importance than the economic interests of those who seek to conduct offsite compensatory mitigation via large projects on lands zoned Ag-NRL.

The proposed amendment is an affirmative statement by the Board of Commissioner that Skagit farmland is too important to be used as mitigation for industrial activity occurring outside farmland. In addition to keeping land available for productive agriculture, the proposed amendment protects the Ag-NRL land base as necessary to provide mitigation for agricultural activities occurring on Ag-NRL lands, which unrestricted offsite mitigation threatens to undermine. This is a long-standing and important political, cultural and economic objective for Skagit County government, as well as most owners of Ag-NRL lands.

The proposed amendment is an appropriate exercise of the County's land use authority and police power, concurrently supporting the fisheries resource as well as farming, while helping to deescalate long-standing conflict between user groups.

4. Comment: Some Ag-NRL zoned land is no longer suitable for agriculture including land owned by commenters

Summary:

Skagit Land Trust argues that certain Ag-NRL land, including land it owns, is no longer suitable for agriculture, expressing that the proposed amendment could place limits on unspecified habitat projects that Skagit Land Trust may wish to pursue in the future using offsite compensatory mitigation funding.

Staff Response:

Skagit County's Ag-NRL zoning is based on rigorous analysis of soil quality and its suitability for productive agriculture. Skagit County's Ag-NRL zoning is highly restrictive *by design*, generally preventing uses of land other than productive agriculture, notwithstanding individual landowners' opinion that farmland under their ownership could be better put to some other use. To the extent an individual Ag-NRL landowner feels a specific parcel of land is no longer viable farmland due to current conditions, the appropriate remedy is to seek a rezone to a different zoning category.

5. Comment: The Ordinance will prevent large scale habitat projects on farmland

Summary:

The Swinomish Indian Tribal Community argues that "[t]he Ordinance incorrectly suggests that fisheries restoration is a threat to agriculture", and that the County is "setting aside the science and failing to support clearly known, needed restoration actions." Leslie and John Parks argue that "Skagit [C]ounty is not on track to meet habitat goals outlined in the chinook recovery plan." The Skagit Land Trust argues that the proposed amendment will produce more conflict and litigation associated with the Tidegate Fish Initiative agreement.

Staff Response:

The Tribe's comments do not appear to be responsive to the proposed amendment and its operative language. The proposed amendment does *not* ban habitat projects on lands zoned Ag-NRL. Rather, it only prohibits offsite compensatory mitigation that involves large-scale habitat projects on Ag-NRL lands. The proposed amendment is centrally concerned with the source of funds, and not the activity itself. Skagit County fully supports the 2005 Skagit Chinook Recovery Plan and hopes to see its target goals completed as soon as possible using state and federal funds.

The Tidegate Fish Initiative (TFI) agreement between diking/drainage districts and federal/state resource agencies, referenced by commenters, is intended to accomplish specific estuary restoration projects necessary to achieve Skagit Chinook Recovery Plan goals while ensuring that districts have timely access to tidegate maintenance permits. Ensuring that estuary objectives are met while safeguarding critical infrastructure is a significant public interest. As such, the TFI agreement constitutes a strong argument in favor of the proposed amendment, not an argument against it.

Skagit County is not a party to the TFI agreement, owns no farmland at issue, and has no direct obligation to restore habitat on the Skagit Delta. The Board of Commissioners has expressed that Skagit County's principal concern and interest in this issue arises from the desire to end 30-plus years of pernicious conflict over fish and farms, which appears closely connected to offsite mitigation spending and the financial dependency it has created. The proposed amendment will help resolve these concerns.

6. Comment: Large scale habitat projects on Skagit farmland should be allowed as fisheries mitigation for Seattle City Light's dams

Summary:

The Swinomish Indian Tribal Community and the Skagit Land Trust both argue that large scale estuary restoration on the Skagit Delta is appropriate mitigation for Seattle City Light's Skagit Hydroelectric Project. The Swinomish Indian Tribal Community argues that this is warranted because, in the Tribe's opinion, agreed-upon estuary restoration pursuant to the TFI agreement is not happening fast enough.

Staff Response:

This issue is in part addressed by the response to item 6 above. Establishing appropriate mitigation for Seattle City Light's Skagit Hydroelectric Project is beyond both the scope of the proposed amendment as well as the County's authority; such authority lies with the National Marine Fisheries Service, and it has yet to make any determination.

Recommendation

Staff supports the proposed amendments, and recommends they be forwarded to the Board of Commissioners with a recommendation they be approved as presented.

Attached:

- September 27, 2022 Planning Commission Public Hearing Transcript
- Submitted Comments on Proposed Offsite Compensatory Mitigation Prohibition