

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 SWINOMISH INDIAN TRIBAL COMMUNITY, et
4 al.,

5 Petitioners,

6 and

Case No. 02-2-0012c

7 WASHINGTON ENVIRONMENTAL COUNCIL, et
8 al.,

**ORDER GRANTING A
STAY**

9
10 Intervenors,

11 v.

12 SKAGIT COUNTY,

13
14 Respondent,

15 and

16 AGRICULTURE FOR SKAGIT COUNTY, et al.,

17
18 Intervenors.
19
20

21
22 **I. SYNOPSIS OF THE DECISION**

23 This matter comes to the Board on Skagit County's Third Motion for Continuance of the
24 Compliance Schedule filed with the Board on May 8, 2007. On May 14, 2007 the Board
25 received objections to extending the compliance period from the Swinomish Tribe ¹. The
26 Washington Department of Fish and Wildlife filed a response stating it had no position on an
27 extension.
28
29
30
31
32

¹ Swinomish Tribe's Response to the County's Third Motion for an Extension of the Compliance Schedule

1 Because of the disagreement between the Tribe and the County on the need for an
2 extension, and because of other circumstances, the Board decided to hold a hearing on the
3 County's motion for a continuance of the compliance schedule. The other circumstances
4 include the lack of a decision by the Washington Supreme Court on the appeal of the
5 December 8, 2003 Compliance Order and the January 13, 2005 Compliance Order and the
6 passage of SSB 5248, legislation that established a time out on the adoption of new
7 measures to protect critical areas as they specifically apply to agricultural activities². In light
8 of the circumstances listed above, the Board also asked the County and the Tribe to brief
9 the following issue:
10

11 Does the Board have authority to issue a stay of the Board's January 18, 2005
12 Compliance Order and its Compliance Order of December 8, 2003 pursuant to RCW
13 34.05.550(1); and are these appropriate circumstances for issuing a stay of these
14 orders?

15 Having reviewed the County's Motion, the Tribe's response, briefs submitted in response to
16 the Board's question, argument and answers to Board questions at the hearing on the
17 extension request, post hearing submittals and SSB 5248, the Board grants a stay of its
18 January 13, 2005 Compliance Order until July 1, 2010.
19

20 II. PROCEDURAL HISTORY

21 This case has a long and complicated history. Case No, 02-2-0012c is the final result of the
22 consolidation of Case Nos. 96-2-0025, 01-2-0004c, 00-2-0033c, 02-2-0009, and 02-2-
23 0012c. The overriding issue in these now consolidated cases is whether the County has
24 complied with the Growth Management Act's (GMA) requirements to protect critical areas
25 and anadromous fish habitat in ongoing agricultural lands.
26
27

28 On December 8, 2003, the Board found that the County's approach failed to protect fish and
29 wildlife habitat areas because of lack of clarity about whether the limited watercourse
30

31
32 ² See Section 2, (3) of SSB 5248.

1 protection measures it imposed would actually be enforced and because of the lack of an
2 effective monitoring and adaptive management program to ensure that the protective
3 measures were actually working.
4

5 On January 13, 2005, the Board found Skagit County's approach for protecting fish and
6 wildlife habitat areas in ongoing agricultural lands adopted to achieve compliance with the
7 Board's December 8, 2003 Compliance Order continued to be noncompliant because the
8 County's program failed to provide the needed adaptive management to ensure that its
9 protection measures are, in fact, protecting Fish and Wildlife Habitat Conservation Areas
10 (FWHCAs). The Board determined that the County's adaptive management program lacks
11 benchmarks and triggers for corrective action and the ability to detect the cause of any
12 deterioration in the existing functions and values of FWHCAs in a timely way so that the
13 current protection measures could be adjusted to provide adequate protection of fish
14 habitat. The Board found that the County's approach to protecting the existing functions
15 and values of FWHCAs in designated ongoing agricultural lands fails to buttress its less
16 than precautionary protection measures with an adaptive management program that will
17 ensure that swift and effective corrective measures are taken if the less than precautionary
18 measures fail to protect existing functions and values of fish habitat.
19
20
21

22 The County appealed this 2005 decision to the Thurston County Superior Court. Later, the
23 Board granted a certificate of appealability of the compliance order to the Court of Appeals.
24 The Court of Appeals, Division II, accepted review of the compliance decision on adaptive
25 management and consolidated it with the Tribe's appeal of the Board's December 8, 2003
26 Compliance Order which had already been accepted for review by the Court of Appeals.
27

28 On July 7, 2005, the Washington State Court of Appeals, Division II, stayed the January 13,
29 2005 Compliance Order for 30 days upon the joint request of the parties. On July 27, 2005,
30 the Court of Appeals again stayed the Order upon a joint request of the parties. On October
31 28, 2005, the Court denied the request of Skagit County to stay the Compliance Order,
32

1 finding that the criteria in RCW 34.05.550(3) had not been met. On November 3, 2005, the
2 Washington State Supreme Court granted the motion of the Tribe and the County to transfer
3 the consolidated appeal to the Supreme Court. The Supreme Court heard the case in
4 February 2006 and has to date not issued a decision.

5
6 On December 22, 2005, Skagit County submitted a request for a continuance, after the
7 November 14, 2006 compliance deadline had passed, and to which the Tribe objected. The
8 Board issued an order on January 9, 2006 denying the County's request to extend the
9 compliance deadline. After a compliance hearing on March 9, 2006, the Board issued its
10 May 6, 2006 Order Finding Continuing Noncompliance and established a new compliance
11 deadline of October 9, 2006.
12

13
14 Since then the County has submitted four timely requests for extensions of the compliance
15 period. The Board granted extensions of the compliance period on September 29, 2006,
16 January 3, 2007, and February 27, 2007, to which the Tribe had no objection.
17

18 The County submitted its fourth request to continue the compliance period on May 8, 2007.³
19 Previous to this, by April 17, 2007, both houses of the Legislature passed SSB 5248,
20 legislation that established a time out on the adoption of new measures to protect critical
21 areas as they specifically apply to agricultural activities⁴. The Governor signed SSB 5248
22 on May 8, 2007, the day before compliance was due. On May 14, 2007 the Board received
23 objections to extending the compliance period from the Tribe⁵. The Washington
24 Department of Fish and Wildlife filed a response stating it had no position on the County's
25 request for a compliance period extension.
26
27

28
29 ³ Skagit County's Third Motion for Continuance of the Compliance Period. (The Board and Skagit County
30 apparently count the number of requests for compliance period extensions differently. The Board counts 4
31 extension requests since it issued its May 2006 Order Finding Continuing Noncompliance.)

32 ⁴ See Section 2, (3) of SSB 5248.

⁵ Swinomish Tribe's Response to the County's Third Motion for an Extension of the Compliance Schedule.
Skagit County also submitted Skagit's County's Reply to Tribe's Response to County's Third Motion to
Continue the Compliance Schedule on May 21, 2007. This document is not admitted as part of the record.

1 Because of the Tribe's objection to the extension and due to the amendment to the GMA
2 effected by SSB 5248, the Board decided to hold a hearing on the County's compliance
3 period extension request and asked the County and the Tribe to brief the following question:

4 Does the Board have authority to issue a stay of the Board's January 18, 2005
5 Compliance Order and its Compliance Order of December 8, 2003 pursuant to
6 RCW 34.05.550(1); and are these appropriate circumstances for issuing a stay
7 of these orders?

8 Skagit County and the Tribe both submitted briefs on May 31, 2007.⁶ The Board held a
9 hearing in Mount Vernon on June 11, 2007. All three Board Members attended; Holly
10 Gadbow presided. At the hearing the Board asked the parties to submit information on the
11 legislative history of SSB 5248 and to list any court cases in which the applicability of the
12 criteria in RCW 34.05.550(3) to stays granted by administrative agencies under RCW
13 34.05.550(1) was analyzed.. Also, Skagit County's request to add to the Record an April
14 27, 2007 letter to Skagit County Planning and Development Services from the Skagit River
15 Cooperative, regarding proposed revisions to the Salmon Heritage Program, Amendments
16 to the Water Quality Monitoring Program was granted and given Exhibit letter E.

17
18
19 On June 22, 2007, the Tribe submitted Swinomish Tribe's Supplemental Response RE:
20 Stay of the Compliance Order. Skagit County's Supplemental Briefing on SSB 5248
21 Legislative History and Agency Use of RCW 34.05.550(3) Criteria was filed on June 25,
22 2007. On June 28, 2007, the Board received the Tribe's Motion for Leave to File Responses
23 to the County's Supplemental briefing on Legislative History and Response. On July 2,
24 2007, the Board received a letter with several attachments from Jay Derr, counsel for Skagit
25 County, objecting to the Tribe's filing dated June 28, 2007. While neither the County nor
26 the Tribe followed the Board's request to submit only information, not briefing, both the
27 Tribe's motion and the County's objections are admitted to the Record.
28
29
30
31

32 ⁶ Skagit County's Brief Regarding Stay of Compliance Orders; Swinomish Tribe's Response to Board's
Request for Briefing on County's Extension Request.

1 III. ISSUES TO BE DISCUSSED

- 2 A. Does SSB 5248 preclude the County from taking action to achieve compliance as
3 directed in the January 13, 2005 Compliance Order?
- 4 B. If the County cannot take action to achieve compliance, does SSB 5248 provide an
5 appropriate basis for a compliance extension?
- 6 C. If a compliance extension is granted, does the Board have authority to find the
7 County "temporarily" in compliance until the expiration of the compliance period
8 because the County cannot take action in the meantime?
- 9 D. If the County cannot take action to achieve compliance pursuant to the outstanding
10 orders of this Board, does the Board have authority to issue a stay pursuant to RCW
11 34.05.550(1); and are these appropriate circumstances for issuing a stay of these
12 orders?
- 13

14 IV. DISCUSSION OF THE ISSUES

15
16 Positions of the Parties

17 The County asserts that SSB 5248 precludes it from taking action to achieve compliance in
18 this case. SSB 5248, the County maintains, specifically prohibits the changes that this
19 Board has ordered:

20 For the period beginning May 1, 2007, and concluding July 1, 2010, counties and
21 cities may not amend or adopt critical area ordinances under RCW 36.70A.060(2) as
22 they specifically apply to agricultural activities.
23 SSB 5248 Sec. 2 (1).

24 The County's initial response to the passage of SSB 5248 was to request this Board to
25 grant a 30 day extension of the compliance period. This thirty day period has passed.
26 Therefore the County has amended its motion to seek either a compliance extension or a
27 stay for the period of the delay imposed by the Legislature in SSB 5248.

28 In answer to the Board's question about its authority to issue a stay, the County argues that
29 RCW 34.05.550(1) provides that agencies can issue stays so long as the stay does not
30 interfere with court proceedings.
31
32

1 In the alternative, the County argues that the Board has the authority to extend the period
2 for compliance until the deadline established in SSB 5248. The County argues that the
3 Board has already found that this case is of unusual scope and complexity so that an
4 extension of the compliance period is proper under RCW 36.70A.300(3)(b). The County
5 argues that SSB 5248 precludes the County from changing its critical areas regulations
6 pertaining to agricultural activities, so it cannot act to achieve compliance in this case no
7 matter what the Board orders. As a result, the County urges the Board to extend the
8 compliance period to the date established for compliance after the delay in SSB 5248. In
9 the meantime, the County asks the Board to find that the County is in temporary compliance
10 due to the delay imposed by SSB 5248. If the County is not found in compliance, the
11 County argues, it will not be eligible for grant funds that are necessary to support the
12 voluntary Salmon Heritage Program that the County will pursue during the SSB 5248 delay
13 period. Therefore, the County asks the Board to find the County is in compliance during the
14 delay period, and extend the period for ultimate compliance to the deadline contained in
15 SSB 5248.
16
17

18
19 The Tribe argues that SSB 5248's limited prohibition on amendments of critical area
20 ordinances does not apply to the County's adaptive management program. Because the
21 adaptive management program is not part of the County's critical areas ordinance
22 applicable to "agricultural activities", the Tribe urges, the delay established in SSB 5248
23 does not apply to the adaptive management program. The Tribe claims that the County is
24 not precluded from achieving compliance on its adaptive management program during the
25 delay period established in SSB 5248 and therefore the Board should order the County to
26 achieve compliance.
27

28
29 The Tribe also argues that the Board does not have authority to issue a stay in this case.
30 First, the Tribe argues there is no authority in the GMA for the boards to issue stays. Since
31 the boards have only those powers conferred by statute, the Tribe argues that the lack of a
32 GMA provision authorizing the issuance of stays means that there is no authority to issue

1 stays. The Tribe points out that this Board as well as the Central Board has acknowledged
2 that no such authority has been granted. Second, the Tribe claims that a party can only
3 request a stay under RCW 34.05.467 within 10 days of issuance of a final order. There
4 would be no reason for this requirement, the Tribe argues, if a party could request a stay at
5 any time under RCW 34.05.550. Third, the Tribe asserts that RCW 34.05.550(1) confers
6 upon the Board only the same authority to issue a stay as is conferred on the reviewing
7 courts in RCW 34.05.550(3). Since the Court of Appeals (Division II) has already found that
8 the criteria for issuing a stay in RCW 34.05.550(3) have not been met in this case, the Tribe
9 argues that the Board is foreclosed from revisiting that decision.
10

11
12 As for the County's request for a compliance extension, the Tribe argues that the Board is
13 obligated under RCW 36.70A.330(2) to issue a decision within 45 days of the compliance
14 hearing. The Tribe asserts that the almost 20 months the Board has extended the
15 compliance period is far in excess of what the Legislature envisioned for achieving
16 compliance.
17

18 Board Discussion

19
20 The first question is whether the enactment of SSB 5248 precludes the County from taking
21 action to achieve compliance pursuant to the outstanding orders in this case. The Tribe
22 concedes that the County can not amend its critical areas ordinance as to agricultural
23 activities during the delay period but claims that the changes required to the adaptive
24 management program by the January 13, 2005 compliance order are not amendments to
25 the County's critical areas ordinance "as they specifically apply to agricultural activities".
26

27 We do not agree for two reasons. First, the adaptive management program is an integral
28 and essential part of the County's scheme for protection of critical areas in ongoing
29 agricultural lands. The Board expressly found this in its January 13, 2005 decision:
30

31 We note that the County's approach to critical areas regulations in ongoing
32 agricultural lands must be viewed as an integrated strategy; if one piece of that
strategy does not work, then it implicates the whole. Therefore, the effectiveness of

1 the monitoring and adaptive management program cannot be viewed as some
2 ancillary issue; it is central to approval of the County's approach to regulation of
3 critical areas in ongoing agricultural lands.
4 Compliance Order – Adaptive Management at p. 13.

5 Second, an adaptive management program must include benchmarks and triggers for
6 changes, including regulatory changes as needed. "In this regard, setting performance
7 measures that will trigger the need for change in protective regulations is the heart of the
8 adaptive management program." Compliance Order – Adaptive Management at p. 21. An
9 adaptive management program requires more than gathering data concerning the success
10 or failure of the measures in place; it also requires a process for a swift and certain
11 response if the measures are not protecting the functions and values of critical areas. The
12 adaptive management program at issue in the 2005 Compliance Order is thus part of the
13 County's "critical areas ordinances under RCW 36.70A.060(2) as they specifically apply to
14 agricultural activities."⁷ Therefore, we find that the County is precluded by SSB 5248 from
15 taking appropriate action to bring its adaptive management program into compliance during
16 the delay period established in SSB 5248.
17
18

19 Because we conclude that the County is precluded by SSB 5248 from taking action during
20 the delay period, the next question is whether the Board should grant the County an
21 extension of the compliance period under RCW 36.70A.300(3)(b). The County argues that
22 an extension is authorized because the case is of "unusual scope and complexity" and is
23 justified because SSB 5248 does not allow the County to act to achieve compliance during
24 the compliance period that is currently in effect.
25
26

27 The Tribe vigorously disagrees, pointing out that if the County had acted in accordance with
28 the original time table, "we wouldn't be here."⁸ The Tribe asserts that RCW
29 36.70A.300(3)(b) is not applicable because it applies to final decision and orders, not to
30
31

32 ⁷ SSB 5248 New Section 2(1).

⁸ Oral Argument

1 compliance orders.⁹ RCW 36.70A.330, the Tribe urges, requires that a compliance hearing
2 be given the highest order of priority and that a compliance decision must be issued within
3 45 days.¹⁰
4

5 While the Board agrees that the statute provides that a hearing under RCW 36.70A.330(2)
6 “shall be given the highest priority of business to be conducted by the board”, the Board
7 does not find that every compliance case is governed by the 45 day schedule cited by the
8 Tribe. The 45-day requirement applies to motions filed under subsection (1) of RCW
9 36.70A.330 which are motions “by a county or city subject to a determination of invalidity
10 under RCW 36.70A.300.” Here, the County is not subject to a determination of invalidity
11 and has filed a motion for an extension of the time for compliance, rather than a motion to
12 lift invalidity. The 45-day period (which runs from the filing of the motion to rescind
13 invalidity) is not applicable here.¹¹
14
15

16 However, we do agree with the Tribe that an extension of the compliance period is only
17 authorized (at least implicitly) for the purpose of achieving compliance. This is shown by the
18 last sentence in RCW 36.70A.300(3)(b):
19

20 The board may require periodic reports to the board on the progress the jurisdiction is
21 making towards compliance.

22 If the jurisdiction can not use the extension period to achieve compliance, such progress
23 reports would be meaningless.
24

25 The impropriety of a compliance extension under the circumstances present here is further
26 shown by the County’s request that the Board find, in addition to extending the compliance
27 period, that the County is *in compliance* during the compliance period. There is simply no
28

29
30 _____
31 ⁹ Tribe’s Response to Board Request for Briefing on Extension Request, at 11.

32 ¹⁰ *Ibid* at 12-13.

¹¹ See *Friday Harbor v. San Juan County*, WWGMHB Case No. 99-2-0010c (Order on Rescission of Invalidity and Compliance/Invalidity, November 30, 2000). This case also refers to a prior extension of the compliance period granted to the County after the expiration of the initial 180-day compliance period.

1 way that a Board can order a jurisdiction that is *in compliance* to *achieve* compliance. If the
2 Board were to find that the County is in compliance with its obligations under the GMA
3 during the delay period, that would appear to be the end of it. There is no mechanism to
4 undo a compliance finding when the delay period has expired and no statutory basis for the
5 Board to enter a finding of temporary compliance.
6

7 It would have been helpful if the Legislature had addressed the status of pending cases
8 where critical areas protections in agricultural lands have been found noncompliant when it
9 adopted SSB 5248. However, it did not. We have reviewed the legislative history provided
10 by the Tribe and the County and find nothing in the legislative history that sheds any light on
11 the question of the status of cases on which compliance has been ordered but not achieved.
12

13
14 It was because of this conundrum that the Board asked the parties to brief the Board's
15 authority to enter a stay under RCW 34.05.550(1). This provision of the Administrative
16 Procedure Act (APA) is notably brief:

17 Unless precluded by law, the agency may grant a stay, in whole or in part, or other
18 temporary remedy.
19

20 The Tribe correctly notes that the boards have not found a basis in the GMA to issue
21 stays.¹² Further, there is no rule in the Boards' Rules of Practice and Procedure (Ch. 242-
22 02 WAC) for the issuance of stays. However, the GMA provides that the Administrative
23 Procedure Act (APA) governs practice and procedure before the boards unless it conflicts
24 with specific provisions of the GMA:
25

26 All proceedings before the board, any of its members, or a hearing examiner
27 appointed by the board shall be conducted in accordance with such administrative
28 rules of practice and procedure as the boards jointly prescribe. All three boards shall
29 jointly meet to develop and adopt joint rules of practice and procedure, including
30 rules regarding expeditious and summary disposition of appeals. The boards shall
31 publish such rules and decisions they render and arrange for the reasonable
32 distribution of the rules and decisions. **Except as it conflicts with specific**

¹² Tribe's Response to Board Request for Briefing on Extension Request at 13.

1 **provisions of this chapter, the administrative procedure act, chapter 34.05**
2 **RCW, and specifically including the provisions of RCW 34.05.455 governing ex**
3 **parte communications, shall govern the practice and procedure of the boards.**
4 RCW 36.70A.270(7)(emphasis added).

5 Therefore, although the GMA does not directly authorize the board to issue stays, the APA
6 provisions apply to the practice and procedure of the boards and those do authorize the
7 boards to issue stays, unless there is a direct conflict with the GMA.

8
9 The Tribe argues that the history of the APA demonstrates that the Legislature intended the
10 boards to lose the ability to issue stays once an appeal is filed in court. The Tribe argues
11 this based on a 1989 legislative change. In 1988, the Tribe claims, the APA provided:

12 unless precluded by law, an agency may grant a stay, in whole or in part, or other
13 temporary remedy during the pendency of judicial review.¹³
14

15 In 1989, the Tribe further contends, the Legislature deleted the language “during the
16 pendency of judicial review.”¹⁴ According to the Tribe, this change means that the
17 Legislature intended to remove the authority of administrative agencies to issue stays once
18 appeals to court have been filed¹⁵. However, the deletion of the phrase “during the
19 pendency of judicial review” does not “clearly” show that the Legislature intended that there
20 be no authority to issue a stay during judicial review. The deletion of the phrase suggests,
21 on the contrary, that the Legislature removed a limitation on the authority of administrative
22 agencies to stay their decisions. If the Legislature had wanted to limit the use of stays once
23 a judicial appeal had been filed, it could easily have said so, for example, by changing the
24 language to “until an appeal for judicial review has been filed.”
25
26

27 The Tribe further argues that the criteria for issuing stays under the APA are found in RCW
28 34.05.550(3):
29

30
31 ¹³ *Swinomish Tribe's Supplemental Response Re Stay of Compliance Order*, at p. 2

32 ¹⁴ *Ibid* at 3.

¹⁵ *Ibid*.

1 If judicial relief is sought for a stay or other temporary remedy from agency action
2 based on public health, safety, or welfare grounds the court shall not grant such relief
3 unless the court finds that:

4 (a) The applicant is likely to prevail when the court finally disposes of the
5 matter;

6 (b) Without relief the applicant will suffer irreparable injury;

7 (c) The grant of relief to the applicant will not substantially harm other
8 parties to the proceedings; and

9 (d) The threat to the public health, safety, or welfare is not sufficiently
10 serious to justify the agency action in the circumstances.

11 RCW 34.05.550(3)

12 Since Division II of the Court of Appeals has already denied a stay under these criteria, the
13 Tribe argues, the Board is bound by that decision and cannot issue a stay now. The County
14 noted that it did not find any additional cases ruling that an agency is bound by these criteria
15 for judicial stays.¹⁶ The County identified one case where the Shoreline Hearings Board
16 (SHB) used the criteria in RCW 34.05.550(3) to evaluate a stay of the effective date of WAC
17 rules adopted by the Department of Ecology.¹⁷ The County notes that this did not indicate
18 that an agency was required to use those criteria. Instead, the SHB applied these criteria as
19 an exercise of discretion because it had been granted the authority to review shoreline rules
20 as to facial validity and because the SHB has authority to issue stays.¹⁸

21 By its terms, the criteria in subsection RCW 34.05.550(3) apply to courts, as opposed to
22 agencies. Logically, an agency may have reasons of its own for granting a stay or other
23 temporary remedy of its own decision which may not fit within these criteria. If an agency
24 does so, judicial review is available for decisions granting such relief in RCW 34.05.550(4).

25 At the hearing on the motion, the Board invited briefing on the question of whether the
26 criteria of RCW 34.05.550(3) apply to agency stays. Both parties submitted briefing but the
27 Board finds that none of the cases supplied are pertinent to the circumstances before the
28
29

30
31
32 ¹⁶ Skagit County's Supplemental Brief on SSB 5248, at 5.

¹⁷ *City of Seattle v. Department of Ecology*, SHB No. 96-48.

¹⁸ *Ibid.*

1 Board here. Here, the County is precluded from taking action to achieve compliance by the
2 delay imposed in SSB 5248. This does not make the County's present enactments
3 compliant – it merely delays the requirement that compliance be achieved.
4

5 Therefore, we find that the granting of a stay is the appropriate remedy in this case. The
6 stay shall be granted in accordance with SSB 5248 until **July 1, 2010**. The compliance
7 obligations of the County shall be stayed until that time. Thereafter, the County must
8 respond to this Board's orders. The new compliance deadline is December 28, 2010. To
9 allow the County to assess the results of the legislative delay, the Board will allow the
10 County **60 days** after the stay has expired to present the Board with a progress report. This
11 progress report shall apprise the Board of the planned course of action the County will take
12 to achieve compliance in light of any new amendments to the GMA adopted as a result of
13 SSB 5248 delay. The progress report shall also contain a work plan that outlines the steps
14 to be taken by the County planning staff, Planning Commission and the Board of County
15 Commissioners, including public participation. The Board shall hold a hearing after receipt of
16 the progress report and determine a briefing schedule and compliance hearing date, and
17 whether any adjustments need to be made to the compliance period.
18
19

20
21 Additionally, the Board notes that we found above that the Board has no authority to find the
22 County in compliance during the time out established by SSB 5248. Nevertheless, we
23 encourage the Washington Department of Community, Trade, and Economic Development
24 not to let noncompliance in this case penalize the County's eligibility for grants and loans
25 during the stay period so that the County may pursue its voluntary strategy.
26

27 **V. FINDINGS OF FACT**

- 28 1. Skagit County is a county located west of the crest of the Cascade Mountains that is
29 required to plan pursuant to RCW 36.70A.040.
- 30 2. Petitioner Swinomish Tribal Community (the Tribe) has participated in writing and
31 orally in the compliance proceedings in this case.
32

- 1 3. The Board's December 8, 2003 Compliance Order found that the County's approach
2 failed to protect fish and wildlife habitat areas because of lack of clarity about whether
3 the limited watercourse protection measures it imposed would actually be enforced
4 and because of the lack of an effective monitoring and adaptive management
5 program to ensure that the protective measures were actually working.
6
- 7 4. The Board's January 13, 2005 Compliance Order found Skagit County's approach for
8 protecting fish and wildlife habitat areas in ongoing agricultural lands adopted to
9 achieve compliance with the Board's December 8, 2003 Compliance Order
10 noncompliant because the County's program failed to provide the needed adaptive
11 management to ensure that its protection measures are, in fact, protecting Fish and
12 Wildlife Habitat Areas (FWHCAs).
13
- 14 5. The County appealed this 2005 decision to the Thurston County Superior Court and
15 later the Board granted a certificate of appealability of the compliance order to the
16 Court of Appeals.
- 17 6. The Court of Appeals, Division II, accepted review of the compliance decision on
18 adaptive management, and consolidated it with the Tribe's appeal of the Board's
19 December 8, 2003, Compliance Order which had already been accepted for review
20 by the Court of Appeals.
21
- 22 7. On November 3, 2005, the Washington State Supreme Court granted the motion of
23 the Tribe and the County to transfer the consolidated appeal to the Supreme Court.
- 24 8. The Supreme Court heard the consolidated appeal in February 2006 and has to date
25 not issued a decision.
- 26 9. The Board has issued numerous compliance period extensions to Skagit County with
27 the concurrence of the Tribe.
- 28 10. The Legislature passed SSB 5248, legislation that established a time out on the
29 adoption of new measures to protect critical areas as they specifically apply to
30 agricultural activities, and the Governor signed it into law on May 8, 2007.
31
32

- 1 11. Skagit County's adaptive management program is an integral and essential part of
- 2 the County's scheme for protection of critical areas in ongoing agricultural lands.
- 3 12. An adaptive management program must include benchmarks and triggers for
- 4 changes, including regulatory changes as needed.
- 5 13. The County is precluded by SSB 5248 from taking appropriate action to bring its
- 6 adaptive management program into compliance during the delay period established
- 7 in SSB 5248.
- 8 14. The County is not subject to an order of invalidity.
- 9 15. The County has filed a motion for an extension of the time for compliance, rather
- 10 than a motion to lift invalidity.
- 11 16. The history of the Administrative Procedures Act (APA) does not demonstrate that
- 12 the Legislature intended the boards to lose the ability to issue stays once an appeal
- 13 is filed in court.
- 14 17. There is no statutory basis for the Board to enter a finding of temporary compliance.
- 15 18. The Legislature did not address the status of pending cases where critical areas
- 16 protections in agricultural lands have been found noncompliant by the growth
- 17 hearings boards when it adopted SSB 5248.
- 18 19. The GMA provides that the Administrative Procedure Act (APA) governs practice and
- 19 procedure before the boards unless it conflicts with specific provisions of the GMA
- 20 (RCW 36.70A.270(2)).
- 21 20. The APA provisions authorize the boards to issue stays, unless there is a direct
- 22 conflict with the GMA.
- 23 21. By its terms, the criteria in subsection RCW 34.05.550(3) apply to courts, as opposed
- 24 to agencies.
- 25 22. Even though the County is precluded from taking action to achieve compliance by the
- 26 delay imposed in SSB 5248, this does not make the County's present enactments
- 27 compliant – it merely delays the requirement that compliance be achieved.
- 28
- 29
- 30
- 31
- 32

1 23. The County's critical areas protections in agricultural lands have been out of
2 compliance for many years.

3 24. SSB 5248 requires that the William D. Ruckelshaus Center must work to achieve
4 agreement among the stakeholders and develop a coalition that can be used to
5 support agreed upon changes or new approaches for protecting critical areas during
6 the 2010 session.
7

8 25. Any Finding of Fact hereafter determined to be a Conclusion of Law is hereby
9 adopted as such.
10

11 VI. CONCLUSIONS OF LAW

12 A. The Board has jurisdiction over the parties and subject matter of this case.

13 B. Petitioner Swinomish Tribal Community has standing to participate in these
14 compliance proceedings.

15 C. RCW 36.70A.330(2) is not applicable in these circumstances.

16 D. The Board has authority pursuant 34.05.550(1) to issue a stay of its January 13, 2005
17 Compliance Order.
18

19 E. Any Conclusion of Law hereafter determined to be a Finding of Fact is hereby
20 adopted as such.
21

22 VII. ORDER

23 Having reviewed the County's Motion, the Tribe's response, briefs submitted in response to
24 the Board's question, argument and answers to Board questions at the hearing on the
25 extension request, post hearing submittals, and SSB 5248, the Board GRANTS a stay of
26 its January 13, 2005 Compliance Order until December 28, 2010. The following
27 compliance schedule will apply:
28
29

30

Stay Expiration Date	July 1, 2010
Compliance Progress Report Due (including work plan and proposed	August 30. 2010

31
32

compliance schedule)	
Objections to proposed compliance schedule (if any) due	September 10, 2010
Hearing on proposed compliance schedule and work plan	September 17, 2010
Compliance Deadline	December 28, 2010

Dated this the 9th day of July, 2007.

Holly Gadbow, Board Member

Margery Hite, Board Member

James McNamara, Board Member

Pursuant to RCW 36.70A.300 this is a final order of the Board.
Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.
Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)