



April 23, 2009

Commissioners Ken Dahlstedt, Sharon Dillon & Ron Wesen
Skagit County Administration Building
1800 Continental Place, Suite 100
Mount Vernon, WA 98273

Board of Directors

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*People dedicated to
preserving Skagit County's
rural character by protecting
the natural environment;
supporting sustainable,
resource-based economies; and
promoting livable urban
communities for present and
future generations.*

Dear Commissioners:

By this letter, Friends of Skagit County requests that the Board of County Commissioners reconsider its decision to authorize certification of the Mitigation Banking Instrument for the Nookachamps Wetland Mitigation Bank, taken on March 17, 2009 by resolution.

Since the resolution is not available on the county website, we have not reviewed the document. However, this request for reconsideration comes from various agency requirements under RCW's for Rule-making in Washington State.

RCW 34.05.322 *Scope of Rule-making authority* states "...**an agency may not rely solely on the section of law stating a statute's intent or purpose**, or on the enabling provisions of the statute establishing the agency, or on any combination of such provisions, for its statutory authority to adopt the rule..."**(emphasis added)**.

The Department of Ecology is required to complete the additional requirements of this RCW in order to operate a program under the draft rule. DOE does not have the authority to simply state that because they support wetland mitigation banks that a local government must support the banking program and/or proposed wetland mitigation banks. DOE has not completed the requirements under this RCW which would allow the agency to require Skagit County to support the proposed wetland mitigation banks. Skagit County can deny bank certification based upon DOE's failure to comply with this rule-making requirement.

Section (1)(d) states that an agency must "Determine that **the probable benefits of the rule are greater than its probable costs**, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented..." **(emphasis added)**.

To our knowledge DOE has not provided ANY analysis of probable benefits which would be data, science, economic analysis or other information for the Nookachamps Bank. Nor has DOE provided any quantitative or qualitative estimate of benefits of the project. Skagit County does not have to certify the Nookachamps Bank until it receives this information from DOE.

Section (1)(f) states: "...**Determine that the rule does not require those to whom it applies to take an action that violates requirements of another federal or state law...**" **(emphasis added)**.

The Department of Ecology is requiring the proponents of the Nookachamps Bank, the Board of County Commissioners, the Department of Planning and Development Services and other county staff to violate, at a minimum, the State Growth Management Act, the Skagit County Comprehensive Plan, local development codes and other state and local laws associated with planning and development which require the identification and protection of resource lands (farmland) and critical areas. This appears to violate the above Section (1)(f).

Section (1)(h) Determine if the rule differs from any federal regulation or statute applicable to the same activity...and determine that the difference is justified by....

(i) A state statute that explicitly allows the agency to differ from federal standards; or

(ii) Substantial evidence that the difference is necessary to achieve the general goals and specific objectives (of the rule); and

(j) Coordinate the rule, to the maximum extent practicable, with other federal, **state and local laws applicable to the same activity or subject matter....” (emphasis added).**

DOE has ignored public comments and comments by elected officials concerning how the draft wetland mitigation banking rule violates the State’s Growth Management Act and local planning laws. The agency has not added language to the draft rule to justify how the draft rule does not violate GMA or local planning. To our knowledge, the DOE has not consulted with Skagit County to discuss how the draft rule does not violate local planning laws. If such consultation was held, there was no public notification of this discussion.

DOE has not considered the public interest in its rule-making process. No evaluation has been done of the cost of risk or failure to the public of wetland mitigation banks.

RCW 34.05.328 Public Participation – Concise explanatory statement. (6)(a) Before filing an adopted rule with the Code Reviser, an agency shall prepare a concise explanatory statement of the rule:...

(ii) Describing the differences between the text of the proposed rule as published in the register and the text of the rule as adopted, other than editing, stating the reasons for differences; and

(iii) Summarizing all comments received regarding the proposed rule, and responding to the comments by category or subject matter, indicating how the final rule reflects agency consideration of the comments or why it fails to do...”

To our knowledge, the requirements of Section 6(a) have not yet been addressed.

We request that the Board of County Commissioners rescind the resolution which approves the Nookachamps Wetland Mitigation Bank’s banking instrument and reconsider the wisdom of approval of wetland mitigation banks in Skagit County.

Yours sincerely,

Ms. Ellen Bynum
Director

EB/

cc: FOSC Board; Gail Terzi, USACE; Lauren Driscoll, DOE; Governor Christine Gregoire; Legislative Representatives and Senators 10th, 39th & 40th Districts; Gary Christensen, Skagit County Planning & Development Services.