



September 5, 2022

Skagit County Commissioners  
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Dear Commissioners,

We appreciate the opportunity to comment on the proposed ordinance **denying permit applications for offsite compensatory mitigation projects on Skagit County Agricultural-Natural Resource Lands**. While we agree that compensatory mitigation should stay local to where the environmental damage occurs, we disagree on how “local” is defined in the proposed ordinance and in a watershed. We think the proposed ordinance prohibiting off-site compensatory mitigation on land zoned AG-NRL is the wrong tool to use to achieve the desired complementary goals of preserving agricultural lands and advancing good fish and wildlife habitat restoration projects. We believe the ordinance is being used to tackle a particular situation with Seattle City Light, rather than advancing goals of a watershed wide plan, and will have unintended consequences.

#### Summary

- We are very supportive of legal compensatory mitigation staying local – by that we mean within the same watershed where the environmental impact takes place.
- We agree that the Skagit Watershed should generally not accommodate compensatory mitigation for negative environmental impacts occurring outside the watershed.
- According to the Growth Management Act and the County’s own policies, Skagit County is required to use best available science<sup>1</sup> when updating policies and regulations that relate to critical areas. We think this should be strongly applied when creating regulations that involve compensatory mitigation. In a joint rule issued in 2008—and specifically demanded by

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<sup>1</sup> The Growth Management Act states that jurisdictions are required to use the "best available science" (BAS) in developing and updating policies and regulations to protect the functions and values of critical areas. In addition, special consideration is required to be given to conservation or protection measures necessary to preserve or enhance anadromous fish populations.; <https://skagitcounty.net/Departments/PlanningAndPermit/caoupdate.htm>

Congress—the Environmental Protection Agency<sup>2</sup> and the Army Corps of Engineers<sup>3</sup> and subsequently all other agencies, officially endorsed the watershed-based approach for compensatory mitigation. The reason is that the watershed-based approach, rather than mandatory on-site mitigation, fosters incorporation of aquatic ecosystem science into compensatory mitigation plans.

- Entities required to mitigate should select the best project to replace the environmental loss while considering and meeting other local land needs; such as the preservation of Skagit’s important agricultural land base.
- Using zoning regulations as the method for identifying where legally required compensatory mitigation can or cannot happen is not science-based. It negates analysis of the best projects in the impacted watershed. It closes off options. It limits private landowners’ options on uses of their land.
- AG-NRL zoning (agricultural zoning) in Skagit County is disjointed outside of the western part of the County. Many properties in the Middle Skagit were historically zoned AG-NRL but no longer fit that use due to river movement and flooding, but the zoning has not been updated.
- Adopting a Hearing Examiner Special Use Permit requirement with defined parameters would allow mitigation projects to be vetted for natural resource or other criteria without using the coarse tool of “zoning restrictions” which throws the baby out with the bathwater.

Mitigation is legally required for certain permitted projects that cause unavoidable impacts; this includes projects undertaken by entities such as drainage and diking districts, for example. In return, the mitigation provides environmental benefits, usually locally. While there are many opinions on mitigation, best available science uniformly prefers a “watershed-based” approach that selects the best project(s) in the watershed where the impact takes place. In the 1980s and 1990s, regulators preferred that Compensatory Mitigation occur as close as possible to the sites of destruction, and preferably in the same location as the development. However, the former preference for “on-site” methods of mitigation ended up creating far too many isolated restored or artificial “wetlands” at the edge of shopping mall parking lots. While this approach let the permittee build, it did little or nothing in return for the environment. All federal agencies have since adopted preference for local watershed-based approaches that identify the best nearby projects for the mitigation, recognizing that the watershed where the impact occurs is part of an inter-connected ecosystem.

The Army Corps of Engineers website states : *A watershed approach must be used, to the extent appropriate and practicable, for siting compensatory mitigation projects for Department of the Army permits. The watershed approach applies to all mitigation banks, in-lieu fee programs, and permittee responsible compensatory mitigation*<sup>4</sup>.

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<sup>2</sup> <https://www.epa.gov/cwa-404/watershed-approach-compensatory-mitigation>

<sup>3</sup> National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, § 314, 117 Stat. 1392, 1430–31 (2003).  
94 See Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19,594, 19,594 (Apr. 10, 2008) (to be codified at 33 C.F.R. pts. 325 and 332; 40 C.F.R. pt. 230)

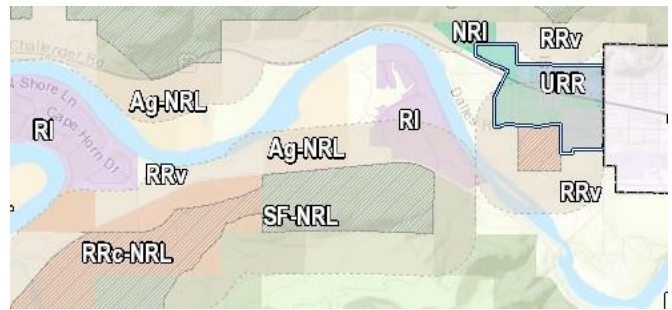
<sup>4</sup> <https://www.usace.army.mil/Media/Fact-Sheets/Fact-Sheets-View/Article/1088740/watershed-approach-to-compensatory-mitigation-projects/>

We do not think it wise to have a "cookbook" approach to where Compensatory Mitigation can occur in the Skagit Watershed, using zoning as the criterion. Zoning doesn't relate directly to where habitats occur in a watershed and has little to do with how they are interconnected. Zoning does not take into account where the most need is. At the same time, there are tools that can be used to keep the agricultural land base intact as Compensatory Mitigation projects are considered. There are win-win opportunities to restore fish habitat in the delta while also improving dikes and drainage. This will become even more important with sea-level rise and climate change.

Here is an example of the unintended consequences of adopting a "cookbook approach": In 2015 Skagit County was required to do Compensatory Mitigation for emergency repair to the Cockerham dike after a flood event (an area zoned AG-NRL shown as the red dot). The mitigation project selected was to re-connect a slough that had been cut off for decades on Skagit Land Trust's Cumberland Creek Conservation Area (in blue dashes on land zoned RRc-NRL). This project was in the same reach of the river, but in different zoning. Salmon – absent for 80 years - have since returned to this slough. Under the proposed ordinance, if the zoning had been reversed – and it is common in this stretch of the river to have mixed zoning in a small area- this excellent project could not take place.



Lest this be considered an unusual occurrence, the zoning maps of areas on the Middle Skagit that follow show how disjointed zoning can be in our watershed. None of the island lands depicted on the map on the left are currently used for agriculture. The map on the right shows that zoning in the same reach of the Skagit River is not uniform. A good deal of the land zoned AG-NRL on the map can no longer support viable agriculture. Allowing compensatory mitigation on these types of land and islands would not reduce the agricultural land base. Yet it will deprive property owners and agencies options for other land uses and funding streams for habitat restoration. It will disallow use of appropriate lands for mitigating dike repairs and other needs. This ordinance does not consider a property's actual use or the realities of a dynamic river system.



The ordinance under consideration seems specifically aimed at dam relicensing negotiations with Seattle City Light. We understand there are numerous issues related to this. We know projects for salmon are important both at the dam site itself and along the course of the Skagit River. We are surprised however that one of the main justifications for this ordinance is to stop *“interests [that] look to mitigate distant environmental impacts”* in the Skagit. Generally, regulators strongly prefer, or mandate, local mitigation so we don’t believe this is a threat at this time. And in this specific case, the dams have had, and will continue to have, impact on the entire Skagit River Watershed in both good ways (flood control) and environmentally degrading ways. The latter is what the utility is legally required to mitigate. There is nothing “distant” about the impact of dams on the Skagit delta or at Ross, Diablo, and Gorge Lakes or on the river reaches between. The best projects that help replace watershed and habitat functions should be the priorities for mitigation actions.

We are excited by and supportive of the continued exploration of salmon projects at the dam site itself. And we are sure that the County and our community can find other ways besides adopting this ordinance to shape what happens in the Skagit Delta and on other agricultural lands with Seattle City Light. Farms vs. Fish is a false choice. According to scientific studies, more delta land needs to be restored, but only a very small percent of farmland might need to be restored to achieve the target goals and help salmon recover. Ways to achieve project selection without using a zoning category include:

-- Compensatory Mitigation projects could be examined and denied or approved by requiring a Hearing Examiner Special Use permit that takes into consideration if proposed projects meet the agreed to goals of the Skagit Tidegates and Fish Initiatives (TIF) or other plans already in place or agreed to.<sup>5</sup>

--The Interim Ordinance states that the County is supportive of the Chinook Recovery Plan. Compensatory Mitigation could be used to meet agreed to specific goals for the Chinook Recovery Plan

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<sup>5</sup> WDFW in a November 2021 letter to the County says that: *“The Tidegate Fish Initiative (TFI) signatories and other agricultural community partners engaged in an assessment of 23 project concepts to determine which had the most benefits and least negative impact across farm, fish and flood interests (Skagit Hydrodynamic Model Alternatives Analysis<sup>5</sup>). The outcome is broad agreement about which projects to focus on next, many of which are on private farmland.”*

in land zoned AG-NRL. It could be viewed as a way to fund and make progress on agreed to goals and plans while maintaining the agricultural land base.

- Using funds from vetted Compensatory Mitigation projects could also help our community move forward on farm and fish initiatives, rather than getting stalled in lawsuits in a part of the County that has been the focus of many legal actions.<sup>6</sup>

#### Summary

As a rule - and this ordinance sets a rule - the watershed-based approach is the best available scientific approach for Compensatory Mitigation project selection. There will likely be well-qualified and important on-site compensatory mitigation projects proposed – including potential fish passage projects at the dam sites. An on-site project can always be selected in an ecosystem lens – a watershed approach does not take that off the table.

Mitigation rarely replaces 100% of what has been lost environmentally. It is a regulatory method adopted to try to do the best we can for environmental benefit when we develop the places we live and work and from which we secure natural resources. For this reason, we should set the bar high and adopt a best available science rationale in Skagit-based ordinances that deal with Compensatory Mitigation project selection. Making plans to maintain our agricultural land base and to make progress on watershed-wide fish and wildlife habitat goals is better done with other tools than a zoning ordinance.

Thank you for the opportunity to comment.



Molly Doran  
Executive Director  
Skagit Land Trust

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<sup>6</sup> <https://earthjustice.org/news/press/2021/swinomish-tribal-community-provides-notice-of-intent-to-sue-corps-of-engineers>