IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SWINOMISH INDIAN TRIBAL COMMUNITY and WASHINGTON ENVIRONMENTAL COUNCIL, Petitioners, v. WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD; SKAGIT COUNTY, a municipal corporation of the State of Washington; SKAGIT COUNTY FARM BUREAU; SKAGITONIANS TO PRESERVE FARMLAND; WESTERN WASHINGTON AGRICULTURAL ASSOCIATION; SKAGIT COUNTY DIKING DISTRICT NO. 3; SKAGIT COUNTY DIKING DISTRICT NO. 12; SKAGIT COUNTY DRAINAGE DISTRICT NO. 17; and SKAGIT COUNTY CONSOLIDATED DIKING DISTRICT NO. 22, Respondents. SKAGIT COUNTY, a municipal corporation of the State of Washington; SKAGIT COUNTY FARM BUREAU; SKAGITONIANS TO PRESERVE FARMLAND; WESTERN WASHINGTON AGRICULTURAL ASSOCIATION; SKAGIT COUNTY DIKING DISTRICT NO. 3; SKAGIT COUNTY DIKING DISTRICT NO. 12; SKAGIT COUNTY DRAINAGE DISTRICT NO. 17; and	)	No. 76339-9 En Banc Filed September 13, 2007

SKAGIT COUNTY CONSOLIDATED DIKING DISTRICT NO. 22,

Petitioners,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, SWINOMISH INDIAN TRIBAL COMMUNITY, and WASHINGTON ENVIRONMENTAL COUNCIL,

Respondents.

ALEXANDER, C.J.—In this consolidated appeal, we review two separate decisions by the Western Washington Growth Management Hearings Board (Board). Both decisions concern Skagit County's efforts to comply with the critical areas provisions of the Growth Management Act (GMA). In the first decision, *Swinomish Indian Tribal Community v. Skagit County*, No. 02-2-0012c, 2003 GMHB LEXIS 73 (W. Wash. Growth Mgmt. Hr'gs Bd. (WWGMHB) Dec. 8, 2003) (hereinafter 2003 Compliance Order), the Board largely upheld Skagit County's 2003 effort to comply with the GMA. Approval, however, was subject to two exceptions, "the enforcement of watercourse protection measures and the need for more specificity in [the county's] monitoring program and adaptive management process." *Id*. at *3. Although the Board's 2003 Compliance Order directed the county to correct the deficiencies within 180 days, it concluded in a 2005 order that the county had failed to do so completely.

Swinomish Indian Tribal Cmty. v. Skagit County, No. 02-2-0012c, 2005 GMHB LEXIS 2, at *2-3 (WWGMHB Jan. 13, 2005) (hereinafter 2005 Compliance Order). After review, we uphold both of the Board's decisions.

I. FACTUAL AND PROCEDURAL HISTORY

In 1990, the legislature adopted the GMA, chapter 36.70A RCW. One section of that act, RCW 36.70A.060(2), required local governments to enact development regulations protecting so called "critical areas" by September 1, 1991. "Critical areas" are defined as "(a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas." RCW 36.70A.030(5). The requirement to "protect" critical areas is a part of the GMA's larger purpose of requiring comprehensive land use planning within the state of Washington. *See* RCW 36.70A.020(10) (providing that local governments will "[p]rotect the environment"); RCW 36.70A.010 (describing the legislature's intent in adopting the GMA to provide for "comprehensive land use planning").

The legislature created three regional boards to review compliance with the GMA by the cities and counties that are located within each board's jurisdictional boundaries. *See* RCW 36.70A.250-.350. One of the boards, the Western Washington Growth Management Hearings Board, is responsible for reviewing Skagit County's compliance with the GMA.

Since 1996, Skagit County has made several efforts to comply with the GMA's critical areas mandate.[1] In 2002, the Board held that the county's then-current critical areas ordinance did not comply with the GMA because there was "no mandatory, fallback approach in place to ensure the protection of CAs [critical areas] and anadromous fish." *Swinomish Indian Tribal Cmty. v. Skagit County*, No. 02-2-0012c, 2002 GMHB LEXIS 67, at *13 (WWGMHB Dec. 30, 2002). Consequently, the Board ordered the county to "adopt an alternative that . . . must include the adoption of mandatory development regulations for agriculture as necessary to comply with RCW 36.70A.060(2) and .172(1)." *Id*. Whether Skagit County complied with this directive is the primary issue in this consolidated appeal.

In 2003, following the Board's 2002 finding of noncompliance, Skagit County adopted Ordinance 020030020, which contained a "no harm" standard for protecting anadromous fish habitat in agricultural areas. The Swinomish Indian Tribal Community (Tribe) and the Washington Environmental Council (WEC) challenged the ordinance's "no harm" standard, alleging that it failed to protect critical areas, as required by RCW 36.70A.060(2). After reviewing the challenge, the Board upheld the ordinance, concluding that the county was "in compliance with the [GMA] except for the

[1] *See, e.g., Friends of Skagit County v. Skagit County*, Nos. 96-2-0025 & 00-2-0033c, 2001 GMHB LEXIS 53 (WWGMHB Feb. 9, 2001); *Friends of Skagit County v. Skagit County*, Nos. 96-2-0025 & 00-2-0033c, 2000 GMHB LEXIS 323 (WWGMHB Aug. 9, 2000); *Friends of Skagit County v. Skagit County*, No. 96-2-0025, 1998 GMHB LEXIS 283 (WWGMHB Sept. 16, 1998); *Friends of Skagit County v. Skagit County*, No. 96-2-0025, 1997 GMHB LEXIS 344 (WWGMHB Jan. 3, 1997).

enforcement of watercourse protection measures and the need for more specificity in its monitoring program and adaptive management process." 2003 Compliance Order, 2003 GMHB LEXIS 73, at *3.

The Tribe and the WEC each petitioned the Thurston County Superior Court to review the Board's decision. The petitions were consolidated by the superior court. Thereafter, all three parties (Skagit County, the Tribe, and the WEC) requested, pursuant to the provisions of chapter 34.05 RCW, that the Board certify its decision for direct review by Division Two of the Court of Appeals. The Board agreed that the standard for direct review had been met and, consequently, it granted the motion. Division Two of the Court of Appeals then granted direct review.

In 2004, while appellate review was pending, Skagit County adopted Ordinance 020040011. It responded to the Board's directions regarding the need for enforcement of watercourse protection measures and greater specificity in its monitoring and adaptive management program. The Tribe and WEC argued to the Board that the 2004 ordinance did not bring the county into full compliance with the GMA. The Board agreed. *See* 2005 Compliance Order, 2005 GMHB LEXIS 2. The county then petitioned Division Two of the Court of Appeals to directly review the Board's decision, alleging that the Board failed to give proper deference to its interpretation of adaptive management and that the Board used improper procedures in reaching its decision. The Court of Appeals accepted direct review and consolidated the appeal with the

pending appeal of the 2003 Compliance Order. We subsequently accepted the Tribe's motion to transfer the consolidated appeal from the Court of Appeals to this court. We now review the decisions of the Board that Skagit County's 2003 Ordinance, with two exceptions, complied with the GMA and its decision that the county's 2004 ordinance did not fully comply with the GMA.

II. STANDARD OF REVIEW

The Board is charged with determining compliance with the GMA and, when necessary, invalidating noncomplying comprehensive plans and development regulations. *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.,* 142 Wn.2d 543, 552, 14 P.3d 143 (2000) (citing RCW 36.70A.280, .302). The Board "shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." RCW 36.70A.320(3). An action is "'clearly erroneous'" if the Board is "'left with the firm and definite conviction that a mistake has been committed.'" *Cent. Puget Sound Hr'gs Bd.,* 142 Wn.2d at 552 (quoting *Dep't of Ecology v. Pub. Util. Dist. No. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993)). "[C]omprehensive plans and development regulations [under the GMA] are presumed valid upon adoption." RCW 36.70A.320(1). Although RCW 36.70A.3201 requires the Board to give deference to a county, the county's actions must be consistent with the goals and requirements of the GMA. *Cent. Puget Sound Hr'gs Bd.,* 142 Wn.2d at 561.

This court, in turn, reviews the Board's decisions pursuant to the Administrative Procedure Act (APA), chapter 34.05 RCW. RCW 34.05.570(3). The Board's legal conclusions are reviewed "de novo, giving substantial weight to the Board's interpretation of the statute it administers." *Cent. Puget Sound Hr'gs Bd.*, 142 Wn.2d at 553. If the Board's findings of fact are reviewed, the substantial evidence test is used. *Id.*

III. ANALYSIS

A. Background to the 2003 and 2005 Board Decisions

The GMA was enacted largely "'in response to public concerns about rapid population growth and increasing development pressures in the state."' *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd*., 154 Wn.2d 224, 232, 110 P.3d 1132 (2005) (internal quotation marks omitted) (quoting *Cent. Puget Sound Hr'gs Bd*., 142 Wn.2d at 546). As we have already noted, one of the central requirements of the GMA is that counties and cities, which plan under it, must protect "critical areas." RCW 36.70A.060(2). But the GMA places additional, and sometimes competing, obligations on local governments. For example, it lists as "planning goals" to both "[m]aintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries" and "[e]ncourage the conservation of . . . productive agricultural lands, and discourage incompatible uses." RCW 36.70A.020(8). Local governments are not, however, given much direction by that statute as to whether

protection of critical areas or the maintaining of agricultural lands is a priority. In fact, the GMA explicitly eschews establishing priorities: "The [GMA's planning] goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations." RCW 36.70A.020.

The lack of priority in the planning goals becomes especially problematic when local governments are faced with land that qualifies as both agricultural land *and* as a critical area (for example, a parcel of agricultural land that abuts a water source). Skagit County, in particular, had to confront this tension between maintaining agricultural land and protecting critical areas. This was necessary because the county contains approximately 115,000 acres of agricultural land that have been designated under the GMA as agricultural lands of long-term commercial significance. Furthermore, a significant portion of these lands are located in areas that, although historically part of the Skagit and Samish River deltas and/or floodplains, have been cleared, diked, and drained to make them suitable for agricultural production. Some of this activity occurred as long ago as 100 years. Thus, present day agricultural production in the area depends, in part, upon this network of well established drains and dikes.

At the same time, the State has identified the Skagit and Samish Rivers watershed as the "most significant watershed in Puget Sound" in terms of salmon

recovery. Admin. R. (AR) at 4074. It is home to at least six species of salmon and two fish species that are listed under the Endangered Species Act.[2] As the county acknowledges, "[t]he anadromous fish stocks in the Skagit and Samish River systems are another valuable Skagit County natural resource." Resp't Skagit County's Resp. Br. at 9. The resource is also of economic significance because just as farmers depend on agricultural land for their livelihood, persons involved in the fishing industry and belonging to the Tribe depend upon healthy rivers for theirs.

Despite the explicit lack of a prioritization in the planning goals section of the GMA, the legislature has provided some guidance for determining GMA priorities. Specifically, in 1995, the legislature amended the GMA to strengthen protection of critical areas:

> In designating and protecting critical areas under this chapter, counties and cities *shall include the best available science* in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities *shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries*.

RCW 36.70A.172(1) (emphasis added). The GMA was amended again in 1997 to provide that growth management hearings boards should "grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter" and that "[l]ocal comprehensive plans and development regulations

[2]Endangered and Threatened Wildlife and Plants, 64 Fed. Reg. 58,910 (Nov. 1, 1999) (Coastal-Puget Sound Bull Trout); Endangered and Threatened Species, 64 Fed. Reg. 14,308 (Mar. 24, 1999) (Puget Sound Chinook).

require counties and cities to balance priorities and options for action in full consideration of local circumstances." RCW 36.70A.3201. But these amendments add little in the way of guidance. For example, the requirements to be guided by the "best available science" (BAS) in developing critical areas regulations and to "give special consideration" to protecting anadromous fisheries arguably conflict with the legislature's directive that growth management hearings boards defer to local balancing of "local circumstances," if that local balancing is not in favor of critical areas. *Id*. It is with these numerous tensions in mind that we must decide whether Skagit County's critical areas ordinance complies with the GMA.

B. The 2003 Board Decision

1. The "no harm" standard

Riparian farm land in Skagit County qualifies as both "agricultural land" and "critical areas" under the GMA. *See* RCW 36.70A.030(2), (5). In an effort to "protect" both, consistent with what the GMA requires in RCW 36.70A.020(10), the county's 2003 ordinance established a "no harm" standard that ongoing agricultural operators must meet. AR at 988 (Skagit County Ordinance 020030020, at 78) (hereinafter 2003 Ordinance). Under the 2003 Ordinance, farmers are to conduct ongoing agricultural activities "so as not to cause harm or degradation to the existing Functional Values" of critical areas. *Id*. In effect, the county's no harm standard sets the "existing" condition of local critical areas as the baseline for measuring harm. *Id*. The county contended

before the Board that the no harm standard protects critical areas in a manner consistent with the GMA. The Board largely agreed with the county.

At the core of the Board's decision was its interpretation of the word "protect," as it appears in RCW 36.70A.172(1). The Board held that the requirement under the GMA to "protect" critical areas is met when local governments prevent new harm to critical areas. *See* 2003 Compliance Order, 2003 GMHB LEXIS 73, at *7-9. Accordingly, it held that the county protects these areas by adopting the no harm standard because it does not allow existing conditions to further degrade. *See id*.

The Tribe asserts here, as it did before the Board, that where an area is already in a degraded condition, it is not being protected unless that condition is improved or enhanced.[3] It contends that the Board's "construction of 'protect' to allow maintenance of degraded, status quo conditions nullifies the legislature's direction to 'protect the functions and values of critical areas.'" Am. Br. of Swinomish Indian Tribal Cmty. at 38.

The Board's refusal to conflate "protect" and "enhance," the Tribe asserts, "is based on a false premise—that 'protect' and 'enhance' are mutually exclusive." Am. Br. of Swinomish Indian Tribal Cmty. at 39. The Tribe argues that because the terms are not mutually exclusive, the Board cannot "exclude from the 'protect' mandate measures which both 'protect' and 'enhance.'" Am. Br. of Swinomish Indian Tribal Cmty. at 42.

[3]For purposes of simplicity, we discuss similar positions and arguments that are put forward separately by the Tribe and the WEC by referring only to the first party, the Tribe. For example, both the Tribe and the WEC challenge the no harm standard in the 2003 Ordinance, but we refer to it as the Tribe's position.

In our effort to determine if the Board erred, we have endeavored to ascertain the meaning of the word "protect." The legislature, unfortunately, has not defined "protect" within the GMA. We therefore accord the word its common meaning, and where necessary, consult a dictionary. *See Quadrant Corp.,* 154 Wn.2d at 239 (citing *Dahl-Smyth, Inc. v. City of Walla Walla,* 148 Wn.2d 835, 842-43, 64 P.3d 15 (2003)). The Tribe cites *Webster's New World Dictionary of the American Language* (College Ed. 1966) in support of its contention that "'protect'" means "'to shield from injury, danger, or loss'" and that to protect "'*can* result in [an object's] enhancement.'" Am. Br. of Swinomish Indian Tribal Cmty. at 39 (emphasis added). The Tribe, however, fails to recognize that even under the definition it offers, "can" is used to describe an *option* of enhancement, rather than a *requirement* of enhancement, when defining "protect."

That difference is significant. We say that because it illustrates that something can be protected without it being enhanced. For example, an individual charged with protecting his friend's dilapidated automobile discharges that duty despite not refurbishing it. If the car is returned in its same condition, it was protected, but not enhanced.[4]

[4]The dissent attempts to buttress its position that "protect" entails "enhance" by asserting that the automobile analogy is "unavailing." Dissent at 6. It concludes, "[s]imply returning [the automobile] in the same condition does not demonstrate how the individual protected it; rather, it shows only that the individual returned it." *Id*. The dissent, in our view, confuses the question of how an object is protected with the question of *whether* it was protected. Because this case turns upon what "protect" means, it is the latter question that is determinative. Asking how the object was protected is secondary. To answer the relevant question of whether an object has been protected: If it is returned in the same condition it was given, surely no new harm

The legislature has also recognized that "protect" has a different meaning than "enhance." In several sections of the GMA, the legislature *allows* enhancement of natural conditions under the GMA without *requiring* enhancement. For example, RCW 36.70A.172(1) requires counties to "give special consideration to . . . protection measures necessary to preserve *or* enhance anadromous fisheries." (Emphasis added.) This statute clearly gives counties a choice between preserving "or" enhancing. Furthermore, the requirement is to give "special consideration to" such measures, not necessarily to adopt them. *See* WAC 365-195-925(2) (a county must include "in the record" evidence of special consideration to comply with RCW 36.70A.172(1)). Another statute, RCW 36.70A.020(10), lists as a goal of the GMA to "enhance the state's high quality of life, including air and water quality." However, the GMA allows counties to decide how to achieve the goal of enhancing water quality without specifically requiring enhancement of a damaged fish habitat. In our judgment, water quality and fish habitat are related, but they are not the same. A duty to enhance the quality of water is not a duty to enhance fish habitat. A third example is RCW 36.70A.460. It recognizes that under chapter 77.55 RCW, fish habitat enhancement projects that meet certain criteria are entitled to a streamlined permitting process. Nothing in that chapter, however, requires a county to undertake such projects. *See* RCW 77.55.181.

As the foregoing illustrates, the legislature has not imposed a duty on local

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has befallen it and it was protected. This is true by definition.

governments to enhance critical areas, although it does permit it. Without firm instruction from the legislature to require enhancement of critical areas, we will not impose such a duty. Therefore, to the extent that the Tribe argues that the GMA places a higher burden upon the county than the duty to prevent new harm to critical areas, we disagree. The "no harm" standard, in short, protects critical areas by maintaining existing conditions.

2. Mandatory Buffers

We next consider whether, as the Tribe contends, the GMA requires the county to establish mandatory buffers along streams and rivers on the upland strip of land. Buffers are strips of land contiguous to a watercourse, usually containing indigenous shrubs and trees. They are generally not used for agricultural purposes. *See, e.g.,* Am. Br. of Swinomish Indian Tribal Cmty. at 5-6. The Tribe argued to the Board that because a provision of the GMA, RCW 36.70A.172(1), requires the county to use BAS in developing protections for critical areas and because BAS supports requiring mandatory riparian buffers, then the GMA requires the county to establish such buffers. The Board held that BAS, and by extension the GMA, does not require the county to establish mandatory riparian buffers. Again, we agree with the Board.

In reaching this determination, we began by reviewing how the GMA instructs local governments to employ BAS. The legislature has expressly delegated to counties and cities the function of developing the specific means for protecting critical areas.

See RCW 36.70A.3201. Under the GMA, counties and cities "'have broad discretion in developing . . . [development regulations] tailored to local circumstances.'" *King County*, 142 Wn.2d at 561 (alteration in original) (quoting *Diehl v. Mason County*, 94 Wn. App. 645, 651, 972 P.2d 543 (1999)). Moreover, the GMA does not require the county to follow BAS; rather, it is required to "include" BAS in its record. RCW 36.70A.172(1). Thus, the county may depart from BAS if it provides a reasoned justification for such a departure. *See Ferry County v. Concerned Friends*, 155 Wn.2d 824, 837-38, 123 P.3d 102 (2005); WAC 365-195-915(1)(c)(i)-(iii). Here, the county justified its decision to not require mandatory riparian buffers on the basis that doing so would "impos[e] requirements to restore habitat functions and values that no longer exist." Resp't Skagit County's Resp. Br. at 44. This was based on a recognition of the fact that the vegetation that had made up the riparian buffers along streams and rivers was cleared long before there was a legal impediment to doing so.

If the omission of mandatory buffers from the county's critical areas ordinance is a departure from BAS, it is a justified departure of the kind that is tolerated by the GMA. As we have noted above, the GMA's requirement to protect does not impose a corresponding requirement to enhance. That holding guides us here. A requirement to develop buffers would impose an obligation on farmers to replant areas that were lawfully cleared in the past, which is the equivalent of enhancement. Without a duty to enhance being imposed by the GMA, however, we cannot require farmers within Skagit

County to replant what was long ago plucked up. The county need not impose a requirement that farmers establish riparian buffers.

C. The 2005 Board Decision

As we observed above, the Board did not fully approve the 2003 Ordinance. It withheld its approval of two parts of the ordinance: "the enforcement of watercourse protection measures and the need for more specificity in its monitoring program and adaptive management process." 2003 Compliance Order, 2003 GMHB LEXIS 73, at *3. Furthermore, the Board ordered the county to address these issues in accord with RCW 36.70A.300(1). Consequently, as we have already noted, the county revised its critical areas ordinance in 2004 (Ordinance 020040011) (hereinafter 2004 Ordinance). The Tribe again challenged the county's compliance with the GMA. After reviewing the county's effort, the Board held in early 2005 that the watercourse protection measures were now compliant with the GMA. 2005 Compliance Order, 2005 GMHB LEXIS 2. It withheld approval, however, of the monitoring program and adaptive management sections of the 2004 Ordinance. The county appealed that decision, arguing that the Board followed improper procedure in reaching its decision and that, in any case, the Board should have approved the revised ordinance.

1. Alleged Procedural Errors

The county argues, first, that the Board committed procedural error by consulting an outside expert and consulting factual materials that were not a part of the record that

was submitted to the Board. Specifically, it asserts that the Board erred in using a technical adviser, Dr. Oscar Soule,[5] without giving the parties an opportunity to rebut or object to the technical advice provided by Dr. Soule. This argument overlooks the fact that the Board is expressly authorized to consult experts "[i]f it determines that advice from scientific or other experts is necessary or will be of substantial assistance in reaching its decision." RCW 36.70A.172(2).[6] While the GMA provides no specific procedure for the utilization of an expert under RCW 36.70A.172(2), the practices and procedures of the growth management hearings board are governed by the APA, chapter 34.05 RCW. RCW 36.70A.270(7). A provision in the APA permits the Board to engage in ex parte communications with persons "who have not participated in the proceeding in any manner, and who are not engaged in any investigative or

[5]Dr. Soule is a retired professor of environmental studies at The Evergreen State College.

[6]The concurrence/dissent cites various statutes and a regulation in support of its conclusion that "[i]mproper procedures [i.e., reliance on Dr. Soule] are also grounds for reversal." Concurrence/dissent at 9 (citing RCW 36.70A.290(4), .270(7); RCW 34.05.449(2), .452(3); WAC 242-02-540). None of the cited statutes or the regulation provides justification for reversing the Board's decision. Furthermore, they do not override the clear authorization for ex parte consultation with experts that RCW 36.70A.172(2) and 34.05.455(1)(c) provide. For example, RCW 36.70A.270(7) directs the Board to comply with the APA and WAC provisions for using evidence in its decisions. Those provisions, including the two cited by Justice J.M. Johnson, WAC 242-02-540 and RCW 36.70A.290(4), provide the Board with the discretion to supplement the record with additional evidence. Additionally, RCW 34.05.449(2) provides for a response to introduced evidence only "[t]o the extent necessary" as determined by the Board. Finally, RCW 34.05.452(3) merely provides that "[a]ll testimony of parties and witnesses . . . be made under oath." Thus, if there is any tension between these provisions and the Board's use of Dr. Soule, and it appears that there is not, it does not justify reversing the Board's decision.

prosecutorial functions in the same or a factually related case." RCW 34.05.455(1)(c). Accordingly, we conclude that the Board did not err in consulting Dr. Soule.

The county claims, additionally, that the Board erred in using nonrecord materials to define the concept of "adaptive management."[7] The county argues that the Board is prohibited from consulting nonrecord materials because "'[f]indings of fact shall be based exclusively on the *evidence* of record in the adjudicative proceeding and on matters officially noticed in that proceeding.'" Skagit County's Opening Br. at 38 (emphasis added) (quoting RCW 34.05.461(4)). In our view, the Board did not err in considering these nonrecord materials because the materials were not evidence. Rather, the Board used the publications to assist in interpreting the term "adaptive management" as used in WAC 365-195-920(2). *See* 2005 Compliance Order, 2005 GMHB LEXIS 2, at *21-22. Such use of scholarly materials does not, in our view, transform these materials into "evidence." In sum, the Board's use of the nonrecord

[7]The amount of nonrecord materials is very slight in comparison to the entirety of the administrative record. The materials in question consisted of four publications:

"(1) Hymanson, Kingma-Rymek, Fishbain, Zedler and Hansch, California Coastal Commission: 'Procedure Guidance for Evaluating Wetland Mitigation Projects in California's Coastal Zone';

"(2) 'Use of Monitoring and Adaptive Management to Promote Regeneration in the Allegheny National Forest,' Lois DeMarco, USFS [United States Forest Service] National Silvicultural Workshop, Kalispell, Montana;

"(3) Salafsky, Margoluis and Redford, "Adaptive Management: A Tool for Conservation Practitioners," World Wildlife Fund, Inc. (2001); and

"(4) The British Columbia Forest Practices Code." Skagit County's Opening Br. at 17. A reference to any of these four documents occurs only on three pages of the Board's 2005 order.

materials to aid it in defining the term "adaptive management" did not violate the APA or the GMA.

2. Alleged Substantive Errors

We next address the county's substantive challenges to the Board's 2005 decision. The Board determined that the county's revised ordinance failed to bring its monitoring and adaptive management processes into compliance with the GMA. It concluded that the monitoring process provided for in the 2004 Ordinance lacked the necessary benchmarks for comparing the data it gathered. 2005 Compliance Order, 2005 GMHB LEXIS 2, at *25-26. The Board concluded, additionally, that even if the monitoring process was adequate in detecting degradation of critical areas, the ordinance did not have an effective adaptive management process that was capable of responding to the detected harm. *Id*. at *32-33.

The monitoring program set forth in the 2004 Ordinance consists of two components: a water quality monitoring program and a salmon habitat monitoring program. The county contends that both programs "describe in great detail the schedule for monitoring, methods for selecting sites, monitoring parameters and protocols (how and what will be measured), quality control procedures, and data assessment procedures." Skagit County's Opening Br. at 13. This contention overlooks the fact that the Board took issue with how the county proposed to use the data it collected. More specifically, the Board held that the county could not sufficiently

analyze the data because its monitoring program lacked appropriate benchmarks to compare data as it was collected. *See* 2005 Compliance Order, 2005 GMHB LEXIS 2, at *25-26.

We agree with the Board that the county has not established appropriate benchmarks. In fact, the county is unable to produce a description of any such benchmarks, despite its statement that "the County's program *does* include sufficient benchmarks." Skagit County's Opening Br. at 50. That same brief contains an assertion by the county that it *cannot* adopt benchmarks because salmon habitat monitoring program "science has not established[,] and the state has not adopted[,] specific numbers or quantities" to use as benchmarks. *Id*. at 54. Any deficiencies in the State's monitoring process do not, however, excuse the deficiencies of the county's monitoring process. A benchmark is needed to compare data as it is recorded. Data that cannot be analyzed, via comparison to the benchmark, is essentially meaningless because a harm cannot be detected unless there is a benchmark by which to define a harm in the first place.

We are also unpersuaded by the county's argument that in the absence of an adequate benchmark, it does the "next best thing" by proposing to monitor current conditions in an effort to develop a benchmark in the future. Skagit County's Opening Br. at 56. No indication is given as to when this process will be complete. Instead, the county merely notes that it will take at least three years to complete the initial

monitoring of current conditions before a benchmark is established. *Id*. At best, then, the county can provide full compliance with the GMA three years after it went before the Board and argued that it was compliant. We find no reason to reverse the Board's holding that such an assurance by the county is insufficient.[8]

The issue of the benchmarks in the monitoring program dovetails into what the role of adaptive management is in the protection of critical areas. When a monitoring system detects newly discovered risks to critical areas from land use or development, adaptive management is a process used to confront the scientific uncertainty surrounding them. WAC 365-195-920. As part of the GMA's regulations describe it, critical areas regulations are "treated as experiments that are purposefully monitored and evaluated to determine whether they are effective and, if not, how they should be improved to increase their effectiveness." WAC 365-195-920(2). An effective adaptive management program thus "relies on scientific methods to evaluate how well regulatory

[8]The concurrence/dissent asserts that we should reverse the Board's 2005 decision because the Board failed to give the proper "deference" to the county's "assurance[]" of future compliance under the "clearly erroneous" standard. Concurrence/dissent at 7. Without question, the "clearly erroneous" standard requires that the Board give deference to the county, but all standards of review require as much in the context of administrative action. The relevant question is the degree of deference to be granted under the "clearly erroneous" standard. The amount is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the county's actions a "critical review" and is a "more intense standard of review" than the arbitrary and capricious standard. *See, e.g.*, *Cougar Mountain Assocs. v. King County*, 111 Wn.2d 742, 749, 765 P.2d 264 (1988). And even the more deferential "arbitrary and capricious" standard must not be used as a "rubber stamp" of administrative actions. *See Ocean Advocates v. United States Army Corps of Eng'rs*, 361 F.3d 1108, 1118, 1119 (9th Cir. 2004).

and nonregulatory actions achieve their objectives." *Id*. In short, under GMA regulations, local governments must either be certain that their critical areas regulations will prevent harm or be prepared to recognize and respond effectively to any unforeseen harm that arises. In this respect, adaptive management is the second part of the process initiated by adequate monitoring.

In its 2005 Compliance Order, the Board did not approve the county's adaptive management program.[9] It noted that "clear goals, objectives, performance standards, and a well-defined monitoring program" are essential to a successful adaptive management program and that the county did not demonstrate them. AR at 1312-13. Because we agree with the Board that the monitoring system set forth in the 2005 Ordinance by the county is fatally flawed, we need not reach the question of whether its adaptive management system complies with the GMA. Without a compliant monitoring system, the adaptive management program cannot be compliant as the county cannot adequately adapt its management of critical areas if it is unable to adequately detect changes to them.

V. CONCLUSION

[9]The Board specifically held, "The question is what will work to protect fish habitat in the same environment where ongoing agriculture is well-functioning and being conserved. Adaptive management is a creative tool to explore possible solutions, but it requires rigor, commitment, and prompt change in response to indications of problems in order to ensure that the county's less-than-precautionary protections of fish habitat in ongoing agricultural lands comply with RCW 36.70A.040, .060, and .172. The monitoring and adaptive management system . . . still does not establish an overall protection strategy for fish and wildlife habitat in ongoing agricultural lands that complies with these provisions of the GMA." AR at 1304-05.

In sum, we affirm the Board's 2003 and 2005 Compliance Orders.

AUTHOR:

Chief Justice Gerry L. Alexander

WE CONCUR:

Justice Tom Chambers

Justice Charles W. Johnson

Justice Barbara A. Madsen

Justice Mary E. Fairhurst

Justice Bobbe J. Bridge