

**SKAGIT COUNTY HEARING EXAMINER  
STATE OF WASHINGTON**

<p>In the Matter of Appeal of: BEVERLY and MARVIN MACKEN, Appellants, v. SKAGIT COUNTY, Respondent,</p>	<p>No. PL08-0610  DECISION ON APPEAL OF NOTICE AND ORDER TO ABATE A PUBLIC NUISANCE</p>
---	---

This matter came regularly before the Hearing Examiner, Pro Tem, for a public hearing on November 19, 2008. The Appellants represented by Pat Larson, Consultant, of La Grande, Oregon and the Skagit County Planning and Development Services (hereinafter may be referred to as “County”) is represented by Ryan Walters, Deputy Prosecuting Attorney.

**INTRODUCTION**

This is an appeal of a Notice And Order To Abate A Public Nuisance, issued by the County on September 30, 2008 to the Appellants. A timely appeal was filed. Extensive testimony has been submitted by or on behalf of the parties and argument submitted in writing at the open record appeal hearing on November 19, 2008. The Appellants declined to testify at the open record appeal hearing. The record was left open after the hearing for supplemental submittal of documents and argument until December 1, 2008. Numerous exhibits, documents and digital media have been introduced into the record.

Based on the evidence presented and argument of counsel, the Hearing Examiner makes the following:

## **FINDINGS OF FACT**

- 1) This matter is brought before the Hearing Examiner by Notice of Appeal filed by Beverly Macken and Marvin Macken (hereinafter may be referred to as Macken) in response to a Notice And Order To Abate A Public Nuisance (hereinafter referred to as Notice), issued by the County on September 30, 2008.
- 2) This is an open record appeal and both parties submitted testimony and documents which have been admitted as exhibits.
- 3) The County's Notice alleges violation of Skagit County Code 14.24.120(4)(a)(i) and ordered Appellant landowners to reconfigure fencing on their property to completely fence cattle out of Colony Creek, or submit an agreement with a contract to do the work when weather permits.
- 4) In defense of the Notice, Appellants raise factual and legal issues, which are summarized as follows:
  - a. The designed and installed watering gaps on Colony Creek is a best management practice and allowed under the County Code;
  - b. RCW 90.22.040 grants livestock the right to drink directly from the stream;
  - c. The financial grants offered to Mackens to provide water to their cattle are unwarranted;
  - d. The County has disregarded the NRCS technical guides and rejected best management practices developed by qualified experts;
  - e. The County has failed to explain why the watering gaps do not meet the best management practices definition;

- f. The County's decision has been unfair and arbitrary;
  - g. There is a conflict between what the County requires and what is required or allowed by the Washington Department of Ecology;
  - h. The delay between a November 30, 2005 Notice of Violation and the Notice that is now appealed exceeds all reasonable time limitations and is unenforceable;
  - i. There is no evidence that watering gaps cause pollution;
  - j. Watering gaps do provide time limited access to water and thus comply with the County Code and NRCS standards;
  - k. The County definition of qualified expert is in error;
  - l. SCC 14.38.020 allows best management practices and is not being followed by the County;
  - m. The County has failed to provide due process to Appellants.
- 5) The subject property is located at the intersection of Colony Road and Colony Mountain Drive in Bow and is owned by Mackens, who have owned the property since about 1907. The Mackens maintain 10 to 15 head of cattle on their property.
- 6) The western edge of the Mackens' property is bounded by Colony Creek. Colony Creek eventually feeds into Samish Bay, which has a history of shellfish bed closures due to high coliform levels. Colony Creek is on the Washington DOE 303(d) list of impaired waterways.
- 7) The entire Samish Watershed is the subject of a TMDL (Total Maximum Daily Load) water quality improvement project targeting fecal coliform contamination. *Staff Finding*
- 7.

- 8) In the 1980s the Mackens constructed a fence along Colony Creek to protect the stream, but provided an 80 foot watering gap (also called “water gap”) to allow the cattle to drink from the stream.
- 9) The County received a complaint about the Appellants’ cattle having free access to Colony Creek in 2004. *Exhibit 1*. The County and the Skagit Conservation District worked with Appellants to correct the alleged violations throughout 2005 and 2006 and commissioned a study of Colony Creek in 2007 to evaluate options.
- 10) After enforcement efforts, the Mackens redesigned the watering gap to allow a more limited cattle access to Colony Creek. This work was completed in May 2008.
- 11) Colony Creek is on the Washington DOE list of impaired waterways for fecal coliform, dissolved oxygen and pH parameters. The County believes that water quality is not a basis or determining factor for issuance of the Notice. *Exhibit 12*.
- 12) The Washington DOE issued a Notice Of Correction to the Mackens on February 22, 2008, based on allegations of violation of State law related to cattle having direct access to Colony Creek. *Exhibit 18*.
- 13) The Skagit Conservation District has offered to Mackens a number of options for grants that would allow alternatives to the water gap method of watering cattle, including installing a well with a solar-powered pump. The cost-share grants were acceptable to the Mackens, but they claimed they could not afford to pay their share. A financial donation from Taylor Shellfish was offered to pay half of the Mackens’ cost-share, but they also rejected that offer. At least one option extended to Mackens by the Washington DOE would have provided an alternative at no cost to them. *Exhibit 37*. This offer was rejected

by Mackens.

- 14) Skagit County has adopted SCC 14.24.120(4)(a)(i) which references conservation practice standards written by the Natural Resources Conservation Services (NRCS), a national governmental organization under the Department of Agriculture.
- 15) Best management practices (BMP) in Skagit County are defined in SCC 14.04.020 and refer to the NRCS conservation practice standards.
- 16) Skagit Conservation District's Livestock and Small Farm Planning and Technical Program Coordinator, John Schuh, is a NRCS certified planner and testified that the applicable best management practices in this situation is NRCS conservation practice standard 575, Animal Trails and Walkways. His testimony was that water gaps are not a BPM under the NRCS standard.
- 17) Appellants' experts testified that NRCS standards are not best management practices and the standards are not regulatory. *Appellants' Exhibit 3*. Dr. Larry Larson testified that the standards are "a template to qualify for specific cost-sharing program underneath the federal program." Pat Larson argues that NRCS uses the term 'conservation practices' because the BMP term is ambiguous and does not reflect accurately the programs they administer.
- 18) Skagit Conservation District and DOE have offered alternative methods of providing water to Appellants' cattle that would allow the water gaps to be eliminated. The alternative methods of providing water to the Appellants' cattle are feasible and the DOE proposal was free to the Appellants.
- 19) Any conclusion herein which may be deemed a finding is hereby adopted as such.

## CONCLUSIONS OF LAW

The Hearing Examiner, having duly considered the matter and all testimony and evidence presented at the public hearing and submitted while the record was open, makes the following conclusions:

- 1) The Hearing Examiner has jurisdiction over the parties and the subject matter of this appeal pursuant to Skagit County Code 14.06.160.
- 2) The Appellants have the burden of establishing by a preponderance of the evidence that the decision (the Notice) is clearly erroneous. *Hearing Examiner rule 3.17.*
- 3) In determining whether the appeal should be granted and whether the County's decision is clearly erroneous, the Hearing Examiner looks at whether Appellants have violated SCC 14.24.120(4)(a)(i) and the applicable NRCS conservation standards.
  - a. SCC 14.24.120(4)(a)(i) states that "Access to a watercourse for livestock watering and/or stream crossings shall be limited to only the amount of time necessary for watering and/or crossing a watercourse. Livestock watering facilities or access shall be constructed consistent with applicable NRCS conservation practice standards, . . ."
  - b. The applicable standard is number 575, (also identified as "WA 575-1") Animal Trails And Walkways, which standard states, in part: Water gaps can be used to provide or improve controlled access to water. . . . Water gaps will not be recommended where the water body is or could be impaired by livestock impacts (fecal coliforms, pathogens or sediments) . . . Water gaps will only be considered after all feasible alternative water sources have been considered and found to not be feasible."

- 4) The enforcement actions of the Washington DOE is a separate action and not directly applicable to the present appeal. The County's enforcement action that is now on appeal is not a water quality issue.
- 5) Appellants' reliance on RCW 90.22.040 is misplaced. The statute does not supersede or invalidate the actions taken by the County.
- 6) Appellants have not demonstrated that the alternatives offered to the water gaps are not feasible.
- 7) The water gaps on Appellants' property do not meet the applicable NRCS standards.
- 8) The Appellants have not established by a preponderance of the evidence that the decision (the Notice) is clearly erroneous.
- 9) The 2005 Notice of Violation is not the determination that is before the Hearing Examiner and the Appellants' argument that there is only one parcel identified in the notice does not void the actual decision that is on appeal.

Based on the foregoing findings and conclusions, the Hearing Examiner now makes the following:

### **DECISION**

The appeal is **DENIED**.

Signed January 7, 2008

---

C. THOMAS MOSER,  
Skagit County Hearing Examiner, Pro Tem