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BEFORE THE WESTERN WASHINGTON GROWTH  
MANAGEMENT HEARINGS BOARD

CITIZENS PROTECTING CRITICAL AREAS, FRED )  
HILL MATERIALS, INC., AND OLYMPIC )  
STEWARDSHIP FOUNDATION, et al., )  
  
Petitioners, )  
  
v. )  
  
JEFFERSON COUNTY, )  
  
Respondent. )

No. 08-2-0029c

**PETITIONER OLYMPIC  
STEWARDSHIP FOUNDATION'S  
RESPONSE TO JEFFERSON  
COUNTY'S STATEMENT OF  
ACTIONS TAKEN TO COMPLY**

Olympic Stewardship Foundation Petitioners (OSF) respectfully submit this response to Jefferson County's Statement of Actions Taken to Comply (SATC) without waiving any of the arguments raised in the prior proceedings which are subject to the petition for review pending in Thurston County Superior Court, No. 08-2-02852-3. In its November 19, 2008, Final Decision and Order (FDO), this Board concluded that Jefferson County's critical areas ordinance failed to comply with the GMA in three regards:

1. The critical areas ordinance imposed regulations on shorelines that are within the exclusive jurisdiction of the Shoreline Management Act (SMA). These regulations constituted segment updates to the County's shoreline master program and must be reviewed and approved by the Department of Ecology prior to adoption. (Conclusion of Law H)

1 2. The critical areas ordinance’s channel migration zone regulations (CMZ)  
2 were not supported by Best Available Science (BAS). (Conclusion of Law  
L)

3 3. The critical areas ordinance’s blanket restriction on the removal of any  
4 vegetation in a CMZ was not supported by BAS. (Conclusion of Law M)

5 As explained below, Jefferson County’s remand revisions remain in noncompliance with the GMA.

6 **ARGUMENT**

7 **I**

8 **JEFFERSON COUNTY’S REMAND ORDINANCE**  
9 **IMPROPERLY REGULATES SHORELINES AS**  
10 **CRITICAL AREAS UNDER THE GMA**

11 In its Final Decision and Order, this Board concluded that “[t]hose portions of the CMZ  
12 which are located within the 200-foot shoreline jurisdiction are regulated by the SMA.” FDO at  
13 49 (Conclusion of Law H).<sup>1</sup> Jefferson County recognized this limitation in the preamble to the  
14 remand ordinance. (Ord. 06-0511-09 at 1 (“Critical areas in the jurisdiction of the SMA are  
15 governed only by the SMA.” )), and stated that it was the County’s intent to only regulate those  
16 areas of CMZs that fall outside the jurisdiction of the SMA. Ord. 06-0511-09 at 1-2 (citing ESHB  
17 1933, Laws of 2003, ch. 321 § 1; *Futurewise*, 164 Wn.2d 242). But the County’s intent did not  
18 make it into the language of the regulations. According to the plain language of the remand  
19 ordinance, the CMZ regulations apply to the “high risk” areas of a CMZ which the County defined  
20 as including “the footprint of the active stream channel” and all areas where the channel is “likely”  
21 to migrate within 50 years. Ord. 06-0511-09 (JCC 18.10.030). The remand ordinance imposes

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23 <sup>1</sup> This conclusion was supported by statute (RCW 36.70A.480) and overwhelming case law  
24 directly on point. See *Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242  
25 (2008); *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 699 (2007); *Biggers v. City of*  
*Bainbridge Island*, 124 Wn. App. 858, 866-67 (2004); *Evergreen Islands v. City of Anacortes*,  
WWGMHB No. 05-2-0016 at 31 (Final Decision and Order, Dec. 27, 2005).

1 critical area restrictions on these areas *without exclusion*. Ord. 06-0511-09 (JCC 18.22.160(2)(d),  
2 (3); JCC 18.22.170(4)(d)).

3 The County's continuing attempt to regulate shoreline areas under the Growth Management  
4 Act (GMA) violates RCW 36.70A.480, which mandates that critical areas within shorelines be  
5 regulated under the SMA and that regulations implementing the GMA comply and be harmonized  
6 with the requirements of the SMA. See *Preserve Our Islands v. Shoreline Hearings Bd.*, 133 Wn.  
7 App. 503, 523 (2006); *Biggers*, 124 Wn. App. at 866-67. While this Board lacks authority to  
8 review the substance of the CMZ regulations *as a segment update to its shoreline master program*  
9 until the Department of Ecology reviews the regulations,<sup>2</sup> this Board can and should rule that the  
10 County's continuing regulation of shoreline areas violates RCW 36.70A.480 and fails to comply  
11 with the GMA.

## 12 II

### 13 JEFFERSON COUNTY'S REMAND REVISIONS TO 14 THE CMZ REGULATIONS ARE NOT SUPPORTED 15 BY BEST AVAILABLE SCIENCE

16 On remand, Jefferson County attempted to bring its CMZ regulations into compliance with  
17 the GMA in three ways. First, it changed its definition of CMZs. SATC at 4-5; Ord. 06-0511-09  
18 (JCC 18.10.030). Second, it changed the critical area protection standards to apply only to "high  
19 risk" CMZ areas. SATC at 5; Ord. 06-0511-09 (JCC 18.22.160(2)(d)). And third, it limited its  
20 vegetation retention standards to apply only to "high risk" CMZs. SATC at 5-6; Ord. 06-0511-09  
21 (JCC 18.22.170(4)(d)). As explained below, these minimal, superficial changes do not bring the  
22 County's CMZ regulations into compliance.

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25 <sup>2</sup> This Board concluded that the County's critical area regulations of its shorelines are in fact  
segment updates to its shoreline master program which must be submitted to the Department of  
Ecology for review and approval prior to adoption. FDO at 49 (Conclusion of Law H).

1 **A. The County's Changes to the CMZ Regulation**  
2 **Are Not Supported by BAS**

3 In its Final Decision and Order, this Board concluded in part that the County's CMZ  
4 regulations failed to comply with the GMA because it adopted a definition of a "high risk" CMZ  
5 that was not supported by BAS. FDO at 49 (Conclusion of Law L). At the hearing on the merits,  
6 the County explained that the CMZ studies in the BAS record were confusing because they used  
7 different methodologies for delineating risk. TR 113-17 (stating that the Perkins Geosciences study  
8 designated high-risk CMZs based on a 50-year timeframe, whereas the Bureau of Reclamation  
9 report for the same rivers used a 100-year timeframe to delineate CMZs). When asked by the  
10 Board what methodology was used in the BAS studies to delineate risk, the County planner could  
11 not answer, stating that he would have to go back and review the BAS again. TR 117.

12 The County failed to answer the Board's question on remand, let alone demonstrate that it  
13 undertook the required process of analyzing how the differences in the CMZ studies affected the  
14 various CMZ delineations. *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824,  
15 835 (2005) (Local government must provide a "scientific foundation, evidence of analysis, [and]  
16 a reasoned process to justify [critical area regulations]."). Instead, the County repeated the same  
17 error that led to the first finding of noncompliance—ignoring the different methodologies and  
18 conclusions of the various CMZ studies in an attempt to adopt an overly-simplistic and uniform  
19 standard for designating the "high risk" CMZ area on all rivers. As a result, the County's remand  
20 ordinance fails to satisfy the GMA's BAS requirement and remains noncompliant.

21 The County's adoption of a uniform standard for delineating the "high risk" CMZ areas is  
22 not supported by the BAS. The Hoh River BAS (Appendix 7 to OSF's Prehearing Brief) was  
23 researched and conducted before Department of Ecology drafted its *Framework for Delineating*  
24 *CMZ's* (Appendix 4 to OSF's Prehearing Brief), and used a different methodology to delineate  
25 CMZs. App. 7 at 54. As a result, the Hoh River BAS concluded that its high, medium, and low

1 risk delineations could only “*roughly correspond* to channel migration being likely to occur in a  
2 time frame of less than 50, 50-100 and greater than 100 years, respectively.” App. 7 at 53  
3 (emphasis added). This is because the Hoh River study was designed to create a worst case  
4 scenario in order to assess the unconstrained risks to Hoh tribe infrastructure.

5 For example, the Hoh study deliberately delineated CMZs “*with no consideration of roads,*  
6 *buildings and bank armoring,*” despite the fact that approximately 21% of the Hoh River’s banks  
7 contained rock armoring in 1999. App. 7 at I, 52 (explaining that the Hoh tribe wanted to learn the  
8 potential reach of CMZs if the river was left unconfined) (emphasis added). And as a result, “[n]o  
9 Disconnected Migration Areas were subtracted from the CMZs based on the presence of roads,  
10 housing or bank armoring.”<sup>3</sup> App. 7 at 54. According to the Hoh River BAS, the CMZ  
11 delineations overstate the risk of channel migration.

12 It is well-established that critical area protections that are too large are not necessary to  
13 protect the actual functions and values of critical areas, and constitute enhancement or restoration  
14 regulations which exceed the GMA’s requirements. *Swinomish Indian Tribal Cmty. v. W. Wash.*  
15 *Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 421 (2007); *Ferry County*, 155 Wn.2d at 835;  
16 *Honesty in Envtl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings*  
17 *Bd.*, 96 Wn. App. 522, 533-34 (1999). The County failed to comply with the GMA’s BAS  
18 requirement by including oversized risk assessments and disconnected areas as part of its

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21 <sup>3</sup> This contradicts the County’s legislative definition of CMZs, which excludes disconnected areas:

22 [CMZ] does not include Disconnected Migration Areas, which are areas that have  
23 been disconnected from the river by legally existing artificial structure(s) that  
24 restrain channel migration (such as levees and transportation facilities build [sic]  
above or constructed to remain intact through the 100-year flood elevation), that are  
no longer available for channel migration by the river.

25 Ord. 06-0511-09 (JCC 18.10.030); *see also* Ord. 06-0511-09 (JCC 18.22.160(2)(d))  
 (“Disconnected Migration Areas . . . shall be excluded from review.”).

1 delineation of the “high risk” CMZ for the Hoh River. *See HEAL*, 96 Wn. App. at 533-34 (BAS  
2 requirements permit only those conditions that are (1) necessary to mitigate a specific adverse  
3 impact of a proposal, and (2) roughly proportional to the impact they are designed to mitigate). The  
4 County’s remand revisions are not supported by the BAS and remain noncompliant.

5 **B. The County’s 100 Percent Vegetation Retention**  
6 **Requirement Is Not Supported by BAS**

7 In its FDO, this Board concluded that the County’s 100 percent vegetation retention  
8 standard set forth in JCC 18.22.170(4) was not supported by BAS:

9 [T]he cited JCC provision appears to limit the removal of vegetation on the entirety  
10 of property containing a designated [geologically hazardous area] or its buffer. For  
11 a CMZ this would be an area of varying width and risk assessment. Although it is  
hard to ascertain from the Record presented to the Board, this area may range in  
size from a hundred feet to thousands of feet.

12 Of concern to the Board is Jefferson County’s apparent requirement to retain  
13 vegetation regardless of the associated probability of risk which is not equal within  
the entire mapped CMZ, let alone on the entirety of properties only a portion of  
14 which are within a CMZ. . . .

15 . . .

16 A blanket restriction on the removal of vegetation that is not linked to the functions  
and values it is intended to protect is not supported by BAS.

17 FDO at 38-39.

18 [The BAS] notes the role served by vegetation but finds that the retention of  
19 vegetation is not equal throughout a CMZ. Therefore, a blanket restriction on the  
removal of vegetation is not supported by BAS and violates the GMA.

20 FDO at 50 (Conclusion of law N).

21 On remand, the County amended its critical area protection standards to include a 100  
22 percent vegetation retention requirement on all private property that contains a mapped “high risk”  
23 CMZ area. SATC at 5-6; Ord. 06-0511-09 (JCC 18.22.170(1), (4)(d) (“Within a high risk CMZ,  
24 vegetation removal shall not be allowed.”)). The County chose not to revise JCC 18.22.170(1),  
25 which subjects entire lots to the vegetation retention standards where only a portion of the parcel

1 contains a "high risk" CMZ area or its buffer. SATC at 5-6. The remand revision still does not  
2 comply with the GMA's BAS requirement.

3 **1. There Is No Support in the BAS Record for a Uniform**  
4 **100 Percent Natural Vegetation Retention Standard**  
5 **Throughout All High Risk CMZ Areas**

6 At the hearing on the merits, the County acknowledged that the protection standards in its  
7 CMZ regulations imposed "a blanket prohibition on development . . . to ensure that the stream has  
8 a protective buffer in the future even if the stream were to move away from its present location."  
9 TR 49-50. The County's legislative record does not indicate how the County arrived at its blanket  
10 "no development" standard. In fact, the County has never explained the basis for this requirement,  
11 let alone justified its decision by citation to the BAS as required by *Ferry County*, 155 Wn.2d at  
12 835.<sup>4</sup> See County Pre-Hearing Brief at 12-16; SATC at 5-6. Nor has the County ever identified  
13 the number of parcels affected by the "blanket prohibition on development."<sup>5</sup>

14 The reason the County has never discussed the BAS is because the science establishes that  
15 the 100 percent vegetation retention standard forces land owners to dedicate their private property  
16 to creating new forest cover, which is one of the primary conditions necessary for *increased*  
17 channel migration. The study prepared by Perkins Geosciences, *Lower Hoh River Channel*

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18 <sup>4</sup> Due to the County's lack of argument on this issue, the Board had to take it upon itself to search  
19 the record to find *any* support for the County's vegetation retention standard. See FDO at 37-38.  
20 The Board was only able to find two studies addressing the role of riparian vegetation in CMZs.  
21 See FDO at 38 (citing App. 4 at 31-32 and App. 7 at Chapters 4 and 5). Neither of the studies  
22 support the County's adoption of a blanket 100 percent vegetation retention standard.

23 <sup>5</sup> To bridge this gap, OSF prepared and submitted three overlay maps for the Duckabush,  
24 Dosewallips, and Big and Little Quilcene Rivers to show the large number of lots affected by the  
25 County's CMZ regulations. See Exhibits 1-3. In the Duckabush River valley, approximately 145  
rural residential parcels are either wholly or partially within the CMZ. In the Dosewallips River  
valley, approximately 175 rural residential, 4 rural village center parcels, and 6 LAMIRD parcels  
are either wholly or partially within the CMZ. In the Big and Little Quilcene River valleys,  
approximately 317 rural residential and 9 rural village center parcels are either wholly or partially  
within the CMZ.

1 *Migration Study*, discusses this issue in detail. The study concludes that, while riparian vegetation  
2 may provide some local benefits (such as protection of the immediate adjacent bank (App. 7 at  
3 38)), log jams caused by large woody debris accelerate erosion, avulsion, and channel migration.  
4 App 7 at 17-18. The study made the following conclusions regarding the role that large woody  
5 debris plays in causing channel migration:

- 6 • Log jams initiate bends in straight channel segments;
- 7 • Log jams increase the erosion rate by blocking the channel and  
8 causing it to shift laterally;
- 9 • Log jams were associated with 4 of the 9 major meander bends and  
10 caused some of the highest short term erosion rates;
- 11 • Meander log jams cause side channels because they force water to  
12 flow in a new direction;
- 13 • Small and large log jams were associated with a 2,000-foot wide  
14 unstable area resulting in numerous side channels and channel  
15 migration over a 30-year period;
- 16 • Log jams generally cause the river to shift a distance of 1-3 channel  
17 widths;
- 18 • The lower rate of avulsion since 1964 may be due to reduction in  
19 LWD log jams.

20 App. 7 at 38. The County's 100 percent vegetation retention standard will have the effect of  
21 *increasing* the rate and size of channel migration along Jefferson County's rivers and is not  
22 supported by BAS.

23 **2. Subjecting Entire Lots Containing a CMZ or  
24 Its Buffer to 100 Percent Vegetation Retention  
25 Requirement Is Not Supported by BAS**

26 In its FDO, the Board stated that one of its primary concerns was with the provision  
27 applying the 100 percent vegetation retention requirement to an entire lot, even if only a portion  
28 of the property is within a CMZ or its buffer. FDO at 38-39. The County retained the provision  
29 unchanged, without addressing the Board's concern. SATC at 5-6; JCC 18.22.170(1). The  
30 County's CMZ vegetation retention regulation remains noncomplaint.



1           **3.     The County Failed To Justify Its Decision To**  
2           **Eliminate All Development Rights Based on**  
3           **Risks Associated with Public Works Projects**

4           In its FDO, the Board concluded that the County's 100 percent vegetation retention  
5 standards may be justified only when the County can demonstrate a link to the functions and values  
6 of a critical area. FDO at 39. The County has failed to demonstrate this link. The County's CMZ  
7 regulations purport only to regulate "[a]reas subject to the natural movement of stream channel  
8 meanders" (JCC 18.22.160(2)(d)), but the BAS establishes that the risk delineation for some  
9 segments of the mapped CMZ areas was based on effects of County public works projects. These  
10 areas are not critical areas and have no functions and values subject to regulation under the GMA.<sup>6</sup>  
11 RCW 36.70A.030; RCW 36.70A.172. For example, one stretch of the Little Quilcene River was  
12 delineated "high risk" because of the projected impacts of a public levee project. App. 6 at 10 n.1.  
13 The BAS also stated that some of the mapped "high risk" areas should be reclassified as  
14 disconnected areas when other public works projects are completed. App. 6 at 10 n.2, 12 n.2 (Two  
15 stretches of the Big Quilcene (reaches A and B) that are currently delineated "high risk" CMZs  
16 should be reclassified as disconnected areas when the Linger Longer Reach levee project is  
17 completed). By choosing a "no development" standard for all private property within "high risk"  
18 CMZs *regardless of whether the risk is due to a public works project or natural stream meanders*,

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22 <sup>6</sup> In these circumstances, the County's "no development" vegetation retention requirement is not  
23 a regulation designed to protect the functions and values of a critical area. Instead, it is a regulation  
24 that condemns private property for public use. *See Dickgieser v. State*, 153 Wn.2d 530, 534-35  
25 (2005) (Where government action results in a taking or damage of private property without  
formally exercising eminent domain, the property owner may bring a claim for inverse  
condemnation.); *Fitzpatrick v. Okanogan County*, 143 Wn. App. 288, 302-03 (2008) (Evidence that  
the government's construction of a dike that caused a river channel to migrate and damage private  
property supported claim for inverse condemnation.).

1 **CONCLUSION**

2 For the foregoing reasons Petitioner OSF respectfully requests that the Board find that  
3 Jefferson County's remand ordinance remains noncompliant with the GMA.

4 DATED: June 17, 2009.

5 Respectfully submitted,

6 BRIAN T. HODGES

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**EXHIBIT 1**

Petitioner OSF's Resp. To County's  
Statement of Actions Taken to Comply - 12

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**EXHIBIT 2**

Petitioner OSF's Resp. To County's  
Statement of Actions Taken to Comply – 13

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**EXHIBIT 3**

Petitioner OSF's Resp. To County's  
Statement of Actions Taken to Comply – 14

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