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BEFORE THE
WESTERN GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

No. _____

PETITION FOR REVIEW

OLYMPIC STEWARDSHIP FOUNDATION, a)
Washington nonprofit corporation; JIM HAGEN, a)
member of Olympic Stewardship Foundation;)
WILLIAM WHEELER, a member of Olympic)
Stewardship Foundation; DIANE JOHNSON, a)
member of Olympic Stewardship Foundation; ROGER)
SHORT, a member of Olympic Stewardship)
Foundation; JOHN RICHMOND, a member of)
Olympic Stewardship Foundation; BUD SCHINDLER,)
a member of Olympic Stewardship Foundation;)
TEREN MACLEOD, a member of Olympic)
Stewardship Foundation,)
Petitioners,)
v.)
JEFFERSON COUNTY,)
Respondent.)

1 **I. IDENTITY OF PETITIONERS**

2 Petitioner Olympic Stewardship Foundation is a Washington nonprofit corporation.
3 Olympic Stewardship Foundation represents itself and its members in this action. Olympic
4 Stewardship Foundation members provided oral and/or written testimony regarding the challenged
5 ordinance. The registered agent for petitioner Olympic Stewardship Foundation is James Storey,
6 40 Glen Ave, Chimacum, WA 98325. Petitioner Olympic Stewardship Foundation 's president is
7 Jim Hagen, 241 Sand Road, Port Townsend, WA 98638, who may be reached at 360-379-8914.

8 Petitioner Jim Hagen is a member of Olympic Stewardship Foundation and provided oral
9 and/or written testimony regarding the challenged ordinance. He is a resident of unincorporated
10 Jefferson County. His address is 150 Maple Drive, Port Townsend, WA 98368. His phone number
11 is 360-379-1702.

12 Petitioner William Wheeler is a member of Olympic Stewardship Foundation and provided
13 oral and/or written testimony regarding the challenged ordinance. He is a resident of Jefferson
14 County. His address is Fair Lea Tree Farm, P.O. Box 552, Quilicene, WA 98376. His phone
15 number is 360-774-1862.

16 Petitioner Diane Johnson is a member of Olympic Stewardship Foundation and provided
17 oral and/or written testimony regarding the challenged ordinance. She is a resident of Jefferson
18 County. Her address is 70 Market Street, Port Hadlock, WA 98339. Her phone number is 360-
19 385-9026.

20 Petitioner Roger Short is a member of Olympic Stewardship Foundation and provided oral
21 and/or written testimony regarding the challenged ordinance. He is a resident of Jefferson County.
22 His address is 1720 Center Road, Chimacum, WA 98325. His phone number is 360-732-4601.

23 Petitioner John Richmond is a member of Olympic Stewardship Foundation and provided
24 oral and/or written testimony regarding the challenged ordinance. He is a resident of Jefferson
25 County. His address is P.O. Box 536, Forks, WA 98331. His phone number is 360-374-2414.

1 Petitioner Bud Schindler is a member of Olympic Stewardship Foundation and provided
2 oral and/or written testimony regarding the challenged ordinance. He is a resident of Jefferson
3 County. His address is 270 Rhododendron Lane, Brinnon, WA 98320. His phone number is 360-
4 796-4190.

5 Petitioner Terren MacLeod is a member of Olympic Stewardship Foundation and provided
6 oral and/or written testimony regarding the challenged ordinance. She is a resident of Jefferson
7 County. Her address is 241 Sand Road, Port Townsend, WA 98638. Her phone number is
8 360-379-8914.

9 **II. NAME AND ADDRESS OF PETITIONERS' ATTORNEY**

10 Brian T. Hodges
11 Pacific Legal Foundation
12 10940 NE 33rd Place, Suite 210
13 Bellevue, Washington 98004
14 Phone: (425) 576-0484
15 Fax: (425) 576-9565
16 Email: bth@pacifical.org

17 **III. CHALLENGED ACTION**

18 Petitioners seek review of Jefferson County Ordinance 03-0317-08. On March 17, 2008,
19 Jefferson County adopted Ordinance 03-0317-08. The required Notice of Adoption was published
20 in the *Port Townsend Leader* on March 26, 2008. Applicable provisions from the Ordinance are
21 attached.

22 **IV. STATEMENT OF THE ISSUES**

23 All statements of issues below are directed at whether Jefferson County failed to comply
24 with the specified provisions of the Washington State Growth Management Act (Chapter 36.70A
25 RCW), as applicable to actions taken pursuant to the GMA, in substance, process, or both, in the
adoption of Ordinance 03-0317-08, as adopted on March 17, 2008, and as ultimately published on
March 26, 2008.

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1 **Fish and Wildlife Habitat Conservation Areas (JCC 18.22.195-280)**

2 A. Jefferson County failed to include best available science as required by RCW
3 36.70A.172(1), where:

- 4 1. Jefferson County adopted prescriptive buffers on all streams as critical areas for fish
5 and wildlife habitat conservation without specification as to why each stream
6 (including non fish-bearing and seasonal streams) constituted a “critical area” as
7 required by RCW 36.70A.172(1). (JCC 18.22.270, Table 18.22.270(1).)
- 8 2. Jefferson County limited “[a]ny land use or development activity that is subject to
9 a development permit or approval requirements of [the County’s] code” to the
10 requirements of the critical areas ordinance without the required nexus and
11 proportionality of permit or development-related activity. (JCC 18.22.250.)

12 **Functionally Isolated Buffers**

13 B. Jefferson County failed to include best available science as required by RCW
14 36.70A.172(1) where it granted the code Administrator the discretion to place the burden
15 of proving that a prescriptive buffer is physically and functionally separated from a critical
16 area and does not protect the functions and values of the critical area on the affected
17 property owner. (JCC 18.22.095.)

18 **Geologically Hazardous Areas (JCC 18.22.160-180)**

19 C. Jefferson County failed to include best available science as required by RCW
20 36.70A.172(1) in adopting a “channel migration zone” designation as a category of
21 geologically hazardous critical areas (JCC 18.22.160-180, 18.10.030), where:

- 22 1. Jefferson County failed to comply with the GMA’s best available science
23 provisions by creating a new geologically hazardous critical area designation not
24 recognized by the GMA. RCW 36.70A.030(5), (9); RCW 36.70A.172(1).

- 1 2. In designating a “channel migration zone” as a geologically hazardous area,
2 Jefferson County created a contradiction in its code which requires that a
3 geologically hazardous area classification must be based upon “a combination of
4 erosion, landslide and seismic hazard.” JCC 18.22.160(1), (2); RCW
5 36.70A.030(5), (9); RCW 36.70A.172(1).
- 6 3. Jefferson County adopted an impermissibly broad definition for “channel migration
7 zone” by designating all “[a]reas of natural movement of stream channel meanders”
8 as geological hazard critical areas. JCC 18.22.160(2)(d); RCW 36.70A.030(5), (9);
9 RCW 36.70A.172(1).
- 10 4. Jefferson County failed to differentiate between high, moderate , low, and no-risk
11 channel migration zones; therefore, Jefferson County imposed restrictions on
12 development near designated “channel migration zones” without the required nexus
13 and proportionality of permit or development-related activity.
- 14 5. Jefferson County subjected “channel migration zone” areas to the same protection
15 standards applicable to erosion, landslide, and seismic hazard areas without
16 specification as to why every “channel migration zone” (whether high, moderate,
17 low, or no-risk) constituted a “critical area” as required by RCW 36.70A.172(1).
- 18 6. Jefferson County subjected the development of private property adjacent to any area
19 designated as a “channel migration zone” (whether high, moderate, low, or no-risk)
20 to the vegetation retention requirements of JCC 18.22.170(4) without first
21 demonstrating the required nexus and proportionality of permit or development-
22 related activity.

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1 7. Jefferson County subjected the development of private property adjacent to any area
2 designated as a “channel migration zone” (whether high, moderate, low, or no-risk)
3 to the clearing and grading (open space and impervious surface) requirements of
4 Chapter 18.30 JCC without first demonstrating the required nexus and
5 proportionality of permit or development-related activity.

6 8. Jefferson County subjected the development of private property adjacent to any area
7 designated as a “channel migration zone” (whether high, moderate, low, or no-risk)
8 to the prescriptive buffer requirements applicable to landslide hazard areas under
9 JCC 18.22.170(6) without first demonstrating the required nexus and
10 proportionality of permit or development-related activity.

11 D. Jefferson County improperly interfered with the substantive requirements guaranteed by
12 Washington’s Shoreline Management Act (SMA), Chapter 90.58 RCW by adoption of the
13 “channel migration zone” classification of geologically hazardous critical areas. The SMA
14 governs all of the shorelines of the state, including certain shorelines on segments of
15 streams. RCW 90.58.030(2)(d); RCW 90.58.040.

16 1. By designating all “channel migration zone” as geologically hazardous critical
17 areas, and providing for no shoreline use exemptions, Jefferson County’s critical
18 areas ordinance improperly bars permissible shoreline uses that would be permitted
19 under the SMA. *See* RCW 90.58.100(6) and RCW 90.58.030(3)(e)(I)-(iv).

20 2. By regulating all “channel migration zones” as geologically hazardous critical areas
21 under the GMA without regard to those areas subject to the SMA, Jefferson County
22 failed to comply with RCW 36.70A.480.

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1 3. By regulating all “channel migration zones” as geologically hazardous critical areas
2 under the GMA without regard to those areas subject to the SMA, Jefferson County
3 deprived property owners of protected property rights, thereby failing to comply
4 with RCW 36.70A.370 and failing to consider and properly apply the limitations
5 under goal RCW 36.70A.020(6).

6 **Failure to Balance GMA Goals**

7 E. Jefferson County failed to include best available science to protect critical area functions
8 and values as required by RCW 36.70A.172(1), and failed to consider and properly apply
9 the limitations under goal RCW 36.70A.020(6) in adopting Ordinance 03-0317-08 sections
10 specifically identified above:

- 11 1. As applied to private property that is developed with homes, yards, businesses,
12 and/or other accessory structures (rendered nonconforming by the ordinance),
13 which are not reasonably related to the object of state law (“protection of critical
14 areas”), Ordinance 03-0317-08 is not supported by best available science.
- 15 2. As applied to private property that is developed with homes, yards, businesses,
16 and/or other accessory structures, without the required nexus and proportionality
17 of permit or development-related activity.

18 **Legislative Findings**

19 F. Jefferson County made a number of findings with respect to the adoption of Ordinance 03-
20 0317-08. The findings are clearly erroneous as to the matters addressed above, or are not
21 supported by substantial evidence, and cannot stand to support the sections under review
22 in sections A through E above. Petitioners particularly object to the following findings:

- 23 • Finding 105, regarding the consideration and review of best available science;
24 • Findings 144-46, 148, concluding that the County’s critical area regulations did not
25 result in an unconstitutional taking of private property;

- 1 • Finding 149, concluding that the County's critical area regulations did not violate
2 substantive due process.

3 Petitioners will address the specific findings at issue with each of the sections addressed
4 in our briefing to the Board.

5 **V. STANDING**

6 Olympic Stewardship Foundation is a nonprofit corporation providing a broad range of
7 natural resource stewardship services to citizens living on Washington's Olympic Peninsula.
8 Olympic Stewardship Foundation has members that are landowners and residents of Jefferson
9 County and who are affected by the county's adoption of Ordinance 03-0317-08. Olympic
10 Stewardship Foundation's members and the named individual Petitioners actively participated in
11 Jefferson County's CAO update, providing both oral and written comments on a broad range of
12 issues including those issues raised by this Petition. Olympic Stewardship Foundation's members
13 and the named individual Petitioners also provided hundreds of pages of evidence and hours of
14 testimony on the matters giving rise to the legal claims set forth above. Olympic Stewardship
15 Foundation, on behalf of itself, its members, and individual member Petitioners have participation
16 standing under RCW 36.70A.280(2)(b), and Olympic Stewardship Foundation further has
17 representative standing under RCW 37.70A.280(2)(d) for its members' interests adversely and
18 directly affected by Ordinance 03-0317-08.

19 **VI. ESTIMATED TIME REQUIRED FOR HEARING ON THE MERITS**

20 Given the size of the record and the need to track both public participation and best
21 available science related to each of the issues raised, Petitioners believe their case would require
22 a full day to present. This time could increase if other parties also bring petitions or intervene and
23 participate in the Olympic Stewardship Foundation action.

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1 **VII. RELIEF SOUGHT**

2 Olympic Stewardship Foundation and the individual Petitioners respectfully request this
3 Board to declare that matters addressed above are clearly erroneous on the record as provided under
4 RCW 36.70A.320(3), and unlawful as failing to fall within the legal requirements of the GMA and
5 the laws of the State of Washington applicable to the GMA. As such, the Growth Board is
6 requested to rule that the referenced sections of Ordinance 03-0317-08 are "not in compliance"
7 with the GMA as provided by RCW 36.70A.300, and remand the matters back to Jefferson County
8 with instruction to provide adequate participation and adopt regulations consistent with the GMA.
9 Further, in as much as the rules adopted by Jefferson County are excessive and materially interfere
10 with the goals of the GMA, the Board is also requested to invalidate Ordinance 03-0317-08 in its
11 entirety.

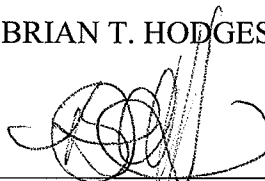
12 **VIII. VERIFICATION OF PETITION**

13 Petitioners have read the Petition for Review and believe the contents to be true and correct
14 to the best of their knowledge.

15 DATED: May 23, 2008.

16 Respectfully submitted,

17 BRIAN T. HODGES

18 

19 Brian T. Hodges, WSBA No. 31976
20 Pacific Legal Foundation
21 10940 NE 33rd Place, Suite 210
22 Bellevue, Washington 98004
23 Telephone: (425) 576-0484
24 Facsimile: (425) 576-9565

25 Attorney for Petitioners

Excerpts from Ordinance
03-0317-08

EXHIBIT C

Note: a) Add the following language to JCC 18.

b) JCC Table of Contents to be modified appropriately.

Chapter 18.10 Definitions

18.10.030 C definitions.

"Channel migration zone" means an area within the lateral extent of likely stream channel movement that is subject to risk due to stream bank destabilization, rapid stream incision, stream bank erosion and shifts in the location of stream channels. "Channel migration zone" means the corridor that includes the present channel, the severe channel migration hazard area and the moderate channel migration hazard area. "Channel migration zone" does not include areas that lie behind an arterial road, a public road serving as a sole access route, a state or federal highway or a railroad. "Channel migration zone" may exclude areas that lie behind a lawfully established flood protection facility that is likely to be maintained by existing programs for public maintenance consistent with designation and classification criteria specified by public rule. When a natural geologic feature affects channel migration, the channel migration zone width will consider such natural constraints.

Chapter 18.15 Land Use Districts

On page 18-68 of the JCC Title 18 add:

Article VI-D.

- (1) See JCC 18.20.030 for exemptions from the critical area requirements for agricultural activities designated under RCW 36.70A.170. Any agricultural activities designated under RCW 36.70A.170 that are not exempt from critical area requirements shall be subject to the JCC Title 18.
- (2) See JCC 18.22 for critical areas. All references to Environmentally Sensitive Areas within the Jefferson County Code are interchangeable with the term "Critical Areas".

Chapter 18.22 Critical Areas

ARTICLE I	Purpose
18.22.010	Purpose - generally
ARTICLE II	Administrative Provisions
18.22.020	Applicability
18.22.030	Identification and mapping of critical areas
18.22.050	Coverage
18.22.070	General exemptions
18.22.080	Nonconforming uses
18.22.090	Reasonable economic use variance
18.22.095	Physical separation, functional isolation
ARTICLE III	Critical Aquifer Recharge Areas
18.22.100	Classification
18.22.110	Designation
18.22.120	Applicability
18.22.130	Protection standards
18.22.135	Adaptive management
ARTICLE IV	Frequently Flooded Areas
18.22.140	Incorporation by reference

- (f) The proposed variance complies with all federal, state and local statutory and common law, including the Endangered Species Act, and statutory laws related to sediment control, pollution control, floodplain restrictions, and on site wastewater disposal, and common law relating to property and nuisance.
 - (g) There will be no material damage to nearby public or private property and no material threat to the health or safety of people on or off the property.
 - (h) The inability to derive reasonable economic use of the property is not the result of actions by the applicant in segregating or dividing the property and creating the undevelopable condition after the effective date of the regulations codified in this chapter.
- (5) Conditions.
- (a) In granting approval for reasonable economic use variances, the hearing examiner may require mitigating conditions.
 - (b) In granting approval for reasonable economic use variances involving designated wetlands, the hearing examiner shall consider the following mitigating conditions:
 - (i) Provision of a mitigation plan demonstrating how the applicant intends to substantially restore the site to predevelopment conditions following project completion; and
 - (ii) The restoration, creation or enhancement of wetlands and their buffers in order to offset the impacts resulting from the applicant's actions; the overall goal of any restoration, creation or enhancement project shall be no net loss of wetlands function and acreage.
- (6) Performance Bond. The Administrator may require a performance bond of 120% of the cost of the outstanding work items to be accomplished.

18.22.095 Physical Separation, Functional Isolation

Buffers areas which are both physically separated and functionally isolated from a critical area and do not protect the critical area from adverse impacts shall be excluded from buffers otherwise required by this Chapter. Functional isolation can occur due to existing public roads, structures, vertical separating, or any other relevant physical characteristic. The Administrator may require a Biological Site Assessment to determine whether the buffer is functionally isolated.

Article III – Critical Aquifer Recharge Areas

18.22.100 Classification

Critical aquifer recharge areas are naturally susceptible due to the existence of permeable soils or a seawater wedge in coastline aquifers. Certain overlying land uses can lead to water quality and/or quantity degradation. The following classifications define critical aquifer recharge areas.

- (1) Susceptible aquifer recharge areas are those with geologic and hydrologic conditions that promote rapid infiltration of recharge waters to groundwater aquifers. For the purposes of this Article III, unless otherwise determined by preparation of an aquifer recharge area report authorized under this article, the following geologic units, as identified from available State of Washington Department of Natural Resources geologic mapping, define susceptible aquifer recharge areas for east Jefferson County:
- (a) Alluvial fans (Ha);
 - (b) Artificial fill (Hx);
 - (c) Beach sand and gravel (Hb);
 - (d) Dune sand (Hd);
 - (e) Floodplain alluvium (Hf);
 - (f) Vashon recessional outwash in deltas and alluvial fans (Vrd);
 - (g) Vashon recessional outwash in melt water channels (Vro);
 - (h) Vashon ice contact stratified drift (Vi);
 - (i) Vashon ablation till (Vat);
 - (j) Vashon advance outwash (Vao);
 - (k) Whidbey formation (Pw); and
 - (l) Pre-Vashon stratified drift (Py).
- (2) Those areas meeting the requirements of susceptible aquifer recharge areas (above) and which are overlain by the following land uses as identified in this code are subject to the provisions of the protection standards in this article:
- (a) All industrial land uses;
 - (b) All commercial uses;
 - (c) All rural residential land uses;

- risk of significant adverse groundwater quality impacts. The determination of significant adverse groundwater quality impacts will be based on the anti-degradation policy included in Chapter 173-200 WAC.
- (10) Authority for Denial. In all critical aquifer recharge areas, the administrator may deny approval if the protection standards contained herein or added mitigating conditions cannot prevent significant adverse groundwater quality impacts.

18.22.135 Adaptive Management

As part of the periodic review and amendment to Jefferson County's implementing regulations required under RCW 36.70A.130(4), Jefferson County shall review the need for and implement an adaptive management program for groundwater resources in certain discrete geographic areas of the County, consistent with the provisions of WAC 365-195-920(2).

Article IV – Frequently Flooded Areas

18.22.140 Incorporation by Reference

This Article IV incorporates by reference the classification, designation and protection provisions contained in the Jefferson County floodplain management ordinance (Chapter 15.15 JCC) with the following addition:

- (1) In addition to the insurance maps identified in the floodplain management ordinance (Chapter 15.15 JCC), flood hazard areas shall be identified with reference to the Federal Emergency Management Agency (FEMA) 100-year floodplain designations. Such flood hazard areas shall be subject to the criteria of the floodplain management ordinance.
- (2) The floodplain management ordinance conforms with the intent of the minimum guidelines (WAC 365-190-080(3)) through directly considering the effects of flooding on human health and safety, together with effects on public facilities and services, through its protection standards.

18.22.150 Relationship to Other Regulations

While the Jefferson County floodplain management ordinance requires consistency with all other applicable laws, in the event that a conflict should exist the stricter standard shall apply to the regulated development.

Article V - Geologically Hazardous Areas

18.22.160 Classification/Designation

- (1) Classification. Geologically hazardous areas shall be classified based upon a combination of erosion, landslide and seismic hazard.
- (2) Designation. The following erosion, landslide, seismic, and channel migration zone (CMZ) hazard areas shall be subject to the standards of this Article V:
 - (a) Erosion Hazard Areas. Areas containing soils or soil complexes described and mapped within the United States Department of Agriculture/Soil Conservation Service Soil Survey for Jefferson County as having a severe or very severe erosion hazard potential.
 - (b) Landslide Hazard Areas. Areas potentially subject to mass movement due to a combination of geologic, topographic and hydrologic factors including:
 - (i) Areas of historic failures or potentially unstable slopes, such as:
 - (A) Areas described and mapped as having severe or very severe building limitations for dwellings without basements within the United States Department of Agriculture/Soil Conservation Service Soil Survey for Jefferson County;
 - (B) Areas described and mapped as recent or old landslides or slopes of unstable materials within the Washington State Department of Ecology Coastal Zone Atlas of Jefferson County; and
 - (C) Areas described and mapped as areas of poor natural stability, former landslides and recent landslides by the Washington State Department of Natural Resources, Division of Geology and Earth Resources;
 - (ii) Areas potentially unstable as a result of rapid stream incision, stream bank erosion, or undercutting by wave action; and
 - (iii) Areas with any indications of earth movement, such as:

- (A) Rockslides;
 - (B) Earthflows;
 - (C) Mudflows; and
 - (D) Landslides.
- (c) Seismic Hazard Areas. Areas subject to severe risk of damage as a result of earthquake induced ground shaking, slope failure, settlement, soil liquefaction, or surface faulting. These areas are identified by the presence of: poorly drained soils with greater than 50 percent silt and very little coarse material; loose sand or gravel, peat, artificial fill and landslide materials; or soil units with high organic content.
- (d) Channel Migration Zones (CMZs). Areas subject to the natural movement of stream channel meanders. In the delineated high risk CMZ area, channel migration is likely within the next 100 years. Areas protected from channel movement due to the existence of permanent levees or infrastructure improvements such as roads and bridges constructed and maintained by public agencies are excluded from the high or moderate risk designation
- (3) Sources Used for Identification. Sources used to identify geologically hazardous areas include, but are not limited to:
- (a) United States Department of Agriculture/Soil Conservation Service, Soil Survey for Jefferson County.
 - (b) Washington State Department of Ecology, Coastal Zone Atlas.
 - (c) Washington State Department of Natural Resources, Slope Stability and Geologic Maps of Eastern Jefferson County.
 - (d) Washington State Department of Natural Resources, Geographic Information System: Soil Survey.
 - (e) Washington State Department of Natural Resources, Geologic Maps of Eastern Jefferson County, Compressibility of Earth Materials in Eastern Jefferson County.
 - (f) United States Department of the Interior, USGS Quad Maps.
 - (g) US Department of the Interior, Bureau of Reclamation. 2004. Channel Migration Zone Study for the Duckabush, Dosewallips, Big Quilcene and Little Quilcene Rivers, Jefferson County, Washington. Denver, CO.
 - (h) Perkins Geosciences. 2006. Channel Migration Hazard Maps for the Dosewallips, Duckabush, Big Quilcene and Little Quilcene Rivers, Jefferson County, Washington. Seattle, WA.
 - (i) Perkins Geosciences with TerraLogic GIS. June, 2004. Lower Hoh River Channel Migration Study Summary Report.
 - (j) The following rivers are not regulated in this section as a result of not having mapped CMZs (not an exhaustive list):
Thorndyke Creek, Shine Creek, Chimacum Creek, Snow Creek, Salmon Creek, Upper Hoh River, Bogachiel River, Clearwater River, and Quinault River
- (4) Geologic Hazard Area Maps. The maps prepared by the county using the identification sources listed in this section have been produced for informational purposes only and are not regulatory devices forming an integral part of this code.

18.22.170 Protection Standards

- (1) General. Application for a project on a parcel of real property containing a designated geologically hazardous area or its buffer shall adhere to the requirements set forth below.
- (2) Drainage and Erosion Control.
- (a) An applicant submitting a project application shall also submit, and have approved, a drainage and erosion control plan, as specified in this chapter, when the project application involves either of the following:
 - (i) The alteration of a geologically hazardous area or its buffer; or
 - (ii) The creation of a new parcel within a known geologically hazardous area.
 - (b) Drainage and erosion control plans required under this chapter shall discuss, evaluate and recommend methods to minimize sedimentation of adjacent properties during and after construction.
 - (c) Surface drainage shall not be directed across the face of a marine bluff, landslide hazard or ravine. The applicant must demonstrate that the storm water discharge cannot be accommodated on-site or upland by evidence of a geotechnical report, unless waived by the administrator. If drainage must be discharged from a bluff to adjacent waters, it shall be collected above the face of the bluff and directed to the water by tight line drain and provided with an energy dissipating device at the shoreline, above OHWM.
 - (d) In addition to any erosion control methods specified in the drainage and erosion control plan, the administrator may require hydroseeding of exposed or disturbed areas or other BMPs.
- (3) Clearing and Grading.

- (a) In addition to the general clearing and grading provisions in Chapter 18.30 JCC, the following provisions shall also apply:
 - (i) Clearing within geologically hazardous areas shall be allowed only from April 1st to November 1st, unless the applicant demonstrates that such activities would not result in impacts contrary to the protection requirements herein;
 - (ii) Only that clearing necessary to install temporary sedimentation and erosion control measures shall occur prior to clearing for roadways or utilities;
 - (iii) Clearing limits for roads, septic, water and storm water utilities, and temporary erosion control facilities shall be marked in the field and approved by the administrator prior to any alteration of existing native vegetation;
 - (iv) Clearing for roads and utilities shall remain within construction limits which must be marked in the field prior to commencement of site work; and
 - (v) The authorized clearing for roads and utilities shall be the minimum necessary to accomplish project specific engineering designs and shall remain within approved rights-of-way.
 - (b) The following provisions regarding grading shall apply:
 - (i) An applicant submitting a project application shall also submit, and have approved, a grading plan, as specified in this chapter, when the application involves either of the following:
 - (A) The alteration of a geologically hazardous area or its buffer; or
 - (B) The creation of a new parcel within a known geologically hazardous area.
 - (ii) Excavation, grading and earthwork construction regulated under this section shall only be allowed from April 1st to November 1st, unless the applicant demonstrates that such activities would not result in impacts contrary to the protection requirements herein.
- (4) **Vegetation Retention.** The following provisions regarding vegetation retention shall apply:
- (a) During clearing for roadways and utilities, all trees and understory lying outside of approved construction limits shall be retained; provided, that understory damaged during approved clearing operations may be pruned.
 - (b) Damage to vegetation retained during initial clearing activities shall be minimized by directional felling of trees to avoid critical areas and vegetation to be retained.
 - (c) Retained trees, understory and stumps may subsequently be cleared only if such clearing is necessary to complete the proposal involved in the triggering application.
- (5) **Buffer Marking.** The location of the outer extent of landslide hazard area buffers shall be marked in the field as follows:
- (a) A permanent physical separation along the boundary of the landslide hazard area shall be installed and permanently maintained. Such separation may consist of logs, a tree or hedgerow, fencing, or other prominent physical marking approved by the administrator.
 - (b) Buffer perimeters shall be marked with temporary signs at an interval of one per parcel or every 100 feet, whichever is less. Signs shall remain in place prior to and during approved construction activities. The signs shall contain the following statement: "Landslide Hazard Area & Buffer – Do Not Remove or Alter Existing Native Vegetation."
 - (c) In the case of short plat, long plat, binding site plan or site plan approvals under this code, the applicant shall include on the face of any such instrument the boundary of the landslide hazard area and its buffer.
- (6) **Buffers – Standard Requirements.** The following landslide hazard area buffer provisions shall apply:
- (a) Buffer areas shall be required to provide sufficient separation between the landslide hazard area and the adjacent proposed project.
 - (b) The appropriate width of the landslide hazard area buffer shall be determined by either: application of the standard buffer width set forth below; or, by acceptance of a geotechnical report meeting the criteria of this section.
 - (c) Buffers shall remain naturally vegetated. Where buffer disturbance has occurred during construction, replanting with native vegetation shall be required.
 - (d) Buffers shall be retained in their natural condition; however, minor pruning of vegetation to enhance views may be permitted by the administrator on a case-by-case basis.
 - (e) All buffers shall be measured perpendicularly from the top, toe or edge of the landslide hazard area boundary.
 - (f) A standard buffer of 30 feet shall be established from the top, toe and all edges of landslide hazard areas.
 - (g) A building setback line is required to be five (5) feet from the edge of any buffer area for a landslide hazard area OR to outside the full extent of the high risk channel migration zone (CMZ), whichever is greater.
- (7) **Reducing Buffer Widths.** The administrator may reduce the standard landslide hazard area buffer width only when the project applicant demonstrates, to the satisfaction of the administrator, that the project cannot meet the

required setback. The reduced buffer must adequately protect the proposed project from the risks of the landslide hazard area to the maximum extent possible. Under no circumstances shall the buffer width be reduced to less than 15 feet.

- (8) **Increasing Buffer Widths.** The administrator may increase the standard landslide hazard area buffer width when a larger buffer is necessary to protect the proposed project and the landslide hazard area. This determination shall be made when the administrator demonstrates any one of the following through appropriate documentation:
- (a) The landslide area is unstable and active.
 - (b) The adjacent land is susceptible to severe landslide or erosion, and erosion control measures will not effectively protect the proposed project from the risks posed by the landslide hazard area.
 - (c) The adjacent land has minimal vegetative cover.
- (9) **Geotechnical Report.**
- (a) An applicant submitting a project application shall submit, and have approved, a geotechnical report, as specified in Article VIII of this chapter, when the application involves any of the following:
 - (i) The alteration of a landslide hazard area or its buffer.
 - (ii) The creation of a new parcel within a known landslide hazard area.
 - (iii) The construction of a publicly owned facility in a designated seismic hazard area.
 - (b) Where a geotechnical report is required for a landslide hazard area, the project application shall not be approved unless the geotechnical report certifies all of the following:
 - (i) There is minimal landslide hazard as proven by a lack of evidence of landslide activity in the vicinity in the past;
 - (ii) An analysis of slope stability indicates that the proposal will not be subject to risk of landslide, or the proposal or the landslide hazard area can be modified so that hazards are eliminated;
 - (iii) The proposal will not increase surface water discharge or sedimentation to adjacent properties beyond predevelopment conditions;
 - (iv) The proposal will not decrease slope stability on adjacent properties; and
 - (v) All newly created building sites will be stable under normal geologic and hydrogeologic conditions (if applicable).
 - (c) Where a geotechnical report is required for a seismic hazard area, the project application shall not be approved unless the geotechnical report demonstrates that the proposed project will adequately protect the public safety.

18.22.180 Conditions

- (1) **General.** In granting approval for a project application subject to the provisions of this Article V, the administrator may require mitigating conditions that will, in the administrator's judgment, substantially secure the objectives of this article.
- (2) **Basis for Conditions.** All conditions of approval required pursuant to this section shall be based upon either the substantive requirements of this section or the recommendations of a qualified professional, contained within a special report required under this chapter.

Article VI - Fish and Wildlife Habitat Conservation Areas (FWHCAs)

18.22.195 Compliance Alternatives

Article VI sets forth the prescriptive requirements. Applicants for development permits or approvals subject to this Article VI may elect to comply with the Critical Area Stewardship Plan (CASP) provisions set forth in Article IX of this Chapter in lieu of the prescriptive requirements set forth herein.

18.22.200 Classification/Designation

- (1) **Classification.** Fish and wildlife habitat conservation areas (FWHCAs) are those areas identified as being of critical importance to the maintenance of endangered, threatened, or sensitive species of fish, wildlife and/or plants, or species of local importance. These areas are typically identified either by known point locations of specific species (such as a nest or den) or by habitat areas or both. All areas within the County meeting these criteria are hereby designated critical areas and are subject to the provisions of this article.
- (2) **Mapping.** The approximate location and extent of identified fish and wildlife habitat conservation areas (FWHCAs) are shown on the County's critical area maps. These maps are to be used as a guide and do not provide a

- (d) Upon approval, the ordinance designating and regulating the species or habitat of local importance shall be codified in this article for public information and implementation by the department, and a notice to title shall be placed upon all parcels affected by the designation.
 - (e) Each ordinance creating a species or habitat of local importance shall include periodic review of reassessment of the initial designation. The length of the periodic review may be dependent on the characteristics of the species or habitat.
- (8) Removal from designation. Species or habitats of local significance may be removed at any time, PROVIDED, that they no longer meet the criteria set forth in JCC 18.22.210(5). (e.g., as a result of a natural catastrophe or climatic change event), and PROVIDED FURTHER, that the procedural requirements of this section and the procedural requirements established for Type V land use decisions set forth within Chapter 18.40 JCC.

18.22.220 Sources used for Identification

Sources used to identify fish and wildlife habitat conservation areas (FWHCAs) include, but are not limited to the following:

- (1) United States Department of the Interior, Fish and Wildlife Service, National Wetlands Inventory.
- (2) Washington State Department of Natural Resources, Water Type Index Maps.
- (3) Washington State Department of Fish and Wildlife, Non-Game and Priority Habitats and Species databases.
- (4) Public and private tidelands or bedlands suitable for shellfish harvest and identified by the Washington Department of Health's classification system and shellfish protection districts established pursuant to Chapter 90.72 RCW.
- (5) Kelp and eelgrass beds may be classified and identified with the Department of Natural Resources Aquatic Lands Program and the Department of Ecology (note: many locations are compiled in the Puget Sound Environmental Atlas).
- (6) Herring and smelt spawning times and locations are outlined in WAC 220-110-240 through WAC 220-110-250, Hydraulic Code Rules, Technical Report No. 79, and the Puget Sound Environmental Atlas.

18.22.230 Fish and wildlife Habitat Conservation Area (FWHCA) Maps

County maps identifying FWHCAs have been produced for informational purposes only and are not regulatory devices forming an integral part of this Article VI.

18.22.250 Regulated Activities

Any land use or development activity that is subject to a development permit or approval requirements of this code shall be subject to the provisions of this Article VI. These include, but are not limited to the following activities that are directly undertaken or originate in a FWHCA or its buffer, unless otherwise exempted under JCC 18.22.070.

- (1) Stream Crossings. Any private or public road expansion or construction which is proposed and must cross streams classified within this article, shall comply with the following minimum development standards:
 - (a) The design of stream crossings shall meet the requirements of the Washington Department of Fish and Wildlife. Fish passage shall be provided if necessary to address manmade obstructions on-site. Other alternatives may be allowed upon a showing that, for the site under review, the alternatives would be less disruptive to the habitat or that the necessary building foundations were not feasible. Submittal of a habitat management plan which demonstrates that the alternatives would not result in significant impacts to the fish and wildlife habitat area (FWHCA) may be required;
 - (b) Crossings shall not occur in salmonid spawning areas unless no other reasonable crossing site exists. For new development proposals, if existing crossings are determined to adversely impact salmon spawning or passage areas, new or upgraded crossings shall be located as determined necessary through coordination with the Washington State Department of Fish and Wildlife;
 - (c) Bridge piers or abutments shall not be placed either within the floodway or between the ordinary, high water marks unless no other reasonable alternative placement exists;
 - (d) All stream crossings shall be designed based on the 100-year projected flood flows, even in non-fish bearing Type Np and Ns streams. In addition, crossings for Type S and F streams should allow for downstream transport of large woody debris;
 - (e) Crossings shall serve multiple properties whenever possible; and
 - (f) Where there is no reasonable alternative to providing a culvert, the culvert shall be the minimum length necessary to accommodate the permitted activity.

- (2) Utilities. Placement of utilities within designated fish and wildlife habitat areas may be allowed pursuant to the following standards:
- (a) Construction of utilities may be permitted in FWHCAs or their buffers, only when no practicable or reasonable alternative location is available and the utility corridor meets the requirements for installation, replacement of vegetation and maintenance outlined below. Utilities are encouraged to follow existing or permitted roads where possible.
 - (b) Construction of sewer lines or on-site sewage systems are not permitted in FWHCAs or their buffers, except that they may be permitted in a buffer area when the applicant demonstrates it is necessary to meet state and/or local health code requirements; there are no other practicable alternatives available; and construction meets the requirement of this article. Joint use of the sewer utility corridor by other utilities may be allowed.
 - (c) New utility corridors shall not be allowed in FWHCAs with known locations of federal or state-listed endangered, threatened or sensitive species, except in those circumstances where an approved habitat management plan is in place.
 - (d) Utility corridor construction and maintenance shall protect the environment of fish and wildlife habitat areas and their buffers.
 - (i) New utility corridors shall be aligned when possible to avoid cutting trees greater than 12 inches in diameter at breast height (four and one-half feet) measured on the uphill side.
 - (ii) New utility corridors shall be revegetated with appropriate native vegetation at not less than preconstruction vegetation densities or greater, immediately upon completion of construction or as soon thereafter as possible due to seasonal growing constraints. The utility shall ensure that such vegetation survives for a three-year period.
 - (e) Utility towers should be painted with brush, pad or roller and should not be sandblasted or spray-painted, nor shall lead-base paints be used.
- (3) Bank Stabilization.
- (a) A stream channel and bank, bluff, and shoreline may be stabilized when naturally occurring earth movement threatens existing legal structures (structure is defined for this purpose as those requiring a building permit pursuant to the building code), public improvements, unique natural resources, public health, safety or welfare, or the only feasible access to property, and, in the case of streams, when such stabilization results in maintenance of fish habitat or improved water quality, as demonstrated through a habitat management plan or equivalent study or assessment. Bluff, bank and shoreline stabilization shall follow the standards of the Jefferson County Shoreline Master Program, geologically hazardous areas provision in this chapter, and the floodplain management ordinance.
 - (b) The administrator shall require that bank stabilization be designed by a professional engineer licensed in the state of Washington with demonstrated expertise in hydraulic actions of shorelines. For bank stabilization projects within FWHCAs, the applicant must provide a geotechnical report that demonstrates that bioengineering solutions (vegetation versus hard surfaces) are infeasible. The report must document the engineering rationale why bioengineering solutions are infeasible in a manner that can be confirmed through review by other engineering professionals. Bank stabilization projects may also require a hydraulic project approval from the Washington Department of Fish and Wildlife that will be determined after consultation with WDFW.
- (4) Gravel Mining. Gravel mining is discouraged within FWHCAs or their buffers, and it shall not be permitted if it causes unmitigatable significant adverse impacts, but it may be allowed following the review and approval of a habitat management plan, including a detailed mining and reclamation plan pursuant to the applicable performance standards in Chapter 18.20.240 JCC or as otherwise required in this code.
- (5) Forest Practices, Class IV General. Timber harvesting with associated development activity involving land conversions from forest use, or otherwise meeting the DNR definition as a Class IV General application, shall comply with the provisions of this article, including the maintenance of buffers, where required.
- (6) Road/Street Repair and Construction. Any private or public road or street expansion or construction which is allowed in a FWHCA or its buffer shall comply with the following minimum development standards:
- (a) No other reasonable or practicable alternative exists and the proposed road or street serves multiple properties whenever possible;
 - (b) Public and private roads are encouraged to provide for other purposes, such as utility crossings, pedestrian or bicycle easements, viewing points, etc.;
 - (c) The road or street construction is the minimum necessary, as required by the department of public works' guidelines. Minimum necessary provisions may include projected level of service requirements; and
 - (d) Construction time limits shall be determined in consultation with the Washington Department of Fish and Wildlife in order to ensure species and habitat protection.

- (7) Outdoor Recreation, Education and Trails. Activities and improvements that do not significantly affect the function of the FWHCA or regulated buffer (including viewing structures, outdoor scientific or interpretive facilities, trails, hunting blinds, etc.) may be permitted in FWHCAs or their buffers.
 - (a) Trails and other facilities shall, to the extent feasible, be placed on existing road grades, utility corridors, or other previously disturbed areas;
 - (b) Trails and other facilities shall be planned to minimize removal of trees, shrubs, snags and important wildlife habitat;
 - (c) Viewing platforms, interpretive centers, benches and access to them, shall be designed and located to minimize impacts to wildlife, fish, or their habitat and/or critical characteristics of the affected FWHCA;
 - (d) Trails, in general, shall be set back from streams so that there will be minimal impact to the stream from trail use or maintenance. Trails shall be constructed with pervious surfaces when feasible and trails within FWHCAs are not intended to be used by motorized vehicles.
- (8) Chemical Application or Storage. Chemical applications are not permitted within FWHCAs unless expressly approved as part of a farm plan, forest practices application, or for the control of invasive or noxious plant species. In cases where approved chemical applications occur as part of a forest practices application or farm plan, proper reporting procedures shall be followed. Chemical storage shall not be permitted within a FWHCA or its buffer.

18.22.265 Habitat Management Plans – When Required

When a development proposal is located on lands which may contain a habitat for a Protected Species other than Bald Eagle nesting territories, or when the applicant proposes to alter, decrease or average the standard buffer, a Habitat Management Plan (HMP) shall be required, consistent with the requirements of JCC 18.22.440.

18.22.270 Protection Standards

- (1) General. Application for a project on a parcel of real property containing a designated FWHCA or its buffer shall adhere to the requirements set forth in this section.
- (2) Drainage and Erosion Control. An applicant submitting a project application shall also submit, and have approved, a drainage and erosion control plan, as specified in this chapter.
- (3) Grading. An applicant submitting a project application shall also submit, and have approved, a grading plan, as specified in this chapter.
- (4) Vegetation Retention. The following provisions regarding vegetation retention shall apply:
 - (a) All trees and understory lying outside of road rights-of-way and utility easements shall be retained (except for hazard trees) during clearing for roadways and utilities; provided, that understory damaged during approved clearing operations may be pruned.
 - (b) Damage to vegetation retained during initial clearing activities shall be minimized by directional felling of trees to avoid critical areas and vegetation to be retained.
 - (c) Retained trees, understory and stumps may subsequently be cleared only if such clearing is necessary to complete the proposal involved in the project application.
- (5) Buffers – Standard Requirements. The administrator shall have the authority to require buffers from the edges of all FWHCAs in accordance with the following:
 - (a) Buffers generally.
 - (i) Buffers shall be established for activities adjacent to FWHCAs as necessary to protect the integrity, functions and values of the resource, consistent with the requirements set forth in Tables 18.22.270(1) and 18.22.270(2) of this section.
 - (ii) A building setback line of five feet is required from the edge of any buffer area, however, nonstructural improvements such as septic drain fields may be located within setback areas.
 - (iii) Buffers shall be retained in their natural condition, however, minor pruning of vegetation to enhance views or provide access may be permitted as long as the function and character of the buffer are not diminished.
 - (iv) Lighting shall be directed away from the FWHCA.
 - (b) Prescriptive FWHCA Buffers.
 - (i) The standard buffer widths required by this article are considered to be the minimum required to protect the stream functions and values at the time of the proposed activity. When a buffer lacks adequate vegetation to protect critical area functions, the administrator may deny a proposal for buffer reduction or buffer averaging.
 - (ii) The standard buffer shall be measured landward horizontally on both sides of the stream from the ordinary high water mark (OHWM) as identified in the field. Nevertheless, the required buffer shall

include any adjacent regulated wetland(s), landslide hazard areas and/or erosion hazard areas and required buffers, but shall not be extended across paved roads or other lawfully established structures or hardened surfaces. The following standard buffer width requirements are established, provided that portions of streams that flow underground may be exempt from these buffer standards at the administrator's discretion when it can be demonstrated that no adverse effects on aquatic species will occur.

TABLE 18.22.270(1): STREAM BUFFERS*	
STREAM TYPE	BUFFER REQUIREMENT
Type "S" - Shoreline Streams	150 feet
Type "F" - Fish Bearing Streams	150 feet
Type "Np" - Non-Fish Bearing Perennial Streams	75 feet
Type "Ns" - Non-Fish Bearing Seasonal Streams greater than or equal to 20% grade	75 feet
Type "Ns" - Non-Fish Bearing Seasonal Streams less than 20% grade	50 feet

* Note:

(a) The buffers set forth above shall apply to culverted streams; though in limited circumstances, a variance may be made in the application of stream buffers under Article IX of JCC Chapter 18.40.

(b) Stream type shall be determined using the criteria set forth in WAC 222-16-030.

(iii) Buffers for other FWHCAs. The administrator shall determine appropriate buffer widths for other FWHCAs based on the best available information. Buffer widths for non-stream habitat conservation areas shall be as follows:

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BEFORE THE
WESTERN GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

No. _____

DECLARATION OF SERVICE

OLYMPIC STEWARDSHIP FOUNDATION, a)
Washington nonprofit corporation; JIM HAGEN, a)
member of Olympic Stewardship Foundation;)
WILLIAM WHEELER, a member of Olympic)
Stewardship Foundation; DIANE JOHNSON, a)
member of Olympic Stewardship Foundation; ROGER)
SHORT, a member of Olympic Stewardship)
Foundation; JOHN RICHMOND, a member of)
Olympic Stewardship Foundation; BUD SCHINDLER,)
a member of Olympic Stewardship Foundation;)
TEREN MACLEOD, a member of Olympic)
Stewardship Foundation,)
Petitioners,)
v.)
JEFFERSON COUNTY,)
Respondent.)

Declaration of Service

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
(425) 576-0484 FAX: (425) 576-9565

1 BRIAN T. HODGES declares as follows:

2 I am a resident of the State of Washington, employed at 10940 NE 33rd Place, Suite 210,
3 Bellevue, Washington 98004. I am over the age of 18 years and am not a party to this action.

4 On the below date, a true copy of the *Petition for Review* was filed via E-mail with the
5 Western Washington Growth Management Hearing Board pursuant to WAC 242-02-230(1) and
6 WAC 242-02-240(2)(a), with the original Petition plus four copies sent via U.S. mail on the same
7 date to the following address:

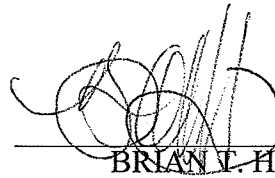
8 Western Washington Growth
9 Management Hearing Board
10 319 7th Avenue SE, Suite 103
Olympia, WA 98501
western@ww.gmhb.wa.gov

11 On the same date, a true copy of the *Petition for Review* was served on Jefferson County via hand
12 delivery with a copy sent via U.S. mail to the following address:

13 Donna M. Eldridge, Auditor
14 Jefferson County
15 1820 Jefferson Street
P.O. Box 563
Port Townsend, WA 98368

16 I declare under penalty of perjury that the foregoing is true and correct and that this
17 declaration was executed this 23rd day of May, 2008, at Bellevue, Washington.

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24
25



BRIAN T. HODGES

Declaration of Service

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
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