

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2 CITIZENS PROTECTING CRITICAL AREAS  
3 AND OLYMPIC STEWARDSHIP FOUNDATION,  
4 ET AL,

Case No. 08-2-0029c

**FINAL DECISION AND ORDER**

5 Petitioner,

6 v.

7  
8 JEFFERSON COUNTY,

9 Respondent.  
10

11  
12 **I. SYNOPSIS**

13 In May 2008, the Western Washington Growth Management Hearings Board (Board)  
14 received several Petitions for Review (PFR) challenging Jefferson County's enactment of  
15 Ordinance No. 03-0317-08, which adopted Chapter 18.22 of the Jefferson County Code  
16 (JCC) as the County's Critical Areas Ordinance (CAO).  
17

18  
19 Petitioners Citizens Protecting Critical Areas (CPCA) presented two issues for the Board's  
20 review. The Board determines Issue 1 has been abandoned by CPCA. The remaining  
21 issue questions whether the enforcement provisions pertaining to the CAO sufficiently  
22 protect critical areas as required by the Growth Management Act (GMA). The Board finds  
23 that JCC 18.50, the enforcement provisions for Jefferson County's Unified Development  
24 Code,<sup>1</sup> is intended to ensure compliance with the protection standards established within  
25 the CAO and that the challenged legislative enactment did not amend JCC 18.50 nor were  
26 there amendments to the GMA which directly affected this provision of the County's code so  
27 as to require revision pursuant to RCW 36.70A.130. As such, the Board concludes  
28 CPCA's challenge is untimely and the Board has no jurisdiction to address the issue.  
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<sup>1</sup> JCC 18.22 is a component of the County's Unified Development Code.

1 Petitioners Olympic Stewardship Foundation, *et al.* (OSF) presented several issues for the  
2 Board's review related to buffers, channel migration zones, and property owners' rights and  
3 duties. The Board determines OSF has abandoned Issues 2 and 7.  
4

5 A crucial issue for the Board's resolution was the application of the Supreme Court's July  
6 2008 holding in *Futurewise v. Western Washington Growth Management Hearings Board* in  
7 relationship to critical areas within shorelines as presented by OSF within Issue 9. The  
8 Board finds that, despite the pendency of a Motion for Reconsideration, the Supreme  
9 Court's finding is persuasive and the Board applies the rationale to this Final Decision and  
10 Order. In that regard, the Board concludes that it has jurisdiction to review only those  
11 provisions of the County's development regulations for critical areas that apply outside the  
12 jurisdictional boundaries of the Shoreline Management Act.  
13

14  
15 The key issue for OSF was the designation of Channel Migration Zones (CMZs) as critical  
16 areas and the related risk assessment, which was set forth in Issues 4 and 5. The Board  
17 finds that OSF failed to demonstrate Jefferson County's designation of CMZs as a type of  
18 Geologically Hazardous Area (GHA) was clearly erroneous. The Board concludes the  
19 function and value of a CMZ is the prospective protection against loss of life and property  
20 due to the geomorphic and ecological processes of rivers and streams as they migrate  
21 throughout their alluvial valleys and this function and value presently exists. As such, the  
22 County's designation of CMZs as a critical area is appropriate under the GMA.  
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25 However, the Board concludes that OSF had carried its burden of proof as to Issues 4 and  
26 5, in demonstrating Jefferson County's definition of 100 years as the time period for High  
27 Risk CMZs is not supported by the scientific documentation relied upon by the County.  
28 The Board cannot determine from the Record whether the designated High Risk CMZs  
29 mapped by the County encompassed a probability of channel migration within 100 years, as  
30 set forth in JCC 18.22.160(2)(d), or within 50 years, as denoted within the scientific  
31 documentation and maps.  
32

1 The Board concludes OSF failed to carry its burden of proof in regards to Issue 1 because  
2 the 75-foot buffer adopted in Table 1 of JCC 18.22.270 for certain perennial and intermittent  
3 non-fish bearing streams is within the range of buffer widths presented by the County's Best  
4 Available Science (BAS).

5  
6 The Board concludes OSF failed to carry its burden of proof in regards to Issue 3 because  
7 with JCC 18.22.095 the County is not requiring property owners to designate critical areas  
8 and identify the functions and values of these areas. Rather, this provision provides a  
9 procedural mechanism by which property owners may be relieved of compliance with the  
10 CAO if they can demonstrate a critical area buffer is physically separate and functionally  
11 isolated from its "parent" critical area such that it fails to provide protection for the functions  
12 and values of the critical area.

13  
14 The Board finds OSF demonstrated Jefferson County violated the GMA, as set forth in Issue  
15 6, because although the retention of vegetation is significant, the importance is based on  
16 bank stabilization and erosion protection and is therefore more relevant within high to  
17 moderate risk areas which are at a greater probability of being impacted by a river or  
18 stream's migration. Thus, the Board concludes that the County's blanket restriction on the  
19 removal of vegetation throughout the entirety of a CMZ, regardless of the associated risk  
20 factor, is not linked to the functions and values it is intended to protect and is not supported  
21 by BAS.

22  
23  
24 The Board concludes OSF failed to carry its burden of proof in regards to Issue 8 as the  
25 application of buffers to the CMZ, with the exception of JCC 18.22.170(6)(g), is limited by  
26 the language of JCC 18.22.170 and is not applicable to a CMZ in its entirety. JCC  
27 18.22.170(6)(g) does require a five foot building setback from the outer edge of a High Risk  
28 CMZ but such a nominal requirement is supported by the County's BAS and is limited to  
29 those areas of the CMZ most at risk for channel migration.  
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1 The Board concludes OSF failed to demonstrate Jefferson County violated RCW  
2 36.70A.020(6) and 36.70A.370 as set forth in Issue 10 as the Record before the Board  
3 clearly demonstrates the consideration of private property rights during the enactment of  
4 Ordinance 03-0317-08. In addition, the Board concludes OSF has failed to provide  
5 evidence of either a legally protected property right which was impacted by the County's  
6 action or that the action was arbitrary and discriminatory.  
7

## 8 II. PROCEDURAL HISTORY

9  
10 During the month of May 2008, the Board received three PFRs challenging Jefferson  
11 County's adoption of Ordinance No. 03-0317-08 (Ordinance). PFRs were received from  
12 Citizens Protecting Critical Areas (CPCA),<sup>2</sup> Olympic Stewardship Foundation, *et al.* (OSF),<sup>3</sup>  
13 and Fred Hill Materials, Inc. (Fred Hill).<sup>4</sup> Pursuant to RCW 36.70A.290(5), the Board  
14 consolidated these three PFRs into a single matter; referencing it as Case No. 08-2-0029c.<sup>5</sup>  
15

16 In July 2008, pursuant to WAC 242-02-710(1), the Board dismissed Fred Hill as a party and  
17 dismissed all issues raised by Fred Hill.<sup>6</sup>  
18

19 During the months of August and September 2008, the Board received timely filings of  
20 briefs from CPCA, OSF, and Jefferson County. Also in September, the Board received a  
21 motion for leave to file an *Amicus Curiae* brief in support of Jefferson County from the Port  
22 Gamble S'Klallam Tribe, Jamestown S'Klallam Tribes, Washington Environmental Council,  
23 and Futurewise (collectively, *Amici* parties).  
24

25  
26 On October 7, 2008, the Board held the Hearing on the Merits (HOM) in Olympia,  
27 Washington. CPCA was represented by Gerald Steel. OSF was represented by Brian  
28  
29  
30

31 <sup>2</sup> CPCA's PFR was assigned Case No. 08-2-0024.

32 <sup>3</sup> OSF's PFR was assigned Case No. 08-2-0029.

<sup>4</sup> Fred Hill's PFR was assigned Case No. 08-2-0027.

<sup>5</sup> May 27, 2008 Order on Consolidation and Notice of Hearing and Preliminary Schedule.

<sup>6</sup> July 3, 2008 Order Dismissing Fred Hill Materials, Inc.

1 Hodges, and Jefferson County was represented by Mark Johnsen. All three Board  
2 Members attended. Holly Gadbaw presided.

### 3 4 III. PRELIMINARY MATTERS

#### 5 Amicus Curiae Brief

6 As noted *supra*, the Board received a motion by the *Amici* parties to file a brief in support of  
7 Jefferson County as to issues raised by OSF in relationship to the designation and  
8 regulation of channel migration zones and buffers for non-fish bearing streams.<sup>7</sup> In addition,  
9 the *Amici* parties submitted argument as to OSF's reliance on the Supreme Court's July 31,  
10 2008 decision in *Futurewise v. Western Washington Growth Management Hearings Board*.<sup>8</sup>

11  
12 OSF filed an objection to the *Amici* parties' brief contending that it "offers no unique or  
13 helpful information that has not already been presented by the parties ... [and] a significant  
14 portion of the proposed brief simply repeats Jefferson County's versions of the facts and  
15 arguments."<sup>9</sup> In addition, OSF asserts the brief "fails to correctly identify the issues  
16 addressed, offers scientific conclusions without citation to evidence in the Record, cites a  
17 non-BAS document as BAS, cites to the same exhibit that it has separately moved to strike,  
18 and fails to provide accurate citations to the Record."<sup>10</sup> At the HOM, the Board GRANTED  
19 the *Amici* parties' motion, thereby permitting the *Amici* Brief.  
20  
21

22  
23 In addition to its motion for an *Amici* Brief, the *Amici* parties filed a Motion to Strike  
24 appendices and associated arguments submitted by OSF with its Prehearing Brief.<sup>11</sup> The  
25

26 <sup>7</sup> *Amici* Brief, at 2.

27 <sup>8</sup> Docket No. 80396-0. As the *Amici* parties correctly note, the Supreme Court issued its decision on July 31,  
28 2008, and reconsideration of this decision has been requested by several parties, including *Futurewise*.  
29 However, at the time of the October 7, 2008 Hearing on the Merits, the Supreme Court has yet to announce its  
30 position on the request for reconsideration.

31 <sup>9</sup> OSF Objection, at 2. At the HOM, OSF questioned whether it would be permitted to file a reply to the *Amici*  
32 Brief contending that its filing was in opposition to the *Amici* parties and did not provide responding argument  
as to the assertions set forth in the *Amici* Brief. Both Jefferson County and CPCA objected to permitting such  
a reply. Later in the HOM, OSF stated that it did not need to file a reply in relationship to the *Amici* Brief  
because its briefing and oral arguments sufficiently addressed the assertions made in the brief.

<sup>10</sup> OSF Objections, at 2.

<sup>11</sup> Motion to Strike, at 1.

1 *Amici* parties asserted that the appendices, with the exception of portions of Appendix 5 and  
2 Appendix 6, are not part of the Record in this matter nor has OSF sought supplementation  
3 of the Record for these appendices. OSF contends the *Amici* parties have no standing to  
4 file a procedural motion and are simply reiterating the same claim made by CPCA with its  
5 Motion to Strike; a motion which was subsequently denied by the Board.<sup>12</sup> OSF further  
6 notes that all of the challenged appendices are contained within the Record.<sup>13</sup> At the HOM,  
7 the Board DENIED the *Amici* parties' motion; OSF's appendices are part of the Record for  
8 this proceeding.  
9

10  
11 Abandoned Issues:

12 With Issue 1, CPCA asserted Jefferson County failed to comply with the public participation  
13 provisions of the GMA.<sup>14</sup> CPCA presented no argument, written or oral, as to this issue.

14 With the exception of setting forth Issue 2 within an introductory section, it does not appear  
15 to the Board that OSF has presented any argument, written or oral, as to this issue which  
16 alleged Jefferson County failed to comply with the GMA when it subjected all land use or  
17 development activity to review under the CAO.<sup>15</sup> In addition, the Board finds no argument  
18 supporting Issue 7 which challenged the application of the County's clearing and grading  
19 restrictions contained in JCC 18.22.170(3) to CMZs. Although cursory reference to this  
20 issue was made in a footnote and an excerpt of the challenged provisions was noted within  
21 OSF's brief, this does not amount to "briefing" of the issue.<sup>16</sup>  
22  
23

24 Therefore, pursuant to WAC 242-02-570, the Board deems these issues - CPCA Issue 1  
25 and OSF Issues 2 and 7 - abandoned.<sup>17</sup>  
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30 <sup>12</sup> OSF Opposition to Motion to Strike, at 1 (citing to September 15, 2008 Order on Motion to Strike).

<sup>13</sup> OSF Opposition to Motion to Strike, at 2-3.

<sup>14</sup> See CPCA PFR, at 2; July 10, 2008 Prehearing Order, at 2.

<sup>15</sup> See OSF PFR, at 4; OSF Restatement of Issues, at 1, July 10, 2008 Prehearing Order, at 2.

<sup>16</sup> See OSF Prehearing Brief, Footnote 16; See also, Pages 7 and 15 for provision excerpts.

<sup>17</sup> See also, *WEC v. Whatcom County*, Case No. 95-2-0071, FDO (December 20, 1995); *OEC v. Jefferson County* Case No. 94-2-0017, FDO (February 16, 1995) – unbriefed issues are deemed abandoned.

1 IV. BURDEN OF PROOF

2 For the purposes of Board review of comprehensive plans and development regulations  
3 adopted by local government, the GMA establishes three major precepts: a presumption of  
4 validity; a "clearly erroneous" standard of review; and a requirement of deference to the  
5 decisions of local government.  
6

7 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and  
8 amendments to them are presumed valid upon adoption:  
9

10 Except as provided in subsection (5) of this section, comprehensive plans and  
11 development regulations, and amendments thereto, adopted under this chapter  
12 are presumed valid upon adoption.

13 The GMA further provides that the standard of review is whether the challenged enactments  
14 are clearly erroneous:

15 The board shall find compliance unless it determines that the action by the  
16 state agency, county, or city is clearly erroneous in view of the entire record  
17 before the board and in light of the goals and requirements of this chapter.<sup>18</sup>

18 In order to find the County's action clearly erroneous, the Board must be "left with the firm  
19 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,  
20 121 Wn.2d 179, 201, 849 P.2d 646 (1993).  
21

22 Within the framework of state goals and requirements, the Board must grant deference to  
23 local governments in how they plan for growth:  
24

25 In recognition of the broad range of discretion that may be exercised by  
26 counties and cities in how they plan for growth, consistent with the  
27 requirements and goals of this chapter, the legislature intends for the boards  
28 to grant deference to the counties and cities in how they plan for growth,  
29 consistent with the requirements and goals of this chapter. Local  
30 comprehensive plans and development regulations require counties and  
31 cities to balance priorities and options for action in full consideration of local  
32 circumstances. The legislature finds that while this chapter requires local  
planning to take place within a framework of state goals and requirements,  
the ultimate burden and responsibility for planning, harmonizing the planning

<sup>18</sup> RCW 36.70A.320(3).  
FINAL DECISION AND ORDER  
Case No. 08-2-0029c  
November 19, 2008  
Page 7 of 51

1 goals of this chapter, and implementing a county's or city's future rests with  
2 that community.<sup>19</sup>

3  
4 In challenging the sufficiency of compliance efforts as well as in an initial petition for review,  
5 the burden is on Petitioners to overcome the presumption of validity and demonstrate that  
6 any action taken by the County is clearly erroneous in light of the goals and requirements of  
7 the GMA.<sup>20</sup> Where not clearly erroneous, and thus within the framework of state goals and  
8 requirements, the planning choices of local government must be granted deference.  
9

## 10 V. DISCUSSION

11 At challenge is Jefferson County's adoption of a new chapter to the Jefferson County Code  
12 (JCC) – Chapter 18.22 - the County's Critical Areas Ordinance (CAO). The adoption  
13 process for JCC 18.22 started in 2006 and was subject to continuing development and  
14 revision by the County's Department of Community Development, the Planning  
15 Commission, the Critical Areas Committee and Planning Commission Sub-Committee, and  
16 the Board of County Commissioners (BOCC) and allowed for several public hearings and  
17 meetings. The BOCC's decision to adopt JCC 18.22 as the County's CAO occurred on  
18 March 17, 2008 with the enactment of Ordinance No. 03-0317-08.<sup>21</sup>  
19

20  
21 Petitioners raise distinct issues in this matter. CPCA contends Jefferson County is not  
22 adequately protecting critical areas because the CAO's enforcement provisions are  
23 ineffective. To the contrary, OSF asserts the County has effectively gone too far in adopting  
24 provisions addressing stream buffers, critical area review procedures, channel migration  
25 zones (CMZs), and development activities within CMZs.  
26

27  
28 The text of each issue will be set forth within the discussion related to that issue.  
29

### 30 Citizens Protecting Critical Areas (CPCA)

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<sup>19</sup> RCW 36.70A.3201 (in relevant part).

<sup>20</sup> RCW 36.70A.320(2).

<sup>21</sup> Ordinance 03-0317-08; County Response Brief, at 1-3.



1 • **Protecting Critical Areas through Enforcement Provisions**

2 *Issue 2: Whether the County after the adoption of the Ordinance has complied with the*  
3 *requirement of RCW 36.70A.060(2) and .172(1) to "adopt development regulations that*  
4 *protect critical areas" as required by RCW 36.70A.130, and whether, particularly for fish and*  
5 *wildlife habitat areas and associated wetlands, the County's development regulations fail to*  
6 *actually require enforcement and monitoring sufficient to protect critical areas in violation of*  
7 *RCW 36.70A.020(9) and (10), .060(2), .172(1), and .130?*

8 **Positions of the Parties**

9 CPCA contends JCC 18.22 does not adopt any new enforcement regulations for the  
10 protection of critical areas.<sup>22</sup> According to CPCA, the County relies on existing regulations  
11 contained in JCC 18.50 for enforcement of the CAO's provisions which are inadequate  
12 because these provisions: (1) are not mandatory, allowing for discretionary application, (2)  
13 are based on a complaint driven system, (3) lack monitoring provisions, and (4) fail to  
14 incorporate BAS.<sup>23</sup> In support of these assertions, CPCA provides two complaint-based  
15 cases to demonstrate that the County is not enforcing its CAO.<sup>24</sup> CPCA also submits  
16 various comments from individuals and groups as to the need for adequate enforcement in  
17 order to protect critical areas.<sup>25</sup>

18  
19  
20 CPCA further asserts that information derived from Water Resource Inventory Area (WRIA)  
21 plans, which CPCA contends is BAS, shows enforcement of regulations is necessary to  
22 protect critical areas and the WRIA analysis plainly shows the County's critical area  
23 regulations are not being adequately enforced.<sup>26</sup> According to CPCA, the failure of the  
24 County to have effective enforcement regulations deviates from BAS without the required  
25 reasoned justification for such a deviation.<sup>27</sup>  
26  
27  
28

29 <sup>22</sup> CPCA focuses on fish and wildlife habitat areas and their associated wetlands.

30 <sup>23</sup> CPCA Prehearing Brief, at 2-3, 10.

31 <sup>24</sup> CPCA Prehearing Brief, at 4-9 (citing to County Complaints COM06-00037 and COM07-00064, Exhibits 16-  
32 750 and 16-749, respectively).

<sup>25</sup> CPCA Prehearing Brief, at 14-18 (citing to various comments contained in Exhibits 8 and 12).

<sup>26</sup> CPCA Prehearing Brief, at 10-14 (citing to WRIA plans – Exhibit 8-525).

<sup>27</sup> CPCA Prehearing Brief, at 10 (citing to *Friends of Skagit County v. Skagit County*, WWGMHB Case No. 96-  
2-0025 and *WEC v. Whatcom County*, WWGMHB Case No. 95-2—0071).

1 In response, Jefferson County first asserts CPCA's challenge is untimely because it is  
2 actually attacking JCC 18.50, which was adopted in 2001 and was not amended by  
3 Ordinance No. 03-0317-08.<sup>28</sup> Jefferson County then contends that even if CPCA was  
4 permitted to challenge the County's enforcement provisions, the GMA does not mandate the  
5 specific types of enforcement suggested by CPCA, such as monitoring.<sup>29</sup>  
6

7 The County points out that JCC 18.50 provides enforcement tools which sufficiently satisfy  
8 the requirements of the GMA such as Notice and Orders, Stop Work Orders, Emergency  
9 Orders, suspension and revocation of permits, and civil and criminal penalties.<sup>30</sup> The  
10 County cites to previous Board and court decisions to support its assertion that the GMA is  
11 silent as to enforcement and does not require "specific language guaranteeing that all  
12 violations will be prevented or punished in a particular fashion" nor does the GMA mandate  
13 "any specific level of funding or number of employees for monitoring and enforcement of  
14 critical area regulations."<sup>31</sup>  
15  
16

17 In reply, CPCA reiterates its assertions that the GMA requires critical areas to be protected  
18 and the County's enforcement program does not adequately protect these areas, primarily  
19 because it lacks a monitoring program which CPCA believes to be fundamental.<sup>32</sup> Also,  
20 CPCA points out that the language of JCC 18.50 is permissive and without the inclusion of  
21 mandatory language the County fails to protect critical areas.<sup>33</sup> As to Jefferson County's  
22 contention that CPCA's challenge is untimely, CPCA argues it is not challenging JCC 18.50  
23 but rather its challenge is based on an argument that "the updated CAO does not have  
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29 <sup>28</sup> County Response Brief, at 20-21.

30 <sup>29</sup> County Response Brief, at 21.

31 <sup>30</sup> County Response Brief, at 22 (citing to JCC 18.50.05-18.50.110).

32 <sup>31</sup> County Response Brief, at 21-23 (citing to *Concerned Friends of Ferry County v. Ferry County*, EWGMHB Case No. 06-1-0003; *Diehl v. Mason County*, WWGMHB Case No. 95-2-0073; *Smith v. City of Kelso*, 112 Wn. App. 277 (2002); *Moore v. Wayman*, 85 Wn. App. 710 (1997).

<sup>32</sup> CPCA Reply Brief, at 2-4, 5-6.

<sup>33</sup> CPCA Reply Brief, at 5-7.

1 enforcement and monitoring programs that are a necessary component to 'protect' fish and  
2 wildlife habitat areas and associated wetlands."<sup>34</sup>

3  
4 **Board Discussion**

5 The first question for the Board to resolve is whether CPCA's challenge is timely. As noted  
6 by Jefferson County, the enforcement provisions for the CAO are contained in JCC 18.50  
7 which was not amended by the legislative enactment under challenge in this matter. The  
8 enactment of Ordinance No. 03-0317-08 was a direct result of challenges raised in 2005 to  
9 the County's seven-year update to the CAO's predecessor – JCC 18.15, the County's  
10 Environmentally Sensitive Areas provisions.<sup>35</sup> As such, the Board finds that the challenged  
11 Ordinance is a continuation of the County's duty to comply with RCW 36.70A.130(1) in  
12 updating its comprehensive plan and development regulations to ensure compliance with  
13 the GMA.  
14

15  
16 In *Thurston County v. WWGMHB*, the Supreme Court analyzed the scope of review  
17 available during an update conducted pursuant to RCW 36.70A.130 and held (Emphasis  
18 added):<sup>36</sup>

19  
20 *... [A] party may challenge a county's failure to revise a comprehensive plan*  
21 *only with respect to those provisions that are directly affected by new or*  
22 *recently amended GMA provisions, meaning those provisions related to*  
23 *mandatory elements of a comprehensive plan that have been adopted or*  
24 *substantively amended since the previous comprehensive plan was adopted*  
25 *or updated, following a seven year update. This rule provides a means to*  
26 *ensure a comprehensive plan complies with recent GMA amendments,*  
27 *recognizes the original plan was legally deemed compliant with the GMA, and*  
28 *preserves some degree of finality.*

29 <sup>34</sup> CPCA Reply Brief, at 5.

30 <sup>35</sup> In December 2004, in order to comply with RCW 36.70A.130(1) – the GMA's 7-year update requirement, the  
31 County adopted Ordinance No. 17-1213-0. In February 2005, the Washington Environmental Council (WEC)  
32 timely filed a Petition for Review against the County challenging the environmental regulations set forth in JCC  
18.15. See *WEC v. Jefferson County*, Case No. 05-2-0006. Case No. 05-2-0006 was dismissed by the Board  
at the request of the parties based on a Settlement Agreement having been reached. See May 19, 2008  
Order of Dismissal.

<sup>36</sup> *Thurston County v. WWGMHB*, 164 Wn.2d 329, 344-45 (2008) (Internal citations omitted).

1 The legislature intended for the update process to include an assessment of  
2 whether a comprehensive plan complies with recent amendments to the GMA.  
3 *The update process "provides the vehicle for bringing plans into compliance*  
4 *with recently enacted GMA requirements and for recognizing changes in land*  
5 *usage or population. It creates no 'open season' for challenges previously*  
6 *decided or time-barred."* If a county fails to revise its comprehensive plan to  
7 comply with new or amended GMA requirements, a party must be able to  
8 challenge the comprehensive plan or GMA amendments would be essentially  
9 unenforceable.

10 *Limiting the scope of failure to revise challenges recognizes the original*  
11 *comprehensive plan was legally deemed GMA compliant. A comprehensive*  
12 *plan is presumed valid upon adoption and is conclusively deemed legally*  
13 *compliant if it is not challenged within 60 days. The seven year update does*  
14 *not strip the original comprehensive plan of its legal status as GMA compliant,*  
15 *and we will not presume the legislature intended such a drastic measure in the*  
16 *absence of statutory language to that effect. If the laws have not changed, the*  
17 *comprehensive plan remains GMA compliant.*

18 Finally, limiting failure to revise challenges to those aspects of a  
19 comprehensive plan directly affected by new or substantively amended GMA  
20 provisions serves the public policy of preserving the finality of land use  
21 decisions. Finality is important because "[i]f there were not finality, no owner of  
22 land would ever be safe in proceeding with development of his property." The  
23 legislature recognized the importance of finality in limiting the time period for  
24 challenging a comprehensive plan to 60 days. *If we were to allow a party to*  
25 *challenge every aspect of a comprehensive plan for GMA compliance every*  
26 *seven years, the floodgates of litigation initially closed by the 60-day appeal*  
27 *period would be reopened. Aspects of plans previously upheld on appeal*  
28 *could be subjected to a new barrage of challenges because a party could*  
29 *argue it is challenging a county's failure to update a provision, rather than*  
30 *reasserting its claim against the original plan. Because the legislature has not*  
31 *condoned such a result, we choose to limit challenges for failures to update*  
32 *comprehensive plans to those provisions that are directly affected by new or*  
*recently amended GMA provisions.*

33 Thus, the Supreme Court made it clear that when a city or county is conducting a review  
34 pursuant to RCW 36.70A.130, petitioners are limited to challenges for failures to update  
35 comprehensive plans to those provisions directly affected by new or recently amended GMA  
36 provisions. The Board notes that in the *Thurston County* case the Supreme Court was

1 referencing a comprehensive plan as opposed to development regulations, such as JCC  
2 18.50. However, RCW 36.70A.130(1)(a) provides (Emphasis added):

3 Each comprehensive land use plan *and development regulations* shall be  
4 subject to continuing review and evaluation by the county or city that adopted  
5 them. Except as otherwise provided a county or city shall *take legislative*  
6 *action to review and, if needed, revise* its comprehensive plan and  
7 *development regulations* to ensure the plan *and the regulations* comply with  
8 the requirements of this chapter according to the time periods specified in  
9 subsection (4) of this section.

10 Therefore, the Board finds the reasoning and rationale set forth by the Supreme Court in the  
11 *Thurston County* matter, in regards to updates conducted pursuant to RCW 36.70A.130 for  
12 comprehensive plans, applies equally to development regulations. The question before the  
13 Board then becomes whether the GMA provisions CPCA alleges were violated by the  
14 County were directly affected by new provisions or were recently amended, thereby  
15 necessitating a revision to JCC 18.50 in order to ensure compliance with the requirements  
16 of the GMA and permitting a challenge based on these provisions.  
17

18 According to Jefferson County, JCC 18.50 was adopted in 2001 and the challenged  
19 Ordinance did not modify or amend this chapter. The key provisions of the GMA relied on  
20 by CPCA – 36.70A.060(2) and 36.70A.172(1) - were both enacted prior to 2001 and have  
21 not been substantially amended since that time.<sup>37</sup> The GMA's requirements set forth in  
22 .060(2) and .172(1) remain the same today as they did in 2001. RCW 36.70A.060 requires  
23 development regulations to protect critical areas. RCW 36.70A.172(1) requires counties  
24 and cities to include the best available science in the development of policies and  
25 development regulations in order to protect the functions and values of critical areas. As for  
26 the GMA's goals cited by CPCA, although RCW 36.70A.020(9) was amended in 2002, this  
27 amendment did not modify language in relationship to fish and wildlife habitat.<sup>38</sup> Therefore,  
28  
29  
30  
31

32 <sup>37</sup> RCW 36.70A.060 was amended in 2005 (see 2005 c 423 §3). However, this amendment did not mandate a  
revision of JCC 18.50.

<sup>38</sup> See 2002 c 154 §1  
FINAL DECISION AND ORDER  
Case No. 08-2-0029c  
November 19, 2008  
Page 13 of 51

1 no new or amended provisions-have been adopted by the Legislature which would require  
2 Jefferson County to revise JCC 18.50 while conducting its RCW 36.70A.130 update.

3  
4 The Board finds and concludes that the provisions of JCC 18.50 were not amended by  
5 Ordinance No. 03-0317-08 nor were the provisions directly affected by new or recently  
6 amended GMA provisions which would have necessitated a revision in order to ensure  
7 compliance with the GMA. Therefore, the provisions of JCC 18.50 are not open to  
8 challenge by CPCA.

9  
10 **Conclusion:** The Board finds and concludes that CPCA's challenge is founded on an  
11 assertion that the provisions of JCC 18.50 do not adequately protect critical areas as  
12 required by the GMA. JCC 18.50 sets forth the enforcement provisions for Jefferson  
13 County's Unified Development Code, including the CAO. The challenged legislative  
14 enactment – Ordinance No. 03-0317-08 – did not amend JCC 18.50 nor were there  
15 amendments to the GMA which directly affected this provision of the County's code so as to  
16 require revision pursuant to RCW 36.70A.130.

17  
18  
19 Since the County adopted JCC 18.50 in 2001 it is presumed to be GMA compliant and  
20 CPCA's contention that its provisions, via application to the CAO, fail to comply with the  
21 GMA as required by RCW 36.70A.020(9), .020(10), .060(2), .130, and .172(1) is untimely  
22 and the Board has no jurisdiction to address the issue.

23  
24  
25 **Olympic Stewardship Foundation (OSF)**

26 OSF set forth 10 issues for the Board's review. As noted *supra*, no argument was  
27 presented as to Issues 2 and 7 and, therefore these issues are deemed abandoned. The  
28 Board further notes that within OSF's briefing were several assertions based on  
29 constitutional premises.<sup>39</sup> This Board has previously held, and reaffirms today, that the  
30 GMA does not confer upon the Boards the authority to determine constitutionally-based  
31

32  

---

<sup>39</sup> See e.g., OSF Prehearing Brief, at 13-14 (constitutional nexus and rough proportionality requirements).  
FINAL DECISION AND ORDER  
Case No. 08-2-0029c  
November 19, 2008  
Page 14 of 51  
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1 claims and therefore such claims will not be addressed within this Final Decision and  
2 Order.<sup>40</sup>

3  
4 The Board will address the remaining issues in a similar format as presented by OSF.

5  
6 • **Application of the Shoreline Management Act**

7 *Issue 9: Did Jefferson County fail to comply with Washington's Shoreline Management Act,*  
8 *RCW 90.58.080, RCW 90.58.100(6), and RCW 90.58.030(3)(e)(i)-(iv), and GMA provisions*  
9 *RCW 36.70A.370, RCW 36.70A.020(6), and RCW 36.70A.480, by adopting the restrictions*  
10 *and limitations on all development and land use within all "channel migration zones" in JCC*  
11 *18.22.160-.180, regardless of whether the property is a shoreline of the state?*

12 **Positions of the Parties**

13 OSF contends Jefferson County's action in adopting Ordinance 03-0317-08 was clearly  
14 erroneous because this ordinance enacted critical area regulations within areas that are the  
15 exclusive jurisdiction of the Shoreline Management Act (SMA), RCW 90.58.<sup>41</sup> OSF cites  
16 the recent Supreme Court holding in *Futurewise v. Western Washington Growth*  
17 *Management Hearings Board* as well as the 2007 holding in *Biggers v. City of Bainbridge*  
18 *Island* to support this contention.<sup>42</sup> According to OSF, both of these cases stand for the  
19 premise that the SMA is the exclusive source of shoreline protection and development.<sup>43</sup>

20  
21  
22 In response, the County argues that the SMA does not prevent regulation of CMZs under  
23 the GMA. According to the County, RCW 36.70A.480 did not remove the County's  
24 authority to regulate critical area buffers under the GMA; rather, it specifically authorizes the  
25 County to do so through the CAO.<sup>44</sup> The County further notes that the *Futurewise* decision

26  
27  
28 <sup>40</sup> See, *Panesko v. Lewis County*, Case No. 00-2-0031c and *Hadaller v. Lewis County*, Case No. 08-2-0004c,  
29 Combined Compliance Order/FDO (July 2, 2008). See also, *Dudek/Bagely v. Douglas County*, EWGMHB  
30 Case No. 07-1-0009, Order on Motions (Sept. 26, 2007)(Board does not have jurisdiction over constitutional  
31 issues); *Skills v. City of Auburn*, CPSGMHB Case No. 07-3-0008c, FDO (July 18, 2007)(Allegations based on  
32 constitutional issues are beyond the Board's jurisdiction.).

<sup>41</sup> OSF Prehearing Brief, at 10.

<sup>42</sup> OSF Prehearing Brief, at 10 (Citing *Futurewise v. WWGMHB*, Docket No 80396-0 (July 31, 2008); *Biggers*  
*v. Bainbridge Island*, 162 Wn.2d 683 (2007)).

<sup>43</sup> OSF Prehearing Brief, at 10-11.

<sup>44</sup> County Response Brief, at 7-8.

1 is merely a slip opinion which, due to a pending motion for reconsideration, does not have  
2 the force of law.<sup>45</sup> In addition, the County asserts that neither *Futurewise* nor *Biggers* state  
3 that all GMA regulations with a shoreline area are invalid, as OSF suggests, and that court  
4 decisions provide no suggestion that such a regulation is inappropriate.<sup>46</sup>

5  
6 In reply OSF encourages the Board not to ignore the Supreme Court's holding in *Futurewise*  
7 despite the fact that no mandate has been issued due to the pending motion for  
8 reconsideration. OSF further contends that until the Court issues a mandate, the parties  
9 may rely on this Board's decision underlying the appeal because the Board was the fact  
10 finding body.<sup>47</sup>

### 12 Board Discussion

13  
14 The Board recognizes, based on the Supreme Court's recent holding in *Futurewise, et al. v.*  
15 *WWGMHB*, that there may be one exception to the GMA's rule requiring protection of critical  
16 areas – critical areas located within the jurisdiction of the SMA. The Court, in addressing the  
17 question of whether the Legislature intended the GMA to apply to critical areas in shorelines  
18 covered by a Shoreline Master Plan (SMP) until the Department of Ecology has approved a  
19 new or updated SMP, stated (Emphasis added):<sup>48</sup>

20  
21 [Citing ESHB 1933 (codified as RCW 36.70A.480)] "The legislature intends  
22 that critical areas within the jurisdiction of the [SMA] shall be governed by the  
23 [SMA] and that critical areas outside the jurisdiction of the [SMA] shall be  
24 governed by the [GMA]." We hold that the legislature meant what it said.  
25 *Critical areas within the jurisdiction of the SMA are governed only by the SMA.*

26 The regulations at issue for OSF in this case relate primarily to the County's adoption of  
27 Channel Migration Zones (CMZs) for four of its most prominent rivers. The Board notes all

28  
29 <sup>45</sup> County Response Brief, at 8.

30 <sup>46</sup> County Response Brief, at 8.

31 <sup>47</sup> OSF Reply, at 1-2 (citing to *Obert v. Environmental Research & Development Corp.* 112 Wn.2d 323 (1989)).  
32 The Board case underlying the appeal before the Supreme Court is *Evergreen Islands v. City of Anacortes*,  
WWGMHC Case No. 05-2-0016, FDO (Dec. 27, 2005).

<sup>48</sup> *Futurewise, et al v. WWGMHB*, 162 Wn.2d 242, 244–45 (2008). The Board notes the tension created by the  
Supreme Court's ruling in the *Futurewise* case, leaving the protection of critical areas within the shoreline area  
to regulations which date back to the 1970s in some areas of the State.



1 of these rivers are within the jurisdiction of the SMA and therefore land located within 200  
2 feet of either side of the rivers falls under the jurisdiction of the SMA. Therefore, despite the  
3 lack of a mandate and the pending motion for reconsideration,<sup>49</sup> this Board will adhere to  
4 the Court's unambiguous holding that critical areas within the shoreline are regulated by the  
5 SMA.  
6

7 Thus, for the area of the CMZ that is within the 200 foot shoreline jurisdiction, the Board  
8 views the County's action effectively as a segment of its SMP update which is subject to  
9 review and approval by Ecology. However, as is explained below, CMZs are not limited to a  
10 200 foot area bordering either side of a river. Rather CMZs expand outward from the river's  
11 edge and encompass land in excess of the area within the SMA's regulatory boundaries.  
12 For the area of the CMZs that are located outside the 200 foot shoreline jurisdiction, these  
13 are critical areas squarely within the GMA's jurisdiction pursuant to RCW 36.70A.060, .170,  
14 and .172. As such, this Board has jurisdiction to review the adopted regulations for  
15 compliance with the GMA.  
16  
17

18 **Conclusion:** The Board finds that the Supreme Court's recent pronouncement in  
19 relationship to the jurisdictional interface between the SMA and GMA is persuasive and the  
20 Board applies the holding to this decision. Therefore, for only those areas of the County's  
21 CMZs that are located outside of the 200 foot shoreline jurisdiction, the Board has  
22 jurisdiction to review development regulations adopted pursuant to the GMA's mandates to  
23 protect critical areas as provided in RCW 36.70A.060, .170, and .172.  
24  
25

26 • **Prescriptive Buffers for Streams**

27 *Issue 1: Did Jefferson County fail to comply with RCW 36.70A.172(1) in adopting the*  
28 *prescriptive buffers, identified in JCC 18.22.270, Table 18.22.270(1), on all streams as*  
29 *critical areas for fish and wildlife habitat conservation?*  
30  
31

32 <sup>49</sup> The Supreme Court issued its decision on July 31, 2008. On August 20, 2008, CTED and Ecology filed a Motion for Reconsideration of the decision. As of the issuance of this FDO, the Court has yet to accept or deny the Motion.

1 **Positions of the Parties**

2 OSF contends that Jefferson County's prescriptive 75-foot buffers on all property adjacent to  
3 intermittent and non-fish-bearing streams (Ns and Np streams) are not based on BAS.

4 OSF asserts the County simply "split the difference" when faced with competing BAS  
5 without undertaking a reasoned process of balancing the various planning goals against  
6 BAS necessary to justify the 75-foot buffer for these streams.<sup>50</sup>  
7

8 Jefferson County responds by pointing out the BAS in regards to buffers for seasonal, non-  
9 fish bearing streams recommended buffers ranging from 50 feet to 100 feet and the  
10 selected buffer of 75 feet is within that range. In addition, the County notes its CAO  
11 provisions permit a buffer reduction to 50 feet on low gradient non-fish bearing season  
12 streams.<sup>51</sup>  
13

14  
15 The *Amici* parties submit that the GMA requires the inclusion of BAS in the development of  
16 regulations to protect critical areas but does not mandate the selection of "one set of BAS  
17 over rival BAS."<sup>52</sup> Rather, the *Amici* parties contend the 75-foot buffer selected by the  
18 County incorporated varying pieces of valid scientific evidence and selected a buffer  
19 somewhere within the range established by that evidence.<sup>53</sup>  
20

21 OSF provided no reply on this issue.  
22

23 **Board Discussion**

24 At issue are the prescriptive buffers for Type Np and Type Ns non-fish bearing streams.

25 JCC 18.22.270 – Table 1 sets forth the following buffers:  
26

27

Stream Type	Buffer Requirement
Type "Np"	75 feet

28  
29  
30

31 <sup>50</sup> OSF Prehearing Brief, at 20-21. OSF's Reply Brief did not provide any additional argument on this issue.

32 <sup>51</sup> County Response Brief, at 18-20.

<sup>52</sup> *Amici* Response Brief, at 8.

<sup>53</sup> *Amici* Response Brief, at 9.

1	Non-Fish Bearing Perennial Stream	
2	Type "Ns" – Non-Fish Bearing Seasonal	75 feet
3	Streams greater than or equal to 20%	
4	Type "Ns" – Non-Fish Bearing Seasonal	50 feet
5	Streams less than 20% grade	

6  
7 Both OSF and the County agree that BAS relied on during the CAO update process  
8 recommended buffer widths ranging from 50 feet to 100 feet for Ns and Np streams. RCW  
9 36.70A.172(1) requires Jefferson County to include BAS when developing critical area  
10 protections and there is no doubt that a 75 foot buffer falls within the range of BAS, with a  
11 50 foot buffer being at the lowest range of the spectrum. Therefore, the Board finds no error  
12 with the County's selection of this buffer width.  
13

14 OSF cites to *Swinomish* and *Ferry County* to support an assertion that the Record needs to  
15 contain evidence demonstrating that the County "undertook the required reasoned process  
16 of balancing the various planning goals against BAS necessary to justify the 75-foot  
17 buffer."<sup>54</sup> However, the Board does not read these two cases as requiring a balancing  
18 between the GMA's mandate to protect critical areas and the non-prioritized goals  
19 jurisdictions are to use as a guide when developing comprehensive plans and development  
20 regulations. Rather, both *Swinomish* and *Ferry County* set forth the principle that if a  
21 jurisdiction seeks to deviate from BAS it must provide a reasoned justification for such a  
22 deviation.<sup>55</sup> In addition, the Court of Appeals in *WEAN v. Island County* stated that it is  
23 when a jurisdiction elects to adopt a critical area requirement that is outside the range that  
24 BAS would support, the jurisdiction must provide findings explaining the reasons for its  
25 departure from BAS and identifying the other goals of GMA which it is implementing by  
26 making such a choice.<sup>56</sup> Here, Jefferson County's choice of buffer width did not deviate  
27 from BAS; rather the County selected a width within the range of BAS and as such,  
28  
29  
30  
31

32 <sup>54</sup> OSF Prehearing Brief, at 21. OSF cites to no specific GMA planning goal(s).

<sup>55</sup> *Swinomish*, 161 Wn.2d at 430-31 (citing to *Ferry County*, 155 Wn.2d at 837-38).

<sup>56</sup> *WEAN v. Island County*, 122 Wn. App. 156, 173 (2004).

1 although the balancing of GMA goals is always required in the context of GMA planning, the  
2 justification sought by OSF is not needed for a decision supported by BAS.

3  
4 **Conclusion:** The Board finds and concludes that OSF failed to demonstrate Jefferson  
5 County violated RCW 36.70A.172(1) when it adopted prescriptive buffers for Ns and Np  
6 streams. JCC 18.22.270 – Table 1 establishes buffers widths which are within the range of  
7 BAS considered by the County.  
8

9 

- **Burden Shifting**

10 *Issue 3: Did Jefferson County fail to comply with RCW 36.70A.172(1) when it adopted JCC*  
11 *18.22.095, which placed the burden on the affected property owner of proving that a*  
12 *prescriptive buffer is physically and functionally separated from a critical area and does not*  
13 *protect the functions and values of the critical area?*

14 **Position of the Parties**

15 OSF contends that functionally and physically isolated areas are not critical areas and  
16 therefore cannot be subjected to the County's CAO.<sup>57</sup> OSF asserts the language of JCC  
17 18.22.095, which gives the County "unlimited discretion to shift the burden of demonstrating  
18 physical and functional isolation" onto the property owner, violates the GMA because it is  
19 the County that bears the burden of designating critical areas and identifying the functions  
20 and values before imposing regulatory restrictions.<sup>58</sup>

21  
22  
23 In response, Jefferson County asserts that JCC 18.22.095 is a typical critical areas  
24 provision and aligns with other cities and counties which require applicants to "take certain  
25 steps to demonstrate that a proposed development will not impact critical areas."<sup>59</sup> The  
26 County points to requirements for the delineation of wetland boundaries, wildlife habitat  
27 reports, geotechnical reports, or geological assessments – all of which are routinely required  
28 in order for a development proposal to be adequately reviewed.<sup>60</sup>  
29  
30

31  
32 <sup>57</sup> OSF Prehearing Brief, at 21.

<sup>58</sup> OSF Prehearing Brief, at 22.

<sup>59</sup> County Response Brief, at 19-20.

<sup>60</sup> County Response Brief, at 20.

1 The *Amici* parties did not submit briefing on this issue.

2  
3 In reply, OSF reiterates its assertions that the GMA mandates local government and not  
4 property owners to develop BAS to identify critical areas before imposing restrictions. In  
5 addition, OSF argues the County's analogy to other types of reports is erroneous because  
6 the property at issue in this matter does not constitute a critical area and thus the property  
7 owner is not required to demonstrate proposed activities will not harm the area.<sup>61</sup>  
8

9 **Board Discussion**

10 JCC 18.22.095 provides:

11  
12 Buffer areas which are both physically separated and functionally isolated  
13 from a critical area and do not protect the critical area from adverse impacts  
14 shall be excluded from buffers otherwise required by this chapter. Functional  
15 isolation can occur due to existing public roads, structures, vertical separating,  
16 or any other relevant physical characteristic. The administrator may require a  
17 biological site assessment to determine whether the buffer is functionally  
18 isolated.

19 This provision is contained within Article II of JCC 18.22, the Administrative Provisions of the  
20 County's CAO, and is applicable to all types of buffers for critical areas.

21 First, the Board notes that OSF misreads the County's provision. JCC 18.22.095 provides  
22 that buffer areas which are both physically separated and functionally isolated from their  
23 "parent" critical area so as to serve no protection against adverse impacts to the critical area  
24 are exempted from compliance with the CAO. JCC 18.22.095 does not exempt isolated  
25 critical areas, only separated and isolated buffers which fail to provide protection to the  
26 critical area itself.  
27

28  
29 Second, the County has performed its duty in designating the critical area and assigning it a  
30 prescriptive buffer in order to protect the functions and values of the critical area as required  
31 by the GMA. The County is not asking a property owner to designate a critical area; it is  
32

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<sup>61</sup> OSF Reply Brief, at 9-10.  
FINAL DECISION AND ORDER  
Case No. 08-2-0029c  
November 19, 2008  
Page 21 of 51

1 simply requesting that if property owners wish to be relieved from compliance with the CAO  
2 then a Biological Site Assessment (BSA) should be submitted to demonstrate the basis for  
3 exemption. As the County correctly noted, the Board sees this requirement as being similar  
4 to requiring property owners to prepare other types of reports which demonstrate the  
5 proposed development will not adversely impact a critical area. Here, the property owner  
6 would essentially be requesting a reduction in the standard buffer, due to separation and  
7 isolation, and is therefore required to show that this reduction will not adversely impact the  
8 functions and values of the critical area which the buffer is intended to protect.<sup>62</sup>

10  
11 **Conclusion:** The Board finds and concludes that OSF has failed to demonstrate Jefferson  
12 County violated RCW 36.70A.172(1) by enacting JCC 18.22.095. This provision of the  
13 County's CAO does not require property owners to designate critical areas and identify the  
14 functions and values of these areas. Rather, this provision provides a procedural  
15 mechanism by which property owners may be relieved from compliance with the CAO if they  
16 can demonstrate a critical area buffer is physically separate and functionally isolated from its  
17 "parent" critical area such that it fails to provide protection to the functions and values of the  
18 critical area.  
19

20  
21 • **Channel Migration Zones**

22 The following issues and discussion relate to Jefferson County's enactment of CAO  
23 regulations for Channel Migration Zones (CMZs). OSF presented both consolidated and  
24 individualized arguments in relation to Issues 4 to 10 in relationship to these issues. The  
25 Board will address the issues in a similar fashion but has grouped the issues based on  
26  
27  
28  
29  
30

31 <sup>62</sup> The Board agrees with OSF that Jefferson County should provide guidance either within the CAO itself or  
32 within an informational handout as to what facts and information are required to be contained in the BSA.  
However, the requirement for a BSA is discretionary and details as to the necessary information would  
undoubtedly be provided or clarified when the report is made a requirement for development application  
review.

1 subject matter. Prior to discussing the issues, the Board believes a brief understanding of  
2 CMZs is necessary.<sup>63</sup>

3  
4 In the simplest of terms, a CMZ is a corridor of variable widths that includes the current  
5 stream or river channel plus the adjacent areas through which the channel has migrated or  
6 is likely to migrate within a given timeframe. The migration of a stream or river creates  
7 hazards to both private and public property while at the same time, when not restricted,  
8 provides for aquatic and riparian habitat by ensuring the fluvial process is accommodated.  
9 Thus, the principal goal of establishing a CMZ is to predict areas at risk for future channel  
10 erosion due to fluvial processes thereby guiding development in and along river and stream  
11 systems away from these areas. The need to identify CMZs is heightened in Washington  
12 due to the legacy of glaciation and the effects of large woody debris on channel bed  
13 dynamics.  
14

15  
16 Although methodologies for delineating CMZs have been developed to assist in flood  
17 hazard management, a CMZ is not the same thing as a floodplain or floodway as these  
18 areas focus on inundation while the CMZ represents areas both within and outside of  
19 floodplains and floodways which are susceptible to channel erosion. The delineation of  
20 CMZs is based on an analysis of historical information and field data to interpret past and  
21 current channel conditions in order to predict future channel behavior and areas at risk of  
22 channel movement. The delineation process takes into account trends in channel  
23 movement, context of disturbance history and changes in boundary conditions, as well as  
24 topography, bank erodibility, hydrology, sediment supply, and wood debris loading. The  
25 delineation is characterized by four zones and areas – Historical Migration Zone (HMZ),<sup>64</sup>  
26  
27  
28

29  
30 <sup>63</sup> The following synopsis of CMZs is based on WA State Dept. of Ecology's *A Framework For Delineating*  
31 *Channel Migration Zones (2003)*; US Dept. of the Interior – Bureau of Reclamation's *Channel Migration Zone*  
32 *Study Jefferson County, WA (2004)*; NOAA/Perkins Geosciences' *Channel Migration Hazard Maps – Final*  
*Report (2006)*; Perkins Geosciences/TerraLogic GIS's *Lower Hoh River Channel Migration Study (2004)*.  
Excerpts of these documents are included as Appendices 4, 5, 6, and 7, respectively to OSF's Prehearing  
Brief and reference to the first three documents is made as Findings 89, 90, and 91 or Ordinance 03-0317-08.

<sup>64</sup> The HMZ is the collective area the channel occupied in the historical record.

1 Avulsion Hazard Zone (AHZ),<sup>65</sup> Erosion Hazard Area (EHA),<sup>66</sup> and Disconnected Migration  
2 Area (DMA)<sup>67</sup> – and based on the equation of:  $HMZ + AHZ + EHA - DMA = CMZ$ .

3  
4 Article V of JCC 18.22 classifies CMZs as a type of Geologically Hazardous Area. The  
5 County's scientific documentation further delineated CMZs into four types: Disconnected  
6 Migration Areas (DMA), High Hazard CMZs, Moderate Hazard CMZs, and Low Hazard  
7 CMZs.<sup>68</sup> Also within the County's scientific documentation, hazard delineation was based  
8 on a varying time frame: High Hazard – less than 50 years; Moderate Hazard – 50 to 100  
9 years; Low Hazard – greater than 100 years.<sup>69</sup> CMZ Hazard Maps were produced for four  
10 of Jefferson County's rivers: the Duckabush River, the Dosewallips River, the Big Quilcene  
11 River, and the Little Quilcene River.<sup>70</sup>

#### 12 Designation, Delineation, and Categorization of CMZs

13  
14  
15 *Issue 4: Did Jefferson County fail to comply with RCW 36.70A.172(1) and RCW*  
16 *36.70A.030(5), (9) when it adopted a "channel migration zone" designation as a category of*  
17 *geologically hazardous critical areas in JCC 18.22.160-180 and 18.10.030?*

18 *Issue 5: Did Jefferson County fail to comply with RCW 36.70A.172(1) and RCW*  
19 *36.70A.030(5), (9) when it adopted JCC 18.22.160(2)(d), which designated all "[a]reas of*  
20 *natural movement of stream channel meanders" as geologically hazardous critical areas?*

#### 21 **Position of the Parties**

22 OSF contends CMZs do not constitute a critical area under the GMA; rather CMZs simply  
23 set aside "potential land to be preserved for potential future channel migration."<sup>71</sup> OSF  
24 points to the GMA's categorical listing of critical areas set forth in RCW 36.70A.030(5) and  
25 asserts that, although not an exhaustive listing, a critical area must presently exist in order  
26  
27  
28

29 <sup>65</sup> The AHZ is the area not included in the HMZ that is at risk of avulsion.

30 <sup>66</sup> The EHA is the area not included in the HMZ or AHZ at risk of bank erosion from stream flow or mass  
wasting. It is comprised of two components: the Erosion Setback (ES) and the Geotechnical Setback (GS).

31 <sup>67</sup> The DMA is the portion of the CMA where man-made structures physically eliminate channel migration.

32 <sup>68</sup> JCC 18.22.160(2)(d); Exhibit 16-108.

<sup>69</sup> Exhibit 16-108.

<sup>70</sup> OSF Prehearing Brief, Appendix 6; Exhibit 16-108.

<sup>71</sup> OSF Prehearing Brief, at 11, 14.



1 for it to be afforded protection and its designation must be based on BAS.<sup>72</sup> According to  
2 OSF, CMZs represent a range of historic and potential future locations of river channel  
3 migration and are therefore not an existing critical area with functions and values that  
4 require protection from impacts of development.<sup>73</sup> OSF further contends that the “practical  
5 effect of Jefferson County’s adoption of a CMZ critical area designation would be the  
6 creation of a no-build super buffer extending anywhere from dozens to thousands of feet in  
7 each direction from designated rivers and streams.”<sup>74</sup>

9 OSF further argues that the purpose of BAS is not solely critical area protection but it is also  
10 “intended to protect economic and property interests from unsupported and unduly  
11 precautionary regulation.”<sup>75</sup> OSF asserts that a buffer which is too large, is not necessary to  
12 protect the functions and values of critical areas, or is outside the range of BAS may violate  
13 nexus and rough proportionality requirements.<sup>76</sup>

15 OSF contends that the BAS fails to provide a scientific assessment of what areas constitute  
16 low, medium, or high risk CMZs and that the County’s supporting BAS does not provide an  
17 assessment of actual risk of the identified CMZs.<sup>77</sup>

19 Jefferson County argues that the GMA authorizes it to designate critical areas based on  
20 BAS and CMZs are “important natural features of healthy river systems” and “are vital to the  
21 continuing ecological integrity of riparian systems.”<sup>78</sup> According to the County, cases relied  
22 on by OSF – specifically *Tracy* and *Swinomish* – do not prohibit the designation of CMZs  
23 given both the natural processes served by CMZs and the County’s ability to “go beyond  
24  
25  
26

27  
28 <sup>72</sup> OSF Prehearing Brief, at 11-12 (citing to *Tracy v. Mercer Island*, CSPGMHB Case No. 92-3-0001, FDO  
29 (Jan. 5, 1993); *WEAN v. Island County*, 122 Wn. App. 156 (2004); *Swinomish Tribe v. WWGMHB*, 161 Wn.2d  
30 415 (2007)).

31 <sup>73</sup> OSF Prehearing Brief, at 13-14.

32 <sup>74</sup> OSF Prehearing Brief, at 5-6.

<sup>75</sup> OSF Prehearing Brief, at 13.

<sup>76</sup> OSF Prehearing Brier, at 12-13. Nexus and rough proportionality are based on constitutional principles.

As noted *supra*, the Board does not have authority to address constitutional claims.

<sup>77</sup> OSF Prehearing Brief, at 16-17.

<sup>78</sup> County Response Brief, at 9-10.

1 mere protection of riparian areas to require enhancement of such areas.”<sup>79</sup> As to OSF’s  
2 assertions that the CMZ was too large or unnecessary, Jefferson County contends it “relied  
3 on a variety of respected BAS sources to identify appropriate CMZs and to set scientifically  
4 supportable buffers where development and other alteration of the natural environment is  
5 restricted.”<sup>80</sup>  
6

7 In regards to OSF’s allegations that the County’s BAS fails to provide a basis for concluding  
8 which CMZs are high risk and which are low risk, the County states the Perkins Report fully  
9 explains the delineation of risk zones. The County notes that although CMZs carry a certain  
10 element of uncertainty, such uncertainty does not preclude the County from “implementing  
11 [BAS] to analyze which [CMZs] are at greater or lesser risk.”<sup>81</sup>  
12

13 The *Amici* parties point out that the regulation of CMZs is not unprecedented and notes  
14 several counties which have included CMZs within their CAOs.<sup>82</sup> The *Amici* parties further  
15 note that given the GMA’s non-exhaustive listing of critical areas, the regulation of other  
16 types of critical areas based on BAS is not prohibited.<sup>83</sup>  
17

18 In reply, OSF reiterates its claim that a CMZ is not an existing critical area but represents an  
19 area set aside to protect a range of potential future locations of river channel migration.<sup>84</sup>  
20

21 OSF contends that “there is no authority supporting Jefferson County’s claim that the GMA  
22 authorizes local government to designate potential future critical areas that do not currently  
23 have functions and values threatened by development and/or use as critical areas.”<sup>85</sup> As to  
24 OSF’s assertion in regards to risk, OSF asserts the County’s BAS provides for specific  
25  
26  
27  
28

29  
30 <sup>79</sup> County Response Brief, at 10-11 (Citing *Swinomish*, 161 Wn.2d, at 429-30).

<sup>80</sup> County Response Brief, at 11-12.

<sup>81</sup> County Response Brief, at 14 (Citing Appendix 6 to OSF Brief – Perkins Report).

<sup>82</sup> *Amici* Response Brief, at 9-10.

<sup>83</sup> *Amici* Response Brief, at 10-11.

<sup>84</sup> OSF Reply Brief, at 5.

<sup>85</sup> OSF Reply Brief, at 5-6.

1 delineated risks and the County departed from this BAS when it included medium risks  
2 within the high risk delineation category without the necessary reasoned justification.<sup>86</sup>  
3

#### 4 **Board Discussion**

- 5 • Designation/Delineation of CMZs

6 RCW 36.70A.170(1)(d) requires the designation of critical areas. RCW 36.70A.030(5) sets  
7 forth five types of areas and ecosystems as critical areas: Wetlands, Aquifer Recharge  
8 Areas, Fish and Wildlife Habitat Conservation Areas, Frequently Flooded Areas, and  
9 Geologically Hazardous Areas (GHAs). The Board views the GMA as effectively  
10 establishing two categories of critical areas – those areas whose functions and values are  
11 protected for the beneficial services they provide (i.e. Wetlands, FWHCAs, Aquifer  
12 Recharge Areas) and those areas for which protection is needed due to the threat these  
13 areas pose to persons and property (i.e. Frequently Flooded Areas, GHAs).  
14  
15

16 Although CMZs can incorporate all five of these types of critical areas, Jefferson County  
17 elected to include CMZs within the category of GHAs primarily due to the erosive character  
18 of a CMZ and the need to protect structures from future damage.<sup>87</sup> RCW 36.70A.030(9)  
19 defines Geologically Hazardous Areas (GHAs) as:  
20

21 ...[a]reas that because of their susceptibility to erosion, sliding, earthquake, or  
22 other geological events, are not suited to the siting of commercial, residential,  
23 or industrial development consistent with public health or safety concerns.

24 The Legislature instructed CTED, in consultation with resource agencies, to develop  
25 minimum guidelines for designating critical areas, and the GMA requires cities and counties  
26 to consider these guidelines in making their critical area designations.<sup>88</sup> WAC 365-190-  
27 080(4) provides guidance in regards to GHAs and states, in its preamble: (Emphasis added)  
28  
29

30  
31 <sup>86</sup> OSF Reply Brief, at 8 (citing to *Swinomish Tribe*, 161 Wn.2d at 430-431, *Ferry County*, 155 Wn.2d at 837-  
32 38).

<sup>87</sup> Exhibit 12-103 Correspondence from Jamestown S'Klallam Tribe and Exhibit 20-559, CAO Advisory Group,  
recommending the inclusion of CMZs within both FWHCAs and GHAs; County Response Brief, at 12-13.

<sup>88</sup> RCW 36.70A.050(1) and (3); RCW 36.70A.170(2).

1 [GHAs] include areas *susceptible* to erosion, sliding, earthquake, or other  
2 geological events. They *pose a threat* to the health and safety of citizens  
3 when incompatible commercial, residential, or industrial development is sited  
4 in areas of significant hazard. Some geological hazards can be reduced or  
5 mitigated by engineering, design, or modified construction or mining practices  
6 so that risks to health and safety are acceptable. When technology cannot  
7 reduce risk to acceptable levels, building in [GHAs] is best avoided. This  
8 distinction should be considered by counties and cities that do not now classify  
9 geological hazards as they develop their classification scheme.

9 The guidelines include a broad range of hazards, from the ordinary sloughing of steep bluffs  
10 to events that might occur once every millennium. Erosion, landslide, and seismic hazards  
11 are all addressed along with other geological events including volcanic activity, mass  
12 wasting, debris flows, rockfalls, and differential settlement. For example, WAC 365-190-  
13 080(4)(d) describes Landslide Hazard Areas (LHAs) as being areas potentially subject to  
14 landslides based on a combination of geologic, topographic, and hydrologic factors and  
15 include, relevant to this matter, areas of historic failure, areas that have shown movement  
16 during the Holocene epoch (10,000 years ago to present), and areas potentially unstable as  
17 a result of rapid stream incision, stream bank erosion, and undercutting by wave action.  
18 Thus, designation of GHAs is based, in part, on an analysis of historical activity of the site  
19 and the potential or susceptibility of the site for future geological instability based on  
20 historical data in combination with present day scientific methodologies.  
21  
22

23 The Board likens CMZs to Volcanic Hazard Areas (VHAs) and Seismic Hazard Areas  
24 (SHAs).<sup>89</sup> The designation of VHAs essentially speculates on the projected path of a  
25 pyroclastic flow, lava flow, debris avalanche or flow, mudflows, or related flooding which  
26 would result from volcanic activity. Similarly, SHAs seek to determine the risk of damage as  
27 a result of an earthquake based on a record of earthquake damage in the past and the  
28 tentative location of fault lines. It is this futuristic potential or susceptibility of damage that  
29 creates the risk for which critical area designation as a GHA is needed.  
30  
31  
32

---

<sup>89</sup> See WAC 365-190-080(4)(e) Seismic Hazard Areas; -080(4)(f)(i) Volcanic Hazard Areas.

1 OSF cites to the Central Board's 1993 holding in *Tracy v. City of Mercer Island* and the  
2 State Supreme Court's 2007 holding in *Swinomish Tribe v. WWGMHB* to support its  
3 contention that GMA critical areas must exist in the present time. However, both of these  
4 cases addressed retrospective regulations which required restoration or enhancement of  
5 previously altered or degraded critical areas, not the designation of areas which, if properly  
6 regulated, serve to protect persons and property today and tomorrow by limiting  
7 development within specified areas. The County is not seeking to restore or enhance a  
8 previously degraded critical area; rather it is seeking to avoid loss or damage in the future  
9 by ensuring appropriate development occurs based on assigned risk levels.  
10

11  
12 Thus, the Board disagrees with OSF's contention that the functions and values of a CMZ do  
13 not presently exist and therefore the GMA does not authorize the designation. To support  
14 this statement would be contrary to the very functions and values underlying a GHA - to  
15 protect against *future* loss of life and/or property due to the geological event being  
16 addressed. In other words, the functions and values sought to be protected by GHAs are  
17 the protection of life and property and those functions and values exist today. Here,  
18 Jefferson County, in considering the geological consequences of channel migration, namely  
19 the potential for stream bank erosion and channel migration within the historical and  
20 projected path of a stream or river, appropriately designated CMZs as a type of GHA given  
21 the geological nature of the impacts. As such, the County's designation of CMZs as a  
22 critical area is appropriate under the GMA.  
23  
24

25 In addition, the County's definition of CMZs as being those "areas subject to the natural  
26 movement of stream channel meanders"<sup>90</sup> mirrors the definitional language contained within  
27 the scientific documents relied on by the County. The Washington State Department of  
28 Ecology (Ecology) states that the CMZ is an "area where a stream or river is susceptible to  
29 channel erosion ... due to fluvial processes"<sup>91</sup> and the United States Department of Interior -  
30  
31  
32

<sup>90</sup> JCC 18.22.160(2)(d).

<sup>91</sup> Appendix 4, at 1.

1 Bureau of Reclamation provides that CMZs are “areas that have historically been part of the  
2 active channel and that are prone to channel erosion and avulsion.”<sup>92</sup> The Board finds no  
3 error in Jefferson County’s minimal definition as it denotes both the natural aspect of CMZs  
4 and the modification to the channel that is the basis for CMZ designation.  
5

6 • Risk Assignment

7 The Board recognizes that a delineated and designated CMZ encompasses land which,  
8 based on a scientific analysis, is susceptible to channel erosion due to fluvial processes.  
9

10 The CMZ serves to protect persons and property from future damage caused by the natural  
11 migration of a river or stream. For Jefferson County, hazard areas for CMZs were  
12 delineated using four factors: (1) geomorphic channel type; (2) type of channel migration –  
13 lateral or avulsions; (3) type of sediment regime – transport or deposition; and (4)  
14 constraints on channel migration.<sup>93</sup> Hazard assignments utilized the identified areas or  
15 zone (i.e. HMZ, AHZ, EHA) as characterized by the CMZ delineation equation noted  
16 *supra*.<sup>94</sup>  
17

18 The Board does not find error in Jefferson County’s use of a 100-year time period as a basis  
19 for High Risk CMZs as the scientific documentation utilized similar timelines, with the  
20 timeline used for a CMZ delineation affecting the relative area included within the CMZ.<sup>95</sup>  
21 However, it is the uncertainty as to what timeline the County’s CMZ maps actually reflect in  
22 regards to risk that concerns the Board.  
23  
24

25 According to Dr. Perkins during a presentation before the County in 2004, High Hazard  
26 areas were to be assigned to land near the river or within the low former channel and, were  
27 based on a probability of channel migration within the next 50 years.<sup>96</sup> Moderate Hazard  
28

29  
30 <sup>92</sup> Appendix 5, at 1.

31 <sup>93</sup> Exhibit 16-108.

32 <sup>94</sup> Appendix 6.

<sup>95</sup> Appendix 4 – Ecology’s Framework for CMZs, at 1 (noting that CMZs are delineated based on a specified time period and that a CMZ intended to capture channel processes for 100 years into the future may be smaller in area than a CMZ intended to capture channel processes for 500 years).

<sup>96</sup> Exhibit 16-108.

1 areas were to also be assigned to land near the river or within the low former channel, but  
2 were based on a probability period of 50 to 100 years.<sup>97</sup> Low Hazard areas were, by  
3 default, to be assigned to the remaining areas of the valley floor beyond the high and  
4 moderate hazard zones but generally encompassed land that was farther from the river with  
5 an unchannelized surface and utilized a probability period of greater than 100 years.<sup>98</sup>  
6 The 2006 Final Report noted that the hazard zones roughly correspond to channel migration  
7 being likely in a time frame of less than 50, 50-100, and over 100 years.<sup>99</sup> Thus, it would  
8 appear scientific documentation as to the risk assignment of CMZs correlates to these three  
9 time periods.  
10

11  
12 However, although the County maps clearly denote High, Moderate and Low hazard areas,  
13 the County's Code only addresses High Risk CMZ areas. JCC 18.22.160(2)(d) defines High  
14 Risk CMZ areas to be areas where channel migration is likely to occur within the next 100  
15 years, which is contrary to the scientific documentation which sets 50 years or less for high  
16 hazard areas.<sup>100</sup> As such, it is unclear to the Board whether the County's CMZ Hazard  
17 Maps accurately reflect the science relied on by the County in designating and delineating  
18 CMZs and their associated risks. Thus, both the public and property owners are left to  
19 question whether the High Risk areas delineated on the County's maps encompass those  
20 areas susceptible to channel migration within the next 50 years, as indicated by the BAS, or  
21 within the next 100 years, as defined by the JCC. Clarification in this regard is needed in  
22 order to satisfy RCW 36.70A.172's requirement to include BAS when developing  
23 regulations, which include the CMZ maps.  
24  
25

26  
27 **Conclusion:** The Board finds and concludes that OSF has failed to demonstrate Jefferson  
28 County's designation of CMZs as a type of GHA was clearly erroneous and violated RCW  
29 36.70A.030(5), .030(9), and .172(1) as set forth in Issues 4 and 5. It is the functions and  
30

31  
32 <sup>97</sup> Exhibit 16-108.

<sup>98</sup> Exhibit 16-108; Appendix D, Section 4.2.

<sup>99</sup> Appendix 6 – Perkins Report, at 6.

<sup>100</sup> JCC 18.22.160(2)(d).

1 values of the critical area which presently exist for which the GMA requires regulatory  
2 protection. Here, the functions and values of a CMZ are the prospective protection against  
3 loss of life and property due to the geomorphic and ecological processes of rivers and  
4 streams as they migrate throughout their alluvial valleys. Jefferson County has provided a  
5 minimal definition of CMZs within their code provisions that addresses the areas impacted  
6 based on the natural movement of a channel which is supported by similar scientific  
7 definitions. As such, the County's designation of CMZs as a critical area is appropriate  
8 under the GMA.  
9

10  
11 The Board finds and concludes that OSF has carried its burden of proof in demonstrating  
12 Jefferson County's definition of 100 years as the time period for High Risk CMZs is not  
13 supported by the scientific documentation relied upon by the County. It is unclear from the  
14 Record whether the designated High Risk CMZs mapped by the County encompass a  
15 probability of channel migration within 100 years, as set forth in JCC 18.22.160(2)(d), or  
16 within 50 years, as denoted within the scientific documentation. The County will need to  
17 take legislative action to clarify this discrepancy and comply with RCW 36.70A.172.  
18

#### 19 Development within CMZs

20  
21 *Issue 6: Did Jefferson County fail to comply with RCW 36.70A.172(1) when it adopted JCC*  
22 *18.22.170(4), by imposing vegetation retention standards on all development in a "channel*  
23 *migration zone"?*

24 *Issue 8: Did Jefferson County fail to comply with RCW 36.70A.030(5), (9) and RCW*  
25 *36.70A.172(1) when it adopted JCC 18.22.170(6), which subjects all development in a*  
26 *"channel migration zone" to the prescriptive buffer requirements applicable to landslide*  
27 *hazard areas?*<sup>101</sup>

#### 28 **Position of the Parties**

29 OSF contends that Jefferson County has broadly defined CMZ's to include all areas subject  
30 to the natural movement of stream channel meanders thereby subjecting property meeting  
31

32 <sup>101</sup> OSF argues Issue 8 both in isolation (see Pages 15-17 of Prehearing Brief) and in conjunction with Issues 5, 6, and 7 (See Pages 17-19 of Prehearing Brief). However, the Board finds the arguments intermixed and therefore addresses Issues 5 to 8 as a single category of argument.



1 this definition to the protective standards of JCC 18.22.170.<sup>102</sup> OSF points to various  
2 restrictions contained in JCC 18.22.170 which it asserts would apply development  
3 restrictions such as mandatory vegetation retention, permanent physical separation along  
4 the critical area's boundary, mandatory 30 foot buffer kept in natural vegetation, and  
5 mandatory five foot building setbacks from buffers and effectively bar all development within  
6 High Risk CMZs based on buffer regulations.<sup>103</sup>  
7

8 According to OSF, the BAS is devoid of any discussion of these restrictions being necessary  
9 to protect the functions and values of CMZs.<sup>104</sup> As such, OSF argues the prescriptive  
10 protection standards were adopted without any BAS identifying actual impacts of  
11 development on the functions and values of the designated CMZs. According to OSF, the  
12 County departed from BAS denoting risk hazards for CMZs without a reasoned justification  
13 as well as uniformly barring all development within high risk CMZs as part of the buffer  
14 regulations contained in JCC 18.22.170(6)(g). OSF contends the impact of CMZs is  
15 "enormous" and can impact several parcels worth millions of dollars.<sup>105</sup> OSF also questions  
16 the County use of the term "likely" in relationship to the probability of channel migration.<sup>106</sup>  
17  
18  
19  
20  
21

22  
23 <sup>102</sup> OSF Prehearing Brief, at 15.

<sup>103</sup> OSF Prehearing Brief, at 15-17 (citing to JCC 18.22.170).

24 <sup>104</sup> OSF Prehearing Brief, at 16. In a footnote to this section, OSF contends CMZs are closely related to  
25 floodplains and riparian habitat areas which are already "subject to multiple state laws." OSF states areas  
26 encompassed by CMZs include critical areas that are already regulated as GHAs, Aquifer Recharge Areas,  
27 Fish and Wildlife Habitat Conservation Areas, and Wetlands for which the County would need to demonstrate  
28 that the area was not already protected by "layers of regulations." While this layering of regulation may be a  
29 true statement, the Board does not read the GMA to limit protections of a certain type of critical area based on  
30 what other types of critical areas may be simultaneously located on the property as each critical area serves  
31 unique functions and values. It is the functions and values of a particular critical area that must be protected  
32 under the GMA. For example, although regulations relating to GHAs may restrict development on a steep  
slope in order to protect against inappropriate development within an area potentially subject to landslide, this  
same area may also serve as habitat for wildlife that seeks to feed or reproduce in the area due to the safety  
afforded by the steep slope. As such, development regulations related to GHAs may not reflect the functions  
and values of the area as wildlife habitat as a buffer designed to preserve the structural integrity of a building  
may not be adequate to ensure the biological functions of wildlife are not disturbed.

<sup>105</sup> OSF Prehearing Brief, at 18.

<sup>106</sup> OSF Prehearing Brief, at 18.

1 In response, Jefferson County argues OSF is simply "falling back" on its argument that the  
2 County's BAS is not to "OSF's liking."<sup>107</sup> The County asserts BAS studies and summaries  
3 indicate that risk to property from river flooding is comparable to the risks posed by a  
4 landslide in an erosion hazard zone and, therefore, similar restrictions are appropriate when  
5 "a river avulses and occupies a different portion of the [CMZ]."<sup>108</sup> Thus, the County contends  
6 it was reasonable and appropriate to treat CMZs as a species of erosion hazard areas and  
7 the language of the GMA which addresses areas of erosion and other geological events  
8 supports such a categorization.<sup>109</sup> In addition, the County argues BAS clearly demonstrates  
9 that "a prohibition on development is reasonable and necessary in high risk CMZs,  
10 notwithstanding some uncertainty as to the exact date of future avulsions, and the precise  
11 path that such a river channel change will involve."<sup>110</sup>

12  
13  
14 The *Amici* parties provide generalized briefing as to the benefit of CMZs but submit no  
15 specific argument as to the development regulations in question.<sup>111</sup>

16  
17 In reply, OSF argues that "there is no BAS in the record supporting the County's imposition  
18 of prescriptive landslide buffers on all CMZs." Rather, OSF contends the CMZ delineation  
19 already includes erosion and landslide setbacks and the County fails to cite to BAS to  
20 support a need for a buffer in addition to the setback.<sup>112</sup>

21  
22  
23 **Board Discussion**

24 The Board first notes that OSF raises many constitutionally-based claims in regards to its  
25 issues related to development regulations. As noted above, the Board has no jurisdiction  
26  
27  
28  
29

30 <sup>107</sup> County Response Brief, at 12.

31 <sup>108</sup> County Response Brief, at 12.

32 <sup>109</sup> County Response Brief, at 13-14 (citing to RCW 36.70A.030(9)).

<sup>110</sup> County Response Brief, at 15.

<sup>111</sup> *Amici* Response Brief, at 9-12.

<sup>112</sup> OSF Reply Brief, at 7 (citing to Appendix 4 and Appendix 6).

1 to address constitutional claims and will not respond to such claims within this Final  
2 Decision and Order.<sup>113</sup>

3  
4 With these issues, OSF generally claims the County's action was clearly erroneous because  
5 it does not have supporting BAS for the development regulation it seeks to apply with JCC  
6 18.22.170. Elsewhere in this Final Decision and Order, the Board concluded that the  
7 designation of CMZs as a type of geological hazardous area was not clearly erroneous  
8 given the geologically-based risks associated with the area. As such, the application of  
9 regulations related to the protection of such areas would likewise be appropriate. The  
10 question is whether the County's GHA regulations, in relationship to CMZs, are supported  
11 by BAS.  
12

13  
14 OSF cites to several provisions contained in JCC 18.22.170, the County's Protection  
15 Standards for GHAs, which relate to vegetation retention and maintenance, permanent  
16 buffer marking to provide physical separation, temporary signage during construction, a  
17 standardized buffer of 30 feet, and a standard building setback line of five feet.<sup>114</sup> OSF  
18 contends these regulations are not supported by BAS.  
19

20 Exhibit A to Ordinance No. 03-0317-08 provides a 24-page listing of the documents relied  
21 on by Jefferson County as BAS in developing its CAO. This listing includes several  
22 documents addressing the morphology of river and stream systems such as the U.S.  
23 Department of Interior-Bureau of Reclamation *2004 Channel Migration Zone Study for*  
24 *Jefferson County*, the Washington Department of Ecology *2003 Framework for Delineating*  
25 *Channel Migration Zones*, and Perkins Geoscience's *2006 Channel Migration Hazard Maps*  
26 *for Jefferson County*. The Board does not read OSF's argument to be founded on a  
27 premise that the County's listing of scientific documents is not BAS; rather, the Board reads  
28  
29

30  
31 <sup>113</sup> The Board can't help but question OSF's assertion that the word "likely" requires an assignment of  
32 ascertainable standards as the common definition of the term is "having a high probability of occurring."  
Given the scientific probability analysis inherent to CMZ delineation, to assign a High Risk CMZ to areas that a  
"likely" to be impacted amounts, in the Board's opinion, is to assign a High Risk CMZ to areas with a "high  
probability" of being impacted.

<sup>114</sup> JCC 18.22.170(4), .170(5), .170(6).

1 OSF's argument to assert that these documents do not address the regulations adopted by  
2 Jefferson County.

3  
4 First, the Board must address the appropriate application of JCC 18.22.170 – the County's  
5 Protection Standards for GHAs. With JCC 18.22.160-.180, the County has established four  
6 types of GHAs: Erosion Hazard Areas (EHAs), Landslide Hazard Areas (LHAs), Seismic  
7 Hazard Areas (SHAs), and Channel Migration Zones (CMZs). The protection standards set  
8 forth in JCC 18.22.170 apply to all properties containing a designated GHA or its buffer but,  
9 from the very language of the provision itself, *not all standards apply to all types of GHAs*.  
10 The Board reads .170(1), .170(2), .170(3), and .170(4) to apply uniformly to all types of  
11 GHAs. These provisions have no limiting language; rather the provisions address GHAs in  
12 general.  
13

14  
15 This is not the same for .170(5) and .170(6), which reference LHAs.<sup>115</sup> For example, JCC  
16 18.22.170(5) states:

17       Buffer Marking. The location of the outer extent of *landslide hazard areas*  
18       *buffers* shall be marked in the field as follows ...  
19

20 Likewise, JCC 18.22.170(6) similarly limits the application to LHAs as it provides:

21       Buffers – Standard Requirements. The following *landslide hazard area* buffer  
22       provisions shall apply:

23       ...  
24       (f) A standard buffer of 30 feet shall be established from the top, toe and all  
25       edges of *landslide hazard areas*.

26 The only exception to the limiting language in JCC 18.22.170(6) is contained in .170(6)(g)  
27 which provides:

28       A building setback line is required to be five feet from the edge of any buffer  
29       area for a landslide hazard area or to outside the full extent of the high risk  
30       channel migration zone (CMZ), whichever is greater.  
31

32  
<sup>115</sup> Excerpts from these provisions are denoted with italics for emphasis. See also JCC 18.22.170(7)-(8),  
which contains limiting language as to LHAs.

1 Buffers: OSF contends the County has imposed a 30 foot buffer on CMZs through the  
2 application of JCC 18.22.170(6). The County responds that .170(6) is only applicable to  
3 LHAs. As noted *supra*, with a single exception, the provisions of JCC 18.22.170(6) contain  
4 limiting language, restricting its application to a single type of GHAs – a landslide hazard  
5 area. Thus OSF's allegation that the County failed to comply with RCW 36.70.172(1) in  
6 relationship to the prescriptive buffers of JCC 18.22.170, is not supported by the language  
7 of the code provision. Simply put, because of the specific reference to LHAs the code  
8 provision requiring a 30 foot standardized buffer does not apply to CMZs, which are a  
9 separate and unique category of GHAs and, are not LHAs.<sup>116</sup>

11  
12 JCC 18.22.170(6)(g) does reference CMZs and requires that a building be set back a  
13 minimum of five feet from the outside edge of a High Risk CMZ. As OSF notes, this  
14 effectively bars development within the area of a CMZ most at risk for loss or damage due  
15 to the alluvial process of its associated river and within five feet of this area. However, the  
16 County's BAS does support such a limitation because the principal goal for delineating a  
17 CMZ is to guide development away from high risk areas that would otherwise be threatened  
18 or damaged by channel migration.<sup>117</sup> Development is prohibited within other types of critical  
19 areas in order to protect either the critical area itself (i.e. wetlands) or the potential for  
20 structural damage (i.e. steep slopes/landslide areas) and the Board sees no difference in  
21 regards to High Risk CMZs. With the cited regulation, the County is restricting development  
22 only within those areas of a CMZ which have the highest risks, thereby facilitating the  
23 functions and values CMZs are intended to protect – prospective loss or damage.  
24  
25

26 Vegetation: OSF cites to both JCC 18.22.170(4)(c) and .170(6)(c)-(d) which relate to the  
27 retention of vegetation. As noted above, .170(6) is generally applicable only to LHAs and  
28  
29

30  
31 <sup>116</sup> If the Board were to accept OSF's argument, then the provisions of .170(5) and .170(6) would similarly  
32 apply to Seismic Hazard Areas which would negate the language of .170(9) which permits the construction of  
a publicly-owned facility *within* a designated SHA subject to an approved geotechnical report. Leaving the  
Board to wonder – where's the buffer when a project may be constructed *within* the critical area itself.

<sup>117</sup> See generally, Appendix 4 – Ecology's Framework for Delineating CMZs; Appendix 5 – USDI Bureau of  
Reclamation's CMZ Study.

1 therefore the Board's review is limited to .170(4). The importance of vegetation in the  
2 fluvial environment has been well documented, especially in regards to its significant role in  
3 erosion control, bank stabilization, bank protection, and bank accretion.<sup>118</sup> Vegetation is  
4 also important as it serves to provide the recruitment of large woody debris (LWD) which  
5 can prevent bank erosion and serves to direct how and where a channel may migrate.<sup>119</sup>  
6 However, the cited JCC provision appears to limit the removal of vegetation on the entirety  
7 of property containing a designated GHA or its buffer. For a CMZ this would be an area of  
8 varying width and risk assessment. Although it is hard to ascertain from the Record  
9 presented to the Board, this area may range in size from a hundred feet to thousands of  
10 feet.  
11

12  
13 Of concern to the Board is Jefferson County's apparent requirement to retain vegetation  
14 regardless of the associated probability of risk which is not equal within the entire mapped  
15 CMZ, let alone on the entirety of properties only a portion of which are within a CMZ. That  
16 is, vegetation removal is not precluded only within the high risk area. Thus, should a  
17 property owner be prohibited from removing vegetation within a low risk area, or that portion  
18 of a property outside a CMZ where the probability of channel occupation is slight or  
19 nonexistent? The Board recognizes that as a river migrates it will naturally encompass  
20 areas which may currently be classified as low risk; however, this alone does not warrant a  
21 blanket restriction. Based on the scientific documentation's finding that vegetation serves  
22 an important role within what would be deemed the highest risk area of a CMZ - the area  
23 within which a river may move within the 50 year period - the County's limitation on  
24 vegetation removal as drafted is not supported by BAS.  
25  
26

27  
28 **Conclusion:** The Board finds that the application of buffers to the CMZ, with the exception  
29 of JCC 18.22.170(6)(g), is limited by the language of JCC 18.22.170 and is not applicable to  
30 a CMZ in its entirety. JCC 18.22.170(6)(g) does require a five foot building setback from  
31

32 <sup>118</sup> Appendix 4 – DOE's *Framework for Delineating CMZs*, at 31-32 (citing to several studies supporting the benefits of vegetation).

<sup>119</sup> Appendix 7 – Chapters 4 and 5.

1 the outer edge of a High Risk CMZ but such a nominal requirement is supported by the  
2 County's BAS and is limited to those areas of the CMZ most at risk for channel migration.

3  
4 The Board finds that although the retention of vegetation is important, the importance of  
5 vegetation retention is based on bank stabilization and erosion protection and is therefore  
6 more relevant within high to moderate risk areas which are at a greater probability of being  
7 impacted by the river or stream's migration. A blanket restriction on the removal of  
8 vegetation that is not linked to the functions and values it is intended to protect is not  
9 supported by BAS.

10  
11 Thus, the Board concludes OSF has failed to demonstrate that the County failed to comply  
12 with RCW 36.70A.030(5), .030(9), and .172(1) when it adopted Ordinance No. 03-0317-08  
13 which enacted this provision in relationship to buffer requirements contained in JCC  
14 18.22.170. The Board concludes OSF has carried its burden of proof in demonstrating that  
15 the County failed to comply with RCW 36.70A.172(1) by not having BAS which supports the  
16 limitation of vegetation removal on the entirety of a parcel which includes property within a  
17 CMZ.  
18

19  
20  
21 • **Property Rights and Non-Conforming Uses**

22 *Issue 10: Did Jefferson County fail to comply with RCW 36.70A.172(1) and RCW*  
23 *36.70A.370, and fail to consider and balance planning goal 6 (RCW 36.70A.020(6) (property*  
24 *rights)) in adopting JCC 18.22.160-180, which changes existing development and uses into*  
25 *nonconforming uses?*

26 **Position of the Parties**

27 OSF contends that with the adoption of Ordinance 03-0317-08 "all existing development  
28 and uses located within a CMZ will be deemed nonconforming."<sup>120</sup> OSF argues that  
29 because Washington seeks to phase out nonconforming uses (NCUs), Jefferson County  
30 must have a scientific basis for extending CMZ restrictions to the existing built environment  
31 and the Record is void of the required BAS. OSF further asserts that the Record fails to  
32

<sup>120</sup> OSF Prehearing Brief, at 19 (citing to JCC 18.22.080; *CFFC v. Ferry County*, 155 Wn.2d 824 (2006)).

1 demonstrate that the County considered and/or balanced the protection of private property  
2 rights in making its determination.<sup>121</sup>

3  
4 Jefferson County states that it is "entirely appropriate to categorize structures within [CMZs]  
5 as nonconforming" and such a categorization is "simply a recognition that such uses are  
6 currently permitted because they were in place before new regulations went into place."<sup>122</sup>

7 According to the County, NCUs are not illegal, are not required to be removed, and although  
8 such uses may not be expanded or changed they are permitted to be repaired, maintained,  
9 and restored.<sup>123</sup> The County points out that this is consistent with Washington law and is  
10 not a violation of the GMA.<sup>124</sup>

11  
12 OSF provides no reply on this issue.

#### 13 14 **Board Discussion**

15  
16 JCC 18.22.080 sets forth the CAO's requirement as to NCUs and provides (In relevant  
17 part):<sup>125</sup>

- 18 1. Any legal use or legal structure in existence on the effective date of the  
19 ordinance codified in this chapter that does not meet the buffer requirements  
20 of this chapter for any designated critical area shall be considered a legal  
21 nonconforming use.  
22 ...  
23 3. A legal nonconforming use or structure may be maintained or repaired without  
24 limitation by this chapter.  
25 4. A legal nonconforming use or structure that has been damaged or destroyed  
26 by fire or other calamity may be restored and its immediate previous use may  
27 be resumed.

28  
29 <sup>121</sup> OSF Prehearing Brief, at 20.

30 <sup>122</sup> County Response Brief, at 17.

31 <sup>123</sup> County Response Brief, at 17 (citing JCC 18.10.140 and JCC 18.22.080).

32 <sup>124</sup> County Response Brief, at 17-18 (citing to RCW 36.70A.060(1)(a) (development regulations may not prohibit uses legally existing ...); *LBN v. Stevens County*, EWGMHB Case No. 03-1-0003, FDO (Feb. 10, 2004) (expansion of nonconforming building toward shoreline not supported by BAS).

<sup>125</sup> The Board notes Jefferson County has additional regulations pertaining to NCUs. See JCC 18.05.170, JCC 18.20.260.



1 OSF is correct that this provision, contained in Article II Administrative Provisions of the  
2 CAO, applies to all existing, legal uses within Jefferson County that no longer satisfy critical  
3 area buffer requirements as modified or created upon the adoption of Ordinance 03-0317-  
4 08. The establishment of NCUs is seen as an appropriate exercise of a government's police  
5 powers and although the guiding policy within Washington seeks to phase out NCUs  
6 because they have become detrimental to one or more public interests, Jefferson County is  
7 not seeking to phase out NCUs but rather to restrict further development within critical areas  
8 and their buffers.<sup>126</sup> Property owners within CMZs having established, legal uses are not  
9 required to terminate the use or remove the structure. Property owners may continue to  
10 maintain, repair, and, in certain situations, replace the NCU; the only limitation being that the  
11 NCU must remain consistent with the historic use.  
12

13  
14 OSF contends the County violated the GMA because it failed to point to a scientific basis in  
15 the record for extending CMZ restrictions to the existing built environment. However, the  
16 same scientific evidence which expounds the need to restrict development within CMZs  
17 applies to existing structures. The Board questions OSF's reasoning: if the County's BAS  
18 demonstrated structures should not be built in a CMZ because of the potential for loss or  
19 damage, then why would that same scientific evidence not apply to the potential for loss or  
20 damage to existing structures? The Board sees the BAS applying equally in both  
21 situations.  
22

23  
24 Lastly, OSF contends Jefferson County failed to consider private property rights as required  
25 by RCW 36.70A.020(6) and 36.70A.370. RCW 36.70A.370 mandates that the State  
26 Attorney General (AG) establish a process which enables local government planning under  
27 the GMA to evaluate proposed actions in order to assure that such actions do not result in  
28 an unconstitutional taking of property based on state and federal constitutional protections.  
29 This, the AG has done with the creation of an advisory memorandum: *Avoiding*  
30

31  
32  

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<sup>126</sup> See *City of University Place v. McGuire*, 144 Wn.2d 640, 648 (2001); *Anderson v. Island County*, 81 Wn.2d  
312, 323 (1972); *Rhod-A-Zalea v. Snohomish County*, 136 Wn.2d 1 (1998).

1 *Unconstitutional Takings of Private Property.*<sup>127</sup> This section of the GMA further requires  
2 local governments to utilize the established process but notes: "Nothing in this section  
3 grants a private party the right to seek judicial relief requiring compliance with the provisions  
4 of this section."<sup>128</sup>  
5

6 This Board has previously held it does not have jurisdiction to determine whether property  
7 rights have been violated based on RCW 36.70A.370, primarily due to the constitutional  
8 nature of such challenges.<sup>129</sup> However, this Board has also stated .370(2) mandates that  
9 local governments "utilize" the adopted process and, although the substance of the process  
10 used is protected by attorney-client privilege, there must be evidence which demonstrates  
11 the process recommended by the AG was utilized in adopting the challenge ordinance.<sup>130</sup>  
12

13  
14 Jefferson County points the Board to no evidence that it utilized the AG's process which  
15 sets forth a 5-step process for evaluating proposed actions. These steps seek to ensure  
16 that decision makers have guidance on constitutional limitations relating to the regulation of  
17 private property and internal processes are in place to assess and incorporate constitutional  
18 issues.<sup>131</sup> The AG's memorandum denotes several "warning signals" which local  
19 government should consider when taking an action including the consideration of: (1) the  
20 permanent or temporary physical occupation of private property, (2) the deprivation of all  
21 economically viable use of the property, (3) the denial or diminishment of a fundamental  
22 attribute of property ownership, (4) the requirement for dedication of property or granting of  
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24  
25

26  
27 <sup>127</sup> Pursuant to WAC 242-02-600, the Board takes Official Notice of the most recent Advisory Memorandum,  
dated December 2006. The Memorandum is available on-line at: <http://www.atg.wa.gov/takingsmemo.aspx>.

28 <sup>128</sup> RCW 36.70A.370(2), .370(4).

29 <sup>129</sup> *Rosewood v. Friday Harbor*, Case No. 96-2-0020 Order (Oct. 1996). See also, *Wilma v. Stevens County*,  
EWGMHB Case No. 06-1-0009c, FDO (March 2007) (no jurisdiction concerning RCW 36.70A.370(2) and  
30 citing to *Shulman v. City of Bellevue*, CPSGMHB Case No. 95-3-0076, FDO (May 1996) ("A private party is not  
31 granted the right to seek judicial relief for alleged noncompliance with RCW 36.70A.370, Board does not have  
jurisdiction to determine whether there has been a violation of RCW 36.70A.370.)

32 <sup>130</sup> *Ostrom Company v. Whatcom County*, Case No. 05-2-0017 FDO at 25 (Feb. 2006) (Finding Declaration of  
County Prosecutor sufficient evidence to show that the Attorney General's process was used as part of the  
legal advice given to the County Council.)

<sup>131</sup> Advisory Memorandum, at 2-3.

1 an easement, and (5) the severity of impact on a property owner's economic interest.<sup>132</sup>

2 The Board notes these considerations are incorporated within Findings/Conclusions 144  
3 through 149 of the challenged Ordinance which address private property rights.<sup>133</sup>

4  
5 Although it would have benefited Jefferson County to clearly denote it had utilized the AG's  
6 process and therefore complied with RCW 36.70A.370(2), the Board finds, based on the  
7 Ordinance's own language, sufficient evidence in the Record to conclude the County utilized  
8 the required process.

9  
10 RCW 36.70A.020(6) - Goal 6 of the GMA provides:

11  
12 Property rights. Private property shall not be taken for public use without just  
13 compensation having been made. The property rights of landowners shall be  
14 protected from arbitrary and discriminatory actions.

15 The Board has previously stated that in order for a petitioner to prevail in a challenge based  
16 on Goal 6, they must prove that the action taken by a local jurisdiction has impacted a  
17 legally recognized right and that the action is *both* arbitrary *and* discriminatory. Showing only  
18 one is insufficient to overcome the presumption of validity that is accorded to jurisdictions by  
19 the GMA.<sup>134</sup> In addition, this Board has held that the "protection" prong of Goal 6 involves a  
20 requirement for the protection of a *legally recognized* right of a landowner being singled out  
21 for unreasoned and ill-conceived action.<sup>135</sup>

22  
23  
24 OSF is required to assert that it has a legally recognized property right which has been  
25 impacted by the County's action and that the challenged action was taken in both an  
26

27  
28 <sup>132</sup> Advisory Memorandum, at 14-15.

29 <sup>133</sup> Ordinance 03-0317-08.

30 <sup>134</sup> *Hadaller v. Lewis County*, Case No. 08-2-0004, Combined FDO and CO, at 14-15 (July 2008)(citing *Pt*  
*Roberts Registered Voters Assoc. v. Whatcom County*, Case No. 00-2-0052, FDO (April 2001) and *Achen v.*  
*Clark County*, Case No. 95-2-0067, FDO (Sept. 1995)).

31 <sup>135</sup> *Achen v. Clark County*, Case No. 95-2-0067, FDO (Sept. 1995)(holding that the Legislature did not intend  
32 to protect unrecognized rights such as the right to subdivide or develop land for maximum personal financial  
gain, the right to divide land for inheritance of financing, or the right to preclude government from changing  
zoning on property; rather the GMA protects those rights which are legally recognized by statute, constitution,  
or court decision).

1 arbitrary and discriminatory manner. Although OSF asserts its property rights were violated  
2 in several areas of its briefing, in regards to Issue 10, OSF sets forth no specific legally  
3 protected property right nor does it explain how the County's action was both an arbitrary  
4 and discriminatory action as required by RCW 36.70A.020(6). Rather OSF simply states the  
5 County failed to properly consider and/or balance private property rights. However, as  
6 noted *supra*, Findings/Conclusions Nos. 144 through 149 clearly demonstrate that the issue  
7 of property rights was before the County during the enactment process and without OSF  
8 providing evidence to the contrary, the County is presumed to have acted in compliance  
9 with the GMA.

10  
11  
12 **Conclusion:** The Board finds and concludes OSF has failed to demonstrate Jefferson  
13 County violated RCW 36.70A.370. The Findings/Conclusions set forth in the challenged  
14 Ordinance clearly demonstrate the consideration of the recommended "warning signals"  
15 provided within the AG's memorandum and, as such, the Board assumes the County  
16 utilized the process as required.

17  
18 The Board finds and concludes OSF has failed to demonstrate Jefferson County violated  
19 RCW 36.70A.020(6). As noted above, the Ordinance itself demonstrates the County  
20 considered private property rights during the enactment of Ordinance 03-0317-08 and OSF  
21 has failed to provide evidence of either a legally protected property right which was  
22 impacted by the County's action or that the action was arbitrary and discriminatory.

## 23 24 25 VI. FINDINGS OF FACT

- 26 1. Jefferson County is a county located west of the crest of the Cascade Mountains that  
27 is required to plan pursuant to RCW 36.76A.040.
- 28 2. On March 17, 2008, Jefferson County enacted Ordinance No. 3-0317-08, which  
29 adopted a new chapter to the Jefferson County Code – Chapter 18.22 - the County's  
30 Critical Areas Ordinance. Included within Exhibit A of the Ordinance is a 24-page  
31 listing of the documents relied on by the County as Best Available Science (BAS)  
32 when developing its Critical Areas Ordinance (CAO).

- 1 3. During the month of May 2008, the Board received three Petitions for Review  
2 challenging Jefferson County's adoption of Ordinance No. 03-0317-08. Petitions  
3 were received from Citizens Protecting Critical Areas (CPCA), Olympic Stewardship  
4 Foundation, *et al.* (OSF), and Fred Hill Materials, Inc. (Fred Hill). Pursuant to RCW  
5 36.70A.290(5), the Board consolidated these three PFRs into a single matter,  
6 referencing it as Case No. 08-2-0029c. Petitioner Hill was subsequently dismissed  
7 from the matter.  
8
- 9 4. An *Amicus Curiae* Brief was filed in support of Jefferson County by the Port Gamble  
10 S'Klallam Tribe, Jamestown S'Klallam Tribes, Washington Environmental Council,  
11 and Futurewise.  
12
- 13 5. Petitioner Citizens Protecting Critical Areas (CPCA) presented no argument – written  
14 or oral, as to Issue 1.  
15
- 16 6. Petitioner Olympic Stewardship Foundation, *et al* (OSF) presented no argument –  
17 written or oral – as to Issues 2 and 7.  
18
- 19 7. CPCA challenged JCC 18.22 for failing to protect critical areas due to inadequate  
20 enforcement provisions which lack mandatory language and monitoring provisions,  
21 are based on a complaint-driven system, and fail to incorporate Best Available  
22 Science (BAS).  
23
- 24 8. JCC 18.50 is the County's enforcement provisions applicable to JCC 18.22.  
25
- 26 9. Pursuant to *Thurston County v. WWGMHB*, during a RCW 36.70A.130 update  
27 challenges for failure to update development regulation provisions are limited to  
28 those provisions which are directly affected by new or recently amended GMA  
29 provisions.  
30
- 31 10. JCC 18.50 was adopted in 2001 and was not amended by Ordinance 03-0317-08.  
32 The GMA has not been amended so as to establish new requirements for Jefferson  
County which would necessitate an amendment to JCC 18.50 and, therefore, the  
provisions of JCC 18.50 are not open to challenge.
11. In *Futurewise v. WWGMHB*, the Supreme Court held critical areas within the  
exclusive jurisdiction of the Shoreline Management Act, RCW 90.58, are governed by

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the SMA and critical areas outside the jurisdiction of the SMA are governed by the GMA.

- 12. The Supreme Court's decision is pending a Motion for Reconsideration and the Court has not issued a mandate as of the date of this Order.
- 13. OSF challenges Jefferson County's regulations primarily in relationship to the adoption of Channel Migration Zones (CMZs) on four of the County's rivers.
- 14. Portions of the CMZ are located within the 200 foot jurisdiction of the SMA.
- 15. Jefferson County, with JCC 18.22.270 – Table 1, has established buffer widths of 50-75 feet for Type Np and Type Ns non-fish bearing streams.
- 16. The County's BAS relied on during the CAO update recommended buffer widths ranging from 50 feet to 100 feet for Ns and Np streams.
- 17. JCC 18.22.095 is applicable to all types of buffers for critical areas and permits an exemption from the CAO for buffer areas which are both physically separated and functionally isolated from the "parent" critical area serve no protection against adverse impacts.
- 18. With JCC 18.22.095, the County is requesting property owners seeking relief from compliance with the CAO to submit documentation to demonstrate the basis for the requested exemption.
- 19. Ordinance 03-0317-08 recognizes a new type of critical area within Jefferson County – Channel Migration Zones (CMZs). CMZs are corridors or variable widths that include the current stream or river channel plus adjacent areas through which the channel has migrated or likely to migrate within a given timeframe.
- 20. BAS within the Record denotes that the migration of a stream or river creates hazards to both private and public property. Delineation of a CMZ includes the classification of risk assessment for areas within the CMZ.
- 21. Jefferson County has designated CMZs for four of its rivers – the Duckabush River, the Dosewallips River, the Big Quilcene River, and the Little Quilcene River.

- 1 22. Jefferson County elected to include CMZs within the category of Geologically  
2 Hazardous Areas (GHAs). GHAs are recognized as a type of critical area pursuant  
3 to RCW 36.70A.030(5).
- 4 23. The designation of a GHA is based, in part, on an analysis of historical activity of a  
5 site and the potential or susceptibility of the site for future geological instability. The  
6 functions and values sought to be protected by GHAs are the protection of life and  
7 property and, those functions and values exist today. Functions and values of CMZs  
8 relate to protect against bank erosion and channel migration as these comprise  
9 development potential.
- 10  
11 24. BAS within the Record notes risk assessments based on time periods of 50 years for  
12 high risk areas, 50-100 years for moderate risk areas, and greater than 100 years for  
13 low risk areas. JCC 18.22.160(2)(d) defines High Risk CMZ areas to be those areas  
14 where channel migration is likely to occur within the next 100 years.
- 15  
16 25. It is unclear from the Record whether the County's CMZ Hazard Maps reflect the  
17 BAS contained within the Record as to risk assessment delineation.
- 18  
19 26. JCC 18.22.170, the County's Protection Standards for GHAs apply to all properties  
20 containing a designated GHA or its buffer but, for the language of the provision itself,  
21 not all standards apply to all types of GHAs.
- 22  
23 27. JCC 18.22.170(1) - .170(4) apply uniformly to all types of GHAs. JCC 18.22.170(5) -  
24 .170(6) contains limiting language restricting application to Landslide Hazard Areas.  
25 JCC 18.22.170(6)(g) contains excepting language in regards to building setbacks for  
26 high risk CMZs.
- 27  
28 28. Limitations on development within high risk CMZs is supported by the County's BAS  
29 which sets forth the principal goal of delineating a CMZ to be guiding development  
30 away from high risk areas.
- 31  
32 29. The retention of vegetation is important in that it serves to control erosion, provides  
for bank stabilization, protects the bank, and reduces bank accretion. JCC  
18.22.170(4)(c) limits the removal of vegetation on the entirety of property containing

1 a designated GHA or its buffer. For a CMZ, restriction on vegetation removal does  
2 not correlate with the CMZ's risk assessment.

3 30. RCW 36.70A.020(6) and 36.70A.370 seeks to protect private property rights.

4 Ordinance 03-0317-08 demonstrates the consideration of property rights. OSF did  
5 not set forth a legally recognized property right or assert that Ordinance 03-0317-08  
6 was adopted in an arbitrary and discriminatory manner.

7  
8 31. With the adoption of Ordinance 03-0317-08, some existing uses became non-  
9 conforming uses under the County's CAO. Jefferson County does not require the  
10 termination of a non-conforming use. Property owners may continue to maintain,  
11 repair, and replace a non-conforming use so long as the use remains consistent.

12 32. BAS in the Record supports the restriction on development of both new and existing  
13 uses in order to protect from loss of life and/or damage to property.

14 33. Any Finding of Fact later determined to be a Conclusion of Law is adopted as such.  
15

## 16 VII. CONCLUSIONS OF LAW

17 A. The Petitions filed were timely, pursuant to RCW 36.70A.290(2).

18 B. The Petitioners have standing to appear before the Board, pursuant to RCW  
19 36.70A.280(2).

20 C. The Board has subject matter jurisdiction over Ordinance 03-0317-08, pursuant to  
21 RCW 36.70A.280(1)(a).

22 D. Petitioner CPCA has failed to adequately brief CPCA Issue 1. The Issue is deemed  
23 abandoned.

24 E. Petitioner OSF has failed to adequately brief OSF Issues 2 and 7. The Issues are  
25 deemed abandoned.

26 F. Petitioner OSF presents several assertions based on constitutional grounds. The  
27 Board has no authority to determine constitutionally-based claims.

28 G. Petitioner CPCA's challenge to the enforcement provisions of JCC 18.22, set forth in  
29 JCC 18.50, is untimely.  
30  
31  
32



- 1 H. Those portions of the CMZ which are located within the 200 foot shoreline jurisdiction  
2 are regulated by the SMA. As such, the County's CAO represents a segment of its  
3 SMP update which is subject to review and approval by the Department of Ecology.  
4 Those portions of the CMA which are located outside of the 200 foot shoreline  
5 jurisdiction are regulated by the GMA. As such, the Board has jurisdiction to review  
6 the provisions as they apply to this area for compliance with the GMA.  
7  
8 I. Petitioner OSF has failed to demonstrate that the County's adoption of Ordinance 03-  
9 0317-08 violated RCW 36.70A.172 in regards to stream buffers. JCC 18.22.270 –  
10 Table 1, adopting buffer widths of 50-75 feet for Type Np and Type Ns non-fish  
11 bearing streams; these widths are within the range set forth in the County's BAS.  
12  
13 J. Petitioner OSF has failed to demonstrate that the County's adoption of Ordinance 03-  
14 0317-08 violated RCW 36.70A.172 in regards to property owners' responsibilities  
15 relating to physically and functionally separated critical area buffers. JCC 18.22.095  
16 does not delegate to property owners the County's duty to designate critical areas  
17 and identify the functions and values of these areas. This provision of the CAO  
18 provides relief for property owners for critical area buffers which are separate and  
19 isolated from the critical area itself.  
20  
21 K. Petitioner OSF has failed to demonstrate that the County's adoption of Ordinance 03-  
22 0317-08 violates RCW 36.70A.030(5), .030(9), and .172(1) with the establishment of  
23 CMZs.  
24  
25 L. Petitioner OSF has demonstrated that the County's adoption of Ordinance 03-0317-  
26 08 violates RCW 36.70A.172(1) as it relates to the mapping of hazard risk  
27 assessment areas. The GMA requires development regulations to be based on BAS,  
28 the County's hazard maps are a component of their CAO, and it is unclear from the  
29 Record whether these maps are based on BAS timelines or the definitional period of  
30 100-years set forth in JCC 18.22.160(2)(d).  
31  
32 M. Petitioner OSF has failed to demonstrate that the County's adoption of Ordinance 03-  
0317-08 violates RCW 36.70A.030(5), .030(9), and .172(1) in relationship to the

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protection standards set forth in JCC 18.22.170 in regards to buffers and building setbacks.

- N. Petitioner OSF has demonstrated that the County's adoption of Ordinance 03-0317-08 violates RCW 36.70A.172(1) in relationship to the protection standards set forth in JCC 18.22.170 in regards to vegetation removal. The BAS contained in the County's Record notes the role served by vegetation but finds that the retention of vegetation is not equal throughout a CMZ. Therefore, a blank restriction on the removal of vegetation is not supported by BAS and violates the GMA.
- O. Petitioner OSF has failed to demonstrate that Jefferson County violated RCW 36.70A.370. Ordinance 03-0317-08 clearly denotes the consideration of property rights and the process required by .370 is assumed to have been utilized.
- P. Petitioner OSF has failed to demonstrate that the County's adoption of Ordinance 03-0317-08 violates RCW 36.70A.020(6).
- Q. Any Conclusion of Law later determined to be a Finding of Fact is adopted as such.

**VIII. ORDER**

Jefferson County shall take legislative action to bring itself into compliance with the GMA as provided for in this Final Decision and Order.

Compliance Due	May 18, 2009
County's Statement of Actions Taken and Index to the Record Due	June 1, 2009
Objections to a Finding of Compliance Due (if any)	June 18, 2009
County Response to Any Objections Due	July 6, 2009
<b>Compliance Hearing</b>	July 15, 2009

ENTERED this 19<sup>th</sup> day of November, 2008.

  
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 Holly Gadbaw, Board Member

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James McNamara, Board Member

  
William P. Roehl, Board Member

Pursuant to RCW 36.70A.300 this is a final order of the Board.

**Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and three copies of the petition for reconsideration, together with any argument in support thereof, should be filed by mailing, faxing or delivering the document directly to the Board, with a copy to all other parties of record and their representatives. **Filing means actual receipt of the document at the Board office.** RCW 34.05.010(6), WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

**Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil

**Enforcement.** The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person, by fax or by mail, but service on the Board means **actual receipt of the document at the Board office** within thirty days after service of the final order.

**Service.** This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

1 **WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD**

2 Case No. 08-2-0029c

3 Citizens Protecting Critical Areas and Olympic Stewardship Foundation, et al  
4 v. Jefferson County

5 **DECLARATION OF SERVICE**

6 I, PAULETTE YORKE, under penalty of perjury under the laws of the State of  
7 Washington, declare as follows:

8 I am the Executive Assistant for the Western Washington Growth Management  
9 Hearings Board. On the date indicated below a copy of a FINAL DECISION AND ORDER  
10 in the above-entitled case was sent to the following through the United States postal mail  
11 service:  
12

13 Citizens Protecting Critical Areas  
14 PO Box 1077  
15 Port Hadlock, WA 98339

Gerald Steel, PE  
Attorney-at-Law  
7303 Young Road NW  
Olympia, WA 98502

16 Olympic Stewardship Foundation  
17 c/o Jim Hagen, President  
18 241 Sand Road  
Port Townsend, WA 98638

Brian T. Hodges  
Pacific Legal Foundation  
10940 NE 33<sup>rd</sup> Place Suite 210  
Bellevue, WA 98004

19 Jim Hagen  
20 150 Maple Drive  
Port Townsend, WA 98368

William Wheeler  
Fair Lea Tree Farm  
PO Box 552  
Quilicene, WA 98376

21 Diane Johnson  
22 70 Market Street  
23 Port Hadlock, WA 98339

Roger Short  
1720 Center Road  
Chimacum, WA 98325

1 John Richmond  
2 PO Box 536  
3 Forks, WA 98331

Bud Schindler  
270 Rhododendron Lane  
Brinnon, WA 98320

4 Terren MacLeod  
5 241 Sand Road  
6 Port Townsend, WA 98638

Jefferson County Auditor  
1820 Jefferson Street  
PO Box 563  
Port Townsend, WA 98368

7 Mark R. Johnsen  
8 Karr Tuttle Campbell  
9 1201 Third Avenue Suite 2900  
10 Seattle, WA 98101

David Alvarez  
PO Box 1220  
Port Townsend, WA 98368

11 DATED this 19<sup>th</sup> day of November, 2008.

12   
13 Paulette Yorke, Executive Assistant