No. 40272-6-II

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION II

OLYMPIC STEWARDSHIP FOUNDATION,

Petitioner,

v.

WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD,

Agency Respondent.

On Appeal from the Superior Court of the
State of Washington for Thurston County

PETITIONER'S OPENING BRIEF

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INTRODUCTION

Washington law prohibits local governments from imposing uniform, pre-set development conditions without regard to the specific needs created by a given development. *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 763 (2002) (invalidating a uniform development condition requiring all property owners to set aside 30% of property as open space to protect the environment and provide critical habitat); *Citizens' Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 665 (2008), *rev. denied*, 165 Wn.2d 1030 (2009) (invalidating critical area regulation requiring all rural property owners to retain natural vegetation on 50% to 65% of their lots). Yet this is exactly what Jefferson County did when it adopted a 100% vegetation retention standard as a condition on any permitted use of private property located in a "high risk" area of a "channel migration zone" (CMZ), despite the fact that a whole host of site-specific conditions will reduce or eliminate any risk of channel migration on regulated parcels.

Not only is the mandatory and uniform condition on all development within the regulated area unlawful, the process the County used to develop its 100% vegetation retention standard violates the Growth Management Act (GMA). The GMA requires that local government create a record demonstrating that it engaged in a reasoned process of evaluating the "best

available science" when it develops critical area regulations. Here, the County ignored science concluding that vegetation retention is not an effective method to protect against channel migration. There is simply no record demonstrating how or why the County came up with a uniform 100% vegetation retention standard. The growth board erred when it affirmed the County's critical area regulations without requiring that the County create a record of its evaluation process.

Petitioner Olympic Stewardship Foundation (OSF) seeks a decision reversing the growth board's Final Decision and Order and Compliance Order and remanding the County's CMZ regulations for further proceedings to bring them into compliance with the law.

ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO

Assignment of Error 1: The growth board erred in entering conclusion of law K in its Final Decision and Order. AR 1 at 836.

Assignment of Error 2: The growth board erred in entering conclusion of law M in its Final Decision and Order. AR 1 at 836-37.

Assignment of Error 3: The growth board erred in entering conclusion of law N in its Final Decision and Order. AR 1 at 837.

Assignment of Error 4: The growth board erred in its Final Decision and Order by concluding that Jefferson County's non-conforming use regulations comply with the GMA. AR1 at 828 (no conclusion of law).

Assignment of Error 5: The growth board erred in it Compliance Order by concluding that Jefferson County's CMZ regulations comply with the GMA's "best available science" requirement. AR 2 at 180-81.

Issue A: Whether under the de novo standard of review, the growth board erred when it concluded that Jefferson County's decision to adopt a 100% vegetation retention standard within a high risk CMZ complies with the GMA's "best available science" requirement. (Relating to Assignments of Error 1-3, 5.)

Issue B: Whether under the de novo standard of review, the growth board erred when it concluded that Jefferson County's critical areas ordinance (CAO) complies with the GMA, where (1) the regulations impose a 100% vegetation retention standard as a uniform and preset condition on all new development (2) without first demonstrating a nexus between the proposed use of property and the projected impact, and (3) without showing that the limitation on the property owner's use actually mitigates the identified impact. (Relating to Assignments of Error 1-3, 5.)

Issue C: Whether under the de novo standard of review, the growth board's conclusion that Jefferson County's nonconforming use regulations comply with the GMA is erroneous under a retroactive amendment to the GMA. (Relating to Assignment of Error 4.)

CITATIONS TO THE RECORD

The administrative record on appeal consists of the clerks' papers, two volumes of the record before the Western Washington Growth Management Hearings Board, and transcripts from two hearings. OSF will cite the administrative record as follows:

AR 1 ___: Administrative record relating to the growth board's Nov. 19, 2008, Final Decision and Order (Case No. 08-2-02852-3);

AR 2 ___: Administrative record pertaining to the growth board's July 20, 2009, Compliance Order (Case No. 09-2-01897-6);

TR 1 ___: Transcript of the Oct. 7, 2008, hearing on the merits; and

TR 2 ___: Transcript of the July 15, 2009, compliance hearing.

STATEMENT OF FACTS

A. What Is a Channel Migration Zone?

The phrase Channel Migration Zone (CMZ) describes the area adjacent to a river, including all land that the river could potentially occupy as a result of avulsion and/or meandering if the river is unconstrained and the banks are left unprotected. Jefferson County Code (JCC) 18.10.030.[1] Over time and for various reasons, stream channels change their locations on valley

[1] Jefferson County's revised CMZ regulations can be found at AR 2 at 21-25.

floors. A CMZ is comprised of historical channel beds, potential channels, and potential areas that could erode due to changes in the river's course. CMZs are regulated to set aside and preserve all potential land that a river or stream could occupy in the future. Tr. 1 at 29 ("The object of identifying a CMZ is to ensure that the stream [has] a protective buffer in the future."). Due to the breadth of potential channel beds and erosion areas, the size of CMZs can extend from dozens to thousands of feet landward in both directions of an existing channel. AR 1 at 235 ("CMZs can also extend from hillslope to hillslope across the entire valley bottom.").

B. Jefferson County's Adoption of CMZ Regulations

The GMA does not identify CMZs as a category of critical areas requiring protection. RCW 36.70A.030. The County's decision to regulate CMZs under the GMA resulted from a settlement agreement with a private environmentalist organization, Washington Environmental Council (WEC). In 2001 and 2004, after Jefferson County adopted critical area regulations, WEC filed two petitions for review with the Western Washington Growth Management Hearings Board (WWGMHB No. 01-02-0013; WWGMHB No. 05-2-0006). The County settled the lawsuits, agreeing in pertinent part to adopt critical area regulations that "preserve the integrity" of CMZs by restricting the development of private property within their boundaries. AR 1

at 489. After the settlement agreement was finalized, Jefferson County began the process of updating its critical areas regulations. On March 17, 2008, Jefferson County adopted its critical areas update (AR 1 at 11-21), which was published on March 26, 2008. AR 1 at 3.

The critical areas update designated CMZs along the County's major rivers, the Duckabush, Dosewallips, Big Quilcene, Little Quilcene, and the Lower Hoh Rivers, as a category of "geologically hazardous areas." JCC 18.10.030; JCC 18.22.160(3)(g), (h), (i). Within each river's CMZ, the County delineated areas of potential or anticipated risk. JCC 18.10.030; JCC 18.22.160(2)(d). The CMZ regulations only apply to the "high risk" areas of a CMZ, which the County defined as those "portions of the channel that are likely to migrate within a 50-year timeframe." JCC 18.10.030; JCC 18.22.160(2)(d). All property located in a "high risk" CMZ is subject to a 100% vegetation retention requirement as a mandatory and pre-set condition on any permitted use or development. JCC 18.22.170(4)(d). According to the CMZ maps, approximately 600 parcels of private property are either fully or partially located in a "high risk" CMZ.[2] AR 2 at 40-44.

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[2] In the Duckabush River valley, approximately 145 rural residential parcels are either wholly or partially within the CMZ. In the Dosewallips River valley, approximately 175 rural residential, 4 rural village center parcels, and 6 areas of intense rural development parcels are either wholly or partially within the CMZ. In the Big and Little Quilcene River valleys, approximately
(continued...)

On May 23, 2008, OSF filed a Petition for Review with the Western Washington Growth Management Hearings Board. AR 1 at 2-23. OSF challenged the portions of the County's CAO that designate and regulate CMZs as critical areas. AR 1 at 5-8. After briefing and a hearing on the merits, the growth board upheld the County's designation of CMZs as critical areas, but remanded the CMZ regulations because the County's delineation of risk areas did not comply with the GMA's "best available science" provisions.[3] AR 1 at 836-37. On remand, the County made corrections to its CMZ regulations, and the Board concluded that the revised Ordinance was in compliance with the GMA. AR 2 at 180-81. The superior court upheld the growth board decisions, and OSF timely filed this appeal. CP 66-70, 246-318.

STANDARD OF REVIEW

This appeal seeks review of conclusions of law entered by the growth board in *Citizens Protecting Critical Areas and Olympic Stewardship*

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[2] (...continued)
317 rural residential and 9 rural village center parcels are either wholly or partially within the CMZ. AR 2 at 40-44.

[3] The Board also concluded that, pursuant to *Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242 (2008), Jefferson County could not adopt critical area regulations on areas subject to the jurisdiction of the Shoreline Management Act (SMA). AR 1 at 836. This issue is not on appeal.

Foundation, et al. v. Jefferson County, No. 08-2-0029c (Final Decision and Order, Nov. 19, 2008, and Compliance Order, July 20, 2009). On appeal from a growth board decision, this Court reviews the Board's conclusions de novo and applies the standards of the Administrative Procedure Act (APA), ch. 34.05 RCW, directly to the record before the Board. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553 (2000). Under the APA, "a court shall grant relief from an agency's adjudicative order if it fails to meet any of nine standards delineated in RCW 34.05.570(3)." *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 498 (2006). Of the possible grounds for relief under the APA, two apply here:

> (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied; [and]
>
> . . . .
>
> (d) The agency has erroneously interpreted or applied the law . . . .

RCW 34.05.570(3). Challenges under subsections (a) and (d) are reviewed de novo. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45 (1998). As demonstrated below, the growth board erred when it (1) failed to properly apply the GMA's "best available science"

provision to Jefferson County's critical areas update, and (2) failed to apply the constitutional nexus and proportionality limitations that have been incorporated into the "best available science" process. The growth board's decision should be reversed and remanded for further proceedings to bring the County's critical areas update into compliance with the law.

SUMMARY OF ARGUMENT

This appeal seeks review of a growth board decision upholding Jefferson County's adoption of a 100% vegetation retention standard as a uniform and pre-set condition on any permitted use of private property within a designated "high risk" CMZ. The GMA's "best available science" provision requires that Jefferson County create a legislative record demonstrating that it engaged in a reasoned process of evaluating all relevant science in the record—including science that is not to its liking—when it developed its 100% vegetation retention standard. The County did not do so.

Moreover, the County's uniform vegetation retention standard is also illegal as a matter of law. The County's discretion in developing critical area regulations is limited by the constitutional nexus and rough proportionality tests set out in by the U.S. Supreme Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Our Supreme Court applies the tests from these cases to preclude the

uniform application of a development condition to all proposed development without considering actual impacts. *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d at 763.

As set forth below, there is no record indicating how or why it adopted a 100% vegetation retention standard where:

(1) The record includes only one study that discusses the adopted vegetation standard, and that study indicates that preserving vegetation will not be effective to control channel migration;

(2) The overboard sweep of the CMZ regulations covers new development that will not be threatened by channel migration; and

(3) The 100% vegetation retention standard is facially invalid under the constitutional nexus and proportionality tests as incorporated into the GMA.

The lack of a reasoned process on the record violates Supreme Court and appellate decisions interpreting the GMA's "best available science" requirement and warrants reversal of the growth board's decisions. *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 421 (2007); *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 834-38 (2005); *Honesty in Envtl. Analysis & Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (HEAL)*, 96 Wn. App. 522, 533 (1999). Jefferson County's 100% vegetation retention

standard is unlawful and the growth board's decision upholding it is erroneous. RCW 34.05.570(3)(a), (d).

ARGUMENT AND AUTHORITIES

I

THE GROWTH BOARD FAILED TO REQUIRE THAT THE COUNTY DEMONSTRATE HOW IT CAME UP WITH A UNIFORM 100% VEGETATION RETENTION STANDARD

The growth board's failure to require the County to demonstrate where in the record it satisfied the GMA's "best available science" provision is fatal to the County's CMA regulations. AR 1 at 173-75. The GMA sets out specific requirements for local governments to follow. They must develop a "best available science" record to:

(1) Identify and designate critical areas. RCW 36.70A.060(2), .170, .172;

(2) Identify what functions and values of the critical areas are "susceptible to damage from development." *HEAL*, 96 Wn. App. at 533; and

(3) Create a record that includes and considers valid and relevant scientific information (best available science) as part of the legislative process.[4] RCW 36.70A.172(1); *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d at 834-38.

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[4] The County identified five sources of "best available science" that it relied on in developing its CMZ regulations. AR 2 at 20.

Once local government has compiled the "best available science," it must engage in a "reasoned process," demonstrating on the record that it considered all of the relevant scientific evidence, competing evidence, all proposed solutions, and other factors to develop locally appropriate regulations. *Ferry County*, 155 Wn.2d at 834-35; *Stevens County v. Futurewise*, 146 Wn. App. 493, 514-15 (2008); *HEAL*, 96 Wn. App. at 532-34. The "reasoned process" requires that local government "go beyond mere designation and protection mechanisms and ensure that the real reason for identification and protection of critical areas (their functions and values) is being accomplished." *Clark County Natural Res. Council v. Clark County*, No. 96-2-0017, 1996 GMHB LEXIS 413, at * 11 (W. Wash. Growth Mgmt. Hearings Bd. Dec. 6, 1996) (cited favorably by *Ferry County*, 155 Wn.2d at 834-35).

This "reasoned process" requirement furthers the GMA's mandate to protect critical areas in a balanced fashion. Local government is not given carte blanche to adopt the most aggressive measures to protect, restore, or enhance the environment. *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d at 421. Instead, the GMA imposes a substantive limitation on overly precautionary critical area restrictions, requiring that local governments ensure that critical areas regulations are

supported by a degree of analytical rigor and scientific scrutiny. *E.g.*, *HEAL*, 96 Wn. App. at 532-34. The "best available science" provision, applied properly, accomplishes two things: (1) it requires that local government establish the necessary scientific and factual foundation to support development regulations that will restrict or condition the use of private property, and (2) it precludes local authorities from relying upon speculation or surmise when imposing regulations on the use of private property. *Ferry County*, 155 Wn.2d at 837-38; *HEAL*, 96 Wn. App. at 532-34.

In this case, there is nothing in the record demonstrating that Jefferson County engaged in a "reasoned process" when it adopted a 100% vegetation retention standard as a mandatory condition on any permitted use of property within a "high risk" CMZ. *See* AR 1 at 577-81 (County's Pre-Hearing Brief, avoiding all discussion of the reasoned process requirement). And without this required record, the growth board was unable to properly apply the GMA's "best available science" requirement under *Swinomish*, *Ferry County*, and *HEAL*. Its decision upholding the County's CAO should be reversed and remanded. RCW 34.05.570(3)(d).

A. The County Adopted a Vegetation Retention Standard Without Considering Adverse Scientific Conclusions

The growth board erred when it upheld the County's 100% vegetation retention standard without any discussion of the County's failure to evaluate conclusions in its "best available science" that were adverse to its decision to impose a uniform 100% vegetation retention standard as a mandatory condition on all permitted uses of property in the "high risk" area. The growth board's failure to address this legal requirement constituted an error of law. RCW 34.05.570(3)(d).

1. The County Did Not Consider Science Concluding That Vegetation Retention Is Not Effective Against Channel Migration

The County's CAO states that it adopted the 100% vegetation retention standard on all permitted uses of property within the "high risk" CMZ in order to protect property and people from the risk of damage or harm due to channel migration. AR 2 at 17 (legislative finding 40). The GMA requires that the County show how it arrived at its chosen critical area restriction by providing a record demonstrating that it evaluated all of the relevant conclusions and recommendations contained in its scientific record. *Swinomish*, 161 Wn.2d at 421; *Ferry County*, 155 Wn.2d at 837-38; *HEAL*, 96 Wn. App. at 532-34. This is where the growth board erred. There is only one study in the record (the Hoh River study) that discusses potential

methods to protect against the risk of channel migration. AR 1 at 427-29, 431. And that study concluded that preserving forest cover was *not effective in reducing the risk of channel migration.* AR 1 at 407, 431. Without some indication of how or why the County chose to disregard its own science when it chose to impose a 100% vegetation retention standard, the growth board was required to conclude that the CMZ regulations did not comply with the GMA's "best available science" provision as interpreted by our Supreme Court and appellate courts.

The growth board's failure to apply *Swinomish*, *Ferry County*, and *HEAL* leaves in place a critical area regulation that does nothing to protect Jefferson County citizens from the risk of damage due to channel migration. The Hoh River study listed five potential methods to mitigate against a combination of risks associated with river-adjacent development.[5] AR 1 at 427-29, 431. The study concluded that only four of the identified methods would be effective against channel migration. AR 1 at 427-29, 431. While retention of dense, old forest could slow channel migration in certain circumstances, the study ultimately concluded that preserving forest within

[5] The Hoh River addressed a combination of channel migration, flood, and tsunami risks to tribal infrastructure located at the mouth of the Hoh River.

the floodplain was ineffective to reduce the risk of channel migration.[6] AR 1 at 367, 429, 431. The proposed methods include:

1. Remove and relocate all infrastructure at least 300 feet outside the floodplain and beyond all risk areas of the CMZ (AR 1 at 427);

2. Place rip rap, logs with root wads, and engineered log jams at the edge of the river at historic meander belts where channel migration is most likely (AR 1 at 427-28);

3. Construct bank armoring made up of rip rap and large woody debris to protect where the river is scouring the bank, then bury the armor and replant the area (AR 1 at 428-29);

4. Install hard bank armor under emergency conditions when the river moves close enough to threaten buildings or infrastructure (AR 1 at 429); and

5. Preserve "existing dense forest on the floodplain" because "patches of forest that managed to survive bank erosion would eventually grow large enough to slow channel migration" (AR 1 at 429).

The study broke this range of alternatives down into a chart setting out the effectiveness of each approach *vis-a-vis* the type of risk. Notably, the chart

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[6] The study also determined that "it was not possible to quantitatively analyze the effects of forest cover on erosion rates." AR 1 at 407. In fact, the study noted that existing areas of old growth forest adjacent to the Hoh River had shrunk over the past 35 years because the trees were ineffective at stopping river bank erosion. AR 1 at 367, 406-07 (land containing old growth forest eroded at a faster rate than pasture land).

(reproduced below) concludes that forest retention is not effective in reducing the risk of channel migration. *See* chart at no. 5.

Approach	Hazard Reduced			Reliability	Habitat Impacts
	Channel Migration	Flooding	Tsunami		
1. Relocate to high ground	☆	☆	☆	Very good	None
2a. Armor edge of historic meander belt	☆			Good	High
2b. Levee to block overflow channels		☆		Fair?	Low
3a. Protect buildings with bank armor	☆			Fair	Low
3b. Levee to block flooding from north		☆		Poor to Fair?	Low
4. Emergency bank protection	☆			Poor	Moderate
5. Preserve floodplain forest			☆	Good	None

AR 1 at 431.[7]

The County's failure to consider the conclusion that forest retention is ineffective to protect against channel migration repeats the same error of

[7] The Hoh River study recommended bank armoring (alternative 3) where there was a lower likelihood of flooding than was present along the mouth of the Hoh River. AR 1 at 430. But because of the location of the tribe's infrastructure and conditions at the mouth of the Hoh, the study recommended a combination of alternatives 1 and 5. *Id.*

law that resulted in Division I of this Court reversing a trial court decision that upheld Seattle's steep slope ordinance. In *HEAL*, Seattle had adopted amendments to its steep slope regulations as part of its critical areas update. *HEAL*, 96 Wn. App. at 535. The stated purpose of the city's development restrictions was to prevent further erosion. *Id.* Seattle, however, failed to consider contrary scientific conclusions contained in its "best available science" record, which opined that the city's prohibition against steep slope disturbance would not actually prevent erosion.[8] Division I held that the GMA's "best available science" process required the city to identify the "nature and extent of [the critical areas'] susceptibility" to damage that will in fact result from use or development of the property. *HEAL*, 96 Wn. App. at 533. And in this regard, the court held that the GMA limited local government's discretion to adopt development restrictions to those measures that are necessitated by the impacts of new development—critical areas policies that restrict the use of private property may not be unduly precautionary, or based on "speculation and surmise." *HEAL*, 96 Wn. App.

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[8] *See* Brian T. Hodges & Daniel A. Himebaugh, *Have Washington Courts Lost Essential Nexus to the Precautionary Principle? Citizens' Alliance for Property Rights v. Sims*, at 32 n.138 (forthcoming in Environmental Law, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1533574) (citing Respt's Br., Wash. Ct. App. Div. 1 No. 40939-5-I at 3-7 (Dec. 17, 1997)).

at 531 (citing *Bennett v. Spear*, 520 U.S. 154, 176 (1997)). The *HEAL* Court explained:

> [I]f the City proposed a policy prohibiting development on slopes steeper than a 40 percent grade or requiring expensive engineering conditions for any permitted project, only the best available science could provide its policy-makers with facts supporting those policies and regulations which, when applied to an application, will assure that the nexus and rough proportionality tests are met. If the City failed to use the best available science here in making its policy decision and adopting regulations, the permit decisions it bases on those regulations may not pass constitutional muster under *Nollan* and *Dolan*. The science the legislative body relies on must in fact be the best available to support its policy decisions. Under the cases and statutes cited above, it cannot ignore the best available science in favor of the science it prefers simply because the latter supports the decision it wants to make. If it does so, that decision will violate either the nexus or rough proportionality rules or both.

HEAL, 96 Wn. App. at 534. Because Seattle did not evaluate the contrary scientific conclusions when it adopted its steep slope policies, the Court held that the city failed to comply with the GMA's "best available science" requirement. *HEAL*, 96 Wn. App. at 534-35.

HEAL illustrates why the growth board's decision to uphold Jefferson County's 100% vegetation is erroneous. The County's "best available science" concluded that forest retention alone was ineffective to reduce the risk of channel migration. And, as discussed below, the science concluded that its risk delineations were only rough estimates, and that the actual risk

of channel migration will vary based on several site-specific factors. The County cannot ignore scientific opinions and recommendations contained in the "best available science" record simply because they are not to the County's liking. *Ferry County*, 155 Wn.2d at 837-38; *HEAL*, 96 Wn. App. at 534 (County "cannot ignore the best available science in favor of the science it prefers simply because the latter supports the decision it wants to make."). Instead, the County is required to demonstrate that it evaluated each of the alternative solutions presented by the "best available science." *Ferry County*, 155 Wn.2d at 834-35. If, after evaluating all of the *effective* proposed solutions on the record, the County still believes that "protection can be ensured using an approach different from that derived from the best available science, the local government must demonstrate on the record how the alternative approach will protect the functions and values of critical areas." *Concerned Friends of Ferry County v. Ferry County*, No. 04-1-0007c at 14, Third Order on Compliance (E. Wash. Growth Mgmt. Hearings Bd. Mar. 10, 2009) (citation omitted). The County did not take any of the steps the law requires to support its 100% vegetation retention standard. The growth board's decision to uphold the County's CMZ regulations, without requiring the County to comply with *Swinomish*, *Ferry County*, and *HEAL*, is erroneous and should be reversed. RCW 34.05.570(3)(d).

2. The County Did Not Consider Science Concluding That the Actual Risk of Channel Migration Is Determined by Site-Specific Conditions and Other Factors

The requirement that Jefferson County explain in the record how and why it chose to impose a uniform 100% vegetation retention standard on all regulated lots is further necessitated by "best available science" conclusions that the risk delineations are only rough estimates, and that the actual risk of channel migration will vary based on several site-specific factors. *HEAL* held that the GMA's "best available science" provision requires that local government show how its chosen critical area restriction is necessary to mitigate or avoid an identified impact of the regulated development. *HEAL*, 96 Wn. App. at 533. The growth board was required to determine whether the County demonstrated a direct connection between its regulation and the impact of new development, but the board did not even reference the issue. AR 2 at 181; *HEAL*, 96 Wn. App. at 531. As a result, the growth board erroneously upheld a uniform development restriction that is only supported by the County's speculation that a 100% vegetation retention standard is broad enough to mitigate for any potential impact that could result from any permitted use of property within a "high risk" CMZ.

a. The Effect of Vegetation on Bank Stability Is Not Uniform on All of the Lots That Are Subject to the 100% Vegetation Retention Standard

The very idea that a uniform 100% vegetation retention standard is necessary throughout the County's "high risk" CMZ is nothing more than guesswork. The impact of vegetation on channel migration is unpredictable (AR 1 at 318); bank stability will vary based on multiple site-specific factors, such as tree species, size, age, spacing, and the overall vegetation conditions.[9] AR 1 at 258-59, 261, 272, 277. The vegetation conditions in Jefferson County's "high risk" CMZs are anything but uniform.[10] There are a number of cleared and developed lots, as well as undeveloped land.[11] *See* AR 2 at 40-

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[9] In fact, one study listed the "pros" and "cons" of vegetation retention, cautioning that in some circumstances, log jams caused by large woody debris actually accelerate erosion and avulsion, increasing the risk of channel migration. AR 1 at 409.

[10] Vegetation in the historic migration hazard area of the County's Eastern Rivers is largely comprised of immature vegetation and alder trees, while the most common types of vegetation in the adjacent avulsion hazard areas are "alders, swordfern, cottonwood and blackberry bushes." AR 1 at 315-16. The regulated area of the Hoh River is mostly comprised of 10-60 year old, deciduous trees. AR 1 at 406 (Forests with trees greater than 100 years old make up less than 5% of the vegetation cover in the flood plain).

[11] For example, there are at least thirteen cleared lots with existing single-family residences that fall completely within the "high risk" CMZ area of the Duckabush River (Parcel Nos. 502171006, 502172016, 502172020, 502172019, 982201830, 982201826, 982201824, 982201823, 981901419, 981901410, 981002223, 981002226, 502172007). AR 2 at 40.

44. Without a record demonstrating that the County evaluated how the varied conditions within its "high risk" zone affect the actual risk of channel migration, the growth board could not evaluate whether a uniform 100% vegetation retention standard is supported by "best available science" and its decisions should be reversed.

b. All Property Located Within a Designated "High Risk" Zone Is Not Subject to the Same Risk

The growth board's failure to apply *Swinomish*, *Ferry County*, and *HEAL* deprives numerous property owners of their right to develop and use land *where there is no risk of channel migration.* The study that delineated the "high risk CMZs along the Eastern Rivers cautioned that its conclusions should only be used as "an indicator of relative risk, rather than a precise prediction of the time in which the river would reach a given location."[12] AR 1 at 361. "It is not possible to predict which sites will actually be occupied due to the stochastic nature of multiple variables"; areas within the delineated "high" and "medium" risk areas "will probably not be occupied by the river channel during the next century." AR 1 at 361. In fact, to arrive at

[12] Similarly, the Hoh River study concluded that its risk delineations could only "*roughly correspond* to channel migration being likely to occur in a time frame of less than 50, 50-100 and greater than 100 years, respectively." App. 7 at 53 (emphasis added).

its risk classifications, the study "*assumed* that new meander bends or avulsions *would occur at all likely sites*." AR 1 at 361 (emphasis added).

Much of the private property adjacent to the County's major rivers is protected by existing bank protection (*e.g.*, revetments, rip rap, levees, dikes, etc.). AR 1 at 307, 309, 311-13, 366 (21% of the Hoh River's banks contained rock armoring). Bank protection eliminates the risk of channel migration. AR 1 at 273-75, 278, 351, 371 428-29, 431. But the studies that the County relied on to establish its "high risk" zones mapped the areas "with no consideration of roads, buildings and bank armoring." AR 1 at 366; *see also* AR 1 at 348 (Eastern River CMZs mapped as if they were "unconstrained by human engineering"); AR 1 at 332 (mapping CMZs "without regard to modifications imposed by man-made features along the channel); AR 1 at 425 ("No Disconnected Migration Areas were subtracted from the CMZs based on the presence of roads, housing or bank armoring.").[13] There is nothing in the record demonstrating how the County

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[13] The science also concluded that certain public works projects increased the risk of channel migration on downstream parcels of private property, resulting in a "high risk" classification. AR 1 at 355 n.2 (Areas classified as "high risk" would be reclassified "medium risk" if levees were moved.); AR 1 at 357 n.2. In these circumstances, the County's 100% vegetation retention standard eliminates all development rights on private property because of the existence of a public project. *See Dickgieser v. State*, 153 Wn.2d 530, 534-35 (2005) (A claim for compensation arising from public logging activities that affected stream bed and caused stream to overflow (continued...)

bridged the gap between the conclusions that property within the "high risk" area will not be subject to channel migration and its decision to impose a uniform 100% vegetation retention standard on all property within the designated area. Thus, the growth board's decision upholding the County's CMZ regulations does not comply with the GMA's requirement of a demonstrated connection between regulation and the impact of new development.

c. Data Errors Overstated the Amount of Land That May Be Subject to "High Risk" of Channel Migration

Finally, the growth board erred when it upheld the County's 100% vegetation retention standard despite the fact that the County failed to evaluate "best available science" reporting significant data errors affecting the studies' reliability. The study that mapped the CMZs for the Eastern Rivers cautioned that it was "important to note" that the data it relied on contained "several sources of error." AR 1 at 331 (reporting an "assume[d] uncertainty" of ±100 feet on its CMZ maps). AR 1 at 331. These data errors are of enormous magnitude where the County has chosen a regulatory device

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[13] (...continued)
parcel of private property was properly pleaded as a taking.). The GMA requires that the County demonstrate how its 100% vegetation retention standard is necessary to mitigate or avoid impacts to a critical area—not a public project. *HEAL*, 96 Wn. App. at 533.

that eliminates all development rights in private property. And yet there is no evaluation in the record of why the 100% vegetation retention standard is necessary throughout the area delineated as "high risk".

Under *Swinomish*, *Ferry County*, and *HEAL*, the growth board was required to assure that Jefferson County created a record demonstrating that it engaged in the required process of evaluating "best available science" that concluded: (1) forest retention is ineffective to protect against channel migration; (2) various site-specific factors will change or eliminate the risk of channel migration; and (3) the data relied on in delineating the "high risk" areas may be off by ± 100 feet. The growth board erred when it affirmed the County's adoption of CMZ regulations without the required record of a reasoned process, and its decisions should be reversed and remanded. RCW 34.05.570(3)(d).

3. The Growth Board's *Post Hoc* Review of the "Best Available Science" Cannot Relieve the County of Its Obligation To Evaluate All of the Science in the Record

The County failed to respond to OSF's "reasoned process" argument, so the growth board took it upon itself to search the record to find any support for a vegetation retention requirement. AR 1 at 825. But the board's *post hoc* review of the record cannot supplant the County's duty to engage in a reasoned process as part of the public process of developing its critical area

regulations. *Swinomish*, 161 Wn.2d at 421 (requiring county to create a record explaining why it departed from conclusions in scientific record) *Ferry County*, 155 Wn.2d at 837 (requiring a record demonstrating that the County—not the growth board—engaged in a reasoned process).

The Board's search of the record located only two references commenting on the general relationship between large trees located adjacent to a river and the condition of river banks and channels.[14] AR 1 at 825; AR 1 at 834 (finding that vegetation "serves to control erosion, provides for bank stabilization, protects the bank and reduces bank accretion). Merely acknowledging the existence of these studies, however, did not address any of the contrary scientific conclusions discussed above, and did not cure the County's failure to demonstrate that it engaged in a "reasoned process" of evaluating adverse scientific conclusions and recommendations. The board's conclusion that the 100% vegetation retention standard complied with the

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[14] The board reversed the County's first version of its CMZ regulations which imposed its 100% vegetation retention standard to all areas of a CMZ, concluding that the mere fact that a river may naturally migrate and encompass a property alone does not warrant a blanket vegetation retention standard. AR 1 at 825. But, as the growth board noted, the cited references only spoke to the impact of vegetation along the river bank, and did not address how the County developed its 100% vegetation retention standard (as opposed to a 75%, 50%, 25%, or site-specific standard). AR 1 at 825; AR 1 at 837 (The science "finds that the retention of vegetation is not equal throughout a CMZ.").

GMA's "best available science" requirement is erroneous and should be reversed. RCW 34.05.570(3)(d).

B. The Growth Board Did Not Require the County To Create a Record Demonstrating That the Vegetation Retention Standard Satisfies Constitutional Standards

Failing to apply *Swinomish*, *Ferry County*, and *HEAL*, the growth board approved a development condition that violates the constitutional nexus and rough proportionality tests. *HEAL*, 96 Wn. App. at 533-34. As incorporated into RCW 82.02.020, the nexus and proportionality tests strictly limit local government's authority to impose conditions on development; government must demonstrate that exactions are "reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply."[15] RCW 82.02.020; *Trimen Dev. Co. v. King County*, 124 Wn.2d 261, 274 (1994). In *HEAL*, Division I of this Court held

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[15] In order to establish a nexus, the County's record "must show that the development . . . will create or exacerbate the identified public problem." *Burton v. Clark County*, 91 Wn. App. 505, 521 (1998). If the County is able to establish a nexus, its record must next "show that its proposed solution to the identified public problem is 'roughly proportional' to that part of the problem that is created or exacerbated by the landowner's development." *Id.* at 523. Proportionality asks the question whether the County established a reasonable relationship between the identified problem and the regulation. *Id.* at 525-26. Stated another way, the "'rough proportionality' test measures the relationship between the conditions placed on the use of property and the *negative* impacts of that use that would justify the denial of the proposed use in the first instance." *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 676 (1997).

that the "best available science" process must be sufficient to satisfy the constitutional nexus and rough proportionality tests:

> [P]olicies and regulations adopted under GMA must comply with the nexus and rough proportionality limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications. If a local government fails to incorporate, or otherwise ignores the best available science, its policies and regulations may well serve as the basis for conditions and denials that are constitutionally prohibited. [. . . .] Both requirements have also been incorporated into the GMA amendments to RCW 82.02 authorizing development conditions.

HEAL, 96 Wn. App. at 533-34 (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825; *Dolan v. City of Tigard*, 512 U.S. 374) (footnotes omitted). The growth board refused to consider OSF's arguments on this issue (AR 1 at 821-22) and, as a result, it upheld a critical area regulation that cannot satisfy nexus and proportionality. RCW 34.05.570(3)(a), (d).

Jefferson County's uniform 100% vegetation retention standard is invalid on its face because it does not comply with the nexus and proportionality standards. Our Supreme Court has held that a development condition cannot be "uniformly applied, in the preset amount, regardless of the specific needs created by a given development." *Isla Verde*, 146 Wn.2d at 763. In *Isla Verde*, a property developer sought a permit to build a 51-lot subdivision on 13.4 acres in the City of Camas. *Id.* at 746. Camas, however, had adopted an ordinance similar to Jefferson County's vegetation retention

requirement, which required that all new development set aside 30% of the land as open space to protect the environment. *Id.* at 749-50. The developer challenged the set-aside development conditions. *Id.* at 750. Our Supreme Court examined the nexus and proportionality tests (as incorporated by RCW 82.02.020), and confirmed that the they require local governments to demonstrate that a development condition is reasonably necessary based on the impact of the proposed development:

> We have repeatedly held, as the statute requires, that development conditions must be tied to a specific, identified impact of a development on a community. *RCW 82.02.020 does not permit conditions that satisfy a "reasonably necessary" standard for all new development collectively*; it specifically requires that a condition be "reasonably necessary as a direct result of the proposed development or plat."

Isla Verde, 146 Wn.2d at 761 (emphasis added; internal citations omitted).

Isla Verde's holding is not unique. In *Citizens' Alliance*, a citizen group challenged King County's adoption of a critical area regulation that automatically required rural property owners to retain 50% to 65% of their land in native vegetation in a uniform and pre-set manner as a condition on development of rural property. *Citizens' Alliance*, 145 Wn. App. at 654, 657-58. King County's regulation did not consider whether or not proposed development will actually result in any increased impacts to identified critical areas, and did not take into account whether existing regulations or other site-

specific management practices could satisfactorily mitigate any impacts of development. *Citizens' Alliance*, 145 Wn. App. at 657-58, 660-61. The Court held that the nexus and proportionality limits do not permit local government to impose conditions "that are reasonably necessary for *all* development, or *any potential development.*" *Citizens' Alliance*, 145 Wn. App. at 665. Accordingly, the Court concluded that King County's vegetation retention requirement was unlawful:

> The failings of the ordinance before us are highlighted by the precise point made in *Trimen* and the dissent in this court's decision in *Henderson Homes*. KCC 16.82.150 imposes a uniform requirement for cleared area on each lot, unrelated to any evaluation of the demonstrated impact of proposed development. While the ordinance before us prescribes clearing limits in proportion to the size of the lot, it fails to relate the clearing limit to the nature and extent of the proposed development on the lot. Although KCC 16.82.150 contains other criteria, none address *the requirement that the clearing limits be impact specific*, such as the statute requires. Thus the necessary proportionality that is required to fulfill the statutory exception is not satisfied.

Citizens Alliance, 145 Wn. App. 668-69.[16]

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[16] Similarly, in *Castle Homes & Dev., Inc. v. City of Brier*, 76 Wn. App. 95 (1994), the city imposed exactions on development based on a share of the "cumulative impact" of all the new development in its subdivisions, regardless of the specific impact of a particular development. *Id.* at 106. As a result of the "cumulative impact" approach, the court found that the city's approach "d[id] not take into account the direct impact of each separate subdivision location and the differing street distribution impacts of each" and held that the mitigation impact fees violated the nexus and proportionality requirements of RCW 82.02.020. *Id.* at 108. "When exacted without

(continued...)

Like the conditions invalidated in *Isla Verde* and *Citizens' Alliance*, Jefferson County's CMZ 100% vegetation retention standard automatically applies to all development applications for property located within a "high risk" CMZ, and is automatically imposed in a uniform and preset manner at the time the landowner files a land use application. JCC 18.22.170(1), (4)(d). The County's CMZ regulation does not take into consideration whether or not the proposed development will actually result in any increased risk of channel migration or any other impacts. JCC 18.22.170(1), (4)(d). Moreover, County's 100% vegetation retention standard contains no provision for variation of the condition to ensure proportionality. JCC 18.22.170(1), (4)(d). Nor do the CMZ regulations contain any provision to consider the efficacy of other critical areas regulations that specifically allow development within areas designated as "high risk" CMZs (including the County's shoreline development regulations, floodplain regulations, and other site-

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[16] (...continued)
limitation to the direct impact, they are not appropriate and are in derogation of the law." *Id.* at 109.

specific management practices).[17] JCC 18.22.170(1), (4)(d). Jefferson County's ordinance cannot satisfy the nexus and proportionality tests that prohibit uniform development conditions. The growth board erred when it upheld a uniform 100% vegetation retention condition despite binding Supreme Court and appellate precedent holding that uniform development conditions are unlawful. The growth board's decision should be reversed and remanded for further proceedings to bring the County's regulations into compliance with the law. RCW 34.05.570(3)(a), (d).

II

THE LEGISLATURE RETROACTIVELY AMENDED THE GMA TO PROHIBIT NONCONFORMING USE CHARACTER IN SHORELINE CRITICAL AREAS

As part of its challenge to Jefferson County's CMZ regulations, OSF argued that the County's decision to deem all vested and existing development located within the new CMZ buffers as nonconforming uses.

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[17] For example, the County regulates the risk of channel change and flooding in the Frequently Flooded Areas provisions of its CAO. *See* JCC 18.22.140 (incorporating the Flood Damage Prevention provisions of its Building Code, JCC 15.15, as part of the CAO). Contrary to the CMZ regulations, the flood regulations specifically permit the use and development of property within a floodplain subject to certain site-specific conditions (such as a disclaimer of liability, elevating the lowest floor of a structure, and floodproofing). *See* JCC 15.15.070-.080.

AR 1 at 175-76 (citing JCC 18.22.080[18]). The Board dismissed this argument under the GMA as it existed in 2008. AR 1 at 828.

Since then, there has been a change in the law. On March 18, 2010, the Legislature retroactively amended RCW 36.70A.480 in Engrossed House Bill 1653 (2010 Wash. Sess. Laws ch. 107, 61st Leg., Reg. Sess.) (EHB 1653). This enactment prohibits local governments from deeming existing structures and uses within 200 feet of a shoreline (which includes Jefferson County's "high risk" CMZs) as nonconforming. The amended statute provides that

> a use or structure legally located within shorelines of the state that was established or vested on or before the effective date of the local government's development regulations to protect critical areas may continue as a conforming use and may be redeveloped or modified[.]

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[18] JCC 18.22.080 provides as follows:

> (1) Any legal use or legal structure in existence on the effective date of this Chapter 18.22 that does not meet the buffer requirements of this chapter for any designated critical area shall be considered a legal nonconforming use.
>
> (2) Any use or structure for which an application has vested or for which a permit has been obtained prior to the effective date of the ordinance codified in this chapter, that does not meet the buffer requirements of this chapter for any designated critical area, shall be considered a legal nonconforming use.

EHB 1653 at Sec. 2(3)(c)(i). The nonconforming use provision of the County's CAO fails to comply with EHB 1653, and this Court should reverse and remand the growth board's decision for further proceedings to bring the nonconforming use provision into compliance with the law.[19] *Marine Power & Equip. Co. v. Human Rights Comm'n Hearing Tribunal*, 39 Wn. App. 609, 620 (1985) (When controlling law changes between the entering of judgment below and consideration of the matter on appeal, appellate court should apply the new or altered law.).

CONCLUSION

For the foregoing reasons, OSF respectfully requests that this Court conclude that the growth board erroneously applied the GMA's "best available science" requirement under Supreme Court and appellate precedent. OSF further requests that this Court reverse the growth board's decisions, and

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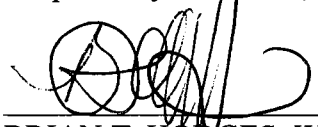
[19] OSF did not appeal the Board's dismissal of this argument to the superior court. CP 8. But the Legislature's intervening, retroactive amendment of the statute authorizes this Court to review this issue. RAP 2.5(a); *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 441 (2008) (Courts generally recognize an exception to waiver where a new issue arises while the appeal is pending because of a change in the law.).

remand the matter for further proceedings to bring the County's CAO into compliance with the law.

DATED: April 15, 2010.

Respectfully submitted,



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DECLARATION OF SERVICE

BRIAN T. HODGES declares as follows:

I am a resident of the State of Washington, employed at 10940 NE 33rd Place, Suite 210, Bellevue, Washington 98004. I am over the age of 18 years and am not a party to this action. On the below date, true copies of the Petitioner's Opening Brief were served to the following as indicated:

Bruce Turcott (Via U.S. Mail)
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Growth Management Hearings Board

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Attorney for Jefferson County

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 14th day of April, 2010, at Bellevue, Washington.

BRIAN T. HODGES

APPENDIX A

Jefferson County Ordinance No 06-0511-09 Revising the CMZ provisions of the critical areas ordinance, JCC §18.22

(AR 2 13-26)

JEFFERSON COUNTY
STATE OF WASHINGTON

In the matter of amending the Critical Areas Ordinance, as codified in Chapter 18.22 JCC } **Ordinance No. 06-0511-09**

WHEREAS, RCW Chapter 36.70A, et seq., also known as the Growth Management Act ("GMA"), requires that counties planning under the GMA adopt development regulations that are consistent with and implement their comprehensive plans; and

WHEREAS, Jefferson County adopted a GMA-derived Comprehensive Plan on August 28, 1998 via Resolution and completed its seven-year update of said Comprehensive Plan via Ordinance on December 13, 2004; and

WHEREAS, the Unified Development Code (UDC) was originally adopted on December 18, 2000 as a development regulation required by the Growth Management Act, to be effective January 16, 2001; and

WHEREAS, for proper citation in courts of law the UDC has been codified within the Jefferson County Code (JCC) at Title 18; and

WHEREAS, Jefferson County adopted a Critical Areas Ordinance or "CAO" (No. 03-0317-08) on May 17, 2008, which created a new Chapter 18.22 (Critical Areas) JCC and repealed portions of Chapter 18.15 (Environmentally Sensitive Areas), including 160 findings of fact of which are incorporated by reference; and

WHEREAS, Jefferson County received timely appeals, called petitions for review, to Ordinance No. 03-0317-08, resulting in a review of the ordinance by the Western Washington Growth Management Hearing Board; and

WHEREAS, Western Washington Growth Management Hearings Board issued a Final Decision and Order on November 19, 2008 requiring Jefferson County to legislatively amend the geologically hazardous areas of the JCC, as it pertains to channel migration zones(CMZs) by May 18, 2009; and

WHEREAS, the November 19, 2008 Final Decision and Order from the Western Washington Growth Management Hearings Board required clarification of what constitutes a high risk CMZ and clarification of vegetation removal within a CMZ; and

WHEREAS, the Department of Community Development proposed code amendments to comply with the Final Decision and Order; and

WHEREAS, the Washington Supreme Court in ***Futurewise v WWGMHB***, 164 Wash.2d 242, 189 P.3d 161(2008) decided the legislative intention of adopting SHB 1933 in 2003 was that "Critical areas in the jurisdiction of the SMA are governed only by the SMA" and some CMZs

extend beyond the shoreline jurisdiction, thereby warranting regulation through the GMA in accordance with Chapter 18.22 JCC; and

WHEREAS, the Planning Commission held a public hearing on the proposed CMZ amendments to the critical areas ordinance on March 18, 2009; and

WHEREAS, the Planning Commission held deliberations on April 1, 2009, in which the Planning Commission recommended that the Board of County Commissioners adopt the proposed amendments as drafted by Department of Community Development; and

WHEREAS, the Board of County Commissioners held a public hearing on April 27, 2009 on the proposed amendments to the critical areas ordinance; and

WHEREAS, the Board of County Commissioners (BoCC) now completes this process by the adoption of this ordinance, which amends the critical areas ordinance adopted on May 17, 2008, to comply with the Final Decision and Order and makes the following findings of fact and conclusions of law:

1. The State of Washington adopted the Growth Management Act (or "GMA") in 1990.

2. Jefferson County began planning under the GMA in the early 1990s.

3. The County adopted a Comprehensive Plan under GMA on August 28, 1998. The County completed its statutorily required seven-year update of its Comprehensive Plan on December 13, 2004.

4. The GMA, under RCW 36.70A.050, requires the state agency Community Trade and Economic Development (CTED) to provide guidelines to classify and protect critical areas.

5. The GMA, at RCW 36.70A.060, requires each county to adopt development regulations to protect critical areas.

6. RCW 36.70A.170, part of the GMA, requires counties to designate critical areas. To comply with RCW 36.70A.172 counties planning under GMA must include Best Available Science to protect the functions and values of critical areas.

7. Critical Areas are defined in the GMA at RCW 36.70A.030 as including the following areas and ecosystems: a) wetlands; b) critical recharge areas for aquifers used for potable water; c) fish and wildlife habitat conservation areas; d) frequently flooded areas; and e) geologically hazardous areas.

8. The GMA, specifically RCW 36.70A.3201, recognizes the broad range of discretion that may be exercised by counties. This means that the BoCC, as the County legislature for Jefferson County, must balance the priorities and options based upon local circumstances. Within the framework of state goals and requirements, the State Legislature has concluded that the ultimate burden for planning, harmonizing and implementing a county's future rests with that community.

9. In order to balance the planning goals of the GMA, the BoCC encouraged the involvement of citizens.

10. The 1998 and 2004 Jefferson County Comprehensive Plan includes an Environment Element as a chapter of the Plan.

11. ENG 9.0: "Ensure that landslide and erosion hazard areas are appropriately designated and that measures to protect public health and safety are implemented for hazardous areas."

12. ENP 9.1: "Review standards to minimize adverse impacts to public health and safety and to public and private property for areas where risks may occur from hazards such as landslides, erosion, subsidence, and other impacts associated with geologic hazards."

13. ENP 9.2: "Improve the scientific information which serves as the basis of land use and planning, such as the nature and distribution of geologic materials, processes, and conditions."

14. ENP 9.3: "Land uses in geologic hazard areas should be allowed only when appropriate mitigation is provided to protect public safety and the environment."

15. ENP 9.4: "Establish a preference for the use of landslide mitigation measures which are compatible with natural conditions, including setbacks, appropriate siting, drainage control, buffers, and bioengineering solutions."

16. ENP 9.5: "The County may require geotechnical reports for areas of potential risk from geologic conditions or processes when necessary, and may provide for qualified staff or peer review of studies under a reasonable fee schedule."

17. ENP 9.6: "Promote best management practices to minimize landslide in land use regulations related to septic systems, drainage, forest practices, agricultural practices, industry, and other development."

18. ENP 9.7: "Promote public education programs that foster an understanding of landslide hazard areas and encourage homeowners and communities to mitigate existing problems."

19. Jefferson County Natural Resources Division and Jefferson County Department of Community Development received the following report: Perkins, S.J. 2006. *Final Report. Channel Migration Hazard Maps for the Dosewallips, Duckabush, Big Quilcene, and Little Quilcene Rivers, Jefferson County, Washington.* Perkins Geosciences, in February, 2006.

20. A document from the U.S. Department of the Interior Bureau of Reclamation entitled *September, 2004 Channel Migration Zone Study Jefferson County, Washington Duckabush, Dosewallips, Big Quilcene and Little Quilcene Rivers*. Technical Service Center Flood Hydrology Group D-8530 Denver, Colorado, provides channel migration zone information.

21. Jefferson County received report: Perkins, S.J. 2004. *Final Report. Lower Hoh River Channel Migration Study. Prepared for the Hoh Indian Tribe, in June 2004.*

22. A document entitled *A Framework for Delineating Channel Migration Zones,* Washington State Department of Ecology, Washington State Department of Transportation, November, 2003. Ecology Final Draft Publication #03-06-027, provides channel migration zone information.

23. Jefferson County received a correct and timely Petition for Review to the Western Washington Growth Management Hearings Board from Olympic Stewardship Foundation and certain named individuals on May 23, 2008.

24. Washington Environmental Council appealed the initial adoption of the UDC (which was adopted by Jefferson County on December 18, 2000) and the subsequent amendments to the UDC (which were adopted on December 13, 2004). Jefferson County entered into an agreement with Washington Environmental Council to agenda and review specific items as part of the UDC update. Both of the 2000 and 2004 cases were consolidated, and the Western Washington Growth Management Hearings Board issued an Order Dismissing Case (Case No. 05-2-0006) on May 19, 2008. The order was issued because Jefferson County completed the remaining items in the Settlement Agreement between Jefferson County and the Washington Environmental Council.

25. The Western Washington Growth Management Hearings Board issued their Final Decision and Order on November 19, 2008. Among the legal conclusions reached by the Western Washington Growth Management Hearings Board in that FDO is the conclusion that the decision of the County to include CMZs as a type of GMA "critical area," specifically as a subset of the critical area category known as "geologically hazardous areas" was and is GMA-compliant.

26. Jefferson County Department of Community Develop published a Notice of Intent to Amend the UDC with line-in/line-out text (MLA09-00070) on March 4, 2009.

27. The Planning Commission held a public hearing on the proposed amendments to the UDC on March 18, 2009.

28. The Planning Commission deliberated on the proposed amendments on April 1, 2009. The Planning Commission recommended that the BoCC approved the amendments, as proposed in MLA09-00070, in response to the Final Decision and Order from the Western Washington Growth Management Hearings Board on November 19, 2008.

29. On April 13, 2009, the BoCC determined that another public hearing was warranted, and directed DCD staff to notice a public hearing on April 27, 2009.

30. The BoCC held a public hearing on April 27, 2009 to allow interested citizens, tribes and agencies the opportunity to comment on the proposed amendments to the CAO.

31. The BoCC, during their regular agenda, deliberated on the proposed amendments on May 4, 2009, and directed staff to prepare a draft ordinance for May 11, 2009.

32. The BoCC concludes that the attached Ordinance is not a permanent or temporary physical occupation of private property that would require just compensation.

33. The BoCC concludes that the attached ORDINANCE will not act to deprive property owners in this County of all economically viable uses of their real property.

34. The BoCC concludes that the attached ORDINANCE will not deny or substantially diminish a fundamental attribute of real property ownership. The State Attorney General defines the fundamental attributes of real property ownership as the right to own or possess the property, the right to exclude others from that property and the right to sell that property.

35. The BoCC concludes that the attached ORDINANCE does not require a real property owner to dedicate a portion of their property to a public use because when a permit application is made

by a citizen and the terms of this ORDINANCE are applied as part of determining whether the permit should be granted, the conditions required of the applicant by the ORDINANCE will and must have a nexus to the adverse impacts of that proposal and will and must be roughly proportional to the magnitude of the perceived likely harm.

36. The BoCC concludes that the ORDINANCE will not rise to the level of a 'regulatory taking' with respect to real property because any possible interference with investment-backed expectations that the new ORDINANCE will cause is outweighed by the fact that the new ORDINANCE furthers an important governmental interest [as established by RCW 36.70A.060(2)] in the least-intrusive means possible.

37. The BoCC concludes that the Ordinance does not violate or diminish the substantive due process rights that real property owners hold because the Ordinance serves a legitimate public purpose through means that are both reasonably necessary to achieve the intended purpose and not unduly oppressive to the landowner.

38. With regard to Growth Management Indicator JCC 18.45.080(1)(b)(i), the existence of the FDO represents the changed circumstances leading to this Ordinance. Jefferson County adopted Ordinance No. 03-0317-08 on March 17, 2008, the new Critical Areas Ordinance. Jefferson County then received appeals from interested parties, resulting in a hearing before the Western Washington Growth Management Hearings Board. The Western Washington Growth Management Hearings Board issued a Final Decision and Order on November 19, 2008 stating that the appellants had prevailed with regard to certain issues pertaining to CMZs. The FDO requires Jefferson County to legislatively bring itself into compliance with the GMA by May 18, 2009. Further, the FDO requires a County's Statement of Actions Taken and Index to the Record Due by June 1, 2009, and a Compliance Hearing on July 15, 2009. This ordinance fulfils GMA-related requirements to incorporate Best Available Science into critical area regulations and addresses specified items found within the Final Decision and Order of November 2008.

39. With regard to Growth Management Indicator JCC 18.45.080(1)(b)(ii), Jefferson County is to revise those section of Ordinance No. 03-0317-08 pertaining to CMZs to better incorporate the science that the County used, as required by the Final Decision and Order.

40. With regard to Growth Management Indicator JCC 18.45.080(1)(b)(iii), there is no change in County-wide attitudes. However, Jefferson County development regulations are intended to protect and promote public health and safety. The proposed amendments are intended to strike a compromise between the rights of the landowner to use his/her own property while ensuring development proposals consider public interest and safety. This proposal has been prepared for public review, and input from the public has been sought and considered during the legislative process to comply with the FDO.

NOW, THEREFORE, the Board of County Commissioners for Jefferson County, Washington, in regular session assembled does hereby ordain as follows:

Section 1: Adoption of Amendments to JCC 18.22. Pursuant to the County's authority conferred by RCW 36.70A and 43.21C, the Board of County Commissioners hereby adopts the amendments to development regulations, which are marked as **EXHIBIT B,** attached hereto and by this reference made a part of Jefferson County Code Title 18.22, as an official land use control and comprehensive plan implementing regulation for Jefferson County, Washington.

Section 2: Best Available Science (BAS). By incorporating all 160 findings of fact for Critical Areas Ordinance No. 03-0317-08, this ordinance includes all best available Sciences literature that was submitted, considered, and evaluated by citizens, agencies, tribes, the Planning Commissioners, Department of Community Development, and the Board of County Commissioners. The references listed in **EXHBIT A** are considered the applicable literature to address the November 19, 2008 Final Decision and Order issued by the Western Washington Growth Management Board. See Findings and Conclusions for specific references determined by the Board of County Commissioners to balance the goals of the Growth Management Act and include best available science.

Section 3: Severability. In the event any one or more of the provisions of this ordinance shall for any reason be held to be invalid, such invalidity shall not affect or invalidate any other provisions of this ordinance, but this ordinance shall be construed and enforced as if such invalid provision had not been contained therein; PROVIDED, that any provision which shall for any reason be held by reason of its extent to be invalid shall be deemed to be in effect to the extent permitted by law.

Section 4: Attachments.

Exhibit A **Bibliography of Best Available Science Reviewed**

Exhibit B **Amended Critical Areas Code JCC 18.22.**

Section 5: SEPA: Adoption of Existing Environmental Documents. The SEPA Responsible Official has determined that existing environmental documents provide adequate environmental review of this ordinance to satisfy the requirements of WAC 197-11-600. The following existing environmental documents are being adopted:

- Draft and Final Environmental Impact Statements (DEIS/FEIS) and addenda prepared in anticipation of adoption of the Comprehensive Plan in 1998. The DEIS and FEIS are dated February 24, 1997 and May 27, 1998, respectively, and examined the potential cumulative environmental impacts of adopting alternative versions of the Comprehensive Plan.

- 2004 Comprehensive Plan Amendment Docket Department of Community Development Integrated Staff Report and SEPA Addendum issued September 22, 2004. The Addendum included description and analysis of code amendments proposed in 2004 that are similar to those being proposed now. The current proposal is more protective than the 2004 proposal, which was not adopted, and incorporates best available science with respect to critical areas protection under GMA.

Section 6: Effective Date. This ordinance shall be in full force and effect on May 11, 2009 at 5:00 pm.

Approved and signed this 11th day of May, 2009.

JEFFERSON COUNTY
BOARD OF COMMISSIONERS

David Sullivan, Chairman

Phil Johnson, Member

John Austin, Member

Attest:

Lorna L. Delaney
Clerk of the Board

Approved as to Form Only:

5/11/2009

David Alvarez
Deputy Prosecuting Attorney

EXHIBIT A
Channel Migration Zones
Citations

Considered for Amendments to JCC Chapter 18.22

Perkins Geosciences with TerraLogic GIS. 2003. *Lower Hoh Channel Migration Study.* Prepared for the Hoh Indian Tribe. September 2003.

Perkins Geosciences with TerraLogic GIS. 2004. *Lower Hoh River Channel Migration Study.* Prepared for the Hoh Indian Tribe. June 2004.

Klawon, J. 2004. *Channel Migration Zone Study for the Duckabush, Dosewallips, Big Quilcene, and Little Quilcene Rivers.* United States Bureau of Reclamation, Denver, Colorado. Prepared for Jefferson County. September 2004.

Perkins Geosciences. 2005. *Channel Migration Hazard Maps for the Dosewallips, Duckabush, Big Quilcene, and Little Quilcene Rivers.* Prepared for Jefferson County. July 2005.

Perkins Geosciences. 2006. *Channel Migration Hazard Maps for the Dosewallips, Duckabush, Big Quilcene, and Little Quilcene Rivers.* Prepared for Jefferson County. Final Report, February 2006.

EXHIBIT B

Proposed Line-in/Line-out Development Code Language

All header references are to the Jefferson County Code, Title 18 Unified Development Code

Chapter 18.10 Definitions

18.10.030 C definitions.

"Channel migration zone" (or CMZ) means an area within the lateral extent of likely stream channel movement that is subject to risk due to stream bank destabilization, rapid stream incision, stream bank erosion and shifts in the location of stream channels. "Channel migration zone" means ~~the corridor that includes the present channel, the severe channel migration hazard area and the moderate channel migration hazard area~~ the Historic Channel Migration Zone (which is the footprint of the active channel documented through historical photographs and maps), the Avulsion Hazard Zone (which is an area with the potential for movement of the main river channel into a new location), and the Erosion Hazard Area (which is an area outside the Historic Channel Migration Zone and the Avulsion Hazard Zone, and includes an Erosion Setback for a 100-year period of time and a Geotechnical Setback to account for slope retreat to a stable angle of repose). "Channel migration zone" does not include ~~areas that~~ Disconnected Migration Areas, which are areas that have been disconnected from the river by legally existing artificial structure(s) that restrain channel migration (such as levees and transportation facilities build above or constructed to remain intact through the 100-year flood elevation), that are no longer available for migration by the river.~~lie behind an arterial road, a public road serving as a sole access route, a state or federal highway or a railroad.~~ "Channel migration zone" may exclude areas that lie behind a lawfully established flood protection facility that is likely to be maintained by existing programs for public maintenance consistent with designation and classification criteria specified by public rule. When a natural geologic feature affects channel migration, the channel migration zone width will consider such natural constraints. "High Channel Migration Hazard" (or high risk CMZ) for the Big Quilcene, Little Quilcene, Dosewallips, Duckabush, and Lower Hoh Rivers means those non-disconnected portions of the channel that are likely to migrate within a 50-year timeframe. For the Big Quilcene, Little Quilcene, Dosewallips, and Duckabush Rivers, "Moderate Channel Migration Hazard" (or moderate risk CMZ) means those non-disconnected portions of the channel that are likely to migrate within a 50- to 100-year timeframe; and "Low Channel Migration Hazard" (or low risk CMZ) means those non-disconnected portions of the channel that are likely to migrate beyond a 100-year timeframe. For the Lower Hoh River, "Moderately High Hazard" (or moderately high risk CMZ) means those non-disconnected portions of the channel that are likely to migrate within a 50- to100-year timeframe, "Moderate Hazard" means those non-disconnected portions of the channel that are likely to migrate beyond a 100-year timeframe, and "Low Hazard" means the non-disconnected portions of the channel that are less likely to be affected by channel migration, but is still at risk due to its location on the valley floor.

Chapter 18.22 Critical Areas

Article V - Geologically Hazardous Areas

18.22.160 Classification/Designation

(1) Classification. Geologically hazardous areas shall be classified based upon a combination of erosion, landslide and seismic hazard.

(2) Designation. The following erosion, landslide, seismic, and channel migration zone (CMZ) hazard areas shall be subject to the standards of this Article V:

(a) Erosion Hazard Areas. Areas containing soils or soil complexes described and mapped within the United States Department of Agriculture/Soil Conservation Service Soil Survey for Jefferson County as having a severe or very severe erosion hazard potential.

(b) Landslide Hazard Areas. Areas potentially subject to mass movement due to a combination of geologic, topographic and hydrologic factors including:

(i) Areas of historic failures or potentially unstable slopes, such as:

(A) Areas described and mapped as having severe or very severe building limitations for dwellings without basements within the United States Department of Agriculture/Soil Conservation Service Soil Survey for Jefferson County;

(B) Areas described and mapped as recent or old landslides or slopes of unstable materials within the Washington State Department of Ecology Coastal Zone Atlas of Jefferson County; and

(C) Areas described and mapped as areas of poor natural stability, former landslides and recent landslides by the Washington State Department of Natural Resources, Division of Geology and Earth Resources;

(ii) Areas potentially unstable as a result of rapid stream incision, stream bank erosion, or undercutting by wave action; and

(iii) Areas with any indications of earth movement, such as:

(A) Rockslides;

(B) Earthflows;

(C) Mudflows; and

(D) Landslides.

(c) Seismic Hazard Areas. Areas subject to severe risk of damage as a result of earthquake induced ground shaking, slope failure, settlement, soil liquefaction, or surface faulting. These areas are identified by the presence of: poorly drained soils with greater than 50 percent silt and very little coarse material; loose sand or gravel, peat, artificial fill and landslide materials; or soil units with high organic content.

(d) Channel Migration Zones (CMZs). Areas subject to the natural movement of stream channel meanders. ~~In~~ Those areas within the delineated high risk CMZ ~~area,~~ (the area in which channel migration is likely to occur within the next ~~100~~ 50 years) are subject to this Article. ~~Areas protected from channel movement due to the existence of permanent levees or infrastructure improvements such as roads and bridges constructed and maintained by public agencies are excluded from the high or moderate risk designation~~ Disconnected Migration Areas, which are areas that have been disconnected from the river by legally existing artificial structure(s) that restrain channel migration (such as levees and transportation facilities build above or constructed to remain intact through the 100-year flood elevation) and are no longer available for migration by the river, shall be excluded from review under Article V. Moderately high, moderate, and low risk CMZs areas are also excluded from review under this article.

(3) Sources Used for Identification. Sources used to identify geologically hazardous areas include, but are not limited to:

(a) United States Department of Agriculture/Soil Conservation Service, Soil Survey for Jefferson County.

(b) Washington State Department of Ecology, Coastal Zone Atlas.

(c) Washington State Department of Natural Resources, Slope Stability and Geologic Maps of Eastern Jefferson County.

(d) Washington State Department of Natural Resources, Geographic Information System: Soil Survey.

(e) Washington State Department of Natural Resources, Geologic Maps of Eastern Jefferson County, Compressibility of Earth Materials in Eastern Jefferson County.

(f) United States Department of the Interior, USGS Quad Maps.

(g) US Department of the Interior, Bureau of Reclamation. 2004. Channel Migration Zone Study for the Duckabush, Dosewallips, Big Quilcene and Little Quilcene Rivers, Jefferson County, Washington. Denver, CO.

(h) Perkins Geosciences. 2006. Channel Migration Hazard Maps for the Dosewallips, Duckabush, Big Quilcene and Little Quilcene Rivers, Jefferson County, Washington. Seattle, WA.

(i) Perkins Geosciences with TerraLogic GIS. June, 2004. Lower Hoh River Channel Migration Study Summary Report.

(j) The following rivers are not regulated in this section as a result of not having mapped CMZs (not an exhaustive list):
Thorndyke Creek, Shine Creek, Chimacum Creek, Snow Creek, Salmon Creek, Upper Hoh River, Bogachiel River, Clearwater River, and Quinault River

(4) Geologic Hazard Area Maps. The maps prepared by the county using the identification sources listed in this section have been produced for informational purposes only and are not regulatory devices forming an integral part of this code.

18.22.170 Protection Standards

(1) General. Application for a project on a parcel of real property containing a designated geologically hazardous area or its buffer shall adhere to the requirements set forth below.

(2) Drainage and Erosion Control.

(a) An applicant submitting a project application shall also submit, and have approved, a drainage and erosion control plan, as specified in this chapter, when the project application involves either of the following:

(i) The alteration of a geologically hazardous area or its buffer; or

(ii) The creation of a new parcel within a known geologically hazardous area.

(b) Drainage and erosion control plans required under this chapter shall discuss, evaluate and recommend methods to minimize sedimentation of adjacent properties during and after construction.

(c) Surface drainage shall not be directed across the face of a marine bluff, landslide hazard or ravine. The applicant must demonstrate that the storm water discharge cannot be accommodated on-site or upland by evidence of a geotechnical report, unless waived by the administrator. If drainage must be discharged from a bluff to adjacent waters, it shall be collected above the face of the bluff and directed to the

water by tight line drain and provided with an energy dissipating device at the shoreline, above OHWM.

(d) In addition to any erosion control methods specified in the drainage and erosion control plan, the administrator may require hydroseeding of exposed or disturbed areas or other BMPs.

(3) Clearing and Grading.

(a) In addition to the general clearing and grading provisions in Chapter 18.30 JCC, the following provisions shall also apply:

(i) Clearing within geologically hazardous areas shall be allowed only from April 1st to November 1st, unless the applicant demonstrates that such activities would not result in impacts contrary to the protection requirements herein;

(ii) Only that clearing necessary to install temporary sedimentation and erosion control measures shall occur prior to clearing for roadways or utilities;

(iii) Clearing limits for roads, septic, water and storm water utilities, and temporary erosion control facilities shall be marked in the field and approved by the administrator prior to any alteration of existing native vegetation;

(iv) Clearing for roads and utilities shall remain within construction limits which must be marked in the field prior to commencement of site work; and

(v) The authorized clearing for roads and utilities shall be the minimum necessary to accomplish project specific engineering designs and shall remain within approved rights-of-way.

(b) The following provisions regarding grading shall apply:

(i) An applicant submitting a project application shall also submit, and have approved, a grading plan, as specified in this chapter, when the application involves either of the following:

(A) The alteration of a geologically hazardous area or its buffer; or

(B) The creation of a new parcel within a known geologically hazardous area.

(ii) Excavation, grading and earthwork construction regulated under this section shall only be allowed from April 1st to November 1st, unless the applicant demonstrates that such activities would not result in impacts contrary to the protection requirements herein.

(4) Vegetation Retention. The following provisions regarding vegetation retention shall apply:

(a) During clearing for roadways and utilities, all trees and understory lying outside of approved construction limits shall be retained; provided, that understory damaged during approved clearing operations may be pruned.

(b) Damage to vegetation retained during initial clearing activities shall be minimized by directional felling of trees to avoid critical areas and vegetation to be retained.

(c) Retained trees, understory and stumps may subsequently be cleared only if such clearing is necessary to complete the proposal involved in the triggering application.

(d) Within a high risk CMZ, vegetation removal shall not be allowed. Vegetation removal outside of a high risk CMZ shall not be reviewed under this Article. Should this provision conflict with other vegetation retention requirements specified within the JCC, the more restrictive protection requirement applies.

(5) Buffer Marking. The location of the outer extent of landslide hazard area buffers shall be marked in the field as follows:

(a) A permanent physical separation along the boundary of the landslide hazard area shall be installed and permanently maintained. Such separation may consist of logs, a tree or hedgerow, fencing, or other prominent physical marking approved by the administrator.

(b) Buffer perimeters shall be marked with temporary signs at an interval of one per parcel or every 100 feet, whichever is less. Signs shall remain in place prior to and during approved construction activities. The signs shall contain the following statement: "Landslide Hazard Area & Buffer – Do Not Remove or Alter Existing Native Vegetation."

(c) In the case of short plat, long plat, binding site plan or site plan approvals under this code, the applicant shall include on the face of any such instrument the boundary of the landslide hazard area and its buffer.

(6) Buffers – Standard Requirements. The following landslide hazard area buffer provisions shall apply:

(a) Buffer areas shall be required to provide sufficient separation between the landslide hazard area and the adjacent proposed project.

(b) The appropriate width of the landslide hazard area buffer shall be determined by either: application of the standard buffer width set forth below; or, by acceptance of a geotechnical report meeting the criteria of this section.

(c) Buffers shall remain naturally vegetated. Where buffer disturbance has occurred during construction, replanting with native vegetation shall be required.

(d) Buffers shall be retained in their natural condition; however, minor pruning of vegetation to enhance views may be permitted by the administrator on a case-by-case basis.

(e) All buffers shall be measured perpendicularly from the top, toe or edge of the landslide hazard area boundary.

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

(g) A building setback line is required to be five (5) feet from the edge of any buffer area for a landslide hazard area OR to outside the full extent of the high risk channel migration zone (CMZ), whichever is greater.

(7) Reducing Buffer Widths. The administrator may reduce the standard landslide hazard area buffer width only when the project applicant demonstrates, to the satisfaction of the administrator, that the project cannot meet the required setback. The reduced buffer must adequately protect the proposed project from the risks of the landslide hazard area to the maximum extent possible. Under no circumstances shall the buffer width be reduced to less than 15 feet.

(8) Increasing Buffer Widths. The administrator may increase the standard landslide hazard area buffer width when a larger buffer is necessary to protect the proposed project and the

landslide hazard area. This determination shall be made when the administrator demonstrates any one of the following through appropriate documentation:

(a) The landslide area is unstable and active.

(b) The adjacent land is susceptible to severe landslide or erosion, and erosion control measures will not effectively protect the proposed project from the risks posed by the landslide hazard area.

(c) The adjacent land has minimal vegetative cover.

(9) Geotechnical Report.

(a) An applicant submitting a project application shall submit, and have approved, a geotechnical report, as specified in Article VIII of this chapter, when the application involves any of the following:

(i) The alteration of a landslide hazard area or its buffer.

(ii) The creation of a new parcel within a known landslide hazard area.

(iii) The construction of a publicly owned facility in a designated seismic hazard area.

(b) Where a geotechnical report is required for a landslide hazard area, the project application shall not be approved unless the geotechnical report certifies all of the following:

(i) There is minimal landslide hazard as proven by a lack of evidence of landslide activity in the vicinity in the past;

(ii) An analysis of slope stability indicates that the proposal will not be subject to risk of landslide, or the proposal or the landslide hazard area can be modified so that hazards are eliminated;

(iii) The proposal will not increase surface water discharge or sedimentation to adjacent properties beyond predevelopment conditions;

(iv) The proposal will not decrease slope stability on adjacent properties; and

(v) All newly created building sites will be stable under normal geologic and hydrogeologic conditions (if applicable).

(c) Where a geotechnical report is required for a seismic hazard area, the project application shall not be approved unless the geotechnical report demonstrates that the proposed project will adequately protect the public safety.

18.22.180 Conditions

(1) General. In granting approval for a project application subject to the provisions of this Article V, the administrator may require mitigating conditions that will, in the administrator's judgment, substantially secure the objectives of this article.

(2) Basis for Conditions. All conditions of approval required pursuant to this section shall be based upon either the substantive requirements of this section or the recommendations of a qualified professional, contained within a special report required under this chapter.