

FILED

OCT 28 2011

No. 297632

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

YAKIMA COUNTY, a political subdivision of the State of Washington,
and the YAKIMA COUNTY FARM BUREAU, INC., *et al.*,

Respondents/Cross-Appellants,

v.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD, an agency of the State of Washington, WES HAZEN, the
UPPER WENAS PRESERVATION ASSOCIATION, FUTUREWISE,
and the CONFEDERATED TRIBES AND BANDS OF THE YAKAMA
NATION, *et al.*,

Appellants/Cross-Respondents.

**FUTUREWISE'S APPELLANT/CROSS RESPONDENT
REPLY BRIEF**

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I. INTRODUCTION

In this Reply Brief, Appellant/Cross Respondent Futurewise addresses the argument made by Yakima County and the Yakima County Farm Bureau, Inc.'s Joint Brief of Respondents/Cross-Appellants. As this Reply Brief shows, the arguments all fail.

II. ARGUMENT

A. Standard of Review and Failure to Assign Error to Findings of Fact

1. Standard of Review

On pages 6 – 10 of the Brief of Appellant Futurewise, we identified the standard of review. On pages 12 through 15 of their Joint Brief of Respondents/Cross-Appellants, Yakima County and the Yakima County Farm Bureau, Inc. misstate who the Court owes deference to. As we documented in our Brief of Appellant Futurewise, the Supreme Court addressed the deference to be granted to growth management hearings boards' decisions in *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 498, 139 P.3d 1096, 1100 (2006) (internal citations omitted):

But while the Board must defer to Lewis County's choices that are consistent with the GMA, the Board itself is entitled to deference in determining what the GMA

requires. This court gives “substantial weight” to the Board’s interpretation of the GMA.¹

The Supreme Court recently addressed the issue of deference concluding:

¶ 16 In *City of Arlington*, this court held that boards must consider anecdotal evidence, and, where, within the constraints of the GMA, more than one appropriate planning choice exists, boards must defer to a county's discretion. 164 Wn.2d at 788, 193 P.3d 1077. Petitioners, however, take the rule in *City of Arlington* to the extreme point of eliminating any evaluative role for boards. The legislature granted authority to three boards to adjudicate issues of GMA compliance. Former RCW 36.70A.250 (1994), .280(1)(a) (2003). While county actions are presumed compliant unless and until a petitioner brings forth evidence that persuades a board that the action is clearly erroneous, RCW 36.70A.320(3), deference to counties remains “bounded ... by the goals and requirements of the GMA,” *King County*, 142 Wn.2d at 561, 14 P.3d 133. The deference boards must give “is neither unlimited nor does it approximate a rubber stamp.” *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 435 n. 8, 166 P.3d 1198 (2007). Moreover, when it comes to interpreting the GMA, the same deference to counties does not adhere, and we give substantial weight to a board's interpretation. *Lewis County*, 157 Wn.2d at 498, 139 P.3d 1096.²

¹ *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 498, 139 P.3d 1096, 1100 (2006) (internal citations and footnote omitted).

² *Kittitas County v. Eastern Washington Growth Management Hearings Bd.*, 172 Wn.2d 144, 156, 256 P.3d 1193, 1199 (2011).

So as to the interpretation of the GMA, this court owes deference to the Board and none to Yakima County.

2. Because Yakima County and the Yakima County Farm Bureau, Inc. assigned no error to any of the Eastern Board's Findings of Fact, they are verities on appeal

Yakima County and the Yakima Farm Bureau, Inc. (County and Farm Bureau) did not assign error to any of the Board's findings of fact.³ RAP 10.3(g) requires a "separate assignment of error for each finding of fact a party contends was improperly made..."⁴ Therefore the Board's findings of fact are verities on appeal and cannot be challenged by either the County or the Yakima Farm Bureau.⁵

B. The Board correctly determined that Yakima County's exemptions from the critical areas regulations violated the Growth Management Act, but the County has also correctly repealed them.

Since our Brief of Appellant Futurewise was filed on June, 13 2011, Yakima County has repealed the exemptions in Yakima County

³ Joint Brief of Respondents/Cross-Appellants pp. 4 – 6.

⁴ *State v. Kindsvogel*, 149 Wn.2d 477, 481, 69 P.3d 870, 872 (2003).

⁵ *Seattle School Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 488 – 89, 585 P.2d 71, 79 – 80 (1978); *Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings Bd.*, 113 Wn. App. 615, 628, 53 P.3d 1011, 1017 (2002) *review denied Manke Lumber Co. v. Central Puget Sound Growth Management Hearings Board*, 148 Wn.2d 1017, 64 P.3d 649 (2003).

Code (YCC) 16C.03.07, YCC 16C.03.08, and YCC 16C.03.08.⁶ We very much appreciate the County's decision to repeal these provisions and thank Yakima County. We also agree with the County and Farm Bureau that this has mooted out any challenge to the Eastern Board's conclusion that these exemptions violated the GMA.⁷

C. The Board's decisions on wetland and stream buffers correctly followed the GMA's critical areas and "best available science" requirements and are supported by substantial evidence. (Futurewise Assignment of Error 1 and Issue 1)

1. Yakima County's failure to protect streams and to use best available science in adopting stream buffers has failed to protect all critical areas functions and values and violated the GMA

In the Brief of Appellant Futurewise on pages 20 through 32, Futurewise established that:

- RCW 36.70A.060(2) requires that Yakima County "shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170."

⁶ Joint Brief of Respondents/Cross-Appellants p. 48 and Appendix A: Exhibit A to Ordinance 6-2011 pp. 4 – 6.

⁷ *Clallam County v. Dry Creek Coalition*, 161 Wn. App. 366, 391 – 94, 255 P.3d 709, 719 – 21 (2011).

- RCW 36.70A.172(1) requires that Yakima County “shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas.” RCW 36.70A.172(1) requires the protection of “all functions and values.”⁸
- RCW 36.70A.172(1) also requires that Yakima County “shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.”
- We showed that Yakima County’s stream buffers, which range from zero for Type 5 streams to 100 feet for Type 1 streams,⁹ were narrower than needed to protect stream functions including providing large woody debris for streams and rivers which requires at least 90 feet,¹⁰ organic matter input to provide food for the fish and wildlife in the rivers and streams which requires at least 170 feet,¹¹ and maintaining

⁸ *Whidbey Envtl. Action Network (“WEAN”) v. Island County*, 122 Wn. App. 156, 174 – 75, 93 P.3d 885, 894 (2004) *reconsideration denied* July 12, 2004, *review denied Whidbey Environmental Action Network v. Island County*, 153 Wn.2d 1025, 110 P.3d 756 (2005).

⁹ AR 2893, Yakima County Ordinance No. 13-2007 Exhibit A: Critical Areas Ordinance of Yakima County, Washington Table 6 – 1 p. 75; AR 3763, FDO p. 39.

¹⁰ AR 3201, *Yakima County BAS Review* p. 75.

¹¹ *Id.*

microclimate which fish, including anadromous salmon, and wildlife require to survive which requires at least 141 feet.¹²

- We also showed that Yakima County failed to follow the requirements set out in the Supreme Court of Washington's *Ferry County* decision for a reasoned departure from best available science.¹³

While we analyzed the buffers on Type 1 streams, which are shorelines of the state, for illustrative purposes, the Board concluded that our appeal of Type 1 streams was moot because the county had adopted a new shoreline master program that applies to Type 1 streams.¹⁴ The shoreline master program is the subject of another appeal not before this Court. So this appeal addresses Type 2 through 5 stream buffers.

(a) Since the stream buffers were adopted in 1995, the bull trout has been listed as endangered under the federal Endangered Species Act demonstrating continuing damage to the river systems of Yakima County

The County and County Farm Bureau argue that neither Futurewise nor the Yakima Nation have shown that county's streams have been degraded since Yakima County adopted its current stream buffers in

¹² *Id.*

¹³ *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 837 – 38, 123 P.3d 102, 108 – 09 (2005).

¹⁴ AR 3740, FDO p. 16.

1995. However, in June 1998, the U.S. Fish and Wildlife Service listed the bull trout as a threatened species.¹⁵ Bull trout require cool temperatures to survive.¹⁶ One of the functions of adequate stream buffers is to maintain cool water temperatures.¹⁷ This requires buffers at least 33 feet wide, but Yakima County allows all stream buffers at issue in this case to be reduced to 25 feet.¹⁸ And for Type 5 streams, no buffer is required. So given the county's current buffers, it is no wonder that the bull trout was listed after the buffers were adopted.

(b) The stream buffers are not within the range of best available science and do not adequately protect streams

On page 33 to 36 of the Joint Brief of Respondents/Cross-Appellants under the heading of “the buffers are within the range of BAS,” the County and County Farm Bureau cite to not a single scientific study. Rather, they cite to the findings of Ordinance 13-2007. But the cited findings only cite the *Yakima County BAS Review*.¹⁹ The *Yakima County BAS Review* documents the need for significantly wider riparian

¹⁵ AR 3156, *Yakima County BAS Review* p. 30.

¹⁶ AR 3168, *Yakima County BAS Review* p. 42.

¹⁷ AR 3195, 3201, *Yakima County BAS Review* p. 69, p. 75.

¹⁸ AR 3763, FDO p. 39.

¹⁹ Joint Brief of Respondents/Cross-Appellants pp. 34 – 36.

buffers than the county adopted. Table 2 from the *Yakima County BAS Review* lists the following minimum and maximum riparian buffer widths for selected functions:²⁰

Minimum and maximum riparian buffer widths²¹

Function	Minimum (feet)	Maximum (feet)
Large woody debris/structural complexity	90	525
Organic matter input	170	262
Stream bank stabilization	10	170
Sediment control	12	600
Nutrient and pollutant inputs control	13	860
Microclimate	141	784
Stream shading/water temp. moderation	33	525
Terrestrial wildlife habitat	25	984

When compared to the minimum buffers in Table 2, the Type 2 stream buffers of 75 feet, which can be reduced to 25 feet, fail to protect the large woody debris and structural complexity function, the organic matter input function, the microclimate function, and, when reduced to 25 feet, the stream shading and water temperature moderation function.²² The Type 3 stream buffers of 50 feet, which can be reduced to 25 feet, fail to protect the large woody debris and structural complexity function, the organic matter input function, the microclimate function, and, when reduced to 25

²⁰ AR 3201, *Yakima County BAS Review* p. 75.

²¹ AR 3201, *Yakima County BAS Review* p. 75, Table 2 “Minimum and maximum riparian buffer widths.”

²² AR 2893, *Yakima County Ordinance No. 13-2007 Exhibit A: Critical Areas Ordinance of Yakima County, Washington* Table 6 – 1 p. 75.

feet, the stream shading and water temperature moderation function.²³

The Type 4 stream buffers of 25 feet, which can be reduced to 15 feet, fail to protect the large woody debris and structural complexity function, the organic matter input function, the microclimate function, and, when reduced to 15 feet, the stream shading and water temperature moderation function and terrestrial wildlife habitat function.²⁴ The Type 5 stream buffers of zero feet fail to protect the large woody debris and structural complexity function, the organic matter input function, the stream bank stabilization function, sediment control function, nutrient and pollution inputs control function, the microclimate function, the stream shading and water temperature moderation function, and the terrestrial wildlife habitat function.²⁵

In footnote 4 on page 40 of the Joint Brief of Respondents/Cross-Appellants, the County and County Farm Bureau point to a study that includes an 82.5 foot buffer for organic matter input and another recommending 100 feet for the same function. But at 82.5 feet or 100 feet, none of the stream buffers at issue in this appeal would protect this

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

function, the largest is 75 foot and can be reduced to 25 feet.²⁶ Also in footnote 4 on page 40 of the Joint Brief of Respondents/Cross-Appellants, the County and County Farm Bureau point to one report recommending a 75 foot width and another report recommending a 98 foot width for “microclimate.” But these reports actually recommend widths for preventing wind damage (75 feet) and maintaining humidity and soil temperature (98 feet), a subset of microclimate.²⁷ The recommendations for maintaining microclimate at AR 3387 are actually 200 to 525 feet in width and 328 feet in width.²⁸ The county’s widest stream buffer at issue in this appeal (75 feet) is just over a third of narrowest of these recommendations, assuming it is not reduced to 25 feet.²⁹

So we see that the *Yakima County BAS Review* does not support a conclusion that the buffers are based on best available science. Rather it supports the conclusion that Board was right, that these buffers are not based on best available science.

²⁶ *Id.*

²⁷ AR 3387, *Yakima County BAS Review* p. 262.

²⁸ *Id.*

²⁹ AR 2893, *Yakima County Ordinance No. 13-2007 Exhibit A: Critical Areas Ordinance of Yakima County, Washington Table 6 – 1 p. 75.*

The findings cited by the County and the County Farm Bureau on pages 34 through 36 of their Joint Brief of Respondents/Cross-Appellants as justification for the buffers the county retained do not claim that the stream buffers protect all functions and values as the GMA requires.³⁰ The finding provides that the “[b]uffers perform several functions to protect critical areas” The findings go on to say that the buffers “provide a modest level of riparian wildlife function. Providing a high level of riparian wildlife habitat would require much larger buffers.” The findings make no claims for many functions such as microclimate.³¹ A modest level of riparian wildlife function will not protect all functions and values or maintain existing conditions which the Supreme Court of Washington has said complies with the GMA.³² So we see that the stream buffers are not based on BAS.

The County and County Farm Bureau then argue that there is “no specific science citations that can be precisely applied in Yakima

³⁰ *WEAN*, 122 Wn. App. at 174 – 75, 93 P.3d at 894.

³¹ Joint Brief of Respondents/Cross-Appellants pp. 34 –36.

³² *Swinomish Indian Tribal Cmty. v. Western Washington Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 430, 166 P.3d 1198, 1206 (2007).

County.”³³ Like the last findings we looked at, the finding they cite does not exactly prove the point although it does say what the quote says. The findings go on, after the quote by the County and County Farm Bureau, to admit

[t]here is science that applies to forested areas of Yakima County, but there is a lack of science related to the more arid Columbia Basin. There is agriculturally based buffer science that would apply to some of the rural areas of the County, but individually citations are usually focused on limited issues, and do not look at the range of functions provided by the buffer or do not have broad applicability.³⁴

The citations to the *Yakima County BAS Review* on page 37 of the Joint Brief of Respondents/Cross-Appellants also admit that science exists. For example, the first cited bullet from the *Yakima County BAS Review* states “few citations address the unique geography or eastern Washington.” “Few” is more than “no specific science citations ...”

In fact, as was documented on pages 29 to 30 of the Brief of Appellant Futurewise, the *Yakima County BAS Review* includes extensive local science. For example, the bibliography of Chapter 2 of the *Yakima County BAS Review*, which covers rivers and streams, cites no fewer than

³³ Joint Brief of Respondents/Cross-Appellants p. 36 citing AR 2813 (Ordinance 13-2007, Findings at 8).

³⁴ AR 2813, Yakima County Ordinance No. 13-2007, Findings p. 8 of 13.

20 sources that include the Yakima basin, the Yakima River, or its tributaries in the title.³⁵ And as we have seen, *Yakima County BAS Review* was able to identify specific buffers widths to protect river and stream functions and values.³⁶

The County and County Farm Bureau say, without citation to the record, that this a mere outline of the minimum and maximum buffers found in all literature, regardless of whether the science is specific to arid Eastern Washington.³⁷ But the issue is not whether the science is specific to arid Eastern Washington, the issue whether the BAS is applicable to Yakima County and nothing the *Yakima County BAS Review* indicates it is not applicable.³⁸ In fact, the *Yakima County BAS Review* states that “Table 2 Minimum and maximum riparian buffer widths,” reproduced on page 8 of this brief, is based on “a review of the best available science regarding riparian buffer widths ...”³⁹ It is “the minimum and maximum

³⁵ AR 3215 – 21, *Yakima County BAS Review* pp. 89 – 95.

³⁶ AR 3201, *Yakima County BAS Review* p. 75.

³⁷ Joint Brief of Respondents/Cross-Appellants p. 39.

³⁸ AR 3201, *Yakima County BAS Review* p. 75.

³⁹ *Id.*

values found in the literature,” but the *Yakima BAS Review* says nothing about any of it being inapplicable to Yakima County.⁴⁰

Further, if the county truly lacked scientific information, the better approach was not to keep the old buffers, rather it was to apply the “precautionary or no risk approach” in WAC 365-195-920 as we documented on pages 31 to 32 of the Brief of Appellant Futurewise. The Supreme Court of Washington blessed these regulations in *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*. In that case, Skagit County’s adaptive management program violated the GMA because it failed to include an adequate monitoring program.⁴¹ Here, Yakima County claims to lack science knowledge, but does not even attempt an adaptive management program. This violates the GMA.

On page 40 of the Joint Brief of Respondents/Cross-Appellants, the County and County Farm Bureau acknowledge that “[o]rganic matter input” and ‘microclimate’ are not included in the functional properties of hydrologically related critical areas addressed in the County’s ordinance.”

⁴⁰ *Id.*

⁴¹ *Swinomish Indian Tribal Cmty.*, 161 Wn.2d at 436 – 37, 166 P.3d at 1209.

As we have seen, Yakima County is required to protect “all functions and values.”⁴² The county’s failure to address these functions both explains, in part, the narrow buffers and violates the GMA. The County and Farm Bureau then claim other than these functions, the stream buffers are based on BAS.⁴³ But as we documented above, the Type 2 through 5 stream buffers, or the lack thereof, fail to protect many other functions.⁴⁴

(c) The Board gave Yakima County all of the deference it was due

On pages 41 through 48 of the Joint Brief of Respondents/Cross-Appellants, the County and the County Farm Bureau claim the Board erred by elevating a study by Knutson and Naef above all other studies, that this study does not apply to Yakima County, and that their buffers are GMA compliant for a grab bag of reasons. All of these arguments fail.

As to the first argument, excerpts from Knutson and Naef study and many citations were included the *Yakima County BAS Review*.⁴⁵ The specific tables used to construct the table on page 42 of the FDO were

⁴² *WEAN*, 122 Wn. App. at 174 – 75, 93 P.3d at 894.

⁴³ Joint Brief of Respondents/Cross-Appellants p. 40.

⁴⁴ AR 3201, *Yakima County BAS Review* p. 75; AR 2893, Yakima County Ordinance No. 13-2007 Exhibit A: Critical Areas Ordinance of Yakima County, Washington Table 6 – 1 p. 75.

⁴⁵ AR 3136 – 3205, AR 3388 – 94, *Yakima County BAS Review* pp. 10 – 79, pp. 262 – 69.

taken from Tab 4-D attached to Futurewise's Brief before the Board.⁴⁶ And another table from Knutson & V. L. Naef Table is in the *Yakima County BAS Review*.⁴⁷ So if anyone imposed Knutson and Naef on Yakima County, it was the county itself. In fact a review of the Board's Final and Decision and Order in which the Board discussed the adequacy of the riparian or stream buffers shows that most of the citations were to Exhibit 77, the *Yakima County BAS Review*.⁴⁸ Despite the argument on page 47 of the Joint Brief of Respondents/Cross-Appellants that the Board's use of the table and the mean buffers at AR 3766 was arbitrary, it was just one piece of evidence among several.⁴⁹ And the Type 2 through Type 5 stream buffers all fail to meet the narrowest buffer within the range for three of the listed functions.⁵⁰ So the Board's decision was not arbitrary. At bottom, the riparian buffers the county retained were

⁴⁶ AR 1746 – 49, K. L. Knutson & V. L. Naef, *Management Recommendations for Washington's Priority Habitats: Riparian* pp. 164 – 67 (Wash. Dept. Fish and Wildlife, Olympia WA: 1997); AR 3766 FDO at 42.

⁴⁷ AR 3388 – 94, *Yakima County BAS Review* pp. 262 – 69.

⁴⁸ AR 3764 – 69, FDO at 40 – 45.

⁴⁹ *Id.*

⁵⁰ AR 3766, FDO at 42; AR 2893, Yakima County Ordinance No. 13-2007 Exhibit A: Critical Areas Ordinance of Yakima County, Washington Table 6 – 1 p. 75.

inconsistent with the county's own science, not just the table at AR 3766, page 42, of the Board's Final Decision and Order.

It is true, as the Joint Brief of Respondents/Cross-Appellants says on page 42, that the Knutson and Naef buffer recommendations are guidelines, but they are also best available science as the County's own BAS Review attests to.⁵¹ It is also true that Knutson and Naef wrote that sufficient information does not currently exist to provide variable width buffers as the County and County Farm Bureau contend. That is why Knutson & Naef do not recommend variable width buffers. Variable width buffers take into account not just the minimum width for a specific function, such as microclimate, but also site specific conditions such as the intensity of land uses adjacent to the stream.⁵² Knutson & Naef do not recommend this type of buffer.

The County and Farm Bureau then misinterpret their own BAS Review to claim that Knutson & Naef only address riparian habitat areas (RHAs), not buffers.⁵³ This is untrue. While Knutson & Naef do have RHA recommendations, they also compile and analyze an extensive array

⁵¹ AR 3136 – 3205, AR 3388 – 94, *Yakima County BAS Review* pp. 10 – 79, pp. 262 – 69.

⁵² AR 3203, *Yakima County BAS Review* p. 77.

⁵³ Joint Brief of Respondents/Cross-Appellants pp. 42 –44.

of science for river and stream buffers. You can see this Appendix C from their report which includes riparian buffer widths intended to protect streams from adjacent upland impacts, such as the loss of shade from land clearing and sediment flowing into streams from uplands.⁵⁴ So Knutson & Naef do address buffer widths. While Knutson & Naef's RHA recommendations do recommend that the entire flood plain should be included in the RHA, the buffer recommendations do not and are buffers as described by the *Yakima BAS Review*.⁵⁵

The County and County Farm Bureau then argue that the buffer studies in the Yakima County BAS Review and Knutson and Naef are not related to the stream typing system that is the basis of the County's regulatory system. However, the *Yakima County BAS Review* identifies a study that found a 66 foot wide buffer was necessary for bank stabilization and sediment control on ephemeral [Type 5] streams.⁵⁶ Futurewise's briefing also connected the buffer width recommendations from Knutson and Naef, which the Board referred to as the *1997 WDFW Riparian*

⁵⁴ AR 1746 – 49, K. L. Knutson & V. L. Naef, *Management Recommendations for Washington's Priority Habitats: Riparian* pp. 164 – 67 (Wash. Dept. Fish and Wildlife, Olympia WA: 1997).

⁵⁵ *Id.*; AR 3205, *Yakima County BAS Review* p. 79.

⁵⁶ AR 3386 *Yakima County BAS Review* p. 261.

Recommendations, with the stream typing system.⁵⁷ This resulted in recommended buffers of 100 feet on Type 2 and 3 streams with salmon or bull trout use and 50 feet on Type 4 and 5 streams.⁵⁸ These recommendations are considerably larger than the buffers the County retained including the Type 2 stream buffers of 75 feet, which can be reduced to 25 feet; the Type 3 stream buffers of 50 feet, which can be reduced to 25 feet; the Type 4 stream buffers of 25 feet, which can be reduced to 15 feet; and the Type 5, ephemeral, stream buffers of zero.⁵⁹

The County and County Farm Bureau then argue that allowing the reduction in stream buffers to 25 and 15 feet is GMA complaint because the site plan and project design is to include “measures which ensure the protection and performance of the functional [values].”⁶⁰ They liken this to the “no harm” standard approved in the *Swinomish* decision. First, the GMA requires the protection of functions and values, their standard does not require protection.⁶¹ Rather it provides that the “[w]hen granting an adjustment to the provisions of this chapter, the Administrative Official

⁵⁷ AR 3765, FDO at 41.

⁵⁸ AR 3765 – 66, FDO at 41 – 42.

⁵⁹ AR 2893, Yakima County Ordinance No. 13-2007 Exhibit A: Critical Areas Ordinance of Yakima County, Washington Table 6 – 1 p. 75.

⁶⁰ Joint Brief of Respondents/Cross-Appellants p. 46.

⁶¹ RCW 36.70A.172.

may require alternative measures to be taken to protect the function and value of the HRCA.”⁶² So the measures and preventing harm are not required. Second, in the *Swinomish Indian Tribal Community* decision the Supreme Court of Washington concluded that “[i]n short, under GMA regulations, local governments must either be certain that their critical areas regulations will prevent harm or be prepared to recognize and respond effectively to any unforeseen harm that arises.”⁶³ As we have documented before, there is no evidence that buffers this tiny, 25 feet and 15 feet, can work and the County and County Farm Bureau have cited none.⁶⁴ So the County cannot be certain this scheme will prevent harm. And the County has no monitoring system in place to “recognize and respond effectively to any unforeseen harm that arises.” So this scheme is like the failed adaptive management program in the *Swinomish Indian Tribal Community* decision which lacked an effective monitoring system

⁶² AR 2857, YCC 16C.03.23(3)(c). YCC 16C.06.16, at AR 2893, provides that the Adjustment criteria in YCC 16C.03.23 are used to reduce the buffer widths to 25 feet.

⁶³ *Swinomish Indian Tribal Comty.*, 161 Wn.2d at 436, 166 P.3d at 1209.

⁶⁴ See for example AR 1746 – 49, K. L. Knutson & V. L. Naef, *Management Recommendations for Washington’s Priority Habitats: Riparian* pp. 164 – 67 (Wash. Dept. Fish and Wildlife, Olympia WA: 1997).

and therefore violated the GMA.⁶⁵ Although here Yakima County lacks the entire adaptive management program. The County and Farm Bureau also argue their buffers are only part of a system that will protect streams, but again fail to show any evidence their scheme will work and fail to provide an adaptive management program. So again, like Skagit County's argument in the *Swinomish Indian Tribal Community* decision, their argument fails.

Finally, the County and Farm Bureau argue, without citation to authority or analysis, that a single function or value of a critical area should not be elevated above all other functions.⁶⁶ But as we have seen, the GMA requires the protection of all functions and values.⁶⁷ As we have also seen, the county's buffers fail this requirement.

2. The Board's decision that the wetland buffer reductions violate the GMA is supported by substantial evidence and correctly interpreted the GMA

In the Brief of Appellant Futurewise on pages 33 through 36, Futurewise established that:

⁶⁵ *Swinomish Indian Tribal Comty.*, 161 Wn.2d at 436 – 37, 166 P.3d at 1209.

⁶⁶ Joint Brief of Respondents/Cross-Appellants p. 48.

⁶⁷ RCW 36.70A.172; *WEAN*, 122 Wn. App. at 174 – 75, 93 P.3d at 894.

- The *WEAN* decision concluded that: “the GMA requires that the regulations for critical areas must protect the ‘functions and values’ of those designated areas.⁶⁸ This means all functions and values.”⁶⁹ And the *Swinomish Indian Tribal Community* decision requires maintaining the existing condition of critical areas.⁷⁰ Since wetlands are a critical area, these standards apply to them as well.⁷¹
- In addition, RCW 36.70A.060(2) requires that Yakima County “shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170.”
- RCW 36.70A.172(1) also requires that Yakima County “shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas.” RCW 36.70A.172(1) requires the protection of “all functions and values.”⁷²

⁶⁸ RCW 36.70A.172(1).

⁶⁹ *WEAN*, 122 Wn. App. at 174 – 175.

⁷⁰ *Swinomish Indian Tribal Cmty.*, 161 Wn.2d at 430, 166 P.3d at 1206.

⁷¹ RCW 36.70A.030(5).

⁷² *WEAN*, 122 Wn. App. at 174 – 75, 93 P.3d at 894.

- We showed that Yakima County’s wetland buffers, which can all be reduced to 25 feet,⁷³ were narrower than the bare minimum of 98 feet wide that the County’s own BAS Analysis showed was necessary to protect wetland functions and values.⁷⁴

As near as we can discern, the County and County Farm Bureau made four responses. The first response is that the Honorable Judge Gibson affirmed the wetland buffer reductions.⁷⁵ However, Judge Gibson never mentions the word wetlands in his analysis or in the order, only referring to stream buffers and buffers.⁷⁶ The order’s conclusion only provides that the County’s failure to designate and regulate Type 5 “stream buffer widths” is reversed, there is no mention of wetland buffers being reversed.⁷⁷ Consequently, Judge Gibson did not reverse the Board

⁷³ AR 2893, Yakima County Ordinance No. 13-2007 Exhibit A: Critical Areas Ordinance of Yakima County, Washington Table 6 – 1 p. 75; AR 3763, FDO p. 39.

⁷⁴ AR 3280, *Yakima County BAS Review* p. 154, Table 17.

⁷⁵ Joint Brief of Respondents/Cross-Appellants p. 32.

⁷⁶ CP 4 –5, Hon. Blaine G. Gibson *Yakima County, et al. v. Eastern Washington Growth Management Hearings Board, et al.* Yakima County Superior Court Case No. 10-2-01392-9 pp. 4 – 5 (Feb. 8, 2011).

⁷⁷ CP 5, *Id.* at p. 5.

on this issue. It is also not worth arguing much over this question as this Court reviews the Board order, not the Superior Court order.⁷⁸

The second response is that the County and County Farm Bureau argue that we have not shown that keeping the 1995 wetland buffers has degraded wetlands since 1995. The *Yakima County BAS Review* documents that adverse impacts on wetlands are continuing. The review cites the *Draft 2001 Yakima Subbasin Summary* as documenting that “[i]rrigated agriculture and general development have altered the hydrologic cycle and the associated wetland and riparian habitat.”⁷⁹ The same source documented that “the consequences of poor land use in adjacent habitats can negatively impact the quality of open water by adding numerous chemicals such as pesticides, herbicides, and fertilizers. These can impact wildlife directly through poisoning or indirectly through reduction and/or alteration of the food base.”⁸⁰ Adequate buffer widths prevent these types of impacts.⁸¹

⁷⁸ *City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091, 1093 (1998).

⁷⁹ AR 3224, *Yakima County BAS Review* p. 98.

⁸⁰ AR 3225, *Yakima County BAS Review* p. 99.

⁸¹ AR 3264 – 71, *Yakima County BAS Review* pp. 138 – 45.

Third, it may be that the County and County Farm Bureau are arguing that the wetland buffers are within the range of BAS, but as the Brief of Appellant Futurewise documents on pages 33 to 36, the 25 foot wide wetland buffers are not based on best available science. They are also not wide enough to protect wetlands as RCW 36.70A.060 requires.

Finally, it may be that the County and County Farm Bureau are arguing on page 36 of the Joint Brief of Respondents/Cross-Appellants that there is no wetland science applicable to Yakima County. This argument, if they are making it, is dead wrong. As the *Yakima BAS Review* documents there is extensive wetland science applicable to Eastern Washington the Yakima Basin.⁸² The Washington State Department of Ecology even has wetland buffer recommendations specific to Eastern Washington.⁸³

⁸² AR 3223 – 64, *Yakima County BAS Review* pp. 71 – 138. See also AR 1789 – 91, Washington State Dept. of Ecology and Washington State Dept. of Wildlife, *Wetlands in Washington State Volume 1 – A Synthesis of the Science* pp. 2-22 – 2-24 (March 2005 Final Report).

⁸³ AR 1844, Washington State Dept. of Ecology Letter to Board of County Commissioners for Yakima County p. 2 of 6 (Dec. 7, 2007); AR 1753 – 56, Washington State Dept. of Ecology, *Wetlands in Washington State Volume 2 – Protecting and Managing Wetlands Appendix 8-D Guidance on Widths of Buffers and Ratios for Compensatory Mitigation for Use with the Eastern Washington Wetland Rating System pp. 1 – 4* (April 2005).

To the extent County and County Farm Bureau intend their arguments on pages 32 to 48 of the Joint Brief of Respondents/Cross-Appellants to apply to the wetland buffers, we incorporate by reference our response in the earlier section of this brief on riparian buffers. There is substantial evidence on the record supporting the Board's finding that Yakima County's allowance for wetland buffer reductions violates the GMA and the Board properly interpreted the GMA, so the Board's decision should be upheld.

D. The Board correctly determined that Type 5 Streams are fish and wildlife habitat and that their protection is necessary to protect fish and wildlife habitat and complies with the Growth Management Act. (Futurewise Assignment of Error 2 and Issue 2)

In the Brief of Appellant Futurewise on pages 27 through 46, Futurewise established that:

- RCW 36.70A.170 and RCW 36.70A.060(2) requires Yakima County to designate and protect critical areas within its boundaries, including fish and wildlife habitats.⁸⁴

⁸⁴ *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 832 – 33, 123 P.3d 102 (2005); *Stevens County v. Futurewise*, 146 Wn. App. 493, 511, 192 P.3d 1, 10 (2008) review denied *Stevens County v. Futurewise*, 165 Wn.2d 1038, 205 P.3d 132 (2009).

- RCW 36.70A.172(1) requires that Yakima County “shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas.” RCW 36.70A.172(1) requires the protection of “all functions and values.”⁸⁵
- RCW 36.70A.172(1) also requires that Yakima County “shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.”
- Type 5 streams, as defined by Yakima County’s critical areas regulations, are fish and wildlife habitat and also play an important role in maintaining the function of other classifications of streams and riparian areas including important salmon habitat.⁸⁶

1. The adoption of Ordinance 2-2009 has not mooted the issue of Type 5 stream protection

On pages 28 through 32 of the Joint Brief of Respondents/Cross-Appellants, the County and County Farm Bureau argue that our appeal of Yakima County’s decision not to designate and protect Type 5 streams is moot. It is not.

⁸⁵ *WEAN*, 122 Wn. App. at 174 – 75, 93 P.3d at 894.

⁸⁶ AR 3163, *Yakima County BAS Review* p. 37; AR 1925, Hazen p. 13; AR 3134 – 35, *Yakima County BAS Review* pp. 8 – 9; AR 3141, *Yakima County BAS Review* p. 15; AR 3158, *Yakima County BAS Review* p. 32.

This is not a case like the *Dry Creek Coalition* case where the provision at issue had been repealed.⁸⁷ Yakima County did not repeal YCC 16C.06.16, Table 6-1 and Yakima County still does not designate or protect Type 5 streams as critical areas.⁸⁸ This is the core of our case and has not changed. So the Court can provide us with effective relief as we explained on pages 36 and 37 of the Brief of Appellant Futurewise. The Court can affirm the Board and require Yakima County to designate and protect Type 5 streams.

The County and County Farm Bureau seem to be arguing on pages 30 to 32 of the Joint Brief that former YCC 16C.07.16, Table 16 is no longer in effect, that the amended version of YCC 16C.07.16, Table 16 was presumed valid and since its GMA 60-day appeal period has passed it cannot be challenged. But this argument misstates what Ordinance 2-2009 did. Ordinance No. 2-2009 only added the language about the clearing and grading regulations applying to Type 5 streams.⁸⁹ It did not repeal Ordinance No. 13-2007 nor did it fail to designate and protect Type 5 streams. Ordinance No. 13-2007 did that and Futurewise timely appealed

⁸⁷ *Clallam County v. Dry Creek Coalition*, 161 Wn. App. 366, 391 – 94, 255 P.3d 709, 719 – 21 (2011).

⁸⁸ Joint Brief of Respondents/Cross-Appellants p. 29 – 30.

⁸⁹ *Id.*

that ordinance.⁹⁰ So the argument that somehow our appeal is time barred or moot fails. The Board and Court both agreed.⁹¹

2. The Board correctly determined that Type 5 streams are fish and wildlife habitat and that their protection is necessary to protect fish and wildlife habitat

(a) Type 5 streams both have fish and wildlife habitat and contribute to fish and wildlife habitat through the stream system

On pages 17 through 19 of the Joint Brief of Respondents/Cross-Appellants, the County and County Farm Bureau argue that if “intermittent streams have ‘limited’ riparian corridors then smaller ephemeral streams ... presumably have ‘extremely limited’ to no riparian habitat.” Even if the presumption is correct, The *Yakima County BAS Review* identifies impaired riparian functions as one of the “most critical habitat concerns” in the Yakima Basin.⁹² This is why “[t]he importance of riparian areas, combined with the large losses that have already occurred, make it vital that the remaining riparian areas be protected (USDIBOR

⁹⁰ AR 47, Futurewise’s Petition for Review; AR 2893, Ordinance No. 13-2007 YCC 16C.06.16, Table 6 – 1.

⁹¹ AR 3763, FDO p. 16; CP 1 – 2, Hon. Blaine G. Gibson *Yakima County, et al. v. Eastern Washington Growth Management Hearings Board, et al.* Yakima County Superior Court Case No. 10-2-01392-9 pp. 4 – 5 (Feb. 8, 2011).

⁹² AR 3172, *Yakima County BAS Review* p. 46.

2002).”⁹³ And Yakima County must protect the existing conditions of critical areas.⁹⁴ So even if ephemeral streams have “extremely limited” to no riparian habitat, the Yakima County BAS Review documents that the existing riparian must be protected to protect fish and wildlife habitat. Further, the County and County Farm Bureau ignore the evidence on pages 44 and 45 of the Brief of Appellant Futurewise on the benefits to fish habitat of protecting riparian vegetation along Type 5 streams in forested areas of eastern Washington and native vegetation on Type 5 streams in the shrub-steppe areas of Yakima County.⁹⁵

On page 20 of the Joint Brief of Respondents/Cross-Appellants, the County and County Farm Bureau quote the Yakima County Planning Commission finding “that there must be a point along a stream corridor where the stream is no longer regulated as fish and wildlife habitat. The BAS indicates that the best point to make this distinction is between ephemeral and intermittent streams.”

⁹³ AR 3139, *Yakima County BAS Review* p. 13.

⁹⁴ *Swinomish Indian Tribal Cmty.*, 161 Wn.2d at 430, 166 P.3d at 1206.

⁹⁵ AR 1743 – 44, K. L. Knutson & V. L. Naef, *Management Recommendations for Washington’s Priority Habitats: Riparian* pp. 19 – 20 (Wash. Dept. Fish and Wildlife, Olympia WA: 1997).

This argument has four problems. First, neither the finding nor the County's and County's Farm Bureau briefing identify what BAS show that ephemeral streams do not qualify as fish and wildlife habitat under the County critical areas regulations or the GMA. It cannot be the *Yakima County BAS Review* which documents that rivers act as a system with each of the different stream types contributing to fish and wildlife habitat and the functions and values that support the habitat.⁹⁶ The *Yakima County BAS Review* also documents that to protect the river system from upland erosion, the buffer system should be continuous along the entire stream channel. This is particularly important in semi-arid climates such as Yakima County because the rate of upland erosion is greater in Yakima County due to less dense vegetation.⁹⁷ The *Yakima County BAS Review* reports on a study by Wenger that found 98 to 328 foot wide buffers are required to maintain long-term riparian function.⁹⁸ "To be most effective, buffers should extend along all streams, including intermittent and ephemeral channels."⁹⁹

⁹⁶ AR 3131 – 95, *Yakima County BAS Review* pp. 5 – 69.

⁹⁷ AR 3200, *Yakima County BAS Review* p. 74.

⁹⁸ *Id.*

⁹⁹ *Id.*

The second problem is the Planning Commission findings do not say that Type 5 streams do not have habitat value. As the Planning Commission wrote, “[t]his does not mean that other areas of the landscape, including Type 5 streams, do not have some habitat value.”¹⁰⁰ If Type 5 streams have habitat value and the Brief of Appellant Futurewise on pages 39 through 46 documents that they do, the GMA requires that those functions and values must be protected. As the Court of Appeals wrote in the *WEAN* decision: “the GMA requires that the regulations for critical areas must protect the ‘functions and values’ of those designated areas. RCW 36.70A.172(1). This means all functions and values.”¹⁰¹

The third problem is that the Planning Commission’s justification for not designating ephemeral streams is that they are storm water driven and “lack riparian vegetation that distinguishes them from surrounding areas” does not mean they do not have habitat value.¹⁰² The lack of riparian vegetation only applies to the “arid portions of Yakima County” and is based on the scientific data “Knutson and Naef, 1997.”¹⁰³ As the Brief of Appellant Futurewise on page 45 documented in a quote from

¹⁰⁰ AR 3474, Findings of Fact and Recommendation p. 14.

¹⁰¹ *WEAN*, 122 Wn. App. 156, 174 – 175, 93 P.3d 885, 894 (2004).

¹⁰² Joint Brief of Respondents/Cross-Appellants p. 20.

¹⁰³ AR 3136, *Yakima County BAS Review* p. 10.

Knutson and Naef, they concluded that Type 5 streams in arid areas contribute habitat value to the stream system even without a well defined riparian area, the upland like vegetation “assists in moderating stream temperature, sedimentation, water quality and quantity, and debris flows downstream.”¹⁰⁴ Type 5 streams in forested areas also have riparian vegetation and habitat functions.¹⁰⁵

The fourth problem is that it ignores the important sediment storage and other habitat values of Type 5 streams identified in the *Yakima County BAS Review* and in Knutson and Naef, some of which we documented in the Brief of Appellant Futurewise on pages 40 to 42.

(b) The Board was not required to defer to the County’s decisions to not designate and protect Type 5 streams because it violated the GMA

On pages 22 through 25 the Joint Brief of Respondents/Cross-Appellants, the County and County Farm Bureau argues that the Board did not properly defer to the County’s planning decisions citing the *Quadrant Corp.* decision. But *Quadrant Corp.*’s holding is that deference is owed to

¹⁰⁴ AR 1743, K. L. Knutson & V. L. Naef, *Management Recommendations for Washington’s Priority Habitats: Riparian* p. 19 (Wash. Dept. Fish and Wildlife, Olympia WA: 1997).

¹⁰⁵ *Id.* at AR 1744, p. 20.

county planning actions that are consistent with the goals and requirements of the GMA.¹⁰⁶

The Joint Brief of Respondents/Cross-Appellants argues on page 23 and 23 that since “the GMA does not define ‘fish and wildlife conservation areas,’” that “it stands to reason that such areas must actually include fish and wildlife habitat.” First, note the County and County Farm Bureau do not cite to any authority for this proposition. Second, the legislature could have used the term “fish and wildlife habitat,” but it chose not to. Instead it chose “fish and wildlife habitat conservation areas” in RCW 36.70A.030(5)’s definition of critical areas, indicating that it meant to include those “areas” needed to “conserve” “fish and wildlife habitat.” The Supreme Court of Washington State’s *Ferry County* decision concluded that “[f]ish and wildlife habitat conservation areas include areas where [endangered, threatened, and sensitive] ETS species have a primary association, habitats and species of local importance, and waters of the state that provide fish and wildlife habitat.”¹⁰⁷ This

¹⁰⁶ *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 238, 110 P.3d 1132, 1139 (2005).

¹⁰⁷ *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 832, 123 P.3d 102, 106 (2005) *citing* WAC 365-190-080(5) the predecessor to WAC 365-190-130(2) *emphasis added accord Stevens*

interpretation, in addition to being consistent with the plain language of the GMA in RCW 36.70A.030(5), finds support in Yakima County’s own definition of “wildlife habitat” which

means areas which, because of climate, soils, vegetation, relationship to water, location, and other physical properties, have been identified as of critical importance to maintenance of wildlife species.¹⁰⁸

As the Brief of Appellant Futurewise documented on pages 39 through 46 and the *Yakima County BAS Review* also documented, the vegetation in and near Type 5 streams and Type 5 stream’s relationship to water, their location, their sediment and gravels, and their physical properties make them of critical importance to maintaining salmon, steelhead, and other wildlife species and providing fish and wildlife habitat.¹⁰⁹ And the steelhead and bull trout which live in the Yakima basin rivers and streams are listed as threatened under the federal Endangered Species Act.¹¹⁰ Type 5 streams area also defined as waters of the state.¹¹¹

County v. Futurewise, 146 Wn. App. at 511, 192 P.3d at 10 as to ETS species.

¹⁰⁸ AR 2836, YCC 16C.02.435.

¹⁰⁹ AR 3141 – 58, *Yakima County BAS Review* pp. 15 – 32.

¹¹⁰ AR 1925 Hazen p. 13; AR 3162 – 68 *Yakima County BAS Review* pp. 36 – 42.

¹¹¹ RCW 90.48.020 “Wherever the words ‘waters of the state’ shall be used in this chapter, they shall be construed to include lakes, rivers, ponds,

Further, Yakima County’s definition of wildlife habitat does not require that fish or wildlife live in all of the areas, only that it must be of critical importance to maintaining the wildlife species. The Supreme Court’s conclusion that “waters of the state that provide fish and wildlife habitat” are fish and wildlife habitat is also consistent because the gravel and other beneficial sediments that flow downstream to create salmon and steelhead habitat, are providing habitat.¹¹²

This is consistent with the Board’s conclusion that Type 5 Ephemeral streams constitute fish and wildlife habitat “due to the important role these streams play in maintaining the overall health of the stream corridor system”¹¹³ and because they are waters of the state.¹¹⁴

On pages 23 and 24, the Joint Brief of Respondents/Cross-Appellants argues that the Board erred by interpreting all references to “streams” to encompass ephemeral streams. First, error was not assigned to the Board’s findings of fact related to streams, so they are verities on

streams, inland waters, underground waters, salt waters and all other surface waters and watercourses within the jurisdiction of the state of Washington.”

¹¹² AR 3141 – 58, *Yakima County BAS Review* pp. 15 – 32.

¹¹³ AR 3726, FDO at p. 2.

¹¹⁴ AR 3758, FDO at p. 34.

appeal.¹¹⁵ Second, the Joint Brief of Respondents/Cross-Appellants does not provide a single citation to the record were the Board misinterpreted the *Yakima County BAS Review*.

On pages 24 and 25, the Joint Brief of Respondents/Cross-Appellants argues that since WAC 365-190-130(2) is only a guideline and since the WAC 365-190-130(2) only requires that certain types of habitat “must be considered” for designation as fish and wildlife habitat conservation areas that the Board erred in “making the designation as mandatory.” But this argument is contrary to the Supreme Court of Washington’s *Ferry County* decision where the court concluded that “[f]ish and wildlife habitat conservation areas include areas where [endangered, threatened, and sensitive] ETS species have a primary association, habitats and species of local importance, and waters of the state that provide fish and wildlife habitat.”¹¹⁶

¹¹⁵ *Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings Bd.*, 113 Wn. App. 615, 628, 53 P.3d 1011, 1017 (2002).

¹¹⁶ *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 832, 123 P.3d 102, 106 (2005) citing WAC 365-190-080(5) the predecessor to WAC 365-190-130(2) emphasis added, *accord Stevens County v. Futurewise*, 146 Wn. App. 493, 511, 192 P.3d 1, 10 (2008) as to ETS species.

Reading the GMA as whole, this is the proper conclusion. GMA Goal 9, in RCW 36.70A.020(9) calls on counties and cities to “conserve fish and wildlife habitat” RCW 36.70A.030(5) defines “[c]ritical areas” to “include the following areas and ecosystems ... fish and wildlife habitat conservation areas” RCW 36.70A.170(1) provides that each county, and each city, shall designate where appropriate ... critical areas.” RCW 36.70A.060(2) requires that “[e]ach county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170.” RCW 36.70A.172(1) provides that “[i]n designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.” While RCW 36.70A.3201 does recognize “the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the board to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter.” Reading all of this together, we see that counties must designate and

protect “fish and wildlife conservation areas,” not fish and wildlife conservation areas chosen by the county, words the legislature could have used but did not. The boards and courts could have required the designation of all fish and wildlife habitats, but recognized that this would be a difficult task, so they limited it to certain habitat types listed in WAC 365-190-130(2). Given that counties and cities must exercise their “deference” “consistent with the requirements and goals of” the GMA, the Supreme Court in *Ferry County* and the Court of Appeals in *Stevens County* correctly interpreted the law. And so did the Board relying on “waters of the state” prong of WAC 365-190-130(2)(f).¹¹⁷

In addition, the Washington State rule is that “[t]he doctrine of *stare decisis* ‘requires a clear showing that an established rule is incorrect and harmful before it is abandoned.’”¹¹⁸ The County and the County Farm Bureau have not clearly shown that the *Ferry County* and *Stevens County* decisions were wrongly decided. They have also not even attempted to show the rules are harmful. So the Court should continue to follow *Stevens County* and *Ferry County v. Concerned Friends of Ferry County*.

¹¹⁷ AR 3758, FDO at p. 34.

¹¹⁸ *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930, 935 (2004).

Since the Board's decision was consistent with the GMA's goals and requirements and the county's decision on Type 5 streams was not, under the *Quadrant Corp.* decision Yakima County was not entitled to deference. So the Board did not improperly fail to defer to the County.

(c) Yakima County's decision not to designate and protect Type 5 streams was not based on a reasoned process and fails to protect critical areas as RCW 36.70A.060 requires

On pages 25 through 28 of the Joint Brief of Respondents/Cross-Appellants, the County and County Farm Bureau argue that not designating Type 5 streams as fish and wildlife habitats and not protecting them was based on a reasoned justification to depart from best available science. However, the county's departure fails to comply with the requirements of the Supreme Court's *Swinomish Indian Tribal Community* and *Ferry County* decisions. In *Swinomish Indian Tribal Community* the Supreme Court wrote that

the county may depart from BAS if it provides a reasoned justification for such a departure. See *Ferry County v. Concerned Friends*, 155 Wn.2d 824, 837-38, 123 P.3d 102 (2005); WAC 365-195-915(1)(c)(i)-(iii). Here, the county justified its decision to not require mandatory riparian buffers on the basis that doing so would "impos[e] requirements to restore habitat functions and values that no longer exist." Resp't Skagit County's Resp. Br. at 44. This was based on a recognition of the fact that the vegetation that had made up the riparian buffers along streams and

rivers was cleared long before there was a legal impediment to doing so.

¶ 24 If the omission of mandatory buffers from the county's critical areas ordinance is a departure from BAS, it is a justified departure of the kind that is tolerated by the GMA. As we have noted above, the GMA's requirement to protect does not impose a corresponding requirement to enhance. That holding guides us here. A requirement to develop buffers would impose an obligation on farmers to replant areas that were lawfully cleared in the past, which is the equivalent of enhancement. Without a duty to enhance being imposed by the GMA, however, we cannot require farmers within Skagit County to replant what was long ago plucked up. The county need not impose a requirement that farmers establish riparian buffers.¹¹⁹

Here, the justification was that the county determined “‘there must be a point along a stream corridor where the stream is no longer regulated as fish and wildlife habitat’ and determined that such a point was ‘between ephemeral and intermittent streams.’”¹²⁰

The standards for evaluating departures are in the Supreme Court's *Ferry County* decision, which as you can see was cited in cited in *Swinomish Indian Tribal Community*. In the *Ferry County* decision, the Washington State Supreme Court quoted with approval a Western Washington Growth Management Hearings Board decision

¹¹⁹ *Swinomish Indian Tribal Cmty*, 161 Wn.2d at 430 – 31, 166 P.3d at 1206 – 07.

¹²⁰ Joint Brief of Respondents/Cross-Appellants p. 28.

that held that it would consider claims regarding BAS on an individual basis with these factors in mind:

(1) The scientific evidence contained in the record; (2) Whether the analysis by the local decision-maker of the scientific evidence and other factors involved a reasoned process; and (3) Whether the decision made by the local government was within the parameters of the Act as directed by the provisions of RCW 36.70A.172(1).¹²¹

The Supreme Court applied this rule to Ferry County's use of Dr. Knight's letters.

¶ 28 Furthermore, the steps taken in analyzing the information do not constitute a reasoned process. The county directs us to no evidence of it evaluating the science produced by Dr. McKnight. Nor is there sufficient evidence of the county comparing science provided by Dr. McKnight to any other resources, such as science available from state or federal agencies or the Colville Tribe. As the Western Washington Growth Management Hearings Board correctly stated, a "[c]ounty cannot choose its own science over all other science and cannot use outdated science to support its choice." *Island County Citizens' Growth Mgmt. Coalition v. Island County*, No. 98-2-0023c, 2000 WL 268939, at *7 (W. Wash. Growth Mgmt. Hr'gs Bd. Mar. 6, 2000).¹²²

Like Ferry County, Yakima County does not direct this Court to any evidence where it evaluated the claim that "there must be a point along a stream corridor where the stream is no longer regulated as fish and

¹²¹ *Ferry County*, 155 Wn.2d at 834, 123 P.3d at 107.

¹²² *Ferry County*, 155 Wn.2d at 837 – 38, 123 P.3d at 108 – 09.

wildlife habitat ...” As we documented in Part II.D.2 of this brief, there is no scientific support for this proposition. Yakima County has not shown that it compared this contention to any science in the record, including its own BAS Review. Yakima County has not shown its decision was within the parameters of the Act as directed by the provisions of RCW 36.70A.172(1). So like Ferry County, Yakima County has failed to make a reasoned departure from the best available science requirement.

But even if Yakima County had conducted the reasoned process the *Ferry County* decision requires, it would still have failed in its independent duty under RCW 36.70A.060(2) to “protect” critical areas. This independent requirement can be seen in the *Swinomish Indian Tribal Community* decision where the Supreme Court agreed that the county could have properly departed from best available science in not requiring buffers on agricultural lands, but also concluded that the adaptive management program applicable to agricultural areas failed to comply with RCW 36.70A.040, .060, and .172.¹²³ In *Swinomish Indian Tribal Community*, Skagit County at least had a flawed adaptive management program to protect fish habitat. Here, Yakima County has nothing in its

¹²³ *Swinomish Indian Tribal Cmty*, 161 Wn.2d at 431 & 436 – 37, 166 P.3d at 1206 – 07 & 1209.

critical areas regulations to protect Type 5 streams and only relies on its clearing and grading regulations which primarily addresses sediment discharges¹²⁴ and does not protect riparian vegetation, the transport of spawning gravels, or other critical area functions as RCW 36.70A.060 requires. The failure to comply with RCW 36.70A.060 alone warrants sustaining the Board.

III. CONCLUSION

Yakima County and the Farm Bureau have the burden of showing the invalidity of the Board's decision. The Board's decision that parts of the critical areas regulations do not comply with the GMA was based on substantial evidence, which included Yakima County's own BAS analysis. The Board's conclusions that these provisions violated the GMA properly interpreted the GMA. Futurewise respectfully requests that this Court affirm the Board's decision.

¹²⁴ Joint Brief of Respondents/Cross-Appellants, the County and County Farm Bureau p. 30.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Tim Trohimovich', written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned certifies under the laws of Washington State and the pain of perjury that on this 26th day of October 2011, I caused the foregoing Futurewise's Appellant/Cross Respondent Reply Brief to be served on the following parties in the manner shown below:

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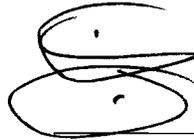
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