

NO. 297632

FILED

JUN 15 2011

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.

BRIEF OF APPELLANT FUTUREWISE

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I. INTRODUCTION

Appellants Futurewise and the Confederated Tribes and Bands of the Yakama Nation appeal part of the Superior Court of Yakima County's Decision on Petition for Judicial Review (February 8, 2011) on the Eastern Washington Growth Management Hearings Board's Final Decision and Order (FDO) in Case No. 08-1-0001c. This appeal arises out of Yakima County's update of its Critical Areas Ordinance (CAO), Ordinance 13-2007, and an update to its Comprehensive Plan 2015 and Development Regulations, Ordinance 15-2007. The amendments and exemptions fell short, failing to protect the County's critical areas, rural areas, and agricultural lands of long term significance.¹

In considering Futurewise's challenge to the ordinances, the Eastern Washington Growth Management Hearings Board (Eastern Board or EWGMHB) determined that a number of the County's comprehensive plan provisions and development regulations violated the Growth

¹ The Record transmitted to the Superior Court by the Board and forwarded to this Court by the Superior Court is identified at Clerks Papers 6 – 8. The Record uses the page numbers from the Eastern Board record. Accordingly, all references to the record before the Board are referenced as Administrative Record (AR) with the page number from the record. The references to the Superior Court decision reference CP and the applicable page number.

Management Act (GMA), chapter 36.70A RCW.² Yakima County (County) and the Yakima County Farm Bureau (Farm Bureau) appealed the Board's conclusions that the CAO ordinance violated the GMA because: (1) the development permit exemptions were not based on best available science (BAS); (2) the County failed to designate Type 5 ephemeral streams as a critical area without citing any BAS support and without designating and protecting critical areas; (3) the County adopted stream buffer widths that do not protect all functions and values as required by the GMA; and (4) the County's allowance for substantial wetland buffer reductions allows buffer widths outside supported BAS ranges and fail to protect wetlands.

The Yakima County Superior Court concluded: (1) that the issue as to whether or not the regulation that did not designate Type 5 streams as fish and wildlife habitats complied with the GMA was not moot or barred by the statute of limitations, (2) that the County's decision not to designate and protect Type 5 streams as fish and wildlife habitats does not violate the GMA, (3) that the county's exemptions for certain development

² AR 3726 – 28, *Hazen et al. v. Yakima County*, Eastern Washington Growth Management Hearings Board (EWGMHB) Case No.08-1-0008c, Final Decision and Order (April 5, 2010), at 2 – 4. Hereinafter FDO.

activities violate the GMA, (4) that the stream buffer widths comply with the GMA.³ Futurewise took the position that the Eastern Board properly concluded that Yakima County's CAO amendments violated the Growth Management Act.⁴ Since this conclusion is consistent with appellate courts' holdings interpreting the Growth Management Act and is supported by substantial evidence in the record, Futurewise respectfully requests that the Court reverse the Superior Court on issues (2) and (4) above and uphold the portions of the Final Decision and Order challenged by the County and the Farm Bureau.

II. ASSIGNMENTS OF ERROR

1. The Board's decisions on wetland and stream buffers correctly followed the GMA's requirement to protect critical areas and the requirement to incorporate best available science and are supported by substantial evidence. (Finding of Fact and Conclusion of Law No. B.4.)

Issue 1: Did Yakima County fail to comply with the requirements to protect critical areas and include best available science without reasoned justification for a departure from the science in adopting its development regulations and stream and wetland buffers?

³ CP 1 – 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. 1 – 5 (Feb. 8, 2011).

⁴ AR pp. 3726 – 28, FDO at 2 – 4.

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 and comply with the Growth Management Act. (Finding of Fact and Conclusion of Law No. B.4.)

Issue 2: Does the exclusion of Type 5 streams from regulation and protection deviate from the requirement to protect critical areas and include best available science as required by the Growth Management Act?

III. STATEMENT OF THE CASE

The issues in this case revolve around the failure of Yakima County to properly update critical areas regulations to protect critical areas, which provide essential ecosystem functions and values and include fish and wildlife habitat. As the Washington State Supreme Court has held “every seven years a county is required to take legislative action to update its comprehensive plan and development regulations ‘to ensure the plan and regulations comply’ with the GMA. Former RCW 36.70A.130(1)(a).” *Thurston County v. W. Washington Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 342, 190 P.3d 38, 44 (2008).

In 2005, Yakima County began its seven year update of its existing Critical Areas Ordinance, which was enacted in 1995. As part of the amendment process, the county reviewed the best available science (BAS) and the review was released by the County in 2006. Beginning in 2006,

Yakima County made its revised CAO available for public comment. On December 18, 2007, Yakima County enacted the revised CAO (Yakima County Code Chapter 16C) as Ordinance No. 13-2007 and adopted an amended comprehensive plan and zoning code as Ordinance No. 15-2007 (Yakima County Code Chapter 15).⁵ Futurewise, Wes Hazen, and other petitioners commented on the revised CAO through letters and testimony and filed a timely appeal to the Eastern Board of the two ordinances. The comprehensive plan and zoning regulations are not at issue in this case because the County and Farm Bureau did not appeal those parts of the Eastern Board decision.

The Eastern Board held that parts of Yakima County's critical areas ordinance (CAO) violated the GMA in April 2010. AR 3741 – 74, *Hazen et al. v. Yakima County*, EWGMHB Case No. 08-1-0008c, Final Decision and Order (April 5, 2010), at 17 – 50, hereinafter FDO. The Board also found that Futurewise's challenge to the County's failure to designate Type 5 streams as fish and wildlife habitats was not moot. AR 3737 – 41, FDO pp. 13 – 17. The Board remanded Ordinance 13-2007

⁵ AR 386 – 499, Yakima County Ordinance No. 13-2007; AR 2920 – 3108, Yakima County Ordinance No. 15-2007.

and Ordinance 15-2007 to Yakima County to bring them into compliance with the GMA.

Yakima County then filed an Administrative Procedure Act Petition for Review with the Superior Court of Yakima County, which found that the ordinance that governs Type 5 streams had been amended, but the original challenged provisions remained. Thus, the challenge regarding Type 5 streams was not barred by the statute of limitations or moot. CP 1 – 2. The Superior Court found that the County’s exemptions for certain development activities violate the GMA. CP 3 – 4. Additionally, the Superior Court found that the County’s lack of regulation of Type 5 streams as fish and wildlife habitat did not violate the GMA and the County’s stream buffer widths were within BAS. CP. 2 – 4.

Because there is substantial evidence in the record supporting the findings of the Eastern Board and the Eastern Board properly interpreted and applied the law, Futurewise and the Confederated Tribes and Bands of the Yakima Nation then appealed to this court on March 8, 2011. Yakima County and the Farm Bureau cross-appealed.

IV. ARGUMENT

A. Standard of Review

The Growth Management Hearings Board

is charged with adjudicating GMA compliance, and, when necessary, with invalidating noncompliant comprehensive plans and development regulations.

King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 142 Wn.2d 543, 552, 14 P.3d 133, 138 (2000). (internal citations and quotation marks omitted).

The Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of challenges to decisions of the Growth Management Hearings Board. *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 233, 110 P.3d 1132, 1137 (2005). The Eastern Board makes its decision by adjudications, so the applicable provisions of the APA are those that apply to adjudications generally. RCW 36.70A.280. Futurewise, the prevailing party before the Eastern Board, may argue any ground to support the Board's order which is supported by the record. *Whidbey Env'tl. Action Network ("WEAN") v. Island County*, 122 Wn. App. 156, 168, 93 P.3d 885, 891 (2004). "Under the judicial review provision of the APA, 'the burden of demonstrating the invalidity of [the Board's decision] is on the party asserting invalidity.'" *Thurston County v. Cooper Point Ass'n.*, 148 Wn.2d 1, 7-8, 57 P.3d 1156, 1159-60 (2002) citing RCW 34.05.570(1)(a). Thus the burden of

demonstrating the Board's decision was erroneous rests with Yakima County and the Farm Bureau.

Issues of law under RCW 34.05.570(3)(d) are reviewed *de novo*. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 116 Wn. App. 48, 54, 65 P.3d 337, 340 (2003). 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.^{FN7}

^{FN7}. The dissent wrongly summarizes the Board's role as merely this: "to ensure that the proper legislative bodies under the GMA are making the decisions mandated," as if *any* decisions will do. Actually, the Board is empowered to determine whether county decisions comply with GMA requirements, to remand noncompliant ordinances to counties, and even to invalidate part or all of a comprehensive plan or development regulation until it is brought into compliance. In other words, the Board is more than a deskbook dayminder telling counties what decisions are due.

Although counties have a "broad range of discretion" in choosing policy tools to carry out the GMA goals and requirements, "the deference ends when it is shown that the county's actions are in fact a 'clearly

erroneous' application of the GMA." *Quadrant*, 154 Wn.2d at 238. Thus it is only in the event a court finds a Growth Board's ruling failed to apply this "more deferential standard of review" [that is, the broad range of discretion] to a county's action that the Board is not entitled to deference from that court." *Id.*

During the same term as *Lewis County*, the Supreme Court again specifically stated that "substantial weight" must be given to the growth board's interpretation of the GMA. *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 424, 166 P.3d 1198, 1203 (2007).

The Board's findings of fact are reviewed for whether they are supported by substantial evidence. RCW 34.05.570(3)(e). In reviewing Board findings of fact under RCW 34.05.570(3)(e), the test of substantial evidence is "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091, 1094 (1998).

The Court of Appeals does not weigh the evidence or substitute its view of the facts for that of the Board. *Callegod v. Wash. State Patrol*, 84 Wn. App.663, 676, n.9, 929 P.2d 510 (1997). On mixed questions of law

and fact, the court determines the law independently, and then applies the law to the facts as found by the Board. *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 57 P.3d 1156, (2002). As demonstrated below, the Board correctly interpreted the law and reached its decision based on substantial evidence. Thus the Board correctly determined that the County's critical areas regulation exemptions, stream buffer widths, and failure to designate and protect Type 5 streams violated the Growth Management Act, so its decision should be upheld.

B. The Board correctly determined that Yakima County's exemptions from the critical areas regulations violated the Growth Management Act.

1. The exemptions do not protect critical areas and maintain the existing conditions of critical areas and so violate the GMA.

The protection of critical areas is intricately tied to the maintenance of existing conditions in those areas. The Washington State Supreme Court has held that:

¶ 14 The GMA directs counties and cities to designate critical areas. RCW 36.70A.170. RCW 36.70A.030(5) lists types of critical areas: (1) fish and wildlife habitat conservation areas, (2) wetlands, (3) frequently flooded areas, (4) critical aquifer recharge areas, and (5) geologically hazardous areas.

Ferry County v. Concerned Friends of Ferry County, 155 Wn.2d 824, 832, 123 P.3d 102, 106 (2005). The Washington State Supreme Court has also held that:

¶ 16 Counties and cities are further required to adopt development regulations that protect designated critical areas. RCW 36.70A.060. “In designating and protecting critical areas ... counties and cities shall include best available science in developing policies and development regulations to protect the functions and values of critical areas.”

Ferry County, 155 Wn.2d at 833, 123 P.3d at 106; RCW 36.70A.172 (1).

The Washington State Supreme Court “endeavored to ascertain the meaning of the word ‘protect.’” *Swinomish Indian Tribal Cmty.*, 161 Wn.2d at 428–30. After analyzing a dictionary definition, the provisions of the Growth Management Act, and advisory regulations that help to explain the act’s requirements, the Supreme Court concluded that a GMA-compliant critical areas regulation “protects critical areas by maintaining existing conditions.” *Swinomish Indian Tribal Cmty.*, 161 Wn.2d at 430. Additionally, the Washington State Court of Appeals held that the duty to protect applies to preexisting uses, not just new uses. *Clallam County v. W. Wash. Growth Mgmt. Hearings Bd.*, 130 Wn. App. 127, 137, 121 P.3d 764, 769 (2005) review denied *Clallam County v. W. Wash. Growth Mgmt.*

Hearings Bd., 163 Wn.2d 1053, 187 P.3d 751 (2008). The Court of

Appeals has also held that:

Citing WAC 365-190-080(5), the county contends the GMA does not require counties to protect all the designated habitats of endangered, threatened, and sensitive species. But the rule merely states that land use regulations are not required to protect every individual of a listed species, wherever and whenever that individual may be found within the county. The GMA directs counties to determine what lands are primarily associated with listed species, and then to adopt regulations protecting those lands. RCW 36.70A.020(9), .030(5), .060(2), .170(1)(d). The Board properly concluded that the GMA requires the county to designate and protect all critical areas within its boundaries.

Stevens County v. Futurewise, 146 Wn. App. 493, 511 fn.7, 192 P.3d 1, 10 fn.7 (2008) review denied *Stevens County v. Futurewise*, 165 Wn.2d 1038, 205 P.3d 132 (2009).

As the Eastern Board correctly concluded, the GMA does not prohibit all exemptions, but in order for the exemptions to satisfy the GMA requirements listed above, the County “must show by using best available science that it has tailored the exemption to reasonably ameliorate potential harm and address cumulative impacts.”⁶ By enacting critical areas regulation exemptions without reference to BAS or following

⁶ AR 3753 – 55, FDO at 29, citing *Clallam County v. WWGMHB*, 130 Wn. App. 127, 140 (2005).

the process for departing from BAS, the County has acted beyond the discretion allowed by GMA standards. *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 123 P.3d 102 (2005) ; WAC 365-195-915.

Yakima County's exemptions do not follow its BAS or the independent requirement to protect critical areas in RCW 36.70A.060(2).⁷ For example, for upland wildlife habitats some of the exemptions from standard development permits include: developments disturbing less than 21,780 square feet on existing lots (i.e. less than ½ acre allowed by YCC 16C.03.09(b) in AR 94); new driveways or roads less than 2,640 feet (i.e. less than ½ mile allowed by YCC 16C.03.09(c) in AR 94); or the unlimited development allowed for additions to or the alteration of existing single family residences *and associated facilities* (i.e. the development allowed by YCC 16C.03.09(d) in AR 94). Consequently, the exempted less than half-acre of disturbed land or the less than half-mile of

⁷ AR 3753, FDO at 29. The exemptions for wetlands and “hydrologically” related critical areas are in Yakima County Code (YCC) 16C.03.07 in AR 91 – 94. The exemptions for geologically hazardous areas are in YCC 16C.03.08 in AR 94. The exemptions for upland wildlife habitat and habitats of local importance are in YCC 16C.03.09 in AR 94 – 95.

road can be the habitat of any endangered, threatened, or sensitive species, such as the ferruginous hawk or sage grouse, or their needed buffers.⁸

Yakima County's own *BAS Review* confirms this detrimental result from home and road building activities in wetlands and upland wildlife habitat. Filling wetlands, removing vegetation, and compacting soils, as is necessary to build a house, creates a significant disturbance according to the *Yakima County BAS Review*.⁹ Buffers are needed to protect the water quality of wetlands and other wetland functions and values.¹⁰ "Wetland buffers are essential to maintain viable wildlife habitat ..."¹¹ The *Yakima County BAS Review* documents that river and stream buffers are necessary to protect these fish and wildlife habitats.¹² Tree cutting, road building, clearing, and the construction of buildings may affect riparian habitat features.¹³ And significantly reducing buffers below the recommended widths, "may result in short- and long-term loss of both riparian and

⁸ The ferruginous hawk and sage grouse inhabit Yakima County's shrub-steppe habitats and are on the state or federal list of threatened or endangered species. AR 3308, *Yakima County's Review of Best Available Science for Inclusion in Critical Areas Ordinance Update* p. 182 (October 2006). Hereinafter *Yakima County BAS Review*.

⁹ AR 3256, *Yakima County BAS Review* p. 130.

¹⁰ AR 3264 – 82, *Yakima County BAS Review* pp. 138 – 156.

¹¹ AR 3271, *Yakima County BAS Review* p. 145.

¹² AR 3195 – 3206, *Yakima County BAS Review* pp. 69 – 80.

¹³ AR 3206, *Yakima County BAS Review* p. 80.

instream habitat quality for fish and wildlife.”¹⁴ So building a house in a buffer, as the exemption in YCC 16C.03.07(1) at AR 91 allows, harms wetlands, streams, rivers, fish, and wildlife; this fails to protect the existing conditions of critical areas that the GMA requires.

For upland wildlife habitat, the *Yakima County BAS Review* recommends, among other measures, maintaining fallen wood debris and leaf litter, minimizing clearing, requiring vegetative screening adjacent to development in elk winter range areas, minimizing the conversion of shrub-steppe areas, setting distances around nests in which disturbances are avoided.¹⁵ Building a road almost a half mile long or construction or modification disturbing almost a half acre of land, as the exemptions allow, goes against these recommendations. By authorizing these activities without a permit, the County fails to ensure protection of the existing conditions of critical areas that the GMA requires.

In geologically hazardous areas, the *Yakima County BAS Review* recommends against grading on past landslides or areas susceptible to landslides.¹⁶ Yet YCC 16C.03.08 exempts uses and surface disturbances,

¹⁴ *Id.*

¹⁵ AR 3321, *Yakima County BAS Review* p. 195.

¹⁶ AR 3380, *Yakima County BAS Review* p. 225.

which would including clearing, grubbing, and grading of any size as long as it does not include excavation, fill, or irrigation. As a result, the County's regulations fall short in protecting its people and property from geologic hazards, and again, does not maintain the existing condition of the critical area as the GMA commands.

As written, the County's critical areas regulations allow direct harm to critical areas. YCC 16C.03.06 at AR 90 provides that "[a]ny incidental damage to, or alteration of, a critical area that is not a necessary outcome of the exempted activity shall be restored, rehabilitated, or replaced" But for any "necessary" damage that occurs to critical areas there is no similar requirement. So the up to a half acre of disturbed habitat and the up to half mile of new road through a wildlife habitat or buffer authorized by YCC 16C.03.09(b) and YCC 16C.03.09(c) at AR 94 are destroyed and no replacement of these lost functions and values is required. Even with the County's administrative review of the exemptions to determine if they are exempt, nothing in the critical areas regulations requires the protection of the critical areas from the exempt use or mandates the replacement of the lost critical areas.

In sum, Yakima County's own BAS illustrates that even minor activities could result in habitat disturbance. The County's failure to

include the GMA-required BAS in designating its exemptions leaves its habitats and critical areas vulnerable and subject to degradation in violation of the GMA.

2. The exemptions that except certain developments from Shoreline Management Act “substantial development permit” requirements actually exempt the development from critical areas regulation requirements.

As written, Yakima County’s critical areas regulations exemptions mimic the Shoreline Management Act (SMA) “substantial development permit,” exemptions. RCW 90.58.030(3)(e). Under the SMA, certain activities are exempted from the requirement to obtain a substantial development permit unless they are meet the definition of “substantial development.”¹⁷ However, the authority for this specific type of exemption does not exist in Growth Management Act critical areas regulation requirements. Instead, the GMA requires that critical areas regulations “protect all critical areas” and “maintain the existing

¹⁷ "Substantial development" is “any development of which the total cost or fair market value exceeds five thousand dollars, or any development which materially interferes with the normal public use of the water or shorelines of the state. RCW 90.58.030(3)(e).

conditions.” *Stevens County*, 146 Wn. App. at 511 fn.7 , 192 P.3d at 10 fn.7; *Swinomish Indian Tribal Comty.*, 161 Wn.2d at 430.

While the County’s exemptions may be appropriate for a shoreline master program, the exemptions violate the Growth Management Act and should not be included in a critical areas regulation. This is because under the Shoreline Management Act the exemptions only exempt development from the requirement to obtain a substantial development permit. The way the exemptions are written in the critical areas update makes them exemptions from the requirements of the critical areas regulations.

For example, the first important difference between the shoreline master program and the critical areas ordinance for the purpose of this issue is in the Shoreline Master Program’s YCC 16D.03.01, which includes this sentence: “All proposed uses and development occurring within Shoreline jurisdiction must conform to chapter 90.58 RCW, the Shoreline Management Act and this shoreline master program.”¹⁸ There is no equivalent requirement in YCC 16C.03.01 at AR 86. Second, YCC 16D.03.06(12), 16D.03.07, 16D.03.08, and 16D.03.09 all state that the listed development activities are exempt from requirement to obtain

¹⁸ AR 3562.

substantial development permits.¹⁹ But the critical areas regulations do not exempt the development from a specific permit, they exempt them from the critical areas regulations.²⁰ In practice, these exemptions would allow construction of a single family home without a critical areas permit, which could be detrimental to adjacent wetlands or other critical areas.

Again, Yakima County provides no evidence in the record demonstrating that the exemptions are justified by the science. And as was previously shown, the *Yakima County BAS Review* documents that that these uses and activities will harm critical areas.

3. The agricultural activities included in RCW 36.70A.560 and subject to the “Ruckelshaus Center moratorium” are excluded from the critical areas regulations by YCC 16C.01.05(3).

The Board correctly concluded that Yakima County’s critical areas regulations do not apply to “agricultural activities” covered by RCW 36.70A.560.²¹ The exemption that the Board quoted in its FDO can be found in YCC 16C.01.05(3) “Applicability” at AR 70. YCC 16C.01.05(3) refers to the bill that adopted RCW 36.70A.560 (Senate Bill 5248) rather

¹⁹ AR 3565 –69.

²⁰ AR 91 – 94 in YCC 16C.03.07; AR 94 in YCC 16C.03.08; AR 94 – 95 in YCC 16C.03.09.

²¹ AR 3754 – 55, FDO at 30 – 31.

than the codified section, but the effect is the same. So the invalid exemptions are not necessary to comply with RCW 36.70A.560.

C. The Board’s Decisions on wetland and stream buffers correctly followed the GMA’s “Best Available Science” requirements and procedures as interpreted by the appellate courts, and are supported by substantial evidence. (Futurewise Assignment of Error 1 and Issue 1)

1. Yakima County’s failure to use Best Available Science in adopting stream buffer regulations has resulted in a failure to protect all functions and values of its critical areas.

The GMA mandates 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.060(2) (emphasis added). Growth Management Hearings Boards have found that the mandate to “protect” requires that “the values and functions of such ecosystems must be maintained” and that critical areas regulations must “in no case result in a net loss of value and functions of such ecosystems” *Tulalip Tribes of Washington (Tulalip I) v. Snohomish County*, CPSGMHB Case No. 96-3-0029, Final Decision and Order, 1997 WL 29145 (Jan. 8, 1997) at 7; and *Swinomish Indian Tribal Community, et al. v. Skagit County, et al.*,

WWGMHB Case No. 02-2-0012c, Compliance Order, 2003 WL 23305927 (December 8, 2003) at 22-23, quoting *Tulalip I.*

Washington court decisions are consistent with these decisions. For example, the Supreme Court defined the protection standard as the “no-harm standard,” which “in short, protects critical areas by maintaining existing conditions.” *Swinomish Indian Tribal Cmty. v. Western Washington Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 430, 166 P.3d 1198, 1206 (2007). The Supreme Court concluded that “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.” *Swinomish Indian Tribal Cmty.*, 161 Wn.2d at 436.

Furthermore, to satisfy the mandate to protect critical areas, 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). As the Court of Appeals has held, this requires the protection of “... all functions and values.” *WEAN*, 122 Wn. App. 156, 174 – 75 (2004).

Additionally, when a local government adopts development regulations to protect all functions and values of critical areas, along with

best available science (BAS), it “shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.” RCW 36.70A.172(1) .

These mandates are ongoing, requiring Yakima County to revise its development regulations when necessary to comply with current BAS to ensure the protection of the functions and values of critical areas. RCW 36.70A.130 (1)(a); 36.70A.060(3).

Yakima County has chosen to adopt buffers in an attempt to satisfy the legislative mandate to protect the functions and values of rivers and streams in the County. The County also acknowledged the functions and values of streams and wetlands by listing them in YCC 16C.06.05.²² During the adoption of the Critical Areas Ordinance (CAO) amendments in 2009, the County reviewed a selection of science available regarding stream buffers which clearly indicated that the buffer widths established by the County in 1995 were not adequate to provide the necessary protection for streams and rivers.²³ The science advises that local conditions such as land use, soil composition, and climate as well as

²² AR 466 – 467, Yakima County Ordinance No. 13-2007, pp 68-69.

²³ AR 3197 – 3206 & 3386 – 97, *Yakima County BAS Review* pp. 71 – 80 & pp. 261 – 72.

stream type or width should be considered in determining the width of buffers and includes tables comparing ecosystem function to the buffer widths necessary to maintain those functions.²⁴ However, the County then chose to ignore that science and adopt the same narrow standard buffer widths adopted in 1995.

While Yakima County did conduct a review and listed science in its record, it is clear that the County disregarded the substance of the *Yakima County BAS Review*. Like Ferry County, there is no evidence in the record of Yakima County evaluating the science supporting the narrower stream buffers it adopted or that Yakima County compared that science to the *Yakima County BAS Review* or the other science in the record that supports wider buffers. *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 837 – 38, 123 P.3d 102, 108 – 09 (2005).. Consequently, like Ferry County’s analysis, Yakima County’s analysis of the science did not involve the required “reasoned process.” *Id.* (quoting *1000 Friends of Wash. v. City of Anacortes*, WWGMHB No. 03-2-0017, FDO (Feb. 10, 2004)). So it fails to meet the standards for departing from best available science.

²⁴ AR 3197 – 3206 & 3386 – 97, *Yakima County BAS Review* pp. 71 – 80 & pp. 261 – 72.

Such a reasoned process would also have to reference the science to support the narrower buffers that were chosen by the County. *Ferry County*, at 155 Wn.2d at 834, 123 P.3d at 107. As noted by the Board, “[a]lthough the County spends seven pages of its Response Brief addressing aquatic buffers, the Board finds no specific citation to any BAS which actually supports the County’s adopted buffers.”²⁵

The *Yakima County’s BAS Review* was not short on data, discussing ranges of buffer widths appropriate for protecting different functions based upon scientific recommendations.²⁶ The County’s BAS Review also included numerous tables presenting specific buffer recommendations for protecting different specific functions.²⁷ A cursory glance at these recommendations makes it clear that Yakima County’s buffers do not meet the widths necessary to protect all functions. For illustrative purposes, the Growth Management Hearings Board included a table in its Final Decision and Order.²⁸ This table consisted of the individual functions Yakima County sought to protect, compared with the effective buffer width ranges for the specific functions as detailed by the

²⁵ AR 3765, FDO at 41.

²⁶ AR 3195 – 3207, *Yakima County BAS Review* pp. 69–81.

²⁷ AR 3386 – 97, *Yakima County BAS Review* Appendix A pp. 261–72.

²⁸ AR 3766, FDO at 42.

Knutson/Naef (1997) study cited in the BAS Review. Comparing the table to the standard buffer widths in Yakima County, and contrasting that with the potential buffer reductions, reveals the County's failure to protect the various functions and values of streams and wetlands that it recognizes in YCC 16C.06.05.²⁹

In reaching its conclusion, the Board utilized many studies to compile the table, including the Knutson/Naef study, which is a synthesis of numerous independent studies; the ranges in the table reflect the entire range of recommendations of the independent studies.³⁰ The *Yakima County BAS Review* repeatedly cites to this study, so Yakima County must believe it has scientific validity.³¹ Further, the Board utilized other studies found throughout the County's BAS Review: "Additional studies are provided in the *Yakima County BAS Review* Appendix which also demonstrate Yakima County's failure to include BAS in the development

²⁹ AR 3765, FDO at 40. YCC 16C.06.05(1)-(3) lists the functional properties of streams, lakes ponds, wetlands; stream channels; and lakes, ponds, and wetlands; 16C.06.05 (5) lists wildlife habitat functions.

³⁰ The County's own BAS Review contains a table of the Knutson/Naef study synthesis at AR 3388 – 94, *Yakima County BAS Review* Appendix A pp. 263–69. It clearly reflects buffer widths documented by numerous independent studies.

³¹ AR 3136 – 3218, *Yakima County BAS Review* pp. 10 – 92.

of its stream buffers.”³² Keeping with *WEAN*, the Board noted that the County is required to protect all functions and values of critical areas, not just a select few. *WEAN*, 122 Wn. App. at 172 – 73.³³ The Board pointed out that this is consistent with the County’s own BAS Review, which states that “[buffers] should be sufficiently wide to achieve the full gamut of riparian and aquatic ecosystem functions . . .”³⁴ In developing buffer widths, Yakima County ignored this requirement and took an inappropriately simplistic approach by combining the ranges for specific functions to form one overly general range that allows for very narrow buffers.

By using this approach which allows 25 foot wide buffers for all but Type 1 streams, to echo the Board, the County’s buffer widths still “fall below the mean buffer for all functions and below the range of buffer widths for *all* functions *except* temperature control and pollution filtration.”³⁵ For example, the *Yakima County BAS Review* documents that the minimum effective buffer width to provide large woody debris, which

³² AR 3765, FDO at 42. The appendix can be found at AR 3386 – 97, *Yakima County BAS Review* pp. 261 – 72.

³³ AR 3765, FDO at 42.

³⁴ AR 3197, *Yakima County BAS Review* p. 71.

³⁵ AR 3765, FDO at 42.

as explained below is needed to provide for steelhead and salmon habitat, is 90 feet and 525 feet may be needed.³⁶ Organic matter input to provide food for the aquatic environment requires at least 170 feet and 262 feet may be needed. Maintaining microclimate requires at least 141 feet and 784 feet may be needed.³⁷ Microclimate results from the cooler summer temperatures and warmer winter temperatures that occur near rivers and streams with adequate riparian buffers.³⁸ Such microclimate inducing buffers are necessary for the survival of steelhead and salmon because they lower the high summer temperatures that are problematic for those species in the Yakima Basin.³⁹ However, the stream buffers Yakima County adopted are all smaller than the widths needed to protect these functions. The buffer widths adopted by the County are found in YCC 16C.06.16, Table 6-1, and are:

- Type 1, 100 feet.
- Type 2, 75 feet, which can be reduced to 25 feet.
- Type 3, 50 feet, which can be reduced to 25 feet.
- Type 4, 25 feet, which can be reduced to 15 feet.
- Type 5, No buffer standards.⁴⁰

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

³⁷ *Id.*

³⁸ AR 3145 & 3169 – 72, *Yakima County BAS Review* p. 19 & pp. 43 – 46.

³⁹ *Id.*

⁴⁰ AR 3763, FDO p. 39.

Thus, the County's approach of using such narrow buffers quite simply ignores the extensive BAS and the County's own BAS Review that suggests wider buffers are necessary to protect all functions and values. Failing to protect the rivers and streams also violates RCW 36.70A.060(2)'s requirement to protect critical areas. *WEAN*, 122 Wn. App. at 170, 93 P.2d 892. Yakima County's failure to protect all of the functions and values of its critical areas is an erroneous interpretation of the GMA and is not supported by substantial evidence. The Eastern Board recognized Yakima County's clear failure to protect all functions and values of critical areas, and this Court should affirm the Board's decision.

2. Yakima County has departed from the Best Available Science without reasoned justification, and thereby, has failed to protect all functions and values of its critical areas.

If a County decides to deviate from BAS, it must provide "a reasoned justification for such a departure. See *Ferry County v. Concerned Friends*, 155 Wn.2d 824, 837 – 38, 123 P.3d 102, 108-109 (2005); WAC 365-195-915 (1)(c)(i)-(iii)." *Swinomish Indian Tribal Cmty.*, 161 Wn.2d at 431, 166 P.3d at 1206. The only justification offered by the County is that there is no Yakima County science applicable to stream buffers.

However, the *Yakima County BAS Review* includes extensive local science, so the County did not face a deficiency of relevant data. For example, the status of the salmon and steelhead is summarized for the Yakima Basin and their problems identified.⁴¹ Riparian characteristics specific to Yakima County were identified.⁴² Other county specific conditions were also inventoried, such as the effects of channelization on rivers and streams and water quality.⁴³ While the *Yakima County BAS Review* noted that few of the studies address the unique geography of eastern Washington and are difficult to apply locally, the report still recommended buffers widths.⁴⁴ Additionally, the *Yakima County BAS Review* identifies impaired riparian functions and a lack of large woody debris as some of the “most critical habitat concerns” in the Yakima Basin.⁴⁵ This is why the *Yakima County BAS Review* states that “[t]he importance of riparian areas, combined with the large losses that have already occurred, make it vital that the remaining riparian areas be

⁴¹ AR 3159 – 75, *Yakima County BAS Review* pp. 43 – 49.

⁴² AR 3135 – 39, *Yakima County BAS Review* pp. 9 – 13.

⁴³ AR 3175 – 91, *Yakima County BAS Review* pp. 49 – 65.

⁴⁴ AR 3195 – 3206, *Yakima County BAS Review* pp. 69 – 80.

⁴⁵ AR 3172, *Yakima County BAS Review* p. 46.

protected (USDIBOR 2002).”⁴⁶ “USDIBOR 2002” refers to the U.S. Department of the Interior’s 2002 *Interim comprehensive basin operating plan for the Yakima Project, Washington*, which includes Yakima basin specific science.⁴⁷ In fact the bibliography of Chapter 2 of the *Yakima County BAS Review*, which covers rivers and streams, cites no fewer than 20 sources that include the Yakima basin, the Yakima River, or its tributaries in the title.⁴⁸ And this does not include study *Classification and management of riparian and wetland sites in the national forests of eastern Washington*, which would include the national forests in Yakima County.⁴⁹

So, a “reasoned justification” for departing from the buffer recommendations is nowhere to be found in the record. As detailed above, the *Yakima County BAS Review* summarized an extensive amount of Yakima County specific science and included recommended buffer widths. Yakima County has plainly failed to identify, weigh, or minimize any risks associated with its narrow buffers. The County has not provided

⁴⁶ AR 3139, *Yakima County BAS Review* p. 13.

⁴⁷ AR 3221, *Yakima County BAS Review* p. 95.

⁴⁸ AR 3215 – 21, *Yakima County BAS Review* pp. 89 – 95.

⁴⁹ AR 3218, *Yakima County BAS Review* p. 92.

reasoned justification for a departure from BAS based on unique local conditions or otherwise, thus the Board's decision should be upheld.

But, even if there is a departure, the GMA still requires that the regulations for critical areas must "protect" the critical areas. RCW 36.70A.060(2); *WEAN*, 122 Wn. App. at 170, 93 P.2d 892. And as we showed previously, the adopted stream buffers will not protect the riverine critical areas.

3. Yakima County has failed to take a precautionary or no risk approach in the absence of science, and thereby, has failed to protect all functions and values of critical areas.

The science in the record, which includes extensive science specific to streams and rivers in Yakima County, is more than sufficient for establishing buffers to protect functions and values of Yakima County streams and rivers. However, even if this Court were to find an absence of adequate science, the County failed to take the "precautionary or no risk approach" prescribed by WAC 365-195-920. As WAC 365-195-920, which provides guidelines pertaining to the GMA and BAS, explains:

Where there is an absence of valid scientific information or incomplete scientific information relating to a county's or city's critical areas leading to uncertainty about which development and land use could lead to harm of critical areas or uncertainty about the risk to critical area function...counties...should use the following approach:

(1) ‘precautionary or no risk approach’ in which development and land use activities are strictly limited until the uncertainty is sufficiently resolved...

As noted above, these guidelines follow the common sense approach to satisfying the GMA’s mandate to protect the functions and values of critical areas. The alternative is clearly an approach that risks harm to the functions and values of critical areas due to the unknowns. This is clearly contrary to the conclusion of our state Supreme Court 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. *Swinomish Indian Tribal Cmty.*, 161 Wn.2d at 436, 166 P.3d at 1209. As noted by the Board, Yakima County failed to take any precautionary measures to prevent or even minimize risks by choosing the lowest possible buffers widths within the known scientific recommendations when it very well could have established wider buffers.⁵⁰ Thus, the Board’s finding that Yakima County failed to take a precautionary or no risk approach should be upheld.

⁵⁰ AR 3763, FDO p. 44.

4. The Board’s decision finding that the wetland buffer reductions violate the GMA is supported by substantial evidence.

As we have seen, the *WEAN* decision concluded that: “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.” *WEAN*, 122 Wn. App. at 174 – 175. And *Swinomish Indian Tribal Community* requires maintaining the existing condition of critical areas. *Swinomish Indian Tribal Cmty.*, 161 Wn.2d at 430, 166 P.3d at 1206. Since wetlands are a critical area, this standard applies to them as well. RCW 36.70A.030(5).

As with the adopted stream buffers, the wetland buffers reductions permitted by the County result in buffers smaller than the science supports and fail to adhere to the Department of Ecology’s recommended standards. The buffers adopted by the County in YCC 16C.06.16 are:

- Type 1: (standard/minimum) 200’/25’
- Type 2: 100’/25’
- Type 3: 75’/25’
- Type 4: 50’/25’⁵¹

⁵¹ AR 473 – 474, ,YCC 16C.06.16, Table 6-2; AR 3763, FDO at 39.

And based on YCC 16C.03.23, the County is authorized to perform administrative adjustments that further reduce the minimum buffer widths.⁵²

The *Yakima County BAS Review* relates that:

The primary purpose of buffers is to protect and maintain the wide variety of functions and values provided by wetlands (or other aquatic areas). The physical characteristics of buffers—slope, soils, vegetation, and width—determine how well buffers reduce the adverse impacts of human development and provide the habitat needed by wildlife species that use wetlands.⁵³

The Department of Ecology, which provides counties and cities with technical assistance related to the protection of wetlands, wrote to Yakima County seven times to inform the County that the BAS did not support the minimum buffers it adopted.⁵⁴ Specifically, Ecology cautioned that “allowing minimum buffers to shrink to as little as 25 feet for all wetlands, even those with the highest habitat function, will certainly result in degradation of wetland functions.”⁵⁵ The County’s own analysis concludes that the minimum buffer supported by the scientific literature is

⁵² AR 436 – 38, YCC 16C.03.23; AR 3772 – 73, FDO at 49–50.

⁵³ AR 3264, *Yakima County BAS Review* p. 138.

⁵⁴ AR 1843.

⁵⁵ AR 1844.

98 feet, and the maximum recommended buffer is 350 feet.⁵⁶ The County's data elaborates even further and recommends a minimum buffer of more than 3,000 feet for some wildlife species.⁵⁷ The County also noted that the range given by many of the studies was qualified with the proviso that "the lower end of the spectrum is the minimum necessary to maintain physical and chemical processes, while the upper end of the spectrum may be necessary to maintain biological processes."⁵⁸ And to protect all of the functions and values of critical areas both must be protected. *WEAN*, 122 Wn. App. at 174 – 175

Thus the County's buffers under 98 feet have no support in the County's own science, which recognizes that smaller buffers could impact the function of biological processes. But the County permits all of its wetland buffers to be reduced to 25 feet. Consequently, the minimum buffer identified by the County is insufficient based on its own science and the GMA mandate to protect all the functions and values of the wetlands.

⁵⁶ AR 3280, *Yakima County BAS Review* p. 154, Table 17.

⁵⁷ AR 3276, *Yakima County BAS Review* p. 150, Table 15.

⁵⁸ AR 3280, *Yakima County BAS Review* p. 154.

As the Board noted the county allows an almost 90 percent reduction in the buffer for Type 1 wetlands.⁵⁹ As the Board wrote, “Yakima County does not reference any BAS justifying a reduction in a standard buffer by any percentage, let alone up to 90 percent.”⁶⁰ There is substantial evidence on the record supporting the Board’s finding that Yakima County’s allowance for wetland buffer reductions violates 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 comply with the Growth Management Act. (Futurewise Assignment of Error 2 and Issue 2)

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

An appeal is moot “when it presents purely academic issues and when it is not possible for the court to provide effective relief.” *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 91 Wn. App 1, 22, 951 P.2d 1151, 1162 (1998). Under the public interest exception, the Court of Appeals has discretion to decide an appeal that has become moot if there is a question of “continuing and substantial public interest.” *King*

⁵⁹ AR 3773, FDO p. 49.

⁶⁰ *Id.*

County, 91 Wn. App at 23. But resorting to that exception is not necessary here.

In October 2009, Yakima County adopted Ordinance 2-2009, which included clarifications regarding buffer widths and adjustments and the applicability of the grading code. However, Futurewise is challenging Yakima County's failure designate and protect Type 5 streams. As the Board recognized, Ordinance 2-2009 does "add clarifying language to Type 5 streams..." but it found that "[appellants'] argument as to Type 5 streams – not recognized as a critical area, unregulated under the CAO – was retained as well."⁶¹ Because Ordinance 2-2009 did not amend the CAO provisions that exclude Type 5 streams from critical areas designation and protection, Futurewise can gain no relief from the amendment; thus, the challenge to this exclusion is not moot.

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.

Type 5 streams are important fish and wildlife habitat and also play an important role in maintaining the function of other classifications

⁶¹ AR 3763, FDO p. 16.

of streams and riparian areas. As elaborated in the sections above, Yakima County is required to designate and protect critical areas within its boundaries, including fish and wildlife habitats. *Ferry County*, 155 Wn.2d at 832 – 33; *Stevens County*, 146 Wn. App. at 511 fn.7. Additionally, as previously mentioned, the GMA requires that critical areas regulations protect all functions. RCW 36.70A.172(1); *WEAN*, 122 Wn. App. at 174-175). Special consideration is given to anadromous fisheries. RCW 36.70A. 172 (1).

Yakima County chose not to regulate Type 5 streams, which leaves the entire stream system and surrounding critical areas vulnerable to harm. Yakima County Ordinance No. 13-2007 in YCC 16C.06.06(5) provides that:

(i) Type 5 streams are all ephemeral streams within Yakima County not classified as Type, 1, 2, 3, or 4. Type 5 streams are not regulated.⁶²

Yakima County Ordinance No. 13-2007 in YCC 16C.02.370 defines a stream as:

(i) water contained within a channel, either perennial, intermittent or ephemeral. Streams include natural watercourse modified by many, for example, by stream flow manipulation, channelization, and relocation of the

⁶² AR 486, Yakima County Ordinance No. 13-2007 p. 69.

channel. They do not include irrigation ditches, wasteways, drains, outfalls, operational spillways, canals, stormwater runoff facilities, or other artificial watercourses.⁶³

Yakima County Ordinance No. 13-2007 in YCC 16C.02.175 defines an ephemeral stream as a stream that flows only in response to precipitation and lacking groundwater association with water flowing usually less than 30 days per year.⁶⁴

Even streams that go dry part of the year support fish. As documented by the *Yakima County BAS Review*, 15 percent of the summer steelhead that spawn in the Satus Creek drainage spawn in “tributaries that regularly go dry by mid- to late-May.”⁶⁵ And the summer steelhead is listed as a federally threatened species.⁶⁶

The *Yakima County BAS Review* reports that more than half of the stream corridors in Yakima County are intermittent or ephemeral streams.⁶⁷ These types of streams compose a minority of the streams in

⁶³ AR 414, Yakima County Ordinance No. 13-2007 p. 16.

⁶⁴ AR 407, Yakima County Ordinance No. 13-2007 p. 9.

⁶⁵ AR 3163, *Yakima County BAS Review* p. 37.

⁶⁶ AR 1925, Hazen p. 13.

⁶⁷ AR 3135, *Yakima County BAS Review* p. 9.

the Cascades and foothills and a majority of the streams in the Columbia Basin.⁶⁸

As the County's *BAS Review* makes clear, rivers act as a system with each of the different stream types contributing to fish and wildlife habitat and functions and values.⁶⁹ One of the important contributions of ephemeral streams is to provide sediments that help form salmon and fish habitat in the other reaches of the stream system. The *Yakima County BAS Review* reports that "ephemeral streams are typically found on steep ridges and hillslopes..."⁷⁰ These steep headwaters and hillslope areas store sediment that is transported downstream by intense thunderstorms or rain-on-snow events.⁷¹ These headwaters, including Type 5 streams, have the largest bed materials, such as gravels.⁷² When this sediment is transported downstream it creates a "shifting habitat mosaic" downstream including new bars and islands, which provide important fish and wildlife habitats.⁷³

⁶⁸ AR 3134 – 35, *Yakima County BAS Review* pp. 8 – 9.

⁶⁹ AR 3131 – 3221, *Yakima County BAS Review* pp. 5 – 95.

⁷⁰ AR 3134, *Yakima County BAS Review* p. 8.

⁷¹ AR 3135, *Yakima County BAS Review* p. 9.

⁷² AR 3152, *Yakima County BAS Review* p. 26; AR 1744, Tab 4-D, K. L. Knutson & V. L. Naef, *Management Recommendations for Washington's Priority Habitats: Riparian* p. 20 (Wash. Dept. Fish and Wildlife, Olympia WA: 1997).

⁷³ AR 3141, *Yakima County BAS Review* p. 15.

The “maintenance” of these features “depends on an adequate supply of sediment...”⁷⁴

Salmon and steelhead depend on these habitats including pools, riffles, substrates [the beds of the rivers and streams], and other features.⁷⁵

In fact the factors that currently limit salmon and steelhead productivity the Yakima Basin include “fine sediment delivery and deposition.”⁷⁶

So failing to designate and protect Type 5 streams means that the important function of providing the right kind of sediments will no longer be provided. Road construction, fills, excavations, and other forms of development in or near Type 5 streams may either disrupt proper sediment deposits or accelerate erosion or detrimental sediments releases during thunderstorms and rain-on-snow events. For these reasons, the *Yakima County BAS Review* notes that the recovery of salmon and steelhead species will require the “revision, implementation, and enforcement of land use ordinances that provide protection for natural ecological processes within the instream and riparian corridors.”⁷⁷ Yakima County’s failure to adopt development regulations to protect the existing conditions

⁷⁴ *Id.*

⁷⁵ AR 3158, *Yakima County BAS Review* p. 32.

⁷⁶ AR 3170, *Yakima County BAS Review* p. 44.

⁷⁷ AR 3173, *Yakima County BAS Review* p. 47.

of Type 5 streams not only impacts those streams, but also directly and indirectly impacts proper sedimentation in Type 1-4 rivers and streams and their salmon and steelhead habitat.

Another important function of ephemeral streams is to provide riparian habitat. But YCC 16C.02.175 notes that “[t]he lack of any groundwater association results in a lack of a distinctive riparian vegetation compared to the surrounding landscape.” However, the County’s conclusion is not based on the scientific evidence in the record. Further, with or without vegetation, Type 5 streams contribute essential fish and wildlife habitat functions to the stream system. As the *Yakima County BAS Review* explains, “the riparian area encompasses an aquatic area between the low and high water marks and that portion of the terrestrial landscape, from the high water mark toward the upland, where elevated water tables or flooding may influence vegetation and the ability of soils to hold water.”⁷⁸ In Yakima County “good riparian habitat generally is found along some forested headwater reaches.”⁷⁹ Headwaters

⁷⁸ AR 3136, *Yakima County BAS Review* p. 10.

⁷⁹ AR 3138, *Yakima County BAS Review* p. 12.

streams include Type 5 streams.⁸⁰ “Because riparian habitat more strongly influences the structure and function of small streams than large streams, small streams are more prone to pronounced impacts from the removal of riparian vegetation than are large streams and rivers.”⁸¹ “Examples of activities that affect riparian habitat features include tree cutting, road building, agriculture, grazing, clearing, earthmoving, mining, filling, burning, or construction of buildings or other facilities.”⁸²

Yakima County's BAS Review notes that “[a]pproximately 80 percent of all wildlife in Washington State uses riparian areas at some life stage. Riparian corridors are important for wildlife as migration and dispersion corridors.”⁸³ They provide other benefits as well:

Undisturbed riparian communities provide abundant food, cover, and water for wildlife. Riparian vegetation supplies food and cover for insects emerging from the river as well as for its own resident invertebrate populations. These invertebrates, in turn, support numerous mammals, birds, reptiles, and amphibians, and assorted invertebrates. For these reasons, riparian areas generally provide high-value wildlife habitat.⁸⁴

⁸⁰ AR 1744, Tab 4-D, K. L. Knutson & V. L. Naef, *Management Recommendations for Washington's Priority Habitats: Riparian* p. 20 (Wash. Dept. Fish and Wildlife, Olympia WA: 1997).

⁸¹ AR 3205, *Yakima County BAS Review* p. 79.

⁸² AR 3206, *Yakima County BAS Review* p. 80.

⁸³ AR 3136, *Yakima County BAS Review* p. 10.

⁸⁴ AR 3137, *Yakima County BAS Review* p. 11.

Riparian areas and adjacent forests also provide important functions for in stream habitats. “Forest ecosystems adjacent to stream corridors provide 99 percent of the energy and carbon sources in aquatic food webs.”⁸⁵ These food sources are important to sustain salmon and steelhead populations.⁸⁶ Woody debris is an important component of fish and wildlife habitat in streams and rivers.⁸⁷ “The majority of woody debris is supplied by the riparian area, and to a lesser extent, by the zone of influence.”⁸⁸ The zone of influence is the upland vegetation adjacent to the riparian habitat that provides functions similar to the riparian habitat.⁸⁹

In addition to *Yakima County’s BAS Review*, other evidence in the record supports the need to protect Type 5 streams and their riparian areas.

In forested areas of Eastern Washington

Because of the interconnected nature of stream systems, the habitat quality of most streams is important to fish production. Even small headwater streams (DNR Water Types 4 and 5) that have no fish influence the habitat quality downstream in fish-bearing waters. For example, small streams recruit large organic debris that may later be transported to fish habitats (Bisson et al. 1987). Small

⁸⁵ AR 3144, *Yakima County BAS Review* p. 18.

⁸⁶ AR 3158, *Yakima County BAS Review* p. 32.

⁸⁷ *Id.*

⁸⁸ AR 3144, *Yakima County BAS Review* p. 18.

⁸⁹ AR 3139, *Yakima County BAS Review* p. 13.

streams can also provide storage and the slow release of sediments, thereby regulating the flow of sediments downstream (Sullivan et al. 1987, Benda 1988). Many damaging landslides begin in small headwater streams as a result of logging roads, timber harvest, or other activities in the upper watershed. Retaining intact riparian habitat along small headwater streams is essential to protecting downstream fish habitat, particularly in areas with unstable soils (Cederholm 1994).⁹⁰

In the shrub-steppe areas of Yakima County Washington:

Small, intermittent streams and draws may naturally have little or no characteristic riparian vegetation. Instead, they consist of largely upland plant species, including big sagebrush, bitterbrush, rabbitbrush, and spiny hopsage. The presence of woody and herbaceous vegetation assists in moderating stream temperature, sedimentation, water quality and quantity, and debris flows downstream.⁹¹

The *Yakima County BAS Review* identifies impaired riparian functions and a lack of large woody debris as some 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 1744, Tab 4-D, K. L. Knutson & V. L. Naef, *Management Recommendations for Washington’s Priority Habitats: Riparian* p. 20 (Wash. Dept. Fish and Wildlife, Olympia WA: 1997). The *Yakima County BAS Review* repeatedly cites this report as Knutson and Naef 1997). AR 3136 – 3218, *Yakima County BAS Review* pp. 10 – 92.

⁹¹ AR 1743, *Id.* at p. 19.

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

2002).”⁹³ Despite this strong recommendation, Yakima County fails to protect Type 5 streams, their riparian habitats, and the zone of influence, contra its own science.

In conclusion, the designation and protection of Type 5 streams is the only way to protect the connectivity of the multilevel stream system. Regulation through other CAO provisions provides no guarantee that Type 5 stream biological functions will be protected. The Board concluded, and the *Yakima County BAS Review* confirms that that Type 5 streams are critical to maintaining the overall health of the stream corridor, habitat and ecological functions, water quality functions, as well as the health of fish and wildlife.⁹⁴ Allowing development in or near Type 5 streams without adequate buffers will not maintain the existing conditions of critical areas as the GMA requires. The Board correctly followed the law as decided by the Supreme Court and Court of Appeals. Substantial evidence supports the Board’s decision regarding designation of Type 5 Streams; thus the Board’s decision must be affirmed.

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

⁹⁴ AR 3765, FDO at 36.

V. 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 and supporting authority. Futurewise respectfully requests that this Court affirm the Board's decision. For the foregoing reasons, Futurewise requests the Board reverse the Superior Court on the two questions on which the court did not affirm the Eastern Board and reinstate the Final Decision and Order of the Growth Management Hearings Board.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies under the laws of Washington State and the pain of perjury that on this 13th day of June 2011, I caused the foregoing Brief of Appellants Futurewise to be served on the following parties by regular U.S. Mail, postage prepaid:

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

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