

**FILED**

AUG 19 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 297632

(Yakima County Superior Court No. 10-2-01392-9)

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COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION THREE

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

Respondents/Cross-Appellants,

v.

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

Appellants/Cross-Respondents,

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**JOINT BRIEF OF RESPONDENTS/CROSS-APPELLANTS**

---

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**TABLE OF CONTENTS**

I. INTRODUCTION .....1

II. ASSIGNMENTS OF ERROR AND ISSUES RELATED TO ASSIGNMENTS OF ERROR .....4

    A. Growth Board Decision (RAP 10.3(h)) .....4

    B. Superior Court Decision (RAP 10.3(a)(4)).....5

III. STATEMENT OF THE CASE.....6

    A. County Legislative Process.....7

    B. Growth Board Proceedings .....9

    C. Superior Court Proceedings .....11

IV. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, AND STANDARD OF REVIEW .....12

V. ARGUMENT .....16

    A. The Growth Board Erroneously Concluded that the County’s Decision Not to Designate and Regulate Ephemeral Streams as Fish and Wildlife Habitat Conservation Areas Violated the GMA.....16

        1. The County’s BAS Indicates that Ephemeral Streams Do Not Provide Fish and Wildlife Habitat..... 17

        2. The County’s Decision Not to Designate Ephemeral Streams as Fish and Wildlife Habitat Conservation Areas Was Guided By BAS..... 19

        3. The Growth Board Improperly Failed to Defer to the County’s Planning Decisions With Respect to the Regulation of Ephemeral Streams..... 22

        4. The County’s Decision Regarding Ephemeral

	Streams Was the Result of a Reasoned Process.....	25
5.	The Issue Regarding the County’s Regulation of Ephemeral Streams is Moot or Otherwise Barred by the Statute of Limitations.....	28
B.	The Superior Court Correctly Concluded that the County’s Stream Buffers, and Adjustments to Stream and Wetland Buffers, Were Supported by BAS—The Growth Board’s Decision to the Contrary is Erroneous. ...	32
1.	The Buffers Are Within the Range of BAS .....	36
2.	The County Compiled the Best “Available” Science Regarding Buffers, Recognizing that It Was an Imperfect Fit t.....	36
3.	The County’s Decisions Regarding Buffers Were the Result of a Reasoned Process.....	38
4.	The Board Failed to Defer to the County By Imposing Imperfect Science and Ignoring Unique Aspects of the County’s CAO.....	41
C.	Futurewise’s Challenge to the County’s CAO Exemptions Has Been Rendered Moot By the County’s Recent Adoption of Ordinance 6-2011, Which Repealed those Exemptions.....	48
	CONCLUSION.....	49

## TABLE OF AUTHORITIES

### CASES

<i>Cortez-Kloehn v. Morrison</i> , 162 Wn. App. 166 (2011).....	6
<i>Ferry County v. Concerned Friends of Ferry County</i> , 155 Wn.2d 824 (2005).....	26, 33
<i>Hazen et al. v. Yakima County</i> , EWGMHB Case No. 09-1-0014.....	6, 31, 32
<i>Honesty in Env'tl. Analysis &amp; Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hr 'gs Bd.</i> , 96 Wn. App. 522, 526, 979 P.2d 864 (1999).....	15
<i>Kelley v. Centennial Contractors Enter., Inc.</i> , 147 Wn. App. 290 (2008).....	5, 6
<i>Kittitas County v. E. Wash. Growth Mgmt. Hr 'gs Bd.</i> , 2011 Wash. LEXIS 596 (Wash. July 28, 2011) .....	45
<i>Lewis County v. W. Wash. Growth Mgmt. Hr 'gs Bd.</i> , 157 Wn.2d 488, 497 (2006).....	15
<i>Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hr 'gs Bd.</i> , 2011 Wash. App. LEXIS 1862 (Wash. Ct. App. Aug. 5, 2011).....	34, 36
<i>Quadrant Corp. v. Washington State Growth Management Hr 'gs Board</i> , 154 Wn.2d 224 (2005).....	14, 22
<i>Skagit Surveyors and Engineers, LLC, v. Friends of Skagit County</i> , 135 Wn.2d 542 (1999).....	7
<i>Sorenson v. City of Bellingham</i> , 80 Wn.2d 547 (1972).....	31
<i>Spokane Research &amp; Def. Fund v. City of Spokane</i> , 155 Wn.2d 89, 117 P.3d 1117 (2005).....	31, 48
<i>Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hr 'gs Bd.</i> , 161 Wn.2d 415, 430 (2006).....	26, 27, 46
<i>Thurston County v. W. Wash. Growth Mgmt. Hr 'gs Bd.</i> ,	

164 Wn.2d 329 (2008)..... 13

STATUTES

RCW 34.05.570 ..... 4, 5,14, 15  
RCW 36.70A.030..... 7, 23  
RCW 36.70A.050..... 24  
RCW 36.70A.060..... 7  
RCW 36.70A.130..... 7  
RCW 36.70A.140..... 8  
RCW 36.70A.170..... 2, 24  
RCW 36.70A.172..... passim  
RCW 36.70A.250..... 3  
RCW 36.70A.290..... 31  
RCW 36.70A.300..... 12  
RCW 36.70A.320..... 2, 13, 30  
RCW 36.70A.3201..... 2, 14  
RCW 43.330.007 ..... 9

Yakima County and Yakima County Farm Bureau, Inc. (collectively “Respondents”) submit this Joint Brief of Respondents/Cross-Appellants in response to (1) the Brief of Appellants Futurewise, Wes Hazen and Upper Wenas Preservation Association (collectively “Futurewise”), and (2) the Brief of Appellant Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”).

## **I. INTRODUCTION**

Although the Growth Management Act (“GMA”), chapter 36.70A RCW requires counties to include “best available science” (“BAS”) in developing critical areas regulations, it does not create a technocracy, *i.e.* a society managed by scientific and technical experts. RCW 36.70A.172. Lamentably, however, the briefs of Futurewise and the Yakama Nation (collectively “Appellants”) interpret the GMA to require exactly that.

Indeed, Appellants essentially argue that the GMA requires Yakima County (“County”) to amass volumes of scientific studies, statistically analyze the data therein, and then develop critical areas regulations that fit the sole, and therefore, ideal answer produced thereby. For Appellants, this process apparently yields a perfect size of stream buffer widths and even provides an unmistakable answer regarding whether ephemeral streams constitute critical areas. According to

Appellants, if there is any deviation from this ideal, the County has failed to “follow” BAS and is, therefore, out of compliance with the GMA.

Fortunately for the County, the GMA doesn’t create a technocracy. By legislative design, the GMA recognizes that science isn’t always clear, regional differences matter, and local decision making is paramount. Indeed, the only way to arrive at a technocratic interpretation of the GMA is by crawling over, under, or around its most rudimentary provisions.

For example, the GMA endows counties with a “broad range of **discretion**” in complying with the GMA and flexibility to “balance priorities...in full consideration of **local circumstances.**” RCW 36.70A.3201 (emphasis added). For this reason, growth boards are statutorily obligated to defer to local decision making, rather than imposing their own policy preferences. RCW 36.70A.320(3).

This local discretion also extends to the requirement to designate and protect “critical areas.” *See* RCW 36.70A.170 (requiring counties to “designate **where appropriate**...critical areas” (emphasis added). By definition, something that is “critical” is “indispensible” or “vital.” Merriam Webster Dictionary (online ed. 2011). In other words, not everything can be “critical.” Consistent with a preference for local decision making, if there is a question regarding whether something is, or isn’t, “critical”, the local legislative body’s determination is paramount.

Finally, the GMA requires counties to “**include** the best available science” in developing regulations to protect critical areas. RCW 36.70A.172 (emphasis added). As candidly stated by our Supreme Court, “the GMA does not require the county to follow BAS; rather, it is required to ‘include’ BAS in its record.” *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. H’rgs Bd.*, 161 Wn.2d 415, 430 (2006). The BAS must then be used in a reasoned legislative process, but does not dictate a result. *Id.* at 431. Thus, even with respect to the protection of critical areas, the GMA implements the principle of local decision making, rather than creating a technocracy.

When these fundamental concepts are considered, it is clear that the Eastern Washington Growth Management Hearings Board<sup>1</sup> failed to accord the County the requisite deference in the way it planned for growth under the GMA. Specifically, the Growth Board erred in concluding that ephemeral streams are critical areas. Administrative Record (“AR”) 3726 (Decision at 2). It also erred by employing Respondents’ technocratic approach to the GMA by concluding that the County’s stream buffer sizes were not supported by BAS. *Id.* at 3726-27 (Decision at 2-3). Not

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<sup>1</sup> In 2010, three regional growth management hearings boards were legislatively consolidated into a single board, with three regional panels. See RCW 36.70A.250. Accordingly, for ease of reference, this brief utilizes the singular term “Growth Board.”

surprisingly, the Honorable Judge Blaine G. Gibson reversed the Growth Board on these issues. CP 1-5.

Respondents respectfully request that this Court reverse the challenged portions of the Growth Board's decision.

**II.**  
**ASSIGNMENTS OF ERROR AND ISSUES RELATED TO**  
**ASSIGNMENTS OF ERROR**

**A. Growth Board Decision (RAP 10.3(h))**

**Assignment of Error**

The Growth Board erred in issuing its Final Decision and Order (“Decision”), dated May 5, 2010. AR 3725-3821 (Decision).

**Issues Pertaining to Assignment of Error**

1. By definition, ephemeral streams “flow only in response to precipitation with no groundwater association, [and] usually less than 30 days per year.” AR 2827 (Yakima County Code (“YCC”) 16C.02.175). The Growth Board concluded that the County failed to comply with the GMA by not designating ephemeral streams as critical areas, namely Fish and Wildlife Habitat Conservation Areas. AR 3756-60. Was the Growth Board's Decision in this regard arbitrary and capricious, unsupported by substantial evidence, or an erroneous interpretation or application of the law? *See* RCW 34.05.570(3)(d), (e), and (i).

The standard of review for this error is addressed in further detail

below. *See infra*, at 13-16.

2. The Board concluded that the County's stream buffers, and authorized adjustments to stream and wetland buffers, were not supported by BAS. AR 3760-74. Was the Board's Decision in this regard arbitrary and capricious, unsupported by substantial evidence, or an erroneous interpretation or application of the law? *See RCW 34.05.570(3)(d), (e), and (i)*.

The standard of review for this error is addressed in further detail below. *See infra*, at 12-16.

3. On July 12, 2011, the County enacted Ordinance 6-2011, which repeals the critical areas exemptions challenged here on appeal by Futurewise. Does the enactment of Ordinance 2-2011 render Futurewise's challenge moot?

Mootness is a question of law that this court reviews *de novo*. *Kelley v. Centennial Contractors Enter., Inc.*, 147 Wn. App. 290, 294 (2008).

**B. Superior Court Decision (RAP 10.3(a)(4))**

**Assignment of Error**

The trial court erred in issuing the portion of its Decision on Petition for Review, dated February 8, 2011, that concluded that Futurewise's challenge concerning ephemeral streams was not moot or

otherwise barred by the statute of limitations. CP 1-2.

### **Issue Pertaining to Assignment of Error**

Ordinance 2-2009 amended portions of Ordinance 13-2007 concerning ephemeral streams, which are the subject of this appeal. Futurewise challenged Ordinance 2-2009 in a separate, and largely unsuccessful, appeal to the Growth Board. *See generally Hazen, et al. v. Yakima County*, EWGMHB Case No. 09-1-0014. The Growth Board rejected Futurewise's argument that the County failed to designate ephemeral streams as critical areas, namely Fish and Wildlife Habitat Conservation Areas. *Id.* at 18. The Board's Decision was not appealed. Is the challenge to ephemeral streams by Futurewise now moot or otherwise barred by the statute of limitations?

A determination of mootness and the applicability of a statute of limitations are generally questions of law that this court reviews *de novo*. *Kelley v. Centennial Contractors Enter., Inc.*, 147 Wn. App. at 294 (mootness); *Cortez-Kloehn v. Morrison*, 162 Wn. App. 166 (2011) (statute of limitations).

### **III. STATEMENT OF THE CASE**

The GMA was originally adopted in 1990, largely in response to growing pains in the Puget Sound region, including traffic congestion,

school overcrowding, urban sprawl, and loss of rural lands. *Skagit Surveyors and Eng'rs, LLC, v. Friends of Skagit County*, 135 Wn.2d 542, 546-47 (1999). The GMA requires counties to enact development regulations to designate and protect “critical areas.” RCW 36.70A.060(2). “Critical areas” include wetlands, critical aquifer recharge areas, fish and wildlife habitat conservation areas, frequently flooded areas, and geologically hazardous areas. RCW 36.70A.030(5). In designating and protecting critical areas, counties must “*include* the best available science.” RCW 36.70A.172(1)(emphasis added). An ordinance adopted to comply with these requirements is commonly referred to as a “critical areas ordinance” (“CAO”). Once adopted, a county must periodically “review and, *if needed*, revise its [CAO].” RCW 36.70A.130(1)(a) (emphasis added).

#### **A. County Legislative Process**

Yakima County enacted its first CAO in 1995. *See* Title 16A YCC. Because of the considerable complexity of the undertaking, the County began the process to update its first CAO as early as 2002. AR 3470.

In late 2002, the County convened a Best Available Science Advisory Group (“SAG”), comprised of an impressive body of state, federal, tribal and private sector scientific professionals. *Id.* SAG was

intended to assist the County with its obligation to “include the best available science” in developing amendments to its CAO. *Id.* See also RCW 36.70A.172(1).

The mandates of the SAG were to (1) assess the County’s collected bibliography of scientific citations for completeness and applicability; (2) recommend additional BAS citations, especially those of local relevance, and (3) comment on drafts of the County’s synthesis of its science. AR 3470. In 2006, the work of SAG culminated with the publication of a 350-page synthesis of a large volume of scientific reports and studies entitled “Yakima County’s Review of Best Available Science for Inclusion in Critical Areas Ordinance Update,” dated October 2006 (“BAS Review”). AR 3109-3461.

Under the GMA, counties are also required to develop and implement a “public participation program...providing for early and continuous public participation in the development and amendment of [its CAO].” RCW 36.70A.140. Accordingly, in early 2004, the County launched an extensive public participation process to solicit public input regarding amendments to the CAO from stakeholders, including environmental, agricultural, and development interests, in addition to tribal, state and local governments. AR 2807.

Quite commendably, the process resulted in thirty-six stakeholder

meetings, five public meetings, six city and town elected official meetings, eight city and town staff meetings, and thirty-six Planning Commission study sessions. *Id.* Numerous public hearings were subsequently held before the Planning Commission and the Board of County Commissioners. *Id.* On December 18, 2007, the process was culminated by the enactment of Ordinance 13-2007 (hereinafter “CAO”), which was codified in YCC Title 16C. AR 2816.

**B. Growth Board Proceedings**

Individuals and entities subsequently filed Petitions for Review to the Eastern Washington Growth Management Hearings Board (“Growth Board”), challenging various portions of Ordinance 13-2007. AR 3728. These petitioners including the following: Wes Hazen, Upper Wenas Preservation Association, and Futurewise; Confederated Tribes & Bands of the Yakama Nation; Washington Department of Fish and Wildlife (“WDFW”); and Washington State Department of Commerce (Commerce).<sup>2</sup> *Id.* The Growth Board consolidated these appeals. *Id.*

Prior to adjudication of these petitions by the Growth Board, the County, WDFW and Commerce entered into discussions to potentially resolve these agencies’ concerns regarding Ordinance 13-2007. AR 3729.

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<sup>2</sup> Formerly Department of Community, Trade and Economic Development. *See* RCW 43.330.007.

These productive settlement negotiations were then expanded to include all parties, and resulted in additional amendments to the CAO and building codes via the enactment of Ordinances 2-2009. CP1071-1083 (Ordinance 2-2009, Findings).

Notably, as a result of these enactments, both WDFW and Commerce withdrew their petition, having apparently concluded that the County's CAO fully complied with the GMA, including designating and protecting critical areas. AR 380-500 (Petition for Review); AR 1051-1055 (Order Granting Withdrawal). Only Futurewise and the Yakama Nation continued their appeal of the Ordinance 13-2007.

On April 5, 2010 the Growth Board issued its Final Decision and Order ("Decision"). AR 3725-3821. In its Decision, the Growth Board found the County in compliance on a number of the issues. However, as relevant to this appeal, the Growth Board concluded that Ordinance 13-2007 did not comply with the GMA because it allegedly

- (1) failed to designate and regulate Type 5 or ephemeral streams as Fish and Wildlife Habitat Conservation Areas. AR 3726, 3756-60 (Decision at 2, 32-36);
- (2) established buffers for streams, and allowed buffer reductions for both streams and wetlands, that were not supported by BAS. AR 3726-27, 3760-74 (Decision at 2-3, 36-50); and
- (3) allowed certain exemptions to critical area regulations that were not supported by BAS. AR 3726, 3751-55 (Decision at 2, 27-31).

**C. Superior Court Proceedings**

The County and the Farm Bureau filed Petitions for Review of the Growth Board's Decision in Yakima County Superior Court on May 4 and 5, 2010, respectively. The Petitions challenged the portions of the Growth Board's Decision regarding the regulation of ephemeral streams, stream buffers, and critical area exemptions. CP 1-4.

On February 8, 2011, the Honorable Blaine G. Gibson issued a Decision on Petition for Judicial Review. CP 1-5. Specifically, Judge Gibson held that the County's decision not to designate ephemeral streams as critical areas, namely Fish and Wildlife Habitat Conservation Areas, did not violate the GMA:

**An ephemeral stream, by definition, flows "only in response to precipitation, with no groundwater interaction, and usually flow[s] less than 30 days per year." If every furrow, groove, crease, corrugation, rimple, or wrinkle in the earth's surface that carries water when it rains qualifies as a "critical area," there would not be any significant non-critical areas left in the County.**

CP 3 (emphasis added).

Judge Gibson also held that the County's stream buffers, and allowed adjustments to wetland and stream buffers, did not violate the GMA:

**[T]he bulk of the BAS relied upon by the Board relates to the west side of Washington, and has little or no**

application to the arid east side of the state. There was little BAS available to the County which derived from studies of the types of land prevalent in Central Washington.

Faced with a paucity of applicable BAS, the County performed a systemic analysis of the available data, including information derived from the actual buffers which had been in place since 1995. The County's determination that the existing buffers had been, for the most part, adequately performing their intended function was a reasoned justification for the buffers adopted in the CAO. Therefore, the Board's determination that the buffers violated the GMA was in error.

CP 4.

Finally, Judge Gibson concluded that the "exemptions" for certain development activities were not supported by BAS. CP 3-4.

On March 8, 2011, Futurewise and the Yakama Nation jointly filed a Notice of Appeal of the trial court's decision. Yakima County and the Farm Bureau subsequently filed Notices of Cross-Appeal.

#### **IV. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, AND STANDARD OF REVIEW**

The Administrative Procedure Act (APA), chapter 34.05 RCW, governs this Court's review of the Growth Board's decision. RCW 36.70A.300(5). The interaction between the GMA and the APA creates a unique standard of review—deference is owed to the County's legislative decision, and not the Growth Board's Decision. Specifically, the GMA

ensures *local deference* by requiring that “development regulations, and amendments thereto, adopted under [the GMA] are **presumed valid upon adoption.**” RCW 36.70A.320(1) (emphasis added). As a corollary principle, “the burden is on the petitioner” before the growth board to demonstrate non-compliance with the GMA. RCW 36.70A.320(2) (emphasis added). Additionally, “[t]he board **shall find compliance** unless it determines that the action by the...county...is clearly erroneous.” RCW 36.70A.320(3)(emphasis added). A county’s action is clearly erroneous if the Growth Board has a “firm and definite conviction that a mistake has been committed [by the county].” *Thurston County v. W. Wash. Growth Mgmt. Hr’gs Bd.*, 164 Wn.2d 329, 340-41 (2008).

Unfortunately, notwithstanding these clear legislative directives, growth boards all too frequently continued to impose their own policy preferences rather than deferring to local decision-making. By 1997, the Legislature was constrained to provide additional direction to the growth boards via a largely unprecedented amendment to the GMA:

**[T]he legislature intends that the board applies a more deferential standard of review to actions of counties and cities... In recognition of 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 boards to grant deference to counties and cities in how they plan for growth... Local comprehensive plans and development regulations require counties and cities to**

balance priorities and options for action in full consideration of local circumstances... **[T]he ultimate burden and responsibility for planning, harmonizing the planning goals of [the GMA], and implementing a county's or city's future rests with that community.**

RCW 36.70A.3201 (emphasis added).

The Legislature was not alone, however, in recognizing that local control was all too often being eroded by the Growth Boards. After analyzing the importance of RCW 36.70A.3201, the State Supreme Court stated as follows:

In the face of this clear legislative directive, we now hold that **deference to county planning actions**, that are consistent with the goals and requirements of the GMA, **supersedes deference granted by the APA and courts to administrative bodies** in general.... ...Thus a **board's ruling that fails to apply this "more deferential standard of review" to a county's action is not entitled to deference from this court.**

*Quadrant Corp. v. Wash. State Growth Mgmt. Hr'gs Bd.*, 154 Wn.2d 224, 238 (2005) (emphasis added). In other words, although appeals under the APA generally require the court to accord deference to the agency's decision, that is not the case with appeals from the Growth Board.

Under the APA, this Court may provide relief from the Growth Board's decision in nine specific instances. RCW 34.05.570(3). Specifically, the County and Farm Bureau contend that the Growth Board's decision may be reversed on any or all of the following grounds:

...

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under [the APA];

...

(i) The order is arbitrary or capricious;

RCW 34.05.570(3).

This Court sits in the same position as the trial court and applies these APA standards directly to the administrative record before the Board. *Lewis County v. W. Wash. Growth Mgmt. Hr 'gs Bd.*, 157 Wn.2d 488, 497 (2006). Thus, like the Growth Board, this Court defers to the County's planning action unless the action is clearly erroneous. *Quadrant*, 154 Wn.2d at 238.

Issues of law are reviewed *de novo*. *Honesty in Envtl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hr 'gs Bd.*, 96 Wn. App. 522, 526 (1999). Findings of fact are reviewed by whether substantial evidence supports the Growth Board's findings. *Id.* Substantial evidence is that sufficient to persuade a fair minded, rational person of the truth of the matter. *Id.*

**V.**  
**ARGUMENT**

**A. The Growth Board Erroneously Concluded that the County’s Decision Not to Designate and Regulate Ephemeral Streams as Fish and Wildlife Habitat Conservation Areas Violated the GMA**

The County properly exercised its discretion to determine that Type 5 or ephemeral streams, are not critical areas. “Ephemeral streams” are defined as those that “flow only in response to precipitation with no groundwater association, [and] usually less than 30 days per year.” AR 2827 (YCC 16C.02.175). If ephemeral streams are considered “critical,” there are apparently precious few areas of the County that are not critical.

Quite revealingly, Futurewise is the only party at this point that continues to urge that ephemeral streams qualify as “critical areas” under the GMA. Even the Yakama Nation, which fervently argues for greater protection of salmon, limits its brief to arguing regarding the allegedly inadequate buffers for Types 2 through 4 streams. Yakama Nation Br. at 11-13. Perhaps even more revealing is the fact that the WDFW, the very state agency that is charged with protecting our State’s fisheries, withdrew its petition before the Board after having been fully satisfied that the County’s CAO adequately protected ephemeral streams. AR 3729.

The Growth Board erroneously concluded that Ordinance 13-2007, the County’s amended CAO, did not comply with the GMA for a failure to

designate and regulate Type 5 ephemeral streams as Fish and Wildlife

Habitat Conservation Areas:

The Board found Yakima County's decision not to designate and regulate Type 5 Ephemeral streams under the CAO failed to comply with the GMA due to the important role these streams play in maintaining the overall health of the stream corridor system.

AR 3726 (Decision at 2). In reaching this conclusion, the Growth Board erroneously interpreted or applied the law, and/or the Growth Board's decision was not supported by evidence that is substantial when viewed in light of the whole record before the Court, and/or the Growth Board's decision was arbitrary or capricious. RCW 34.05.570(3). The Growth Board's complete analysis on this issue is contained on pages 32 through 36 of the Decision. AR 3756-60.

**1. The County's BAS Indicates that Ephemeral Streams Do Not Provide Fish and Wildlife Habitat**

As previously indicated, "[i]n designating and protecting critical areas under [the GMA], counties and cities 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)(emphasis added). In accordance with this statute, the County compiled a 350-page synthesis of a large volume of scientific reports and studies entitled

“Yakima County’s Review of Best Available Science for Inclusion in Critical Areas Ordinance Update,” dated October 2006 (“BAS Review”). AR 3109-3461. Notably, no party in this action asserts that this document is not actually comprised of the “best available science.” Instead, the point of disagreement appears to be regarding whether the County “included” BAS in developing Ordinance 13-2007. RCW 36.70A.172(1).

The County’s BAS Review thoroughly analyzed the biological differences between perennial, intermittent, and ephemeral streams:

Another way to characterize the difference among stream channels is to categorize by water flow:

- perennial;
- intermittent, or
- ephemeral.

Perennial streams generally flow year-round, even during periods of no rainfall. Groundwater is a source of much of the water in the channel. Intermittent streams flow only during certain times of the year, usually more than 30 days per year, with inputs from precipitation and groundwater. **Ephemeral streams flow only in response to precipitation, with no groundwater interaction, and usually flow less than 30 days per year.**

...

**Ephemeral streams typically are found on steep ridges and hillslopes, apart from groundwater interaction.**

AR 3134 (BAS Review at 8)(emphasis added).

The BAS Review further indicates that even intermittent streams,

which are larger and have greater duration of flow than ephemeral streams, have limited habitat value:

The size of the riparian area [*i.e.* vegetated upland] can vary with stream flow. Intermittent streams typically have **limited** interaction with the landscape and contain **narrow riparian corridors**, while large perennial rivers may have expansive riparian areas with multiple vegetation layers... Generally, as the size of the stream increases, the influence on the stream on the riparian area increases because of the larger volume of water. Conversely, the influence of the riparian area on the stream decreases as the stream size increases. Intermittent and perennial streams located in the arid portions of Yakima County may have little or no riparian vegetation.

AR 3136 (BAS Review at 10)(emphasis added). Given the sliding scale of stream sizes, if comparably larger intermittent streams have “limited” riparian corridors, smaller ephemeral streams, which flow less than 30 days per year, presumably have “extremely limited” to no riparian habitat.

**2. The County’s Decision Not to Designate Ephemeral Streams as Fish and Wildlife Habitat Conservation Areas Was Guided By BAS**

The Yakima County Planning Commission (“Planning Commission”) carefully considered the BAS Review and recommended to the Yakima Board of County Commissioners (“BOCC”) that Type 5 Streams not be regulated as Fish and Wildlife Habitat Conservation Areas:

A review of the BAS indicates a significant functional difference between intermittent and ephemeral streams in Yakima County. Ephemeral streams are stormwater

driven, lack riparian vegetation that distinguishes them from surrounding areas, and therefore do not constitute fish and wildlife habitat. This does not mean that other areas of the landscape, including Type 5 streams, do not have some habitat value. It does acknowledge 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. Consequently, Type 5 streams are recommended to not be regulated as fish and wildlife habitat, though they may be protected under geologically hazardous area, floodplain, stormwater, construction, grading or other development regulations.**

AR 3475 (Findings of Fact and Recommendation at 14)(emphasis added).

In turn, the BOCC carefully reviewed the Planning Commission's recommendations and the underlying BAS Review. As a result, the BOCC adopted many of the Planning Commission's findings as its own, including this one. AR 2808 (Ordinance 13-2009, Findings at 3)("[T]he Board hereby adopts the PC Findings and Recommendations...with the following changes..."). The CAO was amended accordingly.

In particular, although Ordinance 13-2007 designated and protected certain streams as Fish and Wildlife Habitat Conservation Areas, by design it did not do so with respect to Type 5 or ephemeral streams, which generally flow less than 30 days per year. Specifically, the CAO designated all "[p]erennial and intermittent streams, **excluding ephemeral streams**, including the stream main channel and all secondary channels

within Ordinary High Water Mark” as Fish and Wildlife Habitat

Conservation Areas. AR 2885 (YCC 16C.06.03(2))(emphasis added).

Next, the CAO classified streams as follows:

- 1) **Type 1 streams**, lakes and ponds are those waters...meeting the criteria of “shorelines of the state” and “shorelines of statewide significance” under RCW Chapter 90.58...;
- 2) **Type 2 streams**, lakes, and ponds are those surface water features which...are considered “Streams, Lakes, and/or Ponds of Local Importance”...;
- 3) **Type 3 streams** include all perennial streams within Yakima County not classified as Type 1 or 2;
- 4) **Type 4 streams** are all intermittent streams within Yakima County not classified as Type 1, 2, or 3;
- 5) **Type 5 streams are all ephemeral streams within Yakima County not classified as Type 1, 2, 3, or 4.**

AR 2887 (YCC 16C.06.06)(emphasis added).

Finally, the CAO established protection measures, specifically buffers, commensurate with types of streams being regulated:

<b>Stream Type</b>	<b>Buffer Width Standard/(minimum adjustment) See 16C.06.16, subsections 1-4.</b>
Type 1 Shoreline streams, lakes and ponds	100'
Type 2 streams, lakes and ponds	75'/(25')
Type 3 streams (Perennial), lakes and ponds	50'/(25')
Type 4 streams (Intermittent), lakes and ponds	25'/(15')
Type 5 streams (Ephemeral)	<b>No buffer standards</b> Type 5 streams are not regulated.

AR 2893 (YCC 16C.06.16, Table 6-1).

Consistent with the BAS Review, the County did not establish buffers for ephemeral streams. Although both YCC 16C.06.06(5) and YCC 16C.06.16, Table 6-1 both state that “Type 5 streams are not regulated,” this merely means that they are not regulated as Fish and Wildlife Habitat Conservation Areas. Instead, the BOCC’s findings clarify that ephemeral streams remain “protected under geologically hazardous area, floodplain, stormwater, construction, grading or other development regulations.” AR 3475 (Findings of Fact and Recommendation at 14).

**3. The Growth Board Improperly Failed to Defer to the County’s Planning Decisions With Respect to the Regulation of Ephemeral Streams**

The Growth Board erroneously concluded that Ordinance 13-2007 did not comply with the GMA for a failure to designate and regulate ephemeral streams as Fish and Wildlife Habitat Conservation Areas:

The Growth Board found Yakima County’s decision not to designate and regulate Type 5 Ephemeral Streams under the CAO failed to comply with the GMA due to the important role these streams play in maintaining the overall health of the stream corridor.

AR 3726 (Decision at 2).

The Growth Board’s analysis regarding ephemeral streams improperly failed to defer to the County’s planning decisions. As such, it is not entitled to deference. *Quadrant Corp.*, 154 Wn.2d at 238 (“[A]

Growth Board’s ruling that fails to apply this ‘more deferential standard of review’ to a county’s action is not entitled to deference.”).

The Growth Board improperly interpreted the GMA by requiring the designation of ephemeral streams as Fish and Wildlife Habitat Conservation Areas. The GMA indicates that local jurisdictions “shall designate, **where appropriate**... critical areas.” RCW 36.70A.170 (emphasis added). In turn, the GMA defines “critical areas” to include, Fish and Wildlife Habitat Conservation Areas. RCW 36.70A.030(5). Thus, reframed more explicitly, under the GMA, local jurisdictions “shall designate, **where appropriate**... fish and wildlife habitat conservation areas.” The clear legislative desire to retain *local planning decisions* and recognize *local circumstances* is unmistakable.

Critically, the GMA does not define “fish and wildlife habitat conservation areas.” However, it stands to reason that such areas must actually include fish and wildlife habitat. Nothing in the County’s BAS Review or the Growth Board’s analysis suggests that ephemeral streams, *i.e.* those that generally flow less than 30 days a year, actually constitute fish or wildlife habitat. Instead, the Growth Board viewed ephemeral streams as being critical to “maintaining the overall health of the stream corridor, or merely providing a water quality function, rather than actually constituting habitat. AR 3726 (Decision at 2). Moreover, the Growth

Board engaged in its own interpretation of the BAS Review by choosing to interpret all references to “streams,” even when the term was used in its most generic sense, to encompass ephemeral streams. AR 3758-60)(Decision at 34-36).

The Department of Commerce has “adopt[ed] guidelines to...guide the classification of...critical areas.” See RCW 36.70A.050(1). In particular, these guidelines “shall allow for regional differences that exist in Washington State.” RCW 36.70A.050(3). By their very nature as “guidelines” they are non-binding.

The WAC Guidelines applicable to the designation of Fish and Wildlife Habitat Conservation Areas state as follows:

(2) Fish and wildlife habitat conservation areas that must be *considered* for classification and designation include:

- (a) Areas where endangered, threatened, and sensitive species have a primary association;
- (b) Habitats and species of local importance, as determined locally;
- (c) Commercial and recreational shellfish areas;
- (d) Kelp and eelgrass beds; herring, smelt, and other forage fish spawning areas;
- (e) Naturally occurring ponds under twenty acres and their submerged aquatic beds that provide fish or wildlife habitat;
- (f) Waters of the state;
- (g) Lakes, ponds, streams, and rivers planted with

game fish by a governmental or tribal entity; and  
(h) State natural area preserves, natural resource conservation areas, and state wildlife areas.

WAC 365-190-130(2) (emphasis added). Tellingly, a county must only “consider” designating these areas as Fish and Wildlife Habitat Conservation Areas. The Growth Board erred in making the designation as mandatory, even when the non-binding WAC Guidelines only indicate that such a designation is discretionary. In this regard, the Growth Board’s analysis also improperly failed to defer to the County’s decisions.

**4. The County’s Decision Regarding Ephemeral Streams Was the Result of a Reasoned Process**

Pursuant to RCW 36.70A.172(1), “[i]n designating and protecting critical areas..., counties and cities shall *include* the best available science in developing policies to protect the functions and values of critical areas.” RCW 36.70A.172(1) (emphasis added). The County’s decision not to regulate ephemeral streams as Fish and Wildlife Habitat Conservation Areas is in compliance with this requirement.

Notably, the GMA requirement is to “include” BAS. RCW 36.70A.172(1). As indicated, no party to this action alleges that the County’s BAS Review does not actually constitute “best available science.” In other words, there is no dispute that the County has “included” BAS. Rather, Futurewise has merely argued, and the Growth

Board apparently concluded, that the County failed to “follow” BAS.

Aside from the fact that the County did follow BAS, the GMA imposes no requirement to do so.

The Supreme Court has clarified that the requirement to “include” BAS means precisely that – BAS must be included, it need to be followed:

**[T]he GMA does not require the County to follow BAS; rather, it is required to “include” BAS in its record.**

*Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. H’rgs Bd.*, 161 Wn.2d 415, 430 (2006). The BAS must then be used in a reasoned legislative process, but does not dictate a result. *Id.* at 431.

Additionally, the Supreme Court has clarified that BAS does not trump all other requirements of the GMA. Indeed, BAS may necessarily need to yield to the statutory mandate of local deference:

[T]he requirements to be guided by the “best available science” (BAS) in developing critical areas regulations and to “give special consideration” to protecting anadromous fisheries arguably conflict with the legislature’s directive that growth management hearings boards defer to local balancing of “local circumstances,” if that local balancing is not in favor of critical areas.

*Id.* at 426.

Finally, the Supreme Court has concluded that “[a] County may depart from BAS if it provides a reasoned justification for such a departure.” *Id.* at 430 (citing *Ferry County v. Concerned Friends of Ferry*

*County*, 155 Wn.2d 824, 837-38 (2005)). Critically, the “reasoned justification” for departing from BAS does not need to be based on science itself, although in this case, it is. Nor is the requirement to provide a “reasoned justification” such a high bar as Futurewise suggests.

Indeed, in the *Swinomish* decision, the Supreme Court upheld Skagit County’s decision to apply *no buffers* whatsoever on large salmonid-bearing critical areas, including the Skagit and Samish Rivers, which the State has identified as “the most significant watershed in Puget Sound in terms of salmon recovery.” *Swinomish*, 161 Wn.2d at 425. In *Swinomish*, Skagit County reasoned that applying no buffers would be justified because imposing buffers would be detrimental to the agricultural community and because much of the natural riparian vegetation had already been destroyed in prior centuries:

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.” 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. **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.**

*Id.* at 431 (citations omitted). Unlike Skagit County in the *Swinomish* decision, which upheld the County’s decision to apply no buffers

whatsoever to several of the largest salmon bearing streams in the state, Yakima County has merely decided not to apply buffers on ephemeral streams. As indicated, ephemeral streams generally flow less than 30 days a year, and do not provide any wildlife habitat whatsoever, let alone habitat for salmonids.

As indicated above, the County's BAS Report sharply distinguished between perennial, intermittent, and ephemeral streams within the local context of Yakima County. AR 3135-37. The Planning Commission and the BOCC reviewed that BAS and made detailed findings and concluded that "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 point was "between ephemeral and intermittent streams." AR 3475.

In summary, the County not only "included" BAS in the record, but it followed that BAS to determine that ephemeral streams were not Fish and Wildlife Habitat Conservation Areas. Moreover, even if the County departed from BAS, the County's findings demonstrate a reasoned process with a reasoned decision.

**5. The Issue Regarding the County's Regulation of Type 5 Streams is Moot or Otherwise Barred by the Statute of Limitations**

The trial court erred in issuing the portion of its Decision on

Petition for Review, dated February 8, 2011, that concluded that Futurewise’s challenge concerning ephemeral streams was not moot or otherwise barred by the statute of limitations. CP 1-2

Prior to adjudication of the various petitions filed by the Growth Board challenging Ordinance 13-2007, all parties engaged in complex and compromising settlement negotiations. CP 1072 (Ordinance 2-2009, Findings). On October 13, 2009, as a result of these efforts, the County enacted Ordinance 2-2009, which caused the WDFW and Commerce to be fully satisfied with the County’s compliance with the GMA and to withdraw their petition. AR 380-500 (Petition for Review); AR 1051-1055 (Order Granting Withdrawal).

Critically, for purposes of this APA appeal, Ordinance 2-2009 amended provisions of Ordinance 13-2007, including the manner in which the County regulates Type 5 or ephemeral streams. For example, Ordinance 2-2009 amended YCC 16C.06.16, Table 6-1 as follows

Stream Type	Buffer Width Standard/(minimum adjustment) See 16C.06.16, Subsections 1-4.
Type 1 Shoreline streams, lakes and ponds	100'
Type 2 streams, lakes and ponds	75'/(25')
Type 3 streams (Perennial), lakes and ponds	50'/(25')
Type 4 streams (Intermittent), lakes and ponds	25'/(15')
Type 5 streams (Ephemeral)	<b>No buffer standards</b> Type 5 streams are not regulated through buffer requirements, but activities such as clearing, grading, dumping,

	<u>filling, or activities that block flow, redirect flow to a point other than the original exit point from the property or result in the potential to deliver sediment to a drainage way/channel, are regulated under clearing and grading regulations. These drainages may also be protected under geologically hazardous area, floodplain, stormwater, building and construction, or other development regulations.</u>
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CP 1078-1079 (Amended YCC 16C.06.16, Table 6-1) (additions by Ordinance 2-2009 underlined). In other words, this amended provision ensures that ephemeral streams are regulated under other provisions of the Code (primarily to prevent sediment transport), but they are not regulated as Fish and Wildlife Habitat Conservation Areas.

Former YCC 16C.07.16, Table 6-1, which is the subject of Appellants’ challenge here on appeal, is no longer in effect. Under the GMA, the current or amended version of YCC 16C.07.16, Table 6-1 was “presumed valid upon adoption.” RCW 36.70A.320(1). The very appellants in this action, namely Wes Hazen, the Upper Wenas Preservation Association, and Futurewise, filed a Petition for Review before the Growth Board challenging Ordinance 2-2009, including the alleged failure to regulate Type 5 or ephemeral streams as Fish and Wildlife Habitat Conservation Areas. The Growth Board’s Decision in this regards states as follows:

In the present case, the Board believes the subject of Type 5 streams is not set forth in the issue statement for either Issue No. 1 or Issue No. 4. Thus, according to the majority

of the Board, the argument of Type 5 streams is not within the scope of either of these issues as written and, therefore, cannot be considered. Conclusion: **The majority of the Board finds and concludes Petitioners' argument concerning Type 5 streams is outside the scope of their issue statements and, therefore, not before the Board.**

CP 1102 (*Hazen, et al. v. Yakima County*, EWGMHB Case No. 09-1-0014, at 18)(emphasis added).

A case is moot when it involves only abstract propositions or questions, the substantial questions originally presented no longer exist, or the court cannot provide effective relief or the relief originally sought. *See Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005); *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558 (1972). The amended version of YCC 16C.07.16, Table 6-1 is now in effect. Any challenge to the former ordinance was rendered moot by its adoption, because it presents only abstract propositions or questions and this Court cannot provide effective relief or the relief originally sought. As such, the Growth Board erred in entertaining any challenge to the former ordinance once the amended ordinance was adopted.

Additionally, under the GMA, “[a]ll petitions...[challenging] compliance with the goals and requirements of [the GMA]...must be filed within sixty days after publication.” RCW 36.70A.290(2). Thus, the intended effect of amended YCC 16C.07.16, Table 6-1 and its compliance

with the GMA, may only be litigated in a petition to the Growth Board, where a legislative record has been created that fully explains the intent and effect of those amendments. Appellants already filed a Petition for Review challenging Ordinance No. 2-2009. *See generally Hazen et al. v. Yakima County*, EWGMHB Case No. 09-1-0014. Their Petition was unsuccessful in this regard. The 60-day statute of limitations for filing any other challenge to amended YCC 16C.07.16, Table 6-1 has now passed.

**B. The Superior Court Correctly Concluded that the County's Stream Buffers, and Adjustments to Stream and Wetland Buffers, Were Supported by BAS—The Growth Board's Decision to the Contrary is Erroneous**

Judge Gibson correctly concluded that the BAS relied upon by the Growth Board to invalidate the County's stream buffers (and allowed adjustments to stream and wetland buffers)<sup>3</sup>, was not relevant to arid Eastern Washington. CP 4. The Court affirmed that the County had done a thorough and comprehensive analysis of all available data, including a review of the efficacy of the County's existing buffers, which had been in place since 1995. *Id.* Accordingly, the Court determined that the County's stream buffers, and adjustments to stream and wetland buffers,

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<sup>3</sup> In finding that the County's buffers complied with the GMA, the Court did not distinguish between stream or wetland buffers or allowed adjustments thereto. CP 4. Accordingly, the Court's decision must be read as finding that all aspects of the County's buffer provisions comply with the GMA.

fully complied with the GMA.

Futurewise acknowledges in its brief that “[t]he protection of critical areas is intricately tied to the maintenance of existing conditions in those areas.” Futurewise Br. at 10. Again, Yakima County’s buffers have protected streams and wetlands since 1995. Neither Futurewise nor the Yakama Nation has shown that the County’s streams or wetlands have been degraded during this time. The County’s buffers and use regulations are consistent with BAS and fully protect stream and wetland functions under BAS. To extent that Appellants assert that the County failed to follow BAS, the County engaged in a reasoned process, as required by relevant jurisprudence.

**1. The Buffers Are Within the Range of BAS**

The Growth Board, and the respective Briefs of Futurewise and the Yakama Nation, second guess the County with respect to its analysis of its own BAS Review and its ultimate choice of buffers. This technocratic approach is not consistent with the GMA, and instead erodes legislatively-mandated deference to the County’s decisions. *See supra*, at 13-16.

In the *Ferry County* decision, the Supreme Court recognized that the WAC Guidelines may assist in determining whether a County has complied with the BAS requirement. *See Ferry County*, 155 Wn.2d at 835 n.9, 838-39 (citing WAC 365-195-900 through -925). However, in

contrast the Appellants' approach to the GMA, the Court of Appeals recently interpreted the WAC Guidelines as not "imposing a duty on a county to describe each step of the deliberative process that links the science that it considers to the adopted policy or regulation." *Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 2011 Wash. App. LEXIS 1862, 29-33 (Wash. Ct. App. Aug. 5, 2011). Instead, the Court interpreted the WAC Guidelines to merely require that a County "address...on the record...the relevant sources of best available scientific information included in the decision-making," and nothing more. *Id.* (citing WAC 365-195-915(1)(b)). Here, the County not only addressed its BAS Review and related decision making on the record, it did so in great detail.

Specifically, in enacting Ordinance 13-2007, the BOCC entered extensive legislative findings regarding the application of the County's own BAS Review to its decision making on buffers as follows:

The Board has considered the Best Available Science (BAS) and finds that there has been no evidence or testimony that any significant environmental degradation has occurred with the existing wetland buffers, therefore the existing standards, with edits, are within the range of BAS and sufficient to protect the functions and values of wetlands.

The Board finds that the BAS on buffers covers a wide range of functions and measurements, and there are no specific science citations that can be precisely applied

in Yakima County. There is science that applies to forested areas of Yakima County, but there is a lack of science relating 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 individual 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.

The main goal of the BAS review regarding buffers was to examine the range of science and assess how the existing buffers fit within that range. The buffers outlined in the CAO are within the range of science. The BAS requirement allows jurisdictions to review science and determine the range of science that exists. Jurisdictions may choose protection measures that are within that range of science. The BAS review identified a range of buffer widths that would be acceptable for different functions. When the combination of the different functions is compiled together, it also resulted in a range for a general buffer width. The buffers in the CAO are within this range. Buffers perform several functions to protect critical areas, which are listed in section 16A.06.05 (Functional Properties), and include protecting water quality, providing bank stabilization, and providing riparian wildlife habitat. The buffers provide well for water quality and bank stability functions, and provide a modest level of riparian wildlife habitat function. Providing a high level of riparian wildlife habitat would require much larger buffers. Many buffer widths were proposed through the public process; ranging from a few meters to several hundred feet. Generally, recommendations for small buffers are based on a review of function specific science concentrated on water quality, while larger buffers are based on wildlife science. Recommendations received for large, wildlife buffers still fall within the range of science, but still do not address all wildlife needs based on landscape ecological science.

...

The Board finds that the [stream buffer] widths...are within the range of BAS and are sufficient to protect the functions and values of streams.

AR 2812-14 (Ordinance 13-2007, Findings at 7-9). The County's legislative findings fully comply with *Olympic Stewardship* and its interpretation of the WAC Guidelines. The Superior Court justifiably reversed the Growth Board's determination that the County's action was inconsistent with the GMA.

**2. The County Compiled the Best "Available" Science Regarding Buffers, Recognizing that It Was an Imperfect Fit**

Under the GMA, the County is obligated to "include the best **available** science," in the record, but it need not create its own science, which would be cost prohibitive. RCW 36.70A.172(1)(emphasis added). The term "available" implies that all science may not be a perfect fit, and that a reasoned process may be necessary to apply the science locally.

The BAS Review summarized many scientific publications related to riparian buffer widths. *See* AR 3195-3206 (BAS Review 69-80). However, as indicated in the County's legislative findings, "the BAS on buffers covers a wide range of functions and measurements, and there are **no specific science citations that can be precisely applied in Yakima County.**" AR 2813 (Ordinance 13-2007, Findings at 8)(emphasis added). The BAS Review was consistent with this legislative finding:

- “An evaluation of the Best Available Science concerning riparian zones indicates that few of the citations address the unique geography of eastern Washington.” AR 3195 (BAS Review at 69);
- “Unfortunately, there is little published information about the buffer widths needed to provide natural levels of shade for streams in eastside forest, rangeland, and agricultural systems.” AR 3200 (BAS Review at 74).
- “More research on riparian influences on shading for all ecosystems east of the Cascades is needed...” AR 3201 (BAS Review at 75).

In addition to a lack of science regarding the unique geography of Eastern Washington, the remaining science that was available was also unsettled:

- “Little information exists and additional research is needed before buffer widths likely to protect riparian microclimate can be determined.” AR 3198 (BAS Review at 72) (citing *Spence, Lomnický, Hughes, and Novitzki* (1996)).
- There is agreement in the scientific literature that restricted use of riparian habitat is needed to retain the functions of aquatic and riparian ecosystems. Schaefer and Brown (1992, quoted in Knutson and Naef 1997) state width is one of the most important variables affecting riparian corridor functions. However, there is less agreement on the specific width needed to protect riparian and stream habitat (O’Connell et al. 1993, quoted in Knutson and Naef 1997). Nor is there agreement on which land use activities might be compatible with fish and wildlife in riparian habitat. AR 3201 (BAS Review at 75).

Appellants endlessly criticize the County by alleging that the buffers adopted do not fit within the range of BAS provided in the BAS

Review. *See, e.g.*, *Futurewise Br.* at 24 (“A cursory glance at these recommendations makes it clear that Yakima County’s buffers do not meet the widths necessary to protect all functions.”). This criticism is particularly unwarranted when the BAS Review itself acknowledged the imperfect fit. In particular, *Futurewise* tries to skirt this issue by merely concluding that “the Board utilized many studies,” essentially reasoning that quantity eventually somehow settles or clarifies the issue regarding an imperfect fit, which it does not.

**3. The County’s Decisions Regarding Buffers Were the Result of a Reasoned Process**

When faced with imperfect science that was not applicable to Yakima County, the County was merely required engage in a “reasoned process,” which it did. *Ferry County*, 155 Wn.2d at 835.

Given the variability among studies and the paucity of information in the science for certain ecological functions, it is difficult to evaluate the BAS for all functions for riparian stream buffers in Eastern Washington. Where possible, the BAS Review recommends “[a]ctual buffer width and composition should be based on site-specific conditions.” AR 3200 (BAS Review at 74). The County’s CAO actually includes additional measures to ensure that site-specific review is provided through the permitting process, which can condition permits in order to protect ecological

functions.

Where site-specific analysis is not possible, however, the BAS itself, provided direction about what to do when exact buffers can't be determined for the region:

When site specific analyses are not possible, **general riparian buffer** widths can be applied.

AR 3200 (BAS Review at 74). The Findings from the BOCC, indicate that the County selected a general buffer for this purpose:

The BAS Review identified a range of buffer widths and that would be acceptable for different situations. When the combination of the different functions is compiled together, it also resulted in **a range for a general buffer width**. In looking at the range, it showed that buffers in the proposed CAO fell in that range.

AR 3478 (Findings of Fact and Recommendation at 17)(emphasis added).

The County's approach is consistent with the GMA.

The BAS Review acknowledges that the width of a riparian buffer will "depend[] on the function(s) or range of functions to be protected."

AR 3202 (BAS Review at 76). A review of the BAS regarding riparian buffer widths found a range from 10 to 984 feet. AR 3201. As indicated, Table 2 merely outlines the minimum and maximum buffers for various ecological functions found in all literature, regardless of whether the science is specific to the arid Eastern Washington:

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

AR 3201 (BAS Review at 75).

“Organic matter input” and “microclimate” are not included in the functional properties of hydrologically related critical areas addressed in the County’s ordinance. *See* AR 2866 (YCC 16C.06.05).<sup>4</sup> Futurewise appears to accept the functions and values listed in YCC 16C.06.05 as the ones of concern. *See* Futurewise Br. at 22. With those two exceptions, however, the general buffer widths selected by the County are within the range of BAS summarized in Table 2. AR 2893 (YCC 16C.06.16, Table 6-1).

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<sup>4</sup> Although Table 2 presents a buffer minimum of 170 feet for organic matter input, Appendix A cites one study recommending 82.5 ft. (based on 75% of Site Potential Tree Height (SPTH) of 110 ft.) and another recommending 100 feet. *Cf.* AR 3386 with AR 3201 (BAS Review at 261, 75). Similarly, Table 2 presents a buffer width of 141 feet minimum for the microclimate function, while Appendix A cites to one report recommending a 75 foot minimum, and another with a 98 foot minimum for microclimate. *Cf.* AR 3387 with AR 3201 (BAS Review at 262, 75).

**4. The Board Failed to Defer to the County By Imposing Imperfect Science and Ignoring Unique Aspects of the County's CAO**

The Growth Board erred by elevating a single study, namely Knutson/Naef, above all other scientific studies in the BAS Review. AR 3760-69. As explained in further detail below, this study is simply inapplicable to Yakima County for a variety of reasons.

The Growth Board's near exclusive reliance on the Knutson/Naef study is demonstrated by its wholesale inclusion of a table in its Decision from the Knutson/Naef study. AR 3766. The table addresses various functions for riparian buffers and a "buffer range" and a "mean buffer." In this regard, the Growth Board concluded:

It is clear from these scientific recommendations Yakima County's stream buffers, which range from 25 feet to 75 feet, fall below the mean buffer for *all* functions and below the range of buffer widths for *all* functions except temperature control and pollutant filtration."

AR 3766 (Decision at 42)(emphasis in original). The Growth Board's own analysis concedes that the science demonstrates a range of 10 to 984 feet for buffers. AR 3766 (Decision at 42). As indicated, the County's adopted buffers, which range from 25 feet to 100 feet, fall within this range. AR 2893 (YCC 16C.06.16, Table 6-1). As such, the County followed BAS.

Yet the Knutson/Naef study relied upon by the Growth Board as absolute authority for buffer widths, indicates that its recommended buffers are intended only as guidelines, and

[b]ecause PHS management recommendations address fish and wildlife resources statewide, they are **generalized**. Management recommendations are not intended as site-specific prescriptions December 1997 2 Washington Department of Fish and Wildlife but as **guidelines** for planning. Because natural systems are inherently complex and because human activities have added to that complexity, **management recommendations may have to be modified for on-the-ground implementation**.

(Knutson/Naef Study at 1-2)(emphasis added). As candidly acknowledged by Knutson/Naef:

[S]ufficient information does not currently exist to provide variable width recommendations that adequately accommodate the extreme variability of riparian widths, land uses, and fish and wildlife communities across the Washington landscape. Therefore any application of variable riparian widths must first include additional site-specific and watershed-level studies.

*Id.* See also AR 3201 (BAS Review at 75, summarizing Knutson/Naef).

Additionally, the BAS Review summarizes the Knutson/Naef study, and clarifies that it addresses riparian habitat areas (“RHA”). RHAs are defined as:

The area adjacent to aquatic systems with flowing water (e.g. rivers, perennial or intermittent streams, seeps, springs) that contains elements of both aquatic

water (e.g. rivers, perennial or intermittent streams, seeps, springs) that contains elements of both aquatic and terrestrials ecosystems, which mutually influence each other, and that exhibit the full range of habitat functions necessary to support riparian-associated fish and wildlife.

AR 3205 (BAS Review at 79)

The BAS Review distinguished RHAs from riparian buffers:

Riparian habitat areas differ from riparian buffers. Riparian buffers are usually applied to protect streams from the effects of adjacent, upland activities. Riparian habitat areas include the area from the ordinary high water line to that portion of the terrestrial landscape that directly influences the aquatic ecosystem, including habitat for riparian-associated wildlife. The RHA often includes the extent of the flood plain because that area of appreciably influences and is influenced by the stream system during flood events. The RHA encompasses the extent of riparian vegetation in addition to the zone of the influence.

Because riparian habitat area management recommendations address fish and wildlife resources statewide, they are generalized. Management recommendations are not intended as site-specific prescriptions but rather as guidelines for planning. Because natural systems are inherently complex and because human activities have added to that complexity, management recommendations may have to be modified for on-the-ground implementation.

. . . Recommended RHA widths are derived from a review of the scientific literature, by which generally include a zone of riparian vegetation plus a transition zone dominated by upland vegetation. Even though it may not be obvious that upland vegetation is part of the riparian habitat, scientific studies clearly describe the critical function of transitional areas in maintaining

riparian and aquatic systems. In addition, channel migration is a natural process in alluvial streams and rivers. Where these streams and rivers, RHA width measurements should begin at the edge of the channel migration zone.

Scientific literature supports the maintenance riparian habitat areas as restricted use zones. Examples of activities that may affect riparian habitat features include tree cutting, road building, agriculture, grazing, clearing, earth moving, mining, fill in, burning, or construction of buildings or other facilities. Beyond the standard RHAs, it must be recognized that larger areas are needed by some wildlife species, including the great blue heron, field deer, elk, marten, osprey, and bald eagle.

AR 3205-06 (BAS Review at 79-80). Accordingly, the Knutson/Naef study does not specifically address buffer widths. Rather, the focus of the study is on riparian habitat areas that often include the entire flood plain and areas that would not ever be associated with a buffer for a stream or wetland. Regardless, this is entirely consistent with the County's approach that buffers are only one tool in protecting the function and values of critical areas.

Indeed, the County's choice of specific buffer widths as one of its tools in protecting the functions and values of critical areas is within the discretion of the County legislative authority and it is supported by BAS:

*GMA requires protecting the functions and values of fish and wildlife habitat... The CAO is composed of performance standards that are intended to protect functions and values. A buffer is one tool, though not the only tool, that tries to prevent or reduce impacts on a general level through*

***avoidance.*** The idea is that buffer will do much to protect the functions and values of the stream or wetland and provide wildlife habitat. Buffers cannot accomplish everything, consequently there are other standards – usually related to specific types of activities (road construction, utility construction, filling and grading, etc.).

AR 2813 (Ordinance 13-2007, Findings at 8) (emphasis added).

The Washington State Supreme Court recently issued a decision that held that Growth Boards, in considering county planning *choices*, should give deference to choices that are compliant with the GMA:

To clarify, *City of Arlington* stands for the fact that boards must consider anecdotal evidence provided by counties and defer to local planning decisions as between different planning choices that are compliant with the GMA.

*Kittitas County v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 2011 Wash. LEXIS 596 (Wash. July 28, 2011), at 10.

The County's decision to rely upon a variety of planning and zoning tools, including specific buffer sizes, to protect the function and values of critical areas, is a choice that is consistent with the GMA. The Superior Court recognized this when it reversed the Growth Board's determination in this regard.

An example of the interplay between the various County development regulations and their role in protecting critical areas is found at YCC 16C.06.03(1), which designates "any floodway and floodplain

identified as a special flood hazard area” as a hydrologically related critical area. AR 2884 (YCC 16C.06.03(1)). Uses within the critical area are restricted and regulated according to the provisions of YCC 16C.06 in order to preserve the functions and values of the critical area. *Id.*

Further, standard minimum buffer widths are simple to implement and administer, and provide regulatory predictability. AR 3202 (BAS Review at 76). As demonstrated in the BAS Review, a variety of buffer widths and the use regulations controlling them fall within BAS recommendations, and the County’s use of them is not clearly erroneous.

It is also important to note that the buffer studies addressed in the BAS Review, and Knutson/Naef in particular, are not related to the stream typing system that is the basis of the County’s regulatory scheme. Under the CAO, buffers are related to the size of the streams, which is related to the size and flow rate of the stream.

Additionally, to the extent that the County’s buffers are adequate to protect the functions and values of streams, it was not erroneous to allow an administrative reduction of these buffers on the condition that “any site plan and project design include measures which ensure the protection and performance of the functional [values].” AR 2893 (YCC 16C.06.16) and AR 2856 (YCC 16C.03.23). This standard is no different than the “no net loss of ecological functions” or “no harm” standard that was approved in

the *Swinomish* case and is commonplace. *Swinomish*, 161 Wn.2d at 427.

The Growth Board's analysis is also erroneous because it focuses on the Knutson/Naef study to the exclusion of all other BAS. AR 3766 (Decision at 42). Even when considered on its merits, however, the Growth Board's analysis is completely nonsensical. The Growth Board's concession that the buffers adopted by the County were below the "mean" buffer recommended by Knutson/Naef, simply cannot lead to a conclusion that the County's buffers are outside of the range of BAS. For example, the Knutson/Naef table utilized by the Growth Board states that the range of buffers necessary in order to allegedly protect the sole function of wildlife habitat is from 30 feet to 984 feet and the "mean" buffer is 287 feet. AR 3766 (Decision at 42). According to the Growth Board's analysis, any decision to adopt buffers less than 287 width in feet on all streams, regardless of typing/size, would be inconsistent with BAS. Such a determination clearly would not be supportable by logic or BAS.

Additionally, in the absence of any factors that demonstrate why the "mean" buffer is somehow preferable to anything else within the acceptable range of BAS, the Growth Board's analysis is also wholly arbitrary. It strains credulity to believe that this type of analysis is what was intended by the GMA's mere reference to "include" BAS in adopting development regulations. RCW 36.70A.172(1).

Finally, for the same reason that an individual scientific study cannot be elevated above all others in the BAS Review, a single function or value of a critical area should not be elevated above all other functions and values to dictate the size of buffers. Accordingly, the County was justified in reviewing a range of buffer widths that would be acceptable for different functions, and using that range to adopt a general buffer width.

**C. Futurewise's Challenge to the County's CAO Exemptions Has Been Rendered Moot By the County's Recent Adoption of Ordinance 6-2011, Which Repealed Those Exemptions**

Futurewise's Brief expends nearly ten pages asserting that the County's exemptions from critical areas regulations violate the GMA. *See* Futurewise Br. at 10-19. The specific exemptions challenged by Futurewise were recently repealed by the County via the adoption of Ordinance 6-2011, which is attached hereto as Appendix A. The Court may take judicial notice of an Ordinance adopted by the Yakima County Board of Commissioners. As indicated above, an issue is moot when it involves only abstract propositions or questions, the substantial questions originally presented no longer exist, or the court cannot provide effective relief or the relief originally sought. *See Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005). Here, the exemptions challenged by Futurewise have been repealed. Futurewise's challenge to the exemptions is moot.

## CONCLUSION

The Appellants' manipulation of science to argue for outcomes that support their position, and the Board's acceptance of those assertions, is not supported by the GMA or common sense. By asserting that ephemeral streams, which flow less than 30 days a year (and may even flow as little as one day a year) are critical areas, Futurewise is indicating that there is nothing in the County that isn't "critical." Moreover, Futurewise makes no argument that ephemeral streams even contain fish and wildlife habitat.

Additionally, for over 15 years, since the adoption of the County's first CAO in 1995, the County has diligently protected the functions and values of its critical areas through an array of innovative planning techniques, including reliance on buffers and development regulations. The amendments to the County's CAO were not unilaterally made by the BOCC, but were instead based on an extensive process that included hundreds of hours of science review and testimony by various advisory groups and commissions, and over three dozen public meetings. The resulting CAO thoroughly considered the guidance provided by the BAS Review, and applied those guidelines through choices that the County believes will protect the functions and values of its important critical areas for now and into the future.

RESPECTFULLY SUBMITTED this 18 day of August, 2011.

JAMES P. HAGARTY  
YAKIMA COUNTY PROSECUTING ATTORNEY

By: Paul E. McIlrath by Samuel A. Rodabough, WSBA # 35347  
Terry D. Austin, WSBA No. 6708  
Paul E. McIlrath, WSBA No. 16376  
*per authorization*  
*Attorneys for Respondent/Cross-Appellant Yakima*  
*County*

GROEN STEPHENS & KLINGE LLP

By: SA. Rodabough  
Samuel A. Rodabough, WSBA No. 35347  
*Attorneys for Respondent/Cross-Appellant*  
*Yakima County Farm Bureau, Inc.*



**DECLARATION OF SERVICE**

I, Samuel A. Rodabough, declare as follows pursuant to GR 13 and RCW 9A.72.085:

I am a citizen of the United States, a resident of the State of Washington, and an employee of Yakima County. I am over twenty-one years of age, not a party to this action, and am competent to be a witness herein.

On August 17, 2011, I caused the foregoing document to be served on the following persons via the following means:

<b>Attorney for Eastern Washington Growth Management Hearings Board</b>	<input type="checkbox"/> Hand Delivery via Legal Messenger <input checked="" type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Federal Express Overnight <input type="checkbox"/> Electronic Mail <input type="checkbox"/> Other _____
Mark Worthy, Esq. Asst. Attorney General 800 5 <sup>th</sup> Ave., Suite 2000 Seattle, WA 98104	

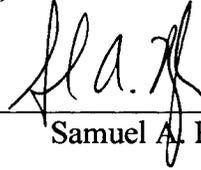
<b>Attorney for Wes Hazen, Upper Wenas Preservation Association, and Futurewise</b>	<input type="checkbox"/> Hand Delivery via Legal Messenger <input checked="" type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Federal Express Overnight <input type="checkbox"/> Electronic Mail <input type="checkbox"/> Other _____
Tim Trohimovich, Esq. Anne Powell, Esq. 814 2nd Ave., Ste. 500 Seattle, WA 98104-1530	

<b>Attorney for Confederated Tribes and Bands of the Yakama Nation</b>	<input type="checkbox"/> Hand Delivery via Legal Messenger <input checked="" type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Federal Express Overnight <input type="checkbox"/> Electronic Mail <input type="checkbox"/> Other _____
Thomas Zeilman, Esq. P.O. Box 34 Yakima, WA 98907	

I declare under penalty of perjury under the laws of the State of

Washington that the foregoing is true and correct.

Executed this 18th day of August, 2011 at Bellevue, Washington.

A handwritten signature in black ink, appearing to read "S.A. Rodabough", written over a horizontal line.

Samuel A. Rodabough

# **APPENDIX A**

# **BOARD OF YAKIMA COUNTY COMMISSIONERS**

## **ORDINANCE NO. 6-2011**

### **IN THE MATTER OF AMENDING YCC TITLE 16C, THE CRITICAL AREAS ORDINANCE OF YAKIMA COUNTY**

WHEREAS, the Washington State Growth Management Act (GMA) requires Yakima County to review and evaluate its development regulations and to take legislative action, if needed, to revise its development regulations to ensure they comply with the requirements of, and time periods in, RCW 36.70A; and

WHEREAS, Yakima County adopted amendments (Ordinance No. 13-2007) to the Yakima County Critical Areas Ordinance (YCC Title 16C) in December 2007 as part of the required seven year plan update requirement of the Growth Management Act; and,

WHEREAS, in February 2008, a number of petitioners appealed the adoption of the ordinance to the Eastern Washington Growth Management Hearings Board (GMHB) in consolidated Case No. 08-1-0008c, alleging that certain provisions of the ordinance failed to comply with certain provisions of the GMA, codified as Chapter 36.70A RCW; and,

WHEREAS, the GMHB issued its Final Decision and Order (FDO) in case No. 08-1-0008c on April 5, 2010, concluding that certain of the provisions of Ordinance 13-2007 appealed by the petitioners failed to comply, including those related critical area exemptions and critical aquifer recharge areas (CARAs); and,

WHEREAS, Yakima County appealed the GMHB's FDO to the Superior Court of the State of Washington; and,

WHEREAS, the Superior Court issued its decision on February 8, 2011, holding that the GMHB properly rejected the County's exemption provisions; and,

WHEREAS, Yakima County has proposed text amendments to YCC Title 16C regarding exemptions to comply with the GMHB FDO, the Superior Court decision, and RCW 36.70A; and,

WHEREAS, following the appeal of the 2007 amendments to the YCC Title 16C, Yakima County adopted an amendatory ordinance (Ordinance No. 1-2011) further amending the YCC Title 16C, the Critical Aquifer Recharge Areas (CARA) Chapter in order to comply with the GMHB's FDO interpretation of the provision of the GMA; and,

WHEREAS, in its April 27, 2011, Partial Coordinated Compliance Order the GMHB recognized the County adopted Ordinance 1-2011 amending YCC Title 16C.09 to adopt new designation and protection standards for CARA, yet they found that County has failed to comply with the requirement to designate CARA; and,

WHEREAS, the GMHB found that without a mapping update to include Best Available Science, the pre-existing CARA designation map did not comply with the GMA; and,

WHEREAS, subsequent to the issuance of the Partial Coordinated Compliance Order, Yakima County reviewed the scientific methodology used to create the CARA map and determined that the CARA maps meet Best Available Science; and,

WHEREAS, Yakima County has coordinated with Petitioner Futurewise to draft amendments to the mapping section of 16C.09 which would address the GMHBs concerns and comply with April 27, 2011, Partial Coordinated Compliance Order; and

WHEREAS, Petitioner Futurewise has acknowledged that the proposed CAO amendments adequately address their concerns as originally brought forth in their Petition for Review.

WHEREAS, the Yakima County SEPA Responsible Official issued a Determination of Nonsignificance (SEP11-018) for the proposed edits to Title 16C, on April 15, 2011; and,

WHEREAS, the comment period on the Determination of Nonsignificance and on the proposed amendments closed on April 29, 2011; and, and a Final Determination of Nonsignificance was issued on May 3, 2011 without further comment period; and,

WHEREAS, the Board of Yakima County Commissioners held a properly advertised public hearing on June 7, 2011 at the Yakima City Hall Hearing Room, 129 N. 2<sup>nd</sup> Street Yakima, WA, for the purpose of taking testimony on the proposed amendments to the Yakima County Critical Areas Ordinance; and,

WHEREAS, the Board, has carefully considered oral and written testimony from the public and recommendations from staff; and,

WHEREAS, the Board is now satisfied that this legislative matter has been sufficiently considered, and that the process leading to the development of the amended Critical Areas Ordinance has been open, extensive, continuous and afforded opportunities to all who wanted to participate or offer testimony; and,

WHEREAS, the Board has, at a properly advertised agenda, deliberated on the proposed amendments, weighed the evidence presented, balanced the goals of the GMA and the desires of the citizens of Yakima County in a final set of amendments to YCC Title 16C; and,

WHEREAS, the Board of Yakima County Commissioners further finds and concludes that adoption and implementation of the amendments to the YCC Title 16C to be in the public interest and essential to direct the future growth and development of Yakima County, consistent with the County's Comprehensive *Plan 2015*: now, therefore,

**BE IT HEREBY ORDAINED:**

**Section 1. Findings.** The Board of Yakima County Commissioners finds that all statutory and County prerequisites for the review and evaluation of YCC Title 16C as well as the requirements for ensuring adequate public notification and opportunities for comment and participation in the amendment process, have been met. The Board makes the following findings:

- A. Legislative Intent. The Board of Yakima County Commissioners finds that it has fully considered the evidence presented throughout the public process of updating, adopting and amending YCC Titles 16C to fulfill the requirements of State law and to comply with the decisions of Superior Court and the GMHB. The Board reaffirms that it has considered the best available science documentation in its decisions and finds the record to be compelling in its support of the

designation and protection of critical areas and the balancing of the public and private interests as expressed by the adopted Critical Areas Ordinance and the amendments herein contained.

- B. State Environmental Policy Act (SEPA). The SEPA Responsible Official has reviewed the potential adverse environmental impacts of the proposed amendments in accordance with the provisions of YCC Title 16, culminating in Final Determinations to retain the *Determinations of Non-significance* issued on May 3, 2011. The Board finds that environmental review is complete and adequate.
- C. The Board finds that the basis for adopting the amendments in Section 2 of this ordinance related to exemptions and Critical Aquifer Recharge Areas designation as documented in staff reports pertaining to and the recitals to this Ordinance substantiate that the action taken is necessary to comply with the decisions of the Court and the GMHB. The Board is satisfied that the CARA mapping as contained in this amendment to Title 16C is consistent with DOE Guidance document 05-10-028 and that the County has used the appropriate measures available to properly designate CARA as provided by Statute and Washington Administrative Code.

**Section 2. Adoption.** The document attached hereto as **Exhibit A** and entitled *Proposed Amendments the Critical Areas Ordinance*, is hereby adopted as an official control required by RCW 36.70A. The amendments shall be made to YCC Title 16C and codified as amendatory sections to YCC Title 16C. This Title shall apply to all unincorporated lands under Yakima County's land use jurisdiction, except for lands under jurisdiction of the Shoreline Management Act (RCW 90.58).

**Section 3. Severability.** If any section, sentence, clause, or phrase of the amended YCC Title 16C as contained in Exhibit A to this ordinance should be held to be invalid or unconstitutional by anybody or court with authority and jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, clause or phrase of the adopted YCC Title.

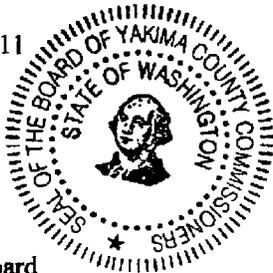
**Section 4. Effective Date.** This ordinance as amended by Section 2 herein and Exhibit A shall be effective at 12:01 a.m. on July 12, 2011.

Dated this 12<sup>th</sup> day of July 2011

ATTEST:

BY: Tiera Girard  
Clerk of the Board

  
Mandy Burkett  
Deputy Clerk of the Board



  
Kevin Bouche, Chairman

  
J. Rand Elliott, Commissioner

  
Michael D. Leita, Commissioner  
Constituting the Board of County Commissioners  
for Yakima County, Washington

**EXHIBIT A  
to Ordinance 6-2011**

**Chapter 16C.03  
APPLICATION AND REVIEW PROCEDURES**

**Sections:**

**General Provisions**

16C.03.01 Critical Area Development Authorization Required

**Inquiry and Early Assistance**

16C.03.02 Critical Area Identification Form and Critical Areas Reports

16C.03.03 Pre-application Conference

16C.03.04 Technical Assistance Conference

**Abbreviated Review Alternatives**

16C.03.05 Minor Activities Allowed without a Permit or Exemption

~~16C.03.06 Exemption Procedural Requirements~~

~~16C.03.07 Exemptions for Hydrologically Related Critical Areas, Wetlands~~

~~16C.03.08 Exemptions for Geologically Hazardous Areas Development Authorizations~~

~~16C.03.09 Exemptions for Upland Wildlife Habitat and Habitats of Local Importance  
Development Authorizations~~

16C.03.10 Mitigation requirements

**General Provisions**

**16C.03.01 Critical Area Development Authorization Required**

1) No new development, construction or use shall occur within a designated critical area without obtaining a development authorization in accordance with the provisions of this title, except for those provided for in section 16C.03.05 (Minor Activities Allowed without a Permit or Exemption). ~~Exemptions, as provided for in sections 16C.03.07 through 16C.03.09, shall be considered as development authorization.~~

**Inquiry and Early Assistance**

**16C.03.02 Critical Area Identification Form and Critical Area Report Requirements.**

1) Prior to the review or consideration of any proposed development, construction or use, except those provided under Applicability (16C.01.05), and Minor Activities Allowed Without a Permit or Exemption (16C.03.05), the County shall consider available information to determine if a critical area is likely to be present. The presence of a critical area found on the paper and electronic maps within or adjacent to the property proposed for development is sufficient foundation for the Administrative Official to require preparation of a critical area identification form, provided by the department, and a preliminary site plan. This critical area identification form and preliminary site plan may be one piece of information used to analyze

how a critical area could be affected by a development proposal. To the extent possible, all critical area features must be identified on the critical area identification form and shown on the preliminary site plan prior to the Administrative Official determining whether the development is subject to this title.

**16C.03.03 Pre-application Conference**

- 7) Determine whether the project requires a permit, and can be processed as an exemption, or if not, what type of permits or reviews may be needed. Final determination of necessary permits will be made based on the project design and submittal materials;

**16C.03.05 Minor Activities Allowed without a Permit or Exemption.**

- 1) The following activities are included under 16C.01.05(1) (Applicability) and are allowed without a permit ~~or exemption~~:
  - a) Maintenance of existing, lawfully established areas of crop vegetation, landscaping (including paths and trails) or gardens within a regulated critical area or its buffer. Examples include, harvesting or changing crops, mowing lawns, weeding, harvesting and replanting of garden crops, pruning, and planting of non-invasive ornamental vegetation or indigenous native species to maintain the general condition and extent of such areas. ~~Cutting down trees and shrubs within a buffer is not covered under this provision, but maybe covered under an exemption.~~ Excavation, filling, and construction of new landscaping features, such as concrete work, berms and walls, are not covered in this provision and are subject to review;
  - b) Minor maintenance and/or repair of lawfully established structures that do not involve additional construction, earthwork or clearing. Examples include painting, trim or facing replacement, re-roofing, etc. ~~Construction or replacement of structural elements is not covered in this provision, but may be covered under an exemption.~~ Cleaning canals, ditches, drains, wasteways etc. without expanding their original configuration is not considered additional earthwork, as long as the cleared materials are placed outside the stream corridor, wetlands, and buffers;
  - c) Low impact activities such as hiking, canoeing, viewing, nature study, photography, hunting, fishing, education or scientific research;
  - d) Creation of unimproved private trails that do not cross streams or wetlands that are less than two (2) feet wide and do not involve placement of fill or grubbing of vegetation;
  - e) Planting of native vegetation;
  - f) Noxious weed control outside vegetative buffers identified in Chapter 16C.06.16, except for area wide vegetation removal/grubbing;
  - g) Noxious weed control within vegetative buffers, if the criteria listed below are met. Control methods not meeting these criteria may still apply for a ~~restoration exemption, or other development~~ authorization as applicable:
    - i) Hand removal/spraying of individual plants only;
    - ii) No area wide vegetation removal/grubbing.
  - h) Agricultural and other accessory uses or structures that maintain the existing natural vegetation (rangeland, grazing, stock fences, outdoor recreation, etc.)

### ~~16C.03.06 — Exemption Procedural Requirements~~

~~Certain activities and uses are exempt from some permit processes and shall instead be reviewed using the procedures below, except that Flood Hazard exemptions provided in 16C.05.20.06, shall follow procedures established to administer Chapter 16C.05 (Flood Hazard Areas).~~

- ~~1) Any exempted development shall be consistent with the policies and provisions of this title.~~
- ~~2) Only those developments that meet the precise terms of one or more of the listed exemptions may qualify for review under these provisions.~~
- ~~3) If any part of a proposed development is not eligible for exemption, then a development permit is required for the entire proposed development project.~~
- ~~4) When a development or use is proposed that does not comply with the bulk, dimensional and performance standards of this title, such development must also obtain an Adjustment (16C.03.23).~~
- ~~5) All exempted activities shall use reasonable methods to avoid impacts to critical areas. To be exempt from this title does not give permission to degrade a critical area or ignore risk from natural hazards. Any 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 at the responsible party's expense, according to section 16C.06.23 (Reclamation).~~
- ~~6) The proponent of an exempt activity shall submit a written request for permit exemption to the Administrative Official that describes the activity and states the exemption requested. The applicant shall submit to the Administrative Official a written description of the project that demonstrates compliance with applicable standards.~~
- ~~7) The Administrative Official shall review the exemption request to verify that it complies with this title.~~
- ~~8) The Administrative Official shall approve or deny the exemption.~~
- ~~9) A formal letter of exemption shall be provided where an exempt activity is approved under this title. A copy of the exemption shall be kept on file by the Administrative Official. If an exemption cannot be granted, the Administrative Official shall notify the applicant in writing of the reason, at which time the applicant may pursue other permit processes under this title.~~
- ~~10) Conditions may be attached to the approval of exempted developments and/or uses as necessary to assure continued consistency of the project with this title.~~
- ~~11) Exempt activities are identified in the following locations. Such activities are stated as exempt from the standard development permits or flood hazard permits. However, this provision does not exempt an activity from other permits or reviews that may be required under this title.
  - ~~a) Those activities listed in sections 16C.03.07 (Exemptions from HRCA, and Wetlands) are exempt from the standard development permit requirements for Wetlands (16C.07), and Hydrologically Related Critical Areas Features (16C.06.03);~~
  - ~~b) Those activities listed in sections 16C.03.09 (Exemptions for Upland Wildlife Habitat Conservation Areas) are exempt from the standard development permit requirements for Upland Wildlife Habitat Conservation Areas (16C.06.11);~~
  - ~~c) Those activities listed in sections 16C.03.08 (Exemptions for Geologically Hazardous Areas) are exempt from the standard development permit requirements for Geologically Hazardous Areas (16C.08);~~~~

- ~~d) Those activities listed in sections 16C.05.20.060 are exempt from the Flood Hazard Permit requirements for Flood Hazard Areas (16C.05).~~

~~16C.03.07 — Exemptions for Hydrologically Related Critical Areas, and Wetlands—~~

~~The following development activities are exempt from standard development permits that are required within Wetlands designated in chapter 16C.07.02 (Designation and Mapping) and Hydrologically Related Critical Areas features designated in section 16C.06.03 (HRCA Features):~~

- ~~1) Construction or practices normal or necessary for farming, irrigation, and ranching activities, including agricultural service roads and utilities, construction of a barn or similar agricultural structure, and the construction and maintenance of irrigation structures including but not limited to head gates, pumping facilities, and irrigation channels; provided, that a feedlot of any size, all processing plants, other activities of a commercial nature, and/or alteration of the contour of the land by leveling or filling other than that which results from normal cultivation, shall not be considered normal or necessary farming or ranching activities. A "feedlot" shall be an enclosure or facility used or capable of being used for feeding livestock hay, grain, silage, or other livestock feed, but shall not include land for growing crops or vegetation for livestock feeding and/or grazing, nor shall it include normal livestock wintering operations;~~
- ~~2) Normal maintenance or repair of existing structures or developments, including damage by accident, fire, or elements. "Normal maintenance" includes those usual acts to prevent a decline, lapse, or cessation from a lawfully established condition. "Normal repair" means to restore a development to a state comparable to its original condition, including but not limited to its size, shape, configuration, location and external appearance, within a reasonable period after decay or partial destruction, except where repair involves total replacement which is not common practice or causes substantial adverse effects to the environment. Replacement of a structure or development may be authorized as repair where such replacement is the common method of repair for the type of structure or development and the replacement structure or development is comparable to the original structure or development including but not limited to its size, shape, configuration, location and external appearance, and the replacement does not cause additional substantial adverse effects to the environment. The need for replacement resulting from a neglect of maintenance and repair is not considered a common method of repair. Replacement of non conforming uses or facilities may also be subject to section 16C.03.26 (Non conforming Uses and Facilities);~~
- ~~3) Emergency construction necessary to protect property from damage by the elements. An "emergency" is an unanticipated and imminent threat, which requires immediate action or response within a time period too brief to allow full compliance with this title. The following criteria must exist to qualify any action under an emergency provision:
  - ~~a) There must be an immediate threat to life, public or private property, or an immediate threat of serious environmental degradation arising from a natural condition or technical incident;~~
  - ~~b) The emergency response must be confined to the action necessary to protect life or property from damage;~~
  - ~~e) The scope of the emergency response must be limited to the work necessary to relieve the immediate threat;~~~~

- ~~d) The emergency response applies only to the period of time in which the actual emergency exists;~~
- ~~e) The request must be accompanied by a paid permit application or a request for a non-emergency exemption. Submittal requirements beyond normal exemption submittal requirements are waived until after the emergency is deemed abated. As soon as the emergency is deemed abated by appropriate authorities, compliance with the requirements of this title is required, and may include removal of the emergency construction if non-structural construction measures can adequately deal with site issues.~~
- ~~4) The operation, maintenance or construction of canals, waterways, drains, reservoirs, or other manmade facilities that now exist or are hereinafter created or developed as a part of an irrigation system;~~
- ~~5) Operation and maintenance of any system of dikes, ditches, drains, or other facilities existing on July 12, 1994, effective date of this Critical Areas Ordinance, for land not within Shoreline jurisdiction, which were created, developed, or utilized primarily as a part of an agricultural drainage and diking system;~~
- ~~6) Any project with a certification from the governor pursuant to chapter 80.50 RCW (Energy facilities — site locations);~~
- ~~7) Site exploration and investigation activities that are prerequisite to preparation of an application for development authorization under this chapter, if:
  - ~~a) The activity will have no significant adverse impact on the environment including but not limited to fish, wildlife, fish or wildlife habitat, water quality, and aesthetic values;~~
  - ~~b) The activity does not involve the installation of any structure, and upon completion of the activity the vegetation and land configuration of the site are restored to conditions existing before the activity;~~~~
- ~~8) The process of removing or controlling aquatic noxious weeds, as defined in RCW 17.26.020 (control of spartina and purple loosestrife), through the use of an herbicide or other treatment methods applicable to weed control that are recommended by a final environmental impact statement published by the Department of Agriculture or the Department of Ecology jointly with other state agencies under chapter 43.21C RCW (SEPA);~~
- ~~9) The removal of trees that are hazardous, posing a threat to public safety, or posing an imminent risk of damage to private property, from critical areas and buffers, provided that:
  - ~~a) A dead tree within a buffer may be shortened to the point that the tree will not strike a structure or defined vehicle parking area. The remainder shall be maintained to provide wildlife habitat, nesting locations and perch sites. A remainder less than ten (10) feet tall may be removed completely;~~
  - ~~b) A diseased or damaged tree may be removed as determined appropriate by the Administrative Official;~~
  - ~~c) The removed portion of trees should be placed within the vegetative buffer area as wildlife habitat, unless it will interfere with a maintained vegetation area identified in section 16C.03.05(a) (Minor Activities), or unless the Administrative Official determines otherwise. Portions of trees to be removed from the buffer area should be felled to the outer edge of a vegetative buffer and dragged out. Heavy equipment is not allowed within the buffer, except within areas identified in 16C.03.05(a) (Minor Activities). Damaged riparian vegetation must be repaired;~~
  - ~~d) Each tree that is felled or topped shall be replaced in a manner acceptable to the Administrative Official.~~~~

**16C.03.08 — Exemptions for Geologically Hazardous Areas**

The following development activities are exempt from standard development permits that are required for Geologically Hazardous Areas designated in chapter 16C.08:

- a) Additions to or alteration of existing single family residences;
- b) Uses and surface disturbances (clearing and grubbing) that do not include excavation, fill or irrigation;
- c) Structures less than 200 square feet that are not used as a place of employment or residence (fences, sheds, gazebos, etc.);
- d) Oil, gas, wind or other exploration that does not include explosions, roads, excavation or fill.

**16C.03.09 — Exemptions for Upland Wildlife Habitat and Habitats of Local Importance**

The following development activities are exempt from standard development permits that are required for Upland Wildlife Habitat Conservation Areas designated in section 16C.06.11:

- a) Agricultural and other accessory uses or structures that maintain the existing natural vegetation (rangeland grazing, stock fences, outdoor recreation, etc.);
- b) Any development and associated facilities with less than a 1/2 acre of disturbance area on existing lots;
- c) New driveways or roads less than 1/2 mile in length;
- d) Additions to or alteration of existing single family residences and associated facilities.
- e) Subdivision consistent with zoning districts, with roads totaling less than a 1/2 mile in length or less. Clustering to reduce infrastructure is encouraged;

**Table 3-1**

<b>General Permits or Reviews</b>
<b>Standard Development.</b> Standard development projects include any development not subject to RCW Chapter 90.58, the Shoreline Management Act.
<b>Exemptions.</b> Exemptions are generally minor activities that do not need to go through the permit process.
<b>Specific Permits</b>
<b>Adjustment.</b> Administrative Adjustments are used outside Shoreline jurisdiction when a project needs to reduce or adjust a development standard.
<b>Non-conforming Use or Facility Alteration.</b> Non-conforming Use or Facility Alterations are necessary when an existing legal use that currently does not conform to this title is to be altered.
<b>Minor revisions to an Existing Permit.</b> Minor Revisions to an Existing Permit allow simplified review of certain changes to a project that has previously received a permit.
<b>Reasonable Use Exceptions.</b> Reasonable Use Exceptions provide an alternative to landowners when all reasonable use of a property has been prohibited.
<b>Flood Hazard Permit.</b> A Flood Hazard Permit is required for activities within floodplains. It is different in that it has special administrative provisions, and may include many of the specific permit types noted above within it, which are described in chapters 16C.05.20 through 16C.05.72. It is focused mainly on construction methods, but may include site design to minimize impacts to adjacent properties or resources, or to locate the proposed development in areas where depth and velocity of floodwaters during the base flood do not exceed the current standards for construction of human occupied structures or safe access.

### **16C.03.26 Non-Conforming Uses and Facilities**

Non-Conforming Uses and Facilities are classified as either conforming uses with non-conforming structures or areas, or as non-conforming uses, as described in subsection 1 below. Both types have different review processes and decision criteria, as provided below in subsections 2 and 3.

- 1) **Classification Criteria** – There may be situations that do not conform to the standards or regulations of this title. These situations are characterized as:
  - a) **Non-conforming Uses.** Uses of a structure or land that were lawfully established at the time of their initiation but are currently prohibited by this title are non-conforming uses, and may utilize structures or land areas that are also non-conforming. A non-conforming use that is discontinued for any reason for more than one year shall have a presumption of intent to abandon, shall not be re-established, and shall lose its non-conforming status, unless an Adjustment (16C.03.23) is obtained to extend the length of time, based on documentation showing that an intent to abandon did not exist during the period of discontinuance. An Adjustment request may be submitted after the deadline has passed. In the case of destruction or damage where reconstruction costs exceed 50% of the assessed value, the structure shall not be rebuilt;
  - b) **Conforming Uses with Non-conforming Structures or Areas** are structures or areas for conforming uses that were lawfully established at the time of their initiation, but currently do not conform to the bulk, dimensional or other development standards of this title. Structures or areas in locations approved under a permit shall not be considered non-conforming. Non-conforming outdoor areas that have not been used or maintained for 5 consecutive years shall lose their non-conforming status and may not be reestablished;
  - c) Any non-conforming structure, area, or use may be maintained with ordinary care according to the provisions in 16C.01.05 (Applicability) and 16C.03.05 (Minor Activities Allowed without a Permit or Exemption) and 16C.03.06 (Exemptions—Procedural Requirements), and do not require additional review under these non-conforming provisions.

### **16C.06.12 Use Classifications**

For purposes of this chapter, the components of any development, construction, or use requiring a critical area development authorization shall be classified as provided below, and shall conform with the development standards applicable to the classification provided in 16C.06.13 through 16C.06.15, except for those activities listed in Section 16C.03.05 (Minor Activities Allowed without a Permit or Exemption):

### **16C.09.03 Mapping**

**Mapping Methodology** – The CARA are depicted in the map titled “Critical Aquifer Recharge Areas of Yakima County”. The CARA map was developed through a geographic information system (GIS) analysis using the methodology outlined in the Washington Department of Ecology “Critical Aquifer Recharge Area- Guidance Document” (Publication 05-10-028). This map depicts the general location of the critical aquifer recharge areas designated in YCC 16C.09.02. Yakima County has developed a GIS database of the CARA map that shows the location and extent of critical aquifer recharge areas. This database will be used by the County to determine whether proposed developments could potentially impact CARA. All applications for

development within the County that are located within a mapped CARA will be required to follow the performance standards of this chapter. The CARA map estimates areas of moderate, high and extreme susceptibility to contamination, in addition to wellhead protection areas. To characterize hydrogeologic susceptibility of the recharge area to contamination, the GIS analysis used the following physical characteristics:

- a) Depth to ground water;
- b) Soil (texture, permeability, and contaminant attenuation properties);
- c) Geologic material permeability;
- d) Recharge (amount of water applied to the land surface, including precipitation and irrigation).