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OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
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NO. 34128-0-II

THURSTON COUNTY, WASHINGTON, a municipal corporation and
political subdivision of the State of Washington, and BLACK HILLS
AUDUBON SOCIETY, a nonprofit corporation,

Appellants/Cross-Respondents,

v.

QUALITY ROCK PRODUCTS, INC., a Washington corporation, and
EUCON CORPORATION, an Idaho corporation

Respondents/Cross-Appellants.

REPLY/CROSS RESPONSE OF BLACK HILLS AUDUBON SOCIETY

David A. Bricklin, WSBA No. 7583
Devon N. Shannon, WSBA No. 34534
BRICKLIN NEWMAN DOLD, LLP
1001 Fourth Avenue, Suite 3303
Seattle, WA 98154
(206) 264-8600
Attorneys for Black Hills Audubon Society

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I. INTRODUCTION

The fundamental issue before this Court is whether the Board of County Commissioners' ("the Board") denial of Quality Rock Product's ("QRP") special use permit ("SUP" or "the Permit") was either based on unsubstantial evidence, or a clearly erroneous application of the law to the facts. QRP makes no showing that the Board's decision was in error.

QRP asserts that the Board did not consider all of the Examiner's findings of fact. But the record reveals the opposite: The Board considered all of the Examiner's findings of fact and the evidence relied on by the Examiner. The Board recognized that the Examiner's findings and the evidence submitted by QRP did not support the issuance of an SUP under TCC 20.54.040. Thus, the Board correctly denied QRP's permit.

QRP also asserts BHAS's decision not to appeal the County's determination under the State Environmental Policy Act ("SEPA") in this case precludes the Board from denying the SUP. QRP's discussion of SEPA is entirely irrelevant and misleading. QRP's mine expansion proposal required SEPA review in addition to an SUP. These are separate and distinct processes. BHAS has every right to appeal the SUP for the applicant's failure to comply with permit criteria regardless of whether the SEPA determination was appealed or not. Any other conclusion would lead to unnecessary and inefficient use of limited administrative and judicial resources.

The reply portion of this brief is limited to the issues raised in QRP's response brief. Specifically, BHAS addresses: (1) QRP's assertion that the Board's decision was not based on substantial evidence; (2) QRP's assertion that the Board's decision was a clearly erroneous application of law to the facts; and (3) QRP's assertion that the Board's decision was outside its jurisdiction.

BHAS also provides responsive argument to QRP's cross-appeal issues. BHAS limits its discussion of these issues to (1) whether the Court should consider QRP's Declaratory Judgment Act claim, and (2) whether the Court should reconsider its denial of QRP's motion to amend.

II. ANALYSIS

A. QRP has the Burden of Proof on Appeal

In its opening brief, BHAS mistakenly indicated that it has the burden of proof to establish one of the errors set forth in RCW 36.70C.130(1). In Tahoma Audubon Society v. Park Junction Partners, 128 Wn. App. 671, 680-81, 116 P.3d 1046 (2005), this court stated that the party "seeking relief from a land use decision" carries the burden of proof even where "that party prevailed on its LUPA claim." Here, QRP is the party seeking relief from the Board of County Commissioners' land use decision denying its SUP. Thus, QRP retains the burden of proof even though it prevailed, in part, before the superior court. Id., citing Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assoc., 151 Wn.2d 279, 288, 87 P.3d 1176 (2004).

QRP has the burden of establishing that the Board's decision to deny the SUP is: ...

(b) ... an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) ... not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) ... a clearly erroneous application of the law to the facts;

(e) ... outside the authority or jurisdiction of the body or officer making the decision.

RCW 36.70C.130(1). In its areas of expertise, the Board is entitled to "substantial deference" in its interpretation of the law and application of the law to the facts of the case. Timberlake Christian Fellowship v. King County, 114 Wn. App. 174, 180, 61 P.3d 332 (2002). See also, Woods v. Kittitas County, 130 Wn. App. 573, 588-89, 123 P.3d 883 (2005).

B. The Examiner's Factual Findings Support the Board's Denial of the QRP Permit

QRP makes generalized arguments throughout its response brief that the Board did not consider all of the Examiner's factual findings in denying the SUP. The implication, then, is that the Board is ignoring some of the Examiner's findings which specifically show that the project will avoid adverse impacts to the Black River. On the contrary, the Board

considered all of the Examiner's factual findings and, seeing no findings establishing the absence of adverse impacts to the Black River, denied QRP's permit application.

1. The Examiner Did Not Find That There Would Be No Adverse Impacts to the Black River

The first argument presented by BHAS in its opening brief is that "The Examiner Failed to Enter Findings of Fact on the Critical Issue of the Project's Potential [Impacts] to the Black River and its Ecosystem." See BHAS Opening Brief at 16. QRP has provided no rebuttal to this conclusion.

QRP points to no specific factual findings by the Examiner that support a conclusion that the project would avoid adverse impacts to the Black River and its environs. It could not have done so, because no such factual finding exists. See Girton v. City of Seattle, 97 Wn. App. 360, 369, 983 P.2d 1135 (1999) (concluding that the permit denial was proper where the hearing examiner made no findings of fact supporting the applicants claim that the project would avoid and prevent erosion problems).

As detailed in BHAS's opening brief, the Examiner mentions the Black River only three times in its second decision. See BHAS Br. at 19-20; AR 36-59. On none of these three occasions does the Examiner indicate that the project will avoid substantial and undue adverse effects to the Black River as required under TCC 20.54.040(3).

In its Response Brief, QRP refers to two of the Examiner's legal conclusions on water impacts to support its argument that the Board ignored the Examiner's factual findings. QRP Br. at 27; AR 53. But, the conclusions¹ do not address impacts to the Black River. The first conclusion indicates that "water quality and quantity issues have been addressed. The maximum lowering of water levels at any well will be no greater than 1.7 feet and the mining will not affect water levels in Ashley Creek." AR 53. But Ashley Creek and the wells referenced in this statement are all upgradient and east of the mine site, where as the Black River is downgradient and west of the proposed mine expansion. The Examiner's statement does not fill the void in the denominated findings which do not address Black River impacts.

The second statement referenced by QRP is similarly irrelevant. It states that "[t]he soil conditions, including sand and gravel layers under the wetland and eastern boundary, as well as under Ashley Creek have been adequately reviewed." AR 53. Again, this conclusion is based on facts related to water quality and quantity impacts east of the proposed mine expansion, not on any facts that discuss an absence of impacts to the Black River or its environs.²

¹ Although the Examiner labels these statements "Conclusions of Law", they appear to be findings of fact. Neither, however, addresses the concerns with adverse impacts to the Black River.

² The Board is not bound by the legal conclusions of the Examiner. Cingular Wireless, LLC v. Thurston County, 131 Wn. App. 756, 762, n.2, 129 P.3d 300 (2006) ("The Board may adopt, amend, reject, or reverse the

QRP cannot point to any factual finding by the Hearing Examiner (whether labeled a “finding” or a “conclusion”) which directly addresses adverse impacts to the Black River and surrounding natural environment or states that the mine will cause no impacts to the valuable environmental resources. As a result, the Board correctly denied QRP’s permit.

2. The Board Considered the Examiner’s Findings in Their Entirety in Denying the QRP Permit

Because QRP cannot support an argument that the Examiner made the required findings, it attempts to turn the argument on its head, asserting that the Board did not consider “all” of the Examiner’s factual findings. QRP’s argument seems to be that because the Board only restated the portions of the Examiner’s findings which were relevant to its decision, it must have ignored the other findings. But because the Board based its decision on impacts to the Black River, it did not need to re-state or reference the Examiner’s findings regarding other issues.

There is nothing in the record to support a conclusion that the Board looked at anything less than the entire record. The Board stated that it “reviewed the hearing examiner’s decision, the evidence presented to the hearing examiner, and listened to the audiotapes of the hearing” and “based on the above record... the proposed location for the gravel mine is

hearing examiner's conclusions of law and decision, or remand for further consideration. TCC 2.06.080(D)”.

not appropriate due to the gravel mining operations' significant adverse impacts on the surrounding sensitive environment... [and] is not consistent with the comprehensive plan policies on the natural environment." AR 3229.

The Board specifically lists ten of the Examiner's factual findings and one conclusion of law which support the Board's permit denial. AR 3230. For example, the Board relied on the Examiner's findings that:

- There is hydraulic connectivity between the aquifer beneath the mine and the Black River, citing HE Decision 1, FOF 44;
 - The aquifer has "moderate to high permeability," citing HE Decision 2, FOF 2;
 - There is potential for the proposal to "reduce water flows and thus exacerbate the water quality problems particularly during the dryer summer months when production would be at its peak," citing HE Decision No. 1, FOF 45;
 - The project would increase annual evaporation and reduce groundwater levels in neighboring wells, citing HE Decision 2, FOF 15, 17;
 - **"The impact to groundwater during the final three proposed phases of the operation is unclear,"** citing HE Decision No. 1, COL 5(g)(ii);
-

AR 3230 (emphasis added). The fact that the Board specifically drew out numerous findings of fact in support of its permit denial validates the Board's statement that it reviewed and considered the Examiner's decision in its entirety.

The Board's complete review of the Examiner's decision is also evident in the Board's statement, that "the hearing examiner did not make any findings on impacts to the Black River, despite the Board's earlier remand decision to study the impacts to the Black River." AR 3231. This statement could not have been made unless the Board had reviewed the entire Examiner's decision.

It is disingenuous for QRP to imply that by not copying every finding of fact entered by the Examiner, the Board "ignored the remaining record."³ QRP Br. at 20. Instead of the picture painted by QRP, the Board in fact considered the factual findings of the Examiner and reiterated in its decision those Examiner findings and conclusions which supported the Board's decision (and contradicted the Examiner's decision).

³ QRP further insinuates that the Board's review and its August 4, 2003 appeal hearing was inadequate because the transcript consisted of only fourteen pages. QRP Br. at 48. QRP overlooks the fact that this was the second hearing of the issue by the Board at which the same issues and facts were before the Board for its consideration. Furthermore, the three Board members stated that they had "listened to the tapes," "made a site visit," and "read all the written material." VR at 3-4.

QRP also falsely implies that the Board “disregarded its appellate obligation” and “substituted its own judgment” for that of the Examiners. QRP Br. at 19-20. The Board of County Commissioners is well aware of its role as an appellate body reviewing the decision of the Hearing Examiner. At the August 4, 2003 hearing, the Board recognized that “sitting as an appellate body, [it] may only review the evidence that was presented to the Examiner and decide whether or not the Hearing Examiner’s decision is supported by the facts presented to him and the applicable state and county regulations.” The Board specifically recognized that “this is not a fact finding hearing.” VR at 3, 48.⁴

In its written opinion, the Board concluded that “As a result of the hearing examiner’s own findings, and lack of findings regarding impacts to the Black River, the hearing examiner’s ultimate conclusion that the proposed location of the project is appropriate and that the project will not have an adverse impact on the surrounding environment, including the Black River, and community is not supported by evidence in the record.” AR 3231. Thus, the Board properly concluded that the Examiner’s decision was not supported by substantial evidence based on the Examiner’s own factual findings.

⁴ Second Board of County Commissioners Hearing (Aug. 4, 2003).

C. Evidence on the Record as a Whole Supports the Board's Denial of QRP's Permit

QRP next argues that even if the Examiner entered no findings that the Black River would be unharmed, QRP has submitted evidence to prove that point. QRP Br. at 20. But because the Examiner entered no findings on this issue, QRP has a heavy burden in trying to upset the Board's decision.

When QRP originally applied for the SUP, it had the burden of demonstrating no harm to the Black River. The Examiner's first decision acknowledged that a "detailed analysis" of impacts to the Black River was lacking.⁵ AR 362. Because this detailed analysis was absent, the Board concluded QRP had not met its burden and remanded the case to give QRP another opportunity to provide the necessary evidence. The Board's remand order required a "detailed analysis of the impact of groundwater to the site, the aquifer and the Black River" prior to a decision on the SUP application. AR 362, Condition Y. QRP did not appeal this decision.

In its second decision, the Board concluded that QRP had still not met its burden. Now QRP again has the burden to demonstrate that there is no substantial evidence to support the Board's denial of the permit. It is not enough for QRP to show that there is conflicting evidence in the record. This court does not re-weigh the evidence. Schuh v. State Dept. of Ecology, 100 Wn.2d 180, 184, 667 P.2d 64 (1983). As we demonstrate

⁵ The Examiner approved the QRP permit only "for the first three phases" AR 359, because "further review" was required to assess the "impact of groundwater to the site, the aquifer and the Black River." AR 362.

below, there is substantial evidence in the record that the project poses risks to the Black River and that QRP did not meet its burden of proving otherwise.

1. The Record Contains Evidence That the Project Poses Substantial Adverse Risks to the Black River

The Examiner's factual findings establish that:

- “Groundwater beneath the site flows from east to west, away from Ashley Creek and neighboring wells but toward the Black River.” AR 346 FOF 44
- “DOE has listed the Black River as water quality impaired under Section 303(d) of the Clean Water Act...The water quality impairment was caused in part by low stream flows.” AR 346, FOF45.
- Creation of the pit lake “would result in the loss of approximately 9.5 million gallons of water per year through evaporation.” AR 347, FOF 47
- “[T]here is no conclusive evidence on water quality and water drawdowns that would result from the final phases of the operation.” AR 355, COL 5(g)(ii).

AR 3230. See also, supra, at 7. These findings establish that the QRP mine expansion project puts the Black River at considerable risk of flow reduction as a result of reduced groundwater recharge from the aquifer that underlies the mine and feeds the Black River.

Furthermore, when the prior owner of adjacent Hardrock Mine (now owned by QRP) sought permission from the State Department of Ecology for water withdrawals in excess of its exemption, the request was

denied because “use of water as requested by the applicant will further impair flows in the Black River...[and] will be detrimental to the public welfare by increasing the number of days each year that base flows are not met, by decreasing water quality, and by further impairing fish habitat.” AR 2901. Because the well at Hardrock Mine and at the proposed mine expansion site draw from the same groundwater aquifer that feeds the Black River, similar adverse results can be expected from QRP’s project. See infra, at 15-16.

These facts alone support the conclusion that the project is not locationally appropriate. The SUP criteria requires a “specific finding” that the proposed special use will not cause adverse effects on the surrounding natural environment. TCC 20.54.040(3). These factual findings, on the contrary, raise only red flags with regard to the type of adverse impacts that would result from the project.

2. Evidence Submitted by QRP Does Not Demonstrate an Absence of Substantial Adverse Impacts to the Black River

The sole document produced by QRP relevant to this remand issue, and the only document referenced as relevant by QRP in its response/cross-appeal, is the October 2002 PGG Hydrogeologic Analysis (“PGG Report”). AR 2492; QRP Br. at 14. The issue here is whether substantial evidence supports the Board’s conclusion that the PGG Report was not an adequate analysis of groundwater impacts to the Black River.

In considering possible impacts of the proposed mine expansion to the Black River, both water quality and water quantity must be considered. The PGG Report is organized by discussion of “Potential Effects of Gravel Mining on Groundwater Quantity” and on “Groundwater Quality.” AR 2503, 2505.

Within the “water quality” and “water quantity” categories, there are at least two elements of the proposed project that could adversely impact the River: (1) water use during mine operation, and (2) the 75 acre pit lake that will be created as the excavation proceeds into the aquifer. Thus, to adequately address the Board’s request for a “detailed analysis of the impact of groundwater to the site, the aquifer and the Black River,” the PGG Report should have considered: (a) impacts to Black River water quantity from mine operation; (b) impacts to Black River water quantity from the pit lake; and (c) impacts to Black River water quality from the pit lake and mine operation. This section also addresses QRP’s claim that it did not need to undergo this analysis.

a. Water Quantity: Water Used to Wash Gravel and for Other Operational Purposes

One of the primary issues in this case is how much water will be utilized by QRP’s proposed 151 acre mine expansion proposal. QRP asserts that evidence in the record is adequate to establish impacts of operational use, and that in any case this issue is beyond the County’s jurisdiction. In response, this section addresses four issues: (a) how much water the QRP mine expansion proposal will require to operate as planned,

(b) where this water will come from, (c) what impacts the water withdrawal will have, and (d) the County's authority to consider these impacts in granting or denying an SUP.

(i) QRP's Water Requirements

The record establishes that QRP intends to extract and then wash as much as 750,000 tons of aggregate per year. AR 336. The record also establishes that QRP would require approximately 17,500 gallons of water per day to wash 750,000 tons of aggregate over the course of a year.⁶ AR 46, 2680. Assuming a six day work week (AR 360), this amounts to 5.5 million gallons per year.

The 17,500 gallon daily estimate for gravel washing does not include other operational water needs like those for dust suppression, operation of the concrete batch plant, and domestic on-site use. The record does not reflect how much water will be required for on-site dust suppression or operation of the concrete plant. These omissions, by themselves, demonstrate that QRP failed to meet its burden of proof on this critical item.⁷

⁶ In its January 21, 2002 report, PGG concluded that one exempt well (allowing withdrawal of up to 5,000 gallons of water per day) could produce approximately 685 tons of aggregate per day based on a six day work week. AR 2680. Therefore, 5,000 gallons (or one exempt well) can produce approximately 214,000 tons of aggregate per year.

⁷ The record shows that domestic on-site use would require approximately 200 gallons per day, or an additional 62,400 gallons per year.⁷ AR 2687.

(ii) QRP's Water Source(s)

QRP has access to two exempt wells,⁸ one on-site and one at the adjacent Hardrock Mine which it recently acquired. Both of these wells draw from the groundwater aquifer that feeds the Black River.

The two existing exempt wells are not sufficient to meet QRP's production needs. Assuming the maximum lawful withdrawal from these wells (5000 gallons per day) and a six day work week (AR 360) those wells would produce only 3.2 million gallons – less than 60% of QRP's needs for washing gravel alone. QRP's water shortage is even greater when the (unknown) quantities for dust suppression, the concrete batch plant and other uses are considered.

QRP does not dispute that the mine will require water far in excess of what is available onsite. Neither does QRP provide any discussion of where it will obtain additional water to facilitate its full operation. It is unknown whether this water would also be drawn from the aquifer feeding the Black River or whether it would be brought in from other sources.

(iii) Impact of Expected Water Withdrawals on the Black River

The question presented to QRP by the Board, then, was: What will the impact of this substantial withdrawal be on the Black River and the

⁸ Under RCW 90.44.050, use of well water for an "industrial purpose in an amount not exceeding five thousand gallons a day, is and shall be exempt" from water appropriation permitting requirements.

surrounding natural environment? QRP failed to answer this question as is evident from the lack of analysis in the record and the lack of factual findings by the Examiner on this issue. The full extent of the adverse impacts from constant and significant groundwater withdrawals is unknown because QRP has not provided any analysis of the withdrawal effects on the Black River system.

The Board correctly concluded that the dearth of information about water quantity impacts from mine operations, and the indicators on the record suggesting that undue impacts would result, precluded issuance of the SUP. The Board considered both the fragility of the surrounding environment (as required by the County SUP regulations) and the scope of QRP's proposal. It concluded, based on the Hearing Examiner's findings of fact and the record as a whole, that "the proposal does pose a significant risk to groundwater" and that therefore it was inconsistent with the County requirements for SUP issuance. The Board's decision was based on substantial evidence and was not an erroneous application of the law to the facts.

(iv) The County is Entitled to Consider Water Quantity Impacts in its Consideration of an SUP Application

QRP asserts that the "County has no authority to regulate, restrict or prohibit QRP's use of the exempt well." QRP Br. at 37. BHAS does not dispute QRP's ability to withdraw 5,000 gallons of water per day from an exempt well. BHAS and the County Commissioners question the

impact of water withdrawals for mining operations and water lost through pit lake evaporation on the surrounding natural environment – including the Black River and its associated wildlife refuge. These unanswered questions go far beyond the water supplied (lawfully) by the two exempt wells.

In considering an SUP application, the County is required to consider the impacts of the project, as a whole, at the proposed location. TCC 20.54.040(3). Because the location chosen by QRP for this project is “uniquely environmentally sensitive,” the likely adverse impacts of the project must be analyzed before the project is approved.⁹ VR at 13.

Under the Code, QRP must make a showing that the project is locationally appropriate in that it will not cause substantial undue adverse effects to the surrounding natural environment. TCC 20.54.040(3). As reiterated throughout this brief, QRP has not made that showing. QRP has not shown how much water it will use for its proposed operation, where that water will come from, or what the impacts from that water use will be to the Black River. Neither has QRP adequately addressed impacts to the Black River from pit lake evaporation.

⁹ Uses such as the mine expansion proposed by QRP require additional safeguards “because [the] special impact or unique characteristics, [of the proposed use] can have a substantial adverse impact upon or be incompatible with other uses of land.” TCC 20.54.010.

The Board is well within its jurisdiction, and in fact is required by TCC 20.54.040 to consider the full impact of the project before it can be approved. A very significant element of that consideration is whether the water use proposed by the project will adversely affect the already flow-impaired Black River. Thus, the Board correctly denied the SUP based on a lack of information provided by the applicant on Black River impacts, and evidence in the record supporting a conclusion that adverse effects would result from the project.

b. Water Quantity: Water Lost Through Pit Lake Evaporation

The PGG Report includes a limited discussion of impacts to groundwater flow to the Black River resulting from evaporation from the pit lake. However, this discussion relies on a faulty analysis. The careful, site specific analysis required by the Board's original remand is still missing, as are Examiner findings of fact on this issue.

The PGG Report attempts to assess pit lake evaporation losses by comparing anticipated losses to current conditions. By inflating the estimate of evaporation loss under current conditions, the Report makes the pit lake losses seem small by comparison. Correcting the estimate of the "current condition" reveals that the pit lake evaporation losses are much greater than the status quo, resulting in a far larger impact on the Black River than acknowledged by the Report.

The PGG Report models the change in evapotranspiration (and resulting change in groundwater recharge) by comparing a predicted “historical” rate of evaporation under forested conditions with the predicted rate from the proposed pit lake. But, “[t]he subject property...has been logged and is basically clear with the exception of some scotch broom...” AR 335. Under current bare conditions, and relatively low evapotranspiration, the Black River struggles to retain water flow during summer months.

The Report concludes that “average annual evaporation from the gravel pit lakes will exceed the historical [e.g. forested] evapotranspiration by about 3.7 inches per year.” AR 2504. But, the current landscape has a much reduced evapotranspiration rate relative to a forested landscape. See AR 2503. Groundwater uptake by a mature forest is much greater than the amount of groundwater lost when the ground has been stripped bare.

PGG’s analysis does not compare the estimated evaporation from the pit lake versus the current, “basically clear” condition of the land. Because a clear landscape would result in far less evapotranspiration than either a pit lake or a forested landscape, the change in evapotranspiration that would result from the QRP project would be much greater than PGG’s hypothetical and irrelevant analysis.

Thus, QRP’s reliance on “the estimated reduction in groundwater recharge at the pit lake of 0.032 cfs ...approximately 5 to 9 % of the current groundwater flow beneath the mine” is an inaccurately low

estimate.¹⁰ AR 2507. The difference between the current groundwater recharge and the reduced groundwater recharge that will result from the pit lake is not considered by PGG in its Report, or elsewhere in the record.

The Hearing Examiner's decision to avoid factual findings related to Black River impacts from the pit lake is explained by PGG's use of inaccurate, hypothetical models to obtain a flawed estimate of loss of groundwater recharge. The Board was fully correct to deny the permit based on QRP's failure to meet its burden of proof. QRP's submission of inadequate and inaccurate evidence regarding the pit lake's water quantity impacts amply justified the Board's decision.

c. Water Quality: Mine Operation and Pit Lake Impacts

The PGG Report briefly discusses estimated changes to water temperature and turbidity due to the QRP project. The PGG Report concludes that the temperature changes and local increases in turbidity will not have a significant impact on the Black River surface water. But again, this analysis is oversimplified and inaccurate.

First, beyond temperature and turbidity changes, the PGG Report does not discuss any other water quality concerns. For example, there is

¹⁰ Despite a factual record which establishes that the pit lake will decrease groundwater flow to the Black River, even under an inaccurately low estimate, QRP asserts that "the lake will act as a reservoir to replenish the groundwater during the dry season when water levels in the Black River are at their lowest." QRP Br. at 25. Nothing in the record supports this assertion either. Instead, the record establishes that the pit lake will increase the evaporation rate and thereby reduce the amount of groundwater recharging the Black River throughout the year. AR 2507.

no consideration of adverse impacts to the Black River from wood waste toxins leaching into the groundwater. AR 1357. Nor is there any discussion of potential seasonal impacts to the Black River. These omissions and inaccuracies render the Report's conclusions unreliable.

Second, the PGG Report does not discuss how decreases in water quantity may affect water quality. The concern with water quality impacts to the Black River does not stem simply from the proposed mine's pollution of water flowing to the Black River via the groundwater aquifer. The concerns are also based on how a reduction in water quantity will effect the concentrations of pollutants in the Black River. Decreases in water quantity in the Black River would also increase surface water temperatures in the River (based on a reduced flow level). AR 2902. Thus, the question for QRP is not as narrow as the PGG Report's analysis. The Commissioners correctly concluded these deficiencies in QRP's submission provided additional support for denial of the permit.

3. QRP's Defense of PGG's Inadequate Analysis Does Not Render the Board's Decision Erroneous

QRP asserts that, in so far as the Board's remand order requires site specific analysis of impacts to the Black River, QRP need not comply with the Board's remand order. QRP Br. at 25. QRP argues that (1) such an analysis was not required under TCC 17.20.200 or by the County hydrogeologist, and that (2) "such data was unnecessary because PGG

assumed that all the water flows through the site into the Black River.”¹¹

Id. Neither of these justifications is valid.

- a. TCC 20.54.040 and the Board’s Remand Order Require a Detailed Analysis of Black River Impacts

QRP complains that it cannot be faulted for omitting the above information from the PGG Report because the County hydrogeologist found the PGG report adequate and because TCC 17.20.200 does not require such an analysis of potential water quality and quantity impacts. QRP Br. at 25. However, neither a statement by County staff nor the requirements of TCC 17.20.200 altered the requirement of TCC 20.54.040 or the Board’s requirement on remand that the applicant provide a “detailed analysis... of the impact of groundwater to the site, the aquifer and the Black River.” AR 3224.

The Board required this detailed analysis to assess the project’s compliance with TCC 20.54.040(3). The need for this “detailed analysis”

¹¹ QRP also states that PGG conducted an on-site aquifer pumping test in August of 2002, implying that this test satisfied any need for site specific analysis and data collection. AR 2500; QRP Br. at 22. This was an “advance outwash aquifer test” which measured the hydraulic connectivity of the aquifer under the mine site. It does not appear that this test had any relevance to assessing water quantity or water quality impacts of the project on the Black River. Thus, BHAS’s concerns regarding the lack of relevant on-site analysis of impacts to the Black River conducted during the summer months when the Black River is most vulnerable are still germane.

was uncontested by QRP. QRP did not appeal the Board's original remand to the Examiner for the purpose of conducting such an analysis to assess impacts to the Black River.

Pursuant to the County Code, to issue an SUP, a specific finding must be made "that the proposed special use is appropriate in the location for which it is proposed" based on evidence establishing that "[t]he proposed use shall not result in substantial or undue adverse effects on . . . [the] natural environment." TCC 20.54.040(3) (emphasis added).

Compliance with the Board's remand order and TCC 20.54.040(3) are not circumscribed by statements from County staff or TCC 17.20.200. QRP cites nothing to support its general assertion that because a county staff person found the PGG Report adequate, the Board is bound by that conclusion.¹²

QRP digs its own hole with its reference to TCC 17.20.200. This regulation provides "additional elements" that may be required for a hydrogeological report under the mineral extraction code. TCC 17.20.200

¹² Furthermore, Mr. Mead's reiteration of the PGG Report conclusions are saddled with the same flaws as the Report itself. AR 2489. Mr. Mead simply echos the findings of PGG and does not conduct his own analysis of the mine expansion impacts. Thus, the omissions in the PGG report caused Mr. Mead to reach the same erroneous conclusions as PGG. His reliance on PGG also resulted in his conclusions lacking any assessment of potential adverse impacts to the Black River itself, not only those areas east of the proposed mine site.

(emphasis added). These “additional elements” are in addition to the “required” elements of a hydrogeological report enumerated under TCC 17.15.535(3). Under the latter section:

A hydrogeological report shall contain:

- a. A description of the soil, geological and hydrological characteristics of the area under permit application consideration, and including the relationships between groundwater and surface water and stream flows;
- b. A discussion of how the characteristics described in subsection B3a above will influence drainage and the movement of water and contaminants in the groundwater, and a discussion of how the proposed project will influence surface water including instream flows;
- c. A description of conditions prior to project development;
- d. A description of conditions as they are likely to exist after complete development of the proposed project, and their impact on groundwater quantity and quality;
- e. A list of those recommendations to be used to mitigate any of these potential groundwater impacts. This shall include the effects of sewage disposal, lawn and yard activities, agricultural and animal husbandry, household chemical use, stormwater impacts and any other impacts reasonably associated with the project type described;
- f. This post development description shall include the effects of the activities likely to occur as a result of the complete development and use of the project at final equilibrium.

TCC 17.15.535 (emphasis added).

The PGG Report does not address several of these issues, specifically, “how the project will influence surface water including instream flows” and “a description of conditions as they are likely to exist after complete development of the proposed project, and their impact on groundwater quantity and quality.” Id. QRP’s reference to the “hydrogeological report” requirements highlights the inadequacy of the PGG Report supports the Board’s denial of its SUP.

b. QRP’s Assumption That “All Water Flows ... Into the Black River” Supports the Need for More Detailed Analysis

QRP next asserts that because it “conservatively assumed” that all groundwater from the project site would reach the Black River, no further onsite analysis of adverse impacts to the Black River was necessary. QRP Br. at 25. PGG’s conclusion that all groundwater from the site flows to the Black River does not cure the omissions and inaccurate assumptions in its Report. AR 2501. Assuming that groundwater under the proposed site flows to the Black River does not answer the question of how the project would impact the quantity or quality of that water.

4. Based on the Evidence Establishing Risks to the Black River and the Inaccuracies and Inadequacies in the PGG Report, the Board’s Permit Denial Was Supported by the Record and the Applicable Law

Evidence relied on by the Examiner and the Board establishes that QRP’s project poses significant risks to the Black River and its surrounding environment. Evidence establishing the vulnerability of the

Black River, the hydraulic connectivity between the mine aquifer and the Black River, as well as evidence indicating the significant quantity of groundwater that will be required to operate the mine and subsequently lost to evaporation shows that the project is not locationally appropriate.

The Board considered the PGG Report and found the conclusions reached therein inadequate to satisfy concerns with water quantity and quality impacts to the Black River. The Board specifically referenced the PGG Report in its decision, stating that “the applicant’s own consultant acknowledged in [the Report], that ‘the pattern of drawdown...indicated by the modeling results is not as sensitive to on site conditions and the magnitude of water level changes may be as much as twice that shown.’” AR 3231.

Furthermore, the Examiner did not adopt the limited and inaccurate conclusions of the PGG Report. The Examiner clearly considered the PGG Report in his decision, but did not make any factual findings based on the Report that would support a conclusion that the QRP project would avoid adverse water quality and/or quantity impacts to the Black River. Because the burden of establishing an absence of adverse effects to the Black River has consistently been on QRP, and its evidence is inadequate, the Board correctly rejected the Examiner’s conclusions and denied the QRP permit.

D. In Denying the QRP Permit Application, the Board Correctly Interpreted and Applied the Relevant Legal Standards for SUP Issuance

QRP asserts that the Board's denial of QRP's permit application was an erroneous application of law to the facts of the case. QRP Br. at 2. The Board's decision was based on the project's lack of compliance with (1) TCC 20.54.040(3), and (2) the County Comprehensive Plan.

1. The Board Correctly Denied the SUP Based on the Project's Failure to Comply With the SUP Criteria in TCC 20.54.040

QRP's 151 acre proposed mine expansion project is located in a Rural Residential Resource zone within Thurston County. The proposed mine site is surrounded on three sides by the Black River National Wildlife Refuge. Under TCC 20.09A.010, the purpose of the Rural Residential Resource designation is to "encourage residential development that . . . is sensitive to the site's physical characteristics; provides greater opportunities for protecting sensitive environmental areas and creating open space corridors . . ."

Mineral extraction is not an authorized or "primary" use within the Rural Residential Resource zone. TCC 20.09A.020. Instead, mineral extraction is a special use within the zone requiring a special use permit under TCC 20.54.040. Under this section:

No application for special use shall be approved unless a specific finding is made that the proposed special use is appropriate in the location for which it is proposed. This finding shall be based on the following criteria:

(a) Impact. The proposed use shall not result in substantial or undue adverse effects on adjacent property, neighborhood character, natural environment, traffic conditions, parking, public property or facilities, or other matters affecting the public health, safety, and welfare.

TCC 20.54.040 (emphasis added).

The Board could not have made a “specific finding” that the QRP proposal was locationally appropriate. The record simply does not support that conclusion. There is substantial evidence to support the Board’s conclusion that the PGG Report is inaccurate and incomplete, and did not establish that the proposed use would “not result in substantial or undue adverse effects” to the Black River and surrounding natural environment.

In QRP’s Response, it mischaracterizes the role of Rural Residential Resource lands. QRP asserts that the zoning designation of the project area, “Rural Residential Resource”, has the purpose of “conserv[ing] long-term commercially significant mineral lands and to minimize land use conflicts by allowing designation status only where a long-term mining operation would be compatible with surrounding land uses.” QRP Br. at 7 (citing TCC 20.30B.010).

QRP misleads the court by implying that this definition is applicable to a “Rural Residential Resource” designation generally. Instead, it applies only to “Designated Mineral Lands”. TCC 20.30B. Only the currently permitted 26 acres are “designated mineral lands.” AR 3229. The remaining 125 acres for which QRP now seeks to obtain a

permit is not so designated. Therefore, mining is not a preferred use of these lands.¹³

2. The Board Correctly Denied the SUP Based on its Inconsistency with the County Comprehensive Plan Policies

The same Examiner findings of fact and evidentiary record supporting the Board's permit denial under the SUP criteria also support the Board's denial based on inconsistency with the Comprehensive Plan. The Board specifically found that the project is not consistent with numerous Comprehensive Plan policies:

Protecting wildlife habitat for important species and protecting unique and rare habitats (Goal 1, Objective B, Policy 4); recognizing the hydrologic continuity between ground and surface water (Goal 2, Objective A, Policy 3); protecting groundwater aquifers, fish and wildlife habitat, and recreational functions of streams (Goal 2, Objective B, Policy 1); protecting streams from adverse impacts of activities occurring adjacent to their waters or within their watersheds by avoiding degradation of water quality (Goal2, Objective C, Policy 1).

AR 3231.

QRP takes issue with the brevity of the discussion offered by the Board in its decision regarding the project's inconsistency with the

¹³ Furthermore, even if the quoted code language applied, it requires that the operation be "compatible with surrounding land uses." The Board specifically found that the 151 acre QRP mine expansion proposal was not compatible with the surrounding environment.

Comprehensive Plan policies on the natural environment.¹⁴ But the Board relied on the Examiner's own findings of fact to reach the conclusions that the project ran afoul of these Comprehensive Plan policies and would adversely affect both the Black River and the surrounding unique and highly valued environment.

The Board's decision lists examiner factual findings that establish inconsistency between the project proposed by QRP and the Comprehensive Plan policies on the natural environment. The Board concluded that "these facts show that the proposal does pose a significant risk to groundwater." AR 3231. This conclusion specifically speaks to Goal 2, Objective B, Policy 1 listed by the Board which requires "protecting groundwater aquifers." AR 3231.

The Board also states that the facts "clearly establish that there is a hydraulic link between the groundwater on-site and the water quality impaired Black River." AR 3230-3231. Acknowledging this hydraulic link, the Board correctly recognizes that adverse impacts to groundwater

¹⁴ The Examiner's decision discusses the Comprehensive Plan policies in more detail. However, the discussion only reveals that the facts he relies on for finding compliance with the Comprehensive Plan do not address water quality or quantity impacts to the Black River. The Examiner's decision goes through the Comprehensive Plan policies and finds compliance with each but, in its subsequent discussion, references portions of the record that establish a lack of water quality or quantity impacts only to Ashley Creek or wells east of the mine site away from the Black River. Again, the purpose of the Board's remand in its original decision was to assess water quality and quantity impacts that the QRP proposal would have on the Black River itself, west of the site.

beneath the mine site will cause adverse impacts to water quality and quantity in the Black River. This directly conflicts with Comprehensive Plan Goal 2, Objective C, Policy 1 requiring that the County “protect[] streams from adverse impacts of activities occurring adjacent to their water and their watersheds by avoiding degradation of water quality.” See BHAS Br. App. D.

Furthermore, the Board was under no obligation to discuss every element ad nauseum where there is a “sufficient record for review.” Henderson v. Kittitas County, 124 Wn. App. 747, 754, 100 P.3d 842 (2004). The Board’s decision presents the relevant findings of fact from the Examiner which acknowledge risks to the Black River and adequately explains why these findings and the lack of findings that these risks will not materialize, demonstrate a lack of consistency with the protective Comprehensive Plan policies.

E. The Board’s Decision that Mitigation was Inadequate Was Supported by Substantial Evidence in the Record and Was Not A Clearly Erroneous Application of Law to the Facts

In the Board’s decision, it concluded that one of the conditions on the project – requiring installation of monitoring wells and a review of project impacts after five years – was inadequate to mitigate the risks and adverse impacts posed by the project.¹⁵ AR 3231. QRP takes issue with this conclusion, asserting that the monitoring conditions will adequately

¹⁵ Under TCC 20.54.070(21)(e) “Any permit issued pursuant to this chapter shall be reviewed by the approval authority no less frequently than every five years....”

avoid any adverse impacts that arise as the project is ongoing. QRP Br. at 33.

To state QRP's argument plainly exposes its deficiency. Impacts are not avoided by measuring or monitoring them. The Comprehensive Plan and regulations do not authorize mines to degrade nearby rivers as long as the degradation is measured. The Board rightly concluded that the monitoring would not effectively mitigate or avoid the adverse effects of the project. AR 3229.

QRP similarly implies that because the project is conditioned on compliance with County and State regulations, the Examiner's monitoring requirement is adequate and the Board's conclusion is clearly erroneous. QRP Br. at 36. See AR 056-57. As above, however, requirements for further review and periodic checkups (no matter how frequent) will not avoid the actual impacts -- it will only measure them.¹⁶ This type of "mitigation" is inadequate where a project is found to have substantial

¹⁶ TCC 17.20.210 requires quarterly monitoring of groundwater. Monitoring does not avoid irreversible impacts, even if monitoring occurs frequently. Furthermore, the frequency may be reduced after two years.

Under the NPDES permit, QRP is required to monitor weekly for temperature of process water between July and September, monthly for ground and surface discharges or process water, and quarterly monitoring of ground water discharges of stormwater. Again, the monitoring does not prevent predicted impacts. Furthermore, the scope of these monitoring requirements is very limited temporally and addresses only water quality, not water quantity.

adverse impacts. AR 3229. Measuring the project's impacts on the Black River will not make those impacts go away.

QRP cites Maranatha Mining, Inc. v. Pierce County to support its argument. 59 Wash. App. 795, 804, 801 P.2d 985 (1990). Maranatha is distinguishable because in that case the court was concerned with Maranatha's compliance with the conditions. Monitoring was recommended as a way to ensure compliance, not, as in this case, as a way to avoid adverse impacts. This is a significant difference because in Maranatha, if the conditions were met, adverse impacts would be avoided or adequately mitigated. Here, monitoring will just measure the damage done.

QRP has not demonstrated that critical impacts to the Black River are avoidable. Monitoring while the project is ongoing does not avoid irreparable damage before it occurs. In both its decisions, the Board recognized the value of the surrounding sensitive environment, recognized the factual record that shows substantial adverse effects threatened by the project, and required (consistent with the SUP criteria) that the full scope of impacts to the Black River from the mine operation and pit lake be properly assessed before the project is approved.

In the Board's oral ruling on the issuance of the SUP, Commissioner Wolfe stated:

There were no significant findings (by the Hearing Examiner) for the Black River which is down gradient to the mine. So because of the sensitivity of the Black River and the surrounding areas and the fact that -- because of the sensitivity, I don't think its enough to acknowledge that there was significant impact and then just to say we'll monitor it. That's not enough.

VR at 14. The Board, therefore, concluded that because the area was “uniquely environmentally sensitive”, monitoring was insufficient to avoid or mitigate the adverse effects that would result from the QRP proposal. Id. at 13. Thus, the Board appropriately concluded that approving the project with monitoring as its primary “mitigation” component would fall far short of ensuring that irreparable damage was avoided.

F. QRP's Discussion of SEPA is Irrelevant, Misleading, and Does Not Demonstrate A Clearly Erroneous Application of Law to the Facts

QRP raises two arguments related to the relevance of SEPA in this case. First, QRP asserts that because BHAS did not challenge the SEPA Mitigated Determination of Non-Significance (“MDNS”), the Board of Commissioners was precluded from finding that the project did not meet Code criteria for an SUP. Second, QRP argues that the Board's use of the phrase “significant adverse impacts” renders its permit denial invalid because this is not the specific language used in the County SUP regulation. TCC 20.54.040. Both of these arguments are erroneous.

1. The County's SEPA Determination on the QRP Project is Irrelevant

In its response brief, QRP argues that because BHAS chose to pursue an appeal of the SUP instead of appealing the County's issuance of an MDNS for the proposed project, BHAS is now precluded from arguing for denial of a special use permit based on impacts to the surrounding environment. QRP asserts that the Board, by denying the SUP in light of the County's MDNS, acted outside of its authority and jurisdiction and contrary to RCW 36.70C.130(1)(e). QRP Br. at 9-10, 28, 29.

This assertion is erroneous, misleading, and a waste of the Court's time. Based on state law, the County has adopted procedures for two distinct processes: environmental review under SEPA and special use permits for certain projects. TCC 20.54.040; TCC Ch. 17.09. These two regulatory regimes have different administrative processes, standards, and opportunities for public involvement.¹⁷

QRP relies on Lakeside Industries v. Thurston County, 119 Wn. App. 886, 83 P.3d 433 (2004) and Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 4 P.3d 123 (2000), for its assertion that a failure to appeal the MDNS bars the Board from determining that the project has a significant adverse impact on the surrounding environment. Neither case stands for this proposition. Instead, both cases discuss the issue of

¹⁷ For example, the administrative process for an SUP challenge includes an appeal to the Board of County Commissioners. TCC 20.60.020. The County SEPA process does not. TCC 17.09.160.

timeliness when a party chooses to appeal a SEPA and permit decision. There is no question as to the timeliness of BHAS's appeal.

On the contrary, case law establishes that a permit decision may be appealed regardless of whether the related SEPA determination is also appealed. Somers v. Snohomish County, 105 Wn. App. 937, 940, 21 P.3d 1165 (2001) (appellant appealed grant of subdivision permit and not SEPA determination). Nowhere in the regulations governing either of these processes is a party precluded from appealing an administrative decision on a permit where a SEPA decision is not also appealed.¹⁸

In effect, QRP is advocating an extension of the exhaustion of remedies doctrine from a solely vertical application (appealing a single permit at every local and state opportunity) to a horizontal application -- requiring appeal of every permit and local administrative decision related to a project where challengeable elements of the decision may overlap. This extension of the exhaustion doctrine would place an undue burden on applicants, appellants, the jurisdictions applying and interpreting the administrative requirements, and ultimately, the courts.

QRP's argument also implies that BHAS should be collaterally estopped from asserting that the project will cause substantial and undue adverse impacts because of the MDNS. First, collateral estoppel is based

¹⁸ A SEPA determination must be appealed with the underlying permit decision, if it is to be appealed. See State ex rel. Friend Rikalo Contractor v. Grays Harbor County, 122 Wn.2d 244, 249, 857 P.2d 1039 (1993). However, there is no requirement that a SEPA decision must be appealed to validate a challenge of the permit itself.

on the premise that there has been an earlier proceeding wherein the parties had a full and fair hearing on the issue. Hadley v. Maxwell, 144 Wn.2d 306, 311, 27 P.3d 600 (2001). The County's MDNS issuance did not create such a forum. BHAS chose the SUP process as its opportunity for a "full and fair" hearing on its concerns with the impacts of the mine on the surrounding environment.

Second, the burden of proving collateral estoppel is on the party asserting it. Spahi v. Hughes-Northwest, Inc., 107 Wn. App. 763, 774, 27 P.3d 1233 (2001). QRP has not discussed the criteria or made any effort to demonstrate it satisfies them. QRP's preclusion argument must be rejected.¹⁹

¹⁹ Even if QRP has properly raised the collateral estoppel defense, it would not succeed. Collateral estoppel requires:

- (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

Hadley v. Maxwell, 144 Wn.2d at 311. As noted above, the regulatory process and purposes of SEPA and SUP are different, and therefore do not encompass identical issues. Furthermore, the policies underlying the doctrine are actually hindered, not supported by application of collateral estoppel under these facts. "Collateral estoppel promotes judicial economy and prevents inconvenience, and even harassment of the parties." Id. Here, application of the doctrine would thwart judicial economy by requiring appellants to appeal more administrative decisions than they necessarily want or need to in attempting to get to the desired end result.

QRP briefly asserts that *res judicata* applies to preclude this Court's consideration of the SUP denial. QRP Br. at 33. QRP's passing reference to the doctrine is inadequate, and this Court need not address its application. Bohn v. Cody, 119 Wn.2d 357, 368, 832 P.2d 71 (1992).

However, this argument also must fail because the doctrine does not apply. "In order to prevent repetitious litigation and to provide binding answers, the *res judicata* doctrine bars reasserting the same claim in a subsequent land use application." DeTray v. City of Olympia, 121 Wn. App. 777, 785, 90 P.3d 1116 (2004).

Res judicata occurs when a prior judgment has a concurrence of identity in four respects with a subsequent action. There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made.

Hilltop Terrace Homeowner's Ass'n v. Island County, 126 Wn.2d 22, 31, 891 P.2d 29 (1995). Here, the subject matter and causes of action of are distinct and separate from the SEPA determination. This is a challenge to an SUP application, not a SEPA MDNS. As stated above, the two actions differ substantively and procedurally. A determination on the validity of one does not bar the consideration of the other.

Adopting QRP's argument would have wide reaching and highly prejudicial impacts. Any individual or organization wishing to appeal a local land use decision would be forced to appeal every related local decision to ensure there was no estoppel effect of one appeal process on

another challenge. This would stretch limited community resources to a point that could render most challenges cost prohibitive.

And, contrary to the doctrine's anti-harassment goals, (see footnote 20, supra) applying collateral estoppel or *res judicata* here would require appellants to harass the opposing party by raising every possible administrative challenge that applies to similar features of the challenged project. The impact on local and state tribunals would also be debilitating as appellants were forced to make numerous new challenges to appeal a single issue.

BHAS was free to appeal the SUP, the MDNS, or both. This type of decision is appropriately left to the appellant, which will be the party investing time and limited resources in its appeal. BHAS challenged the County's issuance of the SUP for the project's failure to meet the specific criteria for SUP issuance under TCC 20.54.040. This was a challenge to the project's principle substantive permit. BHAS did not appeal the County's SEPA determination and thereby passed on a collateral, procedural determination.²⁰ There should be no prejudice to the appellant for this course of action.

²⁰ See City of Des Moines v. Puget Sound Regional Council, 108 Wn. App. 836, 849, 988 P.2d 27 (1999).

2. The Board's Use of SEPA Language to Characterize the Project's Impacts is Irrelevant

QRP also attempts to make an issue out of the Board's use of the phrase "significant adverse impacts" in its denial of the SUP. This too, is a frivolous argument.

Under the County Code,

No application for a [SUP] shall be approved unless a specific finding is made that the proposed special use is appropriate in the location for which it is proposed. This finding shall be based on the following criteria:

a. Impact. The proposed use shall not result in substantial or undue adverse effects on adjacent property, neighborhood character, natural environment, traffic conditions, parking, public property or facilities, or other matters affecting the public health, safety and welfare.

TCC 20.54.040 (emphasis added).

In denying the SUP, the Board made several statements to support its conclusion that the proposed project did not meet the SUP criteria.

Specifically, the Board stated:

· "the proposed location for the gravel mine is not appropriate due to the gravel mining operations' significant adverse impacts on the surrounding sensitive environment," AR 3229 (emphasis added).

· "the proposed gravel mine is not consistent with the comprehensive plan policies on the natural environment," Id.

· “the proposal does pose a significant risk to groundwater,” AR 3231.

· “the hearing examiner’s ultimate conclusion that the proposed location of the project is appropriate and that the project will not have an adverse impact on the surrounding environment, including the Black River, and community is not supported by the evidence in the record,” Id.

Each of these statements by the Board is independently sufficient to communicate the Board’s basis for denial of the SUP. The Board specifically complied with TCC 20.54.040(3) in making a finding that “the proposed location for the gravel mine is not appropriate.” AR 3229, 3231. Nowhere is there a requirement that the Board utilize the phrase “substantial or undue adverse effects” to explain the basis for its decision. The omission of this phrase is irrelevant where the Board’s decision so clearly expresses the basis for its decision: namely, the risk of substantial, documented adverse impacts to groundwater and related natural resources, including the Black River, renders the proposed location inappropriate.

In the same vein, it is irrelevant that the Board used the phrase “significant adverse impacts” to characterize the problems that would result from the project. While this phrase is commonly linked to SEPA and is a term of art in that context, the words still retain everyday meaning outside the SEPA context. Both state and local legislation, as well as case law have used this phrase to connote important, substantial, negative impacts in non-SEPA situation. See e.g., WAC 173-26-211, 241(3)

(shoreline impacts); WAC 173-303-806 (permitting of incineration facilities); WAC 222-16-100 (planning options for the northern spotted owl); RCW 43.143.030 (ocean resources management act project review criteria); Ventures Northwest Ltd. Partnership v. State, 81 Wn. App. 353,359, 914 P.2d 1180 (1996) (State refused to authorize project because it “conflicted with the goals of the Washington Coastal Zone Management Program because of its significant adverse impacts on wildlife habitat and water quality functions.”).

QRP is essentially asking the court to quibble over the difference in meaning between the phrase “significant adverse impacts” and “substantial and undue adverse effects.” For SUP purposes, these phrases are synonymous. The words “significant” and “substantial” are synonyms.²¹ The words “impacts” and “effects” are also synonymous.²² These phrases both get at the identical ultimate point, which is, this project

²¹ See Wilmot v. Kaiser Aluminum and Chemical Corp., 118 Wn.2d 46, 71, 821 P.2d 18 (1991) (court applies a “‘substantial’ or ‘significant’ factor test, where the employee's ultimate proof is to prove by a preponderance of the evidence that retaliation was a substantial or important factor motivating the discharge.”); Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 311, 898 P.2d 284 (1995) (in bringing a discrimination action RCW 49.60.180, a plaintiff must provide evidence that the defendant “discriminatory motivation was a ‘significant or substantial factor in an employment decision ...’.”).

²² Under SEPA regulations “impacts” are defined as the “effects or consequences of actions.” WAC 197-11-752. “Environmental impacts are effects upon the elements of the environment listed in WAC 197-11-444.” WAC 197-11-752.

will cause considerable harm to the natural environment surrounding the mining site proposed by QRP.

As stated above, the Board was under no obligation to use any of these words in reaching its decision. Consistent with TCC 20.54.040(3), the Board concluded that “the proposed location for the gravel mine is not appropriate.” AR 3229. QRP’s semantic debate is immaterial.

G. QRP’s Request for Declaratory Judgment on Cross-Appeal Should be Denied

In its cross-appeal, QRP argues that if the SUP is denied, this Court should declare, pursuant to the Declaratory Judgment Act, that the portion of the permit application pertaining to the hot-asphalt mixing plant should be carved out from the permit denial and separately approved. But QRP cannot segment its unified application at this late date. Nor, pursuant to County Code, could the asphalt plant be approved without the mining operation.

QRP submitted a single permit application to Thurston County: permit application 000788. That special use permit application requested the following:

To allow the Applicant to expand the existing 26-acre mining site to 151 acres; to replace a previously approved concrete batch plant; to construct an asphalt hot mixing plant; and to resume concrete and asphalt recycling.

AR 323.

The Board denied QRP’s permit in its entirety. The Board’s decision says “The Hearing Examiner’s Decision on Remand dated May

30, 2003 is reversed and the SUP 000788 is denied.” AR 3232 (emphasis added). No request was made by QRP before the Examiner or the Board to segment the hot asphalt mixing plant from the permit as a whole. No specific provision was made to allow separate approval of any sub-portion of the proposal.

Under the County Code, a hot mix asphalt plant as an “accessory use” to a mining operation under the County Code. TCC 20.54.070(21)(a). Asphalt production is only permitted as an accessory use to mineral extraction “when expressly permitted through a special use permit.” TCC 20.54.070(21)(a). Here, QRP proposed the asphalt hot mixing plant as an accessory use to its mine expansion proposal. Permitting of asphalt production independent of mineral extraction is not allowed. Denial of the asphalt plant was a legal necessity upon denial of the mine expansion application.

QRP cannot dissect its permit to retain portions of the project it views as salvageable where the entire permit application has been denied. Put another way, this Court would surely not entertain an argument from Audubon that just because the permit was approved, that approval only applied to the gravel mining expansion and not to the asphalt mixing plant.

There was one permit application. If the permit is approved, the hot-asphalt mixing plant is approved. If the permit is denied, so are its component parts, including the hot-asphalt mixing plant.²³

Even if the permit could be segmented to QRP's benefit, the Land Use Petition Act, not the Declaratory Judgment Act, is the proper vehicle to bring any challenge to a decision on a land use permit. RCW 36.70C.010; Grandmaster Sheng-Yen Lu v. King County, 110 Wash. App. 92, 99, 38 P.3d 1040 (2002). QRP's DJA action must be dismissed if for no other reason than the most basic: the Court lacks jurisdiction to consider it. Id.

H. QRP's Motion for Reconsideration of This Court's Denial of the QRP Motion to Amend its Cross-Appeal Should be Denied

QRP did not timely raise the issue of truck access to the proposed mine site in its notice of appeal. This request for reconsideration is untimely.

The Court of Appeals denied QRP's motion to amend its notice on May, 18, 2006. This denial was proper because, under RAP 5.2(a), a party has only 30 days to file a notice of appeal that specifies the portions of the

²³ Nothing precludes QRP from submitting a new permit application that requests approval of a hot-asphalt mixing plant as an accessory use to the currently permitted 26 acre mine operation. See TCC 20.54.070(21)(a). However, because QRP chose to submit one permit application for a 151 acre mining operation, and that one permit was denied, the activities sought under that permit are all denied.

lower decision which the appealing party wants this Court to review. QRP did not timely raise this issue and the Court should reaffirm its denial of QRP's untimely motion.

Furthermore, QRP seeks to raise this issue *only if* this Court affirms the Board's permit denial. QRP's concern that the permit conditions regarding truck access will retain significance where the permit has been denied is misguided. If the permit is denied, the conditions of the permit are vacated. Thus, QRP cannot establish good cause for its request for reconsideration on this issue. QRP's motion for reconsideration should be denied.

III. CONCLUSION

For the foregoing reasons, we ask this Court to affirm the Board's denial of QRP's special use permit in its entirety.

Dated this 14 day of August, 2006.

Respectfully submitted,

BRICKLIN NEWMAN DOLD, LLP

By: 

David A. Bricklin, WSBA No. 7583

Devon N. Shannon, WSBA No. 34534

Attorneys for Black Hills Audubon Society

I am the legal assistant for Bricklin Newman Dold, LLP, attorneys
for Black Hills Audubon Society herein. On the date and in the manner
indicated below, I caused the Reply/Cross Response of Black Hills

Audubon Society to be served on:

Dawn F. Reitan
Inslee, Best, Doezie & Ryder, P.S.
777 - 108th Avenue NE, Suite 1900
P.O. Box C-90016
Bellevue, WA 98009-9016

- By United States Mail
 By Legal Messenger
 By Facsimile
 By Federal Express/Express Mail
 By E-Mail

Gregory Jack Dennis
David J. Ward
The Landerholm Firm
805 Broadway Street, Suite 1000
Vancouver, WA 98660-3343

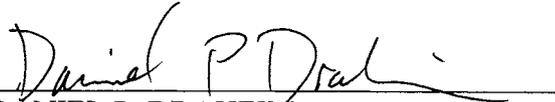
Mailing Address:
P.O. Box 1086
Vancouver, WA 98666-1086

- By United States Mail
 By Legal Messenger
 By Facsimile
 By Federal Express/Express Mail
 By E-Mail

Elizabeth Petrich
Senior Deputy Prosecuting Attorney
Thurston County
2424 Evergreen Park Drive SW, # 102
Olympia, WA 98502
(Attorneys for Thurston County)

- By United States Mail
 By Legal Messenger
 By Facsimile
 By Federal Express/Express Mail
 By E-Mail

DATED this 14 day of August, 2006, at Seattle, Washington.


DANIEL P. DRAHEIM

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