

COURT OF APPEALS
DIVISION II

03 APR 23 PM 1:19

STATE OF WASHINGTON
BY
DEPUTY

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

NO. 38617-8-II

HOOD CANAL COALITION; OLYMPIC ENVIRONMENTAL
COUNCIL; JEFFERSON COUNTY GREEN PARTY; PEOPLE FOR A
LIVEABLE COMMUNITY; KITSAP AUDUBON SOCIETY; HOOD
CANAL ENVIRONMENTAL COUNCIL; and
PEOPLE FOR PUGET SOUND,

Appellants,

v.

JEFFERSON COUNTY and FRED HILL MATERIALS, INC.,

Respondents.

REPLY BRIEF OF APPELLANTS

Keith P. Scully
WSBA No. 28677
GENDLER & MANN, LLP
1424 Fourth Avenue, Suite 1015
Seattle, WA 98101
(206) 621-8868
Attorneys for Appellants

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. SUMMARY OF ARGUMENT	1
II. ARGUMENT	1
A. <u>The EIS is Inadequate Even Had This Been a Purely Nonproject Action</u>	1
1. <u>Every EIS must have a level of detail commensurate with the available data and the environmental impacts of the proposal.</u>	1
2. <u>Significant detail is available, and Jefferson County erred by ignoring it.</u>	3
B. <u>This is a Combined Project and Nonproject Action, and Therefore More Detail was Required in the EIS</u>	8
C. <u>The County and Fred Hill Material's Other Arguments Fail</u>	15
III. CONCLUSION	18

TABLE OF AUTHORITIES

Cases

Alpine Lakes Protection Society v. Washington State Dept. of Natural Resources,
102 Wn. App. 1 (1999) 6

Cathcart-Maltby-Clearview Community Council v. Snohomish County,
96 Wn.2d 201 (1981)..... 8, 9

Cheney v. City of Mountlake Terrace,
87 Wn.2d 338 (1976) 10

Citizen’s Alliance to Protect Our Wetlands v. City of Auburn,
126 Wn.2d 356 (1995) 12, 13, 15

City of Des Moines v. Puget Sound Regional Council,
108 Wn. App. 836 (1999) 9, 10

Klickitat Cty Citizens Against Imported Waste v. Klickitat Cty.,
122 Wn.2d 619 (1993) passim

Moss v. Bellingham,
109 Wn. App. 6 (2002) 13, 14

Statutes

RCW 43.21C.030-31 5

Regulations

WAC 197-11-402(2)..... 2

WAC 197-11-442(2)..... 3

WAC 197-11-444(2)(c) 17

WAC 197-11-444(d)..... 16

WAC 197-11-704(2)(a) 2
WAC 197-11-704(2)(b) 2

I. SUMMARY OF ARGUMENT

Jefferson County and Fred Hill Materials argue that the environmental impact statement (EIS) at issue here is sufficient for a nonproject action. But the EIS in this case is inadequate for any type of action; it provides nothing more than generalities. Moreover, the action in this case is part-and-parcel of a plan to extract more gravel from Jefferson County and move it to ships via a pier. The pier project is in progress, and Jefferson County erred by ignoring it. The EIS should be redone, taking account of the detail available regarding Fred Hill Materials' plans to expand mining operations, and providing data and scientific analysis to aid the Jefferson County Commissioners in reaching a decision on whether to expand the size of mining segments fourfold.

II. ARGUMENT

- A. The EIS is Inadequate Even Had This Been a Purely Nonproject Action
 1. Every EIS must have a level of detail commensurate with the available data and the environmental impacts of the proposal.

Both Jefferson County and Fred Hill Materials argue that the EIS in this case is adequate because this is a nonproject action. But any EIS, whether project or nonproject, must ensure that environmental consequences are “sufficiently disclosed, discussed, and substantiated by

supportive opinion and *data*.” *Klickitat Cty Citizens Against Imported Waste v. Klickitat Cty.*, 122 Wn.2d 619, 644 (1993) (emphasis added). While an EIS for a nonproject action may have less detail available and therefore be less specific in terms of scientific data, every EIS must be based on data. WAC 197-11-402(2); *Klickitat Citizens*, 122 Wn.2d at 641-42.

A “project action” involves a decision on a specific project which will “directly modify the environment.” WAC 197-11-704(2)(a). A “nonproject” action refers to actions which are different or broader than a single site-specific project, such as plans, policies and programs. WAC 197-11-704(2)(b). Whether a proposal consists of a project action or a nonproject action, SEPA requires a level of detail commensurate with the importance of the environmental impacts. WAC 197-11-402(2); *Klickitat Citizens*, 122 Wn.2d at 641-42. In *Klickitat Citizens*, where a tribe challenged the adequacy of an EIS approved by Klickitat County, the court rejected the County’s contention that a nonproject EIS does not require great detail: “SEPA calls for a level of detail commensurate with the importance of the environmental impacts and the plausibility of alternatives.” *Id.* The court emphasized that ““significant impacts on both the natural environment and built environment *must* be analyzed if

relevant” in an environmental impact statement. *Id.* at 642 (emphasis in original).

The discussion of impacts and alternatives for a nonproject proposal must be discussed and substantiated with a level of detail “appropriate to the scope of the nonproject proposal and to the level of planning for the proposal.” WAC 197-11-442(2).

In this case, Jefferson County’s argument appears to be that *no* detail is appropriate for their decision to expand mining segment size fourfold. Jefferson County’s EIS is a restatement of the obvious regarding the impacts of increasing mining segment sizes from 10 to 40 acres. Although it properly identifies all of the areas of potential environmental impact, it offers essentially no data whatsoever to aid decisionmakers in evaluating how great of an impact increasing the size of mining segments fourfold would have. *See* Opening Brief of Appellants HCC et al, at pp. 16-20, 23-29; AR 153-94 (Draft EIS); AR 245-74 (Final EIS).

2. Significant detail is available, and Jefferson County erred by ignoring it.

Jefferson County argues at length that it is acceptable to have an EIS completely devoid of actual data because the total amount of material removed during future mining cannot be accurately predicted. Brief of Jefferson County at 23-25. This argument fails for two reasons. First, one

key change to Jefferson County's mining regulations was not the total amount of material removed, but rather the size of an individual mining segment. The Mineral Resource Lands Overlay (MRLO) changed the size of mining segments from 10 acres at a time to 40 acres at a time. AR at 265-66. Key missing data from the EIS is thus not how many total tons of rock will be removed, but rather a technical analysis of the impacts of removing 40 acres of topsoil and gravel at a time as opposed to 10 acres. This information is readily available: Fred Hill Materials has been conducting mining in ten-acre segments for years, and contrasting information on 40-acre segments is available either from studies of other mines, or simply by allowing Fred Hill Materials to dig a 40-acre test site and measuring the impacts.

Moreover, information on the total amount of extraction is in the record. Inexplicably, the County both argues that they cannot predict the rate of extraction (Brief of Jefferson County at 24-25), and then provides the details of how much gravel is projected for removal. Brief of Jefferson County at 34. The intent is to increase gravel mining from 750,000 tons to 7.5 million tons per year, with 750,000 tons moving on roadways and the remainder transported via the pit to pier project onto ships. Brief of Jefferson County at 34; citing AR 112-17 and 251-56. As the Growth

Board directed, although this maximum goal may not be reached, Washington law is unequivocal in requiring the EIS to measure the maximum amount of resources permitted for extraction. AR 19, *citing Ullock v. Bremerton*, 17 Wn. App. 573, 581 (1977).

In *Ullock*, the court considered a nonproject EIS wherein up to 40 different uses could have been applied to a particular parcel after it was rezoned. In finding that each combination of those 40 uses need not be individually evaluated, the court held that “an EIS is adequate in a nonproject zoning action where the environmental consequences are discussed in terms of the maximum potential development of the property[.]” *Ullock*, 17 Wn. App. at 581.

The County’s argument that because the future demand for gravel cannot be predicted with complete accuracy an EIS need not evaluate any data would eviscerate SEPA. Every resource extraction project is dependent on market demand. Allowing mining, fishing, timber harvest, and other resource collection projects to evade anything more than pro forma SEPA review on a theory that the exact impacts cannot be guaranteed makes a mockery of SEPA’s mandate that responsible officials make an informed decision about the environmental impact of a major action. RCW 43.21C.030-31. This approach has been expressly

forbidden in the context of threshold determinations for timber harvesting. In *Alpine Lakes Protection Society v. Washington State Dept. of Natural Resources*, 102 Wn. App. 1 (1999), the court reversed a determination of non-significance because the agency failed to consider future timber harvest proposals. In *Alpine Lakes*, Plum Creek timber raised exactly the argument set forth by Fred Hill Materials here: that because there were no specific forest practices presently “on the table,” an EIS was not required for a rule change. *Id.* at 15. The court reversed, noting that “[a]n EIS should be prepared where the responsible agency determines that significant adverse environmental impacts are probable following the government action, **even if there are no existing specific proposals to develop the land in question[.]**” *Id.* at 16 (emphasis added). Just as it was “unlikely that Plum Creek would have gone to the expense of performing the analysis” if it did not intend to log, there is every reason to believe Fred Hill Materials intends to increase mining operations in the new, expanded MRLO. *Id.* at 16. Indeed, Fred Hill has expressly said they intended to increase mining, and the County erred by failing to evaluate the proposal in light of Fred Hill’s intent to increase mining to 7.5 million tons of gravel per year. AR 253-54.

The County's argument that no detailed analysis is possible is belied by its own briefing. The County proceeds to do in its brief what it claimed could not be done in the EIS: study the impacts of various extraction scenarios regarding how much would be removed and when. Brief of Respondent at 40-41. Unfortunately, the brief suffers the same fatal flaw as the EIS: even though the amount of extraction can be predicted, there is no empirical analysis whatsoever of what the environmental impacts would be under any scenario.

The County also generically refers to "estimates" of environmental impact in support of its claim that the EIS is adequate. Brief of Respondent at 42. But the County cites to no section of the EIS in support of this claim, and in fact there are no estimates of environmental impact. Instead, there are only generic, patently obvious statements like "more" and "greater" regarding the impacts of increasing the mining segment size. An estimate of environmental damage might meet the standards of SEPA; useless labels do not.

Fred Hill Materials' claim that no detailed data is required because there is no difference between a 10-acre segment and a 40-acre segment defies credulity: there is a fourfold increase in the size of a particular mining site. Brief of Fred Hill Materials at 16-17. As the EIS indicates,

there will be “more” soil disturbed, with “greater” impacts on the environment. It is the detail regarding how much impact that is lacking; up until now, no party has argued that there will be no change in impacts. Additionally, Fred Hill Materials fought hard to get the MRLO passed; if it has no effect on mining, having it enacted would have presumably been a matter of little import.

B. This is a Combined Project and Nonproject Action, and Therefore More Detail was Required in the EIS

Project actions relate to a specific project which will “directly modify the environment.” WAC 197-11-704(2)(a). The pit-to-pier project is sufficiently detailed to bring it within the ambit of law applied to combined project and nonproject actions. The Respondents fail to completely and compellingly address the case law construing combined project and nonproject actions. Relying on *Cathcart-Maltby-Clearview Community Council v. Snohomish County*, 96 Wn.2d 201 (1981), Jefferson County argues that the decision to allow up to 40 acres of mining at a time to further a plan to export gravel via a pit-to-pier conveyor system is exclusively a nonproject action. Brief of Respondent at 18. But this is a combined project and nonproject action, requiring a higher level of detail in the EIS. In *Cathcart-Maltby*, the court ruled that a comprehensive plan amendment could be considered separately to a

possible real estate development because the development was proposed to take place up to 25 years in the future, and its scope was undetermined. *Id.* at 210. But in this case, the scope of both proposed gravel extraction and the pit-to-pier project itself is known. AR 44; 253-54. Fred Hill Materials' plan is to have the pit-to-pier project done within 10 years; unlike a residential development with an unknown number of future houses, the pit-to-pier project's basic design is known, and its impacts on transportation and the volume of material removed can be predicted. AR 253. Likewise, Fred Hill Materials has released its mining plans: 7.5 million tons of gravel. AR 253-54.

Jefferson County next mistakenly relies on *City of Des Moines v. Puget Sound Regional Council*, 108 Wn. App. 836, 853-54 (1999) in support of their argument that no actual data is required in an EIS if the extent of the project's impacts cannot be completely predicted. Brief of Respondent at 25. But *City of Des Moines* requires data and detail. In *City of Des Moines*, the appellants challenged the conclusion in an EIS that there would be no growth in air passenger activity, and also the failure to evaluate impacts of the SeaTac airport expansion beyond 13 years. *City of Des Moines*, 108 Wn. App. 836. In finding that the zero-growth estimate was supported by substantial evidence, the court looked to expert

testimony and scientifically-supported studies. *Id.* at 850-53. In finding that 13 years was a reasonable period to project impacts, the court evaluated expert testimony regarding changes to aircraft design and the air travel market and noted that the reliability of projections diminishes as the length of time is expanded. *Id.* at 853-55. In this case, though, there is no analysis whatsoever. Rather than working with the clear data they had available – that Fred Hill Materials was going to expand mining first to 750,000 tons and then to 7.5 million tons per year, and that the size of the mining segments would increase fourfold – the County chose to completely abdicate its responsibility to use data in favor of meaningless generalities.

Likewise, *Cheney v. City of Mountlake Terrace*, 87 Wn.2d 338 (1976) provides no support for the County’s argument. Brief of Respondent at 27. In *Cheney*, Mountlake Terrace conducted an EIS for a road expansion. Although the road ran through an undeveloped parcel, at the time the EIS was conducted, there were no plans to privately develop the parcel. *Cheney*, 87 Wn.2d at 342. As the *Cheney* court noted, “[t]he agency cannot close its eyes to the ultimate probable environmental consequences of its current action,” but neither need every remote or speculative possibility be considered. *Id.* at 344. In this case, unlike

Cheney, the development is neither remote nor speculative. Fred Hill Materials has made no bones about its intent to expand mining, and has provided details on how much it will be extracting (7.5 million tons), and how the gravel will be moved (the pit-to-pier project). AR 253-54.

Jefferson County similarly mistakenly relies on *Klickitat Cty Citizens Against Imported Waste v. Klickitat Cty.*, 122 Wn.2d 619 (1993) in support of their theory that they had virtually total discretion in deciding what to put into their EIS. Brief of Respondent at 17. In *Klickitat*, the Washington Supreme Court considered a nonproject action, a countywide solid waste management plan, along with a project action, a particular landfill. After the nonproject action EIS was reversed, the court held that the County properly incorporated analysis of the project in a later draft of the nonproject EIS:

Thus, future County approval or environmental review of a site-specific plan does not preclude consideration of that proposal during the earlier, nonproject solid waste plan where *that future activity is specific enough to allow some evaluation of its probable environmental impacts*. Such early disclosure best serves the purposes of SEPA[.]

Klickitat Citizens, 122 Wn.2d at 640 (internal citation omitted; emphasis added). In this case, the future activity is specific enough to

allow evaluation: just like the landfill in *Klickitat Citizens*, as the EIS itself in this case states, the pit-to-pier project's scope is completely known, and the amount of gravel to be withdrawn has been disclosed. AR 253-54. It was error for the County to ignore the detail available in favor of the pro-forma EIS created.

Jefferson County next tries but fails to distinguish *Citizen's Alliance to Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356 (1995). In *Citizen's Alliance*, the court considered a 781-page EIS addressing a zoning code change passed to further the potential development of a racetrack. *Id.* The court noted that the City of Auburn had "combined a 'nonproject action' with a 'project action.'" *Id.* at 362. Because the project and nonproject actions were intertwined, the court required Auburn to analyze both the nonproject and project actions with the same level of detail. *Id.* at 365. In concluding that the EIS adequately evaluated traffic, the court noted that it devoted "42 pages to an extensive description of traffic problems." *Id.* at 368.

In attempting to distinguish *Klickitat Citizens* and *Citizen's Alliance*, Jefferson County claims that the difference is that "both Fred Hill and the County have always considered and analyzed the MRLO and the pit-to-pier as distinct and independent from another[.]" Brief of

Jefferson County at 18. But this is precisely the error. Like *Klickitat Citizens* and *Citizen's Alliance*, the County knows why the nonproject action was requested, and possesses sufficient detail from Fred Hill Materials on the pit-to-pier project and the amount of gravel Fred Hill proposes to extract to provide the analysis required by SEPA. Absent a principled reason to treat the MRLO as separate from the pit-to-pier project, the decision to do so violates SEPA, and deprived the Jefferson County Commissioners of the data necessary to make an informed decision on the MRLO proposal.

Confusingly, Fred Hill Materials joins the fray with a citation to *Moss v. Bellingham*, 109 Wn. App. 6 (2002). But *Moss* supports HCC et al's view. In *Moss*, residents challenged the City of Bellingham's failure to require an EIS for a residential development within Bellingham's urban growth area. Noting that the environmental impacts of development had already been considered in the Comprehensive Plan and urban growth area designation, the court held that no additional EIS was required. In this case, the legislative action at issue (the MRLO) is a change to the Comprehensive Plan. The purpose of SEPA-GMA integration is to avoid duplication of efforts; the County must study the effects of this change now, so that later project-specific mining applications can be handled in an

expedited manner, evaluated primarily for “changed conditions . . . new information, impacts not reasonably foreseeable in the GMA planning process, or impacts specifically reserved in a plan EIS for project review.” 109 Wn. App. at 17. Fred Hill Materials will presumably argue the other side of the coin when they ask for a mining permit: that because the MRLO has been granted, no detailed analysis of a particular mining site is required. The time to study the impacts of the MRLO and its attendant mining is now.

Fred Hill Materials next argues that HCC et al. asks this court to “require that each local government that passes a legislative enactment specifying allowed land uses and activities or designating resources (sic) lands to have before them, concurrently, project permit applications.” Brief of Fred Hill Materials at 20. But this is not what HCC et al. asked of the County: rather than demanding a project permit application or a full consideration of the Pit to Pier project, HCC et al. only asked that available information about the known scope of mining and transportation impacts be included in the EIS, or at a minimum that the EIS provide some actual data on the difference between a 40-acre segment and a 10-acre segment.

C. The County and Fred Hill Material's Other Arguments Fail

Jefferson County argues that transportation impacts were adequately studied, claiming that despite a 50% increase in heavily-laden, slowly moving gravel trucks on local roads and State Route 104, the impact is “negligible” on traffic flow and public safety. Brief of Jefferson County at 30-31. In crafting this argument, the County relies exclusively on the total volume of vehicles on SR 104 compared to the addition of 98 heavy truck trips per day. But a gravel truck is not just another passenger car; a gravel truck is slow-moving, heavy, and difficult to maneuver. An EIS must analyze the particular impacts of a proposal, not rely on generalities inapplicable to the particular facts of the proposal. For example, in *Citizens Alliance to Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356, 368 (1995), the court found adequate a 42-page analysis of traffic that provided an “extensive description of traffic problems.” There is no “extensive description” here; instead, there is simply the bald conclusion that because the overall percentage of gravel trucks is low, there must necessarily be no impacts to road safety or road maintenance.

Jefferson County finally claims that its EIS adequately addresses the impacts to plants and animals. Brief of Respondent at 36. But the

County cites no study whatsoever of the actual impacts; instead the County notes only that the proposed mining site is not in a known territory of a priority species, and is located 500 feet from a creek. *Id.* But an EIS is not limited to priority species; it must study the impact on all plants and animals within a proposal area. WAC 197-11-444(d). Further, the County points to no evidence in the record regarding the impact of placing a 40-acre mining segment 500 feet from a creek.

Contrary to the County's claims, objections to the dearth of data regarding plant and animal impacts have not been abandoned. Brief of Respondent at 36. HCC et al. asked the Growth Board to decide whether the EIS "violate[d] SEPA in other respects, as described in the Coalition's comment letter." AR 557. Although other arguments were emphasized, Appellants specifically noted in briefing to the Growth Board that it "incorporates the points made in its DSEIS comment and hearing comment letters." AR 546. Included in those comment letters were the argument that the EIS failed to evaluate the proposal's impact on plants and animals. AR 531-32 (Comment letter of Hood Canal Coalition provided by Gendler & Mann LLP, attached to briefing provided to Growth Board).

Jefferson County also argues that its complete failure to study the transportation impacts of constructing a massive pier and then having massive, slow-moving gravel ships navigate Hood Canal was excused on a claim that the Hearings Board allowed them to do so. Brief of Respondent at 32. But the Board expressly required the transportation impacts of the pier and its ships to be studied as parts of the County's alternatives analysis. AR 17-18. Jefferson County's theory that because the pier was not considered an alternative to the MRLO they could ignore the Board's order to evaluate the impacts of the overlay, including the pit-to-pier's effect on ship and truck traffic is nonsensical. Brief of Jefferson County at 32, n. 13.

Moreover, even if the Board had directed the County to ignore the ships and trucks associated with the pier, the Board does not have the authority to excuse compliance with SEPA; SEPA mandates consideration of traffic impacts. WAC 197-11-444(2)(c). In this case, the pit-to-pier project with its attendant ships is part and parcel of the plan to expand mining, and the impacts of this massive pier and ships on marine traffic, as well as the impact on highway traffic of frequent bridge openings, must be studied before the County can take action to approve a mining expansion.

III. CONCLUSION

For the reasons discussed herein, the Growth Board's 2004 Compliance Order, along with the Jefferson County Superior Court decision affirming that order, should be reversed, and the mining overlay amendment should be remanded to the Growth Board for further action consistent with SEPA.

DATED this 27th day of April, 2009.

Respectfully submitted,

GENDLER & MANN, LLP

By:



Keith Scully
WSBA No. 28677
Brendan W. Donckers
WSBA No. 39406
Attorneys for Appellants

1 for a Liveable Community, Kitsap Audubon Society, Hood Canal Environmental Council,
2 and People For Puget Sound (hereinafter "Coalition") herein. On the date and in the
3 manner indicated below, I caused the Reply Brief of Appellants to be served on:

4 Martha P. Lantz
5 Assistant Attorney General
6 Attorney General's Office
7 Licensing & Administrative Law
8 Division
9 1125 Washington Street
10 P.O. Box 40110
11 Olympia, WA 98504-0110

James C. Tracy
18887 State Hwy. 305 NE, Suite 500
Poulsbo, WA 98370-7462

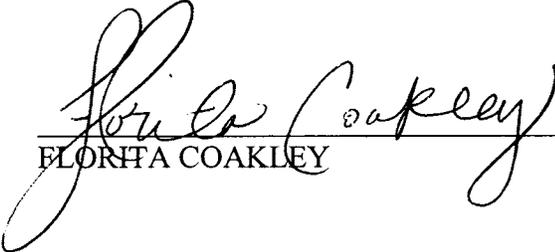
By United States Mail
 By Legal Messenger
 By Facsimile
 By Federal Express/Express Mail

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

13 David Alvarez
14 Chief Civil Deputy Prosecuting Attorney
15 Jefferson County Courthouse
16 1820 Jefferson Street
17 P.O. Box 1220
18 Port Townsend WA 98368

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

20 DATED this 27TH day of APRIL, 2009, at Seattle, Washington.

21
22
23
24
25
26
27
28

FLORITA COAKLEY

HCC-N(Den)COA 38617-8-11Dec serv

DECLARATION OF SERVICE - 2

GENDLER & MANN, LLP
1424 Fourth Avenue, Suite 1015
Seattle, WA 98101
Phone: (206) 621-8868
Fax: (206) 621-0512