

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

NO. 38617-8-II

HOOD CANAL COALITION, OLYMPIC ENVIRON. COUNCIL,
et al
Appellants

vs.

JEFFERSON COUNTY and FRED HILL MATERIALS, INC.
Respondents

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR JEFFERSON COUNTY
Cause Number: 04-2-00382-1

09 APR - 1 PM 12:49
STATE OF WASHINGTON
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

**BRIEF OF RESPONDENT
JEFFERSON COUNTY**

DAVID ALVAREZ
Jefferson County Deputy Prosecuting Attorney
Attorney for Respondent
P.O. Box 1220
Port Townsend, WA 98368
(360) 385-9180
Date: March 28, 2009

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iv
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	2
III. STATEMENT OF THE CASE	2
LEGAL ARGUMENT	16
I. THE 2004 COMPLIANCE ORDER CORRECTLY CONCLUDED THAT THE COUNTY BoCC WAS REASONABLY INFORMED OF THE PROBABLE IMPACTS OF THEIR LEGISLATIVE DECISION	16
II. THE HOOD CANAL COALITION CANNOT SATISFY EITHER RCW 34.05.570(3)(d) OR RCW 34.05.570(3)(e) WITH RESPECT TO THE 2004 COMPLIANCE ORDER AND THEREFORE, THE TRIAL COURT DECISION BELOW SHOULD BE AFFIRMED	20
A. <u>Three (3) alternatives have been studied in the 2004 SEIS</u>	21
<u>Proposed Alternative</u>	22
<u>Approved Alternative</u>	22
<u>No-Action Alternative</u>	23
B. <u>Transportation impacts were adequately analyzed in the 2004 FDO</u>	29
C. <u>Impacts on wildlife habitat are adequately analyzed in the 2004 SEIS</u>	35

D. *The intensity of use (10 acres vs. 40 acres) has been adequately studied*.....37

E. *How much will be extracted and how fast will it be extracted?*39

CONCLUSION43

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES</u>	
<i>Aachen v. Clark County</i> , 95-2-0067 (FDO, 9/20/1995)	22
<i>Callecod v. State Patrol</i> , 84 Wash.App. 663, 673, 929 P.2d 510 (1997) ..	20
<i>Cathcart-Maltby-Clearview Community Council v. Snohomish Cty.</i> , 96 Wn. 2d 201 (1981)	18
<i>Cheney v. City of Mountlake Terrace</i> , 87 Wn. 2d 338, 344, 552 P.2d 184 (1976)	27, 28, 42
<i>Citizen’s Alliance to Protect Our Wetlands v. City of Auburn</i> , 126 Wn. 2d 356, 894 P. 2d 1300 (1995)	18
<i>City of Des Moines v. Puget Sound Regional Council</i> , 108 Wn. App. 836, 853-54, 988 P.2d 27 (1999)	25, 28, 34, 42
<i>King County v. Boundary Review Board</i> , 122 Wn.2d 648, 664, 860 P.2d 1024 (1993)	9
<i>King County v. Central Puget Sound Growth Mgmt. Hr'gs Bd.</i> , 142 Wash.2d 543, 553, 14 P.3d 133 (2000)	20
<i>Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty.</i> , 122 Wn. 2d 619, 860 P. 2d 390, 866 P. 2d 1256 (1993)	17, 18
<i>Port of Seattle v. Pollution Control Hearings Bd.</i> , 151 Wn. 2d 568, 588, 90 P. 3d 659 (2004)	20
<i>Swinomish Indian Tribal Community v. Western Washington Growth Mgmt. Hearings Bd.</i> , 161 Wn. 2d 415, 424, 166 P. 3d 1198 (2007)	19
<i>W.E.A.N. v. Island County</i> , 122 Wn. App. 156, 164, 93 P. 3d 885 (2004), <i>cert. denied</i> , 153 Wn. 2d 1025 (2005)	19

STATUTES

RCW 34.05.570(3)	16
RCW 34.05.570(3)(d)	20
RCW 34.05.570(3)(e)	20
RCW 36.70A	2, 15
RCW 36.70A.060(1)	23
RCW 43.21C	11, 15
RCW 78.44.031(5)	5

BRIEF OF RESPONDENT Jefferson County

*Hood Canal Coalition, Olympic Environmental Council, et al, Appellants v. Jefferson
County and Fred Hill Materials, Inc., Respondents*

REGULATIONS

WAC 197-11-060(3).....6
WAC 197-11-060(4).....26
WAC 197-11-44019
WAC 197-11-4426, 7, 19
WAC 197-11-442(2).....21
WAC 197-11-444(1).....23
WAC 197-11-600(3)(b)(i)35
WAC 197-11-78226

OTHER AUTHORITIES

Jefferson County Ordinance #08-0706-0429, 35, 37
Jefferson County Ordinance #14-1213-023, 4, 7, 14

I. INTRODUCTION

The issue before this Court is straightforward: Was the Jefferson County Commission reasonably informed of the probable significant adverse environmental impacts that might arise from a legislative decision to approve a change in the County's land use map so that 690 acres of Commercial Forest would be granted a Mineral Resource Land Overlay or "MRLO"? In the context of the State Environmental Policy Act (or "SEPA") this was and is a non-project action.

Appellants, to be known collectively herein as "Hood Canal Coalition" or "HCC," have attempted at least five times in their pleadings to confuse and meld two quite distinct SEPA concepts, i.e., a non-project action with a project action. They attempt to do so in order to have the more detailed environmental analysis that would be required for a project action imposed upon the non-project legislative decision to change the land use map. The project action they repeatedly attempt to intertwine with the MRL Overlay is the entirely independent application by Respondent Fred Hill Materials, Inc. ("Fred Hill") seeking permission to install and operate a "pit-to-pier" system that would allow the transport of minerals by barge and ship using marine waters. Note well that the pit-to-pier is a proposal that could be built and then supplied with raw materials whether or not the MRLO exists.

So far, the Jefferson County Board of County Commissioners (“the BoCC”), the Western Washington Growth Management Hearings Board (“the Hearings Board”) and the Superior Court have all correctly rejected the attempts of the HCC to conflate these two distinct SEPA concepts and this Court is respectfully asked to do the same.

II. ASSIGNMENTS OF ERROR

This Respondent did not cross-appeal so it makes no assignments of error.

III. STATEMENT OF THE CASE

In furtherance of the directives and goals found within Ch. 36.70A RCW, the Growth Management Act, requiring local government to designate and protect resource lands, the BoCC provided 690 acres of Commercial Forest Land with a Mineral Resource Land Overlay or “MRLO” through approval of a Comprehensive Plan amendment. The MRLO location is within a tree farm of approximately 72,000 acres where the commercial harvesting of timber is ongoing and inevitable AND the extraction of mineral resources is already an outright or automatic “yes”

use.¹ Without the MRLO FHM would be limited to extracting minerals in 10 acre segments.² With the MRLO, as approved, FHM could extract minerals in 40 acre segments. The BoCC granted the MRLO by approving Ordinance #14-1213-02 in December 2002. A primary reason for granting the MRLO was that the gravel resources found at the location in question were deemed to be “abundant” in an August 15, 2002 letter written by the State Department of Natural Resources (“DNR”) to County planning staff.

Ordinance 14 is the result of a complex and detailed process that began when FHM made timely application for a Comprehensive Plan (or “CP”) amendment seeking an MRLO for 6,240 acres located south of SR 104 in southeastern Jefferson County. However, that is NOT what gained legislative approval. Instead, County staff determined, after a SEPA-driven review and public comment for all 19 CP amendments proposed in 2002, that the largest MRLO they could recommend for approval to the County Commissioners was an MRLO of 690 acres. The adopted MRLO did not alter the underlying zoning designation of any of the 690 acres.

¹ See the Final SEIS from March 2004, pages 1-1 to 1-3. See the Administrative Record or “AR” at 268, 267, 266. The Clerk to the Hearings Board apparently “Bates” stamped each document from back to front.

² See CP 277, page 8 of the 10/2004 Compliance Order issued by the Board. “Segment” is a term of art in the Surface Mining Act, Ch. 78.44 RCW, and is defined later in this Brief.

Assuming the absence of Ordinance 14, FHM always held and does hold the following options pursuant to the existing County DR, specifically, the ability to:

- extract resources at the 6,240 acres in increments of 10 acres or less; and
- apply for any and all County-issued permits needed for the "pit to pier" project.

MRLO. The MRLO also provides certain protections to the resource extraction process that do not exist in the absence of an MRLO.

But the MRLO is not all powerful and, despite the Petitioners' repeated attempts to confuse the record and the decision-makers on these points, the MRLO does NOT:

- Influence the total amount of minerals that will be extracted inside the MRLO boundary or the Thorndyke Tree Farm since FHM or any mining firm could, depending on what the market will bear, obtain the necessary permits to mine the entire 72,000 acres in 10 acre increments if it believed it could sell the product for a profit;
- Determine the rate of extraction, since the market does that because FHM (or any FHM competitor) will not extract minerals it cannot transport and sell at a profit; and
- Serve as a required precondition to the application FHM made in 2003 (one year after applying for the MRLO) for the pit-to-pier project since the permitting process for a land use development exists entirely distinct from the CP amendment process (a legislative process) and barges that will depart from the pier in the future could be loaded with materials obtained from 10 acre segments, 40

BRIEF OF RESPONDENT Jefferson County

Hood Canal Coalition, Olympic Environmental Council, et al, Appellants v. Jefferson County and Fred Hill Materials, Inc., Respondents

acre segments or segments of any size in between.

The County now chooses to precisely define a “segment” and a “disturbed area,” terms that would otherwise mistakenly be considered interchangeable. The best way to explain the difference between those phrases is to state that all “disturbed areas” [a term of art defined at RCW 78.44.031(5)] are “segments” for the purposes of the “segmental reclamation plan”³ a mining firm must submit to the state regulatory agency (Dept. of Natural Resources) for approval before beginning to mine. However, not all “segments” are “disturbed areas”, since a segment can be under reclamation if it was previously mined. Generally, a “disturbed area” is a location that is the site of active mining or is about to be the site of active mining. The County will use the phrase “segment” throughout this Brief.

No one disputes that the 2002 request by FHM for a Comprehensive Plan amendment overlaying the MRLO “on top of” lands already designated as Commercial Forest by the County would require environmental analysis under SEPA for the existence, if any, of any probable significant adverse environmental impacts arising from the

³ A “segmental reclamation plan” is a plan for mining and reclamation after mining. It typically divides an area proposed for mining into segments. Once DNR approval is obtained, the mining firm then mines and reclaims each segment in a progression that is logical for that particular mining site.

possible decision to grant the MRLO. But the legislative decision did not authorize mining or mineral extraction and thus was in the terminology of SEPA a so-called “non-project” action. Different rules apply for the level of environmental analysis that must be done when studying a “non-project” action. The administrative code provisions for SEPA could not be clearer in this regard. See WAC 197-11-442 quoted in part here below:

Contents of EIS on nonproject proposals.

(1) The lead agency shall have more flexibility in preparing EISs on nonproject proposals, because there is normally less detailed information available on their environmental impacts and on any subsequent project proposals. The EIS may be combined with other planning documents.

(2) The lead agency shall discuss impacts and alternatives in the level of detail appropriate to the scope of the nonproject proposal and to the level of planning for the proposal. Alternatives should be emphasized. In particular, agencies are encouraged to describe the proposal in terms of alternative means of accomplishing a stated objective (see WAC 197-11-060(3)). Alternatives including the proposed action should be analyzed at a roughly comparable level of detail, sufficient to evaluate their comparative merits (this does not require devoting the same number of pages in an EIS to each alternative).

...

(4) The EIS's discussion of alternatives for a comprehensive plan, community plan, or other area-wide zoning or for shoreline or

land use plans shall be limited to a general discussion of the impacts of alternate proposals for policies contained in such plans, for land use or shoreline designations, and for implementation measures. The lead agency is not required under SEPA to examine all conceivable policies, designations, or implementation measures but should cover a range of such topics. The EIS content may be limited to a discussion of alternatives which have been formally proposed or which are, while not formally proposed, reasonably related to the proposed action.

WAC 197-11-442 (in pertinent part)

The pit-to-pier proposal is undergoing a distinct “project” level analysis under SEPA at this time. Please note that the Draft and Final Supplemental Environmental Impact Statements (“DSEIS” or “FSEIS”) being challenged here build upon earlier impact statements, specifically a draft and final EIS generated when the County adopted its Comprehensive Plan in August 1998, a draft and final SEIS relating to the 1999 Comprehensive Amendment cycle and a SEIS for the 2002 Comprehensive Plan amendment cycle.⁴

Petitioners appealed Ordinance #14 in early 2003 to the WWGMHB, alleging non-compliance with the State Environmental Policy Act (6 issues), the Growth Management Act (3 issues), the

⁴ See AR 193, 192, pages ii and iii of the Draft SEIS dated March 2004.

County's Comprehensive Plan (4 issues) and the County's procedural development regulations (2 issues).⁵ After voluminous briefing (not part of this record), the County succeeded in defeating 12 of those 15 issues, leaving only three SEPA issues⁶ and one GMA issue to be handled by the County on remand. On remand the County was required to undertake additional environmental review under SEPA. The County, with the help of an outside consultant, generated and published the 2004 DSEIS⁷ and the 2004 FSEIS⁸ that are at the core of this lawsuit.

The 2003 FDO, the FDO that remanded this matter back to the County for further environmental review, requires a close reading by this Court because the Petitioners have so consistently misconstrued the text of that FDO and because the 2003 FDO was quite specific in its directives to the County.

The Petitioners' mantra has consistently been that the pit-to-pier is so interwoven with the mining overlay proposal (Opening Brief, p. 19) that the environmental analysis of the legislative decision must also

⁵ See AR 43-40, p. 3-6 of the Board's FDO from August 2003.

⁶ One of the three SEPA issues, specifically whether SEPA had been violated because the authors and principal contributors to the EIS had not been named is NOT found in the 15 issues as described by the Hearings Board in its Pre-Hearing Order, but appears sua sponte as an issue to be discussed in the 2004 FDO at p. 4, CP 273.

⁷ The cover page of the DSEIS is at AR 195 the last page of that same DSEIS is AR 107.

⁸ Similarly, the FSEIS is at AR 296 to AR 196 with its cover sheet at AR 274.

BRIEF OF RESPONDENT Jefferson County

Hood Canal Coalition, Olympic Environmental Council, et al, Appellants v. Jefferson County and Fred Hill Materials, Inc., Respondents

include detailed environmental analysis of the pit-to-pier. The independence of the pit-to-pier project is expressly proven by the record below, for example FSEIS, p 1-4, §1.5.1 at AR 265 and FSEIS, p. 2-1, AR 256. While the Petitioners have provided this Court with ‘sound bites’ from the 2003 FDO, only a lengthy and verbatim excerpt from that FDO explains how the County’s original SEPA analysis was inadequate:

The Pit-to-Pier Project

Petitioners also allege that the County should have analyzed Fred Hill Materials’ potential pit-to-pier project as part of the EIS on the mineral resource overlay designation. Issue No. 5. Petitioners cite to *King County v. Boundary Review Board*, 122 Wn.2d 648, 664, 860 P.2d 1024 (1993) for the proposition that early environmental review should be undertaken so that decision makers will have the most information on foreseeable consequences of their planning actions: “[w]hen government decisions may have such snowballing effect, decision-makers need to be apprised of the environmental consequences before the project picks up momentum, not after.” *Ibid.* The County responds that it was not timely to evaluate the pit-to-pier proposal because the elements of that proposal are speculative at this time and will be addressed at the permit level. County Brief at 21.

We agree with the County that it was premature for the County to fully evaluate the pit-to-pier project as part of the EIS for the mineral resource overlay designation. Although the applicant did advise the County that it might propose such a project after the mineral resource overlay designation was obtained, a pit-to-pier project involves many more specific elements than the designation of a type of land use area and those specific elements are best evaluated at the project level.

BRIEF OF RESPONDENT Jefferson County

Hood Canal Coalition, Olympic Environmental Council, et al, Appellants v. Jefferson County and Fred Hill Materials, Inc., Respondents

At the same time, there are aspects of a future pit-to-pier project that are appropriate for environmental review at this time. Those aspects arise from the need to transport the mineral extracted under the new mineral resource overlay designation. A conveyor project of some kind is a likely consequence of enhanced excavation, something of which the applicant itself apprised the County.

Environmental review is required even if "no land-use change [will] occur as a direct result of a proposed...action." *King County v. Boundary Review Board*, 122 Wn.2d 648, 664, 860 P.2d 1024 (1993). The court in *King County* addressed whether an EIS was required for a proposed annexation to a city (prior to the implementation of the GMA). *Ibid.* at 655-58, 860 P.2d 1024. The court found that though "no official proposals have been submitted...for the development of the annexation properties..., [e]ven a boundary change...may begin a process of government action which can 'snowball' and acquire virtually unstoppable administrative inertia." *Ibid.* at 664, 860 P.2d 1024.

In this case, the County prepared an EIS but did not evaluate alternatives as required by the SEPA rules, which we have found to be inadequate. *Infra.* The pit-to-pier project was not an alternative to the mineral resource overlay. Instead, it was a possible impact resulting from potentially increased mining activity. Rather than analyzing the pit-to-pier project, the EIS should include the transportation impacts of the various alternatives. See Impact of Truck Traffic, factor #7. The EIS discussion of "truck traffic" presently includes a general description of the existing Level of Service, which is "C" and is expected to reach "F" by 2018. *Ibid.* at 2-31. The discussion indicates that "additional truck traffic would access SR 104 via Rock to Go Road." *Ibid.* In looking at the potential environmental impacts of the increased site size within the two alternative overlay areas (690 acres and 6,240 acres), the EIS should consider increased

BRIEF OF RESPONDENT Jefferson County

Hood Canal Coalition, Olympic Environmental Council, et al, Appellants v. Jefferson County and Fred Hill Materials, Inc., Respondents

production and the consequent need to transport the aggregate mined. If the roads are already at capacity, then the need for some kind of conveyor system should be considered. Since the applicant has already flagged this possibility, the EIS should evaluate that transportation impact generally.

.....

Conclusion: The EIS for the mineral resource land overlay designation is inadequate due to the failure to properly evaluate the environmental impacts of alternatives, including the no action alternative. The County's comprehensive plan amendment designating the mineral resource land overlay does not comply with ch. (sic) 43.21C RCW.

See the 2003 FDO at p. 27 (line 22) to p. 29 (line 30), or AR 19, 18, 17.

Note that the underline emphasis was supplied by this author and the **bold** emphasis was supplied by the Hearings Board in the original.

The Court can conclude from that lengthy excerpt that if the Hearings Board had concluded that a project level analysis of the pit-to-pier project should have been done as part of the analysis of the MRLO designation, then the Hearings Board would have said so in their conclusion for this section. But the Hearings Board did NOT say so. Of course, the Hearings Board immediately understood the difference between a non-project level analysis and a subsequent project level analysis, writing that the “pit-to-pier project was not an alternative to the [MRLO.]” But the Hearings Board makes it even clearer because it continues “rather than analyzing the pit-to-pier project, the EIS should

include the transportation impacts of the various alternatives.” The word “alternatives” can only logically refer to the three choices studied in the EIS documents: A) keep the 10-acre maximum and not grant a MRLO, B) grant an MRLO of 690 acres or C) grant an MRLO of 6,240 acres and does NOT refer to the pit-to-pier. If the pit-to-pier is/was not one of the alternatives, then its transportation impacts need not be studied. The key phrase in that last quote is obviously “rather than,” suggesting that there is not a need to analyze the pit-to-pier in the EIS that were to be generated in order to respond to the issues that the 2003 FDO found non-compliant.

Having discussed what the FDO did NOT tell the County to do, the Court’s attention is respectfully directed to the portion of the FDO where the County DID receive instructions regarding what it needed to undertake on remand, specifically Findings of Fact “N,” “O” and “P” found at p. 40 and 41 of that FDO. AR 6, 5. There the Hearings Board wrote:

N. In the FSEIS, dated November 25, 2002, the staff recommended adoption of the proposal for a 690-acre mineral resource overlay designation. Neither the draft SEIS nor the FSEIS did more than a brief, conclusory evaluation of the no action alternative or the other proposed alternative. The 690-acre staff recommended alternative was evaluated in terms of thirteen factors the County listed as appropriate for evaluation of a mineral resource overlay designation but no other alternative was similarly evaluated.

O. The FSEIS pointed to a capacity problem with respect to truck transport of minerals from the new overlay site. However, the FSEIS failed to describe the

current traffic or predict a range of future truck traffic that would be needed for increased mining activity. The FSEIS also failed to consider whether alternative forms of transport, such as the conveyor suggested by Fred Hill Materials, might be used and with what possible environmental impacts.

P. The proposed mineral resource overlay is located in a forested region where there are many significant critical areas, including lakes and streams. The FSEIS fails to describe the existing wildlife habitat and to evaluate possible environmental impacts on that habitat, reserving SEPA review of those impacts until the permitting stage for any future mining projects.

There were also some “should” statements directed at the County that did not make it into the Findings of Fact but were argued by the parties in their 2004 briefing and at the Compliance Hearing held in early September 2004. They are:

- The EIS should have analyzed the impact of 10-acre mining sites, 2003 FDO, p. 22, AR 24
- The EIS should have analyzed impacts of 10-acre mining sites on upon the quality of the physical surroundings and upon the cost and effects on public services, 2003 FDO, p. 22, AR 24
- The EIS should have analyzed impacts of transporting aggregate from 10-acre mining sites, 2003 FDO, p. 22, AR 24
- The EIS should have analyzed the impacts on critical areas, specifically the potential to disrupt wildlife habitat, 2003 FDO, p. 22, AR 24
- The impacts of the 10-acre maximum, or no-action alternative, should have been compared to the impacts of a 40-acre maximum, 2003 FDO, p. 22-23, AR 24, 23

- The impacts of the maximum possible mining development that could occur under each scenario (no-action or 10-acre segment cap, MRLO of 690 acres with 40-acre maximum, MRLO of 6,240 acres with 40-acre maximum) should be evaluated. 2003 FDO, p. 27, AR 19

This is the analysis that caused the Hearings Board in its 2003 FDO to conclude that the County had generated an inadequate environmental analysis of the probable significant adverse environmental impacts, *if any*, arising from the adoption of Ordinance #14 (designating the MRLO) meaning that Ordinance did not comply with GMA. No violation of any GMA provisions was found by the Hearings Board. See Conclusion of Law #3 in the FDO at p. 42, AR 4. Note that a GMA compliance issue did unexpectedly reappear in the text of the 2004 Compliance Order.

In response to the 2003 FDO, the County and its outside consultant, the Wheeler Consulting Group of Bellingham, WA, who are listed as the EIS' "Authors and Principal Contributors" at page ii of both the DSEIS and the FSEIS⁹, went to work to cure the above-listed defects. The Draft SEIS was published in March 2004 and the Final SEIS in May 2004. The County submitted its Compliance Report in July 2004, Petitioners objected to a finding of Compliance in early August 2005 and the County filed its Reply Brief in mid-August 2004. A Compliance

⁹ For the Draft SEIS see AR 193, for the Final SEIS see AR 273.

Hearing was held before the entire Hearings Board on September 2, 2004.

When the County was found compliant in the Hearings Board's Compliance Order ("CO") of October 14, 2004 here is how the Hearings Board framed the sole remaining issues:

Has the County achieved compliance with Ch. 43.21C RCW (SEPA) with respect to the comprehensive plan amendment adopting a mineral resource overlay (MRLO) as requested by Fred Hill Materials?

1. Does the Final Supplemental Environmental Impact Statement (FSEIS) adequately discuss the alternatives to the proposed action?
2. Does the Final Supplemental Environmental Impact Statement consider the potential development of a pit-to-pier project as a result of the MRLO?
3. Did the County violate the public participation requirements of the GMA (Ch. 36.70A RCW) in adopting the comprehensive plan amendment designating the Fred Hill Materials MRLO?
4. Did the County fail to comply with its obligations under SEPA by failing to identify the authors and principal contributors to the EIS?

The County would note that Issue #2 directly above seems to mix the directive found in the 2003 FDO at Finding of Fact "O" (to study the transportation impacts of the three alternatives) with some larger and undefined duty to study "the potential development of the pit-to-pier as a result of the MRLO." In any event, the County followed the instructions found in Finding of Fact "O" as it could not predict that the CO from October 2004 would frame Issue #2 as broadly as it did. Note well that

BRIEF OF RESPONDENT Jefferson County

Hood Canal Coalition, Olympic Environmental Council, et al, Appellants v. Jefferson County and Fred Hill Materials, Inc., Respondents

despite the broad text of Issue #2, the County was still determined to have satisfied SEPA and thus was also found to be GMA-compliant.¹⁰

The Court may take judicial notice that the subject of the appeal now before you can only be the 2004 CO and cannot be the 2003 FDO. The author makes that statement because it is the 2004 CO that is appealed in the Petition for Judicial Review filed in December 2004. While the County regrets having to spend more than several pages accurately describing for the Court what was or was not written in the 2003 FDO, the County does not agree or concede that any aspect of the 2003 FDO can be revived or given legal effect by this appeal of the 2004 CO.

LEGAL ARGUMENT:

I-THE 2004 COMPLIANCE ORDER CORRECTLY CONCLUDED THAT THE COUNTY BoCC WAS REASONABLY INFORMED OF THE PROBABLE IMPACTS OF THEIR LEGISLATIVE DECISION

This appeal arises in the context of an administrative appeal filed pursuant to the Administrative Procedures Act and as such the standards for review of an agency action are laid out in RCW 34.05.570(3). However, since the Petitioners ask this Court to find that the 2004 DSEIS and FSEIS constitute an inadequate environmental analysis, the Court will

¹⁰ Issues #3 and #4, while briefed for the Superior Court Judge at CP 65, 66 were not briefed for this appellate court and are those issues are thereby abandoned.

presumably focus upon the precedents governing allegations that a local government has not satisfied SEPA.

SEPA challenges are governed by the “rule of reason.” See *Klickitat Cty. Citizens Against Imported Waste v. Klickitat Cty.*, 122 Wn. 2d 619, 860 P. 2d 390, 866 P. 2d 1256 (1993). In order to satisfy the rule of reason “the EIS must present the decision-makers with a ‘reasonably thorough discussion of the significant aspects of the probable environmental consequences’ of the agency’s decision.” *Id.* at 633.

The immense flexibility of the rule of reason is quite clear since that same State Supreme Court decision described it as “in large part a broad, flexible cost-effectiveness standard’, in which the adequacy of an EIS is best determined ‘on a case-by-case basis guided by all of the policy and factual considerations reasonably related to SEPA’s terse directives’”. *Id.* at 633.

While *Klickitat Cty Citizens* states the doctrines that are applicable when the adequacy of an environmental document is challenged, the facts of that case are diametrically different than those before this Court. There the Yakima Indian Tribe challenged the adequacy of the EIS documents generated with respect to the County’s 1989 and 1990 solid waste management plans. The EIS documents for the 1990 plan included EIS documents generated for both the non-project action (the countywide plan

mandated by Ch. 70.95 RCW) and for two project actions, building of the Roosevelt Landfill and inclusion of a CDL/woodwaste facility at that landfill. *Id.* at 639. Also dissimilar factually is *Citizen's Alliance to Protect Our Wetlands v. City of Auburn*, 126 Wn. 2d 356, 894 P. 2d 1300 (1995) where the EIS challenged had analyzed not only a horse race track (the project action) but also a text amendment to the zoning code to allow the race track in a heavy industrial zone as a conditional use, the non-project action. Unlike the circumstances found in *Klickitat Cty. Citizens and Citizens Alliance*, cases extensively and mistakenly relied upon by the HCC, both Fred Hill and the County have always considered and analyzed the MRLO and the pit-to-pier as distinct and independent from one another, each with a separate EIS process. Only HCC would have the Court meld and confuse the two. Instead, the case at bar is more analogous to the facts described in *Cathcart-Maltby-Clearview Community Council v. Snohomish Cty.*, 96 Wn. 2d 201 (1981) where the initial environmental study of only the rezone (a non-project action) was deemed SEPA-compliant although the region rezoned would eventually be the site of a proposed giant residential development (a project action) requiring subsequent and separate environmental analysis.

Similarly, the repeated reliance of HCC on the text of WAC 197-11-440 is generally misplaced since there is more specific text found at WAC 197-11-442 applicable specifically to non-project actions.¹¹

Certainly the Court is authorized by longstanding case law to review “de novo” the now-challenged legal decision of the Hearings Board, i.e., that the 2004 SEPA analysis did reasonably inform the Jefferson County BoCC. *W.E.A.N. vs. Island County*, 122 Wn. App. 156, 164, 93 P. 3d 885 (2004), *cert. denied*, 153 Wn. 2d 1025 (2005).

But there are at least two other principles of law that serve to condition the trial court’s ability to determine the relevant legal issues as if no other agency or person had ruled on those same legal issues. The first is that the trial court, or any subsequent appellate court, must give “substantial weight to the [agency’s] interpretation of the statute it administers.” *Swinomish Indian Tribal Community v. Western Washington Growth Mgmt. Hearings Bd.*, 161 Wn. 2d 415, 424, 166 P. 3d 1198 (2007). Despite the substantial weight accorded them, the agency’s determinations are not binding on the trial court according to *W.E.A.N. vs. Island County*, 122 Wn. App. 156, 93 P. 3d 885 (2004), *cert. denied*, 153 Wn. 2d 1025 (2005) at 164.

¹¹ See pages 10, 11 and 12 of the HCC Opening Brief.

The HCC may also be alleging that the 2004 Compliance Order is not supported by evidence that is “substantial when viewed in light of the whole record before the court,” i.e., an allegation that they are entitled to relief under RCW 34.05.570(3)(e). This standard of review was thoroughly discussed in *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn. 2d 568, 588, 90 P. 3d 659 (2004), which involved the granting of federal permit allowing wetlands to be filled in as part of the project of building the “third runway” at Seattle’s airport:

In reviewing an agency's findings of fact, this court has described the “substantial evidence” test as whether the record contains “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *King County v. Central Puget Sound Growth Mgmt. Hr’gs Bd.*, 142 Wash.2d 543, 553, 14 P.3d 133 (2000) (quoting *Callecod v. State Patrol*, 84 Wash.App. 663, 673, 929 P.2d 510 (1997)).

These are the standards of review that the Court should utilize when analyzing the adequacy of the now-challenged EIS documents.

II-THE HOOD CANAL COALITION CANNOT SATISFY EITHER RCW 34.05.570(3)(d) OR RCW 34.05.570(3)(e) WITH RESPECT TO THE 2004 COMPLIANCE ORDER AND THEREFORE, THE TRIAL COURT DECISION BELOW SHOULD BE AFFIRMED

The conclusion of the BoCC and the Hearings Board that the 2004 Draft SEIS and Final SEIS were and are adequate for SEPA purposes was both a correct application of the applicable law to that issue and a

conclusion that was supported by substantial evidence in the record. For these reasons the trial court decision should be affirmed.

The environmental review performed since the 2003 successfully resolved the following deficiencies described by the Hearings Board in that FDO:

1. Other alternatives than what was Approved, specifically No Action and the Proposed Action were either insufficiently studied or not studied at all, Finding "N;"
2. Alternate forms of transport for FHM's product were not adequately studied, Finding "O;"
3. Probable significant adverse environmental impacts on wildlife were not sufficiently studied, Finding "P;" (these three findings are located at pages 40 and 41 of the FDO) and
4. What the WWGMHB called the "intensity of mining use," which the County understands to mean the study of the differing probable significant adverse environmental impacts, if any, that arise if mining occurs in 40-acre segments rather than in either unlimited or 10-acre segments, was not sufficiently studied. FDO p. 9, 23 and 27.

A. Three (3) alternatives have been studied in the 2004 SEIS:

Initially, note that the Hearings Board, at pages 23 to 27 of the FDO (AR 23-19), strongly suggested that study of the three alternatives described on those pages would constitute a study of reasonable alternatives as is required by WAC 197-11-442(2). The 2004 SEIS

documents used the following nomenclature to describe the three alternatives studied there. See AR 187, 186, portions of the DSEIS.

Proposed Alternative: This was the initial FHM proposal of 6,240 acres minus 1,270 acres of GMA ‘critical areas’ removed from consideration as mining sites. Under this alternative there would be neither a limit on the maximum acreage that could be disturbed, nor the depth of mining. Also FHM would be able to process materials at the extraction site;

Approved Alternative: Defined as the MRLO of 690 acres designated by the County through Ordinance 14 in December 2002, and Ordinance 8 of 2004 that imposed 15 mitigating conditions on extraction inside the MRLO. Examples of those conditions include a prohibition on processing material at the extraction site, a cap of 40 acres on the segment that could be disturbed at any one time and a prohibition against mining to a depth that was within 10 feet of any underground aquifer.

Additionally, it should be noted that either of these alternatives would allow the County to meet its GMA mandate to protect resource lands from incompatible uses (rather than vice-versa) as is required by RCW 36.70A.060(1) and the Western WA Hearings Board in *Aachen v. Clark County*, 95-2-0067 (FDO, 9/20/1995). These two alternatives, because they both designate an MRLO, would require notice to adjacent

landowners of the strong likelihood mining would be undertaken “next door.”

No-Action Alternative: Under this third alternative there would be no additional land designated as an MRLO and mining (as well as processing of what is extracted) could occur in 10-acre segments at any location zoned as either resource land or rural residential. Neighbors would not be put on notice that they were adjacent to a mining site. Mining could occur to a depth that was within zero (0) feet of an underground aquifer. Conversely and unfortunately, depth of mining would be limited by slope and setback restrictions mandated by mining best management practices, meaning deeply-buried resources could not be extracted and thus more acres would have to be ‘scraped clean’ of vegetation in order for the mining firm to extract the same amount of material. By way of hypothetical example only the amount of material that could be obtained from one 40-acre segment might not be equaled unless five segments of 10 acres (or a total of 50 acres) were disturbed. See the DSEIS at p. 2-19, AR 158.

Having previously defined the three alternatives, Jefferson County was informed in the 2003 FDO that it should compare all three alternatives against the 13 environmental factors found in. The County did so by categorizing those 13 factors in accordance with WAC 197-11-444(1) and

(2) at pages 2-8 and 2-9 of the DSEIS (AR 169, 168) and then analyzing them in great detail at pages 3-1 to 3-45 of the DSEIS. (AR 156-112). The FSEIS contains a matrix representation where the three alternatives are compared at FSEIS, pages 1-9 to 1-12. (AR 260-257). All of Section 2 of the FSEIS, found at pages 2-1 to 2-11 (AR 256-246), also serves to compare the various impacts, if any, of the three alternatives. The numerous conclusions found there will not be repeated here.

The HCC alleges that the “No action” alternative, where mining segments would be limited to 10 acres or less, was not adequately studied with respect to A) impact on physical surroundings, B) the cost and effects on public services, C) truck traffic and D) wildlife habitat disruption. The HCC ask for data, numbers, studies and the like.

With respect to A) listed immediately above, the HCC fails to understand that if the “No Action” alternative was approved, then FHM (or any other mining firm) could choose 10-acre sites anywhere within the Thorndyke Tree Farm consisting of 20,000 or more acres. The impact on the physical surroundings would be site and fact-specific and the DSEIS confirms as much as p. 3-26 (AR 131) where it states “any new mining activity proposed outside of a MRL (overlay) would require identification and buffering of shorelines, wetlands and habitat areas.” Similarly the impacts from mineral extraction to wildlife, plants and animals are just as

likely in the absence of an MRL Overlay as they are in the presence of an MRLO. See the DSEIS, at p. 3-26 (AR 131) under the phrase “No action.” The Petitioners’ position also fails to understand that in the next 20 years the County might get one application for a 10-acre mining segment, it might get five, it might get dozens, but is unable to predict what will occur as the market for mineral resources and NOT the size of the segment the mining firm are authorized to dig from will govern what happens. Therefore, any statement in the challenged EIS documents that was more specific than or purported to be more specific than what is found in the relevant EIS documents would be nothing more than a guess. Guessing is not required under SEPA despite the demands of the HCC in their Opening Brief for data, data, data.

For the proposition of law that speculating is not required by SEPA the Court is referred to *City of Des Moines v. Puget Sound Regional Council*, 108 Wn .App. 836, 853-54, 988 P.2d 27 (1999). There the groups opposing the granting of permits that were preconditions to the building of the third runway at Sea-Tac International Airport claimed that the noise study provided as part of the EIS was inadequate because it did not discuss the noise impacts that would occur after 2010, a year then at least some 14 years into the future. That argument was rejected based on evidence provided by the EIS team that no one could predict what quantity

or type of commercial aircraft would be flying (and thus creating noise) in

2010. The Court of Appeals opined:

"WAC 197-11-060(4) explains that "**SEPA's** procedural provisions require the consideration of 'environmental' ***854** impacts ..., with attention to impacts that are likely, not merely **speculative**." This subsection further directs that "[a]gencies shall carefully consider the range of probable impacts, including short-term and long-term effects. Impacts shall include those that are likely to arise or exist over the lifetime of a proposal or, depending on the particular proposal, longer." "Probable" is defined in a later section as "likely or reasonably likely to occur, as in 'a reasonable probability of more than a moderate effect on the quality of the environment' Probable is used to distinguish likely impacts from those that merely have a possibility of occurring, but are remote or speculative." ^{FN30}

FN30. WAC 197-11-782.

Mary Vigilante, the EIS Project Manager, testified that because there were rapid changes in aviation activity during the mid-1980's at Sea-Tac, and because quantification of environmental impacts depends on total aviation activity, aircraft types and engines, and the timing of flights, detailed analysis of the years beyond 2010 in the EIS would be speculative and could lead to a substantially inaccurate evaluation of environmental effects. The Examiner found her testimony credible. Gene Peters, a director with Landrum & Brown, similarly testified that the volatility in airfares, forecasts, fleet mix, and other areas in the period following 1994 made it difficult in 1996 to predict with substantial accuracy impacts beyond the year 2010. As for noise impacts, the experts testified that although it was theoretically possible to run noise contours, the reliability of ****38** the models diminishes as the length of time is expanded. The Cities did not rebut this testimony.

The Examiner's determination that this analysis satisfied SEPA's procedural requirements is supported

BRIEF OF RESPONDENT Jefferson County

Hood Canal Coalition, Olympic Environmental Council, et al, Appellants v. Jefferson County and Fred Hill Materials, Inc., Respondents

by ample evidence in the record. The fact that the Port included an appendix that estimated the effects of the expansion through the year 2020 based on extrapolated data establishes that the Port did what it reasonably could to provide the decision-makers with reliable information about the ***855** potential environmental consequences of their actions. Anything more would have been too **speculative**, and thus the EIS was adequate under **SEPA**. (Emphasis supplied.)

In that same vein the State Supreme Court, in *Cheney v. City of Mountlake Terrace*, 87 Wn. 2d 338, 344, 552 P.2d 184 (1976) held that the environmental analysis being undertaken for a road being built to serve existing traffic needs rather than to encourage development of a private parcel through which that road would run need not analyze the impacts arising from the future use of the parcel because those impacts were too remote and speculative to require present evaluation. Justice Brachtenbach summed it up as follows:

"The mandate of SEPA does not require that every remote and speculative consequence of an action be included in the EIS. The adequacy of an EIS must be judged by application of the rule of reason."

With respect to B) listed above, the impact of 10-acre mining segments on public services, the County again points out that it cannot predict if a firm or firms will want to disturb few, many or dozens of 10-acre segments over the next few decades and where those segments will be. Consider the

speculative nature of any guess in that regard in light of *City of Des Moines* and *Cheney*. That being said the FSEIS states at p. 2-11 (last ¶) (AR 246) that public services would only be impacted to the extent that EMS crews are called out to emergencies. This makes sense since Your Honor can note that mineral extraction typically does not or would not impact school districts, police service, libraries, social services and the like at a level that is probable, significant and adverse AND not susceptible of mitigation. Why? Because more mining activity doesn't necessarily add permanent residents.

With respect to C) above, the impact of 10-acre mining segments on truck traffic, the County will provide the Court with its analysis of this topic elsewhere.

With respect to D) above, i.e., whether 10-acre mining segments might disrupt wildlife habitats, Your Honor is directed to footnote 1 on page 5 of the 2004 Compliance Order where the Hearings Board noted that after the 2003 FDO the Petitioners "do not challenge the County's compliance with this requirement [the potential environmental impacts on wildlife habitat] of the Board's order." If probable significant adverse impacts on wildlife habitat were not briefed and argued before the Western WA Hearings Board when the Hearings Board had to decide on the adequacy of the 2004 EIS documents, then, by logic, the same issue

cannot be before this Court. Presumably, this issue was not litigated in 2004 because the 690 acre MRLO does not contain any GMA “critical areas,” a fact the County and FHM repeatedly brought to the attention of the Hearings Board.¹²

In sum, the County has defined the three alternatives and has sufficiently studied and analyzed their differing impacts (without speculating or guessing as Petitioners would have the County do) so as to provide the decision-makers (the County Commissioners) with a reasonably thorough understanding of the probable significant adverse environmental impacts, if any, of those three alternatives. The County Commissioners considered the conclusions found in the Final SEIS and entered findings of fact in that regard in their subsequent (second) enacting Ordinance (#08-0706-04). SEPA has, therefore, been satisfied as has Finding “N” of the 2003 FDO.

B. Transportation impacts were adequately analyzed in the 2004 FDO:

The County was also told upon remand to study alternate forms of transport that FHM might use to transport product, according to Finding “O” on page 41 of the 2003 FDO. The study of ‘probable significant

¹² In support of that factual assertion see maps of various critical areas reflected in Figures 3-1, 3-2, 3-3 and 3-4, all of which are located between p. 3-3 and 3-15 of the DSEIS. AR 154 to 142.

adverse environmental [transportation] impacts,' is, in reality, the study of transportation capacity, which has been thoroughly studied in this SEIS. See the Final SEIS at p. 2-1 to p. 2-6 generally. AR 256 to AR 251, inclusive.

When analyzing transportation impacts, the most important item the DSEIS and FSEIS convey to the reader is that FHM will continue to use trucks to transport its products to its nearby customers regardless of whether an MRLO designation is approved AND regardless of whether the "pit to pier," is approved and constructed. In other words, assuming the absence of an MRLO and assuming the maximum segment allowed at any one time is 10 acres, there will continue to be truck traffic leaving the Shine Hub to satisfy local demand for FHM's product. See pages 3-40 of the DSEIS (AR 117) and pages 2-3 to 2-6 of the FSEIS. (AR 254-251). The volume of materials that FHM estimates it will transport via truck is estimated to grow by one-half over the next ten to 15 years from an annual volume of 500,000 tons to a predicted yearly volume of 750,000 tons. (FSEIS, p. 2-3.) (AR 254). Yet, that 50% increase in volume transported represents an increase in traffic of only 98 daily trips, 9/10ths of which will turn right (east) towards the Hood Canal Bridge when exiting the road that provides access to FHM's Shine Hub. (FSEIS, p. 2-3.) (AR 254).

What is the impact of 98 trips on that eastbound segment of SR 104? It is negligible, some 0.7 %, or less than one percent. In other words, for every 1,000 vehicles currently using the eastbound segment of SR 104 according to a state DOT traffic volume report, FHM will contribute an additional seven (7) vehicles. And even those seven (7) vehicles wouldn't be added to the SR 104 traffic volumes unless and until 750,000 cubic yards of materials are being moved on an annual basis. Note well that background growth in traffic on SR 104, growth in traffic that cannot be attributed to FHM, will be in excess of six percent (6%) each year. (FSEIS, p. 2-3.) (AR 254).

The second transportation capacity issued highlighted in the SEIS documents is that FHM uses conveyor belts, the “internal” conveyor belts, to move product from the extraction site (the mine face) to the Shine Hub, where it is processed (if processing is needed), then loaded on trucks and sent to the customers. This eliminates numerous truck trips from the mine to the Shine Hub and eliminates the need for internal roads. (FSEIS, p 2-3, 5th ¶ and p. 2-4, 3rd ¶.) (AR 254, 253). The internal conveyor belt is a) currently in place, b) used daily and c) mobile, meaning it can first serve the Wahl Extraction area and later the Meridian Extraction area, the two regions that comprise nearly all of the 690-acre “Proposed Alternative.” (FSEIS, p. 2-3 and 2-4, generally.) (AR 254, 253).

The third transportation capacity issue highlighted in the SEIS documents is what FHM calls the “Central Conveyor” and the Petitioners have colloquially labeled the “pit to pier.” The County, in reliance upon at least three statements to that effect in the FDO¹³, did not study the marine transport system as part of this SEPA analysis, since a CP amendment is, to use SEPA jargon, a “non-project” action, while the marine transport system is a “project” action that is currently subject to a full-blown EIS process, as previously declared by the County.

With that caveat, this EIS does discuss, in general terms, how transportation of materials from the mine face to FHM customers would change if marine transport is approved. By doing so the County is complying with Finding “O” on page 41 of the FDO.

Recall initially that truck traffic for local customers will continue and will increase by an estimated one-half over the next 15 years whether or not marine transport is approved and whether the maximum segment FHM can disturb at any one time is 10 acres or 40 acres or no limit.

¹³ Page 9: “We [the HB] do not agree the [pit to pier] project itself could or should be analyzed at this time.” AR 37.

Page 28 “We agree with the County that it was premature for the County to fully evaluate the pit-to-pier project as part of the mineral resource overlay designation.” AR 18.

Page 29 “Rather than analyzing the pit-to-pier project, the EIS should include the transportation impacts of the various alternatives.” But was the pit-to-pier an alternative? No said the Hearings Board at pages 28-29: “The pit-to-pier project was not an alternative to the mineral resource overlay.” AR 17.

BRIEF OF RESPONDENT Jefferson County

Hood Canal Coalition, Olympic Environmental Council, et al, Appellants v. Jefferson County and Fred Hill Materials, Inc., Respondents

Approval of the marine transport system will cause an increase in the rate of extraction, a point repeatedly made by FHM. That is to say in markets (Seattle, Oregon, California) where FHM cannot now compete because it must transport materials to those distant locations via truck, the same materials transported to those distant customers by water may very well be competitive in price.

The statement that marine transportation will cause an increase in the rate of extraction (and not vice-versa as the Petitioners insist¹⁴) is the best symbol of the major uncertainty that underlies all of this environmental analysis: specifically, that “the intensity of the potential significant adverse impacts of mining will be a function of how quickly the resources are extracted ... rather than the size of the MRL.” And what will control the rate of extraction? The FSEIS, at Section 1.5.2, p. 1-5 (AR 264), states “[t]he rate at which resources are proposed for extraction would be a function of the market for mineral resources.” In sum, the market will be decisive in determining what probable significant

The ability of FHM to be competitive in a distant market, which could occur if the marine transport system becomes a reality, **MUST LOGICALLY** precede the decision to extract the resources needed to meet that market need. To assert the opposite, i.e., that extraction rates will increase before the market needs the product, is illogical because it presumes FHM will extract product in excess of what it needs for local truck-based markets in the hope that at some unknown time in the future it will have the ability to sell that product at a competitive price.

BRIEF OF RESPONDENT Jefferson County

Hood Canal Coalition, Olympic Environmental Council, et al, Appellants v. Jefferson County and Fred Hill Materials, Inc., Respondents

adverse environmental impacts, if any, occur as mining occurs in unlimited, 40-acre or 10-acre segments in and under the Thorndyke Tree Farm.

The marine transport system, if approved, will cause FHM to extract more product for sale to new and distant customers in the Puget Sound region, Oregon and California. FHM estimates that marine transport will 'ramp up' so that 10 years or so after approval of the marine transport system FHM will be transporting 2 million tons to distant customers by barge as well as 500,000 to 750,000 tons by truck. By a date or year that is 25 years or so after approval of the marine transport system FHM predicts that it will be sending 4 million tons by barge, 2.5 million tons by ship and the same 750,000 tons of product by truck to more local customers. Refer to pages 3-40 to 3-45 of the DSEIS (AR 117-112) and pages 2-1 to 2-6 of the FSEIS (AR 256-251) for more details on FHM's long-term plan to use both truck and marine transport to get its product to its customers.

Nor do these EIS documents need to be more specific. Why? Because like the situation in *City of Des Moines* where the authors of the EIS when doing a noise impacts study were not obligated to guess as to the type and quantity of air traffic that would be present some 14 years in the future, the authors of the Jefferson County SEIS documents are not

able to and are not obligated to pinpoint what the demand for mineral products will be 10 or 25 years in the future from a date that is still probably five years in the future.

The County also points out that pursuant to WAC 197-11-600(3)(b)(i) and Condition #14 of Ordinance #08-0706-04 imposed on the MRLO designation by the County Commissioners any “substantial change in the rate of extraction” may potentially trigger the requirement that the underlying permit allowing extraction must undergo another SEPA-driven analysis. In sum, the County has completed the work asked of it in Finding “O” of the FDO.

C. Impacts on wildlife habitat are adequately analyzed in the 2004 SEIS:

The 2002 SEPA analysis was deficient, according to Finding “P” of the FDO, because “possible environmental impacts on” wildlife habitats that might exist in the three alternatives did not receive a sufficiently thorough analysis. Of course, this issue is now moot because the 2004 Compliance Order at footnote #1 on page 5 (CP 274) points out that the Petitioners did not dispute the County’s compliance with this part of the 2003 FDO. Yet the HCC discusses this issue at page 26 of its Opening Brief.

Assuming without conceding that this allegation remains before the Court, this defect has been cured. The reader is referred to pages 3-23 to 3-27 of the DSEIS at AR 134 to 130, Section 3.1.4 entitled “Plants and Animals,” and page 1-11 (AR 258) of the FSEIS. The most important conclusions found in the DSEIS regarding wildlife habitat are A) “[t]he Approved Action MRL is located outside of known territories of priority species as listed in the WDFW PHS database” (DSEIS, p. 3-25, AR 132) and B) “[w]ith the Approved Action MRL, because there are few habitat features such as streams and wetlands, and because the MRL is located away from territories of priority species, fewer indirect impacts to plants and animals would be likely to occur.” (DSEIS, p. 3-26., AR 131) Furthermore, unlike the Proposed Alternative, the Approved Alternative ends at least 500 feet east of Thorndyke Creek, which is a healthy creek containing salmonids such as steelheads, coho and cutthroat trout. See DSEIS p. 3-24 (AR 133) and FSEIS, p. 1-10 (AR 259), under “Water Resources.”

Conversely, the Proposed Alternative, also referred to as the “study area” in the DSEIS, contains two great blue heron territories, osprey territories at the northern and southern edges of the study area and a wood duck territory in the center of the study area, as well as the possibility that the study area is suitable habitat for the hooded merganser, pileated

woodpecker and Vaux's swift in addition to including Thorndyke Creek. (DSEIS, p. 3-24 and 3-25) (AR 133, 132).

Of course, regardless of which alternative was to be chosen, the County's 2001 development regulations relating to GMA "critical areas" would apply and would require identification and buffering of all shoreline, wetland and habitat areas prior to MRL designation and, subsequently, prior to any extraction of resources.

D. The intensity of use (10 acres vs. 40 acres) has been adequately studied:

This Board required further SEPA work, in part, because the County had not sufficiently analyzed the differences in the adverse environmental impacts, if any, of differently sized segments for mining. Specifically, the County needed to investigate the different impacts that might arise if the largest permissible segment is 10 acres in size (as per the No-Action Alternative) or if the largest permissible segment is to be 40 acres, the limit imposed by condition #12 in the 2004 Ordinance #08-0706-04, what is known as the Approved Alternative.

The reader is referred to pages 2-18 to page 2-20, Section 2.8 of the DSEIS (AR 159, 158, 157) and pages 2-6 through 2-10 of the FSEIS (AR 251-247) for the environmental analysis of the relative impacts of a 10-acre cap on segment versus a 40-acre cap on segments. The various

impacts that occur with a 10-acre limit as compared to the impacts that occur with a 40-acre limit are analyzed in terms of seven categories (corresponding closely to the 13 categories found in CP Table 4-3) at pages 2-8 through 2-10 of the FSEIS, or AR 249-247. Note that the Proposed Alternative, because it lacked any County-imposed conditions, had no limit on the size of the “segment.”

An important conclusion drawn in the DSEIS at p. 2-19 (AR 158) is that a limit of 10-acre segments might lead to the extracting firm being unable to recover mineral resources buried deep in the ground because setbacks and safety requirements (the slope running from the ground to the extraction point can typically not exceed 45 degrees before it is too-steep and invites life-threatening slides and erosion) imposed on such a small mining segment would not allow recovery of that deeply-buried resource. Unable to recover the deeply-buried resource and forced to leave them behind as it moved to a new “segment,” the extracting firm might end up disturbing a larger geographical area in order to recover the same volume of ‘product.’ In sum, DNR confirms (DSEIS, p. 2-19, 2nd non-italicized ¶, AR 158) and these SEIS documents repeat this conclusion: larger segment sizes are considered to be more efficient. A DNR official has stated in an e-mail that it would not consider “a mining plan that included a large area of 10-acre segments to be an efficient mining method.” The benefits of

40-acre segments as opposed to 10-acre segments was described in some detail by the Hearings Board at p. 8 (AR 663) of the 2004 Compliance Order and in the DSEIS, §2.8, p. 2-18 to 2-20, AR 159, 158, 157.

The County has provided adequate environmental analysis of the differing impacts that might arise if the cap on ‘segment’ is 10 acre versus impacts that might arise if the limit on ‘segment’ is 40 acres.

E. How much will be extracted and how fast will it be extracted?

The Hearings Board said that the 2004 environmental analysis should include answers to two questions; A) how much will be extracted and B) at what rate (how fast) will it be extracted? These two questions were adequately answered in the 2004 EIS documents. If the answers to these questions do not provide some sort of (unattainable) numerical precision as HCC claims is required by SEPA it is because the market, the law of supply and demand, rather than the applicant or the County will decide the answers to these questions.

As to how much will be extracted the answer truly is that every inch of the 72,000 acres that comprise the Thorndyke Tree Farm (the 690 acres are within a contiguous block of 21,000 acres of Commercial Forest) could be mined for minerals under any and all of the three alternatives. In that regard see the last paragraph on p. 1-3 of the DSEIS at AR 186, where

the DSEIS states that mining is a permitted use on resource lands and a conditional use on rural residential lands. No one truly knows the quantity of resources that are located under the 690, 21,000 or 72,000 acres in the Thorndyke region.

However, the best estimate of the applicant is that over the next 15 years the amount of materials that will be transported away from the Thorndyke region by truck will increase from 500,000 cubic yards to 750,000 cubic yards. FSEIS, p. 2-3, AR 254. If and when the pit-to-pier project is approved and constructed, then at a date measured as 10 years from initial use of the marine transport system some 2 million tons annually would be transported by barge and 25 years from initial use of the marine transport system some 6.5 million tons annually would be transported via water, 4 million tons by barge and 2.5 million tons by ship. FSEIS, p. 2-4, AR 253.

As to how fast mineral resources will be extracted from the Thorndyke Tree Farm region, the answer to that question will be determined by what the mining firms can sell for a profit in the market and will NOT be a function of what is the largest permissible segment they can utilize to extract the materials. See the DSEIS, p. 1-5, last ¶ above the phrase “1.5.3 Issues and Environmental Choices.” AR 184. By way of example only, 15 years from now FHM might be able to take advantage of

BRIEF OF RESPONDENT Jefferson County

Hood Canal Coalition, Olympic Environmental Council, et al, Appellants v. Jefferson County and Fred Hill Materials, Inc., Respondents

the marine transport system thus leading to a greater rate of extraction than than now but increases in the rate of extraction could be dampened by the fact that the marine transport system had just came on board and/or that diesel fuel has so increased in price that truck-transported materials are less competitive in price as the distances traveled with that material increases. In other words, there are too many variables present to make any prognostication for the future anything but a wild guess.

In discussing the No-Action alternative, i.e., a 10-acre cap on segments, the FSEIS acknowledges that all of the alternatives may have an equal impact on the environment, because if the 10-acre cap applies, then more segments may be applied for and extracted from. See the third paragraph on p. 2-7 of the FSEIS, AR 250:

"In summary, in terms of intensity of use, mining-related activities regulated by the [county's development code] that occur outside of a designated MLRs or MRL overlay district would occur on a smaller scale than would those associated with the MRL overlay district alternatives examined in the Draft SEIS, but may eventually cover a similar area and result in a similar level of environmental impact based on the demand for mineral resources. Mining-related activities that may occur under the No Action alternative would depend on individual mining plans in terms of overall area to be mind;" (Emphasis supplied.)

In sum, these two questions have been answered in a manner that complies with SEPA. Any answers other than these would be speculative, and

BRIEF OF RESPONDENT Jefferson County

Hood Canal Coalition, Olympic Environmental Council, et al, Appellants v. Jefferson County and Fred Hill Materials, Inc., Respondents

speculating is not an obligation of any EIS author pursuant to *City of Des Moines* and *Cheney* previously discussed in some detail.

All of the above should lead this Court to conclude that the Hearings Board was legally correct in deciding that the relevant decision-makers, here the County Commissioners deciding upon the proposed Comprehensive Plan amendment to designate 690 acres as an MRLO, were “reasonably informed” of the probable significant adverse environmental impacts, if any, as well as the planned mitigation strategies for impacts achieving that level of adverseness. Numerous citations to the Draft SEIS and Final SEIS provided here indicate that those 2004 EIS documents did answer the questions that the 2003 FDO had decided had been inadequately addressed in earlier environmental studies relating to this MRLO designation. Because of the nature of the questions, some of the answers to those questions had to be estimates and providing estimates rather than guesses is in compliance with SEPA. The Hearings Board was also correct in expressly stating in its 2004 Compliance Order at p. 12 (AR 659) that the County Commission had discretion as to what level of information it would require from this “non-project” EIS. Furthermore, there was present in the DSEIS and FSEIS a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of

the order now challenged. Again, please refer to the many references in this Memo to the DSEIS and FSEIS.

CONCLUSION:

For all of the reasons stated above Your Honor should affirm the ruling of the Western Washington Growth Management Hearings Board memorialized in their October 14, 2004 Compliance Order.

Respectfully submitted this 30th day of MARCH 2009

JUELANNE DALZELL, Jefferson County
Prosecuting Attorney


By: **DAVID W. ALVAREZ**, WSBA #29194
Chief Civil Deputy Prosecuting Attorney

ATTACHMENTS:

2004 Compliance Order of the Western Washington Growth Management Hearings Board

2003 Final Decision and Order of the Western Washington Growth Management Hearings Board

2004 Compliance ⁰⁰⁰⁶⁷⁰

BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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

No. 03-2-0006

COMPLIANCE ORDER
2004

Petitioners,

v.

JEFFERSON COUNTY

Respondent.

FRED HILL MATERIALS,

Intervenor.

I. SYNOPSIS

In 2002, the Jefferson County Commissioners approved a comprehensive plan amendment granting a Mineral Resource Overlay (MRLO) designation to Fred Hill Materials, for the purpose of expanding its existing gravel extraction business. The approved MRLO is located on lands presently designated as Commercial Forest, in the Thorndyke Block of unincorporated Jefferson County, west of the Hood Canal Bridge. In the subsequent 2003 appeal of the adoption of this comprehensive plan amendment to the Board, the Board found that the environmental impact analysis for the MRLO approval did not comply with the State Environmental Policy Act, Ch. 43.21C RCW (SEPA). Jefferson County undertook additional environmental analysis as a result of the Board's order and asks the Board to find it in compliance.

ORIGINAL

1 Petitioners argue that the County's environmental analysis continues to fail to meet the requirements
2 of SEPA because it fails to adequately evaluate the alternatives to the proposed MRLO and fails to
3 address those general aspects of the pit-to-pier project that the Board found were reasonably related
4 to the MRLO. Petitioners also challenge the County's compliance with the public participation
5 requirements of the GMA in the adoption of the MRLO because the County initially advised the
6 public that it could not comment upon the environmental analysis.
7

8
9 The County's adoption is presumed valid and the burden is on the Petitioners to show that the County
10 was clearly erroneous in meeting its obligations under SEPA. In light of this standard of review, we
11 find that the County's environmental analysis, though less than ideal, complies with the requirements
12 of SEPA for comprehensive plan amendments. We find there are many areas in the County's
13 environmental analysis that could have been improved, but we find that they fail to overcome the
14 statutory presumption of validity (RCW 36.70A.320(1)) and the SEPA requirement that the decision
15 of the local government be given substantial weight (RCW 43.21C.090).
16

17
18 In addition, we find that the County's initial refusal to allow public comment on the supplemental
19 environmental analysis failed to comply with the public participation requirements of the Act, but
20 that the County cured this error by providing for public comment at a subsequent public hearing.
21

22 II. PROCEDURAL HISTORY

23
24
25 On December 9, 2002, the Board of Jefferson County Commissioners adopted Ordinance 14-1213-
26 02, amending the Jefferson County comprehensive plan with the addition of a mineral resource
27 overlay (MRLO) requested by Fred Hill Materials. This adoption was timely appealed to the Board
28 in a Petition for Review filed on February 21, 2003, by Petitioners. Fred Hill Materials was granted
29 leave to intervene on March 27, 2003. After a hearing on the merits held on June 24, 2003, this
30 Board entered its Final Decision and Order on August 15, 2003. That order found that the
31 environmental analysis prepared for the MRLO failed to "adequately analyze the no action and other
32

1 alternatives to the proposed action." Final Decision and Order, August 15, 2004, Conclusion of Law 3.
 2 The County was ordered to bring the challenged comprehensive plan amendment into compliance
 3 with the State Environmental Policy Act (SEPA) (Ch.43.21C RCW) within 180 days.
 4

5 The 180 day compliance period was extended to allow the County time to complete its environmental
 6 analysis and, later, to allow the County to relocate its scheduled public hearing to a building large
 7 enough to handle the number of members of the public that wished to attend. The County originally
 8 scheduled the public hearing on this proposal for May 25, 2004. However, because of the overflow
 9 crowd, the County continued the hearing to June 7, 2004, when a larger facility could be used. On
 10 July 6, 2004, the Board of Jefferson County Commissioners adopted Ordinance No. 08-0706-04,
 11 approving the MRLO requested by Fred Hill Materials.
 12

13
 14 The compliance hearing was held in Port Townsend on September 2, 2004. Prior to argument, the
 15 Board admitted, without objection, exhibits 17-100, 17-101, 17-102, 17-103, 17-104, 17-105, 17-106,
 16 and 17-107 proposed by Petitioners in motions to supplement the record.
 17

18 III. ISSUES PRESENTED

19
 20
 21
 22 **Has the County achieved compliance with Ch. 43.21C RCW (SEPA) with respect to the**
 23 **comprehensive plan amendment adopting a mineral resource overlay (MRLO) as requested by**
 24 **Fred Hill Materials?**

- 25 1. Does the Final Supplemental Environmental Impact Statement (FSEIS) adequately
 26 discuss the alternatives to the proposed action?
- 27 2. Does the Final Supplemental Environmental Impact Statement consider the
 28 potential development of a pit-to-pier project as a result of the MRLO?
- 29 3. Did the County violate the public participation requirements of the GMA (Ch.
 30 36.70A RCW) in adopting the comprehensive plan amendment designating the Fred
 31 Hill Materials MRLO?
 32

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

V. ANALYSIS AND DISCUSSION

Issue No. 1: Does the Final Supplemental Environmental Impact Statement adequately discuss the alternatives to the proposed action?

Petitioners challenge the adequacy of the Final Supplemental Environmental Impact Statement (FSEIS) analysis of the alternatives to the proposed action.¹ In the Final Decision and Order in this case, the Board found the 2002 environmental analysis of alternatives to be inadequate. August 15, 2003, Final Decision and Order, Conclusion of Law 3. The Board found that the no-action and 6,240-acre alternatives had only been given a conclusory evaluation, in contrast to the recommended alternative that was evaluated according to 13 factors:

Neither the draft SEIS or the FSEIS did more than a brief, conclusory evaluation of the no action alternative or the other proposed alternative. The 690-acre staff recommended alternative was evaluated in terms of thirteen factors the County listed as appropriate for evaluation of a mineral resource overlay designation but no other alternative was similarly evaluated.

Final Decision and Order, August 15, 2003, Finding of Fact N.

Petitioners point to the evaluation of the no-action alternative in the FSEIS. Rather than evaluate the impacts of the no-action alternative, Petitioner argues the County relied upon an alleged defect in the notice provisions of its own Unified Development Code to dismiss the no-action alternative. Petitioners' Objections to a Finding of Compliance at 7-10. Petitioners also argue that the County failed to fairly and properly compare alternatives by considering mitigating conditions for any alternative but the approved alternative. Ibid at 17.

The County responds that it did compare the alternatives and the no-action alternative will not protect mineral resource lands as required by the GMA because of failings in the County's own notice requirements: "[t]he current regulatory structure FAILS to provide the proper notice of mining

¹ The Board also found that the FSEIS failed to adequately analyze the potential environmental impacts on wildlife habitat (Finding P) but Petitioners do not challenge the County's compliance with this requirement of the Board's order.

1 activity to neighbors because the language does not match what is found in statute.” Reply Brief on
 2 Behalf of Jefferson County at 4. See also Intervenor’s Response To Objections To A Finding Of Compliance
 3 at 2-3. The County further argues that the no-action alternative would not be as environmentally
 4 friendly as the approved action. Reply Brief on Behalf of Jefferson County at 5.
 5

6
 7 The County’s argument with respect to the failure of the no-action alternative to protect mineral
 8 resource lands because of the inadequacy of its own notice provisions is misplaced. First of all, the
 9 question of the adequacy of the notice provisions under the GMA is not before the Board on remand.
 10 As the Petitioners point out, the Board ruled on this question in the Final Decision and Order and the
 11 time for appeal of that decision has long passed. Petitioners’ Objections to a Finding of Compliance at 7.
 12 The timelines for raising a challenge to a County ordinance or a Board decision cannot be said to
 13 only apply to the Petitioners. If Petitioners were the party seeking to re-litigate this issue, the County
 14 would surely object that it was not part of the remand, since the remand and conclusion of non-
 15 compliance were directed solely to the SEPA analysis.
 16

17
 18 Second, the SEPA analysis of the no-action alternative should consider that alternative in terms of its
 19 environmental impacts, not in terms of the legal ramifications of adopting that alternative as a policy
 20 choice. *King County v. Central Puget Sound Bd.*, 138 Wn.2d 161, 184, 979 P.2d 374(1999) (“an alternative
 21 may be taken into account for comparative purposes in an EIS even of the alternative’s legal status is
 22 contested”). This is because the purpose of the requirement for analysis of the no-action alternative is
 23 to provide a benchmark against which the other proposals may be measured.² The legal advisability
 24 of adopting the no-action alternative is a question apart from the SEPA analysis.
 25
 26

27 Third, the ability to cure the avowed defect in the County’s notice provisions lies in the County’s sole
 28 control. There is nothing to prevent the County from curing the problem it has identified. Moreover,
 29 adopting the MRLO does not cure the defect. The County argues that its notice provisions to
 30 neighbors concerning mineral resource activities in Commercial Forest lands are inadequate to
 31
 32

² We note that Intervenor made this point at argument,

1 protect the resource as required by RCW 36.70A.060(1). However, after adoption of the Fred Hill
 2 Materials MRLO, the same notice provisions that the County now believes are defective will still
 3 apply in all other parts of the designated Commercial Forest lands. Once the County identifies what
 4 it believes to be a deficiency, it should correct it rather than use it as a justification for eliminating the
 5 no-action alternative.
 6

7
 8 These flaws in the County's argument do not resolve the question of whether the Draft Supplemental
 9 Environmental Impact Statement, March 2004 (Ex. 3-53) ("DSEIS") and Final Supplemental
 10 Environmental Impact Statement, May 2004 (Ex. 3-61) ("FSEIS") adequately and fairly analyze the
 11 alternatives, however. We must look to the supplemental environmental analysis on its merits and
 12 determine whether it adequately analyzes the potential significant adverse environmental impacts of
 13 each alternative. The SEPA Rules provide that "[A]n EIS shall provide impartial discussion of
 14 significant environmental impacts and shall inform decision makers and the public of reasonable
 15 alternatives, including mitigation measures, that would avoid or minimize adverse impacts or
 16 enhance environmental quality." WAC 197-11-400(2). The SEPA Rules further require that the no
 17 action alternative "shall be evaluated and compared to other alternatives." WAC 197-11-440(5)(b)(ii).
 18

19
 20 Despite the emphasis in the County's ordinance upon the claimed failure of the no-action alternative
 21 to provide proper notice of mining activities (Ordinance 08-0706-09, Findings of Fact 20-25), the no-
 22 action alternative was evaluated and compared to the other alternatives in the DSEIS and the FSEIS.
 23 Although it would have been preferable for the County to devote less of the Draft SEIS to a critique
 24 of its own notification procedures³, it did address environmental characteristics of the no-action
 25 alternative: acreage disturbed under the no-action vs. other alternatives; air quality impacts; water
 26 quality impacts; impacts on plants and animals; noise impacts; transportation impacts. (Summarized at
 27 2-8 through 2-10 of the FSEIS)
 28
 29

30
 31
 32 ³ See also WAC 197-11-402(10) ("EISs shall serve as the means of assessing the environmental impact of proposed
 agency action, rather than justifying decisions already made")

1 A key issue with respect to the no-action alternative from the Board's perspective was the difference
 2 in environmental impacts between mining 10-acre segments (as a maximum allowed mining area in
 3 the absence of an MRLO) and mining a 40-acre area (as allowed in the new MRLO):

4 Thus, at a minimum, the EIS should have discussed the difference between the existing ten-
 5 acre limitation and the new 40-acre limitation.

6 Final Decision and Order, August 15, 2003, at 22-3.

7
 8 The environmental impacts of the no-action (10-acre maximum) and approved alternative (40-acre
 9 maximum) are discussed at Section 2.8 of the DSEIS. This includes a summary description of the
 10 amount of mining material that might be extracted and the reclamation requirements under each
 11 alternative:

- 12 • With 40-acre mining segments, more material could be extracted given the same
- 13 mine area as mining that may occur in 10-acre segments.
- 14 • Mining in 40-acre segments would allow for reclamation planning for optimal
- 15 recovery of a non-renewable resource.
- 16 • Mining in 10-acre segments/disturbed areas may result in lack of recovery or loss of
- 17 non-renewable resources.
- 18 • Mining in 10-acre segments would result in relatively small areas of disturbance at
- 19 any given time, but more area may be required to be disturbed per cubic yard of
- 20 material recovered.

21 DSEIS, March 2004, at 2-20.

22 While the County could have done more analysis of the no-action alternative so that a clearer view of
 23 the maximum rate of extraction of the resource under each scenario could be determined, in light of
 24 the presumption of validity and the deference to be given to local decision-makers, we find that the
 25 environmental effects of the no-action alternative are "sufficiently disclosed, discussed and
 26 substantiated by supportive opinion and data." *Citizens Alliance to Protect our Wetlands v. City of*
 27 *Auburn*, 126 Wn.2d 356, 361, 894, P.2d 1300, 1995 Wash. LEXIS 157 (1995) citing *Klickitat County Citizens*
 28 *Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 641, 860 P.2d 390 (1993).

1 **Conclusion:** Petitioners have not met their burden of proving that the County's analysis of the no-
2 action alternative fails to comply with SEPA. We, therefore, find that the no-action alternative is
3 adequately analyzed.
4

5 **Issue No. 2: Does the Final Supplemental Environmental Impact Statement (FSEIS) consider**
6 **the potential development of a pit-to-pier project as a result of the MRLO?**
7

8
9 Petitioners also challenge the County's compliance with the requirement to analyze identified
10 potential impacts of transportation needs arising out of the MRLO designation. The Final Decision
11 and Order found:

12 The FSEIS pointed to a capacity problem with respect to truck transport of minerals from the
13 new overlay site. However, the FSEIS failed to describe the current traffic or predict a range
14 of future truck traffic that would be needed for increased mining activity. The FSEIS also
15 failed to consider whether alternative forms of transport, such as the conveyor suggested by
Fred Hill Materials, might be used and with what possible environmental impacts.

16 Final Decision and Order, August 15, 2003, Finding O.
17

18 Petitioners assert that the County's new environmental analysis still fails to consider the pit-to-pier
19 project as a potential traffic alternative arising out of the MRLO designation. Petitioners' Objections to
20 a Finding of Compliance at 11. Petitioners argue that the DSEIS implies that a marine transport system
21 would have a beneficial impact on traffic on SR 104 while the FSEIS asserts that the marine transport
22 system is not an alternative to trucking. Ibid.
23

24
25 The County answers that the DSEIS and FSEIS do analyze transportation impacts of the MRLO
26 designation and that the marine transport system is not a potential outcome of the MRLO designation
27 in any event. Reply Brief on Behalf of Jefferson County at 8. Intervenor further argues that Fred Hill
28 Materials would continue to expand its operations, with or without the MRLO, and that it is this
29 expansion of its operations, rather than the MRLO designation, that will lead to the pit-to-pier
30 project. Intervenor's Response To Objections To A Finding Of Compliance at 6.
31
32

1 The County and the Intervenor argue strenuously that the pit-to-pier project (also called the marine
2 transport system) does not follow from the adoption of the MRLO. Ibid; Reply Brief on Behalf of
3 Jefferson County at 6. They urge that it is the market that will determine the need for more material
4 and that Fred Hill Materials will respond based on market demands, regardless of the MRLO.
5 However, this argument misses the point of the Board's earlier findings. The County must analyze
6 potential significant environmental impacts of its nonproject action in terms of the maximum
7 development that might occur as a result of the nonproject action. In this case, maximum
8 development is closely tied to the highest potential rate of extraction and the transportation modes
9 needed to move the mineral resource recovered to markets to meet highest potential demand.
10

11
12 It is true, as Petitioners argue, that the DSEIS and the FSEIS fail to analyze the rate of extraction for
13 purposes of determining what the maximum impact of the MRLO designation might be. For
14 example, the DSEIS states that transportation impacts of the proposed action alternative would be a
15 function of the rate of extraction, but it declines to examine the maximum potential rate of extraction:
16

17 For resources extracted from the study area to be marketed within Jefferson County, SR-104
18 and other rural roadways would experience increased traffic volumes, primarily from haul
19 vehicles, with increased traffic volumes being a function of the rate of extraction. In addition,
20 the rate of extraction would be limited by the ability to use area roadways; if mining-related
21 haul vehicles reduce level of service, restrictions may be placed on the number of vehicles
22 accessing area roadways, possibly resulting in a lower need to extract material.

23 If the trend set by FHM at its Shine Hub is followed, either by FHM or another mining
24 company, for resource extraction in the study area, 90% of the extracted material would be
25 exported from Jefferson County. The most likely export route from the study area, and
26 ultimately from Jefferson County, would be over the Hood Canal Bridge to Kitsap County. If
27 alternatives to truck transport of material to markets are developed, capacity issues with SR
28 104 could be avoided, and expanded markets for material could be developed.

29 DSEIS, March 2004, at 3-43. See also FSEIS, May 2004, at 1-7.

30 It is unclear why the County did not analyze, in the March 2004 DSEIS, the maximum rate of
31 extraction under the various alternatives and the potential impact in each case on transportation. Fred
32 Hill Materials has been very forthcoming with all of its potential development plans, from the very
beginning advising the County of its intentions to expand its business and to develop a marine

1 transport system, the "pit-to-pier" project. At argument, it was apparent that FHM has a great deal of
2 technical information about the way extraction can occur in either the 40-acre areas or the 10-acre
3 segments that it would be happy to contribute to the analysis.
4

5 Because of the lack of analysis of the potential maximum rate of extraction under the various
6 alternatives in the DSEIS, the Petitioners are understandably skeptical about the assertion that the pit-
7 to-pier project will occur regardless of whether the MRLO is approved or not. Petitioners' Objections
8 to a Finding of Compliance at 14. ("This makes no sense.") However, the FSEIS does supplement the
9 DSEIS analysis of transportation impacts with FHM's estimates of the maximum amount of mineral
10 to be extracted with and without an MRLO. FSEIS at 2-4. The FSEIS states that the maximum
11 extraction levels with the MRLO could rise to 7.5 million tons extracted annually. FSEIS at 2-4. This
12 compares with 750,000 tons that could be extracted annually without the MRLO. Ibid. Under either
13 alternative, Fred Hill Materials would transport 750,000 tons annually by truck. Ibid. This truck
14 traffic would add 98 new daily trips to SR-104, or 0.7% to the volume already using that segment of
15 SR-104. FSEIS at 2-3. The additional tonnage to be transported annually at the maximum expansion
16 rate of 7.5 million tons annually (under an MRLO) would be transported via the pit-to-pier project.
17 Four million tons would be transported by barge, and 2.5 million tons on ships that would require
18 opening the Hood Canal bridge. FSEIS at 2-4.
19
20
21

22
23 In addition, we are unable to say that the DSEIS and FSEIS failed to alert the reader that the MRLO
24 is likely to affect the amount of material that Fred Hill Materials can potentially excavate for other
25 reasons. The comments of the Department of Natural Resources strongly suggest that it would not
26 approve an expanded mining operation that relies upon a series of relatively shallow 10-acre mining
27 segments rather than a larger, deeper, well-managed excavation area. DSEIS 2-19.
28

29
30 Petitioners argue that the FSEIS should have gone on to analyze: the impacts of marine transportation
31 on Hood Canal; the potential impacts of marine transportation on the Hood Canal Bridge; the
32 precedent of industrializing Hood Canal; and "numerous other environmental impacts which have led

1 tribes, state-wide environmental groups, interagency entities such as the Puget Sound Action Team,
 2 and members of Congress to oppose the MLO". Petitioners' Objections to a Finding of Compliance at 16.
 3 Clearly, the County Commissioners could have required more detail in the environmental analysis.
 4 Particularly since the Commissioners will not have an opportunity to review the environmental
 5 impacts of the pit-to-pier project itself⁴, the Commissioners might have chosen a more detailed
 6 evaluation of the likely environmental impacts of barge traffic and ships requiring opening the Hood
 7 Canal Bridge. However, the SEPA Rules give the lead agency "more flexibility in preparing EISs on
 8 nonproject proposals". WAC 197-11-442(1). The Rules provide that the lead agency shall discuss
 9 impacts and alternatives in the level of detail appropriate to the level of planning for the proposal.
 10 WAC 197-11-442(2). The general level of discussion of transportation impacts in the FSEIS was
 11 minimal, but within the range of acceptable levels for the evaluation of the adoption of the MRLO
 12 designation.
 13
 14

15
 16 **Conclusion:** In light of these considerations and the standard of review generally, we find that the
 17 analysis of transportation impacts complies with the SEPA requirements for nonproject review of the
 18 Fred Hills Materials MRLO.
 19

20 **Issue No. 3: Did the County violate the public participation requirements of the GMA in**
 21 **adopting the comprehensive plan amendment designating the Fred Hill Materials MRLO?**
 22

23
 24 Petitioners ask the Board to find the County violated the requirements for public participation in the
 25 enactment of the challenged comprehensive plan amendment because the County "published notice
 26 and instructed the large crowd that attended its first public hearing that the public could not discuss
 27 and the BOCC could not consider the contents of the SEIS." Petitioners' Objections to a Finding of
 28 Compliance at 18. The County responds that the June 7th public hearing was well attended (250
 29 people in attendance) and 50 people testified at it; and that many written comments (129) were
 30 received. Reply Brief on Behalf of Jefferson County at 10. The County also notes that the audience at
 31
 32

⁴ The pit-to-pier project will go through a hearing examiner review process instead.

1 the June 7th hearing was advised that the County Commissioners would allow the public to
2 “consider” the EIS documents in their comments. Ibid at 11.

3
4 Petitioners correctly advised the County that public comment on the supplemental environmental
5 assessment should be allowed. Ex. 17-100. It is not readily apparent why the County took the
6 position it initially did. Indeed, the County reversed itself after its May 25th hearing, and did allow
7 public testimony and comments on the SEIS at the June 7th hearing. Ex. 10-11.

8
9
10 Petitioners argue that it is not enough for the County to correct its mistake at the next public hearing.
11 “The Board needs to send a message that governmental hostility to public participation is not
12 acceptable.” Petitioners’ Objections to a Finding of Compliance at 19. This Board (and both of the other
13 Boards as well) has consistently held that the public participation requirement of the GMA is
14 intended to ensure an open, clear, active, and ongoing dialogue between citizens and their local
15 governments. See *WEAN v. Island County*, WWGMHB Case No. 95-2-0063 (Motions Order, June 1, 1995).
16 In this case, the County mistook its obligations under SEPA and initially advised the public that
17 comments on the environmental analysis were not permitted. Ex. 17-101. Had the County not
18 corrected its position, we would be in a very different posture today. However, we do not agree with
19 Petitioners that the only remedy is a finding of noncompliance. In fact, the County did in this case
20 what the Board would have ordered it to do on remand – hold a hearing with open public comment on
21 the environmental analysis.
22
23

24
25 Petitioners accused the County Commissioners of “hiding behind a false legal wall”, both in
26 restricting public comment and in making its decision on the application. Ex. 17-100. It has been
27 unfortunate that the legal issues of notice of mineral resource uses and comment on SEPA documents
28 should have taken such a prominent place in the County’s compliance efforts. Nonetheless, there can
29 be little doubt that the County Commissioners took responsibility for the policy decision they made
30 in this case. Having heard the testimony and reviewed the many written comments received in this
31 case, the Commissioners took them under consideration in their deliberations of June 30, 2004. Ex.
32

1 17-105. The minutes demonstrate that they were cognizant of the public opposition to the MRLO and
2 felt that they had appropriately distinguished the MRLO from the pit-to-pier project that will be
3 reviewed for compliance with the Uniform Development Code by the County's hearing examiner.
4 Ibid. While this Board might have responded differently to the environmental considerations
5 presented to the County Commissioners, it is not the job of a growth management hearings board to
6 substitute its judgment for that of the County Commissioners. The errors in restricting public
7 testimony at the May 25th public meeting were corrected with the June 7th public meeting. The
8 County stumbled on its way to the public hearing, but it ultimately righted itself and complied with
9 the public participation requirements of the GMA.
10

11
12 **Conclusion:** The County failed to comply with the public participation requirements of the GMA at
13 its May 25th public meeting, but corrected its error at the June 7th public meeting and ultimately
14 complied with the public participation requirements of the GMA.
15

16
17 **Issue No. 4: Did the County fail to comply with its obligations under SEPA by failing to**
18 **identify the authors and principal contributors to the EIS?**
19

20 Petitioners argue that the County also failed to comply with SEPA by failing to identify the authors
21 and principal contributors to the EIS as required by WAC 197-11-440(2)(e). Petitioners' Objections to
22 a Finding of Compliance at 17. The County does not appear to contest this allegation in its Reply.
23 However, this failing does not appear to have any consequence in this case. Any error in failing to
24 identify all the contributors to the SEIS is harmless. See *Thornton Creek Legal Def. Fund v. City of*
25 *Seattle*, 113 Wn. App. 34, 52 P. 3d 522, 2002 Wash. App. LEXIS 2569 (2002, Division I) ("We "review
26 procedural errors during the EIS process under the rule of reason and where such errors are of no consequence,
27 they must be dismissed." at n.40).
28

29
30 **Conclusion:** Any error in failing to identify all the principal contributors to the SEIS was harmless
31 and is dismissed as a basis for finding a lack of compliance with SEPA.
32

VI. FINDINGS OF FACT

1. Jefferson County is a county located west of the crest of the Cascade Mountains that has chosen to or is required to plan under RCW 36.70A.040.
2. Petitioners are organizations that, through their members and representatives, submitted written and oral comments before the SEPA "responsible official" and the Board of County Commissioners on all matters raised in the petition for review.
3. Intervenor, Fred Hill Materials, Inc., was the applicant for the mineral resource overlay designation that is the subject of this appeal.
4. This Board entered its Final Decision and Order on August 15, 2003, in response to Petitioners' challenge to the County's December 9, 2002, adoption of Ordinance 14-1213-02, amending the Jefferson County comprehensive plan with the addition of a mineral resource overlay (MRLO) requested by Fred Hill Materials.. That order found that the environmental analysis prepared for the MRLO failed to "adequately analyze the no action and other alternatives to the proposed action." The County was ordered to bring the challenged comprehensive plan amendment into compliance with the State Environmental Policy Act (SEPA) (Ch. 43.21C RCW) within 180 days.
5. The County originally scheduled the public hearing on this proposal for May 25, 2004. However, because of the overflow crowd, the County continued the hearing to June 7, 2004, when a larger facility could be used. On July 6, 2004, the Board of Jefferson County Commissioners adopted Ordinance No. 08-0706-04, approving the MRLO requested by Fred Hill Materials.

- 1 6. The County argues that its notice provisions to neighbors concerning mineral resource activities
2 in Commercial Forest lands are inadequate to protect the resource as required by RCW
3 36.70A.060(1). However, the ability to cure the avowed defect in the County's notice
4 provisions lies in the County's sole control.
5
- 6 7. After adoption of the Fred Hill Materials MRLO, the same notice provisions that the County
7 now believes are defective will still apply in all other parts of the designated Commercial Forest
8 lands.
9
- 10 8. The no-action alternative was evaluated and compared to the other alternatives in the DSEIS
11 and the FSEIS. The County's supplemental environmental analysis addressed environmental
12 characteristics of the no-action alternative: acreage disturbed under the no-action vs. other
13 alternatives; air quality impacts; water quality impacts; impacts on plants and animals; noise
14 impacts; transportation impacts. (Summarized at 2-8 through 2-10 of the FSEIS).
15
16
- 17 8. The environmental impacts of the no-action (10-acre maximum) and approved alternative (40-
18 acre maximum) are discussed at Section 2.8 of the DSEIS. This includes a summary
19 description of the amount of mining material that might be extracted and the reclamation
20 requirements under each alternative.
21
22
- 23 9. Under SEPA, the County must analyze potential significant environmental impacts of its
24 nonproject action in terms of the maximum development that might occur as a result of the
25 nonproject action. In this case, maximum development is closely tied to the highest potential
26 rate of extraction and the transportation modes needed to move the mineral resource recovered
27 to markets to meet highest potential demand.
28
29
- 30 10. The DSEIS and the FSEIS fail to analyze the rate of extraction for purposes of determining
31 what the maximum impact of the MRLO designation might be. However, the FSEIS does
32

1 supplement the DSEIS analysis of transportation impacts with FHM's estimates of the
2 maximum amount of mineral to be extracted with and without an MRLO. FSEIS at 2-4.
3

- 4 11. The FSEIS states that the maximum extraction levels with the MRLO could rise to 7.5 million
5 tons extracted annually. FSEIS at 2-4. This compares with 750,000 tons that could be extracted
6 annually without the MRLO. Ibid. Under either alternative, Fred Hill Materials would transport
7 750,000 tons annually by truck. Ibid. This truck traffic would add 98 new daily trips to SR-
8 104, or 0.7% to the volume already using that segment of SR-104. FSEIS at 2-3. The additional
9 tonnage to be transported annually at the maximum expansion rate of 7.5 million tons annually
10 (under an MRLO) would be transported via the pit-to-pier project. Four million tons would be
11 transported by barge, and 2.5 million tons on ships that would require opening the Hood Canal
12 bridge. FSEIS at 2-4.
13
14
15
16 12. The comments of the Department of Natural Resources strongly suggest that it would not
17 approve an expanded mining operation that relies upon a series of relatively shallow 10-acre
18 mining segments rather than a larger, deeper, well-managed excavation area. DSEIS 2-19.
19
20 13. The general level of discussion of transportation impacts in the FSEIS was minimal, but within
21 the range of acceptable levels of evaluation of the adoption of the MRLO designation.
22
23
24 14. The County published notice and instructed the large crowd that attended its first public hearing
25 on May 25, 2004, that the public could not discuss and the County Commissioners could not
26 consider the contents of the SEIS.
27
28 15. Petitioners advised the County that public comment on the supplemental environmental
29 assessment should be allowed. Ex. 17-100.
30
31
32

1 16. At the June 7, 2004, public meeting, the County Commissioners reversed their earlier position
 2 and accepted public comment and testimony on the supplemental environmental assessment.
 3 Ex. 10-11. The County continued the May 25th public meeting to allow increased attendance
 4 (250 people attended) and 50 people testified at the June 7th public hearing. The County also
 5 received many written comments (129).
 6

7
 8 17. The County identified the majority but not all of the principal contributors to the DSEIS and
 9 FSEIS.
 10

11 VII. CONCLUSIONS OF LAW

- 12
 13 A. This Board has jurisdiction over the parties and subject matter of this compliance action.
 14 B. Petitioners have standing to challenge this compliance action on the basis of their participation
 15 in the proceedings below.
 16 C. The three alternatives were adequately analyzed under SEPA.
 17 D. The analysis of transportation impacts complies with the SEPA requirements for nonproject
 18 review of the Fred Hills Materials MRLO
 19 E. The County failed to comply with the public participation requirements of the GMA at its May
 20 25th public meeting, but corrected its error at the June 7th public meeting and ultimately
 21 complied with the public participation requirements of the GMA. RCW 36.70A.140.
 22 F. Any error in failing to identify all the principal contributors to the SEIS was harmless.
 23
 24
 25

26 //

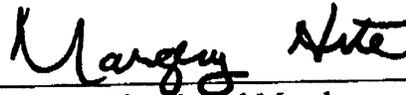
27 //

1 G. The County's adoption of Ordinance No. 08-0706-04, approving the MRLO requested by Fred
 2 Hill Materials, complies with SEPA, Ch. 43.21C RCW as it applies to adopted comprehensive
 3 plans, development regulations, and amendments thereto pursuant to RCW 36.70A.280(2)(a)
 4 and 36.70A.300(1).

5
 6
 7 This is a final order for purposes of a motion for reconsideration pursuant to WAC 242-02-832 and
 8 appeal pursuant to RCW 36.70A.300(5).

9
 10 SO ORDERED this 14th day of October 2004.

11
 12 WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

13
 14
 15 

16 Margery Hite, Board Member

17
 18 

19 Holly Gadbow, Board Member

20
 21 

22 Gayle Rothrock, Board Member

2003 FDO

BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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

Case No. 03-2-0006

FINAL DECISION AND ORDER

Petitioners,

v.

JEFFERSON COUNTY

Respondent.

The Shine Pit gravel quarry is located west of the Hood Canal Bridge and south of State Route 104 in Jefferson County. In 1997, the County designated the region surrounding the Shine Pit as Commercial Forest, a natural resource lands designation. This designation is used primarily for the purpose of protecting commercial forest lands from encroaching inconsistent uses but it also includes mineral excavation as a permitted use. However, under the Commercial Forest designation, mineral excavation sites are limited to ten acres in size.

The Shine Pit is 144 acres in size and is operating lawfully as a non-conforming use in the Commercial Forest designation. However, the Shine Pit is reaching the end of its useful life in terms of extraction of mineral resources and the Fred Hill Materials Corporation would like to expand their operations into other parts of the Commercial Forest designation. In April of 2002, the Fred Hill Materials Corporation submitted an application to the County to designate 6,240 acres in the Commercial Forest zone with a Mineral Resource Lands Overlay. The Mineral Resource Lands Overlay is a land

1 use designation to establish a mineral resource lands designation and increase the size
2 of the area which may be excavated for mineral extraction.

3
4 Fred Hill Materials proposed an amendment to the county's comprehensive plan
5 which would create this 6,240-acre mineral resource lands overlay. In its proposal,
6 Fred Hill Materials explained that it hoped to expand its operations and may include a
7 "pit-to-pier" project in the future that would allow the company to transport its
8 materials directly from the pit to a pier loading facility on Hood Canal for delivery to
9 other markets. The size of the proposed overlay was eventually reduced to 690 acres.
10

11
12 Opposition to the proposed mineral resource overlay was vocal. The County analyzed
13 the impacts of this proposal along with the other 2002 amendments to its
14 comprehensive plan in a supplemental environmental impact statement (SEIS). After
15 public hearings, the Board of county commissioners approved the mineral resource
16 overlay designation with specified conditions.
17

18 This case challenges the adequacy of the county's supplemental environmental impact
19 statement, alleges inconsistencies between the comprehensive plan amendment and
20 the county's own planning policies and regulations, and asserts that the County's
21 adoption of the comprehensive plan amendment is not in compliance with various
22 provisions of the Growth Management Act (GMA), Ch. 36.70A. RCW.
23
24

25 I. PROCEDURAL HISTORY

26 On December 13, 2002, the Jefferson County Board of County Commissioners
27 adopted Ordinance No. 14.1213-02, amending the comprehensive plan to designate a
28 mineral resource overlay requested by Fred Hill Materials, Inc. The ordinance was
29 published on December 25, 2002.
30
31
32

1 Petitioners filed a petition for review with this Board on February 21, 2003. Fred Hill
 2 Materials, Inc. moved to intervene on March 13, 2003 and was granted intervention on
 3 March 27, 2003. A prehearing conference was held telephonically on March 18, 2003
 4 and a prehearing order was entered March 27, 2003, setting, among other things, the
 5 issues for review in this case.
 6

7 The Intervenor and the County filed motions to dismiss issues on April 11, 2003 and a
 8 motions hearing was held telephonically on April 29, 2003. The Board denied the
 9 motions to dismiss and ordered that all issues be heard at the hearing on the merits on
 10 June 24, 2003. Order on Motions, May 19, 2003.
 11

12 The hearing on the merits was held on June 24, 2003 in the City Council Chambers in
 13 Port Townsend, Washington. Petitioners were represented by attorneys Michael
 14 Gendler and Melissa Arias. The County was represented by Deputy Prosecutor David
 15 Alvarez. The Intervenor was represented by attorney James Tracey. All three Board
 16 members were in attendance.
 17
 18

19 II. ISSUES PRESENTED

20 Petitioners challenge Ordinance No. 14.1213-02 and Amendment MLA 02-235,
 21 designating a Mineral Resource overlay, as follows:
 22

23 **Issue 1:** Is Jefferson County's SEPA analysis inadequate for this Comprehensive Plan
 24 amendment because the County's EIS failed to evaluate a "no action alternative" as
 25 required by RCW 43.21C.030(2)(c)(3), WAC 197-11-440(5)(b)(ii), and WAC 197-11-
 26 440(5)(c)(v)?
 27

28 **Issue 2:** Is Jefferson County's SEPA analysis inadequate for this Comprehensive Plan
 29 amendment because the County's EIS failed to evaluate reasonable alternatives,
 30
 31
 32

1 including alternatives that can “feasibly attain or approximate a proposal’s objectives,
2 but at a lower environmental cost or decreased level of environmental degradation” as
3 required by WAC 197-11-440(5)(b)? This issue includes Issue 4.3 from the Petition
4 for Review.

5
6 **Issue 3:** Is Jefferson County’s SEPA analysis inadequate for this Comprehensive Plan
7 amendment because the mitigation was not evaluated with respect to its effectiveness,
8 fails to mitigate the environmental impacts of Amendment MLA 02-235, and purports
9 to mitigate impacts of measures and facilities the applicant intends to construct
10 through a future application?
11

12
13 **Issue 4:** Is Jefferson County’s SEPA analysis inadequate and unlawful because the
14 County’s EIS failed to study and describe the adverse environmental impacts of the
15 proposal with respect to impacts on the built and natural environment, including
16 impacts on residential communities, noise pollution, light and glare pollution, water
17 pollution, traffic, marine traffic, residential and rural community character, conflicts
18 between mineral resource development and residential and rural communities, and the
19 history of other mineral resource use including the impacts of similar activities?
20

21
22 **Issue 5:** Did Jefferson County violate SEPA by: excluding Fred Hill Materials’
23 “pit-to-pier” project from its environmental review and deliberations; discouraging the
24 public and Petitioners from addressing the “pit-to-pier” component of Fred Hill
25 Materials’ project in the public comments and testimony; failing to discuss the impacts
26 of “pit-to-pier” and alternatives; and then conditioning the amendment with “pit-to-
27 pier” specific mitigation that had not been studied, evaluated, or subjected to public
28 comment and testimony?
29
30
31
32

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

Issue 6: Is Jefferson County's SEPA analysis inadequate and unlawful because the County's EIS failed to study and describe the adverse environmental impacts of the change in designation with respect to impacts on ground and surface water quality and quantity, marine water quality, and shoreline habitat?

Issue 7: Does Jefferson County Ordinance No. 14-1213-02 violate RCW 36.70A.020(9) and .060(2) because Amendment MLA 02-235 fails to conserve fish and wildlife habitat?

Issue 8: Does Jefferson County Ordinance No. 14-1213-02 violate RCW 36.70A.020(10) because Amendment MLA 02-235 fails to protect the environment and enhance the State's quality of life including air and water quality and the availability of water?

Issue 9: Does Jefferson County Ordinance No. 14-1213-02 violate WAC 365-195-300 and the County's Comprehensive Plan, Chapter 4, Natural Resource Conservation Element, p. 4-6, because it designates mineral resource lands without adequately considering the fifty-year construction aggregate demand within the County as required by the Plan?

Issue 10: Does Jefferson County Ordinance No. 14-1213-02 violate the Jefferson County Comprehensive Plan objectives, Chapter 4, Natural Resource Conservation Element p. 4-6, because it fails to identify the "three key issues" that need to be addressed prior to designation or conservation of mineral lands: (1) classifying types of mineral resources that are potentially significant in Jefferson County; (2) defining the amount and long-term significance of aggregate that is needed to meet the demand of Jefferson County's projected population; and, (3) determining how to balance a variety of land uses within mineral resource areas?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

Issue 11: Does Jefferson County Ordinance No. 14-1213-02 violate Jefferson County Comprehensive Plan Natural Resource Policy 2.1 because it fails to explain how the proposed mineral resource overlay will advance or harm the policy to “regulate resource-based economic activities so as to mitigate adverse impacts to the environment and adjacent properties?”

Issue 12: Does Jefferson County Ordinance No. 14-1213-02 violate Jefferson County Comprehensive Plan Natural Resource Policy 2.3 because it fails to explain how the proposed mineral resource overlay will advance or harm the policy to “protect the environment from cumulative adverse impacts resulting from resource management practices?”

Issue 13: Is Jefferson County’s adoption of MLA 02-235 inconsistent with the Unified Development Code, Chapter 9, Comprehensive Plan and GMA Implementing Regulation Process, 9.8.b.(1) and (2), because circumstances related to the proposed amendment and the area in which it is located have substantially changed since the adoption of the Plan?

Issue 14: Is Jefferson County’s adoption of MLA 02-235 inconsistent with the Unified Development Code, Chapter 9 Comprehensive Plan and GMA Implementing Regulation Process, 9.8.1.b.(3), because the proposed amendment does not reflect current widely held values of the residents of Jefferson County?

Issue 15: Did Jefferson County violate RCW 36.70A.140 by failing to provide “early and continuous” public participation?

III. BURDEN OF PROOF

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

Petitioners challenge the approval of Amendment MLA 02-2335, a comprehensive plan amendment designating a mineral resource overlay in Jefferson County. Petition for Review. Comprehensive plan amendments are presumed valid upon adoption. RCW 36.70A.320(1). The Board “shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of this chapter.” RCW 36.70A.320(3).

In order to find the County’s action clearly erroneous, the Board must be “left with the firm and definite conviction that a mistake has been made.” *Department of Ecology v. Public Utilities Dist. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

Petitioners have the burden of showing a lack of SEPA compliance for GMA purposes on the clearly erroneous standard. *Durland v. San Juan County*, WWGMHB Case No. 00-2-0062c (Final Decision and Order, May 7, 2001). Whether an environmental impact statement is adequate is a question of law. *Citizens v. Klickitat County*, 122 Wn.2d 619, 626, 866 P.2d 1256 (1993). The adequacy of an EIS is tested under the “rule of reason”, which requires a “reasonably thorough discussion of the significant aspects of the probable environmental consequences” of the agency’s decision. *Ibid.* The decision of the governmental agency must be accorded substantial weight. RCW 43.21C.090.

IV. SUMMARY OF DECISION

Jefferson County was faced with many planning decisions in the 2002 comprehensive plan amendment cycle. We are very impressed with the professionalism of county planning staff and the County officials’ earnest efforts to grapple with the decisions facing them. While it is our task to determine whether the challenged actions are

1 compliant with the Growth Management Act ("GMA") and the State Environmental
2 Policy Act ("SEPA"), we wish to acknowledge the overriding importance of good
3 planning and the major steps the County has taken to responsibly address its local
4 circumstances.

5
6 In this decision, we find that the environmental review that was done for the mineral
7 resource overlay designation in this case was inadequate because of the absence of
8 "sufficient information for a reasoned choice among alternatives". We emphasize that
9 this is not a technical finding; we do not require the County to perform an EIS just for
10 "window dressing" for purposes unrelated to the particular decision facing it. Our
11 decision is based upon the specific environmental factors involved in the mineral
12 resource overlay designation and the significance of the analysis of environmental
13 impacts to the decision before the commissioners. We are aware that many local
14 officials feel that SEPA review is just a procedural technicality that is costly without
15 real benefit. However, SEPA review is intended to provide information about
16 environmental impacts so that decision-makers can know the possible environmental
17 consequences of their choices. Where that information is not presented, not only is
18 SEPA violated, the decision-makers are operating in the dark on these issues.
19
20

21
22 Here, the County responsibly decided that the proposed designation of a mineral
23 resource overlay in a commercial forest zone required environmental review and
24 added it to the supplemental environmental impact analysis performed on all the 2002
25 comprehensive plan amendment proposals (supplemental to the 1998 comprehensive
26 plan environmental review). However, the supplemental environmental impact
27 statement failed to analyze any alternative except the one recommended by staff.
28 Planning staff were clearly trying to make the best possible recommendation to the
29 county commissioners but, in doing so, they neglected to provide the commissioners
30 with adequate environmental information about alternatives.
31
32

1 In this case, mining was already a permitted use in the property under consideration.
 2 Therefore, an analysis of the environmental impacts of what was currently allowed
 3 was extremely important as a benchmark. The SEPA rules require evaluation of the
 4 "no action" alternative which, under Jefferson County regulations, was the mining of a
 5 site of a maximum of ten acres in size. This size limitation is not applicable to a
 6 mineral resource overlay designation. Thus, the intensity of mining in the proposed
 7 area was altered by the designation and the environmental impacts of that change were
 8 the proper subject of SEPA review. Applying the County's own listed factors for
 9 consideration would have yielded baseline information about the no-action alternative
 10 and also would have provided useful information about what conditions should be
 11 applied to the designation, were it to be granted. Applying those same factors to the
 12 other alternatives chosen by the County for evaluation would have disclosed how the
 13 impacts could vary depending upon the size and location of the mineral resource
 14 overlay. The supplemental environmental impact statement ("SEIS") should have
 15 analyzed the no action and other alternatives; failure to do so makes the SEIS
 16 inadequate and not compliant with Ch. 43.21C RCW.
 17
 18

19
 20 Petitioners alleged that the County should have done an evaluation of the potential pit-
 21 to-pier project that would follow from the mineral resource overlay designation. We
 22 do not agree that the project itself could or should be analyzed at this stage. However,
 23 we do note that an analysis of the transportation impacts of increased intensity of
 24 mining use would encompass transportation alternatives to trucking, including the
 25 potential use of a conveyor.
 26

27 V. ANALYSIS AND DISCUSSION OF ISSUES

28
 29 Petitioners' issues fall into three major categories: challenges to the adequacy of the
 30 County's environmental review for the amendment under the State Environmental
 31 Policy Act, RCW 43.21C; challenges to the amendment's consistency with the goals
 32 and requirements of the Growth Management Act, RCW 36.70A; and challenges to

1 the amendment's consistency with the County's planning policies and development
2 regulations.

3
4 **COMPLIANCE WITH SEPA**

5 Issue No. 1: Is Jefferson County's SEPA analysis inadequate for this Comprehensive
6 Plan amendment because the County's EIS failed to evaluate a "no action alternative"
7 as required by RCW 43.21C.030(2)(c)(iii), WAC 197-11-440(5)(b)(ii), and WAC 197-
8 11-440(5)(c)(v)?
9

10
11 Issue No. 2: Is Jefferson County's SEPA analysis inadequate for this Comprehensive
12 Plan amendment because the County's EIS failed to evaluate reasonable alternatives,
13 including alternatives that can "feasibly attain or approximate a proposal's objectives,
14 but at a lower environmental cost or decreased level of environmental degradation" as
15 required by WAC 197-11-440(5)(b)?
16

17
18 Issue No. 3: Is Jefferson County's SEPA analysis inadequate for this Comprehensive
19 Plan amendment because the mitigation was not evaluated with respect to its
20 effectiveness, fails to mitigate the environmental impacts of Amendment MLA 02-
21 235, and purports to mitigate impacts of measures and facilities the applicant intends
22 to construct through a future application?
23

24
25 Issue No. 4: Is Jefferson County's SEPA analysis inadequate and unlawful because the
26 County's EIS failed to study and describe the adverse environmental impacts of the
27 proposal with respect to impacts on the built and natural environment, including
28 impacts on residential communities, noise pollution, light and glare pollution, water
29 pollution, traffic, marine traffic, residential and rural community character, conflicts
30 between mineral resource development and residential and rural communities, and the
31 history of other mineral resource use including the impacts of similar activities?
32

1 Issue No. 5: Did Jefferson County violate SEPA by: excluding Fred Hill Materials'
 2 "pit-to-pier" project from its environmental review and deliberations; discouraging the
 3 public and Petitioners from addressing the "pit-to-pier" component of Fred Hill
 4 Materials' project in the public comments and testimony; failing to discuss the impacts
 5 of "pit-to-pier" and alternatives; and then conditioning the amendment with "pit-to-
 6 pier" specific mitigation that had not been studied, evaluated, or subjected to public
 7 comment and testimony?
 8

9
 10 Issue No. 6: Is Jefferson County's SEPA analysis inadequate and unlawful because the
 11 county's EIS failed to study and describe the adverse environmental impacts of the
 12 change in designation with respect to impacts on ground and surface water quality and
 13 quantity, marine water quality, and shoreline habitat?
 14

15 **Applicable Law**

16 **RCW 43.21C.030**

17 **WAC 197-11-440**

18 **WAC 197-11-442**
 19

20 **Positions of the Parties:**

21 Petitioners assert that the County's environmental review for the proposed overlay did
 22 not comply with WAC 197-11-440(5)(b)(ii) because the County failed to evaluate a
 23 "no action" alternative and other reasonable alternatives to the proposed overlay.
 24 Petitioners' Brief on the Merits, at 10-13. Petitioners assert that the County failed to
 25 study and describe adverse environmental impacts of the proposed overlay. *Ibid.* at
 26 15, 19. As a result, because "neither the impacts nor the mitigation that was adopted
 27 were analyzed," the Final Supplemental Environmental Impact Statement failed to
 28 evaluate the mitigation offered with respect to its effectiveness. *Ibid.* at 15.
 29 Petitioners argue that the conveyor and pier project should have been analyzed
 30 because the project will serve as a mitigating measure for adverse environmental
 31
 32

1 impacts of mining in the proposed overlay. *Ibid.* at 17. Finally, Petitioners argue that
2 while the County has discretion to limit the scope of non-project environmental
3 review, it is nevertheless required to analyze the impacts that the conveyor and pier
4 project would have on water quality, marine water quality, and shoreline habitat,
5 because it is an offsite impact of the proposed overlay. *Ibid.* at 19-21.
6

7
8 The County responds that its environmental review was adequate because the County
9 appropriately limited the scope of its environmental review, deferring further review
10 to the project permitting stage. Respondent Jefferson County's Brief on the Merits, 3-
11 5. Though the County was not required to analyze the "no action" alternative in its
12 Final Supplemental Environmental Impact Statement, the "no action" alternative was
13 "discussed in some detail," had been studied three times, and was known to the
14 County legislators. *Ibid.* at 6-9. The County argues that it "sufficiently disclosed,
15 discussed and substantiated" the "impacts of at least three alternatives." *Ibid.* at 12.
16 The County argues that the overlay "has no project-level impacts...because it does not
17 determine when a single spade of dirt is to be turned...." *Ibid.* at 13. The County
18 argues that the County has provided mitigation measures for any possible future
19 mining projects. *Ibid.* at 13-14. The County argues that it did not need to evaluate the
20 effectiveness of mitigation measures because evaluation of mitigation measures "is
21 impossible in the context of a non-project action...." *Ibid.* at 15. The County further
22 argues that the potential adverse environmental impacts of the proposed overlay were
23 discussed in adequate detail "for this non-project action." *Ibid.* at 17. The County
24 argues that the impacts of the conveyor and pier project did not need to be addressed
25 because the project had not "been proposed or described in detail," and "the conveyor
26 system and the pier will receive an automatic threshold Determination of
27 Significance...." *Ibid.* at 21. Finally, the County asserts that it was not required to
28 speculate on all potential adverse impacts of the conveyor and pier project upon
29 marine water quality and shoreline habitat. *Ibid.* at 21-22.
30
31
32

Applicable Law:Guidelines for state agencies, local governments...

The legislature authorizes and directs that, to the fullest extent possible:

...
 (2) all branches of government of this state, including state agencies, municipal and public corporations, and counties shall:

- ...
 (c) Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official on:
- (i) the environmental impact of the proposed action;
 - (ii) any adverse environmental effects which cannot be avoided...;
 - (iii) alternatives to the proposed action;

RCW 43.21C.030 (in pertinent part)

EIS contents.

- (1) An EIS shall contain the following, in the style and format prescribed in the preceding sections.
- ...
 (5) Alternatives including the proposed action.
- (a) This section of the EIS describes and presents the proposal (or preferred alternative, if one or more exists) and alternative courses of action.
 - (b) Reasonable alternatives shall include actions that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation.
 - (i) The word "reasonable" is intended to limit the number and range of alternatives, as well as the amount of detailed analysis for each alternative.
 - (ii) The "no-action" alternative shall be evaluated and compared to other alternatives.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

(iii) Reasonable alternatives may be those over which an agency with jurisdiction has authority to control impacts either directly, or indirectly through requirement of mitigation measures.

(c) This section of the EIS shall:

(i) Describe the objective(s), proponent(s), and principal features of reasonable alternatives. Include the proposed action, including mitigation measures that are part of the proposal.

...
(iii) Identify any phases of the proposal, their timing, and previous or future environmental analysis on this or related proposals, if known.

...
(v) Devote sufficiently detailed analysis to each reasonable alternative to permit a comparative evaluation of the alternatives including the proposed action. The amount of space devoted to each alternative may vary. One alternative (including the proposed action) may be used as a benchmark for comparing alternatives. The EIS may indicate the main reasons for eliminating alternatives from detailed study.

WAC 197-11-440 (in pertinent part)

Contents of EIS on nonproject proposals.

(1) The lead agency shall have more flexibility in preparing EISs on nonproject proposals, because there is normally less detailed information available on their environmental impacts and on any subsequent project proposals. The EIS may be combined with other planning documents.

(2) The lead agency shall discuss impacts and alternatives in the level of detail appropriate to the scope of the nonproject proposal and to the level of planning for the proposal. Alternatives should be emphasized. In particular, agencies are encouraged to describe the proposal

1 in terms of alternative means of accomplishing a stated
 2 objective (see WAC 197-11-060(3)). Alternatives
 3 including the proposed action should be analyzed at a
 4 roughly comparable level of detail, sufficient to evaluate
 5 their comparative merits (this does not require devoting the
 6 same number of pages in an EIS to each alternative).

7 ...

8 (4) The EIS's discussion of alternatives for a
 9 comprehensive plan, community plan, or other area-wide
 10 zoning or for shoreline or land use plans shall be limited to
 11 a general discussion of the impacts of alternate proposals
 12 for policies contained in such plans, for land use or
 13 shoreline designations, and for implementation measures.
 14 The lead agency is not required under SEPA to examine all
 15 conceivable policies, designations, or implementation
 16 measures but should cover a range of such topics. The EIS
 17 content may be limited to a discussion of alternatives which
 18 have been formally proposed or which are, while not
 19 formally proposed, reasonably related to the proposed
 20 action.

21 WAC 197-11-442 (in pertinent part)

22 **Discussion:**

23 Petitioners challenge the adequacy of the County's environmental review for the
 24 proposed overlay, arguing that the Final Supplemental Environmental Impact
 25 Statement failed to adequately analyze alternatives, including the "no action"
 26 alternative, under RCW 43.21C.030(2)(c)(iii), WAC 197-11-440(5)(b)(ii), and WAC
 27 197-11-440(5)(c)(v). Petitioners argue that the approval of Ordinance 14-1213-02 was
 28 based on inadequate information about adverse environmental impacts and
 29 alternatives; therefore, the Petitioner argues, the County's approval of the Ordinance
 30 should be found non-compliant.
 31
 32

1 As a preliminary matter, we examine the nature of the comprehensive plan amendment
 2 challenged here. In 1995, the County designated approximately 600 acres of Mineral
 3 Resource Lands. County's Brief, 6 n.4. The comprehensive plan adopted in 1998
 4 confirmed these designations and essentially deferred designation of others. *Ibid.* In
 5 the Unified Development Code ("UDC"), the County established a mechanism by
 6 which application could be made for a mineral resource designation as an overlay to
 7 other land use designations. UDC §3.6.3. Application for a mineral resource overlay
 8 designation must be made through the comprehensive plan amendment process:
 9

10 **Designation Procedures.** A Mineral Resource Land
 11 (MRL) Overlay District may be applied based upon the
 12 following criteria, only upon acceptance by the County of a
 13 complete application from a property owner and upon
 14 approval of a redesignation in accordance with Section 9 of
 15 the Code and processed as a comprehensive plan
 amendment.

16 **UDC §3.6.3 (in pertinent part)**

17 There are several key characteristics of a mineral resource overlay designation under
 18 the Jefferson County Code. First, a mineral resource land overlay under the county
 19 code occurs in the context of UDC provisions pertaining to mineral extraction and
 20 mining. That is, mining and mineral extraction activities are already regulated by
 21 portions of the Unified Development Code. *See* UDC §3.6.3, Table 3-1, §4.24, and
 22 §6.17. This means that a mineral resource land overlay designation in a Commercial
 23 Forest zone where mining is a permitted use may have the effect of changing the
 24 regulations applicable to mining in the region being designated. Second, the mineral
 25 resource land overlay designation may carry with it the adoption of specific overlay
 26 conditions. In this case, the conditions are set forth in Ex. 13-1 at 14-18. Thus, the
 27 challenged comprehensive plan amendment in this case also included conditions for
 28 the use of the particular mineral resource overlay area as part of the designation itself.
 29 In addition to any applicable mining and mineral extraction regulations in the UDC,
 30
 31
 32

1 then, conditions for the use of the resource were added with the adoption of the
2 mineral resource overlay designation.

3
4 These points are significant when we consider the nature of the SEPA review that the
5 County was obligated to undertake in making the challenged designation because they
6 bear on the known impacts of the mineral resource lands overlay designation itself,
7 irrespective of any future projects.
8

9
10 As a general matter, SEPA requires the disclosure and full consideration of
11 environmental impacts in governmental decision making. *Polygon Corporation v.*
12 *Seattle*, 90 Wn.2d 59, 61, 578 P. 2d 1309(1978), citing *Norway Hill Preservation &*
13 *Protection Ass'n v. King County Council*, 87 Wn.2d 267, 552 P.2d 674 (1976). The
14 EIS provides a basis upon which the jurisdiction can make the balancing judgments
15 required by SEPA. *SWAP v. Okanogan County*, 66 Wn. App. 439, 441, 832 P.2d 503
16 (Div. III, 1992).
17

18 The required contents of an EIS are set out in WAC 197-11-440.¹ For nonproject
19 actions such as comprehensive plan amendments, the general rules for the content of
20 an EIS apply except that the lead agency (in this case, the County) is granted more
21 flexibility in preparing an EIS than in project actions. This is "because there is
22 normally less detailed information available on their environmental impacts and on
23 any subsequent project proposals". WAC 197-11-442.
24
25

26 *The No-Action Alternative*

27
28 Petitioners first argue that the County failed in its obligation to analyze the "no-action"
29 alternative to the proposed designation. Petitioners' Brief on the Merits ("Petitioners'
30 Brief") at 8-11. Petitioners argue that "this is one of the presumably rare instances
31

32
¹ The Department of Ecology adopted mandatory rules for the preparation of environmental impact statements pursuant to the delegation of authority to the Department of Ecology in RCW 43.21C.110.

1 where the no-action alternative may do more to achieve the resource development
2 goals of the Growth Management Act and the Jefferson County Comprehensive Plan
3 than designating a large area for mineral development". *Ibid.* at 10.
4

5 The County responds that it did do an evaluation of the "no-action" alternative but that
6 the Petitioners' contention that the County could meet its GMA obligations under the
7 current Commercial Forest Land designation is inaccurate. The County argues that it
8 is required to designate and protect mineral resource lands under the GMA and the
9 status quo would not meet the GMA requirements either in terms of protecting the
10 resource or in terms of maintaining and enhancing natural resource extraction
11 industries. Hearing Brief on Behalf of Respondent Jefferson County ("County Brief")
12 at 8.
13

14 Both the County and the Intervenor argue that the County could not adopt the no-
15 action alternative and meet the County's obligation to designate and protect mineral
16 resource lands under the GMA. County Brief at 8; Intervenor's Brief at 13. However,
17 the County disposed of this argument in the 1997 environmental impact statement
18 (EIS) to the comprehensive plan:
19
20

21
22 [Therefore,] the inclusion of mineral extraction and primary
23 processing as a permitted use on designated forest land will
24 protect mineral resource lands from the encroachment of
25 incompatible development, conserve the mineral resource
26 land base of Jefferson County, and allow for its future
27 utilization by the mining industry.

28 Ex. 17-1 at 4-6.

29 The 1997 EIS also explains why the County has elected to use a mineral resource
30 overlay rather than using a Mineral Resource Lands designation:
31

32 An overlay is used because mining operations are
eventually depleted and sites are converted to other uses,

1 and thus the Mineral Lands designation is not permanent.
 2 Upon completion of mining operations and following the
 3 reclamation of the site, it will be removed from the Mineral
 4 Land designation and will be subject to the underlying land
 5 use designation depicted on the Land Use map.

6 Ex. 17-1 at 4-7.

7 Thus, the County's rationale for protecting its mineral resource lands with a
 8 commercial forest designation was settled in 1998. The mechanism for obtaining a
 9 mineral resource overlay was established in the UDC at §3.6.3 as an application for a
 10 comprehensive plan amendment. There is nothing to suggest that this comprehensive
 11 plan amendment is exempt from SEPA review. Further, the EIS may consider
 12 contested alternatives, even if contested on the basis of legality.

13 If we required all alternatives included in an EIS to be of
 14 certain legal status, projects would come to a halt until such
 15 status could be judicially determined, assuming that a
 16 determination could be obtained without issuing an
 17 advisory ruling. In order to avoid this outcome, EISs
 18 would include only unchallenged alternatives, rendering the
 19 discussion of reasonable alternatives superficial, and
 20 weakening their force as an effective decision making tool.
 21 There is no legal requirement that alternatives be certain or
 22 uncontested, only that they be reasonable.

23 *King County v. Cent. Puget Sound Bd.*, 91 Wn. App. 1, 31, 951 P.2d
 24 1151 (Div. I, 1998)²,

25 Under SEPA rules, evaluation and comparison of the "no-action" alternative is a
 26 mandatory element of an EIS (WAC 197-11-440(5)(ii)). In a nonproject SEPA review
 27 "[A]lternatives should be emphasized." WAC 197-11-442(2). The EIS must provide
 28 information about "reasonable alternatives, including mitigation measures," in order to
 29 inform decision-makers and the public about the impacts of the action. WAC 197-11-

30
 31 ² Reversed on other grounds, *King County v. Cent. Puget Sound Bd.*, 138 Wn.2d 161, 979 P.2d 374
 32 (1999). (The Washington Supreme Court approves this language from the court of appeals decision
 saying "Contrary to Friends' assertions, an alternative may be taken into account for comparative
 purposes in an EIS even if the alternative's legal status is contested", 138 Wn.2d at 184.)

1 400(2). We look, then, to the County's evaluation of the "no-action" alternative to
2 determine whether this met SEPA requirements.
3

4 The County argues that it did an evaluation of the no-action alternative. The County
5 points to the following exhibits as evidence of its consideration of the no-action
6 alternative: Ex. 2-4 at 7-11, 21 and 22 (October 25, 2002 Staff Memo to the Jefferson
7 County Planning Commission attaching the 1991 Report to the Legislature regarding
8 Mineral Resources of Long-Term Commercial Significance Within and Outside Urban
9 Growth Areas, corrected March 1994) (County Brief at 6); Ex. 3-1, at 4-1 to 4-9 and
10 4-62 to 4-72 (1997 Draft EIS); Ex. 17-1, at 4-7 (Final 1997 EIS); Ex. 3-12, at 2-33 (the
11 August 21, 2002 Draft SEIS); and Ex. 3-21, at 2-23 (the November 25, 2002 FSEIS).
12 County Brief at 7.
13

14 We have examined the cited exhibits. The discussion of mineral resources of long-
15 term commercial significance contained in the Report to the Legislature (Ex. 2-4) is
16 useful background information regarding the GMA requirements for designation and
17 conservation of mineral resources but it is not an analysis of the no-action alternative
18 to the designation sought by Fred Hill Materials. The environmental impacts reviewed
19 in Ex. 3-1 (1997 Draft EIS) - geologically hazardous areas such as seismic and mine
20 hazard areas (Ex. 3-1, at 4-1 to 4-3); soils characteristics (Ex. 3-1, at 4-4 to 4-9);
21 agricultural lands (Ex. 3-1, at 4-62 to 63); forest lands (Ex. 3-1, at 4-63 to 4-66); and
22 the other land uses discussed (Ex.3-1, at 4-66 to 4-72) do not otherwise address
23 mineral resources and do not address the area at issue. The 1997 Final EIS (Ex. 17-1)
24 notes that there is a high degree of overlap between lands devoted to growing timber
25 and land potentially containing commercial mineral deposits which makes it
26 appropriate to make mineral extraction a permitted use in forest resource lands.
27 However, the 1997 EIS does not discuss a no-action alternative to the proposed
28 overlay designation.
29
30
31
32

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

Ultimately, it is the environmental review for the challenged comprehensive plan amendment, rather than the earlier broad brush depictions of the Jefferson County landscape, that purports to accomplish the evaluation of a no-action alternative. Thus it is to Ex. 3-12 (the August 21, 2002 Draft Supplemental Environmental Impact Statement) and Ex. 3-21 (the November 25, 2002 Final Supplemental Environmental Impact Statement) that we must turn to consider the County's evaluation of the no-action alternative.

The SEIS (Ex.3-21) contains a "Summary Matrix of Impacts and Mitigation Measures" of the proposed mineral resource overlay designation. Ex. 3-21 at 1-8. This lists the alternatives considered as: the proposed action; the no-action alternative; the final staff recommendation alternative; and staff proposed mitigation. In the No Action Alternative column for the Fred Hill, Inc. MRL overlay, the environmental impacts are listed as "Not significant". *Ibid.*

Beyond the matrix, the County argues that two major aspects of the no-action alternative were considered by the County in making the overlay designation: (1) the fact that under current zoning mining is permitted in less than ten-acre increments; and (2) the disadvantages of the "no-action" alternative to both the mining firm and the adjacent landowners. County Brief at 7.

In this case, we assume that the no-action alternative to designating a mineral resource overlay in the proposed area was to continue to allow mining on a permit basis, restricting the permissible mining scope to a site of no more than ten acres. However, the environmental review documents did not describe the no-action alternative in terms of its "principal features", so even now we are assuming that the principal feature is the size of the site that can be disturbed. More significantly, the no-action

1 alternative was not analyzed in sufficient detail to permit a comparative evaluation of
2 the alternatives. WAC 197-11-440(5)(c)(v).

3
4 This is particularly significant here because the discussion of alternatives all centered
5 on the size of the mineral resource overlay area. Ex. 3-12, at 2-37; Ex. 3-21, at 1-8.
6 There was no discussion of the size of the area in which earth could be "disturbed" as
7 part of the mining activity. Yet one of the greatest changes that would occur as a
8 result of the mineral resource overlay designation is the lifting of the limit on the size
9 of a mining site. UDC 3.6.3. Under the existing Commercial Forest designation,
10 mining is a permitted activity. However, the site of mining activity within the
11 Commercial Forest zone cannot exceed ten acres pursuant to UDC §4.24, whereas the
12 UDC does not impose any site limitations within a mineral resource overlay.
13
14

15 An analysis of the no-action alternative should have shown the impacts of ten-acre
16 mining sites in the region. The discussion should include impacts upon and quality of
17 the physical surroundings, as well as the cost of and effects on public services. WAC
18 197-11-440(6)(e). Because transportation of the aggregate is necessarily a part of any
19 mining operation, the EIS should describe the truck traffic or other means necessary to
20 transport the aggregate mined from a site of such a size and the impacts of transport on
21 the environment. Because the proposed mineral resource overlay has a number of
22 critical areas within its boundaries, the EIS should describe the type of wildlife habitat
23 disruption that might be anticipated and provide mitigating measures that might be
24 adopted in response. This evaluation would serve as a benchmark to which the other
25 alternatives could be compared.
26
27
28

29 At a minimum, this no-action alternative should have been compared with what was
30 proposed and adopted. The EIS should disclose, discuss and substantiate by opinion
31 and data a proposed action's environmental effects. *Kiewit Constr. Group v. Clark*
32 *County*, 82 Wn. App. 133, 920 P.2d 1207 (Div. II, 1996). Thus, at a minimum, the

1 EIS should have discussed the difference between the existing ten-acre limitation and
2 the new 40-acre limitation. In this case, the site size limitation was set as a condition
3 of the mineral resource overlay at 40 acres. Ex. 13-1 at 17-18. However, there was no
4 analysis of what environmental impacts a 40-acre site might have. In fact, we could
5 find no explanation of how this size limitation was chosen. An analysis of the no-
6 action alternative would have caused the County to also consider the environmental
7 impacts of the actual condition it imposed. This was not done.
8

9 *Evaluation of other alternatives*

10 Petitioner argues that the alternatives that were considered in the EIS were not truly
11 analyzed; that the County merely assumed, without evaluation, that a smaller land area
12 for the mineral resource overlay would have fewer impacts than a larger area.
13 Petitioners' Brief at 11-12. The County responds that the County analyzed the
14 alternative acreages based upon changes proposed in staff discussions with the
15 applicant, the Department of Fish and Wildlife, the Department of Ecology and the
16 Port Gamble S'klallam Tribe. County's Brief at 10. All of those organizations, the
17 County points out, felt that the 6,240-acre alternative had more potential impact on the
18 environment than the 690-acre alternative. *Ibid.*
19
20

21
22 The Commercial Forest zone in which the mineral resource overlay will apply is a
23 very large territory, larger than even the largest area originally proposed for the
24 overlay. Because mining is permitted in the Commercial Forest zone in which the
25 proposed overlay is located, a major feature of the mineral resource overlay was the
26 intensity of use that would be permitted within the overlay. Even if the acreage in the
27 Mineral Resource Land Overlay area were exactly the same as that in the Commercial
28 Forest zone, there still would have been a change in intensity of use because the ten-
29 acre site limit would no longer apply. UDC §4.24. We have already noted that an
30 analysis of the no-action alternative would have provided the decision makers with
31 this information and the impacts of such a change in intensity.
32

1 However, Petitioners also challenge the analysis the County conducted of the
2 alternative acreages which might be designated with a mineral resource overlay. In
3 considering this challenge, we first look to the alternatives the County chose – a no-
4 action alternative, a 6,240-acre alternative, and a 690-acre alternative. The County
5 considered the applicant's original proposal of 6,240 acres, an alternative that must be
6 evaluated pursuant to WAC 197-11-440(5)(a), and received comments on it. Ex. 3-21.
7 Then the County engaged in discussions with the applicant and came up with a 765-
8 acre alternative. Ex.13-1, at 3. The 765-acre alternative was further modified to 690
9 acres to move the mineral resource overlay boundary approximately 500 feet from
10 Thorndyke Creek, a salmon-bearing stream. Ex. 3-21, at 2-33; Ex. 13-1, at 5. The
11 County's choice of alternative sizes of the area to which the mineral resource overlay
12 designation would apply was reasonable.
13

14
15 However, the County's analysis of these alternatives did not provide the decision
16 makers with full information concerning the potential environmental impacts of the
17 alternatives. In fact, the County's supplemental environmental impact statement of
18 November 25, 2002 (FSEIS) seems to concede that the environmental impacts of the
19 6,240-acre alternative are not fully considered in the FSEIS. The staff
20 recommendation states:
21

22 As discussed in the review letter submitted by the
23 Department of Ecology, the potential environmental
24 impacts of designating the full 6,240 acres are unknown
25 without additional research, study and analysis.

26 Ex. 3-21 at 2-33.

27 Rather than analyze the impacts of the 6,240-acre proposal, the County settled on a
28 smaller area and analyzed it. Ex. 3-21, at 2-31 to 2-32.
29

30 The County analyzed the 690-acre proposal according to the 13 factors it established
31 to consider in evaluating proposals for mineral resource overlays:
32

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

1. Quality of Deposit
2. Size of Deposit
3. Access Distance from Market
4. Compatible with Nearby Areas
5. Impact of Noise
6. Impact of Blasting
7. Impact of Truck Traffic
8. Visual Impact
9. Surface and Ground Water Impacts
10. Wetlands Impact
11. Slopes
12. Biological Impact
13. Impact of Flooding

Ex. 13-21, at 2-28 to 2-30.

Inexplicably, the County did not analyze the three alternatives (including the no-action alternative) in terms of these factors. Instead, the County only evaluated the 690-acre alternative with respect the listed factors. Ex. 3-21, at 2-31 to 2-32. The County argues that the 690-acre alternative was compared to the 6,240 alternative in response to comments received regarding the draft SEIS. County's Brief at 11-12. However, the County only points to a comparison of visual impacts (Ex. 3-21, at 3-13, response to #38) and to water resources analysis in a letter dated November 20, 2002 from the Department of Ecology regarding the proposed 6,240-acre site and the 690-acre alternative. County Brief at 12. No other factors were considered. We have not been able to discern any comparison of the named alternatives in either of the environmental review documents (Ex. 3-12 and 3-21) except in a matrix of the proposed comprehensive plan amendments. Ex. 3-21, at 1-8. That matrix lists the Fred Hill proposal as follows:

Environmental Impacts: Proposed Action	Environmental Impacts: No Action Alternative	Environmental Impacts: Final Staff Recommendation Alternative	Staff Proposed Mitigation
Probably significant adverse impacts	Not Significant	Mitigated to moderate impacts. Area reduced from 6,240 acres to 690 acres. Water quantity and quality impacts at non-project level reviewed by Ecology	State law, UDC regulations, list of mitigation measures in Part 2.

None of this constitutes a "sufficiently detailed analysis to each reasonable alternative to permit a comparative evaluation of the alternatives including the proposed action." WAC 197-11-440(5)(c)(v). As the Washington Supreme Court stated in *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26 at 35, 813 P.2d 498 (1994), "it is impossible from the brief, conclusory descriptions to engage in any meaningful comparison of the alternatives" (discussing the adequacy of the EIS for a public project requiring consideration of off-site alternatives in addition to onsite alternatives).

The County argues that the review that was conducted at this stage was appropriate because the County has flexibility in preparing an EIS and a general discussion of the impacts of alternate proposals is proper because the comprehensive plan affected a land use designation. WAC 197-11-442(1) and (4). However, this regulation does not excuse the County from an analysis and evaluation of environmental impacts of alternatives; it just means that the impacts and alternatives may be discussed "in the 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).

1 As our initial analysis concluded, the mineral resource designation has the effect of
2 changing applicable development regulations and setting new conditions for mining.
3 Therefore, the "level of detail appropriate to the scope of the nonproject proposal"
4 must include the change in intensity of use (site size increase from 10 to 40 acres).
5 We have already discussed how this change in intensity of use should be analyzed in
6 the no-action alternative. In addition, the potential area over which this increased
7 intensity will apply requires evaluation. Here, the County's chosen alternatives should
8 be evaluated in terms of the County's list of 13 factors. The County's evaluation
9 should consider the maximum possible mining development that could occur under
10 each scenario, in keeping with Jefferson County regulations. "We hold that an EIS is
11 adequate in a nonproject zoning action where the environmental consequences are
12 discussed in terms of the maximum potential development of the property under the
13 various zoning classifications allowed." *Ullock v. Bremerton*, 17 Wn. App.573, 575,
14 565 P.2d 1179 (1977).
15

16
17 The alternatives analysis here lacks sufficient information to make a meaningful
18 comparison of the environmental impacts possible under each alternative. It is
19 therefore inadequate.
20

21 *The Pit-to-Pier Project*

22 Petitioners also allege that the County should have analyzed Fred Hill Materials'
23 potential pit-to-pier project as part of the EIS on the mineral resource overlay
24 designation. Issue No. 5. Petitioners cite to *King County v. Boundary Review Board*,
25 122 Wn.2d 648, 664, 860 P.2d 1024 (1993) for the proposition that early
26 environmental review should be undertaken so that decision makers will have the most
27 information on foreseeable consequences of their planning actions: "[w]hen
28 government decisions may have such snowballing effect, decision-makers need to be
29 apprised of the environmental consequences before the project picks up momentum,
30 not after." *Ibid.*
31
32

1 The County responds that it was not timely to evaluate the pit-to-pier proposal because
2 the elements of that proposal are speculative at this time and will be addressed at the
3 permit level. County Brief at 21.
4

5 We agree with the County that it was premature for the County to fully evaluate the
6 pit-to-pier project as part of the EIS for the mineral resource overlay designation.
7 Although the applicant did advise the County that it might propose such a project after
8 the mineral resource overlay designation was obtained, a pit-to-pier project involves
9 many more specific elements than the designation of a type of land use area and those
10 specific elements are best evaluated at the project level.
11

12 At the same time, there are aspects of a future pit-to-pier project that are appropriate
13 for environmental review at this time. Those aspects arise from the need to transport
14 the mineral extracted under the new mineral resource overlay designation. A
15 conveyor project of some kind is a likely consequence of enhanced excavation,
16 something of which the applicant itself apprised the County.
17

18 Environmental review is required even if "no land-use change [will] occur as a direct
19 result of a proposed...action." *King County v. Boundary Review Board*, 122 Wn.2d
20 648, 664, 860 P.2d 1024 (1993). The court in *King County* addressed whether an EIS
21 was required for a proposed annexation to a city (prior to the implementation of the
22 GMA). *Ibid.* at 655-58, 860 P.2d 1024. The court found that though "no official
23 proposals have been submitted...for the development of the annexation properties...,
24 [e]ven a boundary change...may begin a process of government action which can
25 'snowball' and acquire virtually unstoppable administrative inertia." *Ibid.* at 664, 860
26 P.2d 1024.
27

28 In this case, the County prepared an EIS but did not evaluate alternatives as required
29 by the SEPA rules, which we have found to be inadequate. *Infra.* The pit-to-pier
30
31
32

1 project was not an alternative to the mineral resource overlay. Instead, it was a
 2 possible impact resulting from potentially increased mining activity. Rather than
 3 analyzing the pit-to-pier project, the EIS should include the transportation impacts of
 4 the various alternatives. See Impact of Truck Traffic, factor #7. The EIS discussion
 5 of "truck traffic" presently includes a general description of the existing Level of
 6 Service, which is "C" and is expected to reach "F" by 2018. *Ibid.* at 2-31. The
 7 discussion indicates that "additional truck traffic would access SR 104 via Rock to Go
 8 Road." *Ibid.* In looking at the potential environmental impacts of the increased site
 9 size within the two alternative overlay areas (690 acres and 6,240 acres), the EIS
 10 should consider increased production and the consequent need to transport the
 11 aggregate mined. If the roads are already at capacity, then the need for some kind of
 12 conveyor system should be considered. Since the applicant has already flagged this
 13 possibility, the EIS should evaluate that transportation impact generally.
 14

15
 16 Petitioners further argue that the County imposed mitigation on the applicant that was
 17 geared to the pit-to-pier project rather than the mineral resource overlay designation.
 18 Since the County will need to do an alternative analysis as part of its SEPA review of
 19 the mineral resource overlay designation, the question regarding mitigation imposed
 20 should await the County's full environmental review. We do not know what the
 21 County may choose to impose as mitigation once it has full information about
 22 environmental impacts.
 23

24
 25 **Conclusion:** The EIS for the mineral resource land overlay designation is
 26 inadequate due to the failure to properly evaluate the environmental impacts of
 27 alternatives, including the no action alternative. The County's comprehensive
 28 plan amendment designating the mineral resource land overlay does not comply
 29 with ch. 43.21C RCW.
 30
 31
 32

GMA Challenges

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

Issue 7: Does Jefferson County Ordinance No. 14-1213-02 violate RCW 36.70A.020(9) and .060(2) because Amendment MLA 02-235 fails to conserve fish and wildlife habitat?

Issue 8: Does Jefferson County Ordinance No. 14-1213-02 violate RCW 36.70A.020(10) because Amendment MLA 02-235 fails to protect the environment and enhance the State's quality of life, including air and water quality and the availability of water?

Applicable Law:

RCW 36.70A.020(9)

RCW 36.70A.020(10)

Positions of the Parties:

Petitioners argue that the words "conserve and "enhance" in the GMA mandate specific, direct action and that the County has not shown that its actions will conserve habitat and maintain the quality of the environment. Petitioners' Brief at 22-23.

The County responds that RCW 36.70A.060(2) only applies to development regulations; since no development regulations were either adopted or amended as part of the challenged ordinance, its provisions are inapplicable. County Brief at 22. As to the goals of RCW 36.70A.020, the County argues that they are meant as guidance and are not action forcing. *Ibid.* at 23-25. Even if the goals were action forcing, the County goes on, the County's actions in this case were at most neutral as to conservation of the environment and conserving wildlife habitat. *Ibid.*

Discussion and Analysis:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

We have said that the goals of the GMA have substantive authority and must be considered and incorporated into all GMA actions. *Achen v. Clark County*, WWGMHB Case No. 95-2-0067 (Final Decision and Order, September 20, 1995). However, this does not mean that the County must show that it has weighed the GMA goals as part of every action it takes under the GMA. The GMA creates a presumption of validity in favor of local governmental actions and places the burden of proof on the petitioner to demonstrate that any action taken is not in compliance with the Act. RCW 36.70A.320. Petitioners have not raised any factual considerations that show a failure to comply with the cited goals. All that Petitioners have argued is that the County does not know where the wildlife habitat is in the mineral resource overlay area and that the record does not show that the County complied with Goal 10 (protecting the environment). Petitioners' Brief at 23. The argument put forward by Petitioners here would essentially shift the burden to the County to show how it is meeting the GMA goals through this ordinance. This burden shifting is inappropriate. See *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 116 Wn. App. 48, 65 P.3d 337 (Div. I, 2003).

21
22
23
24
25
26
27

Conclusion: There is no requirement in the Act that the County show how it will balance the GMA goals in every comprehensive plan amendment; instead, the burden is on Petitioners to show that the County's action is not in compliance. They have not met their burden here. The County's actions comply with RCW 36.70A.020(9) and (10).

28
29
30
31
32

Issue 15: Did Jefferson County violate RCW 36.70A.140 by failing to provide "early and continuous" public participation?

Applicable Law:

RCW 36.70A.140

Positions of the Parties:

Petitioners argue that the County violated the GMA's public participation requirements by allowing a change in the original proposal without allowing the public the opportunity to comment on it; by asserting that the planning commission meetings were quasi-judicial and therefore commission members could not have individual contacts concerning the comprehensive plan amendment; and by allowing the applicant to discuss its plans for the proposal with the planning commission members directly. Petitioners' Brief at 24-25.

The County responds that the proposal was modified, as the GMA requires, to respond to concerns that were raised in the process; that the Petitioners not only had the opportunity to respond to the information presented by Fred Hill Materials on November 6, 2002, but they actually did respond at length during the county commissioners' hearing of December 5, 2002; that the statement that the proceedings were quasi-judicial was error, but harmless error since public comments were received on all aspects of the proposal. County Brief at 32-34.

Discussion and Analysis:

The gravamen of Petitioners' public participation complaint is their assessment of the treatment accorded to the applicant in this case as "favoritism". Petitioners' Brief at 25. Petitioners claim that the proposal was modified after the SEPA comment period was closed and the County does not contest this fact. Instead, the County points to the December 5, 2002 public hearing minutes which show that many members of the public, including Petitioners, commented on the proposal after the modifications were made. Ex. 6-12. The County states that the planning commission asked questions of

1 the applicant's hydrogeologist at the November 6 planning commission meeting
2 because the planning commission had questions that were raised in the public process.
3 County Brief at 33. However, the public had the opportunity to comment on the
4 revised proposal at the December 5, 2002 county commissioners meeting. *Ibid.* at 34.
5

6 The highly charged atmosphere concerning the Fred Hill Materials' proposal was not
7 eased by the mistaken assertion that contacts with the public would be prohibited as *ex*
8 *parte*. However, the County states (and we see no evidence to the contrary) that the
9 belief that the proposal under consideration was quasi-judicial was simply an error and
10 not an attempt to limit public participation. Further, the planning commission's
11 decision to seek technical assistance from both the Department of Natural Resources
12 and the applicant's hydrogeologist on questions that had been raised concerning the
13 effect of mining on the aquifer was appropriate; this information was provided in the
14 planning commission hearing on November 6, 2002. Ex. 6-16. Since there has been
15 no challenge to the circulation of the revised proposal, we assume that it was widely
16 available for review; comment was clearly received at the public hearing before the
17 county commissioners. Ex. 10-1.
18
19
20

21 **Conclusion: Under the totality of circumstances in this case, we find that the**
22 **Petitioners have failed to meet their burden of proving the County was clearly**
23 **erroneous in the way it provided opportunities for public participation.**
24

25 *Consistency with the County Comprehensive Plan and Development Regulations*

26 **Issue 9: Does Jefferson County Ordinance No. 14-1213-02 violate WAC 365-195-**
27 **300 and the County's Comprehensive Plan, Chapter 4, Natural Resource Conservation**
28 **Element, p. 4-6, because it designates mineral resource lands without adequately**
29 **considering the 50-year construction aggregate demand within the County as required**
30 **by the Plan?**
31
32

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

Issue 10: Does Jefferson County Ordinance No. 14-1213-02 violate the Jefferson County Comprehensive Plan objectives, Chapter 4, Natural Resource Conservation Element p. 4-6, because it fails to identify the “three key issues” that need to be addressed prior to designation or conservation of mineral lands: (1) classifying types of mineral resources that are potentially significant in Jefferson County; (2) defining the amount and long-term significance of aggregate that is needed to meet the demand of Jefferson County’s projected population; and, (3) determining how to balance a variety of land uses within mineral resource areas?

Issue 11: Does Jefferson County Ordinance No. 14-1213-02 violate Jefferson County Comprehensive Plan Natural Resource Policy 2.1 because it fails to explain how the proposed mineral resource overlay will advance or harm the policy to “regulate resource-based economic activities so as to mitigate adverse impacts to the environment and adjacent properties?”

Issue 12: Does Jefferson County Ordinance No. 14-1213-02 violate Jefferson County Comprehensive Plan Natural Resource Policy 2.3 because it fails to explain how the proposed mineral resource overlay will advance or harm the policy to “protect the environment from cumulative adverse impacts resulting from resource management practices”?

Issue 13: Is Jefferson County’s adoption of MLA 02-235 inconsistent with the Unified Development Code, Chapter 9, Comprehensive Plan and GMA Implementing Regulation Process, 9.8.b.(1) and (2), because circumstances related to the proposed amendment and the area in which it is located have substantially changed since the adoption of the Plan?

1 **Issue 14:** Is Jefferson County's adoption of MLA 02-235 inconsistent with the
 2 Unified Development Code, Chapter 9 Comprehensive Plan and GMA Implementing
 3 Regulation Process, 9.8.1.b.(3), because the proposed amendment does not reflect
 4 current widely held values of the residents of Jefferson County?
 5

6 **Applicable Law:**

7 RCW 36.70A.070

8 WAC 365-195-210
 9

10
 11 **Positions of the Parties:**

12 Petitioners argue that the adoption of the mineral resource overlay amendment is
 13 inconsistent with the County's comprehensive code and the County's Unified
 14 Development Code. First, Petitioners argue that the County has failed to estimate its
 15 50-year demand for aggregate and to meet the comprehensive plan requirements for
 16 (1) classifying the types of potentially significant mineral resources; (2) defining the
 17 amount and long-term significance of aggregate needed for the county's projected
 18 population; and (3) determining how to balance a variety of land uses within a mineral
 19 resource area. Petitioners' Brief at 28. Second, Petitioners argue that the County has
 20 failed to follow its own policies to "mitigate adverse impacts" of designating the
 21 mineral resource overlay. *Ibid.* at 30. Third, Petitioners argue that the County failed
 22 to consider whether circumstances have changed since the adoption of the
 23 comprehensive plan and to enter findings and conclusions on changed circumstances
 24 as required by its UDC. *Ibid.* at 31-32.
 25
 26

27
 28 The County responds that it did perform a demand analysis for the county's 50-year
 29 construction aggregate. County Brief at 27; Ex. 2-4. Further, the County argues, it
 30 classified the types of minerals at the site and found them to be substantial. Ex. 13-1,
 31 Finding #51. The amount of aggregate needed to meet demand in the County is
 32

1 defined in Ex. 3-21 at 2-33 (Final Supplemental Environmental Impact Statement) and
 2 the balancing of land uses was done at the time of the adoption of the Land Use Map
 3 in 1998. County Brief at 28-29.
 4

5 In response to the Petitioners' second point, the County states that it was not required
 6 to mitigate the mineral lands overlay because it was not a regulation, but that in any
 7 event, the County did impose 15 mitigation conditions as part of the designation.
 8 County Brief at 29. The County argues that these mitigations served to further the
 9 goal of "protect the environment from cumulative adverse impacts resulting from
 10 resource management practices", in county natural resource policy 2.3. County Brief
 11 at 29.
 12

13
 14 **Discussion and Analysis:**

15 Petitioners' challenge to the consistency of the County's comprehensive plan with the
 16 adopted ordinance is rooted in the GMA requirement that the comprehensive plan
 17 "shall be an internally consistent document and all elements shall be consistent with
 18 the future land use map." RCW 36.70A.070. Petitioners argue that the
 19 comprehensive plan amendment creating the mineral resource overlay is not consistent
 20 with other portions of the comprehensive plan.
 21

22
 23 The administrative regulation defining consistency among planning policies is found
 24 in WAC 365-195-210:
 25

26 Consistency means that no feature of a plan or regulation is
 27 incompatible with any other feature of a plan or regulation.
 28 Consistency is indicative of a capacity for orderly
 29 integration or operation with other elements in a system.

30 In determining when an inconsistency exists between various parts of a local
 31 jurisdiction's planning policies and regulations, we have held that consistency means
 32 that no feature of the plan or regulation is incompatible with any other feature of the

1 plan or regulation. *CMV v. Mount Vernon*, WWGMHB Case No. 98-2-0006 (July 23,
 2 1998 Final Decision and Order). Said another way, no feature of one plan may
 3 preclude achievement of any other feature of that plan or any other plan. *Carlson v.*
 4 *San Juan County*, WWGMHB Case No. 00-2-0016 (September 15, 2000, Final
 5 Decision and Order).
 6

7
 8 The record shows that the County did perform an analysis of the 50-year aggregate
 9 demand. Ex. 2-4. Petitioners argue that the County should have performed an
 10 analysis that showed how much of the aggregate to be mined under this mineral
 11 resource overlay is needed for in-county use. Petitioners' Brief at 28. Whether or not
 12 the comprehensive plan actually requires this kind of analysis, the analysis in Exhibit
 13 2-4 estimates just that. Petitioners' claims regarding the adequacy of the analysis done
 14 exceed the comprehensive plan's own language. The comprehensive plan policy of
 15 mitigation of "adverse impacts to the environment and adjacent properties" in the
 16 regulation of resource-based economic activities (NRP2.1) does not dictate the degree
 17 of mitigation that will be provided. The County argues that it did mitigate the impact
 18 of the mineral resource overlay in the conditions imposed on the designation. Ex. 13-
 19 1 at 14-18. We note that the lack of environmental information about impacts makes
 20 it difficult to assess the adequacy of mitigation measures. Adequate environmental
 21 review is a necessary predicate for decision-making under the County's planning
 22 policies as well as under the GMA itself.
 23
 24

25
 26 **Conclusion:** We do not reach the inconsistency argument with respect to
 27 mitigation measures because appropriate mitigation must be based on an
 28 adequate SEPA review. In all other respects, the Petitioners have failed to meet
 29 their burden in showing that the challenged action is inconsistent with the
 30 County's comprehensive plan and development regulations.
 31
 32

VI. INVALIDITY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

Once we have determined that the County's adoption of the mineral resource overlay designation (comprehensive plan amendment) in this case was non-compliant with the SEPA for failure to conduct an adequate SEPA review, we must consider whether the "continued validity of part or parts of the plan or regulation would substantially interfere with the goals of the chapter [the GMA]". RCW 36.70A.302(1)(b).

Although the petition for review in this case did request that the Board find the challenged ordinance "invalid, null and void" (Petition for Review, Relief Requested), the issue of invalidity was not raised in any of the issues for review nor was it briefed by Petitioners. Without more information on this point, we are unable to determine that an order of invalidity is needed because the comprehensive plan amendment will "egregiously interfere with the local government's future ability to fulfill the goals of the GMA." *FOSC v. Skagit County*, WWGMHB Case No. 95-2-0065 (Compliance Order, February 7, 1996).

Conclusion: Petitioners have failed to meet their burden in showing that the County's action in designating the challenged mineral resource overlay substantially interferes with the goals of the GMA.

VII. FINDINGS OF FACT

A. Jefferson County is a county located west of the crest of the Cascade Mountains that has chosen to or is required to plan under RCW 36.70A.040.

B. Petitioners are organizations that, through their members and representatives, submitted written and oral comments before the Jefferson County Planning Commission and Board of County Commissioners on all matters raised in the petition for review.

1 C. Intervenor, Fred Hill Materials, Inc., was the applicant for the mineral resource
2 overlay designation that is the subject of this appeal.

3
4 D. Petitioners challenge the designation of a mineral resource overlay known as
5 MLA 02-2335 adopted as a comprehensive plan amendment in Ordinance No. 14-
6 1213-02, adopted December 13, 2002 and published December 25, 2002.

7
8 E. Petitioners timely filed their Petition for Review on February 21, 2003.
9

10
11 F. The applicant, Fred Hill Materials, Inc., owns and operates a mineral extraction
12 operation known as "the Shine Pit" located west of the Hood Canal Bridge and south
13 of State Route 104 in Jefferson County. The Shine Pit is ending its useful life and in
14 2002, Fred Hill Materials, Inc. proposed that a 6,240-acre parcel in the commercial
15 forest zone where the Shine Pit is located be designated with a mineral resource
16 overlay.
17

18
19 G. Mining is a permitted use in the commercial forest zone but the size of any
20 mining site in the commercial forest zone is limited to a maximum of ten acres.
21

22 H. Under the Jefferson County Code, a mineral resource overlay is not subject to
23 the size limitations of a permitted mining use in a commercial forest zone. Conditions
24 on the size of mining site that could be "disturbed" may be imposed as part of the
25 mineral resource overlay designation.
26

27
28 I. Jefferson County analyzed the proposed mineral resource overlay's
29 environmental impacts as part of an SEIS done for its 2002 comprehensive plan
30 amendments. The draft of the SEIS was issued on August 21, 2002, recommending
31 approval of the proposed 6,240-acre site with mitigation measures. Ex. 3-12.
32

1 J. Petitioners and others submitted many comments concerning the supplemental
2 environmental impact statement, pointing out the need to analyze the no-action
3 alternative and other alternatives to the proposed action. Petitioners argued that the no
4 action alternative would fully protect mineral resources in the County and still protect
5 the environment.
6

7 K. Fred Hill Materials, Inc. provided information in its application that it wished
8 to expand its operations which might, in the future, include a pit-to-pier project for
9 transporting the mined aggregate to market.
10

11 L. The prospect of a pit-to-pier project generated much controversy and the
12 County determined that the pit-to-pier project was not ready for review, so it declined
13 to consider comments on it until the project review stage.
14

15 M. In response to the comments that the proposed overlay was "too big", Fred Hill
16 Materials modified its proposal by letter dated October 23, 2002 to 765 gross acres.
17 Ex. 11-24. This was later modified to 690 acres to allow sufficient distance from
18 Thorndyke Creek.
19

20 N. In the FSEIS, dated November 25, 2002, the staff recommended adoption of
21 the proposal for a 690-acre mineral resource overlay designation. Neither the draft
22 SEIS nor the FSEIS did more than a brief, conclusory evaluation of the no action
23 alternative or the other proposed alternative. The 690-acre staff recommended
24 alternative was evaluated in terms of thirteen factors the County listed as appropriate
25 for evaluation of a mineral resource overlay designation but no other alternative was
26 similarly evaluated.
27
28
29
30
31
32

1 O. The FSEIS pointed to a capacity problem with respect to truck transport of
2 minerals from the new overlay site. However, the FSEIS failed to describe the current
3 traffic or predict a range of future truck traffic that would be needed for increased
4 mining activity. The FSEIS also failed to consider whether alternative forms of
5 transport, such as the conveyor suggested by Fred Hill Materials, might be used and
6 with what possible environmental impacts.
7

8 P. The proposed mineral resource overlay is located in a forested region where
9 there are many significant critical areas, including lakes and streams. The FSEIS fails
10 to describe the existing wildlife habitat and to evaluate possible environmental impacts
11 on that habitat, reserving SEPA review of those impacts until the permitting stage for
12 any future mining projects.
13

14 Q. The changed proposal from 6,240 acres to 690 acres was discussed at the
15 November 6, 2002 planning commission meeting. Planning commissioners
16 questioned the applicant's hydrogeologist and representatives of the Department of
17 Natural Resources at the meeting. Public comment was not taken at that time.
18
19

20 R. Public comment on the revised proposal was taken at the December 5, 2002
21 meeting of the county commissioners. Petitioners submitted oral and written
22 comments into the record pertaining to the revised proposal.
23
24

25 S. The county commissioners approved the 690-acre mineral resource overlay
26 designation by ordinance dated December 13, 2002. Included in the approval of the
27 revised mineral resource overlay designation were 15 mitigating conditions. The
28 mitigating conditions require, among other things, that certain provisions of the UDC
29 regulating and protecting fish and wildlife habitat areas, wetlands, other critical areas,
30 and best mining practices apply to the mineral resource overlay area. They also limit
31
32

1 the size of an active mining area to 40 acres. Further, the conditions provide that any
 2 application for a pit-to-pier project would require the preparation of a project action
 3 EIS. Ex. 13-1
 4

5 **VIII. CONCLUSION OF LAW**

- 6 1) This Board has jurisdiction over the parties and subject matter of this petition.
 7
 8 2) Petitioners have standing to bring this appeal on the basis of their participation
 9 in the proceedings below and their petition was timely filed.
 10
 11 3) The FSEIS prepared for this comprehensive plan amendment was inadequate
 12 based on a failure to adequately analyze the no action and other alternatives to the
 13 proposed action. Based on the failure to conduct an adequate SEPA analysis and
 14 evaluation, the County's adoption of the challenged comprehensive plan amendment
 15 fails to comply with Ch. 43.21C RCW.
 16
 17

18 **IX. ORDER OF REMAND**

19 This matter is hereby REMANDED to Jefferson County to bring the comprehensive
 20 plan amendment authorizing MLA 02-235 (Ordinance No. 14-1213-02) into
 21 compliance with Ch. 43.21C RCW within 180 days of the date of this Order.
 22
 23

24 Jefferson County shall submit a report on compliance on this matter to this Board and
 25 to all parties in this case by February 19, 2004.
 26

27 A compliance hearing is hereby set for April 14, 2004 at a time and location to be set
 28 by subsequent order. Any party wishing to contest the County's compliance with this
 29 Board's order must submit written objection and reasons to the Board no later than
 30
 31
 32

1 March 11, 2004. The County's response to any written objections shall be due no later
2 than April 9, 2004.

3
4 This is a final order and maybe appealed to superior court as provided in
5 RCW 34.05.514 or 36.01.050 within 30 days of the final order of the Board.
6 RCW 36.70A.300(5).
7

8
9 So ORDERED this 15th day of August, 2003.

10 

11 _____
12 Margery Hite, Board Member

13 

14 _____
15 Nan Henriksen, Board Member

16 

17 _____
18 Holly Gadbow, Board Member
19
20
21
22
23
24
25
26
27
28
29
30
31
32

1
2
3 IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

4 DIVISION II

5 HOOD CANAL COALITION, OLYMPIC
6 ENVIRONMENTAL COUNCIL, et al,

7 Appellants,

8 vs.

9 JEFFERSON COUNTY and FRED HILL
10 MATERIALS, INC.,

11 Respondents.

Case No.: 38617-8-II
Superior Court No.: 04-2-00382-1

12 **DECLARATION OF MAILING**

FILED
COURT OF APPEALS
DIVISION II
09 APR -1 PM 12:49
STATE OF WASHINGTON
DEPUTY

13 Janice N. Chadbourne declares:

14 That at all times mentioned herein I was over 18 years of age and a citizen of the United
15 States; that on the 30th day of March, 2009, I mailed, postage prepaid, a copy of the BRIEF OF
16 RESPONDENT JEFFERSON COUNTY to the following:

17 David C. Ponzoha, Clerk
18 Court of Appeals, Division II
19 950 Broadway, Suite 300
20 Tacoma, WA 98402-4454

James C. Tracy
18887 State Hwy #305, Suite 500
Poulsbo, WA 98370-7401

21 Keith Patrick Scully
22 Gendler & Mann LLP
23 1424 4th Ave Ste 1015
24 Seattle, WA 98101-2217

Martha Patricia Lantz
Offc of Atty Gen Lic & Admin Law
Div
PO Box 40110
Olympia, WA 98504-0110

25 I declare under penalty of perjury under the laws of the State of Washington that the
26 foregoing declaration is true and correct.

27 Dated this 30th day of March, 2009, at Port Townsend, Washington.

28 
Janice N. Chadbourne
Legal Assistant

DECLARATION OF MAILING
Page 1

JUELANNE DALZELL
PROSECUTING ATTORNEY
FOR JEFFERSON COUNTY
Courthouse -- P.O. Box 1220
Port Townsend, WA 98368
(360) 385-9180