

FILED
COURT OF APPEALS
DIVISION II

09 APR -1 AM 9:50

STATE OF WASHINGTON
BY
DEPUTY

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

NO. 38617-8-II

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

Appellants,

v.

JEFFERSON COUNTY and FRED HILL MATERIALS, INC.,

Respondents.

**APPEAL OF FINAL JUDGEMENT OF JEFFERSON COUNTY
SUPERIOR COURT -
Respondent's Reply Brief**

James C. Tracy
Attorney for Respondent
Fred Hill Materials, Inc.

The Law Office of James C. Tracy
18887 Highway #305 - Suite 500
Poulsbo, Washington 98370

(360) 779-7889

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
I. BACKGROUND.....	1
II. ARGUMENT ON ASSIGNMENTS OF ERROR.....	2
A. The Growth Board erred in determining that Jefferson County complied with SEPA because it did not require the County to provide benchmarks, supporting data, and detail.....	2-23
B. The Growth Board erred in determining that Jefferson County complied with SEPA without requiring the County to evaluate the maximum potential mining development under each alternative	2-23
C. The Growth Board erred in determining that Jefferson County complied with SEPA without requiring the County to review significant impacts of the proposed “pit-to-pier”.....	2-23
D. Jefferson County Superior Court erred in affirming the Growth Board, and in adopting the findings of fact and conclusions of law drafted in the Growth Board’s 2004 Compliance order.....	24
IV. CONCLUSION	24

TABLE OF AUTHORITIES

Pages

STATE CASES

<u>Moss v. Bellingham</u> , 109 Wn. App. 6, 31 P.3d 703, rev. den. 146 Wn.2d 1017, 51 P.3d 86 (July 2002).....	8
<u>Citizens Alliance To Protect our Wetlands v. City of Auburn</u> , 125 Wn.2d 356, 894 P.2d 1300 (1995).....	10
<u>Eastlake Community Council v. Roanoke Associates</u> , 82 Wn.2d 475, 513 P.2d 36 (1973).....	12
<u>Leschi Improvement Council v. Wash. St. Highway Commission</u> , 84 Wn.2d, 525 P.2d 774 (1974).....	15
<u>Weyerhaeuser v. Pierce County</u> , 124 Wn.2d 26, 873 P.2d 498 (1994).....	15, 20

STATUTES

RCW 36.70A.....	20
RCW 36.70B.....	20

WASHINGTON ADMINISTRATIVE CODE

WAC 197-11-442.....	5,6,9,19
WAC 197-11-210 through -235.....	7
WAC 197-11-440 (5)(c)(v).....	9
WAC 197-11-060 (5).....	12

I. BACKGROUND

The issue challenged here is the adoption by Jefferson County of an amendment to its GMA compliant comprehensive plan, specifically Ordinance 14-1213-02, which approved MLA 02-235 and designated 690 acres in southeast Jefferson County as mineral resource lands of long term commercial significance. (Applicant - Fred Hill Materials, Inc.)

After a hearing on the merits held on June 24, 2003, the WWGMHB entered its Final Decision and Order (FDO) on August 15, 2003.

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.” (Final Decision and Order, August 15, 2004, Conclusion of Law 3.)

On July 6, 2004, the Board of Jefferson County Commissioners adopted Ordinance No. 08-0706-04, (Hereinafter “Ord. 08”) approving the MRLO requested by Fred Hill Materials.

The WWGMHB compliance hearing was held in Port Townsend on September 2, 2004.

On October 14, 2004, the WWGMHB issued its Compliance Order (CO) which is the subject matter before the Court. Respondent hereby adopts and incorporates by reference as though fully set forth herein, the authorities, and arguments stated in the Respondent's Response Brief submitted by Jefferson County in this matter, including its Statement of the Case.

II. REBUTTAL TO APPELLANT'S

ASSIGNMENTS OF ERROR

On April 25, 2002, Fred Hill Materials, Inc. ("FHM"), submitted a site specific comprehensive Plan Amendment application for a Mineral Resource Land Overlay ("MLA"/"MLO"/"MRL"/"MRLO") on 6240 **gross** acres pursuant to the procedures established in the Jefferson County Unified Development Code ("UDC", effective January 2001) amendment cycle for the GMA-compliant Jefferson County Comprehensive Plan (JCCP).

Appellant's/Appellant's Brief, either purposefully or mistakenly, omits the term "gross" as a limitation on the requested

6240 acres, and further omits the **specific exclusion in the application of critical areas** regulated by the Jefferson County UDC.¹

Further details of the MRL proposal are contained in the MRL Application and its attachments, incorporated herein as though fully set forth.

From the inception of this MRL Application, and re-emphasized repeatedly throughout the processing of this application, **no regulated critical areas or their buffers were or are proposed for designation as mineral resource lands** or for actual mining use. The decision appealed in this matter (Ord 08) clearly and specifically prohibits (as does the adopted UDC) mining in Fish and Wildlife Habitat and wetlands and their associated buffers.

Since the inception of this application and throughout its

1. Specifically, the application provided that:
“1270 acres within that gross area are identified as sensitive [critical] area setbacks and will not be subject to any mining activity. Deduction of this 1270 acre sensitive [critical] area “setback” from the gross MRL yields a preliminary net MRL of approximately 4970 acres. This preliminary net MRL area will be further specified and reduced or enlarged as a result of (1) field identification of fill slopes at sensitive [critical] area boundaries, (2) any additional sensitive [critical] areas and their buffers discovered during the preparation and consideration of subsequent permit applications for expanded mining activities within the MRL, and, (3) field verification and “ground truthing” of actual locations of critical areas and buffers identified on the generalized maps and data sources utilized for preparation of the MRL application.

processing, FHM has disclosed and emphasized its company objectives.²

Appellant's continued assertions that (MRL) request "...was part of FHM's plan to construct a pit-to-pier conveyor..." (Appellant's Brief - "AB" - at p.3; see also AB at 14, 15) are both false and misleading. Appellants attempt to establish a necessary (sine qua non) connection between the proposed MRL (a legislative action pursuant to RCW 36.70A) and a project permit application (pursuant to RCW 36.70B, the Project Permit Review Act, and the UDC).

Appellants attempt to set this inaccurate and misleading impression in the mind of the Court without acknowledging the salient facts clearly set forth in the FSEIS (see Sec. 1.5.1, Sec. 2.1, Response to Gendler Question No. 21, at page 3-14) and the UDC:

1. No mining activities of any kind are authorized or permitted by the approval of a MRL Overlay;

2. Among these were (1) near term objectives relating to existing operations (i.e. the need to appropriately expand excavation areas to provide sufficient resources to supply existing truck serviced markets), (2) longer term objectives relating to "growing" the company's ability to satisfy existing and new truck serviced markets, and (3) even longer term objectives to develop a new marine transport system (called the "pit-to-pier" or "PTP" project/system) to further "grow" the company's ability to satisfy existing and potential local, intra- state, and inter-state markets.

2. No MRL was or is required for FHM to apply for excavation projects less than 10 acres in size ;
3. No MRL was or is required for FHM to apply for necessary permits to construct a conveyor/pier facility from its existing Shine Pit facilities to Hood Canal for the purpose of marine transport of mineral resource products.

Appellants willful disregard of the factual content of the record and applicable regulations is directly related to their stated intent in opposing this non-project MRL approval by Jefferson County. No factual foundation, case law or regulatory precedent is provided as support for this inflammatory proposition.

Appellants now seek (as they did before the WWGMHB and the lower court) this Court's assistance in quashing the approval of the MRL by Jefferson County. It appears Appellant's believe that any fact which in their opinion contravenes this objective and stated purpose may be avoided or disregarded or misstated with impunity. Appellant's intent is clear: to confuse, confound, and complicate every action

remotely related to the MRL in the hope that its denial in the legislative process will be a “political/legislative” solution preventing the development of the conveyor and pier concept and the continuation/expansion of FHM’s mineral resource extraction, processing and transport activities through applicable Jefferson County development regulations and the appropriately fact bound quasi-judicial and judicial processes.

Inclusion of the discussion of the proposed PTP project only tangentially related to the MRL and not dependent upon it, buttressed by case citations regarding decisions on project rather than a non-project actions demonstrates either Appellant’s misunderstanding of the appropriate substantive and procedural bases for consideration of mineral resource land designation or their unwillingness to observe and be bound by it.

The action at issue here is a nonproject action, specifically described in the Washington Administrative Code.³

3. WAC 197-11-442:

“(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.

Appellant's assert that "[Jefferson County] ignored the requirement to review significant impacts of FHM's proposed 'pit-to-pier' project. (AB at 4.)

The WWGMHB FDO, in its supporting rationales and analyses, concludes that:

"The Rules provide that the lead agency shall discuss impacts and alternatives in the level of detail appropriate to the level of planning for the [nonproject] proposal. WAC 197-11-442(2).

The general level of discussion of transportation impacts in the

(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).

(3) If the nonproject proposal concerns a specific geographic area, site specific analyses are not required, but may be included for areas of specific concern. The EIS should identify subsequent actions that would be undertaken by other agencies as a result of the nonproject proposal, such as transportation and utility systems.

(4) The EIS's discussion of alternatives for a comprehensive plan, community plan, or other areawide 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."

FSEIS was minimal, but within the range of acceptable levels for the evaluation of the adoption of the [nonproject] MRLO designation.” (FDO at 12, lines 9-14)

For the purposes of this Petition for Review, the WWGMHB has already determined that the “project” or “proposal” under review is the MRL and **not** any project permit review for specific excavation sites or transport systems. In fact, although subsequent excavation and/or transport system activities are appropriately discussed and disclosed by both FHM and the County in the Integrated GMA/SEPA documents in this matter (See WAC 197-11-210 through -235), the nature and scope for the SEPA non-project analysis (pursuant to WAC 197-11-442) and any subsequent project permit analysis (for the MRL or any other comprehensive plan amendment) is clearly set forth by Jefferson County. (See, for example: DSEIS at Sec. 2.1, 2.4; FSEIS at Sec.1.3, 2.0, 2.1).

Phased environmental review and clear distinction between non-project (GMA/Legislative) and project (Project Permit Review/quasi-judicial) actions have been clearly endorsed by

Washington courts.

In Moss v. Bellingham, 109 Wn. App. 6, 31 P.3d 703, rev. den. 146 Wn.2d 1017, 51 P.3d 86 (July 2002), the court observed:

“The Act further integrates the GMA with the SEPA process in a new chapter entitled "Local Project Review." RCW 36.70B.030 states that "[f]undamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review" and authorizes local governments to "determine that the requirements for environmental analysis and mitigation measures in development regulations and other applicable laws provide adequate mitigation for some or all of the project's specific adverse environmental impacts to which the requirements apply." In addition, under RCW 36.70B.040, local governments must determine a proposed **project's** consistency with its development regulations or comprehensive plan **during project review** by considering the type of land use, level of development, infrastructure, and development characteristics. (Moss at 17-18, emphasis added.)

III. ASSIGNMENTS OF ERROR

The BOCC engaged in a reasoned study of the “no action” alternative sufficient to permit a comparative evaluation at the non-project level of SEPA analysis (as required by WAC 197-11-440(5)(c)(v)). The record clearly indicates that the “no action” alternative was considered by the BOCC in a level of detail they specifically considered “appropriate” to the scope of the non-project proposal as required by WAC 197-11-442. The SEPA guidelines provide significant latitude to local governments in preparing a non-project EIS:

“(4) The EIS's discussion of alternatives for a comprehensive plan, community plan, or other areawide 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.” (Id.)

This MRL is an implementation measure of the JCCP, directed in terms of both process and substantive content by the Jefferson County UDC. In fact, decision maker’s had and considered more than enough information to make the judgements called for regarding this “non-project” action. Appellant’s continually conflate, whether purposefully or through lack of comprehension, the SEPA requirements for a nonproject action with those required for a project action.

For example, Appellant’s rely on Citizens Alliance To Protect our Wetlands (hereafter, “CAPOW”), citation omitted, for the proposition that:

“the purpose of an EIS, is to provide decision-makers with all relevant information about the potential environmental consequences of their actions and to provide a basis for a reasoned judgment that balances the benefits of a proposed project against its potential adverse effects.” CAPOW, 126 Wn.2d at 362.

While this statement is true, it is made in the context of an “intertwined” nonproject/project EIS, not the type of nonproject action at issue here. Nor does this quotation fully inform the Court regarding the CAPOW case. The important connection that Appellant’s are fallaciously attempting to posit is, again, that the MRL is a sine qua non to FHM’s Pit-To-Pier application and/or its approval. It is not. This allegation is demonstrated as false by the record in this matter (e.g. See FSEIS at Sec 1.3, 2.0, 2.1; DSEIS at 2.4; See also: Response to McGuire question #38, 3-37/38, FSEIS; DSEIS at Section 2.4). However, FHM has and continues to recognize the nature of relationship between the MRL and future operations (i.e. , both existing ground based operations if new mining applications approved and potential new transport capability if P-T-P approved). (See DSEIS at 2.9, Approved Action at page 3-43; FSEIS at 1.5.1, 1.5.2; See also FSEIS Discussion at pages 2-4 through 2-5.)

In CAPOW, the text amendment considered in the same EIS with the Auburn Downs race track proposal **was** the sine qua non for the racetrack application:

“The text amendment to the zoning code bears a close relation to the proposed development. NWRA formally proposed the text amendment as a substitute for rezoning the property. The purpose of the text amendment was to enable the development to proceed. Auburn considered the text amendment in the context of permitting the construction of the racetrack and examined the environmental consequences of the text amendment in the body of the project FEIS. The proposed racetrack and the text amendment are intertwined. (CAPOW, at 365.)

Appellant’s use of Eastlake Community Council (citation omitted), a case involving the project application and EIS for Roanoke Reef, a multifamily, over-water project on Lake Union in Seattle, continues their effort to obfuscate this Court’s understanding of the Jefferson County project review process (in which an EIS is underway for the FHM PTP application, and the commitment to Phased Environmental Review (as authorized by WAC 197-11-060 (5) and described at Section 1.3 of the FSEIS) by conflating nonproject and

project SEPA review requirements and processes. Note also that the issues in Leschi and Weyerhauser (citations omitted) also involved project applications. Petitioners simply refuse to accept the lack of a sine qua non relationship between the MRL (nonproject) and P-T-P (project actions) already determined by Jefferson County (in Ord. 08) and the WWGMHB (FDO at 28), and the trial court. Since Petitioners did not contest that specific finding in the FSEIS and Compliance Order, they should not now be allowed to argue project specific authority or regulation in this proceeding in a belated effort to establish this mistaken proposition.

Petitioners continually repeat the charge that the FSEIS did not provide data to substantiate its assertions. (POB at 20, ll. 24-27; POB at 19, ll. 17-18.) However, the WWGMHB specifically pointed out in their Compliance Order that:

“ ...[the County] did address environmental characteristics of the no-action alternative: acreage disturbed under the no-action vs. other alternatives; air quality impacts; water quality impacts; impacts on plants and animals; noise impacts; transportation impacts. (Summarized at 2-8 through 2-10 of the FSEIS)...(CO at

7, ll. 25-28)

Further, regarding the comparison of the “10 acre/40 acre segment/disturbed area issue”, the WWGMHB determined that:

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

1. With 40-acre mining segments, more material could be extracted given the same mine area as mining that may occur in 10-acre segments.
2. Mining in 40-acre segments would allow for reclamation planning for optimal recovery of a non-renewable resource.
3. Mining in 10-acre segments/disturbed areas may result in lack of recovery or loss of non-renewable resources.
4. Mining in 10-acre segments would result in relatively small areas of disturbance at any given time,

but more area may be required to be disturbed per cubic yard of material recovered.

DSEIS, March 2004, at 2-20.

While the County could have done more analysis of the no-action alternative so that a clearer view of the maximum rate of extraction of the resource under each scenario could be determined, in light of the presumption of validity and the deference to be given to local decision-makers, we find that the environmental effects of the no-action alternative are “sufficiently disclosed, discussed and substantiated by supportive opinion and data.” Citizens Alliance to Protect our Wetlands v. City of Auburn, 126 Wn.2d 356, 361, 894, P.2d 1300, 1995 Wash. LEXIS 157 (1995) citing Klickitat County Citizens Against Imported Waste v. Klickitat County, 122 Wn.2d 619, 641, 860 P.2d 390 (1993). (CO at 8, ll.8-29)

Petitioners simply do not accept the WWGHMB’s determination of the adequacy of the analysis as presented. Petitioners apparently know better than the WWGMHB what the WWGMHB

meant when they asked for the supplemental analysis but such mere disagreement cannot be a valid basis for making the determination of adequacy of this nonproject FSEIS.

Petitioners fundamental refusal or failure to grasp and/or accept the nature and function of Mineral Resource Lands designation under both the GMA and the Jefferson County Code is most starkly portrayed in their statements that the final EIS offered the public and decision makers no indication of how much soil would be disturbed, the type of wildlife habitat to be disrupted, how much dust would pollute the air, or which streams would be degraded , to name a few of the most important measures of harm known to arise from mining. As stated above, the MRLO designation does not authorize or permit any mining activity (such authorization would be a project permit) and is provided for the long term protection of commercially valuable resources and associated production activities against the encroachment of incompatible surrounding activities that may threaten their continued viability. Any and all real or perceived “harm[s] known to arise from mining” are required to and in fact are subject to project

level environmental review at the appropriate time and in the appropriate forum specified for such a project permit. Further, mining is an allowed use in Jefferson County's (GMA Compliant) Commercial Forest Zone ("CF" in the UDC). (e.g., FDO at 23, ll. 22-26) subject to a 10 acre limitation on the "disturbed area". Under this "allowed use in CF" scenario, any actual mining application is subject to SEPA analysis, Jefferson County permitting, and Dept. Of Natural Resources Reclamation plan/Permit at minimum. (See SDEIS at 2-17 through 2-19.) The exact same process is required for mining applications in an MRL. Therefore, MRL designation does not change the existing Jefferson County/WDNR regulations of the mining permitting process in any manner or parameter other than the amount of "disturbed area" allowed at any given time. Clearly, the appropriate time and process for consideration of Petitioners "concerns" about "how much"/"the type"/ or "which" are most appropriately addressed on the basis of actual mining activity application, not the MRL designation for protection of "commercially viable mineral resources of long term commercial significance" per the GMA and Jefferson

County Code. Appellant's have not met their burden to show that the "rule of reason" has been violated (Weyerhauser v Pierce County, 124, Wn.2d 26, 873 P.2d 498 (1994), or that the consideration of the "no action" alternative presented in this case does not evince a "reasonably thorough discussion of the significant aspects of the probably consequences of the agency's decision" in regard to the "no action" alternative. (Id. at 38.)

There was no formal "Pit to Pier" project application by FHM at the time of consideration of the challenged comprehensive plan amendment. FHM had announced, at the time of application for the MRL, that it intended to pursue such an application in the future and had presented preliminary concepts regarding such a future application and undertook preliminary discussions with regulatory agencies, local government, and the interested public. Therefore there was no "project" to "exclude" from the MRL environmental review and deliberation. Jurisdictions are not required to engage in consideration of impacts that are remote and/or speculative. However, non-project impacts were considered at the appropriate scale and scope for this

type of planning designation.

In the case at bar, a DSEIS and FSEIS were prepared and the probable significant impacts identifiable at the non-project stage of evaluation were identified and phased environmental was dictated and mitigating measures were identified and made a requirement for any subsequent project action. Therefore Jefferson County acted consistently with the direction of King County v. Washington State Boundary Review Bd. (Citation omitted):

“...where an EIS is required, a lead agency may still employ the "nonproject proposal" provisions of the SEPA Rules. Under these provisions, agencies can limit the scope of an EIS to "the level of detail appropriate to the scope of the nonproject proposal". WAC 197-11-442(2). Uncertainties in development plans can thereby be dealt with by the lead agency without violating the mandate of SEPA. (Id. at 664.)

The proposition Appellants urge here is a simple and straightforward assault on the sequential and iterative planning process established in the GMA (i.e. first adopt the plan, then adopt consistent development regulations to implement the plan, then apply

development regulations as appropriate to project permit applications). It is a patent demand by Petitioners to engage in the very “evil” that RCW 36.70A (the Growth Management Act) and RCW 36.70B (Project Permit Review Act) were designed to prohibit - improperly mixing adoption of comprehensive plans with consideration of project permit applications. To accept Appellant’s proposition here would be to require that each local government that passes a legislative enactment specifying allowed land uses and activities or designating resources lands to have before them, concurrently, project permit applications.⁴

4. RCW 36.70A.140 requires that:

Project review -- Amendment suggestion procedure -- Definitions.

(1) Project review, which shall be conducted pursuant to the provisions of chapter 36.70B RCW, shall be used to make individual project decisions, not land use planning decisions. If, during project review, a county or city planning under RCW 36.70A.040 identifies deficiencies in plans or regulations:

(a) The permitting process shall not be used as a comprehensive planning process;

(b) Project review shall continue; and

(c) The identified deficiencies shall be docketed for possible future plan or development regulation amendments.”

Further, RCW 36.70B clearly states (in pertinent part):

RCW 36.70B.030

Project review -- Required elements -- Limitations.

(1) Fundamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review. The review of a proposed project's consistency with applicable development regulations, or in the absence of applicable regulations the adopted comprehensive plan, under RCW 36.70B.040 shall incorporate the determinations under this section.

In its enactment the Washington Legislature made crystal clear their intentions to clearly demarcate between planning and project permitting decisions. Appellant's proposition is patently antithetical to the GMA planning schema and must be rejected outright by this Court.

The FSEIS was specific to the aspect of the FHM PTP proposal that was of concern to the Board. Citing the FDO the FSEIS states:

“...[w]e agree with the County that it was premature to for the

(2) During project review, a local government or any subsequent reviewing body shall determine whether the items listed in this subsection are defined in the development regulations applicable to the proposed project or, in the absence of applicable regulations the adopted comprehensive plan. At a minimum, such applicable regulations or plans shall be determinative of the:

(a) Type of land use permitted at the site, including uses that may be allowed under certain circumstances, such as planned unit developments and conditional and special uses, if the criteria for their approval have been satisfied;

(b) Density of residential development in urban growth areas; and

(c) Availability and adequacy of public facilities identified in the comprehensive plan, if the plan or development regulations provide for funding of these facilities as required by chapter 36.70A RCW.

(3) During project review, the local government or any subsequent reviewing body shall not reexamine alternatives to or hear appeals on the items identified in subsection (2) of this section, except for issues of code interpretation. As part of its project review process, a local government shall provide a procedure for obtaining a code interpretation as provided in RCW 36.70B.110.

(4) Pursuant to RCW 43.21C.240, a local government may determine that the requirements for environmental analysis and mitigation measures in development regulations and other applicable laws provide adequate mitigation for some or all of the project's specific adverse environmental impacts to which the requirements apply.

5) Nothing in this section limits the authority of a permitting agency to approve, condition, or deny a project as provided in its development regulations adopted under chapter 36.70A RCW and in its policies adopted under RCW 43.21C.060. Project review shall be used to identify specific project design and conditions relating to the character of development, such as the details of site plans, curb cuts, drainage swales, transportation demand management, the payment of impact fees, or other measures to mitigate a proposal's probable adverse environmental impacts, if applicable.”

County to fully evaluate the pit-to-pier project as part of the [nonproject] EIS for the mineral resource land designation...Rather than analyzing the pit-to-pier project, the EIS should include the transportation impacts of the [MRL] alternatives.” (FSEIS, Sec. 2.1, p. 2-1)

On the basis of their review of the FSEIS, the Board’s CO concluded:

“...we find that the analysis of transportation impacts complies with the SEPA requirements for nonproject review of the Fred Hills Materials MRLO.

Appellant’s again know better than the WWGMHB what the Board meant when it stated the direction for their remand on this issue.

Appellant’s erroneously and purposefully assert that the Board had directed Jefferson County to “ ‘...evaluate the transportation impact generally’ of the pit-to-pier project.” (POB at page 26, 19-21)

Comparison with the direct quote above makes clear the Board’s actual direction. The statement’s characterized by Appellant’s as “conflicting” in fact do not conflict at all. It is true that market demand

drives the rate of extraction of materials no matter what the form of transport to deliver these basic commodities to markets/users. It is also obviously true that development of a new form of transport (i.e. marine transport) capable of serving new markets/users which cannot be supplied by existing ground transport will increase the overall rate of extraction of those materials. Perhaps the clear misunderstanding of these basic economic principles are at the root of Appellant's "confusion" on this matter. It should be noted that any increased rate of extraction to supply FHM's PTP project is required to be evaluated in the PTP EIS which is in current production. Further, Ord. 08 specifically requires that any increase in the rate of extraction estimated for the PTP project would be subject to additional SEPA analysis if proposed.

Appellant's have not met their burden to show that the "rule of reason" has been violated (Weyerhauser v Pierce County, 124, Wn.2d 26, 873 P.2d 498 (1994)), or that the review of the general transportation impacts of the MRL alternatives have not been adequately met for this nonproject MRL designation.

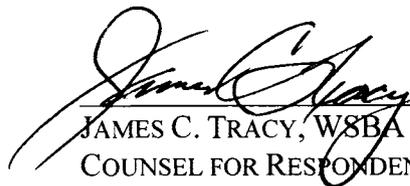
Insofar as there are no additional legal or factual arguments presented by Appellants beyond those attributed to the first three assignments of error, Respondent FHM does not further address Appellant's Assignment of Error No. 4.

III. CONCLUSION

Appellants have continuously presented the same arguments to the Jefferson County Board of Commissioners, the WWGMHB, and the Superior Court. At each juncture the reviewing body has rejected the spurious and fabricated attempts by Appellants to make this case about something it is not - a necessary precursor to FHM's PTP Application currently under EIS preparation.

Respondent FHM asks this Court to join the lower reviewing bodies and reject Appellant's claims for the reasons stated herein.

RESPECTFULLY SUBMITTED THIS 1ST DAY OF APRIL, 2009.


JAMES C. TRACY, WSBA #15656
COUNSEL FOR RESPONDENT FHM, INC.

