

NO. 47641-0-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

OLYMPIC STEWARDSHIP FOUNDATION, et al., CITIZENS' ALLIANCE
FOR PROPERTY RIGHTS JEFFERSON COUNTY, CITIZENS' ALLIANCE
FOR PROPERTY RIGHTS LEGAL FUND, MATS MATS BAY TRUST,
JESSE A. STEWART REVOCABLE TRUST, and CRAIG DURGAN, and
HOOD CANAL SAND & GRAVEL LLC dba THORNDYKE RESOURCE,

Petitioners,

vs.

STATE OF WASHINGTON ENVIRONMENTAL AND LAND USE
HEARINGS OFFICE, acting through the WESTERN WASHINGTON
GROWTH MANAGEMENT HEARINGS BOARD; STATE OF
WASHINGTON, DEPARTMENT OF ECOLOGY; and JEFFERSON
COUNTY,

Respondents.

and

HOOD CANAL COALITION,

Respondent/Intervenor.

HOOD CANAL SAND & GRAVEL'S OPENING BRIEF

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I. INTRODUCTION

This case involves the last minute revision to a section of the Jefferson County (“County”) Shoreline Master Program (“SMP”) prohibiting marine transport of minerals in the Conservancy environment. This revision – made with no disclosure to the public and after opportunity for public comment had closed – had far-reaching ramifications for Petitioner Hood Canal Sand and Gravel (“Hood Canal”). Previously, the County had designated Hood Canal’s property a “Mineral Resource Land”: property with long-term commercial significance for the extraction of minerals. To achieve the County’s expectation of commercial significance, Hood Canal must be able to transport the minerals in a commercially-feasible manner. Hood Canal has no feasible large-scale ground transportation options; it must use marine transport to be commercially significant. The transportation of minerals is such an essential part of Hood Canal’s mining operations that a marine loading facility is necessary to operate consistent with its designation as a mineral land of long term commercial significance. It is therefore water-dependent.

State law mandates that water-dependent uses be given priority on shorelines. Nonetheless, the County’s eleventh-hour revisions ban marine transport of Hood Canal’s minerals. As such, the revision violates the Shoreline Management Act (“SMA”) and Growth Management Act

("GMA"), as well as several other laws and regulations. Hood Canal asks this Court to invalidate this portion of the County's SMP.

II. ASSIGNMENTS OF ERROR

1. The Growth Management Hearings Board ("Board") improperly concluded that Hood Canal's mining operation is water-related rather than water-dependent.

2. The Board failed to address the legal issue of consistency between the Shoreline Management Act and the Growth Management Act as mandated by those Acts and case law.

3. The Board erroneously interpreted and applied the law by failing to require that the Shoreline Master Plan be consistent with the Aquatic Lands Act and the Washington Surface Mining Act.

4. The Board improperly upheld the change to the Conservancy designation in the Shoreline Master Plan despite the County's failure to rely technical, scientific, reasoned, or objective bases in restricting Hood Canal's water-dependent use.

5. The Board improperly upheld the County's adoption of an SMP amendment that prohibited marine transportation of mineral resources without adequate opportunity for public comment in an open hearing in violation of RCW 90.58.130 and Petitioner's due process rights.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Board erroneously interpret and apply the law in concluding that Hood Canal's mining operation is water-related rather than water-dependent?

2. Did the Board erroneously interpret and apply the law in failing to address the legal issue of consistency between the Shoreline Management Act and the Growth Management Act as mandated by those Acts and case law?

3. Did the Board erroneously interpret and apply the law in failing to require that the Shoreline Master Plan be consistent with the Aquatic Lands Act, the Washington Surface Mining Act?

4. Did the Board improperly uphold the Shoreline Master Plan despite the County's failure to rely technical, scientific, reasoned, or Objective bases in restricting Hood Canal's water-dependent use?

5. Did the County engage in unlawful procedure or decision-making, and did the County fail to follow a prescribed procedure by adopting the SMP amendment that prohibited marine transportation of mineral resources without adequate opportunity for public comment?

IV. STATEMENT OF THE CASE

The County initially adopted its SMP in 1974. An update to the 1974 SMP was adopted in 1989 and codified as Ch. 18.25 of the Jefferson County Code ("JCC"). Minor revisions to the 1989 SMP were made in 1993, 1996, and 1998.

In 2004, the County designated Hood Canal's property as within a Mineral Resource Land Overlay ("MRLO").¹ This designates the property as "land primarily devoted to the extraction of minerals or lands that have

¹Jefferson County Ordinance No. 008-40706.

a known or potential long-term commercial significance for the extraction of minerals.”² In adopting the MRLO, the County recognized that marine transportation was intrinsic to Hood Canal’s operations, finding that “With the approval of the marine transport system, [Hood Canal] will be able to sell its product competitively to more distant markets in. . . Without the marine transport system, [Hood Canal] can never compete on price in those more distant for markets because conveying the product by truck would make it too costly to the end user.”³

In 2006, the County began its comprehensive update of its SMP in accordance with RCW 90.58.020. In September 2007, the County released the first available full document version of a draft SMP. Over the next year, the proposed SMP amendments went through numerous revisions, public comment periods and public hearings. During that year, it was reviewed and revised by the County Planning Commission, two citizen/stakeholder groups,⁴ County staff, and the Board of County Commissioners (“BOCC”).

Throughout the review and public comment period, the Mining Shoreline Environment Regulation governing Conservancy – the designation under which Hood Canal’s property falls – read:

Conservancy: Mining use and development *may*
be allowed as a conditional use subject to the

²JCC 18.10130(M).

³Jefferson County Ordinance No. 008-40706, Findings 98-99.

⁴The Shoreline Technical Advisory Committee and Shoreline Policy Advisory Committee. *See* CP 7539.

policies and regulations of this Master Program.⁵

On December 7, 2009, following the final County public hearing and opportunity for public comment, the BOCC revised the Conservancy Mining Shoreline Environment Regulation to read:

Conservancy: Mining use and development are *prohibited*, except for *transportation* of minerals *by road*.⁶

This amendment, which received no public scrutiny or comment, prohibits marine transport of mineral resources, which is essential to Hood Canal's operation.

In March 2010, the County sent the revised "Locally Approved" SMP to the Washington State Department of Ecology ("Ecology"). On April 12, 2010, Ecology accepted the County's locally approved SMP Update as complete for purposes of review. During its review, Ecology informed the County that it could only ban water-dependent uses if it demonstrated scientific support for the prohibition, and that such a ban "in Jefferson County would be hard to defend legally."⁷ Ecology and the County disputed the issue for the next three years. Ultimately, the County agreed to allow aquaculture subject to the Conditional Use Permit process.⁸ Ecology gave its final approval of the County's SMP on February 7, 2014.

⁵CP 2271 (emphasis added).

⁶CP 2269 (emphasis added).

⁷CP 2287.

⁸CP 671.

Pursuant to RCW 90.58.190(2)(a) and RCW 36.70A.290(2)(c), the Petitioners timely petitioned the Board for review on April 18, 2014.⁹ On its own motion, the Board issued an Order of Consolidation, dated April 28, 2014, joining Petitioners Citizens' Alliance For Property Rights Legal Fund ("CAPR"), Olympic Stewardship Foundation ("OSF") and Hood Canal.¹⁰ Petitioners had standing to appear before the Board pursuant to RCW 36.70A.280(2)(b).¹¹ On March 16, 2015, the Board issued its Final Decision and Order ("FDO") denying in its entirety Hood Canal's petition for review, as well as those of OSF and CAPR.¹² Petitioners, aggrieved by the FDO, timely appealed to the Superior Court of Jefferson County on April 15, 2015. As required by RCW 34.05.534, all administrative remedies have been exhausted and the agency action at issue is a final order for purposes of appeal and judicial review.

Upon motion by Ecology, supported by the County, on September 23, 2015, the Commissioner of this Court granted direct review under RCW 34.05.518, removing all three petitions from superior court to this Court.

⁹CP 1-24.

¹⁰CP 803-10.

¹¹CP 7458.

¹²CP 7453-7565.

V. ARGUMENT

A. Standard of Review

The Administrative Procedure Act (APA), Ch. RCW 34.05, governs judicial review of the Board's decision.¹³ Review is based on the record before the Board.¹⁴ This Court reviews the appeal of a Board decision by applying the standards of the Administrative Procedure Act ("APA") directly to the record presented to the Board.¹⁵ This Court may grant relief from the Board's ruling if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

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

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

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion

¹³RCW 34.05.570.

¹⁴RCW 34.05.558.

¹⁵*Honesty in Environmental Analysis and Legislation v. Central Puget Sound Growth Management Hearings Board (HEAL)*, 96 Wn. App. 522, 526, 979 P.2d 864 (1999).

was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.¹⁶

Interpretation of the SMA and local government shoreline regulations involves questions of law, which this court reviews de novo.¹⁷

As will be shown below, the Board erroneously interpreted or applied the law. It failed to follow a prescribed procedure. Its order is not supported by evidence that is substantial when viewed in light of the whole record before the court. Finally, the Board failed to decide all issues requiring resolution.

B. The Board Erred in Upholding the Jefferson County SMP that Violates SMA.

The SMP was adopted in violation of the SMA. The Mining Shoreline Environment Regulation governing Conservancy prohibits transportation of minerals by water in direct contravention of the SMA, GMA, and other statutes and regulations. Moreover, the marine transportation ban was adopted without mandated public hearing or comment, in violation of the SMA and constitutional mandates.

¹⁶RCW 34.05.570(3).

¹⁷RCW 34.05.570.

1. The Board Failed to Address Issue of the Consistency of the SMP with Applicable Laws and Regulations.

In its briefing, Hood Canal repeatedly avers that in adopting and approving the SMP, the County and Ecology failed to consider the SMP's consistency with statutes and regulations required by the SMA and GMA.¹⁸ Yet the Board utterly failed to address this issue.¹⁹ As such, the Board failed to decide all issues requiring resolution, and this Court should remand this matter to the Board to complete its work.

The SMA mandates that each local government develop a master program for the use of shorelines within its jurisdiction.²⁰ Pursuant to the SMA, shoreline development in Washington must be consistent with the policies of the SMA and the local government's master program.²¹

An SMP is the comprehensive use plan for a described area, and the use regulations together with maps, diagrams, charts, or other descriptive material and text, a statement of desired goals, and standards developed in accordance with the policies enunciated in

¹⁸CP 2241 and 7213.

¹⁹Ironically, the Board held that Hood Canal had abandoned its argument that the SMP violated "WAC 173-27-186." Firstly, there is no such regulation. WAC Ch. 173-27 governs shoreline development permits. Hood Canal does argue throughout its briefing that transport of materials via water should be allowed pursuant to a shoreline conditional use permit; thus, no such issue was waived. It is also possible that the Board is referring to WAC 173-26-186. That regulation contains the governing principles and guidelines to implement the SMA (RCW 90.58.020), and requires consistency with other provisions. Hood Canal's case is based on a failure of the County and Ecology to ensure consistency of the SMP with SMA and other statutes. If WAC 173-26-186 is indeed the regulation to which the Board intended to refer, the Board clearly failed to understand its relevance to the consistency mandate, and the arguments pertaining thereto in Hood Canal's brief.

²⁰RCW 90.58.080.

²¹RCW 90.58.140(1).

RCW 90.58.020.²²

Just as the SMA requires SMPs be consistent with the County's regulations and policies, the GMA²³ mandates that the SMP be consistent with the GMA, and the regulations and policies adopted pursuant thereto.²⁴ The policies, goals, provisions, and guidelines of the SMA are used to determine an SMP's compliance, "*except as the shoreline master program is required to comply with the internal consistency provisions of [the GMA].*"²⁵ Thus, the SMP must be consistent with the GMA. Moreover, the goals and policies of the GMA into which the shoreline goals are incorporated are all created equal with no priority given to any one goal.²⁶

The SMA does not trump the provisions of the GMA; rather, the two statutes, along with their implementing regulations, must be "harmonized in the process of overall land use planning and regulation."²⁷

RCW 36.70A.480 specifically states that a county's shoreline master program goals and policies are part of that county's GMA comprehensive plan, and the County's shoreline master program regulations are development regulations. Consistent with this provision, the GMA defines "[d]evelopment regulations" as "the controls placed on development or land use activities by a county or city, including, but not limited to, *zoning ordinances*, critical areas ordinances, *shoreline master programs*, official controls, planned unit development ordinances, subdivision ordinances, and

²²RCW 90.58.030.

²³RCW Ch. 36.70A.

²⁴RCW 36.70A.480; see also *Preserve Our Island v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 524, 137 P.3d 31, 42 (2006), *as amended* (May 15, 2007).

²⁵ RCW 36.70A.480 (emphasis added).

²⁶*Preserve Our Island*, 133 Wn. App. 503, fn. 55.

²⁷ *Id.* at 523.

binding site plan ordinances together with any amendments thereto.” In accordance with the GMA, the County adopted its Shoreline Policies as part of its Comprehensive Plan and its Shoreline Code as part of its GMA development regulations. RCW 36.70A.040(4) states that development regulations must be consistent with and implement the comprehensive plan. Any other interpretation would create chaos in attempts to implement and apply the numerous, varied and sometimes competing policies and regulations governing the use of land.²⁸

This chaos is precisely what Hood Canal objects to. The SMP – specifically the provisions banning outright transportation of minerals via water within the Conservancy designation – directly conflicts with the mandates of the SMA and the GMA (and the regulations pursuant thereto); not to mention the Washington Surface Mining Act;²⁹ the Aquatic Lands Act;³⁰ as well as the County’s own regulations³¹ and comprehensive plan policies.³²

2. The SMP Violates the Mandates of the SMA to Give Priority to Water-dependent Uses.

Under the SMA, shoreline use must give priority to “industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state.”³³ SMPs must also include “An economic development element for the location and design of industries, projects of statewide significance, transportation facilities, port

²⁸*Id.* 133 Wn. App. at 524. (emphasis original)(internal citations omitted).

²⁹ RCW Ch. 78.44.

³⁰ RCW Ch. 79.105.

³¹JCC 18.25.840.

³²Jefferson County Comprehensive Plan.

³³RCW 90.58.020.

facilities, tourist facilities, commerce and other developments that are particularly dependent on their location on or use of the shorelines of the state.”³⁴

Similarly, the SMA-implementing guidelines provide:

New piers and docks shall be allowed only for water-dependent uses. . . . New pier or dock construction. . . should be permitted only when the applicant has demonstrated that a specific need exists to support the intended water-dependent uses. If a . . . commercial entity involving water-dependent uses has performed a needs analysis or comprehensive master plan projecting the future needs for pier or dock space, and if the plan or analysis is approved by the local government and consistent with these guidelines, it may serve as the necessary justification for pier design, size, and construction. The intent of this provision is to allow ports and other entities the flexibility necessary to provide for existing and future water-dependent uses.³⁵

The SMA guidelines also note the SMA’s mandate that:

preference be given to uses that are unique to or dependent upon a shoreline location. Consistent with this policy, these guidelines use the terms “water-dependent,” “water-related,” and “water-enjoyment,” as defined in WAC 173-26-020, when discussing appropriate uses for various shoreline areas . . . Consistent with RCW 90.58.020 and WAC 173-26-171 through 173-26-186, local governments shall, when determining allowable uses and resolving use conflicts on shorelines within their jurisdiction, apply the following preferences and priorities in the order listed below, starting with (d)(i) of this subsection. For shorelines of statewide significance, also apply the preferences as indicated in WAC 173-26-251(2).³⁶

³⁴RCW 90.58.100(2)(a).

³⁵WAC 173.26-231(3)(b).

³⁶WAC 173-26-201(2)(d).

The SMP provision banning outright marine transport of aggregate materials within the Conservancy designation directly conflicts with the above mandates.

3. The Board Erroneously Concluded that Hood Canal’s Operations were not Water-dependent.

These statutory provisions require that preference be given to uses that are dependent on access to the shoreline. The Board determined that “Hood Canal’s proposed mining operation is not ‘dependent on the water by reason of the intrinsic nature of its operations’ because it has the option of road transportation for aggregates.”³⁷ The Board’s determination is an erroneous interpretation of the law; Hood Canal’s operation is in fact water-dependent as that term is defined by applicable law.

The County’s SMP follows the SMA guidelines’ definitions of water-dependent and water-related:³⁸

“Water-dependent use” means a use or *portion of a use* that requires direct contact with the water and cannot exist at a nonwater location *due to the intrinsic nature of its operations*.³⁹

“Water-related use” means a use or portion of a use that *is not intrinsically dependent on a waterfront location* but depends upon a waterfront location for economic viability because of one of the following:

(i) A functional requirement for a waterfront location such as the arrival or shipment of materials by water or the need for large quantities of water; or

(ii) The use provides a necessary service supportive of the water-dependent activities and the proximity of the use to

³⁷CP 7544.

³⁸WAC 173-26-020(39) and (43), respectively.

³⁹JCC 18.25.100(23)(c) (emphasis added).

its customers makes its services less expensive and/or more convenient...⁴⁰

The Board ruled that Hood Canal's operations were a water-related rather than water-dependent use. To support its ruling, the Board cites the *Preserve Our Island* case for the proposition that a mining operation must be located on an island to be considered water-dependent.⁴¹ A close reading of *Preserve Our Island* reveals that the factual situation in that case is very similar to the case at hand, and supports a finding that water transport of aggregates in the instant case is also a water-dependent use.

a. Board Misread *Preserve Our Island* - Mines Need not be Located on an Island to be Water-dependent.

In *Preserve Our Island*,⁴² the Court upheld a Shorelines Hearings Board's determination that a proposed barge-loading facility (much like the one proposed by Hood Canal), by which a mine would transport large quantities of sand and gravel ("aggregate"), is water-dependent. The Board and Respondents in this case point to the fact that the Glacier mine in *Preserve Our Island* was on an island, arguing that because the prohibited use here is not on an island, it is not water-dependent. However, that was not the determining factor in *Preserve Our Island*; rather, the determination of water-dependency was the intrinsic nature of water transport to the overall mining operation.

⁴⁰JCC 18.25.100(23)(g) (emphasis added).

⁴¹CP 7544.

⁴²133 Wn. App. 503, *supra*.

The Glacier mine in *Preserve Our Island* was not limited to transporting aggregate by water because it was on an island. In fact, it had been transporting aggregate to sites on the island on which it was located (Maury Island) and an adjacent island (Vashon Island).⁴³ The mine had transported the aggregate by truck and ferry for over 30 years. While it had also transported aggregate via barge in the past, it had abandoned its barge-loading facility for water transport 30 years prior.⁴⁴ It was now seeking to repair the pier in order to resume materials via barge.⁴⁵ Thus, the Court’s finding of water-dependency was based neither on the mine being located on an island nor a historic use of water transport. Rather, the Court held that the County had designated the mine as a commercially significant mineral resource, and to be commercially significant the mine needed access to marine transport of its aggregate. Therefore it was water-dependent.

The Court began with an analysis of the definition of water-dependent, which is similar to the County’s definition in the present case:

The Department of Ecology’s (DOE) latest Shoreline Guidelines define a “[w]ater-dependent use” as “a use or *portion of a use* which cannot exist in a location that is not adjacent to the water and which is dependent on the water by reason of *the intrinsic nature of its operations*.”⁴⁶

⁴³*Id.*, 133 Wn. App. at 510

⁴⁴*Id.*

⁴⁵*Id.*, 133 Wn. App. at 510-11

⁴⁶*Id.*, 133 Wn.App. at 526 (emphasis added).

The Court determined that the Glacier mine operations were indeed water-dependent. While mining operations as a whole may have been the principal use, the transportation of aggregate was such an essential part of the mining operation that “a barge-loading facility is necessary for the mine ‘to operate consistent with its designation as a mineral land of long term commercial significance.’”⁴⁷ The Court noted that the County had zoned Glacier’s site for commercial mining and designated it as mineral resource land under the GMA. “The current principal use of the site is a commercially significant mining operation, regardless of how it was used in the past.”⁴⁸

The Court held that Glacier could not operate consistent with its designated principal without barging, even though other means of transportation (such as truck) were possible.

The barge-loading facility is thus an integral part of the principal use, and the entire facility must use the shorelines to operate consistent with its County zoning. The Board correctly concluded the barge-loading facility is water-dependent. Substantial evidence supports the Board’s conclusion that Glacier’s mitigation measures and the Board’s conditions make the facility consistent with shoreline management policies.⁴⁹

The Court further stated:

Marine transportation of sand and gravel was necessary to provide a quantity of material similar to that which Glacier proposes to mine and export now and in the future. The fact that the site has been used to mine a lesser “local” annual quantity until demand resumes does not mean that the necessity for barge transportation

⁴⁷*Id.*, 133 Wn. App. at 518.

⁴⁸*Id.*, 133 Wn. App. at 509-10.

⁴⁹*Id.*

has been lost or diminished. The “necessity of the land-water interface” at this facility is consistent not only with the prior use of the site as a source of sand and gravel in King County, but also serves to give purpose and effect to the site’s GMA mineral designations and to the KCSMP, which allows mining in the Conservancy Environment and acknowledges the marine location of sand and gravel as noted in King County’s master program policies.⁵⁰

Thus, the intrinsic nature of barging to the overall mining operation, even though not the only means of transportation, is what makes the operation “water-dependent.”

The Court next discussed the apparent conflict between the SMA, GMA and the regulations adopted pursuant thereto. The designation as a significant commercial mineral resource land under the County’s GMA regulations conflicted with the SMP designation.

The GMA requires counties and cities to adopt a comprehensive plan and implementing development regulations that are consistent with the plan. Among the many goals of the GMA is the need to preserve and utilize the remaining resource lands. RCW 36.70A.170 requires counties and cities to designate “[m]ineral resource lands that are not already characterized by urban growth and that have long-term significance for the extraction of minerals.” RCW 36.70A.060 requires that they adopt development regulations to assure the conservation of mineral resource lands designated under RCW 36.70A.170.⁵¹

The Court noted that the County’s Comprehensive Plan had designated the Glacier mine as mineral resource lands, which should be “conserved for productive use through the use of ‘Designated Mineral

⁵⁰*Id.* 133 Wn. App. at 517-18.

⁵¹*Id.* 133 Wn. App. at 520-21 (internal citations omitted).

Resource Sites where the principal and preferred land uses will be commercial resource management activities.”⁵² The Court further noted that the County had zoned Glacier’s site “mineral”, the purpose which “is to provide for continued extraction and processing of mineral and soil resources in an environmentally responsible manner.”⁵³

The Court addressed the importance of the designation under the GMA:

The appropriate question, then, is what is the property’s intended use, not what has it been used for. The County encourages commercial mining at the site and has placed no restrictions on the intensity of the mining operation. Under the GMA, Comprehensive Plan, and Zoning Code, Glacier’s site is designated for a commercially significant mining operation regardless of the site’s past use.

The Court noted that SMA’s policies and regulations do not take priority over or trump those adopted under the GMA, but rather that the two “must be harmonized in the process of overall land use planning and regulation.”⁵⁴ The Court held that the County could not use the SMP designation as a back door means of prohibiting the use:

The barge-loading facility falls under the SMA and Master Program because it is located in a shoreline environment, and it must comply with their provisions. To this end, both the shoreline and GMA policies and regulations permit the County to impose conditions that will eliminate or diminish environmental impacts. But this does not change the designation of the Glacier site’s principal use as a commercially significant mining operation under

⁵²*Id.* 133 Wn. App. at 521.

⁵³*Id.*

⁵⁴*Id.* 133 Wn. App. at 523.

the GMA, Comprehensive Plan, and Zoning Code. *Because it cannot be a commercially significant mineral resource land without the barge facility, it is a water-dependent use under the applicable requirements for shoreline developments.* If the County wants to prohibit commercially significant mining as the principal use, it must do so directly through a zoning change, not by interpreting its Master Program to create conflicts in violation of RCW 36.70A.480(3) and .040(4).⁵⁵

b) Hood Canal's Operations Are Water-Dependent Under *Preserve Our Island*.

The analysis in *Preserve Our Island* is directly applicable to the circumstances in the instant case. As noted above, Jefferson County's definitions of water-dependent and water-related follow the SMA guidelines' definitions of "water-dependent" and "water-related" as well as those in *Preserve Our Island*: a use or portion of a use that cannot exist in nonwater location due to the intrinsic nature of its operations.⁵⁶

1) County Designated Hood Canal's Property as Mineral Resource Land

In 2004, when adopting the MRLO designation of Hood Canal's property, the BOCC was thorough in its application of the GMA mandates. However, in later adopting the SMP, the BOCC was neither thorough nor consistent with the SMA, GMA, or its own regulations and policies governing mineral resource lands.

In *Preserve Our Island*, the County had zoned Glacier's site for commercial mining and designated it as mineral resource land under the

⁵⁵*Id.* 133 Wn. App. at 525-26 (internal citations omitted)(emphasis added).

⁵⁶WAC 173-26-020(39) and (43), respectively.

GMA. Similarly, Jefferson County designated Hood Canal’s property as in a Mineral Resource Land Overlay, or MRLO.⁵⁷ This designates the property as “land primarily devoted to the extraction of minerals or lands that have a known or potential long-term commercial significance for the extraction of minerals.”⁵⁸ Again, this language is nearly identical to the designation as a “mineral land of long term commercial significance” in *Preserve Our Island*.⁵⁹

Here, as in *Preserve Our Island*, the transportation of aggregate is such an essential part Hood Canal’s mining operations that a waterside loading facility is necessary to operate consistent with its designation as a mineral land of long term commercial significance. Hood Canal’s current principal use of the site is a commercially significant mining operation that requires a waterside facility, regardless of how it was used in the past.⁶⁰

Just like the Glacier mine in *Preserve Our Island*, Hood Canal has no feasible large-scale ground transportation options; it therefore must be considered water-dependent:

This definition supports the Board’s conclusion that the principal use consists of the integrated mine and barge-loading facility. Because, as the Board ruled, the principal use of Glacier’s site is the integrated facility, the “land-water interface” required for the barge-loading facility does not merely confer cost savings or a revenue differentiating advantage. Rather, it is necessary to operate

⁵⁷Jefferson County Ordinance No. 008-40706.

⁵⁸JCC 18.10130(M).

⁵⁹*Preserve Our Island*, 133 Wn.App. at 518.

⁶⁰*Preserve Our Island*, 133 Wn.App. at 509-10.

Glacier's site consistent with the principal use for which it is zoned—as a commercially significant mining operation.⁶¹

The BOCC itself recognized that marine transportation was essential and intrinsic to Hood Canal's operations:

With the approval of the marine transport system, [Hood Canal] will be able to sell its product competitively to more distant markets in, for example, the Puget Sound, Oregon and California. Without the marine transport system, [Hood Canal] can never compete on price in those more distant for markets because conveying the product by truck would make it too costly to the end user. . . . Truck transport and possible future marine transport are independent of one another because they would serve different markets.⁶²

Thus, it is clear that Hood Canal's operations are water-dependent.

2) Designating Hood Canal's Property as Not Water-dependent Conflicts with County Regulations

As noted above, the SMP is part of the County's GMA comprehensive plan and development regulations.⁶³ GMA mandates consistency between statutory and regulatory provisions.⁶⁴ As the Court in *Preserve Our Island* noted, counties must adopt consistent comprehensive plan and implementing development regulations.⁶⁵ By prohibiting marine transportation of Hood Canal's mineral resources, the SMP conflicts with the County regulations as well as the County's

⁶¹*Preserve Our Island*, 133 Wn.App. at 526.

⁶²Jefferson County Ordinance No. 008-40706, Findings 98-99.

⁶³*Preserve Our Island*, 133 Wn.App. at 524.

⁶⁴*Id.*

⁶⁵*Id.*, 133 Wn. App. at 520-21.

comprehensive plan. In fact, the SMP governing mining – very same regulation that prohibits marine transport of minerals – *supports* treatment of the mining operation and marine transport as part and parcel of one operation. Under that regulation, mining operations include:

*the extraction, primary processing and transport of naturally occurring materials. For the purposes of this section, primary processing shall be construed to include screening, crushing, and stockpiling of materials removed from the site where the processing activity is located. Transport of minerals shall include conveyor systems and barge terminals that are specifically dedicated to transport of mined materials from the site to the marketplace.*⁶⁶

Moreover, when the County adopted the MRLO designation, it thoroughly examined the significance of such designation under the GMA, much as the Court did in *Preserve Our Island*. The MRLO involved an amendment to the County’s Comprehensive that “is in furtherance of the GMA mandate to maintain and enhance mineral resource extraction activities in general.”⁶⁷

Furthermore, the Board concludes that when drafting the GMA the State Legislature fully understood that resource extraction industries, particularly mining or excavating, would never be a popular “neighbor” and thus the Legislature made it clear that the resource industries are to be protected from incompatible development such as homes and not vice-versa This amendment was approved by the Board of County Commissioners because, in part, it is in conformance with the requirements of GMA that counties such as this one that are planning pursuant to GMA designate mineral resource lands [RCW 36.70A.170] and assure

⁶⁶JCC 18.25.480(4)(b).

⁶⁷Jefferson County Ordinance No. 008-40706, Finding 46.

the conservation of mineral resource lands by, in part, not permitting the siting of incompatible uses adjacent to such lands [RCW 36.70A.060].⁶⁸

The County recognized that protecting the use mineral lands through such regulations is imperative as “Decisions made pursuant to GMA should never be subject to what amounts to a plebiscite.”⁶⁹

The County has clearly designated Hood Canal’s property as a commercially significant use that is dependent on water to achieve that purpose. As such, the County’s ban on this use violates the mandates of its own regulations, as well as the GMA and SMA.

3) Designating Hood Canal’s Property as Not Water-dependent Conflicts with the County Comprehensive Plan.

The SMP’s ban of marine transportation of Hood Canal’s mineral resources also conflicts with the County’s comprehensive plan. In addition to its designation as a MRLO as discussed above, the County adopted comprehensive plan polices pursuant to GMA that protect and prioritize mineral resource lands. These include:

INDUSTRIAL LAND USE POLICIES

- LNP 12.1 Encourage the establishment of sustainable natural resource-based industrial uses in rural areas to provide employment opportunities.
- LNP 12.2 Natural resource-based industries shall be located near the agricultural, forest, mineral, or aquaculture resource lands upon which they are dependent.

⁶⁸Jefferson County Ordinance No. 008-40706, Finding 53.

⁶⁹Jefferson County Ordinance No. 008-40706, Finding 47.

NATURAL RESOURCE LANDS GOAL

- LNG 13.0 Conserve and manage the forest, agriculture, aquaculture, and mineral resources of Jefferson County for sustainable natural resource-based economic activities that are compatible with surrounding land uses.

NATURAL RESOURCE LANDS POLICIES

- LNG 13.1 Conserve natural resource lands through land use designations and encourage resource-based industries that provide rural employment opportunities.
- LNG 13.3 Work with resource-based industries to achieve compliance with all applicable regulations to protect environmental values and to protect surrounding land uses.

RURAL CHARACTER GOAL

- LNP 18.0 Protect and foster the County's rural character. Rural character is defined by local rural lifestyle, local rural visual landscapes, resource productivity, environmental quality, and significant open space.
- NPR 1.8 Locate natural resource-based economic activities throughout rural areas in close proximity to designated agricultural, forest, or mineral resource lands upon which they are dependent.

NATURAL RESOURCE LANDS GOAL

- NRG 2.0 Encourage resource-based economic activities that are compatible with environmental quality.

MINERAL RESOURCE LANDS GOAL

- NRG 6.0 Conserve and protect Mineral Resource Lands for long-term economic use.

MINERAL RESOURCE LANDS POLICIES

- NRP 6.4 Mitigate conflicts with adjacent land uses by zoning and regulations including operation, siting, buffering and design requirements which minimize conflicts between mineral extraction/primary processing activities and land use

activities located adjacent to designated mineral lands.

MINERAL RESOURCE LANDS GOAL

- NRG 7.0 Provide for mitigation of potential adverse impacts associated with mining extraction and processing operations.

MINERAL RESOURCE LANDS POLICIES

- NRP 7.1 Require environmental review on all mineral lands designation requests and/or conditional use permits.
- NRP 7.2 Provide for the following factors in mineral resource land use decisions:
 - a. The range of environmental impacts, including short-term and long-term effects arising over the lifetime of the proposal;
 - b. The ability of the site to confine or mitigate all operational impacts;
 - c. The compatibility of operations with adjacent land uses when mitigating measures are applied;
 - d. The capacity of transportation facilities to handle safely the transport of products from the site; and,
 - e. The adequacy of plans for reclamation of the site for appropriate future use.
- NRP 7.3 Develop standards and guidelines to identify and address the impact of mining operations on adjoining properties. Such conditioning should not have the intent of rendering mining operations economically unfeasible.⁷⁰

The SMP improperly nullifies these GMA-based policies. The County's land use regulations and comprehensive plan policies elevate and protect Hood Canal's property as a mineral resource land. The County cannot abrogate its GMA-based regulations and policies through

⁷⁰Jefferson County Comprehensive Plan.

the eleventh-hour insertion of an outright ban of such use in the SMP. As the Court stated in *Preserve Our Island*, “If the County wants to prohibit commercially significant mining as the principal use, it must do so directly through a zoning change, not by interpreting its Master Program to create conflicts in violation of RCW 36.70A.480(3) and .040(4).”⁷¹

4) Designating Hood Canal’s Property as not Water-dependent Conflicts with Other Statutes.

Not only does the SMP conflict with the SMA and GMA, it also conflicts with the Aquatic Lands Act and the Washington Surface Mining Act. As discussed above, the SMP is part of the County’s GMA comprehensive plan and development regulations.⁷² GMA mandates consistency between statutory and regulatory provisions.⁷³

i. The SMP Conflicts with the Aquatic Lands Act.

In the Aquatic Lands Act, the legislature placed similar emphasis to protection of mineral resource lands.

The legislature finds that water-dependent industries and activities have played a major role in the history of the state and will continue to be important in the future. The legislature finds that revenues derived from leases of state-owned aquatic lands should be used to enhance opportunities for public recreation, shoreline access, environmental protection, and other public benefits associated with the aquatic lands of the state. The legislature

⁷¹*Preserve Our Island*, 133 Wn. App. at 525-26.

⁷²*Preserve Our Island*, 133 Wn. App. at 524.

⁷³*Id.*

further finds that aquatic lands are faced with conflicting use demands.

The Aquatic Lands Act contains directives to meet these conflicting use demands, similar to those adopted in the SMA:

- (1) Encouraging direct public use and access;
- (2) Fostering water-dependent uses;
- (3) Ensuring environmental protection; and
- (4) Utilizing renewable resources.⁷⁴

These statutes acknowledge the important role that “water-dependent industries” have for Washington, and that aquatic lands are “faced with conflicting use demands.” The State must “strive to provide a balance of public benefits” including fostering, preserving, and enhancing “water-dependent uses.”⁷⁵ In balancing conflicting use demands, the State is required to favor water-dependent uses over other uses, and must give priority to “uses which enhance renewable resources, waterborne commerce, and the navigational and biological capacity of the waters ...”⁷⁶

The SMP conflicts with the Aquatic Lands Act by impeding the ability of the owners of private shorelands – such as Hood Canal – to use state-owned aquatic lands for their water-dependent industries and activities. In fact, the Aquatic Lands Act even defines “water-dependent use” as a use that cannot logically exist in any other location but on the water, and specifically includes water-borne commerce through a terminal – defined as “a point of interchange between land and water carriers, such

⁷⁴RCW 79.105.030.

⁷⁵RCW 79.105.060(24).

⁷⁶*Id.*

as a pier, wharf, or group of such, equipped with facilities for care and handling of either cargo or passengers or both.” Thus, the SMP provision that bans waterborne commerce is in direct derogation of the mandates of the Aquatic Lands Act.

ii. The SMP Conflicts with the Washington Surface Mining Act

Similarly, the Washington Surface Mining Act recognizes that the surface extraction of earth minerals for commercial, industrial or construction purposes is an essential economic activity.

The legislature recognizes that the extraction of minerals by surface mining is an essential activity making an important contribution to the economic well-being of the state and nation. It is not possible to extract minerals without producing some environmental impacts. . . . Therefore, the legislature finds that a balance between appropriate environmental regulation and the production and conservation of minerals is in the best interests of the citizens of the state.

The purpose of the Washington Surface Mining Act, and its associated regulations, is to “Provide that the usefulness, productivity, and scenic values of all lands and waters involved in surface mining within the state will receive the greatest practical degree of protection.” Again, the SMP’s outright ban of the water-dependent use of Hood Canal’s commercially significant mineral resource operations conflicts with this prioritization of essential mining activities in the State.

5) The County Failed to Follow the Mandates of the SMA To Use Technical, Scientific, Reasoned or Objective Bases in Changing the Conservancy Designation that Bans Marine Transport of Mineral Resources.

The County may restrict water-dependent uses in the Conservancy designation only if such restrictions are supported by data and scientific analysis.⁷⁷ In adopting the outright ban on marine transport of aggregate in the SMP, the County failed to follow the procedures mandated by the SMA guidelines. The SMA requires the County to use scientific and technical information as a basis for its SMP.⁷⁸ The SMP must be based “on a reasoned, objective evaluation of the relative merits of the conflicting data.”⁷⁹ The BOCC slipped the ban of marine transport of mineral resources in at the eleventh hour with no scientific or technical support.

Ecology challenged the County’s ban of aquaculture, another water-dependent use, for lack of scientific support. In repeated correspondence with the County, Ecology insisted:

Ecology review determined there was insufficient science basis presented for an outright prohibition of a water-dependent use. . .

The appropriateness of regulating through the permit process versus banning a water-dependent use outright was talked about. The difficulty of legally defending an outright prohibition was discussed. With the information we have seen, an outright ban in Jefferson County would be hard to defend. . . . There needs to be some evaluation of the sites proposed for prohibition that demonstrates a need for protection.

Local governments can apply stricter standards than those outlined in the Guidelines, including limited prohibitions of water-dependent uses, but only where such a prohibition can be shown

⁷⁷ See RCW 90.58.100 and WAC 173-16-201.

⁷⁸ RCW 90.58.100(1); WAC 173-26-201(2)(a).

⁷⁹ WAC 173-26-201(2)(a).

necessary. . . . Jurisdictions like King or Jefferson County, which have diverse and large water bodies and a wide range of conditions, would require a high showing of evidence to support an outright ban throughout the jurisdiction.

It is appropriate to identify areas where conditions warrant prohibiting an activity, showing the science basis for doing so. It is not appropriate to use the Environment Designation system as a “back door” or de facto means of prohibition . . .

Ecology and Jefferson Count’s SMP provisions relating to [aquaculture] must be supported by and aligned with the policies of RCW 90.58.020, effectively apply the “preferred use” priorities of WAC 173-26-201(2)(d) in the order listed, first reserving appropriate areas for protecting ecological processes and functions, then reserving shoreline areas for water-dependent [aquaculture],and provide rationale accordingly based on analysis and SMP provisions should recognize shoreline conditions and technologies will evolve.⁸⁰

Hood Canal strongly agrees with Ecology’s above assessment of the necessary procedures the County must follow prior to an ban of water-dependent uses. Unfortunately, Ecology did not insist on compliance with the statutory and regulatory mandates when it came to banning marine transportation of aggregate. There was no scientific basis provided for the ban, nor was County required to provide any. The ban was not supported by or aligned with the policies of RCW 90.58.020, and was in direct conflict with the “preferred use” priorities of WAC 173-26-201(2)(d); the County provided no analysis-based rationale to support it. Nor was there any logic to the ban. If the goal was to protect the shoreline, why would the County allow the high impact activity of actual mining within the

⁸⁰CP 2287 – 2288.

shoreline habitat, and the high impact transportation via truck, yet prohibit the transport of materials mined in the adjacent upland areas via methods such as barging that can easily be mitigated so as to be compatible with shoreline environments.

Rather, the County used the Environment Designation system as a back door, de facto means of prohibition, rather than allowing the use pursuant to a conditional use permit that would mandate environmental assessment and mitigation. As such, the ban was impermissible under SMA, and must be overturned by this Court.

Ecology argues that it struck a balance by allowing mining only within certain SMP designated areas. This is the same argument the Court rejected in *Preserve Our Island*:

This argument is not persuasive for several reasons. The barge-loading facility is a shoreline dependent use. The portion of the mining operation that consumes non-renewable resources, the mine itself, is located outside the shoreline environment. Limitations on operating hours and mitigation measures keep the shoreline area largely available for the public's recreational activities. And finally, as the Board and DDES properly concluded, mining is a resource use, not an industrial use.⁸¹

Hood Canal's operation constitutes a water-dependent use. The portion of its mining operation that consumes non-renewable resources, the mine itself, is located outside the shoreline environment. A conditional use permit process would ensure mitigation to protect the

⁸¹*Preserve Our Island*, 133 Wn.App. at 536 (internal citation omitted).

shoreline environment. And, as the BOCC determined, mining is a resource use. Therefore, the SMP's ban of marine transportation in the Conservancy designation does not constitute a balancing.

The SMP's prohibition against marine transport of minerals in the Conservancy designation is in direct conflict with state statutes and regulations and County regulations and policies. The County cannot use the SMP designation as a back door means of prohibiting the use that has been approved pursuant to the GMA. Because Hood Canal's mining operations were designated as commercially significant under the MRLO and GMA, the SMP may not constrain Hood Canal from operating in a commercially significant manner. Hood Canal's ability to produce resources in a commercially significant amount is dependent on a waterside loading facility. Therefore, the waterside loading facility is such an integral part of the principal use and so intrinsic to its overall operation that Hood Canal's operations that those operations themselves are water-dependent.

C. Insertion of the Marine Transportation Prohibition After The County Deliberated and Without Public Input Violated the SMA and Hood Canal's Due Process Rights.

After all public hearings and opportunity for comment had closed, the County inserted the prohibition on marine transport of aggregate materials. This substantive revision was not only in contradiction of staff and planning commission recommendations to include marine transport as a water-dependent (and thus allowed) use in the Conservancy

environment, it was not disclosed to the public prior to adoption and no public hearings or comment were allowed on the revision.

1. Insertion of the Marine Transportation Prohibition After The County Deliberated and Without Public Input Violated the SMA.

Both the SMA and the GMA mandate that local governments provide public participation when amending master programs, comprehensive plans, and development regulations.⁸² However, the County failed to provide any public participation whatsoever on a substantive amendment to its SMP. The County inserted the clause prohibiting marine transport of aggregate materials and summarily and on that same day, adopted the revised SMP. This prohibition on marine transport of aggregate materials was brand new; it was not part of any materials prepared by staff, reviewed by the planning commission or stakeholders groups, addressed at a public hearing, or made available for public comment.

Particularly disconcerting is the fact that the substance of this prohibition on marine transport of aggregate materials is in direct contradiction to the original version, which affirmatively included marine transport as a water-dependent (and thus allowed) use in the Conservancy environment. It was this original version that had gone through the extensive, multi-year public process. The original version was also the language recommended by the County's planning commission and staff.

⁸² RCW 90.58.130 and WAC 173-26-090.

The County's adoption of the amendment to its SMP that included this prohibition on marine transport of aggregate materials violated the public participation requirement of the SMA and the GMA and must be invalidated.

The SMA requires public participation in the adoption and amendment of SMPs:

In developing master programs and amendments thereto, the department and local governments, pursuant to RCW 90.58.130 shall make all reasonable efforts to inform, fully involve and encourage participation of all interested persons and private entities...⁸³

The SMA also requires that public review and comment must be provided before the adopting or amendment of an SMP.⁸⁴ It mandates that:

Counties and cities planning under chapter 36.70A RCW, shall establish and broadly disseminate to the public a public participation program identifying procedures whereby proposed amendments of the comprehensive plan and development regulations relating to shorelines of the state. ... Such procedures shall provide for early and continuous public participation through broad dissemination of informative materials, proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, and consideration of and response to public comments.⁸⁵

Here, the County failed to provide "early and continuous public participation" as required in its amendment to the SMP. The County did not inform, fully involve or encourage participation on this substantive change that affected property owners' rights. It did not follow procedures

⁸³ WAC 173-26-090.

⁸⁴ RCW 90.58.130.

⁸⁵ *Id.*

allowing for early and continuous public participation or dissemination of proposals and alternatives. It did not provide opportunity for written comments, public meetings after effective notice, provision for open discussion, or consideration of and response to public comments on the prohibition on marine transport of aggregate materials prior to its adoption.

It is imperative that the public have an opportunity to review and comment on a regulatory revision before the legislative body votes on the proposed change. The County violated Hood Canal's and others' procedural due process right to review and make comments to the amendment of the SMP pursuant to the SMA, RCW 90.28.130 and WAC 173-26-090. As such, the County's adoption of the amendment to the SMP is invalid.

The public process requirement under the SMA is nearly identical to that in the GMA.⁸⁶ Courts have held municipalities to a strict compliance with these critical due process requirements. In *Spokane Cty. v. E. Washington Growth Mgmt. Hearings Bd.*, the Court of Appeals upheld the Board's invalidation of an amendment to the County's comprehensive plan because it was adopted without public participation.⁸⁷

⁸⁶“Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments.” RCW 36.70A.140.

⁸⁷188 Wn. App. 467, 353 P.3d 680 (2015).

Spokane County had adopted increased population growth projections that represented a significant change in the comprehensive plan. The Court held that this amounted to an amendment to the comprehensive plan, and thus required public review and participation. Failure to obtain such public participation violated the GMA. The Court held that “the County effectively turned GMA planning procedures on their head, and deprived the public of its opportunity for review and comment.”⁸⁸

Similarly, in this case, the substantive change to an amendment of its SMP also was adopted without the provision for the public to review and comment. And just like the *Spokane Cty.* resolution, here the new prohibition clause is a significant amendment of the SMP, and as such, the public should have been given an opportunity to review and comment before the County voted to adopt the change. The County deprived the public, interested parties, and Hood Canal their right to review and comment on the prohibition clause prior to the County’s adoption. Thus, the County’s process in adopting the amendment to the SMP violated the SMA and the amendment should be invalidated.

2. Insertion of the Marine Transportation Prohibition After the County Deliberated and Without Public Input Violated Hood Canal’s Due Process Rights.

Not only did the County’s adoption of the added prohibition clause to the amendment to the SMP violate the SMA, Hood Canal’s procedural due process rights to notice and to subsequently participate in the process

⁸⁸*Id.*, 188 Wn. App. at 488.

of adopting the prohibition clause were also violated. The Fourteenth Amendment's due process clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law."⁸⁹

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."⁹⁰

In *Harris*, the Ninth Circuit held that a property owner was entitled to individual notice of a hearing on the county's adoption of a comprehensive plan amendment because, as a result of the amendment process, the owner's land was redesignated for residential use.⁹¹ The *Harris* Court explained that this right to notice arose because the county's action caused the owner actual injuries, including deprivation of the commercial use of his property.⁹²

Here, like *Harris*, Hood Canal has a constitutionally protected property interest that is adversely affected by the County's adoption of the marine transportation prohibition attached to the amendment of the SMP. It is undisputed that Hood Canal is an interested party in the process to amend the SMP. The marine transportation prohibition has now prevented Hood Canal from utilizing marine transport for its products. Hood Canal's

⁸⁹U.S. Const. amend. XIV, § 1.

⁹⁰ *Harris v. Cty. of Riverside*, 904 F.2d 497, 503 (9th Cir. 1990) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 656, 94 L. Ed. 865 (1950); *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 901-02, 47 L.Ed.2d 18 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'").

⁹¹*Harris*, 904 F.2d 497.

⁹²*Id.*

property interest has been severely injured by the County's action. As such, pursuant to *Harris*, Hood Canal should have been apprised of the County's consideration of the prohibition clause so that Hood Canal could be afforded the opportunity to present its objections. As per the Ninth Circuit's holding in *Harris*, the County's failure to do so violated Hood Canal's procedural due process rights and the County's adoption of the amendment to the SMP must be invalidated.

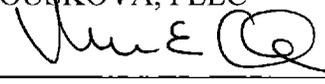
VI. CONCLUSION

Based on the above, Petitioner respectfully requests that this Court, upon review:

1. Vacate the Board's decision in Case No. 14-2-0008c;
2. Enter an order pursuant to RCW 36.70A.302 that the Jefferson County Shoreline Master Program is out of compliance and/or invalid due to the Mining Shoreline Environment Conservancy Regulation that prohibits marine transportation of minerals, and remand this matter back to Jefferson County with directive that the County pass a compliant SMP within a time period considered fair and just by this Court; and
3. Award Petitioner any other relief that this Court deems right and just under the circumstances.

DATED this 15th day of January, 2016.

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By 

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Transmittal Letter

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No. 47641-0-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

OLYMPIC STEWARDSHIP FOUNDATION; J. EUGENE FARR;
WAYNE and PEGGY KING; ANNE BARTOW; BILL ELDRIDGE;
BUD and VAL SCHINDLER; RONALD HOLSMAN; CITIZENS'
ALLIANCE FOR PROPERTY RIGHTS JEFFERSON COUNTY;
CITIZENS' ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND;
MATS MATS BAY TRUST; JESSE A STEWART REVOCABLE
TRUST; and CRAIG DURGAN, and HOOD CANAL SAND &
GRAVEL LLC dba THORNDYKE RESOURCE,

Appellants/Petitioners,

vs.

STATE OF WASHINGTON ENVIRONMENTAL AND LAND USE
HEARINGS OFFICE, acting through the WESTERN WASHINGTON
GROWTH MANAGEMENT HEARINGS BOARD; STATE OF
WASHINGTON, DEPARTMENT OF ECOLOGY; and JEFFERSON
COUNTY,

Respondents,

and

HOOD CANAL COALITION,

Respondent/Intervenor.

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January 21, 2016 - 2:43 PM

Transmittal Letter

Document Uploaded: 7-476410-Affidavit.pdf

Case Name: Olympic Stewardship et al, vs. State of Washington

Court of Appeals Case Number: 47641-0

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: _____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Evanna Charlot - Email: charlot57tb@jmmlaw.com