

NO. 47641-0-II

IN THE 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 E. STEWARD REVOCABLE  
TRUST, and CRAIG DURGAN; and HOOD CANAL SAND &  
GRAVEL, LLC dba THORNDYKE RESOURCES,

Appellants,

v.

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.

RESPONSE BRIEF OF HOOD CANAL COALITION

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## I. INTRODUCTION

Respondent-Intervenor Hood Canal Coalition respectfully submits this response to the arguments raised by appellant Hood Canal Sand & Gravel, LLC (“Hood Canal Sand”). The Hood Canal Coalition supports and incorporates by reference the arguments of the Department of Ecology and Jefferson County in their overall defense of Jefferson County’s 2014 Shoreline Master Program Update (“SMP”).

Hood Canal Sand’s challenge to Jefferson County’s SMP is narrow in scope. While its appeal raises several issues, Hood Canal Sand’s primary complaint is that Jefferson County’s SMP prohibits mining, including mining-related marine transport systems such as conveyors, piers, and barges, within the Conservancy shoreline environment along Hood Canal – a shoreline of state-wide significance.

Hood Canal Sand’s challenge to the Jefferson County SMP is based on three fundamental errors. First, Hood Canal Sand bases the heart of its argument on two falsehoods – falsehoods that it repeats throughout its argument. Contrary to its assertion, Hood Canal Sand’s shoreline property is *not* mineral land, is not zoned for mining, and is not located within Jefferson County’s adopted “Mineral Resource Land Overlay.” (“MRLO”).

Instead, Hood Canal Sand's shoreline property lies within the "Conservancy" shoreline environment, is designated "rural" under the County's Comprehensive Plan, is zoned for rural residential use, and is miles from the County's designated MRLO.

Similarly, contrary to Hood Canal Sand's repeated assertions, Jefferson County did not find that Hood Canal Sand's proposed "pit-to-pier" project was "intrinsic" or "essential" to the County's decision to adopt the MRLO. Instead, while the County recognized that Hood Canal Sand might make more money if it were able to develop the pit-to-pier project, the County expressly found that the MRLO was not dependent upon the pit-to-pier project and expressed doubt that the pit-to-pier project could ever be approved under County Code.

Second, Hood Canal Sand assumes that its proposed pit-to pier project is water-dependent and, as such, Jefferson County and Ecology were required to allow its development within the Conservancy environment. Because the Hood Canal shoreline is a "shoreline of statewide significance" Hood Canal Sand was required to demonstrate, with clear and convincing evidence, that Jefferson County's SMP was inconsistent with the policy of RCW 90.58.020 and Ecology's SMP Guidelines. It failed to do so. Neither

RCW 90.58.020 nor the SMP guidelines require that all uses, even water-dependent uses must be allowed in all shoreline environments. Jefferson County opted to allow mining and mine related marine transport within the High Intensity shoreline environment and not within the Conservancy environment. Jefferson County's action was consistent with both RCW 90.58.020 and the SMP Guidelines.

Third, relying primarily on *Preserve Our Islands v. Shoreline Hearings Board*, 133 Wn. App. 503, 137 P.3d 31 (2007), Hood Canal Sand devotes a significant portion of its argument to its assertion that it's proposed pit-to-pier project is a water-dependent use. But because Jefferson County was within its authority to prohibit even water-dependent uses within the Conservancy shoreline environment, it is irrelevant whether Hood Canal Sand's proposed pit-to-pier project is water-dependent. If this Court decides, however, that it is appropriate to address Hood Canal Sand's argument, this case is readily distinguishable from the procedural posture, applicable law, and fact pattern presented in *Preserve Our Islands*. The Growth Management Hearings Board's ("Board") conclusion that Hood Canal Sand's pit-to-pier project is not water dependent was not erroneous.

Because Jefferson County's SMP is consistent with the Shoreline Management Act and the SMP Guidelines, this Court should uphold the Board's decision and deny Hood Canal's appeal.

## **II. COUNTER STATEMENT OF THE CASE**

### **A. After Extensive Public Review and Comment, Ecology Gave Final Approval to Jefferson County's Updated Shoreline Master Program in February 2014.**

Consistent with the Shoreline Management Act, Ch. 90.58 RCW ("SMA"), Jefferson County adopted its first SMP in 1974. In 2003 the Legislature required the Department of Ecology ("Ecology") to prepare updated SMP guidelines and required for all Counties and Cities to update their SMPs to be consistent with the new SMP guidelines. RCW 90.58.060, .080. Ecology issued its updated SMP Guidelines in late 2003. Ch. 173-26 WAC. As required by RCW 90.58.080(2), in 2006 Jefferson County began the long process of preparing its comprehensive SMP Update. After extensive analysis, public comment, public hearings and debates, Ecology gave final approval to Jefferson County's SMP Update on February 7, 2014.

Jefferson County's SMP defines "mining" to include the marine transportation of minerals from a mine using conveyors, piers, and barges. JCC 18.25.100(13)(h)(i)(D) ("M" Definitions). Jefferson County's SMP prohibits "mining" within most shoreline environments including the

Conservancy shoreline environment. JCC 18.25.480(3). The SMP only allows mining (and mine related marine transportation) in the “High Intensity” shoreline environment. JCC 18.25.480(3).<sup>1</sup>

**B. Hood Canal Sand’s Shoreline Property is Zoned Rural Residential and is Not Within the Jefferson County’s Mineral Resource Land Overlay.**

At the request of Hood Canal Sand’s predecessor, Fred Hill Materials, in 2004 Jefferson County adopted Jefferson County Ordinance 08-0706-04 creating a 690-acre Mineral Resource Land Overlay (“MRLO”) on lands designated as “commercial forest land” in the Thorndyke section of unincorporated Jefferson County west of the Hood Canal.<sup>2</sup> Hood Canal Sand currently mines sand and gravel from its property within the MRLO and transports the materials via conveyor to its mine to its Shine Hub where the material is trucked to markets. Jefferson County Ordinance 08-0706-04, Finding 93.

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<sup>1</sup> In addition to mining, the SMP allows all industrial and commercial piers in the High Intensity environment. JCC 18.25.350(2)(f)..Jefferson County also allows private industrial and commercial piers in “Priority Aquatic” and “Aquatic” shoreline environments if the use is also allowed in the upland shoreline environment. JCC 18.25.350(2).

<sup>2</sup> HCSG cites to Jefferson County Ordinance No. 008-40706. There is no such ordinance. The 2004 MRLO designation was adopted by Jefferson County Ordinance 08-0706-04. A copy is attached an Appendix to the Brief of Respondent Jefferson County.

Hood Canal Sand misleads the Court, however, with its assertion that Jefferson County “designated Hood Canal’s property as within a [MRLO].” HCS Brief at 3-4. Hood Canal Sand’s *shoreline* property is *not* within the MRLO. To the contrary, Hood Canal Sand’s shoreline property is located over a mile away from the designated MRLO and zoned “RR-5, Rural Residential, not mining.”<sup>3</sup>

**C. Jefferson County Expressly Confirmed that Hood Canal’s Proposal for Marine Transportation was Not Dependent Upon the 2004 MRLO Designation.**

In at least three instances, Hood Canal Sand cites Findings 98 of the 2004 MRLO Ordinance, Ordinance 08-0706-04, in support of its proposition that Jefferson County recognized marine transportation as “intrinsic” or “essential” to Hood Canal Sand’s mineral operations. HCS Brief at 3-4, 19, 21-22. By cherry picking Finding 98, Hood Canal Sand repeatedly asserts that marine transportation is *only* way its mining operation can be economic. But when read in context, Jefferson County was abundantly clear that Hood Canal Sand was currently operating at a

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<sup>3</sup> A copy of Figure 3-5 from the March 2004 Supplemental Environmental Impact Statement (“SEIS”) prepared for the MRLO and showing the approved MRLO in relationship to the Hood Canal shoreline is attached as Appendix 1. The SEIS is published at: <http://www.co.jefferson.wa.us/commdevelopment/PDFS/Draft%20SEIS%20MLA02-235.pdf>. A printout of Hood Canal Sand & Gravel’s parcel report and map from the Jefferson County assessor’s office is attached as Appendix 2.

commercial scale using its existing conveyor and trucking operations. *See* Ordinance No. 08-0706-04, Findings 93-100. In Finding 98 the County simply confirmed that Hood Canal Sand might be able to increase sales to more distant markets if its proposed marine transport system was eventually approved. The County did not find that Hood Canal Sand's ongoing mining operation would not be commercial without the pit-to-pier project.

Contrary to Hood Canal Sand's implication, rather than proclaim the company's proposed "pit-to-pier" marine transport system essential to, or intrinsic to, its mining within the MRLO, the County made clear that the MRLO and proposed pit-to-pier project system were completely independent:

Designation of the MRLO requested by FHM is not dependent on a marine transport system, the so-called "pit to pier" and application for and approval of the marine transport system is not dependent on designation of the MRLO.

Ordinance 08-0706-14, Finding 9. Indeed, not only did the County expressly find the MRLO not dependent on marine transport, it also expressly confirmed that Hood Canal's proposed "Pit-to-Pier" project may not meet the County's shoreline and zoning requirements and could be

denied a shoreline conditional use permit or a zoning conditional use permit.

*Id.* Findings 141-143.<sup>4</sup>

### III. ARGUMENT

#### A. Standard of Review

Review of the Board’s decision upholding Jefferson County’s SMP is governed by the Administrative Procedures Act, (“APA”). RCW 34.05.570; *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005); *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 43, 202 P.3d 334 (2009). The party asserting invalidity bears the burden of establishing that invalidity under the nine criteria set out at RCW 34.05.570(3)(a)-(f). *Samson*, 149 Wn. App. at 43. The Court gives

due deference to the Board’s specialized knowledge and expertise, unless there is a compelling indication that the agency’s regulatory interpretation conflicts with the legislature’s intent or exceeds the agency’s authority.

*Id.*

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<sup>4</sup> The Board of County Commissioners expressly stated that “The BOCC has the initial impression that a pier facility (Pit to Pier) proposal contemplated by the applicant may not meet all of the twelve (12) approval criteria, including the following ...[list]... .” *Id.* Finding 143.

**B. Ecology’s Approval of Jefferson County’s Shoreline Master Program is Consistent with Applicable Laws and Regulations.**

**1. Shoreline Master Programs affecting shorelines of statewide significance such as Hood Canal are reviewed against the policy of RCW 90.58.020 and the applicable SMP Guidelines.**

Hood Canal Sand begins its argument by asserting that the County and Ecology “failed to consider the SMP’s consistency with the statutes and regulations required by the SMA *and the GMA.*” HCS Brief at 9. It continues by asserting that the SMP must be consistent with the “GMA and the regulations and policies adopted pursuant thereto.” *Id.* at 10, *citing* RCW 36.70A.480. Hood Canal is mistaken for at least two reasons.

First, Hood Canal Sand’s challenge concerns its property on Hood Canal. The Hood Canal shoreline is a designated “shoreline of statewide significance.” RCW 90.58.030(2)(f)(ii)(C). SMPs for shorelines of statewide significance are reviewed under a different standard than other

“shorelines.”<sup>5</sup> For shorelines of statewide significance, Hood Canal’s burden of proof was high<sup>6</sup>:

If the appeal to the growth management hearings board concerns a shoreline of statewide significance, the board shall uphold the decision by the department unless the board, by clear and convincing evidence, determines that the decision of the department is *inconsistent with the policy of RCW 90.58.020 and the applicable guidelines* or chapter 43.21.C RCW [SEPA]...

RCW 90.58.190(2)(c) (emphasis added.). Thus, the only “laws and regulations” applicable for reviewing an SMP addressing shorelines of statewide significance are the policy in RCW 90.58.020, the applicable SMP guidelines in WAC 173-26-171 to WAC 173-26-251, and the procedural requirements in WAC 173-26-090 to 173-26-160.

This is in contrast to the Board’s review of other “state shorelines” where the Board is charged with reviewing the SMP against the policy of RCW 90.58.020, the applicable SMP guidelines, *and* “the internal

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<sup>5</sup> The SMA creates two classes of state shorelines: “shorelines,” which include all streams and rivers with flow greater than 20 cubic feet per second, and all lakes greater than twenty acres in size; and the much narrower explicitly defined “shorelines of statewide significance,” which includes the Hood Canal. *See* RCW 90.58.030(2)(e) (shorelines), and .030(2)(f) (Shorelines of statewide significance. *See also*, RCW 90.58.020 (setting out the policy and different priorities for shorelines of statewide significance.).

<sup>6</sup> Hood Canal Sand had the burden of proof before the Board. RCW 90.58.190(2)(d).

consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105... .” RCW 90.58.190(2)(b). But here, because Hood Canal Sand is challenging the SMP as it relates to a shoreline of statewide significance, there is no requirement that the SMP be consistent with the internal consistency requirements of the GMA.

And even *if* Hood Canal Sand were challenging the SMP for state “shorelines” instead of “shorelines of statewide significance,” its assertion that “the SMP must be consistent with the GMA, and the regulations and policies adopted pursuant thereto” is wrong. HCS Brief at 10. As quoted above, the SMA only requires that the SMP for shorelines be “internally consistent” with the County’s GMA comprehensive plan. The statute says nothing about requiring consistency with the “GMA and its regulations and policies.” RCW 90.58.190(2)(b),

The GMA itself also makes clear that the SMP “shall” be adopted pursuant to the Ch. 90.58 RCW (the “SMA”) “rather than the goals, policies, and procedures set forth [in the GMA].” RCW 36.70A.480(2). And further, that the “policies, goals, and provisions of [the SMA] and applicable guidelines *shall be the sole basis for determining compliance* of the [SMP] with [the GMA]...” with the limited exception that the County’s SMP must

be internally consistent with the County's GMA comprehensive plan. RCW 36.70A.480(3)(a).

Thus, *if* Hood Canal Sand were challenging the SMP as it relates to shorelines instead of shorelines of statewide significance, the Court need only determine whether the SMP be internally consistent with the County's adopted GMA Comprehensive Plan.<sup>7</sup> Contrary to Hood Canal Sand's unsupported assertion, the SMP is *not* required to be consistent with the GMA. It is required to be consistent with the SMA and the SMP guidelines, and be internally consistent with the County's adopted GMA comprehensive plan.<sup>8</sup>

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<sup>7</sup> According to WAC 173-26-251(3)(e), Counties are required to assure that the local GMA comprehensive plan be "consistent with and support as a high priority the policies for shorelines of statewide significance." The regulation further requires that SMPs "should include policies that incorporate the priorities and optimum implementation directives of [the SMA] into comprehensive plan provisions and implementing development regulations." *Id.* Thus, when reviewing internal consistency, it is the GMA comprehensive plan that must incorporate and be consistent with the policies and directives of the SMA and the adopted SMP.

<sup>8</sup> While not required, as discussed below, Jefferson County's SMP is internally consistent with the County's adopted GMA comprehensive plan. *Infra* at 25-27.

**2. Neither RCW 90.58.020 nor the applicable SMP guidelines “mandate” that mining related development be allowed on every shoreline.**

Hood Canal Sand argues that the SMP prohibition on mining and mine-related marine transportation systems<sup>9</sup> within the Conservancy shoreline environment conflicts with several “mandates” within the SMA and the SMP guidelines. HCS Brief at 11-13. Hood Canal Sand’s argument is based on the mistaken assumption that SMPs are required to allow every use, including mining and mine related marine transport systems, in every shoreline environment. Hood Canal Sand’s argument necessarily fails: nothing in the SMA or SMP implementing guidelines mandate that mining and mine related marine transport facilities be allowed in every shoreline environment.

To the contrary, the SMA and SMP guidelines contemplate a hierarchy of preferred uses and an SMP that designates a variety of shoreline environmental designations that both allow and prohibit difference uses based on the characteristics of the shoreline environment. *See e.g.*, WAC 173-26-201 (process for amending SMP); WAC 173-26-211 (environmental designations); WAC 173-26-241 (shoreline uses).

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<sup>9</sup> Jefferson County defines “mining” to include marine transportation systems such as conveyors, piers and barges. JCC 18.25.100(13)(h)(i)(D).

a. **RCW 90.58.020 does not mandate that water dependent industrial uses be given priority.**

Hood Canal Sand asserts that RCW 90.58.020 mandates that shoreline use must give priority to industrial or commercial uses dependent on use of the shoreline. HCS Brief at 11-12. Hood Canal Sand's assertion is inconsistent with the overall policy set out in RCW 90.58.020. For shoreline of statewide significance such as Hood Canal, the legislative policy in RCW 90.58.020 establishes a clear order of preference:

The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of statewide significance. The department, in adopting guidelines for shorelines of statewide significance, and local government, in developing master programs for shorelines of statewide significance, **shall give preference to uses in the following order of preference which:**

- (1) Recognize and protect the statewide interest over local interest;
- (2) Preserve the natural character of the shoreline;
- (3) Result in long term over short term benefit;
- (4) Protect the resources and ecology of the shoreline;
- (5) Increase public access to publicly owned areas of the shorelines;
- (6) Increase recreational opportunities for the public in the shoreline;

(7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

RCW 90.58.020 (emphasis added). The established order of preferences do not include mining or mine related industrial transportation facilities. *See also* WAC 173-26-251 (SMP Guidelines for shorelines of statewide significance).<sup>10</sup>

Moreover, while Hood Canal Sand is correct that RCW 90.58.020 creates a priority for industrial developments that are dependent on a shoreline location, this priority is far from a mandate that SMPs must allow all water dependent industrial uses in every shoreline environment. To the contrary, the SMA policy is clear that for shorelines (as opposed to shorelines of statewide significance) SMPs are not required to allow development in all locations:

Alterations of the natural condition of the shorelines of the state, **in those limited instances when authorized**, shall be given priority for single-family residences and their appurtenant structures, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to

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<sup>10</sup> The SMP guidelines provide detailed principles and requirements for local governments in how to prepare master programs for shorelines of statewide significance. Consistent with RCW 90.58.020, the guidelines do not prioritize commercial or industrial development within these shorelines of statewide significance.

shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state.

RCW 90.58.020 (emphasis added).

**b. The SMP Guidelines do not require SMPs to allow industrial development in all shoreline environments.**

Hood Canal Sand's assertion that the SMP guidelines mandate that SMPs must allow for industrial development, including marine transport facilities, in all shoreline environments similarly fails. HCS Brief at 12-13. Hood Canal Sand first quotes WAC 173-26-231(3)(b) in support of its argument. HCS Brief at 12. WAC 173-26-231 contain the SMP guidelines for "shoreline modification" which includes piers and docks. Hood Canal Sand fails to explain, however, that the general principles applicable to all shoreline modifications mandate that local governments "allow only shoreline modifications that are appropriate to the specific type of shoreline and environmental conditions for which they are proposed." WAC 173-26-231(2)(c). Thus, before allowing shoreline modifications, local

governments are required to consider first the type of shoreline and shoreline environment.<sup>11</sup>

Hood Canal Sand next quotes WAC 173-26-201(2)(d) in support of its belief that industrial marine transport facilities are required in every shoreline environment. HCS Brief at 12. But Hood Canal Sand leaves out a critical sentence in its quote of WAC 173-26-201(2)(d). In the place where Hood Canal Sand inserts ellipses, the regulation affirms that: “Shoreline areas, being a limited ecological and economic resource, are the setting for competing uses and ecological protection and restoration activities.” This missing sentence is an express recognition that not all uses can be allowed in every shoreline environment. In some areas, ecological protection and restoration may prevail over economic development.

Moreover, WAC 173-26-201(2)(c) provides a lengthy discussion of the intent of the SMP guidelines to protect ecological functions and the requirement of local governments in adopting their SMPs. This includes that:

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<sup>11</sup> This is further verified in the sentence that follows Hood Canal’s lengthy excerpt of WAC 173-26-231(3)(b) for piers and docks. The regulation continues: “Where new piers or docks are allowed...” again, an express recognition that new piers and docks are not allowed everywhere.

Master programs shall contain policies and regulations that assure, at minimum, no net loss of ecological functions necessary to sustain shoreline natural resources. To achieve this standard while accommodating appropriate and necessary shoreline uses and development, master programs should establish and apply:

- Environment designations with appropriate use and development standards; and
- Provisions to address the impacts of specific common shoreline uses, development activities and modification actions; and
- Provisions for the protection of critical areas within the shoreline; and
- Provisions for mitigation measures and methods to address unanticipated impacts.

WAC 173-26-201(2)(c). This is again, express recognition that not all uses must be allowed in every shoreline environment.

The SMA and SMP guidelines do not require that all uses be allowed in every shoreline environment. In *Samson v City of Bainbridge Island*, for example, this Court upheld the City's prohibition on private docks in Bainbridge Island's Blakely Harbor against Samson's argument that the prohibition violated the SMA's preference for water dependent and water related uses. The Court instead agreed with the City that the prohibition supported other goals of the SMA and SMP by protecting against

interference with navigable waters, protecting the public' use of the shoreline and minimizing adverse environmental impacts. 149 Wn. App. 33, 52-54, 202 P.3d 334 (2009).<sup>12</sup>

In this case, as with the City of Bainbridge Island's decision to protect Blakely Harbor in order to protect against adverse environmental impacts, Hood Canal Sand's shoreline property on Hood Canal was designated Conservancy based in part on its key environmental attributes including: high functioning shoreline resources with a low degree of modification or stressors; extensive presence of salmonid habitat including habitat for threatened and endangered species; the presence of erosive or hazardous slopes; and the presence of commercial shellfish beds.<sup>13</sup> Jefferson County's decision to prohibit mining and mine related marine transport within the Conservancy shoreline environment is consistent with RCW 90.58.020 and the SMP guidelines. For this reason alone, the Board's affirmation of the SMP's prohibition neither "conflicts with the legislature's

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<sup>12</sup> See also *Lund v. Dept of Ecology*, 93 Wn. App. 239, 336-37, 96 P.2d 1072 (1998) (upholding an SMP prohibition on over-water residences because even though residences are a preferred use, the use is secondary to "the SMA's primary purpose, which is to 'protect the state shorelines as fully as possible.'"); *Weden v. San Juan Cy.*, 135 Wn.2d 678, 695-697, 958 P.2d 273 (1998)(upholding an SMP ban on personal watercraft because even though the SMA promotes recreational opportunities on the water, that preference is below protecting the resources and ecology of the shoreline).

<sup>13</sup> CP 3693.

intent [n]or exceeds the agency’s authority” and should be upheld. *Samson*, 149 Wn. App. at 43.

**3. While not determinative, the Board’s conclusion that Hood Canal’s marine transport facility was not a “water-dependent” use was not erroneous.**

Hood Canal Sand devotes a significant portion of its Brief to challenging the Board’s conclusion that its mining operation is not “water dependent.” But as discussed above, Jefferson County was not obligated by the SMA or SMP Guidelines to allow mining or mine-related marine transport systems -- whether or not water dependent -- on all shoreline environments, much less in the Conservancy environment on a shoreline of statewide significance. Thus, the Board’s conclusion that Hood Canal’s mining operation was not “water-dependent” is largely irrelevant. But in the event this Court believes it necessary to address the Board’s conclusion that Hood Canal Sand’s proposed pit-to-pier project is not water dependent, the Court should affirm the Board

Hood Canal Sand relies primarily on drawing a comparison between its proposed pit-to-pier facility and the mine and barge loading facility at issue in *Preserve Our Islands* . But other than a desire to potentially increase its profits by locating a marine terminal on the Hood Canal, Hood Canal

Sand's current mining operation and proposed pit-to-pier facility have almost nothing in common with the situation in *Preserve Our Islands*.

At the outset the procedural context of *Preserve Our Islands* is significantly different than the present case. *Preserve Our Islands* was not a challenge to the adoption of an SMP. The case concerned interpretation of an existing SMP. King County's existing SMP allowed "water dependent uses" but prohibited "water related uses" within the Conservancy shoreline environment. The prohibition on "water related use" was not at issue before the Shoreline Hearings Board ("SHB") or court. Instead at issue was whether Glacier's proposed barge loading facility and associated adjacent mine were water dependent and allowed, or water related and prohibited.

The SHB and court concluded that based on the facts of the case – particularly that because Glacier's mining operation was based on an island and could *only* be commercially significant with barge loading -- King County had erred in interpreting its code to find that Glacier's mine and adjacent barge loading facility was not water dependent. And because the project was water dependent it was expressly allowed under King County's SMP.

The *Preserve Our Islands* Court did not conclude, and *Preserve our Islands* does not stand for, or support, the proposition, that a County SMP must allow all water dependent uses in all shoreline environments. Nor does *Preserve our Islands* stand for the proposition that a County cannot prohibit mining related activities, including mine related marine terminals, within a particular shoreline environment. To the contrary, the court concluded that “if the County wants to prohibit commercially significant mining as the principal use, it must do so directly through a zoning change... .” 133 Wn. App. At 535-26. In this case Jefferson County is not misinterpreting its SMP, instead it adopted an SMP that prohibits mining within the Conservancy environment. *Preserve Our Islands* is of little, if any, relevance.

The *Preserve Our Islands* Court’s decision that Glacier’s proposed barge loading facility was “water-dependent” is also factually distinguishable from Hood Canal Sand’s proposed “pit-to-pier” facility. First, in *Preserve Our Islands*, Glacier owned a 235-acre sand and gravel mine “on” the southeast shore of Maury Island. The mining operation was in direct connection to the location of its proposed barge loading facility. 133 Wn. App. at 510-511. Here, in contrast, Hood Canal Sand’s shoreline

property on Hood Canal is over a mile away from its ongoing upland mining operation. Hood Canal's mining operation is not located on, nor adjacent to, the shoreline. *Supra* at 8-9:

Second, Glacier's shoreline property on Maury Island was designated by King County's GMA Comprehensive Plan as "Mineral Resource Lands" and appropriately zoned "M" or "mineral." 133 Wn. App. at 520-522. As the court concluded: "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." *Id.* at 522. Here, in contrast, while Hood Canal Sand actively mines land within Jefferson County's MRLO, that property is over a mile inland and served by an existing conveyor that transports sand and gravel to its Shine Hub for truck transportation. *Supra* at 8-9. Hood Canal's shoreline property is designated by Jefferson County's Comprehensive Plan as "Rural" and zoned "RR-5" or "rural residential." It does not lie within the MRLO. *Id.*

Third, Glacier's mine was located on an island. While the mine had operated at a very small scale selling sand and gravel to local island residents, both the Hearings Board and court agreed that "in order for the mine to operate at a commercially significant level, it requires barging." *Id.*

at 517-518, 520. Here, in contrast, Hood Canal’s mining operation is not located on an island. There was no information before Jefferson County that the Hood Canal’s mining operation was not economic without marine transport. Indeed, the County recognized that ongoing truck transport and possible future marine transport were independent and served different markets, Jefferson County Ordinance 08-0706-04, Finding 99, and that even without marine transport the applicant projected that the quantity of product moved by truck would “increase by 50% over the next decades whether or not the marine transport system is approved.” *Id.* Finding 102.

Finally, Jefferson County’s decision to designated Hood Canal’s MRLO expressly recognized that the mining operation was “not dependent” on a marine transport system, *Id.*, Finding 9. Moreover, that even under Jefferson County’s old SMP, the Board of County Commissioners had doubts as to whether a shoreline conditional use permit would, or could, ever be issued. *Id.* Finding 143. At best, Jefferson County recognized only that Hood Canal might be able to expand to more distant markets “*if* marine transport is approved and *if* more distant customers are available... .” *Id.*, Findings 98-100 (emphasis added). Thus, in contrast with *Preserve our Islands*, in the process of approving Hood Canal’s MRLO overlay, Jefferson

County did not conclude that HCS&G's mining operations would only be commercial with a future marine transportation terminal. Hood Canal's mining operations do not require direct contact with the water due to their intrinsic nature. Hood Canal's operations are not "water dependent."

Whether Hood Canal's mine and marine transfer facility are water dependent is irrelevant in determining whether Jefferson County complied with the SMA and SMP guidelines in deciding that mine related activities are prohibited within the Conservancy shoreline environment. But even if relevant, the Board did not err as a matter of law.

**4. Jefferson County's prohibition on mining related industry within the Conservation shoreline on Hood Canal is not inconsistent with the County's Comprehensive Plan.**

As discussed above, the applicable "laws and regulations" for reviewing an SMP addressing shorelines of statewide significance are the policy in RCW 90.58.020, and the applicable SMP guidelines in WAC 173-26-171 to WAC 173-26-251. RCW 90.58.190(2)(b). *Supra* at 9-12. But even if it was appropriate to review Jefferson County's SMP as if it addressed "shorelines" instead of shorelines of statewide significance and thus also need to meet the consistency requirements within the GMA, RCW 90.58.190(2)(b), Hood Canal Sand fails to meet its burden of demonstrating

an internal inconsistency between the County’s adopted shoreline goals and policies and its other comprehensive plan goals and policies.

Instead Hood Canal Sand simply lists several comprehensive plan policies and then concludes that the SMP nullifies these conclusions. HCS Brief at 23-25.<sup>14</sup> But a comprehensive plan goal to “encourage resource-based industries,” for example, is not “nullified” by Jefferson County’s decision not to allow mining related industry within the Conservative shoreline environment on Hood Canal. First, as discussed above, in designating the MRLO, the County recognized that mining within the MRLO is independent of marine transport and that a shoreline permit might never have been authorized for marine transport. *Supra* at 6-7. Moreover, as discussed above, Jefferson County’s SMP allows mining and industrial piers in the “High Intensity” shoreline environment. *Supra* at 4-5; JCC 18.25.480(3). Thus, contrary to Hood Canal Sand’s assertion, Jefferson County has not prohibited commercial mining through its SMP – it has

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<sup>14</sup> Noticeably missing from Hood Canal’s list of goals and policies are the goals and policies for “Rural Residential Lands” – the comprehensive plan designation and zoning for Hood Canal’s shoreline property.

simply prohibited mining industry uses within the Conservancy shoreline of Hood Canal.<sup>15</sup>

**5. Hood Canal Sand Sand to meet its burden of demonstrating that Jefferson County’s SMP was inconsistent with the applicable shoreline guidelines.**

Hood Canal Sand makes several arguments at pages 29-32 in support of its claim that Jefferson County’s SMP is inconsistent with the SMP guidelines, specifically WAC 173-26-201(2). Hood Canal Sand ignores, however, that it had the burden before the Board to demonstrate, with clear and convincing evidence, that the Jefferson County’s SMP was inconsistent with the applicable guidelines. RCW 90.58.190(2)(c) and (d). It failed to meet its burden below and fails again here.

Hood Canal Sand cites first to RCW 90.58.100(1) and WAC 173-26-201(2)(a) for the proposition that the County was required to use scientific and technical information in adopting its SMP and conduct a reasoned evaluation of the merits of conflicting data. HCS Brief at 29. Hood

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<sup>15</sup> Ironically, Hood Canal Sand quotes *Preserve our Islands* for the proposition that: “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 ... .” HCS Brief at 26. Hood Canal ignores that Jefferson County’s zoning for Hood Canal’s shoreline is not zoned for mining or industry – it is zoned for rural residential use.

Canal Sand fails, however, to point to any evidence supporting its implication that the County failed to comply with the procedures in WAC 173-26-201(2).

To the contrary, the county prepared an extensive shoreline inventory and characterization report and found for the vicinity of Hood Canal Sand's shoreline property that it had the following attributes: high functioning shoreline resources with a low degree of modifications or stressors; extensive presences of salmonid habitat; the presence of salt marshes and lagoons, which are high value areas that are particularly sensitive to disturbance; the presence of erosive and/or hazardous slopes; and the presence of commercial shellfish beds. CP 3693. These factors support the County's decision to prohibit mining and mine related marine transport facilities in this area. Hood Canal Sand cites no contrary evidence nor provides any evidence that the County violated WAC 173-26-201(2)(a)

After quoting Ecology's comments related to aquaculture, HCSG asserts, without explanation, that the County's "ban was not supported or aligned with the policies of RCW 90.58.020..." Hood Canal Brief at 29-30. But as discussed above, *supra* at 13-16, the policies of RCW 90.58.020 do not require SMPs to allow even water dependent uses in every shoreline

environment, especially not on shorelines of statewide significance like Hood Canal.

Hood Canal next asserts, again without analysis or explanation, that the ban was “in direct conflict with the “preferred use” priorities of WAC 173-26-201(2)(d). Hood Canal ignores that WAC 173-26-201(2)(d) first recognized that shoreline areas are limited and that when resolving conflicts, local governments are required to apply the listed preferences and priorities “in the order listed.”<sup>16</sup> Hood Canal then fails to mention that the first listed priority is to: “Reserve appropriate areas for protecting and restoring ecological functions to control pollution and prevent damage to the natural environment and public health.” WAC 173-26-201(2)(d)(i). While the *second* priority is to reserve shoreline areas for water dependent and associated uses, this is the *second* priority after reserving appropriate areas for protection and restoration of ecological functions. Jefferson County’s decision to ban mining and mine-related marine transportation in

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<sup>16</sup> In addition to the priorities identified in WAC 173-26-201(2)(d), for shorelines of statewide significance the regulation also requires application of the preferences set out in WAC 173-26-251(2) which mirror the priorities listed in RCW 90.58.020.

the Conservancy shoreline environment does not conflict with the preferred use priorities in WAC 173-26-20(2)(d).<sup>17</sup>

**C. Jefferson County and Ecology Provided for Public Input Prior to Final Approval of Jefferson County's SMP.**

HCC supports and incorporates by reference the responses of Jefferson County and Ecology confirming that the public, including Hood Canal, were provided the opportunity to provide input prior to final adoption of Jefferson County's SMP.

**IV. CONCLUSION**

Hood Canal Sand had the burden of demonstrating to the Board, with clear and convincing evidence, that Jefferson County's decision to prohibit mining within the Conservancy shoreline environment was inconsistent with RCW 90.58.020 or the applicable SMP guidelines. It failed to meet its burden.

On appeal, this Court gives due deference to the Board's specialized knowledge and expertise unless there is a compelling indication that the

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<sup>17</sup> In a confusing argument, Hood Canal asks "if the goal was to protect the shoreline, why would the County allow the high impact activity of actual mining within the shoreline habitat...? Hood Canal Brief at 30-31. The answer is simple: it didn't. The Jefferson County SMP bans all mining use and development on the Conservancy shoreline environment. JCC 18.25.480(3)(d). *See also* JCC 18.25.220 (use table).

board's interpretation conflicts with the legislative intent. Nothing in RCW 90.58.020 or the applicable SMP guidelines required Jefferson County to allow mining or mining related marine transportation within the Conservancy shoreline environment.

For the foregoing reasons, and the reasons set out by Jefferson County and Ecology, this Court should uphold the Board's decision and deny the appeals

Dated this <sup>27<sup>th</sup></sup>~~28~~ day of April, 2016.

Respectfully submitted,

GENDLER & MANN, LLP

By:   
David S. Mann, WSBA 21068  
Attorneys for Hood Canal  
Coalition

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing was served on all parties of record as stated below in the manner indicated.

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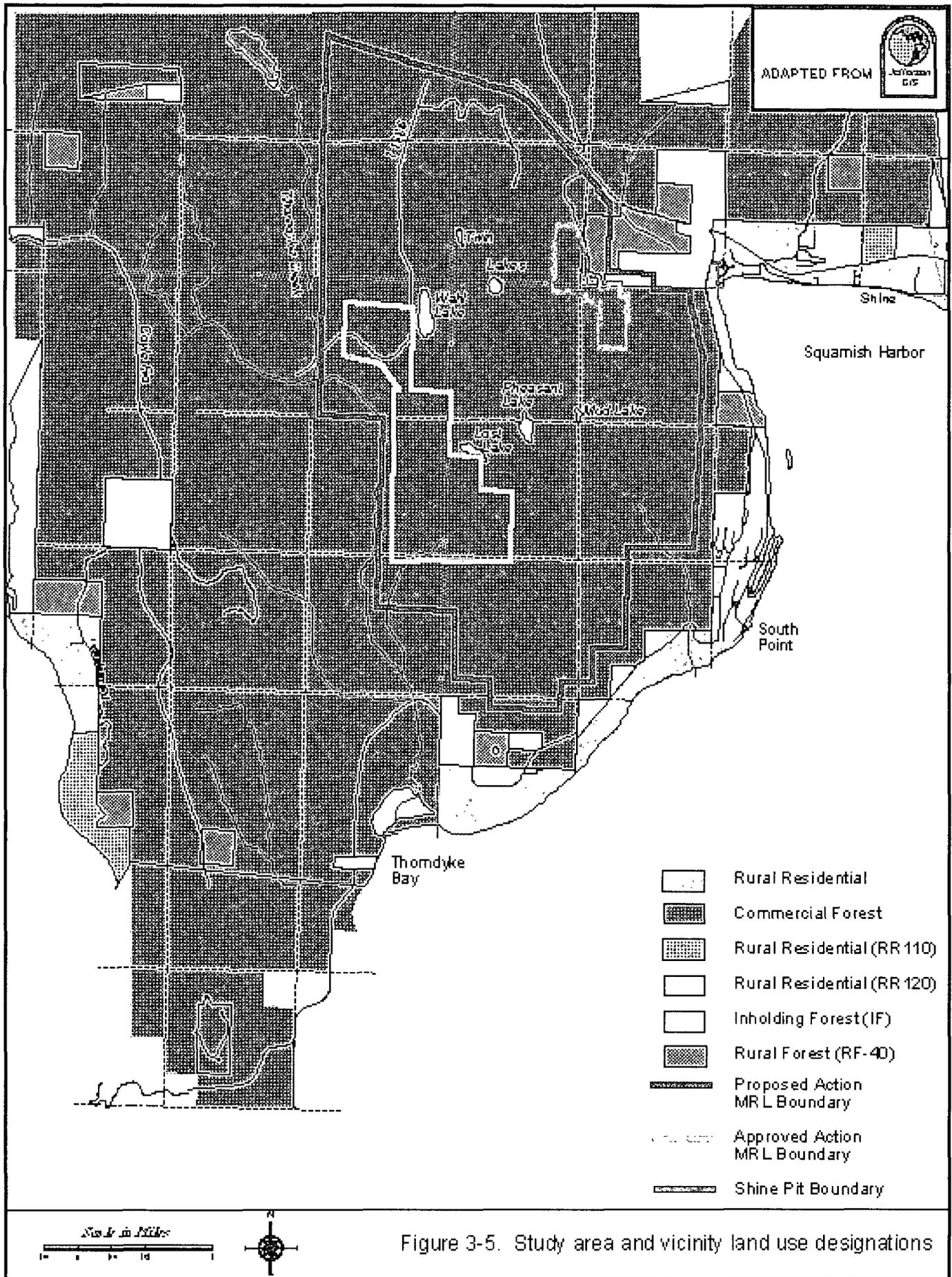
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DIVISION II  
2016 APR 29 PM 1:05  
STATE OF WASHINGTON  
BY DR  
DEPUTY

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

Dated this <sup>27<sup>th</sup></sup>~~28<sup>th</sup>~~ day of April, 2016, in Seattle, WA.

  
\_\_\_\_\_  
David S. Mann

## **APPENDIX 1**



<http://www.co.jefferson.wa.us/commdevelopment/PDFS/Draft%20SEIS%20MLA02-235.pdf>

## **APPENDIX 2**

**Parcel Number:** 721194002

03/21/2016

**Owner Mailing Address:**

HOOD CANAL SAND & GRAVEL LLC  
17791 FJORD DR NE, STE 130

POULSBO WA 98370

**Site Address:**

98370

Section:	19	School District:	Chimacum (49)
Qtr Section:	SE1/4	Fire Dist:	Port Ludlow (3)
Township:	27N	Tax Status:	Taxable
Range:	1E	Tax Code:	0231
Planning area:	98370		
Sewer:		Drainage:	
Bank:		View 1:	
View 2:		Zoning 1:	RR-5 - Rural Residential
Zoning 2:		Zoning 3:	
Sub Division:			
Land Use Code:	9100 - Vacant Land		

98370

**Property Description:**

S19 T27 R1E LOT NO. 1 (LESS W 264')

