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COURT OF APPEALS

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No. 34128-0-II

STATE OF WASHINGTON

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

CM

THURSTON COUNTY, a municipal corporation and political subdivision
of the State of Washington, and BLACK HILLS AUDUBON SOCIETY,
INC. a Washington nonprofit corporation,

Appellants/Cross-Respondents,

vs.

QUALITY ROCK PRODUCTS, INC. a Washington Corporation, and
EUCON CORPORATION, an Idaho Corporation,

Respondents/Cross-Appellants.

**RESPONDENTS/CROSS-APPELLANTS QUALITY ROCK
PRODUCTS, INC. & EUCON CORPORATION'S
REPLY BRIEF ON CROSS-APPEAL**

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I. STATEMENT OF ADDITIONAL FACTS AND ARGUMENT

A. THE 75-ACRE LAKE WILL NOT HAVE A SUBSTANTIAL OR UNDUE ADVERSE EFFECT ON THE BLACK RIVER.

A determination of whether the Thurston County Board of Commissioners' action in reversing the Hearing Examiner's ("HE") decision was arbitrary, capricious or unlawful will be based largely on the facts found by the HE. Therefore, Quality Rock Products ("QRP") offers this clarification and summary of these facts.

The parties have cited many facts and figures regarding the application and the effects of gravel mining below the water aquifer on the Black River and its surroundings.¹ However, none of these facts or figures have been put into the context of the immediate area, the existing mining operation or the greater Thurston County area. QRP's Reply Brief will begin by putting all of these issues into that context.

The general effects of mining below the aquifer were fully addressed in 1995 by Robert Mead, Thurston County's expert in this process. Mr. Mead's report, "The Direct and Cumulative Effects of Gravel Mining on Ground Water Within Thurston County, Washington," (AR 2341-79) discusses the effects of operations like QRP's.² Mr. Mead

¹ QRP incorporates the facts and analysis set forth in its Response Brief.

² For ease of reference, QRP cites to the Administrative Record ("AR") pagination in this Reply Brief.

notes at AR 2342 “For the geological conditions found in Thurston County, the additional risk presented by simple excavation within an aquifer is small.” He also noted that creating gravel pit lakes lowers the water table in wells up-gradient from the lake but raises them on the down-gradient side. He also notes “This is a relatively local effect, but can measurably affect water levels and wells very near to the gravel pit lake.” (AR 2342)

Mr. Mead’s study anticipates more gravel pit lakes being created but notes that if they are “distributed evenly over the whole of Thurston County, these losses are probably not critical.” (AR 2354) In his summary and conclusions, Mr. Mead states “Mining below the water table and into an active aquifer brings some additional minor risks to groundwater quality For the geological conditions found in Thurston County, the additional risk presented by simple excavation within an aquifer is small.” (AR 2362) At AR 2363, he says “Gravel mining, in general, poses low to moderate risks to ground water quality and quantity. But adequate regulatory oversight of project design and approval, operation, monitoring closure and adequate enforcement are necessary if risks are to be kept to an acceptable level.”

Thus, nine years before this matter came before the Thurston County Commissioners, Mr. Mead had anticipated, studied and provided opinions on gravel pit lakes in Thurston County. With regard to the specific analysis of the project’s ground water impacts, Mr. Mead was the

County's expert who opined that the project would not adversely affect the water quantity and quality in the area and with regards to the remand issues pertaining to the Black River. (AR 671)

Further, when looking at the groundwater impacts of the project, it is important to understand that there are 6,950 acres of surface water in Thurston County. (AR 2354) The proposed 75-acre lake will be the equivalent of 1% of that total. Assuming that evapotranspiration from all lakes is the same, the 9-1/2 million gallons of water that will be lost to evapotranspiration from this 75-acre lake equates to 950,000,000 gallons of water being lost from the 6,950 acres of surface water in Thurston County.

There are three productive aquifer units in this portion of northern Thurston County. These units consist of the Vashon Recessional Outwash; the Vashon Advance Outwash; and the Salmon Springs Drift. QRP's mining expansion will only affect the Vashon Advance Outwash. (AR 1400) The Vashon Advance Outwash is estimated to be about 100 feet thick at QRP's site, making it an important local aggregate resource. Elsewhere in northern Thurston County, this unit is typically 15 to 35 feet thick. (AR 1399)

There are 3,800 acres of land within the Black River Refuge boundary. (AR 336) 151 acres within that boundary constitutes only 4% and this is not reflective of the entire drainage area for the Black River.

QRP's current operation produces approximately 216,000 tons of aggregate per year. (AR 599) In August, 2000, the peak production month during this time period produced 25,000 tons.

In Pacific Groundwater Group's ("PGG") study of water use estimates for the proposed McEwan Prairie Surface Mine, it found that large gravel mines have very sophisticated recycling systems and the additional water made available by them is significant. (AR 2680) It found that 50% to 98% of the water used at the studied mines came from recycling ponds. (AR 2683-85) Assuming this is true of QRP's operation, the 5,000-gallon per day well equates to 10,000 to 250,000 gallons per day through its recycling ponds. A mining operation is not required to account for its use of recycled water. The Department of Ecology ("DOE") does not consider evaporation from reservoirs as part of a water rights determination. (AR 2680)

In a study done by SubTerra, Inc. ("SubTerra"), it found that evaporation losses from pit lakes can be a concern in the drier eastern portions of the state, but they have never been seen as a problem in Western Washington. (AR 2176) Further, contrary to claims of the County and Black Hills Audubon Society, Inc. ("BHAS") that QRP only has the PGG study to rely upon, the record demonstrates that SubTerra **also** performed tests relating to ground water and directly responded to concerns raised about water impacts:

Dr. Barron indicated that mining below the water table could cause evaporative loss and contamination to the ground water in this area. Evaporative loss can be a concern in the drier eastern portions of the state however it has not been seen as a problem in western Washington. **We believe that the increased storage capacity created by the lake will more than offset any evaporative loss. The anticipated changes in the water table, as a result of the lake were documented in the Report on the Soils, Geology and Ground Water (SubTerra, 2000) should be minimal** (please see Figures 12, 13 and 14 of that report).³

As demonstrated above, the gravel pit lake will actually act as a reservoir making more water available so that more water can be extracted from wells near the lake with less drawdown of the water table due to the large amount of water available in the lake. (AR 1721; 1816) Likewise, this will mean that more water will be available for recharge of the Black River system. Nothing in the record refutes this finding.

Instead, SubTerra's conclusion were **confirmed** by the County's expert hydrogeologist, Mr. Mead, who also reviewed well, spring and outcrop records for the study area in order to properly analyze the potential water impacts. The information from SubTerra, Mr. Mead and the PGG Study all support the Hearing Examiner's Finding No. 15 that the average annual evapotranspiration from the pit lake would be two feet per year but that this figure would exceed the historic evapotranspiration rate by only 3.7 inches per year. Buttressed by three expert opinions (SubTerra, PGG and Mr. Mead), the HE found that this amount was

³ (Emphasis added) (AR 2176) SubTerra's opinion was submitted in response to a Mace G. Barron, Ecologist for BHAS. (AR 2174)

considered a small change from the vegetative to the lake effect. 3.7 inches is roughly 15.4% of 24 inches. Thus, of the 9-1/2 million gallons that would be lost through evapotranspiration from the lake, 8,037,000 would be lost through reclamation and revegetation of the area.

BHAS argues that using a revegetated, reclaimed area is improper and instead, the bare ground that exists in some areas of the mining operation now should be used. This claim ignores that the mining operation is currently under a reclamation plan from the Washington State Department of Natural Resources (“DNR”), which requires the revegetation of the site. (AR 675-78) In fact, DNR has ordered that “[t]he site shall be **aggressively revegetated** as appropriate for the approved subsequent use of the permit area and as presented in the reclamation plan.” (Emphasis added) (AR 678)

In a February 1, 2002 letter from Robert Mead, he comments on the evapotranspiration concerns expressed in a letter from a Robert Schanz stating: “Although no water right is required for this type of incidental water consumption, it is a real effect of creating a new open body of water. Although this loss is undesirable, it is trivial compared to the amount of water flowing through the system.” (AR 2181-82)

His comment taken in context is real. The amount of water lost from the proposed 75-acre lake is only 1% of the water lost to all open bodies of water in Thurston County. The 150-acre development is only

4% of the entire acreage in the Black River Refuge. Accordingly, Mr. Mead opined:

I do not expect that this expansion will have any significant adverse effect on ground or surface water. As material is excavated from the pit, water will be temporarily drawn from the surrounding area, including the Black River. This effect will be temporary, and will be balanced by the longer-term effect of increased storage in the excavated pit. The increased storage will slightly reduce variations in the local water table. A small amount of additional water will be lost through evaporation, but this will be largely balanced by reduced evapotranspiration from plants now covering the expansion area. . . . The expansion itself should not produce any significant adverse effect on water quality.

(Emphasis added) (AR 671)

The current operation produces 216,000 tons of aggregate per year. This is roughly 86% of the increased production anticipated for the first six years of the expanded mining operation, or 250,000 tons.⁴ The County's Staff correctly identified the "water source" for the Project as being the "existing well on the site which is currently used as an approved public water system for this facility." (AR 667)

⁴ The County's math on page 6 of its Reply Brief is faulty. In footnote 4, it divides 250,000 tons, the amount projected to be produced during each of the first six years of operation, by twelve months to come up with approximately 21,000 tons per month. The County then takes 21,000 tons multiplies it by 1-1/2 to come up with the amount to be used during the heavier production months. This obviously gives you an inflated number. For example, if production was 120 tons per month divided by 12 months, it would equal 10 tons per month. Increasing production for four months by 1-1/2 would be equal to 15 tons for those four months, or an additional 20 tons. Instead of 120 tons, you'd have 140 tons, not the original 120 tons.

Under state law, and a specific SUP condition imposed by the HE, Quality Rock **cannot** withdraw more than 5,000 gallons of water per day from its well unless it obtains an additional water right from the DOE. All claims to the contrary by the County or BHAS are simply disingenuous and irrelevant.⁵ Again, without an additional water right, Quality Rock is limited to withdrawing 5,000 gallons of water a day, period.

II. BURDEN OF PROOF ON APPEAL

BHAS Opening and Reply Briefs raise the question of which party has the burden of proof for this Court's review under RCW 36.70C.130(1). It is unclear from the case law whether the entity appealing from the highest fact finding level and the initial decision maker has the burden to overturn that decision. If the County Commissioners acted in an appellate capacity, they are not the fact finders. Instead, they are in the same position as the Superior Court and this court on review and it is not their decision, but the HE's decision that is at issue.

Likewise, under LUPA it appears that if the County Commissioners were both the fact finders and decision makers, then it would be their decision that was being appealed and the burden to overturn their decision would be on the entity losing before them. In the

⁵ On page 6 of Thurston County's Reply Brief, footnote 5, the claim is made that 5,000 gallons per day from the exempt well is enough to wash only approximately 685 tons per day. QRP presently averages 18,000 tons per month, or over 26 days of production per month, 692 tons per day! According to the County, this is impossible. Obviously, their position and the bases for their position are wrong.

present situation, the Board simply acted as an appellate body, and it can be argued that they have no more distinction than does the Superior Court. The Court of Appeals looks to the findings and conclusions of the HE in this case, not those made by the County Commissioners.

The Court of Appeals reviews the fact finder's findings, either the HE or in the case of a recommendation to a City Council or County Commissioners, for sufficiency of evidence. *Waste Management of Seattle, Inc. v. The Utilities & Transportations Commission*, 123 Wn.2d 621, 632, 869 P.2d 1034 (1994). The party who appeals from those findings is the party who should have the burden of proof on all appeals.

The two cases cited by BHAS are consistent with this reasoning.

First, in *Tahoma Audubon Society v. Park Junction Partners*, 128 Wn. App. 671, 116 P.3d 1046 (2005), the HE approved a conditional use permit. There was no review of that decision by the County Commissioners, but instead the appeal went directly to the Superior Court. The losing party before the HE had the burden of proof on appeal. Here, the Audubon Society was the party seeking relief from the land use decision. The Court specifically found "this burden remains with the petitioning party on appeal, even if that party prevailed on its LUPA claim. See *Pinecrest Homeowners Association v. Cloninger & Associates*, 151 Wn.2d 279, 288, 87 P.3d 1176 (2004). Thus, the Audubon Society bears the burden on appeal."

In our case, the BHAS was the losing party before the HE and thus it bears the burden on appeal, whether that appeal is to the County Commissioners, to Superior Court, or to this Court. This makes sense given that the deferential factual review requires the Court to view the evidence and the reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact finding authority. *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 694, 49 P.3d 860 (2002).

In *Pinecrest, supra*, it appears that the City Council held a *de novo* hearing on the appeal from the HE's decision because the Court notes at 288 in discussing the standard of review:

Under LUPA, this court stands in the shoes of the superior court and limits its review to the record before the City Council. . . . Because the Court of Appeals reversed the superior court and granted Pinecrest's LUPA petition, Cloninger was necessarily the petitioner before this court; however, that status neither eliminates nor alters Pinecrest's burden under RCW 36.70C.130(1).

To the extent that BHAS raised the issue as to the correct burden of proof where the Board acted in an appellate capacity, QRP asks this Court to determine which party correctly has the burden of proof in this matter.

III. THURSTON COUNTY IS LIABLE TO QRP FOR VIOLATING ITS CONSTITUTIONALLY PROTECTED PROPERTY INTERESTS AND FOR VIOLATING RCW 64.40.020

A. ISSUES ON DECLARATORY JUDGMENT.

BHAS argues that because the application for an asphalt plant was coupled with the permit for the expansion of gravel mining that they are bound together and that QRP is not entitled to a permit for the asphalt plant. RCW 36.70C.100 and R.A.P. 8.1 allow a party to request a supersedeas bond to stay an action while on appeal. The intent is to allow an approved development to proceed during the appellate process unless some steps are taken to stop it while protecting the prevailing party from damages caused by the delay. No supersedeas bond has been filed in this action. Without such bond being filed and a stay of proceedings issued, the permit should have been issued. *Pinecrest Homeowners Association, supra*, at 288. In *Pinecrest*, the Court noted that while the Petitioner's "failure to seek a stay did not compromise its right to appeal the superior court decision, the failure permitted Cloninger to act on the superior court decision; the hearing examiner's subsequent approval of the rezone and the city's granting of a building permit were thus legal actions." Like the prevailing party in *Pinecrest*, QRP had a right to have the permit for the asphalt plant issued and the City had an absolute obligation to issue it.

QRP finds Thurston County's response on this issue to be devoid of merit. Thurston County does little more than to regurgitate its factual statements and call them "arguments".

RCW 36.70C.030 excepts judicial review of claims provided by law for money damages or compensation from the LUPA appeal process. It provides that “. . . the claims are not subject to the procedures and standards . . . provided in this chapter for review of the petition.”

Thurston County misinterprets *Hayes v. Seattle*, 131 Wn.2d 706, 934 P.2d 1179 (1997) and ignores its ruling. Thurston County argues that because QRP filed a joint land use petition and complaint including claims for money damages and declaratory relief, that it is bound by the decision in one claim. This is not what *Hayes* or RCW 36.70C.030 holds. Rather, they hold that a party can bring two separate claims, one under LUPA and one for damages or it can combine them in one case. QRP chose to combine them in one case. The fact that the LUPA claim was heard on the record does not preclude QRP from completely litigating the issues with full discovery being allowed in the damages case. Thurston County ignores the statute and this ruling in *Hayes*.

B. THE COUNTY COMMISSIONERS ACTIONS WERE ARBITRARY, CAPRICIOUS AND UNLAWFUL.

At page 30 of its Reply Brief, Thurston County argues “in order for Quality Rock to prevail in its claim for damages, it must establish the Board’s action was arbitrary and capricious. RCW 64.40.020.” How do we know the Board’s actions were arbitrary and capricious?

First, QRP relies on the Statement of Facts above. These facts are overwhelming. The Board is required to give deference to these facts.

Benchmark Land Company v. City of Battle Ground, 146 Wn.2d 685, 49 P.3d 860 (2002). This, coupled with the requirements of RCW 36.70C.130 to review factual issues under the substantial evidence test, required the Board to rule in QRP's favor. Substantial evidence is given a highly deferential standard of review in the light most favorable to the party who prevailed in the highest form that exercised fact-finding authority. *AARCO Products Co. v. Washington Utilities & Transportation Commission*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995); *Benchmark, supra* at 694.

The Board's role is to review the record to determine whether it contained substantial evidence to support the decision of the HE RCW 36.70B.060(3); *East Fork Hills Rural Association v. Clark County*, 92 Wn. App. 838, 965 P.2d 650 (1998). The Board's role is to view the challenged decision and determine whether there is substantial evidence in the record to support it. If more than one conclusion could have been drawn from the evidence, the Board should have deferred to the HE. *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371-72, 859 P.2d 610 (1993).

Because the Board failed to give deference to the HE's findings of fact, their decision should be determined to be arbitrary and capricious and this matter should be remanded to the Superior Court for trial on damages.

C. THE BOARD'S ACTIONS WERE UNLAWFUL.

RCW 64.40.020 provides a cause of action against the government when its actions “exceed lawful authority” If the lawsuit is based upon the actions being unlawful or in excess of lawful authority, then the plaintiff must show that the final decision of the agency “was made with knowledge of its unlawfulness or that was in excess of lawful authority, or it should reasonably have been known to be unlawful or in excess of lawful authority.” How do we know that the Board knew or should have known that its actions were unlawful?

First, because they were told by QRP that they were acting in an appellate capacity and specifically advised of their limited role to search the record for substantial evidence supporting the HE’s decision. (AR 99-103)

Next, the Board utilized the wrong standards and contradicted the County’s own final and binding MDNS, both of which are unlawful acts. The County’s Responsible Official reviewed the impacts to groundwater movement, quantity and quality and determined that the project would not have “probable significant adverse impact upon the environment” and issued a mitigated determination of non-significance (“MDNS”). The County released the MDNS for public comment, advised that the MDNS was subject to appeal if submitted during the identified appeal period and, if it was not appealed, the MDNS would become final. When the MDNS was not appealed, it became final. The Board then failed to use the correct

SUP criteria adopted in the County's own zoning code and based its denial on the wrong SUP standards. The Board used a "significant adverse impact" standard to guide its determination. The standard directly conflicts with the County's final and binding MDNS. The Thurston County Board's actions contradicted the Thurston County Staff's actions on the same issue. The Board had no authority to do this and its actions were unlawful. As stated in *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 961, 954 P.2d 250 (1998).

The discretion permissible in zoning matters is that which is exercised in adopting the zone classifications with the terms, standards, and requirements pertinent thereto, all of which must be by general ordinance applicable to all persons alike. The acts of administering a zoning ordinance do not go back to the questions of policy and discretion which were settled at the time of the adoption of the ordinance. Administrative authorities are properly concerned with questions of compliance with the ordinance, not with its wisdom. To subject individuals to questions of policy in administrative matters would be unconstitutional. (Emphasis added)

The Board's actions went outside the discretion authorized by the County's own zoning code. This makes the Board's actions unlawful.⁶

⁶ The Board specifically required all persons within the County who applied for a SUP permit to use the SUP criteria found in TCC 20.54.040, which provides in pertinent part:

3. Location. No application for a special use shall be approved unless a specific finding is made that the proposed special use is appropriate in the location for which it is proposed. **This finding shall be based on the following criteria:**

The County issued the MDNS and declared that that project did not have a probable “significant adverse impact upon the environment.” AR 631. The Board’s subsequent actions in using the wrong standard, ignoring the MDNS and its binding effect makes its actions unlawful. *See Chelan County v. Nykreim*, 146 Wn.2d 904, 932-33, 52 P.3d 1 (2002) (confirming Washington courts’ adherence to the doctrine of finality in unappealed land use decisions); *Wenatchee Sportsman Association v. Chelan County*, 141 Wn.2d 169, 182, 4 P.3d 123 (1999) (holding that an unappealed decision is valid and “no longer reviewable”). The Board ignored its own ordinances, ignored the SEPA determination and ignored the doctrine of finality in unlawfully overturning the HE’s decision. The Board’s unlawful action subjects it to QRP’s claims for damages.

IV. CONCLUSION

QRP asks this Court to affirm the decision of the Thurston County Superior Court in upholding the HE’s decision; but reverse and hold that the Thurston County Board of Commissioners acted arbitrarily, capriciously and unlawfully in reversing the HE’s decision; reverse the Superior Court’s decision and hold that Thurston County has acted

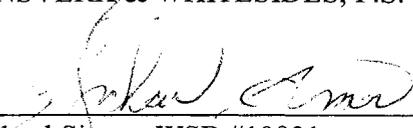
a. Impact. The proposed use shall not result in **substantial or undue adverse effects on . . . natural environment** . . . or other matters affecting the public health, safety and welfare.

By adopting TCC 20.54.040, the Board required that a “finding” on an SUP application “shall be based” on whether the project had “substantial or undue adverse effects” to the “natural environment”. Contrary to BHAS’ assertions, this standard is mandatory for everyone, including the Board. The Board simply did not have the discretion to utilize SUP criteria not adopted in its zoning code when it denied the SUP application:

unlawfully in refusing to issue the permit for the asphalt batch plant; and remand the matter to the Superior Court for a trial on damages for the Board's arbitrary, capricious and unlawful actions and for their refusal to issue the permit for the asphalt batch plant.

Respectfully submitted this 18TH day of October, 2006.

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v.

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies as follows:

1. My name is Linda Gill. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party of this action.

2. On the 18th day of October, 2006, copies of the **Respondents/Cross-Appellants Quality Rock Products, Inc.'s and Eucon Corporation's Reply Brief on Cross-Appeal** were delivered via first class United States Mail, postage prepaid, to the following persons:

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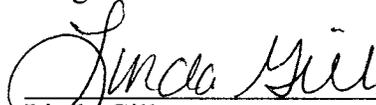
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**I CERTIFY UNDER PENALTY OF PERJURY UNDER
THE LAWS OF THE STATE OF WASHINGTON THAT THE
FOREGOING IS TRUE AND CORRECT.**

DATED: October 18, 2006
At: Vancouver, Washington



Linda Gill