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STATE OF WASHINGTON

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No. 34128-0-II

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

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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.

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**RESPONDENTS/CROSS-APPELLANTS QUALITY ROCK  
PRODUCTS, INC. & EUCON CORPORATION'S  
REPLY BRIEF IN SUPPORT OF 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.**

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.<sup>1</sup> However, none of these figures have been put into the context of the area, the existing mining operation or the greater Thurston County area. Quality Rock Products' ("QRP") 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.<sup>2</sup> Mr. Mead 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

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<sup>1</sup> QRP incorporates the facts and analysis set forth in its Response Brief.

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

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).<sup>3</sup>

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 ("HE") 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 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.

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

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.<sup>4</sup> 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)

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

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<sup>4</sup> 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.

and irrelevant.<sup>5</sup> Again, without an additional water right, Quality Rock is limited to withdrawing 5,000 gallons of water a day, period.

**B. THE BOARD'S DENIAL OF THE SUP BASED ON THE CONCLUSION THAT THE PROJECT HAD "SIGNIFICANT ADVERSE IMPACTS" UTILIZED THE WRONG STANDARD AND CONTRADICTED THE COUNTY'S OWN FINAL AND BINDING MDNS.**

The final and binding effect of the environmental review performed by the County's Responsible Official under the State Environmental Policy Act ("SEPA") is critical to this case. At the beginning of the administrative review, the County's Responsible Official was required to review the environmental impacts of the Project, including impacts to ground water movement, quantity and quality.<sup>6</sup>

Upon reviewing the impacts to ground water movement, quantity and quality (among other environmental factors), the Responsible Official 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's Responsible Official released the MDNS for public comment, and notified the public that the MDNS

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<sup>5</sup> 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.

<sup>6</sup> See WAC 197-11-444(1)(c)(i)-(v) identifying the elements of the environment to be reviewed under "water" as: (i) surface water movement/quantity/quality; (ii) runoff/absorption; (iii) floods; (iv) ground water movement/quantity/quality; and (v) public water supplies.

was subject to appeal if submitted during the identified appeal period. (AR 631)<sup>7</sup> During this appeal period, the County received 73 letters relating to the MDNS, and the following written comments from BHAS which specifically articulated its concerns relating to the proposed 75-acre lake and the potential impacts from the 9.5 million gallons per year of evaporation that could be caused by the lake:

BHAS urges you to reconsider the Quality Rocks Products Mitigated Determination of Non-significance because this project--even with the substantial proposed mitigations--will inevitably cause important and measurable environmental degradation.<sup>8</sup>

\* \* \*

**The proposed gravel extraction for the asphalt plant would excavate a 75-acre lake immediately adjacent to the Black River wetlands.** Because the excavation would be below the level of the aquifer, the lake would largely be fed by groundwater. **Evaporation from the new lake is estimated to amount to up to 9.5 million gallons per year (citation omitted). This would seem to equate to a direct reduction in the amount of groundwater flowing into the wetlands. What effect the reduction in groundwater will have on the wetlands or the downstream portions of the Black River has *not* been addressed.**

(Emphasis added) (AR 844)

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<sup>7</sup> The MDNS specifically identifies the Thurston County Code provisions which require an appeal to contest the MDNS. (AR 631)

<sup>8</sup> BHAS October 18, 2001 letter has been duplicated in the record, and demonstrates their comments submitted prior to the appeal deadline for MDNS. They could have, but chose not to appeal the determination even though they knew about the 75-acre pit lake and "Evaporation from the new lake is estimated to amount up to 9.5 million gallons per year". (AR 725; 844)

BHAS' written comments negate any argument that the County was unaware or did not consider during its SEPA review the potential impacts of the 75-acre lake and the evaporation of 9.5 million gallons of water per year. Further, since BHAS specifically raised these groundwater concerns in the SEPA process, it should have appealed the MDNS to preserve its right to contest the County's determination that the project did not have "significant adverse impacts" to groundwater or the environment.

Surprisingly, the County now claims that it was QRP that somehow failed at the SEPA Checklist level to acknowledge that a 75-acre lake would result or that there might be potential impacts from the same.<sup>9</sup> However, the County ignores its own administrative reports which demonstrate full understanding at the staff and hearing examiner level of the full scope of the project:

For the expanded mining operation, the floor of the existing operation will be lowered about sixty (60) feet, or about forty (40) feet below the regional ground water table. . . . Mining will then proceed below the water table until the final lake configuration is completed. The Applicant expects the gravel reserves to be depleted in approximately twenty (20) years. Final reclamation of the site will result

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<sup>9</sup> The County's argument is surprising because the County's Responsible Official--who has the duty of enforcing SEPA for the County--did not request additional information regarding the proposed 75-acre lake and potential evaporation even though the SEPA WACs gave authority to request the same. *See* WAC 197-11-335(1)-(2) (an agency can require an applicant to submit more information on subjects in the checklist or make its own study and physical investigations on a proposed site).

in a 75-acre lake constructed to Washington State Department of Natural Resources (DNR) standards.<sup>10</sup>

Wetlands associated with the Black River occur just off-site to the northwest of the property. The Nisqually National Wildlife Refuge manages the Black River Refuge Unit immediately east of the project site. The Black River is considered to be one of the last, large intact riparian systems in the Puget Sound area.

(AR 601)

Further, after the MDNS was issued, the County summarized the concerns raised in the 73 citizen letters. (AR 608) County Staff summarized a citizen concern that, “[a]lthough the gravel pit has been there for some time, its expansion and the creation of a 75-acres (sic) artificial lake is likely to significantly impact the groundwater flowing to the Black River a mere half mile away.” (AR 609) Significantly, County Staff specifically notified the HE that all concerns articulated in the written comments were considered by the County when reviewing the SUP application, and the County still recommended approving the SUP, subject to conditions. (AR 610)

The record also demonstrates that the MDNS was only issued after the County’s careful consideration of the following documents: Environmental Checklist; Special Use Permit application; Noise Analysis; Report on the Soils, Geology and Groundwater; Hydrogeologic Report; Drainage and Stormwater Control Plan; Transportation Impact Analysis; Air Quality Analysis; Reclamation Plan Coordination; Wildlife Study; and

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<sup>10</sup> County Staff Report to the HE. (AR 599)

Wetland delineation, Categorization and Enhancement Plan. (AR 633)  
The above record demonstrates that the County had full disclosure of the scope and impacts of the Project when it considered and issued the MDNS.

In its reply, the County misinterprets and misconstrues QRP's SEPA argument before this Court. QRP has never argued that the County-issued MDNS "usurped" the Board's authority to review the Project under the SUP criteria adopted under the County's zoning code (TCC 20.54.040). Instead, QRP has argued that: (1) the Board failed to use the correct SUP criteria adopted in the County's zoning code, and based its denial on the wrong SUP standard; and (2) the standard actually used by the Board of "significant adverse impacts" directly conflicts with the County's final and binding MDNS, which concluded that the Project did not have "significant adverse impacts" to the environment.

**1. The Board Failed To Use The Correct SUP Criteria.**

First, the Board codified the SUP criteria at issue in its zoning code at TCC 20.54.040. 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:**

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:

**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.

*Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 961, 954 P.2d 250 (1998) (emphasis added). Having gone outside the discretion authorized by the County’s own zoning code, this Court should hold that the Board acted erroneously when it used the wrong SUP criteria to deny the project by claiming it had “significant adverse impacts” to the environment.

2. **The Board's Finding Of Significant Impacts Is Contrary To The MDNS And Precluded By The Doctrine Of Finality.**

BHAS' rebuttal to QRP's argument implicitly acknowledges that the Board acted outside its authority by using the wrong criteria, but essentially argues that the Board's use of the standard "significant adverse impacts" was close enough. However, in addition to it being the wrong standard, the Board was simply precluded by the Doctrine of Finality from reversing the County's own final and un-appealed MDNS.

The County-issued MDNS declared conclusively that the project did **not** have a probable "significant adverse impact upon the environment." (AR 631) The only way the Board could refute and contradict this conclusion is if it had timely appealed the MDNS as provided by the County's Code.<sup>11</sup> Thus, not only did the Board use the wrong standard, but it based its denial on a conclusion that was inconsistent with the MDNS. Since the MDNS was not appealed, it was final and binding on all persons, including the Board.

Washington Courts have consistently adhered to the strong Doctrine of Finality in land use decisions, which Doctrine precludes the Board from collaterally attacking the MDNS by later concluding that the project had "significant adverse impacts". Even though an appeal process

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<sup>11</sup> Likewise, the County is now time-barred from claiming the SEPA Checklist was somehow deficient or missing information. Regardless, the County had all the information it claimed that was missing from the Checklist before and during the MDNS appeal period. See discussion *supra* at 8-12.

was available, no party appealed the County's earlier determination that the project did **not** have significant adverse impacts to the environment, and it thus became a final and binding decision. *See Chelan County v. Nykreim*, 146 Wn.2d 904, 932-33, 52 P.3d 1 (2002) (confirming Washington Court's adherence to finality in un-appealed land use decisions); *Wenatchee Sportsman Ass'n v. Chelan County*, 141 Wn.2d 169, 182, 4 P.3d 123 (1999) (holding that an un-appealed decision is valid, and "no longer reviewable.").

The County ignores this case law, and instead relies upon the case of *Bellevue Farm v. Shorelines Bd.*, 100 Wn. App. 341, 351-355, 997 P.2d 380, *rev. denied*, 142 Wn.2d 1014, 16 P.2d 1265 (2000) to somehow make it acceptable that the Board essentially reversed its own final and binding MDNS. However, *Bellevue Farm* does not support the County's argument.

In *Bellevue Farm*, an association appealed the denial of a shoreline substantial development permit to build a 345-foot dock on San Juan Island. *Id.* at 343. When it first applied for the dock permit from San Juan County, the County staff issued a DNS. Later, San Juan County's Hearing Examiner denied the permit because of the applicable conservation zoning, the risks associated with aesthetics and potential precedent. *Id.* at 348. The association appealed to the San Juan County Commissioners who upheld the dock denial. The association appealed the Commissioner's decision to the applicable state agency, the Shoreline

Hearings Board (“SHB”), which also upheld the denial of the dock because of its negative impact on scenic views. *Id.* at 348.

The association appealed the SHB’s denial to Superior Court, which upheld the denial. On review by the Court of Appeals, the association argued that the SHB’s denial was improper because it was bound by the DNS issued by San Juan County. *Id.* 348. The Court of Appeals disagreed and held that the DNS from San Juan County could not be used to preclude another agency, such as the SHB from reviewing the permit under the local shoreline master program and the requirements of the Shoreline Management Act *Id.* at 350. In reviewing this issue, the Court noted:

The Association contends that under this provision, the County’s DNS compelled the Board, “an agency,” to grant the Association’s dock permit. But the Association’s cited case law fails to support its contention that a DNS precludes another agency’s denial of a permit based on environmental impacts reviewed under legislation other than SEPA.

*Bellevue Farm*, 100 Wn. App. at 352 (emphasis added). The Court also quoted an opinion from the Washington Supreme Court, which was in accord with this sentiment:

SEPA [determinations] are uniquely related to the particular decision being taken, and are conclusive only for that purpose. **They are not binding on other decision-making bodies.** To hold otherwise would allow one decision-making body to preempt the authority of any other decision-making body considering a related question to evaluate a particular environmental issue,

**and would foreclose independent analysis and deliberation.** Such a result could contravene the clear intent of SEPA to infuse every governmental exercise of discretion with consideration of environmental amenities and values. *See* RCW 43.21C.030. (Emphasis added).

*Bellevue Farm*, 100 Wn. App. at 354, citing *Department of Natural Resources v. Thurston County*, 92 Wn.2d 656, 667, 601 P.2d 494 (1979).

The holding of *Bellevue Farm* states that a DNS does not bar “other decision making-bodies” such as state agencies from conducting their review of permits under their jurisdiction. Notably, *Bellevue Farm* does not apply in this matter since the state agencies have specifically reviewed their own agency regulations and have still approved certain permits for the site, for example, the DNR Reclamation Plan (AR 335; AR 599); the Olympic Air Pollution Authority preliminary approval of batch plant (AR 687-722) and the DOE-NPDES permit (AR 2529-2580).

While DNS and DOE independently reviewed and approved the permits under their jurisdiction, *Bellevue Farm* does not hold that the MDNS cannot be used to preclude the **same agency, ie, the County** from trying to collaterally attack its **own** final conclusion that the project did not have a significant adverse impacts to the environment. Under the Doctrine of Finality, the Board is legally barred from collaterally attacking its own final decision. The MDNS was a land use decision that was not appealed, and thus was final and binding on the Board. Under *Nykreim* and *Wenatchee Sportsmen*, the Board erred by contradicting its **own** final

MDNS and concluding that the project had “significant adverse impacts” to the environment. (AR 3229)

To avoid this complication, BHAS essentially argues that the two standards of “significant impacts” and “substantial or undue adverse impacts” are very similar. Essentially, it asks the Court to disregard the Board’s use of the wrong standard, which conflicted with the final MDNS. While QRP agrees that the terms “substantial” and “significant” are similar, it notes that the substantial evidence in the record only supports a finding that the project does not have “substantial or undue adverse impact” or “significant adverse impact” to the environment, as demonstrated by the following:

- County issued MDNS which determined project did not have probable significant adverse impacts to the environment. (AR 631)
- PGG study concluded in discussing the historical evapotranspiration that the differences of about 3.7 inches per year “is relatively small compared to the entire water budget and is approximately equivalent to 3 or 4 garden sprinklers discharging continuously.” (AR 2504) Specifically dealing with groundwater discharge to the Black River Valley, PGG gives its estimates a decrease of 0.46% and then states: “In comparison to the water budget of the Black River valley, however, this change is extremely small.” (AR 2507)
- SubTerra concluded: “Based on the findings of this study, the proposed project as presently planned will have minimal impact on the underlying soil and ground water conditions in this area.” (AR 1404) “[A]nticipated 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).” (AR 2176)

- Mr. Mead, County’s expert hydrogeologist concluded: “I do not expect that this expansion will have any significant adverse effect on ground or surface water.” (AR 671) “Outside the property boundary, the effect on water levels will be less than one inch.” (AR 2182) And in a reference to the conditions of the HE’s first approval: “In essence, this new information validates the previous findings related to ground water. With the exception of the condition given above, the conditions related to ground water protection require no other changes.” (AR 2490)
- The HE cited these studies and more for his findings and conclusions. *See, e.g.,* Findings 1-7 (AR 41-42); Findings 13-20 (AR 44-46); and Conclusions 1-3 (AR 53-54). Although the HE may not have specifically addressed the Black River by name, it is referenced in numerous studies and the testimony of witnesses and incorporated in his findings. The HE states “Based on the analysis of the impact to groundwater, aquifer and the Black River, water quality and quantity issues have been addressed.” (AR 53)

Thus, the project’s impacts did not rise to the level of “substantial or undue adverse impact” or “significant adverse impact.” The Superior Court was correct to reverse the Board’s denial of the SUP.

## **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 sit in the same position as the Superior Court and this court do 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 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. ISSUES ON DECLARATORY JUDGMENT**

BHAS argues that because the application for an asphalt plant was coupled with the permit for the expansion of the 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 can them as "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*.

#### IV. QRP'S MOTION FOR RECONSIDERATION

QRP concedes BHAS' argument that if this Court denies its permit for the expansion of the mining operation is denied and the conditions of the permit are vacated, then if the condition dealing with traffic is vacated as well, it has a right to use the roads in effect before the permit was granted. However, this is still a concern to QRP and it asks this Court to retain jurisdiction of that issue if it at all compromises QRP's ability to continue mining if the permit is not granted.

V. CONCLUSION

For the foregoing reasons, QRP respectfully requests the Court to affirm the decision of the Thurston County Superior Court, reversing the Board's denial of the SUP and ordering that the SUP be issued subject to the conditions required by the Hearing Examiner.

Respectfully submitted this 15th day of September, 2006.

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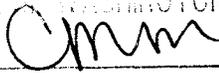
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COURT OF APPEALS

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STATE OF WASHINGTON

BY   
DEPUTY

No. 34128-0-II

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

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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.

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**CERTIFICATE OF SERVICE**

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I, Michelle L. Phommahaxay, hereby certify that on this 15th day of September, 2006, I caused to be served a true and correct copy of Respondents/Cross-Appellants Quality Rock Products, Inc. & Eucon Corporation's Reply Brief in Support of Cross-Appeal and Certificate of Service on the individuals named below in the specific manner indicated:

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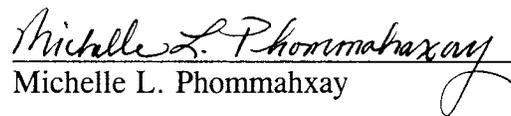
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I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 15th day of September, 2006.

  
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