

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

NO. 38617-8-II

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

Appellants,

v.

JEFFERSON COUNTY and FRED HILL MATERIALS, INC.

Respondents.

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BRIEF OF APPELLANTS

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TABLE OF CONTENTS

	<u>Page</u>
SUMMARY OF ARGUMENT	1
ASSIGNMENTS OF ERROR	2
ISSUES OF LAW	2
STATEMENT OF THE CASE.....	3
ARGUMENT.....	8
A. <u>Standard of Review</u>	8
B. <u>SEPA Requires Full Consideration of Impacts and Alternatives, Sufficiently Disclosed, Discussed and Substantiated With Supporting Opinions and Data</u>	10
C. <u>Nonproject Actions Are Not Exempt From SEPA Compliance, and Must Be Evaluated According to the Level of Detail Available</u>	13
D. <u>Jefferson County Failed To Fully Consider and Sufficiently Disclose, Discuss, and Substantiate With Supporting Opinion and Data Project Impacts and Alternatives</u>	16
1. <u>2003 Growth Board FDO established an analytical framework for Jefferson County to follow under SEPA</u>	20
2. <u>Jefferson County's 2004 environmental review failed to adequately assess impacts and alternatives as required by SEPA</u>	23
E. <u>Jefferson County Commissioners Were Not Capable of Making a Reasoned Decision Based on Information Provided</u>	30

CONCLUSION..... 31

TABLE OF AUTHORITIES

Pages

Cases

Cathcart-Maltby –Clearview Community Council v. Snohomish County,
96 Wn.2d 201 (1981)..... 19, 20

Citizens Alliance to Protect Our Wetlands v. City of Auburn,
126 Wn.2d 356, 894 P.2d 1300 (1995)..... passim

Eastlake Community Council v. Roanoke Associates, Inc,
82 Wn.2d 475, 513 P.2d 36 (1973)..... 10, 11, 30

Klickitat County Citizens Against Imported Waste v. Klickitat County,
122 Wn.2d 619, 860 P.2d 390 (1993)..... passim

Leschi Improvement Council v. Washington State Highway Commission,
84 Wn.2d 271, 525 P.2d 774 (1974)..... 10, 11

Ullock v. Bremerton,
17 Wn. App. 573, 565 P.2d 1179 (1977)..... 22

Weyerhaeuser v. Pierce County,
124 Wn.2d 26, 873 P.2d 498 (1994)..... passim

Statutes

RCW 36.70A.320(1)..... 9

RCW 43.21C.020(3)..... 10

RCW 43.21C.030(c) 11

RCW 43.21C.030(c)(iii) 23

RCW 43.21C.030-31 8

RCW 43.21C.031..... 10

RCW 43.21C.090..... 9

Regulations

WAC 197-11-400(1)..... 10

WAC 197-11-400(2)..... 11, 30

WAC 197-11-400(3)..... 11

WAC 197-11-402..... 11

WAC 197-11-402(2)..... 13

WAC 197-11-440(5)(b) 11

WAC 197-11-440(5)(c)(v)..... 12, 21

WAC 197-11-440(5)(c)(v)-(vi)..... 12

WAC 197-11-440(6)..... 12

WAC 197-11-440(6)(c)(i)..... 12, 21

WAC 197-11-442(1)..... 14

WAC 197-11-442(2)..... 13, 14, 23

WAC 197-11-704(2)(a) 13

WAC 197-11-704(2)(b) 13

SUMMARY OF ARGUMENT

An environmental impact statement (EIS) must provide decision-makers with enough detail to understand the extent of environmental harm likely to occur from an action. The impact statement must discuss details, substantiating conclusions with data to explain specifically *how* a proposal is likely to damage the environment. Absent details properly disclosing, discussing, and substantiating the extent of harm expected, an EIS prevents a decision-maker from fully and accurately assessing the total environmental and ecological factors attendant to a major action.

Jefferson County's environmental impact statement regarding its mineral resource lands overlay amendment in this case failed to address the full extent of environmental impacts. The review did not objectively discuss alternatives and offered only conclusory, simplistic statements about what environmental impacts would occur. Therefore, based on the reasons discussed in greater depth below, both the Growth Board's 2004 Compliance Order finding the EIS compliant and the Jefferson County Superior Court decision affirming that order should be reversed, and the overlay amendment be remanded to the Growth Board for further action consistent with the State Environmental Policy Act (SEPA).

ASSIGNMENTS OF ERROR

A. The Growth Board erred in determining that Jefferson County complied with SEPA because it did not require the County to provide benchmarks, supporting data, and detail.

B. The Growth Board erred in determining that Jefferson County complied with SEPA without requiring the County to evaluate the maximum potential mining development under each alternative.

C. The Growth Board erred in determining that Jefferson County complied with SEPA without requiring the County to review significant effects of the proposed "pit-to-pier" project.

D. Jefferson County Superior Court erred in affirming the Growth Board, and in adopting the findings of fact and conclusions of law drafted in the Growth Board's 2004 Compliance Order.

ISSUES OF LAW

A. SEPA requires that an EIS fully consider impacts and alternatives which are sufficiently disclosed, discussed, and substantiated with supporting opinions and data. The EIS submitted by Jefferson County offered vague, brief, and conclusory descriptions of impacts and provided no benchmark to compare alternatives. Did the EIS fail to comply with SEPA?

B. SEPA requires that an EIS fully consider impacts and alternatives which are sufficiently disclosed, discussed, and substantiated with supporting opinions and data. Jefferson County provided no analysis under each alternative in its EIS and summarily concluded that development would depend on individual mining plans. Did the EIS fail to comply with SEPA?

C. SEPA requires that an EIS fully consider impacts and alternatives. Jefferson County provided contradictory statements regarding specifics of the “pit-to-pier” proposal and failed to fully consider project impacts. Did the EIS fail to comply with SEPA?

D. EIS adequacy is subject to de novo review. While SEPA accords substantial weight to agency decisions regarding EIS adequacy, courts must enforce substantive requirements under SEPA. The Jefferson County Superior Court failed to fully review the County’s EIS. Did the Jefferson County Superior Court err in affirming the Growth Board?

STATEMENT OF THE CASE

Fred Hill Materials (“FHM”) currently operates a gravel quarry called Shine Pit on 144 acres west of the Hood Canal Bridge and south of State Route 104 in Jefferson County. Administrative Record (“AR”)

at 45.¹ The area around and including Shine Pit was designated by the County as a Commercial Forest natural resource region, which authorizes mining operations but limits the size of any mining site to a maximum of ten acres. *Id.* After years of mineral excavation, the available resources in Shine Pit have been nearly depleted, and FHM is attempting to expand its operations to other areas around Hood Canal.

The Jefferson County Uniform Development Code (“UDC”) allows property owners to apply for creation of a Mineral Resource Land Overlay District as a comprehensive plan amendment for the purpose of temporarily conducting more intensive mining operations. UDC 18.15.170; AR at 27-28, 30. The overlay allows different regulations to apply to a mine than set forth in the underlying Comprehensive Plan area, including allowing more land to be mined at one time than ordinarily allowed. AR at 30.

In April 2002, FHM applied for a 6,240-acre overlay to accommodate mining expansion plans as an amendment to the County’s Comprehensive Plan. AR at 44. The proposal was part of FHM’s plan to construct a “pit-to-pier” conveyor project to export gravel by way of

¹ The Administrative Record was received by Appellants on March 9, 2009 and, as indicated in the Corrected Supplemental Clerk’s Papers, was treated as an exhibit by the Jefferson County Superior Court. The pagination of the transmitted AR appears to be in error, as the pages of documents are not always in sequential order. In many places, they are backwards.

marine transport from Hood Canal to markets around the world, and to expand mining operations. Following significant community controversy, Jefferson County and FHM agreed to reduce the proposed overlay from 6,240 acres to 690 acres. AR at 6, 44.

The Jefferson County Board of Commissioners adopted the 690-acre mining overlay as Ordinance No. 14-1213-02 in December 2002. AR at 5, 44. As a component of the County's approval, the County Commissioners provided FHM with authorization to conduct mining operations in 40-acre segments within the overlay boundary. AR at 4-5. Allowing mining activities in 40-acre segments is a fourfold increase from the previous 10-acre limit allowed under a commercial forest designation.

Hood Canal Coalition and six supporting non-profit organizations committed to protecting the local environment appealed the County's approval of the overlay to the Western Washington Growth Management Hearings Board ("Growth Board"). On August 15, 2003, the Growth Board ruled that the County's review of the proposal's environmental impact was inadequate under RCW 43.21C, the State Environmental Policy Act ("SEPA"). AR at 1-45. The Growth Board determined that this original EIS was inadequate to provide the County Commissioners with sufficient information for a reasoned choice among alternatives, and

remanded with specific directives outlined in the 2003 Final Decision and Order (“FDO”). AR at 4, 38.

Specifically, the Growth Board found fault with the County’s EIS because it failed to adequately assess alternatives to the approved 690-acre mining overlay, including FHM’s original proposal for a 6,240-acre overlay and a “no action” alternative. AR at 37-38. As the Board ruled, evaluating the impacts of the no action alternative was “extremely important as a benchmark” for considering and examining other alternatives. AR at 37. The Growth Board also required the County specifically consider the maximum possible mining development that could occur under each alternative, compare the impacts of mining 10 acres at a time versus the impact of mining 40 acres at a time, and provide a more detailed analysis of impacts upon physical surroundings, including impacts caused by transportation operations and anticipated effects upon wildlife habitat. AR at 19, 24. The Board ordered Jefferson County to achieve SEPA compliance within 180 days. AR at 4.

Pursuant to the FDO, the County conducted another environmental review of the overlay, publishing a Draft Supplemental EIS (DSEIS) in March 2004 and a Final Supplemental EIS (FSEIS) in May 2004. AR at 107-367.

As described in more detail in the argument sections, below, neither the new DSEIS nor FSEIS (collectively, EIS) provided detail on the environmental impacts of any of the possible alternatives. Instead, the EIS relied on vague generalities, noting only that the 6,240-acre alternative would have more impacts to the environment, while the 690-acre alternative would have less, and the “no action” alternative (leaving mining in 10 rather than 40-acre segments) would generally have even less impact. AR at 107-367. Among all elements considered – earth, water, plants and animals, environmental health, land and shoreline use, and transportation – the County provided no quantitative analysis with meaningful detail for any of them. Instead, the EIS would merely confirm the common-sense belief of any decision-maker that more mining would lead to more impacts. But the EIS would provide the decision-maker with absolutely no greater understanding about the level of impact.

On July 6, 2004, the County adopted Ordinance No. 08-0706-04, approving the MRLO with a 690-acre overlay. Petitioners again submitted a brief with exhibits explaining why the 2004 environmental review failed to comply with the Growth Board’s 2003 directives and that it was inadequate under SEPA standards. AR at 446-566. Despite express requirements to do so, the County provided no benchmarks, data or detail

in evaluating the “no action” alternative. The County also failed to evaluate the maximum potential mining development under each alternative and further ignored the requirement to review significant impacts of FHM’s proposed “pit-to-pier” project.

Although the Growth Board again identified numerous flaws with the 2004 review, including several areas of noncompliance with 2003 directives, the Board issued a Compliance Order on October 14, 2004. AR at 651-70.

Petitioners appealed the Growth Board’s 2004 decision to Jefferson County Superior Court, arguing that the County failed to comply with SEPA. Clerk’s Papers (“CP”) at 37-66. On October 28, 2008, the court upheld the Growth Board’s 2004 Compliance Order and adopted the Board’s findings of fact and conclusions of law. CP at 143-49. Petitioners timely appealed to this court. CP at 260.

ARGUMENT

A. Standard of Review

SEPA requires an EIS to ensure responsible officials are able to make reasoned and informed decisions about the environmental impact of a major action. See RCW 43.21C.030-31; *Citizens Alliance to Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356, 362, 894 P.2d 1300

(1995). Whether an EIS is adequate is a question of law subject to review de novo. *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 38, 873 P.2d 498 (1994); *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 632, 860 P.2d 390 (1993). This court thus reviews the legal sufficiency of environmental data and analysis present in the EIS. *Weyerhaeuser*, 124 Wn.2d at 38; *Klickitat*, 122 Wn.2d at 633. Adequacy is assessed under the “rule of reason,” which requires decision-makers to be presented with a *reasonably thorough* discussion of the significant aspects of the proposal’s probable environmental consequences. *Id.* (emphasis added). The rule of reason is a standard gauged in large part on a case-by-case basis, guided by all the policy and factual considerations reasonably related to SEPA’s terse directives. *Citizens Alliance*, 126 Wn.2d at 362.

An appellate court reviews the Growth Board’s decision regarding EIS adequacy, not the decision of a trial court. *Klickitat*, 122 Wn.2d at 633. While a governmental agency’s decision concerning EIS adequacy is given substantial weight under RCW 43.21C.090, and comprehensive plan amendments are presumed valid under RCW 36.70A.320(1), an appellate court is not bound by the legal conclusions of an administrative agency or a lower court. *See Leschi Improvement Council v. Washington State*

Highway Commission, 84 Wn.2d 271, 286, 525 P.2d 774 (1974). In the end, the court must determine whether the environmental effects of the proposed action are sufficiently disclosed, discussed, and substantiated by supportive opinion and data. *Citizens Alliance*, 126 Wn.2d at 367; *Klickitat*, 122 Wn.2d at 644; *Leschi*, 84 Wn.2d at 286.

B. SEPA Requires Full Consideration of Impacts and Alternatives, Sufficiently Disclosed, Discussed and Substantiated With Supporting Opinions and Data

SEPA recognizes a “fundamental” right to a healthful environment. RCW 43.21C.020(3). SEPA contains an “unusually vigorous statement of legislative purpose,” requiring consideration of “the total environmental and ecological factors to the fullest in deciding major matters.” *Eastlake Community Council v. Roanoke Associates, Inc.*, 82 Wn.2d 475, 487, 513 P.2d 36 (1973) (emphasis added). SEPA compels informed decision-making. Where a proposal presents the probability of significant, adverse environmental impact, a project applicant must prepare an environmental impact statement to ensure a proposal’s impacts are fully and properly assessed by the local governing body. RCW 43.21C.031. The primary purpose, in fact, of an EIS is to ensure that SEPA’s policies are “integral” to government actions and decision-making processes. WAC 197-11-400(1).

An EIS must therefore provide an “impartial discussion of significant environmental impacts,” WAC 197-11-400(2), and not serve as a means to justify “decisions already made.” WAC 197-11-402. A project proposal’s environmental consequences must be “sufficiently disclosed, discussed, and substantiated by supportive opinion and *data*.” *Klickitat*, 122 Wn.2d at 644, *citing Leschi*, 84 Wn.2d at 286 (emphasis added). The need for supporting data is reinforced by SEPA regulations, which state that an EIS “shall be supported by the necessary environmental analysis” and should include “summaries of, or reference to, technical data” without being overly technical. WAC 197-11-400(3). SEPA administrative regulations guide court decisions, which have indicated unequivocally that SEPA review is to be “detailed and does not invite a lackadaisical approach.” *Leschi*, 84 Wn.2d at 280, *quoting Eastlake*, 82 Wn.2d at 494.

Even stronger language applies to the type of analysis which must be conducted when assessing a proposal’s alternatives. RCW 43.21C.030(c) requires a “detailed statement” on the impact of the proposed action, any adverse environmental effects, and alternatives to the proposed action. WAC 197-11-440(5)(b) provides that an EIS must contain a “detailed analysis” of project alternatives, including a

“no-action” alternative which “shall be evaluated and compared to other alternatives.” A “benchmark” may be used to compare alternatives. WAC 197-11-440(5)(c)(v). With respect to discussed alternatives, the EIS *shall* devote sufficiently detailed analysis to each alternative to permit a “comparative evaluation of the alternatives including the proposed action,” as well as impacts of those alternatives. WAC 197-11-440(5)(c)(v)-(vi) (emphasis added). Where the description of the significance of environmental impacts amounts to “brief, conclusory descriptions,” courts have found it “impossible” to engage in any meaningful comparison of alternatives. *Weyerhaeuser*, 124 Wn.2d at 42.

Under WAC 197-11-440(6), the EIS shall sufficiently “describe and discuss” the affected environment. The EIS shall include a description of the “principal features of the environment that would be affected” by the alternatives and “rare, threatened, or endangered species should be indicated.” WAC 197-11-440(6)(c)(i). Additionally, the EIS must describe and discuss those impacts that will “narrow the range or degree of beneficial uses of the environment or pose long term risks to human health or the environment.” WAC 197-11-440(6)(c)(ii). In the end, a court must determine whether an EIS provided decision-makers with sufficient information to make a fully informed and reasoned decision. *Citizens*

Alliance to Protect Our Wetlands v. City of Auburn, 126 Wn.2d 356, 362, 894 P.2d 1300 (1995).

C. Nonproject Actions Are Not Exempt From SEPA Compliance, and Must Be Evaluated According to the Level of Detail Available

SEPA distinguishes project actions from nonproject actions, but courts have not construed either to license a disregard of SEPA's substantive requirements. A "project action" involves a decision on a specific project which will "directly modify the environment." WAC 197-11-704(2)(a). A "nonproject" action refers to actions which are different or broader than a single site specific project, such as plans, policies, programs, and, like the subject proposal at issue here, include an amendment to a local jurisdiction's comprehensive plan. WAC 197-11-704(2)(b). Whether a proposal consists of a project action or a nonproject action, SEPA requires a level of detail commensurate with the importance of the environmental impacts. WAC 197-11-402(2); *Klickitat*, 122 Wn.2d at 641. In fact, the law states that, with respect to nonproject actions, "alternatives should be *emphasized*." WAC 197-11-442(2) (emphasis added). In *Klickitat*, where a tribe challenged the adequacy of an EIS approved by Klickitat County, the court rejected the County's contention that a nonproject EIS does not require great detail: "SEPA calls for a level

of detail commensurate with the importance of the environmental impacts and the plausibility of alternatives.” *Id.* The court emphasized that ““significant impacts on both the natural environment and built environment *must* be analyzed if relevant”” in an environmental impact statement. *Id.* at 642 (emphasis added).

A lead agency is given increased flexibility in preparing an EIS on nonproject proposals since there is often less detailed information available for review. WAC 197-11-442(1). But this cannot be an excuse for ignoring detail which is available: the discussion of impacts and alternatives must be discussed and substantiated with a level of detail “appropriate to the scope of the nonproject proposal and to the level of planning for the proposal.” WAC 197-11-442(2). For nonproject actions as well as project actions, “alternatives should be emphasized.” *Id.*

For example, in *Citizens Alliance to Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356, 894 P.2d 1300 (1995), the Washington Supreme Court reviewed a proposed action where project elements intertwined with nonproject elements. In *Citizens Alliance*, a citizen’s group challenged the adequacy of an EIS concerning both a proposed horse racing track (the project action) and an amendment to the zoning code to allow commercial recreation as a conditional use (the nonproject

action). The court engaged in a more stringent analysis of the EIS because the nonproject action “bears a close relation to the proposed development.” 126 Wn.2d at 365. In *Citizens Alliance*, the purpose of the text amendment was to enable the development to proceed. *Id.* The proposed racetrack and the amendment were thus construed to be “intertwined.” *Id.*

Similarly, Jefferson County’s adoption of an amendment to its Comprehensive Plan in this case was a response to FHM’s express proposal to expand mining activities, both in terms of extracting mineral resources as well as quickly transporting larger volumes of those resources once they have been extracted and conveyed by a “pit-to-pier” project. While the subject action consists of a nonproject action, as an amendment to the County Comprehensive Plan, the express purpose of the amendment was to enable FHM to expand mining operations on a specific tract of land. Like *Citizens Alliance*, Jefferson County here had to evaluate the nonproject action with the level of detail it had available: it had to evaluate the mineral resource overlay knowing that it was designed to serve a massive pit-to-pier transport operation that would withdraw a huge amount of gravel. FHM has provided considerable detail about the proposal, and SEPA accordingly requires the County to respond with an

adequate disclosure, discussion, and substantiation with *data* analyzing impacts and alternatives. But Jefferson County has not complied with this basic framework.

D. Jefferson County Failed To Fully Consider and Sufficiently Disclose, Discuss, and Substantiate With Supporting Opinion and Data Project Impacts and Alternatives

Dispensing with the clear mandate and policies of SEPA, the EIS here presented decision-makers with “brief, conclusory descriptions” of project impacts on air, water, earth, wildlife, plants, noise levels, and traffic, preventing any meaningful comparison of alternatives. *Weyerhaeuser*, 124 Wn.2d at 42. The County’s failure to substantiate broad assertions in the EIS is perhaps most compellingly illustrated in the “Impacts Summary.” *See* AR at 257-60. Purporting to describe the environmental impacts of each project alternative, the County blithely asserted that a 6,240-acre overlay “could impact earth resources,” but did not say how or provide any data indicating the degree to which earth might be torn up under such an alternative. Based on that vague statement, the County then “examined” the two remaining alternatives: the 690-acre overlay “would result in a lower level of impact,” whereas the no action alternative would have an effect similar to the 6,240-acre overlay,

albeit in “smaller increments.” AR at 260. No study, data, or expert opinion was provided to support such broad assertions.

The substantive portions of the EIS provide little further detail. Appellants strongly urge this court to read the DSEIS and FSEIS; excerpts discussed in this brief cannot do true justice to its paucity of useful information and complete dearth of supporting detail. For example, under “Water Resources,” the FSEIS notes that the 6,240-acre alternative would “likely result in vegetation and soil disturbance during resource extraction operations, possibly leading to erosion, sedimentation and increased turbidity to downstream water bodies, including wetlands.” AR at 259. The FSEIS then compares the 690-acre approved action, but only notes that these impacts “would likely be of shorter duration because of the smaller area included within the MRL.” *Id.* Telling a decision-maker that 690 acres of mining would take place over an unspecified “shorter duration” than 6,240 acres of mining is not the type of scientific analysis an EIS is supposed to provide. Instead, it is a pro-forma statement of the obvious that adds nothing to the information available to the Jefferson County Commissioners and the public.

Although the discussion of earth impacts occurs in the “impacts summary” portion of the FSEIS, there is no more detailed analysis

available. The DSEIS, in the “impacts” section, states only that the 690-acre alternative would result in impacts “on a level similar to that described for the Proposed Action, but would likely be of shorter duration because of the smaller area.” AR at 140-41. None of the alternatives have any quantification of the impacts to be expected.

Science is available to support a more detailed EIS. The EIS has a lengthy list of scientific studies conducted in the Puget Sound region contained in the references section; there is no explanation for why those studies are not incorporated into the analysis. AR at 198-200. Further, the County took at least the initial step towards quantifying the amount of mining that would occur under each of the proposed alternatives. As a former Jefferson County planner noted in a comment letter to the County critical of the EIS, the work plan for the consultant hired to create it called for “an estimation on the total number of acres and depth of mining required to obtain the desired amount of aggregate.” AR at 226. It is thus not a lack of available science, but a decision on the part of Jefferson County not to use it, that led to the complete lack of essential detail in the EIS in this case.

Just as the EIS prepared by Jefferson County failed to adequately evaluate the impacts of increased mining in 40-acre segments, it

completely failed to evaluate the transportation impacts of the related pit-to-pier proposal. FHM has consistently claimed that the pit-to-pier project and its related massive gravel ships traveling through Hood Canal is a separate project, with a separate EIS. But while it may in some circumstances be appropriate to “piecemeal” a project by discussing each piece individually, piecemealing should only be approved in very limited circumstances. Generally, piecemeal review is only acceptable if the first piece of a project is “independent of the second and if the consequences of the ultimate development cannot be initially assessed.” *Cathcart-Maltby – Clearview Community Council v. Snohomish County*, 96 Wn.2d 201, 210 (1981).

For example, in *Cathcart-Maltby*, the court considered a “bare bones” EIS on a zoning change that might lead to a large housing construction project. The *Cathcart-Maltby* court held that a piecemeal EIS was appropriate there, because:

[O]f the difficulty of determining in the abstract, for a period of 25 years, such things as the rate at which the project will develop, the particular location of the housing units, the growth of the tax base which will support the needed public services, the evolution of transportation technologies, and the evolving socio-economic interests of the prospective population.

None of those considerations are present here. FHM seeks to increase its mining operations in order to ship gravel from a pier. The pier has been designed and environmental review started. FHM is in the process of trying to push a bill through the Legislature which would provide for an expedited environmental review of that pier. *See* HB 1970; SB 5836. In this case, unlike *Cathcart-Maltby*, the two proposals are not independent, and we know what the pier will look like and how much ship and truck traffic it will involve. Failing to analyze its impacts *before* expanded mining was authorized violates SEPA's mandate to consider the "ultimate probable consequences, including those secondary and cumulative" of a proposal. *Cathcart-Maltby*, 96 Wn.2d at 209.

1. 2003 Growth Board FDO established an analytical framework for Jefferson County to follow under SEPA.

The County's environmental review is even more egregious when reviewed with specific reference to the Growth Board's 2003 FDO.

In the 2003 FDO, the Growth Board concluded that the EIS for the mining overlay was inadequate under SEPA because the County failed to properly evaluate the environmental impacts of project alternatives. AR at 17. The Board found that the EIS did not describe the no action alternative in terms of its principal features as required under WAC

197-11-440(6)(c)(i), and, more significantly, did not provide sufficient detail to permit a comparative evaluation of the alternatives as required in WAC 197-11-440(5)(c)(v). AR at 24-25. Since the overlay expands mining segment limits, and results in increased mining intensity, the Board sought analysis of the impacts of the existing ten-acre mining sets on physical surroundings as well as impacts of transport and the type of anticipated wildlife habitat disruption. AR at 24. Additional analysis was necessary to provide a benchmark to compare other alternatives – at a minimum, the proposed and adopted alternatives. *Id.* Since mining is ongoing in the existing Shine Pit operation, there is no reason that the impacts of that operation could not have been studied and quantified as a benchmark for the expanded proposal.

While the County analyzed the adopted 690-acre proposal according to 13 factors used for assessing mineral resource overlays, the County “inexplicably” did not analyze other alternatives. AR at 21. A matrix submitted by the County summarily concludes that the proposed action would “probably” result in significant adverse impacts, and the impact of the no action alternative would be “not significant.” Referencing *Weyerhaeuser*, the Growth Board stated ““it is impossible from the brief, conclusory descriptions [present in the original EIS] to

engage in any meaningful comparison of the alternatives.” AR at 20, citing *Weyerhaeuser*, 124 Wn.2d at 35. Although the Board acknowledged that flexibility should be accorded to local jurisdictions reviewing nonproject proposals, the Board correctly noted that the level of detail appropriate to the subject proposal must include the change in intensity of use as well as the potential area over which the intensity will apply. AR at 19. The Board further directed the County’s review to consider the maximum possible mining development that could occur under each scenario. *Id.*, citing *Ullock v. Bremerton*, 17 Wn. App. 573, 575, 565 P.2d 1179 (1977).

The Growth Board also recognized that the “pit-to-pier” project proposed by FHM was a possible impact resulting from an overlay authorizing increased mining and the review “should include the transportation impacts of the various alternatives.” AR at 17. Additionally, in looking at the environmental impacts of the increased size, the Board directed the County to consider “increased production and the consequent need to transport the aggregate mined.” *Id.* The 2003 FDO provided Jefferson County with the analytical framework for which a subsequent, more detailed and complete environmental review was to be conducted. In assessing EIS adequacy and the rule of reason, *Citizens*

Alliance discussed the need to evaluate EIS adequacy on a case-by-case basis, guided by the policy and factual considerations related to SEPA. As described below, Jefferson County failed to meet this requirement.

2. Jefferson County's 2004 environmental review failed to adequately assess impacts and alternatives as required by SEPA.

Integral to EIS preparation is SEPA's requirement to consider alternatives to the proposed action. RCW 43.21C.030(c)(iii). Where an EIS is drafted for a nonproject proposal, alternatives should be emphasized. WAC 197-11-442(2). The discussion of alternatives to the proposed action "is of major importance, because it provides a basis for a reasoned decision among alternatives having differing environmental impacts." *Weyerhaeuser*, 124 Wn.2d at 38.

The Growth Board provided Jefferson County with a specific framework for fulfilling SEPA's mandate requiring a meaningful comparison of nonproject alternatives. The FDO required the County to compare the environmental impacts of mining 10-acre segments, a "benchmark," to the impacts of mining 40-acre segments. AR at 23-24. To help the County establish such a benchmark, the FDO offered details and specifics, directing the County to discuss impacts on the "quality of the physical surroundings" and "cost of and effects on public services," as

well as the “impacts of transport on the environment” and the type of “wildlife habitat disruption” that might result from mining in 10-acre segments. *Id.* The County followed *none* of these directives in the March 2004 DSEIS or the May 2004 FSEIS.

Jefferson County devoted merely a section of the FSEIS to comparing impacts of the 10-acre and 40-acre mining limits. Although the Growth Board relied on Section 2.3 of the FSEIS in approving the County’s review in 2004, the County failed to identify a benchmark or base level of air, water, soil, wildlife, traffic, and noise impacts that could be expected from maintaining the 10-acre limit. AR at 247-49. For example, in discussing soil impacts, the section provided:

10-acre Disturbed Area: *Less* soil would be distributed in any given segment in preparation for mining...a *smaller* quantity of non-renewable resources would be recovered...

40-acre Mining Segment: *More* soil would be disturbed in preparation for active mining...*More* resource may be extracted.

AR at 249 (emphasis added). The County provided no baseline from which to measure “less” or “more.” *Id.* There was no clarity with respect to understanding *how much* soil would be disturbed proceeding with

mining segments up to 10 acres at a time, and how much *more* earth would be disturbed if mining occurred in 40-acre segments.

The discussion of soil impacts was not unique. The EIS summarily stated, without supportive data, that soil, air, unidentified water bodies and unidentified species of wildlife would be impacted more or less depending upon which alternative was chosen. AR at 247-49. The County used imprecise, broad diction throughout the section discussing impacts, including such terms as, less, more, longer, shorter, higher, lower, large, smaller, slower, closer, similar, greater, high, and low. AR at 247-49. The use of indefinite, vague terminology and insufficient supporting detail prevented the Jefferson County Commissioners from fully evaluating the project alternatives and comparing their merits as SEPA requires.

Moreover, although the FSEIS purports to address the Growth Board's 2003 directive to discuss the impacts upon the "quality of physical surroundings" and "cost of and effects on public services," the County "assume[d] it is unlikely the WWGMHB" meant what it said. AR at 246. The County opted not to evaluate public services – such as increased fire protection, water and electric service, and stormwater management - instead dismissively noting that public service and utility impacts would be "typically related to emergency call-outs for roadway

accidents,” and claiming that even these would be analyzed in project-specific reviews. *Id.*

The 2003 FDO also required the County to describe truck traffic or other means necessary to transport aggregate mined from the site and the impacts of such transport on the environment. AR at 24. But the County failed to estimate the number of additional trips generated by the 10-acre mining segments and neglected any description of the environmental impacts of traffic under the no action alternative. AR at 247, 251. Instead, the County cursorily stated that impacts to area roadways would “likely be low,” and that gravel transportation would be at a “lower level” if mining proceeded in 10-acre segments rather than 40-acre segments. *Id.* Despite clear direction from the Growth Board, the County provided decision-makers with scant information to assess the impact of the no action alternative on transportation.

The County responded with even less information discussing impacts to wildlife habitat. The FSEIS simply stated that the no action alternative could “result in direct impacts to plants and animals from clearing existing vegetation.” AR at 258. The FSEIS failed to estimate how much vegetation would be cleared, or explain how wildlife would be affected by the clearing, or identify whether any rare, threatened or

endangered plants or animals might be placed at risk. Again, the County failed to comply with the Board's 2003 directive to describe the type of wildlife habitat disruption anticipated from mining 10 acres at a time. AR at 24.

Jefferson County's 2004 DSEIS and FSEIS did not consider the maximum possible development that could occur under each alternative. *See* AR at 19. Instead of providing analysis of the intensity of use, the FSEIS stated summarily that development under the no action alternative would "depend on individual mining plans." AR at 250. The County specifically declined to predict how many applications for mining permits would be received under the no action alternative. AR at 265. The County also failed to quantify the total acres likely to be mined under any of the alternatives. AR at 257-60.

Finally, Jefferson County did not adequately address the impacts of FHM's pit-to-pier proposal. The 2003 FDO stated that there are "aspects of the pit-to-pier project that are appropriate for environmental review at this time" as part of the overlay review. AR at 18. With specific reference to FHM's pit-to-pier project, the Growth Board stated that the EIS should "evaluate the transportation impact generally." AR at 17. The County simply did not do so.

In its 2004 review, the County confusingly stated that the EIS for the overlay need not address environmental impacts of the FHM pit-to-pier proposal. AR at 255-56. The FSEIS failed to acknowledge that the Growth Board called for the overlay EIS to evaluate environmental impacts of the pit-to-pier conveyor belt and then compare those impacts to the effects of transporting resources by truck. AR at 5, 17-18. In fact, the DSEIS refused to even admit that FHM had already applied for a pit-to-pier facility. It was not until Petitioners warned the County that the DSEIS failed to evaluate the pit-to-pier conveyor, AR at 276-77, that the County flippantly acknowledged the Board's directive. AR at 290-91. But even then, the County's analysis of potential impacts of the conveyor proposal was lackadaisical.

The only specifics the County provided on the transport elements were contradictory. While the County recognized that mineral processing would be increased from 750,000 tons to 7.5 million tons, the FSEIS embraced FHM's contention that local road conditions would be the same whether the project is approved or not. AR at 252-53. This contention conflicts with the statement that mining in the 156-acre Wahl area, one of the sites within FHM's pit-to-pier proposal, would increase gravel-truck traffic on Rock to Go Road and add 98 truck trips daily to SR 104. AR

at 254. The County made no effort to resolve this conflict, and provided discussion of other key impacts – particularly the transportation impacts of moving massive gravel ships to and from the pier. At the very least, the County should have considered how marine transportation might impact the imperiled waters of Hood Canal, what effect increased traffic congestion would have on Hood Canal Bridge due to bridge openings, and the risks and concomitant impacts to SR 104 and the greater Peninsula if a vessel collides with the bridge. The County made no effort to address the water quality, habitat, aesthetic, and other impacts of a four-mile conveyor, a 1,100-foot pier, and massive vessels invading Hood Canal. The County simply refused to evaluate transport impacts and the environmental implications of the pit-to-pier proposal as part of the overlay.

The Growth Board acknowledged the County's minimal discussion of transportation impacts and expressed confusion about the lack of detail: "it is unclear why the County did not analyze in the March 2004 DSEIS the maximum rate of extraction under the various alternatives and the potential impact in each case on transportation." AR at 661. Inexplicably, the Growth Board chose to approve the EIS despite the obvious contradictions with the 2003 FDO and SEPA's clear mandate to evaluate

all known impacts and provide a detailed evaluation.

E. Jefferson County Commissioners Were Not Capable of Making a Reasoned Decision Based on Information Provided

The County's 2004 review did not meet SEPA's requirement to ensure fully-informed decision-making. Rather than considering the "total environmental and ecological factors to the fullest," *Eastlake Community Council*, 82 Wn.2d at 490, the County relied on vague generalities, resisting both the Growth Board's and Petitioners' demands to provide meaningful detail. The County responded to the Growth Board's 2003 FDO with no new studies and no additional data discussing impacts to the air, water, soil, plants, and wildlife.

The County also violated SEPA's requirement to consider environmental impacts with impartiality. An EIS must provide an "impartial discussion of significant environmental impacts." WAC 197-11-400(2). Jefferson County analyzed project alternatives to the 690-acre overlay implying they were not subject to mitigating conditions, but addressed the 690-acre overlay with reference to conditions already imposed by the County Commissioners when the overlay was adopted in 2002. The FSEIS states that, due to "conditions imposed by the [Board of County Commissioners]," material transport from the overlay area to

Shine Hub “may occur only by conveyor,” and not truck. AR at 265. Additionally, the FSEIS provides that the approved overlay “includes additional mitigation attached...as conditions of adoption.” AR at 263. There is no plausible explanation for why similar mitigating conditions could not be applied to other project alternatives. This failure makes the 690-acre proposed alternative seem artificially much more environmentally friendly than the alternatives.

Additionally, Jefferson County asserted in its 2004 review that designating a mining overlay was necessary to both protect mineral resources against incompatible land uses and comply with the Growth Management Act. But the Growth Board rejected the same contention in its 2003 FDO. AR at 27. The County’s resurrection of a discredited rationale to support the 690-acre overlay further demonstrates the County’s bias against the alternatives to the approved overlay and violates SEPA’s requirement to assess reasonable alternatives with impartiality. WAC 197-11-400(2). Such bias prevented the Jefferson County Commissioners from rendering an informed and reasoned decision.

CONCLUSION

For the reasons discussed herein, the Growth Board’s 2004 Compliance Order, along with the Jefferson County Superior Court

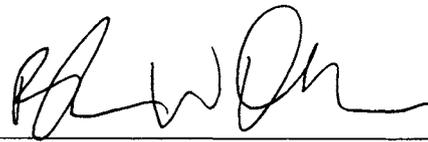
decision affirming that order, should be reversed, and the mining overlay amendment should be remanded to the Growth Board for further action consistent with SEPA.

DATED this 11th day of March, 2009.

Respectfully submitted,

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2 and People For Puget Sound (hereinafter "Coalition") herein. On the date and in the
3 manner indicated below, I caused the Brief of Appellants (corrected) to be served on:

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28 DECLARATION OF SERVICE - 2

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