

COURT OF APPEALS  
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No. 45563-3-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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CONCRETE NOR'WEST, a division of MILES SAND &  
GRAVEL COMPANY and 4M2K, LLC,

Appellants,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT  
HEARINGS BOARD; WHATCOM COUNTY; and FRIENDS OF  
NOOKSACK SAMISH WATERSHED,

Respondents.

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APPELLANTS' OPENING BRIEF

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## I. INTRODUCTION

This appeal addresses Concrete Nor'West and 4M2K, LLC's (collectively "CNW") application to amend the Whatcom County Comprehensive Plan and Zoning Map to expand the Mineral Resource Land ("MRL") overlay by an additional 280 acres and change the existing zoning designation from Commercial Forestry to MRL. If allowed, the requested MRL designation will further the state Whatcom County Comprehensive Plan goal to

Seek to designate a 50 year supply of commercially significant construction aggregate supply to the extent compatible with protection of water resources, agricultural lands, and forest lands.

(Administrative Record ("AR") 855.) Whatcom County has fallen significantly short of meeting this goal.

Significantly, the County has adopted in its Comprehensive Plan specific criteria to be applied to MRL designation requests. There will be no dispute in this appeal that the land CNW proposes for MRL designation satisfies those published criteria. The Whatcom County Planning Staff concluded that the criteria were satisfied, as did the County Planning Commission. Nonetheless, the Whatcom County Council refused to approve the proposed designation.

CNW appealed the Council's decision to the Western Washington Growth Management Hearings Board ("Board") as contrary to both the Growth Management Act ("GMA") and the County's Comprehensive Plan. In its response to CNW's appeal the County did not contest that CNW's MRL application met the MRL designation criteria. Rather, the County contends that satisfaction of the MRL criteria is irrelevant. It claims that absent an express directive in the Comprehensive Plan that the Council shall adopt qualified amendment applications – literally a directive that “the Council shall actually apply the standards it has adopted and published” – the Council has absolute and unconstrained discretion to reject any Plan amendment application, even amendments that meet the County's published standards and further stated Plan policies and goals. According to the County, property owners have no right to expect the Council to apply its own published standards. If property owners are unhappy with a Council's failure to apply published standards, then their sole recourse is to try and elect another Council.

Unfortunately, the Board accepted the County's position and denied CNW's appeal in a Final Decision and Order of the Western Washington Growth Management Hearings Board issued in Concrete Nor'West et al v. Whatcom County, Case No. 12-2-0007, on September

25, 2012 (“Decision”).<sup>1</sup> The Board acknowledged that both the County Planning Staff and the Planning Commission concluded that the relevant criteria were met and recommended approval. It also acknowledged that the County did not challenge CNW’s assertion that all designation had been met. For purposes of its Decision, the Board assumed *arguendo* (and consistent with the record before it) that the designation criteria were satisfied. Nonetheless it denied CNW’s appeal, holding that “the Board lacks authority to grant relief to the Petitioners as they have failed to meet their burden of proof to establish the GMA or the Whatcom County Comprehensive Plan (or other law) mandates adoption of the proposed MRL amendment.” (Decision, Appendix A at 14.)

The Board relied on the recent Washington Supreme Court decision in *Stafne v. Snohomish County*, 174 Wn.2d 24, 271 P.3d 868 (2012), which ultimately held that challenges to a decision rejecting a comprehensive plan amendment may not be had under the Land Use Petition Act (“LUPA”), but must exclusively be through a timely petition to the Growth Boards pursuant to the GMA. *Id.* at 11. In addressing this question of jurisdiction under LUPA, the *Stafne* Court stated that, absent duty created by the GMA or other law, neither the Board nor a court can grant relief from a discretionary legislative act. 174 Wn.2d at 38.

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<sup>1</sup> The Board’s Decision is attached as Appendix A.

The *Stafne* Court was not, however, asked to determine if there was a duty to adopt the particular application appealed in light of relevant standards or even evaluate the merits of the application. The Court did not address or define the circumstances in which a local comprehensive plan will create a duty or mandate. By no means was there a Supreme Court directive to GMA boards that they must relieve municipalities of all responsibility to consider amendment applications in earnest, even proposed amendments that meet all applicable criteria and advance stated comprehensive plan goals. The Board incorrectly interpreted and extended the *Stafne* decision, so as to give local government complete and unfettered discretion to reject qualified comprehensive plan amendment applications, even when the application indisputably satisfies the applicable amendment criteria and furthers Plan goals.

In a typical appeal of a Board decision, the reviewing court evaluates the record to determine if certain relevant criteria set forth in the GMA or local comprehensive plan were met and if the Board properly applied the criteria to the record in light of the relevant standards of review. In a typical appeal there is a dispute between the parties on whether standards are satisfied. This case, however, is unique. In this case, there is no such dispute. It is presumed that the CNW application is

qualified. The question before this Court is does it matter that the criteria were satisfied?

If the answer is no, then the Comprehensive Plan and the County's plan amendment process are rendered little more than a sham. Though the County will readily accept the significant fee it charges to process a property owner's application amendment, the property owner cannot expect that its application will be considered in good faith and consistent with the published Plan standards. Fortunately, the law does not support such an outcome. The GMA directs:

Each county and city that is required or chooses to plan under RCW 36.70A.040 shall perform its activities and make capital budget decisions in conformity with its comprehensive plan.

RCW 36.70A.120. The County Council, in completely ignoring the standards published in its own Comprehensive Plan and rejecting a proposed Plan amendment that would have advanced stated Plan goals and policies, failed to act in conformity with its Plan. The Board misconstrued *Stafne* and erred when it condoned the County's action.

This Court should reverse the Board's decision and hold that the County's action denying the qualified MRL designation application did not comply with its own Plan. The matter should be remanded to the Council for action consistent with the Court's ruling.

## II. ASSIGNMENTS OF ERROR

CNW assigns error to the Superior Court's decision to affirm the September 25, 2012 Final Decision and Order of the Western Washington Growth Management Hearings Board issued in *Concrete Nor'West et al v. Whatcom County*, Case No. 12-2-0007. However, this Court applies the standards set forth in the APA directly to the Board's decision and the administrative record created before the Board. *City of Burien v. Central Puget Sound Growth Management Hearings Board*, 113 Wn. App. 375, 382, 53 P.3d 1028 (2002). Accordingly, pursuant to RAP 10.3(h), CNW assigns error to the Board's decision as follows:

1. The Board erroneously interpreted and applied the GMA, specifically RCW 36.70A.120, in holding that the GMA does not mandate Whatcom County to apply the MRL criteria adopted and published in its Comprehensive Plan and does not mandate the County to adopt proposed amendments that satisfy all adopted MRL criteria.

2. The Board erroneously interpreted and applied *Stafne v. Snohomish County*, 174 Wn.2d 24 (2012), and over-extended dicta to provide Whatcom County with unfettered discretion to reject any and all MRL designation amendment applications, even if the applications meet all designation criteria and further the stated goals and policies of the

comprehensive plan, and even though rejection would be counter to stated goals and policies.

3. The Board erroneously concluded that the Whatcom County Comprehensive Plan, specifically the MRL policies and goals set forth in Chapter 8 of its Comprehensive Plan, and WCC 2.160 do not collectively create a mandate to adopt proposed plan amendments to designate lands that satisfy the general amendment criteria and all of MRL designation criteria.

### **III. ISSUES PRESENTED**

1. Does RCW 36.70A.120 impose on local jurisdictions a duty to adopt proposed comprehensive plan amendments where the proposed amendment satisfies all applicable criteria stated in the comprehensive plan and furthers comprehensive plan goals?

2. Does Title 2.160 of the Whatcom County Code impose a duty upon the Council to adopt proposed Plan amendments that satisfy the general amendment criteria set forth in WCC 2.160.080 and the MRL designation criteria set forth in Chapter 8 of the County's Comprehensive Plan?

3. Did Whatcom County's action rejecting an MRL designation application that satisfies all adopted MRL designation criteria violate the GMA, specifically RCW 36.70A.120?

#### IV. STATEMENT OF THE CASE

As an appeal of a legislative decision made pursuant to the GMA, the Statement of the Case requires a brief description of not only the factual framework in which the decision was made, but the statutory framework as well. Both are set forth below.

**A. The GMA Mandate To Maintain And Enhance The Mining Industry Through The Designation And Conservation of Mineral Resource Lands.**

In recognition of the importance of aggregate materials, the Washington Legislature has expressly stated that “extraction of minerals by surface mining is an essential activity making an important contribution to the economic well-being of the state and nation;” and, thus, “surface mining is an appropriate land use.” RCW 78.44.010, .011. See also, AR 760. Through the GMA, the Legislature also made designation of natural resource lands, including mineral resource lands, a priority in comprehensive planning. A stated GMA goal is to

Maintain and enhance natural resource-based industries, including productive timber, agriculture and fishing industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.

RCW 36.70A.020(8). Consistent with that goal, the GMA directs counties to designate mineral resource lands that are not already characterized by urban growth and that have long-term significance for the extraction of

minerals. RCW 36.70A.170(1)(c). The GMA further directs planning counties to adopt development regulations that will assure the conservation of mineral resource lands designated under RCW 36.70A.170 and assure that uses of adjacent lands do not interfere continued mineral resource industry use. RCW 36.70A.060(1)(a).

Notably, the GMA-required development regulations are not intended to protect development from resources, but are designed to protect the resource from incompatible encroachments. *Achen v. Clark County*, WWGMHB Case No. 95-2-0067 (FDO September 20, 1995) 1995 WL 903178 at \*15 (CP 228)<sup>2</sup> (finding prohibition of mining in flood plain zone without a valid, stated rationale, where land met MRL criteria and SEPA and shoreline regulations would provide adequate protection to critical areas). “Natural resource lands are protected not for the sake of their ecological role but to ensure the viability of the resource-based industries that depend on them. Allowing conversion or resource lands to other uses or allowing incompatible uses nearby impairs the viability of the resource industry.” *Yakima County v. Eastern Washington Growth Management Hearings Board*, 146 Wn. App. 679, 687, 192 P.3d 12 (2008). Thus, while counties must consider and balance the needs of and

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<sup>2</sup> Copies of the Growth Management Hearings Board decisions relevant to this appeal are at Clerk’s Papers (“CP”) 216-246. An index of the Board cases included in the Clerk’s Papers is at CP 213-14.

impacts to uses incompatible to mining activities, they must nonetheless take appropriate action to conserve and protect mineral resource lands from such incompatible uses so as to ensure the continued viability of this essential mining industry. (See AR 760, 765-66, 817-20.)

**B. Whatcom County's Sanctioned MRL Site Selection Process And Designation Criteria.**

The Whatcom County Comprehensive Plan demonstrates a firm understanding of and commitment to the necessity to preserve aggregate materials for the continued viability of the mining industry and, in turn, economic health of the County. It has thus adopted goals and policies that, if adhered to, will preserve the availability of mineral resource lands and maintain and enhance the mining industry in Whatcom County, yet also adequately protect the environment and surrounding community. (AR 846-861.) With regard to addressing uses incompatible to mining, the County's Plan also recognizes that a key component to avoiding or reducing land use conflict is to use MRL designations to provide landowners with advance notice of potential new or expanded mining activities. (AR 847.) Whatcom County's MRL goals are.

Goal 8J: Sustain and enhance, when appropriate, Whatcom County's mineral resource industries, support the conservation of productive mineral lands, and discourage incompatible uses upon or adjacent to these lands. (AR 848.)

Goal 8K: Ensure that mineral extraction industries does not adversely affect the quality of life in Whatcom County, by establishing appropriate and beneficial designation and resource conservation policies, while recognizing the rights of property owners. (AR 848.)

Goal 8L: Achieve a balance between the conservation of productive mineral lands and the quality of life expected by residents within and near the rural and urban zones of Whatcom County. (AR 849.)

Goal 8M: Recognize the importance of conserving productive mineral lands and conserving productive agricultural lands within or near the agricultural zones of Whatcom County without jeopardizing the critical land base that is necessary for a viable agricultural industry. (AR 850.)

Goal 8N: Maintain the conservation of productive mineral lands and of productive forestry land within or near the forestry zones of Whatcom County. (AR 851.)

Goal 8O: Support the extraction of gravel from river bars and stream channels in Whatcom County for flood control purposes and market demands where adverse hydrologic and other environmental effects are avoided or minimized. (AR 852.)

Goal 8P: Designate Mineral Resource Lands (MRLs) containing commercially significant deposits through the county in proximity to markets in order to avoid construction aggregate shortages, higher transport costs, future land uses conflicts and environmental degradation. Balance MRL designations with other competing land uses and resources. (AR 855.)

Policy 8Q: Ensure that mining avoids adverse impacts to the habitat of threatened and endangered fish and wildlife species. (AR 855.)

Goal 8P is particularly relevant to CNW's request to designate and thereby conserve additional MRLs. The County's adopted policies to achieve this goal include:

Policy 8P-1: Seek to designate 50 year supply of commercially significant construction aggregate supply to the extent compatible with protection of water resources, agricultural lands, and forest lands.

Policy 8P-4: Allow mining within designated MRLs through an administrative approval use permit process requiring:

- (1) On-site environmental review, with county as lead agency, and
- (2) Application of appropriate site-specific conditions, and
- (3) Notification to neighboring property owners within 1,000 feet to insure opportunity for written input and/or appeal, and
- (4) Access to de novo review by the Hearing Examiner if administrative approval or denial is appealed.

Policy 8P-5: Consider potential resource areas identified in the Report and Engineering Evaluation Aggregate Resource Inventory Study Whatcom County, Washington (GeoEngineers, Inc., Sept. 30, 2003) [AR 508] during review of land development projects in order to avoid development incompatible with mineral resource extraction.

(AR 855.) These policies establish a balanced designation system and philosophy that invokes a generalized and top-level scrutiny of environmental and other impacts at the designation stage, but ensures that a more rigorous and detailed review will be conducted before mining is authorized. Thus, an adequate supply of MRLs are identified, conserved and protected from development of new incompatible uses (through development restrictions and notification to surrounding landowners), but no actual mining may occur unless approved through an extensive public permit review process with appropriate conditions to protect the environment and the surrounding community.

Consistent with the stated goals and policies, the County has adopted specific criteria to be applied to all MRL designation requests. The criteria are set forth in the Plan at page 8-27 (AR 857-58) and are included in Appendix C to this brief. The criteria are wholly consistent with the express policy to identify and conserve lands suitable for productive mining but defer site-specific environmental review to the permit review process. The Plan expressly sanctions private landowner MRL designation requests as an appropriate method for MRL site selection, provided that the request meets the MRL designation criteria. (Appendix C, AR 858.)

**C. Whatcom County Is Facing A Mineral Resource Shortage.**

Whatcom County designated a Surface Mining Advisory Committee (“SMAC”) to address the mandates of the GMA and the SMAC played a significant role in the development of the MRL goals, policies and criteria in the Comprehensive Plan. (AR 846.) One issue subsequently evaluated by the SMAC was whether the County can meet mineral demands over the next 40 years with the MRLs designated through 2004. The SMAC found that it could not. The SMAC advised:

Theoretically, there is enough total supply in existing MRLs to satisfy a demand over the first 20 years of the planning period. However, there is an imbalance in the demand and supply of sand and gravel. There is a greater need for gravel resources than sand and, as we approach the end of the 20-year planning period, we will run out of sand and gravel resources if existing MRLs are not expanded. Over the 50-year planning period, there would be a mineral resource deficit of approximately 105 million cubic yards if additional MRLs are not designated. This includes a deficit of about 96.9 million cubic yards of sand and gravel and 8.1 million cubic yards of bedrock.

(AR 461.)

The SMAC study reveals that the County has not met its policy to designate sufficient MRL to provide a 50-year supply of mineral resources. (*Id. See also*, AR 644, 649-50.). Thus, further MRL designations are required to meet Plan Goal 8P and Policy 8P-1.

**D. CNW's Application To Designate Additional MRL.**

CNW is a supplier of aggregate and ready mixed concrete. CNW currently operates a sand and gravel mining operation in Whatcom County on a site owned by Miles Sand & Gravel Company located at the intersection of Bowman and Doran Roads in the South Fork Valley. The existing site is within approximately 180 acres of land already MRL. (AR 222, 239-40, 312, 396-98.) CNW desires to expand the MRL designation to expand the mine to include the adjacent property so the mine could be expanded in the future through the permitting process.

CNW submitted an application (No. PLN2009-00013) to amend the County's Plan and zoning designations to include the property in the MRL overlay. (AR 297-309.) The property would remain in the Commercial Forestry zoning designation, but would be available for surface mining pursuant to the permitting requirements set forth in Chapter 20.73 of the Whatcom County Code ("WCC"). (*Id.*) The application was supported by professionally prepared studies demonstrating that the lands contain sufficient quantity and quality minerals of long-term significance for the extraction of minerals as defined by the County's criteria. (AR 310-356, 377-396) The application was also supported by professionally prepared scientific study evaluating the proximity of groundwater tables to proposed mining, pertinent aquifer

characteristics and mitigation measures that may be taken to avoid or minimize impacts to groundwater. (AR 311-18, 363-376, 396-405.) Detailed analysis was provided by CNW to demonstrate that all of the MRL designation and Comprehensive Plan amendment criteria are satisfied. (AR 297-309, 793-810.)

The County reviewed CNW's application pursuant to the State Environmental Policy Act ("SEPA") and, on December 29, 2009, issued a Mitigated Determination of Nonsignificance ("MDNS"). (AR 254-55.) The MDNS set forth certain conditions intended to mitigate certain potential environmental impacts. The conditions included that

This Threshold Determination shall be supplemented with the site specific environmental review at the time of a development application and a new threshold determination shall be issued prior to issuance of any underlying permits. The site specific environmental review will address probable adverse environmental impacts from the proposal, including but not limited to issues related to dust, noise, traffic, groundwater, water quality and archaeological resources.

(*Id.*) Thus, both the MDNS and the Whatcom County permitting process ensure that no mining will occur without detailed site-specific environmental review and requisite approvals.

The County Planning Staff closely evaluated CNW's application against the general Plan amendment criteria at Chapter 2.160 WCC, as

well as the MRL-specific criteria, goals and policies in Chapter 8 of the Plan. (AR 221, 224-37.) Staff also weighed the competing interests of different natural resources on the CNW land and found that inclusion of these forest lands in the MRL overlay would not jeopardize the forest industry:

Designated mineral resources in Whatcom County are not abundant enough to provide a 50-year supply. Forest land can be converted for mineral resources extraction and returned to productive forestry through a reclamation plan, as required by the Washington State Department of Natural Resources, through the Surface Mining Reclamation Program.

With the ability to resume productive forestry after reclamation of mineral resource extraction sites, in staff's opinion there is a higher value in scarce mineral resources than forestry.

(AR 243, Finding 39.)

Staff found that all of the criteria were satisfied and that the application was consistent with the County's goals and policies, to include the goal to conserve sufficient MRLs for a 50 year supply. (AR 224-252.) After presenting a detailed evaluation of each individual criterion (AR 224-37), Staff proposed findings consistent with its evaluation (AR 238-251), recommended approval of the designation and forwarded its recommended findings to the County Planning Commission. The Planning Commission also reviewed CNW's application against the applicable criteria, considered community comments in a public hearing

and recommended approval of the MRL designation and Staff's recommended findings. (AR 276-79.)

**E. The County Council Ignored The MRL Designation Criteria And Denied CNW's MRL Designation Request.**

Though the County's Planning Staff and Planning Commission both concluded that CNW's application met all MRL designation criteria and was consistent with applicable Plan goals and policies, the County Council rejected the proposed MRL designation by a 3 to 3 vote, with one abstention. (AR 288-91, 295-96.) The Council made no findings or conclusions. Thus, the only record of the rationale for its decision is found in the meeting minutes. (AR 288-91.) Remarkably, only the Council members who voted for the amendment referenced the MRL designation criteria. (AR 289-90.) The three Council members voting against not only failed to reference the criteria, but based their decisions on factors not appropriately considered in a designation determination.

Two of the Council members were obviously responding to the emotionally charged community opposition and perceived (but not verified or quantified) environmental impacts if, in fact, mining was ultimately authorized through the permit process. Their focus was exclusively directed to protect conflicting adjacent uses and no attention was paid to the potential productivity of the lands for mining. (AR 291.)

Another Council member refused to consider the proposed MRL designation in the absence of a detailed, site-specific study of potential mining impacts to water quantity and quality. She was steadfast in imposing this additional requirement that exceeded the MRL designation requirements, even though it was confirmed that such a study would be required in the permit review process. (AR 289-90.)

The factors considered by these three Council members were not only beyond the MRL designation criteria, but resulted in a decision that is contrary to the Plan's stated goals and policies, most particularly, the primary goal of conserving productive MRLs. Their decision also ran afoul of prior Board interpretations of the County's goals, policies and MRL criteria and the manner in which they are to be applied. At the County's urging, this Board has twice interpreted the Whatcom County's Plan to require that site-specific environmental review be deferred to the permit process, so that designation decisions – intended only to conserve MRLs, not authorize mining – are based on more generalized criteria and review intended to select and preserve mineral rich lands. *Franz v. Whatcom County Council*, WWGMHB Case No. 05-2-0011 (FDO, September 19, 2005) 2005 WL 2458412 (CP 297-322); *Wells v. Whatcom County*, WWGMHB Case No. 97-2-0030c (FDO January 16, 1998) 1998 WL 43206 (CP 330-341).

The intended application and purpose of the MRL designation process was well-described in *Franz*, which addressed another private owner MRL designation request, which, like here, drew concerns about impacts to groundwater, critical areas, habitat and the surrounding community. The Board expressly found that a Whatcom County MRL designation is not a right to mine. 2005 WL 2458412 at \*20 (CP 314). “The right to mine does not become legal unless a project-specific review occurs and an applicant is granted an administrative approval use permit by the county.” *Id.* at \*18 (CP 313).

Likely impacts on water and critical areas of any specific mining operation are dealt with and used as constraints and conditions at the time of evaluating a request for an administrative permit for mining in Whatcom County; not in the comprehensive plan amendments about natural resources, in a Critical Areas Ordinance, nor in designations of MRLs such as Ordinances 2005-003 and 2005-024. The full tool kit of protections in Whatcom County’s Comprehensive Plan, Policies, and development regulations and in Chapter 20.73 of the Whatcom County Code (WCC) are used to evaluate for approval or denial and condition any mining permit under consideration by the County.

2005 WL 2458412 at \*9 (CP 305). See also, *Wells*, 1998 WL 43206 at \*10 (CP 338). “There is no reason to conclude Whatcom County will not utilize all tools in the comprehensive plan, development regulations, zoning code, and its Critical Areas Ordinance to permit and monitor any

mining operation connected with this designation.” Id. at \*19 (CP 314).

The County ignored the prior Board interpretations of the County’s designation process and criteria – which interpretations were advocated by the County in prior Board appeals – and then acted in a manner that was wholly inconsistent with those interpretations. Without amending the Comprehensive Plan’s actual stated goals, policies and criteria, the County summarily abandoned the Board-approved process and criteria that specifically balanced preservation of mineral resources with the need to address concerns by providing a general review process for MRL designations with detailed and critical evaluation of potential impacts in the subsequent site-specific permitting process.

**F. The Growth Management Hearings Board Acknowledged That CNW Submitted A Qualified Application, But Held That The County Has No Duty To Adopt Qualified Amendment Applications.**

CNW timely filed a Petition for Review with the Board. (AR 1-11.) The County and Intervenor Friends of Nooksack Samish Watershed (“Friends”) moved to dismiss the petition for lack of jurisdiction, arguing that there was no legislative mandate for the County to adopt any proposed plan amendment. (AR 107-109, 112.) CNW responded that the GMA mandates through RCW 36.70A.120 that all planning activities be performed consistent with the local plan. CNW also provided the Board

with the Plan and code provisions that CNW argued imposed a duty on the Council to adopt qualified Plan Amendments. (AR 115-122, 143-163.) The Board denied the motion and held that it had jurisdiction to hear the appeal. (AR 166-170.)

After the Board accepted jurisdiction, CNW submitted a detailed analysis of its amendment application, discussing each applicable amendment and designation criterion and demonstrating that the record established satisfaction of the criterion. (AR 172-882.) Remarkably, the County did not contest that the application met the relevant criteria. In fact, when the Board asked directly if the County disputes that the designation criteria were met, counsel for the County responded: “I certainly didn’t argue that and I don’t feel it’s relevant to the argument.” (Record of 8/28/12 Board Proceeding (“RP”) at p. 88.)<sup>3</sup> Instead, the County argued to the Board: “Even if a site meets all the designation criteria in the CP [Comprehensive Plan], neither the GMA nor the County CP place a duty upon the County to re-designate the land to MRL upon the request of the property owner.” (AR 1005.) According to the County, the

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<sup>3</sup> Counsel for the County advised the Board that, because of the 3-3 Council vote, she did not have an affirmative decision either way and the decision does not give her much guidance. (RP at p. 88.) Nonetheless, the County conceded that it did not argue to the Board that the criteria were not met. (*Id.*)

MRL designation criteria are essentially irrelevant to this appeal and no further inquiry of the Council's decision was required. (RP at 55.)

The Board issued its Final Decision and Order on September 25, 2012. (Appendix A.) In its decision the Board noted:

- “The staff analysis concluded that each of the [MRL] criteria has been met.” (Decision at p. 9, AR 1183. *See also*, Decision at. 12, AR 1186.)
- “Staff recommended approval of Petitioner’s request and the Planning Commission concurred, voting to forward the staff recommendation and proposed findings to the County Council for consideration and approval.” (Decision at p. 9, AR 1183.)
- “The Council made no findings.” (*Id.* at p. 10, AR 1184.)
- “As Petitioners observe, during the Council’s discussion prior to the vote, members who opposed the designation failed to address the designation criteria. Rather, they referred to concerns regarding environmental impacts, including one member’s demand that a study of mining impacts on water quality and quantity first be conducted.” (*Id.*)
- “Petitioners also accurately assert designation of MRL in Whatcom County does not authorize mining activity. Under the WCC, site specific environmental review is conducted during the permitting process.” (*Id.*)
- The County did not challenge Petitioners’ assertion that all designation criteria had been met. In a footnote Intervenor

did raise an assertion that Criterion 9 had not been met. The Staff Report contradicts Intervenor’s argument.” (*Id.* at p. 12, n.38, AR 1186.)

Despite the above and “assuming *arguendo* that the designation criteria were satisfied,”<sup>4</sup> the Board accepted the County’s argument that satisfaction of the criteria was irrelevant to review of the Council’s decision to reject the proposed Plan amendment. The Board interpreted *Stafne, supra*, to relieve local jurisdictions of any obligation to adopt a proposed amendment absent language in the local comprehensive plan or other local law expressly mandating adoption of applications that meet published criteria. The Board found there was no such unequivocal mandate in the County’s Plan or code and concluded: “the Board lacks authority to grant relief to Petitioners.” (Decision at pp. 12-14, AR 1186-88.)

**G. The Superior Court Affirmed The Board’s Decision.**

CNW timely appealed the Board’s decision to the Thurston County Superior Court pursuant to the Administrative Procedure Act, chapter 34.05 RCW (“APA”). (CP 6-60.) The Superior Court denied CNW’s APA appeal (CP 425-26) and CNW thereafter timely filed a Notice of Appeal to this Court (CP 427-30.)

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<sup>4</sup> Decision at p. 12, AR 1186.)

## V. ARGUMENT

The Board misinterpreted *Stafne* as well as Whatcom County's Plan and Code. It effectively held that the County has unfettered discretion to reject any qualified proposed MRL designation amendment, even if the proposed amendment would meet the adopted criteria and further the MRL goals and policies, and even though rejection of the proposed amendment is contrary to those goals and policies. The Board's decision is contrary to the GMA mandate in RCW 36.70A.120 that "[e]ach county and city that is required or chooses to plan under RCW 36.70A.040 **shall** perform its activities . . . in conformity with its comprehensive plan."

### A. Standard Of Review.

Since this is an appeal of a decision by a Growth Management Hearings Board, and understanding of both the Board's role and the court's role is necessary. The Board is charged with adjudicating GMA compliance and invalidating noncompliant plans. RCW 36.70A.280. Legislative actions are presumed valid and the Board will find compliance unless it determines that the legislative action is clearly erroneous in view of the entire record before the Board in light of the goals and requirements of the GMA. RCW 36.70A.320. A Board will find a legislative action clearly erroneous if it is left with a firm conviction that a mistake has been

committed. *Lewis County v. Western Washington Growth Management Hearings Board*, 157 Wn.2d 488, 497, 139 P.3d 1096 (2006). While the Legislature has directed the Growth Boards to give deference to the local jurisdiction's decision-making (RCW 36.70A.3201), it also contemplates a diligent review.

The amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the [municipality's] actions a "critical review" and is a "more intense standard of review" than the arbitrary and capricious standard. (Citations omitted.)

*Swinomish Indian Community v. Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 435, fn. 8, 166 P.3d 1198 (2007).

This Court review's the Board's decision directly pursuant to the standards set forth in the APA, chapter 34.05 RCW.<sup>5</sup> RCW 36.70A.300(5); *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998). Relevant to this appeal, the APA directs that this court shall grant relief from the Board's decision only if the court determines the Board has erroneously interpreted or applied the law. RCW 34.05.570(3)(d). As the

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<sup>5</sup> Because the Court directly reviews the Board's decision, any findings or conclusions made by the trial court are treated as superfluous. *Adams v. Department of Social & Health Service*, 38 Wn. App. 13, 15, 683 P.2d 1133 (1984).

County did not dispute the criteria were satisfied, and the Board assumed the criteria were satisfied for purposes of its analysis, there are no material factual disputes presented in this appeal.

The question of whether an agency has erroneously interpreted or applied the law is reviewed de novo. *Honesty in Environmental Analysis and Legislation (HEAL) v. Central Puget Sound Growth Management Hearings Bd.*, 96 Wn. App. 522, 979 P.2d 864 (1999); *City of Redmond, supra*. Courts review an agency's interpretations of statutes under the error of law standard, "which allows an appellate court to substitute its own interpretation of the statute or regulation for the [agency's] interpretation." *Seattle Area Plumbers v. Washington State Apprenticeship and Training Council*, 131 Wn. App. 862, 871, 129 P.3d 838 (2006), quoting, *Cobra Roofing v. Dept. of Labor & Industries*, 122 Wn. App. 402, 409, 97 P.3d 17 (2004). While courts will accord deference to the Board's interpretation of the GMA, they retain the ultimate authority to interpret a statute and are not bound by the Board's interpretation of the GMA. *Yakima County v. Eastern Washington Growth Management Hearings Board*, 168 Wn. App. 680, 687, 279 P.3d 434 (2012); *City of Redmond, supra*, 136 Wn.2d at 46. Courts "will not defer to an agency determination which conflicts with the statute." *Waste Management of Seattle v. Utilities and Transportation Comm'n*, 123

Wn.2d 621, 628, 869 P.2d 1034 (1994). *See also, Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992).

**B. The GMA, Specifically RCW 36.70A.120, Imposes On All Municipalities A Duty To Conduct All Planning Activities Consistent With Their Adopted Comprehensive Plans.**

The Board correctly noted that RCW 36.70A.130 authorizes municipalities to amend their adopted comprehensive plans annually but does not require amendments. It is likewise true that there is no provision in the GMA that narrowly directs local jurisdictions to adopt certain proposed comprehensive plan amendments. The GMA does, however, direct that, once a plan is adopted, local actions must be in conformity with the adopted plan:

Each county and city that is required or chooses to plan under RCW 36.70A.040 shall perform its activities and make capital budget decisions in conformity with its comprehensive plan. (Emphasis added.)

RCW 36.70A.120. Once a plan is adopted, municipalities are directed to perform their activities consistent with that plan.

This is a common sense requirement. The GMA directs counties to include certain provisions in their comprehensive plan and development regulations. Relevant to this case, the GMA directs planning counties to designate MRLs and establish mechanisms and criteria to make and protect those designations. RCW 36.70A.060(1)(a); 170. Also relevant,

the GMA directs planning counties to establish and broadly disseminate to the public a public participation program that identifies procedures and schedules whereby proposed updates, amendments and revisions are considered by the governing body no more than once every year. RCW 36.70A.130(2)(a). County plans that do not satisfy these GMA requirements will not survive scrutiny by the growth management hearings board.

In this case, Whatcom County has adopted in its Comprehensive Plan MRL designation criteria that satisfy the GMA mandates. RCW 36.70A.120 effectively directs that, once a county successfully adopts GMA required provisions such as these in its plan and implementing regulations, the county is required to conduct future activities in conformity with the adopted provisions. It is not enough to adopt MRL criteria that satisfy the GMA mandates regarding preservation of resource lands. A county must also conduct itself in conformity with its adopted plan. It must apply the criteria adopted and published in its Plan.

The Board acknowledged that the above GMA mandate required it to evaluate Whatcom County's Comprehensive Plan and development regulations to determine if the Plan or regulations "include a duty to designate an applicant's property as MRL during its annual update when the property meets the designation criteria." (Decision at p. 12, AR 1186.)

Unfortunately, the Board seemed to impose an unreasonable (and unstated) requirement for a narrowly expressed unequivocal mandate to adopt specific qualified amendments. The Board effectively required an additional provision stating “the Council shall adopt proposed plan amendments that meet the MRL criteria.” Absent such a statement, the Council is free to disregard and ignore the criteria it adopted and published in its plan. The Board misconstrued RCW 36.70A.120.

Of course, courts should construe statutes and regulatory provisions to give them their plain and ordinary meaning. *Tobin v. Department of Labor and Industries*, 145 Wn. App. 607, 616, 187 P.3d 780 (2008). Where the legislature has not defined a term, the court may give the term its plain and ordinary meaning from a standard dictionary. *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). In this case, the Court must interpret the legislature’s intent in directing that a county “shall perform its activities ... in conformity with its comprehensive plan.”

Notably, the GMA requires that all activities be in conformity with an existing plan; the mandate is not limited only to legislative actions that adopt new plans or affirmatively amend old plans. The GMA mandate is broader. It mandates that a jurisdiction’s activities must be in conformity with the plan. Black’s Law Dictionary (6<sup>th</sup> Ed., 1990) defines conformity

to mean “corresponding in form, manner or use; agreement; harmony, congruity.” Webster’s Ninth New Collegiate Dictionary (1987) defines conformity as “action in accordance with some specified standards or authority.” These definitions indicate that RCW 36.70A.120 requires Whatcom County to conduct its planning activities, which includes review and consideration of proposed plan amendments and actions to reject amendments, in a manner that is in harmony or in congruity with the Plan’s specified goals, policies and criteria. These definitions do not support a construction which limits the jurisdiction’s obligation to following only express mandates, especially since comprehensive plans are typically a compilation of goals and policies.

In reaching its Decision, the Board relied heavily on *Stafne, supra*. It seemed to conclude that *Stafne* directed the conclusion reached. The Board, however, misconstrued and improperly extended *Stafne*.

**C. The Board Misconstrued And Erroneously Extended The *Stafne* Decision In Contravention Of The Clear Mandate Of RCW 36.70A.120.**

In *Stafne*, the landowner requested the county council to “docket” on the council’s comprehensive plan amendment docket his proposal to re-designate his property from forest designations to low density rural residential. 174 Wn.2d at 28. The council refused to place the landowner’s amendment application on its final docket for consideration.

*Id.* The landowner appealed the council's decision, not to a growth management hearings board, but to superior court under the Land Use Petition Act ("LUPA"), chapter 36.70C RCW.

The primary issue before the *Stafne* Court was whether a municipality's decision related to a comprehensive plan amendment must be appealed to the growth management hearings board under the GMA, or whether relief could be sought in the superior court under LUPA. 174 Wn.2d at 30. The Court did not analyze the merits of the challenge and there was no discussion of the relevant amendment criteria. Rather the focus of the *Stafne* Court was the proper appeal forum for the challenge, even more specifically the scope of a court's jurisdiction under LUPA.

The *Stafne* Court held that appeal may not be had through LUPA, but must exclusively be through a timely petition to a GMA board. *Id.* at p. 11. Trying to avoid the statutory mandate that plan challenges must be made to a GMA board, the landowner next argued that such an appeal would be futile because the boards had consistently held they lacked jurisdiction to hear challenges to municipal decisions rejecting proposed plan amendments. According to the landowner, it was futile to require appeal to a board that would certainly refuse to even hear the appeal. Thus, the *Stafne* Court secondarily addressed whether exhaustion of the

board remedy could be excused under the futility doctrine. *Id.* at 34-35. The *Stafne* Court rejected the futility argument.

In refusing to invoke the strictly and narrowly applied futility exception, the *Stafne* Court briefly discussed prior board decisions in which the board held it was without jurisdiction to consider similar appeals. The *Stafne* Court disagreed that the board decisions establish that the boards are always wholly without jurisdiction to hear such challenges. Instead, the Court concluded that the cited decisions reflected case-by-case decisions based on the facts and issues presented. *Id.* at 37. The primary *Stafne* Court rationale with regard to its futility decision is that courts benefit from the analytical framework presented by agencies with special expertise. *Id.* at 35. Nonetheless, in discussing the futility issue, the *Stafne* Court made the following statement in dicta:

We agree with the board's determinations in cases like *Cole* and *SR 9/US 2 LLC*. County and city councils have legislative discretion in deciding to amend or not amend their comprehensive plans. Absent a duty to adopt a comprehensive plan amendment pursuant to the GMA or other law, neither the board nor a court can grant relief (that is, order a legislative discretionary act). In other words, any remedy is not through the judicial branch. Instead, the remedy is to file a proposal at the County's next annual docketing cycle or mandatory review or through the political or election process.

*Id.* at 38.

The *Stafne* court did not address or define the circumstances in which a local plan will create a mandate or give rise to a duty to implement Plan amendment criteria. The *Stafne* Court likewise did not discuss or address the mandate set forth in RCW 36.70A.120. The Court simply seemed to confirm that, in the specific cases cited, the boards correctly concluded they had no jurisdiction because, in those specific cases, a duty in those particular cases had not been demonstrated.

The *Stafne* Court did not conclude that there was no duty to adopt the amendment proposed in the case it addressed. To the contrary, the Court seemed to indicate that circumstances may well exist in which a duty may be found and the board, unlike in the cases cited to the *Stafne* Court, might well accept jurisdiction. The *Stafne* Court simply concluded that, if a plan amendment denial challenge is to be made, it was incumbent upon the landowner to make the challenge by petition to a growth management hearings board. This prerequisite would not be excused on the grounds of futility.

Whatcom County (and the Board) incorrectly latched onto the *Stafne* Court's statement regarding duty, which is arguably dicta, as a clear Supreme Court rule that the County has complete and unfettered discretion to reject any and all proposed Plan amendments with complete disregard

of approved designation criteria and stated Plan goals. That was not the Court's ruling in *Stafne* and no such bright line was drawn.

Again, the *Stafne* Court analyzed Board decisions in which the Board held it was without jurisdiction to hear certain specific appeals to plan amendment rejections: *SR 9/US 2 LLC v. Snohomish County*, CPSGMHB Case No. 08-3-0004 (Order Granting Motion to Dismiss, April 9, 2009, 2009 WL 1134039 (CP 324-28)); *Chimacum Heights LLC v. Jefferson County*, EWGMHB Case No. 09-2-0007 (Order on Dispositive Motion, May, 20, 2009) 2009 WL 1716761 (CP 252-55); and *Cole v. Pierce County*, CPSGMHB Case No. 96-3-0009c (FDO, July 31, 1996) (CP 265-84). 174 W.2d at 32. But the Court also concluded that these Board decisions did not represent a blanket rule, but only case-specific threshold jurisdictional rulings based on the specific facts and issues presented. *Id.* at 37. The Board confirmed in each decision that jurisdiction may nonetheless exist depending on the applicable GMA or plan provisions.

Unlike the cited jurisdictional decisions, following pre-hearing motions, the Board in this case affirmatively held that it had jurisdiction to hear CNW's appeal. (AR 166-170). This case is thus immediately

distinguishable from *Stafne* and the cited Board jurisdictional decisions.<sup>6</sup> Certainly no holding in *Stafne* or the cited Board decisions render inaccurate or discredit CNW's case-specific analysis and conclusion that a duty to amend is created here.

Moreover, in another Board decision also involving CNW, the Board clearly rejected the notion that decisions to deny proposed plan amendments are universally beyond Board or court scrutiny. *Concrete Nor'West v. Whatcom County*, WWGMHB Case No. 07-2-0028 (Order on Dispositive Motion, February 28, 2008) 2008 WL 1766781 (CP 285-95.) In this separate and prior CNW appeal, the Board held that jurisdiction over an amendment denial will lie for a claim asserting that a county failed to follow its own process. (CP 285.) The Board's explanation at pages 5 and 6 in that case is instructive:

[T]he County [cannot] shield itself from a review of how it applies its mineral resource designation criteria based on its decision to deny a request to make a designation change. ...the process of considering the application of the designation criteria would be an appropriate area of Board review. Were it otherwise, it would not be possible for the Board to review those cases where the County's mineral resource land designation criteria were misapplied or

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<sup>6</sup> Another distinction in this case is that, unlike in *Stafne*, Whatcom County accepted CNW's application and the Council agreed to docket the amendment application for consideration. (AR 1002; 295.) It is CNW's position that once docketed, it was incumbent upon the Council to review the application in light of the MRL criteria adopted and published in the County's Plan.

misinterpreted so as to deny designation in cases where the lands under consideration met the applicable criteria. Furthermore, an aggrieved party seeking to challenge the County's decision to deny a proposed redesignation would have no recourse to the courts as the adoption and amendment of comprehensive plans is a matter over which the Growth Management Hearings Boards have jurisdiction. (Emphasis added.)

(CP 289-90.)

Significantly, in the earlier appeal, the Board also noted that the County could not (as it did in this subsequent Board appeal (*see* AR 1001)) take refuge behind the fact that the GMA only mandates periodic review of mineral resource designations. If, during the interim periods, an amendment application seeking MRL designation is submitted, the Board stated that it is still incumbent upon the County to follow its established designation process and criteria:

[M]erely because the County is currently under no obligation to review its mineral resource lands provisions at the present time does not mean that the failure to follow its adopted process and criteria for a designation change is subject to challenge only every seven years.

(CP 290.)

In the 2008 appeal, the Board concluded:

Having chosen to adopt a process for considering applications for the designation of additional mineral resource lands as part of its GMA requirement to conserve natural resource lands, the County cannot then avoid review of the decisions it makes upon those applications during annual review.

(CP 291.)

The above Board decision from the prior CNW appeal cannot be reconciled with the Board's decision in this case.<sup>7</sup> The Board's original, better-reasoned rationale as stated in the prior CNW appeal should, however, be endorsed by this Court. The prior decision is consistent with the *Stafne* Court's directive for case-specific jurisdictional analysis yet, unlike in this case and it does not contravene the GMA directive to the County to perform activities in conformity with its Plan (RCW 36.70A.120).

The Board's interpretation of *Stafne* effectively serves to render Whatcom County's amendment process an illusory process. According to the Board and the County, property owners who review the applicable Plan provisions and then act in good faith by paying the requisite application fee and submitting a qualified amendment application cannot expect that their applications will be considered in earnest. According to the Board and the County, the Council is free to reject a qualified amendment application for any reason or no reason at all. As the County's attorney stated in her oral argument, satisfaction of the stated MRL criteria are irrelevant. (RP at p. 88.)

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<sup>7</sup> The Board held it was without jurisdiction to hear the specific petition presented, but only because the petition did not allege that the County failed to follow its process. (CP 291-92.) CNW asserts such a failure in this case.

Such is not the law. The Council did, in fact, have a duty to render its decision based upon the stated amendment and MRL designation criteria. CNW presented a qualified application that would advance Plan goals. The GMA and County Plan collectively mandated that these land qualified for MRL be designated as CNW requested

**D. Whatcom County's Comprehensive Plan And Code Collectively Create A Duty For Whatcom County To Adopt Qualified Applications To Designate Private Lands MRL.**

Review of Whatcom County's implementing regulations and Plan, also reveal that the County did, in fact, have a duty to adopt CNW's qualified amendment application. Consistent with the directive under RCW 36.70A.130(2)(a), Whatcom County adopted a process for reviewing and evaluating plan amendments. The process and standards are set forth at Title 2.160 of the Whatcom County Code, are located in the Administrative Record at AR 158-165 and attached as Appendix B.

WCC 2.160.020 states the purpose of the Title:

The purpose of this chapter is to define the types of plan amendments and establish timelines and procedures to be followed when proposals are made for amending or revising the Whatcom County Comprehensive Plan. (Emphasis added.)

The process allows for private amendment applications. WCC 2.160.040. Private applications are deemed initiated and eligible of consideration in a comprehensive planning cycle if the Council approves initiation and

places the application on its docket. WCC 2.160.050(D). In this case, the Council voted to “initiate” CNW’s application and agreed to docket the application for consideration in the amendment cycle. (AR 295.)

The County Code provides that Plan amendment applications are to be reviewed against general criteria set forth at WCC 2.160.080. This provision provides that, in order to approve an initiated amendment application, the planning commissions and the county council shall find that each of the listed criterion are satisfied. Relevant to this appeal, the criteria include a requirement that “the amendment conforms to the requirements of the Growth Management Act, is internally consistent with the county-wide planning policies and is consistent with any interlocal planning agreements.” WCC 2.160.080(A)(1). Of course as noted earlier, the GMA requires at RCW 36.70A.120 that activities be performed in conformity with the comprehensive plan. Thus, this amendment criterion that requires compliance with the GMA also requires compliance with the County’s Comprehensive Plan.

Whatcom County’s code mandates that decisions regarding amendment applications be made in consideration of the stated criteria and standards. WCC 2.160.070 directs the planning staff to review and evaluate amendment applications and make a report to the Planning Commission. WCC 2.160.070(B) directs that staff’s “[r]eports shall

evaluate the merits of each initiated amendment based on the approval criteria of WCC 2.160.080.” Consistent with this requirement, the Whatcom County Planning Staff applied to the CNW application all of the criteria set forth in WCC 2.160.080 and all of the specific MRL designation criteria set forth in the Comprehensive Plan (Appendix C, AR 155-56). (See Staff Report at AR 224-252.) Again, after meticulously evaluating each of the relevant criteria, the County’s staff concluded that all criteria were satisfied, the application was consistent with the Plan’s goals and policies, and recommended approval of CNW’s application. (AR 224-252.)

The same requirement is imposed on the County’s Planning Commission. WCC 2.160.090 requires the Planning Commission to hold public hearings on the applications and thereafter “shall evaluate the merits of each amendment in relationship to the approval criteria of WCC 2.160.080 and shall make a recommendation to the county council as to whether the amendments should be approved, approved with modifications or denied.” Again, after evaluating the application against applicable criteria, the Planning Commission recommended approval of the Staff’s proposed findings and the MRL designation. (AR 278.)

Just as it does for the County’s planning staff and commission, the County code also mandates the Council to apply the amendment criteria.

WCC 2.160.100(C) provides: “The council shall decide to approve, approve with modifications or deny comprehensive plan amendments based upon the approval criteria in WCC 2.160.080.” The Code allows the Council to deny a comprehensive plan amendment, but the Council is required to make such a decision to deny in the context of the applicable criteria. It is nonsensical to conclude that this provision allows a Council to deny an application that meets all of the criteria. Even if the Court accepted the Board’s conclusion that a duty may only be imposed through an unequivocal stated directive to adopt qualified amendments, the express mandates of Title WCC 2.160 create such a duty.

However, as noted earlier, CNW disagrees with the Board’s requirement for such a literal and myopic directive. The code and Plan provisions should be read as a whole to determine the mandates imposed. Moreover, jurisdictions are not permitted to wholly ignore and act in direct contravention of stated goals and policies. The GMA requires counties to conduct their activities in conformity with their comprehensive plans. RCW 36.70A.120. This requires that a county act consistent with goals and policies stated in its comprehensive plan.

In this case, there is no disagreement that the County has adopted a policy to seek to designate a 50-year supply of commercially significant construction aggregate. (AR 855.) There is also no disagreement that the

County's supply falls far short of this stated policy. (AR 461.) Finally, the County did not dispute that CNW's MRL application satisfied all of the specific MRL designation criteria set forth in the comprehensive plan. It is inconceivable that a decision to reject an MRL application that meets all criteria and would further a Plan goal that is far from attainment is an activity that is "in conformity with [the County's] comprehensive plan." RCW 36.70A.120. This is especially true here, since site-specific environmental concerns will be addressed and must be mitigated in the mandatory subsequent permitting process that must be fulfilled before any actual mining can commence. Thus public concerns that fall outside the designation criteria will not go unanswered in the permit process.

The Council does have duty to adopt qualified MRL designation applications and the Council breached that duty when it rejected CNW's application.

**E. The "Public Interest" Criterion In WCC 2.160.080 Does Not Legitimize The Council's Decision To Reject An MRL Application That Satisfied All MRL Designation Criteria**

Though the council members opposing the amendment did not cite any criteria, much less the "public interest" criterion in WCC 2.160.080 (*see* AR 288-91), before the Board, the County attempted to use that criterion as an after-the-fact justification for denying CNW's qualified application. Since the Board assumed that all criteria were satisfied, and

ruled only that it “lacks authority to grant relief to the Petitioners”<sup>8</sup> this issue is not before the Court. Even if considered, denial was not in the public interest.

The “public interest” criterion must be considered in context with the applicable Plan provisions and integrated policies. Though omitted in the County’s brief, the Code provides at WCC 2.160.080(A)(3) specific guidance in determining the public interest:

...In determining whether the public interest will be served, factors including but not limited to the following shall be considered:

- a. The anticipated effect upon the rate or distribution of population growth, employment growth, development, and conversion of land as envisioned by the comprehensive plan.
- b. The anticipated effect on the ability of the county and/or other service providers, such as cities, schools, water and/or sewer purveyors, fire districts, and others as applicable, to provide adequate services and public facilities including transportation facilities.
- c. Anticipated impact upon designated agricultural, forest and mineral resource lands. (Emphasis added.)

The “public interest” is intended to be defined broadly with a global perspective of county-wide goals and interests, rather than narrowly based on localized neighborhood-specific concerns. The Code specifically requires consideration of impacts on mineral resource lands. It does not

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<sup>8</sup> Decision (Appendix A) at p. 14.)

call for consideration of any of the issues now highlighted by the County.

In its post-decision justification, the County inappropriately defines the “public interest” to equate to the positions of the opposing community. (See AR 1006-1010.) In the context of permitting decisions, Washington courts have consistently held that land use decisions may not be based upon community displeasure and generalized fears. *Washington State Department of Corrections v. Kennewick*, 86 Wn. App. 521, 533, 937 P.2d 1119 (1997). The same should be true for planning decisions, which RCW 36.70A.120 requires be consistent with the adopted Plan and GMA policies. Community displeasure, under the guise of the “public interest,” should not be permitted as a tool to circumvent stated Plan policies.

The specific concerns articulated by the opposing community were primarily that the mineral resource industry will not be compatible with other surrounding land uses, and a general sense that compatibility and environmental issues (including impacts on water quality) will not, despite the Plan and Code mandates, be addressed in the mandatory permitting process that is a prerequisite to mining. These “concerns,” which are speculative and unsubstantiated, are nonetheless fully addressed by the balanced, phased review process established in the Plan and are not proper grounds to deny the MRL designation that satisfies the criteria.

Recall that the Plan's phased review process for mineral resource lands imposes a higher level, more general review at the MRL designation phase and a more detailed and rigorous site-specific review at the permitting phases that must occur before actual mining. As discussed more fully below, this phased review serves to effectively balance maintenance and enhancement of the mineral resource industry with competing land uses. Had the Council considered the public concerns in the context of this integrated and comprehensive Plan approach, it would have necessarily concluded that those concerns will be adequately addressed in due course through its own established phased process.

The County argued to the Board that the Plan only authorizes deferred site-specific review; it does not preclude such review during the MRL designation process. Making MRL designation applications subject to site-specific review, however, is undeniably inconsistent with the adopted and published Plan process. If the Council no longer concurs with this phased approach, it must formally amend the Plan to change the process. Until that time, the phased-review process in the Plan remains in full force and effect and is not subject to collateral attack. RCW 36.70A.120 mandates that the Council's MRL planning activities (including amendment review) be in conformity with the adopted phased-review process.

Moreover, in prior cases, the Board concluded that site-specific environmental concerns are not appropriately raised in the designation process. Rather, under the County's adopted process, the detailed review is deferred to the permitting phase.

Likely impacts on water and critical areas of any specific mining operation are dealt with and used as constraints and conditions at the time of evaluating a request for an administrative permit for mining in Whatcom County; not in the comprehensive plan amendments about natural resources, in a Critical Areas Ordinance, nor in designations of MRLs such as Ordinances 2005-003 and 2005-024. The full tool kit of protections in Whatcom County's Comprehensive Plan, Policies, and development regulations and in Chapter 20.73 of the Whatcom County Code (WCC) are used to evaluate for approval or denial and condition any mining permit under consideration by the County.

*Franz v. Whatcom County Council*, WWGMHB Case No. 05-2-0011 (FDO, September 19, 2005) at (CP 305). See also *Wells v. Whatcom County*, WWGMHB Case No. 97-2-0030c (FDO January 16, 1998) at (CP 337-39.)

The opposing community's general, unsubstantiated distrust of the permitting process likewise cannot be elevated to a "public interest" under WCC 2.16.080 to justify denial of a qualified MRL application. As the Board noted also noted in *Franz*: "There is no reason to conclude Whatcom County will not utilize all tools in the comprehensive plan,

development regulations, zoning code, and its Critical Areas Ordinance to permit and monitor any mining operation connected with this designation.” *Id* at CP 314.)

The County (after-the-fact) improperly interpreted the “public interest” criterion of WCC 2.16.080 to provide the Council with unfettered discretion to reject any proposed plan amendment. Its interpretation contradicts the full text of the Code provisions. Moreover, it ignores that the phased-review process will adequately address and balance the opposing community concerns articulated in this case.

In light of the inherent, built-in protections, the generalized concerns and community displeasure announced in opposition to CNW qualified application cannot properly be elevated to a “public interest” that justifies denial of CNW’s MRL designation. To the contrary, it would undermine the adopted GMA-compliant phased review process and, correspondingly, undermine the Plan goal to seek designation of a 50-year supply of commercially viable mineral resource lands. The Council did not cite the public interest criteria in WCC 2.160.080 to justify its decision nor did the Board rule on that basis. Even if asserted, denial of CNW’s application on such basis is not an act in conformity with the Plan and violates RCW 36.70A.120.

## VI. CONCLUSION

CNW does not disagree that the GMA affords local jurisdictions substantial discretion in applying their own plan goals and policies and stated standards. Local jurisdictions cannot, however, wholly ignore and disregard stated plan goals, policies and criteria. Whatcom County's total disregard of Plan criteria, goals and policies and rejection of CNW's MRL application violated RCW 36.70A.120, as well as the County's own code. This Court should reverse the Board's Decision and remand the matter with direction to the County to take action consistent with its Plan and stated criteria.

Dated this 7<sup>th</sup> day of February, 2014.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By   
Margaret Y. Archer, WSBA No. 21224  
Attorneys for Appellants

# APPENDIX A

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BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
WESTERN WASHINGTON REGION  
STATE OF WASHINGTON

CONCRETE NOR'WEST AND 4M2K, LLC,

Petitioners,

v.

WHATCOM COUNTY,

Respondent,

and

FRIENDS OF NOOKSACK SAMISH  
WATERSHED,

Intervenor.

Case No. 12-2-0007

**FINAL DECISION AND ORDER**

**I. PROCEDURAL BACKGROUND**

Petition for Review

On April 12, 2012, Concrete Nor'West, a division of Miles Sand & Gravel Company and 4M2K, LLC (Petitioners or CNW) filed a Petition for Review (PFR). The PFR challenges Whatcom County's denial of a requested Ordinance amending the Comprehensive Plan and zoning map to create a Mineral Resource Lands (MRL) designation and zoning overlay on approximately 280 acres of Petitioners' property. The PFR alleges the denial resulted in violations of RCW 36.70A.120 and contravenes RCW 36.70A.020(8), Whatcom County Code (WCC) 2.160 and the County's Comprehensive Plan MRL goals and policies.

1 Motions

2 An order was entered upon stipulation<sup>1</sup> of the parties authorizing intervention by Friends of  
3 Nooksack Samish Watershed, a Washington non-profit corporation (FNSW or Intervenor) to  
4 intervene on behalf of Whatcom County.<sup>2</sup>

5  
6 Hearing on the Merits

7 The Hearing on the Merits (HOM) was held on August 28, 2011 in Bellingham, Washington.  
8 Board members Raymond L. Paoletta, Nina Carter and William Roehl participated with  
9 Board member Roehl presiding. The Petitioners were represented by Margaret Y. Archer  
10 and William T. Lynn. Karen N. Frakes represented Whatcom County. Intervenor FNSW was  
11 represented by David S. Mann.  
12

13  
14 **II. JURISDICTION AND STANDARD OF REVIEW**

15 **A. Board Jurisdiction**

16 The Board finds the Petition for Review was timely filed, pursuant to RCW 36.70A.290(2).<sup>3</sup>  
17 The Board finds Petitioners have standing to appear before the Board, pursuant to RCW  
18 36.70A.280(2).<sup>4</sup> The Board finds it has jurisdiction over the subject matter of the petitions  
19 pursuant to RCW 36.70A.280(1).<sup>5</sup>  
20

21 **B. Presumption of Validity, Burden of Proof, and Standard of Review**

22 Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations, and  
23 amendments to them, are presumed valid upon adoption.<sup>6</sup> This presumption creates a high  
24  
25

26 <sup>1</sup> Stipulation for Order Granting Intervention, filed May 14, 2012.

27 <sup>2</sup> Order Granting Intervention dated May 16, 2012.

28 <sup>3</sup> The County's decision to deny occurred on February 14, 2012 and the PFR was filed on April 12, 2012.

29 <sup>4</sup> The Record establishes participation standing as the action was initiated by the Petitioners and those entities  
were involved throughout the process.

30 <sup>5</sup> In the Board's Order on Motion to Dismiss, the Board found that its jurisdiction was invoked based on the  
Petitioners' allegation of a failure "to follow [an] established process and apply the adopted criteria." That  
31 statement, together with the specific language of the PFR's Issue Statements, was determined to be broad  
enough to include an allegation of a failure to comply with "a duty to adopt a comprehensive plan amendment  
32 pursuant to the GMA or other law." *Stafne v. Snohomish County*, 174 Wn.2d 24, 38.

<sup>6</sup> RCW 36.70A.320(1) provides: "[Except for the shoreline element of a comprehensive plan and applicable  
development regulations] comprehensive plans and development regulations, and amendments thereto,  
adopted under this chapter are presumed valid upon adoption."

1 threshold for challengers as the burden is on petitioners to demonstrate that any action  
2 taken by the County is not in compliance with the GMA.<sup>7</sup>

3  
4 The Board is charged with adjudicating GMA compliance and, when necessary, invalidating  
5 noncompliant plans and development regulations.<sup>8</sup> The Growth Management Hearings  
6 Board is tasked by the legislature with determining compliance with the GMA. The Supreme  
7 Court explained in *Lewis County v. Western Washington Growth Management Hearings*  
8 *Board*.<sup>9</sup>

9  
10 The Board is empowered to determine whether [county] decisions comply  
11 with GMA requirements, to remand noncompliant ordinances to [the county],  
12 and even to invalidate part or all of a comprehensive plan or development  
13 regulation until it is brought into compliance.

14 The scope of the Board's review is limited to determining whether the County has achieved  
15 compliance with the GMA only with respect to those issues presented in a timely petition for  
16 review.<sup>10</sup> The GMA directs the Board, after full consideration of the petition, to determine  
17 whether there is compliance with the requirements of the GMA.<sup>11</sup> The Board shall find  
18 compliance unless it determines the County's action is clearly erroneous in view of the  
19 entire record before the Board and in light of the goals and requirements of the GMA.<sup>12</sup> In  
20 order to find the County's action clearly erroneous, the Board must be "left with the firm and  
21 definite conviction that a mistake has been committed."<sup>13</sup>

22  
23 In reviewing the planning decisions of cities and counties, the Board is instructed to  
24 recognize "the broad range of discretion that may be exercised by counties and cities" and  
25  
26

27  
28 <sup>7</sup> RCW 36.70A.320(2) provides: [Except when city or county is subject to a Determination of Invalidity] "the  
29 burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this  
30 chapter is not in compliance with the requirements of this chapter."

31 <sup>8</sup> RCW 36.70A.280, RCW 36.70A.302.

32 <sup>9</sup> 157 Wn.2d 488 at 498, n.7, 139 P.3d 1096 (2006).

<sup>10</sup> RCW 36.70A.290(1).

<sup>11</sup> RCW 36.70A.320(3).

<sup>12</sup> RCW 36.70A.320(3).

<sup>13</sup> *Lewis County v. WWGMHB ("Lewis County")*, 157 Wn.2d 488, 497-98, (2006) (citing *Dept. of Ecology v. PUD District No. 1 of Jefferson County*, 121 Wn.2d 179, 201, (1993); See also, *Swinomish Tribe, et al. v. WWGMHB*, 161 Wn.2d 415, 423-24, (2007).



1 detailed designation criteria as required by the Whatcom County Comprehensive  
2 Plan?

3 2. Did Whatcom County violate RCW 36.70A.120 and act in contravention of RCW  
4 36.70A.020(8), WCC 2.160 and the MRL policies and goals set forth in Chapter 8 of  
5 its Comprehensive Plan when it rejected CNW's application and the corresponding  
6 proposed ordinance even though the Property and proposal satisfied the general  
7 amendment criteria and all of MRL designation criteria?

8 **Applicable Law**  
9

10 RCW 36.70A.020 (8):

11 Natural resource industries. Maintain and enhance natural resource-based  
12 industries, including productive timber, agricultural, and fisheries industries.  
13 Encourage the conservation of productive forest lands and productive  
14 agricultural lands, and discourage incompatible uses.

15 RCW 36.70A.120:

16 **Planning activities and capital budget decisions — Implementation in**  
17 **conformity with comprehensive plan.**

18 Each county and city that is required or chooses to plan under RCW  
19 36.70A.040 shall perform its activities and make capital budget decisions in  
20 conformity with its comprehensive plan.

21 Whatcom County Code Chapter 2.160 defines the types of plan amendments and  
22 establishes timelines and procedures to be followed when proposals are made for  
23 amending or revising the Whatcom County Comprehensive Plan.  
24

25 **Board Analysis and Findings**  
26

27 Initial designation of natural resource lands (and critical areas) was the first task the GMA  
28 placed on jurisdictions.<sup>17</sup>  
29

30 <sup>17</sup> *City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 48: "Thus, GMA  
31 required municipalities to designate agricultural lands [as well as forest lands and mineral resource lands] for  
32 preservation even *before* those municipalities were obliged to declare their UGAs and adopt comprehensive  
plans in compliance with GMA. The 'designation and interim protection of such areas [are] the first formal step  
in growth management implementation ... to preclude urban growth area status for areas unsuited to urban  
development.'" Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington:  
Past, Present, and Future*, 16 U. PUGET SOUND L. REV. 867 (1993).

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RCW 36.70A.170 (in relevant part):  
**Natural resource lands and critical areas — Designations.**

(1) On or before September 1, 1991, each county, and each city, shall designate where appropriate:

(c) Mineral resource lands that are not already characterized by urban growth and that have long-term significance for the extraction of minerals;

(emphasis added).

Whatcom County designated its mineral resource lands in 1992 on an interim basis in accordance with RCW 36.70A.170.<sup>18</sup> Additional MRL were designated in 1997 with adoption of Whatcom County's first Comprehensive Plan.<sup>19</sup> Following a jurisdiction's initial GMA comprehensive plan adoption and natural resource land designations, the GMA also requires regular review of adopted plans as well as their implementing development regulations:

**RCW 36.70A.130  
Comprehensive plans — Review procedures and schedules —  
Amendments.**

(1)(a) Each comprehensive land use plan and development regulations shall be subject to continuing review and evaluation by the county or city that adopted them. Except as otherwise provided, a county or city shall take legislative action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter according to the deadlines in subsections (4) and (5) of this section. (emphasis added)

The RCW 36.70A.130 review is specifically required to include consideration of MRL designations and development regulations:

**RCW 36.70A.131  
Mineral resource lands — Review of related designations and  
development regulations.**

As part of the review required by RCW 36.70A.130(1), a county or city shall review its mineral resource lands designations adopted pursuant to RCW

<sup>18</sup> See Whatcom County Comprehensive Plan, Ch. 8, pp. 8-23.

<sup>19</sup> Whatcom County Comprehensive Plan, p. 8-24; Brief of Respondent Whatcom County at p. 2.

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36.70A.170 and mineral resource lands development regulations adopted pursuant to RCW 36.70A.040 and 36.70A.060. In its review, the county or city shall take into consideration:

(1) New information made available since the adoption or last review of its designations or development regulations, including data available from the department of natural resources relating to mineral resource deposits; and

(2) New or modified model development regulations for mineral resource lands prepared by the department of natural resources, the \*department of community, trade, and economic development, or the Washington state association of counties.

(emphasis added)

Whatcom County completed its first RCW 36.70A.130(1)(a) review in 2005.<sup>20</sup> Its next review is required to be completed in 2016.

In addition to the above referenced mandatory requirements, RCW 36.70A.130(2)(a) allows jurisdictions to annually update comprehensive plans:

Each county and city shall establish and broadly disseminate to the public a public participation program consistent with RCW 36.70A.035 and 36.70A.140 that identifies procedures and schedules whereby updates, proposed amendments, or revisions of the comprehensive plan are considered by the governing body of the county or city no more frequently than once every year....

Jurisdictions typically accept applications for comprehensive plan amendments on an annual basis and then decide whether or not to consider them, a process known as "docketing." Pursuant to RCW 36.70A.130(2)(a), those applications which are "docketed" are then considered concurrently to insure the cumulative effect of the amendments is ascertained.<sup>21</sup> The County has adopted "procedures and schedules" for consideration of plan amendments.<sup>22</sup> In this matter, the County accepted an application from the Petitioners for a comprehensive plan amendment and zoning map change which would create a MRL

<sup>20</sup> Brief of Respondent Whatcom County at p. 2.  
<sup>21</sup> RCW 36.70A.130(2)(b).  
<sup>22</sup> See Whatcom County Code Ch. 2.160.

1 and zoning overlay on 280 acres (adjacent to Petitioners' existing MRL) and decided to  
2 docket that request. The applicable procedures for review of such proposals<sup>23</sup> were then  
3 followed, including SEPA review and preparation of a staff report and recommendation.  
4 That analysis was then forwarded to the Planning Commission. The County Code also  
5 establishes the processes for review and evaluation of proposed comprehensive plan  
6 amendments by the Planning Commission<sup>24</sup> and the County Council.<sup>25</sup> The Code sets forth  
7 "Approval Criteria" which the Planning Commission and Council are required to find in order  
8 to approve the amendment.<sup>26</sup> Included in the required planning staff analysis and report was  
9 a review of the applicable Comprehensive Plan Policies and the specific designation criteria  
10 for MRLs.<sup>27</sup>

11  
12  
13 The designation criteria relevant to the Petitioners' application include the following:

- 14 6. The site shall have a proven resource that meets the following criteria:
- 15 • Construction material must meet WSDOT Standard Specifications for  
16 common borrow criteria for road, bridge and municipal construction, or  
17 Whatcom County standards for other uses.
  - 18 • Sand and gravel deposits must have a net to gross ratio greater than  
19 80% (1290cy/acre/foot).
- 20

21 <sup>23</sup> WCC 2.160.070.

22 <sup>24</sup> WCC 2.160.090.

23 <sup>25</sup> WCC 2.160.100.

24 <sup>26</sup> WCC 2.160.080, (In part): "A. In order to approve an Initiated comprehensive plan amendment, the planning  
25 commission and the county council shall find all of the following:

26 1. The amendment conforms to the requirements of the Growth Management Act, is internally consistent  
27 with the county-wide planning policies and is consistent with any interlocal planning agreements.

28 2. Further studies made or accepted by the department of planning and development services indicate  
29 changed conditions that show need for the amendment.

30 3. The public interest will be served by approving the amendment. In determining whether the public interest  
31 will be served, factors including but not limited to the following shall be considered:

32 a. The anticipated effect upon the rate or distribution of population growth, employment growth,  
development, and conversion of land as envisioned in the comprehensive plan.

b. The anticipated effect on the ability of the county and/or other service providers, such as cities, schools,  
water and/or sewer purveyors, fire districts, and others as applicable, to provide adequate services and  
public facilities including transportation facilities.

c. Anticipated impact upon designated agricultural, forest and mineral resource lands.

4. The amendment does not include or facilitate spot zoning."

<sup>27</sup> Whatcom County Planning and Development Services Staff Report, Ex. 4 attached to Concrete NorWest's  
Opening Brief. The Goals, Policies and designation criteria are set out in the Whatcom County Comprehensive  
Plan at Chapter Eight-Resource Lands, pp. 8-18 through 8-28.

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7. MRL Designations must not be within nor abut developed residential zones or subdivisions platted at urban densities.

8. MRL Designations must not occur within the 10 year zone contribution for designated wellhead protection areas, as approved by the State Department of Health for Group A systems, and by the Whatcom County Health Department for Group B systems, in accordance with source control provisions of the regulations on water system comprehensive planning. MRL designations may be modified if a wellhead protection area delineated subsequent to MRL designation encompasses areas within a designated MRL. If a fixed radii method is used to delineate a wellhead protection area, the applicant may elect to more precisely delineate the wellhead protection boundary using an analytical model; provided, that the delineated boundary proposed by the applicant is prepared by a professional hydrogeologist; and further provided, that the delineated boundary has been reviewed and approved by the Washington State Department of Health for Group A systems, and by the Whatcom County Health Department for Group B systems. The hydrogeologist shall be selected by mutual agreement of the County, water purveyor, and applicant; provided, if agreement cannot be reached the applicant shall select a consultant from the list of no less than three qualified consultants supplied by the County and water purveyor.

9. MRL Designations should not enclose by more than 50% non-designated parcels...

11. Must demonstrate higher value as mineral resource band forestry resource based upon:

- Soil conditions
- Accessibility to market.
- Quality of mineral resource.
- Sustainable productivity of forest resource

The staff analysis concluded that each of the above referenced criteria had been met.<sup>28</sup> Staff recommended approval of Petitioners' request<sup>29</sup> and the Planning Commission concurred; voting to forward the staff recommendation and proposed findings to the County Council for consideration and approval.<sup>30</sup>

<sup>28</sup> Ex. 4, pp. 4-8, attached to Concrete NorWest's Opening Brief.

<sup>29</sup> Ex. 8, p. 1, attached to Concrete NorWest's Opening Brief.

<sup>30</sup> *Id.*, pg. 3

1 The County Council declined to adopt the proposed Ordinance approving the Petitioners'  
2 MRL designation request, voting 3-3 with one abstention. The Council made no findings. As  
3 Petitioners observe, during the Council's discussion prior to the vote, members who  
4 opposed the designation failed to address the designation criteria. Rather, they referred to  
5 concerns regarding environmental impacts, including one member's demand that a study of  
6 mining impacts on water quality and quantity first be conducted.<sup>31</sup> Petitioners' also  
7 accurately assert designation of MRL in Whatcom County does not authorize mining activity.  
8 Under the WCC, site-specific environmental review is conducted during the permitting  
9 process.<sup>32</sup>

10  
11  
12  
13 Petitioners observe the County adopted specific criteria to be applied in addressing MRL  
14 designation requests. Pursuant to such a request from the Petitioners, they state both the  
15 County Planning Staff and Planning Commission concluded the application met all the  
16 designation criteria and recommended that the County Council approve the designation.  
17 Petitioners argue the ultimate Council denial was not based on consideration of the MRL  
18 designation criteria but rather on factors beyond those criteria: response to public opposition  
19 and a desire for a site-specific water quantity and quality analysis prior to designation.  
20 The underpinning of Petitioners' argument is that RCW 36.70A.120 requires jurisdictions to  
21 act in accordance with their comprehensive plans: "Each county... shall perform its activities  
22 ... in conformity with its comprehensive plan." They then assert Whatcom County's MRL  
23 designation process<sup>33</sup> was adopted to carry out numerous Comprehensive Plan goals and  
24 policies, and the application met each and every applicable criterion for designation. The  
25 Petitioners assert the Council failed to address or apply the designation criteria, but instead  
26 treated the designation request like a site-specific project permit application.  
27  
28

29 The County's position can be simply stated: In order to prevail, the Petitioners must show  
30 the County had a duty to act and they have failed to establish the existence of such a duty.  
31  
32

<sup>31</sup> Tab 9 attached to Petitioners' Opening Brief, Document No. 108, pp. 10-12.

<sup>32</sup> Chapter 20.73 WCC.

<sup>33</sup> Set forth at Ex. 34, pp. 8-27 and 8-28.

1 Citing the *Stafne* decision, the County asserts Petitioners' remedy lies not with the Board,  
2 but through a "proposal at the County's next docketing cycle or mandatory review or through  
3 the political or election process."<sup>34</sup>

4  
5 In this matter, the County observes its Comprehensive Plan "does not mandate that all  
6 property meeting the MRL designation criteria must be designated...."<sup>35</sup> Beyond that, the  
7 County states a Comprehensive Plan amendment must also meet the approval criteria of  
8 WCC 2.160.080, which includes the necessity of a County Council finding that the public  
9 interest will be served. In that regard, the County sets out in detail references to concerns of  
10 the public related to the proposal.

11  
12  
13 Intervenor defers to and adopts the County's Brief and restates the argument that  
14 Petitioners can prevail only if they establish a duty to act. It argues Petitioners failed to cite  
15 any GMA or County legislation imposing such a duty. While not effectively disputing  
16 Petitioners' application met the MRL designation criteria, Intervenor, like the County, cites  
17 WCC 2.160.080 which allows consideration of the public interest.<sup>36</sup>

18  
19 With that background, the Board's analysis begins with *Stafne v. Snohomish County* in  
20 which the Court stated the following:

21  
22 While RCW 36.70A.130 authorizes a local government to amend  
23 comprehensive plans annually, it does not require amendments. Moreover, *it*  
24 *does not dictate that a specific proposed amendment be adopted.* [When] the  
25 County takes an action pursuant to the authority of RCW 36.70A.130 or fails  
26 to meet a duty imposed by some other provision of the GMA, [the petitioner]  
27 may have an action that could properly be brought before the Board.<sup>37</sup>  
(emphasis added)

28 The Board concurs with the County and Intervenor: The Petitioners can prevail if, and only  
29 if, the GMA, the County's Plan or its development regulations impose a duty on the County  
30

31  
32 <sup>34</sup> *Stafne v. Snohomish County*, 174 Wn.2d 24, 38.

<sup>35</sup> Brief of Respondent Whatcom County at 7.

<sup>36</sup> WCC 2.160.080 (A)(3), set out in its entirety at n.26.

<sup>37</sup> 174 Wn.2d 24, 37.

1 to designate MRL during an annual update when all applicable designation criteria are  
2 met.<sup>38</sup>

3  
4 Due to the 3-3 tie vote by the County Council on the requested MRL designation ordinance,  
5 the County's attorney took no position at the HOM on whether the designation criteria were  
6 met, and the record contains no actual findings of fact by the County Council. However, the  
7 staff report stated the application met the applicable designation criteria.<sup>39</sup> Assuming  
8 *arguendo* that the designation criteria were satisfied, the Petitioners failed to cite any GMA  
9 provision that imposes a duty to designate property as MRL when it meets a jurisdiction's  
10 designation criteria. However, in light of the RCW 36.70A.120 obligation for a jurisdiction to  
11 act " . . . in conformity with its comprehensive plan . . . ", the Board's inquiry must necessarily  
12 turn to the Comprehensive Plan. Do either Whatcom County's Plan or its development  
13 regulations include a duty to designate an applicant's property as MRL during its annual  
14 update when the property meets the designation criteria?  
15  
16

17 The Petitioners cite in support of their argument numerous Comprehensive Plan Resource  
18 Lands Goals and Policies as well as the designation criteria. However, the fatal flaw in  
19 Petitioners' argument is the lack of language in any of the cited Goals/Policies or the  
20 designation criteria that require the County to designate lands as MRL<sup>40</sup> when the  
21 designation criteria are met. By way of example, Policy 8P-1 provides the County should  
22 "seek" a 50 year supply of aggregate; it does not mandate such a supply.<sup>41</sup> In addition, that  
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28 <sup>38</sup> The County did not challenge Petitioners' assertion all designation criteria had been met. In a footnote  
29 Intervenor did raise an assertion that Criterion 9 had not been met. The Staff Report contradicts Intervenor's  
30 argument.

31 <sup>39</sup> Whatcom County Planning and Development Services Staff Report (p. 32), Ex. 4 attached to Concrete  
32 NorWest's Opening Brief. The Goals, Policies and designation criteria are set out in the Whatcom County  
Comprehensive Plan at Chapter Eight-Resource Lands, pp. 8-18 through 8-28.

<sup>40</sup> See also *Concrete NorWest v. Whatcom County*, Case No. 07-2-0028 (Order on Dispositive Motion at 13,  
February 28, 2008): "Goals 8H, 8K, 8P and 8P-1 state general objectives of the County's mineral resource  
lands strategy; they do not require any particular action with respect to the Petitioner's application."

<sup>41</sup> The Record, including the Staff Report, supports a conclusion that the County does not currently have a 50  
year supply designated.

1 same Policy is to be pursued to the "extent compatible with protection of water  
2 resources...."<sup>42</sup>

3  
4 Petitioners argue this Board's decision in *Franz v. Whatcom County Council*<sup>43</sup> found an  
5 MRL designation in Whatcom County does not constitute a right to mine and that site-  
6 specific review is conducted at the administrative level. While Petitioners' argument is  
7 accurate, those facts do not lead to a conclusion the Whatcom County Council was required  
8 to approve the MRL designation request.  
9

10 The Board decision in a prior CNW case is also cited by way of support.<sup>44</sup> There the Board  
11 dismissed on motion the Petitioner's claim as it had failed to assert the property met the  
12 MRL designation criteria and that designation was therefore required. Those assertions  
13 were made in this case. However, it is the second prong of the Board's ruling in that prior  
14 decision Petitioners have failed to establish; that the County Comprehensive Plan *requires*  
15 designation.<sup>45</sup>  
16

17  
18 The *Stafne* Court quoted the Central Board's decision in *Cole, et al. v. Pierce County* with  
19 approval:

20 While RCW 36.70A.130 authorizes a local government to amend  
21 comprehensive plans annually, it does not require amendments. Moreover, it  
22 does not dictate that a specific proposed amendment be adopted.<sup>46</sup>

23 That observation is similarly appropriate here. A local government legislative body has the  
24 discretion to adopt or reject a particular proposed comprehensive plan amendment in the  
25

26  
27  
28 <sup>42</sup> Protection of water resources was one of the concerns raised by those opposed to the MRL designation.  
See Tab 9 attached to Petitioners' Opening Brief, Document No. 108, pp. 10-11.

29 <sup>43</sup> Case No. 05-2-0011, (FDO, September 19, 2005).

30 <sup>44</sup> *Concrete NorWest v. Whatcom County*, Case No. 07-2-0028 (Order on Dispositive Motion, February 28,  
2008).

31 <sup>45</sup> *Id.* at 2: "We note that a claim that the County failed to follow the criteria and process for a designation  
32 change adopted in its comprehensive plan would state a claim upon which the Board could act. However,  
Petitioner did not allege that its property met the County's designation criteria for mineral resource lands and  
that the County's plan required the designation change requested by Petitioner." (emphasis added)

<sup>46</sup> Case No. 96-3-0009c (July 31, 1996, FDO) at 10.

1 absence of a GMA or comprehensive plan mandate.<sup>47</sup> The Petitioners have failed to  
2 establish the existence of a mandate.<sup>48</sup>

3  
4 In this matter, the Board lacks the authority to grant relief to the Petitioners as they have  
5 failed to meet their burden of proof to establish the GMA or the Whatcom County  
6 Comprehensive Plan (or other law) mandates adoption of the proposed MRL amendment.  
7

8 **Conclusion**

9 The Board concludes the Petitioners have failed to meet their burden to establish a violation  
10 of RCW 36.70A.120, RCW 36.70A.020(8), Whatcom County Code 2.160 and the County's  
11 MRL goals and policies.  
12

13 **IV. ORDER**

14 Based upon review of the Petition for Review, the briefs and exhibits submitted by the  
15 parties, the Growth Management Act, prior Board Orders and case law, having considered  
16 the arguments of the parties, and having deliberated on the matter, the Board, having  
17 concluded the Petitioners have failed to demonstrate the decision of Whatcom County was  
18 a clearly erroneous violation of RCW 36.70A.120, RCW 36.70A.020(8), Whatcom County  
19 Code 2.160 and the County's MRL goals and policies, this appeal is denied and Case No.  
20 12-2-0007 is dismissed.  
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29  
30 <sup>47</sup> *Stafne v. Snohomish County*, 174 Wn.2d 24, 38: "We agree with the board's determinations in cases like  
31 *Cole* and *SR 9IUS 2 LLC*. County and city councils have legislative discretion in deciding to amend or not  
32 amend their comprehensive plans. Absent a duty to adopt a comprehensive plan amendment pursuant to the  
GMA or other law, neither the board nor a court can grant relief (that is, order a legislative discretionary act). In  
other words, any remedy is not through the judicial branch."

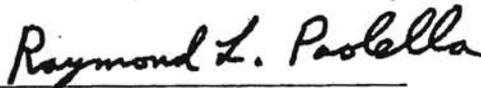
<sup>48</sup> The Board observes that this matter involved an RCW 36.70A.130(2)(a) annual review. Whether or not a  
similar result would be reached had this case been a challenge to an RCW 36.70A.130(1)(a) and RCW  
36.70A.131 review remains an open question.

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Entered this 25th day of September, 2012.

  
William Roehl, Board Member

  
Nina Carter, Board Member

  
Raymond L. Paoella, Board Member

**Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.<sup>49</sup>**

<sup>49</sup> Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-3-830(1), WAC 242-3-840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.



# APPENDIX B

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**Chapter 2.160  
COMPREHENSIVE PLAN AMENDMENTS**

**Sections:**

- 2.160.010 Authority.
- 2.160.020 Purpose.
- 2.160.030 Definitions – Types of comprehensive plan amendments.
- 2.160.040 Application.
- 2.160.050 Initiation of comprehensive plan amendments.
- 2.160.060 Docket of initiated comprehensive plan amendments.
- 2.160.070 Review and evaluation of comprehensive plan amendments – Staff report.
- 2.160.080 Approval criteria.
- 2.160.090 Review and evaluation of comprehensive plan amendments – Planning commission.
- 2.160.100 Review and evaluation of comprehensive plan amendments – County council.
- 2.160.110 Fees.

**2.160.010 Authority.**

The Growth Management Act (GMA) requires that an adopted comprehensive plan shall be subject to continuing review and evaluation, any amendments or revisions to the comprehensive plan conform to the requirements of Chapter 36.70A RCW, and that any changes to development regulations or official controls are consistent with and implement the comprehensive plan (RCW 36.70A.130(2)). Additionally, the GMA requires that the county establish procedures whereby proposed amendments or revisions of the comprehensive plan are considered by the county council no more frequently than once every year; except, that amendments may be considered more frequently under the following circumstances:

- A. The initial adoption of a subarea plan that does not modify the comprehensive plan policies and designations applicable to the subarea;
- B. Adoption or amendment of a shoreline master program;
- C. The amendment of the capital facilities element of a comprehensive plan that occurs concurrently with the adoption or amendment of a county or city budget; or
- D. To resolve an appeal of the comprehensive plan filed with the Growth Management Hearings Board or court. (Ord. 2008-060 Exh. A).

**2.160.020 Purpose.**

The purpose of this chapter is to define the types of plan amendments and establish timelines and procedures to be followed when proposals are made for amending or revising the Whatcom County Comprehensive Plan. (Ord. 2008-060 Exh. A).

**2.160.030 Definitions – Types of comprehensive plan amendments.**

A. "Capital facilities element amendment" means a proposed change or revision to the capital facilities element of the comprehensive plan, including the six-year capital improvement program.

B. "Comprehensive plan amendment" means a proposed change or revision to the Whatcom County Comprehensive Plan, including but not limited to a capital facilities element amendment, text amendment, change to the comprehensive plan designations map or urban growth area amendment.

C. "Text amendment" means a proposed change or revision in the text of any element of the comprehensive plan including revisions to the goals, policies, objectives, principles or standards of the plan.

D. "Urban growth area amendment" means a proposed change or revision to an urban growth area boundary as adopted by the comprehensive plan.

E. "Final concurrent review" means the consideration by the county council of all comprehensive plan amendments that were reviewed and recommended by the council during the previous docket year. This review shall take place on or about February 1st of the year after the previous docket year. (Ord. 2008-060 Exh. A).

**2.160.040 Application.**

A. Applications for suggested comprehensive plan amendments shall include at least the following information:

1. A description of the comprehensive plan amendment being proposed including proposed map or text changes;
2. An explanation of how the comprehensive plan amendment relates to the approval criteria in WCC 2.160.080, Approval criteria;
3. A complete State Environmental Policy Act (SEPA) environmental checklist; and
4. Name, address, and phone number of the applicant, and, if applicable, assessor's parcel number, section, township, and range.

B. The department of planning and development services may prescribe additional information requirements and shall provide forms for proposed comprehensive plan amendments.

C. Completed applications for comprehensive plan amendments must be received by planning and development services by December 31st to be considered for initiation during the next calendar year. Applications proposed by planning and development services are not subject to the December 31st deadline. (Ord. 2008-060 Exh. A).

**2.160.050 Initiation of comprehensive plan amendments.**

A. Comprehensive plan amendments shall be initiated by a resolution of the county council adopted by majority vote on or about March 1st each year.

B. Planning and development services may request a comprehensive plan item be initiated at any time during the year. Requested amendments of this type shall be placed on the docket by a majority vote of the county council and will be considered concurrently with other docketed items in accordance with the procedures in WCC 2.160.100.

C. In determining whether to initiate a comprehensive plan amendment, the county council will consider the following factors:

1. If the amendment relates to a site within a city's urban growth area, modification of a city's urban growth area boundary, or amends comprehensive plan text relating to a city's urban growth area, the county shall consult with and consider the comments from the city, including comments relating to the availability of services. Proposed amendments to city urban growth areas shall be processed in accordance with adopted interlocal agreements between the city and county and any subsequent amendments;
2. If the amendment relates to removing designated agricultural, forestry or mineral resource lands, the council shall consider any long-term trends in the loss of resource lands and cumulative impacts of approving such an amendment;
3. Whether the county has already set a future date for examining the area or issue; and
4. Planning and development services' existing work plan and the additional work the amendment would require of planning and development services staff.

D. The following amendment proposals shall be deemed initiated and included in the resolution that initiates comprehensive plan amendments:

1. Amendment proposals that the county council approves for initiation from those applications received within the application period;
2. Comprehensive plan amendments proposed by councilmembers that the county council approves for initiation;
3. Amendment proposals timely submitted by cities and approved by the county council;
4. Amendment proposals timely submitted by the county executive.

E. The resolution setting the list of comprehensive plan amendments initiated for the amendment cycle, the docket, shall be forwarded to the department of planning and development services. Upon receipt of the resolution, the department shall make copies available to the public and begin the process for the review and evaluation of the proposed amendments as set out in WCC 2.160.070.

F. County planning and development staff shall forward a copy of any suggested plan amendment which would modify a city's urban growth area to the appropriate city staff within 15 days of receipt, and shall notify the city of the date the county council is

scheduled to review the proposed amendment at least 10 days prior to consideration by the county council. (Ord. 2008-060 Exh. A).

**2.160.060 Docket of initiated comprehensive plan amendments.**

A. The department of planning and development services shall keep a docket of Initiated comprehensive plan amendments and WCC Title 20 map and text amendments as initiated by the procedures in WCC 2.160.050.

B. The docket shall include the following information:

1. File number;
2. Name and address of the person or agency proposing the plan amendment;
3. Type of amendment being proposed and description of the amendment;
4. Initial year of proposed amendment;
5. Section, township and range of affected area, if applicable.

C. The docket and all application files shall be available for public review at the planning and development services department during normal business hours. (Ord. 2008-060 Exh. A).

**2.160.070 Review and evaluation of comprehensive plan amendments – Staff report.**

A. The department of planning and development services shall conduct environmental review under SEPA and prepare reports including recommendations on all initiated comprehensive plan amendments and forward both the reports and the result of the environmental review to the planning commission.

B. Reports shall evaluate the merits of each initiated amendment based on the approval criteria of WCC 2.160.080.

C. If a proposed amendment relates to a site within a city's urban growth area, will modify a city's urban growth area or will amend text relating to a city's urban growth area, planning and development services staff shall identify and follow any additional procedures called for in an adopted interlocal agreement between the county and that city. (Ord. 2008-060 Exh. A).

**2.160.080 Approval criteria.**

A. In order to approve an Initiated comprehensive plan amendment, the planning commission and the county council shall find all of the following:

1. The amendment conforms to the requirements of the Growth Management Act, is internally consistent with the county-wide planning policies and is consistent with any interlocal planning agreements.
2. Further studies made or accepted by the department of planning and development services indicate changed conditions that show need for the amendment.

3. The public interest will be served by approving the amendment. In determining whether the public interest will be served, factors including but not limited to the following shall be considered:

- a. The anticipated effect upon the rate or distribution of population growth, employment growth, development, and conversion of land as envisioned in the comprehensive plan.
- b. The anticipated effect on the ability of the county and/or other service providers, such as cities, schools, water and/or sewer purveyors, fire districts, and others as applicable, to provide adequate services and public facilities including transportation facilities.
- c. Anticipated impact upon designated agricultural, forest and mineral resource lands.

4. The amendment does not include or facilitate spot zoning.

5. Urban growth area amendments that propose the expansion of an urban growth area boundary shall be required to acquire development rights from a designated TDR sending area.

a. One development right shall be transferred for every five acres included into an UGA. The county council may modify this requirement if a development agreement has been entered into that specifies the elements of development in the expanded UGA. The development agreement should include, but not be limited to, affordable housing, density, allowed uses, bulk and setback standards, open space, parks, landscaping, buffers, critical areas, transportation and circulation, streetscapes, design standards and mitigation measures.

b. Exceptions to required TDRs include urban growth area expansion initiated by a government agency, correction of map errors, properties that are urban in character, or expansions where the public interest is served.

c. Urban growth area expansion initiated by the county, cities or other agencies shall be subject to review by county and city planning staff, and the appropriate administrative bodies, to determine whether the subject site is appropriate for designation as a TDR receiving area. (Ord. 2008-060 Exh. A).

**2.160.090 Review and evaluation of comprehensive plan amendments -- Planning commission.**

A. The planning commission shall receive the staff's findings and recommendations for the initiated amendments and shall take public comment and hold public hearing(s) on the amendments.

B. At the conclusion of the public hearings and comment period, the commission shall evaluate the merits of each amendment in relationship to the approval criteria of WCC 2.160.080 and shall make a recommendation to the county council as to whether the amendments should be approved, approved with modifications or denied. The planning

commission shall then cause written findings of fact, reasons for action, conclusions and recommendations to be prepared for each amendment. The written findings of fact, reasons for action and conclusions shall be forwarded to the county council in the form of a proposed ordinance(s) for its consideration. (Ord. 2008-060 Exh. A).

**2.160.100 Review and evaluation of comprehensive plan amendments – County council.**

A. Comprehensive plan amendments, except for amendments adopted by emergency ordinance pursuant to Section 2.40 of the Whatcom County Charter, shall be adopted by ordinance after a recommendation by the planning commission has been submitted to the council for consideration. All initiated amendments to the comprehensive plan with the exception of amendments set forth in WCC 2.160.010 shall be considered by the council no more frequently than once a year and concurrently so the cumulative effect of the various proposals can be ascertained. The council may schedule such additional public hearings as the council deems necessary to serve the public interest.

B. If, after deliberating, the council believes the public interest may be better served by departing from the recommendation of the planning commission on an initiated amendment, the council shall conduct a public hearing on that amendment.

C. The council shall decide to approve, approve with modifications or deny comprehensive plan amendments based upon the approval criteria in WCC 2.160.080. Those amendments may be recommended for final concurrent review throughout the year. Final concurrent review by the county council should occur on or about February 1st.

D. The council shall send recommended comprehensive plan amendments on to final concurrent review by December 31st. Amendments that have not been either recommended or denied by the council by December 31st will be re-docketed for the next amendment cycle with the same number with which they were initially docketed. (Ord. 2008-060 Exh. A).

**2.160.110 Fees.**

A. Application fees shall not be required for any application submitted by the county council, county councilmembers, county executive, planning commission, and county planning and development services.

B. All other applicants shall pay application fees as specified in the Unified Fee Schedule.

C. Once an amendment is initiated by resolution of the county council, the applicant shall pay the initiation fee within 15 days. The county council may take official action to waive the initiation fee at the time it approves the initiating resolution if it finds the proposed amendment will clearly benefit the community as a whole and will not be for private financial gain. (Ord. 2008-060 Exh. A).

**The Whatcom County Code is current through Ordinance 2012-022, passed May 22, 2012, and Resolution 2012-015, passed May 8, 2012.**

Disclaimer: The Clerk of the Council's Office retains the official version of the Whatcom County Code. Users should contact the Clerk of the Council's Office for ordinances passed subsequent to the ordinance dated above.

County Website:  
<http://www.whatcomcounty.us/>  
(<http://www.whatcomcounty.us/>)  
County Telephone: (360) 676-6690  
Code Publishing Company  
(<http://www.codepublishing.com/>)  
eLibrary  
(<http://www.codepublishing.com/elibrary.html>)

<http://www.codepublishing.com/wa/whatcomcounty/html/Whatco02/Whatco02160.html>

# APPENDIX C

## Chapter Eight RESOURCE LANDS

### INTRODUCTION

The growth and harvest of farm products, re-generation and harvesting of timber, and excavation of minerals all shape Whatcom County's landscape and strongly influence the economy. Resource lands, which include agriculture, forestry, and mineral resource lands, also largely represent Whatcom County's cultural heritage. These natural resource activities have been major industries since settlement began in the area.

### Chapter Organization

This chapter is divided into three sections: Agricultural Lands, Forest Resource Lands, and Mineral Resources. The action plans for all three sections appear at the end of the chapter.

### Purpose

This chapter contains goals and policies designed to identify and protect the important natural resource lands found in Whatcom County as defined by RCW 36.70A. The development of these goals and policies is necessary to ensure the provision of land suitable for long-term farming, forestry, and mineral extraction so the production of food, fiber, wood products, and minerals can be maintained as an important part of our economic base through the planning period. Without protection of these resource lands, some of the lands could be inappropriately or prematurely converted into land uses incompatible with long-term resource production. The premature conversion of resource lands into incompatible uses places additional constraints on remaining resource lands and can lead to further erosion of the resource land base.

### Process

Each section of this chapter includes a description of the process followed in creating that section.

### GMA Goals, County-Wide Planning Policies, and Visioning Community Value Statements

The following goals and policies in this chapter have been developed:

- to be consistent with and help achieve the state-wide GMA goals to "maintain and enhance" natural resource based industries
- to implement County-Wide Planning Policies which express the desire for the county to become a government of rural lands and sustainable resource based industries
- to fulfill the citizens' vision of Whatcom County where resource based industries are widely practiced and encouraged

The Agricultural Lands, Forest Resource Lands, and Mineral Resources sections of this chapter address Goal 8 of the GMA, which reads:

**"Natural Resource Industries.** Maintain and enhance natural resource based industries, including productive timber, agricultural, and fisheries industries.

**MINERAL RESOURCES - INTRODUCTION****Purpose**

The purpose of this section is to guide Whatcom County in land use decisions involving lands where mineral resources are present.

**Process**

To address the mandates of the Growth Management Act, Whatcom County formed a Surface Mining Citizens' Advisory Committee in the 1990s to produce, through a consensus process, the issues, goals, and policies found in this chapter. Planning staff drafted the sub-section on mineral designations following review and comments from the committee. The committee was comprised of a cross-section of community members including mining operators, foresters, farmers, and rural homeowners representing diverse interests and geographic areas in Whatcom County. The County Council adopted the original mineral resource provisions in the 1997 Comprehensive Plan. These provisions were updated in 2004-2005 after reviewing the GMA, Surface Mining Advisory Committee recommendations and new information.

**GMA Requirements**

One of the goals of the Growth Management Act is to maintain and enhance resource based industries, including the aggregate and mineral resource industries, with the purpose of assuring the long-term conservation of resource lands for future use. The goals and policies in this section support that goal. In addition, the Act mandates that each county shall classify mineral resource lands and then designate and conserve appropriate areas that are not already characterized by urban growth and that have long-term commercial significance.

**MINERAL RESOURCES - BACKGROUND SUMMARY**

Mining activities in Whatcom County have taken place since the 1850s, though the nature, scope and extent of such activities has changed considerably through time. These changes have reflected the economics involved at each point in time at least as much as they reflect the geologic character of Whatcom County. Historically, the more important mineral commodities of Whatcom County have been coal, gold (placer and lode); sandstone, clay, peat, limestone, olivine, and sand and gravel aggregate, with the latter three being especially important at present. Many other commodities, however, have been prospected for or extracted.

In 2004, there were 24 Mineral Resource Land (MRL) designations throughout the County, covering 4,204 acres. For planning purposes, the Surface Mining Advisory Committee recommended using an annual demand for sand and gravel of 12.2 cubic yards per capita and annual demand for bedrock of 1.3 cubic yards per capita in the 2004-05 Comprehensive Plan update, consistent with the rates in the 1997 Comprehensive Plan. There were approximately 108 people directly employed by the mining industry in 2000 (Greater Whatcom Comprehensive Economic Development Strategy, p. III-16).

In Whatcom County, sand and gravel mining occurs mainly east of Interstate-5 and north of Bellingham, with some exceptions. The more important areas from east to west include: (1) the Siper and Hopewell Road area two miles north of Nugents Corner; (2) the Breckenridge Road area just east of Nooksack; (3) the Pangborn and Van Buren Road area two and one half miles southwest of Sumas; (4) the Pole and Everson-Goshen Road area to the southwest of Everson;

(5) the Axton Road area one mile east of Laurel; and (6) the Valley View Road area three miles to the east of Blaine. It is estimated that between 1999-2001 approximately 1.73 million cubic yards of sand and gravel from upland pits were excavated annually in Whatcom County (Report Engineering Geology Evaluation Aggregate Resource Inventory Study Whatcom County, Washington (GeoEngineers, Inc., Sept. 30, 2003, p.7).

Limestone has been mined since the early 1900s in Whatcom County. Historically, the main use for limestone was for portland cement manufacturers and pulp and paper industries. Today, limestone is mined in the Red Mountain area north of Kendall and is primarily used for rip-rap to mitigate effects of flooding, for crushed rock, and for pulp mills. Limestone mining has decreased significantly over the years. In 1966, about 500,000 tons of limestone were produced annually from deposits on Red Mountain and from deposits north of Maple Falls. Since then, limestone mining has decreased significantly.

Whatcom County is home to one of the largest known deposits of olivine in the United States, located in the Twin Sisters Mountain. The extraction of high quality Twin Sisters dunite (olivine) by the Olivine Corporation, largely from the Swen Larsen Quarry, has ranged from 400 tons in the early years of operation to a more recent annual average of approximately 70,000 to 80,000 tons.

In the past extraction of river gravel occurred primarily within the banks of the Nooksack River between Deming and Lynden, as determined by aggregate size and composition. As of March, 1993, 34 gravel bars had approved status for extraction. Between 1990 and 1993, an average of 170,000 cubic yards per year of river gravel were removed from the Nooksack River. Between 1960 and 1987, removal rates averaged about 50,000 cubic yards per year. However, because of federal regulations and decreasing seasonal windows in which gravel could be removed from the river, there has not been any river bar scalping on the Nooksack River since 1995.

#### **MINERAL RESOURCES - ISSUES, GOALS, AND POLICIES**

##### **General Issues**

While urbanization creates demand for sand and gravel resources, it may also encroach upon or build over those same resources, rendering them inaccessible. Strong community opposition to mining near residential, agricultural, or sensitive environmental areas may also limit extractive opportunities. Adequate resource protection could help to assure the long-term conservation of resource lands for future use. It would also help to ensure a competitive market and to guard against inflated land prices by allowing the supply of minerals to respond to the demand of a free market. Helping the aggregate industry and the associated businesses, trades, and export markets creates jobs and stimulates the economy, to the benefit of the county.

Potential conflicts with other land uses, however, may include increased noise, dust, visual blight, traffic, road wear, and neighboring property devaluation. Unreclaimed mines can affect property values while at the same time nearby residents may use the area for shooting, dirt bike riding, and other activities. Controlling trespassing to surface mining can be a significant safety issue for mine operators. Property rights issues range from the right to mine and use the value of mineral resource land to the right to live in an area with a high quality of life and retain home values. Citizens may be generally unaware of the county zoning of surrounding property and the mining uses that are allowed. These and other factors may contribute to a climate of distrust and hostility between the aggregate industry and property owners.

Environmental issues associated with surface mining include groundwater contamination and disruption of fish and wildlife habitat. Surface mines do have the potential, however, if reclaimed properly, to create wetlands and fish and wildlife habitat, possible productive agricultural land for a limited number of crops, or provide land for parks, housing, industrial and other uses.

As a natural result of geologic forces, it is not uncommon in Whatcom County to have excellent mineral deposits located under prime farmland soil and above an aquifer recharge area. Mining in these areas can substantially reduce the productive capacity of the soil and make the underlying aquifer more susceptible to contamination. Removing the soil overburden eliminates the natural filtration system, exposing the aquifer to direct contamination from turbidity, industrial spills, illegal dumping and agriculture products. Removing, stockpiling and spreading soil creates an unacceptable risk of compromising the productive capacity of the most productive and versatile farmland in the County. Another potential problem is that digging out a side hill and/or through a clay barrier could tap the groundwater and suddenly drain an aquifer. This creates a conflict between competing natural resource industries; agriculture and mining. While agriculture is a sustainable industry, mining is an industry that relies on a fixed, nonrenewable resource.

Associated mining activities such as rock crushing on-site can greatly increase the "industrial atmosphere" experienced by nearby property owners. This activity, however, helps to keep material transportation costs down. In addition, accessory uses are a necessary part of most operations, and to carry them out on site is cost-effective.

- GOAL 8J:** Sustain and enhance, when appropriate, Whatcom County's mineral resource industries, support the conservation of productive mineral lands, and discourage incompatible uses upon or adjacent to these lands.
- Policy 8J-1:** Conserve for mineral extraction designated mineral resource lands of long-term commercial significance. The use of adjacent lands should not interfere with the continued use of designated mining sites that are being operated in accordance with applicable best management practices and other laws and regulations.
- Policy 8J-2:** Support the use of new technology and innovative techniques for extraction, processing, recycling and reclamation. Support recycling of concrete and other aggregate materials. Support the efficient use of existing materials and explore the use of other materials which are acceptable substitutes for mineral resources.
- Policy 8J-3:** Minimize the duplication of authority in the regulation of surface mining.
- GOAL 8K:** Ensure that mineral extraction industries do not adversely affect the quality of life in Whatcom County, by establishing appropriate and beneficial designation and resource conservation policies, while recognizing the rights of all property owners.
- Policy 8K-1:** Avoid significant mineral extraction impacts on adjacent or nearby land uses, public health and safety, or natural resources.
- Policy 8K-2:** Consider the maintenance and upgrade of public roads. Address all truck traffic on county roads in a fair and equitable fashion.

- Policy 8K-3:** Avoid adversely impacting water quality. The protection of aquifers and recharge zones should have precedence over surface mining in the event it is determined by the county that adverse impacts cannot be avoided through the standard use of best management practices. Avoid contamination of aquifers by using uncontaminated material for reclamation or on-site storage.
- Policy 8K-4:** Require, where there exists County jurisdiction, the reclamation of mineral resource lands on an ongoing basis as mineral deposits are depleted. Best Management Practices should be used to achieve this.
- Policy 8K-5:** Have an ultimate use for land used for mineral extraction which will complement and preserve the value of adjoining land.
- Policy 8K-6:** Require security to cover the costs of reclamation prior to extraction activity, and insurance policies or a similar type of protection as appropriate to cover other potential liabilities associated with the proposed activity.

#### Rural and Urban Areas

Many of the rural areas in Whatcom County have been and are being used for mineral extraction. Low density rural areas with potential natural resources such as sand and gravel may be able to accommodate a variety of uses, and surface mining has been a traditional use. Significant mineral deposits occur in certain parts of the rural areas. Some of these areas have higher surrounding residential densities than others, and many rural residents expect less intrusive forms of land uses. Determining which areas are the most appropriate for mineral extraction is a difficult and challenging task.

- GOAL 8L:** Achieve a balance between the conservation of productive mineral lands and the quality of life expected by residents within and near the rural and urban zones of Whatcom County.
- Policy 8L-1:** Discourage new residential uses from locating near designated mineral deposit sites until mineral extraction is completed unless adequate buffering is provided by the residential developer.
- Policy 8L-2:** Protect areas where existing residential uses predominate against intrusion by mineral extraction and processing operations.
- Policy 8L-3:** Allow accessory uses to locate near or on the site of the mineral extraction source when appropriate. Authorize crushing equipment to locate near the mineral extraction source as a conditional use provided that all pertinent regulatory standards are maintained. Site asphalt and concrete batch plants as a conditional use, addressing potential impacts for the site.
- Policy 8L-4:** Buffer mineral resource areas adjacent to existing residential areas. Buffers preferably should consist of berms and vegetation to minimize impacts to adjacent property owners. Buffers should be reduced for a limited period of time during reclamation if quality minerals are contained therein.

#### Agricultural Areas

There is considerable overlap between high quality aggregate lands and high quality agriculture lands. Several deposits represent a primary source for sand and gravel and, as well, form the

parent material for prime agricultural soils. Both large, deep, open pit mines and smaller projects removing ridges and high ground have been operating in these overlap areas in the agricultural district. The smaller projects usually occur on dairy farms where corn or grass is cultivated. Potential drawbacks from commercial mining in agricultural areas may include reclamation problems, the loss of scenic terrain, an increased risk of groundwater contamination from future agricultural practices, soil rehabilitation difficulties, negative cost-benefit balance and drainage may also be adversely affected.

Some farmers want the freedom of choice to use their land for farming or surface mining, especially in cases where mining income could "save the farm." Others want to preserve farmland. Some questions to consider are the extent to which surface mining should occur on farmland and the extent to which it should be reclaimed back to farmland if it does occur.

The agriculture zone is sparsely populated and there are fewer conflicts between homeowners and mining industries than in urban or rural zones. Nevertheless, mining activities can significantly impact nearby landowners.

**GOAL 8M:** Recognize the importance of conserving productive mineral lands and conserving productive agricultural lands within or near the agricultural zones of Whatcom County without jeopardizing the critical land base that is necessary for a viable agricultural industry.

**Policy 8M-1:** Allow mining in the agriculture zone that would enhance farming by leveling knolls and ridges when appropriate. In these areas, reclamation of mineral extraction sites should occur in a timely fashion. The site should also be restored for uses allowed in an agricultural zone and blend with the adjacent landscape and contours.

**Policy 8M-2:** Avoid the use of designated agricultural land for mineral or soil mining purposes unless the soils can be restored to their original productive capabilities as soon as possible after mining occurs.

**Policy 8M-3:** Allow accessory uses such as washing and/or screening of material to locate near or on the site of the mineral extraction source when appropriate. Within MRL designations, authorize application for mineral processing facilities such as rock crushers and concrete plants through the conditional use process.

#### **Forestry Areas**

Surface mining of gravel and rock resources is an integral part of a forest landowner's forest management. Adequate supplies of gravel and rock not only add to the economics of forest management, but also reduce environmental impacts of forest roads. Rock crushing helps conserve a valuable commodity by reducing the amount of material necessary for road construction. The use of crushed rock on roads reduces the amount of sediment developed and better protects water quality.

Zoning densities in the Forestry Districts protect the access to mineral resources in the future. These regions contain most of the county's hard rock reserves, such as olivine and limestone. In some areas, the soils overlaying mineral deposits may have a lower productivity for growing timber compared to the high mineral resource value.

As lowland sand and gravel resources become exhausted or unavailable, the commercial potential of mining in forest zones increases enough to warrant the expense of hauling. While this would increase the potential for impacts, such as heavier truck traffic, land use conflicts may be minimal based on the lack of or low residential densities in these zones.

- GOAL 8N:** Maintain the conservation of productive mineral lands and of productive forestry lands within or near the forestry zones of Whatcom County.
- Policy 8N-1:** Recognize the importance of forest lands in the county and the importance and appropriateness of surface mining as part of conducting forest practices within the forest zones.
- Policy 8N-2:** Allow rock crushing, washing and sorting in the forest zones when appropriate as long as conflicts with other land uses can be mitigated.
- Policy 8N-3:** Allow commercial surface mining operations in the forest zones when appropriate as long as conflicts with other land use zones can be mitigated.
- Policy 8N-4:** Carefully consider the siting of asphalt and concrete batch plants due to possible adverse impacts.

#### Riverine Areas

Proponents of river bar scalping support it for both economic and flood control purposes. River bar aggregate supplies high quality rock material (although it produces poor quality sand due to excessive organic material). In addition, if done properly, bar scalping can stabilize a section of the river channel and decrease flood damage immediately downstream.

Although the public believes river bar scalping will significantly reduce flooding along the entire river, in fact its benefits are local and it may have negative effects in areas surrounding the mining site. For example, if done improperly gravel removal can de-stabilize the river channel locally and increase, rather than decrease, flood damage downstream. After intensive bar scalping, floodwater that is normally stored on the floodplain of the mined reach can be concentrated and dumped on the reach immediately downstream. If gravel mining exceeds the rate of replenishment from upstream, the river bed may lower both upstream and downstream; this bed degradation can undermine bridge supports and other structures, cause adjacent banks to erode (or stabilize, depending on how much and where gravel is removed), lower groundwater tables adjacent to the river, and damage riparian vegetation.

Improper mining methods in fish spawning reaches can de-stabilize spawning gravel or clog it with silt, remove cover vegetation or trap smolts during out-migration. Over harvesting of gravel can erode the river bed and expose the underlying substrate, reducing or eliminating pool and riffle habitat for fish and other aquatic animals. Finally, petroleum spills from mining equipment can degrade local surface water quality if not responded to properly.

While river gravel is a renewable resource that could extend the life of other Whatcom County gravel resources, river bars are not a reliable source from year to year. The amount of gravel that can be mined varies with seasonal and yearly rates of gravel deposition; high and low water levels and timing; and fish migration, spawning and out-migration timing. Various costs raise the price of river bar gravel. For example, there are several streams (e.g. Boulder Creek, Porter Creek, Glacier Creek, etc.) which may offer significant quantities of sand and gravel, but which are not currently

being mined due to prohibitive transportation costs. Other factors include the cost and limited availability of access easements to the river, the repeated handling that is necessary for extraction and processing of the material, and the cost of complying with regulations.

Finally, many state and federal regulations restrict scalping locations and practices. The cost and time delay of duplicate regulation, environmental restrictions, royalty charges and the regulatory process are deterrents to river bar mining.

**GOAL 80:** Support the extraction of gravel from river bars and stream channels in Whatcom County for flood control purposes and market demands where adverse hydrologic and other environmental effects are avoided or minimized.

**Policy 80-1:** Designate river gravel as a supplemental source to upland reserves.

**Policy 80-2:** Allow, when appropriate, the stockpiling, screening, and washing of river gravel in all zone districts when associated with river gravel extraction as close to the extraction site as possible to keep handling and transportation costs to a minimum.

**Policy 80-3:** Design river gravel extraction to work with natural river processes so that no adverse flood, erosion, or degradation impacts occur either upstream or downstream of extraction sites. Base mining extraction amounts, rates, timing, and locations on a scientifically determined sediment budget adjusted periodically according to data provided by a regular monitoring plan.

**Policy 80-4:** Locate and operate river gravel extraction to provide long-term protection of water quality and quantity, fish and wildlife populations and habitat, and riparian vegetation.

**Policy 80-5:** Plan and conduct operations on rivers and streams so that short- and long-term impacts and hazardous conditions are either prevented or held to minimum levels which are not harmful to the general public. Create as little adverse impact on the environment and surrounding uses as possible.

**Policy 80-6:** Fully consider the recommendations of the Flood Hazard Management Committee to encourage gravel bar scalping that decreases the likelihood of flooding and lowers the costs of flood damage and repair, flood management, and emergency services.

**Policy 80-7:** Support the use of gravel from tributary streams for flood hazard control, provided environmental impacts are fully addressed.

**Policy 80-8:** Support the use of public access easements that exist to allow gravel removal.

**Policy 80-9:** Work with other jurisdictions and related agencies to reduce or eliminate redundant regulations, streamline the permitting process, and provide greater opportunities for appropriate river gravel extraction to enhance other important resources, specifically agricultural.

### Mineral Designations

Whatcom County's interim designation work, accomplished in 1992, was based upon the following statutory direction:

"On or before September 1, 1991, each county [required to plan under the Act] shall designate where appropriate: ... Mineral resource lands that are not already characterized by urban growth and that have long-term significance for the extraction of minerals ..." (RCW 36.70A.170).

"Minerals" include gravel, sand, and valuable metallic substances" [RCW 36.70A.030(11)].

The Growth Management Act also directed counties to:

"adopt development regulations ...to assure the conservation of... [designated] mineral resource lands..." [RCW 36.70A.060(1)].

Whatcom County responded to the above mandates as follows:

- By adopting Interim Mineral Resource Lands (MRL) designations covering 1,250 acres of lowland sand and gravel deposits. All of these areas had existing reclamation permits from the Washington State DNR covering at least twenty acres.
- By restricting density to one unit per twenty acres within MRL designations and, more recently, by requiring disclosure notices on property and development within three five feet of the MRLs.

The GMA goes on to state that counties:

"shall review these designations...when adopting their comprehensive plans ...and may alter such designations...to insure consistency" [36.70A.060(3)].

This is the most pertinent part of the Act in terms of plan direction.

The Washington State Department of Community Development was required to produce "Procedural Criteria," (Chapter 365-195 WAC), to further assist interpretation of the act by counties and cities. This helped to further elucidate the link between mineral designations and the GMA comprehensive plan. The "Procedural Criteria" provides guidance in Section 400, Natural Resource Lands, as follows:

Prior to the development of comprehensive plans, cities and counties planning under the Act ought to have designated natural resource lands of long-term commercial significance and adopted development regulations to assure their conservation. Such lands include agricultural lands, forest lands and mineral resource lands. The previous designations and development regulations shall be reviewed in connection with the comprehensive plan adoption process and where necessary be altered to ensure consistency.

Generally, natural resource lands should be located beyond the boundaries of urban growth areas. In most cases, the designated purposes of such lands are incompatible with urban densities.

The review of existing designations should, in most cases, be limited to the question of consistency with the comprehensive plan, rather than revisiting the entire prior designation and regulation process. However, to the extent that new information is available or errors have been discovered, the review process should take this information into account.

Review for consistency in this context should include whether the planned use of lands adjacent to agriculture, forest or mineral resource lands will interfere with the continued use in an accustomed manner and in accordance with the best management practices of the designated lands for the production of food, agricultural products, timber, or for the extraction of minerals.

If these guidelines are followed, then the comprehensive plan should address mineral designations by asking the following questions: Is there new information that might lead to different designations at this point and have errors been made?

Interim designations, as discussed above, were based upon minimal criteria. A more complete set of designation criteria is necessary in order to better define which areas in the county are appropriate for mineral designations. These designations should also include quarry rock and valuable metallic mineral sites because interim designations did not include these resources.

The interim designations were also based more upon a twenty year planning horizon than a fifty year planning horizon. The Minimum Guidelines to Classify Agriculture, Forest, and Mineral Lands (Chapter 365-190 WAC) state that "the Department of Natural Resources has a detailed minerals classification system counties and cities may choose to use" (section 070(b)). This classification system recommends a fifty year planning horizon. The Surface Mining Advisory Committee also has recommended planning for a fifty year supply. Implementing this goal would require the adoption of criteria allowing for additional mineral resource areas.

Additional MRLs were, in fact, designated when the Comprehensive Plan was adopted in 1997 in an attempt to plan for a fifty-year supply of mineral resources. However, in 2004, the Surface Mining Advisory Committee concluded that the existing MRLs do not contain a fifty-year supply of mineral resources. The Surface Mining Advisory Committee estimated that, as of 2005, there will be a supply of approximately 60.7 million cubic yards of sand and gravel and 8.7 million cubic yards of bedrock in existing MRLs that will be available for future use.

The fifty year demand for minerals in Whatcom County is difficult to project and requires many assumptions. Based upon Whatcom County's per capita rate of consumption of 12.2 cubic yards of sand & gravel and 1.3 cubic yards of bedrock that is being utilized for official planning purposes, approximately 174.4 million cubic yards would be required over the fifty year planning period from 2005-2054. The Washington State Department of Natural Resources, however, has recommended a per capita rate that would result in a fifty year demand of approximately 129 million cubic yards in Whatcom County. This estimate assumes that conservation, recycling, increased cost, high density development (which requires less rock per person), and political decisions will result in reduced demand despite continued population growth. Conversely, some factors may increase demand for aggregate such as the construction of mass transportation systems, the possible substitution of masonry materials for wood products, and increased exports to Canada or other United States counties.

Meeting the demand for construction aggregate in Whatcom County requires expansion of the mineral resource land designations and the consideration of the importation of aggregates. The policies and criteria below are meant to guide meeting the demand for construction aggregate.

- GOAL 8P:** Designate Mineral Resource Lands (MRLs) containing commercially significant deposits throughout the county in proximity to markets in order to avoid construction aggregate shortages, higher transport costs, future land use conflicts and environmental degradation. Balance MRL designations with other competing land uses and resources.
- Policy 8P-1:** Seek to designate a 50 year supply of commercially significant construction aggregate supply to the extent compatible with protection of water resources, agricultural lands, and forest lands.
- Policy 8P-2:** Ensure that at least 50% of the total areas designated for construction aggregate is within ten miles from cities and urban growth areas where feasible.
- Policy 8P-3:** Ensure that designations of urban growth boundaries are consistent with mineral designations by considering existing and planned uses for the designated areas and adjacent properties. Intergovernmental agreements should demonstrate how future land uses of mined areas will protect underlying aquifers, given the increased groundwater vulnerability to contamination.
- Policy 8P-4:** Allow mining within designated MRLs through an administrative approval use permit process requiring:
- (1) on-site environmental review, with county as lead agency, and
  - (2) application of appropriate site specific conditions, and
  - (3) notification to neighboring property owners within 1,000 feet to insure opportunity for written input and/or appeal, and
  - (4) access to de novo review by the Hearing Examiner if administrative approval or denial is appealed.
- Policy 8P-5:** Consider potential resource areas identified in the Report Engineering Geology Evaluation Aggregate Resource Inventory Study Whatcom County, Washington (GeoEngineers, Inc., Sept. 30, 2003) during county review of land development projects in order to avoid development incompatible with mineral resource extraction.
- Policy 8P-6:** Work with the Port of Bellingham, the City of Bellingham, or waterfront property owners to facilitate the importation of mineral resources necessary to provide County citizens with adequate mineral resources at reasonable prices.

**Fish and Wildlife**

Utilization of mineral resource lands can impact habitat, including riparian areas, stream flows, channel habitat structure and water quality.

**Goal 8Q:** Ensure that mining avoids adverse impacts to the habitat of threatened and endangered fish and wildlife species.

**Policy 8Q-1:** Ensure that adequate riparian buffers are maintained along rivers and streams.

- Policy 8Q-2: Ensure proper treatment of wastewater prior to discharge.
- Policy 8Q-3: Provide and maintain best management practices for erosion control to prevent sedimentation.
- Policy 8Q-4: Provide proper storage and containment of hazardous materials, and provide for appropriate on-site spill response and clean-up materials and personnel.
- Policy 8Q-5: Avoid surface mining in the floodplain.
- Policy 8Q-6: Allow river bar scalping, except where it would adversely affect spawning or critical habitat areas.
- Policy 8Q-7: Work with state and federal agencies to develop policies and regulations regarding in-stream gravel extraction to ensure that spawning or critical habitat is not adversely impacted and that flooding or erosion in surrounding areas is not increased.

**MINERAL RESOURCE LANDS (MRL) - DESIGNATION CRITERIA****I. Non-Metallic Mineral Deposits***General Criteria*

1. Non-metallic deposits must contain at least one million cubic yards of proven and extractable sand, gravel, or rock material per new MRL Designation.
2. Minimum MRL Designation size is twenty acres.
3. Expansion of an existing MRL does not need to meet criteria 1 or 2.
4. MRL Designation status does not apply to surface mines permitted as an accessory or conditional use for the purpose of enhancing agriculture or facilitating forestry resource operations.
5. All pre-existing legal permitted sites meeting the above criteria will be designated.
6. The site shall have a proven resource that meets the following criteria:
  - Construction material must meet WSDOT Standard Specifications for common borrow criteria for road, bridge and municipal construction, or Whatcom County standards for other uses.
  - Sand and gravel deposits must have a net to gross ratio greater than 80% (1290 cy/acre/foot).
7. MRL Designations must not be within nor abut developed residential zones or subdivisions platted at urban densities.
8. MRL Designations must not occur within the 10 year zone of contribution for designated wellhead protection areas, as approved by the State Department of Health for Group A systems, and by the Whatcom County Health Department for Group B systems, in accordance with source control provisions of the regulations on water system comprehensive planning. MRL designations may be modified if a wellhead protection area delineated subsequent to MRL designation encompasses areas within a designated MRL. If a fixed radii method is used to delineate a wellhead protection area, the applicant may elect to more precisely delineate the wellhead protection boundary using an analytical model; provided, that the delineated boundary proposed by the applicant is prepared by a professional hydrogeologist; and further provided, that the delineated boundary has been reviewed and approved by the Washington State Department of Health for Group A systems, and by the Whatcom County Health Department for Group B systems. The hydrogeologist shall be selected by mutual agreement of the county, water purveyor, and applicant; provided, if agreement cannot be reached the applicant shall select a consultant from a list of no less than three qualified consultants supplied by the county and water purveyor.
9. MRL Designation should not enclose by more than 50% non-designated parcels.

*Additional Criteria for Designated Urban and Rural Areas*

10. Abutting parcel size density must not exceed one unit per nominal five acres for more than 25% of the perimeter of the site unless project specific mitigation is created.

*Additional Criteria for Designated Forestry Areas*

11. Must demonstrate higher value as mineral resource than forestry resource based upon:
  - soil conditions
  - accessibility to market
  - quality of mineral resource
  - sustainable productivity of forest resource

*Additional Criteria for Designated Agricultural Areas*

12. Prohibit MRL designations in areas designated Agriculture by the Whatcom County Comprehensive Plan that contain "Prime Farmland Soils" as listed in Table 5, Soil Survey of Whatcom County Area, Washington, U.S. Department of Agriculture Soil Conservation Service. A Goldin (1983).

**II. River and Stream Gravel**

13. MRL Designation status applies to river gravel bars possessing necessary permits and containing significant quality reserves.
14. MRL Designation status may apply to those upland sites located in proximity to river gravel sources and used primarily for handling and processing significant amounts of river gravel.

**III. Metallic and Industrial Mineral Deposits**

15. For metallic and rare minerals, mineral designation status extends to all patented mining claims.
16. Mineral Resource Designation status extends to all currently permitted industrial mineral deposits of long-term commercial significance.
17. All other non-patented mineral deposits must meet the non-metallic MRL Designation criteria, numbers 6 through 12, as applicable.

**MINERAL RESOURCES - SITE SELECTION METHOD**

1. Sites meeting Mineral Resources Designation Criteria 1-5 (and areas enclosed by these sites greater than 50%).
2. Sites requested by owner or operator meeting designation criteria.
3. Sites that are regionally significant meeting designation criteria.
4. Sites adjacent to both roads and other proposed MRL sites meeting designation criteria.

COUNTY OF SPOKANE  
INVESTORS

2014 FEB 12 AM 1:00

STATE OF WASHINGTON

*[Signature]*  
DEPUTY

COURT OF APPEALS, DIVISION II  
OF STATE OF WASHINGTON

CONCRETE NOR'WEST, a division  
of MILES SAND & GRAVEL  
COMPANY and 4M2K, LLC,

Appellants,

vs.

WESTERN WASHINGTON GROWTH  
MANAGEMENT HEARINGS BOARD;  
WHATCOM COUNTY; and FRIENDS  
OF NOOKSACK SAMISH  
WATERSHED,

Respondents.

NO. 45563-3-II

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 7<sup>th</sup> day of February, 2014, I  
served via the U.S. Postal Service, a true and correct copy of  
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