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

OLYMPIC STEWARDSHIP FOUNDATION; J. EUGENE FARR; WAYNE  
and PEGGY KING; ANNE BARTOW; BILL ELDRIDGE; BUD and VAL  
SCHINDLER; RONALD HOLSMAN; CITIZENS' ALLIANCE FOR  
PROPERTY RIGHTS JEFFERSON COUNTY; CITIZENS' ALLIANCE FOR  
PROPERTY RIGHTS LEGAL FUND; MATS MATS BAY TRUST; JESSE A.  
STEWART REVOCABLE TRUST; and CRAIG DURGAN and HOOD  
CANAL SAND & GRAVEL LLC dba THORNDYKE RESOURCE,

Appellant/Petitioners,

v.

STATE OF WASHINGTON ENVIRONMENTAL AND LAND USE  
HEARINGS OFFICE, acting through the WESTERN WASHINGTON  
GROWTH MANAGEMENT HEARINGS BOARD; STATE OF  
WASHINGTON, DEPARTMENT OF ECOLOGY; and JEFFERSON  
COUNTY,

Respondents,

and

HOOD CANAL COALITION,

Respondent/Intervenor.

BRIEF OF RESPONDENT JEFFERSON COUNTY

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I. IDENTITY OF RESPONDENT

Jefferson County is one of the Respondents in the above-referenced appeal, which concerns Jefferson County's Shoreline Master Program. Jefferson County is asking the Court to affirm the Final Decision and Order of the Growth Board, approving the Master Program.

II. INTRODUCTION

This appeal arises from a decision of the Western Washington Growth Management Hearings Board (the "Growth Board") upholding the Jefferson County Shoreline Master Program ("SMP"). In its 93-page decision, the Growth Board rejected all of the many arguments presented by Petitioners as to why the SMP should be invalidated.

The arguments raised by Petitioners in this appeal are for the most part similar to those made to the Growth Board, with the exception of the facial constitutional challenge to the SMP, which was not an issue the Growth Board had jurisdiction to decide. In addition, Hood Canal Sand's brief raises several new arguments that were not presented to the Board.

Other than constitutionality, the issues raised in this appeal were thoroughly analyzed by the Growth Board in its 93-page decision. With its intimate familiarity and expertise in analyzing the Shoreline Management Act (SMA) and its guidelines and applicable case law, the Growth Board found the challenges to the SMP to be without merit.

The Respondents urge this Court to affirm the Growth Board's decision, uphold the Jefferson County SMP and dismiss this appeal. Petitioners have not met their burden of showing that the Growth Board's decision was clearly erroneous or unlawful. Nor is there any basis for a determination that the SMP is facially unconstitutional.<sup>1</sup>

### III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Respondent Jefferson County believes that the issues pertaining to the assignments of error are best stated as follows:

#### A. **Olympic Stewardship Foundation**

1. Whether OSF met its burden to prove the SMP fails to recognize and protect private property rights.
2. Whether the Board erred in concluding that the SMP appropriately includes the concept of "No Net Loss."
3. Whether the Board erred in concluding that the SMP's references to "restoration" are lawful.
4. Whether the Board erred in concluding that the County's action to comprehensively amend the SMP was lawful.
5. Whether the Board appropriately dismissed certain OSF arguments based on waiver and abandonment.
6. Whether the Board erred in concluding that incorporation of the County's Critical Area Ordinance into the SMP was lawful.

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<sup>1</sup> In order to respond thoroughly to the numerous issues raised by Appellants, Jefferson County and Ecology have to some extent divided responsibility for addressing issues in their briefs. Jefferson County respectfully asks to incorporate by reference the arguments in Ecology's brief.

7. Whether OSF met its burden to prove that an expansion of the Natural shoreline designation was unlawful.

8. Whether the Board erred in concluding that the SMP complies with the SMA and SMA Guidelines, including WAC 173-86-186.

9. Whether OSF can prove that the SMP constitutes a facial taking.

10. Whether OSF is entitled to attorney fees.

**B. Citizens' Alliance for Property Rights, et al. (CAPR)**

1. Whether the Board erred in concluding that an economic impact analysis was not required, and that the SMP was supported by science.

2. Whether the SMP violates RCW 43.21H.010.

3. Whether the SMP is unconstitutionally vague.

4. Whether the Board erred in finding that the SMP provisions addressing beach stairs, shoreline armoring, boating facilities, and floodplain development are lawful.

5. Whether CAPR's challenge to the constitutionality of RCW 90.58.190 is properly before this Court, and if so, whether CAPR met its burden of proof.

6. Whether CAPR is entitled to attorney fees.

**C. Hood Canal Sand & Gravel**

1. Whether the SMA requires that piers for the transport of mining products be treated as water-dependent.

2. Whether Hood Canal Sand waived arguments regarding the SMP's consistency with other statutes.

3. Whether Hood Canal Sand has met its burden of proving inconsistency.

4. Whether the Board erred in concluding that the SMP's environmental designations relied on reasoned scientific grounds.

5. Whether Hood Canal Sand waived its argument regarding public notice, and if not, whether it met its burden of proving that it was not afforded an opportunity to comment.

#### IV. STATEMENT OF THE CASE

##### A. Proceedings Below.

The SMA was enacted to facilitate the protection of the state's shorelines with state and local government regulation. Every local government which contains "shorelines of the state" within its boundaries must complete a Comprehensive Update to its Shoreline Master Program in accordance with the timetable set by the legislature. RCW 90.58.030(3)(c), .080. A Shoreline Master Program is a combination of planning policies and development regulations that address uses and development in the shoreline. WAC 173-26-186. A local government has discretion to tailor its Master Program to local conditions and circumstances, but the Master Program must be compliant with Ecology's SMA guidelines, and changes to a Master Program are not effective until review and approval by Ecology. RCW 90.58.080(1), .090; WAC 173-26-171(3)(a). Upon approval by Ecology, a local jurisdiction's Master Program becomes part of Washington state's shoreline regulations. *Citizens for Rational Shoreline Protection v. Whatcom County*, 172 Wn.2d 384, 393, 258 P.3d 36 (2011).

Jefferson County adopted an updated draft SMP and submitted it to Ecology for review. Ecology approved it with required changes, which the County accepted pursuant to RCW 90.58.090(2)(e). The Petitioners (Appellants herein) appealed the new SMP to the Growth Board.

The Board heard oral argument and considered briefing previously submitted by the parties which drew from the administrative record developed during the SMP adoption and approval process. In its Final Decision and Order (“FDO”), the Board affirmed the SMP in all respects.

Appellants sought review in Jefferson County Superior Court. Ecology requested a Certificate of Appealability from the Board, and filed a Notice of Discretionary Review in the Court of Appeals, Division II. Discretionary review was granted. The Appellants have filed their opening briefs. This brief constitutes the response of Jefferson County.

B. Factual Background.

Jefferson County adopted its first Shoreline Master Program in 1974 and amended it several times. (CP 421). The Department of Ecology (“Ecology”) adopted new SMP guidelines in December 2003 (WAC 173-26), and the Legislature required all jurisdictions in the state to update their SMP’s by 2014. RCW 90.58.080. Jefferson County’s legislative due date was December 2011, although Ecology and the County agreed to continue working in good faith on the update beyond that date. (CP 422).

Jefferson County's work on the SMP update began in earnest in February 2006, and continued for several years. (CP 422). Throughout the process, Jefferson County put extraordinary effort into informing and engaging stakeholders and the general public in the SMP update. Direct mailings and emails were sent to shoreline property owners, and numerous public events and workshops were held. (CP 428-433; FDO, pp. 87-88).

In April, 2006, the Jefferson County Department of Community Development ("DCD") established two advisory committees to assist staff and consultants with the various phases and work products of the SMP update project. A Shoreline Technical Advisory Committee ("STAC") was formed to assist with the compilation and review of the most current scientific and technical information, as per WAC 173-26-201. DCD staff also established a Shoreline Policy Advisory Committee ("SPAC") in 2006 to assist with the development of goals, policies and regulations based on the technical work. (CP 1953). The committees worked extensively through 2006, 2007 and 2008. (CP 433-437).

DCD staff worked with consultant ESA Adolfson and STAC to prepare the November 2008 Final Shoreline Inventory and Characterization Report ("SI"), consistent with WAC 173-26-201. (CP 437; CP 3451-3720). Ecology provided technical support to the County in its SI work by conducting a detailed watershed characterization of East Jefferson County using a landscape analysis method. This

characterization identifies areas (grouped by hydrogeologic units) that are most important to maintaining ecosystem functions and areas with human-caused alterations that degrade such functions. It analyzes which sub-basins are best suited for protection, development and restoration. This report was appended to the October 2008 Final Shoreline Restoration Plan ("FSRP") and the results were also incorporated into the Restoration Planning Report for the SMP update project. (CP 439; CP 4789-4894).

Battelle Marine Sciences Laboratory also conducted a detailed marine nearshore analysis and prioritization for East Jefferson County. This study identified the relative level of shoreline ecological functions and the stressors to those functions, by scoring numerous controlling factors in order to identify and prioritize the relative potential for successful restoration and conservation efforts. (CP 438; CP 4980-5007).

In February 2009, DCD staff and consultants prepared the Draft Cumulative Impact Analysis ("Draft CIA") to assess the total collective effects that the goals, policies, shoreline designations and regulations proposed in the draft SMP would have on the shorelines if all allowed use and development occurred. (CP 439-440; CP 3451-3720).

On August 24, 2009, DCD staff presented recommendations with suggested line-in/line-out SMP text revisions to the BOCC. Following public hearings, the BOCC deliberated in October 2009 and directed staff to incorporate a number of changes. On October 22, 2009, DCD staff

released the draft Locally Approved SMP (“LASMP”) for BOCC review. The BOCC requested staff to make final edits to a number of provisions in the draft LASMP. (CP 445-447).

On March 1, 2010, DCD staff sent the LASMP submittal packets to Ecology for its review. From April 12 to May 11, 2010, Ecology conducted a statewide public comment period on the LASMP. Ecology received nearly 400 submittals of comments. (CP 455).

On January 26, 2011, Ecology concluded that Jefferson County had met the procedural and policy requirements of the SMA and announced its conditional approval of the LASMP, pending 26 “required changes.” The letter from Ecology also included 14 “recommended changes,” along with findings and conclusions to support its decision. (CP 454-455). Ecology and the County spent an extended period debating and evaluating the County’s jurisdiction-wide prohibition on “net pen aquaculture” (salmon farming). On December 16, 2013 the County sent a letter to Ecology accepting some of Ecology’s changes and proposing alternatives for others. On that same day, Jefferson County’s Final Shoreline Master Program was approved and adopted by the BOCC. (CP 469-470). On February 7, 2014, Ecology approved the SMP with the County’s proposed revisions. The SMP became effective 14 days later.

Challenges to the County’s SMP were timely filed by Petitioners (Appellants herein), which ultimately led to the Growth Board’s Final

Decision and Order (FDO) approving the SMP. (CP 7451-7546). This appeal followed.

## V. ARGUMENT

### A. Standard of Review.

#### 1. The “Clear and Convincing Evidence” Standard Applies to Petitioners’ Challenges.

Challenges to Shoreline Master Programs are governed by the SMA and are adjudicated by the Growth Management Hearings Board. RCW 90.58.190(2). The Growth Board is charged with adjudicating GMA compliance and, when necessary, invalidating noncompliant plans and development regulations. RCW 36.70A.280 and RCW 36.70A.302. The Board also reviews Shoreline Master Programs and amendments thereto for compliance with the requirements of the SMA, Ecology’s applicable guidelines, the internal consistency requirements of RCW 35.63.125, 35A.63.105, 36.70A.040(4) and 36.70A.070, and Chapter 43.21C RCW (SEPA) as it relates to the adoption of master programs and amendments under Chapter 90.58 RCW. *See* RCW 90.58.190(2)(b) and (c).<sup>2</sup>

A petitioner has the burden of proof in any appeal to the Growth Board. RCW 90.58.190(2) addresses the scope of review and the burden of proof. It also distinguishes different review standards for “shorelines”

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<sup>2</sup> RCW 35.63.125 and 35A.63.105 do not apply to counties obligated to plan under the GMA and the SMA.

and “shorelines of statewide significance” (“SSWS”). Where a challenge is to provisions regulating SSWS, the petitioner must satisfy the “clear and convincing evidence” standard under RCW 90.58.190(2)(c). In applying this standard, the Board should find compliance unless Ecology’s approval of the SMP is noncompliant with the policy of 90.58.020 and its guidelines, or SEPA.

Even under the lesser standard applicable to “shorelines,” (non-SSWS), a petitioner must establish that the master program was invalid in light of the SMA policy and guidelines, internal consistency and SEPA (RCW 43.21C). RCW 90.58.190(2)(b). With respect to provisions of master programs that affect only “shorelines,” a petitioner must still establish that its provisions are “clearly erroneous.” RCW 36.70A.320(3); *Everett Shorelines Coalition v. City of Everett*, CPSGMHB No. 02-3-009c, Order Granting Tribes’ Motion (2003). This standard is not satisfied unless the Growth Board is left with a “firm and definite conviction” that a mistake was made. *Brinnon Group v. Jefferson County*, 159 Wn. App. 446, 464, 245 P.3d 789 (2011).

In Jefferson County, the SSWS category applies to virtually all marine shorelines, including the Strait of Juan de Fuca, Puget Sound and Hood Canal, as well as major rivers in the County, where mean annual flow exceeds 1,000 cfs. RCW 90.58.030(2)(f). (CP 600; 3467-3477).

Although the higher burden of proof (clear and convincing evidence) applies to most or all of the challenged regulations in Jefferson County's SMP, the Board found that, even under the marginally lower burden of proof for "shorelines," the Petitioners failed to meet their burden. The Growth Board's finding of compliance was appropriate, whether or not the heightened standard of review for SSWS is applied.

2. The APA Governs Judicial Review of Growth Board Decisions.

This appeal is governed by the standards of the Administrative Procedure Act ("APA"), RCW 34.05.001 *et seq.*; *Quadrant v. Central Puget Sound Growth Management Hearings Board*, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005); *Samson v. Bainbridge Island*, 149 Wn. App. 33, 202 P.3d 334 (2009), *rev. denied*, 166 Wn.2d 1036. The APA establishes nine criteria for challenging an agency's orders in adjudicative proceedings. *See*, RCW 34.05.570(3). Appellants base their challenges on several of these criteria.

In a judicial challenge to an order or rule under the APA, the challenger bears the burden of proving invalidity. RCW 34.05.570(1); *Quadrant, supra*, 154 Wn.2d at 233; *Spokane County v. Hearings Board*, 173 Wn. App. 310, 325, 293 P.3d 1248 (2013). As explained below, in meeting their burden of proof, the Appellants in this case must overcome

several layers of deference which are due the Growth Board's decision upholding the Jefferson County SMP.

3. The Growth Board's Decision is Entitled to Multiple Layers of Deference.

In most GMA and SMA appeals which reach the Court of Appeals, there is a conflict between the position asserted by the local jurisdiction and the decision of the Growth Board. It is common for the local government to assert that the Growth Board has usurped local authority and control, while the Board contends the local jurisdiction's enactment violates the GMA or the SMA. The courts have stressed that challenges to enactments under the GMA and the SMA ordinarily require a balancing of state authority and local government prerogatives:

Like so many appeals of local government planning decisions that are reversed by the Growth Board, this case requires us to harmonize competing powers delegated to the Board and to local governments by the GMA.

*Spokane County v. Hearings Board, supra*, 173 Wn. App. at 321. But in this appeal, all governmental bodies with jurisdiction have reached the same conclusion regarding the SMP's compliance with the SMA and applicable law. Hence the multiple layers of deference which are afforded the Growth Board's FDO.

A Growth Board decision is entitled to considerable deference because of its expertise in analyzing GMA and SMA policies and enactments. *See, Kitsap County v. Central Puget Sound Growth*

*Management Hearings Board*, 138 Wn. App. 863, 871-72, 158 P.3d 638 (2007). As the highest forum that exercised fact-finding authority, the Board's view of the evidence should be viewed by the court in a light most favorable to the Board's determinations. *Spokane County v. Eastern Washington Growth Management Hearings Board*, 176 Wn. App. 555, 309 P.3d 673 (2013), *rev. denied*, 179 Wn.2d 1015. And while the Court reviews the Board's legal conclusions de novo, deference is given to its interpretation of the statutes it administers. *Stevens County v. Futurewise*, 146 Wn. App. 493, 192 P.3d 1 (2008), *rev. denied*, 165 Wn.2d 1038.

The Growth Board's unanimous approval of the Jefferson County SMP should not be lightly disturbed. As the Court of Appeals stressed in *Samson v. City of Bainbridge Island*, *supra*:

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

149 Wn. App. at 43. Appellant OSF makes the extraordinary statement that the Growth Board "rubber stamped" Ecology's approval of the SMP. (Brief, p. 17). OSF's dismissal of a 93-page opinion as a "rubber stamp" is a reflection of the attitude of the Appellants toward shoreline regulation and the SMP update process. In truth, the Board's decision is well-reasoned, and should be afforded substantial weight. *Id.*

Importantly, it is not only the Growth Board's approval of the SMP that is entitled to deference in this appeal. It has been stated that the deference due a Growth Board's decision may be outweighed by the deference afforded to a local jurisdiction's planning actions. *Kitsap County, supra*, 138 Wn. App. at 871-72. The court should defer to a county's planning action under the GMA or the SMA unless "clearly erroneous." *Brinnon Group v. Jefferson County, supra*, 159 Wn. App. at 464 (2011). Under the GMA, planning jurisdictions have broad discretion in adapting the requirements of the Act to local realities. *Quadrant v. Hearings Board, supra*, 154 Wn.2d at 236. The same principles apply to a local jurisdiction's planning actions under the SMA. Thus, where the Growth Board has approved a local government's SMP, "double deference" is due the Board's decision.

Moreover, in the setting of this appeal, deference is due not only to the Growth Board's decision and the local jurisdiction's planning actions, but also the interpretation of SMA policies and guidelines by Ecology, which is tasked with applying and enforcing its own regulations, including the SMA. RCW 90.58.050, .195; *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 86, 11 P.3d 726 (2000).

Jefferson County's SMP went through numerous hearings and revisions before the Locally Approved SMP was submitted to Ecology for its review and approval. What followed was a thorough evaluation by

Ecology, which resulted in some changes to the Locally Approved SMP, to ensure its full compliance with the SMA. The SMP then underwent detailed scrutiny by the Growth Board, which applied its considerable expertise in analyzing master programs for compliance with the SMA.

In a case such as this, where the local jurisdiction, the Department of Ecology and the Growth Board have all approved and endorsed the provisions of a Master Program, it would be highly unusual for a reviewing court to reverse the combined expertise and unanimous judgment of three jurisdictional agencies and find the SMP to be clearly erroneous or unlawful. Not surprisingly, Appellants cite not a single case reversing a Growth Board's *finding of compliance* by the local jurisdiction. There is no reason why this appeal should be the exception.

B. Olympic Stewardship Foundation's Appeal.

1. The Priority Given to Shoreline Protection is Not Inconsistent with Balancing of Multiple Goals.

Olympic Stewardship Foundation ("OSF") argues that the Board's approval of the SMP was unlawful, because the Board quoted from the SMA's language giving preference to the goal of protecting the ecological health of the state's shorelines. *See*, RCW 90.58.020. OSF persists in its argument, notwithstanding the language of the Supreme Court in *Buechel v. Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994) that the SMA must be "broadly construed in order to protect the state shorelines as fully as possible." OSF also ignores *Samson v. City of Bainbridge Island, supra*,

149 Wn. App. at 47-49, which confirms that protection of the shoreline environment has priority under the SMA, even though it places restrictions on private property development. OSF's argument that the SMP should be invalidated based on the Growth Board's citation to statute and controlling caselaw is groundless.<sup>3</sup>

The fact that the SMA places emphasis on protection of the shoreline ecology does not render inapplicable the balancing of goals under the SMA, including private property rights. RCW 90.58.020. And the SMP does indeed recognize and endorse the goal of private property rights through several provisions including: (1) designating zones for intensive residential, commercial and industrial development (SMP Art. 4.2.C); (2) providing the Conditional Use Permit process, whereby uses not permitted outright in a given zone can nonetheless be approved, with conditions (SMP Art. 2.C.17, pp. 2-10); and (3) providing for exemptions, variances, mitigation and other measures to reduce the economic impact of strict compliance. (SMP Art. 9, pp. 9-1 through 9-9).

As the Board correctly held, the fact that the protection of the shoreline environment is paramount under the SMA does not preclude the

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<sup>3</sup> The SMA provides that for SSWS, Master Programs are to give preference to uses in the following order of importance: (1) recognize and protect the statewide interest over local interests; (2) preserve the natural character of the shoreline; (3) result in long-term over short-term benefit; (4) protect the resources and ecology of the shoreline; (5) increase public access to publicly-owned areas of the shoreline; (6) increase recreational opportunities for the public in the shoreline. RCW 90.58.020.

balancing of multiple goals, which the SMP acknowledges and accommodates. The Board did not err in concluding that the SMP is compliant with the SMA and its Guidelines.

2. Jefferson County's Update of Its SMP Was Not Only Permitted, But Required.

At pages 23 to 25 of its Opening Brief, OSF resurrects its unsuccessful argument below that Jefferson County should not have been allowed to update its SMP without a showing that the shorelines of Jefferson County have been substantially degraded since the last iteration of the SMP. OSF argues that absent substantial recent degradation, the County had no legal authority to enact stricter shoreline regulations.

In making this argument, OSF again conflates the criteria which must be met in order for a local jurisdiction to “periodically” amend its SMP *mid-cycle* to reflect change of local circumstances (WAC 173-26-090), with the mandates and elements applicable to this statutorily required SMP update (RCW 90.58.080). The legislature adopted a time table which required all jurisdictions to update their master programs by 2014, to make them consistent with the guidelines of WAC 173-26, as amended. Thus, Jefferson County not only had the legal authority to update its SMP, it was required to do so. (FDO, page 32). Furthermore, in performing the statutorily mandated SMP update, Jefferson County was

required to reflect and incorporate the current policies in RCW 90.58, and the guidelines of WAC 173-26, as amended in 2004 and thereafter.

In order to update its SMP, Jefferson County was not required to prove that its shoreline has been substantially degraded since the previous SMP was enacted in 1998. Instead, it was sufficient for the County to recognize the scientific literature identifying the risks to shorelines posed by inappropriate use and development, and to take reasonable measures to avoid harmful impacts, in compliance with RCW 90.58 and WAC 173-26.

There can be no serious dispute that disruption of natural shorelines tends to degrade ecological functions. RCW 90.58.020; WAC 173-26-176(2). Protection of the shoreline environment is an essential public policy goal. WAC 173-26-186(8). There is ample scientific literature showing that substantial degradation of the Puget Sound shoreline environment has occurred in the past several decades and that the risk of future damage is real. (See, e.g., CP 6655-6664; 7117-7129). The SMA guidelines expressly reference such literature and mandate practices which avoid and/or mitigate further damage. WAC 173-26-221(5)(b). Jefferson County utilized and relied upon such literature in updating its SMP. *See Bibliography of Scientific Literature* (CP 6188-6222) and literature cited in support of *Shoreline Inventory and Characterization Report* ("SI", pp. 6-1 through 6-20—CP 6477-6496).

The literature supporting the need for shoreline protection is abundant. *Id.* Jefferson County officials were cognizant that its marine shoreline contains critical habitats and is home to numerous threatened and endangered species, including declining salmonid species. (SI, pp. 3-5 through 3-15--CP 6269-6279). The SI relied on scientific literature describing how development, near-shore armoring and vegetation removal impact ecological functions. (SI, pp. 3-43 through 3-7--CP 6307-6335).

OSF's arguments in this appeal are similar to those rejected by the Court of Appeals in *Samson v. City of Bainbridge Island, supra*. In *Samson*, the court rejected the contention that there was insufficient proof of "changed local circumstances" to justify Bainbridge's imposition of stricter regulations on shoreline development in Blakely Harbor. Bainbridge's SMP amendments were upheld, even though Blakely Harbor remained largely undeveloped, because development pressures for subdivisions, docks and building permits have increased, and the harbor is *at risk* of degradation. 149 Wn. App. at 56-58. A similar analysis was appropriate in Jefferson County's SMP.

3. The Record Supports Designation of Jefferson County's Marine Shorelines as Critical Areas.

OSF argues that it was unlawful for Jefferson County and Ecology to treat marine shorelines of Jefferson County as critical areas and to incorporate the Critical Areas Ordinance (CAO) by reference. These

arguments are not legally supportable. RCW 36.70A.480(4) expressly provides that SMPs may incorporate existing CAO provisions, so long as the incorporated provisions meet the “no net loss” standard. The SMP incorporates Jefferson County’s CAO and supplements with additional measures for building setbacks, buffers, etc. (SMP Article 6.1.D.). Regarding marine shorelines, the SMP does not simply apply the CAO’s Fish and Wildlife Habitat Conservation Area (FWHCA) buffer, but instead independently establishes a marine shoreline buffer at 150 feet for marine shorelines and rivers, and 100 feet for lakes, based on analysis of the science and existing conditions. (SMP Article 6.1.D.5).

Adoption of the 150 foot shoreline buffer in the SMP was based on an analysis of numerous factors (CP 6463-6465; 6652-6653), and was well within the range of acceptable shoreline buffers under the scientific literature. (FDO, page 37). Further, the buffer is consistent with the CAO, and with the buffers in Whatcom County’s approved SMP. Indeed, it is smaller than the approved 165 foot buffer applied by King County to shorelines outside of Urban Growth Areas. (SI, pp. 5-6, CP 6463).

Nor was it inappropriate to treat Jefferson County marine shorelines as critical areas. Such treatment is justified because the shorelines in Jefferson County provide habitat for listed species and therefore qualify as Fish and Wildlife Habitat Conservation Areas. (*See,*

SI, pp. 3-6 through 3-22 – CP 6270-6226; SMP Article 6, pp. 6-5; JCC 18.22.270).<sup>4</sup>

Ecology evaluated the buffers for shorelines, rivers and lakes, and found them to be supported by science and consistent with the policies and guidelines of the SMA. The Growth Board concurred. (FDO, pp. 37 to 42). The fact that OSF's members would have preferred smaller buffers does not warrant a finding of invalidity of the SMP.<sup>5</sup>

4. The Standard Buffers Are Supported by the Administrative Record and By Science.

OSF argues that it is unacceptable to apply standardized shoreline buffers, suggesting that Jefferson County should be required to analyze every individual parcel in the County and apply a unique buffer to each. This argument is supported by no legal authority. Indeed, standard buffers around critical areas and shorelines are employed by virtually every jurisdiction in the state. The SMA guidelines specifically endorse the use of buffers to protect shorelines. (WAC 173-26-221(2)(c); 173-26-

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<sup>4</sup> The SI concludes that “virtually all of the County’s nearshore marine environment supports or has potential to support highly valuable and ecologically sensitive resources.” (CP 6273). Moreover, much of the shoreline of eastern Jefferson County consists of unstable bluffs and landslide prone areas, and other categories of critical areas (CP 6286-6287, 6298). *See also*, Declaration of Jonathan Brenner, Exhibit B, offered by OSF as Supplemental Evidence.

<sup>5</sup> Of course, appellants cannot reopen and collaterally attack Jefferson County’s CAO, which was approved by the Growth Board and the courts years ago. *See Lake Burien Neighborhood v. City of Burien*, GMHB Case No. 13-3-0012, FDO (2014) at page 10.

221(5)). No court has held that standardized setbacks from shorelines are inherently unlawful.

Nor is there any support for OSF's contention that the SMP is supported by a "very limited scientific record." (OSF Brief, p. 10). It is noteworthy that OSF's statement is followed by citation to portions of the record consisting of nearly 350 pages of scientific analysis. (CP 5645-5721; CP 3451-3720). As the Growth Board found, the County's analysis of shoreline conditions and its application of scientific method was thorough and robust:

Specifically, the Board found the County completed requirements in WAC 173-26-2011(3)(c) to "inventory shoreline conditions" and in WAC 173-26-201(3)(d) to "analyze shoreline issues of concern." The Board found the SI and the CIA to be comprehensive and informative in addressing these WAC requirements.

FDO at 21. The Board found the County's analysis of cumulative impacts to be well documented and supported by science:

Further, the County's CIA identified, inventoried and documented "current and potential ecological functions provided by affected shorelines" and proposed policies and regulations to achieve no net loss of those functions as required in WAC 173-26-186(8).

FDO at 24. The Board characterized the SMP, the SI and the CIA as "replete with scientific evidence demonstrating how the County met legal requirements to establish buffers..." (FDO, page 44).<sup>6</sup>

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<sup>6</sup> Similar buffers surrounding critical areas have been on the books in Jefferson

Finally, OSF's criticism of standard shoreline buffers fails to acknowledge that the SMP provides numerous exceptions, to accommodate site specific circumstances. (See SMP Article 6—CP 0143-0148). The suggestion that the regulations provide no flexibility is not supported by the record.

5. The “No Net Loss” Provisions of the SMA Were Properly Applied.

OSF argues that the Hearings Board should not have approved the “no net loss” standard for evaluating shoreline development. OSF suggests that use of no net loss means that shoreline development cannot occur, because every development must cause some impact. Jefferson County concurs that virtually every shoreline development causes some impact. But in utilizing a standard of no *net* loss, the SMA provides numerous mechanisms to offset such impacts, including mitigation, restoration, the purchase of other lands and easements by the state or conservation entities, voluntary salmon recovery projects, etc. WAC 173-26-201(2)(c); WAC 173-26-186(4), (8). The SMP incorporates such tools. (Article 3.6). The availability of these mechanisms allows the County to ensure that the overall health of the shoreline is not degraded, even as reasonable shoreline development occurs. The incorporation of “no net loss” in the SMP is consistent with the SMA.

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County's CAO since 2009, without the dramatic effects forecast by Appellants. See, JCC

6. The SMP's Incorporation of Restoration Goals Does Not Violate the SMA.

OSF asserts that the SMP should be invalidated because it includes provisions addressing "restoration." This observation does not, however, warrant a finding of noncompliance with the SMA. To the contrary, the SMA guidelines *require* a restoration element in an SMP. Local government is required to identify policies and programs that contribute to the restoration of impaired ecological functions. WAC 173-26-186(8)(c). Moreover, contrary to OSF's argument, the SMP does not require restoration as a condition of all permits. Indeed, restoration ordinarily comes into play only "if ... opportunities exist." (CP 6020).

Restoration is required for certain new uses which have a substantial impact on the shoreline, e.g., float plane docks and marinas. The marina provisions in the SMP address impacts from use over time, and the float plane requirements are intended to compensate for the intensity of use associated with float plane moorage. (CP 6054-6058). As the Board remarked, such requirements are consistent with the county's discretion to balance the various policy goals of the SMA guidelines. The Board properly held that incorporation of restoration elements in the SMP does not constitute a violation of the SMA. (FDO p. 50).

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18.22.270; *OSF v. WWGMHB, supra*, 166 Wn. App. 172 (2012).

7. The Constitutional Claims are Groundless.

a. Any Constitutional Challenge to the SMP Must be a “Facial” Challenge.

OSF asserts that the SMP should be invalidated on constitutional grounds. But OSF’s argument does not come close to satisfying the high standard for proving unconstitutionality of a legislative enactment. Indeed, OSF’s statements regarding constitutionality reflect confusion about the theory it is advancing.

In its Reply in Support of Motion for Additional Discovery in this appeal, OSF represented at page 2 that “no facial takings claim is before this Court.” OSF further represented that “appellants are not asserting an as applied takings challenge.” *Id.* p. 4. Yet in its Opening Brief, OSF changes course, and asserts an argument that has all the features of a regulatory takings claim. OSF attempts to avoid inconsistency by insisting that it is not asserting a takings claim but rather the “Doctrine of Unconstitutional Conditions.” (Brief, p. 40). How this “doctrine” differs from a takings challenge is not explained. In any event, OSF’s constitutional arguments are not supported by law.

The SMP is a legislative enactment, not a decision on a site-specific permit application. Any constitutional challenge must be in the nature of a “facial” challenge, where the plaintiff must prove that the mere enactment of the regulation constitutes a taking. *Guimont v. Clarke*, 121

Wn.2d 586, 606, 854 P.2d 1 (1993), cert. *cert. den.*, 510 U.S. 1176 (1994).

An ordinance or statute is presumed constitutional. A plaintiff shoulders a heavy burden to show otherwise. *Brown v. Yakima*, 116 Wn.2d 556, 559, 907 P.2d 353 (1991). It has been said that statutory unconstitutionality must be proved “beyond a reasonable doubt.” *State v. Alexander*, 184 Wn. App. 893, 896, 340 P.3d 247 (2014), *rev. den.*, 182 Wn.2d 1024. Since a facial attack must show that the challenged legislation is always unconstitutional and therefore void, such challenges are rarely successful. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-51, 128 S. Ct. 1184 (2008).

As noted above, the Appellants are not permitted to assert an “as applied” takings challenge to the SMP, because this appeal does not involve a site-specific permitting decision. Furthermore, even if an “as applied” challenge could be raised in this appeal, such a challenge would not be ripe. Ripeness is not satisfied until the plaintiff/applicant has given the relevant agency an opportunity to arrive at a “final definitive position regarding how it will apply the regulation at issue to the particular land in question.” *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 191, 105 S. Ct. 3108 (1985); *Thun v. City of Bonney Lake*, 164 Wn. App. 755, 762, 265 P.3d 207 (2011).

Each of the cases cited in OSF's constitutional argument involved an "as applied" challenge, in which a permittee contended that application of a regulation to his property destroyed economic use. Such "as applied" constitutional challenges have no place in this SMP appeal.

b. Buffers Protecting Critical Areas Are Not Unconstitutional Exactions.

OSF argues that the SMP should be deemed unconstitutional, citing a variety of cases where it was held that a government had improperly required a landowner to dedicate property to the public, as a condition of permit approval. OSF argues that Jefferson County should not be allowed to "use the permit process to coerce landowners into giving" property to the public. (Brief, p. 41).

The cases cited by OSF are inapposite, and its constitutional argument is misplaced. Restrictions on development and disturbances in critical areas and their buffers are routinely upheld. *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 325, 787 P.2d 907 (1990); *Young v. Pierce County*, 120 Wn. App. 175, 185, 84 P.3d 927 (2004). Such protective buffers do not constitute unconstitutional "exactions." If the courts were to accept OSF's argument, no county or city could enact an ordinance limiting development in or near a shoreline, wetland, landslide area, floodplain or other critical area because, according to OSF, the "nexus and rough proportionality" standard would not be established.

OSF's reliance on *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994) is misplaced. In *Dolan*, the Supreme Court struck down a permit condition which required an owner of land along a creek to dedicate a public greenway across his property. It was this requirement of a public dedication which ran afoul of the nexus and proportionality requirements. The Supreme Court stressed that a mere prohibition on development within a floodplain would "obviously" satisfy the nexus and proportionality requirements:

It seems equally obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek's 100-year flood plain.

512 U.S. at 387. The Supreme Court struck down the City of Tigard's permit condition, however, because it went further and required *dedication* of a public greenway system across Dolan's property:

But the city demanded more – it not only wanted petitioner not to build in the flood plain, but it also wanted petitioner's property along Fanno Creek for its greenway system. The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.

The difference to petitioner, of course, is the loss of her ability to exclude others.

512 U.S. at 393. In contrast, in this case Jefferson County is not requiring owners of shoreline property to dedicate a public park. Rather, the shoreline buffer restrictions are for protection of ecological functions. The County does not come into ownership of private land.

The Washington Court of Appeals has held that an ordinance restricting development in or near a critical area satisfies constitutional requirements of nexus and rough proportionality if it is based on science and was arrived at by a reasonable process. *Kitsap Alliance v. Hearings Board*, 160 Wn. App. 250, 273-74, 255 P.3d 696 (2011). And as the Growth Board held in this case, the imposition of standardized buffers around the shorelines of Jefferson County was a rational means of implementing the policies and goals of the SMA.

C. CAPR's Appeal.

1. The County Adequately Considered Social Science.

Citizens' Alliance for Property Rights ("CAPR") argues that the SMP does not adequately consider social science. Specifically, CAPR contends that the SMP fails to account for the economic impacts of shoreline regulations. The record shows otherwise. The SMP is adequately supported by both the natural sciences and social sciences.

SMP Article 3.2 specifically addresses the importance of economic development and sets goals to accommodate such development. Throughout the SMP, the application of shoreline regulations and restrictions is conditioned by the "feasibility" of such restrictions (*see, e.g.*, SMP pp. 2-15, 3-1, 3-5, 4-3, 6-17, 6-19, 7-14, 7-18, 7-22, 7-30, 8-16, 8-18, 8-32, 8-34, 8-36). As explained in the SMP at pages 2-15 to 2-16, the assessment of "feasibility" includes a determination of whether a

proposed action or permit requirement can be accomplished at a reasonable cost and in a reasonable period of time. These are considerations which implicate social science and economics.

Further, the SMP recognizes and accommodates economic conditions and activities by designating areas on the shoreline which can appropriately accommodate commercial, industrial and residential development. For example, the High Intensity zone allows for substantial development near the shoreline, especially where existing commercial and industrial facilities are already in place. SMP Article 4.2.C.6. By identifying and designating substantial areas for intensive industrial and commercial development, Jefferson County not only considered, but accommodated economically viable use of the shoreline, consistent with RCW 90.58.100(2)(a).

Likewise, by designating a substantial portion of its shorelines for high density residential development, the County recognizes that landowners will make decisions which are based not only on ecological considerations but also economic factors. SMP Article 4.2.C.5.i.

Furthermore, the SMP recognizes economic realities by allowing business and residential uses even in other zones, via conditional use permits. Indeed, the use of CUPs is explicitly designed to “accommodate site-specific allowance” of a variety of uses. (SMP Article 2.C.17, p. 2-10). Economic considerations are important factors in the application

of exemptions, variances and CUPs. (*See generally*, SMP Article 9, pp. 9-1 through 9-9; and SMP Article 6, pp. 6-6 through 6-11).

Contrary to CAPR's argument, there is no requirement in the SMA that a Master Program include an "economic impact statement." No court has held that RCW 43.21H.020 requires an in-depth analysis of a master program's economic impacts on individual landowners. Further, the statute recites that it shall not affect any agency's statutory obligation to protect the environment.<sup>7</sup> An SMP should reflect consideration of a variety of issues, including economics. The Board properly held that the SMP satisfies the policy and guidelines of the SMA. (FDO, pp. 64-67).

Nor is there any basis to assert that the SMP is unlawful because it results in "nonconforming" properties. The argument flies in the face of decades of Washington caselaw, which has consistently recognized the right of governments to apply the "nonconforming" classification to structures and uses which were approved under previous zoning and environmental regulations, but which are no longer consistent with updated regulations. *See, State ex rel. Miller v. Cain*, 40 Wn.2d 216, 218, 242 P.2d 505 (1952); *Development and Environmental Services v. King County*, 177 Wn.2d 636, 643, 305 P.3d 240 (2013). The designation of a structure as nonconforming does not deprive it of legal protection. A

nonconforming use is generally allowed to continue due to concerns of fairness to landowners. *Development and Environmental Services v. King County, supra*, at 643. These considerations are reflected in the language of SMP Article 10.6.

2. The SMP Reflects Extensive Analysis of the Science Supporting Shoreline Protection.

CAPR argues that Jefferson County's use of physical and biological science was inadequate or improper. In support of its argument, CAPR complains that aerial photographs were used to assist in inventorying and characterizing existing shoreline use. It is suggested that the only appropriate methodology would be an individual walking the entire 500+ miles of the Jefferson County shoreline, and documenting the specific conditions of every individual lot. While this may be an admirable goal, there is no requirement in the SMA to complete that level of field work for a shoreline inventory and characterization report. The County used the most cost-effective approach for the SI. Significantly, CAPR does not identify any particular property which was mischaracterized in the report.

As the Board found, the CIA and the SI reflect thoughtful and detailed analysis and mapping that describes and inventories the current

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<sup>7</sup> As CAPR acknowledges, the "State Economic Policy Act" (RCW 43.21H) has never been held to require specific economic analysis in a Comprehensive Plan or Master Program.

uses of the Jefferson County shoreline, and characterizes those uses for environmental designations. (FDO, pp.37, 44-45). The suggestion that the SI is not sufficiently detailed is preposterous. The Ecosystem Characterization and Ecosystem-Wide Processes consists of 70 pages of detailed analysis. (See, Section 3 in the SI: CP 6275-6335). Additionally, the Reach Inventory and Analyses in the SI consist of approximately 120 pages of detailed description of shoreline reaches. (SI Section 4: CP 6336-6457). Furthermore, the Final Inventory and Characterization Map Folio (Appendix C to the SI) is detailed, informative and professionally prepared. (CP 6531-6564). Neither the SMA nor its guidelines require more than this level of detail.

3. Allowing a Degree of Flexibility in the Permit Application Process Does Not Create Unconstitutional Vagueness.

CAPR argues that the SMP results in “excessive delegation of discretion” to permitting staff, in violation of the SMA. The argument is a curious one, as the Appellants (and CAPR in particular) have argued that the shoreline regulations embodied in the SMP are too strict and inflexible and result in “de facto” prohibition of new shoreline facilities. See, CAPR Issue D. Thus, CAPR appears to argue on the one hand that the SMP’s permit regulations are too inflexible, and on the other hand that those same requirements provide too much discretion and flexibility to regulators. The argument is contradictory and inaccurate.

CAPR asserts that a landowner cannot determine from the SMP what uses are allowed, and what conditions may be placed on a proposed development. Yet a review of Article 4 of the SMP, and especially the Use Table at pages 4-6 through 4-7 refutes the argument, as the table sets forth not only the uses which are permitted outright in each environmental designation, but also the uses that are allowed under an "Administrative Conditional Use," and under a "Discretionary Conditional Use." Throughout the tables, the user is advised that further definitions and explanations of permit criteria are found in Articles 2, 9 and 10.

Similarly, Article 6 provides clear explanation as to how the regulations are applied to critical areas, shoreline buffers, nonconforming uses, etc. (See pp. 6-4 through 6-10). Article 7 provides detailed descriptions of the policies and regulations applicable to shoreline modifications, beach access structures, boating facilities, etc. And Article 10 carefully explains how the SMP will be administered and enforced through the permitting process.

The SMA and the WAC regulations expressly endorse the use of flexible tools in dealing with complex permitting issues and the potential loss of ecological function. RCW 90.58.100(5); WAC 173-26-201(2)(e) and (f). In the SMP, there are numerous places where discretion and flexibility are of benefit to the landowner or permit applicant, including

reductions in standard shoreline buffers, “setback averaging,” etc. *See*, JCC 18.25.270(4); JCC 18.22.270(6) and (7).

CAPR next attacks the language of the SMA and the SMP to the effect that they are to be “liberally construed to give full effect to the objectives and purposes” for which they were enacted. RCW 90.58.900; JCC 18.25.080. CAPR argues that all land use ordinances are “in derogation of the common law right” of an owner to use his property, and therefore must be strictly construed. That is not the law. As the Supreme Court has repeatedly held, environmental regulations (such as master programs) should be liberally construed so as to carry out their express purpose and intent. *Development Services of America, Inc. v. City of Seattle, supra*, 138 Wn.2d 107, 117, 979 P.3d 387 (1999).

Upon adoption by Ecology, a master program becomes a part of the state’s SMA regulations. *Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wn.2d 384, 393, 258 P.3d 36 (2011). It is not unlawful for an SMP to state that it should be construed liberally for the purpose of protecting the shoreline environment. *Buechel v. Ecology, supra*, 125 Wn.2d at 203. The Growth Board correctly found that the SMP does not give unlawful discretion to local officials.

4. The Permit Requirements in the SMP are Typical and Do Not Violate the SMA.

As noted above, CAPR’s Issue 4 seems to be the reverse side of its

Issue 3. In Section C of its brief, CAPR argues that the particular requirements which must be met for construction of shoreline facilities such as access structures, boating facilities and shoreline armoring make it impossible for new construction on the shoreline to occur. This argument is not supported by the language of the SMP. The various tools available to permit applicants to address shoreline protection and mitigation are fully compliant with the SMA.

The SMA expressly provides that, while structures may be built on or near the shoreline, permits for shoreline construction should not be granted without an evaluation of impacts, and a master program should condition approvals of shoreline use to protect the environment and ensure no net loss of ecological functions. *See*, WAC 173-26-201(c), (e) and (f). Such restrictions are necessary for protection of shorelines and critical areas, including wetlands, floodplains, etc. WAC 173-26-221(2).

The suggestion by CAPR that Jefferson County has effectively precluded all uses in the shoreline jurisdiction is incorrect. Indeed, the table of the uses allowed in the various shoreline environment designations demonstrates an appropriate balancing of policies and values in each zone. (*See* SMP, pp. 4-6 through 4-8). The SMP's application of permit restrictions on shoreline development is consistent with the directives of the Legislature and Ecology's guidelines. The Growth Board

properly determined that the permitting requirements imposed by the SMP are compliant with the SMA. (FDO, pp. 76-83).

CAPR argues at page 35 that the SMP unlawfully requires public access across private lots. This is inaccurate. First, the “public access” provisions cited by CAPR are in the nature of *policy goals*, and not regulations. JCC 18.25.290(1). Furthermore, the actual regulations provide that public access is not required for individual residential lot owners, but only apply to new commercial and industrial development and large subdivisions. JCC 18.25.290(2). Furthermore, there are numerous exceptions where even commercial and industrial users can be excused from compliance with access requirements. JCC 18.25.290(2)(b). The SMP’s access provisions for commercial and industrial development are not inconsistent with the SMA. Similarly, the regulations pertaining to new boat launches, piers, etc., are reasonable and consistent with the SMA. JCC 18.25.350(2); WAC 173-26-231(3)(b).

5. CAPR’s Due Process Argument is Groundless.

As its final substantive argument, CAPR argues that its right to due process has been violated because (a) the SMP was drafted by a “small group of agency regulators” exercising “raw political power”; and (b) the Growth Board is an “unelected body.” (*See*, CAPR Brief, pp. 41, 48).

CAPR cites no relevant case authority supporting its substantive due process argument. Instead, CAPR’s argument is essentially a political

statement. Significantly, the only Washington due process case in the land use arena cited by CAPR is *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907 (1990), a case which certainly does not support CAPR's argument. The Supreme Court held that Presbytery's due process claim was not ripe, because it had not yet applied for a development permit. 114 Wn. 2d at 339. The circumstances are even more attenuated here. A due process challenge to a legislative environmental enactment is rarely ripe or substantively appropriate. There is nothing in the *Presbytery* decision warranting invalidation of the SMP on due process grounds.

Further, citing a case involving an employment regulation, CAPR argues that a court may strike down a law when there is no connection between the law and a legitimate government objective. *Ongom v. State Department of Health*, 159 Wn.2d 132, 146-47, 148 P.3d 1029 (2006). Yet CAPR cites no authority for the proposition that shoreline buffers serve no rational purpose. CAPR ignores the fact that similar buffers have already been approved in Whatcom County, King County and in Jefferson County's own CAO. (JCC 18.22.270). The suggestion that environmental regulations such as growth management measures serve no legitimate objective has been rejected by the courts. *City of University Place v. McGuire*, 144 Wn. 2d 640, 648, 130 P. 3d 453 (2001).

Nor does CAPR cite any relevant authority for the proposition that a Growth Board's decision should be thrown out because the Board's

members are not “elected officials.” It is common throughout state and federal government for unelected administrative bodies to evaluate legislative enactments for compliance with relevant statutes. Of course, the APA provides that persons dissatisfied with a board’s decision may appeal to the courts, as the Appellants have done here. But the suggestion that decisions by Growth Boards are de facto unconstitutional is an extreme political position that finds no support in the law.

D. Hood Canal Sand and Gravel’s Appeal.

1. Hood Canal Sand’s Brief Improperly Treats This Appeal as if it Were a Quasi-Judicial Permitting Dispute.

Hood Canal Sand’s challenge to the SMP focuses on the prohibition of new industrial piers in the Conservancy shoreline environment. Much of its brief is devoted to a description of a project permit application which is pending before other agencies, and to which the current SMP likely does not even apply. Hood Canal Sand explains at great length the nature of its “Pit-to-Pier” proposal and implies that the County has inappropriately disallowed the project. The argument is misplaced. This appeal concerns a decision by the Growth Board approving a legislative enactment, i.e., the SMP. This appeal does not involve review of a site-specific permit approval or denial.

Hood Canal Sand’s brief carefully avoids the caselaw which holds that a facial challenge to a legislative enactment requires the challenger to

meet a heavy burden. Indeed, the brief cites only three opinions involving a Growth Board decision, and none of those cases supports its argument for invalidation of the SMP. Hood Canal's insistence that it is entitled to a permit for its proposed aggregate transport facility on the Conservancy shoreline of Hood Canal is misplaced, and should be disregarded in the context of this SMP appeal.

Indeed, it is debatable whether Hood Canal Sand even has standing to challenge the SMP in this manner, as it asserts that its Pit-to-Pier project is vested to an earlier SMP, and not the one which is the subject of this appeal. In its brief to the Growth Board, Hood Canal Sand represented that its Pit-to-Pier application was deemed complete in 2003, and is vested to the previous SMP. (CP 2228-2229). The Board specifically referenced this fact in its decision at page 83. (CP 7535). Thus, Hood Canal Sand's challenge to the Jefferson County SMP is not only inappropriate in form and presentation, but is essentially moot.

2. Hood Canal Sand's New Arguments Should Not Be Considered.

Most of the challenges raised by Hood Canal Sand should be rejected because they consist of new legal arguments that were not presented to the Board. In this Court's review of the FDO, new arguments not presented to the Board may not be considered. RCW 34.05.554.

The new arguments include the following: (a) that the SMP is inconsistent with the County's Mineral Resource Land Overlay (MRLO); (b) that the SMP is inconsistent with the Aquatic Lands Act; and (c) that the SMP is inconsistent with the Surface Mining Act. Hood Canal Sand made no such arguments below. Moreover, although Hood Canal Sand made a cursory assertion of inconsistency of the SMP with the SMA and the GMA, the Board found that its broad assertions regarding non-compliance with SMA policies were devoid of any meaningful legal argument, and therefore were effectively abandoned:

Third, the Board notes Hood Canal's Issue 3 alleged violation of WAC 173-27-186 [sic], but the brief is devoid of any legal argument about how it is violated. Absent legal argument, the issue is abandoned.

FDO, p. 92.<sup>8</sup> The Growth Board's Rules of Practice provide that failure to brief an issue constitutes abandonment. WAC 242-03-590. (FDO at 12: CP 7464). Because most of Hood Canal's arguments were not meaningfully presented to the Growth Board, they are not properly before this Court. RCW 34.05.554; *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 412-13, 814 P.2d 243 (1991).

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<sup>8</sup> Hood Canal Sand correctly notes in its brief that the Board's reference to WAC 173-27-186 was incorrect and that the citation should be to 173-26-186. Yet it is clear from the preceding discussion that this was simply a typographical error, as 173-26-186 is repeatedly referenced in the Board's discussion of Hood Canal's Issue No. 3.

3. Hood Canal Sand's Argument Regarding Inconsistency is Based on a False Premise.

Even if this Court were inclined to consider the new arguments raised by Hood Canal Sand relative to inconsistency with various other statutes, its challenge to the SMP would still be unsupported. There is nothing in the SMA or its policies that requires consistency with the Aquatic Lands Act or the Surface Mining Act. Instead, because Hood Canal (the location of the Pit-to-Pier project) is an SSWS, Hood Canal Sand would have to show that the SMP is inconsistent with the SMA and its guidelines. RCW 90.58.190(2)(c). *See*, FDO, p. 7. It has not done so.

Furthermore, the principal thrust of Hood Canal Sand's appeal, *i.e.*, that the SMP is inconsistent with the MRLO, is based on a false premise. Contrary to Hood Canal Sand's central argument, the 2004 amendment to the MRLO did not designate any shoreline property as Mineral Resource land, much less the sensitive Conservancy shoreline of Hood Canal.

Hood Canal Sand argues that because "Hood Canal's property" is within the MRLO, it was inappropriate for the SMP to designate "the property" as Conservancy, where new industrial piers are prohibited. Yet the MRLO designation reflected in Jefferson County Ordinance 08-0706-04 applied to 690 acres in the Thorndyke Tree Farm, an *upland*

area located far from the Hood Canal shoreline. (*See* MRLO ¶ 39, 59).<sup>9</sup> That ordinance expressly states that the designated land “is not within any shoreline designation.” (¶ 130). The ordinance goes on to state that “because this non-project action is focusing primarily on development regulations that would apply to mining in an inland forested area . . . it will not have any relevance to a marine transport proposal.” (MRLO ¶ 139).

In short, the ordinance upon which Hood Canal Sand’s appeal depends is wholly irrelevant to the SMP’s designation of the shoreline on Hood Canal as Conservancy. Even if the issue had been properly raised below, there is no inconsistency between the SMP and the MRLO. Because its “consistency” argument is without any factual or legal basis, pages 1 through 28 of Hood Canal Sand’s Opening Brief should be withdrawn, and this Court should disregard its consistency argument.

4. Transport of Aggregate is Not a Water-Dependent Use.

Hood Canal Sand’s brief implies that new industrial piers have been outlawed on all shorelines in Jefferson County. Yet the SMP treats new commercial and industrial piers as an “allowed” use in some shoreline environments and as a “conditional” use in other areas. New industrial piers are not allowed, however, in “Natural” and “Conservancy”

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<sup>9</sup> Hood Canal Sand mistakenly refers to the MRLO as “Ordinance No. 008-40706.” There is no such ordinance. The MRLO amendment to which Hood Canal Sand apparently refers is found in Ordinance 08-0706-04, attached hereto as Appendix A.

environments. (CP 597-600). Such zoning distinctions are entirely appropriate under the SMA.

WAC 173-26-231(3)(b) mandates that substantial restrictions be placed upon the construction of new shoreline piers. In most cases, new piers and docks should be allowed only for “water-dependent” uses, or for public access. And there is no SMA requirement that Jefferson County treat the transport of aggregate materials as a water-dependent use. The definition of “water-dependent” use in the SMA Guidelines provides:

“Water-dependent use” means a use or portion of a use *which cannot exist in a location which is not adjacent to the water* and which is dependent on the water by reason of the *intrinsic nature* of its operations.

WAC 173-26-020(39). (Emphasis added). In Jefferson County, there is nothing about the transport of sand and gravel materials from an upland mine or pit that “cannot exist” outside of shorelines. Overland transportation of sand and gravel occurs throughout the county on a regular basis. Because there are other available methods for transporting aggregate from a pit to its ultimate destination, a proposed shoreline pier for that purpose is not a “water-dependent” use.

Instead, marine transport of aggregate falls squarely within the statutory definition of “water-related uses,” as the Board properly noted:

“Water-related use” means a use or portion of a use which is not intrinsically dependent on a waterfront location but whose economic viability is dependent upon a waterfront location. . . .

WAC 173-26-020(43). Hood Canal Sand's argument that a pier on Hood Canal would make transport of aggregate *more profitable* closely matches the definition of a water-related use, rather than a water-dependent use. And there is nothing in the SMA that mandates allowance of a water-related use in the Conservancy environment.

Hood Canal Sand seeks to rely on *Preserve Our Islands v. Shorelines Hearings Board*, 133 Wn. App. 503, 137 P.3d 31 (2006) to support its argument that industrial piers must be treated as a "water dependent" use. Its reliance on that case is misplaced. First, *Preserve Our Islands* was a challenge to an Examiner's approval of a permit, rather than a challenge to a legislative enactment such as the SMP. Secondly, *Preserve Our Islands* involved an island property, where sand and gravel could not be realistically transported by surface means alone. *Id.* at 526.

In contrast, Jefferson County is not an island, and there is no reason why sand and gravel cannot be transported to and from Jefferson County pits by road. Indeed, the MRLO cited by Hood Canal Sand recites that Hood Canal's mine currently exports substantial volumes of aggregate by truck, and that it expects the volume of ground transport of aggregate to increase by 50% in the coming decades, irrespective of whether the Pit-to-Pier project goes forward. (MRLO, ¶ 10.2).

There are numerous other differences between the *Preserve Our Islands* case and the present SMP review. First, the Court of Appeals noted that Glacier's sand and gravel mine itself was located on the southeast shoreline of Maury Island. 133 Wn. App. at 510. Moreover, a barge loading structure had been located at the site since 1968. The case involved a challenge to a permit to replace the dilapidated pier with a new one. *Id.* The Court stressed that the shoreline property itself had a "resource land designation," and the principle use of the site was as an integrated facility in the "land-water interface." *Id.* at 519-21. Finally, the King County SMP expressly allowed industrial piers for mining in Conservancy areas. *Id.* at 534.

In contrast, Hood Canal Sand's mine is not located on the shoreline, there is no existing pier structure on the shoreline, and the proposed location of the Pit-to-Pier project is not designated as mineral resource land. Furthermore, the Jefferson County SMP prohibits new commercial and industrial piers in the Conservancy environment. In short, *Preserve Our Islands* bears no resemblance to the current SMP appeal, and provides no support for the suggestion that a Conservancy designation for the sensitive Hood Canal shoreline violates SMA or GMA.

Indeed, a more apt case arose before the Shorelines Hearings Board in *Ecology v. Hama Hama Company*, SHB No. 115 (Final Findings, July 21, 1976), 1976 WA ENV LEXIS 87. The Board held in that case

that prohibition of a sand and gravel pier on Hood Canal was an appropriate restriction under the SMA. The Board concluded that because the location of the Hama Hama Company mine was not on an island, and ground transportation was a viable alternative, the proposed use was properly treated as “water related,” not “water-dependent.”

5. Even Water-Dependent Uses May be Prohibited in Certain Areas.

Even if the SMP had treated aggregate transport as a “water-dependent” use, Jefferson County would still have been justified in restricting the location of such uses. Water dependent uses need not be allowed everywhere. *Samson v. City of Bainbridge Island, supra*, 149 Wn. App. at 51 (2009).

Hood Canal Sand’s argument with respect to the SMP’s disparate treatment of “salmon net pens” and industrial piers is flawed on several levels. First, unlike the transport of materials from an upland mine, which is not necessarily dependent on shoreline use, salmon net pens surely are. Thus, as the Growth Board concluded, it was appropriate for the County to treat net pens as water-dependent, while assigning the “water-related” designation to new aggregate transport facilities. (CP 7544).

Moreover, Hood Canal Sand fails to acknowledge that the concerns raised by Ecology about the LASMP’s restrictions on salmon net pens were grounded on the (original) proposal to ban net pens in *all*

*locations.* The final resolution of this issue did not allow net pens everywhere, but only in certain shoreline designations. (CP 597-600). Similarly, the SMP allows industrial piers in certain areas, but precludes them in Natural and Conservancy environments.

In view of the above factors and the discretion afforded local jurisdictions to craft reasonable regulations to protect sensitive marine environments, the Growth Board properly rejected Hood Canal Sand's arguments and upheld the restrictions on the permissible locations of new industrial piers. (FDO, p. 93). This Court should affirm.

6. The Board Properly Concluded That Hood Canal Sand Had Abandoned Its Argument Regarding Inadequate Public Input, and the Record Refutes Hood Canal's Assertions.

Hood Canal Sand complains that restrictions on the location of piers for aggregate transport were raised at the "last minute," with "no opportunity for public comment." As explained below, the argument is substantively groundless. Moreover, the Growth Board determined that Hood Canal Sand had effectively abandoned this argument below.

Hood Canal Sand's Issue No. 2 in the Growth Board proceeding asked whether Jefferson County had ever held a public hearing on a proposed SMP which included all required components. After reviewing its brief, the Growth Board concluded that Hood Canal Sand had presented no meaningful argument supporting its assertions regarding public input:

The Board agrees with Respondents. Hood Canal provides no legal argument about how the SMA was violated as their brief simply lists sections of the law followed by statements about lack of “adequately utilizing a required process,” that “defects were never corrected” or that Petitioners were not contacted.

FDO at 87. The Growth Board then noted the extensive public process provided by Jefferson County and the numerous opportunities for interested parties to comment on proposed SMP provisions. *Id.* The Board rejected Hood Canal’s argument that an SMP is unlawful when the BOCC accepts some public suggestions and rejects others:

The Board finds the County Commissioners accepted some comments and rejected others; they did so by explaining their rationale in the adopted ordinance. This is their prerogative. Hood Canal’s list of complaints are not legal arguments and do not demonstrate how the SMA or the guidelines were violated.

FDO at 88. The creation of a complex set of land use regulations such as a Shoreline Master Program is an iterative process, during which changes will be made based on input received from agencies and others. The BOCC was entitled to make edits and changes before and after completion of the Locally Approved SMP (LASMP). *See, Preserve Responsible Shoreline Management v. City of Bainbridge Island, GMHB Case No. 14-3-0012, FDO pp. 12-13, 15 (2015).*

Jefferson County has detailed in this Brief at pages 5 through 8 the extensive public process leading up to the approval of the final SMP. (*See generally*, CP 428 through 433). The Court should specifically note that

Hood Canal Sand had ample opportunity to make its position known relative to the treatment of industrial piers in the SMP. The administrative record reflects that there were hundreds of comments submitted by citizens, both before the BOCC issued its final LASMP in March 2010 and during the review by Ecology. (*See, e.g.*, CP 1730-1775 and CP 3117-3198). Significantly, scores of public comments specifically addressed whether industrial piers should be allowed in the Hood Canal Conservancy environment. (CP 1730-1737; CP 1764-1772). Workshops and public meetings addressing this issue and others occurred on September 2 and September 8, 2009, well in advance of the BOCC's adoption of the final LASMP. (CP 445-446).

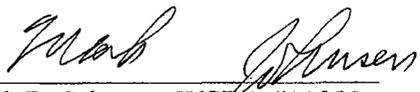
Hood Canal had ample opportunity to offer its input on this and other issues before the proposed SMP was finalized. Indeed, Hood Canal Sand's former attorney Jim Tracy submitted several letters addressing issues of concern to Hood Canal Sand and its predecessor-in-interest Fred Hill Materials, both before and after adoption of the LASMP. (*See, e.g.*, CP 2262-2267; 2248-2249). The suggestion that Hood Canal Sand was not afforded a chance to comment is untrue.

## VI. CONCLUSION

Based on the above, Jefferson County respectfully asks the Court to affirm the Growth Board's FDO.

Respectfully submitted this 27<sup>th</sup> day of April, 2016.

KARR TUTTLE CAMPBELL

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**CERTIFICATE OF SERVICE**

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

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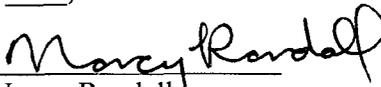
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Seattle, Washington on April 27, 2016.

  
Nancy Randall

# APPENDIX

cc: PA }  
ACD } 7-9-04



STATE OF WASHINGTON  
County of Jefferson

**AN ORDINANCE AMENDING } Ordinance # 08-0706-04**  
**THE COUNTY'S COMPREHENSIVE }  
PLAN TO ACHIEVE COMPLIANCE }  
WITH THE FINAL DECISION AND }  
ORDER OF THE WESTERN }  
WASHINGTON GROWTH }  
MANAGEMENT HEARINGS BOARD }  
REGARDING MLA #02-235, THE FHM }  
APPLICATION FOR A MINERAL }  
RESOURCES LAND OVERLAY }**

WHEREAS, the Board of Jefferson County Commissioners ("the Board") has, as required by the Growth Management Act, as codified at RCW 36.70A.010 et seq., annually creates and implements a process by which citizens and entities can propose amendments to the County's Comprehensive Plan (or "CP"), the CP having been originally adopted via Resolution No. 72-98 on August 28, 1998 and as subsequently amended and;

WHEREAS, a modified version of the proposed amendment known as MLA #02-235 [Fred Hill Materials-Mineral Resource Overlay Designation or "MRLO"] was approved to the extent of 690 acres (the "Approved Alternative") by the Board during December 2002; and

WHEREAS, the Board's approval of the CP amendment known as MLA #02-235 through Ordinance #14-1213-02 (also known as "Ordinance 14") was timely appealed to the Western Washington Growth Management Hearings Board (or "WWGMHB"), said WWGMHB remanding the MLA back to the County for further environmental review.

**NOW, THEREFORE, BE IT RESOLVED** by the Board of County

Commissioners that it makes the following Findings of Fact and Conclusions with respect to MLA #02-235:

1. The County adopted its CP in August 1998 and its development regulations (formally known as the Unified Development Code or "UDC") in December 2000.
2. The Growth Management Act, which mandates that Jefferson County generate and adopt a CP, also requires that there be in place a process to amend the County's CP. The UDC contains precisely such a process in Section 9.
3. The amendment process for the CP must be available to the citizens of this County [including corporations and other business entities] on a regular basis, generally no more than once per year.
4. This particular amendment "cycle" began on or before May 1, 2002, the deadline for submission of a proposed CP amendment.
5. The UDC, specifically UDC §3.6.3, contains a process that allows applicants to obtain an MRLO if certain criteria are satisfied and if the County legislators make the legislative (policy) decision to grant the MRLO designation.
6. MLA #02-235 was timely submitted by Fred Hill Materials, Inc. ("FHM") and it sought to have the zoning designation known as a Mineral Resource Land Overlay or "MRLO" placed on 6, 240 acres of land located in the Thorndyke section of the unincorporated County that now holds the underlying designation of Commercial Forest Land-80 ("CF-80"), Rural Forest-40 ("RF-40") and Rural Residential 1:20 or "RR 1:20."
7. The FHM application for a CP amendment was and is solely an application for an MRLO designation, a non-project action.
8. The FHM application is not an application for permission to build the "pit to pier" project, which FHM always had the ability to immediately apply for pursuant to existing regulations in the UDC once the UDC was adopted regardless of the outcome of this request for an MRLO designation.

9. Designation of the MRLO requested by FHM is not dependent on the marine transport system, the so-called "pit to pier," and application for and approval of the marine transport system is not dependent on designation of this MRLO.
10. If the marine transport system is approved, then the rate of extraction will increase whether or not the extraction is occurring within an MRLO or not.
11. The application from FHM stated that, assuming it obtained the MRLO designation for the 6, 240 acres, some 1,270 acres within that 6, 240 would never be the site of mineral extraction because they constituted environmentally sensitive areas, known as "critical areas" in the GMA lexicon, and the buffers of those environmentally sensitive areas as established in the UDC. Ground verification at the time of a specific project application could serve to further eliminate more acreage from consideration as sites for mineral extraction.
12. Section 3.6.3 of the UDC, which became effective in January 2001 immediately after adoption of the UDC in December 2000, was never the subject of a Petition For Review before the Western Washington Growth Management Hearings Board or "WWGMHB" and thus is valid and remains lawful.
13. FHM, through its legal counsel, wrote a letter to the County's planning staff on October 23, 2002 stating that FHM would modify their application to seek an MRLO of 765 acres [a reduction of 87.7% in the size of the proposed MRLO] and would provide other "carrots" [quarterly inspections to be paid for by FHM] to the County, subject to acceptance of the complete offer package by the County planning department in its staff recommendation to the Board.
14. MLA #02-235 went through the complete public participation process required by the Growth Management Act.
15. By way of example only, the Washington Department of Fish & Wildlife (or "WDFW") commented on this CP amendment in a letter dated October 1, 2002. WDFW understood that the GMA does permit the County to provide suitable lands with an MRLO designation, but urged the County to designate a smaller area

as opposed to the proposed 6, 240 acres. WDFW was concerned that as few acres as possible be removed from Commercial Forest designation for the sake of habitat preservation, but added that it understood the protective provisions of the UDC would apply when a project-specific permit or permits was applied for by FHM. However, the Board notes that designation of an MRLO at a particular parcel or parcels does NOT change the underlying zoning designation of that land.

16. Specifically, this amendment was discussed in some detail in a combined County staff report/Draft Supplemental EIS dated August 21, 2002, a staff memorandum to the Planning Commission dated October 25, 2002 [in response to the FHM letter of October 23<sup>rd</sup>--see FOF #12 above--and to information requests made to staff by the Planning Commission], and a Final SEIS dated November 25, 2002, portions of which are described in more detail below.
17. The Draft SEIS and the Final SEIS were undertaken and generated pursuant to the State Environmental Protection Act (or "SEPA") and a determination by the County planning staff that the 19 proposed CP amendments warranted a threshold "Determination of Significance" and thus environmental review for any potential significant adverse environmental impacts, although they were all non-project actions as that term of art is defined in SEPA. The FEIS was prepared in conformance with SEPA requirements and the amendments in this Ordinance are within the range of alternatives and scope of analysis contained in the FEIS and associated documents.
18. The FSEIS dated November 25, 2002 included staff responses to 71 different categories of questions, comments and concerns expressed orally and in writing by the public regarding the FHM application during the public comment period. It represents a detailed response to the concerns of the citizens, precisely what is intended by SEPA.
19. The EIS prepared with respect to the 1998 adoption of the CP also provided partial environmental review for this non-project action, because the SEPA review for the

CP understood that 1) the CP included a process for MRLO designation, 2) would place such a process in its UDC, 3) would then use that process, in the years following the adoption of the CP and the UDC, to provide MRLO designation for certain suitable parcels and 4) mining was a permitted use in forest lands.

20. However, currently and at all times since adoption of the UDC in 2000, the County has failed to meet the GMA mandate laid out in RCW 36.70A.060(1), which mandates specific language for the notice provisions that must be placed upon, among other documents, plats, building permits and development permits granted to persons or entities undertaking development within 500 feet of a parcel or parcel designated as mineral, forest or agricultural resource lands.
21. Specifically, the disclosure language found in the UDC at Section 3.6.3.3(b)(2) does not match up with the mandatory language found at RCW 36.70A.060(1) because the disclosure language a) is not required to be part of development activities occurring in close proximity to agricultural or forest resource lands (and mining is a foreseeable use in forest resource lands) and b) does not specifically inform the reader that they are undertaking development (for example, residing) at a location close to a place where an application for mining may some day be made, said mining being a “yes” use within an MRLO according to the UDC.
22. Similarly, the notice that is provided to those persons or entities developing in close proximity to agricultural or forest lands does not mention that mining is a “yes” use, meaning that it ‘permitted outright’ to use planner’s parlance. The notice language for agricultural and forest lands is found at UDC §3.3.2(d)(2).
23. In that regard, the County is not fulfilling its mandate under GMA to protect natural resource lands (be they mineral, forest and agricultural lands) from incompatible uses, e.g., residences.
24. Such a statement is true regardless of the decision reflected in the 1998 CP to allow mining as a permitted use in all commercial forest lands because that 1998

decision does not change the fact that the notice language of the UDC is deficient in both its text and its applicability.

25. Thus the Board finds that it cannot fulfill its GMA obligations under the “No Action Alternative” because only by designating lands with the MRL Overlay does that land receive the nuisance and notice protections that the GMA requires counties to provide to lands rich in natural resources pursuant to RCW 36.70A.060.
26. In light of the evidence presented above, the Board respectfully requests that the WWGMHB reconsider its conclusions in the August 2003 Final Decision and Order (“the FDO”) that the County had sufficiently protected and designated mineral resources prior to the submission of MLA #02-235 and would be fully protective of mineral resource lands if it adopted the “No Action” alternative.
27. Thus, MLA #02-235, from the perspective of the County, arose, in part, in the context of the County’s continuing state law mandate to provide the nuisance and notice provisions to lands found to be rich in natural resources, in this specific case, sand and gravel.
28. There was before the County a proposal for a MRLO of 765 acres with certain conditions attached according to the FHM letter dated October 23, 2002.
29. The planning department concluded that the acreage to be granted the MRLO designation should be reduced to 690 acres because 75 acres on the western edge of the 765 MRLO were potentially environmentally sensitive because they were within 500 feet of Thorndyke Creek and should be avoided at the non-project action stage of planning, effectively providing a greater buffer for Thorndyke Creek than that prescribed by the Unified Development Code.
30. The planning department, as part of the FSEIS, expressly recommended rejection of the proposal to provide 6,240 acres with the MRLO designation.
31. The State Department of Ecology (or “DOE”), in a letter to the County dated November 20, 2002, argued for rejecting the 6,240 acre MRLO, primarily because

there was not in place sufficient information to determine if a MRLO designation of some 6, 240 acres would cause significant adverse environmental impacts, such as possible negative impacts on aquifer recharge.

32. The DOE letter of November 20, 2002 concluded that any mineral resource extraction occurring within the 690 acres that now have obtained an MRLO designation would neither puncture an aquifer nor decrease recharge to the aquifers that provide water to wells in the neighboring communities of Shine and Bridgehaven.
33. While County planning staff recommended MRLO designation for only 690 acres, they also placed 15 conditions on the approval, which are listed in the FSEIS, and are made a condition of this approval. The conditions serve to, in part,
  - limit mining to a depth that is not less than ten (10) feet above seasonal high water table in order to protect the aquifers of the Thorndyke region, particularly those that refresh domestic wells in the Shine and Bridgehaven communities (condition #11),
  - prohibit processing of raw materials in the land that has now obtained the MRLO designation (condition #10),
  - reflect a County staff decision that the FHM application for a conveyor and pier facility would receive an automatic Determination of Significance (“DS”) under SEPA, requiring a full-blown environmental impact statement, said application having been made in March 2003 and the DS threshold determination subsequently issued by staff (condition #14),
  - require that if FHM makes any application for mineral extraction on the lands that are now being designated as an MRLO, then the environmental review of that application would include a study of all transportation alternatives, be they marine or overland (condition #14),

- require FHM to finance a quarterly inspection report (condition #9), whether submitted by the company with third-party peer review contracted by the County or prepared by a third-party contracted by the County, and
  - immediately subject the 144-acre Shine Pit hub, consisting of 121 acres of an existing MRLO plus 23 acres added to an existing DNR Surface Mining Permit and which was part of the 6,240 acre proposal submitted, to operational standards and minimums pursuant to condition #2.
34. DOE made the representations of its November 20, 2002 letter based, in part, on condition #11 found in the FSEIS, i.e., that mining would never reach a point that was less than 10 feet above the seasonal high water mark.
35. This condition imposed by this Board on the Approved Alternative, that mining will not come any closer than 10 feet to the seasonal high water mark, is one of the two key distinctions that make the Approved Alternative more meritorious, the other one being the 40-acre cap on disturbed areas, there being no cap on the size of disturbed areas should the Proposed Alternative (6,240-1,270 acres) be adopted.
36. The Board notes that the UDC does not include a maximum size for disturbed areas within an MRLO.
37. MLA #02-235 went through review by the County's Planning Commission or "PC"; specifically there was a public hearing with respect to this amendment before the PC on August 21, 2002 and informational discussion on November 6, 2002.
38. On November 13, 2002 the PC recommended approval of an MRLO for 690 acres, as suggested by the County's planning department. The PC also recommended to the elected County legislators that they include mitigation measures and fund an enforcement officer or procedure.

39. The 690 acres that obtain an MRLO designation via the approval of this proposed CP amendment are located in a valley between two ridges and are not visible from the Hood Canal Bridge or the residences located about one mile south and east of the current FHM operations site of 144 acres, colloquially known as the "Shine Pit."
40. MLA #02-235 was the subject of public hearings before the Board of County Commissioners on December 5, 2002.
41. The County Commissioners and the planning staff received e-mails and signed petitions urging the County Commissioners to reject this amendment.
42. Opposition to this amendment was expressed at the August 21st hearing before the PC and the December 5<sup>th</sup> hearing before the Board.
43. Other citizens of this County expressed their support for this FHM MRLO amendment. Signed petitions were submitted to this effect.
44. The Board also notes that the CP, as a legislative policy decision, reflects and memorializes the overall opinions and intent of the entire citizenry of this county and that the CP includes numerous provisions that support this MRLO designation and the maintenance and enhancement of mineral resource extraction activities in general. They are listed at Finding of Fact #52 below.
45. The Board also notes that the development regulations known as the UDC, as a legislative decision, reflect and memorialize the opinions and intent of the entire citizenry of this county and that the UDC includes a specific provision that creates a process whereby parcels, if criteria are satisfied, can be and should be designated as another MRLO.
46. The presence of such a section in the UDC supports the Board's 2002 decision to approve this request of FHM for an MRLO designation. Why? Because adoption of this CP amendment is in furtherance of the GMA mandate to maintain and enhance mineral resource extraction activities in general.

47. Decisions made pursuant to GMA should never be subject to what amounts to a plebiscite.
48. For example, as distasteful as the decision to provide more lands with a MRLO designation might be to some persons in this county, equally distasteful to others residing in this County is the GMA mandate that rural commercial lands be strictly limited in size and intensity of uses. Yet both are mandated by the GMA, although they are requirements of that state law that are not universally loved.
49. Furthermore, the Board concludes that when drafting the GMA the State Legislature fully understood that resource extraction industries, particularly mining or excavating, would never be a popular “neighbor” and thus the Legislature made it clear that the resource industries are to be protected from incompatible development such as homes and not vice-versa.
50. The Western Washington Growth Management Hearings Board reaffirmed that language in 1995 in such cases as *Aachen v. Clark County* (Cause No. 95-2-0067, FDO dated September 20, 1995).
51. This amendment was the subject of a vote to approve, modify, or reject by the Board of County Commissioners.
52. That vote to approve was made only after the three elected County Commissioners recognized, heard and seriously weighed the strong opinions held by various members of the Jefferson County community both for and against this proposal. Ultimately, however, the decision rested with the sole legislative discretion of the elected County Commissioners.
53. This amendment was approved by the Board of County Commissioners because, in part, it is in conformance with the requirements of GMA that counties such as this one that are planning pursuant to GMA designate mineral resource lands [RCW 36.70A.170] and assure the conservation of mineral resource lands by, in part, not permitting the siting of incompatible uses adjacent to such lands [RCW 36.70A.060].

54. Approval of MLA #02-235 was also in conformance with the County's CP.
55. Numerous goals and policies described in the County's CP are supported and furthered by adoption of MLA #02-235. They are designated as a Goal each of which has related Policies listed under it. In order the CP goals and policies most prominently furthered by this CP amendment are:

- Economic Development Policy (or "EDP") 6.2 [encourage the establishment of new sustainable resource-based activities],
- EDP 6.2.1 [natural resource industries shall be located near the forest resource upon which they are dependent],
- Land Use Goal ("LNG") 12.0 [locate new resource industries in rural areas near the resources to be extracted],
- LNG 13.0 [conserve and manage mineral resource lands for sustainable natural-resource based economic activities that are compatible with surrounding land uses],
- LNG 24.0 [foster sustainable resource-based industry in rural areas of the County],
- Natural Resource Goal ("NRG") 1.0 [encourage the conservation of resource lands and the long-term sustainable use of natural resource-based economic activities],
- NRG 2.0 [encourage resource-based economic activities which are environmentally compatible],
- Natural Resource Policies 2.1 through 2.4, [which discuss generally regulating resource-based economic activities to protect the environment from cumulative adverse impacts by, for example, encouraging the extracting firms to comply with best management practices],

- NRG 6.0 [conserve and protect mineral resource lands for long-term economic use] and the related Natural Resource Policies NRP 6.1 through NRP 6.4, and
- NRG 7.0 [provide for mitigation of potential adverse impacts associated with mining extraction and processing] and NRP 7.2 and NRP 7.3; and
- NRG 9.0 [preserve water resource quality and quantity] and Natural Resource Policy 9.1.

56. Regarding the FHM proposal, staff determined that the “Designation Critical” column (as found in Table 4-3 of the CP) was appropriate with respect to both Quality of Deposit and Size of Deposit based, in part, on an August 15, 2002 letter from DNR stating that “[t]he contention (by the applicant) that there are abundant gravel resources in the area is well founded.” DNR further stated that the applicable maps “portray abundant Quaternary advanced and recessional Vashon outwash deposited by glaciers over the area.” A firm known as GeoResources, LLC wrote a report dated April 27, 2002 that came to the same conclusion.
57. Various unincorporated associations of citizens, led by the Hood Canal Coalition, timely appealed this GMA-based decision to the WWGMHB.
58. After voluminous briefing, oral argument and questions from the members of the WWGMHB, the WWGMHB issued its FDO in August 2003.
59. The WWGMHB determined in its FDO that the Approved Action, specifically designation of a MRLO, with 15 attached conditions, of 690 acres in the Thorndyke Tree Farm, fully complied with the
- Growth Management Act or “GMA” (FDO, p. 31 & 33)
  - County’s CP (FDO, p. 37) and
  - County’s UDC (FDO, p. 37)

60. Thus, the GMA, the CP and the UDC need not be discussed in much detail in the remainder of these Findings of Fact, except to state that all Findings of Fact listed in Ordinance 14 (see FOF #53 to and including FOF #67 in that earlier Ordinance) relating to Section 9 of the UDC and the “growth management indicators” listed there are incorporated herein as if listed in full.
61. The WWGMHB did find at FDO page 29 that the environmental analysis of MLA #02-235 was deficient and required the County to do further environmental review of this non-project action pursuant to the SEPA.
62. The WWGMHB at FDO page 29 found that the County’s environmental review had not analyzed enough alternatives sufficiently , finding that only one alternative, the Approved Alternative, had been sufficiently studied.
63. But the WWGMHB also stated that it saw three reasonable alternatives that required closer and more detailed study pursuant to the applicable state regulation, as described at pages 23 through 27 of the FDO.
64. Specifically, those three alternatives, as described the WWGMHB, are the Proposed Alternative (6,240 acres minus 1,270 acres of critical areas), the Approved Alternative (690 acres with 15 conditions imposed) or the No-Action Alternative (extraction of natural resources occurs county-wide in a manner consistent with the UDC).
65. The WWGMHB was also clear in its FDO that the “pit-to-pier” was NOT an alternative to the Approved Alternative. In fact, the WWGMHB stated in its FDO at page 9 that it “[did] not agree [with the Petitioner] that the project [“pit to pier”] itself could or should be analyzed at this stage.”
66. Of course, the marine transport system (pit to pier) will be the subject of a full-blown SEPA-driven environmental analysis because the County staff issued a threshold “Determination of Significance” shortly after the application for the marine transport system came to the County in March 2003. As the time this

Ordinance was adopted, discussions about the scope of that EIS were about to begin.

67. Clearly recognizing the marine transport system to be a “project” action in SEPA jargon (as opposed to the “non-project” action of providing land with an MRLO designation), the WWGMHB instead used the FDO to inform the County of the following deficiencies in the environmental analysis that had accompanied the adoption of Ordinance 14 in December 2002:
- Other alternatives, specifically No Action and the Proposed Action were either insufficiently studied or not studied at all, Finding “N;”
  - Alternate forms of transport for FHM’s product were not adequately studied, Finding “O;”
  - Probable significant adverse environmental impacts on wildlife were not sufficiently studied, Finding “P;” (these three findings are located at pages 40 and 41 of the FDO) and
  - What the WWGMHB called “intensity of mining use,” which the County understands to mean the study of the differing probable significant adverse environmental impacts, if any, that arise if mining occurs in 40-acre segments rather than in either unlimited or 10-acre segments, FDO p. 9, 23 and 27.
68. Because of these four deficiencies the WWGMHB concluded that the decision-makers for Jefferson County, i.e., this Board acting in its legislative capacity, had not been provided with a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the Approved Alternative, and thus the SEPA analysis done before the 2002 legislative decision to adopt Ordinance 14 had been and was inadequate.
69. County staff has taken steps in order to cure and remedy its non-compliant actions relating to the MLA 02-235;

70. A Draft Supplemental Environmental Impact Statement (DSEIS) to the 2002 Comprehensive Plan Amendments SEIS that included MLA #02-235 (Mineral Resource Lands Overlay District proposed by Fred Hill Materials) has been issued in accordance with SEPA (Chapter 43.21 RCW and Chapter 197-11 WAC). The DSEIS addressed issues raised in the FDO.
71. The Notice of Availability of the DSEIS was published in *The Leader* on March 3, 2004. In addition, the DSEIS was sent to agencies (see distribution list in DSEIS) on March 3, 2004. Individuals expressing interest in FHM proposals were also e-mailed the Notice of Availability. The Notice of Availability indicated that the entire DSEIS was available on the Jefferson County website site. Paper copies were available for inspection and purchase at the County's planning department. The comment period ended on April 2, 2004.
72. Only six (6) comments were received on the DSEIS.
73. A Final Supplemental Environmental Impact Statement (FSEIS) to the 2002 Comprehensive Plan Amendments SEIS that included MLA #02-235 has been issued in accordance with SEPA (Chapter 43.21 RCW and Chapter 197-11 WAC).
74. The FSEIS addressed comments received on the DSEIS and also included additions, corrections and clarifications to the DSEIS. The FSEIS was issued on May 12, 2004. This DSEIS and FSEIS are for a non-project action.
75. Any FHM proposals for future mineral extraction and the previously-submitted application for marine transport would and will require project specific environmental review and full compliance with the UDC.
76. This DSEIS and FSEIS address the issues raised by the FDO.
77. The DSEIS and FSEIS provide additional information on the three alternatives.
78. The Proposed Action Alternative analyzed in the FSEIS is the 6,240 acres MRL (excluding critical areas) applied for by the applicant.
79. As a result of excluding critical areas, the Proposed Action Alternative is, in reality, some 4,970 acres, and no mining would occur within those acres until such time as

there was 'ground truthing' of a specific site proposed for mining, i.e., 'in the field' examination of a site proposed for mining for possible critical areas.

80. The Approved Action Alternative analyzed in the FSEIS is the modified 690 acre MRL approved by the Board, including the 15 conditions of approval from Ordinance 14-1213-02.
81. The No Action Alternative analyzed in the FSEIS examines not designating a MRL and relying on the current UDC requirements for extraction and processing outside of a MRL.
82. The No Action Alternative, this Board finds, leaves the County with a mining district that equates with all of the land zoned Commercial Forest in this County, in other words with a mining district of some 330,000 acres, where mining (extraction) is an automatic "yes" or permitted use with a 10-acre limit on "disturbed area," a term of art under this State's Surface Mining Act.
83. In response to Finding "N" of the FDO, the conclusion by the WWGMHB that other reasonable alternatives were not sufficiently studied, the Board refers the reader, by way of example only, to the table found at pages 1-9 through 1-12 of the FSEIS.
84. The titles given to the columns and rows listed at Pages 1-9 through 1-12 of the FSEIS are closely related to the 13 factors utilized for assessing lands for MRL designation in Table 4-3 of the County's CP. These 13 factors were analyzed in the DSEIS and FSEIS for the three alternatives, although the 13 factors were re-categorized in the FSEIS according to WAC 197-11-444.
85. Regarding a full analysis of the three reasonable alternatives, the reader is also referred to Section 2.5.5 and Section 3 of the DSEIS, Section 3 consuming 45 pages in total of the DSEIS.
86. By way of example only, Section 3.1.4 of the DSEIS addresses potential impacts associated with the three alternatives to wildlife habitat disruption including mitigation measures.

87. With respect to that same deficiency found by the WWGMHB, the reader is also referred to Section 2-4 of the FSEIS, found at pages 2-10 and 2-11.
88. Section 2.4 of the FSEIS provides additional clarification of the No Action Alternative including the cost and effect of this alternative on public services.
89. The greatest uncertainty about the likelihood that probable significant adverse environmental impacts will arise is NOT a function of how many acres (if any) are granted MRLO designation.
90. Instead the uncertainty arises because the rate of extraction of the mineral resources found underground at the Thorndyke Tree Farm will be completely a function of how much 'product' FHM is able to sell, this uncertainty made prominent in the FSEIS at page 1-5, Section 1.5.2.
91. Regarding Finding "O" promulgated by the WWGMHB, the conclusion that alternate forms of transport were not sufficiently studied, both the DSEIS and the FSEIS tackle this issue in some detail, but before those details are discussed here certain misunderstandings must be explained and properly put before the reader of this Ordinance.
92. Those confusions arise concerning the transportation (after extraction) of mineral resources from underneath the Thorndyke Tree Farm.
93. Probably the most significant confusion or misunderstanding is that many persons do not know FHM has in place a mobile conveyor system that currently conveys raw product from the 'mine face' to be processed at the Shine Hub.
94. This conveyor system replaces truck traffic that would otherwise presumably have negative environmental impacts.
95. This internal conveyor system (internal in the sense that it precedes rather than follows processing) should not be confused with the marine transport system that will, if approved, move product (some of which requires processing) to the pier for FHM to sell to distant customers.

96. The distinction between internal and post-processing conveyors leads naturally to the second major confusion that has been present since before adoption of Ordinance 14, specifically the misperception that increased mining activity will somehow cause the marine transport system to be necessary.
97. Instead, it is the approval and installation of the marine transport system that will cause an increased rate of mineral extraction and not vice-versa.
98. With the approval of the marine transport system, FHM will be able to sell its 'product' competitively to more distant markets in, for example, the Puget Sound, Oregon and California. Without the marine transport system, FHM can never compete on price in those more distant for markets because conveying the product by truck would make it too costly to the end user. The reader is referred to the last bullet in Section 1.5.1 of the FSEIS, located at page 1-4 of that document.
99. Truck transport and possible future marine transport are independent of one another because they would serve different markets.
100. If marine transport is approved and if the more distant customers are available, then the rate of extraction from the Thorndyke region will increase regardless of whether the MRLO designation is approved or not.
101. A third confusion held by many people is the mistaken belief held by some that the marine transport system will entirely replace truck traffic as a means of getting FHM's 'product' to market.
102. The applicant has never made such an assertion and the FSEIS discusses FHM's projection that the quantity of its 'product' moved by truck will increase by 50% over the next decades whether or not the marine transport system is approved.
103. While a 50% increase may appear, at first glance to be a significant increase that might, in theory, have probable significant adverse environmental impacts the opposite is, in fact, true because it is only an addition of some 90 to 98 daily trips among a flow of 13,000 already occurring on a daily basis on eastbound SR 104.

104. Additional trips originating from FHM's Shine Hub will amount to an increase of .7% over existing traffic conditions according to the FSEIS.
105. Thus, the effect of that additional traffic coming from FHM's Shine Hub is to add a mere seven (7) vehicles for every thousand (1,000) vehicles that are already traveling eastbound on SR 104 towards the Hood Canal Bridge according to a Washington State DOT study completed in 2001. That same study indicates that background growth in the traffic on SR 104, i.e., traffic growth that FHM does not control and did not create, will independently worsen the level of service on SR 104 over the next decades.
106. The FSEIS concludes that these negligible impacts on the levels of service that are or will be present on SR 104 occur regardless of which of the three reasonable alternatives studied in the DSEIS and FSEIS is adopted by this Board.
107. The FDO stated that the post-FDO "EIS should include the transportation impacts of the various alternatives."
108. The DSEIS and FSEIS contain many details about the probable transportation impacts of the three reasonable alternatives and the reader is referred to pages 3-40 to 3-45 of the DSEIS (Section 3.2.3) and pages 2-2 to 2-6 of the FSEIS (Section 2.2).
109. Regarding probable significant adverse environmental impacts on wildlife, which the WWGMHB concluded in its Finding "P" had been insufficiently studied by the County, the DSEIS analyzes this issue in some detail at Section 3.1.4.2, found at pages 3-23 through 3-27 of that document and summarized at p. 1-11 of the FSEIS.
110. Among the most important conclusions included in the DSEIS is found at p. 3-25 where the author concludes that "[t]he Approved Action MRL is located outside of known territories of priority species as listed in the WDFW PHS database."
111. The statement found in the prior Finding of Fact immediately makes the Approved Alternative more meritorious than the other Alternatives in the collective 'mind' of this Board.

112. A second important conclusion reached on that same page is that the UDC regulations that require identification of species habitat and buffering of “all shoreline, wetland and habitat areas prior to MRL designation” and, in fact, prior to any development that will occur within the unincorporated County.
113. With respect to what the WWGMHB called the “intensity of mining use,” i.e., the different impacts that occur if the maximum permissible mining segment is either no limit (Proposed Alternative), 40 acres (Approved Alternative) or 10 acres (UDC and No Action Alternative), the different impacts are discussed in some detail in the DSEIS at pages 2-18 to 2-20 and within the FSEIS at pages 2-6 through 2-10 (FSEIS Section 2.3).
114. An important conclusion drawn in the DSEIS at p. 2-19 is that a limit of 10-acre disturbed areas might lead to the extracting firm being unable to recover mineral resources buried deep in the ground because set backs and safety requirements (the slope running from the ground to the extraction point can only be so steep before a too-steep slope invites life-threatening slides and erosion) imposed on such a small mining segment would not allow recovery of that deeply-buried resource.
115. Unable to recover the deeply-buried resource, the extracting firm might be required to extract from a larger geographical area in order to recover the same volume of ‘product.’
116. Put another way, the extracting firm would be required to clear vegetation from more acres to obtain the same amount of resource.
117. In sum, the DSEIS and FSEIS indicate that larger “disturbed area” sizes are more efficient based on the nature of the resource found in the Thorndyke area.
118. The size of any particular “disturbed area” will always depend on the site-specific circumstances and application of the ‘best management practices’ promulgated by DNR.
119. The various impacts that occur with 10-acres as compared to the impacts that occur with 40-acre limits are analyzed in terms of seven categories (corresponding closely

to the 13 categories found in CP Table 4-3) at pages 2-8 through 2-10 of the FSEIS. Although the FSEIS uses the phrase “40-acre segments,” it would be equally accurate to use there the term “40-acre disturbed areas.”

120. The FSEIS also concludes, at Section 1.5.5.2 at page 1-8, that no “unavoidable adverse impacts” arise if either the Proposed Alternative or the Approved Alternative are ultimately adopted by this Board.
121. The absence of any “unavoidable adverse impacts” arising if either the Proposed Alternative or the Approved Alternative is adopted strongly suggests that the 15 conditions to mitigate made part of this Ordinance are adequate mitigations.
122. The conditions serve the public purpose of, by way of example only, protecting underground aquifers from penetration by mining (condition #11) and informing the reading public as to which sections of the UDC will apply to future mining extraction as it occurs within the MRLO.
123. This Board is fully aware of these conclusions from the SEPA Responsible Official and used them as part of its decision-making process.
124. The Board finds that designation of an MRLO of 690 acres meets and satisfies the designation criteria listed at UDC §3.6.3.1.
125. Specifically, with respect to UDC §3.6.3.1(a), the Board relies upon the conclusions stated within the April 27, 2002 report of GeoResources, LLC (a report FHM submitted as part of its application for MLA #02-235) to find that the land provided with the MRLO designation is rich in natural resources, i.e., sand and gravel.
126. Specifically, with respect to UDC §3.6.3.1(b), the Board concludes that the area designated is larger than 10 acres and that most, if not all, of the parcels inside the newly-designated MRLO are larger than 10 acres in size.
127. Specifically, with respect to UDC §3.6.3.1(c), the Board concludes that the land within the newly-designated MRLO is surrounded by land zoned “Commercial Forest,” the UDC term for forest-lands of long-term commercial significance.

128. Specifically, with respect to UDC §3.6.3.1(d), the Board concludes that the land within the newly-designated MRLO does NOT have a residential density of one dwelling per five acres or less, instead the greatest density provided any of the newly-designated MRLO is one dwelling unit per 40 acres.
129. The Board makes its conclusions regarding (b),(c) and (d) above based upon the map made part of the Draft SEIS as Figure 3-5 found at page 3-34 of the DSEIS.
130. Specifically, with respect to UDC §3.6.3.1(e), the Board concludes, after examination of the Land Use Map that is part of the County's CP, that the land within the newly-designated MRLO is not within any Shoreline designation or any "Rural Village Center" and is NOT within one-half mile (2,640 feet) of any established or potential "Urban Growth Area" or "Rural Village Center" boundary. Figure 3-5 at p. 3-34 of the Draft SEIS also supports this conclusion.
131. Specifically, with respect to UDC §3.6.3.1(f), the Board concludes, after examination of the EIS documents prepared after the August 2003 FDO, that there are no regulated wetlands or fish or wildlife habitat within the newly-designated MRLO. By way of example only, the Board makes this conclusion after its review of certain pages of the Final SEIS, specifically pages 1-10 and 1-11.
132. A public hearing before this Board occurred on June 9, 2004 as part of the process by which this Board, acting in its legislative capacity, re-examines and reconsiders (based on new environmental information) their earlier decision to adopt Ordinance 14, which served to establish (with 15 conditions) an MRLO designation upon 690 acres in the Thorndyke Tree Farm.
133. This Board finds that, upon review of the DSEIS and the FSEIS, those documents provide a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the three reasonable alternatives studied therein.
134. The Board finds itself to be sufficiently informed to weigh the probable environmental consequences of the three alternatives and to adopt this Ordinance,

which serves to adopt the Approved or 690-acre Alternative, as that term is defined in the 2004 DSEIS and FSEIS.

135. The Board further relies upon the Findings of Fact adopted and made part of Ordinance #14-1213-02, approving Comprehensive Plan Amendment.
136. The Board discussed and deliberated on the legislative decision regarding a possible MRLO designation at a public meeting on June 30, 2004. At that time the Board (by a unanimous 3-0 vote) voted to approve the "Approved Alternative," i.e., an MRLO of 690 acres.
137. The Board imposes certain conditions, including expressly listing certain portions of the UDC that will apply to mining activities undertaken within the MRLO as conditions, pursuant to the Washington Administrative Code.
138. The Board bases its findings and conclusions upon A) the entire record of testimony and exhibits, including all written and oral testimony provided to it and B) the DCD staff reports to it dated May 25, 2004 and June 9, 2004.
139. When a project specific action (like construction of a conveyor and pier facility is proposed, the new project specific action EIS, which has not been started, will focus on the impacts and alternatives including mitigation measures specific to the project action proposal. These impacts will be analyzed to a degree not possible through the non-project EIS for designation of an MRLO. Because this non-project action is focusing primarily on development regulations that would apply to mining in an inland forested area, the DSEIS and FSEIS for MLA 02-235 will not have any relevance to a marine transport proposal. This means that when a project specific EIS process is started for a marine transport proposal we will be starting the SEPA process from the very beginning. This will include ensuring that the EIS prepared for the marine transport proposal is the County's document by ensuring that the consultant reports directly to the County, the process that occurred during the preparation of the DSEIS and FSEIS for MLA 02-235. The project specific EIS will

then follow the EIS process which will include scoping the issues, issuing a DEIS for comment, and addressing the comments in the FSEIS.

140. After the SEPA process is completed, the Shoreline Conditional Use Permit and Zoning Conditional Use Permit for a conveyor and pier facility would be reviewed at a public hearing before the hearing examiner.
141. The conveyor and pier within the shoreline jurisdiction would be reviewed through a Shoreline Conditional Use Permit before the Hearing Examiner. The criteria for a shoreline review are found in the Jefferson County Shoreline Management Master Program and the Shoreline Management Act (Section 5 of the UDC, RCW 90.58 Shoreline Management Act; WAC 173-27 Shoreline Management Permit and Enforcement Provisions). For actions on Shoreline of Statewide Significance (i.e. Hood Canal), there are additional local and state protections. If the proposal does not meet all of the criteria, the proposal will be denied. The WA State DOE makes the final decision on all Shoreline Conditional Use Permits. Numerous other State and Federal approvals would also be required.
142. The Zoning Conditional Use Permit will be reviewed at the same public hearing as the Shoreline Conditional Use Permit before the Hearing Examiner. The 12 approval criteria for a Zoning Conditional Use Permit are found in the Section 8.8.5 of the UDC. If the proposal does not meet all 12 criteria the proposal will be denied.
143. The BOCC has the initial impression that a pier facility (Pit-to-Pier) proposal contemplated by the applicant may not meet all of the twelve (12) approval criteria, including the following: 8.8.5(1) whether a pier facility in Hood Canal is harmonious in design, character and appearance with the development in the vicinity; 8.8.5(3) that a pier facility in Hood Canal is detrimental to uses or property in the vicinity; 8.8.5(4) whether a pier facility will introduce noise, dust, vibrations, and other conditions (like light & visual impacts) to uses or property in the vicinity; 8.8.5(5) whether a pier facility approximately 90 feet above the Mean Lower Low Water Mark (MLLM) will unreasonably interfere with allowable development or

uses of neighboring properties; 8.8.5(6) whether ship openings to the Hood Canal Bridge associated with a pier facility would impact traffic in the vicinity of the proposal; 8.8.5(7) whether a pier facility would comply with all State and Federal requirements, including potential impacts to threatened and endangered species; 8.8.5(9) whether a pier facility would cause significant adverse impacts to the human and natural environment that cannot be mitigated through conditions of approval; 8.8.5(10) whether a pier facility with the limited job creation, limited revenue benefit to the County, potential impacts Hood Canal and to the Hood Canal Bridge (i.e. ship/barge collision with bridge) has merit and value for the community as a whole; 8.8.5(11) whether a pier facility is consistent with the Jefferson County Comprehensive Plan; 8.8.5(12) whether the public interest suffers no significant detrimental effect from a pier facility.

**NOW, THEREFORE, BE IT ORDAINED**, as follows:

Section One: With respect to MLA #02-0235 (Fred Hill Materials) the following real property within Jefferson County is provided with a Mineral Resource Overlay Designation, specifically the land described below:

SEE "EXHIBIT A"

Section Two: The MRLO designation granted to Fred Hill Materials, Inc. shall be and is subject to the following fifteen (15) conditions:

1. Prior to approval and operation of a surface mine in the Wahl Lake or Meridian area of the Thorndyke Tree Farm, the proponent shall submit and satisfy all requirements of the Unified Development Code (UDC) including, but not limited to:
  - a. Protection of environmentally sensitive areas per Section 3:
    - Mining is prohibited in Fish and Wildlife Habitat areas or their buffers.
    - Mining is prohibited in Wetlands or their associated buffers.
    - Submission of an Aquifer Recharge Area Report, Drainage and Erosion Control Plan, and Grading Plan, the combination of which shall demonstrate that the proposed activities will not cause degradation of groundwater or surface waters.
    - Submission of a Habitat Management Plan.

- b. Performance standards of Section 4:
    - Full compliance with the Washington State Surface Mining Act (RCW 78.44) shall be required prior to any mining activity that exceeds 3 acres of disturbed area.
    - Extraction report prepared by a professional geologist with elements required pursuant to UDC 4.24.2.a-f.
    - All extraction and reclamation activities that create a noise disturbance must take place between 7:00 a.m. and 7:00 p.m.
  - c. Development standards of section 6:
    - Stormwater management standards and practices.
    - Best Management Practices for drainage and erosion control and sedimentation control.
    - Mineral extraction Best Management Practices in Aquifer Recharge Areas.
  - d. Jefferson County procedures and policies at UDC Section 8 for implementation of the State Environmental Policy Act (SEPA).
  - e. Any failure to abide by Jefferson County regulations shall be investigated and enforced as provided by the requirements and procedures of Section 10.
2. As a matter of policy, the legal, nonconforming use (i.e., established prior to adoption of the UDC) at the Shine Pit hub of 144 acres (including an existing MRL overlay of 121 acres) shall be subject to operational standards a. and b. upon adoption of a Wahl Lake/Meridian MRL overlay and operational standards c. and d. when (and if) approval is granted through a permit review process for mineral extraction activities in the Wahl Lake/Meridian MRL overlay:
- a. The maximum permissible sound level at any and all receiving properties outside of the Thorndyke Tree Farm shall be 57 dB(A) between 7:00 a.m. and 7:00 p.m. on weekdays and 47 dB(A) on weekends, holidays, and between 7:00 p.m. and 7:00 a.m. on weekdays. Compliance protocol shall be established during review of future mineral extraction permit application. Any planned, temporary exceeding of these standards must be authorized beforehand by the Administrator and documented in the compliance case file.
  - b. Outdoor lighting shall meet the specifications of the US National Park Service Interim Design Guidelines for Outdoor Lighting. Building lighting shall be located high on the structures and include forward throw optics to direct lighting away from the sides of the buildings and onto the ground. Lighting required for mineral extraction, processing, and transportation activities shall be independently mounted (not directly attached to equipment) to allow for a more downward throw of light to further limit the potential for direct light to reach offsite areas.
  - c. Transportation options shall be fully studied in project action environmental review, including optimum hours for truck access to SR 104.
  - d. A visual impact mitigation plan shall be a mandatory element of project action environmental review, including but not limited to the establishment of berms, vegetative plantings, and other measures to mitigate offsite visual impacts.

3. Gravel mining operations shall, prior to approval and operation, obtain from the Washington Department of Ecology Water Quality Program a national Pollutant Discharge Elimination System and State Waste Discharge General Permit (NPDES) for process water, stormwater and mine dewatering water discharges. All activities within the MRL overlays shall be subject to the standards of the latest edition of the Department of Ecology Stormwater Management Manual for Western Washington.

4. Mining operations located within a designated Aquifer Recharge Area shall demonstrate that the proposed activities will not cause degradation of the groundwater quality below the standards described in Chapter 173-200 WAC (Water Quality Standards for Ground Waters of the State of Washington):

- a. The proponent shall prepare a Best Management Practices Report pursuant to the criteria explained below, describing how the operators will integrate other necessary and appropriate mitigating measures in the design, installation, and management of the proposed facility or use.
- b. The report shall be prepared by, or done under the direction of or designed by, a qualified person with demonstrated expertise in the industry or field as demonstrated by a statement of qualifications and at least three references from parties familiar with common business practices in the subject field or known expertise in the field.
- c. The report will identify appropriate BMPs and how they will be employed to prevent degradation of groundwater. Examples of BMPs are available at the DCD Permit Center. All necessary technical data, drawings, calculations, and other information to describe application of the BMPs must be supplied.
- d. The report shall identify how the applicant will satisfy the requirements of the Dangerous Waste Regulations, Chapter 173-303 WAC, in the event that hazardous material is released into the ground or groundwater.
- e. The Department of Community Development and/or a qualified consultant contracted by the County at the applicant's expense shall review the report. The County may consult with the Jefferson County Department of Health and Human Services, State of Washington Departments of Health or Ecology, independent reviewer, or any other parties, as determined at the County's discretion.

5. Establish a written agreement with the County providing that all employees at the mining site will be notified that the operation lies above an Aquifer Recharge Area and all employees shall receive documented annual training concerning all measures set forth by the BMPs established in the reports required above.

6. Mining operations located within a designated Aquifer Recharge Area shall at all times comply with Olympic Air Pollution Control Authority/Olympic Region Clean Air Agency permit requirements. Prior to operation, the proponent shall submit documentation from Olympic Air Pollution Control/Olympic Region Clean Air Agency to the Community Development Department verifying that the

operation is in compliance with Olympic Air Pollution Control permit requirements.

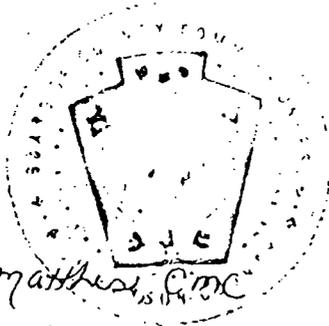
7. Mining operations located within a designated Aquifer Recharge Area shall engage a third-party, selection of which is approved in advance by the County, to monitor compliance with regulations and conditions pertaining to their NPDES/State Waste Discharge Permit. Reports shall be prepared and distributed as required in the NPDES/State permit, with copies to the County each month unless the permit requires quarterly reporting in which case copies will be provided to the County quarterly.
8. Mining operations located within a designated Aquifer Recharge Area shall submit an annual report to the County evaluating implementation of the Department of Natural Resources-approved Surface Mine Reclamation Plan. A qualified, independent consultant approved by the County shall prepare the report. The report shall identify how restoration of the site compares to the approved Reclamation Plan and whether any corrective action is contemplated by the applicant or required by the Department of Natural Resources.
9. The proponent shall submit quarterly inspections prepared by a third party selected by Jefferson County which examines the activities within the MRL overlay to assure compliance with the conditions of approval and mitigation measures of applicable codes, statutes and ordinances. FHM, Pope Resources, and any future permit holders and/or landowners shall allow unlimited access to Jefferson County or other governmental agencies for the purpose of inspection and determination of compliance with applicable conditions of approval and applicable statutes, codes, and ordinances.
10. Uses within the Wahl Lake area and Meridian area MRL overlay will be limited to extraction and transportation via a conveyor system to the Shine Pit hub. No heavy equipment maintenance or crushing operations shall be allowed in this MRL overlay.
11. Mining will be limited to a maximum depth of ten (10) feet above the seasonal high water table, which shall be established and monitored pursuant to standard techniques and verified through independent review as arranged by the County at the applicant's expense.
12. Maximum "disturbed area" [as that term is defined at RCW 78.44.031(5)] size shall be determined in consultation with Department of Natural Resources, but shall not exceed the lesser of 40 acres or the appropriate size for a specific proposed site according to consideration and implementation of the 'best management practices' promulgated by DNR. Reclamation shall be conducted on an on-going basis, pursuant to progressive segmental reclamation standards and according to the specific mining segment sizes and timelines established in DNR-approved Reclamation Plans.
13. During mining operations, dust shall be controlled by the proponent, through means of watering or other methods that are acceptable to the SEPA Responsible Official.

14. The application for a conveyor and pier facility for barge loading in the Hood Canal has previously received a threshold Determination of Significance (DS) from Jefferson County, requiring the preparation of a project-action Environmental Impact Statement (EIS). Transportation of extracted materials to anticipated markets shall be a component of the environmental review of any extraction permit applications. Any permit issued shall be based on the transportation methods and anticipated rate of transport stated in the project application. Subsequent to extraction project approval, any substantial change in the rate of extraction associated with that extraction proposal shall require either a new or amended permit, and potentially a new threshold determination issued by Jefferson County as is allowed by WAC 197-11-600(3)(b)(i).
15. A periodic review process shall be established in conjunction with any future mineral extraction or related permits granted for activities in or associated with the current and newly adopted MRL overlays in the Thorndyke Tree Farm. At five (5) year intervals from permit issuance, DCD will conduct a periodic review process, equivalent to a Type II permit process under Section 8 of the UDC, including applicable public notice provisions and appeal rights, to determine whether the site is operating consistent the most current standards and to establish other conditions as necessary to mitigate identifiable environmental impacts. Written notice that periodic review is commencing shall be provided to the public and to agencies with jurisdiction. The notice shall explain the purpose and intent of the periodic review process and other relevant details.

Section Three: The Comprehensive Plan Land Use Map is hereby amended to reflect the addition of these two newly-adopted Mineral Resource Overlay districts.

Section Four: Severability. If any provision of this ordinance or its application to any person or circumstance is held invalid, the remainder of the ordinance or the application of the provision to other persons or circumstances is not affected.

APPROVED AND ADOPTED this 6<sup>th</sup> day of July, 2004.



SEAL:

ATTEST:

*Julie Matthes, CMC*  
 Julie Matthes, CMC  
 Deputy Clerk of the Board

JEFFERSON COUNTY  
 BOARD OF COMMISSIONERS

*Glenn Huntingford*  
 Glenn Huntingford, Chairman

*Dan Titterness*  
 Dan Titterness, Member

*Patrick Rodgers*  
 Patrick Rodgers, Member

EXHIBIT A

REVISED MRL/O LEGAL

525 Acres – More or Less  
Meridian Extraction Area

The southerly 1,125 feet (plus or minus) of the SE ¼,  
**EXCEPT west 500 feet of said southerly 1125 feet,**  
Section 1, Township 27 N, Range 1 W, W.M.,  
The east ½ of Section 12, Township 27 N, Range 1 W, W.M.  
**EXCEPT the west 500 feet of the east ½ of said Section 12,**  
The North 150 feet (plus or minus) of the NE ¼,  
Section 13, Township 27 N, Range 1 W, W.M.  
The North 150 feet (plus or minus) of the NW ¼,  
Section 18, Township 27 N, Range 1 E, W.M.,  
The SW ¼ of Section 7, Township 27 N, Range 1 E, W.M.,  
The SW ¼ NW Section 7 Township 27N, Range 1 E W.M.

156 Acres – More or Less  
Wahl Lake Extraction Area

LEGAL DESCRIPTION

THAT PORTION OF SECTION 1, TOWNSHIP 27 NORTH, RANGE 1 WEST, W.M., IN JEFFERSON COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS:  
COMMENCING AT A 3" DIAMETER ALUMINUM MONUMENT MARKING THE NORTHEAST CORNER OF SAID SECTION 1; THENCE SOUTH 1 36'37" WEST ALONG THE EAST LINE OF SAID SECTION 1 A DISTANCE OF 906.69 FEET; THENCE NORTH 88 04'20" WEST 1533.75 FEET TO THE POINT OF BEGINNING; THENCE SOUTH 1 55'40" WEST 3279.46 FEET; THENCE NORTH 88 04'20" WEST 363.79 FEET; THENCE NORTH 37 39'30" WEST 1305.08 FEET; THENCE NORTH 79 39'32" WEST 1535.88 FEET; THENCE NORTH 1 55'40" EAST 2048.97 FEET; THENCE SOUTH 88 04'20" EAST 2714.79 FEET TO THE POINT OF BEGINNING.

9 Acres – More or Less  
Conveyor and Maintenance Road Easement

A 60 FOOT WIDE STRIP LOCATED WITHIN THE NORTH HALF OF SECTION 6, TOWNSHIP 27 NORTH, RANGE 1 EAST, W.M. AND WITHIN THE EAST HALF OF SECTION 1 TOWNSHIP 27 NORTH, RANGE 1 WEST, W.M., IN JEFFERSON COUNTY, WASHINGTON, THE CENTERLINE OF WHICH IS DESCRIBED AS FOLLOWS:  
COMMENCING AT THE NORTHEAST CORNER OF SAID SECTION 6; THENCE NORTH 87 46'49" WEST ALONG THE NORTH LINE THEREOF 1219.72 FEET TO THE POINT OF BEGINNING OF THIS CENTERLINE; THENCE SOUTH 2 14'31" WEST 157.83 FEET; THENCE SOUTH 69 02'13" WEST 1498.40 FEET; THENCE SOUTH 64 05'45" WEST 2966.83 FEET TO THE COMMON LINE BETWEEN SAID SECTIONS 1 AND 6; THENCE CONTINUING SOUTH 64 05'45" WEST 1742.15 FEET TO THE EAST LINE OF A LEASE AREA AS DESCRIBED AND DEPICTED ON A RECORD-OF-SURVEY RECORDED IN VOLUME 23 OF SURVEYS, PAGE 29, AUDITOR'S FILE NO. 443672, AND THE POINT OF TERMINATION OF THIS CENTERLINE.  
THE SIDELINES OF THIS EASEMENT SHALL BE LENGTHENED OR SHORTENED, AS THE CASE MAY REQUIRE, SO THAT THEY TERMINATE AT THE NORTH LINE OF SAID SECTION 6 AND THAT THEY TERMINATE AT THE EAST LINE AND ABOVE SAID LEASE AREA.