BEFORE THE SKAGIT COUNTY HEARING EXAMINER

In the Matter of the Appeal of **Central Samish Valley Neighbors** re: Mitigated Determination of Nonsignificance	NO. PL22-0142 (Application Nos. PL16-0097 & PL16-0098) PREHEARING BRIEF ON SEPA

INTRODUCTION

As surface mines go, this project is modest. Of the 700-plus commercial forest acres Concrete Nor'West (Applicant) owns, only 51 will be altered as part of this project. The balance of the property will remain in active forestry use. Mining activities on the 51 acres will occur sequentially over time in four segments and will be limited to extraction and removal of materials from the site. No blasting, crushing, or other processing facilities are proposed. The remote location and 100-foot perimeter buffer will hide the operation from view, though the surrounding properties are themselves "resource lands" in any case.

In short, this is a small surface-mining project, situated within the Mineral Resource Overlay (MRO), and is more than sufficiently conditioned under terms of the proposal itself and a Mitigated Determination of Nonsignificance (MDNS). It is exactly the type of use and

project intended for this location under the Comprehensive Plan.

The County legislative body has determined that natural resources are the "cornerstone" of the County's "economy, community, and history." Given this,

> It is essential that neighbors and residents of natural resource lands better understand and be prepared to accept attendant conditions and the natural result of living in or near natural resource lands and rural areas.[1]

Though the neighbors here live on or near resource lands and some within the MRO, they do not want the land to be used for its legislatively-designated purpose. The opposition to this project has been energetic and persistent, resulting in increased County scrutiny. For instance, in addition to being subject to the typical staff review, the Applicant's traffic report was also subject to a comprehensive peer review, which is unusual for a project of this limited size and scope. As another example, the County required a vibration analysis, also highly unusual, maybe even unprecedented for a mine or other use in the County. And the County required (four full years into the review) critical areas report for the existing forest road within the Applicant's property, even though there are no generally established mitigation measures to address increases in traffic on existing forest roads.

The result of this increased scrutiny is a thoroughly noticed, carefully reviewed, and sufficiently-mitigated project. The County more than met its burden under the State Environmental Policy Act (SEPA). The Hearing Examiner should deny the appeal.

RELEVANT STUDIES THAT FORMED THE BASIS OF THE COUNTY'S REVIEW

The project has been reviewed and scrutinized beyond what is normal for these circumstances, as evidenced, in part, by the following studies required by the County.

[1] Skagit Comprehensive Plan, pp. 104-05.

1. Noise and Vibration Study

Though it is unusual to require a noise *and* vibration study for a project of this size and scope, the Applicant submitted each at the request of the County.[2] The noise study concluded that the noise from the operation of the mine (including from haul trucks on public roads) would not be perceptible or barely perceptible to neighbors above existing background noises.[3] Vibration was also studied at the behest of neighbors and the County. The study concluded that there is no potential for ground-borne vibration due to onsite activities and that there would be no vibration impacts to residences from trucks traveling to and from the site.[4]

2. Critical Areas Review

The Applicant submitted full critical areas reports for the mine operation areas,[5] including a Hydrogeologic Site Assessment, Hazardous Areas/Steep Slopes Review, Wetlands Assessment, and Fish and Wildlife Assessment (and addendum). Despite this, four years after the Applicant submitted applications that were found complete, the County required the Applicant to conduct a focused critical areas assessment over the entire length of the nearly *2 ½ mile* existing internal forest road that is located entirely outside of the mine parcels. As specifically directed by the County, the Applicant engaged an expert to conduct the assessment.[6] The assessment concluded that the project does not include any direct wetland, stream, or buffer impact, "therefore, traditional mitigation measures

[2] Applicant's Ex. B-33.
[3] *Id.* at pp. 9-10.
[4] *Id.* at pp. 9-13.
[5] Applicant's Ex. B-14.
[6] County's Ex. C-14.

such as wetland or buffer enhancement have not been presented."[7] Though there will be no direct impacts, certain mitigation measures (e.g., maintaining existing forested vegetation buffer adjacent to roadway) were recommended in the off-chance that "potential" "minor" indirect impacts occur.[8] These mitigation measures were incorporated in the MDNS.

3. Peer Reviewed Traffic Report

Review of the project's traffic has been comprehensive. The Applicant has submitted a Preliminary Traffic Information Memorandum, Maximum Daily Truck Traffic Memorandum, Traffic Study Summary, and Traffic Impact Analysis. On top of that, on behalf of the County consultants performed a third-party peer review of *all* of the Applicant's traffic information. Again, this is unusual for a project of this size and scope. The consultant's recommendations were incorporated as mitigation measures in the MDNS.

The County's staff report outlines these and other reports and assessments the Applicant provided, and the County reviewed. The idea that the County issued the MDNS before obtaining sufficient information, as the neighbors contend, is completely undercut by the substantial four-year record in this case.

STANDARDS AND LEGAL FRAMEWORK

A. MDNS

Courts and SEPA experts have determined that the MDNS process, used as an alternative to the EIS process, may provide more effective environmental protection than promulgation of an EIS. *See Anderson v. Pierce County,* 86 Wn. App. 290, 305, 936 P.2d

[7] County's Ex. C-14.

[8] *Id.*

432 (1997) (also quoting Professor Settle as discussed below). With an MDNS, a formal EIS is not required, but environmental studies and analysis are often quite comprehensive, similar in scope to an EIS. *Id.* at 301. But unlike the EIS process, which only studies potential mitigation, the MDNS alternative involves actually changing or conditioning a project to eliminate its significant adverse environmental impacts. WAC 197-11-350. The Department of Ecology has noted its purpose:

> The mitigated DNS provision in WAC 197-11-350 is intended to encourage applicants and agencies to work together early in the SEPA process to modify the project and eliminate significant adverse impacts. The mitigated DNS process is not intended to reduce the amount of environmental review done on a project, but reduce the paperwork needed to document the process.

Richard L. Settle, DOE INTERPRETATIONS OF DETERMINATIONS OF NON-SIGNIFICANT PROVISIONS, (1988 SEPA Handbook G-1 to G-6), *quoted in Anderson,* 86 Wn. App at 304. "With an MDNS, promulgation of an EIS and intense public participation are rendered unnecessary because the mitigated project will no longer cause significant adverse environmental impacts." *Anderson,* 86 Wn. App. at 303. The MDNS has thus "found favor with courts and decision-makers as 'conducive to efficient, cooperative, reduction or avoidance of adverse environmental impacts.'" *Moss v. City of Bellevue,* 109 Wn. App. 6, 21, 31 P.3d 703 (2001), *quoting Anderson,* 86 Wn. App. at 303.

B. SEPA

SEPA's purpose is to ensure that the permitting authorities are informed of environmental impacts during the permit review process. SEPA is not "designed to usurp local decision making or to dictate a particular substantive result," but is intended to ensure that environmental impacts, alternatives, and mitigation measures are properly considered by the decision makers for a particular project. *Save Our Rural Environment (SORE) v. Snohomish County,* 99 Wn.2d 363, 371, 662 P.2d 816 (1983). *See also, Moss,*

109 Wn. App. at 14. SEPA seeks to achieve balance, restraint and control, rather than to preclude all development whatsoever. *Cougar Mountain Associate v. King County,* 111 Wn.2d 742, 753-54, 765 P.2d 264 (1988). "SEPA should not be used to block construction of unpopular projects." *Id*.

The standard of review for a threshold determination required by SEPA is in accordance with the Skagit County Code. SCC Ch. 16.12. The County's decision to issue an MDNS and not to require an EIS must be accorded substantial weight. RCW 43.21C.090; RCW 43.21C.075(3)(d); WAC 197-11-680(3)(iv); *Anderson,* 86 Wn. App. at 302. The MDNS must be upheld unless it is determined that the decision to issue it was clearly erroneous. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000); *Norway Hill Preservation and Protection Ass'n v. King County Council*, 87 Wn.2d 267, 552 P.2d 674 (1976).

To satisfy their burden, the appellants must present sufficient credible evidence that leaves the Examiner with a definite and firm conviction that the project, in light of SEPA policy, existing local, state and federal regulations and the conditions imposed by the responsible official, will have a significant environmental impact. *Norway Hill,* 87 Wn.2d at 279; *Moss,* 109 Wn. App. at 13-14. Thus, if the record demonstrates that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA, and that the decision to issue an MDNS was based on information sufficient to evaluate the proposal's environmental impact, the MDNS should be affirmed. *Anderson, supra,* 86 Wn. App. at 302 (citing *Pease Hill Community Group v. County of Spokane,* 62 Wn. App. 800, 810, 816 P.2d 37 (1991)).

In reviewing the County's decision to issue an MDNS for the project, the Examiner should be mindful that there are at least three ways in which to mitigate environmental

impacts to a level below significance. Of course, the most obvious is the imposition of conditions. Mitigation can also be achieved by modifying the project itself. Finally, mitigation may be achieved through compliance with applicable environmental regulations.

C. RCW 36.70B.

Environmental review has evolved since SEPA was first enacted in 1971. One evolution discussed earlier in this brief has been through the development and growing use of the MDNS process as an effective alternative to the EIS process.[9] The MDNS process has become a powerful and commonly used tool for reviewing agencies, and it has been successfully employed on even large-scale projects with the approval of the courts,[10] to adequately mitigate significant adverse impacts without invoking the time-consuming EIS process.

Another significant SEPA evolution occurred through the 1995 enactment the Integration of Growth Management and Environmental Review Act which, among other things, added RCW 43.21C.240 to SEPA. 1995 Wash. Laws, Ch. 347. As amended, SEPA directs responsible officials to integrate comprehensive planning and environmental regulations that operate to mitigate project impacts into their review process. RCW 43.21C.240. In adopting RCW 43.21C.240, the Legislature found that:

> Comprehensive plans and development regulations adopted by counties, cities, and towns under chapter 36.70A RCW and environmental laws and rules adopted by the state and federal government have addressed a wide range of environmental subjects and impacts. These plans, regulations, rules, and laws

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[9] The process of mitigating a significant adverse impact to avoid a determination of significance was initially not addressed in the SEPA Rules, but was nonetheless discussed and approved by Washington courts, and deemed by our Supreme Court in *Hayden v. City of Port Townsend* as "eminently sensible." 93 Wn.2d 870, 880-81, 613 P.2d 1164 (1980). *See also, Brown v. City of Tacoma,* 30 Wn. App. 762, 766-68, 637 P.2d 1005 (1981); *Richland Homeowner's Preservation Ass'n. v. Young,* 18 Wn. App. 405, 416-18, 568 P.2d 818 (1977). Of course, now the MDNS process is expressly authorized through WAC 197-11-350.

[10] *See Moss,* 109 Wn. App. at 20-21 (sustaining MDNS for 172-lot residential subdivision on 76 acres and refusing to hold that MDNS may not be applied to large projects). *See also, West 514, Inc. v. Spokane County,* 53 Wn. App 838, 770 P.2d 1065 (1989).

> often provide environmental analysis and mitigation measures for project actions without the need for an environmental impact statement or further project mitigation.

1995 Wash. Laws, Ch. 347, § 201(1)(A); RCW 43.21C.240 note (Findings and Intent (1)(A)) (emphasis added).

This enactment "substantially streamline[d] the threshold determination process" by allowing a GMA county to rely upon existing development regulations, comprehensive plan requirements, or other applicable local, state, or federal laws or regulations as built-in mitigation for some or all of the adverse environmental impacts of a project. *Moss,* 109 Wn. App. at 16. *See also* WAC 197-11-158, WAC 197-11-330(1)(c). The SEPA regulations now direct the responsible official to

> consider mitigation measures which an agency or the applicant will implement as part of the proposal, including any mitigation measures required by development regulations, comprehensive plans, or other existing environmental rules or laws.

WAC 197-11-330(1)(c).

Similarly, RCW 36.70B.030 – which mandates that "the land use planning choices reflected in the comprehensive plan and regulations "'serve as the foundation for project review'" – includes findings that direct integrated environmental analysis:

> Comprehensive plans and development regulations adopted by local governments under chapter 36.70A RCW and environmental laws and rules adopted by the state and federal government have addressed a wide range of environmental subjects and impacts. These provisions typically require environmental studies and contain specific standards to address various impacts associated with a proposed development, such as building size and location, drainage, transportation requirements, and protection of critical areas. When a permitting agency applies these existing requirements to a proposed project, some or all of a project's potential environmental impacts will be avoided or otherwise mitigated. Through the integrated project review process described in subsection (1) of this section, the local government will determine whether existing requirements, including the applicable regulations or plans, adequately analyze and address a project's environmental impacts. RCW 43.21C.240 provides that project review should not require additional

> studies or mitigation under chapter 43.21C RCW where existing regulations have adequately addressed a proposed project's probable specific adverse environmental impacts. (Emphasis added.)

RCW 36.70B.030 (Intent-Findings-1995 c 347 §§ 404 and 405).

SEPA expressly authorizes local jurisdictions to determine that a project's environmental impact will be mitigated through its own development regulations, rather than through the EIS process, in order to meet SEPA requirements. *In re King County Hearing Examiner*, 135 Wn. App. 312, 325, 144 P.3d 345 (2006); *Anderson,* 86 Wn. App. at 302. *See also,* Butler & King, 24 Washington Practice*, Environmental and Law Practice*, § 16.16 (2007). "As a result, in many contexts SEPA's role is now subordinate to other environmental and land use statutes with its environmental review mandates satisfied by the environmental review requirements imposed by such statutes." Butler & King, 24 Washington Practice at § 17.31.

In addition to the above, Skagit County is required by RCW 43.21C.240 to issue an MDNS based on the County's adopted levels of service. The statute states that **IF**: (1) a jurisdiction has adopted a level of service or other standard (RCW 43.21C.240(4)(b)); and (2) a project decision is conditioned to meet that standard after consultation with the agency involved (RCW 43.21C.240(5)); **THEN** (3) the impact is considered to have been adequately addressed and mitigated (RCW 43.21C.240(2)(a)); (4) no further mitigation may be required (RCW 43.21C.240(3)); and (5) a DNS or MDNS is the "proper threshold determination" (RCW 43.21C.240(1)).

D. ADDITIONAL LIMITATIONS

SEPA authorizes local governments to condition or deny development approvals to "mitigate specific adverse environmental impacts of a development." RCW 43.21C.060.

Although local governments possess the authority under SEPA to impose conditions on development of land, their authority to require or impose development exactions is constrained by statutory and constitutional limits. The appellants' arguments, and specifically their appeal for even more extensive conditions, must be considered in this context.

1. RCW 82.02.020

RCW 82.02.020 states a general rule against local governments' charging any direct or indirect tax, fee, or charge on development projects:

> Except as provided in RCW 63.34.440 and 82.02.050 through 82.02.090, no county, city, town or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land.

RCW 82.02.020. This provision, however, "does not prohibit voluntary agreements with counties, cities, towns, or other municipal corporations that allow a payment in lieu of dedication of land or to mitigate a direct impact that has been identified as a consequence of a proposed development, subdivision, or plat." But no payment can be required that the local government cannot "establish is reasonably necessary as a direct result of the proposed development or plat." RCW 82.02.020 (emphasis added). Thus, RCW 82.02.020 requires that the government must make a project-specific determination of what kind of dedication or fee is "reasonably necessary" as a result of an identified impact of the development on a community. *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 755, 764, 49 P.3d 867 (2002).

2. Constitutional Limitations

Another limitation on a local government's authority is imposed by the constitutional takings doctrine set forth in the U.S. Supreme Court's *Nollan* and *Dolan* cases[11] (as further applied by Washington courts). In both cases the Supreme Court found that the exaction at issue effected a taking in violation of the Fifth Amendment. In *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), the Supreme Court held that there must be an "essential nexus" between a legitimate state interest and the exaction imposed. 483 U.S. at 837. In *Dolan v. City of Tigard,* 512 U.S. 374 (1994), the court further defined this nexus requirement and held that government must demonstrate that the exaction it imposes is "roughly proportional" to the impact of the development. 512 U.S. at 391.

3. SEPA Limitations

Additional limitations apply under SEPA provisions and regulations that provide local governments with the substantive authority to condition projects. The permitting jurisdiction may exercise its substantive SEPA authority under RCW 43.21C.060 to impose mitigation measures only to the extent directly attributable to the identified adverse impacts of a project. RCW 43.21C.060; WAC 197-11-660(1)(d). And the mitigation must be based on adopted written policies of the agency. WAC 197-11-660 1(a).

CONCLUSION

This site is well isolated from neighbors and the scale of the activities is actually quite modest. Though this activity is encouraged in the Mineral Resource Overlay, the project has been aggressively opposed by a core of people for the last 4 years. The result

[11] Washington Courts have interpreted and applied these concepts and addressed the State Constitution. *See e.g., Burton v. Clark County,* 91 Wn. App. 505, 958 P.2d 343 (1998).

is that every aspect has been thoroughly studied, all code requirements have been met, and the mitigation is thorough. We are confident that the Examiner will find the MDNS process and outcome to be well supported by the record and the appeal will be denied.

Dated this 1st day of July, 2022.

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