BEFORE THE HEARING EXAMINER FOR SKAGIT COUNTY

In the matter of the Appeal of **Central Samish Valley Neighbors** A Mitigated Determination of Nonsignificance	**APPEAL NO. PL21-0142** Application Nos. PL16-0097 & PL16-0098 **SKAGIT COUNTY CLOSING BRIEF**

Skagit County respectfully submits this Brief in the above captioned appeal. Central Samish Valley has not carried its burden on proving the County's decision to issue the MDNS or the contents of the MDNS was clearly erroneous. The County respectfully requests the Hearing Examiner deny the appeal.

1. INTRODUCTION

This appeal concerns the County's issuance of a Mitigated Determination of Non-Significance for a proposed surface mine operated by Miles Sand and Gravel. The proposed mine would occupy 68 acres within a corner of 726 acres of contiguous ownership. Fifty-one acres would be mined in four phases (with reclamation after each phase) over the course of about 25 years. Material would not be processed on site, but rather trucked to another facility for such work.

The proposal at issue here has been under consideration for over six years—the application was deemed complete on March 22, 2016. Exh. C-7, at 59; Exh. B-7. The County has issued and withdrew an MDNS twice. Two appeals to the Hearing Examiner have occurred—both of times concerning the County's want of additional information from the applicant. Many resources have been devoted to evaluating this project, including environmental studies related to wetlands, critical areas, fish and wildlife, hydrology, geologic hazards, cultural resources, noise and vibration, and traffic. Thousands of pages of public comments were submitted. Nevertheless, Central Samish Valley Neighbors ("CSVN") have appealed the issuance of the MDNS because they believe the County did so without sufficient information to evaluate the environmental impacts of the proposed mine. Exh. A-1, at ¶¶ 3.1, 3.4, 5.1.2.

But following seven days of testimony CSVN has not carried their burden. SEPA does not require that every possible impact of a project be mitigated. Rather SEPA directs the County's "attention to impacts that are likely, not merely speculative," WAC 197-11-060(4)(a), and mitigation or an EIS is only required for probable significant impacts, *Wild Fish Conservancy v. Wash. Fish & Wildlife Dept*., 198 Wn.2d 846, 866, 502 P.3d 359, 856–57 (2022). And that is what has occurred here. CSVN has not provided clear and convincing evidence that the impacts they identify as unreviewed or under-reviewed

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would have a reasonable probability or likelihood of a more than moderate adverse effect on the quality of the environment. *See* WAC 197-11-782(1); WAC 197-11-796(2). Consequently, the Hearing Examiner should deny the appeal and uphold the MDNS.

2. LEGAL BACKGROUND & STANDARD OF REVIEW

2.1. SEPA Requirements

SEPA review begins with a "threshold determination" as to whether a proposal would have *probable significant adverse environmental impacts* based on the SEPA checklist. WAC 197-11-330; WAC 197-11-960. A "significant" impact means a "reasonable likelihood" exists that the proposal will have "more than a moderate adverse impact on environmental quality." WAC 197-11-794(1). But what constitutes significant "context and intensity … and does not lend itself to a formula or quantifiable test." WAC 197-11-794(2); *see Wild Fish Conservancy*, 198 Wn.2d at 873–74 (stating there is no "precise and workable definition" of significant impact and any analysis will be necessarily subjective since "what to one person may constitute a significant or adverse effect on the quality of the environment may be of little or no consequence to another." (citation omitted)).

If the proposal would not have probable adverse environmental impacts, the County issues a determination of nonsignificance ("DNS"). WAC 197-11-734. If a DNS is issued, an environmental impact statement (EIS) is not required. *Id*.

If the proposal would have probable significant adverse environmental impacts, the County has two options. First, is to issue a determination of significance ("DS") and require an EIS. WAC 197-11-330; WAC 197-11-960. Second, the County may issue a Mitigated DNS ("MDNS") if "by requiring certain specific mitigations, it can be reduced the environmental impacts to a level acceptable under SEPA." *Wild Fish Conservancy*, 198 Wn.2d at 856 (footnote omitted); SCC 16.12.110; WAC 197-11-350(1). Mitigation measures include: (1) avoiding the impact; (2) minimizing the impact; (3) rectifying the impact; (4) reducing or eliminating the impact over time; (5) compensating for the impact; and/or (6) monitoring the impacts and taking appropriate measures. WAC 197-11-768.

Importantly, an MDNS is not a determination that the project "will not have probable, significant adverse environmental effects." *Wild Fish Conservancy*, 198 Wn.2d at 856. Rather, it is a determination that the probable significant adverse environmental can be made non-significant with mitigation. *Id*. Moreover, it is recognized that and MDNS can better address environmental impacts than an EIS. *Id.* at 857 (quoting *Anderson v. Pierce County*, 86 Wn. App. 290, 305, 936 P.2d 432 (1997)).

2.2. Jurisdiction of the Hearing Examiner

"A final environmental threshold determination for a project proposal is administratively appealable as a Level I decision, pursuant to Chapter 14.06 SCC". SCC

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16.12.210(1); *see also* SCC 14.06.050(1)(a)(ix). The hearing examiner has the authority to grant the appeal and overturn the administrative official's decision or may deny the appeal, including denying the appeal subject to any "conditions or modifications deemed necessary." SCC 14.06.160(9); SCC 14.06.110(7); *see also Phillips 66 Co. v. Whatcom County*, 21 Wn.App.2d 1006, 2022 WL 593731 at *7 (2022) (unpublished) (concluding that "incident to the de novo review, the hearing examiner was empowered to strike or add conditions to the MDNS, consistent with the evidence in the record, when reaching the final decisions on open record review.").

2.3. Standard of Review

Central Samish Valley Neighbors "bear the burden of demonstrating that the decision of the Administrative Official is clearly erroneous." SCC 14.06.160(3)(a). To find the County's decision clearly erroneous, the Hearing Examiner must, upon a review of the entire record, be left with "the definite and firm conviction that a mistake has been committed." *Norway Hill Preservation & Protection Ass'n v. King County*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976). Furthermore, "[t]he procedural determination by the County's Responsible Official shall carry substantial weight in any appeal proceeding." SCC 16.12.210(4); RCW 43.21C.075(3)(d); RCW 43.21C.090; *see also Wild Fish Conservancy*, 198 Wn.2d at 866 ("In any action challenging a governmental agency's determination, SEPA requires the court give substantial weight to the agency's decision.").

3. DISCUSSION

The County issued an MDNS conditioning the proposed mine on mitigation of the probable significant adverse environmental impacts of the project. The likely environmental impacts of the project have been well documented and considered. That the County's decision to issue the MDNS was based on sufficient information follows from the weight of the evidence contained in the record.

3.1. Traffic Impacts.

The traffic impacts have likely been the most considered part of this project. Although as a new development the proposed mine would necessarily lead to an increase of traffic, the impacts of this increase are either non-significant or can be properly mitigated as set out in the MDNS.

3.1.1. The Traffic Impact Analysis provided sufficient information as it complied with the requirements of the County Road Standards.

A Level I traffic analysis is required if the project will (1) generate more than 25 PM peak hour trips or (2) is not categorically exempt from SEPA. Skagit Co. Road Stds. § 4.02.A. The proposed mine here meets both of these conditions. Although trip

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generation under normal operating conditions would be less than 25 trips per hour, *see* Exh. C-18 at p. 13, the project is not exempt from SEPA (obviously).

It has been asserted that a Level II TIA was actually required. However, a Level II TIA is only required if the project is within a UGA, would generate more than 100 peak hour trips, an EIS is required, current traffic problems identified by the County or a previous traffic study, and the level of service is currently or, because of the project, would be exceeded. Skagit Co. Road Stds. § 4.02.B. None of these conditions apply. Nevertheless, the TIA went beyond the requirements for a Level I analysis. For example, although a safety analysis is only required for a Level II TIA, Skagit Co. Road Stds. § 4.09; Exh. C-49 S-7, one was included in the TIA in this matter. Exh. C-18 at p. 21.

The Traffic Impact Analysis provided in this matter, Exh. C-18, satisfies the requirements of the County's road standards for a Level I analysis.

3.1.2. The MDNS properly mitigates traffic impacts by limiting operating hours to Monday through Friday traffic to an average of 46 trucks a day.

The MDNS conditions the proposed mine to limited operating hours (Monday to Friday, 7 am to 5 pm). Exh. C-27 at p. 2–3 (condition no. 2). The MDNS also limits traffic to 46 daily trips. *Id*. at p. 5 (condition no. 13.vii). These 46 truck trips, includes trucks both coming to and leaving the mine site. Stipulated Facts (Sept. 13, 2022).

To begin with it is important to note how this number of trucks was derived: the total amount of material to be mined in a year (200,000 tons) was divided by the capacity of the trucks (34 tons), the resulting number was then multiplied by 2 (to account for empty trucks) to obtain the trip generation for the year, this number was then divided by the number of workdays in a year (260 days) to get to the 46 daily average. Since the workday would be 10 hours, the hourly trip generation would be 4.6. Exh. B-50; Exh. C-18, at 13.

Since nearly all of the traffic would go though the Prairie Road/Grip Road intersection, the level of service of that intersection is the relevant limit for traffic that could be generated by this project. The maximum traffic to maintain the level of service is 110 truck trips per hour at the PM peak. Exh C-18, at 13; Exh. B-50. 4.6 truck trips an hour is well below that level of impact. In fact, even in a "worst case" scenario, with all available trucks were to be used at the mine site during extended hours, hourly trip still would not exceed the level of service.

Limiting the number of trucks and the working hours appropriately mitigates any probable significant environmental impacts. Given the difference between the level of traffic before exceeding the level of service, and limiting work to "normal" working hours, addresses the concerns of increased traffic impacts.

One issue that has been raised is that although labeled an average, the MDNS does not specify the denominator for calculating the average, that is over what period of time

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would be used. The County maintains this is clearly a year, given how the number was derived. However. if the Hearing Examiner concludes the absence of a time-period in the MDNS to calculate the average is significant, the County would encourage the Hearing Examiner to exercise its authority provided in the County Code to modify the MDNS. SCC 14.06.160(9); SCC 14.06.110(7); *see also Phillips 66 Co. v. Whatcom County*, 21 Wn.App.2d 1006, 2022 WL 593731 at *7 (2022) (unpublished). Specifically, the County would ask that the condition be modified to include that the average is to be calculated on a yearly basis and excluding any periods of approved extended operations.

3.1.3. The MDNS is not lacking for not prohibiting extended hours and increased traffic upon review.

CSVN take issue with the fact that the MDNS explicitly contemplates situations where the mine could operate outside the normal hours with the County's permission, but there are not specific requirements for obtaining such permission. *See* Exh. A-1, at ¶¶ 3.2 & 5.1.2(2).

This argument fails since the MDNS specifically requires the County approve such operations and puts the applicant on notice that additional conditions may be attached. In particular, Mitigation Condition No. 2 provides:

> If seasonal (temporary) demand indicates a need for extended hours, or Saturday or Sunday operations, the applicant shall submit a request for a temporary deviation to these permitted hours to Planning & Development Services (PDS). If permitted by PDS, such operations may be subject to additional conditions by PDS.

Exh. C-27, at p. 2–3. In addition, Mitigation Condition No. 13.vii reiterates that permission from the County is required for extended operations and increased truck traffic (which cannot exceed 30 trucks per hour).

The County appropriately deferred any decision making to the time in which it is requested. Although it may be the case that extended operations at some point of time is reasonably likely, whether such operations would be significant impact cannot be known until the details of the request are known. At such time the County would be in the best position to address the impacts the extended hours would cause.

3.2. The County properly implemented the provisions of chapter 14.24 of the Code in requiring a 200-foot buffer from the Samish River.

CSVN takes issues with the County's decision to only require a 200-foot buffer, asserting as a high-impact land use such a buffer does not comply with the Critical Areas Ordinance. *See* SCC 14.24.230(1)(a) (standard buffer from a Category I wetland for a high impact land use is 200 feet). CSVN made much of the proposed mine being a high—not moderate—Intensity use, and the County does not disagree. But this argument misses two important things: (1) the buffer size results from the Code in force at the time the

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application was deemed complete, and thus vested; and (2) the Code allows (both then and now) for medium intensity buffers to used in certain circumstances, which is what was done. Consequently, The Appellant has not carried its burden of showing that the County's decision to require a 200-foot buffer was clearly erroneous. Nor did they establish that the County erred in applying the standards set forth in the Critical Area Ordinance at the time the application vested. For purposes of SEPA, the appellants must show that the buffer required by the MDNS is insufficient and a significant environmental harm is likely unless the larger buffer is required. The appellants have failed in carrying this burden.

The application in this matter was deemed complete on March 22, 2016. Exh. C-3 at p. 59. Three months later chapter 14.24 was amended to increase some buffer widths and limit the availability of optional buffers. *Compare* SCC 14.24.230 (enacted Dec. 23, 2008), *with* SCC 14.24.230 (enacted June 30, 2016). When the application was deemed complete, it vested to the 2008 Critical Areas Ordinance, which is what was applied.

At that time, SCC 14.24.230(1)(b) allows a buffer of 270 feet for a high intensity use and 200 feet for a moderate intensity use with a habitat score of 30. See Exh. C-5/B-5 (finding a habitat score of 30). Section 14.24.240(3)(a) also allowed "[h]igh intensity land use projects [to] apply moderate intensity buffers if measures to minimize impacts to wetland from intensity land uses are implemented." The County found that applying the moderate land-use intensity buffer was appropriate given the Fish and Wildlife Site Assessment and the proposed mitigation measures. SUP Exh. 1, Staff Report at 7.

To be sure SEPA does not vest, RCW 19.27.095(6), and the County certainly possessed substantive authority under SEPA to require the larger buffer (and that this was considered is reflected in the record). But that authority only extends insofar as necessary to address a probable significant adverse impact to the environment. Here there is no evidence that applying the larger buffer would do so. This is particularly so given the fact that the 200-foot buffer is allowed specifically based on mitigation of environmental impacts. *See* SUP Exh. 1, Staff Report at 7.

It was also raised that the MDNS does not account for the extra 25-foot buffer required to extend beyond the top of the bank of the sloping area. SCC 14.24.230(2). But this cannot be the case as MDNS Condition No. 16 requires the project to comply with chapter 12.24 SCC, the Critical Areas Ordinance. There is no exception to the requirement of SCC 12.24.230(2) in the MDNS, so the project must comply. The undersigned is unaware of anything restricting the County's incorporation by reference of standards set forth in its development regulations requirement into the MDNS, as it has done here, nor any requirement that such details must be specifically identified. The MDNS is clear as to what is required.

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3.3. Climate Change—Carbon Emissions

CSVN argue that the County did not properly consider climate change, and in particular the carbon emission from the proposed mine. Exh. A-1, 3.9; CVSN SEPA Hearing Br., at p. 15. There is insufficient evidence that the estimated carbon emissions calculated by CSVN, Exh. A-18, at p. 8, constitute a significant impact requiring specific mitigation.

Furthermore, climate change is not something specifically required to be considered under SEPA. Recently, Division 2 of the Court of Appeals did address the issue in *Washington State Dairy Federation v. Dept. of Ecology*, 18 Wn.App.2d 259, 490 P.3d 290 (2021). In this case, environmental groups sought judicial review of the PCHB's decision to largely approve Ecology's issuance of waste discharge permits for concentrated animal feeding operations, claiming in part that SEPA required Ecology to consider the effects of climate change before issuing the permits. The PCHB disagreed on summary judgment, but was reversed with the court holding that SEPA required Ecology to consider climate change "to some extent" when issuing permits. *Id*. at 309.

Dairy Federation has limited applicability to the matter at hand. To begin with, the court made clear that the decision was meaningfully informed by the fact that the lead agency was Ecology—the agency tasked with SEPA. *Id.* at 308 ("While the mandates under SEPA apply to the State generally, they speak with an insistent voice to the Department of Ecology." (internal quotations omitted) (citations omitted)); *id*. at 309 ("Ecology maintains a responsibility to consider the impacts of climate change under SEPA to the extent that it must interpret its rules and statutes consistently with SEPA's mandates."). And even then, the decision was quite minimal: "climate change must be considered *to some extent*". *Id*. at 309 (emphasis added). Moreover, *Dairy Federation* is distinguishable from this matter. It concerned an industry wide permit, *id*. at 270, where as here we are dealing with single, specific development. *See Advocates for a Cleaner Tacoma v. Puget Sound Clean Air Agency, Findings of Fact, Conclusions of Law & Order,* POLLUTION CONTROL HEARING BD., No. 19-087c. 2021 WL 6195873, at *30 (Nov. 19, 2021).

Given the minimal holding of the court in a case involving Ecology issuing a general permit, *Dairy Federation* simply does not lead to the conclusion that climate change was something the County was required to consider in the manner suggested by CSVN. Rather, the conclusion remains that the County, through SEPA, must address probable significant adverse environmental impacts, and while carbon emission would certainly have an impact, the scale of the project (particularly as conditioned in the MDNS) will not likely be a significant adverse impact.

4. CONCLUSION

For the above reason, the Hearing Examiner should deny the appeal.

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DATED this 28th day of October, 2022.

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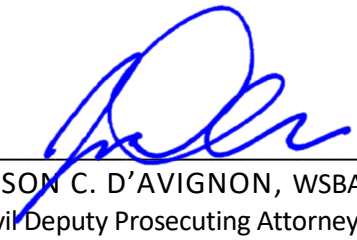

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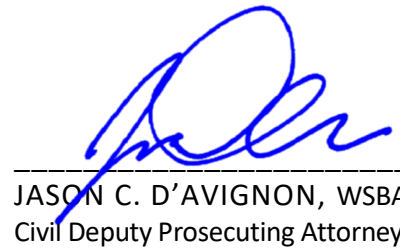
CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2022, I filed the foregoing original document with the Skagit County Hearing Examiner via email to Mona Kellogg, Hearing Coordinator, at monak@co.skagit.wa.us and served the foregoing document via email to:

- Bill Lynn, Attorney for the Applicant, at blynn@gth-law.com;
- Kyle Loring, Attorney for the Appellant, at kyle@loringadvising.com
- Tom Ehrlichman, Attorney for Cougar Peak, LLC, at tom@dykesehrlichman.com

Dated this 28th day of October, 2022, at Mount Vernon, Washington.



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