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5 **BEFORE THE HEARING EXAMINER**
6 **FOR SKAGIT COUNTY**

7 In the Matter of the Application for a
8 Special Use Permit by

9 **Concrete Nor'West/Miles Sand and**
10 **Gravel**

No. PL16-0097; No. PL16-0098

APPELLANT CENTRAL SAMISH
VALLEY NEIGHBORS' POST-
HEARING BRIEF ON SPECIAL
USE PERMIT APPLICATION

11 **I. INTRODUCTION**

12 After seven (7) days of hearing devoted primarily to Applicant Concrete
13 Nor'West/Miles Sand and Gravel's ("Miles") incomplete environmental review, the evidence
14 continues to demonstrate that the proposed 51-acre mine and 68 acres of clearing do not satisfy
15 Skagit County's Mining Special Use Permit ("SUP") criteria. The proposed 200-foot wetland
16 buffer falls 100+ feet narrower than the required buffer for the Samish River wetland and its
17 steep slopes, the wetland edge was not delineated or marked, and wetlands and streams along
18 the 2.2-mile-long haul road were mischaracterized and already impacted by road work for the
19 mine. The applicant did not conduct the required geologically hazardous area investigation into
20 unstable slopes near Swede Creek. And the mine would increase current large truck use of Grip
21 Road from approximately 3 per week to an average of 230 and a maximum of 5,040 truck-and-
22 trailer trips per week, which would cause significant unaddressed traffic and road impacts.

23 It must be emphasized that forty (40) members of the public were sufficiently concerned
24 about the project's unaddressed impacts that they took several hours out of their day to attend
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1 the hearing and to testify about: (1) the numerous vehicle incidents that already occur along
2 Prairie and Grip Roads; (2) personal experiences encountering trucks on the substandard roads
3 and being forced off the road; (3) the lack of an evaluation of the mine's impacts as the
4 population continues to grow along its haul route; and (4) salmon surveys in their yards and
5 projected impacts to them.

6 While Miles could propose a mine that would warrant SUP approval, it has not yet done
7 so. Central Samish Valley Neighbors ("CSVN") therefore respectfully request that the Hearing
8 Examiner deny the SUP.
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10 **II. ARGUMENT**

11 CSVN intends for this brief to supplement the comprehensive SUP comments submitted
12 July 8th by addressing primarily issues that arose during the permit and SEPA appeal hearing
13 that occurred in August and September. Those issues involve: (1) whether Miles' application
14 vested in 2016; (2) whether a Growth Management Act ("GMA") provision allows critical area
15 buffers to be mined; (3) whether a maintenance corridor should apply to the mine; (4) the proper
16 size of the Samish River wetland buffer; (5) the application's oversight of impacts from the haul
17 road development; and (6) whether the Hearing Examiner may continue the permit hearing. In
18 addition, this brief identifies conditions that should apply to a permit for the mine once it has
19 been modified for consistency with the Code. This brief should be read in conjunction with the
20 July 8, 2022 comments that CSVN submitted and with the post-hearing brief that CSVN filed
21 for the SEPA appeal.
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24 **A. Miles' SUP Application Did Not Vest to Rules Effective on the Filing Date.**

25 Although a witness for the County suggested that wetland buffers adopted in 2008 might
26 apply to Miles' application rather than the buffers adopted in 2016, the Skagit County Code

1 (“Code”) plainly does not allow the vesting of Special Use Permit applications like the one
2 Miles submitted. The vested rights doctrine originated at common law, and in Washington,
3 strongly protects the right to develop property. *Potala Village*, 183 Wn. App. at 197. The
4 doctrine applies a date certain standard by which developers are entitled to have their proposal
5 processed pursuant to regulations in effect at the time they submit a complete application,
6 regardless of subsequent changes in land use rules. *Id.* Washington courts first adopted the
7 common law vested rights doctrine in the 1950s, stating that the right to build in accordance
8 with existing zoning ordinances and building codes vested when the developer applied for a
9 “building permit.” *Id.* at 198 (citing *State ex rel. Ogden v. City of Bellevue*, 45 Wn.2d 492, 275
10 P.2d 899 (1954); *Hull v. Hunt* 53 Wn.2d 125, 331 P.2d 856 (1958)). In subsequent years,
11 Washington courts applied the vested rights doctrine to applications for conditional use permits,
12 grading permits, shoreline substantial development permits, and septic permits. *Id.*

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15 In 1987, however, the Washington legislature codified the vested rights doctrine and
16 limited its applicability to building permits and subdivisions. *Potala Village*, 183 Wn. App. at
17 198-99. Since 1987, the courts have repeatedly declared that the vested rights doctrine became
18 statutory with these amendments and declined invitations to extend the doctrine to applications
19 other than those for building permits and subdivisions. In 1994, in *Erickson & Associates v.*
20 *McLerran*, the court refused to vest an application for a master use permit. *Id.* at 199-200 (citing
21 123 Wn.2d 864, 866, 872 P.2d 1090 (1994)). The court noted that all of the decisions applying
22 the vested rights doctrine in other settings predated the 1987 legislation and concluded that it
23 was not a blanket rule requiring municipalities to process all permit applications according to
24 the rules in place at the time of application. *Id.* at 200. In 2009, the court held that a site plan did
25 not vest to laws at the time of application because the applicant had not submitted a building
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1 permit application and thus had not satisfied the statutory vesting criteria. *Abbey Road Group,*
2 *LLC v. City of Bonney Lake*, 167 Wn.2d 242, 251, 218 P.3d 180 (2009). The court expressly
3 declined to extend the doctrine to other situations in the absence of a local vesting ordinance
4 specifying a different date for the site plan, stating that a rule that established a uniform vesting
5 point for every type of land use permit “would eviscerate the balance struck in the vesting
6 statute.” *Id.* Most recently, in 2015, the Court of Appeals reviewed the history set forth above
7 and declined to apply the vested rights doctrine to shoreline substantial development permits.
8 *Potala Village*, 183 Wn. App. at 207-214. The court rejected the applicant’s appeal, concluding
9 that the vested rights doctrine does not apply to shoreline substantial development permits after
10 the legislature’s 1987 codification of the doctrine for building permits and subdivisions. *Id.* 207-
11 214.
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13 Skagit County’s vesting provisions do not apply to the SUP. Skagit County addresses
14 vesting at SCC 14.02.050, which allows only applications for building permits or land divisions
15 to vest to the rules existing at the time of submission of a complete application. Furthermore, in
16 this particular matter, condition 16 of the MDNS requires compliance with SCC 14.24. Ex C-
17 27, at 5. Consequently, the Skagit Critical Areas Ordinance’s (“CAO”) current wetland buffer
18 provisions apply to the Samish River wetland, including the 300+-foot buffer for high impact
19 developments with steep slopes.
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22 **B. The Growth Management Act’s Guidelines for Designating Mineral Resource**
23 **Lands Do Not Authorize Mining in Wetland Buffers.**

24 During the hearing, John Semrau, a consultant for Miles, suggested that a GMA
25 regulation related to designating mineral resource lands authorizes mining in wetland buffers.
26 Matt Mahaffie, an expert in critical areas and SEPA review, testified that in his experience with

1 state laws and local critical areas ordinances, he is not aware of such a law. Mr. Mahaffie was
2 not aware of such a law because no such law exists. The GMA's mineral resource lands
3 designation rules referenced by Mr. Semrau, WAC 365-190-070, instead provide guidance for
4 counties in classifying and designating mineral resource lands generally. They identify the
5 criteria that should be evaluated when considering lands for classification and designation for
6 mineral resource use. WAC 365-190-070. The Department of Commerce promulgated Chapter
7 365-190 WAC for the purpose of establishing a reasonable framework for identifying those
8 lands that qualify as critical areas and resource lands and ensuring that they are designated so
9 that they are not developed for other purposes. WAC 365-190-020. Indeed, where critical areas
10 and resource lands coexist, the rules expressly state that future natural resource operations
11 "should be done in consideration of protecting critical areas, and with special consideration for
12 conservation or protection measures needed to preserve or enhance anadromous fisheries."
13 WAC 365-190-020(7). Thus, contrary to Miles' position that mining can displace Samish River
14 wetland buffers, the rules promote full protection of those buffers and the salmonids that rely
15 upon them. Thus, they weigh against granting the SUP here.

18 **C. Wetland Buffer Setbacks for Maintenance Corridors Apply to the Mine.**

19 One of the issues that arose during the hearing was whether a maintenance corridor
20 should apply to the mine edges to prevent excavation of tree and shrub roots that would lead to
21 mortality for that vegetation. A review of the applicable Code provisions reveals that such a
22 corridor should apply to the berms constructed adjacent to the wetland buffer, and that the
23 application was deficient in failing to propose that measure.

24 The CAO requires a site assessment for proposed activities that would occur within 300
25 feet of a wetland. SCC 14.24.050(4). This site assessment "must include, if necessary, the
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1 designation of a maintenance corridor to provide an area for construction and maintenance of
2 buildings and other structures.” SCC 14.24.050(4)(c)(ix). The standard width of a maintenance
3 corridor is 15 feet. *Id.* According to testimony by Mr. Mahaffie, the intent of maintenance
4 corridor provisions is to prevent activity that could harm buffer vegetation, like Miles’ proposed
5 excavation that would sever tree roots. Adoption of a 15-foot maintenance corridor along the
6 Samish River wetland buffer would address this need.

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8 In addition, the plain language of the maintenance corridor provision applies to the
9 berms that would be constructed at the edge of the buffer. A maintenance corridor should be
10 designated to protect a buffer from construction of buildings and other structures. SCC
11 14.24.050(4)(c)(ix). The Code defines structures as “that which is built or constructed, an
12 edifice or building of any kind, **or any piece of work artificially built up** or composed of parts
13 joined together in some definite manner excluding fences under 6 feet in height.” SCC
14 14.04.020 (emphasis added). The berms that Miles has proposed to construct along the edge of
15 the mine are artificially built-up pieces of work and a 15-foot maintenance corridor should be
16 designated adjacent to those berms to protect the integrity of the buffer vegetation.
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19 **D. A 300+-Foot Buffer Applies to the Samish River Wetland That Needs to be
20 Delineated and Marked.**

21 While CSVN’s July 8 comments explain that the application incorrectly characterized
22 the surface mine and haul road as medium intensity uses under the CAO, the argument below
23 demonstrates that evidence at the hearing confirmed that position and that wetland buffers for
24 high impact land uses must apply for mine operations.

25 The CAO allows high impact land use projects to apply moderate intensity buffers only
26 if measures to minimize impacts to wetlands from high impact land uses are implemented, and

1 references some of the measures to be used at Appendix 8C of the Department of Ecology's
2 ("Ecology") Wetlands in Washington buffer recommendations. SCC 14.24.240(3)(a). Appendix
3 8C, in turn, contemplates buffer reductions based on using moderate-intensity land use buffers
4 for wetlands that score moderate or high for habitat only if a project meets two criteria: (1) it
5 protects "[a] relatively undisturbed, vegetated corridor at least 100-feet wide...between the
6 wetland" and a priority habitat as defined by the Washington Department of Fish and Wildlife;
7 and (2) the project applies measures to minimize the impacts of the land use on wetlands. Ex.
8 A-59, at 10. Appendix 8C then offers examples of such measures. *Id.* at 11. Notably, none of
9 the examples in the chart that Ecology provides would address such a comprehensively
10 destructive project as a surface mine that clears all vegetation and soils and excavates the earth
11 beneath them. *Id.* However, one potentially applicable measure would be to route all new
12 untreated runoff away from the wetland while ensuring that the wetland is not dewatered;
13 testimony at hearing indicated that the removal of higher areas of buffer vegetation and land
14 near the wetland would redirect water away from the wetland and thereby dewater it to some
15 extent. *Id.*; Mahaffie Testimony.

18 Overall, the evidence at hearing demonstrated that Miles has not proposed sufficient
19 measures to reduce the impacts of the high intensity surface mine to a moderate intensity.
20 Indeed, the Miles consultant who characterized the proposal as a moderate impact testified that
21 he was unfamiliar with Ecology's Appendix 8C, and thus was not relying on the measures
22 identified therein to decrease the mine's impact. Further, Mr. Mahaffie testified that the
23 measures cited by that consultant did not actually minimize the mine's impacts because they
24 shrank the buffer without reducing the impacts of fully clearing and excavation 51 acres of land
25 and thus removing all of the hydrological and habitat benefits of the cleared buffer. This
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1 testimony relied in part on and corroborated the earlier determinations from Ecology and the
2 County that the mine qualified as high impact and thereby warranted a 300-foot buffer. Exs. A-
3 34, A-36, A-37, A-38, and A-39 (while the County later issued an MDNS that allowed the
4 buffer to be reduced to 200 feet, it provided no explanation for this about-face). And Miles'
5 consultant Molly Porter also agreed that she would typically characterize the surface mine as a
6 high impact use.

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8 Witnesses at the hearing further agreed that the buffer should extend 25 feet beyond the
9 top of any slope exhibiting a 25% grade or greater, consistent with the CAO. Mahaffie
10 Testimony; Graham Testimony; SCC 14.24.230(2) ("where lands abutting a wetland display a
11 continuous slope of 25% or greater, the buffer shall include such sloping areas."). Application
12 materials have not identified the full extent of these sloping areas along the 1600-foot-plus
13 length of the buffer, but did identify one location where that provision applies. The full site
14 must be surveyed for such slopes and the buffer sized accordingly.

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16 Last, evidence at the hearing demonstrated that the wetland had not been properly
17 delineated and the landward edge marked. As Mr. Mahaffie testified, the full extent of the
18 alleged buffer edge was not shown by data points reflecting information from site investigation.
19 Letters from Ecology confirmed the continuing need to identify the actual edge of the wetland
20 and then measure and mark the landward edge of the buffer. Exs. A-36, A-37, and A-39.

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22 **E. The Wetland and Stream Buffer Impacts from the Haul Road Development Must**
23 **be Addressed with the Properly Characterized Streams and Wetlands.**

24 As discussed in CSVN's SUP comment letter, the impacts associated with the vegetation
25 cutting, road graveling, culvert replacement, and road expansion in wetland and stream buffers
26 along the 2.2-mile-long private haul road must be addressed. As Nora Kammer testified, the

1 witness with the most expertise in forestry practices, the haul road widening, gravel, and
2 vegetation cutting was both unnecessary for forestry practices and also not proposed for the
3 site's forestry operations in either of Miles' 2015 or 2018 Forest Practice Application ("FPAs").
4 Exs. A-41, A-42. Nor did those applications identify the need to conduct road work in the
5 vicinity of streams or wetlands, all of which lie near and in some instances adjacent to the road.
6 Exs. A-41 and A-42. In addition, while Mr. Semrau testified for Miles that the road work
7 involved culvert replacement, the FPAs did not identify the need to do so for forestry. No entity
8 with critical areas review authority evaluated that road work, and that must occur and the
9 impacts thereby exposed must be mitigated.
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11 To ensure that adequate and appropriate mitigation occurs, the stream types must be
12 accurately characterized along the haul road. Miles' consultant, Molly Porter, agreed with Mr.
13 Mahaffie's statements that the consultant report undervalued several streams along the haul
14 road. As Ms. Porter conceded, the buffers for some of the streams must also be increased
15 consistent with the accurate stream type, as well as the high impact land use intensity of the haul
16 road per Mr. Mahaffie's testimony.
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18 **F. The Hearing Examiner Has Authority to Regulate Hearings As Needed to Effect**
19 **Justice.**

20 At the conclusion of the hearing, the Hearing Examiner raised for discussion whether he
21 has the authority to continue the permit hearing if he grants the SEPA appeal, and thus
22 streamline future proceedings to address new information going forward. CSVN does not take a
23 position on whether the Hearing Examiner has the power to hold open the current hearing, but
24 does note that the Hearing Examiner Rules grant the Hearing Examiner "the powers necessary
25 to conduct orderly, efficient, and fair hearings." HEX Rule 1.01. The Rules specifically grant
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1 the Hearing Examiner the authority to regulate the course of hearings and the conduct of
2 participants and to limit testimony by time or subject. HEX Rule 1.01(e), (g). Thus, the Hearing
3 Examiner may have the authority to grant CSVN's SEPA appeal and then conduct a future
4 hearing efficiently by taking testimony on modifications to the proposal.

5
6 **G. Conditions that Should Apply to a Future SUP.**

7 The Code grants the Hearing Examiner broad authority to condition a mining special use
8 permit to ensure that it protects public health, safety, and the environment, and specifically to
9 "mitigate existing and potential incompatibilities between the mineral extraction operation and
10 adjacent parcels," and to "mitigate stormwater runoff and erosion impact." SCC 14.16.440(9),
11 (9)(b), (9)(c), and (9)(d). Based on the evidence adduced at hearing, CSVN recommends that
12 the Hearing Examiner apply the conditions that Cougar Peak identified in its October 7, 2022
13 letter and the conditions listed below, which have been modified from CSVN's July 8, 2022
14 project comments:
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- 16 **1. Hours of Operation for Mining activities.** Mine hours should be limited to 7am to
17 5pm Monday through Friday unless Miles submits a new application for its
18 "expanded hours" proposal.
- 19 **2. Volume of Trucks.** The number of trucks entering and departing the mine property
20 shall be limited to 23 loaded trucks and 23 empty trucks per day.
- 21 **3. County roads, traffic and public safety.** The timing of gravel truck traffic and the
22 location of haul routes shall be limited to those set forth below.
- 23 a. Trucks shall be limited to hauling on County roads that are part of a designated
24 haul route: traveling west on Grip Road, then along Prairie Road to old Highway
25 99. From Old Highway 99, the route would travel to I-5 via Bow Hill Road, or
26 south on Old Highway 99.
- b. During the peak PM traffic hour, the number of trucks entering and departing the

mine property shall be limited to two loaded trucks and two empty trucks.

- c. Private party sales of gravel from the mine site are prohibited.
- d. A cost sharing agreement shall be negotiated between the applicant and Skagit County pursuant to Skagit County Comprehensive Plan Policy 4D-5.3, which states:

Policy 4D-5.3 Roads and Bridges: New public roads and bridges accessing designated Mineral Resource Overlay Areas shall be designed to sustain the necessary traffic for mineral extraction operations. Existing roads and bridges shall be improved as needed as each new extraction operation is developed. Cost sharing for the improvement of roads and bridges shall be negotiated between the permitting authorities and the applicant.

The cost sharing agreement must identify each of the permanent road improvements identified below and include deadlines for completion of improvements, bonding necessary to ensure enforcement by the County, as well as financing and deadlines for maintenance of these improvements over the lifetime of the mine, taking into consideration the wear and tear associated with the increased use by heavy truck traffic. Specific improvements in the cost sharing agreement shall include:

(1) At the intersection of Grip Road and Mine Access Road: The traffic-activated flashing yellow beacon system already required for the intersection of Grip Road and the mine access road in the MDNS.

(2) At the intersection of Grip Road and Prairie Road: Bring intersection and stopping sight distances for the Prairie Road/Grip Road intersection into full compliance with Skagit County Code by further removal of the steep embankment on the north side of that intersection.

- e. All County roads along the haul route shall be brought up to requirements for new road construction as per Skagit County Road Standards (2000), including:

(1) Widen Grip and Prairie Roads with hardened shoulders along the entire

length of the haul route.

(2) Straighten and widen the curves on Grip Road hill about ¼ mile west of the junction between the Property's internal haul road and Grip Road to provide adequate stopping sight distance, ensure gravel trucks with trailers can stay within lanes, and provide a shoulder that meets Skagit County Roads (2000) new road construction standards on both sides of the road.

(3) Widen the two 90 degree turns on Prairie Road just east of Old 99, as required in the MDNS.

4. Natural Environment. Consistent with Skagit County Code, the following actions need to be completed by qualified professionals prior to commencing mining activity.

- a. Field flag and survey the landward edge of the wetlands associated with the Samish River on the property and the landward edge of the required vegetated buffer on the Samish River. The buffer edge must be: 1) at least 300 feet landward from the surveyed wetland edge, and 2) at least 25 feet landward from the top of a 25% slope. This buffer must be undisturbed and no-cut, and the buffer edge fenced and permanently marked consistent with Skagit County's Critical Areas Ordinance.
- b. Survey and permanently mark on the ground a 200-foot undisturbed vegetated buffer between the active mine site and adjacent private property, to reduce noise, vibration and dust. Do not allow side-casting of material in these buffers.
- c. Develop a detailed maintenance plan for the private, internal haul road consistent with the requirements for private roads in Skagit County Road Standards, 2000, and as outlined in Skagit River System Coop's (SRSC) comment letter dated March 9, 2022. As stated in SRSC's letter, the plan needs to include "responsibilities of periodic bridge inspections, inspection of surface water management BMP's, and identified responsibility and financial liability for maintaining such infrastructure." The plan must be developed in consultation

1 with a qualified geologist to ensure that appropriate measures are taken to avoid
2 slope failure in Swede Creek gorge through the lifetime of the mine. Said plan
3 must be made available to the public for review and comment prior to being
4 finalized.

5 **5. Site Compliance and Monitoring Plan.** Prior to commencing mining activity,
6 develop a monitoring plan in cooperation with Skagit County that shares the cost for
7 site inspections, monitoring reports and any necessary follow-up. Conduct site
8 inspections at least every three years with qualified County personnel, or designees
9 who are unaffiliated with the mine owner and operator. The monitoring plan must
10 ensure compliance with the conditions of the MDNS and the SUP, and include the
11 following:

- 12 a. Mechanisms for stopping work and correcting deficiencies if violations are
13 identified, together with follow-up site inspections to ensure implementation of
14 any corrective action.
- 15 b. A written report with findings from the site inspections that is completed and
16 released to the public within 45 days of the site visit, including any enforcement
17 or corrective actions required.
- 18 c. To ensure compliance with permit and settlement conditions, the site inspection
19 shall evaluate:
 - 20 (1) the condition of all buffers and critical areas adjacent to the mine site and the
21 internal haul road;
 - 22 (2) the condition of the Native Growth Protection Easement;
 - 23 (3) the footprint of the haul road to ensure that expansion has not occurred;
 - 24 (4) compliance with all requirements and conditions set forth in the Road
25 Maintenance Plan;
 - 26 (5) groundwater depth at such time in the future when mine excavation is within
25 feet of expected groundwater depth to ensure ten feet separation from the
groundwater, in consultation with a qualified geologist; and

(6) compliance with Skagit County Stormwater Management regulations.

6. Periodic Review and renewal of Special Use Permit. The SUP shall be subject to review based on a consideration of performance and changing conditions. In conjunction with the above site compliance and monitoring plan, the County shall conduct a review of the permit every five years to evaluate compliance with the original conditions, as demonstrated by the periodic site inspection and compliance monitoring. If mine operations are determined to be substantially in compliance with the original terms of the Special Use Permit, then the permit will be renewed. Public input will be sought prior to renewal of the Special Use Permit, and a process will be identified to resolve any disputes regarding the compliance status.

7. No processing or mine expansion. The applicant has stated that they do not intend to develop a gravel processing facility on the site at this time or expand the mine in the future. The environmental review and conditions of the permit would be significantly different if these parameters were changed. Therefore, the applicant must agree to a permanent restriction that prohibits future processing on site, or expansion of the mine.


III. CONCLUSION

Miles' current application does not satisfy SUP criteria because it conflicts with the CAO and allows unnecessary traffic and noise impacts. CSVN respectfully requests that the Hearing Examiner deny it to allow for its modification consistent with those criteria, or to apply the conditions identified above to any SUP.

RESPECTFULLY SUBMITTED this 28th day of October, 2022.

LORING ADVISING PLLC

By



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Attorney for Appellants

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on the date and in the manner indicated below, I caused the following:

- **Appellant Central Samish Valley Neighbors' Post-Hearing SUP Brief**
- **Declaration of Service**

to be served on:

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DATED this 28th day of October, 2022, at Friday Harbor, Washington.



Kyle A. Loring