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

7 In the Matter of the Appeal of
8 **Central Samish Valley Neighbors**
9 of a Mitigated Determination of
10 Nonsignificance,

No. PL16-0097; No. PL16-0098
Appeal No. PL22-0142

**APPELLANT CENTRAL SAMISH
VALLEY NEIGHBORS' POST-
HEARING BRIEF**

11 **I. INTRODUCTION**

12 The State Environmental Policy Act ("SEPA") directs local governments like Skagit
13 County ("County") to assemble and review sufficient information to determine the likely
14 significance of a proposal's environmental impacts prior to issuing a threshold determination
15 like a mitigated determination of significance ("MDNS"). After seven (7) days of hearing, the
16 evidence presented by the parties demonstrated that the County failed to satisfy this requirement
17 when it issued an MDNS for a 51-acre surface mine proposed by Concrete Nor'West/Miles
18 Sand and Gravel ("Miles"). The County failed both to: (1) investigate all potential likely
19 significant impacts; and (2) mitigate for known impacts. For example, the application did not
20 explore the serious safety risks that would be created by the mine's extraordinary increase in
21 trucking traffic on Grip and Prairie Roads. Nor did the application investigate the impacts of
22 likely sedimentation of Swede Creek and its protected salmonids from the impact of stormwater
23 runoff and heavy truck use on the neighboring unstable slopes. Further, the MDNS authorizes a
24 buffer reduction of 100 feet along valuable Samish River wetlands without assessing the
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1 impacts of that decision or requiring mitigation for its impacts on salmonids, the listed Oregon
2 Spotted Frog, or other amphibians. The MDNS also did not mitigate for the impacts of sending
3 up to 30 trucks and trailers per hour on Grip Road's unstable shoulder and regularly flooded
4 roadbed near Swede Creek, require compensation for the 2018 haul road work and the impacts
5 of its vegetation cutting, graveling, and widening in stream and wetland buffers, or address
6 acknowledged excessive noise on neighboring properties and during gravel hauling.
7

8 During and after the hearing, Miles suggested that it would now be willing to take some
9 remedial steps, implying both that impacts exist and that they were not examined or addressed
10 prior to the County's issuance of the MDNS. While Central Samish Valley Neighbors
11 ("CSVN") approve of actions that would improve substandard roads, decrease brake noise, and
12 address haul road drainage, the proposals have not been reduced to concrete plans and have not
13 been circulated for public review and therefore cannot cure the County's error.
14

15 Consequently, CSVN respectfully requests that the Hearing Examiner grant the SEPA
16 appeal, reverse the MDNS, and direct the County to obtain sufficient information about all of
17 the mine's likely environmental impacts and either condition the project to address those
18 impacts or require a suitable Environmental Impact Statement ("EIS") to properly evaluate the
19 impacts and propose alternatives.
20

21 Also, as discussed below, CSVN has revisited its earlier position and now believes that
22 the Skagit County Code ("Code") may grant the Hearing Examiner the authority to modify an
23 MDNS. While this approach could address the known but unmitigated impacts for the mine, it
24 would be unable to cure the impacts that have not been adequately investigated and would
25 circumvent public review of the adequacy of proposed mitigation -- CSVN therefore
26 discourages the Hearing Examiner from taking that path. However, if the Hearing Examiner

1 chooses to modify the MDNS, CSVN offers several apposite conditions in its post-hearing brief
2 on the Special Use Permit (“SUP”) application, which should be read together with this brief.

3 II. ARGUMENT

4 CSVN argues in this appeal that the County violated SEPA by issuing an MDNS
5 without either evaluating all of the likely significant impacts that would be generated by Miles’
6 68-acre clearing and 51-acre gravel mine or adequately conditioning the mine operation to
7 render the disclosed impacts insignificant. The Hearing Examiner should grant the appeal and
8 reverse the MDNS pursuant to the clearly erroneous standard if, “although there is evidence to
9 support it, the reviewing court on the entire evidence is left with the definite and firm conviction
10 that a mistake has been committed.” *Norway Hill Pres. & Prot. Ass’n v. King Cnty.*, 87 Wn.2d
11 267, 274, 552 P.2d 674 (1976). In conducting this review, the clearly erroneous standard also
12 requires the Hearing Examiner to “consider the public policy and environmental values of
13 SEPA.” *See Sisley v. San Juan Cnty.*, 89 Wn.2d 78, 84, 569 P.2d 712 (1977). Because an
14 MDNS precludes an EIS, an incorrect threshold determination thwarts SEPA’s goal for “full
15 disclosure of environmental information so that environmental matters can be given proper
16 consideration during decision making.” *Norway Hill*, 87 Wn.2d at 273. Notably, the Hearing
17 Examiner plays an essential role in ensuring that local governments are not tempted to
18 circumvent what may be perceived as a more burdensome EIS process. *See id.*

19 The following argument summarizes the most germane SEPA provisions, the Skagit
20 Hearing Examiner’s authority in reviewing threshold determinations, and the evidence that
21 demonstrates that the County did not evaluate or address the mine’s full suite of impacts. CSVN
22 relies on the hearing brief that it submitted on July 1, 2022 to provide the factual background for
23 this appeal, and for its comprehensive recitation of SEPA standards. CSVN further relies on its
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1 post-hearing SUP brief to address vesting and other issues related to the application's failure to
2 meet Code permit approval criteria.

3 **A. SEPA Requires Full Review of the Mine's Likely Significant Impacts.**

4 The Legislature adopted SEPA to ensure that agencies fully inform themselves of a
5 project's potential environmental consequences before they issue a decision, and to encourage
6 public involvement in decisions that significantly affect environmental quality. *See Norway*
7 *Hill*, 87 Wn.2d at 279; WAC 197-11-030(f). In adopting SEPA, the Legislature declared the
8 protection of the environment to be a core state priority, "indicat[ing] in the strongest possible
9 terms the basic importance of environmental concerns to the people of the state." RCW
10 43.21C.010; *Leschi v. Highway Comm'n*, 84 Wn.2d 271, 279-280 (1974). Accordingly, a
11 responsible official must assemble and review full environmental information before
12 determining whether a project will have significant impacts, and must require a detailed EIS for
13 proposals for "major actions having a probable significant, adverse environmental impact."
14 RCW 43.21C.031(1); *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 814, 576 P.2d 54 (1978).
15 Thus, a county must "to the fullest extent possible...(c) Prepare environmental documents that
16 are concise, clear, and to the point, and are supported by evidence that the necessary
17 environmental analyses have been made" and "make its threshold determination based upon
18 information reasonably sufficient to evaluate the environmental impact of a proposal." WAC
19 197-11-030(2), -335.
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23 The issue of significance is particularly pertinent in the present matter where the impacts
24 of large, 105,000-pound gravel truck and trailer combinations would burden substandard rural
25 lanes popular for cycling and walking and that serve as essential routes for schools. Under
26 SEPA, "significance" means "a reasonable likelihood of more than a moderate adverse effect on

1 environmental quality.” WAC 197-11-794(1); *Boehm v. City of Vancouver*, 111 Wn. App. 711,
2 717, 47 P.3d 137 (2002) (citing *Norway Hill*, 87 Wn.2d at 278). Significance is not limited to a
3 “formula or quantifiable interest;” it involves a proposal’s *context* and *intensity*--an impact may
4 be significant if its chance of occurrence is low but the resulting impact would be severe. WAC
5 197-11-794(2); *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17,
6 54-55, 252 P.3d 382 (2011) (overturning DNS for project that would increase traffic by .05%
7 and .12% in two locations). The courts have also stated that the term “significantly” includes

8
9 the examination of at least two relevant factors: (1) the extent to which the action
10 will cause adverse environmental effects in excess of those created by existing
11 uses in the area, and (2) the absolute quantitative adverse environmental effects of
12 the action itself, including the cumulative harm that results from its contribution
13 to existing adverse conditions or uses in the affected area.

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15 *Norway Hill*, 87 Wn.2d at 277. As shown by Miles’ traffic counts, the project’s addition of 46
16 to 300+ truck trips per day to roads that currently average about 3 truck trips per week would
17 add a significant amount of truck traffic. *Compare* Ex. 49 S-13 *with* Ex. C-18 at 57-67). Further,
18 as testified by Ross Tilghman, the County’s willingness to treat loaded gravel truck and trailers
19 as equivalent to sedans for project traffic studies ignored the severity of impacts that would
20 occur in an incident with a truck and another road user, and caused Miles to forego a proper
21 Conflicts Analysis to understand and address the risk of that harm.

22
23 Also relevant here, Shorelines Hearings Board decisions indicate that a county cannot
24 use an MDNS to avoid an EIS by simply referring to other applicable legal standards. *See*
25 *Quinalt Indian Nation v. Hoquiam*, SHB No. 13-012c, Order on Summary Judgment, 18 (Dec.
26 9, 2013). In *Quinalt*, the SHB noted that an agency cannot “simply list generally-applicable
laws that a project must by law comply with and, without more, conclude that compliance will
be sufficient to render impacts insignificant.” *Id.* at 36. As noted in CSVN’s hearing brief,

1 several MDNS conditions merely refer to compliance with existing laws.

2 Last, it should be remembered that SEPA's policies and goals function to supplement
3 existing agency authority. WAC 197-11-030(1). Consequently, where impacts like the noise and
4 vibration caused by hauling gravel on Skagit's substandard roads might be exempt from review
5 under other statutory schemes, they should be reviewed pursuant to SEPA.

6
7 **B. The Skagit County Code May Grant the Hearing Examiner Authority to Modify
8 the MDNS.**

9 While the Code does not expressly grant the Hearing Examiner authority to add
10 conditions to an MDNS, it does contemplate Hearing Examiner modification of administrative
11 decisions. SCC 14.06.160(9). Administrative tribunals like the hearing examiner are creatures
12 of the legislative body that creates them and may exercise only that power granted by that body.
13 *See HJS Dev., Inc. v. Pierce Cnty.*, 148 Wn.2d 451, 61 P.3d 1141 (2003); *Lejeune v. Clallam*
14 *Cnty.*, 64 Wn. App. 257, 270, 823 P.2d 1144 (1992) (citing *State ex rel. Pub. Util. Dist. No. 1 of*
15 *Okanogan Cnty. V. Dep't of Pub. Serv.*, 21 Wn.2d 201, 208-09, 150 P.2d 709 (1944). Moreover,
16 a hearing examiner cannot possess inherent power because that type of power is power that has
17 not been granted. *Id.* Thus, the Hearing Examiner may exercise only those powers expressly
18 granted by the Skagit County Board of Commissioners.

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20 As discussed below, while SEPA does not address this question, the Code may grant the
21 Hearing Examiner authority to add conditions to a SEPA threshold determination for a Type II
22 permit. SCC 14.06.160(9). However, as a matter of public policy and consistent with
23 fundamental principles of fairness, the Hearing Examiner should refrain from exercising that
24 power here because several impacts have not received a full environmental accounting and have
25 not been subject to the agency and public review contemplated by SEPA.
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1 **1. SEPA does not address whether the Hearing Examiner may modify an**
2 **MDNS but promotes public and agency participation.**

3 SEPA authorizes counties to conduct administrative appeal hearings of threshold
4 determinations and directs them to

5 provide for the preparation of a record for use in any subsequent appeal
6 proceedings, and shall provide for any subsequent appeal proceedings to be
7 conditioned on the record, consistent with other applicable law. An adequate
8 record consists of findings and conclusions, testimony under oath, and taped or
9 written transcript.

10 RCW 43.21C.075(3)(c). But SEPA is silent as to whether a hearing examiner may substantively
11 revise a threshold determination by adding or removing conditions.

12 SEPA policies, however, contemplate comprehensive public participation in reviewing
13 the environmental information on which a county relies in issuing its threshold determination.

14 As noted above, agencies must “to the fullest extent possible,” encourage public involvement in
15 decisions that significantly affect the quality of the environment. WAC 197-11-030(2)(f).

16 Where a county issues a DNS, the responsible official must send the DNS and environmental
17 checklist to agencies with jurisdiction, the Department of Ecology, and affected tribes, and must
18 issue public notice and receive public comment. WAC 197-11-340(2). SEPA highlights the
19 meaningful role that the agency and public comments play in the environmental review process,
20 directing the responsible official to “reconsider the DNS based on timely comments,” and
21 authorizing modification or even withdrawal of the DNS. WAC 197-11-340(2)(f).

22 Further, the mitigated DNS process contemplates disclosure of environmental
23 information and mitigating measures *before* issuance of the threshold determination. The SEPA
24 Rules for a mitigated DNS state that their purpose “is to allow clarifications or changes to a
25 proposal prior to making the threshold determination.” WAC 197-11-350. Thus, where an
26 applicant learns that a county is considering a Determination of Significance, the applicant can

1 revise the proposal to mitigate the impacts but must then recirculate the revised environmental
2 checklist. WAC 197-11-350(2). A county then issues its threshold determination, and if the
3 proposal continues to have a probable significant impact, an EIS must be prepared. *Id.*

4 **2. The Code may grant the Hearing Examiner authority to modify the MDNS.**

5 The Code grants the Hearing Examiner appellate authority over SEPA threshold
6 determinations. A threshold determination like an MDNS qualifies as a Level I decision for
7 which the Director of Planning and Development Services makes a final decision that may be
8 appealed to the Hearing Examiner in an open record appeal hearing. SCC 14.06.050(1)(a)(ix).
9 In contrast, the underlying SUP application here qualifies as a Level II application for which the
10 Director makes a recommendation to the Hearing Examiner, who then conducts an open record
11 predecision hearing before issuing the final decision. SCC 14.06.050(1)(b). Both of these
12 decisions generally may be appealed to the Board of Commissioners in a closed record appeal.
13 SCC 14.06.050(1)(a), (1)(b).
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16 Although the Code does not expressly declare that the Hearing Examiner may modify a
17 threshold determination, it suggests that the authority to issue a decision on an appeal
18 encompasses the power to modify it if necessary. The Code's procedures for open record public
19 hearings direct the Hearing Examiner to "render a decision or make a recommendation on the
20 appeal or development permit" that, among other considerations, must include "any conditions
21 or modifications deemed necessary." SCC 14.06.160(9). This provision does not distinguish
22 between types of permits or the type of hearing examiner decision, suggesting that it applies to
23 all decisions, including those for appeals of final threshold determinations.
24

25 The Hearing Examiner's Rules for Appeal Hearings suggest, conversely, that the
26 Hearing Examiner's authority to modify a decision relates to decisions based on substantive

1 criteria rather than threshold determinations. Hearing Examiner Rule 3.20 states that the
2 “Examiner’s decision may affirm, modify, remand or reverse the administrative decision(s)
3 being reviewed,” and when modified, “the Examiner may attach reasonable conditions found
4 necessary to make the action consistent with applicable approval criteria.” HEX Rule 3.20(b)
5 (emphasis added). The reference to “approval criteria” suggests that this authority likely does
6 not apply to threshold determinations because a threshold determination does not issue pursuant
7 to approval criteria, but rather in relation to a project’s likely environmental impacts.
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9 An unpublished decision discussed at hearing, *Phillips 66 Co. v. Whatcom Cnty. et al.*,
10 also provides little illumination on this issue. No. 82599-2-I (Wn. Ct. App. 2022). In that
11 opinion, the court ruled that a hearing examiner did not exceed his authority by *clarifying* a
12 condition, but declined to rule whether the addition of a condition would exceed the hearing
13 examiner’s authority. *Phillips 66 Co.*, No. 82599-2-I, at 15. Although the opinion suggests that
14 an open record public hearing and de novo review necessarily empower a hearing examiner to
15 strike or add conditions to an MDNS, the court did not harmonize that conclusion with the
16 instances under state law where a reviewing body conducts an open record appeal hearing
17 without the authority to amend a county permitting decision, such as those involving the
18 Shorelines Hearings Board or Pollution Control Hearings Board. *Id.* at 15; Chapters 371-08
19 WAC (PCHB), 461-08 WAC (SHB). The opinion also characterized the Hearing Examiner’s
20 decision on the MDNS as “the final decision on open record review,” whereas in the instant
21 matter, the Hearing Examiner reviews an appeal of the final decision rendered by the Director
22 of PDS. *Compare Phillips 66 Co.*, No. 82599-2-I, at 15 with SCC 14.06.060(1)(a).
23
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25 Consequently, the Skagit Hearing Examiner’s authority to add conditions to an MDNS
26 remains uncertain.

1 **3. The Hearing Examiner Should Decline to Modify the MDNS.**

2 In the event that the HEX concludes that he has the authority to add conditions to the
3 MDNS, he should nonetheless decline to modify it because there remains insufficient
4 information about several project impacts. For example, while a 300+-foot buffer condition
5 could mitigate for potential impacts to the Samish River wetlands, and limiting hours of
6 operation could mitigate for potential noise impacts on neighboring properties, impacts
7 associated with hauling on narrow roads and slope instability along Swede Creek require further
8 investigation before they can be addressed.
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10 Furthermore, SEPA policies and associated principles of fairness weigh against adding
11 conditions to the permit without the opportunity for agency and public review of the impacts
12 and proposed mitigation measures. As noted at subsection B.1 above, SEPA contemplates the
13 public's opportunity to review a proposal and conditions prior to finalization of the MDNS. The
14 Code reinforces this pre-decision sequence, directing that "[d]ocuments or studies prepared in
15 the development permit review process under the requirements of SEPA or specific
16 development regulations shall be prepared so that they can be reviewed by the public, the
17 County and other agencies during the applicable comment periods." 14.06.070(2)(b). Thus,
18 SEPA contemplates an opportunity for the public to review and comment on a proposal and any
19 conditions intended to mitigate for its impacts.
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22 **C. The MDNS Must Be Reversed Because the County Did Not Review the Mine's Full**
23 **Environmental Impacts and Did Not Mitigate All of the Disclosed Impacts.**

24 The County clearly erred by issuing the MDNS without mitigating project impacts to
25 render them insignificant and without considering all of the mine's likely environmental
26 impacts to determine their significance. *See Boehm*, 111 Wn. App. at 718. The threshold
determination "must be based upon information reasonably sufficient to determine the

1 environmental impact of a proposal.” *Pease Hill Cmty. Group v. Spokane Cnty.*, 62 Wn. App.
2 800, 810, 816 P.2d 37 (1991). The applicant attempted to cure some of these deficiencies by
3 presenting evidence at hearing, six months after the MDNS, but continued to leave several
4 impacts unexplored and unaddressed. The following sections list: (1) evidence at hearing of
5 significant adverse environmental impacts that the MDNS did not address; and (2) evidence of
6 unexamined impacts that must be studied before reissuing a threshold determination.

7
8 **1. Evidence of significant, unmitigated impacts.**

9 ***a. Traffic Impacts.***

- 10 • Hauling east of the mine site on Grip Road--Brian Bowser shared video showing the
11 difficulty for a truck and trailer to stay within their lanes along the numerous tight turns,
12 including one across train tracks. Bowser Test.; Ex. A-27.
- 13 • Hauling on F&S Grade Road – witnesses testified to the sharp curve that would need to
14 be negotiated at the intersection with Prairie Road, in addition to the intersection with
15 Kelleher Road.
- 16 • Unstable and flooded roads – photographs depicted the unstable shoulder toward the top
17 of the Grip Road hill, and flooding near the intersection of Grip and Prairie Roads. Exs.
18 A-14 and A-15. Bowser testified that flooding can be severe enough to close the road,
19 yet the application does not evaluate measures to mitigate the impacts of redirected mine
20 hauling traffic as a result of the flooding or ensuring that the unstable road shoulder
21 receives timely repairs when impacted by mine traffic.
- 22 • Sight distance at Prairie and Grip Road intersection – the applicant asserted at hearing
23 that it would be too expensive to address the sight distance by cutting into the slope and
24 removing the impediment but failed to produce figures or analysis to support that claim.
25 Testimony from Tilghman and Bowser demonstrated that, consistent with WSDOT draft
26 guidance, this step should have been taken before relying on a mechanical stopgap like
beacon lights. In addition, Bowser testimony indicated that the cost for additional right-
of-way would not have been significant.
- Grip Road hill – Miles’ offer during the hearing to take some steps to address the narrow

1 road acknowledges the need to take action there, but Miles did not offer a concrete
2 proposal and the MDNS does not include a specific condition.

3 ***b. Noise Impacts.***

- 4 • Adjacent properties – Kristen Wallace acknowledged that the sound studies relied on
5 residential receptors far from property lines and testified that at 100 feet, the width of the
6 setback between the mine and adjacent properties, mining equipment will generate noise
7 as high as 75-76 dBA. Yet the MDNS does not include mitigation for those impacts on
8 neighbors like Linda Walsh and her family enjoying the woods along the boundary line,
9 such as limited hours for excavating near adjacent properties.

10 ***c. Wildlife, Wetland, and Stream Impacts.***

- 11 • Samish River wetland – Matt Mahaffie, an expert in critical areas and SEPA application
12 with a background as a private consultant and a government employee, testified that the
13 MDNS did not mitigate for the impacts of an undersized 200-foot buffer when the
14 County’s Critical Areas Ordinance requires a 300-foot buffer for the high impact
15 industrial land use, with an additional 25 feet above the top of a 25% slope (Semrau
16 Exhibit, C-36 at 41, shows average slopes of nearly 50% rising from the wetlands). This
17 testimony was consistent with the County’s July 6, 2017 letter to Miles (Ex. A-34) and
18 the Department of Ecology comments to Skagit County (Exs. A-36, A-37, A-38, A-39).
19 Mahaffie testified that the mine characteristics cited by Graham for reducing the buffer
20 do not actually minimize its impacts and were not consistent with Appendix 8C
21 recommendations for reducing the buffer based on the land use impact, and Graham
22 testified that he was not familiar with Appendix 8C. Molly Porter, another Miles
23 consultant, testified that she would typically characterize surface mines as high impact
24 land uses.
- 25 • Haul Road – Mahaffie testified that the 2018 work identified by Nora Kammer and John
26 Day on the 2.2-mile-long haul road, including vegetation removal, graveling the surface,
and any widening of the road, caused impacts in wetland and stream buffers that have
not been mitigated. Porter testified that she had not examined those impacts based on her
assumption that the road size, surface, and devegetation preexisted the application.
Kammer explained that the forestry applications by Miles had not identified the need to

1 conduct road work and had indicated that no work would occur in the vicinity of
2 streams, indicating that the road work occurred for the mine, not forestry. Exs. A-41, A-
3 42. Mahaffie also testified that daily use of the haul road by gravel truck and trailer
4 traffic would cause greater impacts than periodic logging operations in the form of a
5 distinct habitat break, noise, dust, and lights that would affect amphibians and other
6 species, yet the MDNS does not mitigate for those impacts.

7 **2. Evidence of unexamined impacts.**

8 ***a. Traffic Impacts***

- 9 • Substantial increase in truck traffic on substandard Grip Road –Miles’ traffic studies
10 showed that large truck traffic would increase from approximately 3/week to an average
11 of 230 over a 25-year period and a maximum of 5,040/week¹ -- this is an increase of 70-
12 1680 times current traffic (*compare* Ex. 49 S-13 and the 6-8 axle truck that Miles would
13 use to haul gravel *with* Ex. C-18 at pages 57-67). Yet Miles did not conduct a conflicts
14 analysis. Tilghman testified that the authorization for up to 30 trucks and trailers also
15 should have been reviewed for safety under the county road standards because the trucks
16 and trailers stretch out for 75 feet and state guidance typically characterizes this as 2
17 vehicles. Further, SEPA functions as supplemental authority and a conflicts analysis
18 should have occurred to fully evaluate the mine’s hauling impacts. WAC 173-11-030(1).
19 That analysis would have evaluated safety issues like:
 - 20 ○ Bicycle impacts. Phil McLoud testified to the use of Prairie and Grip Roads and the
21 lack of rideable shoulders and thus safety risks of adding large gravel hauling trucks
22 without improving the roads. Though Norris claimed during his testimony that Miles
23 surveyed bicycle use, the vehicle counts do not do so.
 - 24 ○ Potential conflicts with school buses and emergency vehicles;
 - 25 ○ Roadway geometries;
 - 26 ■ Safety along the steep Grip Road grade and the possibility of brake failure;

¹ Under the extended hours scenario, Miles would be authorized to run 30 trips per hour for 24 hours per day over a 7-day week, resulting in 5,040 trips.

- Safety with just 20-22 feet of pavement and lack of usable shoulder; and
- Maintenance needs for the roads as the truck/trailers override the pavement edge.
- Speeds traveled – Gary Norris conceded that although speeds actually traveled on Grip Road are significantly higher than posted speeds, as seen on Ex. 49-S-6, Miles’ analysis used posted speeds for its review, presumably including those for turns.
- Cumulative impacts – Miles testimony conceded that they have purchased and operate a gravel mine (Proctor Pit) to the east on Grip Road, but did not study the cumulative traffic impacts of hauling gravel from both mines.

b. Climate Change and Carbon Emissions.

- The application did not evaluate air pollution like diesel or carbon emissions. Tilghman testified that mine excavation and hauling would generate a significant amount of emissions—at least 718 metric tons annually, not including the carbon impacts of removing 68 acres of trees, shrubs, and soils at the site that would otherwise absorb carbon. In *Wash. State Dairy Fed. v. State*, 490 P.3d 290, 317 (Wn. App. 2021), the court held that Ecology erred when it failed to consider climate change when drafting waste discharge permits, indicating that SEPA requires review of these impacts.

c. Noise Impacts

- The applicant declined to study noise impacts from gravel hauling based on an exemption that does not apply to SEPA, which provides supplemental authority to study impacts like the noise of compression brakes when traveling down Grip Road’s 8% grade, or the noise and vibration from crossing the bridge on Prairie Road.

d. Slope stability impacts along the private haul road near Swede Creek

- Unevaluated slope instability -- Dan McShane testified that, based on his experience in the vicinity of the mine and as an engineering geologist, no responsible geologist could conclude that the private haul road is not at risk from landslides or does not pose a risk of increasing landslides or erosion. Miles’ geotechnical report erroneously assumed the existence of high strength glacially consolidated sediments and thereby overlooked:
 - Swede Creek’s stream processes and potential slope undercutting;

- Convergent topography below the east-west portion of the road; and
- Dessication fractures.

McShane provided further un rebutted testimony that the report failed to identify numerous areas of potential instability, including non-planar features like:

- An Incised creek – during the hearing, Miles’ consultant acknowledged this issue but the applicant has not proposed a method to address it other than generally suggesting that they would do so;
 - Likely landslides;
 - Convergent topography;
 - Very steep slope above the creek; and
 - Eroded stream bank.
- **Salmon impacts**—Kammer testified that the application did not study the impacts of the slope instability and potential sedimentation on multiple salmon species, including protected salmonids like bull trout, Chinook, Coho, that inhabit the Samish River and its Swede Creek tributary.

e. Wildlife, Wetland, and Stream Impacts.

- Wildlife corridor – Mahaffie testified that the application did not investigate the impacts of clearing and mining a significant portion of one of the area’s last forested wildlife corridors through the overall property, and its use by bears, cougars, bobcats, and other species. The SEPA checklist did not identify these species at the site and John Semrau, who prepared it, had no explanation for that omission.
- Redirected water -- Mahaffie testified that the application did not evaluate the impact of removing the top of the hill above the wetland or redirecting water away from it.

III. CONCLUSION

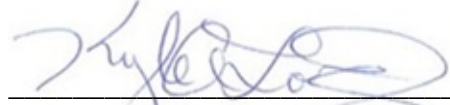
The County clearly erred when it issued the MDNS without mitigating for and investigating all environmental impacts from the mine. It must be vacated and the County must

1 be directed to address this SEPA violation.

2 RESPECTFULLY SUBMITTED this 28th day of October, 2022.

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4 LORING ADVISING PLLC

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6 By



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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 SEPA 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