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7 **BEFORE THE HEARING EXAMINER FOR SKAGIT COUNTY**

8 IN THE MATTER OF THE APPEAL OF

9 CENTRAL SAMISH VALLEY NEIGHBORS

10 RE: SPECIAL USE PERMIT AND APPEAL OF
11 MITIGATED DETERMINATION OF
12 NONSIGNIFICANCE
13

NO. PL22-0142 (Application Nos. PL16-0097 & PL16-0098)

CONCRETE NOR'WEST/MILES SAND AND
GRAVEL CLOSING BRIEF RE: SEPA & SUP

14 **INTRODUCTION**

15 This brief addresses both the Special Use Permit (SUP) application and the SEPA
16 appeal. There is of course substantial overlap. The SUP criteria address compatibility,
17 mitigation of impacts, and adequacy of infrastructure that for the most part mirror SEPA
18 elements of the environment.
19

20 The Examiner has a vast written record and heard lengthy testimony. The record
21 already includes the opening briefs from all parties and an extensive staff report. This
22 closing brief will seek to avoid repetition and focus on the record information we think is
23 particularly useful to the Hearing Examiner now at the end of the process.
24

25 **BASIC PRINCIPLES**

26 We start with a few basic principles that guide your review:

1 **A. STATUTORY and CODE PROVISIONS**

2 1. This property is designated Rural Resource-Natural Resource Land (RR-NRL) with a
3 Mineral Resource Overlay (MRO). Natural Resource Lands are described in the
4 comprehensive plan as “the cornerstone of Skagit County’s economy, community,
5 and history.”¹ The stated purpose of the zoning and comprehensive plan provisions
6 for Natural Resource Lands is to preserve and use the natural resources and protect
7 them against incompatible land uses. Skagit County Code (SCC) 14.16.430(1) and
8 Comprehensive Plan at pp.104-105. That is very different from the priorities in other
9 zones. As pointed out in our opening brief, numerous provisions in the County code
10 and state law express the importance of, and preference for, the extraction of
11 available mineral resources where they are found in commercially viable
12 quantities.²

13
14 2. Though mining requires a special use permit in the MRO, numerous provisions in
15 the Skagit County Code (SCC) are unique to mining SUPs and recognize the
16 importance of mining.

17 a. The Code as to SUPs in the MRO describes mining as an “essential economic
18 activity” and states the Examiner must review an application recognizing that
19 it is not possible to extract mineral resources without environmental
20 impacts. Removal of vegetation, alteration of the surface, interim loss of
21 habitat, dust, noise, traffic and other impacts necessarily occur with any
22 mineral extraction and that basic fact must be the basis for the Examiner’s
23 mineral extraction and that basic fact must be the basis for the Examiner’s
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25 mineral extraction and that basic fact must be the basis for the Examiner’s
26 mineral extraction and that basic fact must be the basis for the Examiner’s

¹ Comprehensive Plan pp 104-105.

² See Comprehensive Plan policies cited at page 4 of our pre-hearing brief and pp 20-23 of the Staff Report.

1 review. This focuses attention on the specific proposal and site, rather than
2 the more generalized impacts that a mining use would have in any location.

3 SCC 14.16.440(9)(a).

4 b. Any mitigation conditions are to be “performance based, objective
5 standards” and must be directly and proportionally related to limiting surface
6 mining impacts. This again focuses the analysis on the specific proposal and
7 directs that mitigation must be both proportionate and objective.
8 SCC 14.16.440(9)(a).

9 c. Conditions must also be reasonable, practicable, and generally capable of
10 being achieved by the mine operator. This paraphrases a standard that
11 applies under SEPA, but the specific reiteration of that standard in the
12 context of the SUP process is obviously intended to limit discretion.
13 SCC 14.16.440(9)(a)(ii).

14 d. Further, though not specific to mining SUPs, SCC Ch. 14.38 articulates the
15 County’s “declared policy” to “enhance and encourage Natural Resource
16 Land management within the County,” including as to mining.
17 SCC 14.38.010. This policy is to be utilized in interpreting and enforcing the
18 County’s code. SCC 14.38.010(2)(a).

19 3. As noted in our opening brief, the Project Review Statute, RCW Ch. 36.70B requires
20 that where there are adopted standards, those must be the basis for decision-
21 making and not replaced or bypassed on an ad hoc basis.

22 4. The same is true under RCW 43.21C.240. If a jurisdiction has adopted a level of
23 service or other standard and the project is conditioned to meet that standard, the
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1 impact is considered to have been adequately addressed and mitigated. No further
2 mitigation may be required and a DNS or MDNS is the appropriate threshold
3 determination. Here, the County's MDNS extensively notes the applicable standards
4 adopted by it and by other jurisdictions and conditions the project to meet those
5 adopted standards. As a matter of law, the County has deemed these impacts to
6 have been appropriately mitigated and further mitigation may not be required.
7

- 8 5. Finally, the County Code itself notes that impacts to noise, vibrations, and other
9 impacts are to be mitigated based on the County's adopted performance standards
10 in SCC 14.16.840. Both in that section and in SCC 14.16.440, the County has
11 adopted especially comprehensive standards for mining activities and those govern
12 decision making, narrowing the need and potential for additional discretionary
13 requirements.
14

15 **B. SITE CONDITIONS, LOCATION AND PROPOSED OPERATIONS**

16 The nature of the site, and its location, as well as the very limited proposed
17 activities provide much of the impact avoidance and mitigation that might otherwise be
18 required to meet the applicable SUP standards and to reduce environmental impacts below
19 any level of significance.

- 20 1. The site is very large, particularly in relation to the small area to be disturbed. With
21 over 735 acres in a commercial forest plantation, the site has long natural resource
22 use consistent with the County priorities under the RR-NRL zoning. Of those 735
23 acres, only 51 will be disturbed in phases and that area will be sequentially
24 reclaimed and returned to a forestry use. A mine site with only 7% of the site
25 disturbed, with the balance being retained as what is essentially a buffer, is
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1 extraordinary, maybe unique. Having 93% of the site unchanged by the proposal
2 certainly reduces the noise, dust, earth, water, vegetation, and habitat impacts that
3 all mines create.

- 4 2. Miles proposes only excavation and transport of minerals, with none of the other
5 crushing, screening, blasting, washing batching and other activities that are allowed
6 in the MRO and are commonplace at other mines. As noted in our opening brief,
7 this is literally the least possible level of activity at a surface mine. With only one or
8 two employees, two to three pieces of equipment, no buildings, and no water
9 consumption, this is the most moderate mine that could be imagined. The self-
10 imposed limit of 23 loads a day (46 trips) on average is far less than the roads could
11 accommodate and represents another critical reduction of the impacts that mining
12 necessarily creates
13
14 3. There is an existing mine on the site, with existing roads suitable for not only the
15 gravel hauling but the ongoing logging traffic. This significantly reduces the impacts
16 associated with the mine. Any other comparable mine would require the
17 development of the road infrastructure as well as the mine site itself, with literally
18 miles of additional impacts.
19
20 4. There is no dispute that this site is close to the markets where it is needed. Other
21 potential mineral resource sites are necessarily farther out but still served by
22 comparable rural roads. Notably, under SCC 14.16.440(1), "mineral resources
23 must be in close and economic proximity to the market to be served." That is not
24 just an economic factor, but an environmental one as well. Given the need for
25 mineral resources recognized by the State and County, the public is best served by
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1 close-in designated resource land. It would be contrary to this express public policy
2 to bypass this site and go further for needed materials, particularly when that would
3 require more trucks on similar roads (perhaps even these same roads) with similar
4 impacts. This recognized benefit of using nearby resources and the
5 acknowledgement that all mining has impacts address many of the comments
6 made during the public hearing.
7

8 **SPECIFIC IMPACTS AND MITIGATION**

9 **A. NOTE REGARDING HAUL ROAD INDIRECT IMPACTS**

10 Before turning to specific areas of potential impact, we want to briefly note the
11 critical areas and environmental analysis associated with the use of the existing haul road.
12 That was the subject of comment and criticism from several of the witnesses.

13 First, this was a review that was specifically directed by the County and by the
14 consultant engaged to identify those critical areas that were to be reviewed. Specifically,
15 the County engaged the Watershed Company to conduct a physical survey along both sides
16 of the haul road for several hundred feet to determine those potential critical areas that
17 were to be analyzed. Based on the results of that professional analysis, the County issued
18 a letter (Exhibit C-57) that identified the specific features to be reviewed. This was a "Type
19 I decision" that was appealable by its own terms under SCC 14.06.170. That formal
20 decision served as the basis for the work by the Applicant and its consultants thereafter.
21 Though this requirement came up very late in the process (5 years after the application)
22 the process was in keeping with the County Code. See SCC 14.24.080(4).
23
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25 Second, and more importantly, the impact to be studied-additional use of the
26 existing haul road- was at most indirect as no development activities or alterations of either

1 critical areas or their buffers were proposed. As noted by several witnesses, the Critical
2 Areas Ordinance, SCC Ch. 14.24 (CAO), does not define or regulate indirect impacts. It
3 regulates “disturbance of soil or water” or “removal of or damage to existing vegetation.”
4 SCC 14.24.060. All of the professional witnesses, including those who suggested the
5 analysis was insufficient admitted that they themselves had never completed a review nor
6 been asked to analyze critical area impacts based only on increase in traffic. None could
7 identify any accepted scientific standards or management recommendations to be used in
8 such analysis. As near as we can tell, this was a first for all concerned, well outside of
9 normal practice.
10

11 The road here exists and is in use today, and as the Applicant’s geologist Matt Miller
12 noted, was “well-traveled.” Several opponent witnesses characterize the proposal as one
13 that would “change the use” of the existing road since there would be gravel trucks instead
14 of logging trucks and more regular traffic. To our knowledge, that thematic response has
15 no scientific or legal basis. A “change of use” is meaningless unless the impacts are shown
16 to increase. No witness identified any standards, guidelines, or management
17 recommendations to address impacts that might result from an incremental increase in
18 the use of existing road. No one could tie the change here to any particular impact. This is
19 truly uncharted territory, likely well beyond the consideration of any intended CAO analysis
20 and beyond the extent of available science cited by any party.³
21

22 Despite these challenges, the Applicant’s experts undertook the directed critical
23 areas analysis of both wetlands and streams as well as potential geologic hazards. Their
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25
26 ³ Note that Mr. Mahaffie referenced a DOE publication by number but was unable to identify any specific area where the analysis of indirect impacts was discussed. Our own review found nothing in the publication that would shed light on this.

1 work was accepted by the County experts. The geotechnical and biological experts both
2 identified mitigation measures to help avoid or minimize even the indirect impacts, and all
3 of those were incorporated by the County in the MDNS.⁴ In addition, the Applicant proposed
4 paving one section of the haul road to reduce the potential for erosion and to better control
5 drainage. Ms. Forbes, the County's expert, found the mitigation sufficient.

6
7 One final note regarding the haul road; a theme of several opponent witnesses was
8 that the haul road had been significantly expanded or altered in the years leading up to the
9 Hearing Examiner's review. There was substantial rebuttal testimony that showed this was
10 not the case. Mr. Barton and Mr. Semrau both testified they had personally observed the
11 road before and after the work, that the road prism was not altered, and that the road was
12 always wider than many logging roads and was graveled before the work. There were
13 improvements to the drainage (replacement of corroded pipes for example at the request
14 of the DNR) but no alteration of the ditch lines that establish the prism of the road, its basic
15 size and shape. New gravel was put down in recent years but that was part of Miles' plan
16 to maintain the entire road network within the plantation. Mr. Barton testified that they
17 have already moved onto other roads for similar maintenance. All of the work was reviewed
18 before and after by the DNR, which oversees commercial forestry.

19
20 In short, the arguments, based only on a review of aerial photographs or other
21 sources, did not establish any actual expansion of the roads. In any event, even if
22 expansion had been proved, that would not be within the scope of this review. That activity
23 occurred several years ago and is not a part of this application. The County conducted no
24 enforcement activity regarding this work, nor did anyone pursue any challenges based on
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4 MDNS at p. 4 (Condition 13).

1 a failure to comply with any applicable codes. This is simply not a timely or viable issue
2 before the Hearing Examiner.

3 **B. TRAFFIC**

4 Traffic was studied in a manner consistent with the County's adopted Road
5 Standards, which determine the level of study required for any proposal. After County-
6 directed peer review by two different traffic engineering firms, Applicant's traffic engineer
7 Gary Norris, with literally decades of experience,⁵ prepared a study that exceeded the
8 requirements for a Level I traffic analysis under the Road Standards. Level I was the
9 appropriate one according to both traffic engineers, Norris and Jones and that is clear from
10 the language of the Road Standards. The Norris report exceeded those requirements
11 because, among other things, it studied safety – the main concern identified here by
12 Appellants. In addition to studying available crash data, all that is required even for a
13 Level II analysis, the report also evaluated for the potential for traffic to cross over in the
14 tightest areas. That analysis was performed utilizing "auto turn," a program utilized by
15 traffic engineers as a matter of standard practice using site-specific information. Even
16 traffic planner Tilghman agreed this was "cross over analysis".
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19 Everyone has acknowledged that Grip and Prairie roads do not meet the County's
20 current standards for new roads. The County Engineer, Forrest Jones, testified that those
21 are only construction standards for new county roads, not an indication of any inadequacy
22 as to roads built in the past. Mr. Barton and Mr. Woods both testified that roads similar to
23 those that would be used here blanket the rural area of the County, and Mr. Barton testified
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⁵ In addition to the required traffic engineering qualification, Mr. Norris holds special certifications in both traffic operations and road safety.

1 that such roads are the norm for its professional drivers as they travel to and from existing
2 surface mines in the County. Notably, they have driven these roads with a virtually perfect
3 record.

4 The evidence showed that there are trucks, even like those Miles uses, on these
5 road today. Miles proposed mitigation for sight distance issues and for potential “cross
6 overs.” Both remedy existing problems, with Miles paying 100% of the cost. Certainly, Miles
7 would be pleased to “negotiate” with the County to share these cost (as opponents claimed
8 is required), but that takes a willing county to share expenses. There can be no legal defect
9 under the Road Standards for failure to negotiate where an applicant pays the entire cost.
10

11 Miles can certainly not be required to bring the entire road system to the new road
12 standard. That would not be “proportionally related to limiting surface mining impacts.”
13 Nor would it be “reasonable, practicable, and generally capable of being achieved by the
14 mine operator.” Both are required by SCC 14.16.440(9). For the same reason, Miles cannot
15 be required to remove more of the hill impacting the sight distance at Grip and Prairie
16 where there is no right of way beyond what the County improved. Miles has no power to
17 condemn right of way nor did any traffic engineer testify that work was required.
18

19 The traffic argument really highlights the importance of this “close in” resource and
20 the short haul to the source of demand. Other MRO areas would require use of the same
21 or similar roads but over a greater, potentially even much greater, distance. That means all
22 the same traffic impacts would result, but with more miles traveled, more potential
23 encounters between trucks and other vehicles, more fuel consumed, more carbon impacts,
24 more tire wear, and greater cost in every respect.⁶ Denying the use of this particular deposit
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26 ⁶ As to climate/carbon impacts, there was no evidence of impacts and no analysis was required. *Washington State Dairy Federation v. Wash. State Dep’t of Ecology*, 18 Wn. App.2d 259, 490 P.3d 290 (2021) decided

(which trucks traveling to other potential sources might literally drive by) is not at all consistent with either the specific words or spirit of the County Codes or the GMA.

1. School Busses

Very significant attention was devoted to school busses, but they, like narrow roads, are ubiquitous in the rural area. Since school busses go where people live, they run on all the rural roads where gravel might be transported. That is no doubt why neither affected school district objected to the project, or as near as we can tell, even commented. Trucks are a fact of life in the rural area.

Miles agrees that the safety of the busses and their passengers are critical. That safety concern is why, by state law, school busses bring all traffic in both directions to a complete stop until all passengers have safely departed and crossed the street if necessary. The fact that school busses use Grip and Prairie Roads simply means that gravel trucks will be in the line of vehicles stopped by school busses.

That leaves only the potential for a school bus to meet a gravel truck. Mr. Tilghman offered a simplistic graph showing only that more vehicles mean more chances for an "encounter." Of course that is true for every project that generates any traffic. That is why traffic engineers review crash data to evaluate physical conditions where more traffic might present safety risks. Both engineers (Norris and Jones) testified however that it is not so simple as stating that every increase in traffic causes more risk. Mr. Jones noted while that could be the case, more trucks on the roads could slow traffic and improve safety.

only that the Department of Ecology has a particular obligation to consider all SEPA impacts, including impacts of climate change, in issuing general discharge permits. Here, the trucks, the primary source of greenhouse gases for the project, are regulated under federal diesel exhaust emission standards. There is no evidence that trucks used for this operation somehow produce more emissions than equivalent trucks used for the myriad of other natural resource uses in the County.

1 The record includes a traffic analysis that exceeds adopted standards and was
2 prepared and accepted by qualified professionals. The conclusions were buttressed by
3 testimony from well-qualified experts. There was no substantial evidence that analysis was
4 erroneous or that there was any potentially significant impact to school busses or children.

5 **2. Bicycles**

6 The testimony from the cycle club president, Mr. McLeod, was that there are maybe
7 two or two and a half organized rides per month in the summer and one per month in the
8 colder part of the year. Grip and Prairie roads are not designated bike routes but are used
9 for both organized rides and informally. The narrow or non-existing shoulders are known
10 conditions, reflected on the County's own Bike Map. Exhibit A-29. Even though there are
11 trucks, recreational vehicles, and others that share these roads now, these conditions
12 apparently allow cyclists to feel safe in using the road. On the Exhibit A-29 Bike Map, Grip
13 and Prairie roads are in the "low traffic" category and will remain so with the project.

14 Notably, when Mr. McLeod was asked if the club could send an email to Miles
15 notifying it in advance of any rides so that it could advise its drivers, he hesitated and noted
16 that his organization was all volunteer and he could not assure that would happen. Frankly,
17 if a concern is not worth the investment of a simple email notice, it should hardly be the
18 basis for Hearing Examiner action. In any event, the small number of rides, most of which
19 would occur in evenings and weekends, does not warrant leaving the valuable and
20 important mineral resource in place.

21 There is no sufficient evidence of cycle impacts to support any condition, and
22 certainly not denial. The fact that bicyclists ride on county roads, most of which are not built
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1 to current standards, most of which involve sharing with trucks, and many of which carry
2 even more traffic, dispels the concerns.

3 3. Traffic Mitigation

4 The traffic impact analysis (TIA) included an auto turn analysis for the S-curves at
5 Prairie Road near its intersection with Highway 99. The auto turn analysis depicts the path
6 of a truck like those proposed by Miles through these curves. The MDNS requires widening
7 at these curves to allow the trucks to track through the curves without cross over. Note that
8 this is not limited to mitigating impacts from the mining trucks. The curves are an existing
9 condition, and as video and other evidence showed, there is cross over that currently
10 occurs at this location even with the existing traffic. Nonetheless, Miles did not object and
11 has planned that improvement.
12

13 Even though the TIA and MDNS did not note a comparable potentially significant
14 impact at the Grip Road S-curves, Miles has presented the auto turn analysis of that
15 location and proposed a condition of approval that would require similar improvements.
16 Like the other analysis, that was based on the very trucks proposed by Miles. We believe
17 the examiner has the authority to include this condition based on the analysis of *Phillips*
18 *66 Company v. Whatcom County*, 21 Wn. App.2d 1006 (2022). Under the Skagit County
19 code, a special use permit, and any accompanying SEPA appeal, present a Level II review
20 that must include the following decision:
21

22 The Hearing Examiner decision or recommendation shall be in writing and shall
23 include a statement of the applicable criteria and standards from the Skagit
24 County Comprehensive Plan; the Skagit County Code and other applicable law;
25 a statement of the facts that the Hearing Examiner found showing the
26 application does or does not comply with each applicable approval criterion and
assurance of compliance with applicable standards; the reasons for the
decision or the recommendation to approve or deny the development permit or
appeal; ***and any conditions or modifications deemed necessary.***

1 SCC 14.06.160(9). Thus, the Examiner's authority under the code here is the same as it
2 was in *Phillips 66*. And, as in *Phillips 66*, the Examiner here conducted an open record
3 hearing with a de novo review, taking testimony and evidence. Incident to such a de novo
4 review, the Examiner is empowered to strike or add conditions to the MDNS. We have found
5 nothing in SEPA that would otherwise limit such authority. Certainly there is no procedural
6 harm when a new condition is added to mitigate impacts, when the condition is added at
7 the behest of the party burdened and where there is a full opportunity to discuss the
8 condition at a public hearing.
9

10 The traffic analysis also identified existing defects in sight distance at the project
11 entrance and at the intersection of Prairie and Grip Roads. Mr. Jones noted that the latter
12 of these two problems had been remedied to the extent possible within the existing right
13 of way and without triggering potential impact to the Samish River. The MDNS requires the
14 installation of a traffic-actuated beacon system that would provide flashing alerts to drivers
15 at both of these two intersections, again improving safety over the existing condition.
16 Requiring more would not be proportional or reasonable, nor would it be achievable, since
17 required right of way is not available for further improvements. That would ultimately be a
18 task for the County since it has the power to condemn right of way, but as Mr. Jones
19 testified, the crash history at this location does not warrant further work at this time.
20
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22 C. WETLANDS

23 1. Mine Site

24 First, the wetlands adjacent to the mine site were certainly properly delineated by
25 Graham Bunting. Based on their years of experience, Oscar Graham and Pat Bunting
26 conservatively used the toe of the slope as the edge of both the wetlands and the ordinary

1 high water for the river system. They expressed confidence that no wetland was located
2 outside of that boundary and the County's expert, Leah Forbes, agreed. Oscar Graham
3 testified that none of the three required wetland indicators were present above that line,
4 let alone all three. There is certainly no reason to dig holes in a hillside where there are no
5 indications a wetland might be located above that edge. While neighbor and biologist
6 Mahaffie was critical of this delineation, he offered no evidence that it was erroneous or
7 that any wetlands existed above the toe of the slope.
8

9 There was considerable testimony about the appropriate intensity level of the
10 proposal and the corresponding buffer, but very little actual *analysis*. Oscar Graham
11 testified that his first reaction was that mining would be high impact, but that his view was
12 tempered here by the specific elements of the proposal and physical conditions. The fact
13 that the mine was located with the ridgeline serving as a barrier or shield for the wetland
14 and river, the low level of activity with just one or two employees, limited equipment and
15 no processing, the absence of potential for surface or ground water impact or water
16 consumption, and the temporary nature of the use with reclamation and replanting to occur
17 within just a few years, led him to the conclusion that this was actually a medium impact
18 activity.
19

20 Opponents emphasized the brief DOE comments, but those are devoid of any
21 analysis and simply treat all mines the same. For all of the reasons noted above, this is the
22 most moderate mine that could be envisioned. There was no analysis of the types testified
23 to by Mr. Graham, just a conclusion. Similarly, the opponents analogize this to a "industrial"
24 use, but such a use has large scale building and is permanent with none of the tempering
25 effects relied upon by Mr. Graham. The use is not listed in any category, in either the County
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code or the DOE guidance, and all parties agreed that required the exercise of judgment. The burden falls to the Appellants to support their claim with actual analysis, not simple labels, and to overcome the presumption that favors the County decision⁷.

2. Haul Road

Molly Porter and others from the NES firm evaluated the wetland and stream impacts from the use of existing haul road by gravel trucks. There was no dispute about her delineation or categorization of wetlands. Mr. Mahaffie, a neighbor who is also a biologist, cited additional information about streams. Ms. Porter testified that she reviewed that information and stated it did not change her conclusions. That is not surprising, since she found no direct impacts to either wetlands, streams, or their buffers, and only the most modest indirect impacts.

Mr. Mahaffie complained about the failure to fully analyze indirect impacts, but cited no Code provisions, no management recommendations, and no standards. He himself had never prepared an analysis of impacts resulting only from an increased use of an existing road. Again, he focused on prior actions he claimed altered the road, but that is simply not before the Hearing Examiner nor is it supported by substantial evidence. Despite the unprecedented nature of the assignment, the NES team conscientiously analyzed the potential for indirect impacts and analyzed possible sources of concern. They identified several mitigation measures to assure there would not even be indirect impacts and those are incorporated in the MDNS.

⁷ Though we do not believe the Appellants have met their burden to show the current buffer is insufficient, if the Hearing Examiner were to determine that the buffer should be modified in some way, we believe he has the authority to do so based on *Phillips 66 Company*, 21 Wn. App.2d 1006, as discussed above on pages 13-14.

1 Mr. Mahaffie also complained about the impedance of animal crossings over the
2 existing haul road but identified no species of significance and no management
3 recommendations. There is simply no evidence that truck traffic at the volume proposed
4 would have any more or different effects than the logging trucks and other vehicles that
5 currently use this well-traveled road.

6 **D. GEOLOGIC HAZARD**

7
8 Miles was specifically asked to study one area noted by the County consultant on
9 Exhibit C-57, near the bridge. CSVN witness Mr. McShane had not been to the site but was
10 critical of the report in part for failing to note another area Miles was not asked to review,
11 an incised channel located at virtually the other end of the road near the mine site itself.
12 That is an existing condition, not an impact of the project. Mr. McShane would not testify
13 that an increased number of trucks, or trucks of increased weight, would have a greater
14 impact on geologic hazards and in fact specifically declined to do so.

15
16 Most importantly, that incised channel erosion issue was tied to an existing
17 drainage culvert and all of the experts testified that the storm water could easily be directed
18 elsewhere. A condition of the MDNS requires best management practices for road
19 maintenance and Miles offered an additional condition of approval expressly agreeing to a
20 road maintenance agreement consistent with the County's Road Standard requirement.

21 Mr. McShane also testified to several other minor deficiencies including a
22 secondhand report that an area that had slumped after the AES experts had visited the
23 site. Matt Miller from AES testified that he had read Mr. McShane's letter and heard his
24 testimony and that none of his conclusions were changed. These are routine maintenance
25 issues. Mr. McShane was never on the site and his testimony was not sufficient to
26

1 overcome the onsite work by AES and its acceptance by the County. Notably, AES was
2 required to professionally stamp its report and that stamp, with its corresponding
3 acceptance of liability, was important to the County as noted by Leah Forbes.

4 E. NOISE

5 Through a professional firm with substantial experience and credentials, Miles
6 submitted a noise analysis, and the County accepted that report. The County went so far
7 as to require a vibration analysis, which is highly unusual except in cases where industrial
8 uses have that impact. Both studies concluded that the impacts with respect to noise and
9 vibration were modest and mitigated by site conditions.
10

11 It is notable that the County has an adopted standard for noise under the provisions
12 of SCC 14.16.440 and 14.16.840. According to the noise analysis, the proposal “easily
13 meets” the adopted standard. Note that in our submittal on conditions sent on October 7,
14 2022, the Applicant objected to one of the conditions of the staff report that would have
15 contradicted the applicable noise standard by treating neighboring properties in the
16 Natural Resource Land category as if they were Class A-EDNA residential. SCC
17 14.16.840(5) expressly classifies those lands as “Class C EDNA Industrial.” The County
18 must apply its own standards.
19

20 Note also that the County Code standards actually would allow 24-hour use because
21 of the natural resource designation, with provision for the Hearing Examiner to shorten
22 those only based on “site-specific circumstances.” SCC 14.16.440(10)(i). Since the noise
23 analysis concluded this site would meet even the test applicable to residential receptors,
24 there would be no basis for such a limitation in the Applicant’s view. Nonetheless, the
25
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1 MDNS does limit the hours and the Applicant did not appeal or otherwise object to that
2 restriction.

3 Under the applicable noise regulations, vehicle noise is exempt from the noise
4 regulation scheme. WAC 173-60-050(4)(a). Mr. Loring suggested that absence of
5 regulations provided an opportunity for the Hearing Examiner to create an ad hoc rule or
6 mitigation measure limiting truck noise. That is not the law. This is a specific exemption,
7 not a gap in the law. A conscious decision was made to exempt vehicle noise and that
8 preempts local regulation. Moreover, there was no evidence of any kind to suggest any
9 reasonable and objective standard as the law would require.
10

11 SUP AND SEPA CRITERIA

12 In addition to the comments in the Staff Report and the facts and analysis above, it
13 is worth remembering the purpose of an SUP, especially in this specific context.

14 The express purpose of an SUP is to show “that the proposed activity will not
15 adversely affect or prevent those uses normally allowed within the respective district.”
16 SCC 14.16.900(1)(a) (emphasis added). The SUP criteria address compatibility, mitigation
17 of impacts, and adequacy of infrastructure. These will depend on where a project is located,
18 the policy goals of the district, and relative size and intensity of the project.
19

20 Here, the project is objectively modest as far as surface mines go. There will be no
21 blasting, crushing, or other processing facilities. Moreover, it is located within the MRO,
22 making it an “essential economic activity” for the area and the use contemplated by the
23 County legislature as most appropriate.

24 The County’s code recognizes this primacy, even in the context of analyzing an SUP
25 application. Appropriate site-specific conditions for mining SUPs in the MRO:
26

1 [S]hall reflect the differences in potential impacts based on the mineral
2 extraction operation's location in resource, rural or urban growth areas and
3 recognize that the purpose of designating mineral resource lands is to conserve
4 mineral resource lands, allow continued operation of existing legally
established mining operations, and assure that use of adjacent lands does not
interfere with the extraction of minerals.

5 SCC 14.16.440(9). Here, the fact that the mine is in a resource area within the MRO means
6 that the SUP analysis starts from the position of assuring that use of adjacent lands does
7 not interfere with extraction of minerals. Compatibility, mitigation of impacts, and adequacy
8 of infrastructure are all viewed through this policy lens. And all of these requirements are
9 met, as evidenced through the testimony and vast record presented at the hearing.

10
11 The SUP criteria also for the most part mirror SEPA elements of the environment.
12 The basic purpose of SEPA is for local jurisdictions to fully consider environmental factors
13 when taking actions that may affect the quality of the environment. *King County v. Wash.*
14 *State Boundary Review Bd.*, 122 Wn.2d 648, 659, 860 P.2d 1024 (1993). SEPA seeks to
15 achieve balance, restraint, and control, not to preclude unpopular development. *Cougar*
16 *Mountain Associate v. King County*, 111 Wn.2d 742, 753-54, 765 P.2d 264 (1988).

17 Here, the project has been reviewed and scrutinized far beyond what is normal
18 under these circumstances. Studies for geological and hydrological conditions, critical
19 areas review noise, and traffic were completed and thoroughly analyzed. The neighbors
20 asked for and got the analysis expanded and convinced the County to obtain peer review.
21 They also asked for and received a critical areas analysis of increased traffic on an existing
22 haul road, which seems to be unprecedented. The additional requests stretched the
23 process out for years. It cannot be credibly argued that the County missed any step in its
24 review of environmental factors. The very articulate and vocal neighbors were heard and
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1 the impacts they were concerned about studied and mitigated to the fullest extent allowed
2 by law.

3 In addition to the studies and requirements discussed above, the MDNS requires
4 the Applicant to comply with numerous code provisions and administrative regulations.
5 Under RCW 43.21C.240 that means the relevant impact is considered to have been
6 adequately addressed and mitigated. The following are just some of such conditions in the
7 MDNS:
8

- 9 • Condition No. 4 requires compliance with Northwest Clear Air Agency (NWCAA)
10 requirements for mining related activities, both on and offsite;
- 11 • Condition No. 5 requires compliance with SCC Ch. 14.32, the Skagit County
12 Stormwater Management Ordinance, as it relates to runoff and
13 erosion/sedimentation control measures;
- 14 • Condition No. 6 requires compliance with SCC 14.16.840, Skagit County
15 Performance Standards regulating vibration, heat, glare, steam, electrical
16 disturbance, and noise;
- 17 • Condition No. 12 requires compliance with Skagit County requirements relating
18 to refueling of trucks or other equipment onsite, including compliance with the
19 International Fire Code (IFC) and adopted Skagit County Fire Code standards;
- 20 • Condition No. 13 requires compliance with all requirements from Skagit County
21 Planning and Skagit County Public Works, including as to road maintenance and
22 improvements, the installation of safety beacons, and load requirements under
23 RCW 46.61.065;
24
25
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- Condition No. 16 requires compliance with SCC Ch. 14.24, the Skagit County Critical Areas Ordinance, including as to erosion control on the haul road and BMPs to ensure protection of downstream waters, maintaining trucks in good working condition to ensure petroleum or other chemicals do not adversely affect adjacent critical areas, maintaining existing forested vegetation buffer adjacent to the haul road, protection of geological hazard areas, etc.;
- Condition No. 17 requires compliance with SCC Ch. 14.26, the Shoreline Master Program (SMP), including created a Protected Critical Area to assure identification of critical areas and long-term protection;
- Condition No. 18 requires compliance with Department of Ecology (DOE) requirements, including as to stormwater runoff, and coverage under the NPDES Sand & Gravel Permit;
- Condition No. 19 requires compliance with SCC 14.16.440 regulating the Mineral Resource Overlay (MRO).

This is not a complete list; there are a number of other substantive conditions in the MDNS.

CONCLUSION

The burden is on the Appellants. To satisfy their burden, they had to present sufficient credible evidence that left 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 Preservation and Protection Ass'n v. King County Council*, 87 Wn.2d 267, 279, 552 P.2d 674 (1976). They failed to do this. The record demonstrates that environmental factors were considered in a manner sufficient to amount to prima facie compliance with

1 the procedural requirements of SEPA, and that the County's decision to issue an MDNS
2 was based on information sufficient to evaluate the proposal's environmental impact.

3 The County did not take any short cuts. Environmental issues have been reviewed
4 and then reviewed again. Mitigation is thorough – from the proposal itself, from County
5 conditions, from applicable legal standards, and even from conditions offered by the
6 Applicant during the hearing. Courts and SEPA experts have determined that the MDNS
7 process in some cases will provide more effective environmental protection than
8 promulgation of an EIS. See *Anderson v. Pierce County*, 86 Wn. App. 290, 305, 936 P.2d
9 432 (1997). That is the case here. The MDNS should be affirmed.
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12 Respectfully submitted this 28TH day of October 2022.

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