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**BEFORE THE HEARING EXAMINER
FOR SKAGIT COUNTY**

In the Matter of the Application for a
Special Use Permit

No. PL16-0097, No. PL16-0098

**Concrete Nor'West/Miles Sand
and Gravel SUP**

COUGAR PEAK LLC'S
POSTHEARING BRIEF

I. INTRODUCTION

Cougar Peak LLC and the McLeod Family ("Cougar Peak") offer the following post-hearing brief as authorized by the Hearing Examiner. This brief incorporates by reference Cougar Peak's *Prehearing Brief* and *Supplemental Prehearing Brief* as though fully set forth herein. (Of particular note in the *Prehearing Brief* is the Standard of Review Section).

Cougar Peak's driveway access to Grip Road is 490 feet from the entrance to the proposed mine – enough distance for fully loaded trucks exiting the mine to get up to full speed in the existing 40 mph zone. Cougar Peak does not oppose approval of the mine, with appropriate further study and the addition of a series of proposed conditions that include a reduction in speed limits on Grip Road and exclusion of mining trucks on Grip Road during the hours that school buses travel on the roadway to and from local schools.¹ These and other conditions are reasonable, practical and capable of being achieved by the mine operator.

¹ Note that a condition prohibiting truck traffic on Grip Road during morning and afternoon school bus hours does not necessarily implicate curtailment of hours for the mine itself; the applicant is not precluded from operating the mine during those hours, i.e., mining and preparing gravel for loading onto trucks during other hours.

II. SUMMARY OF ARGUMENT

The mine operation proposed by Miles Sand & Gravel (Miles), by the accounts of all traffic experts in the case, raises issues of public safety on Grip Road, a narrow, two-lane rural County road, due to the number of proposed truck trips in and out of the mine, coupled with the types of truck-trailer combinations the applicant acknowledges will generally be 70 feet long and over 8 feet wide. In some places, Grip Road travel lanes are less than 11 feet wide. All traffic experts testifying in the case acknowledged the likelihood of crossovers into opposing lanes during normal daily use of Grip Road by the mine operation.

This is not an appeal proceeding and Cougar Peak does not have the burden of proof in this briefing and at hearing. Nonetheless, Cougar Peak spent considerable time at hearing making sure there is a record that identifies traffic safety problems and supports exercise of authority to impose protective conditions. At hearing, Cougar Peak's traffic expert and witnesses presented a wealth of factual detail and analysis about the increase in threat of harm to school children and residents on Grip Road if mining truck traffic is increased at proposed levels, due to crossovers and frequency. For example, Cougar Peak's traffic expert, Ross Tilghman, and citizen Wallace A. Groda offered testimony evaluating the specific locations with potential for a severe road crash involving school children and a 70-foot long heavy truck-trailer rig.

When the Commissioners adopted the framework under the Growth Management Act for mining activities in resource lands, they adopted an express policy requiring project-by-project traffic review, and mandated that mining proposals must protect public safety on the roadways. Based on that policy framework, as implemented in the County's regulations for mining special use permits, SCC ch. 14.16.440, .900, the Hearing Examiner is required to conduct a close review of existing traffic safety issues on Grip Road, and weigh the degree to

1 which the addition of project traffic will increase the risk of harm to the public on the
2 roadway. This "delta" is the key to risk analysis in this case.

3 One of the chief concerns made clear in this case is that the severity of a potential
4 accident involving school children and other residents traveling on Grip Road. The potential
5 severity of even a small increase in collisions warrants the conclusion that the risk of road
6 accidents from the project is high.²

7 The applicant argued to the contrary taking a minimalist approach to assessing project
8 safety impacts on Grip Road. The applicant's attorney and representative argued essentially
9 that all mines in Skagit County are served by substandard rural roads and thus when the
10 County Commissioners approved Mineral Resource Overlays, they must have known this
11 condition would be the norm. The applicant's traffic analysis and letters went so far as to say
12 that *it is the County's responsibility* to mitigate substandard rural roads that are not capable of
13 serving the proposed mine safely. Exhibits 18, 39. Under the framework adopted by the
14 County Commissioners for the Mineral Resource Overlay, that "safe harbor" for mining
15 applicants simply does not exist. The applicant is required to mitigate identified hazards.

16 Neither the applicant or Public Works staff or their experts presented any detailed
17 analysis or quantification of the increase in risk attributable to acknowledged substandard road
18 widths and the potential for crossovers on Grip Road. Exhibit 18; Testimony of Forrest Jones.
19 Instead they essentially relied on level of service standards, which include some but safety
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22 ² Even if the Hearing Examiner were to accept the testimony of the Applicant and County experts that the probability of
23 injury in any one occurrence will not rise, all experts acknowledged that the total number of possible occurrences will
24 increase substantially. Probability judgments aside, the potential severity of harm triggers a high risk conclusion under
generally accepted risk analysis. By way of analogy only (this is not a SEPA appeal), see the SEPA definition of
"significance" in WAC 197-11-794 which utilizes the standard method for measuring risk:

25 (2) Significance involves context and intensity (WAC 197-11-330) and does not lend itself to a formula or
26 quantifiable test. The context may vary with the physical setting. Intensity depends on the magnitude and duration
27 of an impact. The severity of an impact should be weighed along with the likelihood of its occurrence. An impact
may be significant if its chance of occurrence is not great, but the resulting environmental impact would be severe
if it occurred.

1 considerations, while omitting other key dangers; they proposed mitigation for some sight-
2 distance problems on Grip Road (but not those at Lillian Lane or other curves to the east); and
3 they proposed vague widening proposals for two of the six blind curves on Grip Road to be
4 used by the mining trucks.³

5 In the absence of any written and detailed safety analysis, it is left to the Hearing
6 Examiner to either remand the matter for additional study, or to utilize the hearing testimony
7 to identify the safety risks and then impose conditions to protect the public on the County's
8 rural roads. Cougar Peak identifies the conditions necessary to bring this project into
9 conformity with the County's policy and regulatory framework for public road safety in the
10 attached Exhibit A.

11 III. STANDARD OF REVIEW

12 Under the applicable law, the applicant has an affirmative duty to demonstrate
13 protection of public safety on Grip Road. That duty to protect public safety is required by the
14 framework for mining special use permits, adopted in Skagit County's policies and regulations
15 implementing state land use mining policy. Under the Growth Management Act (GMA),
16 RCW 36.70A.170(1)(c), Skagit County adopted Mineral Resource Overlay designations and
17 policies for mining within those areas. But at the same time, it instituted express and
18 consistent protective measures for public safety on rural County roads.

19 The County's protective measures to ensure road safety were enshrined in its
20 comprehensive plan goals and policies for mineral lands. Exhibit 49, S-2. Those planning
21 goals and policies are in turn implemented in County regulations mandating that the Hearing
22 Examiner approve only those mining projects in which the applicant has proven that the
23 operation will protect public safety on the roadways serving the mine, as mandated by policies
24 in the comprehensive plan. Skagit County Code (SCC) §§ 14.06.160 (3); 14.16.440(7)(b).

25 Special Use Permits are reviewed by the Hearing Examiner under SCC 14.16.440,

26
27 ³ See discussion below of the single road-widening offer by the applicant involving two of seven dangerous curves.

1 .900.

2 Under § 14.16.440(9)(a), the Hearing Examiner is directed to include project conditions
3 "that will mitigate detrimental impacts to the environment and conditions that protect the
4 general welfare, health and safety." In subsection (9)(b), the Hearing Examiner is required to
5 "consider the requirements of this Chapter as minimum standards based on unique site-
6 specific factors or conditions as appropriate to protect public health, safety, and the
7 environment."

8 The criteria for Hearing Examiner approval of a mining Special Use Permit put the
9 burden on the applicant and again reinforce the requirement for a showing of no "potential
10 adverse effects on the general public health, safety, and welfare:"

11 14.16.900 Special Use Permit Requirements

12 (1) Special Uses

13 (b) Process/Authority for Special Use Permit . . .

14 (v) The burden of proof shall be on the applicant to provide evidence in
15 support of the application. The criteria for approval or denial shall
include the following: . . .

16 (E) The proposed use will not cause potential adverse effects on the
general public health, safety, and welfare . . .

17 (G) The proposed use is not in conflict with the health and safety of
18 the community.

19 (H) The proposed use will be supported by adequate public facilities or
20 services and will not adversely affect public services to the
surrounding areas, or conditions can be established to mitigate
21 adverse impacts on such facilities.

22 (I) The proposed use will maintain the character, landscape and
lifestyle of the rural area. For new uses, proximity to existing
23 businesses operating via special use permit shall be reviewed and
24 considered for cumulative impacts.

25 SCC § 14.16.900(1)(b). The Hearing Examiner is given broad authority to implement these
26 mandates by either sending a mining proposal back for completion of studies, or by condition
27 the project to mitigate the operation's impacts. See, e.g., Hearing Examiner Rule 2.10,

1 adopted by Resolution No. 20080511 (authorizing remand). A remand offers the cleanest
2 solution to this contentious proceeding, provided public and agency review is included at a
3 rescheduled public hearing on the new road safety information and proposed mitigation.

4 IV. ISSUES PRESENTED FOR DECISION.

5 As applied to this case, these Hearing Examiner mandates translate into a series of
6 basic questions:

- 7 1. What is the policy and regulatory framework for traffic safety related to mines?
- 8 2. Do the existing conditions on Grip Road include any hazards to be considered?
- 9 3. What is required to assess the increase in risk to public traffic safety on Grip
10 Road when project traffic is added to existing conditions (the "delta")?
- 11 4. Did Public Works fail to provide written analysis of that potential increase in
12 traffic risk, as required by code?
- 13 5. Did the applicant fail to assess the increase in risk in its traffic analysis?
- 14 6. Should the Hearing Examiner remand? If not, does the record contain sufficient
15 evidence to condition the project to prevent an increase in road safety risk?
- 16 7. What conditions are necessary to protect public safety on Grip Road?

17 V. ARGUMENT.

18 The mandate to protect public safety on Grip Road is clear and enforceable, thus
19 requiring that the Hearing Examiner either remand the proposal or condition the project. This
20 mandate is reflected in the County Commissioners' adoption of a policy and regulatory
21 framework for review of mining operations.

22 A. The Policy and Regulatory Framework for Mines in Skagit County Mandates 23 Denial When Public Safety is not Analyzed or Protected (Mitigated).

24 While certain nuisance aspects of are relaxed under the County's rules for mining
25 within lands designated with the Mineral Resource Overlay, the opposite is true for traffic
26 safety impacts under the County's adopted policy and regulatory framework for review of
27

1 mining permits. Nowhere do those policies and regulations provide an applicant a safe harbor
2 that allows them to obtain mining permit approval without close review of whether rural roads
3 are adequate to serve the particular mine at issue.⁴ To the contrary, the County's GMA
4 framework requires an individualized study of traffic impacts for each project:

5 Traffic Impacts: Potential effects of truck traffic from mining operations shall be
6 reviewed as part of the permitting process.

7 Skagit County Comprehensive Plan 2016-2036, Policy 4D-5.2 (Ord. 2016-0004, eff. June 30,
8 2016). The requirement for close scrutiny of the traffic impacts of the Miles mining proposal
9 also appears in the Hearing Examiner review criteria for approval of mining Special Use
10 Permits:

11 (b) The Hearing Examiner shall consider the requirements of this Chapter as
12 minimum standards based on unique site-specific factors or conditions as
appropriate to protect public health, safety, and the environment.

13 SCC § 14.16.440(9)(b) (emphasis added). This mandate to consider "unique site-specific
14 factors" and to regulate the proposed mine operation beyond minimum standards when
15 necessary to protect public road safety, necessarily implies a close review of road safety. This
16 express mandate in code requires the Hearing Examiner to fully examine the site-specific
17 factors on Grip Road that will likely lead to an increase in risk to public safety, if the mine is
18 approved and 70-foot long truck-trailer combinations are allowed with any frequency on that
19 road.

20 **B. The Proposal Omits Basic Information Required by Code and Necessary for**
21 **Analysis of Safety on Public Roads, Thus Warranting a Remand.**

22 The policy and regulatory framework sets up a logical information flow that includes
23 certain specific pieces of information and analysis from the applicant and Public Works.
24

25
26 ⁴ If Miles finds those express road safety regulations too restrictive, its recourse is to seek legislative amendments, not ask
27 a Hearing Examiner to relax the adopted standards. In this case, the applicant is in effect asking the Examiner to ignore
the statutory mandates and accept vague and conclusory traffic studies on the issue of Grip Road safety.

Specifically, the code expressly requires the following three elements that are missing from the record:

- (a) A map depicting right-of-way widths along the full extent of Grip Road, the primary rural road serving the mine entrance; SCC § 14.16.440(8)(a)(i);
- (b) A written estimate of maximum daily truck traffic anticipated on Grip Road;⁵ SCC § 14.16.440(8)(f); and
- (c) A written review by Public Works demonstrating that Grip Road and other roads "are capable of sustaining the necessary traffic for the proposed mineral extraction operation" and that the proposed operation meets road safety standards set out in the comprehensive plan and County regulations. SCC § 14.16.440(8)(i).⁶

A hearing examiner does not have authority or discretion to exempt an applicant or County staff from clear requirements set forth in the code. *Chaussee v. Snohomish County*, 38 Wn. App. 630, 638 (1984) (Hearing Examiner had no discretion to exempt landowner without regard to statutory requirements and the need for substantial evidence to meet statutory requirements). Based on the policy and regulatory framework applicable to the Hearing Examiner's review, Cougar Peak requests that the Hearing Examiner remand the project for additional road safety analysis, with an order requiring written analysis made available to the public for review prior to the conclusion of any public hearing.

1. The Code Expressly Required Information About Existing Conditions That is Missing From the Record.

The record of traffic analysis before the Hearing Examiner does not provide the basic information on existing road conditions required by code. It was the applicant's burden to bring this information to the public and the Examiner for review, and those omissions merit a remand.⁷

⁵ As discussed below, the applicant's traffic engineer, Gary Norris, provided an "average daily trip" figure but testified that this "average" would not tie into any agreed-upon cap on total annual trips, thus declining to commit to any firm estimate of daily trips that could be monitored or considered a ceiling on daily trips. To further illustrate that point, the applicant is on record at the same time seeking authorization to operate as many as 300 trips per day. Exhibit

⁶ This third requirements is addressed under the subsequent section involving risk analysis.

⁷ Under SCC § 14.06.160 (cited above) and related provisions, the applicant has not met its basic burden of bringing a

1 The applicant never provided a map depicting the right-of-way widths on Grip Road,
2 the sole County road proposed by the applicant for direct access to and from the mine. The
3 applicant is required to provide those ROW widths in order to meet their burden of showing
4 that there are no substandard roads serving the mine, or if there are, to demonstrate where road
5 widening would be feasible. By failing to provide this information, the applicant deprived
6 Public Works, the public and the Hearing Examiner of the ability to evaluate whether right-of-
7 way is available for proposed mitigation (and thus capable of being accomplished) in order to
8 address crossover problems. This was not harmless error or a technical oversight.⁸

9 2. The Applicant's Description of Total Truckloads per day is Inadequate.

10 The applicant provided an unquantifiable "average" daily estimate of truckloads per
11 day, but did so in a manner that makes the estimate meaningless in terms of either traffic
12 safety analysis or Hearing Examiner evaluation of appropriate conditions to protect public
13 safety. Thus, the applicant failed to provide the required operations plan detailing "estimated
14 truckloads per day," as expressly required by SCC § 14.16.440(8)(f).

15 At hearing, the Hearing Examiner appropriately noted the difficulty of getting the
16 applicant's representative and the applicant's traffic expert to agree on whether there was a
17 maximum annual truck count, underlying the applicant's daily estimate of truckloads per day
18 (using an average of 46 trucks per day). While the applicant's expert testified that there would
19 be no more than 11,765 trips per year (total, in and out), the applicant's representative refused
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21 complete project description to the Hearing Examiner for review. It is not the job of the Hearing Examiner, County Staff
22 or the public to prove or decipher anything in this proposal. It is not the Hearing Examiner's job to fill in gaps in the
23 applicant's presentation at hearing. The entire burden rests with the applicant to prove that the project complies with the
applicable criteria and requirements of the Skagit County Code. *Id.*

24 ⁸ The code authorizes the Hearing Examiner to impose mitigation conditions on a Special Use Permit approval if the
25 mitigation is "reasonable, practicable and generally capable of being achieved by the mine operator." SCC
26 14.16.440(9)(a)(ii). That assessment requires knowledge as to the available right-of-way on Grip Road, and thus the
27 applicant's failure to provide that right-of-way measurement for Grip Road thwarts the Special Use Permit process.
Because the requirement is essential to the nexus question and determination of what mitigation is reasonable, the
omission of the ROW mapping was not harmless error or a matter of "form over substance." Presumably the data is a
public record and it would not have taken much for the applicant to have provided this required information.

1 under cross examination to put a cap on total annual trips. Thus, the applicant's effort to
2 utilize an "average" was meaningless without an annual total upon which to base the count. In
3 order for the Hearing Examiner to evaluate appropriate conditions, a firm daily estimate is
4 needed. (The only concrete cap on daily traffic offered by the applicant was 30 trips per hour,
5 without any limit on the number of hours in a day they would operate under "extended hours."
6 The Hearing Examiner could reasonably interpret the applicant's answer to this code
7 requirement as 300 trips per day if a cap of ten hours was placed on any such extended hours.)

8 Cougar Peak maintains that the intent behind this express code requirement was for an
9 applicant to allow the Hearing Examiner to evaluate what the daily impact of the project
10 would be, and to determine whether a different daily truck count should be required to protect
11 the public on the roads. The applicant's refusal to comply with this submittal requirement
12 apparently relied on its traffic analyst's opinion that traffic studies always evaluate "averages."
13 However, this code provision is express and does not speak of the requirements for traffic
14 studies or Level of Service traffic analysis. The express code requirement does not say
15 "estimated average truckloads per day." Here, in the absence of cooperation by the applicant,
16 the Hearing Examiner should remand the case for a firm description or alternatively, impose
17 an annual cap on total truck trips in and out.

18 **C. The Record Contains an Incomplete Safety Review; Without Analysis of the**
19 **Increase of Trucks and Risk Compared to Existing Risk, a Remand Must Issue.**

20 1. Planning and Public Works staff failed to provide written analysis of a potential
21 increase in traffic risk in light of the County's adopted safety standard.

22 A record of Public Works review is needed in order to establish a nexus between
23 project traffic increases and the increased risk to public safety necessitating mitigation
24 measures to improve Grip Road travel safety. The Staff report did not cite to one. Instead, it
25 contained unsupported and conclusory statements about compliance with the public safety
26 standard, with no citations to the record or any public works memoranda.

27 Based on the testimony of Forrest Jones, Public Works staff relied entirely on LOS standards
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1 in the code for any safety analysis.

2 In the absence of a record presented by staff, Cougar Peak contends that the Hearing
3 Examiner must conduct a safety analysis based on the record and testimony at hearing.
4 Cougar Peak maintains that, to meet the protective standard adopted by the County for mining
5 proposals, the risk-analysis method must look at the maximum potential increase in risk to
6 public traffic safety on Grip Road over current conditions

7 The Hearing Examiner's safety analysis should use the maximum possible number of
8 daily trips for the risk analysis. To do otherwise would be to underestimate the potential
9 increase in risk over current conditions. Underestimating the potential risk over current
10 conditions would violate the County's policy and regulatory framework requiring an
11 assessment of public safety.

12 The Special Use Permit application and review criteria expressly require that the record
13 include a road safety review by Public Works that is missing here:

- 14 (i) A review from Skagit County Public Works Department or Washington
15 State Department of Transportation demonstrating that roads or bridges are
16 capable of sustaining the necessary traffic for the proposed mineral
17 extraction operation, and that the proposed operation meets **level-of-**
18 **service, safety, and other standards** as outlined in the Skagit County
Transportation Systems Plan, the Skagit County Comprehensive Plan, and
applicable State and local regulations.

19 SCC § 14.16.440(8)(i) (emphasis added).

20 The safety analysis required here, as part of the policy and regulatory framework for
21 Hearing Examiner approval of an SUP, was incomplete. Partial completion of the mandate by
22 Public Works does not support a conclusion of compliance. A failure to require complete
23 analysis results in incomplete mitigation of safety impacts, and thus a heightened risk to
24 public safety in violation of the County's policy and regulatory framework for mines.

25 Public Works' completed a partial but incomplete review of the project for safety
26 impacts on Grip Road. It reviewed LOS -- finding that follow-on times on Grip Road would
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1 not be exceeded by the project. It reviewed two sight-distance intersection problems on Grip
2 Road (mine entrance and Prairie Road intersection) but ignored the Lillian Lane intersection
3 sight-distance problem and all Grip Road intersections east of there. Public Works did not
4 require further analysis of the two crashes reported for the Lillian Lane intersection or assess
5 how that risk of accidents there might increase with project traffic. Public Works' witness,
6 Forrest Jones, testified that the department did not require either a Level I or Level II analysis
7 because the LOS threshold was not met to trigger those.

8 Public Works' review of the applicant's traffic analysis relied entirely upon two peer
9 review studies that it commissioned. Exhibits 15, 16. Other than those, Public Works never
10 provided any written memoranda in this record. That omitted written review from Public
11 Works is prima facie evidence that Public Works did not conduct the review expressly
12 required under SCC § 14.16.440(8)(i). *Sisley v. San Juan County*, 89 Wn.2d 78, 85 (1977)
13 (conclusions determinative of the outcome must be supported by some reasoning in the
14 record). The two peer reviews analyzed only sight-distance and LOS safety issues. There was
15 no mention of substandard road widths, sight-distance problems east of the mine on Grip
16 Road, crossover potentials, or any assessment comparing current risk to future risk with the
17 project. Public Works never commissioned any third party review of the applicant's sole
18 traffic assessment related to those issues at Exhibit 18, and Public Works never produced its
19 own written assessment. The record reflects that lead planning staff wanted to get the project
20 to hearing after issuance of the MDNS and did not want to revisit any of those road safety
21 impacts when this omission was called to their attention. Testimony of Brandon Black.

22 Forrest Jones testimony confirmed that there was never any written assessment of
23 increased risk to school buses on Grip Road by the applicant or by Public Works. Exhibit 18
24 contains no mention of school buses or school children transport. Testimony of Ross
25 Tilghman. Public Works was not barred from requiring a study method similar to that
26 contained in the Level II study elements, in order to ensure an adequate analysis of public road
27

1 safety. If Public Works chose not to require that particular method of study from the
2 applicant, it still had a duty to require a safety analysis using some other reasonable method.
3 In other words, it would have made perfect sense for Public Works to have asked the applicant
4 to conduct a safety analysis containing the same or similar elements as the Level II safety
5 analysis, even without requiring a Level II traffic study.

6 Public Works' narrow review of any safety issues and complete lack of written analysis
7 of increased public road risk failed to meet the code standard. The code required that the
8 Public Works review road safety above and beyond a mere "level-of-service" standard. SCC
9 § 14.16.440(8)(i). A complete safety review meeting the intent of this provision and
10 comprehensive plan safety policies would have included an analysis of Grip Road sight
11 distance issues east of the mine entrance; it would have analyzed current patterns of school
12 bus use of Grip Road; it would have commented on the inadequate road widths and potential
13 for truck-trailer cross-overs, and it would have included an analysis of the "delta" change
14 between existing risk and increased risk directly attributable to project truck-trailer
15 combinations in their 70-foot length and 8-foot plus width.

16 The applicant's failure and Public Works' failure to provide those analyses thwarted the
17 intent of the code by depriving the Hearing Examiner and the public the opportunity to
18 evaluate the road safety of the proposed operations plan, separate and apart from LOS
19 analysis. In order to obtain that analysis, the Hearing Examiner will need to remand the
20 requested permit. Any remand should include a requirement that the new analysis be made
21 public prior to forwarding it to the Hearing Examiner, so that the public participants in this
22 hearing can exercise their right to review and comment on any recommendations.

23 2. The Applicant Also Failed to Provide the Basic Road Safety Risk Analysis;
24 the Hearing Examiner Must Remand the Application
25 for Appropriate Analysis.

26 At hearing, the applicant incorrectly asserted that because a Level II safety analysis was
27 not triggered by the number of project pm peak trips, they were not required to submit one.

1 This is a gross misreading of the statutory framework. Miles Sand & Gravel operates over a
2 dozen mines in Washington State and is quite familiar with the various road safety standards
3 in each jurisdiction in which it operates, including Skagit County. The Hearing Examiner
4 should issue findings discounting the credibility of the applicant's expert traffic analysis and
5 applicant testimony suggesting a minimalist approach is sufficient. Those are self-serving.

6 The County's policies and code plainly require a safety risk analysis above and beyond
7 LOS analysis and the narrow study limits of the County's Road Standards. The Road
8 Standards are adopted by resolution and cannot supplant the clear and express requirements
9 for safety analysis contained in the policy and regulatory framework cited earlier.⁹ The fact
10 that a Level II Road Standards safety analysis was not triggered is not a lawful excuse to
11 exclude a risk analysis adequate to make findings about the risk to public road safety. The
12 better course would have been for Miles to have conducted the Level II safety analysis as a
13 proxy for what the policies and code require.¹⁰

14 As discussed, a safety analysis meeting the requirements of the County's policy
15 framework would include an account of current conditions and risk, and then a comparison of
16 that risk level to the risk level that will likely result from the maximum use of the road by the
17 project. The applicant's traffic analyst, Gary Norris, acknowledged he did not provide that
18 kind of comparative risk analysis in the record. He also admitted that he did not conduct any
19 safety analysis whatsoever on Grip Road east of Lillian Lane.

20 When asked to provide supporting data for Exhibit 18, Mr. Norris did produce at

22 ⁹ The County Commissioners adopted a method for determining whether roadways are safe where crash data is not
23 sufficient to determine road safety with the proposed influx of a different type of traffic. See Exhibit 49, S-12 (Section
24 4.09). The Commissioners adopted that method in the County's Road Standards, in Resolution No. 17930 (2000), at
25 Exhibit 49, S-7A, Page 2.

26 ¹⁰ Permit reviews are not the appropriate place to rewrite the policy and regulatory framework. However, the Hearing
27 Examiner does report to the County Commissioners on issues that arise throughout the course of a year, in general
28 comments that are not project specific. This project will provide a future case study in that regard, in our view. The
29 Skagit County Commissioners may wish to address a gap in the adopted Road Standards that appears to have been relied
30 upon here by the applicant and Public Works, to avoid conducting a safety analysis of potential harm to school bus use of
31 Grip Road.

1 hearing five years of crash data on Grip Road. When asked, however, he acknowledged the
2 data did not involve any existing traffic patterns with daily trips by 70-foot long truck-trailer
3 rigs similar to those proposed in the Miles operation plan. The traffic studies in this case,
4 Exhibits 12 – 18, never provided any written analysis of the effect of these truck-trailer rigs on
5 school buses operating twice daily on Grip Road or the residents who travel the road on a
6 daily basis. Testimony of Ross Tilghman. In the absence of any written analysis of potential
7 collisions between the new project traffic and existing types of traffic, the Examiner must
8 discount Mr. Norris' "safety analysis" as conclusory at best. A remand is required.

9 Mr. Norris' testimony on safety issues revealed other glaring omissions in the
10 applicant's traffic analysis. Mr. Norris testified that he conducted no additional safety analysis
11 of the four danger curves located on Grip Road east of the mine (readily viewed by looking at
12 a map of Grip Road; see, e.g., Exhibit 49, S-16(c)).¹¹ This omission was significant since, on
13 the other hand, Mr. Norris acknowledged that his study estimated that at least five percent
14 (5%) of the project traffic *would utilize the easterly route*. (The applicant's representative also
15 confirmed in his testimony that Miles would use that easterly portion of Grip Road as the most
16 direct route for local deliveries to Sedro Wooley from the mine). On cross examination, Mr.
17 Norris acknowledged that his crash data only extended as far as Lillian Lane, to the east of the
18 mine entrance. It did not extend beyond that point, even though Grip Road continues on for
19 miles to the east.

20 The crash data relied upon by the applicant for his "safety" analysis was not
21 representative of the conditions that will exist if a mine permit is approved. It did not cover
22 the proposed haul route east of the mine. Cougar Peak maintains that a safety review that
23 complies with County policy and code must include estimates of increased accidents with the

24
25 ¹¹ At hearing, the applicant made much of the fact that it was conducting an "Auto Turn" analysis on Grip Road. After
26 weeks of delay, the applicant produced the results of its analysis in a two-page sketch, without any supporting data. Mr.
27 Norris testified that the analysis determined that only two curves needed widening on Grip Road. Yet, on cross
28 examination, Mr. Norris admitted that he did not conduct this Auto Turn analysis at the 90-degree turn at Lillian Lane or
any portion of Grip Road east of there.

1 project trips included, on all road segments. A remand is the remedy best suited to obtaining
2 that basic risk assessment.

3 **D. In the Alternative, the Hearing Examiner now has Ample Evidence With Which**
4 **to Condition the Project to Mitigate Projected Increased Road Risk.**

5 In the event the Hearing Examiner does not remand the project for the missing safety
6 analysis, the key legal issue is whether the County code requirements can be satisfied by the
7 safety analysis provided in the hearing record by the public and Cougar Peak's expert witness.
8 At the risk of repeating what is already in the record, the evidence supporting a Hearing
9 Examiner safety analysis can be summarized as follows.

10 1. Existing Conditions and Potential Hazards Identified at Hearing.

11 Cougar Peak presented Ross Tilghman as an expert with extensive experience working
12 on the content of traffic studies and the evaluation of whether they contain elements required
13 by local codes and policies, including Skagit County's requirements for a road safety study.¹²

14 Mr. Tilghman identified the risk-study elements missing from Exhibits 12 – 18. He
15 also testified that the crash data related to Exhibit 18 and presented by Mr. Norris, was not
16 determinative of whether the project would be likely to result in additional traffic accidents
17 ("occurrences") between project truck-trailer combinations and current types and levels of
18 traffic. Mr. Tilghman testified that there was a high likelihood that occurrences would
19 increase in number as a result of the project, and therefore a detailed traffic safety analysis
20 was required in order to meet the code requirement for assessing the protection of public
21 safety on Grip Road. Mr. Tilghman described in detail the types of factors that would
22 normally be studied in a safety analysis on a rural road involving daily school bus pick-ups
23 and deliveries.

24 This expert testimony can and does serve as a sufficient basis to condition the project to

25 ¹² The applicant's attorney at hearing did not object to Mr. Tilghman as an expert on the subject of the content of traffic
26 studies and whether they contain an adequate road safety analysis. Accordingly, the Hearing Examiner designated him as
27 an expert, based on the Examiner's review of a curriculum vitae submitted earlier in the case when Mr. Tilghman testified
separately on behalf of the SEPA appellants.

1 protect school buses during the times they are present on Grip Road segments, both west and
2 east of the mine. Based on that risk analysis, and the evidence submitted identifying the times
3 that school buses are present, Exhibit 49, S-6, the Hearing Examiner has a basis to limit truck
4 hours during those times.

5 2. Detailed Testimony of Current Hazard Conditions From the Public.

6 As additional support and for comparative purposes, Cougar Peak presented other
7 witness testimony presenting facts and first-hand knowledge of current Grip Road safety
8 dangers, including the testimony of parents of children residing on Grip Road and Lillian Lane
9 who noted the high level of concern for the safety of school children. Those facts and
10 evidence included the location of bus stops and a school bus turnaround area; the use of Grip
11 Road by private cars transporting schoolchildren; the lack of applicant analysis of crossovers
12 at key curves; the lack of shoulders on Grip Road; the substandard width of travel lanes on
13 Grip Road; the seasonal increases in danger for Grip Road travel; the steep terrain at some
14 Grip Road curves; and the project's projected increase in truck-trailer combinations using Grip
15 Road compared to existing traffic levels.¹³ Neil McLeod testified about the frequency of use
16 of their single driveway out onto Grip Road near one of the curves at grade, just west of the
17 mine entrance, including its use by his family, visitors to the 800-acre preserve, employees,
18 contractors and suppliers. The impacts of the project's unsafe use of Grip Road is direct and
19 significant for each of these residents.

20 The record contains additional support for protection of school children and residents
21 on Grip Road, traffic experts for the applicant and the County admitted under oath that the
22 only way to avoid a rise in the number of new occurrences involving school buses would be to
23 eliminate new truck traffic altogether during the times school buses are on Grip Road (one of
24
25

26 ¹³ Testimony of Jennifer Aven; Testimony of Jessica Hoyer; Testimony of Neil McLeod; Exhibit 49, S-1 and attachments
27 A, B, and C; Declaration of Wallace A. Groda at Exhibit 49, S-16 with attachments A-D.

1 Cougar Peak's proposed conditions). See testimony of Forrest Jones¹⁴ (the Public Works lead
2 official who signed off on the project and the proposed mitigation measures). Without any
3 analysis of the severity of that risk to school children and residents on Grip Road, the rate of
4 current and predicted increases in occurrences, and mitigation sufficient to reduce that risk,
5 the applicant and County staff have failed to propose road mitigation sufficient to meet the
6 public safety test established in County policy and regulation.

7 The code required that Public Works and the applicant provide a safety analysis (using
8 methods similar to those in the Level II Road Standards), and the Hearing Examiner has the
9 opportunity and duty to correct that error now, by adding SUP conditions restricting truck
10 hours on Grip Road and requiring road widening on all restricted sight-distance curves on the
11 entire Grip Road segment to be used by hauling for the mine.

12 3. The Applicant's Late and Limited Offer to Widen Some Roadway is an
13 Admission of the Basic Safety Hazard Present on Grip Road.

14 The applicant did submit at hearing a late but vague offer to widen Grip Road in two of
15 the many danger locations. The risk of crossovers on Grip Road was readily acknowledged by
16 the applicant's traffic analysis, Exhibit 18, and in live testimony by Gary Norris, yet no
17 mitigation was proposed until hearing to address the heightened risk. Based on testimony at
18 hearing, but no written analysis, the applicant has presented an ill-defined proposal to widen
19 only two of the dangerous curves on Grip Road to an unspecified degree. In evaluating that
20 limited offer, the issue is whether the offer includes a commitment to widen the curves to the
21 standard required by the County's road standards for roads of this type. Cougar Peak requests
22 a condition requiring road widening to the full County standard shown in Exhibit 49, S-14.¹⁵

23
24 ¹⁴ Forrest Jones, Transportation/Program Section Manager, Skagit County Public Works, forrestj@co.skagit.wa.us.

25 ¹⁵ While the applicant appeared to claim (and the Hearing Examiner indicated his possible agreement) that this proposed
26 mitigation on two curves was a concession by the applicant in response to hearing testimony, Cougar Peak does not regard
27 the complete lack of detail in that proposal as responsive to the public safety deficiency. For one, there was never any
testimony at hearing from Public Works staff in response to the applicant's proposal, and thus no analysis of the scope or
adequacy of the proposal. This omission is significant when evaluating what weight to give the applicant's offer. During

1 The obvious remaining question is whether the Hearing Examiner must require
2 additional mitigation to cover the areas the applicant has ignored. The applicant provided a
3 very cursory sketch of an "Auto Turn" analysis purporting to find only two curves that needed
4 widening on Grip Road. On cross examination, the applicant's traffic expert acknowledged
5 that he did not apply the analysis to the Lillian Lane intersection or any portion of Grip Road
6 to the east (which Cougar Peak believes is a basis alone for restricting use of the easterly haul
7 route). Despite requests from Cougar Peak, the applicant supplied no supporting data for the
8 sketch it produced that could be reviewed by the public or Public Works to determine whether
9 the proposed mitigation was in the correct location or involved correct calculations.

10 Since, The applicant has proposed widening of only two of the areas identified by
11 experts as likely locations of crossovers, without offering similar road realignments or
12 widening at the other identified locations, Cougar Peak requests that the Hearing Examiner
13 either condition the project to exclude truck-trailer travel to the east, or require the applicant to
14 perform similar road widening at the five additional corners identified in the record.¹⁶

15 **E. Conditions Necessary to Protect Public Safety on Grip Road.**

16 When it became apparent at hearing that the applicant had failed to meet its burden of
17 offering adequate mitigation, the applicant was asked whether they would accept additional
18

19
20 the months over which the hearing spanned, the applicant and the County Public Works staff had ample opportunity to
21 clarify and define the parameters for widening the two curves, but chose not to do so, despite Cougar Peak's repeated
22 requests that the Hearing Examiner require the applicant to provide on the record detail of its proposed mitigation and
23 Public Works analysis of the proposal, prior to issuance of any decision that might include the applicant's vague mitigation
24 proposal. The applicant's mitigation offer for the first time at hearing did not include enough specifics to fairly evaluate
25 the adequacy of what was being proposed; it included only a rough sketch of the proposal (with an inaccurate scale) that
26 did not define road widths, right-of-way widths, or proposed truck-trailer widths or lengths to scale on the drawing. In the
27 event the Hearing Examiner rejects this request for a remand to allow Public Works review on the record and public
28 comment, Cougar Peak requests that any road widening included as a permit condition ensure that the widening will meet
width standards for this rural County road, the dimensions of which are shown in Exhibit 49, S-14.

26 ¹⁶ The five danger corners east of the mine are identified on Exhibit 49, S-16(C) (Declaration of Wallace A. Groda). The
27 applicant's offer to widen Grip Road in two locations west of the mine does nothing to mitigate these danger areas east of
the mine.

1 voluntary conditions addressing the increased risk. Under oath, the applicant declined to
2 support the following voluntarily conditions to protect Grip Road safety:

- 3 (a) restriction on gravel truck travel to the east of the mine;¹⁷
- 4 (b) reduction in travel speeds at corners;
- 5 (c) forbearance of truck travel during prime hours of school bus travel, morning or
6 afternoon;
- 7 (d) provision for bus turnouts or safe bus stops; and
- 8 (e) a cap on total number of trips annually (which in turn would equate to a definite,
9 measurable limit on average daily truck traffic).

10 The applicant declined to institute any of these mitigation measures. The applicant was asked
11 whether it would accept these possible voluntary measures, because those mitigation
12 conditions do not appear in the list proposed by County Public Works staff, in the staff report
13 to the Hearing Examiner on the Special Use Permit.

14 Cougar Peak requests that the final decision on the permit include corrections to
15 conditions recommended by County staff and additional conditions necessary to protect public
16 safety. Under SCC § 14.16.440, the Hearing Examiner's review of mining proposals within
17 the Mineral Resource Overlay district includes a mandate to consider whether any conditions
18 are necessary in order to mitigate detrimental impacts and “protect the general welfare, health
19 and safety.” In the context of traffic safety, the Examiner “shall” look for conditions that
20 protect the safety of neighboring residents on Grip Road. *Id.* This code mandate reinforces
21 that the burden is on the applicant to prove the proposal is adequate to protect public safety.

24
25 ¹⁷ As shown in the Declaration of Wallace A. Groda, Exh. 49, S-16(C), there are at least four additional road curves of
26 over 85 degrees (inside angle) on Grip Road that would necessarily be traversed by the mining trucks traveling east from
27 the mine. Neither the applicant or the County staff proposed any mitigation conditions for widening or improving safety at
those four dangerous locations. It is undisputed that the proposed truck-trailer combinations would necessarily cross-over
into opposing lanes in order to navigate those turns on Grip Road.

1 Cougar Peak asks the Hearing Examiner to adopt findings noting that the applicant's
2 proposed set of conditions and those proposed in the Staff Report, Exhibit C-1 at 31 for the
3 Special Use Permit would fail to rise to the level necessary to meet the applicable safety
4 standard for mining permits. Cougar Peak then requests that the Hearing Examiner adopt
5 Cougar Peak's proposed conditions, submitted previously to the Examiner on October 7, 2022
6 and reproduced here for convenience in the attached Exhibit A.

7
8 **VI. REQUESTED RELIEF.**

9 Cougar Peak requests in the first instance that the Hearing Examiner remand the
10 proposal for correction of the threshold flaws in the mining Special Use Permit. A remand is
11 appropriate to ensure that Public Works staff fairly evaluate the risks of the proposal on
12 County rural roads and the Hearing Examiner has an opportunity to review substantial
13 evidence supporting any mitigation proposals.

14 In the alternative, Cougar Peak requests that any Hearing Examiner condition the
15 project with the additional conditions cited above. Cougar Peak agrees that Miles potentially
16 has a right to operate a mine and obtain a mining Special Use Permit from the Hearing
17 Examiner within this designated mineral resource land. But that right is qualified under
18 County law to ensure there are permit mitigation measures in place that will protect school
19 children and residents who travel several times a day on Grip Road.

20 Respectfully submitted this 31st day of October, 2022,

21 DYKES EHRLICHMAN LAW FIRM

22 

23
24 Tom Ehrlichman, WSBA No. 20952
25 Counsel for Cougar Peak LLC
26
27
28

CERTIFICATE OF FILING

I, Tom Ehrlichman, am a partner at the Dykes Ehrlichman Law Firm and hereby certify that I caused this *Posthearing Brief* to be filed with the Clerk for the Skagit County Hearing Examiner and counsel for all parties of record in the above-captioned matter, all via electronic mail on October 31, 2022.

Signed, October 31, 2022:



Tom Ehrlichman, WSBA No. 20952