

Building, Hearing Room C.

Pursuant to RCW 36.70A.320(1) Ordinance #17938 is presumed valid upon adoption. The burden is on Petitioners to demonstrate that the action taken by Skagit County is not in compliance with the requirements of the Growth Management Act (GMA, Act) RCW 36.70A.320 (2).

Pursuant to RCW 36.70A.320(3), a Board “shall find compliance unless it determines that the action by [Skagit County] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” In order to find the County’s action clearly erroneous, we must be “left with the firm and definite conviction that a mistake has been made.” *Department of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

Over 30 issues were raised in this consolidated case. Petitioners failed to brief some of the issues; others were briefed unpersuasively. We will not discuss all of the issues briefed by petitioners. **We find that, except as to the categories of issues set forth in the remainder of this order, petitioners have failed to sustain their burden of showing that Skagit County has failed to comply with the Act.**

Petitioners’ challenges included:

- 1) The 1997 CP established a three tiers classification system for the MRO. The three classes were:
MRA-3 (Mineral Resource Areas where designation criteria have the potential to be met.)
MRA-2 (Mineral Resource Areas where designation criteria are met.)
MRA-1 (Mineral Resource Areas where the designation criteria are met and County mining permits are issued.)
- 2) The 1997 CP also provided mineral land designation criteria that included marketability and threshold values criteria.
- 3) There is no evidence in the record that any properties in the MRO were ever designated

by the County as “known” MRAs (MRA- 1 or 2).

4) There is substantial evidence in the record that all of the MRO was designated MRA-3 (“potential” mineral lands).

5) Ordinance #17938 modified the Land Use Element and Natural Resource Element of the CP for the Mineral Resource Overlay. It also adopted a special use permit process for mining and associated uses. SCC 14.16.440.

6) The CP now requires that future designation of MRO areas must meet the mineral land designation criteria that were in the 1997 CP for a MRA-2 designation. Reference in the CP to MRA-1, 2, and 3, have been eliminated.

7) There is no reasoned analysis in the record to justify the upgrade from “potential” mineral lands to “known” mineral lands for each of the existing MRO sites. There is no reasoned analysis in the record that each of the MRO sites meets the mineral lands designation criteria that were in the 1997 CP and which remain applicable to new MRO designations.

8) Petitioner NRM specifically challenged the designation of the West Belleville Site.

9) The CAO provides inadequate habitat protection because of channel migrations and floodplains and is clearly erroneous by not including the full floodplain in the habitat protection area for the Belleville Site.

10) The CP and DRs are in violation of the GMA because they do not prohibit deep pit mining adjacent to type 1-3 streams; do not require restoration of the lands to be suitable for forestry or agriculture use after the mining is complete; and do not prohibit surface mining in aquifers. Although these policies were adequate under the previous MRO designation scheme, they are not adequate under the new MRO designation scheme where mining is allowed anywhere on the 23,620 acres without the designation hearing promised by the 1997 CP.

11) Because of the potential catastrophic impact to anadromous fisheries and the potential catastrophic impact to the I-5 bridge over the Samish River (both documented in the record), the designation of “known” MRO lands in Sections 13 and 18 (the Belleville Site) should be found invalid.

12) The mineral land DRs in SCC 14.16.440 apply to 23,620 acres of land in Skagit County when only 625 to 750 acres are actually required for a fifty year supply of sand and gravel. This is a fundamental flaw.

13) The 1997 CP required asphalt plants, concrete batch plants, washing, and crushing to be allowed on a site only when associated with a special use permit for extraction of long-term commercially significant minerals. This policy was modified in the current CP to allow offsite asphalt plants etc. to be located on any site in the 23,620 acres of MRO or even on Natural Resource Industrial (NRI) lands.

14) CP Policy 5D-2.5 should be found invalid for authorizing major commercial/industrial development of concrete and asphalt plants to be permanently sited on forest and agricultural lands in the MRO that are not even associated with mining operations. This policy substantially interferes with goals (5) and (8) of the Act.

15) Because there was no petition for this CP amendment submitted to the Board of County Commissioners (BOCC) by July 31, 1999, CP policy 2-9 prevented the County from adopting CP amendments to the MRO in the year 2000. The County also failed to follow several other provisions of its CP amendment process requirements.

16) The County's CP amendments relating to mineral lands should be found invalid because:

- a) The County appears to have acted in bad faith in entering an agreement with FOOSC in June 1999 that stipulated to changing the original mining ordinance to implement the 1997 CP.
- b) The process substantially interfered with the citizen participation goal of the Act.
- c) The process also substantially interfered with Goal (6) because property owners adjacent to MRO lands were not given due process by the County when it changed the meaning of its MRO designation from "potential" to "actual" mineral lands.

17) The CP designation criteria for MRO are not clear.

18) The County's SEPA analysis was inadequate for the CP amendments.

The County responded in part:

1) In 1992 and 1993, a nine-member Citizen's Advisory Committee (CAC) met to review information, data and maps, to identify MRO issues and draft policies. Using a base map provided by the Department of Natural Resources (DNR), the CAC "mapped mineral resource areas," using local knowledge, technical information from DNR geologists, mineral resource information and maps depicting known mineral resources and existing permitted sites. The resulting mineral areas map was included as an overlay to the Land

Use Designation Element Maps for the January 13, 1994, draft Environmental Impact Statement (EIS) for the Land Use Designation Element.

2) Between January and June of 1994, the County held a series of public hearings on the Draft EIS. During that time, the County also gathered information on known mineral deposits and existing mining sites, including information submitted by DNR and property owners. Based on this information, the County produced a revised map of known and potential mineral areas as part of the June 1994 Final EIS for the Land Use Element. This map became the basis of the MRO of the Natural Resource Lands (NRL) Map adopted by the County to protect NRLs.

3) The County adopted its first NRL Ordinance, No. 16287, on September 11, 1996, followed six days later by Ordinance No. 16291. That Ordinance designated NRLs, including Mineral Lands through the MRO, and amended the County Zoning Map. As part of the process for adopting Ordinance No. 16291, the Planning Commission found that potential mining operation-related impacts were more appropriately addressed and mitigated through the Hearing Examiner special use permit process “to allow potential adverse impacts to be mitigated and to address site-specific circumstances and issues.”

4) The CP mentioned three categories of Mineral Resource lands, depending on whether the minimum threshold value in the CP criteria for a particular site were potential (MRA-3), known (MRA-2) or known and permits had been issued (MRA-1). The County also adopted 14 additional criteria for designation of MRAs, primarily mirroring the Department of Community, Trade and Economic Development (DCTED) guidelines in WAC 365-190-070.

5) The Map Portfolio adopted as part of the 1997 CP included the MRO Map from Ordinance No. 16291, with the exception of certain areas where a ¼ mile separation was put in place between the mineral lands and rural residential areas, in response to an order from this Board in FOSC v. Skagit County, (No. 95-2-0075). On July 14, 1997, this Board found the County’s CP “regarding mineral lands to be in compliance with the GMA.” (No. 95-2-0075, Compliance Order).

6) Numerous petitions challenging the County’s CP were filed with this Board, consolidated under Abenroth, et al. v. Skagit County, No. 97-2-0060c. In response to these, the County agreed to a stipulation to postpone and reconsider certain issues in the case.

One was that the County remove all MRO from Rural lands or, where appropriate, redesignate the area Rural Resource-NRL with MRO. Id. The County's MRA and MRO criteria adopted in the CP were not challenged in Abenroth.

7) In 1998, the County spent a significant amount of time struggling to develop a MRO Ordinance, and described its efforts as including the following:

- March 1998, Zoning CAC rewrite of December 1997 staff-proposed MRO Ordinance (Exhibit 1, No. 99-2-0012 Index);
- The County held a public hearing on the proposal on June 22, 1998 (Exhibit 16, No. 99-2-0012 Index). Planning and Permit Center (PPC) staff urged adoption of the Ordinance (Exhibit 18, No. 99-2-0012 Index) as an interim control (Exhibit 19, No. 99-2-0012 Index);
- The version of the Ordinance put out for hearing by PPC staff was amended from the March CAC version by requiring an additional public hearing before the Hearing Examiner before property attained MRA-2 status. (Exhibit 26, No. 99-2-0012 Index);
- The County received substantial comments on the proposal (Exhibit 27, No. 99-2-0012 Index). One comment, from former PPC staff person, Pat Bunting, who staffed the Mineral CAC in the early 1990's, said the proposal was not consistent with the CP by including an additional required hearing for designation of MRA-2 properties. (Id., p. 2). Comments from Richard Langabeer and Larry Willman (Intergroup Development Corporation) were to the same effect. (Id., pp. 28-34) On the other hand, a letter from FOOSC urged that the CP criteria required additional hearings to advance from MRA-3 to MRA-2 or MRA-1. (Id., pp. 5-9) See Staff Summary of Comments (Exhibit 28, No. 99-2-0012 Index);
- On July 17, 1998, staff issued a report to the Board of County Commissioners (BOCC) summarizing the public comments, pointing out the confusion of the three categories of MRA lands under the CP designation criteria and urging changes to the draft MRO Ordinance. (Exhibit 29, No. 99-2-0012 Index);
- As a result, staff issued a new draft Ordinance and public comment period through August 7, 1998 (Exhibits 33 and 34, No. 99-2-0012 Index). Staff issued a memorandum to the public summarizing the changes. (Exhibit 36, No. 99-2-0012 Index);

- The County received substantial additional public comment. (Exhibit 38, No. 99-2-0012 Index – only selected letters included). Again, comments from Ms. Bunting, Mr. Langabeer and Mr. Willman criticized the additional hearing requirement relating to the change from MRA-3 to MRA-2. (Id., letters included);
- The BOCC considered the proposed Ordinance in open session on August 11, 1998 (Exhibit 40, No. 99-2-0012 Index). The BOCC questioned why project areas that already had mineral permits or activities on site should have to go through a hearing to move from MRA-3 to MRA-2. Id. The BOCC suggested that staff contact industry representatives for suggested revised language. Id.
- Staff then solicited more comments to the July 30 draft, specifically focused on the MRA classification (Exhibit 42, No. 99-2-0012 Index);
- Public comments were received (Exhibit 43, No. 99-2-0012 Index, selected letters included). Again, letters from Ms. Bunting, Mr. Langabeer and Mr. Willman reflect frustration with the additional step for a hearing to the MRA-2 classification, while a letter from FOOSC advocated the additional hearing step. (Id., letters included);
- PPC staff met with interested parties (“Ad Hoc Mineral Advisory Committee”) on August 31, 1998 (Exhibit 44, No. 99-2-0012 Index);
- Additional correspondence again followed that meeting (Exhibit 45, No. 99-2-0012 Index, only selected letters included). The letter from Mr. Willman again criticized the additional hearing requirement to move from MRA-3 to MRA-2. Id.
- PPC staff then proposed another draft ordinance which it again circulated for comments. (Exhibit 47, No. 99-2-0012 Index)
- On October 14, 1998, PPC staff issued a 13-page Staff Report to the BOCC summarizing the issues and problems it had had in developing a proposed Ordinance (Exhibit 48, No. 99-2-0012 Index). Those problems stemmed principally from differences of opinion as to whether the MRA designation process had already occurred prior to adoption of the CP or whether it was to happen in subsequent hearings in connection with the MRO Ordinance. Id.

Staff chose an approach which did not require additional hearings to classify lands as MRA-2. *Id.* The staff proposal was to adopt an interim ordinance allowing MRO permits to go forward on existing MRA-designated lands on the CP Map without a retroactive analysis of whether those mapped MRAs met all classification criteria in the CP. **The staff proposal further recommended that the CP be amended to clarify the MRO policies** *Id.*, p. 10.

- On November 17, 1998, the County adopted Interim Ordinance No. 17210 its first MRO Ordinance (Exhibit 57, No. 99-2-0012 Index).
- After conducting additional hearings, the County adopted a permanent MRO through Ordinance No. 17313 (Exhibit 90, No. 99-2-0012 Index) on February 9, 1999.

8) FOSC appealed Ordinance No. 17313 to this Board in the 99-2-0012 case. In its Petition for Review in Case No. 99-2-0012, FOSC alleged that the Ordinance was inconsistent with the designation process in the CP. Of the five issues framed by FOSC in its petition, four alleged inconsistency between the Ordinance and the CP, and the fifth sought invalidity. Eight Stipulated Orders extending the time for a decision have been filed in that case, pursuant to RCW 36.70A.300(2)(b)(ii).

9) In order to resolve these alleged inconsistencies, and consistent with the October 14, 1998, Staff Report referenced above, as part of its Fall 1999 Package, the County proposed amendments to its CP regarding its Mineral Lands and proposed a new MRO Ordinance. The proposed revisions to the CP mineral policies were explained in the November 8, 1999, Staff Report as follows:

The proposed revisions to the mineral lands policies of the Comprehensive Plan are consistent with the requirements and guidance of the GMA. Nothing in the Act or the regulations and agency guidance requires a three-tiered designation process. The County has chosen to take a broad and protective approach to designation of mineral lands by starting with all potential lands where mineral resources are believed to be present. From that start, the County then adjusted the mineral lands designations where it determined existing land uses or environmental constraints would result in unmitigatable conflicts with mining operations. Otherwise, the County has chosen to reduce the development potential within $\frac{1}{4}$ mile of all of these mineral resource lands to minimize or eliminate potential future conflicts. While the result may be an amount of mineral resource lands in excess of the quantities that will be consumed within

the next 20 or even 50 years, such a result is not inconsistent with the GMA mandate to protect all resource lands of long-term commercial significance.

Only minor changes were proposed to the MRO Ordinance. The proposed amendments to the CP were released to the public in early November, 1999. Following a public hearing and receipt of public comment in December of 1999, the Planning Commission deliberated in early 2000. Then it released revised versions of the CP amendments and proposed UDC for public comment.

10) Following receipt of additional public comment the Planning Commission adopted a Recorded Motion recommending adoption of the amendments to the CP policies and the new mining ordinance (SCC 14.16.440). Those findings summarize the reasons for the CP policy revisions:

69. These proposed Comprehensive Plan Amendments contain revisions to the Mineral Lands policies from the 1997 Comprehensive Plan. These amendments are intended to address some lack of clarity or confusion that has arisen over interpretation of the 1997 policies and the intent and process for designation of mineral lands that was addressed in those policies. In particular, questions have arisen over the basis of the original mineral lands designations and whether owners of lands so designated are entitled to pursue mining permits, or whether they first require an additional step of classification or designation of the lands before being eligible for mining permits. Although the policies for designation in the Comprehensive Plan were drafted in the context of future additional designations, due to the nature of the confusion, changes to these policies are appropriate.

70. Based on reconsideration of the Comprehensive Plan mineral resource policies, and through a re-analysis of the record, the currently designated MRO fulfills its purpose to protect and conserve mineral lands of long-term commercial significance. In spite of varying interpretations and even confusion over existing Comprehensive Plan policies, GMA guidelines to classify and conserve mineral resource lands are applied appropriately. All lands with the mineral resource overlay designation will be protected on an equal footing. If future evidence demonstrates that they do not have the potential for long-term commercial significance, MRO designated lands can be removed from that designation.

71. Rather than simply designating sites with existing operations and permits, all lands that provide mineral resource potential are designated, and therefore, are protected. Information on presence and value of the resource, as well as potential conflicting land uses, were considered in making this designation. These designations adequately protect mineral areas of long-term commercial significance and protect the health, safety, and property interests of the public.

72. Adjacent land uses are designated to be of sufficient minor intensity so as not to raise conflicts with future mining operations. This is achieved by imposing land use densities of 1 dwelling unit per 10 acres, or less within $\frac{1}{4}$ mile of the designated mineral resource lands. Mining is the preferred use in these areas, and the potential to reduce land-use conflicts has been reduced to the greatest extent possible.

73. Mining operation-related impacts are appropriately addressed and mitigated through the hearing examiner special-use permit process to allow potential adverse impacts to be mitigated and to address site-specific circumstances and issues. Contrary to some confusion expressed in the public comments, this special use permit process provides for public notice, comment and a public hearing on all potential impact issues. There is no need for additional layers of public hearing requirements beyond those established in the code.

74. The County's approach is consistent with the GMA mandate to protect all resource lands of long-term commercial significance, even if the protected resources exceed the quantities that will likely be consumed within the next 20 or even 50 years. The Planning Commission does not find any direction in GMA that would limit the County to designate only mineral resources sufficient for a 20, 30 or even 50-year demand. In fact, since mineral resources are not a renewable resource (you cannot grow more rock), the Planning Commission finds it better provides for very long-term resource production to identify today all areas of potential production and to impose appropriate density restrictions adjacent to all of these areas to avoid the need for future downzones or future land use conflicts.

11) The Board of County Commissioners adopted these MRO CP policy amendments and new MRO Ordinance as part of Ordinance No. 17938. With the exception of one change to CP Policy 5D-2.4, the CP amendments related to the MRO adopted as part of Ordinance

No. 17938 are identical to those which went out for public comment in November of 1999. The MRO Ordinance adopted as part of Ordinance No. 17938 also is nearly identical to the version which went to public hearing in November of 1999.

12) Under the County's MRO (SCC 14.16.440), strict standards and requirements have been established for new development on MRO-designated lands. Many of the concerns raised by NRM in its Brief are addressed by the strict criteria for site-specific mineral operations permits in the Ordinance, which will have to be satisfied by applicants seeking mineral-related permits under that Ordinance. SCC 14.16.440(8). Strict standards for approval of applications are established. SCC 14.16.440(9) Operating standards or requirements have been established relating to site area and width, buffers, maximum noise levels, blasting, vertical limitations and aquifer protection, surface water protection, benches and terraces, reclamation and hours of operation. [SCC 14.16.440(10)]

13) There is nothing in GMA that mandates a three-tier process for designating mineral lands. So the County's elimination of the prior three-step system in its CP is not a violation of GMA.

14) Petitioners' charge that the County's designation of 23,620 acres of Mineral lands violates CPP 1.1 and the CP, is based on a misreading of GMA, the CPPs and the CP. There is no limitation in GMA, the CPPs or the CP on how many acres of MRO may be designated. Since Mineral NRLs are a nonrenewable resource, they must be designated in order to assure preservation.

15) NRM's concern about a conflict between mining activities and adjacent properties has already been addressed through the ¼ mile buffer ordered by this Board in No. 95-2-0075 and established through the CP.

16) It makes much better long-term GMA sense to designate all mineral lands and to downzone around those lands now to avoid conflict, rather than to limit the designations (and associated surrounding downzones) to only a 50-year total supply. Limiting MRO designations to a 50-year supply now would allow areas adjacent to those areas which now have MRO designations, but which would lose the MRO designations, to develop in the interim, inconsistent with future mining activity, and would pretty much guarantee greater land use conflicts in the future when additional mineral lands are needed.

17) Designating the land as MRO does not mean that the land will have C/I use. The MRO is a land use classification that overlays other NRL classifications, such as Rural Resource-

NRL and Secondary Forest-NRL

18) Wildlife Habitat Conservation Areas (HCA) challenges should be rejected because the County did not change its regulations relating to HCAs in Ordinance #17938. These HCAs and stream buffers were approved by this Board in Case #96-2-0025c.

19) Since the Channel Migration Zone includes the entire lower Skagit River Valley, if the County carried out Petitioners' demand, the agricultural industry would be grievously impacted. GMA does not require such action.

20) The County's riparian buffer on the Belleville Pit site is established in its CAO at SCC 14.24.530(2). That Ordinance establishes buffers for Type 1, 2 and 3 streams, and additionally contains provisions for increasing buffer widths [SCC 14.24.530(2)(a)] based on a case-by-case basis. These CAO protections are incorporated as part of the MRO Ordinance and must be considered by the County when considering a mining permit under SCC 14.16.440.

21) Petitioners are asking this Board to regulate operations on the Belleville Pit site. That is not this Board's job.

22) Petitioners assert, without citing any authority from GMA, that the County's MRO Ordinance is out of compliance with GMA because it does not prohibit deep pit mining. If NRM believes that deep pit mining on the Belleville Pit site should not be allowed due to its proximity to the Samish River, it should present those arguments and evidence at the appropriate time through the permit application process, and not seek this Board's condemnation of an ordinance of general applicability throughout the County.

23) CP MRO Policy 5D-2.5 (p. 5-24) states:

Activities associated with mineral extraction operations are those activities that further develop the base product of the mineral being extracted. Examples of these activities include washing, crushing, asphalt plants, and concrete batch plants. Associated activities shall be allowed as a hearing examiner special use within the Mineral Resource Overlay or in areas designated Natural Resource Industrial – NRI. Those associated activities must meet the necessary requirements of the Special Use Permit specific to those areas and must be listed in the Permitted Uses of those Districts.

This Policy specifically authorizes asphalt plants and concrete batch plants that are "associated with mineral extraction operations" as special uses "in areas designated" NRI. Under SCC 14.16.440(7)(b)(ii), these associated activities are only allowed on-site, after

obtaining a special use permit. The County has not allowed them anywhere on 26,620 acres of NRL lands, as contended by NRM.

24) The County has not violated its CP Amendment process.

25) The Settlement Agreement with FOOSC was terminated on April 7, 2000. The County was then forced to amend its CP. Further, this was a commitment to be in effect while the No. 99-2-0012 appeal was on hold, and was not a commitment by the County to any ultimate or permanent solution. Section 1.7 of the Settlement Agreement specifically noted that any interim actions taken by the County to comply with the Settlement Agreement did not guarantee any eventual result.

26) Further, the lengthy public review process undergone in 1998 prior to the adoption of Ordinance No. 17210, and later No. 17313, showed that there was substantial disagreement among various folks as to exactly what type of review process in the MRO Ordinance was required by the three categories of MRA lands in the policies in the 1997 CP. In fact, Pat Bunting, a former County employee with the Planning and Permit Center, who was the staff liaison to the Mineral CAC, specifically disagreed with FOOSC that the CP required a MRA designation hearing as part of a MRO ordinance. Intervenor Intergroup Development Corporation's arguments in this case demonstrate additional disagreement with NRM and FOOSC over exactly what the 1997 CP required as far as a MRO Ordinance. Due to these conflicting views, the County amended the Mineral Policies of the CP in order to clarify them, and then adopted development regulations consistent with the new MRO CP policies. GMA does not prohibit doing that. In fact, that procedure was done in order to comply with GMA's requirements in RCW 36.70A.040(3)(d) that development regulations be consistent with CP policies.

27) RCW 36.70A.130(2)(b) recognizes an exception from the one-year batching requirements for CP amendments that are in response to Hearings Board orders. Here, the County's amendment of its CP MRO policies are partially in response to the No. 99-2-0012 appeal (and the eight Orders Extending Time in that case), and in an effort to make its CP MRO policies and MRO Ordinance consistent. The County should not be found out of compliance with GMA for precisely following the language of the GMA regulations. Under the facts of this case, the Board should find that the CP amendment procedures in Chapter 2 of the CP do not apply to the County's MRO amendments.

28) The mineral designation criteria are clear. These criteria [with the exception of (n)] are

taken from WAC 365-190-070(2)(d), the classification criteria issued by DCTED for Mineral Lands. Counties are directed to use these guidelines in designating their Mineral lands. RCW 36.70A.050(3).

29) The County did not violate SEPA in its analysis for the MRO. The County's mineral resource policies are within the range of alternatives first proposed and analyzed in the January, 1994 Draft EIS. The 1995 addendum to the FEIS stated:

“To determine the location of mineral resource lands of long-term commercial significance, the County applied the criteria in the State Department of Community Development's (DCD) ‘Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands and Critical Areas’” contained in WAC 365-190-070. (*Id.*, Addendum, p. 27, emphasis added). The County provided other statements from SEPA addendum in 1995, 1996, and 1999 to show that those documents never contemplated that mining would occur on lands that fell into one particular category.

30) NRM claims that the County designated a “‘known’ MRO where mining permits ‘shall be granted.’” This sums up NRM's misunderstanding of the County's amended policies. The MRO is NOT an area where permits “shall be granted,” as NRM asserts. NRM is quoting the County's mining regulations out of context. SCC 14.16.440(9)(a) states, in part, that the “permit shall be granted if the impacts are mitigatable” (emphasis added). The County's SEPA analysis did not contemplate that mining would be allowed as an outright permitted use, as NRM seems to suggest. Within the MRO, mining is allowed only by special-use permit pursuant to the provisions of SCC 14.16.440, the CAO and all other applicable standards. The County has not allowed permits on 23,620 acres.

31) NRM claims that concrete and asphalt plants may “pop up anywhere” and that, somehow, there will be an “excess of facilities...allowed to clutter the environment which is likely to lead to economic failures and facility abandonment.” However, NRM cites nothing in the record and provides no factual data to support these speculative assertions. It is the County's obligation under GMA to maintain, enhance and conserve mineral resource lands. RCW 36.70A.020(8); .060(1). It is not the County's obligation to engage in speculative market analyses of how many mining operations might be profitable in Skagit County before adopting regulations on that subject matter. The County's choice in its CP amendments and development regulations on MRO areas was within the range of alternatives discussed in earlier SEPA documents. Petitioners have not carried their burden to show otherwise.

32) Petitioner have failed to meet their burden of showing noncompliance, let alone invalidity.

Intervenor Intergroup Development Corporation echoed many of the County's responses and added:

- 1) NRM's "actual vs. potential" argument is not relevant since, pursuant to the GMA and CTED guidelines (WAC 365-190-070), the County designated both actual and potential mineral resource areas to ensure that areas of long-term commercial significance would be protected. Neither GMA nor CTED requires counties to distinguish between potential and actual mineral resource lands in their CPs.
- 2) WAC 365-190-070(2)(c) states:
"Counties and cities should consider classifying known and potential mineral deposits so that access to mineral resources of long-term commercial significance is not knowingly precluded."

RCW 36.70A.070(2)(d) lists 13 criteria that are to be considered in making these designations. The County used the CTED criteria to classify known and potential mineral resource lands as MRO. The County's 1996 EIS Addendum addressed each of these criteria for the mineral resource areas and discussed how mineral resource areas fulfilled these criteria. These criteria were established by CTED to guide counties in designating lands throughout the County; they were never meant to be used as a basis to deny individual permits.

- 3) The County chose to designate and protect all lands with the potential for mineral resource extraction, not just a limited supply for 20 or 50 years. This Board in *Achen v. Clark County 95-2-0067* noted that it is unlikely for a county to overly designate resource lands. Petitioners, however, imply that the County must take a much more restrictive approach in protecting mineral lands. This is contrary to both long-range planning and practical sense. Surely, Petitioners would not argue that protections of natural forest or agricultural land should be limited
3) to a 50-year supply. To take such a limited view of natural resource protection would be to ensure land use conflicts in fifty years.
- 4) As this Board has noted, mineral resource protection ordinances are "...not intended to protect development from the resource, but are designed to protect the resource from

the incompatible encroachment.” *Achen*. Petitioners consistently argued the opposite; namely that the County’s regulations should protect the neighboring short plat as opposed to the long-term viability of the natural resource. The County’s DRs ensure that the public will have the opportunity to comment on the impacts of any proposed mining operation through the required special use permit process. In fact, all of the issues raised by NRM regarding the Belleville site will be addressed in the full scope EIS that is currently being prepared for Belleville’s special use permit and amended DNR reclamation plan.

5) NRM would have the County only designate mineral resource areas that are distant from both the market and any platted area. Both CTED and the County, however, recognize that mineral resource areas must be in proximity to the market to be served.

6) NRM consistently ignored the Belleville site’s status as a vested mining site and that it existed as a mining site prior to the adjacent property being developed as a short plat. The only short platted lots within one quarter mile of the Belleville site were platted in 1993 and 1995, which was after the site was permitted by DNR.

7) From the inception of the process of designating mineral resource areas in the County, the Belleville site was recognized as a permitted site as an actual mineral resource area. As the permit indicates, this site has always been considered for long-term commercial viability.

8) Petitioners consistently argued that mineral lands warrant less protection than other natural resource areas. GMA requires protection of all natural resource lands, including mineral resource areas, and it does not create a hierarchy for protection of natural resource areas.

9) NRM’s argument that higher density development should be protected at the cost of losing mineral resource areas makes a mockery of the GMA and the County’s legislative process.

10) NRL designation required by the GMA must be a legislative process; not a hearings examiner process demanded by Petitioners.

11) The legend on the 1994 MRO map (Ex. 13) says designated permitted areas not potential lands for designation.

Board Discussion and Conclusion

RCW 36.70A.170 states:

“RCW 36.70A.170 Natural resource lands and critical areas –Designations.

(1) On or before September 1, 1991, each county, and each city, shall designate where appropriate:

- (a) Agricultural lands that are not already characterized by urban growth and that have long-term significance for the commercial production of food or other agricultural products;
- (b) Forest lands that are not already characterized by urban growth and that have long-term significance for commercial production of timber;
- (c) Mineral resource lands that are not already characterized by urban growth and that have long-term significance for the extraction of minerals; and
- (d) Critical areas.

(2) In making the designations required by this section, counties and cities shall consider the guidelines established pursuant to RCW 36.70A.050.”

Many of the Petitioners’ arguments seem to be depend on an interpretation of the Act that it requires a different standard for designation of mineral lands than for other NRL lands. In previous cases before us, FOSC fought to require all property that might qualify for agriculture or forest NRL designation to be so designated whether or not property owners wanted that designation. In the case now before us, NRM and FOSC claim that in order to comply with the Act, the County must put mineral landowners through an additional process before a hearings examiner to qualify for NRL designation, even if mining is a permitted current use on that property. We find not such difference of importance or priority among NRL lands in the Act.

Petitioners also claimed that the County should be required to select no more than a 50-year supply of mineral lands for designation. GMA and CTED guidelines, WAC 365-190-170, encourage counties to designate both actual and potential mineral resource areas to ensure that areas of long-term commercial significance will be protected. Neither the Act nor the guidelines requires a three-tier approach, nor do they require the designation criteria to exclude lands in excess of a 50-year mineral supply. **The County’s conservative approach of designating more than a 50-year supply of mineral resource lands complies with the Act.**

The County’s November 8, 1999 Addendum (Ex. 158) fully explains why the County clarified its MRL designation policy and map in the CP. The Addendum stated in part:

“These proposed Comprehensive Plan Amendments contain revisions to the Mineral Lands

policies from the 1997 Comprehensive Plan. These amendments are intended to address some lack of clarity or confusion that has arisen over interpretation of the 1997 policies and the intent and process for designation of mineral lands that was addressed in those policies. In particular, questions have arisen over the basis of the original mineral lands designations and whether owners of lands so designated are entitled to pursue mining permits, or whether they first require an additional step of classification or designation of the lands before being eligible for mining permits. Although the policies for designation in the Comprehensive Plan were drafted in the context of future additional designations, due to the nature of the confusion, staff is recommending changes to these policies.

By way of background, the Growth Management Act mandates protection of natural resource lands, including mineral lands, of long-term commercial significance. To address this mandate, Skagit County took a very broad approach to its designation and protection of mineral resource lands. Rather than simply designating sites with existing operations and permits, the County chose to evaluate and designate as Mineral Resource Overlay, all lands with the potential for mineral resource extraction. The County chose to designate, and therefore protect, all lands that provide mineral resource potential, not just a limited supply for 20 or even 50 years. As summarized in this SEPA addendum, the County reviewed available information on presence and value of the resource, as well as considered potential conflicting land use issues in making this designation. In some cases, this information included specific geotechnical evaluation of sites or specific, existing mining operations permits. In other cases, this information was the more general DNR mapping and more anecdotal information from property owners and informed participants. To fulfill its obligations to protect mineral resource lands, the County opted to designate and map lands with potential commercial mineral resources, based on the level of information available, with the expectation that the market would prove (or disprove) this designation with detailed, site-specific geotechnical information as a later stage, when the mining operating permit was sought. This approach of including potential mineral resource lands is encouraged in the GMA regulations and in the DNR publications that guided mineral lands designation.

Then, with this board mineral lands overlay designation, the County made sure that adjacent land uses were of sufficiently minor intensity not to raise conflicts with future mining operations by imposing land use densities of 1 dwelling unit per ten acres or less within ¼ mile of the designated mineral resource lands.

In response to the challenges and confusion that arose after the adoption of the 1997 Comprehensive Plan policies regarding mineral lands, the County has reevaluated its record and its approach to mineral lands designation. Based on a reconsideration of Comprehensive Plan mineral resource policies, and through a reanalysis of the record, the County determines that the currently designated Mineral Resource Overlay fulfills its

purpose to protect and conserve mineral lands of long-term commercial significance. Further, the County determines that, in spite of varying interpretations and even confusion over existing Comprehensive Plan policies, GMA guidelines to classify and conserve mineral resource lands were applied appropriately. The County further finds that the MRA 1, 2, and 3 designation discussions in the 1997 Comprehensive Plan are not required by GMA and only serve to confuse the expectations of property owners as to which of the mineral resource overlay sites are actually intended to be preserved and protected by the County. As a result, the County is now proposing to eliminate this three-tiered designation and instead to choose to protect with equal footing, all lands with the mineral resource overlay designation. The policies also contain a description of how currently-designated MRO lands can be removed from designation, if future evidence demonstrates that they do not have the potential for long-term commercial significance.

Through consideration of the above, and through several factors outlined below, the County also determines the currently adopted Mineral Resource Overlay to be an area where mining is a preferred use – there the potential for minerals of long-term commercial significance is highest, and the potential for land use conflicts has been reduced to the greatest extent possible.

a) General Proposal

The proposed revisions accomplish the following:

- i) Discontinue use of a hierarchical framework (MRA 1, 2 and 3) for the designation of mineral lands.
- ii) Amend the Comprehensive Plan by moving and combining policies relating to the designation of mineral lands from the Natural Resource Conservation Element into and with the Land Use Element.
- iii) Essentially readopt the existing implementing development regulations.
- iv) Readopt the existing Mineral Resource Overlay in the Official Skagit County Comprehensive Plan/Zoning Map.”

The County has the right to clarify or change its MRL designation policy as long as the amended policy complies with the Act.

Petitioners were incorrect when they claimed that there was no evidence in the record that properties in the MRO were previously designated as MRA 1 or 2. The evidence in the record was conflicting. It was obvious that there was a major misunderstanding as to what work the Citizen Advisory Committee (CAC) had done several years earlier in developing recommendations for the original MRO designations. Ex. 29 (from Case 99-2-0012) indicated that FOSC and current County staff at that point thought that the previous CAC work that could

be found was not sufficient to determine the marketability and minimum threshold value for the areas previously “designated.” Current staff therefore recommend that all be labeled MRA-3 and be required to go through an additional hearings examiner process to be designated MRA 1 or 2 (known).

However, correspondence in the record relating to the June 1998 draft of SCC 14.04.126 (Ex. 27 from Case 99-2-0012) shows that some members of the CAC, owners of designated property, and the County person who staffed the CAC believed they had gone through a two year process to classify and designate MRA 1 and 2 lands, not merely to recommend MRA-3 (potential) sites. They further believed that the established criteria in the CP were for further designations in the future.

The June 24, 1998, letter from Patricia Bunting to the BOCC stated in part:

“This written testimony is provided in timely response to the comment period associated with the June 22, 1998 public hearing on the Mineral Resource Overlay Ordinance. I wish to expand upon my oral testimony. My testimony is provided in part, because of my history of involvement as Skagit County staff representative with the Mineral Resource Citizen Advisory Committee. My experience with the Citizen Advisory Committee suggests that it was a well balanced group which represented the broad interests of Skagit County’s citizenry....

- 1) The Comprehensive Plan adopted Mineral Resource Areas (MRA-1, 2 and 3) and defines categories for those areas. The Comprehensive Plan Map (Map 1) depicts permitted sites (crossed shovels) which had requested designation through the development of the Comprehensive Plan. These sites as depicted on the map are MRA-1 and MRA-2 sites. The proposed Mineral Resource Overlay District, as drafted, is inconsistent with the policy guidance and map of the Comp. Plan in that it fails to clearly reflect the existing status of MRA-1 and MRA-2 designations. The level or degree of regulatory consideration afforded existing operations should be clarified.
- 2) The intent of the MRA-3 category was to address future mining sites without existing permits.”

These mineral lands were supposed to have been designated eight years ago. We would not have previously found the County in compliance if we had understood that these lands were not really designated but rather might someday be designated if they did not interfere with new housing projects and met additional standards not required by the CTED WAC or GMA.

It is unfortunate that FOSC was misled into believing that the County was committed to adopting FOSC's preferred implementation of the three-tiered process. However, the County had the right to clarify the Ordinance the way it did, as long as the amended policies comply with the Act.

We are also not persuaded by Petitioners' charge that the County should be required to go through the MRO CP amendment process again because the County allegedly did not follow its own CP amendment process requirements. The County worked on the changes to the MRO for two years with many public meetings and considerable public input. The record is clear that there was much confusion and disagreement over what the original MRO CP policies meant. The CP and UDC needed to be remedied to remove the confusion and ensure consistency. Some of the County's actions were made in response to a Board order in Case #99-2-0012. RCW 36.70A.130(2)(b) provides an exception to the annual CP amendment requirements if the County provides appropriate public participation and the amendment is taken to resolve an appeal of a CP filed with a Growth Management Hearings Board. Although some of the action was not in response to a previous FDO, we believe nothing would be gained by requiring the County to do its process over again.

As to the challenge to asphalt plants and concrete batch plants, SCC 14.64.440(7)(b)(ii) allows these uses in NRL lands only on-site as an associated use after obtaining a special use permit. These uses may be stand alone only in the Natural Resource Industrial (NRI) lands. **This provision complies with the Act.**

Petitioners have also failed to meet their burden of showing the County was clearly erroneous as to their critical areas, Belleville site, deep pit mining, and SEPA challenges.

We find the County's amendments to its MRO in the CP to be in compliance with the Act.

Findings of Fact pursuant to RCW 36.70A.270(6) are adopted and attached as Appendix I and incorporated herein by reference.

This is a Final Order under RCW 36.70A.300(5) for purposes of appeal.

Pursuant to WAC 242-02-832(1), a motion for reconsideration may be filed within ten days of issuance of this final decision.

So ORDERED this 6th day of February, 2001.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Nan A. Henriksen
Board Member

William H. Nielsen
Board Member

APPENDIX I

Findings of Fact pursuant to RCW 36.70A.270(6)

1. GMA and CTED guidelines, WAC 365-190-170, encourage counties to designate both actual and potential mineral resource areas to ensure that areas of long-term commercial significance will be protected. They do not prohibit designation of more than a 50-year supply.
2. Neither the GMA nor WAC 365-190-170 requires a three-tier approach to designation.
3. The County's November 8, 1999, Addendum (Ex. 158) fully explained why the County needed to clarify its MRA designation policy and map in the CP.
4. Correspondence in the record showed that some members of the mineral resource CAC, owners of designated property, and the County staff representative to the CAC believe they had gone through a two-year process to classify and designate MRA 1 and 2 lands (known) not merely to recommend MRA 3 (potential) sites. They further believed that the

established criteria in the CP were for further designations in the future.

5. The record clearly shows there was much confusion and disagreement over what the original MRO CP policies meant. The CP and UDC needed to be remedied to remove the confusion and ensure consistency.
6. The County's action on its MRO was partially in response to a Board order in Case #99-2-0012.
7. SCC 14.64.440(7)(b)(ii) allows asphalt plants and concrete batch plants in NRL lands only on-site as an associated use after obtaining a special use permit.