

**+BEFORE THE WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD**

HOOD CANAL, OLYMPIC ENVIRONMENTAL
COUNCIL, JEFFERSON COUNTY GREEN PARTY,
PEOPLE FOR A LIVEABLE COMMUNITY, KITSAP
AUDUBON SOCIETY, HOOD CANAL
ENVIRONMENTAL COUNCIL and PEOPLE FOR PUGET
SOUND

Petitioners,

v.

JEFFERSON COUNTY

Respondent.

Case No. 03-2-0006

**FINAL DECISION
AND ORDER**

The Shine Pit gravel quarry is located west of the Hood Canal Bridge and south of State Route 104 in Jefferson County. In 1997, the County designated the region surrounding the Shine Pit as Commercial Forest, a natural resource lands designation. This designation is used primarily for the purpose of protecting commercial forest lands from encroaching inconsistent uses but it also includes mineral excavation as a permitted use. However, under the Commercial Forest designation, mineral excavation sites are limited to ten acres in size.

The Shine Pit is 144 acres in size and is operating lawfully as a non-conforming use in the Commercial Forest designation. However, the Shine Pit is reaching the end of its useful life in terms of extraction of mineral resources and the Fred Hill Materials Corporation would like to expand their operations into other parts of the Commercial Forest designation. In April of 2002, the Fred Hill Materials Corporation submitted an application to the County to designate 6,240 acres in the Commercial Forest zone with a Mineral Resource Lands Overlay. The Mineral Resource Lands Overlay is a land use designation to establish a mineral resource lands designation and increase the size of the area which may be excavated for mineral extraction.

Fred Hill Materials proposed an amendment to the county's comprehensive plan which would create this 6,240-acre mineral resource lands overlay. In its proposal, Fred Hill Materials explained that it

hoped to expand its operations and may include a “pit-to-pier” project in the future that would allow the company to transport its materials directly from the pit to a pier loading facility on Hood Canal for delivery to other markets. The size of the proposed overlay was eventually reduced to 690 acres.

Opposition to the proposed mineral resource overlay was vocal. The County analyzed the impacts of this proposal along with the other 2002 amendments to its comprehensive plan in a supplemental environmental impact statement (SEIS). After public hearings, the Board of county commissioners approved the mineral resource overlay designation with specified conditions.

This case challenges the adequacy of the county’s supplemental environmental impact statement, alleges inconsistencies between the comprehensive plan amendment and the county’s own planning policies and regulations, and asserts that the County’s adoption of the comprehensive plan amendment is not in compliance with various provisions of the Growth Management Act (GMA), Ch. 36.70A. RCW.

I. PROCEDURAL HISTORY

On December 13, 2002, the Jefferson County Board of County Commissioners adopted Ordinance No. 14.1213-02, amending the comprehensive plan to designate a mineral resource overlay requested by Fred Hill Materials, Inc. The ordinance was published on December 25, 2002.

Petitioners filed a petition for review with this Board on February 21, 2003. Fred Hill Materials, Inc. moved to intervene on March 13, 2003 and was granted intervention on March 27, 2003. A prehearing conference was held telephonically on March 18, 2003 and a prehearing order was entered March 27, 2003, setting, among other things, the issues for review in this case.

The Intervenor and the County filed motions to dismiss issues on April 11, 2003 and a motions hearing was held telephonically on April 29, 2003. The Board denied the motions to dismiss and ordered that all issues be heard at the hearing on the merits on June 24, 2003. Order on Motions, May 19, 2003.

The hearing on the merits was held on June 24, 2003 in the City Council Chambers in Port Townsend, Washington. Petitioners were represented by attorneys Michael Gendler and Melissa Arias. The County was represented by Deputy Prosecutor David Alvarez. The Intervenor was represented by attorney James Tracey. All three Board members were in attendance.

II. ISSUES PRESENTED

Petitioners challenge Ordinance No. 14.1213-02 and Amendment MLA 02-235, designating a Mineral Resource overlay, as follows:

Issue 1: Is Jefferson County's SEPA analysis inadequate for this Comprehensive Plan amendment because the County's EIS failed to evaluate a "no action alternative" as required by RCW 43.21C.030(2)(c)(3), WAC 197-11-440(5)(b)(ii), and WAC 197-11-440(5)(c)(v)?

Issue 2: Is Jefferson County's SEPA analysis inadequate for this Comprehensive Plan amendment because the County's EIS failed to evaluate reasonable alternatives, including alternatives that can "feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation" as required by WAC 197-11-440(5)(b)? This issue includes Issue 4.3 from the Petition for Review.

Issue 3: Is Jefferson County's SEPA analysis inadequate for this Comprehensive Plan amendment because the mitigation was not evaluated with respect to its effectiveness, fails to mitigate the environmental impacts of Amendment MLA 02-235, and purports to mitigate impacts of measures and facilities the applicant intends to construct through a future application?

Issue 4: Is Jefferson County's SEPA analysis inadequate and unlawful because the County's EIS failed to study and describe the adverse environmental impacts of the proposal with respect to impacts on the built and natural environment, including impacts on residential communities, noise pollution, light and glare pollution, water pollution, traffic, marine traffic, residential and rural community character, conflicts between mineral resource development and residential and rural communities, and the history of other mineral resource use including the impacts of similar activities?

Issue 5: Did Jefferson County violate SEPA by: excluding Fred Hill Materials' "pit•to•pier" project from its environmental review and deliberations; discouraging the public and Petitioners from addressing the "pit-to-pier" component of Fred Hill Materials' project in the public comments and testimony; failing to discuss the impacts of "pit•to•pier" and alternatives; and then conditioning the amendment with "pit-to-pier" specific mitigation that had not been studied, evaluated, or subjected to public comment and testimony?

Issue 6: Is Jefferson County’s SEPA analysis inadequate and unlawful because the County’s EIS failed to study and describe the adverse environmental impacts of the change in designation with respect to impacts on ground and surface water quality and quantity, marine water quality, and shoreline habitat?

Issue 7: Does Jefferson County Ordinance No. 14-1213-02 violate RCW 36.70A.020(9) and .060(2) because Amendment MLA 02-235 fails to conserve fish and wildlife habitat?

Issue 8: Does Jefferson County Ordinance No. 14-1213-02 violate RCW 36.70A.020(10) because Amendment MLA 02-235 fails to protect the environment and enhance the State’s quality of life including air and water quality and the availability of water?

Issue 9: Does Jefferson County Ordinance No. 14-1213-02 violate WAC 365-195-300 and the County’s Comprehensive Plan, Chapter 4, Natural Resource Conservation Element, p. 4-6, because it designates mineral resource lands without adequately considering the fifty-year construction aggregate demand within the County as required by the Plan?

Issue 10: Does Jefferson County Ordinance No. 14-1213-02 violate the Jefferson County Comprehensive Plan objectives, Chapter 4, Natural Resource Conservation Element p. 4-6, because it fails to identify the “three key issues” that need to be addressed prior to designation or conservation of mineral lands: (1) classifying types of mineral resources that are potentially significant in Jefferson County; (2) defining the amount and long-term significance of aggregate that is needed to meet the demand of Jefferson County’s projected population; and, (3) determining how to balance a variety of land uses within mineral resource areas?

Issue 11: Does Jefferson County Ordinance No. 14-1213-02 violate Jefferson County Comprehensive Plan Natural Resource Policy 2.1 because it fails to explain how the proposed mineral resource overlay will advance or harm the policy to “regulate resource-based economic activities so as to mitigate adverse impacts to the environment and adjacent properties?”

Issue 12: Does Jefferson County Ordinance No. 14-1213-02 violate Jefferson County Comprehensive Plan Natural Resource Policy 2.3 because it fails to explain how the proposed mineral resource overlay will advance or harm the policy to “protect the environment from cumulative adverse impacts resulting from resource management practices?”

Issue 13: Is Jefferson County’s adoption of MLA 02-235 inconsistent with the Unified Development Code, Chapter 9, Comprehensive Plan and GMA Implementing Regulation Process, 9.8.b.(1) and (2), because circumstances related to the proposed amendment and the area in which it is located have substantially changed since the adoption of the Plan?

Issue 14: Is Jefferson County’s adoption of MLA 02-235 inconsistent with the Unified Development Code, Chapter 9 Comprehensive Plan and GMA Implementing Regulation Process, 9.8.1.b.(3), because the proposed amendment does not reflect current widely held values of the residents of Jefferson County?

Issue 15: Did Jefferson County violate RCW 36.70A.140 by failing to provide “early and continuous” public participation?

III. BURDEN OF PROOF

Petitioners challenge the approval of Amendment MLA 02-2335, a comprehensive plan amendment designating a mineral resource overlay in Jefferson County. Petition for Review. Comprehensive plan amendments are presumed valid upon adoption. RCW 36.70A.320(1). The Board “shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of this chapter.” RCW 36.70A.320(3).

In order to find the County’s action clearly erroneous, the Board must be “left with the firm and definite conviction that a mistake has been made.” *Department of Ecology v. Public Utilities Dist. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

Petitioners have the burden of showing a lack of SEPA compliance for GMA purposes on the clearly erroneous standard. *Durland v. San Juan County*, WWGMHB Case No. 00-2-0062c (Final Decision and Order, May 7, 2001). Whether an environmental impact statement is adequate is a question of law. *Citizens v. Klickitat County*, 122 Wn.2d 619, 626, 866 P.2d 1256 (1993). The adequacy of an EIS is tested under the “rule of reason”, which requires a “reasonably thorough discussion of the significant aspects of the probable environmental consequences” of the agency’s decision. *Ibid.* The decision of the governmental agency must be accorded substantial weight. RCW 43.21C.090.

IV. SUMMARY OF DECISION

Jefferson County was faced with many planning decisions in the 2002 comprehensive plan amendment cycle. We are very impressed with the professionalism of county planning staff and the County officials' earnest efforts to grapple with the decisions facing them. While it is our task to determine whether the challenged actions are compliant with the Growth Management Act ("GMA") and the State Environmental Policy Act ("SEPA"), we wish to acknowledge the overriding importance of good planning and the major steps the County has taken to responsibly address its local circumstances.

In this decision, we find that the environmental review that was done for the mineral resource overlay designation in this case was inadequate because of the absence of "sufficient information for a reasoned choice among alternatives". We emphasize that this is not a technical finding; we do not require the County to perform an EIS just for "window dressing" for purposes unrelated to the particular decision facing it. Our decision is based upon the specific environmental factors involved in the mineral resource overlay designation and the significance of the analysis of environmental impacts to the decision before the commissioners. We are aware that many local officials feel that SEPA review is just a procedural technicality that is costly without real benefit. However, SEPA review is intended to provide information about environmental impacts so that decision-makers can know the possible environmental consequences of their choices. Where that information is not presented, not only is SEPA violated, the decision-makers are operating in the dark on these issues.

Here, the County responsibly decided that the proposed designation of a mineral resource overlay in a commercial forest zone required environmental review and added it to the supplemental environmental impact analysis performed on all the 2002 comprehensive plan amendment proposals (supplemental to the 1998 comprehensive plan environmental review). However, the supplemental environmental impact statement failed to analyze any alternative except the one recommended by staff. Planning staff were clearly trying to make the best possible recommendation to the county commissioners but, in doing so, they neglected to provide the commissioners with adequate environmental information about alternatives.

In this case, mining was already a permitted use in the property under consideration. Therefore, an analysis of the environmental impacts of what was currently allowed was extremely important as a benchmark. The SEPA rules require evaluation of the "no action" alternative which, under Jefferson County regulations, was the mining of a site of a maximum of ten acres in size. This size limitation is not applicable to a mineral resource overlay designation. Thus, the intensity of mining in the

proposed area was altered by the designation and the environmental impacts of that change were the proper subject of SEPA review. Applying the County's own listed factors for consideration would have yielded baseline information about the no-action alternative and also would have provided useful information about what conditions should be applied to the designation, were it to be granted. Applying those same factors to the other alternatives chosen by the County for evaluation would have disclosed how the impacts could vary depending upon the size and location of the mineral resource overlay. The supplemental environmental impact statement ("SEIS") should have analyzed the no action and other alternatives; failure to do so makes the SEIS inadequate and not compliant with Ch. 43.21C RCW.

Petitioners alleged that the County should have done an evaluation of the potential pit-to-pier project that would follow from the mineral resource overlay designation. We do not agree that the project itself could or should be analyzed at this stage. However, we do note that an analysis of the transportation impacts of increased intensity of mining use would encompass transportation alternatives to trucking, including the potential use of a conveyor.

V. ANALYSIS AND DISCUSSION OF ISSUES

Petitioners' issues fall into three major categories: challenges to the adequacy of the County's environmental review for the amendment under the State Environmental Policy Act, RCW 43.21C; challenges to the amendment's consistency with the goals and requirements of the Growth Management Act, RCW 36.70A; and challenges to the amendment's consistency with the County's planning policies and development regulations.

COMPLIANCE WITH SEPA

Issue No. 1: Is Jefferson County's SEPA analysis inadequate for this Comprehensive Plan amendment because the County's EIS failed to evaluate a "no action alternative" as required by RCW 43.21C.030 (2)(c)(iii), WAC 197-11-440(5)(b)(ii), and WAC 197-11-440(5)(c)(v)?

Issue No. 2: Is Jefferson County's SEPA analysis inadequate for this Comprehensive Plan amendment because the County's EIS failed to evaluate reasonable alternatives, including alternatives that can "feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation" as required by WAC 197-11-440(5)(b)?

Issue No. 3: Is Jefferson County's SEPA analysis inadequate for this Comprehensive Plan amendment

because the mitigation was not evaluated with respect to its effectiveness, fails to mitigate the environmental impacts of Amendment MLA 02-235, and purports to mitigate impacts of measures and facilities the applicant intends to construct through a future application?

Issue No. 4: Is Jefferson County's SEPA analysis inadequate and unlawful because the County's EIS failed to study and describe the adverse environmental impacts of the proposal with respect to impacts on the built and natural environment, including impacts on residential communities, noise pollution, light and glare pollution, water pollution, traffic, marine traffic, residential and rural community character, conflicts between mineral resource development and residential and rural communities, and the history of other mineral resource use including the impacts of similar activities?

Issue No. 5: Did Jefferson County violate SEPA by: excluding Fred Hill Materials' "pit-to-pier" project from its environmental review and deliberations; discouraging the public and Petitioners from addressing the "pit-to-pier" component of Fred Hill Materials' project in the public comments and testimony; failing to discuss the impacts of "pit-to-pier" and alternatives; and then conditioning the amendment with "pit-to-pier" specific mitigation that had not been studied, evaluated, or subjected to public comment and testimony?

Issue No. 6: Is Jefferson County's SEPA analysis inadequate and unlawful because the county's EIS failed to study and describe the adverse environmental impacts of the change in designation with respect to impacts on ground and surface water quality and quantity, marine water quality, and shoreline habitat?

Applicable Law

RCW 43.21C.030

WAC 197-11-440

WAC 197-11-442

Positions of the Parties:

Petitioners assert that the County's environmental review for the proposed overlay did not comply with WAC 197-11-440(5)(b)(ii) because the County failed to evaluate a "no action" alternative and other reasonable alternatives to the proposed overlay. Petitioners' Brief on the Merits, at 10-13.

Petitioners assert that the County failed to study and describe adverse environmental impacts of the proposed overlay. *Ibid.* at 15, 19. As a result, because "neither the impacts nor the mitigation that was adopted were analyzed," the Final Supplemental Environmental Impact Statement failed to

evaluate the mitigation offered with respect to its effectiveness. *Ibid.* at 15. Petitioners argue that the conveyor and pier project should have been analyzed because the project will serve as a mitigating measure for adverse environmental impacts of mining in the proposed overlay. *Ibid.* at 17. Finally, Petitioners argue that while the County has discretion to limit the scope of non-project environmental review, it is nevertheless required to analyze the impacts that the conveyor and pier project would have on water quality, marine water quality, and shoreline habitat, because it is an offsite impact of the proposed overlay. *Ibid.* at 19-21.

The County responds that its environmental review was adequate because the County appropriately limited the scope of its environmental review, deferring further review to the project permitting stage. Respondent Jefferson County's Brief on the Merits, 3-5. Though the County was not required to analyze the "no action" alternative in its Final Supplemental Environmental Impact Statement, the "no action" alternative was "discussed in some detail," had been studied three times, and was known to the County legislators. *Ibid.* at 6-9. The County argues that it "sufficiently disclosed, discussed and substantiated" the "impacts of at least three alternatives." *Ibid.* at 12. The County argues that the overlay "has no project-level impacts...because it does not determine when a single spade of dirt is to be turned...." *Ibid.* at 13. The County argues that the County has provided mitigation measures for any possible future mining projects. *Ibid.* at 13-14. The County argues that it did not need to evaluate the effectiveness of mitigation measures because evaluation of mitigation measures "is impossible in the context of a non-project action...." *Ibid.* at 15. The County further argues that the potential adverse environmental impacts of the proposed overlay were discussed in adequate detail "for this non-project action." *Ibid.* at 17. The County argues that the impacts of the conveyor and pier project did not need to be addressed because the project had not "been proposed or described in detail," and "the conveyor system and the pier will receive an automatic threshold Determination of Significance...." *Ibid.* at 21. Finally, the County asserts that it was not required to speculate on all potential adverse impacts of the conveyor and pier project upon marine water quality and shoreline habitat. *Ibid.* at 21-22.

Applicable Law:

Guidelines for state agencies, local governments...

The legislature authorizes and directs that, to the fullest extent possible:

...

- (2) all branches of government of this state, including state agencies, municipal and public corporations, and counties shall:

...

- (c) Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official on:
 - (i) the environmental impact of the proposed action;
 - (ii) any adverse environmental effects which cannot be avoided...;
 - (iii) alternatives to the proposed action;
- RCW 43.21C.030** (in pertinent part)

EIS contents.

(1) An EIS shall contain the following, in the style and format prescribed in the preceding sections.

...

(5) Alternatives including the proposed action.

(a) This section of the EIS describes and presents the proposal (or preferred alternative, if one or more exists) and alternative courses of action.

(b) Reasonable alternatives shall include actions that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation.

(i) The word "reasonable" is intended to limit the number and range of alternatives, as well as the amount of detailed analysis for each alternative.

(ii) The "no-action" alternative shall be evaluated and compared to other alternatives.

(iii) Reasonable alternatives may be those over which an agency with jurisdiction has authority to control impacts either directly, or indirectly through requirement of mitigation measures.

(c) This section of the EIS shall:

(i) Describe the objective(s), proponent(s), and principal features of reasonable alternatives. Include the proposed action, including mitigation measures that are part of the proposal.

...

(iii) Identify any phases of the proposal, their timing, and previous or future environmental analysis on this or related proposals, if known.

...

(v) Devote sufficiently detailed analysis to each reasonable alternative to permit a comparative evaluation of the alternatives including the proposed action. The amount of space devoted to each alternative may vary. One alternative (including the proposed action) may be used as a benchmark for comparing alternatives. The

EIS may indicate the main reasons for eliminating alternatives from detailed study.

WAC 197-11-440 (in pertinent part)

Contents of EIS on nonproject proposals.

(1) The lead agency shall have more flexibility in preparing EISs on nonproject proposals, because there is normally less detailed information available on their environmental impacts and on any subsequent project proposals. The EIS may be combined with other planning documents.

(2) The lead agency shall discuss impacts and alternatives in the level of detail appropriate to the scope of the nonproject proposal and to the level of planning for the proposal. Alternatives should be emphasized. In particular, agencies are encouraged to describe the proposal in terms of alternative means of accomplishing a stated objective (see WAC 197-11-060(3)). Alternatives including the proposed action should be analyzed at a roughly comparable level of detail, sufficient to evaluate their comparative merits (this does not require devoting the same number of pages in an EIS to each alternative).

...

(4) The EIS's discussion of alternatives for a comprehensive plan, community plan, or other area-wide zoning or for shoreline or land use plans shall be limited to a general discussion of the impacts of alternate proposals for policies contained in such plans, for land use or shoreline designations, and for implementation measures. The lead agency is not required under SEPA to examine all conceivable policies, designations, or implementation measures but should cover a range of such topics. The EIS content may be limited to a discussion of alternatives which have been formally proposed or which are, while not formally proposed, reasonably related to the proposed action.

WAC 197-11-442 (in pertinent part)

Discussion:

Petitioners challenge the adequacy of the County's environmental review for the proposed overlay, arguing that the Final Supplemental Environmental Impact Statement failed to adequately analyze alternatives, including the "no action" alternative, under RCW 43.21C.030(2)(c)(iii), WAC 197-11-440(5)(b)(ii), and WAC 197-11-440(5)(c)(v). Petitioners argue that the approval of Ordinance 14-1213-02 was based on inadequate information about adverse environmental impacts and alternatives; therefore, the Petitioner argues, the County's approval of the Ordinance should be found non-

compliant.

As a preliminary matter, we examine the nature of the comprehensive plan amendment challenged here. In 1995, the County designated approximately 600 acres of Mineral Resource Lands. County's Brief, 6 n.4. The comprehensive plan adopted in 1998 confirmed these designations and essentially deferred designation of others. *Ibid.* In the Unified Development Code ("UDC"), the County established a mechanism by which application could be made for a mineral resource designation as an overlay to other land use designations. UDC §3.6.3. Application for a mineral resource overlay designation must be made through the comprehensive plan amendment process:

Designation Procedures. A Mineral Resource Land (MRL) Overlay District may be applied based upon the following criteria, only upon acceptance by the County of a complete application from a property owner and upon approval of a redesignation in accordance with Section 9 of the Code and processed as a comprehensive plan amendment.

UDC §3.6.3 (in pertinent part)

There are several key characteristics of a mineral resource overlay designation under the Jefferson County Code. First, a mineral resource land overlay under the county code occurs in the context of UDC provisions pertaining to mineral extraction and mining. That is, mining and mineral extraction activities are already regulated by portions of the Unified Development Code. *See* UDC §3.6.3, Table 3-1, §4.24, and §6.17. This means that a mineral resource land overlay designation in a Commercial Forest zone where mining is a permitted use may have the effect of changing the regulations applicable to mining in the region being designated. Second, the mineral resource land overlay designation may carry with it the adoption of specific overlay conditions. In this case, the conditions are set forth in Ex. 13-1 at 14-18. Thus, the challenged comprehensive plan amendment in this case also included conditions for the use of the particular mineral resource overlay area as part of the designation itself. In addition to any applicable mining and mineral extraction regulations in the UDC, then, conditions for the use of the resource were added with the adoption of the mineral resource overlay designation.

These points are significant when we consider the nature of the SEPA review that the County was obligated to undertake in making the challenged designation because they bear on the known impacts of the mineral resource lands overlay designation itself, irrespective of any future projects.

As a general matter, SEPA requires the disclosure and full consideration of environmental impacts in governmental decision making. *Polygon Corporation v. Seattle*, 90 Wn.2d 59, 61, 578 P. 2d 1309 (1978), citing *Norway Hill Preservation & Protection Ass'n v. King County Council*, 87 Wn.2d 267, 552 P.2d 674 (1976). The EIS provides a basis upon which the jurisdiction can make the balancing judgments required by SEPA. *SWAP v. Okanogan County*, 66 Wn. App. 439, 441, 832 P.2d 503 (Div. III, 1992).

[1]

The required contents of an EIS are set out in WAC 197-11-440. For nonproject actions such as comprehensive plan amendments, the general rules for the content of an EIS apply except that the lead agency (in this case, the County) is granted more flexibility in preparing an EIS than in project actions. This is “because there is normally less detailed information available on their environmental impacts and on any subsequent project proposals”. WAC 197-11-442.

The No-Action Alternative

Petitioners first argue that the County failed in its obligation to analyze the “no-action” alternative to the proposed designation. Petitioners’ Brief on the Merits (“Petitioners’ Brief”) at 8-11. Petitioners argue that “this is one of the presumably rare instances where the no-action alternative may do more to achieve the resource development goals of the Growth Management Act and the Jefferson County Comprehensive Plan than designating a large area for mineral development”. *Ibid.* at 10.

The County responds that it did do an evaluation of the “no-action” alternative but that the Petitioners’ contention that the County could meet its GMA obligations under the current Commercial Forest Land designation is inaccurate. The County argues that it is required to designate and protect mineral resource lands under the GMA and the status quo would not meet the GMA requirements either in terms of protecting the resource or in terms of maintaining and enhancing natural resource extraction industries. Hearing Brief on Behalf of Respondent Jefferson County (“County Brief”) at 8.

Both the County and the Intervenor argue that the County could not adopt the no-action alternative and meet the County’s obligation to designate and protect mineral resource lands under the GMA. County Brief at 8; Intervenor’s Brief at 13. However, the County disposed of this argument in the 1997 environmental impact statement (EIS) to the comprehensive plan:

[Therefore,] the inclusion of mineral extraction and primary processing as a

permitted use on designated forest land will protect mineral resource lands from the encroachment of incompatible development, conserve the mineral resource land base of Jefferson County, and allow for its future utilization by the mining industry.

Ex. 17-1 at 4-6.

The 1997 EIS also explains why the County has elected to use a mineral resource overlay rather than using a Mineral Resource Lands designation:

An overlay is used because mining operations are eventually depleted and sites are converted to other uses, and thus the Mineral Lands designation is not permanent. Upon completion of mining operations and following the reclamation of the site, it will be removed from the Mineral Land designation and will be subject to the underlying land use designation depicted on the Land Use map.

Ex. 17-1 at 4-7.

Thus, the County's rationale for protecting its mineral resource lands with a commercial forest designation was settled in 1998. The mechanism for obtaining a mineral resource overlay was established in the UDC at §3.6.3 as an application for a comprehensive plan amendment. There is nothing to suggest that this comprehensive plan amendment is exempt from SEPA review. Further, the EIS may consider contested alternatives, even if contested on the basis of legality.

If we required all alternatives included in an EIS to be of certain legal status, projects would come to a halt until such status could be judicially determined, assuming that a determination could be obtained without issuing an advisory ruling. In order to avoid this outcome, EISs would include only unchallenged alternatives, rendering the discussion of reasonable alternatives superficial, and weakening their force as an effective decision making tool. There is no legal requirement that alternatives be certain or uncontested, only that they be reasonable.

King County v. Cent. Puget Sound Bd., 91 Wn. App. 1, 31, 951 P.2d 1151 (Div. I, 1998)

[2]

Under SEPA rules, evaluation and comparison of the "no-action" alternative is a mandatory element of an EIS (WAC 197-11-440(5)(ii)). In a nonproject SEPA review "[A]lternatives should be emphasized." WAC 197-11-442(2). The EIS must provide information about "reasonable alternatives, including mitigation measures," in order to inform decision-makers and the public about the impacts of the action. WAC 197-11-400(2). We look, then, to the County's evaluation of the "no-

action” alternative to determine whether this met SEPA requirements.

The County argues that it did an evaluation of the no-action alternative. The County points to the following exhibits as evidence of its consideration of the no-action alternative: Ex. 2-4 at 7-11, 21 and 22 (October 25, 2002 Staff Memo to the Jefferson County Planning Commission attaching the 1991 Report to the Legislature regarding Mineral Resources of Long-Term Commercial Significance Within and Outside Urban Growth Areas, corrected March 1994) (County Brief at 6); Ex. 3-1, at 4-1 to 4-9 and 4-62 to 4-72 (1997 Draft EIS); Ex. 17-1, at 4-7 (Final 1997 EIS); Ex. 3-12, at 2-33 (the August 21, 2002 Draft SEIS); and Ex. 3-21, at 2-23 (the November 25, 2002 FSEIS). County Brief at 7.

We have examined the cited exhibits. The discussion of mineral resources of long-term commercial significance contained in the Report to the Legislature (Ex. 2-4) is useful background information regarding the GMA requirements for designation and conservation of mineral resources but it is not an analysis of the no-action alternative to the designation sought by Fred Hill Materials. The environmental impacts reviewed in Ex. 3-1 (1997 Draft EIS) - geologically hazardous areas such as seismic and mine hazard areas (Ex. 3-1, at 4-1 to 4-3); soils characteristics (Ex. 3-1, at 4-4 to 4-9); agricultural lands (Ex. 3-1, at 4-62 to 63); forest lands (Ex. 3-1, at 4-63 to 4-66); and the other land uses discussed (Ex.3-1, at 4-66 to 4-72) do not otherwise address mineral resources and do not address the area at issue. The 1997 Final EIS (Ex. 17-1) notes that there is a high degree of overlap between lands devoted to growing timber and land potentially containing commercial mineral deposits which makes it appropriate to make mineral extraction a permitted use in forest resource lands. However, the 1997 EIS does not discuss a no-action alternative to the proposed overlay designation. Ultimately, it is the environmental review for the challenged comprehensive plan amendment, rather than the earlier broad brush depictions of the Jefferson County landscape, that purports to accomplish the evaluation of a no-action alternative. Thus it is to Ex. 3-12 (the August 21, 2002 Draft Supplemental Environmental Impact Statement) and Ex. 3-21 (the November 25, 2002 Final Supplemental Environmental Impact Statement) that we must turn to consider the County’s evaluation of the no-action alternative.

The SEIS (Ex.3-21) contains a “Summary Matrix of Impacts and Mitigation Measures” of the proposed mineral resource overlay designation. Ex. 3-21 at 1-8. This lists the alternatives considered as: the proposed action; the no-action alternative; the final staff recommendation alternative; and staff proposed mitigation. In the No Action Alternative column for the Fred Hill, Inc. MRL overlay, the

environmental impacts are listed as “Not significant”. *Ibid.*

Beyond the matrix, the County argues that two major aspects of the no-action alternative were considered by the County in making the overlay designation: (1) the fact that under current zoning mining is permitted in less than ten-acre increments; and (2) the disadvantages of the “no-action” alternative to both the mining firm and the adjacent landowners. County Brief at 7.

In this case, we assume that the no-action alternative to designating a mineral resource overlay in the proposed area was to continue to allow mining on a permit basis, restricting the permissible mining scope to a site of no more than ten acres. However, the environmental review documents did not describe the no-action alternative in terms of its “principal features”, so even now we are assuming that the principal feature is the size of the site that can be disturbed. More significantly, the no-action alternative was not analyzed in sufficient detail to permit a comparative evaluation of the alternatives. WAC 197-11-440(5)(c)(v).

This is particularly significant here because the discussion of alternatives all centered on the size of the mineral resource overlay area. Ex. 3-12, at 2-37; Ex. 3-21, at 1-8. There was no discussion of the size of the area in which earth could be “disturbed” as part of the mining activity. Yet one of the greatest changes that would occur as a result of the mineral resource overlay designation is the lifting of the limit on the size of a mining site. UDC 3.6.3. Under the existing Commercial Forest designation, mining is a permitted activity. However, the site of mining activity within the Commercial Forest zone cannot exceed ten acres pursuant to UDC §4.24, whereas the UDC does not impose any site limitations within a mineral resource overlay.

An analysis of the no-action alternative should have shown the impacts of ten-acre mining sites in the region. The discussion should include impacts upon and quality of the physical surroundings, as well as the cost of and effects on public services. WAC 197-11-440(6)(e). Because transportation of the aggregate is necessarily a part of any mining operation, the EIS should describe the truck traffic or other means necessary to transport the aggregate mined from a site of such a size and the impacts of transport on the environment. Because the proposed mineral resource overlay has a number of critical areas within its boundaries, the EIS should describe the type of wildlife habitat disruption that might be anticipated and provide mitigating measures that might be adopted in response. This evaluation would serve as a benchmark to which the other alternatives could be compared.

At a minimum, this no-action alternative should have been compared with what was proposed and adopted. The EIS should disclose, discuss and substantiate by opinion and data a proposed action's environmental effects. *Kiewit Constr. Group v. Clark County*, 82 Wn. App. 133, 920 P.2d 1207 (Div. II, 1996). Thus, at a minimum, the EIS should have discussed the difference between the existing ten-acre limitation and the new 40-acre limitation. In this case, the site size limitation was set as a condition of the mineral resource overlay at 40 acres. Ex. 13-1 at 17-18. However, there was no analysis of what environmental impacts a 40-acre site might have. In fact, we could find no explanation of how this size limitation was chosen. An analysis of the no-action alternative would have caused the County to also consider the environmental impacts of the actual condition it imposed. This was not done.

Evaluation of other alternatives

Petitioner argues that the alternatives that were considered in the EIS were not truly analyzed; that the County merely assumed, without evaluation, that a smaller land area for the mineral resource overlay would have fewer impacts than a larger area. Petitioners' Brief at 11-12. The County responds that the County analyzed the alternative acreages based upon changes proposed in staff discussions with the applicant, the Department of Fish and Wildlife, the Department of Ecology and the Port Gamble S'klallam Tribe. County's Brief at 10. All of those organizations, the County points out, felt that the 6,240-acre alternative had more potential impact on the environment than the 690-acre alternative.

Ibid.

The Commercial Forest zone in which the mineral resource overlay will apply is a very large territory, larger than even the largest area originally proposed for the overlay. Because mining is permitted in the Commercial Forest zone in which the proposed overlay is located, a major feature of the mineral resource overlay was the intensity of use that would be permitted within the overlay. Even if the acreage in the Mineral Resource Land Overlay area were exactly the same as that in the Commercial Forest zone, there still would have been a change in intensity of use because the ten-acre site limit would no longer apply. UDC §4.24. We have already noted that an analysis of the no-action alternative would have provided the decision makers with this information and the impacts of such a change in intensity.

However, Petitioners also challenge the analysis the County conducted of the alternative acreages which might be designated with a mineral resource overlay. In considering this challenge, we first look to the alternatives the County chose – a no-action alternative, a 6,240-acre alternative, and a 690-acre alternative. The County considered the applicant's original proposal of 6,240 acres, an

alternative that must be evaluated pursuant to WAC 197-11-440(5)(a), and received comments on it. Ex. 3-21. Then the County engaged in discussions with the applicant and came up with a 765-acre alternative. Ex.13-1, at 3. The 765-acre alternative was further modified to 690 acres to move the mineral resource overlay boundary approximately 500 feet from Thorndyke Creek, a salmon-bearing stream. Ex. 3-21, at 2-33; Ex. 13-1, at 5. The County's choice of alternative sizes of the area to which the mineral resource overlay designation would apply was reasonable.

However, the County's analysis of these alternatives did not provide the decision makers with full information concerning the potential environmental impacts of the alternatives. In fact, the County's supplemental environmental impact statement of November 25, 2002 (FSEIS) seems to concede that the environmental impacts of the 6,240-acre alternative are not fully considered in the FSEIS. The staff recommendation states:

As discussed in the review letter submitted by the Department of Ecology, the potential environmental impacts of designating the full 6,240 acres are unknown without additional research, study and analysis.

Ex. 3-21 at 2-33.

Rather than analyze the impacts of the 6,240-acre proposal, the County settled on a smaller area and analyzed it. Ex. 3-21, at 2-31 to 2-32.

The County analyzed the 690-acre proposal according to the 13 factors it established to consider in evaluating proposals for mineral resource overlays:

1. Quality of Deposit
2. Size of Deposit
3. Access Distance from Market
4. Compatible with Nearby Areas
5. Impact of Noise
6. Impact of Blasting
7. Impact of Truck Traffic
8. Visual Impact
9. Surface and Ground Water Impacts
10. Wetlands Impact
11. Slopes
12. Biological Impact
13. Impact of Flooding

Ex. 13-21, at 2-28 to 2-30.

Inexplicably, the County did not analyze the three alternatives (including the no-action alternative) in terms of these factors. Instead, the County only evaluated the 690-acre alternative with respect the listed factors. Ex. 3-21, at 2-31 to 2-32. The County argues that the 690-acre alternative was compared to the 6,240 alternative in response to comments received regarding the draft SEIS. County’s Brief at 11-12. However, the County only points to a comparison of visual impacts (Ex. 3-21, at 3-13, response to #38) and to water resources analysis in a letter dated November 20, 2002 from the Department of Ecology regarding the proposed 6,240-acre site and the 690-acre alternative. County Brief at 12. No other factors were considered. We have not been able to discern any comparison of the named alternatives in either of the environmental review documents (Ex. 3-12 and 3-21) except in a matrix of the proposed comprehensive plan amendments. Ex. 3-21, at 1-8. That matrix lists the Fred Hill proposal as follows:

Environmental Impacts: Proposed Action	Environmental Impacts: No Action Alternative	Environmental Impacts: Final Staff Recommendation Alternative	Staff Proposed Mitigation
Probably significant adverse impacts	Not Significant	Mitigated to moderate impacts. Area reduced from 6,240 acres to 690 acres. Water quantity and quality impacts at non-project level reviewed by Ecology	State law, UDC regulations, list of mitigation measures in Part 2.

None of this constitutes a “sufficiently detailed analysis to each reasonable alternative to permit a comparative evaluation of the alternatives including the proposed action.” WAC 197-11-440(5)(c) (v). As the Washington Supreme Court stated in *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26 at 35, 813 P.2d 498 (1994), “it is impossible from the brief, conclusory descriptions to engage in any meaningful comparison of the alternatives” (discussing the adequacy of the EIS for a public project requiring consideration of off-site alternatives in addition to onsite alternatives).

The County argues that the review that was conducted at this stage was appropriate because the County has flexibility in preparing an EIS and a general discussion of the impacts of alternate proposals is proper because the comprehensive plan affected a land use designation. WAC 197-11-442(1) and (4). However, this regulation does not excuse the County from an analysis and evaluation

of environmental impacts of alternatives; it just means that the impacts and alternatives may be discussed “in the level of detail appropriate to the scope of the nonproject proposal and to the level of planning for the proposal.” WAC 197-11-442(2).

As our initial analysis concluded, the mineral resource designation has the effect of changing applicable development regulations and setting new conditions for mining. Therefore, the “level of detail appropriate to the scope of the nonproject proposal” must include the change in intensity of use (site size increase from 10 to 40 acres). We have already discussed how this change in intensity of use should be analyzed in the no-action alternative. In addition, the potential area over which this increased intensity will apply requires evaluation. Here, the County’s chosen alternatives should be evaluated in terms of the County’s list of 13 factors. The County’s evaluation should consider the maximum possible mining development that could occur under each scenario, in keeping with Jefferson County regulations. “We hold that an EIS is adequate in a nonproject zoning action where the environmental consequences are discussed in terms of the maximum potential development of the property under the various zoning classifications allowed.” *Ullock v. Bremerton*, 17 Wn. App.573, 575, 565 P.2d 1179 (1977).

The alternatives analysis here lacks sufficient information to make a meaningful comparison of the environmental impacts possible under each alternative. It is therefore inadequate.

The Pit-to-Pier Project

Petitioners also allege that the County should have analyzed Fred Hill Materials’ potential pit-to-pier project as part of the EIS on the mineral resource overlay designation. Issue No. 5. Petitioners cite to *King County v. Boundary Review Board*, 122 Wn.2d 648, 664, 860 P.2d 1024 (1993) for the proposition that early environmental review should be undertaken so that decision makers will have the most information on foreseeable consequences of their planning actions: “[w]hen government decisions may have such snowballing effect, decision-makers need to be apprised of the environmental consequences before the project picks up momentum, not after.” *Ibid.*

The County responds that it was not timely to evaluate the pit-to-pier proposal because the elements of that proposal are speculative at this time and will be addressed at the permit level. County Brief at 21.

We agree with the County that it was premature for the County to fully evaluate the pit-to-pier project as part of the EIS for the mineral resource overlay designation. Although the applicant did advise the

County that it might propose such a project after the mineral resource overlay designation was obtained, a pit-to-pier project involves many more specific elements than the designation of a type of land use area and those specific elements are best evaluated at the project level.

At the same time, there are aspects of a future pit-to-pier project that are appropriate for environmental review at this time. Those aspects arise from the need to transport the mineral extracted under the new mineral resource overlay designation. A conveyor project of some kind is a likely consequence of enhanced excavation, something of which the applicant itself apprised the County.

Environmental review is required even if "no land-use change [will] occur as a direct result of a proposed...action." *King County v. Boundary Review Board*, 122 Wn.2d 648, 664, 860 P.2d 1024 (1993). The court in *King County* addressed whether an EIS was required for a proposed annexation to a city (prior to the implementation of the GMA). *Ibid.* at 655-58, 860 P.2d 1024. The court found that though "no official proposals have been submitted...for the development of the annexation properties..., [e]ven a boundary change...may begin a process of government action which can 'snowball' and acquire virtually unstoppable administrative inertia." *Ibid.* at 664, 860 P.2d 1024.

In this case, the County prepared an EIS but did not evaluate alternatives as required by the SEPA rules, which we have found to be inadequate. *Infra*. The pit-to-pier project was not an alternative to the mineral resource overlay. Instead, it was a possible impact resulting from potentially increased mining activity. Rather than analyzing the pit-to-pier project, the EIS should include the transportation impacts of the various alternatives. See Impact of Truck Traffic, factor #7. The EIS discussion of "truck traffic" presently includes a general description of the existing Level of Service, which is "C" and is expected to reach "F" by 2018. *Ibid.* at 2-31. The discussion indicates that "additional truck traffic would access SR 104 via Rock to Go Road." *Ibid.* In looking at the potential environmental impacts of the increased site size within the two alternative overlay areas (690 acres and 6,240 acres), the EIS should consider increased production and the consequent need to transport the aggregate mined. If the roads are already at capacity, then the need for some kind of conveyor system should be considered. Since the applicant has already flagged this possibility, the EIS should evaluate that transportation impact generally.

Petitioners further argue that the County imposed mitigation on the applicant that was geared to the pit-to-pier project rather than the mineral resource overlay designation. Since the County will need to

do an alternative analysis as part of its SEPA review of the mineral resource overlay designation, the question regarding mitigation imposed should await the County's full environmental review. We do not know what the County may choose to impose as mitigation once it has full information about environmental impacts.

***Conclusion:* The EIS for the mineral resource land overlay designation is inadequate due to the failure to properly evaluate the environmental impacts of alternatives, including the no action alternative. The County's comprehensive plan amendment designating the mineral resource land overlay does not comply with ch. 43.21C RCW.**

GMA Challenges

Issue 7: Does Jefferson County Ordinance No. 14-1213-02 violate RCW 36.70A.020(9) and .060(2) because Amendment MLA 02-235 fails to conserve fish and wildlife habitat?

Issue 8: Does Jefferson County Ordinance No. 14-1213-02 violate RCW 36.70A.020(10) because Amendment MLA 02-235 fails to protect the environment and enhance the State's quality of life, including air and water quality and the availability of water?

Applicable Law:

RCW 36.70A.020(9)

RCW 36.70A.020(10)

Positions of the Parties:

Petitioners argue that the words "conserve and "enhance" in the GMA mandate specific, direct action and that the County has not shown that its actions will conserve habitat and maintain the quality of the environment. Petitioners' Brief at 22-23.

The County responds that RCW 36.70A.060(2) only applies to development regulations; since no development regulations were either adopted or amended as part of the challenged ordinance, its provisions are inapplicable. County Brief at 22. As to the goals of RCW 36.70A.020, the County argues that they are meant as guidance and are not action forcing. *Ibid.* at 23-25. Even if the goals were action forcing, the County goes on, the County's actions in this case were at most neutral as to conservation of the environment and conserving wildlife habitat. *Ibid.*

Discussion and Analysis:

We have said that the goals of the GMA have substantive authority and must be considered and incorporated into all GMA actions. *Achen v. Clark County*, WWGMHB Case No. 95-2-0067 (Final Decision and Order, September 20, 1995). However, this does not mean that the County must show that it has weighed the GMA goals as part of every action it takes under the GMA. The GMA creates a presumption of validity in favor of local governmental actions and places the burden of proof on the petitioner to demonstrate that any action taken is not in compliance with the Act. RCW 36.70A.320. Petitioners have not raised any factual considerations that show a failure to comply with the cited goals. All that Petitioners have argued is that the County does not know where the wildlife habitat is in the mineral resource overlay area and that the record does not show that the County complied with Goal 10 (protecting the environment). Petitioners' Brief at 23. The argument put forward by Petitioners here would essentially shift the burden to the County to show how it is meeting the GMA goals through this ordinance. This burden shifting is inappropriate. See *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 116 Wn. App. 48, 65 P.3d 337 (Div. I, 2003).

Conclusion: There is no requirement in the Act that the County show how it will balance the GMA goals in every comprehensive plan amendment; instead, the burden is on Petitioners to show that the County's action is not in compliance. They have not met their burden here. The County's actions comply with RCW 36.70A.020(9) and (10).

Issue 15: Did Jefferson County violate RCW 36.70A.140 by failing to provide "early and continuous" public participation?

Applicable Law:

RCW 36.70A.140

Positions of the Parties:

Petitioners argue that the County violated the GMA's public participation requirements by allowing a change in the original proposal without allowing the public the opportunity to comment on it; by asserting that the planning commission meetings were quasi-judicial and therefore commission members could not have individual contacts concerning the comprehensive plan amendment; and by allowing the applicant to discuss its plans for the proposal with the planning commission members

directly. Petitioners' Brief at 24-25.

The County responds that the proposal was modified, as the GMA requires, to respond to concerns that were raised in the process; that the Petitioners not only had the opportunity to respond to the information presented by Fred Hill Materials on November 6, 2002, but they actually did respond at length during the county commissioners' hearing of December 5, 2002; that the statement that the proceedings were quasi-judicial was error, but harmless error since public comments were received on all aspects of the proposal. County Brief at 32-34.

Discussion and Analysis:

The gravamen of Petitioners' public participation complaint is their assessment of the treatment accorded to the applicant in this case as "favoritism". Petitioners' Brief at 25. Petitioners claim that the proposal was modified after the SEPA comment period was closed and the County does not contest this fact. Instead, the County points to the December 5, 2002 public hearing minutes which show that many members of the public, including Petitioners, commented on the proposal after the modifications were made. Ex. 6-12. The County states that the planning commission asked questions of the applicant's hydrogeologist at the November 6 planning commission meeting because the planning commission had questions that were raised in the public process. County Brief at 33. However, the public had the opportunity to comment on the revised proposal at the December 5, 2002 county commissioners meeting. *Ibid.* at 34.

The highly charged atmosphere concerning the Fred Hill Materials' proposal was not eased by the mistaken assertion that contacts with the public would be prohibited as *ex parte*. However, the County states (and we see no evidence to the contrary) that the belief that the proposal under consideration was quasi-judicial was simply an error and not an attempt to limit public participation. Further, the planning commission's decision to seek technical assistance from both the Department of Natural Resources and the applicant's hydrogeologist on questions that had been raised concerning the effect of mining on the aquifer was appropriate; this information was provided in the planning commission hearing on November 6, 2002. Ex. 6-16. Since there has been no challenge to the circulation of the revised proposal, we assume that it was widely available for review; comment was clearly received at the public hearing before the county commissioners. Ex. 10-1.

Conclusion: Under the totality of circumstances in this case, we find that the Petitioners have failed to meet their burden of proving the County was clearly erroneous in the way it provided

opportunities for public participation.

Consistency with the County Comprehensive Plan and Development Regulations

Issue 9: Does Jefferson County Ordinance No. 14-1213-02 violate WAC 365-195-300 and the County's Comprehensive Plan, Chapter 4, Natural Resource Conservation Element, p. 4-6, because it designates mineral resource lands without adequately considering the 50-year construction aggregate demand within the County as required by the Plan?

Issue 10: Does Jefferson County Ordinance No. 14-1213-02 violate the Jefferson County Comprehensive Plan objectives, Chapter 4, Natural Resource Conservation Element p. 4-6, because it fails to identify the "three key issues" that need to be addressed prior to designation or conservation of mineral lands: (1) classifying types of mineral resources that are potentially significant in Jefferson County; (2) defining the amount and long-term significance of aggregate that is needed to meet the demand of Jefferson County's projected population; and, (3) determining how to balance a variety of land uses within mineral resource areas?

Issue 11: Does Jefferson County Ordinance No. 14-1213-02 violate Jefferson County Comprehensive Plan Natural Resource Policy 2.1 because it fails to explain how the proposed mineral resource overlay will advance or harm the policy to "regulate resource-based economic activities so as to mitigate adverse impacts to the environment and adjacent properties?"

Issue 12: Does Jefferson County Ordinance No. 14-1213-02 violate Jefferson County Comprehensive Plan Natural Resource Policy 2.3 because it fails to explain how the proposed mineral resource overlay will advance or harm the policy to "protect the environment from cumulative adverse impacts resulting from resource management practices"?

Issue 13: Is Jefferson County's adoption of MLA 02-235 inconsistent with the Unified Development Code, Chapter 9, Comprehensive Plan and GMA Implementing Regulation Process, 9.8.b.(1) and (2), because circumstances related to the proposed amendment and the area in which it is located have substantially changed since the adoption of the Plan?

Issue 14: Is Jefferson County's adoption of MLA 02-235 inconsistent with the Unified Development Code, Chapter 9 Comprehensive Plan and GMA Implementing Regulation Process, 9.8.1.b.(3), because the proposed amendment does not reflect current widely held values of the residents of Jefferson County?

Applicable Law:

RCW 36.70A.070

WAC 365-195-210

Positions of the Parties:

Petitioners argue that the adoption of the mineral resource overlay amendment is inconsistent with the County's comprehensive code and the County's Unified Development Code. First, Petitioners argue that the County has failed to estimate its 50-year demand for aggregate and to meet the comprehensive plan requirements for (1) classifying the types of potentially significant mineral resources; (2) defining the amount and long-term significance of aggregate needed for the county's projected population; and (3) determining how to balance a variety of land uses within a mineral resource area. Petitioners' Brief at 28. Second, Petitioners argue that the County has failed to follow its own policies to "mitigate adverse impacts" of designating the mineral resource overlay. *Ibid.* at 30. Third, Petitioners argue that the County failed to consider whether circumstances have changed since the adoption of the comprehensive plan and to enter findings and conclusions on changed circumstances as required by its UDC. *Ibid.* at 31-32.

The County responds that it did perform a demand analysis for the county's 50-year construction aggregate. County Brief at 27; Ex. 2-4. Further, the County argues, it classified the types of minerals at the site and found them to be substantial. Ex. 13-1, Finding #51. The amount of aggregate needed to meet demand in the County is defined in Ex. 3-21 at 2-33 (Final Supplemental Environmental Impact Statement) and the balancing of land uses was done at the time of the adoption of the Land Use Map in 1998. County Brief at 28-29.

In response to the Petitioners' second point, the County states that it was not required to mitigate the mineral lands overlay because it was not a regulation, but that in any event, the County did impose 15 mitigation conditions as part of the designation. County Brief at 29. The County argues that these mitigations served to further the goal of "protect the environment from cumulative adverse impacts resulting from resource management practices", in county natural resource policy 2.3. County Brief at 29.

Discussion and Analysis:

Petitioners' challenge to the consistency of the County's comprehensive plan with the adopted

ordinance is rooted in the GMA requirement that the comprehensive plan “shall be an internally consistent document and all elements shall be consistent with the future land use map.” RCW 36.70A.070. Petitioners argue that the comprehensive plan amendment creating the mineral resource overlay is not consistent with other portions of the comprehensive plan.

The administrative regulation defining consistency among planning policies is found in WAC 365-195-210:

Consistency means that no feature of a plan or regulation is incompatible with any other feature of a plan or regulation. Consistency is indicative of a capacity for orderly integration or operation with other elements in a system.

In determining when an inconsistency exists between various parts of a local jurisdiction’s planning policies and regulations, we have held that consistency means that no feature of the plan or regulation is incompatible with any other feature of the plan or regulation. *CMV v. Mount Vernon*, WWGMHB Case No. 98-2-0006 (July 23, 1998 Final Decision and Order). Said another way, no feature of one plan may preclude achievement of any other feature of that plan or any other plan. *Carlson v. San Juan County*, WWGMHB Case No. 00-2-0016 (September 15, 2000, Final Decision and Order).

The record shows that the County did perform an analysis of the 50-year aggregate demand. Ex. 2-4. Petitioners argue that the County should have performed an analysis that showed how much of the aggregate to be mined under this mineral resource overlay is needed for in-county use. Petitioners’ Brief at 28. Whether or not the comprehensive plan actually requires this kind of analysis, the analysis in Exhibit 2-4 estimates just that. Petitioners’ claims regarding the adequacy of the analysis done exceed the comprehensive plan’s own language. The comprehensive plan policy of mitigation of “adverse impacts to the environment and adjacent properties” in the regulation of resource-based economic activities (NRP2.1) does not dictate the degree of mitigation that will be provided. The County argues that it did mitigate the impact of the mineral resource overlay in the conditions imposed on the designation. Ex. 13-1 at 14-18. We note that the lack of environmental information about impacts makes it difficult to assess the adequacy of mitigation measures. Adequate environmental review is a necessary predicate for decision-making under the County’s planning policies as well as under the GMA itself.

Conclusion: We do not reach the inconsistency argument with respect to mitigation measures because appropriate mitigation must be based on an adequate SEPA review. In all other respects, the Petitioners have failed to meet their burden in showing that the challenged action is

inconsistent with the County's comprehensive plan and development regulations.

VI. INVALIDITY

Once we have determined that the County's adoption of the mineral resource overlay designation (comprehensive plan amendment) in this case was non-compliant with the SEPA for failure to conduct an adequate SEPA review, we must consider whether the "continued validity of part or parts of the plan or regulation would substantially interfere with the goals of the chapter [the GMA]". RCW 36.70A.302(1)(b).

Although the petition for review in this case did request that the Board find the challenged ordinance "invalid, null and void" (Petition for Review, Relief Requested), the issue of invalidity was not raised in any of the issues for review nor was it briefed by Petitioners. Without more information on this point, we are unable to determine that an order of invalidity is needed because the comprehensive plan amendment will "egregiously interfere with the local government's future ability to fulfill the goals of the GMA." *FOSC v. Skagit County*, WWGMHB Case No. 95-2-0065 (Compliance Order, February 7, 1996).

Conclusion: Petitioners have failed to meet their burden in showing that the County's action in designating the challenged mineral resource overlay substantially interferes with the goals of the GMA.

VII. FINDINGS OF FACT

A. Jefferson County is a county located west of the crest of the Cascade Mountains that has chosen to or is required to plan under RCW 36.70A.040.

B. Petitioners are organizations that, through their members and representatives, submitted written and oral comments before the Jefferson County Planning Commission and Board of County Commissioners on all matters raised in the petition for review.

C. Intervenor, Fred Hill Materials, Inc., was the applicant for the mineral resource overlay designation that is the subject of this appeal.

D. Petitioners challenge the designation of a mineral resource overlay known as MLA 02-2335 adopted as a comprehensive plan amendment in Ordinance No. 14-1213-02, adopted December 13, 2002 and published December 25, 2002.

E. Petitioners timely filed their Petition for Review on February 21, 2003.

F. The applicant, Fred Hill Materials, Inc., owns and operates a mineral extraction operation known as “the Shine Pit” located west of the Hood Canal Bridge and south of State Route 104 in Jefferson County. The Shine Pit is ending its useful life and in 2002, Fred Hill Materials, Inc. proposed that a 6,240-acre parcel in the commercial forest zone where the Shine Pit is located be designated with a mineral resource overlay.

G. Mining is a permitted use in the commercial forest zone but the size of any mining site in the commercial forest zone is limited to a maximum of ten acres.

H. Under the Jefferson County Code, a mineral resource overlay is not subject to the size limitations of a permitted mining use in a commercial forest zone. Conditions on the size of mining site that could be “disturbed” may be imposed as part of the mineral resource overlay designation.

I. Jefferson County analyzed the proposed mineral resource overlay’s environmental impacts as part of an SEIS done for its 2002 comprehensive plan amendments. The draft of the SEIS was issued on August 21, 2002, recommending approval of the proposed 6,240-acre site with mitigation measures. Ex. 3-12.

J. Petitioners and others submitted many comments concerning the supplemental environmental impact statement, pointing out the need to analyze the no-action alternative and other alternatives to the proposed action. Petitioners argued that the no action alternative would fully protect mineral resources in the County and still protect the environment.

K. Fred Hill Materials, Inc. provided information in its application that it wished to expand its operations which might, in the future, include a pit-to-pier project for transporting the mined aggregate to market.

L. The prospect of a pit-to-pier project generated much controversy and the County determined that the pit-to-pier project was not ready for review, so it declined to consider comments on it until the project review stage.

M. In response to the comments that the proposed overlay was “too big”, Fred Hill Materials

modified its proposal by letter dated October 23, 2002 to 765 gross acres. Ex. 11-24. This was later modified to 690 acres to allow sufficient distance from Thorndyke Creek.

N. In the FSEIS, dated November 25, 2002, the staff recommended adoption of the proposal for a 690-acre mineral resource overlay designation. Neither the draft SEIS nor the FSEIS did more than a brief, conclusory evaluation of the no action alternative or the other proposed alternative. The 690-acre staff recommended alternative was evaluated in terms of thirteen factors the County listed as appropriate for evaluation of a mineral resource overlay designation but no other alternative was similarly evaluated.

O. The FSEIS pointed to a capacity problem with respect to truck transport of minerals from the new overlay site. However, the FSEIS failed to describe the current traffic or predict a range of future truck traffic that would be needed for increased mining activity. The FSEIS also failed to consider whether alternative forms of transport, such as the conveyor suggested by Fred Hill Materials, might be used and with what possible environmental impacts.

P. The proposed mineral resource overlay is located in a forested region where there are many significant critical areas, including lakes and streams. The FSEIS fails to describe the existing wildlife habitat and to evaluate possible environmental impacts on that habitat, reserving SEPA review of those impacts until the permitting stage for any future mining projects.

Q. The changed proposal from 6,240 acres to 690 acres was discussed at the November 6, 2002 planning commission meeting. Planning commissioners questioned the applicant's hydrogeologist and representatives of the Department of Natural Resources at the meeting. Public comment was not taken at that time.

R. Public comment on the revised proposal was taken at the December 5, 2002 meeting of the county commissioners. Petitioners submitted oral and written comments into the record pertaining to the revised proposal.

S. The county commissioners approved the 690-acre mineral resource overlay designation by ordinance dated December 13, 2002. Included in the approval of the revised mineral resource overlay designation were 15 mitigating conditions. The mitigating conditions require, among other things, that certain provisions of the UDC regulating and protecting fish and wildlife habitat areas, wetlands,

other critical areas, and best mining practices apply to the mineral resource overlay area. They also limit the size of an active mining area to 40 acres. Further, the conditions provide that any application for a pit-to-pier project would require the preparation of a project action EIS. Ex. 13-1

VIII. CONCLUSION OF LAW

- 1) This Board has jurisdiction over the parties and subject matter of this petition.
- 2) Petitioners have standing to bring this appeal on the basis of their participation in the proceedings below and their petition was timely filed.
- 3) The FSEIS prepared for this comprehensive plan amendment was inadequate based on a failure to adequately analyze the no action and other alternatives to the proposed action. Based on the failure to conduct an adequate SEPA analysis and evaluation, the County's adoption of the challenged comprehensive plan amendment fails to comply with Ch. 43.21C RCW.

IX. ORDER OF REMAND

This matter is hereby REMANDED to Jefferson County to bring the comprehensive plan amendment authorizing MLA 02-235 (Ordinance No. 14-1213-02) into compliance with Ch. 43.21C RCW within 180 days of the date of this Order.

Jefferson County shall submit a report on compliance on this matter to this Board and to all parties in this case by February 19, 2004.

A compliance hearing is hereby set for April 14, 2004 at a time and location to be set by subsequent order. Any party wishing to contest the County's compliance with this Board's order must submit written objection and reasons to the Board no later than March 11, 2004. The County's response to any written objections shall be due no later than April 9, 2004.

This is a final order and maybe appealed to superior court as provided in RCW 34.05.514 or 36.01.050 within 30 days of the final order of the Board. RCW 36.70A.300(5).

So ORDERED this 15th day of August, 2003.

Margery Hite, Board Member

Nan Henriksen, Board Member

Holly Gadbow, Board Member

[1]

The Department of Ecology adopted mandatory rules for the preparation of environmental impact statements pursuant to the delegation of authority to the Department of Ecology in RCW 43.21C.110.

[2]

Reversed on other grounds, *King County v. Cent. Puget Sound Bd.*, 138 Wn.2d 161, 979 P.2d 374 (1999). (The Washington Supreme Court approves this language from the court of appeals decision saying “Contrary to Friends’ assertions, an alternative may be taken into account for comparative purposes in an EIS even if the alternative’s legal status is contested”, 138 Wn.2d at 184.)