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lawyers working for the environment

Reply to: Seattle Office

April 20, 2023

VIA EMAIL TO: SMcDanie@co.whatcom.wa.us

Whatcom County Planning & Development Services
5280 Northwest Drive
Bellingham, WA 98226-9097

Re: Public Comments of Homeowners Opposed to Mining Expansion in Opposition to the Proposed Ranch Quarry Surface Mine (CUP2023-00001 & SEP2023-00005)

Dear Whatcom County Planning & Development Services:

Our firm represents the group Homeowners Opposed to Mining Expansion. We submit the following comments on the Group's behalf regarding the proposed Ranch Quarry Surface Mine (CUP2023-00001 & SEP2023-00005). For the reasons that follow, the application submitted to the county does not qualify for approval as conditional use under the county's development regulations. Under SEPA, the application does not provide sufficient information to allow the county to make a threshold determination and, based on the information that was provided, a SEPA threshold determination of significance will eventually be required.

Based upon the information that we have reviewed, it is clear that the applicant, Brent Cowden, plans to create a loud and dusty industrial mining and processing operation with significant heavy truck traffic. Part of this industrial use would be on land which is zoned Rural and is outside of the county's Mineral Resource Lands overlay district. The proposed mining operations would be in close proximity to existing residential homes and residential uses that comport with the Rural zone.

The county should deny the conditional use application. A full environmental analysis in the form of an environmental impact statement (EIS) will be required.

I. THE APPLICANT FAILED TO INCLUDE TWO PARCELS THAT ARE PART OF THE PROPOSED MINING OPERATION

Brent Cowden applied for a conditional use permit for the Ranch Quarry Surface Mine across several lots in the county's Rural Forestry and Rural zones. The application, and the county's original March 13, 2023 Notice of Application, both specify that the mining operations would be limited to five parcels: Parcel Nos. 400518479443; 400518488379; 400518466281;

400517049475; and 400517118447. All five of those parcels are within the county's Mineral Resource Lands overlay district.

The county re-noticed the application on April 4, 2023. In re-noticing the application, the county added two new parcels to the application: Parcel Nos. 400517200503 and 400517220470. Those two parcels are proposed to contain the private access road from the proposed pit to South Pass Road, near the intersection of South Pass Road and Frost Road. But these two new parcels are not addressed in the application materials submitted by the applicant. Importantly, Parcel Nos. 400517200503 and 400517220470 are not within the county's Mineral Resource Lands overlay district.

The two new parcels are clearly part of the proposed mining operations. The definition of mining "operations" at RCW 78.44.031(8) includes "all mine-related activities, exclusive of reclamation, that include, but are not limited to activities that affect noise generation, air quality, surface and ground water quality, quantity, and flow, glare, pollution, traffic safety, ground vibrations, and/or significant or substantial impacts commonly regulated under provisions of land use or other permits of local government and local ordinances, or other state laws." The definition goes on to specifically include: "Transporting minerals to and from the mine, on-site road maintenance, road maintenance for roads used extensively for surface mining activities, traffic safety, and traffic control." RCW 78.44.031(8)(d).¹

Not only did the applicant fail to include Parcel Nos. 400517200503 and 400517220470 in his application, the applicant falsely and repeatedly stated that mining operations would only occur on parcels within the Mineral Resource Lands overlay district. Many examples illustrate the applicant's false statements on this issue in its application materials (bold emphasis supplied):

Application Form

- CUP2023-00001 Application at 3 (listing only tax parcel numbers 400518479443; 400518488379; 400518466281; 400517049475; and 400517118447)
- CUP2023-00001 Application at 4 (stating that the Comprehensive Plan designation is "Mineral Resource Lands")
- CUP2023-00001 Application at 5 (describing the project as: "The proposal is for an approximate 70 acre rock quarry **on five underlying parcels** which total approximately 180 acres in size. The underlying parcels are zoned Rural Forestry (RF) and R10A, and they are **all located in the Mineral Resources Overlay (MRL) district.**")

¹ Whatcom County defines "surface mining" variously as "the process or business of extracting materials," WCC 20.97.434, and "all or any part of the processes involved in mining by removing the soil or rock overburden and mining directly from deposits thereby exposed, including also open pit mining, gravel bar scalping and mining of deposits naturally exposed at earth's surface, and including production of surface mining refuse," WCC 23.110.190(13). Transporting minerals to and from the proposed mine is an integral part of "the process or business of extracting materials" and of "the processes involved in mining[.]"

Project Narrative

- CUP2023-00001 Project Narrative at 1 (“The proposed quarry will be comprised of a portion of **five parent parcels** which total approximately 108 acres, **all located within the Mineral Resource Lands (MRL) overlay district.**”)

Map Set

- CUP2023-00001 Map Set at 1–2 (outline of project site in existing conditions and site plan sheets excludes Parcel Nos. 400517200503 and 400517220470 from the site)

Aquifer Recharge Study

- CUP2023-00001 Aquifer Recharge Study with exhibits at PDF page 5 (“The proposed mine is located on South Pass Road east of Sumas, WA on portions of Whatcom County tax parcels 400517118447, 400517049475, 400518479443, 400518488379, and 400518466281.”)
- CUP2023-00001 Aquifer Recharge Study with exhibits at PDF page 8 (“Subject Property: Includes all parcels under ownership by the project proponent and containing at least a portion of the Mine, specifically Whatcom County APNs: 400517118447, 400517049475, 400518479443, 400518488379, and 400518466281”—omitting Parcel Nos. 400517200503 and 400517220470)
- CUP2023-00001 Aquifer Recharge Study with exhibits at PDF page 8 (“Mine: Includes the limit of grading for rock removal and processing associated with the proposed Ranch Quarry Surface Mine project which occurs on portions of Whatcom County tax parcels 400517118447, 400517049475, 400518479443, 400518488379, and 400518466281.”)
- CUP2023-00001 Aquifer Recharge Study with exhibits at PDF page 9 (“**The Mine is within the Mineral Resource Lands (MRL) Special District** and is in an area zoned Rural (R10A) and Rural Forestry. **The Mine will be located across five (5) parcels** that total approximately 107-acres.”);
- CUP2023-00001 Aquifer Recharge Study with exhibits at PDF page 39–43, Figures 4–7 (Depictions of mine area limit exclude Parcel Nos. 400517200503 and 400517220470)

Critical Areas Report

- CUP2023-00001 Critical Areas Rpt at PDF page 9 (“The proposed Ranch Quarry is approximately 80 acres and encompasses portions of five parcels (400518 466281, 400518 488379, 400518 479443, 400517 049475, 400517 18447) . . . **All of the parcels are located within a Mineral Resource Lands (MLR) Special District.**”).

Geohazard Review

- CUP2023-00001 ELEMENT Letter-Geohazard Review at PDF page 2 (“The quarry extent (herein referred to as “site”; see Figure 2) will encompass approximately 80 acres of land amongst **five separate parcels.**”)

- CUP2023-00001 ELEMENT Letter-Geohazard Review at PDF pages 19–23, Figures 1–5a (depicting the eastern limit of the “Proposed Mine Limit ‘Site’” as coextensive with the Mineral Resource Lands overlay district and excluding Parcel Nos. 400517200503 and 400517220470)

Encroachment Permit Application

- CUP2023-00001 Encroachment-Permit-Application at 1 (describing work to be performed as “Improvement to the access point off of South Pass Road if deemed necessary via Conditional Use Permit” but listing only five parcel numbers and excluding Parcel Nos. 400517200503 and 400517220470. Parcel No. 400517220470 contains the access point off of South Pass Road, so it is strikingly wrong to omit this parcel when discussing the mining operation’s proposed access point)

Critical Areas Impact Assessment

- CUP2023-00001 Impact Assessment at PDF page 2 (“The proposed Ranch Quarry is approximately 80 acres and encompasses portions of five parcels (400518 466281, 400518 488379, 400518 479443, 400517 049475, 400517 18447).”)
- CUP2023-00001 Impact Assessment at PDF page 8 (“**All of the parcels are located within a Mineral Resource Lands (MLR) Special District.**”)

Preliminary Stormwater Proposal

- CUP2023-00001 Preliminary-Stormwater-Proposal at 1 (listing only tax parcel numbers 400518479443; 400518488379; 400518466281; 400517049475; and 400517118447)

Preliminary Traffic

- CUP2023-00001 Preliminary-Traffic at 1 ((listing only tax parcel numbers 400518479443; 400518488379; 400518466281; 400517049475; and 400517118447, **even though all traffic is proposed to enter and exit via Parcel Nos. 400517200503 and 400517220470**)

Supplemental Questions

- CUP2023-00001 Supplemental Questions at 1 (omitting Parcel Nos. 400517200503 and 400517220470 and stating: “**The subject property is zoned Rural Forestry and R10A and is located in the Mineral Resource Lands (MRL) overlay district where surface mining is allowed** as a Conditional Use pursuant to WCC 20.73.150.”)
- CUP2023-00001 Supplemental Questions at 1 (stating, in response to “Goal 8L: Ensure mineral extraction industries do not adversely affect the people and other properties in the vicinity . . . , “**the property is located within the MRL overlay district**”)
- CUP2023-00001 Supplemental Questions at 2 (“**Being in the MRL overlay district, the intended use of the area is for surface mining. The proposed use is therefore harmonious and appropriate with the intended character within the MRL.**”)V

Vicinity Map

- CUP2023-00001 Vicinity Map (does not even depict the entirety of Parcel Nos. 400517200503 and 400517220470, which are part of mining operations, nor does it include those parcels in the shaded “subject area.”)

SEPA Environmental Checklist

- Ranch Quarry SEPA-Environmental-Checklist-PDF at 2, Question A.11 (“The proposed quarry will be comprised of **five parent parcels** that total approximately 108 acres. The property is zoned Rural Forestry and R10A and is **located in the Mineral Resource Lands (MRL) overlay district.**”)
- Ranch Quarry SEPA-Environmental-Checklist-PDF at 7, Question B.3.c (asserting that drainage facilities “make sure no stormwater leaves the site” but not addressing the access road on Parcel Nos. 400517200503 and 400517220470.)
- Ranch Quarry SEPA-Environmental-Checklist-PDF at 11, Question B.7.b.3 (asserting that “the mining activity will take place on ~70 acres within a 108 acre project site. Therefore, there will be ~38 acres to help buffer/mitigate noise impacts.” But omitting the two parcels containing the access road from the “project site” and ignoring that a major source of noise impacts would be heavy trucks using the access road on these parcels, which are outside of the MRL district and abut residential lots outside of the MRL district)
- Ranch Quarry SEPA-Environmental-Checklist-PDF at 13, Question B.8.f (asserting in response to question asking “**What is the current comprehensive plan designation of the site[:]**” “**Mineral Resource Lands (MRL).**”)
- Ranch Quarry SEPA-Environmental-Checklist-PDF at 13, Question B.8.1 (“**The proposed surface mine is located with the Mineral Resource Lands designated in the Comprehensive Plan for mining purposes.**”)

The county’s amendment of its notice of application to include Parcel Nos. 400517200503 and 400517220470 does not cure the applicant’s failure to include those parcels in its application materials. It is the applicant’s burden to demonstrate compliance with county regulations and to disclose the impacts that the project would have on the human and natural environment. The applicant has failed to carry that burden. The application should be denied.

II. THE RANCH QUARRY SURFACE MINE DOES NOT QUALIFY FOR A CONDITIONAL USE PERMIT

The proposed mine does not qualify for a conditional use permit under the requirements set out for conditional uses in the Rural Zone at WCC 20.36.159. Because the conditional use requirements for surface mining at WCC 20.36.159 are incorporated by reference into the conditional use requirements for surface mining in the Rural Forestry zone (WCC 20.42.153), the proposed mine does not qualify for a conditional use permit in the Rural Forestry zone, either.

WCC 20.36.159 allows for surface mining operations outside of the county’s Mineral Resource Lands overlay district only if certain requirements are met. The very first condition is: “(1) The

activity is not subject to Washington State's Surface Mining Act (Chapter 78.44 RCW)." This proposed mine would be subject to Washington State's Surface Mining Act, so this proposed mine is not allowed as a conditional use (or permitted use) in the Rural or Rural Forestry zones. Surface mining is therefore a prohibited use under WCC 20.36.200 ("Prohibited uses. All uses not listed as permitted, accessory, administrative approval, or conditional uses are prohibited[.]")

WCC 20.36.197 allows surface mining subject to Washington State's Surface Mining Act in the Rural zone as a conditional use, but only "within a Mineral Resource Land Special District[.]" WCC 20.42.197 mirrors this requirement for the Rural Forestry zone. The proposed mining operation would extend beyond the Mineral Resource Land overlay district (and is therefore not "within" the MRL district), so it is prohibited.

Moreover, even if the proposed mine were not subject to Washington State's Surface Mining Act (which it is), it would greatly exceed the maximum size for surface mines in the Rural and Rural Forestry zones. "A cumulative maximum of three acres may be mined within the outer boundary of the parcel as it existed at the time of adoption of the amendment codified in this subsection." WCC 20.36.159(9).

Another, separate set of conditional use criteria is provided at WCC 20.73.150 for surface mining within the county's Mineral Resource Lands overlay district. But the proposed mining operation extends beyond county's Mineral Resource Lands overlay district, so WCC 20.73.150 should not apply. Even if those more permissive conditional use requirements did apply, the applicant fails to meet them.

Within the Mineral Resource Lands overlay district, surface mining is allowed as a conditional use only if buffers are established "of sufficient size and with sufficient vegetation or berming to ensure that noise, dust, noxious weeds and other impacts to surrounding property owners are within applicable regulations and performance standards." WCC 20.73.150(3). Because the applicant failed to include the parcels containing the access road to the proposed mine in its application materials, the applicant failed to address the significant impacts, including noise and dust impacts, of 25 "round trip" heavy truck trips per day (25 heavy trucks entering the site and 25 trucks leaving the site each day, *i.e.*, 50 one-way heavy truck trips per day). Because the applicant did not address the impacts of heavy truck traffic along the access road on Parcel Nos. 400517200503 and 400517220470 at all, the applicant also failed to demonstrate that buffers between those parcels and adjacent residential lots in the Rural zone are "of sufficient size and with sufficient vegetation or berming to ensure that noise, dust, noxious weeds and other impacts to surrounding property owners are within applicable regulations and performance standards" as required by WCC 20.73.150(3).

Moreover, by ignoring impacts of heavy trucks traveling back and forth on the access road (and not even including the parcels containing the access road in its application materials), the applicant deprived the county of information needed to assess whether "[a]pplication of additional site specific conditions may be required to mitigate potential impacts" under WCC 20.73.150(5).

III. EVEN IF THE RANCH QUARRY SURFACE MINE DID QUALIFY TO BE CONSIDERED AS A CONDITIONAL USE, IT CANNOT COMPLY WITH THE CONDITIONAL USE PERMIT CRITERIA

The proposed surface mining operation does not qualify as a conditional use, for the reasons explained above. But even if it were a conditional use in the Rural zone, there is no adequate evidence showing that conditional use permit criteria in WCC 22.05.026(3) are met. The applicant's information regarding the county's conditional use criteria is set out in its responses to the county's "supplemental questions" (CUP2023-00001 Supplemental Questions). But the applicant's responses are inaccurate, incomplete, and inadequate to demonstrate compliance with the county's conditional use permit criteria.

- A. There is insufficient evidence to show that the proposed surface mine would "be harmonious and in accordance with the general and specific objectives of Whatcom County's Comprehensive Plan, zoning regulations, and any other applicable regulations" as required by WCC 22.05.026(3)(a).**

The applicant first responds by stating "The subject property is . . . located in the Mineral Resource Lands (MRL) overlay district where surface mining is allowed[.]" Resp. to Supplemental Question 1. But that is not true. The proposed surface mining operations would also occur on Parcel Nos. 400517200503 and 400517220470, which are not located in the Mineral Resource Lands overlay district.

Then, building on that misrepresentation, the applicant cherry-picks the Comprehensive Plan goals and policies that encourage mining activity within the Mineral Resource Lands overlay district and asserts that it complies with them. But the Comprehensive Plan goals and policies that encourage mining activity within the Mineral Resource Lands overlay district do not apply on Parcel Nos. 400517200503 and 400517220470, which are not located in the Mineral Resource Lands overlay district.

As to "Policy 8L-1: Avoid significant impacts on adjacent or nearby land uses, public health and safety, or natural resources from mineral extraction[.]" the applicant does not even assert that the proposed surface mine would avoid significant impacts on adjacent or nearby land uses. The applicant only states that the mine would be "setback from adjacent properties." But nowhere does the applicant discuss how the access road on Parcel Nos. 400517200503 and 400517220470 would be set back from adjacent properties. Nor does the applicant provide any information regarding noise, dust, light, and vibration impacts from heavy truck traffic on that access road and the resulting significant impacts to adjacent or nearby land uses. Moreover, as discussed in detail below, the applicant fails to provide any information regarding the presence of asbestos-containing minerals in the proposed mining area and the grave risks to human health from mining, crushing, and transporting asbestos-containing minerals.

As to “Goal 8M: Achieve a balance between the conservation of productive mineral lands and the quality of life expected by residents within and near the rural and urban zones of Whatcom County[,]” the applicant only asserts that “the site will maintain appropriate buffering and conditions so as to minimize impacts on surrounding residents.” But, again, the applicant ignores that noise, dust, light, and vibration impacts from heavy truck traffic on the proposed access road will result in significant impacts to adjacent or nearby land uses. And the presence of asbestos-containing minerals in the proposed mining area means that the proposed project threatens not only the “quality of life expected by residents,” but also their life expectancy. There is insufficient evidence to show that this criterion is met.

- B. There is insufficient evidence to show that the proposed surface mine would “be designed, constructed, operated, and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity, and that such use will not change the essential character of the same area” as required by WCC 22.05.026(3)(b).**

The applicant responds: “Being in the MRL overlay district, the intended use of the area is for surface mining. The proposed use is therefore harmonious and appropriate with the intended character within the MRL.” That might be true for the five parcels within the Mineral Resource Lands overlay district. But the proposed mining operations extend beyond Mineral Resource Lands overlay district, which the applicant fails to acknowledge or address. The existing or intended character of the general vicinity, and essential character of the area, is residential. On Parcel Nos. 400517200503 and 400517220470, surface mines subject to state mining regulations (like the proposed mine) are a prohibited use. The proposed surface mine is not harmonious with the intended or essential character of the area and the applicant has not put forward any evidence that it is. There is insufficient evidence to show that this criterion is met.

- C. There is insufficient evidence to show that the proposed surface mine would “be consistent with rural land use policies as designated in the rural lands element of the Comprehensive Plan” as required by WCC 22.05.026(3)(c).**

The applicant’s response to supplemental question 3 states:

The subject site is zoned Rural Forestry (RF) and R10A. There are several rural land use policies contained in the rural lands element of the Comprehensive Plan. The only goal identified in the Comprehensive Plan relative to rural lands is Goal 2DD, which is to “retain the character and lifestyle of rural Whatcom County.” There are several policies that seek to implement this goal, varying from rural densities to setbacks and compatibility with adjacent resource lands. Since the subject proposal is not for a development, structure etc. and is for a temporary use of the property, most of these policies do not apply to this proposal.

That response does not provide evidence showing that the proposed surface mine would “retain the character and lifestyle of rural Whatcom County.” Indeed, the applicant entirely dodges the

question by asserting that “most of these policies [under Goal 2DD] do not apply” while not saying which policies do apply, or how the proposed surface mine is consistent with those policies. Nor is Comp Plan Goal 2DD the only goal relevant to the proposed surface mine which the applicant failed to address. The other rural land use policies which the applicant failed to address include:

- Policy 2DD-2: Protect the character of the rural area through the County’s development regulations.
- Policy 2DD-7: Maintain the historic character and cultural roles of each rural area and community.
- Policy 2FF-3: Ensure that business operations do not adversely impact adjacent residential, agricultural or forest land, or compromise water quality and quantity.
- Policy 2GG-3 Proposed uses and densities within the Rural designation should reflect established rural character.
- Policy 2GG-7: Development within Rural designations shall be consistent with rural character as described in this chapter.

By failing to address the rural land use policies as designated in the rural lands element, the applicant failed to provide sufficient evidence to show that the proposed surface mine would “be consistent with rural land use policies as designated in the rural lands element of the Comprehensive Plan.” There is insufficient evidence to show that this criterion is met.

D. There is insufficient evidence to show that the proposed surface mine would not “be hazardous or disturbing to existing or future neighboring uses” as required by WCC 22.05.026(3)(d).

The applicant admits: “Noise and traffic associated with the proposed surface mine could potentially be disturbing to existing neighboring uses.” By admitting this and not proposing any mitigation to address these impacts, the applicant admits this conditional use criterion is not met. Moreover, as discussed in detail below, the applicant fails to provide any information regarding the presence of asbestos-containing minerals in the proposed mining area and the grave risks to human health from mining, crushing, and transporting asbestos-containing minerals. The remainder of its answer continues to ignore that the proposed mining operations would extend beyond Mineral Resource Lands overlay district, causing noise, dust, light, and vibration impacts from heavy truck traffic on the access road located outside of the Mineral Resource Lands overlay district. There is insufficient evidence to show that this criterion is met.

E. There is insufficient evidence to show that the proposed surface mine would “be serviced adequately by necessary public facilities such as highways [and] streets” as required by WCC 22.05.026(3)(e).

The applicant provides no evidence regarding this conditional use criterion. Moreover, the document CUP2023-00001 Supplemental Questions skips this criterion, jumping from Question 4 (discussed above) to Question 6 (discussed below). And the applicant failed to provide county

reviewers with a traffic study. There is no information in the record regarding adequacy of sight distances, levels of service at intersections, signage, road shoulders, road weight limits, or any other evidence to show that this criterion is met.

- F. There is insufficient evidence to show that the proposed surface mine would not “create excessive additional requirements at public cost for public facilities and services, and will not be detrimental to the economic welfare of the community” as required by WCC 22.05.026(3)(f).**

The applicant provides no evidence regarding whether its proposed heavy truck traffic would damage local roads or require additional signage or road improvements. Moreover, the applicant asserts that “the proposed mineral extraction will be an asset to the economic welfare of the community via additional job creation[,]” but elsewhere in the application materials, the applicant states that “three to five people will work associated with the surface mine.” SEPA Checklist at Question B.8.i. Three to five jobs are hardly a significant asset to the economic welfare of the community. There is insufficient evidence to show that this criterion is met.

- G. There is insufficient evidence to show that the proposed surface mine would not “involve uses, activities, processes, materials, equipment, and conditions of operation that will be detrimental to any persons, property, or the general welfare by reasons of excessive production of traffic, noise, smoke, fumes, glare or odors” as required by WCC 22.05.026(3)(g).**

The applicant admits that there “could be excess noise and traffic associated with the proposal than what would otherwise exist in a rural area.” But the applicant fails to provide any evidence regarding the access road on Parcel Nos. 400517200503 and 400517220470 and the noise, dust, and heavy truck traffic associated with that access road. Nor does the applicant even mention noise and dust impacts from rock crushing activity, or blasting. Indeed, it does not appear that the applicant mentions blasting anywhere in its application materials, even though the five parcels proposed mining are dominated by bedrock (Ranch Quarry SEPA-Environmental-Checklist-PDF at 5, response to Question B.1.f: “bulk of the site material is bedrock”). Blasting, of course, has numerous associated noise, dust, vibration and safety impacts, including flyrock and mobilization of asbestos.

The applicant fails to disclose the presence of asbestos-containing minerals within the proposed mining area. Mining, crushing, and transporting asbestos-containing minerals would pose grave health hazards to local residents and mine workers. Please see our detailed discussion of asbestos hazards below, under the section heading “*SEPA Checklist – AIR.*”

There is insufficient evidence to show that this criterion is met.

H. There is insufficient evidence to show that the proposed surface mine would “have vehicular approaches to the property which shall be so designed as not to create an interference with traffic on surrounding public streets” as required by WCC 22.05.026(3)(h).

The applicant fails to provide any evidence regarding this criterion. The applicant’s cursory response regarding this criterion is: “The proposed surface mine entrance will be off of South Pass Road and will be well separated from other surrounding county roads.” There is no information in the record regarding sight distances, levels of service at intersections, signage, or any other evidence to show that this criterion is met for the proposed surface mine and its associated heavy truck traffic. Heavy trucks carrying full loads do not accelerate quickly and the applicant provides no evidence regarding how these loaded heavy trucks turning north or south onto South Pass Road from the proposed access road might interfere with existing traffic on South Pass Road. Nor has the applicant submitted a traffic study. There is insufficient evidence to show that this criterion is met.

I. There is insufficient evidence to show that the proposed surface mine would not “result in the destruction, loss or damage of any natural, scenic, or historic feature of major importance” as required by WCC 22.05.026(3)(i).

The applicant asserts that there are “no archeological finds on the subject property.” But the applicant has not conducted an archeological survey. A mere assertion that the applicant has not stumbled across cultural resources (without actually looking for them) does not provide sufficient evidence to show that this criterion is met. Moreover, the applicant limits its response to natural, scenic, or historic features “on the property” or “on the site.” But neither this criterion nor Supplemental Question 9 limits the inquiry to the interior boundary of the site. For example, Saar Creek, a salmon-bearing stream, is just over 400 feet from the intersection of the proposed access road and South Pass Road. And the streams and wetlands that would be affected by the proposed surface mine drain into Saar Creek. The applicant states: “There are no proposed direct impacts to said critical areas [including wetlands] resulting from the surface mine.” But the proposed mine would result in 86,642 square feet of mining activity within protected wetland buffers (CUP2023-00001 Map set, Sheet 2).

The applicant fails to address the lack of any buffer between the proposed access road and the eastern edge of “Wetland A” as shown on CUP2023-00001 Map set, Sheet 2. In addition, our research indicates that approximately ten years ago Wetland A was filled to construct the existing private road/driveway on Parcel Nos. 400517200503 and 400517220470 without proper permits and authorizations. Therefore, the jurisdictional extent of Wetland A is likely greater than shown on Sheet 2 of the applicant’s map set.²

² See 1987 Corps of Engineers Wetlands Delineation Manual (“Unauthorized activities. Unauthorized discharges requiring enforcement actions may result in removal or covering of indicators of one or more wetland parameters. Examples include, but are not limited to: (1) alteration or removal of vegetation; (2) placement of dredged or fill material over hydric soils; and/or (3) construction of levees, drainage systems, or dams that significantly alter the area hydrology.”), *available at*:

The applicant does not provide sufficient evidence to show that this criterion is met.

IV. THE COUNTY LACKS SUFFICIENT INFORMATION TO ISSUE A THRESHOLD DETERMINATION OF NONSIGNIFICANCE UNDER SEPA

As an initial matter, the applicant failed to include Parcel Nos. 400517200503 and 400517220470 as part of the proposed mining operations area, so there is *no* information, let alone sufficient information, to analyze the probable, significant, adverse environmental impacts of the proposed project associated with heavy truck traffic on these two parcels (including noise, dust, and vibration impacts). Indeed, the applicant repeatedly and falsely asserts throughout the Checklist that the entire proposed mining operation would be located in the Mineral Resource Lands overlay district. That failure alone is enough to require a finding that more information is needed before the county issues a threshold determination under SEPA.

A. SEPA's procedural requirements.

SEPA's mandates are aimed at improving decision-making by assuring that agency decisions are based on adequate information about a proposal's environmental impacts. *Polygon Corporation v. Seattle*, 90 Wn.2d 59, 578 P.2d 1309 (1978), citing *Norway Hill Preservation & Protection Ass'n v. King County Council*, 87 Wn.2d 267 (1976). SEPA further requires that the County demonstrate that environmental impacts were considered in a manner sufficient to amount to *prima facie* "compliance with the procedural requirements of SEPA." *Sisley v. San Juan County*, 89 Wn.2d 78, 64 (1977). SEPA regulations specifically require that the County "carefully consider the range of probable impacts, including short-term and long-term effects" of a proposal. WAC 197-11-060(4)(c).

These requirements start at the threshold determination stage. The threshold determination is probably the most important single step in the SEPA process. The public policy of SEPA is thwarted if an EIS is not prepared for a project with significant impacts. *Norway Hill Preservation and Protection Association v. King County Council*, 87 Wn.2d 267, 273 (1976).

Consequently, the threshold determination must be based on "information reasonably sufficient to evaluate the environmental impact of a proposal." WAC 197-11-335; WAC 197-11-330; *Anderson v. Pierce County*, 86 Wn. App. 290, 301 (1997). See also *Norway Hill Preservation and Protection Ass'n v. King County Council*, 87 Wn.2d 267, 276 (1976); *Spokane County v. E. Wash. Growth Management Hr'gs Bd.*, 176 Wn. App. 555, 579 (2013), *review denied* 179 Wn.2d 1015 (2014).

The threshold determination "must indicate that the agency has taken a searching, realistic look at the potential hazards and, with reasoned thought and analysis, candidly and methodically addressed those concerns." *Conservation Northwest v. Okanogan County*, 194 Wn. App. 1034,

2016 WL 3453666, *32 (2016) (unpublished). “SEPA seeks to ensure that environmental impacts are considered and that decisions to proceed, even those completed with knowledge of likely adverse environmental impacts, are ‘rational and well documented.’” *Columbia Riverkeeper v. Port of Vancouver, USA*, 188 Wn.2d 80, 92 (2017) (quoting 24 Wash. Practice: Environmental Law and Practice § 17.1, at 192). This information must be adequate to demonstrate that the agency has taken the requisite “hard look” at environmental impacts. *Pub. Util. Dist. No. 1 of Clark County*, 137 Wn. App. 150, 158 (2007).

For the purpose of deciding whether an EIS is required, the relevant information necessary to assess the project impacts begins with the environmental checklist that is submitted with the application. A threshold determination must be based on the information in the environmental checklist and any additional information that is requested by the responsible official. WAC 197-11-335. The purpose of the checklist is to ensure that the agency fully discloses and carefully considers a proposal’s environmental impact before adopting it. *Spokane County v. E. Wash. Growth Management Hr’gs Bd.*, *supra*, 176 Wn. App. at 579. For that purpose, the information provided in the checklist must be detailed and complete. *Id.* See also *Conservation Northwest v. Okanogan County*, 194 Wn. App. 1034, 2016 WL 3453666, *32 (2016) (unpublished). Broad generalizations and rote answers in a checklist are condemned as improper. *Id.*

The SEPA regulations at Chapter 197-11 WAC specify, in part, that “[i]f information on significant adverse impacts essential to a reasoned choice among alternatives is not known, and the costs of obtaining it are not exorbitant, agencies *shall* obtain and include the information in their environmental documents.” WAC 197-11-080(1) (emphasis supplied). When there are “gaps in relevant information,” agencies “shall make clear that such information is lacking or that substantial uncertainty exists.” *Id.* at (2). Finally, agencies may proceed in the absence of vital information only if the cost of obtaining the missing information is “exorbitant,” or the means of obtaining such information is “speculative or unknown.” If they do so, they must prepare a “worst case analysis and likelihood of occurrence.” WAC 197-11-080 (text following sub-(3)(b)).

B. The County lacks information needed to make a threshold determination.

The applicant’s failure to provide information sufficient for the county to analyze the probable, significant, adverse environmental impacts of the proposed project is not limited to the omission of any information regarding Parcel Nos. 400517200503 and 400517220470. More information is needed from the applicant before the county can make a threshold determination. Other examples of the applicant’s failure to provide sufficient information include, but are not limited to:

- *SEPA Checklist – AIR*

In response to Checklist Question B.2.a, the applicant states that the only types of air emissions that would result from the proposed project are: “Normal emissions associated with the operation of equipment and machinery used for mining.” The applicant then states that the quantities of emissions to the air associated with the operation of equipment and machinery used for mining

“are unknown.” That response does not provide the county with sufficient information to assess probable, significant, adverse air quality impacts. For example, there is no information provided regarding the proposed rock crusher or what its air quality impacts might be.

Nor does the applicant disclose the presence of rock types that commonly contain asbestos. According to the Center for Disease Control’s Agency for Toxic Substances and Disease Registry (ATSDR): “Asbestos is most commonly found in three rock types: serpentinites, altered ultramafic rocks, and some mafic rocks. Other rock types known to host asbestos include metamorphosed dolostones, metamorphosed iron formations, carbonatites, and alkalic intrusions. . . . **Asbestos can be released from these rocks if the rocks are broken or crushed.**” (emphasis supplied).³

Asbestos-containing minerals are prevalent on the site of the proposed mining operation. CUP2023-00001 Aquifer Recharge Study with exhibits at PDF pages 13⁴ and 41, Figure 5.⁵

In response to Checklist Question B.2.c, the applicant states that it does not propose any specific mitigating measures to protect air quality, other than limiting the hours of operation. But without knowing anything about the quantity of air emissions, including asbestos emissions, how could the applicant or the county assess the need for mitigation? The county should require the applicant to conduct testing for asbestos throughout the project area. The county must comply with WAC 197-11-080 regarding this missing information.

These responses do not provide the county with sufficient information to assess probable, significant, adverse air quality impacts.

- *SEPA Checklist – WATER*

In response to Checklist Question B.3.a.1, the applicant states: “Five small, unnamed, non-fish bearing seasonal streams exist within 300’ of the proposed mine.” But the applicant fails to mention Saar Creek—a salmon-bearing less than 500 feet from proposed mining operations. The applicant

³ https://www.atsdr.cdc.gov/noa/where_is_asbestos_found.html, last visited April 20, 2023.

⁴ “3.2. Geology

The surface geology of the Study Area is a complex mix of metasedimentary, metamorphic, and ultramafic bedrock outcrops overlain by a thin mantle of glacial deposits (Figure 5). The geology of the area was mapped in the *Geologic Map and interpreted Geologic History of Kendal and Deming 7.5-minute Quadrangles, Western Whatcom County, Washington* and indicated that the units consisted of the metasedimentary Volcanic Sandstone of the Chilliwack Group (PPmtc), metamorphic Yellow Aster Complex and meta-conglomerate of the Bell Pass Mélange (pPogy/pPMogy), ultramafic assemblage (pTu) of serpentinite, dunite, pyroxenite peridotite, and Sumas Stade till and/or glaciolacustrine deposits (Qgus) of the Fraser Glaciation (Dragovich, et. al., 1997).”

⁵ See also https://www.dnr.wa.gov/Publications/ger_asbestos_map.pdf (last visited April 20, 2023), showing ultramafic rock and serpentine in the location of the proposed surface mine.

fails to mention that the five “small, unnamed, non-fish bearing seasonal streams” all drain to Saar Creek and that one of them is accessible to fish in its lower reach, despite the instruction to “state what stream or river [each surface water body] flows into.”

The applicant does not mention wetlands at all in this response, even though “wetlands” are specifically included in the list of surface water bodies that must be disclosed under Checklist Question B.3.a.1.

In response to Checklist Question B.3.a.2, which asks: “Will the project require any work over, in, or adjacent to (within 200 feet) the described waters[,]” the applicant answers: “No.” But the proposed mine would result in 86,642 square feet of mining activity within protected wetland buffers (CUP2023-00001 Map set, Sheet 2). And “Wetland A” on map set Sheet 2 is likely under-delineated, due to the previous illegal placement of wetland fill to construct the private road/driveway on Parcel Nos. 400517200503 and 400517220470.⁶ And if there are five streams within 300’ of the proposed mine, how likely is it that the mine operations area is not within 200’ feet of any of those five streams?

In response to Checklist Question B.3.c.1, the applicant states: “The source of runoff will be rainwater. There are 5 drainage storage facilities proposed on the site and will be installed during segmental mining to store the 25-year 24-hour storm event to make sure no stormwater leaves the site.” But the applicant also admits: “The drainage facilities may slowly discharge into adjacent wetlands.” The adjacent wetlands extend off of the proposed mining site and feed the adjacent streams. And the applicant fails to address in any way stormwater runoff from the proposed access road on Parcel Nos. 400517200503 and 400517220470. How can the applicant assert that “no stormwater leaves the site” in light of that?

Checklist Question B.3.c.3 asks: “Does the proposal alter or otherwise affect drainage patterns in the vicinity of the site?” The applicant simply states: “No.” But the mine will create a huge pit where a hill used to be. How can that not affect drainage patterns?

These responses do not provide the county with sufficient information to assess probable, significant, adverse water quality impacts.

- *SEPA Checklist - ANIMALS*

Checklist Question B.5.a asks: “Check any birds and animals, which have been observed on or near the site or are known to be on or near the site.” But the boxes for Trout and Salmon are not checked, even though they are in Saar Creek and potentially an unnamed tributary to Saar Creek.

⁶ See Note 2, *supra*, and accompanying text.

Checklist Question B.5.b asks: “List any threatened or endangered species known to be on or near the site.” The applicant asserts: “There are no threatened or endangered species known to be on or near the site.” But the applicant’s own Critical Areas Report at PDF 41/128 admits that Saar Creek has documented steelhead, is accessible to coho, and is presumed to have bull trout and cutthroat trout. And the lower reach of Stream B is gradient accessible to coho, bull trout, cutthroat, and steelhead.

These responses do not provide the county with sufficient information to assess probable, significant, adverse impacts to animals.

- *SEPA Checklist – ENVIRONMENTAL HEALTH*

The applicant admits that the proposed project could result in environmental health hazards (Checklist Question B.7.a). But the applicant fails to include any disclosure of the presence of asbestos-containing minerals in the project area (please refer to our discussion of asbestos under the *SEPA Checklist – AIR* heading, *supra*).

Checklist Question B.7.b.2 asks: “What types and levels of noise would be created by or associated with the project on a short-term or a long-term basis (for example: traffic, construction, operation, other)?” The applicant responds: “Noise associated with the project will be from heavy equipment operation during the mining activities.” But there is no analysis of the types and levels of noise. The applicant did not provide a noise study or do any modeling of noise impacts. There is no information provided regarding the types of heavy equipment that might be used. For example, there is no information provided regarding the rock crusher, which would be a major source of noise impacts. There is no information provided regarding noise from heavy trucks traveling up and down the proposed access road 50 times a day. There is no information provided regarding the piercing noise from backup beepers on moving heavy equipment. There is no information provided regarding the noise from dumping loads of crushed rock into metal truck beds.

The applicant did not provide the county with sufficient information to assess probable, significant, adverse environmental health impacts, including asbestos and noise.

- *SEPA Checklist – LAND AND SHORELINE USE*

In response to Checklist Question B.8.h, the applicant admits that parts of the site have been classified as critical areas by the county.

Checklist Question B.8.i asks for information regarding: “Proposed measures to ensure the proposal is compatible with existing and projected land uses and plans, if any.” In response, the applicant falsely asserts: “The proposed surface mine is located with the Mineral Resource Lands

designated in the Comprehensive Plan for mining purposes.” This response again ignores and fails to disclose the proposed mining operations on Parcel Nos. 400517200503 and 400517220470. Moreover, the applicant provides no information regarding measures to ensure the proposal is compatible with existing and projected land uses and plans. There is no information regarding the parcels north of and adjacent to Parcel Nos. 400517200503 and 400517220470—which are residential parcels used for residential purposes—or how the proposed mining operation would be compatible with those pre-existing residential uses. These two residential parcels, like Parcel Nos. 400517200503 and 400517220470, are not within the Mineral Resource Lands overlay district.

The applicant did not provide the county with sufficient information to assess probable, significant, adverse impacts to existing and projected land uses and plans.

- *SEPA Checklist – AESTHETICS*

Checklist Question B.10.b asks: “What views in the immediate vicinity would be altered or obstructed?” In response, the applicant states: “None.” But the applicant proposes to remove a hill and replace it with a pit. How can that not affect views from nearby residential properties? The applicant has not provided a viewshed analysis.

Checklist Question B.10.c asks for: “Proposed measures to reduce or control aesthetic impacts, if any.” The applicant simply states: “None as there are no impacts.” But as above, the applicant has not prepared or submitted a viewshed analysis.

The applicant did not provide the county with sufficient information to assess probable, significant, adverse aesthetic impacts.

- *SEPA Checklist – LIGHT AND GLARE*

Checklist Questions B.11.a & b ask the applicant to describe the types of light and glare impacts produced by the proposed project, what time of day those impacts would occur, and whether those impacts could interfere with views. The applicant asserts that there “should be no light or glare produced by the surface mine” and states only “N/A” to Question B.11.b. But those answers are premised on the applicant’s position that the proposed access road is not part of the proposed mining operation. If the proposed mine is approved, heavy trucks would travel up and down the proposed access road, often after dark in the winter months. The proposed access road has several curves, which would cause the trucks to shine their headlights in various directions and angles. The applicant did not provide any analysis of these probable light and glare impacts.

The applicant did not provide the county with sufficient information to assess probable, significant, adverse light and glare impacts.

- *SEPA Checklist – HISTORIC AND CULTURAL PRESERVATION*

In response to Checklist Question B.13.b, the applicant says there are no landmarks, features, or other evidence of Indian, historic use or occupation and no material evidence, artifacts, or areas of cultural importance on or near the site. But the applicant then admits: “There have been no archaeological studies performed on the site[.]”

In response to Checklist Question B.13.c (“Describe the methods used to assess the potential impacts to cultural and historic resources on or near the project site”), the applicant states: “Historic maps and future consultation with the Whatcom County and the Department of Archeology will be initiated if necessary.” First, this appears to be an admission that the applicant did not even take the basic step of reviewing publicly-available historic maps. Second, who decides if further investigation is necessary—the applicant? That would be a recipe for no further investigation.

The applicant did not provide the county with sufficient information to assess probable, significant, adverse impacts to cultural resources.

- *SEPA Checklist – TRANSPORTATION*

Checklist Question B.14.a requires the applicant to: “Identify public streets and highways serving the site or affected geographic area and describe proposed access to the existing street system. Show on site plan, if any.” The applicant’s only response is: “The site is served via a private easement off of South Pass Road.” But the proposed access road on Parcel Nos. 400517200503 and 400517220470 is part of the proposed mining operation. The Site Plan (CUP2023-00001 Map Set at Sheet 2) does not show a detail of the intersection of the proposed access road with South Pass Road. No proposed improvements to this intersection are shown, even though slow-moving heavy trucks would be turning onto or off of South Pass Road at this access point 50 times a day.

Checklist Question B.14.d asks: “Will the proposal require any new or improvements to existing roads, streets, pedestrian, bicycle or state transportation facilities, not including driveways?” The applicant simply asserts: “No. It is not expected that the proposed mine will require improvements to existing roads, streets, or other facilities.” But there is no information or analysis of the adequacy of the intersection of the proposed access road with South Pass Road to accommodate slow-moving heavy trucks entering and exiting 50 times a day. Nor is there any analysis of whether the roads that would be used by these trucks have adequate sight lines, levels of service, shoulders (especially important regarding safety impacts to pedestrians and bicyclists), or load-bearing capacity to safely handle the proposed increased in heavy truck traffic.

Checklist Question B.14.f asks: “How many vehicular trips per day would be generated by the completed project or proposal? If known, indicate when peak volumes would occur and what

percentage of the volume would be trucks (such as commercial and non-passenger vehicles). What data or transportation models were used to make these estimates?” In response, the applicant states: “The surface mining operation will generate approximately 25 vehicular trips per day. Peak volumes unknown. Approximately 95% will be trucks.” The applicant provides no information regarding the data or models it used (if any) to make its estimates. And the applicant admits that peak volumes are unknown (because it did not seek out that information).

We note that the applicant’s traffic impact “study” (CUP2023-00001 Preliminary-Traffic) is a two-page form only. It does not analyze or provide any information regarding levels of service, intersections, or sight distances. Moreover, it is inaccurate. It bases its math on 15 new trips per day, but the other application documents (including the SEPA Checklist) state that there will be 25 round trips (50 one-way trips) per day.

The applicant did not provide the county with sufficient information to assess probable, significant, adverse impacts to traffic.

V. THE INFORMATION PROVIDED BY THE APPLICANT TO THE COUNTY SHOWS THAT A DETERMINATION OF SIGNIFICANCE IS REQUIRED

While the information provided by the applicant to date is insufficient for the county to analyze the probable, significant, adverse environmental impacts of the proposed project, the applicant admits to impacts sufficient to show that once a complete application is submitted, a determination of significance will be required. Those impacts admitted by the applicant include impacts to noise, traffic, wetlands and wetland buffers, and environmental health hazards. Of course, the applicant put its proposed project in the best possible light in its application. For example, nowhere does the applicant disclose the presence of asbestos-containing minerals or the probable human health impacts of mining, crushing, and transporting asbestos-containing minerals. A fuller analysis based on adequate information will show that the significant adverse impacts of the proposed surface mining operation are unavoidable and cannot be mitigated into nonsignificance.

VI. CONCLUSION

For all the forgoing reasons, the county should deny Brent Cowden's conditional use application, demand more information regarding the proposed surface mine's probable, significant, adverse environmental impacts, and (once that information is provided) issue a determination of significance under SEPA so that a full environmental review is prepared for the project.

Very truly yours,

BRICKLIN & NEWMAN, LLP

A handwritten signature in blue ink, appearing to read 'Zachary K. Griefen', is written over the typed name.

David A. Bricklin
Zachary K. Griefen
*Counsel for Homeowners
Opposed to Mining Expansion*