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Oliver Orjiako, Director
Clark County Community Planning
1300 Franklin Street; 3rd Floor
Vancouver, WA 98666-9810

Re: Appeal of SEPA DNS for

Dear Mr. Orjiako:

Pursuant to CCC 40.570.080.D(1)(a), Friends of Livingston Mountain seeks to appeal the SEPA Determination of Non-Significance issued for CPZ2013-00015 Surface Mining Overlay Update.

This appeal should be considered a "contingent appeal." If the Board of County Commissioners follows the Planning Commission's Recommendation and removes the original recommendation for the mineral overlay in the Livingston Mountain area, then this appeal need not be decided.

If, however, the Board of County Commissioners adds any of the Livingston Mountain area back into the mineral overlay, then we request the Board consider this appeal along with its consideration of the recommendation.

Basis of Appeal

The purpose of the State Environmental Policy Act ("SEPA") and the EIS process is to provide decision-makers – in this case the County Commissioners -- with all relevant information about the potential environmental consequences of their actions and to provide a basis for a reasoned judgment that balances the benefits of a proposal action against its potential adverse effects.[1] Consistent with this purpose, "SEPA mandates governmental bodies consider the total environmental and ecological factors to the fullest in deciding major matters."[2] These considerations must be integrated into governmental decisionmaking processes so that "presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical consideration."[3] The environmental analysis must "accompany the proposal through the existing agency review processes" so that officials will use it in making decisions.[4] SEPA's ultimate quest has been described as ensuring "environmentally enlightened government decision making.[5]

[1] *Citizen Alliance to Protect our Wetlands v. City of Auburn*, 126 Wn.2d 356, 362 (2005).
[2] *Eastlake Comm'ty Coun. v. Roanoke Assocs*., 82 Wn.2d 475, 490 (1973).
[3] RCW 43.21C.030(2)(b); *Eastlake*, at 492.
[4] RCW 43.21C.030(2)(d), WAC 197-11-655.
[5] Settle, Richard; *The Washington State Environmental Policy Act*, § 14.01(2)(b), p. 14-56 (Release 21, 2009).

SEPA requires the preparation of an EIS all "major actions significantly affecting the quality of the environment." The normal first step is the "threshold determination process." A threshold determination *not* to prepare an EIS requires a determination that the action is not major and will not significantly affect the environment.[6] Because the policies of SEPA are thwarted whenever an incorrect threshold determination is made, the process and information reviewed during the threshold determination is critical.[7]

The threshold determination process requires "local government to consider all environmental and ecological factors *before* taking action that might significantly affect the quality of the environment."[8] Indeed, the SEPA rules mandate consideration of the environmental review "at the earliest possible time to ensure that planning and decisions reflect environmental values… ."[9] The SEPA rules state establish follow requirements for timely environmental review:

> (2) **Timing of review of proposals.** The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, ***at the earliest possible point*** in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified.
>
> (a) ***A proposal exists when an agency*** is presented with an application or ***has a goal and is actively preparing to make a decision*** on one or more alternative means of accomplishing that goal *and* the environmental effects can be meaningfully evaluated.
>
> (i) ***The fact that proposals may require future agency approvals or environmental review shall not preclude current consideration***, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts.[10]

Here, there is no reasonable dispute that the County has a "goal" and is "actively preparing to make a decision" to create new and expanded mineral resource overlays, as well as eliminate some existing overlays.[11] It is irrelevant that further approvals may be necessary. The County knows the location of the proposed mineral resource overlays, and while additional review may be necessary before mining may commence, the act of designating the land with a mineral resource overlay opens it up for mining use and mining becomes and an allowed use subject only to administrative review. Sufficient information is available or can easily be collected to review

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[6] *Juanita Bay Valley Community Ass'n. v. City of Kirkland*, 9 Wn.App. 59, 73 (1973).
[7] *King County v. Boundary Review Board*, 122 Wn.2d 648, 663-64 (1993); *Norway Hill Preservation and Protection Ass'n v. King County Council*, 87 Wn.2d 267, 273 (1976).
[8] *Lanzce G. Douglass, Inc., v. City of Spokane Valley*, 154 Wn. App. 408, 422 (2010).
[9] WAC 197-11-055. *King County*, 122 Wn.2d at 663 (1993); *Stempel v. Department of Water Resources*, 82 Wn.2d 109, 118 (1973); *Loveless v. Yantis*, 82 Wn.2d 754, 765-66 (1973).
[10] WAC 197-11-055(2).
[11] WAC 197-11-055(2)(a).

the environmental impacts.[12]

Consistent with WAC 197-11-055(2), the County was required to at least consider the environmental effects as part of its threshold determination. SEPA requires that the threshold determination be "based on information reasonably sufficient to evaluate the environmental impact of a proposal" and that the County *actually consider* this information prior to making the threshold determination.[13] Instead of meeting these requirements, however, the SEPA DNS for the mineral resource lands amendments provides *absolutely no information* on impacts, but instead defers *all* analysis to a later time.

While WAC 197-11-060(5) confirms that the "level of detail and type of environmental review may vary with the nature and timing of proposals …" this does not mean that review can be avoided. *Phased review* is not the same as *no review*. As the SEPA regulations confirm:

> A nonproject proposal may be approved *based on an EIS assessing its broad impacts*. When a project is then proposed that is consistent with the approved nonproject action, the EIS on such a project shall focus on the impacts and alternatives including mitigation measures specific to the subsequent project and not analyzed in the nonproject EIS. (emphasis added)[14]

This mandate to review the impacts during the Comprehensive Plan amendment process is supported also by the GMA regulations. WAC 365-196-620 explains:

> (3) Phased environmental review.
>
> (a) The growth management process is designed to proceed in phases, moving, by and large, from general policy-making to more specific implementation measures. Phased review available under SEPA can be integrated with the growth management process through a strategy that identifies the points in that process where the requirements of the two statutes are connected and seeks to accomplish the requirements of both at those points.
>
> (b) In an integrated approach major emphasis should be placed on the quality of SEPA analysis at the front end of the growth management process - the local legislative phases of plan adoption and regulation adoption. ***The objective should be to create nonproject impact statements, and progressively more narrowly focused supplementary documents, that are sufficiently informative. These impact statements should reduce the need for extensive and time consuming analysis during subsequent environmental analysis at the individual project stage.*** (emphasis added).

[12] WAC 197-11-055(2)(a)(i).
[13] WAC 197-11-335(1); *Norway Hill*, 87 Wn.2d at 275; *Moss*, 109 Wn. App. at 14.
[14] WAC 197-11-443(1).

In other words, it is clearly erroneous to ignore review of potential impacts during the non-project review. While a "barebones" EIS addressing the potential impacts of surface mining within the new or amended mineral resource overlays may be appropriate, it is *not* appropriate to simply defer all analysis to a later date.[15] The impacts, at least the broad impacts, must still be analyzed.

In a similar situation addressed in *King County v. Boundary Review Board*, the Washington Supreme Court reviewed the City of Black Diamond's action approving a DNS for a proposed annexation. The City's position was that the proposed annexation was a non-project "map change" and that "any future development of the property is speculative and thus not suitable for full environmental review."[16] The City argued that this was particularly true where no "official proposals have been submitted to Black Diamond for development of the annexation property."

The Supreme Court soundly rejected the City's DNS:

> One of SEPA's purposes is to provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences. Decision-making based on complete disclosure would be thwarted if full environmental review could be evaded simply because no land-use changes would occur as a direct result of a proposed government action. Even a boundary change, like the one in this case, may begin a process of government action which can "snowball" and acquire virtually unstoppable administrative inertia. Even if adverse environmental effects are discovered later, the inertia generated by the initial government decisions (made without environmental impact statements) may carry the project forward regardless. When government decisions may have such snowballing effect, decisionmakers need to be apprised of the environmental consequences *before* the project picks up momentum, not after.[17]

The Court concluded:

> We therefore hold that a proposed land-use related action is not insulated from full environmental review simply because there are no existing specific proposals to develop the land in question or because there are no immediate land-use changes which will flow from the proposed action. Instead, an EIS should be prepared where the responsible agency determines that significant adverse environmental impacts are probable following the government action.[18]

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[15] *SeeI Organization to Preserve Agricultural Lands ("OPAL") v. Adams Cy.*, 128 Wn.2d 869, 879-880 (1996); *citing Cathcart-Maltby-Clearview Community Council v. Snohomish County*, 96 Wash.2d 201, 208-11, 634 P.2d 853 (1981).

[16] 122 Wn.2d at 662.

[17] 122 Wn.2d at 664 (internal citations omitted, emphasis in original).

[18] While the court recognized that the City *could* treat the annexation as a "nonproject" proposal, it rejected the concept that SEPA review of a nonproject action meant it evaded review. To the contrary, the court confirmed that under the SEPA rules for nonproject proposals "agencies can limit the scope of an EIS to "the level of detail

As discussed below, it is critical that both the County Commissioners have sufficient information before them to understand the impacts of their decision. Impacts that include, but are not limited to, traffic impacts, public safety impacts, noise and dust impacts, impacts to quality of life, and impacts to water supply and water quality.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

GENDLER & MANN, LLP

David S. Mann

Enclosures

cc:

appropriate to the scope of the nonproject proposal" *Id.* at fn 10. *See also, Magnolia Neighborhood Planning Council v. City of Seattle*¸ 155 Wn. App. 305 (2010)