

The Honorable Judge Anna M. Laurie
Kitsap County Superior Court

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR JEFFERSON COUNTY

IRON MOUNTAIN QUARRY, LLC, a)
Washington Limited Liability Company,)
and POPE RESOURCES, a Delaware)
Limited Partnership;)

NO. 10-2-00181-5

Petitioner/Plaintiffs,)

RESPONSE BRIEF OF
RESPONDENTS/DEFENDANTS

vs.)

JEFFERSON COUNTY, a Washington)
Municipal Corporation, acting through its)
Department of Community Development;)
and STACIE L. HOSKINS, Planning Mana-)
ger, Jefferson County Department of Com-)
munity Development;)

Respondents/Defendants.)

I. INTRODUCTION

Petitioners (hereafter “IMQ”) have asked this Court to reverse Jefferson County’s initial decision in the SEPA process for a proposed 40-year, 142-acre gravel mining operation. IMQ further asks the Court to assume an “oversight” role in directing issuance by Jefferson County (the “County”) of a determination of nonsignificance (“DNS”) or compelling negotiations with IMQ regarding the terms of a mitigated DNS (“MDNS”).

RESPONSE BRIEF OF
RESPONDENTS/DEFENDANTS - 1

MENKE JACKSON BEYER
EHLIS & HARPER, LLP
807 North 39th Avenue
Yakima, WA 98902
Telephone (509)575-0313
Fax (509)575-0351

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3 The relief requested by IMQ is without precedent in any reported Washington case. IMQ
4 cites no authority for this remedy. IMQ does not explain how the public participation process
5 that is at the heart of SEPA's policy of information-based community decisionmaking would be
6 fulfilled with judicial management of an inherently administrative task.

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8 IMQ has sought this remedy in the context of a constitutional writ of certiorari. By
9 seeking to litigate its disagreement with the County, IMQ has pursued a forum where dynamic
10 and far-reaching considerations of local planning are constrained to a single adversarial hearing.

11 IMQ disagrees with the substance of the County's decision, but the decision to issue a
12 determination of significance ("DS") was fairly reached and IMQ cannot show that it was the
13 result of arbitrary and capricious decisionmaking. IMQ does not develop any argument to show
14 that the County acted illegally.

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16 IMQ is wrong to claim that the DS represents action by the County to "block" its project.
17 In the absence of IMQ's lawsuit, the public review and collaborative development of a
18 satisfactory environmental impact statement ("EIS") would already be underway. Following
19 SEPA review, and if the County were to wrongfully deny the storm water management permit
20 necessary to develop the mine, IMQ would have a well-defined right to judicial review under the
21 Land Use Petition Act, Ch. 36.70C RCW ("LUPA"). The Court would then have an opportunity
22 to review an administrative record complete with public comments, comments from other
23 relevant governmental agencies, and a specific record of findings and conclusions to explain the
24 County's choice to either approve or deny IMQ's permit.
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3 Instead, IMQ has made the tactical choice that it should litigate against the County now
4 and ask the Court to insert itself directly into the planning and environmental review process.

5 The Court should also be aware that IMQ has sought money damages against the County.
6 (Petition for Constitutional Writ of Certiorari and Complaint for Damages at 24-25, par. 6.2) If
7 the Court finds the DS to have been issued arbitrarily and capriciously, then this finding could
8 establish as a matter of collateral estoppel that the County owes substantial damages to IMQ, as
9 well as reasonable attorney's fees.
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11 Issues of institutional expertise and the primary jurisdiction of administrative agencies
12 under SEPA are reflected in a very high burden of proof for IMQ. The law recognizes that the
13 relief sought by IMQ is inimical to the smooth function of land use decisionmaking by local
14 government agencies. IMQ's factual and legal arguments in support of this remedy fall short.
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16 IMQ tries to show the Court that this is one of the "rare cases" in which a constitutional
17 writ of certiorari should reverse an interim step in the SEPA decisionmaking process. But IMQ's
18 disagreement with the County is prosaic. IMQ seems convinced that public participation is an
19 obstacle to project expediency. The fact that the County disagrees is not the equivalent of anti-
20 developer bias.
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22 In short, this case is about the extent to which the County has complied with SEPA's
23 requirement for an EIS in any case where "the lead agency reasonably believes that a proposal
24 may have a significant adverse impact...." WAC 197-11-330(4). The County has never balked
25 at judicial review of the DS in this case, and even stipulated to issuance of the writ so that review
26 might proceed. The record shows ample basis for the DS, and the Court should deny IMQ's
27 invitation to take over the administration of the SEPA process for this application.
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3 The Court should specifically find that the DS was not illegal or arbitrary and capricious.

4 **II. FACTUAL BACKGROUND**

5 Despite IMQ's accusations of bias, the only motivating factor for the County's actions
6 has been the need to make well-reasoned decisions regarding planning and environmental
7 review. Although IMQ cannot be criticized for focusing on the fulfillment of its business goals,
8 the County has a broader commitment to the public in general. Making appropriate
9 governmental decisions on mineral resource extraction sites requires faithfulness to previously-
10 existing planning documents, careful assessment of the County's own expertise in mining impact
11 assessment, and full opportunity for public participation in environmental review and
12 decisionmaking.
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14 This section of the County's brief describes how the County has attempted to fulfill its
15 mission with regard to mining activities, and how a DS for IMQ's proposal is consistent with the
16 County's best efforts to act in an appropriate and transparent manner. IMQ argues that the Court
17 should review its application as a "low-level administrative permit process." But this permit will
18 authorize mining activities of a type that have been the subject of regulatory actions by the
19 County for many years before IMQ's application was submitted.
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22 **A. Background of mineral resource planning in Jefferson County.**

23 Over a decade ago, the County identified that the primary kind of commercial mineral
24 extraction within the County is rock material mined from quarries. (AR 1257).¹ By 1997, the
25 County recognized that "quarry impacts from noise, dust, and traffic are general concerns of
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28 ¹ All references to the administrative record correspond to unique document control numbers and
29 are designated as "AR ____".

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3 adjacent residents or property owners” living near mineral resource extraction sites. (*Id.*) A
4 similar view of the environmental significance of surface mining has been codified in state law:

5 The legislature recognizes that the extraction of minerals by
6 surface mining is an essential activity making an important
7 contribution to the economic well-being of the state and nation. It
8 is not possible to extract minerals without producing some
9 environmental impacts. At the same time, comprehensive
10 regulation of mining and thorough reclamation of mined lands is
11 necessary to prevent or mitigate conditions that would be
12 detrimental to the environment and to protect the general welfare,
13 health, safety, and property rights of the citizens of the state.
14 Surface mining takes place in diverse areas where the geologic,
15 topographic, climatic, biologic, and social conditions are
16 significantly different, and reclamation specifications must vary
17 accordingly. ***Therefore, the legislature finds that a balance
18 between appropriate environmental regulation and the
19 production and conservation of minerals is in the best interests of
20 the citizens of the state.*** RCW 78.44.010. (emphasis added)

21 The County’s environmental impact statement for its 1998 comprehensive plan went into
22 little additional detail regarding mineral resource planning or mining impacts. (*Id.*) In the
23 1990s, the County had only minimal planning documents governing resource lands. At that
24 time, the County had not yet developed any comprehensive policy for mineral resource land
25 planning. (AR 1325-1326).

26 In the following years, the County began to implement more sophisticated goals and
27 policies for decisionmaking regarding mining. The County incorporated a matrix-based
28 approach for assessing suitability of mineral resource lands into its 1998 comprehensive plan.
29 (AR 779-780).

30 By 2002, the County had progressed from an *ad hoc* approach for mineral resource
planning to a fully GMA-compliant comprehensive mineral lands regulatory ordinance. (AR
751; 778-782). Under this framework, once candidate lands are identified, potential sites for

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3 commercial mineral extraction must be evaluated to assess land use compatibility, economic
4 issues, and environmental impacts. (AR 751). This approach links comprehensive mineral
5 resource overlay planning with future site-specific land use decisionmaking. (Id.) The County
6 integrated mining impact analysis within broader comprehensive planning considerations. This
7 resulted in: systematic classification of significant types of mineral resources; creation of a
8 predictable means of balancing different land uses within and adjacent to mineral resource areas;
9 and establishing protections for mineral resource lands from the encroachment of incompatible
10 development. (AR 750-751).

11
12 Through these new planning tools, a review of a new mineral resource designation
13 request was performed for an application by Fred Hill Materials near the intersection of SR-104
14 and SR-19 in the Shine area of Jefferson County, which is located just west of the Hood Canal
15 Bridge and near the proposed IMQ site. In the review process for the Fred Hill Materials mineral
16 resource overlay application, the County evaluated excessive noise, dust, blasting, vibrations,
17 adjacent land use compatibility, and impacts of gravel truck traffic. (AR 1648-1655).

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19 As a final point on background topics, IMQ repeatedly argues that the County failed to
20 require an adequate SEPA review several years ago for a different quarry (i.e., the Mason Shine
21 Quarry). This argument is not correct, but if accepted as true it raises the puzzling suggestion
22 that IMQ believes itself to be now entitled to its own erroneous SEPA decision. In fact, the
23 County was not the lead agency for SEPA review of Mason Shine Quarry's expansion – the state
24 Department of Natural Resources was. (AR 2133, 2145). The County cannot answer for what
25 DNR did or failed to do during its SEPA review of Mason Shine Quarry. In any event, the
26 proposal of Mason Shine Quarry was the expansion of an existing mine from 20 acres to 40
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3 acres, and may not be comparable to the long-term impact analysis associated with IMQ’s new
4 142-acre facility. (AR 2145).

5 **B. IMQ’s mine site application has not proceeded within the County’s overall**
6 **mineral resource planning framework.**

7 IMQ first approached the County about ways in which it could develop its mine without
8 going through the above-described mineral resource planning process. Instead, IMQ sought to
9 develop its facility based on nonconforming use rights under the doctrine of “diminishing
10 assets.” (AR 4951-4952). This doctrine provides for a unique approach to nonconforming uses
11 for mining operations and was addressed as a matter of first impression by the Washington
12 Supreme Court in 2001. See City of University Place v. McGuire, 144 Wn.2d 640, 649, 30 P.3d
13 453 (2001). IMQ is correct that IMQ and the County disagreed on the applicability of this
14 doctrine, and that these disputes resulted in two court rulings regarding the nature of IMQ’s
15 diminishing assets rights. But IMQ overstates the significance of these decisions.
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18 In one of the superior court rulings cited by IMQ, it was actually a citizens’ group, the
19 Port Ludlow Village Council, and not Jefferson County, that sued to challenge a hearing
20 examiner determination that IMQ had nonconforming mineral use rights to its mine. (AR 4121).
21 In the second matter, the County’s position on the need for IMQ to obtain a conditional use
22 permit was upheld by the Jefferson County Hearing Examiner. (AR 4113). Although the
23 hearing examiner was later reversed in court, Judge Verser observed that “both parties provided
24 well reasoned arguments and legal memoranda in support of their positions.” (AR 4072).
25 IMQ’s argument that these decisions manifest a “campaign of opposition” by Jefferson County is
26 an exaggerated rhetorical claim that is not borne out by the record. IMQ’s theme, in any event,
27 does nothing to analytically carry IMQ’s burden of proof.
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3 Even as IMQ was litigating the question of its right to proceed under the diminishing
4 assets doctrine, IMQ also filed an application, under protest, to adopt a mineral resource land
5 overlay designation for its proposed mine site. (AR 3756). In doing so, IMQ was careful to
6 point out that it did not intend to abandon its position under the diminishing assets doctrine and
7 disputed that it was required to obtain a mineral resource land overlay. (Id.) The County
8 initiated review of the IMQ mineral resource overlay application. In this application process,
9 IMQ submitted a SEPA environmental checklist. (AR 3789-3801). A public comment period
10 was initiated by the County. The IMQ application generated voluminous public responses from
11 concerned individuals and affected governmental agencies. (AR 3805-4056).

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13 During the public comment process on the mineral resource overlay application,
14 individuals expressed concern about noise, dust, and traffic impacts. (AR 3809). The
15 Washington State Department of Transportation expressed concern about potential impacts to the
16 state's transportation system. (AR 3831). Specific concerns were raised regarding noise
17 disruption due to blasting. (AR 3851, 3858). The compatibility of the IMQ mining site with the
18 Port Ludlow Master Planned Resort area was questioned as a significant and long-lasting
19 potential negative impact. (AR 3869). One commenter noted that the mining proposal would
20 alter the topography of the mined area in a way that would destroy the natural barrier helping to
21 insulate Port Ludlow from sounds of future mining operations in the vicinity of the IMQ site.
22 (AR 3871-3872). Another commenter reiterated concern about blasting and vibrations. (AR
23 3891).

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3 A comment raised the possibility that the IMQ proposal could have much greater
4 cumulative impacts if it were to expand operations to incorporate a marine dock accessed by a
5 roadway traveling directly through the center of the Port Ludlow community. (AR 3912). The
6 concern that the IMQ site could lead to indirect or cumulative impacts on Port Ludlow was
7 compared to circumstances in Granite Falls, Washington, where a mining operation exists close
8 to residential communities with a high degree of resultant conflict. (AR 3936). The above is a
9 brief summary of numerous other comments received by the County, many of which repeat the
10 same basic points. (AR 3805-4056).

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12 The mineral resource overlay process assures meaningful public participation under the
13 Jefferson County Code at JCC 18.45. Thus, these and similar concerns were echoed during a
14 hearing on the IMQ mineral resource overlay application conducted by the Jefferson County
15 Planning Commission on April 9, 2008. (AR 3896).

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17 Counsel for IMQ, Molly Lawrence, wrote a letter to the Jefferson County Planning
18 Commission dated October 3, 2008, which was intended, in part, to respond to comments
19 received on the application. (AR 3958-3962). In this letter, Ms. Lawrence assured the County
20 that “there should be no doubt that all the questions raised in the recent comment letters will be
21 addressed and resolved before IMQ undertakes mineral resource operation for the subject
22 property.” (AR 3961). Ms. Lawrence repeated her point by stating that “all operational issues
23 and impacts will be addressed at the time IMQ applies for a permit to undertake mineral
24 extraction at the subject property.” (*Id.*)
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3 IMQ's attorney urged that the Planning Commission needed to act to designate the IMQ
4 property as mineral resource overlay without delay because she recognized the existence of
5 potentially challenging incompatibility between the mining operation and the Port Ludlow
6 community. Or, in the words, of Ms. Lawrence: "...the increasing development (largely
7 residential) at Port Ludlow is actually a key reason for the County to designate the subject
8 property now." (AR 3962). The Port Ludlow Master Planned Resort was referred to as
9 "imminent incompatible development on adjacent lands." (Id.) Likewise, "if development of
10 Port Ludlow continues as it has over the past several years... it will likely continue to expand
11 closer and closer to the subject property. That expansion of development, without the concurrent
12 recognition of this critical mineral resource, will make the possibility of protecting this property
13 and making it available for mineral resource extraction in the future all the more difficult." (Id.)

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16 Representatives of the Port Ludlow Master Planned Resort publicly announced in 2004
17 an intent to focus on serving as a "destination resort for the traveling public." (AR 4181). A
18 draft environmental impact statement discussing this shift in emphasis was disseminated in
19 April, 2004. (AR 4168-4405).

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21 The same reassurances were provided by the same attorney in a separate letter to the
22 Jefferson County Board of County Commissioners dated November 25, 2008. (AR 4006-4007).
23 In this letter, Ms. Lawrence criticized the Planning Commission for ignoring IMQ's application
24 materials, and again placed a strong emphasis on the incompatibility problem of the mining site
25 and Port Ludlow: "It is very likely that Port Ludlow will continue to expand toward this
26 property. It will make it all the more difficult – if not impossible – to protect and utilize the
27 important mineral resources that are abundant on this property in the future." (AR 4007).
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3 Similar assurances were made by different attorneys representing IMQ during the near-
4 simultaneous proceedings to assert IMQ's right to mine as a legal nonconforming use. In
5 proceedings before the Jefferson County Hearing Examiner on July 25, 2008, IMQ attorney
6 Keith Moxon stated that "SEPA review will address sufficiently the impacts of the mine." (AR
7 4103). Mr. Moxon also stated that "all impacts will be covered by the County through the SEPA
8 process. The process provides many opportunities for public involvement." (AR 4106).

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10 But IMQ has since chosen to rely on a permit review process based on its nonconforming
11 use rights. In the absence of any need to obtain a conditional use permit or other form of zoning
12 determination, and with no pending mineral resource overlay application, the only development
13 entitlement that IMQ requires of Jefferson County is a storm water management permit. And as
14 IMQ correctly notes, the Jefferson County code does not prescribe any public notice or public
15 hearing process regarding this permit.
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17 Under IMQ's new preferred development approval pathway, public participation will
18 occur, if at all, only during the SEPA review of its storm water management permit application.
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20 **C. The storm water permit application and SEPA checklist materials of IMQ
21 contained inconsistencies and ignored impacts.**

22 IMQ submitted an application for a storm water management permit to Jefferson County
23 on February 25, 2010. (AR 3, 87). On the same date, IMQ also submitted a SEPA checklist for
24 the proposed mine. (AR 88-100). The SEPA checklist was accompanied by engineering and
25 environmental studies, including hydrology, wetland mitigation, noise assessment, and traffic
26 impacts. (AR 101-568).
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3 The application materials indicated that the mine was expected to be in operation for
4 approximately 40 years. (AR 9). The mine would generate “occasional” blasting noise, but
5 blasting noise impacts were not addressed in the noise study. (AR 25; 184-222). The application
6 indicated that there were two streams on the site, including one that discharges into Suquamish
7 Harbor. (AR 25). There was no air quality study or dust deposition analysis to describe the
8 relationship between expected particulate emissions and surface water quality impacts. The
9 application materials only indicated that “some dust and vehicle emissions will occur as a result
10 of mining activities at the subject property.” (AR 92).

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12 The application materials indicated that the nearest residence is approximately one mile
13 from the mine site and that the nearest public road (i.e., SR-104) approaches to within 300 feet of
14 the site. (AR 25, 98). The application materials did not contain any analysis or discussion of
15 mitigation measures relating to vibration or flyrock² risk associated with expected blasting.
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17 The application materials did not include a restoration plan to be used for site reclamation
18 after mining activities ceased. Instead, the application stated that “a restoration plan will be
19 generated at the end of the mining operations as required by the mining permits.” (AR 27).
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21 The groundwater conditions analysis concluded that there would be no hydrogeologic
22 connection between the site and drinking water sources. This conclusion was based, in part, on
23 the assumption that “...water wells do not exist within the footprint of the proposed New Shine
24 Quarry (NSQ) site...” (AR 139). But the SEPA environmental checklist indicated that the site
25 will contain wells for industrial and domestic water use. (AR 93).
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29 ² Rock displaced by blasting and propelled beyond recoverable limits.

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3 The SEPA checklist stated that expected noise levels would be similar to those associated
4 with adjacent mining operations. (AR 96). The noise assessment study was based on existing
5 topography. (AR 188). The noise assessment study noted that “topography is expected to have a
6 significant effect on the assessment due to screening provided by topographical features such as
7 hills.” (AR 194). The report also noted that “the effects of the complex terrain are apparent in
8 the modeling results... .” (AR 199). But details of “site-specific installations and unique
9 acoustical effects” presented “a level of uncertainty” to the authors of the noise assessment. (AR
10 200). There was no assessment made of the alteration of one of the most prominent features at
11 the site -- a north-south trending ridge with topographic relief on the order of 300 feet -- on
12 propagation of off-site noise sources, such as the adjacent Mason Shine Quarry or vehicle traffic
13 on SR-104. (AR 200-200, 250).

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16 The effect of this alteration of topography was either unknown or was not assessed by the
17 authors of the noise assessment study, despite the “significant effect” that topography was
18 expected to have on the validity of the assessment. Although IMQ argues that the noise model
19 “accounted for the effects of...topography” careful review of the report does not indicate that the
20 *change* in topography was addressed. The specific parameters for the acoustic modeling do not
21 list alterations of topography. (AR 192-193).

22
23 Blasting noise was not discussed at all. (AR 187-188).

24 The SEPA checklist indicated that the site was accessed by an existing private roadway
25 that parallels the property’s southwestern lease line. (AR 98). This road, Shine Quarry Road,
26 terminates to the north at Beaver Valley Road (SR-19) in a little less than two miles from its
27 southerly terminus, but the traffic impact analysis did not include any mention of impacts of
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3 gravel truck traffic on SR-19 at its intersection with Shine Quarry Road. (AR 236-248). The
4 study area for traffic impacts was focused only on SR-104, because the traffic study author
5 “assumed that all project trips will access the site via SR-104.” (AR 244). The traffic impact
6 assessment stated that the gravel trucks entering and exiting the property “would not be operated
7 by Iron Mountain Quarry.” (AR 239). The trucks would be based off-site and were expected to
8 be owned by private businesses purchasing IMQ’s gravel products. (Id.) The basis for assuming
9 that none of the private trucks accessing the site would use SR-19 was unexplained.
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11 Nothing in the IMQ application materials required that trucks access the site only at SR-
12 104. The traffic impact assessment did not determine what increase in truck volume should be
13 expected to access the site from SR-19, nor was there any assessment of trip distribution, levels
14 of service, or safety at the SR-19 intersection with Shine Quarry Road. (AR 244-247).
15

16 The traffic impact analysis and the SEPA environmental checklist did not propose any
17 traffic mitigation measures whatsoever, whether at the intersection of Shine Quarry Road and
18 SR-19 or Shine Quarry Road and SR-104, despite a projection of up to 108 new truck trips per
19 day. (AR 99, 243, 247). The trip calculations assumed 27 tons per truck per trip, although no
20 basis was stated for assuming that some of IMQ’s customers would not use smaller-capacity
21 trucks and, thereby, generate more trips per day. (AR 243). The traffic impact analysis assumed
22 that background traffic “volumes will remain at existing levels.” (AR 242). The basis for
23 assuming that traffic volumes on SR-104 will remain unaltered for the next 40 years was not
24 explained, and precluded any discussion of how expected increases could conflict with gravel
25 truck traffic.
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3 The traffic impact analysis assumed that demand for gravel materials would be “spread
4 fairly evenly throughout the year,” but conflicting data in a different technical report indicated
5 substantial variability in the rate of trip generation, with summer volumes ranging from between
6 26,000 and 52,000 tons per month and winter volumes ranging from 8,000 to 16,000 tons per
7 month. (AR 238, 257). This represents a potential 650% increase of seasonal truck traffic. The
8 traffic impact analysis did not reconcile this inconsistency.
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10 **D. Jefferson County made a diligent review of the IMQ application materials.**

11 During February and March, 2010, staff from Jefferson County’s Department of
12 Community Development (“DCD”) reviewed the IMQ application materials. The review was
13 performed collaboratively by DCD Director Al Scalf, Planning Manager and SEPA-Responsible
14 Official Stacie Hoskins, and Associate Planner David W. Johnson. (AR 4936).
15

16 Time records maintained by these individuals indicate that Mr. Johnson was the staff
17 person with initial responsibility for reviewing the application materials and that he spent 26
18 hours on this process.³ (AR 4938). Records from DCD also indicate that Mr. Scalf spent 3
19 hours independently reviewing the application and that Ms. Hoskins spent 4.75 hours. (AR
20 4936). In a meeting that occurred on March 15, 2010, these three individuals collectively
21 discussed the IMQ application materials and the appropriate SEPA process for the proposal.
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26 ³ IMQ misunderstands the time record information presented at AR 4938. Contrary to IMQ’s
27 argument, this record shows that Mr. Scalf and Mr. Johnson, combined, billed 14 hours’ time
28 between 3/1/10 and 3/31/10. Of this total, Mr. Scalf’s time accounted for 3 hours. Mr. Johnson
29 billed for the balance (11 hours) but, in addition, Mr. Johnson also devoted 15 hours of time that
30 he recorded but that had already been paid for out of IMQ’s initial application fees and was
therefore not billed. (11 hours + 15 hours = 26 hours expended by Mr. Johnson)

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3 (AR 4937). The DCD staff hours recorded as expended for the IMQ application review process
4 total 33.75 hours. (AR 4936, 4938).

5 In notes prepared on March 8, 2010, Ms. Hoskins reflected on questions of wetland
6 buffering, wetland mitigation planning, aquifer recharge calculations, aquifer-wetland hydrology,
7 noise impacts on adjacent parcels, and view impacts. (AR 595). Notes from Mr. Johnson dated
8 March 15, 2010, pointed out the absence of a mineral resource overlay designation relating to
9 protection of mining activities at the site. (AR 4471). Mr. Johnson's notes also referenced: the
10 relationship between the mine and the Port Ludlow Master Planned Resort; potential cumulative
11 impacts of the proposal; the relationship of the application to the SEPA standard of significance
12 ("reasonable likelihood of more than a moderate adverse impact"); the absence of any narrative
13 discussion tying the individual technical and scientific reports together; and the potential
14 advantage of peer review to assess proposed mitigation. (Id.)

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17 Ms. Hoskins' notes contained numerical references to specific sections of the SEPA
18 checklist and supplemental reports. (AR 595). The notes of Mr. Johnson contained his later
19 assessment, in numerical order, of the relative priority of various concerns discussed in the
20 meeting of March 15, 2010. (AR 4471).

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22 Notes taken by Mr. Scalf in preparation for the meeting with his staff included:
23 observations on storm water; soils/erosion; regional hydrology; groundwater monitoring; slug-
24 testing of wells and borings; fish and wildlife habitat impacts; stream and wetland impacts; noise
25 from drilling, blasting, and processing operations; dust and air quality impacts; traffic impacts
26 associated with SR-104 and Beaver Valley Road (i.e., SR-19); and miscellaneous other project-
27 specific issues of concern. (AR 572).
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3 Mr. Scalf's notes pointed out the benefit of an "impartial discussion" and "long term
4 document" in the event that an EIS were prepared. (Id.) In reference to the topic of a DS, Mr.
5 Scalf made notations pertaining to other mining operations, including nearby quarries known as
6 Mats Mats and Fred Hill Materials, and other Washington gravel mining operations located in
7 Granite Falls and on Maury Island. (AR 571).

8
9 In light of the record, IMQ is wrong to argue that there is a "complete lack of any
10 evidence that the County actually reviewed IMQ's Application, Checklist, and technical studies."
11 Further, not a single comment on any of these persons' contemporaneously-prepared notes
12 suggests an improper motive of the County towards IMQ.

13
14 A draft Notice of Determination of Significance and Request for Comments on Scope of
15 EIS was prepared under the direction of Ms. Hoskins. (AR 4472-4473). The draft was
16 preserved, and reflects changes made prior to final issuance. (Id.)

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18 One week after the staff meeting of March 15, 2010, Ms. Hoskins signed a final version
19 of the DS on March 22, 2010. (AR 569-570). In this document, Mr. Johnson was identified as
20 the "project lead planner." (AR 570). The document stated that the lead agency "has identified
21 the following areas for discussion in the EIS: earth (ridgeline, soils), air quality (dust), surface
22 water (streams, wetlands), groundwater, plants, animals, traffic, fly rock, noise, vibration, land
23 use and aesthetics." (Id.)

24 **E. IMQ ignored an invitation by the County to supplement its application materials**
25 **so that the DS might be withdrawn and mitigation measures jointly agreed upon.**

26 The same day that IMQ sued the County, April 7, 2010, one of IMQ's attorneys wrote a
27 letter to the County. (AR 4996-4997). In this letter, Keith Moxon stated that IMQ was "willing
28 to discuss SEPA issues with the County." (AR 4996). Mr. Moxon asked whether there were
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3 changes that could be made to IMQ’s proposal or whether there were any mitigation measures
4 that “would address the environmental issues alleged by the County,” such that the County could
5 “withdraw its DS and issue a Determination of Non-Significance (DNS) or a mitigated
6 Determination of Non-Significance (MDNS).” (Id.)
7

8 The County took Mr. Moxon’s letter as a good faith inquiry to engage the SEPA process
9 allowed by WAC 197-11-360(4) (“If at any time after the issuance of a DS a proposal is changed
10 so, in the judgment of the lead agency, there are no probable significant adverse environmental
11 impacts, the DS shall be withdrawn and a DNS issued instead.”)

12 In response, the County’s lawyer wrote a letter dated May 5, 2010, which stated that the
13 “County is certainly willing to engage in a dialogue with IMQ regarding the DS.” (AR 4998).
14 In this letter, the undersigned stated that the “County will carefully review either a revised
15 proposal or additional information provided by IMQ regarding the DS topics. Ideally, such
16 information will demonstrate how IMQ’s project will use mitigation measures to reduce the
17 impacts of the project below the threshold level of significance. Pursuant to WAC 197-11-
18 360(4), the County is committed to working with IMQ to explore cooperative reduction or
19 avoidance of adverse environmental impacts.” (Id.) The letter continued, and asked that if
20 “IMQ elects either of these options, please let me know so that the County may coordinate
21 matters and provide IMQ a timely response to any new proposal or submissions of information.”
22 (Id.)
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25 The letter was never answered, and IMQ provided no new or supplemental information.
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3 **III. LEGAL ARGUMENT**

4 **A. IMQ’s lawsuit raises implications regarding institutional expertise and local**
5 **control over land use and environmental review processes.**

6 As noted above, the specific relief requested by IMQ is literally without precedent. There
7 is no reported Washington case in which any DS was found to be in error and the SEPA process
8 subsequently performed by judicial decree pursuant to a constitutional writ of certiorari.
9 Numerous reported cases, however, have resulted in the contrary conclusion (i.e., reversal of
10 local agency determinations not to require an EIS). See, e.g., King County v. Boundary Review
11 Board, 122 Wn.2d 648, 860 P.2d 1024 (1993) (The basic purpose of SEPA is “to require local
12 governments to consider total environmental and ecological factors to the fullest extent when
13 taking major actions significantly affecting the quality of the environment.”); Hires v. Board of
14 Clallam County Commissioners, 84 Wn.2d 796, 529 P.2d 823 (1974) (“the requirements of
15 SEPA may not be thwarted merely because compliance therewith is difficult. It is an attempt by
16 the people to shape their future environment by deliberation, not default.”); Norway Hill
17 Preservation & Protection Ass’n v. King County Council, 87 Wn.2d 267, 552 P.2d 674 (1976)
18 (the procedural provisions of SEPA “constitute an environmental full disclosure act.”)
19
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21 One commentator noted that, as of December, 2009, there were over 100 reported
22 appellate court decisions citing SEPA, but only two of these cases involved the issuance of
23 determinations of significance. See Richard R. Settle, The Washington State Environmental
24 Policy Act: a Legal and Policy Analysis, at 13-7, § 13.01(1) (Matthew Bender ed., release no.
25 21, 2009).
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3 To understand why this is the case, it is necessary to explain how judicial review of a
4 SEPA DS interrupts the public and local agency review process and requires a court to act in an
5 extraordinary manner on an incomplete or, at best, partially-developed record. This discussion
6 leads directly into the applicable standard of review.
7

8 **B. Standard of review for constitutional writ of certiorari.**

9 IMQ has a very high hurdle to justify reversal of the DS under a constitutional writ of
10 certiorari. A few general observations about this remedy are in order.

- 11 1. Reversal of the DS is an intrusion into local agency decisionmaking with unknown
12 implications.

13 This case is unusual in that it involves interlocutory review. In most cases in which
14 constitutional writs are granted, the law provides no right of appeal at all, even at the final
15 conclusion of the administrative process. In such cases, the writ is a “mere matter of form
16 differing not at all from appeal of the final judgment.” See B. Feigenbaum, Interlocutory
17 Appellate Review via Extraordinary Writ, 36 Wash. L. Rev. 1, 2 (1961).
18

19 In other words, most cases addressing the constitutional writ involve administrative
20 decisions for which judicial review was statutorily barred or not provided for. See, e.g., State ex
21 rel. Cosmopolis Consol. Sch. Dist. No. 99 v. Bruno, 59 Wn.2d 366, 369, 367 P.2d 995 (1962)
22 (constitutional writ may be granted to allow judicial review of administrative decision when no
23 statutory review procedure provided); Blanchard v. Golden Age Brewing Co., 188 Wash. 396,
24 410, 415, 63 P.2d 397 (1936) (constitutional writ granted despite statute which purported to take
25 away jurisdiction of courts to issue restraining orders or injunctions in any case involving a labor
26 dispute); Lockheed Ship Building Company v. Department of Labor & Indus., 56 Wn. App. 421,
27 426, 783 P.2d 1119 (1989) (where no judicial review provided, court may exercise its “inherent
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3 power” to review any final action of an administrative agency); King County v. Board of Tax
4 Appeals, 28 Wn. App. 230, 234, 237, 622 P.2d 898 (1981) (constitutional writ granted where
5 Supreme Court had interpreted statute to preclude judicial review).

6
7 Few cases involve the situation here, in which appellate review is provided under the
8 SEPA statute at the end of the administrative process. See RCW 43.21C.075.

9
10 In cases involving interlocutory review -- as in the present case where a SEPA appeal is
11 expressly authorized by LUPA once a final decision has been made by the County -- the Court
12 should be extremely reluctant to grant the remedy sought by IMQ.

13
14 If a constitutional writ is to be allowed at all for interlocutory review of SEPA threshold
15 determinations, it should be reserved only for when a local agency acts in a blatantly improper
16 and illegal manner. Many benefits would accrue from a strict limitation on the use of
17 constitutional writs for SEPA appeals, as explained by Professor Settle:

18
19 A felicitous but uncertain outcome of SEPA’s new right to judicial
20 review might be sensible, straightforward procedures freed from
21 the anachronistic, wasteful and perplexing shackles of the
22 extraordinary writ. If government action is challenged only on
23 SEPA non-compliance grounds, SEPA clearly provides a right to
24 judicial review which, it would seem, could be pursued according
25 to the general rules of civil procedure. *Indeed, since SEPA now*
26 *usually provides a ‘plain, speedy, and adequate remedy at law,’*
27 *review by extraordinary writ should arguably be unavailable*
28 *except, perhaps, in extraordinary cases excluded from SEPA’s*
29 *right to judicial review.* R. Settle, The Washington State
30 Environmental Policy Act, at 20-8, § 20.01. (emphasis added)

31
32 This Court’s reversal of the DS would thwart “SEPA’s absolute insistence upon simultaneous
33 judicial review of all SEPA and any non-SEPA challenges of government action...” (Id.)

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3 SEPA's linkage requirement has not been met in this case. The County has made no
4 recommendation regarding the proposed IMQ storm water management permit application and
5 has taken no action on the permit. In other words, the County simply has not made any decision
6 on whether to allow or deny the mine.
7

8 The SEPA linkage requirement would be directly undermined by reversing the DS under
9 these circumstances. According to RCW 43.21C.075(6)(c), SEPA requires that "[j]udicial
10 review under this chapter shall without exception be of the governmental action together with its
11 accompanying environmental determination."

12 The County has not attempted to immunize itself from judicial review. A right to judicial
13 review exists pursuant to LUPA at the end of the administrative process for the storm water
14 management permit application.
15

16 But a decision interfering with the DS now could have major unintended consequences
17 for the integrity of the local SEPA review process. Doing so would frustrate the orderly
18 administrative SEPA process, and would replace it with an *ad hoc* novel process of managing a
19 piecemeal SEPA appeal. It is unclear what this step would mean for this Court, for other
20 governmental agencies with jurisdiction over parts of the IMQ proposal⁴ and, not least, for
21 project proponents and opponents alike. Judicial oversight of each discrete step of the
22 administrative SEPA process as it occurs would result in micromanagement of the land use
23 development process by the courts. For example, does IMQ propose that the Court invite public
24 comment letters on topics for which IMQ and the County cannot agree? In the event that IMQ
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27 _____
28 ⁴ Additional permits for the IMQ mine will likely be necessary from the Department of Ecology
29 and the Department of Natural Resources, and possibly other agencies with jurisdiction. The
30 present SEPA review will serve as the guiding environmental review process for all permits.

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3 and the County were to agree on a given matter, would an appeal by a third party require
4 interlocutory review? On how many topics, and with what frequency, might this occur?

5 Washington courts recognize the distinction between judicial and agency expertise.
6 Preserving this distinction avoids premature interruption of the administrative process, provides
7 for full development of the facts, protects the autonomy of administrative agencies by giving
8 them the opportunity to correct their own errors, and discourages litigants from ignoring
9 administrative procedures by resort to the courts. Harrington v. Spokane County, 128 Wn. App.
10 202, 210, 114 P.3d 1233 (2005).

11
12 2. Washington law disfavors reversal of the DS.

13 Review of a case seeking a constitutional writ of certiorari is always discretionary with
14 the superior court. Saldin Securities, Inc. v. Snohomish County, 134 Wn.2d 288, 949 P.2d 370
15 (1998) (“...exercise of this inherent power is discretionary....”).

16
17 Two different standards of review are involved in this case, but both point to a large body
18 of law that IMQ must overcome to establish the relief it seeks.

19 The SEPA statutory mandate at RCW 43.21C.090 requires that “substantial weight” be
20 given to an agency’s procedural determinations. The statute applies to “any action involving an
21 attack on [an agency SEPA determination].” Id.

22
23 The standard of review developed by the courts for constitutional writs of certiorari is
24 higher (i.e., more deferential to the County) than the “substantial weight” standard. This case is
25 controlled by the “illegal” and “arbitrary and capricious” standards of review established by
26 Saldin Securities, Inc. v. Snohomish County, 134 Wn.2d 288, 949 P.2d 370 (1998). In Saldin
27 Securities, the court defined arbitrary and capricious action as follows:
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3 *...willful and unreasoning action, without consideration and in*
4 *disregard of facts and circumstances.* Where there is room for
5 two opinions, action is not arbitrary and capricious, even though
6 one may believe an erroneous conclusion has been reached. *Id.* at
7 296. (emphasis added)

8 Also, a decision to require an EIS must not be reached in an illegal or unreasoning manner.

9 IMQ's request that this Court "conduct a de novo review of the County's decision" is a bold
10 misstatement of the law. If this were true, then courts would regularly be required to supply their
11 judgments on interim SEPA determinations in an adversarial proceeding isolated from the public
12 review and participation process. This is not the law.

13 In Saldin Securities, the Supreme Court reviewed a developer's request for a
14 constitutional writ of certiorari based on an allegedly erroneous determination of significance.

15 The developer argued that the Snohomish County Council erred in requiring an environmental
16 impact statement and affirming a DS. The council reached this decision after reviewing
17 materials on possible groundwater contamination from residential developments. *Id.* at 291.

18 The court determined that "...conflicting evidence was presented concerning whether the
19 proposed developments could cause nitrate levels in the groundwater to exceed permissible
20 levels." *Id.* at 297. The court held as follows:

21
22 Clearly, the Council heard evidence that, if believed, would have
23 refuted Petitioners' evidence that the projects would have no
24 significant impact on groundwater. Although the superior court
25 may have been convinced that the Council's decision was in error,
26 this does not justify granting a constitutional writ. ***When a***
27 ***tribunal bases its conclusion on disputed evidence it has not***
28 ***acted in an arbitrary or capricious manner.*** State ex rel. Hood,
29 82 Wn.2d at 402, 511 P.2d 52. Thus, the constitutional writ should
30 not have been granted because the Council's determination of
significance was not illegal or arbitrary and capricious.

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3 In conclusion, we find that the decision of the superior court
4 granting Petitioner's a constitutional writ was in error and reinstate
5 the decision of the Council. Id. at 297. (emphasis added)

6 The court in Saldin Securities rendered the standard of review essentially a search for whether
7 any substantial evidence supports the administrative decision.

8 The burden of proof in seeking a constitutional writ rests with IMQ. Should an
9 administrative body's decision be challenged, it is the appealing party's burden to demonstrate
10 that the decision was erroneous under the proper standard of review. Englund v. King County,
11 67 Wn. App. 701, 705, 839 P.2d 339 (1992).

12 In case of either a constitutional or statutory writ of certiorari, the Court sits in a
13 specialized role as an appellate body in review of the lower tribunal's decision. Cf. Gerard v.
14 San Juan County, 43 Wn. App. 54, 715 P.2d 149 (1986) (in statutory writ case, court's role "is
15 limited to review of the record of action taken by the administrative body and a determination of
16 whether that body's actions were arbitrary, capricious or contrary to law."); Foster v. King
17 County 83 Wn. App. 339, 346, 921 P.2d 552, 556 (1996) (in constitutional writ case, scope of
18 review is "limited to whether the hearing officer's actions were arbitrary, capricious, or illegal.")

19 A reviewing court is not to re-weigh evidence. Accordingly, a court may not substitute
20 its judgment for that of the administrative decisionmaking body. See Polygon Corp. v. Seattle,
21 90 Wn.2d 59, 63-64, 578 P.2d 648 (1983) ("We have said that SEPA requires the disclosure and
22 full consideration of environmental impacts in governmental decisionmaking. [citation omitted]
23 That mandate would be meaningless under the facts of this matter if the superintendent was
24 powerless to decide in the manner that 'full consideration of environmental impacts' impelled.")

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3 This is true whether the court is reviewing a decision under the substantial evidence
4 standard, the clearly erroneous standard, or the arbitrary and capricious standard. See e.g.,
5 Freeburg v. Seattle, 71 Wn. App. 367, 371-72, 859 P.2d 610 (1993) (substantial evidence);
6 Franklin County Sheriff's Office v. Sellers, 97 Wn.2d 317, 330, 646 P.2d 113 (1982) (clearly
7 erroneous); Van Sant v. Everett, 69 Wn. App. 641, 650, 849 P.2d 1276 (1993) (arbitrary and
8 capricious).

9
10 Here, because of the absence of any public review process associated with the storm
11 water management permit, there has been no administrative hearing by any tribunal. The Court
12 can only base its review on the record before the County upon which the DS was issued. This
13 record was certified to the Court by Ms. Hoskins, and IMQ has made no objection to it. (AR
14 4406-4407). The Court must view the evidence and draw inferences in light of the County's
15 conclusions. Freeburg, 71 Wn. App. at 372.

16
17 **C. The County's DS was not illegal or outside the County's jurisdiction.**

18 SEPA is focused on procedurally structuring public review and deliberation of proposed
19 actions through fully disclosing environmental impacts:

20
21 *At the outset it is apparent that the very heart of the procedural*
22 *requirements of SEPA is the necessity for preparation of an*
23 *environmental impact statement.* RCW 43.21C.030(c). As
24 appellant points out in its brief, an environmental impact statement
25 is particularly important because it documents the extent to which
26 the particular agency has complied with other procedural and
27 substantive provisions of SEPA.... Juanita Bay Valley
28 Community Ass'n. v. City of Kirkland, 9 Wn. App. 59, 68, 510
29 P.2d 1140 (1973). (emphasis added)

30 Put another way, Professor Settle has noted that "the EIS preparation process assembles, distills,
and organizes into useful form environmental data developed by interested citizens and agencies

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3 with expertise or jurisdiction at all levels of government. It is axiomatic that an EIS is not
4 merely a disclosure document. Like SEPA's other procedural requirements, it is not an end but a
5 means of fostering agency actions consonant with SEPA's substantive policies." R. Settle, The
6 Washington State Environmental Policy Act, at 8-5, § 8.01.

7
8 Although courts have inherent jurisdiction under the constitutional writ of certiorari to
9 review agency actions, such review should be mindful of this context. A cautious approach to
10 using the constitutional writ of certiorari to judicially review an interim SEPA action was
11 developed more fully in Saldin Securities, discussed at length above, and requires a showing that
12 the DS was reached by an agency acting illegally or in an arbitrary and capricious manner.
13 Saldin, 134 Wn.2d at 296.

14
15 Division 2 of the Washington Court of Appeals recently ruled on the scope of review for
16 the "illegality" prong of this test. Gehr v. South Puget Sound Community College, 155 Wn.
17 App. 527, 228 P.3d 823 (2010). The plaintiffs in Gehr alleged that the Washington State
18 Personnel Resources Board committed an illegal act by refusing to hear an appeal based on an
19 absence of standing. The trial court agreed with the board and denied the petition for a
20 constitutional writ of certiorari. The plaintiffs appealed. The Court of Appeals affirmed and
21 held that review under the constitutional writ does not permit a court to inquire whether the
22 administrative agency made errors of law:
23

24 We are convinced that the "illegal act" requirement does not
25 empower a court under its constitutional review power to review
26 alleged errors of law committed by an administrative agency. *The*
27 *review, rather, is restricted to an examination of whether the*
28 *agency has acted within its authority as defined by the*
29 *constitution, statutes, and regulations.* (emphasis added)

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3 Id. at 535 (citing King County v. Bd. of Tax Appeals, 28 Wn. App. 230, 622 P.2d 898 (1981)).

4 As stated in a different case, to repeat, the purpose of such a writ is “to enable a court of
5 review to determine whether the proceedings below were within the lower tribunal’s jurisdiction
6 and authority.” Clark County PUD v. Wilkinson, 139 Wn.2d 840, 845-46, 991 P.2d 1161
7 (2000).
8

9 In passing, IMQ may be suggesting that the DS was illegal with its argument that the
10 County “made no attempt to document the basis for the DS.” As a statement of the factual
11 record, this is wrong for the reasons set forth above at Section II(D). As a statement of law, this
12 is also wrong. It is true that a DS must satisfy documentation requirements, as set forth at WAC
13 197-11-360. But the DS here meets those requirements, because it “describes the main elements
14 of the proposal, the location of the site,...and the main areas the lead agency has identified for
15 discussion in the EIS.” WAC 197-11-360. Beyond this, a threshold determination requires
16 “neither written findings and conclusions nor public hearings....” R. Settle, The Washington
17 State Environmental Policy Act, at 13-37, § 13.01[4].
18

19 IMQ offers a string of citations on the issue of an agency’s documentation of its threshold
20 determination, but virtually without exception these are cases where determinations of
21 *nonsignificance* were issued. In these cases, courts have scrutinized the record relating to an
22 MDNS or DNS because such decisions pose a risk of action that is antithetical to SEPA’s
23 environmental responsibility mission. See Bellevue v. King County Review Board, 90 Wn.2d
24 856, 860, 586 P.2d 470 (1978) (decision not to require EIS was undertaken cursorily); Gardner v.
25 Board of Commissioners, 27 Wn. App. 241, 617 P.2d 743 (1980) (no justification for decision
26 not to require EIS); Levine v. Jefferson County, 116 Wn.2d 575, 580-81, 807 P.2d 363 (1991)
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3 (no justification for mitigation measures of DNS). If the DS here is allowed to run its course, the
4 EIS will become the agency record for a decision on the storm water management permit. This
5 is unlike the “quite absolute agency choice [to issue a DNS] which has major potential for
6 subverting SEPA and which the courts are well-suited to police.” R. Settle, The Washington
7 State Environmental Policy Act, at 14-23, § 14.01[1][b].
8

9 IMQ has no viable argument that the actions of the County in issuing the DS were illegal.

10 **D. The County’s DS was not arbitrary and capricious.**

11 The test formulated by Saldin Securities requires the Court to consider whether there is
12 any substantial evidence in the record supporting the DS. If so, the DS must be sustained and
13 EIS preparation should be undertaken. Only if the County engaged in “willful and unreasoning
14 action” may the Court reverse the DS. Saldin Securities, 134 Wn.2d at 296.
15

16 A useful example of the “arbitrary and capricious” prong comes from Foster v. King
17 County, 83 Wn. App. 339, 921, 552 (1996). In Foster, the court worked through an analysis
18 similar to that of Saldin Securities, and held that the DS was valid because “the hearing officer
19 based these decisions on numerous potential environmental impacts specifically related [to the
20 proposed use].” Foster, 83 Wn. App. at 347. As such, the court agreed that the petitioners did
21 not “clearly demonstrate that they were willful and unreasoning actions taken without regard to
22 the facts and circumstances of the case.” Id.
23

24 Justice Talmadge predicted in his concurrence in Saldin Securities that the reach of the
25 constitutional writ could, if not carefully checked, result in courts becoming “land use review
26 boards.” Id. at 305. His views anticipated IMQ’s efforts here: “[a]ll one has to do is clang the
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3 bell of arbitrary and capricious decision making, and like the fire horses of old, Washington
4 courts may now come charging out, writ of certiorari in hand, to douse the flames.” Id.

5 There are three principle ways to demonstrate how the County’s DS was appropriate.

6 First, there are genuine inconsistencies and omissions contained in the IMQ materials on
7 topics for which the gravel mine proposal is likely to have a probable significant adverse
8 environmental impact. WAC 197-11-330(4). Second, with respect to these gaps in IMQ’s
9 materials, the County had a reasonable basis to conclude that the gaps relate to reasonably likely
10 impacts in light of prior environmental reviews of other nearby gravel mines. Third, the DS was
11 appropriate because the County’s attempt to invite IMQ to clarify the project in ways that could
12 have supported withdrawal of the DS and substitution of a different SEPA threshold
13 determination was ignored by IMQ. (AR 4998-4999). In this vein, the County asked IMQ to
14 provide additional information regarding the DS topics such that mitigation measures could be
15 proposed to reduce the impacts of the project below the threshold level of significance. (Id.)
16 IMQ’s choice not to respond to this letter made retention of the DS the only defensible choice for
17 the County.
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20 Turning to the IMQ application materials, various gaps and inconsistencies were
21 discussed above in Section II. Although it is unnecessary to repeat the same points made above,
22 a few highlights bear mention:
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- The IMQ materials contained no discussion of noise impacts regarding blasting operations;⁵
- The noise assessment study ignored the planned alteration of topography (i.e., ridgeline removal) due to mining;
- The IMQ materials contained no discussion of air quality or dust impacts and provided no basis to evaluate any dust mitigation measures;
- The IMQ materials contained no discussion of vibration impacts due to blasting;
- The IMQ materials contained no discussion of risks to residences or motorists as a result of blasting-produced flyrock;
- The IMQ materials contained no discussion of any traffic mitigation;
- The traffic impact analysis did not include the intersection of SR-19 and Shine Quarry Road within the traffic study area;
- The traffic impact analysis did not acknowledge expected large seasonal changes in the rate of gravel production and corresponding rate of trip generation;
- The traffic impact analysis did not address any background traffic growth or discuss the relationship between background traffic growth and future mining operations;
- The IMQ application materials contained no discussion of land use compatibility for impacts of the mining site on the Port Ludlow Master Planned Resort;

⁵ Although IMQ is correct that blasting operations are exempt from noise regulations, the reliance on this exemption to justify ignoring blasting in the noise assessment is in error. Being exempt from noise regulations is not the equivalent of establishing the absence of a significant noise impact for SEPA purposes. See Preserve Our Islands v. Shorelines Hearings Board, 133 Wn. App. 533, 540-41, 137 P.3d 31 (2006) (comparison of project noise to King County code limits not dispositive of SEPA adequacy of noise study). IMQ's mistake is also illustrated by the SEPA statutes, which state that its "policies and goals...are supplementary to those set forth in existing authorizations of all branches of government of this state, including state agencies, municipal or public corporations, and counties." RCW 43.21C.060.

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4 • The IMQ application materials contained no discussion of
5 cumulative or indirect impacts of developing a new large-scale,
6 long-term commercial gravel mine in close proximity to
7 already-existing gravel mines.

8 These gaps and inconsistencies relate to “elements of the environment” pursuant to WAC
9 197-11-444. These are appropriate topics for discussion in an EIS. The County could not have
10 defended any other SEPA threshold determination. A determination of nonsignificance would
11 have been improper and, on this record, would have been a blatant abandonment of the County’s
12 duty to the public.

13 Second, the County’s DS is also justified by reference to the County’s recent experience
14 with similar types of proposals. This experience provided guidance to the County for the sorts of
15 impacts that are anticipated from large commercial gravel mining operations. A particularly
16 useful comparison was made by the County to a gravel mine located north of Port Ludlow and
17 known as the Mats Mats quarry. Comprehensive environmental review of a proposal to deepen
18 the Mats Mats quarry was conducted by the Washington State Department of Natural Resources
19 following issuance of a DS on April 20, 2000. (AR 2230).

20 The SEPA rules required the County to not merely rely upon the IMQ application
21 materials, but also to “independently evaluat[e]” that information, and the Mats Mats documents
22 formed part of the County’s evaluation. WAC 197-11-330(1)(a)(i).

23 In Mr. Scalf’s notes preceding the March 15, 2010, meeting he had with Ms. Hoskins and
24 Mr. Johnson, the Mats Mats DS/EIS was noted. (AR 571). The Mats Mats quarry operation
25 proposal required, just as the IMQ proposal requires, a storm water management permit from
26 Jefferson County. (AR 2234). A draft environmental impact statement was issued for the
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3 proposal in January of 2002. (AR 2232-2367). In this document, a principal author coordinated
4 the discussion and analysis of numerous technical and scientific reports. (AR 2234-2235). The
5 IMQ materials lack any comprehensive narrative discussion.

6 The Mats Mats quarry draft environmental impact statement (“DEIS”) identified potential
7 impacts regarding dust emissions. (AR 2272-2281). As part of its analysis of dust emissions,
8 the DEIS discussed primary and secondary regulatory standards for particulate matter, including
9 effects on human health and other effects like soiling, corrosion, and damage to vegetation. (AR
10 2272-2273). Air quality models were used to estimate concentrations of regulated pollutants and
11 to predict fallout for particulate matter deposition at various points on- and off-site. (AR 2274-
12 2275). Conclusions regarding deposition of particulate matter were related to potential resulting
13 changes to water quality. (AR 2275, 2291). The IMQ materials contain no air quality study.

14 Thirty-three exploration borings were completed at the Mats Mats site to identify and
15 monitor groundwater conditions. (AR 2286). Aquifer slug tests (to measure permeability of
16 material) were performed at 20 of the exploration borings. (Id.) These analyses demonstrated a
17 basis to conclude that the site had very low hydraulic conductivity. (Id.) The IMQ materials
18 contain an apparent inconsistency regarding the presence of wells on the site, and did not include
19 any aquifer transmissivity slug testing.

20 In a section regarding blasting procedures and vibration effects as a result of blasting, the
21 Mats Mats DEIS discussed blast vibration criteria specified in federal regulations issued by the
22 Federal Office of Surface Mines. (AR 2335). These regulations were deemed suitable for
23 application to the quarry operations. (Id.) Specific vibration-minimizing blasting standards were
24 compared to blast monitoring data and expected structural stability of adjacent residences. (AR

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3 2336). Ground vibration monitoring was proposed to verify compliance with relevant standards.
4 (AR 2337). In the same section of the Mats Mats DEIS, the risk of flyrock from blasting
5 activities was discussed. It was noted that “flyrock from blasting on the Mats Mats quarry site
6 has traveled beyond the site boundaries” on rare occasions. (AR 2336). Specific standards and
7 mitigation measures to address the risk of flyrock were identified. (AR 2337-2338).
8

9 IMQ argues that there is no evidence in the record of “any risk related to flyrock,” but
10 this is not true. According to an article from The Journal of Explosives Engineering, “[f]lyrock
11 has been known to travel remarkable distances from a blast, and a plan to protect against flyrock
12 must take into account the worst case scenario.” (AR 2666). None of the IMQ materials
13 contains any plan to protect against flyrock. The nearest public road is 300 feet from the
14 proposed mine site. (AR 98). The IMQ materials do not discuss vibration impacts of blasting.
15

16 The Mats Mats DEIS contained a discussion of the relationship between the proposed
17 quarry and land use patterns in the vicinity. (AR 2339-2344). This discussion included the
18 recognition of potential impacts resulting from continued mining in combination with other
19 planned development in the area. (AR 2342). This discussion also included mention of potential
20 indirect land use impacts that could change the general character of the area.⁶ (AR 2342). In a
21 related section of the DEIS, an analysis was performed regarding consistency between the
22 proposed mining use and other land use regulations, plans, and policies. (AR 2345-2353). In
23 this discussion, the relationship of the proposal to Jefferson County’s comprehensive plan goals
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28 ⁶ The Court will recall that this was a topic of consternation to IMQ’s lawyer, Molly Lawrence,
29 in her letters to the County during the IMQ mineral resource overlay hearings. (AR 3962, 4007).

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3 and policies was evaluated. Various performance standards were identified and discussed so that
4 the standards and the proposal's expected compliance with the standards could be compared.
5 (AR 2347-2353). The IMQ materials contain no analysis of indirect or cumulative impacts. See
6 WAC 197-11-060(4) (SEPA impacts are short-term and long-term effects, including direct and
7 indirect impacts).
8

9 The transportation analysis of the Mats Mats DEIS included not only impacts on the
10 direct access road leading to the site, but also on relevant contiguous roads likely to experience
11 traffic loads attributable to the proposal. (AR 2354-2362). Anticipated traffic volumes, levels of
12 service, and traffic safety conclusions were set forth, even though the proposal was not
13 anticipated to result in any new truck or employee traffic to area roadways. (Id.) The IMQ
14 traffic analysis relies on incomplete and unexplained assumptions regarding road access points,
15 trip generation, and background traffic growth.
16

17 The Mats Mats DEIS was widely disseminated to concerned citizens and various
18 regulatory agencies, including the Jefferson County Department of Community Development.
19 (AR 2364-2366).
20

21 After the Mats Mats DEIS was produced and disseminated, an array of public comment
22 letters were received. These letters were tracked by specific comments raised in each, and each
23 comment was analyzed with an adequate response statement. (AR 2925-3254). A public
24 hearing on the DEIS was conducted on March 7, 2002, and the comments of hearing participants
25 were recorded and also discussed and analyzed. (AR 3256-3269).
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3 In July of 2003, a final environmental impact statement (“FEIS”) was published. (AR
4 3270-3755). As part of the FEIS, the hydrogeologic evaluation contained in the DEIS was
5 subjected to peer review by an independent geotechnical and environmental consulting firm.
6 (AR 3748-3750). As a result of the peer review process, the findings and conclusions of the
7 hydrogeologic evaluation were confirmed. (AR 3749).
8

9 A clear matrix-style chart was prepared so that elements of the environment potentially
10 affected by the Mats Mats quarry could be compared and reviewed in conjunction with proposed
11 mitigation measures. (AR 2743-2747).
12

13 The Court may find it instructive, as did the County personnel, to consider the IMQ
14 materials in relationship to the EIS process fulfilled by the Mats Mats project proponent. This
15 review will highlight the fragmentary and conclusory nature of the IMQ application materials in
16 comparison to the integrated documentation associated with Mats Mats. This review will also
17 highlight the essential role of public review by concerned citizens and other governmental
18 agencies, whereby an initial DEIS was promulgated, scrutinized, and refined to vet the adequacy
19 of its discussions and conclusions. It should not be missed that one of the benefits of agency and
20 public review is that this serves as a corrective to potential pro-project bias of an applicant’s own
21 paid technical consultants. The corrective nature of the public review process will be lost should
22 the Court reverse the DS in this case.
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24 The third reason why the DS should be upheld is because the County invited IMQ to
25 clarify or add to its environmental review materials so that the County could, potentially,
26 reevaluate the appropriateness of its DS. (AR 4998-4999). IMQ was either unwilling or unable
27 to improve the quality of its analysis. Commitments made earlier by IMQ’s attorneys to provide
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3 a full discussion of project-specific impacts were ignored. IMQ elected to repudiate any SEPA
4 dialogue with the County and instead pursued a remedy in court.

5 By electing this option, IMQ deprived both itself and the County (as well as the public
6 generally) of a cooperative evaluation of IMQ's project. IMQ's choice to pursue litigation
7 means that the EIS scoping process has yet to occur. WAC 197-11-408(1) ("The lead agency
8 shall narrow the scope of every EIS to the probable significant adverse impacts and reasonable
9 alternatives, including mitigation measures.")

10
11 IMQ criticizes the County for blocking its project. But the only delay associated with
12 IMQ's SEPA process has been self-inflicted by IMQ. The irony of this event was actually
13 foretold in the letter of IMQ's attorneys to Jefferson County dated April 7, 2010, in which IMQ
14 stated that it "formally objects to the County's proposed EIS scoping and asks the County to
15 suspend such work immediately." (AR 4996).

16
17 **E. IMQ's request to reverse the DS is actually a request that the Court shelter the**
18 **project from public review.**

19 Because the storm water management permit requires no public review or public hearing
20 process, IMQ's attack on the DS implies that no public review process for this project should
21 occur. IMQ's approach belies a lack of confidence that its project can be justified at this location
22 under the scrutiny of the public decisionmaking process.

23 Promises by IMQ's attorneys to subject the project to environmental review have been
24 undermined by IMQ's litigation choices. Presciently, attorneys for IMQ acknowledged that this
25 may be a case of fundamental land use incompatibility in light of the proximity of the Port
26 Ludlow Master Planned Resort. (AR 3962, 4007). Intensification of this portion of Jefferson
27 County for mineral resource extraction purposes may simply be anathema to the community's
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3 view of its planning future. IMQ is wrong that the EIS process is “undefined and indefinite,”
4 because the details of the process are specified clearly in the SEPA WACs, even including
5 matters such as timing, size, format, and scope. WAC 197-11-400 - 430. At the very least, the
6 citizens of Jefferson County should be entitled to participate directly in the review of IMQ’s
7 proposed actions.
8

9 “Aggregate production temporarily obliterates entire mine-site ecosystems, but this loss
10 can be mitigated with carefully sequenced reclamation.” William S. Lingley, Jr., Aspects of
11 Growth Management Planning for Mineral Resource Lands, Washington Geology, vol. 22, no. 2,
12 July, 1994, at 39. (AR 1793). “Detrimental social impacts of mining include noise, back-up
13 alarms, blasting vibrations, glare, truck traffic, dust, and creation of attractive nuisances. Noise
14 and air pollution commonly fall below the statutory definitions of infractions, but these can be
15 acutely noticeable in pristine rural areas.” (*Id.* at 41). (AR 1795).
16

17 In her letter to the Jefferson County Board of County Commissioners dated November
18 25, 2008, IMQ’s attorney Molly Lawrence stated her opinion that “...at this point, the subject
19 property is still far enough from the Port Ludlow area that it can be mined without significantly
20 impacting Port Ludlow.” (AR 4007). If this contention remains viable, it should be
21 demonstrated through appropriate preparation of an EIS and public review of the underlying
22 IMQ application for a stormwater management permit.
23

24 This result was presaged by Judge Verser in his Opinion on Land Use Petition dated
25 April 15, 2009. In this opinion, Judge Verser upheld IMQ’s position that no conditional use
26 permit was needed in light of IMQ’s diminishing asset entitlement. However, Judge Verser
27 reached this conclusion, in part, with a stated expectation that IMQ has yet to fulfill:
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3 There are ample protections afforded to the County under which
4 general permitting authority including SEPA authority to insure
5 that concerns relating to offsite effects of any mining (noise,
6 vibration, dust, traffic, etc.) are addressed and that the public is
7 protected from possible adverse impacts. (AR 4072).

8 The simplicity of the SEPA problem in this case has been clouded by IMQ's failure to
9 acknowledge that its proposal is reasonably likely to have significant environmental impacts.
10 WAC 197-11-330(4). The DS was proper.

11 The goals of SEPA are not furthered by "a quagmire of crafty burden shifting arguments
12 and nightmarish procedural rhetoric." K. Hirokawa, The Prima Facie Burden and the Vanishing
13 SEPA Threshold: Washington's Emerging Preference for Efficiency Over Accuracy, 37 Gonz.
14 L. Rev. 403, 405 (2002).

15 **IV. CONCLUSION**

16 For the foregoing reasons, the Jefferson County Determination of Significance should be
17 sustained.

18 DATED THIS 1st day of September, 2010.

19
20 MENKE JACKSON BEYER
21 EHLIS & HARPER LLP

22 

23 KENNETH W. HARPER

24 WSBA #25578

25 *Attorney for Respondents/Defendants*