

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

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;)
)
Petitioner/Plaintiffs,)
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.)

NO. 10-2-00181-5

NOTICE OF DISCRETIONARY
REVIEW TO COURT OF
APPEALS, DIVISION II

TO: Clerk of Jefferson County Superior Court
AND TO: Clerk of Kitsap County Superior Court
AND TO: Court of Appeals, Division II
AND TO: All parties of record and their counsel

Jefferson County, a Washington municipal corporation, acting through its
Department of Community Development, and Stacie L. Hoskins, Planning Manager,
Jefferson County Department of Community Development, respondents/defendants below,
seek review by the designated appellate court of the memorandum opinion and annexed
order entered on October 5, 2010.

NOTICE OF DISCRETIONARY REVIEW
TO COURT OF APPEALS, DIVISION II - 1

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

A copy of the decision is attached to this notice.

DATED THIS 25th day of October, 2010.

MENKE JACKSON BEYER
EHLIS & HARPER LLP



KENNETH W. HARPER
WSBA #25578
Attorney for Respondents/Defendants
807 North 39th Avenue
Yakima, WA 98908
(509) 575-0313
(509) 575-0351/Fax
kharper@mjbe.com

Attorneys for Petitioners/Plaintiffs

Mr. Keith Moxon
Mr. Dale Johnson
Attorneys at Law
GordonDerr LLP
2025 First Avenue, Suite 500
Seattle, WA 98121
206-382-9540
206-626-0675/Fax
kmoxon@GordonDerr.com
djohnson@GordonDerr.com

NOTICE OF DISCRETIONARY REVIEW
TO COURT OF APPEALS, DIVISION II - 2

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

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

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

No. 10-2-00181-5

MEMORANDUM OPINION

v.

JEFFERSON COUNTY, a Washington
Municipal Corporation, acting through its
Department of Community Development;
and STACIE L. HOSKINS, Planning
Manager, Jefferson County Department of
Community Development.,
Respondent.

THIS MATTER comes before the Court upon Iron Mountain Quarry's appeal under a constitutional writ of certiorari seeking court review of an administrative decision of the Jefferson County Department of Community Development to make a "determination of significance" on IMQ's storm water permit application. The determination of significance has the implication of requiring IMQ to undertake completion of an environmental impact statement

Oral argument was heard before this court on September 20, 2010. Petitioner, Iron Mountain Quarry, was represented by Dale Johnson. Respondent Jefferson County was represented by Kenneth Harper.

MEMORANDUM OPINION

COPY

JUDGE ANNA M. LAURIE
Kitsap County Superior Court
614 Division Street, MS-24
Port Orchard, WA 98366

STANDARD OF REVIEW

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

The Superior Court functions as an appellate court for purposes of review of an agency action under a constitutional writ of certiorari. The inherent authority to review administrative decisions for arbitrary and capricious action is vested in the Court under Article IV, § 6 of the Washington State Constitution. Although a SEPA appeal is authorized under LUPA once a final decision is made by the County, Iron Mountain Quarry seeks interlocutory review of the County’s SEPA threshold determination.¹ Review under a constitutional writ is allowed when a local agency has acted in a blatantly improper manner. The Court exercises its “inherent supervisory capacity” in this constitutional writ case.²

Under review are the actions of Jefferson County’s Department of Community Development (“County” or “DCD”) in making a determination of significance (“DS”) with respect to Iron Mountain Quarry’s (“IMQ”) storm water permit application. The Court conducts a de novo review of the County’s decision to determine whether the decision to issue the DS was arbitrary and capricious action, or contrary to law. “Arbitrary and capricious” action of administrative bodies is “[w]illful and unreasoning action, without consideration and [in] disregard of facts or circumstances.”³ Further, “[w]here there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration though it may be felt that a different conclusion might have been

¹ See Land Use Petition Act, Ch. 36.70C RCW (“LUPA”)
² *Saldin Securities v. Snohomish County*, 134 Wn.2d 288, 292-294, 949 P.2d 370 (1998).
³ *Cougar Mountain Associates v. King County*, 111 Wn.2d 742, 750, 765 P.2d 264 (1988); *DuPont-Fort Lewis School Dist. No. 7 v. Bruno*, 79 Wash.2d 736, 489 P.2d 171 (1971).

1 reached.”⁴ Under the facts and circumstances of this case the Court will consider the
2 competency and sufficiency of the evidence contained within the record in evaluating
3 whether the County’s actions were arbitrary and capricious.⁵
4

5 ANALYSIS

6 This appeal centers on consideration of the extent to which the County has
7 complied with SEPA’s threshold requirements and whether corresponding review of the
8 record shows a basis for the issuance of the determination of significance. A DS should
9 only be issued for proposals significantly affecting the quality of the environment. Upon
10 issuance of a DS, an environmental impact statement (“EIS”) is required. Substantive and
11 procedural safeguards are necessary to protect land owners from abusive and arbitrary land
12 use regulations. Accordingly, Title 197-11 WAC establishes very clear SEPA rules and
13 guidelines for agencies to follow when evaluating proposals in consideration for issuance
14 of a determination of significance.
15
16

17 SEPA Policy

18
19 The SEPA threshold review process requiring compliance with the SEPA checklist
20 is set forth in JCC 18.40.760(3).⁶ The SEPA checklist provides the information necessary
21 to make the threshold determination required for issuance of a DS. Under this process the
22 County must determine whether there is a reasonable likelihood that the proposal in
23 question will have a “probable significant adverse environmental impact” on a given
24
25
26
27

28
29 ⁴ *Cougar Mountain* at 750.

⁵ *State v. County of Pierce*, 65 Wn.App. 614, 617, 829 P.2d 217 (1992).

⁶ Jefferson County adopts SEPA’s rules at Chapter 197-11 WAC. JCC 18.40.700(2).
30

1 element of the environment, based on the proposed action, the information in the checklist,
2 and any other information furnished in conjunction with the applicable law.⁷

3 In this instance, the County DCD's actions constitute a failure to adequately follow
4 the SEPA process.
5

6 **Failure to Adhere to SEPA Protocol**

7 The County was required to make its threshold determination "based upon
8 information reasonably sufficient to evaluate the environmental impact of a proposal."⁸ The
9 record does not support the County's contentions that review time was commensurate to
10 the depth of information contained in the IMQ application. On the contrary, the record
11 shows the County failed to document due analytic consideration given to the application as
12 required under the SEPA process. The notes written by DCD staff in the record offered by
13 the County contain at best conclusory statements and fail to document any substantive
14 consideration. It is of considerable note that eight of the twelve areas of concern mentioned
15 in the DS issued were specifically addressed by IMQ's application and checklist, yet no
16 documentation of due consideration of the materials provided by IMQ with respect to those
17 eight areas exists. The obvious lack of written analysis of the application materials is a
18 startling departure from SEPA protocol.
19
20
21
22

23 Specifically, the IMQ application submitted consisted of 568 pages of application,
24 expanded SEPA checklist and studies related to the environmental impact of the project
25 and potential mitigation of such. Ms. Hoskins devoted a mere 2.25 hours to her review of a
26 considerable application submitted by IMQ. This cannot be considered sufficient time to
27
28

29 ⁷ JCC 18.40.760.

30 ⁸ Chapter 197-11-335 WAC.

1 undertake review of such materials. The County offers the fact that Mr. Johnson, a member
2 of Ms. Hoskins' staff, undertook 26 hours of review as evidence of due analysis. However,
3 the record shows that Mr. Johnson's time was not limited to review of the application
4 materials. Curiously, although the County contends that Mr. Johnson did in fact perform a
5 substantial review of the application and environmental studies and analysis, there are no
6 notes in the record to reflect his review and no summary detailing or even noting his
7 findings of such a review. Further, the meeting notes in the record documenting initial
8 discussion of the application indicate that Ms. Hoskins rather than Mr. Johnson would
9 conduct initial review of the application materials and technical reports. The extent to
10 which anyone at the DCD undertook any meaningful review at all is questionable given the
11 fact that the record indicates little to no reference made by the County to specific details of
12 the IMQ proposal either in the DCD notes nor through any other analysis.
13
14
15

16 SEPA rules mandate that an agency may only require an EIS if "after following
17 WAC Chapters 197-11-080 and 197-11-335 the lead agency reasonably believes that a
18 proposal may have a significant adverse impact."⁹ In this matter, it is not realistic that the
19 County could have a substantive basis for reasonable belief in light of the lack of
20 meaningful review done. If the County's review was so sparse because of a perception of
21 absent or conflicting information, it "shall make clear that such information is lacking or
22 that substantial uncertainty exists."¹⁰ The County made no such indication prior to the
23 issuance of the DS.
24
25
26
27
28

29 ⁹ Chapter 197-11-330(4).

30 ¹⁰ Chapter 197-11-080(2).

1 **Failure to Consider Mitigation**

2 Under the SEPA rules process for making a threshold determination, the SEPA
3 responsible official must, among other requirements, consider mitigation measures the
4 applicant or agency will implement as part of the proposal.¹¹ In this case there is no
5 indication that the DCD Planning Manager in her capacity as the SEPA responsible official
6 or her team adequately addressed the potential mitigation of perceived environmental
7 impacts provided in IMQ's storm water permit application. Instead, the County disregarded
8 IMQ's documentation of potential environmental impacts and mitigation, until *after* the
9 determination had already been made. During oral argument the County noted it may have
10 done a better job of documenting its analysis had they known it would come under judicial
11 review. However, such hindsight does not suffice for evidence of meaningful review.
12
13
14

15 **Lack of Further Inquiry**

16 SEPA rules dictate if the County believes it has insufficient information upon which
17 to evaluate the proposal it should take additional steps to acquire the relevant data
18 including: requiring additional information be submitted by the applicant; make its own
19 further inquiry; or consulting with other agencies that may have expertise.¹² After the
20 issuance of the DS, the County sent a letter to IMQ stating they were willing to engage in a
21 dialogue with respect to the determination. The letter indicated that the County would
22 review a revised proposal or additional information submitted by IMQ regarding mitigation
23 of impact and other DS-related topics. However, if the County required additional
24 information to make the determination, the time to request such was prior to its issuance of
25
26
27
28

29 ¹¹ Chapter 197-11-330 WAC.

30 ¹² Chapter 197-11-335 WAC.

1 a DS, in accord with SEPA procedure. It is exceptionally troubling that neither Ms.
2 Hoskins nor any other DCD staff contacted anyone at IMQ or its agents to request
3 additional information prior to issuance of the DS.

4 **County Predisposition**

5
6 Moreover, the County has an established predisposition to the IMQ project which
7 appears to have led to a hasty and under informed decision on this application. Significant
8 litigation history exists between the County and IMQ. IMQ's mining proposal for the New
9 Shine Quarry has been the subject of two previous Land Use Petition Act appeals, both
10 resulting from DCD's opposition to IMQ's operation.¹³ The County DCD made their
11 determination on the project in a short 25 day period. As noted, were the County to need
12 more information or clarification on any of the application materials SEPA process requires
13 further investigatory measures and inquiry, none of which were undertaken by the County.
14 While it is uncertain as to what extent the County's predisposition against the IMQ project
15 contributed to the lack of meaningful review, it is certain that in the least the IMQ
16 application and expanded SEPA checklist provided ample documentation for which the
17 DCD could use to begin a substantive analysis. As there is scant evidenced that meaningful
18 analysis was undertaken, it seems likely that in keeping with its prior objection to IMQ's
19 mining operation, the County may have very well already decided that an EIS would be
20 required prior to the storm water permit application being filed. This factor alone would not
21 be sufficient to upset a proper review, but in conjunction with the other factors, it is
22 noteworthy.
23
24
25
26
27
28

29 _____
30 ¹³ Land Use Petition Act, Ch. 36.70C RCW *et seq.*

CONCLUSION

1
2 It is established that the County made little to no attempt to document their basis for
3 the DS, issuing no findings or conclusions and undertaking a degree of review that was not
4 commensurate with the IMQ application materials presented. As the record must show
5 sufficient deliberations and consideration in addition to a final decision to survive judicial
6 scrutiny, the issuance of the DS by Jefferson County's Department of Community
7 Development was arbitrary and capricious.
8

9
10 The Court is not adopting the position that the only decision which can be
11 supported by the record is a DNS. Rather, the Court finds that without a record sufficient to
12 show that the County duly considered IMQ's proposal, their decision to issue the DS was
13 on its face arbitrary and capricious. Although IMQ has requested the Court either revoke
14 the DNS and issue a DNS, or in the alternative appoint a referee and act in an oversight
15 capacity, neither is a remedy this court will order. Such remedies are outside of the relief
16 typically granted in SEPA actions and are undertaken only in exceptional circumstances.
17
18 Further, the Court is not in the business of or position to undertake review of the evaluation
19 process based on scientific evidence and factual application. In this case, the petitioners can
20 be made whole by receiving a meaningful review in compliance with SEPA rules, together
21 with any damages properly awarded in a later proceeding
22
23

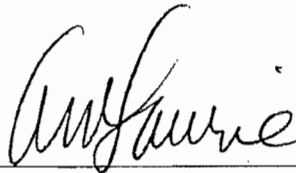
24 Therefore, for the reasons set forth herein, it is hereby

25 **ORDERED** that the decision of the Jefferson County Department of Community
26 Development finding of a Determination of Significance requiring an Environmental
27 Impact Statement is **VACATED** and this matter **REMANDED** to Jefferson County for
28 further proceedings not inconsistent with this Court's Memorandum Opinion to include
29
30

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

further action of making a determination on the IMQ application in compliance with SEPA policy.

Dated: October 5, 2010.



JUDGE ANNA M. LAURIE

DECLARATION OF MAILING

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

I, MICHELLE DELLINO, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action, and competent to be a witness herein.

On October 5, 2010, I caused a copy of the foregoing document to be served in the manner noted on the following:

Dale Johnson Gordon Derr LLP 2025 First Avenue, Suite 500 Seattle, WA 98121	<input checked="" type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Fax: <input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via E-mail
Kenneth W. Harper Quinn N. Plant Menke Jackson Beyer Ehlis & Harper, LLP 807 North 39 th Avenue Yakima, WA 98902	<input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Fax: <input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via E-mail
	<input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Fax: <input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via E-mail
	<input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Fax: <input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via E-mail

DATED this 5th day of October, 2010 at Port Orchard, Washington.


MICHELLE DELLINO