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IN SUPERIOR COURT  
JEFFERSON COUNTY CLERK

IN THE 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/Plaintiffs,

vs.

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.

No. 10 2 00181 5

PETITION FOR  
CONSTITUTIONAL WRIT OF  
CERTIORARI AND  
COMPLAINT FOR DAMAGES  
PURSUANT TO Ch. 64.40 RCW

**I. RELIEF REQUESTED**

Iron Mountain Quarry, a Washington limited liability company, ("IMQ") and Pope Resources, a Delaware limited partnership, ("Pope Resources") (collectively referred to hereafter as "Petitioners") by and through their undersigned counsel, apply to this Court for a Constitutional Writ of Certiorari directed to Jefferson County and Stacie L. Hoskins, Planning Manager, Jefferson County Department of Community Development ("DCD").

PETITION FOR CONSTITUTIONAL WRIT OF CERTIORARI AND  
COMPLAINT FOR DAMAGES PURSUANT TO Ch. 64.40 RCW -1

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ORIGINAL

1 On February 25, 2010, IMQ applied to Jefferson County for a Type I Stormwater  
2 Management Permit for the New Shine Quarry, a hard rock mining operation in southeast  
3 Jefferson County (MLA No. 10-00072). Attach. A to Exhibit A, Declaration of Dale N.  
4 Johnson (Johnson Decl.”). On March 22, 2010, DCD issued a “Notice of Determination  
5 of Significance and Request for Comments on Scope of EIS” (the “Determination of  
6 Significance” or “DS”) pertaining to operation of the New Shine Quarry. Attach B to  
7 Johnson Decl. Jefferson County purportedly issued the Determination of Significance  
8 pursuant to the State Environmental Policy Act (“SEPA”), Ch. 43.21C *et seq.* Petitioners  
9 contend the Determination of Significance is unlawful.

10 Petitioners ask this Court to review DCD’s decision, determine that the  
11 Determination of Significance was an illegal, arbitrary and capricious governmental  
12 action, and direct Jefferson County to issue a Determination of Nonsignificance (“DNS”)  
13 consistent with the environmental analysis and proposed mitigation submitted by  
14 Petitioners. Petitioners seek relief through this constitutional writ of certiorari because  
15 there is no other avenue of appeal available under SEPA. Petitioners further seek  
16 damages and recovery of attorneys’ fees pursuant to Ch. 64.40 RCW.

## 17 II. PARTIES

### 18 2.1 Petitioners.

19 2.1.1 Petitioner Iron Mountain Quarry, LLC, is a Delaware limited  
20 partnership doing business at 22121 17<sup>th</sup> Avenue S.E., Suite 117, Bothell, WA 98021-  
21 7404. IMQ has mineral use rights to mine the property that is the subject of the  
22 Stormwater Management Permit Application and is the project applicant.<sup>1</sup> Pursuant to  
23 lease rights with Pope Resources, IMQ holds rights and interests in the real property  
24 comprising the site of the New Shine Quarry.

25 <sup>1</sup> IMQ’s use rights have been confirmed by this Court in previous LUPA actions as described in Section IV.



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IV. FACTS

4.1 **Background Facts.**

4.1.1 **New Shine Quarry Proposal.**

4.1.1.1 IMQ proposes mining operations at the New Shine Quarry, on a 182-acre tract of land owned by Pope Resources ("Pope Parcel"). The Pope Parcel is comprised of the existing 40-acre Mason/Shine Quarry and the 142-acre New Shine Quarry. IMQ has mineral lease rights from Pope Resources for 142-acres within the Pope Parcel. The New Shine Quarry Site is located on a private road north of SR 104 approximately 4 miles west of the Hood Canal bridge, mostly in Section 29, Township 28, Range 01 East, WM in Jefferson County ("Site"). The New Shine Quarry will be located adjacent to and south and east of the existing Mason/Shine Quarry operation.

4.1.2 **Jefferson County Unlawfully Approved Comparable Mining Operations without any SEPA Review.**

4.1.2.1 On June 23, 2004, Jefferson County approved a proposed expansion of mineral operations at the Mason/Shine Quarry site from 20 to 40 acres. The County did not undertake any SEPA review to evaluate potential impacts of the Mason/Shine Quarry expansion. No SEPA checklist was required by the County and no SEPA determination was issued. The County approved a stormwater permit for the Mason/Shine Quarry site in 2004 without any SEPA review. The County's approval of the Mason/Shine Quarry expansion in 2004 was based on the "diminishing asset doctrine," even though DCD later refused to recognize this doctrine with respect to IMQ's mining proposal.

1                   4.1.3    **Jefferson County's Denial of IMQ's Nonconforming Use**  
2   **Rights.**

3                   4.1.3.1           In May of 2007, IMQ representatives met with DCD  
4 representatives to discuss IMQ's proposed expansion of mineral resource operations on  
5 the Site. DCD representatives stated that County code requirements would require a  
6 comprehensive plan amendment and mineral resource land ("MRL") designation for any  
7 mining over 10 acres without a MRL designation. DCD refused to process IMQ's  
8 application for proposed mineral resource uses without a comprehensive plan amendment  
9 and MRL designation.

10                   4.1.3.2           Numerous communications between legal counsel  
11 for DCD and IMQ took place over the following months. In August of 2007, IMQ met  
12 with DCD representatives for a "pre-application conference" at which time DCD  
13 representatives again declined to recognize IMQ's nonconforming mineral use rights.

14                   4.1.3.3           On November 30, 2007, IMQ filed a formal code  
15 interpretation request with DCD pursuant to JCC 18.40.360. The request included  
16 attachments that described in detail the IMQ mineral resource use proposal for mining at  
17 the Site. IMQ asked DCD to confirm that the 10-acre limit of JCC 18.20.240(1) did not  
18 apply to IMQ based on its nonconforming mineral use rights.

19                   4.1.3.4           On January 5, 2008, DCD issued a response to  
20 IMQ's code interpretation request, in which DCD refused to apply the diminishing asset  
21 doctrine established by the Washington Supreme Court and refused to recognize IMQ's  
22 nonconforming mineral resource use rights. IMQ appealed DCD's code interpretation to  
23 the Jefferson County Hearing Examiner ("Hearing Examiner").

24                   4.1.3.5           On March 14, 2008, the Hearing Examiner held a  
25 public hearing on IMQ's code interpretation appeal. The County received numerous

1 written comments from the general public pertaining to perceived environmental impacts  
2 related to the New Shine Quarry proposal. The Hearing Examiner conducted an open  
3 record public hearing; considered the testimony of representatives of Jefferson County,  
4 IMQ, and the general public; and reviewed 69 hearing exhibits, most of which related to  
5 perceived environmental impacts.

6 4.1.3.6 On April 9, 2008, the Hearing Examiner issued his  
7 decision, which confirmed IMQ's nonconforming mineral use rights at the Site over the  
8 objections of DCD.

9 4.1.3.7 On April 29, 2008, Port Ludlow residents filed an  
10 appeal of the Hearing Examiner decision pursuant to the Land Use Petition Act ("LUPA"),  
11 Ch. 36.70C *et seq.*

12 4.1.3.8 On November 17, 2008 this Court denied the LUPA  
13 appeal of the Hearing Examiner's decision by the Port Ludlow residents and confirmed  
14 IMQ's nonconforming mineral use rights (Cause No. 08-2-00142-2). Attach. C to  
15 Johnson Decl.

16 4.1.4 **Jefferson County Unlawfully Attempted to Subject the Exercise**  
17 **of IMQ's Established Mineral Use Rights to a Conditional Use**  
**Permit Requirement.**

18 4.1.4.1 On May 7, 2008, shortly after the Hearing Examiner  
19 issued his first code interpretation confirming IMQ's nonconforming use rights, an  
20 associate planner in DCD issued a letter to IMQ stating that DCD would require IMQ to  
21 apply for a Conditional Use Permit ("CUP") in order to exercise its mineral resource use  
22 rights at the IMQ Site. DCD's letter alleged "off-site impacts (noise, vibration, dust,  
23 traffic)" and informed IMQ that DCD had "good reason to believe that the Iron Mountain  
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1 mining activities as proposed will create such impacts to the Port Ludlow community and  
2 therefore will require a Conditional Use Permit” pursuant to JCC 18.20.240(2)(g)(i).

3 4.1.4.2 DCD assumed such off-site project impacts without  
4 any evidence in the record to support such a conclusion. No permit application or any  
5 specific project description had been submitted to the County. DCD did not have a SEPA  
6 checklist for mineral use activities. Planning staff speculated that adverse impacts would  
7 result from IMQ’s proposed mineral use activities.

8 4.1.4.3 On May 14, 2008, IMQ requested a code  
9 interpretation pertaining to DCD’s CUP requirement. In a code interpretation issued on  
10 June 11, 2008, the Director of DCD interpreted JCC 18.20.240(2)(g)(i) to require that  
11 IMQ must obtain a conditional use permit before exercising its mineral resource use rights  
12 at the IMQ Site.

13 4.1.4.4 IMQ appealed the Director’s code interpretation to  
14 the Hearing Examiner.

15 4.1.4.5 On September 24, 2008, the Hearing Examiner  
16 denied IMQ’s appeal and upheld DCD’s code interpretation to require a CUP, despite this  
17 Court’s previous ruling that IMQ’s mineral resource use rights had been established.

18 4.1.4.6 IMQ appealed the Hearing Examiner’s decision to  
19 this Court (Cause No. 08-2-00350-6). On April 15, 2009, this Court ruled in favor of  
20 IMQ, concluding:

21 There are ample protections afforded to the County under its  
22 general permitting authority including SEPA authority to  
23 insure that concerns relating to offsite effects of any mining  
24 (noise, vibration, dust, traffic, etc.) are addressed and that  
25 the public is protected from possible adverse impacts. A  
Conditional Use Permit requirement is not appropriately one  
of those regulatory mechanisms available to the County . . .

1 in light of Petitioners' established nonconforming mineral  
2 use rights.

3 Attach. D to Johnson Decl.

4 **4.1.5 Jefferson County Unlawfully Predetermined that an EIS would  
5 be Required for the New Shine Quarry.**

6 4.1.5.1 On May 2, 2008, Al Scalf, the Director of DCD,  
7 publically stated that environmental issues alleged during the first code interpretation  
8 appeal, such as concerns about impacts of noise and impacts on wells, would make an EIS  
9 for the proposed mine "highly probably." Attach. E to Johnson Decl. These comments  
10 were made prior to the submission of any permit application by IMQ or submission of  
11 other project specific information that would enable the County to evaluate project-related  
12 environmental impacts.

13 4.1.5.2 Counsel for IMQ requested that Mr. Scalf retract his  
14 predetermination of the EIS requirement. He declined to do so.

15 **4.2 IMQ Has Completed an Extensive Assessment of Potential  
16 Environmental Impacts.**

17 4.2.1 Following this Court's decision in the second LUPA appeal, IMQ  
18 initiated the process to obtain a Stormwater Management Permit for the proposed quarry  
19 as required by JCC 18.30.070.

20 4.2.2 IMQ undertook extensive investigations to identify and address  
21 potential environmental issues related to the proposed mining operation.

22 4.2.3 On July 30, 2009, representatives of IMQ met with Jefferson  
23 County staff in a formal Pre-Application Conference. IMQ shared with County staff  
24 environmental information that had been prepared by IMQ, including wetland and traffic  
25

1 analyses. IMQ discussed what information the County desired in order for it to conduct  
2 the necessary permit and environmental review.

3 4.2.4 Based upon the information provided by County staff at the pre-  
4 hearing conference, IMQ identified environmental issues and commissioned a range of  
5 environmental studies that far exceeded the requirements of the Stormwater Management  
6 Permit Application. At a cost of over \$500,000, IMQ undertook objective engineering  
7 and scientific studies conducted by the best qualified experts in order to identify and  
8 address all potential significant environmental impacts that could possibly result from  
9 operation of the New Shine Quarry.

10 4.2.5 On February 25, 2010, IMQ submitted to Jefferson County a  
11 completed Stormwater Management Permit Application for the New Shine Quarry.  
12 Attach. A to Johnson Decl. In conjunction with this application, IMQ submitted an  
13 extended SEPA Environmental Checklist. Attach. F & G to Johnson Decl.

14 4.2.6 The following studies, comprising hundreds of pages of expert  
15 study, analysis and evaluation, were attached to the checklist and submitted to DCD:

16 (1) *Shine Quarry Phase 1A Drainage Control Report*, Layton  
17 and Sell Inc. P.S., February 2010;

18 (2) *New Shine Quarry Wetland Delineation and Inventory*,  
19 Environ, July 2009;

20 (3) *Hydrology Report (Groundwater Technical Memo)*, Environ,  
21 June, 2009;

22 (4) *Critical Aquifer Recharge Area Report for the New Shine*  
23 *Quarry*, Environ, February, 2010;

24 (5) *Wetland Mitigation Sequencing Analysis*, Brent Carson,  
25 February, 2010;

(6) *Conceptual Wetland Mitigation Plan and Indirect impacts*  
*Analysis*, Environ, February, 2010;

1 (7) *New Shine Quarry Wetland Delineation and Inventory*,  
2 Environ, July 2009;

3 (8) *Geologic and Geohazard Assessment*, AMEC, February,  
4 2008;

5 (9) *Existing Habitats, Plants and Animals at the Proposed new*  
6 *Shine Quarry Site in Jefferson County, Washington*, Environ,  
7 January, 2010;

8 (10) *Community Noise Assessment for the Proposed Iron*  
9 *Mountain Quarry, Shine, Washington*, AMEC, December 2009;

10 (11) *Visual impact of Proposed new Shine Quarry*, Centre Point  
11 Consultants, Inc. December, 2009; and,

12 (12) *Iron Mountain Quarry Traffic Impact Analysis*,  
13 Transportation Solutions, Inc. December 2009.

14 **4.2.6.1 Geologic and Geohazard (Earth) Assessment.**

15 4.2.6.1.1 IMQ commissioned AMEC Earth and  
16 Environmental, Inc. ("AMEC") to conduct a geotechnical and geologic assessment of the  
17 New Shine Quarry Site. This assessment evaluated the potential for geologic hazards at  
18 the Site, based upon the proposed mining operation, topography, surface vegetation,  
19 surface water, soil conditions, and bedrock conditions. Attach. F, Tab 2, to Johnson Decl.

20 4.2.6.1.2 AMEC concluded that only a small portion  
21 of the Site, in an area that will not be disturbed by mining, would present a potential  
22 seismic hazard and that further mitigation related to such hazard is unnecessary. AMEC  
23 further concluded that the slope hazard on the Site is low and that any such hazard will be  
24 mitigated as part of quarrying operations.

25 **4.2.6.2 Surface Water (Wetland & Streams) Analysis.**

4.2.6.2.1 IMQ retained Environ International Inc.  
("Environ") to prepare a wetland delineation report pursuant to Jefferson County Critical  
Areas Study report requirements (JCC 18.22). In the spring of 2009, Environ performed

1 extensive field studies to identify, delineate, and rate wetlands on Site. Environ identified  
2 and delineated a total of 20 wetland areas using comprehensive onsite wetland  
3 determination methods specified by the Washington State Department of Ecology  
4 (“Ecology”) and the U.S. Army Corps of Engineers (“Corps”). Attach. F, Tab 3, &  
5 Attach. G, Tab 3, to Johnson Decl. Two minor streams outside the proposed active  
6 mining area were also identified. *Id.* As part of the wetland study, Environ worked  
7 closely with Corps, Ecology, and Jefferson County wetlands officials, including leading  
8 staff from these agencies on an all-day Site visit.

9                                   4.2.6.2.2       Based upon Environ’s findings, IMQ  
10 presented Jefferson County a detailed Wetland Mitigation Sequencing Analysis for the  
11 New Shine Quarry Site pursuant to JCC 18.22.350(1). Attach. G, Tab 1, to Johnson  
12 Decl. IMQ approached mitigation sequencing through an iterative process that considered  
13 which wetlands and wetland buffers could be avoided while still having adequate mineral  
14 reserves to assure project feasibility and adequate areas for administrative uses,  
15 equipment, and processing facilities and infrastructure, including roads and stormwater  
16 management facilities.

17                                   4.2.6.2.3       IMQ evaluated mitigation sequencing using  
18 three scenarios through quantitative modeling. The first included preparation of a grading  
19 plan to estimate maximum minable mineral reserves without regard for wetlands. The  
20 second was a grading plan designed to avoid direct impact to wetlands and their  
21 associated buffers generally along the western boundary of the proposed mining area.  
22 Finally, a grading plan was prepared to avoid all wetlands and their associated buffers.  
23 Based upon this analysis, IMQ concluded that a feasible limit of wetland avoidance exists  
24 at the Site, which meets Jefferson County standards.

1                                   4.2.6.2.4        Environ prepared a separate conceptual  
2 mitigation plan to address rectifying, reducing and compensating for direct and indirect  
3 unavoidable impacts to wetlands and wetland buffers. Attach. G, Tab 2, to Johnson Decl.  
4 The wetland mitigation plan includes both onsite and offsite mitigation, which accounts  
5 for phased mining operations at the Site. At least 2.93 acres of onsite wetland mitigation  
6 would be created or re-established under this plan. Proposed offsite compensation would  
7 preserve or protect at least 20 acres of Category I estuarine intertidal wetland and  
8 approximately 21 acres of forested uplands.

9                                   4.2.6.2.5        No streams or stream buffers will be  
10 impacted by the proposed mining activities.

11                                  4.2.6.2.6        Based upon the extensive wetlands analysis  
12 and mitigation planning undertaken, it is apparent that the New Shine Quarry can be  
13 operated in full compliance with local, state and federal wetland regulations and fully  
14 mitigate all wetland impacts.

15                                  4.2.6.3           **Groundwater Analysis.**

16                                  4.2.6.3.1        Environ performed an analysis of existing  
17 groundwater conditions beneath and in the vicinity of the New Shine Quarry Site. Attach.  
18 F, Tab 4, to Johnson Decl.

19                                  4.2.6.3.2        Environ hydrologists conducted field  
20 reconnaissance and compiled and interpreted published hydrogeologic information and  
21 ground water well logs in the vicinity of the Site.

22                                  4.2.6.3.2        The Environ experts concluded that there are  
23 no permanent water wells within the footprint of the proposed New Shine Quarry.  
24 Moreover, there is no hydrogeologic connection between the Site and drinking water  
25 sources in the vicinity.

1                                   4.2.6.3.4       Environ concluded that there will be no  
2 appreciable long term changes to runoff resulting from the addition of impervious surfaces  
3 at the Site. Temporary changes to soil cover are not expected to result in significant loss  
4 of recharge to aquifers. The proposed mining activities will involve only relatively minor  
5 amounts of fuels and hazardous materials stored and used on Site. Moreover, in the  
6 unlikely event of a significant release of a hazardous material or petroleum hydrocarbon,  
7 downward migration into a beneficial use aquifer is unlikely. Accordingly, no significant  
8 impact on groundwater from mining operations at the site is likely.

9                                   4.2.6.4               **Habitat, Plant and Animal Assessment.**

10                                   4.2.6.4.1       IMQ engaged Environ to assess existing  
11 habitat composition and plant and animal communities on the Site and to determine  
12 impacts to such species and ecological communities that could result from mine  
13 operations. Certified ecologists and ecotoxicologists reviewed existing conditions on the  
14 Site, including the possible existence of priority habitats and state and federally listed  
15 threatened and endangered species and state listed priority species. Attach. F, Tab 6, to  
16 Johnson Decl.

17                                   4.2.6.4.2       Based upon a review of the proposed mining  
18 plan, Environ concluded that there will be no direct impacts or loss of designated critical  
19 habitat or habitat that is essential to any federally-or state-listed threatened or endangered  
20 species resulting from the proposed mine operations. In addition, compliance with  
21 existing laws and required mitigation, including mine reclamation plans and compensatory  
22 wetland mitigation plans will ensure that any upland and wetland forest habitat types that  
23 are impacted by the mining proposal, will be replaced. Accordingly, there will be no  
24 significant loss of habitat acreage or functions.

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4.2.6.5 Noise Assessment.

4.2.6.5.1 IMQ retained AMEC Geomatrix, Inc., to perform a community noise assessment for the proposed New Shine Quarry. Attach. F, Tab 7, to Johnson Decl.

4.2.6.5.2 AMEC measured the noise emissions of the equipment proposed for use at the New Shine Quarry and determined planned locations for equipment use during the three phases of proposed quarry resource development. Based on noise from similar sources and the proposed locations of the equipment, AMEC modeled predicted ambient noise levels at the Site. The model accounted for the effects of both topography and typical unfavorable meteorological conditions on potential noise propagation using reasonable worst-case assumptions for equipment operations. The modeling results were compared to the criteria established by state and local regulations governing maximum environmental noise levels, and to existing conditions measured in the vicinity of the Site.

4.2.6.5.3 Based upon the data and conditions modeled, AMEC Geomatrix concluded that maximum permissible environmental noise levels would not be exceeded at any surrounding Pope owned property. The noise level at the nearest residential receptor in Port Ludlow was determined to range from 38.0 to 39.8 decibels. This is equivalent to the typical noise environment in a standard residential living room, below that of a typical office or of conversational speech, and well below any applicable regulatory levels.<sup>2</sup>

4.2.6.5.4 AMEC concluded that the noise impacts of the proposed New Shine Quarry will not be significant and will not approach the

<sup>2</sup> Temporary site noise between 7:00 and 10:00 p.m. is exempt from community noise regulations (WAC 173.60.040) as is noise from daytime blasting events (such as occasionally occur during quarry operations), and noise from motor vehicles that are regulated under WAC 173.62. WAC 173-60-050.

1 maximum permissible noise levels established by Jefferson County and Ecology at the  
2 nearest parcels owned by others.

3 4.2.6.6 **Visual Impact Analysis.**

4 4.2.6.6.1 IMQ commissioned a study by Centre Pointe  
5 Consultants, Inc., to assess the visual impact of the New Shine Quarry. Attach. F, Tab 8,  
6 to Johnson Decl. Centre Point visited the site and assessed view impacts based upon four  
7 view stations within existing or potential residential sites near Port Ludlow, which posed  
8 "worst case" view scenarios. These four stations, which were determined using Global  
9 Positioning System (GPS) and Light Detection and Ranging (LIDAR) technology, are at  
10 or above the elevation of the proposed mining operation.

11 4.2.6.6.2 A 360 degree series of photographs was  
12 taken at each station. Once direction and location of the existing Mason/Shine Quarry and  
13 New Shine Quarry were determined for each photograph, the two dimensional field of the  
14 top of the trees over the proposed quarry was projected into each photograph. The result  
15 displays the top of the New Shine Quarry from each viewing station.

16 4.2.6.6.3 Based upon this methodology, Centre Point  
17 concluded that no significant visual impact would, or could, occur for the proposed  
18 mining operation.

19 4.2.6.7 **Traffic Impact Analysis.**

20 4.2.6.7.1 IMQ engaged Transportation Solutions, Inc.  
21 ("TSI") to analyze potential traffic impacts of the New Shine Quarry proposal and, if  
22 necessary, recommend physical improvements to minimize or eliminate possible effects of  
23 such impacts. Attach. F, Tab 9, to Johnson Decl.

1                                   4.2.6.7.2       TSI's analysis focused on possible impacts at  
2 or near the intersection of State Route ("SR") 104 and the private access roads that will  
3 service the New Shine Quarry.

4                                   4.2.6.7.3       TSI evaluated existing traffic volumes in this  
5 segment of SR 104, level of service and queuing at the intersection, and collision data  
6 obtained from the Washington State Department of Transportation ("WSDOT"). TSI  
7 then determined future conditions (which include the New Shine Quarry), including trip  
8 generation, trip distribution and assignment, level of service, and queuing and safety.

9                                   4.2.6.7.4       TSI concluded that traffic generated by the  
10 proposed project would not adversely affect the level of service on SR-104. The volume  
11 of truck traffic generated by existing and proposed operations does not indicate that a  
12 center left turn lane, speed change lanes, or right turn lane are warranted. The review of  
13 collision data on the road segment combined with an evaluation of sight distance and  
14 intersection geometrics concluded that there are not safety deficiencies at the intersection.  
15 Based upon their analysis, TSI concluded that the proposed New Shine Quarry would add  
16 only a small number of trips to the intersection and there will be no adverse traffic impacts  
17 requiring mitigation.

18           4.3       **SEPA Requires a Threshold Determination.**

19                           4.3.1   Pursuant to JCC 18.40.760, as part of the permit process IMQ was  
20 required to initiate the SEPA review process by submitting an environmental checklist.  
21 The County uses the checklist to make the threshold determination required by JCC  
22 18.40.760(3).

23                           4.3.2   The threshold determination is the County's decision regarding  
24 whether there is a reasonable likelihood that the New Shine Quarry will have a "probable  
25

1 significant adverse environmental impact” on an element of the environment. *Id.* This  
2 determination may result in the following: (1) a Determination of Significance (“DS”); (2)  
3 a Determination of Non-Significance (“DNS”); or, (3) a Mitigated Determination of Non-  
4 significance (“MDNS”). *Id.* A DS is appropriate only if the project may have a “probable  
5 significant adverse environmental impact.” JCC 18.40.760(3)(a). A DNS shall be issued  
6 if a project will not have a significant adverse environmental impact. JCC  
7 18.40.760(3)(b). The responsible official may issue an MDNS based on conditions  
8 attached to the proposal by the responsible official or based on changes to, or  
9 clarifications of, the proposal made by the applicant. JCC 18.40.760(4).

10 4.3.3 In relevant part, WAC 197-11-330 provides:

11 (1) In making a threshold determination, the responsible official shall:

12 (a) Review the environmental checklist, if used:

13 (i) Independently evaluating the responses of any applicant and  
14 indicating the result of its evaluation in the DS, in the DNS, or on the  
checklist; and

15 (ii) Conducting its initial review of the environmental checklist and  
16 any supporting documents without requiring additional information  
17 from the applicant.

18 (b) Determine if the proposal is likely to have a probable significant  
19 adverse environmental impact, based on the proposed action, the  
information in the checklist (WAC 197-11-960), and any additional  
20 information furnished under WAC 197-11-335 and 197-11-350; and

21 (c) Consider mitigation measures which an agency or the applicant will  
22 implement as part of the proposal, including any mitigation measures  
required by development regulations, comprehensive plans, or other  
existing environmental rules or laws.

23 WAC 197-11-335 further provides:  
24  
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1           The lead agency shall make its threshold determination based upon  
2 information reasonably sufficient to evaluate the environmental impact of a  
3 proposal . . . The lead agency may take one or more of the following  
4 actions if, after reviewing the checklist, the agency concludes that there is  
5 insufficient information to make its threshold determination:

6           (1) require an applicant to submit more information on subjects in  
7 the checklist;

8           (2) Make its own further study, including physical investigations  
9 on a proposed site;

10           (3) Consult with other agencies, requesting information on the  
11 proposal's potential impacts which lie within the other agencies'  
12 jurisdiction or expertise . . .; or

13           (4) Decide that all or part of the action or its impacts are not  
14 sufficiently defined to allow environmental analysis and commit to timely,  
15 subsequent environmental analysis . . .

16           4.3.4 When a threshold determination results in a DS it shall not be  
17 administratively appealable under SEPA. JCC 18.40.810; RCW 43.21C.075(6)(c).  
18 These provisions deny judicial review of the Determination of Significance under SEPA,  
19 will improperly increase environmental analysis burdens for IMQ, and will result in  
20 project delay.

21           4.4    **Jefferson County's Threshold Determination was Undertaken with a**  
22                    **Complete Disregard of the Facts Presented by IMQ.**

23           4.4.1 On March 22, 2010, less than four weeks after IMQ submitted its  
24 permit application and its voluminous expanded environmental checklist with supporting  
25 expert studies, Jefferson County, through its DCD Planning Manager, Stacie L. Hoskins,  
issued a Determination of Significance, asserting that IMQ's proposal to mine the Site is  
likely to have a significant impact on the environment. Attach. B to Johnson Decl. DCD

1 concluded that an environmental impact statement (EIS) is required under RCW  
2 43.21C.030(2)(c).

3 4.4.2 The two page DS, stated in relevant part:

4 The Lead Agency has indentified [*sic*] the following areas  
5 for discussion in the EIS:

6 Earth (ridgeline soils), air quality (dust), surface water  
7 (streams wetlands), groundwater, plants, animals, traffic, fly  
8 rock, noise, vibration, land use and aesthetics

9 4.4.3 Under RCW 43.21C.031(1), an environmental impact statement is  
10 required to analyze only those probable adverse environmental impacts which are  
11 significant.

12 4.4.4 On information and belief, Jefferson County undertook no  
13 independent investigation or analysis in reaching the decision to issue the DS. DCD did  
14 not request additional information from IMQ, its agents, or consultants; did not make its  
15 own further study; and did not consult with other agencies in response to the  
16 environmental analysis performed by IMQ. Nor did Jefferson County request public  
17 comment prior to issuing the DS.

18 4.4.5 There is no evidence that the areas cited by the County for further  
19 review in an EIS are associated with probable significant impacts on the environment  
20 attributable to the New Shine Quarry.

21 4.4.5.1 Eight of the twelve areas of concern identified by  
22 DCD in the DS have been specifically addressed in IMQ's environmental analyses and  
23 environmental checklist submitted in conjunction with the Stormwater Management  
24 Permit Application. These include earth, surface water, groundwater, plants, animals,  
25 traffic, noise, and aesthetics. IMQ's exhaustive analyses of these issues establishes that  
they do not pose a probable significant adverse impact on the environment. Jefferson

1 County has provided no evidence disputing IMQ's analyses in reaching its decision to  
2 issue the DS.

3 4.4.5.2 "Land use" issues cited by DCD have been settled  
4 by this Court previously. IMQ has a right to mine the 142 acres at the Site. Attach. C &  
5 D to Johnson Decl. There is no basis for the County's conclusion that "land use" issues  
6 pose probable significant adverse environmental impacts which must be further addressed  
7 in an EIS.

8 4.4.5.3 The undefined issue of "fly rock" has never been  
9 raised by the County. There is no evidence that the risk of flying rock poses a risk to the  
10 environment at the New Shine Quarry or that any such risk cannot be mitigated. The  
11 existence of such risk is purely speculative. There is no basis for asserting that "fly rock"  
12 will have a probable significant impact on the environment.

13 4.4.5.4 The issue of "air quality (dust)" is the subject of  
14 independent regulation pursuant to Ch. 70.94 RCW (State Clean Air Act) and 42 U.S.C. §  
15 7401 *et seq.* (Clean Air Act), under the direct supervision of the Olympic Region Clean  
16 Air Agency ("ORCAA"), for which Jefferson County has no jurisdiction. IMQ's  
17 operations must and will comply with applicable air quality standards as directed and  
18 enforced by ORCAA. As such, there is no basis for DCD's allegation that operation of  
19 the New Shine Quarry will create significant adverse impacts to air quality.

20 4.4.5.5 There is no evidence that the issue of "vibration"  
21 poses a probable significant impact on the environment. There is no record of any adverse  
22 vibration impacts resulting from blasting activities at the adjacent Shine/Mason Quarry,  
23 which are comparable to those proposed for the New Shine Quarry and are projected to  
24 occur at the New Shine Quarry no more than two times per month on average. There is no  
25 evidence that vibration from blasting activities will violate applicable legal standards.

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**V. AUTHORITY**

5.1 **This Court has Authority to Grant a Constitutional Writ.**

5.1.1 A Court may issue a constitutional writ of certiorari to review a SEPA determination if (1) no other avenue of appeal is available and, (2) facts exist that, if verified, indicate the lower tribunal has acted in an illegal or arbitrary and capricious manner. *Saldin Securities*, 134 Wn. 2d. at 294. This Court has inherent power provided in Article IV, Section 6 of the Washington State Constitution to review administrative decisions for illegal or manifestly arbitrary acts. *Id.* at 292. “[W]illful and unreasoning action, without consideration and in disregard of facts or circumstances” is by definition arbitrary and capricious. *Hood v. Washington State Personnel Bd.*, 82 Wash.2d 396, 402, 511 P.2d 52 (1973), *citing Lillions v. Gibbs*, 47 Wash.2d 629, 633, 289 P.2d 203, 205 (1955). Jefferson County’s decision to issue a DS in this matter was undertaken with a complete disregard of the facts. Accordingly, this Court should issue a writ of certiorari in this matter.

5.1.2 **IMQ has no avenue of appeal other than a constitutional writ.**

5.1.2.1 IMQ has no mechanism through which it can appeal Jefferson County’s DS determination other than through a constitutional writ. When a threshold determination results in a DS it is not be appealable under SEPA. JCC 18.40.810. Review of a SEPA determination must “without exception” be coupled with review of the final action on the application. RCW 43.21C.075(6)(c). Here, the Type I Stormwater Permit Management Application has not been acted upon by the County and based upon the County’s DS, would not be acted upon until preparation of an EIS. Accordingly, in the absence of a constitutional writ, IMQ must prepare an EIS and thereafter obtain a final decision on its stormwater permit application before challenging the County’s illegal DS determination.

1                   5.1.2.2           Washington courts recognize the right of a party to  
2 seek judicial review of SEPA Determinations of Significance through the use of a  
3 constitutional writ of certiorari under the circumstances of this case. *Saldin Securities*,  
4 134 Wn. 2d. at 294. In *Saldin*, the Court recognized that RCW 43.21C.075(6)(c)  
5 “effectively denies judicial review to project proponents of determinations of significance  
6 and other agency SEPA determinations which might improperly increase environmental  
7 analysis burdens and project delay.” *Id* (internal quotations omitted).

8                   5.1.2.3           Preparing an EIS is an extremely costly and time  
9 consuming endeavor. *Saldin Securities*, 134 Wn. 2d. at 295. For a party who is forced by  
10 the arbitrary action of an agency to prepare an EIS, review of that decision by an agency  
11 after the permitting decision is “too little too late.” *Id*. Accordingly, in *Saldin* the Court  
12 held that courts may grant a constitutional writ of certiorari to review a Determination of  
13 Significance provided “facts exist that, if verified, indicated the lower tribunal has acted  
14 in an illegal or arbitrary and capricious manner.” *Id*.

15                   5.1.3    **The facts establish that Jefferson County has acted in an**  
16                                   **arbitrary and capricious manner.**

17                   5.1.3.1           IMQ can clearly demonstrate that Jefferson County’s  
18 Determination of Significance was arbitrary and capricious. As discussed herein, the only  
19 relevant and competent evidence of impacts indicates that operation of the New Shine  
20 Quarry will have no probable significant adverse impacts upon the environment. IMQ has  
21 thoroughly addressed those issues for which the County seeks to require an EIS - those  
22 which pose a potential risk of probable significant impact on the environment. Only three  
23 issues (fly rock, dust, and vibration) have not been specifically addressed in the  
24 environmental analyses submitted in conjunction with IMQ’s Stormwater Management  
25

1 Permit Application. There is no evidence that any of these issues pose the risk of probable  
2 significant impacts on the environment.

3                   5.1.3.2           The issue of fly rock has never been raised as an  
4 issue of concern by the County and there is no basis for the assertion that it poses a  
5 probable significant risk at the Site. Best management practices for mining at the Site will  
6 ensure that no rock will fall off-site as a result of intermittent blasting activities. Any  
7 potential air quality impacts will be fully mitigated through compliance with air quality  
8 regulations under the jurisdiction of ORCAA. There is no evidence that dust related  
9 issues will not be satisfactorily addressed through independent regulation by ORCAA and  
10 application of best management practices at the New Shine Quarry. Vibration resulting  
11 from blasting activity will be infrequent. Modern mining practices result in little  
12 perceptible vibration from blasting. There is no evidence that vibration emanating from  
13 the existing Shine/Mason Quarry has a significant impact on the environment. There is no  
14 competent evidence to support Jefferson County's conclusion that these issues require  
15 further analysis in an EIS.

16                   5.1.3.3           Jefferson County's DS determination is arbitrary and  
17 capricious. IMQ established through its independent expert studies that no probable  
18 significant environmental impacts will result from construction and operation of the New  
19 Shine Quarry. No competent evidence to the contrary has been made available to the  
20 County. The County's threshold determination constitutes willful and unreasoning action in  
21 disregard of facts and circumstances.

22                   5.1.3.4           Petitioners have exhausted all administrative  
23 remedies and timely bring a claim of damages pursuant to Ch. 64.40 RCW.





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7.8 For leave to amend this Petition and Complaint as may be necessary and appropriate;

7.9 For a judgment for damages, costs and reasonable attorneys' fees against Jefferson county pursuant to Ch. 64.40 RCW;


7.10 For an award of Petitioners' costs and attorneys' fees as otherwise allowed by law;

7.11 For pre-judgment and post-judgment interest at the maximum legal rate;

7.12 For such other and further relief as this Court deems just and equitable.

DATED this 6<sup>TH</sup> day of April, 2010.

GORDONDERR LLP

By:   
Keith Moxon, WSBA #15361  
Dale Johnson, WSBA #26629  
Attorneys for Petitioners  
Iron Mountain Quarry, LLC and  
Pope Resources

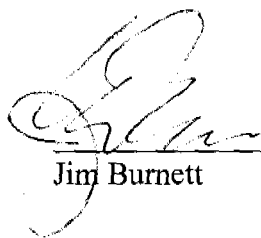
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**DECLARATION**

I certify that I am one of the owners of Iron Mountain Quarry, LLC, Petitioner. I have read the foregoing Petition for Constitutional Writ of Certiorari, know the contents thereof, and believe the same to be true and correct to the best of my knowledge.

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 02 of April, 2010.

  
\_\_\_\_\_  
Jim Burnett