IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

HOOD CANAL COALITON; OLYMPIC ENVIRONMENTAL COUNCIL; JEFFERSON COUNTY GREEN PARTY; PEOPLE FOR A LIVEABLE COMMUNITY; KITSAP AUDUBON SOCIETY; HOOD CANAL ENVIRONMENTAL COUNCIL; and PEOPLE FOR PUGET SOUND,	)	No. 63872-6-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
Appellants,	)	
v.	)	
JEFFERSON COUNTY and FRED HILL MATERIALS, INC.,	)	FILED: November 9, 2009
Respondents.	)	

Grosse, J. — Under the Growth Management Act (GMA)[1] actions and regulations of a local governmental entity in comprehensive plan amendments are presumed valid upon adoption and the Growth Management Hearings Board (Board) is required to apply a deferential standard of review. After a remand, the Board found that Jefferson County's ordinance establishing a mineral resource land overlay in a commercially forested area complied with the requirements of the State Environmental Policy Act (SEPA), chapter 197-11 WAC. Because there was substantial evidence to

[1] RCW 36.70A.3201.

support the Board's finding that the 2004 supplemental environmental impact statement (SEIS) on non-project proposed action adequately discussed alternatives to the proposed action, thereby giving the Jefferson County Board of County Commissioners sufficient information on which to base a decision, we affirm.

FACTS

In April 2002, Fred Hill Material, Inc. (Fred Hill) sought an amendment to the Jefferson County comprehensive plan to place a mineral resource land overlay (MRLO) district on 6,240 acres that was designated primarily as commercial forest in an area west of Hood Canal Bridge.[2] The area encompasses 6,240 acres in southeast Jefferson County within the 72,000-acre Hood Canal Tree Farm owned by Pope Resources. The study area is bordered on the west by Thorndyke Creek, on the north and northeast by State Route (SR) 104 and on the south and east by the Thorndyke Road vicinity. The study area is largely forested and surrounded by forested areas that on the east and southeast give way to residential uses and eventually Squamish Bay and Hood Canal.

Fred Hill subsequently offered to modify the original proposal by reducing the acreage to be mined within the 6,240-acre area to 765 acres. The Jefferson County Department of Community Development (County) issued a final SEIS (FSEIS) on November 25, 2002, describing the modified proposal and further reducing the acreage

[2] MRLO's are areas that provide regulations in addition to those required in the underlying use.

to a 690-acre MRLO district.

On December 13, 2002, the Jefferson County Board of County Commissioners (Commissioners) adopted Ordinance 14,1213-02, placing an MRLO on 690 acres. Hood Canal appealed to the Board which found that the environmental review undertaken for the MRLO designation was inadequate because of its failure to provide "sufficient information for a reasoned choice among alternatives." The Board found the 2002 SEIS failed to analyze any alternative except the one recommended by the staff, thus leaving the County Commissioners without adequate environmental information about possible alternatives to the proposal, in particular, the no-action alternative. Because mining was already a permitted use on the property under consideration, the analysis of environmental impacts of what was currently permitted could serve as a benchmark. The County was given additional time to submit a supplemental draft and final EIS on the alternatives. The County submitted the 2004 supplemental draft EIS (SDEIS) and 2004 supplemental final EIS (SFEIS), which the Board found adequate. Hood Canal appealed to Jefferson Superior Court which upheld the Board. Hood Canal appeals.

Analysis

Comprehensive plan amendments are presumed valid upon adoption.[3] The Board "shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in

[3] RCW 36.70A.320(1).

light of the goals and requirements of this chapter."[4] An action is "'clearly erroneous,'" if the board has a "'firm and definite conviction that a mistake has been committed.'"[5] The question before this court is whether the Board was correct in concluding that the County's actions were not clearly erroneous. "Judicial review of board actions is governed by the Administrative Procedure Act, chapter 34.05 RCW."[6] This court reviews the Board's legal conclusions de novo, giving substantial weight to the Board's interpretation of the GMA. The findings of fact are reviewed for substantial evidence.[7]

Jefferson County analyzed the Hill proposal under the following three scenarios: no-action alternative (maintain the 10-acre segments available for mining), the approved alternative proposal (690-acre MRLO, 40-acre mining segments) and the proposed alternative (6,720-acre MRLO, 40-acre mining segments).

In its 2003 remand to the County for SEPA compliance, the Board made particular findings of fact, noting the deficiencies in the County's 2002 draft SEIS (DSEIS) and FSEIS:

> N. In the FSEIS, dated November 25, 2002, the staff recommended adoption of the proposal for a 690-acre mineral resource overlay designation. Neither the draft SEIS nor the FSEIS did more than a brief, conclusory evaluation of the no action alternative or the other proposed alternative. The 690-acre staff recommended alternative was evaluated

[4] RCW 36.70A.320(3); see also City of Arlington v. Central Puget Sound Growth Mgmt., 164 Wn.2d 768, 193 P.3d 1077 (2008).
[5] Lewis County v. W. Wash. Growth Mgmt. Hearings Bd., 157 Wn.2d 488, 497, 139 P.3d 1096 (2006) (quoting State, Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County, 121 Wn.2d 179, 201, 849 P.2d 646 (1993)).
[6] Thurston County v. W. Wash. Growth Mgmt. Hearings Bd., 164 Wn.2d 329, 341, 190 P.3d 38 (2008).
[7] Swinomish Indian Tribal Comm. v. W. Wash. Growth Mgmt. Hearings Bd., 161 Wn.2d 415, 424, 166 P.3d 1198 (2007).

> in terms of thirteen factors the County listed as appropriate for evaluation of a mineral resource overlay designation but no other alternative was similarly evaluated.
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> O. The [2002] FSEIS pointed to a capacity problem with respect to truck transport of minerals from the new overlay site. However, the [2002] FSEIS failed to describe the current traffic or predict a range of future traffic that would be needed for increased mining activity. The [2002] FSEIS also failed to consider whether alternative forms of transport, such as the conveyor suggested by Fred Hill Materials, might be used and with what possible environmental impacts.
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> P. The proposed mineral resource overlay is located in a forested region where there are many significant critical areas, including lakes and streams. The [2002] FSEIS fails to describe the existing wildlife habitat and to evaluate possible environmental impacts on that habitat, reserving SEPA review of those impacts until the permitting stage of any future mining projects.

The 2004 SDEIS and 2004 SFEIS addressed environmental characteristics of the no-action alternative. The no-action alternative noted that mining in 10-acre areas might result in the need to disturb more areas than a 40-acre segment, i.e., a total of 50 acres (five 10-acre segments) in order to obtain the same amount of gravel as would be obtained by mining a 40-acre segment. This would mostly be caused by the need to slope the sides in accordance with safety regulations, which results in a smaller total area that can be mined in the 10-acre segments. Thus, mining in 10-acre segments might result in small areas of disturbance, but the aggregate area disturbed per cubic yard of material recovered would be larger. Further, the no-action plan permits digging below the water table, whereas both the approved and proposed alternatives required a 10-foot distance from the water table.

The County examined the transportation impacts on SR 104, the primary peninsular travel route throughout the county. SR 104 intersects with a private forest management roadway, Rock To Go Road (asphalt-surfaced for dust control), and with SR 19. The impact of the proposed action was compared with the assessed road level of service "C" (13,000 vehicles stable flow, but speed and maneuverability impacted by higher volumes). The volume of traffic on roads in 2001 was projected to result in average daily traffic of 24,917 vehicles in 2018 resulting in an "F" level of service (forced or breakdown flow). The 2004 SFEIS uses Fred Hill's estimate of the maximum amount of mineral to be extracted with and without an MRLO. The maximum with an MRLO could rise to 7.5 million tons extracted annually as opposed to the 750,000 tons that could be extracted annually without the MRLO. Under either alternative this would add 98 new daily trips to SR 104, increasing the volume of traffic to the volume already using SR 104 by 0.7 percent. The pit-to-pier project could result in additional tonnage being transported by barge (4 million tons) and by ship (2.5 million tons). The ships would require the opening of the Hood Canal Bridge. Should this project be approved, the impact on the marine ecosystem will be analyzed by the Commissioners' review of the environmental impacts of the pit-to-pier project itself.

In assessing the impact of the projects on water, the County noted that the proposed area contained significant dips in the tops and bottoms of geologic units and water levels, and could have an adverse affect on recharging the Vashon aquifer, perhaps even impacting wells. The approved action area includes few streams and no

mapped lakes or wetlands. Maintaining future mining at 10 feet above the water table will help, although there will be disturbance leading to possible erosion, sedimentation, and increased turbidity to downstream water levels.

Because the no-action plan involves 10-acre areas, the smaller total of land disturbed in the mining phrase equated to lower erosion and sedimentation. But the impact to aquifers might be greater because the depth at which mining occurs would be greater.

Plants and animals are minimally impacted by all three actions. The area is managed forest land and largely replanted with douglas fir. Logging occurs in blocks within the tree farm.

Noise impact in the proposed action comes primarily from the hauling of the product to off-site locations. The impact caused by the approved action would be slightly less, primarily because the approved proposal does not permit mineral processing. Thus, there would be no noise associated with it. Conveyer use might result in lower noise impacts because trucks would not have to travel as much. The no-action alternative actually might result in a higher level of noise and the possibility of blasting might be greater because of the need to go deeper to recover the gravel. Noise-mitigating measures are imposed in both the proposed and approved alternatives and the no-action alternative would have to comply with Unified Development Code conditions.

As noted in Citizens Alliance to Protect Our Wetlands v. City of Auburn:[8]

> The adequacy of an EIS is tested under the "rule of reason." SEAPC v. Cammack II Orchards, 49 Wn. App. 609, 614-15, 744 P.2d 1101 (1987); Cheney v. Mountlake Terrace, 87 Wn.2d 338, 344-45, 552 P.2d 184 (1976). In order for an EIS to be adequate under this rule, the EIS must present decisionmakers with a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the agency's decision. Cheney, 87 Wn.2d at 344-45 (quoting Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir.1974)). The rule of reason is "in large part a broad, flexible cost-effectiveness standard", in which the adequacy of an EIS is best determined "on a case-by-case basis guided by all of the policy and factual considerations reasonably related to SEPA's terse directives". R. Settle, [The Washington State Environmental Policy Act: A Legal and Policy Analysis] § 14(a)(i) [(4th ed.1993)].

The 2004 SDEIS and SFEIS disclosed, discussed, and substantiated the environmental impacts sufficiently to enable Commissioners to make a reasoned decision. The fact that 40 acres could be potentially subject to a permit rather than 10 acres does not in and of itself render the alternative unreasonable.[9]

Pit-to-Pier Project

At the time it requested the MRLO, Fred Hill informed Jefferson County that it would soon be applying for a pit-to-pier project which would enable the transport of gravel via barge and ship. Such a project would enable Fred Hill to ship gravel to a wider area.

Under the SEPA rules, governmental actions fall within two categories:

> (a) **Project actions.** A project action involves a decision on a specific project, such as a construction or management activity located in a defined geographic area. . . .

[8] 126 Wn.2d 356, 361-62, 894, P.2d 1300 (1995).

[9] See King County v. Central Puget Sound Growth Mgmt. Hearings Bd., 138 Wn.2d 161, 979 P.2d 374 (1999) (holding that a higher density alternative was reasonable because the hearing board had not shown that the higher density alternative would have more adverse environmental impacts than the proposal).

> (b) **Nonproject actions.** Nonproject actions involve decisions on policies, plans, or programs.[10]

It is undisputed that the MRLO is a non-project action. At issue is whether this non-project action is so intertwined with the future proposed pier-to-pit project that a more in-depth SEPA analysis should have been undertaken. Hood Canal argues that the Board's 2003 order required the supplemental EIS to consider the impact of the pit-to-pier project. But the Board ruled as follows:

> Petitioners allege that the County should have done an evaluation of the potential pit-to-pier project that would follow from the mineral resource overlay designation. We do not agree that the project itself could or should be analyzed at this stage. However, we do note that an analysis of the transportation impacts of increased intensity of mining use would encompass transportation alternatives to trucking, including the potential use of a conveyor.

Thus, there was not a finding by the Board that the pit-to-pier proposal required an in-depth EIS analysis. Nor has Hood Canal made a showing that such would be required.

In Cathcart-Maltby-Clearview Community Council v. Snohomish County,[11] the court upheld the EIS for a rezone enabling developers to construct 6,000 residential units which would accommodate 19,000 people in an area that was subject to two comprehensive plans. Although the EIS was characterized as "bare bones," the court found it sufficient because it identified potential impacts and provided a framework for further EIS preparation.[12]

Likewise, here, the County included factors that might be present should the pit-

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[10] WAC 197-11-704(2).
[11] 96 Wn.2d 201, 211, 634 P.2d 853 (1981).
[12] Cathcart-Maltby-Clearview, 96 Wn.2d at 208.

to-pier project become a reality. That analysis primarily included the transportation effect discussed above. The intensity of mining use was also addressed, and both the 2004 draft and final EIS address a conveyor system that could be used at the Wahl and Meridian sites within the MRLO to permit transport of the gravel to the processing plant to cut down on the use of trucks on the state highway, thus minimizing the impact.

CONCLUSION

In sum, we conclude that the 2004 SFEIS was not required to consider the pier-to-pit project as that future project is not dependent on the proposed action. Further, the 2004 draft and final EIS sufficiently discussed and estimated the environmental impacts of the alternative actions satisfying the rule of reason and allowing for a reasonable evaluation of the proposal's impacts by the Commissioners.

Affirmed.

Grosse, J.

WE CONCUR:

Dwyer, A.C.J.

Cox, J.