

August 28, 2024

VIA USPS AND EMAIL (jamey.ayling@co.kittitas.wa.us; cds@co.kittitas.wa.us)



Jayme Ayling
Planning Manager and Responsible Official
Kittitas County Community Development Services
411 North Ruby St., Suite 2
Ellensburg, WA 98926

RE: *Gibson Rezone (RZ-24-00001)*
Ellensburg Cement Products, Inc. SEPA Comments

Dear Mr. Ayling:

Please consider this letter as formal comments on behalf of Ellensburg Cement Products, Inc. (Ellensburg Cement) on the State Environmental Policy Act (SEPA) Determination of Nonsignificance (DNS) issued by Kittitas County under File No. RZ-24-00001 on August 15, 2024.¹ These comments are provided pursuant to chapter 43.21C RCW, WAC 197-11-340, WAC 197-11-500, *et seq.*, and chapter 15.04 of the Kittitas County Code.

Based on the following comments, at this time, the DNS should be withdrawn and additional SEPA analysis should be conducted. A DNS should only issue “[i]f the responsible official determines there will be no probable significant adverse environmental impacts from a proposal.” WAC 197-11-340(1). The County’s DNS should be withdrawn because (a) neither the SEPA Checklist nor the County’s environmental review address, let alone evaluate, the probable impacts of any future development that would be occasioned by the rezone; (b) improperly postpones and defers such environmental analysis until the project stage; and (c) it fails to impose any mitigating conditions on the proposed rezone to address known probable environmental impacts. As such, Ellensburg Cement respectfully requests the County’s SEPA Responsible Official reconsider the DNS pursuant to WAC 197-11-340, and withdraw the determination at this time.

¹ Jeff Hutchinson, President of Ellensburg Cement Products, Inc., previously submitted written comments to the County by email dated August 21, 2024. Those additional comments should be considered as further written comments on the SEPA threshold determination and land use rezone proposal and are incorporated herein by this reference.

BACKGROUND

Founded in 1945, Ellensburg Cement, headquartered and doing business in Kittitas County, is a local and family-owned business specializing in ready-mix concrete and aggregates. Ellensburg Cement is committed to environmental compliance and stewardship in its business operations and has received the *Environmental Merit Award* from the Washington Aggregates and Concrete Association. Ellensburg Concrete has worked with the County on a number of sites, going through robust and detailed conditional use permitting and thorough environmental review associated with its operations.

Ellensburg Cement is interested in and concerned by Kristen Gibson's, of Gibson & Son ("Gibson"), pending rezone application and proposal based on the evident intent of the proposal to evade thorough environmental review associated with the understood proposed gravel mining and rock crushing operations envisioned for the site. Even as a non-project action, the SEPA review must disclose and evaluate the probable effects of the proposed rezone, including the short and long-term effects that may be occasioned by the differing land use regulations. To read the Checklist, one would be left with the impression that no such changes are occurring, and certainly would be left guessing at what those are. Yet, the proposal seeks to change the zoning designation for a singular parcel entirely encompassed within the Agriculture-20 (A-20) zone so that differing rules may apply. The remaining surrounding property would all remain A-20. To the point, Gibson requests a rezone of just one parcel to permit (where currently not allowed) rock crushing operations and to allow for mining and excavation operations as a matter of right, and without requiring a conditional use permit process for intensive mining and excavation operations. None of these changes or impacts are disclosed or analyzed.

Without disclosure of these facts and probable impacts by Gibson in the SEPA Checklist, and without any resulting review of these impacts by the County Responsible Official in making its SEPA threshold determination, the existing SEPA review is lacking. To the point, by not disclosing, analyzing, or quantifying the actual impact and probable effects of the rezone, it is impossible for the County to properly evaluate the environmental impacts based on the required SEPA factors and considerations.

The information provided by Gibson is presently not reasonably sufficient to evaluate the environmental impacts of the proposal.² Absent a complete review addressing these impacts, the current SEPA determination cannot be sustained.

SEPA CONSIDERATIONS

When reviewing proposals subject to environmental review, “SEPA demands a ‘thoughtful decision-making process’ where government agencies ‘conscientiously and systematically consider environmental values and consequences.’” *Wild Fish Conservancy v. Wash. Dep’t of Fish & Wildlife*, 198 Wn.2d 846, 873, 502 P.3d 359 (2022). A threshold determination (such as a DNS) “must indicate that the agency has taken a searching, realistic look at the potential hazards and, with reasoned thought and analysis, candidly and methodically addressed those concerns.” *Conservation Northwest v. Okanogan County*, 2016 Wash. App. LEXIS 1410, 88-89, 194 Wn. App. 1034 (June 16, 2016).

Moreover, while postured here as a non-project action in the form of a rezone only, even for such non-project actions, the County “must address the probable impacts of any future project action the proposal would allow.” *Spokane County v. E. Wash. Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 579, 309 P.3d 673 (2013); see also WAC 197-11-060(4)(c)-(d). The express purpose of these rules is “to ensure an agency fully discloses and carefully considers a proposal’s environmental impacts before adopting it and ‘at the earliest possible stage.’” *Id.* (quoting *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 663-64, 666, 860 P.2d 1024 (1993)); see also WAC 197-11-060(5)(d)(i)-(ii).

Against this backdrop, Ellensburg Cement has concluded that the environmental disclosure and review is presently incomplete and lacking, and provides the following additional SEPA comments for the County’s consideration:

Lack of Disclosure and Analysis of Impacts of Rezone

The SEPA Checklist and associated review is lacking any disclosure or analysis of the probable impacts of the proposed rezone, in contravention of SEPA’s dictates.³ The SEPA rules expressly require consideration of “the range of

² See WAC 197-11-100 (“Further information may be required if the responsible official determines that the information initially supplied is not reasonably adequate to fulfill the purposes for which it is required.”)

³ For the vast majority of responses in the SEPA Checklist, the applicant merely responds “not applicable.”

probable impacts, including short-term and long-term effects” and that considered impacts “shall include those that are likely to arise or exist over the lifetime of a proposal or, depending on the particular proposal, longer.” WAC 197-11-060(4)(c). Further, a proposal’s effects “include direct and indirect impacts caused by a proposal, including “those effects resulting from growth caused by a proposal, as well as the likelihood that the present proposal will serve as a precedent for future actions.” WAC 197-11-060(4)(d).

Despite the above, the SEPA Checklist does not disclose these impacts and is devoid of any analysis. For example, Section B.8 of the SEPA Checklist requires disclosure of the “proposal’s affect on current land uses or nearby adjacent properties.” Rather than addressing the actual impacts of the rezone, the Checklist includes a mere conclusory statement that the “proposal does not affect current land uses on nearby or adjacent properties.” See Checklist at § B.8.a. It then goes on to merely summarily state that the “proposed zoning is consistent with the Rural Working land designation and activities, which prioritizes management of farming, ranching, and rural lifestyles in the A-20 zone, and prioritizes resource management in the Forest and Range zone.” *Id.*⁴ Similarly, and even more glaring, in the non-project supplement sheet, the Checklist merely repeats these or similar statements, without analysis, and defers environmental review, asserting that “[a]ny future permits would be reviewed for impacts and/or mitigation measures under the applicable regulations in effect at the time of the permit action.” This type of non-disclosure and non-analysis expressly contradicts SEPA rules requiring current the

⁴ Further, the SEPA Checklist gives sparse attention to the appropriateness of the proposed rezone under existing land use plans. See, e.g., Checklist at § D.5. No disclosure or analysis is provided with respect to the proposed isolated spot zoning of a singular tract within the much larger A-20 zone, including without limitation, **RR-P6** (“Allow for lands which offer adequate supply of rock and gravel resources located in areas compatible for such uses and conditioned so that operation does not negatively impact rural character.”); **RR-P16** (“Land use development within the Rural area that is not compatible with Kittitas County rural character or agricultural activities as defined in RCW 90.58.065(2)(a) will not be allowed.”); **RR-P18** (“Buffer standards and regulations should continue to be developed that will be used between incompatible rural uses.”); **RR-P21** (“Functional separation and setbacks found necessary for the protection of water resources, rural character and/or visual compatibility with surrounding rural areas shall be required where development is proposed.”); **RR-G22** (“Provide preservation of agriculture activities where producers can live and work on their own lands separate from Resource Lands.”); and **RR-P45** (“Commercial/Industrial development in Rural Working lands shall be compatible to the rural environment, and must be developed as determined necessary to not significantly impact surface and groundwater.”).

consideration of the probable effects of changed land use occasioned by a rezone, including both its short-term and long-term effects.

Even a cursory review of KCC 17.15.060.1 evinces the potentially not insignificant changes that would be occasioned by the rezone. Understanding Gibson's business operations, this would most notably include allowing for rock crushing as a new permitted use (where currently not allowed), allowing for future and expanded mining and excavation as a permitted use (where current operations must be consistent with any conditional use permit and future expansion or changed operations must undergo a thorough conditional use permit process), and allowing the conditional development of asphalt and concrete plants and retail sales. None of the impacts or effects of these intensive land uses, which would now be permitted for the first time or subject to relaxed standards, is disclosed, analyzed, or meaningfully evaluated. As these represent the most obvious and significant differences between the two zones, the intent though is clear. In short, the environmental review is devoid of relevant analysis and is insufficient.

Further, the SEPA Checklist and associated review appears devoid of any disclosure or analysis of the actual potential impacts of the newly permitted uses under the proposed rezone. Notably, this includes, without limitation, the following:

- Neither the SEPA Checklist nor any studies address noise and other impacts associated with blasting and vibration associated with the rock crushing operations that would be permitted under the proposed rezone.
- Neither the SEPA Checklist nor any studies address dust control, emissions, or air quality impacts from rock crushing operations that would be permitted under the proposed rezone.
- Neither the SEPA Checklist nor any studies address potential traffic impacts and safety associated with increased truck traffic and heavy machinery associated with uses that would be permitted under the proposed rezone.

- Neither the SEPA Checklist nor any studies address potential impacts to groundwater, hydraulic connectivity with surface water bodies,⁵ or aquifer impacts.
- While the application materials note a lack of any water rights associated with the property, the SEPA Checklist does not address or evaluate how water supply would be made available to the property for dust control and operational issues, and the impact of the same.

The DNS as issued includes no consideration or imposition of any mitigating conditions associated with these issues. As the proposed rezone would allow for new intensive uses as a matter of right, without further review, SEPA requires review of these probable impacts now, and such review cannot be deferred.

IMPROPER DEFERAL OF REQUIRED ENVIRONMENTAL REVIEW

Second, to the extent the SEPA Checklist and the County's review purports to effectively defer review of the environmental impacts of the rezone, such deferral is inappropriate and SEPA analysis must occur now and at the forefront before the rezone can be undertaken. The SEPA Checklist statement that "[a]ny future permits would be reviewed for impacts and/or mitigation measures under the applicable regulations in effect at the time if the permit action" is insufficient and a transparent attempt to not just defer but to avoid review. Yet, if the County were to in fact approve the proposed rezone, activities currently not permitted (i.e. rock crushing) or permitted only through a conditional use permit process and continued compliance with any applicable CUP (i.e. mining and excavation) would become activities permitted as a matter of right. The County should reject this slight-of-hand, and at a minimum, must evaluate these impacts now, with any probable adverse impacts adequately mitigated. As Washington courts have explained, even for non-project actions (such as rezones):

. . . the agency must address the probable impacts of any future project action the proposal would allow. The purpose of these rules is to ensure an agency fully discloses and carefully considers a proposal's environmental impacts before adopting it and "at the earliest possible stage." An agency may not postpone environmental analysis to a later implementation stage if [**685] the proposal

⁵ While the SEPA Checklist notes that Parke Creek is within 200 feet of the property in the southwest corner, see Checklist at § 3.a.1, it avoids any discussion of any impacts of the new uses authorized under the rezone, merely describing as "non-applicable." *Id.* at § 3.a.2.

would affect the environment without subsequent implementing action.

Spokane County v. E. Wash. Growth Mgmt. Hearings Bd., 176 Wn. App. 555, 579, 309 P.3d 673 (2013) (internal citations omitted); *see also Millennium Bulk Terminals-Longview, LLC v. Dep't of Ecology*, 2020 Wash. App. LEXIS 647, *17-18 (Wash. Ct. App. Mar. 17, 2020) (piecemealing of environmental review “is disfavored because the later environmental review often seems merely a formality, as the construction of the later segments of the project has already been mandated by the earlier construction”). The County should not and under the SEPA rules cannot, defer this review.

MITIGATING CONDITIONS REQUIRED FOR ISSUANCE OF ANY DNS

While Ellensburg Cement asserts the current SEPA disclosures and analysis is defective and is not based upon information reasonably sufficient to evaluate the environmental impact of the proposal, it further asserts that even when all impacts are properly disclosed, that any subsequent threshold determination, must, at a minimum, include and impose appropriate necessary mitigating conditions as part of a mitigated determination of nonsignificance (MDNS). The entire purpose of the rezone appears to be to loosen permitting standards for gravel operations and avoid and eliminate the robust conditional use permitting process⁶ that Ellensburg Cement has undergone for each of its relevant operations. These conditions have, in the past included, without limitation, required conditions related to the hours of operation of rock crushing operations, analysis of and limitation on trucks and heavy equipment impacting the adjacent community and County roadways, mitigating dust and noise impacts, and addressing compatibility and mitigating impacts on adjoining land uses, and others.

WITHDRAWAL AND RECONSIDERATION OF THE DNS REQUIRED

A DNS must be based upon “information reasonably sufficient to evaluate the environmental impact of a proposal.” WAC 197-11-335; *see also Moss v. City of Bellingham*, 109 Wn. App. 6, 14, 31 P.3d 703 (2001). To receive a DNS, an applicant must furnish reasonably complete information about the impacts. In

⁶ See Chapter 17.60A KCC (Conditional Uses). The conditional use permitting process requires, without limitation, that the proposed use is not detrimental or injurious to the public health, peace, or safety or to the character of the surrounding neighborhood, will not create excessive public cost for facilities and services, be adequately served by existing facilities and roads, and may impose specific conditions to ensure compliance. *See, e.g.*, KCC 17.60A.015 and KCC 1760A.020.

this regard, SEPA cases instruct that “the [local jurisdiction] must demonstrate that it had actually considered relevant environmental factors before [issuing the threshold determination]. Moreover, the record must demonstrate that the [local jurisdiction] adequately considered the environmental factors in a manner sufficient to be a prima facie compliance with the procedural dictates of SEPA.” *Boehm v. City of Vancouver*, 111 Wn. App. 711, 718, 47 P.3d 137 (2002). The responsible official “shall reconsider the DNS based on timely comments and may retain or modify the DNS or, if the responsible official determines that significant adverse impacts are likely, withdraw the DNS or supporting documents.” WAC 197-11-340(2)(f). Withdrawal of the DNS is appropriate here.

The SEPA rules further require that the lead agency withdraw a DNS where “new information is presented indicating . . . a proposal’s probable significant adverse environmental impact,” WAC 197-11-340(3)(a)(ii), or where the “DNS was procured by misrepresentation or lack of material disclosure.” WAC 197-11-340(3)(a)(iii). Here, Ellensburg Cement has raised new information not clearly disclosed in the SEPA Checklist or evaluated by the County, including the undisclosed actual material differences between the zoning designations. This new information requires withdrawal of the DNS. WAC 197-11-340(3)(a)(ii). Similarly, the lack of material disclosure on these issues, and of the lack of actual consideration of the probable effects of the rezone requires withdrawal of the DNS. WAC 197-11-340(3)(a)(iii). Withdrawal of the DNS will permit the County to ensure proper SEPA review consistent with WAC 197-11-335⁷ and applicable law, and to impose mitigating conditions, as demonstrated to be necessary.

SPOT ZONING AND NEED FOR GENERALLY APPLICABLE RULES

Related to the above, Ellensburg Cement views this proposal as a piecemeal special favor in the form of spot zoning that would benefit only Gibson and does not further the County’s land use goals, policies, or the broader interests. The proposal seeks to rezone one individual parcel entirely encompassed within the A-20 zoning designation. The County should act cautiously and resist efforts at such spot zoning benefiting just one party. While Gibson may or will offer arguments as to its views of the appropriate zoning classification of this parcel, such consideration should be given a broader view. Similarly, if the County in

⁷ Pursuant to WAC 197-11-340(2)(f), in response to comments, the Responsible Official shall reconsider the DNS, including modification or withdrawal, and where the lead agency concludes that there is insufficient information it may require an applicant to submit more information on subjects in the checklist. See WAC 197-11-335(1). This result is dictated here.

fact believes it is in the best interests of the County to more broadly permit rock crushing and gravel operations, or streamline the permit process for the same, it should do so holistically and not to the benefit of a singular property and property owner on a case-by-case basis.

CONCLUSION

The SEPA Checklist fails to properly disclose, let alone consider, the probable effects of the rezone. As such, the County's SEPA evaluation and DNS fails to demonstrate SEPA compliance. Given these deficiencies, and in further consideration of the significant impacts occasioned thereby, in accordance with the provisions of WAC 197-11-340(3), Ellensburg Cement respectfully requests the County withdraw the DNS issued on August 15, 2024, to ensure all appropriate impacts are evaluated and mitigated.

We request notice, directed to the undersigned, of any action the County takes relating to this threshold determination and the underlying rezone application.

Thank you in advance for your consideration of these comments. Please feel free to contact me if you have any questions or require any additional information. We appreciate the County's careful review of this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jm R', is written over a horizontal line.

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cc: Ellensburg Cement Products, Inc.