



COUNTY COMMISSIONERS

Cathy Wolfe
District One
Sandra Romero
District Two
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District Three

RESOURCE STEWARDSHIP DEPARTMENT

Creating Solutions for Our Future

Cliff Moore
Director

MEMORANDUM

TO: Parties of Record

FROM: Cami Petersen
Land Use Clerk

DATE: March 14, 2011

SUBJECT: **Project No. 2010102512, Sequence No. 11-100416, 11-102417 VE,
Black Hills Audubon Society and Friends of Rocky Prairie Appeal of
Maytown Sand & Gravel 5-Year Review**

Attached is a copy of the Decision of the Board of Thurston County Commissioners relating to the above-mentioned case.

Any appeal of this land use decision must be filed in Superior Court pursuant the Land Use Petition Act, RCW Chapter 36.70C, within 24 days of the mailing of this decision.

Please contact me at (360) 754-3355 extension 6348 if you have questions regarding this Decision.

BEFORE THE BOARD OF COUNTY COMMISSIONERS
THURSTON COUNTY, WASHINGTON

In Re the Matter of,

Maytown Sand & Gravel, LLC

Project No. 2010102512

Maytown Aggregates

Five Year Review of SUPT-02-0612

DECISION

THIS MATTER came before the Board of County Commissioners (Board) on March 3, 2011 as a result of appeals filed by Black Hills Audubon Society (BHAS) and Friends of Rocky Prairie (FORP) of the hearing examiner's decision, dated December 30, 2010, which approved a five year review of special use permit SUPT-02-0612 issued December 16, 2005 (2005 SUP) authorizing a 284 acre gravel mine. The issues raised in the appeals concern the hearing examiner's conclusions relating to whether or not Maytown Sand and Gravel and the Port of Tacoma (Applicants) have complied with the conditions of the 2005 SUP and the standards of chapter 20.54 TCC. In response, the Applicants have moved to dismiss BHAS and FORP's appeals for lack of standing

The Board reviewed the hearing examiner's decision and the evidence presented to the hearing examiner. In addition each Board member made a declaration, pursuant to the Appearance of Fairness Doctrine, that since this appeal was filed with the Board they have had no ex—parte contact with any of the parties and that they could fairly and impartially judge this case on the record and pursuant to applicable law. No party challenged any of the Board members' participation in this case.

STANDING

The Applicants' Motion to Dismiss BHAS and FORP's appeals for lack of standing are without merit for the following reasons:

- i. Both FORP and BHAS are nonprofit organizations whose purpose is to protect sensitive habitat and species in Thurston County.
- ii. Furthermore, each of these organizations has members that live or recreate near the proposed mine and would potentially be harmed by the activities of the mine.
- iii. Lastly, each of these organizations has been actively and extensively involved in the review of the underlying permit. For these reasons, the Board concludes that both FORP and BHAS are "aggrieved" parties pursuant to TCC 2.06.070 and therefore have standing to challenge the hearing examiner's decision in this case.

ISSUES ON APPEAL

This case is not a dispute about the facts, and none of the parties are challenging the hearing examiner's findings for lack of substantial evidence. Instead this case is about the following issues:

- i. Whether the 2005 SUP should be terminated pursuant to TCC 20.54.040(4) (a) because the mine operation was vacated for more than three years, or it was not operated by a mine operator. For the reasons discussed by the hearing examiner, the Board concludes there are not grounds to terminate the permit pursuant to TCC 20.54.040(4) (a).
- ii. Whether the 2005 SUP should be terminated pursuant to TCC 20.54.040(4) (d) for failure to comply with the conditions and timing of water quality monitoring and failure to fund the conservation fund. For the reasons discussed by the hearing examiner, the Board concludes there are not grounds to terminate the permit pursuant to TCC 20.54.040(4) (d).
- iii. Whether TCC 20.54.070(21)(e), and condition C of the 2005 SUP authorizes the hearing examiner to apply the 2002 Critical Areas Ordinance (2002 CAO¹) or the 2010 Interim Critical Areas Ordinance (2010 CAO) to the 2005 SUP, and require the Applicants to prepare supplemental studies, as a result of undisputed evidence that there are newly discovered critical areas within the proposed mine area that will be destroyed without further conditions. For the reasons discussed by the hearing examiner, the Board does not believe the 2010 CAO may be applied to the 2005 SUP. However for the following reasons the Board has determined the 2002 CAO should be applied to the 2005 SUP and further studies should be required before mining can commence.
 - Condition C of the 2005 SUP specifically requires the hearing examiner to determine whether the conditions of approval have been complied with or should be amended. See Exhibit 1, attachment g at p. 43 (SUPT-02-0612 Findings, Conclusions, and Decision, issued December 16, 2005)
 - Condition A of the 2005 SUP requires the applicant/operator to comply with all conditions of the MDNS dated October 24, 2005. *Id.*
 - The 2005 SUP was approved because of repeated commitments in the underlying environmental review documents that mining related activities would *not* take place within the Native Outwash Prairie and other protected critical areas. Exhibit 13, Appendix D 1 (Habitat Management Plan for Maytown Aggregates, Ecological Land Services, Inc. 8/01/2002).
 - The underlying environmental documents specifically assured "[t]he

¹ The CAO applied in review of SUPT-02-0612 was referenced frequently in the five year hearing before the examiner as the "2002 CAO." For the sake of consistency, this decision, like the hearing examiner's decision, will continue to call it the 2002 CAO, although the regulations were adopted prior to 2002. See Exhibit C, note 16.

existing native outwash prairie, wetlands, riparian areas (including streams), and oak woodlands within the applicant's overall 1,613-~~ACRE~~ ownership **will be completely avoided and buffered from the proposed activity.**" Emphasis supplied. *Id.* at p. 28. As a result of this mitigation, the Applicant's consultant opined that the mine "will not adversely impact Thurston County's important habitats and species . . . or the additional species of concern identified by the state and federal agencies" provided that the proposed project avoids and buffers the important habitats. . ." *Id.* "In order to conclude that the proposed project will have no adverse impact to the on-site important habitats and species the following items were considered: . . . The [mine area] avoids all of the important habitats . . . including native outwash prairie, wetland, riparian, and oak woodland." *Id.* at 29.

- The above recommendations of the environmental consultant which were reflected in the habitat management plans for the site, resulted in a condition of the 2005 special use permit to "avoid" "all critical area habitat and species." Exhibit 1, attachment g at p. 43 (Condition A of the 2005 SUP) and Exhibit 1, attachment f, at p. 3 (Mitigated Determination of Non-Significance (MDNS), issued October 24, 2005)².
- Other conditions of the 2005 SUP provide:
- The "total 1,613 acre ownership contains several critical areas and habitats that are regulated by the Thurston County Critical Areas ordinance (Title 17.15), including wetlands, stream, riparian areas, native outwash prairie , and oak woodland habitats, as well as a number of species using those habitats. In accordance with the Thurston County Critical Areas ordinance 17.15.900, in order to define the edge of the critical area buffers and to protect the delineated buffers from encroachment, signs shall be constructed at the edge of **all** critical area buffers. The buffers shall be accurately identified and marked by a professional wetland biologist and habitat biologist." *Id.* at p. 2 (MDNS condition 9).
- The "applicant shall be in full compliance with Thurston County's Critical Areas Ordinance for protection of all on-site wetlands." *Id.* (MDNS condition 10).
- The "Native Outwash Prairie will be avoided, buffered by a minimum of 100 feet, and will not be impacted by the mining activity." *Id.* at p. 3 (MDNS Condition 13).
- However, during the five year review hearing, Department Fish and Wildlife (DFW) and County staff testified that during site visits in 2009 and 2010, they observed critical areas, as defined in the 2002 CAO,

² Since Condition A of the 2005 SUP requires the Applicant to "comply with all conditions of the Mitigated Determination of Non-Significance dated October 24, 2005" each condition of the MDNS is a conditional of approval for the 2005 SUP.

within the proposed boundaries of the mine, that will be destroyed unless additional measures are taken to protect these critical areas. Exhibit C (Hearing Examiner's Decision, December 30, 2010, Findings 64, 65, 66, 72 and 73). See *also* Exhibit 1, at 9-10, and attachment mm, Exhibits, 7, 38, 40, and 49.

- If the mine is allowed to proceed without assessing whether or not these recently observed critical areas are protected under the 2002 CAO, then the above conditions of the 2005 SUP to "avoid" "all critical area habitat and species" will be violated.
- Therefore, a condition needs to be added to insure that the SUP condition requiring that critical areas be avoided and buffered is complied with.
- Until subsequent habitat surveys are conducted it is not clear that the Applicants' site plan has captured all critical areas, as defined under the 2002 CAO, within the proposed mine areas.
- The Applicants' argument, that regardless of newly alleged critical areas, TCC 17.15.355 authorizes the Applicants to continue mining without further restrictions for the life of the 2005 SUP, is without merit. Before TCC 17.15.355 can come into play, the 2005 SUP has to have authorized mining *within* a critical area. In this case, the fundamental reason the 2005 SUP was granted was because there would be no mining within a critical area. Therefore TCC 17.15.355 does not apply in this case.
- The hearing examiner's conclusion 5C, to the extent that it determines the hearing examiner is without authority to require additional studies to determine whether or not any critical areas, as defined under the 2002 CAO, currently exist within the mine area, is erroneous as a matter of law. Condition C of the 2005 SUP requires that the SUP be reviewed every five years for the purpose of assessing whether the conditions of approval have been complied with *or* should be amended. See *also* TCC 20.54.070(21) (e). It is entirely appropriate on the facts of this case to require the Applicants to undertake supplemental studies to ensure that they will not mine within a critical area as prohibited by the 2005 SUP.
- The hearing examiner also erred when she concluded that no other five year review decision has ever reduced the mine footprint. See Exhibit C at page 42. In 2006100954 SUPT, Lakeside Industries 5 year review (SUP 14-88, SUP 98-067), which was discussed by the hearing examiner, the applicant was required to reduce the *vertical* footprint of his mine in order to avoid breaching the water table. *Id* at 43.
- In the *Lakeside* case, there was new information, during the five year review, to suggest that Lakeside may be breaching the water table if it was allowed to mine to the depth that it was originally approved for.

Since Lakeside was not allowed to breach the water table, as a condition of its permit, additional studies were conducted, which ultimately limited the vertical mine footprint, from 60 feet to 40 feet. Likewise, in this case, new information surfaced during the five year review which suggests that if mining is allowed to move forward, it may destroy protected critical areas. Since the applicant is not allowed to destroy critical areas, additional studies are needed to determine whether or not all critical areas within the mine area are protected or whether additional buffers need to be imposed

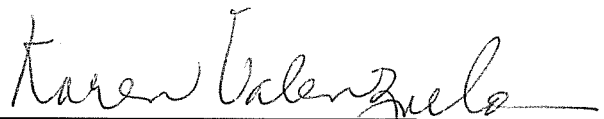
IT IS HEREBY ORDERED AS FOLLOWS:

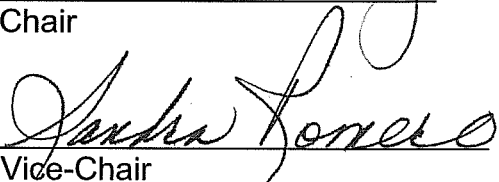
The Applicants' Motion to Dismiss BHAS and FORP's appeals for lack of standing is denied. It is further ordered that this matter shall be remanded back to the hearing examiner for purposes of determining whether critical areas, as specified below, and as defined in the 2002 CAO, are protected within the mine area. This will require the preparation of a supplemental habitat management plan, pursuant to TCC 17.15.735 (2002 CAO). The scope of this supplemental habitat management plan shall evaluate whether or not there is a jurisdictional (1) native outwash prairie habitat in Mine Area 1, 3 and 4; (2) wetland or stream in Mine Area 1; and (3) oak habitat in Mine Area 2 and Fill Area 1 Stockpile. If the hearing examiner determines that the supplemental habitat management plan reveals the above identified jurisdictional critical areas, the final site plan shall be amended to delineate the jurisdictional critical areas and their buffers before mining can commence. The hearing examiner shall also determine whether or not any other conditions need to be amended or added as a result of the supplemental habitat management plan. The hearing examiner's decision shall be final unless appealed to the Board pursuant to TCC 2.06.070.

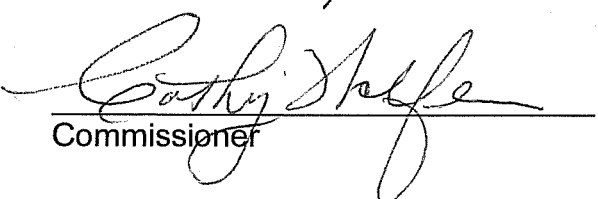
ATTEST:

BOARD OF COUNTY COMMISSIONERS
Thurston County, Washington


Cami Petersen
Clerk of the Board


Karen Valenzuela
Chair


Sandra Jones
Vice-Chair


Cathy Shaffer
Commissioner