



COUNTY COMMISSIONERS

Cathy Wolfe
District One

Sandra Romero
District Two

Bud Blake
District Three

HEARING EXAMINER

Creating Solutions for Our Future

BEFORE THE THURSTON COUNTY HEARING EXAMINER

In the Matter of the Application of)	
)	Project # 2015106455
Port of Tacoma, Applicant)	
)	
)	Maytown Aggregates
For Five Year Review of)	
Special use permit SUPT 02-0612)	
as amended on April 8, 2011)	
(No. 2010101170))	FINDINGS, CONCLUSIONS, AND
for a 284-acre gravel mine within a)	DECISION
<u>497-acre Disturbed area</u>)	

SUMMARY OF DECISION

The request for approval of a five-year review of special use permit SUPT-02-0612, issued December 16, 2005 and subsequently amended on April 8, 2011, authorizing a 284-acre gravel mine within a 497-acre disturbed area, is **APPROVED subject to conditions**.

SUMMARY OF RECORD

Request

The Port of Tacoma (Applicant) seeks approval of the code-required five year review of the mining operation authorized pursuant to SUPT-02-0612 on December 30, 2005 as subsequently amended on April 8, 2011. The 2005 SUP permitted mineral extraction on 284 acres within a 497-acre disturbed area subject to reclamation approved by the Washington Department of Natural Resources. The 2011 SUP Amendment altered the mine's groundwater monitoring plan.

Hearing Date

The Thurston County Hearing Examiner conducted an open record public hearing on the five-year review request on December 22, 2015. At adjournment, the record was held open for the County's response to the Applicant's request to strike recommended condition F, and for a reply by the Applicant to the County's response. The parties agreed to extend the deadline for decision issuance to January 15, 2016.

Testimony

The following individuals submitted testimony under oath at the open record public hearing:

Mike Kain, Manager, Resource Stewardship Department
Dawn Peebles, County Health Department Environmental Health Division
Arthur Saint, County Public Works Department
Mark Rettmann, Port of Tacoma, Applicant Representative
Erin Galeno, Port of Tacoma, Applicant Representative
Roy Garrison, Applicant Representative
Eric Staley, Applicant Representative
Bonnie Earl
Tom Rutledge
Sue Danver, representing Black Hills Audubon Society
Sharron Coontz, representing Friends of Rocky Prairie

Attorney Representation:

Conor McCarthy and Carolyn Lake, Goodstein Law Group PLLC, represented the Applicant.

Exhibits

The following exhibits were admitted in the record of this matter:

1. Resource Stewardship Department Staff Report, with the following attachments:
 - a. Legal Notice
 - b. Notice of Application, November 18, 2015
 - c. Application, received September 1, 2015
 - d. 2009, 2012 and 2015 Aerial Photos
 - e. Gopher Soils Map
 - f. Mine Registration
 - g. Site Plans
 - h. Photos of the Site, taken December 10, 2015
 - i. 2012, 2013, 2014 and 2015 Recycling Facility Permits
 - j. Maytown Quantities Excavated
 - k. Table 1, Summary of County Permit Requirements
 - l. Comment Letters received:
 1. Black Hills Audubon Society, undated
 2. Email from Sharon Coontz, dated December 8, 2015
 - m. Comment Memorandum from Dawn Peebles, Environmental Health, dated December 14, 2015
 - n. Comment Email from Kevin Hughes, Public Works, dated December 9, 2015

- o. Comment Memorandum from Kevin Chambers, Public Works, dated October 7, 2015
 - p. Comment Email from Department of Natural Resources, dated December 8, 2015
 - q. Comment Letter from Department of Ecology, dated September 28, 2015
 - r. Response to Comments Received on Five Year Review, Port of Tacoma, dated December 11, 2015
2. Applicant's Report of County Permit Compliance Review - Supporting Narrative, dated August 26, 2015, with table of contents, attachments, and tables:
- Table 1: Summary of County Permit Requirements
- Table 2: Pacific Groundwater Group - List of Monitoring Reports 2009 to 2015
- Attachments:
- A. Reissuance of a Final Mitigated Determination of Non-significance, dated October 24, 2005
 - B. Special Use Permit SUPT-2-1612 Decision of the Thurston County Hearing Examiner, dated December 16, 2005
 - C. Five Year Review of SUPT-2-1612 Decision of the Thurston County Hearing Examiner, dated December 30, 2010
 - D. Mitigated Determination of Non-significance, dated January 19, 2011
 - E. Special Use Permit SUPT-2-1612 Amendment Decision of the Thurston County Hearing Examiner, dated April 8, 2011
 - F. Aerial Photographs of Mine Entrance: August 24, 2011 and July 5, 2012
 - G. Proceed to Mine Letter, dated November 8, 2011
 - H. Aerial Photographs of I-5 Turn Pocket: September 3, 2011 and July 5, 2012
 - I. Off Site Private Well Survey Near Maytown Aggregates, dated Dec. 21, 2009
 - J. Thurston County Staff Report for Hearing Examiner Public Hearing, dated December 6, 2010
 - K. 2014 Off-Site Private Well Inventory, Maytown Sand and Gravel Site, dated December 19, 2014
 - L. 2011 Maytown Sand and Gravel Groundwater and Surface Water Monitoring Plan, dated March 17, 2011
 - M. Black Hills Audubon Society Settlement Agreement, dated October 5, 2005
 - N. Agreed Order No. DE 6901, Department of Ecology, dated October 16, 2009
 - O. Water Rights Certificates
 - P. Sand and Gravel General Permit, Department of Ecology, dated October 1, 2010

- Q. Archeological Survey, Proposed Maytown Aggregates Development, dated November 17, 2005
 - R. Clean Fill Dumpsite Agreements, dated 2012 to 2015
 - S. 2015 Mine Registration with Thurston County
 - T. 2015 Recycling Facility Permit, dated March 31, 2015
 - U. Pacific Groundwater Group Monitoring Reports Available upon request
3. Comment Letter from Tom Rutledge, undated
 4. Photos of Public Notice Posting on Site
 5. Applicant Response to Tom Rutledge Comment Letter, dated December 22, 2015
 6. Department of Natural Resources Quantity Report, dated August 3, 2015
 7. Activity Report, dated August 6, 2015
 8. Applicant Response to Condition F, dated December 22, 2015
 9. Email Correspondence regarding Noise Monitoring, dated December 10, 2015
 10. Email Correspondence between Kain and McCarthy, dated November 18, 2015
 11. Report of Supplemental Permit Compliance Review, dated August 6, 2015
 12. County's Response to Applicant's Exhibit 8 regarding striking recommended Condition F, dated January 5, 2016
 13. Port's Reply to County's Response in Exhibit 12, dated January 7, 2016

Upon consideration of the testimony and exhibits submitted at the open record hearing, the Hearing Examiner enters the following findings and conclusions:

FINDINGS

1. On December 16, 2005, the Thurston County Hearing Examiner approved SUPT-02-0612, authorizing the mineral extraction operation known as Maytown Aggregates.¹ The instant application seeks approval of the five-year review of the mine consistent with Thurston County Code (TCC) 20.54.070.21.e, which states:

Any permit issued pursuant to this chapter shall be reviewed by the approval authority no less frequently than every five years from the date of the decision to approve the permit. The approval authority shall determine the frequency of permit review. The director may authorize a reasonable fee for this review. At the time of such review, the approval authority may impose additional conditions upon the operation if the approval authority determines it is necessary to do so to meet the standards of this chapter, as amended.

¹ The legal description of the subject property is a portion of Sections 1, 2, 11 and 12, Township 16 North, Range 2 West, W.M.; known as Tax Parcel Number 12602340100. *Exhibit 1.*

A previous five-year review was conducted in late 2010 and approved December 30, 2010. Subsequently, SUPT-02-0612 was amended on April 8, 2011. The amendment altered the ground water monitoring plan established in mitigation measures 6A and 6C imposed via the October 24, 2005 MDNS in the original SUP review, which were made conditions of permit SUPT-02-0612 approval. *Exhibits 1, 2A, 2B, 2C, and 2E.*

2. Surrounding land uses are as follows. To the north are wetlands and a forested hillside owned by the Applicant; there are also two residences across the railroad tracks to the northwest, and approximately 1,300 acres of undeveloped forestland zoned R 1/20 and RRR 1/5. There is forestland to the northeast. Property to the east and southeast consists of mounded prairie owned by the Washington State Department of Fish and Wildlife (WDFW); there is a rural residential subdivision approximately 2,000 feet beyond the mine boundary adjacent to the WDFW-owned land. To the south there is a wetland associated with Beaver Creek, owned by WDFW, and a rural residential subdivision about 2,000 feet from the mine boundary. To the west is forestland, Tilley Road, and a rural residential subdivision about 1,800 feet from the mine boundary. *Exhibit 1.*
3. The 284-acre mineral extraction portion of the site was designated Mineral Lands of Long Term Commercial Significance on December 16, 2005. Washington State Department of Natural Resources (DNR) approved a reclamation plan for the site on September 19, 2007. The approved mine consists of nine segments, eight of which are designated mine areas and one is a designated fill area. Mining commenced in November 2011 and is on-going in 45-acre Mine Area 1; approximately 35 acres have been mined to some degree resulting in approximately 77,000 tons of rock products being extracted, sold, and delivered off of the mine site. Stockpiling of clean fill material began in 2012 and continues within the 44-acre Fill Area. *Exhibits 1, 1.G, 5, and 6.*
4. The instant application for five-year review was timely submitted on September 1, 2015 and determined to be complete on November 13, 2015. The purpose of five-year review is to determine whether the operation is in compliance with the conditions of the approved special use permit and to determine whether additional conditions are necessary to ensure compliance with applicable county code standards. *Exhibits 1, 1B, and 1C.*
5. The mine operates under five approval documents: the MDNS dated October 24, 2005; SUPT-02-0612 dated December 16, 2005; the previous five-year review decision (No. 2010102512) dated December 30, 2010; the modified MDNS dated January 19, 2011; and the SUP Amendment (2010101170) dated April 8, 2011. Altogether, there are 64 conditions found in the following approval documents which are listed in a table (Table 1) prepared by the Applicant. *Exhibits 2A, 2B, 2C, 2D, and 2E.* Table 1 lists each condition and describes the current compliance status as understood by the Applicant. *Exhibit 2, Table 1.* This table is incorporated into these findings by this reference.
6. County Public Works, Public Health and Social Services, and Resource Stewardship Staff reviewed the five approval documents, Table 1, and the five-year review application materials. County Staff conducted site visits on January 14, 2010, October 7, 2010,

October 20, 2011, November 4, 2011 and December 10, 2015. Based on this review, Staff determined that only seven of the conditions required development in the record beyond Applicant's assertion and Staff's concurrence with that assessment. The seven conditions are:

2005 MDNS Condition 2: The Applicant shall prepare and implement a plan that will be used to keep quarry materials out of the County right-of-way.

2005 MDNS Condition 15: Noise levels shall comply with WAC 173-60. The operator shall ensure that noise levels are monitored at least quarterly following the start of mining operations. All monitoring must be done using qualified personnel and equipment as specified in WAC 173-58 or as otherwise approved by the Thurston County Health Department. Monitoring results and data must be submitted to Thurston County Development Services and the Health Department for review. All monitoring must be done during normal operating conditions and hours and must continue on a quarterly basis until or unless the Health Department determines a lesser or greater frequency is warranted. If the Applicants propose a method of noise monitoring for this facility other than specified in WAC 173-60, then a detailed monitoring plan must be prepared and submitted for review and approval prior to the start of mining operations. In the event that monitoring shows noise levels at the property lines exceeding the daytime or nighttime standards in WAC 173-60, the Applicants may be required to cease operations until such time as acceptable mitigation has been provided and implemented and further monitoring data demonstrates the noise levels have been reduced to levels meeting WAC 173-60. The use of back-up strobe lights may be required as an alternative to back up beepers if the beepers are found to be a significant noise impact to near-by residences. The Applicant shall construct a 15-foot high landscape berm along the entry road and 1,000 feet east of the entry road to mitigate any probable noise impacts. All equipment used on the site shall be equipped with mufflers and be properly maintained to limit noise.

2005 MDNS Condition 26: Three agencies have air quality jurisdiction in the project area: the United States Environmental Protection Agency (EPA), the Washington State Department of Ecology (DOE) and the Olympic Air Pollution Control Authority (OAPCA). All operations on site must meet the standards and requirements of each agency.

2005 SUP Condition A: The Applicant/Operator shall comply with all conditions of the Mitigated Determination of Non-Significance dated October 24, 2005 (identified above as Exhibit 1, Attachment e).

2005 SUP Condition D: The Applicant/Operator shall comply with all conditions of ORCAA Order of Approval for Notice of Construction 01 NOC 116 and any other applicable ORCAA regulations.

2005 SUP Condition N: All vehicles leaving the site shall comply with RCW 46.61.655 (escape of load materials and cleaning of vehicles). (TCC 17.20.170)

2005 SUP Condition O: All truck wheels shall be washed before trucks leave the site and the Operator shall regularly maintain the access road to prevent airborne dust, congestion, air pollution, and safety hazards.

Exhibits 1, 1.M, 1.N, and 1.O; Kain Testimony.

7. Regarding the other 57 conditions, County Staff concurred with the Applicant's compliance status assessments in Table 1, finding the operation to be in compliance with all 57 conditions. *Exhibit 1; Kain Testimony; Peebles Testimony; Saint Testimony.*
8. Regarding 2005 MDNS condition 2, requiring preparation and implementation of a plan to keep quarry materials out of the County right-of-way, Table 1 noted:

A plan to prevent quarry materials from entering the Thurston County right-of-way was submitted to Thurston County and approved per the 2005 SUP (Attachment B, page 41, conclusion 6e). Also, in an un-appealed letter from Thurston County dated November 8, 2011 (Attachment G), Thurston County approved all pre-mining Conditions of the 2005 MDNS.

Exhibit 2, Table 1. Planning Staff concurred that prior to the commencement of mining, the plan was submitted and approved by County Public Works. Staff indicated after mining commenced in 2011, the County received no complaints of quarry materials on County roads until the notice of application and comment period for the instant five-year review; however, there were complaints during the comment period regarding quarry materials in the road. *Exhibit 1.L.2.* In response to the comments received, County Public Works Staff agreed to conduct periodic drive-by inspections of roadways used by gravel trucks leaving the mine. Staff noted this would be easy to do because Public Works has a facility on those roads. Planning Staff recommended a condition of approval designed to trigger additional mitigation by the Applicant should complaints of loose gravel reasonably attributed to the mine continue to be submitted and/or loose gravel on County roads is independently discovered by Public Works inspections. With this condition, Resource Stewardship Staff determined that any concern over potential noncompliance with Condition 2 would be adequately addressed. *Exhibit 1; Kain Testimony; Saint Testimony.*

9. Condition 15 of the 2005 MDNS, which was made a condition of SUPT-02-0612, required noise monitoring reports conducted during normal operations to be submitted to the County on a quarterly basis unless directly to report at other intervals by the Health Department; it also required construction of a 15-foot high landscape berm along the entry road and 1,000 feet east of the entry road to mitigate any probable noise impacts, and noise mufflers and maintenance for all equipment used on the site to limit noise. *Exhibits 1, 2A and 2B.*

10. As noted in Table 1, the berm was constructed consistent with the condition and mining equipment in use on-site, including loaders and customer trucks, are equipped with mufflers. *Exhibit 2; Exhibit 2, Table 1*. However, Planning Staff noted that no noise reports consistent with the requirements established by Condition 15 have been submitted to date. The mine has been in operation since November 2011. Since that time, the County has not received a single noise complaint. Currently mining activities are limited to Mine Area 1, which is the area farthest from residences. Staff noted that as mining proceeds into other segments, noise complaints may arise. Because of the noise attenuation measures already in place and the absence of noise complaints, Planning Staff determined that the partial noncompliance with Condition 15 is not a substantial compliance issue rendering approval of five-year review inappropriate. However, Staff recommended a new condition of approval that would require the operator/owner to work with the County Environmental Health Section to produce a noise monitoring and mitigation plan for future compliance with Condition 15. *Exhibit 1; Kain Testimony; Peebles Testimony*.
11. 2005 MDNS Condition 26, imposed as a condition of SUPT-02-0612 approval, which is essentially a reminder that the mine must operate in compliance with the applicable federal, state, and local air quality requirements. Condition 26 does not impose any affirmative actions aside from compliance with the standards of these three clean air agencies. *Exhibits 1, 2A and 2B*.
12. In Table 1, the Applicant noted that the operator has applied with the Olympic Region Clean Air Agency (ORCAA) for a permit to operate a rock crusher, and that as of August 2015 the permit was still in review. *Exhibits 2 and 2, Table 1*.
13. Planning Staff noted that while the 2005 SUP approved use of a crusher, the mine currently operates without one. Staff noted that ORCAA is the entity with authority to determine compliance with all aspects of air quality regulations for Thurston County land uses. At the time of five-year review application ORCAA had not received any air quality complaints about mining on-site, active since November 2011. Staff noted this for the record and did not indicate any noncompliance with regard to this condition. *Exhibit 1; Kain Testimony*.
14. Regarding SUPT-02-0612 Condition A, which requires compliance with all conditions imposed in the 2005 MDNS, the above findings demonstrate a lack of compliance with 2005 MDNS Condition 15 (no proper noise reports yet submitted). As noted above, Planning Staff submitted the position that a condition of approval would adequately ensure compliance going forward, and in light of no noise complaints, Staff found this lack of compliance not to be substantial. *Exhibits 1, 2, 2.A, and 2.B; Kain Testimony*.
15. SUPT-02-0612 Condition D required compliance with conditions imposed in an ORCAA approval for Notice of Construction 01 NOC 116 and any other applicable ORCAA regulations. *Exhibit 2.B*. ORCAA notified Thurston County that Notice of Construction 01 NOC 116 related to an asphalt plant requested by a previous owner and that the

approval has lapsed. There is no request for approval of an asphalt plant currently pending. For the remainder of the condition, it is duplicative of the requirement imposed by 2005 MDNS Condition 26, addressed above, about which Staff noted that an air quality permit is required to operate a rock crusher and such a permit is pending with ORCAA presently. *Exhibit 1; Kain Testimony.*

16. SUPT-02-0613 Condition N requires all vehicles leaving the site to comply with RCW 46.61.655² and TCC 17.20.170³. Both the Applicant and Planning Staff noted that this condition is duplicative of, and was already addressed above under, 2005 MDNS Condition 2. *Exhibits 1 and 2.*
17. SUPT-02-0612 Condition O imposes a two part requirement: first that the wheels be washed before leaving the site, and second that the access road be maintained to prevent pollution and hazards. *Exhibit 2B.* In response, the Applicant stated as follows:

Wheels are physically cleaned by trucks traveling on 1.9 miles of paved road surface from Segment [Mine Area] 1 before exiting the site, and the road is regularly swept. See [the earlier 2005 MDNS Condition 2] section of this report for discussion regarding prevention of releasing mine materials onto Thurston County rights-of-way. A wheel-wash station could be an alternative means once

² RCW 46.61.655 Dropping load, other materials—Covering. (1) No vehicle shall be driven or moved on any public highway unless such vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping therefrom, except that sand may be dropped for the purpose of securing traction. (2) No person may operate on any public highway any vehicle with any load unless the load and such covering as required thereon by subsection (3) of this section is securely fastened to prevent the covering or load from becoming loose, detached, or in any manner a hazard to other users of the highway. (3) Any vehicle operating on a paved public highway with a load of dirt, sand, or gravel susceptible to being dropped, spilled, leaked, or otherwise escaping therefrom shall be covered so as to prevent spillage. Covering of such loads is not required if six inches of freeboard is maintained within the bed. (4)(a) Any person operating a vehicle from which any glass or objects have fallen or escaped, which would constitute an obstruction or injure a vehicle or otherwise endanger travel upon such public highway shall immediately cause the public highway to be cleaned of all such glass or objects and shall pay any costs therefor. (b) Any vehicle with deposits of mud, rocks, or other debris on the vehicle's body, fenders, frame, undercarriage, wheels, or tires shall be cleaned of such material before the operation of the vehicle on a paved public highway. (5) The state patrol may make necessary rules to carry into effect the provisions of this section, applying such provisions to specific conditions and loads and prescribing means, methods, and practices to effectuate such provisions. (6) Nothing in this section may be construed to prohibit a public maintenance vehicle from dropping sand on a highway to enhance traction, or sprinkling water or other substances to clean or maintain a highway. (7)(a)(i) A person is guilty of failure to secure a load in the first degree if he or she, with criminal negligence, fails to secure a load or part of a load to his or her vehicle in compliance with subsection (1), (2), or (3) of this section and causes substantial bodily harm to another. (ii) Failure to secure a load in the first degree is a gross misdemeanor. (b)(i) A person is guilty of failure to secure a load in the second degree if he or she, with criminal negligence, fails to secure a load or part of a load to his or her vehicle in compliance with subsection (1) or (2) of this section and causes damage to property of another. (ii) Failure to secure a load in the second degree is a misdemeanor. (c) A person who fails to secure a load or part of a load to his or her vehicle in compliance with subsection (1), (2), or (3) of this section is guilty of an infraction if such failure does not amount to a violation of (a) or (b) of this subsection. (emphasis added)

³ TCC 17.20.170 - Vehicle preparation. All vehicles leaving the site shall comply with RCW 46.61.655 (escape of load materials and cleaning of vehicles).

mining is located in closer proximity to the Site entrance, such as when mining is initiated and the proposed processing facility is constructed south of the railroad tracks.

Exhibit 2.

18. Planning Staff concurred with Applicant's assessment that 1.9 miles of travel on paved roads was adequate to ensure the intention of SUPT-02-0612 Condition O is met, because it is a sufficient distance to remove gravel and mud from truck wheels prior to entering the roadway. Staff noted that if future reports of gravel, mud, or dirt on the roadway are verified by Public Works, the requirement to implement a wash station shall be fully implemented. *Exhibit 1; Kain Testimony.*
19. With regard to the amended water monitoring plan imposed through the 2011 SUP Amendment (No. 2010-101170), the record demonstrates compliance with the revised water monitoring plan, including reporting requirements. *Exhibit 2, Table 2; Exhibits 2.I, and 2.K.*
20. Upon review of the 64 conditions implemented by the five approvals, County Staff determined that the mining operation is in compliance with all conditions or can become compliant without substantial corrective action. Staff determined that there are "no issues of concern that cause the County to hesitate in recommending approval of the subject Five-Year Review." *Exhibit 1, page 6; Kain Testimony.*
21. Subsequent to the original SUP approval in 2005 and the 2011 SUP Amendment, the United States Fish and Wildlife Service (USFWS) listed the Mazama pocket gopher as a threatened species pursuant to the federal Endangered Species Act (ESA) in 2012. The majority of the approved mine area overlays soils identified by USFWS as potential gopher habitat. Thurston County lacks enforcement authority concerning the ESA. Discovery of pocket gophers during land disturbing activity would trigger Applicant obligations under federal law and the involvement of USFWS. *Exhibits 1 and 1.E; Kain Testimony.*
22. Despite lacking jurisdiction to enforce the ESA, Planning Staff recommended a condition of approval as follows:

F. If Mazama pocket gophers are discovered during any land disturbing activity, the activity must cease in the area of discovery and the United States Fish and Wildlife Services must be contacted for guidance.

Exhibit 1.

23. The Applicant objected to recommended Condition F, arguing (in part) as follows:

[T]he County has taken the position that the County must perform [mazama pocket gopher] MPG review for 'building permits' in order to avoid Thurston County liability under the ESA. However, the ESA does not clearly place

responsibility upon Thurston County to enforce the federal law. [citation omitted, see Exhibit 8] Moreover, the County has acknowledged that the appropriate permitting authority for an ‘incidental take’ is the USFWS. [citation omitted] Ultimately, the County has not established the authority to enforce the ESA. ... [D]espite the County’s motivation in implementing this policy, the policy presumably only applies to the issuance of ‘building permits.’... Further, the USFWS guidance letter to landowners clearly only obligates landowners “who know that Mazama pocket gophers are present on their property.” In the present case, the Port has no knowledge of MPG present on its property and the Port is not seeking a new permit or a building permit. Consistent with the Hearing Examiner’s Decision in the 2010 review, the five year review process does not ‘re-open’ the permit. Rather, during the five year review, the Hearing Examiner may only “impose additional conditions upon the operation if the approval authority determines it is necessary to do so to meet the standards of this chapter, as amended” TCC 20.54.070.21.e. The County has not amended the TCC 20.54 to impose a requirement to perform additional critical areas review during a five year review.

Exhibit 8. The author of the mine’s habitat management plan testified there was no need for recommended Condition F in order to ensure protection of any critical area required to be protected pursuant to the regulations in effect at the time the 2005 SUP vested. *Garrison Testimony.*

24. Acknowledging Thurston County cannot enforce the ESA, the County noted it is nonetheless bound by the requirements of the applicable critical areas ordinance (CAO), which requires protection of threatened or endangered species. Recommended Condition F was intended to protect the Applicant, by promoting compliance with County and federal law, and also intended "as a layer of legal protection for the County should the applicant discover Mazama Pocket Gopher activity on-site." *Exhibit 12.* As a solution to the Applicant's objection, the County modified the language of recommended Condition F to make it suggestive instead of mandatory while still protecting the County from subsequent liability for any illegal taking of species under the ESA. *Exhibit 12.*

25. The Applicant opposed even the modified language, arguing:

Ultimately, while the Port acknowledges that the Port must comply with the requirements of the Endangered Species Act, there is no authority for Thurston County to impose the proposed condition (F), as amended, upon permit SUPT 02-0612. Moreover, existing Condition E of the ‘2005 SUP’ (incorporated into SUPT-020612) already acknowledges that the site must be in compliance with federal regulations. The current proposed condition (F) regarding mazama pocket gophers is an unnecessary redundancy in the many conditions that apply to the site. Specifically stating that the mine must comply with a particular federal regulation could be misconstrued as an additional compliance issue under Thurston County’s critical areas ordinance. Thurston County’s responsibility to notify a permittee of the need to comply with federal regulations is satisfied by

Condition E of the '2005 SUP', as well as its statements made in the 'Final Analysis' section of the Staff Report. No more is needed.

Exhibit 13.

26. Both the initial special use permit (SUPT-02-062) and the 2011 amendment to the permit underwent review for compliance with the requirements of the State Environmental Policy Act. The October 24, 2005 mitigated determination of non-significance (MDNS) became final on November 8, 2005. A modified MDNS was issued for amendments to the SUP on January 19, 2011, which became final on February 9, 2011. SEPA review is not required for the instant five-year review because it is not an action pursuant to SEPA regulations. *See WAC 197-11-704.* Inspections and reviews of prior decisions are exempt from SEPA review pursuant to WAC 197-11-800 (12) & (13). *Exhibit 1.*
27. Notice of application was mailed to parties of record on November 18, 2015. Notice of public hearing was sent to all property owners within 2,600 feet of the site and to other interested parties on December 8, 2015 by regular mail and/or email. Notice of hearing was posted onsite on December 10, 2015 and was published in The Olympian on December 11, 2015. The application and available materials were posted on the County's Permitting and Land Use webpage and the County Hearing Examiner webpage, both under Maytown Five Year Review, on approximately December 2, 2015. *Exhibits 1, 1.A, and 1.B.*
28. Prior to the preparation of the Staff Report, the County received two comment letters from the public in response to the November 18th notice of application. Concerns included: reports of gravel on the nearby roads and flying off of trucks leaving the site; a statement that critical areas on-site should be protected; the assertion that Port of Tacoma does not have legal authority to operate in Thurston County; a request for avoidance of any further destruction of critical areas that were protected under the Thurston County Code in force at the time of the original special use permit, e.g. mima mounds; and a request that the County and the operator protect the many listed State and Federal species, as well as critical areas, in the area of the mine. *Exhibit 1.L.* After reviewing the public comments received prior to hearing, Planning Staff was not persuaded that the mining operation is out of compliance with the applicable conditions of approval. *Exhibit 1; Kain Testimony.*
29. Prior to the hearing, Tom Rutledge submitted comments addressing the following (paraphrased) issues of concern: mining equipment is using back up beepers/alarms, versus ambient-sensitive warning devices; quarterly noise monitoring and residences built since the plan was originally created in 2004; no wheel washing; uncovered loads and damage to his vehicle; whether there is a minimum production needed to avoid vacation of the SUP; questions about the Port's ownership and operation; County control over/involvement in sale and/or purchasers; whether the industrial water right has expired; and questions about emergency response. *Exhibit 3.* The Applicant submitted a detailed response to these questions and issues. *Exhibit 5.*

30. Public comment offered at hearing was as follows:

Sue Danver, on behalf of Black Hills Audubon Society, inquired about: whether issuance of the recycling permit requires notice under County Code? whether the operator is recording the source of stockpiled recyclable materials? why wheel washing isn't presently underway because it is specifically required by one of the 64 conditions? and whether the operator can be required to cover stockpiled recyclable materials in order to prevent pollution from recycled road materials from being washed into ground water during rain events. *Danver Testimony.*

Bonnie Earl testified regarding concerns about the following: regarding Endangered Species Act compliance, will clearance surveys be conducted prior to soil disturbing activities? She noted there are additional listed species in the vicinity. She inquired whether hydrology monitoring being implemented and noted that bull frogs are a threat to spotted frogs, a listed species. She requested bull frog mitigation be required. *Earl Testimony.*

Tom Rutledge lives on southern border of mining site; he testified that he understands back up alarms are to be used as warranted and said they are not currently a significant problem, but he lives more than a mile from current operations and can hear them. He requested that when noise monitoring is conducted, design of the monitoring program be required to consider residences built since initial monitoring stations were established and asked that new residences be included in baseline. He testified that he has been on-site twice in private vehicles during gravel purchase and that no wheel washing was performed on either vehicle. He stated that he drives Tilly Road frequently and that he regularly sees uncovered loads leaving the site, and that he can always see product above rails. He testified that he has been hit twice in the last year following a Lloyd truck on Maytown Road and had to go to Safelite. He questioned whether the operator has legal access to the water rights asserted by the Applicant, or whether the water right may have lapsed through lack of use and reversion, and asked that the County pursue this question with Department of Ecology. *Rutledge Testimony.*

Sharron Coontz, on behalf of Friends of Rocky Prairie, testified that the FORP website has received several complaints of flying gravel hitting cars. FORP agrees with Mr. Rutledge that the Applicant's water rights are in question, asserting the water has not been in use since 1994. She also asserted that mima mounds have been impacted by activities on-site and requested that the County protect this resource consistent with applicable code. *Coontz Testimony.*

31. In response to public comment, County Staff offered the following. The Port has applied for and received recycling permits, as it was authorized to do in the original 2005 SUP. The County Code does not require notice to parties of record of a recycling permit, which is handled through ministerial review as an operating permit. Solid waste and hazardous materials standards of both State and County regulations are applied through the review

of the recycling permit. The source of the recycled materials stockpiled on site is reported and included in the record in Exhibit 2. Covering recycling stockpiles is not required by code. Public Works has not received complaints regarding mud in the road that would be addressed by wheel washing. Based on the complaints generated in the instant hearing process, Public Works intends to conduct inspections of the County rights-of-way used by operator vehicles and would require a wheel washing station to be implemented upon discovering evidence that it is warranted; however, at this juncture, they still agree that the 1.9 miles of paved road between the active mine site and the site entrance adequately perform the same function. Anyone with complaints of mud or earth tracked onto County rights-of-way by vehicles existing the mine site should submit complaints to the County Public Works Department. Because the gopher was not listed pursuant to the ESA prior to the 2005 vesting and approval of the mine, the County has no authority to require clearance surveys to be conducted. However, the County stands by its recommended condition F. Noise monitoring would be conducted at the boundary of the overall subject property. Anyone who feels that noise volumes generated by the mining operation exceed legal limits or go against conditions of the mine approvals should submit complaints to the County Health Department Environmental Health Division. In 2010, during the previous five year review process, the County pursued invalidation of the Applicant's water rights. The Washington State Department of Ecology decided not to invalidate those rights and the County is not going to pursue that issue further. Mike Kain, Land Use and Environmental Review Division Manager for Resource Stewardship, has personally toured the subject property and observed Mima mounds in relation to the approved mine area. He testified that all significant areas of Mima mounds are outside the approved mine area and provided with buffers of at least 100 feet. *Kain Testimony; Peebles Testimony; Saint Testimony.*

32. In response to public comment, representatives for the Applicant offered as follows. Regarding noise, as stated in WAC 173-60-050(4)(e), “sounds created by safety and protective devices where noise suppression would defeat the intent of the device...” are exempt from codified maximum permissible environmental noise levels. Back-up beepers are a requirement for equipment safety on mine sites. Quarterly noise monitoring has occurred; however, the Applicant does not object to the County's position that noise monitoring and reporting must improve to achieve full compliance with the conditions of approval. Currently, mining is occurring only in Mine Segment 1, which located thousands of feet from any adjacent residence and approximately 7,000 feet from Mr. Rutledge’s residence. The Applicant agreed to preparing and submitting a noise monitoring and mitigation following the current five-year review, drafted to include consideration of residences constructed since the first noise study was completed. Regarding mining materials in the County roadways, prior to Mr. Rutledge's December 18, 2015 letter, the Applicant had not received any complaint to date of material falling from vehicles. The Applicant proposed to work with the mine operator to ensure the applicable requirements are being enforced. Regarding water rights, the Port provided the Water Right Certificates as Exhibit 2, Attachment O. However, the Applicant argued that the determination of water rights is not within the jurisdiction of Thurston County and that the water rights remain valid unless a court determines otherwise in a water rights adjudication. Regarding the question of which agency provides emergency

services, the Applicant noted that the Port has an operating agreement in place with Lloyd Enterprises, Inc., (“LEI”) for the operation of the mine and it is expected that LEI would contact all appropriate emergency responders in an emergency and notify the Port. The Applicant argued that the determination of water rights is not within the jurisdiction of Thurston County. Applicant representatives agreed with County Staff that Mima mounds are outside mine area and are protected by a buffer. *Exhibit 5; Staley Testimony; Rettmann Testimony.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner has jurisdiction to conduct the five-year review pursuant to TCC 2.06.010 and TCC 20.54.070(21)(e).

Criteria of Approval For Five Year Review

Pursuant to TCC 20.54.070(21)(e), a special use permit for a mine “shall be reviewed by the approval authority no less frequently than every five years from the date of the decision to approve the permit.... At the time of such review, the approval authority may impose additional conditions upon the operation if the approval authority determines it is necessary to do so to meet the standards of this chapter, as amended.”

Conclusions Based on Findings

1. The undersigned concurs with Planning Staff's determination that the record demonstrates that the active mining operation is in compliance with the 57 conditions not addressed in detail in the staff report. The Applicant's assessments as to compliance with these 57 conditions as identified in Exhibit 2 itself and in Exhibit 2, Table 1 are adopted. The record also demonstrates compliance with 2005 MDNS Condition 26 and SUPT-02-0612 Condition D. *Findings 1, 5, 6, 7, 11, 12, 13, 15, 16, 17, and 19.*
2. The record demonstrates noncompliance with 2005 MDNS Condition 15, which required the operator to ensure that noise levels are monitored at least quarterly following the start of mining operations, with results and data submitted to Thurston County Development Services and the Health Department for review. Considering the distance of current mining activities from the nearest adjacent residential parcels, the lack of reported noise complaints prior to hearing, and Planning Staff's position that even this degree of non-compliance is not substantial enough to warrant anything beyond imposition of additional conditions ensuring future compliance, the undersigned is persuaded that this history of non-compliance is appropriately remedied through additional conditions. However, in light of hearing testimony concerning equipment back up alarms that are audible and offensive at adjacent residences, the undersigned disagrees with County Staff that it is appropriate to wait any longer to begin to comply with this condition that was triggered by commencement of mining. Accordingly, Staff's recommended condition will be modified. *Findings 5, 6, 9, 10, 14, 29, 30, 31, and 32.*

3. Regarding noncompliance with 2005 SUP Condition O, evidence in the record supports the conclusion that the end goal of wheel washing is currently being met by the 1.9 miles paved on-site road that loaded vehicles currently travel before entering public rights-of-way. Planning Staff did not recommend a condition addressing a trigger for alteration of this status quo; therefore a condition of approval is necessary to ensure current mine operations remain compliant with the condition. *Findings 5, 6, 8, 17, 18, 28, 29, 30, and 31.*
4. Regarding noncompliance with 2005 SUP Condition N (escape of materials from loads into the public roadway), as of the instant hearing the County is now in receipt of complaints from multiple parties regarding escaped materials. The Applicant must develop and implement a plan to ensure that operators/haulers comply with State and County regulations regarding escape of materials. County Public Works Staff would review the proposed plan for consistency with applicable requirements. With a condition requiring development and implementation of such a plan, compliance with this condition would be demonstrated. *Findings 5, 6, 30, and 31.*
5. Any question pertaining to whether or not the Port of Tacoma has the legal right to own and operate a gravel mine on property in Thurston County is outside the scope of the instant five-year review as well as outside the jurisdiction of the County's hearing examiner. Similarly, no County official has jurisdiction over any question as to the validity of the Port's water rights. *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 636 (1984).⁴ *Findings 28, 29, 30, and 32.*
6. The undersigned (who was the hearing officer in the most recent proceedings) had intended in the April 2011 SUP Amendment that the deadline for five year review run from the date of SUP amendment; the parties, being uncertain of this, desired to complete the instant five year review, up to and including decision, prior to December 30, 2015; however, their application was not deemed complete until November 13, 2015. Due to previously scheduled hearings, the hearing in the instant application was not able to be set until December 22, 2015, leaving too short a time for decision issuance by December 30th, both in light of the County Code's ten business day allowance and the multiple yearend holidays. Based on discussion in the record and the undersigned's assurance that a decision issued after December 30, 2015 would be considered timely, the parties agreed to a January 15, 2016 decision issuance date and to alteration of the deadline for future five year reviews to follow the amendment issuance date. In order to avoid this situation in the future, and consistent with previous interpretation of the requirements established at TCC 20.54.070.21.e⁵, it is hereby stated that the intent of the instant decision is that the

⁴ "Administrative agencies are creatures of the legislature without inherent or common-law powers and may exercise only those powers conferred either expressly or by necessary implication." *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 636 (1984).

⁵ See *Waldrick Mine Five Year Review, No 2013102726*, decision issued May 5, 2014.

next five year review hearing be conducted within five years of the instant decision prior to the anniversary date of the permit, which is April 8, 2011. *Findings 1, 4, and 27.*

DECISION

The five-year review of special use permit SUPT-02-0612 as amended on April 8, 2011 authorizing a 284-acre gravel mine within a 497-acre disturbed area is **APPROVED** subject to the following conditions which apply to the Applicant and all successors in interest:

- A. Within 90 days of the instant approval, the Applicant shall prepare and submit a plan to implement the quarterly noise monitoring consistent with 2005 MDNS Condition 15, to include quarterly reporting of results to the County, for review and approval to the County Environmental Health Division. Noise monitoring shall consider all sensitive sound receiving properties adjacent to the mine perimeter. Quarterly monitoring and reporting consistent with the approved plan shall commence within 30 days of plan approval, and in no case shall fail to commence prior to June 1, 2016.
- B. Should the County receive verified reports, or should Public Works detect upon its own inspection, that mining materials, mud, or earth are being tracked onto public rights-of-way from the mine site, wheel washing shall be required to commence within 30 days.
- C. Within 60 days of the instant decision issuance, the Applicant shall develop and submit a plan to the County Public Works Department for the prevention of the escape of materials from loaded vehicles leaving the site into the public roadway. The plan shall be implemented within 15 days of Public Works approval.
- D. A rock crusher shall not operate on-site until ORCAA issues a Construction Permit and the County Environmental Health Section has approved a noise monitoring and mitigation plan that includes the crusher.
- E. All mining activity must continue to be in compliance with the applicable conditions established through the MDNS issued October 24, 2005, SUPT 02-0612 approved December 16, 2005, Five-Year Review approved December 30, 2010, MDNS issued January 19, 2011, SUP Amendment approved April 8, 2011, and the current five-year review.
- F. Should SUPT 02-0612 as amended April 8, 2011 remain active, the next five-year review hearing shall be conducted prior to April 8, 2021, and five year review shall be conducted at least every five years thereafter. (Pursuant to TCC 20.54.070(21)(e) the Hearing Examiner shall set the frequency of the review.)
- G. If Mazama pocket gophers are discovered during any land disturbing activity, the activity should cease in the area of discovery and the United States Fish and Wildlife Services should be contacted for guidance.

DECIDED January 15, 2016.



Sharon A. Rice
Thurston County Hearing Examiner

THURSTON COUNTY
PROCEDURE FOR RECONSIDERATION AND APPEAL
OF HEARING EXAMINER DECISION TO THE BOARD

NOTE: THERE MAY BE NO EX PARTE (ONE-SIDED) CONTACT OUTSIDE A PUBLIC HEARING WITH EITHER THE HEARING EXAMINER OR WITH THE BOARD OF THURSTON COUNTY COMMISSIONERS ON APPEALS (Thurston County Code, Section 2.06.030).

If you do not agree with the decision of the Hearing Examiner, there are two (2) ways to seek review of the decision. They are described in A and B below. Unless reconsidered or appealed, decisions of the Hearing Examiner become final on the 15th day after the date of the decision.* The Hearing Examiner renders decisions within five (5) working days following a Request for Reconsideration unless a longer period is mutually agreed to by the Hearing Examiner, applicant, and requester.

The decision of the Hearing Examiner on an appeal of a SEPA threshold determination for a project action is final. The Hearing Examiner shall not entertain motions for reconsideration for such decisions. The decision of the Hearing Examiner regarding a SEPA threshold determination may only be appealed to Superior Court in conjunction with an appeal of the underlying action in accordance with RCW 43.21C.075 and TCC 17.09.160. TCC 17.09.160(K).

A. RECONSIDERATION BY THE HEARING EXAMINER (Not permitted for a decision on a SEPA threshold determination)

1. Any aggrieved person or agency that disagrees with the decision of the Examiner may request Reconsideration. All Reconsideration requests must include a legal citation and reason for the request. The Examiner shall have the discretion to either deny the motion without comment or to provide additional Findings and Conclusions based on the record.
2. Written Request for Reconsideration and the appropriate fee must be filed with the Resource Stewardship Department **within ten (10) days of the written decision**. The form is provided for this purpose on the opposite side of this notification.

B. APPEAL TO THE BOARD OF THURSTON COUNTY COMMISSIONERS (Not permitted for a decision on a SEPA threshold determination for a project action)

1. Appeals may be filed by any aggrieved person or agency directly affected by the Examiner's decision. The form is provided for this purpose on the opposite side of this notification.
2. Written notice of Appeal and the appropriate fee must be filed with the Resource Stewardship Department **within fourteen (14) days of the date of the Examiner's written decision**. The form is provided for this purpose on the opposite side of this notification.
3. An Appeal filed within the specified time period will stay the effective date of the Examiner's decision until it is adjudicated by the Board of Thurston County Commissioners or is withdrawn.
4. The notice of Appeal shall concisely specify the error or issue which the Board is asked to consider on Appeal, and shall cite by reference to section, paragraph and page, the provisions of law which are alleged to have been violated. The Board need not consider issues, which are not so identified. A written memorandum that the appellant may wish considered by the Board may accompany the notice. The memorandum shall not include the presentation of new evidence and shall be based only upon facts presented to the Examiner.
5. Notices of the Appeal hearing will be mailed to all parties of record who legibly provided a mailing address. This would include all persons who (a) gave oral or written comments to the Examiner or (b) listed their name as a person wishing to receive a copy of the decision on a sign-up sheet made available during the Examiner's hearing.
6. Unless all parties of record are given notice of a trip by the Board of Thurston County Commissioners to view the subject site, no one other than County staff may accompany the Board members during the site visit.

C. STANDING All Reconsideration and Appeal requests must clearly state why the appellant is an "aggrieved" party and demonstrate that standing in the Reconsideration or Appeal should be granted.

D. FILING FEES AND DEADLINE If you wish to file a Request for Reconsideration or Appeal of this determination, please do so in writing on the back of this form, accompanied by a nonrefundable fee of **\$651.00** for a Request for Reconsideration or **\$866.00** an Appeal. Any Request for Reconsideration or Appeal must be **received** in the Permit Assistance Center on the second floor of Building #1 in the Thurston County Courthouse complex no later than 4:00 p.m. per the requirements specified in A2 and B2 above. **Postmarks are not acceptable.** If your application fee and completed application form is not timely filed, you will be unable to request Reconsideration or Appeal this determination. The deadline will not be extended.

* Shoreline Permit decisions are not final until a 21-day appeal period to the state has elapsed following the date the County decision becomes final.



Project No. _____
Appeal Sequence No.: _____

☐ Check here for: RECONSIDERATION OF HEARING EXAMINER DECISION

THE APPELLANT, after review of the terms and conditions of the Hearing Examiner's decision hereby requests that the Hearing Examiner take the following information into consideration and further review under the provisions of Chapter 2.06.060 of the Thurston County Code:

(If more space is required, please attach additional sheet.)

☐ Check here for: APPEAL OF HEARING EXAMINER DECISION

TO THE BOARD OF THURSTON COUNTY COMMISSIONERS COMES NOW _____
on this _____ day of _____, 20__, as an APPELLANT in the matter of a Hearing Examiner's decision
rendered on _____, 20__, by _____ relating to _____

THE APPELLANT, after review and consideration of the reasons given by the Hearing Examiner for his decision, does now, under the provisions of Chapter 2.06.070 of the Thurston County Code, give written notice of APPEAL to the Board of Thurston County Commissioners of said decision and alleges the following errors in said Hearing Examiner decision:

Specific section, paragraph and page of regulation allegedly interpreted erroneously by Hearing Examiner:

1. Zoning Ordinance _____
2. Platting and Subdivision Ordinance _____
3. Comprehensive Plan _____
4. Critical Areas Ordinance _____
5. Shoreline Master Program _____
6. Other: _____

(If more space is required, please attach additional sheet.)

AND FURTHERMORE, requests that the Board of Thurston County Commissioners, having responsibility for final review of such decisions will upon review of the record of the matters and the allegations contained in this appeal, find in favor of the appellant and reverse the Hearing Examiner decision.

STANDING

On a separate sheet, explain why the appellant should be considered an aggrieved party and why standing should be granted to the appellant. This is required for both Reconsiderations and Appeals.

Signature required for both Reconsideration and Appeal Requests

APPELLANT NAME PRINTED

SIGNATURE OF APPELLANT

Address _____

Phone _____

Please do not write below - for Staff Use Only:

Fee of ☐ \$652.00 for Reconsideration or \$870.00 for Appeal. Received (check box): Initial _____ Receipt No. _____

Filed with the Resource Stewardship Department this _____ day of _____, 20__.

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