



COUNTY COMMISSIONERS

Cathy Wolfe  
District One  
Sandra Romero  
District Two  
Karen Valenzuela  
District Three

**HEARING EXAMINER**

*Creating Solutions for Our Future*

**BEFORE THE HEARING EXAMINER  
FOR THURSTON COUNTY**

In the Matter of the Application of	)	
	)	Project # 2010101170
<b>Maytown Sand &amp; Gravel, LLC</b>	)	
	)	App. No. 11-101508VE
For Approval of a Amendment	)	
Special Use Permit SUPT-02-0612; and	)	App. No. 11-101509VE
	)	
In the matter of the Appeals of	)	
	)	<b>Maytown Aggregates</b>
<b>Maytown Sand &amp; Gravel, LLC</b>	)	
	)	<b>Maytown Sand and Gravel</b>
and	)	<b>SUP Amendment (SUPT-02-0612)</b>
	)	
<b>Friends of Rocky Prairie</b>	)	
	)	
Of the County's January 19, 2011	)	
SEPA Threshold Determination	)	

**SUMMARY OF DECISIONS**

Because neither Appellant met the burden of proving that the County SEPA Responsible Official's environmental threshold determination was in error, both appeals of the SEPA Mitigated Determination of Non-Significance (MDNS) issued January 19, 2011 are **DENIED**.<sup>1</sup>

The request for an amendment of special use mining permit SUPT-02-0612 to alter the approved ground water monitoring plan for the 284-acre mine within a 497-acre project boundary southeast of the Maytown Road/Tilley Road intersection is **GRANTED**, subject to conditions.

**SUMMARY OF RECORD**

**Request**

Maytown Sand & Gravel, LLC (MSG, Applicant) requested approval of a amendments to the groundwater monitoring plan approved during review of a mining operation approved by the

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<sup>1</sup> See Conclusion II.A.2.

Thurston County Hearing Examiner in 2005. The amendments would alter requirements established in conditions of approval 6A and 6C implemented through a October 24, 2005 MDNS and made conditions of permit approval for the mine. The December 16, 2005 special use permit (SUPT-02-0612), authorized the excavation of approximately 20.6 million cubic yards of sand and gravel from a mine area totaling 284 acres within a 497.3-acre project site south of Millersylvania State Park. The mine site is addressed as 13120 Tilley Road SW in Thurston County, Washington.

### **Appeals**

Thurston County reviewed the proposed amendments for compliance with the requirements of the State Environmental Policy Act (SEPA) and issued a mitigated determination of non-significance (MDNS) on January 19, 2011.

Two appeals of the MDNS were filed with the Resource Stewardship Department (Department).

- I. Appeal 11-101508VE, filed by Maytown Sand & Gravel, LLC (MSG, Applicant/Appellant) was received by the Department on February 9, 2011<sup>2</sup>, alleging the following (paraphrased) errors in the MDNS:
  1. The proposed amendments do not require a formal amendment process pursuant to the Thurston County Code, and the County erred in subjecting them to a formal SUP Amendment application process;
  2. The proposed amendments should have been handled as enforcement matter (enforcing conditions of SUPT-02-0612 permit approval) during Five Year Review of the mining permit;
  3. Assuming the formal amendment process is required, the proposed amendments to groundwater monitoring do not constitute an "action" for SEPA purposes and the threshold determination was unnecessary and therefore unlawful; and
  4. Assuming the formal amendment process is required, the proposed amendments to groundwater monitoring have no environmental impact, and the decision to subject them to a threshold determination was unlawful.

MSG requested that the Examiner conclude that no review pursuant to SEPA was required for the proposed amendments and to set aside the MDNS.

- II. Appeal 11-101509VE, filed by Friends of Rocky Prairie (FORP, Appellant), was received by the Department on February 9, 2011, alleging the following (paraphrased) errors in the MDNS:

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<sup>2</sup> The appeal form and appeal notice are both dated January 9, 2011. However, the MDNS was issued January 19, 2011, its appeal period expired February 9, 2011, the appeal notice reference a letter (attached) written January 25, 2011. It is assumed the dates on the form and notice are clerical errors. The Hearing Examiner Clerk indicated the appeal was received February 9, 2011.

1. The process allowing amendment of conditions in the 2005 MDNS violates SEPA;
2. The County failed to independently review the 2005 MDNS as required by Ch. 43.21C.034 RCW; Ch. 197-11-630(1) WAC;
3. The County violated WAC 197-11-600(3)(b)(ii) when it adopted or incorporated by reference the 2005 MDNS into the 2011 MDNS because the 2005 MDNS was procured by misrepresentation or lack of material disclosure;
4. The County violated WAC 197-11-600(3)(b)(ii) by not preparing a new threshold determination because there is new information that the proposal will have significant adverse environmental impacts;
5. The County violated WAC 197-11-340(3)(a)(iii) by not withdrawing the 2011 MDNS because it was procured through lack of material disclosure or misrepresentation;
6. The County violated WAC 197-11-340(a)(i) because the new groundwater monitoring plan is a substantial change to the proposal because the noncompliance by the Applicant with the original monitoring plan led to environmental harm;
7. The County violated WAC 197-11 when it issued the 2011 MDNS because it did so without an adequate environmental checklist;
8. The County erred by not vacating the SUP because no legal pre-mining or mining activity occurred on the site for three years after the issuance of the SUP, a violation of Thurston County Code (TCC) 20.54.040.a;
9. The County erred in allowing the Port of Tacoma to have the SUP because it is outside of the Port's authority to operate a mine, a violation of Ch. 53.04.010 RCW;
10. The County erred by not vacating the SUP when the interlocal agreement between the Port of Olympia and the Port of Tacoma lapsed, a violation of Ch. 53.08.240 RCW;
11. The County erred by not vacating the SUP due to the Applicant's non-compliance with conditions of the 2005 MDNS that were required as conditions of the SUP approval.

In its pre-hearing brief, FORP further argued that too much time had elapsed since the 2005 MDNS was issued such that the County's reliance on that document was improper. The relief requested in FORP's appeal was for an order that the 2011 MDNS must be withdrawn.

### **Hearing Date**

The Thurston County Hearing Examiner *pro tem* conducted a consolidated open record public hearing on the SUP amendment request and SEPA appeals on March 7, 8, and 9, 2011. On the record at the conclusion of the proceedings, the Examiner requested additional time beyond ten working days to prepare written findings and conclusions, consistent with TCC 2.06.050.A. In addition, arrangements were made for the submission of post-hearing submittals, including a revised water monitoring plan, responsive comments from County Staff and other parties, and

final briefing. The submission schedule was memorialized in the March 10, 2011 Post-Hearing Order. All materials requested in the Order were timely submitted and admitted. A final decision due date of April 8, 2011 was established on the record at hearing.

### **Testimony**

At the open record public hearing, the following individuals presented testimony under oath:

Mike Kain, Manager, Resource Stewardship Department  
Tony Kantas, Resource Stewardship Department  
Nadine Romero, Water Resources Department  
Cynthia Wilson, Long Range Planning Department  
Sharron Coontz, representing Friends of Rocky Prairie  
Charles Ellingson, Pacific Groundwater Group  
Roy Garrison  
Francis Naglich  
Jack Hedge, Port of Tacoma  
Meryl Bernstein  
Patrick Dunn

### **Attorney Representation**

Jeff Fancher, Deputy Prosecuting Attorney, represented Thurston County.  
Patrick Williams represented Friends of Rocky Prairie (FORP).  
John Hempelmann and Randal Olson represented Maytown Sand & Gravel, LLC (MSG).  
J. Tayloe Washburn and Steve Gillespie represented the Port of Tacoma (the Port).

### **Exhibits**

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

EXHIBIT 1 Resource Stewardship Land Use and Environmental Review Report, dated March 7, 2011, with the following attachments:

Attachment a	Legal Notice, published February 25, 2011
Attachment b	Original SUP Amendment Application Letter, April 22, 2010, (partially withdrawn by Applicant on July 1, 2010 and October 29, 2010)
Attachment c	Application Narrative, July 1, 2010
Attachment d	Application Narrative, August 24, 2010
Attachment e	Application Narrative, October 29, 2010
Attachment f	Application Narrative, December 13, 2010
Attachment g	Environmental Checklist, August 23, 2010
Attachment h	Mitigated Determination of Non-Significance, issued October 24, 2005
Attachment i	Notice of Application <i>revised</i> , September 17, 2010
Attachment j	Notice of Application/Proposed MDNS <i>amended</i> , December 21, 2010
Attachment k	Hearing Examiner Decision, issued December 16, 2005
Attachment l	Settlement Agreement, October 5, 2005
Attachment m	Groundwater Monitoring Plan, September 2005

Attachment n	Vicinity Map, August 22, 2007
Attachment o	Mining Area Map, November 3, 2009
Attachment p	Reclamation Sequence Map, November 3, 2009
Attachment q	Reclamation Plan Approval, September 19, 2007
Attachment r	Typical Wetland Creation Cross Section Map, November 3, 2009
Attachment s	Site Map, January 19, 2010
Attachment t	Letter from John Hempelmann, October 29, 2010
Attachment u	Hydrogeologic Report by Nadine Romero, November 10, 2010
Attachment v	Site Plan Legend, October 13, 2010
Attachment w	Site Plan, October 5, 2010
Attachment x	Letter of February 16, 2010 to Tayloe Washburn; including attachment
Attachment y	Appeal of an Administrative Decision, March 2, 2010
Attachment z	Email from Washburn, March 9, 2010
Attachment aa	Memorandum from Nadine Romero, February 19, 2010
Attachment bb	Letter to Hempelmann and Washburn, June 17, 2010
Attachment cc	Memorandum from Nadine Romero, June 8, 2010
Attachment dd	Letters from Department of Ecology, May 10, 2010, September 27, 2010, October 7, 2010
Attachment ee	Groundwater and Surface Water Monitoring Plan, January 18, 2011
Attachment ff	Page 8 of Response to Comments on Thurston County MDNS for Maytown Aggregates, prepared by Pacific Groundwater Group, April 23, 2004
Attachment gg	Email from Tony Kantas, September 28, 2010
Attachment hh	Letter from Thomas R. Bjorgen, March 23, 2009
Attachment ii	Letter from Thomas R. Bjorgen, May 19, 2009
Attachment jj	October 29, 2008 Letter from Tony Kantas to Tom Bjorgen with November 25, 2008 letter from Tony Kantas to Tayloe Washburn
Attachment kk	March 20, 2009 letter from Michael Kain to Thomas Bjorgen with March 29, 2009 letter from Michael Kain to Thomas Bjorgen
Attachment ll	Letters submitted from the following as a result of the Notice of Application and proposed MDNS issued on December 21, 2010: <ol style="list-style-type: none"> <li>1. Confederated Tribes of the Chehalis Reservation, January 10, 2011</li> <li>2. Black Hills Audubon Society, January 10, 2011</li> <li>3. The Law Offices of M. Patrick Williams, January 10, 2011</li> <li>4. Cairncross &amp; Hempelmann, Attorneys at Law, Representing Maytown Sand &amp; Gravel, January 10, 2011</li> </ol>
Attachment mm	Comment Letters from the following: <ol style="list-style-type: none"> <li>1. Tayloe Washburn, 3/9/10</li> <li>2. David Hays, 6/1/09</li> <li>3. Elizabeth A. Rodrick, 7/5/09</li> <li>4. Gail Olson, 11/12/09</li> <li>5. Richard Bellon, 11/20/09</li> <li>6. Richard Bellon, 12/15/09</li> <li>7. Charles Ellingson, 2/4/10</li> </ol>

8. WA Department of Ecology, 5/10/10
9. Knoll Lowney, 5/24/10
10. Sharron Coontz, 8/18/10
11. Sharron Coontz, 8/19/10
12. Sharron Coontz, three emails, 9/2/10
13. Donald Krupp, 9/2/10
14. Loralin Toney, 9/18/10
15. Tom and Wendy Rutledge, 9/19/10
16. Clara Jacobson, 9/19/10
17. Bill Miller, 9/19/10
18. Susan Finkel, 9/19/10
19. Lawrence M. Jacobson, 9/19/10
20. Jesse Hoffman, 9/21/10
21. Sharron Coontz, 9/20/10
22. Donald Krupp, 9/21/10
23. Diane Sonntag, 9/21/10
24. Sharron Coontz, 9/22/10
25. Raymond Jarlik-Bell, 9/22/10
26. Suzanne Maloney, 9/22/10
27. Sharron Coontz, 2 emails, 9/23/10
28. Jennifer Booker, 9/25/10
29. Marta Glenn, 9/26/10
30. WA Department of Ecology, 9/27/10
31. Mayra Pena, 9/27/10
32. Shauna Sharpes, 9/29/10
33. Walter R. Jorgensen, 9/29/10
34. Bill Hillman, 9/29/10
35. Carol Trasatto, 9/29/10
36. E.L. Johnson, 9/29/10
37. Trudy White, 9/30/10
38. Sherrie Marsh, 9/30/10
39. Rosie Finn, 10/1/10
40. Elisabeth Schenk, 10/1/10
41. Fred Greef, 10/1/10
42. Peta Henderson, 10/2/10
43. James Blakeley, 10/2/10
44. Pat Larson, 10/2/10
45. Joslynn Davidson, 10/2/10
46. Suzanne Miles, 10/3/10
47. Jennifer Booker, 10/3/10
48. Bob Jacobs, 10/3/10
49. Deb Reichelderfer, 10/3/10
50. WA Native Plant Society, Michael Marsh & John Browne, 10/5/10
51. Nature Conservancy, Patrick Dunn, 10/6/10
52. Donald Krupp, 10/6/10

53. Jeanette Gum, 10/6/10
54. Lindsay Smith, 10/6/10
55. Jena Hoehn, 10/6/10
56. Todd Howard, 10/6/10
57. Christie Vintilo, 2 emails, 10/6/10
58. Lisa Lantz, 10/7/10
59. Meryl Bernstein, 10/7/10
60. Dianne Conrad, 10/7/10
61. Patrick Williams, 10/7/10
62. Sharron Coontz, 10/7/10
63. John Kleinpell, 10/7/10
64. Patrick Dunn, 10/7/10
65. Doug Hopkins, 10/8/10
66. Mike Kain, 10/11/10
67. BHAS, Sam Merrill, 10/12/10
68. Donald Krupp, 10/14/10
69. Sharron Coontz, 10/18/10
70. Donald Krupp, 10/19/10
71. Mike Kain, 10/22/10
72. Donald Krupp, 10/25/10
73. John Hempelmann, 10/29/10
74. Michael Marsh, 11/1/10
75. John Hempelmann, 11/2/10, including emails of 10/25/10
76. Chanele Holbrook-Shaw, 11/4/10
77. WA Department of Ecology, 11/15/10
78. Michael Marsh and John Browne, 11/22/10
79. WA Dept of Ecology, 1/10/11
80. Linda Saunders, 2/1/11
81. WA Dept of Ecology, 2/2/11
82. BHAS, Debra Jaqua, 2/2/11
83. Sharron Coontz, 2/2/11, including attachments

Attachment nn      Color copies (8.5x11) of two color photos of public notice posted on-site

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|-----------|---|
| EXHIBIT 2 | <ol style="list-style-type: none"> <li>a.      MSG Witness and Exhibit List dated March 2, 2011</li> <li>b.      MSG Pre-Hearing Brief in SEPA Appeals, dated March 2, 2011</li> <li>c.      MSG Pre-Hearing Brief in SUP Amendment, March 2, 2011</li> </ol>                                     |
| EXHIBIT 3 | <ol style="list-style-type: none"> <li>a.      FORP Witness List dated, March 2, 2011</li> <li>b.      FORP Pre-Hearing Brief for SEPA Appeal, March 2, 2011</li> <li>c.      FORP Pre-Hearing Brief for Appeal of the County's Amendment of Special Use Permit 02-0612, March 2, 2011</li> </ol> |
| EXHIBIT 4 | <ol style="list-style-type: none"> <li>a.      Port Witness and Exhibit List, dated March 2, 2011</li> <li>b.      Port Pre-Hearing Brief Regarding SEPA dated March 2, 2011</li> </ol>   |

- c. Port Pre-Hearing Brief Regarding Amendment, dated March 2, 2011
- EXHIBIT 5
  - a. MSG Motion To Strike FORP'S Pre-Hearing SEPA Appeal Brief, dated for March 7, 2011
  - b. MSG Hearing Brief in SEPA Appeals, dated March 7, 2011
  - c. MSG Hearing Brief for SUP Amendment, dated March 7, 2011
- EXHIBIT 6
  - a. FORP Hearing Brief for the SEPA Appeal, dated March 7, 2011
  - b. FORP Hearing Brief Regarding SUP Amendment, dated March 7, 2011
- EXHIBIT 7
  - a. Port Amendment Hearing Brief and Motion to Dismiss/Exclude, dated March 7, 2011
  - b. Port Hearing Brief Regarding FORP'S SEPA Appeal and Motion to Dismiss FORP Issues 8-11, dated March 7, 2011
- EXHIBIT 8 November 4, 2005 email to Alison Moss from Jeff Fancher, including attachment: October 24, 2005 Re-Issuance of a Mitigated Determination of Non-Significance
- EXHIBIT 9 Resume of Charles T. Ellingson, LHG, Principal Hydrogeologist
- EXHIBIT 10 November 23, 2010 letter to Mike Kain, Nadine Romero, Steve Cortner, Randy Lloyd and John Hempelmann from Charles Ellingson and Inger Jackson, Pacific Groundwater Group
- EXHIBIT 11 MSG Appeal of MDNS, filed on February 9, 2011, with the following attachments:
  - a. January 19, 2011 MDNS
  - b. Correspondence to Mike Kain from John Hempelmann, dated January 10, 2011
  - c. Correspondence to Mike Kain from John Hempelmann, dated January 25, 2011
- EXHIBIT 12 FORP Appeal of MDNS, dated February 9, 2011 (with January 19, 2011 MDNS attached)
- EXHIBIT 13 November 24, 2010 email to Jason P. Kunz from John Hempelmann
- EXHIBIT 14 November 24, 2010 letter to Mike Kain from Stephan A. Kalinowski, Department of Fish & Wildlife
- EXHIBIT 15 August 31, 2010 Email from Cindy Wilson to Mike Kain, with attached forwarded email from Annie Szvetecv, Department of Ecology, dated August 27, 2010



- EXHIBIT 16 Maytown Sand & Gravel 2005 Special Use Permit, Technical Studies, Reviews and Approvals, Exhibit for Appeal Hearing SUPT-02-0612, March 7-9, 2011. Exhibit submitted by Garrison Resource Group, Inc.
- EXHIBIT 17 Resume of Roy L. Garrison, Garrison Resource Group, Inc.
- EXHIBIT 18 July 27, 2010 email from Kelly McAllister, Department of Transportation to Cindy Wilson
- EXHIBIT 19 July 27, 2010 email from Ann E. Potter, Department of Fish & Wildlife to Cindy Wilson
- EXHIBIT 20 Final Topography Map, Maytown Aggregates, Inc., March 1, 2011 by Garrison Resource Group, Inc.
- EXHIBIT 21 Summary of Extensive Technical Studies, Reviews and Approvals, created March 2, 2011 by Garrison Resource Group, Inc.
- EXHIBIT 22 Typical Wetland Creation Cross Section, Maytown Aggregates, Inc., February 25, 2011 by Garrison Resource Group, Inc.
- EXHIBIT 23 December 8, 2010 letter to Hearing Examiner from Sam Merrill, President, Black Hills Audubon Society
- EXHIBIT 24 Undated email to Mike Kain from Eric Erler, Capitol Land Trust
- EXHIBIT 25 August 2007 Port of Tacoma, Maytown Aggregates Surface Mine Reclamation Permit Application
- EXHIBIT 26 Curriculum Vitae of Francis Naglich, Ecological Land Services, Inc.
- EXHIBIT 27 Figure 4, Time Series Plot of Water Elevation – MSG Groundwater and Surface Water Stations, Pacific Groundwater Group
- EXHIBIT 28 Figure 3, Continuous Hydrographs for PP08 and WETA1, Pacific Groundwater Group
- EXHIBIT 29 Figure 5, Time Series Plot of Water Elevations – MT05, MT06, MT12, and PP08, Pacific Groundwater Group
- EXHIBIT 30 Effect of Mining Start Date and Monitoring Gap on Number of Groundwater Measurements
- EXHIBIT 31 Effect of Longer Monitoring Period

- EXHIBIT 32 Maytown Aggregates 2002 and 2005 Off Site Well Inventory
- EXHIBIT 33 December 31, 2009 Memorandum to Jack Hedge, Port of Tacoma, from Doug Kelly and Pony Ellingson, Pacific Groundwater Group
- EXHIBIT 34 Estimated Cumulative Cost of Water Monitoring Maytown Sand & Gravel
- EXHIBIT 35 Number of Water Measurements to be Collected in 5 Years of Monitoring – 2005 vs. 2011 Plan
- EXHIBIT 36 Power Point Presentation “First Update to the Commission, Preliminary Planning and Coordination, South Sound Logistics Center, Project No. E2619, Port of Tacoma, Port of Olympia”
- EXHIBIT 37 February 29, 2008 Memorandum to Rob Collins from Jay Stewart, Port of Tacoma
- EXHIBIT 38 Thurston County Development Services Nonresidential Permit # 08111469 issued October 16, 2008
- EXHIBIT 39 December 11, 2009 email to Jeff McCann from Mike Kain including attachments
- EXHIBIT 40 January 4, 2010 Memorandum to Michael Kain and Jeffrey Fancher, Thurston County from Tayloe Washburn and Steve Gillespie, Foster Pepper PLLC
- EXHIBIT 41 Written Testimony of Sharron Coontz including attachments, submitted March 9, 2011
- EXHIBIT 42 March 14, 2011 Board of County Commissioners Decision on Appeal of Project 2010102512, Five Year Review of SUPT-02-0612
- EXHIBIT 43 a. 2011 Maytown Sand and Gravel Groundwater and Surface Water Monitoring Plan, revised March 17, 2011 (clean version)  
b. 2011 Maytown Sand and Gravel Groundwater and Surface Water Monitoring Plan, revised March 17, 2011 (redline version)
- EXHIBIT 44 Memorandum from Mike Kain regarding March 17, 2011 revised water monitoring plan, dated March 21, 2011
- EXHIBIT 45 FORP's comments in response to March 17, 2011 revised water monitoring plan, dated March 28, 2011
- EXHIBIT 46 MSG comments in response to public comment at hearing, dated March 31, 2011
- EXHIBIT 47 Port comments in response to public comment at hearing, dated March 31, 2011

EXHIBIT 48 MSG Post-Hearing Brief, dated March 31, 2011

EXHIBIT 49 FORP Post-Hearing Brief, dated March 31, 2011<sup>3</sup>

EXHIBIT 50 Port Post-Hearing Brief, dated March 31, 2011

**The record also includes:**

- A. (FIRST) Pre-Hearing Order, issued January 6, 2011 (scheduling the hearing for March 7 and a second pre-hearing conference for February 15)
- B. FORP's Motion for Recusal of Hearing Examiner, dated February 14, 2011
- C. SECOND Pre-Hearing Order, issued February 16, 2011
- D. MSG's Response to FORP Motion to Recuse, dated February 18, 2011
- E. Port Response to FORP Motion to Recuse, dated February 18, 2011
- F. FORP's Reply to MSG and Port Responses, dated February 22, 2011
- G. Decision Denying Motion for Recusal, issued February 25, 2011
- H. FORP's Motion for Stay of the Hearing, dated March 4, 2011
- I. MSG's Response to FORP's Motion, dated March 4, 2011
- J. Port of Tacoma's Response to Motion, dated March 4, 2011
- K. THIRD Pre-Hearing Order (Denying Motion to Stay), issued March 4, 2011
- L. Post-Hearing Order Setting Submission Schedule, issued March 10, 2011

Based upon the record developed at the open record hearing, the Hearing Examiner enters the following findings and conclusions. The following findings are applicable to the SEPA appeals and the requested permits.

## **FINDINGS**

### **Introduction**

1. The instant SUP amendment would result in four changes to two conditions of SUPT-02-0612. Mining special use permit SUPT-02-0612 was approved on December 16, 2005, authorizing the extraction of 20.6 million cubic yards (cy) of sand and gravel over twenty years from a 284-acre mine consisting of eight mapped mine areas in a 497-acre project boundary. The SUP designated the mine area as Mineral Resource Lands of Long Term Commercial Significance. The approved reclamation plan would leave the eight excavated mine pits as lakes and wetlands, separated by upland, to serve as wildlife habitat and recreation space. The subject property is located southeast of the Maytown Road/Tilley Road intersection, south of Millersylvania State Park.<sup>4</sup> The proposed amendments relate to groundwater monitoring requirements established by conditions of

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<sup>3</sup> FORP submitted an attachment with its post-hearing brief, offering a document not previously included in the record of this matter. The Post-Hearing Order clearly identified all documents that were allowed to be submitted and prohibited submission of any others. FORP's attachment is not admitted.

<sup>4</sup> The subject property is a portion of Sections 1, 2, 11, and 12, Township 16 North, Range 2 West, W.M.; also known as Tax Parcel No. 12602340100. *Exhibit 1, page 2.*

the permit. No mining or significant earth disturbing activity has occurred on-site. *Exhibit 1, Attachment k, SUPT-02-0612 Findings and Conclusions, Exhibit 1, pages 2-3; Exhibit 1, Attachments p( Reclamation Sequence Map, and q (Reclamation Plan Approval, dated September 19, 2007); Exhibit 20; Exhibit 22*

#### Site Description

2. The area within the 497-acre project boundary is generally flat with some mounds in the eastern portion. It contains some areas of Douglas fir and Oregon white oak. Site vegetation is generally dominated by Scotch broom and non-native grasses. The Tacoma Rail Mountain Division rail line crosses the northern portion of the property east to west. The site is located 2.5 miles east of Interstate 5 (I5). Mine Areas 1 and 2 are north of the railroad tracks in the extreme northeast corner of the site. Mine Areas 3 and 4 border the native outwash prairie east of the site. Mine Areas 5, 6, 7, and 8 are located generally in the center of the project boundary, with Mine Area 7 extending furthest to the west. Aggregate stockpiles are planned along the rail line in the center of the site, and a large soil fill area is planned in the northwest portion of the site. *Exhibit 1, page 3; Exhibit 1, Attachment p.*
3. The subject property is located in an area that contains a number of unique and important habitats, including Beaver Creek, Allen Creek, native outwash prairie, Oregon white oak stands, and wetlands including a large wetland complex (Wetland A). Adjacent to the south of the site, Wetland A provides habitat for two federally listed endangered species: the Oregon spotted frog and *Howellia* (an aquatic plant), as well as other important species including the Olympic mud minnow. The mine project boundary and the eight mine areas were designed to exclude the creeks, wetland, stands of Oregon white oak, and identified native outwash prairie. *Exhibit 1, Attachment k SUPT-02-0612; Exhibit 1, Attachment l, Settlement Agreement.*
4. The subject property is zoned Rural Residential (R 1/20). The Applicant owns an area of forested hills and wetlands abutting the north mine project boundary. Also off-site to the northwest are two rural residences north of the rail line and approximately 1,300 acres of forestland. Property to the east and southeast is mounded prairie now owned by the Washington State Department of Fish and Wildlife (DFW). There is a rural residential subdivision approximately 2,000 feet east of the mine project boundary. Beaver Creek and Wetland A (on property also owned by DFW) are south of the project boundary. There is a rural residential subdivision approximately 2,000 feet from the mine boundary. Tilley Road abuts the subject property's west boundary. West of Tilley road is a rural residential subdivision about 1,800 feet from the mine boundary and additional forestland. *Exhibit 1, page 2; Exhibit 1, Attachment s, Updated Site Map.*

#### Procedural Background

5. At the time the mining permit was initially submitted, the 497-acre project area was part of a larger 1,613-acre parcel owned by Citifor. The Citifor acreage was located in the terminal moraine of a recessional outwash plain left behind by the Vashon Glacier. Before European settlement, the site was part of a large prairie characterized by Mima mounds, prairie habitat, creeks, wetlands, and stands of oak trees. After settlement, forest began to intrude into the prairie. Over time, portions of the subject property were used

for grazing, timber production, and industrial manufacturing. Approximately 700 acres in the north central portion of the Citifor acreage were used for industrial purposes including the manufacture and testing of artillery, concrete pipe, dynamite, and other explosives, for a period of 55 years beginning prior to WWII. In the mid-1990s, forested portions of the site were extensively logged. The industrial uses contaminated site soils and the underlying groundwater. *Exhibit 1, Attachment k, SUPT-02-0612; Exhibit 1, Attachment dd; Hedge Testimony.*

6. Through its agent, Citifor applied for a Thurston County special use permit to mine the interior of the site.<sup>5</sup> In the process of seeking the necessary state permits, Citifor entered into a Model Toxics Control Act (MTCA) Agreed Order with the Washington State Department of Ecology (DOE) requiring a remedial investigation and feasibility study (RI/FS) for the site. The RI/FS study area included the area subject to the mining application. *Exhibit 1, Attachment k, SUPT-02-0612.*
7. After completing State Environmental Policy Act (SEPA) review of the proposed mine/special use, the County issued a mitigated determination of non-significance (MDNS) on May 4, 2004. Black Hills Audubon Society (BHAS) appealed the MDNS. Subsequently, Citifor's agent negotiated a settlement (Settlement Agreement) of the MDNS appeal with BHAS and the Capitol Land Trust (CLT, together referred to as the conservation organizations). Several changes to the mining proposal resulted from the negotiated Settlement Agreement.<sup>6</sup> Upon review of the revised mining proposal, the County issued a revised MDNS on October 24, 2005. It was not appealed and became final on November 7, 2005. After a full public hearing, SUPT-02-0612 was approved on December 16, 2005. *Exhibit 1, Attachments k and l; Kain Testimony; Exhibit 40.*
8. After the December 2005 SUP approval, more than 800 acres of the Citifor acreage east and south of the mine site were sold to DFW. DFW purchased the land for conservation purposes, as it represents one of the largest intact native outwash prairies left in Washington. At the time of the sale, conservation organizations would have liked to purchase the entire 1,613-acre site, but they were unable to negotiate such a purchase. *Exhibit 1, Attachment k, SUPT-02-0612; Hedge Testimony; Dunn Testimony.*
9. The remaining Citifor acreage (754 acres), including the approved SUP, was sold in October 2006 to the Port of Tacoma (the Port). In conjunction with the Port of Olympia, the Port planned to develop the site as a rail-served logistics center. The logistics center project encountered resistance and the Port identified three potential alternative dispositions for the property: sale or lease to a mining operator; sale or lease to other

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<sup>5</sup> Allen & Company LLC acted as Citifor's agent. *Exhibit 1, Attachment k.*

<sup>6</sup> "The mine area was reduced to 284 acres, disturbed area was reduced to 497 acres, designated mineral lands were reduced to 284 acres, prairie buffers were expanded to 100 feet from the proposed 35 feet, four small oak groves were protected, the amount of gravel to be extracted over the life of the project was reduced by 6%, a 1000-foot long noise attenuation berm was added, the amount of fill dirt to be brought in was reduced by 50%, and the storage areas for the fill dirt and the recycled asphalt were moved farther away from the wetlands." *Exhibit 1, Attachment l.*

industrial developers; or sale for residential development. In perfecting its mining permit, the Port applied for the Department of Natural Resources (DNR) reclamation permit in January 2007, which was approved in September of the same year. *Hedge Testimony; Exhibit 25; Exhibit 36; Exhibit 37; Exhibit 1, Attachment q; Exhibit 40.*

10. The Port also applied for coverage under the Sand & Gravel General Permit, a national pollution discharge elimination system (NPDES) permit administered by the DOE in August 2007. As part of the NPDES permit, the Port was required by the Agreed Order with DOE to complete the RI/FS clean up begun by Citifor. From January 2007 through October 2008, the Port removed 20 million tons of contaminated soil and took other clean up actions as directed by DOE at a cost of nearly one million dollars. At the time of hearing, DOE had cleared six of the eight mine areas for mining. Mine Areas 5 and 8 were still under clean up order; the estimated cost of completing the required work is \$400,000.00. *Exhibit 1, Attachment d; Hedge Testimony.*
11. In 2008, the Port applied to Thurston County for a building permit to place a scale house near the rail line. The scale house was to contain an office for a single employee to run the scale. The building permit was approved October 16, 2008. The County subsequently notified the Port that construction and operations-related activities on-site pursuant to the building permit had tolled the three-year timeline in TCC 20.54.040(4)(a) and that SUP expiration was precluded. *Exhibit 38; Hedge Testimony; Exhibit 1, Attachment jj.*
12. On January 4, 2010, the Port requested permission to commence mining. By letter and memorandum dated February 16, 2010, the County notified the Port that some of the pre-mining conditions that remained to be satisfied (including conditions 6A and 6C) would require submittal of an application for SUP amendment, which would be decided administratively and appealable to the hearing examiner.<sup>7</sup> The Port initially appealed the determination that an SUP amendment was necessary, but that appeal did not proceed.<sup>8</sup> *Exhibit 1, Attachments c, x, and y.*
13. On April 1, 2010, the Port conveyed ownership of the mine site and SUP to the Applicant. Due to the structure of the purchase and sales agreement, the Port retained ownership interests in the property and the permit. They have remained involved in the County's processing of requests related to SUPT-02-0612. *Exhibit 1, Attachment b.*

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<sup>7</sup> The County's February 16, 2010 letter stated: "At this point, our analysis is that there are no unmet requirements that rise to the Hearing Examiner level to attain compliance." *Exhibit 1, Attachment x, letter.* Addressing groundwater monitoring compliance, the February 16, 2010 memorandum stated: "Such minor timeline change may be approved by staff upon submittal of an application for amendment. The timing for full establishment of that baseline compliance will be set during review of the amendment. This decision would be appealable to the Hearing Examiner." *Exhibit 1, Attachment x, memorandum, pages 4-5.*

<sup>8</sup> The March 2, 2010 appeal may have been withdrawn by letter dated July 1, 2010. *Exhibit 40; Exhibit 1, Attachment c; Exhibit 4.c, page 5, FN 2.*

14. On April 26, 2010, the Applicant MSG (together with the Port) submitted a request to amend six SUP conditions relating to: the freeway turn pocket (condition 5); timing and extent of water monitoring (conditions 6A and 6C); removal of a noise berm (condition 15); stormwater management (conditions 23, H, and I); and notification to off-site well owners (condition V). Notice of the amendment application was published and the County received voluminous comments. On May 6, 2006, the Applicant requested approval to begin construction of the 1,000-foot noise berm at the site entrance that is one of the pre-mining conditions. *Exhibit 1, Attachment b*. However, on June 17, 2010, County Staff notified the Applicant by letter that the six requested amendments rose above the level of administrative determination, would require a new SEPA checklist, and must be heard by the hearing examiner. The letter informed the Applicant that the request to begin berm construction would be held pending resolution of the amendment application. *Exhibit 1, Attachment bb*.
15. In July 1, 2010, MSG revised the original amendment application to request approval of amendments only for conditions 5, 6A, and 6C. The Applicant submitted an environmental checklist on August 24, 2010 and requested that its application for amendment submitted under protest<sup>9</sup> be fully processed. Finally, on October 29, 2010, the Applicant withdrew its request to amend condition 5. The instant request for SUP amendment addresses only conditions 6A and 6C. *Exhibit 1, Attachments c, d, e, and f*.
16. Pursuant to TCC 20.54.070(21)(e), SUPT-02-0612 was required to undergo five year review to determine if the mining operation was in compliance with conditions of permit approval. The Maytown Aggregates mine was the first in County history to undergo five year review prior to commencement of mining. The five year review hearing was held on December 6, 7, and 8, 2010. During the proceedings, the Applicant and the Port argued that the Examiner had authority to amend conditions 6A and 6C in the course of deciding five year review. However, there was public comment in opposition to such an outcome. Members of the public asserted that the County had advertised an SUP amendment proceeding and that they were not prepared to address amendment issues at the five year review hearing. Based on the expectation of a second proceeding that resulted from the notice of SUP amendment application, the Applicant requested that the Examiner not exercise the authority, if any, pursuant to five year review criteria to make the amendments, but rather to require the separate amendment proceeding. The December 30, 2010 Five Year Review Findings, Conclusion, and Decision concluded, among other items: that failure to comply with the deadlines established in conditions 6A and 6C did not terminate the SUP; that the Applicant was in compliance with all permit conditions except 6A and 6C; and that a separate Amendment hearing would be required to address compliance with the two conditions. *Exhibit 1, Attachments f, i, and j; Exhibit 42; Exhibit 1, page 13; Exhibit 1, Attachment ll.4; Exhibit 42*.

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<sup>9</sup> Both the Port and MSG have argued that the February 16, 2010 County determination that formal amendment application was not required under Thurston County Code, and later, argued that the County was bound by its February 2010 decision that amendments, if required, could be decided administratively. All subsequent applications for amendment have been submitted under protest. *Exhibit 1, Attachments d and f; Hempelmann Comments; Washburn Comments*.

17. On March 3, 2011, the Thurston County Board of Commissioners (BOCC) heard appeals of the Five Year Review Decision filed by BHAS and FORP. One issue on appeal was whether SUPT-02-0612 should be terminated due to the failure of owners to comply with the timing of water quality monitoring required by conditions 6A and 6C. The BOCC upheld the hearing examiner's conclusion that the SUP should not be terminated for failure to satisfy 6A and 6C's deadlines. The Board remanded the Five Year Review Decision for further development on other issues related to critical areas. The remand did not require further proceedings related to water monitoring. *Exhibit 42.*

Proposed SUP Amendments

18. The proposed amendments would change conditions 6A and 6C, originally found in the October 24, 2005 MDNS, which made conditions of the SUP by condition A. The original conditions 6A and 6C stated:

6. The applicant shall adopt the Maytown Aggregates Groundwater Monitoring Plan (Appendix B and Revision 2 of the Groundwater Monitoring Plan, dated September 26, 2005), with the following provisions:

A. Prior to any mining activity and within one-year of final issuance of the Special Use Permit (as used in this MDNS "final issuance" means the issuance of the permit and the resolution of any appeals) the operator will field verify off-site supply wells in the following areas:

1. West half of Section 6, T16N R1W
2. Northwest quarter of Section 7, T16N R1W
3. Southwest quarter of Section 2, T16N 6 R2W
4. Northeast quarter of Section 10, T16N R2W
5. South one-half of Section 11, T16N R2W
6. South one-half of Section 12, T16N R2W

....

6C. Pursuant to the Groundwater Monitoring Plan, to avoid repeated access to the private wells identified in the proceeding conditions, seventeen (17) monitoring wells shall be established within and surrounding the mine. The wells shall monitor water levels, temperature, and water quality, including measurement of background conditions, and by documenting the construction and performance of off-site water supply wells prior to mining. Four well stations are specific to NPDES monitoring of the process water. The other 13 stations serve the purposes of monitoring for protection of off-site wells and wetlands. The operator shall survey these monitoring wells: (a) six times yearly; or (b) four times yearly if data loggers are installed in the monitoring wells. The surveys shall begin within 60 days of the final issuance by the County of the Special Use Permit. The monitoring data shall be submitted to Thurston County Development Services Department, Washington State Department of Ecology, and the Washington State Department of Fish & Wildlife every two months or quarterly if data loggers are installed in the monitoring wells. The operator will summarize the mining and water monitoring data in a report to the County every



two years. The groundwater monitoring reports shall be prepared by a Washington State Licensed Hydrogeologist.

*Exhibit 1, Attachments h and k; Exhibit 1, pages 5-6 (emphasis added).*

19. As required by the preamble of condition 6, the then-Applicant adopted the 2005 Groundwater Monitoring Plan (2005 Plan). However, the one-year deadline for completing verification of off-site supply wells was not met. The required verification of off-site supply wells was submitted in December 2009. *Exhibit 1, page 5; Kain Testimony; Exhibit 32; Exhibit 33.*
20. Discrepancies between the language of condition 6C and the language of the 2005 Plan led to substantial confusion with respect to compliance with the condition. First, as stated by the author of the 2005 Plan, the 17 monitoring stations were not all intended to be wells; some are required to be surface water monitoring stations.<sup>10</sup> Second, one of the 17 stations was intended to be monitored after commencement of mining because it was required to monitor a process water pond, which won't contain process water until gravel processing has begun. Third, there was significant disagreement regarding what parameters were required to be monitored at which stations how frequently pursuant to the 2005 Plan. Fourth, the "within 60 days of SUP issuance" requirement of condition 6C was not found in the 2005 Plan. *Exhibit 10; Ellingson Testimony; Romero Testimony; Exhibit 1, pages 5-7; Exhibit 1, Attachments m, u, aa, and cc, Romero memoranda.*
21. Because the MDNS mitigation measures were adopted as conditions of SUP approval, Department Staff determined: that the Applicant was out of compliance with conditions 6A and 6C due to failure to perform the required monitoring by the specified deadlines; that the only means of bringing the permit into compliance with these conditions is to obtain approval of an SUP amendment; and that the required SUP amendment is an action subject to environmental review pursuant to SEPA. *Exhibit 1, page 5-6; Kain Testimony; Exhibit 1, Attachments ff and gg.*
22. Disputing that a hearing examiner amendment to the SUP is necessary to obtain compliance with the conditions, the Applicant requested the instant SUP amendment under protest in order to mitigate delay. The proposed amendment would: 1) change the timing for field verification of off-site supply wells to require that it be done "prior to the commencement of mining"; 2) change the timing for commencement of background water quality monitoring to be consistent with the 2011 Plan; 3) clarify the process and parameters for water monitoring; and 4) set the number of water monitoring stations to 16 for the testing prior to commencement of mining, with the 17<sup>th</sup> station to be installed and monitored when the process water pond is built. *Exhibit 43.a; Exhibit 1, Attachments b, c, d, e, and f, Application Narratives.*

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<sup>10</sup> Surface water is not monitored by drilling a well. *Ellingson Testimony.*

Environmental Review of the SUP Amendment Application

23. The County's SEPA Responsible Official determined that the requested amendment would affect the environment through the actions involved in the water monitoring it would establish, making it an "action" requiring environmental review pursuant to the SEPA regulations. The County issued a mitigated determination of non-significance (MDNS) on January 19, 2011. As stated in the MDNS, the County's threshold determination was based on information included in (but not necessarily limited to) the following documents:

- Environmental Checklist, dated August 26, 2010
- Expanded environmental checklist, dated July 2002, with associated documents
- Supplement to expanded environmental checklist, dated September 2005
- Hearing Examiner Decision SUPT-02-0612, dated December 16, 2005
- MDNS issued October 24, 2005
- Vicinity Map, dated August 22, 2007
- Mining area map, dated November 23, 2009
- Application narratives dated: April 22, 2010, July 1, 2010, August 24, 2010, October 29, 2010, and December 13, 2010
- Site Plan, dated October 5, 2010
- Groundwater Monitoring Plan, dated September 26, 2005 (the 2005 Plan)
- Groundwater and Surface Water Monitoring Plan, dated January 18, 2011
- County Hydrogeologist Nadine Romero Memoranda dated: February 9, 2010, June 8, 2010, and November 10, 2010
- DOE correspondence dated: May 10, 2010, September 27, 2010, and October 7, 2010
- Settlement Agreement, dated October 5, 2005
- Department Correspondence to John Hempelmann and Tayloe Washburn, dated June 17, 2010
- WAC 197-11
- Department Site Visits, dated January 14, 2010, June 23, 2010, and October 7, 2010
- Public comment in response to Notices of Application for SUP Amendment, notices dated September 8, 2010 and September 17, 2010
- Comments of the Confederated Tribes of the Chehalis Reservation, dated January 10, 2011
- BHAS Comments, dated January 10, 2011
- FORP Comments, dated January 10, 2011
- MSG Comments, dated January 10, 2011
- Five Year Review proceedings in December 2010

*Exhibit 11.a, January 19, 2011 MDNS; Exhibit 1, page 10; Kain Testimony.*

24. The environmental checklist submitted by the Applicant, dated August 23, 2010, addressed only those elements of the environment that could be impacted by the proposed SUP Amendments: groundwater (3b) and stormwater (14).<sup>11</sup> Because of the limited scope of the proposed amendments and because the County had so much other information related to the project, the County accepted the 2010 environmental checklist as submitted. *Kain Testimony; Exhibit 1, Attachment g; Exhibit 1, page 13.*
25. In determining that the proposed SUP amendment was an "action" that triggered SEPA review, the Department considered the following (among other items): the proposed amendments relate to water monitoring, one of the most important environmental issues with the special use; the conditions sought to be amended were originally proposed through the SEPA process; and review of the proposed changes opened the issue of water monitoring for further consideration. Testimony at the December 2010 Five Year Review hearing revealed the extent of confusion about the requirements of the 2005 Plan. *Exhibit 1, pages 5, 10-11; Kain Testimony.*
26. As mitigation for the proposed SUP amendments, the 2011 MDNS required the Applicant to adopt and implement the new water monitoring plan. The MDNS contained the following language intended to amend conditions 6A and 6C:

6. The applicant shall adopt in writing a revised Groundwater Monitoring Plan, to replace the 2005 Groundwater Monitoring Plan, that more clearly sets out the water monitoring requirements for the proposed mineral extraction project as interpreted by the Thurston County Hydrogeologist. That document, entitled Groundwater and Surface Water Monitoring Plan, dated January 18, 2011 has been drafted by the applicant and approved by the Thurston County Environmental Health Division pursuant to TCC 17.20.210. That Plan was incorporated as a part of the MDNS.

6A. Prior to the commencement of mining the operator will field-verify off-site supply wells in the following areas:

1. West half of Section 6, T16N R1W
2. Northwest quarter of section 7, T16N R1W
3. Southwest quarter of Section 2, T16N R2W
4. Northeast quarter of Section 10, T16N R2W
5. South one-half of Section 11, T16N R2W
6. South one-half of Section 12, T16N R2W

6C. The Groundwater and Surface Water Monitoring Plan dated January 18, 2011 shall set out and control the water monitoring procedures for the life of the subject mine. The Plan resolves the discrepancies between the 2005 Groundwater Plan and the original language of MDNS condition 6C, and sets

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<sup>11</sup> The environmental checklist was completed when the Applicant still sought amendment of condition 5, related to the construction of a turn pocket for the I5 off-ramp at Maytown Road. *Exhibit 1, Attachment g.*

new deadlines for completion of background water quality monitoring. The original language of condition 6C is deleted.

*Exhibit 11.a, January 19, 2011 MDNS.*

Changes to Water Monitoring Requirements

27. The 2005 Plan did not establish a minimum duration for the collection of pre-mining monitoring data. *Exhibit 1, Attachment m; Ellingson Testimony; Exhibit 10.* Correspondence between the County and the Applicant in 2004 supports the assertion that there was no intention to set a minimum duration for pre-mining monitoring.

There are no hard and fast rules about how many measurements should be in the background data set; however, the more data that are included, the better will be our ability to identify mining effects in the "foreground" (period of mining). To include as much data as possible in the background data set, we recommend that the background period include all data prior to mining below the water table south of the railroad tracks.

*Exhibit 1, Attachment ff, Comments of Pacific Groundwater Group to the County, April 23, 2004.* The Applicant consultants who participated in preparation of the environmental documents for the 2005 proceedings recalled that mining was believed to be approximately 12 to 18 months off at the time of hearing. *Exhibit 1, Attachments ff and gg; Garrison Testimony; Naglich Testimony.*

28. Department Staff determined that there is nothing in the record linking 6A's one-year deadline or 6C's 60-day deadline to environmental issues or concerns. The staff member who drafted the MDNS conditions, Tony Kantas, testified that he did so in concert with counsel for the then-Applicant, relying on the available studies and reports. Although he couldn't recall a specific reason that those deadlines were chosen, he testified it was possible they had come from a previous SEPA review. Mr. Kantas testified he did not intentionally add new requirements beyond those of the 2005 Plan. Department Staff submits that the tight deadlines were imposed because, at the time of MDNS issuance, mining was believed to be imminent. *Exhibit 1, page 5-6; Kain Testimony; Kantas Testimony; Exhibit 8.*
29. Scientists for the County, the Applicant, and DOE indicated that the failure to comply with the deadlines in conditions 6A and 6C resulted in no environmental harm. *Romero Testimony; Ellingson Testimony; Exhibit 1, Attachment dd.*
30. When the Applicant sought to bring the permit into compliance with the requirements of 6A and 6C, the Department sought review of the water monitoring requirements of the 2005 Plan by the County hydrogeologist, Nadine Romero. The 2005 Plan called for monitoring to establish "background" conditions. Applicant witness and author of the

2005 Plan, Charles "Pony" Ellingson<sup>12</sup>, testified that the only testing parameters implied in the use of the word background in the original plan were water temperature and water level. In contrast, Ms. Romero interpreted the use of the word background as a hydrogeological term of art that encompasses more than the two parameters suggested by Mr. Ellingson. In an internal memorandum dated February 19, 2010, Ms. Romero stated:

Generally, we require any facility that can have a potentially significant impact to an aquifer both in terms of water quality and hydrologic budget dynamics to monitor for water quality parameters and hydraulic head (elevation). We want to establish ambient or background aquifer conditions including basic geochemistry and contaminant concentrations and determine ground water flow direction. First we want to know the natural ground water chemistry as controlled by major cations and anions (Ca, Mg, Na, K, Mn, Fe, bicarbonate, sulfate, nitrate, chloride) and other water quality indicator parameters such as total dissolved solids, temperature, specific conductivity, pH, and dissolved metals. In addition, we require a background sampling of organic volatiles and semi-volatiles. ... At least two years of ground water sampling, semi-annually, should be performed [consistent with] Appendix I, II, and III... .

*Exhibit 1, Attachment aa.* Attached to the memo were the three appendices listing the intended volatile organic, semi-volatile organic, and dissolved metal/conventional constituents testing parameters. *Exhibit 1, Attachment aa.*

31. The February 19, 2010 Romero memorandum required testing for approximately 160 parameters that were not specified in the 2005 Plan. The Applicant objected to the County adding new or additional testing parameters because: a) the 2005 Plan was approved, is final, and may not be added to, and b) mining does not use the extensive list of compounds they would be required to test pursuant to the additional parameters. *Ellingson Testimony; Exhibit 10.*
32. Given the site's history of extensive contamination from historical industrial uses, testing for the additional County parameters is necessary to determine whether operations contribute to the release of pre-existing contaminants into groundwater. *Romero Testimony; Exhibit 1, Attachment dd.*
33. Desiring to commence mining, the Applicant began the required additional parameter testing in March 2010 and agreed to complete the second year of testing under protest. *Ellingson Testimony; Exhibit 10.*
34. In the wake of the December 2010 Five Year Review hearing, Mr. Ellingson, Ms. Romero, and Department Staff jointly developed a new Groundwater and Surface Water Monitoring Plan (the 2011 Plan). The 2011 Plan, dated January 18, 2011, does the following: changes the timing for commencing field verification of off-site wells and for commencing water monitoring; adds additional water quality parameters beyond those

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<sup>12</sup> See Exhibit 9.

required in the 2005 Plan; clarifies that the 17 monitoring sites are a combination of wells and surface water stations, clearly identifying the purpose of each; and clarifies that the 17th station will be established once the process water pond is constructed and monitored when it contains process water. As compared to the 2005 Plan, the 2011 Plan requires an additional year of ground water monitoring before mining could begin. The County hydrogeologist testified that the 2011 Plan addresses all contingencies necessary to protect both the operator and the surrounding land uses. *Exhibit 1, Attachment ee; Romero Testimony.*

35. Over a five year period, the total number of measurements that would be taken under the 2011 Plan is nearly five times greater than the total number of measurements taken over five years pursuant to the 2005 Plan. *Exhibit 35; Ellingson Testimony.*
36. The County and Applicant hydrogeologists agreed that there is currently much more pre-mining data than was required by the 2005 Plan and that at the time of the instant hearing, there was sufficient pre-mining data gathered to allow mining to commence. *Ellingson Testimony; Romero Testimony; Exhibit 10.*
37. Through the course of testimony at the instant hearing, hydrogeologists for both the Applicant and the County discovered confusing terms and organizational choices in the January 18th 2011 Plan. Prior to the close of testimony, the Applicant and County jointly requested to supplement the record with a revised final version of the 2011 Plan that would eliminate the confusions illuminated during testimony. The requested changes were clerical and organizational in nature and were intended to avoid confusion in future interpretation of the Plan given the unknown date when mining will commence. The record was held open for submission of a revised plan (both a redline copy showing the exact changes and a clean copy of the final document). Because the Applicant was to submit the revised document, the record was also held open for comments from the County to indicate their review and approval of the final version. In addition, members of the public who participated at hearing were invited to submit comments on the changes to the January 18, 2011 Plan. *Ellingson Testimony; Romero Testimony; Exhibit 43.a; Exhibit 43.b.*
38. Both versions of the revised plan, dated revised March 17, 2011, were timely submitted. The redline version (43.b) shows the following changes to the January 18, 2011 Plan: corrected page references; elimination of the terms "background" and "foreground" where they were confusing; clarification of the rationale and the nature of the additional water quality parameters required by the County starting in 2010 and into the future; a revised date of March 17, 2011; and other organizational changes that clarified the intent without altering the substance of the January 18, 2011 Plan. The 2011 Plan in the record at Exhibit 43.a is the final version of the proposed water monitoring plan for the SUP amendments. *Exhibits 43.a and 43.b.*
39. The 2011 Plan clarifies that the process water pond will be constructed as required and will not be monitored until the operator begins processing aggregate; therefore there can

be no “background (pre-mining) monitoring” of the 17th station (labeled as station G-1). *Exhibit 42.a, page 9.*

40. Table 2 of the 2011 Plan lists each station with a unique name, and Figure 1 shows where each is located on the ground. Table 2 clearly identifies: whether each site is a station or well; whether it is included in the NPDES permit monitoring scheme or is part of the Applicant's 2005-created perimeter monitoring scheme; and which parameters were or will be tested in which time frame. The final version of the 2011 Plan included a contingency that will guide monitoring in the event that mining does not commence in 2011; this reflects the fact that the County's additional water quality parameters must be monitored for two years prior to mining to establish the necessary background data and then must be monitored for the life of the mine through "post closure". If litigation in this matter is protracted, there may be a time after the two years of background data is complete before mining starts. *Exhibit 43.a, Table 2.*
41. In the 2011 Plan, the Applicant and County have reached agreement as to the additional water quality parameters that apply to the mine site. The background monitoring parameters tested starting in March 2010 consisted of a broad suite of general geochemical and pollution-identification parameters (Tables 1 and 2). Beginning in 2011, a more focused suite of parameters used at other County gravel mines, with modifications specific to this site, would be monitored pursuant to the 2011 Plan. *Exhibit 42.a, page 7.*
42. Per the Post-Hearing Order, the Department reviewed the revised March 17th 2011 Plan and commented that it corrects the confusion in the January 18th 2011 Plan without substantively altering the January 18th plan. The March 17, 2011 revisions do not alter the issuance of the 2011 MDNS and do not change the County's recommendation of SUP Amendment approval. *Romero Testimony; Kain Testimony; Exhibit 44.*

#### How the Proposed Amendments Affect the Information Available

43. The existing water monitoring data is summarized as follows. Monitoring of some stations began as early as 2002 and then halted until the end of 2003. Monitoring was conducted at most stations in the 2005 Plan (excluding the process water pond) from the end of 2003 through the beginning of 2006.<sup>13</sup> There is a period of 12 to 18 months between the beginning of 2006 and January 2008 during which no water monitoring was conducted. Two of the wells in the 2005 Plan were not drilled until after 2008.<sup>14</sup> Aside from the process water pond, all other stations identified in the 2005 Plan were installed and monitored as of March 2009. By March 2010, there was one complete year of data required by the 2005 Plan. As of March 2011, there was one complete year of 2005 Plan data plus the additional County parameter data. *Ellingson Testimony; Exhibit 27; Romero Testimony.*

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<sup>13</sup> This segment of the data set predates permit approval. *See Exhibit 27.*

<sup>14</sup> MT 12 was drilled in late 2009, and MT13 was drilled in March 2010. *Ellingson Testimony.*

44. The Applicant's hydrogeologist testified that it is not "continuous" data that is more important, but rather the total number of measurements. Even with the 12 to 18 months of no data, if mining were to start immediately, there would still be twice as much data available than there would have been had mining started in 2007 and water monitoring began the day after SUPT-02-0612 was approved. *Exhibit 31; Ellingson Testimony*. Mr. Ellingson prepared a graphic demonstrating the statistical notion of the "confidence interval" that shows that the significance of each monitoring event decreases as the total number of measurements increases. Another graphic demonstrates that water levels in the various stations track each other on nearly parallel lines, allowing fairly confident extrapolation in the event of a missing measurement. *Exhibit 29; Exhibit 31; Ellingson Testimony*.
45. In its SEPA appeal, FORP argued that the 12 to 18 months of data missing between early 2006 and January 2008 endangers federally listed *Howellia* and the Oregon spotted frog, because many years of continuous monitoring were contemplated when the Settlement Agreement was negotiated. FORP asserted that the SUP amendment has the effect of retroactively approving this gap in data collection, which gap - they asserted - harms the environment. FORP argued that the Conservation Organizations cannot complete the off-site biological monitoring that the Settlement Agreement contemplated in the absence of that 12 to 18 months of data. *Coontz Testimony; Exhibit 41; FORP briefing*.
46. In support of its arguments, FORP offered testimony from Patrick Dunn, Director of the South Sound branch of The Nature Conservancy (TNC). Mr. Dunn testified that TNC had hoped to purchase the mine site for conservation and that the group had participated in the negotiations that led to the Settlement Agreement (although he had not personally been involved). He noted the site is desirable because of its restoration value and its proximity to the DFW land and its suite of rare, sensitive habitats. Mr. Dunn expressed concerns about the loss of biologic monitoring data due to the delay in funding of the conservation fund established via the Settlement Agreement. He stated his concerns were based on the fact that a longer time series of biological data would improve the understanding of natural conditions on-site, making it easier to determine if later variations in populations are caused by mining impacts. To his understanding, the Settlement Agreement did not establish a minimum or optimal amount of baseline data needed to adequately monitor the effects of the mine on water dependent species in Wetland A. *Dunn Testimony*.
47. Mr. Dunn testified that he had not personally reviewed the proposed SUP amendments and was not aware of the details of the 2011 Plan. After hearing the testimony of other witnesses, Mr. Dunn gave the opinion that the 2011 Plan did not sound like it would result in adverse impacts on the species of concern. *Dunn Testimony*.
48. Wetland A is a relatively stable wetland system that is both ground and surface water fed. Existing data shows no major changes in its hydrology between 1995 and 2002. Beavers have more impact on Wetland A hydrology than any other single factor. One year of pre-



mining data is a sufficient quantity to understand the impacts to Wetland A that could result from mining. *Naglich Testimony; Exhibit 28; Exhibit 29.*

49. Mr. Dunn agreed with both the County and Applicant hydrogeologists that at least a year would pass after mining penetrates the water table before the effects of mining could reach down gradient Wetland A, due to the speed with which groundwater travels on-site. *Dunn Testimony; Romero Testimony; Ellingson Testimony.*

Site Evaluation Prior to 2005 Permit Issuance

50. In its SEPA appeal, FORP argued that new evidence is available that shows critical areas were overlooked on-site during the environmental review that led up to the 2005 issuance of SUPT-02-0612. They argued that this new information is evidence of lack of material disclosure or misrepresentation on the part of the then-Applicant, which - they asserted - is grounds for reopening the 2005 MDNS for review. In support of their claim of new evidence, they offered the testimony of one County employee and called one of the Applicant's principle environmental consultants as a witness. They offered correspondence from individuals who claimed to have been excluded from the property during the review leading up to the 2005 hearing. The argument is essentially that there were critical areas that existed on-site that the Applicant, either by omission or intentional misrepresentation, omitted from review which should have been protected when SUPT-02-0612 was reviewed and issued. *Wilson Testimony; Garrison Testimony; Exhibits 13, 14, 15, 18, 19, 23, and 24.*
51. The Applicant offered testimony of two of the principal consultant scientists who prepared the data on which the 2005 SUP was based. Both testified with great detail about the methods they used to review the site. Mr. Garrison testified in detail about the team of scientists hired to survey the site's critical areas and described tours of the site in which members of the Conservation Organizations and DFW staff participated. Specifically with regard to Mine Area 1, Mr. Garrison testified that he personally reviewed every square yard of it, walking it at least a half dozen times specifically looking for prairie habitat and other critical areas. Mr. Naglich testified that his familiarity with the site dates back to mid-1990s, shortly after it was logged. Mr. Naglich testified he is confident there was no seasonal stream that was missed in Mine Areas 1 and 2. He stated that Mine Area 1 was not native outwash prairie when he reviewed it; it was dominated by non-native grasses and there was not a dominance of prairie species. *Garrison Testimony; Exhibits 16, 17, 20, 21, 22, and 25; Naglich Testimony; Exhibit 26.*

General Findings

52. Written notice of the public hearing was sent to all property owners within 2,600 feet of the site, sent to all other known interested parties, and posted on the County's webpage on February 22, 2011. Notice of hearing was published in The Olympian and The Nisqually Valley News on February 25, 2011 and posted on-site on February 28, 2011. *Exhibit 1, page 4; Exhibit 1, Attachments a and nn.*
53. Public comments received in response to notice of SUP amendment application included the following concerns about the amendment: modification to SEPA could allow

industrial development of the site; none of the protections imposed in the original SUP process should be removed in a less public process; requests to revoke the SUP because of noncompliance; new information about critical areas on-site; request to reopen the 2005 MDNS to "correct erroneous information"; impacts of mining would be too significant on Millersylvania State Park and surrounding rural development; the incomplete 2011 environmental checklist; urging that no changes be allowed to the Settlement Agreement; concern about loss of prairies in the area; lack of material disclosure in 2005; request for EIS; concern that the environmental information relied on is outdated; and other concerns. *Exhibit 1, pages 7-9; Exhibit 1, Attachment mm.* The majority of concerns expressed related to mining and were did not address the specific proposed amendments. Some of the comments that do specifically address the amendment assert without providing authority that the monitoring deadlines should not be changed because they were "established by environmental experts" (Attachment mm.15) and "put in place for a reason" ( Attachment mm.18). *Exhibit 1, Attachment mm.*

54. During the SEPA comment period, the Confederated Tribes of the Chehalis Reservation (the Tribes) submitted comments the issuance of the MDNS in response to the missed water monitoring deadlines. The Tribes asserted that they had not been requested to submit information in the original hearing on SUPT-02-0612. In response, the Department made the Tribes a party of record. The Tribes did not appeal the 2011 MDNS and did not participate in the public hearing on the SUP amendment despite notice. According to Department Staff, archeological survey of the site was conducted by the owner and further study is required in a northern/central portion of the property. The area requiring further study has been field marked. *Kain Testimony; Exhibit 1, Attachment ll.1.*
55. BHAS submitted a letter opposing any amendment to conditions 6A and 6C asserting: "BHAS believes that changes cannot be made to an existing legal settlement agreement, or to a MDNS and Special Use Permit to which it led.... [A]ny changes to the MDNS would require the withdrawal of that document and a new environmental investigation of the site. This process would include all previously interested parties." *Exhibit 1, Attachment mm.67.*
56. BHAS's concern was echoed by FORP and other members of the public, who expressed the opinions that the amendments to groundwater monitoring conditions would violate the Settlement Agreement and that the conservation organizations should have been consulted about the proposed water monitoring amendments. FORP submitted the opinion that the timing of payment into the conservation fund was not consistent with the terms of the Settlement Agreement.<sup>15</sup> *Exhibit 1, Attachment mm; Exhibit 41; Coontz Testimony.*

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<sup>15</sup> The Examiner notes that FORP did not exist at the time the Settlement Agreement came into existence, is not a party to the agreement, and likely does not have standing to assert the rights of the conservation organizations that were party to the agreement.

57. Further public comment at the hearing urged consideration of the sensitivity of the site and requested that the correct procedures be followed to ensure reliable protection of critical areas and water supplies. *Bernstein Testimony.*
58. Negotiations of the Settlement Agreement included discussions of the potential for impacts to species of concern from hydrologic changes caused by the mine. However, the Settlement Agreement contained no provisions that sought to control the content of the project's water monitoring program. Instead, the agreement established a conservation fund which the Conservation Organizations could use to conduct biological monitoring of species of concern at sites down gradient from the mine (at their option - it was not the only possible use for the funds). *Exhibit I, Attachment j.*
59. SUPT-02-0612 condition T states: "Any expansion or alteration of this use will require approval or a new or amended Special Use Permit. The [Director] will determine if any proposed amendment is substantial enough to require Hearing Examiner approval." *Exhibit I, Attachment k.*
60. The Department recommendation approval of the SUP amendment with conditions. *Exhibit I, page 14; Kain Testimony.*

## **CONCLUSIONS**

### **Jurisdiction**

The Hearing Examiner has jurisdiction to decide this Special Use Permit application under Sections 2.06.010 and 22.62.020 of the Thurston County Code, and Section 36.70.970 of the Revised Code of Washington. The Examiner is authorized to decide appeals of environmental threshold determinations made pursuant to the State Environmental Policy Act pursuant to TCC 2.06.010(E) and TCC 17.09.160(A).

### **Criteria and Standards for Review**

#### ***SEPA Appeal***

The State Environmental Policy Act (Chapter 43.21C RCW or "SEPA") specifies the environmental review procedures the County must follow for proposals that may have an impact on the environment. One purpose of SEPA is to "insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations." Every proposal that may impact the environment (unless it is exempt from the act) must undergo some level of environmental review. *RCW 43.21C.030 (b).*

The SEPA threshold determination is a determination as to whether a proposal is "likely to have a probable significant adverse environmental impact." *WAC 197-11-330.* If the responsible official determines that a proposal will not have a probable, significant adverse environmental impact, a Determination of Non-Significance (DNS) is issued. If the responsible official determines that a proposal *will* have a probable, significant adverse environmental impact, a Determination of Significance (DS) is issued and an Environmental Impact Statement (EIS) must

be prepared. SEPA provides a process in which a Mitigated Determination of Non-Significance (MDNS) may be issued to address identified probable significant adverse environmental impacts so that an EIS need not be prepared. *WAC 197-11-350*.

“Significant” as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on the environment. Significance involves context and intensity and does not lend itself to a formula or a quantifiable test. *WAC 197-11-794*. Several marginal impacts when considered together may result in a significant adverse impact. *WAC 197-11-330(3)(c)*.

“Probable” means likely or reasonably likely to occur. The word probable is used to distinguish likely impacts from those that merely have a possibility of occurring, but are remote or speculative. *WAC 197-11-782*.

The lead agency must make its threshold determination “based upon information reasonably sufficient to evaluate the environmental impact of a proposal.” *WAC 197-11-335*.

In deciding whether to require an EIS, the lead agency must consider mitigation measures that the agency or Applicant will implement as part of the proposal, including any mitigation measures required by development regulations, comprehensive plans, or other existing environmental rules or laws. *WAC 197-11-330(1)(c)*. The lead agency’s reliance on existing laws and plans to mitigate some of the environmental impacts of a project need not be disclosed in the MDNS. *Moss v. City of Bellingham*, 109 Wn. App. 6, 21-23 (2001). Use of mitigation to bring a project into compliance with SEPA, without promulgation of an EIS, has been viewed favorably by Washington Courts. *Anderson v. Pierce County*, 86 Wn. App. 290, 303 (1997).

Clear error is the standard of review applicable to substantive decisions under SEPA. *Cougar Mt. Assocs. v. King County*, 111 Wn.2d 742, 747, 765 P.2d 264 (1988). The determination by the governmental agency is clearly erroneous only if the reviewing tribunal is left with “the definite and firm conviction that a mistake has been committed.” *Id.* at 747 (quoting *Polygon Corp. v. Seattle*, 90 Wn.2d 59, 69, (1978)).

The Hearing Examiner may consider environmental information presented after issuance of the threshold determination in deciding the appeal. The purposes of SEPA are accomplished if the environmental impacts of the development are mitigated below the threshold of significance, even if the mitigation is not identified in the SEPA document. *Moss v. City of Bellingham*, 109 Wn. App. 6, 25 (2001).

The burden of proof is on the Appellant to show that the proposal will have probable, significant adverse environmental impacts. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 719, 47 P.3d 137 (2002).

The procedural determination of the County's Responsible Official shall be accorded substantial weight in appeals. *TCC 17.09.160.1.2; TCC 17.09.160.S; RCW 43.21C.075(3)(d); RCW 43.21C.090*.

### ***SUP Amendment Criteria for Review***

The Hearing Examiner may approve an application for a Special Use Permit only if the following general standards set forth in TCC 22.56.050 are satisfied:

- A. Plans, Regulations, Laws. The proposed use at the specified location shall comply with the Tumwater Joint Plan, and all applicable federal, state, regional, and Thurston County laws or plans.
- B. Underlying Zoning District. The proposed use shall comply with the general purposes and intent of the applicable zoning district regulations and subarea plans. Open space, lot, setback and bulk requirements shall be no less than that specified for the zoning district in which the proposed use is located unless specifically provided otherwise in this chapter.
- C. Location. No application for a special use shall be approved unless a specific finding is made that the proposed special use is appropriate in the location for which it is proposed. This finding shall be based on the following criteria:
  - 1. Impact. The proposed use shall not result in substantial or undue adverse effects on adjacent property, neighborhood character, natural environment, traffic conditions, parking, public property or facilities, or other matters affecting the public health, safety and welfare. However, if the proposed use is a public facility or utility deemed to be of overriding public benefit, and if measures are taken and conditions imposed to mitigate adverse effects to the extent reasonably possible, the permit may be granted even though said adverse effects may occur.
  - 2. Services. The use will be adequately served by and will not impose an undue burden on any of the improvements, facilities, utilities, or services existing or planned to serve the area.

### **Conclusions Based on Findings**

#### ***I. Disposition of Motions***

- 1. Both MSG (at Exhibit 5a) and the Port (at Exhibit 7a) moved to strike/exclude FORP's brief entitled "Friends of Rocky Prairie's Pre-Hearing Brief for Appeal of the County's Amendment of Special Use Permit 02-0612", at Exhibit 3c from the record. In addition to challenging FORP's standing to offer legal briefing in the amendment proceedings, the motions essentially contend that the arguments contained in the brief ask that the SUP be revoked or terminated, which issues are not properly part of the scope of the hearing on the proposed amendments to the SUP. These motions are denied. In the amendment portion of the proceedings, FORP has the same standing as any member of the public. Any public hearing participant may be represented by an attorney at hearing. It is for the examiner to determine the relevance and credibility of the public comment offered and assign weight appropriately.

2. The Port of Tacoma moved to dismiss appeal issues 8, 9, 10, and 11 as stated in FORP's notice of appeal (noted in full in the summary of record, above). The four issues pertain to the validity of the SUP and are not issues appropriately within the scope of a SEPA appeal. Further, the same four grounds for SUP termination/vacation/invalidation were argued by FORP at the 2010 Five Year Review hearing. The Hearing Examiner's December 30, 2010 decision expressly concluded that the SUP was not invalidated on those four grounds. This conclusion was upheld by the Board of County Commissioners when FORP appealed the five year review. This motion was granted and FORP SEPA appeal issues 8, 9, 10, and 11 were excluded from the SEPA appeal portion of the proceedings.
3. In post-hearing briefing, MSG and the Port both requested that FORP's comments in Exhibit 45 that exceed the restrictions in Post-Hearing Order not be admitted. Sections 1, 3, and 4 (conclusion) in Exhibit 45 failed to adhere to the parameters of the post-hearing order and are not admitted.
4. On April 4, 2011, MSG submitted a post-hearing motion to strike FORP's Post-Hearing Brief, on the grounds that it argued issues for the first time and that it attempted to introduce new evidence. That motion was not considered timely. However, for the record, any post-hearing argument that exceeds the scope of issues briefed and argued at hearing was not relied on.

## ***II. SEPA Appeals***

### **A. MSG APPEAL**

1. **An SUP amendment was required.** Both MSG and the Port argue that the changes entailed in the instant proposal to amend SUPT-02-0612 could have been handled administratively via enforcement authority and that no amendment application (administrative or quasi-judicial) was required. The Department decided otherwise and its decision has several sources of support. While there are no criteria for "special use amendment" identified in the code, TCC 20.54.030 expressly authorizes the review and approval of "amended special use authorizations." Pursuant to TCC 20.54.015(1), administrative review is allowed for a specified list of special uses. Pursuant to TCC 20.54.015(2), the hearing examiner is the approval authority for any special use not listed, and amended special use authorizations are not included in subsection (1). SUPT-02-0612 itself, at condition T, states that "any expansion or alteration" of the use would require submittal of a new or amended special use permit. Permission to mine was predicated on compliance with water monitoring conditions. Changes in the number and nature of monitoring sites specified in the conditions of permit approval, even if intended to increase consistency with the 2005 Plan, are still "alterations" to the use as approved. Condition T also reserves to the Department the discretion to decide whether a given amendment requires administrative or quasi-judicial review. At the Five Year Review hearing, the Applicant characterized the proposed changes as "clerical" in nature. The County Code is silent as to clerical corrections to conditions in issued permits. Case law

suggests that the County is bound by the permit as issued absent further process. *Chelan County v. Nykreim*, 146 Wn.2d 904 (2002).

While it may arguably have been in accordance with County Code for the Applicant's technical non-compliance with water monitoring deadlines to be handled as an enforcement action, changes to the nature and number of required monitoring sites fall less clearly within the scope of enforcement. Because the County Code does not explicitly state criteria establishing whether SUP amendments are administrative or quasi-judicial, the Department exercised discretion in deciding which process applied. Its decision is due substantial deference because the ordinance is unclear, the Department is charged with administration of the ordinance, and the decision is within the Department's expertise. *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846 (2007).

2. **MSG has successfully demonstrated that the proposed changes to the water monitoring conditions would not impact the environment and should not be considered an "action" pursuant to the SEPA regulations, rendering environmental threshold review superfluous. However, it is not clear that the Hearing Examiner has jurisdictional authority to hear challenges to the SEPA Responsible Official's procedural determination of whether a proposal is an "action" requiring SEPA review. TCC 17.09.160.A; WAC 197-11-680(3)(a)(iii); *Chaussee v. Snohomish County Council*.<sup>16</sup> In the event that conclusion II.A.2 is reversed by a reviewing body for lack of jurisdiction or on other grounds, the remaining conclusions are entered based on the evidence in the record.<sup>17</sup>**

## **B. FORP APPEAL**

1. **The County did not amend the 2005 MDNS.** (FORP Issue 1) MDNS mitigation measures become conditions of permit approval once a permit is issued and the SEPA appeal period ends. They may be enforced in the same manner as any other permit condition. *TCC 17.09.090.G*. The instant SUP amendment does not constitute an amendment of the 2005 MDNS.
2. **The County did not adopt or incorporate the 2005 MDNS by reference; it prepared a new environmental threshold determination.** (FORP Issues 2 and 3) Part Six of the SEPA regulations (WAC 197-11-600) speaks to situations in which the reviewing agency uses existing environmental threshold determination documents for subsequent action on the same proposal. In the instant case, the County concluded that the SUP amendments

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<sup>16</sup> TCC 17.09.160.A: Only final threshold determinations in the form of a determination of significance (DS) mitigated determination of non-significance (MDNS), or a determination of non-significance shall be appealable to the hearing examiner... WAC 197-11-680(3)(a)(iii): Appeals on SEPA procedures shall be limited to review of a final threshold determination and final EIS. *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 636, 689 P.2d 1084 (1984) "[examiners are] creatures of the legislature without inherent or common-law powers [that] may exercise only those powers conferred either expressly or by necessary implication."

<sup>17</sup> The Applicant requested a full disposition of the issues of both appeals in case of remand. *Hempelmann argument; Exhibit 2b, page 11*.

were not the same proposal, but an independent proposal, and issued a new 2011 MDNS. WAC 197-11-600(3) does not authorize the County to reopen review of the entire mine site in conducting environmental review on the instant application for SUP amendments. Part Six regulations do not apply. *Findings 23, 24, 25, and 26.*

3. **The County relied on adequate information in reaching its environmental threshold determination.** (FORP Issue 7) The proposed amendments relate only to water monitoring conditions. The Applicant submitted an environmental checklist that addressed water monitoring and stormwater issues. In addition to the 2011 environmental checklist, the Department reviewed a significant amount of additional information, some dating from the review of the initial SUP application, and some after February 2010. The nature and scope of information relied on were consistent with the SEPA regulations. WAC 197-11-330(1)(a)(ii). The County's 2011 MDNS is based on information sufficient to evaluate the impacts of the proposed amendments. *Findings 23 and 24.*
4. **There record contains no evidence of misrepresentation or lack of material disclosure with regard to the issuance of the 2011 MDNS.** (FORP Issue 5) Aside from brief assertions that the MDNS is inadequate on its face, FORP did not argue or present evidence to show misrepresentation or lack of material disclosure in the issuance of the 2011 MDNS and has abandoned this issue.
5. **Arguments outside the scope of the proposed SUP amendments are not properly considered in this appeal. That stated, the record contains no evidence of probable adverse impacts as a result of the proposed SUP amendments.** (FORP Issues 4 and 6)
  - A. (Issue 4) FORP asserted that the 2001 MDNS violated WAC 197-11-600(3)(b)(iii) because "there is new information that shows that the proposal will have significant adverse environmental impacts". As concluded above, Part Six regulations do not apply because the County correctly treated the SUP amendment application as a new proposal. SUPT-02-0612 is no longer a proposal subject to review; it is an issued license or permit.
  - B. (Issue 6) FORP asserted that the 2011 MDNS violated WAC 197-11-340(a)(i)<sup>18</sup> in that the 2011 Plan constitutes a "substantial change to the proposal because [the Applicant's non-compliance] with the [2005 Plan] led to environmental harm."
    - 1) FORP failed to show that the proposed amendments constitute a substantial change to the approved mining operation. The changes that would result from approval of the amendment increase the number of pollutants for which the Applicant is required to monitor and establish with more-enforceable certainty which parameters must be monitored at which stations by what date. These changes do not represent any decrease in monitoring as intended by the 2005 Plan, upon which the Hearing Examiner based SUP approval. On the contrary, they represent an empirical increase in water monitoring requirements and would

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<sup>18</sup> Clearly FORP intended to cite WAC 197-11-340(3)(a)(i).



create more water monitoring data than was contemplated in the 2005 Plan. *Findings 22, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36.*

- 2) Third, FORP failed to establish any environmental harm (much less probable significant environmental harm) that could result from the proposed amendments. The proposed amendments change the original reference of "17 wells" to "17 stations". This has no impact on the environment. The amendment would require the 17th station to be monitored only after it is built, e.g., when process water exists. The record contains no evidence that data from a 17th station is needed before the process water pond is built in conjunction with operations. The 2011 Plan contains all of the testing parameters required in the 2005 Plan and adds a significant suite of additional parameters. There is no environmental impact from testing for additional parameters. *Findings 28, 29, 30, 31, 32, 33, 34, 35, 36, 39, 40, and 41.*
- 3) FORP's only basis for alleging adverse environmental impacts from the proposed amendments is that, if approved, the SUP amendment would allow the mine to operate with an approximately 18 month "data gap" which - they argue - in itself constitutes environmental harm. They offered no expert witness or scientific testimony in support of this assertion. There is no evidence in the record that suggests data from 2006 to 2008 is more valuable than data gathered before and since those dates or even uniquely valuable. As its strongest, FORP's evidence demonstrated that "more data is better." Expert witnesses offered by the County and the Applicant agree that more data is better; however, the record overwhelmingly supports the conclusion that there is in fact no harm from the "data gap." There is considerably more data available than was contemplated as necessary by the SUP. *Findings 35, 36, 43, 44, 45, 46, 47, 48, and 49.*
6. **FORP did not show clear error. The appeal is denied.** The evidence offered by FORP as a whole can best be characterized as generalized complaints from concerned citizens, which without more cannot be relied on as a basis for land use decisions. *Findings 46 and 47. Sunderland Servs. v. Pasco*, 127 Wn.2d 782, 797 (1995)<sup>19</sup>; *Parkridge v. City of Seattle*, 89 Wn.2d 454, 462 (1978); *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795 (1990).
7. Any arguments not addressed were deemed unpersuasive.

### **III. SUP Amendment**

1. The proper scope of the hearing on the SUP amendment application extends no further than the proposed amendments and any conceivable impacts they could have. As concluded above, SUPT-02-0612 is a valid permit, which has not been vacated or expired by any of the methods asserted in comment on the application and which is not subject to review due to the instant proposal for amendment. *See Conclusion I.2, above.*

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<sup>19</sup> "While the opposition of the community may be given substantial weight, it cannot alone justify a local land use decision." *Sunderland Servs. V. Pasco*, 127 Wn.2d 782, 797 (1995).

Arguments relating to alleged violations of the 2005 Settlement Agreement between BHAS and the former property owner are outside the scope of Hearing Examiner authority and do not constitute a basis for denial of the instant application.

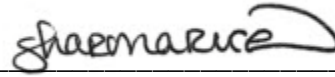
2. The proposed amendments to the approved water monitoring program would not render the approved mine inconsistent with the applicable zoning standards. The record contains no evidence of adverse impacts to adjacent properties, uses, the natural environment, or the public health, safety, and welfare. To the contrary, with the adoption of the 2011 Plan, water monitoring would include many more parameters (measuring for approximately 160 additional compounds in water quality testing), would extend for a longer period of time, and would be conducted under a more organized (thus more easily enforced) system than the approved 2005 Plan. Finally, the amended water monitoring plan would not increase reliance (if any) on improvements, facilities, utilities, or services existing or planned to serve the area. The Applicant has demonstrated compliance with the SUP criteria for approval of the requested amendments. *Findings 28, 29, 30, 31, 32, 33, 34, 35, 36, 39, 40, and 41.*
3. Conditions 6A and 6C are amended as proposed. To implement the amendments, the 2011 Plan is adopted to govern water monitoring for the life of the mine and the post-closure period. Due to scrivener and organizational errors discovered during testimony in the January 18, 2011 Plan (upon which the MDNS was based), a condition of approval is necessary to ensure that the correct version 2011 Plan is used. *Findings 37, 38, 39, 40, 41, and 42.*

### **DECISIONS**

Based on the preceding findings and conclusions, the appeals of the January 19, 2011 mitigated determination of non-significance are **DENIED** and the SUP Amendment application is **APPROVED**, subject to the following conditions:

1. The revised March 17, 2011 Maytown Sand and Gravel Groundwater and Surface Water Monitoring Plan shall be adopted, replacing the 2005 Groundwater Monitoring Plan and SUPT-02-0612 conditions 6A and 6C. The Applicant and any successors in interest shall be required to comply with the monitoring program established in 2011 Plan in the record at Exhibit 42.a.
2. No other amendments to SUPT-02-0612, issued December 16, 2005, are granted. All on-site activities shall comply with the requirements of SUPT-02-0612 as modified in the instant approval and as amended through the Five Year Review process (File No. 2010102512).

**DECIDED** this 8th day of April 2011.

A handwritten signature in black ink, appearing to read "sharonarice", written over a horizontal line.

Sharon A. Rice  
Thurston County Hearing Examiner *pro tem*



Project No. 2010101170 SUP Amendment  
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 ☐ \$595.00 for Reconsideration or \$820.00 for Appeal. Received (check box): Initial \_\_\_\_\_ Receipt No. \_\_\_\_\_  
Filed with the Development Services Department this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

## 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 Development Services 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 Development Services 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 **\$595.00** for a Request for Reconsideration or **\$820.00** 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.