



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
IN AND FOR THE COUNTY OF THURSTON**

In the Matter of the Application of)	No. 2010102512
)	
Maytown Sand & Gravel, LLC)	Maytown Aggregates
)	Five Year Review of SUPT-02-0612
)	
For Approval of a Requested)	
Five Year Review of a Mineral Extraction)	FINDINGS, CONCLUSIONS, AND
<u>Special Use Permit (SUPT-02-0612)</u>)	DECISION

SUMMARY OF DECISION

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

SUMMARY OF RECORD

Request

Maytown Sand & Gravel, LLC (Applicant) seeks approval of the code-required five year review of the mining operation authorized pursuant to SUPT-02-0612 on December 30, 2005. The SUP permitted mineral extraction on 284 acres within a 497-acre disturbed area subject to reclamation reviewed and approved by the Washington Department of Natural Resources.

During the proceedings, significant disparity of opinion as to the appropriate scope of a five year review arose. Therefore, the instant decision must address both the five year review of the operation and the appropriate scope of a five year review more generally.

Hearing Date

The Thurston County Hearing Examiner *pro tem* held an open record public hearing on the request on December 6, 7, and 8, 2010 that lasted twenty-one hours. At adjournment, the record was held open for submission of specific items from the County, the Applicant, and the Port including a final legal brief and any comments in response to the public comment delivered on

the final day of the hearing. The Post-Hearing Order, issued December 9, 2010, established December 16, 2010 as the deadline for submission.

Testimony

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

Mike Kain, Manager, Resource Stewardship Department
Cindy Wilson, Long Range Planning Department
Jeremy Davis, Long Range Planning Department
Tony Kantas, Resource Stewardship Department
Nadine Romero, Water Resources
Jason Kunz, WDFW
Michelle Tirhi, WDFW
Phil Crane, WDOE
Roy Garrison
Steve Cortner, Maytown Sand & Gravel LLC
Charles Ellingson, Pacific Groundwater Group
Scott Hooten, Port of Tacoma
Jack Hedge, Port of Tacoma
Joe Arnett
Bill Robinson
Linda Saunders
Tom Rutledge
Meryl Bernstein
Sharron Coontz, representing Friends of Rocky Prairie
Sue Danver, representing Black Hills Audubon Society

Attorney Representation:

Jeff Fancher, Deputy Prosecuting Attorney, represented Thurston County.
John Hempelmann represented Maytown Sand & Gravel, LLC.
J. Tayloe Washburn represented the Port of Tacoma.

Exhibits

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

EXHIBIT 1 Resource Stewardship Department Staff Report, dated December 6, 2010, with the following attachments:

Attachment a	Legal Notice, published November 19, 2010
Attachment b	Notice of Application, October 26, 2010
Attachment c	Application, received August 6, 2010
Attachment d	Site Plan, received October 5, 2010
Attachment e	Site Plan legend, received October 13, 2010
Attachment f	Mitigated Determination of Non-Significance, issued October 24, 2005

Attachment g	SUPT-02-0612 Findings, Conclusions, and Decision, issued December 16, 2005
Attachment h	Settlement Agreement, October 5, 2005
Attachment i	Groundwater Monitoring Plan, September 2005 ¹
Attachment j	Vicinity Map, August 22, 2007
Attachment k	Mining Area Map, November 3, 2009
Attachment l	Reclamation Sequence Map, November 3, 2009
Attachment m	Reclamation Plan Approval, September 19, 2007
Attachment n	Hydrogeologic Report by Nadine Romero, November 10, 2010
Attachment o	Comment Letters from the following: <ol style="list-style-type: none"> 1. John Hempelmann, October 29, 2010 2. John Hempelmann, November 2, 2010; including emails of October 25, 2010 3. Department of Natural Resources, November 3, 2010 4. Letter from Roy Garrison to Mac McKay, Department of Natural Resources, November 21, 2010 5. Ric Abbett, November 15, 2010 6. Linda Saunders, November 13, 2010 7. Black Hills Audubon Society, November 15, 2010; including letters of May 24, 2010 and October 12, 2010 8. Friends of Rocky Prairie, received November 15, 2010; including several attachments 9. Jason Kunz, Department of Fish and Wildlife, November 12, 2010 10. Tom Rutledge, undated 11. Department of Ecology, November 15, 2010, October 7, 2010, September 27, 2010 and May 10, 2010 12. Richard Bellon, Confederated Tribe of the Chehalis Reservation, June 4, 2010, plus attached emails dated: <ol style="list-style-type: none"> a. November 20, 2009 b. December 15, 2009 c. December 16, 2009 d. January 15, 2010 13. Chanele Holbrook-Shaw, Heernett Environmental Foundation, November 4, 2010;
Attachment p	Letter from Thor Hoyte, attorney for Nisqually Indian Tribe, to Jay Allen, Allen and Company, LLC, October 23, 2005
Attachment q	Letter from Capitol Land Trust, November 18, 2005
Attachment r	Letter from Black Hills Audubon Society, November 18, 2005
Attachment s	Letter from Department of Fish and Wildlife, November 22, 2005
Attachment t	Memorandum from Nadine Romero, February 9, 2010

¹ According to Applicant witness testimony, the document at Exhibit 1, Attachment i is not the final version of the 2005 Pacific Groundwater Group September 2005 report that was reviewed and relied on by the Hearing Examiner in December 2005. The Applicant witness could tell as much because in his decision the Examiner referenced the correct Township/Range information from page 2 of the final version of this September 2005 report, in the instant record at Exhibit 24. *Ellingson Testimony*.

Attachment u	Memorandum from Nadine Romero, June 8, 2010
Attachment v	Letter from Mike Kain to John Hempelmann, June 17, 2010
Attachment w	Resolution No.14380, Interim Prairie and Oak Habitat Definitions and provisions
Attachment x	Prairie and Oak Habitat Definitions in effect at time of complete SUP application in 2002
Attachment y	Applicant Memorandum of Authorities in Support of Motion to Confirm Limit of Scope of Decision on Five Year Review, November 23, 2010
Attachment z	Applicant Motion to Confirm Limit of Scope of Decision on Five Year Review, November 23, 2010
Attachment aa	Port of Tacoma's Memorandum Regarding Scope of Decision in Five Year Review, November 24, 2010
Attachment bb	Friends of Rocky Prairie's Answer to Port of Tacoma's Memorandum, November 28, 2010
Attachment cc	Chronology of Project, August 2002 through July 2010
Attachment dd	Current Zoning Map
Attachment ee	2009 Aerial Photo of Site
Attachment ff	Photos of the Site taken January 14, 2010 and October 7, 2010
Attachment gg	1967 Aerial Photo Showing Historic Extent of Mima Mounds
Attachment hh	Photos of Public Hearing Notice Posting
Attachment ii	Pacific Groundwater Group Report, November 23, 2010
Attachment jj	Miscellaneous Emails <ul style="list-style-type: none"> 1. From Tony Kantas to Mike Kain, September 28, 2010 2. From Mike Kain to Cliff Moore, October 21, 2010 3. From Gina Suomi to Donald Krupp, November 3, 2010 4. From Sharron Coontz to Donald Krupp, November 3, 2010
Attachment kk	Page 8 of Response to Comments on Thurston County MDNS for Maytown Aggregates, prepared by Pacific Groundwater Group, April 23, 2004
Attachment ll	Letter of February 16, 2010 to Tayloe Washburn, including attachment
Attachment mm	Letter of November 24, 2010 from Department of Fish and Wildlife
Attachment nn	Summary of Maytown Five Year Review Staff Report
Attachment oo	Comment Letters from the following: <ul style="list-style-type: none"> 1. Eric Erler, undated 2. Laurie and Todd Batten, December 3, 2010 3. Michelle Tirhi, Department of Fish and Wildlife Email, December 3, 2010 4. Sharron Coontz Email, December 3, 2010, with attached letter to J. Tayloe Washburn, Robert I. Goodstein and Jeff Fancher from Thomas R. Bjorgen dated May 19, 2009 5. Sharron Coontz Email, December 3, 2010, with attached email from Richard Bellon, Chehalis Tribe General Manager dated December 16, 2009

- Attachment pp
6. Sharron Coontz Email, December 3, 2010, with attached email from Ric Abbett, President/CEO, Northwest Steelhead and Salmon Conservation Society dated December 2, 2010
 7. Tayloe Washburn Email, December 5, 2010
- Comment Letters from the following:
1. Michael Marsh for the Conservation Committee, Washington Native Plant Society, November 1, 2010
 2. Letter to Mike Kain, Resource Stewardship Department from Michael Marsh and John Browne for the Conservation Committee, Washington Native Plant Society, undated
- EXHIBIT 2 Declaration of Sharron Coontz, Representative of Friends of Rocky Prairie, November 30, 2010, including exhibit a, Letter from Steve Pozzanghera to Sharron Coontz dated November 15, 2007
- EXHIBIT 3 Thurston County's Response to Motion to Confirm Limit of Scope of Decision on Five Year Review, December 6, 2010
- EXHIBIT 4 Color Map titled "Maytown Aerial Imagery, 2009," printed December 1, 2010
- EXHIBIT 5 Color Map titled "Maytown LiDar Hillshade," printed December 1, 2010
- EXHIBIT 6 Color Map titled "Maytown Soil Types," printed December 1, 2010
- EXHIBIT 7 Prairie and Oak Habitat Best Available Science and Source Review, submitted by Jason Kuntz on behalf of the County
- EXHIBIT 8 Maytown Sand and Gravel, LLC Prehearing Brief, December 6, 2010
- EXHIBIT 9 Port of Tacoma's Hearing Brief, December 6, 2010
- EXHIBIT 10 Comment letter from Patrick Dunn, the Nature Conservancy, to Michael Kain, Thurston County Resource Stewardship Department, October 6, 2010
- EXHIBIT 11 Resume of Roy L. Garrison
- EXHIBIT 12 Final Topography Map, Maytown Aggregates, Inc. Port of Tacoma, December 2, 2010
- EXHIBIT 13 Portions Pertaining to Critical Area Reviews and Approval, assembled by Garrison Resource Group, Inc., December 3, 2010:
1. Findings, Conclusions, Decision; Special Use Permit, Granted December 16, 2005 [duplicate of Exhibit 1, Attachment g]

2. Appendix A: HydroGeologic Analysis for Maytown Aggregates, Pacific Groundwater Group, July 2002
3. Maytown Aggregates Expanded Environmental Checklist Response to Agency Comments, Pacific Groundwater Group, October 25, 2002
4. Response to Comments on Thurston County MDNS for Maytown Aggregates, Pacific Groundwater Group, April 23, 2004
5. Maytown Aggregates Revised and Expanded Analysis of Hydrologic Effects from Mining, and Presentation of a Revised Groundwater Monitoring Plan, Pacific Groundwater Group, September 26, 2005 [a/k/a "the Groundwater Monitoring Plan" or GMP, superseded by Exhibit 24]
6. Appendix B: Maytown Aggregates Surface Water Management, SubTerra, Inc., September 30, 2005
7. Appendix C: Wetland Boundary Survey and Rating Report for Maytown Aggregates, Ecological Land Services, Inc., August 1, 2002
8. Appendix D: Additional Environmental Documents to Supplement Habitat Management Plan, Ecological Land Service, Inc., August 2002
9. Appendix D-1: Habitat Management Plan for Maytown Aggregates, Ecological Land Services, Inc., August 1, 2002
10. Appendix D-2: Maytown Aggregates Supplement Report to the Habitat Management Plan, Clarification and Response to Thurston County MDNS, Ecological Land Services, Inc., April 23, 2004
11. Appendix D-3: Maytown Aggregates, Response to Black Hills Audubon Society Comments, Ecological Land Service, Inc., September 22, 2004
12. Appendix D-4: Maytown Aggregates Second Supplemental Report to the Habitat Management Plan, Clarification and Response to Thurston County MDNS, Ecological Land Services, Inc., September 23, 2005

EXHIBIT 14 Summary of Extensive Technical Studies, Reviews and Approvals

EXHIBIT 15 Washington State Department of Natural Resources Reclamation Plan and Storm Water Pollution Prevention Plan

EXHIBIT 16 Typical Wetland Creation Cross Section, Maytown Aggregates, Inc., Port of Tacoma, November 3, 2009

EXHIBIT 17 Figure 1, Site Map, MDNS Supplemental Information, Maytown Aggregates, June 2002

EXHIBIT 18 Figure 10, Site Photographs, Habitat Management Plan, Maytown Aggregates, June 2002

EXHIBIT 19 Site 9 (Maytown), Site Layout/Aerial, Revised January 18, 2008

EXHIBIT 20 Curriculum Vitae of Charles T. Ellingson, LHG

- EXHIBIT 21 Outline of Testimony, Charles T. (Pony) Ellingson, Pacific Groundwater Group, December 6, 2010
- EXHIBIT 22 Enlarged Pages 5 and 8 of Appendix B, Exhibit 24
- EXHIBIT 23 Enlarged Figure 1, Exhibit 1, attachment ii
- EXHIBIT 24 Maytown Aggregates Groundwater Monitoring Plan, Revision 2, referenced in the SUPT-02-0612 record as Exhibit 1, Attachment cc, Appendix A, "Hydrogeologic Analysis", Pacific Groundwater Group September 2005 Report/Letter²
- EXHIBIT 25 Enlarged Table 1, Exhibit 1, Attachment ii
- EXHIBIT 26 Enlarged Table 3, Exhibit 1, Attachment ii
- EXHIBIT 27 Hydrogeologic Information Package for Maytown Sand and Gravel ("the Data Package"), Pacific Groundwater Group, December 2, 2010, including the following:
1. Hydrogeologic Analysis Report, July 2002
 2. Revised and Expanded Hydrogeologic Analysis Report, September 2005
 3. Groundwater Monitoring Plan, 2005
 4. Perimeter Monitoring Program Data Reports, Bimonthly beginning 2008
 5. Perimeter Monitoring Program First Biannual Summary Report, December 2009
 6. SWPPP Groundwater Monitoring Reports, Quarterly in 2010
 7. Off-Site Supply Well Inventory Report, December 2009
 8. On-Site Boring Logs, Various Dates
 9. Completion memo for wells MT-12 and MT-13
 10. Data from 2010 County-required monitoring of March 2010, dated November 4, 2010 (to N. Romero) and November 10, 2010 (to M. Kain)
 11. Data from 2010 County-required monitoring of September 2010, dated November 4, 2010 (to N. Romero) and November 10, 2010 (to M. Kain)
 12. Elevation survey data from stations MT-12 and MT-13, current
- EXHIBIT 28 Technical Memorandum to Jack Hedge, Port of Tacoma; Steve Cortner, Maytown Sand and Gravel, from Charles Ellingson, Pacific Groundwater Group, April 20, 2010
- EXHIBIT 29 Example Postcard of Outreach Program to Well Owners, undated

² At hearing, this document was identified as the groundwater monitoring plan relied upon by the Examiner, rather than Exhibit 1, Attachment i. Exhibit 24 is a duplicate of Exhibit 13, Attachment 5 and Exhibit 27, Attachment 2.

- EXHIBIT 30 Letter to Offsite Well Owners from Pacific Groundwater Group, February 4, 2010, including attached monitoring data for January 2008 through January 2010 and map titled Figure 1, Maytown Aggregates Site Plan
- EXHIBIT 31 Enlarged Table 2, Exhibit 1, Attachment ii
- EXHIBIT 32 Enlarged Page 7, Exhibit 1, Attachment ii
- EXHIBIT 33 Outline of Testimony of Charles T. (Pony) Ellingson, Pacific Groundwater Group, December 6, 7, 8, 2010
- EXHIBIT 34 Memorandum to John Hempelmann, Cairncross & Hempelmann, from Inger Jackson and Charles Ellingson, Pacific Groundwater Group, December 5, 2010
- EXHIBIT 35 Page 1100 of Black's Law Dictionary showing definition of *nunc pro tunc*
- EXHIBIT 36 Curriculum Vitae of Nadine L. Romero, Thurston County Hydrogeologist, LHG, LG
- EXHIBIT 37 Comparison Tables of Monitoring Plans and Proposals, prepared by Nadine Romero, December 6, 2010
- EXHIBIT 38 West Rocky Prairie soils, vegetation and rare plants, prepared by Joe Arnett, Washington Natural Heritage Program, Washington State Department of Natural Resources
- EXHIBIT 39 Prairies and Oak Woodlands Conservation Ordinance, Frequently Asked Questions from Thurston County Website, November 30, 2010
- EXHIBIT 40a West Rocky Prairie PowerPoint presentation to Thurston County Planning Commission by Michele Tirhi, Department of Fish and Wildlife
- EXHIBIT 40b Willamette Valley-Puget Trough-Georgia Basin Ecoregional Assessment
- EXHIBIT 40c Management Recommendations for Washington's Priority Habitats, Oregon Whit Oak Woodlands, Department of Fish and Wildlife, January 1998
- EXHIBIT 40d Restoring Rare Native Habitats in the Willamette Valley by Bruce H. Campbell
- EXHIBIT 41 Resolution No. 14401, September 7, 2010
- EXHIBIT 42 Public Comment of Black Hills Audubon Society, December 8, 2010 including the following attachments:
1. Environmental Checklist submitted August 13, 2002
 2. Recorded Notice Regarding Restrictions on Use of Land, undated

- EXHIBIT 43 Audio Excerpts of Special Use Permit 2005 Hearing Examiner Hearing (on compact disc), submitted by Sharron Coontz
- EXHIBIT 44 Written testimony of Sharron Coontz including attachments
- EXHIBIT 45 Letter from Ken S. Berg, Western Washington Fish and Wildlife Office, June 5, 2002
- EXHIBIT 46 Letter to Tayloe Washburn from Tony Kantas, November 25, 2008
- EXHIBIT 47 Memorandum to Michael Kain and Jeffrey Fancher, Thurston County from Tayloe Washburn and Steve Gillespie, Foster Pepper PLLC, January 4, 2010, including the following attachments:
1. Maytown Aggregates Groundwater Monitoring Plan
 2. Letter from Foster Pepper to Thurston County dated October 22, 2008
 3. Memo to County from Foster Pepper dated January 4, 202 regarding FORP assertions
 4. Reclamation Plan Final Topography Map
 5. Two letters from the County to Foster Pepper dated October 29, 2008 and November 25, 2008
 6. Two letters from the County to Tom Bjorgen, attorney for FORP, dated March 20, 2009 and March 25, 2009
 7. Pacific Groundwater Group memo regarding monitoring history dated November 30, 2009
 8. Pacific Groundwater Group Water Level and Temperature Summary Report dated December 29, 2009
- EXHIBIT 48 Appeal of February 16, 2010 Findings Regarding Compliance with SUP 02-0612, J. Tayloe Washburn and Steven J. Gillespie, March 2, 2010
- EXHIBIT 49 Color Map titled “Maytown Oak and Grassland Habitat (DNR),” printed December 1, 2010
- EXHIBIT 50 Thurston County's Post-Hearing Brief, dated December 16, 2010
- EXHIBIT 51 Maytown Sand & Gravel LLC's Closing Brief, dated December 16, 2010, with Applicant's proposed findings and conclusions³

³ The December 9, 2010 Post-Hearing Order specified that no documents in addition to those listed in the order would be admitted, and the Applicant's proposed findings were not listed in the Order. However, on the record at hearing, the Examiner requested that the Applicant submit suggested language to address the Applicant's December 8th request that the Examiner rule no amendment was necessary but that the amendment hearing should proceed as scheduled in order to avoid the delay that would otherwise result from an appeal of the five year review decision. The proposed findings contain that suggested language and are admitted as an attachment to the brief to the extent they respond to the specific request of the Examiner.

EXHIBIT 52 Port of Tacoma's Closing Brief, dated December 16, 2010

EXHIBIT 53 Maytown Sand & Gravel Comments in response to Public Comment, dated December 16, 2010

EXHIBIT 54 Port of Tacoma Comments in response to Public Comment, dated December 16, 2010

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

FINDINGS

Site History and Procedural Background

1. The instant application seeks approval of the review required for mineral extraction operation special use permits pursuant to Thurston County Code (TCC) 20.54.070.21.e, which states:

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

On December 30, 2005, the Thurston County Hearing Examiner approved SUPT-02-0612, authorizing the mineral extraction operation known as Maytown Aggregates. At condition of approval C, the frequency of permit review was established as "each five years". The mining operation was approved for a twenty year duration. As of the date of the five year review hearing, no mining or significant ground-disturbing pre-mining activity had occurred. County Staff indicated that the twenty year clock begins when mining commences. *Exhibit 1, Attachment c, Five Year Review Application; Exhibit 1, Attachment g, Findings, Conclusions, and Decision, SUPT-02-0612; Kain Testimony.*

2. The application for SUPT-02-0612 was originally submitted August 13, 2002 by Allen & Company, the agent for then-owner Citifor, Inc. At the time of application, the property in Citifor's ownership included 1,613 acres (the Citifor acreage). Portions of the Citifor acreage had historically been used for industrial purposes dating back to before World War II, including artillery, concrete pipe, dynamite, and other explosives manufacturing and testing. The industrial uses contaminated site soils and the underlying groundwater.

Other portions of the Citifor acreage had historically supported timber production and grazing. *Exhibit 47; Cortner Testimony; Exhibit 1, page 2.*

3. The Citifor acreage included prairie habitat, creeks, wetlands, stands of oak trees, and species identified as important by the Thurston County Code. During special use permit review, Roy Garrison, then Citifor consultant, conducted many tours⁴ of the Citifor acreage specifically for the purpose of identifying any critical areas that required protection pursuant to the Thurston County critical areas ordinance (CAO). Participants of the tours included County Staff, representatives from Washington State Department of Ecology (DOE) and Washington State Department of Fish and Wildlife (DFW), Washington State Department of Natural Resources (DNR), other applicant consultants, and members of several citizen conservation organizations. The organizations represented during these tours included (but was not necessarily limited to) Black Hills Audubon Society (BHAS), Capitol Land Trust (CLT), and The Nature Conservancy (TNC). *Exhibit 1, Attachment g; Garrison Testimony; Tirhi Testimony; Kain Testimony; Wilson Testimony.*
4. Upon completion of review of the proposal for compliance with the requirements of the State Environmental Policy Act (SEPA), the County issued a May 4, 2004 mitigated determination of non-significance (MDNS) for the proposed mine. BHAS appealed the MDNS. Subsequently, the Applicant negotiated a settlement (Settlement Agreement) of the MDNS appeal with BHAS and CLT (the conservation organizations). Several changes to the proposal resulted from the negotiated Settlement Agreement with the conservation organizations.⁵ After review of the revised proposal, the County issued a revised MDNS on October 24, 2005. It was not appealed and became final on November 7, 2005. *Exhibit 1, Attachments g, h, and nn.*
5. After a full public hearing process, the mining special use permit was approved on December 16, 2005. SUPT-02-0612 authorized the extraction of 20.6 million cubic yards (cy) of sand and gravel from a specifically mapped 284-acre mine area consisting of eight established Mine Areas to be mined in phases from east to west within a 497-acre project site.⁶ It also permitted accessory uses including: administrative offices; gravel washing,

⁴ Mr. Garrison estimated that he led "dozens" of these tours from 2002 to 2005. *Garrison Testimony.*

⁵ "The mine area was reduced to 284 acres, disturbed area was reduced to 497 acres, designated min[eral 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 cc.*

⁶ In the County's October 24, 2005 MDNS, the exact acreage of the mine area is stated as 284.2 acres, and the exact area of the disturbed project site is 497.3 acres. *Exhibit 1, Attachment f.* The hearing examiner decision of December 16, 2005 identifies the mine area as 284 acres, and the overall project site as 497.3 acres. *Exhibit 1, Attachment g.* Throughout the instant decision, the mine area will be referred to as 284 acres and the overall project site as 497 acres. This is for expedience and is not intended to reflect any limitation or change on the project areas as approved in the issued permit.

crushing, and sorting; asphalt and concrete recycling; and the importing of 2,500,000 cy of clean fill. The permit also designated the mine area as Mineral Resource Lands of Long Term Commercial Significance. No appeals of the special use permit were filed. *Exhibit 1, Attachments g, cc, and nn.*

6. The DNR-approved mining plan would start work in Mine Area 1 and proceed numerically through the eight approved mine areas. Reclamation is required to start as soon as possible after completion of each mine area. In each area, mining would first occur above the water table, after excavation of the topsoil which would be stored around the perimeter of the disturbed foot print. Mining would proceed to a depth of approximately fifteen to twenty feet below the water table in each Mine Area. The deepest pits would be created in Mine Areas 4 and 6, reaching approximate depths of 106 feet below the starting elevation, and the shallowest pits would be excavated in Mine Areas 7 and 8, reaching depths of approximately 30 feet below the original ground elevation. Excavation in no more than two mine areas is approved simultaneously. Mining in two areas would only occur if market demand existed. The disturbed area would be reclaimed as lake, wetland, and upland forest to be used for wildlife habitat and recreation. *Exhibit 15, Reclamation Plan Narrative.*
7. A timeline of some (but not all) significant transactions and actions that occurred after issuance of SUPT-02-0612 follows in a paraphrased format:
 - In March 2006, Citifor sold more than 800 acres of the Citifor acreage to DFW. The DFW parcel surrounds the proposed mining area to the west, south, and east. It is almost entirely occupied wetlands, prairie, and oak woodlands and it contains the identified species of importance or related habitat.
 - In July 2006, the Ports of Olympia and Tacoma entered into an Interlocal Agreement to purchase and develop part of the remaining Citifor acreage with the South Sound Logistics Center.
 - In September 2006, the Port of Tacoma began discussions with DNR regarding the process for obtaining the required reclamation permit.
 - In October 2006, the Port of Tacoma bought 754 acres from Citifor, Inc, including the SUP .
 - In January 2007, the Port of Tacoma applied for the DNR reclamation permit.
 - In August 2007, the Port of Tacoma applied for coverage under the Sand & Gravel General Permit, a National Pollution Discharge Elimination System (NPDES) permit administered by the DOE. DOE informed the Port of Tacoma that NPDES coverage would not issue until the contamination resulting from previous industrial uses on-site was cleaned up through a Model Toxics Control Act remedial investigation and field study (RI/FS).
 - On September 19, 2007, DNR approved the reclamation plan submitted by the applicant and issued Surface Mining Reclamation Permit Number 13010.
 - In November 1007, the Friends of Rocky Prairie (FORP) submitted an application to have the Port property and other parcels to the north rezoned from the rural

resource industrial (RRI) and rural/residential resource (RRR 1/5) zoning it had when the SUP was reviewed and approved to rural (R 1/20).⁷

- In June 2008, the Interlocal Agreement between the two ports expired or was terminated and the proposal for the logistics center was withdrawn.⁸
- In July 2008, the Port submitted an application to the County to extend the SUP for an additional year.
- In October 2008, the Port applied for a building permit to construct a scale house. The County issued the building permit on October 16, 2008.

Exhibit 1, Attachments m and cc; Hooten Testimony; Exhibit 49, Attachment 5; Hedge Testimony.

8. On October 29, 2008, the County determined no SUP extension was necessary because the actions taken to date by the Port satisfied the requirement of TCC 20.54.040.4.a and expiration of the permit was precluded. The October 29, 2008 letter also informed the Port that all earth-disturbing activities on-site would be required to cease "until the groundwater monitoring survey reports (Condition "6.C 10/24/05 MDNS"), the monitoring plan for Wetland "A", Beaver Creek, and Allen Creek systems (Condition 12 10/24/05 MDNS), and the archeological survey (Condition 20 10/24/05 MDNS) have been submitted to Thurston County for review and approval." *Exhibit 47, Attachment 5.*
9. The Port submitted additional information and was informed by the County by letter dated November 25, 2008 that "all information requested in the October 29, 2008 letter has been submitted." *Exhibit 47, Attachment 5.* The November 2008 letter restated that it is the property owner's responsibility to ensure that the property remains in compliance with all hearing examiner conditions of SUPT-02-0612. The Port began to market the property with the approved SUP after receipt of the October 29 and November 25, 2008 letters. *Exhibit 47, Attachment 5; Hedge Testimony.*
10. On July 28, 2009, the County adopted an interim prairie conservation ordinance (Resolution No. 14260). The interim provisions were renewed and amended on July 20, 2010 in Resolution 14380. The County's critical area ordinance definitions of prairie and oak woodlands were amended; new studies are required with proposal for uses that would affect oak or prairie areas; and new requirements for determining buffers for important habitats and species were established. The County's new critical areas definitions were based on new information from state and federal agencies and on best available science. *Exhibit 1, Attachment w; Kunz Testimony; Exhibit 7.*

⁷ At the time of SUP review and issuance, 70 percent of the property was zoned RRI and 30 percent was zoned RR 1/5. *Exhibit 1, Attachment g.*

⁸ For the remainder of the instant decision, any further references to "the Port" will refer only to the Port of Tacoma. The Port of Olympia has no further involvement in this matter.

11. In October 2009, County Staff met with representatives from the Port and from Maytown Sand & Gravel LLC, a prospective buyer. The subject of the meeting included a discussion of the County's position on the status of compliance with the SUP conditions and other issues required to be addressed before mining could commence. After this meeting, the Port requested permission to commence mining. *Exhibit I, Attachment cc; Cortner Testimony; Kain Testimony.*
12. In response, the County issued a letter dated February 16, 2010 denying permission to mine. This letter had attached to it a memorandum (also dated February 16, 2010) detailing the County's analysis of the project's compliance with each of the conditions of project approval. The County summarized of the conclusions of its February 16, 2010 memo regarding compliance with project conditions as follows:

"[The February 16, 2010 memorandum] went through all 54 conditions of the SUP⁹ and outlined what was required to be in compliance and noted that even though some deadlines were missed, the Port could, with two exceptions, still meet the intent of the conditions of the SUP. The two exceptions were considered significant issues. One related to water monitoring. It was the County's determination that the timing and extent of water monitoring were the crucial elements of the conditions, not the start date. The February 16 letter provided a more detailed outline of what the water monitoring expectations were. These details were provided by County hydrogeologist Nadine Romero. The second issue related to a WSDOT condition requiring the construction of a freeway turn pocket."

Exhibit I, Attachment cc. The February 16, 2010 letter and memorandum together concluded that some of the pre-mining conditions that remained to be satisfied would require submittal of an application for amendment of the SUP. The 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 I, Attachment jj, 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

⁹ The materials refer variously to 54, 55, 63, or other numbers of conditions that apply to the mining operation through both the MDNS and the SUP. The October 24, 2005 MDNS contains 32 numbered mitigation measures. MDNS condition 6 contains six lettered subparts, A through F. Condition 6 states, "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: ...". Thus, MDNS condition 6 preamble contains an affirmative performance requirement and each of the six lettered subparts contains performance requirements. None of the 31 other MDNS conditions has subparts. Altogether the MDNS contains 38 conditions. *Exhibit I, Attachment f.* The December 16, 2005 hearing examiner SUP decision contains 23 lettered conditions, A through W. SUP condition A requires compliance with the MDNS conditions, and MDNS condition 32 requires compliance with the SUP conditions, rendering both duplicative and without independent performance obligation. The total number of conditions that must be complied with appears to be 59, although MDNS condition 14 restates facts and contains no affirmative requirement.

during review of the amendment. This decision would be appealable to the Hearing Examiner." *Exhibit 1, Attachment jj, memorandum, pages 4-5.*

13. The Port appealed the February 16, 2010 determination that formal amendment was necessary to find compliance. No other parties appealed the determination. During the pre-hearing conference for the appeal, the Port requested that its appeal be placed on hold pending ongoing negotiations. *Exhibit 1, Attachment cc.*
14. In March 2010, Maytown Sand & Gravel LLC (Maytown, or the Applicant) purchased the mine site and SUP on contract. Due to the structure of the purchase and sales agreement, the Port retains an ownership interest in the property and the permit. They have participated in these proceedings due to their ownership interests in the property and the mining permit. *Exhibit 1, Attachment cc; Hedge Testimony; Exhibit 47.*
15. On April 26, 2010, Maytown submitted a request to amend six SUP conditions relating to: timing, extent, and notification requirements related to water monitoring; the freeway turn pocket; and removal of a noise berm. 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. However, on June 17, 2010, County Staff notified the Applicant by letter that the 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, Attachments v and cc.*
16. In July 1, 2010, Maytown revised the original amendment application such that only two conditions would be amended: the timing and extent of water monitoring and the freeway turn pocket. *Exhibit 1, Attachment cc.* The amendment is a separate review from the instant five year review of the SUP and it is not under consideration in the instant decision.
17. On July 14, 2010, Maytown sought permission to initiate work on off-site road improvements required as pre-mining conditions of the SUP. This road work would add turn lanes and other improvements to the intersection of Case Road and Tilley Road. County Staff determined that until the SUP amendment is resolved, the Applicant is out of compliance with conditions of approval and no substantial work shall be authorized on or off-site. *Exhibit 1, Attachment cc; Kain Testimony.*
18. As of the five year review hearing date, WDOE had cleared six of the eight mine areas for mining. Mine Areas 1 and 2 were the first to be cleared by WDOE. The two remaining to be cleared are Mine Areas 5 and 8. *Exhibit 1, page 17.*

19. County Staff visited the site with Applicant representatives, DFW Staff, and others on January 14, 2010 and October 7, 2010. *Exhibit 1, page 6; Kain Testimony; Tirhi Testimony; Wilson Testimony; Garrison Testimony; Ellingson Testimony.*
20. Land uses surrounding the approved mine site consist of the following. To the north are wetlands and a forested hillside owned by the Applicant, two residences across the tracks to the northwest, and approximately 1,300 acres of undeveloped forestland zoned R 1/20 and RRR 1/5. To the northeast is forestland. To the east and southeast is mounded prairie owned by DFW with a rural residential subdivision adjacent to the state owned area about 2000 feet beyond the mine boundary. To the south is the Beaver Creek wetland, owned by DFW, with a rural residential subdivision about 2000 feet from the mine boundary. To the west is forestland, Tilley Road and a rural residential subdivision about 1,800 feet from the mine boundary. *Exhibit 1, page 2.*
21. Five year reviews for mining SUPs do not require new or additional review for compliance with SEPA. *Washington Administrative Code (WAC) 197-11-704; WAC 197-11-800; Exhibit 1, page 3.*
22. Notice of the five year review public hearing was sent to property owners within 2,600 feet of the site and to other interested parties by US Mail, as well as posted on the County's website for the project, on November 16, 2010. Notice of hearing was published in The Nisqually Valley News and The Olympian on November 19, 2010. Notice of hearing was posted on-site on November 24, 2010. *Exhibit 1, page 3; Exhibit 1, Attachment a.*

County's Analysis at Five Year Review

23. County Staff stated that the purpose of the five year review is to determine if the Applicant is in compliance with the conditions of the approved SUP and whether additional conditions should be imposed on the operation to meet the standards of the County Code, as amended. *Exhibit 1, page 2.*
24. County Staff determined that there are 63 separate conditions of approval, treating those that overlap individually. Upon review of the application, the permit, and the site, Staff opined that 49 of the 63 conditions are now or can be compliant in a timely fashion: some conditions have been satisfied, and many others can be satisfied as pre-mining preparations proceed without significant additional efforts or review. However, Staff stated that three of the 63 conditions contain deadlines related to water monitoring that have passed and eleven conditions require "more review before judgment on compliance can be completed." *Exhibit 1, page 28.*
25. The County found the following conditions had been satisfied: MDNS 6.B, 6.E, 6.F, 8, 12, 27, and 28, and SUP G, L, and M. *Exhibit 1, pages 4- 28; Kain Testimony.*
26. The County found there is "no compliance issue with this condition at this time" for the following list of conditions. The reason for the "no compliance issue at this time"

determination was either that the condition must be satisfied before a specific event that is not yet imminent, or that the condition must be satisfied in an ongoing manner for the life of the mine. The "no compliance issue at this time" conditions include: MDNS 1, 2, 3, 4, 5, 6.D, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, and 30, and SUP B, D, E, F, H, I, J, K, N, O, P, Q, R, S, V, and W. *Exhibit 1, pages 4- 28; Kain Testimony.*

27. The three water monitoring conditions with which the County alleges the Applicant is noncompliant are MDNS 6.A, MDNS 6.C, and SUP A. *Exhibit 1, pages 5, 7, and 23; Kain Testimony.* The conditions that, according to the County, are "not compliant at this time" include MDNS conditions 7, 9, 10, 11, 14, and 31. The County asserted that several additional conditions require "more review before judgment on compliance can be completed."¹⁰ *Exhibit 1, pages 4-28; Kain Testimony.* The County's asserted grounds for finding noncompliance and/or requiring more review are detailed in the findings below, under the following subject headings: water rights; ground water monitoring; and critical areas protection.
28. Based on its analysis of the site and compliance with applicable code, the County recommended that the five year review be approved with four conditions:

One: All critical areas on-site, whether defined in the 2002 code or the 2010 code, [shall] be protected with appropriate buffers. This will require additional field surveys, with a likely reduction in the mining area and a revision in the reclamation plan.

¹⁰ The body of the County's staff report (Exhibit 1) lists each condition of the MDNS and the SUP in italics. Following each condition is a brief County analysis of the Applicant's current compliance with the requirement(s) of the condition. Many of these brief analyses include the words, "no compliance issue with this condition at this time". These conditions generally require action later in the process, meaning the Applicant has not yet complied because performance is not yet required and the Applicant has the ability to comply at a later time. Some of the brief analyses state, "compliant" or "condition satisfied" because the required action(s) was/were already performed. Several of the brief analyses explicitly state, "not compliant at this time" or other language that makes it clear the County finds the Applicant is out of compliance with the requirements of the given condition. Several of the brief analyses do not make it clear what the County's position on compliance is due to conflicting language and/or to a lack of explicit statement on compliance. During the prehearing conference, the Examiner asked the County for a list of the specific condition numbers that were alleged to be out of compliance, because the staff report does not make it definitively clear. The staff report states that three water monitoring conditions are out of compliance and eleven other conditions "require more review" before compliance can be determined. *Exhibit 1, page 28.* Testimony clearly identified the three water monitoring conditions that the County determined were out of compliance. *Kain Testimony.* However, no list of noncompliant condition numbers was provided in writing or testimony. Of the eleven conditions that "require more review", a close reading of the staff report establishes definite assertions of noncompliance with MDNS conditions 7, 9, 10, 11, 14, and 31. From the analysis section following each condition as listed in the staff report, the Examiner finds that the other six conditions that "require more review" in the County's opinion could include MDNS conditions 13, 21, 29, and 32 and SUP conditions A, C, T, and U. The Examiner concludes that the uncertainty as to which conditions the County specifically alleges noncompliance is immaterial, because the reasoning for the allegations of noncompliance is thematic and is thoroughly addressed in the other portions of the staff report, in Mr. Kain's testimony, and in the County's legal briefing. Regardless, the final determination of compliance with each condition is within the Examiner's purview.

Two: [The Applicant shall] demonstrate that valid water rights are assigned to the property, or submit for County approval a valid water use plan that either shows how operations can proceed without exceeding 5,000 gallons per day, or how and where water in excess of 5,000 gallons per day will be brought to the site.

Three: [The Applicant shall] follow through on the SUP amendment currently in process. If the SUP amendment is not approved, the SUP will lapse.

Four: [I]f mining is allowed to commence, all mining activity must continue to be in compliance with the conditions established through SUPT-02-0612 and the on-going SUP amendment process.

Exhibit 1, Attachment nn; Kain Testimony.

29. County staff noted that it is unusual, if not unprecedented, that no mining (or even significant ground disturbing activity) had take place in the approved mine by the time of the first five year review. Staff stated that typically a mine site has been scraped of top soil over most or all of the site, and mining has commenced. According to Staff, in mining operations where mining has commenced, "changes to critical areas definitions would have little or no effect", in contrast with the present situation where no ground has been disturbed. Staff stated that because no mining has occurred, the current critical areas definitions should be applied to the five year review of the site.¹¹ Staff acknowledged that this would result in a net reduction in the approved mine area. *Exhibit 1, Attachment nn; Kain Testimony.*

Water Rights

30. MDNS condition 21 states:

21. If the total ground water withdrawal on this site will be equal to or greater than 5,000 gallons per day, a water right permit from the Washington State Department of Ecology would be required.

Exhibit 1, Attachment f.

31. In light of the MDNS and in review of the 2002 SUP application, SUPT-02-0612 addressed the issue of water rights in finding number 6, which states:

The Applicant has two water right certificates that allow industrial use consistent with gravel mining and processing. Together, the certificates provide 371 acre-feet per year and an instantaneous rate of 230 gallons per

¹¹ Maytown and the Port entered standing objections at the prehearing conference and again at the outset of the hearing to any testimony related to the application of the 2009/2010 interim CAO, arguing that the permit is vested to the regulations in effect at the time of complete application. *Hempelmann Comment; Washburn Comment.*

minute (gpm). This amount of water would be sufficient to support the proposed operations. *Exhibit 1, Attachment cc, Appendix A, Pacific Groundwater Group July 2002 report.*

Exhibit 1, Attachment g.

32. The five year review staff report stated that compliance with MDNS condition 21 is required prior to the withdrawal of 5000 gallons of water per day and found no compliance issue with this condition at the time of five year review. However, Staff asserted that without confirmation of the water right validity or submittal of a water use and source plan, they would limit - via condition of approval on the five year review - mining and associated activities to an amount possible using no more than 5000 gallons of water per day including rock washing, dust control, truck wheel washing and domestic use. *Exhibit 1, page 19; Kain Testimony.*
33. In support of the recommended condition regarding water rights in the December 6 staff report, the County attempted to offer testimony at the five year review public hearing demonstrating alleged DOE staff concerns about the validity of the water rights certificates referenced in SUPT-02-0612. Counsel for the Applicant objected on the grounds that neither the County's Hearing Examiner nor any other County official has authority to determine the validity of water rights. The testimony about DOE staff's concerns was not allowed. Counsel for the Applicant also argued that the DOE does not issue letters of water right verification and that to condition five year review approval on submission such a letter was to create a condition impossible to satisfy. *Fancher Argument; Crane Testimony; Hempelmann Argument.*

Groundwater Monitoring Conditions

34. Findings 22 through 36 of SUPT-02-0612 address groundwater studies and monitoring, and Findings through 38 address surface water management and protection. Compliance with MDNS conditions 6.A and 6.C is a primary topic in dispute in this five year review proceeding.¹² The Applicant argued that the conditions are taken directly from its own consultant's groundwater monitoring plan (GMP), and that any conflict between the GMP and the MDNS conditions should be corrected in favor of reflecting the intent of the GMP. The County argued that the MDNS conditions contain their own requirements separate from the GMP, that the Applicant did not appeal the MDNS, and that the corrections requested go beyond the scope of a five year review process. *Exhibit 1, Attachment g; Hempelmann Argument; Ellingson Testimony; Fancher Argument; Kain Testimony.*

¹² The third condition lacking compliance due to groundwater monitoring concerns is SUP condition A, which requires compliance with all MDNS conditions and creates no substantive performance requirement of its own. *Kain Testimony; Exhibit 1, Attachment g.*

35. The MDNS conditions state as follows:

MDNS 6.A:

Aquifer (Although based on the above mentioned reports stating that no impairment to the groundwater is predicted, the following conditions will apply):

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)¹³ 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 RIW R2W
2. Northwest quarter of Section 7, T16N 5. South one-half of Section 11, T16N RIW R2W
3. Southwest quarter of Section 2, T16N 6. South one-half of Section 12, T16N R2W
4. Northeast quarter of Section 10, T1 6N

MDNS 6.C

C. 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.

36. Condition 6A required the off-site well survey to be completed within one year of permit issuance, which would have been December 2006. The Applicant finished the required survey and submitted the data to the County in a report dated December 31, 2009. The County had no objections to the adequacy of the report other than the timeliness of its submission. The staff report states: "Staff assessment is that the time deadline presumed

¹³ This document is the GMP.

that mining activities were imminent, thus there was some urgency in meeting the condition. Nothing found in the record to date appears to link the time deadline to an environmental issue." *Exhibit 27, Attachment 7; Ellingson Testimony; Kain Testimony; Exhibit 1, page 5.*

37. Despite the lack of environmental impacts, at hearing the County maintained that because the Hearing Examiner adopted the deadline (via SUP condition A), and because there was voluminous public comment relating to the retention of the deadlines, condition 6.A is out of compliance until and unless an amendment to the deadline is approved by the Hearing Examiner. The County asserted that no substantial land disturbing activity would be allowed to occur on-site until the requested amendment is granted, and that if it is not granted, the County would be unable to issue its "proceed to mine" letter and the 2005 approval of SUPT 02-0612 would lapse. *Exhibit 1, page 6; Kain Testimony.*
38. The Applicant argued that the even though compliance with condition 6.A's deadline was late, the condition has been substantively complied with. The Applicant's groundwater consultant, Mr. Charles Ellingson, asserted that having the survey later than December 2006 is beneficial for all parties in that the data (which is not required to be revisited for five years) more accurately represents the pre-mining condition than it would have had the inventory been completed in 2006. *Ellingson Testimony; Exhibit 33.*
39. The County's staff hydrogeologist, Nadine Romero, testified that the scientific purpose of the off-site survey is as much to protect the mine operator as it is to protect the off-site well owners, as it prevents the mine for being blamed for contaminants already in the offsite well water. She testified that the delay in compliance with MDNS 6.A resulted in no gap in needed data and no environmental harm. *Romero Testimony.*
40. DOE submitted comments dated September 27, 2010 and October 7, 2010 indicating that the delay in the timing of well monitoring does not appear to have any impacts on the results of the monitoring or on the environment. *Exhibit 1, Attachments o.11.b and o.11.c.*
41. The DOE issued the Applicant its Sand and Gravel General Permit on October 25, 2010. The Sand and Gravel permit contains the stat's required performance items for the NPDES monitoring stations. Pursuant to the sand and gravel permit, the Applicant is subject to specific extensive testing and reporting requirements. *Exhibit 15; see specifically Exhibit 15, Sand and Gravel General Permit, page 4.*
42. MDNS 6.C established required monitoring to detect impacts resulting from mining operations on groundwater and surface waters in and adjacent to the mine area, to begin within 60 days of permit approval. At least ten of the 17 stations identified in the condition have been monitored for some required parameters since 2002. However, as of the five year review, the County determined the Applicant to be out of compliance because the specified 60-day deadline for initiation of monitoring was not met and because not all required data from all 17 sites had been submitted as of the hearing date.

The County noted that condition MDNS 6.C required monitoring to begin in March 2006, but that systematic compliance with the required monitoring was not accomplished until January 2008, and the initial data included results for only 14 sites. Some parameters were missing for some sites, specifically temperature data. The County acknowledged that the required summary report was submitted in December 2009. After March 2010, results were reported for 16 stations, including temperature data. The 17th site is identified in the GMP as process water pond that has not been constructed and which will not be constructed until after mining commences. The County acknowledged that no data could be submitted for the specified 17th site until the pond contains process water, but noted that MDNS 6.C specifically required 17 monitoring sites and that the Applicant was out of compliance. *Exhibit 1, page 7; Kain Testimony.*

43. Mr. Ellingson testified on behalf of the Applicant as author of the original GMP and as a consultant who has been involved in review of the site for a proposed mining operation since 2002. Mr. Ellingson noted that the first sentence of MDNS 6 requires the Applicant to adopt the GMP and stated that to the extent that details in 6.A and 6.C conflict with the GMP, the conflicts were errors of interpretation in drafting the MDNS. *Ellingson Testimony; Exhibit 33.*
44. As explained by Mr. Ellingson, the GMP (in the record at Exhibit 24) establishes two separate monitoring programs. The first is a perimeter monitoring program with 13 stations (nine groundwater wells and four surface water sampling stations) measuring water level and temperature to detect potential impacts of mining on off-site wetlands and water supply wells. The second is the NPDES program, required by DOE as part of the Sand & Gravel General Permit, consisting of three groundwater monitoring wells at which water quality will be measured and surface water sampling of one process water pond. Mr. Ellingson testified that the failure of MDNS 6.A and 6.C to clearly identify the difference between the distinct timing requirements and purposes of the two programs has led to misunderstanding the intent of the GMP and to the perception of "data gaps" that do not really exist. *Ellingson Testimony; Exhibit 33; Exhibit 34; Exhibit 1, Attachment ii.*
45. Regarding the perimeter program, twelve of the thirteen stations have continuous records from January 2008, with occasionally missing measurements related to temperature probe failure and access problems.¹⁴ The thirteenth perimeter station was installed in December 2009. For 2009 measurements, two of the NPDES well were included in the data sets with the perimeter stations. All thirteen perimeter stations have continuous records (without gaps) since January 2010. *Ellingson Testimony; Exhibit 33; Exhibit 34; Exhibit 1, Attachment ii.*

¹⁴ According to Mr. Ellingson: "Occasional missing measurements are to be expected and do not constitute lack of compliance. Examples of accepted and permitted programs with missing data exist throughout the state: pH meter failures, [temperature] probe not long enough, dry sites look like "missing" [data] but are not, access issues..." *Exhibit 33.*

46. Mr. Ellingson asserted that the 17th station was always intended to be the process water pond, which cannot by definition be monitored until it contains process water, and that there is no other basis for the requirement of a 17th monitoring station. *Ellingson Testimony; Exhibit 33; Exhibit 34; Exhibit 1, Attachment ii.*
47. The Applicant requested that the five year review decision correct the "error" of MDNS condition 6.C that requires "17 wells", asking that "wells" be changed to "stations" in four locations in the condition. *Ellingson Testimony; Hempelmann Argument; Exhibit 51.*
48. The second sentence of MDNS 6.C requires monitoring of "background conditions" without defining the term: "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." *Exhibit 1, Attachment f.* The County's hydrogeologist and the Applicant's hydrogeologist disagree what is meant by "background conditions". *Romero Testimony; Ellingson Testimony.*
49. In early 2010, the County sought input from the County hydrogeologist on the types and frequency of monitoring required by the SUP and MDNS conditions. In a February 9, 2010 memorandum, Ms. Romero outlined her recommendations for what background conditions should be monitored, "including basic geochemistry and contaminant concentrations", "ground water chemistry as controlled by major cations and anions (omitted list of elements)", "other water quality indicator parameters such as total dissolved solids, temperature, specific conductivity, pH and dissolved metals", and "a background sampling of organic volatiles and semi-volatiles" as spelled out in an attached appendix. *Exhibit 1, Attachment t.*
50. Ms. Romero did not dispute that the additional water quality parameters required by her February 9, 2010 memo are "new", as in not required in the SUP, MDNS, or GMP. She cited her role as a County Health Officer and TCC 17.20.200/.210 as authorizing her to impose new sampling parameters on the existing permit beyond those spelled out in the GMP and conditions. *Romero Testimony.*
51. In its February 16, 2010 letter and memo, the County informed the Port that testing for Ms. Romero's list of recommended additional water quality parameters at 17 stations would be required twice in the year prior to commencement of mining (once at peak high water/March and once at peak low water/September) in order to satisfy MDNS 6.C. *Exhibit 1, Attachment jj; Exhibit 33.* In a June 8, 2010 memo, Ms. Romero clarified that her recommendation was for two years of the additional water quality parameter sampling events (March/September) prior to mining, which recommendation the County adopted in the December 6 staff report. *Exhibit 1, Attachment u; Exhibit 1, page 7.* In a November 2010 memo, Ms. Romero stated that mining - if started in 2011 - would need to slow or stop prior to breaching the high water table in Mine Area 1, unless the complete second year of additional water quality parameter sampling was completed first. *Exhibit 1, Attachment n.*

52. The Applicant consultant, as author of the GMP, testified that MDNS 6.C's reference to "background conditions" did not require additional parameters beyond those listed explicitly in the condition (water levels, temperature, and water quality), but merely used the term background to identify testing done prior to mining. *Ellingson Testimony*. The Applicant contested the additional water quality parameters (162 to 172 chemicals which the Applicant argued are not related to mining) based on their being added to the requirements of the GMP several years after permit approval and based on the expense. The Applicant asserted that it costs approximately \$50,000 per testing event to obtain the required data. However, the Applicant has completed one full round of testing (both March and September 2010) and has indicated they intend to complete second round prior to entering the water table, should mining be allowed to commence in 2011, unless excused from the additional water quality parameter requirements by these proceedings. *Exhibit 33; Ellingson Testimony*.
53. As of the time of the five year review hearing, Ms. Romero's opinion as to the existence of "data gaps" had evolved from her November 10, 2010 memorandum. According to Ms. Romero, the County has all data they need to issue a proceed to mine letter, except for the second year of additional water quality parameter sampling. While she didn't speak to legal requirements, Ms. Romero testified that there is no scientific basis for requiring a 17th station to be included in pre-mining background data gathering, aside from the general tenet that more data is better. *Romero Testimony*.
54. The Applicant requested to be excused from the second year of additional water quality parameters altogether, or, in the alternative, requested clarification that the second full year of additional parameter sampling need not be completed prior to commencement to mining, but only prior to mining into the water table. In support of this, Mr. Ellingson testified that groundwater from the mine area would take between six months to two years to reach the perimeter stations and that pollutants travel slower than ground water. *Ellingson Testimony*.

Critical Areas Protection: Compliance with Conditions

55. SUPT-02-0612 condition 7 states:

7. The final site plan delineating all on-site critical areas, project boundary and mine boundary and all SEPA and Hearing Examiner conditions shall be recorded with the Thurston County Auditor on all parcels.

Exhibit 1, Attachment g.

56. The final site plan, dated October 5, 2010, has been submitted, but not yet recorded. *Exhibit 1, page 9.*

57. MDNS condition 9 states:

9. The total 1,613-acre ownership contains several critical areas and habitats that are regulated by the Thurston County Critical Areas Ordinance (Title 17.15), including wetlands, streams, riparian areas, native out-wash prairie, and oak woodland habitats, as well as a number of species using those habitats. In accordance with the Thurston County Critical Areas Ordinance 17.15.900, in order to define the edge of the critical area buffers and to protect the delineated buffers from encroachment, signs shall be constructed at the edge of all critical area buffers. The buffers shall be accurately identified and marked by a professional wetland biologist and habitat biologist. The signs shall be metal (or alternative permanent and durable material) and mounted on a minimum 4 by 4 inch treated wood post. The template for the sign must be presented to Thurston County Development Services Environmental/Shoreline Section for approval. These signs shall be located at the point where the buffer makes a change of direction, and not less than every 300 feet so that each sign is viewable from another sign in each direction.

Exhibit 1, Attachment g.

58. Among other performance items, MDNS condition 10 requires wetland buffer signs to be installed along the buffer of Wetland A. Although the rest of the condition's wetland delineation tasks had been completed, the placement of signs along the site boundary adjacent to Wetland A had not been completed at the time of the five year review hearing. *Exhibit 1, pages 11-13.*

59. MDNS condition 11 states:

11. The Habitat Management Plan dated August 1, 2002, and the Supplement Report dated April 23, 2004 prepared by Ecological Land Services, Inc. identifies four areas of oak trees within the applicant's overall ownership. All four oak tree areas described in the Supplement Report to the Habitat Management Plan dated April 23, 2004 shall be excluded from the project area as already shown on the site plan.

Exhibit 1, Attachment g.

60. MDNS condition 14 (nearly a page long) is incorporated by this reference from Exhibit 1, Attachment 3, page 3.¹⁵ Addressing MDNS 14 in the five year review staff report,

¹⁵ To paraphrase, it acknowledges the requirement of TCC 17.15.735 for a habitat management plan. It addresses the August 1, 2002 and April 23, 2004 habitat management plans prepared for the Applicant (and reviewed and accepted by the County) and states that the plans "identif[y] all the important habitats within the overall 1.613-acre ownership and [all important] and endangered species that could inhabit within those habitats [sic]." *Exhibit 1, Attachment f, page 3.* MDNS condition 14 lists 15 species of concern the plans specifically address and determined

County Staff stated: "This condition contains no requirements. It describes the potential species on-site and re-states the terms of the [Settlement] Agreement discussed in number 8 above. It also states that the Habitat Management Plans submitted prior to the 2005 decision concluded that required buffers and monitoring would adequately protect all probable important and listed species identified on the entire site. This conclusion was not appealed. However, based on recent site visits, the County and WDFW now believe that the identified buffers and monitoring will not adequately protect the species of concern. Additional wildlife surveys are needed to conclusively determine if adequate protection has been provided. ... C[ompliance with this c]ondition required prior to substantial land disturbing activity. Additional wildlife surveys are needed to determine if compliance has been attained or if more protections are required. Compliance with this condition has not been met at this time." *Exhibit 1, page 16.*

61. MDNS condition 31 states:

31. No work shall occur on-site during the SEPA and Special Use Permit Review process and the resolution of any appeals, with exception to the ongoing Remedial Investigation and Feasibility Study being evaluated by the Washington State Department of Ecology as described in the above Condition No. 16.

Exhibit 1, Attachment f.

62. The original SEPA and SUP review process and appeal period were completed in January 2006. The Applicant interprets MDNS 31 to mean that substantial land disturbing activity is not barred by this condition as of the date SUPT-02-0612 became final in 2006. However, the County asserted that the Applicant's request for SUP amendment, which has triggered new SEPA review, reactivates the stay of MDNS 31, stating: "because no mining or substantial land disturbing activity has occurred on-site, this review gives rise to the possibility, in fact the obligation, to place the commencement of such activity on hold while additional review is completed." In addition, the County has taken the position that the interim CAO applies to this five year review, giving rise to the need to field study, delineate, and protect additional or new critical areas within the project boundaries prior to ground disturbing activities. Staff stated that substantial land disturbing activity may not occur prior to a final decision, including resolution of any appeals, on the subject Five Year Review and on the on-going SUP amendment request. *Exhibit 1, page 22; Kain Testimony.*

that the Oregon Spotted Frog, Coho salmon, Howellia, and the Olympic Mud Minnow "are present or probably present in the site but outside of the Mine and Project Boundaries." *Id.* MDNS 14 notes that the native outwash prairie potentially provided habitat for five butterfly species of importance, two plant species of importance, and that Beaver and Allen Creeks provide suitable habitat for cutthroat trout. The condition noted the buffers and monitoring required. Finally, the condition restated the requirements of the Settlement Agreement with BHAS that was fully described in MDNS condition 12 and made note that MDNS condition 8 required compliance with the Settlement Agreement. *Exhibit 1, Attachment f.*

63. County Staff did not recommend findings of compliance with MDNS conditions 10 (requiring protection of all on-site wetlands), 13 (requiring identification, avoidance, and provision of a buffer to the native outwash prairie in the eastern end of the site), 29 (requiring an archeological survey), and 32 (requiring compliance with SUP conditions), and SUP conditions A (requiring compliance with MDNS conditions), C (establishing five year review requirements), and T (requiring development to be in compliance with the final approved site plan). The primary reason for not finding compliance with MDNS 10 and 13 and SUP T relates to the County's position that the interim CAO provisions should be applied to the five year review. *Exhibit 1*.

Critical Areas Protection: County Analysis of Compliance with TCC 20.54 As Amended

64. Based on County Staff observations during a site visit of October 7, 2010, Staff requested that the site plan be amended to reflect the location of several alleged critical areas discovered during the October site visit that were not included in the application material reviewed in 2005 and therefore not considered for mitigation at the time of permit issuance. Staff contended that the critical areas were either overlooked by the Applicant's consultants and County Staff during pre-approval site visits, or that the critical areas (especially prairie) have evolved or emerged on-site in the time since the initial site studies. *Kain Testimony; Wilson Testimony; Exhibit 1, pages 9-10*.
65. According to County Staff, some of the recently discovered alleged critical areas would meet the definition of a critical area under both the 2002 CAO and the interim CAO provisions relating to prairies and oak habitat. The County Staff Report alleged that the following critical areas require protection at the time of five year review:

Location	CAO in 2002	Current CAO
Mine Area 1	wetland that may have met the 2002 definitions and known prairie habitat areas that likely did not meet the 2002 definitions	wetland and prairie habitats that likely meet current code definitions
Mine Area 2	a wetland, a stream, and an oak grove that would have met the code definition as a critical area in 2002	wetland, stream, and oak grove meet definitions under current code
Fill Area 1 Stockpile	five acre grove in the proposed stockpile area straddling the access road may have met the 2002 definition of oak woodlands	oak grove in the proposed stockpile area adjacent to the south side of the rail line near meets the current critical area definition
Mine Areas 3 and 4	known to be prairie but did not meet 2002 definitions	prairie habitat under the current code definition

Testimony clarified that the stream alleged to exist in the staff report in Mine Area 2 was the same seasonal stream alleged to exist in Mine Area 1. Only one seasonal stream was alleged by the County and/or DFW to be in need of identification and possible protection. *Exhibit 1, pages 9-10; Kain Testimony; Kuntz Testimony; Wilson Testimony.*

66. County Staff present at the January and October 2010 site visits observed Mima mounds and canary grass and waded through standing water within Mine Area 1. *Wilson Testimony.* According to Applicant consultants, the areas containing canary grass and standing water were outside of the mine area boundaries. *Garrison Testimony.*
67. The County's interim prairie conservation ordinance (Resolution No. 14260, renewed and amended via Resolution 14380) amended CAO definitions of "native outwash prairies" and "oak woodlands". Under the CAO in effect in 2002¹⁶, prairies were defined as open areas of excessively drained soils predominantly inhabited by native drought resistant species of grasses, forbs, lichens, and mosses. The five acre area was a minimum threshold, and dominance of specific species was the primary indicator. Under the 2002 CAO, oak woodlands were defined as areas where Oregon white oak comprised more than twenty percent of the trees in a pure or mixed stand of oak or oak savannah more than five acres in size. *Exhibit 1, Attachments w and x.*
68. Under the interim CAO provisions¹⁷, oak woodlands were redefined. No minimum area is required. "Oak habitat" and "oak woodlands" definitions are based on percentage of Oregon white oak coverage within stands of trees. "Oak savannahs" were established as critical areas. Oak savannahs are communities of widely spaced trees with a canopy coverage of less than twenty-five percent, of which Oregon white oaks comprise at least fifty percent of the canopy. This could result in oak savannahs consisting of one oak tree. *Exhibit 1, Attachment w; Kain Testimony.*
69. The interim CAO replaced the "native outwash prairie" definition with "prairie", "prairie, dry" and "prairie, wet" definitions. The new prairie definition removed the minimum size for prairies and made existence of either Mima mounds or plant communities as the primary diagnostic features. The interim CAO also recognizes that marginal prairie areas currently dominated by invasive species such as Scotch Broom are restorable and therefore included them in the areas subject to protections. *Exhibit 1, Attachment w.*
70. Other new requirements of the interim CAO include new features of buffer area designation and new special studies requirements. *Exhibit 1, Attachment w.*

¹⁶ The CAO applied in review of SUPT-02-0612 was referenced frequently in testimony as "the 2002 CAO". For the sake of consistency and economy, the instant decision will continue to call it the 2002 CAO, although the regulations were adopted prior to 2002.

¹⁷ The interim prairie conservation ordinance (both 2009 and 2010 amendment) were alternately referenced in testimony as "the 2009 CAO", "the current CAO", and other abbreviations. The instant decision will endeavor to uniformly refer to the code in effect at the time of the five year review hearing as "the interim CAO".

71. At the five year review hearing, the County took the following position: Until updated habitat surveys are conducted and reviewed by qualified wildlife biologists, it cannot be known whether the site plan reflects all critical areas within the proposed 497-acre disturbed area onsite. The County argued that the site plan cannot be released for recording and the approval to commence mining cannot be given until new studies are submitted, reviewed, and approved. The County estimated that the recently discovered critical areas, if fully set aside and buffered, would likely reduce the mine area by 95 to 105 acres, but that the actual reduction in area couldn't be known until studies were conducted. *Exhibit 1, pages 9-10, 29; Kain Testimony.*
72. DFW Staff conducted reviews of the West Rocky Prairie (the area they purchased from Citifor Inc.) and adjacent portions of the subject property (primarily Mine Areas 1 and 2, Mine Areas 3 and 4, and along the rail line) on May 26, 2009. DFW Staff identified remnant prairie and oak woodlands within the mine boundaries. Thirteen species identified on-site are diagnostic dry prairie plants and two are diagnostic wet prairie plants under the interim CAO definitions. Six of the identified plants were listed as diagnostic prairie species under the 2002 CAO. DFW stated in a November 24, 2010 letter to the County: "It is assumed that these species and the prairie habitat they represent were present during the last review of the project (2005) but were unaccounted for by either the applicant or the jurisdictions for a variety of reasons including lack of appropriate surveys and access restrictions." *Exhibit 1, Attachment mm.*
73. Subsequent to the May 2009 site visit, DFW identified two portions of the subject property within the mine boundary as priority habitat areas targeted for conservation. The "Priority 1" conservation area occupies much of Mine Area 1. The "Priority 2" conservation area occupies portions of Mine Areas 3, 4, and 6, and possibly portions of Mine Areas 2 and 5. *Exhibit 1, Attachment mm, Figure 3.* Altogether, DFW's priority conservation target areas cover 200 acres. *Exhibit 1, Attachment mm.*
74. Noting the mine site's contiguous boundary with what is now West Rocky Prairie Wildlife Area, where nine butterfly species identified as Species of Conservation Concern¹⁸ have been found, DFW supported the County's recommendation of applying current CAO definitions to the five year review and requiring a new habitat management plan to be developed and approved prior to any on-site activity. DFW also supported a suggestion that the order in which the mine areas are mined should be changed, leaving Mine Area 1 for last. According to DFW, the proposed alteration in the order in which mine areas are mined would allow conservation organizations more time in which to amass the funds necessary to purchase the priority areas from MSG for conservation

¹⁸ "Of the 52 butterfly species that have been recorded in Thurston County, 45 of those species have been found on the subject property and its connected neighboring property, West Rocky Prairie Wildlife Area.... For comparison, an average Thurston County site likely supports less than a dozen species of butterfly. Nine prairie and oak woodland dependent butterflies are identified as Species of Conservation Concern; all nine have been documented on West Rocky Prairie (this being only 1 of 2 sites in western Washington having that distinction). All of these butterflies live year round on the site as adults (butterfly), an egg, a caterpillar, or a chrysalis." *Exhibit 1, Attachment mm.*

purposes. Comments were also submitted by the Washington National Heritage Program, an agency that provides scientific support to DNR, in favor of retaining as large a portion of the restorable prairie as possible. . *Exhibit 1, Attachments o.8.b and mm; Tirhi Testimony; Arnett Testimony.*

75. DFW recommended that the subject property be studied for potential streams, so that they can be classified and protected. In the same letter, DFW noted that it is evident that any on-site streams do not connect to either Allen or Beaver Creeks downstream, and that therefore it is unlikely any fish habitat is present on-site. *Exhibit 1, Attachment mm.* DFW Area Habitat Biologist Jason Kunz visited the site with Applicant representatives in October 2010 and found two culverts. In his testimony, he stated that the FPARS maps reviewed by DFW and the County indicated the presence of one possible stream or drainage in Mine Area 1 and that during his site visit he found no defined channels. Mr. Kunz did find culverts draining under the access road and/or railroad tracks that lead to an area blocked by a berm. Mr. Kunz testified that while Wetland C may have possible fish connectivity, there are no streams within the mine project boundaries connected to Beaver or Allen Creeks and no waters on-site that could provide salmon habitat. *Kunz Testimony; Exhibit 1, Attachment o.9.*
76. At the time the MDNS was issued, only Mine Areas 1 and 2 had been cleared for mining by DOE in the MTCA cleanup action. The mining plan was designed around Mine Areas 1 and 2 being mined first with the project proceeding westward as mine areas were cleared for excavation by DOE, mining was completed, and mined areas were reclaimed into lakes and wetlands. Based on DFW's identification of Mine Area 1 as a Priority 1 conservation target area, the County recommends that the Applicant either be required to or voluntarily reorganize the mining plan, such that Mine Areas 1 and 2 would be mined last or at least later, allowing DFW and the conservation organizations time to gather funds to purchase them to prevent mining. Staff noted if the mining sequence is changed, the DNR reclamation plan may need to be amended. *Exhibit 1, page 17; Kain Testimony.*
77. The County doesn't dispute that a reduction of 95 to 105 acres from a 284-acre mine is a significant reduction in the mineral excavation operation; however, they point out that at approximately 180 acres, this would still be the third largest mine in Thurston County. In the balancing of interests required by the Comprehensive Plan's directives to protect both critical areas and mineral lands of long term significance, at the five year review, the County decided the balance should swing in favor of critical areas protection. The County took the position that since no ground has been broken, the project should be treated as a proposed use at the point of five year review rather than as a permitted use. The County asserted that entire site should be re-reviewed for compliance with new codes every five years. In the alternative, the County argued that if the interim CAO provisions are held not to apply to the mine, the entire should be studied for critical areas that currently meet or in 2002 would have met the 2002 CAO definitions and that any areas determined to be critical areas in those studies should be excluded from the mine boundary. *Kain Testimony; Exhibit 1, pages 28-32; Exhibit 50.*

Critical Areas Protection In SUPT-02-0612

78. The process of the County's review of the 2002 special use permit application included submission of several critical areas studies by Applicant consultants, responses to County and Public comments by Applicant consultants, and revisions to critical area studies and plans. The complete exhibit list can be found at Exhibit 1, Attachment g, pages 2 through 7. The following studies (among others) were reviewed and accepted by the County prior to the County's recommendation of approval of SUPT-02-0612:

- HydroGeologic Analysis, Pacific Groundwater Group, July 2002
- Expanded Environmental Checklist including response to agency comments, Pacific Groundwater Group, October 2002
- Revised and Expanded Analysis of HydroGeologic Effects from Mining and Revised Groundwater Monitoring Plan, Pacific Groundwater Group, September 2005
- Surface Water Management Plan, Sunterra, September 2005
- Wetland Boundary Survey and Rating Report, Ecological Land Services, August 2002
- Environmental Documents to Supplement Habitat Management Plan, Ecological Land Services, August 2002
- Clarification and Response to Thurston County MDNS, Supplemental Report to Habitat Management Plan, April 2004
- Response to BHAS Comments, Ecological Land Services, September 2004
- Second Supplemental Report to Habitat Management Plan, September 2005

Exhibit 13; Garrison Testimony.

79. The Hearing Examiner decision in SUPT-02-0612 addressed prairie, oak habitat, wetlands, Important Species/Species of Concern, habitat management, and the possible seasonal stream in Mine Areas 1 and/or 2. Findings 39 through 53 address critical areas identification and protection in and around the mine site. In the record of the instant decision, the Applicant offered excerpts of many of the studies and reports addressing critical areas identification and protection at Exhibit 13. *Exhibit 1, Attachment g; Exhibit 13.*

80. Regarding prairies, SUPT-02-0612 Finding 44 states:

A large area of native outwash prairie was identified in the northeastern portion of the site, bounded by the railroad on the north and Beaver Creek on the south. Eighteen small, isolated areas characterized by prairie vegetation were identified within the Scotch Broom-dominated interior portion of the site, west of the larger prairie area. The isolates range in size from 0.01 to 0.33 acres in area. None of them meets the definition of native outwash prairie due to their sizes less than five acres. However, the isolates have been included within the project site and would not be protected. *Exhibit 1,*

Attachment cc, Appendix D, ELS August 2002 report, page 5; Exhibit 8.10, Figure 3, Native Outwash Prairie Detail Map; Testimony of Ms. McGrath. The CAO states that buffers for important habitats should be established on a case by case basis as described in a habitat management plan. *TCC 17.15.720.* The Applicant proposed a 35-foot buffer for the native outwash prairie habitat on-site. Due to its extreme endangerment and the high intensity of the proposed use, the County requested a 100-foot buffer and the Applicant altered the proposed project site to provide the requested 100-foot buffer. *Testimony of Mr. Kantas; Exhibit 8.10, Figure 1, Critical Areas Site Map.* The on-site portion of the native outwash prairie is estimated to contain another 1.5 million cy of aggregate, but it will not be mined. *Comment of Ms. Moss.*

Exhibit 1, Attachment g.

81. Regarding Oregon white oak woodlands, SUPT-02-0612 Finding 52 stated:

Three small stands of Oregon White Oak woodlands were identified in the southern central portion of the Applicant's overall property within Wetland A's 300-foot buffer. Oak Area 1 is 4.02 acres; Oak Area 2 is 3.06 acres; and Oak Area 3 is 0.72 acres. Oregon White Oak woodlands equal to or greater than five acres in area are identified as areas of important habitat in TCC Chapter 17.15 Table 8, for their function of supporting diverse wildlife populations. Oak Areas 1 and 2 are separated by at least 80 feet of non-forested land dominated by Scotch Broom. Oak Area 3 is 4,400 feet away. These three oak areas are too small to satisfy the County's five-acre minimum to obtain important habitat status. A fourth, 2.3-acre oak woodland is located in the north central portion of the Applicant's property, south of the railroad. Even though Oak Area 4 is too small to be jurisdictional, the Applicant has voluntarily excluded it from the mine areas. *Exhibit 1, Attachment cc, Appendix D.1, ELS Habitat Supplement 1, April 23, 2004, pages 19-20; Exhibit 8.13, Figure 1, Plan View of Full Mine Development; Testimony of Ms. McGrath.*

Exhibit 1, Attachment g.

82. State and County species of concern were addressed in Findings 43 and 45 through 51. Species specifically addressed in submitted reports, agency comments, and the findings included: bald eagle, Oregon Spotted Frog, Mardon Skipper (butterfly), Whulge Checkerspot (butterfly), Oregon Branded Skipper (butterfly), Oregon Silverspot (butterfly), Puget Blue (butterfly), Valley Silverspot (butterfly), Bull Trout, Coho salmon, Coastal Cutthroat Trout, Golden Paintbrush (prairie plant), Howellia (aquatic plant), White-Top Aster (prairie plant), and Olympic Mudminnow. *Exhibit 1, Attachment g, pages 19-22.*

83. As approved by DNR, the Applicant's reclamation plan would create approximately 193 acres of open water, 50 acres of wetland habitat, 26 acres of riparian shoreline, and 230 acres of reforested upland. The open water component would include eight lakes ranging from 4.5 to 43 acres in size. The shorelines would have sinuous boundaries and slopes (above the original level of the water table) of not more than 2H:1V. Structural elements would be incorporated along the finished shorelines to provide substrate and cover for invertebrates, amphibians, and fish. Gravel processing water would be directed to specific locations to create shallow deltas and islands, resulting in wetland habitat with a minimum of two islands per lake to create safe nesting habitat for water fowl. A predator channel would be placed between the islands and shoreline to keep land predators away from the nesting habitat. Riparian areas would be planted with native shrubs and appropriate trees to protect the shoreline from erosion. Upland areas would be revegetated with upland species, intended to ultimately become forested. Reclamation would include removal of blackberry and other invasive species until the site is captured by the revegetated native plantings. *Exhibit 15, Reclamation Plan Narrative, pages 2-4 and Figure 7, Typical Wetland Creation Cross Section; County Approval for Surface Mining, SM-6, dated January 25, 2007; Garrison Testimony. Also see SUPT-02-0612 Finding 75.*

Applicant's Position on Critical Areas Protection

84. In addition to the Applicant's voluntary retention of Oak Area 4, noted in the permit at Finding 52, the Applicant is presently proposing to retain three additional small stands of Oregon white oaks existing south of the rail line and north of the approved 44-acre fill area. Like Oak Area 4, these stands of oaks were too small to be jurisdictional at the time the permit was reviewed and issued. By redesigning the contours of the fill area, the Applicant can retain the additional oak stands. *Garrison Testimony; Exhibit 14 .*
85. At the five year review hearing, the Applicant argued that entire property was exhaustively studied and that all jurisdictional critical areas were set aside and buffered consistent with - and beyond the requirements of - the CAO in effect at the time of permit review. The majority of the Citifor acreage was sold to DFW, including all the then-identified jurisdictional prairies, oak woodlands, wetlands, and associated buffers. The boundaries of the eight approved mine areas skirted the critical areas and buffers. The Applicant argued that any changes to conditions on the ground or to the County's critical areas ordinance since permit approval are irrelevant because the mine site is a vested, permitted use and is not subject to re-review for critical areas protection. *Exhibit 1, Attachments y and z; Exhibit 8; Exhibit 51; Hempelmann Comments.*
86. The Port of Tacoma, as an entity with ownership interests in the subject property, generally concurred with the Applicant's position regarding the adequacy of study of the site and opposed the vested, permitted mine being reviewed as a proposed use. *Exhibit 1, Attachment aa; Exhibit 9; Exhibit 52; Washburn Argument.*
87. The mine operator and an Applicant consultant both testified that in their many years of experience with mining in multiple states, including Washington, no mine they've ever

worked on was subjected to critical area regulations that were enacted after the mine permit issuance date. The Applicant argued that the County's proposed reduction in mine area by 95 to 105 acres would destroy the profitability of the mine plan. According to the Applicant, Mine Area 1 contains the highest quality aggregate onsite. Even requiring a change in the order in which pits are excavated could result in a replacement mine plan unworkable to such a degree as to render the mine not cost effective and therefore not minable. *Garrison Testimony; Cortner Testimony.*

88. The Applicant consultant chiefly responsible for identification and study of on-site critical areas during review of the 2002 SUP application testified that in his professional opinion, no critical areas were overlooked or withheld from disclosure prior to issuance of the 2005 permit. He testified that it is not consistent with sound scientific practices to conclude what conditions existed on the ground five to eight years previously based on present day conditions. *Garrison Testimony.*
89. The Applicant argued that application of the interim CAO at the point of five year review would be manifestly unjust. If the mine plan were altered to the extent recommended by the County, the Applicant would lose its more than one million dollar investment in the site and would lose all future profits, in addition to the losses that would accrue to the Port, both parties having acted in reliance on statements from the County regarding compliance with conditions of approval in the October 2009 meeting, the February 2010 memo, and other statements by the County. The Applicant requested that the doctrine of equitable estoppel be applied to protect the mine owner from such losses if the interim provisions are determined to apply. *Exhibit 51.*

Amendment of SUP vs. Treatment as Compliance Issue through Five Year Review

90. After purchasing the property and based on the County's position as stated in the February 16, 2010 letter and memo, the Applicant applied for amendment of six conditions of SUPT-02-0612 "under protest" on April 26, 2010. The number and nature of public comments the County received after publishing notice of SUP amendment application led the County to conclude that a public hearing was required to allow "discussion of the science of ground water monitoring". On June 17, 2010, the County notified the Applicant that the requested amendment rose to the level of Hearing Examiner determination and would require a revised SEPA threshold determination. Staff later clarified that the revised SEPA determination would relate to two conditions of approval (MDNS 6.A and 6.C), not to all conditions required by the MDNS. *Exhibit 1, Attachment cc; Kain Testimony.*
91. On July 1, 2010, the Applicant revised its application for amendment to reduce the proposed changes. The first proposed amendment would amend the deadline for construction of the required I-5 turn pocket. Washington State Department of Transportation (WSDOT) recommended approval of the deadline change. The second amendment requested by the revised amendment application would alter the deadline for beginning of background water monitoring in MDNS 6.A and 6.C. The revised application for amendment withdrew the Applicant's opposition to the additional

parameters recommended by the County hydrogeologist in February 2010. *Exhibit 1, Attachment cc.*

92. On July 12, 2010, FORP submitted a comment letter in response to the amendment application urging the County to reopen the entire special use for new review under SEPA as a result of the proposed amendment to SUPT-02-0612. *Exhibit 1, Attachment cc.*
93. At the five year review hearing, the County requested that the noncompliance issue involving water monitoring start dates (MDNS conditions 6.A and 6.C) be resolved through an amendment to the SUP rather than through the five year review process. *Exhibit 1, page 32; Kain Testimony.*
94. In pre-hearing briefs, the Applicant and the Port renewed the Port's earlier arguments that the issue of missed start dates for background water monitoring should be handled via the County's enforcement authority pursuant to TCC 20.60.010, rather than through an additional open public hearing process. *Exhibit 1, Attachments y, z, and aa; Exhibits 8, 9, 51, and 52.* However, at the five year review hearing, both the Applicant and the Port changed their requests slightly. They asked that the instant decision *conclude* that the proper route for addressing the missed start dates would be enforcement through the five year review process but also that the instant decision *require* the amendment hearings to proceed, to address due process concerns raised by members of the public who alleged reliance on the published notice of amendment application. *Hempelmann Argument; Washburn Argument.*
95. Regardless of the request for the amendment proceedings to go forward, the Applicant asked that the five year review decision conclude that MDNS 6.C's requirement for monitoring of "17 wells" was an error and that the start date deadlines of 6.A and 6.C were errors, in that they misconstrued the GMP they attempted to paraphrase. The Applicant requested that the instant decision conclude that the mining operation is currently in compliance with 6.A and 6.C regardless of having missed the initial start deadlines, because all the background data required has now been submitted on all of the stations that were envisioned to exist prior to commencement of mining. *Ellingson Testimony; Hempelmann Argument; Exhibit 51.*
96. The County argued that the Applicant should not be allowed to use the five year review process as "Trojan horse" to get around the public process required for amendment of an approved special use permit because the proposed amendment has been advertised and relied on by County residents who intend to provide testimony and argument at that hearing. The County took the position that the Examiner lacks authority to amend MDNS conditions in the course of the five year review and pointed out that the Applicant did not timely appeal the MDNS. *Fancher Comments; Exhibit 50.*
97. FORP and BHAS both submitted comments in opposition to the missed start deadlines of MDNS conditions 6.A and 6.C being addressed via the five year review process. Both

groups and several individual members of the public took the position that any amendment to the conditions of the MDNS or SUP - including amendment of the watering monitoring start dates - would be an improper amendment of the Settlement Agreement between BHAS and Allen & Company, entered into on October 5, 2005. *Coontz Testimony; Denver Testimony; Exhibits 42 and 44.*

Other Findings

98. After adoption of the 2009 interim prairie conservation ordinance, the County put up a web page containing answers to frequently asked questions (FAQ). The County's FAQ page contains the following questions and answers (among others):

Q: When did the Interim regulations take effect?

A: The interim regulations took effect when Thurston County Commissioners approved Ordinance 14260 on July 28, 2009. ...

Q: So what does this mean to me?

A: If you intend to develop or clear land on, or within 600 feet of, an area that is defined as prairie habitat or Oregon white oak habitat, you'll need to develop a habitat management plan. This requirement doesn't apply to projects that are within an existing footprint and that have the same area and location of impervious surface or that involve minor road repairs. The interim regulations do not prevent development in prairies and Oregon white oak woodlands.

Q: Are the interim regulations retroactive?

A: No. Legally existing uses and structures already located within proposed critical areas or buffers may continue at the same location. However, the County can require property owners to use best management practice to mitigate impacts on prairies and Oregon white oak habitat.

Exhibit 42. According to County Long Range Planning Staff involved with drafting the interim CAO, the instant mining operation was not specifically considered or discussed in relation to adoption of the interim CAO provisions. *Davis Testimony.*

99. Regarding the difference in the County's position on compliance with critical areas conditions between the February 16, 2010 memo (Exhibit 1, Attachment II) and the five year review staff report, the County offered the following explanation. The February 16th memo was issued in response to a request to commence mining. The December 6, 2010 staff report was issued in response to a request for five year review. The five year review provisions (TCC 20.54.070.21.e) allow the review authority to impose additional conditions upon the SUP where appropriate, while the "proceed to mine" provisions (TCC 17.20.160) reference only the existing conditions. According to the County, additional requirements beyond those in a proceed to mine letter can and do surface during five year reviews. *Kain Testimony; Exhibit 1, Attachment cc.*

100. BHAS appealed the initial May 4, 2004 MDNS issued by the County for SUPT-02-0612. The Settlement Agreement (referenced in findings 4 and 58 above) entered into by Allen & Company LLC and BHAS resulted in the withdrawal of that SEPA appeal. Several other entities were involved in the negotiations, including DFW, The Nature Conservancy, and Capitol Land Trust (CLT). The County was not a party. The terms of the agreement included (among other items):
- Designation of mineral lands of long term significance was limited to the 284-acre mine area;
 - Establishment of a Conservation Fund administered by a conservation organization and funded by Allen & Company in the amount of \$325,000 "in lieu of conducting hydrologic and biologic monitoring on both the WDFW site and the [subject property], for the purpose of determining whether any observed changes are adverse, and if adverse, are the result of mining activities" upon the BHAS withdrawal of SEPA appeal and sale of the property as a permitted mining operation;
 - Compliance with the Settlement Agreement was to be a condition of permit approval; and
 - "This Agreement may only be amended in writing executed by both parties."

Exhibit 1, Attachment h. BHAS withdrew its SEPA appeal. *Exhibit 1, Attachment cc.*

101. CLT, BHAS, and DFW all indicated their support for the County's environmental determination of October 24, 2005, stating that their "concerns related to the Maytown Aggregates proposal have been addressed via the Settlement Agreement entered into by Allen and Company, LLC and the BHAS effective October 5, 2005." *Exhibit 1, Attachments h, q, r, and s.*
102. FORP was established in 2007 and was not a party to the Settlement Agreement. The group came into existence to advocate for preservation of the subject property as prairie habitat. *Exhibit 47, page 4; Exhibit 44; Coontz Testimony.*
103. In 2007, FORP applied for a rezone of the subject property and much of the surrounding Rocky Prairie area from RRI and RR 1/5 to R 1/20. The proposed rezone was approved by the County Commissioners in Resolution 14401 on September 7, 2010. The resolution directly addressed the mining operation approved within the area to be rezoned. Finding 84 stated: "The proposed Reclamation Sequence Map for the gravel mine shows a series of lakes intended to provide habitat. Future use of the property as wildlife habitat is consistent with the R 1/20 land use category." Finding 87 stated: "The use of the MSG property as future wildlife habitat and as a resource use are consistent with the R 1/20 land use designation." *Exhibit 41, page 17; Davis Testimony.*
104. Public Participation by BHAS and FORP contested the authority of the Examiner during the Five Year Review to amend the MDNS conditions, specifically because of the Settlement Agreement. FORP argued that the SUP is invalidated or expired because the

Port cannot operate a gravel mine in Thurston County. FORP argued that the accessory uses listed on the site plan should be formally denied in the five year review process. *Danver Testimony; Coontz Testimony; Exhibit 44; Exhibit 42.*

105. FORP argued that the environmental review leading up to issuance of the 2005 MDNS was inadequate. FORP alleged that the recently discovered critical areas within the project boundaries that would have met the 2002 CAO are evidence of "lack of material disclosure" as contemplated in WAC 197.11.340 that invalidate the 2005 MDNS, whether the failure to disclose was intentional or inadvertent, and argued that environmental review must start over. *Exhibit 1, Attachment 8; Coontz Testimony; Exhibit 44.*
106. FORP argued that the special use permit is invalidated by: 1) the lack of material disclosure and the resulting need to begin SEPA review from scratch and 2) because the Port of Tacoma would not have been legally allowed, pursuant to the Interlocal Agreement with the Port of Olympia, to operate a mine and thus the SUP lapsed during the Port's ownership. BHAS argued that the SUP lapsed because the Conservation Fund was not timely funded and because the groundwater monitoring start date deadlines in MDNS 6.A and 6.C were not met. Both groups argued that MDNS 6.C requires "continuous" monitoring and that environmental harm resulted or could result from the "gap" in monitoring after permit issuance. *Exhibit 1, Attachment 8; Coontz Testimony; Exhibit 44; Danver Testimony; Exhibit 42.*
107. Public participation by persons working for the Washington National Heritage Program, The Nature Conservancy of Washington, Wolf Haven, FORP, and BHAS, as well as general members of the public, urged that the County should retain as much of the subject property as prairie as possible, due to the rareness of prairie habitats and the dependence of prairie obligate species that are listed as threatened or endangered and in order to protect ground and surface waters. *Arnett Testimony; Robinson Testimony; Saunders Testimony; Rutledge Testimony; Bernstein Testimony; Coontz Testimony; Danver Testimony; Exhibit 1, Attachments o.5, o.6, o.7, o.8; o.10, and o.13.*
108. According to public testimony, future industrial uses are listed on the site plan and there is language in the MSG purchase and sales agreement (not in evidence) relating to the future sale of a portion of the post-excavated site to the rail line for the development of a rail yard. FORP, BHAS, and members of the public opposed future railroad use of portions of the site after mining is completed, opposed development of a Redi-Mix concrete plant on-site, and opposed any increase in the amount of approved impervious surface. *Coontz Testimony; Danver Testimony; Exhibit 1, Attachment o.8.*
109. The Applicant noted that while potential accessory uses are listed on the site plan notes, no future use of the site is presently proposed beyond habitat creation. The apparent increase in impervious surface, taken from the site plan notes, does not reflect an increase from the amount of impervious surface proposed, but rather reflects the total amount of

existing on-site impervious surface plus the amount approved by the SUP. *Cortner Testimony; Hempelmann Argument.*

110. In December 2009, the Confederated Tribes of the Chehalis Reservation (Chehalis Tribes) submitted comments to the County regarding the Port's property, stating: "We are concerned about the cultural and archeological resources within Rocky Prairie. We are requesting that the property owners initiate an archeological investigation as recommended by the previous archeological review they submitted..." *Exhibit 1, Attachment o.12.b.* Subsequently, in response to notice of Maytown SUP amendment application, the Chehalis Tribes submitted additional comment opposing any amendment and re-referencing their concerns about the adequacy of the archeological studies of the site to the date of the comment (June 4, 2010). *Exhibit 1, Attachment o.12.*
111. During review of the 2002 SUP application, in response to County request for comments, the Nisqually Tribe indicated that Rocky Prairie was part of their ancestral range. The Nisqually Tribe submitted comments regarding the proposed mine SUP, requesting that the archaeological study be conducted and that the Tribe be included in that study. Upon completion of the study, the Nisqually Tribe submitted no additional comments. *Exhibit 1, Attachment p.* The Chehalis Tribes assert that they were not contacted to review the archeological study prior to approval of the SUP. The County agrees that the Chehalis Tribe was not formally notified of or requested to comment on the archaeological study prior to its adoption. Through recent communication with a Tribal representative, the County has learned that the Rocky Prairie area, including the proposed mine, is also within the ancestral range of the Chehalis Tribes. County Staff asserted that the archaeological survey required by conditions has been completed. Staff noted that the Tribes have not submitted specific reasons why the existing study is inadequate. In response to the Chehalis Tribes June 2010 comments, the County encouraged them to participate in the five year review process. However, aside from comments on the SUP amendment proposal, the Tribes submitted no comments. *Exhibit 1, page 21; Exhibit 1, Attachment o.12; Kain Testimony.*
112. A Port of Tacoma representative testified that eighty percent of the site's aggregate resource was encumbered by previous industrial use contamination and subject to the RI/FS. Cleanup began in 2006. At the time of the five year review hearing, eight percent of the encumbered area had been released for mining and the twenty percent remaining was released for concurrent mining and remediation of contamination. During its ownership of the subject property, the Port oversaw the RI/FS remediation efforts and applied for the DOE, DNR, and County (SM-6) permits required to proceed with surface mining. *Hooten Testimony; Hedge Testimony.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner has jurisdiction to conduct the five year review pursuant to Sections 2.06.010 and 20.54.070(21)(e) of the Thurston County Code.

Criteria of Approval For Five Year Review

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

Special Use Permit Criteria

TCC 20.54.040, General Standards

In addition to the specific standards set forth hereinafter with regard to particular special uses, all uses authorized as special uses shall meet the following standards:

1. Plans, Regulations, Laws. The proposed use at the specified location shall comply with the Thurston County Comprehensive Plan and all applicable federal, state, regional, and Thurston County laws or plans.
2. 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.
3. 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:
 - a. 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 the adverse effects may occur.
 - b. 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.

Other Applicable Provisions of the Thurston County Code

TCC 17.15.355, Review Standards - Authorized activity time period

- A. Authorization to undertake regulated activities within critical areas or their buffers shall normally be valid for a period of the underlying permit.

- B. Prior to the granting of an extension to an underlying permit, the review authority may require updated studies and/or additional hearings if, in its judgment, the original intent of the permit is altered or enlarged by the renewal, or if the applicant failed to abide by the terms of the original permit.

TCC 17.20.160 - Inspections

- A. For applications filed after the effective date of this chapter, the operator shall provide access to the site for the purpose of inspections to ensure compliance with the provisions of this chapter. The director may authorize a reasonable fee for such inspections. The operator will submit to either an inspection or, at the option of the director, a conference before commencing the extraction of mineral resources. The inspection or conference shall be based on conditions and standards ordered by the approval authority to be complied with before the operations commence.
- B. Gravel mines, whether in existence on the effective date of this chapter or subsequently permitted, shall be inspected annually for compliance with this chapter. The planning department, in consultation with the prosecuting attorney, shall establish in writing a program and schedule under which such inspections shall be carried out. This program shall prioritize inspections concerning fuel and petroleum products storage, spill prevention, spill occurrence and water pollution prevention in general.

TCC 20.54.030 - Status of Special Use

Any use for which a special use is authorized by the approval authority and which complies with the specific requirements of this chapter and those of other applicable chapters of this title shall be deemed to be a permitted use on the lot on which it is thus permitted. Once a special use has been authorized, however, the use shall not be enlarged, extended, increased in intensity, or relocated unless an application is made for a new or amended special use authorization.

TCC 20.54.040.4 - Time Limits

- a. Expiration of Approval. If a building permit has not been issued, or if construction activity or operation has not commenced within three years from the date of final approval, the special use permit shall expire. The special use permit shall also expire when the use or activity for which the permit was granted is vacated for a period of three years.
- b. Upon the application of the owner or representative, the approval authority may grant a one year extension. In no case shall the approval authority grant an extension for more than one year at a time. If an extension of time is approved, the special use permit will be subject to all new and amended regulations, requirements, policies or standards which are adopted after the original date of approval.
- c. ...
- d. Time Limit and Re-Review. Where the approval authority is the hearing examiner, there may be a condition to provide time limits for the use. If it is determined after

review that the special use no longer meets the conditions set by the hearing examiner at the time of the initial approval, the use may be terminated, or such standards added as will achieve compliance with the original hearing examiner conditions.

Discussion

Amendment:

Processing of the instant five year review application was significantly complicated by the change in ownership of the property and by the related SUP amendment application, which evolved over time. The Port appealed the County's February 2010 determination that the SUP needed to be amended administratively to correct the missed deadlines in MDNS conditions 6.A and 6.C. The Port subsequently "placed its appeal on hold", which for practical purposes had the same effect as withdrawing the appeal. The Port then sold the property and the new owner requested amendment to six conditions, exceeding the simple correction of missed deadlines in MDNS 6.A and 6.C. The County determined that the amendment request rose above the threshold of ministerial actions and published notice of the application for SUP amendment. The Applicant subsequently reduced the scope of its requested amendments.

In the five year review proceedings, the Applicant requested that the Examiner "make corrections" to MDNS 6.A and 6.C to make the condition consistent with the September 2005 groundwater monitoring plan. These corrections were advertised as being part of the publicly noticed SUP amendment application. While it may be appropriate for clerical errors in conditions of approval to be corrected via the five year review process AND while the five year review process may be the appropriate venue for addressing enforcement of missed deadlines in conditions that have been satisfied in an untimely fashion, the circumstances of the present applications render it questionably proper for this five year review to address "clerical" corrections to MDNS or SUP conditions of approval. At the end of the hearing, Applicant representatives stated that the mining operation's interests in forestalling appeal of the five year review on procedural grounds align with the public's asserted due process rights. In the end, the Applicant requested that the amendment proceedings take place, rather than having the corrections made via the instant five year review decision.

Five Year Review:

Although previous five year review decisions do not carry precedential value as they would if they'd been issued by Courts, still they are instructive as to the historical policy of the County regarding the types of changes and conditions that have historically been imposed. In a survey of all five year review decisions posted on the County website, none of the listed five year review decisions has ever reduced the mine footprint.¹⁹

New conditions have been imposed in several five year reviews to require a noxious weed control plan. In each case, the weed control plans were required based on evidence at the hearing that the mine operation in question was adversely affecting adjacent properties or uses

¹⁹ On the County's Hearing Examiner webpage, gravel mine decisions are posted dating back to 1991. The earliest five year review decision posted was the 1997 Nielsen Pacific 5 year review, SUPT 970412.

through the spread of noxious weeds. 2006100954 SUPT, Lakeside Industries 5 year Review (SUP 14-88, SUP 98-067); 2006104333 SUPT, O'Neil & Son's 5 year review (SUPT 000337).

Additional conditions were imposed in one five year review to mitigate impacts identified at the public hearing. The conditions required a revised site plan and a report to Development Services Department every six months listing speeding citations earned by drivers from mine. The condition stated that any speeding violations would trigger immediate review of the permit. 970412 SUPT, Nielsen Pacific 5 year review.

One five year review decision changed the depth to which mining was allowed by the original SUP. In that case, the original SUP had allowed mining to a depth of 60 feet, conditioned on compliance with an MDNS condition that prohibited excavation into the water table. Evidence at the five year review hearing alleged that the water table had been breached. The Applicant proposed a change to the permitted SUP, restricting maximum depth to 40 feet. The Examiner required hydrogeologic studies to ascertain depth to water table. Although the hydrogeologic study concluded that there had been no breach of the water table, the data collected as part of the study indicated that the maximum excavation depth would need to be modified to remain above the water table. The five year review decision restricted excavation to a maximum depth of 40 feet via additional conditions of approval. 2006100954 SUPT, Lakeside Industries 5 year Review (SUP 14-88, SUP 98-067).

Conclusions Based on Findings

1. Standing. The Applicant is the current legal owner of the subject property. The Port of Tacoma, which maintains legal ownership rights to the property, is an interested person or interested party to this proceeding.²⁰ FORP and BHAS assert equal standing with the Applicant and the Port. Although BHAS is signatory to the Settlement Agreement referenced in several conditions of approval and was a party of record in the 2005 SUP proceeding, their status in the instant five year review application is not as an "interested person". Like FORP, which was not a party to the previous SUP proceedings, BHAS is present in the five year review proceedings as members of the public that became parties of record when they submitted comments. This status does not confer the rights pertaining to appellants, such as cross examination rights. The hearing examiner rules of procedure grant the Examiner discretion in determining the rights of members of the public in terms of briefing and cross examination. In order to facilitate a complex proceeding in which all public comment questions would normally have been reserved for the end of a multiday hearing, with no guarantee of witness availability, the Examiner allowed limited cross examination by BHAS and FORP of County and Applicant witnesses. This discretionary allowance of cross examination and its limitation to five minutes each per witness do not restrict FORP's or BHAS's rights to appeal the five year review decision.

²⁰ Thurston County Hearing Examiner Rules of Procedure 1.1 defines an 'interested person' as "any individual, partnership, corporation, association, or public or private organization of any character, that may be affected by proceedings before the Hearing Examiner and shall include any party in a contested case." *Thurston County HE RoP 1.1*.

2. Water Rights. Evidence in the record at the 2005 special use permit hearing demonstrated that the subject property owned sufficient water rights to conduct the proposed mining activities. In the instant five year review proceedings, the County offered evidence that there *may be* concerns about the validity of the property's water rights. Based on those potential concerns, the County requested a condition requiring substantiation of the validity of those water rights via a letter of confirmation for DOE. The concerns offered about the water rights are speculative in nature. No County officer has jurisdiction to determine the validity of water rights. *RCW 90.03.110*. However, should adjudication proceeding through the appropriate channels result in the determination that the subject property's water rights have become invalid, the operator of the mine would need to demonstrate the ability to provide adequate water for on-site operations with the withdrawal of no more than 5,000 gallons per day. A modified version of the County's recommended water rights condition would ensure that the use does not exceed the allowed water withdrawal in either circumstance. As a side note, MDNS contrition 21 prohibits the withdrawal of more than 5,000 gpd. It does not prohibit the operator from obtaining process water by other legal methods. *Findings 30, 31, 32, and 33.*
3. SUP Amendment. The Examiner is an appropriate body to rule on what is intended by conditions of approval for special use permits, whether the conditions are instituted via the SUP or the MDNS. In the instant case, MDNS 6.A and 6.C are arguably rendered ambiguous because the preamble to MDNS 6 requires adoption of the groundwater monitoring plan (GMP) while the paraphrasing of the GMP contained in the subparts of MDNS 6 is inconsistent with the GMP itself. Neither the MDNS nor the SUP make reference to evidence supporting MDNS 6.C's requirement for specifically "17 wells" to be monitored before commencement of mining. Testimony at the five year review hearing established that the number 17 was derived from the GMP, not from any other source in science or law. However, the language of 6.C created an affirmative obligation to monitor 17 wells separate from the requirements of the GMP. The then-Applicant did not appeal the MDNS. Neither the previous owners nor the Applicant have monitored 17 wells. The Applicant's requested "clerical" corrections to 6.A and 6.C may arguably be within the Examiner's authority, both in terms of deadlines and types/number of monitoring stations.²¹ Yet, the County still asserts that MDNS 6.A and 6.C can't be amended via five year review. The outstanding issues regarding groundwater monitoring are: a) clarification that surface water monitoring stations count towards the "17 wells", b) whether a 17th well/station must be included in the background data set in order to comply with MDNS condition 6.C, and c) the deadlines for compliance. Given the complex history of the permit and given the County's creation of an expectation of public participation in a hearing prior to any amendment of the language of adopted conditions,

²¹ In fact, such changes have been made in previous five year reviews. In the Jim Mell/Olympia Fuel and Asphalt, five year review (980607 SUPT), the Examiner changed conditions relating to hours of operation and required setbacks/buffers, and removed the ten year limit on the life of the mine altogether.

the Applicant should proceed with the SUP amendment hearings to address the technical noncompliance with MDNS 6.A and 6.C in order to avoid the color of impropriety.

Findings 90, 91, 93, 94, 95, 96, and 97.

4. Groundwater Monitoring. With a condition requiring amendment of the language of the conditions to be considered in a public hearing on the SUP amendment application, the five year review decision can find compliance with the water monitoring conditions.
 - A. Substantive compliance with the intent and specific requirements of the groundwater monitoring plan have been demonstrated, both in terms of off-site supply well protection and perimeter ground /surface water protection. Bi-monthly data gathering began in 2008 and continued through the hearing date. Although some parameters were missing at some stations on some dates, the individual missing measurements do not rise to the level of failure to comply with monitoring. All required data was submitted in 2010 for 16 stations. According to the GMP, the 17th station is a process water pond that cannot be monitored until it is constructed and contains process water, which is by definition after mining commences. According to DOE, the County hydrogeologist, and the Applicant's consultant, there is a better, more complete data set available now than there would have been had the deadlines been met and mining had begun "imminently". No harm has resulted or will result from the timing of compliance. There is adequate background data to commence earth disturbing activities, including mining above the water table. *Findings 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, and 53.*
 - B. Whether or not the 162 additional parameters are required by the permit or have been inappropriately added after permit issuance, the Applicant has performed the required additional parameter testing "under protest" and has stated that they intend to complete the second round thereof by September 2011 "under protest". They are therefore in compliance with background condition monitoring, aside from the issue of the 17th station. The question of whether the additional parameters are required by the permit is more appropriately addressed in the context of the SUP amendment application and will be deferred. *Findings 48, 49, 50, 51, 42, 43, and 54.*
 - C. MDNS 6.B requires the off-site well inventory to be updated every five years for the life of the mine. In order to forestall any future confusion, a condition of five year review approval would establish the five year off-site well inventory clock as beginning with the date of the first inventory. If the December 2009 data becomes more than five years old prior to commencement of mining, the inventory shall be updated prior to mining. Once the mine becomes active, this information shall be updated within five years of its original collection date, and then every five years thereafter. *Findings 36 and 53.*

5. The five year review process does not open the permitted mining operation to compliance with the subsequently enacted interim CAO provisions. No new study of the site is necessary in order to determine compliance with the conditions of permit approval or with applicable provisions in TCC 20.54.
- A. The plain language of the code, read as a whole, does not support the County's position that five year review subjects an approved mine to compliance with later enacted ordinances outside of TCC 20.54. The five year review provisions at TCC 20.54.070.21.e expressly require compliance with amendments to "this chapter, as amended". TCC 20.54 has not been amended. TCC 20.54.040.1, 040.2, and 040.3 all require *proposed* special uses to satisfy current code. TCC 20.54.040.b specifically requires time limited SUPs that apply for extensions to satisfy codes in effect on the date of the extension application. No extension has been applied for in the present case. TCC 20.54.030 restricts permitted uses to review under current code if they enlarge, extend, increase in intensity, or relocate. None of these situations applies, and SUPT-02-0612 determined the use was compliant with TCC 20.54 as of the date of issuance. If adopted, the County's position would have the same effect as requiring mines to re-apply every five years. The Examiner is not persuaded to accept this interpretation of the Code, which would ultimately lack common sense. The time and expense needed to acquire DNR and DOE approvals argues against the County's position. No mining could ever occur under such a paradigm because no operator could afford the costs of reapplying every five years.
- B. The Thurston County Comprehensive Plan obligates the County to balance the protection of mineral lands of long term significance with the protection of critical areas. SUPT-02-0612 conducted that balancing analysis. More than 800 acres of critical areas were permanently protected as a direct result of the permit. The 284-acre mine site has been designated mineral lands of long term commercial significance. Without further conditions, the mine will remediate hundreds of acres contaminated by historical industrial uses and leave behind lake, wetland, and upland forest habitat.
- C. The extensive critical area reviews conducted from 2002 to 2005 were accepted by the County and relied on by the Examiner in issuing the permit now under review. Even the conservation organizations supported the October 2005 MDNS, submitting letters stating that it addressed all their concerns about the Maytown permit. The record contains no evidence establishing a lack of material disclosure during the 2002 through 2005 review. Credible evidence supports the conclusion that no critical areas that should have been protected pursuant to the 2002 CAO were missed; however, even if they were, the County and the Applicant are equally bound by the issued permit. The interpretation of TCC 20.54.070.21.e that five year review opens a permitted mine for review as if it were a *proposed* mine is inconsistent with land use law as interpreted and applied by the courts of Washington. *Skamania County v. Columbia River Gorge Commission*, 144

Wn.2d 30 (2001); Noble Manor v. Pierce County, 133 Wn.2d 269 (1997); Chelan County v. Nykreim, 146 Wn.2d 904 (2002).

- D. There is no evidence of noncompliance with any condition relating to critical areas protection except for MDNS 10. The County asserted that required signage along the site boundary in the buffer of Wetland A has not yet been posted. A condition of approval would adequately ensure compliance with MDNS 10.

Findings 3, 55, 58, 71, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 87, 88, 89, 98, 101, and 103.

6. Five Year Review is approved subject to the conditions below. The Applicant has demonstrated compliance with all conditions except MDNS 6.A, 6.C, and 10. Compliance with those conditions can be ensured by new conditions of approval. According to the authors of the original groundwater monitoring plan and the County's current hydrogeologist, all information needed to begin earth work has been submitted. Other than the technicalities of timing and the types and number of water monitoring stations - which issues are deferred to the separate SUP amendment proceedings - as conditioned, no compliance issues exist that would prevent the Applicant from proceeding with pre-mining requirements, including those that involve significant ground disturbing activities, and the commencement of mining. *Findings 24, 25, 26, 43, 52, 53, and 54.*
7. Expiration has been officially precluded. *Finding 8.* The record is devoid of evidence upon which the Examiner could or should invalidate the permit. The County Hearing Examiner has no authority to terminate a permit based on the identity of the legal owner of the property. Disputes arising from alleged breach of the Settlement Agreement are private civil disputes beyond the scope of the five year review and outside the Examiner's jurisdiction. The five year review decision does not encompass potential future accessory uses or post-mining uses of the subject property. Any future use will be required to go through all appropriate permit review procedures prior to development. The scope of the Examiner's authority does not include equitable remedies.

DECISION

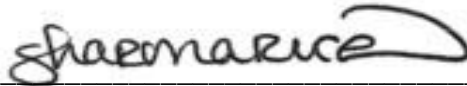
The five year review of special use permit SUPT-02-0612 authorizing a 284-acre gravel mine within a 497-acre disturbed area, is **APPROVED** subject to the following conditions:

1. The Applicant shall complete the SUP amendment public hearing process for the previously submitted application for amendment of SUPT-02- 0612.
2. In the event that the water right certificates relied on in SUPT-02-0612 finding number 6 are invalidated by appropriate authorities, the Applicant shall submit for County approval a water use plan that shows how operations can proceed without exceeding the withdrawal of 5,000 gallons per day OR shall scale back operations to the point that not more than 5,000 gallons per day are needed. The water use plan shall be submitted to the

County within 30 days of the operator's receipt of notice of water rights invalidation. If water would be imported, the water use plan must specify by what means and from what source water in excess of 5,000 gallons per day will be brought to the site.

3. If the December 2009 off-site supply well survey data becomes five years old prior to commencement of mining, the off-site supply well inventory required by MDNS 6.A shall be updated prior to mining. Once the mine becomes active, the inventory information shall be updated within five years of its original collection date, and then every five years thereafter.
4. The Applicant shall install all signage required by MDNS condition 10 prior to commencement of mining.

DECIDED December 30, 2010.



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