BEFORE THE HEARING EXAMINER
IN AND FOR THE COUNTY OF THURSTON

In the Matter of the Application of
Maytown Sand & Gravel, LLC
For Approval of a Amendment
Special Use Permit SUPT-02-0612; and
In the matter of the Appeals of
Friends of Rocky Prairie
and
Maytown Sand & Gravel, LLC

DECISION ON
MOTION FOR RECUSAL

Of the County's January 19, 2011
SEPA Threshold Determination

Summary of Decision
The Motion for Recusal is denied.

Background

On December 6, 7, and 8, 2010, Thurston County Hearing Examiner pro tem Sharon A. Rice held an open record public hearing on the five year review (File No 20101102512) of the mineral extraction operation approved in 2005 as SUPT-02-0612. Friends of Rocky Prairie (FORP) was a party of record to the five year review proceeding. At the hearing, there was testimony about a related, pending application for amendment (File No. 2010101170) of SUPT-02-0612. The five year review Findings, Conclusions, and Decision (Decision) was issued on December 30, 2010.

On the Application's motion, an initial pre-hearing conference on the SUP amendment application matter was conducted on January 6, 2011. At that prehearing conference, it was acknowledged that the County had not yet issued its environmental threshold determination on the application, and that it was anticipated there would likely be at least one appeal of the
threshold determination. After considering the timeline of threshold determination issuance, a second pre-hearing conference was scheduled for February 15, 2011.

Acting as Responsible Official pursuant to the State Environmental Policy Act (SEPA), the Thurston County Resource Stewardship Department issued its environmental threshold determination, a mitigated determination of non-significance (MDNS), on the above-captioned SUP Amendment application on January 19, 2011.

On February 9, 2011, both the Applicant (Maytown Sand & Gravel, or MSG) and FORP timely appealed the MDNS.

On February 14, 2011, FORP submitted a Motion for Recusal of the Hearing Examiner (Motion) and requested that the next day's pre-hearing conference be stricken pending a ruling on the Motion. The Applicant and interested party Port of Tacoma argued that the pre-hearing conference should proceed as scheduled and the Motion be addressed in its course.

On February 15, 2011, the Examiner conducted the second pre-hearing conference by telephone, during which the Motion was discussed. Among other matters, the Second Pre-Hearing Order issued February 16, 2011 established a schedule for submission of responses to the Motion for Recusal by the Applicant MSG and interested party Port of Tacoma, as well as a reply from FORP.

The following materials were timely submitted and reviewed in consideration of the instant Motion:

- FORP's Motion for Recusal of the Hearing Examiner, dated February 14, 2011
- MSG's Response to FORP's Motion for Recusal of the Hearing Examiner, dated February 18, 2011
- Port of Tacoma's Response to Motion for Recusal of the Hearing Examiner, dated February 18, 2011
- FORP's Reply to MSG and the Port's Responses, dated February 22, 2011

**Grounds Argued for Recusal**

FORP's Motion alleges that in the course of issuing the Decision on the related five year review application, the Examiner prejudged two questions that are at issue in the above-captioned SUP Amendment Applicant and consolidated SEPA Appeal hearing, namely:

1) That the Hearing Examiner prejudged issues concerning "lack of material disclosure" during the five-year review and, 2) that the Hearing Examiner's determination that the "clerical corrections" to the SUP could have "arguably" been accomplished during the five-year review thereby obviating the need for a SEPA Amendment appeal appears to prejudge that the County is wrong to have the SEPA Amendment Appeal at all.

FORP's Reply, page 5.
More fully developing the second asserted basis for recusal, FORP's briefing states:

Specifically, in the Conclusions Based on Findings of the five-year review the Hearing Examiner addresses the "SUP Amendment" and concludes that this "arguably" should have occurred during the five-year review.

FORP's Reply, page 6 (underline added for emphasis).

**Discussion**

1. **Prejudgment on SEPA issues relating to lack of material disclosure**

"Lack of material disclosure" is a phrase that appears three times in the December 30, 2010 Decision: Findings 105 and 106 (page 37) and Conclusion 5.C (on pages 44-45).

As argued by FORP on the record at the five year review hearing, the phrase "lack of material disclosure" comes from Washington Administrative Code (WAC) WAC 197.11.340, a section of the administrative rules that implement the State Environmental Policy Act (SEPA). The phrase was inserted into the five year review proceedings solely through FORP's testimony and written submittals.

Criteria for review of five year review applications do not include analysis pursuant to SEPA. The Decision addressed FORP's argument regarding "lack of material disclosure" because it was a considerable portion of public comment received on the subject of which critical areas regulations should be applied at the time of five year review. Findings 105 and 106 reflect FORP's argument on which critical areas regulations should apply; they do not contain Examiner analysis any of SEPA issues. Conclusion 5.C's use of the phrase "lack of material disclosure" acknowledges and disposes of FORP's arguments regarding which critical areas regulations should apply. No SEPA conclusions were rendered in 5.C or any other conclusion.

To the extent that FORP intends to argue lack of material disclosure at the pending SUP amendment and SEPA appeal hearing, they will have a full opportunity to make a record. SEPA analysis will be conducted in considering the SUP amendment application and both SEPA appeals.

2. **Prejudgment regarding whether there should be an SUP Amendment proceeding**

FORP's second basis for assertions of prejudgment comes from the content of the Decision's conclusion 3. The full text of that conclusion follows:

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.1 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, 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.

Decision, page 44.

FORP's Motion for Recusal selectively quotes and slightly misquotes the conclusion. The Motion's use of quotation marks varies from their use in the Decision, and the Motion uses the word "should" where conclusion 3 uses the word "may", altering its meaning.

The language at issue is from the following sentence of conclusion 3:

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.

In this sentence, conclusion 3 acknowledges that the Applicant characterized the requested changes as "clerical" in nature. Further, in using the words "may arguably", it acknowledges that reasonable minds could differ as to whether such changes are appropriately made in a five year review decision or not.

However, the final sentence of conclusion 3 expressly holds that an SUP Amendment is required. In so doing, conclusion 3 ends the debate between reasonable minds in favor of the additional process. The Motion for Recusal's statement of concern that perhaps the Examiner doesn't actually think one is required is accordingly unpersuasive.

1 [Footnote 21, Decision page 43.] 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.
3. Arguments opposing Motion

The Applicant and the Port oppose the recusal motion on similar and sometimes overlapping grounds. Among other arguments, both the Applicant and the Port argue that the Motion is untimely: that FORP should have filed its Motion earlier because FORP received the five year review decision when it was issued, and that FORP's timing in requesting recusal is either a delay tactic and/or an exercise in examiner shopping. Regardless of the timeliness of the Motion, the Applicant and the Port argue that recusal at this late date would result in delays to the process that would unduly harm them.

4. Appearance of Fairness Doctrine

The appearance of fairness doctrine is intended to ensure that hearings are not only actually fair, but further, appear to be fair. Neither any of the case law cited by the parties (FOPR, the Applicant, and the Port) nor the statute codifying the judicially-created doctrine (Revised Code of Washington, RCW 42.36) directly address the fact pattern currently at issue: where a hearing examiner has heard a previous related matter and one party alleges prejudgment of issues in a pending matter.

The Motion for Recusal was received and considered with great seriousness. The appearance of fairness doctrine is the sacrosanct high ground of quasi-judicial decision making, and no hearing examiner takes allegations of its violation lightly. Abundance of caution might dictate recusal on the basis of the mere allegation. That said, fairness is argued with equal fervor on both sides of the instant discussion. Reasonable minds can and do differ in land use disputes. FORP has argued not that this Examiner has engaged in improprieties or has demonstrated a lack of integrity with regard to her decision making, but only that the potential appearance of prejudgment casts enough of a pall that the doctrine is triggered and recusal required.

In the world of quasi-judicial decision making, each matter is decided on its own merits. In any given proceeding, the Hearing Examiner's jurisdiction is limited both by the scope of jurisdiction conferred by ordinance for a specific type of decision and also is limited to the record created at the public hearing.

The questions to be answered at the five year review hearing and at the SUP amendment hearing (which subsequently evolved to include two SEPA appeals) are legally, jurisdictionally distinct. In the five year review proceeding, the Examiner lacked authority to consider the adequacy of SEPA review. The Decision addressed the testimony and evidence offered at hearing but did not make any conclusions concerning SEPA review. The same will be true on reverse: in the SUP amendment/SEPA appeal proceeding, the Examiner's authority will be limited to the criteria for approval of SUP amendments and the scope of authority conferred to the Examiner to decide appeals. The ensuing decision will be limited to the record created at the pending hearing.

On balance, a close reading of the Decision reveals no prejudgment of any SEPA matters and expressly demonstrates the Examiner's conclusion that the SUP amendment process is required.
Decision
The Motion is denied. The Motion, responses, and this order will be included in the record of the pending matter, which shall proceed as scheduled.

DECIDED February 25, 2011.

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Sharon A. Rice
Thurston County Hearing Examiner pro tem