BEFORE THE HEARING EXAMINER OF THURSTON COUNTY

In the Matter of the Application of
MAYTOWN SAND AND GRAVEL, LLC

SUP No. 02-0612

Mitigated Determination of Non-Significance of SUP 02-0612

FRIENDS OF ROCKY PRAIRIE’S
PRE-HEARING BRIEF FOR STATE
ENVIRONMENTAL POLICY ACT
APPEAL

I. Introduction

The facts and law relevant to the disposition of the issues in this case are very complex. However, this does not mean a clear path cannot be found to guide the decision making process. From a factual standpoint the path is clear if not obvious. Maytown Sand and Gravel (“MSG”) applied to amend the 2005 Mitigated Determination of Non-Significance (“2005 MDNS) and Special Use Permit (“SUP”) because it is out of compliance with conditions of the 2005 MDNS, which were incorporated into the SUP. What MSG is seeking in this process are amendments to conditions in the 2005 MDNS. The County and MSG would like to confuse the issue by claiming it is only an amendment to the SUP. This, however, is not
accurate. MSG is out of compliance with conditions in the 2005 MDNS and it is only through
the MDNS’s incorporation into the SUP that the conditions in question can in any manner be
considered “conditions” of the SUP. Therefore, the facts show that MSG is seeking
amendments to the 2005 MDNS in order to gain compliance with the SUP.

The facts also show that the County did amend certain conditions in the 2005 MDNS. It
is uncontested that the language, deadlines, and water monitoring requirements for MDNS
Conditions 6A and 6C were amended as a result of this process. This is an amendment to the
SUP only because the MDNS, and its requirements, are a condition of the SUP. Therefore,
this process was an amendment to the 2005 MDNS as it relates to a condition of the SUP.

The County also improperly avoids its SEPA obligations that are triggered when using
existing environmental documents to meet its responsibilities. The County seems to argue that
the 2011 MDNS can stand alone, but it is clear that the County relied heavily on existing
environmental documents when issuing the 2011 MDNS. Because the County relied on these
documents but did not follow the proper SEPA procedure the County violated SEPA and the
2011 MDNS must be overturned.

The legal issues in this case involve the State Environmental Policy Act (“SEPA”),
particularly the codes concerned with issuing or amending threshold determinations. SEPA
does not mandate substantive outcomes, but is instead designed to ensure that “environmental
factors were adequately considered in a manner sufficient to establish prima facie compliance
with SEPA.”¹ Therefore, the command of SEPA is to ensure decision-makers issue threshold
determinations and amend threshold determinations based on sufficient information to fully

evaluate the project’s impacts on the environment. The County failed to meet this standard and therefore the 2011 MDNS is clearly erroneous and must be rejected.

a. The County Violated SEPA by Amending the 2005 MDNS Because the Appeal Window for the 2005 MDNS Closed Six Years Ago

The County erred by amending the 2005 MDNS, which despite the County’s claim otherwise, is exactly what has occurred. In spite of the County’s claim that this is an SUP amendment with an accompanying MDNS based only on the SUP amendment, it is clearly an amendment of conditions found only in the 2005 MDNS. Since MSG did not appeal these conditions of the 2005 MDNS when it was issued, MSG is barred from amending them now. Therefore, the County violated its own SEPA regulations by allowing for the amendment.2

The Application Narratives submitted by MSG on April 22, 2010, July 1, 2010, August 24, 2010, and October 29, 2010 all request amendments to the MDNS.3 The April 22nd letter, which on the County website is named “Original SUP Amendment Application Letter,” actually seeks to amend conditions in both the MDNS and SUP. This letter initially sought to amend MDNS Conditions 5, 6A, 6C, and 15. Additionally, MSG wanted to amend SUP Conditions H, I and V.4 It is clear that MSG wanted to amend both the 2005 MDNS and some conditions of the SUP.

The July 1st letter discusses the “minor amendments” for MDNS Conditions 5, 6A and 6C.5 It should be noted that this letter and the April 22nd letter distinguish between amendments to the MDNS and amendments to the SUP. In the July 1st letter, MSG withdraws requests for amendments to MDNS 6C (relating only to background water quality testing) and MDNS 15

2 TCC 17.09.160(C).
(noise attenuation berm), as well as Condition V in the SUP (relating to monitoring data sent to off-site neighbors).\(^6\)

The August 24\(^{th}\) letter, which accompanied the environmental checklist for the 2011 MDNS, is regarding “Special Use Permit 02-0612/Maytown Sand & Gravel, LCC SEPA Checklist for Requested Amendments to MDNS Conditions 5, 6A and 6C.”\(^7\) This letter contains no discussion of amending the SUP and it specifically refers to the amendments of “MDNS Conditions 5, 6A and 6C.”\(^8\)

Additionally, the County makes it clear, in the Amended Notice of Application mailed on December 21, 2010, that the amendment process followed by the County will result in a change to the conditions of the MDNS:

Below in *italics* are the original conditions from the October 24, 2005 MDNS for SUPT 02-0612 that are the subject of this proposed revision. Following the original language is the proposed language in **bold** for the same numbered condition. Unless subsequently amended through an appropriate process, the unchanged conditions of the 2005 MDNS will remain in full force and effect. They will be attached to this MDNS as an addendum upon MDNS issuance. (Original emphasis.)\(^9\)

The plain language of this provision clearly evinces the County’s belief that the changes sought by MSG would amend the 2005 MDNS Conditions 6A and 6C. This belief is reinforced in the 2011 MDNS, which states: “the new language does not add new conditions to the original MDNS. The new language provides *changes* and clarifications to the original

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\(^4\) Notice of Application Letter April 22, 2010.
\(^5\) Notice of Application Letter July 1, 2010.
\(^6\) Id.
\(^7\) Notice of Application Letter August 24, 2010.
\(^8\) Id.
Therefore, it is clear that MSG sought an amendment to the 2005 MDNS and the County granted it. However, because these conditions were not appealed when the 2005 MDNS was initially issued MSG is barred from seeking to change them now.

Despite the clear intent of both the County and MSG to amend the 2005 MDNS and what in fact actually occurred, the County is now claiming that it did not amend the 2005 MDNS. The County now makes the nonsensical argument that the amendments sought by MSG will only change the SUP and not the 2005 MDNS. In the County’s Staff Report, issued February 25, 2011, the County flatly states, “the County is not amending the 2005 MDNS.”

The County then uses this false premise in responding to FORP’s claim that the County erred in processing the amendments by stating, “since the County did not amend or re-adopt the 2005 MDNS, FORP’s argument fails.” The County makes the same argument for FORP’s arguments regarding the County’s failure to properly review the 2005 MDNS and the County’s improper adoption or incorporation of the 2005 MDNS. However, as is clearly stated by the County in the 2011 MDNS, the conditions that are being amended are “the original conditions from the October 24, 2005 MDNS for SUPT 02-0612…” It seems impossible that the County can argue it is not amending the 2005 MDNS.

It should be noted the County argues in the County Staff Report that “the law does not allow the County to re-examine issues the County failed to appeal (after it issued the 2005 MDNS) when the proposed amendments do not involve the issues FORP would like re-examined. Chelan County v. Nykreim, 146 Wn.2d 904, 932-933, 53 P.3d 1 (2002); DeTray v.

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9 Amended Notice of Application, December 21, 2010 pg. 5.
10 Mitigated Determination of Non-Significance, January 19, 2011 pg. 4. (emphasis added).
11 County Staff Report at 12.
12 County Staff Report at 12.
13 Mitigated Determination of Non-Significance 2011.
As discussed below, this argument does not apply to FORP because FORP is challenging the County’s application of SEPA to this process and MSG has sought an amendment to the permit allowing for its review. However, this legal reasoning does apply to MSG, who like the County, “failed to appeal” the 2005 MDNS. This violates RCW 43.21C.075 and Thurston County Code 17.09.160(C), which allows for fourteen calendar days to appeal a threshold determination.

The County cannot have it both ways. The County changed how it presented the proposed amendments presumably because amending the 2005 MDNS would cause the entire document to be called into question. There is clear evidence from the five-year review of this SUP that the 2005 MDNS was issued improperly because it was procured through a lack of material disclosure, and there is new information indicating this proposal’s probable significant adverse environmental impact. Because the 2005 MDNS is flawed, it cannot be used. However, the County’s chosen method of amending the 2005 MDNS, but claiming it is not amending it, is improper.

b. The County Erred by Failing to Properly Adopt the 2005 MDNS when the County Amended the 2005 MDNS through the 2011 MDNS, Thereby Violating WAC 197-11-630

Since the County claims the 2011 MDNS is not an amendment to the 2005 MDNS, even though its sole purpose is to change conditions of the 2005 MDNS, the County must have relied on the 2005 MDNS when making a threshold determination for the 2011 MDNS. If this is the case, then the County violated WAC 197-11-630 because it failed to properly adopt the 2005 MDNS.

\[14\] County Staff Report at 12.
When issuing a MDNS based on existing environmental documents, as the County did, a lead agency can use existing environmental documents to meet the requirements of the SEPA in one of three ways. First, an agency can incorporate an existing document by reference via the procedures in WAC 197-11-600(4)(b) and 625. Any existing environmental document can be incorporated by reference, but it must be identified, its relevant content discussed and made available for public review.\(^\text{15}\) Second, a lead agency can use existing documents via an addendum.\(^\text{16}\) An addendum can only be used for something that “adds analyses or information about a proposal.”\(^\text{17}\) According to the SEPA Handbook, produced by the Department of Ecology, “addendums are not appropriate if the changes or new information indicates any new or increased significant adverse environmental impact.”\(^\text{18}\) (Original emphasis.)

Finally, a lead agency can adopt a previously created MDNS or environmental checklist for a new proposal, if the existing MDNS or environmental checklist adequately addresses the potential environmental impacts of the new proposal.\(^\text{19}\) If the lead agency chooses to adopt an existing MDNS it must determine if the document meets the agency’s environmental review standards.\(^\text{20}\) Furthermore, the agency must state it is adopting the document and use a particular form, found in WAC 197-11-965, and allow for the distribution of copies of the document to interested parties and placing a copy in the public library or some other public office.\(^\text{21}\)

\(^{15}\) WAC 197-11-625(2).
\(^{16}\) WAC 197-11-600(4)(c) and 625.
\(^{17}\) WAC 197-11-600(4)(c).
\(^{19}\) WAC 197-11-630(1).
\(^{20}\) Id.
\(^{21}\) WAC 197-11-630(2)(b).
The County initially chose adoption as the method to meet its SEPA requirements for use of an existing environmental document.\textsuperscript{22} The language used by the County in the Amended Notice of Application states; “The unchanged conditions of the October 24, 2005 MDNS will be adopted by Thurston County pursuant to WAC 197-11-340, 630 and 965 at the time of issuance of this MDNS. The unchanged conditions will remain in full force and effect.”\textsuperscript{23} However, sometime between the posting of the Amended Notice of Application and the issuance of the 2011 MDNS (approximately four weeks) the County decided that it would not adopt the 2005 MDNS and dropped this language from the 2011 MDNS. It now appears the County has amended the 2005 MDNS without any consideration of the validity of the document itself.

The omission of this requirement occurred after FORP submitted a comment letter to the County highlighting it.\textsuperscript{24} Thus instead of complying with SEPA requirements that the County itself initially stated it had to follow, the County removed these requirements from the 2011 MDNS, apparently to avoid its duty to review the adequacy of adopting existing environmental documents. This is improper and contrary to SEPA law.\textsuperscript{25}

Without explanation, Note C of the 2011 MDNS states: “Thurston County has determined that the SEPA review is limited to the proposed amendments and not to issues that were already reviewed in the earlier SEPA process unrelated to the proposed amendments. Only the requested changes and the effect of those changes are subject to this review. The unchanged conditions of the October 24, 2005 MDNS remain in full force and effect.”\textsuperscript{26}

\textsuperscript{22} Amended Notice of Application, December 21, 2010 pg. 7 Note C.
\textsuperscript{23} Id.
\textsuperscript{24} FORP SEPA Comment letter January 10, 2011.
\textsuperscript{25} WAC 197-11-630.
\textsuperscript{26} 2011 MDNS pg. 5 Note C.
However, this determination by the County and the removal of references to WAC 197-11-340, 630, and 965 from the issued MDNS without explanation is contrary to the law and policy of SEPA. It is contrary to SEPA law because the County offers no explanation of how it met SEPA requirements for using the existing 2005 MDNS. The County admits to relying on 2005 MDNS when it determined “the environmental threshold determination and conditions” of the 2011 MDNS, but it does not properly adopt or incorporate the 2005 MDNS.

In the County’s Staff Report, in which it responds to FORP’s issue that the County procedure was improper, the County confuses amending the 2005 MDNS and the process necessary for the creation of the new MDNS. This confusion has produced the stunning contradiction whereby the County does not require extensive environmental analysis for the 2011 MDNS because it relies on the 2005 MDNS and environmental documents, while at the same time claiming the new MDNS is a completely independent process and the existing environmental documents are beyond the scope of review. The County cannot have it both ways.

Although the County claims it did not adopt the 2005 MDNS for the issuance of the 2011 MDNS, even if the County had sought this method of amending the 2005 MDNS it would have been improper. The State Environmental Policy Act allows for the adoption of existing environmental documents for an amendment to a MDNS to meet SEPA requirements if environmental impacts were adequately evaluated in the previous document. However, some analysis must occur to determine whether the document being adopted is appropriate for the new proposal.

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27 2011 MDNS pg. 3.
28 WAC 197-11-600, 630.
Pursuant to WAC 197-11-630(1), the County must “independently review the content of the document and determine it meets” the County’s environmental standards. The County stated in the Notice of Application that it would render its decision based upon the adoption of the October 24, 2005 MDNS via WAC 197-11-630, but it appears the County did not in fact do so. If the County had conducted an independent review, as required by the law, given the evidence and testimony at the permit’s five-year review, the County could not have found the October 2005 MDNS meets its environmental standards. The County itself proved in its briefs and its testimony for the five-year review that critical areas and at-risk habitat were missed during the 2005 environmental review.\(^{29}\)

The County states that it did not incorporate this document by reference, by addendum, or by adoption.\(^{30}\) Had the County stayed true to its decision in the Amended Notice of Application to adopt the 2005 MDNS, it is likely that the County would have found the 2005 MDNS does not meet its standards for an environmental document as required by WAC 197-11-630(1). As discussed below, the County’s only option was adoption, as it correctly claimed in the Notice of Application, but adopting the 2005 MDNS is contrary to SEPA law because it was procured without the full environmental information necessary for the lead authority to make a reasonable determination of the environmental impacts. Therefore, if it is found that the County did adopt the 2005 MDNS it did so improperly because it failed to independently review the document and determine that it met the County’s environmental review standards as required by WAC 197-11-630(1).

\(^{29}\) All testimony, evidence, and the documents from the Five-Year Review are incorporated by reference.

\(^{30}\) County Staff Report pgs 12, 13.
c. The County Cannot Use the 2005 MDNS to Meet its Responsibilities under SEPA Because New Information Indicates the Proposal Will Have Significant Adverse Environmental Impacts Thereby Violating WAC 197-11-600(3)(b)(ii)

In the alternative, even if the County simply used the existing 2005 MDNS unchanged to meet all or a part of its responsibilities under SEPA, the County still violated SEPA because new information regarding the probable significant adverse environmental impacts of the proposal render the 2005 MDNS unusable for this purpose. If there is “new information,” which “includes discovery of misrepresentation or lack of material disclosure,” regarding an existing MDNS, then the agency cannot use it to meet its responsibilities under SEPA. It is important to note that “new information” can also simply mean there is new information about the impacts of a proposal that have come to light since the creation of the environmental document. It does not mean there has to be lack of material disclosure or misrepresentation.

Testimony taken during the five-year review shows the County’s concern regarding the delineation of native outwash prairie. The County’s cross-examination of Mr. Garrison, consultant for the applicant, revealed that some environmentally sensitive areas were missed during the information gathering process that led to the October 2005 MDNS. During Day 2 of the five-year review Mr. Garrison admitted that he had never investigated Mine Area 1, instead deciding that it couldn’t be prairie because it had been logged in the mid 1990’s. His reasoning was that logging would have caused an invasion of non-native plants, thereby rendering the area non-prairie habitat. In fact, the cutting of the invasive Douglas fir removes the dark canopy that can prevent prairie plants from flourishing; since this was done by 1996, it’s likely that Mine Area 1 was a relatively healthy prairie by 2002. But it was not actually

31 WAC 197-11-600(1) and 600(3)(b)(ii).
32 WAC 197-11-600(3)(b)(ii).
investigated by Mr. Garrison. The Habitat Management Plan his company submitted said that areas would be omitted from the prairie boundary if they “were modified by previous filling, grading, and logging.” (Emphasis added.) Instead, it seems Mr. Garrison’s only criterion for eliminating an area as prairie was that it had been logged. He even showed a picture pointing into Mine Area 1 that was labeled, “Disturbed areas, including logged areas, not to be included in the NOP [Native Outwash Prairie] boundary.” And in later testimony, he admitted that there was very little Scot’s broom in Mine Area 1, thus removing any argument that the area was dominated by invasive plants and thus not prairie.

Along with failing to survey the area, Mr. Garrison admitted he was aware that Mine Area 1 had several mima mounds, another indicator of prairie as well as important geologic features to be protected in their own right. Photographs such as Exhibit ____ show that the same topography as is found on the adjacent prairie continues above the railroad tracks, which seem to have been used as an arbitrary boundary of the prairie.

These factors provide convincing evidence that Mine Area 1 was healthy prairie in 2005, especially when combined with the information found during the recently-allowed investigation of the area by WDFW. In 2009, Washington Department of Fish and Wildlife personnel who had been prevented from accessing the site since around 2001 (see Exhibits _____ and ____), were finally allowed to survey Mine Area 1. They found four at-risk butterfly species and their host plants, as well as many other prairie plants, including a favorite host of the federal candidate Taylor’s Checkerspot, historically documented there. (See Exhibit ____ for survey results.) Furthermore, the Department determined the area was still a functional prairie. (See Exhibit ____, sent from WDFW to both the County and the applicants.)

33 Habitat Management Plan of ELS.
It is important to note that an investigation of the site in 2005 could well have proven that Mine
Area 1 was Native Outwash Prairie, a protected critical area at the time. And had a butterfly
survey occurred, as the Habitat Management Plan submitted by the applicant implied it had,
these at-risk species and their habitat would have been identified and protected as required by
the Thurston County Code then in effect.

This information that environmentally sensitive and protected lands were missed during
the initial environmental review is new information. Although many citizens thought some
critical areas were missed, there was never verification prior to Mr. Garrison and others’
testimony at the five-year review that prairie and oak trees were still unprotected. This
information was not part of the 2005 MDNS. Additionally, this new information shows that if
the project goes forward as planned, under the unchanged 2005 MDNS, there will be
destruction of environmentally sensitive and protected areas and species. Therefore, the
County cannot use the 2005 MDNS as it is to meet its SEPA responsibilities for the 2011
MDNS.

d. **WAC 197-11-600(3)(b)(ii) Requires the Preparation of a New Threshold
   Determination Because New Information Shows the Project Will Have
   Significant Adverse Environmental Impact**

   Here the County is acting on the same proposal but analyzing how the proposed
   amendments would impact the environment. Section 1 of WAC 197-11-600 provides “the
criteria for determining whether an environmental document must be used unchanged and
describes when existing documents may be used to meet all or part of an agency's
responsibilities under SEPA.”34 The County claims that the “unchanged conditions of the 2005

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34 WAC 197-11-600(1).
MDNS will remain in full force and effect.”35 Additionally, it is clear the County relied on “all
the previous SEPA documents” when it reviewed the proposed amendments because the
environmental checklist submitted for the proposed amendments “was not complete in itself.”36
Finally, the County plainly states, “the County reviewed and considered the information in the
2005 MDNS when making the new threshold determination for the amendment proposal.”37
Therefore, it is clear that the County relied on and used existing environmental documents
unchanged.

However, an agency cannot use a MDNS or EIS unchanged if there is a substantial
change to the proposal or if there is new information that the proposal will have an adverse
impact on the environment. In this instance, there is evidence of this type of new information.
In fact, the County discovered this new information during the five-year review, during which
the County argued that this new information should be applied to the SUP.38 Therefore,
pursuant to WAC 197-11-600(3)(b)(ii), and as argued in subsection c, the County cannot use
the 2005 MDNS to meet its SEPA obligations for the 2011 MDNS. (See letter g, page 21, for
discussion of substantial change to the proposal.)

More importantly however, not only can the County not rely on the 2005 MDNS to
meet its SEPA responsibilities associated with the issuance of the 2011 MDNS, as stated
above, the County is required to prepare a new threshold determination because it knows of
new information indicating the proposal’s likely significant adverse environmental impacts.
The Court of Appeals addressed this issue as it relates to an EIS in Preserve Our Islands v.

35 2011 MDNS pg. 4.
36 County Staff Report pg. 13.
37 Id. at 12.
38 County’s Post Hearing Brief for Five-Year Review
Shorelines Hearings Board, 133 Wn.App. 503, 542, 137 P.3d 31 (2006), holding that “SEPA requires a supplemental EIS…when new information indicates a proposal’s “probable significant adverse environmental impacts” were not previously covered by ‘the range of alternatives and impacts analyzed in the existing environmental documents’.” (Citing WAC 197-11-600(3)(b)(ii).) For DNSs the proper remedy is “preparation of a new threshold determination.”  

While SEPA is designed to give finality to a MDNS, the regulations contain important exceptions. One important exception is in Part Six, as noted in the following pronouncement: “When the responsible official makes a threshold determination, it is final and binding on all agencies, subject to the provisions of this section and WAC 197-11-340, 197-11-360, and Part Six.” Part Six of the SEPA regulations, which addresses “When to Use Existing Documents,” creates exceptions to the finality of a DNS. These exceptions exist so that an agency is not obligated to use a deficient MDNS when conducting its own SEPA and substantive decision processes. Absent these exceptions, agencies and the public would be without recourse when presented with a document that lacks information sufficient to determine the environmental impact of the proposal.

WAC 197-11-600(3) provides opportunities for both agencies and the public to raise questions concerning the adequacy of a MDNS after the comment period has closed. This section specifically applies in situations when an agency is acting on the same proposal and governs how to use existing environmental documents, as is the case in this instance.

39 WAC 197-11-600(3)(b)(ii).
40 WAC 197-11-390(1).
Subsection (a) allows an agency to assume lead agency status if it is “dissatisfied” with the finalized DNS. This provision is purely discretionary, applies specifically to agencies, and allows for the agency to use its own specialized knowledge and experience to determine if the final DNS is sufficient for purposes of SEPA compliance.

As the Pollution Control Hearings Board held in *Beach Drive Northeast v. King Co.* and WDOT, even agencies that have failed to comment on a DNS are not precluded from challenging them after the comment period has run. In that case the Board held, “[t]he SEPA rules provide for those agencies [that did not comment] another mechanism for remedying dissatisfaction with a DNS – assumption of lead agency status. WAC 197-11-600(3).”\(^{41}\) Clearly, subsection (3)(a) applies to agencies and provides them with an opportunity to remedy a deficient final DNS at their discretion.

In contrast, subsection (3)(b) does not apply strictly to agencies. The language in subsection (3)(b) begins “[f]or DNSs and EISs, preparation of a new threshold determination or supplemental EIS is required…” if there are “substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts” or if there is “new information indicating a proposal's probable significant adverse environmental impacts.” As stated above, new information includes discovery of misrepresentation or lack of material disclosure.\(^{42}\) It is important to note that “new information” is not limited solely to “misrepresentation or lack of material disclosure,” but includes any new information, as that phrase is commonly defined.

\(^{41}\) *Beach Drive Northeast v. King Co. and State DOT*, SHB 87-50, 88-47 (1989).

\(^{42}\) See, supra subheading c.
The intent of WAC 197-11-600(3)(b) is to provide for mandatory correction of egregious errors in an existing DNS, or MDNS, that is to be used by an agency for its own SEPA process. The statute correctly removes agency discretion where lack of material disclosure and/or misrepresentation are present or when new information indicates the proposal will have significant adverse impacts on the environment. The regulation does not limit the ability of any party commenting on the jurisdictional agency’s SEPA process to point out information regarding the underlying lack of material disclosure or new information. More importantly, the definition of “new information” found in subsection (b) (lack of material disclosure and misrepresentation) allows for correction of the situation in which the public does not comment on the original MDNS because the document mistakenly concludes, due to lack of information, that the proposal will have no adverse environmental impacts, as in this instance. This interpretation is true to SEPA’s overriding policy that decisions must be “based upon information reasonably sufficient to determine the environmental impact of a proposal.”

The testimony and evidence presented at the five-year review showed that the 2005 MDNS failed to account for several environmental impacts that will occur on the site if mining goes forward as planned. Had the County known this information back in 2005, the 2005 MDNS would have protected these areas. The County now knows this new information, therefore it cannot use the 2005 MDNS unchanged to meet its obligations under SEPA, as per WAC 197-11-600. The County is required by WAC 197-11-600(3)(b)(ii) to prepare a new threshold determination because this new information shows there will be adverse environmental impacts.

It is highly likely that protected Native Outwash Prairie exists (and existed at original permitting) in the area known as Mine Area 1. If mining goes forward as planned this section of Native Outwash Prairie will be irreparably harmed. It is also clear that habitat for at least four at-risk butterfly species and the species themselves will also be irreparably harmed if mining is allowed in Mine Area 1.

The county cannot use the 2005 MDNS to meet its obligations under SEPA because it is based on insufficient information to determine likely significant adverse impacts to the environment. The 2005 MDNS improperly excludes the area known as Mine Area 1 from protection because it was not properly surveyed at the time. New information clearly shows this area contains critical areas and habitat for at-risk species. Had this information been known by the hearing examiner at the time of permitting, it is virtually certain, given the hearing examiner’s comments on critical area protection, that this area would have been excluded from mining activity. Fortunately, SEPA allows for correction and additional protections for areas if new information shows a proposal will likely have a significant adverse impact on the environment. The law mandates that in this circumstance the agency must prepare a new threshold determination. WAC 197-11-600(2)(b).

e. The Significant Time Between the Initial Environmental Review of This Site and the Proposed Amendments Makes Reliance on the Original MDNS Impossible

The applicant’s own environmental lead, Mr. Garrison, testified at the Five Year Review that he had “no doubts” that the site had changed since its original investigation because it’s a “dynamic ecosystem” certain to change. He wasn’t surprised that WDFW personnel had spotted a new wetland, a critical area by the 2005 definition, and a possible new stream. The original SEPA checklist for this site was completed almost a decade ago. The
applicant and county are relying on an outdated Environmental Checklist that fails to account for any changes that occurred on the site. Yet it is the general policy of SEPA that environmental documents are “concise, clear, and to the point, and are supported by evidence that the necessary environmental analyses have been made.”

Furthermore, case law is clear that existing “environmental documents may be used ‘provided that the information in the existing document(s) is accurate and reasonably up-to-date.’” Additionally, certain municipalities, such as Seattle, require that before an existing environmental document is used the information in it must be “accurate and reasonably up to date.” The County’s reliance on out-of-date environmental documents violates this policy because it is clear that for the current proposal the necessary environmental analyses have not been made. The stale environmental document adopted by the county through this latest process fails to consider any significant changes that occurred on the site in the intervening years.

The County cannot use the old, out-of-date environmental checklist and 2005 MDNS to adequately assess the impacts of the current proposal. These documents do not reflect the reality of the situation at the proposed site. The only remedy is to withdraw the MDNS and reestablish conditions through a new SEPA process based on current understanding of the site.

f. The County Must Withdraw the 2011 MDNS Because it was Procured Through Lack of Material Disclosure and Fails to Contain Sufficient Information for the County to Make a Valid Threshold Determination

The guidelines for the threshold determination process begin in WAC 197-11-330. When a responsible official makes the threshold determination he should determine whether

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44 WAC 197-11-030(2)(c).
“all or part of the proposal, alternatives, or impacts have been analyzed in a previously prepared environmental document, which can be adopted or incorporated by reference (see Part Six).” This is apparently the path the County took in this instance, although as detailed above, the County failed to fully comply with the requirements found in Part Six of the SEPA rules. This is apparent because the environmental checklist submitted in 2010 by MSG for the MDNS amendments is woefully incomplete.

In fact, the County acknowledges this in the County Staff Report, stating: “while the County agrees that the checklist submitted for the amendment proposal was not complete in itself, the County did have all the information it needed to conduct a thorough SEPA review of the proposal. Not only did it have all the previous SEPA documents, the County had conducted site visits, was involved in the Five Year Review and was provided all the information it needed to review the amendments under SEPA.” The County’s reliance on existing SEPA documents to meet its obligations for the 2011 MDNS violates SEPA. The County itself argued and proved during the Five-Year Review that certain critical areas were not included during the initial environmental review for the 2005 MDNS. Therefore, the County cannot rely on SEPA documents it knows to be insufficient to meet its SEPA obligations for the 2011 MDNS as it claims. Since there is new information indicating the proposal’s likely significant adverse impact on the environment, the County must not rely on the existing environmental documents.

This is important because, as stated above, the use of existing environmental documents allows for an analysis to determine whether they meet SEPA standards. The County has

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\[46\] SMC 25.05.600(B).

\[47\] WAC 197-11-3302(a).
attempted to meet its requirements under WAC 197-11-330 without having to meet the requirements of Part Six of the SEPA rules. This violates the very backbone of SEPA, which requires decisions be made based on reliable and sufficient information to make an informed decision regarding the environmental impact of a project. The County cannot at the same time rely on existing environmental documents and yet completely ignore new information showing the project will have an adverse environmental impact.

However, in the alternative, if the County simply relied on Part Three of the SEPA rules and issued the 2011 MDNS under WAC 197-11-350 or 355\(^{49}\), and did not rely on the old environmental checklists or 2005 MDNS, the County must withdraw the 2011 MDNS if it was procured through lack of material disclosure.\(^{50}\) The environmental checklist submitted in 2010 for the 2011 MDNS amendments contains no information, whether material or not.\(^{51}\) It is devoid of any meaningful analysis of the potential impacts of the proposed action. There is hardly a need to argue whether the information that was not disclosed was material because no information was disclosed. Therefore, because the County did not adopt or incorporate by reference any of the existing environmental documents it must have relied on the 2010 environmental checklist. Because this environmental document is completely devoid of any environmental information, the 2011 MDNS was procured through a lack of material disclosure and must be withdrawn.

g. The 2011 Groundwater and Surface Water Monitoring Plan and the Related Amendments Represent a Substantial Change to the Proposal, Therefore a New Threshold Determination is Required

\(^{48}\) County Staff Report pg. 13.  
\(^{49}\) The 2011 MDNS states it was issued under WAC 197-11-355 and the County Staff Report refers to WAC 197-11-350, pg. 12.  
\(^{50}\) WAC 197-11-340(3)(a)(iii).  
\(^{51}\) Environmental Checklist August 23, 2010.
The County claims that no environmental harm has occurred as a result of MSG’s failure to comply with 2005 MDNS Conditions 6A and 6C, the water monitoring conditions. However, the County also acknowledges that “water monitoring [is], one of the most significant environmental issues with the project.” The reason water monitoring is so crucial is because it provides the baseline information to know when harm is occurring to water quality and the integrity of the off-site well owners water supply as well as for the natural resources in the area.

As The Nature Conservancy informed the County in a comment letter in October 2010, the mine area contains many rare and at-risk species and adequate baseline water monitoring is the key to protecting them. The mine site contains rare prairies, wetlands, and oak stands, which are not only rare themselves but also support rare and at-risk species. These at-risk species include four state-sensitive butterfly species that use the prairie as habitat. The four species are the Puget blue, great-spangled fritillary and the Oregon-banded and Sonora skippers. However, the change in water monitoring conditions, and the failure of MSG to comply with the original conditions, greatly imperils the federally listed water howellia and the federal candidate Oregon spotted frog. In order to best protect these species, many years of baseline water monitoring data is needed. These species rely on the wetlands in the area and the change in the water monitoring conditions proposed via this amendment fail to provide sufficient information to form clear baseline information.

However, because MSG and the Port failed to comply with the clear timelines established for water monitoring, many years of invaluable data was lost. The point of the

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52 County Staff Report pg. 11.
timeline for water monitoring was to create an adequate baseline of existing water quality and quantity information. Due to the failure of the applicant to comply with this required condition FORP, the Chehalis Tribe, the Conservation Organizations, the Department of Fish and Wildlife, the Department of Natural Resources, and neighbors of the proposed mine have been deprived of valuable baseline data. Had the applicant met the conditions of the MDNS and begun water monitoring when and how they were required there would be a great deal of valuable baseline data available. Instead, no data was gathered for several years, contrary to the terms of the MDNS and SUP.

The applicant and others have stated that the delay is irrelevant because mining didn’t begin when expected. This position reveals four serious problems:

First: A lack of understanding of the MDNS conditions that planned for the immediate start of on-site and off-site monitoring by the mine owners and the Conservation Organizations, and the continuation of that monitoring for the life of the mine. Despite the Port’s insistence at the Five Year Review that they always intended to mine the property, they failed to establish the conservation fund as required by the MDNS and SUP. If they were intending to mine, they were required to set up that fund so the Conservation Organizations could begin immediate monitoring of the off-site wetlands they were so concerned about. (See Exhibit ____, letter from Patrick Dunn, The Nature Conservancy.) The Port did not establish the fund, yet three years later attempted to claim they’d now sold to miners and so would pay the Conservation Organizations, and in their Response to Appeals brief completely contradicted the sworn testimony of Mr. Hedge, saying the Port is not an “operator,” so they apparently could not mine and didn’t need to pay the into the fund. (That money is now in

\[^{54}\text{Id.}\]
escrow pending the resolution of litigation surrounding these matters.)

The very Settlement Agreement that allowed this SUP to be issued with just a MDNS instead of the EIS originally planned by the County (see Exhibit ____ ) was breached in a way that may have sabotaged one of the main goals of that agreement: the protection of the two extremely hydrology-sensitive species discussed in The Nature Conservancy’s letter.

Secondly, on a site where pre-mining conditions included the design, approval and construction of an additional lane at the freeway off-ramps and road widening around the project site, no sensible person, despite Mr. Garrison’s testimony at the five-year review, could have believed that mining would occur soon. The Port itself, in a January 4, 2010 letter to the County (Exhibit ____ ), claimed that any owner would have needed at least three and a half years to prepare this site for mining.

Thus, there was a great deal of baseline information expected over several seasons so that once mining began, any negative effects, especially on the water levels around the federally endangered water howellia and the state endangered Spotted frogs, could be addressed immediately. Contaminants are and were only one part of the picture, a very important part to be sure, but no more important than the concern for extensive background monitoring of water levels on this ever-changing site and its neighboring wetlands.

Third, there seems to be an incorrect assumption on the part of many that the delay in monitoring causes no harm because the data now is newer and thus more valuable. This misses the MDNS statement that makes it clear that monitoring will not just begin within 60 days of the permit’s issuance, but will continue for the life of the mine. More data is always better than less, and the negotiators of this SUP and its Settlement Agreement knew that and arranged for that. (See MDNS Conditions 12 and 14.) Further, this assumes again that the
missed monitoring deadline only affects the on-site monitoring, when in fact it was tied to the
ability of the Conservation Organizations to do their off-site monitoring for protection of
dangered species.

A fourth problem is that the applicant’s unsystematic approach to the water monitoring
has not, contrary to their testimony at the five-year review, provided even one (1) year of
complete data matching the specifications required in the permit. In the Real Estate papers of
the MSG purchase of the site from the Port, in the section entitled SUP Plan, they admit that as
of April 2010 the 16th well had not even been drilled yet. (Exhibit ____, page ____.)
The new Groundwater and Surface Water Monitoring Plan created for the 2011 MDNS
essentially rubberstamps the off and on monitoring that has occurred and fast tracks approval
for mining activity to begin. The new plan basically memorializes the monitoring that has
occurred, monitoring that is less than what the original monitoring plan required, and amends
the 2005 MDNS so that it appears MSG is now in compliance. Furthermore, the new plan
improperly what off-site well owners must prove in order to show impairment of their wells.
Impairment and probable cause are legal terms that relate to specific facts. The water
monitoring plan cannot limit legal options of the off-site well owners. The new monitoring
plan is a substantial change to the proposal that will probably lead to significant environmental
harm; therefore pursuant to WAC 197-11-340(a)(i) the County must withdraw the MDNS.

II. Relief Sought

a. The Hearing Examiner overturn the County’s MDNS threshold determination.

b. Any other relief deemed appropriate by the Hearing Examiner.
DATED this 2\textsuperscript{nd} day of March, 2011, at Seattle, Washington

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