FORP RESPONSE TO THURSTON COUNTY’S MOTION FOR RECONSIDERATION

BEFORE THE HEARING EXAMINER IN AND FOR THURSTON COUNTY

In the Matter of the Application of
MAYTOWN SAND AND GRAVEL, LLC
Amendments Decision of SUP 02-0612
Of Thurston County’s SEPA Determination

SUP No. 02-0612
Project # 2010101170
App. No. 11-101508VE
App. No. 11-101509VE

FRIENDS OF ROCKY PRAIRIE’S RESPONSE TO THURSTON COUNTY’S MOTION FOR RECONSIDERATION

I. Introduction:

Friends of Rocky Prairie (“FORP”) submits this Response to Thurston County’s (“County”) Motion for Reconsideration, as per the Hearing Examiner’s instruction in the Second Post-Hearing Order issued April 19, 2011 and Thurston County Code 2.06.060. FORP agrees with the County’s argument that the amendment proposal is an action under SEPA. FORP also requests that the Hearing Examiner, upon reconsideration, find that the proposed amendments are an action under SEPA and that SEPA review was required.
II. Argument:

The Hearing Examiner, at the request of the Applicant, included a Conclusion Based on Findings in the decision as to whether the amendments to the MDNS are an “action” under SEPA Regulations. The Hearing Examiner, herself, questions whether there is authority to make this decision. Decision II.A.2 page 31. FORP agrees with the County’s argument that there is no authority for the Hearing Examiner to make this determination. However, if it is found that the Hearing Examiner has the jurisdictional authority to make this decision, it was decided incorrectly. The proposed amendments are an action under SEPA.

The Hearing Examiner erred in finding that the proposed amendments to Conditions 6A and 6C of the 2005 MDNS is not an “action” under SEPA Regulations. The Hearing Examiner erred in finding that an “action” under SEPA must “impact the environment” and that the proposed amendments “would not” impact the environment and therefore there was no “action” and that the environmental review was “superfluous.” Decision II.A.2 page 31. This reasoning clearly highlights the flaws in the Applicant’s argument that the proposed amendments somehow exist completely separately from the mining proposal and that approving the amendments does nothing more than edit a document. As made evident in the County’s Motion for Reconsideration, “clearly, the amendment proposal is an action under SEPA as it is a necessary component of the underlying special use permit.” Thurston County’s Motion 6 : 21-22.

A local agency decision that can be deemed an “action” under SEPA is the threshold for when environmental review must begin. SEPA defines “actions” as, “new or continuing activities (including projects and programs) entirely or partly financed, assisted, conducted, regulated, licensed, or approved by agencies.” WAC 197-11-704(1)(a). Actions also include
“new or revised agency rules, regulations, plans, policies, or procedures.” WAC 197-11-704(1)(b). The former are usually considered “project actions” and the later are “nonproject actions.” Therefore, there are many “actions” that do not “impact the environment”, yet still trigger an agency’s SEPA review responsibility. However, the particular action of the County’s concern in this instance is a continuing activity (gravel mining) licensed by the County that will “modify the environment.” WAC 197-11-704(1)(a)(i).

The Hearing Examiner mistakenly takes the language from WAC 197-11-704(3), that “certain categorical exemptions in Part Nine identify in more detail governmental activities that would not have any environmental impacts and for which SEPA review is not required” in finding that “water monitoring conditions would not impact the environment and should not be considered an ‘action’…” under SEPA and therefore no SEPA review was necessary. However, this parenthetical statement from the WAC refers specifically to the categorical exemptions found in Part Nine. An amendment to a MDNS (or SUP) that would allow for the operation of a gravel mine is not listed in the categorical exemptions. Therefore, the Hearing Examiner’s standard that an “action” under SEPA only occurs when there is an impact to the environment is incorrect.

Finally, the County is correct in its Motion that the proposed amendments cannot be logically separated from the larger mining proposal. FORP agrees that, “to be able to mine, approval of an amendment is necessary as the previous owners failed to comply with conditions of approval.” County’s Motion 6 : 18-20. Therefore, the environmental impact of the amendments could be enormous. If the amendments were not proposed, or are not approved, the mine cannot go forward and there is no environmental impact. However,
approval of the amendments would allow for the mine to operate for 20 years, removing 20.6 million cubic yards of sand and gravel and forever impacting the environment.

III. Conclusion:

For the foregoing reasons, FORP respectfully requests the Hearing Examiner find that the proposed amendments are an action under SEPA and that SEPA review by the County was not superfluous.

Dated this 26th day of April 2011

The Law Offices of M. Patrick Williams
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Attorney for Appellant Friends of Rocky Prairie
CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury of the laws of the state of Washington, that on April 26th, 2011, I caused a copy of Friends of Rocky Prairie’s Response to Thurston County’s Motion for Reconsideration to be delivered to the parties to this matter via email to the following addresses:

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DATED this 26th day of April, 2011, at Seattle, Washington

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