BEFORE THE HEARING EXAMINER IN AND FOR THE COUNTY OF THURSTON

In the Matter of the Application of Hearing Examiner Sharon A. Rice
MAYTOWN SAND & GRAVEL, LLC, No. 2010101170
For Amendments to a Mineral Extraction PORT OF TACOMA’S PRE-HEARING
Special Use Permit (SUPT-02-0612) BRIEF

I. INTRODUCTION AND RELIEF REQUESTED

The Examiner’s decision on the proposed clarifying amendments should be the last regulatory hurdle that Applicant Maytown Sand and Gravel, LLC (“MSG”) must clear prior to commencing mining. Party of Interest/Interested Party Port of Tacoma (“Port”) and Applicant Maytown Sand and Gravel, LLC (“MSG”) consistently have taken the position that these amendments are unnecessary because (1) the County had administratively required a much more rigorous water testing and monitoring regime in place of the original SUP conditions and (2) both the County and the Department of Ecology (“Ecology”) expressly recognized that literal noncompliance with the original testing and monitoring conditions had caused no environmental harm whatsoever and the substituted requirements were more protective of the environment. The County has substantial discretion in administering and enforcing permit terms and conditions. The County exercised its discretion to substitute more rigorous testing and monitoring requirements for those originally contained in the SUP Conditions. That is, the County properly disregarded and waived literal noncompliance with the original testing and monitoring conditions in light of its imposition and MSG’s compliance with much more rigorous
requirements. Under these circumstances, the original provisions became unenforceable as a result of the County’s administrative actions.

Nevertheless, the County, after first recognizing that simple administrative housekeeping clarification of the SUP conditions would suffice, changed its position and required formal amendment of the SUP Conditions by the Hearing Examiner with potential appeal to the Board of County Commissioners. While the Port and MSG disagree with the County’s position and the resulting unnecessary delay, MSG has applied for the required amendments to avoid further delay in the commencement of mining. The Port submits that MSG is legally entitled to the amendments and requests that the Examiner approve MSG’s application. The rigorous testing and monitoring requirements reflected in the proposed amendments represent the culmination of a great deal of work by hydrogeologists working for the County and MSG, and they should be completely non-controversial. All who have studied the question from a scientific standpoint, including the Department of Ecology and the hydrogeologists working with the County and with MSG, agree: the failure to comply with the technical timing requirements of MDNS Condition 6 produced no environmental harm and the substituted more rigorous requirements are more protective of the environment. The Port does not abandon its long-held position that this formal amendment process is unnecessary and unauthorized, but concludes nevertheless that supporting these amendments is the most expedient way to begin mining and avoid additional damages. The Port respectfully requests that the Examiner limit the scope of the hearing to the narrow issues of the proposed amendments and the SEPA appeals and issue a decision on the issues properly before the Examiner in this proceeding.¹

II. STATEMENT OF FACTUAL BACKGROUND

The proposed amendments would simply update environmentally irrelevant timing provisions of SUP/MDNS Conditions 6A and 6C, conform these conditions to the more rigorous

¹ The Port has read and agrees with MSG’s pre-hearing brief and incorporates the same herein by reference.
testing and monitoring requirements that have been administratively imposed by the County, and
correct mistakes and eliminate confusion in the language of the original conditions. The
evidence at the hearing will demonstrate that granting these amendments will cause no
environmental harm whatsoever. The evidence at the hearing will also establish the following
background facts.

Group (“PGG”) and Roy Garrison, then of Ecological Land Services, worked with Allen on the
application process. On May 4, 2004, the County issued the original MDNS on the proposal.
The Black Hills Audubon Society (“BHAS”) appealed this MDNS, and a year of negotiations on
the project ensued. In response to those negotiations, PGG drafted a Groundwater Monitoring
Plan (“2005 GMP”). Although only Allen and BHAS signed the eventual settlement agreement
(“SA”), the negotiations involved a collaboration between Allen and his consultants, BHAS and
the Nature Conservancy (the “Conservation Organizations”), WDFW, Ecology, and the County.
Under the SA, BHAS agreed to drop its appeal in exchange for a payment of $325,000 into a
conservation fund to be managed by the Conservation Organizations, upon sale or lease to a
mining operator. BHAS did drop its appeal and the County issued a new MDNS on October 24,
2005 (“2005 MDNS”), which by letter BHAS agreed addressed its concerns regarding the
proposal.

The SA included no language regarding groundwater monitoring. The County
incorporated the provisions of the 2005 GMP into Condition 6 of the 2005 MDNS (“MDNS 6”).
MDNS 6 first required the applicant to adopt the 2005 GMP and then summarized its
requirements. The summary was not entirely accurate—while the 2005 GMP required bi-
monthly monitoring of water levels and temperature at 9 wells and 4 surface stations, MDNS 6
appeared to require monitoring at 17 wells, including the station destined for the process water
pond that would have no water in it until mining commenced. The GMP establishes different
monitoring goals for different stations and specifies different background monitoring parameters
for each, including 13 “perimeter” stations and 4 “NPDES” stations. MDNS 6 makes no
distinction between these 17 “wells.” Despite the differences, the County did not evaluate the
2005 GMP requirements and decide to change them. The County simply did not accurately
incorporate them into MDNS 6. The 2005 MDNS was not appealed.

The Hearing Examiner approved the mining SUP on December 16, 2005. The SUP
decision also established the County’s formal designation of the Property as Mineral Lands of
Long Term Commercial Significance under the Growth Management Act. No appeal of the SUP
was filed, and it became final on January 3, 2006. Citifor, then the owner of the Property (and
on whose behalf Jay Allen had applied for the SUP) had not conducted the groundwater
monitoring—required by MDNS 6C to commence within 60 days of SUP issuance, or March 4,
2006—before selling the Property to the Port in July of 2006.

The Port commenced systematic, bi-monthly groundwater monitoring required by MDNS
6C in January 2008 and completed the offsite well survey required by MDNS 6A in December
2009. On October 16, 2008, the County issued a building permit to the Port to construct a scale
house. On October 29, 2008, the County by letter requested that the Port provide groundwater
monitoring survey reports in accordance with MDNS 6C. The County acknowledged by letter
dated November 25, 2008 that the Port provided the requested reports, and the County further
stated that “[i]t is the property owners’ responsibility to ensure the property remains in
compliance with all adopted Hearing Examiner conditions i.e. continual monitoring of the
groundwater.” (Emphasis added). As evidenced by these two letters, the County concluded that
the SUP was in good standing and that the Port was compliant with the SUP’s conditions. In
reliance on the County’s assurances, the Port proceeded to market the Property as a permitted
gravel mine. Several months later, the County informed attorney Tom Bjorgan, then
representing the Friends of Rocky Prairie (“FORP”) that these letters contained appealable
determinations and, because they had not been appealed within the specified time limitation,
were final as a matter of law.
In December of 2009, more than a year after stating that the Port was in compliance with
the groundwater monitoring requirements of the SUP, Mr. Kain sent an e-mail to MSG’s
consultant stating for the first time that the County had concerns about the timing requirements
of MDNS 6. The Port responded to this e-mail on January 4, 2010, explaining in detail the
Port’s actions in compliance with the substance and purpose of MDNS 6 and stating the Port’s
position that no additional action was required to remedy the technical violation of the timing
provisions. In this memo, the Port argued that there was no requirement for an amendment of
the timing provisions of MDNS 6 to address a simple matter of County enforcement of a
technical requirement. On February 16, 2010, the County responded to this memo and detailed
the County’s analysis and conclusions regarding the Port’s compliance status with each condition
of the SUP and MDNS. The County’s memo concluded that although the failure to commence
groundwater monitoring in accordance with the timing provisions of MDNS 6 was a technical
violation of the SUP, it produced no environmental harm and could be addressed by a staff-level
amendment. In reliance on this County determination, MSG and the Port closed their purchase-
and-sale agreement on April 1, 2010.

The County’s February, 2010 memo contained the first implication by the County’s
hydrogeologist, Nadine Romero, that the groundwater monitoring plan approved by the
Examiner was not adequate to protect groundwater. In her memo accompanying the County’s
February 2010 memo, she wrote that the Port should commence a costly new groundwater
monitoring program that would test for a much more extensive range of pollutants—virtually
none of which have anything to do with mining and the levels of which could not be exacerbated
by mining. Nevertheless, the Port complied with these new requirements and conducted the first
year of semi-annual testing. MSG has continued this testing regime to the present, and Ms.
Romero now agrees that MSG is in compliance with the substance and purpose of Condition 6,

---

2 The Port appealed certain issues in the County’s February 16, 2010 memo, but it requested that the Examiner hold
the appeal pending negotiations with the County. The hearing on that appeal has not yet occurred.
as well as her additional monitoring requirements. Ms. Romero also agrees that the delay in
commencing groundwater testing had no adverse environmental consequences and that the
enhanced testing regime she imposed has provided superior data.

After negotiating with the County, MSG submitted its request for amendments. MSG’s
original request for amendments was broader than what the County’s February 16 memo stated
could be decided by staff, but it was not broader than what the County had orally represented
could be decided by staff. The County published a notice of application and received several
comments from the public. Citing the additional complexity of the amendment request, the
volume of comments, and the high probability of appeal to the Hearing Examiner, the County
decided to send the amendment requests to the Hearing Examiner in the first instance. The
County then determined that because the requests would be heard by the Examiner, SEPA
review was necessary—despite the fact that the County’s SEPA responsible official had already
determined in the February 2010 Memo that no environmental harm would result from the
amendments. MSG objected to the change, but relented under protest and submitted a new
environmental checklist limited to the potential impacts of the amendments. MSG later reduced
the scope of its amendment request. The Amendment request now addresses only MDNS 6.

Meanwhile, the County’s required Five-Year Review was conducted through a separate
regulatory process. In that proceeding, the Examiner conducted a thorough three-day hearing
and issued a Decision on December 30, 2010. In that Decision, the Examiner acknowledged that
the Five-Year Review may be the proper forum for evaluating compliance with conditions and
amending or imposing additional conditions if necessary, but concluded that because the County
had created a public expectation for the Amendment request, the hearing and decision on the
proposed Amendments should proceed. FORP and BHAS have appealed the Five-Year Review
Decision to the Board of County Commissioners.

The County subsequently on January 19, 2011 issued an MDNS for the proposed
amendments (“2011 MDNS”). MSG, BHAS, and FORP provided public comment regarding the
MDNS. FORP and MSG filed appeals of the 2011 MDNS on February 9, but BHAS did not. The present proceeding consolidates hearings on the proposed amendments of SUP Condition 6 and the 2011 MDNS on the proposed amendments.

III. ISSUES

Should the Examiner grant MSG’s request for amendments to SUP/MDNS Condition 6, conforming the condition to the County’s substituted groundwater testing and monitoring requirements and correcting inaccuracies in the original language of Condition 6?

IV. LEGAL ARGUMENT AND AUTHORITY

The Port commenced systematic groundwater monitoring later than specified in SUP/MDNS Condition 6. In response to this delay in groundwater testing and monitoring, the County imposed extensive additional requirements and expressly acknowledged, as did Ecology, that the delay in testing had no adverse environmental impacts and that the more rigorous requirements provided superior data and, thus, were more protective of the environment than those specified in Condition 6. Even though the County has administratively cured the technical noncompliance with Condition 6, the County has compelled MSG to apply for a formal amendment of the SUP and has determined that the proposed amendment is subject to a new SEPA threshold determination. The requirement of a formal amendment and its attendant hearing process and decision by the Hearing Examiner, subject to a potential appeal to the Board of County Commissioners, has caused major additional delay in MSG’s attempts to begin mining, as authorized by the SUP. And the requirement of a new SEPA threshold determination for the proposed technical amendments, which have no environmental relevance, has caused additional potential delay. Unfortunately, such delay has jeopardized the Port’s sale of the property.

However, now that the County has compelled MSG to seek these unnecessary amendments, it is clearly appropriate for the Examiner to grant them without further delay. The amendments simply conform the language of SUP/MDNS Condition 6 to the enforcement
measures the County already has administratively imposed and finally will allow MSG to commence mining.

A. The Examiner Should Grant the Requested Amendments

The Port consistently has taken the position that the County lacks authority to require these formal amendments, and discusses that position below. Even though these amendments are unnecessary, now that the County has required the formal amendment process and MSG has elected to apply for the amendments to avoid further delay in mining, the Examiner should grant the request. The Port agrees with the Staff Report’s analysis of the requested amendments.³ The County, as the SEPA responsible official, has determined that the requested amendments are appropriate and will produce no environmental harm. The evidence at the hearing will support the County’s determination. Additionally, granting the requested amendments will allow MSG to begin mining and mitigate additional damages to MSG and the Port.

The evidence and testimony at the hearing will establish that granting the amendments will benefit the public and serve the purposes of the SUP. The County has long held the opinion, confirmed again by the Staff Report, that Examiner Driscoll, when he approved the SUP in 2005, anticipated that mining would commence within one year. The necessary implication of this assumption was that one year of groundwater monitoring data would suffice to establish the “background” conditions. Instead, systematic groundwater monitoring now has been conducted for more than three years, including a full year of testing under the County’s more extensive groundwater monitoring regime imposed in 2010. All the experts who have reviewed the question agree that the course of groundwater monitoring that actually has occurred is more

³ The Port strongly disagrees, however, with the County’s continued assertion of authority to require MSG to seek “written approval” prior to commencing mining, made once again in the last page of the Draft Staff Report. As the Port has argued repeatedly, the Code does not authorize the County to issue a written affirmative finding of compliance with permit conditions that authorizes mining to commence. Rather, the Code provision cited by the County authorizes the County to inspect mines periodically, and prior to mining. Obviously, the County may “red tag” a mining operation for non-compliance with permit conditions or the Mineral Extraction Code, but this is a very different power from the authority the County asserts. The County has previously stated that a “letter to proceed” would constitute an appealable event under TCC 20.60.060. Given the level of opposition to this mine, it is entirely likely that allowing the County to impose an additional unauthorized appeal point will result in yet more delay. The Code does not support this result.
protective of groundwater than that anticipated and approved by Examiner Driscoll. Not even
project opponents have alleged—and they cannot prove—any cognizable harm that would result
from granting the requested amendments. At no point has any member of the public, or of
FORP, or of BHAS, alleged an environmental harm that will arise as a result of adjusting the
commencement date of groundwater monitoring from five years ago to at least one year prior to
mining (and in fact, three years ago).

Additionally, the amendments will clarify and update the requirements imposed by the
2005 MDNS. The testimony and evidence will demonstrate that the SEPA responsible official
who drafted the MDNS conditions in 2005 did not intend to impose additional substantive
monitoring requirements beyond those contained in the Groundwater Monitoring Plan (“GMP”).
And yet, the language of the MDNS varies from the language of the GMP in small but very
important ways. For example, the MDNS requires background testing of 17 “wells,” despite the
fact that the GMP specifies a combination of wells and surface water stations and that the 17th
station will be the process water pond that has not been constructed and, because it will be filled
with the water used to process gravel, will not have water in it until mining commences. The
evidence will show that these inconsistencies between the language of the GMP and the 2005
MDNS that was intended to reflect the GMP were inadvertent. The requested amendments
correct these discrepancies without reducing the required groundwater monitoring or causing any
risk of environmental harm.

Finally, granting the requested amendments will mitigate additional damages to MSG and
the Port. MSG has owned the Property for nearly a year, and, despite being in full compliance
with the substance of the SUP and MDNS conditions, has yet to extract a single cubic yard of
gravel. The County continues to refuse to allow MSG to proceed to construct on- and off-site
improvements required as pre-mining conditions. MSG already has suffered extensive monetary
damages as a result of the delay. If the delay continues, the Port’s sale of the property to MSG
may be jeopardized with immense potential damages to the Port. Granting the requested amendments will remove the last regulatory hurdle to the commencement of mining.

B. This Amendment Hearing is not Authorized by Code

Although the Port disagrees that the County has the authority to require MSG to go through this process, the Port does not request that the Examiner simply dismiss the action without addressing the merits of the Amendments. Rather, the Port requests that the Examiner rule on the question of whether this Amendment proceeding was proper and also, in her written decision, address the merits of the requested amendments regardless of her disposition on the process questions. The Port offers the briefing in this section in support of this request and to preserve its arguments.

The County already exercised its enforcement authority over the SUP by requiring compliance with new and stricter groundwater monitoring requirements for an additional year before MSG would be allowed to mine. The Port and MSG complied with the County’s new requirements in full, in addition to complying with the substance of the MDNS and the GMP. Any earlier missed deadlines contained in MDNS 6 are immaterial because they caused no environmental harm whatsoever. There is no need and no authority to require MSG and the Port to apply for these SUP amendments.\(^4\)

1. The County already exercised its enforcement authority over this matter

Compliance with timing requirements of MDNS 6 and the consequences of any noncompliance are enforcement questions. The County Code clearly grants staff the power and duty to enforce MDNS and SUP conditions. See, e.g., TCC 20.60.010; 17.20.160; 17.20.280. In

\(^4\) This hearing represents the culmination of a series of improper County decisions. First, the County required the Applicant to seek amendments to nullify a technical permit violation, even though the County already had administratively required substitute, more-rigorous requirements and acknowledged that the new requirements cured any technical noncompliance with the original SUP conditions. Second, the County reversed its earlier, unappealed position that the amendments could be handled at the staff level and instead required a much more extensive process, including a hearing before the Hearing Examiner and potential appeal to the Board of County Commissioners. Third, the County subjected the proposed amendments to a new threshold determination and appeal under SEPA, despite the County’s uncontradicted conclusion that the amendments would cause no adverse environmental impact.
this case, the County has exercised its enforcement authority, whether or not it chooses to label its actions as "enforcement." In response to literal noncompliance with immaterial provisions of the permit conditions, the County administratively imposed substitute groundwater testing and monitoring requirements and determined that compliance with the new requirements sufficed. Any noncompliance with permit conditions was administratively cured or waived.

The County required (a) monitoring of a whole new suite of potential pollutants, without regard to whether the level of those pollutants could be affected by gravel mining; and (b) an additional year of groundwater monitoring before significant earth-disturbing activity would be allowed. These are significant requirements, costing tens of thousands of dollars in direct monitoring and testing fees, and much more as a result of lost opportunities to mine. All involved agree that there has been full compliance with the County’s new requirements.

Now, in addition to this enforcement-in-fact, the County has required MSG to seek formal amendments of the SUP conditions. After first concluding that the technical amendments could be done at the staff level (a decision that was unappealed), the County reversed itself and determined that a full SUP amendment process before the Hearing Examiner was required. The County stated in writing that the decision was prompted by the scope of MSG’s request, but County staff orally informed MSG that the switch was made due to the high volume of opposition to the requests. Although this sort of regulatory decision may not be made to quell project opposition, *Maranatha Min., Inc. v. Pierce County*, 59 Wn. App. 795, 804, 801 P.2d 985 (1990) ("Community displeasure cannot be the basis of a permit denial."), the County persisted.

By taking curative enforcement action, the County already had waived the right to further address any noncompliance with the environmentally irrelevant timing provisions prior to this amendment proceeding. The County’s enforcement actions rendered the literal terms of the timing provisions simply unenforceable against MSG, though MSG must still comply with the County’s new requirements. Alternatively, MSG is now legally entitled to have the conditions simply clarified to conform to the circumstances and reflect the County’s enforcement decisions.
Because the clarification is legally required, it is not discretionary and there is no reason to require a formal amendment process.

2. **The Staff Report does not support the County’s decision to require MSG to seek amendments.**

Although the Staff Report correctly describes the process for amending an SUP for gravel mining, it does not establish the County’s authority to require such amendments under the circumstances of this case. The Code provision it relies upon applies only if the applicant proposes to enlarge, extend, increase in intensity, or relocate the use. TCC 20.54.030. MSG does not propose any of these. Rather, MSG simply seeks a clarification of confusing and environmentally irrelevant timing provisions of the conditions. The Staff Report asserts that a Type III SUP amendment was required, but this argument assumes its own conclusion—that the non-compliance must be addressed through amendment rather than enforcement.\(^5\)

Non-compliance with MDNS or SUP conditions triggers a duty in the County to require the permittee to return to compliance. It does not trigger a post-enforcement requirement to amend the conditions to retroactively erase the non-compliance. The Staff Report argues that a County order to achieve compliance “typically requires a permit,” but it did not here. MSG achieved full compliance with the substance of the original GMP and the County’s additional groundwater monitoring requirements without additional permits.

Finally, the Staff Report statements regarding the status of the SUP are unsupported by law. For a variety of reasons, denial of the requested amendments would not inextricably lead to the revocation of the SUP.\(^6\) In particular, stating that MSG is “out of compliance” with the SUP “until and unless an amendment to the [timing provisions] is approved by the Hearing Examiner” does not justify the conclusion that the SUP must be amended or invalidated. The Staff Report

---

\(^5\) The County previously cited SUP Condition T as justification, but that provision applies only to site plan changes, not changes in groundwater testing requirements.

\(^6\) In particular, given the County’s multiple assurances of validity upon which the Port and MSG reasonably relied, a reviewing court would agree that the County is estopped under these circumstances from denying the continuing validity of the SUP.
statements that unless amendments are granted, the County “will be unable to provide notice to
commence mining” and that “[i]n such case, the 2005 approval would lapse” similarly finds no
support in law. In our legal system, literal noncompliance is often not substantial or meaningful
enough to justify certain remedial actions. Thus, in contract law, a literal breach of contract
often does not rise to the level of “material breach” that would justify nonperformance by the
other party. In tort law, conduct that violates a duty often is not actionable unless actual
damages result. And here, under constitutional substantive due process, RCW 82.02.020, RCW
64.40.020, and common law tort theories, not every instance of literal noncompliance with a
regulatory condition can justify revocation of the permit or denial of permission to proceed under
the permit. The Staff Report acknowledges once again that the failure to comply with the timing
requirements of MDNS 6 produced no environmental harm and that MSG is now in full
compliance with administratively imposed, more extensive, groundwater testing and monitoring
requirements. The County’s enforcement authority has resolved any technical noncompliance
with the timing provisions of SUP/MDNS Condition 6, and there is no rational basis for either
declaring the SUP invalid based on environmentally irrelevant breaches or requiring MSG to
endure a burdensome amendment process and potential additional appeals.

V. CONCLUSION

There is no reason to deny the requested amendments and every reason to grant them.
The amendments simply ratify the enforcement actions the County already has taken. Even
project opponents cannot seriously assert that the proposed amendments (as opposed to the mine
itself, which already is authorized by the SUP that may not be collaterally attacked, as the Staff
Report explicitly acknowledges)\(^7\) will have any affect whatsoever on the environment. This
amendment process, whether it is authorized or not, can terminate a succession of regulatory

\(^7\) As the County writes in the Staff Report, “[t]he 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.” (citing Chelan County v. Nykredit, 146 Wn.2d 904, 932-33, 53 P.3d 1 (2002); DeTray v.
City of Olympia, 121 Wn. App. 777, 785-92, 90 P.3d 1116 (2004)).

PORT OF TACOMA’S PRE-HEARING BRIEF - 13
delays and will allow mining to proceed. The Port respectfully requests that the Examiner grant the requested amendments.

DATED this 2nd day of March, 2010.

FOSTER PEPPER PLLC

J. Tayloe Washburn, WSBA #13676
Richard L. Settle, WSBA # 3075
Steven J. Gillespie, WSBA # 39538
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
Telephone: (206) 447-4400
Facsimile: (206) 447-9700
E-mail: WashJ@foster.com
E-mail: gills@foster.com

Attorneys for Party of Interest, Port of Tacoma