APPEAL OF AN ADMINISTRATIVE DECISION

TO THE THURSTON COUNTY HEARING EXAMINER COMES NOW Maytown Sand & Gravel, LLC on this 9th day of January 2011, as an APPELLANT in the matter of an administrative decision rendered on January 19, 2011, by Thurston County Resource Stewardship Dept., relating to Mitigated Determination of Non-Significance on Project No. 2010101170

THE APPELLANT, after review and consideration of the reasons given by the administrative official for his/her decision, does now, give written notice of APPEAL to the Hearing Examiner of said decision under the provision(s) of the ordinances marked below.

X 17.09.160 SEPA
☐ 17.15.410 CRITICAL AREAS
☐ 20.60.060 ZONING
☐ 22.62.050 TUMWATER UGA ZONING
☐ 18.10.070 PLATTING & SUBDIVISION
☐ 19.12.010 SHORELINE PROGRAM
☐ 21.81.070 LACEY UGA ZONING
☐ 23.72.190 OLYMPIA UGA ZONING

STATE THE BASIS OF THE APPEAL AS OUTLINED IN SECTION “A” ON REVERSE SIDE OF THIS FORM.

See Attached Appeal.

(If more space is required, please attach additional sheet.)

AND REQUESTS that the Hearing Examiner, having responsibility for review of such decisions will upon review of the record of the matters and the allegations contained in this appeal, find in favor of the appellant and reverse the administrative decision.

Maytown Sand & Gravel, LLC
APPELLANT NAME PRINTED
Cairncross & Hempelmann, PS by Randall P. Olsen
SIGNATURE OF APPELLANT

Address 524 2nd Ave., Suite 500, Seattle, WA 98104
Phone: 206-587-0700

Please do not write below - for Staff Use Only:

Filed with Development Services this _____ day of _________________ 20__, by ____________________________

Filing fee deposit of $1710.00*, receipt no. ____________________________ by ____________________________

*The filing fee deposit will cover staff time (for Planning, Environmental Health & Development Review), and Hearing Examiner time to hear the appeal and issue a decision.
BEFORE THE HEARING EXAMINER OF THURSTON COUNTY

In the Matter of the Application of

MAYTOWN SAND AND GRAVEL, LLC

For a Five Year Review of Special Use Permit

02-0612.

NO. 2010101170

MAYTOWN SAND AND GRAVEL’S
APPEAL OF MDNS RELATED TO
TECHNICAL AMENDMENTS TO
SPECIAL USE PERMIT

I. INTRODUCTION

Maytown Sand and Gravel, LLC (“MSG”) hereby appeals Thurston County’s Mitigated Determination of Non-Significance (“MDNS”) with regard to the proposed amendments to Special Use Permit No. 02-612 (the “SUP”). Environmental review and issuance of the MDNS are unnecessary because (1) the Thurston County Code does not require an amendment process in this situation, none should have occurred, and therefore no SEPA review is required on that process; (2) this is a compliance matter that could have and should have been resolved administratively by staff or during the Five Year Review proceeding; (3) the proposed amendments are not an “Action” within the meaning of the State Environmental Policy Act (“SEPA”) and therefore SEPA review is not required; and (4) even if the amendments were

1 MSG has agreed to the new Groundwater and Surface Water Monitoring Plan (“GSWMP”) attached to the MDNS, but that is a voluntary act intended to avoid litigation and further delay. The GSWMP does not mitigate any adverse impacts but rather, as stated by the County Hydrogeologist, enhances information.
technically “Actions” under SEPA, the amendments have no environmental relevance and would have no environmental impacts that need to be analyzed or mitigated.

II. ELEMENTS OF APPEAL

The following information is set forth in accordance with TCC 17.09.160.D, which lists the requirements for an appeal of environmental determinations:

A. TCC 17.09.160.D.1 – Name, mailing address and telephone number of appellant and representative.

1. Appellant
Maytown Sand & Gravel, LLC
c/o Steve Cortner
12890 Freemont Street
Yucaipa, California 92399
T: 909-228-3311

Maytown Sand & Gravel, LLC
c/o Randy Lloyd
PO Box 3889
Federal Way, WA 98063-3889
T: (253) 874-6692

2. Appellant Representative
Cairncross & Hempelmann, P.S.
c/o John W. Hempelmann
524 2nd Ave., Suite 500
Seattle, Washington 98104
T: 206-587-0700
B. TCC 17.09.160.D.2 – Copy of MDNS

See attached Exhibit A (Mitigated Determination of Non-Significance for Project No. 2010101170).

C. TCC 17.09.160.D.3 – Concise statement of factual and legal basis for the appeal citing specifically alleged errors in the decision.

1. The County erred by requiring a threshold determination of the SUP amendments because the Thurston County Code does not require such an amendment process. Thus, there should not have been an amendment procedure and there should not have been any SEPA review. The County’s decision to create an amendment process and to subject that process to a threshold determination is unlawful.

2. The County erred when it chose to require a threshold determination regarding the SUP amendments because the subject of the amendments (the changes to Conditions 6A and 6C) should have been addressed as a compliance matter by County Staff in the same way the County addressed other compliance matters in its February 16, 2010 County Memo, or in the Five Year Review process. The County admits that the amendments’ “new language does not add new conditions to the original MDNS. The new language provides changes and clarifications to the original language.” January 19, 2011 MDNS at 4. That is, the amendments merely made the language in the original SUP and MDNS consistent with compliance requirements that the County had initiated and determined were sufficient to resolve any technical noncompliance that had occurred.

The County had the authority to require these changes during the Five Year Review. TCC 20.54.040.21.e states that at the time of the Five Year Review “the approval authority may impose additional conditions upon the operation if the approval authority determines it is necessary to do so to meet the standards of this chapter, as amended.” Additionally, the
Examiner has the authority to add standards to “achieve compliance with the original hearing examiner conditions.” TCC 20.54.040.4.d.

In the Five Year Review proceeding, the changes now sought in the amendments could have been made without engendering the unwarranted appeals, procedural burdens, and substantial additional delays and expenses to MSG caused by the County’s unauthorized and unnecessary environmental review and subsequent MDNS issuance. The County’s decision to require the amendments and subject them to a threshold determination is unlawful.

3. The County erred when it chose to require a threshold determination of the SUP amendments because the proposed amendments do not amount to an “Action” within the meaning of the SEPA rules and case law interpreting the statutory term “Action” and therefore SEPA review was not required. A threshold determination is required for proposals that meet the definition of “Action” and that are not categorically exempt. WAC 197-11-310. Actions do not include bringing administrative enforcement actions. WAC 197-11-704(3). The County is using its enforcement authority to require MSG to amend the SUP. Exercise of such enforcement authority does not meet the definition of “Action” under SEPA and therefore a threshold determination is not required. The County’s decision to subject the amendments to a threshold determination is unlawful. In addition, SEPA does not allow a threshold determination for government activities, even if they arguably are within the literal definition of “Action” in the SEPA rules where such activities do not have any adverse environmental impacts and, thus, have no environmental relevance.

4. The County erred when it chose to require a threshold determination of the SUP amendments because the amendments have no environmental impact. Under SEPA, when acting on the same proposal, the County “shall use [the] environmental document unchanged, except” when substantial changes are made to the proposal such that “the proposal is likely to have significant adverse environmental impacts.” WAC 197-11-600. Here, at the Five Year Review hearing, all experts (including County Staff, the County Hydrogeologist, the Maytown
Hydrogeologist and the Department of Ecology) agreed that the proposed amendments will have no adverse environmental impact. The County’s decision to subject the amendments to a threshold determination is unlawful.

D. TCC 17.09.160.D.4 – Specific Relief Sought

For the reasons stated above, MSG seeks the following relief:

1. A ruling by the Examiner that a threshold determination for the amendments was not required or authorized; and

2. MSG requests that the Examiner issue the decision on this appeal after the hearing in March because of the County-created expectation of a hearing process open to the public.

E. TCC 17.09.160.D.5 – Appellant’s standing to appeal pursuant to Section 17.09.160.B.

The County’s MDNS determination has a substantial effect on MSG’s rights under the SUP. The County’s decision to subject the amendments to a threshold determination subjects MSG to additional procedural burdens and substantial additional delays and expenses. Additionally, it exposes MSG to the possibility and high likelihood of appeal from project opponents who have expressly indicated their desire to challenge and appeal any environmental determination related to the project. This is true despite the absence of environmental impacts. MSG is therefore an aggrieved party within the meaning of TCC 17.09.160.D.

MSG has filed comments during the comment period required by WAC 197-11-340. See Exhibit B (MSG Letter to Michael Kain dated January 10, 2011) and Exhibit C (Letter to Michael Kain dated January 25, 2011). Because MSG commented on the MDNS in its letters

\[ See \text{ footnote 1 supra.} \]

DATED this 9th day of January, 2011.

CAIRNCROSS & HEMPELMANN, P.S.

[Signature]

John W. Hempelmann, WSBA No. 1680
Randall P. Olsen, WSBA No. 38488
Attorneys for Maytown Sand and Gravel, LLC
MITIGATED DETERMINATION OF NONSIGNIFICANCE

This Mitigated Determination of Nonsignificance (MDNS) is being issued under TCC 17.09.095 and WAC 197-11-355, the optional MDNS process. On December 21, 2010 a Notice of Application along with a Proposed MDNS were issued. Based on comments received and submittal of a new Groundwater and Surface Water Monitoring Plan for the proposed mining operation, the proposed MDNS was revised. It follows below.

SEPA and LAND USE MASTER PROJECT NUMBER
2010101170

Proponent: Maytown Sand & Gravel, LLC
c/o Steve Cortner
12890 Freemont Street
Yucaipa, CA 92399

Description of Proposal: On December 16, 2005, the Thurston County Hearing Examiner approved a Special Use Permit (SUP) for a 284-acre gravel mine with a 350-acre total disturbed area in the southeast quadrant of the Maytown Road/Tilley Road intersection. The SUP approval adopted the October 24, 2005 SEPA MDNS for the project. The current proposal seeks to amend the SUP as follows: 1) change the timing for field verification of off-site supply wells; 2) change the timing for commencement of background water quality monitoring; 3) clarify the process for water monitoring; and 4) set the number of water monitoring stations to 16 for the initial testing, with a 17th station to be established later. Each of the four items proposed for amendment were set as MDNS conditions that were incorporated into the SUP approval. To change these conditions requires both issuance of a new SEPA threshold determination on the proposed amendments and a Hearing Examiner amendment of the SUP.

Items 1 and 2 above had specific time deadlines set through the MDNS. The deadlines have passed. A new timeline is sought. Item 3 was not clearly set out in the MDNS. Clarification regarding the monitoring process and parameters is sought. Item 4 set the number of initial monitoring stations at 17. The applicant seeks to set the number at 16 stations with a 17th added later as a process water pond. All other conditions of the original MDNS and SUP approval will remain unchanged. In summary, the applicant requests to delete the subject time deadlines and water monitoring process language established in the original approval and replace them with new deadlines and language as established through review of the proposed amendment. The Resource Stewardship staff is the issuing authority for the SEPA threshold determination and the County Hearing Examiner will be the approval authority for the amendment request and any appeal of the SEPA threshold determination.

Location of Proposal: 13120 Tilley Road SW, Olympia, WA 98512
Section/Township/Range: Portions of Sections 1, 2, 11 and 12, Township 16N, Range 2W
Tax Parcel No.: 12602340100

EXHIBIT A

2000 Lakeridge Drive SW, Olympia, Washington 98502 (360) 786-5490/FAX (360) 754-2939
TDD (360) 754-2939 Website: www.co.thurston.wa.us/permitting
Threshold Determination: The lead agency for this proposal has determined that the attached mitigating conditions, along with required compliance with applicable codes will mitigate all probable significant adverse impacts upon the environment. An Environmental Impact Statement is not required under RCW 43.21C.030(2)(C). This decision was made after review by the Lead Agency of a completed Environmental Checklist and other information on file with the Lead Agency. This information is available to the public on request.

Mitigating Conditions: See Attachment

Jurisdiction: Thurston County
Lead Agency: Resource Stewardship Department
Responsible Official: Mike Kain, Manager/Environmental Review Officer

Date of Issue: January 19, 2011
Comment Deadline: February 2, 2011
Appeal Deadline: February 9, 2011

A Site Plan depicting the previously approved mine areas is attached.

Appeals: Threshold determinations may be appealed pursuant to TCC 17.09.160 if a written notice of appeal, meeting the requirements of TCC 17.09.160(D), and the appropriate appeal fee are received by the Thurston County Resource Stewardship Department prior to 4:00 p.m. on the appeal deadline date shown above. Per TCC 17.09.160(B), only aggrieved parties who submit written comments during the comment period may appeal.

Note: The issuance of this Mitigated Determination of Nonsignificance does not constitute project approval. The applicant must comply with all applicable requirements of the Thurston County Critical Areas Ordinance, Shoreline Master Program for the Thurston Region, Thurston County Stormwater Drainage Design and Erosion Control Manual, Thurston County Sanitary Code, Thurston County Rural Zoning Code, and the International Building Code, as well as applicable State and Federal requirements prior to receiving permits.

Thurston County Resource Stewardship Department
Building #1, Administration
2000 Lakeridge Drive SW
Olympia, WA 98502
(360) 786-5475

cc: Department of Ecology, Alex Callender
Department of Fish & Wildlife, Jason Kunz
TC Environmental Health
Squaxin Island Tribe
Adjacent Property Owners within 500 Feet
Department of Natural Resources, Mine Division

Nisqually Tribe
TC Public Works, Development Review
Known Interested Parties
Chehalis Tribe
Sub Area # 3
MDNS Attachment
Project # 2010101170

Information Reviewed

The environmental threshold determination and conditions are substantially based on analysis of information obtained from the following documents and site visits. Many of these documents are on the County’s Maytown Sand and Gravel webpage, http://www.co.thurston.wa.us/permitting/landuse-activities/maytown-supt-five-year-review.htm. All of these documents and other related documents are also available for public review from 8:00 a.m. to 12:00 p.m. at the Permit Assistance Center on the second floor of Building #1, Thurston County Courthouse, 2000 Lakeridge Drive SW, Olympia, Washington.

a. Environmental Checklist dated August 26, 2010
b. Expanded Environmental Checklist dated July, 2002, along with associated documents
c. Supplement to Expanded Environmental Checklist dated September 2005
d. Hearing Examiner Decision on SUP 02 0612 dated December 16, 2005
e. Mitigated Determination of Non-Significance issued October 24, 2005
f. Vicinity Map dated August 22, 2007
g. Mining Area Map dated November 3, 2009
h. Application Narrative dated April 22, 2010
i. Application Narrative dated July 1, 2010
j. Application Narrative dated August 24, 2010
k. Application Narrative dated October 29, 2010
l. Application Narrative dated December 13, 2010
m. Site Plan dated October 5, 2010
n. Groundwater Monitoring Plan dated September 26, 2005
r. Settlement Agreement dated October 5, 2005
s. Letter to John Hempelmann and Tayloe Washburn dated June 17, 2010
t. Numerous letters and emails submitted by the public as a result of the Notice of Application issued on September 8, 2010 and re-issued on September 17, 2010
u. WAC 197-11
w. Letters submitted from the following sources as a result of the Notice of Application and Proposed MDNS issued on December 21, 2010:

Confederated Tribes of the Chehalis Reservation dated January 10, 2011
Black Hills Audubon Society dated January 10, 2011
The Law Offices of M. Patrick Williams, Representing Friends of Rocky Prairie dated January 10, 2011
Cairncross & Hempelmann Attorneys at Law, Representing Maytown Sand & Gravel dated January 10, 2011
Mitigating Conditions

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 new language in *bold* for the same numbered condition. The new language does not add new conditions to the original MDNS. The new language provides changes and clarifications to the original language. Unless subsequently amended through an appropriate process, the unchanged conditions of the 2005 MDNS will remain in full force and effect.

1. 6. The applicant shall adopt the Maytown Aggregates Groundwater Monitoring Plan (Appendix B and Revision 2 of the Groundwater Monitoring Plan, dated September 26, 2005), with the following provisions:

6. The applicant shall adopt a revised Groundwater Monitoring Plan, to replace the 2005 Groundwater Monitoring Plan, that more clearly sets out the water monitoring requirements for the proposed mineral extraction project as interpreted by the Thurston County Hydrogeologist. That document, entitled Groundwater and Surface Water Monitoring Plan, dated January 18, 2011 has been drafted by the applicant and approved by the Thurston County Environmental Health Division pursuant to TCC 17.20.210. That Plan is incorporated as a part of this MDNS.

2. 6A. Prior to any mining activity and within one-year of final issuance of the Special Use Permit (as used in this MDNS “final issuance” means the issuance of the permit and the resolution of any appeals) issuance the operator will field-verify off-site supply wells in the following areas:

1. West half of Section 6, T16N R1W
2. Northwest quarter of section 7, T16N R1W
3. Southwest quarter of Section 2, T16N R2W
4. Northeast quarter of Section 10, T16N R2W
5. South one-half of Section 11, T16N R2W
6. South one-half of Section 12, T16N R2W

6A. Prior to the commencement of mining the operator will field-verify off-site supply wells in the following areas:

1. West half of Section 6, T16N R1W
2. Northwest quarter of section 7, T16N R1W
3. Southwest quarter of Section 2, T16N R2W
4. Northeast quarter of Section 10, T16N R2W
5. South one-half of Section 11, T16N R2W
6. South one-half of Section 12, T16N R2W

3. 6C. Pursuant to the Groundwater Monitoring Plan, to avoid repeated access to the private wells identified in the proceeding conditions, seventeen (17) monitoring wells shall be established within and surrounding the mine. The wells shall monitor water levels, temperature, and
water quality, including measurement of background conditions, and by documenting the construction and performance of the off-site water supply wells prior to mining. Four well stations are specific to NPDES monitoring of the process water. The other 13 stations serve the purposes of monitoring for protection of off-site wells and wetlands. The operator shall survey these monitoring wells: (a) six times yearly, or (b) four times yearly if data loggers are installed in the monitoring wells. The surveys shall begin within 60 days of the final issuance by the County of the Special Use Permit. The monitoring data shall be submitted to Thurston County Development Services Department, Washington State Department of Ecology, and the Washington State Department of Fish & Wildlife every two months or quarterly if data loggers are installed in the monitoring wells. The operator will summarize the mining and water monitoring data in a report to the County every two years. The groundwater monitoring reports shall be prepared by a Washington State Licensed Hydrogeologist.

6C. The Groundwater and Surface Water Monitoring Plan dated January 18, 2011 shall set out and control the water monitoring procedures for the life of the subject mine. The Plan resolves the discrepancies between the 2005 Groundwater Plan and the original language of condition 6C, and sets new deadlines for completion of background water quality monitoring. The original language of condition 6C is deleted.

Notes

A. Washington State Water Quality Laws, Chapter 90.48 RCW, Water Pollution Control and WAC 173-201A, Water Quality Standards for Surface Waters of the State of Washington, define quality of state waters. Any discharge of sediment-laden runoff or of other pollutants to waters of the state is in violation of these state laws and may be subject to enforcement action.

B. During all mining activities, all releases of oils, hydraulic fluids, fuels and other deleterious materials must be contained and removed in a manner that will prevent their discharge to waters and soils of the state. The cleanup of spills shall take precedence over all other work at the site.

C. 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.

Summary

The Thurston County Resource Stewardship Department has determined that the requirements for environmental analysis, protection, and mitigation have been adequately addressed in the above conditions, as well as in development regulations and the Comprehensive Plan adopted under chapter 36.70A RCW, and in other applicable local, state, or federal laws or rules, as provided by RCW 43.21C.240 and WAC 197-11-158. Other than the conditions listed above, and those unchanged conditions from the October 24, 2005 MDNS issued for SUPT 02-0612, this Department will not require additional mitigation measures under SEPA.
DIRECTIONS TO SITE:
The site is located approximately 10 miles south of Olympia. From Olympia, drive southbound on Interstate 5 towards Portland. Take the WA-121 (Exit 95) towards Maytown. Drive eastbound on WA-121 (Maytown Road SW). Turn right onto Tilly Road. Site is located on left (east) side of Tilly Road, just south of the intersection of Tilly Road and WA-121.

NOTE:
USGS topographic quadrangle map reproduced using MAPTECH, Inc. software Terrain Navigator.
January 10, 2011

Michael Kain
Thurston County Resource Stewardship Dept.
20000 Lakeridge Dr. SW, Building 1
Olympia, Washington 98502

Re: Comments to Amended Notice of Application and Likely Issuance of MDNS

Dear Mr. Kain:

As you know, Cairncross & Hempelmann represents Maytown Sand & Gravel ("MSG") in relation to project case No. 2010101170, which is the subject of the Thurston County Amended Notice of Application and Likely Issuance of a Mitigated Determination of Non-Significance ("Notice") mailed on December 21, 2010. While the Notice states that MSG submitted application for an amendment to the previously issued special use permit ("SUP"), it should be very clear to the County that MSG has done so under protest.

As MSG has consistently stated in its prior communications, this amendment process is not required by the Thurston County Code. MSG is proceeding with this unnecessary procedure only because the County has created a public expectation for the amendment hearing, and MSG hopes to avoid any procedural appeal that might delay further the commencement of mining under the SUP.

The purpose of the pending amendment hearing is to address the technical noncompliance with Conditions 6A and 6C of the October 24, 2005 MDNS. The 2005 SUP decision by the Thurston County Hearing Examiner required compliance with these MDNS Conditions.\(^1\) The proposed amendments are for exceptionally small changes to the requirements of 2005 MDNS Conditions 6A and 6C, as adopted by the 2005 SUP.

My December 13, 2010 letter to you explained the limited nature of the SUP amendments.\(^2\) The only necessary amendments are small modifications to the timing for commencing field verification of off-site wells and water monitoring surveys, and the correction of clerical errors that have led to confusion.

\(^1\) See 2005 SUP Condition A.
\(^2\) I have attached the December 13, 2010 letter for your convenience.
A. The Thurston County Hearing Examiner’s Five Year Review Decision Provides Strong Guidance to the County for Amending Conditions 6A and 6C.

On December 6, 7, and 8, the Thurston County Hearing Examiner conducted a Five Year Review hearing, as required under the SUP. The Examiner issued her decision ("Decision") on December 30, 2010, approving the SUP with limited conditions. Conditions 6A and 6C were discussed in detail during the Five Year Review Hearing. With regard to Condition 6A, the Examiner’s Decision at Finding Nos. 36 to 40 found as follows:

36. Condition 6A required the off-site well survey to be completed within one year of permit issuance, which would have been December 2006. The Applicant finished the required survey and submitted the data to the County in a report dated December 31, 2009. The County had no objections to the adequacy of the report other than the timeliness of its submission. The staff report states: "Staff assessment is that the time deadline presumed that mining activities were imminent, thus there was some urgency in meeting the condition. Nothing found in the record to date appears to link the time deadline to an environmental issue." Exhibit 27, Attachment 7; Ellingson Testimony; Kain Testimony; Exhibit 1, page 5.

37. Despite the lack of environmental impacts, at hearing the County maintained that because the Hearing Examiner adopted the deadline (via SUP condition A), and because there was voluminous public comment relating to the retention of the deadlines, condition 6.A is out of compliance until and unless an amendment to the deadline is approved by the Hearing Examiner. The County asserted that no substantial land disturbing activity would be allowed to occur on-site until the requested amendment is granted, and that if it is not granted, the County would be unable to issue its "proceed to mine" letter and the 2005 approval of SUPT 02-0612 would lapse. Exhibit 1, page 6; Kain Testimony.

38. The Applicant argued that the [sic] even though compliance with condition 6.A's deadline was late, the condition has been substantively complied with. The Applicant's groundwater consultant, Mr. Charles Ellingson, asserted that having the survey later than December 2006 is beneficial for all parties in that the data (which is not required to be revisited for five years) more accurately represents the pre-mining condition than it would have had the inventory been completed in 2006. Ellingson Testimony; Exhibit 33.

39. The County's staff hydrogeologist, Nadine Romero, testified that the scientific purpose of the off-site survey is as much to protect the mine operator as it is to protect the off-site well owners, as it prevents the mine for being blamed for contaminants already in the offsite well water. She testified that the delay in compliance with MDNS 6.A resulted in no gap in needed data and no environmental harm. Romero Testimony.
40. DOE submitted comments dated September 27, 2010 and October 7, 2010 indicating that the delay in the timing of well monitoring does not appear to have any impacts on the results of the monitoring or on the environment. Exhibit 1, Attachments o.11.b and o.11.c.

[Decision at Findings 36 – 40 (emphasis added)]

As the Examiner’s findings make clear, there is unanimous agreement among the County Staff, County’s expert hydrogeologist, Nadine Romero, MSG’s expert hydrogeologist, Charles “Pony” Ellingson, and the Department of Ecology (“Ecology”) that amending the timing of well monitoring will have no significant adverse environmental impacts. MSG concurs with the opinions of all these officials and experts.

With regard to Condition 6C, the 2005 MDNS stated that water monitoring surveys were to begin within 60 days of SUP issuance. Though the start date of routine monitoring did not begin within that time, all experts agree that no harm has occurred from the delay and the Examiner has found MSG in substantive compliance with the survey requirements. This timing requirement should therefore be eliminated in the SUP amendment proceeding.

Additionally, there are two clerical errors that need correcting. The first is the use of the term “wells” in place of “stations” in several places within Condition 6C. Though the 2005 Groundwater Monitoring Plan (“GMP”) makes clear the distinction between monitoring wells and monitoring stations, the existing language from Condition 6C has led to much unnecessary confusion and should be made clearer. The second clerical error needing correcting is the obvious fact that no water sampling can occur at the 17th monitoring station because it is to exist in a process water pond that is to be constructed after mining commences. The SUP amendment will therefore clarify that water sampling at the 17th station will occur only after it is created and contains water.

In her Decision, the Examiner succinctly described the issue:

44. As explained by Mr. Ellingson, the GMP (in the record at Exhibit 24) establishes two separate monitoring programs. The first is a perimeter monitoring program with 13 stations (nine groundwater wells and four surface water sampling stations) measuring water level and temperature to detect potential impacts of mining on off-site wetlands and water supply wells. The second is the NPDES program, required by DOE as part of the

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3 In fact, testimony showed that there is a better, more complete data set available now than there would have been had the deadlines been met and mining had begun imminently, as anticipated in 2005.

4 Conditions 6A and 6C under the 2005 MDNS referred to the 2005 Groundwater Monitoring Plan (“GMP”) as the source of the water monitoring requirements under Condition 6. The GMP therefore sets forth the monitoring requirements that Conditions 6A and 6C attempt to summarize. Any confusion about water monitoring requirements under the SUP should therefore be resolved in reference to the GMP.
Sand & Gravel General Permit, consisting of three groundwater monitoring wells at which water quality will be measured and surface water sampling of one process water pond. Mr. Ellingson testified that the failure of MDNS 6.A and 6.C to clearly identify the difference between the distinct timing requirements and purposes of the two programs has led to misunderstanding the intent of the GMP and to the perception of "data gaps" that do not really exist. Ellingson Testimony; Exhibit 33; Exhibit 34; Exhibit 1, Attachment ii.

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46. Mr. Ellingson asserted that the 17th station was always intended to be the process water pond, which cannot by definition be monitored until it contains process water, and that there is no other basis for the requirement of a 17th monitoring station. Ellingson Testimony; Exhibit 33; Exhibit 34; Exhibit 1, Attachment ii.

[Decision at Finding 44]

In her conclusions, the Examiner summarized why the Condition 6C language led to confusion:

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....

[Decision at Conclusion 3]

With clarification from hydrogeologists Mr. Ellingson and Ms. Romero, the Examiner concluded that MSG is in substantive compliance with the groundwater monitoring requirements:

A. Substantive compliance with the intent and specific requirements of the groundwater monitoring plan have been demonstrated, both in terms of off-site supply well protection and perimeter ground/surface water protection. Bi-monthly data gathering began in 2008 and continued through the hearing date. Although some parameters were missing at some stations on some dates, the individual missing measurements do not rise to the level [sic] of failure to comply with monitoring. All required data was submitted in 2010 for 16
stations. According to the GMP, the 17th station is a process water pond that cannot be monitored until it is constructed and contains process water, which is by definition after mining commences. According to DOE, the County hydrogeologist, and the Applicant's consultant, there is a better, more complete data set available now than there would have been had the deadlines been met and mining had begun "imminently". No harm has resulted or will result from the timing of compliance. There is adequate background data to commence earth disturbing activities, including mining above the water table. Findings 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, and 53.

B. Whether or not the 162 additional parameters are required by the permit or have been inappropriately added after permit issuance, the Applicant has performed the required additional parameter testing "under protest" and has stated that they intend to complete the second round thereof by September 2011 "under protest". They are therefore in compliance with background condition monitoring, aside from the issue of the 17th station. The question of whether the additional parameters are required by the permit is more appropriately addressed in the context of the SUP amendment application and will be deferred. Findings 48, 49, 50, 51, 42, 43, and 54.

[Decision at Conclusion 4]

The Examiner's Decision thus found that amending Conditions 6A and 6C would cause no environmental harm, and that MSG is in substantial compliance with the intent and specific requirements of the groundwater monitoring plan. The minor amendments proposed in the pending amendment hearing should similarly reflect the relative simplicity of the proposed changes.

B. No Additional Mitigation Conditions Should be Added to the Amended MDNS Because the Amendments are to Clarify Existing Conditions—No Probable Significant Adverse Environmental Impacts Exist to Justify Additional Mitigating Conditions.

MSG takes issue with several aspects of the Proposed MDNS. Those issues are addressed as follows.

1. Prefatory Language of Proposed MDNS

The introductory language of the Proposed MDNS states that under the 2005 MDNS the goal to clarify the process for water monitoring “was not clearly set out in the MDNS.” This is incorrect. The 2005 MDNS twice referenced the GMP as the source of the requirements under Condition 6. The GMP already contains the required monitoring program. The pending amendment hearing is simply meant to clarify the intent of the GMP by amending the language from MDNS Condition 6.
The Proposed MDNS also states that the “applicant seeks to set the number at 16 stations with a 17th added later as a process water pond.” MSG is not “requesting” this; it is clear from the GMP. This is a clarification of 6C to reflect the existing GMP. It does not change the monitoring plan previously in place.

Under the heading “Information Reviewed,” the Proposed MDNS fails to list Pacific Groundwater Group’s November 23, 2010 document, titled “Clarifications and Comments on County Memo of November 10, 2010 Relating to Hydrogeologic Information.” This important document clarifies several errors and/or misunderstandings in County hydrogeologist Nadine Romero’s November 10, 2010 memo.

2. Proposed New Condition 6


MSG agrees that the new Groundwater and Surface Water Monitoring Plan (“GSWMP”) should clarify confusion arising from the 2005 MDNS. It should not, however, be based on memos by County Hydrogeologist Nadine Romero. Those memos impose unlawful conditions that the County has no authority to impose upon a vested permit like MSG’s SUP. 5

In fact, there is no basis for imposing new MDNS conditions at all. As explained above, the County Staff, County hydrogeologist, MSG’s hydrogeologist, and Ecology all agree that there will be no environmental effect from the amendments. In short, there is no justification for imposing new mitigating conditions because there are no probable significant adverse environmental impacts that need to be mitigated. See WAC 197-11-350.

3. Proposed New Condition 6A

MSG notes that Condition 6A under the 2005 MDNS states that field verification of off-site supply wells is to occur “prior to mining activity.” The Proposed New Condition 6A states that it is to occur “[p]rior to any substantial land disturbing activity.” Other than this unnecessary change, MSG does not object to the language of Proposed New Condition 6A.

5 As detailed in Pacific Groundwater Group’s November 23, 2010 document, titled “Clarifications and Comments on County Memo of November 10, 2010 Relating to Hydrogeologic Information,” Ms. Romero’s memos contain many errors and misunderstandings. The County should therefore not rely on Ms. Romero’s memos as the basis of the new Groundwater and Surface Water Monitoring Plan.
4. Proposed New Condition 6C

The 2005 MDNS Condition 6C begins with “Pursuant to the Groundwater Monitoring Plan”. The water monitoring process, parameters, and timeline for sampling were all contained in the 2005 GMP. Condition 6C attempted to summarize the GMP, but some of Condition 6C’s language led to confusion. Despite this confusion, MSG has now submitted all the required water monitoring data, including the additional water monitoring requirements included in Ms. Romero’s February and November 2010 memos.

The Examiner’s Decision at Finding 42 recognized this fact: “After March 2010, results were reported for 16 stations, including temperature data. The 17th site is identified in the GMP as process water pond that has not been constructed and which will not be constructed until after mining commences.” Ms. Romero’s testimony also acknowledged that, under the GMP, the County has all data it needs to issue a “proceed to mine” letter. Decision at Finding 53. While the County seeks a second year of water quality parameter sampling, it does not dispute that such sampling data was not required under the SUP, MDNS, or GMP. Decision at Finding 50.

Rather than clarifying the original monitoring requirements under the approved 2005 GMP, Proposed New Condition 6C attempts to unlawfully impose new requirements. MSG strongly opposes the County’s attempt to add these new requirements. The following are MSG’s comments on the language of Proposed New Condition 6C:

a. Proposed New Condition 6C: “The purpose of the compliance monitoring stations is to detect any groundwater impacts from mining operations to off-site domestic wells and wetlands”. Comment: The proposed statement is not logical and no attempt should be made to change the purpose of monitoring. Compliance monitoring stations cannot detect impacts to off-site wells. The purpose of monitoring was established in the 2005 GMP as follows: “The purpose of this groundwater monitoring plan is to generate information that will address the following issues and regulatory requirements:

- The potential for impairment of off-site water supply wells
- Changes in water levels and quality resulting from mining
- NPDES monitoring requirements”

b. Proposed New Condition 6C: “Four (4) of the compliance stations have been established specifically for NPDES monitoring of the process water.” Comment: Three of the four NPDES stations have been established to date, the fourth is station G-1, the process water pond, which will be constructed later.
c. **Proposed New Condition 6C:** "Twelve (12) of the compliance monitoring stations consist of eight (8) groundwater monitoring wells and four (4) surface water stations at wetlands and streams." **Comment:** Although the statement is arithmetically correct, the stations in question are not clear, and the statement probably reflects continued lack of understanding of the GMP on the County's part. As indicated in the 2005 GMP, Pacific Groundwater Group documents of 2010, and Five Year Review hearing exhibits and testimony, the 2005 perimeter monitoring program consists of thirteen stations, nine of which are wells, and four of which are surface water stations.

d. **Proposed New Condition 6C:** "At minimum, the operator shall monitor the 16 existing monitoring stations: (a) six times yearly, or (b) four times yearly if data loggers are installed." **Comment:** This statement changes the scope of the 2005 Plan and Condition 6C. The 2005 Plan requires that the 13 perimeter stations be monitored six times per year. The proposed statement requires 16 stations to be monitored at that frequency. The monitoring frequency for NPDES/SWPPP program wells (not pond) has always been quarterly.

e. **Proposed New Condition 6C:** "Background monitoring for the existing sixteen (16) stations shall be completed prior to the commencement of substantial land disturbing activity on-site." **Comment:** This data has been completed. The County has all the data required under the GMP to allowing substantial land disturbing activity on-site. Ms. Romero admitted such in her testimony before the Hearing Examiner at the Five Year Review Hearing.

f. **Proposed New Condition 6C:** "The sampling and analysis methods, water quality parameters, monitoring schedules and monitoring frequency for both foreground and background data collection shall be specified in the new Groundwater and Surface Water Monitoring Plan." **Comment:** There is no basis for requiring the new GSWMP. Sampling should occur pursuant to the approved 2005 GMP.

g. **Proposed New Condition 6C:** "The monitoring data from all stations shall be submitted...no less frequently than every two months or quarterly if data loggers are installed in the monitoring stations." **Comment:** Foreground data should be submitted as required by the 2005 GMP.

h. **Proposed New Condition 6C:** "At minimum, one year of background water monitoring shall be completed prior to any substantial land disturbing activity on-site for the original sixteen (16) monitoring stations." **Comment:** This has been provided. See comment e.

i. **Proposed New Condition 6C:** "The background water quality testing shall be completed in accordance with the new Groundwater and Surface Water Monitoring Plan." **Comment:** Background water quality testing should occur pursuant to the approved 2005 GMP.
j. Proposed New Condition 6C: “At minimum, the foreground data collection shall consist of bi-monthly water temperature, water level and the specified water quality parameters as provided in the new Groundwater and Surface Water Monitoring Plan.” Comment: Foreground data should be submitted as required by the 2005 GMP.

In summary, the Hearing Examiner’s Decision provides strong guidance to the County as to how it should proceed with the SUP amendment hearing. MSG has applied to make two very minor amendments to MDNS Conditions 6A and 6C that by their very nature will have no environmental effect. First, by amending the wording of Condition 6C to clarify the water monitoring required under the 2005 GMP, the amendment makes no changes to the existing requirements, and therefore no environmental impact will occur. Second, changing the time for off-site well verification and commencing water monitoring will result in no probable adverse environmental impacts. All experts agree on this point.

For these reasons, there will be no environmental impacts from these amendments and any new mitigating conditions are wholly unjustified. MSG has expended much time, effort, and money to secure its right to mine under its vested SUP. The County should not use the SUP amendment process as a means to impose unlawfully new conditions upon MSG’s SUP.

Very truly yours,

[Signature]

John W. Hempelmann
Randall P. Olsen

JWH:msd
cc: Maytown Sand and Gravel, LLC
    J. Tayloe Washburn
    Steven Gillespie
    Port of Tacoma
January 25, 2011

Mike Kain
Thurston County Resource Stewardship Dept.
20000 Lakeridge Dr. SW, Building 1
Olympia, Washington 98502

Re: Request for Thurston County to Authorize Pre-Mining Activities under Maytown Sand & Gravel’s Special Use Permit 02-0612

Dear Mr. Kain:

On behalf of Maytown Sand & Gravel ("MSG"), we are again writing to request formally that MSG be allowed to undertake pre-mining activities under the above-described Special Use Permit ("SUP"), including substantial earth disturbing activities on-site and off-site road improvements. The County has continuously refused to issue permits for off-site road work\(^1\) and construction of a sound attenuation berm\(^2\) required by the SUP. In December, the County refused again to issue the permit for the berm even after unanimous expert testimony\(^3\) established that the County has all necessary data to authorize pre-mining activities.

MSG requests that the County issue such permits immediately. There is no lawful basis for the County’s position that MSG cannot begin these pre-mining activities until after final approval from the County to proceed to mine. MSG can choose to begin such activities prior to any such approval, and it chooses to do so immediately. We again protest the County’s position that some unidentified Code provision authorizes the County to hold up mining under the SUP until the County issues a “notice to proceed.” The County’s delays are increasing the damages to MSG, and thus to the County. The County continues such denials at its peril.

A brief history of the County’s actions related to this SUP illustrates MSG’s exasperation and the need for this letter.

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\(^1\) On July 14, 2010 and again on December 20, 2010, County refused to issue the permit for off-site road work.

\(^2\) On June 17, 2010 and again on December 27, 2010, County refused to issue the permit for the noise attenuation berm.

\(^3\) This testimony was provided in the December 6, 7, and 8, 2010 Five Year Review Hearing before the Thurston County Hearing Examiner.

jhempelmann@cairncross.com
Direct: (206) 254-4400

EXHIBIT C
Background Leading up to MSG’s Purchase of the SUP

The SUP has been permitted since early 2006. In July of 2006, it was sold along with the underlying property to the Port of Tacoma (“Port”). In the fall of that year, the Port began taking steps to further secure its mining rights under the SUP. In July of 2008, the Port decided to market the SUP and property for sale, but prior to doing so it sought confirmation from the County that the SUP remained valid.

On October 29, 2008, Tony Kantas sent a letter to the Port on behalf of the County confirming that the on-site activities undertaken by the Port precluded expiration of the SUP under TCC 20.54.040.4.a. The letter stated that it contained an appealable determination. That determination was not appealed.

Shortly thereafter, the Port began to market the property. It put the property out for bids and received responses from a number of potential purchasers. The Port selected MSG as the top bidder based on the amount of its bid and its experience in gravel mining.

On October 28, 2009, as part of due diligence review of the property and SUP 020612, MSG gathered substantial documentation and met with Department of Ecology and County staff members to discuss the status of the SUP. MSG’s due diligence review included an October 28, 2009 meeting at the Thurston County offices between MSG representatives Steve Cortner, Jim Magstadt, Randy Lloyd, Roy Garrison, Jeff McCann and County representatives Mike Kain, Jeremy Davis and other staff.

At that time, the County staff stated that the only SUP conditions that could not be made compliant were timing issues related to water quality monitoring under MDNS Conditions 6A and 6C. Both Mr. Kain and Mr. Cortner testified to this fact at the Five Year Review Hearing. Both also testified that Mr. Cortner was looking for any other potential problems or issues that could affect a potential MSG purchase of the site. The County identified no other issues.

Following the October 28, 2009 meeting with the County, MSG signed the purchase and sale agreement to purchase the property from the Port. MSG relied on the County’s statements that the minor technical amendments to the SUP were the only noncompliance issues that remained.

Subsequent to MSG’s Purchase of the SUP

Given the technical noncompliance with the timing requirements of MDNS Conditions 6A and 6C, the Port and MSG sought written assurance from the County that the SUP remained valid. On February 16, 2010, pursuant to a request by the Port, the County issued a compliance memo (“County Memo”). The County Memo assessed the level of compliance with the conditions of approval for the SUP.
Mike Kain  
January 25, 2011  
Page 3

In the County Memo, with respect to MDNS Condition 6A, the County found that information relating to that Condition had been provided, but the timing requirement for verifying off-site supply wells—"within one year of final issuance of the Special Use Permit"—had not been met. The County Memo described the status of Condition 6A as "technically out of compliance" and provided the following analysis:

After reviewing this condition, staff assessment is that the time deadline presumed that mining activities were imminent, thus there was some urgency in meeting the condition. As no earth disturbing or mining activity has taken place, although the deadline was not met, at this time, staff do not consider this a significant issue. Such minor timeline change may be approved by staff upon submittal of an application for amendment. This decision would be appealable to the Hearing Examiner.

[County Memo at 3 (emphasis added)]

With respect to MDNS Condition 6C, the County Memo explained that the condition had been partially satisfied but the specific time deadline for beginning water monitoring—"within 60 days of final issuance by the County of the Special Use Permit"—had not been met. But the County also found that because no earth disturbing activities had taken place, the opportunity still existed to conduct a full monitoring plan and baseline testing. The County’s analysis included the following:

Again, it is the staff assessment that the deadline attached to this condition presumed that mining activities were imminent, meaning within twelve months. Although the applicant did not meet the deadline, the fact is, no earth disturbing or mining activities have yet taken place. Thus, presuming that the applicant follows through with the plans outlined above, including drilling and monitoring wells 16 and 17, the opportunity to conduct a full monitoring plan as described in the condition, to be used as a baseline for future comparisons, still exists. Because it is still possible to obtain that full baseline data set, at this time, staff does not believe that missing the deadline set out in the original condition is a significant issue. Staff will not authorize any mining activities until the baseline has been established. Such minor timeline change may be approved by staff upon submittal of an application for amendment. The timing for full establishment of that baseline will be set during review of the amendment. This decision would be appealable to the Hearing Examiner.

[County Memo at 4 (emphasis added)]

MSG, in reliance on County representations as to the validity of the SUP during the October 28, 2009 meeting, subsequent discussions with County staff, and the confirmations in
the February 16, 2010 County Memo, waived its due diligence contingency in the purchase and sale agreement with the Port and closed the transaction on April 1, 2010.

The Examiner’s Five Year Review Decision

The Thurston County Hearing Examiner conducted a Five Year Review Hearing\(^4\) December 6, 7, and 8, 2010. The Examiner’s Decision (“Decision”), issued on December 30, 2010, approved the SUP with limited conditions. Substantial testimony on Conditions 6A and 6C was provided during the hearing. With regard to Condition 6A, the Examiner’s Decision at Finding Nos. 36 to 40 found as follows:

36. Condition 6A required the off-site well survey to be completed within one year of permit issuance, which would have been December 2006. The Applicant finished the required survey and submitted the data to the County in a report dated December 31, 2009. The County had no objections to the adequacy of the report other than the timeliness of its submission. The staff report states: “Staff assessment is that the time deadline presumed that mining activities were imminent, thus there was some urgency in meeting the condition. Nothing found in the record to date appears to link the time deadline to an environmental issue.” Exhibit 27, Attachment 7; Ellingson Testimony; Kain Testimony; Exhibit 1, page 5.

37. Despite the lack of environmental impacts, at hearing the County maintained that because the Hearing Examiner adopted the deadline (via SUP condition A), and because there was voluminous public comment\(^5\) relating to the retention of the deadlines, condition 6A is out of compliance until and unless an amendment to the deadline is approved by the Hearing Examiner. The County asserted that no substantial land disturbing activity would be allowed to occur on-site until the requested amendment is granted, and that if it is not granted, the County would be unable to issue its "proceed to mine" letter and the 2005 approval of SUPT 02-0612 would lapse. Exhibit 1, page 6; Kain Testimony.

38. The Applicant argued that the [sic] even though compliance with condition 6A’s deadline was late, the condition has been substantively complied with. The Applicant's groundwater consultant, Mr. Charles Ellingson, asserted that having the survey later than December 2006 is beneficial for all parties in that the data (which is not required to be revisited for five years) more accurately represents

\(^4\) Prior to, during, and at all times since the Five Year Review Hearing, the Port and Maytown have disputed the need for an administrative amendment. They believed that the technical noncompliance under Conditions 6A and 6C should have been handled as a compliance issue by Staff in mid 2010 or, at the latest, during the Five Year Review.

\(^5\) The vast majority of this public comment came from two sources: The members of Friends of Rocky Prairie and Black Hills Audubon Society.
the pre-mining condition than it would have had the inventory been completed in 2006. Ellingson Testimony; Exhibit 33.

39. The County’s staff hydrogeologist, Nadine Romero, testified that the scientific purpose of the off-site survey is as much to protect the mine operator as it is to protect the off-site well owners, as it prevents the mine for being blamed for contaminants already in the offsite well water. She testified that the delay in compliance with MDNS 6.A resulted in no gap in needed data and no environmental harm. Romero Testimony.

40. DOE submitted comments dated September 27, 2010 and October 7, 2010 indicating that the delay in the timing of well monitoring does not appear to have any impacts on the results of the monitoring or on the environment. Exhibit 1, Attachments o.11.b and o.11.c.

[Decision at Findings 36 – 40 (emphasis added)]

As the Examiner’s Findings make clear, there is unanimous agreement among the County Staff, County’s expert hydrogeologist, Nadine Romero, MSG’s expert hydrogeologist, Charles “Pony” Ellingson, and the Department of Ecology (“Ecology”) that amending the timing of well monitoring will have no environmental impacts. While FORP and BHAS have appealed the Examiner’s Decision, those appeals do not cite any evidence that contradicts the expert opinions of the hydrogeologists and Ecology about Conditions 6A and 6C.

With regard to Condition 6C, the 2005 MDNS stated that water monitoring surveys were to begin within 60 days of SUP issuance. Though the start date of routine monitoring did not begin within that time, all experts agree that no harm has occurred from the delay. In fact, testimony showed that there is a better, more complete data set available now than there would have been had the deadlines been met and mining had begun imminently, as anticipated in 2005. The Examiner therefore found MSG in substantive compliance with the survey requirements.

Lastly, there are two clerical errors in Condition 6C that need correcting. The first is the use of the term “wells” in place of “stations” in several places. Though the 2005 Groundwater Monitoring Plan (“GMP”) makes the clear distinction between monitoring wells and monitoring stations, the existing language from Condition 6C has led to confusion and should be made clearer. The second clerical error needing correcting is the obvious fact that no water sampling can occur at the 17th monitoring station because it is to exist in a process water pond that is to be constructed after mining commences. The SUP Amendment should therefore clarify that water sampling at the 17th station will occur only after it is created and contains water.

These limited technical amendments should have no effect on MSG’s ability to commence pre-mining activities. In her Decision, the Examiner agreed:
A. Substantive compliance with the intent and specific requirements of the groundwater monitoring plan have been demonstrated, both in terms of off-site supply well protection and perimeter ground/surface water protection. Bi-monthly data gathering began in 2008 and continued through the hearing date. Although some parameters were missing at some stations on some dates, the individual missing measurements do not rise to the level of failure to comply with monitoring. All required data was submitted in 2010 for 16 stations. According to the GMP, the 17th station is a process water pond that cannot be monitored until it is constructed and contains process water, which is by definition after mining commences. According to DOE, the County hydrogeologist, and the Applicant's consultant, there is a better, more complete data set available now than there would have been had the deadlines been met and mining had begun "imminently". No harm has resulted or will result from the timing of compliance. There is adequate background data to commence earth disturbing activities, including mining above the water table. Findings 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, and 53.

[Decision at Conclusion 4.A (emphasis added)]

The Examiner's Decision thus found that amending Conditions 6A and 6C would cause no environmental harm, and that MSG is in substantive compliance with the intent and specific requirements of the groundwater monitoring plan. Moreover, the County and MSG have agreed on a revised Groundwater and Surface Water Monitoring Plan dated January 18, 2011 and the County has issued an MDNS adopting that Plan. The minor amendments proposed in the pending amendment hearing provide no basis for the County's continuing refusal to issue MSG pre-mining permits. Given these facts, it is arbitrary and capricious for the County to block the required pre-mining activities because of an ad hoc County Amendment process relating to technical corrections.

MSG's Request to Commence Pre-Mining Activities

MSG requests that the County issue the permits required for MSG to commence pre-mining activities, including the construction of off-site roadway improvements and construction of the noise attenuation berm. There is no basis for refusing to grant permits for off-site work. By definition, it will not have an effect on the site. In fact, it will actually improve public safety. Also, even though the berm and road work will be nowhere near the off-site critical areas allegedly requiring additional signage on the property's southern boundary, MSG is willing to install those signs prior to starting on-site work.

The County's actions in delaying the start of mining have led to lost business opportunities for MSG, and also lost jobs and tax revenue to the County and State. By delaying and extending the approval process, MSG has missed opportunities to bid on several large construction contracts utilizing sand and gravel from this property. These construction projects
are relatively close to the site, thereby reducing travel time and potential traffic impacts. The County’s actions also delay the local jobs that will be created when mining can begin. The tax revenues from mining is similarly forestalled by the County’s actions. The County cannot justify these negative consequences.

The stalling of this project must end. With this request, MSG believes it has exhausted its options before the County. We request\textsuperscript{6} that the County immediately issue these permits.

\begin{flushright}
Very truly yours,
\end{flushright}

\begin{flushright}
John W. Hempelmann
Attorney for Maytown Sand & Gravel
\end{flushright}

JWH:msd

\textsuperscript{6} The County can consider it a demand, if the County requires a demand prior to taking action.
RECEIPT
Thurston County
Resource Stewardship Department
2000 Lakeridge Drive
Olympia, WA 98502
(360) 786-5490

BROCO SAND & GRAVEL LLC
34667 PACIFIC HWY S
FEDERAL WAY WA 98003

PAYMENT #: 103093

Project Type: MISCELLANEOUS REVENUE

Application/Permit #: 11101408

This number should be used to check the status of your project or when calling in for any inspection or information after a permit is issued.

Memo: CHK NO 5060

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Received by: [Signature]

Date: February 9, 2011