December 8, 2010

TO: Hearings Examiner, Thurston County  
2000 Lakeridge Drive SW, Olympia, WA 98502

RE: Public Hearing on Five-Year Review of SUPT02-0612, Maytown Sand & Gravel, LLC,  
Project No.: 2010102512

Black Hills Audubon Society (BHAS) requests party standing.  
As a signatory of and participant in the Settlement Agreement (SA) that was a key document in  
the issuance of Special Use Permit 02-0612 (SUPT) and its accompanying MDNS, BHAS  
requests confirmation that it is a party of standing for the hearing of the Five-Year Review of the  
Special Use Permit SUPT 02-0612 and that it has the privileges associated with that standing.

Black Hills Audubon is a party to the Settlement Agreement, without which this SUP would not  
exist in its current form.

Black Hills Audubon has been involved with this property since 2002, initially with Jay Allen.  
BHAS’s importance was recognized by the Hearing Examiner in Finding 83 in the SUP decision  
dated December 16, 2005. Finding 83 states that compliance with the BHAS Settlement  
Agreement (SA) is one of the 32 conditions required by the reissued MDNS. BHAS may be  
prevented from fully determining whether there has been compliance with the SA if we are not  
allowed some measure of standing in this matter.

Status of the Settlement Agreement (SA)  
BHAS has not been approached to discuss any changes to the original 2005 SA, nor have we been  
asked to approve of any changes to its terms. No support for, or acceptance of, any modification  
to the 2005 SA by BHAS should be assumed. The SA is a legal document that was incorporated  
into the SUP.

Applicant is attempting to alter the SUPT in this five-year-review  
The applicant is attempting to alter the SUPT in this five-year-review. As we stated in BHAS’s  
May 24, 2010 and November 15, 2010 letters, if the applicant wishes to change the SUPT, the  
special use permit application process should be started over. (Cited letters, Staff Report,  
Attachment o, #7)
The project is out of compliance with requirements of the MDNS and SUP
We support the County’s conclusions that the project is out-of-compliance with multiple requirements of the SEPA and SUPT conditions.

As stated in our letters of May 24, 2020, October 12, 2010 and November 15, 2010, BHAS believes that MSG is out-of-compliance with their water monitoring requirements (Staff Report, cited BHAS letters are Attachment, o, #7).

- Point 3 in the Summary of Project Modifications from the revoked May 4, 2004 MDNS is:

  “Continue groundwater and surface water monitoring to collect background data to neighboring wells, hydrology of wetlands and Allen Creek and Beaver Creeks.”
  (Staff Report, Attachment f, page 1)

But Mr Ellingson’s testimony on December 7, 2010, confirmed that there was no monitoring from mid-2006 until January 2008. There was a significant time gap in water monitoring.

- Regarding the payment of the Conservation Fund to the Conservation Organizations as specified in the SA, it is inaccurate to state, “This condition has been satisfied” (condition #8, Staff Report pages 10-11). The SA states the conditions for the COs were to receive the $325,000 Conservation Fund:

  “2.3 Timing/Obligation to Fund. At closing, Allen will provide the Conservation Fund to the Fund Administrator from the proceeds of sale of the property to an operator. Allen is obligated to fund the Conservation Fund only upon the occurrence of all of the following events:
  2.3.1. BHAS’ compliance with Section 3 this Agreement, including withdrawal of its MDNS appeal; and
  2.3.2. Sale of the property as a permitted mining operation to an operator or an owner who subsequently leases to an operator.” (Settlement Agreement, p. 7)

Closing was in July 2006 and the Conservation Fund wasn’t established until April 2009. It remains in escrow until all compliance and legal issues are resolved.

In his testimony on December 6, the DNR Natural Heritage Program scientist testified that the Federally Endangered Water Howelia is water level sensitive. Water Howelia is in the WDFW Class I wetlands. Good water level background data would be valuable in learning what water level conditions allow Howelia to exist on the WDFW property. With this knowledge, scientists could then monitor and respond to an unacceptable water level. Failure to receive these funds resulted in the Conservation Organizations being unable to do any baseline water data collection on the WDFW property.

The COs were also unable to use the money to help extirpate the spreading Scots Broom on WDFW property, or proceed with any other conservation efforts discussed in the

Black Hills Audubon Society
Settlement Agreement.

**Corrections/Clarifications to the Final Staff Report (12/6/10)**

1) At the top of page 6, the Staff Report states, “Additionally, in an April 23, 2004 document authored by Mr. Ellingson, he states in summary, that if mining is delayed, the hydrologic monitoring can be delayed.” (Staff Report, attachment kk).

BHAS believes that Mr. Ellingson’s statement is irrelevant. This April 23, 2004 PGG report was prepared for the original May 4, 2004 MDNS, which BHAS later appealed. This appeal resulted in negotiations among the Conservation Organizations, various agencies, and Jay Allen and the revocation and reissuance of the MDNS. Water monitoring was a significant topic at these negotiations, and the discussions started anew without regard for any previous conditions and assumptions. Therefore, this April 23, 2004 should not be considered supportive of any delay in water monitoring deadlines as prescribed by the October 24, 2005 MDNS.¹

2) On page 10-11 of the Staff Report, the County states, “Payment has been placed in escrow for release upon County approval to commence mining.” It is important to note that item 2.3 of the SA does not say “upon County approval to commence mining.”²

3) The page 29 discussion in the Staff Report about prairie habitat in the NE corner of the MSG property states “However, that area was visited by staff from the County and various state and non-profit environmental groups prior to Hearing Examiner approval in 2005. It was cleared as non-prairie by those groups. (Staff Report, attachments q, r and s).”

In fact, at no time did a representative of BHAS visit the northeast corner of the proposed mine property. Also, the cited attachment r is a letter from BHAS that indicates only a general acceptance of the Settlement Agreement. At no time did any BHAS representative make a declaration that the NE area was not prairie.

**Corrections/Clarifications to other referenced pertinent documents**

1) The Environmental Checklist submitted by Jay Allen on August 13, 2002, stated: “Up to 100,000 square feet, or 0.4% of the total site, could be covered by impervious surfaces consisting of a gravel or concrete pad for concrete and asphalt recycling, concrete pad for refueling, existing buildings and internal roadways.”³

As part of this five-year review, MSG submitted a Site Plan Map. In the narrative of the Site Plan Map, MSG said it would have a total of 1,372,102 square feet of impervious surface. This large expansion of the amount of impervious surface from 100,000 square feet to 1.372 million square feet should be denied. This would be a significant alteration of the original Special Use Permit and should require an entirely new SUP permit. (Staff Report, Attachment d, page 2 of 9)

² Settlement Agreement is Attachment h of the Staff Report. Section 2.3 is on page 7.
³ Environmental Checklist, Jay Allen LLC for Mine on 13120 Tilley Road, SW, August 13, 2002, page 3, 1g.

¶ Black Hills Audubon Society
2) Conclusions Based On Findings 6b in the SUPT states, “No hazardous materials or fuel would be stored or disposed of on-site.” 4 (Staff Report, Attachment g). Yet, in the narrative on the Site Plan Map received October 5, 2010, in the last sentence under the Hazardous Material paragraph, the applicant states, “If Maytown determines it will need to store fuel onsite it will pursue the SUPT and condition 28 of the MDNS.” (Staff Report, Attachment d, page 2 of 9)

Concern for Future Proposed Use of the Property
BHAS and other conservation organizations are invested in the ecological health of the WA Fish and Wildlife Department property adjacent to the south side of the mine as well as the long-term future of the mined area.

Conclusion 3A of the SUP states: “As conditioned, the finally reclaimed project would be rural in character, providing commercial forestry opportunities and lakes for recreational uses and wildlife habitat.”

However, there are clues of larger development.

- We have already discussed the Site Plan narrative mentioning need for a total of 1,372,102 square feet of impervious surface. Obviously, to come up with such an exact figure, the applicant must have some project in mind.

- The Site Plan narrative also mentions the plan for a concrete batch plant. We believe that Jay Allen testified in the original hearing that there would be no concrete plant.

- As our letter of May 24, 2010 by Knoll Lowney of Smith & Lowney PLLC (Attachment o, #7) indicates, we are concerned about mention of railroads. This is a reasonable concern because the previous owner still holds title to land under a real estate agreement and they previously had plans to build an enormous Logistics Center on the property.

Because of our concern, BHAS Attorney Knoll Lowney of Smith & Lowney, PLLC recently attached a “Recorded Notice Regarding Restrictions on Use of Land” to the title of Maytown Mine property for BHAS in which he states: “The Settlement and the SUP restrict the use of the entire Property and do not allow any portion of it to be used for industrial development such as a rail yard.” (Page 1 of this Recorded Notice is Attachment 1 of this comment letter.)

BHAS is adamant that there should be no consolidation of the Amendment Hearing planned for January with this Five Year Review Hearing
Combining these two hearings would preclude our ability to hire an attorney and expert witnesses. There was no time for adequate notice to deal with the amendment issues in the Five Year Review Hearing.

4Summary of Decision for File NO. SUPT 020612, 16th day of December 2005, p. 41, Conclusion 6b.
5 Ibid., p. 38.
Settlement Agreement is a unique and important collaborative effort

You have heard from other agencies and non-profit organizations that participated in the negotiations with Jay Allen. We urge you to consider their testimony and letters as a way to understand the full story behind the Settlement Agreement. This agreement represents much hard work and good-faith collaboration and must not be ignored.

Thank you for consideration of these comments.

Respectfully,

Sam Merrill

Sam Merrill, President
Black Hills Audubon Society

Attachments:

Attachment 1: Environmental Checklist, Jay Allen LLC for Mine on 13120 Tilley Road, SW, August 13, 2002.

Attachment 2: Recorded Notice Regarding Restrictions on Use of Land, by Knoll Lowney of Smith & Lowney PLLC for Black Hills Audubon Society.