BEFORE THE HEARING EXAMINER OF THURSTON COUNTY

In the Matter of the Application of
MAYTOWN SAND AND GRAVEL, LLC
Amendments of SUP 02-0612

No. 2010101170

AMENDMENTS: MAYTOWN SAND & GRAVEL'S BRIEF IN SUPPORT OF GRANTING SUP AMENDMENTS

I. INTRODUCTION

The only issue in the SUP\(^1\) amendment Hearing is whether the Examiner should approve adoption of water monitoring requirements that ensure better and more complete water monitoring data than ever anticipated by the original SUP conditions.\(^2\) The answer is obvious. The Examiner should approve the SUP amendments, which increase environmental protections at the site and provide clear water monitoring guidelines for the County, Maytown Sand and Gravel ("MSG") and the interested public.

The January 19, 2011 MDNS identifies four SUP amendments which can be broken into two parts. The first is the verification of off-site supply wells, which was intended to be completed prior to mining so that any negative effects of mining on off-site supply wells can be

\(^1\) Special Use Permit 02-0612 ("SUP").

\(^2\) There is also an issue that relates to the County's amendment process. MSG consistently has taken the position that the County lacks authority to require these formal SUP Amendments. To preserve MSG's rights, we include arguments on this issue in this Brief.

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monitored and appropriately remediated. Mining has not commenced at the site and field verification of off-site supply wells was completed in 2009.³ Thus, MSG is in compliance with the intent of this condition and the technical SUP amendment affirms that compliance.

The remaining portions of the SUP amendments are contained in the 2011 Maytown Sand and Gravel Groundwater and Surface Water Monitoring Plan, January 18, 2011 ("2011 Plan"). The 2011 Plan is the result of lengthy, in-depth analysis by County and MSG hydrogeologists of the science of water monitoring as it applies to the SUP site. The 2011 Plan (1) changes the timing for commencement of background water monitoring, (2) clarifies the process for water monitoring and adds additional conditions not contained in the 2005 Groundwater Monitoring Plan ("2005 Plan"), and (3) corrects the number and nature of the water monitoring stations which were confused by the summary of the 2005 Plan in original 2005 MDNS Condition 6C adopted by the 2005 SUP.

The 2011 Plan contains the substance of the SUP amendments. Importantly, the County has received no negative comments on the 2011 Plan, and it is difficult to think of what negative comments could be made. The 2011 Plan merely changes the timing, clarifies the process, and increases the scope and duration of water monitoring. These are not objectionable or controversial amendments.

FORP’s primary objections appear to be aimed at the January 19, 2011 MDNS, or more accurately at the SUP itself. In MSG’s SEPA Appeals: Brief in Support of Approving MDNS and Response to FORP Appeal ("MSG SEPA Appeals Brief"), MSG addresses FORP’s primary arguments. To the extent that FORP makes the same arguments in its briefing on the SUP amendments, MSG incorporates in this document the responses from its SEPA Appeals Brief.

³ Under the 2011 Maytown Sand and Gravel Groundwater and Surface Water Monitoring Plan, off-site supply well verification is to occur every five years. See § 4.0.

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II. STATEMENT OF FACTS

MSG incorporates herein the Statement of Facts contained in its SEPA Appeals Brief.

III. ISSUE

The SUP amendments adopt the 2011 Plan, change the timing for field verification of off-site water supply wells, change the timing for commencing background water monitoring, clarify water monitoring conditions, and increase the scope and duration of water monitoring. All hydrogeologic experts agree that these changes result in more and better data than would have been available had water monitoring and mining occurred as anticipated in 2006. Issue: Should the Examiner approve the SUP amendments. Answer: Yes.

IV. AUTHORITY

A. The County Carefully Analyzed the Site’s Water Monitoring Requirements, is Now Requiring Compliance with the 2011 Plan, and MSG Agrees to Comply with the 2011 Plan.

As the evidence at the Hearing will show, the issue of water monitoring has undergone an astonishing level of review. In her memo of February 9, 2010, County hydrogeologist Nadine Romero recommended that the County impose several additional water monitoring requirements on the SUP site. The County’s February 16, 2010 Compliance Memo then imposed those additional monitoring requirements.

Partly because the original MDNS Condition 6 was not precisely drafted, confusion ensued over what conditions needed to be monitored and where. MSG’s hydrogeologic consultants exchanged a great deal of correspondence with Ms. Romero about what type of monitoring was intended, required, and necessary to supply useful data. The confusion and need for clarification became apparent during testimony at the Five Year Review Hearing on the SUP. There, MSG’s consultant and the principal of the firm that authored the 2005 Plan, Charles "Pony" Ellingson, presented extraordinarily detailed testimony regarding the 2005 Plan’s requirements and the points of confusion caused by the wording of MDNS Condition 6C.
At all times, MSG has stated that the additional monitoring requirements discussed in Ms. Romero’s February 9, 2010 and subsequent communications are not required under the 2005 Plan and should not be imposed. Nonetheless, the County continued its efforts to impose additional water monitoring requirements. Recognizing the need to move forward and commence mining, MSG chose to agree with the County on specified additional monitoring. This agreement is now entirely contained in the 2011 Plan. MSG supports the 2011 Plan, as long as the County grants timely approval for MSG to begin mining, and urges that it be adopted by the SUP Amendments.

The 2011 Plan will expressly be made part of the SUP through the proposed amendments. Thus, despite MSG’s long held protest against the need for the additional monitoring contained in the 2011 Plan, MSG has agreed and the SUP amendments now provide for an extraordinary level of water monitoring. The Examiner should approve the SUP amendments.

B. No One Challenges the Wisdom of Adopting the SUP Amendments.

The 2011 Plan was adopted and included in the January 19, 2011 MDNS (“2011 MDNS”). The 2011 MDNS specified a 14-day comment period that expired on February 2, 2011. During that period, no one made any comments objecting to the 2011 plan or the substance of the proposed SUP amendments. Hopefully, when FORP briefs the SUP amendment issue, it will concede that these amendments provide for more monitoring and result in better data and a better analysis of the water conditions at the site.

The essence of FORP’s opposition is that monitoring was required to occur strictly within one year of SUP issuance—whether that compliance logically makes sense or not. It is true that if water monitoring started in 2006, there would be more data available today from those early years. But hydrogeologic experts and staff have all agreed that more old data is of little to no
value because the purpose of Condition 6C was to establish background conditions immediately before mining commences.

Since March of 2010, all of the background data—including the additional water monitoring data required by County hydrologist Nadine Romero—has been continuously collected and continues to be collected. Indisputably, one year of complete background monitoring data will have been gathered prior to any mining activity. Despite this fact, and because the monitoring conditions under the SUP were technically out of compliance and needed to be revised, the County and MSG have agreed to the 2011 Plan, which continues to provide more and better data than what would have been available had monitoring and mining commenced as anticipated in 2005. In fact, it is the failure to commence background water monitoring in 2006 which has led to the creation of a clearer, more complete monitoring plan that will lead to the existence of better background and foreground monitoring data. The Examiner should approve the SUP amendments.

C. The SUP Amendment Process Is Unlawful.

The County’s SUP amendment process is not authorized by law. In the County’s February 16, 2010 Compliance Memo (“Compliance Memo”), the County reviewed the missed deadlines under SUP and MDNS Condition 6. The County concluded that “Such minor timeline changes may be approved by staff upon submittal of an application for amendment.” Compliance Memo at 4-5. On April 22, 2010, MSG applied for the administrative amendments discussed in the Compliance Memo. FORP submitted approximately 100 pages\(^4\) of comments and additional documents. Largely based on FORP’s comments, the County changed its mind about the ability to amend the SUP through an administrative action and determined that “the April 22, 2010 application to amend SUP 020612 must be submitted to the Hearing Examiner for

\(^4\) FORP Comments to April 22, 2010 MSG Application for Administrative Amendments. The exact number of pages is difficult to discern because FORP’s comments were not placed on numbered pages and the attachments were not identified and enumerated.
decision-making.” Five Year Review, Exhibit 1, attachment v (June 17, 2010 Letter from Mike
Kain to Tayloe Washburn and John Hempelmann).

The County’s decision to impose a SUP amendment hearing in addition to the Five Year
Review Compliance Hearing cannot be based solely upon public opposition to the changes.
Maranatha Mining v. Pierce County, 59 Wn. App. 795 (1990); see also, Sunderland Services v.
Pasco, 127 Wn.2d 782 (1995). Thus, the County must have some legal basis for requiring the
SUP amendment hearing. The Thurston County Code and the original 2005 SUP conditions,
however, contemplate amendments to a special use permit only if the use is enlarged, extended,
increased in intensity, or relocated. TCC 20.54.030 explains that issued SUPs are deemed
“permitted uses” and that “[o]nce a special use has been authorized, however, the use shall not be
enlarged, extended, increased in intensity, or relocated unless an application is made for a new or
amended special use authorization.” This provision is mirrored in the original SUP conditions.
SUP condition “T” states that “[a]ny expansion or alteration of this use will require approval of a
new or amended Special Use Permit” and the “Development Services Department will determine
if any proposed amendment is substantial enough to require Hearing Examiner approval.”

At no point has the SUP been enlarged, extended, increased in intensity, relocated, or
altered. The only proposed changes are to timing and increases to existing water monitoring
requirements. County Staff and the County Hydrogeologist have repeatedly stated there is no
harm, but only benefits, from the proposed changes. Clearly, these changes are not of the type
encompassed by TCC 20.54.030 and SUP Condition T. Consequently, there is no basis in the
County Code or the original SUP conditions for the County’s decision to require the SUP
amendment proceeding. It is beyond the County’s authority and should have been handled as a
compliance matter either administratively or, at the latest, during the Five Year Review Hearing.
Under TCC 20.54.040(4)(d), the Examiner had the authority to approve the changes
during the Five Year Review Hearing\textsuperscript{5}, but in response to citizen opposition the County chose to
create an unlawful process with the result of providing opposition groups additional appeal
opportunities and subjecting MSG to additional prejudicial delay. At the end of the March 7, 8,
and 9 hearings, the Examiner should rule that the SUP amendment procedure is unlawful. But to
avoid the potential for remand, MSG urges the Examiner to proceed to approve the SUP
amendments.

\textbf{III. CONCLUSION}

The SUP amendments themselves cannot be controversial. In short, they ensure better
and more complete water monitoring data than ever anticipated by the original SUP conditions.
All expert hydrogeologists agree that the SUP amendments will provide more data and better
information than would have existed had monitoring began within a year of SUP issuance and
mining commenced as anticipated.

FORP does not object to requiring MSG to undertake more water monitoring. Instead,
FORP focuses its arguments on stopping mining activity under the SUP. The limited issue of
whether to approve the SUP amendments is an easy one. The amendments should be approved.

DATED this 2\textsuperscript{nd} day of March, 2011.

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\textsuperscript{5} The Examiner also has the authority to approve these additional conditions. 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.”

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