Attached are the responses from the County.

Sent from my Verizon Wireless BlackBerry

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From: "Mike Kain" <KAINM@co.thurston.wa.us>
Date: Fri, 11 Dec 2009 16:49:47
To: Jeff McCann <jeff@outdoor-perspectives.com>
Subject: Maytown Aggregate Special Use Permit Questions; Project #020612

Jeff,

Based on some research and analysis of the file and the applicable codes, following are responses to each of your thirteen questions submitted on 11/18/09. I have included your question in italics with the response following.

1. MDNS Condition 6 a & b. There has been some confusion on this condition. Some believe it was acceptable to wait to satisfy the condition until closer to the start of the mining activities. So while some parts of these conditions have been worked on, it is possible they may not have been completed. Our group will be pushing the Port to get in compliance with it. Does the County code or other policy allow the Port or a subsequent owner/operator to come into full compliance now without penalty, by simply gathering the additional data and submitting the reports?

Certainly, prior to any substantial activity on site these conditions must be satisfied. However, for condition 6a, the timeline for compliance was set at one year from final issuance. The permit became final on December 30, 2005. The deadline for submission of the information was December 30, 2006. For 6b, even though a timeline was not specified, this condition must be addressed prior to substantial activity on site. Some activity has occurred. A determination of whether this activity was substantial or not has not been made.

I can find none of the information in the file required by conditions 6a or 6b. Therefore, compliance has not been achieved for 6a, and because the deadline has passed, compliance cannot be achieved. Upon further review, a similar conclusion may be made for 6b.

Even if the information is subsequently submitted, the current lack of 6a and 6b information will remain a violation of the permit approval and will be a factor in the determination of overall compliance with the special use permit conditions.

2. MDNS Condition 6 c. The MDNS has a requirement of 17 monitoring points. Since January 2008, Pacific Groundwater Group has been conducting on site monitoring every other month in 14 locations. You should have received 11 separate monitoring reports from PGG. Do you have these reports? Are they acceptable?

The file contains just nine of the monitoring reports, beginning with January 2008. The SEPA condition required the reporting to commence no later than March 2006 with a report
submitted every other month. There should be at least 23 reports. The condition specified 17 well sites on each report. The reports show only 14 well sites. Additionally, condition 6c specifies that the reports shall monitor "water levels, temperature, and water quality, including measurement of background conditions". None of the nine reports addresses water level, water quality or background conditions. Some reports omit temperature as well. The reports, as submitted, are not acceptable. The timing, scope and coverage are not compliant with the approval.

3. The three locations they have not been monitoring have issues with them. One is on WDFW property to which the Port apparently does not have legal access and the other two monitoring locations are in a "hot spot" area that has not been "released" by DOB yet under the cleanup plan. As such, digging or drilling in these areas is not prudent. However, apparently, some alternate wells also have been monitored. Given these facts, will the County require the wells/monitoring in these areas at this time? Can the monitoring locations be relocated? If so, who should direct these changes?

Without detailed review of the monitoring goals and the effect of less than full monitoring coverage, I cannot determine whether the well locations may be relocated or if the alternate wells are satisfactory. That determination would be made upon formal application to amend the condition, accompanied by supporting analysis. The process is discussed below in #4. Alternatively, that determination could be made as a part of the County review for the "Letter to Proceed". However, the finding for that letter may show the project to be out of compliance. If so, an application to amend would also need to be submitted, reviewed and approved before mining could commence.

4. What is the process to address MDNS condition compliance: Can the Port simply come into compliance with Condition 6.a and b. by conducting the baseline monitoring and submitting reports to the County? If not, what must happen first? As to Condition 6.c, can the Port continue to ignore monitoring efforts from the three wells from which monitoring is not possible due to other reasons, or must some approval be granted by the County to allow that? If a process is required, what is the process? Is it to seek a revision of the conditions? If the Port sought a revision to either of these SEPA conditions to clarify the timing and applicability, would such a revision be treated as a "minor adjustment" under TCC 20.60.020, with a decision by the Director subject to appeal to the Hearing Examiner? Or would it be a "major adjustment" with a recommendation from the Director and decision by the Hearing Examiner? Or would it be some other process? Would additional SEPA review be required?

For those items without a stated or implied timeline, compliance must be achieved either prior to initiation of substantial activity on site, or prior to mineral extraction, depending on the requirement. For any item with a stated or implied timeline that has passed, compliance cannot be achieved. Depending on the significance of the item in noncompliance and the number of such items, whether individually significant or not, the validity of the special use permit could be jeopardized. If compliance issues are deemed to be less than significant and therefore, the SUP remains valid, the items must still be completed in a timely manner or mineral extraction cannot commence.

Regarding three wells from which monitoring is not possible, the Port must submit an alternative that will accomplish the same or similar monitoring goals. If that is not possible, the condition must be amended. Monitoring efforts cannot be ignored. The determination of whether the amendment is minor or major would be made by the County. That determination would dictate the amendment process.

The Hearing Examiner is the approval authority for a major amendment. A public hearing would be required. Approval authority for a minor amendment lies with staff. No public hearing is required. In either case, the process would require re-issuance of SEPA. Any amended SEPA condition would be subject to comment and appeal periods. The County has not determined whether amendment to well monitoring conditions would be deemed minor or major. That determination would be made only upon submittal of a formal request to amend, or at the time of request for a Letter to Proceed.

5. MDNS Condition 6 f and SUP Condition C. 5 year review. I know in our meeting we said the 5 year review would come up in December 16, 2010 or January 3, 2011. Can you give me the specific date the 5 year review is due by? Also, SUP condition C says the Operator is responsible to ensure this occurs within the five year time period. Can you explain what is involved in getting on the calendar for review (how early should we make our request)? Additionally, we have been told that the 20 year permit time starts from the time the mine
starts to operate, not from the permit issuance date. Can you confirm this?

The SUP was issued on December 16, 2005 and became final on December 30, 2005. Therefore, the Five Year Review must be completed on or before December 30, 2010. Keep in mind "completed" does not occur until the public hearing is held and the decision is issued by the Hearing Examiner.

The review is initiated upon submittal of a Special Use Permit application and fee to the Thurston County Permit Assistance Center. The Five Year Review process, including staff review and recommendation, public notification, public hearing, and Hearing Examiner decision would take at least four months to complete. Any complicating issues brought forward during the review or during the hearing could add more time. Although not counted toward the timeline, the Examiner's decision is appealable to the Board of County Commissioners.

The 20 year mineral extraction operating period approved by the Hearing Examiner commences upon initiation of mineral extraction in Phase I of the mine.

6. MDNS Condition 7. We are not aware of any recorded site plan showing these items. Is it sufficient for the Port or a subsequent owner to simply record a site plan that shows the delineations for only the on site critical areas, project boundary and mine boundary within the 750 acres being acquired? Or just the 497 acre permit area? Or just the 284 acre mine area? And are there any other items from the SUP conditions and MDNS conditions that must be shown on this to be recorded map?

The map must depict the required items within the 497-acre project area, and where applicable, carry them across the project area boundary sufficiently to show where any critical area or buffer extends beyond the boundary. This site plan has not yet been submitted or recorded.

Although a timeline was not specified, it is reasonable to require this item to be completed prior to any substantial work on site. The County has not determined if substantial work on site has been done. Upon future site visit in response to a request for a Letter to Proceed, or upon site visit for compliance or other reason, the substantial work determination will be made. If the determination is in the affirmative, then the lack of a recorded site plan would be considered noncompliant with the MDNS. Any additional work on site would be halted until the site plan is recorded. Keep in mind each noncompliant action or lack of action will be noted and considered prior to the Letter to Proceed.

7. MDNS Conditions 9-14. We will be asking the Port to produce a map showing clear ownership of the properties (Port vs. WDFW) along with a letter of explanation for the benefit of the County. How do these conditions relate to the property retained by the Port vs. the property sold to WDFW (the 750 acres vs. the previous acreage of 1,613)? How can we clearly understand which conditions remain and which parts are no longer applicable due to the sale? Can the County confirm by letter to the permit file that these conditions apply only to the lands within control of the permittee? Or is a revision to the condition required? If a revision is required, what is the process to be followed?

The permit conditions are designed to mitigate impacts from the mineral extraction project. Therefore, most conditions are applicable to the 497-acre project boundary. However, some conditions, particularly well monitoring and critical area signage, must be implemented outside the boundary even though they are intended to aid in mitigating impacts from within the boundary. The signage must be placed at the buffer line. If the buffer line is now owned by others, permission must be obtained. If such permission is not granted, the signage must be placed at the property line. Upon the request for a Letter to Proceed, the County will specify in greater detail which conditions still must be completed and where implementation must occur.

8. SUP Condition T: We want to verify we are all working from the same approved SUP site plan. Can you please provide us with a copy of the County approved SUP site plan?

The site plan the County has on file is the same one submitted with the application. However, as you are aware, the Hearing Examiner required that a new site plan be submitted and recorded with the County Auditor. To date, that has not been done.

9. What is the process to address SUP amendments, if any? SUP condition T states that
the Development Services Department will determine if any proposed amendment to the use will be substantial enough to require Hearing Examiner approval. Are there any criteria used to make that determination?

The response to #4 above describes the amendment process. It is not always possible to make a determination of major or minor regarding specific amendments until some formal review is conducted. There are no criteria in the code for making that determination. The determination is made on a case by case basis.

10. Request for additional correspondence: Jeff Pancher suggested to our attorney that we ask you for copies of letters from Sandy Mackie, representing the Port of Olympia, as well as a letter from one of the Port of Olympia Commissioner's regarding the Port of Tacoma's Maytown property. Could you give us copies of those letters?

Per your request, attached to this email is a letter from Alexander Mackie of Perkins Coie, dated October 27, 2009 to Ed Galligan, Executive Director, Port of Olympia. Additionally, per your request, I have attached a letter from Port of Olympia Commissioner George Barner, dated November 2, 2009 to the Thurston County Board of Commissioners.

11. SUP "Letter to Proceed" under TCC 17.20.160: We now understand from both you and from the Port as well as our attorney’s discussion with your attorney that it is County practice to issue a written document that the SUP conditions have been met prior to allowing excavation to begin, and that the written document is not an administrative decision that is subject to appeal. Could you please confirm that the written "letter to proceed" will state on its face that it is not an independent administrative determination subject to appeal? Also, could you please confirm that once the SUP conditions are met, no other County permits (e.g., a grading permit) are required prior to beginning excavation.

Pursuant to TCC 20.60.060(1), any determination made by the County may be appealed to the Hearing Examiner. The Letter to Proceed is a determination of whether the applicant has met the conditions of approval. Although I am not aware of a past appeal on a similar determination, the code would indicate that the letter may be appealable.

Regarding additional permits, a grading permit for off site road improvements and an encroachment permit for access onto a County road will be required from the County Public Works Department prior to commencement of mining. Kevin Hughes is the contact at 360 754-3355 extension 2492. A septic system permit and well permit must also be approved by the County Environmental Health Department prior to mining, or prior to receiving a building permit for a habitable structure, whichever occurs first. John Ward is the contact at 360 754-3355 extension 2636. Additionally, the Olympic Region Clean Air Agency may require a construction permit prior to operation. The contact is Robert Moody at 360-586 1044. I am not aware of any additional County permits that are required.

12. Use of on site materials to conduct pre mining off site mitigation: If we acquire the site, we would like to utilize on site materials for some of the off site improvements, including road improvements, prior to beginning commercial mining and sales. We cannot find any prohibition against the use of on site materials to conduct mitigation activities either on site or off site. Please confirm that we will be able to use on site materials to construct off site mitigation or, if your answer that we cannot, please describe the authority you rely on for that determination.

Exporting materials off site is allowed only from an approved mineral extraction site. The Maytown site is not approved for mineral extraction until all conditions are met. Therefore, material from the Maytown site cannot be exported to meet off site conditions. Gravel for off site road improvements must come from another source.

By definition, at TCC 20.03.040(84.5)(e), an approved mineral extraction site is not required if material is extracted and used on the same site. That would not be the case for the Maytown off site improvements. Further, pursuant to TCC 17.20.160(A), the Maytown site cannot commence mineral extraction until cleared to proceed by the County. Such clearance cannot be given until the off site improvements required by the Hearing Examiner in condition A and in SEPA conditions 3, 4 and 5 are completed. So, bottom line, material from the Maytown site cannot be used to satisfy off site conditions of approval.

13. Mineral resources overlay: The Examiner's Decision approving the SUP states that "The request to designate the 284 acre mine area as mineral resource lands of long term
commercial significance is GRANTED." In some initial meetings with the County, we were
told that the lands were not so designated. Please confirm that the 284 acre mine area
has been properly designated as mineral resource lands of long term commercial
significance.

Pursuant to TCC 20.30B.030(2)(b), the Hearing Examiner may grant designation status. On
page 43 of the December 16, 2005 decision, the Hearing Examiner clearly granted the
request to designate the 284-acre mine area as mineral resource lands of long term
commercial significance. That designation was not appealed and became final on December
30, 2005.

Let me know if you have additional questions.

Mike Kain
Manager
Thurston County Land Use & Environmental Review
360-786-5471
kainm@co.thurston.wa.us

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October 27, 2009

Ed Galligan
Executive Director
Port of Olympia
915 Washington Street NE
Olympia, WA 98501-6931

Re: South Sound Logistics Center

Dear Ed:

Questions have been raised about the ability of the Port of Tacoma to own and sell land in Thurston County. The land in question was the proposed rail intermodal site near Maytown. The Port of Olympia and Port of Tacoma entered into an agreement under provisions requiring foreign ports to obtain a host jurisdiction’s consent to participate within the host jurisdiction’s boundaries. That agreement and RCW 53.08.240 provide a compete answer to the question asked.

(1) Any two or more port districts shall have the power, by mutual agreement, to exercise jointly all powers granted to each individual district, and in the exercise of such powers shall have the right and power to acquire jointly all lands, property, property rights, leases, or easements necessary for their purposes, either entirely within or partly within or partly without or entirely without such districts: PROVIDED, That any two or more districts so acting jointly, by mutual agreement, shall not acquire any real property or real property rights in any other port district without the consent of such district.

RCW 53.08.240(1).

The Port of Tacoma did receive “consent” from the Port of Olympia to acquire the Maytown property by reason of Section 1 of the initial agreement with the Port of Tacoma, acknowledging the acquisition and contracting for joint development as provided in the code section cited above. The agreement also provided that if the joint venture did not proceed:

99999-9774/LEGAL.17202726.1
... If the Parties are unable to agree on terms and conditions for the joint development and operation of the Property by December 31, 2007, then the Port of Tacoma shall proceed to divest itself of its ownership of the Property, at no risk or cost to the Port of Olympia.

While the joint development portion of the agreement, with one year extension, has now expired, the language quoted specifically reflects "mutual consent" for the Port of Tacoma to "divest itself of its ownership." The ability to divest ownership as stated is the exercise of a statutory power of the Ports, which include the power to surplus and sell the lands in question. The contract did not impose any specific time limit that would imply a reasonable time under the circumstances, so long as the transaction is "at no risk or cost to the Port of Olympia." Ports have the authority to surplus and sell lands and to maintain such lands and take steps necessary to improve or maintain their value until the sale occurs (in this case the development permits-gravel extraction—which run to the property).

There is no additional form or agreement required for the "mutual agreement" for the Port of Tacoma to sell the property in question. If it would make the record clearer, the Port of Olympia may want to simply introduce a clarifying resolution that under the agreement there was no specific timetable set for the disposal of the property, and the Port of Olympia considers the duty to sell is on commercially reasonable terms (both time and money). The resolution could go on to further clarify that the Port of Olympia considers actions by the Port of Tacoma taken to maintain entitlements to be consistent with the intent of the agreement and in the current economic climate, that it may take some time to sell a large property.

The Port of Olympia need do no more unless the Port of Tacoma asks to use the property for some Port purpose not presently authorized. I would consider an action by the Port of Tacoma to lease the property to a gravel operator under current permits to provide some revenue from the site and evidence of higher value for sale purposes to be part of a reasonable effort to sell the property, so long as the property was listed and available for sale.

I trust this answers your question.

Sincerely yours,

Alexander W. Mackie

AWM:kr
November 2, 2009

Thurston County Commissioners
2000 Lakeridge Drive
Olympia, Washington

Dear Commissioners,

As Port Commissioner, I have been contacted by many constituents concerned about the Maytown property owned by the Port of Tacoma. According to documents I've received, written by the Port of Tacoma's own attorneys, the Port of Tacoma continued working on the Maytown land after their interlocal agreement with the Port of Olympia was ended. It was only that interlocal agreement that gave the Port of Tacoma any right to own property or have property rights in Thurston County, and I'm appalled that they continued working here, going so far as to apply for a building permit after the interlocal agreement ended.

I understand from the County's letter to the Port that it was this and other post-interlocal-agreement activities, such as the construction of a berm, which led to them being allowed to forestall the expiration of the Special Use Permit associated with the land. (Even had the interlocal agreement been in effect at this time, these actions would have been outside its scope; all land use planning and permitting was to be the job of the Port of Olympia.)

The other actions they list as having completed, such as water monitoring, etc., were requirements, some from DOE as required clean up, and some from the MDNS, and these in no way indicated they had begun the process of beginning mining. But this raises another issue. The fact is, according to our attorney, that ports are not authorized to be gravel miners. It seems obvious that a Special Use Permit authorizing an illegal activity would then itself be considered illegal or invalid.

When the Port of Olympia voted to end the interlocal agreement as of June 30, 2008, it was my assumption, based on my understanding of the interlocal agreement laws, that the Port of Tacoma would sell the property as required by law and the interlocal agreement. They would not continue working on the property since that was not allowed by either the agreement or the law.

The two ports entered into this agreement to explore the possibility of building the South Sound Logistics Center for the mutual benefit of both ports. The "mutual benefit" language is part of the interlocal agreement.
law and our specific agreement. At no point was gravel mining part of the plan. And a gravel mine run by the Port of Tacoma, even were that legal, would not be of benefit to the Port of Olympia, and thus would be illegal and in direct contradiction to the stated goals of the Interlocal Agreement signed by both ports on July 19, 2006.

As clearly stated in the interlocal agreement, the Port of Tacoma shouldered the risk for this venture, and they cannot now be allowed to avoid the consequences of that risk by asking that Thurston County and the Port of Olympia accept an illegal and invalid Special Use Permit so that they can recoup their investment. Such risk is inherent in the free enterprise system.

The Port of Tacoma is asking the citizens of our county, the citizens that we represent, to suffer the consequences of Tacoma's unfortunate choices. But the Interlocal Agreement signed by the ports states that "... the Port of Tacoma shall proceed to divest itself of its ownership of the Property, at no risk or cost to the Port of Olympia." The cost to our citizens, and thus to the Port of Olympia and all of Thurston County, of a gravel mine on this property would be huge and unacceptable. I fervently hope that the County will reexamine the Special Use Permit and notify the Port of Tacoma that it is invalid.

Thank you very much for your consideration of this matter.

Sincerely,

George L. Barner, Jr., Commissioner, Port of Olympia

cc: Clare Petrich, Commissioner, Port of Tacoma
    Tim Ferrell, Port of Tacoma
    John Wolfe, Port of Tacoma
    Jack Hedge, Port of Tacoma
    Senator Patty Murray
    Representative Brian Baird
    Senator Karen Fraser
    Brian Sonntag, Auditor
    Jay Manning, Governor's Office
    John Mankowski, Governor's Office
    Friends of Rocky Prairie