BEFORE THE HEARING EXAMINER IN AND FOR THE COUNTY OF THURSTON

In the Matter of the Application of

MAYTOWN SAND & GRAVEL, LLC,

For Amendments to a Mineral Extraction
Special Use Permit (SUPT-02-0612); and

In the matter of the Appeals of

Friends of Rocky Prairie

And

Maytown Sand & Gravel, LLC

Of the County’s January 19, 2011
SEPA Threshold Determination

Hearing Examiner Sharon A. Rice

Project No. 2010101170

App. No. 11-101509 VE

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PORT OF TACOMA’S RESPONSE TO PUBLIC COMMENT

In accordance with the Examiner’s Post-Hearing Order in this matter, Interested Party the Port of Tacoma ("Port") submits this document to respond to public comment submitted by Sharron Coontz regarding both the requested amendments and the environmental review of the same as well as the comments submitted by M. Patrick Williams on behalf of the Friends of Rocky Prairie ("FORP") regarding the changes to the 2011 Groundwater and Surface Water Monitoring Program ("2011 GSMP").¹ The Port will endeavor to avoid repeating points it has

¹ The Post-Hearing Order also allowed responses to Exhibit 15, submitted by FORP after the close of the hearing. That exhibit should not affect the Examiner’s evaluation of this matter. It contains an e-mail from Ecology’s Annie Szvetecz to the County’s Cindy Wilson, followed by Ms. Wilson’s e-mail to Mike Kain. FORP offered no foundation for this hearsay and double-hearsay e-mail exchange, purportedly expressing the legal opinions of two non-lawyer declarants. There is nothing in the record that indicates, for example, what Ms. Wilson asked of Ms.
already addressed in its briefing on the topic and instead focus on particular points raised by members of the public. 2

As the Examiner properly concluded in the hearing, neither the Examiner nor anybody else at the County has jurisdiction over questions of state law, including the Interlocal Cooperation Act at Chapter 39.24 RCW or authorizing statutes governing port districts at Title 53 RCW. The Examiner similarly has no jurisdiction over the rights and duties created by contract, either the Interlocal Agreement entered into between the Port and the Port of Olympia or the Settlement Agreement between the Black Hills Audubon Society and Jay Allen. Regardless of the merits of Ms. Coontz’s arguments 3 on these points (which a reviewing court would find lacking), the Examiner cannot rule on them except to dismiss as outside her jurisdiction.

A. Response to Public Comments Submitted at Hearing By FORP

1. The County’s issuance of a building permit prevented SUP expiration

Ms. Coontz now alleges for the first time that the Port’s acquisition of a building permit violated SUP Conditions 18 and 19 and therefore could not satisfy the requirements of TCC 20.54.040.4.a. This argument cannot succeed for several independent reasons. First, the permit issued on October 16, 2008. It is a land use decision that is final as a matter of law if not appealed. Ms. Coontz entered evidence that demonstrated that she was aware of the issuance of the building permit on October 17, 2008. See e-mail from Tony Kantas to Sharon [sic] Coontz

Svetecz, except for the brief snippets of what may or may not be Ms. Wilson’s questions. Nothing suggests that Ms. Wilson provided to Ms. Svetecz any detailed information regarding the content of these amendments (i.e., only additional mitigation as well as a mitigation timing change). All Exhibit 15 reveals is that Ms. Svetecz’s cursory responses were apparently not informed by the relevant details of this particular SEPA issue—an issue that the Port believes Ecology’s SEPA policy lead would agree is not even covered by SEPA. Ms. Wilson’s e-mail to Mr. Kain consists only of her characterization of Ms. Svetecz’s general response and Ms. Wilson’s opinions of the County’s enforcement options, which are in line with Ms. Wilson’s personal disposition towards this project as demonstrated in her testimony. For all these reasons, Exhibit 15 has no relevance to the actual issues before the Examiner and the Examiner should give Exhibit 15 no weight in her final decision on this matter.

2 The Port has reviewed MSG’s response to public comment and incorporates the same herein by reference.

3 Because Ms. Coontz is the FORP spokesperson and FORP’s most vocal advocate, the task of distinguishing between Ms. Coontz’s opinions and FORP’s opinions is sometimes difficult. Thus, this brief refers to Ms. Coontz and FORP interchangeably.

PORT OF TACOMA’S RESPONSE TO PUBLIC COMMENT - 2

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(October 17, 2008), attached to Ms. Coontz’s written testimony. Yet Ms. Coontz did not appeal the issuance of the building permit either administratively or under LUPA. It therefore became final as a matter of law either 14 days later (the Thurston County Code deadline for administrative appeal to the Hearing Examiner) or 21 days later (the time limit for invoking the appellate jurisdiction of the superior court under LUPA). Ms. Coontz cannot now assert that the building permit was issued in error. As Mr. Kantas stated in his e-mail, under TCC 20.54.040.4.a, the SUP cannot expire if a building permit issues within three years of SUP issuance. A building permit issued and its issuance is valid as a matter of law, so the SUP could not expire under the plain terms of the ordinance.

Second, Ms. Coontz’s argument is barred for failure to exhaust administrative remedies. On February 16, 2010, the County made an appealable determination that the Port was in compliance with Conditions 18 and 19. See Exhibit 1, Attachment x. Ms. Coontz received a copy of the County’s determinations by letter, also dated February 16, 2010. Ms. Coontz did not appeal that determination and is now barred from challenging it.

Third, Ms. Coontz’s reading of Conditions 18 and 19 is in error. These conditions preclude the “release of any building permits” prior to sewage system permit application submittal or final construction approval for a public water system, respectively. They do not, as Ms. Coontz asserts, prohibit the permittee from submitting an application for a building permit; rather, they prohibit the County from releasing a building permit. The County, not the Port, has full control over whether it chooses to release a building permit, and in this case it chose to do so once it satisfied itself that the building permit would not require a septic system or a water hookup. This was a proper use of the County’s enforcement authority over permit conditions.

4 Testimony of Jack Hedge.
5 This is also an example of exactly the sort of common-sense enforcement the Port has always maintained the County should have exercised over the failure to comply with the technical requirements of Condition 6.
2. **The requested amendments are merely technical and have no effect on the environment**

Although FORP, acting through Ms. Coontz, strongly disagrees that the requested amendments are merely technical, neither Ms. Coontz nor anyone else has offered evidence that the amendments are properly categorized any other way. As the Port has stated many times over, everyone who has studied the question from a scientific perspective agrees: the course of groundwater monitoring has produced a robust model of site hydrology. For example, the understanding of the interaction between, say, Wetland A on the WDFW property and groundwater levels is so robust that little can be gained from additional years of pre-mining monitoring.\(^6\) Despite Ms. Coontz’s lay categorization of the course of groundwater monitoring as “barely one year,” state-certified hydrogeologist Charles Ellingson testified that our understanding of the hydrology of the site is based on several years’ data and is in fact very good. Mr. Ellingson’s exhibits establish that the readings from the groundwater and surface water stations are highly correlated. The lines on Exhibit 29 are nearly parallel to one another, meaning that readings from one station allow us to predict with a very high degree of certainty the readings at all nearby stations. And although nobody disputes that “more is better,” Exhibit 31 demonstrates that, at some point, more is not that much better. The more measurements PGG takes, the flatter the curves become, indicating that additional measurements provide progressively less of an increase in our confidence that we know the “true” average. State-certified County hydrogeologist Nadine Romero agrees that the data set is sufficiently robust to allow mining to commence.

The testimony presented by Mr. Dunn does not raise any substantial question regarding the correctness of Mr. Ellingson’s or Ms. Romero’s testimony and conclusions. Ms. Coontz mischaracterizes Mr. Dunn’s testimony and letter. As demonstrated during cross examination, while Mr. Dunn had questions and was clearly concerned about the water-dependent species on
the WDFW property, he had not studied the question and did not know the details of the water monitoring that have already occurred. Mr. Ellingson, who wrote the original Groundwater Monitoring Program ("2005 GMP") on which Condition 6 is based, testified that he expected mining to commence within a year of SUP issuance and designed the 2005 GMP on that assumption. The evidence demonstrates that from a scientific perspective, only one year of monitoring is necessary to establish an understanding of site hydrology sufficient to protect the water-dependent species that concerned Mr. Dunn. PGG has gathered much more than that.

As Mr. Kain and Mr. Kantas testified, at the time of SUP issuance, mining was anticipated to commence within a year. Mr. Ellingson, Mr. Garrison, and Mr. Naglich all testified that they too expected mining to commence within 12-18 months of SUP issuance; Mr. Dunn testified that the then-applicant so told him; and County staff concluded that Examiner Driscoll believed mining was "imminent," meaning within 12 months. Nonetheless, Ms. Coontz persists in arguing that everybody at the time must have anticipated that mining would take years to commence and now asserts, without citation to the record, that the offsite road improvements would take years to complete. Although the record does not contain any facts to support or contradict Ms. Coontz's new assertion, subsequent to writing the January 4, 2010 memo, the undersigned attorneys learned that the off-ramp improvements specified in Condition 5 can be permitted and built inside of six months and the other road improvements will take only weeks to construct upon permitting. Nothing in the record supports Ms. Coontz's bare assertions on this point and they should be disregarded.

3. The Conservation Fund was timely funded

The timing for payment of the Conservation Fund is established by the Settlement Agreement and by no other source. The Agreement states that Allen shall pay $325,000 upon sale to a mine operator or to another party that subsequently leases to a "mine operator." The

Port is not a mine operator. When the Port sold, rather than leased, the Property to MSG, Allen’s obligation to pay the Conservation Fund upon sale to a mining operator became the Port’s obligation, and the Port paid $325,000 into escrow on April 1, 2010, the same day MSG and the Port closed the real estate deal. Neither the MDNS nor the SUP specify another time for payment, so there is no basis to assert that the Conservation Fund should have been paid earlier. Furthermore, because the question of whether the Port (or Allen) timely paid the Conservation Fund arises in contract, the Examiner has no jurisdiction to consider the question and FORP has no standing to assert BHAS’s rights. There is likewise no basis to assert that the Conservation Organizations (identified in the Agreement as the Black Hills Audubon Society and the Capitol Land Trust, not FORP or Ms. Coontz) must use the Conservation Fund for groundwater monitoring; in fact, as Mr. Dunn conceded, the Agreement permits the Conservation Organizations to use the Fund however they choose, including habitat acquisition. Ms. Coontz, who does not appear to be a member of either Conservation Organization, nevertheless presumes to explain why the Conservation Organizations have left the Conservation Fund sitting in escrow for nearly a year. The Examiner should give this hearsay evidence no weight.

4. The County has no obligation to consult outside organizations before taking enforcement action on an issued permit

The Conservation Organizations have no control over the County’s exercise of its enforcement authority—the law does not allow a County to delegate its enforcement authority, and even if it could, it could not do so through a contract, such as the Settlement Agreement, to which the County is not even a party. And although Ms. Coontz complains that the Conservation Organizations should have been included in the process but were not, over the Port’s protest the County gave public notice and conducted a public hearing before the Hearing Examiner on the

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7 The Port’s status as a “mine operator” is utterly irrelevant to these proceedings, as it was to the Five-Year Review and every other question regarding the validity of the SUP. Nevertheless, since Ms. Coontz persists in raising the question: the Port has consistently acknowledged that it is not a mine operator, but it has also consistently intended to have gravel mining operations conducted on the site by a qualified mine operator. Of course the Port would have to hire a mining operator to extract the gravel; the Port does not have equipment or expertise in gravel mining.
requested amendments for the express purpose of having a public discussion of the science of groundwater monitoring. **Not one of the Conservation Organizations—or anyone other than Ms. Coontz—appeared at the hearing to offer public testimony.** The Conservation Organizations did provide written comment, but its public comment is devoid of expert testimony or advice regarding the proposed amendments or the new Groundwater and Surface Water Monitoring Plan. Even though the County was under no obligation to ensure the Conservation Organizations had a chance to contribute to the amendment process, it took extraordinary steps to do so. That the Conservation Organizations did not offer their assistance does not provide Ms. Coontz with an argument that the process was flawed.

**5. No areas that should have been protected in 2002 were missed**

Although FORP filed a SEPA appeal, Ms. Coontz argues on the amendment hearing record that SEPA dictates that the site should be reviewed. As the Port argued in response to FORP’s SEPA appeal, SEPA dictates nothing of the sort. The evidence at the hearing was overwhelming—no critical areas were missed before the SUP issued in 2005. Mr. Naglichi did not “indicate . . . that he thought [Mine Area 1] looked like a pasture in 2004,” as Ms. Coontz writes and as any lay person might “indicate” upon viewing any patch of actual prairie. Rather, he testified under oath on the basis of his expertise and professional experience that he visited the site many times from 1996 through 2004 and personally observed non-native invasive grasses, common to livestock pastures, dominating Mine Area 1. Mr. Naglichi has been in the business of delineating critical areas for decades, and he understands what prairie grasses and plants—and their non-native, invasive counterparts—look like. Mr. Garrison testified that he personally looked at every square yard of the 45-acre Mine Area 1, and he described how he did it. Mr. Garrison testified that Mine Area 1 was not even close to being “dominated” by prairie species—the standard for protection under the 2002 CAO. The record is devoid of contemporaneous evidence to the contrary.
In addition, the question of whether there were critical areas missed in 2002-2005 is res judicata. The Examiner decided in the Five-Year Review Decision that “[t]he record contains no evidence establishing a lack of material disclosure during the 2002 through 2005 review” and “[c]redible evidence supports the conclusion that no critical areas that should have been protected pursuant to the 2002 CAO were missed . . . .” Conclusion 5.C. Although the Board of County Commissioners remanded for a new evaluation of critical areas, the Board expressly did not disturb the Examiner’s factual findings. FORP participated in the five-year review process and had ample opportunity to build its record, but the Examiner disagreed then. FORP cannot keep raising the same issue over and over. As a matter of law, no critical areas that should have been protected under the 2002 CAO were missed in 2002-2005.

B. Response to FORP Comments on Post-Hearing Changes to 2011 Groundwater and Surface Water Monitoring Program

The Hearing Examiner’s Post-Hearing Order permitted parties of record who participated in the hearing to provide “comments responding only to the revisions to the 2011 monitoring plan.” FORP timely provided such comment, but did not strictly comply with the scope of the Examiner’s Order as FORP’s comments are not limited to the changes made to the document. Nevertheless, the Port responds herein. In short, as demonstrated by the evidence offered at the hearing, the concerns expressed by FORP have no basis in science and the Examiner should disregard them.

1. The Conservation Organizations had a Full and Fair Opportunity to Participate in the Amendment Process and Chose not to

FORP, which is not one of the “Conservation Organizations” contemplated in the Settlement Agreement,8 argues once again that the SUP cannot be amended without County

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8 The Settlement Agreement defined “Conservation Organizations” to include only BHAS and the Capitol Lands Trust. See Exhibit 1 Attachment /, ¶ F. FORP now asserts that the term “Conservation Organizations” is broad, also including WDFW, DNR, and the Nature Conservancy. But FORP does not include itself even on its expanded list—FORP is neither a Conservation Organization nor a signatory to the Settlement Agreement and has no standing to assert rights under the Agreement.
consultation with BHAS. Setting aside the undisputed legal principle that the County cannot
delegate its enforcement authority away (and the Conservation Organizations certainly cannot do
so for the County), the County has gone to great expense to hold a public hearing on the
amendments. Not one representative of either “Conservation Organization” appeared to provide
testimony. They provided written comments before the hearing, but these comments lacked any
scientific analysis of the amendments or their effect on either the environment or the efficacy of
the groundwater monitoring program. Instead, these letters all appear to express the same
concerns—the oft-expressed but never-supported (and now debunked) statement that the 18-
month gap in groundwater monitoring had a deleterious effect on the understanding of site
hydrology, the lack of consultation with the Conservation Organizations, and so forth. No
Conservation Organization submitted comments from a hydrogeologist to help guide the County
in its review of the requested Amendments. Nobody submitted scientific testimony that would
counter the conclusion shared by Mr. Ellingson and Ms. Romero, both state-certified
hydrogeologists, that neither the 18-month gap in monitoring, nor the amendments, nor the 2011
GSMP produced any environmental harm.

Now FORP argues that the County is powerless to change the 2011 GSMP in the
minuscule, technical manner proposed by Mr. Ellingson, accepted by Ms. Romero, and authored
by both. Once again, FORP’s concern is for the process—that the Conservation Organizations
were not consulted. FORP’s concern does not implicate any legal principals; rather, FORP
appears to worry for the policy behind changing a monitoring program that was drafted
collaboratively. But such concerns cannot animate the Examiner, who as a quasi-judicial official
must apply the law as written and leave policy decisions to the County’s legislative body. There
is no legal reason for the Examiner to adopt FORP’s position.
2. The So-Called “Data Gap” is Irrelevant to the Monitoring Program and the Environment

The County’s stated purpose for the Amendment hearing was to have a public discussion of science of groundwater monitoring. That discussion has now occurred, and the evidence and testimony clearly supported the conclusion that the data set is now so robust that gaps in groundwater monitoring do not affect the total understanding of site hydrology in any significant way. The lessons of this public discussion appear to have been lost on FORP, however, which once again submits public comment reiterating the same concerns the scientific testimony and evidence dispatched at the hearing.

Now the same hydrogeologist that testified that gaps do not affect the total understanding of site hydrology has, in concert with the County’s hydrogeologist, drafted a plan to allow the permittee some measure of relief from the exceedingly expensive groundwater monitoring program the County imposed in 2010. These scientists agree that this “gap,” should it occur at all,\(^9\) will not affect the environment or the robustness of the data set. MSG has gathered all of the pre-mining hydrological data necessary; requiring it to continue to gather samples as it endures further litigation and delays would have no effect other than to compel MSG to incur additional expenses while providing no corresponding additional benefit to the environment.

Against the conclusions of these scientists, the only hydrogeologists that appear on the record, FORP offers no evidence other than its unsubstantiated lay opinion that gaps in the monitoring program “hinders the ability to adequately protect against off-site impacts of the mining operation.” This position was discredited by the testimony and evidence offered in the hearing. FORP has no reason to conclude that this “time gap” leads to “less protective mitigation”; the evidence shows that any gap will have no effect whatsoever.

\(^9\) This issue, which is not yet ripe, will likely be mooted because MSG will commence mining in 2011 unless it is further delayed by improper and unauthorized County regulatory processes. The Port and MSG have filed complaints for damages arising out of the delay produced by the County’s handling of this matter.
3. The Amended Plan Made no Changes to the “Impairment” Standards

The Post-Hearing Order was very clear—FORP may comment on changes to the 2011 GSMP. The Examiner did not intend to allow the minor post-hearing alterations to the 2011 GSMP to create a new opportunity for FORP to comment on the substance of portions of the 2011 GSMP that were not changed after the hearing. The “redline” document demonstrates that Section 4.1 on p. 12, the subject of FORP’s third point, did not undergo any changes after the hearing.\textsuperscript{10} Thus, the Examiner should disregard FORP’s third argument.\textsuperscript{11}

Section 4.1 of the 2011 GSMP was available for review by the public for several weeks before the hearing, and the Examiner may consider any comment timely submitted by an offsite well owner regarding these concerns. FORP, by contrast, has no standing to assert potential harm to offsite wells—it has not established that it owns any offsite wells.

Even if this were a proper subject for comment at this time, and even if FORP were the proper party to submit such comment, however, FORP’s comment misses the substance of Section 4.1. That Section requires the County as regulator, not the offsite well owner, must present evidence establishing probable cause to conclude that the problems were caused by the mine. This may include a “preliminary analysis indicating that the static water level in the well has declined more than would be caused by natural variability plus changes in local water use.” In other words, the aggrieved offsite well owner need only observe degradation in well performance or water quality and alert the County to the problems. The County then assumes its proper regulatory role of investigating and pursuing the complaint. This is an entirely appropriate method of addressing any complaints, and FORP suggests no alternative.

II. CONCLUSION

The evidence and testimony at the hearing clearly establish that the Examiner should grant MSG’s request for amendment to the SUP. Doing so will correct the technical deficiencies

\textsuperscript{10} Indeed, Section 4.1 appears in substantially the same form in the 2005 Groundwater Monitoring Plan, Exhibit 1, Attachment m, pp. 3-4.
of the conditions of the MDNS incorporated into the SUP, providing clarity and certainty to the permittee, the County, and the public. None of the points raised or exhibits offered by FORP compels the opposite conclusion.

DATED this 31st day of March, 2011.

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11 The portion the Examiner should disregard includes the last two paragraphs of p. 3.