BEFORE THE HEARING EXAMINER OF THURSTON COUNTY

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

I. INTRODUCTION

There are two simple issues before the Examiner. The first is whether the Special Use Permit ("SUP") amendments, which clarify the language of, change the timing for, and increase the scope and duration of water monitoring, should be approved. The second issue is whether those same amendments need additional environmental review because they will have a probable significant adverse environmental impact.

These are simple issues with simple answers. The amendments should be approved and there are no probable significant adverse environmental impacts from increased water
monitoring. Accordingly, the Thurston County SEPA Responsible Official’s decision to issue a Mitigated Determination of Non-Significance ("MDNS") should be upheld and the amendments should be approved.

As observed at the Hearing, the appeal by the Friends of Rocky Prairie ("FORP") is serious misuse and abuse of SEPA. FORP is trying to use SEPA to undo almost ten years of efforts that led to the instant mineral extraction SUP. Since at least 2002, the SUP site, the Maytown Mine (“Mine”), has been prepared for mineral extraction. From the very beginning, many interested organizations and individuals have been continuously involved. Between 2002 and 2005, the SUP application and physical site underwent extraordinary scrutiny and several issues were debated and negotiated, resulting in compromises and agreements. As a result of that level of participation, which SEPA and the County Code encourage, the SUP was issued and no appeal was made. The SUP then became a final land use decision and a vested permit.

Now, in these proceedings, FORP is attempting to undo all those efforts, negotiations, and approvals through a challenge to increased water monitoring requirements. This is the absurd reality of FORP’s appeal. As any outside observer can see, FORP objects to the existence of the Mine, not the amendments to the SUP and not the SEPA review of those amendments—the only subjects of these proceedings. Instead of focusing on the narrow issues in the instant SEPA appeals, FORP mischaracterizes the issues and creates elaborate “straw-man” arguments in an attempt to attack the vested and final 2005 SUP. Rather than focusing on FORP’s misdirection, the Examiner should instead go right to the heart of this matter.

Unfortunately, despite the absence of legal support for FORP’s arguments, the political realities in Thurston County have provided a means of propping up those arguments. For these reasons, Maytown Sand and Gravel, LLC (“MSG”) requests that the Examiner make very detailed and explicit findings of fact with regard to FORP’s several irrelevant arguments. Such findings will be important in the appeals and litigation that appear to lie ahead.
Foremost among FORP's arguments is the incredible and unsupported argument that critical areas were missed in 2005 and that SEPA review of the vested mineral extraction SUP should be reopened. The overwhelming weight of the evidence shows that no critical areas were missed and, though totally outside the scope of this hearing, MSG requests that the Examiner make detailed findings on that issue.

The Examiner's detailed findings and clear decision on the simple issues in these SEPA appeals will help decrease the probability that reviewing bodies will be confused on the facts and therefore misapply the law. The facts are clear, the law is clear, and the result is clear. The MDNS should be upheld and the SUP amendments should be approved. MSG should finally be allowed to commence mining under its extensively reviewed, final, and vested Special Use Permit.

II. STATEMENT OF FACTS

A. Issuance and Nature of the SUP

This SEPA Appeal Hearing involves small technical changes to Special Use Permit 02-0612 ("SUP"). The SUP authorizes mineral extraction on the subject site (the "Property"), which has a 284-acre mineral extraction area designated by Thurston County as Mineral Lands of Long-Term Commercial Significance. The Thurston County Hearing Examiner issued the SUP on December 16, 2005, and it became final on January 3, 2006. Subject to extensive conditions (59 lettered and numbered conditions, some with multiple parts), the SUP authorized mining of an extremely valuable and necessary mineral resource. The SUP authorizes mining of approximately 20,600,000 cubic yards of aggregate needed for public and private projects in the region. The SUP specified the twenty-year duration of the permit and the physical boundaries of the area to be mined.
B. County Confirmation/Determination of the SUP’s Enduring Validity

Since the SUP was issued, no mining has occurred. Indeed, as the County has acknowledged, no substantial ground disturbing activities have taken place. Rather, the prior owner, the Port of Tacoma (“Port”),¹ engaged in necessary pre-mining operations, including working with the Department of Ecology to clean up the Property,² before selling it to MSG in April of 2010.

Pursuant to an application from the Port, the County, on October 16, 2008, issued a building permit for a scale house on the site. On October 29, 2008 and November 25, 2008, the County confirmed in a written, appealable decision that the Port’s activities on the Property had forestalled the expiration of the SUP under TCC 20.54.040(4)(a). FORP received a copy of the County’s decision and did not appeal. On March 16, 2009, counsel for FORP sent a letter to the County arguing that the SUP had expired. In letters of March 20 and 25, 2009, the County responded by stating that FORP received a copy of the prior decisions, no timely appeal was made, and the decision was final.

C. Timing and Expansion of 2005 MDNS Water Monitoring Conditions 6A and 6C

The SUP contains a number of conditions, including by reference the 33 conditions of the Mitigated Determination of Non-Significance issued on October 24, 2005 (“2005 MDNS”). Some of these conditions must be satisfied prior to the start of mining. On February 16, 2010, the County issued a memo in the style of an analysis of compliance of the SUP conditions (“Compliance Memo”). The Compliance Memo stated that full compliance was still possible with regard to all conditions except for the timing requirements of MDNS Condition 6.

¹ MSG purchased the Maytown property in April, 2010, pursuant to a real estate contract with the Port.
² Portions of the area around the site had historically been used for industrial purposes dating back to before World War II, including artillery, concrete pipe, dynamite, and other explosives manufacturing and testing. The industrial uses contaminated site soils and the underlying groundwater.
Because at the time of SUP issuance in 2005 the parties and the County assumed mining was imminent, MDNS Condition 6 required adoption of the Groundwater Monitoring Plan ("2005 Plan") and required the permittee to (1) conduct a field survey of offsite supply wells in certain enumerated areas prior to mining and within one year of SUP issuance and (2) commence groundwater monitoring in compliance with the 2005 Plan within 60 days of SUP issuance. At the time the Port purchased the Property (about six months after SUP issuance), some field verification and groundwater monitoring had already commenced. However, no regular, systematic groundwater monitoring occurred until January of 2008.

The Port continued the groundwater monitoring required by the 2005 Plan, throughout 2008, 2009, and 2010. The February 16, 2010 County Compliance Memo attached a February 9, 2010 memo from County Hydrogeologist Nadine Romero and required the Port to conduct more expansive groundwater monitoring than that specified in the 2005 Plan. In addition to complying with the requirement of bi-monthly testing since January of 2008, the Port commenced the County’s additional monitoring requirements before selling the SUP and underlying property to MSG in April of 2010.

Since acquiring the Property, MSG has continued the groundwater monitoring program pursuant to the 2005 Plan and has conducted, under protest, substantial and expensive additional water monitoring required by the County. Primarily, the water monitoring requirements are aimed at monitoring the effects, if any, to water issues once mining commences. To date, no mining or substantial ground disturbing activities have taken place. All the water quality information, data and test results required by the County, including the requirements in excess of the SUP conditions and the 2005 Plan, have now been delivered to the County.

D. Setting the Number of Monitoring Stations

Condition 6C of the 2005 MDNS attempted to summarize the 2005 Plan authored by Pacific Groundwater Group and adopted by the SUP and MDNS. The summary language, however, confused the difference between groundwater wells and surface water monitoring.
stations by indiscriminately utilizing the terms “wells” and “stations” to describe the type of monitoring. Condition 6C of the 2005 MDNS thus refers to establishing “17 monitoring wells,” though logically surface water is not monitored by means of drilling a well into the ground where groundwater is found.

In addition to the indiscriminate use of the term “wells,” the summary in Condition 6C also did not recognize that the 17th monitoring station, under the terms of the 2005 Plan, is for the purpose of monitoring specific surface water which is to exist in a future process water pond to be constructed after mining commences. Thus the 17th monitoring station does not yet exist and cannot be tested. As of March 2010, water monitoring results have been reported for all 16 stations. However, because Condition 6C required monitoring 17 sites prior to mining, the SUP was technically out of compliance. The SUP amendments clarify this misunderstanding by setting the number of water monitoring stations at 16 for the initial testing, with a 17th station to be established after the process water pond can be constructed.

E. Clarification of the Water Monitoring Process

On December 6, 7, and 8, 2010, a Five Year Review Hearing was held to review the SUP and address any compliance issues. During the Hearing, the author of the 2005 Plan, Charles “Pony” Ellingson, explained the discrepancies between the 2005 Plan as drafted and the language of Condition 6. The County’s Hydrogeologist, Nadine Romero, also gave testimony at the Hearing and was able to witness Mr. Ellingson’s testimony.

During the Hearing, Mr. Ellingson and Ms. Romero agreed on some of the discrepancies and need for clarification. On other issues, however, they did not agree. For example, Ms. Romero admitted that the additional water monitoring required by her February 9, 2010 memo were new requirements beyond those contemplated by the 2005 Plan, but stated that, nonetheless MSG would be required to comply with those new requirements. MSG disputed the need for these new requirements but proposed further discussions with the County.
Since the Five Year Review Hearing, Mr. Ellingson, Ms. Romero, and County Staff have negotiated and agreed to a Groundwater and Surface Water Monitoring Plan ("2011 Plan"). The 2011 Plan changes the timing for commencing field verification of offsite wells, for commencing water monitoring, adds monitoring in terms of both scope and duration, clarifies that 17 monitoring stations are a combination of wells and stations, and that the 17th station will be established once the process water pond is constructed and filled with water. While not agreeing that the SUP amendment process is necessary or lawful, MSG has agreed to the 2011 Plan, which should eliminate the remaining technical compliance issues and allow mining to commence.

F. Substance of the SUP Amendments and MDNS

The MDNS itself clearly sets forth the nature of the SUP amendments and their effect on the 2005 MDNS.

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....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.3

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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.4

G. County Decision to Require SUP Amendment and SEPA Determination

The February 16, 2010 County Compliance Memo stated that the two timing provisions would be minor amendments processed by staff. MSG applied for the minor amendments on

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3 January 19, 2011 MDNS at 1.

4 Id. at 4.
April 22, 2010. After comments generated primarily by FORP, the County changed the
requirement, and instead required the amendments to be processed by the Hearing Examiner
through a formal SUP amendment proceeding. MSG believes the County should not have
required an amendment of the SUP due to the technical noncompliance with Conditions 6A and
6C and that the County should have resolved the matter as a compliance issue as they have with
other conditions. Thus, MSG applied for minor amendments of the SUP under protest, and that
matter is now before the Examiner.

H. The SEPA Appeal and SUP Amendment Hearing

On March 7, 8, and 9, 2011, MSG, the Port, FORP, and other interested members of the
public attended and participated in a hearing before Thurston County Hearing Examiner pro tem,
Sharon A. Rice (the “Examiner”). The Examiner heard three days of testimony and has received
detailed exhibits for review. At the hearing, hydrogeologic experts from the County and MSG
noted some minor changes to the 2011 Plan that were needed to provide further clarity. Those
changes have been made and the 2011 Plan was revised and hearing participants have been
allowed to comment on those changes.

III. STATEMENT OF ISSUES

A. The “Proposal” for Review. SEPA requires the County to determine whether a
proposal has a probable significant adverse environmental impact and thus requires
an environmental impact statement. This is known as a threshold determination. In
2005, the proposal was for a mineral extraction Special Use Permit and a 2005
MDNS threshold determination on that proposal was issued, not appealed, and is
final. Here, the only proposal requiring a threshold determination is the proposal to
make minor technical amendments to the SUP. Issue: Is the “proposal” for SEPA
review limited to the minor amendments to the SUP? Answer: Yes.

B. Burden of Proof. Under SEPA statutory and administrative provisions and the
Thurston County Code, the determinations of the SEPA responsible official are
entitled to substantial weight. The County’s 2011 MDNS is thus presumed correct
and the opponent must carry the burden of refuting that determination. Issue: Must
FORP carry the burden of establishing that the MDNS was clearly erroneous by
showing the existence of probable significant adverse environmental impacts?
Answer: Yes.
C. **FORB’s Irrelevant Issues/Contentions.** Issues in this matter are limited to the appropriateness of the 2011 MDNS and the proposed SUP amendments. FORB has made several arguments that are totally unrelated to these limited issues, and that have already been argued and decided by the Examiner and the Thurston County Board of County Commissioners. **Issue:** Should the Examiner dismiss FORB’s arguments that are irrelevant to the issues under review and that are collaterally estopped by previous decisions? **Answer:** Yes.

D. **Credible Evidence.** MSG offered testimony from critical area experts who scrupulously studied the site between 2002 and 2005 and delineated all critical areas under the Code. FORB offered only speculation and imprecise testimony and conjecture about possible critical areas seen in unspecified areas during the past two years. **Issue:** Should the Examiner issue findings that clearly establish the substance and credibility of MSG’s expert testimony in comparison to the testimony of FORB’s witnesses? **Answer:** Yes.

E. **Application of WAC 197-11-340(3)(a).** A lead agency is to withdraw a DNS if (1) there are substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts or (2) the DNS was procured by misrepresentation or lack of material disclosure. There are no changes to the SUP proposal other than the proposed minor amendments and FORB provided no credible evidence showing a lack of material disclosure during the 2002-2005 review. In fact, MSG provided overwhelming evidence showing that the SUP and SEPA review was extraordinarily thorough and no critical areas were missed. **Issue:** Did the County correctly decide to not withdraw the 2005 MDNS based on WAC 197-11-340(3)(a)? **Answer:** Yes.

F. **Application of WAC 197-11-600(3)(ii).** Under WAC 197-11-600(3), an agency “acting on the same proposal” is to use the environmental document unchanged except under certain circumstances, including when new information indicates a proposal’s probable significant adverse environmental impacts (this includes discovery of misrepresentation or lack of material disclosure). Here, the County is not acting on the same proposal, but rather is acting on the proposal to make minor amendments to the SUP. Further, all credible evidence shows no misrepresentation or lack of material disclosure. **Issue:** Did the County correctly decide not to reopen SEPA review of the 2005 SUP under WAC 197-11-600(3)(ii)? **Answer:** Yes.

G. **Approval of SEPA Review.** An MDNS can issue if the proposal with mitigation will cause no probable adverse environmental impact. All hydrogeologic experts agree that increasing the scope and duration of water monitoring will cause no such impact. FORB offered no credible evidence showing that the amendments will cause a probable adverse environmental impact. **Issue:** Should the Examiner rule that the proposal with mitigation will cause no probable adverse environmental impact and that the MDNS was issued properly? **Answer:** Yes.
H. Approval of SUP Amendments. No one seriously contends that the proposed SUP amendments are adverse in any way to the environment or that they have any negative effect whatsoever. Issue: Should the Examiner approve the SUP amendments? Answer: Yes.

IV. AUTHORITY

A. The Minor SUP Amendments are the “Proposal” for SEPA Review Purposes, Not, as FORP Argues, the Already Approved and Final 2005 Mineral Extraction Special Use Permit.

Under SEPA, the County must determine whether a “proposal” has a probable significant adverse environmental impact and thus requires an environmental impact statement. WAC 197-11-300(2); WAC 197-11-310; WAC 197-11-797. A proposal is a proposed action, and such actions fall into one of two categories: project actions or non-project actions. WAC 197-11-784; WAC 197-11-704. Project actions are decisions on a specific project and include agency decisions to license, fund, or undertake any activity that will directly modify the environment.\(^6\) WAC 197-11-704(a)(i).

In this matter, the County made clear that the “proposal” subject to environmental review is the SUP amendments. The County’s January 19, 2011 MDNS (“2011 MDNS”) clearly states that “[t]he current proposal seeks to amend the SUP…. Each of the four items proposed for amendment were set as MDNS conditions that were incorporated into the SUP approval.” 2011 MDNS at 1 (emphasis added).

In its briefing and arguments, FORP mischaracterizes the proposal. This is one of their many “straw-man” arguments. Contrary to FORP’s contentions, the proposal is not an

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\(^5\) MSG adopts and incorporates by reference the arguments in the Port of Tacoma’s Post-Hearing Brief.

\(^6\) The SUP amendments will not directly modify the environment and the amendments have no environmental relevance. MSG adopts and incorporates by this reference the arguments contained in MSG’s March 2, 2011 Brief in Support of Approving MDNS, and Brief in Response to FORP Appeal at Section IV.B, which argue that there was no need for SEPA review of the SUP amendments and the Examiner should rule accordingly.
application for a gravel mine permit – that permit was issued in 2005. That proposal was
evaluated and approved in December of 2005, at which time the SUP was issued, was not
appealed, and shortly thereafter became final. The 2011 MDNS was issued on the SUP
amendment proposal, which includes only limited changes to water monitoring requirements
under the SUP.

The distinction between the 2005 MDNS and the 2011 MDNS is made plain by the
descriptions of the two different proposals. The 2005 MDNS was issued on the following
proposal: “Special use permit approval to mine 20.6 million cubic yards of sand and gravel from
the site over a 20-year period.” The 2011 MDNS was issued on a very different, much more
limited proposal: “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.” FORP’s attempt to use the SUP amendments to attack the 2005 MDNS and
SUP is an attempt to use the tail to wag the dog (if not the toe nail to wag the dog).

In an effort to sidestep the fact that the 2005 MDNS on the 2005 SUP is no longer subject
to scrutiny, FORP argues that the SUP amendments are necessarily also amendments to the 2005
MDNS and therefore the 2005 MDNS should be reopened. In essence, FORP argues that
because the 2005 MDNS conditions are physically written in the 2005 MDNS and not also
physically written in the 2005 SUP (only incorporated by reference), any amendment to those
conditions is necessarily an amendment to the 2005 MDNS. This is an unpersuasive semantic
argument.
The conditions of the 2005 MDNS were incorporated into the SUP by operation of law and by the terms of the SUP. The SUP amendments do not change the 2005 SUP proposal to extract gravel from the site and do not change the environmental effects of that proposal. The amendments merely clarify, change the timing of, and increase the scope and duration of water monitoring. The environmental effect of these changes is the limit of the required environmental review. The County properly reviewed the environmental effect of the amendments and issued the 2011 MDNS. FORP's arguments for the reopening environmental review that was properly conducted and made final five years ago do not withstand even moderate scrutiny. The Examiner should review this matter in light of the actual proposal at issue: to wit, the minor technical amendments to the SUP explained in the 2011 MDNS.

B. Under SEPA Statutory and Administrative Provisions and the Thurston County Code, Determinations of the SEPA Responsible Official are Entitled to Substantial Weight.

Threshold determinations, like the MDNS at issue in this matter, are subject to SEPA's qualification that the "decision of the governmental agency shall be accorded substantial weight." RCW 43.21C.090; See Boehm v. City of Vancouver, 111 Wn. App. 711, 47 P.3d 137 (2002). The SEPA Rules (WAC 197-11) also mandate deference to the responsible official. WAC 197-11-680(3)(viii) ("Agencies shall provide that procedural determinations made by the responsible official shall be entitled to substantial weight."). Also in accordance with SEPA statutory provisions and the SEPA Rules, the Thurston County Code expressly requires that the "hearing examiner shall give substantial weight to the environmental review officer's procedural determination." TCC 17.09.160(I)(2).

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7 TCC 17.09.090(G); December 16, 2005 SUP Decision at Condition A.
Here, according to the Thurston County SEPA responsible official, Mike Kain, the SEPA proposal at issue is the proposal to amend the SUP and the mitigating conditions, which change and clarify the original water monitoring requirements. According to Mr. Kain, these mitigating conditions “along with required compliance with applicable codes will mitigate all probable significant adverse impacts upon the environment.” 2011 MDNS at 2. Consequently, the County issued a Mitigated Determination of Non-Significance, and an Environmental Impact Statement was not required.

The County’s MDNS must be accorded substantial weight and is presumed correct. It cannot be overturned unless the opponent carries its burden of establishing an error. As can be seen from the testimony, evidence, and law discussed herein, FORP has not come close to meeting its burden and the MDNS should be upheld.

C. Many of FORP’s Claims are Irrelevant to its Appeal of the MDNS and Should be Dismissed.

Several of the grounds for appeal listed in FORP’s Notice of Appeal are totally irrelevant to the issues in this matter. At minimum, Issues 8, 9, 10, and 11 should be dismissed. Those issues state as follows:

(8) The County erred by not vacating the SUP because no legal pre-mining or mining activity occurred on the site for three years after issuance of the SUP. TCC 20.54.040(a).

(9) The County erred in allowing the Port of Tacoma to have the SUP because it is outside of the Port’s authority to operate a mine. Ch. 53.04.010 RCW.

(10) The County erred by not vacating the SUP when the Interlocal Agreement between the Port of Olympia and the Port of Tacoma lapsed. Ch. 53.08.240 RCW.

(11) The County erred by not vacating the SUP due to the Applicant’s noncompliance with Conditions of the 2005 MDNS that were required as a condition of the SUP approval.
FORP February 9, 2011 Notice of Appeal at 3.

FORP already made these same arguments during the Five Year Review of the SUP and the Examiner and, subsequently on appeal, the Thurston County Board of County Commissioners ("BOCC") ruled against FORP.8 Because these issues have already been decided, FORP is legally precluded by the doctrine of collateral estoppel from rearguing these issues in this proceeding. Collateral estoppel, also known as issue preclusion, is the doctrine that prevents a party from relitigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one.9 Moreover, the Examiner has ruled the Examiner does not have jurisdiction over issues (8), (9), and (10). For these reasons, FORP’s grounds for appeal listed in the above paragraphs should be dismissed.


While totally irrelevant to the issues in the SEPA appeals, the lynchpin of FORP’s case is their argument that critical areas defined by the County’s Code prior to 2005 existed in 2005 and were missed, and therefore SEPA review of the 2005 SUP should be reopened based on a lack of material disclosure during the 2005 review.10 FORP’s argument is not supported by law and it is not supported by the facts established in the testimony or evidence at the hearing. An accurate comparison and understanding of the credibility of the testimony and the reliability of the

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8 See Hearing Examiner Decision In the Matter of Application of Maytown Sand & Gravel, LLC For Approval of a Requested Five Year Review of a Mineral Extraction Special Use Permit (SUPT-02-0612) (hereinafter “Five Year Review Decision”) at page 47, Conclusion 7; BOCC March 14, 2011 Decision In Re the Matter of Maytown Sand & Gravel, LLC at page 2.

9 See Black’s Law Dictionary (9th Ed. 2009). The familiar doctrine of res judicata precludes whole claims from being relitigated. It implies that no further issues exist relating to the dispute, whereas with collateral estoppel there may be other adjudicable issues. See Bryan A. Gardner, A Dictionary of Modern Legal Usage at 169 (2nd Ed. 1995).

10 FORP cites WAC 197-11-340(3) and 197-11-600(3) in support of this contention.
evidence presented at the hearing is essential for an accurate decision in this appeal and future appeals. For this reason, MSG respectfully requests that the Examiner carefully weigh the testimony and evidence provided on these points, and make explicit findings of fact in the Examiner’s decision.

The record shows that FORP primarily relies on the following in support of its contention that critical areas were missed in 2005 that should have been protected under the 2002 Critical Areas Ordinance (“2002 CAO”): 11 (1) a November 24, 2010 letter from Stephan Kalinowski of WDFW to Mike Kain (Exhibit 14); (2) testimony of Cindy Wilson; and (3) testimony of Patrick Dunn.

MSG and the Port rely on the following in support of their position that critical areas were not missed in 2005 that should have been protected under the 2002 CAO: (1) testimony of Roy Garrison, the applicant’s consultant who reviewed the site for critical areas prior to 2005; (2) testimony of Francis Naglich, the applicant’s consultant who reviewed the site for wetlands and other critical areas prior to 2005; (3) extensive studies and documentation of studies conducted prior to 2005 SUP issuance; and (4) aerial and other photographs taken prior to 2005.

FORP places heavy emphasis on the November 24, 2010 letter from Stephan Kalinowski, Regional Habitat Program Manager of WDFW, to Mike Kain. This letter makes imprecise claims and assumptions that are unsupported by testimony, documentary evidence, or the law, and are tainted by WDFW’s express ulterior motive to have environmental groups purchase the property that it scrutinizes.

11 Throughout proceedings before the Hearing Examiner and the Thurston County Board of County Commissioners, the critical areas ordinance that applied at the time of permitting the 2005 SUP has been referred to as the 2002 CAO. Even though the 2002 CAO was enacted prior to 2002, we retain that designation in this pleading for the sake of consistency.
In the letter, Mr. Kalinowski claims that “all of the streams mapped on this site need to be field verified to determine if they exist,” but the only evidence of any unmapped streams that he provides is the previously well-studied Forest Practices Application Review System (“F-PARS”) map that indicates a stream in Mine Area 1 that no one has ever been able to find in 2002-2005 or in 2009-2010. Mr. Kalinowski’s letter also makes claims about “remnant prairie” being present, but such areas relate to the 2009 interim Critical Areas Ordinance (“2009 CAO”),\(^{12}\) which the Examiner and the BOCC have ruled do not apply.\(^{13}\) Mr. Kalinowski states that six diagnostic prairie species are now found on the site and that “[i]t is assumed that these species and the prairie habitat they represent were present during the last review of the project (2005) but were unaccounted for.” (Emphasis added). An assumption is not credible evidence in any hearing and is certainly not credible evidence under the circumstances of this case. Moreover, Mr. Kalinowski does not allege, and could not allege, that any such species found now were dominant on the site in 2005 as would have been required under the 2002 CAO. See TCC 17.15, Table 8. Perhaps this is why the letter at Addendum 1 admits, “Prairie restoration is needed on the site.”

Finally, the letter discusses a 2009 butterfly survey meant to show that the butterfly species that are associated with prairie habitat have been found on or near the mine areas. First, the existence or non-existence of butterflies are not mentioned and have no relationship with

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\(^{12}\) Thurston County initially adopted an interim critical areas ordinance in 2009, Ordinance 14260. This ordinance was renewed, and amended, in 2010 through Ordinance 14380 and renewed again on Jan. 25, 2011 through Ordinance 14478. For the sake of simplicity, interim ordinances and renewals are referred to collectively herein as the “2009 CAO.”

\(^{13}\) See Thurston County Ordinance No. 14380 at 10 (including in the definition of Prairie, or Westside Prairie areas of restorable prairie), readopted in Ordinance No. 14478; See also Examiner’s December 30, 2010 Decision; BOCC March 14, 2011 Decision.
establishing critical areas under Thurston County’s 2002 CAO. Butterflies are not even
mentioned in the Thurston County Code. This is a distinction that WDFW is trying to make
based upon how it characterizes prairies. It has no relationship to the legal determination of
critical areas defined by the Code.

Second, this 2009 butterfly information is of little relevance to the question of whether
critical areas were missed in 2005. Since 2006, WDFW has been actively creating habitat for
these butterflies on the property directly adjacent to the Mine area that WDFW now claims has
shown some butterfly species. Information from 2009 alleging butterflies on WDFW property
and on or near the SUP site does not even begin to prove that prairie areas under the 2002 CAO
were missed in 2005. Mr. Garrison and Mr. Naglich both testified that scientists cannot
determine what prairie habitat existed in 2005 based on site visits in 2009 and 2010. One does
not need expert testimony on this point. Common sense is sufficient. Casting further doubt on
Mr. Kalinowski’s inference that 2009 butterflies equate to 2005 prairie, even his letter admits
that the “species persistence on the property is [] inconclusive.”

With regard to all the issues in the Kalinowski letter, it is notable that no one from
WDFW presented testimony at the Hearing and there was no opportunity to ask questions in
response to the allegations contained in Mr. Kalinowski’s letter. Also, the letter itself cast doubts
on the WDFW’s motives. At pages 2-3, the letter states:

WDFW would like to restate point three from the Thurston County letter dated
February 16, 2010 to Tayloe Washburn … ‘The Port has indicated a possible
willingness to shift mine phasing such that segment one is mined last. This would
preserve that 45-acre area for 12-15 years. Such phasing would give conservation
organizations time to raise funds for a possible purchase of this area.’ … This site
is remnant prairie, which by virtue has restoration value.
WDFW has made it clear that it has identified Mine Area 1 as a Priority 1 acquisition property. If funds become available, WDFW would like to see this property purchased for restoration efforts.

WDFW’s November 24, 2010 letter contains non-specific and self-serving claims. Its imprecise and legally irrelevant contentions should be weighed against the clear testimony of the experts who reviewed the site for critical areas between 2002 and 2005. Additionally, WDFW’s self-serving claims militate against its credibility. If WDFW can delay mining or stop it altogether, it might be able to able to simultaneously devalue the property and also provide more time to raise money to purchase that property at its newly discounted value. The Examiner should view WDFW’s claims with these things in mind.

FORP’s two primary witnesses were Cindy Wilson and Patrick Dunn. Cindy Wilson is a Senior Planner at the Planning Department in Thurston County. Ms. Wilson has worked for the County for 18 years and has a background in Fisheries Science and Zoology.\(^\text{14}\) She estimated that she has been on the mine site four times, beginning in late 2008.\(^\text{15}\) Her last visit to the site was October 7, 2010.\(^\text{16}\) Patrick Dunn is the Director of the South Sound Program of The Nature Conservancy, a nonprofit conservation organization. He’s been in that position for 17 years. Originally, the Nature Conservancy attempted to negotiate a purchase of the SUP site from Citifor, the owner at the time.\(^\text{17}\)

\(^{14}\) March 7, 2011 Testimony at Section 12, 1:30 – 2:00.
\(^{15}\) March 7, 2011 Testimony at Section 12, 1:58 – 2:17.
\(^{16}\) March 7, 2011 Testimony at Section 12, 2:20 – 2:28.
\(^{17}\) March 8, 2011 Testimony at Section 9, 26:00 – 27: 52.
MSG’s two primary rebuttal witnesses were Roy Garrison and Francis Naglich. Roy Garrison, consultant for the original SUP applicant and now MSG, has been in the mining business for 35 years. Mr. Garrison has worked on over 200 mine sites, and his company at the time, Ecological Land Services, Inc., did all of the critical areas review and evaluation starting in 2001 and ending in 2005.18 Francis Naglich, consultant for the original SUP applicant and now MSG, is an accomplished wetland biologist and president of Ecological Land Services, Inc. Mr. Naglich has managed or played a key role in over 1,200 wetland related projects in western Washington and Oregon since 1990.19 The resumes of Mr. Garrison and Mr. Naglich, at exhibit 17 and 26 respectively, summarize their extensive experience in their fields.

Oak Woodlands

With regard to “Oregon oak woodlands,” Ms. Wilson testified that under the 2002 CAO, those areas were defined as 20 percent or more of a five acre mixed stand. She explained, “So, if you had five acres of Douglas fir and oaks mixed you would need approximately an acre of oak to qualify for that. A stand is referred to generally. It can be within visual distance. It can be nestled together. It’s one of those calls that needs to be taken a look at in the field.”20

Ms. Wilson’s testimony about the appropriate methodology for identifying oak stands was conclusively rebutted by the testimony of Roy Garrison, who presented the detailed methodology derived prior to 2005 from WDFW’s expertise in such issues. Mr. Garrison first read the 2002 CAO definition of oak woodlands, which are defined as “[a]reas where Oregon white oak (Quercus garryana) comprises more than 20 percent of the trees in pure or mix stands

18 March 8, 2011 Testimony at Section 4, 15:30 – 18:30; Exhibit 17 (Resume of Roy Garrison).
19 Exhibit 26, Resume of Francis Naglich.
20 March 7, 2011 Testimony at Section 12, 3:08-3:30.
of oak or oak savanna greater than five acres in size.”

He then explained that there had been questions about defining oak stands in 2005 and the Supplemental Report to the Habitat Management Plan responded to that same issue. The following is a portion of the verbatim testimony of Mr. Garrison on this issue:

**R. Garrison:** Because the Thurston County Code just references “trees” – “20 percent of the trees in pure or mixed stands of oak or oak savanna greater than five acres”—our immediate question was, what defines a stand? So, we went to the County, asked them what a stand of oak refers to so we can get our arms around where are you going to apply this 20 percent of oak—whether it’s pure or mixed stand. And “mixed” they’re referring to—in this project site—is predominately going to be Douglas fir. So, we uh, they didn’t have anything for us. They didn’t, they had no interpretation of that, so we agreed to—I believe the suggestion came from the team, the WDFW folks on the team—to take a look at if WDFW had a recommendation, a management recommendation for evaluating those. Low and behold they did. So, we gathered that and through that it gave a clear definition, from a scientists perspective, it’s obviously been, in my opinion, misunderstood by the County in making a reference that there are regulated stands out there.

**J. Hempelmann:** Excuse me, Mr. Garrison, that was Ms. Wilson. Not the County.

**R. Garrison:** I’m sorry. Excuse me. Ms. Wilson, of Thurston County. So, that took us to an addition, if you will, that we reviewed with the science team. And all this was to be more thorough and to have a better understanding and to define the code at Thurston County. So, by the way, if you look at the new Code, they ended up adopting everything we put into our plan into the new Code.

So, what I’m going to try to describe for you, just for the record here, I’m going to read it first, what the WDFW management recommendations were, and this was the guidance we used to evaluate the site. They describe Oregon white oak woodlands as quote, “Stands of pure oak or oak conifer associations where the canopy coverage of the oak component is greater or equal to 25 percent, or where total canopy coverage of the stand is less than 25 percent but oak accounts for at least 50 percent of the canopy coverage present.” The latter refers to an oak savannah.

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21 TCC 17.15.200; TCC 17.15, Table 8; March 8, 2011 Testimony at Section 6, 17:00 – 17:46.
So, to break that down, our task was to evaluate the site. So, from this recommendation, and from a forestry perspective, there is a definition that I need to define here that is considered a canopy. A forest canopy is, if you will, a collage of trees—I’m not going to be specific to oak or prairie trees—a canopy is a canopy when it is considered, when they actually overlap or come close to touching each other from their outlying limbs, often called a drip line.\textsuperscript{22}

As Mr. Garrison’s testimony shows, the existence of an oak “stand” was something that he and his team took very seriously. In fact, the County adopted the same oak stand language when it adopted the interim 2009 CAO.\textsuperscript{23} Ms. Wilson, on the other hand testified that “a stand can be within visual distance” and “it’s one of those calls that needs to be taken a look at in the field.” To MSG’s knowledge, no one has adopted Ms. Wilson’s definition of an oak stand.

When Ms. Wilson was asked if there were Oregon white oak woodlands that existed in 2005 that were missed, she testified that there were three areas that she thought were worthy of reviewing, including oaks along the entry road, oaks in Mine Area 1, and oaks in Mine Area 2.\textsuperscript{24} Ms. Wilson testified that these areas were not mapped and did not appear to be reviewed in the reports.

Roy Garrison’s testimony and reports from the 2002-2005 review show that Ms. Wilson’s claims are wrong. Mr. Garrison testified as follows:

… Ms. Wilson had noted that there were many oaks on the property. I think she referred to the access area, access road, she referred to mine area 2, there are, there are oaks out there. There are oaks on a number of different places on the property. But they did not meet the definition underneath our recommendation with the WDFW. *** We walked the entire site, checking all the different oak out there and see if they would have any consistency with regards to canopy or

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\textsuperscript{22} March 8, 2011 Testimony at Section 6, 22:37 – 26:04.

\textsuperscript{23} See Thurston County Ordinance No. 14380 at 10 (definition of Oak Habitat), readopted in Ordinance No. 14478.

\textsuperscript{24} March 7, 2011 Testimony at Section 12, 4:32 – 5:12.
mixed stand with Douglas fir. And if their canopy was intact, greater than five acres, then that would become a regulated oak woodland. We did not find that.\textsuperscript{25}

Following this general testimony, Mr. Garrison addressed each of Ms. Wilson's alleged oak areas, explained how they were evaluated, and why they did not meet the definition of oak woodlands under the 2002 CAO.\textsuperscript{26} Additionally, Mr. Garrison explained that several oak areas on the site did not meet the definition for oak woodlands under the 2002 CAO, but they were nonetheless delineated and excluded from the mine area by the applicant.\textsuperscript{27}

A very vivid example and a clear refutation of Ms. Wilson's testimony is found in the Habitat Management Plan, Appendix D2 at Figure 2, which is a large aerial photograph of the site from 2002 that shows the canopy coverage for the areas that Ms. Wilson alleged should have been categorized as "oak woodlands" under the 2002 CAO.\textsuperscript{28} Mr. Garrison provided clear testimony on each of the three areas that Ms. Wilson believed should be characterized as oak woodlands.

\textbf{J. Hempelmann}: Now, would you show the Examiner where Mine Area Number 2 is? Where Ms. Wilson said that it was clear that there was oak groves that qualified in 2002 as a protected critical area.\textsuperscript{29}

\textbf{R. Garrison}: Yes. It would be north of the tracks, west of Mine Area 1. It's a little moon-shaped... I believe it's only about 4 acres of mine area there, 4 ½ acres. And it's delineated by a red boundary just north of the tracks and in that you can see scattered trees that, again, the lighter shade of tree that is typically oak. Again, this isn't our method of determining whether it was oak or not; that

\textsuperscript{25} March 8, 2011 Testimony at Section 6, 26:04 – 27:17.
\textsuperscript{26} March 8, 2011 Testimony at Section 7, 00:00 – 14:37, Exhibit 16, Habitat Management Plan at Figure 2 (showing oaks as they existed during the 2002—2005 review).
\textsuperscript{27} See Exhibit 20.
\textsuperscript{28} Habitat Management Plan, Appendix D, Figure 2.
\textsuperscript{29} Visual reference was to Exhibit 20 and an aerial photo from June of 2002 found in Habitat Management Plan, Appendix D, Figure 2.
was on the ground. But it is a pretty good example that we had some scattered oak out there.

**J. Hempelmann**: Is it fair to contrast, if you will, Oak Areas 1 and 2 immediately south of Mine Area 1 across all this scotch broom dropping down below the mine boundary. Comparing that oak – see where one and two is?

**R. Garrison**: Yes.

**J. Hempelmann**: Put your finger on that. Contrast that with mine area 2 above the tracks?

**R. Garrison**: Yes.

**J. Hempelmann**: And does this aerial comport with what you saw on the ground in 2002 that shows why you delineated 1 and 2 and you did not delineate anything in Mine Area Number 2?

**R. Garrison**: Correct.

**J. Hempelmann**: Is that also true of oaks along the entrance road? I’m looking at that entrance road on the aerial all the way over to the places between second and third stockpile where we do have a protected oak grove – voluntarily protected by the way- are those scattered oaks then to the south of the entrance road? Is that what I’m seeing?

**R. Garrison**: There’s going to be a few of those that are oak and a few of those that are probably conifer.

**J. Hempelmann**: Is it fair to contrast those oaks along the entrance road with, say, further along the entrance road between, just below the second and third stockpiles that are voluntarily protected? Is there a fundamental difference in your opinion?

**R. Garrison**: Yes, there is. There is a canopy on the ones that we elected to voluntarily place. There is an umbrella, if you will—as discussed earlier, a canopy. It’s very conservative too, if you can see that. There are gaps in there but we voluntarily recognize that as habitat.

**J. Hempelmann**: There’s gaps in the canopy but nonetheless you said that you were conservative, would you say?

**R. Garrison**: I would say it was a conservative delineation.
J. Hempelmann: And all those areas that are protected at least on Exhibit 20 are less than five acres in size?

R. Garrison: That's correct.

J. Hempelmann: So, arguably even those are not protected under that 2002 Ordinance.

R. Garrison: Correct.

J. Hempelmann: Does Exhibit 20 reflect, in your view, a very, very careful assessment of oak during the work that you did leading up to the 2005 SUP?

R. Garrison: Yes, I believe it does.

J. Hempelmann: And in fact, does the Finding 52 of the 2005 SUP recognize these oak groves are being protected even though they might not qualify under the ordinance?

R. Garrison: 52 referring to?


R. Garrison: I don't have that in front of me.

J. Hempelmann: Subject to check, the number, would you agree that the Examiner recognized the oak groves and the work that he's done to protect them?

R. Garrison: Yes, that's correct.

Ms. Wilson's imprecise and inaccurate claims about oak groves that were missed is troubling because it shows her bias against the Mine. The fact that her testimony on this issue is so thoroughly refuted by Mr. Garrison and in the 2002 aerial photo of the site must be taken into account by the Examiner when judging the lack of credibility of all Ms. Wilson's testimony.

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Mazama Pocket Gophers

Ms. Wilson testified that Mazama pocket gophers are a threatened species by the state WDFW and a candidate species (species requiring more research to determine if endangered) by US Fish and Wildlife Service. She testified, "I did see one pocket gopher mound at the south boundary between the fish and wildlife property and this property when we were doing the well inspection...just the one mound but I haven't done a survey for them either. I'm not sure there's been one out there."  

Under cross-examination, Ms. Wilson's imprecise testimony also lacked credibility. When asked if Ms. Wilson knew whether the alleged gopher mound was on the WDFW property or the MSG property, she stated, "I believe it was on the Maytown side of the boundary." But when pressed on this point, she replied, "No. I don't know exactly." When asked, if she knew that WDFW is planting pocket gophers on their property, she admitted "Yes." And when asked if it was in fact a pocket gopher mound, whether the mound could have been created by a WDFW planted pocket gopher, Ms. Wilson again admitted, "Yes." Finally, when asked if she was saying that there are currently pocket gophers on the MSG property, she admitted, "I don't know that." Ms. Wilson's testimony was, to say the least, inconclusive with regard to the presence of a single gopher mound, its location, and whether it belonged to a Mazama pocket gopher. Her testimony was largely speculative and imprecise at best.

32 March 7, 2011 Testimony at Section 12, 6:34 – 6:51.
33 March 7, 2011 Testimony at Section 12, 21:30 – 21:40.
34 March 7, 2011 Testimony at Section 12, 21:40 – 21:49.
35 Ms. Wilson used the term "trans-located" but admitted that the meaning is the same as "planted" in this context.
Wetlands and Streams

Ms. Wilson testified:

In Mining Area 1, which is the northeast area, north of the tracks. Mine Area 1, as I understand it, is defined as the actual mine area, so it’s at the toe of the slope. Within a corner of that property, there is a slightly wooded area that contained hydrology, when we were out there. Small channels, we didn’t follow them, we didn’t try to determine what stream type they were. Associated with that, within sort of the next area, more open area, there is reed canary grass and there’s quite a bit of water that I, had this discussion before, waded through. So, we do know there is water there, most likely groundwater. Wetlands are fed by groundwater, frequently. So, the question was does this area qualify as wetlands. That was another evaluation that we recommended be done.37

Ms. Wilson claimed that this is a potential missed critical area requiring more evaluation, but on cross examination, she was unable to state affirmatively that there was a stream or wetland in the area that she was observing. Further, she did not appear to know whether she was even observing conditions within the actual boundary of Mine Area 1. Finally, in addition to not having seen a stream and not knowing if what she had seen was within the mine boundary, she admitted that she had no idea whether what she had seen existed prior to 2005. The verbatim cross-examination testimony follows:

J. Hempelmann: Can you tell this Examiner, categorically, that there is an intermittent seasonal stream inside the delineated Mine Area number 1? Can you say there is an intermittent stream inside Mine Area number 1?

C. Wilson: I can say there is evidence of water. I don’t know whether there’s a stream.

J. Hempelmann: You said a few minutes ago, it might have been groundwater.

C. Wilson: It could be. The drainages I was referring to in the northeast area, drain towards a groundwater/wetland area. What appears to be a wetland.

J. Hempelmann: Ok. And you saw that in 2010?

37 March 7, 2011 Testimony at Section 12, 11:21 – 12:16.
C. Wilson: Yes. I know we’ve had this discussion before. I believe it was spring of 2010.

J. Hempelmann: And you have no idea whether that water was there in 2005 or not?

C. Wilson: Correct.

J. Hempelmann: Because you were never, you weren’t out on the property in 2005?

C. Wilson: Correct.

J. Hempelmann: Or 2006?

C. Wilson: Correct.

J. Hempelmann: Or 2007?

C. Wilson: I don’t think so.

J. Hempelmann: You referred to the corner of the property. But you didn’t follow it. Do you know whether you were inside or outside the boundary of Mine Area 1 at that corner of the property?

C. Wilson: If Mine Area 1 goes to the toe of the slope, then I was on the flat area, so that would be within the boundary.

J. Hempelmann: So, you don’t know. You’re assuming that you were within the boundary because it was at the flat area at the toe of the slope?

C. Wilson: I’m following the counters on the site plan.38

Ms. Wilson’s equivocal and imprecise testimony about evidence of an intermittent stream in an unknown area pales in comparison to the testimony of Francis Naglich, the lead wetland biologist, who applied extraordinary scrutiny to his analysis of the site during the pre-2005 wetland review. The following is a portion of Mr. Naglich’s verbatim testimony:

38 March 7, 2011 Testimony at Section 12, 23:08 – 24:59.
F. Naglich: I had been on this site in the winter of 1995 and '96 over a period of several weeks to delineate the wetlands the first time. So, when I saw the maps in 2002 from the department of natural resources showing a supposed stream...

J. Hempelmann: Is that the F-PARS map?

F. Naglich: F-PARS, yes. A supposed stream meandering down through the middle of Mine Area 1 and into the native outwash prairie I was baffled, I was like, I didn’t see that in '95 and '96. I’ve got to go see if that’s really on...I’ve got to see if there’s some evidence that that’s actually there. So I was looking for any evidence of wetland plants, looking for flood marks, looking for stained leaf litter, looking for mold or mildew on, or water marks on stumps or logs. I could find nothing in 2002 to show that there was any kind of standing water recently in that mine area. I’m not saying that there isn’t occasionally wintertime water that can come up. I did not see it in '95 or '96.

J. Hempelmann: And did you see it in 2002?

F. Naglich: No, nor did I see it in 2004.

J. Hempelmann: And when you just said water can come up, are you saying what Mr. Garrison said earlier that it’s an area where water can rise to the surface?

F. Naglich: I believe its high groundwater flooding, yes.

J. Hempelmann: Did you in 2002 find any wet area at the toe of the slope up there in the northwest corner of the northeast section?

F. Naglich: Um, up here?

J. Hempelmann: Yes.

F. Naglich: Just north of Mine Area 1?

J. Hempelmann: Yes, just northwest of Mine Area Number 1

F. Naglich: I did not.39

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J. Hempelmann: Are you confident, from a professional point of view, that there are no intermittent streams on Mine Area 1 or Mine Area 2?

F. Naglich: Yes, I’m confident of that.

J. Hempelmann: And are you confident that there are no wetlands in Mine Area 1 and Mine Area 2?

F. Naglich: I am confident of that as well.

J. Hempelmann: Can you opine on whether or not Ms. Wilson or anybody from WDFW or anyone else for that matter, can go out onto that site and in 2009 and 2010 and testify accurate and credibly that there was an intermittent stream or wetland there in 2002 to 2005 that was missed?

F. Naglich: No, and I’ll explain why. Over my 21 years of experience, there have been cases where a land owner has altered their site, filled a wetland for example or bulldozed through a stream, and often times we have to go out and do kind of forensic research to find out what the impacted area was. We have to take...we usually have to go off of the impacted areas and go to adjacent area to find soils, dig a hole, record the vegetation, monitor the hydrology. Those are what you have to do to be definitive of what was there. The other way, which is an imperfect way, but it’s kind of the best next step, is if you can’t go back in time and you can’t collect that data, you have to go by an aerial photo or photos actually on the ground, and those are difficult. Those are difficult to work with when it comes to wetlands. Example, oak trees, you can look back in time on aerial photos and probably pick out oak trees. But, going back in time and picking out wetlands on a site like this would be very difficult. Even on an aerial photo. But, that’s your best way, there’s no other way to do it than an aerial photo. I can’t go back and dig a test hole, I can’t go out and dig a test hole today and determine whether it was wet or dry eight years ago, it’s just impossible. It’s not how we do our work. It has to be real, it has to be observed, it has to be documented at the time the work is done.

J. Hempelmann: So, you’re saying any contention in 2010, or now 2011, that there was an intermittent stream in Mine Area 1 cannot be credibly established?

F. Naglich: It cannot be credibly established. And, as our documents have stated, we were there to prove it was not there.

Mr. Naglich’s precise testimony clearly outweighs the speculative and imprecise testimony of Cindy Wilson who could only testify to conditions within the last two years and who, even then, could not identify her location or whether she could say with any certainty that a stream or wetland exists in Mine Area 1. Mr. Naglich reviewed Mine Area 1 for exactly those
things, and he did so over multiple years. His expertise, thorough review and testimony on this
topic deserves credence.

Mima Mounds and Prairie Habitat

With regard to the existence of mima mounds, Ms. Wilson testified:

Mima mounds are considered a type of prairie, outwash prairie; they can be
mounded or flat. Under the 2002 ordinance, there’s a phrasing that refers to
predominance of prairie vegetation. And because there’s been lots of Scot’s
broom that’s been allowed to grow on the property, and again I don’t think it’s
been mowed for the past few years, um, some of those areas that were in question,
on the south of the railroad tracks clearly had mima mounds on those but also had
a lot of Scot’s broom. That was one of the reasons why there was a question about
whether those should be considered prairie habitat.

On the northeast area, again in Mining Area 1, there are mima mounds out there,
and those had previously been covered by Douglas fir. They were mined, excuse
me, harvested in the 90s, and currently have some excellent prairie vegetation.
They’re mapped as prairie soils. That area was not evaluated in the original
habitat reports. It was referred to, basically, as ‘we did not look at areas that had
been previously logged.’

* * *

From the reports, it’s clear that that northeast area was not evaluated because they
excluded it because it had been previously logged. So, there’s no data to suggest
what vegetation was there. There is clearly prairie soils—soils don’t go away—
there’s clearly mima mounds—those don’t go away—the vegetation that was
there was not discussed. From the aerals it was not overrun with Scot’s broom,
um, there was previous, um, about perhaps Idaho fescue was out there, but that is
a prairie plant, one of the prairie plants listed in our ordinance.

So, I wasn’t there in 2002. Everything else would lead me to believe that it would
have qualified as prairie and would have had the vegetation there.... But I was not
there in 2002.

When asked under cross-examination where in the Habitat Management Plan it stated
that potential prairie habitat was not evaluated in Mine Area 1 because it was logged, Ms. Wilson

40 Id. at Section 12, 12:30 – 13:50.
41 Id. at Section 12, 14:37 – 15:24.
could not identify any such statement. The only supportive statement she identified was a
caption under a photo, which stated, “View north from area north of Tacoma Rail Mountain
Division rail line showing logged area that is not dominated by native prairie species. Disturbed
areas, including logged areas, were not included in the native outwash prairie boundary.”42

Mr. Garrison’s testimony clearly established that Ms. Wilson’s claims were incorrect and
did not reflect the methodology used or the scrutiny applied to the site.

J. Hempelmann: Did you neglect to evaluate Mine Area 1 or any other mine
area for native outwash prairie solely because it had been logged?

R. Garrison: No.

J. Hempelmann: Did you in fact evaluate every square yard of Mine Area
number 1 and the other mine areas to assess all of the factors in the Thurston
County Code identified for determining native outwash prairie:

R. Garrison: That’s correct.

J. Hempelmann: Ms. Wilson said this morning, in referring to the photograph
that’s in the habitat management plan, dated 6-2002, where it’s “viewed north
from area north of Tacoma Rail Mountain Division rail line showing logged area
that is not dominated by native prairie species.” She said she, she admitted that
she did not know how you determined that it was not dominated by native prairie
species. Will you explain to the hearing examiner how you determined that it was
not dominated by native prairie species?

R. Garrison: Yes. As I mentioned earlier, we, we: ELS, Ecological Land
Services, I had a botany individual on the staff, that we, and I walked with her, we
did transects walking the full length of Mine Area 1, north and south.

J. Hempelmann: I need to interrupt you. What is a “transect.”

R. Garrison: Transect meaning that we walked a line of site path that didn’t
overlap with the next one, but paralleling the next one so that you have assurance
that you’ve seen everything in between those two transects. And we did that with

42 Habitat Management Plan, Appendix D, Figure 10 (emphasis added).
the rest of the mine areas as well. ** ** We walked that site like we did the rest of the property. It was obvious that there was not a dominance of prairie species.

**J. Hempelmann:** Were you looking for prairie species?

**R. Garrison:** Oh, specifically, yes. And another reason too; in the wetland science world, we’re pretty trained in what species are what, especially grass species and herbaceous species. To insure that, I had Mara McGrath, our botanist, who is very well versed in those species come along. So it wasn’t just my eyes, there were two of us. And ultimately, Francis [Naglich] had been on the site, too, looking for prairies and streams. So, basically, multiple sets of eyes on multiple visits to determine whether that had enough habitat or concern for habitat to start putting plots on it. We saw a lot of non-native species on the site. Coupled with the disturbance [from logging] it was obvious that the site was not going to meet the 50 percent dominance of native prairie species. So, like the rest of the property, other than the prairie to the east, we moved forward and focused on delineating the boundaries and defining those boundaries of the prairie that was ultimately delineated east of mining segments 3 and 4.

**J. Hempelmann:** Was it a close call in Mine Area 1 as to whether there was 50 percent of native prairie species?

**R. Garrison:** In our opinion, no it was not. Otherwise we would have gone ahead and done our transects of plots and methodology to continue to define that western edge of the prairie boundary.

**J. Hempelmann:** I understand if it’s a close call then you go to the next level of plot analysis.

**R. Garrison:** Yes

**J. Hempelmann:** And you did not do that in this case because none of you thought there was a dominance of 50 percent or greater of native prairie species?

R. Garrison: It wasn’t even close. There were a few species there, but not even close to approaching dominance. 43

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43 March 8, 2011 Testimony, Section 7, 14:40 – 23:40.
J. Hempelmann: In any of the meetings [with stakeholders] from 2002-2005 that you have described and is now in evidence as Exhibit 21, did anyone ever say to you, you’re wrong there is native outwash prairie in Mining Area 1?

R. Garrison: No.\textsuperscript{44}

Mr. Garrison’s testimony clearly establishes that Ms. Wilson’s claim (and FORP’s repetition of the claim) that Mine Area 1 was not evaluated because it was logged is without basis. Mr. Garrison and his team evaluated every square yard of the property and Mine Area 1 had no dominance of native plant species. None of the stakeholders at the time, including DNR, WDFW, the County, Black Hills Audubon Society, Ecology, or The Nature Conservancy, disagreed with the analysis. Ms. Wilson’s claims to the contrary lack any evidentiary support in the record and should be given no weight.

In addition to the speculative nature of her allegations, Ms. Wilson’s testimony should be viewed in light of her advocacy efforts against the Mine. Exhibit 15 shows Ms. Wilson’s emails from August of 2010, in which she asked questions to Annie Szvetecz, SEPA Policy Lead at the Department of Ecology, and then misinterpreted Ms. Szvetecz’s answers in a subsequent email to Mike Kain and Cliff Moore of Thurston County.

In response to Ms. Wilson’s question of whether SEPA review of a change in a project is considered a different proposal under SEPA. Ms. Szvetecz answered, “A change in the project that requires a permit amendment is usually considered a different proposal under SEPA than the project as described in the existing SEPA documents. In which case the previous MDNS and checklist can be adopted with an addendum but a new threshold determination will be made on the new agency action.” Ms. Wilson then asked if the SEPA review is limited to only the scope

\textsuperscript{44} March 8, 2011 Testimony, Section 7, 24:22 – 24:42.
of the proposed amendments, to which Ms. Szvetecz answered that she believed that “the County has authority to conduct additional environmental review [beyond what was contained in the previous MDNS and checklist] to make a new threshold determination.” Ms. Wilson then forwarded and misinterpreted Ms. Szvetecz’s responses to Mike Kain and Cliff Moore of the County. Ms. Wilson claimed, “Basically the response received from Ecology is that there is nothing that limits us reopening SEPA on the project and conducting an environmental analysis sufficient to make a new threshold determination on the project as a whole.”

Ms. Wilson’s advocacy against MSG’s Mine can be seen in Exhibit 15 in terms of both her questions and her interpretations of the answers. Her emails show that she was actively trying to find ways to reopen SEPA on the 2005 Mine permit by inquiring whether it would be possible to do so based upon MSG’s current minor technical amendments. Ms. Wilson’s misinterpretation of Ms. Szvetecz’s statement is further proof that she was seeking a certain answer from Ms. Szvetecz. MSG is disappointed to have seen an important County staff member become an active opponent of the Mine but, sadly, the facts speak for themselves. Ms. Wilson’s testimony at the Hearing should be viewed in light of her past advocacy efforts against the Mine.

**Water Monitoring**

Patrick Dunn was FORP’s only witness on the limited issue in the SEPA appeals. Mr. Dunn testified with regard to the water monitoring at the site. Mr. Dunn, a member of The Nature Conservancy, was involved in negotiations with the original SUP applicant for a possible purchase of the mine area. When those negotiations for purchase failed, his organization and others negotiated and entered into a settlement agreement with the applicant with regard to monitoring certain species on the site and elsewhere in southwest Washington.
During direct examination, Mr. Dunn explained that the conservation organizations that signed the settlement agreement with the original applicant believed that the agreement was “related to the uncertainties of the impacts of the mine on the wetlands,” that “what’s happening to the species isn’t being monitored through the groundwater monitoring system,” and that the “settlement agreement supplied money to look at those very special species.” Mr. Dunn then admitted that he was not aware that the funds under the settlement agreement were available but unused by the conservation organizations.

With regard to whether the proposed SUP amendments have any probable significant adverse environmental impact, Mr. Dunn saw no such impacts. In fact, he admitted that the amendments might make the situation better. The following verbatim exchange is between County Attorney Jeff Fancher and Mr. Dunn.

**J. Fancher:** Do you have an opinion on whether the amendments and the increased monitoring cause an adverse or negative impact to the environment?

**P. Dunn:** Well, the actual gathering of additional data from wells, I would not see that there is an impact from that. The impact is from the assessment of future actions and changes that additional data can help you assess.

**J. Fancher:** What additional data are you talking about?

**P. Dunn:** The ones referenced in terms of the additional parameters in the groundwater monitoring.

**J. Fancher:** So, in and of themselves, the amendments don’t cause any impacts. They actually make the situation better to review impacts. Is that correct?

**P. Dunn:** Yes. I don’t. Uh, in a sense, your, I don’t understand the logic in your question in terms of the amendments making an impact, in terms of the amendments aren’t changing actions on the ground.

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45 March 7, 2011 Testimony at Section 9, 30:30 – 32:11.

J. Fancher: Ok. So, in your mind, or in your opinion, the amendments are making the situation better. Is that correct?

P. Dunn: Potentially, yes.\textsuperscript{47}

During his testimony at the hearing, even Mr. Dunn would not state that the background water monitoring that has occurred to date was inadequate. Instead he admitted only that more is better.\textsuperscript{48} He also admitted that each element of the SUP amendment caused no adverse environmental impact.\textsuperscript{49} In short, there was nothing in Mr. Dunn’s testimony that requires anything other than approval of the SUP amendments and approval of the MDNS on those amendments.

E. The SUP Amendments are Very Minor and there is Absolutely No Credible Evidence Showing a Lack of Material Disclosure During the 2002-2005 Review; WAC 197-11-340(3)(a)(i) and (iii) Do Not Apply.

FORP argues that the 2005 MDNS should be withdrawn under WAC 197-11-340(a)(i) because there “are substantial changes to the proposal so that the proposal is likely to have significant adverse environmental impacts.” As discussed above, the “proposal” at issue is the SUP amendments, which increase the scope and duration of water monitoring.

MSG’s expert hydrogeologists testified that there is no potential adverse environmental impact of any kind by virtue of having collected more water monitoring data under the 2011 Plan.\textsuperscript{50} The County’s expert hydrogeologist stated that in terms of parameters and the foreground program, there will be much more data than there would have been had the

\textsuperscript{47} March 7, 2011 Testimony at Section 9, 38:35 – Section 10, 01:10.
\textsuperscript{48} March 8, 2011 Testimony at Section 11, 02:30 – 3:30.
\textsuperscript{49} March 8, 2011 Testimony at Section 11, 05:48 – 7:00.
\textsuperscript{50} March 7, 2011 Testimony, Section 6 at 26:38 – 27:01.
monitoring begun as anticipated in 2005.\textsuperscript{51} No one, not even FORP’s own witnesses, were bold enough to suggest that the increased water monitoring would cause significant adverse environmental impacts.\textsuperscript{52}

There is no evidence in the record establishing that the proposed amendments “are likely to have significant adverse environmental impacts.” There is no evidence in the record. Without evidence establishing such likelihood, WAC 197-11-340(a)(i) cannot apply. FORP’s arguments on this point are off the mark and have no evidentiary or legal support.

FORP also argues that the 2005 MDNS should be withdrawn under WAC 197-11-340(a)(iii) because it “was procured by misrepresentation or lack of material disclosure.” As discussed above in Section IV.D, the credibility of the testimony and weight of the evidence overwhelmingly refute FORP’s argument on this point. Cindy Wilson testified that she had never set foot on the site prior to 2008. She testified that there were oak stands that might have met the 2002 CAO, but Roy Garrison thoroughly inspected the site prior to 2005, and he conclusively refuted Ms. Wilson’s methodology.\textsuperscript{53} Moreover, as described above, the 2002 aerial photo\textsuperscript{54} confirms that Mr. Garrison (and others who confirmed oak stands in 2002-2005) was correct and that Ms. Wilson’s imprecise assumptions in 2010 were wrong.

\textsuperscript{51} March 7, 2011 Testimony, Section 9 at 12:00 – 15:02.

\textsuperscript{52} See Exchange between County Attorney Jeff Fancher and The Nature Conservancy member Patrick Dunn at Section IV.D, page 35 supra.

\textsuperscript{53} See Section IV.D supra. Ms. Wilson testified that oak stands could be defined as trees within visual distance of one another. But Mr. Garrison explained that his team identified the best management practices then used by WDFW and adopted a definition of oak stands that relates to proximity of canopy cover. That is the same methodology that the County ultimately adopted in its current interim critical areas regulations. Ms. Wilson’s “sight distance” test was flatly rejected as an option and the 2002 CAO should not be rewritten here.

\textsuperscript{54} Habitat Management Plan, Appendix D, figure 2.
Ms. Wilson testified that she saw what might have been a single pocket gopher mound within the mine boundary in 2010, but she admitted that she never confirmed that it was truly a pocket gopher mound, and she further admitted that she had not done a survey and did not know if there were actually any pocket gophers on the mine site. Ms. Wilson also testified to the existence of mima mounds, but Mr. Garrison explained that mima mounds were not protected critical areas under the 2002 CAO, so their existence does not change the 2002 CAO analysis. Finally, Ms. Wilson made an aggressive, unsupported, and biased statement that Mine Area 1 was not evaluated because it was logged. Mr. Garrison, on the other hand, provided detailed testimony explaining the methodology used to review that area. Ms. Wilson claimed that she saw what might be a wetland near the toe of the slope in Mine Area 1, an area that the contour map shows is outside the boundary of the actual mine area. Francis Naglich, the wetland biologist who reviewed the site prior to 2005, testified that he thoroughly reviewed that area on several occasions and was confident that there was no such wetland or intermittent stream in that area.

In summary, FORP’s claims of lack of material disclosure are pure conjecture, and even their conjecture is imprecise. They have offered no evidence in support of their claims. MSG, on the other hand, has provided overwhelming evidence showing the extensive critical area review that was conducted prior to SUP issuance. There is no credible testimony or factual basis for finding a lack of material disclosure under WAC 197-11-340(a)(iii).


In another example of a “straw-man” argument, FORP makes the erroneous assumption that the “proposal” under review is the vested 2005 mineral extraction SUP. As explained above
in Section IV.A, the “proposal” that is the subject of environmental review in this matter is the application for SUP amendments. MSG is not re-applying for a new mineral extraction permit. FORP erroneously relies on WAC 197-11-600(3)(ii) to argue for a second SEPA review of a vested permit that has undergone no substantial changes.

WAC 197-11-600 relates to the use of unchanged, existing environmental documents to satisfy SEPA review requirements for a proposal. WAC 197-11-600(3)(ii) provides that a new threshold determination is required if there is “[n]ew information indicating a proposal's probable significant adverse environmental impacts.” But the “proposal” at issue here are the limited technical changes to water monitoring requirements, not a new application for a gravel mining permit. Further, the County did not rely on an unchanged environmental document to satisfy SEPA requirements. The 2005 MDNS is not being used in place of issuing a new threshold determination on the proposed SUP amendments. The County chose to issue a new threshold determination on the SUP amendments. The 2011 MDNS is the new threshold determination on the proposal. The County did not simply rely on the 2005 MDNS to meet its SEPA obligation for the SUP amendments. FORP’s arguments to the contrary are an unlawful attempt to bootstrap the 2005 MDNS into these proceedings, and should not be allowed.

G. The Amendments will have No Probable Significant Adverse Environmental Impacts and the MDNS was Issued Properly and Should be Upheld.

As discussed in Section IV.B above, FORP must carry the burden of showing that the County’s MDNS decision was erroneous. FORP, however, has offered no evidence of probable significant adverse environmental impacts from the SUP amendments. FORP’s Notice of

55 MSG continues to challenge whether SEPA review on the amendments was required at all.
Appeal does not contain even an allegation of the existence of probable significant adverse environmental impacts from the SUP amendments.

All the experts agree on the absence of adverse environmental impacts. MSG’s expert hydrogeologists, Charles “Pony” Ellingson, testified that collecting more water monitoring data under the 2011 Plan has no potential adverse environmental impact of any kind.\(^{56}\) The County’s expert hydrogeologist, Nadine Romero, stated that in terms of parameters and with regard to the foreground program, there will be much more data than there would have been had the monitoring begun as anticipated in 2005.\(^{57}\) No one, not even FORP’s own witnesses could testify that the increased water monitoring would potentially cause significant adverse environmental impacts.\(^{58}\)

MSG has consistently taken the position that the SUP amendments and SEPA review of those amendments were never necessary. The County has essentially exercised its enforcement authority to require technical modifications to the SUP. Initially, the County indicated that such changes would be handled as minor amendments and approved by staff.\(^{59}\) However, FORP’s opposition to the Mine caused the County to require a formal SUP amendment process and a SEPA threshold determination on those amendments. Making the assumption that these minor amendments are indeed required to undergo this formal SUP amendment process, it should be clear by this point that the increased monitoring will cause no probable adverse environmental impacts. If required at all, the MDNS should be affirmed.

\(^{56}\) March 7, 2011 Testimony, Section 6 at 26:38 – 27:01.

\(^{57}\) March 7, 2011 Testimony, Section 9 at 12:00 – 15:02.

\(^{58}\) See Testimony of Patrick Dunn and Cindy Wilson.

\(^{59}\) See February 16, 2010 Compliance Memorandum, Exhibit 1, attachment x.
H. The SUP Amendments Increase Water Monitoring Under the SUP, there is No Legitimate Reason to Deny them, and they Should be Approved.

The only issue in the SUP amendment hearing is whether the Examiner should approve adoption of the water monitoring requirements that ensure better and more monitoring data than ever anticipated by the original SUP conditions. FORP’s public comment on the SUP amendments spanned twenty minutes without once explaining how the SUP amendments adversely impacted the environment.\(^{60}\) Instead, FORP argued that, despite the fact that there is much more and better water monitoring data today than anyone expected would exist prior to mining, the SUP should not be amended because of technical noncompliance. Refusing to amend the SUP on the basis of technical noncompliance when such noncompliance has no discernable negative effect defies common sense and would be the height of injustice. This is especially true given the extraordinary effort of the applicant and Port of Tacoma to clean up and prepare this property for mining. Further, FORP’s claim that a permit cannot be amended is contrary to how the County has treated every other permit holder.\(^{61}\) Moreover, the Thurston County Code and the 2005 Settlement Agreement both anticipated amendments.

As mentioned in the introduction to this brief, FORP objects to the mine, not the SUP amendments and not to the MDNS on those amendments. When the SUP amendments are viewed impartially, the SUP amendments are a non-controversial and positive addition to this extraordinarily scrutinized mineral extraction permit. The SUP amendments should be approved, and MSG should be allowed to commence mining under the 2005 Special Use Permit.

\(^{60}\) March 9, 2011 Testimony, at Section 7, 00:19 – Section 8, 1:15

\(^{61}\) March 9, 2011 Closing Argument of County, statements of Jeff Fancher at Section 3, 17:10 – 17:25.
I. SUP Amendments and SEPA Review are Unnecessary and Unlawful

The County had the authority to require the changes now being made in the SUP amendments without requiring a formal SUP amendment process. The amendments themselves do not directly modify the environment and they have no environmental relevance. MSG adopts and incorporates by this reference the arguments contained in MSG's March 2, 2011 Brief in Support of Approving MDNS, and Brief in Response to FORP Appeal at Section IV.B and .C, which argue that there was no need for SEPA review of the SUP amendments and the Examiner should rule accordingly.

V. CONCLUSION

As stated at the outset of this Post-Hearing Brief, there are two simple issues before the Examiner: (1) whether the SUP amendments should be approved, and (2) whether the MDNS on those amendments should be approved. FORP has offered no persuasive evidence or arguments for denying approval of the SUP amendments or denying approval of the MDNS on those amendments. Instead, FORP has used these proceedings as an opportunity to argue a litany of irrelevant issues that lack legal and factual support.

FORP objects to the existence of the Mine, not the actual issues in these proceedings—the amendments to the SUP and the MDNS issued on those amendments. Unfortunately, MSG is forced to expend substantial time, effort, and money to respond to FORP's arguments, even if they lack legal support. This is especially true given the current political climate in Thurston County. FORP has found success in causing the County to reverse its position on the 2005 SUP. What was once a minor compliance matter, easily changed with staff approval, has become a major SUP amendment requiring SEPA review and a three-day hearing. This is only the latest of the many regulatory abuses MSG has endured.
FORP's SEPA appeal is a serious misuse and abuse of SEPA. All the work reviewing plans, delineating critical areas, negotiating settlements, and protecting unregulated oak groves, happened over five years ago. Based on all that work, the SUP was reviewed and approved. FORP is trying now, in 2011, to invalidate, delay, or minimize mineral extraction under the permitted 2005 mineral extraction SUP, which was issued on Designated Lands of Long-Term Commercial Significance. To use an analogy from the world of sports, FORP is trying to use this SUP amendment and MDNS proceeding as an opportunity to make a “shoelace tackle” of the SUP. But FORP is over five years too late to the game. The Examiner should approve the SUP amendments and the MDNS on those amendments.

DATED this 31st day of March, 2011.

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